SUPREME COURT OF KENTUCKY

82-SC-467-DC
(81-CA-2513-MR)

SHARON A. SCHORK and
AL SCHORK - - - - - - - - Movants

versus

CHARLES H. HUBER, M. D. - - - Respondent

JEFFERSON CIRCUIT COURT
79-CI-11840

BRIEF OF MOVANTS, SHARON A. SCHORK AND AL SCHORK

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I certify that a copy of this brief was mailed, U. S. postage prepaid, to the Honorable Joseph Eckert, Judge, Jefferson Circuit Court, Hall of Justice, 600 W. Jefferson, Louisville, Kentucky 40202; John C. Scott, Clerk of the Court of Appeals, Bush Building, 403 Wapping Street, Frankfort, Kentucky 40601; and Douglas H. Morris, Counsel for Respondent, 2300 One Riverfront Plaza, Louisville, Kentucky 40202, this 14th day of October, 1982.

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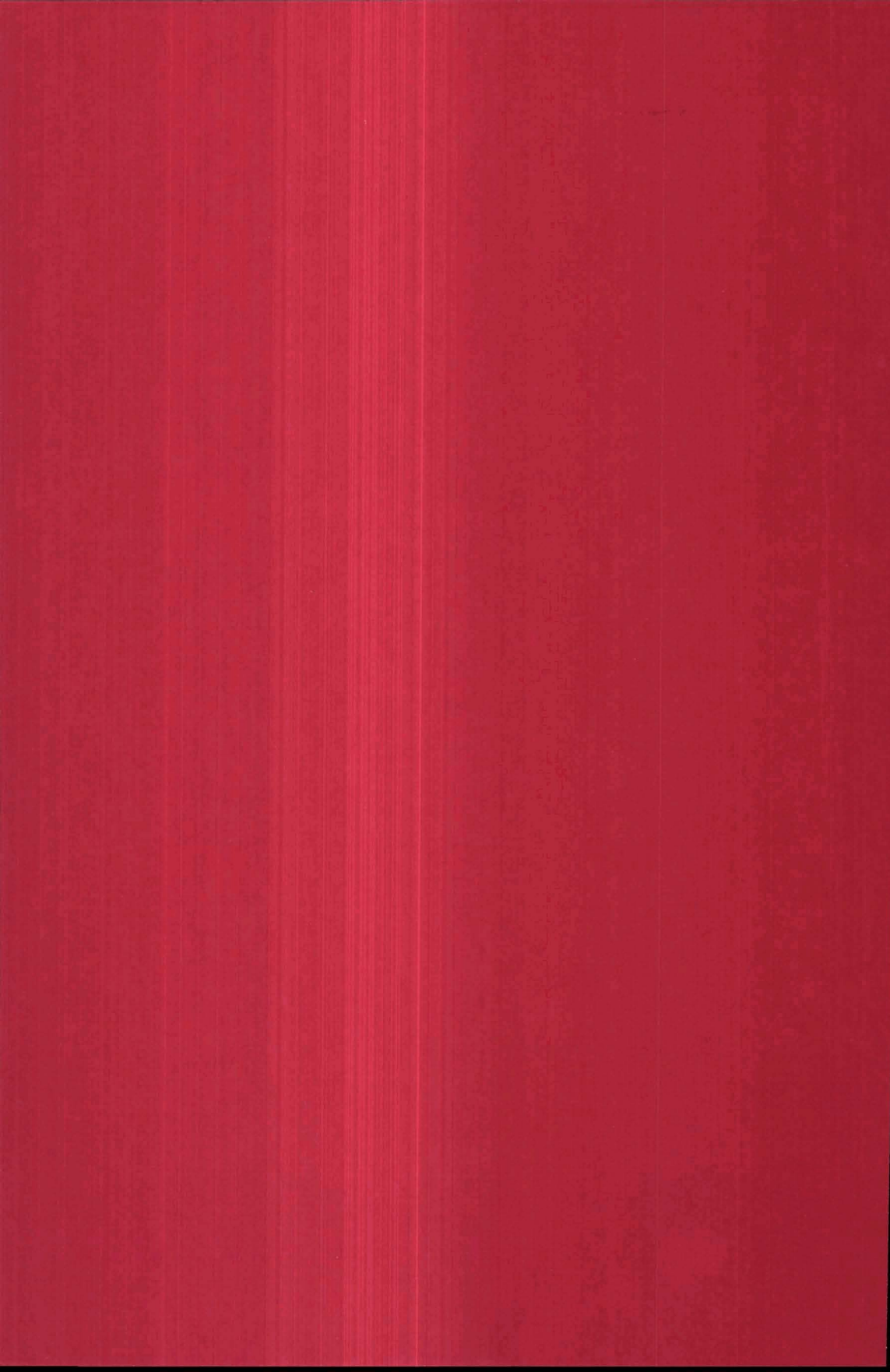

INTRODUCTION

This is an appeal by parents of a healthy normal child from a partial summary judgment dismissing their claims for the costs of rearing the child and the mental pain and suffering and disruption to family life caused by the unplanned conception and birth of the child against the physician whose alleged negligent post-sterilization treatment of the mother resulted in the conception of the child.

This appeal presents the issues regarding the unplanned child: (1) May damages be recovered to compensate for the cost of raising the child; and (2) may damages be recovered for emotional and mental suffering and burdens caused to the lives of the parents by the unplanned child?

INDEX

STATEMENT OF POINTS AND AUTHORITIES

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May it please the Court:

STATEMENT OF THE CASE

Appellants, Sharon Schork and Al Schork (hereinafter Sharon or Al or collectively the Schorks), are a young married couple in their early thirties. The Schorks have three healthy children: a daughter age 7, a son age 5, and a son now 3 years old who was born after the alleged medical negligence of Charles H. Huber, M.D. (hereafter Dr. Huber) (Deposition Sharon Schork, pp. 4 & 5). After the birth of their second child, Sharon and Al decided that two children were all they could afford, financially, mentally, and physically (Deposition Sharon Schork, pp. 7, 8 & 9; Deposition Al Schork, pp. 9, 10 & 11).

Sharon first visited Dr. Huber for the purpose of having herself sterilized on August 26, 1977. Dr. Huber performed

a laparoscopic fallopian ring tubal type sterilization procedure on Sharon on August 31, 1977 (Deposition Sharon Schork, p. 8; Deposition Charles H. Huber, M.D., p. 8). Sharon discussed her desire to limit her family and for sterilization with Dr. Huber before the procedure was performed. In those discussions, Dr. Huber told Sharon the procedure was 99 or 99.5 percent effective in preventing pregnancy (Deposition Sharon Schork, p. 13; Deposition Charles H. Huber, M.D., p. 15).

Three weeks after the sterilization procedure was performed Sharon returned to Dr. Huber to have the effectiveness of the procedure checked. Dr. Huber advised Sharon on that visit that everything was fine, although Dr. Huber performed no tests (Deposition Sharon Schork, p. 14).

On Sunday, June 11, 1978, about ten months after the sterilization procedure was performed, after about a week of experiencing a brownish discharge, Sharon felt a thrust and expelled a "bunch of waste" from her body. She then started bleeding. She became frightened. She described to her husband what had happened to her. Sharon went back to the bathroom and looked at what she had discharged; the discharged material was still in the bowl of the toilet. What she saw was a tissue-like material about three inches by one inch wide. Sharon did not save the material. Sharon's first reaction was alarm and concern that she might have cancer, and she feared she might be facing death; a little later on the same day it occurred to her she might have had a miscarriage (Deposition Sharon Schork, pp. 15 & 16).

The day after experiencing the discharge, Monday, June 12, 1978, Sharon called Dr. Huber's office describing what had happened to her the previous day to the person

who answered the telephone at Dr. Huber's office; Sharon specifically told the person she believed she had had a miscarriage (Deposition Sharon Schork, p. 16). The person to whom she was talking on the telephone made an appointment for Sharon to see Dr. Huber on June 14, 1978, Wednesday of that same week. Dr. Huber's office was very crowded when Sharon arrived for her appointment. After Sharon had waited a long period of time to see the doctor, one of Dr. Huber's nurses asked her if she couldn't come back another day, telling Sharon Dr. Huber was scheduled for surgery. Because Sharon was upset and had come a long distance to see Dr. Huber, she told the nurse she needed to see the doctor then. After this discussion, Sharon was allowed to see Dr. Huber. Sharon described to Dr. Huber what had happened to her, and she told Dr. Huber expressly and specifically that she thought she had had a miscarriage. Sharon also told Dr. Huber at that time that she had missed one or two periods before she experienced the discharge. Dr. Huber told Sharon that what she had experienced was just a buildup from missed periods. He gave Sharon a pap smear and sent her home without any other tests, assuring her she was sterile (Deposition Sharon Schork, pp. 17 & 18; Deposition Charles H. Huber, M.D., pp. 21, 22 & 23).

Early in November, 1978, Sharon began experiencing morning sickness. She went to her regular family physician who told her she had a kidney infection for which he gave her medication. The morning sickness continued; so Sharon went back to see Dr. Huber on December 27, 1978. On this visit, Dr. Huber told Sharon she was pregnant (Deposition of Sharon Schork, pp. 18 & 19). Sharon did

not return to Dr. Huber but used another obstetrician for her pregnancy and delivery.

Sharon is certain that she described the discharge to Dr. Huber in detail and that she told Dr. Huber she believed that she had had a miscarriage. Dr. Huber denies that Sharon told him that, but, he says that if Sharon did tell him what she contends she did, good medical practice and the required standard of care would have required that he give her a test (hysterosalpingogram) to determine whether or not she was sterile.

> Q. 66. Doctor Huber, had Sharon Schork given you such information, would a hysterosalpingogram been called for?
>
> A. What information is that?
>
> Q. 67. That she believed that she had had a miscarriage and found what she believed to be . . .
>
> A. Yes, sir, I would have done that.
>
> Q. 68. And, would that have been required by good medical practice?
>
> A. Yes, sir.

(Deposition Charles H. Huber, M.D., p. 25).

If Sharon told Dr. Huber what she contends she told him Dr. Huber admits he was negligent in not performing a hysterosalpingogram.

As a result of Dr. Huber's assurances, Sharon and Al took no birth control measures to prevent conception resulting in Sharon's pregnancy and the birth of their third child.

The Schorks filed a Complaint in this Action in Jefferson Circuit Court, Division One, on December 21, 1979, alleging Dr. Huber was negligent in post surgery treatment

of Sharon and that Dr. Huber's post surgery statements to her constituted warranties that she was sterile. The Schorks allege in their Complaint that, 1) Sharon has been damaged in that, a) her power to labor and earn money has been diminished; b) she will be required to labor and spend money in rearing the child; c) that her family life has been and will be disrupted as a result of the unplanned child; and d) that she suffered as a result of the pregnancy and birth; and that, 2) Al has been damaged in that, a) he will be required to labor and spend money in rearing the child; and b) he has suffered emotional harm because his family life has been disrupted (TR 1-4).

Dr. Huber's motion for summary judgment granted by the trial court on September 2, 1981, ordered that "the allegations of the Plaintiffs' Complaint which seeks recovery for the labor and money necessary in rearing the child of the parties whose conception and birth is the subject of this litigation be stricken from the Complaint as well as allegations dealing with the disruption of family life, mental suffering and any claims on behalf of the Plaintiff, Al Schork" (TR 158).

The Schorks filed Notice of Appeal to the Kentucky Court of Appeals on September 25, 1981 (TR 160) and made Motion for transfer of the case from the Kentucky Court of Appeals to the Kentucky Supreme Court pursuant to CR 76.18 on September 29, 1981. The motion to transfer to the Supreme Court was denied on October 12, 1981 (TR 162). The Kentucky Court of Appeals upheld the Trial Court's partial summary judgment in an unpublished opinion No. 81-CA-2514-MR rendered on May 28, 1982. The Supreme Court of Kentucky granted Discretionary Review on September 14, 1982.

ARGUMENT

I. Public Policy Favors Family Planning and Establishes the Right of Persons to Limit the Size of Their Family for Whatever Personal or Private Reasons They May Have; Such a Public Policy Would Require That One Who Negligently Interferes With That Right Causing Harm Should Pay for the Harm He Caused, the Cost of Raising the Child.

The labels which have been applied to the causes of action brought by persons for conceptions, births and lives resulting after negligently performed sterilization procedures and negligent treatment and advice given by physicians surrounding such sterilizations arouse a lot of emotion, sentimentality and religious feelings. The actions have commonly been called actions for "wrongful life," "wrongful birth" and "wrongful conception." The words or concepts of "birth" and "life," and the values that for each of us are inherent in them, are emotionally charged and are subjects about which people tend to have deeply entrenched feelings and ideas.[1] Therefore, we will avoid the use of labels, and, where it is necessary to use them or where we do use them, we will try to use the labels consistently and accurately. As the labels have come to be used in these cases today, they generally are applied as follows:

> *WRONGFUL LIFE:* The term "wrongful life" is used to denote an action in damages brought by or on behalf of the child (not the parents) claiming that the child

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[1]Robertson, *Civil Liability Arising from "Wrongful Birth" Following an Unsuccessful Sterilization Operation*, 4(2) Amer. J. of Law & Medicine 131, 133 (1978).

was born into a disadvantageous life by reason of another's negligence.[2]

WRONGFUL BIRTH: The term "wrongful birth" is used to denote an action in damages brought by the parents (or family) of the child for losses (expenses) they sustain as a result of the birth of the child.[3]

WRONGFUL CONCEPTION: The term "wrongful conception" is used to denote an action in damages brought by the parents (or family) of the child for losses (expenses) they receive as a result of the conception of the child. Wrongful conception is similar in design to the term "wrongful birth" but has an important distinction in that the term is used to underscore the point that the injury claimed by the parents originates and arises out of the conception, and the term places no obvious limitations on recoverable damages.[4]

WRONGFUL PREGNANCY: The term "wrongful pregnancy" is one that has been used to limit the damages in wrongful birth and wrongful conception cases to damages for pain, suffering, discomfort and the medical expenses of the mother as a result of her pregnancy, including the cost of the failed sterilization and the loss to the husband of comfort, compassion, services and consortium of the wife, but limited to the loss of consortium arising from pregnancy and immediately following birth.[5]

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[2]Wilmoth, *Wrongful Life and Wrongful Birth Causes of Action—Suggestions for a Consistent Analysis*, 63 Marquette L. Rev. 611 (1980); Carroll, *Recovery for Wrongful Conception: Who Gets the Benefit—The Parents or the Public?*, 14(4) New England L. Rev. 784, 787-790 (1979); Annot., 83 ALR 3d 15, 19 (1978).

[3]*Wrongful Conception*, 5 William Mitchell L. Rev. 464, 467 (1979); Annot., 83 ALR 3d 15, 19 (1978); Carroll, *Recovery for Wrongful Conception: Who Gets the Benefit—The Parents or the Public?*, 14(4) New England L. Rev. 784, 787-790 (1979).

[4]*Id.*

[5]Carroll, *Recovery for Wrongful Conception: Who Gets the Benefit —The Parents or the Public?*, 14(4) New England L. Rev. 784, 789, 790 (1979).

There are generally five factual contexts which give rise to actions for wrongful life, wrongful conception, and wrongful birth:

1) A child born as a result of an unsuccessful sterilization operation and treatment.
2) A child born as a result of the negligent dispensing, by a pharmacist or physician, of oral contraceptives.
3) A child born as a result of the denial of a pregnant woman's right to choose to have an abortion.
4) A child born after an unsuccessful abortion.
5) A child born because of negligent preconception advice of a genetic counselor who does not warn higher-than-average risk persons of their risk of bearing a child with a particular disease.[6]

This case using the definitions and classifications discussed above is a "wrongful conception" case arising in the factual context of negligent medical treatment following a failed sterilization procedure. The Schorks do not complain because the sterilization procedure was unsuccessful, but because the doctor failed to take proper precautionary measures in his post-operation treatment when presented with evidence of a failed or unsuccessful procedure.

The Kentucky Court of Appeals, in *Maggard* v. *McKelvey,* Ky. App., 627 S. W. 2d 44 (1981), barred the Maggards' recovery for the support of the child, saying:

> Common sense tells us that it is in society's best interests to hold physicians to a standard of professional competence and impose liability when they are negligent in treating their patients. But to hold a doctor responsible for the support of a mistakenly conceived

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[6]Robertson, *Civil Liability Arising from "Wrongful Birth" Following an Unsuccessful Sterilization Operation,* 4(2) Amer. J. of Law & Medicine 131, 134, 135 (1978); 83 ALR 3d 15 §2(a), 22, 23, 24 (1978).

> child takes him well beyond the scope of his duty to his patient, as commonly thought of by both the lay public and the medical profession. Public policy can, and in this instance does, cut off the legal responsibility of the physician, even though he may have been negligent and the injured be innocent. Without a clear expression of public opinion, some indication from the legislature or an interpretation by our Supreme Court to the contrary, we conclude that our public policy prohibits the extension of liability to include these damages. See *Deutsch, supra.*
>
> Accordingly, we hold that the damages are limited to the general and special damages incidental to the pregnancy and birth, such as, pain and suffering, loss of consortium, medical and hospital expenses, and loss of wages.

The Kentucky Court of Appeals, by the *Maggard* decision, has on public policy grounds limited the parents' cause of action in Kentucky to one for "wrongful pregnancy."

Life today has drastically changed in the United States and in Kentucky. In the early days of our country, a living was often made on a farm or other small family business where children were an asset in the form of manual labor and help in running the farm and business. Today, families do not generally have such an advantage from their children. Today, the value of the services of a child is largely fiction. In terms of economics, children today are generally an economic and financial liability and burden rather than an economic asset. The costs of shelter, food, clothing, medical and dental expenses, transportatin and education rise daily. In place of the bucolic rural life and peaceful, slower-paced city life, we now live in an electronic age full

of automobiles, motorcycles, rock concerts, drugs, crime, wars, and threats of nuclear holocausts. Children require closer attention and guidance from parents who have less and less time because of the complex demands of our society.

> Although our forefathers, jealous of the security that a large family could offer in an agricultural society, would have shuddered at the thought of voluntarily seeking sterility by means of a surgical operation, today voluntary sterilization is rapidly growing in popularity. Sterilization is now the second most popular method of contraception in the United States among white married couples, lagging only three percentage points behind oral contraceptives. Furthermore, sterilization is the most popular method of contraception among couples married for 10 years or more. This increase in the frequency of voluntary sterilization has been dramatic: for example, in the period between 1965 and 1975 the number of married couples in the United States practicing birth control who chose sterilization rose from 8.8 percent to 31.3 percent.[7]

Contraception is a common and accepted practice among Americans today. It is a practice encouraged as responsible by medical professionals, governmental agencies, private agencies, schools, colleges and some churches. Contraception is also big business for the medical profession. "For example, about 670,000 tubal ligations were performed in 1978 compared with 178,000 in 1971, . . ."[8]

Elective contraceptive sterilization is becoming, if it has not already become, the method of choice of family

[7]Robertson, *Civil Liability Arising from "Wrongful Birth" Following an Unsuccessful Sterilization Operation,* 4(2) Amer. J. of Law & Medicine 131, 135-136 (1978).

[8]Appleson, *"Wrongful Birth" Suits on the Rise,* 67 A.B.A.J. 1255 (1981).

planning by couples in the thirty to forty-four age group. They choose this method because the use of other contraceptive measures has often proven unreliable or is dangerous to the health of the woman. It threatens to surpass the pill as the leading method of birth control in the United States.[9] Family planning and family limitation are the custom and practice of the people of this country and reflective of the country's public policy.

The Kentucky Revised Statutes as well as the statute books of all the states are filled with statutes attempting to provide ways and means for the support of children whose parents either cannot or will not support them. When the parents can't or won't, it then becomes the burden of society and the taxpayer. Current laws and social structure (which is the public policy), because of this, support responsibility in procreation. Persons should be and are encouraged to limit the size of their families to the number of children they can properly care for both economically and emotionally. When such responsibility is shown by parents, both individual citizens and society as a whole benefit.

Consistent with federal constitutional law and current social facts, the Sixth Circuit Court of Appeals, in a Kentucky case dealing with abortion, *Wolfe* v. *Schroering,* 541 F. 2d 523 (6th Cir. 1976), shed light on Kentucky public policy by confirming the individual's private constitutional right to make decisions and control the strictly private matter of reproduction.

Carroll, in the *New England Law Review,* gave a clear expression of the public policy implications and development as relate to "wrongful conception" actions:

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[9]Carroll, *Recovery for Wrongful Conception: Who Gets the Benefit —The Parents or the Public?,* 14(4) New England L. Rev. 784, 787-790 (1979).

> Notions of public policy have not barred recent actions for wrongful conception because the courts have begun to recognize that '[t]he choice not to procreate has become [subject to certain limitations] a constitutional guarantee.' There has always been a societal interest in encouraging and protecting marriage and procreation. This interest reflects an accepted public policy. Family planning, population control and a woman's right of privacy have recently achieved a similar status. However, a conflict has developed between two accepted public policies and courts have had difficulty trying to render decisions which reflect the *mores* of society. For the most part, the conflict has been resolved to the extent of the court's deciding that an action should not be barred. Since states may not infringe upon the rights of a husband and wife to use contraceptives and do, in fact, provide information, instructions and medical advice relating to contraceptions, they cannot eviscerate the right not to procreate by completely denying it protection.
>
> . . . Like other types of birth control, sterilization has been sanctioned by the federal and state governments which have provided access to information, instructions and medical advice. Attempts by physicians and hospitals to establish individualized standards or to deny sterilization completely have encountered court intervention in the form of injunctive relief. Thus, it would be antithetical to the protected right not to procreate, as well as to the custom of widespread use of contraceptives, for courts to hold, as a matter of law, that no damage can result from an unwanted pregnancy where precautions were taken to avoid that pregnancy.

Carroll, *Recovery for Wrongful Conception: Who Gets the Benefit—The Parents or the Public?,* 14(4) New England L. Rev. 784, 800, 801 (1979).

The Michigan Supreme Court, in *Sherlock* v. *Stillwater Clinic,* Minn., 260 N. W. 2d 169 (1977), allowed recovery for

the costs of raising a child due to the negligent performance of a tubal ligation; the court in this case realistically held that it would be "myopic" to declare today that the benefits of parenthood outweighed the costs as a matter of law. The court there stated at 175 that the admonition or directive to "be fruitful and multiply" had "not only lost contemporary significance to a growing number of potential parents but is contrary to public policies embodied in statutes encouraging family planning."

The Ohio court in enunciating its policy in *Bowman* v. *Davis,* Ohio, 356 N. E. 2d 496 (1976) at 499, said:

> It is the opinion of this court that the cause of action pursued successfully by the Bowmans at the trial and appellate levels is not barred by notions of public policy. The choice not to procreate, as part of one's right to privacy, has become (subject to certain limitations) a Constitutional guarantee. See *Griswold* v. *Connecticut* (1965), 381 U. S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510; *Roe* v. *Wade* (1973), 410 U. S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147; and *Doe* v. *Bolton* (1973), 410 U. S. 179, 93 S. Ct. 755, 35 L. Ed. 2d 147. For this court to endorse a policy that makes physicians liable for the foreseeable consequences of all negligently performed operations except those involving sterilization would constitute an impermissible infringement of a fundamental right.

The New York court made a clear public policy statement favoring family planning in *Riveria* v. *State,* 404 N.Y.S. 2d 950 (1978), where it stated at 953:

> Family planning is an essential aspect of the XIV Amendment's guarantee of the right to marry, establish a home and bring up children. *Meyer* v. *Nebraska,* 262 U. S. 390, 43 S. Ct. 625, 67 L. Ed. 1042)

Riveria was also grounded on the United States Supreme Court decision of *Griswold* v. *Connecticut,* 381 U. S. 479 (1965).

Stating the public policy of Connecticut and also citing the United States Supreme Court case of *Griswold* v. *Connecticut, id.,* and *Roe* v. *Wade,* 410 U. S. 113 (1973), reh. denied, 410 U. S. 959 (1973), the Supreme Court of Connecticut said in *Ochs* v. *Borrelli,* Conn., 445 A. 2d 883 (1982) at 885:

> In our view, the better rule is to allow parents to recover for the expenses of rearing an unplanned child to majority when the child's birth results from negligent medical care. The defendants ask us to carve out an exception, grounded in public policy, to the normal duty of a tortfeasor to assume liability for all the damages that he has proximately caused . . . But public policy cannot support an exception to tort liability when the impact of such an exception would impair the exercise of a constitutionally protected right. It is now clearly established that parents have a constitutionally protected interest located "within the zone of privacy created by several fundamental constitutional guarantees," . . . to employ contraceptive techniques to limit the size of their family. The defendants' general argument of public policy is therefore unpersuasive. *Troppi* v. *Scarf, supra,* 187 N. W. 2d at 517.

The Appellate Court of Illinois in *Pierce* v. *DeGracia,* Ill. App., 431 N. E. 2d 768 (1982) at 769, addressing itself to the issue of policy in allowing parents to recover the cost of raising a child conceived as a result of medical negligence, said:

> The right of parents to control their reproductivity is a fundamental right and neither the individuals in-

volved nor society is harmed by the decision to limit family size.

The physicians themselves are being warned by those in their own profession who recognize the societal circumstances demanding and accepting contraceptive sterilization. In a recent article that appeared in the October 15, 1980, *Ob. Gyn. News,* the following was attributed to Lt. Cdr. Richard J. Stock, MC, USNR:

> Lt. Cdr. Richard J. Stock, MC, USNR, said at an international congress on female endoscopic sterilization.
>
> The tremendous increase in demand for elective sterilization procedures has been accompanied by a concurrent increase in lawsuits based on the failure of these operations. Legal actions have been brought for failure of sterilizations since 1934, but only recently have most been pursued, said Dr. Stock, of the Naval Regional Medical Center, Portsmouth, Va.
>
> These "wrongful birth" suits brought by the child's parents typically allege that their child was born as a consequence of negligence by the physician or that the birth constituted a breach of contract. Increasingly, the judicial trend has moved toward allowing recovery for medical expenses, lost wages, economic costs of raising a child, and pain and suffering caused by the unwanted birth, he said at the congress sponsored by the American Association of Gynecologic Laparoscopists.
>
> Some legal commentators have concluded that physicians are not at great risk for financial loss for an unsuccessful sterilization procedure, but such optimism is unwarranted. In fact, several six-figure verdicts against physicians in wrongful birth cases have been sustained on appeal, Dr. Stock pointed out.

> To better insulate themselves from liability, physicians must be aware of four areas of potential negligence: preoperative conduct (informed consent), performance of the sterilization operation, postoperative testing, and postoperative counseling.

Although we do not believe that numbers alone are very meaningful concerning an issue as important as this, we have searched for cases which have dealt with the question of conception resulting from medical negligence and find:

1) HEALTHY CHILD: Thirteen cases from eleven states have allowed damages to be recovered for the cost of raising the child:

Anonymous v. *State,* Conn. Super. Ct., 366 A. 2d 204 (1976).

Betancourt v. *Gaylor,* N.J. Super. Ct., 344 A. 2d 336 (1975). (Statement by court in later case, *P.* v. *Portadin, infra,* indicating disapproval.)

Bowman v. *Davis,* Ohio, 356 N. E. 2d 496 (1976).

Cockrum v. *Baumgarten,* Ill. App., 425 N. E. 2d 968 (1981).

Custodio v. *Bauer,* Cal. App., 59 Cal. Rptr. 463 (1967).

Mason v. *W. Pa. Hosp.,* Pa. Super. Ct., 428 A. 2d 1366 (1981).

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

Phillips v. *U. S.,* 508 F. Supp. 544 (D.S.C. 1981).

Pierce v. *DeGracia,* Ill. App., 431 N. E. 2d 768 (1982).

Pierce v. *Piver,* 262 S. E. 2d 320 (N.C. 1980).

Riveria v. *State,* 404 N.Y.S. 2d 950 (1978).

Sherlock v. *Stillwater Clinic,* Minn., 260 N. W. 2d 169 (1977).

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

2) DISEASED OR DEFORMED CHILD: Six cases from five states have allowed damages to be recovered for the cost of raising the impaired child:

Curlender v. *Bio. Science Laboratories,* Cal. App., 165 Cal. Rptr. 477 (1980).

Jacobs v. *Theimer,* Tex., 519 S. W. 2d 846 (1975).

Naccash v. *Burger,* Va., 290 S. E. 2d 825 (1982).

Roback v. *U. S.,* 658 F. 2d 471 (7th Cir. 1981).

Schroeder v. *Perkel,* N.J., 432 A. 2d 834 (1981).

Turpin v. *Sortini,* 643 P. 2d 954 (Cal. 1982).

3) HEALTHY CHILD: Ten cases from nine states have denied damage recovery for the cost of raising the child:

Coleman v. *Garrison,* Dela., 349 A. 2d 8 (1975).

Maggard v. *McKelvey,* Ky. App., 627 S. W. 2d 44 (1981).

P. v. *Portadin,* N.J. Super. Ct., 432 A. 2d 556 (1981).

Public Health Trust v. *Brown,* Fla. App., 388 So. 2d 1084 (1980).

Rieck v. *Medical Protective Co.,* Wis., 219 N. W. 2d 242 (1974).

Stills v. *Gratton,* Cal. App., 127 Cal. Rptr. 652 (1976).

Sutkin v. *Beck,* Tex. App., 629 S. W. 2d 131 (1982).

Terrell v. *Garcia,* Tex. App., 496 S. W. 2d 124 (1973).

White v. *U. S.,* 510 F. Supp. 146 (D.C. Kan. 1981).

Wilber v. *Kerr,* Ark., 628 S. W. 2d 568 (1982).

4) DISEASED OR DEFORMED CHILD: Seven cases from five states have denied damage recovery for the cost of raising the impaired child:

Becker v. *Schwartz,* N.Y. App., 386 N. E. 2d 807 (1978).

Berman v. *Allan,* N.J., 404 A. 2d 8 (1979).

Dumer v. *St. Michaels Hosp.*. Wis., 233 N. W. 2d 372 (1975).

Gleitman v. *Cosgrove,* N.J., 227 A. 2d 689 (1967). (Soundness of decision was questioned in *Berman* v. *Allan, supra.*)

Moores v. *Lucas,* Fla. App., 405 So. 2d 1022 (1981).

Speck v. *Finegold,* Pa., 439 A. 2d 110 (1981).

Stribling v. *deQuevada,* Pa. Super. Ct., 432 A. 2d 239 (1980).

Our research indicates the majority of states who have addressed the issue of wrongful conception have resolved the public policy argument in favor of allowing parents to recover the cost of raising the child conceived as a result of medical negligence.

II. An Action By Persons for "Wrongful Conception" Is a Traditional Tort Claim Upon Which They Are Entitled to Recover Damages Which They Have and Will Suffer as a Result of a Physician's Negligence, Including the Cost of Raising the Child.

The cases which have allowed parents to recover for "wrongful conception" have treated the cause of action as a regular medical malpractice or negligence action which is a traditional common law tort action. The New York court in *Riveria* v. *State, supra* at 953, rejected "the view that courts should refrain from recognizing a cause of action such as this one unless and until the legislature does so. The fundamental principles of tort law were created by courts not legislatures, . . ."; therefore, the parents should be "afforded the opportunity of proving the customary elements of duty, negligence, proximate cause and damages." *Id.*

The Minnesota Supreme Court when confronted with the issue raised by an action brought by parents for "wrong-

ful conception" as a result of a negligently performed vasectomy which resulted in the birth of a normal, healthy child stated:

> Analytically, such an action is indistinguishable from an ordinary medical negligence action where a plaintiff alleges that a physican has breached a duty of care owed to him with resulting injurious consequences. Where the purpose of the physician's actions is to prevent conception or birth, elementary justice requires that he be held legally responsible for the consequnces which have in fact occurred.

Sherlock v. *Stillwater Clinic, supra* at 174.

The North Carolina court said in *Pierce* v. *Piver, supra* at 321-322:

> The action is basically one for medical malpractice, sounding in negligence and breach of contract. Plaintiff's complaint adequately stated a claim for relief cognizable under existing legal principles of this jurisdiction. Similar complaints, alleging negligence and breach of contract, have been found sufficient in other jurisdictions. *Jackson* v. *Anderson* (Fla. App.), 230 So. 2d 503 (1970); *Martineau* v. *Nelson,* 311 Minn. 92, 247 N. W. 2d 409 (1976); *Vaughn* v. *Shelton* (Tenn. App.), 514 S. W. 2d 870 (1974).

The Appellate Court of Illinois, in *Pierce* v. *DeGracia, supra* at 769, said:

> The court found that the case before them was indistinguishable from an ordinary medical malpractice action and applied the standard measure of damages in tort which attempts to place the injured parties in the position they would have been had no wrong occurred. *Myers* v. *Arnold* (1980), 83 Ill. App. 3d 1, 38 Ill. Dec. 228, 403 N. E. 2d 316.

The Connecticut court also treated the action as one in tort in *Ochs* v. *Borrelli, supra,* when it said at 885:

> But public policy cannot support an exception to tort liability when the impact of such an exception would impair the exercise of a constitutionally protected right. It is now clearly established that parents have a constitutionally protected interest located "within the zone of privacy created by several fundamental constitutional guarantees. . . ."

The action for "wrongful conception" is clearly a classic common law tort action where there is no need for legislative action to establish a cause.

III. The Most Substantial Damage in "Wrongful Conception" Cases Is the Cost of Raising the Child and the Emotional Damage Caused By the Interference With Family Planning.

The reasons the Schorks together decided that they would limit the size of their family by contraceptive sterilization were financial and emotional. Sharon, describing the reasons for her sterilization and the effects the wrongful conception have had on her life, said (Deposition Sharon A. Schork, pp. 8, 9, 10, 11, 12, 36 & 37):

> 42. Why was it that you decided you wanted to have a sterilization?
>
> A. Well, my husband and I felt like two children were all we could afford financially and mentally, physically. There is quite a bit of responsibility and we felt two would be our limit.
>
> 43. When did you make that decision?
>
> A. Well, prior to my setting up the appointment with Dr. Huber, probably I—well, we considered it before my second child was even born, but I didn't

want to have it done immediately after that, I wanted to make sure he was okay and everything was, you know, going to be all right with him first cause I definitely wanted two children.

44. So this is something you had talked about since the birth of your second child?

A. Yes, sir.

. . .

49. There were no medical considerations involved, I mean no one ever told you you had difficulty having children or it would be bad for your health in any way or anything like that?

A. Well, no, sir. Birth control pills always seemed to upset me, I had side effects. And for this reason I did not want to continue going on the birth control pills and I wanted to protect my ownself and I decided this would be in my best interest and my husband's.

50. No doctor ever told you, for example, you shouldn't have other children, that's what I'm asking?

A. No, sir.

. . .

55. The first time you went to see Dr. Huber. I take it you had never been to him before?

A. No, I hadn't. I went to his office and I explained to him that I wanted to have the sterilization done, he asked me when was the last time I had a Pap smear. And it had just been about a month before when I had gone to see Dr. App. And he just told me he recommended the type of sterilization for me that he felt would be appropriate for me.

56. What kind of sterilization was that?

A. That was called ring tubal.

. . .

59. Did Dr. Huber advise you of any side effects or problems that might be encountered in doing the ring or tubal or any other—

. . .

A. What he seemed to stress to me most was was I sure I did not want any more children, when I had this operation performed it could not be reversed or it would probably be difficult, that I should know in my own mind I did not want any other children.

. . .

143. Your complaint also says in the future you will be caused to suffer pain and suffering. Do you consider that at the present time you are undergoing any pain or suffering as a result of having Tony?

A. Well, like I told you before I know that I always have to worry if anything should happen to my husband or to myself if my children are left behind. I have him to raise and send to school and college. I feel like this has bothered me thinking that, you know, I had not prepared for it.

. . .

146. You indicated or the complaint also states your family life has been irreparably damaged. Do you feel your family life has been irreparably damaged as a result of the birth of Tony?

A. Well, in a sense it has. There are things that I had planned to do that, you know, we are unable to do now. My husband travels four or five days a week and is away from my family. We were getting into a position we were going to be able to start going on some trips with him where he would be driving to spend more time with him and with the bottles and things of this nature I feel like I am tied down for a few more years.

Al said in his testimony (Deposition Al Schork, pp. 9, 10, 28, 30, 31, 38, 44, 45, 47, 48, 51, 52, 53, 54 & 55):

40. You started talking about your decision about your family planning, et cetera. And after you all were married and before you had your first child did you all have discussions about how many children you wanted?

A. Yes, sir.

41. And what were those discussions, what was the nature of them?

A. Well, we wanted to wait before we tackled that responsibility until we felt we were in a comfortable enough position to provide the atmosphere we wanted to provide for our children. I want to say probably six, eight months after we were married we began, you know, discussing what we wanted in life, size of family, so on. And we felt that two children, you know, we read some books on it and we felt that two children would make a very nice family. We're not particularly impressed with this world we live in and which is changing every day and we felt that is what we could afford emotionally and financially.

. . .

105. By the way, you indicated before that when you had had some conversations about how many children you were going to have and so forth you had done some reading about that?

A. Uh-huh.

106. What type of reading, what did you go to?

A. Oh, it's the basic books, you can send for to Washington, planned parenthood and stuff like that, you know, leaflets, giving you moral objectives, economic objectives, all things one would want to study and weigh when making that determination.

. . .

116. What kind of information would be in these booklets you had received if they didn't talk about methods of contraception or preventing the birth of children?

A. Specifically I can't give you specifics, I can give you the theme—

117. [Interposing] Okay.

A. [Continuing] —of the literature. Primarily given today's economic problems, the poverty in the world, the population of the world in the future, the moral standpoint that, you know, you have some children, it's a tough world, you have X number of hours to devote to each one.

. . .

175. Now that Tony has been born how do you feel about Tony?

A. Love him, he's an entirely different human being that we weren't expecting and being the people we are we made the necessary adjustments at any cost to welcome him into our family and to make him feel wanted and loved.

176. Do you think you have been successful with that?

A. Yes, sir, very much so.

177. You feel he is wanted and loved?

A. Indeed. But I think he's wanted and loved more out of necessity than planning.

178. Is Tony, as far as you can tell, developing at a normal rate, et cetera?

A. Physically, yes, sir.

179. Is there some other problem?

A. He is a little bit harder to discipline than my previous two children were. Either I forgot or the same plan isn't working.

180. Has the birth of Tony caused you any loss of income?

A. Yes, sir.

181. How is that, how much and how has it caused it?

A. I couldn't set a dollar amount on it, but any time you look at providing for a child in the manner that we had planned from the day we were married and with clothes and food and medicine.

. . .

188. The complaint says you have been caused to experience pain and suffering both physical and mental because of the birth of Tony. First of all, have you had any physical pain as a result of the birth of Tony?

A. Yes, sir, I definitely have.

189. How is that?

A. In the form of loss of sleep, in trauma.

190. What kind of trauma?

A. I am the type of person if I don't have things daily organized and planned and yearly organized and planned and five years organized and planned, if I don't have that as a map to reach the goals I have set for myself I don't get anywhere. So I had all this laid out and all of a sudden, you know, if you were talking about forfeiture on a bill or something like that I could easily overcome, you're talking about the expense and responsibility of adding another human being to the face of this world and then providing for it and that is something that was a trauma for me.

191. That is emotional or mental, I would assume, is what you're describing to me now?

A. Well, it took a form of loss of sleep and I was treated for peptic ulcers, which I have never had a stomach disorder in my life and I don't—like I say, I don't go to doctors, this is the first time I have been to a doctor, I think, in eight years.

. . .

204. Is it your statement or belief that the peptic ulcer is a result of the birth of Tony?

A. I'm not a physician and I am not very good at fortune telling, I can only say through the loss of sleep I have experienced since the day my child was born, the worry, the anxiety created by ways certainly a major contributing factor to, you know, this illness.

. . .

207. Why is it again that you have the worry and anxiety and can't sleep?

A. Well, it's to me very, very basic. You look at rearing children, some people do it as a sideline and to some people it's the most important thing they do. My wife and I were married three years and practiced birth control because we felt we weren't ready and we wanted to make doggone sure we were going to make it together and we wanted to make sure we had some form of financial stability and future and we figured that it was one of the most major decisions in our life to have two children. And when a third child comes along and I am looking at rearing that child in a manner that would allow him to become a produced—productive person, you know, not just a human being, I wanted him to be somebody and that is tackling a tremendous amount of responsibility. And also when you have two children, you know, you can give them fifty-fifty percent of your time and when you add a third you're going to thirty-three and a third, thirty-three and a third, thirty-three and a third and I felt that might somewhat cut back my ability to extend to them the time and effort looking at it from a percentage standpoint.

208. How frequent would you say you have difficulty sleeping?

A. Every night.

209. Every night since December 28th when you found out your wife was pregnant?

A. Every night.

210. Had you ever had difficulty sleeping prior to that time?

A. Maybe for a short period of time if I had a particular problem, you know.

211. Nothing for an extended period of time?

A. No, never.

212. How severe is the sleeping problem, do you miss twenty minutes of sleep, an hour, two hours, three hours?

A. I generally—it just depends on how much I am thinking about the incident and what other contributing factors, you know, enter into it. There is times that it doesn't bother me near as much and there are times I go to bed at nine o'clock and finally I go to sleep at two or three in the morning.

213. The thing that is keeping you awake is thinking about the birth of Tony and the things you have told us about rearing him and so forth?

A. And what times and options are available with my other children. And there are other problems that enter into it. I am saying that in losing sleep one has the opportunity to cruise all of his problems and the major one is, you know, dealing with this other child.

. . .

215. Are there any other physical or emotional problems that you feel you have as a result of the birth of this child you haven't told us about?

A. Producing the amount of money necessary to give him a good quality education from grade one through, you know, college. Trying to set a course and path that he can follow to be successful, looking at him as an individual versus what I want for him and what I want for my other son. The things normally associ-

ated with fatherhood when one's, you know, dedicated to doing it right.

216. Do you feel that these problems are any different from you than they might be for any other individual that has three children?

A. Yes, sir, I do.

217. Why is that?

A. Because I am a concerned, dedicated father, the most important thing in my life from the time I can barely remember is I wanted a family. I didn't have one and when I got one I wanted to make sure they were very well cared for and like I say, become productive members of society, not just people. I wouldn't be happy with my children as people, I want them to be productive, to carry on, you know, the same traditions.

It is clear from the testimony of these two parents that the temporary pain and disruption caused by pregnancy is insignificant when compared to the lifetime of responsibility the life of an unplanned child brings. Dr. Huber performed the sterilization of Sharon to prevent the kind of economic hardship and emotional disruption of the Schorks' lives that the wrongful conception has caused. To allow recovery only for the expenses and pain of the pregnancy and loss of consortium during and immediately after pregnancy is no more than a sop to the parents; it is not fair recompense for the harm and damage the doctor's negligence visits on them. Such an approach gives the mother little and the father nothing in terms of remedy for their harm. The primary purpose of the sterilization operation in this case was to prevent the financial expense and emotional investment needed to raise a child. The doctor knew this. The doctor's negligence caused the con-

dition that allowed the conception of the child; he should, therefore, under our traditional concepts of fairness and law be required to pay for the burden his negligence imposes on the parents.

The Schorks now love the healthy child thrust on them as a result of Dr. Huber's negligence. However, the fact remains the Schorks attempted through Dr. Huber's services to prevent the birth of this "unwanted blessing." The child is of their body, and they should not be called upon to renounce it in order to recover from Dr. Huber what he should rightfully pay. The Connecticut court put it very well in *Ochs* v. *Borrelli, supra* at 885, 886:

> In our view, the better rule is to allow parents to recover for the expenses of rearing an unplanned child to majority when the child's birth results from negligent medical care.
>
> . . .
>
> The defendants' initial argument founders on its premise that a recognition of the economic costs of parenthood is necessarily a negative judgment on the child who occasions them. We may take judicial notice of the fact that raising a child from birth to maturity is a costly enterprise, and hence injurious, although it is an experience that abundantly recompenses most parents with intangible rewards. There can be no affront to public policy in our recognition of these costs and no inconsistency in our view that parental pleasure softens but does not eradicate economic reality. The plaintiffs' testimony at trial confirming their love for Catherine should not become a reason for denying them financial relief.

The Illinois court also said it well in *Pierce* v. *DeGracia, supra* at 770:

> Certainly the costs of rearing an unplanned child to majority are damages which proximately flow from either the tort of medical negligence or the breach of contract by a physician who fails to properly perform a vasectomy. In assessing damages, the jury should be allowed to consider the potential benefits of the unplanned child which may accrue to the family interests. Parental age, marital status, family income, family size and the health of all family members are factors in this consideration. The possible benefits do not automatically offset all damages nor are they to be completely ignored by the jury.

Even if the wrongful conception results in a healthy child, as in this case, there is loss to the family in terms of things in addition to money. The mother and father must spread their society, comfort, care, affection, protection and emotional support over a larger group of children for a longer period of time. These resultant changes can be measured, and these losses should be just as compensable as losses attributable either to the mother's death or injury in childbirth or to the mental suffering attendant to the unwanted pregnancy because of anticipatable complications. *Custodio* v. *Bauer, supra.* A physician should not be able to escape liability for the cost of raising a child born as the result of his negligence on the fiction that such an award would have him pay for the fun, joy, affection and pleasure that rearing and educating such a child brings. The birth of a child can be something less than a blessed event when the sterilization was intended to prevent a birth for the financial and emotional reasons outlined by the parents in this case. Annot., 83 ALR 3d 15 §3(a) (1978) at 31.

IV. Recovery Should Not Be Denied in Wrongful Conception Cases Because Damages Are Difficult to Measure.

Much of the difficulty some courts have had in allowing recovery in "wrongful conception" cases and kindred causes of action has been their contention that it is virtually impossible to measure in pecuniary terms the philisophical problem of "being" versus "not being" or "nothingness," and it is difficult to measure the harm to parents of having an unwanted child vis-a-vis the "joy" of parenthood. Annot., 83 ALR 3d 15 § 2(a) (1978) at 21. It is believed that neither of these "problems" should legitimately prevent recovery by parents who have children the product of wrongful conception.

Measuring the value of "being" or "non-being" is not the issue in an action brought by *parents* who have a child as a result of wrongful conception because the harm to them is not the life of the child but is rather the more tangible costs of rearing the child, and the emotional and practical impact the unplanned child has on the parents' lives.

Damages have been allowed in our courts traditionally for such difficult things to value as:

Wrongful death: a value must be placed on lost unused life.

Loss of consortium: a value must be placed on the loss of companionship, love, comfort and sex with another person (not too unlike the "joys" of parenthood).

Wrongful loss of various parts of the body: a value must be placed on the loss of a leg, a finger, an ear, a breast, a penis, a colon, a tooth, ad infinitum. All of these parts are difficult to value since their

value depends on the individual, considering age, occupation, status, physical condition, mental condition, etc., etc.

Mental pain and suffering endured: a value must be placed on something that cannot be seen, touched, or measured and which is as variable as there are numbers of people in the world.

Mental pain and suffering likely to be endured in the future: a value must be placed on the same as the above but projecting the future.

The list could go on and on. The point is our system of justice has rarely for the real reason of difficulty of determination denied relief to injured persons.

The damages of an unplanned child in terms of financial cost to raise are as easily or more easily determinable and predictable as any of the list above. The offsetting benefit (if any) a jury may reasonably conclude has accrued to the parents as a result of the conception and life of the child are as easily determinable as *mental pain and suffering,* losses caused by a *wrongful death, loss of consortium, or loss of body part.*

If the doctor had not been negligent, the wrongful conception would not have occurred. Our system has traditionally allowed recovery if it is certain that some damage has resulted from the alleged negligence. Mere uncertainty as to the amount of damage has not precluded recovery; it is our system of justice's practice to leave it to the good sense of the jury to form the best estimate that can be made under the circumstances. Annot., 83 ALR 3d 15 § 3(a) (1978) at 35. As the court indicated in *Troppi* v. *Scarf, supra,* the elements of the gross damages—the lost wages, the pain and anxiety attributable to the pregnancy, the medical and hospital expenses, the cost of rear-

ing the child, are reasonably ascertainable by the trier of fact. The uncertainty in determining the net damages stem from application of the benefits rule of *Restatement (Second) of Torts* § 920 (1979), which would require in a case of this sort that the trier of fact compute the dollar value of the companionship and the services of the unplanned child. Placing a dollar value on these elements may well be more difficult than assessing damages for lost wages, but the difficulty in determining the amount to be subtracted from the gross damages does not justify a throwing up of hands and denying recovery altogether. Annot., 83 ALR 3d 15 § 3(a) (1978) at 33.

In a wrongful conception case brought by parents the elements of loss and benefit are separate, the loss being the financial and emotional expense which the parents sought to prevent by submitting to the surgery and treatment, and the benefit being whatever value a jury may reasonably conclude has accrued to the parents as a result of the child. Annot., 83 ALR 3d 15 (1978) at 34. These losses and benefits are measurable.

V. In a Wrongful Conception Case the Parents Should Not Be Required to Mitigate Damages By Abortion or Adoption.

Dr. Huber argues in this case, as have defendants in similar cases before him, that the Schorks could have mitigated their damages by placing the child product of the wrongful conception for adoption or by having the child aborted. Such an argument is without merit.

The defendant, in *Troppi* v. *Scarf, supra* at 519, 520, made the same argument. The court answered the argument reasonably, completely and humanly in its Opinion:

Mitigating Damages. It has been suggested that parents who seek to recover for the birth of an unwanted child are under a duty to mitigate damages by placing the child for adoption. If the child is "unwanted", why should they object to placing him for adoption, thereby reducing the financial burden on defendant for his maintenance?

However, to impose such a duty upon the injured plaintiff is to ignore the very real difference which our law recognizes between the avoidance of conception and the disposition of the human organism after conception. This most obvious distinction is illustrated by the constitutional protection afforded the right to use contraceptives, while abortion is still a felony in most jurisdictions. At the moment of conception, an entirely different set of legal obligations is imposed upon the parents. A living child almost universally gives rise to emotional and spiritual bonds which few parents can bring themselves to break.

Once a child is born he obviously should be treated with love regardless of whether he was wanted when he was conceived. Many, perhaps most, persons living today are conceptional accidents in the sense that their parents did not desire that a child result from the particular intercourse in which the person was conceived. Nevertheless, when the child is born, most parents accept him with love. That the plaintiffs accepted their eighth child does not change the fact that the birth of another child, seven years younger than the youngest of their previously born children, unbalanced their life style and was not desired by them.

[6] The doctrine which requires a plaintiff to take measures to minimize the financial consequences of a defendant's negligence requires only that reasonable measures be taken.

> "If the effort, risk, sacrifice, or expense which the person wronged must incur in order to avoid or minimize a loss or injury is such that under all the circumstances a reasonable man might well decline to incur it, a failure to do so imposes no disability against recovering full damages." *McCormick*, Damages, § 35, p. 133.

It should be noted that the standards by which reasonable conduct is determined are less stringent when used to evaluate the subsequent acts of the injured party than when used to evaluate the tortious act itself.

In determining reasonableness, the best interests of the child must be considered. The law has long recognized the desirability of permitting a child to be reared by his natural parents. The plaintiffs may have believed that the hazards of adoption would damage the child.

A child will not be taken from his mother without her consent, without regard to whether the child was conceived or born in wedlock, unless the child is neglected or the mother is unfit. The mother's right to keep the child is not dependent on whether she desired the conception of the child.

As a matter of personal conscience and choice parents may wish to keep an unwanted child. Indeed, parents have been known to keep children that many think should be institutionalized, e.g., mentally retarded children, not because of any anticipated joy or happiness that the child will bring to them but out of a sense of obligation. So, too, the parents of an unplanned, healthy child may feel, and properly so, that whether they wanted the child or not is beside the point once the child is born and that they have an obligation to rear the child as best they can rather than subject him to rearing by unknown persons.

Further, even though the parents may not want to rear the child they may conclude that the psychological

impact on them of rejecting the child and placing him for adoption, never seeing him again, would be such that, making the best of a bad situation, it is better to rear the child than to place him for adoption.

[7] Many women confronted with an unwanted pregnancy will abort the fetus, legally or illegally. Some will bear the child and place him for adoption. Many will bear the child, keep and rear him. The defendant does not have the right to insist that the victim of his negligence have the emotional and mental makeup of a woman who is willing to abort or place a child for adoption. If the negligence of a tortfeasor results in conception of a child by a woman whose emotional and mental makeup is inconsistent with aborting or placing the child for adoption, then, under the principle that the tortfeasor takes the injured party as he finds him, the tortfeasor cannot complain that the damages that will be assessed against him are greater than those that would be determined if he had negligently caused the conception of a child by a woman who was willing to abort or place the child for adoption.

[8] While the reasonableness of a plaintiff's efforts to mitigate is ordinarily to be decided by the trier of fact, we are persuaded to rule, as a matter of law, that no mother, wed or unwed, can reasonably be required to abort (even if legal) or place her child for adoption. The plaintiffs are entitled to have the jurors instructed that if they find that negligence of the defendant was a cause in fact of the plaintiffs' injury, they may not, in computing the amount, if any, of the plaintiff's damages, take into consideration the fact that the plaintiffs might have aborted the child or placed the child for adoption.

The Schorks have lovingly accepted the child into their home although they took steps to prevent his birth. Additional pain cannot now be inflicted upon them and their

child under the guise of mitigation of damages by abortion or adoption. This is illustrated by the testimony of the Schorks (Deposition Sharon Schork, pp. 33 & 35):

139. Is that the kind of thing you feel caused you pain and suffering during the pregnancy, mental, I am talking about the mental pain and suffering?

A. I don't really feel I suffered mental pain while I was pregnant. I mean it was—well, it was something that, you know, I had to work out. Like I said, Dr. Huber said he could perform an abortion, it's something I do not believe in, I would not do it, I could not do it. I knew there would be a lot of adjustments to be made, but I knew I would make them.

. . .

141. By the way, talking about the abortion for just a moment, what religion are you? Is that one of the factors that—

A. [Interrupting] I'm Catholic, but it still would not have anything to do—well, I am sure would have a little bearing on it, but no, I would not do it, I don't care. I don't go to church every Sunday, if that's what you mean. I was raised a Catholic, but.

142. What you're saying is your decision is based just on the way you feel and not because the Catholic church may tell you yes or no?

A. That's right.

(Deposition Al Schork, pp. 36, 37 & 38):

139. What did he tell you?

A. I remember this vividly, he told me it was an act of God and without pausing he offered to abort the child free, I remember that better than I remember anything in my life.

140. Any other conversations between you and Dr. Huber at that time?

A. I told him that there was no way in the world that that was a viable option and that I was very disappointed, and, you know, we had taken the necessary precautions and we had planned this thing out and it turned out and did us.

141. Anything else about the conversation or is that all you recall?

A. That's all I recall at this point. I think he also—after he saw how stern I was against the abortion concept I think he offered to deliver the baby free at no cost. And I think he also offered to re-perform the sterilization process at no cost.

142. Is that the sum and substance of the conversation?

A. As best I recollect, yes, sir.

143. You said that abortion was not a viable alternative?

A. No, sir.

144. Why was that?

A. Because I believe killing little children is a crime against God and the state.

145. Does it involve any religious background, upbringing or belief?

A. Basic morality.

146. I'm sure you and your wife had conversations about your situation after that, after the December 28th when you found out she was pregnant?

A. Yes, sir.

147. Can you tell me the nature of those conversations, what you all decided to do—

A. [Interposing] Grin and bear it.

148. Excuse me?

A. Grin and bear it.

149. Did you ever consider giving the child up for adoption?

A. No, sir.

150. Didn't even talk about it?

A. Not even a consideration.

VI. Physicians Should Not Be Given Special Protection and Privilege By the Law Because Their Negligent Acts Can Cause Great Harm.

The law requires equal protection and treatment of its citizens. Both the United States Constitution and Kentucky Constitution guarantee equal protection and treatment of its people.

U. S. Const. Amend. 7:

> [Trial by jury in civil cases.]—In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury, shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

U. S. Const. Amend. 14:

> § 1. [Citizenship—Due process of law—Equal protection.]—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ky. Const., Bill of Rights § 14:

> Right of judicial remedy for injury—Speedy trial. —All courts shall be open, and every person for an

> injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.

Physicians should not be given, and are not given, immunity from civil actions under the law because of the nature of their work or because they deal with matters that can result in great harm. It is apparent in our society a physician's work can be difficult and his rewards can be great. The medical profession and hospital industry today are a multibillion dollar industry.

Doctors are not today the quaint caricatures drawn by Norman Rockwell; they are highly trained and highly paid technicians who perform their arts using highly sophisticated and expensive electronic and mechanical equipment. Computers are more their tools today than the traditional black bag.

The courts should not carve out special status and protection for physicians, druggists and others in the medical business allowing them to operate with immunity and making them invulnerable to legitimate claims for harm caused by their negligence. Physicians do what they do today largely for pay and profit; they do not deserve the immunity formerly afforded charitable institutions.

History and tradition teach us that they perform best who are held accountable for their acts. The imposition of civil liability encourages potential tortfeasors to exercise more care in the performance of their duties, and hence, to avoid liability producing negligent acts. Applying this theory to wrongful conception cases (this case) public policy and tradition favor a tort scheme which encourages physicians to exercise great care in performing sterilizations and in providing care surrounding such procedures.

To absolve the physician of liability for all but an insignificant portion of the harm his negligence brings would be to remove an effective deterrent against negligent care in a widely used and rapidly expanding area of medical practice and profit. Annot., 83 ALR 3d 15 § 4(a) (1978) at 41.

In our modern world there are many businesses and professions whose negligent acts can cause great harm and damage. They are still held accountable in terms of civil liability. The victim of the airline company whose negligence causes a crash killing hundreds is not denied recovery because damages can be great or hard to determine. The victim of the bus company or railroad whose negligent acts cause death or serious harm is not denied recovery because such companies deal with large numbers of people and damages can be tremendous. The fact that they continue to be liable makes them take greater care. Such is true of the large manufacturing companies whose products go to millions. The continued availability of traditional tort remedies provides incentive for high quality care in performing duties. They should not be abandoned.

It remains that when an action is brought for such a cause as "wrongful conception" there is generated much emotion and bias. When one gets past the emotion, it can be seen that the action is nothing but a medical malpractice or negligence action. As the North Carolina Court said in *Pierce* v. *Piver, supra* at 322:

> The action is basically one for medical malpractice, sounding in negligence and breach of contract. Plaintiff's complaint adequately stated a claim for relief cognizable under existing legal principles of this jurisdiction. Similar complaints, alleging negligence and breach of contract, have been found sufficient in other jurisdictions. *Jackson* v. *Anderson* (Fla. App.) 230

So. 2d 503 (1970); *Martineau* v. *Nelson,* 311 Minn. 92, 247 N. W. 2d 409 (1976); *Vaughn* v. *Shelton* (Tenn. App.) 514 S. W. 2d 870 (1974).

CONCLUSION

The partial summary judgment of the Jefferson Circuit Court should be reversed. All of the Movants claims for damages should be reinstated including their claims for the cost of rearing the child and the emotional harm caused them by the disruption of family life.

Respectfully submitted,

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