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Wrongful Pregnancy Actions: Should Courts Allow Recovery for Childrearing Expenses?—*Burke v. Rivo*, 406 Mass. 764, 551 N.E.2d 1 (1990)

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Note

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I. INTRODUCTION

Today, the costs of rearing children have become astronomical. Many people simply cannot afford to have the number of children they might otherwise want. Consequently, many use birth control; however, most birth control methods do not provide 100 percent certainty against pregnancy. Thus, some people seek more drastic procedures that they believe will completely eliminate the possibility of pregnancy.

Medical procedures exist that allow both men and women the opportunity to be sterilized. However, sometimes sterilization is not successful, and the woman becomes pregnant with a child that the parents believed would never be conceived due to the sterilization. Faced with the prospect of financial crisis due to the unexpected child, the parents may sue the physician who performed the sterilization procedure.

"Wrongful birth" or "wrongful pregnancy" actions are generally synonymous terms for a type of medical malpractice involving a physician's negligent performance of a sterilization procedure.[1] In this cause of action, the patient and his or her spouse sue the physician for costs associated with the childbirth, pain and suffering (both physical and psychological), and sometimes the costs of raising the child until he or she reaches the age of majority.[2] This action must be distinguished from a claim of "wrongful life," which is brought in the name of, and on behalf of, the newborn child and seeks damages for the child's unwanted existence. The vast majority of courts have rejected such "wrongful life" claims.[3]

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1. Commentators are divided on which term is appropriate. For various viewpoints, *see generally* J. STEIN, DAMAGES AND RECOVERY § 221.2, at 323 (Cum. Supp. 1989); DeVries, *Wrongful Life, Wrongful Birth, and Wrongful Pregnancy: Judicial Divergence on the Birth-Related Torts*, 20 FORUM 207 (1985); Note, *Wrongful Birth: A Child of Tort Comes of Age*, 40 U. CIN. L. REV. 65 (1981). This Note focuses specifically on sterilization, however, the principles discussed herein would also apply to other physician-assisted means of birth control.

   The subject of wrongful pregnancy has generated a plethora of law review articles. For discussions of various approaches to wrongful pregnancy, *see generally* Clinite, *Wrongful Birth: The Appropriate Measure of Damages*, 70 ILL. B. J. 772 (1982). Zaslow, *Wrongful Conception, Wrongful Birth, and Wrongful Life: The Perameters of Liability*, 10 LEGAL ASPECTS OF MED. PRACTICE 5 (1982); Note, *Parents in Wrongful Birth Action Are Entitled to Recover the Extraordinary Expenses of Raising a Defective Child to Age of Majority but Are Not Entitled to Recover Ordinary Expenses of Rearing a Normal or Defective Child*—Ramey v. Fassoulas, 414 So. 2d 198 (Fla. 3d Dist. Ct. App. 1982), FLA. ST. U.L. REV. 312 (1982); Comment, *Wrongful Conception: Who Pays for Bringing Up Baby?*, 47 FORDHAM L. REV. 418 (1978); Recent Developments, *Tort Law: Wrongful Birth and Wrongful Life Actions*—Siemieniec v. Lutheran General Hospital, 117 Ill. 2d 230, 512 N.E.2d 691 (1987), 11 HARV. J.L. & PUB. POL'Y 859 (1988); Case Comment, *Tort Law—Wrongful Birth: Public Policy Precludes Award of Child Rearing Costs*—Kingsbury v. Smith, 441 A. 2d 1003 (N.H. 1982), 17 SUFFOLK U.L. REV. 280 (1983); Recent Development, *To Be or Not To Be: The Pennsylvania General Assembly Eliminates Wrongful Birth and Life Actions*, 34 VILL. L. REV. 681 (1989).
2. *See infra* notes 4-5 and accompanying text.
3. *See, e.g.*, Elliott v. Brown, 361 So. 2d 546 (Ala. 1978); Lininger v. Eisenbaum, 764 P.2d 1202 (Colo. 1988)(en banc); Moores v. Lucas, 405 So. 2d 1022 (Fla. App. 1981); Blake v. Cruz, 108 Idaho 253, 698 P.2d 315 (1984); Siemieniec v. Lutheran Gen. Hosp. 117 Ill. 2d 230, 512 N.E.2d 691 (1987); Bruggeman v. Schimke, 239 Kan. 245, 718 P.2d 635 (1986); Pitre v. Opelousas Gen. Hosp. 517 So. 2d 1019 (La. App. 1987), *writ granted*, 519 So. 2d 105 (La. 1987); Strohmaier v. Associates in Obstetrics & Gynecology, 122 Mich. App. 116, 332 N.W.2d 432 (1982); Smith v. Cote, 128 N.H.

The majority of courts addressing wrongful pregnancy claims have held that the plaintiffs have a valid cause of action, and consequently courts have awarded the traditional tort remedies of general and special damages relating to actual medical services incident to the birth and delivery, but not the costs of raising the child.[4] Thus, the controversy in recent cases has been over awarding childrearing costs. Several courts have departed from the majority and have awarded these damages.[5]

Burke v. Rivo[6] is the latest in this relatively new line of cases. The *Burke* court held that in addition to recovering all costs associated with the birth, the parents were entitled to recover from the physician the costs of raising their child, offset against the benefits received by the parents of having their child.[7] This Note examines the *Burke* court's decision to allow childrearing damages, pointing out its strengths and weaknesses, and suggests that other courts generally follow *Burke* but with some major additions.

Part II begins the Note with a discussion of the *Burke* opinions. It outlines the facts of the *Burke* case, discusses the majority's allowance of childrearing damages, and concludes with a discussion of the dissent's concern over a potential negative impact of such an award on the child.

Part III notes the three major theories used by courts to deny

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231, 513 A.2d 341 (1986); Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); Azzolino v. Dingfelder, 315 N.C. 103, 337 S.E.2d 528 (1985), *cert denied*, 479 U.S. 835 (1986); Ellis v. Sherman, 512 Pa. 14, 515 A.2d 1327 (1986); Nelson v. Krusen, 678 S.W.2d 918 (Tex. 1984); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975). *But see* Turpin v. Sortini 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982).

4. *See, e.g.*, Boone v. Mullendore, 416 So. 2d 718 (Ala. 1982); Wilbur v. Kerr, 275 Ark. 239, 628 S.W.2d 568 (1982); Flowers v. District of Columbia, 478 A.2d 1073 (D.C. App. 1984); Coleman v. Garrison, 327 A.2d 757 (Del. Super. 1974), *aff'd*, 349 A.2d 8 (Del. 1975); Cockrum v. Baumgartner, 95 Ill. 2d 193, 447 N.E.2d 385 (1983); Schork v. Huber, 648 S.W.2d 861 (Ky. 1983); Sala v. Tomlinson, 73 A.D.2d 724, 422 N.Y.S.2d 506 (1979); Mason v. Western Pa. Hosp., 499 Pa. 484, 453 A.2d 974 (1982); Smith v. Gore, 728 S.W.2d 738 (Tenn. 1987).

5. *See, e.g.*, University of Ariz. Health Sciences Center v. Superior Court, 136 Ariz. 579, 585, 667 P.2d 1294, 1297-99 (1983); Stills v. Gratton, 55 Cal. App. 3d 698, 708-09, 127 Cal. Rptr. 652, 658-59 (1976); Custodio v. Bauer, 251 Cal. App. 2d 303, 325, 59 Cal. Rptr. 463, 477 (1967); Ochs v. Borrelli, 187 Conn. 253, 259-60, 445 A.2d 883, 886 (1982); Cockrum v. Baumgartner, 99 Ill. App. 3d 271, 273-74, 425 N.E.2d 968, 970 (1981), *rev'd*, 95 Ill. 2d 193, 447 N.E.2d 385 (1983); Burke v. Rivo, 406 Mass. 764, 772, 551 N.E.2d 1, 6 (1990); Troppi v. Scarf, 31 Mich. App. 240, 257, 187 N.W.2d 511, 519 (1971); Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 175-76 (Minn. 1977); Marciniak v. Lundborg, 153 Wis. 2d 59, 450 N.W.2d 243, 245-46 (1990). *But cf.* Lininger v. Eisenbaum, 764 P.2d 1202, 1207 (Colo. 1988)(limiting award of childrearing damages to cases where child is abnormal). *See generally* J. STEIN, *supra* note 1, § 221.4, at 330 (Cum. Supp. 1989).

6. 406 Mass. 764, 551 N.E.2d 1 (1990).

7. *Id.* at 772, 551 N.E.2d at 6.

childrearing expenses. These theories are the overriding benefit theory, the adverse effect on the child theory, and the speculative damages theory. The Note concludes that each of these theories is without merit.

Part IV focuses on a two-part rule used by some courts to offset the damage award against the benefits of parenthood. The Note concludes that this benefit rule with its same interest limitation, if properly applied, can operate to make fair recoveries possible.

Part V is devoted to discussing whether courts should consider the availability of abortion and/or adoption as potential reducers of damages. While recognizing that not everyone considers abortion or adoption as viable alternatives to parenthood, the Note concludes that because both abortion and adoption are legal alternatives in many jurisdictions, courts in those states must consider them in their damages analyse.

Part VI discusses a method for determining what interest the parents sought to prevent by undergoing a sterilization procedure. Such a "motivational analysis" is crucial in the wrongful pregnancy context since, as the Note points out, it is a fair and equitable method for properly ascertaining the correct amount of damages.

Part VII is the Note's conclusion. It provides a summary and review of the Note's important points.

II. *BURKE V. RIVO*[8]

A. Facts

In December 1983, Carole Burke met with her physician, Elliot Rivo, M.D., to discuss her desire not to have additional children. The Burkes were suffering financial difficulties, and Mrs. Burke wanted to return to work. According to the Burkes, Dr. Rivo recommended Mrs. Burke undergo a bioplar cauterization[9] procedure and that Dr. Rivo guaranteed Mrs. Burke would not become pregnant again.[10] Thus, in February 1984, Dr. Rivo performed a laparoscopic bilateral tubal ligation by bipolar cauterization.[11] On June 25, 1985, a pregnancy test confirmed Mrs. Burke was pregnant. Subsequently, on February 12, 1986, she gave birth to her fourth healthy child, and the next day she underwent a second sterilization operation known as a bilateral salpingec-

8. 406 Mass. 764, 551 N.E.2d 1 (1990).
9. A bipolar cauterization involves burning the fallopian tubes. *See* DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 170, 232 (26th ed. 1981) [hereinafter DORLAND'S] (combination of separate definitions of "bipolar" and "cauterization").
10. Brief for Appellant at 3, Burke v. Rivo, 406 Mass. 764, 551 N.E.2d 1 (1990).
11. The procedure would have involved constricting the fallopian tubes with ligatures and then burning them so that the tubes become severed. See DORLAND'S, *supra* note 9, at 743 (definition of "ligation" and "tubal 1.").

tomy.[12] Laboratory reports revealed that following the first operation, there had be a recanalization[13] of Mrs. Burke's left fallopian tube. The Burkes alleged that if Dr. Rivo had explained to Mrs. Burke the risk of recanalization associated with the original procedure, however small, she would initially have chosen a different and more certain sterilization procedure.[14]

The Burkes sought recovery for emotional distress sustained as a result of the unwanted pregnancy, other damages directly associated with the birth, and the costs of raising their child.[15] The trial judge reported the question concerning the proper measure of damages to the state appeals court and the case was subsequently transferred to the Supreme Judicial Court of Massachusetts.[16] Specifically, the trial judge's question was:

> The question of the proper measure of damages recoverable by the parents of a normal, healthy child who was conceived and born (1) following the defendant physician's alleged negligent performance of a sterilization procedure on the mother, and (2) following the physician's alleged guarantee that the sterilization procedure would prevent any future pregnancy.[17]

The trial court was seeking rules of law to be applied to the facts of the Burke's case because there was no prior Massachusetts decision addressing this question. Thus, the Supreme Judicial Court of Massachusetts had to determine whether recovery of childrearing costs was permissible in wrongful pregnancy cases. A discussion of the majority and dissenting opinions follows.

B. Majority Opinion

The majority held that the proper measure of damages included the costs incident to the birth, including emotional distress, and the costs of rearing the child if the Burkes' reason for seeking sterilization was based on economic or financial considerations.[18] However, the court further held that the consequences of the physician's negligence, including childrearing costs, could be offset against the current and future benefits the Burkes enjoyed by having the child.[19]

The court's ruling that the Burkes could recover all damages "directly associated with the birth (sometimes including damages for par-

12. A bilateral salpingectomy involves the excision of both uterine tubes. *See* BLAKISTON'S GOULD MEDICAL DICTIONARY 170, 1214 (4th ed. 1979)(combination of separate definitions of "bilateral" and "salpingectomy").
13. Recanalization involves the re-forming of channels, here the fallopian tubes. *See* DORLAND'S, *supra* note 9, at 211 (definition of "canalization").
14. Brief for Appellant at 4, Burke v. Rivo, 406 Mass. 764, 551 N.E.2d 1 (1990).
15. *Id.* at 7-8.
16. Burke v. Rivo, 406 Mass. 764, 764-65, 551 N.E.2d 1, 1-2 (1990).
17. *Id.*
18. *Id.* at 772, 551 N.E.2d at 6.
19. *Id.*

ents' emotional distress)"[20] was in harmony with the majority of jurisdictions that have considered the issue.[21] However, the court's holding that childrearing expenses were also recoverable was previously adopted by only a substantial minority of other courts.[22]

C. Dissent

The dissenters disagreed with the majority over awarding childrearing costs.[23] Joining the majority of other jurisdictions which have denied childrearing costs, the dissenters stated that public policy precluded such an award. Specifically, the dissenters argued that public policy precluded recognizing a child's life as a loss,[24] and that awarding childrearing costs would have potentially adverse effects on children and families.[25]

III. THEORIES DENYING RECOVERY FOR CHILDREARING EXPENSES: SHOULD THEY BE FOLLOWED?

Normal tort principles require awarding childrearing costs where the plaintiff establishes liability.[26] These costs are reasonably foreseeable and/or natural and probable consequences of the physician's negligence.[27] Thus, the only basis for denying or limiting these traditional damages must be on public policy grounds.[28]

Three theories have been used by other courts to justify their decisions that childrearing costs should not be awarded: (1) the overriding benefit theory, (2) the adverse effect on the child theory, and (3) the speculative damages theory. The *Burke* court rejected each of these theories in determining that childrearing costs were properly awarded.[29] Each theory is discussed below.

A. The Overriding Benefit Theory

Courts embracing the overriding benefit theory hold that the benefit conferred on parents by a child (many courts require a healthy,

20. *Id.* at 766, 551 N.E.2d at 3.
21. *See* cases cited *supra* notes 4-5.
22. *See* cases cited *supra* note 5.
23. Burke v. Rivo, 406 Mass. 764, 773, 551 N.E.2d 1, 6 (1990).
24. *Id.* at 775, 551 N.E.2d at 7.
25. *Id.*
26. *Id.* at 769, 551 N.E.2d at 4. The *Burke* court also discussed contract principles, specifically noting that Dr. Rivo could be held liable for breach of guarantee. *Id.* at 766-767, 551 N.E.2d at 2-3. However, this Note is limited to discussing tort law, and thus will focus on that part of the *Burke* decision.
27. Other courts have failed to recognize childrearing costs as reasonably foreseeable and/or probable consequences of the physician's negligence. *See* cases cited *supra* note 4.
28. Burke v. Rivo, 406 Mass. 764, 769, 551 N.E.2d 1, 4 (1990).
29. *Id.* at 769-71, 551 N.E.3d at 4-6.

normal child) outweighs any injury the parents may have incurred as a matter of law.[30] In rejecting this theory, the *Burke* court stated that it "simply lacks verisimilitude."[31] When an individual has sought medical intervention to keep from having a child, that person has unequivocally shown that for him or her, the benefits of parenthood did not outweigh the burdens of having a child.[32]

Furthermore, public policy does not favor a notion that the birth of an unplanned, albeit healthy child, results in no damage to its parents or that any damage is outweighed by the benefits as a matter of law.[33] For example, contraceptive methods are used every day to prevent the birth of healthy children. To have a rule saying that for reasons of public policy contraceptive failure results in no damage as a matter of law ignores the fact that millions of people use contraceptives daily.[34] The conduct of those millions is surely indicative of community sentiment, which is the foundation of public policy.

B. The Adverse Effect on the Child Theory

Another theory used to disallow recovery for childrearing costs posits that some day the child might be adversely affected by learning he or she was unwanted and that someone else paid his or her expenses.[35] The *Burke* court noted that, "Courts expressing concern

30. *See, e.g.*, Boone v. Mullendore, 416 So. 2d 718, 722-23 (Ala. 1982)(restricted to normal healthy child); Coleman v. Garrison, 349 A.2d 8, 13-14 (Del. Super. 1975)(restricted to normal healthy child); Fassoulas v. Ramey, 450 So. 2d 822, 823-24, (Fla. 1984); Public Health Trust v. Brown, 388 So. 2d 1084, 1085 (Fla. 1980)(restricted to normal healthy child); Fulton-DeKalb Hosp. Auth. v. Graves, 314 S.E.2d 653, 655-56 (Ga. 1984); Wilczynski v. Goodman, 73 Ill. App. 2d 51, 62, 391 N.E.2d 479, 487 (1979)(restricted to normal healthy child); Schork v. Huber, 648 S.W.2d 861, 862 (Ky. 1983)(restricted to normal healthy child); Maggard v. McKelway, 627 S.W.2d 44, 47 (Ky. App. 1981); Mason v. Western Pa. Hosp., 499 Pa. 484, 487, 453 A.2d 974, 976 (1982); Christensen v. Thornby, 192 Minn. 123, 126, 255 N.W. 620, 622 (1934) (earliest case found; restricted to normal healthy child); Berman v. Allan, 80 N.J. 421, 432, 404 A.2d 8,14 (1979)(restricted to normal healthy child); Weintraub v. Brown, 98 A.D.2d 339, 348-49, 470 N.Y.S.2d 634, 641 (1983); Sala v. Tomlinson, 73 A.D.2d 724, 726, 422 N.Y.S.2d 506, 509 (1979)(restricted to normal healthy child); Terrell v. Garcia, 496 S.W.2d 124, 128 (Tex.Civ.App. 1973), *cert. denied*, 415 U.S. 927 (1974) (restricted to normal healthy child); Rieck v. Medical Protective Co., 64 Wis. 2d 514, 518 n.6, 219 N.W.2d 242, 244 n.6 (1974)(restricted to normal healthy child).

31. Burke v. Rivo, 406 Mass. 764, 769, 551 N.E.2d 1, 4 (1990)(citation omitted).

32. *Id.*

33. Brief for Appellant at 15, Burke v. Rivo, 406 Mass. 764, 551 N.E.2d1 (1990).

34. Troppi v. Scarf, 31 Mich. App. 240, 253, 187 N.W.2d 511, 517 (1971).

35. Burke v. Rivo, 406 Mass. 764, 770, 551 N.E.2d 1, 4 (citation omitted). *See, e.g.*, Boone v. Mullendore, 416 So. 2d 718, 722 (Ala. 1982); University of Ariz. Health Sciences Center v. Superior Court, 136 Ariz. 579, 592, 667 P.2d 1294, 1302 (1983)(en banc)(Gordon, V.C.J., dissenting); Wilbur v. Kerr, 275 Ark. 239, 244, 628 S.W.2d 568, 571 (1982); Coleman v. Garrison, 349 A.2d 8, 14 (Del. 1975); McKernan v. Aasheim, 102 Wash. 2d 411, 417, 687 P.2d 850, 855 (1984).

about the effect on the child nevertheless allow the parents to recover certain direct expenses from the negligent physician without expressing concern about harm to the child when the child learns that he or she was unwanted."[36] In fact, the once unwanted child's knowledge that someone other than the parents had paid for his or her upbringing may alleviate the child's distress at the knowledge of having once been unwanted.[37]

Furthermore, this fear of an adverse effect on the child is predicated on the tenuous assumption that the child is in fact "damage." To the contrary, "[t]he allowance of rearing costs is not an aspersion upon the value of the child's life . . . [but] is instead a recognition of the importance of the parents' fundamental right to control their reproductivity."[38] In other words, the child itself is not "damage," rather it is the cost of raising the child, which is the reasonably foreseeable consequence of the physician's negligence, that is the damage.

C. The Speculative Damages Theory

A final theory used to disallow childrearing damages is that they are too speculative or are unreasonably disproportionate to the physician's negligence.[39] Rejecting this theory as well, the *Burke* court stated that, "[t]he determination of the anticipated costs of child-rearing *[sic]* is no more complicated or fanciful than many calculations of future losses made every day in tort cases."[40] For example, if a physician negligently cares for a newborn child, damage calculations would be performed regarding the newborn's earning capacity and expected medical expenses over the child's lifetime. Furthermore, childrearing expenses should be no more difficult to calculate than damages for pain and suffering or mental anguish, and population studies are readily available to provide figures for childrearing costs.[41]

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36. Burke v. Rivo, 406 Mass. 764, 770, 551 N.E.2d 1, 4 (1990)(citation omitted).
37. *Id.* at 770, 551 N.E.2d at 4-5.
38. Cockrum v. Baumgartner, 99 Ill. App. 3d 271, 273, 425 N.E.2d 968, 970 (1981), *rev'd*, 95 Ill. 2d 193, 447 N.E.2d 385 (1983), *cert denied sub. nom.*, Raja v. Michael Reese Hosp. & Med. Center, 464 U.S. 846 (1983). *See also* Rivera v. New York, 94 Misc. 2d 157, 162, 404 N.Y.S.2d 950, 953 (Ct. Cl. 1978)(stating "[W]here a physician's negligence results in the birth of an unwanted child, a substantial interference with the fundamental rights of the parent occurs, which may well have catastrophic financial consequences."). *See generally* Comment, *Wrongful Life: Birth Control Spawns a Tort*, 13 J. MARSHALL L. REV. 401 (1980).
39. Burke v. Rivo, 406 Mass. 764, 771, 551 N.E.2d 1, 5 (citation omitted). *See e.g.*, Boone v. Mullendore, 416 So. 2d 718, 721 (Ala. 1982); Schork v. Huber, 648 S.W.2d 861, 863 (Ky. 1983); Terrell v. Garcia, 496 S.W.2d 124, 127 (Tex.Civ.App. 1973); James G. v. Caserta, 322 S.W.2d 872, 878 (W.Va. 1985); Rieck v. Medical Protective Co., 46 Wis. 2d 514, 519, 219 N.W.2d 242, 245 (1974); Beardsley v. Wierdsma, 650 P.2d 288, 292 (Wyo. 1982).
40. Burke v. Rivo, 406 Mass. 764, 771, 551 N.E.2d 1, 5 (1990).
41. Marciniak v. Lundborg, 153 Wis. 2d 59, 66, 450 N.W.2d 243, 246 (1990). *See also*

IV. OFFSETTING CHILDREARING EXPENSES AGAINST THE BENEFITS OF HAVING A CHILD

A number of courts holding childrearing costs recoverable have recognized that children add a great deal to their parents' lives, and therefore have offset the damage award against these benefits.[42] The

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Troppi v. Scarf, 31 Mich. App. 240, 261, 187 N.W.2d 511, 520-21 (1971)(holding cost of childrearing is a computation routinely performed in countless cases), *leave to appeal denied*, 385 Mich. 753 (1971); Terrell v. Garcia, 496 S.W.2d 124, 129 (Tex. Civ. App. 1973)(Cadena, J., dissenting)(complicated damages occur in many cases), *cert. denied*, 415 U.S. 927 (1974). Many sources exist relating to computation of childrearing expenses. *See generally* Ciecka, *Estimating the Costs of Children in Wrongful Birth Cases*, 28 TRIAL LAW. GUIDE 297 (1984); Franz, *Calculating Damages in Wrongful Pregnancy Cases*, in The Practical Lawyer's Manual on Pretrial Preparations, 165, 166-67 (1985)(discussing U.S.D.A. study of costs of childbearing); Note, *Wrongful Birth Damages: Mandate and Mishandling by Judicial Fiat*, 13 VAL. U.L. REV. 127, 152 n.170 (1978)(table provided by Population Reference Bureau giving costs of childraising in 1977).

Regarding the speculative damages argument, Nebraska courts have long allowed triers of fact to make difficult damages calculations in wrongful death cases. *See, e.g.*, Crewdson v. Burlington N. R.R. Co., 234 Neb. 631, 643-45, 452 N.W.2d 270 (1990)(holding in action for wrongful death of child of majority age damages may be recovered for loss of contributions reasonably expected to be made by child, and for the loss of society, comfort, and companionship of the child); Garvin v. Coover, 202 Neb. 582, 586-87, 276 N.W.2d 225, 227-28 (1979)(holding damages for loss of society, comfort, and companionship resulting from wrongful death of child being by their very nature problematical, the amount is peculiarly for jury to determine); Caradori v. Fitch, 200 Neb. 186, 194, 263 N.W.2d 649, 655 (1978)(holding measure of damages for wrongful death of minor child includes loss of society, comfort, and companionship of child); Selders v. Armentrout, 192 Neb. 291, 292-93, 220 N.W.2d 222, 223-24 (1974)(holding amount of damages for wrongful death of minor child is difficult to estimate and is peculiarly within the province of jury to determine); State Farm Mut. Auto. Ins. Co. v. Selders, 187 Neb. 343, 345-46, 190 N.W.2d 789, 791 (1971)(holding measure of damages in action for wrongful death of minor child is the pecuniary loss which parent sustains by reason of being deprived of the child's services throughout his minority and the loss of contributions reasonably expected to be made after reaching majority). Therefore, it would be illogical for Nebraska courts to exclude childrearing expenses on the pretext that those amounts would be too difficult to ascertain. In fact, some courts have specifically analogized wrongful pregnancy with wrongful death damages. *See, e.g.*, Hartke v. McKelway, 707 F.2d 1544, 1552 n.8 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 983 (1983); Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 176 (Minn. 1977).

42. *See, e.g.*, University of Ariz. Health Sciences Center v. Superior Court, 136 Ariz. 579, 585, 667 P.2d 1294, 1297-99 (1983); Stills v. Gratton, 55 Cal. App. 3d 698, 708-09, 127 Cal. Rptr. 652, 658-59 (1976); Ochs v. Borrelli, 187 Conn. 253, 259-60, 445 A.2d 883, 886 (1982); Troppi v. Scarf, 31 Mich. App. 240, 255, 187 N.W.2d 511, 519 (1971); Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 175-76 (Minn. 1977). *But see* Custodio v. Bauer, 251 Cal. App. 2d 303, 325, 59 Cal. Rptr. 463, 477 (1967)(no offset for benefits); Cockrum v. Baumgartner, 99 Ill. App. 3d 271, 273-74, 425 N.E.2d 968, 970 (1981), *rev'd*, 95 Ill. 2d 193, 447 N.E.2d 385 (1983)(same). This type of offset appears to be a recognition that although the overriding benefit theory goes too far in stating the benefits of having a child outweigh all damage, some benefit may exist to offset part of the cost. However, a number of courts have ruled out such

Burke court followed these cases and ruled that any benefits Mr. and Mrs. Burke received from having their child must be offset against their damage award.[43]

The basis for this offset comes from the "benefit rule" set out in section 920 of the *Restatement (Second) of Torts*,[44] which states:

> When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable.[45]

Facially, the *Burke* court appears to have correctly applied the benefit rule. However, the court failed to fully address the "same interest" limitation contained in comment b.[46] Specifically, the same interest limitation states that "[d]amages resulting from an invasion of one interest are not diminished by showing that another interest has benefited."[47]

Applied to the wrongful pregnancy context, the same interest limitation requires an identification of the interest a plaintiff sought to protect in attempting to avoid conception, and a determination of whether a special benefit to that interest was conferred upon the plaintiff as a result of the physician's negligent conduct.[48] While the *Burke* court identified the interest the Burkes sought to protect by sterilization, namely the economic stability of their family, the court's failure to adequately recognize the effect of the same interest limitation is apparent in its broad pronouncement that, "[t]he trier of fact should offset against the cost of rearing the child the benefit, if any, the parents received and will receive from having their child."[49]

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recovery altogether on the theory that it is exceedingly difficult to weigh the intangible benefits of a healthy baby against the cold economic burden of raising the baby to adulthood. J. STEIN, *supra* note 1, § 221.4, at 330-31 (Cum. Supp. 1989)(listing numerous cases).

43. Burke v. Rivo, 406 Mass. 764, 772, 551 N.E.2d 1, 6 (1990).
44. RESTATEMENT (SECOND) OF TORTS § 920 (1977).
45. *Id.*
46. *Id.* at comment b.
47. *Id.*
48. Note, *Recovery of Childrearing Expenses in Wrongful Birth Cases: A Motivational Analysis*, 32 EMORY L.J. 1167, 1180 (1983).
49. Burke v. Rivo, 406 Mass. 764, 772, 551 N.E. 1, 6 (1990)(footnote omitted). Other courts have differed on how to apply the same interest limitation. For a broad reading of the same interest limitation, *see, e.g.*, Troppi v. Scarf, 31 Mich. App. 240, 255, 187 N.W.2d 511, 518 (1971)(holding it would be unsound to separate noneconomic damage from economic damage of unplanned child in applying the same interest rule), *leave to appeal denied*, 385 Mich. 753 (1971); Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 176 (Minn. 1977)(holding trier of fact must reduce award of childrearing expenses by the value of the child's aid, comfort, and society which will benefit the parents for the duration of their lives). For a narrow reading of the same interest limitation, *see, e.g.*, Custodio v. Bauer, 251 Cal. App. 2d 303, 323, 59 Cal. Rptr. 463, 476 (1967)(holding offsetting benefit must be to the interest protected); Cockrum v. Baumgartner, 99 Ill. App. 3d 271, 274, 425 N.E.2d

A correct application of the benefit rule and same interest limitation requires the trier of fact to first determine the interest sought to be protected. This interest identification is best done through a "motivational analysis."[50] Then, any benefit conferred upon that interest by the physician's negligence may be set off from the damage award, whether pecuniary or nonpecuniary. Such an approach is far more likely to attain an equitable damage award, from both the plaintiff's and defendant's perspectives, than either an overly broad or overly narrow application of the benefits rule and same interest limitation. For example, a broad interpretation of the same interest limitation would allow prenatal pecuniary costs to be offset by postnatal nonpecuniary benefits of parenthood, resulting in a potentially significant, if not unfair, reduction in the plaintiff's recoverable damages.[51] On the other hand, a narrow reading of the limitation would not allow for the offsetting of pecuniary interests with nonpecuniary interests, and as such may provide a windfall to the plaintiff.[52] Thus, the best approach for a court to take in determining whether the physician's negligent conduct has conferred a special benefit to the interest of the plaintiff that was harmed, is to focus its analysis on discerning exactly what interest the plaintiff sought to protect by undergoing the sterilization operation.[53]

V. IS ABORTION OR ADOPTION AN OPTION?

Many women become pregnant each year and decide to either terminate their pregnancy or give their children up for adoption. Rather than seeking child support from unwed fathers, for instance, mothers may decide not to incur childrearing expenses by giving the baby up for adoption or aborting the fetus. Similarly, couples whose birth control does not work may not sue the pharmaceutical company, for example, but instead decide to handle the situation themselves. Why then, should the parents of an unplanned child be able to collect dam-

968, 970 (1981)(holding the rewards of parenthood should not be allowed to mitigate childrearing costs because they are emotional in nature and do nothing to benefit the plaintiff's injured financial interests), *rev'd*, 95 Ill. 2d 193, 447 N.E.2d 385 (1983), *cert. denied sub. nom.*, Raja v. Michael Reese Hosp. & Med. Center, 464 U.S. 846 (1983).

50. The "motivational analysis" originates in Note, *supra* note 48, and is discussed *infra* beginning at Part VI.

51. Note, *supra* note 48, at 1181. *See, e.g.*, Boone v. Mullendore, 416 So. 2d 718, 721 (Ala. 1982)(Faulkner, J., concurring specially)(broad interpretation of benefit rule and same interest limitation); University of Ariz. Health Sciences Center v. Superior Court, 136 Ariz. 579, 586, 667 P.2d 1294, 1299-1300 (1983)(broad interpretation of benefit rule and same interest limitation). *See also* cases cited *supra* note 49.

52. Note, *supra* note 48, at 1182. For cases giving a narrow reading to the same interest limitation, see cases cited *supra* note 49.

53. *Id.* at 1183 (quoting RESTATEMENT (SECOND) OF TORTS § 920 (1977)).

ages from a physician who performed the failed sterilization procedure when they could have *avoided* the financial burdens associated with childrearing by considering the options of abortion or adoption?

The "avoidable consequences doctrine" set forth in section 918 of the *Restatement (Second) of Torts*[54] states that, "[o]ne 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 commission of the tort."[55] Although the *Burke* court did not expressly reject the doctrine, rejection can be inferred from the court's statement that, "[w]e also firmly reject any suggestion that the availability of abortion or of adoption furnishes a basis for limiting damages payable by a physician but for whose negligence the child would not have been conceived . . .,"[56] since applied to wrongful pregnancy cases, "avoidance of substantial harm can be effectuated in two ways, either by aborting the fetus within legally prescribed time limits or by placing the child for adoption."[57]

A number of other courts have specifically addressed the avoidable consequences doctrine in the wrongful pregnancy context and held that foregoing abortion or adoption should not be a factor in evaluating the plaintiff's damages,[58] while still others have held the doctrine applicable.[59] Those courts which refused to consider the abortion or

54. RESTATEMENT (SECOND) OF TORTS § 918 (1977).

55. *Id.*

56. Burke v. Rivo, 406 Mass. 764, 770, 551 N.E.2d 1, 4 (1990).

57. Note, *supra* note 48, at 1184.

58. *See, e.g.*, University of Ariz. Health Sciences Center v. Superior Court, 136 Ariz. 579, 586 n.5, 667 P.2d 1294, 1301 n.5 (1983); Morris v. Freudenfeld, 135 Cal. App. 3d 23, 31, 185 Cal. Rptr. 76, 80 (1982); Jones v. Malinowski, 299 Md. 257, 274, 473 A.2d 429, 437-38 (1984); Troppi v. Scarf, 31 Mich. App. 240, 260, 187 N.W.2d 511, 520 (1971), *leave to appeal denied*, 385 Mich. 753 (1971); Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 176 (Minn. 1977); Rivera v. New York, 94 Misc. 2d 157, 162-63, 404 N.Y.S.2d 950, 954 (Ct. Cl. 1978); Mason v. Western Pa. Hosp., 286 Pa. Super. 354, 370, 428 A.2d 1366, 1376 (1981)(Brosky, J., concurring), *modified*, 499 Pa. 484, 453 A.2d 974 (1982); Smith v. Gore, 728 S.W.2d 738, 751-52 (Tenn. 1987); Marciniak v. Lundborg, 153 Wis. 2d 59, 69, 450 N.W.2d 243, 247-48 (1990). *See generally* J. STEIN, *supra* note 1, § 221.8, at 339-40.

59. *See, e.g.*, Boone v. Mullendore, 416 So. 2d 718, 728 (Ala. 1982)(Jones and Shore, J.J., concurring specially) "Inherent in the mother's decision to carry the child to full term . . . is her decision to rear the child."); Coleman v. Garrison, 327 A.2d 757, 761 (Del. Super. Ct. 1974) "[T]his Court does not find it reasonable for a defendant to be assessed damages representing support for a child when the plaintiffs choose to raise the child even where other lawful alternatives are available. . . . In so doing, plaintiff-parents are thus indicating that the benefits . . . outweigh any hardship or expense incident to the raising of the child."), *aff'd*, 349 A.2d 8 (Del. 1975); Ziemba v. Sternberg, 45 App. Div. 2d 230, 234, 357 N.Y.S.2d 265, 270 (1974)(Cordamore, J., dissenting) "[S]ince a legal abortion was an option still available at that time, failure to [make use of] this legal alternative should operate to bar [plaintiff's] present claim for damages."). *See generally* J. STEIN, *supra* note 1, § 221.8, at 340 (citing two cases).

adoption alternatives ignored fundamental tort law principles. For example, writing in the mid-1930s Professor McCormick stated that, "[a]ny suffering or disability incurred by one who has sustained personal injury, when the same could have been avoided by submitting to treatment by a physician selected with reasonable care, must be excluded as a ground of recovery."[60]

Furthermore, applying the avoidable consequences doctrine in its proper form would not necessarily, or as a matter of law, require the trier of fact to dismiss the plaintiff's claim to childrearing damages because the plaintiff refused abortion or adoption. The *Restatement (Second)'s* version of the doctrine clearly states that the plaintiff's damages are to be reduced only if he or she could have taken *reasonable* steps to avoid injury.[61] Thus, under the avoidable consequences doctrine, if a plaintiff chooses to raise the child, she must bear the financial burden that goes with this choice, but only if the trier of fact were to find such a result reasonable and equitable. To label such a requirement as "judicial coercion," effectively forcing the plaintiff to abort or place her child up for adoption, would be inaccurate. In fact, the doctrine only places upon the plaintiff the burden of making a choice, the reasonableness of which would be determined later by the trier of fact.[62] Such a case-by-case determination of whether it would have been "reasonable in the circumstances" for the plaintiff to have avoided increasing her injury is what the avoidable consequences doctrine contemplates.[63]

By necessity then, whether the trier of fact considers abortion or adoption reasonable will depend on the facts of the particular case. In that regard, one court recognized that, "[w]here ethical or religious scruples prevent a plaintiff from submitting to . . . surgery, the trier of

60. C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 36, at 136 (1935). Although McCormick continued by stating, "[i]t is held, however, that the victim may use his own judgment about submitting to a dangerous or serious operation. . ." *id.*, using this statement to justify a rule precluding consideration of abortion would be incorrect. Apparently, Professor McCormick was concerned that a person not be required to undergo a medical treatment that could be considered dangerous or serious in terms of risk for that person. Yet the wide-spread use of abortion by the American public creates a strong inference that for many, if not most, women a properly performed abortion is not a particularly dangerous medical procedure. Thus, consistent with this Note's analysis, whether abortion was a reasonable alternative to continued pregnancy and subsequent childbirth for any particular person is a question for the trier of fact. *See infra* notes 61-63 and accompanying text.

61. RESTATEMENT (SECOND) OF TORTS § 918 (1977)(emphasis added). *See also* C. MCCORMICK, *supra* note 60, § 35, at 133 (stating only reasonable steps to minimize injury are required).

62. Note, *supra* note 48, at 1187.

63. Note, *Judicial Limitations on Damages Recoverable Fort the Wrongful Birth of a Healthy Infant*, 68 VA. L. REV. 1311, 1328 (1982). *See also* Note, *supra* note 41, at 165-67.

fact may consider these scruples as part of the circumstances which bear upon the reasonableness of his conduct."[64] Thus, the doctrine provides for all situations which might arise in wrongful birth cases. For example, plaintiffs opposed to abortion on moral or religious grounds can take comfort in knowing their convictions will be considered in the trier of fact's assessment of the reasonableness of their choice not to avail themselves of one mitigating method.[65] Conversely, some plaintiffs may not indicate any moral or religious unwillingness to have an abortion.[66] Ultimately, however, since abortion is legal in most states, it would be illogical not to consider it as an element of mitigation in those jurisdictions.[67]

VI. DISCERNING THE INTEREST SOUGHT TO BE PROTECTED

What interests of the parents are harmed by the doctor's negligent performance? In answering this question, the *Burke* court focused on the parents' motivation in attempting to avoid childbirth:

> If the parents' desire to avoid the birth of a child was founded on eugenic reasons (avoidance of a feared genetic defect) or was founded on therapeutic reasons (concern for the mother's health) and if a healthy normal baby is born, the justification for allowing recovery of the costs of rearing a normal child to maturity is far less than when, to conserve family resources, the parents sought unsuccessfully to avoid conceiving another child.[68]

Undertaking such a "motivational analysis" as the *Burke* court did, is a far more sensible alternative than the "child-as-injury" ap-

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64. Troppi v. Scarf, 31 Mich. App. 240, 258 n.11, 187 N.W.2d 511, 519 n.11 (1971), *leave to appeal denied*, 385 Mich. 753 (1971).

65. Those opposed to abortion may take further comfort in one commentator's observation and suggestion that, "[t]he defendant has the burden of demonstrating that the plaintiffs' conduct was unreasonable; and in the wrongful birth case, the burden should not be a light one." Note, *supra* note 63, at 1328.

66. *See, e.g.*, Ziemba v. Sternberg, 45 A.D.2d 230, 357 N.Y.S.2d 265 (1974).

67. The avoidable consequences doctrine has long been law in Nebraska. The supreme court accepted the doctrine in Colton v. Benes, 176 Neb. 483, 126 N.W.2d 652 (1964), holding:

> [O]ne injured by another's tort is required to exercise ordinary care to seek medical or surgical treatment so as to effect a cure and minimize damages, on pain of not being allowed [recovery] for consequences of the injury which could have been averted by the exercise of such care.

Id. at 497, 126 N.W.2d at 661. Furthermore, both abortion and adoption are legal alternatives to parenthood under Nebraska law. *See* NEB. REV. STAT. §§ 28-325 to 347 (Reissue 1989)(abortion); NEB. REV. STAT. §§ 43-101 to 160 (Reissue 1988)(adoption). Therefore, for Nebraska courts to exclude an avoidable consequences analysis when the doctrine has been long applied, and where abortion and adoption are legal alternatives to parenthood, would be illogical under this Note's analysis.

68. Burke v. Rivo, 406 Mass. 764, 772, 551 N.E.2d 1, 5 (1990)(citations omitted).

proach.[69] One commentator insightfully reasoned that since tort law is designed to compensate individuals for losses to legally recognized interests, courts must determine the specific interests the parents sought to protect through sterilization in order to assess appropriate damages. While these interests might be quite diverse or varied, ignoring them would mean that the courts have not devoted proper attention to *why* the sterilization operations were sought in the first place.[70] In other words,

> Only after the motivation, the "why," has been discovered may the courts properly determine "how much." Rather than taking the "child-as-injury" approach, then, is it suggested that application of a motivational analysis would best clarify the interests the plaintiff sought to protect, and thereby allow proper compensation for any injuries thereto.[71]

Thus, under a "motivational analysis," the inquiry focuses on the costs of childbirth and raising the child, *not* the presence of the child itself. As one court recognized, the parents seek damages because the direct, foreseeable, and natural consequences of the physician's negligence forced upon them the very burdens they sought to avoid through sterilization. The parents do not want damages because they do not love and want to keep the unplanned child.[72]

Courts have recognized three motives behind limiting the size of a family: (1) therapeutic—to prevent harm to the mother's health;[73] (2) eugenic—to prevent the birth of a defective or unhealthy child;[74] and (3) socioeconomic—to avoid the additional expense of raising a child or to avoid disruption of the parents' careers or lifestyles.[75] Damage awards may vary according to the reason or motive behind the sterilization, and motives may be intertwined. For simplicity's sake, the discussion below keeps the motives separate.

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69. Note, *supra* note 48, at 1169 (containing an in-depth discussion of the motivational analysis).

70. *Id.* at 1170 (quoting W. PROSSER, HANDBOOK ON THE LAW OF TORTS § 1 (4th ed. 1971)).

71. *Id.*

72. Jones v. Malinowski, 229 Md. 257, 270, 473 A.2d 429, 435-36 (1985).

73. *See, e.g.*, Hartke v. McKelway, 707 F.2d 1544, 1556 (D.C. Cir. 1983); Wilczynski v. Goodman, 73 Ill. App. 3d 51, 53, 391 N.E.2d 479, 481 (1979); Christensen v. Thornby, 192 Minn. 123, 123, 255 N.W. 620, 621 (1934).

74. *See, e.g.*, Ochs v. Borrelli, 187 Conn. 253, 254-55, 455 A.2d 883, 883-883 (1982); Speck v. Finegold, 268 Pa. Super. 342, 348 n.4, 408 A.2d 496, 499 n.4 (1979), *aff'd*, 497 Pa. 77, 439 A.2d 110 (1981).

75. *See, e.g.*, Troppi v. Scarf, 31 Mich. App. 240, 244, 187 N.W.2d 511, 512 (1971), *leave to appeal denied*, 385 Mich. 753 (1971); Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 171 (Minn. 1977); Betancourt v. Gaylor, 136 N.J. Super. 69, 74, 344 A.2d 336, 339 (1975); Speck v. Finegold, 268 Pa. Super. 342, 348 n.4, 408 A.2d 496, 499 n.4 (1979), *aff'd*, 497 Pa. 77, 439 A.2d 110 (1981).

A. Damages Permissible in a Therapeutic Context

Sterilization sought for therapeutic reasons is meant to protect the physical or mental health of the patient or the spouse of the patient. Thus, if the health of the woman is the only interest sought to be protected, the only forseaable injury was impairment of the woman's health by pregnancy and childbirth.[76] The California Court of Appeals discussed therapeutic sterilization in *Custodio v. Bauer*.[77] Addressing the question of whether to allow birth expenses, the court stated:

> The purpose of the operation was to save the wife from the hazards to her life which were incident to childbirth. It was not the alleged purpose to save the expense incident to pregnancy and delivery. . . . The expenses alleged are incident to the bearing of a child, and their avoidance is remote from the avowed purpose of the operation.[78]

Following *Custodio's* rational, damages for a negligent therapeutic sterilization should be limited to the costs of the failed operation, compensation for any injuries to the woman's health and possibly mental anguish associated with the birth.[79] The result is that the only costs recoverable would be those the operation was designed to avoid in the first place.

Application of the benefit rule[80] and same interest limitation[81] in the therapeutic context would be severely restricted. The damages recoverable in a wrongful pregnancy action prompted by a negligent therapeutic sterilization would be limited to the cost of the operation, both general and special damages related to any injury to the mother's health as a result of pregnancy, and any mental anguish.[82] Thus, any offset by the benefit rule would be virtually non-existent. Under the same interest limitation, the defendant's offset would be restricted to any specific benefit bestowed on the mother's health as a result of the pregnancy and childbirth, since that was the interest sought to be protected.[83] Childrearing costs would not be recoverable, because they were not costs sought to be avoided by the operation. However, if the physician's negligence caused the mother some kind of disabling injury such that she could not raise her children without special assistance, then any "extraordinary" expenses associated with this special

76. Note, *supra* note 48, at 1190.
77. 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967). *See also* Note, *supra* note 48, at 1190 (discussing *Custodio*).
78. *Id.* at 318, 59 Cal. Rptr. at 473 (quoting Christensen v. Thornby, 192 Minn. 123, 126, 255 N.W. 620, 622 (1934)).
79. Note, *supra* note 48, at 1190-91.
80. *See supra* notes 44-53 and accompanying text.
81. *See supra* notes 47-53 and accompanying text.
82. Note, *supra* note 48, at 1191.
83. *Id.*

aid ought to be recoverable.[84] In other words, the recovery should include the *extra* costs associated with raising the child, for example the cost of a "nanny" or nurse, if, but only if, these extra costs flow from a harm to the health of the mother.

Applying the avoidable consequences doctrine to the therapeutic context, the physician might argue that the only amount recoverable is the cost of the operation, since the fetus could have been aborted immediately after pregnancy was discovered. Yet, because the question is one of reasonableness and would involve different considerations in every case, the answer might vary with different triers of fact. Since, however, normal childrearing costs would generally not be recoverable in this situation, mitigation by abortion or adoption appears an unlikely requirement.[85]

B. Damages Permissible in a Eugenic Context

Where a couple seeks sterilization for eugenic reasons, the interests sought to be protected are easily identifiable.[86] Simply put, the parents want to avoid the risk of giving birth to a defective or unhealthy child and the emotional and pecuniary costs associated therewith. Thus, unless the child is born unhealthy or defective, the parents should be limited in their recovery to the cost of the negligent operation and compensation for any "side effects." Additionally, recovery ought to be allowed for emotional distress until the parents were, or can be, assured of the child's good health.[87] No childrearing expenses should be allowed if the child is in good health.

However, where a defective or unhealthy child is born as the result of a negligent eugenic sterilization, the parents should be allowed to recover substantial damages, in addition to pregnancy and birth-related costs, including damages for mental and emotional distress, and extraordinary childrearing expenses.[88] The parents' interest injured by the physician's negligence is "the financial and emotional 'expense' of raising and impaired child."[89] Thus, since it is highly improbable that the parents would realize a pecuniary benefit from the birth of a defective or unhealthy child, "application of benefit rule would be limited to offsetting the post-birth 'rewards of parenthood' against the . . . nonpecuniary damages for emotional distress and mental anguish."[90] Furthermore, the physician might argue that the avoidable consequences doctrine requires consideration of the abortion or adoption al-

84. *Id.* at 1191-92.
85. *Id.* at 1192.
86. *Id.*
87. *Id.* at 1194.
88. *Id.* at 1192-93.
89. *Id.* at 1193.
90. *Id.*

ternatives. Yet, as noted above, that is a reasonableness question for the trier of fact which may vary with the particular case.

C. Damages Permissible in a Socioeconomic Context

The socioeconomic motivation behind a sterilization operation can be divided into two main categories: "pure economic" and "socioeconomic."[91] "Pure economic" may be the most common reason for undergoing a sterilization operation.[92] By doing so, the couple is simply trying to avoid the financial hardshsips associated with having a child. If economic considerations are the sole purpose force behind the sterilization, arguably the parents deserve a liberal recovery of childrearing expenses. The interest sought to be protected is purely pecuniary in nature. Therefore, the parents should be awarded damages for all provable financial injuries. A narrow interpretation of the benefit rule's same interest limitation should be used so as to best compensate the parents for their new and sudden financial burden, thrust upon them by the physician's negligence. Thus, only economic benefits received by the parents as a result of the child's birth should be considered in mitigation of damages. However, since the economic benefits a child contributes to the family coffers are relatively few, any offset allowed will likely have a negligible impact on the damage award.[93]

The parents' motivation in seeking sterilization is most difficult to ascertain in the "socioeconomic" cases. Here, the parents choose not to have a child because it would burden their careers or lifestyle.[94] Thus, since economic factors are not primarily the issue, the interests involved are more non-pecuniary in nature. As such, damages should be awarded for any injury to those non-pecuniary interests in addition to the traditional pregnancy and birth-related expenses. Applying the benefit rule, the trier of fact should offset the nonpecuniary damages claimed by the plaintiff against the benefits of parenthood.[95] Certainly such an offset could significantly reduce the plaintiff's recovery,[96] however it is clearly a fair result under the traditional tort principles. Furthermore, childrearing expenses *per se* should not be awarded where they were not sought to be avoided. If, on the other hand, the plaintiff can prove one purpose for the operation was to avoid childrearing costs, then such costs should be allowed.

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91. *Id.* at 1194-95.
92. *Id.* at 1194.
93. *Id* at 1195 (footnote omitted). *See also* Troppi v. Scarf, 31 Mich. App. 240, 255, 187 N.W.2d 511, 518 (1971), *leave to appeal denied*, 385 Mich. 753 (1971)(stating there is a growing recognition that the financial services parents can expect from offspring are largely illusory).
94. Note, *supra* note 48, at 1195.
95. *Id.* at 1196.
96. *Id.*

It has been asserted that socioeconomic sterilizations present the most difficult cases in which to apply the avoidable consequences doctrine, since neither the health of the mother nor that of the child is at stake.[97] However, since abortion and adoption are currently legal alternatives in many jurisdictions, the trier of fact should consider them.

VII. CONCLUSION

In order that our tort law system functions in a just manner, courts must recognize and consistently apply the principles on which the system was founded. The benefit rule with its same interest limitation and the avoidable consequences doctrine are fundamental parts of the system. Furthermore, there exists the principle that a negligent tortfeasor is liable for all of the reasonably foreseeable consequences of his negligence. For courts to discard these traditional tort ideals in the specific area of wrongful pregnancy would be for them to shut their eyes to what a wrongful pregnancy case truly is—a medical malpractice action, which in turn is nothing other than a negligence claim.

A correct application of the benefit rule is important where courts apply the rule to offset the plaintiff's damages. The same interest limitation requires a determination of the interest sought to be protected by the sterilization before any offset for benefits can be made against the damage award.

Consideration of abortion and/or adoption as potential reducers of the damage award, where they are legal choices, is essential under the avoidable consequences doctrine. Clearly, the potential of a reduction in a damage award because a plaintiff failed to abort her fetus is controversial considering the debate over the propriety of abortions generally. However, because some states allow abortions it would be illogical to ignore abortion as a factor in those jurisdictions. Furthermore, because the trier of fact will evaluate a choice not to abort under a case-by-case reasonableness standard, those opposed to abortion will have an opportunity to prove choosing abortion was unreasonable for them.

The motivational analysis is the most effective way of determining the interest sought to be protected. The three fundamental groups of interests, therapeutic, eugenic, and socioeconomic, each require special analyses to determine the types of awardable damages. The best case for childrearing damages is in the "pure economic" context where the parents' sole interest in sterilization was to keep from incurring the expenses associated with raising a child.

The *Burke* opinion is certainly a step in the right direction in making correct applications of the above described theories reality. Although the *Burke* court did not correctly apply every aspect of these

97. *Id.*

theories, its generally enlightened approach to the wrongful pregnancy cause of actions should be used to guide courts like Nebraska's,[98] who have never considered a wrongful pregnancy claim.

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98. Nebraska courts must also correctly apply the provisions of the Nebraska Hospital-Medical Liability Act. NEB. REV. STAT. §§ 44-2801 to 2855 (Reissue 1988). The Act provides a one million dollar cap on medical malpractice damage awards provided the physician previously qualified to come under the scope of the Act, and the patient did not elect to be outside the Act. However, the Act does not dictate the types of damages recoverable. Thus, although a wrongful pregnancy plaintiff could be limited to a one million dollar maximum recovery, the Act would not prohibit part of that amount from being childrearing damages.