

Torts: The Wisconsin Supreme Court Addresses Wrongful Pregnancy Causes of Action. *Marciniak v. Lundborg*, 153 Wis. 2d 59, 450 N.W.2d 243 (1990)

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NOTE

TORTS—The Wisconsin Supreme Court Addresses Wrongful Pregnancy Causes of Action. *Marciniak v. Lundborg*, 153 Wis. 2d 59, 450 N.W.2d 243 (1990).

INTRODUCTION

With the rise in popularity of sterilization in the United States as a method of contraception,¹ a new cause of action has developed. This cause of action, known as wrongful pregnancy or wrongful conception,² occurs when a female or male undergoes a sterilization procedure and the female subsequently becomes pregnant. A healthy child is born and the female or couple sues the physician for damages caused by the negligent sterilization, the pregnancy, and the costs of rearing the child. Although the other damages have been routinely granted, until recently, child rearing damages were generally rejected by the courts on public policy grounds.

In *Marciniak v. Lundborg*,³ the Wisconsin Supreme Court, in a unanimous decision, declined to follow the majority of states who reject damages on public policy grounds by concluding that the "costs of raising the child to the age of majority may be recovered by the parents for damages caused by a negligently performed sterilization operation."⁴ Even more trendsetting, the court further concluded that "these costs may not be offset by any

1. The sterilization of a female is known as tubal ligation, a procedure during which the physician blocks the fallopian tubes so that sperm is unable to unite with the egg. Sometimes, however, the procedure fails because a channel forms in the gap in the tube, allowing sperm to unite with the egg, or because a physician negligently misses or inadequately treats a fallopian tube. It is the latter type of failure that results in an action for negligent sterilization. Gary I. Strausberg, *The Failed Tubal Ligation*, 21 TRIAL 30, 30-31 (1985).

Sterilization of a male is known as a vasectomy, a relatively simple operation carried out under local anesthesia. Sperm may remain stored in the seminal vesicle and prostate for several weeks following the operation, making pregnancy possible despite the operation. Or, following the surgery, the vas may rejoin, allowing the sperm to enter the urethra, unite with the egg and result in pregnancy. John F. Lombard, *Vasectomy*, 10 SUFFOLK U. L. REV. 25, 32-33 (1975).

2. "Wrongful pregnancy" or "wrongful conception" should be distinguished from "wrongful birth" and "wrongful life" causes of action. "Wrongful birth" is an action brought by parents against a physician who negligently failed to inform them of the increased possibility that their child would be born with birth defects. 70 C.J.S. *Physicians and Surgeons* § 99 (1987). "Wrongful life" is a claim brought on behalf of a child born with birth defects and is the child's equivalent of parents' wrongful birth action. *Id.* § 100.

3. 153 Wis. 2d 59, 450 N.W.2d 243 (1990).

4. *Id.* at 61, 450 N.W.2d at 244.

benefits conferred upon the parents by virtue of the presence of the child in their lives."⁵

This Note begins with a summary of the facts of *Marciniak*. The development of the cause of action for wrongful pregnancy is then discussed, followed by an evaluation of the *Marciniak* decision. The Note concludes with a prediction of *Marciniak's* impact on future wrongful pregnancy causes of action.

I. STATEMENT OF THE CASE

Paula Marciniak underwent a sterilization operation⁶ in 1981 to avoid having additional children.⁷ Mrs. Marciniak testified at her deposition that she chose surgical sterilization because she desired to get off birth control pills and "was led to believe that the surgical procedure would be permanent."⁸ However, in 1983, Mrs. Marciniak gave birth to a healthy child.⁹

The Marciniaks filed a Submission of Controversy with the Wisconsin Patients Compensation Panel; the action was then transferred to the Circuit Court of Polk County.¹⁰ The defendants sought dismissal of the Marciniaks' claim for recovery of the costs of rearing the child.¹¹ The trial court held that when a healthy child is born as a result of negligent sterilization, child rearing costs to the age of majority are recoverable, but that the value of any benefits the parents receive by virtue of the presence of the child in their lives must be subtracted from these costs.¹²

The court of appeals reversed the circuit court decision,¹³ concluding that recovery of child rearing costs was barred by the public policy consid-

5. *Id.*

6. Mrs. Marciniak underwent a "laparoscopy with bilateral fallopian tube cauterization." *Marciniak v. Lundborg*, 153 Wis. 2d 59, 62, 450 N.W.2d 243, 244 (1990).

7. At the time of the operation, the Marciniaks had two children, ages eight and seven. Mrs. Marciniak worked 25 hours a week as a clerical aid at \$4.90 per hour to assist the family financially. *Id.*

8. *Id.*

9. *Id.* When asked at her deposition why she did not abort the unplanned child, she replied: "I could not kill a baby. . . . I am Catholic." As to why she did not give the child up for adoption, she stated: "It was my child." *Id.*

10. Several defendants were dismissed by stipulation and order. *Id.* at 63, 450 N.W.2d at 244.

11. *Id.*

12. *Id.*

13. 147 Wis. 2d 556, 433 N.W.2d 617 (Ct. App. 1988), *rev'd*, 153 Wis. 2d 59, 450 N.W.2d 243 (1990).

erations enunciated in *Rieck v. Medical Protective Co.*¹⁴ The Wisconsin Supreme Court then granted review and reversed the holding of the court of appeals.

II. BACKGROUND OF THE WRONGFUL PREGNANCY CAUSE OF ACTION

A. General Development

The cause of action for wrongful pregnancy dates back to a 1934 Minnesota Supreme Court decision. In *Christensen v. Thornby*,¹⁵ the plaintiff underwent a vasectomy after the defendant physician warned the plaintiff's wife that she might not survive the birth of another child.¹⁶ The plaintiff's wife subsequently became pregnant and gave birth to a healthy child.¹⁷ The plaintiff sued for medical expenses and anxiety caused by fears for his wife's health.¹⁸ The court denied the plaintiff any recovery, stressing that the purpose of the vasectomy was to protect the health of the plaintiff's wife and not to prevent the expenses of pregnancy.¹⁹ The court concluded: "Instead

14. 64 Wis. 2d 514, 219 N.W.2d 242 (1974). In *Rieck*, Justice Hansen, writing for a unanimous court, barred recovery of child rearing costs where a physician negligently failed to diagnose Mrs. Rieck's pregnancy, thereby precluding the possibility of an abortion. The court stated:

Even where the chain of causation is complete and direct, recovery may sometimes be denied on grounds of public policy because: (1) The injury is too remote from the negligence; or (2) the injury is too wholly out of proportion to the culpability of the negligent tort-feasor; or (3) in retrospect it appears too highly extraordinary that the negligence should have brought about the harm; or (4) because allowance of recovery would place too unreasonable a burden (in the case before us, upon physicians and obstetricians); or (5) because allowance of recovery would be too likely to open the way for fraudulent claims; or (6) allowance of recovery would enter a field that has no sensible or just stopping point. (citation omitted). Any one of these public policy considerations could be sufficient to deny recoverability. (footnote omitted).

Id. at 517-18, 219 N.W.2d at 244. The *Rieck* court then went on to bar recovery on grounds (2), (5), and (6). *Id.* at 518-19, 219 N.W.2d at 244-45.

The court of appeals found that "[t]he fact that Paula Marciniak sought and was the subject of surgery eliminates the concern for fraudulent claims." *Marciniak*, 147 Wis. 2d at 558, 433 N.W.2d at 618. However, it also concluded that there was "no factual distinction that would eliminate the expressed concerns in *Rieck* for factors (2) and (6)" and reversed the trial court's decision granting to the Marciniaks child rearing costs. *Id.* at 559, 433 N.W.2d at 618.

15. 192 Minn. 123, 255 N.W. 620 (1934).

16. *Id.* at 123, 255 N.W. at 621.

17. *Id.* at 124, 255 N.W. at 621.

18. *Id.* The plaintiff did not allege negligence on the part of the physician but deceit that the surgery would be successful. *Id.* at 126, 255 N.W. at 622.

19. *Id.*

of losing his wife, the plaintiff has been blessed with the fatherhood of another child."²⁰

Twenty years later, a Pennsylvania court reached a similar result. In *Shaheen v. Knight*,²¹ the plaintiff chose to have a vasectomy for family planning reasons.²² The plaintiff sued for breach of contract when his wife subsequently became pregnant and gave birth to the couple's fifth child.²³ Like *Christensen*, the court concluded that the plaintiff had suffered no damages, stating: "The only damages asked are the expenses of rearing and educating the unwanted child. We are of the opinion that to allow damages for the normal birth of a normal child is foreign to the universal public sentiment of the people."²⁴ Not all courts, however, agreed with this "overriding benefit theory" — that the benefit of the birth of a healthy child always outweighs, as a matter of law, any injury to the parents — but denied child rearing damages on other grounds.²⁵

The first breakthrough for the wrongful pregnancy cause of action occurred in 1967, when a California Court of Appeals decided *Custodio v. Bauer*.²⁶ The plaintiff was the mother who had already borne nine children when she underwent sterilization upon her physician's advice that another pregnancy would aggravate a bladder and kidney disorder.²⁷ The plaintiff sued her physicians for negligence when her tenth child was born.²⁸ The

20. *Id.*, 255 N.W. at 622. It should be noted that although the *Christensen* court denied recovery for negligent sterilization, it found that sterilization was not against public policy or public morals. *Id.* at 125-26, 255 N.W. at 622.

21. 11 Pa. D. & C.2d 41 (1957).

22. *Id.*

23. *Id.*

24. *Id.* at 45. The court continued:

To allow damages in a suit such as this would mean that the physician would have to pay for the fun, joy and affection which plaintiff Shaheen will have in the rearing and educating of this, defendant's [sic] fifth child. Many people would be willing to support this child were they given the right of custody and adoption, but according to plaintiff's statement, plaintiff does not want such. He wants to have the child and wants the doctor to support it. In our opinion, to allow such damages would be against public policy.

Id. at 45-46.

25. See, e.g., *Ball v. Mudge*, 64 Wash. 2d 247, 391 P.2d 201 (1964), where the court declined to follow *Christensen* and *Shaheen*, but upheld the judgment for the defendant on other grounds. Compare *West v. Underwood*, 132 N.J.L. 325, 326, 40 A.2d 610, 611 (1945), where the court reversed a nonsuit, stating the plaintiffs "were entitled to recover for all pain and suffering, mental and physical, together with loss of services and any other loss or damage proximately resulting from such negligence." *Id.*

26. 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).

27. *Id.* at 307, 59 Cal. Rptr. at 466.

28. *Id.* at 308, 59 Cal. Rptr. at 466.

court quickly resolved issues of proximate cause and public policy,²⁹ and focused on the damage issue with which previous courts had long struggled. The court noted that the purpose of damages is not to compensate for the unwanted child but to “replenish the family exchequer so that the new arrival will not deprive the other members of the family of what was planned as their just share of the family income.”³⁰ The court also pointed out that even “[c]ity, state and federal agencies have instituted programs for dispensing of contraceptive information with a view toward economic betterment of segments of the population.”³¹ The court allowed damages for child rearing costs, noting at the same time the applicability of the “benefit rule,” which requires that damage to a particular interest be diminished by the amount to which the same interest has been benefited by the defendant’s tortious conduct.³²

In *Troppi v. Scarf*,³³ the defendant pharmacist negligently filled the plaintiff’s prescription for birth control pills with tranquilizers.³⁴ Like *Custodio*, the *Troppi* court rejected the public policy arguments of *Christensen* and *Shaheen*, but instead allowed child rearing damages on constitutional grounds, noting that “[c]ontraception has been held to be within a constitutionally protected ‘zone of privacy’ that surrounds the marital relationship.”³⁵ The *Troppi* court, as well, applied the “benefit rule.” However, it concluded that the value of the benefit conferred by the birth of a healthy child should be subtracted from the plaintiffs’ total recovery, rather than being weighed against a particular interest harmed.³⁶ Further, the *Troppi*

29. The court rejected the defendants’ allegation that the injuries or damages suffered by the plaintiffs were not the proximate result of any breach of duty on their part because of the intervening sexual relations between the parents, and agreed with *Christensen* and *Shaheen* that a sterilization operation, whether motivated by either health or financial reasons, is not against public policy. *Id.* at 317, 59 Cal. Rptr. at 472.

30. *Id.* at 324, 59 Cal. Rptr. at 477.

31. *Id.* at 325, 59 Cal. Rptr. at 477.

32. *Id.* at 323, 59 Cal. Rptr. at 476. The “benefit rule” originates from the RESTATEMENT (SECOND) OF TORTS § 920 (1979). Section 920 provides:

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.

Id.

33. 31 Mich. App. 240, 187 N.W.2d 511 (1971).

34. *Id.* at 244, 187 N.W.2d at 512.

35. *Id.* at 253, 187 N.W.2d at 517 (citing *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965)).

36. *Id.* at 255, 187 N.W.2d at 518. The RESTATEMENT (SECOND) OF TORTS § 920 cmt. b provides a much narrower interpretation of “interest”:

b. *Limitation to same interest.* Damages resulting from an invasion of one interest are not diminished by showing that another interest has been benefited. Thus [for example] one

court held that parents who seek damages for the birth of an unwanted child have no duty to mitigate damages by aborting the fetus or placing the child for adoption.³⁷

B. Wrongful Pregnancy in Wisconsin

Prior to *Marciniak v. Lundborg*, the only Wisconsin Supreme Court decision addressing child rearing damages was *Rieck v. Medical Protective Co.*³⁸ *Rieck*, however, was not a "true" wrongful pregnancy case in that the plaintiffs sued their obstetrician for failure to timely diagnose the pregnancy, thereby precluding an abortion.³⁹ The Wisconsin Supreme Court denied the parents' request for child rearing costs on public policy grounds.⁴⁰ The court, agreeing with *Shaheen*, held that to shift the costs to the obstetrician would "create a new category of surrogate parent, . . . be wholly out of proportion to the culpability involved, . . . place too unreasonable a burden upon physicians, . . . [and] . . . enter a field that has no sensible or just stopping point."⁴¹

Two years later, the Wisconsin Supreme Court in *Dumer v. St. Michael's Hospital*⁴² took a step in the direction of allowing child rearing costs. In *Dumer*, the pregnant plaintiff was negligently diagnosed by the defendants as suffering from an allergic reaction when in fact she had rubella.⁴³ When the child was born with a "rubella syndrome,"⁴⁴ the plaintiff

who has harmed another's reputation by defamatory statements cannot show in mitigation of damages that the other has been financially benefited from their publication . . . unless damages are claimed for harm to pecuniary interests . . . Damages for pain and suffering are not diminished by showing that the earning capacity of the plaintiff has been increased by the defendant's act.

Id. See Joseph S. Kashi, *The Case of the Unwanted Blessing: Wrongful Life*, 31 U. MIAMI L. REV. 1409, 1415-19 (1977), for in-depth discussions of the benefit rule as well as criticisms of the *Troppi* application and A.N.M., Note, *Judicial Limitations on Damages Recoverable for the Wrongful Birth of a Healthy Infant*, 68 VA. L. REV. 1311, 1323-26 (1982).

37. *Troppi*, 31 Mich. App. at 257-60, 187 N.W.2d at 519-20. The court based this holding on the tort principle that: (1) "the tortfeasor takes the injured party as he finds him"; and (2) on reasonableness. "While the reasonableness of a plaintiff's efforts to mitigate is ordinarily to be decided by the trier of fact, we are persuaded to rule, as a matter of law, that no mother, wed or unwed, can reasonably be required to abort (even if legal) or place her child for adoption." *Id.* at 260, 187 N.W.2d at 520 (footnote omitted).

38. 64 Wis. 2d 514, 219 N.W.2d 242 (1974).

39. *Id.* at 516-17, 219 N.W.2d at 244.

40. See *supra* note 14 and accompanying text.

41. *Rieck*, 64 Wis. 2d at 518-19, 219 N.W.2d at 244-45.

42. 69 Wis. 2d 766, 233 N.W.2d 372 (1975).

43. *Id.* at 769, 233 N.W.2d at 373. Rubella, sometimes called German measles, is a mild viral infection marked by a pink macular or spotty rash, fever and lymph node enlargement. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1163 (26th ed. 1981).

brought suit, alleging that because of the defendant's negligent misdiagnosis and consequent failure to warn her of the possible effects of rubella on the fetus, the child was not aborted.⁴⁵ The Wisconsin Supreme Court refused to recognize a cause of action for wrongful life,⁴⁶ but held that the parents' claim for expenses arising out of the congenital defects stated a claim upon which relief could be granted.⁴⁷ While the court did not need to address whether child rearing costs were recoverable, it found that the parents were entitled to recover damages sustained because of the child's defects.⁴⁸ Thus, the Wisconsin Supreme Court took a small step toward allowing the recovery of child rearing damages by recognizing that the birth of an unwanted child does not outweigh the burdens of parenthood as a matter of law.

III. THE *MARCINIAK* DECISION

In a unanimous decision written by Justice Bablitch, the Wisconsin Supreme Court in *Marciniak v. Lundborg*⁴⁹ held that parents may recover the costs of rearing a child conceived subsequent to a negligent sterilization operation.⁵⁰ In reaching this conclusion, the court discussed and applied basic principles of tort law.

The court began its discussion by noting that the general rule in Wisconsin is that a person is liable for any consequences which follow an unbroken sequence from a negligent act, even if unforeseeable.⁵¹ The court then recognized the public policy bases, also cited in *Rieck v. Medical Protective Co.*,⁵² for denying recovery where the chain of causation is complete.⁵³ It then addressed the issue of whether the normal rule of recovery

44. Transplacental infection of the fetus in the first trimester may produce developmental anomalies of the heart, eyes, brain, bone and ears, including cataracts, deafness, abnormal smallness of the head, and mental retardation. *Id.* at 1163, 1297.

45. *Dumer*, 69 Wis. 2d at 769, 233 N.W.2d at 374.

46. *Id.* at 772-73, 233 N.W.2d at 375-76. The court stated: "The infant plaintiff would have us measure the difference between his life with defects against the utter void of nonexistence, but it is impossible to make such a determination. This Court cannot weigh the value of life with impairments against the nonexistence of life itself." *Id.* at 773, 233 N.W.2d at 375-76 (quoting *Gleitman v. Cosgrove*, 49 N.J. 22, 28, 227 A.2d 689, 692 (1967)).

47. *Id.* at 776, 233 N.W.2d at 377.

48. *Id.*

49. 153 Wis. 2d 59, 450 N.W.2d 243 (1990).

50. *Id.* at 61, 450 N.W.2d at 244.

51. *Id.* at 64, 450 N.W.2d at 245 (citing *Hartridge v. State Farm Mut. Auto Ins. Co.*, 86 Wis. 2d 1, 11, 271 N.W.2d 598, 602 (1978)).

52. 64 Wis. 2d 514, 517-18, 219 N.W.2d 242, 244 (1974).

53. *Id.* at 65, 450 N.W.2d at 245.

should prevail or whether the *Rieck* public policy considerations should preclude recovery of child rearing costs.⁵⁴

The court carefully addressed and rejected each public policy argument the defendants raised. First, the court disagreed with the argument that child rearing costs are "too speculative," stating simply that "[j]uries are frequently called on to make far more complex damage assessments in other tort cases."⁵⁵ Next, the court rejected the argument that the costs of child-rearing would be "wholly out of proportion to the culpability of the negligent physician."⁵⁶ The court responded that "the public policy of this state does not categorically immunize defendants from liability for foreseeable damages merely because the damages may be substantial."⁵⁷ Third, the court disagreed that awarding damages to the parents would psychologically harm the child when he or she later learns of his or her parents' lawsuit.⁵⁸ Neither did the court believe that allowing child rearing costs would in any way "debase the sanctity of human life," noting instead that the Marciniaks desired to *enhance* their child's life.⁵⁹ Further, the court dismissed the argument that allowing these costs would shift the burden of rearing the child to the defendant, thereby creating a new category of surrogate parent. The court stated that "[t]o equate the responsibility of parenting with the responsibility of paying for the costs of child raising is illogical."⁶⁰ Finally, the court rejected the argument that allowing child rearing costs would enter a field that has no sensible or just stopping point; the court put its faith "in our courts and our juries to distinguish the legitimate [claim] from the fraudulent."⁶¹

Having concluded that the public policy considerations of *Rieck* and other courts did not preclude the recovery of child rearing costs, the court next addressed the issue of mitigation. It held that parents are not required to abort the fetus or to give the child up for adoption as a means of mitigat-

54. *Marciniak*, 153 Wis. 2d at 65, 450 N.W.2d at 245.

55. *Id.* at 66, 450 N.W.2d at 245-46.

56. *Id.*, 450 N.W.2d at 246.

57. *Id.*

58. The court reasoned that:

[t]he parents' suit for recovery of child rearing costs is in no reasonable sense a signal to the child that the parents consider the child an unwanted burden. The suit is for costs of raising the child, not to rid themselves of an unwanted child. . . . But the love, affection, and emotional support they are prepared to give do not bring with them the economic means that are also necessary to feed, clothe, educate and otherwise raise the child.

Id. at 67, 450 N.W.2d at 246.

59. *Id.* at 67-68, 450 N.W.2d at 246.

60. *Id.* at 68, 450 N.W.2d at 246.

61. *Id.* at 68, 450 N.W.2d at 246-47.

ing damages.⁶² Rather, the court stressed that “[t]he rules requiring mitigation of damages require only that reasonable measures be taken. We do not consider it reasonable to expect parents to essentially choose between the child and the cause of action.”⁶³ The court concluded its public policy analysis by distinguishing *Rieck* both on its facts and on the relative degree of culpability of the defendant.⁶⁴ The court then held that child rearing costs were recoverable but declined to extend such costs beyond the age of majority because “parental duty of support ordinarily ceases at the age of majority.”⁶⁵

The final issue addressed by the court was whether the “benefit rule” of the *Restatement (Second) of Torts* section 920⁶⁶ requires that recovery of child rearing costs be offset by any benefits the parents receive by virtue of the child’s presence in their lives.⁶⁷ The court discussed the two limitations to the benefit rule: (1) that the circumstances to be considered in mitigation of damages must benefit the same interest that was harmed; and (2) that the benefit can offset the damage only to the extent that it is equitable.⁶⁸ The court deferred to the intent of the drafters, as well as to scholarly criticisms of improper applications of the “benefit rule” by previous courts.⁶⁹ The court agreed with these authorities that a narrow interpretation of “interest” was correct. It concluded that “[p]roperly applied . . . the ‘same interest’ rule would require that the economic damages involved in raising the child be offset by corresponding economic benefits, and that emotional harms be offset by emotional benefits, and so on.”⁷⁰ However, the court declined to apply the “benefit rule” to negligent sterilization cases using the

62. *Id.* at 69, 450 N.W.2d at 247. Interestingly, as supporting authority, the court wrongly cited the “avoidable consequence doctrine” of the RESTATEMENT (SECOND) OF TORTS § 918(1) (1979), which requires mitigation where “reasonable,” as RESTATEMENT (SECOND) OF TORTS § 920 cmt. f (1979). Section 920 is the “benefit rule.” Despite the incorrect citation, the court’s analysis was consistent with § 918(1).

63. *Marciniak*, 153 Wis. 2d at 69, 450 N.W.2d at 247 (citation omitted).

64. *Id.* at 70, 450 N.W.2d at 247-48. The court stated that because the plaintiff in *Rieck* was already pregnant when she consulted with the physicians, the interest of the *Rieck* plaintiff was the inability to terminate the pregnancy, rather than the avoidance of pregnancy as was the case in *Marciniak*. The physician’s negligence in *Rieck* was in failing to diagnose the pregnancy, but the plaintiff did not seek another medical opinion until it was too late to abort the fetus. Further, the *Rieck* defendant did not know that the plaintiff desired an abortion if pregnant, while in *Marciniak* the defendant was aware the plaintiff wanted to avoid conception. *Id.*

65. *Id.* at 71, 450 N.W.2d at 248 (citation omitted).

66. *See supra* note 32 and accompanying text.

67. *Marciniak*, 153 Wis. 2d at 72, 450 N.W.2d at 248.

68. *Id.*

69. *Id.* at 72-73, 450 N.W.2d at 248-49. The court paid particular attention to § 920 cmt. f. *Id.*

70. *Id.* at 73, 450 N.W.2d at 249.

rule's second limitation — that applying the benefit rule would be inequitable.⁷¹ The court concluded:

The parents made a decision not to have a child. It was precisely to avoid that "benefit" that the parents went to the physician in the first place. . . . With respect to emotional benefits, potential parents in this situation are presumably well aware of the emotional benefits that might accrue to them as the result of a new child in their lives. When parents make the decision to forego this opportunity for emotional enrichment, it hardly seems equitable to not only force this benefit upon them but to tell them they must pay for it as well by offsetting it against their proven emotional damages. With respect to economic benefits, the same argument prevails.⁷²

Thus, the court held that child rearing costs to the age of majority "may not be offset by the benefits conferred upon the parents by virtue of the presence of the child in their lives."⁷³

IV. ANALYSIS

In *Marciniak v. Lundborg*,⁷⁴ the Wisconsin Supreme Court joined the minority of jurisdictions that have addressed the child rearing damage issue. While twenty-six of thirty-three states that have ruled on this issue have allowed other damages, only six jurisdictions have allowed child rearing costs.⁷⁵ Further, these six states have offset damages by the benefits of the child's presence in the parents lives.⁷⁶ Only one other state, Ohio, has awarded child rearing costs to parents with no offset.⁷⁷ However, the lead-

71. *Id.*

72. *Id.* at 73-74, 450 N.W.2d at 249.

73. *Id.* at 74, 450 N.W.2d at 249.

74. 153 Wis. 2d 59, 450 N.W.2d 243 (1990).

75. David J. Burke, Comment, *Wrongful Pregnancy: Child Rearing Damages Deserve Full Judicial Consideration*, 8 PACE L. REV. 313, 324 n.78 (1988). These states include Arizona, California, Connecticut, Maryland, Michigan and Minnesota and Ohio. *Id.* For a synopsis of each jurisdiction's leading case and holding on this issue, see *id.* at 340-72.

The author also discusses the strong concurrences and dissents in some cases which have denied child rearing damages, hinting that these courts could reverse their leading cases in the near future. *Id.* at 325-29.

This author notes that since the publication of the cited Comment, none of the jurisdictions addressing the child rearing damage issue has overruled its leading case. *Id.*

76. *Id.* at 324.

77. *Id.* at 324, 363-64 & n.79, 351-54. The leading Ohio case is *Bowman v. Davis*, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976). However, the *Bowman* court did not even address the "benefit rule." Instead, the court concluded that constitutional rights *required* it to allow child rearing costs, stating:

The choice not to procreate, as part of one's right to privacy, has become (subject to certain limitations) a Constitutional guarantee. For this court to endorse a policy that makes physicians liable for the foreseeable consequences of all negligently performed operations

ing Ohio decision was based on the "Constitutional guarantee" of the right not to procreate, rather than a finding that applying the "benefit rule" to the tort of negligent sterilization is inequitable.⁷⁸

In reaching its decision, the Wisconsin Supreme Court found recent scholarly analysis of the child rearing damage issue, especially treatment of the issue by other courts, highly persuasive. Indeed, throughout its appraisal of the defendant's public policy arguments, the court rejected each argument with reasoning based substantially on the trend in other jurisdictions.

The court's decision to follow the trend rejecting public policy arguments strengthened the *Marciniak* analysis. However, the court's rationale was weakened by its subsequent attempt to distinguish *Rieck* on its facts. The court stated:

The plaintiff in *Rieck* was already pregnant at the time she consulted with the physicians. . . . [The interest of the parents] was not the interest in avoiding pregnancy in the first instance, as is the case here.

Moreover, the culpability in the present case differs from that of *Rieck*. The doctor's negligence in that case consisted of failing to diagnose pregnancy at seven weeks. . . . In the present case, the physicians were aware that the plaintiff was seeking consultation and treatment for the express purpose of permanently avoiding conception.⁷⁹

The weakening effect is twofold. First, the court reduced the impact of the reasoning behind its rejection of public policy considerations by limiting the holding to negligent sterilization. Second, it left many unanswered questions as to the application of the holding. For example, by distinguishing *Rieck*, the court implied that child rearing costs will not be awarded in cases where a physician negligently fails to diagnose pregnancy, thus precluding the parents' option of abortion. Hence, the question arises whether the court's holding applies to other scenarios that might lead to a wrongful pregnancy action. For example, in *Troppi v. Scarf*⁸⁰ the parents sued a pharmacist for filling the mother's birth control prescription with tranquil-

except those involving sterilization would constitute an impermissible infringement of a fundamental right.

Bowman, 48 Ohio St. 2d at 46, 356 N.E.2d at 499 (emphasis supplied)(citations omitted).

78. *Bowman*, 48 Ohio St. 2d at 46, 356 N.E.2d at 499. As supporting authority, the Ohio court cited *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973); and *Griswold v. Connecticut*, 381 U.S. 479 (1965).

79. *Marciniak*, 153 Wis. 2d at 70, 450 N.W.2d at 247-48.

80. 81 Mich. App. 240, 187 N.W.2d 571 (1971). For a discussion of the case see *supra* notes 34-38 and accompanying text.

izers. Or, in *Christensen v. Thornby*⁸¹, the husband underwent a vasectomy because the wife's health was in danger; a healthy child was subsequently born with no injury to the mother. It is unclear whether the *Marciniak* holdings would therefore apply where: (1) the couple chooses sterilization to prevent medical danger to the mother, rather than for financial reasons, and a healthy child is born with no injury to the mother;⁸² or (2) where the cause of the pregnancy is something other than negligent sterilization. In sum, while the court attempted to follow a clear trend of rejecting public policy arguments as grounds for denying child rearing costs, its holding to allow these damages in wrongful pregnancy actions remains open-ended.

More effective is the courts holding that the "benefit rule" should not be applied in negligent sterilization cases,⁸³ although it is again unclear whether the rule is likewise inapplicable to other wrongful pregnancy actions. Nevertheless, it is noteworthy that the court avoided the inconsistent application of the *Tropi* court when it diminished damages by the total value of the benefits conferred upon the parents.⁸⁴ The Wisconsin Supreme Court adopted a more consistent interpretation of the rule — that economic damages can only be offset by economic benefits, and that emotional harms can only be offset by emotional benefits.⁸⁵

However, instead of then employing the "benefit rule" properly, the court concluded that it was not equitable to apply the rule in the context of the tort of negligent sterilization.⁸⁶ While it is undetermined whether the benefit rule is similarly inapplicable to other wrongful pregnancy causes of action, the court's holding as to *how* the rule should be used *if* applicable still prevails. The court based its decision not to apply the "benefit rule" on the fact that "[i]t was precisely to avoid that 'benefit' [of a child] that the parents went to the physician in the first place."⁸⁷ Thus, instead of holding that recovery of child rearing costs was mandated by "Constitutional guarantee[s],"⁸⁸ and relying on controversial decisions such as *Roe v. Wade*⁸⁹ as

81. 192 Minn. 123, 255 N.W. 620 (1934). For a discussion of the case see *supra* notes 15-20 and accompanying text.

82. See, e.g., *Flowers v. District of Columbia*, 478 A.2d 1073, 1078-83 (D.C. 1984) (Ferren, J., dissenting). Judge Ferren argued that child rearing damages should be awarded where the couple chose sterilization for economic reasons but denied whose sterilization is deemed medically necessary and a healthy child is born with no injury to the mother. *Id.*

83. *Marciniak*, 153 Wis. 2d at 73-74, 450 N.W.2d at 249.

84. *Tropi*, 31 Mich. App. at 255, 187 N.W.2d at 518.

85. *Marciniak*, 153 Wis. 2d at 73, 450 N.W.2d at 249.

86. *Id.*

87. *Id.*

88. *Bowman*, 48 Ohio St. 2d at 41, 356 N.W.2d at 496. For a discussion of the case see *supra* notes 75-77 and accompanying text.

89. 410 U.S. 113 (1973).

supporting authority, the court chose the more pragmatic alternative to reach the same conclusion: equity.

CONCLUSION

Through its decision in *Marciniak v. Lundborg*,⁹⁰ the Wisconsin Supreme Court became the first court both to allow child rearing costs to parents for damages caused by a negligently performed sterilization *and* to conclude that because application of the “benefit rule” would be inequitable, the costs may not be offset by virtue of the presence of the child in the parents’ lives. Thus, the court set precedent in the recovery of damages in negligent sterilization cases and in the proper application of the “benefit rule” to this tort. The *Marciniak* decision suggests that public policy considerations have lost a foothold when it comes to denying damages in this area of the law, although it is undetermined what future impact the decision will have on other wrongful pregnancy causes of action.

It is as well not evident how the *Marciniak* decision will affect medical care. Although the *Marciniak* court put much emphasis on parents’ right to decide whether to conceive a child, the decision could ultimately result in limiting this choice as it could lead to even higher medical malpractice and health insurance costs, and, inevitably, to the unwillingness of physicians to perform sterilization procedures.

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90. 153 Wis. 2d 59, 450 N.W.2d 243 (1990).

