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Flowers v. District of Columbia: Another Court Refuses to Settle the Question of Damages in Wrongful Conception Cases

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FLOWERS v. DISTRICT OF COLUMBIA: ANOTHER COURT REFUSES TO SETTLE THE QUESTION OF DAMAGES IN WRONGFUL CONCEPTION CASES

In tort actions the usual measure of damages is compensatory.[1] In contrast to other forms of relief,[2] compensatory damages[3] are calculated by comparing the condition of the injured party had there been no negligent conduct with the condition of the injured party following negligent conduct.[4] Calculating compensatory damage awards in tort actions for medical malpractice[5] is, however, an arduous task. For example, it is difficult to determine accurately the monetary value of a limb that has been lost or damaged because of a physician's negligence. It is even more difficult to determine the value of a life lost because of negligent conduct. Thus, the issues of medical malpractice present moral as well as legal questions courts regularly must answer.

In the last twenty years, courts have begun to recognize a cause of action in tort based on "wrongful conception,"[6] where a physician's negligent per-

1. Gleitman v. Cosgrove, 49 N.J. 22, 28, 227 A.2d 689, 692 (1967).

2. Other forms of damage relief include punitive damages and nominal damages. Punitive damages are awarded to punish a party for outrageous conduct and to deter similar actions in the future. Chesapeake & Potomac Telephone Co. v. Clay, 194 F.2d 888, 891 (D.C. Cir. 1952). Nominal damages are awarded to vindicate a right when no real loss or injury has been suffered. *Id.* at 890.

3. Compensatory damages compensate the injured party for the actual damage suffered. *Id.* Compensatory damages make good or replace the loss caused by the wrong or injury. *Id.*

4. *Gleitman*, 49 N.J. at 28, 227 A.2d at 692.

5. Medical malpractice occurs when a member of the medical profession renders professional services to a degree of skill and learning below that which is commonly applied by an average, prudent, and reputable member of the medical community. Washington Hosp. Center v. Butler, 384 F.2d 331, 335 (D.C. Cir. 1967); Quick v. Thurston, 290 F.2d 360, 362 (D.C. Cir. 1961); Rodgers v. Lawson, 170 F.2d 157, 158 (D.C. Cir. 1948).

6. The terms "wrongful life," "wrongful birth," "wrongful conception," and "wrongful pregnancy" are frequently confused and misused by the courts. "Wrongful life" actions are brought by the child against a doctor whose negligent actions proximately caused the child's birth. Harbeson v. Parke-Davis, Inc., 98 Wash. 2d 460, 478, 656 P.2d 483, 494 (1983). In essence, children who bring wrongful life actions claim they should not have been born. *Id.* These actions are usually dismissed by the court because it is impossible to calculate the difference in damages between what the child would have been without the negligent conduct (dead) and what the child is, with the negligent conduct (a handicapped human being). *See* Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied*, 379 U.S. 945 (1964) (court

dismissed a suit brought by an illegitimate son against his father for having to live with the fact of his illegitimacy). In another action, Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967), the court stated that it

> cannot weigh the value of life with impairments against the nonexistence of life itself. By asserting that he [the child] should not have been born, the infant plaintiff makes it logically impossible for a court to measure his alleged damages because of the impossibility of making the comparison required by compensatory remedies.

Gleitman, 49 N.J. at 28, 227 A.2d at 692 (child brought a wrongful life action against the doctor for negligently failing to warn the parents about the danger posed from the mother's having rubella). *But see* Turpin v. Sortini, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982); Harbeson v. Parke-Davis, Inc., 98 Wash. 2d 460, 656 P.2d 483 (1983). In both of these cases the courts recognized the child's cause of action for wrongful life, but the courts limited damages to those extraordinary expenses incurred by the child's defect. *See generally* Comment, *"Wrongful Life": The Right Not To Be Born*, 54 TUL. L. REV. 480 (1980).

"Wrongful pregnancy" and "wrongful conception" are terms that may be used interchangeably. Phillips v. United States, 508 F. Supp. 544, 545 n.1 (D.S.C. 1981); Note, *Robak v. United States: A Precedent-Setting Damage Formula for Wrongful Birth*, 58 CHI.[-]KENT L. REV. 725, 725 n.2 (1982). (For purposes of this Note, the term "wrongful conception" will be used.) Wrongful conception occurs when a woman gives birth to a healthy child following the negligent filling of a contraceptive prescription, a negligently performed abortion, or a negligently performed sterilization operation. Phillips v. United States, 508 F. Supp. 544, 545 n.1 (D.S.C. 1981); Note, *Robak v. United States: A Precedent-Setting Damage Formula for Wrongful Birth*, 58 CHI.[-]KENT L. REV. 725, 725 n.2 (1982). Wrongful conception actions are brought by the parents of the resulting child for damages to compensate them for the "injury" they have suffered upon the birth of the child. Phillips v. United States, 508 F. Supp. 544, 545 n.1 (D.S.C. 1981); Note, *Robak v. United States: A Precedent-Setting Damage Formula for Wrongful Birth*, 58 CHI.[-]KENT L. REV. 725, 725 n.2 (1982); Comment, *"Wrongful Life": The Right Not To Be Born*, 54 TUL. L. REV. 480 (1980).

An action for "wrongful birth" is similar to one for "wrongful conception" except that in a wrongful birth action the resulting child is unhealthy in some way. Phillips v. United States, 508 F. Supp. 544, 545 n.1 (D.S.C. 1981); Comment, *"Wrongful Life": The Right Not To Be Born*, 54 TUL. L. REV. 480, 485 (1980). Although in wrongful birth actions the resulting child is unhealthy, wrongful birth and wrongful conception actions arise under several similar circumstances as follows: (1) When a physician negligently performs a vasectomy on a man who later impregnates a woman; (2) When a physician negligently performs a sterilization operation on a woman who subsequently becomes pregnant; (3) When a physician incorrectly performs an abortion; and (4) When a physician negligently fails to inform a woman that she is pregnant in time for her to have an abortion. Note, *Wrongful Birth: A Child of Tort Comes of Age*, 50 U. CIN. L. REV. 65, 66-67 (1981) (citations omitted).

Wrongful birth also occurs in two other circumstances. First, it occurs when a physician negligently informs a pregnant woman that her fetus is healthy, but it is not. Second, it occurs when a physician negligently fails to inform a woman that a disease she has threatens the health of her fetus. *Id.* In all wrongful birth and wrongful conception cases the parents, rather than the child, bring the action for damages incurred during and after the pregnancy. For further discussion of terminology, see Phillips v. United States, 508 F. Supp. 544, 545 n.1 (D.S.C. 1981); Nanke v. Napier, 346 N.W.2d 520, 521 (Iowa 1984); Note, *Wilbur v. Kerr: The Tort of Wrongful Birth in Arkansas*, 36 ARK. L. REV. 429, 430 n.7 (1982); Note, *Robak v. United States: A Precedent-Setting Damage Formula for Wrongful Birth*, 58 CHI.[-]KENT L. REV. 725, 725 n.2 (1982); Note, *Wrongful Birth: A Child of Tort Comes of Age*, 50 U. CIN. L. REV. 65 (1981); Comment, *"Wrongful Life": The Right Not To Be Born*, 54 TUL. L. REV. 480, 485 (1980).

formance of a sterilization operation results in the birth of a healthy child.[7] Today, recognition of this cause of action[8] is unanimous among jurisdictions that have addressed the issue.[9] There is no consensus, however, on what damages a plaintiff should recover in such a case. One court has offered guidelines by stating that proper damages can be determined by treating a wrongful pregnancy[10] action as a medical malpractice suit, governed by public policy considerations and tort principles.[11] These guidelines do not offer much assistance, however, because it is the reconciliation of public policy issues with tort principles that proves the most troublesome. This problem is evidenced by the fact that courts have applied four different theories to measure damages in suits for wrongful conception.[12]

Until *Flowers v. District of Columbia*,[13] the District of Columbia Court of Appeals never had addressed the question of proper damages in a suit for wrongful conception.[14] In *Flowers*, although plaintiff underwent a steriliza-

7. *See infra* note 9 and accompanying text.

8. Several of the courts cited in this Note have used the term "wrongful birth" where the action is, in reality, one for wrongful conception. *See supra* note 6 and accompanying text. This Note specifically addresses the question of damages in actions for wrongful conception.

9. Hartke v. McKelway, 707 F.2d 1544 (D.C. Cir. 1983), *cert. denied*, 463 U.S. 983 (1983); McNeal v. United States, 689 F.2d 1200 (4th Cir. 1982); Boone v. Mullendore, 416 So. 2d 718 (Ala. 1982); Wilbur v. Kerr, 275 Ark. 239, 628 S.W.2d 568 (1982); Univ. of Arizona Health Sciences Center v. Superior Court, 136 Ariz. 579, 667 P.2d 1294 (1983); Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967); Ochs v. Borrelli, 187 Conn. 253, 445 A.2d 883 (1982); Coleman v. Garrison, 349 A.2d 8 (Del. 1975); Fassoulas v. Ramey, 450 So. 2d 822 (Fla. 1984); Public Health Trust v. Brown, 388 So. 2d 1084 (Fla. Dist. Ct. App. 1980), *petition for review denied*, 399 So. 2d 1140 (Fla. 1981); Cockrum v. Baumgartner, 95 Ill. 2d 193, 447 N.E.2d 385 (1983), *cert. denied*, 464 U.S. 846 (1983); Nanke v. Napier, 346 N.W.2d 520 (Iowa 1984); Schork v. Huber, 648 S.W.2d 861 (Ky. 1983); Jones v. Malinowski, 299 Md. 257, 473 A.2d 429 (1984); Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971); Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977); Kingsbury v. Smith, 122 N.H. 237, 442 A.2d 1003 (1982); P. v. Portadin, 179 N.J. Super. 465, 432 A.2d 556 (1981); Sorkin v. Lee, 78 A.D.2d 180, 434 N.Y.S.2d 300 (1980); Mason v. Western Pa. Hospital, 499 Pa. 484, 453 A.2d 974 (1982); Terrell v. Garcia, 496 S.W.2d 124 (Tex. 1973), *cert. denied*, 415 U.S. 927 (1974); Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974); Beardsley v. Wierdsma, 650 P.2d 288 (Wyo. 1982).

10. *See supra* note 6 and accompanying text.

11. Beardsley v. Wierdsma, 650 P.2d 288, 292 (Wyo. 1982).

12. These theories are:

a. The blessing concept, allowing no recovery of damages. *See infra* text accompanying notes 21-41.

b. The California rule, allowing complete recovery of damages. *See infra* text accompanying notes 42-50.

c. The benefit rule, allowing recovery of damages based on the balancing of the benefits and injuries resulting from the birth. *See infra* notes 51-59 and accompanying text.

d. The limited recovery rule, allowing recovery of damages based on the actual out-of-pocket, pregnancy-related damages. *See infra* text accompanying note 78.

13. 478 A.2d 1073 (D.C. 1984).

14. The *Flowers* court refers to this as an action for wrongful birth. *Id.* at 1077. The

tion operation, she subsequently became pregnant.[15] After giving birth to a healthy child, plaintiff brought a negligence action against her physician.[16] The trial court allowed the plaintiff to present to the jury the question of damages for medical expenses, for pain and suffering, for lost wages during pregnancy and after the birth, and for the costs of a future sterilization operation.[17] The trial court, however, would not allow the plaintiff to present the question of whether the award should include the costs of rearing the child.[18] The District of Columbia Court of Appeals affirmed the trial court's decision not to present the question of damages for childrearing expenses.[19] In a strongly worded dissent, however, Judge Ferren favored awarding damages that included childrearing costs.[20]

This Note will provide an historical analysis of damage awards applied in wrongful conception cases. Particular emphasis will be placed on the public policy considerations presented as different theories have evolved. It will examine the majority and dissenting opinions in *Flowers*, comparing them with prior state and federal court decisions. The analysis will suggest the *Flowers* majority ignores certain important policy considerations while overemphasizing others. The Note will conclude the majority has not set a strong precedent for the lower courts in the District of Columbia and that the question of damages in wrongful conception cases remains unsettled.

I. Historical Approach to the Damages Question

A. The Early Cases and the Blessing Concept

The Supreme Court of Minnesota first addressed the issue of damages for wrongful conception in 1934 in *Christensen v. Thornby*.[21] In *Christensen*, the husband-plaintiff underwent a vasectomy to prevent his wife, who had experienced great difficulty in the birth of their first child, from becoming pregnant again.[22] When the wife subsequently became pregnant, the husband brought an action against the doctor for deceit in the representation

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action is more properly termed wrongful conception, however, because the child born following the negligently performed sterilization operation was healthy. *Id.* at 1074; *see also supra* note 6 and accompanying text. This Note will refer to the action as one involving wrongful conception. *See supra* notes 6-7 and accompanying text.

15. 478 A.2d at 1074.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 1078.
20. *Id.* at 1078-83.
21. 192 Minn. 123, 255 N.W. 620 (1934).
22. *Id.* at 123-24, 255 N.W. at 621.

that the vasectomy would prevent conception.[23] The plaintiff did not allege negligence by the doctor and the court found there was no cause of action.[24] Because there was no cause of action, the court did not directly address the question of damages. Dictum indicated, however, that even though the parents had not wanted more children, they had been "blessed" with a child and that any expenses incurred because of the pregnancy were too remote to be calculated as damages.[25]

The next court to address the issue of damages in wrongful conception cases was a Pennsylvania lower court, in *Shaheen v. Knight*.[26] In *Shaheen*, the plaintiff-husband underwent a sterilization operation because he claimed he could not financially support an additional child.[27] His wife subsequently became pregnant, and plaintiff brought an action for breach of contract to sterilize.[28] Essentially relying on the dictum in *Christensen* and the "blessing concept," the Pennsylvania lower court held that "to allow damages for the normal birth of a normal child is foreign to the universal public sentiment of the people."[29] The court further held that allowing damages would force the doctor to pay for the affection, joy, and fun that plaintiff would experience in raising the child.[30] Finally, the court found damages would be against public policy because there were people who would gladly support the child if they were given the right of adoption or custody.[31] The court reasoned that because other people were willing to raise the child if given the opportunity, it did not seem fair to allow plaintiff to keep the child and to force someone else to support it.[32]

Perhaps one of the harshest applications of the "blessing concept" was by the New Jersey Supreme Court in *Gleitman v. Cosgrove*.[33] *Gleitman* arose when the plaintiff's physician negligently failed to warn the plaintiff that because she had contracted rubella (German measles) during her pregnancy, there was a possibility her child would be born with birth defects.[34] Plaintiff

23. *Id.* at 126, 255 N.W. at 622.
24. *Id.* at 124, 255 N.W. at 620.
25. *Id.* at 126, 255 N.W. at 622.
26. 11 Pa. D. & C.2d 41 (Pa. 1957).
27. *Id.*
28. *Id.*
29. *Id.* at 45.
30. *Id.* at 45-46.
31. *Id.* at 46.
32. *Id.*; *see also* Ball v. Mudge, 64 Wash. 2d 247, 391 P.2d 201 (1964).
33. 49 N.J. 22, 227 A.2d 689 (1967). The issue in *Gleitman* was actually "wrongful birth" because an unhealthy child was born. *See supra* note 6 and accompanying text. The court nevertheless focused on the preciousness of human life and applied the "blessing concept" to this case. *Id.* at 31, 227 A.2d at 693.
34. *Id.* at 26, 227 A.2d at 691.

subsequently delivered a baby with birth defects,[35] and the New Jersey Supreme Court denied all recovery.[36] The court held the complaint did not give rise to actionable damages because the damages were not cognizable at law. Further, the court held that even if the damages were cognizable, public policy supporting the pricelessness of life precluded recovery.[37] The *Gleitman* court strictly applied the blessing concept and concluded that even an award of damages to help the expenses of caring for a child with birth defects contravened public policy.

In essence, the early courts relying on the "blessing concept" concluded the birth of a child was a gift and not an injury. Consequently, the courts found it would be against public policy to award damages for what was in reality a blessing.[38] These courts also reasoned that an award of damages was against public policy because of the possible emotional trauma to the child when he learned his parents felt injured by his birth. Finally, these courts found that damages awarded for the birth of a child were antithetical to the "family" as an institution[39] because such an award tended to lessen the value of human life.[40] Thus, while the early courts often recognized parents suffered physically and financially from the birth of unplanned children, they continually denied recovery.[41]

B. The California Rule

Today, most courts reject a strict application of the blessing concept, which states that any damage award for wrongful conception is against public policy.[42] The first court significantly departing from the blessing concept was the California Court of Appeal in *Custodio v. Bauer*.[43] In *Custodio*, the plaintiff underwent a sterilization operation because pregnancy would have aggravated an existing medical condition.[44] When plaintiff later became pregnant, and gave birth to a healthy child, she brought a negligence action against her physician.[45]

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35. *Id.* at 25, 227 A.2d at 690.

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

37. *Id.*, 227 A.2d at 693.

38. *Shaheen*, 11 Pa. D. & C.2d at 45-46.

39. *See* HANDLING PREGNANCY AND BIRTH CASES 106 (W.H. Winborne ed. 1983) (citations omitted).

40. *Id.*

41. *Id.*

42. Gleitman v. Cosgrove, 49 N.J. 22, 31, 227 A.2d 689, 693 (1967); Shaheen v. Knight, 11 Pa. D. & C.2d 41, 45-46 (1957).

43. 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).

44. *Id.* at 307, 59 Cal. Rptr. at 466.

45. *Id.* at 308, 59 Cal. Rptr. at 466.

The California Court of Appeal held that the parents of an unplanned, healthy child could recover all damages proximately caused by a negligently performed sterilization operation. The court noted damages could include all those damages directly related to the pregnancy, such as medical expenses, lost wages, pain and suffering, and the costs to raise the child to the age of majority.[46] The court did not find this award contravened public policy because the award was not based on a calculation of the value of a child's life or on the child's worth.[47] Instead, the award reflected the amount needed "to replenish the family exchequer so that the new arrival [would] not deprive the other members of the family of what was planned as their just share of the family income."[48] In addition, the court found a family experiences loss when an unplanned child is born because the parents must make their protection, care, support, and comfort available to more people.[49] The court reasoned that if the change in family status can be measured in economic terms, then it is compensable.[50]

C. The Benefit Rule Balancing Test

While *Custodio* represented a significant departure from the "blessing" concept, at the same time society as a whole was witnessing a significant change in its attitude toward women and the family. Several commentators have pointed to "judicial indications of shifts in the public conscience."[51] The changing public conscience toward wrongful conception was clearly rec-

46. *Id.* at 321-24, 59 Cal. Rptr. at 476-78.

47. *Id.* at 324, 59 Cal. Rptr. at 477.

48. *Id.*, 59 Cal. Rptr. at 477.

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

50. *Id.* at 323-24, 59 Cal. Rptr. at 476.

51. Note, *Wilbur v. Kerr: The Tort of Wrongful Birth in Arkansas*, 36 ARK. L. REV. 429, 441 (1982) (citation omitted); *see also* Note, *Robak v. United States: A Precedent-Setting Damage Formula for Wrongful Birth*, 58 CHI.[-]KENT L. REV. 725, 732-33 (1982); Note, *Wrongful Birth: A Child of Tort Comes of Age*, 50 U. CIN. L. REV. 65, 71-72 (1981). These commentators discuss the importance of two Supreme Court cases that exemplify the shift in public sentiment: Griswold v. Connecticut, 381 U.S. 479 (1965), and Roe v. Wade, 410 U.S. 113 (1973).

Griswold signifies the first judicial shift. In *Griswold*, the Supreme Court held that it was an unconstitutional infringement of privacy for states to prevent the use of contraceptives. *Griswold*, 381 U.S. at 485. In essence, the Court, for the first time, recognized that family planning was not against public policy. *Griswold*, 381 U.S. 479 (1965); *see also* Note, *Wilbur v. Kerr: The Tort of Wrongful Birth in Arkansas*, 36 ARK. L. REV. 429, 441-42 (1982). *See generally* Note, *Constitutional Law: Supreme Court Finds Marital Privacy Immunized from State Intrusion as a Bill of Rights Periphery*, 66 DUKE L.J. 562 (1966).

Eight years later in *Roe*, the Supreme Court held that a woman's fundamental right to privacy included her right to an abortion. *Roe*, 410 U.S. at 153. Consequently, the mother's right to choose an abortion would, within certain limitations, supersede the fetus' right to life. *Roe*, 410 U.S. 113 (1973); *see also* Note, *Robak v. United States: A Precedent-Setting Damage*

ognized by the Michigan Court of Appeals in *Troppi v. Scarf*,[52] which marked the application of the benefit rule,[53] a third approach to damage awards in wrongful conception actions.

In *Troppi*, a pharmacist negligently filled a birth control pill prescription with a mild tranquilizer.[54] Relying on the "pills," the plaintiff used no other form of contraception and subsequently became pregnant.[55] She gave birth to a healthy baby and brought suit for wrongful pregnancy.[56] Finding no reason to preclude the trier of fact from assessing damages in this action as it would in any other negligence action, the Michigan Court of Appeals relied on the general rule of damages applicable to tort actions.[57]

The calculation of damages in tort actions requires the use of the benefit rule.[58] Applying the benefit rule, a court balances like interests to determine whether the tortious conduct, in effect, has benefited the plaintiff in some way. Here, the court balanced the benefits of childrearing against the elements of claimed damages (including economic costs, anxiety, pain, and suffering). The court reasoned it could weigh these factors because all were inextricably related to childrearing and, thus, represented the same interest.[59]

Several other jurisdictions, including the United States Court of Appeals for the District of Columbia Circuit, also have applied a balancing test to

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Formula for Wrongful Birth, 58 CHI.[-]KENT L. REV. 725, 733 (1982). *See generally* Smith, *The Right to Privacy: Roe v. Wade Revisited*, 43 JURIST 289 (1983).

52. 31 Mich. App. 240, 187 N.W.2d 511 (1971).

53. THE RESTATEMENT (SECOND) OF TORTS § 920 (1977) summarizes the benefit rule:

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

Id. Therefore, if defendant's tortious conduct confers a benefit to the same interest that the conduct harmed, then the dollar amount of the benefit is subtracted from the dollar amount of the injury.

54. *Troppi*, 31 Mich. App. at 244, 187 N.W.2d at 512.

55. *Id.*, 187 N.W.2d at 512-13.

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

57. *Id.* at 252, 187 N.W.2d at 516; *see supra* text accompanying notes 1, 4; *see also supra* note 3 and accompanying text.

58. *See supra* note 53 and accompanying text.

59. *Troppi*, 31 Mich. App. at 255, 187 N.W.2d at 518. The court further conceded that determining a monetary value for intangible benefits is somewhat uncertain, but that "difficulty in determining the amount to be subtracted from the gross damages does not justify throwing up our hands and denying recovery altogether." *Id.* at 261, 187 N.W.2d at 521. The court also stated that recovery for wrongful death depended upon a calculation of the value of a person's services and companionship. *Id.* at 262, 187 N.W.2d at 521. Further, the court implied that if wrongful death damages could be ascertained, then wrongful conception damages could be maintained as well. *Id.*

determine damages in wrongful conception actions.[60] For example, in *Hartke v. McKelway*,[61] the District of Columbia Circuit Court recognized the District of Columbia courts had not addressed the issue of damages in wrongful pregnancy actions.[62] After discussing the various approaches used previously by other courts, the court in *Hartke* concluded that "allowing the plaintiff to prove that raising a child constitutes damage is the course of greater justice, and the one the District of Columbia courts may well adopt."[63]

The court stated it saw "no significant distinction between the task here [of awarding and determining damages in a wrongful conception case] and the analogous task of fixing damages for wrongful death, for pain and suffering, or for extended loss of consortium."[64] It recognized, however, that there were difficulties in determining an appropriate award of damages, which would vary depending upon the circumstances.[65] Thus, the court found the trier of fact must look to the reasons[66] for seeking a sterilization operation in determining the extent to which parents are injured.[67]

In *Hartke*, the plaintiff sought sterilization for therapeutic reasons.[68] She had a history of serious pregnancy-related problems, as well as other gynecological problems and greatly feared for her health.[69] One doctor had told the plaintiff she could not survive another pregnancy.[70] The fear of becom-

60. *See, e.g.*, Hartke v. McKelway, 707 F.2d 1544 (D.C. Cir.), *cert. denied*, 463 U.S. 983 (1983) (benefits of childrearing may be offset against the expenses thereof); Univ. of Arizona Health Sciences Center v. Superior Court, 136 Ariz. 579, 667 P.2d 1294 (1983) (trier of fact may consider the pecuniary and nonpecuniary elements of damage relating to childrearing offset by the pecuniary and nonpecuniary benefits received by the parents from their parental relationship with the child); Ochs v. Borrelli, 187 Conn. 253, 445 A.2d 883 (1982) (childrearing expenses held recoverable, but should be reduced by value of the benefits received by the parents from having a child); Jones v. Malinowski, 299 Md. 257, 473 A.2d 429 (1984) (trier of fact may consider awarding damages for childrearing costs offset by the benefits received by the parents from the child's comfort, society, and aid); Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971) (the benefits of a child may be weighed against the elements of damage); Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977) (costs of rearing the child are recoverable, but must be offset by value of child's aid, comfort and society).

61. 707 F.2d 1544 (D.C. Cir.), *cert. denied*, 463 U.S. 983 (1983).

62. *Id.* at 1551.

63. *Id.* at 1552.

64. *Id.* at 1552 n.8 (citations omitted).

65. *Id.* at 1553.

66. The court discussed three possible reasons for seeking sterilization. These included: (1) socioeconomic, to avoid disruption of lifestyle or career, or to conserve family resources; (2) eugenic, to avoid the birth of a handicapped child; and (3) therapeutic, to avoid dangers to the mother's health during pregnancy and childbirth. *Id.* at 1553-54.

67. *Id.* at 1553-55.

68. *Id.* at 1556.

69. *Id.*

70. *Id.* at 1549.

ing pregnant was so great that her boyfriend offered to have a vasectomy if there were any risk of the plaintiff becoming pregnant following the sterilization.[71]

Based upon these facts, the court reasoned that because the plaintiff had given birth to a healthy baby and the mother, herself, was healthy, the risks prompting her to avoid future pregnancies did not exist.[72] The court concluded that when a couple seeks "sterilization solely for therapeutic or eugenic reasons, it seems especially likely that the birth of a healthy child, although unplanned, may be, as it is for most parents, a great benefit to them."[73] The court further concluded that under these circumstances a jury could not rationally find the plaintiff was injured by the birth of a healthy child and, therefore, she could not recover damages for costs to rear the child.[74]

D. The Majority Rule of the Limited Recovery Theory

While the *Custodio*[75] theory of awarding complete damages has not been followed, many jurisdictions[76] have applied the balancing test of *Troppi*.[77] The method used by the majority of courts to determine damages in wrongful conception cases, however, affords plaintiffs a more limited recovery than does the balancing test. Relying partially on the blessing concept, the majority of courts calculate damages by determining the out-of-pocket, direct, pregnancy-related expenses only, and do not allow any recovery for childrearing costs. Jurisdictions employing this method have allowed recovery for lost wages, medical expenses, cost of a future sterilization operation, loss of consortium and comfort, and for the pain and suffering endemic to pregnancy and childbirth.[78] This was the theory followed by the District of

71. *Id.* at 1547, 1549.

72. *Id.* at 1557.

73. *Id.* at 1554.

74. *Id.* at 1557.

75. 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967). *See supra* text accompanying notes 43-50.

76. *See supra* note 60 and accompanying text.

77. 31 Mich. App. 240, 187 N.W.2d 511 (1971). *See supra* notes 52-59 and accompanying text.

78. *See, e.g.*, McNeal v. United States, 689 F.2d 1200 (4th Cir. 1982); Boone v. Mullendore, 416 So. 2d 718 (Ala. 1982); Wilbur v. Kerr, 275 Ark. 239, 628 S.W.2d 568 (1982); Coleman v. Garrison, 349 A.2d 8 (Del. 1975); Fassoulas v. Ramey, 450 So. 2d 822 (Fla. 1984); Public Health Trust v. Brown, 388 So. 2d 1084 (Fla. Dist. Ct. App. 1980), *petition for review denied*, 399 So. 2d 1140 (Fla. 1981); Cockrum v. Baumgartner, 95 Ill. 2d 193, 447 N.E.2d 385, *cert. denied*, 464 U.S. 846 (1983); Nanke v. Napier, 346 N.W.2d 520 (Iowa 1984); Schork v. Huber, 648 S.W.2d 861 (Ky. 1983); Kingsbury v. Smith, 122 N.H. 237, 442 A.2d 1003 (1982); P. v. Portadin, 179 N.J. Super. 465, 432 A.2d 556 (1981); Sorkin v. Lee, 78 A.D.2d 180, 434

Columbia Court of Appeals in *Flowers*.

II. *FLOWERS V. DISTRICT OF COLUMBIA:* CONFLICTING PRIORITIES

A. Differing Public Policy Mandates

In *Flowers*, the plaintiff, Geraldine Flowers, underwent a sterilization operation after deciding she could not financially support additional children.[79] Two years after the operation, however, Flowers gave birth to a healthy baby.[80] She filed suit against the District of Columbia alleging the sterilization operation had been negligently performed and that she had become pregnant and had given birth as a proximate result of the negligence.[81]

At trial, Flowers sought compensation for all expenses directly related to the pregnancy and birth,[82] as well as the costs of rearing the child to the age of eighteen.[83] The trial court permitted the jury to hear all of plaintiff's claims except the claim for childrearing costs.[84] The District of Columbia Court of Appeals affirmed the decision of the trial court.[85]

On appeal, the *Flowers* court considered whether the trial court had erred in ruling Flowers could not pursue her claim for childrearing costs.[86] Flowers contended that because this was a typical medical malpractice case, the standard principles of tort law should apply.[87] According to the court, the standard principles of tort law required application of the benefit rule[88] and the doctrine of avoidable consequences.[89] On public policy grounds the court expressly refused to apply either of these rules.[90] The majority instead applied the theory of damages based on directly-related costs and outlined four public policy reasons for rejecting a recovery based on childrearing

N.Y.S.2d 300 (1980); Mason v. Western Pa. Hospital, 499 Pa. 484, 453 A.2d 974 (1982); Beardsley v. Wierdsma, 650 P.2d 288 (Wyo. 1982).

79. *Flowers*, 478 A.2d at 1074.

80. *Id.*

81. *Id.*

82. *Id.* These expenses included medical expenses, lost wages, pain and suffering, and the cost of a future sterilization operation. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 1078.

86. *Id.* at 1074.

87. *Id.* at 1075.

88. *See supra* text accompanying note 53.

89. *Flowers*, 478 A.2d at 1076. The avoidable consequences doctrine states that "one injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure after the commission of the tort." RESTATEMENT (SECOND) OF TORTS § 918 (1977).

90. *Flowers*, 478 A.2d at 1076-77.

costs.[91]

The majority concluded that any recovery for childrearing costs was against public policy because it required some application of the benefit rule.[92] This rule balances the positive and negative factors attributable to the birth of a child. The court here determined this would require placing a dollar value on a child to ascertain the monetary benefit conferred to the parents as well as the actual expenses incurred by the parents upon the child's birth.[93] The court observed that as a result parents would tend to minimize the child's worth and thereby denigrate him "to minimize the offset to which the defendant is entitled."[94]

In addition, the majority found that an award for childrearing costs was against public policy because it also required application of the avoidable consequences doctrine.[95] Under this doctrine a plaintiff must prove "that he could *not* have reasonably avoided the consequences of the physicians' negligence."[96] The court recognized the only way to avoid the consequences of a physician's negligence in a wrongful conception case is for the mother to give up the child for adoption or to undergo an abortion.[97] The court concluded that applying the avoidable consequences doctrine forces the jury to consider these alternatives, even though they are "matters that seem particularly unsuited for the traditional adversarial process."[98]

The majority further determined that childrearing cost recovery is against public policy because the award has a destabilizing effect on the family.[99] In essence, the award forces a third party, the physician, to provide financially for the child, which the court found harmful to family unity. Finally, the majority held that an award of damages is against public policy because it is "wholly disproportionate to the culpability"[100] of the defendant-physician.

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91. *Id.* at 1074-78.

92. *Id.* at 1076. *See also supra* note 53.

93. *Flowers*, 478 A.2d at 1076.

94. *Id.* (quoting Cockrum v. Baumgartner, 95 Ill.2d 193, 202, 447 N.E.2d 385, 390 (1983), *cert. denied*, 464 U.S. 846 (1983).

95. *See supra* note 89.

96. *Flowers*, 478 A.2d at 1077.

97. *Id.* The majority expressly stated, however, that it was not suggesting that a jury would necessarily find abortion or adoption reasonable ways to avoid the consequences of raising an unwanted child. *Id.* at 1077 n.4. The court nevertheless suggested a jury might find them reasonable. *Id.*

98. *Id.* at 1077.

99. *Id.* The court found that § 16-4501 of the District of Columbia Code mandates a policy of a stable home environment and that a damage award for wrongful conception undermines this policy. D.C. CODE ANN. § 16-4501 (1983).

100. *Flowers*, 478 A.2d at 1077 (quoting Berman v. Allan, 80 N.J. 421, 432, 404 A.2d 8, 14 (1979), where the issue was actually "wrongful birth" because an unhealthy child was born. *See supra* text accompanying note 6).

The court determined an award places an unreasonable burden on the physician, while allowing all the benefits to be enjoyed by the parents.[101]

Dissenting from the majority opinion, Judge Ferren rejected the majority's reasoning and its partial return to the blessing concept. Instead, he wrote in favor of the benefit rule. Judge Ferren's application of the benefit rule, however, differed from the application enunciated in *Troppi*. The *Troppi* court found the tangible and intangible damages and benefits of childrearing could be balanced because they were so inextricably related as to represent the same interest.[102] In *Flowers*, however, Judge Ferren stated the tangible and intangible costs and benefits of childrearing do not represent the same interests[103] and, therefore, cannot balance each other.

The proper application, according to Judge Ferren, would require a plaintiff to present evidence that economic reasons motivated her sterilization.[104] Evidence presented by the defendant-physician to the contrary, for example, that plaintiff was well-situated financially, would offset plaintiff's allegations. Plaintiff then would present evidence of reasonable childrearing expenses again to be balanced against evidence presented by the defendant-physician regarding the unreasonableness of these expenses.[105] This literal application of the rule requires only like interests to be balanced. Unlike *Troppi*, however, this application does not require the court to calculate the monetary value to the parents of a child's comfort, joy, love, and affection. Thus, as used by Judge Ferren, the rule does not mandate any valuation of the child's worth and there is no risk that parents may denigrate the child.[106]

Judge Ferren also observed an award of damages could be pro-family rather than anti-family. He stated an award may relieve some of the financial burden and stress that could result from the birth of an unplanned child. An award thus may increase family harmony. Judge Ferren concluded the parents then may concentrate on providing the child and his siblings with the love and affection they need, rather than focusing on the family's financial situation.[107] Finally, the dissent noted that public policy demands some mechanism to deter negligent acts, and that wrongdoers must be held responsible for the foreseeable consequences of their wrongful acts.[108]

101. *Flowers*, 478 A.2d at 1077 (citing Sorkin v. Lee, 78 A.D.2d 180, 184, 434 N.Y.S.2d 300, 303 (1980)).

102. *See supra* note 59 and accompanying text.

103. *Flowers*, 478 A.2d at 1080-81.

104. *Id.* at 1081.

105. *Id.*

106. *Id.*

107. *Id.* at 1079.

108. *Id.* at 1083.

B. Selective Public Policy Mandates

There is no doubt the majority's decision to award only directly-related costs as damages is the current majority rule.[109] There are, however, several problems with this approach. First, the majority in *Flowers* completely ignores the test established in *Hartke*.[110] In an action for wrongful conception, the *Hartke* court found if a plaintiff underwent a sterilization procedure for therapeutic or eugenic reasons, then the subsequent birth of a healthy child to a healthy mother would be a great benefit to the parents.[111] From this analysis it follows that if a plaintiff had a sterilization operation for financial reasons, then the plaintiff would suffer financial damages from the birth of a child. In other words, a plaintiff who wanted to limit family size for financial reasons would be injured by having to raise an additional, unplanned child. Applying this analysis to *Flowers*, the plaintiff suffered real financial harm from the birth of an unplanned child.

The dissent's application of the benefit rule, however, *is* consistent with the *Hartke* analysis. According to Judge Ferren, once plaintiff proves that financial reasons motivated the decision to become sterilized, the defendant-physician has an opportunity to present evidence to the contrary.[112] This is an effective way to balance like interests and satisfies the requirements of the benefit rule.

Secondly, the majority insists that the avoidable consequences doctrine must be applied if standard tort principles are applied to determine damages.[113] The avoidable consequences doctrine requires that plaintiff make reasonable efforts to mitigate his damages. As noted by the majority, in wrongful conception cases, abortion and adoption are two ways to avoid the necessary consequences of a physician's negligence and to mitigate damages.[114] By not expressly dismissing these alternatives as unreasonable or against public policy, the court implies a jury could find abortion and adoption reasonable methods of mitigation. In a footnote the court stated it did not "conclude that a court or jury would necessarily find abortion or adoption to be a reasonable method of avoiding the consequences."[115] Nevertheless, the court further noted that a court or jury would "be called upon to consider this alternative as an exercise of choice by the parent before having

109. *See supra* note 78 and accompanying text.
110. *Hartke*, 707 F.2d 1544 (D.C. Cir.), *cert. denied*, 463 U.S. 983 (1983).
111. *Id.* at 1554.
112. *Flowers*, 478 A.2d at 1081.
113. *Id.* at 1077.
114. *Id.*
115. *Id.* at 1077 n.4.

the child."[116]

Thus, the majority in *Flowers* would find it necessary to allow the jury to consider the fact that plaintiff did or did not choose one of these alternatives if it applied standard tort principles to measure the damages. In essence, the majority suggests that adoption and abortion may be reasonable considerations. The majority also stated, however, that adoption and abortion are "highly personal matters that seem particularly unsuited for the traditional adversarial process."[117] Yet, the court concluded that abortion and adoption are reasonable enough to allow court or jury consideration.[118] The majority's recognition of unreasonable and unsuitable alternatives substantially weakens its holding and blurs the guidelines for future decisions.

Judge Ferren's dissent is more persuasive. According to the dissent, because these matters are unsuited for the adversarial process, they are unreasonable alternatives and, therefore, a court or jury should not be allowed to consider them.[119] While abortion and adoption are acceptable practices to many people, the dissent found it unreasonable for a court to suggest that a plaintiff consider adoption or abortion.[120]

In addition, the court's holding in *Flowers* does not make clear how the court will interpret the law on this and similar issues in the future. It provides no guidelines concerning how it would review a wrongful birth situation in which the child born under similar circumstances was handicapped. The court seems to suggest that parents of a handicapped child born following a negligently performed sterilization operation would recover at least the extraordinary costs of rearing the child.[121] At the same time, however, the court does not specify whether it would allow such a recovery and thus may leave future plaintiffs speculating. Further, by implying it would allow the recovery of damages for the birth of a handicapped child, the majority seems

116. *Id. See* Jones v. Malinowski, 299 Md. 257, 473 A.2d 429 (1984), where the court of appeals stated, "[m]ost courts which have considered the question have determined, as a matter of law, that neither course of action [referring to abortion and adoption] would be reasonable and consequently [consideration thereof] is not required." *Id.* at 274, 473 A.2d at 438 (citations omitted).

117. *Flowers*, 478 A.2d at 1077.

118. *Id.* at 1077 n.4.

119. *Id.* at 1082.

120. *Id.*; *see supra* note 116 and accompanying text. *But see* Public Health Trust v. Brown, 388 So. 2d 1084 (Fla. Dist. Ct. App. 1980), *petition for review denied*, 399 So. 2d 1140 (Fla. 1981). The court observed the fact that the " 'benefits' of parenthood far outweigh any of the mere monetary burdens involved . . . may be deemed conclusively presumed by the fact that a prospective parent does not abort or subsequently place the 'unwanted' child for adoption." *Id.* at 1085-86 (citations omitted); *see also* Sorkin v. Lee, 78 A.D.2d 180, 434 N.Y.S.2d 300 (1980). The court noted "the mother was aware of the unwanted pregnancy from its inception and did not choose to terminate it." *Id.* at 183, 434 N.Y.S.2d at 302.

121. *Flowers*, 478 A.2d at 1076 n.3.

to suggest that some children are not blessings because of their lack of physical or mental capacity. Surely this conclusion is as offensive as the conclusion that a perfectly healthy child is not a blessing.

Finally, the majority fails to recognize that its holding ignores a significant public policy issue. The majority essentially would allow a wrongdoer, a negligent physician, to escape without punishment for his wrongful acts. Such a ruling weakens the standard of professional conduct and expertise demanded in the area of family planning and leaves a vacuum in medical malpractice recovery.[122] In essence, the ruling exempts the medical profession from liability for negligence toward parents attempting to limit the size of their families.[123]

III. CONCLUSION

Flowers v. District of Columbia presented the District of Columbia Court of Appeals with a case of first impression to determine a proper award of damages for a plaintiff who was the victim of a negligently performed sterilization operation. In balancing various public policy considerations, the *Flowers* majority awarded damages based on the widely used theory of direct, pregnancy-related costs. In doing so, the court denied damages for childrearing costs. While the result of the District of Columbia approach is certainly supported by other jurisdictions, the court's rationale is confusing and leaves critical gaps in the guidelines established for similar cases in the future. Most disturbing is the *Flowers* court's suggestion that it would be necessary to allow the jury to consider adoption and abortion as alternatives to childrearing while simultaneously suggesting that these issues are unsuitable for the adversarial process.

Thus, while the court may have been correct in finding that preservation of the family requires that it not award childrearing costs in wrongful conception actions, it is doubtful the court has set a strong precedent upon which future courts may rely. Hopefully, when this issue is presented to the District of Columbia Court of Appeals again, it will more evenly consider all of the injuries suffered and all of the public policy questions at hand.

Nancy L. White

122. *See* Kingsbury v. Smith, 122 N.H. 237, 242, 442 A.2d 1003, 1005 (1982).
123. *See* Beardsley v. Wierdsma, 650 P.2d 288, 292 (Wyo. 1982).