UIC Law Review

Volume 13 | Issue 2 Article 6

Winter 1980

Wrongful Life: Birth Control Spawns a Tort, 13 J. Marshall L. Rev.401 (1980)

Margaret J. Mullen

WRONGFUL LIFE: BIRTH CONTROL SPAWNS A TORT

INTRODUCTION

The birth control revolution[1] has spawned the development of a new basis of tort liability. During the past two decades, sweeping changes have occurred in the availability[2] and social acceptance[3] of both permanent[4] and temporary[5] contraception and pregnancy termination techniques.[6] This societal transformation was expedited by the United States Supreme Court's

1. Birth control is not of modern invention. Contraception has been practiced in some form for at least several thousand years. Aristotle wrote that conception could be prevented by "anointing that part of the womb on which the seeds fall with oil of cedar, or with ointment of lead or with frankincense commingled with olive oil." The "condom," the first modern method of contraception, was mass produced in the 1840's. The "diaphragm" was developed after the invention of vulcanized rubber but had its roots in earlier primitive devices. The two newest methods of birth control are the intra-uterine device (IUD) and oral contraceptives (the "Pill"). *See* note 5 *infra*; L. WESTOFF & C. WESTOFF, FROM NOW TO ZERO-FERTILITY, CONTRACEPTION AND ABORTION IN AMERICA 40-45 (1968) [hereinafter cited as WESTOFF & WESTOFF].

2. Three United States Supreme Court decisions guarantee that meaningful reproductive choices are available to all persons. Griswold v. Connecticut, 381 U.S. 479 (1965), held that a state statute outlawing the dissemination of birth control information to married people "would unjustifiably intrude on rights of marital privacy which are constitutionally protected." *Id.* at 497. Eisenstadt v. Baird, 405 U.S. 438 (1972), indicated that the guarantee of privacy extended to single as well as married persons. Roe v. Wade, 410 U.S. 113 (1973), struck down a Texas criminal abortion statute on the ground that a constitutional right to privacy included a woman's unconditional right to terminate her pregnancy in the first trimester. *See generally* Commentary, *Pregnancy, Privacy, and the Constitution: The Court at the Crossroads*, 25 U. FLA. L. REV. 779 (1973).

3. The wide-ranging social acceptance of birth control is best evidenced by the attitude of Roman Catholic American women. A 1969 study showed that 63% of this group were opposed to the papal ban on contraception. WESTOFF & WESTOFF, *supra* note 1, at 203.

4. Permanent contraception is sterilization. In the male, this is accomplished by a vasectomy—the surgical severance of the *vas deferens* through which the sperm travel. Hackett & Waterhouse, *Vasectomy-Reviewed*, 116 AM. L. OBSTETRICS & GYNECOLOGY 438, 443 (1973). In the female, the more complicated tubal ligation is required. This is the surgical interruption of the Fallopian tubes so that the eggs cannot enter the uterine cavity where fertilization takes place. Thompson, Haverkamp & Drose, *Sterilization of the Female*, 70 ROCKY MTN. MED. J. 431, 432 (1973).

5. Temporary contraceptive measures include the oral contraceptive (the "Pill"), the intra-uterine device, and spermicides. *See* Comment, *The Pill—A Legal and Social Dilemma*, 45 TEMPLE L.Q. 484, 497 (1972).

6. Termination of pregnancy is accomplished by an abortion, "the expulsion of the fetus at a period of utero-gestation so early that it has not

recognition of an individual's right to determine his or her reproductive destiny.[7] When, however, this right is wrongfully interfered with, and the birth of a child results, the courts must decide whether a cause of action exists and, if so, what damages are recoverable.

Actions for wrongful life[8] are attempts by injured plaintiffs to explore the limits of professional malpractice liability where,

---

acquired the power of sustaining an independent life." People v. Heisler, 300 Ill. 98, 100, 132 N.E. 802, 803 (1921).

7. *E.g.*, Roe v. Wade, 410 U.S. 113 (1973). For a synopsis of the Supreme Court trilogy on reproductive rights, see note 2 *supra*.

8. The term "wrongful life," in addition to serving as a generic term for different actions brought by the parents of an unplanned child, also encompasses actions brought on behalf of the infant born of the negligence and actions by the siblings of the infant. The infant plaintiff in a wrongful life action asserts that his very existence under some condition is wrongful. For example, such actions have been asserted where the child is born illegitimate. *E.g.*, Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963) (infant sued his father for tort of "bastardy," court, while admitting tort had been alleged, refused to allow cause of action which could have such "far-reaching" results); *cf.* Williams v. State, 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966) (rejecting illegitimate child's claim for damages where birth resulted from rape of mother while she was in state mental hospital). *See generally* Note, *Compensation for the Harmful Effects of Illegitimacy*, 66 COLUM. L. REV. 127 (1966).

Wrongful life actions have also been brought against physicians by infants for failure to diagnose birth defects. The allegation is not that the physician's negligence caused the plaintiff's condition, but that it caused the plaintiff to be *born* in an impaired state. *Compare* Bergstreser v. Mitchell, 577 F.2d 22 (8th Cir. 1978) (finding that infant had stated a cause of action for injuries resulting from a negligent Caesarean section to the mother two years before its birth) *and* Renslow v. Mennonite Hosp., 67 Ill. 2d 348, 367 N.E.2d 1250 (1977) (sustaining infant's cause of action for injuries resulting from negligent transfusion of her Rh-negative mother with Rh-positive blood some nine years prior to child's conception) *with* Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967) (dismissing infant's claim for damages against physician who negligently failed to advise mother of risks of birth defects). Essentially the infant's claim is that its very existence is wrongful. Such claims by infant plaintiffs have been uniformly dismissed. The reason given by most courts in denying recovery is that compensation is impossible to determine because no comparison can be made between life with defects and no life at all. *See, e.g.*, Gleitman v. Cosgrove, 49 N.J. at 28, 227 A.2d at 692, stating: "The infant plaintiff would have us measure the difference between his life with defects against the utter void of nonexistence, but it is impossible to make such a determination." *See generally* Note, *Father and Mother Know Best: Defining the Liability of Physicians' Inadequate Genetic Counseling*, 87 YALE L.J. 1488 (1978).

Wrongful life claims have also been asserted against physicians by the *siblings* of unplanned or deformed infants. The damage alleged consists of a diminution of their share of parental love, affection and financial support due to the infant's birth. No court has allowed recovery. *See* Aronoff v. Snider, 292 So. 2d 418, 419 (Fla. Dist. Ct. App. 1974) (court stated: "The concept of a cause of action in children for [wrongful life] is without foundation in law or logic"); Cox v. Stretton, 77 Misc. 2d 155, 352 N.Y.S.2d 834 (Sup. Ct. 1974) (basing denial of cause of action upon absence of any enforceable claim on part of children to their parents' services). Claims by the infant and his siblings for wrongful life will not be discussed textually. *See gener-*

for example, a negligent sterilization is performed;[9] where prescriptions for contraceptives are carelessly dispensed by a pharmacist;[10] where an abortion is negligently not brought to fruition;[11] and where a mother is unable to make an informed decision on whether to complete the reproductive process because her pregnancy was inadvertently misdiagnosed,[12] or because the effects on the fetus of an existing condition, such as rubella, were improperly predicted.[13] The net effect of the negligence is the birth of a child who must be nurtured and educated. If the child is born defective, the financial and emotional toll upon the parents may be inconceivably extensive.[14]

The term "wrongful life" functions as a broad umbrella under which plaintiffs, alleging these factually divergent wrongs, have sought judicial recognition of their claims. Various causes of action subsumed under the general heading of "wrongful life" are differentiated both by the manner in which the malpractice defendant's negligence impinges upon the plaintiff's reproductive rights and by the damages claimed. For example, "wrongful conception" describes those wrongful life cases in which the plaintiff's right to prevent conception is infringed by a physician's negligent failure to sterilize.[15] The

---

ally Comment, *Busting the Blessing Balloon: Liability for the Birth of the Unplanned Child*, 39 ALB. L. REV. 221 (1975).

9. *See, e.g.*, Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).

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

11. *See, e.g.*, Wilczynski v. Goodman, 73 Ill. App. 3d 51, 391 N.E.2d 479 (1979).

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

13. *See, e.g.*, Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975).

14. For example, the annual cost of care for a child born with the dreaded Tay-Sachs disease is $20,000-$40,000. The national expenditure for health care of those afflicted with Down's Syndrome (mongolism) has been estimated to be at least one billion dollars per year. H.R. REP. NO. 498, 94th Cong., 1st Sess. 19 (1975), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 709, 727. The parents' psychological suffering is also striking. The birth of a defective child often causes the parents "shock and denial, anxiety, anger and/or guilt, and depression." Griffin, Kavanagh & Sorenson, *Genetic Knowledge, Client Perspectives, and Genetic Counseling: A Consumers' View*, 2 SOC. WORK IN HEALTH CARE 171, 174 (1976-1977) (citing Falech & Britton, *Phases in Coping: The Hypothesis and Its Implications*, 21 SOC. BIOLOGY 1 (1974)). This emotional toll has been judicially recognized. *See* Berman v. Allan, 80 N.J. 421, 434, 404 A.2d 8, 17 (1979) (Handler, J., dissenting) ("Without doubt, expectant parents, kept in ignorance of severe and permanent defects affecting their unborn child, suffer greatly when the awful truth dawns upon them with the birth of the child").

15. *See, e.g.*, Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 170 (Minn. 1977) ("an action for 'wrongful conception' may be maintained [by the parents of an unplanned child who was born after a negligent sterilization], and that compensatory damages [including the costs of rearing the child] may be recovered. . . .") Wrongful conception cases may also arise where

cause of action accrues at conception since the negligence nullifies plaintiff's right to prevent fertilization.

"Wrongful pregnancy"[16] is an action which has also been classified under the rubric of wrongful life. "Wrongful pregnancy" is distinguishable from "wrongful conception" only in the damages alleged to have been suffered.[17] The latter action demands all damages flowing from the negligence, including the costs of rearing the child to maturity. "Wrongful pregnancy" relief, however, includes only reimbursement for the cost of the negligent treatment and damages arising from the *pregnancy itself*. Recovery for expenses incurred in raising the child are not demanded.

Those wrongful life cases in which the negligent act infringes the exercise of the mother's right to terminate her pregnancy give rise to an action termed "wrongful birth."[18] The physician in such a case may have negligently misinformed the mother about the possibility of birth defects. Since the mother made the decision to become pregnant, the *conception* and *pregnancy* are not the basis of the claimed injury. Rather, the *birth* of the child which would otherwise have been aborted is asserted to be wrongful.

Jointly, these actions constitute the basis for redress of negligent interference with plaintiffs' reproductive rights. This comment will examine the recoverable damages in the parental cause of action[19] for wrongful life; the term being used throughout to encompass wrongful conception, wrongful pregnancy, and wrongful birth. Initially, the historical development of the cause

---

a prescription for oral contraceptives is negligently filled. *See, e.g.*, Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1970).

16. *See, e.g.*, Bushman v. Burns Clinic Medical Center, 83 Mich. App. 453, 460, 268 N.W.2d 683, 686 (1978) (court distinguished wrongful conception cases from case at bar, stating: "A more appropriate resolution of the difficulties presented, and the one hereby adopted, is to view the action as one for 'wrongful pregnancy' . . . thereby limiting the scope of the injury to the very real expenses and obvious difficulties attending the unexpected pregnancy of a woman") (quoting Coleman v. Garrison, 327 A.2d 757, 761 (Del. Super. 1974), *aff'd*, 349 A.2d 8 (Del. 1975)).

17. In both wrongful conception and wrongful pregnancy actions, the fact clusters are similar. For example, the child in either case might be born of the negligence of the sterilizing physician. The difference between the actions is that in wrongful pregnancy the parents do not recover the costs of rearing the child.

18. *See, e.g.*, Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979) (parents of mongoloid child stated cause of action for "wrongful birth"; parents alleged that physician had negligently failed to advise 38 year-old mother of high risk of birth defects in children born to women of that age).

19. This comment will exclude from further discussion those actions asserted by the infant born of the negligence as well as those by the siblings of the unplanned or defective child. *See* note 8 *supra*.

of action will be surveyed. Attention will then be directed to *Wilczynski v. Goodman*,[20] a recent Illinois Appellate Court decision which sustained a parent's action predicated on a negligent abortion. The *Wilczynski* holding and its supporting rationale on the issue of damages will be analyzed and compared with recent decisions in other jurisdictions. Finally, proposed methods for determining recoverable damages will be scrutinized with complete compensation advocated for all damages proximately caused by the tortious interference with reproductive decision-making.

THE DEVELOPMENT OF THE WRONGFUL LIFE CAUSE OF ACTION

Public Policy as a Basis for Denial

In its inception, the parental cause of action for wrongful life met with judicial disapproval. The first court confronted with the claim that the birth of a child was a legal damage refused to recognize the cause of action. *Christensen v. Thornby*,[21] rather than regarding the birth as an injury resulting from a negligent vasectomy, perceived it as a "*blessing*" to the plaintiff.[22] While the "blessing" barrier to recovery suggested that legal damage, an essential element of tort liability,[23] was lacking, subsequent cases insisted that denial of the wrongful life cause of action was based upon perceived public policy.

In refusing to award damages, the court in *Shaheen v. Knight*[24] explained that "to allow damages for the normal birth

20. 73 Ill. App. 3d 51, 391 N.E.2d 479 (1979).

21. 192 Minn. 123, 255 N.W. 620 (1934). *Christensen* was a deceit action against a surgeon who performed a vasectomy upon the plaintiff. The plaintiff brought suit when his wife, who experienced great difficulty in the birth of her first child, became pregnant and delivered another baby. The *Christensen* court affirmed a dismissal of the complaint on the ground that the plaintiff failed to allege fraudulent intent, a necessary element of a deceit action. The importance of the decision, however, lies not in its holding, but rather its dicta.

22. The *Christensen* court stated: "Instead of losing his wife, the plaintiff has been *blessed* with the fatherhood of another child." Therefore, the damages demanded to compensate the plaintiff for the expenses of pregnancy and for his anxiety over his wife's health were "remote" from the purpose of the operation, which was to safeguard the health of the mother. The court added, "[A]s well might the plaintiff charge defendant with the cost of nurture and education of the child during its minority." *Id.* at 126, 255 N.W. at 622 (emphasis added). *Contra*, Custodio v. Bauer, 251 Cal. App. 2d 303, 318, 59 Cal. Rptr. 463, 476 (1967) (court sustained cause of action, stating: "To say, as in *Christensen*, that the expenses of bearing a child are remote from the avowed purpose of an operation undertaken for the purpose of avoiding childbearing is a *non sequitur*").

23. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 30 (4th ed. 1971).

24. 11 Pa. D. & C.2d 41, 43, 6 Lyc. 19, 20 (C.P. 1957) (emphasis added). The plaintiff, Shaheen, whose contraceptive vasectomy resulted in the birth

of a normal child is foreign to the universal public sentiment of the people. . . . [T]o allow such damages would be against *public policy*." While in *Shaheen* the child was born healthy, in 1966 the Illinois Appellate Court decided a negligent sterilization case, *Doerr v. Villate*,[25] in which a mother gave birth to a retarded and physically deformed child. The only issue discussed by the court, however, was whether the tort or contract statute of limitations applied. The court offered no opinion on whether the "blessing" argument would deny recovery for the birth of a seriously defective infant.[26] Nevertheless, since the court did recognize an injury, *Doerr* demonstrates the shift in judicial attitudes toward the "blessed event" concept.

The Allowance of Recovery

It is questionable whether the assumptions made by the prior decisions regarding public policy were valid[27] when ren-

---

of his fifth child, alleged as damages the costs of educating and maintaining that child. The Pennsylvania trial court held that he could not recover, although the court did recognize that sterilization is not against public policy.

"Contraceptive sterilization," such as the vasectomy in *Shaheen*, is performed to prevent contraception for the purpose of limiting family size. It is to be distinguished from "therapeutic sterilization" which is performed to protect the physical or mental health of the mother, and from "eugenic sterilization" which is designed to prevent the propagation of mental defectives and criminals. Driver, *Population Policies of State Governments in the United States: Some Preliminary Observations*, 15 VILL. L. REV. 818 (1970).

25. 74 Ill. App. 2d 332, 220 N.E.2d 767 (1966). In *Doerr*, the defendant-doctor agreed to sterilize the husband of plaintiff after she gave birth to two retarded children.

26. Although the *Doerr* court offered no indication as to its opinion on damages, Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967), extracted this meaning: "The *Doerr* case makes it apparent that the compensation is . . . to replenish the family exchequer so that the new arrival will not deprive other members of the family of what was planned as their just share of family income." *Id.* at 321, 59 Cal. Rptr. at 477.

For a discussion of the public policy factors militating against the parents' recovery for denial of the opportunity to abort a defective fetus, see Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967). *Gleitman* arose before Roe v. Wade, 410 U.S. 113 (1973), secured the mother's right to abort a first-trimester fetus. *See* note 2 *supra*.

27. Courts may properly declare and apply the public policy of the community only when it is subject to virtual unanimity of opinion. Lurie v. Republican Alliance, 412 Pa. 61, 192 A.2d 367 (1963). The criteria for determination of public policy have been variously described as "the community common sense and common conscience," Kintz v. Harriger, 99 Ohio St. 240, 246, 124 N.E. 168, 175 (1919); "public morals," Liggett v. Shriver, 181 Iowa 260, 265, 164 N.W. 611, 612 (1917); and "well-settled public opinion," Sipes v. McGhee, 316 Mich. 614, 623, 25 N.W.2d 638, 642 (1947).

The *Shaheen* court based its decision that public policy precluded recovery on its own observation coupled with a pronouncement in a *110 year-old* case. It cited Matchin v. Matchin, 6 Pa. 332, 337 (1847), for the proposition that "[t]he great end of matrimony is not the convenience of the parties, though they are necessarily embarked in it, but the procreation of

dered. However, the radical changes which had occurred in society since the courts were initially confronted with wrongful life claims were highlighted in 1967 by *Custodio v. Bauer*.[28] Although hailed as a major breakthrough in the development of the cause of action,[29] *Custodio*'s importance rested more in its dicta than its holding. The plaintiff submitted to a tubal ligation[30] upon the advice of the defendent-physician that an eighth pregnancy would aggravate a kidney and bladder condition. Pregnancy resulted, and the parents brought suit demanding, *inter alia*, the costs of rearing the child.[31] The trial court dismissed the complaint, but the California Court of Appeal reversed, holding that the allegations stated a cause of action for conventional damages.[32]

Custodio's significance lies in its discussion of the issue of damages.[33] The court noted that if liability was established, the plaintiffs could recover more than nominal damages. Further, it hypothesized that recoverable damages included pain and suffering, damages for wrongful death if the mother died or sustained injuries during delivery, the costs of rearing, and even damages incurred because the mother would be forced to "spread her society, comfort, care, protection and support over a

---

progeny. . . ." Shaheen v. Knight, 11 Pa. D. & C.2d at 45, 6 Lyc. at 23. This reliance has been strongly criticized. Note, *Remedy for the Reluctant Parent: Physicians' Liability for the Post-Sterilization Conception and Birth of Unplanned Children*, 27 U. FLA. L. REV. 158, 160 (1974).

28. 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).

29. Kashi, *The Case of the Unwanted Blessing: Wrongful Life*, 31 U. MIAMI L. REV. 1409, 1411-12 (1977).

30. For the definition of a tubal ligation, see note 4 *supra*.

31. The plaintiffs in *Custodio v. Bauer* alleged causes of action in negligence, failure to inform, malpractice, negligent misrepresentation, fraud, deceit, and breach of contract. Damages were demanded for their expenses, for injury to Mrs. Custodio, and for the costs of rearing the child.

32. 251 Cal. App. 2d at 309, 59 Cal. Rptr. at 468.

33. *En passant*, the *Custodio* court dealt with two minor issues. Defendants asserted that the plaintiffs' act of sexual intercourse constituted an intervening cause of the injuries alleged. The court dismissed this sophism by stating that the test of an intervening cause is the foreseeability of that event. "It is difficult to conceive how the very act the consequences of which the operation was designed to forestall, can be considered unforeseeable." *Id.* at 314, 59 Cal. Rptr. at 472.

The court also noted that a therapeutic sterilization is not against public policy stating:

> [T]he matter would appear to be one of individual conscience. The question of whether the state can now control the subject may be questioned in view of the fact that the giving of information, instruction and medical advice to married persons as to the means of preventing conception is now clothed in a cloak of constitutional protection. (Griswold v. Connecticut, 381 U.S. 479 (1965)).

251 Cal. App. 2d at 315, 59 Cal. Rptr. at 472-73.

larger group."[34] The *Custodio* court refused to hold that recovery should be reduced by any benefits resulting from the parent-child relationship, stating that the award could be offset solely by any proven benefit to the plaintiff's kidney and bladder condition.[35] A more flexible approach to the application of the "benefits" rule was espoused four years later in a case which may be termed the third generation in the lineage of wrongful life.[36]

Troppi v. Scarf,[37] a wrongful conception case, unambiguously rejected the argument that public policy precluded recovery of damages for an unplanned child.[38] Further, the court discussed the "benefits" rule[39] and held that the benefits of the unplanned child could be weighed against all the elements of damage claimed by the plaintiffs.[40] Thus, recovery of the costs

34. *Id.* at 318, 59 Cal. Rptr. at 476.

35. *Id.* This holding resulted from *Custodio*'s narrow view of a rule, advanced as a rationale for the "blessing" concept, which provides that "where the defendant's tortious conduct has caused harm to the plaintiff or his property and in so doing has conferred upon the plaintiff a special benefit to the interest which was harmed, the value of the benefit conferred is considered in mitigation of damages, where this is equitable." RESTATEMENT OF TORTS § 920 (1939). Rather than applying this rule to require mitigation for the benefit of parenting, *Custodio* focused on the words "*benefit to the interest which was harmed*" and refused to mitigate since the defendant failed to demonstrate that Mrs. Custodio's kidney and bladder condition was benefited since the purpose of the operation was to protect her health.

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

37. *Troppi* was an action for damages allegedly resulting from the birth of a child to Mrs. Troppi after the defendant-pharmacist negligently filled her birth control pill prescription with tranquilizers. Plaintiffs alleged as damages the wife's lost wages; her medical and hospital expenses; the pain and anxiety of pregnancy and childbirth; and the costs of rearing. *Id.* at 243, 187 N.W.2d at 513.

38. The *Troppi* court examined Michigan statutes which were designed to foster the use of contraceptives and discussed the constitutional protection of their use provided by Griswold v. Connecticut, 381 U.S. 479 (1965). The court concluded that damages should be assessed as in any other negligence case, stating that "public policy favors a tort scheme which encourages pharmacists to exercise great care in filling prescriptions. To absolve the defendant of all liability here would be to remove one deterrent against [negligence]. [S]uch absolution cannot be defended on public policy grounds." 31 Mich. App. at 248, 187 N.W.2d at 517.

39. RESTATEMENT OF TORTS § 920 (1939); *see* note 35 *supra*.

40. The *Troppi* court rejected *Custodio*'s narrow view of the "benefits" rule and held that all the benefits of the child could be weighed against all the damages, stating: "Since pregnancy and its attendant anxiety, incapacity, pain and suffering are inextricably related to child bearing, we do not think it would be sound to attempt to separate those segments of damage from the economic costs of an unplanned child in applying the 'same interest' rule." 31 Mich. App. at 248, 187 N.W.2d at 518. This rejected the plaintiff's argument that only the costs of rearing should be offset by the value of a parental reward. Even the damages related to the pregnancy (which, arguably, would not be affected by a relationship developed after birth) were held to be subject to diminution by the benefits of the birth of the child. *Contra*, Bushman v. Burns Clinic Medical Center, 83 Mich. App. 453, 268 N.W.2d 683 (1978) (reversed trial court's application of benefits rule to ac-

of rearing the infant to majority was allowed, subject to diminution by the value of the child's birth to the parent. Although this weighing of benefits against alleged damages has been criticized,[41] the *Troppi* analysis provided a flexible and serviceable approach to resolution of wrongful life claims which stood in sharp contrast to the doctrinaire decisions preceding it.

Despite the well-reasoned *Troppi* opinion, cases in the wrongful life area remain in conflict.[42] While the courts have struggled to formulate an appropriate method of computing damages, two discernible trends have emerged on the recoverability of the costs of rearing a child. Awards of rearing costs are gaining increasing acceptance among jurisdictions which have faced the claim.[43] However, other courts have refused to allow

---

tion for wrongful pregnancy). *See* notes 16 & 17 and accompanying text *supra*. "The benefits rule set forth in *Troppi* should not apply to an action narrowly confined to damages for wrongful pregnancy and not wrongful life. To the extent this is inconsistent with *Troppi*, we stand in disagreement." 83 Mich. App. at 456, 268 N.W.2d at 685.

41. One student author protests:

> The theory behind the [*Troppi*] benefits rule is sound. . . . But to arrive at an artificial figure representing the value of having a child, and then to subtract that from a gross figure for damages is needless complication. For instance, a danger exists that the aggravating circumstances, as for example the age of the mother, may be considered twice, first in increasing the amount of gross damage, and second in decreasing the value of the benefit incurred.

Comment, *Busting the Blessing Balloon: Liability for the Birth of the Unplanned Child*, 39 ALB. L. REV. 221, 231 (1975).

42. *Compare* Coleman v. Garrison, 327 A.2d 757 (Del. Super. 1974), *aff'd*, 349 A.2d 8 (Del. 1975) *and* Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974) (denying any recovery to parents) *with* Rivera v. State, 94 Misc. 2d 157, 404 N.Y.S.2d 950 (Ct. Cl. 1978) *and* Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977) (allowing full recovery, including costs of rearing).

43. *See* Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692 (E.D. Pa. 1978) (failure to advise of risks of defects, medical costs of rearing recoverable); Stills v. Gratton, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976) (negligent abortion, normal tort damages recoverable); Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967) (negligent sterilization, costs of rearing recoverable); Anonymous v. Hospital, 33 Conn. Supp. 126, 366 A.2d 204 (1976) (negligent sterilization, costs of rearing recoverable); Green v. Sudakin, 81 Mich. App. 545, 265 N.W.2d 411 (1978) (negligent sterilization, costs of rearing recoverable); Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971) (negligent dispensation of oral contraceptives, costs of rearing recoverable); Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977) (negligent sterilization, costs of rearing less value of child's society allowed); Betancourt v. Gaylor, 136 N.J. Super. 69, 344 A.2d 336 (1975) (negligent sterilization, all damages proximately resulting from negligence, including costs of rearing, recoverable); Becker v. Schwartz, 46 N.Y.2d 401, 387 N.E.2d 217, 413 N.Y.S.2d 895 (1978) (negligent failure to advise of birth defects, costs of care and treatment of defective child recoverable); Ziemba v. Sternberg, 45 A.D.2d 230, 357 N.Y.S.2d 265 (1974) (negligent misdiagnosis of pregnancy, costs of rearing recoverable); Rivera v. State, 94 Misc. 2d 157, 404 N.Y.S.2d 950 (Ct. Cl. 1978) (negligent sterilization, costs of rearing recoverable); Cox v. Stretton, 77 Misc. 2d 155, 352 N.Y.S.2d 834 (Sup. Ct. 1974)

rearing costs, limiting recovery to those damages incurred during pregnancy.[44] Another area of controversy surrounds the award of damages for the emotional suffering of the parents.[45] *Wilczynski v. Goodman*[46] represents the initial attempt by the Illinois courts to deal with the difficult damages issues presented in wrongful life actions.

WILCZYNSKI V. GOODMAN

In January, 1976 Jean Wilczynski underwent a therapeutic

(negligent sterilization *and* misdiagnosis of pregnancy, costs of rearing recoverable if proven); Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976) (negligent sterilization, one twin was healthy, the other defective, costs of rearing both held recoverable); Stribling v. de Quevedo, [1980] 6 FAM L. REP. (BNA) 2299 (Pa. Super. Ct. Jan. 10, 1980) (negligent sterilization, costs of rearing defective child recoverable) Speck v. Finegold, No. GD 76-07752 (Pa. Super. Ct. July 25, 1979) (negligent sterilization and negligent abortion, costs of rearing defective child recoverable); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975) (negligent failure to advise of birth defects, costs of rearing related to defects recoverable); Dumer v. St. Michael's Hosp., 9 Wis. 2d 766, 233 N.W.2d 372 (1975) (negligent failure to advise of birth defects, medical costs of rearing defective child recoverable).

44. *See* LaPoint v. Shirley, 409 F. Supp. 118 (W.D. Tex. 1976) (negligent sterilization, costs of rearing denied); Coleman v. Garrison, 327 A.2d 757 (Del. Super. 1974), *aff'd*, 349 A.2d 8 (Del. 1975) (negligent sterilization, costs of rearing held speculative and conjectural); Wilczynski v. Goodman, 73 Ill. App. 3d 51, 391 N.E.2d 479 (1979) (negligent abortion, costs of rearing denied as contrary to public policy favoring right of unborn to life); Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979) (negligent failure to advise of risks of birth defects, costs of rearing mongoloid child not recoverable); Clegg v. Chase, 89 Misc. 2d 510, 391 N.Y.S.2d 966 (Sup. Ct. 1977) (negligent failure to sterilize, costs of rearing normal infant denied); Terrell v. Garcia, 496 S.W.2d 124 (Tex. Civ. App. 1973), *cert. denied*, 415 U.S. 927 (1974) (negligent sterilization, costs of rearing not recoverable); Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974) (negligent misdiagnosis of pregnancy, costs of rearing not recoverable).

45. The following cases have allowed parents of unplanned or defective children to recover damages for mental anguish: Bishop v. Byrne, 265 F. Supp. 460 (S.D. W. Va. 1967) (negligent sterilization, healthy child); Green v. Sudakin, 81 Mich. App. 545, 265 N.W.2d 411 (1978) (failure to sterilize, healthy fourth child); Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977) (negligent sterilization, healthy child); Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979) (negligent failure to advise of birth defects, mongoloid child); Karlsons v. Guerinot, 57 A.D.2d 73, 394 N.Y.S.2d 933 (1977) (negligent failure to advise of birth defects, child born with rubella syndrome).

Other courts have refused to award damages for mental suffering to wrongful life plaintiffs: Becker v. Schwartz, 46 N.Y.2d 401, 387 N.E.2d 217, 413 N.Y.S.2d 895 (1978) (negligent failure to advise of birth defects, defective child); Howard v. Lecher, 53 A.D.2d 420, 386 N.Y.S.2d 460 (1976), *aff'd*, 42 N.Y.2d 109, 366 N.E.2d 64, 397 N.Y.S.2d 363 (1977) (negligent failure to advise of birth defects); Stribling v. de Quevedo, [1980] 6 FAM. L. REP. (BNA) 2299 (Pa. Super. Ct. Jan. 10, 1980) (negligent sterilization, defective child); Speck v. Finegold, No. GD 76-07752 (Pa. Super. Ct. July 25, 1979) (negligent sterilization and abortion, defective child).

46. 73 Ill. App. 3d 51, 391 N.E.2d 479 (1979).

abortion[47] performed by Dr. Raymond Goodman. The pregnancy was not terminated, and the plaintiff, Wilczynski, gave birth to a healthy child. She brought suit against the physician and charged him with negligence and breaches of contract and warranty, alleging as damages, *inter alia*, the costs of rearing the child.[48] The trial court dismissed the complaint,[49] and the plaintiff appealed.

The Illinois Appellate Court[50] affirmed the dismissal of the breach of contract and warranty counts.[51] The dismissal of the negligence count, however, was reversed and the cause remanded for trial. In discussing plaintiff's asserted damages, the *Wilczynski* court read the complaint as having pleaded a legally sanctioned abortion[52] but, after examining Illinois public policy on the right to life as legislatively declared in the Illinois Abortion Law,[53] decided that the existence of "a normal, healthy life

47. A therapeutic abortion (for the definition of an abortion, see note 6 *supra*), is one that is performed when the mental or physical health of the mother is endangered by the continuation of her pregnancy. DAVIS, TABER'S CYCLOPEDIC MEDICAL DICTIONARY A-6 (12th ed. 1973).

48. The plaintiff alleged that her damages included expenses for the abortion, for medical and hospital costs related to the pregnancy and childbirth, and for the costs of raising and educating the child. 73 Ill. App. 3d at 53, 391 N.E.2d at 481.

49. The decision of the trial court was rendered by the Hon. David A. Canel, Judge of the Circuit Court of Cook County.

50. Mr. Justice Hartmann of the First District of the Illinois Appellate Court delivered the opinion in which Messrs. Justice Stamos and Perlin concurred.

51. *Wilczynski* relied on Rogala v. Silva, 16 Ill. App. 3d 63, 305 N.E.2d 571 (1973), in rejecting the contract and warranty claims on the ground that no separate consideration had been alleged. *Rogala* was a breach of warranty action against a physician who allegedly assured Mrs. Rogala that he would perform a sterilization during the Caesarean delivery of her fifth child and that no more pregnancies would occur. The appellate court affirmed the trial court's dismissal stating that "if the Illinois courts would consider enforceable such a warranty by a physician, it would be necessary to allege and prove the making of the warranty, the plaintiff's reliance thereon and a separate consideration." *Id.* at 65, 305 N.E.2d at 572.

52. The *Wilczynski* court focused on the fact that the abortion was performed for therapeutic reasons and concluded that such an action did not contravene either the precepts of Roe v. Wade, 410 U.S. 113 (1973), *see* note 2 *supra*, or the legislatively established public policy favoring life over abortion. 73 Ill. App. 3d at 58, 391 N.E.2d at 485. The court specifically reserved opinion on the issues presented by cases where the abortion was performed for nontherapeutic reasons. *Id.* at 58 n.3, 391 N.E.2d at 485 n.3.

53. *Wilczynski* cited the Illinois Abortion Law of 1975, which provides in pertinent part:

> It is the intention of the General Assembly of the State of Illinois to reasonably regulate abortion in conformance with the decisions of the United States Supreme Court of January 22, 1973. Without in any way restricting the right of privacy of a woman or the right of a woman to an abortion under those decisions, the General Assembly of the State of Illinois do solemnly declare and find in reaffirmation of the longstanding policy of this State, that the unborn child is a human being from the

is an esteemed right under our laws, rather than a compensable wrong."[54] Therefore, damages in the form of costs of rearing the child were not recognized.[55] The court held, however, that those damages related to the pregnancy itself were compensable, since their recovery did not involve any judgment as to the child's right to life.[56]

The *Wilczynski* holding is based upon an application of the public policy regarding abortion to a cost of rearing award in a wrongful life case. The court's reasoning is somewhat tenuous. Whether the assumed relationship between tort damages and abortion exists is questionable. Further, the court's opinion is not only inconsistent with recent decisions in the wrongful life area,[57] but is also inconsistent within itself.

The Relevance of the Illinois Abortion Law

The purpose of tort law is to provide compensation to those persons wrongfully injured in the pursuit of a legal right.[58] Since the right of a potential mother to terminate her pregnancy has been secured,[59] the negligent interference with that right gives rise to legal damages. Tort damages are measured by comparing the condition the plaintiff would have been in, had the

---

time of conception and is, therefore, a legal person for purposes of the unborn child's right to life, and is entitled to the right of life from conception. . . .

ILL. REV. STAT. ch. 38, § 81-21 (1977).

54. 73 Ill. App. 3d at 62, 391 N.E.2d at 488.

55. The *Wilczynski* court said:

> In our judgment, a public policy which deems precious even potential life while yet in the womb, at such cost and expense that condition may entail, does not countenance as compensable damage to its parent or parents those additional costs and expenses necessary to sustain and nurture that life once it comes to fruition upon and after successful birth.

Id.

56. In finding the damages related to the pregnancy recoverable, the *Wilczynski* court distinguished rearing expenses, stating: "Damages based upon hospital and medical costs attending plaintiff's unwanted pregnancy, as they affect her person, have little to do with the child's right to life and its concomitant expense of upbringing and education." *Id.* at 63, 391 N.E.2d at 489.

57. *See, e.g.*, Green v. Sudakin, 81 Mich. App. 545, 265 N.W.2d 411 (1978) (allowing costs of rearing not against public policy); Becker v. Schwartz, 46 N.Y.2d 401, 387 N.E.2d 217, 413 N.Y.S.2d 895 (1978) (allowing costs of caring for defective child who was born after defendant-physician negligently failed to test for defects); Rivera v. State, 94 Misc. 2d 157, 404 N.Y.S.2d 950 (Ct. Cl. 1978) (recovery of costs of rearing not against public policy); Speck v. Finegold, No. GD 76-07752 (Pa. Super. Ct. July 25, 1979) (allowance of costs of rearing not against public policy).

58. *E.g.*, Stills v. Gratton, 55 Cal. App. 3d 698, 703, 127 Cal. Rptr. 652, 656 (1976).

59. Roe v. Wade, 410 U.S. 113 (1973); *see* note 2 *supra*.

defendant not been negligent, with the plaintiff's subsequent impaired condition.[60]

Wilczynski's discussion of the policy stated in the Illinois Abortion Law[61] is inapposite to this analysis. This is obvious when it is applied to other fact patterns. For example, if the physician had negligently performed a therapeutic sterilization which resulted in pregnancy and birth, the court's discussion of the public policy against *abortion* would be decidedly not germane. *Wilczynski*'s focus on the fact that the birth followed a negligent termination of pregnancy ignores the broader issue of negligent interference with reproductive rights.

Comparison of Wilczynski *to Other Recent Decisions*

One recently decided negligent sterilization case dismissed public policy as a basis for denial of recovery. In so holding, *Rivera v. State*[62] reasoned that such a position would run afoul of the spirit of *Griswold v. Connecticut*[63] that certain matters, such as the right to use contraceptives, are of strictly private concern.[64] The *Rivera* court recognized the fundamental nature of the right to plan one's family and concluded that when such a right has been violated, the law must provide a remedy.[65] *Rivera* went so far as to question the validity of even the assertion that public policy required the denial of recovery based on the

60. Betancourt v. Gaylor, 136 N.J. Super. 69, 73, 344 A.2d 336, 339-40 (1975).

61. For a reproduction of the Illinois Abortion Law relied upon in *Wilczynski*, see note 53 *supra*.

62. 94 Misc. 2d 157, 404 N.Y.S.2d 950 (Ct. Cl. 1978). *Rivera* arose out of a negligent sterilization. The Court of Claims held that the plaintiff stated a valid cause of action in medical malpractice for damages for medical expenses, pain and suffering incident to pregnancy, and for the anticipated costs of rearing the unwanted child. The *Rivera* court also rejected an argument which represents the converse of the *Wilczynski* holding. Defendant asserted that the plaintiff was required to have an abortion once the pregnancy was diagnosed in order to mitigate damages. The court replied: "A rule of law which required claimant to have an abortion would constitute an invasion of privacy of the grossest and most pernicious kind." *Id.* at 161, 404 N.Y.S.2d at 954.

63. *See* note 2 *supra*.

64. The *Rivera* court cited Griswold v. Connecticut, 381 U.S. 479 (1965), for the proposition that the decision to limit one's family size involves an intimate relation between husband and wife and the role of their physician in one aspect of that relation. From that the court concluded that "[w]here a physician's negligence results in the birth of an unwanted child, a substantial interference with the fundamental rights of the parents occurs, which may well have catastrophic consequences. . . ." *Id.* at 162, 404 N.Y.S.2d at 953. The *Rivera* court observed that "this is especially true of the Riveras who already had five children." *Id.* at 162 n.5, 404 N.Y.S.2d at 953 n.5.

65. *Id.* at 164, 404 N.Y.S.2d at 954.

birth of a child.[66] *Rivera*'s statement that *Griswold* precludes the denial of rearing costs on public policy grounds[67] indicates that *Wilczynski* stands in clear contradiction to the United States Supreme Court's tripartite enunciation on reproductive rights.[68]

A recent Pennsylvania wrongful life case, whose facts, though bizarre, were similar to *Wilczynski*, reached a different result than the Illinois court. *Speck v. Finegold*[69] allowed the plaintiffs, the victims of *both* a negligent vasectomy and a negligent abortion, to recover the costs of rearing their defective child. The *Speck* court specifically rejected the trial court's reasoning that the sanctity of life precluded recovery, stating that the issue was not the value and preciousness of life but, rather, whether the defendants were negligent.[70]

Speck found *Griswold* and *Roe v. Wade* controlling on the question of whether public policy prevented recovery predicated upon a negligent abortion.[71] Although *Speck* is somewhat distinguishable from *Wilczynski* because the Pennsylvania abortion statutes do not propound public policy views on the right to life, its resolution authorizing recovery of rearing costs casts doubt on the Illinois opinion's precedential value. It seems axiomatic that legislative pronouncements must yield to the

66. "This idea [that the birth of a child cannot be regarded as a wrong] holds a place of importance in many people's religious and philosophical beliefs, although it is by no means shared by all." *Id.* at 161, 404 N.Y.S.2d at 953.

67. *Rivera* rejected the same public policy argument raised by the defendant in *Wilczynski*, stating: "It is no answer to say that a result which claimant specifically sought to avoid, might be regarded as a blessing by someone else. Such a position would cast upon the sea of public opinion what the Supreme Court has declared to be a matter of strictly private concern." *Id.* at 162, 404 N.Y.S.2d at 954.

68. *See* note 2 *supra*.

69. No. GD 76-07752 (Pa. Super. Ct. July 25, 1979). The facts of this case are compelling. In *Speck*, the plaintiff and his two children were victims of a crippling disease of the fibrous structures of the nerves, known as neurofibromatosis. He consulted his physician, Dr. Finegold, about a vasectomy in order to prevent further transmittal of the disease. Dr. Finegold performed the vasectomy, but Mrs. Speck became pregnant. The parents then conferred with Dr. Schwartz and engaged him to perform an abortion. He did so and, in the face of Mrs. Speck's protestations that the pregnancy was continuing, persistently assured her that the abortion was successful. Mrs. Speck later delivered a premature infant afflicted with neurofibromatosis, and plaintiffs brought suit for negligence against both doctors demanding, *inter alia*, the costs of caring for the infant.

70. *Id.* (slip op. at 7).

71. The *Speck* court stated that "[t]he last vestige of this public policy view was eliminated in [those] two cases decided by the Supreme Court of the United States (citations omitted)." *Id.* at 8. For a synopsis of the decisions in *Griswold* and *Roe*, see note 2 *supra*.

mandates of the nation's highest court, but the holding in *Wilczynski* implies otherwise.

The Internal Inconsistency of Wilczynski

Wilczynski v. Goodman[72] refused to allow recovery of rearing costs, but it did uphold the recoverability of damages related to the pregnancy. *Wilczynski* distinguished the two awards, finding that the former disparaged the infant's right to life while the latter did not.[73] This distinction may be applauded as equitable in that it provides at least some recovery to the injured plaintiff and a measure of deterrence to the negligent defendant.[74] It cannot, however, be hailed as logical. *Troppi v. Scarf* held that the damages from a pregnancy and the birth of the child were not separable for the purpose of applying the "benefits" rule.[75] This statement applies equally as well to the denial or award of damages based upon a public policy against abortion. *Wilczynski* is internally inconsistent because the award of pregnancy related damages recognizes the pregnancy as an injury. If the birth of the child is not cognizable as an injury due to considerations of public policy, then neither should pregnancy, *a necessary precursor to childbirth*. Recognition of both types of awards would properly include an understanding that neither denigrates the *child's* right to life; rather, they merely effect a full recovery for tortious interference with *parental* reproductive rights.

The Costs of Rearing Award

Limitation of awards in wrongful life cases to those damages related to pregnancy, as in *Wilczynski*,[76] betrays traditional tort

72. 73 Ill. App. 3d 51, 391 N.E.2d 479 (1979).

73. The distinction between these two awards is set forth in the following enigmatic statement by the *Wilczynski* court, "Damages based upon hospital and medical costs attending plaintiff's unwanted pregnancy, as they affect her person, have little to do with the child's right to life and its concomitant expense of upbringing and education." *Id.* at 63, 391 N.E.2d at 489.

74. Deterrence may well have been the motivating force behind the specious differentiation of the two awards. The *Wilczynski* court noted: "The practical effect of such a position [denying all recovery] would allow tortious conduct by a medical practitioner in such cases to be totally uncompensable. Further, unwarranted immunity would thereby be extended to the medical profession if damages ensuing from improper treatment were to be denied." *Id.*

75. *See* notes 36-41 and accompanying text *supra*.

76. *Wilczynski* buttressed its denial of the rearing costs by stating that recognition of this award should emanate from the legislature, citing Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849, *cert. denied*, 379 U.S. 945 (1964). This reliance on *Zepeda* is misplaced because in that case the illegi-

principles of recovery. The general rule of damages in a tort action is that the defendant is liable for all the injuries proximately resulting from his wrongful act.[77] There is no valid reason to depart from this rule in wrongful life cases by awarding the relatively minor pregnancy related damages and denying the more substantial rearing costs.[78] The argument supporting the recovery of the costs of raising the child is particularly compelling when the unplanned child suffers from serious birth defects and requires constant medical care.[79]

The curtailment of damages to those resulting from the pregnancy can be traced to *Coleman v. Garrison*.[80] The *Coleman* court recognized the injury to the plaintiff and awarded damages for wrongful pregnancy.[81] However, it felt that the value of a child's life should not vary with the circumstances of its birth and refused to award rearing costs. It was feared that assessing the costs of rearing the child in different family circumstances would invite "speculation" and would be "ethically questionable."[82] A recent Michigan Appellate Court case[83] relied on *Coleman* in awarding only the pregnancy related dam-

---

timate *infant* was suing its father for wrongful life. Such claims by infants have been universally denied. *See* note 8 *supra*. Further, the argument that recognition of rearing costs should await legislative action was rejected in Rivera v. State, 94 Misc. 2d 157, 404 N.Y.S.2d 950 (Ct. Cl. 1978). In refusing to acquiesce to the suggestion that any recovery should be initiated by the legislature, the *Rivera* court stated: "The fundamental principles of tort law were created by the courts not legislatures. Where legislatures have entered the field, it has frequently been in response to the unwillingness of the judiciary to respond to changing times or to depart from *stare decisis.*" *Id.* at 161, 404 N.Y.S.2d at 953.

77. Troppi v. Scarf, 31 Mich. App. 240, 245, 187 N.W.2d 511, 514 (1971).

78. Terrell v. Garcia, 496 S.W.2d 124, 130 (Tex. Civ. App. 1973) (Cadena, J., dissenting), *cert. denied*, 415 U.S. 927 (1974).

79. Indeed, although the Texas courts have refused to award the costs of rearing a healthy child, where the child is defective, the parents may recover those expenses allocable to the defective condition. *Compare* Terrell v. Garcia, 496 S.W.2d 124 (Tex. Civ. App. 1973), *cert. denied*, 415 U.S. 927 (1974) *and* Hays v. Hall, 477 S.W.2d 412 (Tex. 1972) *with* Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975).

For a discussion of the annual costs for treatment of defective children, see note 14 *supra*.

80. 327 A.2d 757 (Del. Super. 1974), *aff'd*, 349 A.2d 8 (Del. 1975). The plaintiffs in *Coleman* were the victims of a negligent sterilization. They sought damages for the costs of rearing the child, and the trial court entered summary judgment in favor of defendant on that issue.

81. *See* notes 16 & 17 and accompanying text *supra*. It was the *Coleman* case which dubbed the cause of action "wrongful pregnancy," while restricting recoverable damages to Mrs. Coleman's pain and discomfort during pregnancy and her medical expenses, the outlay for the unsuccessful tubal ligation, and Mr. Coleman's loss of consortium during her confinement.

82. The court said:

To make such a determination would, indeed, raise the unfortunate

ages. This indication of *Coleman*'s continuing vitality[84] is unfortunate.

The *Coleman* rationale for denying the costs of rearing is an abdication of judicial responsibility. To measure the effect of a child's birth into families with varying financial and emotional circumstances is no more speculative than to make a comparison of the value of the loss of an arm to a quarterback as opposed to a judge.[85] Damages measuring the value of a husband's loss of consortium are as "ethically questionable" as those based upon the birth of an unplanned child. The law makes such difficult evaluations as a matter of course. Moreover, difficulty in assessing damages is no excuse for denying recovery for those which are the proximate result of tortious conduct.[86]

The Propriety of a Setoff for Benefits Conferred

Despite a few decisions to the contrary, the trend of recent decisions favors the award of rearing costs.[87] However, even those courts which allow the award conflict on the question of whether recovery should be diminished by the value to the parent of the parent-child relationship. One view would rarely require diminution.[88] For example, if the plaintiff-mother underwent a sterilization to protect her emotional health and later discovered that the birth resulting from defendant's negligence actually benefited her emotional health, the award would be diminished by the value of that benefit. However, if the parents sought to protect the mother's physical health by submitting to a sterilization, no setoff would be required unless the birth of the child enhanced the mother's health.

---

prospect of ruling, as a matter of law, that under certain circumstances a child would not be worth the trouble and expense necessary to bring him into the world. It is not difficult to understand the reluctance of many distinguished jurists to find that the birth of a child is an injury for which the plaintiff should deserve an award of damages.

327 A.2d at 761.

83. Bushman v. Burns Clinic Medical Center, 83 Mich. App. 453, 268 N.W.2d 683 (1978).

84. *But see* Green v. Sudakin, 81 Mich. App. 545, 265 N.W.2d 411 (1978) (allowing costs of rearing).

85. For a discussion of the various factors which would affect the parents' recovery in wrongful life cases, see notes 87-91 and accompanying text *infra*.

86. *See* Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 378-79 (1972); Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562-66 (1931); Troppi v. Scarf, 31 Mich. App. 240, 260-62, 187 N.W.2d 511, 520-21 (1971).

87. *See* note 43 *supra*.

88. Custodio v. Bauer, 251 Cal. App. 2d 503, 59 Cal. Rptr. 463 (1967); *see* note 35 and accompanying text *supra*.

The better view recognizes the benefits which most persons receive from parenting, regardless of the reason they decided to limit the size of their family.[89] Under this approach, recovery could be denied if the benefits were held to outweigh the damages. For example, where the parents merely plan to forestall, rather than forego, parenthood, the jury could arrive at a recovery figure representing net damages from an unplanned child by deducting the perceived benefit of parenthood. In this instance, because the parents planned to conceive anyway and would have voluntarily incurred the expenses, *albeit* at a later time, the resulting computation would be a negative figure denoting no recovery.

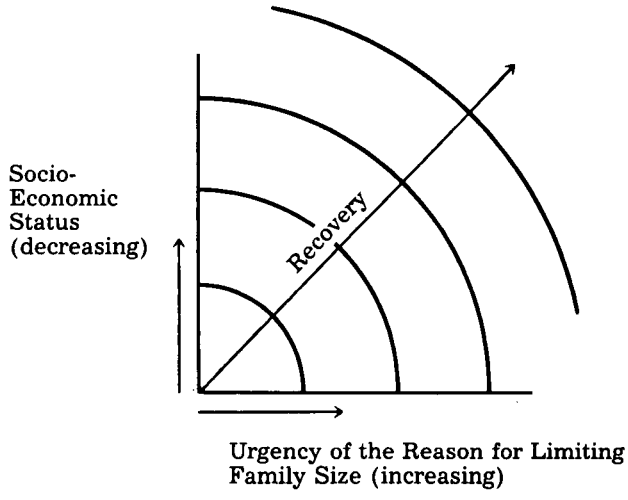
The Determination of Net Recovery

This system, however, has been criticized as needlessly complicated,[90] and alternative proposals include a system designed to coordinate two factors: the urgency of the parents' reason for seeking to limit their family size and their socio-economic status.[91] But even pursuant to this procedure, the couple

89. Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971); *see* notes 39 & 40 *supra*.

90. *See* note 41 *supra*.

91. The two factors are plotted on the graph below. The coordination of a couple's socio-economic status and the urgency of the reason for limiting their family size produces a point which lies within one of the "bands of recovery." As the bands move inward toward the intersection of the coordinates, recovery decreases until only nominal damages can be obtained. An example of a low urgency value would be the fear of physical harm to the mother *with no physical harm* resulting from the pregnancy. A higher value of the "urgency" coordinate would result where the parents were not married.



in the aforementioned example, who merely planned to postpone raising a family, could never recover the full cost of rearing the unplanned child. Yet, their award of damages would be increased as their socio-economic status decreased. If the purpose of the sterilization was to prevent the birth of a defective child, and the child was born suffering from defects; then the full costs of rearing the child should be awarded, since the reason for the contraceptive measure was an urgent one. However, as the parents' socio-economic status increased, recovery would be decreased.

Regardless of the method used to determine its value, generally some benefit to the parents should be recognized.[92] Excessive awards can also be prevented by the use of clear jury instructions on the matter of setoff for benefits and special interrogatories[93] which require the jury to indicate the various factors used to determine the damage award. A just system of recovery in wrongful life actions harmonizes the view that children are a benefit with a realization that there is some detriment to the parent whose procreative rights are interfered with by a defendant's negligence.

CONCLUSION

The cause of action for wrongful life has emerged as an inevitable concomitant of the birth control revolution. The assertion that the birth of a child is a legal damage is a novel one, and the initial reaction of the judiciary was to view the injury as *damnum absque injuria*. The public policy judgment on which this determination was based, if ever valid, has certainly yielded to the United States Supreme Court's pronouncements[94] concerning an individual's right to limit his or her family size.

It is clear that the action to redress negligent interference with reproductive rights is legally cognizable. The determination of recoverable damages, however, remains clouded by obscure and outmoded interjections of public policy into the analysis of the cause of action. It is urged that the Illinois courts

---

Note, *Redressing a Blessing: The Question of Damages for Negligently Performed Sterilization Operations*, 33 U. PITT. L. REV. 886, 897-98 (1972).

92. Most parents would admit to some reward from the parent-child relationship, at least where the child is normal and healthy.

93. Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 176 (Minn. 1977), held: "To assist the jury in measuring the various and complex elements of damages, we finally require that all future action for wrongful conception be submitted to the jury with a special verdict form and with explanatory instructions."

94. *See* note 2 *supra*.

reject the holding of *Wilczynski v. Goodman*[95] that Illinois public policy on the fetal right to life[96] requires the denial of the costs of rearing award. Recovery of rearing costs is not an aspersion upon the rights of the unborn. It is a reflection of the magnitude of the parents' right to control their reproductive activity, and as such it should be recognized in Illinois.

Margaret J. Mullen

95. 73 Ill. App. 3d 51, 391 N.E.2d 479 (1979).

96. A recent Illinois Supreme Court decision serves to diminish the importance of the state's public policy on the right to life and thus, arguably, constitutes an implied rejection of *Wilczynski*'s rationale. People v. Greer, No. 51214 (Ill. Feb. 22, 1980), held that taking the life of a fetus was not murder under the current Illinois statute. The decision was based upon the court's consideration of (1) the status of the unborn at common law, (2) sister state opinions on the question, and (3) the attitude reflected in the Illinois Abortion Act. *Accord*, State v. Brown, 378 So. 2d 916 (La. 1979). *But cf.* Wrongful Death of a Non-Viable Fetus: A New Cause of Action, Pub. Act No. 81-946 effective date Jan. 1, 1980, 1979 Ill. Legis. Serv. 2295-96 (West) (to be codified as ILL. REV. STAT. ch. 70, § 2.2) (the state of gestation or development of the plaintiff shall not foreclose maintenance of a wrongful death action).