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Fundamental Protection of a Fundamental Right: Full Recovery of Child-Rearing Damages for Wrongful Pregnancy

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FUNDAMENTAL PROTECTION OF A FUNDAMENTAL RIGHT: FULL RECOVERY OF CHILD-REARING DAMAGES FOR WRONGFUL PREGNANCY

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Abstract: The U. S. Constitution and Washington statutes protect the right to choose not to have a child as a fundamental right. When a healthy child is born after contraceptive methods fail due to physician negligence, parents can sue on a "wrongful pregnancy" cause of action. In all jurisdictions recognizing wrongful pregnancy, parents may recover damages for medical expenses associated with pregnancy and childbirth. A controversy exists, however, concerning whether parents may recover the ordinary expenses of child rearing. While some states allow full recovery of these expenses, and other states allow recovery of the economic expense offset by the emotional benefit of parenthood, the overwhelming majority, including Washington, denies recovery of child-rearing expenses on the basis of public policy. By comparing *McKernan v. Aasheim*, the Supreme Court of Washington decision denying child-rearing damages for wrongful pregnancy, with other child-related torts in Washington, this Comment exposes *McKernan*'s erroneous and inconsistent application of tort principles and demonstrates that strict application of tort principles mandates full recovery of child-rearing expenses. Further, the state public policy relied on in *McKernan* cannot be maintained after the passage of Initiative 120, which declared as Washington public policy that reproductive rights are "fundamental." This Comment argues that child-rearing damages are necessary to deter malpractice and fully compensate parents whose exercise of fundamental reproductive rights has been substantially impaired by physician negligence.

Beginning in 1960, the availability of effective and convenient contraceptive methods resulted in widespread changes in birth control.[1] Access to reliable birth control has led to smaller families and longer spacing between births, resulting in better health for infants, children, and women and an improved social and economic role for women.[2] The U.S. Supreme Court supported access to birth control by invalidating, as violative of fundamental privacy rights, statutes preventing the use and distribution of contraceptives to married couples[3] and unmarried persons.[4] So basic is the right to procreative autonomy and personal

1. *See* Center For Disease Control, *Achievements in Public Health, 1900–1999: Family Planning* (visited Feb. 16, 2000) <http://www.cdc.gov/epo/mmwr/preview/mmwrhtml/mm4847a1.htm> [hereinafter *Achievements*] (noting that prior to introduction of birth control pills and intrauterine devices, contraceptive methods most commonly used were condoms, contraceptive douches, withdrawal, and rhythm method).

2. *See id.*

3. *See* Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

4. *See* Eisenstadt v. Baird, 405 U.S. 438, 454–55 (1972) (upholding fundamental privacy right of unmarried persons to have access to contraceptives on equal protection grounds).

privacy that the Court in *Roe v. Wade*[5] held that women have the constitutional right to terminate a pregnancy prior to fetal viability.[6] Through Initiative 120[7] in 1991, Washington state voters proclaimed as public policy that reproductive choice is a fundamental right.[8]

Today, nearly sixty-five percent of women of child-bearing age use contraception to prevent pregnancy.[9] Although in the mid-1960s the birth control pill was the most popular method of contraception, the use of surgical sterilization[10] has significantly increased over the last two decades[11] and is currently the most commonly used contraceptive method in the United States.[12] High expectations for contraceptive efficacy, safety, and convenience may have influenced couples to choose permanent contraception through sterilization.[13] Doctors advise patients choosing sterilization that their decision to have no children in the future must be firm: "You must be absolutely sure you will never change your mind or regret your choice—no matter how your life changes."[14]

Unfortunately, expectations for contraceptive effectiveness and the right to prevent pregnancy are sometimes thwarted by physician negligence such as improperly performing tubal sterilizations and vasectomies,[15] giving incorrect medical advice,[16] and failing to replace

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5. 410 U.S. 113 (1973).

6. *See id.* at 163. Fetal viability may occur as early as the 24th week of pregnancy. *See id.* at 160.

7. *See* 1992 Wash. Laws 1 (codified at Wash. Rev. Code § 9.02.100 (1998)).

8. *See infra* Part I.B.

9. *See* J.C. Abma et al., *Fertility, Family Planning, and Women's Health: New Data From the 1995 National Survey of Family Growth* (visited Feb. 16, 2000) <http://www.cdc.gov/nchs/datawh/statab/pubd/2319_41.htm>.

10. Surgical sterilization includes vasectomy for men and tubal sterilization for women. A vasectomy is considered permanent contraception. *See* Contraception Information Center, Journal of the American Medical Association, *All About Vasectomy* (last modified June 1995) <http://www.ama-assn.org/special/contra/support/ppfa/vasecto1.htm> [hereinafter *Vasectomy*]. Tubal sterilization is accomplished by closing off the fallopian tubes by various methods. *See* Contraception Information Center, Journal of the American Medical Association, *All About Tubal Sterilization*, (last modified July, 1998) <http://www.ama-assn.org/special/contra/support/ppfa/tubal1.htm> [hereinafter *Tubal Sterilization*].

11. *See Achievements*, *supra* note 1.

12. *See* Anjani Chandra, *Surgical Sterilization in the United States: Prevalence and Characteristics, 1965–95*, Vital and Health Statistics, June 1998, at 2.

13. *See id.* (hypothesizing that introduction of birth control pill brought greater expectations for method effectiveness, but health and safety concerns resulted in decreased reliance on pill).

14. *Vasectomy*, *supra* note 10; *Tubal Sterilization*, *supra* note 10.

15. *See, e.g.*, University of Ariz. Health Sciences Ctr. v. Superior Court, 667 P.2d 1294, 1296 (Ariz. 1983); Marciniak v. Lundborg, 450 N.W.2d 243, 244 (Wis. 1990).

intrauterine devices.[17] In addition, physicians may fail to diagnose early pregnancies[18] and inadequately perform abortions,[19] preventing individuals from exercising their rights to terminate pregnancies before fetal viability.

The increased expectation in the efficacy of contraception,[20] coupled with the belief that the constitutional right to procreative autonomy will be protected,[21] has increasingly led parents to seek legal compensation when physician negligence has nullified their choice to prevent unwanted pregnancy and childbirth.[22] Even though the majority of states recognize a negligence cause of action for wrongful pregnancy, most jurisdictions severely limit available damages by denying recovery of ordinary rearing expenses for healthy children.[23]

This Comment argues that, because a right is only as valuable as the remedy vindicating it, the Supreme Court of Washington should strictly and consistently apply tort principles and allow child-rearing damages for wrongful pregnancy. Part I summarizes U.S. constitutional and Washington statutory bases of the right to choose to prevent pregnancies. Part II explains the medical malpractice tort of wrongful pregnancy, tort-recovery principles, and approaches to recovery for wrongful pregnancy. Part III explores the application of tort principles to child-related tort actions in Washington, including wrongful death, wrongful birth, wrongful life, and wrongful adoption. Part III also examines *McKernan v. Aasheim*,[24] the Supreme Court of Washington's decision denying

16. *See* Burns v. Hanson, 734 A.2d 964, 965 (Conn. 1999).

17. *See* Jackson v. Bumgardner, 347 S.E.2d 743, 745 (N.C. 1986). An intrauterine device (IUD) is a reversible contraceptive method in which a small device containing copper or a hormone is placed in the uterus by a clinician. *See Understanding IUDs*, Contraception Information Center, Journal of the American Medical Association (last modified Jan. 2000) <http://www.ama-assn.org/special/contra/support/ppfa/iudspb02.htm>. The negligence of other health care providers sometimes results in wrongful pregnancy, such as a pharmacist's negligent dispensing of birth control pills. *See* Troppi v. Scarf, 187 N.W.2d 511, 512 (Mich. Ct. App. 1971).

18. *See, e.g.*, M.A. v. United States, 951 P.2d 851, 852 (Alaska 1998).

19. *See* Miller v. Johnson, 343 S.E.2d 301, 302 (Va. 1986).

20. *See, e.g.*, Marciniak v. Lundborg, 450 N.W.2d 243, 244 (Wis. 1990) (stating patient believed sterilization would be "permanent").

21. *See* McKernan v. Aasheim, 102 Wash. 2d 411, 413, 687 P.2d 850, 851 (1984) (noting but not addressing plaintiff's alleged infringement of constitutionally protected right).

22. Courts have accommodated changes in attitudes toward family planning by allowing lawsuits against contraceptive services providers. *See* David J. Burke, Comment, *Wrongful Pregnancy: Child Rearing Damages Deserve Full Judicial Consideration*, 8 Pace L. Rev. 313, 313 n.5 (1988).

23. *See infra* Part II.C.

24. 102 Wash. 2d 411, 687 P.2d 850 (1984).

recovery of child-rearing damages for wrongful pregnancy. Part IV argues that *McKernan* fails to uphold the traditional tort principles of compensation and deterrence and that the decision rests on baseless fears and outdated public policy. Finally, Part V argues that full recovery of child-rearing expenses is necessary to vindicate the constitutionally and statutorily protected fundamental right to prevent pregnancy.

I. THE RIGHT TO CHOOSE NOT TO PROCREATE IS A FUNDAMENTAL RIGHT

A. The U.S. Constitution Protects the Right to Privacy Including the Right To Choose Not To Procreate

The U.S. Supreme Court has expressed "no doubt" as to the correctness of judicial decisions extending the constitutionally protected right to privacy to personal choices concerning contraception.[25] The right to choose not to have a child is at the "very heart" of a group of constitutionally protected choices, including decisions relating to marriage, family relationships, child rearing, and education.[26] The choice whether to bear or beget a child is central to these Fourteenth Amendment privacy rights[27] because it concerns the "most intimate and personal" choice a person may make in his or her lifetime.[28] For example, in *Carey v. Population Services International*,[29] the Court held that government restrictions that impede access to contraceptives unacceptably impair the right to privacy[30] because such access is "essential to the exercise" of constitutionally protected reproductive rights.[31] Further, the Court has held that the right of privacy is broad enough to include a woman's decision whether or not to terminate a pregnancy.[32]

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25. Planned Parenthood v. Casey, 505 U.S. 833, 852 (1992) (citing Carey v. Population Servs. Int'l, 431 U.S. 678 (1977), Eisenstadt v. Baird, 405 U.S. 438 (1972), and Griswold v. Connecticut, 381 U.S. 479 (1965)).

26. Carey v. Population Servs. Int'l, 431 U.S. 678, 685 (1977).

27. *See id.*

28. *Casey*, 505 U.S. at 851.

29. 431 U.S. 678 (1977).

30. *See id.* at 685.

31. *Id.* at 688–89.

32. *See* Roe v. Wade, 410 U.S. 113, 153 (1973).

When evaluating cases involving reproductive rights, courts must rely on legal standards and not moral arguments. In *Planned Parenthood v. Casey*,[33] the Court acknowledged the differing moral opinions concerning the "meaning of procreation" and "human responsibility and respect for it."[34] One viewpoint is based on such "reverence for the wonder of creation that any pregnancy ought to be welcomed . . . no matter how difficult it will be to provide for the child and ensure its well-being."[35] The other view is that the "inability to provide for the nurture and care of the infant is a cruelty to the child and an anguish to the parent."[36] The Court has recognized that these moral dilemmas underlie both contraceptive and abortion decisions.[37] In the landmark case of *Roe v. Wade*,[38] the Court acknowledged that religion, life and family values, and moral standards are likely to influence one's thinking, but concluded that courts must decide reproductive issues based on legal standards "free of emotion and of predilection."[39]

B. *Washington State Public Policy Protects the Right to Choose Birth Control*

In 1991, Washington state voters passed Initiative 120 declaring as the state's public policy concerning birth control and abortion that "every individual possesses a fundamental right of privacy with respect to personal reproductive decisions."[40] The impetus for the initiative was concern that the U.S. Supreme Court would overrule *Roe v. Wade*.[41] Although seen as an abortion-rights initiative,[42] the law also declared that "[e]very individual has the fundamental right to choose or refuse birth

33. 505 U.S. 833 (1992).

34. *Id.* at 852–53.

35. *Id.* at 853.

36. *Id.*

37. *See id.* at 852–53.

38. 410 U.S. 113 (1973).

39. *Id.* at 116.

40. 1992 Wash. Laws 1 (codified at Wash. Rev. Code § 9.02.100 (1998)).

41. *See* Joan Fitzpatrick, Editorial, *Initiative 120: Should Abortion Laws Be Reversed? Yes*, Seattle Times, Oct. 13, 1991, at A17 (noting initiative safeguards reproductive privacy regardless of U.S. Supreme Court reversal or restriction of abortion rights).

42. *See Abortion Rights Initiative 120 Wins After Vote Recount*, Seattle Post-Intelligencer, Dec. 14, 1991, at B1.

control."[43] Washington law also prevents state discrimination against the exercise of these rights in the "regulation or provision of benefits, facilities, services, or information."[44] For example, because Washington provides state-funded prenatal and maternity care, it must also fund abortion services for qualified women.[45] The public policy of Washington state is that the right to choose whether or not to have a child is a fundamental right.

II. THE TORT OF WRONGFUL PREGNANCY: GENERAL PRINCIPLES, PARAMETERS, AND THEORIES OF RECOVERY

Wrongful pregnancy is a type of medical malpractice claim based on provider negligence. If a plaintiff successfully proves a negligence claim, tort-recovery principles normally hold the tortfeasor responsible for all harm caused by the conduct. The potential recovery may be reduced by any incidental benefit to the same interest harmed as a result of the conduct, by the plaintiff's failure to avoid additional harm, or both. Jurisdictions, however, vary in their application of these tort-recovery principles to wrongful pregnancy and thereby affect the ability of parents to recover child-rearing damages.

A. The Negligence Tort of Wrongful Pregnancy

The medical malpractice tort of wrongful pregnancy is distinct from other causes of action involving the birth of a child. Despite some confusion in applying labels to such actions, a consensus in terminology has developed.[46] Wrongful birth can be brought by parents and refers to an action based on a health-care provider's alleged breach of duty to the parents to disclose information or perform medical procedures with due care and the breach is a proximate cause of the birth of a defective child.[47] Wrongful life is a cause of action brought on a child's behalf to recover damages for having been born with defects due to the act or

43. Wash. Rev. Code § 9.02.100(1) (1998).

44. Wash. Rev. Code § 9.02.100(4) (1998).

45. *See* Wash. Rev. Code § 9.02.100(4); Washington Secretary of State, Voters Pamphlet 14–15 (1st ed. 1991).

46. *See* Girdley v. Coats, 825 S.W.2d 295, 296 (Mo. 1992).

47. *See id.*

omission of the health-care provider.[48] Wrongful pregnancy refers to an action brought by parents of a healthy child whose birth is allegedly caused by a breach of duty owed to the parents, such as a negligently performed sterilization.[49]

Wrongful pregnancy, like other medical malpractice torts,[50] requires proving the negligence elements: duty, breach, proximate cause, and damage or injury.[51] For a successful claim, wrongful pregnancy plaintiffs must establish the defendant had a duty to meet the standard of care[52] and show the defendant breached this duty.[53] A plaintiff must also prove that the defendant's alleged failure to meet the standard of care was the proximate cause of the harm allegedly suffered.[54] Because medical facts regarding sterilization procedures are normally outside the experience of lay persons,[55] proving the standard of care and causation usually requires expert testimony.[56] Finally, plaintiffs must prove they were in fact harmed[57] and suffered damages[58] assessable with reasonable certainty.[59]

Due in part to the requirement of expert testimony, the costs of bringing a medical malpractice action can be substantial. One expert

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48. *See* Smith v. Gore, 728 S.W.2d 738, 741 (Tenn. 1987).

49. *See* Harbeson v. Parke-Davis, Inc., 98 Wash. 2d 460, 467, 656 P.2d 483, 488 (1983). Wrongful pregnancy claims include wrongful conception claims, where the negligence is causally connected to failing to prevent conception resulting in pregnancy, and further encompasses failing to diagnose a pregnancy or negligently performing an abortion. *See* Mark Strasser, *Misconceptions and Wrongful Births: A Call For a Principled Jurisprudence*, 31 Ariz. St. L.J. 161, 162–63 (1999). Therefore, this Comment will use the term "wrongful pregnancy" to refer to both wrongful pregnancy and wrongful conception causes of action.

50. *See Girdley*, 825 S.W.2d at 296.

51. *See Harbeson*, 98 Wash. 2d at 468, 656 P.2d at 489.

52. A health-care provider meets the standard of care by demonstrating reasonable prudence and the degree of skill, care, and learning possessed by other members of the medical profession in the state. *See* Wash. Rev. Code § 7.70.040 (1998).

53. *See Harbeson*, 98 Wash. 2d at 467, 656 P.2d at 489.

54. *See id.* at 467–68, 656 P.2d at 489. Mere failure to prevent an unwanted pregnancy does not automatically indicate causation. *See* Johnston v. Elkins, 736 P.2d 935, 939 (Kan. 1987).

55. *See* Ball v. Mudge, 64 Wash. 2d 247, 251, 391 P.2d 201, 204 (1964).

56. *See* Harris v. Robert C. Groth, M.D., Inc., 99 Wash. 2d 438, 449, 663 P.2d 113, 118–19 (1983).

57. *See* McKernan v. Aasheim, 102 Wash. 2d 411, 419, 687 P.2d 850, 855 (1984).

58. Damages are separated into "general damages," which cannot be exactly quantified in monetary terms such as mental or physical pain and suffering, inconvenience, and loss of enjoyment; and "special damages," which are quantifiable economic losses such as medical and hospital expenses and lost wages. *See* 22 Am. Jur. 2d *Damages* § 41 (1988).

59. *See McKernan*, 102 Wash. 2d at 419 n.2, 687 P.2d at 855 n.2.

estimates these costs to reach approximately $20,000 for a wrongful pregnancy case and up to $100,000 for a more complex medical malpractice action.[60] Plaintiffs' attorneys are reluctant to represent clients in medical malpractice cases where there has not been a significant permanent injury or where there is no potential recovery of long-term special damages.[61] Therefore, few plaintiffs have brought wrongful pregnancy cases in Washington since the decision in *McKernan v. Aasheim*[62] denying child-rearing damages.[63]

B. Tort-Recovery Principles

If a plaintiff proves the necessary elements of a negligence claim, courts award damages for two purposes: (1) to provide an incentive to prevent future harm,[64] and (2) to make the victim as whole as possible through monetary compensation.[65] To accomplish these ends a tortfeasor normally is held liable for all the harm proximately caused.[66]

A victim's potential total recovery is subject to reduction. Section 920 of the Restatement (Second) of Torts recommends that triers of fact consider whether the injured plaintiff has benefited as a result of the tortious conduct when assessing total damages.[67] When applying this rule, courts must offset damages to a plaintiff's particular interest by the amount that *same* interest has been benefited by the defendant's tortious conduct.[68] The Restatement specifically opposes using a dissimilar interest as an offset. For example, when suing for the wrongful death of his wife, a husband's claim for loss of consortium is not offset because he no longer has to contribute to her financial support.[69] Courts will deny

60. Telephone Interview with Mark A. Johnson, Chairman, Professional Negligence Section, Washington State Trial Lawyers Ass'n (Feb. 20, 2000).

61. *See id.*

62. 102 Wash. 2d 411, 687 P.2d 850 (1984); *see also infra* Part III.D.

63. *See* Telephone Interview with Mark A. Johnson, *supra* note 59.

64. *See* W. Page Keeton et al., *Prosser & Keeton on Torts* § 4, at 25 (5th ed. 1984).

65. Aker Verdal A/S v. Neil F. Lampson, Inc., 65 Wash. App. 177, 183, 828 P.2d 610, 613 (1992).

66. *See* Seattle First Nat'l Bank v. Shoreline Concrete Co., 91 Wash. 2d 230, 234, 588 P.2d 1308, 1312 (1978).

67. *See Restatement (Second) of Torts* § 920 (1979).

68. *Cf. Restatement (Second) of Torts* § 920 cmts. a, b.

69. *See Restatement (Second) of Torts* § 920 cmts. a, b ("Damages resulting from an invasion of one interest are not diminished by showing that another interest has been benefited.").

liability unless the net result establishes that a plaintiff has suffered damage that can be assessed with reasonable certainty.[70]

In addition to potentially decreasing a plaintiff's recovery based on section 920, courts also consider adjusting a plaintiff's recovery based on the avoidable-consequences doctrine. This doctrine requires an injured party to use reasonable effort to avoid further harm after the tort has been committed.[71] However, a reasonable person threatened with future harm may refuse mitigation that would subject him or her to a different kind of pain.[72] Courts are split over whether the avoidable-consequences doctrine requires wrongful pregnancy plaintiffs to utilize abortion or adoption to mitigate their damages.[73]

Courts have either refused to apply these tort principles strictly or have modified them in the wrongful pregnancy child-rearing damages context. The result is a sharp discrepancy in wrongful pregnancy recovery from state to state.

C. *Jurisdictional Approaches to Wrongful Pregnancy Recovery*

Historically, courts denied any recovery for wrongful pregnancy based on the blessings doctrine.[74] This doctrine, traced to *Christensen v. Thornby*,[75] holds that the birth of a human being is not a harm, but rather a blessing that precludes any damages award.[76] Courts followed the blessings doctrine until *Custodio v. Bauer*[77] rejected the policy arguments

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70. *See, e.g.*, McKernan v. Aasheim, 102 Wash. 2d 411, 419 n.2, 687 P.2d 850, 855 n.2 (1984) (requiring reasonable basis, not mathematical precision, for estimating plaintiff's loss).

71. *See Restatement (Second) of Torts* § 918 (1979).

72. *See Restatement (Second) of Torts* § 918 cmt. d. For example, a patient whose broken leg was improperly set can recover for such pain without being required to go through the pain of re-breaking the leg to reset the bone. *See Restatement (Second) of Torts* § 918 cmt. d.

73. *Compare* Flowers v. District of Columbia, 478 A.2d 1073, 1077 (D.C. 1984) (noting avoidance of consequences of negligent sterilization "obviously" accomplished by abortion or adoption), *with* Marciniak v. Lundborg, 450 N.W.2d 243, 247 (Wis. 1990) (holding it is not reasonable to require abortion or adoption to mitigate child-rearing damages).

74. *See* Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 173 (Minn. 1977); *see also* Ball v. Mudge, 64 Wash. 2d 247, 249–50, 391 P.2d 201, 203–04 (1964) (upholding jury's finding of no proximate cause but adding in dicta that reasonable jury could find plaintiffs not damaged where "blessing of a cherished child" far outweighed child-rearing costs).

75. 255 N.W. 620, 621 (Minn. 1934) (finding no liability, but opining that "[i]nstead of losing his wife, the plaintiff has been blessed with the fatherhood of another child").

76. Christopher D. Jerram, Note, *Child Rearing Expenses as a Compensable Damage in a Wrongful Conception Case:* Burke v. Rivo, 24 Creighton L. Rev. 1643, 1649 (1991).

77. 59 Cal. Rptr. 463 (Cal. Ct. App. 1967).

asserted by earlier courts[78] and concluded "that the birth of a child may be something less than [a] 'blessed event.'"[79] The Custodios brought suit after Mrs. Custodio, despite having undergone a tubal ligation after giving birth to their ninth child,[80] gave birth to their tenth child.[81] The court determined that the expense of the operation was recoverable together with damages for physical complications and, if proven, mental and physical pain and suffering.[82] The court also allowed damages for the necessity of the mother to care for, protect, and support a larger family.[83] Most importantly, the court allowed full child-rearing damages, reasoning that the compensation was not for the "so-called unwanted child . . . but to replenish the family exchequer . . ." so that the new baby would not deprive other family members of what would have been their share of the family income.[84]

Since *Custodio*, courts have generally agreed that wrongful pregnancy is actionable[85] but have disagreed over recoverable damages. Forty-three jurisdictions have found a valid tort cause of action for damages resulting from the birth of an unwanted child.[86] In virtually every such jurisdiction, courts award damages for lost wages, loss of consortium, and medical expenses and pain and suffering associated with the failed procedure, pregnancy, and childbirth.[87] Some courts allow damages for emotional distress,[88] while others expressly deny recovery for emotional pain and

78. *See id.* at 473–74.

79. *Id.* at 475.

80. *See id.* at 466.

81. *See id.* at 476.

82. *See id.* at 475–77.

83. *See id.* at 476.

84. *Id.* at 477.

85. *See* Emerson v. Magendantz, 689 A.2d 409, 411 (R.I. 1997) (noting that only one court of last resort failed to recognize tort cause of action for negligently performed sterilizations). The Supreme Court of Nevada denied a wrongful pregnancy negligence claim. *See* Szekeres v. Robinson, 715 P.2d 1076, 1078 (Nev. 1986). However, recovery of the costs of medical, surgical, and hospital care associated with the failed surgery could be awarded where the physician contracted, but failed, to prevent pregnancy. *See id.* at 1079.

86. *See infra* notes 91, 104–05 accompanying text. Two jurisdictions have allowed wrongful pregnancy actions, but did not address the issue of child-rearing damages. *See* Carr v. Strode, 904 P.2d 489, 504 (Haw. 1995); Begin v. Richmond, 555 A.2d 363, 368 (Vt. 1988).

87. *See, e.g.*, Fulton-DeKalb Hosp. Auth. v. Graves, 314 S.E.2d 653, 654 (Ga. 1984). Only one court has explicitly recognized damages for the mother's lost earning capacity. *See* Burke v. Rivo, 551 N.E.2d 1, 3–4 (Mass. 1990).

88. *See, e.g.*, Smith v. Gore, 728 S.W.2d 738, 751–52 (Tenn. 1987).

suffering.[89] Jurisdictions, however, sharply divide over whether parents can recover the ordinary child-rearing expenses incurred as a result of the birth of the initially unwanted child.[90]

This disagreement stems from varying applications of tort-recovery principles and results in three approaches to wrongful pregnancy child-rearing damages recovery. Most jurisdictions refuse to award the costs of rearing an unplanned child and thereby make an exception to the principle holding the tortfeasor fully responsible for harms caused. Other courts allow child-rearing damages but divide further into two classes: those that apply the benefits rule—requiring the financial interest harmed to be offset by a dissimilar interest, the emotional benefits of parenthood—and those that allow full recovery of child-rearing damages.

1. Limited-Damages Rule: Only Pregnancy and Childbirth Costs Recoverable

The vast majority of jurisdictions adheres to the "limited damages rule" for wrongful pregnancy damages, permitting recovery for the costs of the failed procedure, pregnancy, and childbirth-related damages.[91] These courts articulate one or more of a variety of public-policy reasons for denying child-rearing damages. Some courts implicitly apply the blessings doctrine, holding that "in a proper hierarchy of values"[92] the

89. *See, e.g., Emerson*, 689 A.2d at 414.

90. *See* Cockrum v. Baumgartner, 447 N.E.2d 385, 387 (Ill. 1983).

91. In all, 32 jurisdictions limit recovery to pregnancy and child-bearing expenses. *See generally* Boone v. Mullendore, 416 So. 2d 718 (Ala. 1982); M.A. v. United States, 961 P.2d 861 (Alaska 1998); Wilbur v. Kerr, 628 S.W.2d 568 (Ark. 1982); Coleman v. Garrison, 349 A.2d 8 (Del. 1975); Flowers v. District of Columbia, 478 A.2d 1073 (D.C. 1984); Fassoulas v. Ramey, 450 So. 2d 822 (Fla. 1984); *Graves*, 314 S.E.2d 653; *Cockrum*, 447 N.E.2d 385; Garrison v. Foy, 486 N.E.2d 5 (Ind. Ct. App. 1986); Nanke v. Napier, 346 N.W.2d 520 (Iowa 1984); Byrd v. Wesley Med. Ctr., 699 P.2d 459 (Kan. 1985); Schork v. Huber, 648 S.W.2d 861 (Ky. 1983); Pitre v. Opelousas Gen. Hosp., 530 So. 2d 1151 (La. 1988); Macomber v. Dillman, 505 A.2d 810 (Me. 1986); Rouse v. Wesley, 494 N.W.2d 7 (Mich. Ct. App. 1993); Girdley v. Coats, 825 S.W.2d 295 (Mo. 1992); Hitzemann v. Adams, 518 N.W.2d 102 (Neb. 1994); Kingsbury v. Smith, 442 A.2d 1003 (N.H. 1982); P. v. Portadin, 432 A.2d 556 (N.J. Super. Ct. App. Div. 1981); O'Toole v. Greenberg, 488 N.Y.S.2d 143 (N.Y. 1985); Jackson v. Bumgardner, 347 S.E.2d 743 (N.C. 1986); Johnson v. University Hosps. of Cleveland, 540 N.E.2d 1370 (Ohio 1989); Morris v. Sanchez, 746 P.2d 184 (Okla. 1987); Mason v. Western Pa. Hosp., 453 A.2d 974 (Pa. 1982); Emerson v. Magendantz, 689 A.2d 409 (R.I. 1997); *Gore*, 728 S.W.2d 738; Terrell v. Garcia, 496 S.W.2d 124 (Tex. Ct. App. 1973); C.S. v. Nielson, 767 P.2d 504 (Utah 1988); Miller v. Johnson, 343 S.E.2d 301 (Va. 1986); McKernan v. Aasheim, 102 Wash. 2d 411, 687 P.2d 850 (1984); James G. v. Caserta, 332 S.E.2d 872 (W. Va. 1985); Beardsley v. Wierdsma, 650 P.2d 288 (Wyo. 1982).

92. *Cockrum*, 447 N.E.2d at 389.

benefits—such as joy, companionship, and affection—of raising a healthy child far outweigh the costs.[93] These courts reason that considering a child an "injury offends fundamental concepts attached to human life,"[94] which is "presumptively valuable."[95] Other courts fear for the mental and emotional health of the children who will one day learn not only that they were unwanted by their parents but also that another person paid their rearing expenses.[96]

Courts adhering to the limited-damages rule reject strict application of tort principles, which normally hold the tortfeasor responsible for all harm caused, to wrongful pregnancy because the application of strict tort principles would also require application of section 920[97] and the avoidable-consequences doctrine.[98] These courts offset child-rearing costs, an economic interest, with the non-economic benefits of the child's companionship, comfort, and aid to the parent.[99] By comparing these dissimilar interests, limited-damages courts determine that assessing non-economic benefits and deducting them from the economic expense of child rearing renders the damages "incalculable"[100] and too speculative.[101] These courts also reject applying section 920 because of the belief that requiring consideration of any emotional benefit might lead to parents disparaging their child's worth in order to minimize the offset and maximize their recovery.[102] Finally, these courts fear that strict application of the avoidable-consequences doctrine might require parents to abort or give their child up for adoption in order to mitigate damages.[103]

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93. *See, e.g.*, *Beardsley*, 650 P.2d at 293. Some courts so hold as a matter of law. *See, e.g.*, *Nanke*, 346 N.W.2d at 522–23.

94. *Schork*, 648 S.W.2d at 862.

95. *Rouse*, 494 N.W.2d at 10.

96. *See Boone*, 416 So. 2d at 722.

97. *See supra* notes 67–68 and accompanying text.

98. *See, e.g.*, Flowers v. District of Columbia, 478 A.2d 1073, 1076 (D.C. 1984) (objecting to applying section 920 and avoidable consequences doctrine to wrongful pregnancy); *see also supra* notes 71–72 and accompanying text.

99. *See, e.g.*, Johnson v. University Hosps. of Cleveland, 540 N.E.2d 1370, 1373 (Ohio 1989) (citing Jones v. Malinowski, 473 A.2d 429 (Md. 1984)).

100. Beardsley v. Weirdsma, 650 P.2d 288, 293 (Wyo. 1982).

101. *See, e.g.*, Coleman v. Garrison, 349 A.2d 8, 12 (Del. 1975).

102. *See, e.g.*, Wilbur v. Kerr, 628 S.W.2d 568, 571 (Ark. 1982).

103. *See, e.g.*, *Flowers*, 478 A.2d at 1076–77.

2. *Child-Rearing Costs Recoverable*

A minority of jurisdictions concludes there should be recovery for at least some child-rearing expenses. These courts refuse to make exceptions to the standard application of tort principles, rejecting the emotional premises and public-policy arguments of the limited-damages rule in favor of upholding plaintiffs' constitutional rights not to procreate. Jurisdictions allowing recovery are, however, further divided whether to permit full recovery of child-rearing costs[104] or to require an offset for the emotional benefits of parenthood.[105]

a. Rejection of Limited-Damages Rule

Courts allowing recovery of child-rearing costs strictly adhere to the tort principle requiring a tortfeasor to assume liability for all the damages proximately caused, refusing to make exceptions based on public policy.[106] These courts hold physicians legally responsible for the consequences they caused.[107] Courts considering whether the strict application of tort principles to child-rearing damages would require avoidance of consequences by aborting or putting the child up for adoption have held, as a matter of law, that neither course of action would be reasonable and thus failure to so act is not a barrier to recovery.[108]

Courts refusing to adhere to the limited-damages rule reject the fear that a child will suffer significant emotional harm from discovering his or her parents sued to recover child-rearing costs. Instead, these courts accept the proposition that parents, not courts, are better suited to decide what is best for the child.[109] The courts assume that in the future the child will be able to distinguish the emotional support the parents are willing

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104. *See generally* Custodio v. Bauer, 59 Cal. Rptr. 463 (Cal. Ct. App. 1967); Lovelace Med. Ctr. v. Mendez, 805 P.2d 603 (N.M. 1991); Zehr v. Haugen, 871 P.2d 1006 (Or. 1994); Marciniak v. Lundborg, 450 N.W.2d 243 (Wis. 1990).

105. *See generally* University of Ariz. Health Sciences Ctr. v. Superior Court, 667 P.2d 1294 (Ariz. 1983); Ochs v. Borrelli, 445 A.2d 883 (Conn. 1982); Jones v. Malinowski, 473 A.2d 429 (Md. 1984); Burke v. Rivo, 551 N.E.2d 1 (Mass. 1990); Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977).

106. *See Ochs*, 445 A.2d at 885.

107. *See Marciniak*, 450 N.W.2d at 248.

108. *See id.* at 247.

109. *See University of Ariz.*, 667 P.2d at 1300.

and able to give from the economic means of support they sought in court.[110] The courts speculate that knowing his or her parents had financial assistance with child-rearing costs might alleviate the distress of discovering that he or she was initially unwanted.[111] One court allowing child-rearing costs noted with irony that limited-damages courts express concern of potential emotional harm to the child if his or her parents recover child-rearing costs but nonetheless allow recovery of pregnancy and childbirth expenses, where an equal potential for emotional harm exists.[112]

Jurisdictions allowing at least some recovery of child-rearing expenses imply that the right to recover is related to the parents' constitutional right to choose not to procreate.[113] The recognition of child-rearing costs as a compensable element of damages in wrongful pregnancy cases protects this right.[114] Courts reject the emotional and sentimental justifications for the limited-damages rule—that child-rearing damages disparage the value of human life or the societal need for harmonious family units[115]—in favor of applying "logical considerations"[116] and standard tort principles. These courts explicitly reject the proposition that the benefits of child rearing outweigh the economic burden of rearing a child for all parents, noting the widespread exercise of the constitutional right to contraception, sterilization, and abortion.[117]

b. Child-Rearing Costs Reduced by the "Benefits" Rule

Courts requiring an offset for emotional benefits of parenting against child-rearing damages do so based on section 920[118] and are referred to as

110. *See Marciniak*, 450 N.W.2d at 246.

111. *See* Burke v. Rivo, 551 N.E.2d 1, 4–5 (Mass. 1990); *see also* Custodio v. Bauer, 59 Cal. Rptr. 463, 477 (Cal. Ct. App. 1967).

112. *See Burke*, 551 N.E.2d at 4.

113. *See, e.g.*, Ochs v. Borrelli, 445 A.2d 883, 885 (Conn. 1982) (citing Roe v. Wade, 410 U.S. 113, 153 (1973) and Griswold v. Connecticut, 381 U.S. 479, 485 (1965)).

114. *See id.*

115. *See* Jones v. Malinowski, 473 A.2d 429, 435 (Md. 1984).

116. University of Ariz. Health Sciences Ctr. v. Superior Court, 667 P.2d 1294, 1298–99 (Ariz. 1983); *see also supra* notes 32–38 and accompanying text.

117. *See, e.g., Burke*, 551 N.E.2d at 4.

118. *See, e.g.*, Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 176 (Minn. 1977); *see also supra* notes 67–68 and accompanying text.

adhering to the "benefits" rule.[119] Benefits-rule jurisdictions reject the view of the limited-damages courts because calculating child-rearing costs is routine[120] and assessing the offset for the benefit is just the opposite of assessing damages in the wrongful death of a child.[121] Benefits-rule jurisdictions, however, also reject *full* recovery of child-rearing damages because allowing full recovery "prevents the trier of fact from considering the basic values inherent in the relationship and the dignity and sanctity of human life."[122] These courts reason, for example, that applying the benefits rule recognizes that "parental pleasure softens . . . economic reality"[123] and thereby prevents unjust enrichment.[124] Some benefits-rule courts direct juries to consider the reason the parents sought sterilization.[125] If the reason parents sought sterilization was not economically based, but rather to prevent harm to the mother or the birth of a defective child, the parents are deemed to have suffered no financial injury from the birth of a healthy child with no adverse health effects to the mother.[126]

c. *Full Recovery of Child-Rearing Costs Allowed*

Courts allowing full recovery of child-rearing costs reject applying the benefits rule as violative of the section 920 "same interest" requirement.[127] Full-recovery courts emphasize that wrongful pregnancy damages compensate for the financial expense incident to raising the child and not for the child's birth as the "harm."[128] Further, these courts

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119. *See, e.g.*, McKernan v. Aasheim, 102 Wash. 2d 411, 416–17, 687 P.2d 850, 853 (1984).

120. *See Jones*, 473 A.2d at 436.

121. *See Burke*, 551 N.E.2d at 6 n.6.

122. University of Ariz. Health Sciences Ctr. v. Superior Court, 667 P.2d 1294, 1299 (Ariz. 1983).

123. Ochs v. Borrelli, 445 A.2d 883, 885–86 (Conn. 1985).

124. *See* Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 176 (Minn. 1977).

125. *See, e.g., University of Ariz.*, 667 P.2d at 1300.

126. *See* Jones v. Malinowski, 473 A.2d 429, 436 (Md. 1984).

127. *See* Marciniak v. Lundborg, 450 N.W.2d 243, 249 (Wis. 1990). In recognition of this principle, one court allowing full recovery of child-rearing costs denied recovery for emotional distress because it would *properly* be offset by any emotional benefit and it feared this could lead to the "unseemly spectacle" of disparaging the child in order to minimize the offset. Lovelace Med. Ctr. v. Mendez, 805 P.2d 603, 613 (N.M. 1991). *But see Marciniak*, 450 N.W.2d at 249 (reasoning it was inequitable to apply section 920 to either economic or emotional interest because it was precisely this benefit parents sought to avoid through sterilization).

128. *See, e.g., Lovelace*, 805 P.2d at 609 ("[I]t is not the birth of the child that is the harm; it is . . . the invasion of the parents' interest in the financial security of their family . . . ."); *Marciniak*,

reject the need to consider the parents' reasons for seeking sterilization because the initial reasons do not conclusively determine whether the parents' economic interest has been injured.[129]

III. RECOGNIZED CAUSES OF ACTION CONCERNING CHILDREN IN WASHINGTON

Washington strictly applies traditional tort principles—holding tortfeasors responsible for all harm caused and offsetting harms by any benefit to the same interest—in several causes of action concerning children. The same-interest rule is followed in wrongful death and wrongful birth. Whether the child will suffer emotional harm from the ensuing litigation is generally not a concern in wrongful birth, wrongful life, or wrongful adoption causes of action. When considering wrongful pregnancy damages, however, Washington courts make an exception to these principles based on public policy.

A. Wrongful Death of a Child

Washington has recognized a statutory action for the wrongful death of a child for more than 130 years.[130] The statute left damages wholly to the courts, which for seventy-five years were measured as the value to parents of the child's services until majority, less the cost of support and maintenance during that interval.[131] Because a child's services were worth little in a modern economy, this measure seldom resulted in more than nominal recovery; therefore, in 1967 the Supreme Court of Washington extended the measure of damages definition to include an emotional-harm component.[132] Six days later a legislative amendment went into effect prescribing damages for loss of love and companionship

450 N.W.2d at 246 ("The suit is for the costs of raising the child, not to rid themselves of an unwanted child.").

129. *See Lovelace*, 805 P.2d at 612 (giving example of professional woman who sought sterilization for non-economic reasons but finds her financial situation and long-term prospects abruptly changed as result of unexpected birth).

130. *See* Wilson v. Lund, 80 Wash. 2d 91, 102–04, 491 P.2d 1287, 1293–94 (1971) (Wright, J., concurring).

131. *See* Skeels v. Davidson, 18 Wash. 2d 358, 368–69, 139 P.2d 301, 305–06 (1943).

132. *See* Lockhart v. Besel, 71 Wash. 2d 112, 117, 426 P.2d 605, 608–09 (1967) (allowing "loss of companionship" damages).

and destruction of the parent-child relationship.[133] In spite of the addition of emotional damages, the court continued to require offset of only the harmed pecuniary interest (loss of child's services), and not the emotional interest, by the benefit of the foregone child-rearing expenses due to the death of the child.[134]

B. Wrongful Birth and Wrongful Life

In 1983, the Supreme Court of Washington faced the issue whether to allow a causes of action for wrongful birth, wrongful life, or both in *Harbeson v. Parke-Davis, Inc.*[135] Finding the tort of wrongful birth actionable, the court concluded that parents have a constitutional reproductive right to prevent the birth of a defective child, that health-care providers have a correlative duty to honor that right,[136] and that recognition of that right will deter medical malpractice.[137] To determine the damages available to parents in a wrongful birth action, the court analogized to the damages available for the wrongful death of a child.[138] The court noted that the wrongful death statute allows for recovery of both pecuniary loss and emotional injury, and saw no reason why this policy should not also apply in the case of wrongful birth.[139] Recoverable pecuniary damages included the expense of the child's birth and the medical, hospital, and medication expenses attributable to the child's defective condition.[140] In addition, parents could recover for their emotional injuries caused by the birth of the child, offset by the "countervailing" emotional benefits from the birth of the child.[141] The court was not concerned with potential emotional harm to the defective child from the parent's lawsuit.

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133. *See* 1967 Wash. Laws 1734 (codified at Wash. Rev. Code § 4.24.010 (1998)).

134. *See* Clark v. Icicle Irrigation Dist., 72 Wash. 2d 201, 210, 432 P.2d 541, 547 (1967) (reducing $33,025 judgment by $15,000 (portion attributable to loss of services) because no attempt was made to show that value of such services exceeded cost to parents of child's support and maintenance). The court seemed unconcerned about whether the emotional damages exceeded child-rearing costs. *See id.*

135. 98 Wash. 2d 460, 656 P.2d 483 (1983).

136. *See id.* at 472, 656 P.2d at 491 (citing Roe v. Wade, 410 U.S. 113 (1973)).

137. *See id.* at 473, 656 P.2d at 491.

138. *See id.* at 474–75, 656 P.2d at 492–93 (citing Wash. Rev. Code § 4.24.010 (1994)).

139. *See id.* at 475, 656 P.2d at 493.

140. *See id.*

141. *See id.*

To provide a "comprehensive and consistent deterrent to malpractice," the *Harbeson* court extended the policies associated with a parent's claim for wrongful birth to a child's claim for wrongful life.[142] The court limited damages to the calculable extraordinary expense for medical care and special training.[143] The court denied general damages,[144] which required measuring the value of an impaired existence as compared to nonexistence (a task "beyond mortals"), because such damages could not be established with reasonable certainty.[145]

C. *Wrongful Adoption*

Washington recently recognized a cause of action for wrongful adoption in *McKinney v. State*.[146] The action arose when an adoption-placement agency negligently failed to disclose information about an impaired child's medical, psychological, and familial background.[147] The parents claimed that had the agency disclosed the information they would not have adopted the child.[148] The court determined that adoption agencies have a duty to provide an adoptive child's medical and social information in a timely manner based both on statute[149] and the unique relationship between an adoption agency and prospective parents.[150] Damages were not at issue because the court upheld the jury's finding that the agency's negligence did not impact the McKinney's decision to adopt the impaired child and therefore did not proximately cause them any harm.[151] Potential relief includes damage awards and revocation of adoptions where there was a failure to disclose the health information on

142. *Id.* at 481, 656 P.2d at 496.

143. *See id.* at 482, 656 P.2d at 496–97. The child's recovery is limited to damages from majority and beyond if the parents recovered expenses up to majority in a wrongful birth action. *See id.* at 480, 656 P.2d at 495.

144. *See supra* note 58.

145. *Harbeson*, 98 Wash. 2d at 482, 656 P.2d at 496.

146. 134 Wash. 2d 388, 950 P.2d 461 (1998).

147. *See id.* at 394, 950 P.2d at 464.

148. *See id.*

149. *See id.* at 396, 950 P.2d at 465 (citing Wash. Rev. Code § 26.33.350 (1994) and Wash. Rev. Code § 26.33.380 (1994)).

150. *See id.* at 397, 950 P.2d at 466.

151. *See id.* at 407, 950 P.2d at 471.

adoptive children.[152] Before the *McKinney* decision, commentators had raised concerns regarding the potential adverse psychological effect on children of the requirement that the parents prove they would not have adopted the child if fully informed.[153] The court, however, was silent on the issue.

D. Wrongful Pregnancy

In 1984, the Supreme Court of Washington faced the issue of whether child-rearing damages were available in a wrongful pregnancy action in *McKernan v. Aasheim*.[154] Notwithstanding a tubal ligation, Mrs. McKernan became pregnant and gave birth to a healthy child.[155] The McKernans filed suit against Dr. Aasheim alleging negligence, lack of informed consent, breach of warranty, and violation of their constitutional right to prevent future pregnancies.[156] In addition to damages related directly to the procedure, pregnancy, and childbirth, the McKernans alleged damages for the costs associated with rearing the child, a college education, and emotional burdens.[157] The trial court granted Dr. Aasheim's motion for partial summary judgment and dismissed the portion of the complaint that sought damages for the costs of rearing and educating the child.[158] The supreme court accepted direct review.[159]

The court acknowledged that the majority of jurisdictions considering the issue had refused to award child-rearing costs but dismissed, as unpersuasive, many of the reasons cited by those courts.[160] For example, the court reasoned that the benefits of parenthood could not always outweigh the costs of rearing a child, or people would not choose to be

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152. *See* D. Marianne Brower Blair, *Getting the Whole Truth and Nothing But the Truth: The Limits of Liability for Wrongful Adoption*, 67 Notre Dame L. Rev. 851, 854 n.6 (1992).

153. *See, e.g.*, Blair, *supra* note 152, at 900 (citing John R. Maley, Note, *Wrongful Adoption: Monetary Damages As a Superior Remedy to Annulment of Adoptive Parents Victimized by Adoption Fraud*, 20 Ind. L. Rev. 709, 730 (1987)).

154. 102 Wash. 2d 411, 687 P.2d 850 (1984).

155. *See id.* at 412, 687 P.2d at 851.

156. *See id.* at 413, 687 P.2d at 851.

157. *See id.*

158. *See id.*

159. *See id.*

160. *See id.* at 414–18, 687 P.2d at 852–54.

sterilized.[161] Further, allowing child-rearing damages would not place an unreasonable burden on health-care providers.[162] In any case, the court determined that it is not the judiciary's responsibility to deny child-rearing damages in order to protect health-care providers from large tort awards.[163] The court trusted that juries could distinguish legitimate from fraudulent claims.[164] The court noted—but did not address—the question of whether strict application of tort principles would require application of the avoidable-consequences doctrine.[165] The court did acknowledge, however, that jurisdictions allowing some recovery of child-rearing expenses have held that both abortion and adoption were unreasonable means of mitigation.[166]

The *McKernan* court nonetheless denied recovery of child-rearing costs.[167] The court reasoned that full recovery of child-rearing costs went "too far" because a child is more than an "economic liability" and may provide his or her parents with "love, companionship, a sense of achievement, and a limited form of immortality."[168] While recognizing that the benefits rule would weigh the benefits of parenthood against the child-rearing costs, the court concluded that it could not be applied in Washington for two reasons.[169] First, the court reasoned that the damages assessed under the benefits rule are too speculative because whether child-rearing costs outweigh the emotional benefits of parenthood is not calculable with reasonable certainty.[170] Emotional benefits would vary depending on whether the child "turn[s] out to be loving, obedient and attentive, or hostile, unruly or callous" or "grow[s] up to be President of the United States, or to be an infamous criminal."[171] Second, the court warned that the benefits rule might compel parents to prove the child

161. *See id.* at 418, 687 P.2d at 854.

162. *See id.*

163. *See id.*

164. *See id.*

165. *See id.* at 417, 687 P.2d at 854; *see also infra* note 196 and accompanying text.

166. *See id.*

167. *See id.* at 419, 687 P.2d at 854.

168. *Id.*

169. *See id.* at 419–20, 687 P.2d at 855.

170. *See id.*

171. *Id.*

"was more trouble than it was worth" by disparaging their child's value to them in order to maximize their recovery of child-rearing expenses.[172]

The court was also unwilling to allow full recovery of child-rearing expenses because of fear of emotionally harming the child.[173] The court was convinced that a potential for significant harm to the child existed from "being an unwanted or 'emotional bastard,' who will some day learn that its parents did not want it and, in fact, went to court to force someone else to pay for its raising . . . ."[174] The court refused to leave the decision to the parents about whether to risk the emotional psyche of their unplanned child.[175] Determining that permitting recovery of child-rearing expenses violated the public policy of the state, the court adopted the reasoning of the Supreme Court of Arkansas, which stated that "'[i]t is a question which meddles with the concept of life and the stability of the family unit . . . [and] will undermine society's need for a strong and healthy family relationship.'"[176]

Finally, the court concluded that the denial of child-rearing damages would not immunize negligent physicians from all liability resulting from unsuccessful sterilizations because some damages could be established with reasonable certainty.[177] Specifically, plaintiffs could recover for the expense, pain and suffering, and loss of consortium associated with the failed sterilization, pregnancy, and child birth.[178]

IV. THE SUPREME COURT OF WASHINGTON ERRED IN DENYING CHILD-REARING DAMAGES FOR WRONGFUL PREGNANCY

The *McKernan* court's reasoning that child-rearing damages are too speculative is based on the court's belief that the economic harm of child rearing must be offset by the emotional benefits of parenthood, a misapplication of section 920 of the Restatement (Second) of Torts. In no other child-related tort do Washington courts offset the harm by a benefit to a dissimilar interest. Nor do Washington courts consider the potential

172. *Id.* at 420, 687 P.2d at 855.

173. *See id.* at 421, 687 P.2d at 855.

174. *Id.* at 421, 687 P.2d at 856 (quoting Wilbur v. Kerr, 628 S.W.2d 568, 571 (Ark. 1982)).

175. *See id.* at 421, 687 P.2d at 855.

176. *Id.* at 421, 687 P.2d at 856 (quoting Wilbur v. Kerr, 628 S.W.2d 568, 571 (Ark. 1982)).

177. *See id.* at 421–22, 687 P.2d at 856.

178. *See id.* at 421, 687 P.2d at 855.

emotional harm to the subject child in other child-related torts. The current denial of child-rearing damages is based, not on legal standards, but on emotional considerations that no longer reflect the public policy of Washington. The failure of Washington courts to allow child-rearing costs, the largest element of damages, renders the pursuit of wrongful pregnancy claims cost inefficient, leaving victims with little or no remedy and providing diminished incentive for physicians to use due care.

A. The McKernan *Court Erroneously and Inconsistently Applied Tort Principles When Denying Recovery for Child-Rearing Damages*

The Supreme Court of Washington misconceived section 920 by requiring that the harm of economic expense be offset by emotional benefits. Among torts involving children, this erroneous application of section 920 occurs only in the wrongful pregnancy context. Once section 920 is applied properly, *McKernan*'s argument about speculative damages is irrelevant because child-rearing damages are routinely calculated. Further, the avoidable-consequences doctrine does not require that wrongful pregnancy plaintiffs mitigate through abortion or adoption, as it would be unreasonable to force those choices onto parents.

1. Tort Principles Oppose Using a Dissimilar Interest as an Offset

No basis exists for requiring the economic injury suffered by parents raising an unexpected child to be offset by the emotional benefit they sought to avoid, but may now enjoy. Section 920, from which the benefits rule is derived,[179] contemplates that harm and the offsetting benefit will be the same type of interest.[180] Therefore section 920 does not intend that a financial harm, such as child-rearing costs, must or should be offset by an emotional benefit, such as the joys of parenthood, as this offset compares "apples to oranges."[181]

179. *See supra* notes 118–119 and accompanying text.

180. *See Restatement (Second) of Torts* § 920 cmt. a (1979).

181. Johnson v. University Hosps. of Cleveland, 540 N.E.2d 1370, 1374 (Ohio 1989).

2. *The Supreme Court of Washington Does Not Require Consideration of Dissimilar Interests for Purposes of Offset in Other Child-Related Torts*

The Supreme Court of Washington has validated the same-interest requirement of section 920 in other tort cases involving children.[182] In actions for the wrongful death of a child, the court requires the economic "loss of service" component to be offset by the benefit of not having to pay the financial cost of support and maintenance of the deceased child.[183] The damages for loss of services are usually nominal under modern economic circumstances[184] while the economic benefit of not having to pay child-rearing expenses is substantial.[185] Unlike wrongful pregnancy actions, the court does not require that the resulting net-economic benefit carry over as an offset to the emotional harm of losing the child.[186]

In wrongful birth actions, for example, the court correctly applies the same-interest policy by requiring the *countervailing* emotional benefit of raising the defective child to be considered when assessing damages for emotional-distress injuries.[187] It is possible the emotional benefit of raising a child with a defect, who may spend more time with the parents, could equal or exceed that of raising a healthy child. The court, however, does not compel juries to offset the economic interest of extraordinary medical care and educational expenses with the emotional benefit of rearing a child,[188] although such emotional benefits could eclipse ordinary child-rearing costs.[189]

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182. *See, e.g.*, Harbeson v. Parke-Davis, Inc., 98 Wash. 2d 460, 482, 656 P.2d 483, 496–97 (1983); Clark v. Icicle Irrigation Dist., 72 Wash. 2d 201, 209–10, 432 P.2d 541, 546–47 (1967); *see also supra* notes 134, 141 and accompanying text.

183. *See Clark*, 72 Wash.2d at 210, 432 P.2d at 547.

184. *See supra* note 132 and accompanying text.

185. The U.S. Department of Agriculture estimates the cost of rearing a child in the United States to be between $177,250 and $350,210. *See* Mark Lino, *Expenditures on Children by Families, 1998 Annual Report*, U.S. Dep't. of Agric., Miscellaneous Publication No. 1528-1998 at 11 tbl.12 (1999).

186. *See supra* note 134 and accompanying text.

187. *See* Harbeson v. Parke-Davis, Inc., 98 Wash. 2d 460, 475, 656 P.2d 483, 493 (1983).

188. *See id.*

189. *See* McKernan v. Aasheim, 102 Wash. 2d 411, 419–20, 687 P.2d 850, 854–55 (1984).

3. *Child-Rearing Damages Are Not Too Speculative To Permit Recovery*

The court's concern is misplaced because child-rearing damages are not too speculative to permit recovery in wrongful pregnancy cases if offset of harm by a dissimilar interest is not required. In Washington, tort damages must be established with reasonable certainty.[190] Courts can utilize economic demographers, actuarial and insurance-company statistics,[191] and population studies[192] to assess child-rearing costs. The U.S. Department of Agriculture annually estimates child-rearing costs and is able discreetly to categorize those costs by specific expenditure and vary the estimate by income level and geographic region.[193] The financial interest of the parents has, in fact, been calculably injured by the cost to raise a child they had not planned and sought permanently to prevent.[194] Only the erroneous requirement that the economic interest be offset by the emotional benefit injects uncertainty into the calculation.

4. *The Avoidable-Consequences Doctrine Does Not Require Parents To Mitigate Damages by Aborting or Placing the Child up for Adoption*

Proper application of basic tort principles does not require the mitigation of child-rearing damages through abortion or giving the child up for adoption. In *McKernan*, the court raised, but did not address, the possibility that such mitigation might be required.[195] The avoidable-consequences doctrine requires that only *reasonable* efforts be made to mitigate damages.[196] The *McKernan* court correctly noted that courts have held abortion and adoption to be unreasonable means of reducing child-rearing damages.[197] Further, avoidance of consequences does not

190. *See id.* at 419, 687 P.2d at 855.

191. *See, e.g.*, Jones v. Malinowski, 473 A.2d 429, 436 (Md. 1984).

192. *See* Marciniak v. Lundborg, 450 N.W.2d 243, 246 (Wis. 1990).

193. *See* Lino, *supra* note 185, at 15–20.

194. Although the court does not allow ordinary child-rearing damages in wrongful birth, and the issue is undecided in wrongful adoption, a denial in those cases is not necessarily less than full compensation. Where the parents sought a healthy pregnancy or adopted child and the accompanying expense, they are only damaged to the extent of extraordinary expenses.

195. *See* McKernan v. Aasheim, 102 Wash. 2d 411, 417, 687 P.2d 850, 854 (1984).

196. *See Restatement (Second) of Torts* § 918 (1979).

197. *See McKernan*, 102 Wash. 2d at 417–18, 687 P.2d at 854.

require that plaintiffs take action that is painful in a different way in order to mitigate damages.[198] Quite possibly, parents chose sterilization as a means of birth control, rather than theoretically less effective measures, because to them, terminating a future pregnancy or giving a child up for adoption would be pain of a different type. Proper application of tort principles, including offsetting benefit from harm to the *same interest* and requiring *reasonable* mitigation, allows recovery of child-rearing damages in wrongful pregnancy cases.

B. The McKernan *Court Denied Child-Rearing Damages Based on Fears of Emotional Harm that Are Meritless and Inconsistently Applied in Torts Concerning Children*

Close analysis of the *McKernan* court's fears of emotional harm or disparagement of the child reveals that permitting recovery of child-rearing damages is actually likely to benefit the child emotionally as well as materially. Emotional harm to the child is not considered in wrongful birth or wrongful adoption cases. Likewise, no rational basis justifies using fear of emotional harm to the child to deny child-rearing damages in wrongful pregnancy cases.

1. The Emotional Harm to the Child Will Be No Greater If Child-Rearing Damages Are Allowed

It is specious to assert that the denial of child-rearing damages in a wrongful pregnancy suit provides protection of the child's psyche where other pregnancy and childbirth damages are allowed. Even where only pregnancy-related damages are allowed, proof of liability is logically the same: plaintiffs must introduce evidence that the child was unwanted, that the parents sought to exercise their right to prevent future pregnancies by choosing sterilization, and that the physician negligently stymied the exercise of that right resulting in the child's birth.[199] That the child was initially unwanted is the basis of any wrongful pregnancy action, whatever the measure of damages allowed. The child could learn that he or she was initially unwanted whether or not the parent-plaintiffs recover child-rearing costs. Instead of protection, the denial of recovery

198. *See supra* note 72 and accompanying text.

199. *See supra* Part II.A.

could have the opposite result—the child may feel less accepted if the parents must bear the very costs they went to great lengths to avoid.

2. *The Child Is Less Likely To Suffer Emotional Harm If Full Recovery Is Permitted*

A child whose parents sued for child-rearing expenses would not suffer any more emotional trauma than other children who learn they were initially unplanned.[200] After all, the parents will have chosen to raise the child and will not have sought to have an abortion or to put the child up for adoption. The child will likely understand that the parents sued because they needed financial assistance and not because the child was an unwanted burden.[201] To know that the financial strain the family might have experienced was eased and that his or her presence actually contributed to the overall welfare of the family could conceivably provide a measure of comfort to the child.[202]

Finally, the court's fear that the child will be disparaged if child-rearing damages are available is only a consideration for jurisdictions following the benefits rule, not for jurisdictions allowing full recovery.[203] Full recovery would eliminate any temptation or need for parents to disparage their child in court because the parents would be free to acknowledge the worth of their child while stressing the financial deficit created by costs of raising him or her.

3. *The Court Fears Potential Emotional Harm to the Subject Child Only in Wrongful Pregnancy Actions*

The Supreme Court of Washington considers potential harm to the child only when denying child-rearing damages in wrongful pregnancy

200. *See* Custodio v. Bauer, 59 Cal. Rptr. 463, 477 (Cal. Ct. App. 1967) (noting emotional injury to child in wrongful pregnancy context not greater than other circumstances resulting in unplanned birth).

201. *See* Marciniak v. Lundborg, 450 N.W.2d 243, 246 (Wis. 1990).

202. *See id.* ("Relieving the family of the economic costs of raising the child may well add to the emotional well-being of the entire family, including this child, rather than bring damage to it."); *see also* Burke v. Rivo, 551 N.E.2d 1, 4–5 (Mass. 1990).

203. *See* McKernan v. Aasheim, 102 Wash. 2d 411, 420, 687 P.2d 850, 855 (1984) (noting application of benefits rule obliges parents to disparage child).

actions.[204] A child with a physical defect but full mental faculties is equally likely to discover his or her parents sued to recover the extraordinary expenses associated with the defect. The court, however, has expressed no concern about potential emotional harm to a child who is the subject of a wrongful birth action where, in order to recover, the parents must allege they would have prevented the pregnancy or aborted the child had they known it would be born defective.[205] Despite warnings from commentators about emotional harm to the child,[206] the court raised no such concerns in 1998 when it allowed a cause of action for wrongful adoption, even though the parents must allege that had they known of the child's defects they would not have adopted him or her[207] and the potential remedy is revoking the adoption.[208] This indifference toward an adoptee's emotional health exists even though in a wrongful adoption action it is possible that the child will be old enough to be aware of an ongoing suit and of having been given up by its biological parents. The court's inconsistent consideration of potential emotional harm to children in wrongful pregnancy suits implies that only normal, healthy children warrant emotional protection by the court.[209] The court should not assume the parent's role as protector of the child's emotional health, but rather, should provide legal remedies for legal wrongs and fully compensate parents for the tortious conduct.

C. *Prevailing Legal Standards and Public Policy No Longer Support the* McKernan *Decision*

The *McKernan* court abandoned standard tort principles when denying child-rearing damages in an apparent attempt to express appreciation for life. Ironically, the denial of child-rearing costs may encourage abortions among financially distressed parents. The emotion-based public policy

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204. *See supra* Parts III.B–D. In addition to child-related torts, courts reviewing paternity lawsuits do not consider potential emotional harm to children born out of wedlock, even though there the child may one day discover that his or her mother hailed the child's *own father* into court to receive assistance with child-rearing costs. *See generally* Linda D. v. Fritz C., 38 Wash. App. 288, 687 P.2d 223 (1984). There, however, initials are used to protect the child's identity. *See id.*

205. *See* Harbeson v. Parke-Davis, Inc., 98 Wash. 2d 460, 656 P.2d 483 (1983).

206. *See* Blair, *supra* note 153 and accompanying text.

207. *See* McKinney v. State, 134 Wash. 2d 388, 406, 950 P.2d 461, 470-71 (1998).

208. *See supra* note 152 and accompanying text.

209. If the court is truly concerned about preventing harm to the child, it could allow the child to reap the financial benefits of child-rearing damages and use initials in the case caption, as in paternity suits, to protect the child's privacy. *See supra* note 204.

rationale in *McKernan* cannot stand in light of the declaration by Washington voters that reproductive rights are fundamental.

1. The Decision Whether To Allow Child-Rearing Damages Should Be Made According to Legal Standards Rather Than Emotional Public-Policy Considerations

The *McKernan* court should have followed the admonition of the U.S. Supreme Court and made its decision according to legal standards—traditional tort principles of compensation and deterrence—rather than being swayed by dubious emotional considerations.[210] The *McKernan* court denied child-rearing damages based on moral considerations, claiming that allowing such damages "'meddles with the concept of life and the stability of the family unit.'"[211] The court's determination that allowing full child-rearing damages is unacceptable because a child is more than an "economic liability"[212] is akin to the notion that any pregnancy should be welcomed, regardless of how difficult it may be for parents to provide for the child.[213] The U.S. Supreme Court has recommended that judicial decisions concerning contraception be made according to legal standards, "free of emotion" and "predilection."[214] Denying child-rearing damages based on the court's predilection regarding life and family values impairs parents' constitutionally protected privacy by failing to provide an effective remedy for sterilization malpractice.

2. The Decision To Deny Child-Rearing Damages May Encourage Abortions

Whatever the court's actual predilection regarding the value of life, the court's failure to award child-rearing costs may encourage, or even force, parents to choose abortion. Economically overextended parents faced with an unwanted pregnancy and no potential financial assistance

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210. *See* Roe v. Wade, 410 U.S. 113, 116 (1973).

211. McKernan v. Aasheim, 102 Wash. 2d 411, 421, 687 P.2d 850, 856 (1984) (quoting Wilbur v. Kerr, 628 S.W.2d 568, 571 (Ark. 1982)).

212. *Id.* at 419, 687 P.2d at 854.

213. *See* Planned Parenthood v. Casey, 505 U.S. 833, 853 (1992); *see also supra* note 35 and accompanying text.

214. *Roe*, 410 U.S. at 116.

through recovery of child-rearing damages may find themselves considering two choices: adoption or abortion.[215] Many parents may fear they would be unable to put the child up for adoption after the mother has carried the child to term.[216] The court's denial of child-rearing costs may force parents unable to afford to raise the child to choose the cheaper alternative of abortion rather than going through with the pregnancy.[217] The Washington court's decision to deny child-rearing costs because a child is "more than an economic liability"[218] may have been meant to encourage the sentiment that it will always be worth it to give birth and to promote reverence for the human life. Although this rationale reflects pro-life values, the decision may actually encourage the abortion alternative.[219] Therefore, the decision to deny child-rearing damages may actually contravene the public policy it attempts to further.

3. *The Public Policy Cited in* McKernan *Conflicts with the Washington Public Policy that the Right to Reproductive Choice Is Fundamental*

The public-policy basis of the decision denying child-rearing damages in *McKernan* conflicts with current Washington public policy as adopted through Initiative 120.[220] This initiative, passed seven years after the *McKernan* decision, declared that the public policy of Washington state respects reproductive rights as fundamental. The judiciary, when determining public policy, must first look to relevant statutory provisions.[221] The *McKernan* decision elevated the speculative emotional harm to the child above providing judicial protection from negligent interference with parents' *fundamental* right of reproductive choice. The public-policy notions that predicated the denial of child-rearing expenses are outmoded since the passage of Initiative 120.

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215. *See* Michael H. Knight, Note, Johnson v. University Hospitals of Cleveland*: A Misapplied Public Policy*, 13 Geo. Mason L. Rev. 153, 166–67 (1990).

216. *See id.* at 167.

217. *See id.* at 167–68.

218. McKernan v. Aasheim, 102 Wash. 2d 411, 419, 687 P.2d 850, 854 (1984).

219. *See Knight*, *supra* note 215, at 166–67.

220. *See supra* Part I.B.

221. *See* Cary v. Allstate Ins. Co., 130 Wash. 2d 335, 340, 922 P.2d 1335, 1338 (1996).

D. *The Failure to Allow Recovery of Child-Rearing Costs in Wrongful Pregnancy Actions Effectively Immunizes Physicians from Liability and Leaves Victims Inadequately Compensated*

By denying child-rearing costs, which are the substantial portion of a potential damage award, the court has effectively eliminated the incentive for attorneys to pursue wrongful pregnancy claims. Costs of a routine pregnancy and childbirth are $8,000 or less.[222] The estimated cost of bringing a wrongful pregnancy claim is at least $20,000, excluding attorney fees.[223] Because neither significant permanent physical injury nor recovery of ongoing special damages is associated with the birth of a healthy child,[224] plaintiffs' attorneys are reluctant to pursue wrongful pregnancy claims. Indeed, the leading treatise on Washington tort litigation implies that no cause of action exists for wrongful pregnancy of a healthy child.[225]

The potential of only minimal damages in pursued claims and the resulting disincentive for attorneys to pursue lawsuits effectively immunizes physicians from liability, resulting in little deterrence of malpractice and inadequate compensation for parents. Even if a plaintiff brings a successful claim for limited damages, the physician responsible for the negligent sterilization has little to fear where the parents must bear the major cost of the tortious conduct—rearing the unplanned child, estimated at up to $350,000.[226] Judicial recognition of a legal injury without provision for an effective remedy is contrary to the central principles of tort law. A guiding principle of torts is to make the victim as whole as possible through compensation.[227] Absent awards for child-rearing costs, plaintiffs in wrongful pregnancy suits are either woefully undercompensated or unable to bring a lawsuit, which results in no recovery for the physician's negligence.

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222. Health Insurance Association of America, *Source Book of Health Insurance Data 1999-2000*, at 115 tbl. 5.12 (1999) (reporting costs of hospital stay and physician charge for uncomplicated vaginal delivery in Washington as $7,210).

223. *See* Telephone Interview with Mark A. Johnson, *supra* note 60 and accompanying text.

224. *See id.*

225. *See* 16 *Washington Practice* § 4.25, at 91 (citing McKernan v. Aasheim, 102 Wash. 2d 411, 687 P.2d 850 (1984)) ("Washington recognizes a cause of action for wrongful birth, but only where the child is other than a normal, healthy child.").

226. *See* Lino, *supra* note 185, at 11.

227. *See supra* note 65 and accompanying text.

V. FULL RECOVERY OF CHILD-REARING EXPENSES IS NECESSARY TO VINDICATE A CONSTITUTIONALLY AND STATUTORILY PROTECTED FUNDAMENTAL RIGHT

A right is only as valuable as the remedy available to vindicate it. The Supreme Court of Washington has previously recognized constitutional reproductive rights and the correlative duties of health-care providers to provide due care to honor those rights, as well as the relationship between tort remedies and malpractice deterrence.[228] The choice to prevent future pregnancies through sterilization is the same exercise of reproductive choice involved in abortion, and probably a more palatable alternative to many. Just as legislative restrictions on contraceptives and abortion impairs the exercise of a constitutional right,[229] so does the virtual judicial protection afforded physicians who negligently perform sterilizations. Whether the legislature denies access to abortions and contraceptives or the judiciary refuses to provide the legal framework necessary to assure that choosing to prevent future pregnancies through sterilization is effective, the result is the same: the constitutional and statutorily protected right to prevent unwanted pregnancies is impaired. The U.S. Supreme Court and Washington voters have elevated the right to prevent pregnancies to the highest status as a *fundamental* right. A right held in such esteem deserves fundamental protection by way of a meaningful tort recovery for the interference with that right. The court must structure a legal remedy for negligent sterilization in a manner that assures physician accountability and fully vindicates the right to reproductive choice that is protected as fundamental under both state and federal law.

VI. CONCLUSION

The Supreme Court of Washington's policy denying recovery of child-rearing damages for wrongful pregnancy is based on a misconceived application of Restatement (Second) of Torts section 920 and questionable fear of emotional harm to the child. The court should apply section 920 as it does in other torts concerning children and require a benefits offset only to the same interest that is harmed. The court also should not consider what may be an irrational fear of emotional harm to

228. *See* Harbeson v. Parke-Davis, Inc., 98 Wash. 2d 460, 472–73, 656 P.2d 483, 491 (1983).

229. *See* Carey v. Population Servs., Int'l, 431 U.S. 678, 689–90 (1977).

the unplanned child, but should concern itself with providing legal remedies for legal wrongs, as it has done more recently when creating a wrongful adoption cause of action.

The public-policy decision to deny full recovery of child-rearing damages is apparently based on emotional considerations with a decidedly pro-life ring to them. Judicial decisions should be made according to legal standards, notwithstanding the court's predilection regarding reproductive rights. Ironically, the court's articulated public policy may actually encourage abortions rather than perpetuate a reverence for life.

Finally, the denial of child-rearing damages cannot be reconciled with the fundamental nature of reproductive rights. The choice to have or not to have children is one of the most personal, intimate, and important decisions a person makes in his or her lifetime and is so esteemed that it is given *fundamental* status by both the U.S. Constitution and Washington law.[230] The denial of child-rearing damages for wrongful pregnancy contravenes this fundamental status and the basic purposes of tort recovery—compensation and deterrence—by placing the entire burden of physician negligence on parents and providing little incentive for attorneys to bring wrongful pregnancy cases. The duty to use due care by physicians performing sterilization procedures undertaken by parents exercising their reproductive rights should not be effectively nullified by judicial notions of public policy. Child-rearing damages are a necessary tort remedy to fully vindicate fundamental reproductive rights impaired by physician negligence.

230. *See supra* Parts I.A.–B.