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Notes

BURKE v. RIVO: TOWARD A MORE RATIONAL APPROACH TO WRONGFUL PREGNANCY

I. INTRODUCTION

It is a fundamental principle of tort law that a victim of negligence should be compensated for his or her injury and placed as nearly as possible in the position he or she would have occupied were it not for the defendant's negligence.1 Where the cause of action is for wrongful pregnancy, however, the majority of United States courts are reluctant to adhere to this common law principle.2 The courts are reluctant because this area of the law is emotionally charged, infusing moral, ethical and philosophical judgments into traditional law concepts.3 Consequently, courts confronted with an action for wrongful pregnancy often attempt to balance these value judgments against established legal principles.4 In response to the conflict between values and legal principles, courts have adopted a number of approaches to assess the damages available in a wrongful pregnancy action.5

1. See W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON THE LAW OF TORTS § 1, at 6 (5th ed. 1984) [hereinafter PROSSER & KEETON ON TORTS].
4. See, e.g., Szekeres v. Robinson, 102 Nev. 93, 96-97, 715 P.2d 1076, 1078 (1986) (birth of normal, healthy child is not a "wrong" but a "right"; since no injury, court will not provide remedy in form of action for damages); Nanke v. Napf, 346 N.W.2d 520, 523 (Iowa 1984) (parent cannot be said to be injured by birth of normal healthy child: "That a child can be considered an injury offends fundamental values attached to human life." (quoting Cockrum v. Baumgartner, 95 Ill. 2d 193, 198, 447 N.E.2d 385, 388 (1983))); Public Health Trust v. Brown, 388 So. 2d 1084, 1085 (Fla. Dist. Ct. App. 1980) ("[I]t is a matter of universally shared emotion and sentiment that the intangible but all-important, incalculable but invaluable 'benefits' of parenthood far outweigh any of the mere monetary burdens involved.").
5. See, e.g., Marciniak v. Lundborg, 153 Wis. 2d 59, 61, 450 N.W.2d 243, 244 (1990) (parents may recover full damages, including all child rearing expenses and costs connected with birth and pregnancy); Szekeres v. Robinson, 102 Nev. 93, 95, 715 P.2d 1076, 1077 (1986) (no cause of action in tort for birth of normal child); Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 170 (Minn. 1977) (recoverable damages include costs connected with pregnancy and birth

(805)
In *Burke v. Rivo*, the Supreme Judicial Court of Massachusetts addressed the issue of whether the plaintiff parents were entitled to recover as damages the cost of raising their normal, healthy child, who was born as a result of the defendant physician’s negligent performance of a sterilization. The Massachusetts court held that child rearing costs are recoverable damages in wrongful birth actions. The court decided that no public policy considerations precluded recovery of traditional tort and contract damages in a case of this nature. The *Burke* court, however, limited the recovery of the costs of raising a normal, healthy child to cases where the parents’ reason for seeking sterilization was founded on economic or financial considerations. The court further limited the availability of such damages by holding that in these cases, “the trier of fact should offset against the cost of rearing the child the benefit, if any, the parents receive and will receive from having their child.”

This Note will examine the different approaches state courts have taken when determining the damages recoverable for the birth of an unplanned, but healthy, child. This Note will analyze the *Burke* majority’s reliance upon moral and ethical values in formulating a public policy rationale for its refusal to recognize traditional tort principles of damages. Finally, this Note will consider where *Burke* fits into the various


7. Id. at 769, 551 N.E.2d at 4. The *Burke* court articulated the issue before it as whether the plaintiffs are entitled, if they establish liability, to the cost of raising their child. Under normal tort and contract principles, that cost is both a reasonably foreseeable and a natural and probable consequence of the wrongs that the plaintiffs allege. The question is whether there is any public policy consideration to which we should give effect to limit traditional tort and contract damages.

*Id.*

8. Id. at 772, 551 N.E.2d at 6.
9. Id. at 769, 551 N.E.2d at 4. For a discussion of the *Burke* court’s analysis of the public policy considerations involved in the case, see *infra* notes 77-86 and accompanying text.
11. *Id.*
12. State courts take four different approaches to the availability of damages in wrongful pregnancy actions: (1) failure to recognize a cause of action; (2) application of a “limited damages rule”; (3) application of a “benefit rule”; and (4) allowance of full recovery. For a discussion of the “no cause of action” approach, see *infra* notes 30-32 and accompanying text. For a discussion of the “limited damages rule”, see *infra* notes 33-40 and accompanying text. For a discussion of the “benefit rule,” see *infra* notes 41-53 and accompanying text. For a discussion of the full recovery rule, see *infra* notes 55-62 and accompanying text.
13. See *Burke*, 406 Mass. at 769-70, 551 N.E.2d at 4. For a discussion of the
approaches taken by state courts and whether the case is part of a trend toward a more rational approach to damage awards in wrongful pregnancy actions.14

II. Background

The cause of action in Burke was based upon an allegation that the defendant physician negligently performed a sterilization procedure upon the plaintiff mother that resulted in the birth of a normal, healthy child.15 In order to better understand the Massachusetts supreme court's holding in Burke, as well as the reasoning behind its holding, it is necessary to briefly explain the relevant terminology in this area of tort law.16 The terms "wrongful birth," "wrongful life," "wrongful pregnancy" and "wrongful conception" tend to be used loosely by courts and commentators.17 Each of these terms, however, has a separate and distinct meaning.

A "wrongful birth" action is an action brought by parents to recover damages associated with the birth of a child who has a mental or physical defect.18 A wrongful birth action is based upon an allegation that the defendant physician was negligent in one of two respects: (1) failing to perform a medical procedure to detect possible defects in the fetus; or (2) failing to inform the parents of the likelihood of their conceiving a baby who would be born with birth defects (in other words, negligent genetic counseling).19 Courts usually recognize this type of majority's reliance upon ethical values, see infra notes 95-97 and accompanying text.

14. For a discussion of the Burke court's approach to wrongful pregnancy actions and trends in this area, see infra notes 73-76 and accompanying text.
16. The Burke court did not utilize the terminology which will be defined in this Background section and used throughout this Note. The use of precise terminology is important, however, in order to analyze the Burke court's position within this complex area of the law. For a more detailed discussion of terminological distinctions between related causes of actions where an individual's negligence results in the birth of a child, see Phillips v. United States, 508 F. Supp. 544, 545 n.1 (D.S.C. 1981).
17. See id. ("[J]udicial adherence to this terminology has not been uniform, with many courts utilizing the term 'wrongful birth' to describe 'wrongful pregnancy' claims.").
18. See id. ("[W]rongful birth' actions . . . usually involve planned children who are born deformed.").
19. See, e.g., id. at 547 (physician failed to inform parents of likelihood that child would be born with Down's Syndrome where mother noted on prenatal questionnaire that her sister was afflicted with the disease); Atlanta Obstetrics & Gynecology Group v. Abelson, 195 Ga. App. 274, 274, 392 S.E.2d 916, 917-18 (1990) (physicians failed to advise plaintiffs of increased risks of genetic abnormalities associated with mother's age and failed to perform amniocentesis in order to detect whether unborn child had Down's Syndrome). The theory underlying an action for wrongful birth is that the defendant physician's negligence precluded an informed decision by the parents about whether to have the child. Phillips v. United States, 508 F. Supp. 544, 545 n.1 (D.S.C. 1981) (citing
A “wrongful life” action also involves a child born with defects as a result of a physician’s negligence in either failing to detect the defects or failure to inform the parents of the likelihood of their baby having some type of abnormality. This cause of action differs from an action for wrongful birth in only one respect: an action for wrongful life is instituted by the child rather than by the parents. Most courts, however, are reluctant to recognize this cause of action, asserting that the action requires an impossible weighing of the value of no life against the value of life with defects. Additionally, a number of state legislatures have enacted statutes prohibiting actions for wrongful life.

A “wrongful pregnancy” action is one brought by parents for damages where a normal, healthy child is born as the result of a defendant’s negligence. Wrongful pregnancy actions can be broken into two categories. The first category consists of cases where the defendant’s negligence leads to the conception of a child; cases in this category are also referred to as actions for “wrongful conception.” Such actions normally arise in one of two ways: (1) a physician is negligent in performing a sterilization procedure (usually a tubal ligation or vasectomy); or (2) a

Comment, 54 Tul. L. Rev. 480, 484 (1980). Had the parents been properly advised of the presence, or risk, of a birth defect in their unborn or potential child, the parents could have avoided conception or terminated the pregnancy.

Id.

20. See, e.g., Atlanta Obstetrics & Gynecology Group v. Abelson, 195 Ga. App. 274, 274-75, 392 S.E.2d 916, 918 (“In those states wherein the legislature has not acted, ‘most courts . . . have been more receptive to the parents’ wrongful birth claims[] after the Supreme Court’s legalization of abortion in 1973, and there is by now quite general agreement that the parents should be permitted to recover at least their pecuniary losses . . . . ’” (quoting PROSSER & KEETON ON TORTS, supra note 1, § 55, at 571)). But see Wilson v. Kuenzi, 751 S.W.2d 741 (Mo.) (no cause of action exists for wrongful birth), cert. denied, 488 U.S. 893 (1988).


24. See, e.g., MINN. STAT. ANN. § 145.424 (West 1989) (“No person shall maintain a cause of action or receive an award of damages on behalf of that person based on the claim that but for the negligent conduct of another, the person would have been aborted.”); S.D. CODIFIED LAWS ANN. § 21-55-1 (1987) (“There shall be no cause of action or award of damages on behalf of any person based on the claim of that person that, but for the conduct of another, he would not have been conceived or, once conceived, would not have been permitted to be born alive.”).


pharmacist is negligent in filling a prescription for birth control pills.\textsuperscript{27} The second category of wrongful pregnancy actions consists of cases where, as a result of the defendant's negligence, the mother carries the child to full term. This type of action usually involves a failed abortion procedure.\textsuperscript{28}

The \textit{Burke} case involved an action for wrongful pregnancy or, more specifically, for wrongful conception. Courts have taken four distinct approaches in cases involving wrongful pregnancy.\textsuperscript{29} One approach is to decline to recognize a cause of action.\textsuperscript{30} Presently, Nevada is the only jurisdiction that follows this approach.\textsuperscript{31} The rationale for denying recovery is that there is no wrong which must be redressed; the birth of a normal, healthy child is not considered an injury as a matter of law.\textsuperscript{32}

\textbf{NOTE}


29. For an overview of the development of the four approaches to wrongful pregnancy and wrongful conception actions, see Kashi, \textit{The Case of the Unwanted Blessing: Wrongful Life}, 31 U. MIAMI L. REV. 1409, 1410-16 (1977).

30. \textit{See} Szekeres v. Robinson, 102 Nev. 93, 715 P.2d 1076 (1986). Szekeres arose out of an allegedly failed sterilization procedure performed on the mother, Phyllis, which led to the birth of a healthy baby girl, Erica. \textit{Id.} at 94, 715 P.2d at 1076. Phyllis sued the attending physicians and the hospital on her own behalf, as well as on behalf of her other children, claiming to have been injured by Erica's birth. \textit{Id.} Phyllis's husband, Peter, also joined the suit, asking for damages caused by Phyllis's unavailability during the pregnancy. \textit{Id.} The trial court dismissed the plaintiffs' tort and contract claims. \textit{Id.} at 94-95, 715 P.2d at 1076-77. The Supreme Court of Nevada affirmed the dismissal of the wrongful pregnancy action, but remanded the case for consideration of the breach of contract claim. \textit{Id.}

31. \textit{See} Johnson v. University Hosps., 44 Ohio St. 3d at 54, 540 N.E.2d 1370, 1373 (1989) ("Nevada is currently the only jurisdiction to adhere to this absolute position of no tort recovery in a 'wrongful pregnancy' action."); Smith v. Gore, 728 S.W.2d 738, 742 (Tenn. 1987) (Nevada is only jurisdiction to adhere to absolutist position of refusing to recognize tort of wrongful pregnancy).

32. Szekeres, at 96-97, 715 P.2d at 1078. In Szekeres, the Nevada Supreme Court stated:

Many courts have taken for granted that normal birth is an injurious and damaging consequence and have disagreed only on the "how much" part of such claims. We do not take the wrongness nor the injuriousness of the birth event for granted and say, to the contrary, that
Courts that follow the other three approaches to a wrongful pregnancy action are consistent in their recognition of a cause of action, but differ as to what damages are recoverable. The second approach to wrongful pregnancy actions permits certain limited damages to be recovered, but denies recovery for child rearing costs. This "limitation of damages" approach is the majority view. Jurisdictions that follow this approach typically allow recovery for: (1) the medical and hospital expenses due to the pregnancy and birth; (2) the cost of the original sterilization procedure; (3) the cost of re-sterilization, if desired; (4) pain and suffering connected with the pregnancy and birth; (5) the father's loss of consortium; and (6) the mother's lost wages.

Courts that follow the limitation of damages approach point to a number of reasons for denying recovery of child rearing expenses. Many maintain that awarding child rearing costs would have a negative impact on the stability of the family unit. Additionally, courts often opine that it would be emotionally harmful to the child to learn not only that he was unwanted, but also that the funds used to raise him were supplied by another. Other courts deny child rearing costs on the theory that the benefits of raising a child outweigh the monetary burdens.

normal birth is not a wrong, it is a 'right.' It is an event which, of itself, is not a legally compensable injurious consequence even if the birth is partially attributable to the negligent conduct of someone purporting to be able to prevent the eventualty of childbirth.

Id. at 97, 715 P.2d at 1078. The Szekeres court held that "in Nevada, the birth of a normal child is not a civil wrong for which the court will provide a remedy in the form of an action for damages." Id. at 95, 715 P.2d at 1077.

33. See Boone v. Mullendore, 416 So. 2d 718, 721 (Ala. 1982) (child rearing costs not recoverable in wrongful pregnancy action); see also Macomber v. Dillman, 505 A.2d 810, 815 (Me. 1986) (child rearing costs not recoverable in case involving failed sterilization procedure which resulted in birth of normal, healthy child).

34. Johnson v. University Hosps., 44 Ohio St. 3d 49, 55, 540 N.E.2d 1370, 1375 (1989) ("The vast majority of jurisdictions which have decided the issue [of what damages are recoverable in a wrongful pregnancy action] adheres to a theory of damages which denies all child-rearing expenses.").

35. See, e.g., Boone v. Mullendore, 416 So. 2d 718, 723 (Ala. 1982) (parents may recover damages for medical and hospital expenses connected with pregnancy, mother's physical pain and suffering and mental anguish and father's loss of comfort, companionship, services and consortium); Kingsbury v. Smith, 122 N.H. 237, 243, 442 A.2d 1003, 1006 (1982) (recoverable damages in wrongful pregnancy action include medical and hospital expenses of pregnancy, cost of sterilization, pain and suffering connected with pregnancy, loss of mother's wages and father's loss of consortium).

36. See, e.g., Cockrum v. Baumgartner, 95 Ill. 2d 193, 447 N.E.2d 385 (1983) (permitting parents to, in effect, transfer costs of raising child to negligent physician would run counter to public policy commanding preservation of family relations); Flowers v. District of Columbia, 478 A.2d 1073, 1077 (D.C. 1984) ("[P]ermitting parents to initiate litigation to force a third person to rear financially their child has a potentially destabilizing effect on families.").

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

Some courts refuse to award the costs of child-rearing because the plaintiffs have failed to avail themselves of the opportunities for mitigation, referring to abortion and adoption. Various practical problems with awarding child rearing costs (such as the speculative nature of such costs and the difficulty in determining a just or sensible stopping point) and a fear of fraudulent claims are also cited by courts as reasons for adopting the limitation of damages approach.

The third approach to wrongful pregnancy actions allows the parents to recover, in addition to the damages associated with the pregnancy and birth, the costs of rearing their unplanned child offset by the value of the child’s aid, comfort and society during the parents’ lifetime. A minority of jurisdictions follow this approach, which is generally referred to as the “benefit rule.”

.Ct. App. 1980) (“[I]t is a matter of universally-shared emotion and sentiment that the intangible but all-important, incalculable but invaluable ‘benefits’ of parenthood far outweigh any of the mere monetary burdens involved.”); See also Nanke v. Napier, 346 N.W.2d 520, 522-23 (Iowa 1984) (public policy of Iowa dictates that “a parent cannot be said to have been damaged or injured by the birth and rearing of a normal, healthy child because the invaluable benefits of parenthood outweigh the mere monetary burdens as a matter of law”).

39. See, e.g., Schork v. Huber, 648 S.W.2d 861, 862 (Ky. 1983) (court stated that “in a pure legal sense, the parents have failed to mitigate the damages which they charge”); Boone v. Mullendore, 416 So. 2d 718, 723 (Ala. 1982) (court noted problem with assessment of damages in wrongful pregnancy actions due to conflict between state mitigation requirement and moral issues of abortion and adoption). This view is based upon the avoidable consequences doctrine of the Restatement (Second) of Torts § 918. Section 918 states that “one injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure after the commission of the tort.” RESTATEMENT (SECOND) OF TORTS § 918 (1979) [hereinafter RESTATEMENT (SECOND)].


In Beardsley, the Supreme Court of Wyoming concluded that allowing recovery for child rearing costs in a wrongful pregnancy action places an unreasonable burden on the defendants. 650 P.2d at 292. The court stated that allowing claims for the damages or expenses incurred after the birth of the child is “likely [to] open the way for fraudulent claims, and . . . enter a field that has no sensible or just stopping point.” Id. Additionally, the Beardsley court held that the injury in such an action is too remote from the negligence and is out of proportion to the culpability of the tortfeasors. Id.


42. The term “benefit rule” is derived from the Restatement (Second) § 920, “Benefit to Plaintiff Resulting from Defendant’s Tort.” Section 920 states that [w]hen the defendant’s tortious conduct has caused harm to the plain-
Courts that utilize the benefit rule reject the majority view that child rearing costs are too speculative to be awarded and instead hold that the award of such costs simply requires a routine calculation of reasonably foreseeable expenses to maintain, educate and support the child through majority.\(^43\) In the view of these courts, the difficulty in calculating an award is not a legitimate reason to deny just compensation to a victim of negligence.\(^44\) The benefit rule approach also discounts the argument that allowing child rearing costs will emotionally harm the subject child or create family instability.\(^45\) This approach recognizes that the plaintiffs in a wrongful pregnancy action are seeking damages not because they do not love their child, but because the defendant's negligence has thrust burdens upon them which they sought to avoid.\(^46\) In addition, courts that advocate the benefit rule have noted that family planning is not against contemporary public policy; therefore, parents should be compensated when their wish to limit the size of their family is tiff 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.

**Restatement (Second) § 990.**

- 43. *See, e.g.*, Jones v. Malinowski, 299 Md. 257, 272, 473 A.2d 429, 436 (1984). In justifying its use of the benefit rule, the Court of Appeals of Maryland opined that child rearing costs . . . are neither too unquantifiable nor too speculative to deny their recovery under settled rules applied by the cases. The computation of such costs requires a routine calculation of reasonably foreseeable expenses that will be incurred by the parents to maintain, support and educate the child to majority age. Such calculations are based on well-recognized economic factors regularly made by actuaries for estate planners and insurance companies; indeed, the expenses associated with raising a child are well appreciated by the average citizen through first-hand experience.

*Id.* *See also* Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 176 (Minn. 1977) (“In the case of a normal, healthy child, we would anticipate that these expenses could not ordinarily be projected beyond the age of [the unplanned child's] majority, for it is at that age that the parental duty to support ceases.”).

- 44. University of Ariz. Health Sciences v. Superior Court, 136 Ariz. 579, 586, 667 P.2d 1294, 1301 (1983) (although right to damages must be established by plaintiff without speculation, recovery will not be precluded merely because amount uncertain).

- 45. For a discussion of the view that awarding child rearing damages will not harm the subject child, see *infra* notes 46, 58-59 & 108-11 and accompanying text.

- 46. Jones v. Malinowski, 299 Md. 257, 270, 473 A.2d 429, 436 (1984). The *Jones* court found that the damages claimed in a wrongful pregnancy action bear no relation to the child's value or worth to the family. *Id.* The court recognized that “[t]he parents seek damages, not because they do not love and want to keep the unplanned child, but because the direct, foreseeable and natural consequences of the physician's negligence has [sic] forced upon them burdens which they sought and had a right to avoid by submitting to sterilization.” *Id.*
frustrated by the negligence of another. At least one court adopting the benefit rule has suggested that a right to recovery exists based upon a fundamental constitutional right not to procreate, citing the United States Supreme Court decisions in Griswold v. Connecticut and Roe v. Wade.

Lastly, those courts that apply the benefit rule reject the notion that the issue of mitigation should be considered when calculating the damages in a wrongful pregnancy action. The avoidable consequences doctrine articulated in Restatement (Second) of Torts section 918, upon which the mitigation requirement is based, requires “the use of reasonable effort or expenditure” by the plaintiff to mitigate any damages. These courts hold that the options of adoption and abortion, both intensely personal decisions, are not “reasonable” methods of mitigation as a matter of law.

47. Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 175 (Minn. 1977). In Sherlock, the Minnesota Supreme Court recognized that [the use of various birth control methods by millions of Americans demonstrates an acceptance of the family-planning concept as an integral aspect of the modern marital relationship, so that today it must be acknowledged that the time-honored command to “be fruitful and multiply” has not only lost contemporary significance to a growing number of potential parents but is contrary to public policies embodied in the statutes encouraging family planning.

Id. (footnotes omitted).

48. Id. The Sherlock court stated that “recent decisions of the United States Supreme Court, moreover, seem to suggest that the right to limit procreation is of a constitutional dimension.” Id.

49. 381 U.S. 479 (1965). In Griswold, the United States Supreme Court held that a Connecticut statute forbidding the use of contraceptives was unconstitutional. Id. at 485. The Court found that “[a] zone of privacy [is] created by several fundamental constitutional guarantees contained in the Bill of Rights.” Id. The Court concluded that the right to use contraceptives lies within this zone of privacy. Id. at 485.

50. 410 U.S. 115 (1973). In Roe, the United States Supreme Court held that the right of personal privacy was broad enough to encompass the decision to have an abortion. Id. at 153. The Supreme Court arrived at this conclusion by explaining that although “[t]he Constitution does not explicitly mention any right of privacy . . . [this] Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.” Id. at 152. The Court further stated that previous decisions “make it clear that the right [of privacy] has some extension to activities relating to . . . procreation . . . [and] contraception.” Id. (citing Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942); Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972)).

51. Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 176 (Minn. 1977). The Sherlock court stated that “the refusal of a mother to submit to an abortion or of the parents to give their child up for adoption should not be regarded as a failure on the part of the parents to mitigate damages.” Id.

52. Restatement (Second) § 918. For the text of § 918, see supra note 39.

53. See, e.g., Jones v. Malinowski, 299 Md. 257, 274, 473 A.2d 429, 438 (1984). The Maryland Court of Appeals held that, as a matter of law, neither abortion nor adoption is a reasonable course of action in mitigation, and therefore, neither one is required of the plaintiffs. Id. The court stated, “[t]he best interest of the child, and the natural instincts of the parent, make it unreasona-
The fourth approach to wrongful pregnancy actions permits recovery of all damages, including all child rearing costs, without offset for any value to the parents of the child's aid, comfort and society. Only one jurisdiction has currently adopted this view. In Marciniak v. Lundborg, the Supreme Court of Wisconsin articulated a number of reasons for holding that full damages are recoverable. The Wisconsin court reasoned that recovery should not be precluded on the grounds that damages are too speculative, pointing out that juries frequently make more complex damage assessments in other negligence actions. Additionally, the court decided that allowing the recovery of child rearing costs

54. See Marciniak v. Lundborg, 158 Wis. 2d 59, 64, 450 N.W.2d 243, 245 (1990) (parents may recover all child rearing costs in wrongful pregnancy action).


Although no jurisdiction other than Wisconsin has adopted the full recovery approach, many state court judges have urged the adoption of this measure of damages. See, e.g., Johnson v. University Hosp., 44 Ohio St. 3d 49, 61, 540 N.E.2d 1370, 1380 (1989) (Brown, J., dissenting) (in wrongful pregnancy actions, "court should follow well-established principles of tort law and allow the plaintiff to recover the readily measurable damages which were previously caused by the defendants' negligence"); Flowers v. District of Columbia, 478 A.2d 1073, 1081 (D.C. 1984) (Ferren, J., dissenting) (full recovery for wrongful pregnancy should be permitted if mother proves election of sterilization solely for economic reasons and presents expert evidence of reasonable child rearing costs); Mason v. Western Pa. Hosp., 499 Pa. 484, 496, 453 A.2d 974, 980-81 (1982) (Larsen, J., dissenting) (parents of unplanned child should be permitted to recover full cost of raising child to age of majority).

56. 153 Wis. 2d 59, 450 N.W.2d 243 (1990). In Marciniak, the plaintiff, Paula Marciniak, underwent a tubal ligation in order to avoid having future children. Id. at 62, 450 N.W.2d at 244. Marciniak had used birth control pills prior to the sterilization procedure, but underwent the surgical procedure because she desired to continue use of the pill and was led to believe that the surgical procedure would be permanent. Id. Two years after the operation, Marciniak gave birth to a normal, healthy child. Id.

Marciniak and her husband brought an action against the defendant physician, and others, to recover the costs of raising their unplanned child. Id. at 63, 450 N.W.2d at 244. The defendants then sought dismissal of the Marciniaks' claim for child rearing expenses. Id. Although the trial court ruled that such expenses are recoverable, the Wisconsin court of appeals reversed, concluding that recovery was barred by public policy. Id. The Wisconsin supreme court, however, reversed the court of appeals' decision and held that parents may recover all child rearing costs in wrongful pregnancy actions. Id. at 64, 450 N.W.2d at 245.

57. Id. at 66, 450 N.W.2d at 245-46. The Supreme Court of Wisconsin
would not emotionally harm the child because “[t]he suit is for costs of raising the child, not to rid [the parents] of an unwanted child.”\textsuperscript{58} In fact, the Wisconsin court continued, “[r]elieving the family of the economic costs of raising the child may well add to the emotional well-being of the entire family.”\textsuperscript{59} The \textit{Marciniak} court also found that no mitigation in the form of adoption or abortion was required of the plaintiffs.\textsuperscript{60} The Wisconsin court also reasoned that the defendants should not be immunized from liability for foreseeable damages simply because the damages at issue were substantial.\textsuperscript{61} Therefore, the court held that, in the absence of public policy considerations to the contrary, it was re-


\textit{Id.} at 66, 450 N.W.2d at 246.

\textsuperscript{58} \textit{Id.} at 67, 450 N.W.2d at 246. The \textit{Marciniak} court disagreed with the defendant’s contention that awarding child rearing costs may psychologically harm the child when the child learns of the action for wrongful pregnancy. The court declared that

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[the parents] obviously want to keep the child. The love, affection and emotional support any child needs they are prepared to give. But the love, affection and emotional support they are prepared to give do not bring with them the economic means that are also necessary to feed, clothe, educate and otherwise raise the child. That is what this suit is about and we trust the child in the future will be well able to distinguish the two.

\end{quote}

\textit{Id.}

\textsuperscript{59} \textit{Id.}

\textsuperscript{60} \textit{Id.} at 69, 450 N.W.2d at 247. In rejecting the defendant’s contention that the parents’ refusal to abort the healthy child or put it up for adoption constituted a failure to mitigate damages, the Wisconsin court stated that [t]he rules requiring mitigation of damages require only that reasonable measures be taken. We do not consider it reasonable to expect parents to essentially choose between the child and the cause of action. That would truly be a “Hobson’s choice.” In addition, the decisions concerning abortion or adoption are highly personal matters and involve deeply held moral or religious convictions. For these reasons, courts have typically rejected the argument that parents must select either abortion or adoption as a method of mitigation, and we concur.

\textit{Id.} (citation omitted).

\textsuperscript{61} \textit{Id.} at 66, 450 N.W.2d at 246. The Wisconsin Supreme Court rejected the defendant’s argument that an award of the costs of raising a child would be wholly out of proportion to his culpability. \textit{Id.} While noting that child rearing costs are significant, the court stated that “the public policy of [Wisconsin] does not categorically immunize defendants from liability for foreseeable damages merely because the damages may be substantial. Individuals often seek sterilization precisely because the burdens of raising a child are substantial and they are not in a position to incur them.” \textit{Id.} Additionally, the Wisconsin court noted that “in recent cases where the courts have reported the amount of the child rearing damages either requested or awarded to the plaintiffs, such amounts

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In many cases, the costs have been held to be substantial, even where the damage was `mild'. … In some cases, the court may reasonably conclude that the child’s care was not the primary consideration in the decision to refuse to abort the child. It may be that the parents were seeking an abortion solely because they thought it would be easier or cheaper to raise the child or that they were not emotionally ready to raise the child at the time of the pregnancy. In such cases, the court may conclude that the child’s care was not a major consideration in the parents’ decision not to abort the child. However, in the cases where the court has held that the child’s care was a major consideration in the parents’ decision not to abort the child, the court has been more likely to hold that the parents were not entitled to an award of damages. In these cases, the court has been more likely to hold that the parents were not entitled to an award of damages because the parents’ decision was based on a rational consideration of their own interests and those of the child. The court has also been more likely to hold that the parents were not entitled to an award of damages because the parents’ decision was not based on a rational consideration of their own interests and those of the child.

\end{quote}
quired to apply traditional rules governing tort damages to recovery in negligent sterilization actions. 62

The Wisconsin court then addressed whether the benefit rule should be applied to wrongful pregnancy actions. The court concluded that "it is not equitable to apply the benefit rule in the context of the tort of negligent sterilization." 63 The court reasoned that, since any benefits conferred upon the parents due to the birth of the unplanned child were not asked for and actually were sought to be avoided, it would be unfair not only to force these benefits upon the parents, but also to require the parents to pay for the benefits by offsetting them against their proven damages. 64

III. DISCUSSION: Burke v. Rivo

In 1983, Carole Burke underwent a tubal ligation prompted by her desire not to have more children because of her family's financial difficulties. 65 Approximately two years later, Burke gave birth to a healthy, normal child. 66 Burke and her husband then sued the physician who had performed the tubal ligation based on a theory of negligent per-


have not approached the awards for other serious torts." 67 Id. at 66-67, 450 N.W.2d at 246.

62. Id. at 71, 450 N.W.2d at 248. Expanding on its conclusion that ordinary rules of tort damages should apply to wrongful pregnancy actions, the Marcinia

court found that

[o]ne of the basic principles of traditional damages is the concept that the wrongdoer compensate those who are injured by his or her neglig-

gence. Where the purpose of the physician's actions is to prevent con-

ception through sterilization, and the physician's actions are performed negligently, traditional principles of tort law require that the physician be held legally responsible for the consequences which have in fact oc-

curred. We therefore conclude that the parents of a healthy child may recover the costs of raising the child from a physician who negligently performs a sterilization.

Id.

63. Id. at 73, 540 N.W.2d at 249.

64. Id. The Wisconsin Supreme Court stated that

[t]he 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 might accrue to them as a result of a new child in their lives. When parents make the decision to forego this opportunity for emotional en-

richment, 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.

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


66. Id. at 766, 551 N.E.2d at 2.
formance of a sterilization. In *Burke v. Rivo*, the Supreme Judicial Court of Massachusetts addressed the issue of the proper measure of damages in a negligent sterilization action.

The *Burke* court agreed with the weight of authority that liability may attach for "negligently performing a sterilization procedure when the result is the conception of a child [or] ... negligently failing to advise a patient of the risks of conceiving a child following a particular sterilization operation ...; [or] ... breach[ing] ... a guarantee that following a sterilization procedure there would be no further pregnancy." The court stated that damages in such an action would include the costs of the unsuccessful sterilization and of any re-sterilization procedure, the costs directly flowing from the pregnancy, the wife's lost earning capacity, the medical expenses of the delivery and care following the birth, the cost of care for any other children while their mother was incapacitated, the husband's loss of consortium, the wife's pain and suffering and any emotional distress resulting from the unwanted pregnancy.

The *Burke* court then addressed the issue at hand: "[W]hether the plaintiffs are [also] entitled, if they establish liability, to the cost of raising their child." The court held that parents may recover the costs of rearing a normal, healthy, but unwanted, child; no public policy consideration dictated that damages should be limited. The court, however, limited its holding to cases where the parents elected sterilization based

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67. *Id.*
69. *Id.* at 764-65, 551 N.E.2d at 1-2. The superior court judge reported the question of law concerning damages to the Massachusetts Appeals Court. *Id.* The case was then transferred to the supreme court on its own motion. *Id.* at 765, 551 N.E.2d at 2.

The question reported by the trial judge was: "What is the measure of damages in an action claiming (a) breach of a guarantee that a surgical procedure would forever prevent pregnancy; and (b) negligence in performing that procedure, where the child born as a result of the pregnancy was in every way normal and healthy?" *Id.* at 765 n.2, 551 N.E.2d at 2 n.2. The supreme court assumed that the subject child was in every way normal and healthy for the purpose of deciding the damages question. *Id.*
70. *Id.* at 766, 551 N.E.2d at 2-3.
71. *Id.* at 768, 551 N.E.2d at 3-4.
72. *Id.* at 769, 551 N.E.2d at 4. The Massachusetts Supreme Court recognized that "[u]nder normal tort and contract principles, th[e] cost [of child rearing] is both a reasonably foreseeable and a natural and probable consequence of the wrongs that the plaintiffs allege." *Id.* The court concluded that it must discern "whether there is any public policy consideration to which [it] should give effect to limit traditional tort and contract damages." *Id.*
73. *Id.* at 772, 551 N.E.2d at 6. The *Burke* court concluded that "no reason founded on sound public policy [existed] to immunize a physician from having to pay for a reasonably foreseeable consequence of his negligence or from a natural and probable consequence of a breach of his guarantee, namely the parents' expenses in rearing the child to adulthood." *Id.* at 772-73, 551 N.E.2d at 6.
upon economic or financial considerations.\textsuperscript{74} Additionally, the court concluded that where recovery is permitted, the trier of fact should offset any benefit the parents will receive from raising their normal, healthy child against the cost of rearing.\textsuperscript{75} The \textit{Burke} court thus adopted the benefit rule.\textsuperscript{76}

The \textit{Burke} court dismissed as "outstandingly unimpressive" many of the justifications for denying recovery of child rearing costs cited by other courts.\textsuperscript{77} The court rejected the "judicial declaration" that the joy and pride in raising a normal, healthy child will always outweigh the economic burdens.\textsuperscript{78} In finding that the birth of a child is not always a net benefit, the court acknowledged that

\[\text{the very fact that a person has sought medical intervention to prevent him or her from having a child demonstrates that, for that person, the benefits of parenthood did not outweigh the burdens, economic and otherwise, of having a child. The extensive use of contraception and sterilization and the performance of numerous abortions each year show that, in some instances, large numbers of people do not accept parenthood as a net positive circumstance.}\textsuperscript{79}

The court also refused to use the availability of abortion or adoption as a basis upon which to limit the damages a defendant physician must pay.\textsuperscript{80}

The \textit{Burke} court rejected the reasoning of the majority of jurisdictions that awarding child rearing costs would adversely affect the child.\textsuperscript{81} The court noted that although many courts express concern about the effect on the subject child if the child learns that someone else has paid for his or her support, they nevertheless allow the recovery of certain other expenses from which the child could just as surely learn that he or she was not wanted.\textsuperscript{82} The \textit{Burke} court found that "[t]he once unwanted child's knowledge that someone other than the parents had

\textsuperscript{74} Id.

\textsuperscript{75} Id.

\textsuperscript{76} For a discussion of the benefit rule approach to wrongful pregnancy actions, see \textit{supra} notes 41-55 and accompanying text.

\textsuperscript{77} \textit{Burke}, 406 Mass. at 769, 551 N.E.2d at 4.

\textsuperscript{78} \textit{Id.} (citing Boone v. Mullendore, 416 So. 2d 718, 722 (Ala. 1982) ("The birth of a healthy child, and the joy and pride in rearing that child are benefits on which no price tag can be placed. This joy far outweighs any economic loss that might be suffered by the parents.").)

\textsuperscript{79} Id.

\textsuperscript{80} Id. at 770, 551 N.E.2d at 4. The \textit{Burke} court "firmly reject[ed] any suggestion that the availability of abortion or of adoption furnishes a basis for limiting damages payable by a physician but for whose negligence the child would not have been conceived." \textit{Id.}

\textsuperscript{81} Id. For a discussion of the view that allowing full damages in a wrongful birth action will result in future emotional harm to the subject child, see \textit{supra} note 36 and accompanying text.

\textsuperscript{82} \textit{Burke}, 406 Mass. at 770, 551 N.E.2d at 4. For a discussion of damages
been obliged to pay the cost of rearing him or her may in fact alleviate the child's distress at the knowledge of having once been unwanted."\(^{85}\)

Lastly, the court rejected the arguments that child rearing costs are too speculative or are unreasonably disproportionate to the doctor's culpability.\(^{84}\) The *Burke* court, however, restricted the recovery of child rearing costs to cases where the parents chose sterilization for economic reasons.\(^{85}\) The court declared that

> [i]f the parents' desire to avoid the birth of a child was founded on eugenic reasons (avoidance of a feared genetic defect) or was founded on therapeutic reasons (concern for the mother's health) and if a healthy normal baby is born, the justification for allowing recovery of the costs of rearing a normal child to maturity is far less than when, to conserve family resources, the parents sought unsuccessfully to avoid conceiving another child.\(^{86}\)

### IV. Analysis

All costs directly and foreseeably arising out of a wrongful pregnancy action, including child rearing expenses, should be recoverable. Approaches allowing less than full recovery of all costs or refusing to recognize a cause of action altogether constitute a departure from traditional tort law and lead to an increased risk of negligence by physicians.\(^{87}\) Additionally, the public policy considerations cited by the

that are recoverable in jurisdictions following the limited damages approach, see *supra* note 35 and accompanying text.

83. *Burke*, 406 Mass. at 770, 551 N.E.2d at 4-5. The Massachusetts court concluded that "[i]n any event, it is for the parents, not the courts, to decide whether a lawsuit would adversely affect the child and should not be maintained." *Id.*

84. *Id.* at 770-71, 551 N.E.2d at 5. The *Burke* court stated that [t]he determination of the anticipated costs of child-rearing is no more complicated or fanciful than many calculations of future losses made every day in tort cases. If a physician is negligent in caring for a newborn child, damage calculations would be made concerning the newborn's earning capacity and expected medical expenses over an entire lifetime. The expenses of rearing a child are far more easily determined. If there is any justification for denying recovery of normal tort damages in a case of this character, it is not that the cost of rearing a child is incapable of reasonable calculation or is too great to impose on a negligent physician.

*Id.* at 771, 551 N.E.2d at 5.

85. *Id.* at 772, 551 N.E.2d at 6.

86. *Id.* at 772, 551 N.E.2d at 5.

87. *See Sherlock v. Stillwater Clinic*, 260 N.W.2d 169, 175 (Minn. 1977). In *Sherlock*, the Supreme Court of Minnesota recognized that

[a]nalytically, ... an action [for a negligently performed sterilization] is indistinguishable from an ordinary medical negligence action where a plaintiff alleges that a physician has breached a duty of care owed to him with resulting injurious consequences. Where the purpose of the
majority of courts do not establish a rational basis on which to deny plaintiffs in these cases their just compensation.88

A wrongful pregnancy action is based on a traditional tort theory of negligence.89 Logically, therefore, fundamental rules governing tort damages should apply. A wrongful pregnancy plaintiff who proves the tort elements of duty, breach of duty and causation should be fully compensated for all damages suffered.90 Additionally, the general tort principle that an injured plaintiff should be placed as nearly as possible in the position he or she would have occupied had it not been for the defendant’s negligence91 should apply to wrongful pregnancy actions. In the case of the plaintiffs in a wrongful pregnancy action, that position is one where they do not have the burden of paying the costs of rearing an additional, unplanned child.

There are also policy reasons for allowing full recovery in wrongful pregnancy actions. It is only through the imposition of standards of care on individuals that society is protected from the results of careless or reckless behavior. Therefore, it is imperative that all negligent defendants be held responsible for the foreseeable consequences of their negligent acts. Under the present majority approach, where courts deny recovery of child-rearing expenses as damages in wrongful pregnancy actions, physicians are held liable for the foreseeable consequences of all negligently performed operations except those involving steriliza-

88. See Marciniak v. Lundborg, 153 Wis. 2d 59, 70-71, 450 N.W.2d 243, 248 (1990). The Marciniak court rejected as unpersuasive the various public policy notions on which the majority of jurisdictions rest their adherence to the limited damages approach. Id. at 65-71, 450 N.W.2d at 245-48. For a discussion of the Marciniak court’s treatment of these policy arguments, see supra notes 57-62 and accompanying text.

89. See Sherlock, 260 N.W.2d at 174 (wrongful pregnancy actions indistinguishable from ordinary medical malpractice actions); see also Jones v. Malinowski, 299 Md. 257, 263, 473 A.2d 429, 432 (1984) (“there is a cause of action in tort based upon traditional medical malpractice principles for negligence in the performance of a sterilization procedure”).

90. See Prosser & Keeton on Torts, supra note 1, § 80, at 164-65 (5th ed. 1984); see also University of Ariz. Health Sciences v. Superior Court, 136 Ariz. 579, 585, 667 P.2d 1294, 1300 (1983) (court recognized that “[o]ne of the basic principles of damage law is the concept that a wrongdoer may be held liable for all damages which he may have caused and all costs which the victim may sustain as a result of the wrong”) (emphasis added).

91. Prosser & Keeton on Torts supra note 1, § 1, at 5-6; see Sherlock, 260 N.W.2d at 175 (court recognized “the elementary principle of compensatory damages which seeks to place injured plaintiffs in the position that they would have been had no wrong occurred”).
tion. This approach discourages physicians from taking any added precautions to ensure conformance with a reasonable standard of care, and thus leads to more negligent sterilizations and the conception of more unwanted, or at least unplanned, children.92

The refusal of courts to award full damages, including child rearing expenses, for an unplanned child in this situation is more than simply an additional expense; it is also a violation of a constitutionally protected right.93 This constitutional question often arises in the wrongful pregnancy context because many of these actions involve sterilizations performed by state-subsidized clinics. The choice not to procreate is guaranteed against governmental interference as part of the fundamental right to privacy contained in the United States Constitution.94 When courts refuse to award full damages in wrongful pregnancy actions, they violate the Constitution by interfering with a woman’s right not to have children.

Courts that allow less than full recovery in wrongful pregnancy actions cite no rational basis for denying these plaintiffs just compensation for their injuries. Those courts that declare that no cause of action ex-

92. See Sherlock, 260 N.W.2d at 175. The Sherlock court concluded that “[c]ompensatory damages for the cost of rearing the child to the age of majority would . . . serve the useful purpose of an added deterrent to negligent performance of sterilization operations,” as well as “reinforce the physician’s duty of due care from the outset of the physician-patient relationship.” Id.; see also Prosser & Keeton on Torts, supra note 1, § 4, at 25. This noted source of authority states that

[t]he “prophylactic” factor of preventing future harm has been quite important in the field of torts. The courts are concerned not only with compensation of the victim, but with admonition of the wrongdoer. When the decisions of the courts become known, and defendants realize that they may be held liable, there is of course a strong incentive to prevent the occurrence of the harm. Not infrequently one reason for imposing liability is the deliberate purpose of providing that incentive.

Id.

93. See, e.g., Sherlock, 260 N.W.2d at 175 (“Recent decisions of the United States Supreme Court . . . seem to suggest that the right to limit procreation is of a constitutional dimension.”); Johnson v. University Hosps., 44 Ohio St. 3d 49, 59-60, 540 N.E.2d 1370, 1379 (1989) (Brown, J., dissenting). In Johnson, Justice Brown stated in dissent that

the choice not to procreate, as part of one’s right to privacy, has become (subject to certain limitations) a Constitutional guarantee. For this court to endorse a policy that makes physicians liable for the foreseeable consequences of all negligently performed operations except those involving sterilization would constitute an impermissible infringement of a fundamental right.

Id. at 60, 540 N.E.2d at 1379 (Brown, J., dissenting) (citations omitted) (quoting Bowman v. Davis, 48 Ohio St. 2d 41, 46, 556 N.E.2d 496, 499 (1976) (emphasis added)).

94. See Roe v. Wade, 410 U.S. 115 (1973) (constitutional right to privacy encompasses woman’s decision to terminate pregnancy); Griswold v. Connecticut, 381 U.S. 479 (1965) (fundamental right to privacy exists and encompasses married couple’s decision to use contraception). For a discussion of the right to privacy, see supra notes 49-50 and accompanying text.
ists because the birth of a normal, healthy child is not a wrong or an injury that must be redressed have injected their own moral and ethical judgments into the law.\textsuperscript{95} It is not a court's job to dictate what public policy should be regarding the birth of an unplanned, but healthy, child.\textsuperscript{96} A court's only job is to interpret the law.\textsuperscript{97} Basic public policy formulation is the function of the legislative branch. Courts should apply the traditional common law tort principle of compensation for wrongful conduct in wrongful pregnancy actions. If the application of these existing tort principles is contrary to the state's public policy, then the legislature can step in and legislate against wrongful pregnancy actions. The practice of courts refusing compensation, however, is inappropriate. This point is particularly strong given that United States Supreme Court decisions have struck down laws that impermissibly infringed on the right to decide not to have a child.\textsuperscript{98}

Courts that follow the limited damages rule in wrongful pregnancy actions rationalize their adherence to this majority approach with faulty reasoning. Many of these jurisdictions deny full recovery on the basis that the costs of raising a child are too speculative to be awarded.\textsuperscript{99} This belief, however, is not a sound rationale for denying such compensation to wrongful pregnancy plaintiffs. Child rearing expenses are not too speculative to be calculated; with today's sophistication in analyzing financial and economic trends, the cost of raising a child to majority can

\begin{itemize}
\item \textsuperscript{95} See, e.g., Johnson, 44 Ohio St. 3d at 59, 540 N.E.2d at 1378 (Brown, J., dissenting). Dissenting from the Ohio Supreme Court's adoption of the limited damages approach to wrongful pregnancy actions, Justice Brown recognized: The decision not to have children or to limit the size of a family is the lawful prerogative of any couple and of any mother. Our charge is not to weigh the moral values in making that choice. It is not for us to decide whether a couple errs when they elect to have no children. It is not for us to say whether a couple with three children makes a wise choice when they decide to have no more children in order to concentrate their resources on adequate support for the existing children. \textit{Id.} (Brown, J., dissenting). Justice Brown further stated that "[t]o inject the unmeasurable value of a human life (the baby) into the argument is to charge the issues with misdirected emotion." \textit{Id.} at 60, 540 N.E.2d at 1380 (Brown, J., dissenting).

\item \textsuperscript{96} See Macomber v. Dillman, 505 A.2d 810, 815-16 (Me. 1986) (Scolnik, J., concurring in part and dissenting in part) ("[I]t is the duty of this Court to follow public policy, not to formulate it, absent a clear expression of public opinion.").

\item \textsuperscript{97} See Public Health Trust v. Brown, 388 So. 2d 1084, 1086 (Fla. Dist. Ct. App. 1980) (Pearson, J., dissenting) ("judges are more to be trusted as interpreters of the law than as expounders of what is called public policy").

\item \textsuperscript{98} See Roe v. Wade, 410 U.S. 113 (1973) (recognizing woman's constitutional right to terminate pregnancy); Griswold v. Connecticut, 381 U.S. 479 (1965) (recognizing married couple's constitutional right to use contraception).

\item \textsuperscript{99} See, e.g., Beardsley v. Wierdema, 650 P.2d 288, 292 (Wyo. 1982) (child rearing expenses too speculative to be awarded). For a discussion of the view that child rearing costs are speculative in nature, see \textit{supra} note 40 and accompanying text.
\end{itemize}
be reasonably determined using actuarial tables.\textsuperscript{100} Additionally, courts recognize that juries are competent to make complex damage assessments in other types of negligence cases, such as actions for loss of consortium.\textsuperscript{101} Therefore, even if child rearing expenses are not easily calculated, that is not a fair or reasonable basis on which to deprive full recovery to a plaintiff in a wrongful pregnancy action.

A second reason given by courts adhering to the limitation of damages rule for denying recovery of child rearing costs is that such awards tend to be very large and are out of proportion to the culpability of the defendant.\textsuperscript{102} The potential size of the award in a wrongful pregnancy action is not a reasonable basis on which to immunize a physician from the foreseeable results of his negligence.\textsuperscript{103} The fact that child rearing costs are so significant emphasizes the great economic impact that the defendant’s negligence has had upon the plaintiffs’ lives—in many cases, the precise impact that the plaintiffs tried to avoid. Since these costs are the foreseeable result of the defendant’s negligence, and especially because they are so significant, in the interest of fairness, the defendant should compensate the plaintiffs for this injury.

Courts that limit damages in a wrongful pregnancy action on the basis that, as a matter of law, the benefits of raising a normal, healthy child outweigh the costs rely on moral and ethical judgments rather than concrete legal principles.\textsuperscript{104} Plaintiffs who bring wrongful pregnancy actions, many of whom underwent sterilizations for economic or financial reasons, do not reach the same conclusion. Such plaintiffs had already decided before they underwent a sterilization procedure that, for them, the costs of raising a child outweighed the benefits.\textsuperscript{105}

Another widely held view among advocates of the limited damages approach is that awarding child rearing costs to the parents will harm

\textsuperscript{100} Jones v. Malinowski, 299 Md. 257, 272, 478 A.2d 429, 436 (1984). Child rearing expenses can be calculated based on economic factors that are made regularly by actuaries for insurance companies and estate planners. Id.

\textsuperscript{101} Johnson v. University Hosps., 44 Ohio St. 3d 49, 59, 540 N.E.2d 1570, 1379 (1989) (Brown, J., dissenting) (juries frequently calculate far more speculative damages, such as for pain and suffering, loss of consortium and loss of earning potential, in personal injury and wrongful death cases). For a discussion of the ability of juries reasonably to calculate child rearing costs, see supra notes 43, 57 & 84 and accompanying text.

\textsuperscript{102} See, e.g., Beardsley v. Wierdsma, 650 P.2d 288, 292 (Wyo. 1982). For a discussion of the substantial size of awards including child rearing costs, see supra note 40 and accompanying text.

\textsuperscript{103} Marcianni v. Lundborg, 153 Wis. 2d 59, 66-67, 450 N.W.2d 243, 246 (1990).

\textsuperscript{104} See, e.g., Public Health Trust v. Brown, 388 So. 2d 1084, 1085 (Fla. Dist. Ct. App. 1980) ("[I]t is a matter of universally-shared emotion and sentiment that the intangible but all-important, incalculable but invaluable ‘benefits’ of parenthood far outweigh any of the mere monetary burdens involved."). For a discussion of the view that the benefits of child rearing outweigh the burdens, see supra note 38 and accompanying text.

\textsuperscript{105} Burke, 406 Mass. at 769, 551 N.E.2d at 4.
the emotional health of the unplanned child. One court has gone so far as to refer to the subject child in a wrongful pregnancy action as an “emotional bastard.” This rationale for limiting damages is faulty for a number of reasons. First, the fact that the unplanned child’s parents seek child rearing costs as damages should not send the child a signal that the parents do not love and want to keep the child. The plaintiffs in a wrongful pregnancy action have committed themselves to the welfare of their unplanned child and simply need monetary assistance. Second, it is not the award of child rearing expenses which may harm the unplanned child. Any possible damage to the child would arise from the fact that the parents initiated the lawsuit in the first place. The decision whether to bring the lawsuit, however, is one for the parents, and not the courts, to make. Third, any award of damages that contributes to the plaintiffs’ financial stability should add to, rather than detract

106. See, e.g., Cockrum v. Baumgartner, 95 Ill. 2d 193, 447 N.E.2d 385 (1983). For a discussion of the concern about emotional trauma to the unplanned child in a wrongful pregnancy action, see supra note 36 and accompanying text.


108. Marciniak v. Lundborg, 153 Wis. 2d 59, 450 N.W.2d 243, 246 (1990). The Marciniak court opined that “[t]he parents’ suit for recovery of child rearing costs is in no reasonable sense a signal to the child that the parents consider the child an unwanted burden. The suit is for costs of raising the child, not to rid themselves of an unwanted child.” Id.; accord Jones v. Malinowski, 299 Md. 257, 270, 473 A.2d 429, 436 (1984) (plaintiffs do not seek damages because they do not love and want to keep child, but because defendant’s negligence has forced upon them burdens which they sought to avoid).

109. See, e.g., Johnson v. University Hosps., 44 Ohio St. 3d 49, 60, 540 N.E.2d 1370, 1379-80 (1989) (Brown, J., dissenting). In his dissent, Justice Brown noted that the case was not about whether Ruth Johnson [the plaintiff mother] wants to keep her child. Johnson does not want to give up her baby girl. Now that the child is born she will do her best, within her resources, to raise and love the child. The mother has accepted the inevitable, and loves and wishes to raise her child. This does not erase the fact of injury and resulting damages.

Id.; see also Marciniak, 153 Wis. 2d at 67, 450 N.W.2d at 246. The Marciniak court recognized that the plaintiffs clearly loved and wanted to keep their child. Id. The court noted, however, that “the love, affection and emotional support they are prepared to give do not bring with them the economic means that are also necessary to feed, clothe, educate, and otherwise raise the child.” Id.

110. Johnson, 44 Ohio St. 3d at 61, 540 N.E.2d at 1380 (Brown, J., dissenting). In his dissent, Justice Brown rejected the majority’s view that awarding child-rearing costs may result in emotional harm for the subject child, stating: The majority expresses concern that a child may experience emotional harm by discovering that the parents did not desire the child’s conception. Such concern is disingenuous. The child may draw the same conclusion from the fact that a suit has been filed to recover the expenses of pregnancy and childbirth. Surely the majority cannot believe that refusal to recognize child-rearing expenses as damages will result in [the plaintiff’s] child being raised in a more loving, nurturing environment.

Id. (Brown, J., dissenting).
from, the child’s (as well as the entire family’s) emotional well-being.111 If child rearing damages are awarded, the unplanned child then knows that his or her birth, although unplanned, has not seriously affected the family’s finances.

The limited damages approach has an inherent inconsistency: If these courts find that the subject child will be harmed by an award of child rearing costs, how can they rationalize granting an award of the costs associated with the birth and delivery? Once the child learns that the defendant paid these minor expenses, it is doubtful that the fact that the defendant pays other expenses as well will lead to additional emotional trauma.112 Any possible harm to the child’s emotional health would result from the child’s knowledge of the defendant’s contribution to his or her expenses, not from the particular cost on which the money was spent.

The concerns expressed by many courts that awarding child rearing costs will lead to fraudulent claims113 or open a field with no just or sensible stopping point114 are not valid reasons to immunize physicians from liability for the damages caused by their negligence or to deny

111. Marciniak, 155 Wis. 2d at 67, 450 N.W.2d at 246. ("Relieving the family of the economic costs of raising the child may well add to the emotional well-being of the entire family, including [the unplanned] child, rather than bring damage to it."). If child rearing costs are awarded, the addition of a new child would not further deplete limited family resources which must be spread among the siblings and parents, thus contributing to the financial stability of the family. See, e.g., Custodio v. Bauer, 251 Cal. App. 2d 303, 324, 59 Cal. Rptr. 463, 477 (Cal. Ct. App. 1967) (compensation awarded not for unwanted child, but rather to replenish family’s exchequer so as not to deprive other family members of their planned share of family income).

112. The limited damages approach is inconsistent in other ways as well. See Terrell v. Garcia, 496 S.W.2d 124, 130 (Tex. Ct. App. 1973) (Cadena, J., dissenting), cert. denied, 415 U.S. 927 (1974). Justice Cadena recognized another internal inconsistency present in the limited damages approach:

If, indeed, the satisfaction which normal parents derive from raising a child outweighs, as a matter of law, the considerable expense of raising a child, it would follow that such joy and satisfaction would outweigh the relatively insignificant medical costs of the pregnancy and delivery. . . . 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.

113. See, e.g., Johnson, 44 Ohio St. 3d at 61, 540 N.E.2d at 1380 (Brown, J., dissenting). In his dissent, Justice Brown also recognized the inconsistency between the court’s award of damages for the costs of the pregnancy and its disallowance of damages for the expenses of raising the unplanned child. Id. at 61, 540 N.E.2d at 1380 (Brown, J., dissenting). According to Justice Brown, “[t]here is no rational difference between the damages caused by ‘the [wrongful] pregnancy itself’ and the child-rearing expenses. The cost of pregnancy can no more be balanced against ‘the value . . . [of] a smile’ than can the child-rearing expenses.” Id. (Brown, J., dissenting).

114. See, e.g., id.
their victims the compensation they deserve. The judicial system in general, and juries in particular, are entirely competent to recognize and handle these problems should they arise.\textsuperscript{115}

Lastly, the reliance of many courts on the avoidable consequences doctrine of section 918 of the Restatement (Second)\textsuperscript{116} as a rationale for limiting recovery of child rearing costs is misplaced.\textsuperscript{117} Section 918 requires only that a plaintiff make reasonable attempts at mitigation of his or her damages.\textsuperscript{118} The only forms of mitigation that are available in this situation (abortion and adoption) are unreasonable. The choice of abortion or adoption is an intensely personal decision and should not be mandated by a court.\textsuperscript{119} Therefore, section 918 should not be applied in a wrongful pregnancy action to limit recovery of child rearing expenses.

Like the approaches that disallow a cause of action for wrongful pregnancy or limit damages to birth-related expenses, the benefit rule is also analytically flawed.\textsuperscript{120} Under the benefit rule, the trier of fact is asked to balance the costs of child rearing against any benefits derived from raising the child.\textsuperscript{121} This approach ignores the fact that the plaintiffs in a wrongful pregnancy action have already performed this cost-benefit analysis; they decided to undergo sterilization precisely because they had determined that, for them, the benefits did not outweigh the burdens.\textsuperscript{122} Comment f to section 920 of the Restatement (Second), upon

\textsuperscript{115} Marciniak, 153 Wis. 2d at 68, 450 N.W.2d at 247. In Marciniak, the defendant physician argued that child rearing costs should not be awarded because it could lead to fraudulent claims or open a field with no sensible or just stopping point. \textit{Id.} at 68, 450 N.W.2d at 246. In deciding that these fears were unfounded, the Wisconsin court noted that, with respect to “other claims brought by other plaintiffs, we have confidence in our courts and our juries to distinguish the legitimate from the fraudulent.” \textit{Id.} at 68, 450 N.W.2d at 247.

\textsuperscript{116} Restatement (Second) \S 918. For a discussion of the use of the avoidable consequences doctrine in wrongful pregnancy actions, see \textit{supra} notes 51-53 and accompanying text.

\textsuperscript{117} Jones v. Malinowski, 299 Md. 257, 274, 475 A.2d 429, 438 (1984) (mitigation not necessary because unreasonable to require abortion or adoption).

\textsuperscript{118} Restatement (Second) \S 918. For the text of \S 918, see \textit{supra} note 39.

\textsuperscript{119} Marciniak, 153 Wis. 2d at 69, 450 N.W.2d at 247 (“[D]ecisions concerning abortion or adoption are highly personal matters and involve deeply held moral or religious convictions.”).

\textsuperscript{120} For a discussion of the benefit rule and its application to a wrongful pregnancy action, see \textit{supra} notes 41 & 42 and accompanying text.

\textsuperscript{121} See Jones, 299 Md. at 270, 475 A.2d at 435 (permitting “trier of fact to consider awarding damages to parents for child rearing costs to the age of the child’s majority, offset by the benefits derived by the parents from the child’s aid, society and comfort”).

\textsuperscript{122} Marciniak, 153 Wis. 2d at 73, 450 N.W.2d at 249. In Marciniak, the Wisconsin Supreme Court noted, “[t]he 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.” \textit{Id.}
which the benefit rule is founded, states that a tortfeasor should not be permitted to force a benefit on the plaintiff against the plaintiff's will. By reducing the plaintiffs' damages in a wrongful pregnancy action by the amount of the "benefit" they will derive from their child, these courts require the exact result that comment f warns against: forcing the parents to accept a benefit that they had already decided to avoid.

Secondly, and more importantly, the benefit rule as derived from section 920 is misapplied by the courts that utilize it in a wrongful pregnancy context. Section 920 applies only where the benefits of the defendant's negligence affect the same interest to which the plaintiff has suffered increased costs. Comment a to section 920 states that the "damages allowable for an interference with a particular interest [of the plaintiff] be diminished by the amount to which the same interest has been benefitted by the defendant's tortious conduct." Comment b states the corollary proposition that "[d]amages resulting from an invasion of one interest [of the plaintiff] are not diminished by showing another interest has been benefitted." Wrongful pregnancy actions involve two entirely separate and distinct interests of plaintiffs: economic costs and emotional benefits. Those jurisdictions that have adopted the benefit rule misapply the Restatement section on which the benefit rule rests by balancing these separate interests.

123. Restatement (Second) § 920 comment f. The pertinent portion of comment f is as follows:

The rule stated in this Section is limited by the general principle underlying the assessment of damages in tort cases, which is that an injured person is entitled to be placed as nearly as possible in the position he would have occupied had it not been for the plaintiff's tort. This principle is intended primarily to restrict the injured person's recovery to the harm that he actually incurred and not to permit the tortfeasor to force a benefit on him against his will.

Id. (emphasis added).

124. See Marciniak, 153 Wis. 2d at 73-74, 450 N.W.2d at 249. In refusing to apply the benefit rule, the Marciniak court stated that [a]ny "benefits" that were conferred upon [the parents] 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 might accrue to them as the result of a new child in their lives. When parents make the decision to forgo this opportunity for emotional enrichment, it hardly seems equitable to not only force this benefit upon them but to tell them that they must pay for it as well by offsetting it against their proven emotional damages.

Id.

125. Id. at 72-73, 450 N.W.2d at 248-49.

126. Restatement (Second) § 920. For the text of § 920, see supra note 42.

127. Restatement (Second) § 920 comment a (emphasis added).

128. Restatement (Second) § 920 comment b.

129. Marciniak, 153 Wis. 2d at 66, 450 N.W.2d at 248-49.

130. Id. at 73, 450 N.W.2d at 249. The Wisconsin court stated that "[p]roperly applied in the negligent sterilization context, the 'same interest' rule
In *Burke*, the Massachusetts supreme court opted for the benefit rule approach.\footnote{131} The *Burke* court, however, imposed an additional limitation on recovery: In order to recover child rearing costs, the plaintiff must have undergone the sterilization for economic or financial reasons.\footnote{132} This limitation is unrealistic; sterilization is a major decision in one's life and is usually done for more than just one reason. Therefore, a requirement that plaintiffs prove their sterilization was chosen for economic or financial reasons is a very difficult burden to meet. Although *Burke* contains a well-written analysis on why the limited damages rule should not be followed in Massachusetts,\footnote{133} the court does not take its reasoning far enough. The court should not have adopted the benefit rule with its artificial balancing approach, but rather it should have allowed recovery of full damages. *Burke*, however, represents a step in the right direction.

**V. Conclusion**

*Burke* may indicate a modern trend. Hopefully, more courts will move toward allowing child rearing costs as damages in wrongful pregnancy actions. Unfortunately, the limited damages rule is still followed in a large majority of jurisdictions, and courts continue to rely on it in dealing with this issue.\footnote{134} Many of the holdings favoring the limited damages approach, however, are not unanimous decisions, and a number of those decisions have vigorous dissents that advocate the recovery of at least some child rearing expenses.\footnote{135} Those dissenting opinions provide hope that, in the future, the limited damages approach would require that the economic damages involved in raising the child be offset by corresponding economic benefits, and that emotional harms be offset by emotional benefits, and so on." *Id.*

131. *Burke*, 406 Mass. at 772, 551 N.E.2d at 6. For a discussion of the *Burke* court's adoption of the benefit rule, see *supra* notes 73-76 and accompanying text.


133. *Id.* at 766-71, 551 N.E.2d at 3-5. For a discussion of *Burke*’s rationale for rejecting the limited damages approach, see *supra* notes 70-86 and accompanying text.


135. See, e.g., Flowers v. District of Columbia, 478 A.2d 1073, 1081 (D.C. 1984) (Ferren, J., dissenting) (plaintiffs may recover child rearing costs if they underwent sterilization for economic reasons); Public Health Trust v. Brown, 388 So. 2d 1084, 1086 (Fla. Dist. Ct. App. 1980) (Pearson, J., dissenting) (plaintiffs should be awarded child rearing expenses offset by benefit of child's love, affection and companionship); Johnson, 44 Ohio St. 3d at 59, 540 N.E.2d at 1378 (Brown, J., dissenting) (court should follow traditional principles of tort law and allow plaintiff to recover all child rearing expenses); Terrell v. Garcia, 496 S.W.2d 124, 128-30 (Tex. Ct. App. 1973) (Cadena, J., dissenting) (parents may recover all foreseeable costs, including child rearing costs, that result from negligent sterilization).
may be scrutinized and rejected, leading to more *Burke* and *Marciniak*-type rulings.

The 1980s and 90s have seen an increase in the adoption of the benefit rule, although this approach is still the minority view.\(^{136}\) Jurisdictions that recognize that at least some of the costs of child rearing should be recoverable are showing a more rational approach to the damages issue than those courts that adhere to the limited damages rule. Courts that adopt the benefit rule refuse to apply the moral and ethical convictions that the majority of courts inject into the traditional tort law in wrongful pregnancy actions,\(^{137}\) but they have further to go. Courts must abandon artificial methods of limiting damages and must instead award plaintiffs full compensation without misapplying the "benefit rule" by attempting to mold it to conform to wrongful pregnancy actions. Until these courts resolve the inconsistencies in their rulings and recognize the problem of forcing benefits on plaintiffs in these actions, the victims of negligent sterilizations will not receive the full compensation due to them under the law.

Un fortunately, the approach allowing full recovery still remains in the distinct minority. Presently, only the Supreme Court of Wisconsin, in *Marciniak v. Lundborg*, has granted full recovery.\(^{138}\) This decision is a recent one, and will hopefully set the tone for the rest of the country.

The full recovery approach must be recognized in order to best protect society from the negligence of its physicians. Limiting or eradicating liability in negligent sterilization actions simply immunizes


\(^{137}\) See *Burke*, 406 Mass. at 770, 551 N.E.2d at 4. The *Burke* court "firmly rejected a universal rule that the birth of an unexpected healthy child is always a net benefit." Id. In doing so, the court refused to force its moral judgements about the birth of a healthy child on society as a whole. *Id.* at 770, 551 N.E.2d at 5.

\(^{138}\) *Id.*; cf. *Bowman v. Davis*, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976). In *Bowman*, the Ohio Supreme Court addressed the issue of whether public policy prohibits an award of damages for a child born after an unsuccessful sterilization procedure. *Id.* at 45, 356 N.E.2d at 499. In a *per curiam* opinion, the court held that there was a cause of action for a negligent sterilization, but declined to decide whether the damages in such an action should be limited to the costs of pregnancy. *Id.* at 44-46, 356 N.E.2d at 498-99. Many state courts inferred that the Ohio court's refusal to rule on this issue meant that the court adopted a full recovery approach. See, e.g., *Nanke v. Napier*, 346 N.W.2d 520, 522 (Iowa 1984); *McKernan v. Aasheim*, 102 Wash. 2d 411, 416, 687 P.2d 850, 853 (1984). Subsequently, the Ohio Supreme Court recognized this problem and explained that the *Bowman* court had never addressed the issue of child rearing costs (or any damages, for that matter) and that the issue of whether child rearing costs are recoverable in a wrongful pregnancy action was one of first impression in the case at hand. *Johnson v. University Hosps.*, 44 Ohio St. 3d 49, 540 N.E.2d 1370 (1989). The Ohio Supreme Court then held that public policy dictated adherence to the limited damages approach. *Id.* at 58-59, 540 N.E.2d at 1378.
physicians from their negligent acts and discourages conformity to a high standard of care when performing these procedures. The refusal to permit full recovery of damages in wrongful pregnancy actions is likely to lead to more negligent sterilizations. Ultimately, we must protect individuals and society from the potential harm that results from such negligence. We must also ensure that the traditional tort principles of damages continue to be applied. To create instances where some causes of action are not bound by ordinary principles of law is to create uncertainty within our system of compensation for injury.

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