

A CRITIQUE OF THE MOTIVATIONAL ANALYSIS IN WRONGFUL CONCEPTION CASES

Abstract: *Most states now recognize a tort cause of action for wrongful conception, typically resulting from a failed sterilization. States differ, however, in determining whether damages should be awarded for child-rearing expenses and what factors juries can consider in setting such damage awards. This Note argues that one commonly used factor, the parents' motivation for selecting sterilization, is irrelevant and leads to inequitable results. Since the right to use contraception is constitutionally protected, the choice to sterilize in order to avoid financial burdens associated with child-rearing should not be given preferential treatment to sterilizations motivated by concerns of genetic defects or for the mother's health.*

INTRODUCTION

On April 1, 1967 a picture of a mother and a child appeared in the *San Francisco Chronicle* with the following description:

When Kathleen Halloway had her tenth child two years ago, a family consultant advised her to have no more children since her husband made \$40 a week as a London bone and rag picker. The consultant thought the Pill wasn't enough, so on his recommendation Mrs. Halloway had a sterilizing operation. Apparently that wasn't enough either. She gave birth to a 9-pound 3-ounce girl at St. Mary's Hospital. The doctors are still trying to figure out what happened.¹

Situations like the one just described are typical in wrongful conception cases.² Although the birth of a child after a sterilization procedure is not necessarily a result of the physician's negligence, there are many instances where the doctor has been negligent in performing the procedure by not performing the operation properly, not providing post-operative care or failing to notify the patient of the risks involved.³ This Note focuses on those cases where a doctor negligently

¹ *Custodio v. Bauer*, 59 Cal. Rptr. 463, 465 n.2 (Ct. App. 1967).

² See *id.*

³ See Amy Norwood Moore, Note, *Judicial Limitations on Damages Recoverable for the Wrongful Birth of a Healthy Infant*, 68 VA. L. REV. 1311, 1313, 1329-30 (1982); Lisa A. Po-

performs a sterilization procedure resulting in the birth of a child. These cases generally fall under what has come to be known as a cause of action for wrongful conception or wrongful pregnancy.⁴

Today, pre-natal torts and birth-related causes of action have become more accepted by courts and legislatures nationwide.⁵ There is still controversy, however, as to the kinds of damages that are recoverable.⁶ In wrongful conception cases, courts attempt to balance plaintiffs' injuries with public policy concerns involving the valuation of infant's lives.⁷ In balancing these interests, courts have used different rules and sometimes have deviated from traditional tort law principles.⁸ This Note explores the various approaches used by courts in awarding child-rearing damages.⁹ The majority of courts have not allowed full recovery for child-rearing damages.¹⁰ Some courts have devised various tools to limit the damages recoverable and thus, prevent recovery for child-rearing expenses.¹¹ This Note seeks to demonstrate that one of those tools, the motivational analysis, does not produce the best results in wrongful conception cases.¹²

dewils, Note, *Traditional Tort Principles and Wrongful Conception Child-Rearing Damages*, B.U. L. REV. 407, 410-11 (1993).

⁴ There is no universal distinction between the terms wrongful birth, wrongful life, wrongful conception and wrongful pregnancy. See Jill E. Garfinkle, Note, *Burke v. Rivo: Toward a More Rational Approach to Wrongful Pregnancy*, 36 VILL. L. REV. 805, 807 (1991). Wrongful birth is usually a suit brought by the parents of a defective child against a physician for failure to diagnose problems with the fetus and the parents claim that due to the physician's negligence they were deprived from exercising their right to choose whether to abort or keep the fetus. See Russell G. Donaldson, Annotation, *Recoverability of Cost of Raising a Normal, Healthy Child Born as Result of Physician's Negligence or Breach of Contract or Warranty*, 89 A.L.R. 4th 632, § 1(a) (1991). Wrongful life is an action brought by the parents on behalf of a defective child where they seek damages for the impaired life the child now has to live as a result of the physician's negligence. See *id.* Wrongful pregnancy or wrongful conception is an action brought by the parents of a normal and healthy but unplanned child in order to recover damages from a physician for allegedly causing a conception or pregnancy to occur when the couple had sought the doctor's assistance to avoid such occurrence. See Garfinkle, *supra* at 808. Some courts and treatises, however, use all of these terms interchangeably and usually use the term wrongful birth as all-encompassing. See *id.* at 807.

⁵ See Renee Madeleine Hom, Note, *Wrongful Conception: North Carolina's Newest Prenatal Tort Claim—Jackson v. Bumgardner*, 65 N.C. L. REV. 1077, 1077 (1987).

⁶ See *infra* notes 79-158 and accompanying text.

⁷ See *infra* notes 79-158 and accompanying text.

⁸ See *infra* notes 79-158 and accompanying text.

⁹ See *infra* notes 79-158 and accompanying text.

¹⁰ See *infra* notes 79-158 and accompanying text.

¹¹ See *infra* notes 134-58 and accompanying text.

¹² See *infra* notes 327-409 and accompanying text.

Part I of this Note provides an overview of the development of the cause of action for wrongful conception and discusses the four major approaches used in awarding damages in these cases.¹³ Part II discusses endorsements and criticisms of the offset benefits rule used by some courts to calculate damages for child-rearing expenses in wrongful conception cases.¹⁴ Part III discusses the different applications of the motivational analysis in offset benefits jurisdictions.¹⁵ Finally, Part IV analyzes the use of a motivational inquiry in wrongful conception cases and questions whether it produces the best results.¹⁶

I. OVERVIEW OF THE CAUSE OF ACTION FOR WRONGFUL CONCEPTION

Wrongful conception is an action brought by the parents of a normal, healthy but unplanned child in order to recover damages from a physician for allegedly causing a conception or pregnancy when the couple had sought the physician's assistance in avoiding such occurrence.¹⁷ Wrongful conception claims are generally included as part of an action for medical malpractice.¹⁸ The first suits for negligent performance of a sterilization procedure where a healthy child was born were based on claims for misrepresentation, fraud and deceit.¹⁹ Today, claims range from breach of contract and breach of fiduciary duties to negligence.²⁰ The vast majority of cases involve the negligent performance of sterilization procedures such as tubal ligations or vasectomies.²¹ There also have been cases dealing with the liability of a pharmacist for negligently filling a prescription for birth control pills.²²

The development of the cause of action for wrongful conception was hindered because, historically, contraception, sterilization and

¹³ See *infra* notes 17–158 and accompanying text.

¹⁴ See *infra* notes 159–216 and accompanying text.

¹⁵ See *infra* notes 217–326 and accompanying text.

¹⁶ See *infra* notes 327–409 and accompanying text.

¹⁷ Some authors make a further distinction between wrongful conception and wrongful pregnancy. See Garfinkle, *supra* note 4, at 808–09. According to them, wrongful conception are those situations when the negligence occurs during the preconception phase such as the negligent performance of a sterilization procedure. See *id.* Wrongful pregnancy encompasses cases where the negligent act occurs after conception such as the negligent performance of an abortion or a failure to diagnose a pregnancy in time to be able to choose an abortion. See Hom, *supra* note 5, at 1083.

¹⁸ See Hom, *supra* note 5, at 1077.

¹⁹ See, e.g., *Christensen v. Thornby*, 255 N.W. 620, 622 (Minn. 1934).

²⁰ See *infra* notes 29–78 and accompanying text.

²¹ See, e.g., *infra* notes 58–158, 222–326 and accompanying text.

²² See, e.g., *Troppe v. Scarf*, 187 N.W.2d 511 (Mich. Ct. App. 1971).

abortion were not recognized as legal options in many jurisdictions.²³ Furthermore, courts reasoned that public policy considerations would preclude recovery for the birth of a child, particularly if the child was born healthy.²⁴ According to these courts, the birth of a healthy child was a blessing and not a cognizable injury.²⁵

In 1973, in *Roe v. Wade*, the United States Supreme Court held that a woman's right to family planning was a constitutional right.²⁶ Along with *Wade*, other important United States Supreme Court decisions recognized contraception, sterilization and abortion as constitutional rights.²⁷ Those cases provided the impetus for the acceptance of wrongful conception, wrongful birth and other similar causes of action which have developed over the last thirty years.²⁸

A. Chronological Development of Wrongful Conception Claims

Christensen v. Thornby was the first reported case to deal with an action based on a failed sterilization procedure which resulted in the birth of a healthy child.²⁹ In 1934, in *Christensen*, the Supreme Court of Minnesota held that the performance of a sterilization procedure and a contract to perform such a procedure are not against public policy, at least, when medical necessity is involved.³⁰ The court, however, dismissed the plaintiff's claims because they were based on a theory of deceit and there was no showing by the plaintiffs of a fraudulent intent to deceive.³¹ In *Christensen*, the husband underwent a vasectomy because he was advised that it would be dangerous for his wife to bear another child.³² The defendant, a doctor, performed the

²³ See *Christensen*, 255 N.W. at 621-22.

²⁴ See *id.* at 621, 622.

²⁵ See *Custodio v. Bauer*, 59 Cal. Rptr. 463, 473 (Ct. App. 1967); *Christensen*, 255 N.W. at 622.

²⁶ 410 U.S. 113 (1973).

²⁷ See generally *Wade*, 410 U.S. 113 (right to abortion); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (right to use contraceptives by unmarried persons); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to use contraceptives by married persons).

²⁸ See *Wade*, 410 U.S. 113; *Eisenstadt*, 405 U.S. at 438; *Griswold*, 381 U.S. at 479; Benjamin Lee Locklar, Note, *Jackson v. Buongardner: A Healthy Newborn—A Blessing or a Curse?*, 12 AM. J. TRIAL ADVOC. 153, 153 (1988).

²⁹ See 255 N.W. at 621 (discussing the lack of authority cited by the parties because there were no reported cases where a person who consented to a sterilization procedure brought suit against a surgeon).

³⁰ See *id.*

³¹ See *id.* at 622.

³² See *id.* at 621.

operation and guaranteed sterility.³³ Subsequently, the wife became pregnant and delivered a healthy baby without major complications to her health.³⁴ The husband grounded his suit solely in deceit because he claimed that the doctor fraudulently represented to him that the operation was successful and that it would prevent conception.³⁵ The husband made no claims as to whether the doctor negligently performed the operation.³⁶ The *Christensen* court reasoned that the husband did not have a cause of action for deceit because he did not show the requisite element of fraudulent intent.³⁷ According to the court, there was no fraudulent intent because the operation was performed and its purpose was fulfilled—to save the wife from hazards incident to childbirth.³⁸ Moreover, the court viewed the birth of a healthy child as a blessing and not as an injury.³⁹

The *Christensen* court, however, implied that the plaintiff may have been successful on claims for breach of contract or medical malpractice if the plaintiff had sued on those theories.⁴⁰ To the court, a contract to perform the sterilization procedure was not void as against public policy because there was no statutory provision in the state of Minnesota prohibiting sterilization.⁴¹ The *Christensen* court further reasoned that even if there was such a prohibition, an exception is made by most other states when medical necessity requires the operation.⁴² In *Christensen*, the husband's motivation for submitting to a vasectomy was to protect his wife from another pregnancy which would have been detrimental to her health.⁴³ Thus, the court held that in this case, the operation and the contract to perform the sterilization were not void as against public policy.⁴⁴

The court in *Christensen* only dealt with a claim of deceit; the first reported case to use a negligence approach in a failed sterilization case where a healthy child was born was *Ball v. Mudge*.⁴⁵ In 1964, in

³³ See *id.*

³⁴ See *Christensen*, 255 N.W. at 621.

³⁵ See *id.* at 622.

³⁶ See *id.* at 621.

³⁷ See *id.* at 622.

³⁸ See *id.*

³⁹ See *Christensen*, 255 N.W. at 622.

⁴⁰ See *id.*

⁴¹ See *id.* at 621.

⁴² See *id.*

⁴³ See *id.*

⁴⁴ See *Christensen*, 255 N.W. at 622.

⁴⁵ See 391 P.2d 201 (Wash. 1964). *West v. Underwood* was the first reported negligence case dealing with a failed sterilization. See 40 A.2d 610 (N.J. 1945). In *West*, however, the

Ball, the Washington Supreme Court held that a doctor's negligence in performing a vasectomy was not the proximate cause of the pregnancy of the plaintiff's wife.⁴⁶ The husband had a vasectomy because his wife was advised by an obstetrician that further deliveries would be dangerous to her health after already delivering three children by Cesarean section.⁴⁷ In addition, the husband and his wife were unable to afford the expense of raising another child.⁴⁸ The husband submitted to a vasectomy and resumed relations with his wife.⁴⁹ The doctor did not advise the husband to undergo post-operative testing for fertility nor did he provide any type of post-operative care.⁵⁰ The wife became pregnant and delivered a healthy child, again by Cesarean section, without any major complications to her health.⁵¹ The husband and his wife sued the doctor in negligence, claiming that the doctor failed to successfully sterilize the husband and departed from standard medical practice by not providing post-operative care.⁵² The husband sought recovery for the expenses associated with the delivery, care, maintenance and support of the child as well as the pain and suffering of the parents.⁵³

The *Ball* court, in denying the negligence claim, reasoned that the doctor's actions were not the proximate cause of the pregnancy because it was medically possible for the husband to become fertile after a vasectomy.⁵⁴ Therefore, the wife's pregnancy did not necessarily mean that the doctor was negligent in performing the vasectomy.⁵⁵ Although the doctor did not provide post-operative care to the plaintiff, the court nevertheless reasoned that the doctor had not departed from the usual standard of care in the community.⁵⁶ Moreover, it was reasonable for the jury to conclude that plaintiffs suffered no damage from the birth of a healthy child because they loved the child dearly

consequences of the failed procedure were abscesses over the incision and deep pain, not the birth of a child. *See id.* Therefore, the discussion of that case is omitted in this Note.

⁴⁶ *See Ball*, 391 P.2d at 203-04.

⁴⁷ *See id.* at 203.

⁴⁸ *See id.*

⁴⁹ *See id.*

⁵⁰ *See id.* at 203.

⁵¹ *See Ball*, 391 P.2d at 203.

⁵² *See id.*

⁵³ *See id.*

⁵⁴ *See id.* at 203-04.

⁵⁵ *See id.* at 204.

⁵⁶ *See Ball*, 391 P.2d at 204.

and would not consider placing the child for adoption nor "selling it for \$50,000."⁵⁷

It was not long before other jurisdictions started using the negligence approach.⁵⁸ In 1967, the California Court of Appeals, in *Custodio v. Bauer*, was the first court to hold in a suit for wrongful conception in negligence that a physician's actions was the proximate cause of childbirth and that child-rearing damages was compensable even if a healthy child is born.⁵⁹ In *Custodio*, a husband and a wife, sought recovery from their doctors on seven different causes of action having to do with the negligent performance of a sterilization procedure where the wife's fallopian tubes were to be partially removed.⁶⁰ The husband and his wife wanted to undergo this treatment because they were told that another pregnancy, after having nine children, would aggravate the wife's bladder and kidney conditions.⁶¹ Almost a year after the surgery, the husband discovered that his wife was pregnant despite the doctors' assurances of a successful operation.⁶² The wife gave birth to a healthy baby and sought monetary damages for the costs of delivery, emotional distress and child-rearing expenses for the care of the child until the age of majority.⁶³

The *Custodio* court recognized the doctor's actions as the proximate cause of the pregnancy and stated "it is difficult to conceive how the very act the consequences of which the operation was designed to forestall, can be considered unforeseeable."⁶⁴ In addition, the court reasoned that public policy did not prevent the recognition of a cause of action for failed sterilization because the United States Supreme Court had recognized a constitutional right in the use of contraception and sterilization.⁶⁵ According to the *Custodio* court, damages for the delivery were compensable because the birth of the child was an obvious foreseeable consequence of the doctor's negligence and sterilization procedures were no longer illegal or against public policy.⁶⁶ The court also implied that the husband and wife could recover for

⁵⁷ *Id.*

⁵⁸ See *Bishop v. Byrne*, 265 F. Supp. 460, 463 (S.D. W. Va. 1967); *Custodio*, 59 Cal. Rptr. at 466.

⁵⁹ See *Custodio*, 59 Cal. Rptr. at 466, 472.

⁶⁰ See *id.* at 466.

⁶¹ See *id.*

⁶² See *id.*

⁶³ See *id.* at 467 & n.3.

⁶⁴ *Custodio*, 59 Cal. Rptr. at 472.

⁶⁵ See *id.* at 473 (citing *Griswold*, 381 U.S. 479).

⁶⁶ See *id.* at 473, 477.

the mental and physical complications the operation was designed to prevent.⁶⁷ Furthermore, the court reasoned that child-rearing expenses could be compensable because the family suffered a loss by the birth of the child; this was a foreseeable consequence of the doctor's negligence.⁶⁸ The *Custodio* court, however, made clear that the damages were not for the "unwanted" child but to "replenish the family exchequer so that the new arrival would not deprive other members of the family of what was planned as their just share of the family income."⁶⁹ According to the court, this is not against public policy because there is a trend in social ethics towards contraception and family planning as a means of ensuring the "economic betterment of . . . the population."⁷⁰

In sum, plaintiffs seeking compensation for negligently performed sterilization procedures have used various theories in order to persuade courts to accept a cause of action for wrongful conception.⁷¹ At first, it was impossible to achieve recovery because sterilization was illegal in many jurisdictions.⁷² Therefore, efforts by plaintiffs concentrated on using theories having to do with deceit and misrepresentation, claiming that the doctors guaranteed sterility after the operations.⁷³ By 1934, however, one court recognized that breach of contract claims could be recognized if the sterilization was performed to protect the mother's health; this practice did not become widespread since many states still did not recognize sterilization procedures or contracts to perform them as legal.⁷⁴ More importantly, however, the most probable reason for the sporadic use of a breach of contract claim had to do with the fact that doctors were usually careful not to guarantee a result in their written or oral contracts.⁷⁵ Even a few years before sterilization and contraception were recognized as legal rights under the United States Constitution by the United States Supreme Court in 1965, there were failed attempts by plaintiffs to

⁶⁷ See *id.* at 476. The court implied that the husband and wife could not recover because at the time of the lawsuit the wife had not given birth to the child. See *id.* at 467 n.3. Thus, the plaintiffs could not prove mental and physical complications at the time of the suit. See *id.*

⁶⁸ See *id.* at 476.

⁶⁹ *Custodio*, 59 Cal. Rptr. at 477.

⁷⁰ *Id.* at 477.

⁷¹ See *supra* notes 29-70 and accompanying text.

⁷² See *Christensen*, 255 N.W. at 621.

⁷³ See *supra* notes 29-57 and accompanying text.

⁷⁴ See *Christensen*, 255 N.W. at 621.

⁷⁵ See *Bishop*, 265 F. Supp. at 463.

ground their claims in negligence.⁷⁶ Those negligence claims were not successful until after the *Custodio* decision in 1967.⁷⁷ Undoubtedly, Supreme Court decisions dealing with reproductive rights have been the main impetus towards the acceptance of the cause of action of wrongful conception; these decisions stand for the precept that injuries to those constitutional rights are legally compensable.⁷⁸

B. Four Different Approaches to Damages

Today, wrongful conception is a widely accepted cause of action.⁷⁹ Much controversy, however, arises from the various methods used to calculate damages.⁸⁰ Compensation for child-rearing expenses for the birth of a healthy child is the most controversial aspect of damage awards.⁸¹ In fact, most courts today still refuse to award damages for the full cost of these child-rearing expenses.⁸² The compensation theories used by courts can be grouped into four categories: (1) total denial of recovery; (2) limited recovery; (3) full recovery; and (4) offset benefits.⁸³

1. Total Denial of Recovery

Until twenty years ago, when the incidence of pre-natal torts increased, the total denial of recovery approach⁸⁴ was the predominant approach used by courts in wrongful conception actions.⁸⁵ Currently, only two jurisdictions, Kansas and Nevada, still adhere to this approach, neither recognizing the tort nor awarding damages in wrongful conception claims.⁸⁶ The supreme courts of these two states rely on the old common law rationale used to deny this cause of action—

⁷⁶ See *Ball*, 391 P.2d at 202.

⁷⁷ See *supra* notes 59–70 and accompanying text.

⁷⁸ See *id.* at 473; Locklar, *supra* note 28, at 153.

⁷⁹ See Christopher D. Jerram, Note, *Child Rearing Expenses as Compensable Damage in Wrongful Conception Case: Burke v. Rivo*, 24 CREIGHTON L. REV. 1643, 1643 (1991); Lisa A. Podewils, *supra* note 3, at 408.

⁸⁰ See Locklar, *supra* note 28, at 163–67; Moore, *supra* note 3, at 1315–23; Stephen M. O'Shea, Comment, *Burke v. Rivo: A Massachusetts Approach to Wrongful Pregnancy*, 26 NEW. ENG. L. REV. 963, 968–74 (1992).

⁸¹ See Podewils, *supra* note 3, at 408.

⁸² See *infra* notes 100–14 and accompanying text.

⁸³ See O'Shea, *supra* note 80, at 968–74.

⁸⁴ See *Szekeres v. Robinson*, 715 P.2d 1076, 1079 (Nev. 1986).

⁸⁵ See *Horn*, *supra* note 5, at 1077.

⁸⁶ See *Byrd v. Wesley Med. Ctr.*, 699 P.2d 459, 468 (Kan. 1985); *Szekeres*, 715 P.2d at 1077–78.

that the birth of a healthy child is not a harm.⁸⁷ Therefore, as a matter of public policy, these courts rule that there is no cause of action for wrongful conception.⁸⁸

For example, in 1986, the Nevada Supreme Court, in *Szekeres v. Robinson*, declined to award any damages for wrongful conception, and held that such cases were not to be analyzed under a negligence scheme.⁸⁹ The *Szekeres* court found that even if the doctor's negligent or careless conduct contributed to the birth of a child, it would not rise to a tort liability in negligence because the birth of a healthy baby was not a legally compensable damage.⁹⁰ Nevertheless, the court stated that its denial of tort liability did not mean that plaintiffs could not recover under a breach of contract claim.⁹¹ According to the court, the damages in a breach of contract claim would be limited to the cost of medical, surgical and hospital care associated with the failed surgery.⁹²

In *Szekeres*, a woman who underwent surgical sterilization became pregnant and delivered a healthy baby girl.⁹³ She sued her attending physicians and the hospital where the surgery was performed on the theory that she, the newborn and the newborn's siblings had been damaged by the baby's birth.⁹⁴ The newborn's father claimed that he was damaged by the wife's unavailability during the pregnancy.⁹⁵ The court, in denying the existence of a cause of action for wrongful conception in negligence, reasoned that the wrongness or the injuriousness of the birth should not be taken for granted because the birth of a healthy child is not a wrong but a "right."⁹⁶ For the *Szekeres* court, the birth of a healthy child distinguishes a claim of wrongful conception from ordinary medical negligence actions.⁹⁷ The court explained that in medical malpractice actions, the results of the doctor's negligence are injuries such as death or disabilities.⁹⁸ In wrongful conception

⁸⁷ See *Szekeres*, 715 P.2d at 1077-78.

⁸⁸ See *id.*

⁸⁹ See *id.* at 1079.

⁹⁰ See *id.* at 1077.

⁹¹ See *id.* at 1077.

⁹² See *Szekeres*, 715 P.2d at 1079.

⁹³ See *id.* at 1076.

⁹⁴ See *id.*

⁹⁵ See *id.* at 1077.

⁹⁶ See *id.* at 1078.

⁹⁷ See *Szekeres*, 715 P.2d. at 1078 & n.3.

⁹⁸ See *id.* at 1078.

cases, on the other hand, the court explained that the alleged wrong is not an injury for which society should give reparation.⁹⁹

2. Limited Recovery

The second approach to damages in wrongful conception cases is the limited recovery view.¹⁰⁰ This approach is the one espoused by a majority of jurisdictions in the United States.¹⁰¹ The courts using this method allow damages for harm that is the direct result of the physician's negligence but preclude recovery for child-rearing expenses.¹⁰² According to these courts, a parent should not be awarded the costs of child rearing because such damages are too speculative.¹⁰³ These courts also reason that: (1) the benefits of a healthy child outweigh any economic loss; (2) child rearing expenses are disproportionate to the doctor's culpability; and (3) there are devastating psychological effects when a child later finds out he or she was unwanted and that someone else is paying to rear him.¹⁰⁴ In declining to award child-rearing expenses, these courts also are concerned with the possible increase in fraudulent claims and the difficulty in drawing a line to stop the physician's liability.¹⁰⁵

In 1989, the Supreme Court of Ohio, in *Johnson v. University Hospitals*, held that the limited recovery theory was the most appropriate in a wrongful conception action.¹⁰⁶ In *Johnson*, a woman had undergone a tubal ligation which was negligently performed by three doctors.¹⁰⁷ She later became pregnant and realized that she had not been sterilized.¹⁰⁸ As a result, she delivered a healthy child and sued her doctors for pain and suffering related to the pregnancy, birth, personal injury and child-rearing expenses.¹⁰⁹

The *Johnson* court, after exploring the approaches used by other states, did not find it persuasive to award child-rearing expenses because such costs are too speculative and it would be almost impossible

⁹⁹ See *id.*

¹⁰⁰ See *Schork v. Huber*, 648 S.W.2d 861, 863 (Ky. 1983); *Johnson v. University Hosps.*, 540 N.E.2d 1370, 1378 (Ohio 1989).

¹⁰¹ See *Johnson*, 540 N.E.2d at 1375.

¹⁰² See *Schork*, 648 S.W.2d at 862-63; *Johnson*, 540 N.E.2d at 1378.

¹⁰³ See *Johnson*, 540 N.E.2d at 1376.

¹⁰⁴ See *id.* at 1376 (citing *Byrd*, 699 P.2d at 466-67).

¹⁰⁵ See *Locklar*, *supra* note 28, at 165.

¹⁰⁶ See *Johnson*, 540 N.E.2d at 1378.

¹⁰⁷ See *id.* at 1370.

¹⁰⁸ See *id.* at 1370-71.

¹⁰⁹ See *id.* at 1371.

for a jury to place a price tag on the life of a child.¹¹⁰ Furthermore, the court reasoned that Ohio's public policy dictated that the birth of a healthy child can not be an injury to its parents.¹¹¹ The court reasoned that only the Ohio legislature, by balancing competing social philosophies, could decide whether child-rearing expenses could be recognizable damages.¹¹² The *Johnson* court, however, stated that other damages such as medical expenses, loss of consortium, emotional distress, loss of wages, and pain and suffering are appropriate.¹¹³ According to the court, such damages should be allowed because in a negligence analysis the doctor owed a duty to the patient and such duty was breached.¹¹⁴

3. Full Recovery

The third approach to awarding damages in wrongful conception cases is full recovery.¹¹⁵ The jurisdictions applying this view allow recovery for all damages that are incident to the pregnancy including child-rearing expenses.¹¹⁶ Some of these courts have reasoned that it would not be speculative to award these costs because juries are accustomed to calculating these costs in other types of tort actions.¹¹⁷ According to these courts, public policy considerations do not preclude the recovery of child-rearing and education expenses because even the birth of a healthy child imposes certain costs on parents—costs they had sought to avoid.¹¹⁸ Furthermore, some courts have stated that public policy compels recovery of child-rearing damages in order to protect the right to family planning.¹¹⁹

In 1990, for example, the Supreme Court of Wisconsin, in *Marciniak v. Lundborg*, held that the parents of a healthy child may recover damages, including child-rearing expenses, from a physician who negligently performed a sterilization procedure.¹²⁰ The court found that these costs should not be offset by the benefits conferred upon the

¹¹⁰ See *id.* at 1378.

¹¹¹ See *Johnson*, 540 N.E.2d at 1378.

¹¹² See *id.*

¹¹³ See *id.* at 1378 n.8.

¹¹⁴ See *id.* at 1378.

¹¹⁵ See *Marciniak v. Lundborg*, 450 N.W.2d 243, 248 (Wis. 1990).

¹¹⁶ See *id.*

¹¹⁷ See *Marciniak*, 450 N.W.2d at 245.

¹¹⁸ See *id.* at 249.

¹¹⁹ See *Lovelace Med. Ctr. v. Mendez*, 805 P.2d 603, 612-13 (N.M. 1991).

¹²⁰ *Marciniak*, 450 N.W.2d at 245.

parents by the presence of a healthy child in their lives.¹²¹ In *Marciniak*, a woman sought a sterilization procedure to avoid having more children.¹²² At the time, she already had two young children and was working twenty-five hours a week.¹²³ She underwent a laparoscopy with bilateral fallopian tube cauterization and was under the impression that this procedure would result in permanent sterilization.¹²⁴ Despite the surgery, she became pregnant and delivered a child.¹²⁵

In finding the physician negligent, the *Marciniak* court explained that no public policy considerations prevented the recognition of liability.¹²⁶ The court stated that traditional principles of tort liability should apply and a wrongdoer must compensate those who are injured by his or her negligence.¹²⁷ According to the court, child-rearing costs are not speculative because similar types of costs are awarded in numerous other types of cases such as wrongful death cases.¹²⁸ Moreover, these damages are not out of proportion to the doctor's culpability because they are foreseeable.¹²⁹ Additionally, public policy does not immunize defendants from liability merely because the damages are substantial.¹³⁰ The court also reasoned that awarding child-rearing damages to the parents would not psychologically damage the child, but rather it would alleviate the family's economic burdens and add to the well-being of the child.¹³¹ Finally, the *Marciniak* court reasoned that it would not be equitable to force upon the parents the costs of raising a child when they sought precisely to avoid those costs.¹³² The court, therefore, found that the costs of raising a child until the age of majority may not be offset by the benefit of having a healthy child in their lives since such benefit was not sought.¹³³

¹²¹ See *id.*

¹²² See *id.* at 244.

¹²³ See *id.*

¹²⁴ See *id.*

¹²⁵ See *Marciniak*, 450 N.W.2d at 244.

¹²⁶ See *id.* at 248.

¹²⁷ See *id.*

¹²⁸ See *id.* at 245-46.

¹²⁹ See *id.* at 246.

¹³⁰ See *Marciniak*, 450 N.W.2d. at 246.

¹³¹ See *id.* at 246.

¹³² See *id.* at 249.

¹³³ See *id.*

4. The Offset Benefits View

The fourth approach to damages in wrongful conception cases is referred to as the offset benefits view.¹³⁴ Courts using this method reject the view that, as a matter of law, child-rearing expenses are not recoverable.¹³⁵ These courts, however, do not go as far as full recovery because they hold that the child-rearing damages should be offset by the benefit the parents receive from having a healthy child.¹³⁶ These courts draw this principle from Section 920 of the *Restatement (Second) of Torts* which states that when a defendant's tortious act causes harm to the plaintiff but also confers a benefit, such benefit should be considered in mitigation of damages to the extent it is equitable.¹³⁷ Jurisdictions using this approach allow the jury to decide when child-rearing costs exceed the benefits, and allow plaintiffs to recover the difference between the costs and the benefit.¹³⁸ Some courts have refined this process and take into account the plaintiff's motivation for seeking the sterilization procedure.¹³⁹ Those courts which take the parents' motivation into account are more likely to allow recovery for the costs of child-rearing if the primary motivation was financial.¹⁴⁰ If the parents seek sterilization, however, for eugenic reasons (e.g. avoidance of a genetic defect), or out of concern for the mother's health, then recovery for these costs is less justified.¹⁴¹

In 1983, the Supreme Court of Arizona, in *University of Arizona. Health Sciences Center v. Superior Court*, adopted the offset benefits view and held that the benefits of an unplanned but healthy child may be weighed against any pecuniary and non-pecuniary damages in determining plaintiffs' recovery in a wrongful conception case.¹⁴² The *University of Arizona* court found that a health care provider operating a teaching hospital could be liable for negligently performing a vasectomy.¹⁴³ The plaintiffs were a husband and wife, who after having three children, decided not to have any more children.¹⁴⁴ The hus-

¹³⁴ See *University of Ariz. Health Sciences Ctr. v. Superior Ct.*, 667 P.2d 1294, 1297 (Ariz. 1983).

¹³⁵ See *id.* at 1299.

¹³⁶ See *id.* at 1301.

¹³⁷ RESTATEMENT (SECOND) OF TORTS § 920 (1977).

¹³⁸ See *University of Ariz. Health Sciences Ctr.*, 667 P.2d at 1294.

¹³⁹ See *Burke v. Rivo*, 551 N.E.2d 1, 6 (Mass. 1990).

¹⁴⁰ See *id.*

¹⁴¹ See *id.* at 5.

¹⁴² See *University of Ariz. Health Sciences Ctr.*, 667 P.2d at 1299, 1301.

¹⁴³ See *id.* at 1296.

¹⁴⁴ See *id.*

band and wife decided that a vasectomy was the best means of contraception for them.¹⁴⁵ After the husband underwent the vasectomy operation, the wife became pregnant and delivered a healthy child.¹⁴⁶ Subsequently, the husband and wife sued the doctor and his employer, the teaching hospital, seeking damages including child-rearing expenses.¹⁴⁷

The *University of Arizona* court, after discussing the approaches taken by courts throughout the country, reasoned that child-rearing damages are compensable but should be offset by the benefits of the parent-child relationship.¹⁴⁸ The court recognized that the birth of a healthy child is not always a benefit, depending on the reasons behind the parents' decision not to have another child.¹⁴⁹ Although in some cases a family can adjust to the birth of a child they were not expecting, in other cases the birth of an unplanned child can cause serious emotional and economic problems to the parents.¹⁵⁰ Further, contrary to what other courts claim, child-rearing damages are not speculative because such calculations are routinely performed in other types of cases.¹⁵¹

The court reasoned that the costs of child-rearing should be offset by the pecuniary and non-pecuniary benefits conferred on the parents according to the particular circumstances of the case.¹⁵² For example, the court suggested that factors such as family size, family income, age of the parents and marital status be taken into account when calculating the benefit to the parents.¹⁵³ According to the court, the offset benefits approach allows the jury certain flexibility in determining which persons have suffered more or gained more as a result of the birth of a healthy child.¹⁵⁴ The court reasoned that the jury represents a cross-section of the community and as such can better reach a consensus as to whether damages are warranted in the case before them.¹⁵⁵ The court explained that if compensation for child-rearing damages were based on an "iron-clad" rule, judges would im-

¹⁴⁵ See *id.*

¹⁴⁶ See *id.*

¹⁴⁷ See *University of Ariz. Health Sciences Ctr.*, 667 P.2d at 1296.

¹⁴⁸ See *id.* at 1299.

¹⁴⁹ See *id.* at 1300.

¹⁵⁰ See *id.* at 1299.

¹⁵¹ See *id.* at 1297-1298.

¹⁵² See *University of Ariz. Health Sciences Ctr.*, 667 P.2d at 1299.

¹⁵³ See *id.* at 1300 (citation omitted).

¹⁵⁴ See *id.* at 1301.

¹⁵⁵ See *id.* at 1299-1300.

pose their personal views on morality by deciding cases based on personal emotion.¹⁵⁶ The court also reasoned that denying compensation for child-rearing expenses would deviate from one of the basic principles of tort law—that a wrongdoer is held liable for all damages which he caused and all costs which the victim sustains as a result of the wrong.¹⁵⁷ Therefore, the court determined that this case-by-case adjudication in determining child-rearing damages, despite its inevitable variations, provides the most accurate method in computing damages in wrongful conception cases.¹⁵⁸

II. ENDORSEMENT AND CRITICISMS OF THE OFFSET BENEFITS VIEW

A. Endorsements of Offset Benefits View

The offset benefits view presents the most problematic application of all damage rules used by courts in wrongful conception cases.¹⁵⁹ Some commentators have regarded the offset benefits approach to wrongful conception damages as a sensible or enlightened solution.¹⁶⁰ Other commentators consider it merely as a step in the right direction.¹⁶¹ The debate, however, has centered on criticizing the approach as a whole or on criticizing specific cases applying the offsets benefits view.¹⁶² This Note seeks to show that despite all of the shortcomings discussed in the current literature, the most critical flaw of the application of the offset benefits rule to wrongful conception cases is the use of the motivational analysis. This section will review the current debate surrounding the application of the offset benefits rule in wrongful conception cases.

¹⁵⁶ See *id.* at 1298, 1300.

¹⁵⁷ See *id.* at 1300.

¹⁵⁸ See *University of Ariz. Health Sciences Ctr.*, 667 P.2d. at 1301.

¹⁵⁹ See Podewils, *supra* note 3, at 419–20, 421.

¹⁶⁰ See Jerram, *supra* note 79, at 1665; Michael C. Pallesen, Note, *Wrongful Pregnancy Actions: Should Courts Allow Recovery for Childrearing Expenses?*—*Burke v. Rivo*, 406 Mass. 764, 551 N.E.2d 1 (1990), 70 NEB. L. REV. 361, 379 (1991).

¹⁶¹ See O'Shea, *supra* note 80, at 988–89 (suggesting that a more equitable approach within this framework would be to focus on the reasons for the parents' reliance on the surgical procedure); Garfinkle, *supra* note 4, at 828 (arguing that the offset benefits approach is a step in the right direction but that the court should have allowed full recovery).

¹⁶² But see Jeff L. Milsteen, Comment, *Recovery of Childrearing Expenses in Wrongful Birth Cases: A Motivational Analysis*, 32 EMORY L.J. 1167 (1983). Although the Milsteen article is the only journal article dealing exclusively with the motivational framework, it generally deals with wrongful birth actions and not specifically with wrongful conception actions. See *id.*

The jurisdictions that have adopted the offset benefits rule view it as a course of greater justice, at least, when compared to the alternative of denying all recovery.¹⁶³ These courts find that the policy reasons typically advanced to prevent the recovery of child-rearing expenses do not always outweigh the injury suffered by the parents.¹⁶⁴ According to these courts, the offset benefits approach allows the factfinder to weigh all of the circumstances in each case before coming up with a damages award.¹⁶⁵ Only in that way, can the result in each case be the most accurate and efficient in promoting the goals of tort law.¹⁶⁶

Jurisdictions following the offset benefits rule recognize that there are situations where parents, despite the benefits they might receive from the birth of a child, are simply unable to provide for another child, either financially or emotionally or both.¹⁶⁷ Thus, an injury requiring compensation has indeed occurred as a result of the physician's negligence.¹⁶⁸ These courts do not find the recognition of the existence of an injury as inconsistent with public policy because

¹⁶³ See *Jones v. Malinowski*, 473 A.2d 429, 434 (Md. 1984) (quoting *Hartke v. McKelway*, 707 F.2d 1544 (D.C. Cir. 1983)).

¹⁶⁴ See *Ochs v. Borrelli*, 445 A.2d 883, 885 (Conn. 1982); *Troppi v. Scarf*, 187 N.W.2d 511, 518 (Mich. Ct. App. 1971). The *Troppi* court describes a situation where an unwed college student becomes pregnant due to a pharmacist's failure to properly fill her prescription for birth control pills. See *id.* at 518. According to the court, she will suffer far greater damage than the young newlywed who was only using contraceptives temporarily while she and her husband were taking an extended honeymoon trip. See *id.* at 518-19.

¹⁶⁵ See *Troppi*, 187 N.W.2d at 518. In 1992, another panel of the Michigan Court of Appeals in deciding a wrongful conception case declined to follow the "benefits rule" set out in *Troppi*. See *Rouse v. Wesley*, 494 N.W.2d 7, 11-12 (Mich. Ct. App. 1992). In *Rouse*, the Michigan Court of Appeals stated that the portion of the holding in *Troppi* relying on the benefits rule was undermined, yet the court did not overrule *Troppi*. See *id.* at 12 n.3. In 1999, another panel of the Michigan Court of Appeals abolished the tort of wrongful birth until the Michigan Supreme Court or the Michigan legislature provided further guidance. See *Taylor v. Kurapati*, 600 N.W.2d 670, 691 (Mich. Ct. App. 1999). The Michigan Court of Appeals, in *Taylor*, criticized the benefits rule not only in wrongful birth cases but in wrongful conception cases. See *id.* at 678-681. The *Taylor* court was very critical of *Troppi*'s benefits rule and explicitly overruled the application of *Troppi* in wrongful birth cases. See *id.* at 688-91. As to wrongful conception cases, the *Taylor* court assumed claims would be limited by *Rouse* until the Supreme Court of Michigan or the legislature provides further guidance. See *id.* at 681 n.35. The *Taylor* court did not address to what extent wrongful conception claims remain tenable in Michigan because the case before them was a wrongful birth case. See *id.*

¹⁶⁶ See *University of Arizona Health Sciences Ctr. v. Superior Court*, 667 P.2d 1294, 1301 (Ariz. 1983); *Jones*, 473 A.2d at 438; *Burke v. Rivo*, 551 N.E.2d 1, 6 (Mass. 1990).

¹⁶⁷ See *University of Ariz. Health Sciences Ctr.*, 667 P.2d at 1298; *Jones*, 473 A.2d at 435-36; *Burke*, 551 N.E.2d at 4.

¹⁶⁸ See *Jones*, 473 A.2d at 435-36.

"parental pleasures do not eradicate the economic reality."¹⁶⁹ More importantly, as is sometimes suggested by other jurisdictions, these courts do not consider the child as the injury.¹⁷⁰ Instead, similar to jurisdictions allowing full recovery, these courts are willing to award child-rearing expenses because they consider the cost of raising a child as the direct and foreseeable consequence of a physician's negligence.¹⁷¹ Since tort law principles dictate that a wrongdoer must be held liable for all damages caused as a result of his or her wrong, it would be against legal principles and public policy to let parents go uncompensated for their injury.¹⁷²

The offset benefits view, however, differs from the full recovery view in that the recovery of such foreseeable and direct damages can be offset by the pecuniary and non-pecuniary benefits conferred on the parents by the birth of a healthy child.¹⁷³ These jurisdictions find the offset benefits rule desirable because it allows more flexibility by tailoring the damages award to the circumstances of each case rather than subscribing to a strict recovery rule for all cases.¹⁷⁴ To these courts, this flexibility is important in providing a more accurate assessment of the damages in each case.¹⁷⁵ Moreover, these jurisdictions consider it unfair and dangerous to provide full compensation in all cases for the birth of a healthy baby because the benefits and injuries to the parents vary with the circumstances.¹⁷⁶

¹⁶⁹ *Ochs*, 445 A.2d at 885.

¹⁷⁰ See *Lovelace Med. Ctr. v. Mendez*, 805 P.2d 603, 609-11 (N.M. 1991). The court in *Lovelace* applied the offset benefits rule to the emotional distress claim and not to the child-rearing expenses claim. See *id.* at 613-14.

¹⁷¹ See *Jones*, 473 A.2d at 435; *Burke*, 551 N.E.2d at 4.

¹⁷² See *University of Ariz. Health Sciences Ctr.*, 667 P.2d at 1300; *Ochs*, 445 A.2d at 885 (noting that to limit recovery for child-rearing expenses would be tantamount to carving out an exception to traditional tort principles based on public policy and such policy reasons cannot support such an exception because it would impair the exercise of a constitutionally protected right to use contraceptive measures to limit their family size); *Troppi*, 187 N.W.2d at 513.

¹⁷³ See *Jones*, 473 A.2d at 437; *Burke*, 551 N.E.2d at 5; *Troppi*, 187 N.W.2d at 518-19.

¹⁷⁴ See, e.g., *Troppi*, 187 N.W.2d at 518-19 (stating that the trier of fact must look at factors such as family size, family income, age of the parents and marital status in determining the extent to which the birth of a child represents a benefit to his parents).

¹⁷⁵ See, e.g., *University of Ariz. Health Sciences Ctr.*, 667 P.2d at 1300; *Jones*, 473 A.2d at 437 (claiming the offset benefits rule reduces speculation).

¹⁷⁶ See, e.g., *University of Ariz. Health Sciences Ctr.*, 667 P.2d at 1299-1300; *Jones*, 473 A.2d at 437; *Burke*, 551 N.E.2d at 5-6 (noting that when parents undergo a sterilization to avoid transmitting a genetic defect and a healthy child is born to them, the child provides more benefit to the parents than when the parents do so to conserve family resources).

An important component of the formula used by jurisdictions applying the offset benefits rule in calculating the benefits conferred in each case is the parents' motivation for seeking sterilization.¹⁷⁷ These courts reason that by looking at the motivation of the parents, the offset benefits view constitutes a better approach because it makes it easier to determine when a real injury exists and thus, separates the meritorious from frivolous claims.¹⁷⁸ Offset benefits jurisdictions, although in varying degrees, focus on the parents' motivation because, depending on those reasons, the parents might be injured or benefited.¹⁷⁹ For instance, some of these courts suggest that if a parent was sterilized in order to avoid the danger of a genetic defect, the birth of a healthy child would be a blessing and the jury could find that the parents were not injured.¹⁸⁰ Despite this strong suggestion, most jurisdictions applying the offset benefits rule do not specifically mention in their opinions which motivations were considered more likely to trigger compensation.¹⁸¹ These courts favor a totality of circumstances approach, where motivation is one of many factors to be considered by the trier of fact.¹⁸² According to these courts, this approach strives for justice in all cases rather than a strict rule which produces just results in some cases and unjust results in others.¹⁸³

Another reason advanced by the jurisdictions applying the offset benefits rule is that the courts' role in the judicial system is to examine problems logically and apply the relevant legal principles, not to impose the judges' view of morality.¹⁸⁴ These courts reason that creating a strict rule denying or allowing full recovery in wrongful conception cases is tantamount to forcing on society an individual judge's private view on the value of human life.¹⁸⁵ Furthermore, it would take away from the jury their role in considering the basic values of human

¹⁷⁷ See *infra* notes 222-326 and accompanying text.

¹⁷⁸ See *University of Ariz. Health Sciences Ctr.*, 667 P.2d at 1300 (responding to the criticism that the offset benefits view will permit damages where no real injury exists); *Jones*, 473 A.2d at 434.

¹⁷⁹ See *University of Ariz. Health Sciences Ctr.*, 667 P.2d at 1300; *Jones*, 473 A.2d at 436; *Burke*, 551 N.E.2d at 5.

¹⁸⁰ See *University of Ariz. Health Sciences Ctr.*, 667 P.2d at 1300.

¹⁸¹ See *Jones*, 473 A.2d at 437.

¹⁸² See *id.*

¹⁸³ See *University of Ariz. Health Sciences Ctr.*, 667 P.2d at 1298; *Troppi*, 187 N.W.2d at 518-19.

¹⁸⁴ See *University of Ariz. Health Sciences Ctr.*, 667 P.2d at 1298-99; *Troppi*, 187 N.W.2d at 513 (emphasizing that the resolution of the case requires no intrusion into the domain of moral philosophy; it only requires the application of settled common law principles).

¹⁸⁵ See *University of Ariz. Health Sciences Ctr.*, 667 P.2d at 1299.

life inherent in each situation.¹⁸⁶ According to these courts, it is of utmost importance that juries, not judges, consider these basic human values in calculating damages awards in wrongful conception cases because they represent a cross-section of the community and better reflect society's ethical views.¹⁸⁷

B. Criticisms of the Offset Benefits View

The majority of jurisdictions in the United States, however, do not agree with the offset benefits approach.¹⁸⁸ The biggest criticism stems from the application of the benefit rule as stated in the *Restatement (Second) of Torts*.¹⁸⁹ Judges and commentators advocating the limited recovery view argue that the benefits of having a child always outweigh the cost of raising them.¹⁹⁰ Thus, according to them, the correct application of the benefit rule would preclude compensation for child-rearing expenses.¹⁹¹

Full recovery jurisdictions, however, have interpreted the benefit rule differently.¹⁹² Their criticism of the offset benefits approach focuses on the "same interest limitation" of section 920, comment b of the *Restatement (Second) of Torts*.¹⁹³ This limitation requires that benefits of a particular interest be used to offset interest of the same kind.¹⁹⁴ In wrongful conception cases, the same interest limitation would mean using the non-pecuniary benefits conferred on the parents by the birth of the healthy child to offset the non-pecuniary damages

¹⁸⁶ See *id.*

¹⁸⁷ See *id.*

¹⁸⁸ See *supra* notes 100-14 and accompanying text.

¹⁸⁹ RESTATEMENT (SECOND) OF TORTS § 920 (1977). The Restatement (Second) of Torts § 920 provides "[w]hen a 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 it is equitable." *Id.*

¹⁹⁰ See *Johnson v. University Hosps.*, 540 N.E.2d 1370, 1373-74, 1378 (Ohio 1989). The *Johnson* court stated "[i]f the concept of benefit or offset were applied to actions for wrongful pregnancy, . . . benefits could be greater than damages, in which event someone could argue that the parents would owe something to the tortfeasors . . . [A] child should not be viewed as a piece of property." *Id.* at 1374 (citations omitted); see *University of Ariz. Health Sciences Ctr.*, 667 P.2d at 1301 (Gordon, J., concurring in part and dissenting in part).

¹⁹¹ See *University of Ariz. Health Sciences Ctr.*, 667 P.2d at 1301 (Gordon, J., concurring in part and dissenting in part).

¹⁹² See *supra* notes 115-33 and accompanying text.

¹⁹³ RESTATEMENT (SECOND) OF TORTS § 920 cmt. b (1977). The Restatement (Second) of Torts provides that "[d]amages resulting from an invasion of one interest are not diminished by showing that another interest has benefited." *Id.*

¹⁹⁴ See *id.*

and the pecuniary benefits to offset the pecuniary damages.¹⁹⁵ Therefore, the emotional benefits conferred on the parents should not be used to decrease the compensation for child-rearing expenses because these are two different interests.¹⁹⁶

These critics argue that most jurisdictions applying the offset benefits rule interpret this benefit rule too broadly and thus, unjustifiably reduce damages.¹⁹⁷ Some proponents of the offset benefits approach do not find these arguments persuasive because to them, the economic burdens and emotional distress of raising an unplanned child are inextricably related and are basically the same interest.¹⁹⁸ Other offset benefits supporters reason that since the rule is based on the notion of unjust enrichment, to strictly interpret the same interest limitation would allow unjust enrichment to occur in many cases.¹⁹⁹

Other arguments set forth by the critics of the offset benefits approach involve their assessment of public policy.²⁰⁰ They reason that because the most important function of an appellate court is to guide the common law according to public policy, courts should be extremely careful in calculating the damages in wrongful conception cases.²⁰¹ Since there are many differences in opinion and values involved in wrongful conception cases, judges must tread cautiously, keeping the goals of the legal system and justice foremost in their minds.²⁰² According to these critics, the offset benefits approach violates public policy in multiple ways.²⁰³ For example, these critics argue that it is impossible for a jury to place a price tag on the beneficial value of a child to his or her parents.²⁰⁴ As the court in *Johnson* stated, "we are not in the business of placing value on a smile or quantifying the negative impact of a temper tantrum. We cannot pretend to know

¹⁹⁵ See *Johnson*, 540 N.E.2d at 1374; *Marciniak v. Lundborg*, 450 N.W.2d 243, 248-49 (Wis. 1990).

¹⁹⁶ See *Johnson*, 540 N.E.2d at 1374; *Marciniak*, 450 N.W.2d at 248-49.

¹⁹⁷ See *Johnson*, 540 N.E.2d at 1374; *Marciniak*, 450 N.W.2d at 248-49; Garfinkle, *supra* note 4, at 827; Pallesen, *supra* note 162, at 370-71.

¹⁹⁸ See *University of Ariz. Health Sciences Ctr.*, 667 P.2d at 1300 n.4; *Troppi*, 187 N.W.2d at 518 (noting that since pregnancy and its attendant anxiety are inextricably related to child bearing, it would not be sound to separate those segments of damage from the economic costs of raising an unplanned child).

¹⁹⁹ See *University of Ariz. Health Sciences Ctr.*, 667 P.2d at 1300 n.4.

²⁰⁰ See *infra* notes 200-09 and accompanying text.

²⁰¹ See *University of Ariz. Health Sciences Ctr.*, 667 P.2d at 1301 (Gordon, J., concurring in part and dissenting in part).

²⁰² See *id.*

²⁰³ See *id.* at 1302.

²⁰⁴ See *Johnson*, 540 N.E.2d at 1378.

what the future may hold—and neither can or may a jury!”²⁰⁵ Another danger perceived by these critics is that the application of the benefit rule invites a trial over the emotional and psychological benefits and detriments received by the parents.²⁰⁶ This could result in the “unseemly spectacle of the parents’ attempting to show how slight or non-existent was the psychological benefit derived from the child in order to minimize the offset to their non-pecuniary benefits.”²⁰⁷ As to the meaning of the judgment itself, the critics argue that a judgment for the parents under the offset benefits approach suggests that the child is not worth the effort to raise him or her.²⁰⁸ Such result offends notions of public policy.²⁰⁹

The critics of the offset benefits approach also see analytical flaws in the way courts apply the benefits rule.²¹⁰ Critics find that offset benefits jurisdictions are disingenuous because even though they claim their approach is better—in that they are the ones who least deviate from traditional tort law principles—they fail to apply other tort principles such as a duty to mitigate damages.²¹¹ Other analytical flaws are seen in the actual calculation of the cost-benefit analysis.²¹² As one commentator has suggested, the benefits approach ignores the fact that the parents in a wrongful conception case already have done this cost-benefit analysis and for that reason—that the benefits did not outweigh the burdens—sought sterilization.²¹³

It is difficult to ascertain the real impact of all these criticisms because juries usually do not itemize their damage awards and it is nearly impossible to figure out how they arrived at their calculation in

²⁰⁵ *Id.*

²⁰⁶ See *Lovelace Med. Ctr.*, 805 P.2d at 613–14.

²⁰⁷ *Id.*

²⁰⁸ See *University of Ariz. Health Sciences Ctr.*, 667 P.2d at 1302 (Gordon, J., concurring in part and dissenting in part); *Szekeres v. Robinson*, 715 P.2d 1076, 1077 (Nev. 1986).

²⁰⁹ See *Burke*, 551 N.E.2d at 7 (O'Connor, J., dissenting).

²¹⁰ See Garfinkle, *supra* note 4, at 826–27.

²¹¹ See *University of Ariz. Health Sciences Ctr.*, 667 P.2d at 1303 (Gordon, J., concurring in part and dissenting in part) (noting that in the usual lawsuit if a plaintiff has failed to mitigate his or her damages, this fact is allowed as an offset against recovery). For information on the mitigation of damages in wrongful conception cases, see Norman H. Block, *Wrongful Birth: The Avoidance of Consequences Doctrine in Mitigation of Damages*, 53 *FORDHAM L. REV.* 1107 (1985).

²¹² See Garfinkle, *supra* note 4, at 826.

²¹³ See Garfinkle, *supra* note 4, at 826; see also *Marciniak*, 459 N.W.2d at 249 (rejecting the offset benefits view).

offsetting the burdens and benefits.²¹⁴ There is no reliable data to analyze the practical application of the offset benefits approach. Nevertheless, one important flaw that is often overlooked in analyzing the offset benefits approach has to do with the motivational analysis used by those jurisdictions. By giving weight to the reasons why the parents sought sterilization, the courts are implying that a person's right to contraception is legitimate only for certain reasons.²¹⁵ Furthermore, courts that consider motivation deny recovery to a certain group of parents, who despite being injured by a physician's negligence, sought sterilization for non-financial reasons.²¹⁶

III. DIFFERENT APPLICATIONS OF THE MOTIVATIONAL ANALYSIS IN OFFSET BENEFITS JURISDICTIONS

Jurisdictions following the offset benefits rule have not applied the motivational analysis uniformly in determining child-rearing damages.²¹⁷ Some jurisdictions consider the parents' motivation for seeking sterilization to be determinative of the outcome.²¹⁸ Other jurisdictions consider motivation as a factor to be considered by the jury when calculating child-rearing damages.²¹⁹ Only one court using the offset benefits approach has rejected the use of a motivational analysis in calculating child-rearing damages.²²⁰ That court, however, used the offset benefits analysis only for the claims dealing with emotional distress and pain and suffering, not child-rearing damages.²²¹

A. *Motivation as a Determinant—The Massachusetts Approach*

The Massachusetts Supreme Judicial Court first recognized a cause of action for wrongful conception in 1990.²²² Currently, Massachusetts is one of various jurisdictions espousing the offset benefits view when awarding compensation for child-rearing expenses.²²³ The

²¹⁴ See, e.g., *Jones*, 473 A.2d at 431 (noting that it cannot be ascertained from the jury's award of \$70,000 whether it included any money for child rearing costs or if the jury took into account the benefits conferred on the parents by the child).

²¹⁵ See *Lovlace Med. Ctr.*, 805 P.2d at 611.

²¹⁶ See *infra* notes 222–50 and accompanying text.

²¹⁷ See *infra* notes 222–326 and accompanying text.

²¹⁸ See *Burke v. Rivo*, 551 N.E.2d 1, 2 (Mass. 1990).

²¹⁹ See *University of Ariz. Health Sciences Ctr. v. Superior Ct.*, 667 P.2d 1294, 1300 (Ariz. 1983).

²²⁰ See *Lovlace Med. Ctr. v. Mendez*, 805 P.2d 603, 612 (N.M. 1991).

²²¹ See *id.* at 613–14.

²²² See *Burke*, 551 N.E.2d at 2.

²²³ See *id.* at 6.

Massachusetts approach, however, differs from that of the other offset benefits jurisdictions because the parents' motivation for seeking the sterilization determines the outcome.²²⁴

It was not until 1990, in *Burke v. Rivo*, that the Massachusetts Supreme Judicial Court directly addressed a claim for wrongful conception.²²⁵ In *Burke*, the court held that the parents of a healthy baby born after an unsuccessful sterilization procedure could recover damages for raising the child to adulthood.²²⁶ The *Burke* court, however, held that such damages should be offset by the benefits conferred on the parents by the birth of the child.²²⁷ The mother in *Burke* met with her physician to discuss her desire not to have any more children.²²⁸ She wanted to return to work, after having three children, because her family was experiencing financial difficulties.²²⁹ Her doctor suggested that she submit to a tubal ligation.²³⁰ Almost a year and a half after the tubal ligation, she became pregnant and gave birth to a healthy baby.²³¹ The question before the court dealt only with damages because the trial judge concluded that a doctor may properly be held liable if his performance of a sterilization procedure permits conception.²³²

The court relied on the case law of other jurisdictions to conclude that parents of a healthy child born as a result of a doctor's negligence could recover damages directly associated with the birth, including emotional distress.²³³ The recovery of such damages was, according to the court, supported by the fact that almost every jurisdiction in the United States permits these damages.²³⁴ The court held, however, that compensation for child-rearing expenses is allowed only when the parents' motivation for seeking sterilization is financial.²³⁵ The court reasoned that under normal tort and contract principles, child-rearing costs are reasonably foreseeable and are a natural consequence of the defendant's negligence.²³⁶ The court determined that

²²¹ See *id.* at 5-6.

²²² See generally *id.* at 1-8.

²²³ See *id.* at 6.

²²⁴ See *Burke*, 551 N.E.2d at 6.

²²⁵ See *id.* at 2.

²²⁶ See *id.*

²²⁷ See *id.*

²²⁸ See *id.*

²²⁹ See *Burke*, 551 N.E.2d at 2.

²³⁰ See *id.* at 3.

²³¹ See *id.*

²³² See *id.* at 5.

²³³ See *id.* at 4.

the plaintiffs should recover child-rearing costs without regard to public policy reasons (such as the psychological effect on the child when she finds out she was unwanted) or that child-rearing damages are too speculative.²³⁷ The court, however, implied that public policy considerations would limit the recovery of child-rearing expenses when the motivations behind the sterilization are non-financial.²³⁸ According to the court, the birth of a child is not always a net benefit; this is particularly true when parents undergo a sterilization procedure because they can not afford to raise another child.²³⁹ On the other hand, when the reasons behind sterilization are eugenic (to avoid a genetic defect) or therapeutic (to protect the mother's health), the court explained that the birth of a healthy infant is a net benefit because the child was not expected to be healthy.²⁴⁰

The *Burke* dissent advocated the limited recovery rule where plaintiffs may recover immediate costs but not child-rearing expenses.²⁴¹ The dissenting justices reasoned that it would be improper to allow recovery for child-rearing damages because a medical malpractice action for wrongful conception involves the creation of human life and is thus very different from most medical malpractice actions.²⁴² According to the dissent, awarding child-rearing damages leads to improper inquiries into the value of a child to his or her parents.²⁴³ Furthermore, the policy of Massachusetts is to strengthen and encourage family life for the protection of children.²⁴⁴ The dissenting justices argued that the majority's holding contradicted such public policy.²⁴⁵ They also criticized the majority's assumption that parents elected sterilization for one of three reasons: (1) economic; (2) eugenic; or (3) therapeutic.²⁴⁶ The dissent noted that parents may desire sterilization for a combination of reasons not discussed by the majority.²⁴⁷

In Massachusetts, the parents' motivation for seeking sterilization determines whether the parents will be compensated for child-rearing

²³⁷ See *Burke*, 551 N.E.2d at 4-5.

²³⁸ See *id.* at 5-6.

²³⁹ See *id.*

²⁴⁰ See *id.*

²⁴¹ See *id.* at 6 (O'Connor, J., dissenting).

²⁴² See *Burke*, 552 N.E.2d at 6 (O'Connor, J., dissenting).

²⁴³ See *id.* at 7.

²⁴⁴ See *id.*

²⁴⁵ See *id.*

²⁴⁶ See *id.* at 7 n.1.

²⁴⁷ See *Burke*, 551 N.E.2d at 7 n.1 (O'Connor, J., dissenting).

expenses.²⁴⁸ If parents seek sterilization for financial reasons, they will be able to recover child-rearing expenses, subject to an offset benefit analysis.²⁴⁹ On the other hand, if the parents' reasons for undergoing sterilization are not related to financial considerations, they may not recover child-rearing expenses.²⁵⁰

B. *Motivation Is an Implied Consideration in the Decision—The Connecticut Approach*

Other jurisdictions have used motivation as an implied factor in deciding whether child-rearing damages are appropriate.²⁵¹ For example, in 1982, the Supreme Court of Connecticut, in *Ochs v. Borrelli*, held that the parents of a child conceived after an unsuccessful sterilization procedure may recover child-rearing expenses offset by the benefits conferred on them by the child.²⁵² In *Ochs*, a mother of two submitted to a tubal ligation and over a year later, she gave birth to a child.²⁵³ She and her husband sought damages from their doctor for the immediate medical expenses relating to the sterilization and the pregnancy, as well as for the pain and suffering associated with the unplanned pregnancy.²⁵⁴ In addition, she sought compensation for the costs relating to raising her child until the age of majority.²⁵⁵ The trial court instructed the jury to compensate her for all such damages including child-rearing expenses if they found the doctor negligent.²⁵⁶

²⁴⁸ See *id.* at 6.

²⁴⁹ See *id.*

²⁵⁰ See *id.* at 5-6.

²⁵¹ See *Ochs v. Borrelli*, 445 A.2d 883, 884 (Conn. 1982).

²⁵² See *id.* at 885. In *Ochs*, the child was born with orthopedic defects unlike children in other wrongful conception cases who are healthy. See *id.* at 884.

²⁵³ See *id.* at 883-84.

²⁵⁴ See *id.* at 884.

²⁵⁵ See *id.*

²⁵⁶ See *Ochs*, 445 A.2d at 884 n.3. The trial judge instructed:

Where the negligence of the defendant is proven, the law allows plaintiff to recover for the past and anticipated expenses of rearing the unplanned-for child, the rationale being that the new arrival should not deprive the other members of the family of what was planned as their just share of the family income [I]n considering this claim of damages, any child-rearing expenses must be reduced by the value of the benefits conferred on the parents by having an raising the child. Such benefits may be the satisfaction, the fun, the joy, the companionship, and the like, which the plaintiffs as parents have had and will have in the rearing of the child and which make economic expenses worthwhile.

The jury returned a verdict for plaintiffs awarding damages for medical expenses, pain and suffering and child-rearing expenses.²⁵⁷ On appeal, the doctor admitted to negligence but appealed the award of child-rearing expenses on policy grounds.²⁵⁸ The doctor argued that public policy considerations dictate that the birth of a child is always a blessing and that this benefit, as a matter of law, offsets any financial burdens the parents might experience.²⁵⁹

The Supreme Court of Connecticut affirmed the jury's verdict.²⁶⁰ The *Ochs* court reasoned that it does not contradict public policy to allow financial compensation for the birth of an unplanned child.²⁶¹ According to the *Ochs* court, recognizing that there are substantial costs involved in raising a child does not refute the notion that there are also joys involved.²⁶² As such, some compensation for child-rearing expenses is necessary because the parental pleasures do not eradicate the economic reality of the parents.²⁶³ The court also reasoned that a *per se* rule dictating that costs always outweigh the benefits would not be desirable because such determination would vary depending on the facts of each case.²⁶⁴ The court thought that using the offset benefits approach would permit a more effective and equitable case-by-case determination.²⁶⁵ The *Ochs* court did not consider the weighing of non-economic factors against the monetary damages as impermissibly speculative because such computations and value judgments also are made in other tort cases, such as wrongful death.²⁶⁶ Therefore, the court applied the same interest limitation of the *Restatement (Second) of Torts* broadly by allowing non-pecuniary interests to offset the economic injury suffered by the parents.²⁶⁷

Although the *Ochs* court did not expressly indicate in its opinion whether the parents' motivation for seeking sterilization should be considered when awarding child-rearing expenses, it implied that it could be a consideration in determining whether the birth of the

²⁵⁷ See *id.* at 884.

²⁵⁸ See *id.*

²⁵⁹ See *id.*

²⁶⁰ See *id.*

²⁶¹ See *Ochs*, 445 A.2d at 885.

²⁶² See *id.*

²⁶³ See *id.* at 885-86.

²⁶⁴ See *id.* at 886.

²⁶⁵ See *id.*

²⁶⁶ See *Ochs*, 445 A.2d at 885-86.

²⁶⁷ See *id.* at 884 n.3, 886 (stating that the total costs of child rearing were not imposed on the physician because the non-pecuniary benefits of the satisfaction, fun and companionship of raising the child were used to offset the economic costs of child-rearing).

child was a net benefit.²⁶⁸ The *Ochs* court paid a lot of attention to the mother's considerations for undergoing a tubal ligation.²⁶⁹ The mother in *Ochs* had two other children who were born with mild orthopedic defects and she had a history of miscarriage and ovarian surgery.²⁷⁰ The court did not make an issue of the fact that the newborn child was not perfectly healthy because the doctor accepted responsibility for paying for the child's orthopedic expenses.²⁷¹ The court therefore considered that the mother, knowing about her family's genetic history and her own health problems, had sought to avoid having more children by becoming sterilized.²⁷² The *Ochs* court did not object to the consideration of these facts by the jury.²⁷³ Thus, the parents' motivation was an implied factor used by the jury in awarding child-rearing expenses.²⁷⁴

C. Motivation Is an Expressed Factor—The Maryland Approach

Maryland is one of at least two jurisdictions using motivation as a factor in the consideration of child-rearing damages.²⁷⁵ In 1984, the Court of Appeals of Maryland, in *Jones v. Malinowski*, used the offset benefits theory when it decided that a jury could award damages for child-rearing expenses reduced by the value of the benefits conferred upon the parents by the birth of the child.²⁷⁶ *Jones* dealt with a couple's suit against their physician for negligently performing a tubal laparoscopy which resulted in the birth of a healthy child.²⁷⁷ The parents wanted to avoid conceiving more children because they had limited financial means and their three other children suffered from various diseases.²⁷⁸ Furthermore, all of Mrs. Malinowski's pregnancies and deliveries had been traumatic experiences.²⁷⁹ Her first pregnancy resulted in a breech birth, her second child was born with a brain dis-

²⁶⁸ See *id.* at 885-86.

²⁶⁹ See *id.* at 883-84.

²⁷⁰ See *id.*

²⁷¹ See *Ochs*, 445 A.2d at 884 n.2.

²⁷² See *id.* at 883-84.

²⁷³ See *id.*

²⁷⁴ See *id.* at 883-84.

²⁷⁵ See *Jones v. Malinowski*, 473 A.2d 429, 437 (Md. 1984).

²⁷⁶ See *id.*

²⁷⁷ See *id.* at 430.

²⁷⁸ See *id.* In *Jones*, the plaintiff had one child with a brain disease and another with heart disease. See *id.*

²⁷⁹ See *id.*

ease and her third child nearly died at birth and suffered from heart problems.²⁸⁰

In *Jones*, the trial judge instructed the jury that it could consider child-rearing expenses as an element of damages because "persons have the right to limit the size of their family for whatever reason, be it for health or socio-economic reasons."²⁸¹ The trial judge also instructed the jury to consider the "value conferred upon [the parents] in having a healthy child, such as the child's aid, comfort and society during the parents' life expectancy."²⁸² The jury, in finding the doctor negligent, awarded the parents \$70,000 in total damages.²⁸³ The jury's verdict, however, does not itemize the amounts for each type of damages claim it awards.²⁸⁴ Thus, it is impossible to determine if any of it included child-rearing costs and if it did, whether any benefits were taken into account.²⁸⁵

The *Jones* court, in upholding the jury's verdict and the trial judge's damages theory, found that a plaintiff in Maryland may recover for all the natural, direct and proximate consequences of the tortious act.²⁸⁶ In addition, the court found that the benefits rule also had been applied in other civil actions in Maryland.²⁸⁷ Thus, the court reasoned that parents should be able to recover for the consequences of the negligent sterilization, including child-rearing expenses, because to preclude such recovery would be at odds with traditional tort doctrine.²⁸⁸ These costs, however, should be offset by the benefits conferred on the parents in order to permit the verdict to be based upon the facts of the specific case eliminating speculative damages.²⁸⁹

The *Jones* court used the motivational analysis as a means of determining if there was any injury to the parents.²⁹⁰ The court reasoned that an appropriate assessment of damages can be made by focusing on the reasons the parents sought sterilization.²⁹¹ If the physician's negligence impaired the interest the parents sought to

²⁸⁰ See *Jones*, 473 A.2d at 430.

²⁸¹ See *id.* at 431.

²⁸² *Id.*

²⁸³ See *id.*

²⁸⁴ See *id.*

²⁸⁵ See *Jones*, 473 A.2d at 431.

²⁸⁶ See *id.* at 435.

²⁸⁷ See *id.* (citing *Levi v. Schwartz*, 95 A.2d 322 (1953)).

²⁸⁸ See *id.* at 435.

²⁸⁹ See *id.* at 437.

²⁹⁰ See *Jones*, 473 A.2d at 436.

²⁹¹ See *id.*

protect by the sterilization, then child-rearing damages can be compensable.²⁹² In this way, the *Jones* court made motivation a factor to be taken into account when awarding child-rearing damages.²⁹³ The *Jones* court, however, did not make motivation a determinative factor because persons have the right to limit the size of their family for whatever reasons.²⁹⁴

D. Motivation Is Not a Factor—The New Mexico Approach

One jurisdiction has expressly rejected the use of motivation as a consideration for determining compensation for child-rearing expenses.²⁹⁵ In 1991, the Supreme Court of New Mexico, in *Lovelace Medical Center v. Mendez*, held that the parents of a normal, healthy child conceived as a result of a negligently performed sterilization procedure can recover the costs of raising the child from birth to adulthood.²⁹⁶ The *Lovelace* court, however, held that damages for emotional distress in this type of action were not compensable.²⁹⁷ In *Lovelace*, a mother, after having two children, decided to undergo a tubal ligation in order to limit the size of her family.²⁹⁸ The mother and her husband could not afford to raise another child.²⁹⁹ The doctor who performed the procedure, an employee of Lovelace Medical Center, only ligated one of the mother's fallopian tubes.³⁰⁰ Moreover, the doctor failed to inform her that only one of her tubes had been ligated and that therefore, she was not sterile and must continue to use birth control measures.³⁰¹ Because the mother was unaware of her continued fertility, she took no precautions and became pregnant.³⁰² She gave birth to a healthy child and instituted the malpractice action against the hospital.³⁰³

The *Lovelace* court reasoned that the parents had suffered injuries for which they must be compensated.³⁰⁴ According to the court,

²⁹² See *id.*

²⁹³ See *id.*

²⁹⁴ See *id.* at 437 n.5.

²⁹⁵ See *Lovelace Med. Ctr.*, 805 P.2d at 612.

²⁹⁶ See *id.* at 612.

²⁹⁷ See *id.* at 614.

²⁹⁸ See *id.* at app. 615.

²⁹⁹ See *id.*

³⁰⁰ See *Lovelace Med. Ctr.*, 805 P.2d at app. 615.

³⁰¹ See *id.*

³⁰² See *id.*

³⁰³ See *id.*

³⁰⁴ See *id.* at 609.

the injury was not, as some other courts have characterized it, the wrongful act of the doctor or the birth of the child.³⁰⁵ Instead, the parents were injured by the invasion of their interest to their family's financial stability and the invasion to their interest in family planning.³⁰⁶ The *Lovelace* court reasoned that financial compensation in the form of child-rearing expenses is the appropriate method to address the parents' financial injury because it was the doctor's negligence that caused them to incur those child-rearing costs which they originally sought to avoid.³⁰⁷ The *Lovelace* court further reasoned that an offset benefits analysis as to this financial injury only should consider financial benefits in offsetting the financial costs of raising the child.³⁰⁸ According to the court, this is appropriate because the rule as stated in the *Restatement of Torts* only allows interests of the same kind to be offset.³⁰⁹ Thus, the court explained that the costs of raising the child should not be mitigated by the emotional benefits conferred on the parents by the birth of a healthy child.³¹⁰ Additionally, the court explained that parents' motivation for undergoing a sterilization procedure should not be used to prevent compensation for child-rearing expenses.³¹¹ According to the *Lovelace* court, a person's motivation for sterilization should not be conclusive as to whether an economic injury has occurred.³¹²

The *Lovelace* court also reasoned that, as a result of the doctor's negligence, the parents' constitutionally protected right to contraception and family planning was violated.³¹³ The *Lovelace* court found that there were non-pecuniary harms, such as diminution of attention to their other children and emotional distress suffered by the parents, as a result of this injury to their right to family planning.³¹⁴ Although the court thought that submitting those non-pecuniary injuries to an offset benefits analysis would be proper in theory, it would result in the "unseemly spectacle of the parents' attempting to prove how slight or nonexistent was the psychological benefit derived from the birth of

³⁰⁵ See *Lovelace Med. Ctr.*, 805 P.2d at 609.

³⁰⁶ See *id.* at 609, 613.

³⁰⁷ See *id.* at 610, 612.

³⁰⁸ See *id.* at app. 620.

³⁰⁹ See *id.*

³¹⁰ See *Lovelace Med. Ctr.*, 805 P.2d at 614.

³¹¹ See *id.* at 612.

³¹² See *id.*

³¹³ See *id.* at 612-13.

³¹⁴ See *id.* at 613.

their child."³¹⁵ According to the *Lovelace* court, disputes regarding the emotional benefits and emotional injuries suffered by parents are not to be litigated because they are contrary to the public policy of protecting the emotional well-being of children.³¹⁶ Therefore, because the emotional benefits and harms could not be weighed against each other, the parents should not be able to recover for emotional distress and other non-pecuniary harms that were the result of the birth of a child.³¹⁷ Following this reasoning, the *Lovelace* court emphasized that in performing the offset benefits analysis, the same interest limitation of the *Restatement* should be applied narrowly.³¹⁸ Thus, the benefit from having a healthy child does not mitigate or offset the financial costs of child-rearing as they are different types of interests.³¹⁹

The New Mexico approach to wrongful conception does not take into account the parents' motivation for undergoing a sterilization procedure.³²⁰ According to the *Lovelace* court, a person's original reason for undergoing sterilization is not conclusive as to whether the parents' interest in their family's financial security was injured.³²¹ The *Lovelace* court provided an example where a professional woman sought sterilization for non-financial reasons.³²² If the sterilization is performed negligently and she later becomes pregnant, her financial prospects might change abruptly.³²³ Therefore, the professional woman would be injured financially despite her original motivation.³²⁴ The *Lovelace* court also noted that, as a practical matter, it would be very difficult for the jury to identify the parents' motivation.³²⁵ Moreover, using a motivational analysis would encourage "after-the-fact reformulation of the parents' actual intentions."³²⁶

³¹⁵ See *Lovelace Med. Ctr.*, 805 P.2d at 613.

³¹⁶ See *id.*

³¹⁷ See *id.* at 614. The *Lovelace* court, however, allowed the other non-pecuniary harms to be compensated such as pain and suffering associated with the pregnancy and labor. See *id.* at 609. The court did not allow the emotional harms associated with the new presence of the child in the parents' lives to be compensated. See *id.* at 614.

³¹⁸ See *id.*

³¹⁹ See *id.*

³²⁰ See *Lovelace Med. Ctr.*, 805 P.2d at 612.

³²¹ See *id.*

³²² See *id.*

³²³ See *id.*

³²⁴ See *id.*

³²⁵ See *Lovelace Med. Ctr.*, 805 P.2d at 612.

³²⁶ *Id.*

IV. EVALUATION OF THE MOTIVATIONAL ANALYSIS

The advantages proposed by the supporters of the motivational analysis are flawed. Those who propose the use of motivation in the assessment of child-rearing expenses claim that such analysis is necessary to avoid considering the child as the injury.³²⁷ According to these critics, under the traditional tort analysis requiring duty, breach of duty, proximate cause and injury, the unwanted child is viewed as the injury.³²⁸ As was discussed in Part III, this child-as-injury approach is what troubles most jurisdictions denying recovery for child-rearing expenses.³²⁹ This child-as-injury view, however, is not an appropriate articulation of the situation in wrongful conception cases.³³⁰ Parents do not complain because of the existence of a healthy child in their lives.³³¹ Instead, parents are injured because they were not anticipating the expenses associated with rearing a child whose birth was a result of negligent medical care.³³²

Compensation for child-rearing expenses is not for the unwanted child but "to replenish the family exchequer so that the new arrival will not deprive other members of the family [including the new child] . . . of their just share of the family income."³³³ Essentially, parents are injured because they rely on a doctor to perform a non-negligent sterilization and that was not the result.³³⁴ One court described the injury as the mother's continued fertility despite her desire and effort to be sterilized.³³⁵ It is difficult to see how the parents'

³²⁷ See Milsteen, *supra* note 164, at 1170, 1197; Pallesen *supra* note 163, at 375.

³²⁸ See Milsteen, *supra* note 164, at 1197.

³²⁹ See *supra* notes 84-114 and accompanying text.

³³⁰ See *Ochs v. Borrelli*, 445 A.2d 883, 885-86 (Conn. 1982).

³³¹ See *Custodio v. Bauer*, 59 Cal. Rptr. 463, 477 (Ct. App. 1967); *Ochs*, 445 A.2d at 885-86 (stating that the parents love for the child should not become a reason for denying them compensation for child rearing expenses).

³³² See *Custodio*, 59 Cal. Rptr. at 476-77; *Ochs*, 445 A.2d at 885.

³³³ *Custodio*, 59 Cal. Rptr. at 477.

³³⁴ See *Lovelace Med. Ctr. v. Mendez*, 805 P.2d 603, 609 (N.M. 1991).

³³⁵ See *id.* It is important to note that the birth of a child after a sterilization procedure is not per se evidence of negligence. See Podewils, *supra* note 3, at 410. Sterilization procedures are not fool proof. See *id.* The cases discussed in this note and most wrongful conception cases are cases where negligence has been proven otherwise, negligence has been admitted by the doctor or has been assumed by the court for purposes of the appeal. Moreover, in medical malpractice actions doctors are held to the standard of care in the community. See *id.* Therefore, negligence would not be proven by showing that a baby was born but by showing that the doctor did not follow standard procedure of those in his profession and community. See Moore, *supra* note 3, at 1329-30 (noting that negligence in the actual performance of the operation is very difficult to discover and prove); Podewils,

motivation for sterilization would help this analysis. Regardless of whether the parents seek sterilization for health, social or financial reasons, they are injured by the doctor in that they are the subjects of a negligent medical procedure. Motivation has nothing to do with the injury involved in wrongful conception cases, much less with seeking compensation for child-rearing expenses.

Proponents of the motivational analysis also suggest that considering the parents' motivation is helpful because it makes clear to what extent the parents were injured.³³⁶ According to proponents, motivation reveals the interests the parents sought to protect when they decided to undergo a sterilization procedure.³³⁷ By ascertaining these interests, the court is better able to determine whether those interests were injured by the subsequent birth of the child.³³⁸ Therefore, they reason that a motivational analysis helps to distinguish between plaintiffs who have and those who have not suffered real injury.³³⁹

This motivational analysis is flawed because injury occurs only if those precise interests were damaged.³⁴⁰ For example, in a motivational analysis where a parent is sterilized in order to avoid passing on a genetic defect, the jury could easily find that the birth of a healthy child was a blessing rather than a damage.³⁴¹ This would be the result, even though the physician was negligent and the parents were unprepared for the pregnancy.³⁴² The motivational analysis reveals that since the parents sought sterilization to avoid a genetic defect and such eugenic interest was not infringed upon by the birth of a healthy child, the parents were not injured.³⁴³

supra note 3, at 409-11 (discussing ways in which doctors may be negligent in wrongful conception cases and what is needed to prove it).

³³⁶ See *Jones v. Malinowski*, 473 A.2d 429, 435-36 (Md. 1984); Milsteen, *supra* note 164, at 1170, 1189 (arguing that only after evidence of the parents' motivation is discovered may the court properly determine the interests involved and thus, award specific damages for the injury to those interests); Pallesen, *supra* note 162, at 371, 375.

³³⁷ See *University of Ariz. Health Sciences Ctr. v. Superior Ct.*, 667 P.2d 1294, 1300 (Ariz. 1983); *Jones*, 473 A.2d at 434.

³³⁸ See *University of Ariz. Health Sciences Ctr.*, 667 P.2d at 1300; *Jones*, 473 A.2d at 434. Various interests mentioned in court opinions and commentaries are therapeutic (mother's health or child's health), eugenic (avoidance of a genetic defect), socioeconomic (career or lifestyle) and financial. See Milsteen, *supra* note 164, at 1190-97.

³³⁹ See *University of Ariz. Health Sciences Ctr.*, 667 P.2d at 1300; *Jones*, 473 A.2d at 434.

³⁴⁰ See *Jones*, 473 A.2d at 434.

³⁴¹ See *University of Ariz. Health Sciences Ctr.*, 667 P.2d at 1300.

³⁴² See *id.*

³⁴³ See *id.* For further discussion as to how the motivational analysis would evaluate the outcome of various hypothetical cases, see Milsteen, *supra* note 164, at 1190-97 and Pallesen, *supra* note 162, at 376-79.

Some commentators claim that a motivational analysis is particularly helpful to offset benefits jurisdictions because it provides a more effective way to apply the same interest limitation of the benefits rule.³⁴⁴ According to these commentators, a motivational analysis leads to a better application of the benefits rule because, by specifically identifying the interests involved, the judge and the jury can discern any benefits to those interests in order to offset any damages caused to those interests.³⁴⁵ This analysis requires accepting the theory discussed above—that the injury in wrongful conception cases is the damage to the interests the parents sought to protect by submitting to the sterilization.³⁴⁶ As discussed above, it is reasonable to conclude that the injury has nothing to do with the particular motivation of the parents.

Even if one subscribes to such a theory, however, one can still see that a motivational analysis is not necessary to a proper application of the same interest limitation. The purpose of the same interest limitation is to offset benefits of the same kind with damages of the same kind.³⁴⁷ For example, if A tortiously imprisons B and B brings an action for false imprisonment claiming damages for pain, humiliation and physical harm, A cannot offset those damages by claiming that B obtained large sums of money by selling the story to newspapers.³⁴⁸ The financial benefits received by B from the false imprisonment—income from selling the story—is not an interest of the same kind as the pain, humiliation and physical harm suffered by B during the incident.³⁴⁹ Therefore, the same interest limitation as provided for in the *Restatement of Torts* has nothing to do with a person's motivation to perform a specific act.³⁵⁰ As demonstrated in the example above, the same interest limitation could be applied without looking at the person's motivation.³⁵¹ This is, in fact, what some offset benefits jurisdictions have done.³⁵² These courts have assessed the benefits to be offset, not by looking at the parents' motivation, but by looking at a

³⁴⁴ See Milsteen, *supra* note 164, at 1189–90, 1197; Pallesen, *supra* note 163, at 371.

³⁴⁵ See Milsteen, *supra* note 164, at 1197 (arguing that the benefit rule should be applied to offset any recoverable damages with any benefits conferred upon the interest that plaintiff sought to protect); Pallesen, *supra* note 162, at 379.

³⁴⁶ See Milsteen, *supra* note 164, at 1189, 1197; Pallesen, *supra* note 162, at 371, 379.

³⁴⁷ See *RESTATEMENT (SECOND) OF TORTS* § 920, cmt. (b) (1977).

³⁴⁸ See *id.* at § 920 cmt. b, illus. 6.

³⁴⁹ See *id.*

³⁵⁰ See *id.*

³⁵¹ See *id.*

³⁵² See *University of Ariz. Health Sciences Ctr.*, 667 P.2d at 1300; *Jones*, 473 A.2d at 436–37.

variety of factors such as family size, parents' age, income, etc.³⁵³ Most offset benefits jurisdictions have used a motivational analysis primarily for the purpose of identifying the injury and minimizing the danger of compensating plaintiffs when no real injury exists.³⁵⁴ They have not used the motivational analysis to perform the actual offset benefits calculation.³⁵⁵ The reality is that the use of a motivational analysis coupled with the same interest limitation would severely restrict the flexibility the offset benefits approach is striving to accomplish in the first place.

The motivational analysis also has some inherent weaknesses in its application. First, there are practical difficulties in determining the precise motivation behind the parents' decision not to have any more children.³⁵⁶ Second, the fact that the plaintiffs now have to prove motivation creates another hurdle to recovery even though it is already extremely difficult to prove liability in wrongful conception cases.³⁵⁷ In addition, compensating parents that seek sterilization for particular reasons discriminates against parents who were victims of the same type of negligence but who sought sterilization for other reasons.³⁵⁸ Finally, distinctions based on motivation may infringe on constitutionally protected rights to contraception and family planning.³⁵⁹

A problem presented by this motivational analysis is the practical difficulty in determining the motivation for undergoing the sterilization procedure.³⁶⁰ Couples may decide to limit the size of their families for multiple reasons.³⁶¹ This is particularly troublesome for jurisdictions that use motivation as the absolute determinant of the injury because it is unclear how the injury would be determined if a couple sought sterilization for a combination of reasons.³⁶² Jurisdictions that

³⁵³ See *University of Ariz. Health Sciences Ctr.*, 667 P.2d at 1300; *Jones*, 473 A.2d at 436-37.

³⁵⁴ See *University of Ariz. Health Sciences Ctr.*, 667 P.2d at 1300 (motivation used to minimize danger of compensating plaintiffs when no real injury exists); *Jones*, 473 A.2d at 436 (motivation used to identify injury); *Burke v. Rivo*, 551 N.E.2d 1, 5 (Mass. 1990) (motivation used to determine if injury existed); *Troppi v. Scarf*, 187 N.W.2d 511, 518 (Mich. Ct. App. 1971) (motivation or purpose of contraception used to identify injury).

³⁵⁵ See *University of Ariz. Health Sciences Ctr.*, 667 P.2d at 1300; *Jones*, 473 A.2d at 436; *Burke*, 551 N.E.2d at 5; *Troppi*, 187 N.W.2d at 518.

³⁵⁶ See *infra* notes 360-70 and accompanying text.

³⁵⁷ See *infra* notes 371-76 and accompanying text.

³⁵⁸ See *infra* notes 377-82 and accompanying text.

³⁵⁹ See *infra* notes 383-89 and accompanying text.

³⁶⁰ See Garfinkle, *supra* note 4, at 828; Milsteen, *supra* note 164, at 1196-97 (noting that although the motivational analysis discussed therein neatly segregated the motivations, they usually overlap); Pallesen, *supra* note 162, at 375.

³⁶¹ See *Troppi*, 187 N.W.2d at 518.

³⁶² See *Burke*, 551 N.E.2d at 5-6 (allowing recovery for financial motivations only).

use motivation as merely one factor would still face problems because it would become extremely difficult to discern if any real injury occurred—the alleged purpose of the motivational analysis.³⁶³

The Michigan Court of Appeals in *Troppi v. Scarf*, acknowledged that persons seek contraception or sterilization for a variety of reasons—financial, career flexibility or health.³⁶⁴ The *Troppi* court, however, did not perceive any problem with the variety of motivations.³⁶⁵ Instead, the variety of motivations justified a flexible approach like the benefits rule.³⁶⁶ Yet, courts that have applied the offset benefits approach modeled after *Troppi* have used motivation to provide a more static compensation rule; they have not used it for flexibility reasons.³⁶⁷ Most courts applying the offset benefits rule have not addressed directly the practical problems presented when a couple seeks sterilization for multiple reasons.³⁶⁸ This leaves unresolved the situation encountered when simultaneous motivations dictate different results as to compensation of child-rearing expenses.³⁶⁹ Although one commentator has proposed a hybrid motivational analysis in order to address those situations, such approach likely would undermine the purpose of the motivational analysis—providing a more accurate and sensible way of determining damages.³⁷⁰ Furthermore, a hybrid motivational analysis likely would complicate further the current application of the offset benefits rule.

The use of parents' motivation for undergoing a sterilization procedure as a requisite for compensation for child-rearing expenses

³⁶³ See *Lovlace Med. Ctr.*, 805 P.2d at 612 (noting that the motivational rule poses a difficult task for the jury in sorting out the parents' differing motivations and encourages after the fact reformulations of the parents' intentions).

³⁶⁴ See *Troppi*, 187 N.W.2d at 518; see also *supra* note 165.

³⁶⁵ See *id.* at 518–19.

³⁶⁶ See *id.*

³⁶⁷ See *University of Ariz. Health Sciences Ctr.*, 667 P.2d at 1300; *Jones*, 473 A.2d at 436; *Burke*, 551 N.E.2d at 5.

³⁶⁸ See *University of Ariz. Health Sciences Ctr.*, 667 P.2d at 1300; *Jones*, 473 A.2d at 436; *Burke*, 551 N.E.2d at 5.

³⁶⁹ For example, most of the literature seems to suggest that those parents who seek sterilization for eugenic reasons are blessed rather than injured when a healthy child is born. It is not difficult to imagine a situation where parents seek sterilization both for financial reasons and fear of transmitting a genetic disease to their offspring. The financial motivation would seem to dictate recovery for child rearing expenses and the eugenic motivation would seem to dictate no recovery for child rearing expenses. The current motivational analysis does not provide a clear solution to this situation.

³⁷⁰ See Milsteen, *supra* note 164, at 1197. Milsteen did not discuss how such a hybrid motivational analysis would work probably, the analysis would be extremely complicated for juries to apply. See *id.*

or even as a factor in the calculation of damages creates another barrier to recovery.³⁷¹ It is already extremely difficult to prove negligence in wrongful conception cases.³⁷² Adding the parents' motivation as an element unjustifiably would continue to make it harder for plaintiffs to prove their case.³⁷³ Under a motivational analysis, parents not only have to prove the elements of medical malpractice and negligence but they have the burden to prove their motivation for seeking sterilization in order to be compensated for child-rearing expenses.³⁷⁴ Other tort actions or even medical malpractice actions do not engage in a similar motivational analysis. The inquiry into a motivational analysis represents another deviation from traditional tort doctrine in order to artificially discount the damages.³⁷⁵ This does not correspond with the principle which drives offset benefits jurisdictions—that a wrongdoer is accountable for all damages that may have been caused by the tortious misconduct of a defendant.³⁷⁶

The parents' motivation for undergoing a sterilization procedure should not be used as the line to determine if they should be compensated for child-rearing expenses.³⁷⁷ This motivational analysis will not always produce the most equitable results.³⁷⁸ If parents with financial motivations are the only ones able to recover child-rearing expenses, the analysis would inherently discriminate against those parents who wish to limit their family size for perfectly legitimate reasons such as preventing a disease or career choices.³⁷⁹ Parents who seek sterilization for non-financial reasons similarly would be injured by the physician's negligence and also suffer the consequences of having to support an additional child.³⁸⁰ Furthermore, such a strong ver-

³⁷¹ See Garfinkle, *supra* note 4, at 828 (noting that the requirement that plaintiffs prove that they chose sterilization for financial reasons is a very difficult burden to meet); Jerram, *supra* note 79, at 1663.

³⁷² See Moore, *supra* note 3, at 1313; Podewils, *supra* note 3, at 409-11.

³⁷³ See Moore, *supra* note 3, at 1313; Podewils, *supra* note 3, at 409-11.

³⁷⁴ See *Burke*, 551 N.E.2d at 6; Garfinkle, *supra* note 4, at 828; Jerram, *supra* note 79, at 1663.

³⁷⁵ See Podewils, *supra* note 3, at 424-25.

³⁷⁶ See *University of Ariz. Health Sciences Ctr.*, 667 P.2d at 1300; *Jones*, 473 A.2d at 435.

³⁷⁷ See *Lovlace Med. Ctr.*, 805 P.2d at 612.

³⁷⁸ See O'Shea, *supra* note 80, at 986-89. This article proposes a "reason for reliance" approach as the most equitable framework. See *id.* Such analysis however is redundant because the reason for reliance in the physician's words or assurances is already taken into account when proving the breach of duty prong of negligence analysis. See *id.* at 986-89; see also Milsteen, *supra* note 164, at 1190-97; Pallesen, *supra* note 162, at 376-79 (providing examples of outcomes with different motivational contexts).

³⁷⁹ See *Lovlace Med. Ctr.*, 805 P.2d at 612.

³⁸⁰ See *id.*

sion of the motivational analysis seems to disregard the fact that although the parents' original intention was non-financial, they might face financial hardship later when the child is born.³⁸¹ Most importantly, however, is the fact that despite a different motivation, parents wanted to avoid the costs of child-rearing since by choosing sterilization they had decided not to have any more children.³⁸²

Motivation should not be a factor when considering awards for child-rearing expenses because consideration of motivation may infringe on the constitutionally protected rights to contraception and family planning.³⁸³ Regardless of motivation, a couple has a constitutional right to procreative autonomy.³⁸⁴ This interest in limiting family size was frustrated originally by a doctor's negligence.³⁸⁵ In fact, courts and commentators justify the recovery of child-rearing expenses because a doctor's negligence violates these rights.³⁸⁶ To employ a motivational analysis in assessing child-rearing damages is tantamount to disregarding a couple's constitutionally protected rights.³⁸⁷ The parents are deprived of their right to family planning and contraception regardless of their motivation for seeking sterilization.³⁸⁸ Thus, motivation has nothing to do with whether a person should recover child-rearing expenses in a wrongful conception case.³⁸⁹

The motivational analysis used in offset benefits jurisdictions does not promote the overall goals of tort law—deterrence, compen-

³⁸¹ See *id.*

³⁸² See Garfinkle, *supra* note 4, at 826.

³⁸³ See *Loveland Med. Ctr.*, 805 P.2d at 612-13; Garfinkle, *supra* note 4, at 821; Hom, *supra* note 5, at 1096-97.

³⁸⁴ See generally *Roe v. Wade*, 410 U.S. 113 (1973) (holding that constitutional right to privacy encompasses a woman's decision to terminate pregnancy); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (holding that constitutional right to privacy encompasses single person's right to contraception); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that constitutional right to privacy encompasses a married couple's decision to use contraception).

³⁸⁵ See *Ochs*, 445 A.2d at 885; *Troppi*, 187 N.W.2d at 516-17; *Loveland Med. Ctr.*, 805 P.2d at 610.

³⁸⁶ See *Ochs*, 445 A.2d at 885; *Troppi*, 187 N.W.2d at 516-17; *Loveland Med. Ctr.*, 805 P.2d at 610.

³⁸⁷ See Hom, *supra* note 5, at 1097.

³⁸⁸ See Garfinkle, *supra* note 4, at 821; Hom, *supra* note 5, at 1096.

³⁸⁹ See *Loveland Med. Ctr.*, 805 P.2d at 612. *Loveland* differs from other offset benefits decisions because it does not support the use of a motivational analysis. See *id.* Moreover, the *Loveland* court allows the offset-benefits approach as to the emotional and psychological injuries suffered by the parents. See *id.* at 613-14. Therefore, it denies recovery for emotional distress because to them, the emotional and psychological benefits of having a healthy child does not mitigate that non-pecuniary injury. See *id.* The *Loveland* court, however, does not apply offset benefits approach as to the financial injury and allows full recovery for child rearing expenses. See *id.* at 613.

sation and social welfare.³⁹⁰ Inasmuch as courts give some consideration to parents' motivation for undergoing a sterilization procedure in their damages calculation, it does not deter negligent conduct by doctors.³⁹¹ The use of a motivational analysis works as another obstacle in finding the doctor liable for all foreseeable consequences of his or her negligent act.³⁹² This does not increase the standard of care in sterilization procedures.³⁹³ This is particularly worrisome when we realize that, in most cases, doctors could avoid easily the negligent act by providing better post-operative care or more information to patients.³⁹⁴

Another reason why the motivational analysis does not promote the goals of tort law is that it under-compensates a class of plaintiffs.³⁹⁵ As was discussed above, in certain situations eugenic and therapeutic motivations may be seen as less deserving of child-rearing expenses compensation even though these parents also are injured by the physician's negligence.³⁹⁶ This directly contradicts the primary purpose of a tort damages award—to restore the plaintiff to her position before the negligent act.³⁹⁷ Additionally, using motivation does not serve tort doctrine's compensatory goal because it makes it more difficult and complicated for plaintiffs to prove their damages.³⁹⁸ The motivational analysis is simply a device which reduces the potential liability of physicians for child-rearing expenses.³⁹⁹ The purpose of the offset benefits rule, ironically, is to permit compensation for child-rearing

³⁹⁰ See Podewils, *supra* note 3, at 417–19.

³⁹¹ See *Lovelace Med. Ctr.*, 805 P.2d at app. 619. But see Frank A. Sloan, *Tort Liability and Obstetricians' Care Levels*, 17 INT'L REV. L. & ECON. 245 (1997) (reporting that in a Florida study dealing with obstetricians' pre-natal care, tort liability limited the standard of care of obstetricians).

³⁹² See Podewils, *supra* note 3, at 424–25.

³⁹³ See Moore, *supra* note 3, at 1329–30.

³⁹⁴ See Moore, *supra* note 3, at 1329–30; Podewils, *supra* note 3, at 419. Moore notes that all the physician has to do to avoid liability is meet the local fertility standard of care. See Moore, *supra* note 3, at 1329–30. This can be accomplished by providing better post-operative testing for fertility in vasectomy operations or better post-operative monitoring for tubal ligation cases. See *id.* A more simple solution, however, is to provide the patients with better information about the results of the operation. See *id.*

³⁹⁵ See Moore, *supra* note 3, at 1328–30; Podewils, *supra* note 3, at 424–25.

³⁹⁶ See *Burke*, 551 N.E.2d at 5.

³⁹⁷ See Podewils, *supra* note 3, at 407–08.

³⁹⁸ See Moore, *supra* note 3, at 1328–30; Podewils, *supra* note 3, at 424–25.

³⁹⁹ But see O'Shea, *supra* note 80, at 989 (noting that by instructing a jury to give weight to the purpose of the sterilization, the likelihood of under- and over- compensation is greatly reduced).

expenses.⁴⁰⁰ To create exceptions where certain causes of action are not bound by traditional tort principles creates uncertainty in our system of compensation for injury.⁴⁰¹

Finally, permitting courts to consider parents' motivation for seeking sterilization in calculating damages in wrongful conception cases does not promote social welfare.⁴⁰² This may result in a child growing up ill-clothed, ill-fed and ill-educated because his or her family had to extend their financial resources beyond what they could afford.⁴⁰³ Although in most cases parents will adjust to the birth of the child, there are cases where supporting an additional child can have serious financial consequences for the family.⁴⁰⁴ In *University of Arizona Health Sciences Center v. Superior Court*, the court described an example of a husband who, after learning that he had cancer, decided to undergo a vasectomy to avoid the risk of having another child.⁴⁰⁵ His wife became pregnant because the husband's doctor negligently performed the operation and a child was born shortly after the father died from cancer.⁴⁰⁶ In a jurisdiction where motivation determines compensation for child-rearing expenses, the surviving parent would be denied compensation.⁴⁰⁷ Even in a jurisdiction that uses motivation as one factor, this parent would have the additional burden of proving motivation and the damages might be reduced because sterilization was not sought for purely financial reasons.⁴⁰⁸ Such results offend the sanctity and value of human life, the very notions used by courts to justify the existence of the wrongful conception cause of action.⁴⁰⁹

CONCLUSION

Although some courts, in their struggle to find a balance between compensating injured plaintiffs and the public policy considerations of valuing human life, have relied on a motivational analysis, this approach does not produce the best results. As a practical matter, it is extremely difficult to identify and prove motivation for undergoing a

⁴⁰⁰ See *Troppi*, 187 N.W.2d at 518-19.

⁴⁰¹ See Garfinkle, *supra* note 4, at 830.

⁴⁰² See Moore, *supra* note 3, at 1330-31; Podewils, *supra* note 3, at 425.

⁴⁰³ See *University of Ariz. Health Sciences Ctr.*, 667 P.2d at 1299; *Ochs*, 445 A.2d at 884 n.3, 885; Moore, *supra* note 3, at 1329; Podewils, *supra* note 3, at 425.

⁴⁰⁴ See *University of Ariz. Health Sciences Ctr.*, 667 P.2d at 1299 n.3.

⁴⁰⁵ See *id.*

⁴⁰⁶ See *id.*

⁴⁰⁷ See *Burke*, 551 N.E.2d at 5.

⁴⁰⁸ See *University of Ariz. Health Sciences Ctr.*, 667 P.2d at 1300.

⁴⁰⁹ See Podewils, *supra* note 3, at 425.

sterilization procedure. Trials become longer and more complicated in order to find out the exact motivation behind the parents' decision. Moreover, couples often seek sterilization for many reasons, not one. This presents the potential problem of having two motivations dictating different results.

The use of a motivational inquiry places another barrier which plaintiffs must overcome in order to recover. Wrongful conception plaintiffs must not only prove the elements of a regular medical malpractice negligence action, but also must prove their underlying motivation for undergoing a sterilization procedure.

This additional requirement is another deviation from traditional tort doctrine, making it harder for plaintiffs to recover and thus discounting child-rearing damages. That does not seem to promote the basic principles behind tort law—that a wrongdoer be accountable for all damages foreseeably caused by his act. In addition, those jurisdictions which use motivation as the determining factor for recovering child-rearing expenses unjustifiably discriminate against those parents who were not motivated by financial reasons. Motivation should not be a factor taken into consideration by courts because it has the potential of infringing on the constitutionally protected right to contraception and family planning. By limiting the recovery of child-rearing damages to certain motivations, courts are implying that other motivations are not legitimate reasons to seek sterilization. A couple has a constitutional right to contraception regardless of their motivation for doing so.

A general assessment of the motivational analysis leads to the conclusion that it does not promote the overall goals of tort law because it under-compensates plaintiffs and it does not encourage a higher standard of care for physicians. Ironically, a motivational inquiry allows some children to go through life ill-clothed, ill-fed and ill-educated even though the reason for the existence of a cause of action for wrongful conception is the preservation of families and the protection of children.

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