TORTS—CAUSE OF ACTION ON BEHALF OF PARENTS FOR THE NEGLIGENT STERILIZATION OF MOTHER RESULTING IN THE BIRTH OF AN UNWANTED CHILD HELD SUFFICIENTLY SUPPORTED BY CASE LAW TO WARRANT DENIAL OF MOTION FOR SUMMARY JUDGMENT AND TO ALLOW CLAIMANT-PARENTS TO PROVE ALL ITEMS OF DAMAGE, INCLUDING THE ANTICIPATED COST OF REARING THE CHILD, LESS ANY BENEFIT CONFERRED BY THE BIRTH.—*Rivera v. State* (N.Y. Ct. Cl. 1978).

Victoria Rivera, already the mother of five, underwent a sterilization operation commonly known as a bilateral tubal ligation[1] on April 24, 1975 at the State University Hospital of Downstate Medical Center. The procedure was a failure; she became pregnant and bore a healthy child in May, 1977.

Joined by her husband,[2] Mrs. Rivera brought an action against the state, its medical facility and the attending physician[3] based on a claim of medical malpractice. As damages, the claimants sought one million dollars[4] for the medical expenses and the pain and suffering of Mrs. Rivera's pregnancy, as well as for the estimated cost of raising the unwanted child.

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1. Tubal ligation, the cutting and tying off the fallopian tubes as a means of preventing the union of sperm and egg, is accomplished through various techniques, all of which involve the ligation of the tubes and removal of short segments. However, a new channel may be naturally formed, allowing the union, and thereby causing pregnancy; the failure rate is about one percent. 5 LAWYER'S MEDICAL CYCLOPEDIA § 36.43 (1960).

2. This action is brought only on behalf of the parents. Causes of action instituted on behalf of the infant born as a result of a physician's alleged negligence, usually consisting in failing to correctly diagnose a genetic defect and thereby preventing the parents from choosing to abort, have been almost uniformly rejected by the courts. *See* Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963) (infant son's suit against father seeking damages for son's illegitimacy dismissed because of the far reaching consequences of judicial recognition of such a cause of action); Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967) (infant's suit against physician, for the physician's negligent failure to inform mother of the effect of german measles on fetus dismissed because infant's damages not cognizable at law); Karlsons v. Guerinot, 57 A.D.2d 73, 394 N.Y.S.2d 933 (App. Div. 1977) (judicial recognition of infant's cause of action for pain and anguish of its deformed existence withheld because of the impossibility of reckoning damages). *But see* Park v. Chessin, 60 A.D.2d 80, 400 N.Y.S.2d 110 (App. Div. 1977) (breach of parental right to elect abortion when certain that child will be born deformed is tortious to the child's right to be born as a whole, functional being).

Similarly, causes of action on behalf of siblings for damages sustained in their proportional loss of parental affection and family income benefits due to the birth of the unplanned child have been rejected because *inter alia*, the children have no vested rights in future love and care or financial support. *See* Arnoff v. Snider, 292 So. 2d 418 (Fla. Dist. Ct. App. 1974) (concept without foundation in law); Cox v. Stretton, 77 Misc. 2d 155, 352 N.Y.S.2d 834 (Sup. Ct. 1974) (children not entitled to any proportional share of wealth or care). *Contra*, Coleman v. Garrison, 281 A.2d 616 (Del. Super. Ct. 1971) (economically measurable effect of birth of fifth child on standard of living of previous four compensable), *appeal dismissed and opinion vacated on other grounds sub nom.* Wilmington Medical Center Inc. v. Coleman, 298 A.2d 320 (Del. 1972), *dismissed on reargument*, 327 A.2d 757 (Del. Super. Ct. 1974).

3. On argument of the state's motion for summary judgment, the claim against the physician was dismissed for lack of jurisdiction. Rivera v. State, 94 Misc. 2d 157, ____ n.1, 404 N.Y.S.2d 950, 951 (Ct. Cl. 1978).

4. Respondent's Brief for Summary Judgment at 1, Rivera v. State, 94 Misc. 2d 157, 404 N.Y.S.2d 950 (Ct. Cl. 1978).

The defendants, relying on the New York Court of Appeals' holding in *Howard v. Lechner,*[5] moved for summary judgment asserting that no cause of action existed for the failure of a sterilization operation which resulted in the birth of a normal healthy child. In addition, the defendants claimed that it would have been against public policy to award damages for the creation of life.[6]

Held,[7] motion denied.[8] The court concluded that there was sufficient case law in support of the claimant's position to render summary judgment inappropriate and to allow them, if successful, to recover such damages as they might prove, including the anticipated cost of rearing the child, less the cash value of any benefits conferred by the birth. *Rivera v. State,* 94 Misc. 2d 157, 404 N.Y.S.2d 950 (Ct. Cl. 1978).

By denying the state's motion for summary judgment and thereby recognizing the viability of a cause of action on behalf of the claimants, the *Rivera* court allied itself with a growing number of jurisdictions reaching the same conclusions.[9] Commonly grouped under the rubrics "wrongful life"[10] and "wrongful birth"[11] this line of cases has engendered a split of authority on the availability of damages to parents of healthy, albeit unwanted children, born following a negligently performed sterilization operation.[12]

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5. 42 N.Y.2d 109, 366 N.E.2d 64, 397 N.Y.S.2d 363 (1977).

6. Respondent's Brief for Summary Judgment *supra* note 4, at 5.

7. The court also held that the claimants were under no duty to mitigate damages by aborting the unwanted fetus. The court opined that requiring an abortion would have constituted a clear invasion of privacy not to be countenanced by a rule of law. 94 Misc. 2d at ____, 404 N.Y.S.2d at 954. *Accord,* Ziemba v. Sternberg, 45 A.D.2d 230, ____, 357 N.Y.S.2d 265, 269 (App. Div. 1974).

8. Appeal papers were filed by the state on May 23, 1978.

9. *See, e.g.,* Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967); Bushman v. Burns Clinic Medical Center, 83 Mich. App. 453, 268 N.W.2d 683 (1978); Martineau v. Nelson, 247 N.W.2d 409 (Minn. 1976).

10. The term "wrongful life" in proper usage describes an action commenced on behalf of an infant for having been born at all, or having been born with deformities. Note, *Wrongful Birth in the Abortion Context - Critique of Existing Case Law and Proposal for Future Actions,* 53 DEN. L.J. 501 (1976). The term is so used herein.

The *Rivera* court noted that the phrase "wrongful life," which it called an "unfortunate epithet," is used mostly by those in opposition to recovery in cases such as *Rivera.* It characterized the term as an inaccurate description of the cause of action. 94 Misc. 2d at ____, 404 N.Y.S.2d at 953.

11. "Wrongful birth" as used herein, refers to circumstances, as in *Rivera,* where parents or siblings commence an action for harm done to them by a party whose conduct has aided the birth of an unwanted child. *See* Comment, *Strict Liability: A "Lady in Waiting" for Wrongful Birth Cases,* 11 CALIF. W.L. REV. 136, 137 (1974) (hereinafter, cited as *"Lady in Waiting"*).

12. *Compare* Terrell v. Garcia, 496 S.W.2d 124 (Tex. Civ. App. 1973) *cert. denied,* 415 U.S. 927 (1974) (benefits of having child outweigh the economic loss incident to raising it), *and* Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974) (physician's culpability in failing to diagnose pregnancy did not merit shifting of the costs of child's minority to him, while parents retained the benefit of parenting a child) *with* Anonymous v. Hospital, 33 Conn. Supp. 125, 366 A.2d 204 (Super. Ct. 1976) (demurrer to complaint alleging cause of action for wrongful life overruled, defendants permitted to argue benefits of birth to parents in mitigation of damages) *and* Betancourt v. Gaylor, 136 N.J. Super. 69, 344 A.2d 336 (1975) (any damage proximately resulting from negligent sterilization recoverable at law).

Specifically, some courts have preempted recovery on the premise that no damage inheres in the birth of a child[13] or if it does, it is negated by the blessedness of the event.[14] In reaching a different result, the court in *Rivera* recognized that the birth of an unwanted child may realistically represent financial damage to the family and that recovery is available although subject to set-off of the value of the benefits of parenthood.[15]

In so concluding, the *Rivera* court reviewed the relevant case law, especially the decision of *Howard v. Lechner.*[16] The defendants cited *Howard,* a 1977 New York Court of Appeals case, as authority for the proposition that parents have no cause of action based upon a physician's failure to prevent the birth of a child and urged dismissal on that ground.[17] Actually, the holding of *Howard* was more limited.[18] The court of appeals held only that the parents of a child born with Tay-Sachs disease had no cause of action for vicarious emotional and mental distress caused by their exposure to the child's affliction.[19] Liability was not imposed on the defendant-doctor either for his alleged knowledge of the plaintiffs' predisposition as Tay-Sachs carriers[20] or for his failure to test the fetus to determine the presence of the disease.[21]

Because the Riveras did not seek damages for vicarious injury, the court of claims held that *Howard* did not preclude their recovery.[22] Moreover, as the *Rivera* court pointed out, *Howard* left open to question the viability of causes of action, under these or similar facts, which rely on theories of recovery other than vicarious mental and emotional harm to the plaintiffs.[23]

Addressing this unanswered question, the *Rivera* court looked to the results in similar cases that had already reached the intermediate appellate level.[24] Among others,[25] *Park v. Chessin*[26] is cited by the *Rivera* court as

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13. Shaheen v. Knight, 6 Lyc. 19, 11 Pa. D. & C.2d 41 (1957).
14. Christensen v. Thornby, 192 Minn. 123, 255 N.W. 620 (1934).
15. 94 Misc. 2d at ___, 404 N.Y.S.2d at 952-53.
16. 42 N.Y.2d 109, 366 N.E.2d 64, 397 N.Y.S.2d 363 (1977).
17. 94 Misc. 2d at ___, 404 N.Y.S.2d at 951.
18. 42 N.Y.2d at ___, 366 N.E.2d at 66, 397 N.Y.S.2d at 365.
19. *Id.*
20. *Id.* at ___, 366 N.E.2d at 65, 397 N.Y.S.2d at 364.
21. *Id.*
22. 94 Misc. 2d at ___, 404 N.Y.S.2d at 951.
23. *Id.* at ___, 404 N.Y.S.2d at 951.
24. *Id.* at ___, 404 N.Y.S.2d at 952-53.
25. In addition to *Park v. Chessin,* the *Rivera* court cites as authority for the proposition that recovery is available the following cases: Becker v. Schwartz, 60 A.D.2d 587, 400 N.Y.S.2d 119 (App. Div. 1977) (in a per curiam opinion, a cause of action for wrongful birth was validated on the authority of Park v. Chessin, 60 A.D.2d 80, 400 N.Y.S.2d 110 (App. Div. 1977)) and Karlsons v. Guerinot, 57 A.D.2d 73, 394 N.Y.S.2d 933 (App. Div. 1977). However, the court's reliance may be misplaced since that part of the decision in *Karlsons* which upholds the parent plaintiffs' cause of action for wrongful birth has been implicitly overruled by the court of appeals holding in *Howard v. Lechner. Howard* and *Karlsons* are almost factually identical. In fact, the court in *Karlsons* noted the decision of the second department in *Howard* (before it was affirmed by the court of appeals, 42 N.Y.2d 109, 366 N.E.2d 64, 397 N.Y.S.2d 363 (1977), *aff'g* 53 A.D.2d

authority for the proposition that recovery is available.[27] In *Park*, the court found that the defendant physician had breached a duty to speak with due care by tendering a clearly erroneous opinion[28] upon which the plaintiffs had relied in electing to have another diseased child.[29]

The court of claims in *Rivera* found the reasoning of *Park* instructive;[30] it also relied on *Ziemba v. Sternberg*,[31] a case of negligent failure to diagnose a pregnancy, noting that *Ziemba* contained an incisive analysis of the questions raised by the wrongful birth lawsuits.[32] Put simply, the *Ziemba* court relied on settled principles of medical malpractice law to resolve the issues surrounding wrongful birth claims.[33] Plaintiffs' complaint was held to state a cause of action against the defendant-doctor who had prescribed medication to his patient to prevent conception and then failed to diagnose a four and one-half month old pregnancy.[34] Such a breach of care in diagnosis rendered the defendant responsible for all naturally consequent damages.[35]

A different result was reached by the Second Department in *Stewart v. Long Island College Hospital*,[36] a suit for damages incurred as a result of defendant's failure to perform a therapeutic abortion.[37] The court found that the parent-plaintiffs' anguish and mental suffering was not a suable wrong.[38] It also conditioned judicial recognition of the injury on legislative sanction.[39]

Additionally, the *Stewart* court found that in view of the New York *Penal Code* then in effect,[40] the proposed abortion would have been illegal.[41] The *Rivera* court declined to follow either strain of the *Stewart* court's decision[42] and by implication, refused to follow the decision in *Johnson v. Yeshiva University*,[43] which had relied on *Stewart*.[44]

420, 386 N.Y.S.2d 460 (App. Div. 1976)) and declined to follow it. Karlsons v. Guerinot, at ____, 394 N.Y.S.2d at 936.

26. 60 A.D.2d 80, 400 N.Y.S.2d 110 (App. Div. 1977).

27. 94 Misc. 2d at ____, 404 N.Y.S.2d at 951.

28. The defendant, knowing that the plaintiff's first child had succumbed to polycystic disease of the kidneys, advised them that the probability of a future child being similarly afflicted was "practically nil" because the disease was not hereditary, despite the proven medical fact that it *is* hereditary. 60 A.D.2d at ____, 400 N.Y.S.2d at 111. *See also* the entry "polycystic kidney" under the general entry "kidney," STEDMAN'S MEDICAL DICTIONARY 745 (4th ed. 1976).

29. 60 A.D.2d at ____, 400 N.Y.S.2d at 113.

30. 94 Misc. 2d at ____, 404 N.Y.S.2d at 952.

31. 45 A.D.2d 230, 357 N.Y.S.2d 265 (App. Div. 1974).

32. 94 Misc. 2d at ____, 404 N.Y.S.2d at 952.

33. 45 A.D.2d at ____, 357 N.Y.S.2d at 267-69.

34. *Id.* at ____, 357 N.Y.S.2d at 267.

35. *Id.* at ____, 357 N.Y.S.2d at 268.

36. 35 A.D.2d 531, 313 N.Y.S.2d 502 (App. Div. 1970), *aff'd*, 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1972).

37. *Id.* at ____, 313 N.Y.S.2d at 502.

38. *Id.*

39. *Id.*

40. N.Y. PENAL LAW § 80 (McKinney 1909).

41. 35 A.D.2d at ____, 313 N.Y.S.2d at 503.

42. 94 Misc. 2d at ____, 404 N.Y.S.2d at 952-53.

43. 53 A.D.2d 523, 384 N.Y.S.2d 455 (App. Div. 1976) (cause of action for failure to take

Citing a change in the *Penal Code* regarding the legality of abortions, the court in *Rivera* noted that this aspect of *Stewart* was not controlling.[45] Nor did the court follow the lead of the *Stewart* court by practicing judicial restraint.[46] Instead, the court marked the progressive role that courts can play, especially in the field of tort law, as illustrated by the abrogation of the common law doctrine of sovereign immunity by the judiciary rather than by the legislature.[47]

Having examined these cases, the court concluded that sufficient precedent supported the cause of action so that summary judgment would not lie.[48] Reflecting on this decision, the court articulated the policy implications of its holding, especially concentrating on the subject of damages,[49] the traditional point of departure for courts reaching dissimilar conclusions.[50]

As noted, the *Rivera* court essentially permitted the claimants to recover such damages as they might prove, including the anticipated cost of rearing the unwanted sixth child.[51] Additionally, the court was willing to allow the defendants to set off against this sum the cash value of the benefits conferred upon the Riveras by the birth.[52]

The discussion accompanying this formulation is suggestive of the controversy in the courts concerning this subject, but it does not portray the extent of the division.[53] The essence of this divorcement is no less than the worth attributed to life itself.[54] Put another way, much of the judicial hesitation in validating causes of action for wrongful birth stems from a not uncom-

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genetic test of fetus dismissed due to lack of legislative sanction), *aff'd*, 42 N.Y.2d 818, 364 N.E.2d 1340, 396 N.Y.S.2d 647 (1977). In affirming, the court of appeals made note of all the interesting questions posed by *Johnson*. *Id.* at ____, 364 N.E.2d at 1341, 396 N.Y.S.2d at 648. From the tone of the decision, it may be inferred that the court of appeals only regretfully disposed of *Johnson* on the narrow ground required by the record.

44. 53 A.D.2d at ____, 384 N.Y.S.2d at 456.

45. 94 Misc. 2d at ____, 404 N.Y.S.2d at 952 (citing N.Y. PENAL LAW § 125.05 (McKinney 1970)).

46. *Id.* at ____, 404 N.Y.S.2d at 953.

47. *Id.* (citing Jones v. State Highway Comm'n, 557 S.W.2d 225 (Mo. 1977)).

48. *Id.* at ____, 404 N.Y.S.2d at 952.

49. *Id.* at ____, 404 N.Y.S.2d at 952-53.

50. *See generally* Comment, LIABILITY FOR FAILURE OF BIRTH CONTROL METHODS, 76 COLUM. L. REV. 1187, 1195-1204 (1976) (hereinafter cited as Comment, *Methods Failure*); Note, *Sterilization and Family Planning: The Physician's Civil Liability*, 56 GEO. L.J. 976, 991-95 (1968) (hereinafter cited as Note, *Physician's Liability*).

51. 94 Misc. 2d at ____, 404 N.Y.S.2d at 952.

52. *Id.* at ____, 404 N.Y.S.2d at 952-53.

53. For a capsule discussion of the law in wrongful birth cases, *see* Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (Dist. Ct. App. 1967) (plaintiff parents held able to recover more than nominal damages for negligently performed tubal ligation, even if child, their *tenth*, born healthy). *See also* Comment, *Busting the Blessing Balloon: Liability for the Birth of an Unplanned Child*, 39 ALB. L. REV. 221 (1974); Note, *Redressing a Blessing: The Question of Damages for Negligently Performed Sterilization Operations*, 33 U. PITT. L. REV. 886 (1972) (hereinafter cited as Note, *Redressing*).

54. *See* Shaheen v. Knight, 6 Lyc. at ____, 11 Pa. D. & C. 2d at 45: "We are of the opinion that to allow damages for the birth of a normal child is foreign to the universal public sentiment of the people."

mon conviction that birth is a godsend.[55] The courts have in the past viewed the beginning of life as a blessed event.[56]

For example, one of the first cases to decide upon the availability of recovery for negligent sterilization was *Cristensen v. Thornby*,[57] where the plaintiff husband secured a vasectomy to protect his wife from a dangerous third pregnancy.[58] The Minnesota Supreme Court denied recovery.[59] In doing so, it pronounced its rationale in language destined for posterity. Said the court: "Instead of losing his wife, the plaintiff has been *blessed* with the fatherhood of another child."[60]

Later cases, consistent with the theory that birth is a blessing which overrides any concurrent detriment, continued to enumerate the benefits conferred, other than the boon of fatherhood.[61] Included were the fun, joy and affection of rearing and educating a child,[62] the particular windfall of a child dearly loved and worth more than $50,000, companionship,[63] the value of a child's smile and the parental pride in a child's achievement.[64]

Based on these benefits, the value of the child was said to outweigh the cost of having and raising it.[65] And lest a child at some future date discover the litigation over the cost incident to its existence and balk at having had his "value" debated, at least one court has taken pains to insure that the child would understand that the cause of action was brought *only* to determine the outer limits of a physician's liability.[66]

Not surprisingly, this reasoning obscures the underlying issues of adher-

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55. *See* Terrell v. Garcia, 496 S.W.2d 124, 128 (Tex. Civ. App. 1973) ("These intangible benefits [stemming from having a child] are undoubtedly the things that make life worthwhile."); Ball v. Mudge, 64 Wash. 2d 247, ___, 391 P.2d 201, 204 (1964) ("As reasonable persons, the jury may well have concluded that the appellants suffered no damage in the birth of a normal healthy child, whom they dearly love. . . .").

56. Christensen v. Thornby, 192 Minn. 123, ___, 255 N.W. 620, 622 (1934).

57. 192 Minn. 123, 255 N.W. 620 (1934).

58. *Id.* at ___, 255 N.W. at 621.

59. *Id.* at ___, 255 N.W. at 622. The plaintiff's action was one for deceit, and apparently, there was a failure of proof. *Id.* The court did not answer the question of availability of recovery in an action for negligence or breach of contract, although it did suggest that an action sounding in negligence might have had a different result when it said that "[i]t is a matter of common knowledge that such an operation [a vasectomy] properly done in due course effects sterilization." *Id.* In fact, the Minnesota Supreme Court held in Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 172-73 (Minn. 1977), that *Christensen* stood for the proposition that a cause of action exists for negligent sterilization and that in *Christensen*, the plaintiff's case was dismissed only on a pleading technicality. It also noted that the much quoted language "blessed with fatherhood . . ." was merely dicta.

60. 192 Minn. at ___, 255 N.W. at 622.

61. *See* Shaheen v. Knight, 6 Lyc. at ___, 11 Pa. D. & C.2d at ___; Ball v. Mudge, 64 Wash. 2d at ___, 391 P.2d at 201.

62. Shaheen v. Knight, 6 Lyc. at ___, 11 Pa. D. & C.2d at ___.

63. Ball v. Mudge, 64 Wash. 2d at ___, 391 P.2d at 205.

64. Terrell v. Garcia, 496 S.W.2d at 128.

65. *See* 9 UTAH L. REV. 808, 815 (1965).

66. Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974). *Accord*, Coleman v. Garrison, 349 A.2d 8, 14 (Del. 1975).

ence to a duty of due care; despite sometimes arguably clear negligent conduct[67] the plaintiff is often left with only the impalpable and non-fungible accouterments of parenthood. Yet clearly the "overriding benefit" rationale is not easily dismissed. Viewed through our institutions, it is apparent that we do set great store in preserving and guarding the quality of life.[68] For example, witness merely as a single proof the careful procedural safeguards attending the imposition of a sentence of death in a criminal trial,[69] to say nothing of the great debate concerning the correctness of such a penalty.[70]

However, at least in the opinion of the *Rivera* court, this idea of life as ultimate good is not universal.[71] Moreover, even if it were, the court concluded that offense taken to compensation of parent-plaintiffs for the negligence of a physician charged with the duty of sterilization would be no less insupportable than offense taken to the practice of birth control, a practice falling within the constitutionally protected right of privacy.[72]

The court went on[73] to find that the choice of whether or not to have a sterilization operation falls within the "family planning" rights framework of *Griswold v. Connecticut*[74] and *Meyer v. Nebraska*.[75] While true that *Griswold* cloaked certain facets of birth control in constitutional protection,[76] it was

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67. For example, given the relatively low average failure rate of tubal ligations (*see* note 1, *supra*), the physician's failure to adequately sterilize is apparent in most cases. *Cf.* Comment, *"Lady in Waiting,"* *supra* note 11, at 153-57 (where the author suggests that instead of actions in negligence, suits for failure of birth control methods, especially ineffective oral contraceptives, should be pleaded as products liabiliity actions).

68. For example, the projected Budget Authority (legal authority to enter into obligations that will result in future outlays) for fiscal 1979 for the department of Health, Education and Welfare, an organization devoted to spending money on programs for the public good, is $61,691,804,000; the figure for the Department of Housing and Urban Development is $33,112,026,000. THE BUDGET OF THE UNITED STATES GOVERNMENT FISCAL YEAR 1979, 351-54 (1978).

Similarly, for the year ending June 30, 1974, Americans spent $104,000,000,000 or 8% of the gross national product for health care. K. SPENCER, THE GREAT AMERICAN MEDICINE SHOW 1 (1975). And finally, in the year 1960, Americans spent approximately $1,600,000,000 on funerals. J. MITFORD, THE AMERICAN WAY OF DEATH 39 (1963).

69. *See* Gregg v. Georgia, 428 U.S. 153 (1976) (death penalty not *per se* cruel and unusual within the meaning of the eighth and fourteenth amendments; Georgia's procedural system providing *inter alia* for automatic review to state supreme court guards against arbitrary and capricious imposition of death penalty); Woodson v. North Carolina, 428 U.S. 280 (1976) (death penalty not *per se* cruel and unusual within the meaning of the eighth and fourteenth amendments; North Carolina's mandatory imposition of death penalty for first degree murder in violation of eighth and fourteenth amendments in failing to curb arbitrary jury discretion).

70. *See* Gregg v. Georgia, 428 U.S. at 233, (Marshall, J., dissenting) (death penalty excessive; does not deter crime and is a denial of human worth); Furman v. Georgia, 408 U.S. 238 (1972) (on facts before the Court, imposition of death penalty constituted cruel and unusual punishment in violation of eighth and fourteenth amendments).

71. 94 Misc. 2d at ____, 404 N.Y.S.2d at 953.

72. *Id.*

73. *Id.*

74. 381 U.S. 479 (1965).

75. 262 U.S. 390 (1923).

76. The Court's decision in *Griswold* extended the right of privacy to the decision of a married couple to have children; the Supreme Court held that the state could not make the use

probably an overstatement for the *Rivera* court to claim that a physician's negligence in performing a sterilization operation constitutes an interference with fundamental rights for which a remedy must be had.[77]

The remedy, already articulated, is the offset-benefit measure: provable damages of any sort are reduced by the dollar value of the benefit conferred upon the plaintiff by the defendant's negligence.[78] The California case of *Custodio v. Bauer*[79] was the first case to discard the "blessing" theory in favor of allowing recovery for a negligently performed sterilization operation[80] and to implement the offset-benefit rule, though in a limited fashion.[81]

The *Custodio* court restricted the offset value to the specific benefit the parents sought to protect in obtaining the sterilization operation, i.e., the mother's continued mental and physical well being.[82] The Michigan case of *Troppi v. Scarf*[83] which came after *Custodio*, applied the offset-benefit rule more liberally, allowing offset of *any* benefit conferred by reason of the birth.[84] The more recent cases have applied this rule almost uniformly,[85] perhaps for no other reason than that the rule offers a compromise between the competing social and legal issues in the wrongful birth cases.

Proponents of a policy calling for compensation for negligent conduct which causes injury are satisfied with the use of the offset-benefit rule, since the rule makes possible total recovery of all items of damage.[86] Beneficial results of the negligent conduct are relegated to the role of mitigating factors rather than elements vitiating liability.[87] Costs of a second operation,[88] doctor's fees,[89] hospital charges,[90] costs of schooling, clothing and feeding a child during its minority,[91] costs for the pain and suffering of pregnancy,[92] loss of

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of contraceptives by married persons a crime. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-10 at 921 (1978).

77. 94 Misc. 2d at ____, 404 N.Y.S.2d at 953. *Accord,* Bowman v. Davis, 48 Ohio St. 2d 41, ____, 356 N.E.2d 496, 499 (1976) (for the court to allow recovery for all negligently performed operations *except* sterilization would infringe on a constitutionally protected right).

78. *See* Note, *Physician's Liability, supra* note 50, at 994-95.

79. 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (Dist. Ct. App. 1967).

80. *Id.* at ____, 59 Cal. Rptr. at 447.

81. *Id.* at ____, 59 Cal. Rptr. at 476.

82. *Id.* Mrs. Custodio had undergone sterilization to improve her emotional and nervous makeup as well as to improve a kidney and bladder infirmity. *Id.* at ____, 59 Cal. Rptr. at 466.

83. 31 Mich. App. 240, 187 N.W.2d 511 (Ct. App. 1971) (pharmicist negligently supplied tranquilizers rather than oral contraceptives to plaintiff mother).

84. *Id.* at ____, 187 N.W.2d at 518-19.

85. *See* Stills v. Gratton, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (Dist. Ct. App. 1976); Bushman v. Burns Clinic Medical Center, 268 N.W.2d 683 (Mich. 1978).

86. *See* Note, *Redressing, supra* note 53.

87. *Compare* Shaheen v. Knight, 6 Lyc. 19, 11 Pa. D. & C.2d 41 (1957) *with* Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (Ct. App. 1971).

88. Anonymous v. Hospital, 33 Conn. Supp. at ____, 366 A.2d at 205.

89. Ziemba v. Sternberg, 45 A.D.2d at ____, 357 N.Y.S.2d at 267.

90. *Id.*

91. *Id.*

92. Bushman v. Burns Clinic Medical Center, 83 Mich. App. at ____, 268 N.W.2d at 687.

consortium[93] and loss of services[94] are all susceptible to proof and are proper items of damage.

Furthermore, the inability to precisely state the amount of any one of these elements would not be fatal to recovery.[95] It is well settled that damages need not be exactly measured by their proponent.[96] Despite this rule, some courts have denied recovery in these cases because of the difficulty of determining the value of intangibles such as the benefits of parenthood.[97]

Use of the offset-benefit rule, which also accrues to the profit of defendants, would logically lead to the retirement of this flimsy pretext for invalidating actions for wrongful birth. This is so because the offset-benefit rule, despite its apparent prejudice in favor of plaintiffs, is actually the overriding benefit rule of *Cristensen* with a catch.[98] Defendants in jurisdictions using the offset-benefit measure still have the opportunity to substantially reduce or even cut off plaintiffs' award through resort to arguments stressing the magnitude of the value of a child.[99] Even though the defendants would most likely bear the burden of allocating values to intangible benefits,[100] the potential effect on the trier of fact would be worth the trouble.

For example, in a case where the sterilization is procured for the sake of convenience and the plaintiffs are in a high income bracket, there is a likelihood that the trier of fact would be inclined to find only minimal damages.[101] Of course, this line of reasoning would not be as effective when plaintiffs are parents of a ghetto family of seven.[102] Either way, each side stands to gain from the balance; the mechanics of the rule embody the best of the adversary system.

Still the use of the offset-benefit rule does promote some inconsistency. Commentators have indicated that the substance of the rule is drawn from section 920 of the Restatement of Torts.[103] That section outlines the balance of benefit and detriment, but subsumes that the benefits received must be related to the interests harmed.[104] For example, if a woman were to undergo

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93. Bowman v. Davis, 48 Ohio St. 2d at ____, 356 N.E.2d at 497.

94. *Id.*

95. 94 Misc. 2d at ____, 404 N.Y.S.2d at 952.

96. *See* Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931).

97. *See* Gleitman v. Cosgrove, 49 N.J. at 29-30, 227 A.2d at 693 (in wrongful life case, damages are impossible to asses on basis of complaint).

98. *See* Note, *Redressing*, *supra* note 53, at 889.

99. 94 Misc. 2d at ____, 404 N.Y.S.2d at 952-53.

100. *Id.*

101. *See* Note, *Redressing*, *supra* note 53, at 895-99, where the author, in graph form, shows the effect of various factors on recovery.

102. *Id.*

103. Section 920 reads:

> Benefit To Plaintiff Resulting From Defendant's Tort.
>
> Where the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred upon the plaintiff a special benefit to the interest which was harmed, the value of the benefit conferred is considered in mitigation of damages, where this is equitable.

RESTATEMENT OF TORTS § 920 (1939).

104. *See* Note, *Redressing*, *supra* note 53, at 891-92.

a tubal ligation for health reasons, and then have a child, the joy of parenthood would not be offsetting because that benefit would in no way relate to the harm resulting from the ineffective sterilization.[105] Such a result would substantially erode the value of the rule for the defendant. However, since this strict "same interest" test has been largely ignored by the courts in the past,[106] the only danger it represents is that its future employment may tip the equitable balance of the offset-benefit rule in favor of the parents.[107]

Despite this technical snare, the offset-benefit rule is well suited to its difficult conceptual task in the wrongful birth cases. As described, it allows the competing parties in these cases to make their arguments and let the trier of fact decide which prevails, the benefit or the loss. Evaluation of the dollar value of a child's smile may be difficult, but not much more so than evaluating the pain and suffering attending a traditional personal injury case.[108]

Much will depend on the facts of each case, since the relative benefits and losses differ according to socio-economic status and existing family patterns. Yet it is better to apply a rule which allows for these considerations rather than to rigidly allow or deny recovery through use of a straight general rule. Moreover, insofar as it strikes a balance between a physician's negligence and the benefit which most, but not all, associate with birth, the offset-benefit rule, as adopted by the *Rivera* court, offers the best solution.

James Patrick Tallon

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105. *See* Custodio v. Bauer, 251 Cal. App. 3d at ____, 59 Cal. Rptr. at 466 (benefits chargeable against plaintiffs include only those relating to mother's emotional and mental health, for which she underwent sterilization).

106. *See* Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (Ct. App. 1971); Comment, *Methods Failure, supra* note 50, at 1197-99.

107. The possibility of the equitable balance of the offset-benefit rule being tipped in favor of the parents would be greater especially if the *Custodio v. Bauer* implementation of section 920 were to be widely used. *See* note 103, *supra*. That is, the defendants would in most cases, be severly restricted in the benefits they could apply in mitigation and consequently, their potential liability exposure would increase. Where, as in *Custodio*, the parent underwent sterilization for health reasons, the value of a child's smile would be of no relevance.

108. C. McCormick, Handbook on the Law of Damages § 88 (1935).