NEGLIGENCE—DAMAGES—BIRTH OF HEALTHY BUT UNPLANNED CHILD DUE TO PHARMACIST'S NEGLIGENCE HELD A COMPENSABLE INJURY—*Troppi v. Scarf*, 31 Mich. App. 240, 187 N.W.2d 511 (1971).

Mr. and Mrs. Troppi, after the birth of seven children and a miscarriage while the wife was pregnant with the eighth, decided to limit the size of their family. Their physician prescribed Norinyl, an oral contraceptive, but Mrs. Troppi soon became pregnant because the pharmacist had negligently given her mild tranquilizers instead of the prescribed birth control pills. A healthy son was born and plaintiffs, in the case of *Troppi v. Scarf*,[1] sought damages from the defendant pharmacist for Mrs. Troppi's lost wages, the medical and hospital expenses, the pain and anxiety of both pregnancy and childbirth and, most significantly, the economic costs of rearing the child.[2] The trial court entered a summary judgment for the defendant, holding that the benefit derived by plaintiffs from having a healthy child offset any possible damage they could have suffered and thus their complaint did not state a claim upon which relief could be granted.[3] The appellate court reversed, rejecting the overriding benefit theory utilized by the trial court, and held that, under the circumstances of each individual case, any benefits conferred by the birth of an unplanned child should be weighed against the alleged damages.[4] Thus, for the first time an appellate court ruled on the liability of a pharmacist who negligently filled a prescription for oral contraceptives.[5] Regarding the difficulty of computing damages, the court further held that the

> assessment of damages in this [case] is properly within the compe-

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1 31 Mich. App. 240, 187 N.W.2d 511 (1971).

2 *Id.* at 244, 187 N.W.2d at 513.

3 *Id.* at 243-44, 187 N.W.2d at 512-13.

4 *Id.* at 254-57, 187 N.W.2d at 517-19.

5 *Id.* at 247, 187 N.W.2d at 514. On the trial level, a pharmacist was held liable for $8,000 in damages for the cost of medical expenses and the aggravation of a varicose vein condition in Coloff v. Hi Ho Shopping Center, Inc., No. 168070 (Wash. Super. Ct. April 17, 1967) after negligently dispensing dehydrating pills instead of birth control pills, resulting in pregnancy. The jury was not allowed to consider the expense of rearing the child, or the usual pain and suffering attendant to childbirth. In the recent case of Kuhns v. Pine Chemists, Inc., No. 155279-67 (N.Y. Sup. Ct. March 28, 1972) a pharmacist misread a prescription for birth control pills and gave the woman a nasal decongestant. The jury returned a verdict of $8,000 for Mrs. Kuhns' pain and suffering, $6,000 to Mr. Kuhns for the loss of his wife's services before and after the birth of the child and, most significantly, $15,000 was awarded for the expense of raising the child to adulthood.

tence of the trier of fact. The element of uncertainty in the net recovery does not render the damages unduly speculative.[6]

As the child was not a party to the suit in *Troppi* and did not seek direct compensation for any alleged injury, the action was in the nature of an unplanned child action rather than a suit for "wrongful life."[7] In a "wrongful life" action a child sues a parent or a third party on the basis of intentional or negligent acts which caused its birth in what the child considers disadvantaged circumstances. The alleged damages in this type of action arise in two possible situations, illegitimate birth or birth with mental or physical defects.

In the illegitimate birth situations the damages sought are for the stigma of bastardy, a loss of property or inheritance rights and deprivation of a normal home.[8] In the leading case of *Zepeda v. Zepeda*,[9] the trial court's dismissal of a suit brought by a child, alleging that his father had caused him to be born a bastard, was affirmed on appeal. The court acknowledged the commission of a tort, but believed that giving recognition to such a cause of action would be to create a far-reaching new policy that would have to be initiated by the legislature.[10] Subsequently, a trial court in *Williams v. State*[11] found that recovery could be realized by an infant born out of wedlock to a mentally deficient mother who was confined to a state mental hospital. Suing the state of New York, the child claimed the state was negligent in caring for the mother who was sexually assaulted by another patient. However, the appellate division reversed,[12] and that decision was affirmed by the court of ap-

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6 31 Mich. App. at 262, 187 N.W.2d at 521.

7 *See* Note, *The Not So Blessed "Blessed Event,"* 46 N.C.L. REV. 948, 953-55 (1968).

8 *See* Note, *Compensation for the Harmful Effects of Illegitimacy*, 66 COLUM. L. REV. 127, 128 (1966).

9 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied*, 379 U.S. 945 (1964) (illegitimate child's action based on allegation that defendant fraudulently induced his mother to have sexual intercourse by promising marriage when, in fact, he was already married).

10 The court held that "lawmaking, while inherent in the judicial process, should not be indulged in where the result could be as sweeping as here." *Id.* at 262, 190 N.E.2d at 859. *See* Pinkney v. Pinkney, 198 So. 2d 52, 54 (Fla. Dist. Ct. App. 1967) (affirmance of dismissal of infant's complaint alleging that defendant caused plaintiff to be born a bastard on ground that such a far-reaching theory of recovery would have to come from the legislature). For extensive commentary on *Zepeda*, *see* Ploscowe, *An Action for "Wrongful Life,"* 38 N.Y.U.L. REV. 1078 (1963); Recent Case, *Unusual Cases of Tort Liability—Illegitimate Child May Not Recover From Father for Lack of Normal Home or Inferior Social Status*, 77 HARV. L. REV. 1349 (1964); Comment, *Illegitimate Child Denied Recovery Against Father for "Wrongful Life,"* 49 IOWA L. REV. 1005 (1964); Note, *Illegitimate Child May Not Sue Father for Child's Illegitimacy*, 1963 U. ILL. L.F. 733.

11 46 Misc. 2d 824, 260 N.Y.S.2d 953 (Ct. Cl. 1965).

12 25 App. Div. 2d 907, 269 N.Y.S.2d 786 (1966).

peals,[13] which found that being born illegitimate was not a legal injury for which damages could be granted.[14] Thus, New York's "wrongful life" tort enjoyed only a brief existence.

In the second type of "wrongful life" action—the birth of a physically deformed or mentally impaired child—the plaintiff child seeks compensation from a non-parent for a life with birth defects which were avoidable only if the plaintiff had been aborted. For example, the New Jersey Supreme Court case of *Gleitman v. Cosgrove*[15] involved a child born with birth defects as a result of the alleged failure of the mother's obstetrician to warn her of such a possibility when the mother contracted German measles during her pregnancy, thereby denying the parents their option to abort. As to the child's "wrongful life" claim, the court ruled that there were no legally cognizable damages.[16]

Whether the basis of the child's action is illegitimacy or some mental or physical defect, the "wrongful life" claim is contingent on the ultimate assertion that it would have been preferable had he not been born. The repugnance with which the courts have treated such

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[13] 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966).

[14] The court said:

> Being born under one set of circumstances rather than another or to one pair of parents rather than another is not a suable wrong that is cognizable in court.

*Id.* at 484, 223 N.E.2d at 344, 276 N.Y.S.2d at 887. For extensive commentary on *Williams*, *see* Note, *"Wrongful Life"—A New Tort?*, 17 HASTINGS L.J. 400 (1965); Note, *Negligence—Freedom From Illegitimate Birth*, 55 KY. L.J. 719 (1967); Note, *Illegitimacy—Bastard Has Cause of Action Against State for Negligently Permitting Her Mother's Rape, Causing Plaintiff's Illegitimacy*, 41 N.Y.U.L. REV. 212 (1966); Recent Development, *Liability to Bastard for Negligence Resulting in His Conception*, 18 STAN. L. REV. 530 (1966).

[15] 49 N.J. 22, 227 A.2d 689 (1967).

[16] In the words of the court:

> The normal measure of damages in tort actions is compensatory. Damages are measured by comparing the condition plaintiff would have been in, had the defendants not been negligent, with plaintiff's impaired condition as a result of the negligence. The infant plaintiff would have us measure the difference between his life with defects against the utter void of nonexistence, but it is impossible to make such a determination. This Court cannot weigh the value of life with impairments against the nonexistence of life itself. By asserting that he should not have been born, the infant plaintiff makes it logically impossible for a court to measure his alleged damages because of the impossibility of making the comparison required by compensatory remedies.

*Id.* at 28, 227 A.2d at 692. This "logico-legal" difficulty in measuring damages, Tedeschi, *On Tort Liability for "Wrongful Life,"* 1 ISRAEL L. REV. 513, 529 (1966), was also referred to by Judge Keating in his concurring opinion in Williams v. State, 18 N.Y.2d 481, 484-85, 223 N.E.2d 343, 344-45, 276 N.Y.S.2d 885, 888 (1966), where he commented:

> The damages sought by the plaintiff in the case at bar involve a determination as to whether nonexistence or nonlife is preferable to life as an illegitimate with all the hardship attendant thereon. It is impossible to make that choice.

*Id.* at 485, 223 N.E.2d at 345, 276 N.Y.S.2d at 888.

a determination is illustrated by the case of *Stewart v. Long Island College Hospital*,[17] where the plaintiff child alleged that the doctors negligently failed to perform a therapeutic abortion after, as in *Gleitman*, the mother had contracted German measles during her pregnancy. The court, recognizing the ultimate finding which had to be made in order to grant the requested relief, addressed itself to plaintiff's suggested solution:

> [T]here is no remedy for having been born under a handicap, whether physical or psychological, when the alternative to being born in a handicapped condition is not to have been born at all. To put it another way, a plaintiff has no remedy against a defendant whose offense is that he failed to consign the plaintiff to oblivion. Such a cause of action is alien to our system of jurisprudence.[18]

The, as yet, insurmountable barrier to a "wrongful life" recovery, the judicial refusal to rule that life under any conditions could be worse than never being born, does not confront the plaintiff parents in an unplanned child action. The parents, as in *Troppi*, are merely seeking recovery for the damages (fiscal, physical and mental) incurred as a result of an unplanned child, when that birth was caused by the wrongful act of a third party. Such suits are grounded on alleged medical malpractice (negligence), breach of warranty or misrepresentation and deceit in a sterilization operation,[19] and breach of product warranty (products liability).[20]

Although not insuperable, the plaintiff parents in an unplanned child action are confronted by a substantial obstacle—judicial application of the "benefit rule." Under this rule, where the same tortious act which caused the plaintiff personal injury or property damage also confers upon plaintiff a benefit, the jury is instructed to consider such

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[17] 58 Misc. 2d 432, 296 N.Y.S.2d 41 (Sup. Ct. 1968).

[18] *Id.* at 436, 296 N.Y.S.2d at 46. The decision by the trial court to set aside the verdict for the infant plaintiff was affirmed in 35 App. Div. 2d 531, 313 N.Y.S.2d 502, *appeal dismissed*, 27 N.Y.2d 804, 264 N.E.2d 354, 315 N.Y.S.2d 863 (1970).

For a discussion of the utilization of *Gleitman* and *Stewart* in an attempt to devise a cause of action for medical malpractice under the present framework of tort law, see Comment, *A Cause of Action For "Wrongful Life": [A Suggested Analysis]*, 55 MINN. L. REV. 58 (1970). *See generally* Annot., 22 A.L.R.3d 1441 (1968).

[19] *E.g.*, Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (Ct. App. 1967). *See* Annot., 27 A.L.R.3d 906 (1969).

[20] In Whittington v. Eli Lilly & Co., 333 F. Supp. 98 (S.D.W. Va. 1971) the court held that there was no breach of warranty after plaintiff gave birth to a child while using defendant's birth control pills. There is no warranty of 100 percent effectiveness, express or implied, for with birth control pills, as with other drugs, the manufacturer "cannot be held to have become an insurer against plaintiff's 'physiological idiosyncracy.'" *Id.* at 101.

benefit when computing net damage.[21] In the past, courts have viewed the birth of a healthy child as a benefit to the parents which outweighs any possible injury or expense to them, and thus it has long been the policy to deny parental recovery for any injury incident to an unplanned birth which resulted from the tortious conduct of another.[22] Also, in the application of the "same interest" element of the benefit rule, a court is required to look to the specific interest which the plaintiff sought to protect, and only the benefit to that harmed interest is to be considered. Thus, damages resulting from injury to one interest are not reduced be demonstrating that another interest has been benefited.[23] With this principle in mind, the question arises whether the companionship and joy of parenthood should even be considered when the invaded interest is health or economic in nature.

The impact of public sentiment, as reflected in judicial application of an overriding-benefit theory, is evident in the case of *Shaheen v. Knight*,[24] where, for economic reasons, the parents attempted through sterilization to limit the size of their family. After an allegedly warranted but unsuccessful operation, they sought damages for the cost of rearing and educating their unplanned but healthy child. The court, refusing to allow the case to go to the jury, concluded:

> 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 . . . child. . . . [Plaintiff] wants to have the child and wants the doctor to support it. In our opinion to allow such damages would be against public policy.[25]

A more contemporary case, *Ball v. Mudge*,[26] is demonstrative of the continued vitality of the overriding-benefit abstraction. In *Ball*, a

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21 The rule states:

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

RESTATEMENT OF TORTS § 920, at 616 (1939) (emphasis added).

22 *See* Christensen v. Thornby, 192 Minn. 123, 255 N.W. 620 (1934); Shaheen v. Knight, 11 Pa. D. & C.2d 41 (Lycoming County C.P. 1957); Ball v. Mudge, 64 Wash. 2d 247, 391 P.2d 201 (1964). This was also the basis of the trial court's decision in *Troppi*, 31 Mich. App. at 244, 187 N.W.2d at 513.

23 RESTATEMENT OF TORTS § 920, comment *b* at 617 (1939). *See* Maben v. Rankin, 55 Cal. 2d 139, 144, 358 P.2d 681, 684, 10 Cal. Rptr. 353, 356 (1961); Custodio v. Bauer, 251 Cal. App. 2d 303, 323, 59 Cal. Rptr. 463, 476 (Ct. App. 1967).

24 11 Pa. D. & C.2d 41 (Lycoming County C.P. 1957).

25 *Id.* at 45-46. For a view critical of the court's decision see Recent Decision, 19 U. PITT. L. REV. 802 (1958).

26 64 Wash. 2d 247, 391 P.2d 201 (1964).

malpractice and warranty action, the plaintiff parents decided, for health and economic reasons, to cease having children; the husband electing to have a vasectomy performed by the defendant doctors. Approximately one year after the operation, Mrs. Ball became pregnant and subsequently gave birth to a healthy child. The birth, by Caesarean section, had no lasting detrimental effect on the health of Mrs. Ball. The parents in bringing this action sought damages for the expense of delivery and support of this unplanned addition to their family, their pain, suffering and mental anguish and the husband's loss of consortium.[27] The trial court, unlike *Shaheen*, allowed the case to reach the jury which rendered a verdict for the defendant doctors. The appellate court, specifically avoiding the issue of whether as a matter of law plaintiffs had suffered a compensable injury,[28] submitted, as a reasonable justification for the jury verdict, the basic sentiment embodied in the overriding-benefit theory:

> As reasonable persons, the jury may well have concluded that appellants suffered no damage in the birth of a normal, healthy child, whom they dearly love . . . 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.[29]

It is this overwhelmingly high regard for the joys of parenthood which caused the trial court to nonsuit the *Troppi* plaintiffs.

Although the benefit derived from a healthy but unplanned child can more easily be categorized as an overriding benefit, the benefit rule is, nevertheless, equally applicable when the unplanned child is also unhealthy. In the *Gleitman* case the parents sought compensatory damages for the birth of a child who was blind, deaf and mentally retarded. The basis of the parents' action was not that the defendant doctor negligently caused the child's conception, as was the case in *Shaheen, Ball* and *Troppi,* but that his failure to apprise them of the hazards of con-

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27 *Id.* at 248, 391 P.2d at 203.

28 *Id.* at 248-49, 391 P.2d at 203.

> Respondent invites us to determine that the case should not have been allowed to go to the jury because the birth of a normal child without extraordinary pain, suffering or abnormal discomfort to the mother during pregnancy, delivery and recuperation, cannot be damage compensable in law. . . . We decline this invitation because of our conclusion that the verdict for respondents must be sustained. . . . [This] should not be construed as an expression of opinion by this court on respondent's contention that the case should, or should not, have been resolved in his favor as a matter of law.

29 *Id.* at 250, 391 P.2d at 204 (emphasis added) (citations omitted).

The court's decision is discussed and found acceptable in Note, *The Birth of a Child Following an Ineffective Sterilization Operation as Legal Damage,* 9 UTAH L. REV. 808 (1965).

tracting German measles in the early stages of pregnancy prevented them from lawfully terminating the pregnancy. From the point in time at which the defendant doctor, cognizant of Mrs. Gleitman's having had German measles, failed to afford her and her husband the opportunity to abort the pregnancy, the child was in a sense unplanned and, therefore, the defendant doctor's negligent act could be labeled the cause of the birth. It was, essentially, on this basis that Mr. and Mrs. Gleitman sought damages for the wife's mental distress and for the costs incurred in caring for their "unplanned" and unhealthy child.[30] The court, in assessing the argument, said that it was necessary to evaluate the "intangible, unmeasurable, and complex human benefits of motherhood and fatherhood and weigh these against the alleged emotional and money injuries."[31] The court concluded that the value of such benefits and injuries could not be determined and thus there were no damages cognizable at law.[32] There was no indication that these benefits would outweigh the hardship of having and caring for such a severely handicapped child, but it is significant that even in this situation "benefit" to the parents was an important consideration.

In *Gleitman*, Chief Justice Weintraub agreed with the majority's denial of the child's cause of action,[33] but dissented with respect to the complete denial of the parents' claim. He argued that the parents did in fact suffer an injury, but he viewed the injury as a limited one: the denial of the parental option to abort or risk the possibility of giving birth to a deformed or retarded child.

> [T]he mother is hurt in her own right by the denial to her of her option to accept or reject a parental relationship with the child. The father, too, although his right is wholly dependent upon the mother's decision, is so directly concerned in her decision that he may fairly be regarded as a victim of a wrong done to her. No doubt it would be difficult to assess the amount of the injury, but the law should try to compensate for it, if only to reinforce the duty of due care. I would permit the trier of the facts to put a price on the loss of that option.[34]

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30 49 N.J. at 24, 227 A.2d at 690.

31 *Id.* at 29, 227 A.2d at 693.

32 *Id.* at 29-31, 227 A.2d at 693.

33 49 N.J. at 63, 227 A.2d at 711 (dissenting in part). The Chief Justice commented:

> Ultimately, the infant's complaint is that he would be better off not to have been born. Man, who knows nothing of death or nothingness, cannot possibly know whether that is so.
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> . . . To recognize a right not to be born is to enter an area in which no one could find his way.

*Id.*

34 *Id.* at 64-65, 227 A.2d at 712.

Although the Chief Justice recognized a parental injury, he decreased the likelihood of any substantial recovery by permitting the jury to offset whatever benefit the child may bring to the household in terms of the joy of parenthood[35] and by not allowing parental recovery for the "cure and care" of the child, that being considered the child's action.[36] It is posited that had the Chief Justice viewed the injury as an interference in the parental plan and the resulting imposition of the birth of an unhealthy child, the spectrum of damages would have been far more expansive.

The court looks to the interest plaintiff sought to protect, and the interest that was invaded by the defendant, in order to determine how the benefit rule is to be applied.[37] Presumably, in arriving at net damage, if health is the only interest sought to be protected, the jury should consider only physical improvements conferred on plaintiff as a result of defendant's tortious conduct. If economics is the protected interest, the jury should offset any economic benefit, such as the services the child would provide. An example of a court restricting its analysis of damage to the specific interest that plaintiff sought to protect is *Christensen v. Thornby*.[38] There plaintiff contracted with a physician to have a vasectomy performed because he had been warned that his wife's life would be endangered by another pregnancy. The court looked to the interest that plaintiffs sought to safeguard and concluded that, since the wife survived without injury, there was no compensable damage.

> 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. 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 its minority.[39]

The *Christensen* court viewed the expense of pregnancy, child delivery, and rearing of the child as too remote from the protected interest—the mother's health. The reasoning of the court indicates that it might have permitted recovery for such expenses had plaintiffs sought

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35 *Id.* at 65, 227 A.2d at 712.

36 *Id.* at 64, 227 A.2d at 711.

37 *See* authorities cited note 23 *supra.*

38 192 Minn. 123, 255 N.W. 620 (1934).

39 *Id.* at 126, 255 N.W. at 622 (emphasis added).

to limit the size of their family for economic reasons. Similarly, in *Custodio v. Bauer*,[40] the plaintiff wife, for health reasons, underwent a sterilization operation which was unsuccessful. Quoting the benefit rule, the court declared that any benefit conferred by the operation on the plaintiff wife's physical condition may offset the damages.

> [T]he examples given in the Restatement contemplate a benefit to the interest to be protected. If the failure of the sterilization operation and the ensuing pregnancy benefited the wife's emotional and nervous makeup, and any infirmities in her kidney and bladder organs, the defendants should be able to offset it.[41]

Unlike *Christensen*, however, the *Custodio* court chose to imply an economic interest, viewing such damage as consequent to the invasion of the health interest and equally compensable.[42] The court apparently deviated from a rigid application of the benefit rule by making no mention of offsetting the services the child would provide or the value of the love and companionship that is derived from the parent-child relationship. A strict application of the rule would require that the court weigh these economic benefits against the court-implied economic detriment.

Aside from *Custodio* and *Troppi*, courts have been reluctant to allow recovery by parents for the unplanned birth of a child due to a tortious act of another. This judicial indisposition stems somewhat from what might be termed a loose application of the "same interest" element of the benefit rule; this practice being partially an outgrowth of the embracement of the overriding-benefit theory. It was through a combination of the overriding-benefit theory and a liberal construction of the same interest rule that the trial court in *Troppi* dismissed the plaintiffs' complaint. This general application of the benefit rule is harsh because it does not take into consideration the multitude of varying situations. The approach taken by the appellate court in *Troppi* is of major significance only because the court rejected the overriding-benefit theory; the court adhered to the loose application of the same interest principle. The court justified its decision not to

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40 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).

41 *Id.* at 323, 59 Cal. Rptr. at 476.

42 The court decided:

> To say, as in *Christensen*, that the expense of bearing a child are [*sic*] remote from the avowed purpose of an operation undertaken for the purpose of avoiding childbearing is a *non sequitur*. . . . [T]he compensation is not for the so-called unwanted child . . . but to replenish the family exchequer so that the new arrival will not deprive the other members of the family of what was planned as their just share of the family income.

251 Cal. App. 2d at 324, 59 Cal. Rptr. at 476-77. *See* Note, *supra* note 7, at 948 n.4.

disjoin the interests on the ground that pregnancy, with its attendant physical problems, and the economic costs of rearing a child are so closely interwoven that the interests should be considered as a whole.[43] Companionship, as well as services, were weighed against "all the elements of claimed damage."[44] The court viewed the shielded interest as neither health, against which any benefits to physical condition could be offset, nor economics, against which future services provided by the child could be counterbalanced. By thus combining the elements of damages, the court visualized the protected interest as the right not to have the status of parenthood imposed on individuals; and it is against this imposition that *any* consequential benefits may be weighed in computing net damage.

Although the *Troppi* court chose not to strictly apply the same interest rule, the court facilitated recovery by rejecting the popular notion that the benefit derived from a child, without consideration of the facts in the individual case, universally outweighs any parental detriment incurred by the child's unplanned birth. Though the court permitted the benefits to act in mitigation of damages,[45] it took a more reasonable course by applying the rule "in the case-by-case adjudication of the enormously varied claims."[46]

The *Troppi* court's allowance of damages for expenses incident to childbirth is not unique. In *Custodio*, the court, declining to rule that there were no legally cognizable damages, held that, if plaintiff parents establish defendant's negligence, they should recover for the expense of the operation, any pain and suffering which the operation was designed to prevent and compensation to the mother because "[s]he must spread her society, comfort, care, protection and support over a larger group."[47]

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43 31 Mich. App. at 255, 187 N.W.2d at 518.

44 *Id.*

45 *Id.* at 255-56.

46 *Id.* at 256, 187 N.W.2d at 518. The court said further:

> The essential point, of course, is that the trier must have the power to evaluate the benefit according to all the circumstances of the case presented. Family size, family income, age of the parents, and marital status are some, but not all, the factors which the trier must consider in determining the extent to which the birth of a particular child represents a benefit to his parents. That the benefits so conferred and calculated will vary widely from case to case is inevitable.

*Id.* at 257, 187 N.W.2d at 519.

This approach was adopted by the trial court in Coleman v. Garrison, 281 A.2d 616 (Del. Super. Ct. 1971), in an opinion that relied heavily upon the *Troppi* decision. In a motion to dismiss the suit by the parents against a physician after an unsuccessful sterilization operation, the court held that plaintiffs were not precluded as a matter of law from showing damages in excess of the benefit accruing from the birth of a normal, healthy child. It was held to be a matter for jury determination.

47 251 Cal. App. 2d at 323, 59 Cal. Rptr. at 476. The court rejected the argument that to grant damages for support of an unplanned child would cause later emotional

The difficulty involved in computing damages and taking a position adverse to public sentiment are two major stumbling blocks that have prevented recovery in these types of actions. The *Gleitman* decision is illustrative of these forces at work.[48] In *Troppi* the court dealt with these obstacles by holding that a druggist is held to a very high standard of care and defendant's conduct was a clear breach of that duty.[49] Since generally he would be liable for any injury proximately caused by his negligence, the court decided that in this particular instance "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."[50] Not only does the state's support of the family planning programs militate against the argument that such a suit is against public policy,[51] but, as the court also noted, public policy could actually be served.

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problems. In doing so the court said:

> One cannot categorically say whether the 10th arrival in the Custodio family will be more emotionally upset if he arrives in an environment where each of the other members of the family must contribute to his support, or whether he will have a happier and more well-adjusted life if he brings with him the wherewithal to make it possible.

*Id.* at 325, 59 Cal. Rptr. at 477. *But see* Note, *supra* note 29, at 811-12. For a discussion of the *Custodio* case *see* Note, *supra* note 7.

*Custodio* was the basis for the decision in Jackson v. Anderson, 230 So. 2d 503 (Fla. Dist. Ct. App. 1970), where it was held that an action could be maintained against the physician who performed an unsuccessful sterilization operation. A normal, healthy child was subsequently born and plaintiff alleged breach of express warranty and negligence.

48 49 N.J. at 28-31, 227 A.2d at 692-93.

By way of some contrast to *Gleitman*, New Jersey provided an earlier holding in West v. Underwood, 132 N.J.L. 325, 40 A.2d 610 (Ct. Err. & App. 1945), which would support third party liability for negligently performed sterilization operations resulting in unplanned childbirth. Plaintiff alleged the doctor's negligent failure to perform the sterilization during another operation, which necessitated a second operation to accomplish that purpose. No child was born, but plaintiffs sought recovery for the injury and expense of the second operation. The court held that if the jury found defendant was indeed negligent in not performing the sterilization, recovery could be had for

> all pain and suffering, mental and physical, together with loss of services and any other loss or damage proximately resulting from such negligence.

*Id.* at 326, 40 A.2d at 611.

*Underwood* is cited as the correct rule of law in Bishop v. Byrne, 265 F. Supp. 460, 463 (S.D.W. Va. 1967) (where there is a breach of duty by the physician in a sterilization operation plaintiffs are entitled to recover for all damages proximately resulting therefrom); *see* Stewart v. Long Island College Hosp., 35 App. Div. 2d 531, 313 N.Y.S.2d 502 (App. Div. 1970) (award of $10,000 in damages to mother not allowed, partially on ground that compensatory damages would be impossible to ascertain).

49 31 Mich. App. at 245, 187 N.W.2d at 513.

50 *Id.* at 252, 187 N.W.2d at 516.

51 *Id.* at 252-53, 187 N.W.2d at 516-17. The court decided that since the right to limit the size of one's family by the use of contraceptives is constitutionally protected by being within the "zone of privacy" (Griswold v. Connecticut, 381 U.S. 479 (1965)) it was also a right for which the State must provide a remedy if that right is violated. The court concluded:

> In theory at least, the imposition of civil liability encourages potential tortfeasors to exercise more care in the performance of their duties . . . . Applying this theory to the case before us, public policy favors a tort scheme which encourages pharmacists to exercise great care in filling prescriptions. To absolve defendant of all liability here would be to remove one deterrent against the negligent dispensing of drugs. Given the great numbers of women who currently use oral contraceptives, such absolution cannot be defended on public policy grounds.[52]

The court further concluded that the damages sought by plaintiffs could be reasonably determined by a jury.[53] Medical and hospital expenses and lost wages could be determined with ease, and while it is more difficult to weigh pain and anxiety and the cost of rearing a child (setting off the benefits of companionship and services in light of the plaintiff's circumstances), such determinations are made daily by juries in related cases.[54]

The future of actions involving the tortious birth of a child lies not in a child's "wrongful life" claim against a parent or non-parent for particular physical, social or economic disadvantages at birth, when the crucial error of the defendant parent was that he caused the child's conception and that of the defendant non-parent was that he did not abort the plaintiff child or was the negligent cause of its conception. Not only would such a tort create enormous difficulty in determining damages,[55] but extension of the law to such situations is indeed "alien to our system of jurisprudence."[56] There is room, however, in this over-

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> Since the State may not infringe upon this right, it may not constitutionally denigrate the right by completely denying protection provided as a matter of course to like rights.

*Id.* at 253-54, 187 N.W.2d at 517 (footnote omitted). *Cf.* Note, *Dignity as a Legally Protectable Interest*, 46 N.C.L. Rev. 205, 208-12 (1967).

52 31 Mich. App. at 254, 187 N.W.2d at 517.

53 *Id.* at 260-62, 187 N.W.2d at 520-21.

54 *Id.* Juries place a dollar value on the elusive damage of pain and suffering in personal injury actions, and a dollar estimate on the value of prospective costs, companionship and services in wrongful death actions. Mosley v. Dati, 363 Mich. 690, 110 N.W.2d 637 (1961) (failure of jury to award damages for pain and suffering where evidence clearly established that such pain and suffering existed was capricious and arbitrary); Westfall v. Venton, 1 Mich. App. 612, 137 N.W.2d 757 (1965) (jury permitted to place dollar value on services and companionship of spouse in wrongful death action). The jury in Kuhns v. Pine Chemists, Inc., No. 155279-67 (N.Y. Sup. Ct., March 28, 1972) awarded the mother $8,000 for pain and suffering and $15,000 for the cost of raising the child (presumably considering the benefit of the child's companionship and services) in an action based on the same factual situation as *Troppi*. *See generally* 25 C.J.S. *Damages* §§ 62, 63 (1966); 25A C.J.S. *Death* §§ 103, 104 (1966).

55 *See* material cited note 16 *supra*.

56 Stewart v. Long Island College Hosp., 58 Misc. 2d 432, 436, 296 N.Y.S.2d 41, 46 (Sup. Ct. 1968).

crowded world for recovery by the parents from a third party whose negligence results in the birth of an unplanned child. When all the elements of a standard tort action are present, an outdated belief in a child's unquestioned overriding benefit to the parents after its unplanned birth should not prevent compensation for any injury sustained. Often the additional child is no significant hardship; but, in many cases the birth of an unplanned child can bring a great economic strain to a family that outweighs any benefit received, and in a few cases the child can be a financial and psychological disaster. The *Troppi* decision has significantly advanced an area of tort law that endeavors to compensate parents for foreseeable injuries proximately caused by the negligence of a third party.

*Stacy L. Moore, Jr.*