Liability to a Family for Negligence Resulting in the Conception and Birth of a Child

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Since most early American families were necessarily self-sustaining, the birth of a child was a welcome event, viewed with the anticipation that the son or daughter would provide future services for the family.[1] The advent of urban society in the United States, however, has greatly reduced the importance of family members working interdependently and has brought about an increased recognition of the desirability of careful family planning.[2]

Two increasingly common methods of limiting family size have been the use of contraceptives and sterilization operations.[3] Unfortunately, however, the implementation of these methods has been accompanied by instances of negligently performed sterilization operations[4] and negligently filled oral contraceptive prescriptions that have resulted in unwanted and unplanned births. In determining the damages to be awarded for these unplanned family members, courts have been called upon to balance conflicting interests of parents, their children and the negligent parties. The following analysis will examine the existing trend of allowing damages under these circumstances and the legal issues which arise in the determination of those damages.

BACKGROUND AND CASES

Contraception and sterilization were far less common methods of birth control thirty years ago than they are today.[5] It is not surprising,

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1. R. CAVAN, THE AMERICAN FAMILY 35 (1953).

2. Although relevant, the ramifications of the "population explosion" and environmental consciousness as related to the issues in the instant cases are beyond the scope of the present analysis. A comprehensive treatment of these concepts may be found in Montgomery, *The Population Explosion and United States Law*, 22 HAST. L.J. 629 (1971); Note, *Legal Analysis and Population Control: The Problem of Coercion*, 84 HARV. L. REV. 1856 (1971).

3. Driver, *Population Policies of State Governments in the United States: Some Preliminary Observations*, 15 VILL. L. REV. 818, 849 (1970).

4. The surgical operation procedures and present medical practice are described in Note, *Elective Sterilization*, 113 U. PA. L. REV. 415, 419-21 (1965).

5. Driver, supra note 3, at 849:

Policies governing conception control and birth control are undergoing rapid

therefore, that prior to 1971 only four cases[6] arose requiring the courts to determine the propriety of granting damages to the parents of a child conceived due to a third party's negligence. Those early decisions indicated that prevailing public sentiment disfavored recovery of damages for the birth of a normal child under any circumstances. Additionally, the reluctance of members of the medical profession to testify against other physicians may have had a negative effect on the ability to recover.[7]

The six major decisions in this area can be divided chronologically into two groups. The three cases before 1967 denied recovery from the physician who performed the ineffective sterilization operation on the ground that the award of damages to the parents would be against public policy and the birth of a healthy, normal child could only be a benefit to the family. The more recent cases evidence an abrupt reversal. They have allowed recovery not only for the direct costs attending childbirth, but also for the expenses incurred in the rearing and support of the child during minority.

The concluding dictum offered in *Christensen v. Thornby*[8] evidences the stance of the earlier courts in ruling on the subject: "Instead of losing his wife, the plaintiff has been blessed with the fatherhood of another child. . . . As well might the plaintiff charge defendant with the cost of nurture and education of the child during its minority."[9] This sarcasm by the court was an affirmation of the contemporary view favoring childbirth and opposing contraception, a view that manifested itself in the refusal to allow damages for the birth of a normal child under any circumstances.[10]

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change. Since *Griswold v. Connecticut* [381 U.S. 479] in 1965, several states have . . . passed laws or administrative regulations which ease the obtaining of pills . . . and other devices. There has been little change in the written law on sterilization; it remains as vague as before. But the number of sterilizations is increasing and there is reason to believe that the demand will become greater as the method becomes more publicized and as ignorance about it is overcome.

6. Cases cited notes 8, 11, 13 & 17 *infra*.

7. Possible reasons for this reluctance are suggested in *Symposium—The Malpractice Dilemma: A Cure for Frustration*, 30 TEMP. L.Q. 359, 360-61 (1957).

8. 192 Minn. 123, 255 N.W. 620 (1934). The Minnesota Supreme Court was faced with an action for recovery of expenses attending pregnancy and delivery of a child that plaintiffs alleged to have been conceived after a vasectomy operation failed to sterilize the patient. The claim for breach of contract did not allege the physician's negligence, but only that the operation did not achieve the promised results. The court held that a sterilization operation performed on a man whose wife may run grave risks in bearing another child is not against public policy but that plaintiffs' claim of deceit based upon the doctor's promise of future sterility failed to state a claim for relief.

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

10. Recovery was not even allowed for the costs incident to the child's birth. Therefore, in the court's estimation, damages for nurture and education were far from being reasonable claims by the plaintiff. *Id.* To the same effect see Note, *Sterilization and Family Planning: The Physician's Civil Liability*, 56 GEO. L.J. 976, 978 (1968).

In 1957 a Pennsylvania court[11] disposed of an appeal from the dismissal of a negligent vasectomy complaint on public policy grounds without reaching the merits of a claim for breach of contract: "To allow damages in a suit such as this would mean that the physician would have to pay for the fun, joy and affection which plaintiff Shaheen will have in the rearing and educating of this, [plaintiff's] fifth child."[12] In a similar action, a 1964 Washington opinion[13] evidences language of philosophical notions concerning the benefits of children to a family,[14] although it did not refer specifically to public policy. Having found sufficient grounds to uphold the jury verdict for defendant, the court refused to pass on the question whether the action should have been dismissed as a matter of law.[15] As of this 1964 decision, no court had allowed damages to the parents of an unplanned child.[16]

The first opinion to countenance the allowance of damages for the birth and support of a normal child was a California decision which set a precedent for future litigation by recognizing that the action did present a legally cognizable claim for damages.[17] That court declined, however, to rule on the propriety of allowing recovery for the costs of child-rearing because the appeal was taken from a judgment of dismissal before a trial on the merits. It was the opinion of the court that a decision on the merits should await the success or failure encountered by the plaintiffs in sustaining their burden of proof.[18]

11. Shaheen v. Knight, 11 Pa. D. & C.2d 41 (C.P. Lycoming Co. 1957). As in *Christensen*, the complaint in *Shaheen* urged that there had been a breach of contract, no allegation having been made that the vasectomy was performed negligently. The only damages sought were for expenses incurred in rearing the child until majority.

12. *Id.* at 45-46.

13. Ball v. Mudge, 64 Wash. 2d 247, 391 P.2d 201 (1964). Plaintiff became fertile following the vasectomy operation. His wife subsequently conceived, giving birth to a normal child. The complaints against the surgeon alleged negligence and breach of warranty. The court concluded that appellant was not entitled to a directed verdict and that there was sufficient evidence to support the jury's finding that any breach of warranty or negligence was not the cause of the fertility because it could have occurred by a natural refertilization process known as recanalization.

14. 64 Wash. 2d at 250, 391 P.2d at 204:

> As reasonable persons, the jury may well have concluded that appellants suffered no damage in the birth of a normal, healthy child, whom they dearly love, 'would not sell for $50,000,' and that the cost incidental to such birth was far outweighed by the blessing of a cherished child, albeit an unwanted child at the time of conception and birth.

15. 64 Wash. 2d at 249, 391 P.2d at 203. A discussion of the propriety of allowing damages for breach of warranty in this case is presented in 6 ARIZ. L. REV. 318 (1965).

16. In 1965 it was said that "[t]he law of damages does not recognize the normal birth of a normal child as an item of compensable damages, no matter what the circumstances behind the birth." 6 ARIZ. L. REV. 318, 321 (1965).

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

18. *Id.* at 311, 59 Cal. Rptr. at 468. Although the court did not reach the merits, several criteria for recovery were offered in dictum: (1) If defendant physicians are found to have violated a duty, plaintiff's minimum reimbursement is the cost of the unsuccessful sterilization operation. (2) Recovery for physical and mental pain, suffering, and complications which the contraception was designed to prevent should similarly be allowed by applying the mandate of RESTATEMENT OF TORTS § 920 (1939).

In 1971, two state courts approved the awarding of damages for the expenses incurred in rearing an unwanted child. In *Troppi v. Scarf*[19] the gravamen of the complaint was a pharmacist's negligence in dispensing a mild tranquilizer in lieu of the prescribed oral contraceptive. Plaintiffs decided to limit the size of their family after Mrs. Troppi had suffered a miscarriage while pregnant with an eighth child. She became pregnant again while taking the supposed contraceptives and delivered a normal, healthy baby. In the suit that followed, the damages claimed were medical and hospital expenses, pain and anxiety of pregnancy and childbirth, the mother's lost wages, and the costs of rearing the child. The appellate court concluded that the first three claims for damage represented compensable injuries for which there existed no reasonable basis for exculpating the defendant from liability. Additionally, it reasoned that where the state takes an active role in aid of family planning, the use of contraceptives could not be said to be in contravention of the public policy of the state.[20] The court in *Troppi* allowed the benefit accruing from the birth of a healthy child to be balanced against the burden of his support,[21] but dismissed the defendant's contention that plaintiffs be required to mitigate damages by abortion or by placing the child for adoption.[22]

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(3) A change in family status from the birth of an additional child should be compensable because the mother must spread her society more thinly. (4) The suggestion that the child be put up for adoption in mitigation of damages is not consistent with public policy notions of family stability. These criteria appear significantly in later decisions in this context. See, respectively, text accompanying note 29 *infra*; text & notes 73-77 *infra*; text accompanying note 25 *infra*; text & note 22 *infra*.

Two novel suggestions also appeared in this dictum. The court reasoned that if the mother's death resulted from the pregnancy, the remaining family could recover for her society, comfort, care and protection by a wrongful death action. Alternately, if she survived, but remained under permanent disability, her husband could recover for loss of services. Possible support for these contentions lies in Milde v. Leigh, 75 N.D. 418, 28 N.W.2d 530 (1947), which held that plaintiff could recover for loss of his wife's services, society, and companionship during her pregnancy, in a factual situation similar to *Custodio*.

19. 31 Mich. App. 240, 187 N.W.2d 511 (1971).

20. The court cited two recent statutes in support of its conclusion. MICH. STAT. ANN. § 14.7(1) (1969) (MICH. COMP. LAWS § 325.7a), allowing medically indigent mothers, upon request, to enjoy the benefits of family planning advice from public health services, and MICH. STAT. ANN. § 16.414(2) (1968) (MICH. COMP. LAWS § 400.14b), providing necessary drugs for use in family planning.

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

31 Mich. App. at —, 187 N.W.2d at 517.

For further support of the proposition that family planning does not violate public policy, the court cited Griswold v. Connecticut, 381 U.S. 479, 485 (1965), holding that contraception is within the purview of a constitutionally protected "zone of privacy" inherent within the marital relationship.

21. 31 Mich. App. at —, 187 N.W.2d at 518. For a discussion of the willingness of this and other courts to weigh the benefits of children against the cost of their support, see notes 73-77 and accompanying text, *infra*.

22. 31 Mich. App. at —, 187 N.W.2d at 519-20:

The most recent decision, *Coleman v. Garrison*,[23] adds less significantly to this body of law than its predecessor *Troppi*. The defendant, a physician, performed an allegedly negligent sterilization operation[24] on Mrs. Coleman, which failed to prevent her pregnancy and the subsequent birth of the family's sixth child. Damages sought in addition to those claimed for the expenses of the care and maintenance of the child included "the deprivation to [the other five children] of the amount of care and support which they would have received had the last child not been born."[25] Defendant's motion to dismiss the complaint alleged that there was no claim for relief for "wrongful life" in Delaware.[26] Reluctant to make a statement concerning an area of the law currently in flux, the court avoided expressing an opinion on the public policy of Delaware on the problems of unplanned children.[27] As in *Troppi*, the jury was allowed to weigh the benefits of the child against the costs of rearing and support.[28] An additional item of damages found for the first time in this line of cases was the claim for funds from the negligent physician for a subsequent surgical sterilization, the first attempt having proven ineffective. Referring to this last item, the court instructed the jury that if it determined that a second sterilization would minimize damages, plaintiff could recover.[29]

The foregoing analysis of relevant case law serves to illustrate two

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However, to impose such a duty upon the injured plaintiff is to ignore the very real difference which our law recognizes between the avoidance of conception and the disposition of the human organism after conception. . . .

. . . .

. . . [T]he jurors . . . may not . . . take into consideration the fact that the plaintiffs might have aborted the child or placed the child for adoption.

23. — Del. Super. —, 281 A.2d 616 (1971).

24. An allegation of negligence in the performance of female sterilization operations is more likely to succeed than for male vasectomy sterilizations. In males, recanalization would prevent the plaintiff from relying upon res ipsa loquitur. Note, *supra* note 4, at 436.

25. — Del. Super. at —, 281 A.2d at 617.

26. The plaintiffs were the child's parents and it was primarily their interests with which the court was dealing. Traditionally, the tort action for wrongful life is one brought by the child or on his behalf for compensation for injuries caused by his birth. Few reported cases have dealt with this tort. The most noted are Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied*, 379 U.S. 945 (1964); Williams v. State, 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1965), *rev'g* 46 Misc. 824, 260 N.Y.S.2d 953 (Ct. Cl. 1965). These problems are the subject of extensive comment in Note, *Compensation for the Harmful Effects of Illegitimacy*, 66 COLUM. L. REV. 127 (1966); Note, *A Cause of Action for "Wrongful Life": [A Suggested Analysis]*, 55 MINN. L. REV. 58 (1970); Note, *Liability to Bastard for Negligence Resulting in His Conception*, 18 STAN. L. REV. 530 (1966); Note, *Torts—Wrongful Life—No Cause of Action for Failure to Inform Parents of Possible Birth Defects*, 13 WAYNE L. REV. 750 (1967).

27. — Del. Super. at —, 281 A.2d at 618: "A court may determine public policy in the absence of legislation only 'when a given policy is so obviously for or against the public health, safety, morals, or welfare that there is a virtual unanimity of opinion in regard to it. . .' Mamlin v. Genoe, 340 Pa. 320, [325], 17 A.2d 407, [408] (1941) . . . ."

28. — Del. Super. at —, 281 A.2d at 618. *See* text & notes 73-77 *infra*.

29. *Id.* at —, 281 A.2d at 619.

important points. Whereas the courts in earlier cases[30] refused to consider the birth of a child as a possible injury under any circumstances, the more recent decisions[31] have avoided this dogmatic approach and recognized a shift in public attitude concerning the propriety of birth control.[32] Additionally, the courts have utilized the benefit rule as their basis for the computation of damages.[33]

BASES FOR LIABILITY

Analysis of the propriety of awarding damages to the family of a child conceived through the negligence of a pharmacist or physician is best facilitated by an examination of the *Troppi* decision. Initially, it should be noted that the *Troppi* court considered it "extraordinary" that at trial recovery had been denied as a matter of law.[34] As the court stated, the "resolution of the case before us requires no intrusion into the domain of moral philosophy . . . we go no further than to apply settled common law principles."[35] The pharmacist breached a high duty of care owed to the plaintiff. A violation of that duty was the cause of plaintiff's injury.[36] As a result of the defendant's breach of duty, the plaintiffs were required to incur expenses they would not have otherwise incurred. Analytically, to this point *Troppi* presents a judicially cognizable claim for damages.

The ultimate hurdle, however, was the question whether reasons existed, as earlier courts apparently found, to compel departure from this traditional conceptualization of the problem. Although tort law is designed to compensate injured parties, certain policies may preclude such recovery even where there has clearly been injury. A recurring example is the absolute immunity accorded to judges in cases of defamation.[37] Such actions "escape liability because the defendant [was] acting in furtherance of some interest of social importance, which is entitled to protection."[38]

There are positive indications that the earlier cases considered dis-

30. Shaheen v. Knight, 11 Pa. D.&C.2d 41 (C.P. Lycoming Co. 1957); Christensen v. Thornby, 192 Minn. 123, 255 N.W. 620 (1934); Ball v. Mudge, 64 Wash. 2d 247, 391 P.2d 201 (1964).

31. Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967); Coleman v. Garrison, — Del. Super. —, 281 A.2d 616 (1971); Troppi v. Scarf, 187 N.W.2d 511 (C.A. Mich. 1971).

32. *See* text & notes 51-59 *infra.*

33. *See* text & notes 73-77 *infra.*

34. 31 Mich. App. at —, 187 N.W.2d at 513-14.

35. *Id.* at —, 187 N.W.2d at 513.

36. The court ruled that the pharmacist's negligence was the cause in fact of Mrs. Troppi's pregnancy. *Id.*

37. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 114, at 777 (4th ed. 1971).

38. *Id.* at 776.

allowance of damages to be in the interest of social or public policy.[39] *Troppi* did not find the rationale of those opinions persuasive. *Christensen* was distinguished because that operation had been for the health of the mother and the plaintiff made no claim that the child himself or the economic consequences of his birth were unwanted. The denial of recovery by the Pennsylvania court[40] was answered by the statement, "Such a rule would be equivalent to declaring that in every case . . . the services and companionship of a child have a dollar equivalent greater than the economic costs of his support . . . ."[41] In the opinion of the *Troppi* court, the earlier Washington decision[42] appeared noncommittal on the defendant's contention that the issue of damages should not go to the jury. *Troppi* summarized its review of existing case law by indicating that there was no valid reason for preventing the trier of fact from assessing damages as in any other negligence case.[43]

In determining whether to allow damages, a highly significant consideration is the effect recovery might have upon the parties. Although tort law is primarily concerned with restitution of the injured party,[44] an award of damages for the negligence of a pharmacist or physician may well lead to discouragement of similar mistakes or, at least, the exercise of greater care in future circumstances.[45] One commentator has expressed the view that because emotional harm to the child occurs upon learning that he was unplanned, court action should be disallowed in order to lessen the risk of subsequent disclosure.[46] This position fails to consider that in most instances disclosure through litigation will not significantly increase the psychological impact of the unplanned conception upon the child.[47] More importantly, in those situations where the contraception was desired for economic reasons, damages would appear to be a satisfactory remedy. Furthermore, it is arguable that the damages recovered by the family for the financial costs would inure to the benefit of the child and family harmony.[48]

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39. *See* text & notes 9-12 *supra.*
40. Shaheen v. Knight, 11 Pa. D.&C.2d 41 (C.P. Lycoming Co. 1957).
41. 31 Mich. App. at —, 187 N.W.2d at 518.
42. Ball v. Mudge, 64 Wash. 2d 247, 391 P.2d 201 (1964).
43. 31 Mich. App. at —, 187 N.W.2d at 516.
44. W. PROSSER, *supra* note 37, § 2, at 7.
45. Troppi v. Scarf, 31 Mich. App. at —, 187 N.W.2d at 517.
46. Note, *The Birth of a Child Following an Ineffective Sterilization Operation as Legal Damage*, 9 UTAH L. REV. 808, 811 (1965).
47. "The emotional injury to the child can be no greater than that to be found in many families where 'planned parenthood' has not followed the blue-print." Custodio v. Bauer, 251 Cal. App. 2d 303, 324-25, 59 Cal. Rptr. 463, 477 (1967).
48. "Particularly if the family were impoverished, the additional financial burden would restrict opportunities for all its members, and it is only realistic to consider that monetary problems are often at the root of family discord." Note, *supra* note 46, at 808, 811 n.21.

It has been argued that it is primarily those families in the higher income brackets who avail themselves of contraceptives and sterilization techniques and, therefore, that the poor would be benefited least by the allowance of recovery under such circumstances.[49] The more recent cases, however, have involved large families wishing to limit their size for economic reasons.[50] Additionally, it seems logical to conclude that families with substantially higher incomes would not be as inclined to resort to suit as a matter of economic necessity even though they would be better equipped to bear the financial burden of a lawsuit.

An examination of the indicia of present public policy will further illuminate the bases for liability. In the United States, public policy is often reflected in judicial determinations and legislative reform. *Griswold v. Connecticut*[51] represents a strong affirmation of the right to marital privacy.[52] The Court's holding that a Connecticut statute prohibiting the use of contraceptive drugs or devices was unconstitutional[53] has been interpreted by several writers as a declaration of governmental policy concerning birth control.[54] It is not surprising, therefore, that both *Troppi* and *Coleman* relied in part upon *Griswold* in holding that damages for the rearing of an unwanted child were not contrary to public policy.[55] The *Griswold* decision marked the demise of the only state statute actually banning the use of contraceptives.[56] Moreover, although many jurisdictions have no statutes concerning contraception,[57] a trend of further liberalization of existing laws regulating contraceptives by judicial abrogation, repeal, amendment or administrative policy is indicated.[58] This trend is similarly evident with respect to contraceptive sterilization. The Department of Health, Ed-

49. *Id.*
50. *See* note 62 *infra.*
51. 381 U.S. 479 (1965).
52. For an exhaustive review of the *Griswold* holdings and significance see Dixon, *The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy?*, 64 MICH. L. REV. 197 (1965); Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219 (1965); Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case*, 64 MICH. L. REV. 235 (1965).
53. CONN. GEN. STAT. REV. § 53-32 (1958). The court also held unconstitutional a general aiding-and-abetting statute, CONN. GEN. STAT. REV. § 54-196 (1958).
54. Means, *The Constitutional Aspects of a National Population Policy*, 15 VILL. L. REV. 854, 858 (1970); Note, *supra* note 2, at 1876-77; Note, *Constitutional Problems of Population Control*, 4 J.L. REFORM 63, 77 (1970).
55. 31 Mich. App. at —, 187 N.W.2d at 517; — Del. Super. at —, 281 A.2d at 618.
56. R. WEINBERG, LAWS GOVERNING FAMILY PLANNING 4 (1968).
57. Alabama, Georgia, Indiana, New Hampshire, New Mexico, North Carolina, Rhode Island, South Carolina, Tennessee, Vermont and West Virginia fall into this category. "Other state statutes vary widely. A number prohibit only advertising; some deal solely with the distribution of prophylactics; others restrict the dissemination of contraceptives to medical and pharmaceutical sources." *Id.* at 9-10.
58. *Id.* at 2.

ucation and Welfare, the Defense Department and various states participating in Medicaid have recently approved voluntary contraceptive sterilization programs.[59]

The foregoing considerations clearly reflect the current public policy favoring the right to utilize contraceptive devices and techniques. This public policy is inextricably entwined with the courts' task in the present cases of deciding whether to allow damages for the rearing of an unwanted child. In seeking sterilization, pills, or other contraceptive devices, the public must necessarily rely upon the skills of physicians and pharmacists. It is well-settled that the law requires conduct consistent with the superior knowledge, skill and intelligence of such professionals.[60] Since the public has the right to rely on these skills and the last vestiges of the public policy which in the past conferred an immunity to these professionals is disappearing, it is proper that the courts should allow damages for the child-rearing that results from abuse of these skills.

DAMAGES

Once the question of liability has been answered, courts could justly and adequately determine damages for the birth and rearing of an unwanted child by utilizing a two-step process similar to that employed in *Troppi* under the guise of the benefit rule.[61] The first step would entail a determination of the value of the damages suffered by the plaintiff while the second step would operate to offset that amount by the value of all benefits to the family as a result of the child's birth.

Valuation of Damages

The terms *unwanted* and *unplanned* do not necessarily reflect a parental attitude toward the child after its conception and birth, but refer to a child whose parents have made an effort to prevent conception. With this distinction in mind, ascertaining the damages suffered by the plaintiff is the first step. Initially, it must be realized that different results might follow depending upon the purpose for which sterilization or contraception was sought.[62] If the plaintiff establishes that

59. *Id.* at 44.
60. W. PROSSER, *supra* note 37, § 32, at 161.
61. Troppi v. Scarf, 31 Mich. App. —, 187 N.W.2d 511 (1971).
62. The reasons for taking steps to prevent conception are numerous and may include, but are not limited to: (1) fear that a further child may be retarded or deformed; (2) want of time for the couple to develop a relationship or maintain an existing one; (3) deviation to an existing child or children; (4) for unmarried persons, desire for the pleasures of a sexual relationship without the fear of pregnancy; (5) the pursuit of a career without interruption; or (6) the inability to support an additional child. Suggestions (4) and (5) are offered in Troppi v. Scarf, 31 Mich. App. at —, 187 N.W. 2d at 511.

the sole purpose in preventing conception was to protect the health of the mother and no physical harm resulted from the unplanned birth, the trier of fact might logically find that the awardable damages should be less than those arising from the circumstance in which contraception was intended for economic reasons and the costs of the new child detracted significantly from an already overburdened income.[63]

Secondly, certain characteristics of the life-style of the parents may increase or decrease the amount of recovery. For example, as the *Troppi* court foresaw,[64] the damages recoverable for a pharmacist's negligence in dispensing oral contraceptives would be significantly greater to an unmarried woman than to a couple concerned only with the extension of their honeymoon. Similarly, if the new child's presence merely detracts from his parents' leisure time, the recovery may be less than in situations in which his presence interrupts or significantly interferes with a valued career.[65]

Finally, there remains the problem of determining the monetary value to be ascribed to each item of damages claimed. Lost wages or hospital and medical expenses are not difficult to ascertain;[66] payroll checks and receipts can be consulted. Likewise, the pain and anxiety frequently accompanying pregnancy and childbirth have long been recognized to be computable.[67] Perhaps the major element of damages claimed in these suits is the amount that will be necessary for the care, maintenance and education of the child until he reaches majority. This computation is analogous to the ascertainment of damages in wrongful death actions involving children, where the amount of recovery is normally reduced by the sum which would have been necessary to support the child to majority.[68] Because the damages in such situations are necessarily speculative, it has been the traditional func-

63. Sterilization for therapeutic reasons was sought in Christensen v. Thornby, 192 Minn. 123, 255 N.W. 620 (1934), Ball v. Mudge, 64 Wash. 2d 247, 391 P.2d 201 (1964), and Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967); for economic reasons in Shaheen v. Knight, 11 Pa. D.&C.2d 41 (C.P. Lycoming Co. 1957), and Troppi v. Scarf, 31 Mich. App. —, 187 N.W.2d 511 (1971); and for both in Coleman v. Garrison, Del. Super. —, 281 A.2d 616 (1971).

64. 31 Mich. App. at —, 187 N.W.2d at 519.

65. Note, *supra* note 4, at 435 n.79:

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

66. *See generally* W. PROSSER, *supra* note 37, § 52.

67. *Id.* § 54.

68. Note, *supra* note 10, at 994.

tion of the plaintiff's attorney to "bring the child to life"[69] and detail the projected harm to its parents.[70]

The standard to utilize in measuring these expenses in the present context is elusive. If a child is from an impoverished home, that family's standard of living, and consequently the ultimate recovery, may be drastically less than that of a child of more affluent parents.[71] The difficulty of ascertaining the amount of damages, however, should generally not bar recovery.[72]

Mitigation of Damages

Once the extent of the plaintiff's injuries has been ascertained, the second step in the determination is to reduce the damages for those injuries by the amount of benefit derived from the relationship of the child within the family structure. The generally recognized formulation of the benefit rule is:

> 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.[73] [Emphasis added.]

The first express reference to the rule[74] in the birth control con-

69. Decof, *Damages in Actions for Wrongful Death of Children*, 47 NOTRE DAME LAW. 197, 207 (1971).

70. *Id.* The author develops the trial and settlement techniques in a typical child death case. Also included is an abstract of wrongful death statutory damage provisions and pertinent cases from all jurisdictions.

71. Note, *supra* note 10, at 995. A possible solution is also offered:

> The courts might better adapt a formula by which they permit the plaintiff to recover that amount which is normally spent in raising the average child. As a practical matter this would probably give the poverty-stricken plaintiff a larger recovery, but it would avoid giving legal sanction to maintaining the child in poverty.

This suggestion would be favorable to all families of below average income but not similarly satisfactory to those families with higher incomes. An additional problem is whether to honor the negligent party's foreseeable contention that an inflated recovery for poorer families works an injustice upon him. It is submitted that these attendant difficulties render the suggestion impracticable. Perhaps the solution already lies within our system of civil justice:

> The division of function between judge and jury creates a system of checks and balances built into the typical jury trial and unique in our system of judicial administration.
>
> Jury decisions on facts and the application of law to facts seem to be an ameliorating influence on the trial process. The harshness of legal doctrine is often softened by the jury.

C. JOINER, CIVIL JUSTICE AND THE JURY 18 (1962).

72. W. PROSSER, *supra* note 37, § 52, at 318-19; *cf.* RESTATEMENT (SECOND) OF TORTS § 328c, comment *d* at 156 (1965).

73. RESTATEMENT OF TORTS § 920 (1939).

74. It has been suggested that judicial application of the rule to actionable negligence resulting in childbirth is derived from language in *Shaheen* and *Ball*. Sheppard, *Negligent Interference With Birth Control Practices*, 11 S. TEX. L.J. 229, 240 n.46 (1970); Note, *supra* note 46, at 808, 811 n.14. Both cases adopt the reasoning that the

text is found in the decision of *Custodio v. Bauer*, where the plaintiff sought sterilization for therapeutic reasons.[75] The court reasoned that if the failure of the operation should result in any physical or emotional benefit to the plaintiff, the defendant should be permitted to offset the damages allowable by the amount of that benefit.[76] In *Troppi* the rule was construed to encompass the benefit received by the child's parents as a consequence of the birth, in spite of the fact that the primary purpose for seeking contraception was to relieve the economic burden placed on the family. This rationale was also adopted in *Coleman*.[77]

Comparing *Custodio* and *Troppi*, a basic flaw is revealed regarding the application of the benefit rule in the latter case.[78] This error can best be seen by focusing on the limitation imposed by the rule that requires the benefit to be "a special benefit *to the interest which was harmed.*"[79] In explaining this language, comment *b* to section 920 of the *Restatement of Torts* indicates that "[d]amages resulting from an invasion of one interest are not diminished by showing that another interest has been benefited." The primary interest invaded as a consequence of the physician's operation in *Custodio* was the health of the wife.[80] Consequently, the court was correct in concluding that if the defendant could somehow demonstrate a benefit to the plaintiff's health as a result of the pregnancy and subsequent childbirth, that benefit would mitigate the plaintiff's damages.[81] Clearly, in those circumstances the interest invaded would be the same as the interest benefited: Mrs. Custodio's health.[82] On the other hand, the primary item of alleged damage to which the *Troppi* court applied the

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blessing of the child outweighs the damages incurred by its birth. Unless this language embraces the benefit rule by implication, the suggestion appears to be without merit in light of the absence of any specific reference to the rule in either decision. There are no earlier references to the possible use of the benefit rule in this context. There is support for the view that this reference was not to the rule but was a public policy argument by the court. Note, *supra* note 4, at 415, 435.

75. 251 Cal. App. 2d at 306, 59 Cal. Rptr. at 466.

76. *Id.* at 303, 59 Cal. Rptr. at 463.

77. — Del. Super. at —, 281 A.2d at 618.

78. A comparison of the application of the rule is limited by these two cases because it is not conclusive that the cases before *Custodio* dealt with the benefit rule (text & note 74 *supra*) and because the *Coleman* case applied the rule in the same manner as *Troppi*.

79. RESTATEMENT OF TORTS § 920 (1939) (emphasis added).

80. 251 Cal. App. 2d at 307, 59 Cal. Rptr. at 466.

81. *Id.*

82. Comment *a* to § 920 reads: "The rule stated in the Section normally requires that the damages allowable for an interference with a particular interest be diminished by the amount to which the same interest has been benefited by the defendant's act." Illustration 2 is "*A*, surgeon, without *B*'s consent, operates upon *B*'s eye, causing *B* to lose the sight in that eye. In an action for the loss of the eye, it may be shown in mitigation that had *A* not operated, the sight of the other eye would have been lost."

rule was "the *economic costs* of rearing the eighth child."[83] In the court's estimation, however, the benefit received from the birth of the child was not economic in nature but merely the companionship and services of the unwanted child.[84]

It is evident that the mitigation of damages allowed by the court in *Troppi* is inconsistent with a proper application of the benefit rule. Some may suggest that the result reached under the *Restatement* approach is justified; if there are no benefits to the interest harmed, the plaintiff's damages are not to be offset. It would appear, however, that in the present context such a position fails to take cognizance of a certain well-established legal principle. In an action by the parents for the wrongful death of their child, a dollar valuation is made of the child's life, inferentially supporting the proposition that the child's life is a benefit to the parents.[85] To deny that such a benefit exists would leave the parents without recourse in such cases and invite the clearly inaccurate legal presumption that since a child has little present value in an economic sense he is worth nothing to his parents.[86] The converse of this rationale is applicable to the present context. It will be defendant's contention that the recovery should be reduced by the amount of the total benefit of the child to the family.

While the scope of such an allowance of mitigation is clearly much broader than the strict benefit rule, it is not without support. Initially, recovery for loss of services was the guise utilized by courts in allowing damages for the deprivation to the family of intangibles such as companionship or society.[87] Some courts gradually exposed this fiction and couched recovery in the more realistic context of a relational interest within the family.[88] The nature of this in-

83. 31 Mich. App. at —, 187 N.W.2d at 513 (emphasis added).

84. It is clear that no actual economic benefit is received from the companionship of a child in the normal situation. Also, as the *Troppi* court realized, *id.* at 518, the services of a child as an offset of economic costs are largely illusory. *See* text & notes 87-91 *infra.* The question therefore becomes: "What is the nature of the item of damages sought?" RESTATEMENT OF TORTS § 920, Comment *b* (1939) demonstrates the proper application of the rule:

> Thus one who has harmed another's reputation by defamatory statements cannot show in mitigation of damages that the other has been financially benefited from their publication . . . unless damages are claimed for harm to pecuniary interests . . . . Damages for pain and suffering are not diminished by showing that the earning capacity of the plaintiff has been increased by the defendant's act. . . . Damages to a husband for loss of consortium are not diminished by the fact that the husband is no longer under the expense of supporting the wife.

85. W. PROSSER, *supra* note 37, § 127, at 905.

86. See text accompanying notes 87-91 *infra.*

87. W. PROSSER, *supra* note 37, § 124, at 873.

88. *See* Steward v. Gold Medal Shows, 244 Ala. 583, 14 So. 2d 549 (1943); Howell v. Howell, 162 N.C. 283, 78 S.E. 222 (1913); Pickle v. Page, 252 N.Y. 474, 169 N.E. 650 (1930).

terest is the parents' right to the child's services and social pleasure, the latter including custody, control, training, education and religion.[89] Thus it has been suggested that the "social interest in the integrity of the family and its stability instead of a pseudo-property interest in the child perhaps should be the basis for the action."[90] Such thinking is indeed becoming a reality as courts begin to recognize that these intangible injuries are compensable.[91]

In the present context, it is the foregoing benefits the defendant will claim to reduce the ultimate amount of damages. The benefits are real but clearly intangible. Notwithstanding this difficulty, a Michigan Supreme Court decision has enunciated a "pecuniary value of life" measure of benefits based on mutual society and companionship of the child which supports the present analysis.[92] This approach should become the basis for establishing the value of an unplanned child to his family and culminate the second step of mitigating damages. Denial of this mitigation will perpetuate the inconsistency between the anlogous areas of negligent birth and wrongful death. Further application of the benefit rule as set forth in the *Restatement of Torts* produces the dilemma of choosing to apply the rule inaccurately as in *Troppi* or to apply it strictly but without deference to the worth of the child to his family. A more consistent and logical approach would be to discard the restrictions of the *Restatement* rule and adopt the foregoing rule which recognizes the true values that should be considered.

CONCLUSION

As early as 1847, it was suggested that "[t]he great end of matrimony is not the comfort and convenience of the immediate parties, . . . but the procreation of a progeny."[93] More than a century later, a court cited this statement with approval.[94] Yet within the comparatively short time since, there have been three decisions allowing a family to recover damages for the birth of a healthy, normal child.[95] If this is any indication of a trend in the number of cases that

89. Foster, *Relational Interests of the Family*, 1962 U. ILL. L. FORUM 493, 501 (1962).

90. *Id.* The author also reasons, *id.* at 501:

> In contemporary society, children are seldom an economic asset and their contribution to household affairs is at best a mixed blessing . . . on the other hand, if parental authority is to be preserved, if control is a correlative of the duty to support, [and] if minors are to be protected from their own immaturity of judgment . . . it may be necessary or desirable to provide a parental remedy.

91. Cases cited *supra* note 88.

92. Wycko v. Gnodtke, 105 N.W.2d 118 (Mich. 1960).

93. Matchin v. Matchin, 6 Pa. 332, 337 (1847).

94. 11 Pa. D. & C.2d at 45.

95. *See* note 31 *supra.*

courts can expect to arise in this area, firmer bases for the determination of damages than are afforded by the benefit rule must be established. It appears that the *Troppi* rationale of allowing damages, accompanied with the realization that the "end of matrimony" may not be what it once was, is the harbinger of future developments in this area.