

CHAPTER 6

Wrongful Conception Actions

1. Introduction

In this chapter wrongful conception actions are discussed in detail. All the relevant aspects relating to this unique type of action are placed under scrutiny. Note that various difficulties concerning this action are identified for which solutions are then suggested, while references are made to court judgments¹ concerning specific aspects. The varying legal positions currently existing in the United States, England, Germany, the Netherlands and South Africa with regards to this cause of action are considered.

1.1 Facts giving rise to action

In this type of action a normal and healthy, but *unplanned* baby is usually born due to the negligent performance of a sterilization operation or abortion procedure. Potential defendants range from medical practitioners to genetic counsellors,² hospital authorities and manufacturers of contraceptives,³ pharmacists⁴ and even the parents themselves.⁵

Hampton⁶ discusses the facts of the influential case of **Sherlock v Stillwater Clinic**⁷ as a classic example of factual circumstances on which wrongful conception actions could be based. *In casu* the plaintiff already had five children which caused severe financial strain on the family. To ensure that no further children would be born the Sherlocks agreed that Mr. Sherlock should undergo a vasectomy procedure.⁸ In spite of this seemingly foolproof solution another healthy

¹ primarily American decisions.

² **Park v Chessin**, 400 N. Y. S. 2d 724 (1979).

³ **Rieck v Medical Protective Co**, 64 Wis. 2d 514 (1974).

⁴ **Tropi v Scarf**, 31 Mich. App. 240 (1971).

⁵ **Zepeda v Zepeda**, 41 Ill. App. 2d 240 (1963).

⁶ 1986. The Continuing Debate over Recoverability of the Costs of Child-rearing in 'Wrongful Conception' Cases: Searching for Appropriate Judicial Guidelines. **Family Law Quarterly** (20), 45.

⁷ 260 N.W. 2d 169 Minn. (1977).

⁸ this procedure is discussed in ch 11.

child was unexpectedly born a few months later. The ensuing wrongful conception action was successful.⁹

1.2 Increasing importance of family planning

It is submitted that the growing emphasis on the importance of family planning worldwide has had an important impact on the origin and continued prevalence of wrongful conception actions. Over the past few years birth control measures have shown a rapid increase,¹⁰ taking into account that up to 79% of all married white females in the United States of America already took birth control measures in 1982.¹¹

Cheslink¹² is of the opinion that changes in society and behavioural patterns with a tendency towards an urban lifestyle have contributed to the fact that family planning's importance is constantly emphasized in modern society. Because many women have independent careers in modern society, they have become more career orientated and accordingly unwanted children could create many difficulties.¹³ For this very reason many wrongful conception plaintiffs feel that they ought to be compensated.

It is submitted that women have become increasingly aware of their rights and especially their constitutionally protected rights regarding privacy¹⁴ and procreative decisions are held to be almost sacred. Modern medicine has made great contributions towards effective family planning and the average person generally feels confident about the successful implementation of procreative decisions. It is when individuals' informed decisions and responsible planning regarding procreation are indeed not realised (in this modern and technologically advanced age) that *disillusioned* plaintiffs turn to the legal system to seek justice.

⁹ see case discussed in more detail *infra*.

¹⁰ A.N.M. 1982. Judicial Limitations on Damages Recoverable for the Wrongful Birth of a Healthy Infant. *Virginia Law Review* (68), 1311.

¹¹ *ibid*.

¹² 1985. Wrongful Conception F. I. C. *Quarterly*, 289.

¹³ *op cit* p 290.

¹⁴ see the discussion on constitutional rights in ch 9.

2. Position in United States of America

2.1 Traditional tort elements

Strict adherence to and application of traditional tort principles is the obvious and evident route to take in establishing a legal base for wrongful conception actions. Great challenges to this traditional system, however, are experienced when totally new concepts of liability are introduced to an established legal system that originated in ancient times when jurists had no concept of genetic science. In this study alternative approaches to the existing framework of liability are discussed. These new strategies are developed by courts in order to contend with novel concepts and the acknowledgement of previously unprecedented rights.¹⁵

2.2 Founding theories

According to Keplinger and Cramer¹⁶ there are basically three theories on which an action for wrongful conception could be based, namely: negligence; breach of contract/ warranty; or fraudulent misrepresentation and deceit. Cheslik¹⁷ agrees with this premise, but adds an additional basis of liability to support a wrongful conception cause of action, namely the theory of strict liability. She¹⁸ explains that "these claims are by no means mutually exclusive and most plaintiffs will use at least two of the theories".¹⁹ Hampton²⁰ explains that wrongful conception actions usually originate in a specific social and legal setting²¹ and mentions certain events which may create bases for such claims:

2.2.1 Negligence in medical malpractice

¹⁵ eg the right to be born a whole, functional human being - *infra*.

¹⁶ 1988. vol 12 (no 2) *Tort and Insurance Law Journal*, 497.

¹⁷ *op cit* p 291.

¹⁸ *ibid*.

¹⁹ it is reported that in *Custodio v Bauer* 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967), the plaintiffs proceeded under 7 different theories: negligent performance of the sterilization; negligent failure to warn of the fallibility of the sterilization procedure; negligent misrepresentation; lack of informed consent; the plaintiff-husband's right to compensation for damages resulting from the above acts; fraud and deceit and lastly, breach of contract.

²⁰ *op cit* p 47.

²¹ it is submitted that family planning concerns receive more attention in developed countries, where better medical services exist and people are more rights orientated.

Cleaver²² lists the traditional elements of the tort negligence that have to be proven to constitute liability.²³ A plaintiff must establish: that a legal duty rested on the defendant²⁴ towards the plaintiff,²⁵ that a breach of this duty occurred;²⁶ a causal link,²⁷ and real damage/injury.²⁸

A plaintiff suing on the basis of negligence must prove the essential elements of this particular tort. Cheslik²⁹ states that there is usually no difficulty in establishing the relevant duty of care. Breach of this duty can be established by expert testimony that the defendant- physician did not exercise his profession in the degree of skill and care expected from him.³⁰³¹ It is mentioned that the element of causation is generally not difficult to prove in wrongful conception cases, as the patients' resumption or continuation of sexual intercourse after sterilization³² is usually not seen to be an intervening act³³ sufficient to break the chain of causation.³⁴ A possible defence defeating causality is, however, a failure to adhere to post-operative testing instructions.³⁵

²² 1991. Wrongful Birth - The Dawning of a New Action. *South African Law Journal*, 50.

²³ compare the establishing elements of this tort with South Africa's prerequisites for delict in ch 2.

²⁴ typically a medical practitioner or health care worker.

²⁵ typically the patients of the physician in question or individuals seeking family planning advice.

²⁶ see the variety of negligent conduct discussed *supra*.

²⁷ between the above-mentioned breach of duty and the resultant damage.

²⁸ typically child-rearing expenses and other costs incurred due to the unplanned birth.

²⁹ *op cit* p 292.

³⁰ as exercised by general practitioners of good standing in the locality.

³¹ remember that specialists have a higher level of care required from them - see ch 4 for a discussion on professional negligence.

³² or alternative contraceptive measure.

³³ or *novus actus interveniens*.

³⁴ the general rule being that the occurrence of a *foreseeable* intervening act does not break the chain of causation - see ch 4.

³⁵ as was the case in *Bowman v Davis* 48 Ohio 2d 41, 356 N.E. 2d 496 (1976).

It is reported that negligent conduct can be established in a variety of ways:³⁶

2.2.1.1 Lack of informed consent

To ascertain whether the defendant failed to fulfil his duty to inform an objective test should be applied.³⁷ The relevant question would be whether a reasonable person in the patient's position would have withheld consent had all material risks been disclosed.³⁸ It is submitted that it is nevertheless difficult to prevail with this theory given the fact that so few sterilizations are unsuccessful.³⁹ Failure to properly inform⁴⁰ could manifest in a failure to diagnose a pregnancy, failure to suggest the alternative of an abortion⁴¹ or even insufficient post-sterilization instructions. It is generally accepted that breach of the duty of care is the main cause of action under these circumstances.⁴²

2.2.1.2 Negligent misrepresentation

It is possible that post-operative misinformation concerning the perceived success of the operation could be supplied⁴³ to the patient. In such an instance the patient will have to prove that the physician should have known the information in question to be untrue/ unreliable and that the reasonable plaintiff would under similar circumstances have justifiably relied on this misrepresentation.⁴⁴ Patients who are under the impression that they are in fact sterile, could naturally be expected to resume sexual intercourse without additional contraceptive measures. There is no need to prove intent on the part of the physician to misinform his patients.⁴⁵

³⁶ *ibid.*

³⁷ *Hartke v McKelway.*

³⁸ see ch 5 on the duty to inform.

³⁹ sterilization is the most effective way of contraception, with only 5 out of every 1000 performed without success (see ch 11) - it is doubtful whether patients would choose any less effective (alternative) measure of contraception, even without being properly informed of these facts.

⁴⁰ misdiagnosis and/ or faulty advice - see ch 5.

⁴¹ as was the case in *Rieck v Medical Protective Company* - some statutes prohibit physician's to even suggest an abortion or give any assistance in directing patients to abortion clinics, see ch 7 and 10.

⁴² *Hampton op cit* p 48.

⁴³ either through positive misleading conduct or by failing to remove an incorrect impression in the mind of the patient about actual sterility directly after the sterilization operation.

⁴⁴ *Hackworth v Hart* 474 S.W. 2d 377, 380 Ky. (1971) - where a patient relied on post operative assurances that the procedure was "100% and fool-proof".

⁴⁵ and is therefore easier to prove than a claim based on deceit.

2.2.1.3 Negligent performance of sterilization or other post-operative testing procedure

This cause of action calls for the application of the *res ipsa loquitur*⁴⁶ doctrine. It is possible, although highly improbable, that a sterilization may be unsuccessful even without negligent conduct by the physician.⁴⁷ This freak occurrence takes place in the event of so called "re-canalisation", where the patient's fallopian tubes naturally grow back after being severed by the sterilization procedure.⁴⁸

Hampton⁴⁹ mentions forms of sterilization⁵⁰ are laparoscopic tubal cauterization,⁵¹ tubal ligation,⁵² or alternatively the actual removal of the woman's fallopian's tubes. Male sterilization is achieved by means of a vasectomy. He⁵³ reports on other birth control measure failures. Example here are unsuccessful abortions,⁵⁴ or non-surgical medical application such as the incorrect prescription of contraceptive medication.⁵⁵

2.2.2 Breach of contract/ warranty

Cheslik⁵⁶ believes that it is generally more difficult to proceed under a claim for breach of contract than would be the case under negligence.⁵⁷ Because a physician is not considered to be a warrantor or guarantor of his services,⁵⁸ courts require either a specific pre-operative or post-operative contract expressly guaranteeing the success of the medical procedure,

⁴⁶ "the facts speak for themselves".

⁴⁷ Cheslik *op cit* p 294 - see also ch 11 in this regard.

⁴⁸ evidence to this effect can be obtained by means of a "2nd look" operation or a pathology report - spontaneous re-canalisation happens in 1 to 3 out of every 1000 sterilizations performed.

⁴⁹ *op cit* p 47.

⁵⁰ **Hartke v McKelway** 707 F.2d 1544, 1549 D.C. Cir. (1983).

⁵¹ where the woman's fallopian tubes are blocked by burning.

⁵² where the fallopian tubes are cut.

⁵³ *ibid.*

⁵⁴ as in **Stills v Gratton** 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 Cal. Ct. App. (1976), where a Californian court allowed a wrongful conception action.

⁵⁵ as was the case in **Troppe v Scarf**.

⁵⁶ *op cit* p 294.

⁵⁷ in spite of the fact that these claims have the advantage of longer prescription periods allotted by the relevant statutes of limitations.

⁵⁸ see ch 4 on the relationship between physician and patient.

complete with a separate consideration⁵⁹ to show that the physician did in fact agree to guarantee a certain result.⁶⁰

2.2.3 Strict liability

One point of criticism that could be raised against this approach as a legitimate basis for a cause of action in wrongful conception, is that strict liability usually applies only to products and not to services.⁶¹ In cases where service provision was included under this theory, the service was closely related to the product and the relevant service was of a commercial nature and did not have a professional character and it could therefore be agreed that strict liability has a doubtful application to wrongful conception matters. It is submitted that manufacturers of contraceptives, for example, could be held liable for wrongful conception⁶² under the theory of strict liability.⁶³

2.2.4 Misrepresentation or deceit

Cheslik⁶⁴ explains that this base of action is rarely used in modern claims because it requires proof that the physician intentionally made a false misrepresentation as to the success of the sterilization procedure to the plaintiff. This is a difficult, if not impossible, fact to prove.⁶⁵ It is reported⁶⁶ that the first wrongful conception action was that of **Christensen v Thornby**,⁶⁷ instituted in Minnesota in 1934. Here the plaintiff unsuccessfully tried to prove his case⁶⁸ employing the theory of deceit. Since the plaintiff was unable to show fraudulent intent, the claim was dismissed. According to Cheslik⁶⁹ modern claims are rarely based on deceit. A

⁵⁹ see ch 2.

⁶⁰ in **Rogala v Silva** 16 Ill. App. 3d 63, 305 N.E. 2d 571 (1973) it was decided that a physician who called a procedure "a foolproof thing" was merely expressing an opinion and that such pronouncements are mere statements of reassurance and no formal warranties.

⁶¹ ie service providers are not liable in the absence of fault - **Restatement 2nd of Tort**, 5 402 A (1979).

⁶² if it would be possible to prove that a defect in the manufacturer's product has indeed caused the plaintiff damage.

⁶³ were a plaintiff need not prove negligence on the side of the defendant.

⁶⁴ *op cit* p 295.

⁶⁵ see **Christensen v Thornby** 192 Minn. 123, 255 N.W. 620 (1934) discussed *infra*.

⁶⁶ Cheslik *op cit* p 292.

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

⁶⁸ which involved a negligent vasectomy.

⁶⁹ *op cit* p 293.

suggested reason for this is the difficulty in proving wrongful and intentional conduct on the part of the physician. Plaintiffs generally proceed under one⁷⁰ of the remaining and more common theories.⁷¹

2.2.5 Avoidable consequence doctrine

Block⁷² discusses the merits of this doctrine that has been applied by courts in wrongful conception cases. According to this precept a plaintiff cannot recover damages that could have been avoided by the use of reasonable effort after commission of the tort. The foundation of this doctrine in American law is section 918 of the **Restatement (2nd) of Torts**. This section reads:

§ 918 comment a (1979):

"In the cases covered in this Section, it is not true that the injured person has a duty to act,...*but recovery for the harm is denied because it is in part the result of the injured person's lack of care*, and public policy requires that persons should be discouraged from wasting their resources, both physical or [sic] economical."

And also comment b (1979):

"If harm results because of his careless failure to make substantial efforts or incur expense [to avert the consequences of the tort], the damages for the harm suffered are reduced to the value of the efforts he should have made or the amount of expense he should have incurred, in addition to the harm previously caused."

Although a plaintiff is accordingly not required to take any positive action to mitigate damages, a plaintiff is nevertheless precluded from recovering for any additional damages that results from his failure to make a reasonable effort to avoid it.⁷³ The burden of proof rests on the defendant⁷⁴ to show by a preponderance of evidence that a reasonable person in the same circumstances would have taken steps to avoid or limit the adverse consequences of the damage causing event. Plaintiff must prove that such steps as suggested by the defendant would not have been reasonable under the circumstances and he could also be required to

⁷⁰ of course the above-mentioned grounds for instituting a claim are not mutually exclusive.

⁷¹ usually the negligence of the physician.

⁷² *op cit* p 1112.

⁷³ note that these basic principles of the duty to mitigate is fundamentally similar in South African law as a plaintiff is entitled to recover all expenses incurred in mitigation - see ch 2.

⁷⁴ give authority.

substantiate rebutting evidence if the reasonableness of his actual steps taken in mitigation are questioned.

Block⁷⁵ explains that specific application of this doctrine to wrongful conception actions would limit the damages awarded to the point at which the reasonable plaintiff could have acted to avoid greater injury and loss. He suggests two possible periods from which this determination could be applied; either from the stage when the foetus could have been safely aborted or alternatively, from the time the child could have been given up for adoption.⁷⁶ Therefore, the plaintiff's recovery will be limited to the point at which one of these actions could have taken place. Concerning the first instance⁷⁷ mentioned above, Block applies this principle to wrongful conception cases and consider its consequences:

"If the line is drawn at the point at which the fetus could have been aborted, the maximum recovery would include medical costs incident to the abortion, pain and suffering, emotional distress, loss of consortium, loss of wages during the recovery period, and the cost of a second sterilisation when failure of the first is the basis of the action."⁷⁸

With regard to the second time frame:⁷⁹

"Using the point at which the child could be placed for adoption - in other words, immediately after birth - maximum damages would include the medical expenses associated with the pregnancy, loss of wages during the pregnancy and recovery period, pain and suffering, emotional distress associated both with the pregnancy and the adoption, loss of consortium, and the costs of a second sterilisation."⁸⁰

It is clear that a wrongful conception plaintiff would proportionally be entitled to more extensive compensation in the event of giving the child up for adoption than would be the case in the event of an abortion as medical expenses, loss of wages and consortium will be incurred over a longer period. Although the levels of emotional distress will vary in each separate instance, it is submitted that both instances would invariably cause severe emotional anguish. For this

⁷⁵ *op cit* p 1114.

⁷⁶ it could be asked whether either of these actions would be taken by a reasonable and prudent person in the same circumstances - see ch 2.

⁷⁷ *ie* abortion.

⁷⁸ *op cit* p 1114.

⁷⁹ *ie* adoption.

⁸⁰ *ibid.*

very reason one should carefully consider whether either of the options suggested by Block as possible steps to mitigate damages could seriously be expected from the reasonable parent.

2.3 Compensation for wrongful conception

It is submitted that if an action is principally recognized, the logical ensuing questions would be what the extent of the compensable damage is and how it should be calculated.

Smith-Groff⁸¹ conveys with regard to damage awards in wrongful conception actions that the majority of jurisdictions have adopted the limited damages rule, which permits recovery for ordinary medical expenses directly associated with pregnancy and childbirth. It is reported that a minority of states follow the benefit rule, which allows recovery for child-rearing costs minus the beneficial value of the child. Jurisdictions such as New Mexico⁸² and Wisconsin⁸³ have allowed full recovery of expenses for rearing a child, whereas Nevada⁸⁴ has refused to even recognize wrongful conception as a cause of action.

Block⁸⁵ reports that since the eventual recognition of wrongful conception actions in the United States the courts have awarded a broad range of damages, including:

- all medical expenses incident to the unplanned pregnancy;⁸⁶
- the mother's loss of earnings during the pregnancy;⁸⁷
- pain and suffering as a result of the pregnancy and birth;⁸⁸
- loss of consortium;⁸⁹

⁸¹ 1996. Wrongful Conception: When an unplanned child has a birth defect, who should pay the cost? *Missouri Law Review* (61), 139.

⁸² *Lovelace Medical Centre v Mendez* 805 P.2d 603, 612 N.M. (1991).

⁸³ *Marciniak v Lundborg* 450 N.W. 2d 243, 248 Wis. (1990).

⁸⁴ *Szekeres v Robinson* 715 P.2d 1076, 1077 Nev. (1986) (although action referred to as wrongful birth, case involved a failed sterilization procedure).

⁸⁵ *op cit* p 1109.

⁸⁶ *Kingsbury v Smith* 122 N.H. 237, 442 A. 2d 1003 (1982).

⁸⁷ *Beardsley v Wierdsma* 650 P.2d 288 Wyo. (1982).

⁸⁸ *Boone v Mullendore* 416 So. 2d 718, 723 Ala. (1982).

⁸⁹ *Sorkin v Lee* 78 A.D. 2d 180, 184, 434 N.Y.S. 2d 300, 303 (1980).

- mental anguish and emotional distress for the parents⁹⁰ and
- costs of raising the child until the age of majority.⁹¹

He agrees⁹² with most commentators that the last-mentioned head of damage has been the most controversial of these awards and the majority of courts have refused such damages.⁹³

Welborn⁹⁴ mentions three basic views that are held by courts concerning the determination of damages: *limited recovery*, where only actual medical costs together with compensation for pain and suffering directly caused by the pregnancy and birth are allowed;⁹⁵ *application of the benefit rule* where, although, child-raising expenses and/or other costs involved with the pregnancy and birth are allowed, such award is set off by the benefits derived from the child;⁹⁶ *full recovery*, where in exceptional cases the costs involved in child-rearing are included in the composition of the amount of damages, without subtracting the benefits⁹⁷ the parents have acquired in consequence of the unplanned child.⁹⁸

Cheslik⁹⁹ has a similar view on the courts' approach to compensation, although he identifies four distinct approaches and concludes that there is obviously no consensus between courts on the question of damages.

2.3.1 Refusal to recognize damages

⁹⁰ *Tropi v Scarf* 31 Mich. App. 240, 187 N.W. 2d 511 (1971).

⁹¹ *Custodio v Bauer* 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).

⁹² Block *op cit* p 1110.

⁹³ it is interesting to see that the South African courts have been quite liberal in their views on compensation, as child-rearing expenses are principally recognized - see *infra*.

⁹⁴ 1989. *Tulane Law Review* (63) 1216.

⁹⁵ *Smith v Gore* 728 SW 2d 738 Tenn. (1987).

⁹⁶ *Tropi v Scarf* - see benefit rule discussion *infra*.

⁹⁷ these benefits usually include the love and affection felt towards the child, the joy he/ she brings, together with all the emotional gain, comfort and companionship - note, however that if the child should bring his parents any material or patrimonial advantage, this amount or other benefit should also be taken into consideration when compiling the damages award.

⁹⁸ *Custodio v Bauer* 251 Cal. App. 2d 303, 59 Cal. Repr. 463 (1967).

⁹⁹ 1985, *op cit* p 297.

This was the original approach followed by the courts.¹⁰⁰ The so-called “blessed event” theory was then regularly applied, holding that the birth of a healthy baby could never be seen as an injury but should rather be counted a blessing. The widespread use of contraceptive measures to prevent this “blessed event” from occurring, however, marked the abandonment of this approach. Childbirth as it is now recognized is not always a joyous occasion.¹⁰¹

In this respect it should be stated that courts traditionally supported the “overriding benefit theory”. This theory has a faulty basis, as the courts perceived the birth of the child from a normal parent's point of view.¹⁰² What these courts failed to take into account is the fact that wrongful conception plaintiff/ parents specifically sought to avoid pregnancies¹⁰³ altogether. Even where surprised parents do accept their unplanned child into their family the fact of the matter is that:

“Their affection would not provide the money to feed the child or the time for the working mother to resume her career.”¹⁰⁴

In this statement we can see that the unplanned child itself is not an item of damage but that it is merely the “instrument” through which the physician's negligence is transformed into an injury to the parent-plaintiff. The effective implementation of family planning methods is of important public interest. The increased legal protection given to family planning¹⁰⁵ supports this concept and undermines the public policy argument used by followers of the so-called “windfall theory”.¹⁰⁶

Another matter that complicates the acceptance of wrongful conception actions is the fact that

¹⁰⁰ **Christensen v Thornby** 192 Minn. 123, 255 N.W. 620 (1934) and also **Shaheen v Knight** 11 Pa. 2d 41 (1957).

¹⁰¹ **Tropi v Scarf**, 31 Mich. App. 240 187 N. W. 2d 511 (1971).

¹⁰² there is little doubt that parents who have planned and properly prepared for the birth of a child are genuinely overjoyed when the newcomer arrives - wrongful conception parents, however, do not fall into this category, as for them the unexpected pregnancy, (for whichever reason), is a catastrophe.

¹⁰³ even parenthood.

¹⁰⁴ **Tropi v Scarf**.

¹⁰⁵ the right to family planning was first accepted in **Griswold v Connecticut** 381 US 479 (1965), with the recognition of the right to use contraceptives - the following step as **Roe v Wade** 410 US 113 (1973) where a woman's right to seek non-therapeutic abortion was established.

¹⁰⁶ the windfall theory (sometimes referred to as the “overriding benefit theory”) states that wrongful conception plaintiffs should not be allowed recovery, since they have suffered no loss at all - in fact they have actually benefited from the experience.

the injury complained of in these actions is of a peculiar nature as the source of the injury can be removed whenever the plaintiff chooses.¹⁰⁷ It is, however, suggested that this conclusion is based on a superficial investigation of the problem. It is namely obvious that to require such drastic steps from parents would be totally out of proportion to what can be expected from a plaintiff, in terms of containing or minimizing his/ her damage.¹⁰⁸

It is reported¹⁰⁹ that a great number of states have reported decisions which disallowed child rearing expenses as damages.¹¹⁰

Some courts that have denied child-rearing expenses have argued that the birth of a normal, healthy child simply is not a compensable injury.¹¹¹

2.3.2 Award of all damages

The school that allows recovery of wrongful conception actions, argues that recovery protects

¹⁰⁷ ie by means of an abortion or adoption.

¹⁰⁸ in adherence to a general duty on all plaintiffs to mitigate or restrict their damage - see ch 2.

¹⁰⁹ Keplinger, B. and Cramer, J.J. 1988. Wrongful Pregnancy: A house divided. *Tort and Insurance Law Journal* (23), 502.

¹¹⁰ Alabama - *Boone v Mullendore* 416 So.2d 718 Ala. (1982);
Arkansas - *Wilbur v Kerr* 275 Ark. 239, 628 S.W.2d 568 (1982);
Delaware - *Coleman v Garrison* 349 A.2d 8 Del. (1975);
District of Columbia - *Flowes v District of Columbia* 478 A.2d 1073 D.C. (1984);
Florida - *Fassoulas v Ramey* 450 So.2d 822 Fla. (1984);
Georgia - *Fulton-DeKalb Hospital Authority v Graves* 252 Ga. 441, 314 S.E.2d 653 (1984); Illinois - *Cockrum v Baumgartner* 96 Ill. 2d 193, 69 Ill. Dec. 168, 447 N.E.2d 385, *cert. denied sub nom., Raja v Michael Reese Hospital and Medical Center* 464 U.S. 846 (1983); Indiana - *Garrison v Foy* 486 N.E.2d 5 Ind. App. (1985);
Iowa - Kansas - *Johnston v Elkins* 241 Kan. 407, 736 P.2d 935 (1987);
Kentucky - *Schork v Huber* 648 S.W. 2d 861 Ky. (1983);
Maine - *Macomber v Dillman* 505 A.2d 810 Me. (1986);
New Hampshire - *Kingsbury v Smith* 122 N.H. 237, 442 A.2d 1003 (1982);
New Jersey - *P v Portadin* 179 N.J. Super. 465, 432 A.2d 556 (1981);
New York - *O'Toole v Greenberg* 64 N.Y.2d 427, 477 N.E.2d 445, 488 N.Y.S.2d 143 (1985); Pennsylvania - *Mason v Western Pennsylvania Hospital* 499 Pa. 484, 453 A.2d 974 (1982);
Tennessee - *Smith v Gore* 728 S.W. 2d 738 Tenn. (1987);
Texas - *Hickman v Myers* 632 S.W.2d 869 Tex. Ct. App. (1982);
Virginia - *Miller v Johnson* 231 Va. 177, 343 S.E. 2d 301 (1986);
Washington - *Mckernan v Aasheim* 102 Wash. 2d 411, 687 P.2d 850 (1984);
West Virginia - *James G. v Caserta* 332 S.E. 2d 872 W.Va. (1985);
Wyoming - *Beardsley v Wierdsman* 650 P.2d 288 Wyo. (1982).

¹¹¹ *Boone v Mullendore* 416 So. 2d 718 Ala. (1982); *Fassoulas v Ramey* 450 So. 2d 822 Fla. (1984).

the parents' right to freedom of choice.¹¹² They believe that the parents seek damages not because they do not love their child, but because a fault of another has forced on them burdens they sought to and had a right to avoid. By assisting plaintiff parents financially and providing the means to care for their unplanned child, the child will encounter less resentment and anger than would otherwise be the case.

it is apt that the first court to recognize the shift in public policy regarding the legitimate use of contraceptives and the recognition of an individual's procreative autonomy, also took the most liberal approach in awarding damages for wrongful conception. In **Custodio v Bauer**¹¹³ the Californian Supreme Court used the following powerful argument for allowing child-rearing expenses:

"where a mother survives without casualty there is still some loss, she must spread her society, comfort, care, protection, and support over a larger group. If this change in the family status can be measured economically, it should be compensable..."¹¹⁴

In casu the plaintiff sought to be sterilised in order to maintain a certain standard of living. The negligent physician was held liable for all "reasonably foreseeable harm".¹¹⁵ This decision, however, was not widely accepted with great enthusiasm as many courts did not want to burden physicians with possible liability to such an extent.

Cheslik¹¹⁶ argues that it would be unjustified to allow child-rearing expenses in every case as this would fail to take into account the true reasons for each plaintiff's decision for sterilization. If, for example, a couple sought sterilization only to prevent the birth of a handicapped child and a healthy baby is in fact born, the birth could still be seen as beneficial or a windfall.¹¹⁷ In such an instance wrongful conception claim should be rejected. This reasoning seems to be correct.¹¹⁸

¹¹² **Jones v Malinowski** 299 Md. 257, 473 A.2d 429 (1984).

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

¹¹⁴ *ibid.*

¹¹⁵ incl child-rearing expenses.

¹¹⁶ *op cit* p 298.

¹¹⁷ since the feared result did not materialise.

¹¹⁸ To allow full damages under all circumstances would have the same unfair results as the "blessed event" theory which does not take into account the various intricacies of each case, particularly the reason for sterilization. It is submitted that courts should attempt to reach an intermediate position and balance basic tort principles (allowing child-rearing costs) with sound public policy (taking into

2.3.3 Benefits of birth subtracted from full damage award

According to this rule a plaintiff can in principle recover all damages and expenses,¹¹⁹ however, the amount of damages is subject to offset by the value of the benefits conferred upon the parents by the child's birth.¹²⁰

Tropi v Scarf¹²¹ was the first judgment in which this theory was implemented. All benefits derived from the childbirth is calculated and then subtracted from the total amount of damages, regardless of whether the awards were compensation for economic, emotional or physical injuries.¹²²

The court rejected the notion that benefits will always outweigh the burdens in wrongful conception cases. By applying the benefit rule in this broad manner, the **Tropi** court ignored the "same interest" limitation of the restatement rule, which requires that the particular items of damage awarded, *be offset only by benefits conferred to that particular damaged interest*. Thus, damages for the financial injury caused by the birth of an unplanned child (such as additional medical and education costs), may not be diminished by emotional benefits. The **Tropi** court found that economic and emotional injuries are "inextricably related" and accordingly reduced all classes of benefits from all types of liabilities, regardless of any particular benefit or damaged interest. This incorrect assumption was followed by **Arizona Health Sciences Centre v Superior Court**.¹²³ This court was similarly of the opinion that policy concerns merit a lumping together of interests to reduce the plaintiff's damages.

The court in **Sherlock v Stillwater Clinic**¹²⁴ allowed the rule to be properly applied as it was intended. The court also did well in taking into account the offset of financial benefits conferred by the children to their parents *for the duration of the parents' lives*, rather than merely until the

account the reason for sterilization).

¹¹⁹ including child-rearing expenses.

¹²⁰ see discussion *infra* on the principles governing the benefit theory and note the criticism expressed because of the mis implementation of this rule.

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

¹²² In this respect, the court went astray from the true application of **Restatement 2nd of Torts** 920, and the initial intention of the legislator. (see discussion (*circa*) fn. 53). The true intention was that each interest be scrutinized individually and that only benefits pertaining to a specific interest be taken into consideration with regards to the injurious effect of that same interest (and not that all benefits be "subtracted" from the injury of all interests together).

¹²³ 136 Ariz. 579, 667 P. 2d 1294 (1983).

¹²⁴ 260 N.W. 2d 169 Minn. (1977).

time the children reach majority.¹²⁵

2.3.4 Recovery of all damages, excluding child-rearing expenses

According to Keplinger and Cramer,¹²⁶ the majority of courts grant damages for expenses directly linked to pregnancy and birth, but do not readily recognize maintenance costs of a healthy and normal child. Cheslik¹²⁷ agrees that this view has been adopted by the clear majority of American courts. Although courts are reluctant to compensate parents for maintenance costs, they seem willing to allow medical and hospital costs, loss of wages, loss of consortium, pain and suffering and in exceptional cases even the mental anguish suffered by the plaintiff.

In the case of **Johnston v Elkins**¹²⁸ the court stated the heads of damage that could be considered by a court when allocating an award:

- costs of the unsuccessful (initial) sterilization operation;
- pain and suffering endured during the sterilization operation;
- costs related to pre-birth care, hospitalisation costs, and post-birth care expenses;
- pain and suffering experienced by the mother before, during and after the birth and also for the trauma experienced in the following sterilization operation; and
- loss of consortium during the initial sterilization, the birth period itself and for a reasonable period after the birth.

Some courts extent the scope of compensation even further and in addition to the above mentioned items/ heads also allow the following damages:

- loss of income by the mother during the last stages of pregnancy, birth and a reasonable time after the birth,¹²⁹

¹²⁵ In this way the true financial benefit of the children are taken into account and a fair adjustment can be made to the plaintiff-parents' award. In modern western society young children rarely make a significant contribution to the family income. More often elderly parents enjoy financial support from their children, which support has to be considered in order to make a just estimation for purposes of the benefit rule in wrongful conception actions.

¹²⁶ *op cit* p 504.

¹²⁷ *op cit* p 303.

¹²⁸ 241 Kan 407, 736 P.2d 935 (1987).

¹²⁹ **Beardsley v Wierdsman** 650 P.2d 288 Wyo (1982).

- emotional stress¹³⁰ caused by the sterilization operations, the unexpected pregnancy and the eventual birth of the unwanted child;¹³¹ and
- any further costs resulting from medical complications following the sterilization operations and birth.¹³²

Hampton¹³³ conveys that courts have generally responded in one of three ways when confronted with the question of child-rearing expenses.¹³⁴ According to him the majority of jurisdictions allow all damages except child-rearing costs because many are of the opinion that this would violate public policy.

In conclusion, it should be stated that in the **Sherlock** case the court established the principle that, as a point of departure, all reasonable and foreseeable expenses connected with the maintenance of the child should be recognized.

2.3.5 Another possibility

Although the four basic approaches are acknowledged it is possible to add another to the list namely a combination of two of the common approaches.¹³⁵ One can therefore identify in total five basic approaches utilised by courts in dealing with wrongful conception actions can be distinguished.¹³⁶

¹³⁰ Over the years many courts have excluded compensation for emotional distress. An argument used was that satisfaction for distress experienced by the parents is unacceptable and unreasonable as childbirth is not an universally recognized injury. It was also difficult to convince a judge or a jury that they suffered a substantial emotional injury. In spite of these doubts one must concede that possible situations could exist where emotional stress under wrongful conception circumstances could cause a plaintiff actual harm, eg it can be accepted that the news of an unplanned pregnancy in a period of possible promotion and increased responsibility could be devastating for a young professional person. Note that a claim for emotional distress is only actionable in South African law if the plaintiff has actually suffered harm on account thereof. Each case should therefore be considered on its own merits.

¹³¹ **Miller v Johnson** 231 Va 177, 343 SE.2d 301 (1986).

¹³² **Beardsley v Wierdsman**.

¹³³ *op cit* p 48.

¹³⁴ they have either denied the child-rearing costs altogether; allowed child-rearing costs but set it off against the benefits of having a child; or allowed full recovery regardless of benefits.

¹³⁵ that is, to implement a combination of the scheme that reduces recovery by the value of benefits obtained from damage causing event and the scheme that limits certain items of damage recoverable.

¹³⁶ they are: total refusal of all damages; award of all damages; damages with application of the benefit rule; all damages excluding child-rearing expenses and a combination of restricting damages by application of the benefit rule together with

2.3.6 Actual cost

Heida¹³⁷ reports on the varying cost of additional children. It has been found that although the average first child absorbs an astounding 17% of the family income, this percentage decreases as further children are born. Two children take up 25% and three children a comparatively meagre 32% of total familial income. It is suggested¹³⁸ that this consideration be taken into account when compensation for wrongful conception is calculated.¹³⁹

2.4 Arguments for and against child-rearing expenses

Recovery for child-rearing expenses seems to be the pivotal consideration in wrongful conception litigation in the United States of America.

2.4.1 Arguments against

A possible rationale for the widespread denial of child-rearing costs may be traced back to one of the first wrongful conception actions, **Christensen v Thornby**.¹⁴⁰ *In casu* the plaintiff had undergone a failed vasectomy operation. Because plaintiff neglected to allege fraudulent intent¹⁴¹ on the defendant's part, his action was accordingly denied. In the *obiter dicta* of the decision the court stated that to allow child-rearing expenses would be contrary to public policy. After this decision a 30-year *status quo* on this matter was maintained.¹⁴² Courts that do not grant child-rearing costs provide various reasons to substantiate their viewpoint:

- the birth of a normal and healthy child is not a compensable loss/ damage;¹⁴³

the exclusion of certain items of damage recoverable.

¹³⁷ 1997. Foutje...Bedankt?! *Nederlands Juristenblad* (26), 1176.

¹³⁸ *op cit* p 1177.

¹³⁹ it might be found that a sixth child does not cost the parents that much after all.

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

¹⁴¹ as plaintiff based his claim on fraudulent misrepresentation he had to prove that he was intentionally deceived by the physician.

¹⁴² the view expressed *in casu* remained unchallenged until 1967 in the case of *Custodio v Bauer supra*.

¹⁴³ *Boone v Mullendore* 416 So. 2d 718, 723 Ala. (1982).

- the benefits of rearing a child always outweigh the burdens as a matter of law;¹⁴⁴¹⁴⁵
- child-rearing costs place an unreasonable burden on defendant which is wholly out of proportion to the culpability involved;¹⁴⁶¹⁴⁷
- to allow recovery in wrongful conception would render the child an “emotional bastard”;¹⁴⁸¹⁴⁹
- damage awards in wrongful conception are too speculative;¹⁵⁰¹⁵¹
- there exists a need for legislative guidance without which courts are not prepared to

¹⁴⁴ **Mason v Western Pennsylvania Hospital** 499 Pa. 484, 453 A.2d 974 (1982); **Fassoulas v Ramey** 450 So.2d 822 Fla. (1984).

¹⁴⁵ It is submitted that this presumption goes directly against the decision of **Griswold v Connecticut** 381 US 479 (1965), where a fundamental right to procreative autonomy was established. While it might still be possible to assume that emotional benefits of parenthood outweigh the emotional burdens in every case, the courts lump both the economic and emotional interests together - this approach denies case-by-case determination of the facts. The rejection of compensation on this public policy-basis amounts to the use of the benefit rule and the end result thereof is that the benefits exceed the costs involved with the child and in effect cancel the awarded damages, **Raja v Michael Reese Hospital and Medical Centre** 464 US 846 (1983).

¹⁴⁶ **Kingsbury v Smith** 122 N.H. 237, 442 A. 2d 1003 (1982); **Rieck v Medical Protective Company** 64 Wis. 2d 514, 219 N.W. 2d 242 (1974).

¹⁴⁷ Policy considerations therefore necessitate the restriction of recovery on maintenance costs because of the unreasonable burden it would put on medical practitioners. This argument is unconvincing as tort principles dictate that a victim must receive full compensation for the damage suffered (in other tort actions courts do not weigh damages against culpability).

¹⁴⁸ **McKernan v Aasheim** 102 Wash. 2d 411, 687 P. 2d 850 (1984); **Boone v Mullendore and Flowers v District of Columbia** 478 A.2d 1073 D.C. (1984).

¹⁴⁹ Supporters of this rationale believe that the emotional and physiological well-being of the child will be damaged if it would learn later on in its life that her parents were unwilling to maintain it. This line of reasoning is illogical: A child will be less damaged by such a “prejudice”, than if it would grow up in a family with insufficient funds for its education, general maintenance *etc.* Approx 40% of all pregnancies in the U.S.A are unplanned. This would mean that close to half of American society are “emotional bastards” or rather, psychologically prejudiced individuals. If a court is truly concerned with the well-being of a child, it could guarantee anonymity for the plaintiffs.

¹⁵⁰ **James G v Casceto** 332 SE 2d 872 W Va. (1985); **Sorkin v Lee** 78 A.D. 2d 180, 184, 434 N.Y.S. 2d 300, 303 (1980).

¹⁵¹ it is submitted that this is an unfounded concern as “American courts regularly expect juries to award damages where a dollar value is difficult to assess” - the court in **McKernan v Aasheim** 102 Wash. 2d 411, 687 P. 2d 850 (1984) suggested that rearing and educational costs of the child should be calculated by means of actuarial tables and other relevant information.

tackle wrongful conception cases;¹⁵²

- courts are concerned about the looming possibility of opening court doors to fraudulent claims;¹⁵³¹⁵⁴
- some courts believe that wrongful conception plaintiffs fail to mitigate their damages by refusing to give the unwanted child up for adoption or by declining abortion of the foetus¹⁵⁵ and for this reason forfeit the right to claim child-rearing expenses;
- certain judgments maintain that policy considerations prohibit the recovery of maintenance costs for fear that it would transfer the maintenance duty of the parents to the doctor, while the parents enjoy all the benefits of the child.¹⁵⁶

Cleaver¹⁵⁷ mentions additional arguments against acceptance of wrongful conception actions in the United States of America.¹⁵⁸ The first, that no one can place a monetary value on child and the second, the dated contention that adults should not be allowed to contract out of the consequences of sexual intercourse.¹⁵⁹

Cobben¹⁶⁰ argues that the woman in a wrongful conception action cannot maintain two conflicting positions. He explains that once the woman has chosen to personally care for her child (a personal characteristic), she should not be allowed to at the same time maintain a businesslike attitude towards the child and claim maintenance costs for it:

“Duidelijk lijkt mij dat de vrouw zich niet tegelijk op twee posities kan stellen. Als ze er eenmaal voor gekozen heeft haar kind zelf op te voeden (de “niet-zakelijke”

¹⁵² it is submitted that legislative recognition and guidance of wrongful conception would contribute much to legal certainty - see ch 8 where the need for comprehensive wrongful life legislation is explained, with concurrent relevance in wrongful conception.

¹⁵³ **Beardsley v Wierdsma** 650 P 2d 288 Wyo. (1982).

¹⁵⁴ these courts feel that comprehensive damages will lead to the institution of fraudulent actions.

¹⁵⁵ this argument fails to take into account the moral differentiation many couples make between attempting to prevent pregnancy and dealing with potential life after conception - it is also suggested that it is not reasonable to expect parents to take either of these steps: “tortfeasors should take their victims as they find them.”

¹⁵⁶ **Kingsbury v Smith** 122 NH 237, 442 A 2d 1003 (1982).

¹⁵⁷ *op cit* p 65.

¹⁵⁸ and also in South Africa.

¹⁵⁹ this reasoning was obviously considered before the constitutional acceptance of the right to family planning.

¹⁶⁰ *op cit* p 481.

*verhouding), dan kan ze niet tegelijkertijd een "zakelijke" verhouding tot haar kind innemen door integrale vergoeding van de opvoedingskosten te claimen.*¹⁶¹

2.4.2 Arguments in favour

The following rationales could assist in answering some of the criticisms expressed by courts regarding child-rearing expenses:

- a physician who negligently performs an ineffective sterilization or who fails to properly inform a patient of contraceptive-related information should be held to the same level of professional standards that any other physician is expected to adhere to;^{162 163}
- the defendant-physician's negligent conduct should be the focus of a wrongful conception claim and not the birth of a child or the child's worth;¹⁶⁴
- there is a need to consistently apply uniform tort rules concerning the award of damages irrespective of the cause of action;¹⁶⁵
- damages in wrongful conception actions are no more speculative than damages commonly awarded in analogous cases;¹⁶⁶
- the birth of a child is not necessarily more of a benefit than a burden;¹⁶⁷
- there could be no doubt that the birth of a child and the ensuing child-rearing costs

¹⁶¹ *ibid.*

¹⁶² **Jones v Malinowski** 299 Md. 257, 473 A.2d 429 (1984) - it remains true that medical negligent conduct should not be differently treated from any other instance of professional negligence.

¹⁶³ when judging whether certain conduct was negligent, it should already be established that the conduct was also wrongful - see ch 2.

¹⁶⁴ Hampton *op cit* p 54.

¹⁶⁵ **University of Arizona Health Services Centre v Superior Court** 136 Ariz. 579, 667 P. 2d 1294 (1983) - the court could find no persuasive reason why they should not apply the basic damage rules to wrongful conception actions and allowed recovery to that extent.

¹⁶⁶ **Jones v Malinowski** - an economist demographer scientifically calculates the cost of child-rearing with reference to general economic projections and criteria: similar computations are routinely made to measure damages in wrongful death cases without courts being too concerned about the accuracy or acceptability thereof.

¹⁶⁷ **Sherlock v Stillwater Clinic** - the court found no reason to assume that the benefits of having a child will necessarily be greater than having no children in every instance: a jury should weigh the facts and circumstances of each particular case in order to determine whether a specific child could be seen as a blessing or a burden, also (in dissent) **Fassoulas v Ramey**.

cause a direct financial loss to the parents;¹⁶⁸

- parents should be permitted to weigh the risks of possible adverse effects on the child's psychological development against the certain financial support and peace of mind created by a wrongful conception award;¹⁶⁹
- the fear of possible fraudulent claims is an insufficient basis on which to deny recovery.^{170,171}

Hampton¹⁷² summarises the rationales which answer the majority of critics:

- a physician who performs an ineffective sterilization should be held to the same malpractice standards that any other physician must meet;¹⁷³
- the birth of a child is not necessarily more a benefit than a burden;¹⁷⁴
- parents should be permitted to weigh the risks of possible adverse effects on the child;¹⁷⁵
- possible fraudulent claims: an insufficient basis upon which to deny recovery;¹⁷⁶ and

¹⁶⁸ **Sherlock v Stillwater Clinic** - there is principally no real difference between these expenses having an immediate financial effect and the more distant costs such as future medical expenses (which most courts readily compensate).

¹⁶⁹ **Beardsley v Wierdsma** - Hampton *op cit* p 56 holds that it has not yet been proven that wrongful conception litigation has any adverse psychological effect on children and neither has it been established that it would be significantly detrimental to the child should this be so - he also mentions that wrongful conception litigation would probably have no greater effect than any other instance where a child learns that its birth was not planned.

¹⁷⁰ in **McKerran v Aasheim** the court emphasized its faith in the ability of the judicial process to distinguish fraudulent actions from legitimate claims.

¹⁷¹ I am likewise convinced that there are sufficient safety procedures in place to ensure that fraudulent claims do not succeed - justice will certainly not be done if the plaintiffs are prohibited from claiming compensation on account of possible counterfeit claims.

¹⁷² *op cit* p 54.

¹⁷³ **University of Arizona Health Sciences Centre v Superior Court** 136 Ariz. 579, 667 P.2d 1294 (1983); **Jones v Malinowski** 299 Md. 257, 473 A.2d 429 (1984).

¹⁷⁴ **Sherlock v Stillwater Clinic** 260 N.W.2d 169 Minn. (1977); **Beardsley v Wierdsma** 650 P.2d 288 (Wyo. 1982); **Sorkin v Lee** 78 A.D.2d 180, 434 N.Y.S.2d 300 (1980); **Fassoulas v Ramey** 450 So.2d 822 (Fla. 1984); **Troppi v Scarf** 31 Mich. App. 240, 187 N.W.2d 511 (1971).

¹⁷⁵ **Sherlock v Stillwater Clinic** 260 N.W.2d 169 (Minn. 1977).

¹⁷⁶ **McKernan v Aashiem** 102 Wash. 2d 411, 687 P.2d 850 (1984): "Undoubtedly, the system will not decide each case correctly in this field, just as it does not in any field, but here, as in other areas of tort law, we think it better to adopt a rule which will enable courts to strive for justice in all cases rather than to rely upon one which will ensure injustice in many."

- child-rearing costs are not more speculative than analogous damages commonly awarded in other areas of law.¹⁷⁷

2.5 Benefit theory

An important implication of the court's decision in **Tropi v Scarf**¹⁷⁸ was the employment of the so-called "benefit rule" or "benefit theory". Application of the benefit rule has the effect that all benefits in respect of the damage causing event are attributed towards the plaintiff. When the benefit rule is applied the courts appraise the beneficial consequences of a particular damage causing event and the damage award is then accordingly moderated by that amount.

Block¹⁷⁹ explains that in cases such as **Custodio**¹⁸⁰ and **Sherlock**¹⁸¹ the benefit rule was applied and all advantages resulting or emanating from the child, were subtracted from the total amount of damages. I do allow child-rearing costs but reduce the awards by the anticipated benefits¹⁸² the child will provide to the parents to such an extent that no award is in fact given. He describes it as "a form of mitigation used to prevent unjust enrichment to the parents¹⁸³ in wrongful conception claims." In calculating the relevant offset-amount, courts examine the specific circumstances of the plaintiffs-parents and base their awards on a case-by-case approach taking into consideration factors such as: the number of children already in the family; the financial resources available to the parents; and the reasons why the parents sought to limit the size of their family.¹⁸⁴

The **Tropi** court evaluated the same factors when it applied the benefit theory, but added

¹⁷⁷ **Jones v Malinowski** 299 Md. 257, 473 A.2d 429 (1984): "They point out that similar computations are routinely made in wrongful death cases, where juries are required to measure recovery by considering, for example, the value of the child's services and companionship."

¹⁷⁸ *supra*.

¹⁷⁹ 1985. Wrongful birth: The avoidance of consequences. Doctrine in mitigation of damages. **Fordham Law Review** (53:4), 1107.

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

¹⁸¹ 260 NW 2d 169 Minn. (1977).

¹⁸² both monetary and emotional benefits.

¹⁸³ who have the benefit of having the child while collecting damages from the defendant.

¹⁸⁴ the plaintiff's motivation for not wanting to increase their family is of vital importance in the South Africans plaintiff's case - only economic motivation for sterilization would warrant compensation (see **Edouard infra**).

thereto the age and marital status of the plaintiff-parents as additional relevant considerations. The court conceded that it is extremely difficult to place a monetary value or estimate on how much the unexpected extension of a family could adversely influence the typical wrongful conception household. It was suggested that the larger the existing family, the greater the detrimental effect of an additional child would be.¹⁸⁵

It is similarly difficult to appraise how factors such as the varying ages and marital status of parents could affect dealing with unexpected pregnancies. Young married couples would probably be in a better position to deal with such an event than an elderly married couple without any wish for a latecomer child. Unmarried couples are also generally¹⁸⁶ less enthusiastic about unplanned pregnancies than spouses who have considered the possibility of children, but who have decided against it or who have postponed such plans to a more convenient time.

The household income can be accurately calculated and is certainly an important consideration in wrongful conception awards since it directly influences the daily circumstances and living standard of the family. Here one would take into account that the practical impact of an additional child would have less of an adverse effect on a wealthy family than on a family already living on the breadline.

Keplinger¹⁸⁷ reports that the rule allowing the costs of child rearing to be offset by the benefits of the child is usually referred to as the "benefit" rule. To date, jurisdictions recognizing the

¹⁸⁵ If, for example, a family with only one child should be increased by another sibling due to a negligent act of a physician, one could appreciate the fact that the family is still within reasonable and manageable bounds - as apposed to a family of six children who is enlarged even further. Each family's circumstances, however, are different and what might be acceptable and manageable for one could be devastating to another. One must concede that a totally new paradigm is entered into when a couple without children unexpectedly is blessed with a child - for such a couple who did not want children, a single child would certainly have a monumental effect on their everyday circumstances and way of life.

¹⁸⁶ as communal living without marriage becomes more popular and socially acceptable, one could expect an increase in such couples having planned children of their own.

¹⁸⁷ *op cit* p 502.

benefit rule include Arizona,¹⁸⁸ Connecticut,¹⁸⁹ the District of Columbia,¹⁹⁰ Maryland¹⁹¹ and Michigan.¹⁹²

Block¹⁹³ writes that the use of the "benefits offset"¹⁹⁴ has been criticised on several grounds. He mentions firstly that any tort victim should be entitled to recover full damages as a result of the wrongdoing.¹⁹⁵ If a plaintiff's claim is restricted by the implementation of the benefit rule¹⁹⁶ full recovery does not take place and the plaintiff is thereby unjustly prejudiced. Many courts have held that no cause of action exists stating that the intangible and incalculable benefits of a healthy child are always greater than the rearing costs of such a child.

Another unfortunate consequence emanating from the benefit offset approach is that if child-rearing expenses were awarded parents will in order to maximise their recovery, put in the unsavoury position of having to declare that they do not love or want the child, or that the child is of little or no value to them.¹⁹⁷

Cleaver¹⁹⁸ is of the opinion that the implementation of the benefit rule in circumstances like these has the theoretically unacceptable effect that a price tag is put on the love and pleasure of the unplanned child. He warns that when the benefit theory is misapplied in that an overestimation of benefits¹⁹⁹ are made, it could have the effect that the award would be cancelled *in toto*. If so, no damages could be allowed for the reason that the maintenance

¹⁸⁸ **University of Arizona Health Science Centre v Superior Court** 136 Ariz. 579, 667 P.2d 1294 (1983).

¹⁸⁹ **Ochs v Borrelli** 187 Conn. 253, 445 A. 2d 883 (1982).

¹⁹⁰ **Hartke v McKelway** 707 F.2d 1544 *cert. denied*, 464 U.S. 983 (1983).

¹⁹¹ **Jones v Malinowski** 299 Md. 257, 473 A.2d 429 (1984).

¹⁹² **Green v Sudakin** 81 Mich. App. 545, 548, 265 N.W.2d 411, 412 (1978).

¹⁹³ *op cit* p 1111.

¹⁹⁴ another term frequently used for the benefit theory.

¹⁹⁵ **Custodio v Bauer** 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967), **Cockrum v Baumgartner** 96 Ill. 2d 193, 69 Ill. Dec. 168, 447 N.E. 2d 385 (1983) - which philosophy is in line with general principles of natural justice.

¹⁹⁶ synonymous with benefit theory.

¹⁹⁷ it is true in application of the benefit theory that the more the parents acknowledge their love for the unplanned child, the less recovery they would be entitled to.

¹⁹⁸ *op cit* p 52.

¹⁹⁹ both the child's love and similarly the pleasure the parents derive from parenthood.

costs and other expenses associated with parenthood are exceeded by the benefits of having the child.²⁰⁰

It is argued²⁰¹ that children do not contribute much to the family income in modern society.

"To deny these costs is to rob the plaintiffs of compensation even for the most direct consequences of the defendant's negligence. In an urban society, the economic contribution that a child can be expected to make to his family is a small one; the primary benefit that he will bring his parents is the emotional benefit of mutual affection. The unhappy effect of this particular offset is to punish the loving parent: the more pleasure he takes in his child, the less his economic recovery will be. It is difficult to imagine a more inequitable result than this."

To limit an amount of damages by taking into account positive spin-offs from the damage-causing event in order to make a fair assessment is not a new concept. In American law this legal principle is founded by section 920 of the **Restatement 2nd of Torts** (1979):

"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 special benefit conferred is considered in mitigation of damages, to the extent that it is equitable."

According to this section a court may reduce a plaintiff's recovery in the fashion explained above. Many courts²⁰² have ignored or misconstrued the two significant limitations the **Restatement** have placed, namely:

- the circumstances considered in mitigation must benefit the *same interest* that was harmed by the tortious act;²⁰³ and

²⁰⁰ here the use of the benefit theory is severely criticized on grounds of an incorrect and unacceptable error in reasoning - if the child's future *financial benefits* are expected to be greater than its rearing costs, then a damage award would effectively be cancelled out by the accrual of this benefit to the parents, and this would hardly ever be the case.

²⁰¹ A.N.M. 1982. Judicial Limitations on Damages Recoverable for the Wrongful Birth of a Healthy Infant. *Virginia Law Review* (68), 1325.

²⁰² **Flowers v District of Columbia; University of Arizona Health Services Centre v Superior Court** 136 Ariz. 579, 667 P. 2d 1294 (1983).

²⁰³ Block, *op cit.* writes on p 1111: "...the courts have failed to observe the 'same interest' limitation specified in section 920 of the **Restatement 2nd of Torts**, which provides that the benefits used to offset should be of the same type as the damages being awarded. Using this principle, costs of child rearing would be offset by the expected financial benefits of having the child, and emotional distress

- the benefit can be offset against the damage only to the extent that this is *equitable*.

2.5.1 Misapplication of the benefit rule

It is submitted that a superficial probe into many “wrongful conception” judgements reveal that there is a general misapplication and judicial misrepresentation of the benefit theory with regard to the two key aspects mentioned above.²⁰⁴

2.5.1.1 Judicial misrepresentations of “same interest” limitation

Although the **Tropi** court²⁰⁵ regarded the physical, emotional and economic aspects of parenthood as a single interest, comment (b) to section 920 clearly demonstrates that the limitation contemplates a much narrower definition of the word “interest”:

“Damage resulting from an invasion of one interest is not diminished by showing that another interest has been benefited. Thus damages for pain and suffering are not diminished by showing that the earning capacity of the plaintiff has been increased by the defendant’s act.”

It is reported²⁰⁶ that against this background it can clearly be seen that the drafters of the **2nd Restatement** argued that physical, emotional and economic injuries harm separate interests.²⁰⁷ Wrongful conception claims usually involve the injury of all the above-mentioned interests. The true distinction between the various interests are illustrated whenever courts deny recovery for one type of injury, while allowing another. The **Restatement** explains:²⁰⁸

“The benefit rule provides that a benefit of any of these separate interests offsets the damages only to that interest, not to other interests that are harmed by the same act of negligence.”

2.5.1.2 Judicial misrepresentation of limitation to “an equitable extent”

The benefit rule applies only “*to the extent that it is equitable*”. Because a broad reasoning is incorrectly used, many courts weigh the emotional benefits of a wrongful conception child

damages would be offset by the emotional joys of child rearing.”

²⁰⁴ A.N.M. *op cit* p 1326.

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

²⁰⁶ A.N.M. *op cit* p 1325.

²⁰⁷ classes of interest.

²⁰⁸ *ibid*.

against *all* the items of damage associated with childbirth. This could have the unfair result that a wrongful conception plaintiff loses his total recovery because of the restricting effect of the benefit theory. It is suggested²⁰⁹ that this incorrect use of the theory amounts to inequitable results and therefore the benefit theory should find no application in such cases.²¹⁰ To deny a legitimate wrongful conception plaintiff compensation because of this incorrect application of the benefit theory especially in an urban society where the economic contribution of a child to his family is small, is unacceptable and inequitable. It is obvious that the primary benefits of children in a modern and developed urban society are emotional benefits²¹¹ and emotional support. Since benefits are to be considered in mitigation of damages only to the extent that it is equitable, inequitable application of the benefit rule should therefore be stopped.

It is suggested that there would be no unfairness or inequitable results if the benefit rule were to be applied in the correct way. Proper application would only consider same interests, for example where any financial benefits derived from the birth of a child would be taken into account and subtracted from any financial loss suffered in consequence of the birth of the child. In this way there would be no conflict with either of the restatement's limitations.

2.6 Public policy in favour of wrongful conception

It has been suggested that certain policy considerations could be taken into account when expanding the ambit of wrongful conception compensation.²¹² They are the following:

- In all tort cases the primary purpose of the award of damages is to compensate the plaintiff for injuries caused by the defendant's negligence. Many courts²¹³ disallow wrongful conception actions for fear of possible psychological damage to the child. These courts suggest that emotional damage would be caused if the child learns of the litigation concerning it's birth. It has however been suggested²¹⁴ that, even so, the risk of possibly causing a certain amount of psychological trauma in this manner is still

²⁰⁹ A.N.M. *op cit* p 1324.

²¹⁰ note that the end effect of strict application of the benefit theory is the same as if the claim were to be dismissed on grounds of policy - costs relating to the unexpected pregnancy are obviously not part of the "windfall" of parenthood (*ie* windfall theory overriding-benefit theory is applied).

²¹¹ *eg* mutual affection and love.

²¹² A.N.M. *op cit* p 1328.

²¹³ see *supra* reasons given for rejection of claim.

²¹⁴ A.N.M. *ibid*.

much less harmful to the child than growing up in financial hardship²¹⁵ and in an environment where financial constraint has been caused because of its very existence.²¹⁶

- Although the pro-wrongful conception argument has been raised that liability would ensure a high level of medical professional care, it has been suggested²¹⁷ that not all are not convinced that liability would reduce the number of negligently performed sterilization operations. It is nevertheless probable that wrongful conception liability might improve the standard of counselling and post-operative testing.
- The plaintiff's recovery in a wrongful conception suit is circumscribed by the same principles that effectively limit other tort actions. It is suggested that the difficulty in proving the required elements and establishing a cause of action sufficiently protects the defendant from liability where he has not clearly been at fault.
- The items of damage in wrongful conception actions are not more speculative than in other claims. To disallow a legitimate wrongful conception claim on this basis is unnecessary and inequitable²¹⁸.
- It seems obvious that as the popularity and importance of responsible family planning increases, the number of wrongful conception cases will inevitably grow. Until proper guidelines for assessing damages are provided for by statute, courts must rely on standard principles of negligence law.²¹⁹

2.7 Constitutional protection²²⁰

The issue of constitutional protection with regard to wrongful conception was considered in **Kingsbury v Smith**.²²¹ Primarily the fundamental rights to privacy²²² and human dignity are

²¹⁵ caused by the unexpected additional expenses derived from the family budget.

²¹⁶ this view was supported in **Custodio v Bauer**.

²¹⁷ A.N.M. *op cit* p 1329.

²¹⁸ and it could be seen to effectively condone medical negligence.

²¹⁹ *op cit* p 1330.

²²⁰ see ch 9.

²²¹ 122 N. H. 237, 42 A 2d 1003 (1982).

²²² which includes decision making concerning family planning, abortions etc.

important in this regard and the application of these rights to family planning and procreative choice are obvious. These rights were respectively acknowledged and protected in landmark decisions such as *Griswold v Connecticut*²²³ and *Roe v Wade*.²²⁴ In *Sherlock v Stillwater Clinic*²²⁵ it was pertinently stated that these constitutional rights support and protect wrongful conception actions.²²⁶

Hampton²²⁷ is in favour of a rationale based constitutional dimension to the recognition of wrongful conception. He believes that denial of recovery in these cases is totally unacceptable, as the actions originate from an infringement of the plaintiffs' constitutionally protected right to choose not to procreate. It is argued²²⁸ that this right closely corresponds with the ensuing right of an individual to choose sterilization as a birth control method which should also enjoy legal protection. It is accordingly suggested that certain judicial guidelines should be taken into account when the wrongful conception action is considered.²²⁹

2.7.1 No anti-wrongful conception legislation

It would appear that the same public policy considerations once used to prohibit the action for wrongful conception altogether are now implemented to limit wrongful conception damages in many states in America.²³⁰

2.8 Conclusion

Wrongful conception actions have been recognized in virtually every American jurisdiction presented with this issue. In spite of the claim's general acceptance by the courts, the question of damages is still in disarray. The application of the benefit rule as originally intended would present an equitable solution in many instances. It must be emphasized however, that each case should be examined on its own merits.

²²³ 381 US 479 (1965).

²²⁴ 410 US 113 (1973).

²²⁵ 260 N.W. 2d 169 Minn. (1977).

²²⁶ see the detailed discussion on these important cases, together with the relevance of these decisions on wrongful conception litigation in ch 2 where abortion rights, amongst other relevant topics, are investigated.

²²⁷ *op cit* p 59.

²²⁸ *ibid.*

²²⁹ see suggestions mentioned in final reflections ch 12.

²³⁰ for a full discussion on legislation prohibiting wrongful conception, wrongful birth and wrongful life actions, see ch 10.

3. Legal position in England

3.1 Introduction

Jackson²³¹ points out that although there is a vast difference in the legal systems and the legal cultures of the United States and England, “the courses of action available to people who consider themselves injured as a result of the birth of an unanticipated child, caused by the negligence of another”²³² are virtually identical in both countries,²³³ as both countries recognize the parents’ claims, while rejecting wrongful life actions

3.2 Historical background

The first wrongful conception action was reported in England much later than its American counterpart.²³⁴ Cleaver²³⁵ gives possible explanations why the action for wrongful conception only surfaced in England when it did:

- changing public policy considerations concerning family planning and the increased use of contraception as a method of achieving this goal;
- sterilization as an accepted method of preventing unwanted future children became general practice;
- the influence of new abortion legislation in 1967.

3.3 Case law history

3.3.1 Udale

²³¹ 1995. Action for Wrongful Life, Wrongful Pregnancy and Wrongful Birth in the United States and England. *Loyola of Los Angeles International and Comparative Law Journal* (17:2), 535.

²³² *op cit* p 610.

²³³ except for a few American states who recognize wrongful life.

²³⁴ the first English case was reported in 1982 - *McKay v Essex Area Health Authority* (1982) QB 1166 (CA), (1982) 2 All ER 771, whilst the first American case was decided in *Christensen v Thornby* in 1934.

²³⁵ *op cit* p 53.

Udale v Bloomsbury Area Health Authority²³⁶ was the first successful wrongful conception claim that came before the English courts. *In casu* the plaintiff-parents made a decision based on financial considerations not to have any more children. A negligent sterilization operation was performed on Mrs. Udale and she became pregnant once again. She gave birth to her fifth healthy baby nine months later. The hospital in question acknowledged liability for the following damages: Costs of both the sterilization operations,²³⁷ compensation for shock caused by the unexpected pregnancy and loss of income for eleven months.²³⁸ Damages in dispute were: expenses of expanding the family home and child-rearing expenses until the age of sixteen years. Judge Jupp expressed concern over these disputed damages, based on the following grounds:

- the child would feel unwelcome if he should ever discover that his birth has led to litigation;
- the application of the benefit rule²³⁹ disallows these damages;
- wrongful conception accountability would put unacceptable pressure on medical practitioners which may eventually prompt physicians to recommend unnecessary abortions in order to escape possible liability; and
- the effect of the windfall theory,²⁴⁰ by which the birth of a child is always seen as a blessed event.²⁴¹

In spite of these considerations the court "found it legitimate to have some regard to the disturbance to the family finances which the unexpected pregnancy caused"²⁴² and allowed damages to the amount of £8000 for the improvements of the family home²⁴³ and recognized the disruption of the family finances as a compensable injury.

Cleaver²⁴⁴ criticises the court's decision. He finds it illogical that the court recognized loss of

²³⁶ (1983) 2 All ER 522 QB.

²³⁷ *ie* the initially performed procedure as well as the follow-up operation.

²³⁸ a reasonable period before and after birth.

²³⁹ see *supra*, where the benefit rule is discussed.

²⁴⁰ it is submitted that much criticism could be expressed over the acceptability of this theory - see *supra* where a similar viewpoint is held by American critics.

²⁴¹ compensation would attribute to the parents a "double blessing".

²⁴² Cleaver *op cit* p 55.

²⁴³ necessitated by the further extension of the family.

²⁴⁴ *ibid.*

income, medical expenses *et cetera* on the one hand, while not allowing child-rearing expenses as damages. He points out that all the above-mentioned types of damage originate from a single cause of action, namely, the negligent performance of a sterilization operation.

3.3.2 Emeh

The next important wrongful conception case was **Emeh v Kensington and Chelsea and Westminster Area Health Authority**.²⁴⁵ In this case the negligent performance of a sterilization operation caused the birth of a deformed and handicapped child.²⁴⁶ The court *quo* found that all damage resulting from the period *after* twenty weeks of pregnancy is not compensable, since the plaintiff-mother had the opportunity to obtain an abortion. The court therefore found that the mother did not comply with her duty to limit her damages by not taking such drastic steps!²⁴⁷

On appeal the court reached a different conclusion: The choice of the plaintiff-mother not to abort her unexpected child did not constitute a *novus actus interveniens*²⁴⁸. The court of appeal further stated that the mother's duty to mitigate²⁴⁹ could not reasonably have included a duty to obtain an abortion. The decision further declared that the following damages should be compensated by defendant, whether the child in question is born normal or disabled:²⁵⁰ pain and suffering and future loss of amenities of life.²⁵¹

The final order of damages therefore included all demands of the plaintiff except the child-

²⁴⁵ (1984) 3 All ER 1044 (CA); (1985) 1 All ER 346 QB.

²⁴⁶ which could easily cause one to be misled into earmarking it as a wrongful birth action, which it is not - see discussion of the **Bowman v Davis** case *supra*.

²⁴⁷ this viewpoint implies that wrongful conception or wrongful birth mothers with unwanted pregnancies have a duty to obtain an abortion (especially in the case of a handicapped foetus), since abortion may then be legally obtained - I submit that such requirement is unreasonable.

²⁴⁸ see ch 2 where causation as element of delict is further discussed.

²⁴⁹ Visser & Potgieter in their book on the **Law of Damages** (1993) *op cit* 231 declare that as the defendant is usually the blameworthy party, there cannot be expected from a plaintiff too high a degree of care in mitigating his damages. Any conduct that would, for example, be considered below his dignity or would be unreasonable for him under the circumstances, would not be expected from him. The test is that of the reasonable person.

²⁵⁰ it is important that courts, as the court in case, keep wrongful conception and wrongful birth actions apart and the differences in the cause of action be considered when an award is made.

²⁵¹ the court merged this head of damage with "pain and suffering which would occur in the life of the handicapped child" - it is submitted that this anomaly could contribute to the already existing confusion between wrongful conception and wrongful birth actions.

rearing expenses.²⁵²

3.3.3 Thake

In **Thake & another v Maurice**²⁵³ the parents of five healthy children decided, due to financial considerations, not to have any more children. Acting on this decision, Mr. Thake underwent a vasectomy²⁵⁴ procedure in 1975. This procedure would have the effect that he would be made permanently and irreversibly infertile. Against all expectations of the Thake family another healthy child was born in 1978. The court *a quo* found that the medical practitioner committed a breach of contract. In reaching a different conclusion, the Appeal Court stated that no guarantee as to the success of the procedure was given.²⁵⁵ The tort action based on the negligence of the doctor, however, was successful. The court found that there rested a legal duty on every medical practitioner to take utmost care when attending to patients. *In casu* the defendant neglected to inform his patient of the slight possibility that he once again could become fertile.²⁵⁶ This omission was in breach of his duty to take utmost care and the doctor, therefore, did not fulfill his obligations²⁵⁷ towards his patient. Damages were awarded for prenatal stress, pain and suffering as well as reasonable child-rearing costs.

Grubb²⁵⁸ is of the opinion that these decisions in the **Emeh** and **Thake** cases established the cause of action based on wrongful conception in English law. He conveys that the action is usually based on tort, but where suitable, an action can also be based on breach of contract. Both the cases of **Thake v Maurice**²⁵⁹ and **Emeh v Kensington and Chelsea and Westminster AHA**,²⁶⁰ arose out of unsuccessful sterilization operations, which he believes, gave rise to three concurrent issues:

²⁵² the Appeal Court's awards were, £3000 for pain and suffering, plus £1000 for future loss of amenities and a specific award for child-rearing costs was allowed.

²⁵³ (1986) 1 All ER 497.

²⁵⁴ see ch 11.

²⁵⁵ see ch 4 on medical aspects, concerning medical guarantees.

²⁵⁶ *ie* where so-called re-canalisation takes place - see ch 11.

²⁵⁷ a person who is under contractual obligation to act in a certain manner could still be held delictually liable for damage caused to the person for whose benefit he was obliged to act - the contractual relationship could be an indication of the fact that a legal duty existed between the parties.

²⁵⁸ 1985. Medical Law - Failure of Sterilisation - Damages for "Wrongful Conception" **The Cambridge Law Journal**, 30.

²⁵⁹ *supra*.

²⁶⁰ *supra*.

3.3.3.1 Concurrent issues

The first is that the wrongful conception cause of action can be based on contract and/ or tort. The **Thake** court shows that in the absence of negligence, a physician may still be held liable for breach of contract. *In casu*, the physician failed to disclose a small risk that fertility might return and had by implication not only agreed to perform a vasectomy, but also guaranteed permanent sterility. Alternatively the judge found a collateral warranty to the same effect.²⁶¹

It is secondly suggested²⁶² that because the actual birth of the child in question is rather remote from the physician's negligence conduct, could possibly lead to a duty on parents to abort unwanted fetuses in certain instances. In **Emeh** the unexpected pregnancy was only discovered after 20 weeks gestation and the parents accordingly decided against an abortion. The court found their behaviour reasonable under the specific circumstances, but the possibility remains that discovery of the pregnancy at an earlier stage could change the picture to such an extent that it becomes unreasonable not to abort.²⁶³

Finally, it is believed²⁶⁴ that public policy prevented recovery of certain damages in both **Thake** where a healthy child was born and **Emeh** where a deformed child was born.²⁶⁵ In **Udale v Bloomsbury AHA**,²⁶⁶ a number of well-known arguments were mentioned, the most important ones being that of the viewpoint that the acceptance of a child-rearing expenses award would be the "double blessing" and "constitute the rejection of parenthood". Although **Thake** found these arguments persuasive, the court judged it doubtful whether a child is always a blessing.

3.3.4 Eyre

In another case, **Eyre v Measday**²⁶⁷ an unsuccessful sterilization operation was performed on Mrs. Eyre. In spite of the court's decision in the **Take** judgement given in the same year, the claim was rejected on the grounds that plaintiff did not prove that operation was negligently performed and also that plaintiff did not plea that the defendant breached a duty to inform her of the possibility that the procedure could be unsuccessful.

²⁶¹ Grubb. 1985, *op cit* p 31.

²⁶² *ibid.*

²⁶³ I do not agree with this supposition - see ch 2 regarding reasonable mitigation.

²⁶⁴ Grubb. 1985, *op cit* p 32.

²⁶⁵ public policy barred any head of damage that could not be classified as additional expenses attributable to the child's condition of abnormality.

²⁶⁶ *supra.*

²⁶⁷ (1986) 1 All ER 488 (CA).

Grubb,²⁶⁸ in a follow-up commentary on the evolvement of wrongful conception actions in England makes a comparison between correlative cases. He reports that although the defendant-physicians in **Thake and Eyre v Measday**²⁶⁹ competently performed sterilization operations, they failed to disclose a risk that the operations could naturally reverse themselves.²⁷⁰ In both these cases nature indeed took its course and the patients became fertile again. Both plaintiffs claimed for physical injury and financial loss and argued that the physicians expressly guaranteed sterility.

3.3.5 Negligence

The courts applied an objective test to determine the true contents of each medical procedure agreement. It was found that the reasonable patient would only expect reasonable care and skill, with the understanding that "irreversible" means "surgically irreversible" in the context of the finality of sterility achieved by sterilization procedures. At the core of the court's rejection of strict contractual obligation was the recognition that medicine is an inexact science and the outcome of medical procedures are usually uncertain. It is nevertheless possible for a physician to guarantee the success of treatment, but in such instances the guarantee must be given in unequivocal terms. In **Thake** the physician did not disclose any risk of possible regained fertility and even admitted that it was essential to do so.²⁷¹

Instances where non-disclosure of risk might be considered negligent are:

- Upon acquisition of new knowledge, some physicians might decide to disclose that a certain risk exists when a patient undergoes a certain procedure or suffers from a specific condition. The accumulate effect of these disclosures could be that it becomes professional custom to do so as more physicians uniformly agree with these disclosures. Eventually disclosure in that specific instance becomes standard practice and failure to inform a patient would then constitute malpractice.²⁷²

²⁶⁸ Grubb, A. 1986. Failed Sterilisation: Is a claim in contract or negligence a guarantee of success? **The Cambridge Law Journal** 197.

²⁶⁹ both in the same year, 1986.

²⁷⁰ see occurrence of re-canalisation ch 11.

²⁷¹ and thereby acknowledged that he acted inappropriately not to reveal this risk.

²⁷² Grubb. 1986, *op cit* p 199.

- In the **Sidaway case**²⁷³ the court considered the fact that the physician's failure to disclose certain information, could constitute negligent conduct. There appears to be no counterbalancing health based reason to weigh against the need of disclosure. It is suggested²⁷⁴ that "therapeutic discretion"²⁷⁵ would not be suitable in sterilization cases as procreative decisions are of an elective and highly personal nature and usually not a matter of great urgency.²⁷⁶
- Even if a physician is not under a general duty to *volunteer* information about the risks of failure or reversal of a particular medical intervention,²⁷⁷ he is still under a duty to give truthful information if specifically asked about such risks.²⁷⁸ The courts decided that a physician's legal obligations should not depend on whether a patient is treated privately²⁷⁹ or under National Health Service,²⁸⁰ except where there is a clear agreement increasing the legal accountability of the physician. In both instances liability would depend upon proof of negligence. To prove negligence where a sterilization operation has been *prima facie* competently performed, however, still may not be easy.

3.3.6 Gold

The final English case to be discussed, is **Gold v Haringey Health Authority**.²⁸² *In casu* it was found that a physician who failed to inform a patient of the small risk that nature may reverse the surgery and also neglected to advise the patient of a surgical alternative with a smaller risk

²⁷³ **Sidaway v Board of Governors of the Bethlehem Royal Hospital** (1984), Q.B. 493, (1985) A.C. 871.

²⁷⁴ *ibid.*

²⁷⁵ see ch 5.

²⁷⁶ a "therapeutic discretion" to inform or not, could possibly with exception be acceptable in cases of emergency.

²⁷⁷ that would be the case where in the medical fraternity it is not commonly accepted that physicians specifically inform their patients about certain aspects of the relevant condition - therefore, the courts will find that a physician who failed to disclose these facts did not act differently from the expected standard procedure.

²⁷⁸ see ch 11 on medical aspects.

²⁷⁹ where a plaintiff may bring action based on contract.

²⁸⁰ since contractual liability is excluded by statute an action can only be instituted when based on tort.

²⁸¹ as negligence is a prerequisite for post malpractice, based on contract - see ch 2.

²⁸² (1988) QB 481 (CA), (1987) 2 All ER 888 (1987) 3 W.L.R. 649.

of failure,²⁸³ was not negligent. In reaching its decision, the court applied the so-called "Bolam test"²⁸⁴ in terms of which the proper standard of medical care is established by the medical profession itself.²⁸⁵

Grubb²⁸⁶ reports on yet another place that the Court of Appeal was anxious to restrict medical negligence actions for failed sterilization in cases where the procedure itself has been properly performed.²⁸⁷ Grubb criticises that fact that he court did not want to award damages for the birth of a healthy child based on the premise that this would make the physician the 'financial father' of the child, as it was clearly established in **Emeh** that it is not against public policy to award damages for the cost of maintaining a child to majority.

He writes²⁸⁸ in summary of the English position regarding wrongful conception:

"In conclusion, it is submitted that the courts should allow these claims, but perhaps they should limit the damages that can be recovered. Until *Gold* is reversed, the best that can be hoped for is that the medical profession, out of an abundance of caution and fearing that a failure that a future court might take a different view of the law, will adapt its practices to ensure a greater disclosure. Ironically, this may be an example of beneficial defensive medicine!"

4. Legal position in Germany

4.1 Historical background

The first wrongful conception action in Germany was instituted in the year 1967.²⁸⁹ *In casu a*

²⁸³ a vasectomy performed on the patient's husband would have been a more secure option.

²⁸⁴ see ch 5 on informed consent.

²⁸⁵ as opposed to an aspect of negligence determined by the courts, as is the case in South Africa - see **Castell** *infra*.

²⁸⁶ 1988. Contraceptive advice and doctors - A law unto themselves? **The Cambridge Law Journal**, 12.

²⁸⁷ *ie* to cases where negligence lie in respect of a failure to inform.

²⁸⁸ *op cit* p 14.

²⁸⁹ **Landsgericht Itzehoe** 21 Nov. 1968, 1969 **Zeitschrift für das gesamte Familienrecht** 90 ff.