CHILD REARING EXPENSES AS A COMPENSABLE DAMAGE IN A WRONGFUL CONCEPTION CASE:

BURKE V. RIVO

INTRODUCTION

With the extensive use of sterilization as a means of contraception, the wrongful conception suit has become more prevalent. "Wrongful conception" is a medical malpractice claim in which the plaintiff is the parent of a normal, healthy infant whose conception was unplanned and unwanted. The plaintiff alleges that a physician had negligently performed either a sterilization procedure, postoper-
ative fertility testing,\(^4\) genetic counseling,\(^5\) or an abortion.\(^6\) The plaintiff typically seeks to recover damages stemming from the unplanned pregnancy, birthing, and child rearing costs.\(^7\) The courts which have confronted wrongful conception cases have found the task of damage assessment troublesome.\(^8\) The Supreme Judicial Court of Massachusetts, Middlesex, recently tackled this issue in *Burke v. Rivo.*\(^9\)

The Massachusetts Supreme Judicial Court, in *Burke*, held that if the plaintiffs could show an economic motivation for the sterilization procedure, then they would be entitled to recover damages for child rearing costs.\(^10\) The court, however, further held that these damages should be offset by any benefits the parents derive from the addition of the child to their lives.\(^11\)

This Note discusses *Burke* and the measure of damages in wrongful conception cases.\(^12\) The various theories regarding recoverable damages in a wrongful conception case are explored.\(^13\) In addition, other cases which have addressed the issue of the proper measure of damages in a wrongful conception cause of action are dis-


\(^{5}\) Comment, 32 EMORY L.J. at 1168. See, e.g., Berman v. Allan, 80 N.J. 421, —, 404 A.2d 8, — (1979) (Handler, J., concurring in part and dissenting in part). In *Berman*, the court stated, "[T]he injury consists of a diminished childhood in being born of parents kept ignorant of [the child's] defective state while unborn and who, on that account, were less fit to accept and assume their parental responsibilities." *Id.* at —, 404 A.2d at 19.


\(^{8}\) See infra notes 60-180 and accompanying text.


\(^{10}\) *Id.* at 772, 551 N.E.2d at 6.

\(^{11}\) *Id.*

\(^{12}\) See infra notes 16-50 and accompanying text.

\(^{13}\) See infra notes 60-180 and accompanying text.
cussed. Finally, this Note analyzes the holding and reasoning of the Massachusetts Supreme Judicial Court in *Burke*, particularly the economic motivation analysis of the court, and concludes that this decision represents a paradigm upon which other courts may rely.

**FACTS AND HOLDING**

In December, 1983, Carole Burke met with her physician, Dr. Elliot Rivo, to discuss her family situation. Mrs. Burke and her husband had decided it was necessary for Carole to return to work for additional income. In order to make their desire practicable, they discussed sterilization with their physician. Dr. Rivo recommended a type of sterilization procedure known as a tubal ligation and guaranteed that the procedure would be successful. In February, 1984, Dr. Rivo performed a tubal ligation on Carole Burke.

On June 25, 1985, a laboratory test confirmed that Mrs. Burke was pregnant. Nearly eight months later, she gave birth to a healthy child. A medical test revealed that one of Carole Burke's fallopian tubes had recanalized after the tubal ligation procedure, allowing her to become pregnant. The day after giving birth, Carole Burke underwent another sterilization procedure. The second sterilization procedure was a bilateral salpingectomy. The Burkes then brought suit in the Superior Court, Middlesex County, Massachusetts. At trial, Mr. and Mrs. Burke maintained that Dr. Rivo had not warned them of the risk of recanalization. Carole Burke stressed that if she had been warned of any risk of pregnancy, she would have chosen another sterilization method.

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14. See *infra* notes 169-80 and accompanying text.
15. See *infra* notes 181-246 and accompanying text.
17. *Id.*
18. *Id.* It was alleged that over a six-year period, Carole had three children and one miscarriage and that she and her husband did not wish to have more children. *Id.* at 2 n.3.
19. A tubal ligation is defined as "[t]he interruption of the continuity of the oviducts by cutting, cautery, or by a plastic or metal device to prevent future conception." *Stedman's Medical Dictionary* 876 (25th ed. 1990).
21. *Id.* at 76, 551 N.E.2d at 2. See *supra* note 19.
23. *Id.*
24. *Id.*
25. *Id.*
28. *Id.* at 766, 551 N.E.2d at 2.
29. *Id.*
The Burkes brought malpractice and breach of contract actions against Dr. Rivo. Because this was an issue of first impression in Massachusetts, the trial court judge did not know what damages were available, so the judge transferred the question of damages to an appeals court. The case was subsequently transferred to the Massachusetts Supreme Judicial Court, on its own motion, to address the question of damages.

The Massachusetts Supreme Judicial Court agreed with the trial court and concluded that the lower court could properly award the following damages if the plaintiffs successfully proved their case: (1) cost of the failed sterilization procedure; (2) costs directly related to the pregnancy; (3) Carole Burke’s lost earning capacity; (4) medical expenses for delivery and post-natal care; (5) cost of the care for the Burke’s other children while Carole Burke was incapacitated; (6) cost of the subsequent sterilization procedure; (7) expenses stemming from the second sterilization procedure; and (8) Mr. Burke’s loss of consortium. In addition to the damages the trial court had decided would be appropriate, the supreme judicial court stated additional damages were recoverable: (1) Mrs. Burke’s pain and suffering connected with her pregnancy, the birthing process and the second sterilization procedure; and (2) emotional distress sustained by Mr. and Mrs. Burke in connection with the unwanted pregnancy.

The issue specifically addressed by the Massachusetts Supreme
Judicial Court did not, however, concern any of the above damages, rather, the court struggled with one particular damage claim—the Burkes' recovery of child rearing expenses. First, the court recognized that under normal contract and tort principles, child rearing expenses are reasonably foreseeable and a natural consequence of the wrongs alleged by the Burkes. Next, the Justices focused their investigation on the question of whether any public policy arguments existed which would limit traditional contract and tort damages. The majority found there were no public policy considerations to prevent a person who chose to undergo a sterilization procedure for economic purposes from suing under traditional tort and contract principles.

In Burke, the majority position was supported by four of seven justices. In surveying the approaches taken by courts throughout the United States, the majority recognized that many jurisdictions allow the parents of a healthy child to recover "damages directly associated with the birth." However, the court determined that on the issue of whether parents may recover child rearing expenses, there is no agreement among the jurisdictions. The Massachusetts Supreme Judicial Court declared that in Massachusetts, if a plaintiff establishes a physician's liability for negligently performing a sterilization procedure, then the plaintiff may recover damages directly associated with the pregnancy and the rearing of the child. However, the court limited recovery of child rearing expenses to instances where the plaintiff had elected to undergo the sterilization for economic reasons.

In dicta, the court in Burke suggested it would deny the recovery of child rearing expenses when the sterilization procedure was motivated by genetic or therapeutic concerns. However, the court declared that where child rearing expenses were awarded, "the trier of

36. Id.
37. Id.
38. Id.
39. Id. at 764, 773, 551 N.E.2d at 1, 6.
40. Id. at 766, 551 N.E.2d at 3.
42. See Burke, 406 Mass. at 772-73, 551 N.E.2d at 6.
43. Id. at 772, 551 N.E.2d at 6.
44. Id. at 772, 551 N.E.2d at 5.
fact should offset against the cost of rearing the child the benefit, if any, the parents receive and will receive from having their child." After considering arguments that the birth of a child is always a net benefit, the court summarily rejected that position. Additionally, the majority in Burke rejected the argument that the plaintiffs could have mitigated their damages by opting for abortion or adoption.

The dissent asserted that the physician should be liable only for the negligent operation, advice, and the guarantee, and should not be responsible for child rearing expenses. The dissenters argued that it was intolerable to permit a judge or jury to attempt to calculate the value of a child to his parents. However, the dissenters did agree with the majority that if child rearing costs were to be allowed, then such an award must be offset by the benefits that the parents receive in raising a healthy, normal child.

BACKGROUND
THEORIES OF RECOVERY

The overwhelming majority of jurisdictions recognize "wrongful conception" as a compensable injury. Four basic approaches are utilized by courts today to compute wrongful conception damages. One approach is simply to deny all recovery to a wrongful conception plaintiff. The other three approaches allow recovery, but differ as to what damages are recoverable. The jurisdictions which allow recovery are particularly split on the issue of damages for child rearing expenses. The traditional approach allows damages for the pregnancy, birthing process and sterilization costs, but refuses to allow damages for child rearing expenses. However, a number of jurisdictions recognize child rearing expenses as compensable damages. These jurisdictions are split as to whether the award is to be offset by benefits received by the parents. In general, the various approaches

45. Id. at 772, 551 N.E.2d at 6.
46. Id. at 770, 551 N.E.2d at 4.
47. Id.
48. Id. at 773, 551 N.E.2d at 6 (O'Connor, J., dissenting; Nolan and Lynch, J. J., join).
49. Id. at 774, 551 N.E.2d at 6-7.
50. Id.
52. See infra notes 60-180 and accompanying text.
53. See infra notes 60-84 and accompanying text.
54. See infra notes 85-180 and accompanying text.
55. See infra notes 85-180 and accompanying text.
56. See infra notes 85-112 and accompanying text.
57. See infra notes 113-80 and accompanying text.
58. See infra notes 113-80 and accompanying text.
which courts take to the award of damages in wrongful conception cases can be divided into four categories: the blessings doctrine; the traditional approach; recovery of both childbirth and childrearing expenses; and the offset rule.59

The Blessings Doctrine

The "blessings doctrine" holds that the birth of a human being is so sacred that its occurrence alone is enough to preclude an award of damages.60 In Christensen v. Thornby,61 the Minnesota Supreme Court became one of the first courts to address the issue of whether parents suffer legal damage as a result of the birth of an unplanned child.62 This case involved Clarence Christensen, a man who went to his physician for a vasectomy.63 Mr. Christensen had been advised that his wife, who had already given birth to one child, might not survive another pregnancy.64 Dr. Thornby performed the vasectomy, yet Mrs. Christensen became pregnant shortly after Mr. and Mrs. Christensen resumed sexual relations.65 After an uneventful pregnancy, she gave birth to her second child.66 After the birth, Mr. Christensen brought suit in the District Court of Clay County, alleging that Dr. Thornby had guaranteed the success of the vasectomy.67 Mr. Christensen sought to recover damages for his anxiety over his wife's health during her pregnancy and for the expenses of having an unwanted child.68 The district court granted Dr. Thornby's demurrer and Christensen subsequently appealed to the Minnesota Supreme Court.69

On appeal, the Minnesota Supreme Court determined that the performance of the vasectomy procedure did not offend Minnesota

59. See infra notes 60-180 and accompanying text.
60. Christensen v. Thornby, 192 Minn. 123, —, 255 N.W. 620, 622 (1934).
61. 192 Minn. 123, 255 N.W. 620 (1934).
64. Christensen, 192 Minn. at 123, 255 N.W. at 621.
65. Id. at 124, 255 N.W. at 621.
66. See id.
67. Id. at 123-24, 255 N.W. at 620-21.
68. Id. at 124, 255 N.W. at 621.
69. Id. at 123-24, 255 N.W. at 620-21. The trial court sustained the physician's demurrer because the court viewed both the sterilization operation and the contract between the physician and Mr. Christensen as against "public policy." The trial court did not explain its public policy rationale but commented that the law would put the parties in the position where the parties placed themselves. See id. at 123, 255 N.W. at 620-21.
public policy, but sustained the demurrer. The court found that Mr. Christensen had suffered no damages cognizable at law. The court stated:

The purpose of the operation was to save the wife from the hazards to her life which were incident to childbirth. It was not the alleged purpose to save the expense incident to pregnancy and delivery. The wife has survived. Instead of losing his wife, the plaintiff has been blessed with the fatherhood of another child.

In Shaheen v. Knight, a Pennsylvania trial court addressed a similar set of facts. In Shaheen, the plaintiff sought a vasectomy to enable himself "to support his family in comfort and educate it..." In other words, the Shaheens could not afford to have more children. The vasectomy proved unsuccessful and a fifth child was born to Mr. and Mrs. Shaheen. The Pennsylvania court dismissed Mr. Shaheen's claim for breach of contract against the physician, on the ground that "to allow damages for the normal birth of a normal child is foreign to the universal public sentiment of the people." The court found that:

To allow damages in a suit such as this 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 this [plaintiff's] fifth child. Many people would be willing to support this child were they given the right of custody and adoption, but according to plaintiff's statement, plaintiff does not want such. He wants to have the child and wants the doctor to support it. In our opinion, to allow such damages would be against public policy.

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70. Id. at 125-26, 255 N.W. at 622.
71. Id. at 126, 255 N.W. at 622.

The court's approach [in Christensen] fails to take into consideration that, although avoidance of the medical expenses incident to childbirth was not the plaintiff's prime motivation in undergoing the operative procedure, the anxiety suffered and the expenses incurred by the plaintiff were certainly foreseeable results of the unsuccessful operation. Thus, if the defendant did in fact warrant the success of the procedure, he should be held liable for the damages caused by its failure.

Id. at 1410 n.3.
74. See id.
75. Id.
76. Id.
77. Id.
78. Id. at 45.
79. Id. at 45-46. See also, Kashi, 31 U. MIAMI L. REV. at 1141 (criticizing the opinion of the court in Shaheen).
The Nevada Supreme Court has also held that wrongful conception does not result in legally compensable injury. The case of Szekeres v. Robinson arose out of a failed sterilization procedure and the subsequent birth of a healthy, normal child. The Nevada Supreme Court reasoned that the birth of a normal child would not result in a cause of action for which a remedy would be provided.

The Nevada Supreme Court was also careful to point out that the decision had "nothing to do with ordinary medical malpractice cases in which medical negligence results in birth injuries, genetic deformities, and the like."

The Traditional Approach

Of the courts which have addressed the issue of the proper measure of damages recoverable in wrongful conception cases, a majority allow recovery of damages which are directly related to the failed sterilization, pregnancy, and birth; but disallow damages related to child rearing costs for a normal, healthy infant.

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81. 102 Nev. 93, 715 P.2d 1076 (1986).
82. Id. at 94, 715 P.2d at 1076-1077.
83. Id. at 95, 715 P.2d at 1077. The court engaged in an interesting discussion of the origins of tort law and jurisprudence:

The word "tort" derives from the past participle, tortus, of the Latin verb torquere, meaning to bend or twist. What is twisted or not straight became in French tort, a general synonym for "wrong." What is wrong or right, of course, is a matter of moral judgment. The jurisprudence of England from which we derive our own common law was greatly influenced by the legal philosophies of continental Europe, and accordingly the common law evolution of negligence. The common law evolution of negligence very much evolved from ideas of morality taken from these philosophies. What was proper morally should be proper legally; hence, a system developed which was based on wrongs which resulted from the fault of another. This idea is still part of our jurisprudence.

Id. at 96 n.2, 715 P.2d at 1078 n.2.
84. Id. at 97 n.3, 715 P.2 at 1078 n.3.
lowed can be classified into three main types: (1) pain and suffering experienced by the mother during the pregnancy and birth of the infant; (2) loss of the mother's income during pregnancy and birth; and (3) medical expenses incurred attributable to the pregnancy, birth, and immediate post-birth treatment. Other courts may allow additional damages for anxiety experienced by the parents during the pregnancy; the costs of a second sterilization procedure; and for damages related to loss of consortium.

The case of Coleman v. Garrison exemplifies the judicial restriction of recoverable damages. This case involved a failed sterilization procedure and the birth of Mrs. Coleman's sixth child. Although the child was born normal and healthy, the Colemans sued their physician for negligent performance of the sterilization procedure. The Delaware Superior Court, New Castle County, heard the case and allowed damages in four areas: (1) pain, suffering and discomfort of Mrs. Coleman as the result of the pregnancy; (2) the cost of the failed sterilization procedure; (3) loss of consortium; and (4) medical costs attributable to the pregnancy and birth. As for the rest of the Coleman's claim, the Superior Court granted the physician's motion for summary judgment as to the issue of child rearing costs. In affirming the decision of the Superior Court, the Delaware Supreme Court, relying on principles of public policy and the speculative nature of damages, denied recovery of child rearing recovery was limited to medical expenses, cost of sterilization, pain and suffering of the pregnancy, and mother's lost wages; and allowed husband to bring a separate action for lost consortium; McKernan v. Aasheim, 102 Wash. 2d 411, —, 687 P.2d 850, 856 (1984) (allowing damages for pain and suffering, loss of consortium, expenses of failed sterilization procedure and child birth, but disallowing damages for childrearing expenses). See also infra notes 90-112 and accompanying text.


88. See Kingsburg v. Smith, — N.H. —, 422 A.2d (awarding costs of second sterilization procedure).

89. See Boone v. Mullendore, 416 So. 2d 718 (Ala. 1982) (holding damages allowable for loss of consortium).

90. 349 A.2d 8 (Del. 1975).

91. See id. at 10-14.

92. Id. at 9.

93. See id. at 14.

94. Id. at 12.

95. Id. at 13-14. The court explained its "public policy" reasoning explaining that "the value of a human life outweighs any 'damage' which might be said to follow from the fact of birth." Id. at 14.
expenses.\textsuperscript{96}

In Alabama, the case of \textit{Boone v. Mullendore}\textsuperscript{97} also allowed recovery of damages arising out of the wrongful conception but excluded damages for child rearing costs.\textsuperscript{98} In that case, Repsie Boone had stopped using oral contraceptives in reliance upon her physician's reassurances that a certain operation had rendered her sterile.\textsuperscript{99} Repsie Boone subsequently gave birth to a normal, healthy infant.\textsuperscript{100} She thereafter sued her physician, seeking compensatory damages for medical costs as well as for child rearing costs.\textsuperscript{101} The majority of the Alabama Supreme Court in \textit{Boone} refused to allow child rearing expenses, reasoning that those damages would call for speculation, and could have a significant adverse affect on the family unit as a whole, and on the unplanned child as an individual.\textsuperscript{102}

The case of \textit{Cockrum v. Baumgartner}\textsuperscript{103} also illustrates the difficulty in the calculation of wrongful conception damages.\textsuperscript{104} In \textit{Cockrum}, the plaintiffs, Mr. and Mrs. Cockrum, sued their physician, alleging he had negligently performed a vasectomy and postoperative sperm test upon Mr. Cockrum.\textsuperscript{105} Following the failed vasectomy, Mrs. Cockrum became pregnant and gave birth to a normal, healthy child.\textsuperscript{106} At trial, the Cockrums sought to recover for expenses related to child birth as well as for the future costs of raising the unplanned child.\textsuperscript{107} The trial court denied recovery of child rearing costs.\textsuperscript{108} On appeal, the Illinois Appellate Court reversed the holding of the trial court denying recovery of child rearing costs and Dr. Baumgartner appealed to the Illinois Supreme Court.\textsuperscript{109} The Illinois Supreme Court reversed the decision of the appellate court and agreed with the trial court, holding that child rearing costs were not recoverable in an action for negligent sterilization.\textsuperscript{110} The Illinois Supreme Court in \textit{Cockrum} noted that in the majority of jurisdictions the costs of raising a normal healthy child were not recover-
able.\textsuperscript{111} The court stated:

One can, of course, in mechanical logic reach a different conclusion, but only on the ground that human life and the state of parenthood are compensable losses. In a proper hierarchy of values the benefit of life should not be outweighed by the expense of supporting it. Respect for life and the rights proceeding from it are at the heart of our legal system and broader still, our civilization.\textsuperscript{112}

\textit{Recovery of Child Birth and Child Rearing Expenses}

The third approach, which is the least restrictive, permits recovery of all expenses related to the childbirth as well as child rearing costs to the age of majority.\textsuperscript{113} This view was first utilized by the California Court of Appeals in \textit{Custodio v. Bauer}.\textsuperscript{114} This case was the first to allow recovery of any damages in a "wrongful conception" action.\textsuperscript{115}

In \textit{Custodio}, the plaintiff, Berdella Custodio, a mother of nine children, brought an action against her physician to recover damages arising out of Mrs. Custodio's pregnancy, following a failed sterilization procedure.\textsuperscript{116} The trial court found no cause of action, dismissed Mrs. Custodio's case, and she appealed.\textsuperscript{117} The California Court of Appeal overruled the dismissal by the trial court and declared that if Mrs. Custodio could prove her doctor's negligence, then she would be entitled to recover damages for pain and suffering, medical expenses, and child rearing costs.\textsuperscript{118} The court evaluated the approaches taken by the various jurisdictions regarding the proper measure of damages recoverable in wrongful conception actions.\textsuperscript{119} The court of appeal focused on the opinions of \textit{Christensen v. Thornby}\textsuperscript{120} and \textit{Shaheen v. Knight}.\textsuperscript{121} The court of appeal held that if tortious conduct were established, then the law of California provided that the proper measure of damages would be the amount which would compensate the plaintiff for the losses proximately caused by the doctor's negligence.
and that childrearing costs were included in these losses.122

Wisconsin is another jurisdiction which allows the recovery of child rearing costs in a wrongful conception action.123 In Marciniak v. Lundborg,124 the plaintiffs, Douglas and Paula Marciniak, brought an action against their doctor when a child was born to Mrs. Marciniak two years after the defendant had performed a sterilization operation on Mrs. Marciniak.125

The trial court ruled that the Marciniaks could recover the costs of rearing the unplanned child, from birth until the age of majority.126 However, the court allowed the offset of these damages to the extent that the defendant physician was able to show the value of the benefits conferred to the Marciniaks by having the child.127 The defendant appealed and the Wisconsin Court of Appeals reversed the decision of the trial court holding that the recovery of damages for child rearing expenses was barred by principles of public policy.128

On appeal, the Wisconsin Supreme Court addressed two issues: (1) whether the Marciniaks had a cause of action for child rearing expenses to the age of majority; and (2) whether the costs could be offset by any benefits received by the Marciniaks from the birth of the child.129 The Wisconsin Supreme Court held that the Marciniaks could recover child rearing costs if they established their doctor's negligence.130 Furthermore, the court concluded that child rearing expenses may not be reduced by the benefits received by the existence of the unplanned child.131 The court reasoned that allowing the use of the offset rule would be inequitable in the context of a negligent sterilization because it was precisely that "benefit" which were hoped to be avoided.132 Additionally, the court declared that any benefits conferred upon the Marciniaks had been sought to be avoided and were unwanted, which was the reason for undergoing the sterilization procedure in the first place.133 In conclusion, the court explained that "it hardly seems equitable to not only force this benefit upon [the Marciniaks] but to tell them they must pay for it as

124. 153 Wisc. 2d 59, 450 N.W.2d at 249.
125. Id. at —, 450 N.W.2d at 244.
126. Id. at —, 450 N.W.2d at 244.
127. Id. at —, 450 N.W.2d at 244.
128. Id. at —, 450 N.W.2d at 244, 249.
129. Id. at —, 450 N.W.2d at 244.
130. Id. at —, 450 N.W.2d at 245, 249.
131. Id. at —, 450 N.W.2d at 249.
132. Id. at —, 450 N.W.2d at 249.
133. Id. at —, 450 N.W.2d at 249.
well by offsetting it against their proven emotional damages."\(^{134}\)

**Offset Rule**

**General Rule**

Employment of the offset rule is the most controversial feature in damage computation in wrongful conception litigation.\(^{135}\) The rule is set out in section 920 of the Restatement (Second) of Torts:

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.\(^{136}\)

In the context of a wrongful conception case, the offset rule would require that the trier of fact weigh the benefits of the unplanned infant against the amount of damage claimed by the plaintiff.\(^{137}\) The Michigan Court of Appeals in *Troppi v. Scarf*\(^{138}\) utilized the offset rule.\(^{139}\) This involved Frank Scarf, a pharmacist who negligently filled Mrs. Troppi’s prescription for birth control pills with tranquilizers.\(^{140}\) Believing that the pills were oral contraceptives, Mrs. Troppi took them daily.\(^{141}\) Subsequently she became pregnant and delivered her ninth child, a normal, healthy son.\(^{142}\) Following an extensive review of the treatment of damages taken by the various jurisdictions, the Michigan Court of Appeals concluded that “there is no valid reason why the trier of fact should not be free to assess damages as it would in any other negligence case.”\(^{143}\)

The majority in *Troppi* overruled the trial court’s finding that the allowance of any damages in wrongful conception actions contravenes public policy.\(^{144}\) The appellate court stated:

Contraceptives are used to prevent the birth of healthy children. To say that for reasons of public policy contraceptive

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134. *Id.* at —, 450 N.W.2d at 249.

135. Comment, *Wrongful Birth Damages: Mandate and Mishandling by Judicial Fiat*, 13 VAL. U.L. REV. 127, 157 (1978). This rule is frequently confused with the doctrine of mitigation of damages, or the rule of avoidable consequences. Thus when courts refer to mitigation of damages, they are often referring to the rule of offsetting benefits. *Id.* at 157 n.207. See generally *RESTATEMENT (SECOND) OF TORTS § 918 (1979)* (setting out mitigation rule).

136. *RESTATEMENT (SECOND) OF TORTS § 920 (1979).*


139. *Id.* at —, 187 N.W.2d at 518.

140. *Id.* at —, 198 N.W.2d at 512.

141. *Id.* at —, 187 N.W.2d at 512-13.

142. *Id.* at —, 187 N.W.2d at 512-13.

143. *Id.* at —, 187 N.W.2d at 516.

144. *Id.* at —, 187 N.W.2d at 516, 521.
failure can result in no damage as a matter of law ignores the fact that tens of millions of persons use contraceptives daily to avoid the very result which the defendant would have us say is always a benefit, never a detriment. Those tens of millions of persons, by their conduct, express the sense of the community.\textsuperscript{145}

The court recognized the offset rule as set out in the Restatement (Second) of Torts Section 920.\textsuperscript{146} The court held that if the pharmacist’s tortious conduct had conferred a benefit to Mrs. Troppi, then “the dollar value of the benefit is to be subtracted from the dollar value of the injury in arriving at the amount of damages properly awardable.”\textsuperscript{147}

The court in \textit{Troppi} also discussed the problem of certainty of damages which may arise when the offset rule is employed.\textsuperscript{148} The court recognized that the task of placing a dollar value on the offset amount—for example, the value of the companionship and services of an unwanted child—may be more difficult than the task of determining lost wages.\textsuperscript{149} However, the court found that this difficulty “does not justify throwing up our hands and denying recovery altogether.”\textsuperscript{150}

Additionally, the court in \textit{Troppi} addressed the issue of mitigation of damages.\textsuperscript{151} The court considered abortion and adoption as mitigation possibilities.\textsuperscript{152} These mitigation alternatives were dismissed as unreasonable.\textsuperscript{153}

In the case of \textit{Sherlock v. Stillwater Clinic},\textsuperscript{154} the Minnesota Supreme Court approved the use of the offset rule in a wrongful conception case.\textsuperscript{155} In \textit{Sherlock}, Mr. Sherlock had undergone a vasectomy, which was later discovered to be unsuccessful.\textsuperscript{156} As a result of the failed vasectomy, Mrs. Sherlock became pregnant and gave birth to a healthy, normal child.\textsuperscript{157} The Sherlocks brought suit against their physician, alleging that his negligence had caused the unplanned birth of their eighth child.\textsuperscript{158} The Minnesota Supreme Court ap-

\textsuperscript{145} Id. at —, 187 N.W.2d at 517.
\textsuperscript{146} Id. at —, 187 N.W.2d at 517-18. See supra note 136 and accompanying text.
\textsuperscript{147} Troppi, 31 Mich. App. at —, 187 N.W.2d at 518.
\textsuperscript{148} Id. at —, 187 N.W.2d at 520-21.
\textsuperscript{149} Id. at —, 187 N.W.2d at 521.
\textsuperscript{150} Id. at —, 187 N.W.2d at 521.
\textsuperscript{151} Id. at —, 198 N.W.2d at 519-20.
\textsuperscript{152} Id. at —, 187 N.W.2d at 519-20.
\textsuperscript{153} Id. at —, 187 N.W.2d at 520.
\textsuperscript{154} 260 N.W.2d 169 (Minn. 1977).
\textsuperscript{155} See id. at 174, 176.
\textsuperscript{156} Id. at 171.
\textsuperscript{157} See id.
\textsuperscript{158} Id.
plied the offset rule in its computation of allowable damages, but further held that "the trier of fact will then be required to reduce [the plaintiff's costs of child rearing] by the value of the child's aid, comfort, and society which will benefit the parents for the duration of their lives."\footnote{159}

The court in Sherlock also addressed the issue of mitigation of damages.\footnote{160} In Sherlock, the court discussed abortion and adoption alternatives as methods to mitigate damages.\footnote{161} The court summarily concluded that the parents could not be required to submit to either abortion or adoption in order to mitigate their damages.\footnote{162}

In University of Arizona Health Sciences Center v. Superior Court,\footnote{163} the Supreme Court of Arizona adopted the offset rule.\footnote{164} In Health Sciences Center, the court held that in a wrongful conception action the trier of fact may consider pecuniary as well as nonpecuniary damages which pertain to the raising and education of the child; however, the trier of fact must also be instructed to consider offsetting the award by any pecuniary and nonpecuniary benefits the parents will receive from their relationship with the child.\footnote{165} The court commented that the adoption of the offset rule meant that juries would be permitted to consider certain elements of damages that some judges personally believed should not be considered.\footnote{166} However, the court concluded that the "consensus of a cross-section of the community on such important issues is better and more accurately obtained from the verdict of a jury than from the decision of any particular group of that community."\footnote{167} The court also addressed the issue of mitigation of damages, finding that only reasonable measures need be taken in mitigation.\footnote{168}

**Investigation of Plaintiff's Motivation for Sterilization**

The courts which apply the offset rule differ on how to compute damages.\footnote{169} Once it is established that the physician negligently per-

\footnotesize{159. Id. at 176. The court explained its reasoning behind valuing the benefits of the child against the life expectancy of his parents: "In the usual case pecuniary benefits will be minimal during the child's minority." Id. at 176 n.12.}

\footnotesize{160. Sherlock, 260 N.W.2d at 176.}

\footnotesize{161. Id.}

\footnotesize{162. Id.}

\footnotesize{163. 136 Ariz. 579, 667 P.2d 1294 (1983) (en banc).}

\footnotesize{164. Id. at —, 667 P.2d at 1301.}

\footnotesize{165. Id. at —, 667 P.2d at 1299.}

\footnotesize{166. Id. at —, 667 P.2d at 1299.}

\footnotesize{167. Id. at —, 667 P.2d at 1299.}

\footnotesize{168. Id. at —, 667 P.2d at 1302 n.5. The court did not elaborate on what reasonable measures include. See id.}

formed the sterilization procedure, it has been suggested in judicial opinions that courts should first consider the motivation of the plaintiff in choosing to have the sterilization procedure done in order to obtain an equitable damage figure.\textsuperscript{170} This "motivational analysis," it is argued, is consistent with the underlying premise of tort law, which is the "compensation of individuals . . . for losses which they have suffered in respect of all their legally recognized interests."\textsuperscript{171} Furthermore, it is asserted that considering the motivation of the plaintiff would result in a more equitable assessment of damages.\textsuperscript{172} In other words, the plaintiff would not be compensated in excess of child rearing costs and the physician would not bear a burden disproportionate to the tort damage done.\textsuperscript{173}

The Arizona Supreme Court, in \textit{University of Arizona Health Sciences Center v. Superior Court},\textsuperscript{174} recognized that the allowance of child rearing expenses could open the door for greedy plaintiffs to recover damages where no actual injury existed.\textsuperscript{175} The court responded to this concern by advocating a motivational analysis for wrongful conception plaintiffs.\textsuperscript{176} The court stated:

\begin{quote}
We feel this danger [of awarding damages to plaintiffs who have suffered no real injury] is minimized by giving weight and consideration in each case to the plaintiffs' reasons for submitting to sterilization procedures. Such evidence is perhaps the most relevant information on the question of whether the subsequent birth of a child actually constitutes damage to the parents.\textsuperscript{177}
\end{quote}

The court stated that in the hypothetical case where a woman sought sterilization to avoid the possibility of giving birth to a child with a genetic defect, a jury could certainly conclude that the routine birth of a healthy, normal child was a "blessing" instead of a "damage."\textsuperscript{178} The majority in \textit{Health Sciences Center} commented that evidence of the parent's motivation for undergoing the sterilization should be admissible so the jury could learn all motivational information necessary to allow them to determine if any real damage has resulted, and

\begin{footnotes}
\item[721] Troppi, 31 Mich. App. at —, 187 N.W.2d at 516-17; Sherlock, 260 N.W.2d at 176-77. See supra notes 97-102, 138-62 and accompanying text.
\item[170] Comment, 32 EMORY L.J. at 1170.
\item[171] \textit{Id.} (citing W. Prosser, \textit{Handbook on the Law of Torts} § 1 (4th ed. 1971)).
\item[172] Comment, 32 EMORY L.J. at 1170.
\item[173] See \textit{id.}
\item[175] \textit{Health Sciences Center}, 136 Ariz. at —, 667 P.2d at 1300.
\item[176] \textit{id.} at —, 667 P.2d at 1300.
\item[177] \textit{id.} at —, 667 P.2d at 1300 (citing Hartke v. McKelway, 707 F.2d 1544, 1555 (D.C. Cir. 1983). See supra notes 155-59 and accompanying text.
\item[178] \textit{Health Sciences Center}, 136 Ariz. at —, 667 P.2d at 1300.
\end{footnotes}
if so, to what extent.\textsuperscript{179} The majority in \textit{Arizona} expressed confidence in "the inherent good sense of the jury" as the "best safeguard to 'runaway verdicts' . . . provided that the jury is allowed to consider the issues in realistic terms."\textsuperscript{180}

\textbf{ANALYSIS}

The traditional approach is one method for addressing the problem of the proper measure of damages in a wrongful conception case.\textsuperscript{181} The courts which apply the traditional approach allow recovery of damages which are directly related to the failed sterilization, pregnancy, and birth, but disallow damages related to child rearing costs.\textsuperscript{182} The cases of \textit{Coleman v. Garrison},\textsuperscript{183} \textit{Boone v. Mullen-dore},\textsuperscript{184} and \textit{Cockrum v. Baumgartner}\textsuperscript{185} illustrate this approach and also illustrate that principles of public policy are relied upon to deny damages for child rearing costs.\textsuperscript{186}

Other courts have adopted the "blessings doctrine."\textsuperscript{187} Under the blessings doctrine, a person who undergoes sterilization, but later conceives a child, suffers no damages cognizable at law.\textsuperscript{188} The holdings in \textit{Christensen v. Thornby},\textsuperscript{189} \textit{Shaheen v. Knight},\textsuperscript{190} and \textit{Szekeres v. Robinson}\textsuperscript{191} illustrate that the blessings doctrine results in complete denial of damages, thus the issue of awarding damages for child rearing costs never arises.\textsuperscript{182}

\begin{itemize}
\item \textsuperscript{179} Id. at —, 667 P.2d at 1300. The \textit{Hartke} court mirrored this view by explaining that the parents' "preconception calculation" of the reasons for preventing procreation is untainted by bitterness, greed or sense of duty to the child and is perhaps the most telling evidence of whether the child actually injured the parents. \textit{Hartke}, 707 F.2d at 1555.
\item \textsuperscript{180} \textit{Health Sciences Center}, 136 Ariz. at —, 667 P.2d at 1300.
\item \textsuperscript{181} See supra notes 85-112 and accompanying text.
\item \textsuperscript{182} See supra notes 85-112 and accompanying text.
\item \textsuperscript{183} 349 A.2d 8 (Del. 1975).
\item \textsuperscript{184} 416 So. 2d 718 (Ala. 1982).
\item \textsuperscript{185} 95 Ill. 2d 193, 447 N.E.2d 385, \textit{cert. denied sub nom.} \textit{Raja v. Michael Reese Hosp.}, 484 U.S. 846 (1983).
\item \textsuperscript{186} See supra notes 90-112 and accompanying text. See also Note, Resolving the Conflict in Wrongful Birth Actions: \textit{Cockrum v. Baumgartner}, 31 \textit{DEPAUL L. REV.} 409, 412-17 (1982). The dissenters in Burke v. Rivo espoused these same views. Burke v. Rivo, 406 Mass. 764, —, 551 N.E.2d 1, 7 (1990). In \textit{Boone}, the Alabama Supreme Court discussed the measure of damages in wrongful conception actions and adopted the rationale taken by the Delaware Supreme Court in \textit{Coleman}. \textit{Boone}, 416 So. 2d at 721 (citing Wilbur v. Kerr, 275 Ark. 239, 628 S.W.2d 569 (1982); \textit{Coleman}, 349 A.2d at 8)).
\item \textsuperscript{187} See supra notes 60-84 and accompanying text.
\item \textsuperscript{188} See supra notes 60-72 and accompanying text.
\item \textsuperscript{189} 192 Minn. 123, 255 N.W. 620 (1934).
\item \textsuperscript{190} 11 Pa. D. & C. 2d 41 (1957).
\item \textsuperscript{191} 102 Nev. 93, 715 P.2d 1076 (1986).
\item \textsuperscript{192} See supra notes 60-84 and accompanying text.
\end{itemize}
Still another approach says that damages are recoverable for all expenses related to child birth as well as for child rearing costs. As the Custodio v. Bauer and Marciniak v. Lundborg decisions illustrate, courts which allow for the recovery of child rearing expenses are not sympathetic to the arguments that such claims should be denied for public policy considerations. Furthermore, these courts find arguments that the damages are too speculative or unfair equally unpersuasive. However, few jurisdictions have followed in the footsteps of Custodio and Marciniak.

The final approach, the offset rule places the damages question in the hands of the jury. The holdings of Troppi v. Scarf, Sherlock v. Stillwater Clinic, and University of Arizona Health Sciences Center v. Superior Court illustrate that the courts adopting this approach, believe that the triers of fact should compute the amount of damages suffered by a plaintiff in a wrongful conception suit.

Just as the majority in Troppi was quick to recognize the difficulty to the trier of fact posed by the application of the offset rule, the majority in Sherlock also recognized this complexity. However, the majority in Sherlock went even further and established guidelines to minimize these hurdles. The court stated:

To assist the jury in measuring the various and complex elements of damage, we finally require that all future actions for wrongful conception be submitted to the jury with a special verdict form along with explanatory instructions. Coupled with these precautions should be a strict judicial scrutiny of verdicts to prevent excessive awards.
Neither the court in *Troppi* nor the court in *Sherlock* were persuaded by the argument that the application of the offset rule is too much to ask of the trier of fact. Rather, these courts opted to treat the wrongful conception case as they would any other tort, and expected the jury to adapt.

The Supreme Judicial Court of Massachusetts, in *Burke v. Rivo*, held that if the plaintiffs in a wrongful conception case could establish an economic motivation for undergoing a sterilization procedure they would be entitled to recover damages for child rearing costs. The court also held that those damages should be offset by any benefits the parents derive from the addition of the child to their lives.

In other words, the court established that Massachusetts would apply the offset rule combined with an economic motivational analysis in the computation of damages recoverable in wrongful conception cases. However, the court noted that just as in any tort case, to recover at all, the plaintiff must first prove the doctor negligently performed the sterilization procedure. Next, the plaintiff must establish the economic motivation for undergoing the sterilization. If both have been proven, only then will child rearing costs, less the offset amount, be awarded.

Massachusetts joined a group of jurisdictions which had already adopted this well reasoned and equitable method of damage computation. The majority in *Burke*, however, differed from the traditional application of the offset rule. In the context of a wrongful conception case, the offset rule requires that the trier of fact weigh the benefits of the unplanned infant against the amount of damage claimed by the plaintiff. On the issue of damages, the Massachusetts Supreme Judicial Court required the plaintiffs to first establish their economic motivation in undergoing the sterilization procedure before the jury would be allowed to utilize the offset rule.

The majority in *Burke* held that if the parents in a wrongful con-

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208. *Id.* at 176-77. See supra notes 139-53 and accompanying text.
209. See supra notes 139-53 and accompanying text.
211. *Id.* at 772, 551 N.E.2d at 6.
212. *Id.*
213. *See id.*
215. *Id.* at 772, 551 N.E.2d at 6.
216. *Id.*
217. See supra notes 135-68 and accompanying text.
218. See supra notes 34-50, 135-68 and accompanying text.
219. See supra notes 135-68 and accompanying text.
ception action could prove that their physician was negligent and that their financial losses exceed the value they derive from the addition of a child to their lives, the parents may recover child rearing costs to the age of majority. To succeed in recovering child rearing costs in the jurisdictions adopting the offset rule, the plaintiff must prove both of these elements as well. What distinguishes Burke from the approaches taken by the other offset rule cases is the requirement that the plaintiffs prove their economic motivation for undergoing the sterilization procedure.

The holding in Burke is well reasoned because it attempts to comport with the basic premise of tort law: to compensate individuals for losses which they have suffered, no more, no less. Thus, by requiring the Burkes to establish their economic motivation for undergoing the sterilization procedure, the court in Burke required the plaintiffs to establish that the additional child would result in a financial loss greater than the value they derived from the addition of the child. This is an attempt to determine if and by how much the plaintiffs have been damaged.

The court in Burke, therefore, paralleled the majorities in Sherlock and Troppi, specifically rejecting the cases which denied child rearing costs even where the result of a physician’s negligent performance of a sterilization procedure results in the birth of a normal, healthy, infant. The majorities in both Troppi and Sherlock addressed the mitigation issue in their respective discussions of the offset rule. The majority in Troppi found that to impose a duty upon the plaintiff to mitigate damages in effect, would require abortion or adoption, which would “ignore the very real difference which our law recognizes between the avoidance of conception and the disposition of the human organism after conception.” The majority in Sherlock

221. See supra notes 42-47 and accompanying text.
222. See supra notes 135-68 and accompanying text.
223. See supra notes 135-68 and accompanying text.
224. See supra notes 33-50 and accompanying text.
227. See supra notes 33-50 and accompanying text.
228. See supra notes 33-50, 135-68 and accompanying text.
229. Troppi, 31 Mich. App. at —, 187 N.W.2d at 519-20; Sherlock, 260 N.W.2d at 176.
230. Troppi, 31 Mich. App. at —, 187 N.W.2d at 519. The court compared this situation to the scenario where the plaintiff is required to submit to a routine surgery as a mitigation effort: “Where ethical or religious scruples prevent a plaintiff from submitting to relatively minor surgery, the trier of fact may consider these scruples as part of the circumstances which bear upon the reasonableness of his conduct.” Id. at —, 187 N.W.2d at 519 n.11.
reasoned similarly, stating simply that “the refusal of a mother to submit to an abortion . . . should not be regarded as a failure on the part of the parents to mitigate damages.”

Relevant to the mitigation issue is section 918 of the Restatement (Second) of Torts, which sets out the rule of avoidable consequences, also known as the rule of mitigation of damages. The rule states in part, that “one injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure after the commission of the tort.”

The court in Health Sciences Center determined this reasonableness test to mean that parents should never be forced to choose abortion or adoption as a mitigation measure.

In dicta, the court in Burke suggested it would deny the recovery of child rearing costs when the sterilization procedure was motivated by genetic or therapeutic concerns. For example, if the plaintiff’s motivation for undergoing the sterilization procedure was therapeutic, i.e., to protect the health of the mother, then the birth of a normal, healthy infant with no harm to the health of the mother, prevents the recovery of child rearing costs. In situations where the sterilization procedure was motivated by risks of birth defects, the birth of a normal, healthy child, would not warrant child rearing costs, because the child was born without defects. If, however, the child were to be born with defects, recovery of extraordinary child rearing costs would be warranted. Such an award should only be an amount equal to the costs of raising the impaired child above the costs of raising a normal, healthy child.

In addressing the issue of mitigation of damages, the majority in Burke followed the position of the Restatement (Second), established case law, and sound public policy principles in rejecting the notion that abortions or adoptions are appropriate steps to be taken in the

231. Sherlock, 260 N.W.2d at 176.
232. See Restatement (Second) of Torts § 918 (1979).
233. Id. It should be noted that a plaintiff is never required to take any action to mitigate damages. The rule merely means that the plaintiff cannot recover for any increase in the damages that result from the plaintiff’s failure to make a reasonable effort. However, the plaintiff can recover the costs of any mitigation efforts. Id. at § 918 comment b. The application of the mitigation rule to wrongful conception cases has generated much commentary. See, e.g., Comment, Wrongful Birth. The Avoidance of Consequences Doctrine in Mitigation of Damages, 53 Fordham L. Rev. 1107 (1983); Comment, 13 Val. U.L. Rev. at 164-70.
234. Health Sciences Center, 136 Ariz. at —, 667 P.2d at 1301 n.5.
236. Id.
238. Id. at 1192-93.
239. Id.
mitigation of damages.\footnote{240} These alternatives are not “reasonable measures” contemplated by the Restatement.\footnote{241} In determining reasonableness, the child’s best interests must be considered.\footnote{242} The law has traditionally acknowledged the desirability of enabling children to be raised by their natural parents.\footnote{243} Furthermore, as a matter of compliance with religious teachings or personal conscience, parents may simply regard these options as unconscionable.\footnote{244} The court in \textit{Burke} was sensitive to these issues and respected the autonomy of the family.\footnote{245} The court in \textit{Burke} preserved the view that family decisions ought to be made by the family unit.\footnote{246}

CONCLUSION

\textit{Burke v. Rivo}\footnote{247} represents the effort of the Supreme Judicial Court of Massachusetts to resolve the issue of child rearing expenses as a compensable damage in a wrongful conception case. The court determined that just as in a normal tort case, child rearing expenses are compensable if the plaintiff first establishes the physician’s negligence. The court additionally requires the plaintiff to prove the economic motivation for undergoing the sterilization. The court held that juries would then be entitled to offset the damages by any benefits the plaintiff will derive from the addition of the child to the plaintiff’s life. While the Massachusetts Supreme Judicial Court has resolved this issue, many jurisdictions have not. This decision represents a paradigm from which undecided jurisdictions may rely upon when those courts eventually confront this issue.

\textit{Christopher D. Jerram—’91}

\begin{footnotes}
\footnotetext[240]{See supra notes 47, 135-68, 228-34 and accompanying text.}
\footnotetext[241]{See supra notes 135-68, 232-34 and accompanying text.}
\footnotetext[242]{Troppi, 31 Mich. App. at —, 187 N.W.2d at 520.}
\footnotetext[243]{\textit{Id.} at —, 187 N.W.2d at 520.}
\footnotetext[244]{See \textit{id.}}
\footnotetext[245]{See \textit{Burke}, 406 Mass. at 770, 551 N.E.2d at 4.}
\footnotetext[246]{See supra notes 221-45 and accompanying text.}
\footnotetext[247]{406 Mass. 764, 551 N.E.2d 1 (1990).}
\end{footnotes}