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Torts—Wrongful Birth—Public Policy Forbids Award of Damages for Expense of Raising a Healthy, but Unwanted Child

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TORTS—WRONGFUL BIRTH—PUBLIC POLICY FORBIDS AWARD OF DAMAGES FOR EXPENSE OF RAISING A HEALTHY, BUT UNWANTED CHILD. *Wilbur v. Kerr*, 276 Ark. 214, 628 S.W.2d 568 (1982)

In December 1977, Virgil and Wilma Wilbur, plaintiffs, decided to limit the size of their family for economic reasons. The Wilburs consulted Dr. Robert Kerr and Dr. Paul Wilbur, defendants, concerning a vasectomy for Mr. Wilbur, and the procedure was performed in the defendants' office the same day.[1] Tests showed that the vasectomy was unsuccessful, and the defendants performed a second vasectomy. Subsequent tests showed that this attempt was successful. The defendants informed the plaintiffs that they could safely engage in intercourse without the further use of contraceptives.[2] Approximately one year later Mrs. Wilbur became pregnant, resulting in the birth of a normal, healthy daughter. The Wilburs filed a complaint alleging that the defendants' negligent performance of the vasectomy was the proximate cause of the birth. The complaint sought recovery for:

> (1) Medical expenses incurred by Virgil Wilbur related to the alleged failed vasectomy and its consequences; (2) pain and mental anguish allegedly sustained by Virgil Wilbur; (3) medical expenses incurred by Wilma Wilbur relating to the pregnancy and delivery; and (4) the cost and expensive of raising the child, including care, maintenance, support and education.[3]

The defendants filed a motion for summary judgment stating that no genuine issue of fact existed because Arkansas had not recognized "wrongful birth" as a cause of action. The trial court ruled that the suit could continue upon proof of the defendants' negligence for the damages sought for medical expenses, and pain and mental anguish.[4] The trial court sustained the motion on the issue of damages for the expense of raising the child on the ground that such an award was barred by public policy.[5] The plaintiffs then amended their complaint and deleted all requests for recovery except for the expense of raising the child. The trial court sustained

1. Brief for Appellant 4-5, Wilbur v. Kerr, 275 Ark. 239, 628 S.W.2d 568 (1982).
2. *Id.* at 5.
3. *Id.* at 10.
4. *Id.*
5. *Id.* at 11.

the defendants' second motion for summary judgment and dismissed the complaint.[6]

On appeal, the Arkansas Supreme Court limited the issue to whether damages should be allowed for the expense of raising a normal, healthy child born as a result of a negligently performed vasectomy. The court affirmed the holding of the trial court. *Wilbur v. Kerr*, 275 Ark. 239, 628 S.W.2d 568 (1982).

A cause of action based on the birth of an unwanted child is a relatively new development in American law.[7] The United States Supreme Court's decisions in *Griswold v. Connecticut*[8] and *Roe v. Wade*[9] signaled a shift in overall public policy in a direction that favors an individual's right to limit the size of his family. Both decisions emphasized a constitutionally protected right of privacy which is violated if couples are denied the right to take preventive measures to avoid the future birth of children. This shift in policy, coupled with an increased use of various methods of birth control over the past twenty years,[10] has prompted the development of two new causes of action in tort, those for wrongful life and wrongful birth.

A distinction must be made between "wrongful life" and "wrongful birth." Both stem from the birth of an unwanted child due to a defendant's negligence or misrepresentation, but they are separate and distinct causes of action. Wrongful life is an action brought on behalf of the child alleging that the child should not have been born and was therefore injured by his own birth.[11] With one exception,[12] every state has refused to recognize this cause of action on the grounds that it is impossible to measure the value of

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6. *Id.* at 12.

7. Christensen v. Thornby, 192 Minn. 123, 255 N.W. 620 (1934) (first case in which the cause of action was asserted, although the court refused to recognize it as a valid cause of action). J. DOOLEY, MODERN TORT LAW § 14.06 (Supp. 1981).

8. 381 U.S. 479 (1965) (the Court held a Connecticut statute prohibiting the distribution of birth control information to married couples unconstitutional on the ground that it violates a constitutionally protected right of privacy).

9. 410 U.S. 113 (1973) (the Court held unconstitutional a Texas statute prohibiting abortion at any stage of pregnancy, except to save the life of the mother).

10. Westoff & Jones, *Contraception and Sterilization in the United States*, 1965-1975, 9 FAM. PLAN. PERSPECTIVES 153 (1977). The use of sterilization as a method of birth control in the United States increased from 8.8% in 1965 to 31.3% in 1975 among those who used some method of birth control. *See* Pilpel, *Voluntary Sterilization: A Human Right*, 7 COLUM. HUM. RTS. L. REV. 105 (1975), and Dourlen-Rollier, *Legal Problems Related to Abortion and Menstrual Regulations*, 7 COLUM. HUM. RTS. L. REV. 120 (1975).

11. J. DOOLEY, MODERN TORT LAW § 14.06 (Supp. 1981).

12. Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980) (defendant was grossly negligent in performing tests for fetal defects, plaintiff's parents gave birth to a seriously defective child, and on these facts California became the first

non-existence as compared to existence, and because one's life should be considered sacred and not an injury.[13] Wrongful life actions have been brought on behalf of healthy children,[14] children born with a disease or deformity,[15] and even by illegitimate children alleging injury based on their bastardy.[16] Wrongful birth, on the other hand, is an action usually brought by one or both of the child's parents[17] seeking compensation for the various expenses attributable to the unwanted birth caused by the defendant's negligence.[18]

While a few states still refuse to accept it,[19] most jurisdictions have now recognized wrongful birth as a cause of action. Among those jurisdictions allowing a cause of action for wrongful birth, a few have further distinguished actions involving deformed or defective children.[20] For the most part, judicial recognition of the cause

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state to award damages for wrongful life); *see* Note, *Torts—Wrongful Life—Infant's Right to Sue for Negligent Genetic Counseling*, 48 TENN. L. REV. 493 (1981).

13. Elliot v. Brown, 361 So. 2d 546 (Ala. 1978); Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975).

14. Coleman v. Garrison, 327 A.2d 757 (Del. Super. Ct. 1974); Sala v. Tomlinson, 73 A.D. 724, 422 N.Y.S.2d 506 (1979); Nelson v. Krusen, No. 82-106 slip op. (Tex. Ct. App. May 3, 1982) (available Sept. 1, 1982, on *Lexis*, Omni states library, Texas file).

15. Gildiner v. Thoms Jefferson Univ. Hosp., 451 F. Supp. 692 (E.D. Pa. 1978); Smith v. United States, 392 F. Supp. 654 (E.D. Ohio 1975); Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979); Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967); Karlsons v. Guerinot, 57 A.D.2d 73, 394 N.Y.S.2d 933 (1977); Stewart v. Long Island College Hosp., 35 A.D.2d 531, 313 N.Y.S. 2d 502 (1970), *aff'd*, 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1972); Speck v. Finegold, 408 A.2d 496 (Pa. Super. Ct. 1979), *modified* 439 A.2d 110 (Pa. Super. Ct. 1981).

16. Stills v. Gratton, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976); Brown v. Bray, 300 So. 2d 668 (Fla. 1974); Pinkney v. Pinkney, 198 So. 2d 52 (Fla. Dist. Ct. App. 1967); Zepeda v. Zepeda, 41 111. 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 (1966); Slawek v. Stroh, 62 Wis. 2d 295, 215 N.W.2d 9 (1974); *see* Note, *Illegitimate Child Denied Recovery Against Father for "Wrongful Life"*, 49 IOWA L. REV. 1005 (1964).

17. Wrongful birth actions have also been brought by the child's siblings alleging that the child's birth has reduced their share of parental attention and financial support. No court has recognized such an action. Aronoff v. Snider, 292 So. 2d 418 (Fla. Dist. Ct. App. 1974); Cox. v. Stretton, 77 Misc. 2d 155, 352 N.Y.S.2d 834 (1974).

18. *See* Note, *Wrongful Birth: A Child of Tort Comes of Age*, 50 U. CIN. L. REV. 65, 65 (1981).

19. Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967); Johnson v. Yeshiva Univ., 53 A.D.2d 523, 384 N.Y.S.2d 455 (1976), *aff'd* 42 N.Y.2d 818, 364 N.E.2d 1340, 396 N.Y.S.2d 647 (1977); Stewart v. Long Island College Hosp., 35 A.D.2d 531, 313 N.Y.S.2d 502 (1970), *aff'd* 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1974); Terrell v. Garcia, 496 S.W.2d 124 (Tex. Civ. App. 1973), *cert. denied*, 415 U.S. 927 (1974); Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974). *But see* Annot., 83 A.L.3d 15, 29-35 (1978) (gives a detailed analysis of cases from those jurisdictions that recognize wrongful birth).

20. *See* Coleman v. Garrison, 327 A.2d 757 (Del. Super. Ct. 1974); Berman v. Allan, 80

of action has been slower to emerge for healthy children.[21]

Wrongful birth actions arise from a number of fact situations in which the defendant is alleged to have been negligent. The most frequent actions involve conception and birth following a vasectomy[22] or a tubal litigation,[23] birth following an unsuccessful abortion,[24] erroneous diagnosis in which the woman is told she is not pregnant,[25] unsuccessful use of an oral contraceptive or contraceptive device,[26] pharmacist's error in filling a prescription,[27] or failure to perform or properly perform postoperative tests following a sterility procedure.[28] In cases involving deformed or defective children the action has also been based on negligence in performing, or failing to perform tests for fetal defects.[29] Although no court has made the distinction, it is interesting to note that the plaintiffs in wrongful birth actions fall into two distinct categories. The first category includes plaintiffs in suits arising out of a failed sterilization opera-

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N.J. 421, 404 A.2d 8 (1979); Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967); Speck v. Finegold, 408 A.2d 496 (Pa. Super. Ct. 1979), *modified*, 439 A.2d 110 (Pa. Super. Ct. 1981). *See also* Morrison, *Torts Involving the Unborn—A Limited Cosmology*, 31 BAYLOR L. REV. 131, 153-60 (1979); Comment, *Wrongful Life: The Right Not to be Born*, 54 TUL. L. REV. 480 (1980).

21. Unlike situations in which the injury is evidenced by an apparent defect, courts have had difficulty in finding an injury associated with the birth of a normal child and have denied the action based on the "blessed event" theory, *see infra* note 51, or have denied recovery based on the "overriding benefits" rule, *see infra* note 58.

22. Hackworth v. Hart, 474 S.W.2d 377 (Ky. Ct. App. 1971); Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977); Cox v. Stretton, 77 Misc. 2d 155, 352 N.Y.S.2d 834 (1974); Shaheen v. Knight, 11 Pa. D. & C.2d 41 (Lycoming Cty. 1957); Ball v. Mudge, 64 Wash. 2d 247, 391 P.2d 201 (1964).

23. Sard v. Hardy, 34 Md. App. 217, 367 A.2d 525 (1976), *rev'd*, 281 Md. 432, 379 A.2d 1014 (1977); Clegg v. Chase, 89 Misc. 2d 510, 391 N.Y.S.2d 966 (1977); Vaughn v. Shelton, 514 S.W.2d 870 (Tenn. Ct. App. 1974).

24. Stills v. Gratton, 55 Cal. App. 2d 698, 127 Cal. Rptr. 652 (1976); Wilczynski v. Goodman, 73 111. App. 3d 51, 391 N.E.2d 479 (1979); Speck v. Finegold, 408 A.2d 496 (Pa. Super. Ct. 1979), *modified*, 439 A.2d 110 (Pa. Super. Ct. 1981).

25. Debora S. v. Sapega, 56 A.D.2d 841, 392 N.Y.S.2d 79 (1977); Chapman v. Schultz, 89 Misc. 2d 543, 383 N.Y.S.2d 512 (1976); Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974).

26. J.P.M. v. Schmid Laboratories, Inc., 178 N.J. Super 122, 428 A.2d 515 (1981).

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

28. Sard v. Hardy, 34 Md. App. 217, 367 A.2d 525 (1976), *rev'd* 281 Md. 432, 379 A.2d 1014 (1977); Karlsons v. Guerinot, 57 A.D.2d 73, 394 N.Y.S.2d 933 (1977). *See also* Note, *supra* note 18, at 66-67. Causation may be difficult to prove in an action arising from an allegedly negligently performed vasectomy due to a slight risk of recanalization in which the severed vas defrens reattach naturally after a properly performed vasectomy.

29. Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975) (in which the court held that public policy could not be used to bar recovery for the expenses incurred in treating and caring for the defective child); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975).

tion. They contend that they have taken steps to prevent pregnancy and should be permitted to recover damages although they failed to seek an abortion once conception was discovered.[30] The second category includes plaintiffs in actions involving an unsuccessful abortion, failure to diagnose pregnancy, and failure to perform pre-natal tests. They contend that they were denied information which would have allowed them to make the informed decision to seek an abortion, a right denied them by the defendant's negligence.[31]

The most common and most successful theory of recovery in wrongful birth actions has been negligence in tort.[32] Actions based on breach of contract, breach of warranty, and misrepresentation have met with little success.[33] Negligence actions involve a breach of duty by the defendant,[34] which includes a lack of informed consent if the defendant failed to warn of the risk of failure associated with certain birth control methods or failed to outline alternative methods of birth control.[35] Failure to properly test or diagnose has

30. *See supra* notes 22 and 23.

31. *See supra* notes 24, 25, 26, 27 and 28.

32. Robertson, *Civil Liability Arising from "Wrongful Birth" Following an Unsuccessful Sterilization Operation*, 4 AM. J. L. & MED. 131 (1978), sets out four stages in a sterilization procedure at which negligence may occur: (1) preoperative stage (lack of informed consent); (2) performance of the operation (unlikely to apply res ipsa loquitur in actions involving a vasectomy due to risk of recanalization); (3) postoperative testing (failure to confirm removal of actual fallopian tissue after a tubal ligation, or failure to test for live spermatozoa in ejaculate following a vasectomy); and (4) post operative counseling (failure to disclose adverse test results or assurances that the operation was 100% effective). *Id.* at 139-44.

33. Bishop v. Bynre, 265 F. Supp. 460 (S.D.W. Va. 1967) (stating that a physician does not guarantee results by providing services); Coleman v. Garrison, 327 A.2d 757 (Del. Super. Ct. 1974) (separate consideration required to find a guarantee); Christensen v. Thornby, 192 Minn. 123, 255 N.W. 620 (1934) (separate contract required for such a warranty). *But see* Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967) (judgment for plaintiffs on the ground that defendant misrepresented the operation as 100% successful). For a unique theory of recovery, see Roman v. City of New York, 110 Misc. 2d 799, 442 N.Y.S.2d 945 (1981), in which the plaintiff claimed misrepresentation because she relied on a statement in the defendant's planned parenthood publication which said continued use of contraceptives was not necessary following a sterilization operation. The plaintiff underwent a tubal ligation, discontinued use of birth control pills and became pregnant. The complaint was dismissed on the ground that causation was too remote.

34. Liability is based on the traditional elements of negligence: a duty of care owed by the defendant to the plaintiff, a breach of that duty, and an injury to the plaintiff proximately caused by the breach. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 30 at 143 (4th ed. 1971). Arkansas uses the locality doctrine to determine whether a physician's actions were negligent. Under the locality doctrine negligence is found if the doctor failed to use the same degree of skill, care, and knowledge used by physicians in the same or a similar locality. Gambill v. Stroud, 258 Ark. 766, 531 S.W.2d 945 (1975).

35. Sard v. Hardy, 34 Md. App. 217, 367 A.2d 525 (1976), *rev'd*, 281 Md. 432, 379 A.2d 1014 (1977); Garwood v. Locke, 552 S.W.2d 892 (Tex. Civ. App. 1977).

also been the basis for negligence claims.[36]

Once negligence has been found, several arguments have been asserted by defendants in an attempt to limit liability. In a case involving the birth of a defective child, one defendant maintained that his failure to perform fetal tests was not the proximate cause of the defect.[37] Several defendants have contended that the parents' intercourse and the defendants' negligence was the proximate cause of the pregnancy.[38] Another defendant argued that the parents were contributorily negligent by failing to follow his advice to continue the use of other methods of birth control after the sterilization procedure.[39] Finally, an argument often made in wrongful birth actions is that the plaintiffs failed to mitigate damages by not seeking an abortion or putting the child up for adoption once it was born.[40] Most courts have rejected this mitigation argument, saying that only reasonable steps need be taken to reduce an injury, and to require abortion or adoption is not reasonable.[41]

Even though most states now recognize wrongful birth actions, there is still wide disagreement over the types of damages that are compensable.[42] The most common damages sought are those for the

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36. *See supra* note 25, for cases involving failure to detect pregnancy. *See* Robertson, *supra* note 32, at 142, on failure to conduct postoperative tests to determine success of the sterility operation. *See generally* Halligan, *Excusing by Statute the Missing Elements of Torts of Eugenic Nondisclosure*, 9 J. LEGIS. 52 (1982) (in cases involving a child born with a hereditary disease, the defendant may have been negligent in failing to perform or inform the plaintiff of amniocentesis, a test which can reveal at the sixteenth week of pregnancy more than 60 inherited diseases which might be present in the fetus).

37. Smith v. United States, 392 F. Supp. 654 (E.D. Ohio 1975) (argument rejected).

38. Bishop v. Bryne, 265 F. Supp. 460 (S.D.W. Va. 1967) (act was forseeable and was not an intervening cause); Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967) (argument rejected).

39. Martineau v. Nelson, 311 Minn. 92, 247 N.W.2d 409 (1976); (issue remanded for new trial).

40. Ziemba v. Sternberg, 45 A.D.2d 230, 357 N.Y.S.2d 265 (1974); Shaheen v. Knight, 11 Pa. D. & C.2d 41 (Lycoming Cty. 1957); Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974).

41. Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971) (mitigation requirement is unreasonable); Martineau v. Nelson, 311 Minn. 92, 247 N.W.2d 409 (1976) (no duty to seek abortion or adoption); Ziemba v. Sternberg, 45 A.D.2d 230, 234, 357 N.Y.S.2d 265, 270 (1974) (plaintiff had a right, but not an obligation to seek an abortion). Many cases cite C. MCCORMICK HANDBOOK ON THE LAW OF DAMAGES § 35 at 133 (1935), which reads:

> If the effort, risk, sacrifice, or expense which the person wronged must incur in order to avoid or minimize a loss or injury is such that under all the circumstances a reasonable man might well decline to incur it, a failure to do so imposes no disability against recovering full damages.

42. See Trotzig, *The Defective Child and the Actions for Wrongful Life and Wrongful Birth*. 14 FAM. L. Q. 15 (1980).

expense of the failed sterilization operation,[43] mental anguish caused by the unwanted conception and birth,[44] the expense of the pregnancy and delivery,[45] the mother's lost wages,[46] loss of consortium[47] and the expense of raising the child.[48] Courts generally have awarded damages for the expense of the unsuccessful sterilization operation and the expense of the delivery and birth, but have disagreed on the other damages,[49] especially recovery for the expense of raising the child.[50]

The most common bar to recognition of either the cause of action, or an award of damages, has been public policy considerations. The earliest policy reason used by the courts to deny recognition of the action was the "blessed event" theory.[51] This theory states that

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

44. Ziemba v. Sternberg, 45 A.D.2d 230, 357 N.Y.S.2d 265 (1974) (damages awarded); Bowman v. Davis, 48 Ohio St. 2d 42, 356 N.E.2d 496 (1976) (damages awarded); Speck v. Finegold, 408 A.2d 496 (Pa. Super. Ct. 1979) *modified*, 439 A.2d 110 (Pa. Super. Ct. 1981) (damages for emotional distress awarded upon modification). Awards for mental anguish are more commonly awarded in cases involving defective children. *See e.g.,* Berman v. Allan 80 N.J. 421, 404 A.2d 8 (1979) (damages for mental anguish awarded because child was born with Down's Syndrome which doctor failed to discover).

45. Bishop v. Byrne, 265 F. Supp. 460 (S.D.W. Va. 1967) (damages awarded); Stills v. Gratton, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976) (damages awarded).

46. Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971) (damages awarded); Ziemba v. Sternberg, 45 A.D.2d 230, 357 N.Y.S.2d 265 (1974) (damages awarded.

47. Ziemba v. Sternberg, 45 A.D.2d 230, 357 N.Y.S.2d 265 (1974) (damages awarded); Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976) (damages awarded); Vaughn v. Shelton, 514 S.W.2d 870 (Tenn. Ct. App. 1974 (issue of damages remanded).

48. The courts have been nearly evenly split about whether damages for the expense of raising the child are compensable. For cases in which recovery was allowed see Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967); Ochs v. Borrelli, 187 Conn. 253, 445 A.2d 883 (1982); Anonymous v. Hospital, 33 Conn. Sup. 126, 366 A.2d 204 (1976); Cockrum v. Baumgartner, 99 Ill. App. 3d 271, 425 N.E.2d 968 (1981); Green v. Sudakin, 81 Mich. App. 545, 265 N.W.2d 411 (1978); Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971); Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977); Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976); Mason v. Western Pa. Hosp., 428 A.2d 1366 (Pa. Super. Ct. 1981).

For cases in which recovery was denied see Coleman v. Garrison, 327 A.2d 757 (Del. Super. Ct. 1974); Public Health Trust v. Brown, 388 So. 2d 1084 (Fla. Dist. Ct. App. 1980); Wilczynski v. Goodman, 73 Ill. App. 3d 51, 391 N.E.2d 479 (1979); Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979); Sorkin v. Lee, 78 A.D.2d 180, 434 N.Y.S.2d 300 (1980); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975); Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974).

49. Some plaintiffs have sought only damages for the expenses related to the actual birth in order to avoid the controversy associated with other damages, such as the expense of raising the child. Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); Garwood v. Locke, 552 S.W.2d 892 (Tex. Civ. App. 1977) (healthy child born following a tubal ligation).

50. *See supra* note 48.

51. Christensen v. Thornby, 192 Minn. 123, 255 N.W. 620 (1934). The United States

the birth of a child is not an injury because it is the natural by-product and goal of a marriage and is, therefore, a blessed event. Despite the shift in public policy in a direction favoring birth control, recent cases have used a similar "sanctity of life" argument to dismiss the action.[52] Proponents of that argument reason that life is sacred and cannot be held an injury. Another policy reason used by the courts has been the concern that recognition of such an action would lead to an increase in frivolous and fraudulent claims.[53] Other courts have held that recognition of a new cause of action is within the purview of the legislatures and not the courts, but very few legislatures have passed legislation on this issue.[54]

In many jurisdictions which recognize wrongful birth, public policy has been used as a basis to deny recovery for various alleged injuries, particularly the expense of raising the child. One argument used is that an award of damages for the expense of raising the child is out of proportion to the defendant's culpability and it would create a new category of surrogate parent.[55] This reasoning is frequently coupled with the argument that such expenses are too speculative and are incapable of calculation.[56]

Supreme Court decisions in *Griswold* and *Wade*, *see supra* notes 8 and 9, have made this argument obsolete in theory because they hold that a couple has a constitutionally protected right of privacy in choosing to limit the size of their family by the use of birth control techniques. For a case rejecting the "blessed event" theory *see* Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463, 475 (1967) (first court to recognize that the birth of a healthy child is not always a blessed event); *see also* Morrison *supra* note 20, at 159.

52. Coleman v. Garrison, 327 A.2d 757 (Del. Super. Ct. 1974); Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967).

53. Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied*, 379 U.S. 945 (1964) (in which the Court held that if a cause of action for wrongful birth were recognized there would be no limit to the extension of liability, including suits for being born a certain color or race, or for being born into a destitute family); *see also* Howard v. Lecher, 53 A.D.2d 420, 386 N.Y.S.2d 460 (1976); Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974). *But see* Karlsons v. Guerinot, 57 A.D.2d 73, 394 N.Y.S.2d 933 (1977). *See generally* Note, *"Wrongful Life"—A New Tort?* 17 HASTINGS L. J. 400 (1965) (discusses the administrative burdens which would result from recognition of the cause of action); recent cases, *Freedom From Illegitimate Birth*, 55 KY. L. J. 719 (1966-67) (discusses the "flood of litigation" that would result from such recognition).

54. *See, e.g.*, Georgia Voluntary Sterilization Act of 1970, GA. CODE ANN. § 84-935.1 (1970) (physician's liability for wrongful birth extends to negligent acts only, and not to breach of contract).

55. Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974). The court reasoned that recovery for the expense of raising the child would create too great a burden for the defendant. To give the parents the joy and satisfaction of raising the child and at the same time require the defendant to pay all the expenses incurred would create a new category of surrogate parent. *See also* Annot., 83 A.L.R.3d 15, at 48 (1978).

56. *See* Gleitman v. Cosgrove, 49 N.J. 22, 24, 227 A.2d 689, 693 (1967) in which the court states, "[T]he parent's compensatory damages would entail balancing the intangible,

Courts have also considered the adverse effect upon the child which might result from such an award. The "emotional bastard" theory suggests that if a child later learns of the suit he will be incapable of dealing emotionally with the fact that his parents brought suit because he was unwanted.[57]

In considering damages for the expense of raising the child, many courts have offset recovery with the value of the benefits of parenthood. Those courts which have used the "overriding benefits" rule usually denied recovery based on the reasoning that the benefits of parenthood far outweigh the expense of raising the child.[58] Other courts have applied a benefits rule based on the Restatement (Second) of Torts section 920[59] and have only reduced the amount of the award.[60] Although both systems measured the same benefit against the same injury, the outcome usually varied with the theory applied.[61]

Even though recognition of the cause of action was not the stated issue in *Wilbur v. Kerr*,[62] it was an issue that had never been decided in Arkansas. Recognition was implied when Justice Hickman, writing for the majority, stated, "Most states recognize this as a valid cause of action grounded in tort . . . ."[63] Since the court focused on the issue of damages for raising a normal, but unwanted child, it cited several representative cases from other jurisdictions

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unmeasureable, and complex human benefits of motherhood and fatherhood . . . against the alleged emotional and money injuries. Such a proposed weighing is impossible to perform." Compare the similarity of this argument with the "blessed event" theory, *supra* note 51, which states that the value and benefits of parenthood cannot be considered an injury.

57. Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967) (theory rejected); Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977) (theory rejected). *See* Note, *The Birth of a Child Following an Ineffective Sterilization Operation as Legal Damage*, 9 UTAH L. REV. 808 (1965) (origin of the "emotional bastard" theory). One Connecticut court attempted to avoid this problem by deleting the names of the parties. Anonymous v. Hospital, 33 Conn. Supp. 126, 366 A.2d 204 (1976).

58. Shaheen v. Knight, 11 Pa. D. & C.2d 41 (Lycoming Cty. 1957); Terrell v. Garcia, 496 S.W.2d 124, 128 (Tex. Civ. Ct. App. 1973), *cert. denied*, 415 U.S. 927 (1974) (in which the court used the reasoning that it is impossible to place a value on a "child's smile" or other intangible benefits in order to determine an offset to the parent's recovery).

59. RESTATEMENT (SECOND) OF TORTS) § 920 (1979) PROVIDES:

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

60. Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977); *but see* Cockrum v. Baumgartner, 99 Ill. App. 3d 271, 425 N.E.2d 968 (1981).

61. *Compare supra* notes 58 and 60.

62. 275 Ark. 239, 628 S.W.2d 568 (1982).

63. *Id.* at 240, 628 S.W.2d at 569.

which both awarded and denied recovery,[64] with little discussion of the actual reasoning used in those cases.

The court also briefly reviewed several public policy considerations used in jurisdictions which have denied recovery. Among these policy arguments were the "overriding benefits" theory, the speculative nature of the damages, mitigation of damages through abortion or adoption (recognizing that most courts have rejected such mitigation as unreasonable), the application of Restatement (Second) of Torts section 920 to reduce damages and the "emotional bastard" theory.[65] The court found these arguments persuasive and held that Arkansas should also deny recovery for the expense of raising the child based on public policy considerations.[66] The court specifically reasoned that an award for the expense of raising the child would undermine family stability and could be emotionally damaging to the child in later years, and stated that not all problems can be solved through litigation or in terms of dollars and cents.[67]

Justice Dudley wrote a strong dissent which was joined by Chief Justice Adkisson. The dissent criticized the majority's application of public policy in view of well-settled common-law precedents[68] and said that the majority had no basis on which to determine or apply policy which has "erupted" rather than built gradually like the common law.[69] The dissent also argued that the majority opinion subtly encouraged abortion or adoption which conflicted with the majority's concern for family stability.[70] The dissenters favored an award of damages based on common-law negligence but reduced by the value of the pleasure and joy the parents receive from raising the child.[71]

Wilbur v. Kerr is important because the court impliedly recognized a new cause of action in Arkansas and discussed the possible limitations on recovery for wrongful birth. It is also important because the court applied what it perceived to be public policy concerning an award of damages for the cost of raising an unwanted child. Not all writers agree that the courts should determine and

64. *Id.* at 240-41, 628 S.W.2d at 569-70.

65. *Id.* at 241-43, 628 S.W.2d at 569-71.

66. *Id.* at 244, 628 S.W.2d at 571.

67. *Id.* at 243-44, 628 S.W.2d at 571.

68. *Id.* at 244, 628 S.W.2d at 571-72 (Dudley and Adkisson, J. J., dissenting).

69. *Id.* at 244-45, 628 S.W.2d at 571-72.

70. *Id.* at 246, 628 S.W.2d at 572.

71. *Id.* at 246, 628 S.W.2d at 572-73.

apply public policy,[72] and one writer maintains that when the court, rather than the legislature, attempts to set public policy, it produces public tensions because the court lacks the broad-based public input enjoyed by the legislature.[73]

Other courts have maintained the viewpoint of the dissent in *Wilbur* and have offered arguments for application of common law precedent over public policy. A frequent contention is that the type of reasoning used by the Arkansas Supreme Court creates an exception to the common-law rule which holds a tortfeasor liable for all the foreseeable consequences of his negligence.[74] This issue was addressed in *Bowman v. Davis*,[75] in which the Ohio court explained, "For this court to endorse 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."[76]

The policy reasons relied on by the majority in *Wilbur* have been rebutted by various courts in other jurisdictions. First, the "emotional bastard" argument was avoided by the Connecticut court by deleting the names of the parties from the case.[77] Second, the argument that not all problems can be solved in terms of dollars and cents[78] seems to imply that the damages are too speculative or incapable of calculation. This argument has appeared in previous cases involving new causes of action in tort such as wrongful death or negligent infliction of emotional harm, and courts are now able to assign a value to such injuries.[79] Another issue which should be considered is the reduction of recovery based on the benefits rule of

72. *See* Aldisert, *The Nature of the Judicial Process: Revisited*, 49 U. CIN. L. REV. 1 (1980); B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921).

73. Aldisert, *supra* note 72, at 5-7.

74. *See* Terrell v. Garcia, 496 S.W.2d 124, 131 (Tex. Civ. App. 1973), *cert. denied*, 415 U.S. 927 (1974) (held that public policy should not protect a negligent tortfeasor from the consequences of his negligence).

75. 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976).

76. *Id.* at 44, 356 N.E.2d at 499 (emphasis in original).

77. Anonymous v. Hospital, 33 Conn. Supp. 126, 366 A.2d 204 (1976). It should be noted that deleting the names of the parties may not have the effect of creating total anonymity if the suit is brought in a small community.

78. Wilbur v. Kerr, 275 Ark. 239, 243-44, 628 S.W.2d 568, 571 (1982).

79. In Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971), the court compared the difficulty of ascertaining damages in the instant case to earlier problems encountered by courts in cases involving wrongful death. The court explained, "We do not, 'in the assessment of damages, require a mathematical precision in situations of injury where, from the very nature of the circumstances, precision is unattainable.' Particularly is this true where it is the defendant's own act or neglect that has caused this imprecision." *Id.* at 248, 187 N.W.2d at 521 (quoting Purcell v. Keegan, 359 Mich. 571, 576, 103 N.W.2d 494, 496 (1960).

the Restatement (Second) of Torts. One Pennsylvania court rejected such a reduction, and summarized, "The question is not the worth and sanctity of life, but whether the doctors were negligent in their surgical attempts at vasectomy and abortion . . . ."[80]

The debate over the propriety of judicial making of public policy centers on the issue of what the *Wilbur* dissent terms "no logical sense of conscience"[81] or the lack of proper guidelines in deciding what public policy should be and how it should be applied. On the other hand, those who support judicial use of public policy[82] point out that it is a valuable tool for the courts in determining how the law should be applied in a given situation. The law must evolve to be compatible with the times for two reasons. First, public policy considerations enable the court to apply old rules to new situations, such as actions for wrongful birth. Second, it allows the courts to mold legal principles to conform to changing public attitudes, a good example being the Supreme Court's reflection of a change in public attitude toward birth control as expressed in the *Griswold*[83] and *Wade*[84] decisions.

In *Wilbur*, the Arkansas Supreme Court determined that Arkansas public opinion favors a limitation of common-law recovery against a negligent defendant for the expense of raising a normal, but unwanted child. However, in the future the court might very well determine that public policy has shifted on this issue. By using public policy reasons to support its present holding on this issue, the Arkansas Supreme Court has left the door open for future revision and may, on determination of a shift in public attitudes, award damages for the expense of raising the child.[85]

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80. Speck v. Finegold, 408 A.2d 496, 503 (Pa. Super. Ct. 1979) (case involving a defective child); *see also* Cockrum v. Baumgartner, 99 Ill. App. 3d 271, 425 N.E.2d 968 (1981) (case involving a normal child).

81. 275 Ark. at 246, 628 S.W.2d at 572 (Dudley and Adkisson, J. J., dissenting).

82. B. CARDOZO, *supra* note 72.

83. 381 U.S. 479 (1965).

84. 410 U.S. 113 (1973).

85. The Illinois court provides a good example in which a court has reversed its perception of public policy toward awarding damages for the expense of raising a normal, but unwanted child. In Wilczynski v. Goodman, 73 Ill. App. 3d 51, 391 N.E.2d 479 (1979), the court held that public policy forbids an award of such damages, based on reasoning similar to that in *Wilbur*. Two years later, in Cockrum v. Baumgartner, 99 Ill. App. 3d 271, 425 N.E.2d 969 (1981), the court stated that the parents have a legally protected right to limit the size of their family and that interference with this right is actionable. Therefore, the use of public policy to nullify the injury would be an infringement upon the parent's basic rights.