DAMAGES IN TORT FOR WRONGFUL CONCEPTION—WHO BEARS THE COST OF RAISING THE CHILD?

*ANNE C. REICHMAN**

1. Introduction

Can the birth of a healthy normal child be the source of an award of damages? The recent English case of *Udale* v. *Bloomsbury Area Health Authority*[1] which came before Jupp, J. in the Queens Bench Division presents an interesting problem which has yet to confront Australian courts. The case concerned a claim for recovery of pecuniary loss resulting from a negligently performed sterilisation operation. Negligence was admitted by the defendant, and so the question was whether certain items of damage claimed could be regarded as legally compensable—in particular, the cost of raising the child whose birth ensued after the failed operation. This question has arisen again very recently in England[2] but surprisingly it has not come before the courts of the British Commonwealth very often.[3] In America, courts have been grappling with claims for "wrongful conception" for several decades, and the plethora of American cases on the subject and the variety of approaches taken illustrate that "[i]n the medico-legal field it is a fact of life that the scientific advances of the medical profession become the battlefields of the legal profession".[4] It would seem an inevitable concomitant of the increasingly widespread use and availability of contraceptive measures that legal actions will be brought when such measures fail due to the negligent conduct of a third party.

Before examining the *Udale* case in detail, it may be useful to deal

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* Graduate student at Yale Law School; formerly Tutor in the Faculty of Law at Monash University. The author expresses her gratitude to Professor F. A. Trindade of the Faculty of Law, Monash University, for his most valuable guidance in connection with the preparation of this paper.

[1] [1983] 1 W.L.R. 1098. The case was heard before Jupp, J. in the Queens Bench Division. See D. Brahams, "Damages for Unplanned Babies—a Trend to be Discouraged?" (1983) 133 *New L.J.* 643 at 644. See also D. Brahams, "What Damages Should Be Payable for the Birth of an Unplanned Baby?" (Editorial) (1983) 51 *Medico-Legal Journal* 65 and case comment, "Healthy Infant Born After Negligent Sterilisation", *Id.* at 120.

[2] *Thake* v. *Maurice* (Peter Pain, J., Queens Bench Division, judgment delivered 26 March 1983, unreported).

[3] Some of the Commonwealth cases involving wrongful conception are listed by G. B. Robertson, "Civil Liability Arising from 'Wrongful Birth' Following an Unsuccessful Sterilization Operation", (1978) 19 *Jurimetrics Journal* 140, footnotes 17-19 at 146. Although the Australian courts have not yet had to confront the problem of damages for negligently performed sterilisation operations as raised in *Udale*, they have had to consider the question of the extent of a doctor's duty to warn a patient of the risk of failure of a sterilisation operation—see *F. v. R.* [1982] 29 S.A.S.R. 437. See also *Thake* v. *Maurice* *supra* n. 2 where a failure to give adequate warning of the risk of a late recanalisation in a vasectomy operation resulted in a successful wrongful conception action based on breach of contract, misrepresentation and contractual negligence.

[4] Robertson, *supra* n. 3 at 144.

with certain situations which involve claims analogous to the "wrongful conception" claim.

2. Claims Analogous To Wrongful Conception

The term "wrongful conception" is not limited to conception following a failed sterilisation operation, but encompasses a variety of possible situations—such as a failed abortion operation, a failure to diagnose a pregnancy in time to allow the mother the opportunity for an abortion where this would have been an appropriate alternative, the negligent dispensing or manufacture of oral contraceptives, and the negligent design or manufacture of birth control devices. In *Scuriaga* v. *Powell*[5] for example, one of the few precedents for wrongful conception in England, an action was brought by a mother against a doctor for breach of contract arising from an abortion operation which had been negligently performed and which proved ineffective. The plaintiff did not claim any damages for child maintenance, but did successfully claim damages for loss of earnings, pain and suffering, mental anxiety, and impairment of marriage prospects. The common characteristic of the above-mentioned varieties of wrongful conception cases is that the plaintiff is seeking to make the defendant—or those vicariously responsible for the defendant—liable for the birth of a healthy normal infant which the defendant's negligent conduct failed to prevent.

The wrongful conception action must be distinguished from certain other actions which, though analogous in many ways, involve very different considerations. An action for "wrongful birth" is one brought by the parents of an impaired child or by the child itself against a third party whose negligence caused the defect. This may arise either where the embryo or foetus is damaged by a negligent act, as in the Victorian case of *Watt* v. *Rama*,[6] or where the complaint concerns the failure of the medical practitioner to inform the mother of a condition or a disease which endangered the health of the unborn child, thus depriving the mother of the opportunity to have an abortion. An example of the latter situation arose in the case of *McKay* v. *Essex Area Health Authority*,[7] where the plaintiff mother correctly suspected that she had contracted rubella during the first months of pregnancy. However due to a negligent diagnosis by her medical practitioner and the hospital testing service, it was erroneously concluded that she had not been infected. She subsequently gave birth to a deformed child.

In some cases the actions for wrongful birth and wrongful conception will overlap. An example is the recent English case of *Emeh* v. *Kensington and Chelsea and Westminster A.H.A. and Others.*[8] The plaintiff under-

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[5] (1979) 123 *Sol. J.* 406.

[6] [1972] V.R. 353. This problem was brought to the fore in the Thalidomide mishap—see *Distillers Co. (Biochemicals) Ltd.* v. *Thompson* [1971] A.C. 458.

[7] [1982] 1 Q.B. 1166. Some idea of the measure of damages that may be awarded in wrongful birth cases may be gleaned from the decision of a 1982 Canadian case involving the birth of a child with severe physical disabilities, as a result of the doctor's failure to diagnose that the mother was carrying twins. The plaintiff in this action was awarded damages amounting to $1,146,042.80—*Wipfli* v. *Britten* [1982] 22 C.C.L.T. 104.

[8] Queens Bench Division, Park, J., Dec. 21, 1982 (unreported). See Brahams, "Damages for Unplanned Babies—a Trend to be Discouraged?" *supra* n. 1 at 644. See also D. Brahams, 'Handicapped Infant Born After Negligent Sterilisation' (1983) 51 *Medico-Legal Journal* 119.

went an abortion, followed by a sterilisation operation. The latter operation however was negligently performed, and the plaintiff became pregnant. Her child was born with severe congenital abnormalities.

A further category of cases consists of an action known as "wrongful life". This action is brought by the child who alleges not, as in wrongful birth cases, that it should have been born normal and healthy but rather that its very existence is wrongful. In *McKay's* case for example, the child claimed damages for, *inter alia*, her "entry into a life in which her injuries [were] highly debilitating". However, the Court of Appeal did not allow this claim, holding that to do so would be contrary to public policy as a violation of human life, and stressing that it was impossible for the court to compare the value of existence in a disabled state with the value of non-existence. Claims in America and in Canada for this kind of action have met largely with a similar lack of success,[9] and the Law Commission in its Report on Injuries to Unborn Children stated that "[i]n this situation we are clear in our opinion that no cause of action should lie."[10] Similarly actions in America for wrongful life where the plaintiff has sought damages for having been born illegitimate have largely been unsuccessful.[11]

Some confusion can arise from the fact that much of the literature and case-law in this area employs the above terminology somewhat indiscriminately, often using "wrongful birth" as a generic term to encompass all of the above claims. In this paper, however, the terms "wrongful conception", "wrongful birth" and "wrongful life" will be used to convey the specific meanings as described in the preceding paragraphs.

The bases of the various actions that could be brought before the courts in these situations will of course depend on the particular facts involved. Actions in negligence, breach of contract, deceit, products liability and infliction of mental distress are amongst those which have most commonly been brought in the United States.[12] It is not the intention of this article to explore these various bases of liability, or the specific elements of a cause of action which must be established. Instead, the focus will be on the judgment in the *Udale* case, where negligence was conceded by the defendant, and the argument centred upon the issue of damages.

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[9] E.g. *Gleitman* v. *Cosgrove* 227 A. 2d 689 (N.J.S.C., 1967); *Park* v. *Chessin* 413 N.Y.S. 2d 895 (C.A., 1978); *Cataford* v. *Moreau* (1981) 114 D.L.R. (3d) 585. cf. *Harbeson* v. *Parke-Davis Inc.* 98 Wn. 2d 460; 656 P. 2d 483 (1983) in which the Washington Supreme Court allowed an impaired child's wrongful life action where the claim was for extraordinary expenses for medical care and special training even though a claim for general damages would not have succeeded.

[10] The Law Commission Report on Injuries to Unborn Children No. 60, 1974 (Cmnd. 5709), para. 89.

[11] E.g. *Zepeda* v. *Zepeda*, 41 Ill. App. 2d 240, 190 N.E. 2d 849 (1963). Dempsey, J. in refusing to allow a cause of action for wrongful life in that case commented that "[t]he legal implications of such a tort are vast, the social impact could be staggering". The possibility of an action for wrongful life being brought one day by a child born by the Artificial Insemination by Donor program against his parents, claiming that the form of procreation chosen by his parents had injured him socially and psychologically, has recently been raised by Professor Max Charlesworth, Professor of Philosophy at Deakin University Australia—"Adoption and A.I.D.—Access to Information" Conference, reported in The *Sun*, Nov. 9, 1983, at 47.

[12] Family planning organisations and drug companies in Australia may have to consider the possibility of liability for defective products or negligent advice in this context in the light of the recent comments by Professor Robert Hayes of the Faculty of Law at the University of New South Wales Australia concerning a decision in Seattle in the United States to award damages of $125,000 to a woman who became pregnant while using the Dalkon Shield, an interuterine device which was taken off the market in 1974—see The *Australian*, Nov. 23, 1983 at 7.

3. *Udale v. Bloomsbury Area Health Authority*

(a) Facts

After the birth of their fourth child, the plaintiff, Mrs. Udale, and her husband decided to limit the size of their family. Contraceptive measures proved unsatisfactory, as they caused the plaintiff considerable pain and discomfort. Consequently Mrs. Udale decided to have a laparascopic sterilisation operation, which was performed on 4 October 1977.

However the plaintiff continued to suffer pain after the operation. Her general practitioner prescribed painkillers, tablets for hypertension, and antibiotics. Her doctors believed her symptoms were imaginary and referred her to a psychiatrist. When her condition did not improve, she decided to seek a second opinion; it was then, on 15 June 1978, that she discovered that she was approximately four months pregnant.

The plaintiff's reaction to the news was one of shock and anger. It was at this stage too late for an abortion. She was concerned about the extra expense involved and the difficulty of finding a room for the child once it had outgrown its cot, anxious about the effect on the other children, and extremely worried about the drugs which she had been taking whilst unaware that she was pregnant.

The child was born a normal healthy boy, who was quickly accepted into the family. The plaintiff underwent a second sterilisation operation a couple of days after the birth, and in September 1982 a further operation for the removal of a sterilisation clip.

(b) Heads of Damage Claimed

Several heads of damage claimed were not disputed. These included:

(i) the cost of the original ineffective operation;
(ii) the shock and anxiety of the unwanted pregnancy;
(iii) anger at the thwarting of the decision to have no more children;
(iv) suffering caused by the ordinary symptoms of pregnancy which were thought to be illness or disease, and the taking of unnecessary drugs to overcome them;
(v) fear that the drugs may have caused serious harm to the foetus;
(vi) the cost of the operation for resterilisation;
(vii) loss of earnings for approximately eleven months, made necessary by the pregnancy and birth.

The damages which were disputed were as follows:

(i) the proposed extension to the family home, which was estimated at £8,000;
(ii) the cost of maintaining the infant up to the date of the trial (4 years and two months), estimated at £1,750;
(iii) the cost of maintaining the child up until the age of 16 years, estimated at £5,000.

(c) The Judgment

The defendant in *Udale* conceded that there had been negligence in the performance of the operation, the right hand metal clip having been

placed on a nearby ligament instead of on the fallopian tube. The questions therefore of whether a duty of care was owed by the doctor to the patient, whether there had been a breach of that duty, and if so whether the breach caused the damage, were not in issue.

The case was concerned solely with the question of damages, namely whether certain items claimed as damage were recoverable. There was no suggestion that the disputed items of damage were too remote, or that recovery for pure economic loss[13] (i.e. unaccompanied by physical injury) should be precluded. Instead the argument proceeded purely upon policy grounds, and it is these grounds which will be examined in this article.

The defendants argued that as a matter of public policy damages should not be awarded for the birth of a normal healthy child. It was submitted that a child would suffer great harm if it was to learn later that it had been so unwanted that others were paying for its upbringing. It was further argued that to award damages in such cases would be inconsistent with the concept of the family unit and with the assumption of society that children are the natural and desirable consequences of marriage and that their existence constitutes a benefit to parents, the family and to society as a whole—in short, a "blessing". Moreover, to quantify in money terms the benefit of a child and then to set off that amount against the capital sum cost of the child's upbringing and award the difference as damages, could have the undesirable effect of encouraging plaintiffs to assert that they did not value the companionship of the child, in order to recover a larger amount of damages. The defendants also pointed to the potential danger that doctors would be under subconscious pressure to advise abortions in doubtful cases, for fear of an action being brought against them. As a final argument, the defendants emphasised the financial support and assistance which children can provide in later years.

Jupp, J. was persuaded by these arguments, and decided that all three heads of the disputed damages should be rejected. In arriving at this decision he relied heavily on the considerations of public policy which were put forward in *McKay* v. *Essex Area Health Authority.*[14] Although he recognised that many of the issues raised in that case were not relevant to the instant case, and emphasised that his decision was confined to situations involving the birth of normal, healthy babies, he felt that the

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[13] It is unlikely that recovery for pure economic loss would be precluded in these circumstances on the tests put forward by Gibbs, C.J., Mason, J. or Jacobs, J. in the High Court case of *Caltex Oil (Australia) Pty. Ltd.* v. *The Dredge "Willemstadt"* (1976) 136 C.L.R. 529, given that the plaintiff was a member of a specifically foreseen and limited class (Gibbs, C.J. and Mason, J.), and that the plaintiff was in such physical propinquity to the place where the defendant's acts had their operation that a physical effect upon the plaintiff was a foreseeable result of those acts (Jacobs, J.). An analogy may perhaps be drawn with the situation in the case of *Port* v. *New Zealand Dairy Board* [1982] 2 N.Z.L.R. 282. Here the plaintiffs were pedigree Hereford cattle breeders who, deciding to use artificial breeding methods, engaged the services of the defendant to collect semen from Penatok Nobel. The defendant however negligently supplied semen from an Angus bull. The plaintiffs brought an action in negligence claiming damages for economic loss. The court applied the foreseeability test propounded in *Caltex Oil (Australia) Pty. Ltd.* v. *The Dredge "Willemstadt", supra,* in allowing the claim for special damages. It could be argued that just as the conception of the Angus calves was unwanted in this case, so the conception of the child was unwanted in the *Udale* case. Alternatively, however, the argument on economic loss could be put on the basis that in any event the *Udale* situation is not a case of pure financial loss but a claim for financial loss consequent upon physical injury, namely, the pregnancy.

[14] [1982] 1 Q.B. 1166.

policy grounds on which *McKay's* case was decided were impressive and were applicable here. He listed these policy considerations in *McKay's* case as follows:

> (1) The objection that the courts would be open to claims for maintenance by children against doctors who negligently allowed them to be born. (2) The extra burden this would impose on the medical profession and the danger that doctors would be under subconscious pressure to advise abortions for fear of actions for damages. (3) The social implications in the potential disruption of family life and the bitterness it would cause between parent and child. (4) The sanctity of human life which the law must regard as such that failure to prevent it should not be recognised as a cause of action. In other words, the law will not allow an action based on negligence which caused, or at least, allowed, a human life to come into being. (5) There should be rejoicing, not dismay, that the surgeon's mistake bestowed the gift of life upon the child.[15]

Jupp, J. also referred to the following dictum of Waller, L.J. in *Scuriaga* v. *Powell*:

> I quite see that the incidence of pregnancy and the necessity for Caesarian birth would properly form items of damage for the failure of the operation and, indeed, in this case, one of the heads of damage covers this, but, once a woman has given birth to a healthy child without harm to her and the fears of the doctors have been shown to be unfounded, I would not regard it as unarguable in another case that thereafter no more damage would arise.[16]

The decision to refuse recovery for the claimed heads of damage in *Udale* was based on four grounds of public policy set out by Jupp, J. The first ground concerned the undesirability of a child learning at some stage that its birth was a mistake and that it was unwanted, and the feeling that such a pronouncement would be disruptive of the family unit and that society would suffer thereby. The second reason was that by deducting an amount for the benefits that the child would bring as perceived by the mother, the anomalous and inequitable result would follow that a caring mother would in effect be penalised by her love and care, whereas an uncaring mother would receive a higher award of damages. Jupp, J. said that he was reinforced in his conclusion on this point by the fact that he would have to regard the financial disadvantages as offset in this case by the plaintiff's admitted gratitude of having a son after four daughters. Thirdly a concern was expressed that medical practitioners would be under pressure to advise abortions rather than be faced with actions for wrongful conception. And finally, it was stated that "[i]t has been the assumption of our culture from time immemorial that a child coming into the world, even if, as some say, 'the world is a vale of tears', is a blessing and an occasion for rejoicing".[17]

Jupp, J. did not however exclude all damages. He awarded £8,000

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[15] [1983] 1 W.L.R. 1098 at 1109.
[16] *Id.* 1108.
[17] *Id.* 1109.

for pain and suffering, inconvenience and anxiety caused by the pregnancy, and £1,025.20 for loss of earnings during and after the pregnancy.

4. The Public Policy Considerations

The issues raised in *Udale* are not easily resolved, as they involve a delicate balancing of several goals all of which may be seen as equally desirable but which are nonetheless difficult to harmonise—for example, the recognition of the value of human life, a respect for the individual's decision to limit procreation, a concern for the welfare of the infant, a desire to compensate adequately the plaintiff without causing either unjust enrichment or casting a disproportionate burden on the defendant, and an interest in the promotion of high standards of professional medical treatment.

(a) The birth viewed as an overriding benefit

The main premise underlying the decision in *Udale* would appear to be that there has been no damage, because the birth of a healthy child is necessarily a blessed event, and is therefore a cause for celebration and not compensation. According to this view, to award damages in such a situation would be to equate the birth of a child with an injury to its parents, and thereby impliedly to degrade the preciousness of human life. This would be against public policy, being inconsistent with the fundamental concept held by society that life is inherently valuable.

A minority of the American cases have adopted this view, ruling in effect that as a matter of law the benefit of a healthy baby will outweigh any burdens.[18] In one case, for example, it was held that " . . . the jury may well have concluded that the appellants suffered no damage in the birth of a normal healthy child . . . and that the cost incidental to such birth was far outweighed by the blessing of a cherished child, albeit an unwanted child at the time of conception and birth";[19] and in another case the court said: "Who can place a price tag on a child's smile or the parental pride in a child's achievement? . . . Rather than attempt to value these intangible benefits, our courts have simply determined that public sentiment recognises that these benefits to the parents outweigh their economic loss in rearing and educating a healthy normal child."[20]

One of the major fallacies inherent in this argument is its apparent failure to distinguish between those persons who voluntarily undertake parenthood and those who have it imposed upon them. It seems quite inappropriate for the court, rather than the individual concerned, to decide what will be a "benefit" to that individual, and particularly so in actions where the individual has made a conscious decision not to receive the supposed "benefit" and has taken major steps to implement that decision. The individual here has already made the value judgment as to the relative benefits and costs, and has come to the conclusion that the birth of a child would constitute a net detriment. As a dissenting judge in an American

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[18] E.g. *Shaheen* v. *Knight* 11 Pa. D. & C. 2d 41 (1957); *Ball* v. *Mudge* 64 Wash. 2d 247; 391 P. 2d 201 (1964); *Christensen* v. *Thornby* 192 Minn. 123; 255 N.W. 620 (1934); *Terrell v. Garcia* 496 S.W. 2d 124 (Tex. App., 1973).

[19] *Ball* v. *Mudge* 64 Wash. 2d 247 at 250; 391 P. 2d 201 at 204 (1964).

[20] *Terrell* v. *Garcia* 496 S.W. 2d 124 at 128 (Tex. App., 1973).

case noted, "[t]here is a bitter irony in the rule of law announced by the majority. A person who has decided that the economic or other realities of life far outweigh the benefits of parenthood is told by the majority that the opposite is true."[21]

Whether or not the birth of a child will provide any "benefit" to the parents would appear to be an entirely personal decision, and will obviously depend on the individual circumstances. The unacceptable consequences of adopting the inflexible position that an award of damages for the birth of a healthy child is necessarily contrary to the "universal public sentiment of the people"[22] is illustrated by one writer's comment that "[n]o court would be moved by the argument coming from a putative father that he should not be required to provide financial support for the child he has fathered on the grounds that he has bestowed on the mother a priceless blessing".[23] Further, it seems quite extraordinary for a court to say that a child born as a result of a rape for example, must necessarily prove to be a "benefit" to the rape victim, particularly if that victim was a minor or was otherwise inadequately equipped to cope with the raising of a child. Moreover, even where the child is born into an established domestic circle, it is artificial to ignore economic realities and the effect that this may have both on the parents and on any previously born siblings. As one writer has commented, "[a]n inability to provide for and educate their previously born children as they had anticipated or to maintain a higher standard of living once contemplated may be a constant source of sorrow for which the joy derived from the newest child compensates only inadequately".[24] Thus, although it may be true that most parents will love and care for the child once it is born, it does not necessarily follow that they have not suffered economic and in some cases emotional and social damage, and that they would not have been happier without the "blessing" that they took steps to prevent.

The overriding benefit argument can be further challenged on the ground that it is inconsistent with the well-established equitable principle that no person should be forced to accept a "benefit" against his will. As was stated in the early case of *Merritt* v. *Parker*, "[n]o one has a right to compel another to have his property improved in a particular manner; it is as illegal to force him to receive a benefit as to submit to an injury".[25] The strength of this principle is particularly apparent in cases such as *Udale*, where the "benefit" requires the family to make significant adjustments and absorb large costs over a considerable period of time.

Various other arguments, not canvassed in *Udale*, have been raised by other courts in this context. These arguments appear on closer analysis to be little more than variants of the overriding benefit theory. One example is the proposition that to allow a plaintiff to enjoy the benefits of parenthood without having to shoulder the attendant financial consequences is

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[21] *Public Health Trust* v. *Brown* 388 So. 2d 1084 at 1087 *per* Pearson, J. (dissenting) (Fla. Dist. Ct. App., 1980).

[22] *Shaheen* v. *Knight* 11 Pa. D. & C. (2d) 41 at 45 (1957).

[23] J. E. Bickenbach, "Damages for Wrongful Conception: Doiron v. Orr", (1980) 18 *U. W. Ont. L. Rev.* 493 at 498.

[24] L. K. Champlin and M. E. Winslow, "Elective Sterilization", (1965) 113 *U. Pa L. Rev.* 415, footnote 79 at 435.

[25] 1 N.J.L. 526, at 533 (N.J., 1795). Although this is an American case there is no reason to suppose that the principle does not form a part of English or Australian law.

to grant a windfall whereby the plaintiff is unjustly enriched, receiving in effect a double benefit. Another argument is that it is undesirable and contrary to public policy to allow parents to avoid obligations for which they are responsible by shifting the economic costs of raising a child onto a third party; this, it is said, in effect creates a new category of surrogate parents. Both of these arguments appear to be premised on the view that the child is necessarily a benefit to his parents; the questionable basis of this assumption has already been discussed. Further both arguments ignore the fact that the financial costs of raising a child are only one of many costs to be incurred, given that parenthood involves significant commitments in a variety of aspects other than economic ones. Finally, the arguments may be criticised on the basis that they tend to focus on what is perceived to be an injustice to the defendant, rather than analysing the situation according to the general tort principle that a person is to be held responsible for the reasonably foreseeable consequences of his negligent conduct.

It has been successfully argued in some of the American cases that for a court to adopt the attitude that a birth is as a matter of law an overriding benefit is in fact not consonant with public policy, given the increasing availability, use and encouragement of family planning methods in society. Moreover the fact that the courts in America have granted contraceptive measures constitutional protection is significant,[26] as it would be illogical for the courts on the one hand to grant constitutional protection and then to render that protection nugatory by failing to offer relief when the rights ostensibly protected have been invaded.

The situation in Australia may be somewhat different in this regard, given that we do not enjoy the same constitutional guarantees relating to birth control. Further the fact that non-therapeutic abortion is an indictable offence in Australia is an important consideration.[27] Even the status of sterilisation operations themselves appears to be somewhat unclear. In 1954 in the case of *Bravery* v. *Bravery*, Denning, L.J. (as he then was) expressed the view that a male sterilisation constituted a criminal assault, and that the patient's consent was no defence because the operation was contrary to public interest, striking "at the very root of the marriage relationship".[28] The majority of the court however expressly dissociated themselves from this opinion,[29] and the better view appears to be that a sterilisation operation performed with the consent of the patient can not constitute an assault of any kind.[30] It is significant also that in a recent High Court case involving an application for an injunction to restrain an abortion being sought by or performed upon a person pregnant with the applicant's child, Gibbs, C.J. commented that "[t]here are limits to the

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[26] In *Griswold* v. *Connecticut* 381 U.S. 479 (1965), it was held that a state law prohibiting the dissemination of birth control information to married people was unconstitutional, as a violation of the right to marital privacy. According to *Eisenstadt* v. *Baird* 405 U.S. 438 (1972), the privacy protection extends to single as well as married persons. In *Roe* v. *Wade* 410 U.S. 113 (1973), a Texas statutory scheme regulating abortions was struck down as an infringement of the constitutional right to privacy. The result of the *Roe* case is that the state may not interfere with an abortion decision during the first trimester of the pregnancy.

[27] E.g. s. 65 Crimes Act, 1958 (Vic.).

[28] [1954] 1 W.L.R. 1169 at 1181.

[29] *Id.* 1175.

[30] *Brett & Waller's Criminal Law Text and Cases* (5th ed. by C. R. Williams, 1983) at 78.

extent to which the law should intrude upon personal liberty and personal privacy in the pursuit of moral and religious aims."[31]

However it could equally be argued that legislative protection afforded to birth control measures and/or judicial endorsement of such practices does not necessarily lend force to a plaintiff's case in a *Udale* situation. The argument here would be that the issue of birth control is really quite a separate one from that of awarding damages for a birth, with different underlying policy considerations. As one writer has said, " . . . public sentiment could very well be against treating the birth of a normal child as a compensable injury to its parents, *and* wholeheartedly in favour of contraception, abortion and privacy. The question to be asked is rather, whether there are sound policy reasons for denying complete negligence damages in a case of wrongful conception."[32]

(b) The interest of the child

One of the "sound policy reasons" most frequently put forward in arguments against an award of damages is a concern regarding the possibly detrimental psychological effects that may result when the child one day learns that it is unplanned and unwanted, to the extent that its very existence was the subject of a legal action. This consideration was clearly very influential in the *Udale* case, as Jupp, J. stated as one of his reasons for refusing the claim that "[i]t is highly undesirable that any child should learn that a court has publicly declared his life or birth to be a mistake—a disaster even—and that he or she is unwanted or rejected. Such pronouncements would disrupt families and weaken the structure of society."[33] The term "emotional bastard", which is used in much of the American literature in this context, highlights the parallel between physical illegitimacy and emotional illegitimacy insofar as the stigma and psychological harm suffered by the child are concerned. According to some courts, including the court in *Udale*, the effect of what may be perceived by the child as a public declaration that it is unwanted, by a judicial award of monetary compensation for the very fact of it having been born, is viewed as potentially so serious as automatically to outweigh any pecuniary benefit thereby gained by the parents.[34] In the Canadian case of *Doiron* v. *Orr* for example, Garrett, J. stated, "[p]ersonally, I find this approach to a matter of this kind which deals with human life, the happiness of the child, the effect upon its thinking, upon its mind when it realizes that there has been a case of this kind, that it is an unwanted mistake, and that its rearing

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[31] *Attorney-General (Queensland) (Ex. rel. Kerr)* v. *T.* (1982-83) 46 A.L.R. 275 at 277-278.

[32] *Supra* n. 23. See also *Thake* v. *Maurice, supra* n. 2, where Peter Pain, J. noted the development of the state's policy with regard to family planning over recent years and concluded: "It seems to me to follow from this that it was generally recognised that the birth of a healthy baby is not always a blessing." And later he stated, " . . . I do not accept that it is a part of our culture that the birth of a child is always a blessing. It may have been the assumption in the past. I feel quite satisfied that it is not the assumption today."

[33] [1983] 1 W.L.R. 1098 at 1109.

[34] Although this was not considered in *Udale*, it is suggested that one step that the courts could take would be to keep the names of the parties confidential (as in the American case of *Anonymous* v. *Hospital* 33 Conn. Supp. 126; 366 A 2d 204 (1976)) or to keep the court records sealed. However it is conceded that this would offer only a partial solution to the problem, as the child could still learn of the legal action from other sources.

is being paid for by someone other than its parents, is just simply grotesque".[35]

Although at first glance this argument may appear to carry considerable weight, a closer analysis reveals that it is based on the assumption that it is the child who is unwanted and that the parents are thus being compensated for its birth. However, the reality in many cases may well be that it is the economic burden which is unwanted and which the parents are trying to alleviate, and that they are being compensated for the foreseeable result of a third party's negligence as in any traditional negligence action for pecuniary loss. The point is put succinctly by one writer, who states that " . . . the unplanned child is not an item of damage in the wrongful birth suit; it is merely the instrumentality through which the negligence of the defendant is transformed into injury to the plaintiff. The value of the child is not at issue, but rather the costs and benefits that result from its birth."[36] In some of the American cases the courts have been at pains to articulate the justification for the award of damages, in order to prevent the kind of misinterpretation that is evidenced in the *Udale* case. For example, the statement was made in one case that "[s]ince the child involved might someday read this decision as to who is to pay for his support and upbringing, we add that we do not understand this complaint as implying any present or future strain upon the parent-child relationship. Rather we see it as an endeavor on the part of clients and counsel to determine the outer limits of physician liability."[37] In the oft-cited American case of *Custodio* v. *Bauer* the court emphasised that the damages being awarded were not a payment to the parents for having to tolerate the unexpected child, "but to replenish the family exchequer so that the new arrival will not deprive the other members of the family of what was planned as their just share of family income".[38]

If this line of argument has merit, then an irony immediately becomes apparent in the position taken by the *Udale* court. By insisting that an award of damages may not be in the best interests of the child because of potential resultant psychological harm, the court may in fact be helping to bring about exactly the result that it is seeking to avoid. It seems highly likely that a child will be received into the family less willingly when it brings with it an economic burden than when it does not impose this liability. Given that financial problems will often generate tensions within a family, there would seem to be a far lesser chance of the child feeling unwelcome if these problems could be alleviated.[39] The resentments which are likely to be felt from other members of the family who find

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[35] (1978) 86 D.L.R. (3d) 719 at 722-723.

[36] Note, "Judicial Limitations on Damages Recoverable for the Wrongful Birth of a Healthy Infant" (1982) 68 *Va L. Rev.* 1311 at 1317. In this connection, see also *Thake* v. *Maurice, supra* n. 2, where Peter Pain, J. said: "A healthy baby is so lovely a creature that I can well understand the reaction of one who asks—how could its birth possibly give rise to an action for damages? But every baby has a belly to be filled and a body to be clothed. The law relating to damages is concerned with reparation in money, and this is what is needed for the maintenance of a baby."

[37] *Rieck* v. *Medical Protective Co.* 64 Wis. 2d 514, 219 N.W. 2d 242 (1974).

[38] 59 Cal Rptr 463 at 476-77 (Dist. Ct. App., 1967).

[39] Support for this line of argument may be found in *Thake* v. *Maurice, supra* n. 2. After considering the reasoning of Jupp, J. in *Udale*, Peter Pain, J. concluded, "I do not think that if I award damages here it will lead little Samantha to feel rejection . . . . [B]y the time she comes to consider this judgment (if she ever does) she will, I think, welcome it as a means of having made life somewhat easier for her family."

that they are forced to share their resources with the new addition may indeed be a more pressing argument than the proposition put forward in the *Udale* court. Further, the fact that the family would have to adjust its standard of living and in many cases deprive both the unplanned child and other members of the family of opportunities of which they would otherwise have been able to take advantage, is arguably a strong public policy consideration in favour of allowing recovery. These considerations would probably apply regardless of the reason for the plaintiff's wish to undergo the sterilisation operation, as the addition of a new member to the family will always alter the balance of the family finances to some extent; but they are particularly cogent in cases where the operation was performed specifically for economic reasons.

Whether the fears expressed in *Udale* as to the potential psychological damage to the child have any basis in reality is also uncertain. It may be that this concern has been unduly magnified and that, in the words of the *Custodio* court, "[t]he emotional injury to the child can be no greater than that to be found in many families where 'planned parenthood' has not followed the blueprint".[40] It is possible that any harm suffered will not be greater than that experienced by a child whose natural parents have placed it for adoption.

It could further be argued that the very fact that the parents have chosen not to pursue other possible alternatives, such as abortion or adoption, should afford some indication to the child who later learns of the legal action that, although it may have been unwanted at the time of conception or birth, it does not necessarily follow that it has remained unwanted since its birth. Indeed the point is well made that "[i]t is ironic that the 'emotional bastard' argument is made . . . when it is precisely the parents' insistence upon raising the child within their family which gives rise to the . . . action".[41]

(c) Impact upon medical practitioners

A further policy consideration which the court in *Udale* noted was the possibility that if claims for pecuniary loss were allowed for wrongful conception, the effect may be that "[m]edical men would be under subconscious pressure to encourage abortions in order to avoid claims for medical negligence which would arise if the child were allowed to be born".[42] In submitting this argument to the court, the defendant in *Udale* referred to the judgment of Ackner, L.J. in *McKay* v. *Essex Area Health Authority*, where, in dismissing the child's claim that the duty of care owed to her by the doctor involved advising her mother of the desirability of an abortion, the following passage from the Law Commission's Report on Injuries to Unborn Children was cited:

> Such a cause of action, if it existed, would place an almost intolerable burden on medical advisers in their socially and morally exacting role. The danger that doctors would be under subconscious pressures

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[40] *Custodio v. Bauer* 59 Cal Rptr 463 at 477 (Dist. Ct. App., 1967).

[41] Respondent's Brief & Appendix at 28, *Sherlock* v. *Stillwater Clinic* 260 N.W. 2d 169 (Minn., 1977).

[42] [1983] 1 W.L.R. 1098 at 1109.

> to advise abortions in doubtful cases through fear of an action for damages, is, we think, a real one.[43]

The point should be made, however, that the context in which the above passage appeared in both the Law Commission's Report and in *McKay's* case was that of an action for wrongful life. It is submitted that it was quite inappropriate for the court in *Udale* to cite this passage as though it were a general proposition and to seek to apply it in the totally different context of an action for wrongful conception. In fact this point becomes quite clear in the very next sentence in the Law Commission's Report:

> It must not be forgotten that in certain circumstances, the parents themselves might have a claim in negligence.[44]

It is evident therefore that the Report did not consider that the same argument concerning doctors being under pressure to advise abortions would apply to preclude an action brought by the parents for wrongful birth.

Moreover the argument has not operated to preclude recovery in a wrongful birth action brought by the child. In fact, a draft annexed to the Law Commission's Report expressly provided for the bringing of a wrongful birth action by the child, and the terms of this draft have now been embodied in s. 1 of the Congenital Disabilities (Civil Liability) Act 1976 (U.K.).[45]

It is thus clear that the passage upon which Jupp, J. in *Udale* placed such reliance was intended by its authors not as a general statement but as one applying specifically to wrongful life cases. In view of the fact that it has no application to wrongful birth cases, the question arises whether there is any justification for assuming that it should apply to wrongful conception actions. It is submitted that wrongful conception cases are far more analogous to wrongful birth cases than to wrongful life cases, given that neither wrongful conception nor wrongful birth actions involve the seemingly impossible task of the court having to evaluate the state of non-existence, and that therefore it would be more consistent to concede that just as this particular argument has been found to be irrelevant in wrongful birth cases, in the same way it should not be used to preclude recovery in wrongful conception actions.

Further, the argument concerning subconscious pressures on doctors to advise abortions could itself be countered on policy grounds, namely that the public interest is better served by the encouragement of high standards of professional care in the medical profession. Although it is

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[43] Law Commission Report on Injuries to Unborn Children No. 60, 1974 (Cmnd. 5709), para. 89; cited in *McKay* v. *Essex Area Health Authority* [1982] 1 Q.B. 1166 at 1187.

[44] *Ibid.*

[45] The Congenital Disabilities (Civil Liability) Act 1976 (U.K.) provides:

S. 1 (1) If a child is born disabled as the result of such an occurrence before its birth as is mentioned in subsection (2) below, and a person (other than the child's own mother) is under this section answerable to the child in respect of the occurrence, the child's disabilities are to be regarded as damage resulting from the wrongful act of that person and actionable accordingly at the suit of the child.

(2) An occurrence to which this section applies is one which—

(a) affected either parent of the child in his or her ability to have a normal, healthy child; or

(b) affected the mother during her pregnancy, or affected her or the child in the course of its birth, so that the child is born with disabilities which would not otherwise have been present.

true that the deterrent effect of an award of damages is reduced considerably by the existence of liability insurance carried by the medical practitioner, the prospect of a successful action and the damage to the practitioner's reputation that would ensue may be sufficient to operate at least to some degree as a deterrent to negligent performance. While the remarkable dearth of reported medical negligence cases in Australia may be due in part to the high standards of medical care in this country, it has been pointed out that it is probably also attributable to the notorious difficulties involved in establishing a claim.[46] It would indeed seem strange, especially in the light of these difficulties, if a court having imposed liability on a medical practitioner were then effectively to grant a cloak of immunity from the consequences of that liability on the somewhat speculative ground that to do otherwise might result in advice being offered by that practitioner which some may view as undesirable. It is submitted that such reasoning would not increase the respect or the confidence of the public in either the medical or the legal profession.

A further policy argument, raised in several of the American cases, concerns the financial burden imposed on defendants. It may be argued that to award damages for the cost of raising a child is to place an unreasonable burden on defendants, and that the potential liability is thus so excessive as to be unjustified. However, this claim can be met with several answers. First, the obvious point to be made is that it is more equitable to place the burden on the tortfeasor than on the innocent parties. Secondly, as the cost of raising a defective child has been allowed in wrongful birth cases, the argument would not appear to carry much weight in wrongful conception cases where the cost of raising a normal child is likely to be much less than the special costs involved in raising a defective child. And, perhaps most importantly, the claim would appear quite unjustified in view of the fact that due to the compulsory insurance cover carried by medical practitioners, the loss would not in fact be borne by one individual but would be distributed among all the policy holders.

(d) Assessing the damages

The final ground upon which Jupp, J. relied in arriving at his decision in *Udale* was that to award damages as claimed would have the paradoxical effect of penalising the loving parent and rewarding the unloving parent, because the amount of "benefit" to be offset against the detriment would be greater in the case of the loving parent. Jupp, J. stated that

> . . . [a] plaintiff such as Mrs. Udale would get little or no damages because her love and care for her child and her joy, ultimately, at his birth would be set off against and might cancel out the inconvenience and financial disadvantages which naturally accompany parenthood. By contrast, a plaintiff who nurtures bitterness in her heart and refuses to let her maternal instincts take over would be entitled to large damages. In short virtue would go unrewarded; unnatural rejection of womanhood and motherhood

[46] See, G. L. Fricke, "Medical Negligence", (1982) 56 *A.L.J.* 61. It is also possible that the lack of reported cases is due to the fact that insurance companies often settle these claims rather than defend them.

> would be generously compensated. This, in my judgment, cannot be just.[47]

If in fact this is the result that would necessarily follow from an award of damages, one would have to concede that it would indeed be most inequitable. However this anomalous result is by no means an inevitable one, but could be avoided by the adoption of an appropriate method of assessing damages.

In this context it is interesting to note the ways in which the American courts have approached the problem. Most of the decisions in America have proceeded on the basis that in order to avoid unjust enrichment the benefits, both pecuniary and non-pecuniary, which the child will bring into the family should be taken into account in the award of damages by deducting this amount from the sum awarded for the detriment suffered. The courts have relied in this regard on the *Restatement (Second) of Torts*, section 920 of which provides that the amount awarded to the plaintiff may be reduced by the court if the defendant can show that his conduct "has conferred a special benefit to the interest of the plaintiff that was harmed".[48]

This provision, known as the "benefits rule", has however been subject to varying interpretations by the courts.

One approach favoured by many courts[49] involves a literal interpretation of the rule. Under this method no reduction of the award of damages will be made unless it can be shown that the specific interest harmed is also the specific interest that has been benefited. In order to ascertain the nature of the interest harmed, the court will look at the reason for the operation, and will then insist upon a demonstration of exact coincidence between that interest and the interest alleged to be benefited before allowing a reduction of damages. For example, if the operation was performed for economic reasons then the only benefits that may be offset against the damages will be those of an economic nature. Again, if the purpose of the operation was to preserve the physical well-being of the mother, and that interest has been harmed by the birth, then any benefits other than those enuring to the physical condition of the mother would be regarded as totally irrelevant. Emotional benefits would only be considered in reduction of damages where the interest claimed to have been harmed was of a psychological nature.

The other major approach which emerges in many of the American decisions[50] has been to apply the benefits rule in a more flexible way. Under this method the various interests (e.g. physical, financial, social, psychological) are regarded as inseparable, as are the potential benefits. All of the benefits are then weighed against all of the claimed detriments, to decide whether there is a net gain or a net loss or a complete equivalence. This approach will require the court to consider all the relevant circumstances, in order to estimate the impact of the birth of the child on the

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[47] [1983] 1 W.L.R. 1098 at 1109.

[48] Section 920 of the *Restatement (Second) of Torts* (1979) provides: "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".

[49] E.g. *Custodio* v. *Bauer* 251 Cal. App. 2d 303; 59 Cal. Rptr. 463 (Dist. Ct. App., 1967).

[50] E.g. *Troppi* v. *Scarf* 31 Mich. App. 240; 187 N.W. 2d 511 (1971).

family. As one court explained, "family size, family income, age of the parents, and marital status are some, but not all, the factors which the trier must consider in determining the extent to which the birth of a particular child represents a benefit to his parents".[51]

Clearly under the narrow interpretation the balance is tipped in favour of the plaintiff. Adopting the literal approach would almost always assure the plaintiff of some recovery, given that there is in every case an economic cost involved in raising a child and usually relatively little economic benefit to be gained.

Moreover adoption of the literal approach may to a large extent overcome the problem posed in *Udale* concerning the undesirability of what in effect amounts to a reward to those parents who are able to establish that they are prepared only to tolerate the presence of the child. Whereas the flexible approach does effectively encourage this unfortunate result, the same is not true under the narrow approach, at least not in any case where the interest allegedly harmed is of a non-emotional nature, since in these cases the question of a benefit of an emotional nature will be entirely irrelevant.

It is interesting to note that despite the divergence of approaches taken by the American courts on this point, the desirability of the use of the benefits rule itself in this context has been largely accepted. However it is submitted that a more satisfactory solution could be arrived at through the use of an alternative approach, which would not involve the benefits rule at all. Although the benefits rule can legitimately be justified in theory on the ground of preventing unjust enrichment, its use is quite inappropriate in the context of wrongful conception actions, due to the fact that in these cases the so-called "benefit" is one that has been thrust upon the plaintiff and is therefore probably not perceived by the plaintiff as a benefit at all. While the courts adopting the offset benefits approach have ostensibly rejected the view that a child is necessarily and as a matter of law a blessing, their insistence on assigning a notional figure for "benefits" which may be quite illusory would seem to indicate that they are in fact most reluctant to discard entirely this notion.

A further problem with the benefits rule concerns the highly speculative nature of the benefits involved. The difficulty of assessing damages was not regarded as an obstacle by Jupp, J. who stated that "[t]here is ample authority that courts must, as best they can, assess imponderables of all sorts and value them in money terms. Courts often have to find a figure to represent possible financial and other material benefit, however remote, and also immaterial matters of gain and loss, including emotional matters".[52] Although it is true that courts are often required to make calculations which are to some extent uncertain and speculative, it is submitted that whilst in wrongful conception cases it is certainly possible to calculate the detriment involved as in any traditional action,

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[51] *Troppi* v. *Scarf* 31 Mich. App. 240 at 249; 187 N.W. 2d 511 at 519 (1971). See also *Thake* v. *Maurice, supra* n. 2, where Peter Pain, J. decided that the damages to be awarded for the disappointment suffered by the parents on learning of the pregnancy and for the pain and discomfort suffered by the mother in the course of the labour had to be set off against the joy they experienced by the birth of their healthy child, so that, as he said, they "cancel each other out". He added, however, that the joy the parents had for their child was largely of their own making in the way in which they met their difficulties and welcomed the child into the family.

[52] [1983] 1 W.L.R. 1098 at 1107.

to attempt to calculate future intangible "benefits" when the plaintiff did not desire those benefits is to engage to an unacceptable degree in speculation and to create a legal fiction which only serves to cloud analysis and to lead to inequitable results.

A variation on the approach suggested above would be to allow potential financial benefits to be offset but to disregard potential intangible benefits. This method would be equally effective in avoiding the problem raised in *Udale* concerning the rewarding of unloving parents, since here too emotional benefits would not be taken into account. If material benefits are to be deducted, one must ask whether this would include only those benefits which accrue during the relevant period, namely that of the child's minority, (e.g. social security benefits), or whether it would also include potential benefits that might accrue after that period. Clearly if the period is restricted to that of the child's minority the material advantages will in most cases be nominal. Given that children have traditionally been regarded as representing some financial security for the parents' old age, it may be more realistic to take into account the child's potential earning capacity in making the assessment. This latter approach was the one referred to in *Udale*, as the defendants pointed to the fact that "[f]inancial support or assistance, especially perhaps from a son, can be a considerable help to parents in their old age".[53]

Another point raised by the defendants in *Udale* in this context to support the argument that there are material advantages brought by a child and that these should be considered, was that in the event of a child being killed the parents can bring a claim under appropriate legislation for the loss of support. Although not elaborated upon in the *Udale* judgment, the extension of this argument would appear to be that the fact that the courts are prepared to award damages in an action for the wrongful death of a child is of itself an endorsement of the view that the value of the life of a child exceeds the cost of supporting it. Whilst the comparison between wrongful death and wrongful life actions is perhaps an obvious one, in view of the fact that in both cases an evaluation must be made of the benefits and costs of a child, it may be misleading to take the analogy too far, for the following reasons. First the damages awarded in wrongful death actions are not only for pecuniary loss but are intended also to compensate for loss of companionship and for grief. Secondly, damages for pecuniary loss in wrongful death actions are rarely allowed in cases where the deceased was a young child.[54] And thirdly, it seems anomalous to draw an analogy from a cause of action where the injury to the parents consists in deprivation of the child's companionship to a cause of action in which that very companionship forms the subject-matter of the complaint.

Whether the offset benefits rule is adopted or not, a further issue must be addressed, namely whether the detriment suffered should be assessed on an objective or on a subjective basis. In the interests of consistent assessment it could be argued that the award should be computed by reference to the expenses incurred by the average family in raising a

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[53] *Ibid.*

[54] E.g. *Barnett* v. *Cohen* [1921] 2 K.B. 461; see also *Pickett* v. *British Rail Engineering Ltd.* [1980] A.C. 136.

child. However in view of the fact that the object of damages in tort law is to restore the plaintiff to the position in which he would have been had the wrong not been committed, and in line with the general rule that a tortfeasor must take his victim as he finds him, it is submitted that the better method is to assess the extent of the impact of the detriment on the individual family concerned.

5. Mitigation

An argument which could be put forward by defendants, although it was not raised directly in *Udale*, concerns the duty to mitigate damages. In view of the duty imposed by the law upon plaintiffs to take all reasonable steps to mitigate their losses, can it be argued that a plaintiff in a wrongful conception case should be denied recovery on the ground that the loss could have been avoided by undergoing an abortion or by placing the child for adoption?

In *Udale*, the option of adoption was not canvassed at all, and the question of abortion was raised only inferentially by the following passage:

> . . . [s]he discussed abortion with the doctors. They told her there was no risk of harm to her or to the baby which would justify it legally. She herself felt it would be on her conscience if she terminated the baby's life. In short, she and the doctors agreed that it was too late. It seems that she would have tried to get an abortion, so long as it was lawful, if she had known early enough that she was pregnant.[55]

Given that the mitigation of damages rule requires only that reasonable measures be taken, it is submitted that it is not reasonable to require a plaintiff to take the very major step of abortion or of adoption, which may be quite anathema to the plaintiff on religious, moral or emotional grounds, or which in the case of abortion may constitute a serious risk to the plaintiff's health.

In both *Scuriaga* v. *Powell*[56] and *McKay* v. *Essex Area Health Authority*[57] the issue of mitigation of damages was raised by the defendant—in both cases, unsuccessfully. In *Scuriaga* v. *Powell*, where an abortion had been negligently performed, the defendant argued that the plaintiff's failure to undergo a repeat operation when she realised that she was pregnant at 3 months, and her refusal to accept his offer of a further operation at 18 weeks, constituted the effective cause of the continuation of the pregnancy. The defendant gynaecologist conceded, however, that it would have been unreasonable to expect the plaintiff to undergo the very major operation at the late stage of 18 weeks. Watkins, J. held that at the crucial time the plaintiff had wanted to end the pregnancy, and that had she been informed that the abortion had been unsuccessful initially, she would have been prepared at that stage to undergo a second operation. He concluded that the effective cause of the

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[55] [1983] 1 W.L.R. 1098 at 1102-1103. Similarly, in *Thake* v. *Maurice, supra* n. 2, no duty to mitigate by abortion could possibly arise as, due to the doctor's negligence in not informing the parents of the risk of recanalisation, the mother did not realise that she was pregnant until it was too late to carry out a safe abortion.

[56] (1979) 123 *Sol. J.* 406.

[57] [1982] 1 Q.B. 1166.

pregnancy was the defendant's breach of contract. The point was not raised in the appeal, where the issues were confined to quantum.

Similarly in *McKay* v. *Essex Area Health Authority*, which too concerned a failed abortion operation, the defendant submitted that the plaintiff's refusal to have a repeat operation in the 22nd week of pregnancy was the effective cause of the pregnancy. Watkins, J. dismissed this argument, stating that the plaintiff had been willing to undergo a second operation up to the 14th week of pregnancy. His judgment implied that it was not unreasonable for the plaintiff to refuse a second operation at a much later stage, where a far greater risk to her health was involved.

By contrast, however, the court in *Emeh* v. *Kensington and Chelsea and Westminster A.H.A.*,[58] where a sterilisation operation was negligently performed, regarded the plaintiff's failure to seek an abortion as a highly relevant fact. Although the plaintiff there only discovered that she was pregnant at 17½ weeks, the court held that her conduct in failing to take steps to minimise her damage by having an abortion was such as to constitute a *novus actus interveniens*, and her action was dismissed.

The fact that the plaintiff in *Emeh* was thus criticised, whereas no similar criticism was levelled at the plaintiffs by the *Scuriaga* and *McKay* courts is perhaps attributable to the fact that the court in *Emeh* clearly did not believe that the plaintiff's claim was genuine. Park, J. found the plaintiff to be an "unreliable witness", and concluded that her motive in continuing the pregnancy was that she had believed that she would then have a good claim in law. He held that as the pregnancy was thus not unwanted, the plaintiff had suffered no injury. A further significant aspect of the case, however, was the court's view that as the plaintiff had already undergone an abortion operation at one stage prior to the sterilisation operation, it could not be regarded as unreasonable to expect her to undergo an abortion after the failed sterilisation operation.

It is submitted therefore that whether or not a plaintiff's refusal to mitigate damages in this way can be regarded as reasonable will depend on the particular circumstances of the case. The stage at which the pregnancy is discovered will obviously be a relevant—although perhaps not a determinative—factor, as will the plaintiff's past history regarding abortions, as well of course as any suggestion of fraud.[59]

Further, the emotional, religious or ethical ground on which the plaintiff has refused to undergo an abortion will have to be considered. As one judge in a leading American case commented, to allow a defendant to complain that his damages are greater because his victim's makeup is inconsistent with aborting or placing the child for adoption would run

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[58] Queens Bench Division, Park, J., Dec. 21, 1982 (unreported). See Brahams, "Damages for Unplanned Babies—a Trend to be Discouraged?" *supra* n. 1 at 644. See also D. Brahams, "Handicapped Infant Born After Negligent Sterilisation" (1983) 51 *Medico-Legal Journal* 119.

[59] The problem of the possibility of fraudulent claims will not be an easy one for the courts to resolve. The fear that parents may receive damages for the cost of raising the child and then proceed to put the child up for adoption is, it is submitted, a very real one, and may well justify a reluctance on the part of the courts to award damages in certain situations. One suggestion might be to put the money in trust for the child—but the difficulty here is that the wrongful conception action is brought on behalf of the parents, not the child. Alternatively, the court could order periodic payments, instead of a lump sum payment, and would then be in a position to terminate the payments once the parents were no longer maintaining the child. However this suggestion also presents difficulties, in terms of administration and enforcement.

counter to the principle that a tortfeasor must take his victim as he finds him:

> The defendant does not have the right to insist that the victim of his negligence have the emotional and mental makeup of a woman who is willing to abort or place a child for adoption . . . [T]he tortfeasor cannot complain that the damages that will be assessed against him are greater than those that would be determined if he had negligently caused the conception of a child by a woman who was willing to abort or place the child for adoption.[60]

The argument concerning abortion would in any event be of limited significance in countries such as Australia where non-therapeutic abortion is a criminal offence, and therefore would be inapplicable in cases where the justification for the abortion was of a non-medical character. The same is true in Canada and the following comment on the judgment in the Canadian case of *Doiron* v. *Orr*,[61] where the claim was dismissed, is pertinent:

> . . . Mr. Justice Garrett prefaced his denial of child-maintenance damages by commenting that Mrs. Doiron would not consider the options of abortion or adoption, thus implying that she refused to mitigate the damages she was claiming. In Canada it is perfectly outrageous to require, by implication, that someone coming to court asking for child maintenance damages should have had an abortion. If, as in *Doiron*, the grounds for avoiding pregnancy were primarily financial, the abortion would be illegal or, is Mr. Justice Garrett suggesting that Mrs. Doiron should have shammed the symptoms necessary for her to claim that the pregnancy would be likely to endanger her life or health?[62]

Even where the abortion could be justified on medical grounds it is submitted that the courts would be inclined to perceive this as a right, rather than as an obligation. The concept of a requirement of abortion being imposed upon a plaintiff as a positive duty would no doubt be a highly controversial one. One American judge in a dissenting opinion expressed the following view on the matter:

> I am aware of no basis in the law or in our cultural, moral, or sociological heritage lending support to such requirement. The religious, ethical, and constitutional implications of such a rule are far-

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[60] *Troppi v. Scarf* 187 N.W. 2d 511 at 520 (1971). In this connection, see also the decision in *Walker-Flynn v. Princeton Motors Pty. Ltd.* (1960) 60 S.R. (N.S.W.) 488. The plaintiff had suffered serious injuries including a fractured and mis-shapen pelvis in a motor accident caused by the negligence of the defendant. As a result of these injuries, she was incapable of giving birth to a child normally. Moreover, each pregnancy carried an increased risk to her life. Nevertheless, as a Roman Catholic, the plaintiff felt bound to reject any method of contraception. The Supreme Court of New South Wales held that in assessing the damages, the jury should have regard to the plaintiff's behaviour and beliefs, and determine whether those beliefs were conscientiously held. In that case, therefore, the plaintiff's religious beliefs concerning contraception had to be taken into account. It could therefore be argued that if the court will not require a plaintiff to mitigate damages by taking contraceptive measures where to do so would be inconsistent with the plaintiff's beliefs, it follows logically that there can be no duty to mitigate damages by the far more drastic measure of an abortion.

[61] (1978) 86 D.L.R. (3d) 719.

[62] *Supra* n. 23 at 502.

> reaching, to say the least. Although the majority disclaim any suggestion that they hold abortion to be "obligatory", the inescapable implication of the proposition is that a woman who refuses to undergo an abortion for medical reasons may recover while one who refuses for other reasons may not.[63]

To further counter the suggestion that a plaintiff should be required to undergo an abortion or else forego compensation, an analogy may be drawn with the approach that the courts have taken in wrongful life cases. One of the reasons for refusing the child's claim for wrongful life in *McKay* v. *Essex Area Health Authority* was the court's view that to do otherwise would be tantamount to recognising a duty owed to a child to kill the child in pursuance of the child's so-called "right to die". It was felt that the fact that the Abortion Act 1967 (U.K.) gave mothers a right to terminate the lives of their unborn children and allowed doctors to assist in this, did not mean that a doctor was therefore under any legal obligation to terminate the life of the unborn child. It is submitted, therefore, that if no obligation is imposed by law upon a doctor to terminate the life of an impaired foetus, then *a fortiori* no legal obligation can be imposed upon a mother to terminate the life of a healthy foetus.

With regard to the argument concerning adoption, it is submitted that to require parents to take this option or else forego compensation is unrealistic and unduly harsh, predicated as it is on the assumption that the parents' refusal to place the child for adoption is of itself evidence that the child was not unwanted, and that the parents therefore have suffered no damage. Whilst it is well for the courts to be vigilant as to fraudulent claims, such a position ignores the fact that the parents may still resent the financial burden that the new addition to the family brings, even though they may love the child once it is born. Further, many parents may feel a moral obligation to raise the child, regardless of whether they wanted to conceive it. It could also be argued that to advocate adoption in these situations runs counter to the aim of preserving the stability of the family unit—an aim which, in the context of a different argument discussed earlier in this article carried considerable weight in the *Udale* court.

6. Summary and Conclusions

Wrongful conception cases raise many interesting questions. For example, when does the cause of action accrue for the purposes of limitation statutes—at the time of the operation, at the time of conception, at the time of discovery of the pregnancy or at the time of the birth? Who, other than the mother could bring an action in connection with the birth—the father, who has a legal obligation to support the child he has fathered, or perhaps other siblings who complain of a diminution of financial (and perhaps emotional) resources within the family? Could a defendant medical practitioner join as a third party the father of the child when the birth resulted from an act of rape? This article, however, has focused on the question directly in issue in the *Udale* case, namely whether a medical practitioner or those vicariously responsible for his conduct should be liable

[63] *Sorkin v. Lee* 78 A.D. 2d 180; 434 N.Y.S. 2d 300 at 304 *per* Hancock, J. (dissenting).

for child maintenance damages when his negligently performed sterilisation operation results in the birth of a healthy child.

Whilst accepting that compensable damage had been sustained in connection with the pregnancy itself as a result of the defendant's admitted negligence, the *Udale* court refused to accept that the life thus created could be regarded as an injury to its parents. Instead the court adopted the view that a child constitutes a net benefit to its parents, and appeared to treat this as an irrebutable presumption. It is submitted, however, that the adoption of such an inflexible position can amount to little more than a legal fiction in the many cases where the conclusion that ensues is clearly inconsistent with the evidence presented before the court. This somewhat arbitrary approach should therefore be abandoned in favour of an individualised assessment of the particular circumstances surrounding the case.

In making this assessment it is suggested that the courts avoid engaging in calculations concerning potential benefits of a non-material nature. Not only is such an exercise unduly speculative, but it can produce the anomalous and rather ironic result of rewarding parents who demonstrate a lack of affection, whilst penalising the loving parents. As well as being inequitable, this approach carries with it the dangers of encouraging fraudulent claims.

The concern expressed by the *Udale* court regarding the possibility of detrimental effects upon a child who later learns of the legal action is, it is submitted, somewhat overstated. The court's analysis on this point appears to have become distorted by a misplaced focus. The child who was unwanted at the time of conception may be either wanted or unwanted at the time of birth, but the essential point is that the economic burden will always remain. The purpose of an award of damages is therefore to alleviate that burden; there is no justification for assuming that such an award necessarily constitutes an adverse reflection upon the value of the child's life as perceived by its parents. Moreover it is suggested that in its consideration of the welfare of the child the court should be aware of the fact that a denial of damages to the parent may in fact be adverse to the best interests of the child.

As to the impact of successful claims on defendant medical practitioners it is submitted that the court's fear that doctors will be under psychological pressure to perform abortions in doubtful cases should be accorded no greater weight than in wrongful birth cases. Moreover it is in the public interest for the courts to promote adherence to the maintenance of high standards of professional medical treatment by imposing effective sanctions when those standards are not met. Any concern that doctors would be exposed to excessive liability in these actions may be countered by pointing to the compulsory insurance cover carried by medical practitioners in Australia.

Finally it is submitted on the issue of mitigation that to require a plaintiff in a wrongful conception action to mitigate damages by means of either abortion or adoption would be unreasonable and would constitute an unwarranted intrusion into a highly sensitive area fraught with legal, moral, philosophical and religious problems.

The issues raised by the *Udale* case require a delicate balancing of diverse and often competing considerations and interests. An examination

of the policy reasons articulated by the court illustrates a failure to achieve this balance. The unfortunate result is that the decision operates neither in the best interests of the child, nor of the parents, nor of society in general. As it seems inevitable that the problem posed in *Udale* will one day emerge before the courts in Australia, it is to be hoped that the Australian courts will demonstrate a willingness to explore thoroughly the implications involved and will be prepared to deviate from the lead offered by Jupp, J. in *Udale*, and feel free to award damages for the maintenance of a healthy child in wrongful conception cases, where appropriate.[64]

[64] It should be noted that such damages have very recently been awarded in *Thake v. Maurice*, *supra* n. 2.