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involvement, are needed to clarify the *Shapiro* holding, and should be expected in the future.

CLARK HARWELL COLE

## WRONGFUL CONCEPTION AS A CAUSE OF ACTION AND DAMAGES RECOVERABLE

### *Sherlock v. Stillwater Clinic*<sup>1</sup>

After the birth of their seventh child, Mr. and Mrs. Sherlock decided that Mr. Sherlock should undergo a vasectomy. Dr. Stratte performed the operation at the defendant clinic, and advised avoidance of sexual relations without contraception until post-operative testing proved the procedure successful. Following the first test of Mr. Sherlock's semen, Dr. Stratte informed him by telephone that the results were "negative."<sup>2</sup> Believing the operation to have been successful, the Sherlocks resumed normal sexual relations without contraceptives. When Mrs. Sherlock began to miss her menstrual periods several months later, a second test was made, revealing that the sterilization had been ineffective. Mrs. Sherlock was pregnant, and in due course she delivered a normal, healthy baby boy.

The Sherlocks brought suit, claiming that the birth of their child was the result of Dr. Stratte's negligent post-operative testing.<sup>3</sup> Tried as an or-

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1. 260 N.W.2d 169 (Minn. 1977).

2. Actually, the test results indicated "that Mr. Sherlock's semen had a sperm density of 5 to 10 sperm cells per high-powered microscope field and that 50 percent of these were motile." *Id.* at 171. From this information, little can be deduced about Sherlock's degree of fertility since many factors besides sperm density are important and "there is considerable debate as to the lower level of 'normal' and 'fertile.'" 1 M. CAMPBELL, *CAMPBELL'S UROLOGY* 736 (J. Harrison, et. al. ed. 1978). However, although some authorities will tolerate the presence of nonmotile sperm in post-operative samples under certain conditions, see Urquhart-Hay, *Immediate Sterility After Vasectomy*, 81 N. Z. MED. J. 11 (1975), the presence of any motile sperm cells usually indicates that the operation has failed for some reason, Freeman, *Vasectomy in General Practice*, 214 PRACTITIONER 401, 405 (1975). Therefore, Sherlock's sperm sample could not have been considered negative.

3. The Sherlock's also alleged that the vasectomy operation itself had been negligently performed, but the court did not discuss this aspect of the suit, merely noting the difficulty of proving this allegation. *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169, 171 n.1 (Minn. 1977). See further discussion of this cause of action

dinary medical negligence action and submitted to the jury on general negligence instructions, the case resulted in a verdict for the Sherlocks of \$19,500. On appeal, the Supreme Court of Minnesota held that when the birth of a normal healthy child was proximately caused by a physician's negligence, damages could be recovered for medical expenses, the mother's pain and suffering, loss of consortium, *and* the reasonable cost of rearing the child, less the value of the child's aid, comfort, and society.

*Sherlock* illustrates the elements of a small but growing line of cases referred to as "wrongful birth"<sup>4</sup> actions (not to be confused with "wrongful life" actions).<sup>5</sup> In the typical situation giving rise to such a case, a nor-

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4. The proper appellation of this group of cases has not yet been agreed upon. The term used by the *Sherlock* court, "wrongful conception," would apply to the bulk of these cases because it accurately indicates that the defendant's wrongful act is alleged to be the proximate cause of the conception itself. However, there is at least one case in which similar recovery was held allowable after a physician performed an unsuccessful abortion. There the child had been conceived before the alleged negligence. *Stills v. Gratton*, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976). In addition, plaintiffs in "wrongful conception" have sought recovery based on the failure of the physician to diagnose an existing pregnancy or disease in time for an abortion to be performed. *See, e.g., Howard v. Lecher*, 42 N.Y.2d 109, 366 N.E.2d 64, 397 N.Y.S.2d 363 (1977) (recovery denied); *Rieck v. Medical Protec. Co.*, 64 Wis. 2d 514, 219 N.W.2d 242 (1974) (recovery denied). *See generally*, Annot., 83 A.L.R.3d 15 (1978). As a more inclusive term, "wrongful birth" may be preferable.

5. Distinguishing between wrongful birth and wrongful life actions is vital because courts have treated the two much differently. While several jurisdictions have accepted the idea of wrongful birth, only one case has recognized a cause of action for wrongful life. *Park v. Chessin*, 60 App. Div. 2d 80, 400 N.Y.S.2d 110 (1977), noted in 44 MO. L. REV. 117 (1979). Although the subject is too complicated to discuss at length here, some of the more basic features of the wrongful life claim can be noted. The plaintiff is a child who alleges damages because the defendant allowed him to be born. In contrast to ordinary prenatal tort cases there is *no* assertion that the defendant caused any physical injury; birth itself is the injury. In essence the child contends it would be better off unborn.

The suit may be by a bastard against its parents for being forced to endure the stigma of its origin. *See, e.g., Zepeda v. Zepeda*, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), cert. denied, 379 U.S. 945 (1964). Commonly, however, the suit is directed against a physician for negligence which allowed the child to be born. *See, e.g., Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967) (failure to inform mother that rubella could cause birth defects, thereby precluding an informed decision not to obtain an abortion).

With the one exception mentioned above, courts have consistently refused to award damages for such claims, although often recognizing that a tort had been committed. The reasons usually cited are public policy against considering the gift of life an injury, the impossibility of weighing existence against nonexistence to establish the amount of damages; and a fear of increased litigation. *See Note, A Cause of Action for Wrongful Life: [A Suggested Analysis]*, 55 MINN. L. REV. 58 (1970); *Note, Torts—Wrongful Birth and Wrongful Life*, 44 MO. L. REV. 167 (1979).

Since both wrongful life and wrongful birth actions arise from similar situations and in fact often are alleged in the same case, it is easy to understand how they may be confused, but a claim by the parents is not one for wrongful life.

mal, healthy baby is born as a result of the negligence, fraud, or breach of contract of a third party. Second, the parents of the child, as opposed to the child itself, sue as plaintiffs. Third, damages are sought for the expenses which the parents have been, and will be subjected to as a result of the unexpected conception.

Because the cause of action is relatively novel, its development prior to *Sherlock* will be briefly traced. Due to the infrequency of voluntary sterilization in the past, the first case did not appear until 1934. In *Christensen v. Thornby*,<sup>6</sup> the plaintiff husband sought damages for his anxiety and expense accompanying the birth of a normal child despite the performance of a vasectomy by the defendant.<sup>7</sup> The complaint was based on a deceit theory stemming from the doctor's representations concerning efficacy of the sterilization.<sup>8</sup> The court's opinion disallowing recovery turned on the lack of proof of deceit, and on the fact that the operation was undertaken to spare the plaintiff's wife the strain of another birth, not to save the expenses of pregnancy and delivery. Since the wife was not harmed, the court concluded that the plaintiff had suffered no compensable damages.<sup>9</sup> *Christensen* did not deny, however, that a cause of action may exist for an improperly performed sterilization, and therein lies its importance.

In *Shaheen v. Knight*,<sup>10</sup> the question of damages for wrongful conception was considered at greater length. The plaintiffs claimed breach of contract, and sought damages for the expense of maintaining their child. Although the opinion indicated that a contract to sterilize is not against public policy, even if sought solely for economic reasons, plaintiffs were denied recovery because of the court's views of public policy.<sup>11</sup> This conclusion was reached despite the fact that unlike *Christensen* the Shaheens primarily desired to prevent the financial burden which additional children would bring. The court reasoned that to "allow damages . . .

*Bowman v. Davis*, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976). Since damages sought by the parents do not include the child's mere existence, but only some compensation for expenses they are subjected to because of the child, the policy arguments mentioned above do not apply. The courts have been much more receptive to the parents' claims, often allowing them at least in part, while dismissing the child's wrongful life claim when the two arise in the same case. See, e.g., *Dumer v. Saint Michael's Hosp.*, 69 Wis. 2d 776, 233 N.W.2d 372 (1975).

6. 192 Minn. 123, 255 N.W. 620 (1934).

7. Although it is somewhat unusual for a husband to bring suit alone in such situation, at least one case suggests that he may have a separate right to recover. *Milde v. Leigh*, 75 N.D. 418, 28 N.W.2d 530 (1947).

8. The plaintiff alleged that the physician had promised a sterile result from the operation. 192 Minn. at 124, 255 N.W. at 621.

9. The court's feelings were made even clearer by a dictum: "As well might the plaintiff charge defendant with the cost of nurture and education of the child during its minority." *Id.* at 126, 255 N.W. at 623.

10. 11 Pa. D. & C. 2d 41 (1957).

11. The court noted that the purpose of marriage is procreation and that "to allow damages for the normal birth of a normal child is foreign to the universal sentiment of the people." *Id.* at 45.

would mean that the physician would have to pay for the fun, joy, and affection which plaintiff Shaheen will have in the rearing and educating of [plaintiff's] fifth child."<sup>12</sup> *Shaheen* went on to hold that the advantages of having a child *always* outweigh the costs entailed, and that such "overriding benefit" entirely bars recovery for the costs of raising a child.<sup>13</sup>

*Custodio v. Bauer*<sup>14</sup> took a contrary stand on the damages issue.<sup>15</sup> The plaintiff's wife, for predominantly socio-economic reasons,<sup>16</sup> underwent a sterilization operation. Despite this procedure, she conceived an eleventh child. She and her husband, brought suit against the surgeons prior to the birth on a number of grounds, seeking recovery for medical expenses, the wife's pain and suffering, and the expenses of raising the child. Because the case was remanded for trial, the court did not actually award damages in *Custodio*. However, the opinion clearly indicated dislike of the conclusion that the birth and rearing of a normal child as a result of a negligently performed sterilization could never result in compensable damages to the

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12. *Id.* at 45, 46.

13. See also *Terrell v. Garcia*, 496 S.W.2d 124, 128 (Tex. Ct. App. 1973), *cert. denied*, 415 U.S. 927 (1974). ("Rather than attempt to value these intangible benefits, our courts have simply determined that . . . these benefits to the parents outweigh their economic loss . . .") Some doubt is cast on this result, however, because in the same year the Texas Supreme Court remanded a similar case for trial without suggesting that no cause of action was stated. *Hays v. Hall*, 488 S.W.2d 412 (Tex. 1973). Further, two later cases seem to have eroded *Terrell*. In *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975), the court carefully distinguished *Terrell* in allowing recovery of medical expenses related to the treatment of a deformed child, and *Garwood v. Locke*, 552 S.W.2d 892 (Tex. Ct. App. 1977), held that at least the expenses of the pregnancy and delivery could be recovered in a wrongful conception action.

*Cf. Rieck v. Medical Protec. Co.*, 64 Wis. 2d 514, 219 N.W.2d 242 (1974) (alleging physician's negligence for failure to detect a pregnancy in time for an abortion to be performed; court adopted overriding benefit theory).

Often courts have been careful to limit their decision to other aspects of such cases, thereby avoiding the damages question. See *Peters v. Gelb*, 303 A.2d 685 (Del. Super. Ct. 1973) (status of expert witness); *Jackson v. Anderson*, 230 So. 2d 503 (Fla. App. 1970) (recognizing the parents' cause of action without discussion of damages); *Vilord v. Jenkins*, 226 So. 2d 245 (Fla. App. 1969) (decision on statute of limitations question); *Doerr v. Villate*, 74 Ill. App. 2d 332, 220 N.E.2d 767 (1966) (same); *Hackworth v. Hart*, 474 S.W.2d 377 (Ky. 1971) (same); *Ball v. Mudge*, 64 Wash. 2d 247, 391 P.2d 201 (1964) (decision on sufficiency of plaintiff's evidence).

14. 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).

15. Prior cases had apparently indicated some sympathy for an award of damages for wrongful conception, but none actually held so. See *West v. Underwood*, 132 N.J.L. 325, 40 A.2d 610 (1945) (complications from a botched bilateral tubal ligation; the court stated that the plaintiffs should recover for *any* expense or loss due to the surgeon's negligence). See also *Milde v. Leigh*, 75 N.D. 418, 28 N.W.2d 530 (1947) (considering husband's damages).

16. In general, sterilizations may be divided into two types depending on the motive for the operation. Those motivated by medical considerations are termed "therapeutic," while those motivated by social or economic reasons are "elective."

Note, *Elective Sterilization*, 113 U. PA. L. REV. 415, 416 (1965).

parents.<sup>17</sup> Ironically, as in earlier opinions, *Custodio* relied on "public policy" to support its conclusions, but the public policy was that supporting birth control, not procreation.

In *Troppi v. Scarf*,<sup>18</sup> recovery was allowed where pregnancy resulted after the defendant pharmacist negligently filled Mrs. Troppi's prescription for birth control pills with tranquilizers.<sup>19</sup> The court rejected the "overriding benefit theory," and instead developed the "benefit rule": expenses incurred by plaintiffs should be reduced by the benefits conferred by the birth.<sup>20</sup>

From a consideration of the cases to date it is evident that policy arguments are heavily relied on in the argument and resolution of wrongful conception cases. A review of the competing arguments advanced will provide tools for advocates and an understanding of the interests involved. Opponents who would bar the cause of action entirely contend that sterilization operations violate public policy, and that the plaintiff should not be recompensed for such a violation.<sup>21</sup> In fact, a few states formerly had statutes<sup>22</sup> forbidding non-therapeutic sterilization, but none are in effect today.<sup>23</sup> Perhaps this is why courts have flatly rejected the anti-sterilization

17. The court observed that if the "change in the family status can be measured economically it should be as compensable as the [other] losses." *Id.* at 323-24, 59 Cal. Rptr. at 476.

18. 31 Mich. App. 240, 187 N.W.2d 511 (1971).

19. Space does not permit discussion of the liability of pharmacists and drug companies for the ineffectiveness of contraceptive products, an important area which differs greatly from that involving physicians. See Comment, *Strict Liability: "A Lady in Waiting" for Wrongful Birth Cases*, 11 CAL.-W. L. REV. 136 (1974); Note, *Liability for Failure of Contraceptive Devices*, 3 RUT.-CAM. L.J. 489 (1972); Comment, *Up Against the (Uterine) Wall: An Analysis of the Liability for Birth Control Products Manufacturers*, 2 S. ILL. U.L.J. 498 (1976).

20. Between the groups of cases granting all expenses and those denying recovery entirely are other cases which would allow recovery of some expenses. See *Coleman v. Garrison*, 327 A.2d 757 (Del. Super. 1974) (recovery limited to expenses of the unexpected pregnancy); *Garwood v. Locke*, 552 S.W.2d 892 (Tex. Ct. App. 1977) (would permit at least recovery of expenses of pregnancy and delivery); *Dumer v. Saint Michael's Hosp.*, 69 Wis. 2d 766, 233 N.W.2d 372 (1975). Cf. *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975) (recovery of expenses reasonably related to child's defects after physician failed to diagnose mother's rubella).

21. See, e.g., *Shaheen v. Knight*, 11 Pa. D. & C. 2d 41, 42. Cf. *Anonymous v. Hospital*, 33 Conn. Supp. 126, 366 A.2d 204 (1976) (rejecting the related argument that the award of damages would be a violation of public policy).

22. CONN. GEN. STAT. ANN. § 53-33 (West 1960) (repealed by 1969 Conn. Pub. Acts 828, § 214, effective 1971); KAN. STAT. § 76-155 (repealed by 1965 Kan. Sess. Laws, ch. 477, § 1); UTAH CODE ANN. § 64-10-12 (Smith 1953). In general, these statutes outlawed all sterilizations except those for "medical necessity."

23. Although the Utah statute remains in force it has been judicially restricted, applying only to institutionalized persons. *Parker v. Rampton*, 28 Utah 2d 36, 497 P.2d 848 (1972).

public policy argument, whether directed to therapeutic or elective sterilization.

Closely related is a second assertion that public policy favors procreation; the function of the family is to produce and raise children.<sup>24</sup> While a few early cases such as *Shaheen* were influenced by this approach, it is not popular now. Indeed it now appears that family planning and birth control have been recognized by the courts and accorded a high degree of protection.<sup>25</sup> In addition, many legislatures have authorized and supported birth control, including voluntary sterilization.<sup>26</sup>

A third argument made is that the unexpected child will be irreparably damaged if suits for wrongful conception are allowed.<sup>27</sup> That is, when the child learns that he is "accidental," and that his parents sued a doctor or pharmacist "because they didn't want him," he will become an "emotional bastard."<sup>28</sup> Indeed, it has been forcefully argued that any assertion that a child is not wanted should not be allowed.<sup>29</sup> It is not clear, however, that damage will result to a child, and even if it does, "[t]he emotional injury to the child can be no greater than that to be found in many families where 'planned parenthood' has not followed the blueprint."<sup>30</sup> In answer it

law on mayhem, presently RSMo § 559.200 (1969), applied to voluntary sterilization. MO. ATT'Y GEN. OP. No. 62 (1946) (Miller). This has been withdrawn by a subsequent opinion concluding that "Missouri law does not prohibit the performance of voluntary contraceptive human sterilization. . . ." MO. ATT'Y GEN. OP. No. 393 (1971) (Domke).

However, some statutes still regulate such operations closely. *See, e.g.*, VA. CODE. §§ 33-423, 32-426-27 (1973) (regulating where and by whom sterilizations may be performed; requiring written request).

24. *Cf. Matchin v. Matchin*, 6 Pa. 332 (1847) (purpose of marriage is procreation).

25. *See Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *McCabe v. Nassau County Med. Center*, 453 F.2d 698 (2d Cir. 1971); *Jessin v. County of Shasta*, 274 Cal. App. 2d 737, 79 Cal. Rptr. 359 (1969).

26. A number of governmental programs, both state and federal, encourage family planning and contraception. *See, e.g.*, 42 U.S.C. §§ 300-300a (authorizing population research and family planning services); ALASKA STAT. § 18.05.035 (1962); CAL. HEALTH & SAFETY CODE § 295.1 (West Supp. 1979); GA. CODE ANN. §§ 99-3101 to 3109 (Harrison 1976); NEV. REV. STAT. § 422.235 (1963).

Several states have laws expressly authorizing voluntary sterilization. *See, e.g.*, ORE. REV. STAT. § 435.305 (1969).

27. *See Note, The Birth of a Child Following an Ineffective Sterilization Operation as Legal Damage*, 9 UTAH L. REV. 808 (1965).

28. *Id.* at 812.

29. *See Note, supra* note 27 at 815; *Jackson v. Anderson*, 230 So. 2d 503, 503 (Fla. App. 1970) ("this child is not to be thought of as unwanted or unloved, but as unplanned").

30. *Custodio v. Bauer*, 251 Cal. App. 2d 303, 324-25, 59 Cal. Rptr. 463, 477 (1967).

should be pointed out that damages are not granted to compensate parents for tolerating an unwanted, unloved child. Rather, they are awarded to make up for the reduction in the family exchequer caused by the additional child, wanted or not.<sup>31</sup> It could even be said that a child who was the subject of a wrongful conception recovery would have the satisfaction of knowing he was paying his own way.

Defendants have often argued, although with little success, that either the defendant's conduct was not the proximate cause of the unexpected conception,<sup>32</sup> or the plaintiff's sexual relations constituted an intervening cause which cut off the defendant's liability.<sup>33</sup> As one court tersely observed, "It is difficult to conceive how the very act, the consequences of which the operation was designed to forestall, can be considered unforeseeable."<sup>34</sup>

Assuming that public policy allows the existence of a cause of action for wrongful conception at all, the biggest problem becomes determining the appropriate measure of damages. It has been argued that damages for wrongful conception are so uncertain and speculative that they are unmeasurable, and should therefore not be awarded.<sup>35</sup> Of course, the difficulty of measuring damages is present in numerous types of cases. That this fact alone should defeat an otherwise meritorious claim would be unjust, particularly since similar damages are calculated and awarded in child support and paternity suits.<sup>36</sup>

A few defendants argued that plaintiffs should be compelled to mitigate their damages by either aborting the fetus or placing the child up for adoption.<sup>37</sup> Although the *Shaheen* court seemed favorably disposed to this harsh suggestion, most later cases, including *Sherlock*,<sup>38</sup> took a dim view of the idea.<sup>39</sup> Strong social and psychological arguments weigh against re-

31. *Id.* at 323-24, 59 Cal. Rptr. at 476-77.

32. *Id.*

33. *See* Bishop v. Byrne, 265 F. Supp. 460 (S.D. W. Va. 1967); Ball v. Mudge, 64 Wash. 2d 247, 391 P.2d 201 (1964).

34. Custodio v. Bauer, 251 Cal. App. 2d 303, 316-17, 59 Cal. Rptr. 463, 472 (1967).

35. *See* Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967). "In order to determine their compensatory damages, a court would have to evaluate the denial to [the parents] of the intangible, unmeasurable, and complex human benefits of [parenthood] . . . [which is] impossible . . ." *Id.* at 29-30, 227 A.2d at 693.

36. "Although the specific ascertainment of damages in [this] area is difficult, that should not prevent their consideration . . ." Anonymous v. Hospital, 33 Conn. Supp. 126, 128, 366 A.2d 204, 206 (1976); "[M]ere uncertainty as to the amount of damage should not preclude the right of recovery." Betancourt v. Gaylor, 136 N.J. Super. 69, 76, 344 A.2d 336, 340 (1975).

37. *See* Shaheen v. Knight, 11 Pa. D. & C. 2d at 46.

38. The court stated that "the refusal of a mother to submit to an abortion or of the parents to give their child up for adoption should not be regarded as a failure on the part of the parents to mitigate damages." 260 N.W.2d at 176.

39. The idea "is not consistent with the very stability of the family which the



quiring the "mitigation" suggested, since to do so would force the parents to choose between the child and the cause of action. To allow a negligent physician to escape liability because plaintiffs are unwilling to give up a child which they did not expect would be extreme. Support can be found, however, for a requirement of mitigation to an extent to which a reasonable person would not object.<sup>40</sup>

Two basic approaches to the damage issue have arisen, with the cause of action—the overriding benefit theory and the "weighing" or "balancing" test. Regarding the latter, however, which is the more widely accepted in recent cases,<sup>41</sup> exactly what is to be weighed is not clear. In particular, there are differing interpretations of section 920 of the *Restatement of Torts*:

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 the damages, where this is equitable.<sup>42</sup>

*Custodio* took a narrow view of the term "interest," distinguishing parents' interest in a child's society from economic interests in a child's potential earnings. This approach would result in a smaller offset to damages consisting solely of economic benefits, and thus a larger recovery for the plaintiffs. The *Troppi* court, on the other hand, considered all the benefits conferred by the child, economic and emotional.<sup>43</sup> The *Sherlock* court agreed, holding that the plaintiffs could recover the reasonable costs of rearing the unplanned child subject to offsetting the value of the child's aid, comfort, and society during the parents' life expectancy.<sup>44</sup> The court

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[*Shaheen*] court relies on to support its views . . . ." *Custodio v. Bauer*, 251 Cal. App. 2d 303, 324, 59 Cal. Rptr. 463, 477 (1967).

40. See C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 35 (1935).

41. See, e.g., *Stills v. Gratton*, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976); *Anonymous v. Hospital*, 33 Conn. Supp. 126, 366 A.2d 204 (1976); *Betancourt v. Gaylor*, 136 N.J. Super. 69, 344 A.2d 336 (1975); *Bowman v. Davis*, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976). See also, Note, *Damages for Wrongful Birth*, 21 CLEV. ST. L. REV. 34 (1972); Note, *Redressing a Blessing: The Question of Damages for Negligently Performed Sterilization Operations*, 33 U. PITT. L. REV. 886 (1972); Note, *Unplanned Parenthood and the Benefit Rule*, 8 WAKE FOREST L. REV. 159 (1971).

42. RESTATEMENT OF TORTS § 920 (1939) (emphasis added). This wording is changed slightly in the RESTATEMENT (SECOND) OF TORTS § 920 (1979) which states:

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

43. In our contemporary society, it seems unlikely that parents would derive the tangible economic benefits children provided in an agrarian society.

44. 260 N.W.2d at 170-71.

reasoned that the child's pecuniary benefits alone would not be a sufficient offset, since such "benefits [would] be minimal during the child's minority."<sup>45</sup>

The success of a wrongful birth action in Missouri or the measure of damages which would be awarded is uncertain, but a consideration of the possible theories of recovery gives some indications.<sup>46</sup> Almost all cases in other jurisdictions have been based at least in part on tort theories. The most obvious basis for a claim is that the surgeon was negligent in his performance of the sterilization. The birth of a child after an operation upon either of the parents might appear to present a prima facie case of negligence. However, proof of negligence would still be necessary, because even if the operation was originally successful, in a small number of cases "recanalization" occurs whereby the severed tubes grow together again spontaneously.<sup>47</sup> Thus, without negligence on the physician's part, the patient could still become fertile. For this reason the theory is not often advanced.

A better theory, used with success in *Sherlock*, is that the physician was negligent in his post-operative care of the patient.<sup>48</sup> This could occur in at least two ways. First, negligence could be found in failure to test semen samples following the operation<sup>49</sup> or in incorrect testing. Some dispute existed regarding the necessity for such tests. At least one case held that they were not necessary since evidence indicated that the procedure was not

45. *Id.* at 176, n.12.

46. This Note deals with the problems facing physicians in such cases. For discussion of the theories advanced against others such as pharmacists and drug manufacturers see authorities cited note 19 *supra*.

47. See Lombard, *Vasectomy*, 10 SUFFOLK U.L. REV. 25 (1975). See also Lane v. Cohen, 201 So. 2d 804 (Fla. App. 1967) (holding mere failure of vasectomy not sufficient proof of negligence).

48. It seems clear that a physician must use the due care that the case demands in subsequent treatment. See, e.g., Reed v. Laughlin, 332 Mo. 424, 58 S.W.2d 440 (1933). Further, the physician-patient relationship continues until the physician's services are no longer needed. Noren v. American School of Osteopathy, 223 Mo. App. 278, 2 S.W.2d 215 (St. L. 1928).

49. The central question would of course be whether a physician of ordinary skill, care, and prudence would perform such tests. If so, a physician who failed to could be liable for malpractice. See Reed v. Laughlin, 332 Mo. 424, 58 S.W.2d 440 (1933) (physician impliedly contracts to use degree of skill and learning exercised by ordinary members of his profession). See also Morgan v. Rosenberg, 370 S.W.2d 685 (St. L. Mo. App. 1963). The medical literature on vasectomy contains a number of references to the need for post-operative testing of semen to insure the success of the operation. See, e.g., Craft, *Problems of Vasectomy*, 214 PRACTITIONER 70, 73 (1975); Gue & Douglas, *Vasectomy*, 1 MED. J. AUST. 740, 742 (1976); Schmidt, *Technics and Complications of Elective Vasectomy*, 17 FERTILITY AND STERILITY 467, 480 (1966) ("The patient is cautioned that he is still fertile and that he must use contraceptives until he has submitted 2 negative semen specimens, 1 month part."); Strode, *Technique of Vasectomy for Sterilization*, 37 J. UROL. 788, 734-35 (1937).

professional custom, and that physicians followed various practices.<sup>50</sup> However, knowledge of the failure of a percentage of sterilizations makes it unlikely that a physician exercising skill and diligence would forego all subsequent testing. Therefore, most jurisdictions have had little trouble in finding negligence due to incorrect testing procedures. A physician similarly could be found negligent in failing to recommend alternative contraception during the testing period.<sup>51</sup>

A final possibility among the tort theories would be to allege negligence in the physician's failure to warn the patient that the operation might not be successful, thereby rendering the patient's consent uninformed. The chance that such an operation would fail would probably not be high enough to subject a physician to liability for battery by failing to disclose it. However, such failure could constitute negligence.<sup>52</sup> The standard would be whether a physician of average skill, care, and prudence would have so informed the patient. In Missouri the cases hold physicians to a relatively low duty of disclosure.<sup>53</sup> To recover under a negligent failure to warn theory the plaintiff would also have to show proximate cause, *i. e.*, "a causal connection between the doctor's failure sufficiently to inform and the injury for which recovery is sought."<sup>54</sup> This two-fold burden of proving negligence in warning and causation will be difficult for a plaintiff to meet.

Although tort claims have appeared most often in wrongful conception cases, a plaintiff might also consider suing on a contract theory. In

50. *Ball v. Mudge*, 64 Wash. 2d 247, 391 P.2d 201 (1964).

51. See authorities cited note 49 *supra*.

52. It appears that Missouri chooses to treat lack of informed consent as negligence, not battery. The duty to disclose information to the patient concerning the risk is based on the likelihood and degree of danger. *Mitchell v. Robinson*, 334 S.W.2d 11 (Mo. 1960).

53. The *Mitchell* court quoted with approval the statement that "the doctor owes a duty to his patient to make reasonable disclosure of . . . some of the more probable consequences and difficulties inherent in the proposed operation." (emphasis deleted) *Mitchell v. Robinson*, 334 S.W.2d 11, 18 (Mo. 1960), quoting *McCoid, A Reappraisal of Liability for Unauthorized Medical Treatment*, 41 MINN. L. REV. 381, 427 (1957). It seems unlikely that the failure of such an operation would be considered probable enough to require disclosure. However, it has been held elsewhere that a patient undergoing tubal ligation could attach material significance to the slight risk that the operation would be unsuccessful. *Sard v. Hardy*, 281 Md. 432, 379 A.2d 1014 (1977), *reversing*, 34 Md. App. 213, 367 A.2d 525 (1976).

54. *Aiken v. Clary*, 396 S.W.2d 668, 676 (Mo. 1965). The plaintiff has the burden of showing that a reasonable person would not have consented to the operation had this risk been revealed. This is the usual objective standard as used in most states. See, *e.g.*, *Cobbs v. Grant*, 8 Cal. 3d 229, 104 Cal. Rptr. 505, 502 P.2d 1 (1972). However, expert testimony is necessary to create a submissible case as to this informed consent question, a mere claim by the plaintiff not being enough. *Aiken v. Clary*, 396 S.W.2d at 674-75. See also *Hart v. Steele*, 416 S.W.2d 927 (Mo. 1967); *Bateman v. Rosenberg*, 525 S.W.2d 753 (Mo. App. D. St. L. 1975) (allowing defendant physician's admissions for such purpose).

Missouri it has been held that a physician does not warrant a cure merely by taking a case.<sup>55</sup> Nor may mere failure of result in a particular case be taken as evidence that the physician breached his contract with the patient.<sup>56</sup> Therefore, in the absence of an express promise as to a sterile result, it appears that the plaintiff would have difficulty recovering in a contract action for an unsuccessful sterilization operation.

The legality of such a promise by a physician, and its enforceability once made, would be additional questions. Although there are no recent cases on the issue, early Missouri cases hold that a doctor may validly bind himself to a higher duty than the ordinary standard,<sup>57</sup> although there would appear to be little incentive to do so.

In conclusion, it appears that the increased popularity of surgical sterilization as a contraceptive method may eventually give rise to wrongful conception claims in every state. In Missouri, no substantial obstacle to such a claim is apparent at present, but the allowance of the cause of action and the recoverability of damages would both be issues of first impression. Established medical malpractice and general negligence theories would support the acceptance of both. Finally, the public policy favoring family planning would be frustrated if a cause of action for damages for the birth of an unplanned child resulting from ineffective sterilization were denied.

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55. See *Vanhoover v. Berghoff*, 90 Mo. 487, 3 S.W. 72 (1887); *Logan v. Field*, 75 Mo. App. 594 (K.C. 1898).

56. *McDonald v. Crider*, 272 S.W. 980 (K.C. Mo. App. 1925).

57. *Vanhoover v. Berghoff*, 90 Mo. 487, 491, 3 S.W. 72, 73 (1887).

