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## POTSHOTS AT THE STORK: TOWARD A CONSISTENT JUSTIFICATION OF RECOVERY FOR WRONGFUL BIRTH CLAIMS

The failure of courts to define a cause of action for wrongful birth has led to inconsistent results in cases where damages are sought for the birth of a child.<sup>1</sup> This area of tort law has been complicated by attempts to distinguish wrongful birth claims from similar claims for "wrongful life,"<sup>2</sup> "wrongful conception,"<sup>3</sup> and "wrongful pregnancy."<sup>4</sup> Because a cause of action for wrongful birth has not been defined, courts considering tort claims arising from births have encountered difficulties in assessing damages.<sup>5</sup> For medical malpractice claims containing elements of wrongful birth, a cause of action in negligence exists<sup>6</sup> and damages can be assessed in accordance with ordinary tort principles.<sup>7</sup> In a traditional wrongful birth case, however, damages are not recoverable within the established torts framework even if a proper cause of action exists.<sup>8</sup> By treating medical malpractice claims as distinct from wrongful birth claims, a consistent theory of recovery can be developed in accordance with ordinary tort principles.

In a traditional wrongful birth action, an infant plaintiff<sup>9</sup> seeks damages for the unfavorable circumstances of his own existence,<sup>10</sup> alleging that

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<sup>1</sup> Compare *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967) (damages for birth of child not cognizable at law) with *Betancourt v. Gaylor*, 136 N.J. Super. 69, 344 A.2d 336 (1975) (damages for birth of child allowed).

<sup>2</sup> Note, *Wrongful Birth in the Abortion Context - Critique of Existing Case Law and Proposal For Future Actions*, 53 DENVER L.J. 501 (1976); Note, *Wrongful Birth and Emotional Distress Damages: A Suggested Approach*, 38 U. PITT. L. REV. 550, 552 (1977).

<sup>3</sup> *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169 (Minn. 1977) (because claim arose from negligent sterilization operation, claim was for wrongful conception, not wrongful birth).

<sup>4</sup> *Coleman v. Garrison*, 327 A.2d 757, 761 (Del. Super. Ct. 1974), *aff'd*, 349 A.2d 8 (1975) (claim arising from ineffective sterilization stated cause of action for wrongful pregnancy).

<sup>5</sup> See, e.g., *Stills v. Gratton*, 55 Cal. App.3d 698, 127 Cal. Rptr. 652 (1976); *Stewart v. Long Island College Hosp.*, 35 App. Div.2d 531, 313 N.Y.S.2d 502 (1970), *aff'd*, 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1972). Because wrongful birth claims are relatively new to tort law, difficulties in assessing damages center around which items of damage, if any, are properly recoverable. See text accompanying notes 36-39, 62-72 *infra*.

<sup>6</sup> *Sherlock v. Stillwater Clinic*, 260 N.W.2d 174 (Minn. 1977).

<sup>7</sup> See text accompanying notes 62-67 *infra*.

<sup>8</sup> See text accompanying notes 36-39 *infra*.

<sup>9</sup> Also included in the traditional wrongful birth category are claims brought by children for damages, resulting from the birth of younger siblings, for reductions in their proportionate share of inheritances, income, and parental love and affection, which had to be spread over a larger group. Such claims have been denied consistently. See, e.g., *Aronoff v. Snider*, 292 So.2d 418 (Fla. App. 1974) (cause of action by minor children dismissed as without basis in law or logic); *Cox v. Stretton*, 77 Misc.2d 155, 352 N.Y.S. 2d 834 (Sup. Ct. 1974) (cause of action of behalf of prior children dismissed as unknown to law).

<sup>10</sup> *Zepeda v. Zepeda*, 41 Ill. App.2d 240, 190 N.E.2d 849 (1963), *cert. denied*, 379 U.S. 945 (1964); see *Brantley, Wrongful Birth; The Emerging Status of New Tort*, 8 ST. MARY'S L.J. 140, 145 (1976) [hereinafter cited as *Brantley*].

he would never have been born but for the wrongful conduct of the defendant. This allegation implies that nonexistence is preferable to life, so that the plaintiff seeks damages measured by his present state of existence compared to nonexistence.<sup>11</sup> Although courts have not recognized a cause of action for wrongful birth, the action can be analogized to a negligence action, which requires the plaintiff to establish a breach of a duty and demonstrate harm resulting from the breach before a cause of action is stated.<sup>12</sup>

In one variation of the traditional wrongful birth claim, the plaintiff seeks damages for illegitimacy on the theory that the defendant's tortious acts led to the plaintiff's conception. In *Slawek v. Stroh*,<sup>13</sup> for example, the plaintiff alleged that his father had fraudently induced conception by falsely promising to marry his mother, thereby causing plaintiff's illegitimate birth.<sup>14</sup> Because public policy did not impose a duty not to allow plaintiff's illegitimate birth, the court denied recovery of damages for mental anguish, public humiliation, and embarrassment.<sup>15</sup> The *Slawek* court recognized that imposing a duty to prevent illegitimate births would be undesirable, since the result might be to force unwilling parents into marriage. Even if such a duty were imposed, plaintiffs would still have to demonstrate that defendant's breach of duty caused compensable harm<sup>16</sup> in order to recover damages.<sup>17</sup> The harm in an illegitimacy case would be speculative, both because an infant plaintiff would not yet have suffered harm<sup>18</sup> and because there is no standard to measure the value of a plaintiff's existence against nonexistence.<sup>19</sup>

While some courts, as in *Slawek*, may recognize that they have the power to allow illegitimacy claims,<sup>20</sup> such claims traditionally have been rejected.<sup>21</sup> The refusal to recognize a cause of action has not resulted from

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<sup>11</sup> See text accompanying notes 38-39 *infra*.

<sup>12</sup> W. PROSSER, HANDBOOK OF THE LAW OF TORTS §30 (4th ed. 1971) [hereinafter cited as PROSSER].

<sup>13</sup> 62 Wis.2d 295, 215 N.W.2d 9 (1974).

<sup>14</sup> 215 N.W.2d at 21.

<sup>15</sup> *Id.* at 22.

<sup>16</sup> PROSSER, *supra* note 12, at § 30. Recovery for negligence is precluded unless the plaintiff demonstrates actual loss or damage resulting from a defendant's breach of duty. Where only future harm is threatened or nominal damages are sought as a means of vindicating a technical right, a cause of action will not be sustained. *Id.*

<sup>17</sup> Some courts deny recovery in illegitimacy cases out of fear that recognizing a cause of action for wrongful birth would lead to spurious claims from plaintiffs who are dissatisfied with the circumstances surrounding their birth. See *Williams v. State*, 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S. 885 (1966) (being born to one set of parents rather than another is not suable wrong).

<sup>18</sup> See Note, *Compensation for the Harmful Effects of Illegitimacy*, 66 COLUM. L. REV. 129 (1966).

<sup>19</sup> Although the lack of a standard for measuring damages alone would not provide a sufficient basis for denying recovery, *Battalla v. State*, 10 N.Y.2d 237, 242, 176 N.E.2d 729, 731, 219 N.Y.S.2d 34, 38 (1961), the novel nature of the claim may contribute to a reluctance to recognize damages. See text accompanying notes 22-26 *infra*.

<sup>20</sup> 215 N.W.2d at 21.

<sup>21</sup> See *Zepeda v. Zepeda*, 41 Ill. App.2d 240, 190 N.E.2d 849 (1963). In *Zepeda*, the

a view that injuries do not result from illegitimate births,<sup>22</sup> but rather from judicial reluctance to recognize a new tort without legislative approval.<sup>23</sup> Because many state legislatures have removed legal handicaps for illegitimates,<sup>24</sup> the courts feel that recognition of a cause of action for traditional wrongful birth is best left for legislative study and approval.<sup>25</sup> Since legislation has removed the stigma of illegitimacy,<sup>26</sup> courts may now perceive damages arising from illegitimacy as being not only speculative, but possibly nonexistent.

A second type of wrongful birth claim is brought by infant plaintiffs who seek damages as a result of physicians' failures to perform abortions.<sup>27</sup> Most of these claims occur when failure to abort results in the birth of a child afflicted with serious birth defects.<sup>28</sup> In *Gleitman v. Cosgrove*,<sup>29</sup> for example, the plaintiff's mother contracted rubella during early pregnancy, but was never advised that her child might be born with serious birth defects.<sup>30</sup> The *Gleitman* court denied the infant's claim for damages from

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defendant fraudulently induced conception by promising to marry the plaintiff's mother. 190 N.E.2d at 852. Although the court found that the defendant's act was tortious as to the plaintiff, who was not conceived at the time of the tort, *id.* at 852-53, the court held that the complaint did not state a cause of action for damages resulting from the plaintiff's illegitimacy, *id.* at 855, because the state legislature did not recognize such a cause of action. *Id.* at 859; see Comment, *Liability to Bastard for Negligence Resulting in His Conception*, 18 STAN. L. REV. 530 (1966); 77 HARV. L. REV. 1349 (1964). In contrast to *Zepeda*, the court in *Williams v. State*, 46 Misc.2d 824, 260 N.Y.S.2d 953 (Ct. Cl. 1965), *aff'd*, 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966), found the state negligent in failing to protect plaintiff's mother, while she was a patient in a state mental hospital, from the rape that resulted in plaintiff's illegitimate birth. 223 N.E.2d at 343. The claim for damages resulting from the stigma of illegitimacy and deprivation of a normal home life was disallowed, however, on the grounds that defendant's actions were not tortious as to the child. *Id.* at 344; see 41 N.Y.U.L. REV. 212 (1966). Even though a court may be willing to recognize the defendant's acts as wrongful to the plaintiff child, the universal refusal to grant damages in illegitimacy cases renders such recognition meaningless. See text accompanying notes 21-26 *infra*.

<sup>22</sup> *Zepeda v. Zepeda*, 41 Ill. App.2d 240, 190 N.E.2d 849, 857 (1963); see note 21 *supra*.

<sup>23</sup> 190 N.E.2d at 859.

<sup>24</sup> All fifty states have enacted legitimation provisions, Note, *Illegitimacy*, 26 BROOKLYN L. REV. 45, 86-87 (1959), and almost all have instituted actions whereby the expenses of supporting an illegitimate child can be recovered from the state. Comment, *Support of Children Born Out of Wedlock: Virginia at the Crossroads*, 18 WASH. & LEE L. REV. 343, 350 n.60 (1961).

<sup>25</sup> *Zepeda v. Zepeda*, 190 N.E.2d 849, 859 (1963).

<sup>26</sup> See note 24 *supra*.

<sup>27</sup> See *Stills v. Gratton*, 55 Cal. App.3d 689, 127 Cal. Rptr. 652 (1976); *Gleitman v. Cosgrove*, 49 N.J.2d, 227 A.2d 689 (1967); *Stewart v. Long Island College Hosp.*, 35 App. Div.2d 531, 313 N.Y.S.2d 502 (1970); *Dumer v. St. Michael's Hosp.*, 69 Wis.2d 766, 233 N.W.2d 372 (1975).

<sup>28</sup> *Stewart v. Long Island College Hosp.*, 35 App. Div.2d 531, 313 N.Y.S.2d 502 (1970). But see *Stills v. Gratton*, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976) (cause of action brought on behalf of normal child).

<sup>29</sup> 49 N.J. 22, 227 A.2d 689 (1967). See also *Dumer v. St. Michael's Hosp.*, 69 Wis.2d 766, 233 N.W.2d 372 (1975); Note, *A Cause of Action for "Wrongful Life": A Suggested Analysis*, 55 MINN. L. REV. 58 (1970).

<sup>30</sup> 227 A.2d at 689.

the physician for the resultant birth defects because the claim was not cognizable at law.<sup>31</sup> In addition, the action was unsuccessful because the plaintiff failed to show that the defendant physician owed him a duty to terminate his life.<sup>32</sup> As in illegitimacy cases,<sup>33</sup> courts deny recovery in failure to abort actions brought by infants because the claims are novel and because legislatures have not sanctioned the imposition of a duty to abort upon physicians.<sup>34</sup> More importantly, however, courts have refused to recognize a cause of action for failure to abort due to a public policy in favor of human life, irrespective of the quality.<sup>35</sup> The basis of this policy is that the public's interest in protecting human life overrides an individual's interest in being born free of defects.

Courts should continue to deny recovery in wrongful birth cases where infants claim damages for their existence.<sup>36</sup> The difficulty of assessing damages is alone sufficient reason for denying the cause of action, especially where granting damages requires putting a dollar value on the stigma resulting from illegitimacy or the relative worth of life with defects as opposed to nonexistence. Awarding damages in any amount for wrongful birth claims may also be illogical. Because the purpose of the torts system is to provide compensation to individuals who have been wronged,<sup>38</sup> damages are awarded for the reduction in value of the plaintiff's life resulting from the wrong. In a wrongful birth case, a plaintiff claims that he should not have been born, however, there can be no claim of reduced value for a life not lived. No compensatory purpose could be served by assessing damages against a physician for refusing "to consign the plaintiff to oblivion,"<sup>39</sup> and therefore, continued denial of recovery for wrongful birth claims is justified.

In contrast to traditional wrongful birth claims, medical malpractice claims concerning wrongful birth state a cause of action in negligence.<sup>40</sup> Typically, these claims are brought by parents<sup>41</sup> who seek damages for injuries incident to birth.<sup>42</sup> They do not, however, claim that the child should not have been born. The cause of action is therefore not subject to

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<sup>31</sup> *Id.* at 692.

<sup>32</sup> *Id.* at 693.

<sup>33</sup> See text accompanying notes 20-26 *supra*.

<sup>34</sup> *Stewart v. Long Island College Hosp.*, 35 App. Div.2d 531, 313 N.Y.2d 502, 503 (1970). See *Howard v. Lecher*, 53 App.Div.2d 420, 386 N.Y.S.2d 460 (1976).

<sup>35</sup> *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689, 693 (1967). *But see* *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 89, 703 (Jacobs, J., dissenting)(physician had both moral and legal duty to warn of incidence of defects).

<sup>36</sup> *Brantley*, *supra* note 10, at 159; see text accompanying notes 37-39 *infra*.

<sup>37</sup> See *Dumer v. St. Michael's Hosp.*, 69 Wis.2d 766, 233 N.W.2d 372, 375-76 (1975).

<sup>38</sup> *Stewart v. Long Island College Hosp.*, 296 N.Y.S. 41, 46 (Sup. Ct. 1968).

<sup>39</sup> *Id.*

<sup>40</sup> *Sherlock v. Stillwater Clinic*, 260 N.W.2d 174 (Minn. 1977).

<sup>41</sup> *Cf. Renslow v. Mennonite Hosp.*, 40 Ill. App.3d 234, 351 N.E. 2d 870 (1976)(child could recover for injuries sustained as result of transfusion negligently administered to mother prior to conception).

<sup>42</sup> *Coleman v. Garrison*, 327 A.2d 757, 761 (Del. Super. Ct. 1974); *Jacobs v. Theimer*, 519 S.W.2d 846, 849 (S. Ct. Tex. 1975); *Betancourt v. Gaylor*, 136 N.J. Super. 69, 344 A.2d 336, 338 (1975).

the logical inconsistencies inherent in a wrongful birth action.<sup>43</sup> In view of the distinction between wrongful birth actions and malpractice actions containing elements of wrongful birth, a trend toward allowing recovery in the malpractice actions has been established.<sup>44</sup>

The most common malpractice claim concerning birth arises when pregnancy results from an ineffective sterilization operation.<sup>45</sup> In order to recover on a theory of negligence, the plaintiff parents must show not only conception,<sup>46</sup> but that the physician's conduct in performing the operation was wrongful. Where a child is born after one of the plaintiff parents has undergone a sterilization procedure, the defendant physician has clearly breached a duty to perform the operation effectively.<sup>47</sup> The plaintiff must also show that the negligent act was the actual cause of foreseeable harm.<sup>48</sup> Foreseeability, however, depends on the primary purpose for which the sterilization was performed. Where the sterilization is performed primarily for contraceptive purposes, the birth of an unplanned child is a foreseeable result of the physicians's negligence.<sup>49</sup> If the parents seek sterilization for some other reason,<sup>50</sup> such as to protect the mother's health, the causation element may be lacking.<sup>51</sup> Nevertheless, whether the plaintiff is sterilized

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<sup>43</sup> Brantley, *supra* note 10 at 145; see text accompanying notes 37-39 *supra*.

<sup>44</sup> Brantley, *supra* note 10, at 144; see text accompanying notes 63-67 *infra*.

<sup>45</sup> No distinction has been made between the consequences of ineffective sterilization procedures performed on males and females, presumably because unexpected pregnancy is the result in either case. Vasectomy, the male sterilization procedure, involves the surgical interruption of the vas deferens to keep sperm from mixing with other components of the semen. Hackett & Waterhouse, *Vasectomy Reviewed*, 116 AM J. OBSTETRICS & GYNECOLOGY 438, 443 (1973); see Lombard, *Vasectomy*, 10 SUFFOLK U. L. REV. 25 (1975). The most common female sterilization procedure, bilateral tubal ligation, involves the severing of the fallopian tubes to prevent eggs from entering the uterus and becoming fertilized. Thompson, Haverkamp, & Droese, *Sterilization of the Female*, 70 ROCKY MT. MED. J. 29 (April, 1973) [hereinafter cited as Thompson, Haverkamp, & Droese].

<sup>46</sup> See, e.g., *Peters v. Gelb*, 303 A.2d 685 (Del. Super. Ct. 1973), *aff'd*, 314 A.2d 901 (Del. 1974); *Lane v. Cohen*, 201 So.2d 804 (Fla. App. 1967).

<sup>47</sup> Although the physician has a duty to perform sterilizations competently, it is often difficult to prove that the physician actually was negligent in a particular case. Because both the plaintiff and the defendant must rely on expert evidence to establish a breach of duty, the determination of defendant's negligence may depend solely on which expert the fact finder chooses to believe. C. MCCORMICK, EVIDENCE §17 (2d ed. 1972) (use of expert testimony can make the trial a battle of experts). See *Ball v. Mudge*, 64 Wash.2d 247, 391 P.2d 201 (1964) (jury found that negligence of physician was not proximate cause of fertility, apparently accepting expert testimony that vasectomy could reverse itself even if competently performed).

<sup>48</sup> PROSSER, *supra* note 12, at § 41.

<sup>49</sup> Comment, *Liability For Failure of Birth Control Methods*, 76 COLUM L. REV. 1187, 1192-94 (1976).

<sup>50</sup> Sterilization may be performed primarily for contraceptive, therapeutic, or eugenical reasons. Contraceptive sterilization is primarily intended to prevent conception for family planning purposes, while therapeutic sterilization is intended to protect the mother against the aggravation of health problems which would result if the mother became pregnant. Eugenic sterilization is used to prevent the propagation of mental defectives and criminals. Driver, *Population Policies of State Governments in the United States: Some Preliminary Observations*, 15 VILL. L. REV. 818, 826-27 (1970).

<sup>51</sup> The reasons for which a plaintiff chooses to undergo sterilization may affect the dam-

for contraceptive or therapeutic purposes, a cause of action in negligence should be allowed when the sterilization proves ineffective. In both cases, the breach of duty results in exactly what the plaintiff sought to avoid - an unwanted pregnancy which could harm plaintiff's interests in family planning or personal health. Because the physician has failed to perform the operation effectively, the plaintiff in either case should be able to recover the costs of the negligently performed procedure.<sup>52</sup>

When confronted with a cause of action for medical malpractice, courts differ on the measure of damages recoverable when a normal child is born after an ineffective sterilization.<sup>53</sup> Some courts deny recovery<sup>54</sup> by applying two concepts that require reduction of damages because parents are deemed to benefit from the child. First, the "benefits" concept<sup>55</sup> does not preclude recovery, but requires a reduction of damages by the amount which the birth of a child has benefitted the plaintiffs.<sup>56</sup> On the other hand, the "blessing" concept<sup>57</sup> precludes recovery on the basis that the benefits derived from the birth and raising of a child are so great that as a matter of public policy there can be no recovery for the birth of a normal child. The blessing concept is actually an extreme application of the benefits

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age award as well as the element of causation. See text accompanying notes 68-72 *infra*.

<sup>52</sup> *Custodio v. Bauer*, 251 Cal. App.2d 303, 59 Cal. Rptr. 463, 475 (Ct. App. 1967). But see *Terrell v. Garcia*, 496 S.W.2d 124 (Tex. App. 1973), *cert. denied*, 415 U.S. 927 (1974); *LaPoint v. Shirley*, 490 F. Supp. 118 (W.D. Tex. 1976).

<sup>53</sup> Compare *Custodio v. Bauer*, 251 Cal. App.2d 303, 59 Cal. Rptr. 463, 475 (Ct. App. 1967) (parents could recover provable damages) with *Terrell v. Garcia*, 496 S.W.2d 124 (Tex. App. 1973) (no damages allowed where normal child born after ineffective sterilization).

<sup>54</sup> See *Terrell v. Garcia*, 496 S.W.2d 124 (Tex. App. 1973); *LaPoint v. Shirley*, 409 F. Supp. 118 (W.D. Tex. 1976).

<sup>55</sup> RESTATEMENT OF TORTS § 920 (1939).

<sup>56</sup> The benefits in a negligent sterilization case include such items as the joy and satisfaction that the parents derive from raising a healthy child, and may often be greater than the damages the parents would otherwise be entitled to recover. See *Custodio v. Bauer*, 251 Cal. App.2d 303, 59 Cal. Rptr. 463 (Ct. App. 1967) (plaintiff entitled to reimbursement for cost of ineffective sterilization, physical complications, pain and suffering, and future costs of rearing child; damages reduced by value of benefits incident to birth). Some courts have taken a liberal view of the benefits, allowing all benefits from the child's birth to mitigate damages. See, e.g., *Coleman v. Garrison*, 327 A.2d 757 (Del. Super. Ct. 1974). In *Coleman*, the court found significant the fact that the parents chose to retain the child, indicating that the benefits outweighed the hardship and expense involved in rearing. *Id.* at 761. At least one court has taken a much narrower view of the benefits, allowing mitigation of damages only if the birth benefitted the interest plaintiff sought to protect by undergoing sterilization. *Custodio v. Bauer*, 251 Cal. App.2d 303, 59 Cal. Rptr. 463 (Ct. App. 1967). In such a case, if the plaintiff underwent sterilization for therapeutic reasons, and the subsequent birth did not benefit the health problem, there would be no mitigation. See Comment, *Busting the Blessing Balloon: Liability For the Birth Of An Unplanned Child*, 39 ALBANY L. REV. 221, 230 (1975) [hereinafter cited as *Liability*].

<sup>57</sup> *Liability*, *supra* note 56, at 226. The blessing concept was first espoused in *Christensen v. Thornby*, 192 Minn. 123, 255 N.W. 620 (1934). In *Christensen*, plaintiff's claim for damages as a result of an ineffective sterilization was denied. *Id.* at 622. Instead of finding the plaintiff damaged by the resulting pregnancy, the court found that plaintiff had been "blessed with the fatherhood of another child." *Id.*

concept, and was applied in *Terrell v. Garcia*.<sup>58</sup> In *Terrell*, the parents of a normal child born after an unsuccessful sterilization operation sought financial expenses for the child's care and maintenance.<sup>59</sup> The *Terrell* court denied recovery, concluding that the probable earnings of a normal child during minority will always be greater than the parents' expense of rearing the child.<sup>60</sup> Although application of the benefits concept might have allowed the parents some recovery, the *Terrell* court utilized the more rigid blessing concept because placing a dollar value on the benefits received from a child presented "insurmountable" problems of proof.<sup>61</sup>

Mixed concerns over public policy and the application of the benefits concept<sup>62</sup> have resulted in confusion over the types of damages recoverable in negligent sterilization cases. Some courts recognize a cause of action for negligent sterilization but fail to specify the measure of damages.<sup>63</sup> Other courts allow recovery specifically for the costs of the unsuccessful sterilization, plaintiff's pain and suffering, and loss of services, comfort, and companionship.<sup>64</sup> Because the action for negligent sterilization is evaluated under ordinary torts theory, this confusion is unnecessary. Allowing recovery on a negligence claim for failing to perform sterilizations effectively is consistent with the principles of compensatory damages.<sup>65</sup> Therefore, the medical expenses associated with pregnancy resulting from unsuccessful sterilization always should be recoverable.<sup>66</sup> In addition, other provable damages, such as pain and suffering or loss of consortium, should be allowed pursuant to ordinary tort theory.<sup>67</sup>

The assessment of damages against the negligent physician for the costs

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<sup>58</sup> 496 S.W.2d 124 (Tex. App. 1973).

<sup>59</sup> *Id.* at 125.

<sup>60</sup> *Id.* at 127.

<sup>61</sup> *Id.*

<sup>62</sup> See note 56 *supra*.

<sup>63</sup> *Jackson v. Anderson*, 230 So.2d 503 (Fla. Dist. Ct. App. 1970); *Doerr v. Villate*, 74 Ill. App.2d 332, 220 N.E.2d 767 (1966). See generally Note, *Remedy For The Reluctant Parent: Physician's Liability For The Post-Sterilization Conception And Birth Of Unplanned Children*, 27 U. FLA. L. REV. 158 (1974).

<sup>64</sup> See *Bishop v. Byrne*, 265 F. Supp. 460 (S.D. W. Va. 1967); *Coleman v. Garrison*, 327 A.2d 757 (Del. Super. Ct. 1974); *Betancourt v. Gaylor*, 136 N.J. Super. 69, 344 A.2d 336 (1975).

<sup>65</sup> *Sherlock v. Stillwater Clinic*, 260 N.W.2d 175 (Minn. 1977). In *Sherlock*, the court allowed recovery for pre- and post-natal medical expenses, the mother's pain and suffering during pregnancy and delivery, and loss of consortium due to pregnancy. 260 N.W.2d at 175.

<sup>66</sup> *Custodio v. Bauer*, 251 Cal. App.2d 303, 59 Cal. Rptr. 463, 475 (Ct. App. 1967); see text accompanying note 52 *supra*.

<sup>67</sup> See *Bishop v. Byrne*, 265 F. Supp. 460 (S.D. W. Va. 1967); *Coleman v. Garrison*, 327 A.2d 757 (Del. Super. 1974); *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169 (Minn. 1977); *Cox v. Stretton*, 77 Misc.2d 155, 352 N.Y.S.2d 834 (Sup. Ct. 1974). Because pain and suffering by the mother during pregnancy, emotional distress from the unexpected pregnancy, and loss of consortium are all provable damages which would be allowed in an ordinary malpractice action, and because an action for negligent sterilization is indistinguishable from an ordinary malpractice action, recovery for such damages should be allowed. Comment, Howard v. Lecher: *An Unreasonable Limitation on a Physician's Liability in a Wrongful Life Suit*, 12 N.E. L. Rev. 819, 819 (1977).



of rearing the child presents a more difficult issue concerning negligent sterilization. Disallowing recovery is inconsistent with the fact that couples often seek sterilization<sup>68</sup> because they cannot afford to raise another child. Allowing recovery, however, would have the desirable effect of deterring physicians from performing sterilizations negligently.<sup>69</sup> Assessing damages against negligent physicians need not be difficult if a flexible approach is adopted which takes into consideration the circumstances of individual plaintiffs.<sup>70</sup> Plaintiffs who chose sterilization as a means of permanent contraception, for example, would have a stronger claim for the costs of rearing than plaintiffs who wanted more children but chose sterilization for health reasons<sup>71</sup> or as a means of temporarily avoiding pregnancy.<sup>72</sup> Consideration of additional factors, such as the economic status of the plaintiffs and their financial ability to cope with the costs of raising another child, would allow recovery of the costs of rearing while preserving the compensatory nature of the action for ineffective sterilization.

Other types of malpractice cases involving elements of wrongful birth may involve even more difficult questions of liability and damages. Such cases include instances in which a physician either fails to diagnose pregnancy in time for the plaintiff to seek an abortion<sup>73</sup> or to inform the plaintiff of the possibility that a child might be born with birth defects while abortion is feasible.<sup>74</sup> In order to recover on a negligence theory, plaintiffs must show that the physician breached a duty to diagnose the pregnancy or to inform the parents of the possibility that their child might be born with defects. Because public policy is not totally in favor of abortion, courts may still refuse to recognize such a duty and deny recovery when a physician's negligent failure to diagnose or inform results in the failure to procure an abortion.<sup>75</sup> This denial of recovery on public policy grounds is actually a

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<sup>68</sup> The use of sterilization procedures as a contraceptive technique has expanded in recent years. Approximately 15 per cent of white married couples between the ages of 20 and 39 have had sterilization operations. Thompson, Haverkamp, & Droese, *supra* note 45, at 29; see *Sterilization Surge Seen*, 4 J. Legal Med. 34 (June, 1976).

<sup>69</sup> *Sherlock v. Stillwater Clinic*, 260 N.W.2d 175 (Minn. 1977).

<sup>70</sup> See *Liability*, *supra* note 56, at 231-32.

<sup>71</sup> See text accompanying notes 49-51 *supra*.

<sup>72</sup> Kashi, *The Case of the Unwanted Blessing: Wrongful Life*, 31 U. MIAMI L. REV. 1409, 1418-19 (1977). Compare *Christensen v. Thornby*, 192 Minn. 123, 255 N.W.1d 620 (1934) with *Betancourt v. Gaylor*, 136 N.J. Super. 69, 344 A.2d 336 (1975). In a limited number of situations, the effects of a sterilization operation may be successfully reversed. Surgical reversals of vasectomies have an estimated success rate of fifty per cent, although in only 25 per cent of such operations are the resulting sperm capable of causing fertilization. Davis, *Vasectomy*, 72 AM. J. NURSING 509, 512 (1972).

<sup>73</sup> *Ziemba v. Sternberg*, 45 App. Div.2d 230, 357 N.Y.S.2d 265 (1974); *Rieck v. Medical Protective Co.*, 64 Wis.2d 514, 219 N.W.2d 242 (1974).

<sup>74</sup> *Smith v. United States*, 392 F. Supp. 654 (N.D. Ohio 1975); *Howard v. Lecher*, 53 App. Div.2d 420, 386 N.Y.S.2d 460 (1976); *Park v. Chessin*, 88 Misc.2d 222, 387 N.Y.S.2d 204 (Sup. Ct. 1976), *aff'd*, 400 N.Y.S.2d 110 (App. Div. 1977); *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975).

<sup>75</sup> *Rieck v. Medical Protective Co.*, 64 Wis.2d 514, 219 N.W.2d 242 (1974) (recovery can be denied on public policy grounds, even where duty is owing and chain of causation complete).

refusal to extend the physician's liability to include damages resulting from the inability to procure a timely abortion.<sup>76</sup> In *Ziemba v. Sternberg*,<sup>77</sup> however, the court allowed a cause of action where plaintiff claimed that her physician's failure to diagnose pregnancy prevented her from obtaining an abortion which she would otherwise have been able to secure.<sup>78</sup> The *Ziemba* court indicated that damages would be calculated as in an ordinary malpractice action.<sup>79</sup> Thus, as in the negligent sterilization cases, the damages recoverable for negligent diagnosis would include those proximately caused by the physician's negligence, evaluated in accordance with tort principles.<sup>80</sup>

Recovery for the costs of rearing a child, however, cannot always be justified in cases where the doctor fails to diagnose pregnancy. In contrast to the negligent sterilization cases,<sup>81</sup> the physician's negligence in failing to make a proper diagnosis is not a direct cause of the original conception, therefore, allowing damages for costs of rearing might result in a windfall to parents faced with an unwanted birth. Because assessing damages against the physician for the costs of rearing would be punitive in effect, granting such recovery cannot be justified under the compensatory tort scheme.

When the physician diagnoses pregnancy but fails to inform the parents of a condition that could cause birth defects, courts traditionally preclude recovery due to a reluctance to impose liability on the physician in the absence of clear public policy.<sup>82</sup> In *Gleitman v. Cosgrove*,<sup>83</sup> the physician's failure to inform the plaintiff's mother that she had rubella in time for the mother to obtain an abortion resulted in the birth of a child who was blind, deaf, and dumb.<sup>84</sup> The *Gleitman* court refused recovery on the parents' claim for damages arising from the failure to inform, on the basis of a public policy in favor of the "preciousness" of human life.<sup>85</sup> According to this public policy argument, the child's right to live was so valuable that it completely outweighed the parents' right to be free from emotional and financial injury.<sup>86</sup>

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<sup>76</sup> 219 N.W.2d at 246. The *Rieck* court found that awarding damages when a physician failed to diagnose pregnancy would place an unreasonable burden on physicians which is out of proportion to the degree of culpability, because permitting the parents to keep the child while shifting the costs of upbringing to the physician would make the physician a surrogate parent. Such a result was found unreasonable on the facts. *Id.* at 244-45.

<sup>77</sup> 45 App. Div.2d 230, 357 N.Y.S.2d 265 (1974).

<sup>78</sup> 357 N.Y.S.2d at 267-69.

<sup>79</sup> *Id.* at 269.

<sup>80</sup> *Stills v. Gratton*, 55 Cal. App.3d 698, 708-09, 127 Cal. Rptr. 652, 658-59 (1976); see text accompanying notes 65-67 *supra*.

<sup>81</sup> See text accompanying notes 68-72 *supra*.

<sup>82</sup> *Smith v. United States*, 392 F. Supp. 654 (N.D. Ohio 1975); *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967); *Stewart v. Long Island College Hosp.*, 34 App. Div.2d 531, 313 N.Y.S.2d 502 (1970).

<sup>83</sup> 49 N.J. 22, 227 A.2d 689 (1967).

<sup>84</sup> 227 A.2d at 691.

<sup>85</sup> *Id.* at 693.

<sup>86</sup> *Id.*

Disallowing recovery, however, overlooks the argument that if physicians have a legal duty to give competent advice so that parents can make informed decisions,<sup>87</sup> liability should result for breach of that duty.<sup>88</sup> Courts accepting this argument grant damages based upon the expenses necessary to treat the child's physical impairment.<sup>89</sup> Such a result is preferable to disallowing recovery entirely because it serves the compensatory purposes of the torts system by reimbursing the parents for expenses caused by the defects.<sup>90</sup>

In some cases where a physician's negligence caused the birth of a defective child, a cause of action has been allowed even though the physician's breach of duty occurred prior to the conception.<sup>91</sup> In *Renslow v.*

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<sup>87</sup> Determining whether a physician has a duty to inform the parents as to the possible presence of a particular defect generally turns on whether disclosure by the physician is considered standard practice within a given medical community. *Aiken v. Clary*, 396 S.W.2d 668, 675 (Mo. 1965). One court has already accepted a physician's defense that a certain procedure used to diagnose a genetic abnormality was not required by standard community medical practice. *Johnson v. Yeshiva Univ. Hosp.*, No. 217 (N.Y. Ct. App. May 12, 1977), *aff'd*, 53 App. Div.2d 523, 384 N.Y.S.2d 455 (1976).

Due to criticism that the community standard of care is overbroad, see *Waltz & Scheuneman, Informed Consent to Therapy*, 64 Nw. U. L. Rev. 628 (1970), some jurisdictions have adopted a narrower standard which requires a physician to disclose the same information as would a skilled practitioner of good standing under similar circumstances. *Canterbury v. Spence*, 464 F.2d 772, 784 (D.C. Cir. 1972); *Cobbs v. Grant*, 104 Cal. Rptr. 505, 502 P.2d 1, 11 (1972). Thus, whether a duty exists with relation to a particular defect would depend not only on the defect involved, but also on the disclosure standard adopted in the particular jurisdiction.

<sup>88</sup> Placing a duty on physicians to inform of the possibility of defects could lead to substantial problems of proof, particularly with regard to causation. Where testing is required to determine the presence of a defect, the failure to detect the problem could be due to the doctor's negligence in administering the test, or the patient's aberrant response to the test. Alternatively, a defect might be congenital. *Friedman, Legal Implications of Amniocentesis*, 123 U. PA. L. REV. 92, 143 n.260 (1974). Allowing recovery also could lead to a wide range of suits based on a physician's failure to perform a specific testing procedure. *M. Kass & M. Shaw, The Risk of Birth Defects: Jacobs v. Theimer and Parents' Right to Know*, 2 AM. J.L. & MED. 213, 222 (1977) [hereinafter cited as *Kass & Shaw*]; see *Milunsky & Reilly, The "New Genetics: Emerging Medicolegal Issues in the Prenatal Diagnosis of Hereditary Disorders*, 1 AM. J.L. & MED. 71 (1975); *Shaw, Genetically Defective Children: Emerging Legal Considerations*, 3 AM. J.L. & MED. 333 (1977), *Waltz & Thigpen, Genetic Screening and Counseling: The Legal and Ethical Issues*, 68 Nw. U.L. Rev. 696 (1973).

<sup>89</sup> *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975); *Dumer v. St. Michael's Hosp.*, 69 Wis.2d 766, 233 N.W.2d 37 (1975).

<sup>90</sup> Although allowing parents to recover for damages resulting from defects would help compensate them for a physician's breach of duty, such recovery is inconsistent with the cause of action. If the physician had performed his duty, an abortion would have been performed and there would have been no child. By allowing damages for the defects, liability is imposed on the physician because a normal child was not born. Because there can be no reduction in value of a life not lived, imposing such damages may be illogical. Alternatively, allowing recovery for the costs of the defects may be the best way to compromise public concerns for the value of life with the need to hold physicians liable when their negligence results in the birth of a defective child. See *Kass & Shaw, supra* note 88, at 238-39.

<sup>91</sup> *Renslow v. Mennonite Hosp.*, 40 Ill. App.3d 234, 351 N.E.2d 870 (1976); *Park v. Chessin*, 88 Misc.2d 222, 387 N.Y.S.2d 204 (Sup. Ct. 1976).

*Mennonite Hospital*,<sup>92</sup> the court upheld a cause of action for malpractice in favor of a plaintiff child who sustained permanent damage to her nervous system and brain as a result of blood transfusions negligently administered to her mother eight years before conception.<sup>93</sup> Because the child's condition at birth was a foreseeable result of the physician's duty to competently administer transfusions, the *Renslow* court found that the plaintiff could recover for injuries sustained as a result of the negligence.<sup>94</sup> As long as the physician's breach of duty and causation can be demonstrated, the fact that the injured child had not been conceived at the time the tort took place has no effect on the damage calculation.<sup>95</sup> The proper measure of damages can be determined as in the negligent diagnosis cases,<sup>96</sup> based upon the extra costs incurred in treating the child's defective condition.<sup>97</sup>

Although recovery in malpractice cases involving elements of wrongful birth has not been allowed consistently,<sup>98</sup> the trend towards permitting recovery<sup>99</sup> in these cases, as opposed to the wrongful birth cases,<sup>100</sup> is justi-

<sup>92</sup> 40 Ill. App.3d 234, 351 N.E.2d 870 (1976).

<sup>93</sup> 351 N.E.2d at 874; see Comment, *Preconception Torts: Foreseeing The Unconceived*, 48 U. Col. L. Rev. 621 (1977).

<sup>94</sup> 351 N.E.2d at 874.

<sup>95</sup> See *Renslow v. Mennonite Hosp.*, 40 Ill. App.3d 234, 351 N.E.2d 870, 874 (1976); *Park v. Chessin*, 88 Misc.2d 222, 387 N.Y.S.2d 204, *aff'd*, 400 N.Y.S.2d 110 (App. Div. 1977). In *Park*, the parents of a defective child sought damages for medical and support expenses during the two and one half years their child lived, alleging that the physician's advice that the child would not be afflicted with a hereditary kidney disorder led to the conception and birth. 387 N.Y.S.2d at 205. The *Park* court held that the claim stated a cause of action for negligence, *id.* at 212, and indicated that the lower court should determine damages as for any tort claim. *Id.* This result is justifiable, particularly since the parents specifically sought information from the physician relating to the possibility of the defect involved. 400 N.Y.S.2d at 113-14. In allowing recovery, the *Park* court rejected the argument that public policy precluded burdening physicians with additional liability. The court found no justification for granting preferential treatment to physicians whose negligent conduct could result in damages. 357 N.Y.S.2d at 211; see Note, *An Action for Wrongful Life Brought on Behalf of the Wrongfully Conceived Infant*, 13 WAKE FOREST L. REV. 712 (1977).

<sup>96</sup> See text accompanying notes 89-90 *supra*.

<sup>97</sup> See note 95 *supra*. Damages for malpractice claims relating to birth have been sought from pharmacists and birth control pill manufacturers as well as physicians. See *Jorgensen v. Meade Johnson Laboratories, Inc.*, 483 F.2d 237 (10th Cir. 1973) (claim that negligently manufactured birth control pills caused retardation in children subsequently born stated cause of action); *Whittington v. Eli Lilly & Co.*, 333 F. Supp. 98 (S.D. W. Va. 1971) (where no warranty that pills were completely effective, manufacturer not required to insure against susceptibility of certain individuals to pregnancy); *Troppe v. Scarf*, 31 Mich. App. 240, 187 N.W.2d 511 (1971) (pharmacist who negligently filled birth control prescription with tranquilizers held liable for damages incident to subsequent birth); Note, *Unwanted Pregnancy and The Pill - The Question of Liability Of The Manufacturer*, 41 U. CIN. L. REV. 335 (1972).

<sup>98</sup> *Smith v. United States*, 392 F. Supp. 654 (N.D. Ohio 1975); *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967); *Stewart v. Long Island College Hosp.*, 35 App. Div.2d 531, 313 N.Y.S.2d 502 (1970).

<sup>99</sup> See, e.g., *Bishop v. Byrne*, 265 F. Supp. 460 (S.D. W. Va. 1967); *Coleman v. Garrison*, 327 A.2d 757 (Del. Super. Ct. 1974); *Betancourt v. Gaylor*, 136 N.J. Super. 69, 344 A.2d 336 (1975).

<sup>100</sup> See text accompanying notes 9-11 *supra*.

fied. First, in contrast to the wrongful birth claims,<sup>101</sup> damages for injuries concerning birth can be foreseen as being the proximate result of the physician's negligence, and can be calculated in accordance with ordinary malpractice standards.<sup>102</sup> For wrongful birth claims, however, there is no standard by which to measure damages resulting from illegitimacy or the loss of an opportunity to be aborted. Similarly, while fraudulent or meritless litigation might result from allowing either type of claim, the expertise of the medical and legal professions would enable the elimination of dishonest claims in the malpractice area.<sup>103</sup> For the wrongful birth cases, however, there is no comparable area of expertise to aid in the detection and separation of meritless claims.

Finally, public policy considerations justify granting relief in malpractice cases as opposed to wrongful birth cases. While public policy generally disfavors allowing damages for the effects of illegitimacy,<sup>104</sup> courts have begun to recognize individuals' rights to use contraceptive techniques. In *Troppi v. Scarf*,<sup>105</sup> for example, a pharmacist was held liable for negligently filling a birth control pill prescription with tranquilizers when plaintiff's pregnancy resulted.<sup>106</sup> In allowing the cause of action, the *Troppi* court noted that interposing public policy to disallow recovery for contraceptive failure ignored the fact that contraceptives are widely used to avoid pregnancy, and that absolving the defendant from liability would eliminate the deterrent effect on his negligent behavior.<sup>107</sup> More importantly, however, Supreme Court decisions also have recognized individual rights to use contraceptives<sup>108</sup> and obtain abortions.<sup>109</sup> These decisions suggest that an

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<sup>101</sup> See text accompanying notes 37-39 *supra*.

<sup>102</sup> *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169, 174-75 (Minn. 1977).

<sup>103</sup> *Battalla v. State*, 10 N.Y.2d 237, 176 N.E.2d 729, 731-32, 219 N.Y.S.2d 34, 38 (1961). In *Battalla*, the plaintiff sought to recover for the physical manifestations of emotional disturbance caused by fright negligently induced, *id.* at 238-39, 176 N.E.2d at 729, 219 N.Y.S.2d at 35, however, the court found contrary prior case law insufficient to bar recovery. *Id.* at 240, 176 N.E.2d at 730, 219 N.Y.S.2d at 36.

<sup>104</sup> *Williams v. State*, 18 N.Y.2d 481, 223 N.E.2d 343, 376 N.Y.S. 2d 885 (1966).

<sup>105</sup> 31 Mich. App. 240, 187 N.W.2d 511 (1971).

<sup>106</sup> 187 N.W.2d at 512-13. The damage issue was not specifically dealt with by the *Troppi* court, which found only that the damage determination was within the competence of the trier of fact. 187 N.W.2d at 521.

<sup>107</sup> 187 N.W.2d at 517. Arguably, allowing damages in malpractice cases would serve the state's interest by deterring negligence and therefore reducing the births of children destined to become a burden on the state. See *In re Sterilization of Moore*, 289 N.C. 95, 221 S.E.2d 307, 312-13 (1976); Shaw, *Procreation and the Population Problem*, 55 N.C.L. Rev. 1165, 1184 (1977) [hereinafter cited as Shaw].

<sup>108</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965). In *Griswold*, the Court held that a state statute which prohibited the distribution of information regarding contraception was unconstitutionally violative of the right to marital privacy. *Id.* at 481-86. Although *Griswold* declared the statute invalid as to a married couple, the Court later extended its reasoning to invalidate a similar statute which did not allow distribution of contraceptives to unmarried persons. *Eisenstadt v. Baird*, 405 U.S. 438 (1972). In *Eisenstadt*, the Court found that a Massachusetts state statute which only permitted the distribution of contraceptives to married persons deprived unmarried individuals of equal protection. *Id.* at 454-55. The individu-

individual may have a valid claim in tort when negligent acts interfere with the exercise of such rights.<sup>110</sup>

In view of increasing recognition of individual rights to contraception and abortion, an amorphous public policy should not be interposed to preclude damages in ordinary malpractice cases which are not subject to the same considerations as wrongful birth claims.<sup>111</sup> Instead, where negligence and causation are established, damages should be recoverable in accordance with the compensatory principles of the tort system.<sup>112</sup> By distinguishing the malpractice claims from the wrongful birth cases for which no recovery can be justified,<sup>113</sup> ordinary negligence principles can be used to provide a consistent theory of recovery for malpractice cases containing elements of wrongful birth.

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als' right of privacy regarding such personal decisions as whether to practice birth control were considered to be so fundamental as to preclude governmental intrusion. *Id.* at 453.

<sup>109</sup> *Roe v. Wade*, 410 U.S. 113, 153 (1973). The *Roe* Court recognized that although an individual may have a right to an abortion, the right is not unqualified because the state has possible interests in regulation. *Id.* at 154; see *Doe v. Bolton*, 410 U.S. 179 (1973) (procedural requirements of state abortion statute found unconstitutional).

<sup>110</sup> See *Shaw*, *supra* note 107, at 1171. One commentator, however, suggests that the recent Supreme Court opinions protecting the individual right to privacy are singularly unpersuasive and have only initiated the controversy over the propriety of these legal-moral judgments. Dellapenna, *Nor Piety Nor Wit: The Supreme Court on Abortion*, 6 COLUM. HUMAN RIGHTS L. REV. 379, 380 (1975).

<sup>111</sup> See text accompanying notes 98-103 *supra*.

<sup>112</sup> See text accompanying notes 38-39, 65-67 *supra*.

<sup>113</sup> See text accompanying notes 36-39 *supra*.

