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UNIVERSITY OF ALBERTA

"'WRONGFUL BIRTH' - An Emerging Tort in Canada"

BY

Ellen J. MacKenzie

A THESIS

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The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research for acceptance, a thesis entitled "Wrongful Birth - An Emerging Tort in Canada" submitted by Ellen Jane MacKenzie in partial fulfillment of the requirements for the degree of Master of Laws (LL.M.).

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ABSTRACT

This thesis examines the action for "wrongful birth" which involves the question of civil liability arising from the birth of an unhealthy child. The action is examined in two parts; the first part deals with the nature of the liability forming the basis of such an action in the contexts of sterilization and abortion. The second part examines the public policy issues which pervade this area of the law and the problems of assessing the damages arising from this action.

CONTENTS

CONTENTS - cont'd

List of Cases

CANADA

Biggs v. Richter, (1989) 18 A.C.W.S. (3d) 101 (Ont. Dist. Ct.).

Cataford v. Moreau, (1978) 114 D.L.R. (3d) 585.

Cherry v. Borsman, (1990) 75 D.L.R. (4th) 668

Colp v. Ringrose, unreported No. 84474, Trial Division Judicial District of Edmonton, 1976

Cryderman v. Ringrose, [1977] 3 W.W.R. 109 (Alta. Dist. Ct.), [1978] 3 W.W.R. 481.

Doiron v. Orr, (1978) 1 A.C.W.S. 700; (1978) 86 D.L.R. (3d) 719.

Fredette v. Wiebe, (1986) 29 D.L.R. 4th 534.

Grey v. Webster, (1984) 57 N.B.R. (2d) 396.

Guillette v. Maneux, 15 A.C.W.S. (3d) 252 (May 15, 1989 Que. C.A., Beaugregard and Nichols JJ. A., Chevalier J. (ad hoc) Reasons in French, Order No. 089/144/017.

Keats v. Pearce, (1964) 48 Nfld. & P.E.I.R. 102

Morgentaler v. The Queen, (1975) 20 C.C.C. (2d) 449, 53 D.L.R. (3D) 161 (S.C.C.).

Reibl v. Hughes, [1980] 2 S.C.R. 880, 114 D.L.R. (3d)1, 33 N.R. 361, 14 C.C.L.T.1.

Sanderson v. Lamont, unreported No. C803801, Supreme Court of British Columbia, 1983

Snell v. Farrell, 72 D.L.R. (4th) 289 (1990).

ENGLAND

Benarr v. Kettering, (1989) 56 Medio-Legal Journal 179.

Emeh v. Kensington and Chelsea and Westminster Area Health Authority, [1984] 3 All ER 1044.

Jones v. Berkshire Health Authority, transcript 84/NJ/5283, July 2, 1986.

McKay v. Essex Area Health Authority, [1982] 2 All ER 771.

Rance v. Mid Downs Health Authority, [1991] 1 ALL ER 801

Sciuriaga v. Powell, unreported, QBD 18 May 1979.

Sidaway v. Bethlem Royal Hospital Governors and Others, [1985] 1 All ER 643.

Thake and another v. Maurice, [1985] 2 W.L.R. 215 (Q.B.) rev'd in part [1986] 1 All E.R. 497 (C.A.).

Udale v. Bloomsbury Area Health Authority, [1983] 2 All ER 422.

Worster v. City and Hackney Health Authority, unreported, Garland J QBD, June 19, 1987.

GERMANY

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Oberlandesgericht, January 31, 1974, 28 Neve Juristiche Wochenschrift 595.

NEW ZEALAND

Accident Compensation Commission v. Auckland Hospital Board, [1980] 2 NZLR 748.

Lv. M, [1979] 2 NZLR 519.

Re Z, [1982] NZACR 279.

Teitjens v. Rutherford, Noted in [1978] Recent law 137.

UNITED STATES

Adams v. Murakami, 268 Cal. Rptr. 467, 219 C.A. 3d 647, (1990).

Anderson v. Wagner, 61 Ill. App. 3d 822, 19 Ill. Dec. 190, 378 N.E. 2d 805 (1978).

Anonymous v. Hospital, 33 Conn. Sup. 126, 366 A. 2d 204 (1976).

Azzolino v. Dingfelder, 337 S.E. 2d (N.C. 1985).

Ball v. Mudge, 64 Wash. 2d 247, 391 P. 2d 201 (1964).

Bani-Esrali v. Wald, 485 N.Y.S. 2d 708 (Sup. 1985).

Beardsly v. Wierdsma, 650 p. 2d 288 (Wyo. 1982).

Becker v. Schwartz, 400 N.Y.S. 2d 119 (App. Div. 1977).

Berman v. Allen, 80 N.J. 421, 404 A. 2d 8 (1979).

Betancourt v. Gaylor, 264 N.J. Super. 85, 344 A. 2d 336 (Law Div. 1975).

Bishop v. Byrne, 265 F. Supp 460 (S.D.W.V.A. 1967).

Blake v. Cruz, 698 P. 2d 315 (Idaho 1984).

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

Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E. 2d 46 (1976).

Burke et al v. Rivo, 551 N.E. 2d 1 (Mass. 1990).

Bushman v. Burns Clinic, 268 N.W. 2d 683, 83 Mich. App. 453 (1978).

Byrd v. Wesley Medical Centre, 699 P. 2d 459 (Kan. 1985).

C.S. v. Nielson, 767 P.2d 504 (Utah 1988).

Christensen v. Thornby, 192 Minn. 123, 255 N.W. 620 (1934).

Clapman v. Yanga, 102 Mich. App. 47, 300 N.W. 2d 727 (1980).

Clegg v. Chase, 391 N.Y.S. 2d 966 (Sup. Ct. 1977).

Cobb v. Tucker, unreported (No. 3434N) Cal. Super., San Diego County (1975), referred to in 31 the Citation at 103 (1975).

Cockrum v. Baumgartner, 95 Ill. 2d 193, 447 N.E. 2d 385 (1981).

Coleman v. Garrison, 281 A. 2d 616 (Del. Super 1971) appeal dismised sub. nom. Willmington Medical Inc. v. Coleman, 298 A.2d 320 (Del. 1972), 327 A. 2d 757 (Del. Super 1974) aff'd 349 A.2d 8 (Del. 1975).

Continental Casualty Co. v. Empire Casualty Co., 713 P.2d 384 (Colo. App. 1985).

Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rpts. 463 (1967).

Delaney v. Kraft, 470 N.Y.S. 2d 936, 98 A.D. 2d 128 (1984).

Doerr v. Villate, 74 Ill. App. 2d 322, 220 N.E. 2d 767 (1967).

Dumer v. St. Michael's Hospital, 69 Wis. 2d 466, 233 N.W. 2d 372 (1975).

Elliot v. Brown, 361 So. 2d 546 (Ala. 1978).

Fassoulas v. Ramey, 450 So. 2d 822 (Fla. 1984).

Flowers v. District of Columbia, 1984 478 A. 2d 1073 (D.C. 1984).

Fulton-De-Kalb Hosp. Auth. v. Graves, 314 S.E. 2d 653 (1984).

Gallagher v. Duke University, 852 F.2d 773 (4th Cir. 1986).

Garrison v. Foy, 486 N.W. 2d 5 (Ind. App. 1985).

Gildiner v. Thomas Jefferson University Hosp., 451 F. Sup 692 (1978).

Gleitman v.Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967).

Goforth v. Porter Medical Associates, 755 P.2d 678 (OKI 1988).

Goldberg v. Ruskin, 471 N.E. 2d 530 (Ill. App. 1 Dist. 1984).

Greenberg v. Kliot, 47 App. Div. 2d 76, 367 N.Y.S. 2d 966 (1976).

Griswold v. Connecticut, 14 L. Ed. 2d 510, 381 U.S. 479, 85 S.Ct. 1978 (1965).

Harbeson v. Parke-Davis Inc., Wash., 656 P.2d 483 (1983).

Hartke v. McKelway, 707 F.2d 1544 (1983).

Hickman v. Group Health Authority, 393 N.W. 2d 10 Minn. (1986).

Howard v. Lecher, 53 App. Div. 2d 420, 386 N.Y.S. 2d 460 (1976), aff'd 42 N.Y. 2d 109, 397 N.Y.S. 2d 363, 366 N.E. 2d 64 (1977).

Jackson v. Anderson, 230 So. 2d 503 (Fla. App. 1970).

Jacobs v. Theimer, 507 S.E. 2d 288 (Tex. Civ. App. 1974), rev'd 519 S.W. 2d 846 (Tex. 1975).

James v. Casserta, 332 S.E. 2d 872 (W. Va. 1985).

Jennifer v. Kirdnval, 332 S.E. 2d 872 (W. Va. 1985).

Johnson v. Yeshiva University, 53 App. Div. 2d 523, 384 N.Y.S. 2d 455 (1976) aff'd, 42 N.Y. 2d 818, 396 N.Y.S. 2d 647 (1977).

Johnston v. Elkins, 241 Kan. 407, 736 P.2d 935 (Kan.1987).

Jones v. Malinowski, 473 A.2d 429 (Md. 1984).

Jordan v. Bero, 58 W. Va. 28 210 S.E. 2d 618 (1974).

Karlsons v. Guerinot, 394 N.Y.S. 2d 933 (App. Div. 1977).

Kingsbury v. Smith, 122 N.H. 237, 443 A.2d 1003 (1982).

Ladies Centre of Clearwater Inc. v. Reno, 341 So. 2d 543 (Fla. App. 1977).

LaPoint v. Shirley, 409 F. Supp. 118 (W.D. Tex 1976).

Macomber v. Dillman, 505 A. 2d 810 (Me. 1986).

Marciniak v. Lundborg, 450 N.w. 2d 243 (Wis. 1990).

Mason v. Western Pennsylvania Hospital, 428 A. 2d 1366 (1981).

McKernan v. Aasheim, 102 Wash. 2d 411, 687 P.2d 850 (1984).

McNeal v. United States, 689 F.2d 1200 (1982).

Mechikoff v. Humphreys, unreported (No. 192641) Cal. Super., Orange County (1975) referred to in 32 The Citation at 125 (1976).

Miller v. Johnson, 343 S.E. 2d 301 (Va. 1986).

Moores v. Lucas, 405 So. 2d 1022 (1981).

Morris v. Sanchez Okl., 746 P.2d 184 (1987).

Morris v. Frudenfeld, 185 Cal. Rptr 76, 135 C.A. 3d 23 (1982).

Naccash v. Burger, 290 S.E. 2d 825 (1982).

Nanke v. Napier, 346 N.W. 2d 520 (Iowa 1984).

Ochs v. Borelli, Conn., 445 A. 2d 883 (1982).

Park v. Chessin, 387, N.Y.S. 2d 204 (Sup. Ct. 1976) aff'd 400 N.Y.S. 2d 110 (App. Div. 1977).

Phillips v. United States, 575 F. Supp. 1304 (1983).

Pierce v. De Gracia, 59 Ill. Dec. 267, 431 N.E. 2d 768 (1982).

Procanik v. Cillo, 478 A.2d 755 N.J. 1984).

Public Health Trust v. Brown, 388 So. 2d 0184 (Fla. Dist. Ct. App. 1980).

Ramey v. Fassoulas, 414 So. 2d 198 (Fla. 3d Dist. Ct. App. 1982).

Renslow v. Mennonite Hospital, 40 Ill. App. 3d 324, 351 N.E. 2d 870 (1976).

Richardson v. Mellish, 2 Bing. 229, 252 91984), rev. denied 399 So. 2d 1140 (Fla. 1981).

Rickney v Chicago Transit Authority, (1983), 98 Ill. 2d 546, 75 Ill. Dec. 211, 457 N.E. 2d 1.

Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W. 2d 242 (1974).

Rivera v. State of New York, 26, Misc., 2d 157, 404 N.Y.S. 2d 454 (1978).

Robak v. United States, 658 F. 2d 47 (7th Circ. 1981).

Roe v. Wade, 35 L. Ed. 2d 147, 410 U.S. 113, 93 S.Ct. 705 (1973).

Schork v. Huber, 648 S.W. 2d 861 (Ky. 1983).

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

Shaheen v. Knight, 11 Pa. Dist. & Co. R. 2d 41 (Lycoming County Ct. 1957).

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

Siemieniec v. Lutheran General Hospital, 512 N.E. 2d 691 (Ill. 1987).

Slawek v. Stroh, 62 Wis. 2d 295, 215 N.W. 2d 9 (1974).

Smith v. Gore, 728 S.W. 738 (Tenn. 19870.

Smith v. U.S., 392 F. Sup 654 (N.D. Ohio 1975).

Sorkin v. Lee, 78 A.d. 2d 180, 434 N.y.S. 2d 300 (1980).

Speck v. Finegold, 124 P.L.J. 257 (Pa. County Ct. 1976)

Stewart v. Long Island College Hospital, 58 Misc. 2d 432, 296 N.Y.S. 2d 41 (Sup. Ct. 1968) rev'd., 35 App. Div. 2d 531, 313 N.Y.S. 2d 502 (1978) aff'd., 30 N.Y. 2d 695, 283 N.E. 2d 616, 332 N.Y.S 2d 640 (1972).

Stills v. Gratton, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976).

Terrell v. Garcia, 496 S.W. 2d 124 (Tex. Civ. App. 1973) cert. denied 415 U.S. 927 (1974).

Tobin v. Grossman, 24 N.Y. 2d 609, 249 N.E. 2d 419, 301 N.Y.S. 2d 544 (1969).

Troppi v. Scarf, 31 Mich. App. 240, 187 N.w. 2d 511 (1971).

... Superior Court, 667 P.2d 1294 (Ariz. 1983).

Walker by Pizano v. Mart, 790 P.2d 735 (Ariz. 1990).

Weintraub v. Brown, 98 A.D. 2d 339, 470 N..S. 2d 634 (1983).

White v. United States, 519 F. Supp. 16 (D. Kan. 1981).

Wilbur v. Kerr, 275 Ark. 239, 628 S.W. 2d 568 (1982).

Williams v. State, 18 N.Y. 2d 881, 223 N.E. 2d 343 (1966).

Zepeda v. Zepeda, Ill. Iu. App. 2d 240, 190 N.E. 2d 849 (1963) cert. denied., 379 U.S. 945 (1964).

Ziemba v. Sternberg, 45 App. Div. 2d 230, 357 N.Y.S. 2d 265 (1974).

INTRODUCTION

At one time procreation was thought to be the chief purpose of marriage. Today, for many couples, the addition of another mouth to feed may not be such a "blessed event". Recent years have seen a significant number of couples deliberately attempting to avoid parenthood through various methods of birth control. Some families are turning to simple and effective prophylactic devices as a birth control means. Others are turning to sterilization and abortion operations.

While generally effective, these methods of family planning sometimes fail, leaving the parents with the financial obligation and emotional burden of raising an unplanned, unwanted and sometimes defective child at a staggering cost. When the parents can trace the birth of this child child to the negligence of the physician, a legal avenue emerges for transferring this financial burden to the physician in certain circumstances. The essence of the claim is that the plaintiff was denied the procreative choice whether or not to become pregnant or, if pregnant, whether or not to abort because she was given faulty advice or no advice at all.

Any unwanted, unplanned birth can conceivably lead to two different lawsuits against the physician; one brought by the parents of the child claiming that the responsibility of parenthood has caused them economic loss, physical pain and emotional distress; and one brought by the child who claims that its own birth was caused by the conduct of the physician. Commentators have labelled the parents' action as one for "wrongful birth" and the child's as one for "wrongful life". Thus the only real distinction between the two actions concerns who may bring the action and its subsequent success.

Much of the controversy associated with these lawsuits has been attributed to the highly emotional nature of the concepts, "birth" and "life". For this reason, it is not surprising that the plaintiffs' counsel have chosen recently to address juries by using phrases such as "wrongful

pregnancy" or "wrongful conception" in place of the emotionally charged phrases, "wrongful birth" and "wrongful life". As a result of the haphazard use of all of these terms, both in the case law and commentaries, the distinctions between the torts often have been blurred.[1] Differences between them may seem no more than mere semantics, but the distinctions are critical for at least two reasons. First, each of the claims involves fundamentally different legal issues. Second, if the distinction is not made, the danger arises that the arguments used to defeat the wrongful life claim may also be effective in defeating an otherwise valid wrongful birth claim.

Although this thesis is restricted to an analysis of the action for "wrongful birth", and because this action is related in many respects to the action for "wrongful life" and "wrongful pregnancy or conception", it is important to define what is meant by these terms. A review of the most recent American cases suggests that the following definitions provide a guideline for a clear understanding of the various claims brought against the physician. As stated above, the phrase "wrongful birth" denotes a suit brought by parents to recover the monetary and emotional damages they have suffered as a result of giving birth to a child. However, wrongful birth claims have recently been sub-categorized into suits involving the wrongful birth of a severely handicapped child and cases involving the wrongful birth of a healthy, but unwanted or unplanned child. Thus, the "wrongful birth" suit has come to refer specifically to the claim for relief of parents of a child, afflicted with birth defects, against a physician. Wrongful birth actions are brought by parents who claim that they would have avoided conception or terminated the pregnancy by abortion but for the negligence of those charged with prenatal testing, or genetic

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[1] See, for example, Custudio v Bauer 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967); Coleman v Garrison 281 A. 2d 616 (Del. Super, 1971), appeal dismissed; Cox v Stretton 77 Misc. 2d 155, 353, N.Y.S. 2d 834 (Sup. Ct. 1974); Anonymous v Hospital 33 Conn. Supp. 126, 366 A. 2d 204 (1976); Clegg v Chase 391 N.Y.S. 2d 966 (Sup. Ct. (1977); Ladies Center of Clearwater Inc. v Reno 341 So. 2d 543 (Fla App. 1977); Howard v Lecher 53 App. Div. 2d 420, 386, N.Y.S. 2d 460 (1976) aff'd 42 N.Y.S. 2d 109, 397 N.Y.S. 2d 363, 366 N.E. 2d 64 (1977).

counselling as to the likelihood of giving birth to a physically or mentally impaired child. The underlying premise is that prudent medical care should have detected the risk of a congenital or hereditary genetic defect either prior to conception or during the pregnancy. As a proximate result of this negligently performed or omitted genetic counselling or prenatal testing, the parents were foreclosed from making an informed decision whether to conceive a potentially handicapped child or, in the event of pregnancy, to terminate the same. [2]

The corresponding action by or on behalf of an infant who suffers from a genetic or congenital disorder is denominated one for "wrongful life". The child claims that the physician or other health care provider: (1) failed to accurately perform genetic screening tests prior to conception; (2) failed to inform the prospective parents of the hereditary nature of certain genetic disorders; (3) failed to accurately advise, counsel, or test his parents during pregnancy concerning genetic or other risks associated with childbirth suggested by maternal age, physical condition, family medical history,[3] or other circumstances particular to the parents; or (4) failed to perform a surgical procedure intended to prevent the birth of a congenitally or genetically defective child. In a wrongful life claim, the child does not assert that the negligence of the defendants caused his inherited or congenital abnormality, that the defendants could have done anything that would have decreased the possibility that he would be born with such defects, or that he ever had a chance to be normal. The essence of the child's claim is that the medical professional's breach of the applicable standard of care precluded an informed decision to avoid his conception or birth. But for this negligence, the child allegedly would not have been born to experience the pain and

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[2] See, Trotzig, "The Defective Child and the Actions for Wrongful Life and Wrongful Birth," 14 Fam. L.Q. 15, 16-17 (1980); Comment, "Wrongful Life and Wrongful Birth Causes of Action - Suggestions for a Consistent Analysis", 63 Marq. L. Rev. 611, 621 - 23 (1980).

[3] Berman v Allan, 80 N.J. 421, 404 A.2d 8, 10 (1979).

suffering attributable to his affliction.[4] Most courts have rejected this theory that the life of a defective child is worth less that the child's nonexistence.[5] Those few courts allowing wrongful life claims have limited the damages recoverable to the child's impaired condition.[6]

To be distinguished from these actions are those in which recovery is sought for what is appropriately labelled "wrongful conception or wrongful pregnancy". Liability is based either on the physician's negligence in performing a sterilization procedure or an abortion or the pharmacist's or pharmaceutical manufacturer's negligence in preparing or dispensing a contraceptive prescription.[7] The essence of the wrong for which compensation is sought in these

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[4] See, DeVries & Rifkin, "Wrongful Life, Wrongful Birth and Wrongful Pregnancy: Judicial Divergence in the Birth-Related Torts, 20 Forum 207, 211 (1985); Rogers, "Wrongful Life and Wrongful Birth: Medical Malpractice in Genetic Counselling and Prenatal Testing, 33 S.C.L. Rev. 723, 715-716 (1982); Comment, "A Preference for Nonexistence: Wrongful Life and a Proposed Tort of Genetic Malpractice", 55 S. Cal. L. Rev. 477 n.2 (1982); Comment, "Wrongful Life: A Misconceived Tort", 15 U.C. Davis L. Rev. 447, 450 n.13 (1981): Note, "Wrongful Life: A Modern Claim Which Conforms to the traditional Tort Framework", 20 Wm. & Mary L. Rev. 125 (1978): Note, "Father and Mother Know Best: Defining the Liability of Physicians for Inadequate Genetic Counselling", 87 Yale L.J. 1488, 1500 - 02 (1978); see generally Am. Ju. 2d New Topic Service, "Right to Die; Wrongful Life sec. 63 (1979).

[5] See, e.g. Elliott v Brown, 361 So. 2d 546, 548 (Ala. 1978); Blake v Cruz, 108 Idaho 253, 259-60, 698 p. 2d 315, 322 (1984): Becker v Schwartz, 46 N.Y. 2d 401, 412, 386 N.E. 2d 807, 812 413, N.Y.S. 2d 895, (1978); Azzolino v Dingfelder, 315 N.C. 103, 110, 337 S.E. 2d 528, 533 (1985); Nelson v Krusen, 678 S.W. 2d 918, 925 (Tex. 1984); Dumer v St. Michael's Hospital, 69 Wis. 2d 766, 773, 233 N.W. 2d 372, 375 - 76 (1975); Beardsley v Wierdsma, 650 P. 2d 288, 292 (Wyo. 1982).

[6] See, e.g. Turpin v Sortini, 31 Cal. 3d 220, 237, 643 p. 2d 954, 965, 182 Cal. Rptr. 337, 348 (1982); Procanik v Cillo, 97 N.J. 339, 352, 478 A.2d 755, 762 (1984); Habeson v Parke-Davis, Inc., 98 Wash, 2d 460, 475, 656 P. 2d 483, 496-97 (1983).

[7] See, Continental Casualty Co. v Empire Casualty Co., 713 P.2d 384, 392 (Colo. App. 1985); Siemieniec v Lutheran Gen. Hosp., 117 Ill. 2d 230, 237, 111 Ill. Dec. 302. 307, 512 N.E. 2d 691. 696 (1987), Johnston v Elkins, 241 Kan. 407, 410-11, 736 P. 2d 935, 938 (1987); Smith v Gore, 728 S.W. 2d 738, 741 (Tenn. 1987); Miller v Johnson, 231 Va. 177, 182, 343 S.E. 2d 301, 304 (1986), and cases cited therein.

cases is the birth of a healthy and normal - albeit, unplanned and unwanted - child.[8]

Having outlined the terminology to be used in this thesis and having gained a clearer understanding of the alleged wrong upon which the cause of action is predicated, one can now turn to the underlying problems of the wrongful birth action. At the present time, the issues involved in these suits are laden with public policy concerns resulting in decisions with no consistent results. The divergence of views has resulted from the fact that inherent in these actions are sensitive issues. The issues raised involve a delicate balancing of several goals which are difficult to harmonize - the recognition of the value of human life, a respect for the individual's decision to limit procreation, a concern for the welfare of the infant, a desire to compensate the plaintiff adequately without causing unjust enrichment or placing a disproportionate burden on the defendant and finally an interest in the promotion of high standards of professional medical treatment. The issues require the court to evaluate not only the law but morals, medicine, and society.[9]

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[8] See, W. Prosser & W. Keaton, Torts sec 55, at 372-73 (5th ed. 1984); Hampton, "The Continuing Debate Over the Recoverability of the Costs of Child-Rearing in "Wrongful Conception" Cases: Searching for Appropriate Judicial Guidelines", 20 Fam. L. Q. 45, 47-48 (1986); Holt, "Wrongful Pregnancy", 33 S.C. L. Rev. 759, 763-92 (1982); Kashi, "The Case of the Unwanted Blessing: Wrongful Life", 31 U. Miami L. Rev. 1409, 1410-19 (1977); Robertson, "Civil Liability Arising From "Wrongful Birth" Following an Unsuccessful Sterilization Operation", 4 Am. J.L. & Med. 131, 132-35 (1978); see generally Annot., 83 A.L.R. 3d 15 (1978). See also, Boone v Mullendore, 416 So. 2d 718, 720 (Ala. 1982); University of Ariz. v Superior Court, 136 Ariz. 579 n.1, 667 P. 2d 1294, 1296 n. 1 (1983); Garrison v Foy, Ind. App., 486 N.E. 2d 5, 7 91985); Nanke v Napier, 346 N.W. 2d 520, 521 (Iowa 1984); Kingsbury v Smith, 122 N.H. 237, 240, 442 A.2d 1003, 1004 (1982). These actions most frequently have involved normal, healthy children, although they may involve children with a disease or abnormality that was not foreseeable and its prevention was not the purpose of the failed abortion or sterilization procedure. See, e.g., Garrison v Foy, Ind. App., 486 N.E. 2d at 7(1985); See also Boone v Mullendore, 416 So. 2d at 723 (Ala. 1982) (court expressly restricted holding in wrongful pregnancy case, reserving decision on the measure of damages in cases involving children "born and afflicted with predetermined or readily foreseeable genetic or hereditary defects").

[9] Schroeder v Perkel, 87 N.J. 53, 67-68, 432 A. 2d 834, 841 (1981).

I. WRONGFUL BIRTH - A GENERAL OVERVIEW

A. Introduction

It is necessary to note by way of introduction that this study of the wrongful birth action will involve a discussion of authorities originating almost exclusively in the United States. While there are cases that have been decided in jurisdictions other than the United States that have addressed the parents' claim for the wrongful birth of a healthy child,[10] only two other jurisdictions, the United Kingdom and Canada, have had the opportunity to consider the wrongful

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[10] The writer's research to date has revealed only 20 cases that have dealt with the issue of the wrongful birth of a healthy child which have come before courts in countries other than the United States, namely:

1. three in West Germany, (Landericht Itzehoe, Familienrechtzeitung, 1969, 90, referred to in Time Magazine, Dec. 13th. 1968 at 62, the court awarded damages representing half of the cost of raising the child to the age of 18, against a pharmacist who had misread the plaintiff's prescription and had given her indigestion tablets instead of birth control pills. In Oberlandesgericht, January 31, 1974, 28 Neve Juristische Wochenschrift 595, the court recognized a cause of action for wrongful birth involving an unsuccessful sterilization operation, although the plaintiff's claim was dismissed in the merits for the failure to establish negligence on the part of the defendant. Damages were recovered on the part of the defendant. Damages were recovered in a similar West German case in 1977, referred to in Le Devoir (Montreal), Aug. 10th, 1977, p. 8 col. 2).
2. seven in Canada, Cataford v Moreau (1978) 114 D.L.R. (3d) 585; Doiron v Orr, (1978) 86 D.L.R. (3d) 719; Sanderson v Lamont, unrep B.C.S.Ct. 1983 No. c803801; Keats v Pearce, (1984) 48 NFld & PEIR 102; Grey v Webster, New Brunswick Trial Division Q.B. 57 N.B.R. (2d) 396 (1984); Fredette v Wiebe, [1986] 5 W.W.R. 222; Colt v Ringrose unreported, referred to in Green, "Law, Sex and the Population Explosion" 1 Legal Medical Quarterly 82 at 87 (1977).
3. six in England, Sciuriaga v Powell, Q.B.D. May 1979 unreported, (1979) 76 Law society Gaz. 567; Udale v Bloomsbury Area Health Authority, [1983] 2 All E.R. 422; Thake v Maurice, [1941] 2 All E.R. 513; Eyre v Measday, [1986] 1 All E.R. 488; Jones v Berkshire Health Authority, transcript 84/NJ/5283, July 2, 1986; Worster v City and Hackney Health Authority, unreported, Garland J QBD, June 19,1987.
4. four in New Zealand, L. v M., [1979] 2 NZLR 519; Accident Compensation Commissior v Auckland Hospital Board, [1980] 2 NZLR 748; Re Z, [1982] NZACR 279; Teitjens v Rutherford, Noted in [1978] Recent Law 137.

birth of an unhealthy child.[11] In contrast, the numbers of wrongful birth cases heard in the United States would be difficult to estimate. Given that litigated cases in the United States have been far more numerous than those elsewhere and cover a far longer time-span going back to the mid 1930s, it is to these cases that one must turn to approach the subject matter.

B. The Concept

To reiterate, wrongful birth refers to the cause of action brought by the parents of an unhealthy child claiming that they would have avoided conception or terminated the pregnancy had they been properly advised of the risks of birth defects to the child. Like wrongful pregnancy, the action is frequently mislabelled.[12] As outlined previously, the term wrongful birth applies only when the infant is defective. The crux of the wrongful birth action is the negligent deprivation of choice. The plaintiff parents do not allege that the defendant physician caused their infant's abnormality. Rather, the parents allege that the physician's negligence deprived them of the information necessary to make an informed choice as to whether to conceive or to continue a pregnancy. Had such information been presented to them, the parents allege that they would not have had the child.

C. The Factual Setting

It appears from the American case law that the time factor for tortious conduct in the

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[11]In Canada there are two recent cases which hve addressed the isue of the wrongful birth of a defective child: Cherry v. Borsman, (1990) 75 D.L.R. (4th) 668 and Guillette v Maheux, 15 A.C.W.S. (3d) 252 (May 15, 1989 Que. C.A.,Beauregard and Nichols JJ. A., Chevailer J. (ad hoco) Reasons in French, Order No. 089/144/017. In the United Kingdom there have been at

wrongful birth action extends not only to any time after conception but also to any time prior to conception if the resulting causation can be proved.[13] The "preconception" claim maintains that following a lack of, or following incorrect medical information as to the genetic or other medical risks of conception, the plaintiff parents conceived a child later born with defects. The plaintiffs contend that but for the defendant's negligence they would never have conceived at all. Neither England nor Canada has any cases specifically on the subject of wrongful disclosure or non disclosure of genetic and other reproductive information. While there is no legislation or jurisprudence on point in Canada, it will be submitted later in this study that such claims would be considered as compensable under existing Common Law.

The "postconception" claim, on the other hand, arises from the birth of children who, already conceived, would not have been born but for the negligence of the physician. This claim focuses on the liability of the physician with regard to the treatment and counselling of the already pregnant woman as to the risk or presence of birth defects. The essence of the allegation is not that the physician's negligence caused the genetic defects in some way, but rather that the conduct of the defendant has deprived the plaintiffs of the opportunity to make an informed choice as to whether or not to continue the pregnancy.

Preconception negligence claims arise from the birth of a defective child born due to negligent sterilization procedures, failure of birth control devices, and negligent genetic diagnosis and counselling prior to conception.

Postconception claims involve children born due to (1) negligently diagnosed pregnancies, (2) negligently performed abortions (3) failure to diagnose a pregnancy in time for the mother to seek an abortion and, (4) negligent diagnosis and counselling after conception that induces a

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[13] The fact that the child is not even in existence at the time of the conduct complained of raises the question of the remoteness of damage and of whether a duty of care can be owed to someone not even in "being" at the time of the injury to the parents.

woman to carry a child with severe congenital anomalies to term (e.g., where a physician has failed to diagnose rubella in the mother during pregnancy or has failed to inform her of the high risk that rubella may cause the child to be deformed, or where the physician fails to properly test for an impairment by means of genetic tests).

D. Recognition of the Cause of Action in the United States

Prior to 1973 only one American court had ruled on a wrongful birth claim in a reported decision.[14] Since then there has been a dramatic increase in the numbers of wrongful birth cases. There are a few explanations for this trend, the most significant of which is the increase in the number of people undergoing sterilization operations as a means of contraception.[15] Another factor is the recent advances arising in the fields of genetic screening and pre-natal detection of fetal anomalies. Lastly, the United States Supreme Court decision in Roe v Wade[16] in 1973 which gave women in the United States a qualified right to choose abortion as a means of terminating an unwanted pregnancy had a direct bearing on wrongful birth cases arising in the abortion context. This will be discussed in further detail later in this study. The court in Roe declared that the right of privacy implicit in the liberty secured by the Fourteenth Amendment was broad enough to encompass a woman's decision whether or not to terminate her pregnancy and, that prior to viability[17] of the fetus, the state may not restrict a woman's decision whether or not to have an abortion.

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[14] Gleitman v Cosgrove, 49 N.J. 22, 227 A. 2d 689 (1967).

[15] See infra, page 1.

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

[17] Viability is said to be the point when the fetus is "potentially able to live outside the mother's womb, albeit with artificial aid" which is around the twentieth to the twenty-fourth week of pregnancy. 410 U.S. 113 at 160, 153.

In Sherlock v Stillwater Clinic[18] the Minnesota Supreme Court directly held that these constitutional safeguards supported the recognition of a cause of action for wrongful birth.[19]On the other hand, other Courts have written that the reproductive rights set forth as constitutionally protected in Griswold v Connecticut[20] and Roe v Wade have no bearing on the consideration of a wrongful birth action. The better approach, it is submitted, is to say that in light of this decision it would (and has) become crucial for any physician in the United States, regardless of whether or not he or she opposes abortion, to advise the expectant mother of a child as soon as possible, or advise her that the child she is carrying may be defective so that she may exercise her right to seek an abortion. The United States Supreme Court's recognition of this qualified right to terminate a pregnancy has been viewed by some American courts as indicative of a significant shift of public policy and has in fact provided a healthy legal environment in which wrongful birth actions can have validity.

As said above,[21] only one American court had ruled on a wrongful birth claim in a reported decision prior to 1973. In that case, Gleitman v Cosgrove[22] the court dismissed the wrongful birth action for failure to state a claim. Mrs. Gleitman consulted her physician and was told that she was two months' pregnant. She informed her physician that one month earlier she

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[18] 260 N.W. 2d 169 (Minn.1977).

[19] Id. at 175.

[20] The courts in the United States have also granted constitutional protection to contraceptive measures. In the case of Griswold v Connecticut, 381 U.S. 479 (1965) it was held that a State law prohibiting the dissemination of birth control information to married people was unconstitutional, as a violation of the right to marital privacy.

[21] See infra, page 8.

[22] 49 N.J. 22, 227 A. 2d 689 (1967).

had contracted rubella (German measles).[23] Dr. Cosgrove and his associate, Dr. Dolan, incorrectly and repeatedly informed Mrs. Gleitman that the disease would have no effect on her unborn child.[24] Subsequently Mrs. Gleitman gave birth to a son, Jeffrey, who suffered from rubella syndrome; substantial defects in sight, hearing, speech ability and mental retardation. Mrs. Gleitman and her husband sued the physician alleging that had they known of the risk to their unborn son, they would have "obtained other medical advice with a view to the obtaining of an abortion".[25] The court dismissed the wrongful birth claim for two reasons. First, the court found it impossible to measure the plaintiffs' damages in being the mother and father of an impaired child. The court found itself unable to weigh the intangible, immeasurable and complex human benefits of motherhood and fatherhood against the alleged emotional and monetary injuries.[26] Second, even if it could calculate such damages, the court reasoned the "countervailing public policy supporting the preciousness of human life"[27] would require invalidation of the action. The court ultimately decided that, as a matter of law, the benefits of life outweigh its liabilities, whether from the point of view of the child or its parents, even though the child is unwell. In the final analysis, the court was convinced that an accurate computation of damages could not be made, noting that many persons born with defects have become functional members of society. This line of reasoning has pervaded subsequent wrongful birth cases and will be discussed in more detail later in this study.

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[23] Rubella is an acute infectious fever that has only mild effects on the pregnant mother, but when contracted in the first trimester of pregnancy can have devastating effects on the fetus. I.S. Schmidt, Attorney's Dictionary of Medicine and Word Finder G-14 (1974).

[24] 49 N.J. 22, 23, 227 A. 2d 689, 690 (1967).

[25] Id. at 26, 227 A. 2d at 691.

[26] Id. at 29, 227 A. 2d at 693.

[27] Id. at 31, 227 A. 2d at 693.

It is interesting to note that even though the Gleitman case was decided before Roe v Wade, the availability of a legal abortion to the plaintiff mother was assumed by the majority. The majority of the court assumed that somehow or somewhere, Mrs. Gleitman could have obtained an abortion that would not have subjected her to criminal sanctions, and that she did not do so because she relied on the incorrect advice of the defendants.

Since the Gleitman decision, the courts have become much more receptive to wrongful birth actions.[28] In Gildiner v Thomas Jefferson University Hospital[29] the court recognized a wrongful birth claim of negligence for a physician's failure to perform a genetic test for Tay-Sachs disease.[30] The court felt that society had an interest in insuring that genetic testing was properly performed and interpreted. "The recognition of a cause of action for negligence in the performance of genetic testing would encourage the accurate performance of such testing by

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[28] Dumer v St. Michael's Hosp., 69 Wis. 2d 766, 775, 233 N.W. 2d 372, 377 (1975) (recognized a cause of action for wrongful birth, holding that the physician may have had a duty to inform the mother of the probable effects of rubella on the fetus and she was entitled to the damages sustained because of the deformity and defects of the child); See also Robak v United States, 658 F. 2d 471 (7th Cir. 1981) (physicians can be held liable for failure to provide parents with the information they need to decide whether to choose an abortion); Berman v Allan, 80 N.J. 421, 404 A. 2d 8 (1979) (doctor's failure to inform parents of genetic testing was below the standard of acceptable medical practice). See also Ochs et al. v Borrelli et al. Conn., 445 A. 2d 883 (1982), Speck v Finegold, 498 Pa. 77, 439 A. 2d 110 (1981), Procanik v Cillo, 478 A. 2d 755 (N.J. 1984), Blake v Cruz, 698 P. 2d 315 (Idaho 1984), Walker by Pizano v Mart, 790 P. 2d 735 (Arizona 1990), Siemieniec v Lutheran General Hospital, 512 N.E. 2d 691 (Ill. 1987), Azzolino v Dingfelder, 337 S.E. 2d (N.C. 1985), Hickman v Group Health Authority, 393 N.W. 2d 10 (Minn 1986), Jennifer S. v Kirdnul, 332 S.E. 2d 872(W. Va. 1985), Bani-Esrali v Wald, 485 N.Y.S. 2d 708 (Sup. 1985), Phillips v U.S., 575 Supp 1304 (1983), Gallagher v Duke University, 852 F. 2d 773 (4th Circ. 1986), Harbeson v Parke-Davis, Inc., 656 P. 2d 483 (1983), Gildiner v Thomas Jefferson University Hospital, 451 F. Supp. 692 (E.D. Pa. 1978), Becker v Schwartz, 46 N.Y. 2d 401, 386 N.E. 2d 807, 413 N.Y.S. 2d 895 (1978).

[29] 451 F. Supp 692 (E.D. Pa. 1978).

[30] Tay-Sachs disease is a nerve breakdown disorder which causes progressive mental and physical retardation, spasticity, dementia paralysis and early death. See, The Mosby Medical Encyclopedia 23 (1985) at 708.

penalizing physicians who fail to observe customary standards of good medical practice".[31]

In Becker v Schwartz,[32] the Court of Appeals of New York dismissed a wrongful life claim filed on behalf of a deformed infant, but upheld a wrongful birth action filed by the infant's parents.[33] The parents alleged that the defendant doctor informed them neither of the availability of amniocentesis, nor of the increased risk of women over the age of thirty-five having a child afflicted with Down's syndrome.[34] In Park v Chessin,[35] the companion case to Becker, the court found that the plaintiffs had a legally cognizable cause of action for wrongful birth. The Parks had previously had a child afflicted with polycystic kidney disease. The child died five hours after birth. The Parks consulted the defendants to determine the probability of conceiving another child suffering from the same disease. The defendants allegedly informed the Parks that the disease was not hereditary, and therefore the chances were "practically nil". Based on this information the Parks decided to have another baby. This baby suffered from the same disease.

Finally, in one of the most recent cases to be reported in the United States, Walker by Pizano v Mart,[36] the plaintiff mother contracted rubella during the first trimester of her pregnancy. The plaintiff sought the advice of the defendant physicians who negligently failed to perform adequate laboratory tests to detect fetal risks. The plaintiff gave birth to a daughter who suffered from rubella syndrome. The court held that a physician has a duty to inform parents

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[31] Id. at 696 .

[32] 46 N.Y. 401, 386 N.E. 2d 807, 413 N.Y.S. 895 (1978).

[33] Id. at 411-13, 386 N.E. 2d 807, 413 N.Y.S. 2d at 900-01.

[34] Id. at 406, 386 N.E. 2d at 808-09, 413 N.Y.S. 2d at 896-97.

[35] 60 A.D. 2d 80, 400 N.Y.S. 2d 110 (1977).

about fetal problems and risks and allowed the claim by the plaintiff mother for the sums needed.

However, even in recent years it has not been uncommon to find wrongful birth actions in the abortion context dismissed on grounds of public policy as is evident from the case of Azzolino v Dingfelder[37]. The Court in this case went against the trend to recognize wrongful birth actions. The Azzolino court held that wrongful birth claims will not be recognized in North Carolina "absent a clear mandate by the legislature."[38] The Azzolino court stated that in order for other courts to allow recovery under this new tort, they must enter into an "entirely untraditional analysis" and hold that "the existence of human life can constitute an injury cognizable at law."[39] The Azzolino court refused to find the presence of a legal injury, even when the life is severely defective. The court noted that the uncertainty and absence of agreement about which damages can be recovered among the courts recognizing this cause of action may be due to the "failure to recognize that the injury for which they seek to compensate the plaintiffs is the existence of a human life."[40] Another major concern of the Azzolino court is the vulnerability of wrongful birth actions to fraudulent claims. The fear of fraudulent claims is based on the importance of subjective testimony as to the parents' intent not to have any more children and, in the abortion context, as to their decision that, had they known of the defects in their unborn child, they would have taken steps to terminate the pregnancy.[41]

The action for wrongful birth in the sterilization context originated in the case of

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[37] 315 N.C. 103, 337 S.E. 2d 528 (1985), cert. denied 107 S.Ct. 131 (1986), reh. denied 319 N.C. 227, 353 S.E. 2d 401 (1987).

[38] Id. at _, 337 S.E. 2d at 553.

[39] Id. at _, 337 S.E. 2d at 534.

[40] Id. at _,337 S.E. 2d at 534.

[41] Id. at _, 337 S.E. 2d at 535 (citing Rieck v Medical Protective Co., 64 Wis, 2d 514, 519,

Christensen v Thornby.[42] This case involved an action for damages from an unsuccessful sterilization which resulted in the birth of a healthy child. In this case the plaintiff husband had sought a therapeutic[43] sterilization because he was concerned that his wife would not survive another pregnancy. The sterilization was ineffective, the wife became pregnant and a healthy child was subsequently born. The Court found that the purpose of the surgery was to prevent serious physical harm to the wife and because the harm did not materialize, the plaintiff had not been injured but rather had been "blessed with the fatherhood of another child."[44]

Ethical, religious and public policy considerations once again prevented the court from awarding damages as compensation for the birth of their child. The court denied recovery on the ground that as a matter of law, the birth of a child, no matter how unwanted or unplanned, outweighed any injury the plaintiff parents might have to endure.

Commentators have labelled this reasoning as the "overriding benefits" theory or "blessings concept." This theory is a public policy argument that constitutes a complete bar to recovery. The theory stands for the proposition that in all cases where the child is normal and healthy, the birth of the unplanned child constitutes no injury. The more sensible and reasonable approach in some cases, however, is to admit that it does, especially where the parents have sought sterilization for economic reasons or to prevent the birth of a genetically defective baby. The merits of these public policy arguments will be canvassed in more detail later in this study.

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[42] 192 Minn. 123, 255 N.W. 620 (1934).

[43] A therapeutic sterilization operation is one undertaken to preserve the health of one or both of the parents.

[44] 192 Mich. at 126, 255 N.W. at 622, 93 A.L.R. at 572 (1934).

II. WRONGFUL BIRTH - IN THE STERILIZATION CONTEXT

With the decline in the popularity of "the pill" (due to the evidence of health risks associated with it), voluntary sterilization has become the preferred method of contraception for married women in the United States.[45] Sterilization is even more common among couples who have completed their families and are permanently opting for no more children. Sterilization in the female is accomplished by a procedure known as tubal ligation. There are a number of techniques used to accomplish this procedure, the ultimate goal of which is to block the fallopian tubes. While this sterilization procedure is generally an effective means of preventing pregnancy, such a procedure may fail as a result of negligence by the physician missing a tube, cauterizing the wrong structure, or by inadequate burning or banding of the tube. On the average, there is a natural failure rate of four to eight per thousand for all techniques.[46] The reason is either a process called recanalization or one called fistula formation. In both, a channel forms in the gap or defect created in the tube that allows sperm and egg to unite.[47] Spontaneous recanalization

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[45] SHIPP, "Sterilization is the Most Popular Contraceptive for Married Women", Atlanta Const., July 8, 1985, at 4B col.1. See also, N.Y. Times, Dec. 9, 1984, at 29 col. 1-2. Based on interviews with 7,969 women in 1982, the National Center for Health Statistics found that 18% of couples with partners of child bearing age avoided pregnancy through sterilization of either partner, while 16% chose birth control pills. Condoms were used by 7%, diaphragms by 5% and intrauterine devices by 4%. Among couples who wanted no more children, as opposed to those couples who merely wanted to delay child rearing, the use of sterilization more than tripled between 1965 and 1982 from 18% to 62%. Id at col. 4.

[46] Id.

[47] See also, Lombard, "Vasectomy," 10 SUFFOLK U.L. REV. 25, 32 (1975), in which the author describes the male sterilization procedure. Since some sperm can remain stored in the seminal vesicle and prostrate for several weeks following a vasectomy, a negative semen analysis must be accomplished before the patient may be declared surgically sterile.

occurs in .5 to 1.0% of the cases.[48]

It now seems clear that in the United States, contraceptive sterilization is not illegal nor does it contravene rules of public policy.[49] As early as 1934 it was held by the Court in Christensen v Thornby[50] that therapeutic sterilization was not illegal. Since then, the legality of the operation has not been questioned by any court in a wrongful birth action in the sterilization context in the United States.

The Canadian case of Cataford v Moreau[51] involved the birth of a healthy child following a failed sterilization. Since the action had never been considered in a Canadian court prior to this, Mr. Justice Deschenes first had to determine the legality of a purely contraceptive sterilization operation. In determining the legality of the operation, Deschenes J. first examined the criminal law. He felt that although a criminal prosecution against a surgeon possibly could be grounded on sections 228 (causing bodily harm with intent) or 224 (assault), a defence on section 45 would prevail, given the circumstances. That section provides that, "Everyone is protected from criminal responsibility for performing a surgical operation upon any person for the benefit of that person if: (a) the operation is performed with reasonable care and skill and (b) it is reasonable to perform the operation, having regard to the state of health of the person at the time of the operation is performed and to all the circumstances of the case." It now appears as

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[48] See, Penofsky, "Sexual Sterilization," 21 Am. Jurr. P.O.F. 255 (1968) and Kane, "Unsuccessful Sterilization Procedures," Modern Med. 8th March 1971, at 172. See also infra page 25.

[49] See generally, Kouri, "Legality of Purely Contraceptive Sterilization," 7 R.D.Y.S. 1 (1976); Annot., "Legality of Voluntary Non-Therapeutic Sterilization" 35 A.L.R. 3d 1444 (1971).

[50] Supra note 42.

[51] (1978) 114 D.L.R. (3d) 585.

though "benefit"[52] does not deal strictly with the patient's health but can in fact encompass socio-economic and other considerations. Consequently, surgery may be employed not only to protect health, but also to preserve the quality of life in a broader, non-medical sense. In the end the Court held that a contract to perform a voluntary sterilization operation is not illegal and does not contravene public order or good morals. And even in the most recent Canadian cases,[53] the legality of contraceptive sterilization has not been questioned.

In England, in the most recent wrongful birth/sterilization cases, Eyre v Measday[54] and Emeh v Kensington and Chelsea and Westminster AHA[55] the legality of purely contraceptive sterilization was not in issue.

Thus it can be said with some certainty that the recovery of damages for the failure of a purely contraceptive sterilization operation may not be denied on the ground of illegality of the operation.

To date, the writer's research has revealed only four reported wrongful birth/sterilization cases in the United States where the resulting child was born unhealthy.[56] In the United Kingdom, the writer's research has revealed only one reported decision, Emeh v Kensington and

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[52] According to C.J. Meridith, Malpractise Liability of Doctors and Hospitals (1956), p. 217: "But a needless operation causing injury to the patient, is obviously not for his "benefit" and notwithstanding his consent to undergo it, may be the subject of a criminal charge. Included in this category are operations for the sterilization of a male and female, unless performed for the patient's health, or in virtue of a special statutory provision."

[53] Supra note 51.

[54] [1986]1 All E.R. 488.

[55] [1984] 3 All E.R. 1044.

[56] Ramey v Fassoulas, 414 So. 2d 198 (Fla. 3d Ct. App. 1982); Garrison v Foy, 486 N.E. 2d 5 (Ind. App. 1985); Ochs et al. v Borrelli et al., Conn., 445 A.2d 883 (1983); Speck v Finegold, 497 P. 77, 439 A.2d 110 (1981).

Chelsea and Westminster AHA.[57]

A plaintiff bringing an action in tort for negligence in performing a sterilization operation must prove that there was a duty owed by the physician, that the physician breached that duty to the plaintiff by acting as he did and finally that the breach caused that plaintiff's injuries. The law imposes on a medical practitioner a duty to exercise reasonable care and skill in the provision of professional advice and treatment. The standard of care is that to be expected of an ordinary, careful and competent practitioner of the class to which the practitioner belongs. In every case the plaintiff must satisfy the court that the physician's conduct fell below the applicable standard and thus should be regarded as negligent.

There appears to be four different stages at which the physician's conduct may be arguably negligent. The first stage looks at the physician's preoperative conduct and involves the doctrine of informed consent. There is no suggestion made by the plaintiffs that the physician is in any way responsible for the failure of the operation. The plaintiffs' case rests solely on the allegation that when telling them about the procedure he omitted to mention that there is a risk of later fertility (due to recanalization).[58] There is a difference of opinion as to the precise extent of the risk of recanalization occurring, but, as said above, it seems to lie between 0.5 and 1.0 per cent.[59]

It is submitted that this omission constitutes a "material risk" of the sort of which a

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[57] Supra note 55.

[58] Recanalization is the process whereby the vas deferens (in the case of a vasectomy) or the fallopian tubes (in the case of a tubal ligation) having been severed and tied during the operation subsequently regenerate and allow passage of spermotozoa or ova respectively. See also, Penofsy, " Sexual Sterilization" 21 Am Jurr. P.O.F. 255 (1968).

[59] See generally Kane, " Unsuccessful Sterilization Procedure" Modern Med. 8th March 1971, at 172. But see also Sanderson v Lamont, unreported 1983 B.C.S.C. No. C803801 where Taylor J. identified the risk as being between 0.3% or 0.4% of later fertility.

physician must first warn his patient before the patient can be said in law to have given "informed consent" to the operation.[60] The aim of the informed consent rule is to render the patient an informed decision maker able to participate in his or her own care. It is the duty of the physician to disclose all material risks to the patient. Material risks are those risks that a reasonable person in the patient's position would want to be told. Failure to obtain informed consent constitutes negligence and gives rise to a right of recovery if it can be shown to have been the cause of any recognized loss or damage. It is submitted then that a physician who informs his patient that the sterilization operation will be successful will be held liable in tort under the doctrine of informed consent if the operation fails.

However, there is a second component of the informed consent rule. The Court in Reibl v Hughes[61] applied an objective test in determining if there had been a breach of the duty of disclosure. The Court held that the test is what a reasonable person in the patient's particular position would agree to or not agree to, if there had been proper disclosure of the material risks. Thus, even if the physician is held to have breached his duty to inform the plaintiff of the risks of failure of the operation, the patient must still prove that had he or she been properly informed of the risks that he or she would not have chosen to undergo the operation. Recent Canadian cases that have considered this question in this context have been unequivocal in holding that given the decline in the popularity of the use of the pill and given that surgery of this type is often the most effective method of contraception available, the plaintiffs are likely to have undergone the operation even with knowledge of the risk that it might not be effective.[62]

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[60] Reibl v Hughes [1980] 2 S.C.R. 880, 114 D.L.R. (3d) 1.

[61] Supra note 60.

[62] Sanderson v Lamont, unreported B.C.S.C. 1983, and Grey v Webster, 57 N.B.R. (2d) 396 (1984).

The second stage at which the negligence of the physician may be called in to question is in the performance of the sterilization operation itself. Negligence in the performance of the operation can be proved by postoperative testing. For example, in McNeal v United States[63] the plaintiff underwent a tubal ligation, after which the physicians filed an operation report and submitted two excised portions of the fallopian tubes to the pathology department for examination. A lab report was later filed describing the appearance and condition of each segment. It was the physician's testimony that he closed the left fallopian tube through the use of the "Pomeroy" technique whereby the mid-segment of the tube is doubly ligated and the segment distal to the ties is severed and removed. As for the right tube, it was interrupted by the "Kroener" method in which the end of the tube is removed and the tube is sutured. To prove negligence Mrs. McNeal attempted to show, via the operation report and the testimony of two medical experts, that neither the right nor the left tube was properly ligated in accordance with the procedures described by the physician.

As it turned out, the report filed after the surgery was not consistent with the physician's description of the procedures as it indicated that the left tube was operated on twice and failed to state that the end of the right tube was removed as required in the Kroener method ligation. The inference that a proper Kroener procedure was not performed on the right tube was bolstered by the testimony of an expert witness who performed a laproscopic exam on the plaintiff six months after the birth of the child she attempted to prevent.

Similarly in Cataford v Moreau[64] the court found that the operating techniques used by the defendant physician were not "consistent with the teaching in any manual of surgery."[65] The

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[63] 689 F. 2d 1200 (1982).

[64] 114 D.L.R. (3d) 585 (1978).

[65] Id. at 594.

physician in this case had merely cut the right tube into sections without removing a segment from it as is the standard in the medical community. In failing to do this, the physician invited nature to rejoin the separated extremities. The Court held that "[t]he professional negligence of the defendant is proven beyond the shadow of a doubt..."[66]

Postoperative tests may also show that the material removed during the operation was not part of the fallopian tubes. In most cases, conception of a child follows so soon after the sterilization operation that there is a strong inference that it could only be due to the negligence of the physician and not due to recanalization.

Finally, it was held in Custudio v Bauer,[67] and Speck v Finegold[68] that where a physician informs his patient that the operation has been completely successful before the results of the postoperative tests are known he will be held liable for negligence. Taking this one step further, in Garrison v Foy[69] the physician had performed a vasectomy on the plaintiff husband and informed him that he was sterile. Although the defendant had given the plaintiff husband a sperm-sample test before informing him that he was sterile, the physician was found to be negligent in his analysis of the tests and in disseminating incorrect information to him.

Once it is proved that the physician owed a duty of care to the plaintiff and he breached that duty by acting as he did, the plaintiff must prove that the negligence of the defendant physician caused his injury. According to traditional tort principles, the plaintiff has the onus of proving causation on a balance of probabilities. Thus, the patient must show that the doctor's

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[66] Id at 594.

[67] 251 Cal. App. 2d 303, 59 Cal. Repts. 463 (1967).

[68] 124 P.L.J. 257 (Pa. County Ct. 1976).

[69] 486 N.E. 2d 5 (Ind. App. 1985).

negligence probably caused the injury.[70] Given that the birth of a child (healthy or unhealthy) is the very event that the plaintiffs seek to avoid by undergoing the sterilization operation, the demonstration of a causal connection between that negligence and the birth of a child presents few problems. However, where the failed sterilization operation results in the birth of an unhealthy child, some defendants have argued that the physician, if negligent, caused the birth of the child, but not its defects. In LaPoint v Shirley,[71] the court dismissed the claim for the additional expenses relating to the child's birth defect, on the ground of absence of causal connection between the injury and the alleged negligence of the physician. The court concluded that the birth of an abnormal child due to a negligently performed sterilization operation was not a foreseeable consequence of the defendant's negligence. The more sensible approach is to admit that it is. The birth of a defective child is not that uncommon an event; even in the "normal" pregnancy, the risk of a child being born with defects is 4 to 5% and each person carries anywhere from 4 to 8 deleterious genes.[72]

In a recent Canadian case, Cherry v Borsman,[73] Cumming J. stated that, "...the law, in my opinion, is that the negligence of the defendant resulting in the unplanned birth of the child Elizabeth entitles the adult plaintiff to recover... and that her right is not affected by the fact that the child born suffers from disabilities which, however they may have been caused, (that is whether by the negligence of the defendant or otherwise) have resulted in that loss..."

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[70] Snell v Farrell, (1990), 72 D.L.R. (4th) 289; See also, Robertson, G. "Supreme Court Rejects McGhee Doctrine; Good News for Plaintiffs?" Oct. 1990 Health Law News Vol. 4, No. 2 at p. 5.

[71] 409 F. Supp. 118 (W.E. Tex. 1976).

[72] Restak, "Premediated Man: Bioethics and the Control of Future Human Life" (1975) p. 79.

[73] unreported B.C.S.C June 29, 1988 No. C845601.

The following quote take from the judgment of the court in Johnston v Elkins[74] sums up the physician's liability in the wrongful birth/sterilization cause of action:

> The failure to recognize a cause of action against a physician who negligently performs surgical sterilization procedures would be a grant of absolute immunity to a physician whose negligence results in injury to the patient. We decline to grant such immunity. We see no reason why a physician who performs such surgery should be held to a lesser standard of care than a physician or surgeon who performs any other surgical procedure. Such a ruling could lead to a decrease in the standard of care, and would leave victims of professional negligence without a remedy. A physician who assumes responsibility for a sterilization procedure at the request of a patient assumes a professional duty to render appropriate service, including testing and advice regarding the procedure, exercising the same standard of care applicable to other members of the medical profession in the community. A physician is not required to guarantee the success of the procedure. Failure of the physician to achieve success does not automatically indicate negligence. He or she is only required to exercise the required standard of care during the surgery and in later attempting to verify the success or failure of the procedure and to appropriately advise the patient. Immunizing physicians from liability for negligence in this area would be contrary to public policy, and we decline to do so. We simply hold such physicians to the standard of care required of all members of the same school of medicine in the community in which they practice. Such a physician is answerable only if negligence in the performance of the services is established by proof.

III. WRONGFUL BIRTH - IN THE ABORTION CONTEXT

A. The Factual Setting

In the abortion context, wrongful birth actions have arisen in five different fact situations. The first situation arises from the negligent performance of the abortion operation itself. Even though the surgical operation involved in procuring an abortion is relatively minor, as with all surgical procedures, there is a risk of failure. The second situation is where the doctor has failed to diagnose rubella in the mother during pregnancy or has failed to inform her of the high risk that rubella may cause the child to be deformed. Unaware of the attendant risks, the mother does

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[74] 241 Kan. 407, 736 P. 2d 935 (Kan. 1987).

not terminate the pregnancy and the baby is born with rubella syndrome. The third situation, while similar, is different in that the wrongful birth plaintiffs would have avoided conception or terminated the pregnancy had the attending physician not failed to detect a genetic problem. The fourth basis for liability arises when the physician fails to properly test for any impairment by means of amniocentesis. Lastly, a physician may be liable in a wrongful birth suit for failing to diagnose a pregnancy in time for the plaintiff mother to seek an abortion.

In this setting the preconception negligence arises when the physician provides negligent genetic diagnosis and counselling prior to conception that induces parents to conceive a child with severe congenital anomalies. Post conception negligence claims in this setting arise from the birth of children who, although already conceived, would not have been born but for the negligence of the physician. These cases involve children born due to negligently diagnosed pregnancies, negligently performed abortions or negligent diagnosis and counselling after conception that induces a woman to carry a child with severe congenital defects to term.

Once again, the allegation of the plaintiff in the wrongful birth/abortion case is that the conduct of the physician has deprived the plaintiffs of the opportunity to make an informed choice as to whether or not to become pregnant or to continue the pregnancy. The post conception tortious conduct requires a "recognition of abortion as tantamount to an available therapy."[75]

B. The Legal Status of the Unborn

The traditional common law approach to the issue of the legal status of the fetus is that the child only becomes a "human being" at the moment that the child emerges from the mother's body. However, the common law has recognized that a fetus can have the right to inherit

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[75] Rogers-Magnet, Annotation to the case Cataford v Moreau, (1979), 7 C.C.L.T. 241 at 244, 114 D.L.R. (3d) 585 (Que. C.S.).

property, and to sue for injuries done to him or her in the womb. The common law concedes the general proposition that the unborn child can be deemed a legal person where it is for his benefit. Thus, recognition of the unborn's legal rights have usually been dependant upon the issue sought to be determined.

There is no question that recent advances in medical technology and genetics have further complicated the already controversial status of the unborn. The common law systems have not been uniform in their approach to changing medical advances. The American and Canadian courts have opted for a case-by-case approach.

Essential to the recent American decisions that have allowed recovery for wrongful birth in this context is the decision of Roe v Wade[76] which gave women a qualified legal right to choose abortion as a means of terminating an unwanted pregnancy.

In England, the Infant Life (Preservation) Act, 1929 provides that a felony, punishable by life imprisonment, would be committed by any person who, with intent to destroy the life of a child capable of being born alive, by any wilful act caused the child to die before it had an existence independent of its mother unless the act was done in good faith for the purpose of preserving the life of the mother. The Act accepted the arbitrary period of twenty-eight weeks gestation as evidence that the child was capable of being born alive (though the prosecution remains free to prove such capability at an earlier age). In 1976 the Congenital Disabilities (Civil Liability) Act was enacted.[77] This Act clarified and limited the common law position with regard to physician liability for prenatal injuries. Under the Act anyone responsible for an occurrence affecting the parent of a child causing that child to be born disabled is liable in tort

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[76] 410 U.S. 113 (1973). In Roe v Wade a Texas statutory scheme regulating abortions was struck down as an infringement of the constitutional right to privacy. The result of the case was that the state may not interfere with an abortion during the first trimester of the pregnancy.

[77] 1976 U.K., C. 28 s.(1) (5).

to the child provided he or she would have previously been liable to the parent.[78] Hence a duty is owed to the fetus, but only when an analogous duty is owed to the parent. The Commission preparing the Act submitted that a physician caring for a pregnant woman could be held responsible for either a failure to warn her of the risk of deformities thus depriving her of the opportunity to decide whether to terminate the pregnancy, or for negligence or misdiagnosis in the use of these techniques, the breach in either case contributing to the birth of a deformed child. Furthermore, the Abortion Act[79] provides that a physician is not guilty of an offence if there is a "substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped." The Commission considered it probable that a doctor would be lacking in his duty of care to a pregnant woman if he "failed to warn her that there was a risk of her bearing a disabled child and that this was such as to make an abortion legal."[80]

The Abortion Act itself imposes no time-limits on abortions lawfully performed within its terms but expressly states that nothing in the Act has affected, repealed, or amended the provisions of the Infant Life (Preservation) Act 1929. One can see that when the relationship between child destruction under the Infant Life (Preservation) Act and abortion under the Abortion Act are considered, the issue becomes, in the case where fetal defects go undisclosed to the plaintiffs due to the negligence of the physician, whether, at the time an abortion could have been performed, the child was capable of being born alive.[81]

The recent decision of the Supreme Court of Canada in Morgentaler, Smoling et al. v

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[78] Section 1(2) (b) and Section 4(5).

[79] 1967 (U.K.) c. 87 S.1(1)(b).

[80] Report, op cit., para. 29, p. 9 note 5.

[81] See, Rance v Berkshire Health Authority, transcript 84/NJ/5283, July 2, 1986.

The Queen[82] has interesting implications for the wrongful birth action in Canada. In Morgentaler, the Supreme court struck down the whole of section 251 of the Criminal Code. Section 251 contained a criminal prohibition against having or performing all but therapeutic abortions.[83] The criteria for a therapeutic abortion was that the continuation of the pregnancy must endanger the life or health of the mother. Section 251 was struck down on the ground that it was an improper and unjustified infringement of a pregnant woman's right to life, liberty and security of the person under section 7 of the Canadian Charter of Rights and Freedom.[84] The court expressly refrained from considering or commenting upon the issue of the constitutional status of the fetus.

It was anticipated that whatever the Supreme Court decided about abortion it would be controversial. But no one could have anticipated that the Court's decision would catch the government so unprepared, and no one could have imagined that the court's ruling would make it harder, not easier, for a woman to obtain an abortion in Canada. Careful review of the decision reveals that, far from vesting an unrestricted right to abortion, the Supreme Court has left Parliament the freedom to rewrite the laws so that the rights of both the mother and fetus are more equally balanced. However, the Supreme Court did not give any guidelines as to how this should be done, presenting the legislature with tremendous difficulties in drafting a new piece of legislation. The Supreme Court has also left Canadians with a legislative void in a highly controversial area of the law, not to mention that it now appears as though a viable fetus in Canada may receive less legal protection than in the United States (where an abortion after

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[82] (1988) 82 N.R. 1.

[83] Criminal Code, R.S.C. 1970, c. c-34, S.251.

[84] Part 1 of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c.11 [Charter].

viability may only be carried out to preserve the life or health of the mother, where state law so limits).

One reason why the Supreme Court overturned the 1969 law was that it produced unequal access to abortion services, thus contravening the Canada Health Act. Within two weeks of the decision, however, the national patchwork of services that did exist had been destroyed. Only Manitoba and Ontario have spelled out new policies on abortion, with both saying that their provincial health plans will cover the cost of the procedure. The government of British Columbia has stated that it will not finance abortions unless a woman's life is in danger. Nova Scotia has dissolved its ten therapeutic abortion committees, while the Saskatchewan Government has indicated that it may follow British Columbia's lead.

The Supreme Court of Canada, in striking down the abortion section of the Criminal Code in the Morgentaler decision, effectively brought to an end a long period in which the law and what really occurred in practice were completely different. In 1970, two law students undertook a study of Therapeutic Abortion Committees in Canada.[85] The findings indicated that:

1. In some areas of Canada abortions could be obtained for the asking; in other areas abortions could not be obtained even in life threatening circumstances. These women were forced to seek abortions in other communities in Canada or outside Canada.

2. The phrase "therapeutic abortion" was not defined in the Criminal Code and the silence suggested that it was up to the therapeutic abortion committees to determine what was involved. It appeared that what constituted "therapy" was given an extended meaning and a finding of therapeutic need may have been influenced by a number of factors. The word "health" was also

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[85] Kenneth Smith and Harris Wineberg, "A Survey of Therapeutic Abortion Committees" (1970) 12 Crim. Law Quarterly, 279.

left undefined, leaving it to the professional judgment of medical practitioners who decided that health included "mental health." Unfettered by objective standards, the committees surveyed had arrogated unto themselves a purely discretionary power. In every hospital surveyed, "danger to health" was not interpreted to mean that death had to be imminent, but rather that the woman, if allowed to go to term, would lead a less productive life.

3. Most of the committees included rape, incest and extreme youth as grounds for a therapeutic abortion.

4. Every committee surveyed included substantial risk of deformity to the fetus as a ground for a therapeutic abortion. Many of the therapeutic abortion committees would have approved an abortion where there was a serious physical or mental defect in the fetus on the ground that it would be dangerous to the mental health of the mother. It seems that despite the illegality of these eugenic abortions (abortions performed without a therapeutic purpose), they were and continue to be performed by responsible physicians throughout Canada.

5. Nowhere in the Canadian Criminal Code is the health of the fetus considered, yet in every hospital surveyed, the evidence of rubella and other conditions which might affect the health of the fetus were considered sufficient grounds upon which to abort. The justification for eugenic abortions of this type falls under psychiatric indications and once again physicians were forced to exploit the "mental health" avenue.

6. Many of the therapeutic abortion committees surveyed used the mental health avenue for what was in reality a decision based solely on socio-economic considerations. Even though the abortion laws existing in 1970 made no allowance for these factors as an independent ground, it is clear that they were allowed into the committees' decision.

7. Freed from the constraints of legal standards, therapeutic abortion committees in Canada were able to base decisions on all manner of personal biases.

8. Contrary to the intention of section 251 of the Criminal Code, abortion on demand existed in Canada in 1970.

Canadians who have been seeking a change in the abortion laws have been waiting expectantly to see what politicians will do. Bill C-43 was passed by the House of Commons May 29, 1990. The Bill provided that every person who induces an abortion on a female person is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years, unless the abortion is induced by or under the direction of a medical practitioner who is of the opinion that, if the abortion were not induced, the health or life of the female person would be likely to be threatened. The Bill defined "health" to include, for greater certainty, physical, mental and psychological health; "medical practitioner" means a person who is entitled to practice medicine under the laws of that province; and "opinion" means an opinion formed using generally accepted standards of the medical professions.

Again, even in the proposed Bill C-43, no mention was made of the condition of the fetus. It appears that the failure to mention it was not inadvertant. An amendment of that kind has been proposed and rejected in the past. While most physicians in Canada define the concept of "health" to include eugenic health,[86] the fact remains that the language of section 251 and the language chosen in Bill C-43 was deliberately chosen. Thus one author writes:

> "the absence of eugenic abortion in Canada reduces any general duty to the parents, upon establishment of pregnancy to advise prenatal genetic diagnosis, such as by amniocentesis, in order to detect such untreatable conditions as mongolism or spina bifida."[87]

However on January 31, 1991 Senate defeated the abortion Bill. It seems that the abortion issue will not be settled in Canada for some time. It will be an ongoing struggle. Until

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[86] Rogers-Magnet, "Annotation to the case of Cataford v Moreau," (1979). 7 C.C.L.T. 241 at 244, 114 D.L.R. (3d) 585 (Que. C.S.).

[87] Dickens, "Medico-Legal Aspects of Family Law," (1979) p. 65.

new law is made, physicians are in the unenviable position of carrying out their professional responsibilities in a legal vacuum. It does seem reasonable to say however that physicians will continue to do what they have always done in the past.

In Canada, the lack of legislative protection or judicial endorsement of abortion does not necessarily prevent the plaintiff's case in the wrongful birth action. It appears that if genetic conditions in utero become capable of being detected easily and with some certainty by antenatal treatment, an obligation could arise to inform the parents of such an alternative and also to diagnose those cases where the parents are at an identifiable risk. It is clear that as genetic knowledge increases, so does the duty to inform, to diagnose, and to treat. Generally where the breach takes place subsequent to conception, where the plaintiff is not warned that there is a risk of a disease during pregnancy or of the presence of an abnormality in a child already conceived, or where the physician is negligent in the performance or interpretation or prenatal diagnostic test, the possibility of liability exists.

In any event, it is submitted that the only real question to be addressed in the wrongful birth action is whether a physician should be liable for his negligence. To raise questions of ethics, morality, emotion, and "pro-life" issues has no real place in a suit of this nature. The only real issue should be one of compensable damages for negligence and it is submitted that these issues can be dealt without indulging in philosophical or religious non-issues.

Public policy favours the regulation of the medical profession and a tort scheme which encourages great care. The mother's interest in maintaining her emotional and physical well-being may have been harmed by the emotional and physical pain of pregnancy and child birth; the parent's economic well-being may have been injured by the costs involved in the child birth process, and the parent's fundamental right not to procreate has been impaired. The physician should not be able to escape the foreseeable consequences of his negligence and should not be

able to deny the importance of these interests in a subsequent lawsuit. In fact, the public interest in regulating the medical profession will be impaired if the physician escapes liability for his negligent acts.

In the cases to follow, most of the children wrongfully caused to be born are unhealthy and suffer some serious disability. The child's deformity can take many forms but common to each is the fact that heavy expenses for medical care, schooling and institutionalization will be incurred. With rare exception, the parents will not be able to bear these expenses. Parents will be forced to look to either government aid or the wrong-doer who causes the injury. It is submitted that policy would certainly favour the wrong-doer taking responsibility. The physician is the least innocent of the parties since he had the greatest opportunity to prevent the injury.

C. Failed Abortions

The most common method in the United States and the United Kingdom of inducing abortion by surgical procedure is now vacuum aspiration of the uterus.[88] In this procedure a tube is inserted through the cervical canal in to the uterus, a suction instrument is attached to the end of the tube and the "products of conception" are then aspirated. The other surgical method of inducing an abortion is dilation and curettage, a procedure involving the evacuation of the uterus by means of perforation of the amniotic sac. As with any surgical procedure, there are risks. However, if properly performed, the risk of these procedures failing to achieve termination of the pregnancy is minimal. While the numbers of cases involving claims for damages for wrongful birth following an unsuccessful abortion operation are far less in number than those involving a failed sterilization operation, there are at least two reported cases and one

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[88] See generally, Nuebart, "Techniques of Abortion" (1972).

unreported case where the failed abortion resulted in the birth of an unhealthy child.[89]

The physician may be held liable for the actual performance of the abortion operation. The proof of this negligence raises few problems for the plaintiff. The plaintiff need merely prove that the operation failed to terminate the pregnancy. The presumption is that, based on the evidence of expert witnesses, the failure was due to the negligence of the defendant physician. The physician may also be held liable, not for the operation itself, but for the failure to perform postoperative tests, or the incorrect communication of the results of such tests to the patient. Postoperative testing after the abortion operation consists of a pathological analysis of the tissue removed during the abortion to ensure that the pregnancy has in fact been terminated. The patient must also be examined a few weeks after the operation to ensure that she exhibits no signs of a continuing pregnancy. The postoperative testing is crucial because if it is carried out properly,the detection of any failure of the operation may be determined quickly enough so that steps may be taken to have another operation performed.

Speck v Finegold[90] involved a suit by parents occasioned by the birth of a child with neurofibromatosis, a seriously crippling condition already evidenced in the child's siblings. Mr. Speck, the plaintiff father, was a victim of the disease as well and, concerned with the possible affliction in a child conceived in the future, decided to undergo a vasectomy. Following the operation, the doctor assured Mr. Speck he was made sterile. Shortly thereafter, Mrs. Speck became pregnant and, worried that the pregnancy may result in the dreaded consequences they wished to avoid, she sought an abortion. Mrs. Speck was assured that her fetus had been aborted

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[89] Speck v Finegold and Schwartz, 124 P.L.J. 257 (Pa County Ct. 1976), See Gursky, Birth Despite Vasectomy and Abortion Held Not a "Wrong" (1977) J. Leg. Med. 29; Cherry v Borsman, (1990) 75 D.L.R. (4th) 668 (B.C.S.C.); Fredette v. Wiebe, [1986] 5 W.W.R. 222 (B.C.S.C).

[90] Id.

but nevertheless she gave birth to a premature child afflicted with the crippling disease. It was established that the defendant doctor was grossly negligent in his performance of both operations. The court correctly stated that "[t]he question is not the worth and sanctity of life, but whether the doctors were negligent in their surgical attempts at vasectomy and abortion."[91] Accordingly, the parents were able to recover pecuniary expenses which they had borne and would bear for the care and treatment of the child born following a negligently performed sterilization procedure and which resulted in the natural course of things from the commission of the tort. The plaintiff parents were able to recover for the personal expense, pain and suffering, emotional distress incident to the vasectomy and abortion surgeries, but were unable to recover for the emotional disturbances and general distress due to the fact of the infant's birth. The court stated:

> ...our position is that all parents suffer some degree of stress especially if a child is born with a disabling condition. However, not all of these children are "unwanted" in any sense of that term and the emotional anguish that they suffer may be a normal, uncomprehensible price one pays for being a parent. Therefore to allow the plaintiffs' claim for mental and emotional stress would be to give them a societal advantage not conceivable in other cases of parenthood.[92]

In Cherry v Borsman[93] the plaintiff (30 years of age and single) underwent an approved therapeutic abortion. The operation, by suction curettage, was performed by the defendant physician, a qualified specialist in obstetrics and gynaecology. The attempted abortion was unsuccessful; the pregnancy continued. Unfortunately, it did not continue full term and resulted in the birth of an unhealthy child. The plaintiff gave birth to a child born with numerous and serious congenital defects. In this action the plaintiff claimed damages for the negligence of the defendant in the performance of the operation and in the course of the postoperative care and

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[91] 408 A.2d 496 at p. 503.

[92] 268 Pa Supr. Ct. 367, 408 A.2d at 509.

[93] Supra note 89.

follow-up.

The plaintiff's evidence was that had her pregnancy been discovered by the defendant, as it should have been, and had she been advised of her continued state of pregnancy, she would have elected to have a second abortion, which at that time could have been successfully and safely done. By the time the defendant diagnosed the plaintiff's continuing pregnancy and advised her of it, the last date by which a therapeutic abortion could safely be performed had passed.

The court held that the negligence of the defendant resulting in the unplanned birth of the child entitles the plaintiff to recovery.

Aside from the question of whether child rearing damages may be recovered by plaintiffs in a wrongful birth action following an unsuccessful abortion operation, this cause of action gives rise to a number of other interesting legal problems. The first is to what extent the plaintiff parents can claim an award of damages representing their emotional distress at giving birth to a defective child. A second problem that may arise in these cases is whether the plaintiff can be held contributorily negligent in failing to attend a post operative examination.[94] A third problem is under what circumstances can the patient refuse to undergo a repeat abortion, the first one having failed?[95] These issues will be examined in greater detail below.

Despite the decision of Roe v Wade,[96] the question of the legality of the abortion is still relevant in this context. It is still possible for State legislation to declare that abortions performed after viability are illegal. As will be seen later in this thesis, the courts have been very reluctant

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[94] See, Cobb v Tucker, unreported (No. 343N) Cal. Super., San Diego County (1975), referred to in 31 the Citation at 103 (1975); and Mechikoff v Humphrey, unreported (No. 192641) Cal. Super., Orange County (1975) referred to in 32 The Citation at 125 (1976).

[95] This will depend on the stage to which the pregnancy has progressed, whether there is risk to the mother in having a repeat abortion at that stage, and whether an abortion at that stage would be legal.

[96] Supra note 76.

to hold that the plaintiff in a wrongful birth/failed abortion case should have consented to another operation upon discovering that the first had failed.

It is to be noted that in the Canadian case of Cherry v Borsman,[97] the operation performed was one authorized by a therapeutic abortion committee. It is unlikely that a court would recognize a cause of action for wrongful birth involving an illegal abortion. In Canada, prior to 1988, this would have arisen in any case where the abortion was performed without the approval of a therapeutic abortion committee. In the United States, abortions performed after the fetus reaches viability may be illegal.

D. The "Rubella" Cases

Rubella (German measles) is a very mild disease in children and adults. Yet when contracted by the mother during the fourth through the twelfth weeks of pregnancy, it can have damaging effects on the formation of the heart, the lens of the eye, the inner ear, and the brain, depending on exactly when the infection occurs in relation to the embryonic development.[98]

Twenty years ago, rubella could be diagnosed only by clinical symptoms. Attempts to determine whether and when a pregnant woman had contracted rubella, and to gauge the risk that her baby would exhibit a rubella caused effect, were severely limited because many rubella infections produce no clinical symptoms, they are reported retrospectively, and because rubella's clinical symptoms are often confused with those of other common diseases.[99] It was only in 1962 that the rubella virus was identified.[100] In 1964-65, a nationwide epidemic produced

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[97] Supra note 89.

[98] Curtis, BIOLOGY, 4th edition (1983).

[99] Apgar, V. & Beck, J., "Is My Baby All Right?" 381-82 (1972).

[100] Id. at 381.

20,000 to 30,000 handicapped children.[101] In 1966, scientists developed a blood test to determine with a high rate of accuracy whether a pregnant woman recently had been infected with the virus.[102]

The source of the plaintiff's injury in this context is that the birth and life of the defective child, caused by the negligence of the physician in failing to inform her about the effects of rubella, resulted in the loss of the abortion option. The plaintiff, it is submitted, is entitled to be compensated for the loss of the option or choice and for the right to be informed about material and substantial risks. Given the risks of serious fetal abnormalities, it is foreseeable that a woman infected with the rubella virus in the early stages of pregnancy will choose to have an abortion. Equally as foreseeable to the physician is the fact that if he negligently fails to diagnose that the woman is infected with the rubella virus she will be therefore be deprived of information that will influence her decision whether or not to end her pregnancy. It has also been held that a statement by the physician to his patient that there is no risk that rubella will result in fetal anomalies is clearly negligent.[103]

There are at least nine reported "rubella cases" in the United States.[104] The action, first

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[101] Id. at 383.

[102] Id. at 384.

[103] Gleitman v Cosgrove, 49 N.J. 22, 227 A.2d (1967).

[104] Smith v United States, 392 F. Supp. 118 (W.D. Tex. 1976); Anderson v Wagner, 61 III. App. 3d 822, 19 III. Dec. 190, 378 N.E. 2d 805 (1978); Stewart v Long Island College Hosp., 58 Misc. 2d 434, 296 N.Y.S. 2d 41 (Sup. Ct. 1968), rev'd, 35 App. Div. 2d 531, 313 N.Y.S. 2d 502 (1970), aff'd, 30 N.Y.S. 2d 695, 283 N.E. 2d 616, 332 N.Y.S. 2d 640 (1972); Gleitman v Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967); Jacobs v Theimer, 519 S.W. 2d 846 (Tex. 1975); Dumer v St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W. 2d 372 (1975); Procanik v Cillo, 478 A. 2d 755 (N.J. 1984); Blake v Cruz, 698 P.2d 315 (Idaho 1984); Walker by Pizano v Mart, 790 P.2d 735 (Ariz. 1990).

heard in the Gleitman[105] case in 1967, was dismissed because the court found that to allow damages for the emotional stress in raising a child or for the expenses in raising the child made necessary the weighing of the intangible, unmeasurable and complex human benefits of motherhood and fatherhood against the alleged emotional and monetary injuries which was impossible to do. The court held ultimately that, as a matter of law, the benefits of life outweigh its liabilities even though the child is unwell. In the dissenting opinion, Weintraub, J., found this reasoning to be clearly contrary not only to public policy but to fundamentals of tort law as well.[106] The inability to arrive at a quantified damage award, he felt, was neither reason enough to deny an injured party redress nor to allow the culpable party to escape liability. The dissenting judge recognized the difficulty in placing a price tag on the loss of choice of whether or not to risk bearing a deformed child, but he believed the law should compensate in some way. He states, "while the law cannot remove the heartache or undo the harm, it can afford some reasonable measure of compensation towards alleviating the financial burdens."[107] "To deny relief, while relieving the wrongdoer of all liability merely because damages cannot be ascertained with certainty is a perversion of fundamental principles of justice."[108]

As said above, even though the Gleitman case was decided before Roe v Wade, the availability of a legal abortion to the plaintiff mother was assumed by the majority. The majority assumed that somehow or somewhere Mrs. Gleitman could have obtained an abortion that would not have subjected her to criminal sanctions, and that she did not do so because she relied on the incorrect advice of the defendants.

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[105] Supra note 104.

[106] 49 N.J. 22, 227 A.2d 689 (1967) Dissent J. Weintraub.

[107] Id. at 65, 227 A. 2d 689 at 712 (1967).

[108] Id.

In departing from the rigid reasoning in Gleitman, the court in Jacobs v Theimer[109] reasoned that the law must treat the birth of a physically healthy child as worth more than non-birth but that this presumption did not extend to physically burdened children. The court held that the physician was under a duty to the parents to make a reasonable disclosure of rubella and its dangers to the unborn child. In this case the parents were awarded the expenses reasonably necessary for the care and treatment of the child's physical impairment, refusing to award the parents the damages for the costs of raising a normal child and for the parents' emotional pain and suffering. These damages were denied on the grounds that they are impossible to assess; to allow such damages would place an overwhelming burden on physicians which could lead to their being overly cautious; and that any damages beyond the cost of treating the defects should automatically be cancelled by the fact that had the parents been adequately informed and had aborted, they would probably have had another child and would have had to bear the cost of raising it. The Court held that if the parents had wanted to be parents of a normal child (as the Jacobs did) they could only recover the extraordinary expenses associated with the raising of the child; the difference between the support expenses for a normal, healthy child and support expenses for the defective child. It cannot be assumed however that the mother, subsequent to terminating her pregnancy would, in fact, have had another child, and even if such an assumption is made, it is difficult to argue that the hypothetical costs attributable to the "future" child should be permitted to prevent the plaintiff from recovering damages for a totally unrelated pregnancy, birth and rearing of an imperfect child. This type of an award puts the plaintiffs in the position they "expected" to be in which is contrary to traditional compensatory damage rules and in this situation creates an inequity.

Another interesting aspect of the Jacobs decision, at least from a Canadian perspective,

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[109] Supra note 104.

is that at the time this case was decided, abortions were illegal in Texas. Nevertheless, as in the Gleitman decision, the court held that the question of whether to terminate the pregnancy was one for the parents to resolve. The Court held that the physician was not criminally liable unless he actually advised the plaintiffs to terminate the pregnancy and they did so on his advice. Simply to provide the plaintiffs with the information that their fetus might be born with birth defects could not make him an accomplice to a crime. What the parents sought from the physician was information about the mother's illness and the possible risks to the fetus, not advice on abortion. The court in the Jacobs case was clear in saying that the decision whether or not to have an abortion was the mother's and therefore, if there was a risk that the child would be born deformed, that risk must be explained to the mother.

In the foregoing cases the parents claimed that had the physician informed them of a particular condition they would have terminated the mother's pregnancy. Admittedly, the physician does not have the ability to alter the genetic make-up which produces the deformity. However, the physician does have the ability to prevent the injury from manifesting itself. Defendant physicians have argued that they are not the proximate cause of the injury because they did not cause the fetal defect. But the plaintiff's complaint is not that but for the physician's negligence the injuries to the fetus would have been prevented, but rather that had it not been for this negligence the plaintiff would not have been deprived of information that would have lead her to choose to have an abortion and thereby avoid the damages consequent in bearing an unhealthy child. Thus, the failure to diagnose a fetal defect may be viewed as the proximate case of the birth of the deformed child. The deformed child's birth may be considered the foreseeable consequence of such negligence in so far as the negligence denied the mother information that may have convinced her to terminate the pregnancy.

In Canada, based on the rule of informed consent,[110] it is not a defence to say that the physician is not the original cause of injury to the child. The failure to inform the parents of a potential defect is a material risk and a substantial factor in the parents' decision making process. Although the "denial of choice" argument is certainly convincing, it has some great hurdles to overcome in Canada. For example, suppose the plaintiff mother has carried a child to term as a result of the physician's failure to give notice of the pregnancy or warn of an existing defect or risk of defect. The plaintiff is then forced to allege that her alternative was a therapeutic abortion and that this choice was denied to her due to the defendant's negligence. But, to so find requires a recognition of abortion as tantamount to an available therapy. For the Canadian wrongful birth plaintiff bringing a suit in this context, it appears that until the abortion law is settled, that the only argument available is that ultimately, the birth and life of a defective child, caused by the negligence of the physician in failing to inform the mother about the risks of defects resulting in the loss of the abortion option is the source and root of their injury.

In short, it is submitted that in this type of wrongful birth situation a physician should be held liable if he negligently fails to diagnose rubella in the early stages of pregnancy or if he fails to inform the mother of the risk of fetal abnormality inherent in such a diagnosis. The wrongful birth suit in this context also raises other issues concerning the injury the plaintiff suffers and the damages to be awarded for that injury. Is this a situation where the "blessings concept" should apply? Should the plaintiff parents be able to claim for any emotional distress suffered during the pregnancy and as a result of the birth of a defective child? Should the plaintiff parents be compensated for child rearing expenses? Should those child rearing damages be limited to the special or extraordinary expenses associated with the raising of the child? Finally, if child rearing damages are awarded, should they end at majority or continue for the

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[110] Reibl v. Hughes, [1980] 2 S.C.R. 880, 114 D.L.R. (3d)1. See infra page 49.

life of the child? These questions will be examined in more detail below.

E. Genetic Counselling

Liability in the 1990's for wrongful birth will centre on the issue of genetic information.[111] Genetic counselling is a communication process which deals with the human problems associated with the occurrence, or the risk of occurrence, of a genetic disorder in a family. This process involves an attempt by one or more appropriately trained persons to help the individual or family to (1) comprehend the medical facts, including the diagnosis and probable cause of the disorder; (2) appreciate the way heredity contributes to the disorder, and the risk of recurrence in specified relatives; (3) understand the alternatives for dealing with the risk of recurrence; (4) choose the course of action which seems, to the patient, appropriate in view of the risk, family goals and ethical and religious standards; and (5) to make the best possible adjustment to the disorder in an affected family member and/or to the risk of recurrence of that disorder.[112] The essential thrust, aim and philosphy of genetic studies and genetic counseling is the assurance to parents that they ay selectively have unafected offspring when the procreative risk of having defective children is high. The emphasis is not on the removal of defective

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[111] See, Knoppers, B. "Genetic Information and the Law: Constraints, Liability and Rights." CMAJ, Vol. 135 December 1, 1986, 1257; Milunsky and Annas, "Genetics and the Law" (1976); Reilly, " Genetic Counselling and the Law" 12 Houston L. Rev. 640 (1975); Milunsky and Reilly, " The New Genetics": Emerging Medicolegal Issues in the Prenatal Diagnosis of Hereditary Disorders" 1 Am. J.L. & Med. 71 (1975); Friedman, " Legal Implications of Amniocentesis" 123 U. Pa. L. Rev. 92 (1974); Waltz and Thigpen, " Genetic Screening and Counselling: The Legal and Ethical Issues" 68 Nw. U.L. Rev. 696 (1973); Note, " Father and Mother Know Best: Defining the Liability of Physicians for Inadequate Genetic Counselling" Vol. 87 The Yale Law Journal, 1488 (1978); Boutchee, " Genetic Counselling and Medical Malpractice: Recognizing a Cause of Action for Wrongful Life," Vol. 84 Thurgood Marshall Law Rev. 54 (1983).

[112] Ad Hoc Committee on Genetic Counselling, Genetic counselling, 27 AM. J. HUMAN GENETICS 240 - 41 (1975).

fetuses.

If a cause of action is to be allowed for negligent genetic counselling, several questions must be resolved; what constitutes a defect? When does a duty to test and inform arise? What is the degree of testing required for the physician to fulfil his obligation to avoid liability? Must the physician cease the cautious counselling he has undertaken for years? Should the physician now routinely advise his patients that new, expert diagnostic aids are available in order to diagnose prenatal birth defects? The court, in establishing a framework for this tort, must balance the need to protect parents and guarantee the highest quality of genetic counselling and, at the same time, the framework must not trap the physician already caught in spiralling malpractice litigation.

At the moment, human genetics is one of the most rapidly developing areas of medical science. This growth has resulted in the introduction and ever-widening application of numerous new technological means of diagnosis and treating genetically based disorders. Today, after conception, there are many techniques available for examining the fetus in utero to establish whether or not it is destined to be born with an abnormality.[113] Briefly then, a few of the more current techniques such as ultrasound, amniocentesis, fetoscopy and fetal radiography will be outlined. Such a review of medical practice in relation to prenatal diagnosis is a necessary prelude to the understanding of the framework of physician responsibilities.

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[113] Of the more than 2,400 inherited diseases and defects which have been catalogued (V. McKusik, Mendelian Inheritance in Man (4th Ed. 1975)), more than 65 and at least potentially 90 can be diagnosed in utero during the second trimester of pregnancy when abortion is still feasible. (Milunsky, Medico-Legal Issues in Prenatal Genetics Diagnosis, Genetics and the Law, 53, 54 (1976)).

In addition, certain diseases which are sex-linked such as hemophilia and muscular dystrophy occur only in males. Although these ailments cannot be diagnosed prenatally, the sex of the fetus can be determined by chromosome examinations. By electing to abort male fetuses, the parents can choose to have all daughters rather than accept the risk that a son will have the abnormality.

Ultrasound examination enables direct visualization of the fetus and is used to confirm gestational age, assess the possibility of multiple pregnancies and localize the placenta. The increasing use of ultrasound to detect anatomical abnormalities is particularly desirable since the technique seems to present no discernable risk to either the mother or the fetus. The technique is used also as an adjunct to amniocentesis, a tissue culture technique which detects virtually all fetal cytogenetic aberations and more than 70 inborn metabolic errors.

A very recent case from the United Kingdom, Rance v Mid Downs Health Authority[114] is likely to provoke a whole new area of litigation in this area. Here, the plaintiff parents sought an ultrasound examination for the sole purpose of confirming the date of pregnancy and not for the purpose of detecting congenital defects. An ultrasound scan conducted on the plaintiff mother during her pregnancy (at twenty-five and one half weeks) showed the possibility of some spinal irregularity in the fetus. The radiologist performing the procedure didn't think the fetus "looked right" but she had never seen a fetus with spina bifida before. She mentioned the irregularity to the obstetrician at the hospital, but because the irregularity was not evident again, and because the obstetrician believed that it was in practice too late to terminate a pregnancy, the suspicion was not mentioned to the plaintiff nor did he recommend that she have further examinations. When the Rance's baby was born, he was found to have spina bifida and his parents sought damages for the shock and distress they had suffered, and for the financial cost of providing for a son who required extra care and would do so for the rest of his life.

The judge was obliged to consider two issues; (1) whether there had been negligence on the part of the medical staff within the hospital in the conduct of the scan and the related diagnostic procedures and (2) whether, even if there had been negligence, the plaintiffs could show that they would, and legally could, have had the pregnancy terminated at the time had they

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[114] [1991] 1 All E.R. 801.

known of the baby's handicap. This would necessitate a decision as to the lawfulness of abortion carried out before the twenty-eighth week of pregnancy (in this case at twenty-seven weeks).

The plaintiff argued that the Health Authority was negligent in not seeking a second ultrasound opinion from a radiographer who was more experienced and that the obstetrician was negligent in not suggesting a re-scan or referring the plaintiffs to a centre of greater experience once suspicions has been expressed to him. The plaintiffs' case was that a re-scan should have been directed so that, if necessary, the plaintiff mother could have obtained an abortion. The obstetrician gave as his reasoning for failing to re-scan the fact that he believed that an abortion was no longer permissible legally. It was the plaintiff's evidence that had there been no local obstetrician prepared to perform an abortion at twenty-seven weeks, she would have looked for another consultant elsewhere who was prepared to perform an abortion up to twenty-eight weeks.

The judgment is astonishing. Brooke J. accepted that it was a widely held belief in the medical profession that it was unlawful to perform an abortion after twenty-four weeks and although the plaintiffs had produced medical experts to testify that they would have performed and abortion at twenty-seven weeks, he was satisfied that the defendants had acted in accordance with a responsible body of opinion in radiology and obstetrics in taking the view they had of the law relating to abortion. In addition, the judge expressed the view that even if he had reached a different conclusion on the law in this case, he would not have been disposed to make findings of professional negligence against responsible medical men who based their practices on a reasonable belief, shared by many of their colleagues, about the relevant law, even if that belief turned out to be wrong when the law was authoritatively determined in the courts. The implications of this statement are frightening; does this now mean that doctors are to be left to interpret the law?

There are many other questions that this decision raises and leaves unanswered. In this

case the scan was not conducted for purposes of detecting congenital defects, only to confirm dates of pregnancy. So, if the scan is conducted only for this purpose, does the duty of the radiologist and his staff extend to the duty to spot any potential defects in the fetus? Once a defect is spotted or there is a suspicion that the fetus may be suffering from a defect, is there a duty to inform the mother of this information? Is there a duty to screen all pregnant women, or just those women at risk of bearing a defective child?

Regrettably, it was not argued in the Rance case that another reason why ultrasound examinations are performed, aside from confirming dates of pregnancy, might be to also warn the mother of the danger, risk, or possibility that the fetus she is carrying may have fetal abnormalities. Because this was not argued, the decision rested solely on the reasonableness of failing to re-scan in the belief that abortion was out of the question. It is submitted that plaintiffs bringing an action for wrongful birth in this setting must argue that it is the physician's duty to disclose all material risks and that the negligent conduct of the physician has deprived them of the opportunity to make an informed choice as to whether or not to continue the pregnancy.

The technique of amniocentesis is performed at about sixteen weeks of pregnancy by withdrawing amniotic fluid surrounding the fetus in the mother's placenta with a needle and a syringe. The fluid is then tested for chromosomal abnormalities. Through the use of amniocentesis, the sex of the fetus, as well as the presence of gross chromosomal anomalies can be detected. Recent studies indicate that amniocentesis is highly accurate and represents a combined risk of less than 1% of complications.[115] The most recent study concludes that this

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[115] NICHIC National Registry for Amniocentesis Study Group, Midtrimester Amniocentesis for Prenatal Diagnosis, 236 J.A. med. A. 1471, 1472, (1976) (99.4% accuracy in 1040 cases); Simpson, Dallaire, Miller, Simonovich, Hamerton, Miller and McKeen," Prenatal Diagnosis of Genetic Disease in Canada; Report of a Collaborative Study". 115 Canadian Med. A.J. 739 (1976) (99.4% accuracy in 1223 cases).

form of prenatal diagnosis is "safe, highly reliable and extremely accurate.[116]

The American College of Obstetricians and Gynaecologists has identified the following conditions and prerequisites for undertaking amniocentesis for the prenatal diagnosis of genetic disorder:[117]

(1) An appropriate indication exists;

(2) The duration of the pregnancy is appropriate;

(3) The information obtained will be useful to the patient and her family for decision making;

(4) The technique for the particular disorder has been established; and

(5) The patient and her family have been appropriately counselled with regard to the risk of the disorder, the risks of the procedure, and the nature of the information to be obtained.

Amniocentesis may be indicated under the following circumstances:

(1) When one parent is a carrier of chromosomal translocation;

(2) When a couple has already produced a child with congenital defects;

(3) When the pregnant woman is older than age 35;

(4) When the fetus is at risk of being born with X-linked disorders;

(5) When a parental or family history of a certain metabolic disease exists; and

(6) When it is necessary to determine alpha-fetoprotein levels in pregnancies with potential for neural tube anomalies.[118]

Other serious disorders can be detected by means of fetoscopy, a variant of

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[116] Globus et al., Prenatal Genetic Diagnosis in 3000 Amniocentesis 300 (4) N. Eng. J. Med. 157 (1979).

[117] American College of Obstetricians and Genealogists, STANDARDS FOR OBSTETRIC/GYNAECOLOGICAL SERVICES 19 (5th Ed. 1982).

[118] R. Benson, CURRENT OBSTETRIC AND GYNAECOLOGICAL DIAGNOSIS AND TREATMENT 520 (1978).

amniocentesis, involving the addition of an optical system which permits direct access to the fetus. Through a small puncture wound in the mother's abdomen, a fibre optic system can be introduced in to the uterus to view any defect visible to the eye. Samples of fetal blood can also be taken. This method extends prenatal diagnosis to three of the world's most prevalent and most severe inherited diseases; thalassemia, sickle cell anemia and muscular dystrophy. The risks (fetal blood loss, scarring, mortality) and limitations (placental blocking, narrow visual field) of this technique indicate that the use of fetoscopy should be limited to very serious fetal conditions that cannot be detected by other means.[119]

Lastly, fetal radiography serves to identify malformation syndromes for which precise biochemical or chromosomal tests are not yet available. X-ray visualization of the fetus facilitates the diagnosis of certain soft-tissue deformities. However, the hazards and unknown effects of radiation on the developing fetus constitute a very high risk.

Where the feared genetic disorders are defects such as chromosomal anomalies, anatomical abnormalities and a wide variety of metabolic defects that can be directly detected in utero, there is very little risk that healthy fetuses will accidently be aborted.

The importance of prenatal diagnosis is readily understood if one considers the magnitude of newborns with defects or patients in hospitals with diseases that are genetic in origin.[120] It

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[119] Mahoney and Hobbins, "Fetoscopy and Fetal Biopsy," in Lubs and de la Cruz, "Genetic Counseling" 495 (1977); see generally Campbell and Rodeck, "The Role of Ultrasound and Fetoscopy in the Diagnosis of Neural Tube Defects and other Abnormalities" in Jordan and Symonds (eds.) "The Diagnosis and Management of Neural Tube Defects" (1978).

[120] Experts estimate that in the United States, one out of every 20 babies is born with a discernible genetic deficiency and that of all chronic diseases between 20 and 25 percent are predominantly genetic in origin. See Smith, "Manipulating the Genetic Code: Jurisprudence Conundrums," 64 Georgetown L.J. 697 (1976); Birch and Albrecht, "Genetics and the Quality of Life" (1975) Patients whose incapabilities are known to be genetically determined occupy at least half of the hospital beds in America (Smith, ibid.); Jones and Bodmer, "Our Future Inheritance Choice or Chance" (1974).

is of course to be remembered that even in the "normal" pregnancy, the risk of a child being born with defects is 4 to 5% and that each person carries anywhere from 4 to 8 deleterious genes.[121] What prenatal diagnosis does in short, is to create choice, and choice is freedom.

(2) The Legal Framework

The field of genetic counselling is too new and the knowledge too incomplete and esoteric for a mistake, in and of itself, to bespeak negligence. However, there are two things that are certain. One is that major scientific advancements taking place in this area of medicine are bringing with them a concomitant and commensurately high duty of care owed to the patient by the physician. The second is that in cases in which screening is predictive for individuals or populations already identified at being at risk, present case law from the United States shows that an individual has not only the right to have access to the information obtained but also the right to be advised of the need of such screening.

Take, as a hypothetical example, the situation where expectant parents affirmatively seek out specific medical advice regarding a genetic disease. In this case the court must ask whether the physician is under a duty to inform them of the availability of prenatal diagnosis and secondly, what is the duty of care in the performance of these techniques and the subsequent diagnosis. Generally speaking, the duty of care of the physician in the medical treatment of his patient is to exercise due skill and competence in diagnosis and treatment and to give reasonable information and advice to the patient so that the patient can give his informed consent to any medical procedure. The American courts readily conclude that the physician owes the parents

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[121] Restak, "Premeditated Man: Bioethics and the Control of Future Human Life" (1975) p. 79.

a duty of reasonable care. In Naccash v Burger[122] for example, the court held that when the plaintiffs presented themselves to the defendant for Tay-Sachs testing, the defendant owed the plaintiff parents a duty of reasonable care in performing the tests and also had a duty to give "reasonably accurate information" regarding the test results so that the parents could make an informed decision whether to abort the child.[123] Similarly, in Park v Chessin[124] the court permitted parents to recover after they had specifically inquired about the risks of having a second child with polycystic kidney disease. The court stated that the physician's duty to the plaintiff parents was merely an extension of the fundamental tort duty "that one may not speak without prudence or due care when one had a duty to speak, knows that the other party intends to rely on what is imparted, and does, in fact, so rely to his detriment."[125]

As said previously, the physician has the duty to exercise the degree of skill of an average specialist in the field. All physicians however are required to keep up with scientific progress, and the specialist or general practitioner is held to the degree of skill commensurate with the standards of his profession. In recent years, medical science's ability to predict or detect defects in the unborn has expanded significantly. Advances in the fields of prenatal screening and diagnosis have led the American courts to hold that the utilization of such new and innovative techniques requires a greater degree of care. In determining the standard of care required by the physician, the courts should expect him to exercise care to supply an accurate diagnosis and an explanation of the hereditary basis, if known, and the range of available therapeutic options. At

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[122] 223 Va. 406, 299 S.E. 2d 825 (1982).

[123] Id. at 414, 290 S.E. 2d at 829.

[124] 60 A.D. 2d 80, 400 N.Y.S. 2d 110 (N.Y App. Div. 1977), aff'd 46 N.Y. 2d 401, 386 N.E. 2d 807, 413 N.Y.S. 2d 895 (N.Y. 1978).

[125] Id at 86, 400 N.Y.S. 2d at 113.

the very least, courts should compel physicians to be aware of the techniques widely known within the medical community.[126] Reports and journals in medical literature should be a primary source of information used in this determination. Because the field is relatively new and the knowledge involved is far too incomplete for a mistake in and of itself to constitute negligence, a person suing for inadequate genetic counselling would be required to produce expert testimony that the information supplied by the physician would not have been supplied by a prudent and knowledgable practitioner in the field.

In diagnosis there is the possibility of error through inadequate sampling, cell contamination, inconclusive results, or misdiagnosis.[127] Improper handling of the testing procedure itself may also be actionable. In amniocentesis there are risks for both the mother and the fetus. The physician must give the mother adequate warning with regard to the hazards involved prior to the procedure. If the pregnant woman is in a "high risk" group (she is over the age of thirty-five when pregnant or she has contracted rubella during the pregnancy), the conscientious physician would offer to perform amniocentesis and inform the mother of the increased risks of the child being born defective. Even where amniocentesis testing is performed in the expectant mother, the physician may be liable in negligence if he improperly performed the test or misdiagnosed the results. If the amniocentesis test was improperly performed by the physician, the wrongful birth plaintiff would have to show that the defendant physician did not conform to recognized practises and procedures, or that the test results could only have been the

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[126] Note, "Father and Mother Know Best: Defining the Liability of Physicians for Inadequate Genetic Counselling," 87 Yale L.J. 1488, 1505 (1978).

[127] Walt and Thigpen, "Genetic Screening and Counselling: Legal and Ethical Implications," 68 Northwestern U.L. Rev. 696 at 743 (1973); Milunsky and O'Reilly, "The "New" Genetics; Emerging Medico-legal Issues in the Prenatal Diagnosis of Heriditary Disorders," 1 Am. J. Law & Med. 71 at 81 [1975]; Annas and Coyne, "Fitness for Birth and Reproduction; Legal Implications and Genetic Screening," (1975), Fam. L.Q. 463 at 474.

product of negligence.

The standard of care measures "both the sufficiency of the steps taken to detect the genetic risks and the amount of accuracy of the information provided to prospective parents."[128] In Canada, the adequacy of information given to parents prior to any medical treatment could be measured under the doctrine of "Informed Consent."[129] As outlined above, the Supreme Court of Canada in Reibl v Hughes[130] held that the physician must disclose all material risks to the patient and material risks are those risks that a reasonable person in the patient's position would want to be told. In determining whether there has been a breach of the duty of disclosure, the test is what a reasonable person in the patient's particular position would agree to or not agree to, if there had been proper disclosure of the material risks.

Absent a specific inquiry for genetic information by the prospective parents however, the scope of the doctor's duty becomes a more complex question. Suppose a 38 year old pregnant woman consults her physician with regard to her pregnancy but does not specifically request genetic information, or the same woman is simply a patient of the physician whom he knows to be planning to conceive. The duty of the physician to take reasonable care has been defined to include the duty not to omit essential steps in providing care to his or her patients. Tort law embraces the sins of omission as well as the sins of commission. Of course, defendant physicians in the American cases have often urged the court to limit their duty to instances in which the parents have sought out answers to questions and have requested specific care. The American courts have rejected this suggestion however, and instead, have imposed on physicians a positive

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[128] Robertson, "Toward Rational Boundaries of Tort Liability for Injury to the Unborn: Prenatal Injuries, Preconception Injuries and Wrongful Life," Duke L.J. 1401 [1978] at 1504.

[129] Supra note 110.

[130] [1980] 2 S.C.R. 880, 114 D.L.R. (3d) 1.

would want to know. Accordingly, a pregnant woman who consults her physician about the possibility of deformities must, as stated earlier be given an adequate response. In addition, the duty of care towards the same woman may require the disclosure of the risks of deformities and the availability of prenatal diagnosis without a specific request where her medical history indicates that she is in a high risk group. Also, Canadian courts should, in the case of inadequate genetic counselling resulting in the conception of a child later born deformed, find the physician liable for the full costs of caring for the child.

Despite the seemingly clear application of the doctrine of informed consent to cases in this context, a recent Canadian case seems to indicate that the courts will be more than reluctant to find a physician negligent where he fails to recommend experimental testing to the plaintiff mother.[132] Here the plaintiff consulted her physician for advice on her second pregnancy. Her first pregnancy had resulted in the child being born with a neural tube defect. The physician had discussed the possibility of risk to the fetus with a specialist who mentioned that there was a new experimental test for such a defect. The plaintiff's physician did not discuss the experimental testing with the patient, nor did he refer her to the specialist. After the birth of a second child with the neural tube defect, the plaintiff parents claimed against the physician. The action was dismissed on the ground that there was no duty to disclose the availability of a test which was experimental at that time. Nor was there a duty on the part of the physician to refer the plaintiff mother to a specialist.

In England the situation is unclear. It cannot be said with any certainty that in England a physician is under a positive duty to inform those patients of childbearing age who he knows or should have known to be at risk of their chances of conceiving a deformed child. It is not

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[132] Guillette v Maheax, (May 15, 1989, Que. C.A., Beauregard and Nichols JJ. A., Chevalier J., No. 089/144/017; 15 A.C.W.S (3d) 252.

established that the common law professional standard of care requires a physician to investigate the genetic history of every patient of child bearing age.[133]

The present trend in the United States and in Canada is that a physician may be liable if he failed to inform the parents of the possibility of their bearing a defective child when he knew or should have known that his patient was at risk. The courts should be guided by the recently developed standards governing informed consent to surgery and other medical treatment.[134] The duty to disclose medical information would be measured by what a reasonable person would want to know in deciding whether to conceive or continue a pregnancy. The adequacy of this disclosure then, would be measured against what a reasonable person would need to know in deciding whether to undergo treatment. Injury is foreseeable when the properly informed person would not have conceived or continued the pregnancy.

The policy adopted by some genetics clinics not to disclose certain diagnoses from amniocentesis tests may be based in part on a concern that parents, upon being told certain facts, may decide to abort a fetus that genetic counsellors believe will not be seriously burdened.[135] Such information however, cannot be withheld. Such a disclosure cannot be justified by any duty to protect the fetus. The competent counsellor will, however, make every effort to convey the

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[133] See, Sidaway v Bethlem Royal Hospital Governors and Others, [1985] 1 All ER 643, where the House of Lords rejected the test in Reibl v Hughes and held that the physician is required to act in accordance with a practice accepted at the time as proper by a responsible body of medical opinion. Accordingly, English law does not recognize the doctrine of informed consent.

[134] Reibl v Hughes, [1980] 2 S.C.R. 880, 114 D.L.R. (3d) 1.

[135] A problem associated with eugenics is that, by eliminating fetuses with certain diseases, some very creative and productive people, who could manage quite well despite their handicap might also be eliminated. An example appears at page 39 F.L.W. 1980: "A Clinical instructor asks his students to advise an expectant mother on the fate of the fetus whose father has chronic syphilis. Early siblings were born with a collection of defects such as deafness, blindness and retardation. The usual response of the students is: "Abort!" The teacher then calmly replies: "Congratulations, you have just aborted Beethoven."

information in a fashion that will cause the least shock to the parents and maximize their understanding of the facts and uncertainties about the child's condition.

There is also a concern that a physician exposed to liability will be inclined to practice defensive medicine by advising abortion rather that run the risk of having to pay for the lifetime care of a child if it is born with a handicap. It must be remembered that the physician's duty is to disclose all risks and facts regarding the birth of the child. Thereafter, it is up to the parents to make the ultimate decision whether or not to abort. The physician need only act reasonably and once he has done so, his liability is discharged. The physician always has the option open to him to refer patients who require procedures and studies alien to him or to his beliefs (such as amniocentesis or prenatal genetic studies) to physicians who are more willing and competent to undertake such procedures. In suits brought for failure to provide information about genetic risk, physicians with religious or moral objections to the use of contraceptives or abortion cannot be required to perform a sterilization operation or abortion operation. But, in this case, the physician would clearly be negligent in not referring the patient to another physician. The physician's own personal feelings cannot change what constitutes good medical practice.

A physician's refusal to disclose information about genetic risks to prospective parents effectively forecloses their informed decision-making. Parents have no other way to learn of such possibilities except through the physician's warnings. Courts must require physicians to conform to a standard of care exercised by other physicians in uncovering indications that prospective parents may be at genetic risk and so suggest they get additional testing and counselling.

Actionable negligence can also occur after the parents have been told their child will be born with defects. If the parents specifically request an abortion and the physician refuses to perform the abortion or refuses to refer the parents to a physician who will, this may give rise

to an action in wrongful birth.[136]

Despite the various factual contexts in which wrongful birth claims can arise, a common theme in such claims is that but for the negligence of the physician, a child would not have been born. To bring a cause of action in tort, the plaintiff must show that the defendant physician's negligence proximately caused his or her injury. As discussed, the essence of the allegation is not that the defendant's conduct damaged the normal fetus or caused the genetic defects in some way, but rather that the physician's negligence deprived the plaintiff parents of the information necessary to their decision whether or not to avoid the birth of the defective child. In other words, the plaintiffs argue that had they known their child would be defective, they would have avoided the birth through abortion or sterilization.

The injury complained of in a wrongful birth action is the birth of a deformed child. Inextricably linked with this is the recognition that the parental right to avoid giving birth to a defective child is a recognition that the birth of a defective child is an actionable injury. It is fairly common ground today that the birth of a genetically defective child is no longer accepted as a tragedy which could not have been prevented. As we have seen, the increased understanding of the causes of genetic defects along with advances in prenatal diagnoses have made possible the detection of abnormalities before birth. These two factors together with a growing legal acceptance of birth prevention methods have fostered prenatal expectations for healthy children. The American courts have held that establishing proximate case and injury is not a problem in these cases as long as the plaintiffs show that had the physicians not been negligent, they would have aborted their child or avoided conceiving it in the first place.[137]

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[136] Stewart v Long Island College Hospital, 30 N.Y. 3d 695, 283 N.E. 2d 616, 332 N.Y.S. 2d 640 (1972).

[137] See, Blake v Cruz, 108 Idaho 253, 698 P. 2d 315 (1984).

The burden placed upon the physician in tort is not unreasonable given the present state of medical knowledge concerning genetically caused birth defects and the use of tests to avoid such defects. In fact, "[t]he courts would be indulging in a dangerous precedent if they provided a blanket immunization for physicians in the case of their failure to advise parents of the prospects of giving birth to a deformed child. The burden on the medical profession in taking a genealogical history, administering simple, effective tests to determine if there are defects in the fetus and then informing the parents of such possible defects...is not any more unreasonable than the burden placed upon physicians to use reasonable care in delivering a child or informing patients of the risks of surgical procedures."[138] Thus the courts have held that general principles of tort law require that the physician who negligently deprives a mother of the choice whether to continue a pregnancy or to become pregnant at all "make amends for the damages which he has proximately caused. Any other ruling would in effect immunize from liability those in the medical field providing inadequate guidance to persons who would choose to exercise their right to abort a fetus, which, if born, would suffer from genetic defects."[139] As now viewed, "wrongful birth claims [are] a logical and necessary development"[140] in tort law designed to protect the rights of the parents.

F. Preconception Negligence

The preconception claim maintains that following a lack of medical information as to the genetic or other medical risks of conception, or following incorrect information, the couple conceived a child later born with defects. The plaintiffs contend that but for the defendant's

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[138] Birnbaum and Rheingold, Annual Survey - Torts, 28 Syracuse L. Rev. 525, 564 (1977).

[139] Berman v Allan, 80 N.J. 421, 404 A. 2d 81, 14 (1979).

[140] Harbeson v Parke-Davis Inc., 98 Wash. 2d at 467, 656 P.2d 483, 488 (1983).

negligence they would never have conceived at all.

While there is no legislation or jurisprudence on point in Canada, it is submitted that the time factor for tortious conduct should extend not only to any time after conception but also to any time prior to conception if resulting injury and causation can be proved. However, as said previously, the fact that the child is not even in existence at the time of the conduct complained of raises the question of the remoteness of damage and of whether a duty can be owed to someone not even in existence at the time of the injury to the parents.

Although the scope for detection or prediction of fetal abnormality is much more limited prior to conception, given that no fetus exists and consequently tests such as amniocentesis cannot be performed, there is still a duty to advise a patient of a risk that fetal defects may exist whether that advice is sought prior to or after conception.

Support for this proposition is found in Park v Chessin.[141] The parents in Park v Chessin had produced one child who died of polycystic kidney disease shortly after birth.[142] They alleged that in response to their inquiry the defendant physicians informed the plaintiffs that "...inasmuch a as polycystic kidney disease was not hereditary, the chances of their conceiving a second child afflicted with the disease were practically nil."[143] Thereafter a second child was born to the Parks, also suffering from polycystic kidney disease. The parents alleged that the defendants failed to perform tests to ascertain the genetic makeup of the mother and father so as to judge the possibility of any future deformed child. The parents further alleged that, had they

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[141] 60 A.D. 80, 400 N.Y.S. 2d 110 (1977), modified sub nom Becker v Schwartz, 46 N.Y. 2d 401, 386 N.E. 2d 807, 413 N.Y. 2d 895 (1978).

[142] Polycystic disease of the kidneys is congenital, may be transmitted by either parent, and probably represents the result of a dominant gene. Stedmans Medical Dictionary 1382 (4th unabr. lawyer's ed. w Dornette 1976) at 745.

[143] 46 N.Y 2d at 407, 386 N.E. 2d 807, 43 N.Y.S. 2d at 902 (1978).

been accurately informed of the chances that a future child would suffer from the disease, they would not have conceived a second child. The parents' cause of action was upheld by the Appellate division of the New York Supreme Court.

In this case, the plaintiff parents had sought the advice of their physician for the specific purpose of obtaining advice with regard to the risk of fetal abnormality. The physician's breach of duty lay in giving negligent advice as to the extent of that risk. But is the physician under a duty to advise his patient, prior to conception, on matters relating to the risk of fetal abnormality, even though the patient has not consulted him with a view to receiving this advice? It is submitted that even where the plaintiff has not requested the physician's advice on the specific question of future pregnancies, the physician would still be under a duty, after the birth of the first child, to inform the parents of the hereditary nature of the disorder and the consequent risk to subsequent children.

Schroeder v Perkel,[144] lends support for this proposition. Mr. and Mrs. Schroeder alleged that the defendant's negligent failure to diagnose their four year old child's illness (cystic fibrosis)[145] denied them the right to make an informed decision as to whether they should conceive a second child. When the correct diagnosis was finally made Mrs. Schroeder was eight months pregnant with her second child, who shortly after his birth, was also diagnosed as having cystic fibrosis. The court reasoned that the defendant's duty extended from the patient to the immediate family; and the defendant's failure to diagnose the parents as carriers of cystic fibrosis was a breach of that duty; and that the defendant's breach could foreseeably result in the parents

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[144] 87 N.J. 53, 432 A. 2d 834 (1981).

[145] Cystic fibrosis is a common fatal genetic disease. Once the disorder is diagnosed in a child, it is determined that both parents are carriers. The probability that future children will be carriers is 50% and the probability that their children will be afflicted with the disease is 25%. Merck, Manual of Diagnosis and Therapy, 1011 (13th Ed. 1977).

conceiving a second child suffering from cystic fibrosis, thereby necessitating additional expenses.[146]

It is submitted that simply because a patient consults her physician on a matter unrelated to pregnancy does not relieve him from giving such advice in certain circumstances. Certainly, where a physician is consulted by a woman on a matter unrelated to pregnancy, but in the course of taking a medical history he discovers that the patient may be at risk of conceiving a baby with defects, the physician must inform the patient of that risk. For example, if a patient actively seeks genetic diagnosis because of advanced maternal age for childbearing, or because of fear of Tay Sachs disease among Ashkenazi Jews, of sickle - cell anemia among the black population, or thalassemia among the Mediterranean population, the physician owes a duty of care to that patient to provide information of genetic testing, the risks of the test to the patient (and perhaps to the fetus), the risk of false results, and an indication why a test is advisabe. If a physician has responsibility for a member of such population particularly prone to such genetic condition in offspring who does not seek advice, a positive duty may arise to advise about the prudence of seeking counseling, and of risk to offspring. Certain indications such as reproductive history or genetic status of a sibling or parent may indicate the need to advise diagnosis and testing.

In Canada, since the parents alleging such preconception occurrences do not run into conflict with the abortion law, because of the high standard of care demanded of specialists, and the recent developments in regard to the patient's right to be fully informed, there exists a duty on the physician to advise patients prior to conception where their medical history indicates that they are in a high risk group. One Canadian jurist writes:

> "[t]he legal interests of the parents in avoiding the emotional distress of having a defective child, and the additional costs involved in coping with such a child are...compensable under

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[146] See also Gallagher v. Duke University, 852 F. 2d 773 (1988).

> existing Canadian law, and provide a strong incentive to genetic counselling of prospective parents."[147]

It has not been established that the common law professional standard of care requires a physician to investigate the genetic history of every patient of childbearing age. Rather it is suggested that a physician may be liable if he failed to inform the parents of the possibility of their bearing a defective child when he knew or should have known that his patient was at risk, even where that information was not specifically sought out by the patient. This expansion of the duties of the physician would seem to be the present trend as shown in Shroeder v Perkel.[148] The full implications of these added responsibilities in the field of prenatal diagnosis and genetic counselling remain to be clarified.

IV. DAMAGES AND THE PUBLIC POLICY DEBATE

A. Introduction

Although the wrongful birth action appears to fit neatly and easily into a tort context, (duty, breach, proximate cause and ostensible damage), the underlying issues are not so simple and the courts are not agreed on the question of whether damage in fact exists and, if so, what the measure of damage should be. The formulations of awards for wrongful birth are as diverse as the rationales for allowing or denying recovery. Indeed, "the question of damages has presented a difficult and troublesome problem to the courts that have considered wrongful birth claims, with that difficulty engendering widely divergent approaches..."[149] This divergence of views has resulted from the fact that inherent in a wrongful birth action are sensitive issues. These concern procreation, contraception, abortion, the idea that injury can arise out of the birth

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[147] B.M. Dickens, "Medio-Legal Aspects of Family Law" (1979), p. 64.

[148] Supra note 144.

[149] Phillips II, 508 F. Supp. 544, 551 (D.S.C. 1981).

of a baby, and the varying judicial perceptions of family relationships and responsibilities. They require the court to evaluate not only the law but "morals, medicine and society."[150] The issues raised in the wrongful birth cases also involve a delicate balancing of several goals which are difficult to harmonize - the recognition of the value of human life, a respect for the individual's decision to limit procreation, a concern for the welfare of the infant, a desire to compensate the plaintiff adequately without either causing unjust enrichment or placing a disproportionate burden on the defendant physician, and finally an interest in the promotion of high standards of professional medical treatment.

As compensation for their injury, the wrongful birth plaintiffs demand damages for:

(1) the pecuniary expenses associated with the pregnancy and birth;

(2) the mental pain and suffering associated with the pregnancy and birth;

(3) the loss of consortium and interference with established family relations:

(4) the costs of raising the child - parents of a child suffering with birth defects demand additional damages for medical care and other expenses peculiar to raising a handicapped child;[151]

(5) the mental pain and suffering associated with rearing a child afflicted with birth defects.[152]

Claims for the first three of these items of damages have been uniformly recognized and

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[150] Schroeder v Perkel, 87 N.J. at 676-68, 432 A. 2d at 841 (1981).

[151] Jacobs v Theimer, 519 S.W. 2d 846 (Tex. 1975) (damages limited to expenses reasonably necessary for the care and treatment of the child's physical condition); Robak v U.S., 658 F. 2d 471, 478 (7th Cir. 1961) (damages limited to expenses reasonably necessary for the care and treatment of the child's physical condition).

[152] Naccash v Burger, 223 Va. 406, 411, 290 S.E. 2d 825, 828 1962 (plaintiffs sued physician for emotional pain suffered as a result of Tay-Sachs afflicted child's worsening condition).

have raised little controversy. More problematic however are the post - birth costs; the costs of raising the child and the emotional distress that may be suffered in rearing that child.

The early wrongful birth cases struggled with the plea that due to the absence of a legally recognized injury (the birth of a child) or for reasons of public policy, the law should refrain from upholding the cause of action. Thus the issue in the early wrongful birth cases was not whether particular damages should be recoverable, but whether the parents of the child had suffered any damage at all. While the courts may be seen to be moving, albeit with occasional reluctance, to accepting the position that the birth of a child may be a "damage" to the parents, the issues involved in this type of litigation continue to be burdened with public policy concerns resulting in decisions with no consistent results. This section will discuss the question of assessment of damages and the public policy factors relied upon by the courts even today to deny recovery in the wrongful birth action.

B. The Public Policy Issues

In the wrongful birth context, many American courts have refused to recognize wrongful birth claims as a matter of public policy. Occasionally, a court will simply cite public policy considerations with little or no justification.[153] Most of the courts include one or more of the following arguments either to 2explain or to buttress their public policy stance.

(1) The Birth of a Healthy Child is Not an Injury

The most basic justification for denying child rearing costs is that the birth and rearing of a normal, healthy child cannot constitute an "injury" to the parents. The cornerstone of this denial is the idea that a normal, healthy life should not be the basis for a compensable wrong. Under this theory, the birth of any child is, by definition, a "blessing." As such, it constitutes

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[153] Schork v Huber, 648 S.W. 2d 861, 863 (Ky. 1983).

a benefit to the parents rather than a detriment. Consequently, there can be no recovery.[154]

The same courts who employ this theory to deny recovery however, will allow other damages flowing from the same negligent act to be recovered. This apparently illogical position was most obviously stated in Macomber v Dillman,[155] where the court held:

> "[A] parent cannot be said to have been damaged or injured by the birth and rearing of a healthy, normal child. Accordingly, we limit the recovery of damages, where applicable, to the hospital and medical expenses incurred for the sterilization procedures and pregnancy, the pain and suffering connected with the pregnancy and the loss of earnings by the mother during that time."[156]

In Kingsbury v Smith[157] the court held that "the elements of damages that may be recovered are those that are a direct and probably result of the defendant's negligence, except that recovery for the costs of raising a child are not permitted."

In a strong dissenting opinion by Scolnik, J. in Macomber v Dillman[158] he stated:

> "Although I concur that a cause of action exists for medical malpractice in the performance of a tubal ligation, I am unable to agree with the Court's judicially imposed limitation of the damages that are recoverable. The Court reasons that in no circumstances can a parent be said to have been harmed by the birth and rearing of a healthy, normal child. This rationale, however, is not only plainly inconsistent with the Court's recognition of a cause of action but also totally ignores the fact that many individuals undergo sterilization for the very purpose of avoiding such a birth. Moreover, the Court's opinion is an

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[154] See e.g. Public Health Trust v Brown, 388 S. 2d 1084, 1085 (Fla. App. 1980); Cockrum v Baumgartner 95 Ill. 2d 193, 447 N.E. 2d 385, 388 (1983); Fassoulas v Ramey, 450 So. 2d 822, 823 (Fla. 1984) ("[A] parent cannot be said to have been damaged by the birth and rearing of a normal, healthy child").

[155] 585 A.2d 810 (Me. 1986).

[156] Id at 813.

[157] 122 N.H. 237, 244, 442 A.2d 1003, 1006 (1982).

[158] 505 A.2d 810 (Me. 1986).

> unwarranted departure from the fundamental principle of tort law that once a breach of duty has been established, the tortfeasor is liable for all foreseeable damages that proximately result from his acts... By finding that a parent is not harmed by the birth of a healthy child, the Court's opinion is logically inconsistent. In the first part of its opinion the Court applies traditional tort principles to recognize a cause of action for negligence resulting in an unwanted conception and subsequent birth of a normal, healthy child...[T]he Court has in effect concluded that the birth of a normal child is recognized as an injury that is directly attributable to the health care provider's negligence. In the second part of its opinion, however, the Court states that based on unarticulated reasons of public policy, the birth of a normal healthy child cannot be said to constitute an injury to the parents. As a result, the Court limits the damages that a parent can recover to the hospital and medical expenses incurred for the sterilization procedure and the pregnancy, the pain and suffering connected with the pregnancy and the loss of earnings sustained by the mother during that time. If however, the birth of a child does not constitute an injury, no basis exists for any award of damages. Damages for "pain and suffering" and medical expenses incidental to child birth cannot be recoverable if the birth itself is not an injury. Similarly, if the parent is to be compensated for the loss of earnings that result from the pregnancy, should she not equally be compensated for the identical loss following the birth of the child? The Court's opinion fails to reconcile these obvious inconsistencies."

In conclusion, Scolnik, J. states:

> "The majority, I submit, has failed to observe the caveat that public policy "...is a very unruly horse, and when once you get astride it, you never know where it will carry you. It may lead you from the sound law."[159]

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[159] Public Health Trust v Brown, 388 So. 2d 1084, 1087 (Fla. dist. Ct. App. 1980) Pearson, J., dissenting) (quoting Richard v Mellish, 2 Bing. 229, 252 (1984), rev. denied 399 So. 2d 1140 (Fla. 1981); see also Wilbur v Kerr, 257 Ark. 239, 245, 628 S.W. 2d 568, 572 (1982) (Dudley J., dissenting ("I would not invoke the doctrine of public policy when there is no logical sense of conscience. While, in this case, I find many good policy reasons to support the view of the majority, I find an equal number of policy reasons against the view. Therefore I would not invoke the doctrine, instead, I would follow the common law."); Beardsley v Wierdsma, 650 P. 2d 288, 293 (Wyo. 1982) (Rose, C.J. specially concurring) ("The fact that this particular claim involves some moralistic and social overtones having to do with contraception and childbirth should not be permitted to become the handmaiden for the destruction of our established notions of tort law.").

Peter Pain J. in Thake v Maurice[160] took the view that a judge of first instance should hesitate long before attempting to ride this unruly horse in a new direction. In approaching the question of public policy he firmly put sentiment to one side. He states, "[a] healthy baby is so lovely a creature that I can well understand the reaction of one who asks: how could its birth possibly give rise to an action for damages? But every baby has a belly to be filled and a body to be clothed. The law relating to damages is concerned with reparation in money terms and this is what is needed for the maintenance of a baby."[161]

Even though the use of the "blessings" theory clearly leads to absurd results, it continues to expounded by the American courts. In Goforth v Medical Associates Inc.,[162] decided in 1988, the court held ultimately that "under the public policy of this state, a parent cannot be said to be damaged by the birth of a normal, healthy child, and the parent may not recover damages because of the birth of such a child."

(2) The Benefits of the Birth Always Outweigh the Damages

Closely allied with the argument that there are no damages from the birth of a healthy child, is the argument that the benefits always outweigh the costs of child rearing. This argument, labelled by some commentators as the "overriding benefits theory" is a public policy argument that constitutes a complete bar to recovery. Under this principle, the benefits that accrue to an individual by virtue of parenthood always, as a matter of law, outweigh the cost of

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[160] [1985] 2 W.L.R. 215 (Q.B.) rev'd in part [1986] 1 All E.R. 497 (C.A.).

[161] Supra note 160.

[162] 755 P.2d 678 (Okl.1988).

raising the child.[163] A healthy child, whether planned or unplanned, confers upon the parents certain intangible, emotional assets such as joy, companionship, and affection. While these benefits are incalculable, they are deemed to always outweigh child rearing cost.[164]

A minority of the American cases have adopted this view. In Terrell v Garcia[165] the court rejected the parents' wrongful birth claim and concluded that:

> "[T]he satisfaction, joy and companionship which normal parents have in rearing a child make such economic loss worthwhile. These intangible benefits, while impossible to value in dollars and cents, are undoubtedly the things that make life worthwhile. Who can place a price tag on a child's smile or the parents' pride in a child's achievement? Though we may consider the economic point of view only, a child remains some security for the parents' old age. Rather than attempt to value these intangible benefits, our courts have simply determined that public sentiment recognizes that these benefits to the parents outweigh their economic loss in rearing and educating a healthy, normal child."[166]

The view that society should consider every birth of a child a "blessed event" is unacceptable for many reasons. Even if it is assumed for the sake of argument that the cost-benefit equation will generally favour benefits, there is no reason to declare that in every case the benefits will exceed the costs as a matter of law. In many cases, "the birth of a child may be a catastrophe not only for the parents and the child itself but for previously born siblings."[167] This is especially true where the parents have sought sterilization for economic reasons or to prevent the birth of a genetically defective baby. Today it is difficult to join in the declaration that, as a matter of law, the birth of a healthy child will result in benefits exceeding any damages

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[163] See e.g. Mason v Western Pa. Hosp., 499 Pa. 484, 486, 453 A.2d 974, 976 (1982); Terrell v Garcia, 496 S.W. 2d 124, 128 (Tex. Civ. App. 1973); Fassoulas v Ramey, 450 S. 2d 822, 824 (Fla. 1984).

[164] See, Beardsley v Wierdsma, 650 P. 2d 288, 290-91 (Wyo. 1982).

[165] 496 S.W. 2d 124 (Tex. Civ. App. 1973).

[166] Id at 128.

[167] 496 S.W. 2d 124 (Tex. Civ. App. 1973) at 131 (Codena, J., dissenting).

which would be incurred in raising the child. There is no basis for the assumption that all plaintiffs experience joy and satisfaction from raising an unwanted child. It is true that most parents will love and care for the child once it is born but one cannot ignore the fact that some parents might have suffered serious economic or emotional damage and that often parents will feel they would have been happier without the "blessing" they took steps to prevent. As was stated by one commentator:

> "The fact that the parents love the child and feel responsible for its welfare once it has been born does not mean that they would not have been generally happier without it or that its birth constitutes a "blessed event" in every way. An inability to provide for and educate their previously born children as they had anticipated or to maintain a higher standard of living once contemplated may be a constant source of sorrow for which the joy derived from the newest child compensates only inadequately."[168]

In such cases it seems only equitable that a court should assign to the jury the task of weighing the facts and circumstances. This would provide a reasoned factual approach to the determination of whether relief should be granted for consequences that the plaintiff sought to avoid. As the court in Sherlock v Stillwater Clinic[169] observed, the costs of raising an unanticipated or unwanted child are "a direct financial injury to the parents, no different in immediate effect than the medical expenses resulting from the wrongful conception and birth of the child."[170]

Another fallacy inherent in this argument is its apparent failure to distinguish between those persons who voluntarily undertake parenthood and those who have it imposed on them. It seems quite inappropriate for the court, rather than the individual concerned, to decide what

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[168] Note, Elective Sterilization, 113 U. PA. L. Rev. 415, 435 n.79 (1965).

[169] 260 N.W. 2d 169 (Minn. 1977).

[170] Id. at 175.

will be a "benefit" to that individual, and particularly so in actions where the individual has made a conscious decision not to receive the benefit and has taken steps to implement that decision. The individuals in the wrongful birth cases have already decided that the birth of healthy baby and most certainly an unhealthy baby would be a detriment to them. As a dissenting judge in Public Health Trust v Brown[171] noted, "[t]here 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."[172]

Whether or not the birth of a child will provide any benefit to the parents would appear to be an entirely personal decision, and will depend on the individual circumstances. In Thake v Maurice,[173] Peter Pain J. found that the plaintiff parents had reconciled themselves to an unwelcome conception and had accepted the child with joy. But, he stated, the fact that the child had been such a joy to them was largely of their own making. If they had been reluctant to accept the child and grudging in the sacrifices they had to make for her support, then they might have had little joy. Pain J. concluded by saying that while the parents may now experience joy at the birth of the child, the claim for its support and for the costs of the birth still remain.

The unacceptable consequences of adopting the inflexible position than an award of damages for the birth of a healthy child is against pubic policy is illustrated by one commentator's comment that "[n]o court would be moved by the argument coming from a putative father that he should not be required to provide financial support for the child he has

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[171] 388 So. 2d 1084 per Pearson, J. (dissenting) (Fla. Dist. Ct. App., 1980).

[172] Id at 1087.

[173] Supra note 150.

fathered on the grounds that he has bestowed on the mother a priceless blessing."[174] Further, it seems quite extraordinary for a court to say that a child born as a result of rape, for example, must necessarily prove to be a benefit to the rape victim, particularly if the baby is defective or if the victim was a minor or was otherwise inadequately equipped to cope with the raising of the child.

It has been successfully argued in some American cases that for a court to adopt the attitude that a birth is, as a matter of law, an overriding benefit is in fact not in tune with public policy, given the increasing availability, use and encouragement of family planning methods. Moreover, the fact that the courts in the United States have granted contraceptive measures and non-therapeutic abortion constitutional protection is significant. The situation in Canada may be somewhat different in this regard, given that our abortion laws at this time are nonexistent. However, the question to be asked really is whether there are sound policy reasons for denying complete negligence damages in a case of wrongful birth and the answer to that question must be no.

Despite the numerous flaws that exist in the "overriding benefits theory" some courts have, nonetheless, persisted in their use of it to reject wrongful birth claims.

Many courts[175] have erroneously concluded that the "overriding benefits theory" is a rule of damages which exemplifies the "benefits" rule set forth by the Restatement (Second) of Torts.[176] The Restatement states that:

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[174] J.E. Bickenbach, "Damages for Wrongful Conception: Doiron v Orr," (1980) 18 U.W. Ont L. Rev. 493 at 498.

[175] See e.g., Terrell v Garcia, 496 S.W. 2d 124 (Tex. Civ App. 1973), cert denied, 415 U.S. 927 (1974); Wilmington Medical Centre v Coleman, 298 A, 2d 320 (Del. 1972); Coleman v Garrison, 327 A. 2d 757 (Del. Super. Ct. 1974), aff'd, 349 A. 2d 8 (Del. 1975); Custudio v Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).

[176] Restatement (Second) of Torts 920 (1977).

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

It is important to note here that the "benefits" rule of the Restatement is a mitigation of damages rule, while the "overriding benefits theory" is a public policy argument which results in a complete bar to recovery. Confusion of these principles is responsible for various errors and differing results in the courts. The effect of the Restatement will be discussed further and in more detail in this thesis when the assessment of damages question is considered.[177]

(3) Child Rearing Damages are out of Proportion to the Negligent Act.

As a corollary to the "overriding benefits theory," many courts have held that since the existence of a child is in any event a benefit, then the recovery of the ordinary expenses of rearing the child would necessarily constitute a windfall to the parents.[178] Likewise, these courts say that such recovery would place a potentially unreasonable burden on the negligent physician. These courts question the wisdom of allowing recovery of child rearing costs on the grounds that it may be unrealistic to require potential defendants to insure themselves against the possibility of a verdict of such magnitude.[179]

This reasoning has been rejected, even by opponents of child rearing damages. The feeling is that physicians should not be immunized from the reasonably foreseeable damages, such

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[177] Infra p. 83.

[178] Kingsbury v Smith, 122 N.H. at 243, 442 A. 2d at 1006 (1982); Rieck v Medical Protective Co., at 517, 219 N.W. 2d at 244 (1974).

[179] See e.g. Sorkin v Lee, 78 A.D. 2d 180, 183, 434 N.Y.S. 2d 300, 303 (1980); Kingsbury v Smith, at 243, 442 A. 2d at 1006 (1982).

as the expenses of raising the child, "simply because it may be burdensome."[180]

Where child rearing costs have been awarded to plaintiffs in a wrongful birth suit, it can be readily seen that these awards in no way compare to awards given to other plaintiffs suffering injuries involving permanent grave change. For example, in Morris v Frudenfeld,[181] child rearing and educational damages were reported to be $90,000. In Ochs v Borelli[182] they were $56,375. In Hartke v McKelway[183] such damages were $200,000. In Clapham v Yanga[184] child rearing damages were reported at $57,000. Finally, in Sherlock v Stillwater Clinic[185] an award including child rearing costs amounted to $19,500. In contrast to these figures, a 1985 study of damages awarded during 1978 for serious injuries involving permanent damage reported an average award of more than $349,000.[186]

(4) Such Awards Will Promote Fraudulent Claims

An additional basis upon which courts have justified the denial of child rearing costs per se is that such an award will promote fraudulent claims. The court in Rieck v Medical Protective Co.,[187] questioned the motives of parents who brought an action against a clinic for the negligent failure of one of its obstetricians to determine that the mother was pregnant soon

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[180] Schork v Huber, 646 S.W. 2d 862, 867 (Ky. 1983) (Leibson, J., dissenting).

[181] 135 Cal. App. 3d 23, 185 Cal Rptr. 76 (1982).

[182] 187 Conn. 253, 445 A. 2d 883 (1982).

[183] 526 F. Supp. 97 (D.C. Dist. Ct. 1981).

[184] 102 Mich. App. 47, 300 N.W. 2d 727 (1980).

[185] 260 N.W. 2d 169 (Minn. 1977).

[186] See P.M. DANZON, MEDICAL MALPRACTICE (1985).

[187] 64 Wis. 2d 514, 219 N.W. 2d 242 (1974).

enough to permit an abortion. Holding that the costs of raising the child were not reasonable, the court suggested that this was a situation particularly susceptible to fraudulent schemes by parents who might seize the opportunity to claim, contrary to their real intentions, that it had been their intent all along to avoid a pregnancy. The court explained:

> "[I]f the door were opened to recovery under such allegations and such subjective testimony as to state of mind or intention, the temptations 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...[T]o 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."[188]

It is submitted however, that this fear of fraudulent claims is not reason enough to disallow child rearing damages altogether. Such a fear should be and has been rejected by other courts. For example, the court in McKernan v Aasheim[189] emphasized its faith in the ability of the judicial process to distinguish fraudulent claims from legitimate ones. The court stated, "we will not presuppose that courts are so ineffectual and the jury system so imperfect that fraudulent claims cannot be distinguished from the legitimate."[190] Another court observed that "[u]ndoubtedly, the system will not decide each case correctly in this field, just as it does not in any field, but here, as in other areas of tort law, we think it better to adopt a rule which will enable courts to strive for justice in all cases rather than to rely upon one which will ensure injustice in many."[191]

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[188] Id.

[189] 102 Wash. 2d 411, 687 P. 2d 850 (1984).

[190] Id. at 854.

[191] University of Arizona v Superior Court, 136 Ariz. 579, 583, 667 P. 2d 1294, 1298 (Ariz. 1983).

(5) The Emotional Bastard Theory

One of the policy reasons most frequently put forward in arguments against an award of damages is a concern regarding the possibly detrimental psychological effects that may result when the child one day learns that he or she was unplanned and unwanted, to the extent that its very existence was the subject of legal action. This consideration was clearly very influential in the case of Udale v Bloomsbury Area Health Authority.[192] One of the reasons for refusing the claim was that "[i]t is highly undesirable that any child should learn that a court has publicly declared his life or birth to be a mistake - a disaster even- and that he or she is unwanted or rejected. Such pronouncements would disrupt families and weaken the structure of society."[193] According to some courts,[194] including the court in Udale, the effect of what may be perceived by the child as a public declaration that it is unwanted, by a judicial award of monetary compensation for the very fact of it having been born, is viewed as potentially so serious as to automatically outweigh any pecuniary benefit thereby gained by the parents. In the Canadian case of Doiron v Orr,[195] Garrett, J. stated:

> "[p]ersonally, I find this approach to a matter of this kind which deals with human life, the happiness of the child, the effect upon its thinking, upon its mind when it realizes that there has been as case of this kind, that it is an unwanted mistake, and that its rearing is being paid for by someone other than its parents, is just simply grotesque."[196]

The irony of this argument is that by insisting that an award of damages may not be in

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[192] Q.B. Division [1983] 1 W.L.R. 1098.

[193] [1983] 1 W.L.R. 1098 at 1109.

[194] Public Health Trust v Brown, 388 So. 2d 1084 at 1086 (Fla. 3d Dist. Ct. App. 1980); Wilbur v Kerr, 275 Ark. 239 at 241, 628 S.W. 2d 568 at 570 (1982); Coleman v Garrison, 327 A. 2d 757 (Del Supr. Ct. 1974) aff'd 349 A. 2d 8 (Del 1975).

[195] (1978) 86 D.L.R. (3d) 719.

[196] Id. at 722-723.

the best interests of the child because of potential resultant psychological harm, the court may in fact be helping to bring about exactly the result that it is seeking to avoid. The court in Custudio v Bauer[197] reasoned that "an "unwanted" child will probably be better accepted by parents and siblings when he brings with him the wherewithal to provide his own support."[198] In this often cited case, the court emphasized that the damages being awarded were not a payment to the parents for having to tolerate the unexpected child, "but to replenish the family exchequer so that the new arrival will not deprive the other family members of the family of what was planned as their just share of family income."[199]

It is probable that any harm suffered will not be greater than that experienced by a child who learns that his biological parents had placed it for adoption. Possibly the problem could be avoided by keeping the names of the parties confidential as in Anonymous v Hospital.[200] In any event, psychological damage, if it exists, will certainly be less harmful than the hardship of growing up ill-clothed, ill-fed, and ill-educated. By the time the child does learn of the suit, it is hoped that he or she will be mature enough to distinguish between an unplanned and an unwanted child, especially if the parents have continuously provided the child with a loving home environment. The court in Thake v Maurice[201] held that what matters most to the child is how it is received when it enters life. If the child is surrounded by a happy family life, it is this that must make him or her feel wanted and not rejected. The court felt that by the time the child comes to consider the judgment, he or she will welcome it as a means of having made life easier

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[197] 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).

[198] Id. at 325, 59 Cal. Rptr. 463 at 477 (1967).

[199] 59 Cal. Rptr. 463 at 476-77 (Dist. Ct. App. 1967).

[200] 33 Conn. Supp. 126, 366 A. 2d 204 (1976).

[201] Supra note 160.

for his or his family.

Ultimately, the "emotional bastard" theory fails because it is based on the incorrect assumption that the parents are being compensated for the birth of the child. In fact, parents are being compensated for the expenses caused by the physician's negligence.[202] In reality, it is the economic and/or the psychological burden which is "unwanted" and which the parents are trying to alleviate. The unplanned and unwanted child is not the item of damage in the wrongful birth suit - the value of the child is not at issue, but rather the costs and benefits that result from his birth.[203]

It could be further argued that the very fact that the parents have chosen not to pursue other possible alternatives, such as abortion or adoption, should afford some indication to the child who later learns of the legal action that, although it may have been unwanted at the time of conception or birth, it does not necessarily follow that it has remained unwanted since its birth. Indeed the point is well made that "[i]t is ironic that the "emotional bastard" argument is made...when it is precisely the parents' insistence upon raising the child within their family which gives rise to the...action."[204]

C. Public Policy Arguments used Specifically in the Abortion Context

1. One public policy argument prohibiting the wrongful birth action in the abortion context is that the law must protect the conscience of the physician who is morally or religiously oposed to abortion. By removing the duty to provide patients with information that may assist them in

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[202] See Ziemba v Sternberg, 45 App. Div. 2d at 234, 357 N.Y.S. 2d at 270 (1974) (Cardmone, J., dissenting)

[203] Note, "Judicial Limitations on Damages Recoverable for the Wrongful Birth of a Healthy Infant" (1982) 68 Va. L. Rev. 1311 at 1317.

[204] Sherlock v Stillwater Clinic 260 N.W. 2d 169 (Minn., 1977).

choosing abortion, it is asserted that this eliminates pressure on doctors to participate in decisions to which they are opposed.[205]

But again, the asserted justification is without merit. The duty enforced through wrongful birth actions does not in any way effect the right of a physician to refuse on moral or religious grounds to perform an abortion.[206] The physician need not even perform prenatal diagnostic tests nor provide genetic counselling. All that is required of the competent physician is that, in conformity with the standard of care, he inform a woman if she is at an increased risk in having an abnormal child.[207]

Once a physician has so informed a patient, he has the minimal duty to refer the patient, if she wishes, to another doctor for further testing or advice. Such duties do not involve issues of conscience because they do not require a physician to counsel or perform abortions, or even to perform the tests that indicate the condition of the fetus. The physician's role in all of this is to inform the patient on the basis of his expert knowledge; it is then for the patient to "assess the overall effects of the medical condition and possible treatments in light of his or her own

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[205] See, e.g., Note, "Wrongful Birth and Wrongful Life: Analysis of the Causes of Action and the Impact of Utah's Statutory Breakwater," 1984 UTAH L. REV. 833, 857-58 & n. 152 (1984) (reporting that "one purpose of the [Utah wrongful birth] Act is to codify...the rights of individuals to refuse to provide, perform or undergo non-therapeutic abortion or contraceptive sterilization operations that contradict the individual's religious beliefs or moral convictions").

[206] See, Harbeson v Parke-Davis, Inc., 98 Wash. 2d 460, 472-73, 656 P. 2d 483, 491 (1983), aff'd 746 F. 2d 517 (9th Cir. 1984) (providing in part that receipt of federal funds by an individual does not authorize the state to require the recipient to perform or assist in the performance of abortions where such would be contrary to the individual's religious or moral convictions).

[207] See, Kelly, "Genetic Counselling and Tort Liability," in GENETIC COUNSELLING, THE CHURCH AND THE LAW 213-23 (G. Atkinson and A. Moraczowski eds. 1980).

particular goals and values."[208]

2. A further argument used to deny the recognition of the cause of action is that wrongful birth suits will provide an inappropriate incentive for physicians to practice "defensive medicine." The theory behind what physicians term defensive medicine is that physicians will engage in certain conduct because it is dictated by the need to avoid malpractice liability, not by their professional judgment of the best course to follow. The theory is that wrongful birth actions will force physicians anxious to avoid malpractice liability "to offer to each obstetrical patient virtually every known test or procedure that might provide information concerning the fetus' characteristics or qualities, regardless of whether the test or procedure is medically necessary for either the fetus or the mother."[209] Such increased testing is objectionable, it is argued, because it will result in more abortions.

The availability of the wrongful birth action no more encourages physicians to perform medically unnecessary tests than does the possibility of any other malpractice claim. Although it is apparent that most physicians belive that they must practice defensively and do so, it is not obvious that it is as pervasive as some believe it to be or that it provides the most likely explanation for overuse of technology. Plaintiffs cannot succeed in a wrongful birth action with[illegible] that the physician failed to detect increased fetal risk foreseeable by other competent practitioners. A physician defendant can only be made to answer for the harm caused by his professional acts if they fall outside the bounds of acceptable conduct defined by the physician's peers. Thus, a physician's statement that certain procedures are undertaken "solely for legal reasons" ought to be translated "soley because to do so conforms with the standards set

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[208] PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIOURAL RESEARCH, MAKING HEALTH CARE DECISIONS 39 (1982).

[209] Hickman v Group Health Plan Inc., 396 N.W. 2d 10 (Minn. 1986) (No. 852013) at 33.

by the profession". If physicians as a group really do not believe a particular technique - such as a test like amniocentesis - is appropriate under the circumstances in question, an individual physician would have little to fear in failing to employ it. Thus, a physician's complaint that he feels compelled to engage in pointless practices should be directed at his colleagues rather than at the courts.

3. Proponents of the view that the wrongful birth cause of action should not be allowed in the courtroom contend that there must be a limit of this potentially "far-reaching cause of action." Proponents argue that if a woman is allowed to sue her doctor for failing to disclose the risk of a defect in her unborn fetus because that information is essential to her right to decide whether to bear a child, she may also sue for failing to disclose other fetal characteristics such as sex, that might also have caused her to abort.

The wrongful birth claim, however, is limited, as are all malpractice claims, to situations where there has been a violation of the duty of a physician to provide the accepted standard of competent medical care. Thus, the assertion that misinformation as to the sex of the unborn child will prove to be grounds for a tort action is, as yet, unfounded. It is not accepted medical practice to diagnose the sex of an unborn child unless a woman may carry a sex-linked hereditary disorder or unless she requests the information.[210]

4. Although each of these justifications discussed above is put forth as an independent rationale for disallowing a remedy for wrongful birth actions, the critical element of each is an argument against abortion.

The most frequently stated justification for the prohibition of the wrongful birth action is that such a suit demeans the value of human life; it encourages society to devalue and ostracize

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[210] Doctors may, and commonly do, refuse to perform amniocentesis if it is intended merely to identify the sex of the fetus. Powledge & Fletcher, "Guidelines for the Ethical, Social and Legal Issues in Prenatal Diagnosis," 300 N. Eng J. Med. 168, 170 (1979).

the disabled, and sends an untoward message to those already born who are disabled.

But, the availability of the wrongful birth action does not demean the value of life. The true injury alleged and suffered by the parents in the wrongful birth suit is the denial of their right to exercise their choice in private procreation matters and not the birth or life of the child.

The successful wrongful birth claim actually enhances the dignity, comfort and productivity of the severely handicapped child born as a result of a physician's negligence by allowing the parents to recover compensation for the costs needed to provide for the child's support.

D. Trends in Canada and the United Kingdom

In Canada, the Alberta Supreme Court and the Ontario High Court have adopted the position that an action for the birth or raising of a child born as a result of medical negligence cannot be maintained as it would be against public policy.[211] In those cases the plaintiff mothers had decided to have no more children, they had undergone sterilization operations and they had subsequently given birth to unwanted children. All of these cases were decided prior to 1980. In Cataford v Moreau,[212] a decision of the Quebec Superior Court, the facts were that a surgeon negligently performed a sterilization operation on a woman with 10 children. Four months after the operation she became pregnant and an unwanted child was born. In an action brought by the woman and her husband, the judge held that there should be judgment for the woman and her husband. Dealing with the question of public policy he stated:[213]

> "It is still contrary to public order to grant damages following

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[211] See, Colp v Ringrose, A.S.C. No. 84474, 1976 (unreported); Cryderman v Ringrose, [1978] 3 W.W.R. 481; and Doiron v Orr (1978) 20 O.R. (2d) 71, 86 D.L.R. (3d) (Ont. H.C.)).

[212] 114 D.L.R. (3d) 585 (1978).

[213] Id. at 595.

> the birth of a healthy child, on the ground that the event constitutes a blessing intended by the natural order of things.
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> It is far from certain that the Canadian collectivity and, specifically, the Quebec collectivity still accepts this dogma. Under the rubrics of "family planning" and of "voluntary interruption of pregnancy" a very considerable number of men and women presently resort to various artificial methods in order to limit the number of births. The dramatic decline in the birth rate testifies at once to the social consensus which has been achieved on this subject.
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> It is not for the court to bear a moral judgement upon the situation, all the more because the Criminal Code itself permits therapeutic abortions upon certain conditions. But limiting itself to the legal aspect of the question, the court does not believe itself justified in concluding that the undesired birth of a healthy child, especially in a poor family consisting of 10 living children, constitutes such a happy and normal event that it would be offensive to public order to have attached them to pecuniary compensation in an appropriate case."

The court then concluded that the damages flowing from the negligent operation by the surgeon should include the cost of raising the child. The court then determined that the cost of raising a child would be approximately $1,000 per year. This was given a present value of $8,500. Actuarial evidence before the court showed that the plaintiff would receive $7,500 in social assistance as a result of the birth of the child. The court concluded that the $1,000 shortfall was more than offset by the moral and financial benefits of raising a child.

Dealing with the question of public policy in Thake and another v Maurice,[214] Peter Pain, J. held that it could not be said that the birth of a healthy baby was always a blessing or that it was necessarily against public policy to award damages for the unwanted birth of a healthy child. In Emeh v Kensington and Chelsea and Westminster Area Health Authority,[215] the Court of Appeal upheld that there was no rule of public policy which prevented the plaintiff from

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[214] [1984] 2 All E.R. 513, rev'd in part, [1986] All E.R. 497.

[215] [1984] 3 All E.R. 1044; [1985] QB 2021; [1985] 2 W.L.R. 233.

recovering in full the financial damage sustained by her as the result of the negligent failure to perform the sterilization operation properly regardless of whether the child was healthy or abnormal.

The British Columbia Supreme Court had occasion to deal with the issue in 1986 in Fredette v Wiebe.[216] That was a case where the plaintiff was a single 17 year old high school student when she underwent an abortion in her fifth week of pregnancy performed by the defendant physician. Subsequent to the operation, twins were born to the plaintiff, one of whom had a congenital heart defect. After giving birth, the plaintiff lived alone on welfare for eighteen months, during which time one baby underwent heart surgery.

The plaintiff then met and married her husband and, at the time of the trial of the action for damages for negligence, she was twenty-five and a happy wife and mother of three who was reconciled to the birth of twins.

Taylor J. considered the decisions of the English courts and of the Canadian courts which had dealt with similar situations and he concluded that, despite the fact the plaintiff in this case had become reconciled to having given birth to twins, that did not preclude her from claiming for the extra burden of bearing and caring for them. He assessed the damages at $20,000 noting that the plaintiff could only claim for damages actually suffered, which he concluded would be for the period prior to her marriage.

It is upon these principles that Skipp J. awarded the sum of $ 3.38 million to the plaintiff mother and child in a very recent wrongful birth case in British Columbia.[217] The plaintiff mother consulted the defendant physician, a specialist in obstetrics and gynaecology. He examined the plaintiff and determined that she was pregnant. She received approval from a

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[216] [1986] 5 W.W.R. 222.

[217] Cherry v Borsman, (1990) 75 D.L.R. (4th) 668.

therapeutic abortion committee to have an abortion. An error was made in establishing the gestational age of the fetus, which was actually ten and one half weeks, but the physician employed a procedure to implement the abortion that was ordinarily used for very early abortions. The operation removed a portion of the placenta, the organ that nourished the developing fetus, but not the fetus itself. The plaintiff's general physician suspected that she might still be pregnant because of post operative problems and sent her back to see the defendant. He advised her that she had a mild inflammation which would resolve itself and did not suggest any further pregnancy tests or an ultrasound scan. Eight weeks after the operation, the plaintiff consulted another physician who determined that she was still pregnant. Dr. Borsman then ordered a scan. It was discovered that the plaintiff was indeed still pregnant. However, she was assured by Dr. Borsman that there was little chance of the fetus being damaged by the attempted abortion. The pregnancy, by this time, had progressed beyond the stage at which the adult plaintiff could obtain a legal abortion in Canada. It was under these circumstances that she elected to carry this child to term. Unfortunately, the plaintiff gave birth prematurely to a very severely defective child. Both the child and the mother brought an action against the physician.

In adopting the reasoning of the English Court of Appeal in Emeh, Skipp J. held the defendant physician liable for all the costs associated with the child's birth.[218]

E. The Assessment of Damages

Once the plaintiff has successfully established a claim for wrongful birth, and the court has recognized the claim, the court must then determine what elements of damages are appropriate and how those damages should be measured. The controversial nature of the

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[218] See infra, pages 97 and 98 for a more detailed discussion of the heads of damage under which this award was given.

wrongful birth action becomes apparent when considering the nature of damages sought in the typical suit. As outlined above, damages have been sought under a variety of headings, including: the parents' emotional pain and suffering in watching their congenitally deformed child suffer, medical expenses, support costs, lost wages and loss of consortium. Assuming that the court is willing to allow any or all of these damages, it is readily apparent that some of these damages will be easier to measure than will others. Little difficulty arises in calculating damages in regard to medical expenditures or lost wages. Courts, however, have more difficulty calculating damages for the economic costs of raising and educating the child and the parents' emotional pain and suffering in watching their handicapped child suffer. It is on these two heads of damage that this thesis will focus.

As a general proposition, there are at least three different views on the issue of what damages are recoverable in a wrongful birth suit.[219] The first view is that parents may recover only those damages which occur as a result of pregnancy and birth, and may not recover the cost of rearing the child. Herein, this will be referred to as the "limited damages rule." A second view allows the parents to recover all damages and expenses mentioned above, but also includes the costs of rearing a child. This is often called the "full damage rule." A third view, sometimes called the "offsetting benefits rule," allows the recovery of all damages covered in the above two views, but requires the court to offset the benefits incurred.

(1) The "Limited Damages" Rule

It appears that many of the courts adhering to this rule have expressly limited it to cases

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[219] See, Byrd v Wesley Medical Centre, 237 Kan. 215, 216, 699 P. 2d 459, 461 (1985) (quoting the trial judge).

involving the wrongful birth of a healthy, but unplanned child.[220] To illustrate the rule, the case of Boone v Mullendore[221] will be examined. In this case the court was asked to determine the proper measure of damages in a suit for the wrongful birth of a healthy, but unplanned child. Here, the defendant physician informed the plaintiff mother that she was sterile as a result of surgery performed by the defendant to remove both of the plaintiff's fallopian tubes. Relying on this information, the plaintiff did not use any contraceptives, subsequently became pregnant, and gave birth to a healthy, but unplanned child. Thereafter, the plaintiff mother initiated a suit to recover compensatory damages for medical expenses and support costs. In rejecting the "offsetting benefits rule," the court concluded that once liability is established, damages recoverable by the plaintiffs included: (1) damages for the mental and physical pain and suffering sustained by the mother as a result of the pregnancy; (2) damages for the husband's loss of comfort, companionship, service, and consortium of the wife during pregnancy and immediately after the birth; and (3) medical expenses. The court, however, refused to allow an award of support costs because "[a]ny additional damages would tend to be extremely speculative in nature..."[222]

The courts that deny child rearing costs under this rule have justified their denial on the grounds that child rearing damages are too speculative and uncertain, necessitating prophecy and difficult burdens of proof. The court in Sorkin v Lee[223] found damages for the normal

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[220] Boone v Mullendore, 416 So. 2d 718 (Ala. 1982) at 721.

[221] 416 So. 2d 718 (Ala. 1982). See also, Cockrum v Baumgartner, 95 Ill. 2d 193, 447 N.E. 2d 385, cert. denied, 104 S. Ct. 149 (1983); Schork v Huber, 648 S.W. 861 (Ky. 1983); Wilbur v Kerr, 275 Ark. 239, 628 S.W. 2d 568 (1982); Mason v Western Hospital, 499 Pa. 484, 453 A. 2d 974 (1982); Coleman v Garrison, 349 A. 2d 8 (Del. 1975).

[222] Id at 723.

[223] 78 A.D. 2d 180, 434 N.Y.S. 2d 300 (1980).

expenses of rearing and educating a healthy but unwanted child to be "speculative beyond realistic measurement."[224] In Coleman v Garrison[225] the court stated, "first as to the legal concept, it is settled...law that recovery may not be had for damages which are too speculative or conjectural. And that applies to any attempt to measure the value of human life against its costs. A child is born - how can it be said within the ambit of legal predictability that the monetary cost of that life is worth more than its value?...In our view, any attempt to provide a remedy at birth is an exercise in prophecy, and an undertaking not within the specialty of our factfinders." And finally in Bowman v Davis[226] the court stated:

> "...damages may not be recovered unless they are established with reasonable certainty. Uncertainty as to the fact of damage is a ground for denying liability. We believe that it is impossible to establish with reasonable certainty whether the birth of a particular healthy, normal child damaged its parents. Perhaps the costs of rearing and educating the child could be determined through use of actuarial tables or similar economic information. But whether these costs are outweighed by the emotional benefits which will be conferred by that child cannot be evaluated. The child may turn out to be loving, obedient and attentive, or hostile, unruly and callous. The child may grow up to be the President of the United States, or to be an infamous criminal. In short, it is impossible to tell, at an early stage in the child's life, whether its' parents have sustained a net loss or net gain."

Some of these courts have recognized the possibility that the costs of rearing and educating the child could be determined through the use of actuarial tables and other, similar information. Yet these courts finish their analysis by referring back to the more fundamental proposition that the emotional benefits conferred upon the parents will in any event outweigh the costs of rearing and educating the child, whatever those costs may be. In essence, then, these

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[224] Id. at 181, 434 N.Y. S. 2d at 301. See also, Biggs v Richter, (1989) 18 A.C.W.S. (3d) 101 (Ont. Dist. Ct.) where the court held that any attempt to determine the cost of a child born after a failed sterilization procedure was "purely speculative."

[225] 349 A. 2d 8, 12 (Del. 1975).

[226] 48 Ohio St. 2d 41, 356 N.E. 2d 496 (1976).

courts argue that child rearing costs are impossible to measure, and second, that measuring such costs is irrelevant anyway. It is a foregone conclusion, under this approach, that the costs will always be outweighed by parental benefits. In Terrel v Garcia[227] the court held:

> "[A] strong case can be made that, at least in an urban society, the rearing of a child would not be profitable undertaking if considered from the economics alone. Nevertheless,...the satisfaction, joy and companionship which normal parents have in rearing a child make such economic loss worthwhile. These intangible benefits, while impossible to value in dollars and cents, are undoubtedly the things that make life worthwhile. Who can place a price tag on a child's smile of the parental pride in a child's achievement? Even if we consider only the economic point of view, a child is some security for the parents' old age. Rather than attempt to value these intangible benefits, our courts have simply determined that public sentiment recognizes that these benefits to the parents outweigh their economic loss in rearing and educating a healthy, normal child. We see no compelling reason to change such rule at this time."

Certainly, the assessment of damages in a wrongful birth action is a difficult task. But can it be said that it is such a difficult task so as to preclude an award of damages? Can it be said that the benefits of parenthood will in every case as a matter of law outweigh the economic costs of raising a child? It is submitted that the conventional rules for measuring damages are sufficient in wrongful birth cases to determine the parents' recovery. Most wrongful birth decisions have not dealt with the issue of whether damages can be determined with reasonable certainty. Those that do address the issue have done so only briefly. Claims such as lost wages, medical and hospital costs, and rearing costs can be calculated with some exactitude. Although pain and anxiety involve more guesswork, they too are elements of damage traditionally entrusted to the courts in other contexts. Juries are frequently called on to make far more complex damage assessments in other tort cases. Thus, there may actually be a less speculative calculation involved than in many other malpractice actions which are routinely allowed. Admittedly, the problem of conjecture is involved in offsetting the benefits of parenthood. But such a

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[227] 496 S.W. 2d 124 (Tex. Civ. App. 1973), cert. denied, 415 U.S. 927, 94 S. Ct.

computation is not impossible. Indeed, such an offset is similar to items of damage such as loss of society, parental care, attention, and guidance, which are often calculated and allowed in wrongful death cases.[228]

(2) **The Offsetting Benefits Rule**

The concept of the child as an overriding benefit remained, for some time, the fundamental obstacle to judicial recognition of the right of the parents to recover for the damages incident to an unwanted birth. While, it is submitted, the "overriding benefit" theory can no longer justify denying the plaintiffs' recovery as a matter of law, the reasoning behind the theory - that the birth of a child bestows more benefit than burden on the parents - still plays a large role in decisions that limit the damages available for wrongful birth. The demise of the theory then, has not mandated the awarding of full child rearing damages. The courts continue to find other significant factors mitigating against full recovery.

Under this theory, the courts have recognized that the possible benefits of giving birth to a child do not automatically offset all damages. These courts recognize that the costs of rearing a child are damages which proximately flow from the negligence of the physician. In assessing those damages though, the jury should be allowed to consider the potential benefits of the unplanned child which may accrue to the family interests. Parental age, marital status, family income, family size and the health of all the family members are factors in this consideration.

American decisions have proceeded on the basis that to avoid unjust enrightment, the benefits which the child brings into the family should be taken into account in the award by deducting this amount from the amount of detriment suffered. The "offsetting benefits rule" was derived from the Restatement of Torts:

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[228] See e.g., Jones v Malinowski, 299 Md. 257, 272, 473 A. 2d 429, 437 (1984).

> (w)hen the defendant's tortious conduct has caused harm to the plaintiff or to his property and in doing so has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considerable in mitigation of damage to the extent that this is equitable.[229]

The Restatement places two limitations on the application of the benefits rule. The first limitation is that the circumstances to be considered in mitigation must benefit the same interest that was harmed by the defendant's tortious act.[230] The second limitation is that the benefit can offset the damage only to the extent that it is equitable.[231] Although, at first glance, the rule seems straightforward, its application is subject to varying interpretations.

The first application of the benefits rule came in the case of Troppi v Scarf.[232] This view has been expressly approved in several subsequent wrongful birth cases.[233] In this case a pharmacist negligently supplied tranquilizers instead of birth control pills as prescribed by the plaintiff's physician. A healthy child was subsequently born to Mrs. Troppi (her eighth). The plaintiffs claimed for Mrs. Troppi's lost wages, medical and hospital expenses, pain and anxiety of pregnancy and child birth, and the economic costs of raising the child.

The court recognized that a cause of action for the pharmacist's negligence in supplying the wrong drug and that the expenses the plaintiffs incurred were proximately caused by the defendant's negligence. The court also recognized that the physician should be liable for all

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[229] Restatement (Second) of Torts 920 (1979).

[230] See note, "Judicial Limitations of Damages Recoverable for the Wrongful Birth of a Healthy Infant," 68 Va. L. Rev., 1311, 1323 (1982).

[231] Id.

[232] 31 Mich. App. 240, 187 N.W. 2d 511 (Div. 1, 1971).

[233] See, for example, University of Arizona Health Sciences Centre v Superior Court, 136 Ariz. 579, 667 P. 2d 1294 (1983); Sherlock v Stillwater Clinic, 260 N.W. 2d 169 (Minn. 1977); Mason v Western Pennsylvania Hospital, Pa. Super., 428 A. 2d 1366 (1981); Jones v Malinowski, 473 A. 2d 429 (Md. 1984).

injuries proximately caused by the wrongful acts. The court rejected the "overriding benefit" theory saying that the benefit of a healthy child does not override the plaintiffs damage. The court then applied its interpretations of the Restatement's benefits rule. The rule, as applied in Troppi considers whether the birth of the child materially benefits the parents -- it involves a weighing of all benefits of having a child[234] against all elements of claimed damage. Using this approach, the damages related to the pregnancy and delivery are not separated from the damages related to the rearing of the child.

The Court in the Troppi decision was satisfied that this interpretation of the benefits rule would neither absolve the tortfeasor of all liability nor provide the plaintiffs with a windfall. It reasoned further that this approach could provide flexibility in calculating damages in that it could take into account the facts of each case. Accordingly, the Court said that the value of parenthood will vary according to the parents' reasons for avoiding the birth of another child and that fairness dictates that these reasons be considered in determining the benefits of parenthood.

Many American courts have adopted this interpretation of the benefits rule; regarding the emotional, physical and economic aspects of parenthood as a single "interest" and thereby weighing all benefits against all claimed detriments to determine if there is a net gain, a net loss, or a complete equivalence.

In Ochs v Borelli[235] the Court was asked to determine the proper measure of damages

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[234] The potential benefits of a child can be many. See generally L. Hoffamn and M. Hoffman, "The Value of Children to Parents, "Psychological Perspectives of Population" (J. Fawcett ed. 1973). The child represents some financial security for the parents' old age (Terrell v Garcia 496 S.W. 2d 124, 128 (Tex. Civ. App. 1973). But courts have expressed more concern for emotional rather than financial benefits (Troppi v Scarf, 31 Mich. App. 240, 187 N.W. 2d 511 (1971). Each case will involve different considerations but the advantages most frequently mentioned are love, affection, fun and satisfaction of seeing children grow and develop.

[235] 187 Conn. 253, 445 A.2d 883 (1982).

in a wrongful birth suit involving the birth of a child with orthopaedic defects.[236] The parents sought damages for medical expenses incurred directly from the unsuccessful sterilization operation, for the pain and suffering occasioned by the operation, damages for the medical expenses incurred as a result of the infant's orthopaedic therapy and for the cost of raising the infant to majority. The defendant physicians conceded that they were negligent in their performance of a sterilization operation but argued that damages should be limited to orthopaedic treatment costs and exclusive of childrearing expenses since, as a matter of public policy, "the birth of a child is always a blessing to its parents and...this benefit must, as a matter of law, totally offset concomitant financial burdens."[237] In rejecting the physicians' argument, the court stated 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."[238] The court went on to explain that a better rule would allow recovery of the costs of rearing the child until it reaches majority, but would offset under the "benefit-rule" that amount determined by the jury which reflects the value of the benefits conferred upon the parents by the child.[239] The court concluded that although this case-by-case "balancing test" would require a jury to mitigate economic damages by weighing them against non-economic factors, this weighing process is not "impermissibly speculative."[240]

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[236] The Ochs' infant was born with two orthopaedic problems known as forefoot metatarsus adductus and flatfoot. The forefoot adductus was corrected by casts and therapy at a cost of $230. The only remaining treatment required was the use of an arch support in her shoes. The flatfoot condition and a mild knock-knee still existed. 187 Conn. at 255, 445 A.2d at 884.

[237] Id. at 256, 445 A.2d at 884.

[238] Id. at 258, 445 A.2d at 885.

[239] Id. at 259-60, 445 A.2d at 886.

[240] Id.

A different approach to the application of the Restatement is illustrated by the recent case of Marciniak v Lundborg.[241] In this case the plaintiffs sought a remedy for the costs involved in raising a normal, healthy child conceived subsequent to an allegedly negligent sterilization operation. The issues presented to the court were whether the costs of raising the child to the age of majority or beyond are recoverable by the parents, and if so, to what extent these costs should be offset by any benefit they derive from the child. The court concluded that according to traditional tort principles the physician should be liable for the consequences of his negligence. The parents were, accordingly, entitled to recover the costs of raising the child to the age of majority. In determining whether those damages should be offset by the benefits the child provides the court stated:

> Section 920 of the Restatement specifically states that for a benefit to be considered in mitigation of damages it must be "a special benefit to the interest of the plaintiff that was harmed..." comments to Section 920 demonstrate that the drafters of the Restatement felt that the "same interest" limitation contemplates a narrow definition of "interest":
>
> Limitation to same interest. Damages resulting from an invasion of one interest are not diminished by showing that another interest has been benefitted. Thus one who has harmed another's reputation by defamatory statements cannot show in mitigation of damages that the other has been financially benefitted from their publication...unless damages are claimed for harm to pecuniary interest...Damages for pain and suffering are not diminished by showing that the earning capacity of the plaintiff has been increased by the defendant's act...Damages to a husband for loss of consortium are not diminished by the fact that the husband is no longer under the expense of supporting the wife.[242]
>
> Properly applied in the negligent sterilization context, the "same interest" rule would require that the economic damages involved in raising the child be offset by corresponding economic benefits, and that emotional harms be offset by

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[241] 450 N.W. 2d 243 (Wis. 1990).

[242] Restatement (Second) of Torts, sec. 920. comment b.

emotional benefits, and so on.[243]

> We conclude that it is not equitable to apply the benefit rule in the context of the tort of negligent sterilization. The parents made a decision not to have a child. It was precisely to avoid that "benefit" that the parents went to the physician in the first place. Any "benefits" that were conferred upon them as a result of having a new child in their lives were not asked for and were sought to be avoided. With respect to emotional benefits, potential parents in this situation are presumably well aware of the emotional benefits that accrue to them as the result of a new child in their lives. When parents make the decision to forego this opportunity for emotional enrichment, it hardly seems equitable to not only force this benefit upon them but to tell them they must pay for it as well by offsetting it against their proven emotional damages. With respect to economic benefits, the same argument prevails. In addition, any economic advantages the child might confer upon the parents are ordinarily insignificant. Accordingly, we conclude that the costs of raising the child to the age of majority may not be offset by the benefits conferred upon the parents by virtue of the presence of the child in their lives.

The approach used by the court in Marciniak v Lundborg[244] is persuasive. It becomes even more so when one considers the potential effect of the Troppi approach. The consideration of all financial burdens and emotional benefits as part of the same "family interest"[245] can produce harsh results for plaintiffs who may get no recovery at all since juries are likely to view the emotional benefits of parenthood very highly. One commentator has said that a fair reading of section 920 of the Restatement and the accompanying comments can only lead to the conclusion that the Marciniak type of reasoning is the correct interpretation and..."anything other than such a normal interpretation will lead to unjust enrichment of the tortfeasor."[246]

Proponents of this method say that an application of the benefits rule requires two steps:

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[243] See Kashi, "The Case of the Unwanted Blessing: Wrongful Life, 31 U. Miami L. Rev. 1409, 1415 (1977); See generally, D.A. Burgman, "Wrongful Birth Damages Mandate and Mishandling by Judicial Fiat" 13 Val. U.L. Rev. 127 at 158 (1978).

[244] Supra note 241.

[245] See, e.g. Troppi v Scarf, 31 Mich. App. 240, 256-57, 187 N.W. 2d 511, 518-19 (1971).

[246] See, Notes and Comments, "Wrongful Pregnancy: Child Rearing Damages Deserve Full Judicial Consideration," 8 Pace Law Review 314 [1988].

1) First, the court must find the interest that is harmed. This necessitates a consideration of what the plaintiff wanted to avoid by having the operation or seeking the professional advice of the physician on a matter concerning procreation.

2) The second step requires an application of the same interest rule. The court must separate the damages and benefits according to the interest affected and then subtract each benefit according to its type.

Thus where parents seek a sterilization operation or abortion to avoid further financial outlay, the rule would only allow prospective pecuniary benefits from the child to be offset. Non-pecuniary benefits would not be offset. Conversely, if the interest harmed were purely psychological (i.e., the trauma of having a child to care for, particularly a defective child) then, in this situation, the non-pecuniary benefits of companionship and affection would have to be offset against non-pecuniary damages claimed.

It is submitted that the rewards of parenthood should not be allowed in mitigation of rearing costs in some cases because these rewards are emotional in nature and, great though they may be, do nothing whatever to benefit the plaintiff's injured financial interest. This approach would certainly be the most equitable especially in the case where the parents seek recovery for the costs of raising a defective child, and where the costs of doing so are phenomenal.[247]

(3) The Full Recovery Rule

Scant authority exists for the view that a parent should recover the full costs of rearing

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[247] See, Blake v Cruz 698 P. 2d 315 (Idaho 1984) and Harbeson v Parke-Davis, Inc., Wash., 656 P. 2d 483 (1983) (where the court, in determining damages for emotional injury due to the birth of a defective child, held that countervailing emotional benefits attributable to the birth of the child should also be considered and the award adjusted accordingly.)

a wrongfully born child. The Court in Custudio v Bauer[248] held that damages for the economic costs of raising the wrongfully born child were foreseeable results of the breach of the physician's duty. The Court held that the damages in this type of action are the costs to the parents to feed, clothe, house and educate the child to majority. Compensation is not for the child but rather..."to replenish the family exchequer so the new arrival will not deprive the other members of the family of what was planned as their just share of the family income."[249] The Ohio Court in Bowman v Davis,[250] in allowing full recovery for the costs of child rearing, reasoned that a logical inconsistency exists in making the physician "liable for the foreseeable consequences of all negligently performed operations except those involving sterilization..."[251]

The courts have been more willing to award full damages to plaintiffs where the child wrongfully caused to be born is defective. This is certainly evident in Gallagher v Duke University,[252] a case involving a claim by parents against the defendants after the couple's second child was born with genetic birth defects, which were the same as those suffered by their first child, despite assurances that the second child, if conceived, would be normal. The court held that the parents were entitled to recover for the costs of rearing a child without deduction for the benefits of parenthood. Here, because the child was so profoundly impaired, no evidence of a benefit to the parents could be found. Thus, the court was not presented with the difficulty of offsetting the costs of care with the benefits of parenthood.

Support for the "full recovery theory" in this type of situation is also found in the most

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[248] 251 Cal. App. 2d 303, 325, 59 Cal. Rptr. 463, 477 (1967).

[249] 251 Cal. App. 2d 303, 324, 59 Cal. Rptr. 463, 477.

[250] 251 Cal. App. 2d 303, 59 Cal. Rpts 463 (1967).

[251] Supra note 226 at 42, 365 N.E. 2d at 497.

[252] 852 F. 2d 773 (4th Cir. 1988).

recent English and Canadian wrongful birth cases. In Emeh v Kensington and Chelsea and Westminster Area Health Authority,[253] the plaintiff already had three normal children when she underwent a sterilization operation at the defendant hospital. A few short months later the plaintiff mother discovered that she was about twenty weeks pregnant. She considered the possibility of abortion but decided against it. She subsequently gave birth to a child who had congenital abnormalities of a serious nature. These abnormalities meant that the child would need to be under constant medical and parental supervision. The plaintiff claimed damages for the pregnancy and the birth of this child and also for its upkeep.

Here, at first instance in 1982, Park J. had decided that the plaintiff could only receive damages for the first four months of pregnancy on the basis that her failure to seek an abortion constituted a "novus actus interveniens." But, on appeal, the mother was allowed damages for loss of future earnings, pain and suffering and loss of amenity, and damages for the maintenance of the child including the extra care the child would require without offset for any benefits the child would bring to the parents. Slade L.J. saw no rule of public policy which prevented the plaintiff from recovering in full the damage sustained by her as the result of the surgeon's negligent failure to perform the operation properly, whether or not the child was healthy. Since the avoidance of a further pregnancy and birth was the object of the sterilization operation undergone by the plaintiff, the compensable loss suffered by her as a result of the negligence in performing the operation extended to any reasonably foreseeable financial loss directly caused by her unexpected pregnancy.

The award of $3,388,269 given to the plaintiff in Cherry v Borsman[254] as a result of

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[253] [1984] 3 All ER 1044.

[254] (1990) 75 D.L.R. (4th) (B.C.S.C.).

a failed abortion is believed to be one of the largest "medical negligence"[255] awards in Canada. The court awarded $75,000 to the plaintiff mother for her loss of past income, $395,000 to the infant plaintiff for her loss of future income, $160,000 to the infant plaintiff for her pain and suffering, $75,000 to the plaintiff mother for her pain and suffering and emotional distress, $200,000 to the plaintiff mother for her loss of future income, $53,459 to the plaintiff mother for the past care of the child, and $1,824,920 to the infant plaintiff for the cost of her future care. He added $454,390 as a "tax gross-up" to cover income taxes attracted by the investment earnings of the fund and $225,500 to cover professional fees for managing the fund. These amounts included $64,790 to cover the Goods and Services Tax that will be payable.

F. The Measurement of Economic Damages

Assuming that recovery for economic injury is allowed by the court, it is unclear whether damages for rearing and educating the unplanned child consists solely of the bare necessities (an objective test) or of support similar to that which the other children in the family receive (a subjective test). The cases of Coleman v Garrison[256] and Terrel v Garcia[257] seem to suggest

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[255] The defendant's assertion was that this action was one for "wrongful life," which claims have been denied in the United Kingdom, Canada and the majority of the States in the United States. It was the judge's view in this case however, that the plaintiffs' claim could be determined on ordinary negligence principles. The court held that the wrongful life actions arise in situations in which the child is already disabled in utero and the defendant negligently fails to diagnose the condition or inform the mother of the risk so that she can obtain an abortion. In order for the wrongful life action to succeed, the submission is that the child would have been better off dead. The factual difference here, according to the court, was that in this case, the infant plaintiff was not submitting that she would have been better off dead, but rather that she suffered injuries as a result of the defendant's negligence in performing an abortion operation. The court held that it was this additional allegation that the defendant caused the infant plaintiff's injuries that set this action apart from wrongful life actions. Hence it was that the infant plaintiff could obtain damages for her own pain and suffering and for the costs of maintaining herself for the duration of her life which was estimated to be sixty years.

[256] 327 A. 2d 575 at 761 (Del. Super.1974) aff'd 349 A.2d 8 (Del. 1975).

the latter. Under the principle of taking the victim as one finds him this would seem to be the correct interpretation. This approach however, requires more conjecture than an approach compensating only necessities of life and the courts may thus prefer the latter. Perhaps the most equitable test of the two is the objective test with reference to certain subjective factors such as the extra expense involved if the child is defective. But again, the problem remains in how one evaluates the "normal" expenses incurred by the average family in raising a child.

In Thake v Maurice[258] damages of £6,677 were awarded to the plaintiffs (who had five children) for the cost of raising the child born to them as a result of a failed vasectomy. Mr. Justice Peter Pain assessed the damages on a modest basis for necessaries because of the "humble household" into which the child was born.

In the leading English case, Emeh v Kensington and Chelsea and Westminster Area Health Authority,[259] the Court of Appeal awarded the plaintiff mother not only damages for loss of future earnings, pain and suffering and loss of amenity, but also maintenance for the child in the future, including the extra care which a disabled child might need. This award illustrates that the English Courts will be more likely not look to the "hypothetical family," but to the actual circumstances of the particular family where family size, age of parents, their marital status and their income may all be relevant. It appears then, that where the plaintiff parents come from a higher socioeconomic level, the assessment for damages for rearing a child and loss of earnings would probably be very much higher. The recent decision in Benarr v Kettering Health Authority,[260] decided in the High Court on April 27, 1988 bears this view out. Private

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[257] 496 S.W. 2d 124 at 127.

[258] [1985] 2 W.L.R. 215 (Q.B.) rev'd in part [1986] 1 All E.R. 497 (C.A.).

[259] [1984] 3 All E.R. 1044.

[260] See, (1988) 56 Medico-Legal Journal 179.

education fees may be, according to the circumstances, a reasonably foreseeable outcome and could thus be included in the measure of special damages. As Mr. Justice Hodgson said: "It is quite clear that at the date when Mrs. Benarr conceived Katherine the family had decided their children would be privately educated. I am satisfied that whatever the result of this litigation, whether successful or not, Katherine would have been privately educated. I conclude that the plaintiff is entitled to be compensated for the further expense which he will be put to in respect of Katherine's education." From a total award of £62,23 the sum of £19,534 was designated to pay pre-school and preparatory school education, as well as for five years at a private school.

Some courts have been quick to point out that the computation of the parents' economic damages involves a rather routine calculation of reasonable foreseeable expenses that parents incur in maintaining, supporting and educating a child. These calculations are, as the court in Jones v Malinowski[261] recently observed, based upon well-recognized economic factors which actuaries for estate planners and insurance companies use to develop their statistics. For example, the economist demographer who testified in the Malinowski case calculated the cost of raising the plaintiffs' daughter by reference to standard economic projections. His calculations, the court noted, took into consideration the employment and earning capacity of the parents, the expenditures to be made, inflation, the consumer price index and other relevant economic criteria. Much more reliance on the testimony of experts seems to be the trend in assessing damages in the wrongful birth cases.[262] Unfortunately, the majority of the wrongful birth cases to date provide us with a grossly inadequate explanation of how damage awards are arrived at.

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[261] 473 A. 2d 429 (Md. 1984). See also, B. Strong and C. DeVault, "The Marriage and Family Experience", 359 (3d. ed. 1986) where the expense of child rearing to age 18 was estimated to be between $80,000 and $90,000.

[262] See, also, Phillips v United States, 575 F. Supp. 1309 (1983); Cherry v Borsman, (1990) 75 D.L.R. (4th) 668 (B.C.S.C.); Cataford v Moreau, (1978) 114 D.L.R. (3d) 585.

Equally controversial is the determination of the length of time that damages should be awarded to maintain the child. Some courts have awarded child rearing damages to the age of majority.[263] But this length of time may be patently inadequate when one considers that the parents' obligation to provide education may extend beyond the child's majority. The problems are, of course, augmented when the child is born with disabilities. Parents of a child with serious defects will be responsible for the child's support for the duration of his life. Thus, jurors would have to determine the child's life expectancy or, at least, the number of years the child would live before his parents died. On the other had, severely defective children often die very young; they may not require support to the age of majority. Hence, life expectancy must be a fundamental determination in assessing rearing costs for the wrongful birth cases involving abnormal children.

In the case of Siemieniec v Lutheran General Hospital,[264] parents of a child who was born with haemophilia brought an action against the defendant hospital and physicians. The plaintiff mother conceived a child. Her family history revealed that haemophilia ran in her family.[265] Concerned with a possible occurrence of this inherited coagulation disorder in her already conceived child, Mrs. Siemieniec, during the first trimester of her pregnancy, sought genetic counselling at the defendant hospital to determine the likelihood of this contingency. The

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[263] See, Sherlock v Stillwater Clinic, 260 N.W. 2d 169 at 176 (1977) and Siemienec v Lutheran General Hospital, 512 N.E. 2d 691 (Ill. 1987).

[264] 512 N.E. 2d 691 (Ill. 1987).

[265] Haemophilia is a genetic disorder caused by the deficiency or inactivity of coagulation factors needed for blood clotting. The hemophilias include both haemophilia A, or "Classic haemophilia," in which the patient's plasma is deficient in factor VIII clotting activity, and haemophilia B, or "Christmas Disease,: in which patient's plasma is deficient in factor IX coagulation activity. Both types are transmitted as a sex-linked recessive trait on the X chromosome. The trait is passed on via the mother even though the mother is often unaffected. 512 N.E. 2d 691 at 693 (Ill. 1987).

plaintiff was told that the risk of her being a carrier of haemophilia was "very low". Based upon this information, the plaintiffs exercised a conscious choice to proceed with the pregnancy. As a result, a child diagnosed as a haemophilic was born. While recognizing that the general rule of damages in a tort action is that the wrongdoer is liable for all injuries resulting from the wrongful acts, whether they could or should not have been foreseen by him,[266] the court limited the parents recovery to the childrearing expenses incurred by the child prior to his reaching the age of majority.

The reasoning, it is submitted, is not sound. Parents should not be forced to pay the expenses resulting from a child born with defects occasioned by the physician's negligent conduct. The parents will not be adequately compensated by permitting recovery for these damages only for the minority of the child, when it can be shown that the child will not be self-sufficient once the age of majority is reached. Several courts have permitted parents to recover in their wrongful birth action the costs incurred as a result of the child's birth defects after the child has reached the age of majority.[267] These courts have based this holding on the theory that under the common law, where a child is incapable of supporting himself because of physical or emotional disabilities, the parent's obligation to support continues beyond that child's age of majority. It was held in Lieberman v Lieberman;[268]

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[266] Id. at 706.

[267] Phillips v United States, 575 F. Supp. 1309 (D.S.C. 1983); Blake v Cruz, 698 P. 2d 315 (Idaho 1984); Jennifer S. v Kirdnual, 332 S.E. 2d 872 (W. Va. 1985); Gallaher v Duke University, 852 F. 2d 773 (4th Cir. 1988); Cherry v Borsman supra note 254 above; Smith v Cote, (1986) 128 N.H. 231, 244, 513 A. 2d 341, 350; James G. v Casserta; (W. Va. 1985); 332 S.E. 2d 872, 882-83; Sherlock v Stillwater Clinic, 260 N.W. 2d 169 (Minn. 1977) (the court pointed out that, "while parents of a healthy child will ordinarily be required to support it during its minority, parents of an impaired child will need to provide support for a much longer period of time.") at 176.

[268] 517 S.W. 2d 478, 480 (Mo. App. 1974).

> "[A] recognized exception occurs where the adult child is unmarried, unemancipated and insolvent and physically or mentally incapacitated from supporting himself. The parental duty of support in such cases may continue past chronological majority when, because of physical or mental infirmity, the child is unable to provide for his support and undertake the responsibilities normally associated with his age. The duty on the parent to provide post-majority support arises not from the nature of the support or benefits sought, but from the condition of the child seeking the benefit."

Where child rearing damages are awarded to the parents past the child's age of majority, medical evidence is often called upon to determine the life expectancy of the child. For example, the testimony of medical experts determined that the wrongfully born child in Phillips v United States[269] had a life expectancy of forty years.[270] Thus, the plaintiff parents were awarded damages for the expenses, medical, custodial and otherwise, necessitated by the child's condition from birth to estimated life expectancy of 40 years. Other courts have awarded child rearing damages past the age of majority but have disallowed those medical expenses that the child will incur after the parents' death saying that the law terminates the parents' obligation to support their children at their deaths.[271]

Another problem in the assessment of the parents' economic loss for the birth of a defective child is the distinction which some courts have placed between the economic costs of raising a normal healthy child and the additional or extra cost involved in raising an unhealthy child. The majority of jurisdictions recognizing the action permit parents to recover, at a

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[269] 575 F. Supp. 2309 (1983).

[270] The defendants in this case breached the applicable standards of medical care by failing to advise, counsel and test the plaintiff parents concerning the risk that their child would be afflicted with Down's syndrome, commonly known as mongolism.

[271] Gallagher v Duke University, 852 F. 2d 773 at 778 (4th Cir. 1988).

minimum, the extraordinary medical costs needed to raise the defective child.[272] In 1975, the Texas Supreme Court held in Jacobs v Theimer,[273] that where a doctor failed to diagnose a woman's contraction of rubella during pregnancy, a suit for recovery of expenses was limited to the special expenses occasioned by the child's defect. The Jacobs court denied damages for the normal costs of raising a child for the following reasons:

1) These types of damages are impossible to assess. The same objection, however, does not apply when the child has birth defects: "The economic burden relate[s] solely to the physical defects of the child...[and] lie[s] within the methods of proof by which the courts are accustomed to determine awards in personal injury cases."[274]

2) To allow these damages would place an overwhelming burden on physicians which could lead to their being overly cautious; and

3) If parents want to be parents of a normal, healthy child (as the Jacobs did), they can only recover the cost of treating the defects. Any damages beyond the cost of treating the defects should automatically be cancelled out by the fact that had the parents been adequately informed and had aborted, they would probably have had another child and would have had to bear the cost of raising it.

In the same year, the Wisconsin Supreme Court decided Dumer v St. Michaels'

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[272] See, Azzolino v Dingfelder, 337 S.E. 2d (N.C. 1985); Hickman v Group Health Authority, 393 N.W. 2d 10 (Minn 1986); Jennifer S. v Kirdnual, 332 S.E. 2d 872 (W. Va. 1985); Bani-Esrali v Wald, 485 N.Y.S. 2d 708 (Sup. 1985); Jacobs v Theimer; 519 S.W. 2d 846 (Tex. 1975); Phillips v United States, 575 F. Supp. 1304 (1983); Harbeson v Park-Davis, Inc., Wash., 656 P 2d 483 (1983); Siemieniec v Ruskin, 512 N.E. 2d 691 (Ill. 1987); James v Casserta, 332 S.E. 2d 872 (W.V. 1985); Procanik v Cillo, 478 A. 2d 755 (N.J. 1984).

[273] Supra note 272.

[274] 519 S.W. 2d 846 at 849 (Tex. 1975).

Hospital.[275] In that case, causes of action were brought on behalf of the parents and on behalf of their infant who was born with physical and mental deformities resulting from the mother's contraction of rubella during pregnancy. A physician in the emergency room of the defendant hospital failed to diagnose the mother's condition as rubella. As a result, he also failed to inform her of the possible effects of the fetus, thereby precluding her from choosing to abort. Recovery was denied to the infant, but the court ruled that damages sustained by the parents as a result of the child's deformities were recoverable. Damages were limited to "[t]hose expenses which they have reasonably and necessarily suffered, and will to a reasonable medical certainty suffer in the future by reason of the additional medical, hospital and supportive expense occasioned by the deformities of the child as contrasted to a normal, healthy child."[276]

The theory is that the defendant's wrongdoing caused the birth of a defective child but it did not cause the defect. Had the defendant acted properly, the plaintiffs would not have had the child. The plaintiffs' present state - the parents of a defective child - is compared with their alternative state - the parents of a normal child.

The flaw in this reasoning is that under the ordinary compensatory damage standard, the trier of fact would determine the extent of damages by comparing the present state of the plaintiffs - the parents of a defective child - with their alternative state - a couple without this child. The damage awards in both the Jacobs case and the Dumer case were based on the fact that the plaintiffs, by their conduct, indicated that they wanted to be parents of a normal child and had the defendant acted properly, the plaintiffs would have had the opportunity to achieve that goal by an immediate abortion and subsequent pregnancy. However, as discussed previously, it cannot be assumed that the mother would have had another child. And even if she did, should

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[275] 69 Wis. 2d 766, 233 N.W. 2d 372 (1975).

[276] Id.

the court be permitted to prevent the plaintiff from recovering damages by considering the hypothetical costs involved in raising a "future" child?

This unusual measure of damages has two distinct advantages. Under this standard the jury does not have to weigh the intangible benefits and detriments of childbirth to determine whether there is legal injury. The court determines as a matter of law that injury occurred, and asks the jury to measure only the tangible expense attributable to the child's defect. Furthermore, because the jury is never asked whether the child is more of a burden than a joy to his parents, the court avoids the potentially damaging judgment that the child is a net detriment to his parents.

What is misunderstood in these decisions however, is that the parents did not have a normal child plus defects; they had an imperfect child complete with all the consequent suffering. These cases put the plaintiffs in the position they "expected" to be in which is contrary to traditional compensatory damage rules and in this situation creates an inequity.

A better approach to this problem is presented in those cases that allow the parents to recover the costs of medical and hospital care and expenses and maintenance of the child beyond the age of majority (to estimated life expectancy) where the child will continue to be dependant upon the parents.[277]

One last question remains. Does the Restatement's Benefits Rule ever apply in the case of a defective child to offset the total damages allowed for support and if there are benefits from a defective child how do they compare with those associated with a normal child? There is no

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[277] Blake v Cruz, 698 P. 2d 315 (Idaho 1984); Robak v United States, 658 F. 2d 471 (7th Circ, 1981); Gallagher v Duke University, 852 F. 2d 773 (4th Cir. 1988); Emeh v Kensington and Chelsea and Westminster AHA, [1984] 3 All ER 1044; Speck v Finegold, 497 Pa 77, 439 A. 2d 110 (1981); Ochs v Borelli, Conn., 445 A. 2d 883; Cherry v Borsman, (1990) 75 D.L.R. (4th) 668 (B.C.S.C.).

joy in watching a child suffer with genetic or congenital anomalies.[278] It appears obvious that the emotional suffering is probably much greater in the case of an unhealthy child than in the case of a normal child and the benefits of having such a child would hardly be commensurate with the costs of rearing him. Thus, in the most recent American and Canadian wrongful birth cases the courts have either refused to apply the benefits rule at all in assessing the parents' economic damages[279] saying that any "benefits" that were conferred upon them as a result of having a new child were not asked for and were sought to be avoided, or have adhered to the same interest rule in the application of the Restatement; balancing the economic damages involved in raising the child against the corresponding economic benefits and offsetting the emotional harms against

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[278] See Shroeder v Perkel, 87 N.J. 53, 63, 432 A. 2d 834, 842 (1981) (holding that the pleasures of raising a child do not offset the extraordinary medical expenses of raising a child with cystic fibrosis.) Some of the birth defects that may result in injury of birth lawsuit are: "cystic fibrosis," which causes glands to produce thick release of mucus resulting in absorption problems and chronic lung infections, see THE MOSBY MEDICAL ENCYCLOPEDIA 23 (1985) at 208; "Down's Syndrome," which causes mental retardation and numerous physical defects including bowel defects, heart disease, respiratory infections and vision problems, id at 237; "haemophilia," a bleeding disorder in which there is a lack of one of the blood clotting factors, id at 335; "neurofibromatosis," which causes fiberlike growths, brown spots of the skin and defects in the muscles, bones and abdominal organs, id at 500; "polycystic kidney disease," a fatal disease which causes enlarged kidneys with many cysts, id at 583; "spina bifida" which causes a gap in the bone surrounding the spinal cord sometimes resulting in paralysis and loss of bowel and bladder function, id at 682; "rubella syndrome," which causes birth defects including heart disorders, cataracts, deafness and mental retardation, id at 650; "Tay Sachs disease," a nerve breakdown disorder which causes progressive mental and physical retardation, spasticity, dementia, paralysis and early death, id at 708; and "Thalassaemia major," which causes anaemia and iron deposits in major organ necessitating blood transfusions, id at 717. For additional information relating to birth defects that may result in injury of birth lawsuits, see Fryns, "Chromosomal Anomalies and Autosomal Syndromes, 23 BIRTH DEFECTS 7-23 (1987); Opitz and Herrmann, "The Study of Genetic Diseases and Malformations," 13 BIRTH DEFECTS 45, 49-66 (1977); Note, "Father and Mother Know Best: Defining the Liability of Physicians for Inadequate Genetic Counselling," 87 YALE L.J. 1488, 1491 nn. 15-16 (1978).

[279] Cherry v Borsman, (1990) 75 D.L.R. (4th) 668 (B.C.S.C.); Marciniak v Lundborg, 450 N.W. 2d 243 (Wis. 1990); Ball v District No. 4 Area Board, 117 Wis 2d 529, 537, 345 N.W 2d 389 (1984).

the emotional benefits.[280] In other words, these courts have declined to offset the benefits conferred upon the parents by virtue of the presence of the child in their lives against the costs of raising that child.

It is submitted that, in the case of an unhealthy child, the offsetting benefits rule should either be ignored or the same interest rule should be applied. Thus, in determining damages for the parents' emotional injury, countervailing emotional benefits attributable to the birth of the child should be considered. With respect to economic benefits, the same argument prevails. However, any economic advantages the child might confer upon the parents are ordinarily insignificant. Accordingly, the costs of raising the child for the duration of his life should not be offset by the economic benefits conferred by virtue of the presence of the child in their lives.

G. The Parents' Claim for Emotional Distress

In the preceding section it was presumed that the parents were entitled to damages for their emotional distress in giving birth to and raising a child with serious birth defects. But, the question of damages for emotional distress represents another difficult and unsettled aspect of the action for wrongful birth. In the cases where the physician's negligence has resulted in the birth of a healthy child, several courts have indicated that the mother is entitled to recover damages for the anxiety and distress suffered as a result of the unwanted pregnancy and subsequent birth.[281] However, claims by parents for the emotional distress occasioned by the birth of a defective child have not been as consistent.

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[280] Harbeson v Park - Davis, Inc., Wash., 656 P. 2d 483; Phillips v United States, 575 F. Supp 1309 (1983); Blake v Cruz, 698 P. 2d 315 (Idaho 1984).

[281] See, for example, Custudio v Bauer, 251 Cal. App. 2d 303, 59 Cal. Repts. 463 (1967); Bishop V Byrne, 265 F. Supp. 460 (S. D . W. Va. 1967); Betancourt v Gaylor, 136 N.J. Super. 85, 344 A. 2d 336 (Law Div. 1975); Anonymous v Hospital, 33 Conn. Sup. 126, 366 A. 2d 204 (1976).

In addition to seeking compensation for the expenses they will sustain in managing and treating their unhealthy child, parents in the wrongful birth action also seek damages for their emotional distress, which they claim are a natural and foreseeable consequence of the injury they sustained, and hence should be included as an essential element in the calculation of damages.

The American courts' willingness to allow the award of damages for certain items of damage parents have suffered in a wrongful birth suit recognizes that the physician does owe a duty of care. Thus, the reasonable conclusion would be to allow parents to prove that indirect, emotional harm has flowed from the breach of this duty. Traditionally, however, damages for emotional distress consequent upon the birth of an imperfect baby have not been allowed and the cases generally cite four reasons for the plaintiffs' non recovery. The first is that there can be no recovery for emotional and mental distress because such injury is impossible to assess.[282] In Howard v Lecher[283] the plaintiff parents sought to recover damages for mental distress and emotional disturbances resulting from their daughter's affliction with Tay-Sachs. The parents asserted that the defendant physician knew or should have known that they were potential carriers of Tay-Sachs because they were of Eastern European background, and that tests were available to determine whether they were carriers and whether the fetus was afflicted with the disease. It was further alleged that the physician was negligent in that he failed to take a proper genealogical history of the plaintiffs or to properly evaluate the history he did take, and failed to advise them of available tests for themselves or the fetus with regard to Tay-Sachs disease. The court ruled that the claim for emotional harm would not stand; "[I]t is virtually impossible to evaluate as compensatory damages the anguish to the parents of rearing either a malformed child, or a child

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[282] Gleitman v Cosgrove, 49 N.J. 22, 227 A. 2d 689 (1967); Becker v Schwartz, 400 N.Y.S. 2d 119 (App.Div. 1977).

[283] 53 App. Div. 2d 420, 386 N.Y. S. 2d 460 (1976).

born with a fatal disease, as against the denial to them of the benefits of parenthood."[284]

The second reason is that to allow recovery under this head would place an overwhelming burden on physicians which would lead to defensive actions. The theory behind what physicians term "defensive medicine" is that health professionals engage in certain conduct because it is dictated by the need to avoid malpractice liability and not by their professional judgment of the best course to follow.

Third, some courts have denied recovery for mental and emotional distress saying that this is the price one pays being a parent.[285] The emotional distress experienced by parents of an unplanned and defective child is seen as normal consequence of their status as parents. In Speck v Finegold, the court held:

> "Unlike the measurability of pecuniary loss, to which the plaintiff-parents are entitled, there is no legal realm of accountability to which they can look for claimed mental and emotional damages arising out of the birth of their child which could factually place them in a more favourable category than parents who generally, in the vicissitudes and vagaries of life, face the everyday potential of pain and suffering in the raising of their children. It is not possible to distinguish the mental and emotional travail which the plaintiffs claim here from the pain and suffering of parents who raise a retarded child or whose infant is born blind or mongoloid or falls heir to one of the countless natural diseases or being healthy becomes permanently disfigures or handicapped by reason of accident. The fact that plaintiffs did not want [the child] does not alter the sameness in the quality and nature of pain and suffering experienced in the everyday work of parenthood."

The fourth and most commonly argued reason for the denial of emotional damages is that the plaintiff parents are merely "bystanders" at the birth of their child. In Howard v Lecher the court also held that it was the child and not the parents who was the directly injured person. The court reasoned that the parents of a child with a congenital disorder are in the same position as ones who witness their child being injured in an accident. Since the parents are not physically

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[284] Id at 386 and 462.

[285] Speck v Finelgold, 408 A. 2d (1979).

imperilled by the child's condition, recovery is denied. Under this "zone of danger rule,"[286] a bystander who is in a zone of physical danger and who, because of the defendant's negligence, has reasonable fear for his own safety, is given a right of action for physical injury or illness resulting from emotional distress. This rule does not require that the bystander suffer physical impact or injury at the time of the negligent act, but it does require that he must have been in such proximity to the accident in which the direct victim was physically injured that there was a high risk to him of physical impact. The bystander, as stated, must show physical injury, or illness as a result of the emotional distress cause by the defendant's negligence.[287]

Thus, following this reasoning, it is imperative that the parents prove that they have or will suffer physical injury or illness resulting from the emotional distress allegedly caused by the defendant's negligence.

Those courts that continue to adhere to the rule that emotional distress is a proper element of tort damage as long as such distress encompasses some physical manifestation are less rigid in their application of the rule than in the case of Howard v Lecher. In Naccash v Burger,[288] the court observed:

> "We believe that the circumstances of this case justify another exception to the general rule that damages for emotional distress are not allowable unless they result directly from tortiously caused physical injury. The restrictions upon recovery imposed by the provisos in earlier cases were designed to discourage spurious claims asserted by chance witnesses to physical torts involving others. The consideration prompting imposition of the limitations do not exist here...Indeed, to apply the restrictions here or to refuse to recognize an exception

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[286] See, Tobin v Grossman, 24 N.Y. 2d 609 at 611, 249 N.E. 2d 419, 310 N.Y.S. 2d 554 at 555 (1969), where the court concluded that without a "zone of physical danger" qualification, no reasonable limits could be drawn on the emotional injuries to bystanders that a tort feasor might cause.

[287] Rickey v Chicago Transit Authority (1983), 98 Ill. 2d 546, 555, 75 Ill. Dec. 211, 457 N.E. 2d 1.

[288] 223 Va. 406, 290 S.E. 825 (Va. 1982).

to the general rule, "would constitute a perversion of fundamental principles of justice."[289]

A better approach is found in the case of Karlsons v Guerinot,[290] although this case was overruled by the subsequent case of Becker v Schwartz.[291] In this case the physician breached his duty to the plaintiff mother by failing to warn her of her chances of giving birth to a child with Down's Syndrome. The plaintiff was thirty-seven years old and had already given birth to one child with the same affliction, a fact of which the physician was aware. The parents alleged that the physician failed to inform them of the existence of tests that could have detected whether in fact the fetus was defective. The parents sought damages for pain and suffering and mental anguish incident to giving birth to a child in an impaired condition. The Court in the Karlsons case rejected the decision in Howard v Lecher and held that the damage resulting from the negligent infliction of emotional harm could be recovered by the parents. The tort committed, the court explained, was the pre-emption of the parents' choice to determine their child's fate. The court held that if the defendant breached a duty owed to the parents he would be liable for all those injuries flowing to the parents directly from the breach including mental anguish and other emotional injuries.

Later that year the New York court of Appeals in Becker v Schwartz and the companion case Park v Chessin[292] overruled Karlsons v Guerinot. The court upheld the parents' complaint to the extent they sought recovery of the sums expended on the care of their children. But, the calculation of damages for the parents' emotional injuries, the court held, remained"...too

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[289] Berman v Allan, 80 N.J. at 433, 404 A. 2d at 15 (1979).

[290] 394 N.Y.S. 2d 933 (1977)

[291] 400 N.Y.S. 2d 119 (App. Div. 1977).

[292] 60 A.D. 80, 400 N.Y.S. 2d 100 (1977), modified sub nom Becker v Schwartz, 46 N.Y 2d 401, 386 N.E. 807, 413 N.Y. 2d 895 (1978).

speculative to permit recovery notwithstanding the breach of duty flowing from the defendants to themselves."[293]

Notwithstanding the great numbers of cases which have disallowed the recovery of damages for emotional distress in the wrongful birth context, it is submitted that the parents' emotional distress is no less a direct result endured by the plaintiffs than the economic loss suffered. The difficulty in the estimation of these damages should not bar the parents' recovery altogether. The court in Karlsons v Guerinot recognized that "upon sufficient demonstration of proof by the plaintiffs with respect to the emotional and psychological harm which they have suffered, mitigated by any benefits that might accrue to them in rearing the child, the trier of fact can make a reasonable estimate of the damages sustained. Calculations of this nature are not alien to our judicial system and jurors are called upon to make similar determinations often."[294] In Cherry v Borsman, Skipp J. held that, "in my view, the award for these damages should be substantial. Had the abortion resulted in [the plaintiff] giving birth to a normal child she would, in my view, have been entitled to an award of at least $25,000. In Freddette v Wiebe[295] in 1986 Taylor, J. (as he then was) awarded $20,000 to a plaintiff who gave birth to normal twins as a result of a failed abortion. The situation of the adult plaintiff in the case herein is far more severe than the plaintiff in Fredette."[296] "I am satisfied that, in addition to the physical injuries [the plaintiff] suffered as a result of the negligently performed abortion, she suffered a severe traumatic experience upon her learning of the physical and mental injuries sustained by her daughter. She will have many years of pain and suffering and emotional distress and she will

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[293] Id at 414, 386 N.E. 2d at 807, 43 N.Y.S. 2d at 902 (1978).

[294] 57 A.D. 2d 73 at 79, 394 N.Y.S. 2d 933 (1977).

[295] [1986] 29 W.W.R. 222.

[296] Cherry v. Borsman, (1990) 75 D.L.R. (4th) 668 at 718 and 719.

have to cope with the burden of bringing up [the child] and giving her companionship throughout her life."[297] After taking all of these factors into account Skipp, J. assessed the plaintiffs damages for pain and suffering and emotional distress at $75,000.

An emotional distress recovery would not give the plaintiff parents a "societal advantage over other parents" as the court in Mason v Western Pennsylvania Hospital[298] feared it would. Such an award would merely compensate the parents as fully as possible for their physician's negligence. It must be remembered that "an adequate comprehension of the [parents'] claim under these circumstances starts with the realization that the infant has come into this world and is here, encumbered by an injury attributable to the malpractice of the doctor."[299] Thus the "source" of the parents' emotional harm is the physician's breach of duty.

Lastly, it is wholly unrealistic to say that the parents are mere witnesses to the consequences of the tortious conduct involved in these cases.[300] The plaintiffs are not "bystanders" at the birth of their child. "To infer that a mother is a bystander at the birth of her infant manifests a basic misunderstanding of the duty owed a patient by a physician. In such a circumstance as hypothesized, there are two people within the zone of danger, and the doctor owes a duty to each. That the infant may have suffered physical injury while the mother solely psychic, is not to say that each individual could not seek redress against the physician for the particular type of damage he caused."[301] The duty the physician owes to the mother envelopes

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[297] Id at 85.

[298] 286 Pa. super. 354, 428 A. 2d 1366 (1981).

[299] Berman v Allen, 404 A. 2d 8 at 19 (1979).

[300] See, Phillips v United States, 575 F. Supp. 1309 (1983).

[301] Howard v. Lecher, 366 N.E. 2d 64 at 69, 42 N.Y. 2d 109 at 114 (1977) (Cooke, J., dissenting).

a duty to the unborn child, the breach of which carries foreseeable consequences. These may be difficult to evaluate, but they are nonetheless actual.

The unfortunate result of many wrongful birth cases is that the plaintiffs are only compensated for a portion of the physician's negligence; usually that portion which is the most easily and accurately measured. But, it is submitted, that if it is proved that the physician was negligent, the emotional distress consequent upon the materialization of a defective child is the direct result of the physician's negligence and recovery under this head should be permitted in addition to the economic damages claimed.

H. Mitigation of Damage

An argument which could be put forward by the defendants concerns the duty to mitigate damages. There is a duty imposed by the law upon plaintiffs to take all reasonable steps to mitigate their losses. The requirement of mitigation in the American cases is derived from section 918 of the Restatement (Second) of Torts[302] which specifies that a plaintiff cannot recover for damages that could have been avoided by the use of reasonable effort after the commission of the tort. In the wrongful birth context, can it be argued that a plaintiff should be denied recovery on the ground that the loss could have been avoided by undergoing an abortion or by placing the child for adoption?

The rule, as said above, requires the plaintiff to take any reasonable measures available to minimize the financial consequences of a defendant's negligent conduct. If the effort, risk, sacrifice, or expense which the plaintiff must incur in order to minimize the loss or injury is such that a reasonable person under similar circumstances might well decline to incur it, failure to do so will not preclude recovery of full damages. Thus, the question in a wrongful birth action is

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[302] Restatement (Second) of Torts 918 (1979).

whether it is "reasonable" to require the plaintiffs to attempt to mitigate their damages by terminating an unwanted pregnancy or placing an unplanned or impaired child for adoption.

Application of the mitigation rule in a wrongful birth suit would limit the damages awarded to the point at which the reasonable plaintiff could have acted to avoid greater injury and loss - either when the fetus could be safely aborted or when the child could be placed for adoption - if these are actions the reasonably prudent person in the circumstances of the plaintiff would have taken. It is important to remember that the plaintiff is not required to abort the fetus or place the child for adoption, but recovery may be limited to the point at which one of these actions could have taken place.

Some courts in wrongful birth cases have supported the mitigation argument although it was not applicable in the specific case[303] and others have held that the failure to abort or place the child for adoption demonstrates that the benefits of child rearing outweigh the costs.[304] The majority of the American courts, however, have concluded that these measures are unreasonable and that the "refusal of a mother to submit to an abortion, or if the parents refuse to give their child up for adoption should not be regarded as a failure of the parents to mitigate damages."[305] The American courts have also found that "no mother could reasonably be required to abort or place her child for adoption."[306] Although it appears that mitigation is currently a non-issue in the United States, some commentators feel that to ignore the principle results in injustice. The

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[303] Robak v United States, 658 F. 2d 471, 478-79 (7th Circ.1981).

[304] Sorkin v Lee, 78 A.D. 2d 180, 434 N.Y.S. 2d 300; Public Health Trust v Brown, 388 So. 2d 1084; Doiron v Orr, (1978) 20 O.R. (2d) 71, 86 D.L.R. (3d) 719, 2 L.M.Q. 237 (H.C.).

[305] Sherlock v Stillwater Clinic, 260 N.W. 2d 169 at 176 (Minn. 1977).

[306] Rivera v State, Misc. 2d 157 at 163, 1404 N.Y.S. 2d 950 at 954 (Ct. Cl. 1973).

basis of this argument is succinctly described by D.A. Burgman:[307]

> Normally in tort cases, the objective in measuring damage is to achieve compensation, no more and no less. The purpose of compensation is to vesture the wronged party to the position he would have occupied had the wrong not been committed. Clearly, in the wrongful birth situation, this is not an easy task; a new life simultaneously brings with it both costs and comforts, none of them easily assigned a price. Equally clear is the fact that the plaintiff could most effectively be restored to his original financial position by aborting the fetus or placing the child for adoption; such a procedure would not only reduce the damages but would eliminate the need to evaluate the benefits conferred. Yet courts, for the most part, have declined to use the basic legal principles which would restrict recovery. They have awarded speculative damages, they have misapplied the principle of offsetting benefits, and finally, they have excused plaintiffs from mitigating their damages. The result is the awarding to plaintiffs of more than the requisite compensation.

(1) Abortion

Courts have pointed out that the reluctance of the plaintiff to mitigate may be characterized as part of the doctrine of "talem qualem," that you take your victim as you find him. Under this doctrine, the defendant is unable to complain if the wrongful birth plaintiff finds the thought of an abortion abhorrent or if her mental or emotional makeup is inconsistent with having an abortion. There are significant differences between deciding that sterilization is the appropriate method of family planning and having an abortion, and the courts have recognized that plaintiffs should not be penalized for acting within their religious beliefs.[308]

The concept of a requirement of abortion being imposed upon a plaintiff as a positive

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[307] "Wrongful Birth Damages: Mandate and Mishandling by Judicial Fiat," 13 Val. U.L. Rev. 127 at 146 (1978).

[308] Jehovah's witnesses - a group of over one-half million Christians believe that sterilizations rests on the individuals conscience while abortion is a serious wrong. 94 Mis. 2d 157, 404 N.Y.S. 2d 950 (1978). The position of the Catholic Church is that an abortion is equivalent to murder (see O'Connor, "Human Lives, Human Rights," Catholic New York, Oct. 18, 1984 at 52-53).

duty would no doubt be highly controversial. Justice Hancock in Sorkin v Lee commented that he was "...aware of no basis in the law or in our culture, moral or sociological heritage lending support to such a requirement." The "...religious, ethical and constitutional implications of such a rule..."he said, would be "...far reaching to say the least."[309]

Because the question of abortion is indeed such a controversial and emotionally charged subject, most American courts have avoided a discussion of the issue by deciding that, as a matter of law, it is unreasonable for a court to require the parents of an unplanned child to consider having an abortion. This alternative is a uniquely personal choice which cannot be forced upon parents as a means of mitigation damages.[310] The court in Rivera v State stated that "a rule of law which requires the claimant to have an abortion would constitute an invasion of privacy of the grossest and most pernicious kind."[311]Furthermore, the courts have decided that "...the right to have an abortion may not be automatically converted to an obligation to have one. The decision whether or not to undertake that medical procedure must rest on a number of factors including the stage to which the pregnancy has progressed, the health and condition of the woman at the time and the professional judgment and counsel received."[312]

The matter of mitigation of damages by abortion has also been raised in the Canadian courts. The fact that the plaintiff mother in Doiron v Orr[313] would not consider abortion or

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[309] Sorkin v Lee, 78 A.D. 2d 180, 434 N.Y.S. 2d 300 at 204 (1980) per Hancock J. (dissenting).

[310] Stills v Gratton, 55 Cal. App. 3d at 709, 127 Cal. Rptr. at 658 (1976). See also Cockrum v Baumgartner, Ill, App. 425 N.E. 2d 968 at 971, 99 Ill. App. 3d 271, 54 Ill. Dec. 751 (1981).

[311] 26 Misc., 2d 157, 404 N.Y.S. 2d at 454 (1978).

[312] Ziemba v Sternberg, 45 A.D. 2d 230 at 235, 357 N.Y.S. 2d 265 at 270 (1974).

[313] (1957) 20 O.R. (2d) 71, 86 D.L.R. (3d) 719, 2 L.M.Q. 237 (H.C.).

adoption as an alternative, clearly influenced the court in denying recovery. But this comment may be considered obiter in that the physician was found not to have performed the operation negligently, and on this basis alone the plaintiff thereby became disentitled to damages for the cost of raising her child. Any additional comments made after this finding are superfluous to the decision and it is submitted, should not be given any weight. The court in Cataford v Moreau[314] unfortunately did not express an opinion on mitigation because it was found in this case that the burden was more than compensated for by benefits which the plaintiffs would derive from their healthy baby.

The interesting question of whether a plaintiff mother should be obliged to accept the offer of a second abortion after the failure of the first was raised in the case of Fredette v Wiebe.[315] Here the court held that the plaintiff did not fail to mitigate by not having an abortion when she learned she was still pregnant or in not giving up her twins for adoption. The court held that the plaintiff's change in attitude was foreseeable, was not inconsistent, and was a reasonable response to her changing state of pregnancy. The issue was also raised in the case of Cherry v Borsman.[316] Unfortunately, it was left unredressed because of the finding by the court that when the plaintiff discovered the failure of the abortion to end her pregnancy, the pregnancy had, by then, progressed beyond the state at which the plaintiff could obtain a legal abortion in Canada. It was under these circumstances that the plaintiff carried the child to term. The issue of whether the plaintiff mother should have considered giving the child for adoption was not raised, presumably because of the serious nature of the birth defects from which the child suffered.

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[314] (1978) 114 D.L.R. 3d 594.

[315] [1986] 5 W.W.R. 222 (B.C.S.C).

[316] Supra note 279.

The argument concerning abortion would have interesting implications in jurisdictions where non-therapeutic abortion is a criminal offence, and therefore would be inapplicable in cases where the justification for the abortion was of a non-medical character. The following comment on the judgment of Doiron v Orr[317] is pertinent:

> "...Mr. Justice Garrett prefaced his denial of child-maintenance damages by commenting that Mrs. Doiron would not consider the options of abortion or adoption, thus implying that she refused to mitigate the damages she was claiming. In Canada it is perfectly outrageous to require, by implication, that someone coming to court asking for child maintenance damages should have had an abortion. If, as in Doiron, the grounds for avoiding pregnancy were primarily financial, the abortion would be illegal or, is Mr. Justice Garrett suggesting that Mrs. Doiron should have shammed the symptoms necessary for her to claim that the pregnancy would be likely to endanger her life or health?"[318]

The issue of mitigation has also been raised in several cases in the United Kingdom, in all cases unsuccessfully. In Scuriaga v Powell[319] where an abortion had been negligently performed, the defendant argued that the plaintiff's failure to undergo a repeat operation when she realized that she was pregnant at three months was an indication of a failure to mitigate. The court held that at three months a second abortion would have been unsafe for the mother and therefore an unreasonable choice. Similarly, in McKay v Essex Area Health Authority[320] the plaintiff was willing to undergo a second abortion up until the fourteenth week of pregnancy but at twenty-two weeks it was not unreasonable for her to refuse as a greater risk to her health was involved. In Emeh v Kensington and Chelsea and Westminster AHA,[321] the argument

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[317] Supra note 313.

[318] J.E. Bickenbach, "Damages for Wrongful Conception: Doiron v Orr," (1980) 18 U.W. Ont. L. Rev. 493 at 502.

[319] (1979) 123 So. J. 406.

[320] [1982] 1 Q.B. 1166.

[321] [1984] 3 All ER 1044.

presented by the defendant based on the plaintiff's failure to mitigate succeeded in the High Court. A negligently performed sterilization operation resulted in the plaintiff becoming pregnant. Mrs. Emeh subsequently gave birth to a child with severe congenital abnormalities. She claimed that she had not realized her condition until, in her view, she was at least 26 weeks pregnant, and did not then consider an abortion because of the risks involved. In fact, Mrs. Emeh was at most 20 weeks pregnant when her condition was diagnosed. Park J. formed an adverse view of the plaintiff's truthfulness and reliability and concluded that Mrs. Emeh had unreasonably failed to minimize her loss by refusing an abortion. The Court of Appeal reversed this finding and stated that a refusal to have an abortion at 20 weeks was not unreasonable.

In Canada and the United Kingdom, the question of when, if ever, a woman will be obliged to mitigate by securing an abortion is still left open. Neither the Canadian courts nor the courts in England have stated categorically that in all cases the plaintiff should never be required to undergo an abortion in reasonable mitigation. It appears that in these jurisdictions, whether or not a plaintiff's refusal to mitigate can be regarded as reasonable will depend on the particular circumstances of the case.

(2) Adoption

The decision to bear a child and the decision to give up one's baby after it is born involve different emotional and philosophical problems. In Keats v Pearce[322] the court held that while the refusal of the plaintiff to submit to an abortion to minimize her loss is not unreasonable, the refusal to give the child for adoption is unreasonable. The court stated:

> "The law does not allow compensation for loss which the plaintiff could avoid through reasonable action... When the plaintiff's claim is considered, in the light of the principles

[322] 48 NFLD. & P.E.I.R. 102 (1984).

> stated, it will be found to be comprised of loss which she could have avoided through reasonable action. She could not have avoided loss incurred during pregnancy; abortion cannot be considered as reasonable action which she ought to have taken. In any event, there was no legal justification for such action. On the other hand, if she truly did not want the child, with all the blessings and burdens entailed, she could have terminated her responsibility and relationship to the child by arranging for an adoption before or after she was delivered. That is the position at law, and her loss must be assessed on that basis." (emphasis added).

With regard to the argument concerning adoption, it is submitted that to require parents to take this option or else forego compensation is unrealistic and unduly harsh, predicated as it is on the assumption that the parent's refusal to place the child for adoption is of itself evidence that the child was not unwanted, and that the parents therefore have suffered no damage. Although it is a good thing that the courts remain vigilant to fraudulent claims, such a position ignores the fact that the parents may still resent the financial burden that the new addition to the family brings, even though they may love the child once it is born. Courts recognize that the birth of a child gives rise to bonds that a parent might not want to break.[323] Further, many parents may feel a moral obligation to raise the child, regardless of whether they wanted to conceive it. It could also be argued that to advocate adoption in these situations runs counter to the aim of preserving the stability of the family unit - an aim which carries considerable weight. It has also been suggested that adoption is viable as a method of mitigating damages only if the child is normal, since an abnormal child's chances of being adopted are negligible.[324] Offering an abnormal child for adoption would perhaps result in his never having a home and doing so would not constitute reasonable conduct.

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[323] Troppi v Scarf, 31 Mich. App. 240, 187 N.W. 2d 511 (1971).

[324] Comment, "Liability for Failure of Birth Control Methods," 76 Colum. L. Rev. 1187, 1203-04 (1976).

V. CONCLUSION

The following conclusion will attempt to provide the reader with a summation of the major conclusions reached in this paper:

A. Wrongful birth, wrongful pregnancy and wrongful life actions are premised on similar allegations; that the physician's negligence precluded an informed parental choice concerning the initiation or continuation of the procreative choice and thus injured the parents and/or child. These claims assert that under some circumstances, the burdens imposed by life outweigh its benefits. While similar, the torts are completely distinct. The actions are premised upon conduct that occurs at different periods of time; they advance different legal arguments; and they raise distinct philosophical problems.

While most courts reject the wrongful life claim (the claim by or on behalf of an infant who suffers from a genetic or congenital disorder), the wrongful birth claim (the action brought by the parents of an unhealthy child) has had more recognition.

The number of wrongful birth actions in the sterilization context has increased in the past few years, due partly to a comparable rise in the popularity of voluntary sterilization. In the context of sterilization there appear to be four different stages during which the physician's conduct may be arguably negligent; preoperative counselling, performance of the operation itself, postoperative testing and postoperative counselling. It is submitted that a physician who informs his patient that the sterilization operation will be successful will be held liable in tort under the doctrine of informed consent if the operation fails and if the patient proves that had he or she been properly informed of the risks of failure, he or she would not have chosen to undergo the operation. Negligence in the performance of the operation can be proved by postoperative testing and the evidence of expert witnesses.

B. Actions for wrongful birth in the abortion context have arisen in the following fact

situations. The first situation arises from the negligent performance of the operation. The second situation is where the doctor has failed to diagnose rubella in the mother during the pregnancy or has failed to inform her of the high risk that rubella may cause the child to be deformed. The third situation is that the plaintiffs would have avoided conception or terminated the pregnancy had the physician not failed to detect a genetic problem, or failed to properly test for any impairment by means of amniocentesis. Lastly, a physician may be liable in a wrongful birth suit for failing to diagnose a pregnancy in time for the plaintiff mother to seek an abortion.

A question that arises from the still emerging and vaguely defined field of "genetic counselling" is what standard of care will govern the actions of physicians. It appears that a central issue will be the degree of uniformity of conduct that can be expected of practitioners in this relatively new specialty.

The duty of care of the physician has always included both the duty to provide adequate medical treatment and to obtain the patient's consent, the fulfillment of this duty being judged according to the standards of the medical profession. The legalization of abortion in the United States and the availability of sterilization and contraception have given parents the opportunity to plan or avoid conception, or terminate a pregnancy.

These developments have paved the way for legal action taken by parents in cases where they claim that the physician, in failing to inform, diagnose, or treat the patient with regard to the presence or risks of defects, deprived them of the opportunity to avoid or terminate the pregnancy and thus avoid the harm.

A fourth development, the advent of prenatal diagnosis, has made it possible to detect abnormalities in the early stages of pregnancy, forcing the courts to include recourse to such techniques as within the duty of care owed to the patient by the physician. These advances in the fields of prenatal screening and diagnosis have led the courts to interpret the applicable standard

of care as requiring appropriate tests and counselling for women at risk of bearing children with birth defects. Thus, a physician who is consulted by a pregnant woman for prenatal care should inform her, in every case, of the existence and availability of amniocentesis and the benefits and risks involved. Where there is a greater risk of fetal defect (ie., the mother is 38 years old), the physician should advise his patient to undergo amniocentesis testing. It is submitted that a failure to do so should be considered a breach of the duty of care owed by the physician. It is also suggested that a physician may be liable if he failed to inform parents of the possibility of their bearing a defective child when he knew or should have known that his patient was at risk, even where that information was not specifically sought out by the patient.

The fifth and perhaps the most controversial effect of scientific advances on physician liability has come with the discovery of preconception genetic counselling. It is submitted that there is a duty to advise a patient of a risk that a fetal defect may exist where that advice is sought prior to conception. The full implications of this added responsibility for the physician remain to be clarified. However, the proper domain of the wrongful birth action should include only those claims where it is alleged that the physician failed to warn of the possibility of abnormalities his patients of childbearing age wishing to conceive whom the physician knew or should have known to be at risk.

In imposing an affirmative duty of disclosure in the situations described herein, the courts should be guided by the standards governing informed consent to surgery and other medical treatment. As discussed above, the duty to disclose medical information would be measured by what a reasonable person in the plaintiff's position would want to know in deciding whether to conceive or to continue a pregnancy. There is a fear that to compensate plaintiffs will stretch traditional principles of tort liability to the extreme. Yet, to grant blanket immunity to physicians in these cases would establish a dangerous precedent. In fact, it is submitted that the

burden on the medical profession in this area "is not any more unreasonable than the burden placed upon physicians to use reasonable care in delivering a child or informing patients of the risks of surgical procedures."[325]

The courts can be expected to continue to have a substantial role in articulating the boundaries of acceptable conduct. These emerging standards will reflect those imposed by the medical profession.

C. Once uniformly rejected, reported wrongful birth cases presently show a tendency among courts to allow some recovery. However, this leniency should not be confused with a trend towards the eventual uniform recognition of the wrongful birth claim. Even those courts which have allowed recovery have been careful not to appear overzealous in their recognition of the claim. Furthermore, among those courts which have allowed such claims, there is considerable disagreement as to the appropriate measure of damages. Many seemingly insurmountable public policy hurdles have also been placed in the path leading to recognition of the wrongful birth claim. Among these "hurdles" are:

(1) the position that a child's birth can ever be considered an injury; the birth of a child is always a "blessing";

(2) the asserted difficulty of assessing damages;

(3) the fear of a "flood of litigation";

(4) the fear of fraudulent suits;

(5) the fear of placing an intolerable burden upon the medical profession; and

(6) the fear that the child will become an "emotional bastard".

Viewed simply as a negligence case, the negligent physician is responsible for the expenses

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[325] See Klodowski, "Wrongful Life and a Fundamental Right to be Born Healthy : Park v. Chessin; Becker v. Schwartz" , 27 Buffalo L. Rev. 537, 548 [1978].

which are reasonably foreseeable consequences of his actions. When stripped of its emotional overtones, the issue in the wrongful birth cases remains one of compensation. Courts should not rule, as a matter of law, that public policy considerations always outweigh the injury to the parents. The "overriding benefits theory" , a rule of public policy which prohibits recovery as a matter of law, should now be regarded as untenable. There is no reason to say that in every case the birth of a child is always a "blessing" or that the intangible benefits of parenthood outweigh the expenses incurred in raising a child. In the sterilization context, the parents who seek sterilization have already decided that, for them, the burdens outweigh the benefits. In the abortion context, the parents would have aborted the pregnancy or decided not to conceive had the physician not been negligent in providing care to the plaintiffs. Tortfeasors should not be immunized from full accountability for their negligent conduct just because their negligence results in the birth of a human life.

Physicians should also not be immunized from the reasonably foreseeable damages caused by their negligence, such as the expense of raising the child, simply because it may be burdensome. As this thesis has argued, recovery by parents on the grounds described herein, accords with existing tort law. To deny recovery, as the courts have done, because professional liability should otherwise be greatly increased, is merely to pretend that the costs created by professionals' wrongful conduct do no exist, when in fact they are merely less visible, being borne by the victims or the state. It is certainly in the public interest for the courts to promote adherence to the maintainance of high standards of professional medical treatment by imposing effective sanctions when those standards are not met.

Concern expressed by some courts regarding the possibility of detrimental effects on a child who later learns of the legal action is, it is submitted, somewhat overstated. The child who was unwanted at the time of conception may either be wanted or unwanted at the time of birth,

but the essential point is that the economic burden still remains. The purpose of an award of damages to the parents is to alleviate that burden; there is no justification for assuming that such an award necessarily constitutes an adverse reflection upon the value of the child's life as perceived by its parents. Moreover, it is suggested that in its consideration of the welfare of the child, the court should be aware of the fact that a denial of damages to the parents may in fact be adverse to the best interests of the child.

Courts that hesitate to allow the consideration and award of damages out of concern that the calculations would be too speculative should give careful attention to the actual mechanics that are involved. Cost calculations for such matters are fairly routine. The calculation of the "benefits of parenthood", while inherently more speculative than costs, is not impossible.

This review of some of the policy factors articulated in the wrongful birth cases not only illustrates the range of these factors but is evidence of judicial discussion of some factors which are virtually unique when compared with policy concerns in negligence cases generally. It is also intriguing to see how the same policy concerns originating in the early American cases have permeated (although not completely) the English and Canadian caselaw and have led to similar disagreement and division over their applicability.

Public policy barriers created by the earlier cases are now beginning to erode, but not completely. Even in very recent wrongful birth suits the "blessings" of parenthood have been expounded by the defence. The action continues to be vulnerable to public policy arguments and to the emotional susceptibility of the jury.

D. As stated above, early courts denied all damages on the theory that the birth of a child was a blessed event. Since then, the courts have adopted several damages positions on the wrongful birth cause of action. These results make little sense in terms of the law of damages and the principles of negligence. The courts' search for compromise or intermediate positions

in wrongful birth cases is remarkable in light of the virtually unanimous commentary that supports recognition of the cause of action under the traditional negligence framework.

A few courts have awarded full damages and costs associated with childbearing and child rearing without offset. This type of award is more likely to be given where the baby is born unhealthy. The majority of cases involving the birth of an unwanted but healthy child allow the recovery of damages associated with the pregnancy and delivery and deny child rearing costs. Where the baby is born unhealthy the courts are most likely to allow the recovery of all damages and apply the "benefits rule" to offset damages by benefits received. It is submitted however that the benefits rule is misapplied in most wrongful birth cases. It is submitted that whether the baby is born healthy or unhealthy, the benefits rule should only be applied to offset benefits of the same interest. For example, the wrongful birth claim involves injury to physical, emotional, and economic interests, not just to a single interest in avoiding parenthood. That these interests are separable is clear from the fact that many courts deny recovery for one type of injury and permit it for the others.

The benefits rule provides that a benefit to any of these separate interests offsets the damage only to that interest and not to other interests that are harmed by the same act of negligence. It would , therefore, be improper to award damages for the financial costs of child raising, and then reduce the award by the non-economically speculative benefits. As said above, financial injury to the plaintiffs, such as the costs of pregnancy,delivery and upbringing, are hard tangible expenses that are readily capable of ascertainment actuarily.[326]

It is arguably improper to award damages for expenses and then reduce them by the value

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[326] "[s]uch calculations are made by estate planners, insurance companies and sometimes by private parties as incident to support proceedings or matrimonial settlements." Rivera v. State, 94 Misc. 2d 157, 161, 404 N.Y.S. 2d 950, 953 (Ct. Cl. 1978).

which the jury places on the child's hugs and kisses. Properly applied in the wrongful birth cases, the court would allow the recovery for emotional harm to be offset only by an emotional benefit; the recovery for economic harm to be offset only by an economic benefit and so on. Thus, a showing that the child, whether healthy or unhealthy, was a source of joy to its parents, would serve only to offset the emotional cost of raising the child. If the pleasure the parents received from the child outweighed the emotional burden, as it often would in the case of a healthy child, the same interest rule would prevent the court from applying this "surplus benefit" to reduce the plaintiffs' recovery for financial harm.

Certainly, the defendant should not have to pay for the pleasure as well as the pain, that his negligence has caused. At the same time however, courts should not require the plaintiffs to forego their recovery for physicial or economic harm because they have received an emotional benefit. So enthralled have the courts been in the benefits rule that they have largely ignored the same interest limitation of the Restatement which applies equally to the wrongful birth case. A narrow construction of the benefits rule prevents the plaintiffs from being overcompensated without denying them damages for injuries they actually suffered. It would seem inevitable that in jurisdictions that allow child rearing damages for children who are born unhealthy, the courts will eventually be forced to allow the same damages for healthy children. Otherwise where will the courts draw the line when children are born with mild defects?[327]

The plaintiff parents' injury should be assessed according to the normal expenses incurred by the average family in raising a child, although subjective factors could be considered in certain cases.

Where the defective child is incapable of supporting himself because of physicial or

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[327] Mason v. Western Pennsylvania Hosp., 499 Pa. 484, 488 - 89, 453 A. 2d 974 (1982) (O'Brien, C.J., concurring in part and dissenting in part).

emotional disabilities, the parents are entitled to child rearing costs for the life of the child. Where the child rearing costs are awarded to the parents past the child's age of majority, medical evidence should be called upon to determine the life expectancy of the child.

Notwithstanding the great numbers of cases that have disallowed the recovery of damages for emotional distress, it is submitted that the parents' emotional distress is no less a direct result endured by the plaintiffs than the economic loss suffered. The difficulty in estimating these damages should not bar the parents' recovery altogether.

On the issue of mitigation, to require a plaintiff to mitigate damages by adoption or abortion would be unreasonable and would constitute an unwanted and unwarranted invasion of privacy.

As the popularity of family planning increases so will the number of wrongful birth cases. In the sterilization context, courts must rely on the standard principles of negligence law. Only by treating wrongful birth as a negligently inflicted injury and analyzing it according to the principles accepted in other negligence actions can the courts properly compensate parents.

In the abortion context, knowledge about human genetics can often enable prospective parnents to avoid the birth of a defective child. Yet, the courts have not met the challenge presented by suits brought against physicians whose failure to provide adequate genetic counselling has allegedly cause such children to be born. The judicial reluctance to establish consistent guidelines for the imposition of tort liability and to award adequate damages has inhibited society's interest in ensuring that parents have access to information.

This thesis proposes that the parents of a genetically defective child should have a cause of action when they can show that the doctor knew, or should have foreseen that such information would be relevant to these parents, and that had these parents known of the possibility, they

would not have had this child. Once these requirements are met, the parents should be awarded substantial damages for their economic loss and emotional anguish.

The artificial limitations that the courts have placed on wrongful birth recovery are not merely unnecessary; they are also inequitable. The refusal to compensate the plaintiffs for their injuries is not in their best interest, since it often deprives them of the means to support the wrongfully born child; it is not in the best interest of the medical profession since it condones professional negligence; and it is not in the best interest of the child, since it may mean that he enters the family as a "second class citizen".[328]

The wrongful birth action must emerge as a tort designed to protect the parental right to make procreative choices as well as society's interest in ensuring that standards of good medical practice govern the performance of sterilization operations, abortion operations, genetic counselling and diagnosis.

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[328] See Kashi, "The Case of the Unwanted Blessing : Wrongful Life.," 31 U. Miami L. Rev. 1409 (1977) at 1417.

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