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Damages for Wrongful Birth and Wrongful Pregnancy in Illinois

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INTRODUCTION

In one case, a parent sues a doctor, seeking damages for child-birth and child-rearing expenses after the doctor fails to provide adequate genetic testing and a handicapped child is born. In another case, parents accuse a doctor of saddling them with a healthy but unplanned baby after the doctor negligently performs a sterilization operation. These scenarios typify the causes of action which have been labeled, respectively, wrongful birth and wrongful pregnancy.

In a wrongful birth action, the parent alleges injury in the form of the birth of a child with a serious disease or handicap.

3. Although some courts and commentators have distinguished wrongful birth from wrongful pregnancy, the Illinois Supreme Court in Cockrum v. Baumgartner, 95 Ill. 2d 193, 447 N.E.2d 385 (1983), did not make such a distinction, instead using the terms disjunctively. The court did limit its decision, however, to the denial of the costs of rearing a healthy child (the “wrongful pregnancy”), implicitly suggesting that the birth of an unhealthy child (the “wrongful birth”) might yield a different result. Id. at 195, 447 N.E.2d at 386. See infra notes 74-77 and accompanying text.
4. The term “wrongful birth” has been used broadly to describe any tort related to birth. See, e.g., Mason v. Western Pa. Hosp., 428 A.2d 1366, 1378 (Pa. Super. Ct. 1981), vacated, 499 Pa. 484, 453 A.2d 974 (1982) (Hester, J., concurring and dissenting): “[A]lthough this [suit] may more appropriately be labelled as one for wrongful conception, . . . or even wrongful pregnancy, . . . I will retain, for convenience, the wrongful birth nomenclature.” 428 A.2d at 1378 (Hester, J., concurring and dissenting) (citations omitted). The Mason case involved an unsuccessful tubal ligation, and thus the more precise name for the cause of action would have been wrongful pregnancy. See infra notes 5, 6.

One court has noted that a “clear delineation of certain terminological distinctions is essential to a proper understanding of the theoretical issues raised by plaintiffs’ claims.” Phillips v. United States, 508 F. Supp. 544, 545 n.1 (D.S.C. 1983). The Phillips court added: “[T]his court feels that these distinctions are essential to the development of an analytic framework. Perhaps the most compelling justification for this terminology is provided by those jurisdictions that recognize “wrongful birth” claims but not “wrongful pregnancy” claims. Id. For further discussion of terminological problems, see generally Comment, Damages for the Wrongful Birth of Healthy Babies, 21 Duq. L. Rev. 605 (1983).

Rather than terminological distinctions, problems in these new tort causes of action lie in the analyses used by the courts to determine liability and damages. Failure to distin-
resulting from negligently performed or omitted genetic counseling or prenatal testing. With the proper medical information, the parent would most likely have aborted the fetus. In a wrongful pregnancy action, injury to the parent usually results from a negligently performed abortion, sterilization, or contraceptive

The parents' alleged injury is the unwanted pregnancy and subsequent arrival of an unplanned, although usually healthy child. Both wrongful birth and wrongful preg-
nancy claims should be distinguished from a wrongful life cause

unplanned conception occurs. If a state limits wrongful pregnancy damages to pregnancy- and birth-related expenses, the coincidental handicap should not change this limitation.

In other cases, overlap was found to have occurred in cases involving children born with foreseeable handicapped conditions. The parents in these cases had sought sterilization, contraception, or abortion for eugenic reasons. See, e.g., Hays v. Hall, 488 S.W.2d 412 (Tex. 1973) (doctor's negligent performance of a vasectomy on the plaintiff resulted in the birth of a deformed child who lived for only nine months; the parents had sought sterilization after giving birth to two retarded children). Accord Ochs v. Borrelli, 187 Conn. 253, 445 A.2d 883 (1982) (prior births of two children born with orthopedic defects caused parents to seek sterilization for eugenic reasons). In these types of cases, the fact that a parent seeks sterilization in order to avoid the danger of a genetic defect may cause confusion between the typical wrongful pregnancy and wrongful birth suits. One court noted that, in such cases, the benefits offset rule, infra note 39, would be helpful in that "the jury could easily find that the uneventful birth of a healthy, non-defective child was a blessing rather than a 'damage.' " University of Ariz. v. Health Sciences Center v. Superior Ct., 136 Ariz. 579, 585, 667 P.2d 1294, 1300 (1983). Another case of this type invoking the benefits offset rule was Speck v. Finegold, 268 Pa. Super. 342, 408 A.2d 496 (1979). In this case, an infant was born with neurofibromatosis, a crippling disease of the nervous system, after both an unsuccessful vasectomy and an unsuccessful abortion. The sterilization and abortion attempts were sought specifically because the parents feared the child would be born with the hereditary disease from which the father and the child's two sisters also suffered. The court treated the case as a wrongful pregnancy claim and allowed full damages, with a benefits offset, for the care and treatment of the child. Id. at 353, 408 A.2d at 509. Later, in Mason v. Western Pa. Hosp., 286 Pa. Super. 354, 428 A.2d 1366 (1981), vacated, 499 Pa. 484, 453 A.2d 974 (1982), the same court refused to recognize a distinction between handicapped and healthy children. Evidently the court was confused as to whether any real distinction existed between the wrongful pregnancy and wrongful birth causes of action. After noting that Texas and Wisconsin made such a distinction, the Mason court held, "In light of Speck a distinction similar to that made by the [Wisconsin] court is not possible." 428 A.2d at 1370.

The foreseeable handicap in these cases may affect damages significantly in some jurisdictions. In those jurisdictions where damages in wrongful pregnancy cases are usually limited to pregnancy and birth-related expenses, the foreseeable handicap might not change the award at all. The injury is deemed to be the conception. Reasons for avoiding that conception should not be considered when the conception results in a handicapped child. But see Ramey v. Fassoulas, 414 So. 2d 198 (Fla. Dist. Ct. App. 1982), affd, 450 So. 2d 822 (Fla. 1984). In Ramey, a wrongful pregnancy case, a handicapped child was born after an unsuccessful vasectomy. After a subsequent negligently performed sperm count, a healthy child was born. The court denied normal rearing costs for both children, but allowed medical expenses for the handicapped child because of the potentially staggering expenses.

Courts using this limited damages rule should not consider reasons for avoiding the conception when the child turns out healthy, e.g., whether the parents were poverty stricken with ten hungry children at home, or whether the parents had one child and wished to pursue professional careers. But see Hartke v. McKelway, 707 F.2d 1544 (D.C. Cir. 1983), which held that "a fact finder should place great weight on a couple's reason for undergoing sterilization in deciding whether the subsequent birth of a [healthy] child, on balance, constitutes damage to the parents." Id. at 1555. When a jurisdiction uses the benefits offset rule in determining wrongful pregnancy damages, the foreseeable handi-
Wrongful Birth/Pregnancy

of action, which is brought by the child, not the parents.  

Courts and commentators have used the terms wrongful birth and wrongful pregnancy interchangeably. More important than terminology, however, is the confusion engendered when courts fail to distinguish their analyses of the tort issues involved in

cap can have a considerable effect. The jury can award full damages for child rearing, which will include tremendous medical expenses, and then subtract the benefits, which might be considerably less with a severely handicapped child.

8. A wrongful life case is always brought by the child, never by the parents. In a wrongful life case, it is the child who claims that, but for the defendant's negligence, the child would not have been born. The factual situation underlying wrongful life suits fall into the same two general categories as wrongful birth and wrongful pregnancy: plaintiffs handicapped at birth, and the plaintiffs healthy throughout the pregnancy and birth. The distinguishing characteristic of a wrongful life suit is not the underlying facts, but rather the party claiming relief. When the child requests relief, the court is confronted with a philosophical dilemma not present when the child's parents bring suit. Placing the plaintiff child in the position he was prior to the tortious act usually means that the child would no longer exist. For this reason, few courts have been willing to recognize a cause of action for wrongful life. See Note, A Preference for Nonexistence: Wrongful Life and a Proposed Tort for Genetic Malpractice, 55 S.C.L. REV. 477 (1982). A full discussion of this cause of action is beyond the scope of this note.

wrongful pregnancy cases from those arising in wrongful birth actions. Nowhere is the confusion between wrongful pregnancy and wrongful birth more evident, or the consequences more serious, than in the awarding of damages. Damages awarded under both causes of action vary greatly, ranging from the minimal costs of the birth itself, to full damages, including the cost of raising the child.

The urgency of this problem is underscored by the rapid growth in litigation in this area of law. In little more than five years, twenty-six jurisdictions have faced claims of wrongful pregnancy, wrongful birth, or both. Of those courts that have faced both, three have not distinguished wrongful pregnancy from wrongful birth in their analyses, while four have made such a

9. Typical tort issues include: allocation of risk and injury so as not to unduly burden the tortfeasor in proportion to his wrongdoing; application of public policies which might limit the award; and measurement of each damage element to avoid speculative, arbitrary, or inconsistent awards. See generally Moore, Wrongful Birth—The Problems of Damages Computation, 28 U. Mo. K.C.L 1 (1979).


11. Most courts agree that the plaintiff's award should include standard elements of damages, at least up to a point. Thus, a court might award damages for the unsuccessful operation, pain and suffering, medical costs of the pregnancy and birth, lost wages, and loss of consortium, if applicable. There is sharp disagreement, however, as to whether plaintiffs may recover damages for the costs of rearing the child. Compare Cockrum, 99 Ill. App. 3d 271, 425 N.E.2d 968 (1981) (awarding full damages, including rearing costs) with Wilczynski v. Goodman, 73 Ill. App. 3d 51, 391 N.E.2d 479 (1979) (awarding childbirth expenses only). See also Note, Wrongful Conception: Who Pays for Bringing Up Baby?, 47 Fordham L. Rev. 418 (1978); Note, Recovery of Child Support for Wrongful Birth, 47 Tul. L. Rev. 225 (1972). Under the standard damages rule, the element of child-rearing costs would logically be included, since the parents would not have incurred those costs but for the tortfeasor's act.

12. Statistics show that 178,000 tubal ligations were performed in 1971, which number increased to 670,000 in 1978. Appleson, Wrongful Birth Suits on the Rise, 67 A.B.A. J. 1255 (1981). See also infra note 15.

13. The only three states which do not distinguish between wrongful birth and wrongful pregnancy are:

New Jersey: "We see no difference between a so-called 'wrongful birth' action . . . and the so-called 'wrongful pregnancy' action . . . .” P. v. Portadin, 179 N.J. Super. 465, 470, 432 A.2d 556, 558 (N.J. Super. Ct. App. Div. 1981). The New Jersey Supreme Court declined to either approve or disapprove Portadin in Schroeder v. Pelkel, 87 N.J. 53, 69 n.2, 432 A.2d 834, 842 n.2 (1981). It might, however, have approved the lower court’s "no distinction” approach: “Procedural protections and penalties do not vary according to the presence or absence of physical deformities in the victim or defendant. It is life itself that is jealousy safeguarded, not life in a perfect state.” Berman v. Allan, 80 N.J. 421, 429-30, 404 A.2d 8, 13 (1979). In addition, the New Jersey Supreme Court, in a wrongful birth
distinction. Those sixteen jurisdictions which have considered one, but not both, of these causes of action, and others which will be forced to confront the issue in the near future, must decide whether to distinguish wrongful birth from wrongful pregnancy case, used wrongful pregnancy cases to "highlight the problem of assessing damages in wrongful conception [pregnancy], wrongful birth and wrongful life cases," evidently making no distinction between the types of damages problems each cause of action involves. Schroeder v. Perkel, 87 N.J. at 69 n.2, 432 A.2d at 841 n.2.


Michigan: Courts in both wrongful pregnancy and wrongful birth cases often refer to Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971), a wrongful pregnancy case. The Troppi court held that standard tort damages were applicable, and allowed child-rearing expenses with a benefits offset. The court placed heavy emphasis on the reasons behind the parents' decision. If, for example, a sterilization operation was performed to protect the woman's health, yet after the pregnancy "her health remained unimpaired, no damage was suffered." Id. at 248, 187 N.W.2d at 514. Eisenbrenner v. Stanley, 106 Mich. App. 357, 308 N.W.2d (1981), a subsequent wrongful birth case in Michigan also discussing damages, relied heavily on both wrongful birth and wrongful pregnancy cases, especially Troppi, a wrongful pregnancy case.

For another opinion recommending no distinction between the two causes of action, see Becker v. Schwartz, 46 N.Y.2d 401, 486 N.E.2d 807, 411 N.Y.S.2d 895 (1978), in which the dissent found that making any distinction was "drawing arbitrary and artificial boundaries," and recommended either full or no recovery in order to avoid these arbitrary distinctions. Id. at 412, 486 N.E.2d at 819, 411 N.Y.S.2d at 907 (Wachtler, J., dissenting in part).

14. The four states which do indicate a willingness to make the distinction are:

Texas: The Texas Supreme Court has heard only one case in this area recently. In Nelson v. Krusen, 635 S.W.2d 582 (Tex. Ct. App. 1982), aff'd, No. C-1429, slip op. (Tex. 1983), the court denied the wrongful birth claim because the statute of limitations had run. The Texas courts, however, approved such a claim in Terrell v. Garcia, 496 S.W.2d 124 (Tex. Ct. App. 1973), cert. denied, 415 U.S. 927 (1974), and Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975). In Jacobs, a wrongful birth case, the court distinguished wrongful pregnancy from wrongful birth: "The economic burden related solely to the physical defects of the child is a different matter which is free from [the objections present in wrongful pregnancy cases]. Texas cases have indicated this distinction between the cause of action which seeks damages for wrongful birth or life and the cause of action seeking recovery of those expenditures required because the child is deformed—even though the tort was causally related to birth itself and not to deformation alone." Id. at 849.

Wisconsin: The Wisconsin Supreme Court distinguished the two causes of action in Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W. 372 (1975): A Wisconsin wrongful
in awarding damages. The Illinois Appellate Court faces this problem now.

A brief look at the three states which do not separate wrongful pregnancy and wrongful birth illuminates some of the dangers inherent in failing to differentiate between the two causes of action. Inconsistent, arbitrary, and poorly-reasoned opinions plague these states' wrongful pregnancy and wrongful birth

Wisconsin: The Wisconsin Supreme Court distinguished the two causes of action in Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W. 372 (1975): A Wisconsin wrongful pregnancy case was "distinguished from the case at hand because the parents there sought to recover the entire expense of raising a normal, healthy but . . . unwanted child during its dependency. Here the parents sue only for the expense occasioned by the congenital defects." Id. at 775, 233 N.W.2d at 376.

Florida: In Moores v. Lucas, 405 So. 2d 1022 (Fla. Dist Ct. App. 1981), the court relied on the Texas and Wisconsin courts' distinction. In Public Health Trust v. Brown, 388 So. 1084, 1085 n.3 (Fla. Dist Ct. App. 1980), the court noted that an abnormal or unhealthy child poses a different set of problems than a healthy child. In the Florida Supreme Court opinion in this area, Ramey v. Fassoulas, 450 So. 2d 822 (Fla. 1984), the court relied on the Wisconsin and Texas courts' distinction in denying child-rearing costs for raising a healthy child. One judge pointed out the distinction: Wrongful pregnancy is "primarily distinguishable from . . . wrongful birth cases in that the parents . . . want a healthy child, whereas in wrongful conception [pregnancy] cases the parents do not want a child at all." Id. at 826 (Ehrlich, J., dissenting).

New York: A distinction between the two causes of action was noted in Sorkin v. Lee, 78 A.D.2d 180, 434 N.Y.S.2d 300 (1980): "It is one thing to tote up the medical bills and assess damages against a negligent physician for extraordinary unanticipated expenses resulting from the preventable birth of a defective baby. . . . It is quite another to assess him for the myriad costs of raising a normal, healthy child for some indefinite period in the future . . . ." Id. at 183, 434 N.Y.S.2d at 303. Becker v. Schwartz, 46 N.Y.2d 401, 486 N.E. 807, 411 N.Y.S.2d 895 (1978), is the latest opinion in this area from New York's high court, and points to the distinction: "Standing distinctly apart from claims based upon a wrongful conception . . . in which the essence of the wrong for which compensation is sought is the birth of a healthy and normal—albeit unplanned—child, plaintiffs' claims are premised upon the birth of a fully intended but abnormal child for whom extraordinary care and treatment is required." Id. at 410, 486 N.E.2d at 811, 411 N.Y.S.2d at 899.

Close to 200 articles have been written about this subject. It is interesting to note, however, that few commentators have addressed the issue of the distinction between wrongful birth and wrongful pregnancy. Commentators have instead focused initially on two basic issues: whether a wrongful birth [or pregnancy or life] cause of action should be recognized, and which damages formula should be used in wrongful birth [or pregnancy or life] cases. The remainder of the writings in this area are case comments. See, e.g., supra notes 4-6, 8.

A wrongful life and wrongful birth case involving a handicapped child is presently pending in the Illinois Appellate Court. Goldberg, Nos. 81-1450, 81-1962. (Ill. App. Ct., argued Feb. 16, Mar. 23, 1983). See infra notes 105-10 and accompanying text. The plaintiff appealed the dismissal of the wrongful life cause of action (No. 81-1450), and the defendants cross-appealed the allowance of the wrongful birth action (No. 81-1962). Only California and Washington have allowed recovery under the wrongful life cause of action. If the wrongful birth cause of action reaches the Illinois Supreme Court, the court must decide whether to use its "wrongful pregnancy analysis" from Cockrum, or distinguish the analyses and resulting damage awards. See supra note 3.
Wrongful Birth/Pregnancy cases. Such courts must often resort to distinctions based on extraneous, sometimes arbitrary issues such as the reasons the parents desired sterilization. In addition, in the four states which uphold the distinction between wrongful birth and wrongful pregnancy, the wrong damages formula is sometimes used.

Recently, in Cockrum v. Baumgartner, the Illinois Supreme Court limited damages in a wrongful pregnancy action to the cost of the birth of the child. The court has not as yet addressed the issue of damages for wrongful birth. When this issue is addressed, a key consideration will be whether the court should use the same analysis and resulting damages formula it used in Cockrum, or recognize the wrongful pregnancy/wrongful birth distinction in its determination of damages.

This note discusses the damages formula presently used in Illinois for wrongful pregnancy, as well as formulas used by other courts. Two important unanswered questions are then analyzed: whether Illinois should recognize a distinction between the wrongful birth and wrongful pregnancy causes of action, and, if so, which damages formula to use in wrongful birth cases. This note recommends that in wrongful birth cases, Illinois courts use the damages formula which allows recovery for the extraordinary expenses of raising a handicapped child.

17. See infra notes 107-52.

This approach will be primarily useful in cases in which the evidence of the reason for undergoing sterilization is unambiguous and overwhelming, as it is in this case. Where there is a mixture of motivations, and the socio-economic reasons are at least a but-for reason for undergoing the operation, the trier of fact will have to look to more direct, but perhaps less reliable, evidence of whether the birth of a child constitutes damage to the parents. Id. at 1555 n.12. Usually the parents' reasons are subjective, and not clear cut. This case was an exception, because the parents knew their child might be handicapped. It is unlikely that such an arbitrary basis for distinction would work in most other cases, however.

20. See supra note 16.
**BACKGROUND**

*Application of the Standard Tort Damages Formula*

Wrongful birth and wrongful pregnancy cases are typically brought as tort actions.\(^{21}\) Under the standard damages formula used in most tort cases, including wrongful birth and wrongful pregnancy actions,\(^{22}\) the injured plaintiff is returned to the posi-

21. An alternative cause of action also exists under a contract theory. It is interesting to note that Illinois courts hold that injuries to the mother of an unplanned child, conceived after a doctor's negligently performed vasectomy on the father, is a property injury, not a personal injury to the mother. Thus, Illinois' five year statute of limitations for contract actions, ILL. REV. STAT. ch. 110, ¶ 13-205 (1981), not the two year discovery statute of limitations against doctors, id. ¶ 13-212, is applied. This interpretation of the mother's injury as a property claim, however, would not help in the situation where the suit was based on medical malpractice and the four year maximum had been reached. See Doerr v. Villate, 74 Ill. App. 2d 332, 220 N.E.2d 767 (1966) (male plaintiff, after unsuccessful sterilization operation, sued under a breach of warranty cause of action).


A litigant generally brings a cause of action based under a contract theory only when faced with a tort statute of limitations which has run. See Moore, supra note 9, at 2, for an extensive discussion of theories under which wrongful birth and wrongful pregnancy suits have been brought. Illinois plaintiffs face a particularly short medical malpractice
tion he would have occupied had the injury not occurred.23 The victim receives compensation for all consequences flowing from the tortfeasor’s act. An injured plaintiff may be financially compensated for such expenses as medical costs, pain and suffering, and lost wages. Once paid for these losses, he is considered to be in the same legal position he occupied before the injury occurred.

In wrongful birth and wrongful pregnancy cases, one significant consequence flowing from the tortfeasor’s act is the child’s very existence.24 Some courts have therefore concluded that using the standard tort damages rule in a wrongful birth or wrongful pregnancy suit could produce particularly inappropriate results. Putting the parents in their original position had there been no birth or pregnancy would mean compensating them for all expenses resulting from the birth of their child, including the cost of supporting the child until he becomes self-supporting.25


24. See, e.g., Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967). Although the plaintiff was the infant, not its parents, the principle stated by the court is nonetheless applicable:

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 make 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 29, 227 A.2d at 692. See generally AM. JUR. (New Topic Service), Wrongful Life, § 65 (1979).

25. An equally inappropriate result would be to require mitigation of damages by adoption or abortion. At least one court has rejected this requirement. See, e.g., Cockrum v. Baumgartner, 95 Ill. 2d at 193, 447 N.E.2d at 385, cert. denied sub nom. Raja v. Michael
Confronted with these problems, some courts have searched for alternative damages formulas for these causes of action. Difficulties in choosing an appropriate damages formula arise, because the ideal formula must compensate the injured parties, yet neither overburden the tortfeasor nor stray too far from standard tort principles and established public policies. No single damages formula has been accepted by a majority of courts.

Courts generally have determined the award of damages in wrongful birth and wrongful pregnancy cases using one or more of four different formulas: damages for childbearing expenses only; damages for childbearing plus child-rearing expenses, with an offset for the benefits of parenthood; damages for childbearing plus child-rearing expenses with no benefits offset; and damages for the handicapped child’s extraordinary medical and caretaking expenses only.

Damages Limited To Childbearing Expenses

In 1983, the Illinois Supreme Court, in Cockrum v. Baumgartner, held that in wrongful pregnancy cases, parents may recover only childbearing expenses. In many other jurisdictions,
Wrongful pregnancy cases involving healthy children also limit damages to expenses of the pregnancy and birth. These damages generally include medical expenses, loss of wages for the wife, loss of consortium for the husband, pain and suffering for the wife, and the cost of the failed sterilization procedure, abortion, or birth control method.

In wrongful birth cases, no court has limited damages to childbearing expenses alone. Some courts, however, have denied childbearing expenses in wrongful birth cases where the parents had intended to conceive and deliver a child, although not a handicapped one. Other courts have included childbearing expenses in larger awards, reasoning that the parents would have aborted had they known of the handicap, and thus would not have incurred the pregnancy and birth-related expenses absent defendant’s negligence.

Damages for Child-Rearing: Benefits Offset

Six of the twenty-three jurisdictions which have considered wrongful pregnancy claims have allowed parents to recover childbearing expenses, plus damages for rearing and educating the child. These courts have imposed significant limitations on the amounts recoverable, however, by requiring an offset for the benefits of parenting, primarily the joy of sharing the child’s life. Only two of the twelve jurisdictions facing wrongful birth cases have used the benefits offset rule, which appears in section 920.

31. See supra note 7, discussing exceptions to the general rule that wrongful pregnancy cases involve only healthy children.
32. See, e.g., Hartke v. McKelway, 707 F.2d 1544, 1557 (D.C. Cir. 1983) (rearing expenses denied because plaintiff testified that after she discovered her unplanned pregnancy, which occurred after an unsuccessful sterilization, she felt the birth might possibly be a positive experience; court placed heavy emphasis on plaintiff’s reason for desiring to be sterilized). For other courts approving this formula in wrongful pregnancy cases, see supra note 27. For a recent commentary approving the use of this formula in determining damages, see Comment, Wrongful Pregnancy: Recovery for Raising A Healthy Child, 10 N. Ky. L. REV. 341 (1983).
34. See supra note 27.
37. These states are: Arizona, California, Connecticut, Michigan, Minnesota, and Pennsylvania. See supra note 27.
38. These states are: Pennsylvania and South Carolina. Id.
of the *Restatement (Second) of Torts*.\(^{39}\)

The Illinois Supreme Court, in *Cockrum v. Baumgartner*,\(^{40}\) expressly refused to use the benefits offset rule in a wrongful pregnancy case involving a healthy child. The Illinois Appellate Court had earlier attempted to apply the benefits offset rule in two wrongful pregnancy cases.\(^{41}\) The lower court’s losing position was championed by the dissent in the Illinois Supreme Court opinion in *Cockrum*, which stated that a jury should be given the flexibility to take numerous factors into consideration.

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39. The *Restatement (Second) of Torts* states that:

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. *Restatement (Second) of Torts* § 920 (1979). For strong criticism of the use of section 920, see Kashi, *Case of the Unwanted Blessing: Wrongful Life*, 31 U. MIAMI L. REV. 1409 (1977):

If the forced parent is willing to shoulder the enormous responsibility of parenthood, the law should not throw obstacles in his path but rather should endeavor to do everything in its power to assist him. If this places a difficult burden on the defendant, it is well to remember that he is a tortfeasor, and it is far more equitable to shift the burden to him than to the plaintiffs who placed their faith in him, or the innocent infant for whose birth he is responsible. Mason v. Western Pa. Hosp., 428 A.2d 1366, 1374 (Pa. Super Ct. 1981) (Brosky, J., concurring) (quoting Kashi, *supra*, at 1416-17).

The rule includes a provision requiring the benefit to be the same type of interest as the injury. Thus, if the parents claim emotional injury and corresponding damages for pain and suffering, the emotional benefits are of the same interest and may be offset. If the parents claim only pecuniary damages, however, and the benefits are typically characterized as emotional, there would be no offset under a strict application of section 920. One lower court in Illinois has acknowledged this same-interest provision. See, e.g., *Cockrum*, 99 Ill. App. 3d at 271, 425 N.E.2d at 968. The Illinois Supreme Court has refused to apply the benefits offset rule. See *Cockrum*, 95 Ill. 2d at 194, 447 N.E.2d at 385.

The same interest requirement of section 920 reads: “Limitation to same interest. Damages; resulting from an invasion of one interest are not diminished by showing that another interest has been benefitted.... Damages for pain and suffering are not diminished by showing that the earning capacity by the plaintiff has been increased by the defendant’s act.” *Restatement (Second) of Torts* § 920 comment b (1979). One judge reasoned: “A proper application of the (same interest) requirement in a wrongful pregnancy case would require that pecuniary harm of raising the child be offset only by corresponding pecuniary benefit, and emotional benefits of the parent-child relationship are applied as an offset only to corresponding emotional harm.” University of Ariz. Health Sciences Center v. Superior Ct., 136 Ariz. 579, 589, 667 P.2d 1294, 1304 (1983) (Gordon, J., concurring and dissenting).

40. 95 Ill. 2d at 194, 447 N.E.2d at 385.

41. Illinois cases advocating the use of the benefits offset rule include: Pierce v. DeGracia, 103 Ill. App. 3d 511, 513, 431 N.E.2d 738, 740 (1982); *Cockrum*, 99 Ill. App. 3d at 275, 425 N.E.2d at 972 (Linn, J. and Romiti, J., specially concurring), *rev’d*, 95 Ill. 2d 193,
in determining what damages to award.\textsuperscript{42} In no Illinois appellate court decision has the benefits offset rule been applied in a case involving a handicapped child.\textsuperscript{43}

**Full Damages for Child-Rearing: No Offset**

Several courts have allowed full damages for childbearing, rearing and educating the child, and emotional injury\textsuperscript{44} to the parents in both wrongful birth\textsuperscript{45} and pregnancy cases.\textsuperscript{46} The Illinois Supreme Court rejected this approach in \textit{Cockrum}, holding that as a matter of law a parent is not injured by the birth of a healthy child.\textsuperscript{47} The appellate court had allowed the plaintiffs full recovery for the cost of rearing their healthy child, relying on the traditional tort rule that a tortfeasor is liable for all injuries which are the proximate result of the tort.\textsuperscript{48} Moreover, in avoiding any use of the benefits offset rule, the appellate court relied on the distinction between the pecuniary damages plaintiffs sought and the emotional benefits of parenthood which the concurring justices wished to offset.\textsuperscript{49}

Other courts have severely criticized use of the full damages

\textsuperscript{42} The dissent stated:

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. \textit{Cockrum}, 95 Ill. 2d at 209, 447 N.E.2d at 393 (Clark, J., dissenting) (quoting Troppi v. Scarf, 31 Mich. App. 240, 257, 187 N.W.2d 511, 519 (1971)).

\textsuperscript{43} The benefits offset rule could be applied by the First District, as it was in \textit{Cockrum}, however, in a pending case. \textit{See supra} note 16 and accompanying text.

\textsuperscript{44} For a discussion of emotional damages in these cases, see Capron, \textit{supra} note 5, at 639; Note, \textit{Robak v. United States: A Precedent Setting Damage Formula for Wrongful Birth}, 58 CHI-KENT L. REV. 725, 738 (1982); Note, \textit{Father and Mother Know Best: Defining the Liability of Physicians for Inadequate Genetic Counseling}, 87 YALE L.J. 1488, 1513 (1978). A discussion of the topic of emotional damages is beyond the scope of this note.

\textsuperscript{45} \textit{See supra} note 27.

\textsuperscript{46} Id.

\textsuperscript{47} 95 Ill. 2d at 198, 447 N.E.2d at 388.

\textsuperscript{48} 99 Ill. App. 3d at 272-73, 425 N.E.2d at 969-70. Other courts have also relied on traditional torts analyses in awarding full damages. \textit{See, e.g., Robak v. United States}, 658 F.2d 471 (7th Cir. 1981) (applying Alabama law).

\textsuperscript{49} 99 Ill. App. 3d at 274, 425 N.E.2d at 970. The Illinois Supreme Court failed to address this point; however, both plaintiffs and defendants argued the point in their briefs. \textit{See also supra} note 39.
formula in both wrongful pregnancy and wrongful birth cases.¹⁵⁰ Most of these courts base this rejection on their refusal to recognize the birth of any child, healthy or handicapped, as anything but a blessing.¹⁵¹

**Damages Allowed for Extraordinary Expenses**

Some plaintiffs in wrongful birth cases have sought only damages for extraordinary medical and caretaking expenses.¹⁵² In other wrongful birth cases, courts have limited recovery to extraordinary expenses, regardless of what the plaintiffs seek.¹⁵³ Some courts have limited damages for parents of healthy children to childbearing expenses only, but later allowed extraordinary expenses to parents of handicapped children.¹⁵⁴ Typically, these courts reason that many of the policy barriers involved in cases where the parents are “blessed” with a healthy child disappear when the parents give birth to a child who will die within a few years or will lead a severely impaired life.¹⁵⁵

Confronted with the choice of four different damages formulas, with results ranging from very limited recovery to recovery of

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50. See, e.g., *University of Ariz.*, 136 Ariz. at 580, 667 P.2d at 1299.
51. Id.
55. See infra notes 136-45.
57. For example, a Tay Sachs baby usually dies within the first five years of life. See infra note 106.
58. Down’s Syndrome is often the abnormality giving rise to a claim of wrongful birth. Down’s Syndrome is defined as:

[A] syndrome of mental retardation associated with a variable constellation of abnormalities caused by representation of at least a critical portion of all chromosome 21 three times instead of twice in some or all hypoplastic face with short nose, prominent opicanthic skin folds, protruding lower hip, small rounded ears with prominent antihelix, fissure and thickened tongue, laxness of joint ligaments, pelvic dysplasia, broad hands and feet, stubby fingers . . . dry rough skin in older patients and abundant slack neck skin in newborn . . . .”

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full damages, courts vary greatly in their approaches to awarding damages. A major variable seems to be whether the child is handicapped or healthy. The Illinois Supreme Court has not yet addressed the issue of damages in a wrongful birth case.\(^{59}\)

Although not all courts make the distinction, the Illinois Supreme Court indicated in *Cockrum* that it might be willing to recognize a healthy as opposed to a handicapped child as a significant variable.

**Wrongful Pregnancy Damages in Illinois: *Cockrum v. Baumgartner***

*Cockrum v. Baumgartner*\(^{60}\) and its companion case, *Raja v. Tulsky*,\(^{61}\) were both suits in which healthy children were born as a result of improperly performed sterilization procedures. In *Cockrum*, the defendant doctor had negligently performed a vasectomy on the father of the unplanned child.\(^{62}\) Approximately two and one-half months later, the mother discovered she was pregnant, and subsequently gave birth to a healthy boy.\(^{63}\) In *Raja*, the plaintiff experienced signs of pregnancy five years after a tubal ligation. By the time the pregnancy was confirmed, it was too late to obtain a medically safe abortion.\(^{64}\) She subsequently gave birth to a healthy child.\(^{65}\)

In both *Cockrum* and *Raja*, the parents sued their doctor and the hospital at which the procedure was performed in tort, seeking damages for medical expenses, time lost in having the child, and the future expenses of raising the child.\(^{66}\) In both cases, the trial court dismissed the counts seeking damages for the costs raising and educating the child. The cases were consolidated on appeal.\(^{67}\)

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59. See *supra* note 16.
61. Id.
62. Id. at 195, 447 N.E.2d at 386.
63. Id.
64. Id., 447 N.E.2d at 387. She was examined and told by the defendant hospital's clinic employees that she was not pregnant. Two months later she returned to the clinic after having experienced additional symptoms of pregnancy. The clinic then informed the plaintiff that she was indeed pregnant.
65. Id.
66. Id. at 196, 447 N.E.2d at 387.
67. Id.
The Illinois Appellate Court

The Illinois Appellate Court issued a split decision. The majority held that the plaintiffs should receive the full measure of damages caused by the defendants' negligence. The court stated that in awarding damages a benefits offset should not be used: "Section 920 clearly provides that a benefit to the plaintiff caused by defendant's tortious act may be considered in mitigation only where the benefit is to the same interest which was harmed." The court thus found section 920 inapplicable, reasoning that the rewards of parenthood involve emotional interests, while the parents' injuries in Cockrum involved financial interests.

In their concurring opinions, Justices Linn and Romiti stated that the benefits offset rule should have been applied. Both reasoned that parenthood should not be considered a benefit which automatically outweighs all injuries, but that the jury should have been allowed to consider all of the various factors in each plaintiff's case. Justice Linn pointed out that the "application of the special benefits rule in these cases will grant the trier of fact a degree of flexibility in calculating damages . . . ."

The Illinois Supreme Court

The Illinois Supreme Court, with two justices dissenting, reversed the appellate court, holding that the plaintiffs' damages were limited to childbearing expenses. The court apparently

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68. 99 Ill. App. 3d at 274, 425 N.E.2d at 970.
69. Id.
70. Id. Accord Custodio v. Bauer, 251 Cal. App. 2d 303, 323, 59 Cal. Rptr. 463, 476 (1976). See also Note, Judicial Limitations on Damages Recoverable For the Wrongful Birth of a Healthy Infant, 68 Va. L. Rev. 1311, 1326 (1982). Cf. Hartke, 707 F.2d at 1558 n.16 ("The overwhelming majority of courts that have invoked the benefits rule in wrongful conception cases have rejected the strict terms of the Restatement approach.").
71. 99 Ill App. 3d at 275-77, 425 N.E.2d at 971-73 (Romiti, J., and Linn, J., specially concurring).
72. Id. Factors include family size, income, the ages of the parents, and marital status.
73. Id. at 277, 425 N.E.2d at 973.
took into account that the plaintiffs' children were healthy, not handicapped, and repeatedly emphasized the healthy condition of the Cockrum and Raja children.\textsuperscript{75} The court found that there was "no indication that the children are other than normal and healthy"\textsuperscript{76} and emphasized the fact that many courts have shown "an unwillingness to hold that the birth of a normal, healthy child can be judged to be an injury to parents."\textsuperscript{77} The court also found that the "costs of rearing a normal and healthy child cannot be recovered as damages to the parents . . . ."\textsuperscript{78} Moreover, the cases on which the court relied primarily involved healthy children.\textsuperscript{79}

\textbf{Damages Issues}

The Illinois Supreme Court addressed a number of issues in holding that plaintiffs could recover damages only for childbearing expenses when a healthy child was involved.\textsuperscript{80} First, the court found certain elements of plaintiffs' claims too speculative to warrant an award of damages, because the amounts involved were too difficult to prove.\textsuperscript{81} The court noted that courts in other jurisdictions have split on the question of whether the damages in these sorts of cases are too speculative.\textsuperscript{82}

\begin{footnotes}
\textsuperscript{75} See infra note 110.
\textsuperscript{76} 95 Ill. 2d at 196, 447 N.E.2d at 387 (emphasis added).
\textsuperscript{77} Id. at 198, 447 N.E.2d at 388 (emphasis added).
\textsuperscript{78} Id. at 199, 447 N.E.2d at 389 (emphasis added).
\textsuperscript{79} Conspicuous by its absence was any discussion of Robak v. United States, 658 F.2d 471 (7th Cir. 1981) (applying Alabama law), the first federal court of appeals decision in this area of law. Robak, unlike Cockrum, involved a handicapped child. The failure of the court to mention Robak, except in regard to mitigation of damages, is consistent with the court's choice of precedent dealing only with healthy children.
\textsuperscript{80} 95 Ill. 2d 193, 447 N.E.2d 385 (1983). Some arguments against allowing substantial damages, which are very similar to the arguments relied on in Cockrum, are discussed in Moore, supra note 9, at 4-12.
\textsuperscript{81} 95 Ill. 2d at 198, 447 N.E.2d at 388 (citing Sorkin v. Lee, 78 A.D.2d 180, 434 N.Y.S.2d 300 (1980)).
The _Cockrum_ court also expressed concern about the effect of the child’s discovery of his parents’ pursuit of a tort claim. The child could conclude he was “unwanted” and that his parents were, in fact, awarded damages to compensate them for his presence in their lives. The court found that awarding damages for the conception or birth of the “unwanted” child would subvert the state’s public policy, which “commands the development and preservation of family relations.” The use of the benefits offset rule was viewed as particularly offensive to the public policy which requires the preservation of family relations, which the court interpreted as requiring “that the parents demonstrate not only that they did not want the child but that the child has been of minimal value to them.” While some members of the judiciary in other jurisdictions have shared the _Cockrum_ court’s concern for potential psychological harm to the child and have relied on this factor in denying or limiting damages, other courts are in accord with the _Cockrum_ dissent and have dismissed the notion of psychological harm with little or no difficulty.

The court noted that an award of anything beyond childbearing expenses for a healthy child would unduly burden the defendant. Further, damages for child-rearing expenses would allow the plaintiffs to enjoy the benefits of parenthood, while shifting all or some of the financial burden of raising the child to the

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J., concurring), _vacated_, 499 Pa. 484, 453 A.2d 974 (1982); _Moore_, supra note 9, at 6 (discussing three weaknesses in this argument: first, the law permits awards in other factual settings in which it is difficult to put a monetary amount on an injury; second, statistics are available for determining the cost of raising a child; and, third, it is unjust to withhold all relief when precise damages are hard to calculate). For a recent wrongful life case discussing speculative damages, see _Harbeson v. Parke-Davis_, Inc., 98 Wash. 2d 460, 656 P.2d 483 (1983).  

83. 195 Ill. 2d at 198, 447 N.E.2d at 388 (citing _Wilbur v. Kerr_, 275 Ark. 239, 628 S.W.2d 568 (1982)).

84. _Id_. at 201, 447 N.E.2d at 390.

85. _Id_. at 202, 447 N.E.2d at 390.


The court rejected completely the use of the benefits offset rule,\(^9\) noting that the burden on the defendant will often be disproportionate to his culpability and would thus mean a windfall for the plaintiffs.\(^9\)

The court was also concerned that damages for child-rearing “would open the door to false claims and fraud.”\(^9\) The Cockrum court noted that other courts have shown a similar concern, finding that wrongful birth and wrongful pregnancy actions are very tempting to the unscrupulous.\(^9\)

In addition, the Cockrum court addressed several public policies in justifying its decision to limit damages in wrongful pregnancy cases involving healthy children. The court found the “right to privacy” defined in \textit{Roe v. Wade}\(^9\) and \textit{Griswold v. Connecticut}\(^9\) irrelevant to the issue of whether damages may be recovered under the fact situation present in Cockrum for expenses after the birth of the child.\(^9\) By contrast, the appellate court in Cockrum had found these policies highly relevant, because the “right of privacy” recognized in \textit{Roe} and \textit{Griswold} encompasses the couple’s right to decide whether they will have child an issue inherent in wrongful birth and wrongful pregnancy cases. In the appellate court’s view, the violation of this

\(^{89}\) \textit{Cockrum}, 95 Ill.2d at 198, 447 N.E.2d at 388.

\(^{90}\) \textit{See supra} text accompanying notes 37-43, discussing the benefits offset rule.

\(^{91}\) \textit{See}, e.g., Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979); Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974).

\(^{92}\) 95 Ill. 2d at 198, 447 N.E.2d at 388 (citing Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974); Beardsley v. Wierdsma, 650 P.2d 288 (Wyo. 1982)).

\(^{93}\) \textit{University of Ariz.}, 136 Ariz. 579, 588, 667 P.2d 1294, 1302-03 (1983) (Gordon, J., concurring and dissenting) (citing Cox v. Stretton, 77 Wis. 2d 155, 352 N.Y.S.2d 834 (1974) (cause of action by the unplanned child’s siblings, who claimed they now received less care and financial support was dismissed)).

\(^{94}\) 410 U.S. 113 (1973) (woman's right to choose abortion). Many courts have found \textit{Roe} and \textit{Griswold} highly relevant in wrongful birth, wrongful life, and wrongful pregnancy cases. \textit{See}, e.g., Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971); Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977); Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976). The Court, in \textit{Roe}, stated that:

Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it.

\(^{34}\) U.S. at 153.

\(^{95}\) 381 U.S. 479 (1965) (couple's right to choose to use contraceptives).

\(^{96}\) 95 Ill. 2d at 202, 447 N.E.2d at 390.
right results in an injury which should be compensated.97

Another public policy issue considered by the court was that an award of damages could lead to the conclusion "that a child can be considered an injury."98 Such a conclusion would offend "fundamental values attached to human life."99 Moreover, the court stated, "[I]n a proper hierarchy of values, the benefits 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."100

97. 99 Ill. App. 3d at 273, 425 N.E.2d at 970. Typical of many courts' analyses of these issues, one court articulated the applicability of Supreme Court abortion and contraception cases to wrongful birth and wrongful pregnancy: "Public policy and social conscience no longer dictate judicial blindness and inaction with respect to the plight of a woman who has wrongfully been denied the opportunity to determine her destiny in whether or not to give birth to a gravely handicapped infant." Berman v. Allan, 80 N.J. 421, 436, 404 A.2d 8, 16 (1979) (Handler, J., concurring).

98. 95 Ill. 2d at 198, 447 N.E.2d at 388. This same view was expressed in Wilczynski, 73 Ill. App. 3d at 62, 391 N.E.2d at 487.

99. 95 Ill. 2d at 198, 447 N.E.2d at 388.


The Cockrum court noted that an earlier Illinois Appellate Court wrongful pregnancy case had relied heavily on the Illinois Abortion Act's stated policy of protecting human life. 95 Ill. 2d at 201, 447 N.E.2d at 389 (citing Wilczynski, 73 Ill. App. 3d at 62, 389 N.E.2d at 479). The Wilczynski court discussed abortion cases extensively, finding them inapplicable because of the Illinois' stated "pro-life" policy. The Wilczynski court, like the Illinois Supreme Court in Cockrum, limited damages to pregnancy and birth related costs. Illinois' unusual statutory "pro-life" policy is found in the state's Abortion Act. Section 1 of the Act begins with a strong statement:

It is the intention of the General Assembly of the State of Illinois to reasonably regulate abortion in conformance with the decisions of the United States Supreme Court of January 22, 1973 [Roe]. Without in any way restricting the right of privacy of a woman or the right of a woman to an abortion under those decisions, the General Assembly of the State of Illinois do solemnly declare and find in reaffirmation of the longstanding policy of this State, that the unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child's right to life and is entitled to the right to life from conception under the laws and Constitution of this State. Further, the General Assembly finds and declares that longstanding policy of this state to protect the right to life of the unborn child from conception by prohibiting abortion unless necessary to preserve the life of the mother is impermissible only because of the decision of the United States Supreme Court and that, therefore, if those decisions are ever reversed or modified or the United States Constitution is amended to allow protection of the unborn then the former policy of this State to prohibit abortions unless necessary for the preservation of the mother's life shall be reinstated.

Finally, the *Cockrum* court noted that under the standard tort damages formula, a defendant should be liable for all of the costs incurred by plaintiffs as a result of the tortfeasor’s conduct.\(^1\) Although the dissent considered this standard appropriate, with an offset for benefits, the majority held the rule inapplicable in wrongful pregnancy cases.\(^2\) The court emphasized the need to draw the line in the determination and award of tort damages,\(^3\) observing that many courts agree that the standard rule does not fit the wrongful pregnancy and wrongful birth situations.\(^4\)

**PENDING QUESTIONS IN ILLINOIS**

Two major questions remaining in Illinois are whether Illinois courts will recognize a distinction between wrongful birth and wrongful pregnancy cases, and, if so, what damages formula Illinois will use for wrongful birth suits. The urgency of these questions is exemplified by the case of *Goldberg v. Ruskin*,\(^5\) now pending before the Illinois Appellate Court. In *Goldberg*, a baby boy born with Tay Sachs disease\(^6\) died at age two and one-half. The parents were both Jewish and of Eastern European descent, thus at a high risk of being Tay Sachs carriers.\(^7\) The parents claimed that the doctor should have inquired about their ethnic background and should have advised them of the risks, thus giving them the opportunity to obtain simple tests and an abortion if these tests showed that the baby did in fact have Tay

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1. 95 Ill. 2d at 197, 447 N.E.2d at 390.
2. *Id.*
3. “Every injury has ramifying consequences, like the ripplings of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree.” *Cockrum*, 95 Ill. 2d at 197, 447 N.E.2d at 390 (quoting Tobin v. Grossman, 24 N.Y.2d 609, 619, 249 N.E.2d 419, 424, 301 N.Y.S.2d 554, 561 (1969)).
4. *See supra* notes 21-25 and accompanying text.
6. Tay Sachs can be detected by a simple blood test. The disease has been defined as:
   
   [A]n invariably fatal disease of the brain and spinal cord that occurs in Jewish infants of eastern European ancestry. A diseased child appears normal at birth, but, at four to six months, its central nervous system begins to degenerate, and it suffers eventual blindness, deafness, paralysis, seizures, and mental retardation. The life expectancy of an afflicted child is two to four years.

Sachs disease.\textsuperscript{108} The trial court struck and dismissed with prejudice Count I, the child’s wrongful life claim.\textsuperscript{109} The court refused to dismiss the parents’ wrongful birth claim, however, and held that the extraordinary medical expenses incurred by the parents were recoverable. This case is presently on review before the Illinois Appellate Court.

In analyzing how Illinois courts should determine damages in wrongful birth cases, it may be useful to examine more closely the differences between wrongful birth and wrongful pregnancy causes of action. Of particular importance is whether the wrongful pregnancy damages analysis utilized by the Illinois Supreme Court in \textit{Cockrum} is suitable for wrongful birth cases, such as \textit{Goldberg}, under Illinois law. Courts which have refused to distinguish between wrongful birth and wrongful pregnancy have often become entangled in inconsistent analyses, resulting in arbitrary judgments and little or no guidelines for future courts and litigants.\textsuperscript{110} Illinois should thus take care to avoid these problems by differentiating between wrongful birth and wrongful pregnancy claims in determining the appropriate award of damages.

\textsuperscript{108} Id.

\textsuperscript{109} Id.

\textsuperscript{110} An example of one such state is New Jersey. An extensive analysis of New Jersey wrongful birth and wrongful pregnancy decisions is beyond the scope of this article. The New Jersey cases are used merely to show the danger of failing to carefully distinguish between two emerging tort causes of action, wrongful pregnancy and wrongful birth. New Jersey appellate courts have heard four wrongful birth and three wrongful pregnancy cases, five of which have occurred during the past five years. The various holdings include: no recovery for medical costs allowed in a wrongful birth suit, but recovery for emotional costs allowed, Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979); no recovery for any costs, including birth-related expenses, allowed in a wrongful pregnancy case, in accordance with \textit{Berman}, J.P.M. v. Schmid Laboratories, 178 N.J. Super. 122, 428 A.2d 515 (1981); no wrongful birth cause of action exists, Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967); wrongful birth cause of action exists but damages issue cannot be reached because of evidentiary problems, Comras v. Lewin, 183 N.J. Super. 42, 443 A.2d 229 (1982); wrongful birth damages include extraordinary medical expenses, Schroeder v. Perkel, 87 N.J. 53, 432 A.2d 834 (1981); wrongful pregnancy damages include full damages with a benefits offset, Betancourt v. Gaylor, 136 N.J. Super. 465, 432 A.2d 556 (1981); and wrongful pregnancy damages limited to pregnancy and birth-related expenses, P. v. Fontadin, 179 N.J. Super. 465, 432 A.2d 556 (1981).

For an excellent discussion of the general confusion in this area and an extremely well-reasoned opinion, see generally \textit{Harbeson} v. Parke-Davis, Inc., 656 P.2d 483 (Wash. 1983). The \textit{Harbeson} court, in order to avoid confusion, used the four elements of any negligence cause of action: duty, breach, proximate cause, and injury. \textit{Id.} at 487.
The Non-Speculative Nature of Extraordinary Damages

Extraordinary damages are not overly speculative in wrongful birth cases. The medical expenses of a handicapped child and the costs of such a child’s special education and caretaking needs can be calculated with relative ease. One court, in distinguishing wrongful birth cases from wrongful pregnancy claims, stated that wrongful birth expenses “lie within the methods of proof by which the courts are accustomed to determining awards in personal injury cases.”

New Jersey courts, in refusing to distinguish wrongful pregnancy and wrongful birth causes of action, have not been consistent in their treatment of extraordinary damages. For example, the New Jersey Supreme Court found all but emotional damages too speculative in one wrongful birth case, holding that even the medical expenses of raising plaintiffs’ Down’s Syndrome child were speculative and disproportionate to defendant’s wrongdoing. Only two years later, the same court allowed damages for medical expenses, finding medical expenses not overly speculative, stating, in direct contradiction to its language two years earlier, that the previous case did not address the issue of medical expenses. Similarly, a New Jersey appellate court, in a wrongful pregnancy case, relying on the earlier New Jersey Supreme Court case, allowed medical expenses incurred during

111. For Illinois’ treatment of speculative damages in another situation, see, e.g., Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 457 N.E.2d 1 (1983) (discussing damages under a bystander’s cause of action for negligent infliction of emotional distress).

112. Jacobs v. Theimer, 519 S.W.2d 846, 849 (Tex. 1975). It is interesting to note that another court also applied this reasoning to wrongful pregnancy cases: “We think juries in tort cases are often required to assess . . . intangible factors, both emotional and pecuniary, and see no reason why a new rule should be adopted for wrongful pregnancy cases.” University of Arizona Health Sciences Center v. Superior Court, 136 Ariz. 579, 585, 667 P.2d 1294, 1301 (1983). That court also stated that “uncertainty as to the amount of those damages will not preclude recovery and is a question for the jury.” Id.


115. Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1977): “As noted earlier, the first item sought to be recompensed is the medical and other expenses . . . .” Id. at 432, 404 A.2d at 14 (emphasis added).

116. The dissent in Schroeder pointed out this inconsistency: “Berman expressly rejected plaintiffs’ claims for medical expenses . . . .” 87 N.J. at 72, 432 A.2d at 843 n.1 (Schreiber, J., dissenting).
the pregnancy and delivery. Another New Jersey appellate court disapproved such limited damages in a wrongful pregnancy case, instead awarding full damages, including the rearing of the healthy child, and stating that the wrongful birth damages are actually more speculative than wrongful pregnancy damages.

No Emotional Harm to Child in Awarding Extraordinary Damages

Awarding damages now in a wrongful birth suit will not later harm the child emotionally. Most children would be able to understand the purpose of a lawsuit designed to help their parents ease the financial burden of the child's handicap. To minimize the effect on the child, some courts have addressed parts of their opinions to the child, cautioning him not to be upset by any knowledge of the suit. Some parents file suit under the name "Anonymous."

In addition, many of the children born with such severe conditions as Tay Sachs disease, Down's Syndrome, or Rubella Syndrome, are not capable of understanding, and therefore being harmed by, the knowledge that their parents would have aborted them rather than have them live severely impaired, and often quite short, lives. It is true that a few of those who live long enough and are not too severely handicapped might possibly understand. The majority, however, will not. The potential for

119. Furthermore, "there is a distinct difference between being unplanned and unloved, and by the time the child is old enough to understand . . . he should have independent evidence of the nature of his parents' feelings toward him." Moore, supra note 9, at 11.
120. See, e.g., Rieck v. Medical Protective Co., 69 Wis. 2d 766, 770, 219 N.W.2d 242, 245-46 (1975): "[W]e do not understand this complaint as implying any present rejection or future strain upon the parent-child relationship. Rather we see it as an endeavor on the part of clients and counsel to determine the outer limits of physician liability . . . ." This language is quoted in White v. United States, 510 F. Supp. 146, 150 (Dist. Ct. Kan. 1981) (applying Georgia law), addressed to the child: "To Elijah, who may some day read this opinion and question the purpose of his family's actions . . . ." See also Coleman v. Garrison, 349 A.2d 8, 14 (Del. 1975): "We say to him [the child] and we emphasize this, that we regard this case, not as one founded on rejection of him as a person . . . ."
122. One judge, however, felt that a "few are too many." University of Ariz., 136 Ariz.
the child of wrongful birth plaintiffs to be hurt by the knowledge of his parents' suit is thus significantly less than the harm the Cockrum court foresaw a healthy child experiencing upon learning that his parents never planned to conceive him. Moreover, even in wrongful pregnancy cases, some courts have remained unconvinced "that the effect on the child will be significantly detrimental in every case, or even in most cases... [W]e think the parents, not the courts, are the ones who must weigh the risk."123

The New Jersey courts are silent on this issue, in contrast to most other courts addressing wrongful pregnancy causes of action.124 The New Jersey courts' silence may be a result of the difficulty in applying a wrongful pregnancy analysis to a wrongful birth cause of action. The idea of a three-year old child dying of Tay Sachs Disease or a severely retarded thirty-year old with Rubella worrying about his parents' damages award seems absurd. The same analysis cannot be applied to the two different causes of action.

**Defendants Not Unreasonably Burdened by Extraordinary Damages**

Awarding substantial damages does not unreasonably burden defendants in wrongful birth cases. Admittedly, the burden on the defendant is often much greater in the case of a handicapped child than in the case of a healthy child.125 Although a Tay Sachs baby usually lives less than five years126 and might therefore have limited expenses, a Down's Syndrome child often lives a relatively long life, and requires a great deal of financial support. Often Down's children never become self-supporting, even

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123. *University of Ariz., id.* at 585, 667 P.2d at 1300 (citing Hartke v. McKelway, 707 F.2d 1544 (D.C. Cir. 1983)).
125. It is interesting to note in this context that Illinois courts do not find it unreasonable to burden a father with support payments even when he is denied all benefits of parenthood, custody, visitation, etc. See, e.g., Finley v. Finley, 81 Ill. 2d 317, 410 N.E.2d 12 (1980); In re Marriage of Feliciano, 103 Ill. App. 3d 666, 431 N.E.2d 1120 (1981); Huckaby v. Huckaby, 75 Ill. App. 3d 195, 393 N.E.2d 1256 (1979).
126. See *supra* note 106.
as adults. A court might therefore carefully weigh the injury caused by the tortfeasor against the financial burden he will be asked to carry if full damages are awarded to the plaintiffs. One court relied on the fact that the enormity of the financial burden upon the negligent defendant was not present because the plaintiff's child had Tay Sachs disease and would not live long. The child's "life was measured in months, and the cost of her care and treatment was relatively inexpensive."\footnote{127}

The New Jersey courts differ on the question of what an undue burden on a defendant is. One wrongful pregnancy court found child-rearing expenses disproportionate to the defendant's tortious act,\footnote{128} while a second wrongful pregnancy court did not.\footnote{129} One wrongful pregnancy court found all medical and child-rearing expenses out of proportion,\footnote{130} while a second wrongful birth court found medical expenses proportionate to the tortious act, and wrongful pregnancy rearing expenses disproportionate.\footnote{131}

A more consistent analysis would have resulted had wrongful pregnancy and wrongful birth been distinguished. The doctor's negligence might be in failing to diagnose a pregnancy, or it might be in convincing a woman with Rubella that she only has an allergy. The doctor's burden can hardly be measured without looking at the differences in the negligent act and the injury which resulted.

\textit{Less Potential for False Claims When Court Awards Extraordinary Damages}

Awarding damages would not create a potential for false claims in wrongful birth cases. Suits involving handicapped children will not involve such high risks of fraud, since the inju-

\footnotesize{
127. Naccash v. Burger, 223 Va. 406, 415, 290 S.E. 825, 830 (1982). That court went on to state that even if an extended life were anticipated, damages should not automatically be denied: "Even so, we do not necessarily agree that, if liability is established and the damages claimed are compensable and just, the court should perform a balancing test between competing economic interests in determining whether an injured party is entitled to a particular category of damages."
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ries are more easily proved and the damages less speculative. Concerns over fraudulent claims and floods of litigation have arisen before, and the Illinois courts have not allowed such concerns to block a just award of damages. One Illinois court, in a different area of torts, pointed out the importance of continuing this policy.

The New Jersey courts have remained silent on the issue of fraudulent claims, in contrast to many other courts considering claims in the area. Without making a distinction between wrongful pregnancy and wrongful birth, the question of the likelihood that fraudulent claims might be brought is difficult to analyze, and perhaps simply easier for some courts not to address at all.

**Public Policy Issues in Awarding Extraordinary Damages**

Public policy does not preclude substantial damage awards in wrongful birth suits. Illinois courts could reasonably find *Roe v. Wade* and *Griswold v. Connecticut* applicable in wrongful birth cases, perhaps more so than in wrongful pregnancy cases. Certainly the parents of a potentially handicapped child are more likely to choose to abort, and perhaps that choice plays a far more vital role when a parent is told, or should have been told, that the fetus suffers from a serious or even fatal disease.

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134. *Id.*
137. 381 U.S. 479 (1965). The *Roe* and *Griswold* decisions have been held applicable by some courts on the theory that the doctor's negligence precludes any parental decision to abort the child. *See, e.g.*, Phillips v. United States, 508 F. Supp 537, 542-43 (D.S.C. 1980). *See supra* notes 94-97.
138. *See supra* notes 94, 100.
139. *See Gildiner v. Thomas Jefferson Univ. Hosp.*, 451 F. Supp. at 696 (E.D. Pa. 1978). The defendant in *Gildiner* stated that the wrongful birth cause of action recognizes the denial of a chance to abort and argued that this encouraged a "Fascist-Orwellian societal attitude of genetic purity." *Id.* at 696. The court disagreed, pointing out that the main value of genetic testing programs "is based on the opportunity of parents to abort
The New Jersey courts, like most courts, find public policy regarding abortion and contraception an important consideration in wrongful birth cases. The New Jersey Supreme Court has recognized a woman’s right to decide whether to bear a handicapped child, but has never addressed the issue in a wrongful pregnancy case. This is probably because the analyses must differ. In a wrongful birth claim, for example, a major reason for requiring the medical community to avoid negligence in genetic testing is so that the woman can choose to abort if she feels it is necessary. The reasoning cannot be applied to wrongful pregnancy. The New Jersey courts simply create confusion by attempting to treat the two causes of action similarly.

Additionally, the Illinois Supreme Court’s refusal to recognize a human life as a compensable injury might be tempered in the case of a handicapped child where the injury done to the parents is much clearer. Most Illinois decisions show a strong regard for life, yet some Illinois decisions also show a clear recognition that not all life is an automatic blessing. It is perhaps easier to find some injury to the parents when their child faces an impaired life or a life shortened by a fatal disease than when their child is born healthy and strong. Even courts which have held that they cannot measure life with defects against no life at all in a child’s wrongful life case have found the parents’ wrong-

afflicted fetuses, within appropriate time limitations.” Id. The court went on to find that society “has an interest in insuring that genetic testing is properly performed and interpreted.” Id. at 695-96.

140. “Inherent in all the cases are sensitive issues concerning procreation and the right to prevent it by contraception or abortion.” Schroeder v. Perkel, 87 N.J. 53, 67, 432 A.2d 834, 841 (1981).

141. Id. at 53, 432 A.2d at 841.

142. Consistent with Illinois’ strong pro-life public policy, see supra note 100, the Illinois judiciary offers great protection to the unborn child injured through pre-natal torts, and even pre-conception torts. See, e.g., Renslow v. Mennonite Hosp., 67 Ill. 2d 348, 367 N.E.2d 1250 (1977) (mother injured by negligently administered blood transfusion eight years before plaintiff child conceived). Renslow has been cited in various discussions of wrongful birth, wrongful life, and wrongful pregnancy. See, e.g., Wagner, Wrongful Life: Is Denial of this Cause of Action Consistent with Current Tort Law?, 29 MED. TRIAL TECH. Q. 137, 142 n.25 (1983); Note, Torts—Preconception—Infant’s Right to Cause of Action, 50 TENN. L. REV. 195, 200-01 (1982).

143. See generally In re Estate of Brooks, 32 Ill. 2d 361 (1965) (supporting Illinois citizens’ right to refuse medical treatment for any reason whatsoever).

144. See generally Helvey v. Rednour, 86 Ill. App. 3d 154, 408 N.E.2d 17 (1980) (discussing Illinois policy regarding rights of retarded persons in the areas of contraception, procreation, and adoption).
ful birth claim "a different matter which is free from the above objection."

Moreover, the public policy requiring the preservation of family relationships has little relevance to situations where, for example, a Tay Sachs baby will die before the lawsuit is resolved, or the Down's baby will be raised in an institution because of his severe mental and physical handicaps. Family relationships can sometimes best be preserved when the family is given the financial support it so badly needs for the extraordinary expenses created by defendant's negligence.

**Appropriateness of Extraordinary Damages in Wrongful Birth Cases**

Finally, the standard damages rule that a tortfeasor is liable for all damages does fit the circumstances in a wrongful birth factual situation. In the *Cockrum* case, which involved a healthy child in a wrongful pregnancy suit, the court noted that the standard tort damages rule was "not suited for the circumstances in this character of case." Perhaps under different circumstances, such as those in a typical wrongful birth case, the rule would be more appropriate. The injury to the parent bringing a wrongful birth case is more apparent, and the courts are more likely to recognize it. Once the injury is acknowledged, the damages flow as they would from any other tort.

The New Jersey courts appear unsure of whether the standard tort damages rule applies in either wrongful birth or wrongful pregnancy. They have held that: the standard damages rule must be used, thus including the cost of rearing the healthy child; the standard damages rule cannot be used, thus precluding child-rearing costs; and the standard damages rule cannot be used for full damages with a handicapped child. Without distinguishing between wrongful pregnancy and wrongful birth, courts and litigants are left unsure as to whether standard tort damages are available. The dangers of blurring the two causes of action are demonstrated by these inconsistencies.

146. 95 Ill. 2d at 203, 447 N.E.2d at 389.
RECOMMENDATIONS FOR AWARDING DAMAGES IN ILLINOIS WRONGFUL BIRTH CASES

Illinois would be well-advised to pattern its damages formula after those jurisdictions which carefully distinguish between wrongful pregnancy and wrongful birth actions. Illinois should also continue to allow juries to decide awards without limiting wrongful birth awards to minimal damages. In addition, Illinois should consider using a trust fund, as one federal court did, to facilitate payments made for raising the handicapped child in a wrongful birth suit. Finally, as an alternative to awarding extraordinary damages to wrongful birth plaintiffs, Illinois could modify the liberality of the Wisconsin and Texas approaches by using the benefits offset rule.

Awarding Extraordinary Medical and Caretaking Expenses

Illinois should follow the approach employed in Texas and Wisconsin, which both distinguish between handicapped and healthy children in their awards of damages. While limiting or denying damages in wrongful pregnancy cases, which involve healthy children, both Texas and Wisconsin award extraordinary damages in wrongful birth cases, which involve handicapped children.

In Rieck v. Medical Protective Co., a wrongful pregnancy claim, for example, the Wisconsin Supreme Court denied all damages to plaintiffs. The parents had filed their claim after a healthy boy was born following the doctor's failure to diagnose a pregnancy during its early stages so that plaintiffs could obtain an abortion. The Rieck court expressed many of the same concerns as did the Cockrum court, including those regarding speculative damages, unreasonable burdens on defendants, potential for fraudulent claims, and public policy questions.

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150. The same, of course, might be done in a wrongful life count, such as in Goldberg, Nos. 81-1450, 81-1962 (Ill. App. Ct., argued Feb. 16, 1983, Mar. 23, 1983).
151. See infra notes 155-168 and accompanying text.
152. Id.
153. 64 Wis. 2d 514, 219 N.W.2d 242 (1974).
154. Id. at 519, 219 N.W.2d at 247. The extremely weak factual situation might account for the court's refusal to award even birth related expenses, since the Cockrum court did award such expenses where the factual setting was stronger.
155. Id.
156. Id.
One year later, however, the Wisconsin Supreme Court, in *Dumer v. St. Michael's Hospital*,157 awarded extraordinary damages in an action for medical and hospital costs and expenses for supportive care incurred as a result of a wrongful birth child’s deformities. The parents had filed a claim after defendants negligently diagnosed the mother’s rubella as an allergic reaction. Defendants did not know that the mother was pregnant at the time the misdiagnosis was made.158 The *Dumer* court carefully distinguished *Rieck*, wherein the parents had “sought to recover the entire expense of raising a normal, healthy but . . . unwanted child during its dependency. Here the parents sue only for the expense occasioned by the congenital defects.”159

Texas has given similar treatment to wrongful birth and wrongful pregnancy cases. In *Terrell v. Garcia*,160 a wrongful pregnancy action, the Texas Supreme Court refused to award the plaintiff-parent any damages for child-rearing expenses,161 which were the only damages sought. The parents filed suit after a healthy child was born subsequent to an unsuccessful sterilization operation on the mother.162 The court held as a matter of law that the healthy child was a benefit to the parents.163

One year later, the Texas Supreme Court, in *Jacobs v. Theimer*,164 a wrongful birth case, held that a parent could recover extraordinary damages.165 The court stated that there was a significant distinction between *Terrell* and *Jacobs*, where the plaintiff sought damages solely related to the child’s physical defects.166 “No public policy obstacle should be interposed to that recovery.”167

The Illinois Supreme Court has already signalled a willingness to follow the paths of Texas and Wisconsin and allow extraordinary damages in wrongful birth cases. In *Cockrum*, the Illinois Supreme Court relied heavily on both the Texas and

157. 69 Wis. 2d 766, 233 N.W.2d 372 (1975).
158. *Id.* at 769, 233 N.W.2d at 373.
159. *Id.* at 775, 233 N.W.2d at 376.
161. Note that the plaintiffs did not seek pregnancy-related expenses, as in *Cockrum*. Plaintiffs in *Terrell* waived all damages, seeking child rearing expenses only. *Id.* at 126.
162. 496 S.W.2d at 126.
163. *Id.* at 128.
164. 519 S.W.2d 846 (Tex. 1975).
165. *Id.* at 848.
166. *Id.*
167. *Id.*
Wisconsin wrongful pregnancy cases, citing both *Terrell*\(^{168}\) and *Reick*\(^{169}\) extensively.\(^{169}\) In addition, at the time *Cockrum* was decided, the Texas and Wisconsin wrongful birth cases had already been decided, yet *Cockrum* never referred to those cases.

Critics of the Texas-Wisconsin approach to wrongful birth actions argue that such awards might possibly overburden defendants with lifelong financial responsibility to plaintiffs.\(^{170}\) Furthermore, one commentator has noted that giving extraordinary expenses to handicapped children and nothing to healthy children seems to treat the healthy life as being worthwhile, while refusing to extend the same presumption to handicapped children.\(^{171}\) Neither of these arguments, however, is compelling. Extraordinary damages are much less than the full measure of damages that would be provided under a standard tort damages rule.\(^{172}\) The plaintiffs are appropriately awarded more damages than wrongful pregnancy claimants because the plaintiffs in a case involving a handicapped child have suffered a more serious injury. The defendant is not normally overburdened, nor do the plaintiffs receive a windfall.

In addition, most courts which have recognized a distinction between handicapped and healthy children, i.e., between wrongful birth and wrongful pregnancy causes of action, also recognize the need for a different award of damages in each type of case. As this area of torts becomes more defined, the tendency to simply lump all of the cases together must end.

**Guidelines for Illinois Juries in Wrongful Birth and Wrongful Pregnancy Cases**

Typically, Illinois courts have allowed juries to address complicated questions regarding tort damages awards.\(^{173}\) Consistent with this policy, the Illinois Pattern Jury Instructions allow the jury to consider such difficult questions as the nature, extent,
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and duration of the injury. With or without the benefit offset rule, the jury should be allowed to take the handicapped/healthy distinction into account. In his dissenting opinion in Cockrum, Justice Clark offered detailed reasoning for allowing the jury to make the distinction between healthy and handicapped children, including the high probability that a jury would probably not award much, if anything, when the child is healthy. Justice Clark argued strongly that a jury will usually award damages if the parent’s distress is readily believable as the foreseeable result of the doctor’s negligence, and, if not, damages may not be awarded. The difference is in the difficulty of proof. “It is not our role to say to a litigant that because her damages may be difficult to prove, she may not even try to prove them. We should rather trust the jury, here as we do in other cases, to appraise the worth of the evidence presented to it.”

A Trust Fund for the Handicapped Child

As an approach to damages in wrongful birth cases, Illinois courts should consider the use of a trust fund. In Robak v. United States, a Seventh Circuit decision brought under diversity jurisdiction and interpreting Alabama law, wrongful birth plaintiffs were awarded $900,000 in full damages. In part because of the tremendous amount of money involved, the reviewing court approved the district court’s unique approach of setting up a reversionary trust fund for the handicapped child. The parents would draw money out of the trust as needed for the child. If the child died, any remaining funds would be returned


For a jury instruction in a wrongful pregnancy case using the benefits offset rule, see Ochs v. Borrelli, 187 Conn. 253, 262 n.3, 445 A.2d 873, 884 n.3 (1982).

175. Cockrum v. Baumgartner, 95 Ill. 2d at 209, 447 N.E.2d at 393 (Clark, J., dissenting).

176. Id.

177. 658 F.2d 471 (7th Cir. 1981) (applying Alabama law).

178. Robak was the first wrongful birth or wrongful pregnancy case heard by a federal court of appeal. The $900,000 full damages awarded included $30,000 for past expenses, $229,800 for residential education and care to age 21, $515,000 for a qualified companion for the remainder of the adult life, and $200,000 for the cost of maintaining her for her adult life. See also Hartke v. McKelway, 707 F.2d 1544 (D.C. Cir. 1983).

to the defendant. The court noted that the case was governed by ordinary tort principles. The court reasoned that full damages should be awarded since the parents could have aborted the child if they had known of her serious handicaps. The court thus held that damages must include the cost of raising a normal child, because the plaintiffs would not have had to bear that expense but for the defendant's negligence.

**The Benefits Offset Rule**

The benefits offset rule, found in section 920 of the Restatement (Second) of Torts, is another option available to Illinois courts in wrongful birth cases. Although the Illinois Supreme Court has rejected the use of this rule in wrongful pregnancy cases involving healthy children, it might find the rule appropriate in wrongful birth cases involving handicapped children. This might be especially true if Illinois decides to follow the pattern of Texas and Wisconsin of allowing extraordinary damages in cases involving handicapped children.

The major advantage of using this rule is its flexibility, since the jury is allowed to consider many factors. Section 920 balances the injuries against the benefits a plaintiff receives. Moreover, a comment to section 920 requires that the injury and benefit involve the same interest. Although the appellate decision in Cockrum focused on the “same interest harmed” requirement, the Illinois Supreme Court did not address this point.

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180. 658 F.2d at 479-80.
181. Id. at 478.
182. Id. at 479.
183. **Restatement (Second) of Torts** § 920 (1965).
184. See supra note 42.
185. One court noted that in a wrongful pregnancy case, the rule gives “weight and consideration in each case to the plaintiff's 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.” University of Ariz. Health Sciences Center v. Superior Ct., 136 Ariz. 579, 585, 667 P.2d 1294, 1300 (1983) (citing Hartke v. McKelway, 707 F.2d 1544, 1553 n.9 (D.C. Cir. 1983)).
187. 99 Ill. App. 3d at 273, 425 N.E.2d at 970. Cf. Cockrum, 95 Ill. 2d at 209, 447 N.E.2d at 393 (Clark, J., dissenting), wherein the use of the benefits offset rule is supported: “I do not believe that the many benefits of having a child should be excluded as a matter of law; nor do I feel that such benefits can be held to automatically offset all expenses.” For a strong criticism of the Illinois Appellate Court majority opinion in Cockrum, which attempts to explain its strict application of section 920, see Comment, supra note 10, at 133-34:
Wrongful Birth/Pregnancy

Other courts and commentators have also noted this essential requirement of the Restatement rule. Some courts, however, have criticized the strict application of section 920, finding that the economic and emotional interests involved in rearing an unexpected child are inextricably related. Furthermore, the rule itself is based on a concept of unjust enrichment and “strict interpretation of the same interest limitation would result in unjust enrichment in wrongful pregnancy cases.”

CONCLUSION

Illinois courts facing the problem of determining damages in wrongful birth cases involving handicapped children must recognize the distinction between the wrongful birth and wrongful pregnancy causes of action. Each action has different factual settings and different injuries, and thus each should apply a different analysis, resulting in the use of different damage formulas for distinct causes of action. In wrongful birth cases involving handicapped children, Illinois should follow the leads of Texas and Wisconsin. Those states deny general damages and allow recovery for extraordinary medical and caretaking expenses incurred as a result of the child's handicap. These extraordinary expenses are not speculative, and will benefit the child, avoid any undue burden on the defendant, create little or no potential for fraudulent claims, and support Illinois public policies. The extraordinary expenses damages formula adequately and justly

This explanation is inadequate. A plaintiff’s financial and emotional interests work together to support his overall level of satisfaction. Rigid categorization of interests is unnecessary and especially inappropriate in the wrongful birth context in which plaintiffs’ reasons for limiting family size are often multifaceted and complex.

188. Note one commentator’s caution against using non-economic benefits to offset economic injuries: “[N]o amount of emotional pleasure will enable family to meet the financial burdens of raising a child.” Kashi, supra note 39, at 1431. The author analogized to domestic relations cases, stating that “surely no one would suggest that an award of child support in a domestic relations case should be reduced in accordance with the custodial parent’s love for the child.” Id.

189. University of Ariz., 136 Ariz. at 581, 677 P.2d at 1300 (citing Boone v. Mullendore, 415 So. 2d 718, 726 (Ala. 1982) (Faulkner, J., specially concurring)).

compensates the injured parties, while preventing a windfall to plaintiffs.

Illinois should also permit juries to handle the complicated damages questions of wrongful birth cases. In addition, Illinois should consider using a trust fund approach to the damages problem. Finally, Illinois courts should reconsider use of the benefits offset rule. Adopting these recommendations will help Illinois face the difficult goal of balancing the demands of public policy, the rights of injured plaintiffs, and the need to avoid placing undue burden on negligent defendants. It is only through a careful analysis of the actual injuries involved in wrongful birth actions that Illinois courts can achieve this goal.191

REGINA GOULDING PAUL

191. Immediately prior to publication of this issue, the Illinois Appellate Court, in Goldberg v. Ruskin, Nos. 81-1450, 81-1962, slip. op. (Ill. App. Ct. Sept. 12, 1984), allowed the parents of an impaired child to maintain a cause of action in tort for wrongful birth, permitting the recovery of medical and other expenses reasonably necessary for the care and treatment of the child's physical impairment. The court did not find such extraordinary expenses too speculative, referring to such damages as "certain and readily ascertainable." Id. slip op. at 14. The defendants' liability was predicated on their duty to warn the parents of the potential impairment of their child, thereby giving the parents the opportunity to consider an abortion.
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<th>Wrongful Pregnancy</th>
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<td>S.C.</td>
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Key:
"Full" - All damages awarded, including child-rearing expenses, with no benefits offset.
"Extraordinary Expenses" - Medical and caretaking expenses, i.e., child-rearing expenses minus the costs of raising a healthy child. This may or may not include emotional damages, depending on the jurisdiction.
"No C/A" - No cause of action.
"Offset" - RESTATEMENT (SECOND) OF TORTS section 920, the benefits rule. All damages awarded, including child-rearing expenses, with an offset for all benefits.
"Pregnancy" - Damages limited to costs of pregnancy and childbirth.

1. This table represents the most recent holding in each jurisdiction. It does not depict the complete history of the various holdings reached in each jurisdiction.
2. These jurisdictions indicate a willingness to distinguish between wrongful pregnancy and wrongful birth.
3. These jurisdictions refuse to distinguish between wrongful pregnancy and wrongful birth.

Alabama:

Arizona:
9. Id. (wrongful pregnancy; benefits offset rule).
10. No wrongful life cases.

Arkansas:
12. Id. (wrongful pregnancy; pregnancy-related damages, per dicta, although request for those damages was deleted by plaintiff).
13. No wrongful life cases.

California:
16. Turpin v. Sortini, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982) (wrongful life; extraordinary expenses). Because California was the first state to recognize wrongful life, a great deal of attention has been paid to the California cases. Unfortunately, an analysis of those cases is beyond the scope of this note.

Connecticut:
17. No wrongful birth case.
19. No wrongful life cases.
Delaware:
  20. No wrongful birth cases.
  22. No wrongful life cases.
  23. No wrongful birth cases.

District of Columbia:
  24. Stewart v. Bepko, Civ. No 81:2501, slip op. at 5 (D.C. Cir. 1983) (wrongful pregnancy; statute of limitations had run, but court indicated that it might distinguish a wrongful birth cause of action, because the injury arises at a different time); Hartke v. McKeilway, 707 F.2d 1544 (D.C. Cir. 1983) (wrongful pregnancy; pregnancy-related damages). The Hartke court discussed various ways of using the benefits offset rule, indicating that it would always award at least pregnancy-related damages. This court gives the jury a great deal of room to decide, depending on the reason for the sterilization.
  25. No wrongful life cases.

Florida:
  27. Ramey v. Fassoulas, 414 So. 2d 198 (Fla. Dist. Ct. App. 1982), aff'd, 450 So. 2d 822 (Fla. 1984) (wrongful pregnancy; pregnancy-related expenses if healthy; extraordinary and pregnancy-related expenses if handicapped). Note that this is an unusual approach, probably because the facts of the case were so unusual; after a negligently preformed vasectomy, a child with foreseeable handicap was born; then, after a negligently performed sperm count test, a healthy child was born. See also Public Health Trust v. Brown, 388 So. 2d 1084 (Fla. Dist. Ct. App. 1980) (wrongful pregnancy; pregnancy-related expenses).

Georgia:
  29. No wrongful birth cases.
  31. Id. (no wrongful life cause of action exists).

Illinois:
  32. No wrongful birth cases.
  34. No wrongful life cases.

Kentucky:
  35. No wrongful birth cases.
  36. Schork v. Huber, 648 S.W.2d 861 (Ky. 1983) (wrongful pregnancy; approves Maggard, but defers some questions to legislature; holding unclear); Maggard v. McKelvey, 627 S.W.2d 44 (Ky. App. 1981) (wrongful pregnancy; pregnancy-related expenses).
  37. No wrongful life cases.

Michigan:


Minnesota:
41. No wrongful birth cases.
42. Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977) (wrongful pregnancy; offset). In referring to the Texas and Wisconsin courts’ distinction between wrongful birth and wrongful pregnancy, the Minnesota court indicated that it might not be willing to make such a distinction. Id. at 174 n.5.

43. No wrongful life cases.

Missouri:
44. No wrongful birth cases.


New Hampshire:
47. No wrongful birth cases.

49. No wrongful life cases.

New Jersey:


New York:
53. New York has had many cases brought under wrongful birth, wrongful pregnancy, and wrongful life causes of action. Only cases decided under the current state of the law are cited herein. See Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978) (wrongful birth; extraordinary expenses, but no emotional damages).

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Ohio

56. No wrongful birth cases.

57. Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976) (wrongful pregnancy; full damages). This was an unusual case, because one twin was born healthy, and one twin was born with an unforeseeable handicap. The court noted that the issue of whether damages should be limited to pregnancy-related expenses was not raised on appeal. Id. at 498 n.1.

58. No wrongful life cases.

Pennsylvania:


South Carolina:


Texas:


Virginia:

68. Naccash v. Burger, 223 Va. 406, 290 S.E.2d 825 (1982) (wrongful birth, full damages). The Naccash court made no mention of reducing this award by the costs of raising a healthy child. The court included emotional damages, but excluded funeral expenses. In addition, the court noted that those expenses would be limited, since a Tay Sachs baby will normally die within a few years. The court also noted, however, that an extended handicapped life might be handled differently.
70. No wrongful life cause of action exists.

Washington:
72. Ball v. Mudge, 64 Wash. 2d 247, 391 P.2d 201 (1964) (wrongful pregnancy; case dismissed because the parents failed to prove liability; jury found no proximate cause).

Wisconsin:

West Virginia:
77. No wrongful birth cases.
79. No wrongful life cases.

Wyoming:
80. No wrongful birth cases.
82. Id. (no wrongful life cause of action exists).