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Wrongful Conception: Who Pays for Bringing Up Baby?

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INTRODUCTION

Forty-five years ago, when Clarence Christensen sued his doctor because he had fathered a child after having undergone a vasectomy, the Minnesota Supreme Court found itself confronted with the issue of whether a contract to perform a therapeutic sterilization was void as against public policy. The court held that public policy did not bar a therapeutic sterilization and further noted that even the few states that outlawed sterilizations made an exception in the case of medical necessity. Subsequent courts have extended this holding to elective sterilizations. In light of these decisions and the Supreme Court holdings in the last fifteen years that the rights to abortion and contraception fall within the fundamental right of privacy, it appears that states should not interfere with an individual's decision to be sterilized. It is a decision that rests within the "individual conscience."

As the legality of sterilization operations became settled, the question arose whether damages could be recovered in what are generally known as wrongful conception actions—actions against a doctor to recover for the

1. The purpose of a therapeutic sterilization, whether performed on a male or female, is to prevent pregnancy or childbirth from aggravating any existing physical or mental health problems of the female. Note, *Elective Sterilization*, 113 U. Pa. L. Rev. 415, 416 (1965) [hereinafter cited as *Sterilization*]. Vasectomy, the sterilization procedure for men, is a short and simple operation that is usually performed in the physician's office. The operation is performed to prevent the ejaculation of sperm by severing and tying the vas deferens, the tube that connects the testes with the urinary canal. For women, a bilateral salpingectomy (the surgical removal of the Fallopian tubes) or tubal ligation (the cutting and tying off of the Fallopian tubes) prevents the union of sperm and egg which results in conception. *Sterilization*, supra, at 416.
3. *Id.* at 125, 255 N.W. at 621.
7. This terminology was suggested in *Sherlock v. Stillwater Clinic*, __ Minn. ___, ___, 260 N.W.2d 169, 174-75 (1977). This Note will not discuss cases termed "wrongful life" or "wrongful birth" in which the plaintiff alleges that the child's very existence is wrongful in that, had the physician diagnosed the mother's disease that resulted in the child's deformity and informed her of the risk of having a deformed child and of terminating the pregnancy as an alternative, the child would not have been born deformed. The distinction between a wrongful life action and a wrongful birth action is that the former is brought by the child, whereas the latter is brought by the parents. Wrongful conception cases are primarily distinguishable from both wrongful life and wrongful birth cases in that the parents in the latter cases want a healthy child, whereas in wrongful conception cases the parents do not want a child at all. Wrongful life and wrongful birth actions have met with almost universal disapproval in the courts. The reason given by most courts in denying these actions is that the measure of compensatory damages is
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birth of an unwanted child resulting from the doctor's misperformance of the
operation or from his wrongful guarantee of the operation's success. The
cases that addressed this question are inconsistent. A trend toward recovery
has emerged, but even these cases vary as to the extent of recovery permitted. Recoveries granted range from pregnancy-related costs to the
costs of raising the unwanted child until its majority.
The purpose of this Note is to review the inconsistent lines of wrongful
conception cases and to suggest an approach to the prosecution of, and
recovery under, this type of action. Part I will examine various policy factors
underlying the cause of action. Part II will explore the various theories of
recovery available to the plaintiff: medical malpractice, breach of warranty,
deceit, and strict liability. As will be shown, wrongful conception actions
have the best chances of success under one of the medical malpractice
theories, be it negligence in the operation, lack of informed consent, or
negligent misrepresentation. Part III will discuss the issue of damages and
will contend that parents should be allowed to recover for all foreseeable
harm resulting from the defendant's negligence, offset by any benefits of
parenthood that the defendant can prove.

I. PUBLIC POLICY FACTORS FAVORING RECOVERY
FOR WRONGFUL CONCEPTION

A plaintiff in a wrongful conception action has the benefit of public policy
which favors individual choice in matters of birth control. This policy is
impossible because it involves weighing the value of life against the value of nothingness. In
addition, wrongful life cases usually present a proximate cause problem because the cause of the
child's deformities is usually the mother's disease, not the doctor's failure to diagnose it. See, e.g.,
2d 766, 233 N.W.2d 372 (1975). But see Park v. Chessen, 60 A.D.2d 80, 400 N.Y.S.2d 110
App. Dec. 27, 1978). Wrongful conception differs in that the cause of action arises at the time of
the unwanted conception that is proximately caused by the acts of the physician. It is more akin
to a traditional malpractice action than is a wrongful life action. Compensatory damages can be
measured by placing the plaintiff in the position he or she would have been in if the sterilization
operation had been properly performed. See pts. II, III infra.

Actions by siblings against physicians, alleging diminution of their share of parental love,
affection, and monetary support due to the birth of an unwanted or deformed child, also have not

Actions by an illegitimate child against a parent for the "tort" of bastardy, that is, fathering an
illegitimate child, have met a similar fate. See Pinkney v. Pinkney, 198 So. 2d 52 (Fla. Dist. Ct.
App. 1967); Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), cert. denied, 379
N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966) (rejecting claim that child's illegitimate
birth resulting from rape of mother in state hospital was caused by negligent supervision on the
part of the state).


9. For a discussion of the percentage of cases that have allowed recovery, see note 11 infra.


reflected in state statutes that encourage family planning and birth control,\(^1\) even to the point of subsidizing contraceptives as part of state welfare programs.\(^2\) In addition, public acceptance of the individual's right not to have children is evidenced by the widespread use of birth control techniques.\(^3\)

Indeed, societal attitudes regarding the sanctity of life have recently undergone a transformation. For example, the right to have an abortion is deemed fundamental,\(^4\) and it is a decision that rests solely with the pregnant woman.\(^5\) Moreover, an individual's right to die has met with increasing acceptance.\(^6\) The elimination of criminal penalties for suicide reflects this right.\(^7\) Therefore, the value of a child's birth, when unplanned and unwanted, cannot be said to bar an action for wrongful conception.\(^8\)

In addition, public policy regarding the regulation of the medical profession is not furthered by allowing doctors to escape the foreseeable consequences of their negligence.\(^9\) It has been claimed that allowing parents to recover childrearing costs would place an unreasonable burden on physicians.\(^10\) Yet,


\(3\) Between 1970 and 1975, over 3.5 million vasectomies were performed in the United States. Lombard, \emph{Vasectomy}, 10 Suffolk L. Rev. 25, 25 (1975). In 1975, an estimated 7.1 million married women were using birth control pills. Sherlock v. Stillwater Clinic, __ Minn. __, __ n.9, 260 N.W.2d 169, 175 n.9 (1977).


\(5\) Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (declaring unconstitutional a Missouri statute requiring consent of the spouse or parent of an unmarried woman under 18).

\(6\) See, e.g., \emph{In re Quinlan}, 70 N.J. 10, 355 A.2d 647 (as valuable incident to daughter's right of privacy, guardian allowed to assert on behalf of daughter decision to allow natural termination of a vegetative existence), \emph{cert. denied}, 429 U.S. 922 (1976); Cal. Health & Safety Code §§ 7185-7195 (West 1970 & Supp. 1978) (allowing a terminally ill adult the right to authorize the withholding or withdrawal of life-sustaining procedures when death seems imminent). See \emph{generally} Steele & Hill, \emph{A Plea for a Legal Right To Die}, 29 Okla. L. Rev. 328 (1976).

\(7\) Although this may be more indicative of a step toward reality than of approval of the act, it still reflects societal trends. Penalties remain, however, for causing, procuring, or aiding and abetting a suicide. See, e.g., Minn. Stat. Ann. § 609.215 (West 1964); N.Y. Penal Law §§ 120.30, 35 (McKinney 1975); 18 Pa. Cons. Stat. Ann. § 2505 (Purdon 1973).

\(8\) "It is no answer to say that a result which claimant specifically sought to avoid, might be regarded as a blessing by someone else." Rivera v. State, 94 Misc. 2d 157, 162, 404 N.Y.S.2d 950, 953 (Ct. Cl. 1978) (emphasis added).


it seems anomalous to exonerate the medical profession from these damages in light of the special duty owed by it to the public. "Unlike other professions, the medical profession deals not with money or property, but with . . . life and . . . death." Therefore, public interest in the regulation of the medical profession may be hampered by special judicial protection for physicians. Moreover, it would be unjust to allow a violation of the individual's fundamental right not to procreate to go unremedied.

A question that sometimes arises in the courts is whether this remedy should be supplied by the judiciary or by the legislature. Sanctioning judicial activity in the area of wrongful conception presents no problem if one views the lawsuit as a traditional medical malpractice action. However, even if wrongful conception is considered to be a new cause of action, the judiciary's hands need not be tied. First, "[t]he real question is not whether there is any precedent for the action . . . but whether the defendant inflicted such a wrong upon the plaintiff as resulted in lawful damages." Second, the law of torts has traditionally been an area of judicial innovation. This has been strikingly apparent in many areas of tort law in the past fifteen years.

1. col. 2 (Ct. App. Dec. 27, 1978) ("Why should the medical profession be deemed to have placed upon it 'an unreasonable burden' any more than any other profession where malpractice may be charged? . . . [T]he medical profession is not 'unreasonably burdened' if held liable in damages for the injuries caused to those who depend upon it for their very lives.").


24. See Clegg v. Chase, 89 Misc. 2d 510, 391 N.Y.S.2d 966 (Sup. Ct. 1977) (radical departure from common law in creating action for wrongful life should await legislative sanction). The tendency to await legislative sanction has been most pronounced in the illegitimacy cases. See Zepeda v. Zepeda, 41 Ill. App. 2d 240, 262-63, 190 N.E.2d 849, 859 (1963) ("The interest of society is so involved, the action needed to redress the tort could be so far-reaching, that the policy of the State should be declared by the representatives of the people."). cert. denied, 379 U.S. 945 (1964); Slawek v. Stroh, 62 Wis. 2d 295, 317-18, 215 N.W.2d 9, 22 (1974); cf. Stewart v. Long Island College Hosp., 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1972) (wrongful life action).


27. "The fundamental principles of tort law were created by courts not legislatures. Where legislatures have entered the field, it has frequently been in response to the unwillingness of the judiciary to respond to changing times or to depart from stare decisis." Rivera v. State, 94 Misc. 2d 157, 161, 404 N.Y.S.2d 950, 953 (Ct. Cl. 1978).

Commentators have pointed out that tort law is particularly suited to judicial innovation because the conduct involved is not likely to be deterred by advance notice and because the variety of novel fact situations cannot be anticipated. 41 N.Y.U. L. Rev. 212, 212 (1966); see W. Prosser, supra note 20, § 1, at 3-4.

Courts frequently have proven themselves innovative in dealing with new problems in the tort area and competent in handling the consequences of new law.29

II. THEORIES OF RECOVERY

In general, the facts of each case will dictate the appropriate theory of recovery in wrongful conception actions. In order to decide the proper theory under which to proceed, the following questions should be answered: Was a second operation performed which elicited evidence of negligence? Was the patient fully informed before consenting to the operation? Was post-operative testing done, and, if so, was it done properly? Did the physician guarantee sterility?

A. Medical Malpractice

As noted above, wrongful conception actions are usually viewed as traditional medical malpractice actions30 and have proceeded under the following theories: negligent performance of the operation,31 lack of informed consent,32 and negligent misrepresentation resulting from the negligent performance of post-operative testing.33

1. Negligent Performance of the Operation

If the plaintiff chooses to proceed under the theory that the physician negligently performed the operation, he may face several problems in proving his case. The first of these may be showing the physician's breach of duty in the performance of the operation. Because the operation is performed on internal organs, any misfeasance is not readily apparent.34 This problem can be minimized, however, by testimony establishing negligence given by a surgeon who, for example, performed a Caesarian delivery of the wrongfully conceived child or a second sterilization to remedy the prior unsuccessful one.35

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29. See, e.g., cases cited note 28 supra.
30. See note 25 supra and accompanying text.
33. E.g., Hackworth v. Hart, 474 S.W.2d 377, 380 (Ky. 1971); Sherlock v. Stillwater Clinic, — Minn. —, —, 260 N.W.2d 169, 171 (1977)
35. See, e.g., Bishop v. Byrne, 265 F. Supp. 460 (S.D. W. Va. 1967). In this case, the court held on the basis of such evidence that the plaintiffs were entitled to recover for all damages
A second proof of negligence problem arises from the possibility that the pregnancy may be the result of recanalization,\(^3\) which is not the physician's fault. Courts, however, have generally inferred causation in light of the low rate of recanalization in sterilization operations.\(^3\)

In addition to these proof problems, the plaintiff must overcome the argument that subsequent sexual relations are an intervening cause sufficient to break the causal chain. He will, however, have the benefit of several holdings to the contrary.\(^3\) Because the underlying purpose of the operation is to enable the patient to resume intercourse without the fear of conception, sexual relations are foreseeable and within the scope of the original risk, and, therefore, do not break the causal chain.\(^3\)

2. Lack of Informed Consent

The plaintiff may avoid the problems noted above in proving the breach of duty by showing that the physician failed to obtain the plaintiff's informed consent to the operation.\(^4\) To prove a case based upon lack of informed consent, the plaintiff must show that the doctor failed to inform the plaintiff of all of the risks inherent in the operation. If a patient contemplates a sterilization by tubal ligation, her doctor must inform her of the various methods available to perform the surgery,\(^4\) of the possibility of natural failure,\(^4\) of all of the available methods of contraception,\(^4\) and, if the operation is being performed in connection with a Caesarian delivery, of the higher failure rate of any method of tubal ligation when performed at this time.\(^4\)

In vasectomy cases, the patient should be informed of other methods of contraception, of the possibility of natural failure due to recanalization,\(^4\) and of the need to await post-operative testing before being assured of sterility.\(^4\) A proximately resulting from the negligence. \textit{Id.} at 463; \textit{accord}, \textit{West v. Underwood}, 132 N.J.L. 325, 40 A.2d 610 (1945). This type of evidence, however, may have the opposite effect of proving the absence of negligence. \textit{See} \textit{Bennett v. Graves}, 557 S.W.2d 893 (Ky. 1977).

36. Recanalization involves the natural regrowth of the severed tubes. The possibility of recanalization, though rare, does exist. Lombard, \textit{supra} note 14, at 33.


40. The primary question in actions based upon lack of informed consent is how much information a doctor must disclose regarding the risks of the proposed method of treatment. Comment, \textit{Informed Consent in Medical Malpractice}, 55 Cal. L. Rev. 1396, 1396 (1967).


42. \textit{Id.} at \textit{---}, 379 A.2d at 1023 (1977); \textit{see} note 36 \textit{supra} and accompanying text.

43. In \textit{Sard v. Hardy}, 281 Md. 432, 379 A.2d 1014 (1977), the plaintiff claimed that the defendant advised her of the availability of only three options: sterilization, oral contraception, and insertion of an intrauterine device. \textit{Id.} at \textit{---}, 379 A.2d at 1018.

44. \textit{Id.} at \textit{---}, 379 A.2d at 1023; \textit{see} \textit{Prystowsky & Eastman, supra} note 37, at 466-67.

45. \textit{See} note 36 \textit{supra} and accompanying text.

46. This is generally considered essential in determining the success of a vasectomy. Chaset,
physician who follows these guidelines should not be held liable for failing to obtain the patient's informed consent. Although plaintiffs may find informed-consent actions easier to prove, the guidelines set forth in existing and future decisions in these actions, provided that physicians follow them, should eventually vitiate the need for further litigation.

3. Negligent Post-Operative Testing and Negligent Misrepresentation

A similar potential for reducing the need for further litigation lies in wrongful conception actions based upon the theory of negligent failure to carry out post-operative testing. Such actions will serve to standardize the accepted practice in the medical profession with respect to the number of tests and the intervals between tests that are necessary to ensure sterility.

If a theory of negligent post-operative testing is appropriate under the circumstances, the plaintiff also should be able to combine this theory with a negligent misrepresentation theory. An action based upon both theories should succeed if the physician can show that the physician told him that post-operative testing was successful and that the plaintiff was sterile, and that, in reliance on the physician's representation which subsequent testing proves was false, the plaintiff and his wife resumed sexual relations without the use of contraceptives.

Male Sterilization, 87 J. Urology 512, 515 (1962); Lombard, supra note 14, at 33 (patient should not be considered surgically sterile until negative semen analysis is obtained). Testimony to the contrary, such as that given in Ball v. Mudge, 64 Wash. 2d 247, 249, 391 P.2d 201, 203 (1964), seems outdated. See Hackworth v. Hart, 474 S.W.2d 377, 380 (Ky. 1971) (expert testimony that performing three post-operative tests for sterility is standard practice following vasectomy and is necessary to determine whether the operation was successful).

47. One court has held that the physician's duty to disclose should be based upon a reasonable man standard, not a professional standard, and must be measured from the plaintiff's viewpoint as to materiality, not the doctor's. Sard v. Hardy, 281 Md. 432, 379 A.2d 1014, 1022 (1977). This eliminates the need for expert testimony to establish the materiality of the information. Miller v. Kennedy, 11 Wash. App. 272, 284, 522 P.2d 852, 861, aff'd, 85 Wash. 2d 151, 530 P.2d 334 (1975).

The Sard court, however, adopted an objective test of causation. The plaintiff had to show that a reasonable person in the plaintiff's position would not have consented to the treatment if fully informed, not that the plaintiff herself would not have consented. 281 Md. at 439, 379 A.2d at 1025. Adoption of the objective standard precluded the plaintiff's hindsight testimony as to what she would have done from being dispositive.

48. For an example of an action based on this theory, see Sherlock v. Stillwater Clinic, Minn. 260 N.W.2d 169 (1977).

49. An action for negligent misrepresentation is based upon the plaintiff's justifiable reliance on representations which the defendant should have known to be false had he exercised reasonable care. W. Prosser, supra note 20, § 107, at 704.

50. Hackworth v. Hart, 474 S.W.2d 377, 380 (Ky. 1971) (assurances that operation had resulted in sterility); see Sherlock v. Stillwater Clinic, Minn. 260 N.W.2d 169, 171 (1971); Hays v. Hall, 488 S.W.2d 412, 413 (Tex. 1972). As to actions based upon negligent post-operative care and misrepresentation in cases of tubal ligation, see Bowman v. Davis, 48 Ohio St. 2d 41, 43, 356 N.E.2d 496, 497 (1976) (sexual relations resumed in reliance on negligently read post-operative reports); Vaughn v. Shelton, 514 S.W.2d 870, 873 (Tenn. Ct. App. 1974) (post-operative pathology report revealed that operation may not have been successful).
One advantage of an action based upon misrepresentation is that it eliminates the need to prove negligence in the performance of the operation by limiting the plaintiff's case to the post-operative phase. A second advantage is that proof of plaintiff's case will normally be easier in a negligent misrepresentation action than in an action for deceit. Although the plaintiff in one reported case did proceed on a deceit theory by alleging that the defendant knew that his assurances of sterility were false, most plaintiffs are discouraged from doing so because of the difficulty of proving that the defendant had the fraudulent intent necessary to sustain an action for deceit.

If the plaintiff proceeds under a theory of negligent misrepresentation, however, he must show that he had a justifiable right to rely on the superior knowledge of the expert. In determining the patient's right to rely upon the physician's word, it is important to distinguish the physician's express representations, which he indicates are justified by the underlying facts gleaned in the course of treatment, from his mere expressions of opinion. Because physicians may differ as to an opinion, and because their actual knowledge of the true facts cannot, therefore, be inferred, the patient may not justifiably rely upon the physician's opinion.

### B. Breach of Warranty

Expressions of opinion must also be distinguished from warranties of success which may form the basis of a breach of contract action against a physician. If the plaintiff can prove that the physician expressly warranted certain results, he may gain several advantages by bringing a breach of warranty action. First, proof of the existence of a contract to guarantee sterility would obviate the problem of proving negligence in the operation.

52. Christensen v. Thornby, 192 Minn. 123, 255 N.W. 620 (1934) (defendant's demurrer allowed because complaint did not allege fraudulent intent); see W. Prosser, supra note 20, § 107, at 700-01.
53. W. Prosser, supra note 20, § 109, at 727; see Park v. Chessin, 60 A.D.2d 80, 83, 409 N.Y.S.2d 110, 111 (1977), aff'd in part and rev'd in part, No. 78-650, N.Y. Times, Dec. 28, 1978, at 1, col. 2 (Ct. App. Dec. 27, 1978). In Park, the plaintiffs' first child had died from a genetic disease. The defendant obstetrician knew that the plaintiffs would rely on his assurances that the disease was not hereditary. The plaintiffs so relied, and their second child was born with the same fatal disease.
56. The subsequent parenthood would be proof of the breach of warranty of sterility. An interesting issue which has not yet arisen in the vasectomy cases involves a demand by the defendant that the plaintiff undergo a paternity test to account for the possibility that the child was fathered by a person other than the plaintiff. Paternity tests do not establish paternity but can rule out the possibility thereof. Richardson v. Richardson, 252 Ark. 244, 246-47, 478 S.W.2d 423, 425 (1972); Schleimer v. Swann, 93 Misc. 2d 520, 521, 402 N.Y.S.2d 897, 898 (Fam. Ct. 1978). A newly developed blood test, however, has proven to be 95% effective in establishing paternity. Granelli, Blood Type Test Is Changing the Pattern in Paternity Suits, Nat'l L.J., Oct. 2, 1978, at 9, col. 1. Although many courts may be ill-disposed to allow establishment of a child's illegitimacy in the courtroom (the common law presumes all children born in wedlock to be legitimate), this reluctance should be tempered by a realization of the possible consequences involved for the defendant physician in the lawsuit. See generally Sterilization, supra note 1, at 434 n.72.
In addition, the plaintiff generally has the advantage of a longer statute of limitations in contract than he has in tort.\(^5\)

A breach of warranty action, however, may pose some problems for the plaintiff. Because a physician's statements as to the proper course of treatment ordinarily do not give rise to guarantees,\(^6\) a patient must prove at least a specific promise to accomplish a particular result over and above a general expression of opinion or reassurance.\(^7\) Some courts go further and require proof of a separate consideration to support the alleged promise.\(^8\) These

\(^{57}\) See, e.g., Ky. Rev. Stat. §§ 413.120, .140 (1972 & Supp. 1978); N.Y. Civ. Prac. Law §§ 213(2), 214(6), 214-a (McKinney 1972 & Supp. 1978); Wash. Rev. Code Ann. §§ 4.16.040, .130 (1962). Many courts, however, have come to the aid of plaintiffs who sue in tort and have a statute of limitations problem. They do so by applying the time of discovery rule, whereby the statute begins to run when the injury is, or reasonably should have been, discovered, instead of the time of damage rule, whereby the statute runs from the time the injury actually occurs. Under the time of discovery rule, the statute in a wrongful conception action begins to run when the woman, in the exercise of reasonable care and diligence, discovers, or should have discovered, her pregnancy. Bishop v. Byrne 265 F. Supp. 460 (S.D. W. Va. 1967) (applying West Virginia law); Vilord v. Jenkins, 226 So. 2d 245 (Fla. Dist. Ct. App. 1969); Tomlinson v. Siehl, 459 S.W.2d 166 (Ky. 1970); Milde v. Leigh, 75 N.D. 418, 28 N.W.2d 530 (1947); Teeters v. Currey, 518 S.W.2d 512 (Tenn. 1974). The same rule has been applied in vasectomy cases. See Hackworth v. Hart, 474 S.W.2d 377, 379 (Ky. 1971); Hays v. Hall, 488 S.W.2d 412, 414 (Tex. 1972).


\(^{58}\) See Lane v. Cohen, 201 So. 2d 804 (Fla. Dist. Ct. App. 1967); W. Prosser, supra note 20, § 32, at 162; Note, Reassurance or Contract: The Physician Caught Between the Scylla and the Charybdis, 41 U. Mo. K. C. L. Rev. 118 (1972). "Considering the unpredictability of medical results and the differences in individual patients, it is unlikely that the physician of integrity can in good faith promise a particular outcome. Also, some patients are prone subjectively to transform hopeful expressions of opinion into hard promises, particularly following an undesirable result." Sard v. Hardy, 281 Md. 432, 391 A.2d 1014, 1026 (1977).

\(^{59}\) Bishop v. Byrne, 265 F. Supp. 460, 463 (S.D. W. Va. 1967); Depenbrok v. Kaiser Foundation Health Plan, 79 Cal. App. 3d 167, 171, 144 Cal. Rptr. 724, 727 (1978); Custodio v. Bauer, 251 Cal. App. 2d 303, 314-15, 59 Cal. Rptr. 463, 470-71 (1967); Vilord v. Jenkins, 226 So. 2d 245, 246-47 (Fla. Dist. Ct. App. 1969); Cox v. Stretton, 77 Misc. 2d 155, 156, 352 N.Y.S.2d 834, 837 (Sup. Ct. 1974). Two cases which exemplify the difficulty of showing that particular statements are promises rather than expressions of opinion are Hackworth v. Hart, 474 S.W.2d 377, 381 (Ky. 1971) (defendant's assurance that vasectomy was a "foolproof thing, 100%" held to be an expression of professional opinion) and Stephens v. Sniwak, 61 Mich. App. 647, 648-49, 233 N.W.2d 124, 125-26 (1975) (even if plaintiffs had proved the existence of a contract, court held that advice that chances of wife becoming pregnant after husband's vasectomy were "one in a million" would not be basis of breach of contract action when wife became pregnant).

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Problems generally militate against bringing a wrongful conception action based upon breach of warranty.

C. Strict Liability

In the absence of one of the above theories of liability, it has been suggested that a physician be held strictly liable for an unsuccessful sterilization operation.\(^{61}\) Strict liability is ordinarily appropriate if there is a discrepancy between the plaintiff's and the defendant's abilities to protect against loss.\(^{62}\) For example, in the case of wrongful conception, unlike many other injuries resulting from medical malpractice, the plaintiff cannot obtain insurance to protect against unwanted children caused by an unsuccessful sterilization.\(^{63}\) In fact, the plaintiff does not even expect the untoward result, whereas the defendant is aware of the risk of failure and can protect against his misperformance of the operation through medical malpractice insurance.

Nevertheless, a strict liability theory seems inappropriate for wrongful conception cases. Although a recognized attribute of strict liability is the spreading of loss among consumers,\(^{64}\) risk spreading in the area of sterilization will only contribute to further increases in soaring medical costs because the increased malpractice insurance premiums\(^{65}\) will be passed on to patients through higher medical fees. If the cause of action is based upon strict liability, medical malpractice insurance premiums very likely would rise uniformly, at least among all physicians who perform sterilization surgery, whereas if plaintiffs must prove negligence or breach of warranty, the increased premiums would be limited to the individual culpable physicians. Moreover, because the negligence and strict liability standards will have these different effects upon malpractice insurance premiums, physicians may be more likely to exercise greater care in sterilization procedures if a negligence standard is applied.

In addition, strict liability is most appropriate in the context of the sale of products,\(^{66}\) because the manufacturer at least implicitly represents that the product is properly made and fit for use.\(^{67}\) This is not the case with


\(^{62}\) W. Prosser, supra note 20, § 75, at 494-95.

\(^{63}\) See Comment, Continuing the Common Law Response to the New Industrial State: The Extension of Enterprise Liability to Consumer Services, 22 U.C.L.A. L. Rev. 401, 424-25 (1974) (with the increase in injuries resulting from medical treatment, many individuals are turning to the courts for protection because of lack of relief from other sources).

\(^{64}\) "Lady in Waiting", supra note 61, at 151; see W. Prosser, supra note 20, § 75, at 495.


\(^{67}\) W. Prosser, supra note 20, § 97, at 651.
physicians, who are not guarantors of their services. Generally, courts are reluctant to extend strict liability to the area of services. In addition to the difference in the representation given, cases involving personal services do not present the same kinds of problems of proving negligence as do cases involving mass production of goods for sale. It is this proof problem that renders strict liability more appropriate in the latter cases.

III. DAMAGES

The issue of damages in the area of wrongful conception has been the subject of considerable controversy. A number of courts have denied recovery on the grounds that damages were nonexistent, inappropriate, or incapable of measurement. In addition, even courts granting recovery have disagreed as to the extent of damages recoverable.

A. The Existence and Propriety of Damages

Courts that have denied recovery on the ground that no damage in fact resulted, reasoned that the birth of a child, no matter how unwanted or unplanned, is, nevertheless, a blessed event. Yet, it seems strange to say that a person who undergoes a sterilization operation for the very purpose of preventing parenthood has not only suffered no damage upon becoming a parent, but has in fact been blessed. In light of a manifest public policy...
supporting the right not to have children, it seems clear that the unwilling parent has suffered actual damage through the birth of an unwanted child. More enlightened courts have found the existence of emotional, health-related, or financial damages.

A second ground for denying recovery arises from the fear of potential emotional injury to the child if it someday learns that it was unwanted. This seems a poor reason to bar recovery; the chances that a child will suffer emotional injury on learning that he was unplanned are not necessarily greater simply because his parents have brought a wrongful conception action. Furthermore, a child is not necessarily unloved merely because its birth was once unwanted. Thus, so long as the parents lovingly raise the unplanned child, the danger of emotional trauma to the child is not as great as the proponents of the emotional injury argument advocate.

As a third basis for declining to award damages, some courts object to the idea that the plaintiff is enjoying the benefits of parenthood while the defendant bears the costs. These courts are misguided in their focus on injustice to the tortfeasor, for


The answer is that the public interest in regulating the medical profession will be impaired if doctors escape liability for their negligent acts.

B. The Measurement of Damages

Other courts may admit that damages exist but deny recovery because they find the damages impossible to measure. These courts advance the argument that the intangible benefits of parenthood and nonparenthood cannot be measured and weighed against each other to arrive at the appropriate compensatory damages. Although the benefits of parenthood are a valid

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75. See Rivera v. State, 94 Misc. 2d 157, 162, 404 N.Y.S.2d 950, 953 (Ct. Cl. 1978) (notion of compensation for physician's negligence in facilitating birth of an unwanted child is no more offensive than the idea of birth control); notes 5-6, 12-16 supra and accompanying text.

76. For a discussion of cases in which these damages were found, see note 111 infra


concern, they should be used only to offset the plaintiff's recovery rather than to deny recovery altogether. A plaintiff should be compensated for the damages proximately caused by the negligence, which, in addition to pregnancy-related expenses, include the costs of raising the wrongfully conceived child until its majority.86 These latter costs are readily calculable and present no problem in the measurement of damages once liability is established.87 They are not too speculative to measure, for actuaries regularly make such calculations to assist estate planners and insurance companies,88 and courts and juries are frequently called upon to measure damages in cases of intangible injuries such as mental distress and loss of consortium.89

Moreover, the claim that damages are incapable of measurement ignores the distinction between uncertainty as to the fact of damage, which precludes recovery, and uncertainty as to the amount of damage, which does not.90 The wrongdoer should not be relieved of liability because the nature of his tortious conduct precludes the ascertainment of the amount of damages with certainty.91 The problems of uncertainty should be placed on the wrongdoer rather than on the innocent party.92

C. The Extent of Damages Recoverable and the Benefits Rule

Once it is settled that problems in awarding damages should not bar an action for wrongful conception, the next question is what types of damages are recoverable. One approach is to limit damages to pregnancy-related expenses, which may include medical expenses, lost earnings, pain and suffering, and the spouse's loss of consortium.93 This approach, however, seems arbitrary; "there is no discernible reason for allowing recovery for these relatively minor 'damages' and denying recovery for the substantial costs of raising and educating a child."94

86. Wrongful conception cases usually present no proximate cause problem. See notes 7, 38-39 supra and accompanying text. When a person undergoes an operation for the purpose of sterilization, it is self-evident that negligence may cause the occurrence of a subsequent pregnancy.


92. Id.

93. Coleman v. Garrison, 349 A.2d 8, 11 n.5 (Del. 1975) (recovery limited to medical expenses, pain and suffering of pregnancy, and loss of consortium); see Garwood v. Locke, 552 S.W.2d 892 (Tex. Civ. App. 1977) (recovery for medical expenses only damage issue discussed). It is a different matter, however, if pregnancy-related expenses are the only damages sought. Bushman v. Burns Clinic Medical Center, -- Mich. App. --, 268 N.W.2d 683 (1978).

The pregnancy-related costs approach is also inconsistent. If childrearing costs are not recoverable because parenthood, under any circumstances, cannot be recognized as damaging, consistency would demand that the ordeal of pregnancy be recognized as the necessary means to parenthood which parents in normal circumstances readily endure. Thus, to hold that one part of the childrearing process causes damage, while the other does not, is contradictory. Moreover, as shown above, parenthood is not necessarily a blessed event.

Another approach to awarding damages is to permit recovery for all expenses proximately caused by the defendant's negligence, including the costs of childrearing until majority, without any offset for the benefits of parenthood. This approach was followed in Custodio v. Bauer, in which the tubal ligation that the defendant performed on the plaintiff for both therapeutic and elective reasons was unsuccessful. The court characterized the recovery granted as "replenish[ing] the family exchequer so that the new arrival [would] not deprive the other members of the family of what was planned as their just share of the family income," rather than as merely compensating for the child's birth. The measure of "replenishment," in line with California law, was held to include all expenses proximately caused by the negligence. This seems an appropriate method for measuring compensatory damages in that it restores the plaintiff to the position he or she would have been in were it not for the defendant's negligence.

Although the pregnancy-related costs approach is contradictory and fails to compensate the plaintiff for all injuries proximately caused by the defendant's negligence, unmitigated recovery for all damages proximately caused, including the costs of raising the child to majority, also seems unjust. The originally unwanted child will, in most cases, eventually become a source of some joy to the parents. It is therefore suggested that courts apply the Restatement of Torts "benefits" rule, which provides for mitigation of

97. See notes 73-75 supra and accompanying text.
99. In addition to having given birth to nine children, plaintiff had a bladder and kidney condition which would have been aggravated by another pregnancy. Id. at 307-08, 325, 59 Cal. Rptr. at 466, 477.
100. Id. at 324, 59 Cal. Rptr. at 477.
101. Cal. Civ. Code § 3333 (West 1970) (except for breach of contract, and unless otherwise provided, measure of damages is the amount that will compensate for all detriment proximately caused).
103. W. Prosser, supra note 20, § 2, at 7.
104. See notes 93-97 supra and accompanying text.
105. "Where the defendant's tortious conduct has caused harm to the plaintiff or his property and in so doing has conferred upon the plaintiff a special benefit to the interest which was harmed, the value of the benefit conferred is considered in mitigation of damages, where this is equitable." Restatement of Torts § 920 (1939).
damages when the tortfeasor has conferred a benefit upon his victim. One objection raised to the benefits rule is that it is impossible to place a dollar value on the intangible satisfaction, joy, and companionship flowing from the parent-child relationship. This objection, however, is not valid because calculations as to the value of a child's services and, in some states, companionship, are regularly made in actions involving the wrongful death of children.

The major advantage of the benefits rule is that it can take into account the facts of each case and thereby provide needed flexibility in the calculation of damages. In wrongful conception cases, the "value" of parenthood will vary according to the individual's reasons for wanting the sterilization operation. Thus, fairness to both parties dictates that these reasons be considered in determining the benefits of parenthood.

The patient in wrongful conception cases may undergo sterilization for therapeutic, emotional, family size, or financial reasons, or some combination

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110. It should be emphasized that the benefits rule involves a question of mitigation after the determination of damages, not a balancing process to determine their existence. See note 105 supra.
When the purpose is solely therapeutic, the subsequently born child is not necessarily unwanted. In these cases, compensation may be awarded for the unexpected alteration in family status and lifestyle.\textsuperscript{112} However, the jury should be free to conclude that the child was wanted and that, therefore, the benefit of parenthood entirely offsets the health problem involved.\textsuperscript{113}

\textsuperscript{111} Not all cases mention the reason for the sterilization operation. The following list, therefore, deals only with those that do.

**Single reasons:**

**Multiple reasons:**

One study disclosed the following approximate breakdown of the reasons why women undergo tube ligation:

<table>
<thead>
<tr>
<th>Reason</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Therapeutic only</td>
<td>55.2%</td>
</tr>
<tr>
<td>Family size only</td>
<td>33.3%</td>
</tr>
<tr>
<td>Emotional only</td>
<td>6.9%</td>
</tr>
<tr>
<td>Combination</td>
<td>.1%</td>
</tr>
<tr>
<td>Other</td>
<td>4.4%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>99.9%</strong></td>
</tr>
</tbody>
</table>

Prystowsky & Eastman, \textit{supra} note 37, at 463.

Of the cases involving multiple reasons for sterilization, only Ball v. Mudge, 64 Wash. 2d 247, 391 P.2d 201 (1964) and Shaheen v. Knight, 11 Pa. D. & C.2d 41 (C.P. 1957) denied recovery. In the cases in which the operation was performed for only one reason, the breakdown of recovery is as follows: therapeutic—recovery approved, but not necessarily granted, in six of seven cases; emotional—both causes of action allowed over statute of limitations defenses; family size—recovery allowed in two of five cases. None of the three cases which denied recovery when the sole purpose of the sterilization operation was to limit family size took note of the benefits rule, and in one, the court did not disapprove of recovery, but the evidence indicated that no negligence had occurred. Bennett v. Graves, 557 S.W.2d 893 (Ky. 1977).

\textsuperscript{112} "Where the mother survives without casualty there is still some loss. She must spread her society, comfort, care, protection and support over a larger group. If this change in the family status can be measured economically it should be . . . compensable . . . ." Custodio v. Bauer, 251 Cal. App. 2d 303, 323-24, 59 Cal. Rptr. 463, 476 (1967).

\textsuperscript{113} In Martineau v. Nelson, ___ Minn. ___, 247 N.W.2d 409 (1976) and Christensen...
vated an existing condition, the jury may reasonably find that the benefit is of little offsetting value in relation to the trauma experienced.

The same leeway should exist when the sterilization is performed because of emotional fears of giving birth to a deformed child. Special factors to consider would include the degree of mental suffering during the pregnancy and the condition of the wrongfully conceived child. In Doerr v. Villate, for example, the plaintiff's husband underwent a vasectomy because both of their children had been born retarded. The wrongfully conceived child was also born retarded as well as physically deformed. Circumstances such as those in Doerr should present no problem in allowing a substantial recovery for childrearing costs because the mental suffering is undoubtedly great and because the condition of the wrongfully conceived child causes substantial harm to a plaintiff who already has two handicapped children. In such cases, the jury is best left with the freedom to weigh the mitigating effect, if any, of the benefit conferred against the harm suffered. A jury in other cases, however, should be able to decide that the birth of a healthy child is an overriding benefit to a couple, whether their prior children were deformed or healthy.

When financial hardship, the desire to limit family size, or both (as is often the case) are the motivations for undergoing sterilization, the benefits of

\[\text{v. Thornby, 192 Minn. 123, 255 N.W. 620 (1934) the feared adverse effects of pregnancy did not actually occur.}\]

114. See, e.g., Bushman v. Burns Clinic Medical Center, Mich. App., 268 N.W.2d 683 (1978) (crippled mother, history of difficult pregnancy and delivery, suicide threatened after learning of pregnancy); Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976) (birth of twins, one of whom suffered from congenital birth defects, following tubal ligation performed on woman with history of diabetes, difficult pregnancy, and miscarriage); Teeters v. Currey, 518 S.W.2d 512 (Tenn. 1974) (severe complications of pregnancy).

115. For a list of such cases, see note 111 supra.


117. Id. at 334, 220 N.E.2d at 768.

118. Id.

119. For examples of cases presenting fact situations in which such a mitigating effect may be found, see Doerr v. Villate, 74 Ill. App. 2d 332, 220 N.E.2d 767 (1966); Vaughn v. Shelton, 514 S.W.2d 870 (Tenn. Ct. App. 1974); Hays v. Hall, 488 S.W.2d 412 (Tex. 1972); Garwood v. Locke, 552 S.W.2d 892 (Tex. Civ. App. 1977).

120. This was the case in Hays v. Hall, 488 S.W.2d 412 (Tex. 1972). On the other hand, a jury should be just as free to place a higher value on the pain and suffering of pregnancy and the attendant anxiety over the possible birth of another deformed child than on the benefit of the birth of a healthy child.

121. In Vaughn v. Shelton, 514 S.W.2d 870 (Tenn. Ct. App. 1974), three of plaintiff's children were born with congenital hip problems. The pregnancy following the wrongful conception resulted in the birth of a healthy child. In such a case, however, because the plaintiff had previously borne healthy children, in addition to those born with deformities, the benefit of the birth of another healthy child may not be valued highly. In Garwood v. Locke, 552 S.W.2d 892 (Tex. Civ. App. 1977), the plaintiff was a social worker, whose work with deformed children had caused her to form overwhelming fears of giving birth to a deformed child. Because she already had two healthy children and suffered a tremendous degree of emotional trauma during the pregnancy following the wrongful conception, the subsequent birth of a healthy child would seem to be of little benefit to her.

122. For a list of such cases, see note 111 supra.
parenthood are unlikely to outweigh the injury suffered. The benefits rule would also provide the flexibility to find the benefit overriding if sudden relief from financial hardship or a reduction in family size occurs between the time of the sterilization operation and the ensuing pregnancy, thereby eliminating the original reasons for the sterilization.123

In cases involving several reasons for sterilization,124 the calculation of the offset for the benefits of parenthood should be made as follows. First, the factfinder should determine the offset that would be awarded with respect to each reason, as if that were the only reason for undergoing sterilization in the particular case. Then, a percentage should be assigned for each of the several reasons according to the relative part each played in the total decision to be sterilized and applied to the offset values first determined. The sum of these products will determine the total offset.

If, for example, in a case of sterilization for therapeutic and family-size reasons, the total damages amount to $200,000, the factfinder might determine that an offset of $60,000 should be awarded when the reason for sterilization is therapeutic,125 and that an offset of $10,000 should be awarded when the reason is to limit family size. The factfinder may then find that the therapeutic reason accounted for 80% of the decision to be sterilized, and that the family-size reason accounted for 20% of the decision. The total offset would then amount to $50,000, consisting of $48,000 (80% of $60,000) awarded on the basis of the therapeutic reason and $2,000 (20% of $10,000) awarded on the basis of the family-size reason. The plaintiff's net recovery would therefore amount to $150,000.

In general, to aid both the trial court and any appellate court, the jury should be required to return a special verdict, specifying, as in the example above, the various amounts arrived at in the determination of the damage award.126 The use of a special verdict would permit a careful examination of the different amounts allocated to damage and benefit127 and would be of great value in preventing excessive awards.128

CONCLUSION

Modern trends emphasizing the individual's right not to have children have eroded past objections to actions for wrongful conception. When this fundamental right has been violated as a result of a physician's negligence or breach of warranty, a remedy should be provided. The recognition of a right to recover may actually result in less litigation once physicians obtain a fully informed consent and perform proper post-operative testing. Furthermore, difficulty in calculating damages does not justify denial of the remedy,

123. In the usual case, however, the family has suffered great harm by the birth of another child and should be fully compensated.
124. For a list of such cases, see note 111 supra.
125. This figure might be much lower if the pregnancy severely aggravated the existing health problem.
126. This is now standard practice in Minnesota in wrongful conception cases. Sherlock v. Stillwater Clinic, ___ Minn. ____ n.18, 247 N.W.2d 409, 417 n.18 (1976); see Martineau v. Nelson, ___ Minn. ____ n.18, 247 N.W.2d 409, 417 n.18 (1976).
especialy when the difficulty results from the tortfeasor's conduct. Reasonably ascertainable guidelines do exist to facilitate a case-by-case determination of the gravity of the harm.

Judicial mechanisms must evolve to keep pace with changes in societal values and standards of conduct, and courts should not blindly administer precedents based on outdated policies. Innovation, not intellectual rigidity, is the hallmark of a judiciary responsive to the changing values underlying the legal system. An action for wrongful conception involves recognition of only one more of the endless varieties of tortious conduct that violate legally protected rights and that demand legal protection.

*Philip Braverman*