Wrongful Life and Wrongful Birth Causes of Action: Suggestions for a Consistent Analysis

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COMMENTS

WRONGFUL LIFE AND WRONGFUL BIRTH CAUSES OF ACTION — SUGGESTIONS FOR A CONSISTENT ANALYSIS

I. INTRODUCTION

During the past decade, American courts have been confronted with an unprecedented number of actions seeking to impose liability on another, usually a physician, for wrongfully causing a child to be born.1 These actions fall into two general categories. “Wrongful life” actions are those brought by or on behalf of an infant claiming that he was born into a disadvantageous life by reason of another’s negligence.2 “Wrongful birth” actions, on the other hand, are brought by the parents or family of a wrongfully born child demanding compensation for losses they have sustained as the result of the birth.3 It is essential to distinguish these two kinds of cases since most courts have treated them quite differently.4 Further, it is important not to confuse these actions with a suit resulting from a prenatal injury. Instead of asserting that the defendant’s act or omission caused a defective condition in the child, wrongful life and wrongful birth suits involve a claim that the defendant’s negligence actually caused the child’s birth.5

1. Although the earliest wrongful birth cause of action dates back to 1934 (See Christensen v. Thornby, 192 Minn. 123, 255 N.W. 620 (1934)), all but a handful of the claims handled by appellate courts have arisen in the 1970’s.
5. See Berman v. Allan, 80 N.J. 421, 404 A.2d 8, 11 (1979); Gleitman v. Cos-
As the number of wrongful life and wrongful birth cases grows, it becomes increasingly important for courts to formulate a coherent framework within which to analyze these claims. In most instances, the courts have failed to rise to this challenge. While wrongful life causes of action have for the most part been rejected, there continues to be some dispute and confusion regarding the appropriate rationale for denial of the claims. The theoretical problems presented by a wrongful birth claim are even more pronounced, causing dissimilar conclusions with respect to whether such a claim ought to be recognized, and what damages, if any, may properly be recovered. In order to propose a rational and satisfactory analytical approach to these difficult claims, it is necessary to trace the development of the wrongful life and wrongful birth causes of action and explore and evaluate recent analytical trends.

II. REJECTION OF WRONGFUL LIFE ACTIONS: SEARCH FOR A RATIONALE

There are two basic varieties of wrongful life actions. The first involves a child born out of wedlock who claims another’s tortious conduct caused him to be born and suffer the stigma of illegitimacy. The second, and more common type of wrongful life action, is brought by or on behalf of a physically or mentally impaired child against a physician whose alleged negligence caused the child’s birth. The claim in this latter

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7. See text accompanying notes 13-53 infra.

8. See notes 70-108 and accompanying text infra.


type of action is not that the defendant physician caused the child's defects, but that he caused the actual birth by negligently failing to provide the child's parents with information which would have prompted them to prevent or terminate the mother's pregnancy.\textsuperscript{12}

The first two wrongful life actions brought before appellate courts were of the first variety. In\textit{Zepeda v. Zepeda},\textsuperscript{13} an Illinois court considered a complaint filed on behalf of an illegitimate infant against the child's father alleging that he had induced the child's mother to engage in sexual relations by promises of marriage when, in fact, he was already married. The complaint further alleged that the father's wrongful conduct caused the child to be conceived and born.\textsuperscript{14} The plaintiff sought damages for the deprivation of his right to be a legitimate child, to have a normal home and family, to inherit from and through his father and for being stigmatized as a bastard.\textsuperscript{15} Though finding that the father's conduct was tortious and discussing the hardships faced by an illegitimate child,\textsuperscript{16} the court nonetheless denied the child's claim stating:

\begin{quote}
Recognition of the Plaintiff's claim means creation of a new tort: a cause of action for wrongful life. The legal implications of such a tort are vast, the social impact could be staggering . . . . Encouragement would extend to all others born into the world under conditions they might regard as adverse.\textsuperscript{17}
\end{quote}

Thus, due to the far-reaching social implications involved in allowing such a claim, the court determined that recognition of the plaintiff's cause of action could come only from the legislature after a thorough study of the consequences.\textsuperscript{18}

A similar rationale was adopted in\textit{Williams v. State}.\textsuperscript{19} In\textit{Williams} an infant born out of wedlock to a mentally defi-
cient mother as a result of a sexual assault on the mother while she was confined to a state institution, filed suit against the State of New York claiming the State had negligently failed to prevent the assault and had thereby caused the child to be conceived and born. As in Zepeda, the child demanded compensation for injuries suffered as a result of its being an illegitimate child. In a brief opinion, the Court of Appeals of New York cited Zepeda and held that it would not recognize a cause of action for "[b]eing born under one set of circumstances rather than another."20

The public policy concerns expressed by the Zepeda and Williams courts were echoed nearly ten years later in Slawek v. Stroh.21 Confronted with a complaint virtually identical to the one in Zepeda,22 the Wisconsin Supreme Court held that although it probably had the power to recognize a cause of action for wrongful life,23 the "vast social ramifications" which would attend the creation of such an action made it "the type of public policy decision that should be made by the people of this state or their elected legislative representatives."24

Against the backdrop of these so-called "illegitimate-child cases" and their broad public policy arguments, the second variety of wrongful life actions appeared: those brought by impaired infants against negligent physicians. Though courts were less comfortable applying the Zepeda policy arguments to a defective child case, they continued to cite the illegitimate-child cases as authority for the proposition that a cause of action for wrongful life was contrary to public policy.25 Several commentators have lamented over the fact that the first

20. Id. at 484, 276 N.Y.S.2d at 887, 223 N.E.2d at 344.
22. Although the child's allegations in Slawek v. Stroh were very similar to those of the child in Zepeda v. Zepeda, the claim arose in a somewhat different context. In Slawek the child filed a counterclaim after he had been joined as a defendant in an action brought by his father seeking to establish his paternity. See 62 Wis. 2d at 300, 301, 215 N.W.2d at 13.
23. The court held that it probably had the power to create a wrongful life cause of action by virtue of Wis. Const. art. I, § 9 which reads: "Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; . . . ." 62 Wis. 2d at 317, 215 N.W.2d at 22.
24. 62 Wis. 2d at 318, 215 N.W.2d at 22.
25. See, e.g., Gleitman v. Cosgrove, 49 N.J. 22, —, 227 A.2d 689, 692 (citing Zepeda and Williams and noting that wrongful life claims had been denied for "public policy reasons"); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 772, 233 N.W.2d 372, 375 (citing Slawek and stating that although the public policy considerations
wrongful life claims were the rather "frivolous" illegitimate-child cases, which have been characterized as "very poor vehicles through which to argue for the creation of a new cause of action."26 Indeed, there are important ways in which one type of action varies from the other. First, the defendant fathers in Zepeda and Slawek were as much responsible for the fact of the child's illegitimacy as they were for its birth.27 In an action against a physician, on the other hand, the child claims the defendant's negligence caused its life, but not the defective condition from which it suffers. Thus, to the extent they complain of the child's condition rather than its birth, the illegitimate child suits may not be wrongful life actions at all. Second, the defective child actions more closely resemble a traditional tort claim for medical malpractice. A physician has breached his duty to fully inform his patient and his negligence has resulted in the birth of a child with serious mental or physical defects. Finally, the fact that the results of the defendant's negligence in a defective child action are more severe than those in an illegitimate child action may serve to distinguish the two.28 Whether or not courts have taken notice of the foregoing distinctions, they have expressed their dissatisfaction with using a Zepeda-type approach when faced with a defective child case, simply by more carefully considering the latter claims and finding more substantial reasons for denying them.

The first, and perhaps most influential wrongful life case involving an impaired child was Gleitman v. Cosgrove.29 In Gleitman, it was alleged that the defendant physicians had informed Mrs. Gleitman that the measles she had contracted during the first month of her pregnancy would have no effect on her child. Subsequently, she gave birth to a son who had serious physical defects caused by the rubella. Two causes of

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27. But see Torts — Wrongful Birth and Wrongful Life, supra note 5, at 177 n.55 where the author notes that Zepeda arguably fits the wrongful life mold since the father could not have married the mother and thereby legitimated the child.


action were asserted against the physicians, one by the parents and the other on behalf of the child, each claiming that the defendants' negligence deprived the mother of the opportunity to abort the pregnancy and prevent the birth of a defective child. Both the parents and the child sought compensation for the "wrongful birth" the defendants had caused. Both causes of action were dismissed upon a motion for nonsuit.

In considering the child's claim, the Gleitman majority was careful to point out that there was no suggestion that the defendants could have done anything that would have decreased the possibility that the infant, then in gestation, would be born with defects. Therefore, the infant was required to claim not that he should have been born without defects, but that he should not have been born at all. The court went on to note that since the measure of damages in tort actions is compensatory, the infant plaintiff was asking the court to measure the difference between his life with defects against the "utter void of non-existence." The court concluded that the child's claim must be rejected since "[b]y asserting that he should not have been born, the infant plaintiff [made] it logically impossible for a court to measure his alleged damages because of the impossibility of making the comparison required by compensatory remedies." The Gleitman court's "unascertainable damage" rationale became fairly well accepted, and a number of courts adopted the notion as the basis for denying wrongful life claims arising from fact situations similar to the Gleitman case.

However, the rationale is not without its detractors. Just-
tice Jacobs, dissenting in *Gleitman*, contended that a “judicial system engaged daily in evaluating such matters as pain and suffering which admittedly have ‘no known dimensions mathematical or financial’” was equipped to evaluate the harm caused by the physicians’ breach of their legal duty in the *Gleitman* case.37 Further, to deny all relief, while relieving the wrongdoer of all liability, merely because the damages cannot be ascertained with certainty is a perversion of fundamental principles of justice.38 Justice Jacobs’ arguments might be expected to be particularly persuasive in those states, such as Wisconsin, which have “right to remedy” provisions in their state constitutions.39

Some commentators have suggested that the proper method of evaluating an infant plaintiff’s damages is to simply compensate the child for pain and suffering it has experienced by reason of the doctor having caused its birth and thereafter off-set whatever benefits the trier of fact determines have accrued to the child as a result of its birth.40 Presumably, this would avoid the “being or nothingness” problems involved in the *Gleitman* approach.

In light of the foregoing arguments, the New Jersey Supreme Court was persuaded to rethink its “unascertainable damage” rationale when considering a wrongful life claim in the recent case of *Berman v. Allan*.41 There, the court held that although difficulty in ascertaining damages might be a relevant factor in evaluating a claim, it would be reluctant to deny the validity of a wrongful life claim solely upon that basis.42 However, the court felt there was a different reason to conclude the child’s claim must fail: the child had suffered no legally cognizable damage by being brought into existence. Observing the reverence with which life is regarded in our nation’s constitution and in our society, the court determined

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*Cauising One to be Born: Development of a Tort for “Wrongful Life”,* supra note 26, at 61-62.

37. 49 N.J. at ___, 227 A.2d at 704 (dissenting opinion).

38. Id. (citing to Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931)).

39. *See* Wis. Const. art. I, § 9; *but see* note 23 and accompanying text *supra*.


41. 80 N.J. 421, 404 A.2d 8 (1979).

42. Id. at ___, 404 A.2d at 12.
that "life — whether experienced with or without a major handicap — is more precious than non-life."\textsuperscript{43}

Presented this way, the New Jersey court's reasoning in \textit{Berman} is subject to criticism. First, the court simply appears to be making the balance that it held was impossible or difficult to make in \textit{Gleitman}. In essence, the court held as a matter of law that as between being and the "utter void of non-existence," being is always preferable. Thus, although the court purports to be no longer concerned with the measure of damages, it is through that measuring process itself that the court justifies denying the infant's cause of action. Further, one commentator has complained that even if the court is justified in taking a "measure of damages" approach, it has no basis for creating an "irrebuttable presumption that existence, no matter how onerous, is preferable to nonexistence or nonbirth."\textsuperscript{44} Though many persons afflicted with birth defects may lead meaningful and productive lives, all cannot. Those children, for example, born with defects so serious that they cannot experience those pleasures which make life worthwhile but must endure substantial physical pain and mental torment, can hardly be said to be benefited by the mere act of breathing.\textsuperscript{45} Since it would appear, in situations such as these, that reasonable men could differ as to whether a child suffered an injury by being born in its impaired condition, a determination by a trier of fact would be preferable to the \textit{Berman} court's irrebuttable presumption.

Though problems exist with the analysis used in \textit{Berman}, there seemed to be a shift in focus toward what now appears to be the most recent analytical trend in wrongful life cases; that is, evaluating the rights and interests purportedly interfered with by the defendant physician rather than the nature and amount of damage suffered by the child. The first case in which this right and interest approach was most clearly adopted was in \textit{Park v. Chessin}.\textsuperscript{46} There, Mrs. Park had consulted the defendant obstetricians after giving birth to a son who suffered from a hereditary kidney disorder and died sev-

\textsuperscript{43} Id.
\textsuperscript{44} \textit{Torts — Wrongful Birth and Wrongful Life}, supra note 5, at 180.
\textsuperscript{45} Id. at 180 n.72. One example of such an affliction is Tay-Sachs disease. A child born with this defect suffers two or three years of substantial pain before dying.
\textsuperscript{46} 60 A.D.2d 80, 400 N.Y.S.2d 110 (1977).
eral days after birth. The defendants were claimed to have advised Mrs. Park that the affliction was not hereditary and that there was practically no chance a future child would suffer from the disease. A year later, a second child was born to Mrs. Park. Contrary to the defendants’ projections, the child had the kidney disease and survived for only two and one half years. The parents brought an action claiming damages for medical expenses, emotional distress and loss of the wife’s services, and an action was brought on behalf of the deceased child’s estate claiming damages for pain and suffering. The trial term of the Supreme Court of New York denied the defendants’ motion to dismiss and the appellate division affirmed, holding that the child, as well as the parents, stated a cause of action. With respect to the child’s cause of action the appellate division determined that the defendants had interfered with “the fundamental right of a child to be born as a whole, functional human being,” and that a right of action existed based upon that violation. The New York Court of Appeals was not of the same mind, and reversed the appellate division, ruling that there was absolutely no precedent for recognizing such a right.

This absence of precedent apparently caused the California Court of Appeals little concern when it recognized a cause of action for wrongful life in Curlender v. Bio-Science Laboratories. In Curlender, a child born with Tay-Sachs disease brought suit against two laboratories her parents had retained to administer tests designed to disclose whether either parent was a carrier of genes which could result in the conception and birth of a child with the disease. It was alleged that the parents received “incorrect and inaccurate” information due to the defendants’ negligence and thereby failed to avail

47. 88 Misc. 2d 222, 387 N.Y.S.2d 204 (Sup. Ct. 1976).
49. Id. at 88, 400 N.Y.S.2d at 114.
themselves of an eugenic abortion which could have prevented the defective birth.\textsuperscript{52}

After discussing, and apparently approving of, the New York Appellate Division’s recognition of a “fundamental right to be born as a whole, functional human being,”\textsuperscript{53} the \textit{Curlender} court stated:

We have no difficulty in ascertaining and finding the existence of a duty owed by medical laboratories engaged in genetic testing to parents and their as yet unborn children to use ordinary care in administration of available tests for the purpose of providing information concerning potential genetic defects in the unborn.\textsuperscript{54}

However, even assuming the defendant in \textit{Curlender} owed a duty to the plaintiff child, it must still be determined what right or interest the defendant has interfered with by reason of its negligence. It cannot, of course, be said that had the defendant not been negligent the child would have been born without defects. The most that can be said is that but for the negligence the child would not have been born at all. Thus, the right or interest asserted on behalf of the child is not the fundamental right to be born as a whole, functional human being, but the right not to be born at all. No such right, nor even one analogous to it, has ever been recognized in our judicial system and it is unlikely such a right will ever be acknowledged.\textsuperscript{55} If one has not interfered with a legally protected right or interest of another, there is no tortious conduct with respect to the other.\textsuperscript{56} As recognized by the Alabama Supreme Court in a recent wrongful life action:

Fundamental to the recognition of such a cause of action is the notion that the defendant has violated some legal right

\textsuperscript{52} Id. at __, 165 Cal. Rptr. at 480.
\textsuperscript{53} Id. at __, 165 Cal. Rptr. at 484.
\textsuperscript{54} Id. at __, 165 Cal. Rptr. at 488.
\textsuperscript{55} Although many jurisdictions recognize a physician’s duty not to negligently harm an unborn child, a right not to be born does not logically follow. Principles applied to prenatal tort actions are different than those applied to wrongful life actions. Different too are the principles relevant to the “right to die” cases. See \textit{In re Quinlan}, 70 N.J. 10, 355 A.2d 647 (1976); \textit{Note}, \textit{The Right to Die a Natural Death: A Discussion of In re Quinlan and the California Natural Death Act}, 46 CIN. L. REV. 192 (1977).
\textsuperscript{56} W. PROSSER, TORTS (4th ed. 1971) § 53 at 325.
of plaintiff's and as a result she has suffered injury . . . .
We hold that there is no legal right not to be born and the
plaintiff has no cause of action for 'wrongful life.'

By concentrating their attention on the rights and inter-
estests involved in a wrongful life action, it would seem that
courts could avoid the pitfalls of the other rationales dis-
cussed above. Since the physician has interfered with no le-
gally protected interest of the child and is therefore not sub-
ject to any tort liability, the difficult "being or nothingness"
damage questions are no longer relevant. Similarly, the argu-
ments that no right should exist without a remedy to protect
it, or that a wrongdoer should not be allowed to escape liabil-
ity would no longer be germane. There simply is no right not
to be born on the part of the child and, thus, no liability on
the part of the physician. Though rather simplistic in form,
the "legally protected right" analysis appears to offer the most
rational basis for evaluating wrongful life claims.

III. WRONGFUL BIRTH: THE PARENTS' CAUSE OF ACTION

Courts have generally recognized that parents bringing a
wrongful birth action stand in a much different position than
a child asserting a wrongful life claim. The parents seek
compensation not for the new life itself but for the pecuniary
loss and the pain and suffering which result from the birth; a
birth the parents would have avoided but for the negligence of
the defendant.

Wrongful birth actions may result from a variety of fact
situations. Parents of a child born with "rubella syndrome"
have sued claiming they would have sought an eugenic abor-
tion had they been properly advised of possible birth de-
facts; parents of a child with genetic impairments have

58. Berman v. Allan, 80 N.J. 421, ___ 404 A.2d 8, 13 (1979); Becker v. Schwartz,
Michael's Hosp., 69 Wis. 2d 765, 773-74, 233 N.W.2d 372, 376 (1975). The dissenting
opinion in Dumer noted that under Wisconsin law a parent's cause of action for inju-
ries sustained by a child is derivative from the child's cause of action and concluded
that the parent's claim must fail if the child's does. 69 Wis. 2d at 779, 233 N.W.2d at
379. However, most courts have recognized that a parent's cause of action for wrong-
ful birth alleges an injury to the parents themselves.
59. See, e.g., Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967); Jacobs v.
claimed that they would have avoided conception or terminated the mother’s pregnancy had the attending physician not failed to detect the genetic problem, or properly test for the impairment by means of amniocentesis; and parents of a normal, healthy, but unplanned child have brought a cause of action claiming their decision not to bear the child was frustrated by a surgeon’s negligent performance of a sterilization operation, a physician’s failure to make a timely diagnosis of the mother’s pregnancy or a pharmacist’s negligence in filing a prescription for oral contraceptives.

The conclusions reached by various courts regarding the propriety of a wrongful birth cause of action and the extent of damages recoverable, have been as diverse as the fact situations in which these claims arise. Particularly, courts’ analyses have differed depending upon whether the defendants’ negligence intervened prior to conception, thereby causing the pregnancy itself, or after conception, thereby preventing the parents from terminating the pregnancy, and whether the resulting child was normal and healthy, or born with some se-


61. See, e.g., Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692 (E.D. Pa. 1978); Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979). Amniocentesis is a procedure involving the insertion of a long needle into a mother’s uterus in order to obtain a sample of amniotic fluid containing living fetal cells. Thereafter, through an analysis of the number and structure of the cells’ chromosomes, the presence of gross chromosomal defects can be detected.


65. See Torts — Wrongful Birth and Wrongful Life, supra note 5, at 169-70 for a concise compilation of the differing opinions of courts regarding recognition of the wrongful birth cause of action and damages which are properly recoverable.

66. Where a third party’s negligence intervenes prior to conception, as in the case where a sterilization operation is negligently performed, the defendant’s negligence can be said to be the cause of the conception. These cases have sometimes been referred to as “wrongful conception” cases. See Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977).
rious impairment. It is submitted that although these differing factual situations are relevant to the triers of fact’s determination regarding the defendants’ negligence and the extent of the parents’ injury, they should in no way influence an appellate court’s recognition of the parents’ cause of action for all damages flowing from the defendants’ wrongful conduct. Once it is uniformly recognized that public policy, as well as constitutional considerations, mandate protection of the parents’ right to procreative self-determination, a wrongful birth cause of action must be allowed. Further, if courts come to view the wrongful birth action simply as one sounding in tort for medical malpractice, the trier of fact ought to be allowed to determine the extent of the parents’ injury after considering the particular family circumstances in a given case and the impact of the new child’s birth on those circumstances. Policies which courts have heretofore espoused in limiting recoverable damages should merely be considered by the trier of fact as mitigating or aggravating the damages.

An evaluation and criticism of wrongful birth cases must necessarily begin with a discussion of the public policy concerns which have affected the recognition of a cause of action. Following that discussion, the nature of the cause of action for wrongful birth will be treated. Finally, the problems involved in ascertaining and measuring the parents’ injuries will be explored.

A. Public Policy and Recognition of a Cause of Action

The first wrongful birth actions arose at a time when abortions, sterilization operations and other forms of birth control were looked upon with some disfavor. This attitude on the part of the general public, their state legislators and the courts had an obvious influence on wrongful birth decisions.

In Christensen v. Thornby, the plaintiff husband had sought a vasectomy operation so that his wife might avoid the health hazards of another pregnancy. A Minnesota trial court held that vasectomy operations were contrary to public policy

67. See text accompanying notes 70-108 infra.
68. See text accompanying notes 113-26 infra.
69. See text accompanying notes 127-57 infra.
70. 192 Minn. 123, 255 N.W. 620 (1934).
and the parents' cause of action, based upon the negligent performance of that operation, was therefore dismissed. Though affirming the dismissal, the Minnesota Supreme Court held that sterilization operations were not contrary to public policy or common law principles and the claim could not be rejected merely because the plaintiff had submitted to a vasectomy operation.

More than two decades later the same question was addressed by a Pennsylvania court in *Shaheen v. Knight*. In the *Shaheen* case, the court voiced its agreement with the *Christensen* court and held that sterilization operations were not against public policy. The *Shaheen* court stated that "only when a given policy is so obviously for or against the public health, safety, morals or welfare that there is a virtual unanimity of opinion in regard to it" could a court thwart or promote that policy on behalf of the community. There was, the court ruled, no such unanimity of opinion regarding sterilization.

In more recent decisions, courts have held without exception that sterilization for purposes of family planning is entirely consistent with public policy. Although most of these decisions have been based purely on public policy and opinion, the constitutional dimension of the right to procreative self-determination has been noted by a number of modern courts. In the 1976 case of *Anonymous v. Hospital*, a Connecticut Superior Court held that sterilization operations, in addition to being consistent with public policy, were probably constitutionally protected. Citing to *Griswold v. Connecticut*, the court stated: "Whether the state can control the subject

71. See text accompanying note 93 infra.
74. Id. at 43.
75. Id.
79. 381 U.S. 479 (1965).
[sterilization] may be questioned in view of the fact that the giving to married persons of information, instruction, and medical advice on the means of preventing conception is now clothed in a cloak of constitutional protection.\textsuperscript{80}

The Supreme Court of Ohio went somewhat further in \textit{Bowman v. Davis}\textsuperscript{81} when it declared that "the choice not to procreate, as part of one's right to privacy, has become (subject to certain limitations) a constitutional guarantee."\textsuperscript{82} The court went on to intimate that to impose liability on physicians for the foreseeable consequences of all negligently performed operations except those involving sterilization would constitute a deprivation of equal protection.\textsuperscript{83}

In light of the changing public opinion regarding birth control and the Supreme Court's holding in \textit{Roe v. Wade},\textsuperscript{84} the foregoing arguments would appear to be equally applicable in those cases in which reluctant parents claim a physician's negligence deprived them of the opportunity to terminate the mother's pregnancy. Protection of the mother's right to an abortion, however, has not fared nearly as well when pitted against public policy concerns.\textsuperscript{85} In \textit{Gleitman v. Cosgrove},\textsuperscript{86} parents of an impaired child claimed that they were denied the opportunity to avoid the birth of the defective child due to the defendant physician's faulty advice that the rubella contracted by the mother during the first month of her pregnancy would have no effect on her child. Although the New Jersey Supreme Court stated it would assume the mother could have obtained a legal abortion, it went on to hold that "substantial policy reasons prevent this Court from allowing tort damages for the denial of the opportunity to

\textsuperscript{80} 33 Conn. Supp. at \textemdash, 366 A.2d at 205.
\textsuperscript{81} 48 Ohio St. 2d 41, 355 N.E.2d 496 (1976).
\textsuperscript{82} Id. at 46, 355 N.E.2d at 499. There, the \textit{Bowman} court cited to \textit{Roe} as well as \textit{Griswold}. Thus, the court's rationale may be equally applicable to abortion even though \textit{Bowman} involved a sterilization.
\textsuperscript{83} Id.
\textsuperscript{84} 410 U.S. 113 (1973). In \textit{Roe}, the United States Supreme Court held that parents have a constitutionally protected right to obtain an abortion during the first trimester of pregnancy free of state interference.
\textsuperscript{86} 49 N.J. 22, 227 A.2d 689 (1967).
take an embryonic life."\textsuperscript{87}

Though the \textit{Gleitman} case pre-dated the Supreme Court's decision in \textit{Roe v. Wade}, there are some indications that its policy concerns live on. In \textit{Rieck v. Medical Protective Co.},\textsuperscript{88} the Wisconsin Supreme Court held that a cause of action against the physician who failed to diagnose the plaintiff's pregnancy in time for her to obtain an abortion must be dismissed for public policy reasons. Roughly a year later, the Wisconsin Supreme Court faced another "abortion case" in \textit{Dumer v. St. Michael's Hospital}.\textsuperscript{89} In \textit{Dumer}, the parents of a child born with "rubella syndrome" brought suit against a physician for negligently failing to diagnose the rubella and advise them of the availability of an abortion. The court concluded that the doctor had no legal duty to counsel the parents regarding the availability of an abortion, stating that the question of the legal availability of an abortion, particularly when the consultation took place prior to the \textit{Roe} decision, called for a legal rather than medical opinion.\textsuperscript{90} Although the court allowed the action to survive a demurrer to the plaintiff's complaint on the theory that the physician had a duty to properly diagnose the mother's rubella, it expressly left open the possibility of precluding recovery based on public policy concerns after the fact finding process was completed.\textsuperscript{91}

When viewed against the background of the United States Supreme Court decisions in \textit{Griswold} and \textit{Roe}, the views of the New Jersey and Wisconsin courts appear to be unsound. The expression of a public policy against providing a remedy when one is prevented from terminating a pregnancy by the negligent conduct of another, would seem to be inconsistent with the recognition that a woman has an unqualified right to a legal abortion within the first trimester of pregnancy. Further, there is no persuasive reason to accord the right to obtain an abortion any less protection than the right to use con-

\textsuperscript{87} Id. at \textemdash, 227 A.2d at 693.
\textsuperscript{88} 64 Wis. 2d 514, 219 N.W.2d 242 (1974).
\textsuperscript{89} 69 Wis. 2d 766, 233 N.W.2d 372 (1975).
\textsuperscript{90} Id. at 775-76, 233 N.W.2d at 376-77. Although Wisconsin law prohibited abortions except where the mother's life or health was in danger at the time the facts in \textit{Dumer} took place, the court did not appear to limit its holding to the lack of a duty to advise of abortion to pre-\textit{Roe} cases.
\textsuperscript{91} Id. at 776, 233 N.W.2d at 377.
traceptives and undergo a sterilization operation. Therefore, equal protection concerns may prevent denial of the parents’ cause of action for being denied the opportunity to terminate the mother’s pregnancy.  

Even admitting that the right to regulate the size of one’s family is not contrary to public policy and that it is therefore entitled to the protection of the law, courts have refused to recognize the parents’ cause of action for wrongful birth on the theory that public policy prevents the birth of a child as being viewed as an injury to its parents. This issue most commonly arises where parents seek recovery for the costs of rearing an unplanned but otherwise normal and healthy child.

After holding in the Christensen case that the father’s vasectomy was not contrary to public policy and the parents’ claim would not be rejected on that account, the Minnesota Supreme Court nonetheless denied a cause of action since the plaintiff has “been blessed with the fatherhood of another child.” Similarly, the Shaheen court, while finding “no virtual unanimity of opinion regarding sterilization,” held that “to allow damages for the normal birth of a normal child is foreign to the universal public sentiment of the people.”

Though the Christensen and Shaheen cases were decided in 1934 and 1957, respectively, the so-called “blessing doctrine” is not without more modern advocates. In the 1973 case of Terrell v. Garcia a Texas court of appeals held in a negligent sterilization wrongful birth case, that the benefits of parenthood of a healthy child outweighed any damage as a matter of law. There, the court declared:

Who can place a price tag on a child’s smile or the parental pride in a child’s achievement? Even if we consider only the economic point of view, a child is some security for the parents’ old age. Rather than attempt to value these intangible benefits, our courts have simply determined that public sentiment recognizes that these benefits to the parents out-

92. See authorities cited in note 77 supra.
93. 192 Minn. at 126, 255 N.W. at 622.
94. 11 Pa. D. & C.2d at 43, 45.
weigh their economic loss in rearing and educating a healthy, normal child.\textsuperscript{97}

A year later this passage was cited with apparent approval by the Wisconsin Supreme Court in \textit{Rieck v. Medical Protective Co.}\textsuperscript{98}

Modern adherents notwithstanding, the "blessing doctrine" must be rejected as an outmoded notion of public policy. Radical changes in the public’s attitude toward birth control and the family, as well as the protection accorded family planning rights by the United States Supreme Court support the position that a child is not always a "blessing" to its family. Indeed, a number of courts have rejected the notion that the event the parents had sought to prevent is no injury to them.\textsuperscript{99}

In \textit{Troppi v. Scarf},\textsuperscript{100} parents of a normal, healthy, but unplanned child brought suit against a pharmacist whose negligent filling of a prescription for oral contraceptives caused the conception and birth of the child. The Michigan court rejected the defendant's argument that the birth of the child did not constitute a damage to its parents as a matter of law. The court declared that the argument that an unplanned child results in no loss to its parents ignores the fact that tens of millions of persons use contraceptives to avoid the very result the defendant contended was always a benefit, and never a detriment.\textsuperscript{101} Thus, the parents' claim for the costs of rearing the child stood.

The Minnesota Supreme Court came to a similar conclusion in \textit{Sherlock v. Stillwater Clinic}\textsuperscript{102} where parents of a healthy child commenced an action against a surgeon for, \textit{inter alia}, the costs of raising the child born due to the negligent performance of a tubal ligation. The court stated it would be "myopic" to declare today that the benefits of parenthood outweighed the costs as a matter of law. Further,

\textsuperscript{97} Id. at 123.
\textsuperscript{98} 64 Wis. 2d 514, 219 N.W.2d 242.
\textsuperscript{100} 31 Mich. App. 240, 187 N.W.2d 511.
\textsuperscript{101} Id. at 253, 187 N.W.2d at 517.
\textsuperscript{102} 260 N.W.2d 169 (Minn. 1977).
the court held that the time honored command to "be fruitful and multiply" had "not only lost contemporary significance to a growing number of potential parents but is contrary to public policy embodied in the statutes encouraging family planning."\textsuperscript{103}

The New York Court of Claims recognized that the United States Supreme Court's decision in \textit{Griswold} militated against denying the parents' wrongful birth claim in \textit{Rivera v. State}.\textsuperscript{104} The court in \textit{Rivera} held that to accept the "blessing doctrine" would be to "cast upon the sea of public opinion what the Supreme Court has declared to be a matter of strictly private concern."\textsuperscript{105}

In the final analysis, public policy arguments based upon the "blessing doctrine" must fail for the same reasons that public policy arguments based upon unfavorable attitudes toward abortion and contraception fail: the notion that an unplanned child may cause a loss to its parents is consonant with contemporary public policy and is supported by the Supreme Court's recognition of constitutionally protected family planning rights.

While the changes in public attitudes and the scope of constitutional protections accorded to privacy rights have eroded the policy arguments against allowing wrongful birth causes of action, other policy arguments have been advanced in favor of recognizing such claims. As noted by the Minnesota Supreme Court in \textit{Sherlock}, a number of states have enacted statutes expressing a strong public policy favoring family planning.\textsuperscript{106} Refusal to allow a cause of action based upon an interference with birth control would certainly be contrary to that policy. Additionally, there are certain "social engineering" policies which would appear to promote recognition of a wrongful birth cause of action. First, several commentators have argued that as between two parties a loss ought to be borne by the party best able to distribute the risk of loss through such mechanisms as fee adjustments and liability in-

\textsuperscript{103} Id. at 175.
\textsuperscript{104} 94 Misc. 2d 157, 404 N.Y.S.2d 950 (1978).
\textsuperscript{105} Id. at ___, 404 N.Y.S.2d at 954.
In a wrongful birth action, that party would, of course, be the defendant physician. Second, and more persuasive, is the concept that the threat of liability will furnish a strong incentive to prevent potential harm, and thus encourage physicians to exercise due care when performing sterilization operations, diagnosing problem pregnancies and counseling with respect to the potential for birth defects. Conversely, rejection of the cause of action for wrongful birth serves to render even the admittedly negligent physician free of all responsibility for the loss occasioned by his negligence.108

In light of the foregoing, it must be concluded that public policy should not provide a stumbling block to the recognition of wrongful birth claims. On the contrary, once present public attitudes are properly characterized, it would appear that public policy requires that such actions be allowed.

B. Nature of the Cause of Action for Wrongful Birth

Concluding that public policy does not prohibit a claim for wrongful birth does not remove all barriers to recognition of a cause of action. A number of courts have refused to "create" a new cause of action for wrongful birth, while others, after allowing the claim, have severely limited damages recoverable by the plaintiff. These limitations reflect a fundamental misunderstanding of the cause of action for wrongful birth which can be dispelled by an analysis of the elements of such an action.

Plaintiffs have, with varying degrees of success, brought wrongful birth actions based upon the legal theories of breach of contract or warranty, misrepresentation, and deceit.109 The


vast majority of complaints, however, sound in tort and allege medical malpractice.\textsuperscript{110} In order to recover under tort theory, it must be shown that the defendant owed the plaintiff a duty, that the defendant breached that duty and that the breach was the cause of some harm suffered by the plaintiff.\textsuperscript{111}

The duty owed by a physician to his patient is not ordinarily difficult to establish. When treating or advising a patient, a physician will not be liable for medical malpractice so long as he employs, with due care, that degree of skill and learning commonly possessed by members of his profession in good standing.\textsuperscript{112} Thus, if a defendant physician fails to conform to this requisite standard of conduct when performing a sterilization operation, advising prospective parents regarding the possibility of birth defects, or diagnosing a pregnancy or problems therewith in the course of treating the mother, he has breached the duty owed to his patient and should be liable for any resulting injury.

Establishing a breach of this duty is somewhat more difficult. Where a sterilization operation is concerned, evidence of the negligence is usually concealed in the plaintiff's body, thus creating substantial proof problems. The doctrine of \textit{res ipsa loquitur} is of no assistance to the plaintiff.\textsuperscript{113} Since recanalization is possible in both tubal ligations and vasecto-

\textsuperscript{110} But see Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971) (defendant to a wrongful birth action grounded in tort theory was a pharmacist who allegedly failed to properly fill a contraceptive prescription).

\textsuperscript{111} W. Prosser, Torts (4th ed. 1971) § 30 at 143.

\textsuperscript{112} See, e.g., Coleman v. Garrison, 349 A.2d 8 (Del. 1975). Courts have not generally found any difficulty in extending the physician's duty to the spouse of a patient in a wrongful birth situation. For a discussion of potential problems in extending such a duty, see Wrongful Conception, 5 William Mitchell L. Rev. 464, 481-83 (1979).

\textsuperscript{113} See W. Prosser, Torts (4th ed. 1971) § 39 at 214. \textit{Res ipsa loquitur} is a procedural device which allows a plaintiff to prove the defendant's negligence by showing (1) that the result is not one which ordinarily occurs in the absence of negligence, (2) that the defendant had exclusive control of the instrumentality involved in the transaction or occurrence, and (3) that the plaintiff is free of contributory negligence.
mies, a pregnancy could result in the absence of any negligence on the part of the physician. However, in Vaughn v. Shelton, where the plaintiff had become pregnant four months after the performance of a tubal ligation, the court stated that considering the short period of time that elapsed between the operation and the pregnancy, "a reasonable conclusion from that fact might be that one or both of the tubes were not closed whether by negligence or a mere oversight. . . ." The plaintiff's best means of detecting any irregularity in the performance of the operation is to consult pathological tests performed on the matter removed from the plaintiff patient's body. If the physician has failed to remove sections of the fallopian tubes or the vas deferens, or has removed insufficient lengths, negligence may be established.

In cases where the plaintiffs claim they have been deprived of the opportunity to terminate the mother's pregnancy due to a physician's failure to detect a particular condition, the physician will be subject to liability if the parents can prove that the physician's failure to detect the condition fell short of the requisite professional standard of conduct. Note, however, that one court has held that even where the possibility of a birth defect exists, a physician has no duty to advise the potential parents of the availability of abortion.

If the plaintiff parents succeed in proving a breach of the duty, they must further show that the defendant's negligence caused them some injury. It would seem that the causal link between a negligently performed sterilization operation and a subsequent pregnancy would be obvious. Nonetheless, in Custodio v. Bauer, the defendant argued that sexual relations between the plaintiff and her husband constituted an intervening cause of a subsequent pregnancy thereby breaking the causal chain between the surgeon's alleged negligence in the

115. 514 S.W.2d 870 (Tenn. App.), cert. denied, 514 S.W.2d 870 (Tenn. 1974).
116. Id. at 874.
performance of a tubal ligation and the plaintiff's injuries. Declaring that the test of whether an intervening act breaks the causal link is the foreseeability of the act occurring, the court held that "it is difficult to conceive how the very act the consequences of which the operation was designed to forestall, can be considered unforeseeable." 120

Establishing the causal element in post-conception negligence cases may be somewhat more problematic. In these cases, the parents claim that had the doctor informed them of a particular condition they would have terminated the mother's pregnancy. Thus, the physician's negligence can be said to be a cause of the child's birth only if the parents would actually have sought an abortion. In *Rieck v. Medical Protective Co.*, 121 parents of a normal, healthy child brought suit against a physician who had failed to diagnose the plaintiff mother's condition in time for her to obtain an abortion. The Wisconsin Supreme Court rejected the action partly because they felt allowing recovery in such a case would open the way for fraudulent claims. The court stated that since the claim that the parents would have sought an abortion but for the defendant's negligence involved "such subjective testimony as to a state of mind or intention" that to allow recovery upon a failure to make a timely diagnosis of pregnancy would encourage parents "if not to invent an intent to prevent pregnancy, at least to deny any possibility of change of mind or attitude before the action contemplated was taken." 122

A year later in *Dumer v. St. Michael's Hospital*, 123 the same court took a different view where a defective child had been born due to an alleged failure to diagnose rubella. There, the court simply held that in order to complete a cause of action, the plaintiffs had to convince the trier of fact that the wife would have sought and submitted to an abortion. 124 Presumably, the Wisconsin Supreme Court felt that the claim of the parents in *Dumer* was more credible than that of the parents in *Rieck* because of the presence of birth defects. However, it would seem that in any event, the credibility of the

120. *Id.* at ___, 59 Cal. Rptr. at 472.
121. 64 Wis. 2d 514, 219 N.W.2d 242 (1974).
122. *Id.* at 519, 219 N.W.2d at 245.
123. 69 Wis. 2d 766, 233 N.W.2d 372 (1975).
124. *Id.* at 776, 233 N.W.2d at 377.
parents' testimony in light of the surrounding circumstances is more a question for the trier of fact than for an appellate court. There may be proof problems involved in post-conception negligence cases, but parents should not be denied the opportunity to prove their case.

If plaintiff parents are able to show negligence on the part of the physician and establish the causal link between that negligence and the birth of the child, and further, it is admitted that an unplanned or impaired child may not under all circumstances be a blessing to its parents, but may occasion some loss, it becomes apparent that a wrongful birth action fits the mold of a traditional medical malpractice claim. When viewed in this light, the argument, advanced by some, that courts must await some legislative activity before acknowledging wrongful birth claims is unpersuasive. As one court has observed, "[t]he fundamental principles of tort law were created by courts not legislatures," and therefore parents should be "afforded the opportunity of proving the customary elements of duty, negligence, proximate cause and damages."

Once a wrongful birth action is properly characterized as a traditional tort action, the plaintiffs are entitled to compensation for all damages flowing from the defendant's negligent conduct. In an action for recovery of losses sustained as a result of a negligently performed vasectomy, the Minnesota Supreme Court recently stated:

Analytically, such an action is indistinguishable from an ordinary medical negligence action where a plaintiff alleges that a physician has breached a duty of care owed to him with resulting injurious consequences. Where the purpose of the physician's actions is to prevent conception or birth, elementary justice requires that he be held legally responsible for the consequences which have in fact occurred.

Just what the "consequences" of a wrongful birth are, and to what extent the plaintiffs ought to be compensated for those consequences is a question some courts have had a great difficulty determining.

C. Damages in Wrongful Birth Action

Courts which have recognized a cause of action for wrongful birth have generally allowed the plaintiff to seek recovery for the expenses of an unsuccessful sterilization operation, pain and suffering attending the occurrence or continuation of the pregnancy, pain and suffering associated with and medical costs attendant to the delivery of the child, lost wages of the wife, loss of consortium and, where the child is born with impairments, the expenses occasioned by a physically or mentally defective child as contrasted to a normal, healthy child. Courts have been at odds, and continue to be at odds regarding recovery for the costs of rearing a normal, healthy child, and, in the case of an impaired child, the costs of raising the child other than those occasioned by its defect. While the damages would appear to be properly compensable because they are costs the parents would have avoided but for the negligence of the physician, several arguments have been advanced in opposition to allowing recovery.

1. Mitigation of Damages

On occasion, defendants in wrongful birth actions have contended that the plaintiffs could have mitigated their damages by aborting an unwanted pregnancy or placing the child for adoption after birth. In the context of a tort action, this argument would presumably be based upon the "rule of avoidable consequences." This doctrine requires a plaintiff

129. See, e.g., authorities cited in note 128 supra.
131. See, e.g., Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977).
to take any reasonable measures available to minimize the financial consequences of a defendant's negligent conduct. If the effort, risk, sacrifice or expense which the plaintiff must incur in order to minimize the loss or injury is such that a reasonable person under similar circumstances might well decline to incur it, failure to do so will not preclude recovery of full damages. The question in a wrongful birth action is, then, whether it is reasonable to require the plaintiffs to attempt to mitigate their damages by terminating an unwanted pregnancy or placing an unplanned or impaired child for adoption.

Given the public controversy surrounding the issue of abortion, there is a strong argument that it would not be reasonable to require plaintiffs to minimize their damages by terminating an unwanted pregnancy. In Rivera v. State, a New York Court of Claims held that "a rule of law which required the claimant to have an abortion would constitute an invasion of privacy of the grossest and most pernicious kind." The court went on to state that a decision regarding abortion is for the individual to make based upon her own religious, philosophical or moral principles. The court noted that in the minds of many people, there is a significant difference between sterilization as an appropriate method of family planning and abortion. The court offered the example of the Jehovah's Witnesses, a group of over one-half million Christians who believe that sterilization rests on the individual's conscience while abortion is a serious wrong. On the basis of these considerations the Rivera court ruled that the failure of the claimant to obtain an abortion would not affect her cause of action. Several other courts have concurred in this viewpoint, while no court has held that obtaining an abortion is a reasonable means of mitigating damages.

Some courts have held that it is equally unreasonable to require a plaintiff to place a child for adoption. In Troppi v.

135. See C. McCormick, Damages (1st ed. 1935) § 35 at 133.
137. Id. at —, 404 N.Y.S.2d at 954.
138. Id. n.6.
140. See authorities cited in note 139 supra.
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Scarf, a Michigan court of appeals declared that when determining reasonableness, the best interests of the child must be considered. The court held that the law had long recognized the desirability of allowing a child to be reared by its natural parents and the court concluded that a parent might reasonably believe the child would be damaged by adoption. Further, the court recognized that a living child gave rise to emotional and spiritual bonds that a parent would justifiably be reluctant to break. Regardless of whether the parents may have wanted to conceive and rear a child, they might well feel a legal and moral obligation to love and raise the child the best they can, rather than to subject the child to rearing by unknown persons. Finally, the Troppi court declared that parents might conclude that they could not withstand the psychological and emotional impact of rejecting the child and placing it for adoption. Based upon these considerations, the court reasoned that under the principle that a tortfeasor takes his victim as he finds him, he cannot complain if the emotional and mental makeup of the plaintiff parents is inconsistent with aborting or placing the child for adoption.

Not all courts have agreed with the Troppi rationale. The Wisconsin Supreme Court in Rieck v. Medical Protective Co., stated:

To permit the parents to keep their child and shift the entire cost of its upbringing to a physician who failed to determine or inform them of the fact of pregnancy would be to create a new category of surrogate parent.

... It is retention of benefits — the parents keeping their child, and seeking to transfer only the financial costs of its upbringing to the doctor — that is a relevant factor in evaluating the public policy considerations involved.

The Wisconsin court thereafter refused to recognize the plaintiffs' cause of action based upon public policy concerns.

142. Id.
144. 64 Wis. 2d 514, 219 N.W.2d 242 (1974).
145. Id. at 518-19, 219 N.W.2d at 244-45.
What may be criticized about the Wisconsin court’s rationale is that it allows a factor which could be considered in mitigation of damages to preclude recovery of damages altogether. While one might reasonably infer from a parent’s refusal to place an unplanned child for adoption that the parent feels that it derives some benefit from having the child, there is no reason to prevent the plaintiff parent from attempting to recover for the financial losses occasioned by the birth of the child. What some courts have concluded is that the trier of fact ought to be able to consider the intangible benefits that accrue to a parent by virtue of having a child, and offset those benefits against any losses sustained by the parents by virtue of the child’s birth.\textsuperscript{146}

2. Offsetting Benefits

Allowing the trier of fact to offset the benefits of parenthood against the plaintiff parents’ claimed losses in an attempt to accurately assess damages is entirely consistent with the principles of tort law. The so-called “incidental benefits” rule of the Restatement (Second) of Torts reads:

When the defendant’s tortious conduct has caused harm to the plaintiff or to his property and in doing so has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable.\textsuperscript{147}

Several courts have held that it is equitable to apply such a rule to wrongful birth claims, and it appears there is a trend toward recognizing the validity of the rule, at least with respect to cases in which the parents seek to recover the costs of rearing a normal, healthy child.\textsuperscript{148}

The rule was first adopted for application to a wrongful birth action in \textit{Custodio v. Bauer}.\textsuperscript{149} Several years later, a


\textsuperscript{147} \textit{Restatement (Second) of Torts} § 920 (1977).


\textsuperscript{149} 251 Cal. App. 2d 303, 59 Cal. Rptr. 463.
Michigan court of appeals applied the rule in the Troppi case announcing: "[W]e believe that rule to be essential to the rational disposition of this case and the others that are sure to follow. The benefits rule allows flexibility in the case-by-case adjudication of the enormously varied claims which the widespread use of oral contraceptives portends."\(^{150}\)

A number of other courts have more recently adopted the rule in cases in which parents of a normal, healthy but unplanned infant have sued for the costs of rearing and educating the child.\(^{151}\) This recent trend would seem to be a commendable one. Allowing the parents to seek compensation for the costs of rearing the child — costs which would have been avoided but for the defendants’ negligence — while allowing the trier of fact to offset the benefits derived from parenthood, strikes a near-perfect balance between the principle that a tortfeasor ought to be liable for all damages flowing from his negligence, and the traditional notion that a child provides joy and happiness to its parents. Further, use of the incidental benefits rule would appear to vitiate the Wisconsin Supreme Court’s concern that to allow recovery of child rearing costs would result in damages “wholly out of proportion to the culpability” of the defendant and place “too unreasonable a burden upon physicians.”\(^{152}\) To hold a physician responsible for the costs of rearing a child whose birth he negligently caused, reduced by any benefits the parents receive from the child places liability on the physician which is neither unreasonably burdensome nor disproportionate to the culpability of his conduct.

As for the parents’ refusal to place the child for adoption, rather than preclude recovery altogether, this event should simply be one of a number of factors to be considered by a trier of fact when determining to what extent the child benefits its parents. Other circumstances surrounding the birth and its impact on the plaintiff parents should be considered relevant factors in assessing damages. The size of the family, its socio-economic position, the reason the family sought to

\(^{150}\) 31 Mich. App. at 256, 187 N.W.2d at 518.

\(^{151}\) See, e.g., Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977); Rivera v. State, 94 Misc. 2d 157, 404 N.Y.S.2d 950 (1978).

\(^{152}\) 64 Wis. 2d at 518-19, 219 N.W.2d at 245.
avoid another child, and the extent to which the child interferes with established careers of the parents may all be mitigating or aggravating factors under the circumstances. Only when all of these factors are taken into account can the trier of fact properly assess the impact of the unplanned birth and award appropriate damages.

While a trend toward adopting and applying the incidental benefits rule appears in those cases involving normal, healthy children, a quite different, and somewhat curious trend has developed in several recent cases involving the birth of a physically or mentally impaired child after a physician's alleged negligent failure to detect the defective condition. In *Dumer v. St. Michael's Hospital*, the Wisconsin Supreme Court, after emphasizing that the physician, if negligent, caused the birth of the child but not its defects, held that the parents' recovery would be limited to "those expenses which they have reasonably and necessarily suffered and will to a reasonable medical certainty suffer in the future by reason of the additional medical, hospital and supportive expense occasioned by the deformities of the child as contrasted to a normal, healthy child." An almost identical result may be found in a recent Texas decision.

The result in these cases seems to be contrary to fundamental common sense. Once it is understood that the defendant physician could have done nothing to remedy the condition of the child and that his negligence can only be viewed as a cause of the birth itself, parents of an impaired child stand in no different position than parents of a normal unplanned child. But for the negligence of the physician, the costs of rearing and caring for a defective child could have been avoided. Allowing the parents to recover only those costs over and above the costs of rearing a normal, healthy child does not place them in the position they would have been had the physician exercised due care. It is as essential, if not more so, to allow recovery of child rearing costs in a defective child case as in a normal child case. As one court has observed,

154. 69 Wis. 2d 766, 233 N.W.2d 372 (1975).
155. *Id.* at 776, 233 N.W.2d at 377.
while the parents of a healthy child will ordinarily be required to support it during its minority, parents of an impaired child will, in many instances, need to provide support for a much longer period of time.\footnote{157}

Obviously, an impaired child may provide its parents numerous benefits, just as a normal, healthy child does and, the trier of fact should be allowed to offset these benefits against the damages sought by the parents. Thus, although differing fact situations may lead a trier of fact to reach varying results in normal, healthy child cases and impaired child cases, the framework of analysis should be the same. The parents ought to be allowed to seek all damages they have suffered by reason of the defendant's negligence, and the trier of fact should consider all relevant, mitigating or aggravating circumstances bearing on those damages.

IV. Conclusion

As suits for wrongful life and wrongful birth become more common, it is essential that courts develop a meaningful method for analyzing and evaluating such claims. While wrongful life actions, brought by a child against another whose negligence caused the child's birth, have been uniformly rejected by courts, the various rationales advanced as a basis for denying such claims have caused confusion and controversy. Once it is recognized that the child in a wrongful life action attempts to assert a right not to be born — a right with no basis in law or reason — courts may refuse to allow a cause of action and avoid the pitfalls of the traditional "unascertainable damage" approach.

The results of wrongful birth actions brought by parents of a child born by reason of another's negligence have been much less uniform and much more confusing. When courts come to realize that sterilization operations, abortions and other forms of birth control are entirely consonant with public policy and that decisions concerning family planning are entitled to the protection of the state, wrongful birth actions cannot be rejected. When characterized as a traditional claim for medical malpractice, it becomes evident that the plaintiff parents are entitled to be compensated for all losses caused by the defen-

\footnote{157. See Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 176 (Minn. 1977).}
dant's negligence, including costs of rearing an unplanned or impaired child. The trier of fact should be allowed to consider all relevant circumstances when assessing damages, and offset the benefits of parenthood against the damages recoverable by the parents. Only in this way may a proper balance be struck between the right of the parents to be compensated for their losses, and the traditional notion that a child provides its parents with innumerable intangible benefits.

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