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ROBAK v. UNITED STATES: A PRECEDENT-SETTING DAMAGE FORMULA FOR WRONGFUL BIRTH

Robak v. United States

In recent years some parents of abnormal children have sued the mother's attending physician for medical malpractice under the negligence theory of wrongful birth.¹ A cause of action for wrongful birth² alleges that the physician failed to diagnose the defects of the fetus or failed to advise the parents that their child would be deformed,³ thereby depriving them of their right to make an informed decision whether to carry the child to term.⁴ Many courts have recognized the


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liability of the physician under these circumstances\(^5\) and have considered various items of compensable damage.\(^6\) However, until the case of \textit{Robak v. United States},\(^7\) no court which considered the question of liability for a wrongful birth action had faced the challenge of computing a damage award.\(^8\)

In \textit{Robak}, the United States District Court for Northern Illinois promulgated a damage formula and assessed an exact amount of damages to compensate these parents with a wrongful birth claim.\(^9\) The novel development in the \textit{Robak} case was the decision that the monetary award for future maintenance and support of the child should not be paid in one lump sum, but rather should be placed in a reversionary trust with disbursements to be made as expenses are incurred.\(^10\) The


6. The courts identified possible categories of expenses to be reimbursed, but the consideration of damages in each case was dicta. \textit{See}, \textit{e.g.}, Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692 (E.D. Pa. 1978) (cost of medical treatment); Jacobs v. Theimer, 519 \textit{S.W.2d} 846 (Tex. 1975) (the economic costs related to the defect); Dumer v. St. Michael's Hosp., 69 \textit{Wis. 2d} 766, 233 \textit{N.W.2d} 372 (1975) (future medical, hospital and supportive expenses).


8. Prior to \textit{Robak} no reported case for wrongful birth had calculated damages. All of the cases reached the courts on procedural motions. The courts focused on the question of whether liability could ensue and any discussion of damages was dicta. \textit{See}, \textit{e.g.}, Phillips v. United States, 508 F. Supp. 544 (D. S.C. 1981) (motion to dismiss appealed); Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692 (E.D. Pa. 1978) (motion for judgment on pleadings); Berman v. Allan, 80 \textit{N.J.} 421, 404 A.2d 8 (1979) (motion to dismiss appealed); Becker v. Schwartz, 46 \textit{N.Y.2d} 401, 413 \textit{N.Y.S.2d} 895, 386 \textit{N.E.2d} 807 (1978) (motion to dismiss appealed); Jacobs v. Theimer, 519 \textit{S.W.2d} 846 (Tex. 1975) (motion to dismiss appealed). In \textit{Robak}, however, the court had to set an actual damage award in dollars.

A few courts in actions for wrongful conception (or wrongful pregnancy) had prior to \textit{Robak} made damage awards. \textit{See}, \textit{e.g.}, Sherlock v. Stillwater Clinic, 260 \textit{N.W.2d} 169 (Minn. 1977) (jury verdict of $19,500 was vacated in a negligent vasectomy case); Bowman v. Davis, 48 \textit{Ohio St. 2d} 41, 356 \textit{N.E.2d} 496 (1976) (a jury verdict of $462,500 included $12,500 for loss of consortium and expenses in a case involving the birth of twins after a negligent sterilization).


10. \textit{Id.} Since the purpose of the trust was to pay for the care and maintenance of Jennifer Robak during her minority and impaired adulthood the purpose of the trust would be accomplished upon her death. Therefore, the trust would end at Jennifer's death and whatever property remained in the trust at that time would be returned to the settlor, the defendant United States. \textit{See} G. BOGERT, \textit{LAW OF TRUSTS}, \S\S 149-50 (5th ed. 1973).

The district court judge, Marvin Aspen, reasoned that through a reversionary trust the parents could be adequately compensated for their losses yet the defendant could be protected from an award which might lead to a windfall to the parents. \textit{See} notes 172-79 \textit{infra} and accompanying text.
NOTES AND COMMENTS

United States Court of Appeals for the Seventh Circuit affirmed the district court's finding of the physician's liability for negligence, but overturned one aspect of the district court's decision on damages. The Seventh Circuit restored to the damage recovery the amount of money attributable to raising a normal child which had been subtracted by the district court, concluding that those costs were proximately caused by the defendant's negligent conduct, and thereby compensable.

Negligence results when an individual does not conform his conduct to the minimum standards set by the community. Each person owes a general duty to his fellow man but special relationships, such as exist between a doctor and his patient, give rise to a duty of increased care. In treating his patient, a doctor must permit his patient to engage in rational decision-making before consenting to treatment by fully advising his patient as to the risks and consequences of that treatment. A negligence action for medical malpractice, therefore,


12. 658 F.2d at 479. Both parties agreed to the reversionary trust as the mechanism for implementing the damage recovery, hence it was not an issue on appeal. The only issue was the "offset" for the normal costs of childrearing. See notes 196-97 infra and accompanying text.

13. 658 F.2d at 478-79. See notes 192-95 infra and accompanying text.


15. The community demands an external objective standard of conduct requiring reasonableness of a man of ordinary sense using ordinary skill and care. However, the "reasonable man" does take on "non-ordinary" attributes, such as special knowledge. Thus, the reasonableness standard requires the necessary increased care commensurate with those attributes. The social and political climate affect what the community might require. Id. at § 32.

16. Historically, the doctor has been a member of a "public" calling who has held "himself out to the public as one in whom confidence might be reposed, and hence as assuming [sic] an obligation to give proper service, for the breach of which, by any negligent conduct, he might be liable." Id. at § 28 (footnote omitted). The standard of care required of the doctor is the degree of skill and learning commonly possessed by members of the profession in good standing in similar locales. Id. at § 32.


Many things influence the standard of care. As scientific discovery increases medical knowledge and techniques, the standard of care encompasses this additional knowledge, increasing the
can be maintained if the doctor deviates from the proper performance of medical techniques or fails to provide the patient with enough information to make a rational choice about treatment.\textsuperscript{19}

Against this background, courts have been asked to determine whether the failure of a doctor to inform his patient of possible birth defects\textsuperscript{20} violates the standard of care incumbent upon the doctor as a professional. If it does, the courts must further determine to what extent liability should be imposed upon the doctor for the resulting damages and how those damages should be paid.

The district court and the Seventh Circuit Court of Appeals in \textit{Robak v. United States}\textsuperscript{21} held that the defendant physician was liable for negligently failing to inform a patient, who was in the early stages of her pregnancy, that she had rubella and that the rubella would most likely cause serious abnormalities in the fetus.\textsuperscript{22} Without knowing the potential for birth defects, the Robaks did not have the opportunity to consider an abortion. When an abnormal child was subsequently born they were faced with substantial costs for medical and support services. The Seventh Circuit determined that the physician's liability extended to all the past and future expenses necessary for maintaining and supporting the child for the rest of her life.\textsuperscript{23}

This comment will focus on the unique damage formula suggested by the \textit{Robak} courts. However, since liability is a necessary predicate to any damage recovery, this comment will begin with a survey of the responsibilities of the medical practitioner to his patient. \textit{See also Who's Afraid of Informed Consent?}, supra note 17, at 241.


\textsuperscript{20} There are three major causes of birth defects: Down's syndrome, Tay Sachs disease and rubella syndrome. Birth defects from Down's syndrome, or mongolism, include mental retardation, retarded growth, a hypoplastic face with short nose, prominent epicanthic skin folds, protruding lower lip, fissured and thickened tongue, broad hands and feet, and stubby fingers. Tay Sachs, a genetic disease primarily found in Jewish East Europeans or Jews with that ancestry, is characterized by failure to grow, hypertoxicity, spastic paralysis, loss of vision, convulsions and mental deterioration usually resulting in death at four or five years of age. Rubella syndrome results in mental retardation, hearing loss, cataracts and heart defects. The risk of Down's syndrome is increased as the mother approaches 40 years of age, Tay Sachs occurs mainly among Jewish couples, and rubella syndrome results if the disease is contracted in the early stages of pregnancy. Trotzig, \textit{The Defective Child and the Actions for Wrongful Life and Wrongful Birth}, 14 \textit{FAM. L.Q.} 15 (1980); Capron, \textit{Tort Liability in Genetic Counseling}, 79 \textit{COLUM. L. REV.} 618 (1979); Kass and Shaw, \textit{The Risk of Birth Defects: Jacobs v. Theimer and Parents' Right to Know}, 2 \textit{AM. J. L. & MED.} 213 (1976) [hereinafter cited as \textit{The Risk of Birth Defects}].


\textsuperscript{22} 503 F. Supp. at 982-83, 658 F.2d at 477.

\textsuperscript{23} 658 F.2d at 479.
theoretical underpinnings opposing wrongful birth actions and the influences which persuaded courts to later recognize the cause of action.\textsuperscript{24} This comment will then review the process of identifying the various elements of damage, the theories for compensating victims of these losses, and the procedures used to calculate the award. Finally, this comment will analyze the decisions and rationale of both court opinions in \textit{Robak}, focusing specifically on whether the reversionary trust resolves any of the problems involved in compensating the losses sustained in wrongful birth actions when the whole question of what should be considered compensable losses and how they should be calculated is still in doubt. This comment concludes that the reversionary trust can play a major role in selecting the "loss period" and could significantly influence the acceptance of emotional distress damages; however, the remaining calculating procedures would be unaffected when using a reversionary trust.

\textbf{IS WRONGFUL BIRTH A COMPENSABLE CLAIM?}

\textbf{THE \textit{GLEITMAN v. COSGROVE} PRECEDENT}

Courts have long been hesitant to thrust the judicial system into deciding if the circumstances of one's birth detract from the value of life. In \textit{Zepeda v. Zepeda}\textsuperscript{25} an illegitimate son brought an action against his father for damages sustained from the stigma of illegitimacy. The trial court dismissed the suit. On appeal, the Illinois Appellate Court determined that judicial prudence would stave off unending litigation from others dissatisfied with their social, cultural or other inherited disadvantages.\textsuperscript{26} Three years later, the decision in \textit{Williams v. State}\textsuperscript{27} echoed the theory of \textit{Zepeda}. This time a New York appellate court affirmed the dismissal of an infant's suit stating that it was not a justiciable wrong to be born to a particular set of parents or under a particular set of circumstances.\textsuperscript{28}

Some courts have also denied the claims of parents when negligent sterilization operations have resulted in the birth of healthy children.

\textsuperscript{24} Many courts will be faced with the question of whether to recognize wrongful birth as a cause of action. In \textit{Robak} there was no precedent under Alabama law, the governing law, for wrongful birth claims. \textit{See} notes 160-67 infra and accompanying text. The court then must analyze the precedents from sister jurisdictions. \textit{See} notes 63-71infra and accompanying text.


\textsuperscript{26} \textit{Id.} at 260, 190 N.E.2d at 858.


\textsuperscript{28} \textit{Id.} at 483-84, 276 N.Y.S.2d at 887, 223 N.E.2d at 344. Conception occurred as a result of the rape of the mother, an inmate of a New York state mental institution. The court concluded, however, that being born out of wedlock could not be considered grounds for a suit. \textit{Id.}
The birth of a normal child was considered to be a "blessed event" and the benefits and joys of parenthood were thought to far outweigh any possible detriment. Moreover, to permit recovery for the birth of a normal child was considered "foreign to the universal public sentiment of the people."

Until 1967, the public policy view that life was a blessing both to the child and his parents precluded any recovery in suits claiming otherwise. Beginning in that year, however, two distinct patterns emerged in court decisions—one for negligent sterilizations and subsequent births of normal children, another for negligent medical diagnosis resulting in births of defective children.

The California Court of Appeal in *Custodio v. Bauer* set a precedent as the first court to clearly recognize that liability could ensue for faulty sterilizations resulting in the birth of healthy but unwanted children. The mother of nine children underwent a sterilization operation to prevent further pregnancies. When she became pregnant despite the operation, Mrs. Custodio sued her physician for negligently performing the operation and for breach of contract. The court held that the doctor could be liable under both tort and contract law after the parents established a breach of duty.

Although the birth of healthy children after negligent sterilizations led to recovery in decisions following *Custodio*, the prevailing public view that life was a blessing remained an obstacle to recovery in situations where the parents wanted children but the children were eventu-

29. Christensen v. Thomby, 192 Minn. 123, 255 N.W. 620 (1934). The danger to the wife of carrying a child to term led to the sterilization of Mr. Christensen. Despite the hazards of childbirth and a faulty sterilization, a healthy baby was born. The court commented "[l]nstead of losing his wife, the plaintiff has been blessed with the fatherhood of another child." *Id.* at 126, 255 N.W. at 622.

30. Shaheen v. Knight, 11 Pa. D. & C. 2d 41, 44 (1957). Mr. Shaheen wanted to limit the size of his family by undergoing sterilization. When he later failed to prove sterile, a healthy, but unwanted child was born. The Shaheens sought damages for the expenses of rearing and educating the unwanted child. The court refused to allow the claim because the plaintiff would experience the joys, fun and affection of childcare. *Id.* at 45-46.

31. *Id.* at 44.


34. 251 Cal. App. 2d at 325, 59 Cal. Rptr. at 477. Since the action was brought before birth, the court could not determine for certain if the breach created damage; damage is one requirement for establishing negligence. If damages were proven later through a supplementary complaint, the court held that liability would ensue for all damages proximately caused whether or not anticipated. In contract theory, the damages are normally limited to those which are naturally expected to flow from the wrong. *Id.* at 325, 59 Cal. Rptr. at 477.
ally born deformed. In a suit against a doctor for negligence, the New Jersey Supreme Court decision in *Gleitman v. Cosgrove*, adhering to this public policy, set a precedent for denying recovery for wrongful birth claims.

In *Gleitman*, the doctor advised Mrs. Gleitman that the case of German measles she had while one month pregnant would have no adverse effect on her child. Relying on this advice she continued the pregnancy to term but delivered a severely handicapped infant who was deaf, mute, probably retarded, and nearly blind. Mrs. Gleitman claimed that "but for" the doctor's negligent advice she "might have obtained other medical advice with a view to the obtaining of an abortion" and thus would not have suffered from either the costs of the care or the anguish of having a deformed child. The court refused to accept as a cognizable injury "the denial of the opportunity to take an embryonic life" and found that public policy was against recovery for the parents, stating:

Though we sympathize with the unfortunate situation in which these parents find themselves, we firmly believe the right of their child to live is greater than and precludes their right not to endure emotional and financial injury. . . . [A] claim for them would be precluded by the countervailing public policy supporting the preciousness of human life.

Not only did the *Gleitman* court refuse to permit recovery because of the public policy considerations favoring life, but the court stated that the Gleitman's economic injury could not be compensated because the amount of that injury was "impossible" to determine:

A considerable problem is raised by the claim of injury to the parents. In order to determine their compensatory damages a court would have to evaluate the denial to them of the intangible, unmeasurable, and complex human benefits of motherhood and fatherhood and weigh these against the alleged emotional and money injuries. . . . When the parents say their child should not have been

35. 49 N.J. 22, 227 A.2d 689 (1967).
36. *Id.* at 25, 227 A.2d at 690.
37. *Id.* at 26, 227 A.2d at 691.
38. *Id.* at 30, 227 A.2d at 693.
39. *Id.* at 31, 227 A.2d at 693. Judge Proctor also stated:

It is basic to the human condition to seek life and hold onto it however heavily burdened. . . .

The right to life is inalienable in our society. A court cannot say what defects should prevent an embryo from being allowed life such that denial of the opportunity to terminate the existence of a defective child in embryo can support a cause for action . . . . A child need not be perfect to have a worthwhile life. *Id.*

This policy was further substantiated by the New Jersey law which made abortions illegal. N.J. STAT. ANN. § 2A:87-1 (West 1969) (repealed 1979).
40. 49 N.J. at 28, 227 A.2d at 692.
born, they make it impossible for a court to measure their damages in being the mother and father of a defective child.41

Soon after Gleitman, a New York court in *Stewart v. Long Island College Hospital*42 considered a case with a very similar fact pattern and also denied recovery. Adopting the Gleitman rationale, the appellate division, later affirmed by the Court of Appeals, held that both the child's and the parents' claim must be dismissed, particularly "when viewed against a backdrop of public policy which at the time declared the proposed abortion to be an illegal one."43

Thus, where parents claimed the right to compensation based on the denial of their right to choose an abortion, courts maintained that public policy favoring life required a denial of recovery. On the other hand, where the unexpected birth of a child after a sterilization operation constituted a basis for the claim to compensation, not the right to take life, recovery was permitted. The wrongful birth claims failed while the wrongful conception cases succeeded.44

**TWO MAJOR INFLUENCES AFFECTING THE GLEITMAN v. COSGROVE PRECEDENT**

**The Decision in Roe v. Wade**

The 1973 Supreme Court decision in *Roe v. Wade*45 considerably undermined the policy reasons espoused in *Gleitman v. Cosgrove* for denying the wrongful birth cause of action—that the right to life was so precious that states could not sanction its destruction.46 After careful analysis of the United States Constitution, the United States Supreme Court in *Roe* determined that because a woman's fundamental right to

41. *Id.* at 29-30, 227 A.2d at 693. The impossibility of determining damages with respect to the child's claim was determining the difference between life with defects and the "utter void of nonexistence," an incalculable comparison. But in regard to the parents' damages, three of the seven justices felt money damages were ascertainable with reasonable precision and favored permitting the question to go to the trier of fact.

42. 58 Misc. 2d 432, 296 N.Y.S.2d 41 (1968), modified on other grounds, 35 A.D.2d 531, 313 N.Y.S.2d 502 (1970), aff'd mem., 30 N.Y.2d 695, 332 N.Y.S.2d 640, 283 N.E.2d 616 (1972). The mother was admitted to the hospital with rubella and the doctors refused to perform an abortion; the result was the birth of a deformed child.

43. 35 A.D.2d at 532, 313 N.Y.S.2d at 503.


45. 410 U.S. 113 (1973).

privacy implicit in the fourteenth amendment’s concept of personal liberty included the right to choose an abortion,\textsuperscript{47} statutes prohibiting abortions all were unconstitutional.\textsuperscript{48} The Court recognized, however, that some state regulations were permissible. At various stages of pregnancy, the state’s interest in preserving maternal health and in protecting the potential life rose to a compelling interest which could justify regulation of the woman’s right to privacy.\textsuperscript{49} The Supreme Court established a formula for determining permissible state regulation of abortions. Within the first trimester of pregnancy (approximately the first twenty-eight weeks), the state had no compelling state interest sufficient to justify interference with the free decision to abort made by the patient in consultation with her doctor.\textsuperscript{50} During the second trimester, however, the state could regulate abortions, acquiring a compelling interest in preserving the health of the mother as mortality rates for women who abort exceed those for women who carry their pregnancy to term.\textsuperscript{51} It was not until the third trimester, following viability, the point at which the fetus could survive on its own, that the state could regulate abortions to protect the fetus.\textsuperscript{52} Consequently, after the \textit{Roe} decision, states could not declare that at all times the fetus’ right to life superseded the mother’s right to choose an abortion.

\textbf{Informed Consent}

Although not the central issue in \textit{Roe} the Court confirmed the important counseling relationship which exists between a doctor and his patient.\textsuperscript{53} Within the first trimester, the Court contemplated that the abortion decision would be made by the patient after consultation with

\textsuperscript{47} 410 U.S. at 153. The Supreme Court stated:

\begin{quote}
We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One’s philosophy, one’s experiences, one’s exposure to the raw edges of human existence, one’s religious training, one’s attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one’s thinking and conclusions about abortion. \textit{Id.} at 116.
\end{quote}

\textsuperscript{48} \textit{Id.} at 164.

\textsuperscript{49} \textit{Id.} at 163-64.

\textsuperscript{50} \textit{Id.}

\textsuperscript{51} \textit{Id.}

\textsuperscript{52} \textit{Id.}

\textsuperscript{53} The Court stated that prior to the compelling point, “the attending physician, in consultation with his patient, is free to determine, . . . that, in his medical judgment, the patient’s pregnancy should be terminated.” \textit{Id.} at 163. The Court expanded on this view of the physician as counselor in Planned Parenthood v. Danforth, 428 U.S. 52 (1976). The physician was expected to assist his patient in making an informed decision by “giving . . . information to the patient as to just what would be done and as to its consequences.” \textit{Id.} at 67 n.8.
her doctor and consideration of relevant factors, especially the dangers of medical complications.\textsuperscript{54}

This counseling relationship forms the basis of the expanding concept known as informed consent. Informed consent recognizes the principle that a patient has a right of self-determination in making decisions concerning medical treatment.\textsuperscript{55} Rational decision-making requires sufficient information to make a deliberate and informed choice. To ensure this process the medical and legal professions recognize a physician’s fiduciary duty\textsuperscript{56} to fully disclose the nature of, and risks associated with, his suggested medical treatment.\textsuperscript{57} Failure to do so imposes upon the physician liability for malpractice.\textsuperscript{58}

Advances in scientific and technological knowledge in the field of medicine continually expand the boundaries of informed consent and, thereby, the minimum standard of conduct required of physicians.\textsuperscript{59}


\textsuperscript{55} \textit{See} notes 17-19 \textit{supra}.


This fiduciary duty was even recognized by Plato:

The slave doctor prescribes what mere experience suggests—and when he has given his orders, like a tyrant, he rushes off—but the other doctor, who is a freeman, attends and practices upon freemen;—he enters into discourse with the patient and with his friends—and he will not prescribe for him until he has first convinced him; at last, when he has brought the patient more and more under his persuasive influences and set him on the road to health, he attempts to effect a cure.


\textsuperscript{57} \textit{PLATO, THE LAWS, BOOK IV.}


The standard of disclosure includes disclosing those risks which a reasonable man would have considered material to the decision about a treatment. Miller v. Kennedy, 11 Wash. App. 272, 522 P.2d 852 (1974), \textit{aff'd}, 85 Wash. 2d 151, 530 P.2d 334 (1975). For a more detailed discussion of informed consent see Riga, \textit{Informed Consent, supra} note 17. Riga explores whether informed consent requires the disclosure of all material factors (a subjective test) or only those factors a reasonable medical practitioner in the community (an objective test) would give. The article states that informed consent recognizes the autonomy and privacy of an individual requiring, therefore, sufficient information to understand the procedures and make a self-determination to undergo them. \textit{See also} \textit{Informed Dissent, supra} note 56, at 1121-25.

\textsuperscript{59} The standard of care for the professional requires the skill and diligence of a professional with a minimum of special knowledge—the amount determined by similar locales. \textit{Prosser, supra} note 14, at § 32. \textit{See, e.g.}, Karp v. Cooley, 493 F.2d 408 (5th Cir.), \textit{cert. denied}, 419 U.S. 845 (1974); Pegram v. Sisco, 406 F. Supp. 776 (W.D. Ark.), \textit{aff'd}, 547 F.2d 1172 (8th Cir. 1976); Ditlow v. Kaplan, 181 So. 2d 226 (Fla. Dist. Ct. App. 1965). The minimum standard in a locale must be established by expert testimony and is not always easy to determine:

\textit{[I]}t may be difficult, if not impossible, accurately to state the moment in time when every physician should know about a new technique (such as prenatal diagnosis), its indications, and the risks associated with it. When, however, most of a doctor’s peers are aware
Doctors are expected to stay apprised of the latest developments in their field. Clinical identification of diseases with the potential to create problems has led to a heightened awareness of the necessity to detect birth defects in the fetus. At the same time, the ability to detect defects has improved with the discovery of new techniques for *in utero* examinations.\(^{60}\) Furthermore, because it is common knowledge that under certain circumstances there is a high risk that pregnant women will bear children with birth defects,\(^{61}\) doctors are responsible for testing and advising parents about these potential disorders.\(^{62}\)

Hence, the *Roe v. Wade* pronouncement that the right to an abortion was constitutionally protected, coupled with the informed consent requirement that doctors inform parents of potential birth defects, weakened the *Gleitman v. Cosgrove* precedent. These factors influenced the next court to consider a wrongful birth claim.

**Jacobs v. Theimer: A New Precedent**

In 1975 the Supreme Court of Texas became the first court to recognize wrongful birth as a compensable cause of action. In *Jacobs v. Theimer*\(^{63}\) the parents of an abnormal child sued a physician claiming that the physician's failure to inform the mother of the risks attendant to having rubella during pregnancy deprived the parents of the opportunity to have an abortion.\(^{64}\) The *Jacobs* court considered the policy espoused in *Gleitman v. Cosgrove* against recovery in that similar rubella-based injury,\(^{65}\) but stated that the major issue here was Mrs. of and many use the new technique, the point of therapeutic acceptance has been reached.


60. Several techniques of recent discovery and widespread use are amniocentesis, the use of a needle inserted in the abdomen to draw fluid from the uterus so examination of cells discarded by the fetus can be analyzed for birth defects and fetoscopy, the insertion of a tiny lighted instrument through the abdomen to view any defect in the fetus visible to the eye. Fetoscopy is especially good to detect hydrocephaly (water on the brain), anencephaly (absence of the brain), spina bifida (open spine), omphalocoele (open abdomen), and innumerable defects of extremities such as flipper-like limbs caused by thalidomide. *The Risk of Birth Defects*, supra note 20, at 222-23.

61. See note 20 supra.


63. 519 S.W.2d 846 (Tex. 1975).

64. Mrs. Jacobs contracted rubella while on vacation. She saw her doctor, was hospitalized, and was found to be pregnant. She asked if she had contracted measles and if it might have affected the fetus, but the doctor assured her otherwise. The baby was later born with severe deformities requiring significant cost for operations and treatment. *Id.* at 847.

65. The *Gleitman* court had denied recovery because it could not sanction the destruction of
Jacobs' right to make an informed decision about her medical care. The doctor in *Jacobs* violated his duty of full disclosure\(^6\) when he did not advise Mrs. Jacobs about the potential effects of rubella. Consequently, the court declared that the economic burden resulting from the physical deformities must be compensated:

> It is impossible for us to justify a policy which at once deprives the parents of information by which they could elect to terminate the pregnancy likely to produce a child with defective body, a policy which in effect requires that the deficient embryo be carried to full gestation until the deficient child is born, and which policy then denies recovery from the tortfeasor of costs of treating and caring for the defects of the child.\(^7\)

Since *Jacobs*, the jurisdictions that have considered the merits of wrongful birth actions have unanimously recognized the cause of action.\(^6\)\(^8\) The courts have realized that the judicial system must vigorously enforce the customary standards of good medical practice\(^6\)\(^9\) by finding physicians negligent if their medical care falls below those standards.\(^7\)\(^0\) On the other hand, judicial non-interference would immunize doctors from liability for their conduct.\(^7\)\(^1\)

**THE RIGHT TO RECOVER: THE MEASURE OF DAMAGES**

Although the right to recover in such actions has received universal acceptance in recent years, the calculation of the resulting damages continues to perplex courts. Damages claimed in wrongful birth actions due to negligent medical treatment generally fall into two categories:

- Life when public policy favored life. Further, the court said the abortion that the plaintiffs claimed they were denied would, in fact, have been unavailable since under New Jersey law abortions were illegal.
- A second Gleitman consideration was that it was impossible to calculate the value of an impaired life as compared to no life at all. 49 N.J. 22, 29-30, 227 A.2d 689, 692-93 (1967).


\(^8\) Phillips v. United States, 508 F. Supp. at 551.

ries: those based on tangible economic injury to the parents, such as medical, maintenance and support, and education costs; and those based on the intangible non-economic injury resulting from emotional distress. Recovery for pecuniary losses has been endorsed by most courts confronted with the question; recovery for emotional distress, however, remains in disfavor.\textsuperscript{73}

**Pecuniary Losses**

The Texas Supreme Court in *Jacobs v. Theimer* recognized the right to recover damages for the economic injury sustained by the parents through the birth of a deformed child, but it advocated, in dicta, reimbursing them only for those expenses incurred in caring for and treating the physical impairment.\textsuperscript{74} The Wisconsin Supreme Court followed this approach in *Dumer v. St. Michael's Hospital*.\textsuperscript{75} After concluding that the parents could be compensated for a physician's failure to diagnose rubella if they could prove that they would have obtained an abortion, the court also stated, in dicta, that it would limit recovery to only the damages resulting from the deformity and defects of the child. These damages included those reasonable additional medical, hospital and supportive expenses over and above the expenses for rearing a normal, healthy child.\textsuperscript{76}


\textsuperscript{74} 519 S.W.2d 846, 850 (Tex. 1975). The *Jacobs* court had before it an appeal of a motion for summary judgment. The court reversed and remanded. \textit{Id.} at 860.

\textsuperscript{75} 69 Wis. 2d 766, 233 N.W.2d 372 (1975). The *Dumer* court reversed a successful motion to dismiss since wrongful birth did state a cause of action. 233 N.W.2d at 380.

\textsuperscript{76} \textit{Id.} at 776, 233 N.W.2d at 377. Several other courts cursorily treated the damage question. In refusing to grant a judgment on the pleadings for lack of damages, the court in Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692 (E.D. Pa. 1978) simply stated that medical treatment for the child would be recoverable. The court added, however, that when actually called upon to decide the merits, additional kinds of damages might be available. \textit{Id.} at 696. The New York court in Becker v. Schwartz, 60 A.D.2d 587, 400 N.Y.S.2d 119 (1977), \textit{modified}, 46 N.Y.2d 401, 413 N.Y.S.2d 895, 386 N.E.2d 807 (1978) supported the concept of recovery for pecuniary expenses for the past and future care and treatment of the child. A determination of the particular "items of expense or loss," however, had to await a decision on the merits. 413 N.Y.S.2d at 901,
While many courts accept pecuniary losses as damages which naturally flow from the wrong, the New Jersey Supreme Court in *Berman v. Allan* stands alone in reaching the opposite conclusion. Although recognizing that the defendant doctor's negligence caused the additional expenses for medical, educational and supervisory needs, the court reasoned that compensation for damages of this nature would be wholly disproportionate to the culpability of the doctor and would constitute a windfall to the parents. The court refused to place such a financial burden on the physician for, "[i]n essence, Mr. and Mrs. Berman desire to retain all the benefits inhering in the birth of the child—i.e., the love and joy they will experience as parents—while saddling defendants with the enormous expenses attendant upon her rearing."

Thus, although no court prior to *Robak* actually held that specific injuries were compensable, the courts considering wrongful birth have generally identified, as compensable pecuniary damages such things as medical and hospital costs of the pregnancy, future medical expenses related to the defect, equipment and therapy, and education costs. However, because more courts have not had the opportunity to consider the possible compensable damages, the outer limits of compensable pecuniary losses is not yet known.

**Emotional Distress Damages**

The reluctance of courts to grant damages for emotional distress in wrongful birth actions seems to mirror the reluctance of courts to accept a cause of action for negligent infliction of emotional distress. At first, emotional distress was not compensable. However, exceptions slowly were permitted where emotional distress accompanied physical

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386 N.E.2d at 813. Lastly, the court in Phillips v. United States, 508 F. Supp. 544 (D. S.C. 1981) stated that it was premature to "demarcate the ultimate limits" of damages, but recognized that some type of damages would be appropriate. *Id.* at 551.

77. 80 N.J. 421, 404 A.2d 8 (1979).

78. The doctor failed to use amniocentesis to test for Down's syndrome even though there was a high risk of the disease in the fetus since Mrs. Berman was 38 years old. The Bermans did not know of the necessity to have an abortion so they were faced with the costs of treating the deformed child. *Id.* at 432, 404 A.2d at 14.

79. *Id.* This rationale is inconsistent with a tort system which compensates victims for losses without really considering the extent of culpability. In other words, a person can blamelessly or innocently cause injury yet be held accountable if his conduct is contrary to societal expectations. PROSSER, supra note 14, at § 4.

80. 80 N.J. at 432, 404 A.2d at 14.

“impact,” where there was an independent basis of tort liability,\textsuperscript{82} or where the fright occurred from being in the “zone of danger.”\textsuperscript{83} Recently, a few courts have even permitted recovery under a “pure negligence” test for merely witnessing the peril or injury of another.\textsuperscript{84}

Under the “impact rule,” emotional distress damages were awarded as parasitic damages only where there was a contemporaneous physical injury.\textsuperscript{85} Recognizing the harshness of the “impact rule,” many courts adopted the “zone of danger” test.\textsuperscript{86} Under the “zone of danger” test, recovery resulted for emotional distress only if the person was in close proximity to the potential physical danger, thereby subjected to the peril himself. In addition, some physical manifestation of the emotional distress had to be proven.\textsuperscript{87}

Recently some courts have permitted recovery for emotional distress as a bystander if the distress was foreseeable and proximately caused by the defendant’s negligent conduct.\textsuperscript{88} Bystander recovery was permitted in \textit{Dillon v. Legg}\textsuperscript{89} for a mother who witnessed her infant


\textsuperscript{89} 68 Cal. 2d 728, 69 Cal. Rptr. 72, 441 P.2d 912 (1968).
daughter being struck and killed by a negligently driven automobile. The California Supreme Court defined the foreseeability of emotional distress in terms of a three-prong test: "(1) whether [the] plaintiff was located near the scene of the accident . . . , (2) whether the shock resulted from a direct emotional impact upon [the] plaintiff from the sensory and contemporaneous observance of the accident, . . . [and] (3) whether [the] plaintiff and the victim were closely related." The Dillon decision's application was severely limited when several years after Dillon the California Court of Appeal in Jansen v. Children's Hospital Medical Center refused to extend the Dillon decision to a case where the mother's claim was based on severe emotional distress suffered as a result of witnessing the progressive decline and ultimate death of her daughter, a victim of a hospital's negligent diagnosis. The court reasoned that the Dillon decision contemplated "a sudden and brief event causing the child's injury."

The initial hesitancy to extend liability to emotional distress injuries resulted from the fear that fraudulent and exaggerated claims would result and the courts would be inundated with litigation. Later courts rejected these rationales, accepting the fact that medical science can distinguish genuine claims from fraudulent ones, and that the traditional concept of foreseeability of injury, as defined in Dillon, would adequately and justly limit liability.

The decisions addressing emotional distress damages in the wrongful birth context are varied and inconsistent. In deciding whether to permit emotional distress damages, the determining factor seemed to be whether the court characterized the mental harm as a "direct injury" from the doctor's breach of duty to the parents, and thus part of an independent basis of liability, or as "mental injury" suffered under the bystander concept.

90. Id. at 731, 69 Cal. Rptr. at 74, 441 P.2d at 914.
91. Id. at 740-41, 69 Cal. Rptr. at 80, 441 P.2d at 920.
93. Id. at 24-25, 106 Cal. Rptr. at 884-85.
94. Id.
96. See note 95 supra.
99. When viewed as a direct injury damages were recoverable in several cases: Berman v.
In *Karlsons v. Guerinot*\(^{100}\) the Supreme Court, Appellate Division, of New York held that the pain, suffering and emotional distress of the parents of a mongoloid child were a direct injury resulting from the physician’s failure to provide proper medical care.\(^{101}\) Accordingly, the court determined that recovery could be granted.\(^{102}\) The court reasoned that the Karlsons were not bystanders, but instead, were the parties to whom the defendant owed a duty of proper medical care. Because of the defendant doctor’s breach of this duty, they were denied the choice to abort and forego the mental anguish from the deformity.\(^{103}\) In so holding, the court adopted the reasoning of a prior New York decision which permitted recovery for emotional distress damages:

Moreover, not only justice but logic compels the further conclusion that if claimant was entitled to recover her pecuniary losses she was also entitled to recover for the emotional harm caused by the same tortious act.\(^{104}\)

Similarly, the Supreme Court of New Jersey in *Berman v. Allan*\(^{105}\) held that the mental harm suffered by the parents stemmed directly from the loss of Mrs. Berman’s right to abort the fetus.\(^{106}\) This court also reasoned that if the defendant doctor had properly advised the Bermans of the procedure called amniocentesis,\(^{107}\) the parents could have avoided their suffering by opting not to have a child afflicted with Down’s syndrome. The court further explained that emotional distress is just as real as physical pain and no more difficult for a trier of fact to value.\(^{108}\) These two cases viewed the emotional distress damages as

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\(^{101}\) Id. at 75, 394 N.Y.S.2d at 936.

\(^{102}\) Id. at 78, 394 N.Y.S.2d at 936-37.

\(^{103}\) Id. at 79, 394 N.Y.S.2d at 936.


\(^{106}\) Id. at 433, 404 A.2d at 14.

\(^{107}\) See note 60 *infra*.

\(^{108}\) 80 N.J. at 433, 404 A.2d at 15.
part of an independent tort.

On the other hand, concluding that the parents were mere bystanders, the Court of Appeals of New York in *Howard v. Lecher*\(^{109}\) refused to extend liability for the emotional distress resulting from witnessing the injury of another.\(^{110}\) Although the court sympathized with the parents' suffering, it feared a "rippling" effect if damages were granted, and hence, stated that the law must limit the legal consequences of wrongs.\(^{111}\) Since *Howard* was decided, several courts have liberalized the bystander concept in negligent infliction of emotional distress cases, rejecting the fear of unending litigation as a rationale for denying recovery.\(^{112}\) It remains to be seen, however, whether future courts which characterize the parents in wrongful birth cases as bystanders will adhere to the *Howard* approach or follow the lead of negligent infliction of emotional distress cases.

**Calculating Damages**

Within the framework of tort law, damages are meant to be compensatory;\(^{113}\) the wronged party should be restored to the position he would have been in had the wrong not been committed.\(^{114}\) A monetary award is substitutionary; it gives a dollar value for a loss which, although was not a money loss, cannot be otherwise compensated.\(^{115}\) These damage awards may not be based on speculation.\(^{116}\) Hence, once the plaintiff establishes that the defendant's conduct caused the injury, he must prove with reasonable certainty the amount of damages


\(^{110}\) *Id.* at 112, 397 N.Y.S.2d at 365, 366 N.E.2d at 66. The parents claimed that the doctor, aware of their East European ancestry, should have known of the high risk of Tay Sachs disease, a degenerative nervous disorder which causes death within four years. The lack of the doctor's counseling denied the parents the opportunity to test the fetus and, if afflicted, to abort, thus forcing the parents to bear the mental anguish of giving birth to an afflicted child and watching her die from the horrid disease. *Id.* at 111-12, 397 N.Y.S.2d at 364-65, 366 N.E.2d at 66.

\(^{111}\) *Id.* at 113, 397 N.Y.S.2d at 366, 366 N.E.2d at 65. Although ideally there should be a remedy for every wrong, New York has recognized that relief need not be provided for every injury. *Id.* This may just be a New York phenomenon.


\(^{113}\) D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.1 (1973) [hereinafter cited as DOBBS]; C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 137 (1935) [hereinafter cited as MCCORMICK].

\(^{114}\) MCCORMICK, *supra* note 113, at § 137.

\(^{115}\) DOBBS, *supra* note 113, at § 3.1, 148. The calculation of damages is subject to three distinct rules: 1) the damage must in fact be caused by the defendant's actionable conduct, 2) the plaintiff must prove the amount of damages suffered with reasonable certainty, and 3) the damages shown must not be too remote (i.e. in tort language proximately caused). *Id.* at § 3.3.

\(^{116}\) DOBBS, *supra* note 113, at § 3.3, 151.
suffered.\textsuperscript{117} If proof of injury is possible, but an exact amount of damage is not, courts have generally not required mathematical precision in demonstrating the amount of damages.\textsuperscript{118} Instead, the requirement of certainty can be met with enough relevant information for the trier of fact to reasonably estimate the extent of damage.\textsuperscript{119} Absent this factual basis, the claim for damages must be denied as too speculative.\textsuperscript{120}

Courts in wrongful birth cases have had no trouble identifying certain compensable elements of damage. These include medical expenses incurred during pregnancy and for childbirth; future medical care; the costs of equipment, therapy, or educational expenditures necessary to treat the defects; institutional care; and lost wages.\textsuperscript{121} Although no speculation exists in proving these expenses,\textsuperscript{122} two determinations are needed in order to calculate damages: the proper "loss period" for which the costs of maintenance and education should be reimbursed,\textsuperscript{123} and what "offsets," if any, should be permitted to reduce the award for these pecuniary losses.\textsuperscript{124}

\textit{Loss Period}

The "loss period" for which recovery is sought represents the period in which damage or injury has resulted and will continue to result as a consequence of the defendant's negligence. The choice of the "loss period" is very important to the process of computing damages since the extent of recovery can be greatly increased or diminished by the selection. Several options are available to the courts. Since a parent's

\begin{itemize}
  \item Id. at § 3.3.
  \item Id. at § 3.3, 151 n.12 (citing Wilson v. Farmers Chemical Ass'n, 444 S.W.2d 185, 189 (Tenn. App. 1969) ("mere uncertainty as to the amount will not prevent recovery if the evidence is of such certainty as the nature of the case permits.").
  \item Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946).
  \item In such a case, even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly.
  \item Id. at 264.
  \item Dobbs, supra note 113, at § 3.3, 151.
  \item See, e.g., Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 175 (Minn. 1977).
  \item Jacobs v. Theimer, 519 S.W.2d 846, 850 (Tex. 1975).
  \item Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975) (offset for raising a normal child). Consider also the "special benefits rule" of Restatement (Second) of Torts § 920 (1977) and the "blessed event" philosophy of Christensen v. Thornby, 192 Minn. 123, 255 N.W. 620 (1934). See note 29 supra and notes 135-53 infra and accompanying text.
\end{itemize}
legal responsibility for supporting a child usually continues until the child reaches the age of majority, if the age of majority is selected as the "loss period" the court will have to look to the appropriate statute to determine the cut-off age. However, under certain circumstances, where the child is abnormal and incapable of self-support, the parents' obligations may extend beyond minority and perhaps even throughout the child's full lifetime.

If the damages to be granted are reimbursement for expenses incurred for the maintenance and support of the child, the "loss period" should correlate with the obligation of support. Hence, if the obligation extends throughout the child's life, the child's life expectancy will usually be the "loss period." Actuarial tables prepared by life insurance companies are available to determine the number of years to use for the computation.

These actuarial tables are based on the life expectancy of a normal individual. It may thus be argued that in cases where deformities exist which affect the child's life expectancy, some consideration must be given to determine whether its likely that the deformed child will actually live a full life. Where reimbursement is made for a "loss period" much greater than the actual period the child survives, a windfall might be showered on the parents. This same proposition logically affects personal injury cases as well, yet in those cases courts examine only those health factors which would have increased or decreased life expectancy before the tort was committed. This approach follows the logic of traditional damage remedies—that the

125. 59 AM. JUR. 2d, Parent and Child § 50.
128. In wrongful death and personal injury suits, if the injury is permanent, life expectancy is the assumed "loss period." DOBBS, supra note 113, at § 8.7.
129. Id. at § 8.7, 572. These actuarial tables show the average future life at any given age. However, DOBBS cautions that these tables are not always accurate. Sometimes the average expectancy will be lower than the most likely future lifetime. Some care must be used in selecting the table. Id.
130. Id.
132. See note 179 infra and accompanying text.
133. DOBBS, supra note 113, at § 8.7.
injured party should be restored to the position he was in before the
tort occurred; in wrongful birth cases, "but for" the injury a normal life
expectancy would exist. The issue remains open for courts in the
wrongful birth context to use either the full life expectancy of healthy
children or a shortened one based upon the individual health condi-
tions of the child.

Offsets

Offsets contemplate that the injured party, despite suffering legiti-
mate and compensable damage, has also received a benefit. In consid-
ering the allowable damages in wrongful birth actions, some courts and
commentators have claimed that the "special benefit rule" must be ap-
plied. This principle of calculating compensatory damages is rooted
in the Restatement (Second) of Torts. According to section 920 of the
Restatement, if the wronged party's person or property is harmed,
yet at the same time some benefit accrues to that same interest, the
benefit will mitigate some of the damage. Following the Restatement,
courts subtract from the total damage recovery in tort actions certain
"offsets". Two suggested "offsets" in wrongful birth actions are the
value given to the "benefit" of parenthood and the value attributable
to the ordinary costs of raising a normal child.

Benefit Theory

Being a parent has traditionally been considered by many courts
to be a "benefit," since parents experience love and affection from a

134. See, notes 113-14 supra and accompanying text.
136. RESTATEMENT (SECOND) OF TORTS § 920 (1977) states:
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.
This "benefit" theory derives in part from the "blessed event" philosophy espoused in Christ-
tensen v. Thornby, 192 Minn. 123, 255 N.W. 620 (1934). Under this theory a child always confers
benefits on his parents. See notes 29-31 and accompanying text.
It is interesting to note, however, that the courts advocating an "offset" for the "benefits" of
parenthood are in cases involving the birth of normal children. For this comment, those cases are
more properly labeled wrongful conception actions. See note 2 supra.
child, pride from a child’s achievement, and joy from a child’s companionship; all of these were thought to far outweigh any burdens of parenthood.\textsuperscript{140} Recently, though, the validity of this view of parenthood as a “net benefit” has come under suspicion. One court stated that it was “myopic”\textsuperscript{141} to consider that the benefits of parenthood automatically outweigh the burdens. Another judge, in a concurring opinion, noted that “[e]ven assuming that life is an ‘esteemed right’ and one’s life is precious to oneself, it does not follow that one’s existence automatically confers a benefit and no burden on those having a duty to assure one’s life is preserved throughout childhood.”\textsuperscript{142} If parenthood is no longer a “net” benefit, the question arises whether a value attributable to any benefit may still be subtracted from the damage recovery.

Even accepting the view that parenthood is a “benefit,” section 920 of the Restatement clearly provides that a “benefit” may be considered only in mitigation of injury where the benefit is to the same interest which was harmed.\textsuperscript{143} In the wrongful birth context, the characterization of the benefits conferred by parenthood as either emotional or economic (pecuniary) will determine whether the proposed “offset” is permissible according to the Restatement. Court decisions support both theories. If the joys attributable to motherhood and fatherhood are considered emotional\textsuperscript{144} under the “special benefits rule” they can only be balanced against the emotional pain and suffering from

\begin{footnotes}
140. Terrell v. Garcia, 496 S.W.2d 124 (Tex. Civ. App. 1973);

141. Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977).


143. \textit{Wrongful Birth Damages: Mishandling, supra} note 126, at 159-60.

\end{footnotes}
raising an unwanted or abnormal child. Hence, the "special benefits rule" would preclude an "offset" for the benefits conferred by parenthood where only pecuniary losses are to be compensated. There are several other courts, however, which have considered the aid, comfort and companionship that a child gives a parent to be pecuniary benefits, the value of which is properly "offset" against pecuniary losses. These benefits may not be present in the case of abnormal children.

Cost of Childraising

The second frequently advocated "offset" is the cost of raising a normal child. Applying the "special benefits rule," the court compares the economic expenses for care, maintenance, education and medical expenses of rearing a defective child with those same costs for a healthy child, and awards the excess to the parents as damages. The rationale underlying this approach is that the parents desired a normal child and, while benefitting from parenthood, would have incurred the costs of raising the child. This theory assumes that after an abortion is obtained the mother will, in a later pregnancy, give birth to a healthy child, thus incurring expenses for childrearing. In effect, the costs of childrearing for the second child are borrowed for the calculation of damages regarding the first child, and the compensable damage is only the added costs from the defect.

149. See Gleitman v. Cosgrove, 49 N.J. 22, 65, 227 A.2d 689, 712 (1967) (Weintraub, J., dissenting). This approach is criticized in the dissent: I would stress that the valuation could not be made by contrasting the defective child with a normal one, because that was not the option. We cannot go on the hypothesis that the mother would have had the abortion and thereafter conceived and delivered a healthy child. We are dealing with human beings and not with fungibles, and the damages are those suffered with respect to this child. The pain of the parents must be measured against the joy they find in him as he is. Id. at 65, 227 A.2d at 712.
Some commentators suggest that this approach may not be consistent with the traditional goal of compensatory damages—to place the injured party where he would have been had he not been wronged. Courts have recognized that in wrongful birth cases the wrong was the failure to inform the parents of possible birth defects, thereby denying the parents the opportunity to abort the fetus. In light of this, the full costs of rearing the child should be recovered because the comparison should be between having a defective child and, after aborting, having no child at all. The question remains open as to which approach is proper for "offsetting" the "benefits" of parenthood and the costs of childrearing.

**Robak v. United States**

The district court in *Robak*, faced with the task of actually calculating a damage award, confronted both the problem of the proper "loss period" and any appropriate "offsets." The district court decided that the normal life expectancy of seventy-one and eight-tenths years should be the "loss period," that the damages should be deposited in a reversionary trust, and that an offset would be proper for the normal costs of childrearing. On appeal, the Seventh Circuit restored this "offset."

**Facts**

On September 26, 1977, Anna and Robert Robak filed a medical malpractice suit against the United States for negligent medical care received in a military hospital in Fort Rucker, Alabama in 1972. Mrs. Robak had visited the hospital clinic with a fever and a rash. When a pregnancy test confirmed that she was one month pregnant, the doctor properly tested Mrs. Robak for German measles, medically known as "rubella," because rubella can cause major birth defects if contracted in the early stages of pregnancy. Mrs. Robak was tested twice—the

151. McCORMICK, supra note 113.
154. 503 F. Supp. at 983. The 71.8 years life expectancy came from insurance tables.
155. *Id.* at 983 n.2.
156. 658 F.2d at 479.
157. See Note, New Jersey Recognizes Emotional Distress Damages in Wrongful Birth Action
first blood test was negative; the second, several days later, was positive. Neither the doctor nor the clinic staff informed Mrs. Robak that she had rubella or advised her of the serious consequences the disease could have on an unborn fetus.

Jennifer Robak was born January 12, 1973 afflicted with hearing loss, bilateral cataracts, a slight heart defect, and suspected mental retardation. Four years later, after several operations and occupational and physical therapy, the Robaks learned that Jennifer's defects were common symptoms of rubella-syndrome. The Robaks filed suit against the defendant doctor contending that had they known their baby would be born with these maladies they would have aborted the pregnancy.

The Robaks' complaint alleged substantial injury to both parents, each seeking recovery in a separate count for the care, education and maintenance of Jennifer. Another count was a cause of action on behalf of Jennifer herself. The district court dismissed Jennifer's "wrongful life" suit for failure to state a claim upon which relief could be granted, but denied the government's motion to dismiss the parents' "wrongful birth" actions.

As residents of Illinois, the Robaks sued the United States in the Northern District of Illinois under the Federal Tort Claims Act. The case arose under the FTCA because Mrs. Robak was treated in a military hospital by an employee of the federal government. Under the FTCA, the United States government is liable for the negligent and tortious acts of its employees acting within the scope of their employment if a private person would be liable for the same negligent


159. There were two wrongful birth counts, one for each parent and a wrongful life count on behalf of Jennifer. Id. at 473.


161. 28 U.S.C. §§ 1346(b) & 2671 (1976). Section 1346(b) states:

[T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Section 2671 Definitions:

As used in this chapter and sections 1346(b) and 2401(b) of this title the term . . . "[e]mployee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on
Although federal courts have exclusive jurisdiction over suits brought under the FTCA, the substantive law is that of the state law of the place where the negligent act or omission occurred. Since there was no existing precedent under Alabama law for wrongful birth, the District Court for the Northern District of Illinois looked to the state of Alabama for guidance. The Alabama Supreme Court unanimously declined to answer. The district court then asked the Court of Appeals of the Seventh Circuit to determine Alabama law, but the Seventh Circuit refused. The case returned to the district court for a trial which took place on October 7, 1980.

The District Court Determination

At the end of a four-day bench trial, Judge Aspen issued an oral statement of liability, but reserved judgment on the amount of damages and calculation of attorney's fees. Based on the evidence presented, the district court in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, means acting in line of duty. See generally Note, Strict Liability Within the Federal Tort Claims Act: Does it Belong?, 57 CHICAGO KENT L. REV. 499 (1981) for a discussion of the historical justification for enactment of the FTCA and the desired effects. Id. at 499-501 and 500 n.13.

28 U.S.C. § 2674 (1976) states: "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."


Id.

The district court certified the following question to the Alabama Supreme Court for a decision according to Alabama law: "Can the parents of a rubella syndrome child maintain a cause of action for past and future maintenance and care of that child under Alabama law when the parents could have chosen to terminate the pregnancy if the defendant had not failed to diagnose the mother's rubella?" Robak v. United States, 658 F.2d at 473 n.2.

Id. at 473.

Id. The district court certified the question to the Court of Appeals pursuant to 28 U.S.C. § 1292(b)

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

503 F. Supp. at 983. This comment will not further consider the award of attorney's fees since in a typical wrongful birth action it would not be at issue. Here the question arose since the FTCA regulates the award of attorney's fees. 658 F.2d at 479-80. The discarded district court's plan provided for an initial award of $100,000 and then one-third of the actual disbursements.
the court, in its memorandum opinion of November 13, 1980, awarded
the Robaks $900,000 total damages for the care of Jennifer, a judgment
of $450,000 to each parent.169 This $900,000 was only a partial reim-
bursement for the costs of Jennifer's maintenance through minority
and her impaired adulthood that were proved at trial: $30,000 for past
expenses; $229,800 for the cost of residential education and care
through minority (age 21), discounted to present value;170 $515,000 for
the cost of either a companion skilled in sign language and the care of
emotionally disturbed persons, or institutional care for the remainder
of her adult life; and $200,000 for the support of Jennifer through her

made from the trust as the funds were withdrawn to be awarded as attorney fees. 503 F. Supp. at
985.
The Seventh Circuit made a statutory interpretation that under a 1966 amendment to the
FTCA, in 1966 the district court could not exercise any discretion in the fee arrangement between
the attorney and his client as long as the agreement was within the statutory limits of twenty-five
percent.
The Court rendering a judgment for the plaintiff pursuant to section 1346(b) of this
title, . . . may, as part of such judgments, . . . determine and allow reasonable attorney
fees, which, if the recovery is $500 or more, shall not exceed . . . 20 per centum of the
amount recovered under section 1346(b) of this title, to be paid out of but not in addition
to the amount of judgment, . . . recovered, to the attorneys representing the claimant.
Section 2678 after the 1966 amendment now reads: "No attorney shall charge, demand, receive,
or collect for services rendered, fees in excess of 25 per centum of any judgment rendered pursuant
The Senate Report on the amendment had stated the legislative intent:
The language of the committee amendment merely places a limit on fees and removes
from the section the requirement of agency or court allowance of the amount of attorney
fees. The actual amount of attorney fees within the statutory limits, therefore, is made a
matter for determination between the litigant and his attorney.
In addition, the court noted that:
[T]he formula developed by the district court would have a significant chilling effect on
counsel bringing such action, for their fee would be contingent on future events that
might have nothing to do with the merits of the case or the competence of their represen-
tation of their client. If Jennifer Robak were to die accidentally of causes completely
unrelated to her rubella syndrome, for example, counsel here would receive a very small
fee for very extensive efforts.
658 F.2d at 480 n.28.
169. The parents filed separate claims stating that each had an individual responsibility for the
maintenance and support of Jennifer. They received separate awards. The maximum total
award, however, could not exceed the $1,000,000 claimed. Robak v. United States, 503 F. Supp.
170. L. FRUMER, 3 PERSONAL INJURY—ACTIONS, DEFENSES, DAMAGES § 3.04 at 206-07
(1965). Since a damage award contemplates payment in cash now as compensation for past and
future expenses, but is to be compensation for actual loss and no more, it is necessary to reduce the
award to present value. Otherwise, the award would pay now for money due later, and if invested
would overcompensate the plaintiff. Reducing to present value requires determining what
amount when safely invested and earning a given rate of interest would provide the total award at
the end of the time (e.g. 71.8 years in the Robak's case). Id. See DOBBS, note 113 supra, at § 8.7.
The rate of interest may vary. Some courts have picked a fixed rate, others leave it to the
"common sense" of the jury, but in most cases the figure is below the "legal" interest rate (the
statutory maximum or the judgment interest rate). Dobbs, note 113 supra, at §§ 3.5, 8.7.
adult life since she would never be self-supporting.\textsuperscript{171} The court subtracted, as an "offset," an amount attributable to the cost of raising and supporting a normal child.\textsuperscript{172}

The district court further suggested the establishment of a reversionary trust as the mechanism for payment of the award.\textsuperscript{173} Both parties agreed that the money would be placed in a trust and sums from the corpus would be disbursed as needed to pay for the costs of Jennifer's care and support.\textsuperscript{174} Upon Jennifer's death, the remainder of the award, if any, would be returned to the defendant.\textsuperscript{175}

The payment of Jennifer's support expenses through a reversionary trust addressed two apprehensions of the court: that Jennifer would always be supported and that the Robaks would be fully compensated for their added expenses without receiving a windfall upon Jennifer's death.\textsuperscript{176}

The reversionary trust also permitted the court to use the actuarial life expectancy tables of healthy individuals without assessing what downward adjustment to make for Jennifer's irreversible medical condition.\textsuperscript{177} Hence, under the reversionary trust, if Jennifer lived the full seventy-one and eight-tenths years\textsuperscript{178} her entire expenses would be covered. If she lived a shorter life, the reversionary trust would return the remainder of the damage award to the government, preventing her parents from being compensated for expenses they never incurred.\textsuperscript{179} Through the vehicle of a reversionary trust, neither party would be penalized for an error of judgment concerning the expected length of Jennifer's life.

The district court decision was appealed on several grounds. The Government appealed the district court's determination that liability could exist under Alabama law as it existed in 1972.\textsuperscript{180} The plaintiffs

\textsuperscript{171} 658 F.2d at 478.
\textsuperscript{172} 503 F. Supp. at 983 n.2. The district court explained that the damage award compensated the Robaks for their past and future expenses: "The costs of maintaining their daughter, over and above the costs of raising and supporting a normal child." \textit{Id.} The court subtracted approximately $75,000 for child-rearing costs. This appears to be an arbitrary figure since the only evidence at trial regarding such costs was a newspaper article bearing the headline, "It costs $85,000 to raise a child." 658 F.2d at 478 n.21. \textit{See} notes 195 \textit{infra} and accompanying text.
\textsuperscript{173} 503 F. Supp. at 983.
\textsuperscript{174} \textit{Id.}
\textsuperscript{175} \textit{Id.} \textit{See} note 10 \textit{supra}.
\textsuperscript{176} \textit{Id.}
\textsuperscript{177} \textit{Id.} at 983. The court would otherwise have been reluctant to award such a large figure. \textit{Id.} at 984 nn. 3 & 4.
\textsuperscript{178} \textit{See} note 154 \textit{supra}.
\textsuperscript{179} 503 F. Supp. at 983.
\textsuperscript{180} 658 F.2d 471, 473 (7th Cir. 1981).
cross-appealed alleging that the court was not justified in reducing the
amount of damages by an amount equivalent to raising a normal
child. 181

The Seventh Circuit Decision

The United States Court of Appeals for the Seventh Circuit first
considered whether, under Alabama law, a doctor could be held liable
for damages to the parents for a child born with defects—a birth which
would not have occurred "but for" the defendant's omission to inform
the pregnant mother that she had rubella. The court answered in the
affirmative, holding that neither an Alabama law prohibiting abortions
nor a prior wrongful life suit were dispositive of Alabama law for
wrongful birth. 182 The court reasoned that after Roe v. Wade a state
could not constitutionally enforce a law prohibiting abortions, and that
although the Supreme Court of Alabama rejected a wrongful life claim
in Elliott v. Brown, 183 wrongful life suits are based on different policy
considerations. In wrongful life suits the child asks the court to decide
that it would be better not to have been born at all than to be born
deformed, whereas in a wrongful birth claim the cause of action aims
to compensate the parents for the denial of their right to choose an
abortion. 184 Looking to the precedents of two rubella-syndrome cases
in sister jurisdictions, Jacobs v. Theimer, 185 and Dumer v. St. Michael's
Hospital, 186 the Seventh Circuit held that Alabama law permitted
wrongful birth actions. 187

In establishing that Alabama law would permit liability, the Sev-
enth Circuit joins all of the state and federal jurisdictions considering
wrongful birth since Roe in rejecting the archaic anti-abortion policy
considerations of Gleitman v. Cosgrove. In fact, the Seventh Circuit
found comfort in the fact that the New Jersey Supreme Court had itself
rejected that very notion in when Berman v. Allan, it declared that
"[p]ublic policy now supports rather than militates against, the proposi-
tion that [the mother] not be impermissibly denied a meaningful oppor-
tunity to make [the] decision" to have an abortion. 188

The Seventh Circuit noted that wrongful birth was "little different

181. Id. at 474.
182. Id. at 476.
183. 361 So.2d 546 (Ala. 1978).
184. 658 F.2d at 475.
185. 519 S.W.2d 846 (Tex. 1975).
186. 69 Wis. 2d 766, 233 N.W.2d 372 (1975).
187. 658 F.2d at 476.
188. Id. at 474, quoting Berman v. Allan, 80 N.J. 421, —, 404 A.2d 8, 14 (1979).
from an ordinary medical malpractice action." According to the court, the doctor's conduct in the case at bar failed to meet the required standard of care of a professional in Alabama; the Robaks' injury was proximately caused by the doctor's omission.

The second major issue before the court was the question of damage calculation. The Seventh Circuit rejected the district court's determination that the cost of raising and supporting a normal child should reduce the compensatory award for past and future maintenance and support, holding that Alabama courts follow the general rule in med-


> [i]rrespective of the label coined, plaintiffs' complaints sound essentially in negligence or medical malpractice . . . .

Plaintiffs state causes of action in their own right predicated upon a breach of a duty flowing from defendants to themselves, as prospective parents, resulting in damage to plaintiffs for which compensation may be readily fixed.

658 F.2d at 476, n.10.

190. *Id.* at 477-78. The proper standard is the degree of care, skill and diligence commonly exercised by members of his profession in similar locales. *Id.* See PROSSER, note 14 *supra*, at § 32.

The "similar locale" rule in Alabama was the "general neighborhood" rule. *ALA. CODE § 6-5-484(a) (1975):

> In performing professional services for a patient, a physician's, surgeon's or dentist's duty to the patient shall be to exercise such reasonable care, diligence and skill as physicians, surgeons, and dentists in the same general neighborhood, and in the same general line of practice, ordinarily have and exercise in a like case.

The Alabama Supreme Court had interpreted this statute to mean a "national medical neighborhood" standard and since the expert who testified for the Robaks practiced in a similar military hospital during the time Mrs. Robak was treated, his testimony proved that Mrs. Robak's doctor, and therefore, the United States, was negligent. *Robak v. United States*, 658 F.2d 471, 477-78. *See, e.g.*, Baker v. Chastain, 389 So. 2d 932 (Ala. 1980); Zills v. Brown, 382 So. 2d 528 (Ala. 1980).

191. 658 F.2d at 476-77. Following Alabama law the Seventh Circuit utilized the "but for" test to determine if the injuries were caused by the defendant. *See, e.g.*, Wolfe v. Isbell, 291 Ala. 327, 280 So.2d 758, 761 (1973).

The court rejected the government's argument that the irreversible injury to the fetus from the rubella actually occurred prior to the defendant's negligent conduct, and, therefore, could not have caused the injury. The Seventh Circuit recognized that a negligent act did not have to be the sole cause of the injury. Prosser states "[t]he event without millions of causes is simply inconceivable." PROSSER, note 14 *supra*, at § 14, 239. Even so, the Seventh Circuit also recognized that wrongful birth claims are for the denial of the right to seek an abortion to avoid the added expenses from the injury to the fetus, rather than for injuring the fetus. *Id.*

Once the causal link is established the defendant's liability for the consequences may be limited by the policy concerns of proximate cause. The concept of foreseeability of harm must be considered. Two general theories exist. Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928) demanded that foreseeability only extend to those within the "zone of danger." The opposite view is espoused in In re Arbitration Polemis v. Furness, 3 K.B. 560 (1921) which permitted recovery for unlimited liability as long as a direct sequence could be proved from the act to the injury. American courts follow the Palsgraf view.

Other limitations weighing on a court's decision on proximate cause are the events and community values existing at the time of the act. PROSSER, *supra* note 14 at §§ 42-43. The Seventh Circuit refused to hold Alabama's public policy against abortion to be a limiting force under proximate cause. 658 F.2d at 476-77.

192. *Id.* at 479. *See* note 172 *supra* and accompanying text.
ical malpractice suits that the negligent tortfeasor is liable for all damages proximately caused by his conduct.93 "But for" the defendant's negligence which deprived the Robaks of the opportunity to abort, the Robaks would not have had to bear any costs in raising a child. Therefore, the court stated, all expenses including the cost of raising a normal child were compensable.94 The court then remanded the case for a proper determination of damages in light of its decision.95

**ANALYSIS**

Although the Robak case follows precedents of other jurisdictions in permitting wrongful birth actions,96 it marks the first time that any court has formulated a damage award for wrongful birth.97 The district court confronted some of the perplexing issues in damage calcula-

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93. *Id. See* Snow v. Allen, 227 Ala. 615, 151 So. 468 (1933).
94. 658 F.2d at 479.
95. *Id.* On remand, the district court denied subtracting any amount for the costs of raising a normal child and refused to add any additional damages to the award. The court stated:

Regarding the computation of damages, with all due respect, it is our view that the court of appeals apparently either misread our November 13, 1980 opinion or was misled with respect to the Court's method of computing the damages stated therein. Contrary to the suggestion in the court of appeals' opinion, the Court did not reduce the damages awarded to plaintiffs by an amount it considered to be the cost of raising a normal, healthy child. As the court of appeals correctly noted, the only evidence submitted at trial concerning the cost of raising a healthy child was a newspaper article stating that it cost $85,000.00 to raise a child. As Judge Swygert stated his opinion for the court, "[a] reduction of a damage award based on such unsupported evidence would be improper." Accordingly, because the Court found that there was insufficient evidence in the record to determine the cost of raising a normal child; [insufficient whether the amount was to be added or subtracted from the already provided damage award] the cost of raising a normal child did not enter into our damage determination at all, either positively or negatively. Indeed, that was the import of the footnote in our November 13th opinion stating that the damages awarded were "over and above the costs of raising and supporting a normal child . . . . The Court's determination of the amount of damages to which plaintiffs are entitled was based on its computation of the amount plaintiffs had expended and would expend in the future to care for Jennifer without regard to the cost of raising and supporting a normal, healthy child." (citations omitted).

Robak, No. 77C 3595, slip op. on remand at 2-3.

Despite the district court's explanation of its action and its characterization of the "true" meaning of footnote two of its memorandum order of November 13, 1980, this author is unconvinced that footnote two can mean anything other than a recognition that some offset was made regarding the expenses of normal childrearing. If the $90,000 had been recompense for all past and future expenses resulting from the defendant's tort, then the qualification of expenses included and mentioned in footnote two was superfluous, and, incongruous with what the district court now claims it did in calculating the damage award.

97. It is important to note here that this comment distinguishes the wrongful birth claim from that of wrongful conception. *See* notes 2 and 8 supra.
tion such as "loss period" and "offsets," and, with a modification by the Seventh Circuit, advanced a meaningful approach to damage calculation. The Robak formula does not resolve every aspect of proper calculating procedures, but certainly provides an excellent groundwork upon which to build.

The district court suggested a novel mechanism for compensating victims of negligent conduct—a reversionary trust. The reversionary trust presented the court with a means to resolve the question of the appropriate "loss period" for ascertaining damages. Justifiably, the court rejected the age of majority as the outer limit for reimbursing the Robaks' expenses, recognizing as it did that because of Jennifer's impaired health the parents' obligation to support would extend beyond majority. However, it nevertheless remained necessary to select an appropriate "loss period." The choice lay between the life expectancy as determined by the actuarial tables for a healthy child or some shortened lifespan which would adequately account for Jennifer's medical condition. The trust concept permitted the court to base the "loss period" on the actuarial tables for a healthy child while accommodating the concern that Jennifer would not live for that entire period of time. Tort cases support the utilization of the life expectancy of normal children for such damage calculation. In a recent wrongful life claim in California, Curlender v. Bio-Science Laboratories a California court confronted the issue of determining the proper "loss period." The complaint sought damages based on the actuarial life expectancy of seventy years. The court rejected the seventy year limit, but did so only because children afflicted with Tay Sachs can not survive longer than four or five years. While under these circumstances using the seventy year life expectancy would be unreasonable, that would not be the case with Jennifer Robak. Jennifer might live the full seventy-one and eight-tenths years. Besides, in analogous negligence actions, the "loss period" used for cases involving permanent injury is usually the life

198. See notes 125-53 supra and accompanying text.
199. See notes 192-95 supra.
202. 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980). The Curlenders were tested by Bio-Science Laboratories to determine if they were carriers of Tay Sachs disease, a degenerative nervous disorder resulting in death within the first five years of life. The results showed they were not carriers but that information was inaccurate. The Curlenders gave birth to a child afflicted with Tay Sachs. The court held that the child had a cause of action for wrongful life.
203. Id. at 822, 165 Cal. Rptr. at 489. See note 20 supra.
The district court in Robak, however, hesitated to follow the lead of wrongful death and personal injury cases without the reversionary trust as a vehicle, perceiving itself ill-equipped to accurately predict the life expectancy of someone with Jennifer's irreversible medical condition. The district court feared that an error in calculation could lead to substantial inequities. The parents might be unjustly enriched if they were reimbursed for expenses never incurred should Jennifer die before the seventy-one and eight-tenths years expired, thereby penalizing the defendant unfairly. On the other hand, utilizing a life expectancy figure less than one provided in actuarial tables might undercompensate the Robaks should Jennifer live the same life span as a healthy child.

According to the record the defendant failed to present evidence to support its claim that Jennifer's irreversible condition would lessen her life expectancy. However, the court noted the improbability of her living the full seventy-one and eight-tenths years predicted in the insurance tables. This lack of evidence may have produced the district court's reluctance to make an award based on the seventy-one and eight-tenths years while at the same time thwarting the court's ability to choose a shorter "loss period", or, the court simply may not have wanted to predict Jennifer's lifespan. The reversionary trust, by its very nature, resolved any problem the court might have had in determining the appropriate "loss period."

With the reversionary trust as a vehicle for implementing payment of damages, the district court could, without trepidation, direct the reimbursement for all expenses incurred for the care and maintenance of Jennifer for the full seventy-one and eight-tenths years. The amount of money calculated as sufficient to pay all of the proven past and future expenses, discounted to present value, would be deposited in a

204. See Dobbs, supra note 113, at § 8.7.
205. 503 F. Supp. at 983.
206. Id.
207. The government argued that it was highly improbable that Jennifer Robak would live 71.8 years because of impaired health. However, they did not offer any evidence to support this contention. The plaintiff's reply brief, on the other hand, indicated that at trial the child's medical condition proved not to be life threatening and that she would enjoy a normal life expectancy. Plaintiff's Exhibit 12 at 13 (TR 141-42, 165).
208. 503 F. Supp. at 983.
209. Id.
210. Damage awards pay now for further expenses. In order not to overcompensate the plaintiff, some discount must be effected. See note 170 for an explanation of the process of discounting; Dobbs, supra note 113.
trust. Upon Jennifer's death, any excess in unused trust proceeds would return to the defendant.\textsuperscript{211}

In effect, this procedure provides the best possible protection for the interests of both parties. The parents will be adequately and equitably reimbursed for all expenses for whatever number of years Jennifer lives up to seventy-one and eight-tenths years. On the other hand, should Jennifer die before this period ends, the defendant receives the remaining trust funds, thereby protecting the defendant from paying more than a reimbursement for the precise loss sustained by the parents. Although in the \textit{Robak} case the defendant was the United States government, which could spread the burden of its judgment among all taxpayers, in most cases the defendant would be an individual doctor. For the latter kind of defendant, who would be forced to bear the burden virtually alone, the reversionary trust as a mechanism for implementation of damages would be even more appealing as a protection against excessive awards.

Because an award to the parents made through a reversionary trust carries with it certain "strings," the trust can also protect the abnormal child. This concept of protecting the injured minor is not new to the damage arena. In some personal injury cases courts have suggested not reimbursing parents for any medical costs for treating the minor in the future, even though the parents' obligation of support to the minor extends through majority, and perhaps beyond. In instances where the parents' damage was based on the pecuniary expense of treating the personal injury of their minor, the suggested approach is not to include the future expenses of this medical treatment in the parents' award. The courts suggest, instead, that the child recover these expenses himself because a parent may recover the full amount for care but not devote those funds to the care of the child.\textsuperscript{212}

At first glance this concept of reimbursing the minor for future medical costs incurred as a result of his injuries might be applicable to the wrongful birth context. In reality, however, because wrongful life claims, have been almost universally denied,\textsuperscript{213} if the parents don't themselves recover for the expenses incurred, no one will. Until courts accept the wrongful life claim as a valid cause of action, thus providing for the injured child to recover for damage to his own interest, the re-

\textsuperscript{211} 503 F. Supp. at 983.
\textsuperscript{213} The first court to permit a wrongful life cause of action was the California Court of Appeal in \textit{Curlender v. Bio-Science Laboratories}, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980).
versionary trust is the best means to resolve both the problem of ensuring that the child will be adequately cared for while at the same time ensuring reimbursement to the parents.214 Protecting the child in this manner was a major concern of the district court. Under the trust arrangement, sums will be withdrawn only to pay maintenance costs as incurred, and the trust proceeds will be sufficient to cover all future expenses.

As to the "offset" issue, the Seventh Circuit reversed the district court's determination that an "offset" could appropriately be made against the Robaks' full reimbursement for pecuniary losses. The district court had summarily adopted the "defects added-on" approach of Jacobs and Dumer, cases which had limited recovery to only those additional expenses incurred from raising and maintaining the defect of the child.215 Accordingly, the costs of maintenance, education, medical care and other similar support costs for raising a normal child would be subtracted from the total expected costs of rearing the defective child.216

The Seventh Circuit recognized that the "defects added-on" approach adopted by the district court assumes that a choice can be made between having a normal child and a defective one. In reality, this choice was not available to the Robaks and, therefore, arguably an irrelevant standard:217 the Robaks' only choice would have been a deformed child or no child at all. The Seventh Circuit thus reversed the district court's deduction from the Robaks' award of the cost of raising a normal child. The court noted that a wrongful birth claim premised on a doctor's negligently causing the injuries to a child would permit an "offset" but added that no liability could have ensued in the Robaks' case since the injuries to the fetus actually occurred prior to any negli-

214. Using a reversionary trust in this matter gives the appearance of an award to the child—an award held in trust for the protection of her interest. The expressed concern of Judge Aspen and the nature of the award suggest a predisposition to make an award for wrongful life. It would be easy to go one step further and recognize wrongful life claims—legitimate claims on the part of the child, but the district court was limited by the Alabama decision of Elliott v. Brown, 361 So. 2d 546 (Ala. 1978). However, a California court recently ruled that a child could recover if a jury found the hospital negligently failed to inform his parents of a prenatal test which would have alerted the parents to the deformed fetus in time to choose an abortion. The case was subsequently settled out of court for $900,000. A prior California court had been the first to permit a wrongful life claim awarding $1.6 million. See Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980). A Texas court recently upheld a wrongful life claim awarding the child $625,000. Scales v. United States, A-79-CA-70 (W.D. Tex. 1981).


216. 658 F.2d at 479. See notes 172 and 195 supra and accompanying text.

217. See note 149 supra.
gence of the doctor\textsuperscript{218}—when Mrs. Robak contracted rubella. Rather, the Robaks' action was based on the failure to diagnose rubella and inform Mrs. Robak of its consequences so that she could choose the option of an abortion. Hence, all expenses resulting from Jennifer's birth, including the costs of raising a normal child, were the proximate result of the doctor's negligence.\textsuperscript{219}

By denying the "offset" the Seventh Circuit followed the traditional notion of compensatory damages—that an injured party should be placed in the position he would have been in had the wrong not occurred.\textsuperscript{220} With the knowledge that the fetus would be deformed, the Robaks would have aborted and not incurred any expenses of child rearing.

**IMPACT: UNRESOLVED ISSUES**

The *Robak* decisions provided equitable relief for the parties: the parents were compensated for the expenses they have and would incur throughout the life of Jennifer as the result of being denied their right to choose whether to abort, while the defendant was assured that the Robaks would not be overcompensated should Jennifer die earlier than predicted. The reversionary trust allayed fears that courts would otherwise maintain when ordering large damage awards. However, since both parties in *Robak* accepted the reversionary trust as a vehicle for implementing the damage award,\textsuperscript{221} it is unclear whether a court can impose the reversionary trust on unwilling parties through its power to set damages.\textsuperscript{222} Furthermore, since the Seventh Circuit did not review the legality or the appropriateness of the reversionary trust, the precedential value of the reversionary trust is uncertain. Consequently, should the reversionary trust be discarded, there is no indication whether the Seventh Circuit would again choose the normal life expectancy as the appropriate "loss period." An answer may be forthcoming in the determination of a damage award in *Phillips v. United States*\textsuperscript{223} or next year when the wrongful birth claim in *Speck v. Finegold*\textsuperscript{224} will go to trial in Pennsylvania state court.

Several other issues remain to be settled in adjudicating the rights

\begin{itemize}
\item \textsuperscript{218} 658 F.2d at 477. *See* note 151 *supra*.
\item \textsuperscript{219} 658 F.2d at 477.
\item \textsuperscript{220} *Id.* at 479. *McCormick,* *supra* note 113, at § 137.
\item \textsuperscript{221} *See* text accompanying notes 98-112 and 135-47 *supra*.
\item \textsuperscript{222} 503 F. Supp. at 983.
\item \textsuperscript{223} 508 F. Supp. 544 (D.S.C. 1981).
\end{itemize}
of parents denied their right to choose an abortion. For example, courts still must determine whether parenthood is a “benefit” which, according to the “special benefits rule,” should be subtracted from the damage recovery.225 The district court in Robak focused solely on economic “offsots,” such as the cost of rearing a normal child.226 Two recent cases, however, have confronted this issue, suggesting two possible approaches.

In Cockrum v. Baumgartner227 an Illinois appellate court refused to permit the “offset” characterizing the “rewards of parenthood” as strictly emotional in nature.228 According to the “special benefits rule,” a “benefit” may only mitigate damages suffered from the same interest.229 In Cockrum, since the damages compensated plaintiff’s economic interest, plaintiff’s emotional “benefit” of parenthood did not act as an “offset” to the damage award.230 However, two concurring opinions stated that regardless of the label placed on the “benefit,” the trier of fact should be permitted, on a case-by-case basis, to consider the actual “benefits” of parenthood.231 In another Illinois appellate case, Pierce v. DeGarcia,232 the appellate court, following the concurrences in Cockrum, held that the jury should be permitted to consider any “potential benefits” an unplanned child gives to his parents, as one factor in calculating damages,233 regardless of whether the benefit is characterized as emotional or economic.

Whether parenting provides any “benefit” to a person is purely a personal decision, whether the child is normal or deformed. Courts, in other contexts, have recognized that parenthood can not be considered a “benefit” as a matter of law.234 They should also recognize the inequity of imposing their assessment of the “benefits” of parenthood, on any set of parents.

225. 503 F. Supp. at 983.
226. 503 F. Supp. at 983 n.2.
227. 99 Ill. App. 3d 271, 425 N.E.2d 968 (1981). In Cockrum a healthy child was born after a negligently performed sterilization and the parents sued for the expenses of raising and educating the child. Id. at 272, 425 N.E.2d at 969.
228. Id. at 274, 425 N.E.2d at 970. See note 144 supra.
230. 99 Ill. App. 3d at 274, 425 N.E.2d at 970.
231. See Id. at 275-77, 425 N.E.2d at 971-73 (Linn, J. and Romiti, J., concurring).
232. No. 81-360 (Third Illinois Appellate Division).
233. Id.
234. Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971); Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977). Both courts specifically note that if parenthood were such a “benefit” family planning through contraception would not be so widespread. 187 N.W.2d at 513; 260 N.W.2d at 175.
An argument is often made in wrongful conception cases, where the child is normal, that in addition to the emotional benefit of parenthood, the child provides some economic benefit to the parents either in income after majority or in support to the parents in their old age. Under this theory, an “offset” would be proper against the damage award even if only pecuniary losses are compensated. However, in the wrongful birth context, where the child is abnormal, this theory is untenable because the child, unable of self-support, will probably not be able to provide economic benefits for his or her parents. The Robak district court’s silence on whether the “benefits” of parenthood are characterized as emotional or pecuniary, and whether the “special benefits rule” should be applied may indicate that either the court failed to even consider this aspect of “offsets” or that these questions are more relevant to the wrongful conception context.  

Another major unresolved issue concerns whether emotional distress damages are compensable in a wrongful birth action. Emotional distress damages were not sought in the Robaks’ complaint so the court did not have the opportunity to address the issue. However, a request for emotional distress damages should be an integral part of the wrongful birth claim. An emotional distress injury may be considered either as a one-time injury resulting from the realization of the child’s condition at birth, or a continuing injury resulting from the distress in raising the child and dealing on a daily basis with the deformity. Where the injury is characterized as a one-time injury, a lump-sum award would be the appropriate remedy; but if the injury is ongoing, the reversionary trust would provide the same protection against overcompensating the parents as it did with respect to pecuniary losses.  

The trend seems to be moving toward permitting recovery for the negligent infliction of emotional distress. Courts are recognizing that emotional trauma is very real and that malingerers can be distinguished from those with genuine claims. The reversionary trust con-

235. Wrongful conception is the cause of action resulting from a negligent sterilization. In almost all such cases the child born is a normal, healthy one. See note 2 supra.
236. The author spoke with Barbara Klein of Karlin & Fleischer, Chicago, Illinois in October, 1981. Ms. Klein, one of the attorneys for the Robaks stated that since there was not enough case support favoring an emotional damages award, none was included in the complaint.
239. See notes 176-79 supra and accompanying text.
240. See notes 81-97 supra and accompanying text.
241. Dillon v. Legg, 68 Cal.2d 728, 69 Cal. Rptr. 72, 441 P.2d 912 (1968); Rickey v. Chicago
cept may influence courts to move toward permitting recovery for emotional distress in wrongful birth actions as either parasitic damages of the negligence, or as a "bystander," since the trust would insure no over compensation where the "loss period" could not be calculated with certainty.

CONCLUSION

Once establishing liability for wrongful birth, the Robak case made a significant contribution to the resolution of damage calculation by suggesting both an equitable approach to calculating damages and a vehicle for implementing the damage award. The "loss period" has an important impact on the total recovery and whether losses are, in fact, adequately compensated. In cases where the child can never be self-supporting, the Robak decisions hold that the "loss period" must extend to the full life expectancy shown on actuarial tables for healthy children. However, the court chose this "loss period" only after it promulgated the reversionary trust. The reversionary trust allayed the courts' fears that, while assuring reimbursement for all of the parents' losses, an error in judgment regarding the proper "loss period" would not shower a windfall on the parents if the child died before the end of that "loss period." Future courts experiencing a similar hesitancy can similarly protect against inequities while at the same time guaranteeing a just settlement for the injured party by utilizing a reversionary trust.

The reversionary trust played no role, however, in the district court's decision regarding appropriate "offsets," because the court readily adopted the "defects added-on" approach of the Jacobs' court. Holding that no "offset" was appropriate for the costs of raising a normal child since all expenses were proximately caused by the physician's negligence, the Seventh Circuit returned to the traditional notion of remedy—to place the injured party where he would have been had the wrong not occurred. The silence of the Robak courts on the "special benefits rule," coupled with its denial of the "offset" for childrearing may indicate that in the wrongful birth context no "offset" is proper.

The formula for damages designed by the Robak decisions provides a meaningful approach to damage calculation for wrongful birth claims. We need await future decisions to know if the reversionary

trust will receive judicial acceptance as the vehicle for equitably compensating the wrongful birth injury. Future courts should adopt the Robak approach and focus their attention toward resolving the unanswered questions.

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Note: After the text of this comment was already written, the Virginia Supreme Court in *Naccash v. Burger*, 290 S.E.2d 825 (Va. 1982) modified a judgment in a case holding that a wrongful birth damage action existed regarding Tay Sachs disease. The court reduced the verdict by $2274.26, refusing to allow for funeral expenses and the cost of the grave marker. The court did, however, permit recovery for the “expenses incurred in the care and treatment of their afflicted child” and emotional distress damages. *Id.* at 830-31.

The court distinguished the decision in *Berman* stating that a denial of pecuniary reimbursement in the *Naccash* case was not required because the “enormity of the financial burden... imposed upon the negligent physician, is not present here... Carrier Burger’s life span was measured in months, and the cost of her care and treatment was relatively inexpensive.” *Id.* at 830. This was so because Tay Sachs children usually die before they are five years old. The court indicated, however, that “the court should not perform a balancing test between competing economic interests in determining whether an injured party is entitled to a particular category of damages.” *Id.* See notes 77-80 *supra* and accompanying text. On the other hand, the court was compelled to follow the *Berman* court’s determination that emotional distress damages were compensable to avoid a perversion of justice. *Id.* at 831. In *Naccash* the court determined that the emotional distress was a direct result of the negligence of the doctor instead of the result of being a bystander. *Id.* See notes 98-112 *supra* and accompanying text.