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THE USE AND ABUSE OF THE TORT BENEFIT RULE IN WRONGFUL PARENTAGE CASES

KATHRYN C. VIKINGSTAD*

INTRODUCTION

The compensation of tort plaintiffs for the losses they have suffered is one of the major goals of damages in tort causes of action.¹ Consequently, many tort recovery principles are designed to aid in the accurate assessment of losses suffered by the tort plaintiff at the hands of the defendant.² The tort benefit rule is one of the recovery principles used by courts in an attempt to accurately assess the plaintiff's losses.³ However, in the context of child-rearing damages in wrongful parentage⁴ cases, most courts have regularly failed to accurately assess the losses suffered by the plaintiffs. Instead,

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1. RESTATEMENT (SECOND) OF TORTS § 901 (1979).

2. For example, according to the no-worse-off limitation on a defendant's extent of legal responsibility, a defendant is not liable in a tort action "if [the plaintiff's injury] almost certainly would have occurred anyway in the absence of their or anyone else's tortious conduct." Richard W. Wright, *The Grounds and Extent of Legal Responsibility*, 40 SAN DIEGO L. REV. 1425, 1434 (2003). If the plaintiff would have suffered the loss absent the defendant's or anyone else's tortious conduct, the defendant's conduct does not place the plaintiff in any worse position than the plaintiff would have originally been. Therefore, to assess damages against the defendant is to inaccurately assess the loss the plaintiff suffered at the hands of the defendant. A plaintiff who is allowed to recover damages from a defendant when the plaintiff would have suffered the injury even in the absence of the defendant's or anyone else's tortious conduct receives a benefit from the defendant's tortious conduct, rather than an injury. *Id.* at 1463.

3. See RESTATEMENT, *supra* note 1, § 920.

4. Briefly, plaintiffs in wrongful parentage cases seek to recover damages resulting from the birth of a child who would not have been conceived and/or born but for the alleged negligence of the defendant. Numerous terms have been used to describe the many causes of action related to the birth of a child, including wrongful pregnancy, wrongful conception, wrongful birth, and wrongful life. The use of these terms has been less than consistent and rather confusing. I have chosen to use the term "wrongful parentage" as the term to describe the entire group of cases involving suits brought by parents for either the conception of an unplanned child or the continued pregnancy of a child as a result of the defendant's negligence. "Wrongful parentage" is the best term to describe these cases because all of the plaintiffs have wrongfully become parents as a result of the defendant's negligence. For a thorough description of the wrongful parentage causes of action, see *infra* Part I.A.

courts have routinely under-compensated wrongful parentage plaintiffs by disregarding or severely distorting the tort benefit rule. The disregard and distortion of the benefit rule is the result of courts misunderstanding the injury in wrongful parentage cases, along with the subsequent discomfort with viewing the child as an injury.⁵

The tort benefit rule,⁶ as expressed in section 920 of the Restatement (Second) of Torts reads,

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.⁷

The Restatement places a number of limits on the application of this rule,⁸ most notably the same interest limitation⁹ and the equitable limitation.¹⁰ The benefit rule has consistently been used, explicitly or implicitly, by nearly all courts to either substantially reduce or completely preclude child-rearing damages in wrongful parentage cases.¹¹ However, in provid-

5. See, e.g., *Cockrum v. Baumgartner*, 447 N.E.2d 385, 389 (Ill. 1983) ("In a proper hierarchy of values the benefit of life should not be outweighed by the expense of supporting it."); *Szekeress v. Robinson*, 715 P.2d 1076, 1078 (Nev. 1986) ("We do not take the wrongness nor the injuriousness of the birth event for granted and say, to the contrary, that normal birth is not a wrong, it is a 'right.'").

6. It should be noted that the tort benefit rule is questionable as a matter of basic tort policy, unless the rule's function is limited to accurately measuring the damage done to the plaintiff's interests. See DAN B. DOBBS, *REMEDIES* 182 (1973). When a person confers a benefit on another person without also committing a tort, the recipient is not required to compensate the giver because, supposedly, a person should not be required to accept a benefit he or she does not want. RESTATEMENT (FIRST) OF RESTITUTION § 2 (1937). However, the tort benefit rule does require the plaintiff to compensate the defendant for benefits conferred when the benefits are conferred as a result of the defendant's tortious conduct. RESTATEMENT, *supra* note 1, § 920. Because of this contradiction and the principle that unwanted benefits should not be forced upon people, Dan Dobbs argues caution should be exercised when offsetting damages suffered as a result of a tort with the benefits resulting from the tort. DOBBS, *supra*, at 183. Benefits that are clearly and actually realized should be used to offset damages suffered as a result of the tortious conduct, but benefits that are speculative or may not ever be realized should not. *Id.* By offsetting the damages only by benefits that are clearly realized, the rule is limited to the function of accurately assessing the actual loss suffered by the plaintiff to a specific interest. Offsetting damages by benefits which have not accrued or been realized results in an inaccurate assessment of damages because unrealized benefits do not reduce the loss suffered by the plaintiff.

7. RESTATEMENT, *supra* note 1, § 920.

8. See *id.* § 920 cmts. a-b, f.

9. *Id.* § 920 cmts. a-b. Briefly, this limitation allows damages to a plaintiff's interest to be offset by benefits received by that same interest only. In other words, one cannot offset the damages to one interest by the benefits received by a different interest. For further discussion of this limitation, see *infra* Part II.B.

10. RESTATEMENT, *supra* note 1, § 920 cmt. f. This limitation is a reminder that the benefit rule is to be used to assess the loss suffered by the plaintiff. "This principle is intended to restrict the injured person's recovery to the harm that he actually incurred and not to permit the tortfeasor to force a benefit on him against his will." *Id.* For further discussion of this limitation, see *infra* Part II.B.

11. See, e.g., *Univ. of Ariz. Health Scis. Ctr. v. Superior Court*, 667 P.2d 1294, 1299-1300 (Ariz. 1983) (requiring juries, in their consideration of child-rearing damages, to "consider the question of offsetting the pecuniary and non-pecuniary benefits which the parents will receive from the parental

ing what they deem an appropriate assessment of damages in wrongful parentage cases, courts applying this rule have disregarded its limitations, causing anything but an equitable result.¹²

The use and abuse of the benefit rule has been extremely damaging to wrongful parentage plaintiffs.¹³ Through their use and abuse of the benefit rule, courts across the country have withheld damages rightfully owed to wrongful parentage plaintiffs, imposed their personal beliefs on the American legal system, failed to vindicate the legally protected interests of financial and family planning, and acted as a shield for negligent medical professionals.¹⁴ Instead of continuing the abuse and misuse of the benefit rule, courts should apply the rule in its true form and allow wrongful parentage plaintiffs the opportunity to prove and recover child-rearing damages.

Part I of this Note will define wrongful parentage claims and discuss the varying recovery schemes for child-rearing damages developed and applied by courts across the country. Part II will examine the intricacies and contours of the tort benefit rule and how it has been misapplied in wrongful parentage cases. Finally, Part III will discuss how the misapplication of the benefit rule represents a misunderstanding of the injury suffered by wrongful parentage plaintiffs. Part III will also illustrate how a proper understanding of wrongful parentage plaintiffs' injury eliminates the need to misapply the benefit rule, resulting in the opportunity for plaintiffs to prove and fully recover child-rearing damages.

I. THE DEFINITION AND CURRENT RECOVERY RULES OF WRONGFUL PARENTAGE AND WRONGFUL LIFE CLAIMS

A. *Wrongful Parentage and Wrongful Life Defined*

Three common classifications are used to describe cases brought by parents and involving the unwanted birth of a child: "wrongful pregnancy," "wrongful birth," and "wrongful life." "Wrongful pregnancy" typically refers to claims brought by parents who allege that but for the defendant's

relationship with the child"); *Boone v. Mullendore*, 416 So. 2d 718, 722 (Ala. 1982) ("The birth of a healthy child, and the joy and pride in rearing that child, are benefits on which no price tag can be placed. This joy far outweighs any economic loss that might be suffered by the parents." (citing *Wilbur v. Kerr*, 628 S.W.2d 568 (Ark. 1982))).

12. For a full discussion of exactly how the courts have misapplied the benefit rule in light of its limitations, see *infra* Part II.C.

13. For a discussion of how other tort recovery principles have been used in the context of wrongful parentage claims, see Lisa A. Podewils, *Traditional Tort Principles and Wrongful Conception Child-Rearing Damages*, 73 B.U. L. REV. 407 (1993).

14. See *infra* Parts II.A., II.C., III.

negligence, the mother would not have conceived the child or remained pregnant.¹⁵ Though not required, wrongful pregnancy claims most frequently involve the birth of a healthy child.¹⁶ “Wrongful birth” most commonly refers to causes of action brought by the parents of a child born with some sort of handicap or impairment.¹⁷ The parents allege that, but for the negligence of the defendant in testing for or informing the parents of the handicap or impairment, the parents would have avoided or terminated the pregnancy.¹⁸ “Wrongful life,” on the other hand, is brought by a handicapped or impaired child alleging that but for the negligence of the defendant, the child’s parents would have avoided or terminated the pregnancy.¹⁹ The use of this terminology is often inconsistent, confusing, and overlapping.²⁰ To avoid this confusion and to simplify the issue, this article will

15. Michael A. Mogill, *Misconceptions of the Law: Providing Full Recovery for the Birth of the Unplanned Child*, 1996 UTAH L. REV. 827, 827 (1996); see also, e.g., *M.A. v. United States*, 951 P.2d 851 (Alaska 1998) (alleging that but for the defendant’s negligence in diagnosing the plaintiff’s pregnancy, the plaintiff would not have remained pregnant and subsequently given birth); *Wilbur*, 628 S.W.2d 568 (alleging that but for the defendant’s negligence in performing two vasectomies on the father, the mother would not have conceived the child).

16. Mogill, *supra* note 15, at 828; Melissa K. Smith-Groff, *Wrongful Conception: When an Unplanned Child Has a Birth Defect, Who Should Pay the Cost?*, 61 MO. L. REV. 135, 137–38 (1996).

17. Mogill, *supra* note 15, at 828; see also, e.g., *Lininger v. Eisenbaum*, 764 P.2d 1202, 1204 (Colo. 1998) (“wrongful birth” claim involving the birth of a child born with Leber’s congenital amaurosis).

18. Mogill, *supra* note 15, at 828; see also, e.g., *Lininger*, 764 P.2d at 1204 (In claims for wrongful birth, “parents allege that but for a physician’s negligence in either misinforming them or failing to inform them about the likelihood that their child would be born with an impairment, they would not have conceived or would not have carried to term the child who was subsequently born with an impairment.”); *Schirmer v. Mt. Auburn Obstetrics & Gynecological Assocs., Inc.*, 844 N.E.2d 1160, 1164 (Ohio 2006) (“In a *wrongful birth* action, the parents of an unhealthy child born following negligent genetic counseling or negligent failure to diagnose a fetal defect or disease bring suit . . . arguing that they were wrongfully deprived of the ability to avoid or terminate a pregnancy to prevent the birth of a child with the defect or disease.” (citation and internal quotations omitted)).

19. Mogill, *supra* note 15, at 828; see also, e.g., *Bruggeman v. Schimke*, 718 P.2d 635, 638 (Kan. 1986) (In wrongful life actions, the plaintiff child “alleges that but for the defendant doctor or health care providers’ negligent advice to, or treatment of, the parents, the child would not have been born.” (citation and internal quotations omitted)); *Willis v. Wu*, 607 S.E.2d 63, 66 (S.C. 2004) (“The child alleges, because of the defendant’s negligence, his parents either decided to conceive him ignorant of the risk of an impairment or birth defect, or were deprived of information during gestation that would have prompted them to terminate the pregnancy.”).

20. See, e.g., *Walker v. Mart*, 790 P.2d 735, 737 (Ariz. 1990) (recognizing that because of the confusion surrounding the terms, “courts and commentators have often blurred the legal and theoretical distinctions among the actions”); *Lininger*, 764 P.2d at 1204 n.2 (“The use of the terms ‘wrongful life’ and ‘wrongful birth’ more often serves to obscure the issues than to elucidate them . . .”); *Willis*, 607 S.E.2d at 65 (agreeing with other courts that the varying terms “are somewhat misleading and not always used in a consistent manner”). For example, imagine a claim brought by parents of a child who is born with a congenital defect. A year prior, the couple underwent a sterilization procedure to avoid having children. The sterilization failed and the child was conceived. During the prenatal care, the doctor fails to advise the mother of and test for the congenital defect. If the parents had known of the risk of the defect, they would have aborted the fetus. Is this a claim for wrongful pregnancy? Wrongful birth? Both? Although the claim(s) could be sorted with careful attention, this fact pattern illustrates the possible complexities involved in these cases and the inadequacy of the common classifications. Be-

refer to two general classifications of claims involving the unwanted birth of a child: wrongful parentage and wrongful life.

Wrongful parentage, as used here, refers to causes of action brought by the parents of a child whose birth would not have occurred if not for the negligence of the defendant, no matter if the child is healthy or impaired.²¹ In other words, but for the defendant's negligence, the plaintiffs would not have become parents. Using the term "wrongful parentage" to refer to claims traditionally referred to as claims for "wrongful conception" or "wrongful birth" not only eliminates confusion, but also eliminates the emotional baggage associated with the term "wrongful birth." "Wrongful birth" implies that the birth of the child, or the child itself, is the injury suffered by the parents.²² However, in these claims, the child is not the injury. The injury is that the plaintiffs have become parents and will incur the costs associated with being parents.²³

The term "wrongful parentage" encompasses two subcategories of claims: wrongful conception and wrongful continuation. First, in wrongful conception claims, the plaintiff parents allege that but for the defendant's negligence the child would not have been conceived.²⁴ The wrongfully conceived child may either be born or the parents may choose to terminate the pregnancy.²⁵ Wrongful conception actions most frequently involve claims against a physician who the plaintiff parents allege was negligent in the performance of a sterilization procedure or post-operative care following a sterilization procedure.²⁶ However, wrongful conception claims may also be brought against a pharmacist who negligently fills a birth control prescription,²⁷ a physician who improperly inserts or positions a contraceptive device,²⁸ a manufacturer or pharmaceutical company who manufactures a defective contraceptive,²⁹ or a physician who fails to inform parents

cause the damages available in wrongful parentage are determined in great part by the factual history of the claim, *see infra* Part I.B., it is important that the facts of claims not be unnecessarily distorted to fit into the confusing common classifications.

21. Although the health of the child does not define the type of claim involved, it can greatly affect the damages parents may recover. *See infra* Part I.B.

22. *See infra* Part III.

23. *See infra* Part III.

24. *See* sources cited *infra* notes 26–30.

25. Because the negligence alleged in wrongful conception claims is the conception rather than the birth of a child, the claim is not defeated if the child is never born.

26. DAN B. DOBBS, *THE LAW OF TORTS* 793 (2000).

27. *See, e.g.*, *Troppi v. Scarf*, 187 N.W.2d 511, 245–46 (Mich. Ct. App. 1971).

28. *See, e.g.*, *Jackson v. Bumgartner*, 347 S.E.2d 743, 744 (N.C. 1986).

29. *See, e.g.*, *J.P.M. v. Schmidt Labs., Inc.*, 428 A.2d 515, 516 (N.J. Super. App. Div. 1981).

of the likelihood their future children would be handicapped or impaired in a way that would cause the parents to avoid conception.³⁰

The other claim brought under the umbrella of wrongful parentage is a claim for wrongful continuation of a pregnancy. The plaintiff parents in a wrongful continuation claim allege that but for the negligence of the defendant, the mother's pregnancy would not have continued to term and, thus, the child would not have been born.³¹ Fact patterns in wrongful continuation claims typically include the failure of a physician to diagnose a pregnancy in time to safely or legally perform an abortion,³² negligent performance of an abortion,³³ or failure to discover or disclose a likelihood of handicap or impairment of the child which would cause the parents to abort.³⁴

Wrongful life claims, unlike wrongful parentage claims, are brought by a child born with a medical defect or impairment.³⁵ In these actions, the child alleges that the defendant physician's negligence caused the child to be born and, as a result, he or she has been forced to live with the defect.³⁶ An important point must be noted. The claim in a wrongful life case is not that the defendant caused the birth defect. Rather, the claim is that the defendant's negligence caused the child to be born at all.³⁷ In other words, had the doctor properly informed the parents of the child of the defect or impairment, the parents would have aborted or not conceived the child and, as a result, the child would not have been made to suffer life with the defect or impairment.³⁸ Essentially, the injury to the plaintiff is that he or she has been made to suffer through life with a disability as a result of being born.³⁹

30. See, e.g., *Linger v. Eisenbaum*, 764 P.2d 1202 (Colo. 1988).

31. See cases cited *infra* notes 32-34.

32. See, e.g., *M.A. v. United States*, 951 P.2d 851, 852 (Alaska 1998).

33. See, e.g., *Nanke v. Napier*, 346 N.W.2d 520, 521 (Iowa 1984).

34. See, e.g., *Siemieniec v. Lutheran Gen. Hosp.*, 512 N.E.2d 691 (Ill. 1987).

35. See, e.g., *Procanik v. Cillo*, 478 A.2d 755, 757 (N.J. 1984) (minor plaintiff with congenital rubella syndrome); *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483, 486 (Wash. 1983) (two minor plaintiffs with "mild to moderate growth deficiencies, mild to moderate developmental retardation, wide-set eyes, lateral ptosis (drooping eyelids), hypoplasia of the fingers, small nails, low-set hairline, broad nasal ridge, and other physical and developmental defects").

36. See, e.g., *Procanik*, 478 A.2d at 758 (minor child alleged that, because of the defendant's negligence, his parents were "deprived of the choice of terminating the pregnancy" and sought damages for his "impaired childhood"). This is the same definition of "wrongful life" that is commonly used by the courts.

37. *Id.* at 760.

38. See *Kassama v. Magat*, 792 A.2d 1102, 1104 (Md. 2002).

39. See *id.* at 1116 ("The injury sued upon . . . is the fact that [the plaintiff] was born; [the plaintiff] bears the disability and will bear the expenses only because, but for the alleged negligence of [the defendant], [the plaintiff's] mother was unable to terminate the pregnancy and avert [the plaintiff's]

B. Current Recovery Rules for Wrongful Parentage and Wrongful Life

Though courts have attempted to define recovery by reference to the traditional category in which the plaintiff's claim fits, the reality is that not all claims fit neatly into one of the three traditional categories. Rather than trying to define recovery rules with reference to the traditional categories, this section will examine recovery rules based on the underlying factors courts use to determine damages: the plaintiff's identity, whether the child was born or aborted, the health of the child, and the plaintiff's motivation in attempting to avoid the birth of the child.⁴⁰ Examining recovery rules in this manner allows for a complete understanding and comparison of the differing recovery rules and their underlying policies.

1. Recovery for the Birth of a Healthy Child to Parents Who Sought to Avoid the Birth of Any Child

Forty-three jurisdictions in the United States have addressed the issue of whether to recognize a cause of action for the birth of a healthy child to parents who sought to avoid the birth of any child.⁴¹ Of these forty-three

birth. The issue is whether Maryland law is prepared to recognize that kind of injury—the injury of life itself.”).

40. The motivation of the parents in attempting to avoid the birth of the child applies only to wrongful parentage claims, not wrongful life claims.

41. See *Boone v. Mullendore*, 416 So. 2d 718 (Ala. 1982); *M.A. v. United States*, 951 P.2d 851 (Alaska 1998); *Wilbur v. Kerr*, 628 S.W.2d 568 (Ark. 1982); *Univ. of Ariz. Health Scis. Ctr. v. Superior Court*, 667 P.2d 1294 (Ariz. 1983); *Custodio v. Bauer*, 251 Cal. App. 2d 303 (Cal. Ct. App. 1967); *Ochs v. Borrelli*, 445 A.2d 883 (Conn. 1982); *Coleman v. Garrison*, 349 A.2d 8 (Del. 1975); *Flowers v. District of Columbia*, 478 A.2d 1073 (D.C. 1984); *Fassoulas v. Ramey*, 450 So. 2d 822 (Fla. 1984); *Fulton-DeKalb Hosp. Auth. v. Graves*, 314 S.E.2d 653 (Ga. 1984); *Cockrum v. Baumgartner*, 447 N.E.2d 385 (Ill. 1983); *Chafee v. Seslar*, 786 N.E.2d 705 (Ind. 2003); *Nanke v. Napier*, 346 N.W.2d 520 (Iowa 1984); *Byrd v. Wesley Med. Ctr.*, 699 P.2d 459 (Kan. 1985); *Schork v. Huber*, 648 S.W.2d 861 (Ky. 1983); *Pitre v. Opelousas Gen. Hosp.*, 530 So. 2d 1151 (La. 1988); *Macomber v. Dillman*, 505 A.2d 810 (Me. 1986); *Jones v. Malinowski*, 473 A.2d 429 (Md. 1984); *Burke v. Rivo*, 551 N.E.2d 1 (Mass. 1990); *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169 (Minn. 1977); *Rouse v. Wesley*, 494 N.W.2d 7 (Mich. Ct. App. 1992); *Girdley v. Coats*, 825 S.W.2d 295 (Mo. 1992); *Hitzemann v. Adam*, 518 N.W.2d 102 (Neb. 1994); *Szekeress v. Robinson*, 715 P.2d 1076 (Nev. 1986); *Kingsbury v. Smith*, 442 A.2d 1003 (N.H. 1982); *P. v. Portadin*, 432 A.2d 556 (N.J. Super. Ct. App. Div. 1981); *Lovelace Med. Ctr. v. Mendez*, 805 P.2d 603 (N.M. 1991); *O'Toole v. Greenberg*, 477 N.E.2d 445 (N.Y. 1985); *Jackson v. Baumgartner*, 347 S.E.2d 743 (N.C. 1986); *Johnson v. University Hospitals of Cleveland*, 540 N.E.2d 1370 (Ohio 1989); *Morris v. Sanchez*, 746 P.2d 184 (Okla. 1987); *Zehr v. Haugen*, 871 P.2d 1006 (Or. 1994); *Mason v. W. Pa. Hosp.*, 453 A.2d 974 (Pa. 1982); *Emerson v. Magendantz*, 689 A.2d 409 (R.I. 1997); *Smith v. Gore*, 728 S.W.2d 738 (Tenn. 1987); *Flax v. McNew*, 896 S.W.2d 839 (Tex. App. 1995); *C.S. v. Nielson*, 767 P.2d 504 (Utah 1988); *Miller v. Johnson*, 343 S.E.2d 301 (Va. 1986); *Begin v. Richmond*, 55 A.2d 363 (Vt. 1988); *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. Wierdsma*, 650 P.2d 288 (Wyo. 1982). The Supreme Court of Hawaii was also presented with a wrongful parentage case involving the birth of a healthy child. See *Carr v. Strode*, 904 P.2d 489 (Haw. 1995). However, the issue presented to the court was not whether to recognize a tort action for wrongful parentage involving a healthy child, but whether the testimony of an expert medical witness was required under the state's informed consent statute. *Id.* at 479. Though the court remanded

jurisdictions, only one, Nevada, has refused to recognize the tort cause of action.⁴²

In *Szekeres v. Robinson*, the plaintiff mother brought suit in tort and contract against the defendant doctor and his hospital employer.⁴³ The plaintiff alleged that as a result of the doctor's and hospital's negligence in the performance of a sterilization procedure, Mrs. Szekeres became pregnant and gave birth to a healthy baby girl.⁴⁴ The Supreme Court of Nevada dismissed the plaintiff's negligence claim.⁴⁵ The court pointed out that in order to recover under any tort theory of liability, the plaintiff must have suffered some type of legally compensable injury.⁴⁶ The court did not view the birth of a healthy child as a "wrong" or an injury for which a plaintiff could be compensated through a legal cause of action seeking damages.⁴⁷ Instead, the court implicitly viewed the birth of the child as an incontrovertible and irreducible benefit that trumped or conclusively outweighed any economic or noneconomic costs to the plaintiff resulting from the allegedly negligently performed sterilization procedure.⁴⁸ In the end, the court remanded the case for consideration of the facts under a contract theory of liability.⁴⁹ It held that when parties contract for the prevention of pregnancy and a pregnancy occurs, damages may be available in accordance with what was contemplated by the parties at the time the contract was made.⁵⁰

Thirty-two of the forty-two jurisdictions that recognize this cause of action limit the parents' recovery to costs associated with the pregnancy and birth of the child and expressly disallow the parents the costs of raising the child.⁵¹ Costs allowed by the courts subscribing to this limited recovery

the case for a new trial on the issue of informed consent, there was no explicit endorsement of a tort action for wrongful parentage involving a healthy child. *Id.* at 494.

42. See *Szekeres*, 715 P.2d at 1077, 1079.

43. *Id.* at 1076-77 (Nev. 1986). Mr. Szekeres also joined in the suit, seeking damages for loss of consortium while his wife was pregnant.

44. *Id.* at 1077.

45. *Id.*

46. *Id.*

47. *Id.* at 1077-78.

48. See *id.*

49. *Id.*

50. *Id.* The court's decision to consider the Szekeres's claim under a contract theory of liability raises an interesting question. Aside from nominal damages for the breach of contract, why is something that cannot be viewed as a harm or loss under tort law recognized as a loss under contract law?

51. See *Boone v. Mullendore*, 416 So. 2d 718 (Ala. 1982); *M.A. v. United States*, 951 P.2d 851 (Alaska 1998); *Wilbur v. Kerr*, 628 S.W.2d 568 (Ark. 1982); *Coleman v. Garrison*, 349 A.2d 8 (Del. 1975); *Flowers v. District of Columbia*, 478 A.2d 1073 (D.C. 1984); *Fassoulas v. Ramey*, 450 So. 2d 822 (Fla. 1984); *Fulton-DeKalb Hosp. Auth. v. Graves*, 314 S.E.2d 653 (Ga. 1984); *Cockrum v. Baumgartner*, 447 N.E.2d 385 (Ill. 1983); *Chafee v. Seslar*, 786 N.E.2d 705 (Ind. 2003); *Nanke v. Napier*, 346 N.W.2d 520 (Iowa 1984); *Byrd v. Wesley Med. Ctr.*, 699 P.2d 459 (Kan. 1985); *Schorch v.*

approach typically⁵² include the medical and hospital expenses associated with the failed sterilization procedure, abortion, and/or pregnancy tests;⁵³ medical and hospital expenses associated with the pregnancy and childbirth;⁵⁴ pain and suffering associated with the pregnancy and childbirth;⁵⁵ costs of a second, corrective sterilization procedure to prevent future pregnancies;⁵⁶ the mother's lost wages during pregnancy, childbirth, and a reasonable period after birth;⁵⁷ the father's loss of consortium during pregnancy, childbirth, and a reasonable period after birth;⁵⁸ and the emo-

Huber, 648 S.W.2d 861 (Ky. 1983); *Pitre v. Opelousas Gen. Hosp.*, 530 So. 2d 1151 (La. 1988); *Macomber v. Dillman*, 505 A.2d 810 (Me. 1986); *Rouse v. Wesley*, 494 N.W.2d 7 (Mich. Ct. App. 1992); *Girdley v. Coats*, 825 S.W.2d 295 (Mo. 1992); *Hitzemann v. Adam*, 518 N.W.2d 102 (Neb. 1994); *Kingsbury v. Smith*, 442 A.2d 1003 (N.H. 1982); *P. v. Portadin*, 432 A.2d 556 (N.J. Super. Ct. App. Div. 1981); *O'Toole v. Greenberg*, 477 N.E.2d 445 (N.Y. 1985); *Jackson v. Baumgartner*, 347 S.E.2d 743 (N.C. 1986); *Johnson v. Univ. Hosps. of Cleveland*, 540 N.E.2d 1370 (Ohio 1989); *Morris v. Sanchez*, 746 P.2d 184 (Okla. 1987); *Mason v. W. Pa. Hosp.*, 453 A.2d 974 (Pa. 1982); *Emerson v. Magdanz*, 689 A.2d 409 (R.I. 1997); *Smith v. Gore*, 728 S.W.2d 738 (Tenn. 1987); *Flax v. McNew*, 896 S.W.2d 839 (Tex. App. 1995); *C.S. v. Nielson*, 767 P.2d 504 (Utah 1988); *Miller v. Johnson*, 343 S.E.2d 301 (Va. 1986); *McKernan v. Aasheim*, 687 P.2d 850 (Wash. 1984); *James G. v. Caserta*, 332 S.E.2d 872 (W. Va. 1985); *Beardsley v. Wierdsma*, 650 P.2d 288 (Wyo. 1982). These jurisdictions are often referred to as "limited recovery" jurisdictions.

52. Not all limited recovery jurisdictions allow all of the listed damages. Those in the list represent the categories of damages most often allowed by limited recovery jurisdictions. Various jurisdictions allow various combinations of these damages.

53. See, e.g., *Wilbur*, 628 S.W.2d at 571; *Fulton-DeKalb Hosp. Auth.*, 314 S.E.2d at 654; *Johnston v. Elkins*, 736 P.2d 935, 940 (Kan. 1987); *Macomber*, 505 A.2d at 813; *Girdley*, 825 S.W.2d at 298-99; *Hitzemann*, 518 N.W.2d at 107; *Kingsbury*, 442 A.2d at 1006; *Emerson*, 689 A.2d at 414; *Smith*, 728 S.W.2d at 751; *C.S.*, 767 P.2d at 509-10; *Miller*, 343 S.E.2d at 305; *McKernan*, 687 P.2d at 856; *James G.*, 332 S.E.2d at 877; *Beardsley*, 650 P.2d at 292.

54. See, e.g., *Boone*, 416 So. 2d at 723; *Wilbur*, 628 S.W.2d at 571; *Fulton-DeKalb Hosp. Auth.*, 314 S.E.2d at 654; *Chaffee*, 786 N.E.2d at 708; *Johnston*, 736 P.2d at 940; *Maggard v. McKelvey*, 627 S.W.2d 44, 48 (Ky. Ct. App. 1981); *Pitre*, 530 So. 2d at 1161-62; *Macomber*, 505 A.2d at 813; *Girdley*, 825 S.W.2d at 298-99; *Hitzemann*, 518 N.W.2d at 107; *Kingsbury*, 442 A.2d at 1006; *Portadin*, 432 A.2d at 556-57; *Johnson*, 540 N.E.2d at 1378 n.8; *Smith*, 728 S.W.2d at 751; *C.S.*, 767 P.2d at 509-10; *Beardsley*, 650 P.2d at 292.

55. See, e.g., *Boone*, 416 So. 2d at 723; *Wilbur*, 628 S.W.2d at 571; *Fulton-DeKalb Hosp. Auth.*, 314 S.E.2d at 654; *Chaffee*, 786 N.E.2d at 708; *Johnston*, 736 P.2d at 940; *Maggard*, 627 S.W.2d at 48; *Pitre*, 530 So. 2d at 1161-62; *Macomber*, 505 A.2d at 813; *Girdley*, 825 S.W.2d at 298-99; *Kingsbury*, 442 A.2d at 1006; *Portadin*, 432 A.2d at 556-57; *Johnson*, 540 N.E.2d at 1378 n.8; *Smith*, 728 S.W.2d at 751; *C.S.*, 767 P.2d at 509-10; *Beardsley*, 650 P.2d at 292.

56. See, e.g., *Girdley*, 825 S.W.2d at 298-99; *Hitzemann*, 518 N.W.2d at 107; *C.S.*, 767 P.2d at 509-10.

57. *Wilbur*, 628 S.W.2d at 571; *Fulton-DeKalb Hosp. Auth.*, 314 S.E.2d at 654; *Maggard*, 627 S.W.2d at 48; *Macomber*, 505 A.2d at 813; *Girdley*, 825 S.W.2d at 298-99; *Kingsbury*, 442 A.2d at 1006; *Portadin*, 432 A.2d at 556-57; *Johnson*, 540 N.E.2d at 1378 n.8; *C.S.*, 767 P.2d at 509-10; *Beardsley*, 650 P.2d at 292.

58. *Boone*, 416 So. 2d 718, at 723; *Fulton-DeKalb Hosp. Auth.*, 314 S.E.2d at 654; *Johnston*, 736 P.2d at 940; *Maggard*, 627 S.W.2d at 48; *Pitre*, 530 So. 2d at 1161-62; *Macomber*, 505 A.2d at 813; *Girdley*, 825 S.W.2d at 298-99; *Hitzemann*, 518 N.W.2d at 107; *Portadin*, 432 A.2d at 556-57; *Smith*, 728 S.W.2d at 751.

tional distress associated with the pregnancy and delivery of the child or the abortion, if one was performed.⁵⁹

The primary, indeed pervasive argument, either explicitly or implicitly, is very similar to the argument of the Nevada court: the existence of a healthy child is never a harm.⁶⁰ Another way this argument is often put is that the benefits of raising the child, even if the child is unplanned, will always outweigh the costs associated with raising it.⁶¹ For example, in *Cockrum v. Baumgartner*, the Illinois Supreme Court stated, “[i]n a proper hierarchy of values the benefit of life should not be outweighed by the expense of supporting it.”⁶² The court further noted that the rights emanating from a respect for life are “at the heart of our legal system and, broader still, our civilization.”⁶³

These courts also employ numerous supplementary arguments: child-rearing damages are too speculative;⁶⁴ an award of child-rearing damages would be out of proportion with the defendant’s negligence;⁶⁵ large awards will reduce the availability of sterilization procedures;⁶⁶ an award of child-rearing damages will cause emotional harm to the child;⁶⁷ the decision to award child-rearing damages is best left to the state legislatures;⁶⁸ the burden of raising the child is too remote from the tortious act;⁶⁹ there is no logical stopping point and such awards will encourage more litigation;⁷⁰

59. See, e.g., *Boone*, 416 So. 2d at 723; *Pitre*, 530 So. 2d at 1162; *Girdley*, 825 S.W.2d at 298–99; *Johnson*, 540 N.E.2d at 1378; C.S., 767 P.2d at 509–10; *Beardsley*, 650 P.2d at 292.

60. See, e.g., *O’Toole v. Greenberg*, 477 N.E.2d 445, 448 (N.Y. 1985) (“We believe, as a matter of public policy, that the birth of a healthy child does not constitute a cognizable legal harm . . .”); *Jackson v. Baumgartner*, 347 S.E.2d 743, 749 (N.C. 1986) (deciding that allowing child-rearing damages would be contrary to the holding in a prior case that “life, even life with severe defects, cannot be an injury in the legal sense”); *Johnson*, 540 N.E.2d at 1378 (“The extent of recoverable damages is limited by Ohio’s public policy that the birth of a normal, healthy child cannot be an injury to her parents.”).

61. See, e.g., *Nanke v. Napier*, 346 N.W.2d 520, 522–23 (Iowa, 1984) (“[T]he public policy of Iowa . . . dictates that a parent cannot be said to have been damaged or injured by the birth and rearing of a normal, healthy child because the invaluable benefits of parenthood outweigh the mere monetary burdens as a matter of law.”); *Cockrum v. Baumgartner*, 447 N.E.2d 385, 389 (Ill. 1983) (“[T]he benefit of life should not be outweighed by the expense of supporting it.”); *Beardsley*, 650 P.2d at 293 (“We believe that the benefits of the birth of a healthy, normal child outweigh the expense of rearing a child.”).

62. 447 N.E.2d at 389.

63. *Id.*

64. See, e.g., *Beardsley*, 650 P.2d at 292; *Johnson*, 540 N.E.2d at 1378; C.S. v. *Nielson*, 767 P.2d 504, 514 (Utah 1988).

65. See, e.g., *Flowers v. District of Columbia*, 478 A.2d 1073, 1077 (D.C. 1984); C.S., 767 P.2d at 514.

66. See, e.g., *Smith v. Gore*, 728 S.W.2d 738, 748 (Tenn. 1987); C.S., 767 P.2d at 514.

67. See, e.g., *Wilbur v. Kerr*, 628 S.W.2d 568, 571 (Ark. 1982); C.S., 767 P.2d at 514.

68. See, e.g., *Flowers*, 478 A.2d at 1077–78; *Johnson*, 540 N.E.2d at 1378.

69. See, e.g., C.S., 767 P.2d at 514; *Beardsley*, 650 P.2d at 292.

70. See, e.g., C.S., 767 P.2d at 514; *Beardsley*, 650 P.2d at 292.

and an award of child-rearing damages will compromise the stability and relationships of families.⁷¹

Finally, some of these courts cite specific statutory and common law policies in support of their denial of child-rearing damages.⁷² For example, in *Smith v. Gore*, the Tennessee Supreme Court relied on common law and statutory provisions to deny child-rearing damages.⁷³ Both the common law and statutory provisions placed the responsibility of financially supporting children on the parents of that child.⁷⁴ The court felt that awarding child-rearing costs to parents in wrongful parentage cases would shift the financial responsibility of raising a child from the parents to the defendant(s).⁷⁵ Therefore, such an award would violate established public policy.⁷⁶

Currently, six of the forty-two jurisdictions recognizing tort actions for the birth of a healthy child to parents who sought to avoid the birth of any child subscribe to the benefit-offset recovery scheme.⁷⁷ These jurisdictions allow plaintiff parents to recover much of the same costs associated with the pregnancy and delivery that are allowed by limited recovery juris-

71. See, e.g., *Cockrum*, 447 N.E.2d at 390 (“To permit parents in effect to transfer the costs of rearing a child would run counter to that policy [of maintaining family stability and relationships]”); *Flowers*, 478 A.2d at 1077 (“Permitting parents to initiate litigation to force a third person to rear financially their child has a potentially destabilizing effect on families in the District . . .”); *Wilbur*, 628 S.W.2d at 571 (child rearing damages are “a question which meddles with . . . the stability of the family unit”).

72. See, e.g., *Flowers*, 478 A.2d at 1077 (citing specific council policy that “emphasizes the importance of a stable home environment and a secure family relationship for children”); *Smith v. Gore*, 728 S.W.2d 738, 751 (Tenn. 1987) (“[T]he common law itself and statutory law have specifically established responsibility for the support of children.”).

73. See *Smith*, 728 S.W.2d at 745 (“[W]e rest our holding limiting Defendants’ liability in this case on . . . [the fact that] the State of Tennessee imposes by statute the responsibility for the support of children upon the parents . . .”).

74. See *id.* at 750.

75. See *id.* at 751.

76. See *id.*

77. See *Univ. of Ariz. Health Scis. Ctr. v. Superior Court*, 667 P.2d 1294, 1299 (Ariz. 1983) (requiring damages relating to the rearing and education of the child to be offset by the benefits the parents will receive from the parental relationship with the child); *Custodio v. Bauer*, 251 Cal. App. 2d 303, 323 (Cal. Ct. App. 1967) (“If the failure of the sterilization operation and the ensuing pregnancy benefited the wife’s emotional and nervous makeup . . . the defendants should be able to offset it”); *Ochs v. Borrelli*, 445 A.2d 883, 886 (Conn. 1982) (adopting a case-by-case balancing test of benefits against damages); *Jones v. Malinowski*, 473 A.2d 429, 435 (Md. 1984) (“We align ourselves with those jurisdictions which permit the trier of fact to consider awarding damages to parents for child rearing costs to the age of the child’s majority, offset by the benefits derived by the parents from the child’s aid, society and comfort”); *Burke v. Rivo*, 551 N.E.2d 1, 18 (Mass. 1990) (when the sterilization was sought by economic reasons, the parents of a healthy, unplanned child may recover child-rearing damages offset by the benefit parents receive from having the child); *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169, 176 (Minn. 1977) (“[W]e will permit [parents] to recover the reasonably foreseeable costs of rearing, subject to an offset for the value of the benefits conferred to them by the child.”).

dictions.⁷⁸ Unlike the limited recovery jurisdictions, though, these courts argue that plaintiffs are entitled to recover child-rearing damages.⁷⁹ In doing so, these courts reject the arguments asserted by the courts denying recovery of child-rearing damages, including the argument that child-rearing damages are contrary to public policy.⁸⁰

Even though the courts subscribing to the benefit-offset approach do not believe the benefits of a healthy child always outweigh the costs of the child, they do recognize that the parents of the child may receive some benefits from the child's existence.⁸¹ Such benefits may include those to the parents' "emotional and nervous makeup"⁸² through the aid, satisfaction, comfort, joy, society, and fun provided by the child.⁸³ These benefits, according to these courts, should not be ignored.⁸⁴ These courts, therefore, have explicitly invoked the tort benefit rule of section 920 of the Restatement to allow juries to offset child-rearing damages by the benefits the plaintiff parents receive from the parent-child relationship.⁸⁵ By adopting this recovery scheme, these courts argue they allow juries to consider all the circumstances on a case-by-case basis and, thus, reduce the speculation of damages.⁸⁶ Additionally, these courts argue that the benefit offset approach prevents a windfall for plaintiff parents.⁸⁷

Among the courts adopting the benefit-offset recovery scheme, there are several methods of applying the scheme. For example, Massachusetts allows parents to recover child-rearing damages only when their decision to

78. See, e.g., *Burke*, 551 N.E.2d at 3-4 (allowing costs of unsuccessful sterilization procedure; wife's lost earning capacity; medical expenses of the delivery and care following the birth; care for other children while the wife is incapacitated; second sterilization procedure and any expenses flowing from it; husband's loss of consortium; wife's pain and suffering in connection with pregnancy, birth, and second sterilization procedure; and emotional distress suffered as a result of the unwanted pregnancy); *Sherlock*, 260 N.W.2d at 170-71 (allowing "all prenatal and postnatal medical expenses, the mother's pain and suffering during pregnancy and delivery, and loss of consortium").

79. See, e.g., *Univ. of Ariz. Health Scis. Ctr.*, 667 P.2d at 1299; *Ochs*, 445 A.2d at 885; *Jones*, 473 A.2d at 435; *Burke*, 551 N.E.2d at 11; *Sherlock*, 260 N.W.2d at 175-76.

80. See *Univ. of Ariz. Health Scis. Ctr.*, 667 P.2d at 1297-98, 1300; *Custodio*, 251 Cal. App. 2d at 324-35; *Ochs*, 445 A.2d at 885-86; *Jones*, 473 A.2d at 435-37; *Burke*, 551 N.E.2d at 4-5; *Sherlock*, 260 N.W.2d at 175-76.

81. See *Univ. of Ariz. Health Scis. Ctr.*, 667 P.2d at 1299; *Custodio*, 251 Cal. App. 2d at 323; *Ochs*, 445 A.2d at 886; *Jones*, 473 A.2d at 435; *Burke*, 551 N.E.2d at 18; *Sherlock*, 260 N.W.2d at 170-71.

82. *Custodio*, 251 Cal. App. 2d at 323.

83. See *Sherlock*, 260 N.W.2d at 170 (aid, comfort, and society); *Ochs*, 445 A.2d at 886 (satisfaction, fun, joy, companionship).

84. See *Jones*, 473 A.2d at 436-37; *Ochs*, 445 A.2d at 886; *Sherlock*, 260 N.W.2d at 176; *Univ. of Ariz. Health Scis. Ctr.*, 667 P.2d at 1299; *Burke*, 551 N.E.2d at 6.

85. See *Burke*, 551 N.E.2d at 5-6; *Univ. of Ariz. Health Scis. Ctr.*, 445 A.2d at 1299-1300; *Sherlock*, 260 N.W.2d at 176; *Ochs*, 445 A.2d at 886; *Jones*, 473 A.2d at 436-37.

86. See *Jones*, 473 A.2d at 437; *Univ. of Ariz. Health Scis. Ctr.*, 445 A.2d at 1301.

87. See, e.g., *Univ. of Ariz. Health Scis. Ctr.*, 445 A.2d at 1300.

undergo the sterilization procedure was based on economic or financial reasons.⁸⁸ Those damages are to be offset by the benefit, if any, the parents receive from the existence of the child.⁸⁹ Similarly, Arizona and Maryland require the trier of fact to take into consideration the reasons the parents sought the sterilization when determining the extent to which the parents have been harmed by the birth of the child,⁹⁰ but do not require the plaintiff parents to have had a specific motivation at the time the sterilization was sought in order to recover.⁹¹ Rather, these courts believe that consideration of the parents' motivations will reveal the true extent of damage suffered by the plaintiffs.⁹²

The remaining courts in this category do not require any inquiry into the motivations of the plaintiff parents.⁹³ Instead, they require every award of child-rearing damages to be offset by the value of any benefit the parents may receive from the parent-child relationship.⁹⁴ Minnesota's benefit offset recovery scheme distinguishes itself from the others in one way: it allows child-rearing damages to be offset by the benefits the parents will receive during their anticipated life expectancy rather than by just those received until the child reaches the age of majority.⁹⁵

88. *Burke*, 551 N.E.2d at 4.

89. *Id.* at 6.

90. *Univ. of Ariz. Health Scis. Ctr.*, 445 A.2d at 1300; *Jones*, 473 A.2d at 436.

91. *See Univ. of Ariz. Health Scis. Ctr.*, 445 A.2d at 1300 (requiring the trier of fact to give "weight and consideration in each case to the plaintiffs' reasons for submitting to sterilization procedures" but not requiring plaintiffs to have a certain motivation); *Jones*, 473 A.2d at 436 ("[T]he assessment of damages associated with the healthy child's birth . . . should focus upon the specific interests of the parents that were *actually* impaired by the physician's negligence . . .").

92. *See, e.g., Univ. of Ariz. Health Scis. Ctr.*, 445 A.2d at 1300; *Jones*, 473 A.2d at 436. This inquiry into the motivations of plaintiff parents is often referred to as the "motivational analysis." Briefly, the analysis identifies three main reasons plaintiff parents tend to seek sterilization: genetic (to prevent the birth of a defective child), therapeutic (to prevent harm to the mother's health), and economic (to avoid the costs of raising an additional child). Subscribers to this analysis believe that by looking at the motivation of parents in seeking the sterilization procedure, one can determine to what extent the parents have actually been damaged by the birth of a healthy child. According to this analysis, if the parents sought the sterilization procedure for genetic or therapeutic reasons and the failure of the sterilization resulted in the birth of healthy child with no harm to the mother, the parents have not truly been damaged as the harms they were seeking to avoid never actually occurred. Therefore, child-rearing damages should not be awarded. Only if the parents sought the sterilization for economic reasons can they say they have been truly harmed by the birth of a healthy child.

93. *See Sherlock v. Stillwater Clinic*, 260 N.W.2d 169, 170-71 (Minn. 1977); *Ochs v. Borrelli*, 445 A.2d 883, 886 (Conn. 1982); *Custodio v. Bauer*, 251 Cal. App. 2d 303, 323 (Cal Ct. App. 1967).

94. *See Sherlock*, 260 N.W.2d at 176; *Ochs*, 445 A.2d at 886, *Custodio*, 251 Cal. App. 2d at 323.

95. *Sherlock*, 260 N.W.2d at 176 n.12 ("Our only reason for valuing the benefits of the child's aid, comfort, and society against the life expectancy of his parents is that in the usual case pecuniary benefits will be minimal during the child's minority. This approach is, moreover, consistent with the opposite situation encountered in an action for the wrongful death of a minor where, according to the prevailing view, parents may recover the value of the benefits they might reasonably have expected from the child after reaching majority.").

Only three jurisdictions allow the parents of an unplanned child to recover all of the costs associated with raising the child with no benefit offset: Wisconsin, New Mexico, and Oregon.⁹⁶ Like the courts that subscribe to the benefit-offset approach, these courts reject the arguments advanced by the limited recovery jurisdictions against child-rearing damages.⁹⁷

The Supreme Court of New Mexico, in *Lovelace Medical Center v. Mendez*,⁹⁸ took an approach different than that taken by many of the other courts. Rather than viewing the child as the injury, the Supreme Court of New Mexico saw the invasion into the legally protected interests of financial security and family planning as the injuries suffered by the plaintiffs.⁹⁹ By characterizing the injury to the plaintiffs in this manner, the court avoided the discomfort other courts seemed to experience by labeling a healthy, but unplanned, child as an injury.¹⁰⁰ Additionally, the court avoided addressing the numerous public policy arguments that arise when the unplanned child is viewed as the injury.¹⁰¹

Most importantly, the courts allowing parents to fully recover child-rearing damages reject the argument that such damages should be offset by the benefits parents receive from the parental relationship.¹⁰² In *Marciniak v. Lundborg*, Justice Bablitch of the Wisconsin Supreme Court articulated well the court's reasons for rejecting the use of the benefit rule.¹⁰³ The court argued that because of the same interest limitation on the benefit rule,

96. See *Lovelace Med. Ctr. v. Mendez*, 805 P.2d 603 (N.M. 1991); *Zehr v. Haugen*, 871 P.2d 1006 (Or. 1994); *Marciniak v. Lundborg*, 450 N.W.2d 243 (Wis. 1990). But see Bret S. Simmons, *Zehr v. Haugen and the Oregon Approach to Wrongful Conception: An Occasion for Celebration or Litigation?*, 31 WILLAMETTE L. REV. 121, 124 (1995) (arguing *Zehr v. Haugen* did not specifically adopt either the benefit offset or full recovery scheme). The remaining jurisdiction that has recognized a tort action for the birth of a healthy child is Vermont. See *Begin v. Richmond*, 555 A.2d 363 (Vt. 1988). The Supreme Court of Vermont held that the plaintiffs could state a claim for medical malpractice where the defendant's alleged negligence in performing post-vasectomy testing resulted in the conception and subsequent birth of a healthy child. *Id.* at 366.

97. See, e.g., *Lovelace Med. Ctr.*, 805 P.2d at 611; *Zehr*, 871 P.2d at 1011-12; *Marciniak*, 450 N.W.2d at 245-48. In *Marciniak*, the Supreme Court of Washington expressly responded to and rejected each individual argument. See 450 N.W.2d at 245-48.

98. 805 P.2d 603.

99. See *id.* at 612-13 ("We hold, therefore, that the Mendezes' interest in the financial security of their family was a legally protected interest which was invaded by Lovelace's negligent failure properly to perform Maria's sterilization operation (if proved at trial) . . ." and "Mr. and Mrs. Mendez suffered an injury through the invasion of their legally protected interest in limiting the size of their family.").

100. See *id.* at 611-13.

101. See *id.* Recall from the discussion of the limited recovery jurisdictions' rationale for rejecting child-rearing damages the numerous public policy arguments against such damages. These included arguments such as the benefits of a child always outweigh the costs of raising it and an award of child-rearing damages will disrupt the stability of the family unit.

102. See *id.* at 613-14; *Marciniak*, 450 N.W.2d at 248-49. But see *Zehr*, 871 P.2d at 1013 (not specifically addressing whether child-rearing damages should be offset by the benefits).

103. See *Marciniak*, 450 N.W.2d at 245-49.

the economic costs of raising a child could only be offset by economic benefits.¹⁰⁴ However, according to the court, the same interest limitation was not the only thing that made the benefit rule inapplicable. Instead, the court held that application of the benefit rule in actions for the forced parentage of a healthy child would be inequitable, in accordance with the equitable limitation placed upon the rule's use.¹⁰⁵ The court reasoned that plaintiff parents in these cases had, in seeking sterilization or other methods of avoiding pregnancy, decided not to have a child and to avoid the "benefits" associated with the birth of a child.¹⁰⁶

When parents make the decision to forego this opportunity for emotional enrichment, it hardly seems equitable to not only force this benefit upon them but to tell them they must pay for it as well by offsetting it against their proven emotional damages. With respect to economic benefits, the same argument prevails.¹⁰⁷

2. Recovery for the Birth of an Impaired Child to Parents Who Sought to Avoid the Birth of Any Child

Parents who seek to prevent the birth of any child through sterilization, birth control, abortion, or any other means do not always receive with a healthy child when their prevention means fail. Occasionally, the defendant's negligence results in these parents becoming parents to an impaired child.¹⁰⁸ Of the few courts that have addressed the issue of damages in these claims, most disallow recovery of the extraordinary costs associated with the child's impairment.¹⁰⁹ All of them held that the birth of an impaired child is not a foreseeable result of a defendant's negligence when the parents sought to avoid the birth of any child and, therefore, no proximate cause exists in such claims.¹¹⁰ These courts do not address the issue of child-rearing costs unassociated with the child's impairment (i.e., ordinary

104. *See id.* at 249.

105. *See id.*

106. *See id.*

107. *Id.*

108. *See, e.g., Williams v. Univ. of Chi. Hosps.*, 688 N.E.2d 130, 131 (Ill. 1997) (failed sterilization resulting in the birth of a child with attention deficit hyperactivity disorder); *Simmerer v. Dabbas*, 733 N.E.2d 1169, 1172 (Ohio 2000) (failed sterilization resulting in the birth of a child with a heart defect); *Emerson v. Magendantz*, 689 A.2d 409, 410 (R.I. 1997) (failed sterilization resulting in the birth of a child with congenital problems); *Pitre v. Opelousas Gen. Hosp.*, 530 So. 2d 1151, 1153 (La. 1988) (failed sterilization resulting in the birth of a child with albinism); *Williams v. Van Biber*, 886 S.W.2d 10, 11 (Mo. 1994) (failed sterilization resulting in the birth of a child with severe heart condition). *See generally Smith-Groff, supra* note 16 (commenting on *Van Biber*, 886 S.W.2d 10).

109. *See Williams*, 688 N.E.2d at 135; *Van Biber*, 886 S.W.2d at 13; *Simmerer*, 733 N.E.2d at 1174; *LaPoint v. Shirley*, 409 F. Supp. 118, 121-22 (W.D. Tex. 1976).

110. *Williams*, 688 N.E.2d at 134; *Van Biber*, 886 S.W.2d at 13-14; *Simmerer*, 733 N.E.2d at 1173; *LaPoint*, 409 F. Supp. at 121.

child-rearing costs), presumably because they all disallow such damages in claims involving the birth of a healthy child.¹¹¹

Louisiana and Rhode Island, on the other hand, allow parents to recover the extraordinary costs associated with the child's impairment.¹¹² Louisiana allows these damages, so long as the specific impairment was a foreseeable result of the defendant's conduct.¹¹³ Louisiana does, however, expressly disallow the recovery of ordinary child-rearing costs.¹¹⁴ Such costs are "ordinary vicissitudes that befall any family with the birth of a healthy, normal child. Absent unusual circumstances, a child is presumed to be a blessing not offset by the inconvenience of redistributing the family income and patrimony which he or she may occasion."¹¹⁵

The Supreme Court of Rhode Island has developed the most extensive recovery scheme of all the courts that have addressed claims in this category. First, it allows parents to recover the extraordinary costs associated with the child's impairment.¹¹⁶ However, if the defendant was on notice that the parents expected or were likely to give birth to an impaired child, the parents may recover the entire cost of raising the child.¹¹⁷ In either situation, the defendant is liable for the costs even after the child has reached the age of majority.¹¹⁸ However, the child-rearing costs received by the parents must be offset by any monetary assistance given to the parents by governmental or private agencies to assist in caring for and raising the child.¹¹⁹ Finally, the parents are entitled to receive damages for their emotional distress.¹²⁰

111. See *Cockrum v. Baumgartner*, 447 N.E.2d 385, 389 (Ill. 1983); *Johnson v. Univ. Hosps. of Cleveland*, 540 N.E.2d 1370, 1378 (Ohio 1989); *Girdley v. Coats*, 825 S.W.2d 295, 298 (Mo. 1992); *Flax v. McNew*, 896 S.W.2d 839, 845 (Tex. App. 1995). Along the same line, these courts would likely also allow parents to recover the costs associated with the pregnancy and birth of the child, just as they allow parents of healthy children to do so. See *Johnson*, 540 N.E.2d at 1378 n.8; *Girdley*, 825 S.W.2d at 298-99; *Flax*, 896 S.W.2d at 845.

112. See *Pitre*, 530 So. 2d 1151; *Emerson*, 689 A.2d 409.

113. See *Pitre*, 530 So. 2d at 1162 (disallowing the plaintiffs' claim because the plaintiffs did not allege in their complaint that the child's albinism was a foreseeable result of the defendant's negligence). Louisiana also allows parents to recover "expenses incurred during pregnancy and delivery, the mother's pain and suffering, the father's loss of consortium, service and society, and their emotional and mental distress associated with the birth of an unplanned and unwanted child and the unexpected restriction upon their freedom to plan their family." *Id.* 1161-62.

114. *Id.* at 1162.

115. *Id.*

116. *Emerson*, 689 A.2d at 414.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

3. Recovery for the Birth of an Impaired Child to Parents Who Sought to Avoid the Birth of Only an Impaired Child

Claims for the birth of an impaired child are most frequently made by parents who specifically sought to avoid the birth of only an impaired child. These parents would have had, or would not have avoided the conception of, a healthy child but sought only to avoid becoming parents of an impaired child. Claims by these parents can arise from a number of fact patterns. For example, parents may allege that but for the defendant's negligence in failing to discover or disclose the possibility the child would be born with an impairment, they would have either avoided conception or terminated the pregnancy.¹²¹ Plaintiff parents may also allege they sought a sterilization procedure specifically to avoid the birth of an impaired child and that the defendant's negligence in performing the procedure resulted in the birth of an impaired child.¹²²

Georgia, Kentucky, and Michigan have refused to recognize a cause of action for the birth of an impaired child to parents who sought to avoid the birth of such a child.¹²³ According to these courts, the plaintiff parents have not suffered a legal injury because they cannot be said to be harmed by their child's life, no matter how impaired.¹²⁴ These courts also argue that the defendant has not caused the child's impairment,¹²⁵ the damages are too difficult to assess,¹²⁶ and the legislature is better suited to recognize the cause of action.¹²⁷

121. See, e.g., *Keel v. Banach*, 624 So. 2d 1022 (Ala. 1993) (but for the defendant's negligence in failing to discover abnormalities, the parents would have terminated the pregnancy); *Walker v. Mart*, 790 P.2d 735 (Ariz. 1990) (but for the defendant's negligence in failing to disclose the risks of rubella, mother would have aborted); *Lininger v. Eisenbaum*, 764 P.2d 1202 (Colo. 1988) (but for the defendant's negligence in advising the parents of the hereditary nature of blindness, the parents would not have conceived or would have terminated the pregnancy). These claims are the type to which the term "wrongful birth" has traditionally referred.

122. See, e.g., *Fassoulas v. Ramey*, 450 So. 2d 822 (Fla. 1984); *Ochs v. Borrelli*, 445 A.2d 883 (Conn. 1982). I classify these cases as ones where the parents sought only to avoid the birth of an impaired child because the motivation for obtaining the sterilization was to avoid the birth of an impaired child. I assume, absent any indication to the contrary, that these parents would not have obtained the sterilization if they were not concerned with the possibility of having an impaired child. However, one should note that these claims could also be characterized as ones brought by parents seeking to avoid the birth of any child. After all, these parents chose to obtain a sterilization to avoid the birth of an impaired child, knowing that a sterilization (if properly performed) would prevent the birth of any child.

123. See *Atlanta Obstetrics & Gynecology Group v. Abelson*, 398 S.E.2d 557 (Ga. 1990); *Grubbs v. Barbourville Family Health Ctr.*, 120 S.W.3d 682 (Ky. 2003); *Taylor v. Kurapati*, 600 N.W.2d 670 (Mich. Ct. App. 1999).

124. *Atlanta Obstetrics*, 398 S.E.2d at 561; *Grubbs*, 120 S.W.3d at 689; *Taylor*, 600 N.W.2d at 688.

125. *Atlanta Obstetrics*, 398 S.E.2d at 561.

126. *Id.* at 561-62; *Taylor*, 600 N.W.2d at 688.

127. *Atlanta Obstetrics*, 398 S.E.2d at 563; *Taylor*, 600 N.W.2d at 691.

In addition, six states have prohibited a cause of action only when the plaintiff alleges that but for the defendant's negligence, the child would have been aborted.¹²⁸ The distinction according to the Supreme Court of North Carolina is that in claims that the child would have been aborted, the child itself is the injury, whereas in claims that the child would not have been conceived, the injury is the parents' inability to choose whether to conceive the child.¹²⁹ Like other courts, North Carolina refuses to view life as an injury.¹³⁰ Therefore, parents who allege they would have aborted the child have not suffered a legal injury.¹³¹

When parents who sought to avoid becoming parents to an impaired child bring a claim for the birth of such a child, twelve jurisdictions have allowed them to recover exclusively the extraordinary expenses associated with the child's impairment.¹³² Extraordinary expenses may include the costs of medical care and special education necessary to treat the child's impairment.¹³³ However, they do not include damages for emotional distress.¹³⁴ Kansas, Illinois, and Delaware disallow damages for emotional distress either because the parents were not witnesses to the tortious conduct or did not suffer physical injury.¹³⁵ New York, on the other hand,

128. See IDAHO CODE ANN. § 5-334 (2006); MINN. STAT. ANN. § 145.424 (West 2006); MO. ANN. STAT. § 188.130 (West 2006); 42 PA. CONS. STAT. ANN. § 8305 (West 2004); UTAH CODE ANN. § 78-11-24 (1953); *Azzolino v. Dingfelder*, 337 S.E.2d 528 (N.C. 1985). However, Minnesota and North Carolina have specifically held that claims for the wrongful birth of an impaired child are cognizable when the plaintiff claims that but for the negligence of the defendant, the child would not have been conceived. *Molloy v. Meier*, 679 N.W.2d 711 (Minn. 2004); *McAllister v. Ha*, 496 S.E.2d 577 (N.C. 1998).

129. See *McAllister*, 496 S.E.2d at 582.

130. *Azzolino*, 337 S.E.2d at 534.

131. *Id.*

132. See ME. REV. STAT. ANN. tit. 24, § 2931 (2004); *Keel v. Banach*, 624 So. 2d 1022 (Ala. 1993); *Turpin v. Sortini*, 643 P.2d 954 (Cal. 1982); *Lininger v. Eisenbaum*, 764 P.2d 1202 (Colo. 1988); *Garrison v. Med. Ctr. of Del.*, 581 A.2d 288 (Del. 1990); *Haymon v. Wilkerson*, 535 A.2d 880 (D.C. 1987); *Siemieniec v. Lutheran Gen. Hosp.*, 512 N.E.2d 691 (Ill. 1987); *Bader v. Johnson*, 732 N.E.2d 1212 (Ind. 2000); *Arche v. United States*, 798 P.2d 477 (Kan. 1990); *Viccaro v. Milunsky*, 551 N.E.2d 8 (Mass. 1990); *Greco v. United States*, 893 P.2d 345 (Nev. 1995); *Smith v. Cote*, 513 A.2d 341 (N.H. 1986); *Schroeder v. Perkel*, 432 A.2d 834 (N.J. 1981); *Becker v. Schwartz*, 386 N.E.2d 807 (N.Y. 1978); *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975); *Naccash v. Burger*, 290 S.E.2d 825 (Va. 1982); *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483 (Wash. 1983); *James G. v. Caserta*, 332 S.E.2d 872 (W. Va. 1985); *Dumer v. St. Michael's Hosp.*, 233 N.W.2d 372 (Wis. 1975).

133. See, e.g., *Turpin*, 764 P.2d at 1207; *Haymon*, 535 A.2d at 886; *Garrison*, 581 A.2d at 292.

134. See *Becker*, 386 N.E.2d at 413; *Arche*, 798 P.2d at 482; *Garrison*, 581 A.2d at 293; *Siemieniec*, 512 N.E.2d at 707. The following jurisdictions did not specifically address damages for emotional distress: West Virginia, Maine, Colorado, New Jersey, Wisconsin, D.C., Texas, and California.

135. See *Siemieniec*, 512 N.E.2d at 707 ("[B]efore a plaintiff can recover for negligently caused emotional distress, he must have, himself, been endangered by the negligence, and he must have suffered physical injury or illness as a result of the emotional distress . . ."); *Garrison*, 581 A.2d at 293 ("[F]or a claim of mental anguish to lie, an essential ingredient is present and demonstrable physical injury to the plaintiff."); *Arche*, 798 P.2d at 482 ("[P]laintiffs can sustain a cause of action for negligent

disallows damages for emotional distress because an accurate assessment of emotional damages would require the application of the benefit rule.¹³⁶ Assigning a value to the benefits the parents receive from the child would be “too speculative to permit recovery notwithstanding the breach of duty flowing from defendants”¹³⁷

Limited damages, according to these courts, are proportionate to the defendant’s negligence and prevent parents from receiving a windfall.¹³⁸ These courts believe that any pleasure the parents receive from the child “will be derived in spite of, rather than because of, [the child’s] affliction.”¹³⁹ In fact, they view the pleasure the parents will receive from the child as so remote from the child’s impairment that application of the benefit rule would be inappropriate.¹⁴⁰ Besides providing a windfall, an award of damages not specifically associated with the child’s impairment would be inappropriate because plaintiffs in these cases “typically desire a child and plan to support the child.”¹⁴¹ Furthermore, the costs associated with the child’s impairment, supposedly unlike the costs of raising a healthy child, are readily ascertainable.¹⁴²

Eight jurisdictions allow parents to recover the extraordinary expenses associated with the child’s impairment plus additional damages for injuries such as emotional distress, loss of consortium, physical pain, and the costs of the pregnancy and birth.¹⁴³ These courts agree that the ordinary costs of raising a non-impaired child should not be recoverable because such costs would have been assumed by the parents absent the defendant’s negli-

infliction of emotional distress caused by injuries of a third party only if they were witnesses to the occurrence which caused the injury.”).

136. *Becker*, 386 N.E.2d at 415.

137. *Id.*

138. *See, e.g., Haymon*, 535 A.2d at 886; *Garrison*, 581 A.2d at 292.

139. *Schroeder v. Perkel*, 432 A.2d 834, 842 (N.J. 1981).

140. *See Lininger v. Eisenbaum*, 764 P.2d 1202, 1207 (Colo. 1988); *Arche*, 798 P.2d at 482.

141. *Arche*, 798 P.2d at 481; *see also Haymon*, 535 A.2d at 884 (“Ms. Haymon concedes on appeal that Dr. Wilkerson should not be held responsible for the expenses of raising a healthy child because the Haymons willingly undertook to conceive and raise a healthy child.”).

142. *See, e.g., Haymon*, 535 A.2d at 886; *Garrison*, 581 A.2d at 291; *Jacobs v. Theimer*, 519 S.W.2d 846, 849 (Tex. 1975).

143. *See Keel v. Banach*, 624 So. 2d 1022 (Ala. 1993) (emotional distress, loss of consortium, mother’s physical pain, medical costs for the defendant’s negligence); *Kush v. Lloyd*, 616 So. 2d 415 (Fla. 1992) (mental anguish); *Bader v. Johnson*, 732 N.E.2d 1212 (Ind. 2000) (emotional distress, loss of consortium, costs of the pregnancy and birth); *Viccaro v. Milunsky*, 551 N.E.2d 8 (Mass. 1990) (emotional distress); *Greco v. United States*, 893 P.2d 345 (Nev. 1995) (emotional distress); *Smith v. Cote*, 513 A.2d 341 (N.H. 1986) (emotional distress if it causes a tangible loss); *Naccash v. Burger*, 290 S.E.2d 825 (Va. 1982) (emotional distress); *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483 (Wash. 1983) (emotional distress).

gence.¹⁴⁴ However, unlike the courts that limit recovery to only the extraordinary costs, all of these courts allow emotional damages.¹⁴⁵ Washington is the only court that requires the award of emotional damages to be offset by emotional benefits the parents will receive from the child.¹⁴⁶ Nevada addressed the possibility of applying the benefit rule but held the rule inapplicable because “[a]ny emotional benefits [would be] simply too speculative to be considered by a jury in awarding emotional distress damages.”¹⁴⁷ None of these courts require the extraordinary costs associated with the child’s impairment to be offset by the benefits the parents will receive.¹⁴⁸

The debate that appears in all of the above-mentioned jurisdictions is whether parents should be allowed to recover the extraordinary expenses incurred after the child has reached majority. Illinois, Kansas, and Washington limit the parents’ recovery to the extraordinary costs incurred while the child is a minor.¹⁴⁹ Seven other jurisdictions, however, allow parents to recover the extraordinary costs past majority if the parents can show that the child will be dependent on them as an adult.¹⁵⁰ Many of these courts allow post-majority costs because parents have a duty to support adult children when the children are incapable of supporting themselves due to a physical or mental disability.¹⁵¹

In the remaining jurisdictions that have addressed recovery for the birth of an impaired child to parents who sought to avoid such a child, the

144. See, e.g., *Kush*, 616 So. 2d at 424 (“Damages are *not* gauged against the state of affairs that would have existed had the child never been born, because parents always assume the costs of healthy children born to them, even if unplanned.”); *Smith*, 513 A.2d at 349 (viewing damages in terms of the expectancy rule of contracts, “ordinary child-rearing costs are analogous to a price the plaintiffs were willing to pay in order to achieve an expected result.”).

145. See *Keel*, 624 So. 2d 1022; *Kush*, 616 So. 2d 415 (mental anguish); *Bader*, 732 N.E.2d 1212; *Viccaro*, 551 N.E.2d 8; *Greco*, 893 P.2d 345; *Smith*, 513 A.2d 341 (emotional distress if it causes a tangible loss); *Naccash*, 290 S.E.2d 825; *Harbeson*, 656 P.2d 483.

146. See *Harbeson*, 656 P.2d 483, 494.

147. *Greco*, 893 P.2d 345, 351.

148. See *Harbeson*, 656 P.2d 483; *Naccash*, 290 S.E.2d 825; *Keel*, 624 So.2d 1022; *Greco*, 893 P.2d at 350; *Smith*, 513 A.2d 341; *Viccaro*, 551 N.E.2d 8; *Bader*, 732 N.E.2d 1212; *Kush*, 616 So. 2d 415.

149. See *Harbeson*, 656 P.2d at 495 (holding the costs incurred during the child’s minority can be recovered either by the parents or the child, but the costs of the child’s majority can be recovered by the child only); *Siemieniec v. Lutheran Gen. Hosp.*, 512 N.E.2d 691, 706–07 (Ill. 1987) (plaintiffs sought only damages for the costs prior to the child reaching majority); *Arche v. United States*, 798 P.2d 477, 487 (Kan. 1990) (holding extraordinary costs “may be calculated on the basis of the child’s specific life expectancy or until the child reaches the age of majority, whichever is the shorter period.”).

150. See *Lininger v. Eisenbaum*, 764 P.2d 1202, 1207 n.8 (Colo. 1988); *Garrison v. Med. Ctr. of Del.*, 581 A.2d 288, 292 (Del. 1990); *James G. v. Caserta*, 332 S.E.2d 872, 882–83 (W. Va. 1985); *Smith*, 513 A.2d at 350; *Greco*, 893 P.2d at 350; *Viccaro*, 551 N.E.2d at 11; *Kush*, 616 So. 2d 415, 424.

151. See *Lininger*, 764 P.2d at 1207 n.8; *Garrison*, 581 A.2d at 292; *James G.*, 332 S.E.2d at 882; *Smith*, 513 A.2d at 350; *Greco*, 893 P.2d at 350; *Viccaro*, 551 N.E.2d at 11.

extraordinary costs associated with the child's disability are not the primary damages awarded. Arizona and Connecticut allow parents in these claims to recover all of the child-rearing costs (ordinary and those associated with the impairment), offset by the benefits the parents will receive from the child.¹⁵² Ohio, on the other hand, does not allow the recovery of any child-rearing costs, even those associated with the child's impairment.¹⁵³ The Supreme Court of Ohio held that such damages require a weighing of life versus non-life, a balancing act in which the court refused to engage. However, Ohio does allow the recovery of the pregnancy and birth costs the plaintiffs incur as a result of the defendant's negligence.¹⁵⁴ The pregnancy and birth costs, unlike child-rearing damages, were proximately caused by the defendant's negligence.¹⁵⁵

4. Recovery for Wrongful Conception Followed by a Successful Abortion

Not all parents who conceive a child as a result of a defendant's negligence choose to carry the child to term. Parents may choose instead to abort the fetus. The recovery available for parents in this situation is not clear, as only Wyoming and Tennessee have specifically addressed recovery under such facts.¹⁵⁶ In *Beardsley v. Wierdsma*, the Supreme Court of Wyoming held that parents who choose to terminate pregnancies resulting from a defendant's negligence may recover the medical expenses associated with the failed sterilization procedure (if applicable), wages lost because of the pregnancy and abortion, the cost of the abortion, and the pain and suffering associated with the abortion.¹⁵⁷ Such damages are consistent with Wyoming's rule that parents in a claim for the birth of a healthy child may recover the costs associated with the failed sterilization procedure (if applicable), the medical expenses for the birth of the child, lost wages during pregnancy and the birth of the child, and the pain and suffering associated with the pregnancy.¹⁵⁸

152. See *Ochs v. Borrelli*, 445 A.2d 883, 886 (Conn. 1982) (defendant admitted damages associated with impairment and court allowed ordinary child-rearing costs, offset by benefits); *Walker v. Mart*, 790 P.2d 735, 738 (Ariz. 1990) (allowing damages in accordance with *Univ. of Arizona Health Scis. Ctr. v. Superior Court*, 667 P.2d 1294 (Ariz. 1983), which permits parents to recover ordinary child-rearing damages offset by the benefits they will receive).

153. *Schirmer v. Mt. Auburn Obstetrics & Gynecologic Assocs. Inc.*, 844 N.E.2d 1160, 1168 (Ohio 2006).

154. *Id.*

155. *Id.*

156. See *Beardsley v. Wierdsma*, 650 P.2d 288 (Wyo. 1982); *Smith*, 728 S.W.2d at 752.

157. *Beardsley*, 650 P.2d at 292.

158. *Id.*

Although only two states have specifically addressed damages when the unplanned pregnancy has been terminated, it seems logical that other states would fashion recovery rules consistent with the rules governing the birth of a healthy child. Terminating the pregnancy is essentially a form of mitigating the damages in what would have become a claim for the birth of a healthy child.¹⁵⁹ While courts disagree on the recovery of child-rearing damages, nearly all courts allow parents bringing claims for the birth of a healthy child to recover some combination of damages for injuries suffered through the time of birth.¹⁶⁰ Terminating the pregnancy eliminates any issue of child-rearing damages, leaving only the costs incurred through the time of the abortion. The costs incurred through the time of the abortion are essentially the same as the costs that would be incurred by parents through the time of birth. Both parents who choose to have the child and those who choose to terminate the pregnancy will incur expenses associated with a failed sterilization procedure (if applicable), pregnancy costs, lost wages (either associated with the birth or abortion), and pain and suffering (either associated with the birth or abortion). There is no apparent reason to distinguish the costs incurred by parents who choose to terminate from those incurred by parents who choose to carry the child to term.

5. Recovery for Wrongful Life¹⁶¹

The wrongful life cause of action has received little approval. Twenty-seven states have expressly disallowed the cause of action for wrongful life.¹⁶² The primary reason these jurisdictions refuse to recognize a cause of

159. It is, of course, possible the child that would have been impaired. However, absent an indication to the contrary, there is no reason to assume the child would be born in any condition other than healthy.

160. See *supra* Part I.B.1.

161. The recovery rules regarding wrongful life are included for the sake of completeness. However, the remainder of this article will focus on wrongful parentage claims brought by parents. Wrongful life claims involve a host of issues not found in wrongful parentage claims that need not be taken on here. The most notable is that the injury in wrongful parentage claims is not the child's existence. See *infra* Part III. However, the injury in wrongful life claims is the child's existence. Whether one's existence can be considered an injury is not an issue to be decided here.

162. See *Elliot v. Brown*, 361 So. 2d 546 (Ala. 1978); *Walker v. Mart*, 790 P.2d 735 (Ariz. 1990); *Lininger v. Eisenbaum*, 764 P.2d 1202 (Colo. 1988); *Garrison v. Med. Ctr. of Del.*, 581 A.2d 288 (Del. 1990); *Kush v. Lloyd*, 616 So. 2d 415 (Fla. 1992); *Blake v. Cruz*, 698 P.2d 315 (Idaho 1985); *Siemieniec v. Lutheran Gen. Hosp.*, 412 N.E.2d 691 (Ill. 1987); *Cowe v. Forum Group*, 575 N.E.2d 630 (Ind. 1991); *Bruggeman v. Schimke*, 718 P.2d 635 (Kan. 1986); *Grubbs v. Barbourville Family Health Ctr.*, 120 S.W.3d 682 (Ky. 2003); *Kassama v. Magat*, 792 A.2d 1102 (Md. 2002); *Viccaro v. Milunsky*, 551 N.E.2d 8 (Mass. 1990); *Taylor v. Kurapati* 600 N.W.2d 670 (Mich. Ct. App. 1999); *Wilson v. Kuenzi*, 751 S.W.2d 741 (Mo. 1988); *Greco v. United States*, 893 P.2d 345 (Nev. 1995); *Smith v. Cote*, 513 A.2d 341 (N.H. 1986); *Becker v. Schwartz*, 386 N.E.2d 807 (N.Y. 1978); *Azzolino v. Dingfelder*, 337 S.E.2d 528 (N.C. 1985); *Hester v. Dwivedi*, 733 N.E.2d 1161 (Ohio 2000); *Speck v. Finegold*, 439 A.2d 110 (Pa. 1981); *Willis v. Wu*, 607 S.E.2d 63 (S.C. 2004); *Nelson v. Krusen*, 678 S.W.2d 918 (Tex. 1984); *Wood v. Univ. of Utah Med. Ctr.*, 67 P.3d 436 (Utah 2003); *James G. v. Caserta*, 332 S.E.2d 872

action for wrongful life is because they do not believe the child has suffered a legal injury for which he or she can be compensated.¹⁶³ According to these courts, “life—whether experienced with or without a major physical handicap—is more precious than non-life.”¹⁶⁴ The plaintiff child cannot be said to have suffered an injury because the benefits of existence outweigh the costs of suffering associated with the child’s handicap. This argument has also been framed as a respect for the value of life. Recognition of the wrongful life cause of action would, in the view of some courts, be an affront to the value society has attached to human life.¹⁶⁵

Many of these courts also reject the wrongful life cause of action because of the difficulty in assessing damages.¹⁶⁶ To assess the general damages suffered by the child, courts would have to compare the child’s current state with child’s state had the defendant never been negligent. Because wrongful life claims involve a claim that but for the defendant’s negligence the child would not have been born to suffer life with a handicap, this involves a comparison between life with the handicap or impairment and no life at all. According to these courts, assigning values both to life with a handicap and no life at all is not a task of which any jury or judge is capable.¹⁶⁷ Therefore, assessing damages in a wrongful life claim is impossible. As the Supreme Court of South Carolina said in *Willis v. Wu*, “[E]ven a jury collectively imbued with the wisdom of Solomon would be unable to weight the fact of being born with a defective condition against the fact of

(W. Va. 1985); *Dumer v. St. Michael’s Hosp.*, 233 N.W.2d 372 (Wis. 1975). In Idaho, Minnesota, Missouri, North Dakota, Pennsylvania, and Utah, the legislatures have passed statutes prohibiting the cause of action. See IDAHO CODE ANN. § 5-334 (2004); MINN. STAT. ANN. § 145.424 (West 2004); MO. ANN. STAT. § 188.130 (West 2004); N.D. CENT. CODE § 32-03-43 (2004); 42 PA. CONS. STAT. ANN. § 8305 (West 2004); UTAH CODE ANN. § 78-11-24 (1953). The following jurisdictions have not addressed the issue of whether to recognize a cause of action for wrongful life: Alaska, Arkansas, Connecticut, District of Columbia, Georgia, Hawaii, Iowa, Mississippi, Montana, Nebraska, New Mexico, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Vermont, Virginia, and Wyoming.

163. See, e.g., *Walker*, 790 P.2d at 741; *Lining*, 764 P.2d at 1210; *Blake*, 698 P.2d at 322; *Siemieniec*, 512 N.E.2d at 701; *Cowe*, 575 N.E.2d at 635; *Willis*, 607 S.E.2d at 71; *Azzolino*, 337 S.E.2d at 532.

164. *Blake*, 698 P.2d at 322 (quotations and citation omitted).

165. See, e.g., *Bruggeman*, 718 P.2d at 642 (“Whether the person is in perfect health, in ill health, or has or does not have impairments or disabilities, the person’s life is valuable, precious, and worthy of protection.”); *Hester*, 733 N.E.2d at 1166 (“The proposition that it would have been better for [the child] to have not been given life is inconsistent with our recognition of the value of life . . .”); *Siemieniec*, 512 N.E.2d at 702 (agreeing with other courts who reason that wrongful life claims “offend[] society’s deeply rooted belief that life, in whatever condition, is more precious than nonexistence”).

166. See, e.g., *Lining*, 764 P.2d at 1210; *Blake*, 698 P.2d at 322; *Willis*, 607 S.E.2d at 71; *Nelson*, 678 S.W.2d at 925; *Wilson*, 751 S.W.2d at 743; *Becker*, 386 N.E.2d at 712.

167. See, e.g., *Becker*, 386 N.E.2d at 412; *Willis*, 607 S.E.2d at 71.

not being born at all, i.e., non-existence. It is simply beyond the human experience."¹⁶⁸

Only five states have recognized the wrongful life cause of action.¹⁶⁹ These jurisdictions allow the child to recover the extraordinary expenses associated with the impairment or handicap,¹⁷⁰ but do not allow the child to recover general damages for having been born.¹⁷¹ Like the jurisdictions that reject a cause of action for wrongful life, these courts have found the assessment of general damages to be impossible.¹⁷² In addition to the difficulty of assigning values to life with a handicap and to no life at all, California has pointed to the difficulty of applying the benefit rule to general damages.¹⁷³ A child who suffers damage to his or her "general physical, emotional and psychological well-being" as a result of the defendant's negligence also receives "a physical existence with the capacity both to receive and give love and pleasure as well as to experience pain and suffering."¹⁷⁴ Because both the harm and the benefit are "incalculable," one cannot assess the net damages suffered by the child.¹⁷⁵

Extraordinary expenses associated with the child's handicap or impairment, however, are readily calculable and, therefore, recoverable in these jurisdictions.¹⁷⁶ Washington and New Jersey allow a child to recover the extraordinary expenses he or she will incur over the course of their lifetime.¹⁷⁷ However, the child's recovery may not duplicate any damages already recovered by the child's parents for the extraordinary expenses associated with the child's impairment.¹⁷⁸ If the parents of a child could recover the extraordinary expenses but the child could not, "receipt of nec-

168. *Willis*, 607 S.E.2d at 71.

169. *See* ME. REV. STAT. ANN. tit. 24, § 2931(3) (2007); *Turpin v. Sortini*, 643 P.2d 954 (Cal. 1982); *Pitre v. Opelousas Gen. Hosp.*, 530 So. 2d 1151, 1158 (La. 1988) (allowing wrongful life claims if the doctor has "reason to suspect that the danger [of the impairment] exist[s] and . . . [has] reasonable means of detecting its potentiality"); *Procanik v. Cillo*, 478 A.2d 755 (N.J. 1984); *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483 (Wash. 1983).

170. ME. REV. STAT. ANN. tit. 24, § 2931(3); *Turpin*, 643 P.2d at 965; *Harbeson*, 656 P.2d at 479-80; *Procanik*, 478 A.2d at 762. The Supreme Court of Louisiana did not specifically address damages in *Pitre*. However, in the same case, the court implied that parents of an impaired child born as a result of the defendant's negligence could recover the extraordinary expenses associated with the child's impairment, so long as the impairment was reasonably foreseeable by the defendant. *Pitre*, 53 So. 2d at 1162. Presumably, the damages allowed to the child would be similar.

171. ME. REV. STAT. ANN. tit. 24, § 2931(3); *Procanik*, 478 A.2d at 763; *Harbeson*, 656 P.2d at 496; *Turpin*, 643 P.2d at 965.

172. *See Turpin*, 643 P.2d at 964; *Harbeson*, 656 P.2d at 496; *Procanik*, 478 A.2d at 763.

173. *Turpin*, 643 P.2d at 964.

174. *Id.*

175. *Id.*

176. *See* cases cited *supra* note 170.

177. *See Harbeson*, 656 P.2d at 495; *Procanik*, 478 A.2d at 762.

178. *See Turpin*, 643 P.2d at 965; *Harbeson*, 656 P.2d at 495; *Procanik*, 478 A.2d at 762.

essary medical expenses might well depend on the wholly fortuitous circumstance of whether the parents are available to sue and recover such damages.”¹⁷⁹ Such a result would be “illogical and anomalous.”¹⁸⁰

II. THE BENEFIT RULE AND ITS MISUSE IN WRONGFUL PARENTAGE CASES

In crafting recovery rules for wrongful parentage claims, courts have used the actual or presumed benefits of the child to preclude or limit recovery for clear economic and noneconomic costs and losses to parents. Some courts have limited recovery by requiring parents to offset the costs of raising the child by the emotional benefits they will receive from the child.¹⁸¹ Other courts have completely precluded recovery of child-rearing damages by holding that a child is never an injury, i.e., that any costs incurred are outweighed by the benefits.¹⁸² Even though not all of these courts specifically invoke the benefit rule, all implicitly do so and such a practice is subject to the traditional tort benefit rule. In the context of wrongful parentage claims, the courts’ method of weighing benefits against costs represents not only a misunderstanding of the rule, but also a serious misuse of the rule and violation of the basic tort principles the rule is meant to implement.

A. *Isolating the Benefit Rule*

In addition to the actual or presumed benefits of the child, courts have employed a number of supplementary arguments to justify limiting or completely prohibiting an award of child-rearing damages. These supplementary arguments include arguments that child-rearing damages are too speculative; are too remote from the defendant’s negligence; are inappropriate because the birth of an impaired child was not foreseeable; are out of proportion to the defendant’s negligence; require the application of the avoidable consequences doctrine; cause the child emotional damage; compromise the stability and relationships of families; encourage litigation; and reduce the availability of sterilization procedures. A review of these arguments reveals they do not support limiting or precluding child-rearing damages. Furthermore, the weaknesses of these arguments illustrate that the use of the benefit rule, either explicitly or implicitly, has been the major obstacle to plaintiff parents recovering child-rearing damages.

179. *Turpin*, 643 P.2d at 965.

180. *Harbeson*, 656 P.2d at 495 (quotations and citation omitted).

181. *See supra* Part I.B.

182. *See id.*

Speculative: Many courts cite the speculative nature of child-rearing damages as a justification for the denial of such damages.¹⁸³ However, child-rearing damages are anything but speculative. In fact, child-rearing damages are likely easier to ascertain than other types of tort damages, such as damages for pain, suffering, and mental anguish.¹⁸⁴ Unlike damages for pain, suffering, or mental anguish, the costs of raising a child to the age of majority are readily ascertainable through the use of “well-recognized economic factors regularly made by actuaries for estate planners and insurance companies”¹⁸⁵ For example, in 2004 the cost of raising a child to majority in the urban west part of the United States on a two-parent income in the range of \$42,100 to \$70,900 per year is \$ 201,300.¹⁸⁶

Remoteness: A few courts argue that the burden of raising the child is too remote from the defendant’s negligence.¹⁸⁷ However, such an argument is impossible to justify. The defendant’s negligence, whether in the form of an improper sterilization or failure to inform the parents of an impairment, is the direct cause of the child’s existence. If not for the defendant’s negligence, the child would never have been conceived or born. With the birth of that child comes the financial requirements to care for and raise the child. Such expenses are not novel or unexpected; they are the foreseeable and ordinary costs associated with the birth of any child.

Impaired Child Not Foreseeable: Related to the remoteness argument is the one made by courts addressing the birth of an impaired child. These courts often argue that the birth of an impaired child is not foreseeable when parents seek to avoid the birth of any child through sterilization, birth control, or any other means.¹⁸⁸ However, one out of every thirty-three children born in the United States each year is afflicted with some type of birth

183. See, e.g., *Boone v. Mullendore*, 416 So. 2d 718, 721 (Ala. 1982) (allowing recovery of damages associated with the pregnancy but stating “[a]ny additional damages would tend to be extremely speculative in nature”); *Johnson v. Univ. Hosps. of Cleveland*, 540 N.E.2d 1370, 1378 (Ohio 1989) (“Allowing a jury to award child-rearing costs would be to invite unduly speculative and ethically questionable assessments of such matters.”); *Beardsley v. Wierdsma*, 650 P.2d 288, 292 (Wyo. 1982) (“We reject any claim for damages or expenses after the birth of the child. We believe that these later expenses and damages are too speculative”).

184. See *Marciniak v. Lundborg*, 450 N.W.2d 243, 246 (Wis. 1990) (“There may thus actually be a less speculative calculation involved than in many other malpractice actions which are routinely allowed, such as those involving pain, suffering, and mental anguish”); see, e.g., *Burke v. Rivo*, 551 N.E.2d 1, 14 (Mass. 1990); *Univ. of Ariz. Health Scis. Ctr. v. Superior Court*, 667 P.2d 1294, 1297–98 (Ariz. 1983); *Ochs v. Borrelli*, 445 A.2d 883, 886 (Conn. 1982).

185. *Jones v. Malinowski*, 473 A.2d 429, 437 (Md. 1984); see U.S. DEP’T AGRIC., EXPENDITURES ON CHILDREN, 2004 (2004), available at www.cnpp.gov/Publications/CRC/crc2004.pdf (using multiple factors including income, number of parents, and geographical location in determining the costs of raising a child).

186. U.S. DEP’T AGRIC., *supra* note 185, tbl.2.

187. See, e.g., *Beardsley*, 650 P.2d at 292; *C.S. v. Nielson*, 767 P.2d 504, 514 (Utah 1988).

188. See cases cited *supra* note 110.

defect.¹⁸⁹ The causes of seventy percent of these birth defects are unknown.¹⁹⁰ Given these statistics, one can hardly argue that the birth of an impaired child is not foreseeable, even when parents do not specifically seek to prevent the birth of an impaired child.

Out of Proportion: Courts denying child-rearing damages argue that, even assuming child-rearing damages are ascertainable, they are out of proportion with the defendant's negligence and would place too great a burden on defendants.¹⁹¹ A comparison between a potential award of child-rearing damages and the average medical malpractice award quickly dispels this argument. In the United States, the cost of raising a child born in 2004 to the age of majority by parents in the highest income group¹⁹² is \$353,410.¹⁹³ Compare that to the 1999 average United States medical malpractice award of \$3.5 million.¹⁹⁴ In such a light, an award of \$353,410 of child-rearing damages for the negligence of a defendant in a wrongful parentage case, even with an award of costs associated with the pregnancy added, hardly seems very great or burdensome. In any case, recovery should not be precluded simply because the award may seem large.¹⁹⁵

Avoidable Consequences Doctrine: A few courts have expressed concern that allowing child-rearing damages might require the application of the avoidable consequences doctrine.¹⁹⁶ The avoidable consequences doc-

189. Ctrs. for Disease Control & Prevention, Birth Defects, <http://www.cdc.gov/node.do/id/0900f3ec8000dffe> (last visited Sept. 1, 2006).

190. March of Dimes, Quick References and Fact Sheets, http://www.marchofdimes.com/pnhcc/4439_1206.asp (last visited Sept. 1, 2006).

191. See, e.g., *Flowers v. District of Columbia*, 478 A.2d 1073, 1077 (D.C. 1984) (agreeing with *Berman v. Allen*, 404 A.2d 8 (N.J. 1979), that an award of child-rearing damages "would be wholly disproportionate to the culpability involved"); *Beardsley*, 650 P.2d at 292 ("We believe . . . that the injury is out of proportion to the culpability of the tortfeasors; and that the allowance of recovery would place too unreasonable a burden on [defendants]").

192. The United States Department of Agriculture reported findings showing that child-rearing expenses paid by members of the highest income group tended to be higher than those expenses paid by the lower or middle income groups. See U.S. DEP'T AGRIC., *supra* note 185, at iii.

193. *Id.* tbl.12.

194. Peter M. Mellette, Emily W.G. Towey & J. Vaden Hunt, *Health Care Law*, 37 U. RICH. L. REV. 199, 231 (2002); see also David J. Burke, *Wrongful Pregnancy: Child Rearing Damages Deserve Full Judicial Consideration*, 8 PACE L. REV. 313, 333-34 (1988) (showing through comparison that an award of child-rearing damages would be considerably less than the average award for serious medical malpractice injuries in 1978).

195. See *Marciniak v. Lundborg*, 450 N.W.2d 243, 246 (Wis. 1990) (stating that defendants are not "categorically immunize[d] . . . from liability for foreseeable damages merely because the damages may be substantial"); see also Burke, *supra* note 194, at 333.

196. See, e.g., *Flowers*, 478 A.2d at 1077 ("[W]ere we to accept appellant's invitation to treat this case as we would a garden-variety medical malpractice case public policy considerations of extraordinary complexity would be raised when the trial court proceeded to apply, as it must, the rule of 'avoidable consequences.'"); *Boone v. Mullendore*, 416 So. 2d 718, 723 (Ala. 1982) ("This dilemma leads to several more problems in the assessment of damages. First, in Alabama one seeking to hold another liable for damages is required to use reasonable efforts to avoid or mitigate his or her damages.").

trine¹⁹⁷ provides that “one injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure after the commission of the tort.”¹⁹⁸ The question in applying the avoidable consequences doctrine in wrongful parentage cases is whether parents should have to abort the child or offer it for adoption.¹⁹⁹ However, the avoidable consequences doctrine provides that the injured party is only required to make *reasonable* efforts to avoid harm. Requiring a person to abort or put up for adoption their child, even if the person originally sought to avoid the conception of the child, is entirely unreasonable, as the majority of courts have generally agreed.²⁰⁰

Emotional Harm. Many courts have also expressed concern with the possibility that a wrongful parentage suit seeking child-rearing damages could cause further emotional harm to a child who learns that not only was it unwanted, but that its parents also sought the funds to raise it.²⁰¹ This argument is flawed in numerous ways. First, a child for whom the parents did not plan is not necessarily an unwanted or unloved child once it is born.²⁰² Second, in seeking recovery of child-rearing damages, parents are seeking to alleviate the financial burden of raising the child, not to relieve themselves of the child altogether.²⁰³ Furthermore, the courts that argue child-rearing damages will cause emotional harm to the child are the same courts awarding parents costs associated with the pregnancy and birth of

197. The avoidable consequences doctrine is also frequently referred to as the mitigation of damages doctrine.

198. RESTATEMENT, *supra* note 1, § 918(1).

199. See *Johnson v. Univ. Hosps. of Cleveland*, 540 N.E.2d 1370, 1377 (Ohio 1989) (“[A] number of courts have discussed the reasonableness of the alternatives to rearing a child, *i.e.*, an abortion or adoption, as part of the duty to mitigate.”).

200. See, *e.g.*, *id.* at 1377 (“We refuse to say as a matter of law that every parent must mitigate damages by abortion or adoption as a ‘reasonable effort’ to avoid child-rearing expenses. In fact, we find either suggestion repugnant.”); *C.S. v. Nielson*, 767 P.2d 504, 510 n.27 (“[W]e join with those courts which have rejected the notion that in order to obtain damages in a wrongful pregnancy cause of action, parents must have mitigated their damages by aborting or placing the child for adoption. Such alternatives are extreme and unreasonable.”).

201. See, *e.g.*, *Boone*, 416 So. 2d at 722 (“Another problem is the possible harm that can be caused to the unwanted child who will one day learn that he not only was not wanted by his or her parents, but was reared by funds supplied by another person.”); *Wilbur v. Kerr*, 628 S.W.2d 563, 571 (Ark. 1982) (stating the child will be “an unwanted or ‘emotional bastard,’ who will some day learn that its parents did not want it and, in fact, went to court to force someone else to pay for its raising”).

202. See *Flowers v. District of Columbia*, 478 A.2d 1073, 1078 (D.C. 1984) (Ferren, J., dissenting) (“A decision not to have more children does not necessarily mean parents will be hostile to an unplanned child, let alone reject that child as a person. And millions of children who were unplanned—and for a variety of reasons, have come to know it—are secure in their parents’ love.”).

203. See *Marciniak v. Lundborg*, 450 N.W.2d 243, 246 (Wis. 1990) (“The suit is for costs of raising the child, not to rid themselves of an unwanted child.”); see also *infra* Part III.

the child, including the pain and suffering of the mother.²⁰⁴ Surely the child will be no more damaged by learning of an award of child-rearing damages than it would be by learning its mother was awarded damages for the pain, suffering, and mental anguish she suffered while pregnant with the child. Instead, an award of child-rearing damages will likely make the child feel like less of a burden on the family because the financial concerns associated with the child's existence will be alleviated.²⁰⁵

Destabilizing Families: Another argument often made by courts that limit or deny child-rearing damages is that litigation seeking recovery of child-rearing damages "has a destabilizing effect on families."²⁰⁶ However, any disruption caused by litigation to recover child-rearing damages would be small and temporary compared to the disruption of the family unit caused by the lack of financial means throughout the child's lifetime.²⁰⁷ Litigation to recover child-rearing damages would only, at the most, last for a few years. However, the lack of family finances resulting from the birth of an unplanned child could last the entire time the parents support the child.

Excess Litigation: Courts also argue that if parents are allowed to recover child-rearing damages, it would open the door for fraudulent claims and encourage excessive litigation.²⁰⁸ Such an argument is baseless, especially in situations where the parents have taken steps to prevent the birth of the child. Even the most manipulative and plotting person would not find it worthwhile to undergo a sterilization procedure or abortion for the small chance the defendant would be negligent and a child would result. In the

204. See, e.g., *Boone*, 416 So. 2d at 722–23 (expressing concern that the child will suffer emotional damage from an award of child-rearing damages, while allowing the parents to recover "(1) compensation for the physical pain and suffering, and mental anguish of the mother as a result of the pregnancy; (2) the loss to the husband of the comfort, companionship, services, and consortium of the wife during her pregnancy and immediately after the birth; and (3) the medical expenses incurred as a result of the pregnancy"); *Wilbur*, 628 S.W.2d at 571 (expressing concern that the child will suffer emotional damage from an award of child-rearing damages, while allowing the parents to recover "any and all proper damages connected with the operation and connected with the pregnancy").

205. See *Marciniak*, 450 N.W.2d at 246 ("Relieving the family of the economic costs of raising the child may well add to the emotional well-being of the entire family, including this child, rather than bring damage to it."); see also *Burke*, *supra* note 194, at 332 ("Full damages would relieve some of the pressure on the family unit caused by such births and contribute to family love rather than deter it.").

206. *Flowers*, 478 A.2d at 1077; see also *Wilbur*, 628 S.W.2d at 571 (child-rearing damages involve "a question which meddles with the concept of . . . the stability of the family unit"); *Cockrum v. Baumgartner*, 447 N.E.2d 385, 390 (Ill. 1983) ("We would observe, too, that it is clear that public policy commands the development and the preservation of family relations").

207. See Amy Norwood Moore, *Judicial Limitations on Damages Recoverable for the Wrongful Birth of a Healthy Infant*, 68 VA. L. REV. 1311, 1329 (1982) (mentioning the "hardship of growing up ill-clothed, ill-fed, and ill-educated in a family whose financial balance was destroyed by the child's unplanned birth and whose members resent being forced to share their resources with an unexpected newcomer" resulting from a lack of means to support an unplanned child).

208. See, e.g., *Beardsley v. Wierdsma*, 650 P.2d 288, 292; *C.S. v. Nielson*, 767 P.2d 504, 514.

remaining situations, courts should "have confidence in our courts and our juries to distinguish the legitimate from the fraudulent."²⁰⁹

Availability of Procedures: Finally, some courts argue that holding doctors liable for child-rearing damages will decrease the availability of sterilization procedures.²¹⁰ However, denying recovery of child-rearing damages shields negligent doctors from liability for a portion of the injuries they caused.²¹¹ If doctors are not subject to liability for the full extent of damages they have caused, less incentive exists for them to take care in the performance of sterilization procedures and the deterrence of negligence in this context will suffer.²¹² Perhaps some doctors will quit performing sterilization procedures if child-rearing damages are allowed. However, if the choice is between fewer correctly performed sterilization procedures with a remedy for possible negligence, or more procedures without a remedy for possible negligence, common sense dictates that more people would opt for the former.

By understanding how these supplementary arguments do not support limiting or precluding plaintiff parents' recovery of child-rearing damages, one is able to isolate the courts' explicit and implicit use, misuse, and misunderstanding of the tort benefit rule in this context. In turn, it becomes clear that the benefit rule operates as the primary tool in limiting and precluding the recovery of child-rearing damages in wrongful parentage cases.

B. Tort Damages & the Tort Benefit Rule

Damages in tort cases serve four purposes: they (1) "give compensation, indemnity or restitution for harms;" (2) "determine rights;" (3) "punish wrongdoers and deter wrongful conduct;" and (4) "vindicate parties and deter retaliation or violent and unlawful self-help."²¹³ To properly serve these purposes, especially providing compensation for harms suffered,

209. *Marciniak*, 450 N.W.2d at 247.

210. *See, e.g., Smith v. Gore*, 728 S.W.2d 738, 748 (Tenn. 1987) ("If, however, full recovery were allowed in this kind of case, the potentially adverse effect on health care providers of pregnancy avoidance techniques could inhibit the availability of these avoidance techniques to other persons."). This argument has been made exclusively in the context of failed sterilization procedures. However, the same logic would apply if the argument were made in other factual scenarios.

211. *See Ochs v. Borrelli*, 445 A.2d 883, 885 (Conn. 1982) (completely precluding recovery of child-rearing damages would "carve out an exception . . . to the normal duty of a tortfeasor to assume liability for all the damages that he has proximately caused").

212. Again, sterilization procedures are used as an example here because this argument has been made exclusively in this context. However, denying child-rearing damages where a doctor has failed to diagnose or disclose the likelihood of impairment, failed to properly perform an abortion, or where a pharmacist negligently fills a birth control prescription will lessen those defendants' incentive to properly perform their duties.

213. RESTATEMENT, *supra* note 1, § 901.

damages must be accurately assessed. In aid of this accurate assessment of damages, tort plaintiffs bear the burden of proving the damages claimed as compensation with as much certainty as possible given the circumstances of the case.²¹⁴

Likewise, the tort benefit rule is used to aid in the proper assessment of damages. The rule applies when the tortious conduct of the defendant, in the process of causing the plaintiff injury, has caused the plaintiff to receive some kind of benefit.²¹⁵ The exact rule, as found in the Restatement reads,

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.²¹⁶

The Restatement places two limitations on the benefit rule that are relevant to issue of child-rearing damages: the same interest limitation²¹⁷ and the equitable limitation.²¹⁸

First, the same interest limitation allows the damages to one interest to be offset only by the benefits incurred by that *same* interest.²¹⁹ Conversely, "[d]amages resulting from an invasion of one interest are not diminished by showing that another interest has been benefited."²²⁰ In other words, the benefit must be of the same general kind as the losses they offset.²²¹ As an illustration, consider a husband whose wife dies in a car accident due to the defendant's negligence. The husband is awarded damages for loss of consortium. The defendant is not entitled to have the loss of consortium damages reduced by the expenses the husband will save by no longer having to support his wife.²²² Such a reduction would be impermissible under the benefit rule because the loss of consortium is an injury to the husband's emotional interest, while the benefit of reduced expenses is a benefit to his financial benefit.

214. *Id.* § 912. *But see id.* § 912, cmt. a ("[A]n injured person [should] not be deprived of substantial compensation merely because he cannot prove with complete certainty the extent of harm he has suffered.")

215. *See id.* § 920.

216. *Id.*

217. *Id.* § 920, cmts. a–b.

218. *Id.* § 920, cmt. f.

219. *See id.* § 920, cmt. a.

220. *Id.* § 920, cmt. b.

221. DOBBS, *supra* note 26, at 800.

222. Example taken from RESTATEMENT, *supra* note 1, § 920, cmt. b.

The reasoning behind this limitation is that the benefits to one interest do not act to reduce the damages to another interest.²²³ For example, if one suffers an emotional injury as the result of a defendant's tortious conduct, the damages awarded for that injury cannot be offset by the financial benefits incurred as a result of the defendant's same tortious conduct.²²⁴ In such a situation, the money received as a result of the defendant's conduct does nothing to lessen the emotional pain and suffering felt by the plaintiff.²²⁵ Conversely, should the defendant's tortious conduct cause a financial injury but also an emotional benefit, the emotional benefit may not be used to offset the damages awarded for the financial injury because the happiness received will not pay the financial costs incurred.²²⁶

The second limitation relevant to child-rearing damages is the equitable limitation.²²⁷ The equitable limitation "is intended primarily to restrict the injured person's recovery to the harm that he actually incurred and not to permit the tortfeasor to force a benefit on him against his will."²²⁸ For example, suppose *B* owns land on part of which he has planted a garden.²²⁹ *A* moves in next door and is unclear as to the exact dividing line between his and *B*'s property. Mistakenly believing the area where *B* has planted his garden is actually his, *A*'s, land, *A* builds a shed. In the process of building this shed, *A* destroys the garden *B* had planted. Prior to *A* erecting the shed, *B*'s property was worth \$100,000. After *A* erected the shed, *B*'s property value rose to \$102,000. The costs to *B* to remove the shed and replant his are \$4,000. In this situation, *A* may not offset the damages to *B*'s property (\$4,000) by the increased value of *B*'s property as a result of *A*'s negligence (\$2,000). Instead, *A* must pay to *B* the entire \$4,000 in damages *A* has caused to *B*'s property. Although the increase in *B*'s property value is a benefit conferred to *B* by way of *A*'s tortious conduct, *A* may not have the damages caused offset by the increase in value because to do so would be to force a benefit (the shed) upon *B* who does not want the benefit.²³⁰ Thus, such a damages analysis would be inequitable according to the Restatement.

223. See DOBBS, *supra* note 26, at 799 ("The idea of the normal rule is that if the defendant negligently burns down your trees, reducing the value of your land, he does not get any credit for the pleasures you might get because your view is enhanced at the same time your shade is lost. Although those pleasures might be real, they do not diminish the economic loss.").

224. See RESTATEMENT, *supra* note 1, § 920 cmts. a–b.

225. See *id.*

226. See *id.*

227. See *id.* § 920 cmt. f.

228. *Id.* § 920 cmt. f.

229. Example taken from *id.* § 920, illus. 11.

230. See *id.*

Because the purpose of the benefit rule and its limitations is to accurately assess the damages suffered by the plaintiff and to ensure that he or she is compensated only for the injuries suffered, occasionally a plaintiff may not be awarded damages though he or she has suffered an injury to a particular interest. For example, if *A*'s tortious conduct causes an injury to *B*'s financial interest in the amount of \$500, but also confers to *B*'s financial interest benefits worth \$500, the net harm to *B*'s financial interest is zero. Therefore, *B* cannot recover any damages because she has not suffered any net loss to her financial interest.

Similarly, if *A*'s tortious conduct were to cause \$500 worth of harm to *B*'s financial interest, \$500 worth of harm to *B*'s emotional interest, and \$1,000 of benefits to *B*'s financial interest, *B* could not recover damages for the injury to her financial interest. However, she could recover \$500 for the loss suffered by her emotional interest. The \$1,000 in financial benefits completely offset the \$500 in financial damages, so *B* has not suffered any net loss to her financial interest and should not be awarded any damages for the injury suffered by the financial interest. However, *B* has suffered a \$500 loss to her emotional interest for which she should be compensated. The remaining \$500 in financial benefits cannot offset the emotional loss because they are not to the same interest as the loss.

The benefit rule has been used in a number of contexts aside from wrongful parentage cases, including medical malpractice cases not involving the birth of a child²³¹ and non-medical malpractice cases.²³² Examining

231. See, e.g., *Gracia v. Meiselman*, 531 A.2d 1373, 1379 (N.J. Super. Ct. App. Div. 1987) ("The benefits doctrine, wherein complications of surgery are offset by benefits received from surgery, is in accord with the public policy of New Jersey. . . . The court's charge will instruct the jury to subtract from the damages proximately caused by the nerve damage the benefits received from the operation."); *Scott v. Brooklyn Hosp.*, 480 N.Y.S.2d 270, 274 (1984) (rejecting the defendant's argument that the benefit rule should be used to preclude recovery where the defendant doctor caused injuries by the negligent administration of cancer treatments, but the cancer treatments saved the plaintiff's life); *Mohr v. Williams*, 104 N.W. 12, 16 (Minn. 1905) (requiring consideration of the "beneficial nature of the operation" when determining the award of damages against a doctor for operating on an ear without consent).

232. See, e.g., *Heckert v. MacDonald*, 208 Cal. App. 3d 832, 839-40 (Cal. Ct. App. 1989) (considering the benefit of an increased sale price appellants received as a result of the defendant broker's negligence in determining if and how much attorneys' fees should be awarded to the appellants); *Johnson v. Monsanto Co.*, 303 N.W.2d 86, 92 (N.D. 1981) (stating the "general method of ascertaining damages" in defective herbicide cases includes deducting "any reduction in amount and value of labor and expense attributable to the reduced yield"); *Elwood v. Bolte*, 403 A.2d 869, 872 (N.H. 1979) (directing the trial court to base its damages computation on remand on "the value of the plaintiff's lost apple production, less any saved production expenses" in a case where defendant crashed an airplane into the plaintiff's commercial apple orchard and damaged trees); *United States v. Ebinger*, 386 F.2d 557, 561 (2d Cir. 1967) (stating that the trial court judge, in assessing damages, should have deducted the amount of maintenance expenses a new water tower would save the United States, when the old water tower had to be replaced as a result of the defendant's negligence); *Burtraw v. Clark*, 61 N.W. 552, 553 (Mich. 1894) (indicating that the amount of damages to be awarded to the plaintiff depends upon the plaintiff's decision of whether to keep the value of the tortiously dug ditch on the plaintiff's

the use of the benefit rule in these contexts illustrates how the rule and its limitations should and do operate.

An oft-cited case for the use of the benefit rule in non-birth related medical malpractice torts is *Mohr v. Williams*.²³³ The plaintiff in this case consented to the defendant surgeon operating on her right ear.²³⁴ While the plaintiff was under anesthesia for the operation on her right ear, the defendant inspected the plaintiff's left ear and discovered it to be in a worse condition than the right.²³⁵ The defendant then proceeded to operate on the left ear, rather than the right for which he had the plaintiff's consent.²³⁶ The plaintiff brought suit claiming the surgery impaired her hearing and lacked consent.²³⁷ The Supreme Court of Minnesota stated that, in assessing damages, "the nature of the malady intended to be healed and the beneficial nature of the operation should be taken into consideration"²³⁸ In other words, any benefit to the plaintiff's hearing resulting from the doctor's tortious conduct should be considered in assessing the overall injury suffered by the plaintiff.

Although unlikely, the possibility exists that the plaintiff in *Mohr* would have refused to consent to the surgery on her left ear if given the opportunity. In such a situation, offsetting the damages by the benefits the plaintiff received as a result of the surgery on her left ear would be a violation of the equitable limitation placed upon the benefit rule, because the result would be forcing a benefit upon the plaintiff against her will. However, without an indication of what the plaintiff's intentions would be in such a situation, one cannot say that the Supreme Court of Minnesota applied the rule in violation of its limitations.²³⁹

Non-medical malpractice cases also illustrate how the benefit rule is utilized. For example, in *Elwood v. Bolte*, the defendants were the owner and pilot of an airplane that crashed into the plaintiff's commercial apple

land); *Robertson v. Jones*, 71 Ill. 405, 407 (Ill. 1874) (stating that if the plaintiff desires to recover the value of the tortiously dug coal at the mouth of the pit, the cost of conveying the coal to the mouth must be subtracted from the damages); *Maben v. Rankin*, 358 P.2d 681, 684 (Cal. 1961) (on remand, the trial court, in assessing damages, should consider the value of any benefit conveyed to the same interest injured, so long as equitable).

233. 104 N.W. 12.

234. *Id.* at 13.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.* at 16.

239. Nowhere in the opinion does the court indicate the plaintiff would not have had the surgery had she known of the condition of her left ear. Furthermore, the court does not require the benefits of the surgery to be offset against anything other than the injuries caused by the surgery, indicating no violation of the same interest limitation.

orchard, damaging four trees and destroying eleven.²⁴⁰ One of the issues presented to the New Hampshire Supreme Court was the proper measure of damages.²⁴¹ The court held the proper measure of damages was “the plaintiff’s lost apple production, less any saved production expenses.”²⁴² The damaged and destroyed apple trees were clearly injuries to the plaintiff’s financial interests. The reduction in production expenses as a result of having to tend fewer trees is a benefit to the plaintiff’s financial interest. Therefore, in accordance with the benefit rule, the saved production costs reduced the loss suffered by the plaintiff’s injury. By requiring the lost apple production to be offset by the saved production expenses, the court ensured that the plaintiff was compensated for only the net loss suffered by his or her financial interest.

C. *The Misuse of the Benefit Rule in Wrongful Parentage Cases*

The benefit rule has been misunderstood and/or misused by almost all jurisdictions to either limit or completely preclude recovery of normal child-rearing damages in wrongful parentage cases. The jurisdictions that do not allow parents the opportunity to prove and fully recover normal child-rearing damages for the birth of either a healthy or impaired child misuse the benefit rule in one of two ways. First, the jurisdictions that refuse to recognize causes of action for wrongful parentage, or that refuse to award any normal child-rearing expenses, use a severely modified form of the benefit rule. Second, the jurisdictions that offset child-rearing damages, although providing the opportunity for plaintiffs to recover at least some child-rearing damages, improperly allow benefits to be used to reduce or eliminate actual damages, rather than considering, as the rule intends, benefits in assessing the extent of actual damages to an interest.

In refusing to recognize the wrongful parentage cause of action for the birth of either a healthy or impaired child, or refusing to award normal child-rearing costs to parents, many jurisdictions declare, as a matter of law, that the benefits of having the child will always outweigh the costs associated with raising it.²⁴³ Although these jurisdictions do not explicitly acknowledge it, they are applying an altered version of the benefit rule. Rather than considering the specific facts of each individual case in determining the costs and benefits sustained by the parents, these courts con-

240. 403 A.2d 869, 870 (N.H. 1979).

241. *Id.* at 871.

242. *Id.* at 872.

243. *See supra* Part I.B.1–3. Another way of phrasing this argument is that parents have not suffered a legal injury for which they can be compensated.

sider the costs and benefits of the child in the abstract and declare the result of the weighing as a matter of law. Since these courts believe that the benefits received from the existence of the child will always be greater than the costs of raising the child, the benefits offset the costs so that under no circumstances can parents recover any child-rearing damages.

Who can place a price tag on a child's smile or the parental pride in a child's achievement? . . . Rather than attempt to value these intangible benefits, our courts have simply determined . . . that these benefits to the parents outweigh their economic loss in rearing and educating a healthy, normal child.²⁴⁴

The use of the benefit rule in jurisdictions that require normal child-rearing damages to be offset by the benefits of the child is both obvious and simple: these courts evaluate the specific child-rearing costs the parents in the case have incurred or will incur from the birth of the child, reduce those costs by the specific benefits the parents have received or will receive from the parent-child relationship, and award the remaining portion of the child-rearing costs to the parents.²⁴⁵ Unlike the jurisdictions that refuse to award any normal child-rearing damages, these jurisdictions evaluate the costs and benefits of the child under the specific circumstances of each individual case rather than in the abstract.²⁴⁶

While this use of the benefit rule is not as damaging to plaintiff parents, it still represents a misuse of the rule that achieves results contrary to basic tort principles. Although parents are allowed to recover some of the normal child-rearing damages, they are not allowed to recover for the full extent of their financial injury. Instead of using the emotional and financial benefits parents may receive to assess the extent of the parents' respective emotional and financial injuries,²⁴⁷ these courts use emotional benefits to reduce the damages necessary to fully compensate plaintiffs for their financial injuries.

Both forms of misuse result primarily from violations of the benefit rule's same interest limitation. The costs the parents will incur in raising the child are, quite clearly, injuries to the parents' financial interests. The benefits parents receive from having the child are all emotional in nature:

244. *Terrell v. Garcia*, 496 S.W.2d 124, 128 (Tex. App. 1973).

245. *See supra* Part I.B.1.

246. *See, e.g., Univ. of Ariz. Health Scis. Ctr. v. Superior Court*, 667 P.2d 1294, 1301 (Ariz. 1983) ("By permitting the jury to . . . assess and offset the pecuniary and non-pecuniary benefits which will inure to the parents by reason of their relationship to the child, we allow the jury to discount those damages, thus reducing speculation and permitting the verdict to be based upon the facts as they actually exist in each of the unforeseeable variety of situations which may come before the court.").

247. *See generally supra* Part II.B (discussing the proper application of the benefit rule).

fun,²⁴⁸ joy,²⁴⁹ companionship,²⁵⁰ pride,²⁵¹ affection,²⁵² and comfort.²⁵³ Allowing these emotional benefits to offset, either partially or completely, the financial injury of having to raise a child is a patent violation of the same interest limitation.²⁵⁴

Recall, the same interest limitation is imposed because a benefit to one interest does not reduce the extent of the injury to a different interest.²⁵⁵ Thus, a violation of the limitation results in an inaccurate assessment of the injury the plaintiff has suffered to a particular interest.

Significantly, the violation of the same interest limitation by these courts has resulted in an inaccurate assessment of the plaintiff parents' financial injury. Even if one accepts the premise that benefits necessarily flow from the existence of the child in the parents' life, they do nothing to lessen the extent of the injury to the parents' financial interest. The fun parents will have in raising their child will not enable them to purchase diapers or formula. The hospitals who provide medical care to the child will not accept the parents' pride in the child as payment. And, finally, tuition at universities across the country cannot be paid with the affection the child will provide the parents throughout the years. In sum, these courts have not used these emotional benefits to assess the injury to the parents' emotional interest, but instead have used the emotional benefits to reduce, either partially or fully, the portion the parents may recover of the damages necessary to fully compensate the parents for their financial injury.

As justification for their disregard of the same interest limitation, some courts argue that "the economic burden and emotional distress of rearing an unexpected child are inextricably related to each other," and, therefore, the emotional benefits may serve to offset the financial damages.²⁵⁶ However, such a view oversimplifies the source of emotional distress for parents in wrongful parentage cases. Although concerns about meeting the financial needs of an unplanned child are certain to cause a great deal of stress on parents, they are not the only source of stress to parents of an unplanned child. Parents faced with the birth of a child they sought to avoid are likely to face emotional distress generated from several

248. See, e.g., *Ochs v. Borrelli*, 445 A.2d 883, 886 (Conn. 1982).

249. See, e.g., *id.*

250. See, e.g., *id.*

251. See, e.g., *Boone v. Mullendore*, 416 So. 2d 718, 722 (Ala. 1982).

252. See, e.g., *C.S. v. Nielson*, 767 P.2d 504, 514 (Utah 1988).

253. See, e.g., *Beardsley v. Wierdsma*, 650 P.2d 288, 293 (Wyo. 1982).

254. See RESTATEMENT, *supra* note 1, § 920, cmts. a–b; see also *supra* Part II.B.

255. See *supra* Part II.B.

256. See, e.g., *Boone*, 416 So. 2d at 726 (Faulkner, concurring specially); *Univ. of Ariz. Health Scis. Ctr. v. Superior Court*, 667 P.2d 1294, 1300 n.4 (Ariz. 1983).

other sources including the failed sterilization procedure, disruption of future life plans, disruption of the relationship between the child's mother and father, and the decision of whether to keep the child or to abort or give it up for adoption. While overlap may exist between the costs of rearing the unplanned child and the parents' emotional distress, the financial and emotional interests of plaintiff parents are not so "inextricably related" as to justify such a great violation of the benefit rule's same interest limitation.

The violation of the second limitation, the equitable limitation, is not as apparent as the violation of the same interest limitation. Whether the equitable limitation has been violated depends upon whether the plaintiff parents sought to avoid the benefits that may be associated with a child. If the parents did not seek to avoid the benefits associated with a child, the use of the benefits to offset the parents' damages does not force the benefits upon the parents against their will. Parents who sought only to avoid the birth of an impaired child clearly did not seek to avoid the benefits associated with the child because they would have willingly accepted the benefits if the child had been healthy. Therefore, use of any benefits these parents may receive from the child's existence to offset the parents' damages does not violate the equitable limitation.²⁵⁷

Compliance with the equitable limitation is more difficult to assess when it involves parents who sought to avoid the birth of any child. Although the act of undergoing a sterilization procedure or otherwise avoiding a child may indicate a desire to avoid everything associated with a child, that may not always be the case. Parents may seek only to avoid the emotional, financial, and freedom costs associated with a child. Given the opportunity to have a child with all of the benefits associated with the child but none of the costs, these parents may have happily done so. In such situations, use of the benefits associated with the child to offset damages would not violate the equitable limitation.²⁵⁸ However, some parents may see nothing beneficial in the existence of a child. These parents would choose not to have a child, even if the child was loving, talented, beautiful, and came with none of the financial or emotional costs of a typical child. In this situation, the use of benefits perceived by courts to offset the damages suffered by the parents would be a violation of the equitable limitation.

257. Although the use of the benefits may not violate the equitable limitation, it may still violate the same interest limitation if not used appropriately. For example, while using the emotional benefits of the child to offset the financial injury may not violate the equitable limitation because the benefits are not forced upon the parents, such a use does violate the same interest limitation.

258. Again, although use of the benefits may not violate the equitable limitation, the same interest limitation may be violated if the benefits are used to reduce the damages associated with a different interest.

Because the determination of whether the equitable limitation has been violated depends upon the specific motivations of the plaintiff parents,²⁵⁹ one cannot, without looking at the specific facts of each case, conclusively say that all courts that offset the parents' damages with the benefits have violated the equitable limitation. To the extent that courts fail to inquire into the parents' motivations and, as a result force benefits upon parents who sought to avoid the benefits associated with the child, the courts violate the equitable limitation.

Many courts have not only misused the benefit rule and violated its limitations, but they have done so in an inconsistent manner. Many courts that prohibit parents of a healthy child from recovering the costs of raising that child allow parents of an impaired child to recover the extraordinary child-rearing costs associated with that child's impairment.²⁶⁰ Although parents with a disabled child will undeniably incur costs greater than those incurred by parents with a healthy child, it is unclear why the benefits of the disabled child do not outweigh even the extraordinary costs of raising it in the same way that the benefits of a healthy, unplanned child outweigh the costs of raising it.

For example, the Illinois Supreme Court refused to award child-rearing damages in a case involving the birth of a healthy child because "[i]n a proper hierarchy of values the benefit of life should not be outweighed by the expense of supporting it."²⁶¹ Apparently, though, the benefits of a disabled child's life do not outweigh the expense of supporting it, as the Supreme Court of Illinois allows parents to recover the extraordinary child-rearing damages associated with an impaired child's disability.²⁶² In its reasoning, the Supreme Court of Illinois failed to explain just why a disabled child's life is less beneficial to its parents than a healthy child's life is to its parents. Surely the parents of a disabled child do not take any less pride or joy in their child because of its disability, nor does the disabled child love its parents less than the healthy child loves its parents. Why the benefits of an unplanned, healthy child are weighted more heavily

259. This inquiry into the motivations of the parents should not be confused with the inquiry into the motivations conducted by Massachusetts, Arizona, and Maryland in cases where parents sought to avoid the birth of any child. *See supra* I.B.1. Massachusetts, Arizona, and Maryland conduct a motivational inquiry because they believe that such an inquiry will reveal if, and to what extent, the parents have been injured by the birth of the child. The pertinent question in that inquiry is why the parents sought to avoid the birth of the child altogether. The motivational inquiry relevant to the benefit rule's equitable limitation asks only whether the parents sought to avoid the benefits of the child or only the costs. In other words, if the parents could have the child without any of the financial, emotional, or social costs, would they?

260. *See supra* Part I.B.1-3.

261. *Cockrum v. Baumgartner*, 447 N.E.2d 385, 389 (Ill. 1983).

262. *See Siemieniec v. Lutheran Gen. Hosp.*, 512 N.E.2d 691, 706 (Ill. 1987).

than those of a disabled child in evaluating damages is completely unclear.²⁶³

Two additional contradictions exist in some courts' treatment of cases involving the birth of a healthy child versus the birth of an impaired child: (1) the emotional benefits of an impaired child are calculable while they are not for a healthy child,²⁶⁴ or vice versa,²⁶⁵ and (2) the same interest limitation is observed in cases involving the birth of an impaired child, but not a healthy child.²⁶⁶ Washington provides an ideal example of these contradictions. In denying recovery of child-rearing damages in cases involving the birth of a healthy child, the Supreme Court of Washington stated,

[W]hen a parent comes before a court alleging that he or she was damaged by the unplanned birth of a child, the only logical method of determining whether such damage has occurred would be to weigh child-rearing costs against the benefits of parenthood But whether those [child-rearing] costs are outweighed by the emotional benefits which will be conferred by that child cannot be calculated.²⁶⁷

In contrast, Washington requires the emotional damages suffered by parents of an impaired child to be offset by the emotional benefits the parents will receive.²⁶⁸ However, the court did not explain why the emotional benefits cannot be calculated in cases involving a healthy child, but are sufficiently calculable in cases involving an impaired child to require offset.

263. See Smith-Groff, *supra* note 16, justifies the disparity, in part, by stating that the "[p]arents of healthy children derive pleasure from children, yet a parent of an abnormal child 'receive[s] no compensating pleasure from incurring extraordinary medical expenses.'" Smith-Groff makes a faulty comparison. She compares the amount of pleasure received from the healthy child with the amount of pleasure derived from expenses associated with the disabled child. The proper comparison is the amount of pleasure derived from the healthy child as compared to the amount of pleasure derived from the disabled child.

264. Compare *McKernan v. Aasheim*, 687 P.2d 850, 854-55 (Wash. 1984) (finding the emotional benefits of a healthy child to be incalculable), with *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483, 493 (Wash. 1983) (requiring the emotional damages to be offset by the (presumably calculable) emotional benefits of an impaired child).

265. Compare *Becker v. Schwartz*, 386 N.E.2d 807, 414-15 (N.Y. 1978) (finding the emotional benefits of an impaired child to be too speculative to offset against the emotional damages), with *O'Toole v. Greenberg*, 477 N.E.2d 445, 448 (N.Y. 1985) (finding the "moral, social, and emotional advantages arising from the birth of a healthy child" to be calculable enough to be "preferred to the protection of purely economic interests").

266. Compare *McKernan*, 687 P.2d at 854 (finding the only method of determining damages in cases involving the birth of a healthy child is to "weigh child-rearing costs against the benefits of parenthood"), with *Harbeson*, 656 P.2d at 493 (requiring emotional damages in cases involving the birth of an impaired child to be offset only by the emotional benefits received from the birth of the child). See also *Emerson v. Magendantz*, 689 A.2d 409, 414-15 (denying the costs of raising a healthy child in part because the parents' choice to keep the child is evidence the benefits of the child outweigh the costs of raising it, but offsetting the economic costs of raising an impaired child only by the economic benefits received).

267. *McKernan*, 687 P.2d at 854-55.

268. *Harbeson*, 656 P.2d at 493.

Furthermore, had the Supreme Court of Washington been able to calculate the benefits of a healthy child, it would have used those benefits to offset child-rearing damages. Such a practice would violate the benefit rule's same interest limitation. However, in cases involving the birth of an impaired child, the court took care to observe the same interest limitation. Citing section 920 of the Restatement, the court required any award of emotional damages to be offset by any emotional benefits.²⁶⁹ Again, the court failed to explain this contradiction.

III. MISUNDERSTANDING THE WRONGFUL PARENTAGE PLAINTIFFS' INJURY

The misuse of the benefit rule is the result of many courts' misunderstanding of the injury wrongful parentage plaintiffs suffer. Many courts mistakenly view the child as the injury of which the plaintiff parents complain. Because these courts are uncomfortable with the idea of a child being an injury, they have misused and distorted the benefit rule to prevent parents from fully recovering the child-rearing costs associated with the child. A proper understanding of the injury eliminates the discomfort associated with viewing the child as an injury. A proper understanding of the injury also allows for the correct use of the benefit rule, which, in turn, produces an accurate assessment of the parents' injuries and accurate compensation for those injuries.

Many of the courts that limit or preclude recovery of child-rearing damages do so because they view the child as the injury or harm for which the plaintiffs seek compensation.²⁷⁰ However, these courts mistake the result of the defendant's negligence for the injury caused by the defendant's negligence. The injury the plaintiff parents suffer is not the child, but instead is the invasion into the parents' legally protected interests of financial and family planning.²⁷¹ Parents do not seek to rid themselves of the child, but of the financial burden placed upon them by the defendant's negligence and the frustration of their right to plan their family. Because courts that mistake the child for the injury are uncomfortable with the idea of a

269. *See id.*

270. *See supra* Part I.B.1-3.

271. *See Lovelace Med. Ctr. v. Mendez*, 805 P.2d 603, 612-13 (N.M. 1991) (holding the plaintiff's interests in financial security and family planning to be legally protected and, thus, the invasion of those interests to be legally compensable injuries); *Johnson v. Univ. Hosps. of Cleveland*, 540 N.E.2d 1370 1379-80 (Ohio 1989) (Brown, J., dissenting) (arguing the public policy of the majority was inapplicable because the injury is not the existence of the child but the frustration of the mother's legal choice to seek sterilization); *see also Mogill, supra* note 15, at 886 ("[T]he 'injury' is not the birth of the child, but instead, is the invasion of the parents' interest in the financial security of their family and attendant desire to limit their family size.").

child as an injury, they have prevented parents from fully recovering child-rearing damages and have produced results contrary to their cited public policies. To mask this discomfort and legitimize their decisions, courts have misused the benefit rule and employed transparent supplementary arguments.²⁷²

Many of the courts that misunderstand the injury in wrongful parentage cases, and thus deny parents full recovery of child-rearing damages, cite a public policy belief in the sanctity of human life.²⁷³ However, these courts contradict this public policy in two ways. First, these courts proclaim a respect for the sanctity of human life but deny the parents the means of sustaining the sanctified life of the child.

Second, denying parents recovery of child-rearing damages, at the very least, lessens the incentive of plaintiff parents to carry the child to term. Consider, for example, a couple who desires to avoid having any children, either because they cannot afford the child or, while able to afford the child, do not desire to spend their money raising a child. To prevent conception, the woman undergoes a tubal ligation. As a result of the doctor's negligence, the tubal ligation fails and the woman becomes pregnant. Unfortunately, the couple resides in a state where the procedure was performed in a state that does not allow recovery of child-rearing damages. Consequently, the couple is faced with three options: (1) carry the child to term and incur the costs of raising the child, (2) abort the child, or (3) incur the costs of carrying the child to term and then place it for adoption. Options one and three are not desirable to the couple because they require expending monies the couple either does not have or does not want to spend. As a result, the couple is much more likely to choose the second option and abort the child. However, if the state allowed recovery of child-rearing damages, the incentive to abort the child is less, as the parents would not have to be concerned with the financial hardships associated with the unplanned child. In a situation such as this, the sanctity of human life public policy operates in a way that does not promote human life.

272. See *supra* Part II.A. & C. For an example of just how far some courts are willing to stretch rules, see *Taylor v. Kurapati*, 600 N.W.2d 670, 688–91 (Mich. Ct. App. 1999) (arguing that recognizing a wrongful parentage claim involving the birth of an impaired child would result in applied eugenics and the elimination of living, impaired individuals for the benefit of their parents and society as a whole).

273. See, e.g., *Wilbur v. Kerr*, 628 S.W.2d 568, 571 (Ark. 1982) (child-rearing damages involve “a question which meddles with the concept of life”); *Cockrum v. Baumgartner*, 447 N.E.2d 385, 389 (Ill. 1983) (“Respect for life and the rights proceeding from it are at the heart of our legal system and, broader still, our civilization.”); *O’Toole v. Greenberg*, 447 N.E.2d 445, 448 (N.Y. 1985) (“In view of our society’s acknowledgment of the sanctity of life, it cannot be said, as a matter of public policy, that the birth of a healthy child constitutes a harm cognizable at law.”).

A proper understanding of the injury in wrongful parentage claims avoids the discomfort associated with viewing the child as an injury, allows parents to receive accurate compensation for their injuries, and prevents results contradictory to public policies. Neither the invasion into the parents' financial interest nor the invasion into the parents' interest in family planning requires courts to assess the worth of the child. As a result, courts should no longer feel the need to misuse the benefit rule or employ transparent supplementary arguments to limit parents' recovery of child-rearing damages. Instead, courts are free to utilize the benefit rule to accurately assess the injuries suffered by parents and to compensate them accordingly.

A proper assessment of the injuries suffered by plaintiffs in wrongful parentage cases reveals these parents deserve the opportunity to prove and fully recover child-rearing damages. Child-rearing damages in wrongful parentage cases are easily ascertainable, foreseeable, proximately caused by the defendant's negligence, and necessary to fully compensate plaintiffs and deter future negligence.²⁷⁴ Although emotional benefits certainly flow from the existence of the child, these benefits should not be used to offset, partially or completely, the costs of raising the child. The fact that plaintiff parents receive emotional benefits from the child's existence does nothing to lessen the extent of the parents' financial injury, and use of the benefits to offset child-rearing costs violates the benefit rule's same interest limitation.²⁷⁵ However, because these emotional benefits lessen the gross emotional injury suffered by the parents, they can and should be used to offset any emotional damages awarded to the parents. Likewise, any financial benefits the parents may receive from the child's existence should be used to offset the child-rearing damages. All assessments of the costs and benefits should be done on a case-by-case basis, as not all plaintiffs will incur the same costs and benefits.

This analysis does not change when the case involves the birth of an impaired child. Parents who sought to avoid the birth of any child, but gave birth to an impaired child as a result of the defendant's negligence, have merely suffered a greater financial injury than parents of a healthy child. Because the extraordinary costs associated with the child's impairment are within the defendant's extent of legal responsibility and are as ascertainable, foreseeable, and necessary as the ordinary child-rearing costs, they should not be treated any differently. On the other hand, parents who sought only to avoid the birth of an impaired child would have willingly incurred ordinary child-rearing damages if the child had been born healthy.

274. See *supra* Part II.A.

275. See *supra* Part II.C.

However, the parents were not willing to incur those same costs if the child was born impaired and, but for the defendant's negligence, the impaired child would *not* have been born. Therefore, when parents who sought to avoid the birth of an impaired child give birth to an impaired child, the ordinary as well as extraordinary child-rearing damages constitute financial injuries.

CONCLUSION

Courts across the United States have inaccurately assessed the injuries suffered by wrongful parentage plaintiffs and, as a result, have undercompensated the parents. This undercompensation results from the courts' misunderstanding of the injury in wrongful parentage cases. Contrary to many courts' opinions, the injury in these cases is not the child, but the invasion into the parents' legally protected interests of financial and family planning. Because many courts are uncomfortable viewing a child as an injury, they have misused the benefit rule and employed transparent supplementary arguments to severely limit or completely preclude parents from recovering the costs associated with raising the child. Close analysis of these supplementary arguments reveals them to be thinly veiled attempts to mask the courts' discomfort. Also revealed is the courts' predominant misuse of the benefit rule.

Assessing damages due to wrongful parentage plaintiffs in light of their actual injuries, reveals that the parents should be afforded the opportunity to prove and fully recover child-rearing damages. Any benefits the parents receive can and should be utilized, but only to the extent allowed by the benefit rule's same interest limitation. Child-rearing damages are foreseeable, readily ascertainable, proximately caused by the defendant's negligence, and necessary to accurately compensate plaintiffs for their losses. Without the opportunity for plaintiff parents to prove and fully recover child-rearing damages, the defendants in wrongful parentage cases are shielded from liability and are not deterred from future negligence. Most importantly, the parents' legally protected interests go without unvindicated.