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Physician's Negligence Giving Rise to the Birth of a Healthy But Unplanned Child: A Summary of Damages Recoverable by the Parents

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PHYSICIAN'S NEGLIGENCE GIVING RISE TO THE BIRTH OF A HEALTHY BUT UNPLANNED CHILD: A SUMMARY OF DAMAGES RECOVERABLE BY THE PARENTS

I. INTRODUCTION

The decision to undergo a sterilization operation[1] or an abortion[2] is the result of considering many complex emotional and financial factors. The operation may be sought to avoid potential health risks associated with childbirth,[3] or it may be sought to avoid the financial stress a new child will place on the family unit.[4] Regardless of the rationale underlying the decision, the individual will require medical assistance. In some situations, however, this medical assistance is negligently performed, and the result may be the birth of a healthy but unplanned child.[5]

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1. There are three basic types of sterilization operations: 1) tubal ligation (female): the cutting and tying of the tubes leading from the ovaries to the uterus; 2) hysterectomy (female): the removal of the uterus; and 3) vasectomy (male): the interruption of the *vas deferens* which is the tube carrying spermatozoa from the testicle. *See* 5A LAWYER'S MEDICAL CYCLOPEDIA § 36.43 (A. Smith rev. vol. 1972).

2. The three major medical methods of performing an abortion are as follows: 1) cervical dilation and curettage (scraping) of the uterus; 2) vacuum aspiration—best used in early stages of pregnancy; and 3) a method involving withdrawal of the amniotic fluid surrounding the fetus and replacing it with a physiological salt solution. *Id.* § 36.42b.

3. *See, e.g.*, Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976) (sterilization operation).

4. *See, e.g.*, Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977) (sterilization operation).

5. Many similar situations have arisen in this area and include alleged negligence by a physician in not warning prospective parents of possible birth defects in the child. *See* Robak v. United States, 658 F.2d 471 (7th Cir. 1981) (misdiagnosis of rubella in pregnant woman and failure to warn of possible birth defects); Phillips v. United States, 508 F. Supp. 544 (S.C. 1981) (failure to perform amniocentesis test although the need for such test was indicated; resulting birth of child with Down's Syndrome gave rise to parents' cause of action); Phillips v. United States, 508 F. Supp. 537 (S.C. 1980) (child's cause of action denied); Gildner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692 (E.D. Pa. 1978) (failure to warn of possible Tay Sachs hereditary disease); Smith v. United States, 392 F. Supp. 654 (N.D. Ohio 1975) (failure to diagnose and treat rubella in mother does not give the deformed child a cause of action); Turpin v. Sortini, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982) (possible hereditary birth defects); Curlender v. Bio-Science Lab., 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980) (negligent performance of laboratory tests resulting in failure to warn of possible Tay Sachs disease); DiNatale v. Lieberman, 409 So. 2d 512 (Fla. Dist. Ct. App. 1982) (failure to warn of possible birth defects); Moores v. Lucas, 405 So. 2d 1022 (Fla. Dist. Ct. App. 1981) (rubella related birth defects); Eisbrenner v. Stanley, 106 Mich. App. 351, 308 N.W.2d 209 (1981) (failure to diagnose rubella and warn of birth defects); Schroeder v. Perkel, 87 N.J. 53, 432 A.2d 834 (1981) (failure to diagnose cystic fibrosis in the first child and to warn of the possibility of the disease recurring in second child); Berman v. Allen, 80 N.J. 421, 404 A.2d 8 (1979) (failure to advise parents of availability of amniocentesis test; child born with Down's Syndrome); Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967)

Such negligence has given rise to a cause of action[6] on the part of the parents[7] and is generally a result of either the negligent performance of a sterilization or abortion operation,[8] or a negligent assurance by the physi-

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(rubella related birth defects); Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978) (failure to advise of availability of amniocentesis test; child born with Down's Syndrome), *modifying* Park v. Chessin, 60 A.D.2d 80, 400 N.Y.S.2d 110 (1977) (first child born with fatal heredity disease; failure to warn of possible recurrence created causes of action for both parents and child); Karlsons v. Guerinot, 57 A.D.2d 73, 394 N.Y.S.2d 933 (1977) (failure to advise parents of the risks of pregnancy and the likelihood of giving birth to a deformed child and failure to inform of availability of amniocentesis); Howard v. Lecher, 53 A.D.2d 420, 386 N.Y.S.2d 460 (1976) (failure to warn of possible Tay Sachs hereditary disease); *aff'd*, 42 N.Y.2d 109, 366 N.E.2d 64, 397 N.Y.S.2d 363 (1977); Johnsons v. Yeshiva University, 53 A.D.2d 523, 384 N.Y.S.2d 455 (1976) (failure to perform amniocentesis when consulted for genetic counseling), *aff'd*, 42 N.Y.2d 818, 364 N.E.2d 1340, 396 N.Y.S.2d 647 (1977); Stewart v. Long Island College Hosp., 58 Misc. 2d 432, 296 N.Y.S.2d 41 (1968) (failure to warn of rubella connected birth defects), *modified*, 35 A.D.2d 531, 313 N.Y.S.2d 502 (1970); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975) (failure to inform pregnant woman that she had rubella); Naccash v. Burger, ___ Va. ___, 290 S.E.2d 825 (1982) (negligent performance of Tay Sachs test on parents; child born with disease); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975) (rubella not diagnosed and/or physician failed to warn of possible birth defects).

A related situation exists where a physician negligently fails to ascertain that the patient is pregnant or negligently performs a sterilization operation and a healthy child is born. *See* Cockrum v. Baumgartner, 99 Ill. App. 3d 271, 425 N.E.2d 968 (1981); Debora S. v. Sapega, 56 A.D.2d 841, 392 N.Y.S.2d 79 (1977); Ziemba v. Sternberg, 45 A.D.2d 230, 357 N.Y.S.2d 265 (1974); Cox v. Stretton, 77 Misc. 2d 155, 352 N.Y.S.2d 834 (1974); Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974).

6. There has been considerable confusion in the use of the terms "wrongful life," "wrongful birth," "wrongful conception," and "wrongful pregnancy." Many commentators have attempted to sort out the different factual situations and apply the correct terms to them. *See supra* note 5 and accompanying text. *See, e.g.*, Note, *Wrongful Conception: Who Pays for Bringing Up Baby?*, 47 FORDHAM L. REV. 418 (1978) (suggesting that "wrongful conception" is where the parents do not want a child as opposed to "wrongful birth" and "wrongful life" actions where the parents want a healthy child) [hereinafter cited as Note, *Wrongful Conception: Who Pays*]; Note, *Wrongful Birth Damages: Mandate and Mishandling by Judicial Fiat*, 13 VAL. U.L. REV. 127 (1978) ("Wrongful birth" is where the wrong begins at conception as compared to "wrongful life" where the wrong begins with the unsuccessful "killing" of the child.) [hereinafter cited as Note, *Mandate and Mishandling*]. There seems to be no general consensus by the courts as to the use of the terms. *Compare* Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977) (using the term "wrongful conception" in a negligent sterilization case) *with* Coleman v. Garrison, 349 A.2d 8 (Del. 1975) (using the term "wrongful life" in a similar situation).

This article deals primarily with cases concerning the birth of a healthy child whose birth the parents had not planned and avoids labelling these cases with a specific term. If one is required, however, then the action is for the birth of a "healthy but unplanned child."

7. For a case in which an action against the physician was brought on behalf of the newborn child's brothers and sisters, alleging that their share of love, affection, and the family exechequer was reduced from one-third to one-fourth, see Aronoff v. Snider, 292 So. 2d 418 (Fla. Dist. Ct. App. 1974) (cause of action dismissed).

8. *See, e.g.*, Wilbur v. Kerr, 628 S.W.2d 568 (Ark. 1982) (sterilization); Stills v. Gratton, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976) (abortion).

cian that the operation was a success.[9] The latter situation is usually, but not always, accompanied by post-operative tests which erroneously indicate the success of the operation.[10]

If negligence on the part of a physician can be shown, most courts will allow a cause of action under general negligence principles.[11] The courts, however, are split on the issue of assessment of damages.[12] The problem arises when courts consider the child's rearing expenses as an element of damages.

Recently, this issue was addressed in two cases arising in Virginia. The first, *McNeal v. United States*,[13] is a United States Court of Appeals, Fourth Circuit, case applying Virginia law to the issue of recovery of child rearing expenses as a result of an alleged negligently performed sterilization operation. The second case, *Johnson v. Miller*,[14] is a state circuit court case where the trial judge considered the same damage issue as a result of an alleged negligently performed abortion. The *McNeal* court affirmed the trial court's determination that negligence had not been proven and noted that Virginia would not allow such recovery because it was against the state's public policy.[15] The *Johnson* court held the oppo-

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9. *See, e.g.*, Terrell v. Garcia, 496 S.W.2d 124, 125 (Tex. Civ. App. 1973), *cert. denied*, 415 U.S. 927 (1974).

Many of these cases are brought on alternative theories. *See, e.g.*, Mason v. Western Pa. Hosp., 286 Pa. Super. 354, 428 A.2d 1366 (1981) (plaintiff alleged first, that physician breached express and implied warranties that sterilization would prevent childbirth, and second, that he was negligent in performing the tubal ligation). While this article is based mainly on a cause of action in negligence, it is important to note that litigants may run into problems with an action based on contract or warranty theories because the courts have generally held that there must be a separate contract or guaranty, supported by consideration, in order for a cause of action to lie. *Id.* at 1368. *But cf.* Note, *Wrongful Conception: Who Pays, supra* note 6, at 426 (suggesting that some litigants may wish to take advantage of a longer statute of limitations for contract actions as compared to tort actions). *See generally* W. PROSSER, LAW OF TORTS § 92 (4th ed. 1971) (stating that contract damages may be limited in various ways whereas tort damages are limited by only proximate causation and policy considerations denying recovery to certain types of interests).

10. *Compare* Ball v. Mudge, 64 Wash. 2d 247, 391 P.2d 201 (1964) (no post-operative tests; assurance given) *with* Cox v. Stretton, 77 Misc. 2d 155, 352 N.Y.S.2d 834 (1974) (post-operative tests done; assurance given).

11. *See, e.g.*, Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 174 (Minn. 1977) ("[S]uch an action is indistinguishable from an ordinary medical negligence action. . . ."); Bowman v. Davis, 48 Ohio St. 2d 41, ___, 356 N.E.2d 496, 499 (1976) ("[This case] is a traditional negligence action."). *But see* LaPoint v. Shirley, 409 F. Supp. 118 (W.D. Tex. 1976) (No cause of action for the birth of a healthy child exists in Texas.).

12. *Compare* Boone v. Mullendore, 416 So. 2d 718 (Ala. 1982) (allowing only pregnancy and childbirth related damages) *with* Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967) (allowing all damages proximately caused by negligence, including child rearing expenses).

13. No. 82-1014, slip op. (4th Cir. Sept. 27, 1982).

14. No. L-80-2378 (Cir. Ct. of the City of Norfolk 1982).

15. *McNeal*, slip op. at 5-6. There was a concurrence in this case by Judge Ervin, who

site, and allowed the jury to consider all of the alleged damages, including those attributed to child rearing expenses.[16] This case is presently on appeal.[17]

This article[18] begins with a summary of the damages that are generally recoverable in a case involving the birth of a healthy but unplanned child, and then critically examines the various methods courts use to deny or allow all or some of the child rearing expenses. This article concludes with a prediction of the disposition of *Johnson v. Miller* on appeal to the Virginia Supreme Court and a suggested method for consistency in the awarding of damages for the birth of a healthy but unplanned child.

II. Damages Recoverable Generally

The types of damages which commonly are awarded in cases involving the birth of a healthy but unplanned child are those closely associated with the pregnancy and childbirth. In *Sherlock v. Stillwater Clinic,*[19] a case involving a negligently performed sterilization, the court held that the parents should, at a minimum, recover these damages because the award is wholly consistent with the elementary principle of compensatory damages that places the plaintiff in the position he would have been in had no wrong occurred.[20] These damages include the pain and suffering of the pregnancy and childbirth, loss of wages of the mother during pregnancy and childbirth, and medical costs associated with the pregnancy, childbirth and immediate medical care thereafter.[21] Some courts have allowed damages for the mental anguish suffered by the parent during pregnancy and childbirth,[22] and others have awarded damages for a curative sterilization operation.[23] Further, the father may recover for the loss of comfort, companionship, consortium, and services of his wife during

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agreed with the holding as to the negligence issue, but refused to speculate how Virginia would decide a "wrongful birth" cause of action. *Id.* at 7.

16. No. L-80-2378 (Jury Instruction No. 5).

17. No. L-80-2378.

18. For the purposes of this article, negligence will be presumed to have been proven. For a discussion of the elements of proof of negligence in these types of actions, see generally Comment, *Pregnancy After Sterilization: Causes of Action for Parent and Child,* 12 J. Fam. L. 635 (1972-73).

19. 260 N.W.2d 169 (Minn. 1977).

20. *Id.* at 175.

21. *See, e.g.,* Maggard v. McKelvey, 627 S.W.2d 44 (Ky. Ct. App. 1981); P. v. Portadin, 179 N.J. Super. 465, 432 A.2d 556 (1981).

22. *See, e.g.,* Hartke v. McKelway, 526 F. Supp. 97 (D.C. 1981); Boone v. Mullendore, 416 So. 2d 718 (Ala. 1982). *But see* Sala v. Tomlinson, 448 N.Y.S.2d 830 (N.Y. App. Div. 1982) (no recovery for emotional distress occasioned by an unsuccessful tubal ligation); *but cf.* Stribling v. deQuevedo, 422 A.2d 505 (Pa. Super. Ct. 1980) (allowing emotional distress recovery incidental to the negligent surgery, but not incidental to childbirth).

23. *See, e.g.,* Kingsbury v. Smith, ___ N.H. ___, 442 A.2d 1003 (1982).

pregnancy up to and immediately after the birth of the child.[24]

These damages are awarded because they proximately are caused by the physician's negligence and because most courts consider these damages to be a fair approximation of the injury sustained.[25] It has been noted that to disallow such costs would, in the absence of an award for child rearing expenses, permit tortious conduct by a physician to be totally uncompensable.[26] Public policy cannot countenance such a result.[27]

III. Child Rearing Expenses

A. *Introduction*

There is a definitive split among the courts concerning the recoverability of child rearing costs associated with a healthy but unplanned child.[28] Some courts allow recovery of all expenses incidental to the rearing of the child.[29] Others allow such expenses, but permit the defendant to prove offsetting benefits conferred upon the parents as a result of the birth and rearing of a healthy child.[30] Finally, some courts disallow all expenses attributable to the rearing of the child.[31]

A few courts which hold with the latter position have based their decisions on general public policy grounds that a parent is not injured by the birth of a healthy child. Thus, in *Wilczynski v. Goodman*,[32] in considering the issue of damages in relation to a negligently performed abortion, the

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24. *See* Bishop v. Byrne, 265 F. Supp. 460 (S.D.W. Va. 1967); Boone v. Mullendore, 416 So. 2d 718 (Ala. 1982).

25. Mason v. Western Pa. Hosp., 286 Pa. Super. 354, ___, 428 A.2d 1366, 1381 (1981) (Hester, J., concurring and dissenting) ("[T]he rule . . . is . . . consonant with the very real expenses attendant to the injury suffered and the obvious difficulties stemming from the unexpected pregnancy of the woman.")

26. *See* Wilczynski v. Goodman, 73 Ill. App. 3d 51, 391 N.E.2d 479 (1979) (negligent abortion case).

27. *See* Troppi v. Scarf, 31 Mich. App. 240, ___, 187 N.W.2d 511, 517 (1971) (misfilled prescription for birth control pills by pharmacist); Terrell v. Garcia, 496 S.W.2d 124, 128 (Tex. Civ. App. 1973) (Cadena, J., dissenting).

28. For a judicial discussion of the split, see Kingsbury v. Smith, ___ N.H. ___, 442 A.2d 1003 (1982).

There is also a split among the courts concerning the recovery of child rearing expenses when a physician has failed to warn prospective parents of possible birth defects. *Compare* Naccash v. Burger, ___ Va. ___, 290 S.E.2d 825 (1982) (allowing all damages proximately caused by the negligence including care and treatment of the child suffering from Tay Sachs disease) *with* Moores v. Lucas, 405 So. 2d 1022 (Fla. Dist. Ct. App. 1981) (limiting recovery to the costs of caring for the child born with birth defects as a result of the mother's rubella, *less* the costs of raising a normal child).

29. *See* Cockrum v. Baumgartner, 99 Ill. App. 3d 271, 425 N.E.2d 968 (1981); Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976).

30. *See, e.g.*, Anonymous v. Hospital, 33 Conn. Supp. 125, 366 A.2d 204 (1976).

31. *See, e.g.*, Boone v. Mullendore, 416 So. 2d 718 (Ala. 1982).

32. 73 Ill. App. 3d 51, 391 N.E.2d 479 (1979).

court stated:

> In our judgment, a public policy which deems precious even potential life while yet in the womb, at such a 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.[33]

This view, however, was rejected in *Custodio v. Bauer*,[34] the first case to award child rearing expenses for a healthy but unplanned child. In that case, involving a negligently performed sterilization, the court noted that "the compensation is not for the so-called unwanted child . . . but to replenish the family exchequer so that the new arrival will not deprive the other members of the family of what was planned as their just share of the family income."[35] Thus, the court noted, this is not a case where the damages suffered, or the injury alleged, derives from the child's right to life. Rather, the injury alleged is to the parents as it affects their rights.[36]

The better reasoned view seems to suggest that the focus in these cases should not be on the worth and sanctity of life, but on (1) the physician's negligence in the performance of the sterilization or abortion;[37] and (2)

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33. *Id.* at ___, 391 N.E.2d at 487; *see also* Public Health Trust v. Brown, 388 So. 2d 1084, 1085 (Fla. Dist. Ct. App. 1980) ("In our view, however, its basic soundness lies in the simple proposition that a parent cannot be said to have been damaged by the birth and rearing of a normal, healthy child.")

It is important to note that these courts awarded damages for pregnancy related expenses. As one judge has suggested, however, there seems to be a contradiction in holding that the rearing of a child does not present any compensable wrong, but the birth and pregnancy, which are necessary to that child's existence, do represent compensable wrongs. *See* Terrell v. Garcia, 496 S.W.2d 124, 130-31 (Tex. Civ. App. 1973) (Cadena, J., dissenting).

34. 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).

35. *Id.* at ___, 59 Cal. Rptr. at 477; *see also* Stills v. Gratton, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976) (negligent abortion case).

36. In Rivera v. State, 94 Misc. 2d 157, 404 N.Y.S.2d 950 (1978) (negligently performed sterilization; birth of a healthy child), the court noted that other courts may have problems considering the birth of a child as a compensable wrong. The court suggested:

> [W]rongful life . . . is an unfortunate epithet, primarily because it is inaccurate as a description either of the wrong which has been committed or of the injury suffered. By analogy, the term "wrongful death" suffers from the same ambiguity, since the law does not give compensation for the death itself, but rather for the pecuniary loss which results from it. On the other hand, wrongful life does seem to crystallize the fundamental idea underlying much of the opposition to such law suits—that idea being that birth or life, whether wanted or unwanted, perfect or deformed, is an ultimate good which can in no sense be regarded as a wrong.

Id. at ___, 404 N.Y.S.2d at 953.

37. *See* Speck v. Finegold, 268 Pa. Super. 342, 408 A.2d 496 (1979) (unsuccessful vasectomy operation), *aff'd in part, rev'd in part*, 439 A.2d 110 (Pa. 1981).

whether this negligence should give rise to damages as it affects the family's rights.

B. *Specific Public Policy Arguments*

Aside from the general public policy argument based on the theory that a healthy child is not an injury to his parents, many courts use specific public policy arguments to deny recovery of child rearing expenses. Thus the state's concern with the harmony of the family unit,[38] or the concern over the unreasonable burden such an award would place on the physician,[39] serve to deny parents recovery of these expenses.

Moreover, some courts base their decisions on a public disdain for allowing parents to receive all of the benefits of raising the child while placing the economic costs of these benefits on the physicians.[40] There has been the suggestion that such an award would lead to an increase of fraudulent claims.[41] Finally, some courts do not want their trials to degenerate to the point that parents will have to plead before juries that their child is an injury to them.[42]

Many recent decisions, however, have countered these arguments. As to the fears of the courts that the defendant will be forced to sustain an unreasonable burden, or that fraudulent claims will be advanced, one court has suggested that "these reasons ignore the judicial processes which daily meet other problems of equal difficulty and complexity with commendable results."[43] It also seems that the courts which deny recovery on the grounds that the parents are receiving all the benefits while the defendant must pay all the costs ignore the fact that an opposite holding may place upon the parents "such catastrophic financial consequences" that the benefits may not justly compensate the parents for this injury.[44] Further, in the case of a family which cannot financially support another child (i.e., the case of a poor family with a large number of children), any easing of the economic burden in respect to the raising of the new child may promote family harmony rather than disrupt it, at least as

38. Boone v. Mullendore, 416 So. 2d 718 (Ala. 1982); Wilbur v. Kerr, 628 S.W.2d 568 (Ark. 1982).

39. *See, e.g.*, P. v. Portadin, 179 N.J. Super. 465, 432 A.2d 556 (1981); *see also* Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974).

40. *See, e.g.*, Maggard v. McKelvey, 627 S.W.2d 44 (Ky. Ct. App. 1981); J.P.M. & B.M. v. Schmid Laboratories, Inc., 178 N.J. Super. 122, 428 A.2d 515 (1981) (involving a suit against manufacturer of condoms alleging negligent construction of condoms resulted in birth of child); *see also* Coleman v. Garrison, 327 A.2d 757 (Del. Super. Ct. 1974), *aff'd*, 349 A.2d 8 (1975).

41. *See, e.g.*, Rieck v. Medical Protective Co., 64 Wisc. 2d at ___, 219 N.W.2d at 245.

42. Boone v. Mullendore, 416 So. 2d 718, 723 (Ala. 1982); Public Health Trust v. Brown, 388 So. 2d 1084 (Fla. Dist. Ct. App. 1980).

43. Speck v. Finegold, 268 Pa. Super. 342, ___, 408 A.2d 496, 504 (1979).

44. *See infra* text accompanying notes 68-75.

it is aimed at the new child.[45]

It must be remembered that the parents are the innocent parties; it was the physician's negligence which is the cause of the economic burden on the parents. Thus, it has been suggested, the courts which deny child rearing expenses on public policy grounds are overlooking an equally strong public policy argument which forbids tortious actions and the consequences flowing from such actions to go uncompensated. "[I]t is axiomatic that the tort-feasor is liable for all damages which ordinarily and in the natural course of things have resulted from the commission of the tort."[46]

There has been, however, another public policy argument advanced by some courts to deny child rearing expenses. This argument is that there is "the possible harm that can be caused to the unwanted child who will one day learn that he not only was not wanted by his or her parents, but was reared by funds supplied by another person. Some authors have referred to such a child as an 'emotional bastard'. . . ."[47]

Some courts have sought to alleviate this problem by allowing parties to use anonymous names in the headings of cases.[48] If the fear is that friends or relatives of the child will tell him or her of the financial arrangements responsible for his upbringing (presumably at an advanced age of understanding), "[t]he emotional injury to the child can be no greater than that to be found in many families where 'planned parenthood' has not followed the blueprint."[49] Finally, it seems that any emotional damage, these courts fear, may occur due to the fact that the family has filed a lawsuit or has recovered general damages because of his birth. It is submitted that any damage awarded for child rearing expenses will not serve to heighten this emotional damage.

Many courts in recent years have ignored these public policy arguments on the grounds that family planning has achieved a constitutionally protected status.[50] These courts cite the Supreme Court's decisions of *Gris-*

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45. *See, e.g.*, Public Health Trust v. Brown, 388 So. 2d 1084, 1087 (Fla. Dist. Ct. App. 1980) (Pearson, J., dissenting) ("I see nothing humane in denying a parent the wherewithal which might save a child from deprivation or, in many cases, abject poverty.").

46. Speck v. Finegold, 408 A.2d at 508; *see also* Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971).

47. Boone v. Mullendore, 416 So. 2d 718, 722 (Ala. 1982).

48. *See, e.g.*, Anonymous v. Hospital, 33 Conn. Supp. 125, 366 A.2d 204 (1976); P. v. Portadin, 179 N.J. Super. 465, 432 A.2d 556 (1981); *see also* J.P.M. & B.M. v. Schmid Laboratories, Inc., 178 N.J. Super. 122, 428 A.2d 515 (1981) (negligent manufacturing of condoms); Debora S. v. Sapega, 56 A.D.2d 841, 392 N.Y.S.2d 79 (1977) (physician's failure to diagnose pregnancy).

49. Custodio v. Bauer, 251 Cal. App. 2d 303, ___, 59 Cal. Rptr. 463, 477 (1967).

50. *See, e.g.*, Ochs v. Borrelli, 187 Conn. 253, 445 A.2d 883 (1982); Rivera v. State, 94 Misc. 2d 157, 404 N.Y.S.2d 950 (1978); Speck v. Finegold, 268 Pa. Super. 342, 408 A.2d 496 (1979).

wold v. Connecticut,[51] and *Roe v. Wade*[52] and its progeny,[53] for the proposition that there is a fundamental right to limit the size of one's family, or, to put it another way, a fundamental right to not-procreate. Thus, these courts say that "public policy cannot support an exception to tort liability when the impact of such an exception would impair the exercise of a constitutionally protected right"[54] or "for this court to endorse a policy that makes physicians liable for the foreseeable consequences of all negligently performed operations *except* those involving sterilization would constitute an impermissible infringement of a fundamental right."[55]

Some commentators, however, have suggested that the later Supreme Court decisions of *Maher v. Roe*[56] and *Poelker v. Doe*[57] stand for the proposition that a state may encourage childbirth, as opposed to contraception and abortion, and that a court's denial of child rearing expenses could thus be rationalized.[58] If a state denies child rearing recovery, this could be an encouragement of an adoption-alternative by the parents, and thus provide a sound policy reason to deny recovery.[59]

Assuming *arguendo* that the denial of child rearing expenses encourages adoption, and that this, as one court questioned, should be the sound policy of a state,[60] it must be conceded that this argument merely interjects another public policy consideration into an issue already overwhelmed by policy considerations. As one judge recently suggested, if there are many conflicting policy considerations, and it is unclear what the public policy of the state is, it is quite obvious that there is no strong public policy which denies recovery of child rearing expenses.[61] Thus, it appears that courts should not rule as a matter of law that public policy considerations must always outweigh the economic burden of the parent. Members of a jury should be allowed to consider all arguments and, based

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51. 381 U.S. 479 (1965) (use of contraceptives by a married person); *see also* Eisenstadt v. Baird, 405 U.S. 438 (1972) (use of contraceptives by unmarried persons).

52. 410 U.S. 113 (1973) (right to have abortion).

53. *See, e.g.*, Doe v. Bolton, 410 U.S. 179 (1973) (abortion).

54. Ochs v. Borrelli, 187 Conn. at ___, 445 A.2d at 885.

55. Bowman v. Davis, 48 Ohio St. 2d 41, ___, 356 N.E.2d 496, 499 (1976) (per curiam). An in depth examination of the constitutional arguments is beyond the scope of this article. The arguments presented in the text are the arguments advanced by the courts and commentators who have considered these constitutional issues in the area of healthy but unplanned children.

56. 432 U.S. 464 (1977).

57. 432 U.S. 519 (1977).

58. *See, e.g.*, Note, *Mandate and Mishandling, supra* note 6, at 144.

59. *Id.*

60. In Troppi v. Scarf, 31 Mich. App. 240, 259, 187 N.W.2d 511, 520 (1971), the court stated: "The law has long recognized the desirability of permitting a child to be reared by his natural parents."

61. Wilbur v. Kerr, 628 S.W.2d 568, 572 (Ark. 1982) (Dudley, J., dissenting).

on their own experiences, weigh both public policy and economic factors when ruling on the issue of damages.

C. *Benefits Conferred: A Denial of Expenses as a Matter of Law*

Since 1934 and *Christensen v. Thornby*,[62] the first case dealing with the issue of damages in an unsuccessful sterilization case, many courts have denied child rearing expenses on the ground that the benefits a parent receives from the birth and rearing of a healthy child outweigh any economic burden associated with that rearing.[63] A few courts rationalize such a benefits-conferred approach by stressing the public interest of the state,[64] thus characterizing this argument as a basic public policy argument.[65] Other courts state the proposition as a rule of law and give it the weight of an irrebuttable presumption.[66] However expressed, the basic argument is 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."[67]

One court, in considering an analogous situation involving the misfilling of a prescription for birth control pills, countered the benefits-conferred argument by stating:

> Contraceptives are used to prevent the birth of healthy children. To say that for reasons of public policy contraceptive failure can result in no damage as a matter of law ignores the fact that tens of millions of persons use contraceptives daily to avoid the very result which the defendant would have us say is always a benefit, never a detriment. Those tens of millions of persons, by their conduct, express the sense of the community.[68]

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62. 192 Minn. 123, 255 N.W. 620 (1934). Although this case ruled that plaintiff had failed to sustain his burden of proof as to his misrepresentation and warranty claims, *Christensen* has been cited by courts for the proposition that the benefits-conferred outweigh the burdens-suffered. Speck v. Finegold, 268 Pa. Super. 342, ___, 408 A.2d 496, 504-05 (1979), *modified*, 439 A.2d 110 (1981). Since the decision in *Christensen* the Minnesota Supreme Court has reexamined the issue of damages and has reinterpreted that part of *Christensen* as mere *dicta*. Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977) (holding that child rearing expenses, as offset by benefits-conferred, are recoverable).

63. *See, e.g.*, Boone v. Mullendore, 416 So. 2d 718 (Ala. 1982); Coleman v. Garrison, 349 A.2d 8 (Del. 1975); Public Health Trust v. Brown, 388 So. 2d 1084 (Fla. Dist. Ct. App. 1980); Terrell v. Garcia, 496 S.W.2d 124 (Tex. Civ. App. 1973), *cert. denied*, 415 U.S. 927 (1974).

64. *See, e.g.*, Terrell v. Garcia, 496 S.W.2d at 128.

65. *See supra* text accompanying note 61 (possible problems with public policy arguments).

66. *See* Public Health Trust v. Brown, 388 So. 2d at 1086. *See also* Boone v. Mullendore, 416 So. 2d at 722.

67. Public Health Trust v. Brown, 388 So. 2d at 1085-86. For a case holding that these "mere economic burdens" may be "catastrophic," see Rivera v. State, 94 Misc. 2d 157, ___, 404 N.Y.S.2d 950, 953 (1978).

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

One commentator[69] has suggested that this argument overlooks the fact that millions of other people have children, or adopt children and believe, therefore, that the benefits outweigh the burdens. This argument, however, is not advanced for the proposition that *all* persons view the burdens as outweighing the benefits conferred. It merely stands to contradict the reasoning that state sentiment necessarily holds the opposite view.[70]

Moreover, the fact that a "normal" person does not view the rearing of a healthy child as an injury, or alternatively, the fact that "normal" parents are benefitted more than burdened by the rearing of the child, should not preclude recovery by the parent who feels he has been burdened, and who has in fact been burdened.[71]

> It is arguable that the birth of a healthy child confers so substantial a benefit as to outweigh the expenses of birth and support. In the great majority of cases, this is no doubt true . . . but can we say, as a matter of law, that a healthy child always confers such an overriding benefit?[72]

This argument is consistent with the more general negligence principle that a tort-feasor must take the injured party as he finds him.[73]

The parent who seeks a sterlization or abortion already has decided that the burdens to him or her outweigh the benefits of rearing a child and negligent interference with that decision should be found compensable. The physician should not be heard to complain that other parents would consider the benefits as outweighing the burdens. As one judge stated: "The doctor whose negligence brings about such an undesired birth should not be allowed to say 'I did you a favor,' secure in the knowledge that the courts will give this claim the effect of an irrebuttable presumption."[74] Thus, it seems, the more reasoned view allows each parent his day in court to prove that he has in fact been injured.[75]

D. *The Benefits Rule: A Weighing of Factors*

The growing trend in cases involving a healthy but unplanned child allows rearing expenses as recoverable damages, but permits the defendant to prove that the parents have been benefitted by the birth and sub-

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69. *See,* Note, *Mandate and Mishandling, supra* note 6, at 138-39 n.83.

70. *See, e.g.,* Cockrum v. Baumgartner, 99 Ill. App. 3d 271, ___, 425 N.E.2d 968, 970 (1981) (suggesting that although most parents hold the view that a healthy child is a benefit, a court should not raise this view to the standard of public policy).

71. Terrell v. Garcia, 496 S.W.2d 124, 130-31 (Tex. Civ. App. 1973) (Cadena, J., dissenting).

72. Troppi v. Scarf, 31 Mich. App. at ___, 187 N.W.2d at 517.

73. *See generally* W. PROSSER, HANDBOOK OF TORTS § 43 at 261-62 (4th ed. 1971) (liability beyond the risk of defendant's actions).

74. Terrell v. Garcia, 496 S.W.2d at 131 (Cadena, J., dissenting).

75. *See* Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 174 (Minn. 1977).

sequent rearing of the child as an offset to these damages.[76] These courts, in an attempt to apply traditional tort principles, cite what has been termed the "benefits rule" of the *Restatement (Second) of Torts*:

> § 920: When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit *to the interest of the plaintiff that was harmed*, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable.[77]

The majority of the courts that rely on the benefits rule apply this rule across the board, the sum of the benefits to be used to offset the sum of the burdens.[78] The benefits rule is, however, by its terms a specific interest rule: the benefit conferred must be used to offset *the interest that was harmed*. "Damages resulting from an invasion of one interest are not diminished by showing that another interest has been benefited."[79] Two courts have recognized this limitation but have rejected its application to cases involving the birth of a healthy but unplanned child.[80] The court in *Troppi v. Scarf* stated that "[s]ince pregnancy and its attendant anxiety, incapacity, pain and suffering are inextricably related to child bearing, we do not think it would be sound to attempt to separate those segments of damage from the economic costs of an unplanned child in applying the 'same interest' rule."[81]

The court in *Cockrum v. Baumgartner*,[82] however, concerned solely with the issue of child rearing damages, refused to apply the benefits rule because of the same-interest limitation: "The rewards of parenthood should not be allowed in mitigation of rearing costs because 'these rewards are emotional in nature and, great though they may be, do nothing whatever to benefit the plaintiff's injured financial interest.' "[83]

It appears that the latter holding is the better reasoned view of the benefits rule as it applies to the birth of a healthy but unwanted child. Although it is conceded that the pain and suffering, emotional anxiety

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76. *See, e.g.*, Ochs v. Borrelli, 187 Conn. 253, 445 A.2d 883 (1982); Anonymous v. Hospital, 33 Conn. Supp. 125, 366 A.2d 204 (1976); Pierce v. DeGracia, 103 Ill. App. 3d 511, 59 Ill. Dec. 267, 431 N.E.2d 768 (1982); Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971); Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977); Rivera v. State, 94 Misc. 2d 157, 404 N.Y.S.2d 950 (1978); Mason v. Western Pa. Hosp., 286 Pa. Super. 354, 428 A.2d 1366 (1981).

77. RESTATEMENT (SECOND) OF TORTS § 920 (1977) (emphasis added).

78. *See, e.g.*, Ochs v. Borrelli, 187 Conn. at 253, 445 A.2d at 883; Sherlock v. Stillwater Clinic, 260 N.W.2d at 169.

79. RESTATEMENT (SECOND) OF TORTS § 920 comment b (1977).

80. Troppi v. Scarf, 31 Mich. App. at ___, 187 N.W.2d at 518; Sherlock v. Stillwater Clinic, 260 N.W.2d at 176.

81. Troppi v. Scarf, 31 Mich. App. at ___, 187 N.W.2d at 518.

82. 99 Ill. App. 3d 271, 425 N.E.2d 968 (1981).

83. *Id.* at ___, 425 N.E.2d at 970, citing Kashi, *The Case of the Unwanted Blessing: Wrongful Life*, 31 U. MIAMI L. REV. 1409, 1415 (1977).

and incapacity attributable to the birth of a healthy but unplanned child are "inextricably related to the child bearing,"[84] it does not appear that the economic costs of bearing and rearing a child similarly are related. Evidence of this would be the holdings of courts which allow general damages but deny child rearing expenses.[85] Further, in general negligence actions many courts have the jury separate pecuniary losses from emotional anxiety and pain and suffering damages.[86]

A strict interpretation of the benefits rule, then, would require the courts to separate out benefits as they relate to the particular interest harmed.[87] Thus, the emotional joy of raising a child should offset the emotional anguish of raising a child.[88] Similarly, the economic burden of raising a child should be offset only by any corresponding economic gain the parents receive from the child. In this light, it should be noted that *Sherlock v. Stillwater Clinic*[89] held that the expenses should be projected to the age of majority while the benefits conferred should be projected for the duration of the parent's lives. This is a reflection of the acknowledgement that children may grow up and, past the age of majority, receive income which benefits the parents.[90]

There are still courts, however, that deny the use of the benefits rule on the ground that the weighing of damages and benefits would prove too speculative in practice.[91] The courts that have accepted the benefits rule, on the other hand, hold that these damage considerations are no more speculative than considerations in other types of cases, for example,

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84. *See supra* text accompanying note 81.

85. *See, e.g.*, Boone v. Mullendore, 416 So. 2d 718 (Ala. 1982). This is not to suggest that this holding is the correct one. *See supra* text accompanying notes 73-75. This proposition is advanced merely to show that the economic costs can be disassociated from emotional costs.

86. *See, e.g.*, Beaulieu v. Elliott, 434 P.2d 665 (Alaska 1967).

87. *See, e.g.*, Note, *Wrongful Conception: Who Pays, supra* note 6; *Torts, Wrongful Conception, Measuring Damages Incurred by the Parents of an Unplanned Child: Sherlock v. Stillwater Clinic, 260 N.W.2d (Minn. Sup. Ct. 1977)*, 28 DE PAUL L. REV. 249 (1978).

88. The emotional pain may be greater in the case of a child born with a deformity where the physician's failure to warn about this possibility is found to be the proximate cause of the birth. *Cf.* Schroeder v. Perkel, 87 N.J. 53, ___, 432 A.2d 834, 842 (1981) (child born with cystic fibrosis: "Although they [the parents] may derive pleasure from Thomas, that pleasure will be derived in spite of, rather than because of his affliction. [The parents] will receive no compensating pleasure from incurring extraordinary medical expenses. . . . There is no joy in watching a child suffer and die from cystic fibrosis."). *See generally*, Mason v. Western Pa. Hosp., 286 Pa. Super. 354, 428 A.2d 1366 (1981) (suggesting that the emotional offset would vary with the facts of each case).

89. 260 N.W.2d at 176.

90. *Id. See supra* note 87; *see also* VA. CODE ANN. § 20-88 (Cum. Supp. 1982) (providing that under certain circumstances, a child over 18 years old, whose parents are indigent, must provide support for those parents).

91. *See, e.g.*, Boone v. Mullendore, 416 So. 2d 718 (Ala. 1982); Terrell v. Garcia, 496 S.W.2d 124 (Tex. Civ. App. 1973), *cert. denied*, 415 U.S. 927 (1974).

wrongful death, loss of consortium and pain and suffering.[92] Further, it has been argued that a wrongdoer should not be heard to complain that the damages are not exact, because he alone is responsible for creating the situation.[93]

In summary, the burdens which can be offset by the corresponding benefits are: (1) economic loss, including the economic costs of pregnancy, childbirth and child rearing and related costs such as lost wages, medical expenses, and educational expenses projected through the age of majority;[94] and (2) the emotional pain of raising the child projected through the age of majority. On the other hand, the following "injuries" can not be offset by any corresponding benefit: (1) pain and suffering of the mother during pregnancy and childbirth; (2) emotional anguish accompanying the pregnancy and expected childbirth; and (3) loss of consortium, comfort and companionship of wife during pregnancy and childbirth as recoverable by the father. As the court in *Sherlock v. Stillwater Clinic*[95] suggests, special verdicts with explanatory instructions would be helpful here.

E. *Abortion or Adoption: Mitigation of Damages*

In many cases involving the birth of a healthy but unplanned child the question arises as to what extent the parent's failure to abort the fetus[96] or place the child for adoption should be considered a failure to mitigate damages. Some courts which have denied child rearing expenses have done so by giving this consideration the weight of an irrebuttable presumption. Thus, where a parent fails to place the child for adoption, or fails to abort the fetus, it is irrebuttably presumed that the parent is

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92. *See* Ochs v. Borrelli, 187 Conn. 253, 445 A.2d 883 (1982); Anonymous v. Hospital, 38 Conn. Supp. 125, 366 A.2d 204 (1976); Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971).

93. In Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563 (1931), the Supreme Court stated:

> Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence shows the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they can not be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise.

Id.

94. *Cf.*, Sherlock v. Stillwater Clinic, 260 N.W.2d at 176.

95. *Id.*

96. Abortion may be a legally viable alternative at certain stages of pregnancy. *See* Roe v. Wade, 410 U.S. 113 (1973).

benefitted by the physician's negligence more than burdened.[97]

Other courts, in response to this argument, note that a plaintiff, in general, "compromises his right to recover damages *only* by a failure to use reasonable effort or expenditure after the commission of a tort."[98] These courts rule, as a matter of law, that it would be unreasonable to require the parent to place the child for adoption, or to abort the fetus solely because of the risk of losing an award of damages.[99] Such a holding is based partly on the decisions in *Griswold v. Connecticut*[100] and *Roe v. Wade*[101] which preclude the application of these mitigating factors since a requirement of adoption or abortion would be an unreasonable interference with the strictly private choice of family planning.[102] Another argument is based on the strong public policy in favor of keeping the family together. To force a plaintiff to place the child for adoption would be unreasonable in light of such a policy.[103] It appears that the best reasoned argument, based on traditional negligence principles, against considering these factors as mitigating circumstances, is that the tort-feasor takes the injured party as he finds him:

> If the negligence of a tortfeasor results in conception of a child by a woman whose emotional and mental makeup is inconsistent with aborting or placing a child for adoption, then, under the principle that the tortfeasor takes the injured party as he finds him, the tort-feasor cannot complain that the damages that will be assessed against him are greater than those that would be determined if he had negligently caused the conception of a child by a woman who was willing to abort or place the child for adoption.[104]

The courts that deny recovery based upon an irrebuttable presumption and the courts that give no consideration to these mitigating factors are

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97. *See, e.g.*, Coleman v. Garrison, 327 A.2d 757 (Del. Super. Ct. 1974), *aff'd*, 349 A.2d 8 (Del. 1975); Public Health Trust v. Brown, 388 So. 2d 1084 (Fla. Dist. Ct. App. 1980); Sorkin v. Lee, 78 A.D.2d 180, 434 N.Y.S.2d 300 (1980).

98. Ochs v. Borrelli, 187 Conn. 253, ___, 445 A.2d 883, 886 n.4 (1982). *See generally* Troppi v. Scarf, 31 Mich. App. 240, ___, 187 N.W.2d 511, 519 (1971) where the court said: "If the effort, risk, sacrifice or expense which the person wronged must incur in order to avoid or minimize a loss or injury is such that under all the circumstances a reasonable man might well decline to incur it, a failure to do so imposes no disability against recovering full damages." (quoting McCormick, Damages § 35, at 133 (1935)).

99. *See* Ochs v. Borrelli, 187 Conn. 253, ___, 445 A.2d 883 (1982); Cockrum v. Baumgartner, 99 Ill. App. 3d 271, 425 N.E.2d 968 (1981); (Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971); Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977); Rivera v. State, 94 Misc. 2d 157, 404 N.Y.S.2d 950 (1978); Mason v. Western Pa. Hosp., 286 Pa. Super. 354, 428 A.2d 1366 (1981).

100. 381 U.S. 479 (1965).

101. 410 U.S. 113 (1973).

102. *See, e.g.*, Cockrum v. Baumgartner, 99 Ill. App. 3d at ___, 425 N.E.2d at 970. *But see supra* notes 58-59 and accompanying text (an argument against such a holding).

103. *See, e.g.*, Wilbur v. Kerr, 628 S.W.2d 568, 572 (Ark. 1982) (Dudley, J., dissenting).

104. Troppi v. Scarf, 31 Mich App. at ___, 187 N.W.2d at 520.

ruling as a matter of law that such actions are always reasonable or unreasonable.[105] As a few courts have noted, however, the findings of reasonableness and unreasonableness may change with different factual considerations.[106] In *Ziemba v. Sternberg,*[107] the court rejected the holding that a failure to abort a child is *always* a failure to mitigate damages. In this case the court examined the circumstances surrounding the woman's refusal to abort and held that she had shown it was reasonable to forgo an abortion.[108] In *Stills v. Gratton,*[109] the court ruled that cases involving the birth of a healthy but unplanned child should be decided on ordinary tort principles, and, on remand, allowed the defendant to prove any amounts chargeable to the plaintiff under her duty to mitigate damages.[110] In light of these decisions it is suggested that the reasonableness of the parent's failure to mitigate damages will vary with the factual circumstances surrounding each case, and therefore, courts should be hesitant to rule, as a matter of law, that the parent's failure to undergo an abortion or adoption procedure necessarily is reasonable or unreasonable. The trier of fact should be allowed to decide the issue in light of the particular facts of each case.[111]

IV. The Outcome in Virginia

The Supreme Court of Virginia has yet to consider the issue of damages in connection with the birth of a healthy but unplanned child. In the recent decision of *Naccash v. Burger,*[112] however, the court considered the issue of damages in connection with the birth of a deformed child. In *Naccash,* a couple's decision to forgo an abortion was based on a negligently administered test to determine whether or not they were carriers of Tay Sachs, a fatal disease of the brain and spinal cord which afflicts infants.[113] The court in this case avoided all public policy[114] issues and

105. *See, e.g.,* Public Health Trust v. Brown, 388 So. 2d 1084 (1980); Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971).

106. *See, e.g.,* Stills v. Gratton, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976); Ziemba v. Sternberg, 45 A.D.2d 230, 357 N.Y.S.2d 265 (1974).

107. 357 N.Y.S.2d 265 (1974).

108. *Id.* at 269.

109. 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976).

110. *Id.* at 709, 127 Cal. Rptr. at 658-59.

111. This is not to suggest that the trier of fact must always decide the issue. It may be the case that the particular facts warrant a conclusion such that "no reasonable person can differ." If such is the case, then the judge may rule on the facts as he finds them.

112. ___ Va. ___, 290 S.E.2d 825 (1982).

113. *Id.* at ___, 290 S.E.2d at 827.

114. In the case of McNeal v. United States, No. 82-1014, slip op. at 5-6 (4th Cir. Sept. 27, 1982), the court decided that Virginia public policy would not allow the parents "to retain such benefits as the fun, joy and affection of raising the child, while the defendant is burdened with all the bills."

It is suggested, however, that dicta in the *Naccash* case suggests an opposite view: "[W]e do not necessarily agree that, if liability is established and the damages claimed are compen-

handled the case under traditional negligence principles. The court noted that "[o]nly a novel twist in the medical setting differentiates the present situation from the ordinary malpractice action,"[115] and concluded that the parents were "entitled to recover those damages which are the reasonable and proximate consequences of the breach of duty owed them, *viz.*, consequences that a reasonable and informed person could have forseen or anticipated."[116] The court awarded the parents damages for the care and treatment of the child with no offset for any benefits the parents received as a result of the birth,[117] but did not deduct from the damages the reasonable costs of caring for a normal healthy child[118] as other courts had done.[119] The court also awarded damages resulting from the emotional and mental suffering the parents incurred as a result of the birth and rearing of a child afflicted with Tay Sachs disease in contrast to other courts which have denied such recovery.[120]

In light of this decision, it seems that the case of *Johnson v. Miller*,[121] involving an alleged negligently performed abortion resulting in the birth of a healthy child, will be decided on appeal under ordinary tort principles. At trial, the lower court gave a jury instruction which allowed the jury to consider and award all damages that were pleaded, including the cost of raising the child to the age of majority.[122] The court, however, failed to provide an instruction which would have permitted an offset for any benefits the parents received as a result of the birth of the child. Further, the court refused a jury instruction which was concerned with the plaintiff's duty to mitigate damages[123] (a second abortion or placing the child up for adoption).

It is suggested that on appeal the court should uphold the lower court's instruction as to the damages issue—including a consideration of child

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sable and just, the court should perform a balancing test between competing economic interests in determining whether an injured party is entitled to a particular category of damages." *Naccash*, ___ Va. at ___, 290 S.E.2d at 830. This dicta plus the avoidance of a public policy argument and the handling of issues in that case under traditional negligence principles seems to override the rejection of damages for the reasons suggested in *McNeal*.

115. *Id.* at ___, 290 S.E.2d at 829.

116. *Id.* at ___, 290 S.E.2d at 830.

117. *See also* Schroeder v. Perkel, 87 N.J. 53, 432 A.2d 834 (1981).

118. *See also* Robak v. United States, 658 F.2d 471 (7th Cir. 1981).

119. Moores v. Lucas, 405 So. 2d 1022 (Fla. Dist. Ct. App. 1981) (limiting recovery to the costs of caring for a child born with birth defects offset by the costs of raising a normal child).

120. *Id.* at 1026; *see also* Howard v. Lecher, 42 N.Y.2d 109, 366 N.E.2d 64, 397 N.Y.S.2d 363 (1977).

121. No. L-80-2378 (Cir. Ct. of City of Norfolk 1982).

122. *Id.* (Jury Instruction No. 5).

123. *Id.* (Jury Instruction No. 9-B (refused)). It appears that this instruction was refused because the defendant did not bring up the issue until the conclusion of the trial, and to allow it would work an unfair burden on the plaintiff because he did not address the issue at trial.

rearing expenses—because these damages are, in the words of the court in *Naccash,* proximately caused by the defendant's negligence and were reasonable, foreseeable consequences of the negligence.[124] Consistent with these negligence principles, however, it seems that the court should remand the case for further consideration of the issue of benefits conferred, as an offset to damages, and the issue of the reasonableness of the plaintiff's failure to mitigate these damages by abortion or adoption.

V. Conclusion

When a physician's negligence results in the birth of a healthy but unplanned child the parents should be able to recover those costs which proximately are caused by this negligence consistent with ordinary tort principles. Public policy, which is both in favor of awarding damages to the innocent party in a medical malpractice case[125] and, arguably, against recovery for the birth and rearing of a healthy child, should not be used as a rule of law to deny parents the opportunity to recover those damages when they can show that they were in fact injured both economically and emotionally by this negligence.

The equitable application of the benefits rule, to offset damages by corresponding benefits, will serve to ensure that a physician does not escape liability for his negligent acts and, on the other hand, ensure that the parents do not receive windfall benefits because of this negligence. It may be that in most cases the jury will award only minimal damages for the birth of a healthy child, but the parents, if injured, should not be precluded from pleading that the negligence caused them injuries for which they are not being justly compensated.

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124. *See supra* text accompanying notes 114-15. It is important to note here that in a recent Pennsylvania decision, Mason v. Western Pa. Hosp., 286 Pa. Super. 354, 428 A.2d 1366 (1981), the court when faced with a case involving the birth of a healthy child after an alleged negligently performed sterilization operation, felt itself bound by the decision of Speck v. Finegold, 268 Pa. Super. 342, 408 A.2d 496 (1979) (reversed as to the decision denying emotional damages in 439 A.2d 110 (Pa. 1981)), dealing with the birth of a deformed child. The court in *Mason* concluded:

> [I]t would be inconsistent to hold that parents of a deformed or diseased child may recover *all* expenses arising from the tortious conduct while not permitting any recovery for parents of a normal child given that the child in both cases is unwanted . . . . [I]t is axiomatic that the tort-feasor is liable for all damages which ordinarily and in the natural course of things have resulted from the commission of the tort.

Mason, 286 Pa. Super. at ___, 428 A.2d at 1370.

125. *See, e.g.,* Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977) (suggesting that these damage awards would serve as a useful deterrent to negligent performance of sterilization operations).