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Wrongful Conception: North Carolina’s Newest Prenatal Tort Claim—Jackson v. Bumgardner

The area of prenatal torts, including wrongful birth, wrongful life, and more recently, wrongful conception, has witnessed exponential growth over the last twenty years. Unlike claims for wrongful birth or wrongful life, which are often rejected by the courts, wrongful conception generally is accepted as a subspecies of medical malpractice. The controversy in wrongful conception cases arises over the determination of damages, fueled by conflicting policy considerations involving highly sensitive issues.

The North Carolina Supreme Court’s recent recognition of a cause of action for wrongful conception in Jackson v. Bumgardner arrives in the wake of its prior decision in Azzolino v. Dingfelder, the State’s first wrongful birth-wrongful life case. Wrongful conception occurs when “the wrongful act of a third party, usually a physician or pharmacist, interfere[s] with contraceptive or birth control measures adopted or elected by the parents so that an unintended child [comes] into being.” The upshot of both wrongful birth and wrongful life claims, on the other hand, is that the doctor’s negligence deprived the parents of the opportunity to abort the fetus to avoid its subsequent birth. The wrongful conception claim thus differs from both wrongful birth and wrongful life in that it is generally understood to involve preconception, rather than postconception, negligence. Although the court’s decision in Jackson is consistent with the

2. Wrongful life is an action maintained “by or on behalf of a defective child who alleges that but for the defendant’s negligent treatment or advice to its parents, the child would not have been born.” Azzolino v. Dingfelder, 315 N.C. 103, 107, 337 S.E.2d 528, 531 (1985); see also Comment, The Trend Toward Judicial Recognition of Wrongful Life: A Dissenting View, 31 UCLA L. REV. 473, 473 (1983) (“[W]rongful life is a claim brought on behalf of a... defective infant against a third party” for the third party’s negligent failure “to inform the child’s parents that the child might be born defective...”).
3. See infra text accompanying note 8.
5. Id. at 761-63.
8. Holt, supra note 4, at 759.
10. In wrongful life cases the alleged harm to the child results from being born with a nontreatable disability, whereas wrongful birth is a claim brought by the child’s parents for the doctor’s negligent prenatal treatment. In both of these situations the fact of conception is not a basis for a negligence claim against the physician. Wrongful conception, on the other hand, is an action based on the physician’s negligent failure to provide or perform the prescribed method of birth control. See Note, Lifesaving Medical Treatment for the Nonviable Fetus: Limitations on State Authority
majority view regarding wrongful conception claims, heated debate over the issue of damages in such claims continues.\textsuperscript{11}

This Note analyzes \textit{Jackson} in light of \textit{Azzolino} and examines in particular the \textit{Jackson} court's definition of "legal injury" in relation to the assessment of damages. It concludes that the court, by departing from traditional principles of medical malpractice, placed an artificial cap on damages in wrongful conception cases. In so doing the court deprived plaintiffs in \textit{Jackson} of their right to a full remedy.

In January 1979 Varonica Jackson was admitted to Betsy Johnson Memorial Hospital in Lillington, North Carolina after consulting her physician regarding "abnormal uterine bleeding."\textsuperscript{12} Dr. Heath Bumgardner, a licensed physician, performed a dilation and curettage (D \& C)\textsuperscript{13} and a cervical biopsy.\textsuperscript{14} Mrs. Jackson previously had been fitted with an intrauterine device (IUD).\textsuperscript{15} She and her husband, Rufus Jackson, alleged that they had informed Dr. Bumgardner of their limited financial means and inability to bear the responsibility of raising additional children.\textsuperscript{16} They claimed that Dr. Bumgardner had promised to maintain the IUD in place, or reinsert it if the procedure warranted its removal, and that he later represented to Mrs. Jackson that the IUD had been maintained in place or reinserted.\textsuperscript{17}

Mrs. Jackson's physical discomfort continued until April 1979, when she


\textit{11. See generally Holt, supra note 4, at 785-86 (noting courts' problems in accepting the creation of a human being as a compensable wrong); Note, Flowers v. District of Columbia: Another Court Refuses to Settle the Question of Damages in Wrongful Conception Cases, 34 Cath. U.L. Rev. 1209, 1212-24 (1985) [hereinafter Note, Damages] (noting that the question of damages remains unsettled due to courts' inconsistent emphasis on various policy considerations); Note, Wrongful Birth: The Avoidance of Consequences Doctrine in Mitigation of Damages, 53 Fordham L. Rev. 1107, 1114-15 (1985) [hereinafter Note, Wrongful Birth] (noting the avoidance of consequences language used by some courts to hold that failure to abort a child or place it for adoption indicates that benefits of raising a child outweigh its costs); Note, Wrongful Conception: Who Pays for Bringing Up Baby?, 47 Fordham L. Rev. 418, 428 (1978) [hereinafter Note, Who Pays?] (discussing the substantial controversy over grounds of recovery for wrongful conception and extent of recoverable damages); Note, Recovery, supra note 10, at 344 (noting that courts are "sharply divided over the issue of damages, particularly for the costs of rearing a healthy child").}

\textit{12. Jackson, 318 N.C. at 174, 347 S.E.2d at 744.}

\textit{13. Id. A D \& C is "an operation in which the cervix of the uterus is dilated by means of an instrument and the interior of the uterus is then scraped out . . . by means of a curet . . . . The procedure is used both as a means of making a diagnosis . . . and as a treatment, by removing growths or overgrown tissue." 1 Schmidt's Attorneys' Dictionary of Medicine D-1 (17th ed. 1982) [hereinafter Schmidt's].}

\textit{14. Jackson, 318 N.C. at 174, 347 S.E.2d at 744. A biopsy involves the removal and examination of "some tissue, secretion, or other material from the living body, for the purpose of determining the nature of an illness or suspected illness." 1 Schmidt's, supra note 13, at B-58.}

\textit{15. Jackson, 318 N.C. at 174, 347 S.E.2d at 745. An IUD is a "mechanical device placed into the interior of the uterus for the purpose of preventing pregnancy." 2 Schmidt's, supra note 13, at I-86. Although the IUD's success in preventing conception remains a mystery, the prevailing theory is that the device produces a slight irritation that prevents the ovum from implanting itself into the lining membrane of the uterus. Id. at I-86 to -87.}

\textit{16. Jackson, 318 N.C. at 174, 347 S.E.2d at 745.}

\textit{17. Id. at 174, 347 S.E.2d at 744.}
was readmitted to the same hospital for exploratory surgery.\textsuperscript{18} As with the previous surgical procedure, plaintiffs alleged that they had voiced their concerns about reinsertion of the IUD, and that once again Dr. Bumgardner had assured them he would replace the IUD should its removal become necessary during the course of the surgery.\textsuperscript{19} On April 3, 1979, the doctor operated on Mrs. Jackson "for a suspected ovarian cyst."\textsuperscript{20} On July 22, 1980, Mrs. Jackson discovered that she was pregnant.\textsuperscript{21} The Jacksons contended that the IUD was never reinserted following the April 1979 surgery.\textsuperscript{22} Mrs. Jackson gave birth to a healthy baby in February 1981.\textsuperscript{23}

The Jacksons instituted a civil action in contract and tort against Dr. Bumgardner on July 22, 1981.\textsuperscript{24} The tort claim was in essence an action for medical malpractice.\textsuperscript{25} It alleged wrongful conception or wrongful pregnancy arising from defendant's alleged negligent failure to reinsert the IUD and from his alleged failure to notify plaintiffs of its removal, resulting in the birth of a child.\textsuperscript{26} The second cause of action against Dr. Bumgardner was for breach of an alleged oral contract to replace the IUD following surgery.\textsuperscript{27} As damages, the Jacksons sought both costs in connection with Mrs. Jackson's pregnancy and future expenses for the maintenance and support of their child.\textsuperscript{28}

Pursuant to rule 12(b)(6) of the North Carolina Rules of Civil Procedure,\textsuperscript{29} the trial court granted defendant's motion to dismiss for failure to state a claim for which relief could be granted,\textsuperscript{30} and plaintiffs appealed. The North Carolina Court of Appeals reversed and remanded,\textsuperscript{31} noting that it previously had recognized a wrongful conception claim in Pierce v. Piver.\textsuperscript{32} This type of action, the

\begin{itemize}
  \item \textsuperscript{18} Id.
  \item \textsuperscript{19} Id. at 174, 347 S.E.2d at 745.
  \item \textsuperscript{20} Id. at 174, 347 S.E.2d at 744.
  \item \textsuperscript{21} Id. at 174, 347 S.E.2d at 745.
  \item \textsuperscript{22} Id. The complaint did not specify whether Dr. Bumgardner failed to reinsert the IUD after performing the first operation or the second. For statute of limitations purposes, however, plaintiffs' claim was timely filed, one year after Mrs. Jackson discovered that she was pregnant. See N.C. GEN. STAT. § 1-15 (1983).
  \item \textsuperscript{23} Jackson, 318 N.C. at 174, 347 S.E.2d at 745. A cause of action for wrongful conception usually is brought by parents of a healthy, normal infant. See Note, Recovery, supra note 10, at 341. In situations in which the child is born disabled, a wrongful birth/wrongful life claim may be brought simultaneously. The computation of damages in such a situation differs from the computation in a situation involving only a wrongful conception claim. See, e.g., Speck v. Finegold, 268 Pa. Super. 342, 408 A.2d 496 (1979) (parents permitted to recover for the extraordinary costs of raising child afflicted with neurofibromatosis), aff'd in part and rev'd in part, 497 Pa. 77, 439 A.2d 110 (1981).
  \item \textsuperscript{24} Jackson, 318 N.C. at 174, 347 S.E.2d at 745. Id.
  \item \textsuperscript{25} Id. at 177, 347 S.E.2d at 746.
  \item \textsuperscript{26} Id. at 185, 347 S.E.2d at 751.
  \item \textsuperscript{27} Id. at 177, 347 S.E.2d at 746.
  \item \textsuperscript{28} N.C.R.Civ. P. 12(b)(6).
  \item \textsuperscript{29} Jackson, 318 N.C. at 174, 347 S.E.2d at 745.
  \item \textsuperscript{32} 45 N.C. App. 111, 262 S.E.2d 320 (1980); see infra text accompanying notes 118-23 (discussing Pierce). The Jackson court did not distinguish between wrongful pregnancy and wrongful conception claims in its opinion. Jackson, 318 N.C. at 178, 347 S.E.2d at 747. The two types of
Jackson court held, was "simply a species of malpractice which allows recovery from a tortfeasor in the presence of an injury caused by intentional or negligent conduct." 33

On review, the North Carolina Supreme Court upheld a cause of action for wrongful conception. 34 The court denied child-rearing costs, however, on the two-pronged theory that life could never be a legal injury and that even if it were, the speculative nature of damages precluded recovery. 35

The court's decision in Jackson was premised in large part on its recent holding in Azzolino, even though Azzolino did not involve a claim for wrongful conception. In Azzolino the parents of a child born with Down's syndrome filed suit on behalf of the child for wrongful life, and on their own behalf for wrongful birth. 36 The parents claimed that defendants' negligent prenatal care of the mother, including defendants' alleged failure to advise them properly regarding the availability of amniocentesis 37 and other genetic care, 38 deprived them of the option to abort the child. 39 Amniocentesis performed at the proper stage of the mother's pregnancy would have revealed that the child was afflicted with Down's syndrome, a mentally and physically crippling genetic disorder. 40

The North Carolina Supreme Court dismissed both the wrongful life and wrongful birth claims and held that neither stated a recognizable cause of action. Noting the complex issues that other courts have faced in dealing with claims for wrongful life, the court declined to present its own view, holding instead that

claims, however, are materially distinct. See infra notes 51-60 and accompanying text. Jackson is more properly viewed as a wrongful conception case.

33. Jackson, 71 N.C. App. at 110, 321 S.E.2d at 544.
34. Jackson, 318 N.C. at 182, 347 S.E.2d at 749.
35. Id. at 182-83, 347 S.E.2d at 749-50.
36. Azzolino, 315 N.C. at 105, 337 S.E.2d at 530. The parents also brought an additional claim on behalf of the siblings, alleging that the siblings also had suffered harm as a result of the defective child's birth. The court affirmed the trial court's directed verdict for defendants. Id. at 117, 337 S.E.2d at 537.

37. Amniocentesis is a standard diagnostic procedure performed to detect biochemical and chromosomal defects, including Down's syndrome. Elias & Verp, Prenatal Diagnosis of Genetic Disorders, 12 OBSTET. GYNECOL. ANN. 79, 79-80 (1983).
38. Genetic care or genetic counseling involves the use of various medical procedures including ultrasonography, roentgenography, and fetoscopy, in addition to amniocentesis to detect genetic defects in unborn fetuses. Id. at 79; see Gallagher v. Duke Univ., 639 F. Supp. 979 (M.D.N.C. 1986).
39. Azzolino, 315 N.C. at 105, 337 S.E.2d at 530. Plaintiffs named three defendants in their complaint: Orange-Chatham Comprehensive Health Services, Inc. (OCCHS); Dr. James Dingfelder, an obstetrics and gynecology specialist at the University of North Carolina School of Medicine; and Jean Dowdy, a registered nurse and family nurse practitioner employed by OCCHS at the Hayward-Moncure Clinic (Clinic). Azzolino v. Dingfelder, 71 N.C. App. 289, 291, 322 S.E.2d 567, 571 (1984), rev'd, 315 N.C. 103, 337 S.E.2d 528 (1985). Dr. Dingfelder worked at the Clinic one-half day per week, during which he supervised the family nurse practitioners and provided other gynecological and obstetrical services to patients. Id. at 292, 322 S.E.2d at 571.

The Azzolinos sued Dr. Dingfelder for his own negligence and also for the negligence of his nurse on a respondeat superior theory. Id. at 312, 322 S.E.2d at 583. The court of appeals held that Dr. Dingfelder could not be held liable under the doctrine of respondeat superior because the nurse was not found to be negligent. The court, however, did find that he was personally negligent in informing Mrs. Azzolino that amniocentesis was not necessary for a woman under 37 years of age. Id. at 312-18, 322 S.E.2d at 583-86.

40. Azzolino, 315 N.C. at 105, 337 S.E.2d at 530.
"[a]bsent clear legislative guidance to the contrary," it found compelling the view of the New York Court of Appeals that

"[w]hether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and the theologians. . . . [There is] no predicate at common law or in statutory enactment for judicial recognition of the birth of a defective child as an injury to the child . . . ." 42

The Azzolino court similarly rejected the parents' claim for wrongful birth. It assumed arguendo that defendants had breached a duty to the plaintiffs. 43 Whether this breach of duty was the proximate cause of plaintiffs' "injury" was problematic, however, "since even the plaintiffs acknowledge[d] that the fetus . . . was in existence and already genetically defective at the time the defendants first came into contact with the plaintiffs." 44 Even assuming, however, that defendants' breach proximately resulted in the birth of the disabled child, the court was unwilling to extend this tort analysis to include the concept that life could ever be a legal injury:

In order to allow recovery . . . courts must then take a step into entirely untraditional analysis by holding that the existence of a human life can constitute an injury cognizable at law. Far from being "traditional" tort analysis, such a step requires a view of human life previously unknown to the law of this jurisdiction. 45

The Azzolino court declined to apply "the traditional theories of tort law" under which "defendants are liable for all of the reasonably foreseeable results of their negligent acts or omissions." 46 Applying such an analysis required placing a pecuniary value on human life, an idea that the court found riddled with problems. 47 As peripheral issues, the Azzolino court noted the dilemma other courts have encountered with regard to a plaintiff's duty to mitigate damages, 48

41. Id. at 109, 337 S.E.2d at 533.
42. Id. at 109, 337 S.E.2d at 533 (quoting Becker v. Schwartz, 46 N.Y.2d 401, 411-412, 386 N.E.2d 807, 812, 413 N.Y.S.2d 895, 900-01 (1978)).
43. Id. at 110, 337 S.E.2d at 533.
44. Id. at 110-11, 337 S.E.2d at 533.
45. Id. at 111, 337 S.E.2d at 533-34.
46. Id.
47. Id. at 112-13, 337 S.E.2d at 534. The Azzolino court noted the ethical uncertainties faced by courts when trying to place a pecuniary value on human life:

"Although courts and commentators have attempted to make it such, wrongful birth is not an ordinary tort. It is one thing to compensate destruction; it is quite another to compensate creation. This so-called 'wrong' is unique: It is a new and ongoing condition. As life, it necessarily interacts with other lives. Indeed, it draws its 'injurious' nature from the predilections of the other lives it touches. It is naive to suggest that such a situation falls neatly into conventional tort principles, producing neatly calculable damages."

48. Azzolino, 315 N.C. at 112, 337 S.E.2d at 534. See infra note 87; see also infra text accompanying notes 97-98 (argument that parents must mitigate damages either by aborting fetus or placing child for adoption uniformly rejected as against public policy). The Azzolino court, however, noted that North Carolina has "tended to discourage holding physicians or nurses liable for not acting in a manner which will result in abortion." Azzolino, 315 N.C. at 116, 337 S.E.2d at 537.
as well as the danger of fraudulent claims. The court also anticipated that if it were to allow claims for wrongful birth, it would be difficult to determine the standard for "defectiveness" required to hold a negligent physician liable.

Causes of action for wrongful pregnancy or wrongful conception raise concerns similar to those surrounding causes of action for wrongful birth and wrongful life, but the claims are materially distinct. Moreover, "wrongful pregnancy" and "wrongful conception," although conceptually related, are actually separate claims for relief, even though the terms often are used interchangeably by claimants. The vast majority of wrongful pregnancy or wrongful conception cases involve the negligent performance of a bilateral tubal ligation, laparosalpingectomy, or some other sterilization procedure performed on the female.

A smaller number arise as the result of a negligently performed vasectomy or improper filling of a birth control prescription. All of these situa-

49. The Azzolino court warned, "The temptation will be great for parents, if not to invent... a prior desire to abort, to at least deny the possibility that they might have changed their minds and allowed the child to be born even if they had known of the defects it would suffer." Azzolino, 315 N.C. at 113, 337 S.E.2d at 535 (citing Rieck v. Medical Protective Co., 64 Wis. 2d 514, 519, 219 N.W.2d 242, 245 (1974)).

50. Id. at 113-14, 337 S.E.2d at 535.

51. See Note, Damages, supra note 11, at 1209-10 n.6.


Wrongful conception has gained increasing acceptance in most jurisdictions as a valid tort claim, although a small minority have consistently opposed rec


57. Jackson, which involved the alleged negligent failure of the physician to reinsert or maintain in place an IUD prior to conception, was thus a claim for wrongful conception rather than wrongful pregnancy.


60. One student commentator, however, has suggested that these cases should be included within the penumbra of wrongful birth on the premise that the wrongdoing is the resulting birth of the child, rather than the fact of conception or pregnancy. See Note, Wrongful Birth, supra note 11, at 1107 n.2. The similarity between wrongful conception or wrongful pregnancy claims and claims for wrongful birth and wrongful life has caused a good deal of confusion among the courts. See Stills v. Gratton, 55 Cal. App. 3d 698, 705, 127 Cal. Rptr. 652, 656 (1976) (wrongful life action brought for negligent performance of an abortion); Public Health Trust v. Brown, 388 So. 2d 1084-85 (Fla. Dist. Ct. App. 1980) (wrongful birth suit based on improper tubal ligation); Miller v. Duhart, 637 S.W.2d 183, 184 (Mo. Ct. App. 1982) (claim for wrongful life or wrongful birth founded on negligent tubal ligation); Kingsbury v. Smith, 122 N.H. 237, 240, 442 A.2d 1003, 1004 (1982) (wrongful birth action brought for negligently performed tubal ligation); Beardsley v. Wiersma, 650 P.2d 288, 290 (Wyo. 1982) (wrongful birth and wrongful life actions brought for unsuccessful tubal ligations). The wrongful conception claim has even been considered a subcategory of the wrongful life claim. See Comment, supra note 2, at 473 n.1 (citing Kashi, The Case of the Unwanted Blessing: Wrongful Life, 31 U. MIAMI L. REV. 1409, 1409-10 (1977)). Wrongful life and wrongful birth claims, however, are attempts to recover for the birth of a planned child who was born with disabilities, while wrongful pregnancy or wrongful conception claims usually involve the birth of a healthy, but unplanned, child. See Phillips v. United States, 508 F. Supp. 544, 545 n.1 (D.S.C. 1981); Rogers, Wrongful Life and Wrongful Birth: Medical Malpractice in Genetic Counseling and Prenatal Testing, 33 S.C.L. REV. 713, 740-41 (1982); Note, Recovery, supra note 10, at 341-42.

ognition. Although plaintiffs often have attempted to ground this cause of action in contract as well as in tort, such attempts generally have been unsuccessful. The claim traditionally is regarded as a medical malpractice claim in which the plaintiff must establish three elements: (1) a duty on the part of the defendant; (2) a breach of that duty; and (3) damages or injuries proximately resulting to the plaintiff by virtue of the breach.

Although most courts addressing the wrongful conception issue have ruled that a cognizable claim exists, the assessment of damages has not been uniform. Earlier cases adopted the "blessing concept" and refused to award damages for wrongful conception on the theory that the birth of a child is always an "esteemed right" rather than a compensable wrong. Shaheen v. Knight, a Pennsylvania case, was the first case to address the damages issue squarely. In


Other causes of action brought in the guise of breach of contract are similarly disallowed. See, e.g., Sanders v. H. Nouri, M.D., Inc., 688 S.W.2d 24, 26 (Mo. Ct. App. 1985) (alleged breach of contractual agreement for sterilization procedure essentially strict liability allegation and not a basis for recovery); Sala v. Tomlinson, 73 A.2d 724, 725, 422 N.Y.S.2d 506, 508 (1979) (breach of agreement to perform sterilization in good, workmanlike manner and to exercise requisite level of care rejected as essentially an attempt to plead as contract action one that is basically a malpractice action).

Although most prenatal medical malpractice claims are brought under the collective umbrella of negligence in the operation, two other alternative theories of recovery are lack of informed consent and negligent misrepresentation—including negligent postoperative testing. See Note, Who Pays?, supra note 11, at 422; see, e.g., Gallagher v. Duke Univ., 638 F. Supp. 979-80 (M.D.N.C. 1986) (physician negligently provided genetic counseling and information that induced couple to conceive a child eventually born with severe disabilities); Sard v. Hardy, 281 Md. 432, 445-46, 379 A.2d 1014, 1023 (1977) (physician negligently failed to advise plaintiff that tubal ligation might not be 100% successful and to apprise her of more effective surgical methods, precluding plaintiff from conceiving a child eventually born with severe disabilities); Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 171 (Minn. 1977) (sexual relations resumed after vasectomy in reliance on physician's negligent reading of postoperative sterility report, resulting in birth of healthy baby).


See Holt, supra note 4, at 785; cases cited supra note 61.

Note, Damages, supra note 11, at 1212-13.


The first reported wrongful conception case was Christensen v. Thornby, 192 Minn. 123,
Shaheen plaintiff-father sued his physician in contract for the negligent performance of a vasectomy, which resulted in the birth of a child. The court held that although a contract to sterilize was not void as against public policy, even if the reason for sterilization was socioeconomic rather than therapeutic, 71 “to allow damages for the normal birth of a normal child [would be] foreign to the universal public sentiment of the people.” 72 Underlying the court’s decision was the assumption that the purpose of marriage was primarily, if not solely, procreative. 73 A policy favoring birth control, including sterilization and abortion, presumably contradicted this professed goal. It was not until the 1967 California decision in Custodio v. Bauer 74 that a court brought the no-damage rule applied by the Shaheen court into serious question.

The current trend 75 is to allow some measure of damages for wrongful conception. 76 In those jurisdictions recognizing a cause of action for wrongful conception or wrongful pregnancy, courts generally have taken one of three approaches. The majority view adopts the “limited recovery” rule 77 under which recovery is restricted to hospital and medical expenses associated with a future sterilization operation, pregnancy and childbirth, including pain and suffering (both mental and physical), lost wages, and loss of consortium. 78 A significant minority of jurisdictions, following the “benefit” 79 or “offset” 80 rule, permit recovery not only for these expenses, but for child-rearing costs as well, offset by whatever benefits the child confers on his or her parents. 81 The third

255 N.W. 620 (1934). The Christensen court denied the existence of a valid cause of action and, therefore, did not reach the issue of damages. It mentioned in dictum, however, that the birth of a child was a blessing from which no damage could arise. Id. at 126, 255 N.W. at 622.

72. Id. at 23, 11 Pa. D. & C.2d at 45.
73. Id.
74. 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967); see infra text accompanying notes 92-100 (discussing Custodio).
75. The Supreme Court decisions in Griswold v. Connecticut, 381 U.S. 479 (1965), and Roe v. Wade, 410 U.S. 113 (1973), respectively, validating the individual’s right to practice contraception and to have an abortion were instrumental in establishing the principle that one has a fundamental right not to conceive or bear a child. The now well-developed idea of procreative autonomy logically led to the award of compensable damages for violation of these constitutional rights.
76. For an overview of three measures of damages for the birth of a normal, healthy child in a wrongful conception case, see Beardsley v. Wierdsma, 650 P.2d 288, 290-91 (Wyo. 1982).
77. Note, Damages, supra note 11, at 1218.
79. Note, Damages, supra note 11, at 1215-18.
and most liberal damages rule, suggested by the California Court of Appeal in *Custodio*, grants full recovery for the expenses of raising the child, subject to no offset.⁸²

The reasons for a court's decision whether to grant parents relief for wrongful conception are complex and often sensitive, involving serious ethical and moral issues in addition to the typical questions of tort and contract liability. In *Coleman v. Garrison*,⁸³ a leading case denying child-rearing costs, the Delaware Superior Court held that the value of a human life would always outweigh any damage resulting from the fact of birth.⁸⁴ In refusing to recognize the birth of a child as an injury for which parents might recover damages, the court reasoned:

> The preciousness of human life should not be held to vary with the circumstances surrounding birth. To make such a determination would, indeed, raise the unfortunate prospect of ruling, as a matter of law, that under certain circumstances a child would not be worth the trouble and expense necessary to bring him into the world.⁸⁵

The Delaware Supreme Court affirmed the lower court's ruling, and also expressed its concern over the possibility of a negative effect on the child's psyche, should the child discover that he or she was unwanted when conceived.⁸⁶

Key to the lower court's ruling in *Coleman* that the benefits of raising the child outweigh any hardship was plaintiffs' decision to raise the child rather than mitigate their damages,⁸⁷ presumably by aborting the child at the fetal stage or

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⁸². *Custodio* was a demurrer case and did not explicitly apply a full recovery rule. Rather, the court noted that if plaintiffs established liability "they have established a right to more than nominal damages." *Custodio*, 251 Cal. App. 2d at 325, 59 Cal. Rptr. at 477. The court did note, however, that when tortious conduct is established, "the measure of damages . . . is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." *Id.* *Custodio* has been interpreted and followed in other California cases as advocating full recovery. See, e.g., Stills v. Gratton, 55 Cal. App. 3d 698, 709, 127 Cal. Rptr. 652, 658 (1976) ("In our opinion the holding in *Custodio* correctly states the law of this state and . . . clearly demonstrates the weakness of the policy arguments which would limit full compensation recoverable for tort . . . .").

Full recovery for such torts is rare. Ohio and Pennsylvania apparently are the only other states besides California that follow this rule. See, e.g., Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976) (mother who gave birth to twins, one of whom was disabled, following unsuccessful tubal ligation allowed to recover for all foreseeable consequences of negligently performed sterilization operation, including costs of raising the children); Speck v. Finegold, 497 Pa. 77, 439 A.2d 110 (1981) (parents of genetically defective child entitled to recover not only for childbirth and child-rearing expenses, but also for emotional distress incident to birth and raising of child). Pennsylvania formerly had adhered to a stricter standard, denying recovery for attendant mental pain and suffering. See *Stribling v. deQuevedo*, 288 Pa. Super. 436, 432 A.2d 239 (1980); Speck v. Finegold, 268 Pa. Super. 342, 408 A.2d 496 (1979), aff'd in part and rev'd in part, 497 Pa. 77, 439 A.2d 110 (1981).


⁸⁴. *Id.* at 761.

⁸⁵. *Id.*

⁸⁶. *Coleman v. Garrison*, 349 A.2d 8, 14 (Del. 1975); see also *Wilbur v. Kerr*, 275 Ark. 239, 242, 628 S.W.2d 568, 570 (1982) (noting the possibility of emotional harm to child who knows that cost of his or her upbringing was paid for by a third party).

⁸⁷. *Coleman*, 327 A.2d at 761. The requirement that plaintiffs mitigate their damages in order
placing it for adoption following birth. The court found it unreasonable to hold a physician liable for child support "when the plaintiffs choose to raise the child even where other lawful alternatives are available." As to damages, the court denied child-rearing costs based on their speculative nature, but noted that a mother could recover damages in connection with her unexpected pregnancy when the avoidable pregnancy had resulted from a faulty medical procedure. In so holding, the court noted that to rule otherwise "would leave the medical profession virtually immune from liability for improper treatment of patients justifiable seeking to avoid pregnancy." According to the Coleman court, although public policy dictated that parents alleging wrongful conception or wrongful pregnancy be barred as a matter of law from recovering expenditures for the maintenance and upbringing of their child, a straight negligence analysis permitted recovery of pregnancy-related costs that were readily ascertainable and directly linked to the physician's negligence.

The flip side of the public policy coin was eloquently represented in Custodio, the first case in which a court recognized that damages in a wrongful conception case might be "more than nominal." Plaintiff in Custodio, a woman who had undergone a tubal ligation for medical and economic reasons, later became pregnant and brought suit against her physician for negligence, misrepresentation, and breach of contract. Rejecting the sentiment—as espoused in Shaheen and implied in Christensen v. Thornby—that the benefits of rearing a child always outweigh the detriments, the Custodio court noted that in some circumstances "the birth of a child may be something less than a blessed event." The court reversed and remanded the trial court's judgment of dismissal, holding that plaintiffs might be entitled to recover all damages proximately caused by defendant's breach. In support of such a result the court reasoned that the public policy supporting family "social ethics" no longer acted as a bar to awarding child-rearing costs for wrongful conception. The court noted:

With fears being echoed that Malthus was indeed right, there is some trend of change in social ethics with respect to the family establishment. City, state and federal agencies have instituted programs for to obtain a full measure of recovery is also known as the avoidable consequences doctrine. This tort law rule specifies 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). For discussion of the application of the avoidable consequences doctrine in prenatal tort claims, see Note, Wrongful Birth, supra note 11.

88. Coleman, 327 A.2d at 761; see also Rieck v. Medical Protective Co., 64 Wis. 2d 514, 518, 219 N.W.2d 242, 244 (1974) ("To permit the parents to keep their child and shift the entire cost of its unbrining [sic] to a physician . . . would be to create a new category of surrogate parent.").
89. Coleman, 327 A.2d at 761.
90. Id.
91. Id.
93. 192 Minn. 123, 255 N.W. 620 (1934).
94. Custodio, 251 Cal. App. 2d at 321, 59 Cal. Rptr. at 475.
95. Id. at 325, 59 Cal. Rptr. at 477-78. The Custodio court also discussed the possibility of applying the benefit rule, id. at 323, 59 Cal. Rptr. at 476, even though the opinion seems to favor full recovery. See supra note 82.
dispensing of contraceptive information with a view toward economic betterment of segments of the population.

One cannot categorically say whether the tenth arrival in the Custodio family will be more emotionally upset if he arrives in an environment where each of the other members of the family must contribute to his support, or whether he will have a happier and more well-adjusted life if he brings with him the wherewithal to make it possible.96

The Custodio court hinted also that plaintiffs' failure to mitigate their damages would not preclude recovery, noting that "[t]he suggestion in Shaheen that the child be considered as worth its cost or be put out for adoption is not consistent with the very same stability of the family which the same court relies on to support its views of 'universal public sentiment.'"97 Today, courts uniformly reject the argument that parents must select either adoption or abortion as a method of mitigation, on the premise that forcing such a choice "meddles with the concept of life and the stability of the family unit."98 Although parents who practice contraception do so with the express purpose of avoiding pregnancy, a different set of considerations arises once conception occurs. The decision to abort a child or give it up for adoption is a highly personal matter that often involves moral or religious issues. A desire to avoid pregnancy through the practice of contraception does not automatically translate into a willingness to abort or place the child for adoption should that desire be thwarted. The court in Custodio also dismissed the possibility of emotional injury to the child resulting from a damage award for wrongful conception, noting that such injury "could be no greater than that to be found in many families where 'planned parenthood' has not followed the blueprint."99

The decision in Custodio marked the first time a court recognized that the benefits received from the birth of a child would not, as a matter of law, always outweigh the burdens incurred in his or her upbringing. The court noted that "where the mother survives without casualty there is still some loss. She must spread her society, comfort, care, protection, and support over a larger group."100

Custodio's full recovery rule has not been well-received by most courts, primarily because the parents are expected to derive some benefit from the child, even though the child may have been unwanted at the time of conception.101

96. Custodio, 251 Cal. App. 2d at 325, 59 Cal. Rptr. at 477.
97. Id.; see supra text accompanying notes 69-73.
99. Custodio, 251 Cal. App. 2d at 325, 59 Cal. Rptr. at 477. Curiously, most courts denying child-rearing costs on the theory that the child might suffer psychic injury if the child learned that he or she was unwanted when conceived, have allowed damages for the expense, pain and suffering, and loss of consortium related to the negligent sterilization procedure and pregnancy, reasoning that these damages would not have an attendant negative effect on the child. See, e.g., McKernan v. Aasheim, 102 Wash. 2d 411, 421-22, 687 P.2d 850, 856 (1984).
100. Custodio, 251 Cal. App. 2d at 323, 59 Cal. Rptr. at 476.
101. Note, Who Pays?, supra note 11, at 428. The underlying rationale is that it would be unfair to make the "physician . . . have to pay for the fun, joy and affection which plaintiff . . . will have in
WRONGFUL CONCEPTION

The “benefit” rule,\textsuperscript{102} applied for the first time in 1971 in \textit{Troppi v. Scarf},\textsuperscript{103} represents a compromise between the overly broad full recovery alternative and the more restrictive limited recovery rule. Plaintiff in \textit{Troppi} had received a prescription for the contraceptive Norinyl from her physician, but defendant pharmacist allegedly filled the prescription with Nardil, a mild tranquilizer, instead.\textsuperscript{104} When plaintiff subsequently became pregnant and gave birth to a healthy baby, she and her husband sued the pharmacist not only for costs incurred as a result of the pregnancy, but also for the expenses of raising the child to maturity.\textsuperscript{105} The Michigan Court of Appeals held that in addition to the usual damage award for lost wages, medical and hospital expenses, and pain and suffering attendant to childbirth, the economic cost of raising the child, offset by the dollar value of the child’s services and companionship, would be allowed as a proper item of damage.\textsuperscript{106}

\textit{Troppi} is consistent with \textit{Custodio} in its view that the birth of a healthy child does not, as a matter of law, always confer an overriding benefit to his or her parents.\textsuperscript{107} Rather than applying \textit{Custodio}'s full recovery rule, however, the \textit{Troppi} court in its assessment of recoverable damages applied the “benefit” rule as set forth in the Restatement (Second) of Torts:

> When the defendant’s tortious conduct has caused harm to the plaintiff or to 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.\textsuperscript{108}

Application of the benefit rule to wrongful conception claims is a fairly recent phenomenon.\textsuperscript{109} In the past minor children were regarded as economic assets. The absence of child labor laws and extended higher education often meant that children entered the work force at an extremely young age.\textsuperscript{110} Because the pecuniary advantages of having a working child would usually outweigh the relatively low cost of his or her maintenance and education, it thus followed that a wrongful conception claim would be economically impractical.

\begin{itemize}
  \item the rearing and educating of [the] child.” \textit{Shaheen}, 6 Lycoming Rptr. at 23, 11 Pa. D. & C.2d at 45-46.
  \item Application of the benefit rule requires the court to “[balance] like interests to determine whether the tortious conduct, in effect, has benefited the plaintiff in some way.” \textit{Note, Damages, supra} note 11, at 1216; \textit{see infra} text accompanying note 108.
  \item \textit{Shaheen}, 6 Lycoming Rptr. at 23, 11 Pa. D. & C.2d at 45-46.
  \item See \textit{supra} text accompanying notes 102-06.
\end{itemize}
In contemporary society, however, "[m]odern economic reality emphasizes the gulf between the old concepts of a child's economic value and the new facts of modern family life."\textsuperscript{111} Filling the family coffers is no longer a factor in childbearing decisions. In fact, children today are more often economic liabilities than financially productive resources. The Connecticut Supreme Court in \textit{Ochs v. Borrelli}\textsuperscript{112} noted:

\begin{quote}
\text{[R]aising a child from birth to maturity is a costly enterprise, and hence injurious, although it is an experience that abundantly recompenses most parents with intangible rewards. There can be no affront to public policy in our recognition of these costs and no inconsistency in our view that parental pleasure softens but does not eradicate economic reality.}\textsuperscript{113}
\end{quote}

Similarly, the \textit{Troppi} court noted a "growing recognition that the financial 'services' which parents can expect from their offspring are largely illusory."\textsuperscript{114} It advocated a case-by-case application of the benefit rule, taking into account, \textit{inter alia}, factors such as "[f]amily size, family income, age of the parents, and marital status."\textsuperscript{115} The court acknowledged the difficulty of computing damages in this manner, but held that recovery should not be precluded on that basis.\textsuperscript{116} Although not advocating the full measure of recovery as suggested in \textit{Custodio}, the \textit{Troppi} court thus held that when change in family status as a result of the birth of an unplanned child could be measured in economic terms, these damages may be compensable under a benefit analysis.\textsuperscript{117}

Prior to \textit{Jackson} North Carolina implicitly followed the majority view that recognizes a cause of action for wrongful conception. In 1980, four years prior to \textit{Jackson}, the court of appeals upheld such a claim sub silentio in \textit{Pierce v. Piver}.\textsuperscript{118} Plaintiff in \textit{Pierce} had engaged defendant physician to remove a tumor from her ovary, and at the same time, to perform a bilateral tubal ligation to prevent future pregnancies.\textsuperscript{119} She subsequently became pregnant and brought action against the doctor for negligence and breach of contract.\textsuperscript{120} In addition to pregnancy-related costs, plaintiff also sought compensation for the cost of raising and supporting the child until the age of majority.\textsuperscript{121} The court of appeals reversed the trial court's granting of defendant's motion to dismiss the complaint, holding that the action was "basically one for medical malpractice, sounding in negligence and breach of contract" and that a cognizable claim for relief had been adequately stated.\textsuperscript{122} The court did not reach the issue of dam-

\begin{footnotes}
\item 111. \textit{Id.} at 279, 207 N.W.2d at 688.
\item 112. 187 Conn. 253, 445 A.2d 883 (1982).
\item 113. \textit{Id.} at 259, 445 A.2d at 885-86.
\item 115. \textit{Id.} at 257, 187 N.W.2d at 519.
\item 116. \textit{Id.} at 261, 187 N.W.2d at 521.
\item 117. \textit{Id.}
\item 118. 45 N.C. App. 111, 262 S.E.2d 320 (1980).
\item 119. \textit{Id.} at 111, 262 S.E.2d at 321.
\item 120. \textit{Id.} at 111, 113, 262 S.E.2d at 321, 322.
\item 121. \textit{Id.} at 111, 262 S.E.2d at 321.
\item 122. \textit{Id.} at 113, 262 S.E.2d at 321-22.
\end{footnotes}
ages, however, and the parties subsequently settled out of court.123

*Jackson* marked the revival of the wrongful conception issue and placed it before the North Carolina Supreme Court.124 The court divided its analysis of the case into three distinct claims for relief: (1) a claim by the plaintiff-mother, stating a cause of action for wrongful conception;125 (2) a claim by the plaintiff-husband, seeking damages for child-rearing costs to the age of majority;126 and (3) a claim on behalf of both plaintiffs for breach of an oral contract to retain or replace the intrauterine device following surgery.127

The *Jackson* court agreed with the prevailing view that wrongful conception is indistinguishable from ordinary medical malpractice.128 The court further indicated that "traditional tort principles" were applicable in its determination of whether the complaint was sufficient to withstand a 12(b)(6) motion to dismiss.129 Assuming *arguendo* that the doctor owed Mrs. Jackson, his former patient, a legal duty, the breach of which proximately caused her pregnancy, the court held that a valid cause of action existed.130

Defendant in *Jackson* argued that under *Azzolino* all "matters inherently incident to the creation of life, including any pain, suffering or expenses resulting from the birth of a child, are . . . not cognizable damages."131 The court disagreed, stating that defendant misunderstood the nature of the claim in *Jackson*, and furthermore, that defendant had misconstrued the court's holding in *Azzolino*.132 *Azzolino*, the *Jackson* court noted, involved claims for "wrongful birth"133 and "wrongful life."134 The alleged negligence in *Azzolino* had occurred after the fact of pregnancy. The alleged negligence in *Jackson* occurred before the fact of pregnancy. Although defendants' alleged postconception negligence in *Azzolino* was not actionable because "life, even life with severe defects, cannot be an injury in the legal sense,"135 the same was not true for an act of preconception negligence. Defendants' alleged negligence in *Jackson* contributed to the pregnancy itself, an occurrence that plaintiff had specifically sought to avoid. The court criticized defendant for "equating the condition of the preg-
nant plaintiff with the life of her child" and held that "it is the fact of the pregnancy as a medical condition that gives rise to compensable damages and completes the elements for a claim of negligence."

Although the court was willing to allow an award of damages to plaintiff-mother resulting from her medical condition, including hospital and medical expenses, pain and suffering associated with the pregnancy, and lost wages, it flatly refused to consider child-rearing costs as a proper item of damage. Part of the court’s argument rested on its holding that Mr. Jackson did not have standing to sue. The court thus viewed the claim for child-rearing costs solely as part of the mother’s cause of action.

The Jackson court denied recovery for the economic cost of raising the child to majority on two grounds. First, it extended its holding in Azzolino concerning wrongful birth and wrongful life claims, that life could never be a legal injury, to claims for wrongful conception. According to the Jackson court, "to permit recovery of child-rearing expenses would be contra to both the holding and the rationale of Azzolino." Second, the court was unwilling to apply the benefit rule to award damages in wrongful conception cases because of the guesswork involved in determining such damages. Quoting Miller v. Johnson, a recent Virginia wrongful pregnancy case involving an unsuccessful abortion, the court queried: "Who, indeed, can strike a pecuniary balance between the triumphs, the failures, the ambitions, the disappointments, the joys, the sorrows, the pride, the shame, the redeeming hope that the child may bring to those who love him?" The Miller court criticized the result in cases such as Troppi in which the court admitted the difficulty of measuring the value of offsetting benefits for the life of a wrongfully conceived child, yet imposed this burden on the jury. The Jackson court agreed with the holding in Miller that the assessment of this value necessarily would be based on "speculation and

136. Jackson, 318 N.C. at 180, 347 S.E.2d at 748.
137. Id. at 181, 347 S.E.2d at 748.
138. Id. at 182, 347 S.E.2d at 749.
139. In North Carolina a husband’s right to sue for physical injury to his wife is limited to a claim for loss of consortium. Id.; see, e.g., Nicholson v. Hugh Chatham Memorial Hosp., 300 N.C. 295, 266 S.E.2d 818 (1980). It is unclear whether Mr. Jackson could have sued for loss of consortium. Consortium damages, however, would include only the cost of the loss of Mrs. Jackson’s services, society, and affection, and would not compensate Mr. Jackson for the cost of raising their child.
140. Jackson, 318 N.C. at 187, 347 S.E.2d at 752.
141. Id. at 182, 347 S.E.2d at 749.
142. Id. The reluctance of many courts to award damages for child-rearing costs within a wrongful life or birth context arises from the moral sentiment that human life is sacrosanct. See supra note 47.
143. Jackson, 318 N.C. at 183, 347 S.E.2d at 750. Courts frequently have relied on the reasoning of wrongful life cases to support the argument that these damages are unmeasurable. See Note, Who Pays?, supra note 11, at 429 n.85; see, e.g., Coleman v. Garrison, 349 A.2d 8 (Del. 1975); Terrell v. Garcia, 496 S.W.2d 124 (Tex. Civ. App. 1973), cert. denied, 415 U.S. 927 (1974).
144. 231 Va. 177, 343 S.E.2d 301 (1986).
146. Miller, 231 Va. at 187, 343 S.E.2d at 307.
conjecture' 147 and that plaintiffs, therefore, had alleged no recoverable damages.148

With respect to plaintiffs' breach of contract claim, the court held that no such "contract" to maintain in place or reinsert the IUD existed.149 The plaintiff-wife originally sought the doctor's services in treating her uterine bleeding. She later retained him to perform surgery to treat her recurring abdominal pain. The court found that "[t]aken as a whole with due regard for its character, objects and purpose,"150 the actual contract between plaintiff-wife and defendant was to perform the two operations related to plaintiff's gynecological problems, and that "[d]efendant's 'promise' to retain or replace the IUD was merely incidental to this contract."151 Because there was no contract to reinsert or replace the IUD, there could be no breach. Accordingly the court held that dismissal of plaintiffs' contract claim was proper.152

Given the distaste with which many courts have viewed the assessment of damages in wrongful conception cases,153 the result in Jackson was predictable. However, the Jackson court's reasoning is puzzling. The court acknowledged that the case was basically a medical malpractice action to which the general principles of tort law would apply.154 The court correctly employed a standard negligence formula in determining the existence of plaintiffs' cause of action,155 but disregarded the rule of tort law that holds a tortfeasor liable for all damages naturally flowing from the commission of the tortious act.156 In a traditional medical negligence action, once the plaintiff proves the existence of a duty on the part of the physician, the breach of which proximately caused the injury, the physician is "legally responsible for the consequences which have in fact occurred."157 The conception and birth of a child through a physician's failure to retain or replace an IUD is a foreseeable result.158 Because defendant's alleged

147. Jackson, 318 N.C. at 183, 347 S.E.2d at 750 (quoting Miller, 231 Va. at 187, 343 S.E.2d at 307).
148. Id.
149. Id. at 186, 347 S.E.2d at 751-52. The court noted that Jackson was the first North Carolina Supreme Court case involving a breach of contract claim against a physician. Id. at 185, 347 S.E.2d at 751.
150. Id. at 186, 347 S.E.2d at 751.
151. Id. at 186, 347 S.E.2d at 752.
152. Id.
153. See infra note 166 and accompanying text.
154. Jackson, 318 N.C. at 179, 347 S.E.2d at 747-48; see also Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 174 (Minn. 1977) (wrongful conception action analytically indistinguishable from ordinary medical negligence action, in which physician breaches a duty of care to plaintiff with resulting injury).
155. See supra text accompanying notes 64-65.
156. PROSSER AND KEETON ON THE LAW OF TORTS §§ 41 & 42 (W. Keeton 5th ed. 1984) [hereinafter PROSSER & KEETON].
negligence was a proximate cause of Mrs. Jackson's pregnancy, 159 plaintiffs should have been permitted to present evidence of damages flowing from his alleged negligent act or omission. The court's refusal was thus a departure from the recognized standards of tort law.

Proximate cause is much more easily established in wrongful conception cases than in other prenatal tort claims. 160 The main distinction is that the injury alleged in a wrongful conception claim occurs before the fact of pregnancy. In wrongful pregnancy cases, in which the physician fails to diagnose pregnancy or unsuccessfully performs an abortion, the causal link may be more tenuous because the negligent act or omission occurs after conception. Similarly, in wrongful life and wrongful birth claims, as well as in failure-to-diagnose situations, plaintiffs are required to show that the child would have been aborted had the defect been known. 161 In cases involving either wrongful pregnancy, wrongful life, or wrongful birth, the physician is not responsible for plaintiff’s pregnancy. Wrongful conception, however, involves negligence at the preconception stage and the doctor's conduct is directly responsible for the result plaintiff had specifically sought to avoid. 162 Application of the traditional negligence formula dictates that “[w]here the purpose of the physician's actions is to prevent conception or birth, elementary justice requires that he be held legally responsible for the consequences which have in fact occurred.” 163

Courts taking a liberal approach toward damages 164 have been quick to point out the distinction between a wrongful life claim, for which damages are measured “on the relative merits of being versus nonbeing,” 165 and a wrongful conception claim, which simply is a garden-variety form of negligence. Public policy questions are behind most courts' reluctance to award damages for the

159. Courts have uniformly held that the husband's part in contributing to his wife's pregnancy is not an intervening cause that relieves the physician from liability. See, e.g., Bishop v. Byrne, 265 F. Supp. 460, 463-64 (S.D.W. Va. 1967); Custodio, 251 Cal. App. 2d at 316-17, 59 Cal. Rptr. at 472.

160. “When a person undergoes an operation for the purpose of sterilization, it is self-evident that negligence may cause the occurrence of a subsequent pregnancy.” Note, Who Pays?, supra note 11, at 430 n.86. The same argument applies to temporary methods of birth control, such as the IUD or the birth control pill, in which the intended purpose of the contraceptive measure is to avoid conception.

161. See Holt, supra note 4, at 766.

162. The physician in Jackson argued that proximate cause could not be established because a temporary method of birth control, unlike a permanent sterilization procedure, is not foolproof and also requires participation on the part of the user. Jackson, 318 N.C. at 181, 347 S.E.2d at 749. This view, however, has never been endorsed by the courts. See Troppi, 31 Mich. App. 240, 187 N.W.2d 511 (1971) (wrongful conception claim brought for pharmacist's alleged negligent filling of birth control pill prescription held actionable). Under established principles of tort law, “[t]he plaintiff need not negative entirely the possibility that the defendant's conduct was not a cause, and it is enough to introduce evidence from which reasonable persons may conclude that it is more probable that the event was caused by the defendant than that it was not.” Prosser & Keeton, supra note 156, § 41, at 269.


164. See cases cited supra notes 81-82.

expenditures involved in raising a child. However, it is debatable whether philosophical or moral considerations should be allowed to override established principles of tort law. One commentator has noted: "[T]he argument that there can be no injury by virtue of the birth of a healthy child may be a reasonable statement of personal values, but it is an untenable position for the law to take." If traditional principles of tort law apply, then the heart of the issue should be compensation for damages proximately caused by the defendant's negligence.

The flaw in the Jackson court's treatment of the wrongful conception claim is its erroneous reliance on the wrongful life/wrongful birth analysis in Azzolino. In support of its holding that child-rearing costs are not compensable damages, the Jackson court reemphasized that "life, even life with severe defects, cannot be an injury in the legal sense." The court assumed that the injury alleged in Jackson was the continued existence of a normal, healthy child. Damages thus were precluded because the court was unwilling to recognize human life as being anything but beneficial. The court erred, however, when it applied the "value of a life" argument to a claim for wrongful conception. The court in Custodio stressed that "the compensation is not for the so-called unwanted child or 'emotional bastard'... but to replenish the family exchequer so that the new arrival will not deprive the other members of the family of what was planned as

166. Major policy considerations militating against awarding recovery for child-rearing costs include the following:


(2) Recovery of child-raising expenses produces a financial windfall for the parents and places an unreasonable burden on the negligent physician. Inherent in this argument is the sentiment that shifting these costs to the doctor would be "wholly out of proportion to the culpability involved." Rieck v. Medical Protective Co., 64 Wis. 2d 514, 518, 219 N.W.2d 242, 245 (1974); see White v. United States, 510 F. Supp. 146, 149 (D. Kan. 1981); Kingsbury v. Smith, 122 N.H. 237, 243, 442 A.2d 1003, 1006 (1982).

(3) The child's psyche requires protection. See Boone v. Mullendore, 416 So. 2d 718, 722 (Ala. 1982) (taking notice of the "stigma that will attach to [the child] once he learns the true circumstances of his upbringing"); Wilbur v. Kerr, 275 Ark. 239, 242, 628 S.W.2d 568, 570 (1982) (subject child in a wrongful conception action often viewed as an "emotional bastard").


(5) Allowing such costs may open the door to fraudulent claims. See Beardsley v. Wierdsma, 650 P.2d 288 (Wyo. 1982); see also supra note 49 (noting the Azzolino court's discussion of potential fraudulent claims).


169. Jackson, 318 N.C. at 182, 347 S.E.2d at 749 (quoting Azzolino, 315 N.C. at 109, 337 S.E.2d at 532).

170. Id. at 182-83, 347 S.E.2d at 749-50. In Azzolino the injury alleged was the continued existence of the disabled child. Azzolino, 315 N.C. at 105, 337 S.E.2d at 530.

171. See Jackson, 318 N.C. at 180-83, 347 S.E.2d at 748-80.
their just share of the family income." \(^{172}\) Wrongful conception, unlike a claim for wrongful life, does not require a decision between impaired life or nonexistence. The legal injury originates at the moment of conception, \(^{173}\) and at that point the fact of conception itself becomes the injury. The harm, therefore, is not the continued existence of the child, but the denial of plaintiffs' right to plan the size of their family.

This viewpoint has constitutional support. In \(\text{Griswold v. Connecticut}\) \(^{174}\) appellants challenged the constitutionality of a Connecticut statute that made it a crime for any person to use any drug or article to prevent conception. \(^{175}\) Appellants, Planned Parenthood League directors, were convicted under an accessory statute for giving information and medical advice to married couples regarding methods of contraception. \(^{176}\) The United States Supreme Court reversed the conviction and held that a married couple's right to practice contraception was protected by a "zone of privacy" under the Bill of Rights of the United States Constitution. \(^{177}\) This right was extended to unmarried couples seven years later in \(\text{Eisenstadt v. Baird}\). \(^{178}\) In \(\text{Eisenstadt}\) the Supreme Court, in holding that the right to practice contraception inured to unmarried persons as well as married couples, reaffirmed the principle of procreative autonomy: \(^{179}\) "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." \(^{180}\) To exempt physicians from tort liability for a negligent act resulting in conception robs the parents of "the right to plan their family and to determine, within their abilities, whether and when they will have a child"; \(^{181}\) thus, it robs parents of the constitutionally protected right to procreative autonomy. \(^{182}\)

Under this analysis the husband also has a claim for wrongful conception

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\(^{172}\) \(\text{Custodio}, 51\) Cal. App. 2d at 324, 59 Cal. Rptr. at 477 (citing \(\text{Doerr v. Villate}, 74\) Ill. App. 2d 332, 220 N.E.2d 767 (1966)).

\(^{173}\) \(\text{Sherlock v. Stillwater Clinic}, 260\) N.W.2d 169, 175 (Minn. 1977).

\(^{174}\) \(381\) U.S. 479 (1965).

\(^{175}\) \(\text{Id.}\) at 480.

\(^{176}\) \(\text{Id.}\).

\(^{177}\) \(\text{Id.}\) at 485.

\(^{178}\) \(405\) U.S. 438 (1972). In \(\text{Eisenstadt}\) appellee was convicted for exhibiting contraceptive articles during the course of a university lecture and also for giving contraceptives to an unmarried woman at the end of the lecture. \(\text{Id.}\) at 440. The existing Massachusetts statute restricted the distribution of contraceptive articles to married couples.

\(^{179}\) One commentator has noted that procreative autonomy, or the right of individuals to decide whether and when to bear or conceive a child, is a type of patient choice that is characterized by a "heightened electiveness . . . where the special role of personal values or preferences causes a court to have greater than ordinary concern about patient choice." See Shults, \(\text{From Informed Consent to Patient Choice: A New Protected Interest, 95 Yale L.J.} 219, 264 (1985); see generally Robertson, \(\text{Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth, 69 Yale L. Rev.} 405 (1983)\) (identifying freedom to avoid conception and childbirth as one of several aspects of reproduction requiring legal protection).

\(^{180}\) \(\text{Eisenstadt}, 405\) U.S. at 453.


\(^{182}\) \(\text{Oehs}, 317\) Mich. App. at 253-54, 187 N.W.2d at 517; \(\text{Bowman v. Davis}, 48\) Ohio St. 2d 41, 46, 356 N.E.2d 496, 499 (1976).
because the negligent physician also has invaded the husband's right of procreative autonomy. Justice Martin's dissent in *Jackson* noted that Mr. Jackson suffered very real damages as the proximate result of the physician's negligence because Mr. Jackson was responsible for payments to the physician and the arrival of the child affected him both emotionally and financially.\(^{183}\) The father's standing to sue for child-rearing costs has been recognized in a number of jurisdictions.\(^{184}\)

Recovery for child-rearing costs is the most equitable remedy for infringement of plaintiffs' constitutional right to plan the size of their family. As a compensatory measure it attempts to place injured plaintiffs in the position in which they would have been had no wrong occurred. Moreover, allowance of such recovery does not require the court to make an ethically questionable assessment of the child's ultimate worth. As the Illinois Appellate Court in *Cockrum v. Baumgartner*\(^{185}\) noted:

> Regardless of motivation, a couple has the right to determine whether they will have a child. That right is legally protectible and need not be justified or explained. The allowance of rearing costs is not an aspersion upon the value of the child's life. It is instead a recognition of the importance of the parent's fundamental right to control their reproductivity . . . . We cannot endorse a view that effectively nullifies this right by providing that its violation results in no injury.\(^{186}\)

The speculative or conjectural nature of damages is not a completely persuasive argument in wrongful conception cases. When liability is proven, the potential uncertainty of damages for the pecuniary costs of raising a child should not completely preclude recovery.\(^{187}\) Moreover, many courts have held that this situation is no different from others in which the trier of fact routinely fixes damages for wrongful death, loss of consortium, pain and suffering in personal injury cases, or emotional distress.\(^{188}\) Unlike the unmeasurable factors involved

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183. *Jackson*, 318 N.C. at 189, 347 S.E.2d at 753 (Martin, J., concurring in part and dissenting in part).
188. See *Note, Who Pays?*, supra note 11, at 430; *see, e.g.*, *Hartke v. McKelway*, 707 F.2d 1544 (D.C. Cir.), cert. denied, 464 U.S. 983 (1983); *Ochs*, 187 Conn. 253, 445 A.2d 883 (1982). The counterargument to this proposition is that, at least in wrongful death or loss of consortium cases,
in assessing liability for a wrongful life or wrongful birth case, in which the parent receives some benefit from the birth of a child, but suffers losses through the child’s disability, the elements of benefit and loss in a wrongful conception case are separate.189 "The loss is the financial expense which plaintiffs sought to obviate by submitting to surgery. The benefit is whatever . . . has accrued to plaintiffs as a result of the newborn child. These are relatively tangible and measurable factors . . . ."190 On the other hand, some courts have declined to apply the benefit rule to wrongful conception cases on the theory that such benefits were incalculable, with no ascertainable dollar value.191 Application of an offset, these courts have argued, would put parents in the uncomfortable position of having to prove that the child was, in effect, more trouble than he or she was worth.192

Reliance on this theory, however, belies that the emotional rewards of parenthood, "‘great though they may be, do nothing whatever to benefit the plaintiffs’ injured financial interest.’"193 Indeed, there is a valid argument in support of the proposition that the benefit rule is inapplicable to wrongful conception cases and that a full measure of recovery should be allowed. The rationale is that the benefit conferred on the plaintiff by virtue of the defendant's tortious conduct may be considered in mitigation of damages only when the benefit accrues to the same interest that was harmed.194 Child-rearing costs are a "direct financial injury"195 to the parents, no different from pregnancy-related costs, that are not alleviated by whatever benefits a child may provide to the parents through his or her existence.

Although the Jackson court was correct in dismissing plaintiffs' contract claim under the circumstances,196 and in recognizing a claim for wrongful conception, it unjustifiably created a new damages rule for what the court labelled a traditional negligence action. The better approach, as Justice Martin noted in his dissent, would be to allow the trial court to assess recoverable damages, rather than to leave the supreme court to formulate an abstract rule based on the alleged damages are subject to proof because "the relationship (or services) upon the loss of which damages will be based, has already occurred." Note, Recovery, supra note 10, at 352. Wrongful conception actions, on the other hand, require courts to "determine the emotional benefits to parents for a life and relationship not yet experienced." Id.

190. Id.
191. See, e.g., Beardsley v. Wierdsma, 650 P.2d 288, 293 (Wyo. 1982). The Beardsley court compared the offset concept to condemnation law and noted that a child should not be treated as a piece of property. Id.
194. Id.
195. Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 175 (Minn. 1977); see supra text accompanying notes 111-14.
196. If the Jacksons had entered into a special contract for the reinsertion or retention of the IUD, supported by separate consideration, a breach of contract claim presumably would have been supportable. See supra note 63.
“bare record of the pleadings.”197 The costs incurred in the child’s upbringing—including expenditures for food, shelter, clothing, and education—can be readily determined. Although the value of a child’s services and companionship, which should be used to offset these costs, are not easily calculable, such difficulty should not completely preclude recovery. The court in Jackson skirted the issue of damages for the costs of child-rearing by misunderstanding the nature of the injury. “It is not at all that human life or the state of parenthood are inherently injurious; rather it is an unplanned parenthood and an unwanted birth, the cause of which is directly attributable to a physician’s negligence, for which the plaintiffs seek compensation.”198 The benefit rule, although imperfect, clearly is a better alternative to the inequity of no recovery at all for child-rearing costs in wrongful conception cases.

Renée Madeleine Hom