South Carolina Law Review

Volume 33 | Issue 4 Article 7

5-1982

Wrongful Pregnancy

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WRONGFUL PREGNANCY

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I. INTRODUCTION

Wrongful pregnancy cases arise out of situations in which the wrongful act of a third party, usually a physician or pharmacist, interfered with contraceptive or birth control measures adopted or elected by the parents so that an unintended child came into being. Either the pregnancy itself was unwanted or there was no intent that a child should be born as a result of the pregnancy.[1] The complaint against a physician may arise out of a failed sterilization procedure,[2] an unsuccessful abortion,[3] or a negligent failure to diagnose pregnancy within the time when an abortion could be obtained.[4] The complaint against a pharmacist may arise out of negligence in improperly filling a birth control prescription.[5]

"Wrongful pregnancy" is a term that should be reserved for denominating a very narrow group of cases that are frequently, but erroneously, included in discussions of the so-called "wrongful life/wrongful birth" body of case law.[6] Although certain theo-

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1. Abortion is not generally accepted as a suitable method of routine birth control. It must be considered a birth control measure, however, because it is the last alternative available once other birth control methods have failed.

2. *E.g.*, Anonymous v. Hospital, 35 Conn. Supp. 112, 398 A.2d 312 (Super. Ct. 1979); Coleman v. Garrison, 349 A.2d 8 (Del. 1975); Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977); Pierce v. Piver, 45 N.C. App. 111, 262 S.E.2d 320 (1980); Baldwin v. Sanders, 266 S.C. 394, 223 S.E.2d 602 (1976).

3. *E.g.*, Stills v. Gratton, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976); Wilczynski v. Goodman, 73 Ill. App. 3d 51, 391 N.E.2d 479 (1979); Speck v. Finegold, 268 Pa. Super. Ct. 342, 408 A.2d 496 (1979).

4. *E.g.*, Clapham v. Yanga, 102 Mich. App. 47, 300 N.W.2d 727 (1980); Ziemba v. Sternberg, 45 A.D.2d 230, 357 N.Y.S.2d 265 (1974); Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974).

5. Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971). For a discussion of several unreported trial court opinions involving situations in which something other than the prescribed birth control pills were supplied, see MacKauf, *Birth Control and Malpractice*, 10 TRIAL L.Q. 86 (1974); Note, *Unwanted Pregnancy and the Pill—The Question of Liability of the Manufacturer*, 41 U. CIN. L. REV. 335 (1972).

6. In a rapidly expanding field of liability, one cannot expect terminology to be used

retical and philosophical problems are common to all of these cases, a wrongful pregnancy case does not belong in either category.[7] The terms wrongful life and wrongful birth refer to actions brought by either the child or the parents against a physician for negligence on his part that caused the parents to allow a severely defective child to be born.[8] Whether the parents wanted a child or not is irrelevant in a wrongful birth action.[9] The point is that the parents unwittingly brought a defective child into being when they could have aborted the fetus had they been informed of its potential or actual defects.

In most wrongful pregnancy cases, the result of the wrongful act of the physician or pharmacist is the birth of a normal, healthy child, but this is not necessarily so. The child may be both unplanned and incidentally born with defects.[10] The point

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with precision while the courts and commentators are still grappling with the theoretical basis for the consequences of imposing that liability.

7. For a thorough discussion of the theoretical distinctions between the various types of cases that are frequently referred to as "wrongful life" or "wrongful birth," see Rogers, *Wrongful Life and Wrongful Birth: Medical Malpractice in Genetic Counseling and Prenatal Testing*, 33 S.C.L. REV. 713, 715-20 (1982).

8. The physician did not commit any act that caused the defects in the child. If he had, the action would be one for an ordinary prenatal tort. *See* Note, *Tortious Death of the Unborn*, 33 S.C.L. REV. 797, 801 nn. 28 & 29 (1982). Instead the physician's negligent conduct was some act or omission in failing to advise the parents of either the incrased risk of defects in a potential child or the means available for determining potential or actual defects through genetic counseling or prenatal testing. The parents were therefore deprived of the opportunity to make an informed decision on whether to conceive the child or, once conceived, whether to abort the fetus. *See* Rogers, *supra* note 7, at 715.

9. "Wrongful birth" refers only to the action brought by the parents. *See* Rogers, *supra* note 7, at 713. An increasing number of courts have recognized that the parents have a cause of action. *E.g.*, Phillips v. United States, 508 F. Supp. 544 (D.S.C. 1981) (collecting cases). The wrongful life action is brought on behalf of the child, and with the exception of only two jurisdictions, these actions have consistently and repeatedly been denied recognition as a cognizable action at law. The cause of action was briefly recognized in New York. Becker v. Schwartz, 60 A.D.2d 587, 400 N.Y.S.2d 119 (1977); Park v. Chessin, 60 A.D.2d 80, 400 N.Y.S.2d 110 (1977). Both cases were consolidated for appeal and were reversed as to the wrongful life actions. Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978). The action has been recognized by an intermediate appellate court in California. Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 1981) (In opinions by the Honorable Solomon Blatt, Jr., the District Court of South Carolina has considered and rejected the Wrongful Life Cause of Action, *Phillips v. United States*, 508 F. Supp. 537 (D.S.C. 1981), but recognized the Wrongful Birth Cause of Action, *Phillips v. United States*, 508 F. Supp. 544 (D.S.C. 1981)).

10. *E.g.*, *Speck*, 268 Pa. Super. Ct. 342, 408 A.2d 496. Mr. Speck, who suffered from a crippling disease known as neurofibromatosis, fathered two children who also had the disease. Mr. Speck then had an unsuccessful vasectomy, and Mrs. Speck became preg-

is that no child, healthy or otherwise, was supposed to have been born. The fact that most wrongful pregnancy cases are concerned with the unwanted birth of a normal, healthy child serves to highlight the basis for the difficulty the courts have had in dealing with this type of action. Wrongful birth cases are actions for wrongfully allowing an impaired, defective life to come into being. Wrongful pregnancy cases, however, are actions for the wrongful creation of life itself.

Adjusting to or even considering the idea that creation, especially the creation of a normal, healthy human, can in any way be wrongful has been a strain on the judiciary. Some courts have accepted the concept and have attempted to balance competing considerations in order to fashion a remedy that fully compensates the parents for the wrong done and at the same time recognizes the value of and benefit derived from the life that was created.[11] Some courts have recognized that a wrong occurred when the woman became pregnant and that compensable damages were sustained in association with the pregnancy and delivery, but have not accepted that the life created can in any way be a detriment once birth has occurred.[12] Still other courts have not accepted that the creation of a human being can in any way be a compensable wrong.[13] The divergence of opinion in the case law reflects the current divergence of opinion in our society on certain fundamental rights and the priority values to be assigned when these rights are in conflict.

It is now well-settled that individuals in America have a constitutionally protected right to make their own decisions on whether to attempt to limit the size of their families or to attempt not to have children at all.[14] Physicians are free to disseminate information about birth control measures, and citizens have a right of access to the information, means, and methods

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nant. Mrs. Speck subsequently underwent an abortion and, when she complained to her physician that she felt the pregnancy was continuing, was assured that she was no longer pregnant. Mrs. Speck ultimately gave birth to a third child afflicted with neurofibromatosis.

11. *E.g., Sherlock,* 260 N.W.2d 169; Betancourt v. Gaylor, 136 N.J. Super. 69, 344 A.2d 336 (1975).

12. *E.g.,* White v. United States, 510 F. Supp. 146 (D. Kan. 1981); *Wilczynski,* 73 Ill. App. 3d 51, 391 N.E.2d 479.

13. *E.g., Coleman,* 349 A.2d 8; *Rieck,* 64 Wis. 2d 514, 219 N.W.2d 242.

14. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

for birth control. These rights are constitutionally guaranteed by the right of privacy, and the state cannot interfere with the individuals' decision to take measures to avoid pregnancy.[15] Nevertheless, when birth control measures fail, for whatever reason, the constitutional rights of the developing fetus come into sharp conflict with the mother's right of privacy if she chooses not to bear the child. The United States Supreme Court in *Roe v. Wade*[16] resolved this conflict by allocating priorities to the competing interests according to the stage of pregnancy. During the first trimester of pregnancy the woman has an unfettered choice on whether her body will be used to bring a new life into the world. Thereafter, the state has an interest in protecting the rights of the unborn, specifically the right to be born, and may place restrictions on the circumstances under which the pregnancy can be terminated.[17]

Both the public and the politicians continue to grapple with the formidable issue of what is to be done about the unplanned, unwanted, and as yet unborn child. In wrongful pregnancy litigation, the judiciary continues to grapple with what is to be done about the unplanned, unwanted birth of a child who must now be nurtured and cared for. The parents did not want to become parents and took specific precautions to avoid that event, but it happened anyway. Historically, however, birth control methods have not been infallible, and society is conditioned to accept the unplanned child. Nevertheless, in a wrongful preg-

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15. *See id.*

16. 410 U.S. 113 (1973).

17. *Id.* at 164. The continuing controversy over *Roe*, the public debate calling for or denouncing attempts at antiabortion legislation, the many public forums held on the issue of abortion, and advancements in medical technology that call into question a definable point in time at which a fetus is viable all indicate that *Roe* may not be the final resolution of the conflicting and competing rights. Interestingly, a major controversy surrounding the confirmation hearings of Supreme Court Justice Sandra Day O'Connor focused on her refusal to declare her personal opinion on the issue of abortion. Although her statement that it would be improper for a judge to announce a personal opinion on a controversial issue that might later require her judicial consideration comports with the requirements of judicial ethics, *see* ABA CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(c) (1972), it was not satisfactory to some members of the confirmation committee who abstained from the confirmation vote specifically because of Judge O'Connor's failure to announce her position on abortion. Washington Post, Sept. 16, 1981, at 2A, col. 5. American society may be in more or less collective agreement that the state cannot interfere with the individual's choice not to become pregnant. Nevertheless, once conception has occurred despite precautions, the state's role is still a very divisive issue.

nancy case, the failure of the means of birth control has had an assist from a third party—a doctor or a pharmacist who acted wrongfully. It is elementary in the law that one is held accountable for any injury he causes to another by his own wrongdoing.[18] Therefore, the individual should be compensated by the physician or pharmacist who wrongfully interferes with his or her right not to have children.

The body of case law designated as wrongful pregnancy reflects an uneasiness on the part of the judiciary and a divergence of opinion on just about every point—the nature of the wrong committed, the nature of the injury suffered, and the extent and measure of damages if injury is found. Formulating a consistent theoretical construct for litigating these claims has been difficult,[19] even within the same judicial jurisdictions.[20] This article examines predictable patterns that have begun to emerge as more and more courts have acknowledged that a wrong should not go wholly unredressed, even if the result of the wrongdoing is the birth of a child.

II. THE NATURE OF THE WRONG COMMITTED

The wrong complained of against the doctor or pharmacist in a wrongful pregnancy action is that the doctor or pharmacist was engaged to perform some service that was designed to pre-

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18. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 1, at 4 (4th ed. 1971).

19. This difficulty may stem from the inherent difference between considering the existence of a right in the abstract and considering the concrete ramifications of violating or interfering with the exercise of that right, *e.g.*, the right of a particular fetus to exist. Problems concerning the application of constitutional rights are not peculiar to wrongful pregnancy actions. For example, although the Constitution guarantees freedom from unreasonable searches and seizures by the police, U.S. CONST. amend. IV, controversy surrounds the application of the judicially created exclusionary rule of evidence. *See, e.g.*, Vitiello & Burger, Mapp's *Exclusonary Rule: Is the Court Crying Wolf?*, 86 DICK. L. REV. 15 (1981); Spector & Foster, *Swords, Shields, and the Quest for Truth in the Trial Process: The Road from Constitutoonal Standards to Evidentiary Havens*, 33 OKLA. L. REV. 520 (1980).

20. For an illustration of inconsistent results reached by appellate courts in the same state concerning the existence of a cause of action for wrongful pregnancy, *compare* Cox v. Stretton, 77 Misc. 2d 155, 352 N.Y.S.2d 834 (1974) *with* Clegg v. Chase, 89 Misc. 2d 510, 391 N.Y.S.2d 966 (1977). For an illustration of different resolutions within the same jurisdiction on the issue of damages when a plaintiff has failed to obtain an abortion, *compare Ziemba*, 45 A.D.2d 230, 357 N.Y.S.2d 265 *with* Sorkin v. Lee, 78 A.D.2d 180, 434 N.Y.S.2d 300 (1980).

vent birth, that this service was a failure, and that an unintended birth occurred. Whether this failure will render the doctor's or pharmacist's action legally wrongful depends in part on the theory under which recovery is sought. Plaintiffs have grounded their actions in negligence, breach of contract, misrepresentation, fraud and deceit with varying degrees of success. The artificiality often found in the application of established legal doctrines and principles to the fact situation of a wrongful pregnancy case illustrates the inherent problems encountered when the judiciary attempts to fashion a remedy for interference with a newly recognized right.[21] Attempts to devise a theoretical construct for affording protection to the individual who does not want to bring a child into this world, but who does so as a result of some failing on the part of a third party have resulted in divergent and sometimes theoretically inconsistent judicial decisions.[22]

A. Negligence

Negligence is the most commonly used theory for recovery in wrongful pregnancy cases and presents the fewest theoretical problems. This is to be expected since the judicial system is accustomed to holding a physician or pharmacist liable if negligence in the performance of professional services results in injury to the patient. As with any other negligence action, the plaintiff must establish the existence of a duty, a breach of that duty, and a causal link between the breach of duty and the injury suffered.

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21. Although precautions to avoid pregnancy have been taken for many years with varying degrees of success, a totally childless marriage has been viewed as a tragedy for much of mankind's history. It is only in recent years that a couple's election not to have children at all has come to gain at least partial social acceptance. This acceptance may be more attributable to developments in medical science that have made such an election a feasible alternative, than an indicia of a shift in societal values. While in the past it may have been "all right for some people" not to want children, it is now the constitutionally protected right of every individual in America to choose not to have a child. See note 14 and accompanying text *supra*. The supremacy of the individual's right to choose not to reproduce is somewhat foreign and inconsistent with the collective primal urge of mankind to procreate the species.

22. Although wrongful pregnancy cases may have a rather metaphysical overlay, the existence of theoretical growing pains is common to any developing area of the law. The complex and sometimes convoluted development of the law of products liability is a prime example.

Fact situations that may give rise to negligence actions for wrongful pregnancy are the failure to diagnose a pregnancy within the time when an abortion can be obtained and various failings in connection with the performance of sterilization or abortion procedures. The negligent acts complained of may arise out of the surgery itself—cutting something other than the proper tube, incomplete closing of a tube, or similar mechanical actions during the surgery.[23] Following the surgery there may be negligence on the part of the physician for failure to perform tests to confirm sterility, failure to heed pathology tissue reports, or failure to inform the patient of any doubt about the successful completion of the operation itself.[24] Because recanalization is a known process that can occur after a sterilization procedure, the failure to apprise the patient of this fact could give rise to an action for lack of informed consent.[25]

The element of a negligence theory that has received particular attention in wrongful pregnancy litigation, however, is the issue of proximate cause. For instance, in *Custodio v. Bauer*,[26] the defendant contended that the plaintiff's pregnancy was caused by the sexual relations between the parents—an intervening cause—and not by the alleged negligence of the physician in performing a sterilization procedure. The court rejected this contention and stated that "it is difficult to conceive how the very act the consequences of which the operation was designed

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23. See notes 36 & 47 and accompanying text *infra*.

24. See notes 36 & 43-47 and accompanying text *infra*.

25. Problems may be encountered in an informed consent action that sounds in negligence. The information would no doubt be considered material, and therefore the duty exists for the doctor to supply this informaton to the patient. But, under a negligence theory most courts require that the patient prove causation by a showing that, if the withheld information had been supplied, the patient would have chosen not to undergo the procedure. The causal connection was found not to exist in Sard v. Hardy, 34 Md. App. 217, 367 A.2d 525 (1976), a leading informed consent opinion that also happens to be a wrongful pregnancy action. If the jurisdiction holds that informed consent cases sound in battery, however, this obstacle is removed. Under a battery theory, the causation is established if the patient shows that material risk information was known to the doctor, but withheld from the patient, and that the risk did materilize and cause injury to the patient. Under a battery theory, the more significant issue would probably be the materiality of the risk information. The question would be whether the patient would consider the chance of recanalization to be an important consideration in a decision of whether to elect a sterilization procedure as the birth control method of choice.

26. 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1976).

to forestall, can be considered unforeseeable."[27]

A more serious problem of proximate cause, however, arises in the cases in which the negligence complained of is the failure to diagnose pregnancy in time for the plaintiff to obtain an abortion.[28] In establishing proximate cause, the plaintiff in a wrongful pregnancy action arising out of a failure-to-diagnose situation must introduce evidence that an abortion would have been obtained if the diagnosis had been timely made.

In *Rieck v. Medical Protective Co.*,[29] the defendant informed the plaintiff that she was not pregnant. Two months later another doctor diagnosed her as being seventeen weeks pregnant, and subsequently a normal, healthy child was born. Mrs. Rieck and her husband brought suit against the defendant clinic alleging that she would have obtained an abortion if she had been informed of the pregnancy at the earlier date. The court, citing public policy, denied the action and couched much of its policy argument in terms of causation. The court noted that even when the chain of causation is complete, recovery may be denied because of policy considerations. The court emphasized that

> [t]he complaint here alleges what the parents of the child would have done if they had been informed of the fact of pregnancy at the time of the mother's consulting the obstetrician sued. At the time of trial it is entirely predictable that the par-

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27. *Id.* at 316-17, 59 Cal. Rptr. at 472.

28. Because the plaintiff was already pregnant and the child was in the process of development when the physician breached his duty to the patient, the failure to diagnose cases are more like wrongful birth actions in theory. The pregnancy itself did not come about as the result of a physician's negligence, but the continuation of the pregnancy and ultimate birth of the healthy child is alleged to be the result of the defendant's negligence. The point of departure between the two kinds of actions, however, is that in a wrongful pregnancy case the plaintiff did not want a child to be born at all, healthy or otherwise, while the wrongful birth plaintiff may well have intended to have a child, but did not intend to have a defective child. Although the health of a child is not a theoretical determining factor for classification of the action because a child can be both unplanned and defective, the courts have clearly made a distinction as far as the outcome of the case. This distinction is apparent in those jurisdictions that have allowed a wrongful birth action to be brought by the parent of a defective child, but have not allowed a wrongful pregnancy action for the birth of a healthy child. *Compare* Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975)(wrongful birth) *with* Terrell v. Garcia, 496 S.W.2d 124 (Tex. Civ. App. 1973)(wrongful pregnancy); *compare* Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975) (wrongful birth) *with Rieck*, 64 Wis. 2d 514, 219 N.W.2d 242 (wrongful pregnancy).

29. 64 Wis. 2d 514, 219 N.W.2d 224 (1974).

> ents would have firmly testified to the fact of such intention, and its fixed and unalterable character. It is cultivating the obvious to state that, if the door were opened to recovery under such allegations and such subjective testimony as to state of mind or intention, the temptation would be great for parents, where a diagnosis of pregnancy was not timely made, 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. We have no hesitancy in concluding that to hold that the allegations of this complaint constitute a cause of action for recoverable damages would open the way for fraudulent claims and would enter a field that has no sensible or just stopping point.[30]

The court has a valid point on the causation issue. If the plaintiffs would have chosen to continue the pregnancy, then any negligent delay in diagnosis would not have been the proximate cause of any injury they suffered as a result of their attempt at planned parenthood having gone awry.

In *Ziemba v. Sternberg*,[31] the Appellate Division of the New York Supreme Court reached a different conclusion. The plaintiff, after having been assured that she was not pregnant, consulted another physician, learned that she was four and a half months pregnant, and subsequently gave birth to a normal, healthy child. A contested issue on appeal was whether the failure to diagnose the pregnancy was the cause of the child's birth, since the plaintiff could still have obtained a legal abortion after the pregnancy was discovered. The plaintiff was beyond her first trimester when the pregnancy was discovered, and apparently the laws of New York allow abortions beyond that point. The majority first discussed the constitutional right of a woman to obtain an abortion during the first trimester, and then went on to state:

> [O]n the other hand, we cannot agree with the conclusion of the dissenting justice that, since a legal abortion was still available to plaintiff wife at the time her pregnancy was discovered, her failure then to avail herself of that alternative should bar her present claim for damages. *The right to have an abortion may not be automatically converted to an obligation to have*

30. *Id.* at 519, 219 N.W.2d at 245.
31. 45 A.D.2d 230, 357 N.Y.S.2d 265 (1974).

one.[32]

The court called attention to evidence that the plaintiff had received medical information and advice regarding the dangers of abortion at the time her pregnancy was discovered. The court concluded that whether it was reasonable for her to forgo an abortion would be a question for the jury to determine based on the circumstances of the case.[33]

In *Clapham v. Yanga,*[34] the Michigan Court of Appeals upheld a jury verdict in favor of the plaintiff for the negligent failure to diagnose pregnancy in a fourteen-year-old girl. The plaintiff had testified that she would have obtained an abortion if she had known she was pregnant. The jury decided the question of proximate cause in the plaintiff's favor and the appellate court apparently determined that the plaintiff's testimony was sufficient to support the verdict.

The issue of proximate cause may be more difficult to resolve in a failure to diagnose situation since the alleged negligence occurs after conception. Nevertheless, if the jurisdiction recognizes the action at all, the question of whether the evidence introduced is sufficient should be a question for the jury to determine.

Negligence as a basis for recovery in a wrongful pregnancy action presents few theoretical problems, relatively speaking, and the obstacles to recovery instead are the traditional problems of proof encountered in any medical malpractice action.

In a negligence action the plaintiff ordinarily must produce expert medical testimony that the physician's actions fell below the recognized standard of care, since the performance of a sterilization procedure and the necessity for postoperative tests are not matters that lie within the common knowledge of laymen.[35] When the matters in issue are within the understanding of lay-

32. *Id.* at 233, 357 N.Y.S.2d at 269 (emphasis added).

33. The concern for fraudulent claims expressed in *Rieck* is totally lacking in *Ziemba,* probably because the plaintiff had initially consulted the defendant for the purpose of obtaining a birth control prescription and had expressed her desire not to have children before the negligent act.

34. 102 Mich. App. 47, 300 N.W.2d 727 (1980).

35. Ball v. Mudge, 64 Wash. 2d 247, 371 P.2d 201 (1964).

men, expert testimony is not required.[36] In *Clapham*, the case involving the failure to diagnose pregnancy in a fourteen-year-old girl, the court first discussed the locality rule and then ruled that "a jury could find, without specific testimony on the standard of care, that it is negligent not to give a patient who complains of the symptoms experienced by Loriann a pregnancy test."[37] This ruling may be limited to the particular facts of the *Clapham* case, however, since a mature woman might be expected to recognize the significance of certain symptoms of pregnancy that would put her on notice to inquire about the performance or the results of a pregnancy test.[38]

Changes in the medical techniques and procedures used in sterilization operations may make it more difficult to prove negligence than it has been in the past. Initially, sterilization of a woman was performed by a laparotomy, an incision opening up the abdominal cavity. The fallopian tubes were then located and severed, and a section of each tube was submitted to the pathology laboratory for microscopic confirmation of the tissue removed. In recent years, however, laparoscopic techniques have been developed to give the surgeon access to the fallopian tubes

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36. *E.g., Stills*, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976) (defendant doctor failed to notify patient of cause for doubt that abortion had been successfully completed). It should be noted that a breach of contract acton may be preferable in circumstances in which it is alleged that the defendant did not completely close one of the tubes. In Pritchard v. Neal, 139 Ga. App. 512, 229 S.E.2d 18 (1976), the action is referred to by the court as "negligent malpractice due to the Defendant's failure to cut the right fallopian tube." *Id.* at 514, 229 S.E.2d at 19. The court disagreed with the defendant's contention that no evidence, opinion or otherwise, supported the plaintiff's allegation of malpractice and noted that a doctor who performed a radiologic procedure on the plaintiff expressed the opinion that the right tube looked normal and probably had never been cut. The court went on to state that "although his testimony was somewhat equivocal, it did establish a foundation upon which a jury could have concluded that the right tube was never ligated." *Id.* at 514, 229 S.E.2d at 19. The court did not address the question of whether expert testimony was required to establish whether the failure to ligate the tube fell below the standard of care in order to submit the case to the jury. Although *Pritchard* is denominated a negligence action, the court appears to have resolved the issue along the lines of a failure to perform the contract for service, rather than whether the defendant was negligent in failing to do so. Although the failure to perform a service may also be the type of negligence a layman is qualified to determine without the assistance of an expert witness, this is not true in all cases. See note 47 and accompanying text *infra*.

37. 102 Mich. App. at 55, 300 N.W.2d at 730.

38. The court in *Clapham* also discussed the standard to be applied to a minor with regard to contributory negligence. *Id.* at 55-56, 300 N.W.2d at 731-32.

without surgically opening the abdomen.[39] The tube may then be interrupted by electrocoagulation and division[40] or it may be mechanically blocked by folding the tube and securing it with a silicone or rubber ring, known as a Falope ring.[41] If one of these techniques is used,[42] the procedure's success cannot be confirmed by a pathology report because no tissue is removed.

The postoperative procedures for confirming sterility in women is the hysterosalpingogram, a radiologic procedure in which a contrast media is injected and traced through the fallopian tubes. The dye should stop at the point of closure.[43] Use of this procedure has been questioned by some physicians because the pressure caused by the injected dye may conceivably restore patency to a tube that has been interrupted by one of the laparoscopic techniques.[44]

Sterility in men is confirmed by a sperm count in a semen specimen. Questions have also been raised about the interpretations and significance that should be given to a report stating "occasional non-motile sperm seen" because of different techniques that might be used by laboratories that perform the sperm count.[45] Because of the "respectable minority" rule[46] that operates in medical negligence actions, the plaintiff may be unable to prove that a physician's failure to confirm sterility fell below the standard of care practiced by other physicians in the

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39. The abdomen is inflated by introduction of nitrous oxide, and a fiberoptic laparoscope is inserted through an incision in the umbilicus so that the surgeon can visualize the abdominal cavity. Sonderstrom & Smith, *Tubal Sterlization: A New Laparoscopic Method*, in 38 OBST. & GYN. 152 (1971).

40. *Id.*

41. *A Simpler Method to Sterilize Women*, 231 J.A.M.A. 1221 (1975).

42. The laparoscopic techniques have all but replaced the laparotomy in current medical practice. Laparotomy may still be the more appropriate technique, however, if the patient has had prior pelvic surgery or unrelated pelvic disease that would make a laparoscopic approach technically impossible or dangerous. T. GREEN, GYNECOLOGY: ESSENTIALS OF CLINICAL PRACTICE 600 (3d ed. 1977). *See also* Courey, Cunanan & Taefi, *Sterilization via Laparoscope*, 73 N.Y. ST. J. MED. 559 (1973).

43. Doust & Doust, *Ultrasound, Roentgenography, and Radionuclide Imaging in Gynecological Diagnosis*, in D. DANFORTH, OBSTETRICS AND GYNECOLOGY 508 (3d ed. 1977).

44. *Problems in Male and Female Sterilization*, LANCET 1011 (May 6, 1972).

45. *Id.*

46. This rule recognizes that experts may disagree and that a physician is entitled to be judged according to the tenets of the school of medical thought he professes to follow as long as they are in accord with a line of thought of at least a respectable minority of the profession. W. PROSSER, *supra* note 18, § 32, at 163.

same or similar circumstances.

Moreover, in those circumstances in which closure was incomplete and certain complicating conditions existed in the patient, the plaintiff may be unable to produce expert testimony that the physician fell below the standard of care in the performance of the operation.[47] Because a plaintiff in a medical negligence action must produce expert testimony that the failure to perform tests or the failure to close a tube completely fell below standard medical practice, an action based on negligence may not be practicable when expert testimony is not available. A wrongful pregnancy action, by its very nature, lends itself to theories for recovery other than negligence even though the defendant is usually a medical practitioner.

B. Breach of Contract/Warranty

In *Christensen v. Thornby*,[48] the first wrongful pregnancy decision reported, the defendant asserted that a contract to sterilize was void as against public policy and therefore unenforceable. The court in *Christensen* rejected this contention and subsequent decisions have reached the same conclusion.[49]

Courts have recognized a valid cause of action in a number of wrongful pregnancy cases based on breach of contract. The seminal case allowing recovery, *Custodio v. Bauer*,[50] held that the elements of a cause of action for breach of contract are (1) the making of the contract and its terms, (2) the plaintiff's per-

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47. Incomplete closure is not as unheard of an occurrence as one might think. Certain conditions may exist in the patient, such as endometriosis in a woman, that make it very difficult to identify the fallopian tubes. Presumably, if the surgeon follows a proper procedure in attempting to identify and close the tube, then he has followed the standard medical practice, and the defense can assert that the misidentification was an unavoidable accident. If the laparoscopic technique using the Falope ring was employed, no confirming tissue report is possible, and the physician may follow a school of thought that believes the hysterosalpingogram to be inadvisable. Questions could be raised about whether the laparoscopic technique should be used in a patient with endometriosis, see note 42 *supra*, but the plaintiff can expect the defendant doctor to assert that choice of surgical technique is a matter of medical judgment on which all physicians are not in agreement. W. PROSSER, *supra* note 18, § 32, at 162.

48. 192 Minn. 123, 255 N.W. 620 (1934).

49. *E.g.*, Jackson v. Anderson, 230 So. 2d 503 (Fla. Dist. Ct. App. 1970).

50. 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967). A written agreement to sterilize was involved. Since this decision, it is unlikely that a physician would execute a contract for his services in terms of the results to be achieved rather than the procedure to be performed.

formance in the form of consideration paid, (3) the defendant's breach, and (4) damages to the plaintiff resulting from the breach.[51]

In the marketplace, a promise is implied that the buyer will receive from the seller what he has bargained for. In the medical context, however, the general rule is that the only implied promise given by a physician when he contracts to render medical attention is that he will use reasonable skill, judgment, and diligence in rendering his services.[52] This rule is directed to implied agreements to achieve a particular result or cure. In the specific context of wrongful pregnancy actions, however, situations arise in which the express contract to perform the agreed-upon procedure has been breached. In *Green v. Sudakin*,[53] the physician agreed to perform a tubal ligation on the plaintiff following the delivery of a child. The procedure was not performed, and she again became pregnant. The court ruled that the physician's failure to perform the procedure was a breach of contract.[54]

Incomplete performance of an agreed-upon sterilization procedure may also constitute a breach of contract. In *Vaughn v. Shelton*,[55] the plaintiff underwent a tubal ligation but subsequently became pregnant and gave birth to a normal, healthy child. Evidence at trial indicated that only one tube had been closed. Reversing a directed verdict for the defendant, the Tennessee Court of Appeals stated:

> This is not a typical malpractice suit in which the skill of a doctor or surgeon is the issue, nor is it primarily a question as to whether the doctor followed the procedures that are generally recognized by the profession as being proper.
>
> . . . .
>
> When we consider the evidence in the case at bar [a pathologist's report left some questions about whether two fragments of fallopian tube tissue had been removed, or only one] and the short period of time that elapsed after the operation when pregnancy was again found in the patient, a reasonable conclusion from that fact might be that one or both of the

51. *Id.* at 315, 463 Cal. Rptr. at 471. *See generally* Annot., 43 A.L.R.3d 1221 (1972).

52. *E.g.*, Vanhoover v. Berghoff, 90 Mo. 487, 3 S.W. 72 (1887); Grindel v. Rush, 7 Ohio pt. II 123 (1836).

53. 81 Mich. App. 545, 265 N.W.2d 411 (1978).

54. *Id.* at 549, 265 N.W.2d at 413.

55. 514 S.W.2d 970 (Tenn. Ct. App. 1974).

> tubes were not closed, whether by negligence or a mere oversight and failure to carry out the implied terms of the agreement that the tubes would be closed.[56]

If the language of *Vaughn* is read as recognizing, as an implied term of the agreement, that the physician will indeed perform the entire operation, then the ruling is consistent with the general contract principles as they are used in the medical setting. A failure on the part of the physician to render full performance of the agreed-upon procedure would then result in liability for breach of contract.

A physician may bind himself in contract by an express promise or warranty to perform a cure or to obtain a specific result. In that case a jury must find that the physician made a specific, express promise to achieve a particular result that was within the contemplation of the parties at the time the promise was given and that the promise was relied upon by the patient in contracting for the physician's services.[57] Courts are reluctant to find an express promise unless the promise made is clear and specific.[58]

In wrongful pregnancy cases, the express promise may arise from the physician's assurances that a surgical procedure will render or has rendered the patient sterile. The defense generally raised by a physician is that any statement made is a mere expression of opinion or hope.[59] In response to a defendant's contention that statements made were mere matters of opinion, the California Court of Appeals stated that " 'even if defendants' statement was an opinion, plaintiffs justifiedly relied thereon. Defendant held himself out as an expert, plaintiffs hired him to supply information concerning matters of which they were ignorant, and his unequivocal statement necessarily implied that he knew facts that justified his statement.' "[60] This is a particularly lucid approach to the realities of the situation. A physician is certainly capable of qualifying any assurances he gives to a patient, and the average layman has no way of knowing when the statements need such qualification. If assurances about sterility

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56. *Id.* at 871-72, 874.
57. *E.g.*, Guilmet v. Campbell, 385 Mich. 57, 188 N.W.2d 601 (1971).
58. *See* Annot., 43 A.L.R.3d 1221, 1244-45 n.14 (1972).
59. *Id.* at 1244.
60. *Custodio*, 251 Cal. App. 2d at 314, 59 Cal. Rptr. at 470.

can only be given in terms of opinions based on probabilities, because of known instances of regeneration,[61] then the patient should be made aware of the information upon which the doctor's opinion statement is based. The expectations of the patient can then be adjusted accordingly.

The plaintiff must also contend with the general rule of contract law that any contract must be supported by consideration in order to be enforceable. If the physician states that an operation will achieve a particular result and this promise is given at the time of the formation of the contract for services, then the physician has entered into a special contract and can be held liable for its breach. The fee paid by the patient for the contracted service is sufficient consideration to support enforcement of the promise.[62]

Some courts, however, have held that a contract for a particular result could not be supported by the consideration paid for the physician's normal undertaking to use due care and skill in rendering his services, but must be supported by a separate consideration.[63] Because the law imposes a duty on the physician to carry out his services with due care and skill, the fee paid for the doctor's services should be consideration for more than an implied promise not to be negligent. The individual should not have to bargain for that assurance. Decisions requiring separate consideration appear to have confused an express contract to achieve a specific result that was entered into before the operation with an express promise about the success or result of the procedure given after performance of the operation.[64] It is generally accepted that an express warranty or promise made before the rendering of the medical attention constitutes an express contract to obtain a specific result and needs no other consideration than the fee paid by the patient, given that the patient re-

61. See note 86 and accompanying text *infra*.

62. Herrara v. Roessing, 533 P.2d 60 (Colo. App. 1975); Sard v. Hardy, 34 Md. App. 217, 367 A.2d 525 (1977).

63. *Coleman*, 349 A.2d 8. *See* Gault v. Sideman, 42 Ill. App. 2d 96, 191 N.E.2d 436 (1963).

64. In *Gault*, the plaintiff alleged that the physician "warranted" by certain statements that the operation would be safe and would effect a cure for the patient's condition. 42 Ill. App. 2d at 98, 191 N.E.2d at 437-38. In *Coleman*, the plaintiff alleged that the physician stated that a sterilization operation would be 100% effective and that the patient would not become pregnant again. 349 A.2d at 11. In both cases, the promises were given before the rendering of medical services.

lied on the promise in contracting for the physician's services.[65] If the statement that a specific procedure has had or will have a particular result is given after the performance of the procedure, a new and distinct contract is formed—a contract guaranteeing the work that has already been performed by the physician—and the new contract must be supported by a separate consideration.[66]

Some courts have been theoretically accurate in making the distinction between the two types of statements with regard to the consideration requirement. In *Sard v. Hardy*[67] and *Herrara v. Roessing*,[68] the courts of two different jurisdictions were faced with express promises given to the plaintiffs that a sterilization operation had been successful and that the individuals could engage in sexual relations without concern that impregnation could result. After making the distinction between a preoperative promise and a postoperative promise, both courts concluded that, *therefore,* the contract actions had to be dismissed for lack of consideration, because the fee paid for the surgery could not support enforcement of the postoperative promise. In reaching this conclusion, the courts have ignored the concept of "detrimental reliance" as a sufficient alternative to the payment of tangible consideration by the plaintiff.

It is well-established in contract law that the payment of tangible consideration is not required in cases in which the promise given by the promisor was such that it reasonably induced action or forebearance to act on the part of the promisee, to his detriment. As stated in *Restatement (Second) of Contracts:*

> A promise which the promisor should reasonably expect to induce action or forebearance on the part of the promisee or a third person and which does induce such action or forebearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.[69]

A statement given that a sterilization procedure has been suc-

65. *Sard,* 34 Md. App. 217, 367 A.2d 527.
66. *Id.; Herrara,* 533 P.2d 60.
67. 34 Md. App. 217, 367 A.2d 525 (1977).
68. 533 P.2d 60 (Colo. App. 1975).
69. RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981).

cessful and that a woman cannot become pregnant as a result of sexual intercourse is such a promise. The purpose of the operation is to create sterility in order to avoid pregnancy. A statement that this purpose has been achieved would reasonably induce the patient to forgo the use of any other method of contraception. If the promise is breached, then the patient is not in fact rendered sterile, and because of the forebearance to use other contraceptive measures, a pregnancy results. Use of the detrimental reliance doctrine as supporting consideration is particularly appropriate in wrongful pregnancy actions based on postoperative promises. The physician has promised the success of the procedure and has guaranteed that pregnancy cannot occur. The promise should be binding because "injustice can be avoided only by enforcement of the promise."[70]

Even when the elements of a contract action can be proved, certain drawbacks limit the usefulness of the contract theory. It is generally held that a verdict for breach of contract cannot include an award for mental pain and suffering.[71] Exceptions have been allowed, however, in the case of contracts to perform a personal service.[72] In *Green v. Sudakin*,[73] an exception of this type was applied in a wrongful pregnancy action:

> [I]n cases where the contract at issue is ". . . concerned not with trade and commerce but with life and death, not with profit but with elements of personality, not with pecuniary aggrandizement but with matters of mental concern and solicitude, then a breach of duty with respect to such contracts will inevitably and necessarily result in mental anguish, pain and suffering. In such cases the parties may reasonably be said to have contracted with reference to the payment of damages therefor in event of breach. Far from being outside the contemplation of the parties they are an integral and inseparable part of it."[74]

The court went on to state that "[t]he agreement [to perform a tubal ligation] in the instant matter is intensely personal in na-

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70. *See id.*

71. C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 145, at 592 (1935).

72. *Id.*

73. 81 Mich. App. 545, 265 N.W.2d 411 (1978).

74. *Id.* at 548-49, 265 N.W.2d at 413 (quoting Stewart v. Rudner, 349 Mich. 459, 471, 84 N.W.2d 816, 824 (1957)) (citations omitted).

ture. The failure to perform such a contract could foreseeably cause great mental pain and suffering."[75]

A second drawback for pursuing a wrongful pregnancy action under a contract theory is that the physician's liability insurance may not cover an action that prevails under a breach of contract theory. The lack of insurance coverage is a valid concern, since the courts have varied in their construction of the terms of available policies.[76] Further, the insurance carriers can limit their coverage by specifying that the physician shall not enter into any special contract to effect a cure or promise a specific result.[77] When the physician, however, has made no special contract or warranted a particular result, but has instead failed to comply with the terms of his contract to provide the requested medical service, then liability insurance coverage should be available.

Although breach of contract actions are not the most frequently used or generally effective form of action for bringing suit against a physician,[78] the theory should not be automatically discarded as a possibility in a wrongful pregnancy case. The individual who elects sterilization as the birth control method of choice or the patient who exercises her right to obtain an abortion engages the services of a physician for a very specific purpose and not for the purpose of attempting to improve his or her health. The expectations of the elective sterilization patient are quite different from those of a sick or injured patient who looks to the physician to improve his health or condition. Moreover, physicians have been known to make express promises regarding the results of treatment. Finally, in certain narrow cir-

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75. *Id.* at 549, 265 N.W.2d at 413.

76. For the construction of policy provisions that cover liability "on account of any malpractice, error or mistake committed," *compare* Berman v. Aetna Life Ins. Co., 256 A.D. 916, 10 N.Y.S.2d 860 (1939) (denying coverage) *with* Sutherland v. Fidelity & Cas. Co., 103 Wash. 583, 175 P. 187 (1918) (allowing coverage).

77. The same protection has been given by judicial construction in interpreting the terms of a policy specifying that the doctor would not "voluntarily assume any liability" and further provided that coverage was for "the liability imposed by law upon the assured for damages . . . suffered . . . in consequence of any malpractice, error or mistake . . . of the assured in the practice of his profession . . . ." The court concluded that liability for an express promise to produce a specific result was not covered by these policy provisions. McGee v. United States Fidelity & Guar. Co., 53 F.2d 953 (1st Cir. 1931).

78. *See* Annot., 43 A.L.R.3d 1221, 1227-28 (1972).

cumstances,[79] a breach of contract action may prove to be the most useful theory under which a recovery may be had.

C. *Fraud, Deceit, and Misrepresentation*

Only one decision[80] has been located in which the court held that the plaintiff had stated a cause of action for fraudulent misrepresentation, and it is to be noted that the court was determining the sufficiency of the pleadings and not the proofs. The stumbling block for establishing an action for deceit or fraudulent misrepresentation is the element of the theory that requires knowledge on the part of the defendant that his statements are false.

In *Christensen v. Thornby*,[81] the Minnesota Supreme Court found no basis for an action in deceit because of the absence of an allegation that the doctor's statement that a vasectomy would result in sterility was made with fraudulent intent. After noting that it was "common knowledge" that the effect of such an operation was sterility, the court went on to say that "any competent physician or surgeon must necessarily have given plaintiff advice to that effect."[82] Thirty years after *Christensen*, physicians were well aware of the phenomenon of recanalization, a process whereby the severed tubes independently realign themselves and grow back together. In *Ball v. Mudge*,[83] the plaintiff became pregnant one year after her husband had undergone a vasectomy and had been advised that he was sterile. Testimony had been presented at trial that the lapse of time between the vasectomy and the pregnancy made recanalization a likely explanation for the husband's fertility. On appeal from a verdict for the defen-

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79. See notes 39-47 and accompanying text *supra*.

80. *Custodio*, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463. Pritchard v. Neal, 139 Ga. App. 512, 229 S.E.2d 18 (1976), has been cited as finding that an action for fraudulent misrepresentation had been established. *See* Annot., 27 A.L.R.3d 54 (Supp. 1981). The language of the decision indicates, however, that the fraudulent misrepresentation concerned the success of tubal ligations for producing sterility and was directed to a count based on lack of informed consent. Furthermore, the aggravating circumstances mentioned in the annotation—the doctors at first denied that the plaintiff was pregnant, then delayed a decision on whether they would perform an abortion, and finally refused to perform the abortion, without making any effort to help the plaintiff locate other medical assistance—were actually the basis for a charge of abandonment.

81. 192 Minn. 123, 255 N.W. 620 (1934).

82. *Id.* at 126, 255 N.W. at 622.

83. 64 Wash. 2d 247, 391 P.2d 201 (1964).

dant, the Washington Supreme Court agreed with the trial court that the issue of fraud or deceit did not warrant submission to the jury and ruled that "there was no proof that Dr. Mudge made any statement to appellant of an existing fact which was to Dr. Mudge's knowledge either actually or constructively false."[84] The court explained further that the husband's fertility at the time he impregnated his wife could not support an inference that the defendant had known of the husband's fertility a year earlier when the vasectomy was performed and the assurances were given.[85]

The awareness in the medical profession of the process of recanalization was apparently the basis for the ruling in *Custodio* that the defendant could contend that representations about the plaintiff's sterility were not mere statements of opinion.[86] The complaint in *Custodio,* which the court found sufficient, alleged a false representation to the plaintiff that she could not become pregnant after a tubal ligation, an intention to induce the plaintiff to have the operation in reliance on the representation, and an awareness by the defendant of the falsity of the statements at the time they were made.[87] Although *Custodio* found the complaint to be sufficient for an action in fraud, the wrongful pregnancy plaintiff may find the reasoning of the decision to be more useful in the pursuit of an action based on breach of contract.

III. Nature of the Injury

The confusion, inconsistencies, and mental gymnastics evident in attempts by various courts to deal with and define the nature of the wrong committed by the defendant doctor are symptomatic of the underlying problem in a wrongful pregnancy action. This problem is that the courts have had tremendous difficulty dealing with the nature of the injury suffered. The result of the wrongful act by the physician, in most cases,[88] is the birth

84. *Id.* at 250, 391 P.2d at 204.

85. *Id.* at 250, 391 P.2d at 204. Despite the defendant's failure to test the husband's semen after the operation, the court found that the defendant's statements had not been made recklessly, without knowledge of their truth or falsity.

86. 251 Cal. App. 2d at 314, 59 Cal. Rptr. at 470.

87. *Id.* at 313-14, 59 Cal. Rptr. at 470.

88. See note 28 *supra.*

of a normal, healthy child. The concept that the birth of a human being, especially a normal, healthy human being, can in any way be "wrongful" is a concept that many courts have not been able to accept.

In *Christensen,* the first decision to address the issue, the plaintiff had undergone a vasectomy on advice that another pregnancy would be dangerous to his wife's health.[89] The operation was not successful, and Mrs. Christensen gave birth to a normal, healthy child and survived. In affirming the trial court's demurrer holding among other things that the plaintiff suffered no damages, the Minnesota Supreme Court stated:

> Instead of losing his wife, the plaintiff has been blessed with the fatherhood of another child. The expenses alleged are incident to the bearing of a child, and their avoidance is remote from the avowed purpose of the operation. As well might the plaintiff charge defendant with the cost of nurture and education of the child during its minority.[90]

This language gave rise to the so-called "overriding benefits rule," by which some courts have declared as a matter of law that the benefit of the birth of a child outweighs any damage that might be suffered incident to the child's birth. The particular benefits received were expounded on by the court in *Shaheen v. Knight.*[91]

> 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.
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> . . . .
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> [T]o 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, the 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.[92]

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89. 192 Minn. 123, 255 N.W. 620 (1934).
90. *Id.* at 126, 255 N.W. at 622.
91. 6 Lycoming Rptr. 19, 11 Pa. D.&C.2d 41 (1957).
92. *Id.* at 23, 11 Pa. D.&C.2d at 45-46.

The *Christensen* and *Shaheen* cases are recognized as the established law in this area before 1967.[93]

In 1967, a California Court of Appeals decided *Custodio.*[94] The court in *Custodio* recognized that the birth of a child might be something less than a blessed event in some circumstances and addressed various arguments that had been used to justify a denial of recovery. The court pointed out that "to say, as in *Christensen,* that the expenses of bearing a child are remote from the avowed purpose of an operation undertaken for the purpose of avoiding child bearing is a non sequiter."[95] With regard to the rationale expressed in *Shaheen,* the court noted that "[t]he suggestion in *Shaheen* that the child be considered as worth its cost or be put out for adoption is not consistent with the very stability of the family which the same court relies on to support its views of 'universal public sentiment.' "[96] The court in *Custodio* also addressed a matter that had been discussed in a commentary[97] on the issue of wrongful pregnancy with regard to the emotional effect on a child who learns that his parents brought suit because of his birth.[98]

> One cannot categorically say whether the tenth arrival in the Custodio family will be more emotionally upset if he arrives in an environment where each of the other members of the family must contribute to his support, or whether he will have a hap-

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93. One pre-1967 decision did recognize the validity of a wrongful pregnancy action, but did not discuss the relevant policies. Doerr v. Villate, 74 Ill. App. 2d 332, 220 N.E.2d 767 (1966)(sole issue concerned whether statute of limitation for negligence or contract action was applicable). It should be noted that the child in *Doerr* was born retarded and physically deformed as well as unplanned and that the sterilization was sought after the mother had already given birth to two retarded children.

94. 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).

95. *Id.* at 324, 59 Cal. Rptr. at 476.

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

97. Note, 9 UTAH L. REV. 808, 811-12 (1965).

98. The discomfort or perhaps repugnance of the courts in dealing with this type of action is apparent in the solicitude that is frequently expressed in the cases for the feelings of the child that is the subject of the lawsuit. An often quoted passage from *Rieck,* 64 Wis.2d 514, 219 N.W.2d 242, is representative of this concern.

> Since the child involved might someday read this decision as to who is to pay for his support and upbringing, we add that we do not understand this complaint as implying any present rejection or future strain upon the parent-child relationship. Rather we see it as an endeavor on the part of clients and counsel to determine the outer limits of physician liability for failure to diagnose the fact of pregnancy.

Id. at 520, 219 N.W.2d at 245-46.

> pier and more well-adjusted life if he brings with him the wherewithal to make it possible.[99]

The court then concluded that

> [o]n the present state of the record it cannot be ascertained to what extent plaintiffs, if they establish a breach of duty by defendants, are entitled to damages. It is clear that if successful on the issue of liability, they have established a right to more than nominal damages.[100]

The *Custodio* ruling led the way for other decisions, which quickly followed, to recognize that the benefit received by the parents from the birth of a child is a matter that mitigates damages and not one that vitiates liability.[101] Increasingly the courts have recognized the applicability of a general rule of law and equity that the difficulty of ascertaining the amount of the damages to be awarded does not justify denial of a claim altogether.[102]

The concept of wrongful pregnancy as a valid cause of action has not, however, been uniformly accepted by the courts.[103]

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99. 251 Cal. App. 2d at 325, 59 Cal. Rptr. at 477.

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

101. *E.g.*, Bishop v. Byrne, 265 F. Supp. 460 (S.D.W. Va. 1967); *Stills*, 55 Cal. App. 2d 698, 127 Cal. Rptr. 652; Anonymous v. Hospital, 33 Conn. Supp. 125, 366 A.2d 204 (Super. Ct. 1976); Jackson v. Anderson, 230 So. 2d 503 (Fla. Dist. Ct. App. 1970); *Hackworth*, 474 S.W.2d 377; *Troppi*, 31 Mich. App. 240, 187 N.W.2d 511; *Sherlock*, 260 N.W.2d 169.

102. *E.g.*, *Troppi*, 31 Mich. App. 240, 187 N.W.2d 169.

103. Although a majority of courts that have considered the issue since 1967 have recognized that a cause of action can be maintained for wrongful pregnancy, some modern decisions have reached the opposite result. *E.g.*, Terrell v. Garcia, 496 S.W.2d 124 (Tex. Civ. App. 1973); *Rieck*, 64 Wis. 2d 514, 291 N.W.2d 242. Coleman v. Garrison, 349 A.2d 8 (Del. 1975), is frequently cited for a holding that public policy bars any recovery in a wrongful pregnancy action. The progress of this litigation leaves some doubt about whether *Coleman* bars the maintenance of the action or simply the inclusion of the cost of raising the child as an element of damages. The trial court had ruled that the plaintiffs could recover for medical expenses of the pregnancy but not for the cost of rearing the child. 327 A.2d 757 (Del. Super. Ct. 1974). Summary judgment was granted for the defendants, however, based on the plaintiffs' failure to offer opposing affidavits from medical experts. The Delaware Supreme Court, in affirming the lower court's judgment, noted that its analysis differed from that of the lower court, 349 A.2d at 9, but did not mention whether the plaintiffs could recover any damages. The tenor of the case indicates that a wrongful pregnancy action is disallowed in its entirety.

The division in the courts over wrongful pregnancy actions contrasts with their uniform acceptance, in recent years, of actions for wrongful birth brought by parents of a defective child. *See* Rogers, *supra* note 7, at 714.

The reluctance to accept the birth of a child as in any way wrongful is apparent in the various policy considerations that have been advanced to justify denial of the action. The announced policies reflect our changing times as far as the words used, but the result is the same—injury and damages cannot result from the birth of a normal, healthy human being. *Shaheen,* decided in 1957, reflects a view of the purpose of marriage that would dictate denial of the action: "The great end of matrimony is not the comfort and convenience of the immediate parties, though these are necessarily embarked in it; but the procreation of a progeny having a legal title to maintenance by the father. . . ."[104] Although this view of marriage may seem outdated, the court in *Shaheen* has probably expressed the real motivating factor that prevents courts from recognizing the action or resisting its full development: a collective primal urge for procreation of the species leads our society to hold sacred the creation of another human being. The conflict in the cases seems to reflect varying perceptions among the courts about just how much recognition must be given to the right of individual members of the species to make the decision not to procreate.

In *Troppi v. Scarf,*[105] the Michigan Court of Appeals ruled that a wrongful pregnancy action could not be denied on the basis that public policy disfavors contraception. The court observed that the state itself promoted family planning by subsidizing contraceptives as part of its welfare program. The court further noted that *Griswold v. Connecticut*[106] established that the practice of contraception is a constitutionally protected right and that "[s]ince the State may not infringe upon this right, it may not constitutionally denigrate the right by completely denying protection provided as a matter of course to like rights."[107] *Roe v. Wade*[108] was decided in 1973 and served as a basis for the Appellate Division of the New York Supreme Court in *Ziemba v. Sternberg*[109] to distinguish an earlier New York decision that had denied recovery for wrongful pregnancy. These courts have

104. 6 Lycoming Rptr. at 23, 11 Pa. D.&C.2d at 45.

105. 31 Mich. App. 240, 187 N.W.2d 511 (1971).

106. 381 U.S. 479 (1965). The decision in *Troppi,* 31 Mich. App. 240, 187 N.W.2d 511 (1971), preceded Roe v. Wade, 410 U.S. 113 (1973).

107. 31 Mich. App. at 253-54, 187 N.W.2d at 517 (footnote omitted).

108. 410 U.S. 113 (1973).

109. 45 A.D.2d 230, 357 N.Y.S.2d 265.

recognized that if a constitutional right is to be protected they must at least allow an action to be brought when that right has been interfered with.

Decisions such as *Rieck*[110] and *Terrell v. Garcia*[111] have totally ignored the right of the injured party not to have children and have denied a cause of action based on public policy, but the validity of that policy may legitimately be questioned. A guaranteed right is only as good as the protection it is given. In a forceful dissent[112] in *Terrell,* Justice Cadena pointed out that public policy as perceived by the court cannot properly be used to frustrate the exercise of an individual's constitutional right.

> Recent decisions of the United States Supreme Court, *however much these decisions may be condemned as being based on unacceptable moral standards,* establish the legal right of persons [to not have children]. . . . It is, therefore, impermissible to say that social policy requires that a husband and wife be denied the right to limit the number of children which they will bring into the world, or that a person shall be allowed, by his negligent conduct, to frustrate the realization of the married couple's aim to limit the size of their family.[113]

Justice Cadena may not approve of the *Roe* decision, but he at least recognizes that it is the law of the land. The majority in *Terrell* seems to have ignored the fact that they are refusing, on the basis of a perceived social policy, to give protection to a fundamental right guaranteed by the Constitution.

Most courts have acknowledged and given protection to the constitutional right of the individual to choose not to procreate.[114] This right is granted only to the parents of the unplanned child, however, and the courts have uniformly denied a cause of action to anyone other than the parents.[115] The extent to which

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110. 64 Wis. 2d 514, 219 N.W.2d 242.

111. 496 S.W.2d 124 (Tex. Civ. App. 1973).

112. *Id.* at 129 (Cadena, J., dissenting). Justice Cadena attacked the validity of using the benefits rule to bar an action and completely absolve from liability "a bungling physician [who has] forced on unwilling parents the additional economic burden of raising a child which they did not want and would not have had if the physician had acted with reasonable care." *Id.*

113. *Id.* (emphasis added)

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

115. The courts have uniformly denied a cause of action to the siblings of the unplanned child, even when an action was granted to the parents. *E.g., Cox,* 77 Misc. 2d 155, 352 N.Y.S.2d 834. The courts have also uniformly denied a cause of action to the

the courts are willing to go in granting protection to the right not to procreate is varied. The hurdle has been crossed, in most cases, for allowing the cause of action. The battle has now moved into attempts to define the nature of the damages suffered and the proper elements of damages to be recovered.

IV. NATURE OF THE DAMAGES

The foreseeable damages that could result from an unwanted pregnancy and the birth of an unplanned child include the following: the cost of the failed surgical procedure; the mental and physical pain and suffering of the mother for the period of the pregnancy; the mother's pain and suffering for the labor and delivery itself; the medical expenses associated with the pregnancy and delivery; the lost wages of the mother for the period of her confinement; the husband's loss of consortium during and after pregnancy; the economic costs of raising, educating, and maintaining the unplanned child; and the emotional cost of the worry and concern for the child that goes hand in hand with being a parent. These are the foreseeable consequences of a physician's or pharmacist's negligence that results in an unplanned life coming into being. The courts are not in agreement, however, about whether all of these damages are compensable.

The confusion of the courts in establishing the proper elements of damage that are recoverable is illustrated by the inconsistency of the holdings on the elements of damages that are recognized in both wrongful pregnancy and wrongful birth cases. Some decisions allow recovery for the medical expenses and costs of raising and maintaining a defective child but deny recovery for the emotional pain and suffering of the parents.[116] Other decisions allow recovery for the emotional pain and suffering of the parents but not for the cost of raising and maintaining a defective child.[117] There are decisions allowing recovery for the medical expenses and the mother's pain, suffering, and discomfort associated with the pregnancy itself, the cost of the failed sterilization operation and the husband's loss of consortium dur-

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child itself, even if the additional stigma of illegitimacy was present. *E.g., Stills,* 55 Cal. App. 2d 690, 127 Cal. Rptr. 652.

116. *E.g., Speck,* 268 Pa. Super. Ct. 342, 408 A.2d 496.

117. *E.g.,* Berman v. Allan, 80 N.J. 421, 202 A.2d 8 (1979).

ing the pregnancy and immediately thereafter but denying recovery for any damages resulting from the birth of an apparently normal child.[118] Other decisions make no mention of the cost of raising the child but find a compensable injury in the fact that the mother must spread her society, comfort, care, protection, and support over a larger group.[119] There are decisions holding that all losses are compensable, including the costs, emotional upset, and physical inconvenience of raising a child, and applying the benefits rule to the gross amount of damages, including medical expenses and the mother's pain and suffering during pregnancy and delivery, to arrive at a damage award.[120] Finally, still other decisions hold that the benefits rule should not be applied to offset damages when the cost of raising a child is not claimed as a damage suffered, but the plaintiff seeks only compensation for the expenses, pain, and suffering of the pregnancy itself.[121]

This chaotic state of affairs indicates that many courts have not been able to come to terms with the issues at hand. Although most courts have recognized that the benefits rule should not preclude recovery altogether, many courts are still having difficulty including the blessings of parenthood in the formula for calculating damages.

Wrongful interference with rights of the parents has resulted in the birth of a normal, healthy child. Although the parents did not want to be parents, once a child is born it is expected that the child will be cherished. Therefore, a benefit has been conferred. Nevertheless, it is a fundamental precept in the law that a person cannot be forced to accept a benefit he does not want.[122] This concept is complicated in a wrongful pregnancy action by the very nature of the benefit forced upon the plaintiff. The law requires that parents provide necessary support to their children. But, moreover, human nature dictates that once the child is born this obligation, however involuntarily

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118. *E.g.*, Coleman v. Garrison, 327 A.2d 757 (Del. Super. Ct. 1974), *aff'd*, 349 A.2d 8 (1975). See note 103 *supra*.

119. *E.g.*, *Custodio*, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463.

120. *E.g.*, *Betancourt*, 136 N.J. Super. 69, 344 A.2d 336.

121. *E.g.*, Bushman v. Burns Med. Center, 83 Mich. App. 453, 268 N.W.2d 683 (1978).

122. *See generally* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.6, at 182 (1973).

it was assumed initially, will be met with the normal human willingness and desire to nurture and care for one's offspring. The exercise of a constitutionally guaranteed right has been interfered with, a property interest has been damaged—the costs incident to giving birth and raising the child affect the economic interests of the parents—and along with that the natural human response to nurture and care for offspring has been stimulated and activated. The extent to which the benefit received should offset the invasion of protected rights is a particularly thorny question. This difficulty has apparently led some courts to allow some elements of damages and deny others.

The drawback of this approach to the problem, however, is that the benefits received by the parents as a result of an unplanned birth cannot be considered equal in all circumstances for all parents. The circumstances of each case should dictate the extent of the blessing conferred by the negligent doctor on the unwilling parent. The court in *Troppi* illustrated this concept by pointing out that the benefit of a child to an unmarried college coed might be different from the benefit to a newlywed couple who only intended to delay starting a family in order to enjoy an extended honeymoon.[123] It is also a reality of life that it costs money to raise even the most beloved child. The smile of a child may be priceless, but the braces that may be needed to keep that smile perfect carry a very concrete price tag. Furthermore, the courts need to recognize that the emotional strain of raising a child can also vary according to the circumstances of the case. A ghetto mother who has given birth to her eighth child, a child who is a potential candidate for the local street gang, may face serious concerns for the welfare of her child that might not be present in a middle-class, suburban environment. All of these concerns—the expense and pain of bearing a child, the cost of raising a child, and the worry and concern for the child that go hand in hand with being a parent—are detriments of parenthood that could have been avoided if the doctor or pharmacist had not acted wrongfully. The benefits of parenthood should then be weighed against *all* of the detriments to arrive at a figure for damages.[124] This is the approach taken

123. 31 Mich. App. at 256, 187 N.W.2d at 518.

124. A proper theoretical approach to the benefits rule would require that the benefit be accorded to the same interest that was harmed by the defendant's conduct. RE-

in *Troppi* and other decisions[125] and is the most equitable approach found in the case law for dealing with the situation. When courts attempt to determine as a matter of law which detriments sould be considered and which should not, they enter a realm of deliberation that is beyond the capability of the judiciary: fashioning a rule of law for dispensation of justice in all or even a majority of the circumstances that might arise. Case-by-case determinations should be made, and these are best left to the wisdom of the American citizens who make up trial juries.

The abortion issue inevitably arises again in the consideration of the damages suffered. A simple resolution to the problem of damages resulting from the birth of an unplanned child may be accomplished by simply getting rid of the unwanted child either by aborting or by placing the child for adoption with someone who desires parenthood. This resolution, however, is both callous and foreign to the natural impulse of a parent to nurture and care for offspring once born even though a child may have been unwanted at the time of conception. A plaintiff is under an obligation to mitigate damages that might be caused by the wrongful acts of the defendant. The plaintiff is not, however, required to take steps to avoid or minimize a loss suffered that, all circumstances considered, a reasonable person might well decline to take.[126] The court in *Troppi* addressed the issue directly and noted a distinct difference between the avoidance of conception and the "disposition" of a human organism and recognized that "a living child almost universally gives rise to emotional and spiritual bonds which few parents can bring themselves to break."[127] The court mentioned the recognized preference in the law for permitting a child to be reared by its natural parents

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STATEMENT (SECOND) OF TORTS § 920 (1979). Under a pure application of the theory, the personal interest involved in the benefit conferred by the arrival of a normal, healthy child could not be offset against the property interest involved in the economic calculation of the cost of raising the child. The Michigan Court of Appeals in *Troppi* recognized that it was modifying the "same interest" rule and determined that an attempt to separate the intangible damages from the economic costs of an unplanned child would be unsound. 31 Mich. App. at 255, 187 N.W.2d at 518. As long as the courts include all of the detriments of parenthood in the calculation, this would seem to be a reasonable approach under the circumstances.

125. *E.g., Clapham*, 102 Mich. App. 47, 300 N.W.2d 727; *Sherlock*, 260 N.W.2d 169; Stribling v. deQuevedo, _ Pa. Super. Ct. _, 422 A.2d 505 (1980).

126. C. MCCORMICK, *supra* note 71, § 35, at 133.

127. 31 Mich. App. at 257, 187 N.W.2d at 519.

rather than placing a child for adoption and went on 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."[128] The court stated the issues quite succinctly in reaching this conclusion:

> Many women confronted with an unwanted pregnancy will abort the fetus, legally or illegally. Some will bear the child and place him for adoption. Many will bear the child, keep and rear him. The defendant does not have the right to insist that the victim of his negligence have the emotional and mental make up of a woman who is willing to abort or place the child for adoption. If the negligence of a tortfeasor results in conception of a child by a woman whose emotional and mental make up is inconsistent with aborting or placing the child for adoption, then, under the principle that the tortfeasor takes the injured party as he finds him, the tortfeasor cannot complain that damages that will be assessed against him are greater than those that would be determined if he had negiligently caused the conception of a child by a woman who is willing to abort or place the child for adoption.[129]

This approach to the issue comports with accepted principles of the law of damages and gives recognition to human nature as well.

In *Ziemba v. Stenberg*,[130] discussed earlier in this article,[131] the Appellate Division of the New York Supreme Court ruled that the plaintiff's action alleging negligent failure to diagnose her pregnancy was not barred because she had failed to obtain an abortion. Although an abortion was still legally available to the plaintiff at the time her pregnancy was discovered, the court called attention to evidence that she had been advised that an abortion at that stage of her pregnancy would be hazardous. The court ruled that the right to an abortion could not be converted into an obligation to have one and that whether the plaintiff should have undergone an abortion to avoid the injury complained of would be a question for the jury to determine.[132]

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128. *Id.* at 260, 187 N.W.2d at 520 (footnote omitted).
129. *Id.* at 260, 187 N.W.2d at 520.
130. 45 A.D.2d 230, 357 N.Y.S.2d 265 (1974).
131. See text accompanying notes 31-33 *supra*.
132. 45 A.D.2d at 233, 357 N.Y.S.2d at 269.

The same court issued a later decision, however, that indicates a different attitude when the question under review is the extent of damages suffered and not the existence of an injury. In *Sorkin v. Lee*,[133] the court in effect required the plaintiff to mitigate damages by undergoing an abortion to terminate an unplanned or unwanted pregnancy when it addressed the question of whether the cost of raising the child was a recoverable element of damages. The majority refused to allow this element of damages and stated that "such damages are not only speculative beyond realistic measurement . . . but in this case they were avoidable because plaintiffs do not claim that defendant's conduct prevented them from the discovery of the pregnancy or terminating it or that abortion was contra-indicated because of any medical condition of the mother."[134] The court gave lip service to its prior holding in *Ziemba* that the right to an abortion cannot be automatically converted into an obligation to have one in the following passage:

> We do not suggest that the mother was obliged to terminate the pregnancy, nor do we intend to minimize the difficult personal choices confronting a married couple faced with an unplanned pregnancy. Indeed, it is just because such situations require difficult decisions which must be resolved by weighing a variety of personal medical and social considerations, that a defendant's exposure to damages should not depend upon them. On the facts of this case, however, abortion was a legitimate medical option. Plaintiffs were free to elect it or not, but their decision should not affect defendant [sic] potential liability.[135]

At another point in the opinion, the court stated:

> There are serious policy considerations which militate against the recovery sought here. Manifestly, exposure to such damages may result in substantial verdicts against which potential defendants cannot readily insure themselves. That danger will suggest in many physicians that they should practice "defensive medicine." But decisions to sterilize or abort should be based solely upon the psychic and physical well-being of the patient and his or her family, and neither the family's decision

133. 78 A.D.2d 180, 434 N.Y.S.2d 300 (1980).
134. *Id.* at _, 434 N.Y.S.2d at 301.
135. *Id.* at _, 434 N.Y.S.2d at 301.

> nor the physician's advice should be influenced by considerations of legal liability.[136]

In a strong and well-reasoned dissent, Justice Hancock pointed out the fallacy of the majority's rationale and emphasized its apparent requirement that a plaintiff plead and prove that an abortion is medically inadvisable before being allowed to recover for the cost of raising a child.

> Moreover, and of greater significance, the majority position presupposes the existence of a legal requirement that a woman, who has conceived because of a doctor's malpractice, must, if she can withstand an abortion medically, choose between bearing the child, though that choice for financial reasons, family size, or other factors, amount to great hardship for the family, and having an abortion, even though that course may be abhorrent to her for moral, philosophical, or religious reasons. I am aware of no basis in the law or in our cultural, moral, or sociological heritage lending support to such requirement. The religious, ethical, and constitutional implications of such a rule are far-reaching, to say the least. Although the majority disclaim any suggestion that they hold abortion to be "obligatory," the inescapable implication of the proposition is that a woman who refuses to undergo an abortion for medical reasons may recover while one who refuses for other reasons may not.[137]

The dissent went on to point out that the majority's concern regarding potentially excessive liability exposure for physicians in such cases is both inappropriate[138] and unjustified. The jurisdiction allows recovery for the cost of raising a defective child in a wrongful birth action. The dissent noted that the cost of raising a normal child is likely to be much less than the special costs required for raising an abnormal child, especially when the benefits rule is applied to the gross amount calculated.

Most courts have now recognized that the benefits of having a child are not so uniformly beneficial in all cases that they must outweigh all damages sustained by every plaintiff and bar an action for wrongful pregnancy. Those courts have rightly con-

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136. *Id.* at _, 434 N.Y.S.2d at 302 (Hancock, J., dissenting).

137. *Id.* at _, 434 N.Y.S.2d at 304.

138. *Id.* at _, 434 N.Y.S.2d at 304 (citing Becker v. Schwartz, 46 N.Y.2d 413, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978)).

cluded that a determination of these factual issues is within the province of the jury and should not be decided by the courts as a matter of law. Nevertheless, many courts continue to attempt to establish the damages recoverable under such an action purely as a matter of law. If a jury is competent to determine whether the benefit of the birth of the child outweighs any damages sustained by the plaintiff, then a jury is also competent to determine whether the benefits outweigh the cost of raising the child and whether the benefits outweight the emotional strain and inconvenience of raising the child. Determinations of the extent of these intangible detriments and benefits, that vary according to the circumstances of each case are especially suited to the unique service that is provided by a jury.

V. CONCLUSION

Some courts have demonstrated a persistent reluctance to recognize a cause of action for wrongful pregnancy when the result is the birth of a normal, healthy child. Courts have justified the refusal to recognize the action on the basis that application of the benefits rule negates any damages the plaintiff might suffer,[139] that public policy dictates that the birth of a human being cannot be wrongful,[140] that damages are too speculative and uncertain to allow recovery,[141] and that it is not within the province of the judiciary to recognize such a cause of action but that its creation should be by legislative action.[142] Many cases have now recognized wrongful pregnancy as a cause of action, but have used many of the same arguments to restrict the elements of damage that the plaintiff may recover, especially any claim of damages for the cost of raising a normal, healthy child.

The unwillingness to recognize the action may be explained in part by the apparent reluctance of many courts to accept the rulings by the United States Supreme Court that the individual has a constitutionally protected right not to have children. In some cases, this inability to accept the right to have an abortion, for instance, is more obvious than in others.[143] Nevertheless, in

139. *E.g., Shaheen,* 6 Lycoming Rptr. 19, 11 Pa. D.&C.2d 41.
140. *E.g., Rieck,* 64 Wis. 2d 514, 219 N.W.2d 242.
141. *E.g., Terrell,* 496 S.W.2d 124.
142. *E.g., Clegg,* 89 Misc. 2d 510, 391 N.Y.S.2d 966.
143. For instance in *Wilczynski,* 73 Ill. App. 2d 51, 391 N.E.2d 479, the court al-

all decisions since *Roe v. Wade* that deny recognition of the action, the courts are ignoring the Supreme Court rulings regarding the individual's right not to have children. A guaranteed right is only as good as the protection it receives from the courts. Whether a court expressly circumvents the decision in *Roe* or denies relief on other public policy grounds or by application of the benefits rule as a matter of law, the result is the same. The exercise of a fundamental right has been interfered with and the court has refused to allow redress for the wrong done. It appears that these courts are so reluctant to accept the existence of the fundamental nature of the right that they are unwilling to protect it when the exercise of the supposed right has been wrongfully interfered with.

Some courts that have given recognition to the cause of action demonstrate the same reluctance to grant full protection to the individual's right by restricting the elements of damages that are compensable. Some courts assert that certain elements of damages, especially the cost of raising a child, are not recoverable as a matter of law, again on the basis of public policy. Nevertheless, as stated by Judge Pearson in his dissenting opinion in *Public Health Trust v. Brown*,[144]

> [a] judicial declaration of pre-emptive public policy should express the manifest will of the people. . . . The majority's conclusion that the benefits of parenthood *in every case* outweigh

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lowed an action for wrongful pregnancy but denied recovery for the cost of raising the child on the grounds of public policy. The court went through a labored analysis to conclude that the Illinois statute on abortion was valid under the parameters set forth in *Roe v. Wade* and that the statute established a public policy favoring life over abortion. The court went on to say:

> In our judgment, a public policy which deems precious even potential life while yet in the womb, at such cost and expense that condition may entail, does not countenance as compensable damage to its parent or parents those additional costs and expenses necessary to sustain and nurture that life once it comes to fruition upon and after successful birth. The existence of a normal, healthy life is an esteemed right under our laws, rather than a compensable wrong. Plaintiff perceives growing popular acceptance of abortion; however, "The public policy as expressed by legislative acts is not a matter for the courts. Their duty is to apply the law as they find it." . . . If such damages are to be recognized in cases of this character, they should be evaluated by legislative study first, with consideration given to changing professional, economic, social and moral standards and conditions.

Id. at 62, 391 N.E.2d at 487 (citation omitted).

144. 388 So. 2d 1084 (Fla. Dist. Ct. App. 1980).

> the costs of raising a child is totally inconsistent with the manifest will of, at least, the six jurors who decided the present case. I regard the jury's decision as a far more accurate declaration of the will of the people than the majority's decision.[145]

Judge Pearson further pointed out that

> [t]he majority arrives at its assessment of the will of the people by positing that "it is a matter of universally shared emotion and sentiment that the intangible but all-important, incalculable but invaluable 'benefits' of parenthood far outweigh any of the mere monetary burdens involved."
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> . . . .
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> There is a bitter irony in the rule of law announced by the majority. A person who has decided that the economic or other realities of life far outweigh the benefits of parenthood is told by the majority that the opposite is true.[146]

The issues addressed in a wrongful pregnancy action—the detriments that may result from an unwanted pregnancy and the birth of an unplanned child, and the benefits of parenthood—are not so universally recognized and accepted by society as to have an agreed-upon value susceptible of determination as a matter of public policy.

The issue of damages in a wrongful pregnancy case requires consideration of so many competing values based on differing religious, philosophical, moral, ethical, and sociological considerations that it is particularly inappropriate to attempt to decide as a matter of law which values have priority in all circumstances. *Troppi*'s approach to the problem is the most equitable and theoretically sound resolution of the complex issue of damages. A court should first instruct the jury that it may consider all of the detriments to the plaintiff that may result from the unwanted pregnancy and the birth of an unplanned child and then should instruct them that these damages may be reduced by an amount equal to the value of the intangible benefits received by the parents as a result of the child's birth. The jury should be permitted to decide the dollar value that should be assigned to the competing intangible interests and values, for that is a *factual* determination under the circumstances of each case and is the

145. *Id.* at 1086 (Pearson, J., dissenting).
146. *Id.* at 1087.

particular province of the jury to decide.

In short, the courts need to give the jury system an opportunity to work in the resolution of wrongful pregnancy cases. Both the decision about whether the plaintiff has suffered any recognizable injury and the determination of the extent of damages, if any, that have been suffered by the plaintiff should be questions for the jury. After all, public policy is supposed to be an expression of the consensus of opinion and reflected values of society, and jurors are the representatives of society. If a wrongful pregnancy action or damages for the costs of raising a child are so repugnant to the collective values of society that they outweigh the individual's right not to have children, the members of society that make up the jury are the appropriate persons to make the determination. This is not an abdication of judicial responsibility. It is a recognition of the fact that we are living in changing times with changing values, and that the members of society in the body of a jury are the best judges of the importance of certain of those values in deciding how much compensation a particular plaintiff should receive for the wrong done to him or her.