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# Physicians and Surgeons - Damages - Parents of an Unplanned Child, in Suit for Wrongful Conception May Recover Damages for Medical Expenses, Pain and Suffering, Loss of Consortium, and Costs of Rearing the Child to Maturity

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# RECENT CASES

PHYSICIANS AND SURGEONS—DAMAGES—PARENTS OF AN UNPLANNED CHILD, IN SUIT FOR WRONGFUL CONCEPTION MAY RECOVER DAMAGES FOR MEDICAL EXPENSES, PAIN AND SUFFERING, LOSS OF CONSORTIUM, AND COSTS OF REARING THE CHILD TO MATURITY.

Following the birth of their seventh child, the plaintiffs consulted with Dr. Jon Stratte of the Stillwater Clinic in order to insure that no more children would be born to them. Subsequently, a vasectomy was performed on Mr. Sherlock. The clinic failed to inform plaintiffs that the operation was not successful,[1] and plaintiffs resumed normal sexual relations. Several months later plaintiffs discovered Mrs. Sherlock was pregnant and in due course she delivered a healthy baby boy. The plaintiffs brought suit against Stillwater Clinic,[2] claiming that their eighth child's unplanned birth was a direct result of Dr. Stratte's[3] negligent postoperative care of Mr. Sherlock. The plaintiffs requested damages for pain and suffering, loss of consortium, medical expenses, and the costs of rearing a normal, healthy baby to maturity.[4] The original action, brought in District Court, Washington County, Minnesota, was submitted to the jury on general negligence instructions and entered judgment on jury verdict for $19,500. Defendant, Stillwater Clinic appealed.[5]

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1. Sherlock v. Stillwater Clinic, ——Minn.——, ——, 260 N.W.2d 169 (1977). Three weeks after the operation, on January 23, 1971, Mr. Sherlock brought a sample of his semen to the clinic. Later the same day Dr. Stratte telephoned Mr. Sherlock, told him the results of the test were "negative" and advised no further testing or further use of contraceptives. In fact, the January 23 test revealed that Mr .Sherlock was not yet sterile, the semen having a sperm density of 5 to 10 sperm cells per high-power microscope field and that 50% were mobile. *Id.* at 177.

2. *Id.* at ——, 260 N.W.2d at 169. Stillwater Clinic is a partnership. *Id.*

3. Stillwater Clinic rather than Dr. Stratte was named as the defendant because of the agency relationship among the partners of Stillwater Clinic. In Minnesota, each partner is the agent of the others during the existence of the partnership. Egner v. States Realty Co., 223 Minn. 305, 26 N.W.2d 464 (1947). A principal is liable for the acts of an agent within the scope of agency or employment. Kasner v. Gage, 281 Minn. 149, 161 N.W.2d 40 (1968). Also, in Minnesota, a private or charitable hospital is liable for torts of its employees under the respondant superior doctrine. Swigerd v. City of Ortonville, 246 Minn. 339, 75 N.W.2d 217 (1956).

4. Sherlock v. Stillwater Clinic, ——Minn. at ——, 260 N.W.2d at 171. The lawsuit was brought as an ordinary negligence action. *Id.*

5. *Id.* at ——, 260 N.W.2d at 171-72. The defendant challenged the award on the ground that the evidence was insufficient to support the verdict and that the verdict was contrary to law. *Id.*

The Supreme Court of Minnesota ruled that an action for "wrongful conception" may be maintained, and that compensatory damages may include all prenatal and postnatal medical expenses, the mother's pain and suffering during pregnancy and delivery, and loss of consortium.[6] In addition, the parents may recover the reasonable costs of rearing the unplanned child subject to offset by the value of the child's aid, comfort, and society during the parents' life expectancy.[7] *Sherlock v. Stillwater Clinic*, ——Minn.——, 260 N.W.2d 169 (1977).

The uniformly recognized rule, prior to 1967,[8] was that irrespective of the issue of liability for performance of an unsuccessful sterilization operation, no damages resulted from the birth of a normal child through normal delivery.[9] Similarly, it appears that no court ever allowed damages for the birth of an abnormal child[10] or an abnormal delivery[11] prior to 1967.

The reasons given by courts which have refused damages for the birth of an unplanned child resulting from a physician's negligence are numerous. In a Pennsylvania case[12] the plaintiff brought an action for negligence after an ineffective sterilization, and sought damages for supporting, educating, and maintaining an unplanned child until maturity.[13] Damages were disallowed, the theory being voiced that to allow damages for the normal birth of a normal child would be against public policy since the plaintiff wants the benefit of the fun, joy, and affection of the child while he expects the physician to support it.[14]

In addition, a Washington court held that where a vasectomy failed

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6. *Id.* at ——, 260 N.W.2d at 170.

7. *Id.* at ——, 260 N.W.2d at 176. Damages are measured by computing the rearing costs, i.e., the reasonably foreseeable expenses that will be incurred by the parents to maintain, support and educate their child until the age of maturity. The trier of fact will then be required to reduce those costs by the value of the child's aid, comfort and society which will benefit the parents for the remainder of their lives. The court admitted that the dollar value of the benefits to be offset would be difficult to determine, but stated that courts have routinely allowed damages for loss of aid, comfort and society in wrongful death actions where the same problems of proof arise. *Id.*

Because of errors in the submission of the issue of damages to the jury in that they were not specifically instructed to offset the value of the child's aid, comfort and society against projected rearing costs, the case was remanded for new trial limited to that issue. *Id.*

8. A California court was the first to hold that damages for wrongful conception were allowable, if proven, for the birth of a normal healthy child. Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).

9. Christensen v. Thornby, 192 Minn. 123, 255 N.W. 620 (1934); Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967); Shaheen v. Knight, 6 Lyc. 19, 11 Pa. D. & C. 2d 41 (1957); Ball v. Mudge, 64 Wash. 2d 247, 391 P.2d 201 (1964); 27 A.L.R.3d 906, 917 (1969).

10. *See* Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967). In this negligence action involving a defective child, no damages were allowed to parents of a retarded baby. *Id.*

11. *See* Ball v. Mudge, 64 Wash. 2d 247, 391 P.2d 201 (1964). The court refused to grant damages when a Caesarean section had to be performed to save the mother. *Id.*

12. Shaheen v. Knight, 6 Lyc. 19, 11 Pa. D. & C. 2d 41 (1957).

13. *Id.* at ——, 11 Pa. D. & C. 2d at 41-42.

14. *Id.* at ——, 11 Pa. D. & C. 2d at 45-46.

> To allow damages in a suit such as this would mean the physician would have to pay for the fun, joy and affection which plaintiff Shaheen will have in rearing and education of this, defendant's fifth child. Many people would be willing to support this child were they given the right of custody and

to render the plaintiff sterile and negligence was clear since no tests had been given to determine if the operation was effective, damages could not be allowed for the birth of an unplanned child.[15] The court ruled that the benefits of the child far outweighed any expense connected with his birth.[16]

In a New Jersey case,[17] which concerned a physician's negligence in failing to inform parents that a child could be defective, the court stated that in order to determine damages a court would have to evaluate the denial to them of intangible, unmeasurable, and complex human benefits of motherhood and fatherhood and weigh them against the alleged emotional and money injuries.[18] The court concluded that it would be impossible to measure the damages asked when the parents insisted the child should not have been born.[19]

In *Christensen v. Thornby*,[20] the husband was supposedly sterilized by a vasectomy after his wife was advised not to have another child because of health reasons. Nonetheless the wife became pregnant.[21] The court sustained defendant's demurrer claiming plaintiffs stated no cause of action since no negligence on the doctor's part was alleged. The court inferred in dicta that damages for expenses due to the birth of the child would be too remote from the physician's negligence since the purpose of the sterilization was to prevent the mother's death, not prevent childbirth.[22] In contrast to the other early wrongful conception cases, the North Dakota Supreme Court[23] recognized a possible cause of injury to the mother for physical pain and suffering during childbirth.[24]

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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.

*Id.*

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

16. *Id.* at 250, 391 P.2d at 204.

As reasonable persons, the jury may well have concluded that appellants suffered no damages in the birth of a normal, healthy child, whom they dearly love, would not consider placing for adoption, and 'would not sell for $50,000,' and that the cost incidental to such birth was far outweighed by the blessing of a cherished child, albeit an unwanted child at the time of conception and birth.

*Id.*

17. Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967).

18. *Id.* at ——, 227 A.2d at 693.

19. *Id.*

20. 192 Minn. 123, 255 N.W. 620 (1934).

21. Christensen v. Thornby, 192 Minn. 123, 124, 255 N.W. 620, 621 (1934).

22. *Id.* at 126, 255 N.W. at 622 (dictum). "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." *Id.*

23. Milde v. Leigh, 75 N.D. 418, 28 N.W.2d 530 (1947).

24. *Id.* at 424, 28 N.W.2d at 534. In the North Dakota case, the plaintiff had brought an action to recover damages for monies expended for his wife's care and medical expenses and for loss of services and companionship. The plaintiff's wife became pregnant and gave birth after a physician had agreed to render her sterile. *Id.* at 431, 28 N.W.2d at 532.

The court did not rule directly on the question of damages, affirming the ruling of the lower court which had sustained plaintiff's demurrer to the defense of the statute of limitations. *Id.* at 432, 28 N.W.2d at 538.

In considering the case the court recognized an injury could occur from a negligent sterilization, stating:

Beginning in 1967, the traditional view that no damages could result from the birth of an unplanned child was challenged by more liberal courts. *Custodio v. Bauer*,[25] relying in part upon the North Dakota decision[26] was the first to hold that damages, if proven in a case of wrongful conception, were allowable for a normal healthy child.[27] The California court ruled that the mental suffering attendant to the unexpected pregnancy because of complications which may result, the complications which do result, and the delivery of a child are all foreseeable consequences of the failure of the sterilization operation.[28]

In *Troppi v. Scarf*[29] the Michigan Appeals Court expanded the precedent for granting damages for wrongful conception set by California.[30] Following the decision in *Custodio*,[31] the Michigan court concluded that damages should be assessed as in any other negligence action.[32] *Troppi* rejected the traditional public policy argument that the birth of a healthy baby is always a benefit and never a detriment, reasoning that millions of people practice birth control, and would not do so if they felt another child was not a detriment.[33]

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> The negligence of the defendant in this case in the performance of the operation of plaintiffs was an invasion of her rights and any injury sustained by her as a result thereof constituted a tort but did not constitute a tort on the husband. The actionable wrong against the plaintiff was the interference with his marital rights, depriving him of his wife's services, society and companionship, and requiring expenditures by him for her medical treatment and care. These do not constitute mere items of damages in an action for negligence; they are essential to the cause of action itself, which cannot arise until such consequences have followed the injury.

*Id.* at 431, 28 N.W.2d at 532.

25. 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).

26. The California court interpreted the North Dakota case to imply "that the husband on proof of any of the theories of breach of duty on the part of defendants should recover any extraordinary, if not all, of the medical expenses attendant to his wife's confinement and as well the expenses of a sterilization operation." Custodio v. Bauer, 251 Cal. App. 2d 303, ——, 59 Cal. Rptr. 469, 475 (1967).

27. *Id.* at ——, 59 Cal. Rptr. at 477. The action was a result of the negligence of a physician who failed to sterilize the mother of nine children and asked damages for mental and physicial suffering, medical expenses and costs of raising the child to maturity. *Id.* at ——, 59 Cal. Rptr. at 466-67.

In making the decision the California court was careful to explain that "the compensation was not for the so-called unwanted child . . . , but to replenish the family exchequer to that . . . [an extra child would not deprive the rest of the family of what had been planned as their share of the family income.] *Id.* at ——, 59 Cal. Rptr. at 477.

28. *Id.* at ——, 59 Cal. Rptr. at 476. In California, the general test of foreseeability of the act is used to determine whether an independent intervening act, which actively operates to produce an injury, breaks the chain of causation. Gill v. Epstein, 62 Cal. 2d 611, 401 P.2d 397, 44 Cal. Rptr. 45 (1965). The court in *Custodio* found it difficult to conceive how the very act, the birth of a child, the consequences of which the operation was designed to forestall, could be considered unforeseeable. Custodio v. Bauer, 251 Cal App. 2d at ——, 59 Cal. Rptr. at 472.

29. 31 Mich. App. 240, 187 N.W.2d 511 (1967). The case involved a negligence action by a plaintiff against a pharmacist. The plaintiff conceived after the defendant negligently dispensed tranquilizers instead of birth control pills. *Id.* at 243, 187 N.W.2d at 512.

30. *Id.* at 240, 187 N.W.2d at 511.

31. *Id.* at ——, 187 N.W.2d at 516.

32. *Id.*

33. *Id.* at ——, 187 N.W.2d at 517. The Michigan court answered the traditional arguments that a child could never be a detriment by stating the following:

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

However, the Michigan court allowed for the mitigation of damages by the value of the child to the parents, adopting the special benefit rule from the Restatement, Torts Section 920 (1939).[34] Although the court rejected the idea that benefits would always outweigh any damages, it did feel that benefits should vary with the circumstances in each case.[35]

The holding in *Troppi* represents the majority rule, which has been followed almost to the letter in similar cases by California,[36] Connecticut,[37] New Jersey,[38] and Ohio.[39] The majority rule has allowed damages of four basic types,[40] including damages for costs of rearing the unplanned child,[41] less the value of any special benefit to be derived

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us say is always a benefit, and never a detriment. Those tens of millions of persons, by their conduct, express the sense of the community.

*Id.*

34. *Id.* at ——, 187 N.W.2d at 517-18; *See* RESTATEMENT OF TORTS § 920 (1939), which states the following: "Where the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred upon the plaintiff a special benefit to the interest which was harmed, the value of the benefit conferred is considered in mitigation of damages, where this is equitable." *Id.*

35. Troppi v. Scarf, 31 Mich. App. at ——, 187 N.W.2d at 519. The Michigan appellate court reasoned that the trier of fact must have the power to evaluate the benefit according to all circumstances of the case presented. Family size, family income, age of parents and marital status of parents are some but not all of the factors to be considered in determining the extent to which the birth of a child represents a benefit to his parents. *Id.*

*Troppi* also answered the traditional argument that the parents should either give up the child for adoption, get an abortion or pay for the child's upbringing themselves. Applying the tort principle that a tortfeasor takes his victim as he finds him, the court stated that a defendant does not have the right to demand that the victim of his negligence have the emotional and mental makeup of a woman who is willing to abort or place a child for adoption. Because a negligent tortfeasor takes his victim as he finds him, he cannot complain that the damages that will be assessed against him are greater because his negligence resulted in the conception of a child by a woman whose emotional and mental makeup is inconsistent with aborting or placing a child for adoption than if the victim of his negligence had been a woman who could do so. *Id.* at ——, 187 N.W.2d at 520.

The Ohio court in Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976), rejected the arguments of courts which had claimed damages for unplanned children would be against public policy. Raising a constitutional issue, the Ohio court reasoned that to enforce a policy that makes physicians liable for the foreseeable consequences of all negligently performed operations except those involving sterilizations would be a violation of a fundamental right, the right not to procreate. *Id.* at 135-36, 356 N.E.2d at 499. *See generally* Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

36. Stills v. Gratton, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976).

37. Anonymous v. Hospital, 33 Conn. Supp. 125, 366 A.2d 204 (1976).

38. Betancourt v. Gaylor, 136 N.J. Super. 69, 344 A.2d 336 (1975).

39. Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976).

40. *Id.* at ——, 356 N.E.2d at 497. The Ohio Supreme Court allowed a $450,000 jury verdict for damages connected with the birth of an unplanned child plus $12,500 for loss of consortium and cited the following as four basic types of damage: (1) expenses stemming from foreseeable consequences of the operation; (2) the value of the mother's society, comfort, care and protection lost to other members of the family; (3) expenses due to the change in the family status, including extra money to compensate for the fact that the mother must spread her society, comfort, care and protection over a larger group and extra money to replenish the family exchequer so that the new arrival will not deprive other members of the family of their planned share; and, (4) economic costs of rearing the child. *Id.*

41. California, Connecticut, Michigan, New Jersey and Ohio allow damages for pain and suffering, loss of consortium, medical expenses and costs of rearing the unplanned child. *See* Stills v. Gratton, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976); Anonymous v. Hospital, 33 Conn. Supp. 126, 366 A.2d 204 (1975); Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971); Betancourt v. Gaylor, 136 N.J. Super 69, 344 A.2d 336 (1975); Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976).

from the birth of the child.[42] The action for wrongful conception damages due to a doctor's negligence in performing a sterilization procedure has been recognized as a traditional negligence action.[43]

Two states, Texas,[44] and Wisconsin,[45] follow the present minority rule. In refusing to award damages for wrongful conception, the Texas court followed the theory that although raising a child may not be profitable from an economic point of view, the intangible benefits of a normal healthy child make any economic loss worthwhile.[46] Wisconsin followed the alternative theory, ruling that granting damages for the birth of a healthy child would be violative of public policy.[47]

A number of the early cases which rejected damages and the present minority courts are very much concerned with the adverse effect on the child in question when he someday learns his parents sued their family doctor because he was born.[48] While the child may benefit financially from a recovery by his parents, resultant psychological or emotional harm may far outweigh any pecuniary benefit. The claim by the child's parents may have the effect of making him an "emotional bastard," when he learns of his parents' suit, the very

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42. *See supra* note 34. The benefit test has been adopted by several jurisdictions. Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967); Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971); Sherlock v. Stillwater Clinic, ——Minn.——, 260 N.W.2d 169 (1977). *See* Anonymous v. Hospital, 33 Conn. Supp. 126, 366 A.2d 204 (1975); Betancourt v. Gaylor, 136 N.J. Super. 69, 344 A.2d 336 (1975); Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976).

43. *See* Troppi v. Scarf, 31 Mich. App. at ——, 187 N.W.2d at 516; Bowman v. Davis, 48 Ohio St. 2d at ——, 356 N.E.2d at 499. The physician's negligence in each case is the proximate cause of birth of the child, and the birth of the child costs the family the expense of childbirth and rearing as well as medical expenses, loss of consortium, and pain and suffering during pregnancy. *Id.*

44. LaPoint v. Shirley, 409 F. Supp. 118 (W.D. Tex. 1976); Terrell v. Garcia, 496 S.W.2d 124 (Tex. Civ. App. 1973).

45. Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974).

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

> Who can place a price tag on a child's smile or the parental pride in a child's achievement? Even if we considered only the economic point of view, a child is some security for the parents' old age. Rather than attempt to value these intangible benefits, our courts have simply determined that public sentiment recognizes that these benefits to the parents outweigh their economic loss in rearing and educating a healthy, normal child.

*Id.*

47. Rieck v. Medical Protective Co., 64 Wis. 2d at 518-19, 219 N.W.2d at 245. An action for damages for a child born after an ineffective sterilization procedure was rejected for public policy reasons on the following grounds: (1) the resulting damages would be wholly out of proportion to the culpability involved; (2) allowing recovery would place an unreasonable burden upon physicians; (3) a cause of action for wrongful conception would open the way for fraudulent claims; (4) a field of damages would be opened that has no just or sensible stopping point; and, (5) the parents seek to retain the child and all benefits while seeking to transfer only the financial costs of its upbringing to the doctor. *Id.* at 519, 219 N.W.2d at 244.

Delaware borrowed points from both the minority view and the majority view in Coleman v. Garrison, 349 A.2d 8 (Del. 1975). That case allowed damages for pain and discomfort of pregnancy, medical expenses, loss of consortium and for the cost of a tubal ligation, but refused to grant any damages for rearing the unplanned child. The court felt that the value of human life would outweigh any possible future costs. In addition the court felt it would violate public policy since the child could be injured emotionally by knowledge of the circumstances of the lawsuit stemming from his birth. *Id.*

48. *See* Coleman v. Garrison, 349 A.2d 8 (Del. 1975); Shaheen v. Knight, 6 Lyc. 19, 11 Pa. D. & C. 2d 41 (1957); Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974).

essence of which is that the child is a continuing burden and the product of a doctor's misfeasance rather than his parents' wishes.[49]

In *Sherlock* the Minnesota Supreme Court followed the majority rule closely. However, in doing so, the court overruled what other state courts[50] had considered to be the rule in Minnesota.[51] In making its decision the Minnesota court contrasted the action for wrongful conception brought in *Sherlock* from an action for "wrongful birth" or "wrongful life" which asks the jury to measure damages on relative merits of being versus non-being.[52] The action for wrongful conception is exclusively that of the parents, since it is they, not the child, who suffers the injury.[53] In addition, the court felt that the emotional shock to the child whose birth is the subject of the lawsuit would be no greater than the distress felt by any child who finds that his birth is nothing more than a product of his parents' ineptitude at birth control.[54]

Using the majority rule, the *Sherlock* decision recognized that the expenses of the birth of an unplanned child are a direct financial injury to the parents and that such damages should be recovered in an ordinary negligence action.[55] The majority in *Sherlock* also felt that the failure of the mother to abort or give up the child for adoption could not be regarded as failure to mitigate damages.[56] The only variation of the majority rule stated in *Sherlock* from that stated in *Troppi* was that rather than a general jury verdict, Minnesota courts would use a special verdict with explanatory instructions to prevent excessive damage awards.[57]

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49. 9 UTAH L. REV. 808, 811-12 (1965).

50. Shaheen v. Knight, 6 Lyc. 19, 11 Pa. D. & C. 2d 41 (1957); Terrell v. Garcia, 496 S.W.2d 124 (Tex. Civ. App. 1973); Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974).

51. Christensen v. Thornby, 192 Minn. 123, 255 N.W. 620 (1934). In deciding a question of whether a cause of action existed, the court's dictum was interpreted to be the rule in Minnesota by other courts:

> [T]he plaintiff has been blessed with the fatherhood of another child. The expenses alleged are incident to the bearing of a child, and their avoidance is remote from the avowed purpose of the operation. As well might the plaintiff charge defendant with the cost of nurture and education of the child during minority.

*Id.* at 126, 255 N.W. at 622 (dictum).

The majority in *Sherlock* explained its decision by stating that the former rule, which was in fact merely dictum, stood only for the proposition that a cause of action exists for an improperly performed sterilization, since the issue of damages was neither raised nor directly considered in that earlier case. Sherlock v. Stillwater Clinic, ——Minn. at ——, 260 N.W.2d at 172-73.

52. *Id.* at ——, 260 N.W. at 172. *Compare* with Zepeda v. Zepeda, 41 Ill. App. 2d 204, 190 N.E.2d 849 (1963); Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967); Dumer v. St. Michael's Hospital, 69 Wis. 2d 766, 233 N.W.2d 372 (1975) (examples of "wrongful birth" cases).

53. Sherlock v. Stillwater Clinic, ——Minn. at ——, 260 N.W.2d at 175.

54. *Id.* at ——, 260 N.W.2d at 173, *citing* Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).

55. Sherlock v. Stillwater Clinic, ——Minn. at ——, 260 N.W.2d at 175.

56. *Id.* at ——, 260 N.W.2d at 176. *See supra* notes 34 and 35.

57. *Id.* Chief Justice Sheran, joined by Justice Peterson dissented. The dissent in *Sherlock* followed the minority theory that the worth of a healthy baby to his parents will always exceed the costs associated with birth and rearing. *Id.* at ——, 260 N.W.2d at 177 (Sheran, C. J., Peterson, J., dissenting).

Minnesota's decision in *Sherlock* is a well reasoned decision in a situation with intense emotional and ethical problems for both the courts and the litigants. These same legal versus moral-ethical problems would also arise in North Dakota should a case similar to *Sherlock* arise. If the present North Dakota Supreme Court should interpret its decision in *Milde v. Leigh*,[58] the same way the California[59] and Michigan[60] courts have, then at least damages for pain and suffering, medical expenses, and loss of consortium could be recovered for the birth of an unplanned child due to a physician's negligence. The Minnesota court decision in *Sherlock*, joining with the majority which includes California could also influence the North Dakota court should an action seeking damages for rearing an unplanned child arise. On the other hand, a state whose electorate twice turned down liberalized abortion laws could well refuse damages for rearing an unwanted child on the grounds that such an award would be violative of public policy.

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58. Milde v. Leigh, 75 N.D. 418, 28 N.W.2d 530 (1947).
59. Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).
60. Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971).