

EXHIBIT H

Restatement (Second) of Torts § 920 (1979)

Restatement of the Law - Torts

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Restatement (Second) of Torts

Division 13. Remedies

Chapter 47. Damages

Topic 2. Diminution of Damages

§ 920 Benefit to Plaintiff Resulting from Defendant's Tort

Comment:

Reporter's Note

Case Citations - by Jurisdiction

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.

Comment:

a. The rule stated in this Section normally requires that the damages allowable for an interference with a particular interest be diminished by the amount to which the same interest has been benefited by the defendant's tortious conduct. Thus if a surgeon performs an unprivileged operation resulting in pain and suffering, it may be shown that the operation averted future suffering. (See Illustration 1). If a surgeon has destroyed an organ of the body, it may be shown in mitigation that the operation improved other bodily functions. (See Illustration 2). Likewise one who has interfered with the physical condition of land can show in mitigation, except in cases like those dealt with in Comments *c*, *d* and *f*, that the change resulted in an improvement to the land. (See Illustration 3).

Illustrations:

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1. A, a surgeon, having been directed to examine but not to operate upon B's ear, performs an operation that is painful but that averts future pain and suffering. The diminution in future pain is a factor to be considered in determining the amount of damages for the pain caused by the operation.
2. A, a surgeon, without B's consent, operates upon B's eye, causing B to lose the sight in that eye. In an action of battery, it may be shown in mitigation of damages for the loss of the eye that had A not operated, the sight of the other eye would have been lost.
3. A tortiously digs a channel through B's land, thereby making it impossible to grow crops upon the land through which the channel runs. It may be shown in mitigation that the digging of the channel drains the remainder of B's land, making it more valuable.

b. Limitation to same interest. Damages resulting from an invasion of one interest are not diminished by showing that another interest has been benefited. Thus one who has harmed another's reputation by defamatory statements cannot show in mitigation of damages that the other has been financially benefited from their publication (see Illustration 4), unless damages

are claimed for harm to pecuniary interests. (See Illustration 5). Damages for pain and suffering are not diminished by showing that the earning capacity of the plaintiff has been increased by the defendant's act. (See Illustration 6). Damages to a husband for loss of consortium are not diminished by the fact that the husband is no longer under the expense of supporting the wife.

Illustrations:

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4. A charges B with murder. In an action for defamation in which B claims no special damages, the defendant cannot show in mitigation that the business of B, a seller of soft drinks, has been increased as the result of the charge.
5. A charges B with being a member of a secret order. B brings an action for defamation alleging as special damage the loss of income by B as a surgeon. A can show in mitigation of damages that because of the false charge, B has been enabled to attract crowds to lectures given by him, to his great profit.
6. A tortiously imprisons B for two weeks. In an action brought by B for false imprisonment in which damages are claimed for pain, humiliation and physical harm, A is not entitled to mitigate damages by showing that at the end of the imprisonment B obtained large sums from newspapers for writing an account of the imprisonment.

c. Benefits common to the community. Although ordinarily the damages for harming land are measured by the difference in its value before and after the tort, it would be unjust to apply this measure of recovery when the tortious conduct increases values in the vicinity generally and at the same time causes special harm to the plaintiff. Therefore, the rule stated in this Section is limited to situations in which the tortious act has conferred a benefit in which the public generally does not share. Thus one whose house is continuously shaken by the operation of an adjoining factory is entitled to damages although the factory is so beneficial to the neighborhood that it enables the plaintiff to obtain more rent for his house than he did before. (See Illustration 7).

The statements in this Comment do not apply to the authorized or tortious taking of or harm to land for a public purpose, the rules for which are not within the scope of this Restatement.

Illustration:

Illustration:

7. A's factory emits acid fumes that the prevailing winds carry upon B's farm, destroying his vegetation. In spite of the fact that B's land has been increased in market value by the location of the factory, B is entitled to damages for the harm. These damages include the value of the destroyed vegetation and the difference between the rental value of the land with and without the fumes and, if B lives on the land, an amount for the personal discomfort or other harm to B and his family.

d. Causation. Under the rule stated in this Section to justify a diminution of damages the benefit must result from the tortious conduct. Thus one who, in boring for oil, fails to control his well, thereby causing the plaintiff's land and house to be covered with petroleum, is not entitled to have the damages reduced by showing that his success in drilling for oil in his land resulted in an increase in value of the plaintiff's land; the increase does not result from the tortious inundation but from the fact that oil is discovered. The rules of causation applicable to the creation and extent of liability (see §§ 435A, 435B and 917) apply to the diminution of damages. (See Illustration 8). Furthermore, if the plaintiff is entitled to claim damages based upon a valuation of property at a particular time, the damages are not reduced by a subsequent beneficial event. (See Illustration 9).

Illustrations:

Illustrations:

8. A knocks B down, as a result of which B is prevented from taking a ship that later sinks with all on board. B's damages for the battery are not diminished by his escape from death resulting from A's act. B, however, cannot recover damages for failing to receive medical treatment that he would have received if he had not missed the ship and the ship had not sunk. (See § 435B).
9. A fraudulently persuades B to purchase Blackacre for \$3000, although its value at that time is \$2000. Had Blackacre been as represented, the value would have been \$3500. The following week changes in the neighborhood cause Blackacre to appreciate in value to \$5000. B's measure of recovery is not diminished by the subsequent rise in market value.

e. On payments made to the injured party by the tortfeasor or by a joint tortfeasor, and on payment or other benefits conferred on the injured party by a third party, see § 920A.

f. *Equitable considerations.* The rule stated in this Section is limited by the general principle underlying the assessment of damages in tort cases, which is that an injured person is entitled to be placed as nearly as possible in the position he would have occupied had it not been for the plaintiff's tort. This principle is intended primarily to restrict the injured person's recovery to the harm that he actually incurred and not to permit the tortfeasor to force a benefit on him against his will. (Cf. Restatement of Restitution §§ 2, 112). Thus, when a person has land or chattels that he has devoted to a particular purpose, he is entitled to continue to use them for that purpose, and the person who interferes with the use is not entitled to have damages mitigated by the fact that he has added to their market value. In these cases the good faith, and reasonableness of the attitudes, of the parties are factors in determining the measure of recovery. Thus unless the plaintiff is capricious or spiteful and the defendant has acted by mistake, so that his conduct was not knowingly tortious (see Illustration 10), the damages may not be diminished by the fact that the defendant's interference has increased the monetary value of the property. On the contrary, if the owner has acted reasonably in restoring the property to its original condition, he may recover the cost of doing so. (See Illustration 11).

Illustrations:

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10. A, at the direction of B, a person who he thought was authorized, tears down a dilapidated building of no economic value on C's land and erects on the land a substantial building. After completion, A learns that B was an exasperated neighbor, acting without authority, because the dilapidated building was maintained by C solely out of spite to his neighbors. C is not entitled to substantial damages from A.

11. A, mistakenly believing that he is entitled to land that in fact forms a portion of a garden on B's estate, erects a garage on the land, which adds to the market value of the property. B is, nevertheless, entitled to recover damages for the amount reasonably expended by him in removing the garage and restoring the garden, unless this would cause undue hardship to A.

Reporter's Note

Comment a: Illustrations 1 and 2 are based on *Mohr v. Williams*, 95 Minn. 261, 104 N.W. 12 (1905).

See also *Maben v. Rankin*, 55 Cal.2d 139, 10 Cal.Rptr. 353, 358 P.2d 681 (1961); *Morris v. St. Paul City Ry.*, 105 Minn. 276, 117 N.W. 500 (1908).

Illustration 3 is taken from *Burtraw v. Clark*, 103 Mich. 383, 61 N.W. 552 (1894). See also *Mayo v. City of Springfield*, 138 Mass. 70 (1884); *Meier v. Portland Cable Co.*, 16 Or. 500, 19 P. 610 (1888); *Murphy v. City of Fond du Lac*, 23 Wis. 365, 99 Am.Dec. 181 (1868).

Cf. *Magnolia Metal Co. v. Gale*, 189 Mass. 124, 75 N.E. 219 (1905).

Comment b: With Illustrations 4, 5, and 6, compare *Northwest Oil Co. v. Haslett Warehouse Co.*, 168 Or. 570, 123 P.2d 985 (1942); *Caldwick v. Marysville Water & Power Co.*, 114 Wash. 562, 195 P. 1027 (1921); *Read v. Webster*, 95 Vt. 239, 113 A. 814 (1921); *Samples v. Kansas City R. Co.*, 232 S.W. 1049 (Mo.App.1921).

Comment c: Illustration 7 is based on *Levi v. Schwartz*, 201 Md. 575, 95 A.2d 322 (1953); *Wyatt v. Central Coal & Coke Co.*, 209 S.W. 585 (Mo.App.1918); *Mayrant v. City of Columbia*, 82 S.C. 273, 64 S.E. 416 (1909).

Comment d: For Illustration 9, see the cases cited in connection with Illustration 7, *supra*.

Case Citations - by Jurisdiction

G.A.1
G.A.3
G.A.D.C.
G.Fed.Cl.
G.D.Cal.Bktry.Cl.
D.D.C.
W.D.La.
D.Nev.
D.N.J.
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N.Y. Sup. Ct. App. Div.

N.Y. Sup. Ct.

N.C.

Ohio

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Okla.

Pa.

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Tenn.

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Va.

Wash.

W. Va.

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Wis. App.

Wyo.

C.A.1

C.A.1, 2010. Cit. in sup., com. (f) cit. in sup. Attorneys brought class action against Puerto Rico's integrated bar association, seeking a permanent injunction prohibiting it from charging them for life insurance as part of their annual dues, and seeking damages reflecting forced participation in the association's life-insurance program between 2002 and 2006, when the program ended. The district court granted summary judgment for plaintiffs. Affirming the district court's declaration of liability and its grant of injunctive relief, this court rejected defendant's argument that class members who did not want the insurance could not recover their premiums because they "benefitted" from coverage that they did not desire; it was a general rule of tort that damages were not reduced by conferring undesired benefits of some other species. *Brown v. Colegio de Abogados de Puerto Rico*. 613 F.3d 44, 53.

C.A.1, 2010. Cit. in ftn. Former client sued accounting firm and firm's partner over allegedly negligent tax advice that caused it to delay payment of its taxes. After a jury found in favor of client, the district court awarded damages. This court affirmed; while firm's argument that the benefits to client of the delay, which gave client the use of its money and allowed it to earn about 7% of the withheld funds, offset any interest and penalties imposed by federal and state tax authorities and might be a basis for reducing damages on remand, firm had not asked for a recalculation that reduced damages, but rather for a determination that there were no net damages. The court noted that, while a decision as to whether an offset should be allowed could be regarded as a policy choice, Massachusetts case law might well favor such an offset. *Haddad Motor Group, Inc. v. Karp, Ackerman, Skabowski & Hogan, P.C.*, 603 F.3d 1, 7.

C.A.1, 2005. Quot. in sup. Equipment lessee sued finance lessor for breach of contract, unjust enrichment, and fraud, after lessor failed to pay equipment vendors and a vendor sued lessee for purchase price of equipment; lessor counterclaimed for, inter alia, conversion of equipment. District court entered judgment for lessee. This court affirmed, holding that lessor's conversion counterclaim failed, since lessor did not show that it was damaged by conversion. Assuming that lessor was rightful owner of equipment and that lessee acted wrongfully in returning equipment to vendors, lessor still would owe vendors the purchase price. By returning equipment, lessee settled debt on lessor's behalf, and any damage lessor suffered from conversion would be offset by benefit conferred. *Eureka Broadband Corp. v. Wentworth Leasing Corp.*, 400 F.3d 62, 71.

C.A.3

C.A.3, 1977. Cit., quot. in fn. and Note cit. in fn. in disc. (T.D. No. 19, 1973). Plaintiff, after being refused admittance by a night manager to the service entrance of a restaurant owned by defendant corporation, struggled with the manager and was hit on the head. Plaintiff was allegedly so dazed as a result that he fell through the restaurant window sustaining injuries that necessitated amputation of his arm. Appeal and cross-appeal were taken from judgment awarding plaintiff damages for loss of past and future earnings, and for pain, suffering, disfigurement, and embarrassment but denying damages for future rehabilitative and medical expenses. The court modified in part, reversed and remanded in part, holding, inter alia, that the evidence was sufficient to support an award for future medical and rehabilitative expenses. *Varlack v. SWC Caribbean, Inc.*, 550 F.2d 171, 179.

C.A.D.C.

C.A.D.C. 1983. Cit. in fn., com. (b) cit. in fn. Following the birth of a healthy child subsequent to a sterilization operation, a woman brought a wrongful conception case against the surgeon who had performed the unsuccessful operation. The district court upheld the jury's verdict of damages for the woman's medical expenses, pain, suffering, and mental anguish resulting from the pregnancy and childbirth, and the finding of lack of informed consent, but disallowed the award of childrearing expenses, and cross-appeals were taken. This court affirmed, holding, inter alia, that in view of the fact that the woman underwent the sterilization operation for therapeutic reasons, because of danger to her of pregnancy and childbirth, but later bore a healthy, prized child, the district court properly allowed the benefits of childbearing to be offset against the expenses thereof, but not against the expenses associated with the pregnancy and childbirth. *Hartke v. McKelway*, 707 F.2d 1544, 1558, certiorari denied 464 U.S. 983, 104 S.Ct. 425, 78 L.Ed.2d 360 (1983).

Ct.Fed.Cl.

Ct.Fed.Cl. 2004. Com. (f) cit. in disc. Owners of affordable-housing projects financed by federal government mortgage loans filed suit following the enactment of two statutes restricting the exercise of the mortgage-prepayment option in the contracts; owners argued that such legislation constituted a breach of contract and a taking of property. Finding that there was a breach of contract, this court, on remand, held, inter alia, that the owners should not be forced to mitigate their damages by entering into substitute arrangements with the government that were unreasonable and undesirable. *Franconia Associates v. U.S.*, 61 Fed.Cl. 718, 757.

C.D.Cal.Bkrcty.Ct.

C.D.Cal.Bkrcty.Ct. 2001. Quot. but dist. After Chapter 7 debtors brought class action against first mortgage holder, the district court referred several issues to the bankruptcy court. The bankruptcy court held, inter alia, that plaintiffs were entitled to compensatory and punitive damages for payments they made to defendant, who was in contempt of court when it continued collection activities against plaintiffs despite automatic stay imposed by bankruptcy court. *In re Henry*, 266 B.R. 457, 480.

D.D.C.

D.D.C. 1981. Cit. in fn. The plaintiff brought a wrongful conception case against the defendant doctor, who had performed an unsuccessful sterilization operation on the plaintiff. The jury found the defendant negligent and awarded the plaintiff damages for expenses, pain and suffering, and for the future cost of raising the child less the benefits of the child's comfort and society. The defendant moved for a judgment n.o.v. and for a new trial. With respect to the issue of damages for the costs of raising the plaintiff's healthy baby, the court recognized the division among the courts that had addressed the issue. The court further noted that most courts which allowed recovery of childrearing costs required an offset for the value of the child's society and comfort. However, the court determined that the plaintiff should not recover the costs of raising the child when the sterilization was sought for therapeutic reasons (as opposed to economic reasons) and the plaintiff prized her child.

The court accordingly vacated the damage verdict and a new trial was ordered to award damages in accordance with the court's reasoning. *Hartke v. McKelway*, 526 F.Supp. 97, 104, judgment affirmed 707 F.2d 1544 (1983), certiorari denied 464 U.S. 983, 104 S.Ct. 425, 78 L.Ed.2d 360 (1983).

W.D.La.

W.D.La.1988. Subsec. (a) cit. in disc. A railroad employee who was injured during the course of his employment sued his employer for damages. The court granted the employer's motion to exclude evidence of the plaintiff's medical expenses that had already been paid under a group insurance plan funded by the defendant. The court held that the collateral source rule, which prohibited crediting payments that had been conferred on an injured party by an independent source against the tortfeasor's liability, did not apply to the payments received by the plaintiff under the group policy. *Lyons v. Southern Pacific Transp. Co.*, 684 F.Supp. 909, 910.

D.Nev.

D.Nev.2008. Cit. but dist. Current landowners of site formerly used for military purposes as a magnesium plant brought a contribution action under CERCLA to recover certain environmental cleanup costs against the United States and another former owner of the site. This court, inter alia, denied plaintiffs' request for a hearing on their motion to exclude evidence of environmental insurance payments they had received. The court declined to extend application of the "collateral source rule" of tort law to the CERCLA context, reasoning that, unlike cases that sounded in tort, CERCLA actions were not injury actions in which the injured party was seeking damages to be made whole again. Rather, in the context of a CERCLA action, the environment was the injured party, and permitting plaintiffs to receive a windfall beyond reimbursement for the money they fronted for the cleanup would allow them to profit from their own and prior contamination simply by being in the subsequent chain of title. *Basic Management Inc. v. U.S.*, 569 F.Supp.2d 1106, 1123.

D.N.J.

D.N.J.1999. Cit. in headnote, quot. in disc., com. (a) quot. in disc. Clients brought professional malpractice action against accounting firm, alleging that, because of defendant's negligence, they were required to pay the IRS a tax deficiency of approximately \$60,000. Defendant moved to implead individual accountant, and all parties moved for summary judgment. Denying the motions, the court held, in part, that plaintiffs could recover from defendant the interest they paid IRS, but that defendant could invoke both the collateral source rule and the benefits rule to reduce plaintiffs' recovery; that, if defendant's third-party complaint had not been procedurally defective, it would have been able to seek contribution, though not indemnity, from individual accountant; and that material factual issues existed as to whether defendant failed to adhere to professional standards. *Ronson v. David S. Talesnick, CPA*, 33 F.Supp.2d 347, 348, 354.

E.D.N.Y.

E.D.N.Y.1993. Cit. in sup. A buyer of gasoline shipped in a carrier's oceangoing tanker sued under the Carriage of Goods by Sea Act for damages caused by darkening of the gasoline's color while in the carrier's possession. This court held that the buyer had failed to prove diminution in the gasoline's fair market value but was entitled to damages for the incidental cost of restoring the gasoline to a marketable color. Under the collateral source rule, the carrier could not benefit from any prior insurance payment made to the buyer for the damaged cargo. *Texport Oil Co. v. M/V Amolyntos*, 816 F.Supp. 825, 844, affirmed in part, reversed in part 11 F.3d 361 (2d Cir.1993).

S.D.N.Y.

S.D.N.Y. 2001. Com. (d) cit. in disc. Trustee for liquidation of securities broker-dealer under the Securities Investor Protection Act moved for an order upholding his determinations with respect to six customers' claims based on unauthorized trading in their accounts. Annuling the trustee's determinations and remitting, the court held that customers could pursue claims for cash, rather than receive a return of their stock that broker-dealer had sold for cash, which it had then reinvested without authorization. The court also held that it was not equitable for trustee to require customers to pay back certain cash amounts they had received from broker's unauthorized transactions if trustee was proposing merely to return their stock, which was now virtually worthless. *In re Stratton Oakmont, Inc.*, 257 B.R. 644, 658, reversed 42 Bank.Ct.Dec.(CRR) 48, 2003 WL 22698876 (D.D.N.Y.2003).

N.D. Ohio

N.D. Ohio, 2009. Quot. in case quot. in sup. Mortgage borrowers sued mortgage lender, alleging that it violated Ohio statutes prohibiting residential mortgage prepayment or refinancing penalties in excess of 1% of the original principal loan amount. Denying plaintiffs' motion for class certification, this court held, inter alia, that any appropriate damage calculation had to consider the benefits received by class members, in the form of lower interest rates, by being subject to the prepayment penalty, and that the individualized nature of such calculations weighed against a finding of predominance. The court explained that it was equitable to apply Ohio's benefits rule here, because the class members, if successful, should only recover the harm they actually incurred. *Gawry v. Countrywide Home Loans, Inc.*, 640 F.Supp.2d 942, 958.

D.S.C.

D.S.C. 1983. Cit. in disc. Plaintiff parents successfully brought an action in wrongful birth against the defendant hospital for failing to advise the plaintiffs of the risk that their child might be afflicted with Down's Syndrome and for failure to diagnose a cardiac disorder. The only issue was the proper amount of damages. The court awarded the parents economic damages equaling their expenses for the duration of the child's life. The court also awarded damages for the parents' emotional suffering, following the trend to abandon the presence of physical manifestation of the emotional harm as an absolute prerequisite to recovery. In addition, the court applied the "benefits rule," holding that the benefits flowing from the child's birth amounted to 50% of the damages for mental anguish, and entered the award accordingly. *Phillips v. United States*, 575 F.Supp. 1309, 1319.

D.S.C. 1981. Cit. in disc. Parents of a child born with Down's Syndrome brought an action against the United States, alleging that the failure of a doctor at a Naval medical center to advise, counsel, and test the mother during her pregnancy concerning the risks of Down's Syndrome constituted a breach of the physician's duty. On motion for summary judgment, the defendant asserted, inter alia, that any failure of the Naval physician in advising, counseling, and testing the plaintiff did not constitute actionable negligence; that an allegation of "wrongful birth" does not state a cause of action upon which relief can be granted; and that the plaintiffs had not suffered any damage cognizable at law. The court denied the defendant's motion for summary judgment, holding, inter alia, that, under South Carolina law, a "wrongful birth" claim was a legally cognizable cause of action. The court noted that, in calculating the plaintiffs' damages, any benefits they derive from the defendant's negligence may properly be offset against the detriments flowing from that conduct, in accordance with traditional tort principles, but that the complexity of this balancing process is not directly relevant to the validity of a cause of action. Accordingly, the court held that if a claim is legally cognizable, mere difficulty in the ascertainment of damages would be insufficient to preclude the action. *Phillips v. United States*, 508 F.Supp. 544, 550.

Ala.

Ala. 1982. Cit. in disc., quot. in spec. conc. op. in sup., com. (b) cit. in spec. conc. op. (Erron. cit. as com. (6).) Following an operation for the removal of cysts, a surgeon told his patient that both of her fallopian tubes had been removed and she was sterile. When she subsequently became pregnant and delivered a healthy child, the former patient brought this negligence

action for damages. The plaintiff settled with the hospital for the amount of her medical expenses; the trial court then granted summary judgment in favor of the surgeon, stating that, as a matter of law, the plaintiff could not recover more than the settlement amount, which comprised the actual medical expenses incurred in giving birth. The plaintiff appealed, and this court reversed and remanded for trial. The court rejected the "benefit" rule of damages as being too speculative, contrary to public policy, and harmful to the family unit and the child's emotional and mental well-being. However, if liability were established at trial, the plaintiff could recover not only medical expenses, but also damages for pain and suffering, mental anguish, and loss of consortium. A specially concurring opinion differed with the majority's view on the "benefit" rule. It would allow complete recovery in wrongful pregnancy actions through application of the rule. *Boone v. Mullendore*, 416 So.2d 718, 721, 726.

Alaska

Alaska, 1990. Cit. but not fol. A federal district court certified to the Supreme Court of Alaska the question whether, when a child was conceived as a result of a tortious sexual relationship between a therapist and his client, the client could recover from the therapist the costs of raising the child. Answering in the negative, the court said that permitting one parent to sue the other in tort for the wrongful birth of their child was against public policy. However, assuming that the therapist committed professional malpractice by seducing his client, the client was entitled to recover tort damages for any injury to her resulting from the therapist's conduct, including medical expenses, pain and suffering, lost wages, emotional distress, and punitive damages, if warranted. *Poor v. Moore*, 791 P.2d 1005, 1007.

Ariz.

Ariz. 1983. Cit. in disc., quot. in fn. in disc. coms. (a) and (b) cit. in fn. in disc., and com. (b) quot. in fn. to conc. and diss. op. The parents of a healthy but unplanned child born after a negligently performed vasectomy brought a wrongful pregnancy action against a hospital. The lower court denied the hospital's motion for partial summary judgment. This court affirmed, holding that the proper measure of damages in a wrongful pregnancy action was past and future pecuniary and nonpecuniary expenses incurred by the parents, less a deduction for any pecuniary and nonpecuniary benefits that the parents would receive by virtue of having a healthy child. One justice, concurring in part and dissenting in part, argued that the pecuniary harm of raising the child should be offset only by the corresponding pecuniary benefit; the emotional benefits of a parent-child relationship should be applied only to offset the corresponding emotional harm. *University of Ariz. v. Superior Court*, 136 Ariz. 579, 667 P.2d 1294, 1297, 1299, 1303, 1304.

Ark.

Ark. 1982. Cit. in disc. and quot. in diss. op. The plaintiffs, parents of a healthy child, brought suit against the doctor who negligently and unsuccessfully performed a vasectomy on the husband, seeking to recover for the expense of raising the child. The lower court granted the doctor's motion for summary judgment and the plaintiffs appealed. The appellate court reviewed the various approaches other courts had taken to the "wrongful birth" cases, including the possibility of allowing recovery that is offset by the jury for the "benefits" the parents receive from a child. However, the court concluded that it was against public policy to allow any recovery for the cost of raising a child and affirmed the lower court's decision. The dissent supported the adoption of the "benefit rule," whereby the jury could offset the expenses of raising a child with the joy and comfort the child provided. *Wilber v. Kerr*, 275 Ark. 239, 628 S.W.2d 568, 571, 572.

Cal.

Cal. 2003. Cit. in disc. Railroad employee, who was injured while using a sledgehammer to drive in spikes that a spike machine had only partially driven in, sued railroad for negligence under the Federal Employers Liability Act (FELA). Trial court entered judgment on a jury verdict awarding plaintiff damages, and appellate court affirmed. This court affirmed in part

and reversed in part, holding, *inter alia*, that, in a FELA action brought in state court, the jury, as a general rule, should not be told of the injured employee's ineligibility for benefits flowing from California's workers' compensation law or any other collateral source. However, a highly unusual circumstance supported trial court's instruction on plaintiff's ineligibility for workers' compensation, in that plaintiff had suffered a previous injury and had applied for workers' compensation benefits as a result of that injury. *Lund v. San Joaquin Valley R.R.*, 31 Cal.4th 1, 1 Cal.Rptr.3d 412, 71 P.3d 770, 774.

Cal.1982. Quot. in part in *sup.* The plaintiff, a minor child who was born deaf, sought to recover from various medical care providers. The lower court dismissed the case. The plaintiff appealed and the intermediate appellate court affirmed. This court reversed and remanded for further proceedings. The court held that in a wrongful life suit the plaintiff could recover special damages for extraordinary expenses necessary to treat the hereditary ailment, but not general damages for being born impaired. The court noted that tort damages were to be compensatory, and that the defendant was entitled to a setoff if the tortious conduct also conferred a benefit on the plaintiff. The defendants did confer a benefit, life, on the plaintiff, and any award of general damages would require the jury to consider the value of nonlife because that was the position the plaintiff would have occupied absent the defendants' negligence. The court denied general damages because a reasoned, nonarbitrary award was not obtainable, considering the incalculable nature of both elements of the harm-benefit equation. *Turpin v. Sortini*, 31 Cal.3d 220, 182 Cal.Rptr. 337, 347, 643 P.2d 954, 961.

Cal.App.

Cal.App.2002. Quot. in *sup.* Parents and minor child brought medical-malpractice action against sperm bank and physicians after child inherited kidney disease from sperm donor. The trial court denied parents motion for leave to amend to add claim for punitive damages. Denying parents' petition for writ of mandate, this court held, *inter alia*, that child could not recover general damages because of their incalculable nature based on a harm-benefit analysis, nor could she recover lost earnings from bank or physicians, neither of whom caused the child's kidney abnormalities. *Johnson v. Superior Court*, 101 Cal.App.4th 869, 887, 124 Cal.Rptr.2d 650, 664.

Cal.App.1989. Quot. in *sup.*, com. (f) cit. in *sup.* The purchasers of an apartment building sued the sellers and the seller's real estate broker/managing agent of the property for intentional misrepresentation, negligent misrepresentation, concealment, and negligent nondisclosure when extensive dry rot was discovered in the building's internal wood structure, requiring unanticipated expenses for the purchasers. The trial court rendered judgment on a jury verdict awarding the plaintiff \$200,000 against the sellers and broker jointly and severally, gave the sellers judgment on their cross-claim against the broker for complete indemnity on the plaintiff's judgment, exonerating them from any fault that contributed to the plaintiffs' injuries, and denied the sellers the attorney's fees they sought from the broker. The sellers appealed the lower court's denial of attorney's fees, but this court affirmed, holding that the pecuniary benefit conferred on the sellers by their broker's tortious conduct, an increase in the purchase price, substantially exceeded their pecuniary damage incurred in attorney's fees; therefore the lower court's decision was supported by the evidence, was correct in law, and was equitable under the circumstances. *Heckert v. MacDonald*, 208 Cal.App.3d 832, 256 Cal.Rptr. 369, 372, 373.

Colo.

Colo.1988. Cit. in *disc.* Parents of a child born blind sought their physicians' advice about the possibility that a second child would be born blind. In reliance on the physicians' opinion that the infliction was not hereditary, the parents chose to have a second child. The second child was born blind also, and after he was diagnosed as having a hereditary form of blindness, the parents sued the physicians for wrongful birth and, on behalf of the second child, for wrongful life. The trial court dismissed the claims. This court affirmed in part and reversed in part, holding, *inter alia*, that the parents stated a valid cause of action for wrongful birth, and that they were entitled to prove and to recover at least the extraordinary medical and education expenses they had incurred and would incur if they could establish that the expenses were proximately caused by the physicians' negligence. The court reasoned that the extraordinary financial burden the plaintiffs suffered because of their son's blindness was sufficiently unrelated to the pleasure they would derive from raising him to preclude operation of the

benefit rule. *Lininger v. Eisenbaum*, 764 P.2d 1202, 1206.

Conn.

Conn. 1982. *Cit. in sup.* An action was brought against a physician and his professional corporation to recover for damages for negligent sterilization procedures performed on the plaintiff. The plaintiff conceived a child after the procedure was performed, and the child was born with a mild orthopedic defect. The jury award to the plaintiff included ordinary childrearing costs. The defendants appealed, conceding liability, but arguing that the plaintiff should have been awarded only the costs of the child's orthopedic expenses. They maintained that damages for a wrongful conception claim could not encompass ordinary childrearing expenses. This court rejected that contention and affirmed the judgment, establishing the rule of allowing parents to recover for the expenses of rearing an unplanned child to majority when the child's birth resulted from negligent medical care. The court noted that such recovery could be reduced by any benefits conferred on the parents by having and raising the child, the amount to be determined on a case-by-case basis, balancing the costs and benefits. Finally, because the defendants failed to claim that the parents failed to mitigate their damages by resorting to abortion or adoption, the court merely observed that the parents will have compromised their right to recover damages only if they have failed to use "reasonable effort or expenditure after the commission of the tort." *Ochs v. Borrelli*, 187 Conn. 253, 445 A.2d 883, 886.

Del.Super.

Del.Super. 1989. *Cit. but dist.* A condominium association sued the condominium builders for design and construction defects under theories of contract and tort. The plaintiff and defendants filed pretrial motions to resolve questions concerning the measure of damages. This court held that the appropriate measure of damages was the reasonable cost of remedying the defects and rejected the defendants' argument that the cost of repairs should be prorated for the expired useful lives of defective building parts, because quantification of the diminished use, as well as the assessment of useful lives of the parts, presented an overwhelming problem of proof. The court rejected the defendants' suggestion that the useful life concept be employed here in a tort context, noting that the concept had the potential of giving the defendants too much of a benefit while failing to make the plaintiff whole. *Council of Unit Owners v. Carl M. Freeman Assoc.*, 564 A.2d 357, 364.

D.C.App.

D.C.App. 1987. *Cit. in disc.* A 34-year-old pregnant woman was informed by her doctor that genetic testing and amniocentesis were unnecessary in her case. After her child was born with Down's Syndrome, a birth defect detectable through amniocentesis, the woman sued the doctor for wrongful birth. The trial court dismissed for failure to state a claim. Reversing, this court held, *inter alia*, that the benefit rule and the avoidable consequences doctrine did not come into play in a true wrongful birth case, and that the appropriate measure of damages would be the amount that would compensate the plaintiff for all of the damages proximately caused by the defendant's negligence, including extraordinary medical and other health care expenses incurred as a result of the child's birth defect. *Haymon v. Wilkerson*, 535 A.2d 880, 884.

D.C.App. 1984. *Quot. in part in sup., quot. in diss. op., com. (b) quot. in part in diss. op., illus. 4 and 6 cit. in ftm. in diss. op.* The plaintiff sued under the principle of respondeat superior, alleging that two physicians employed by the defendant negligently performed a sterilization procedure. After the birth of a baby, the plaintiff sued to recover the costs of her pregnancy and the cost of rearing her healthy child. The trial court permitted the plaintiff to pursue the claim on the cost of the pregnancy, but not that for rearing the child. This court affirmed, concluding that the defendant's tortious conduct conferred a benefit on the plaintiff and that the plaintiff could have avoided the cost of raising the child by, for example, putting the child up for adoption or procuring an abortion. A dissenting opinion said that childrearing expenses should be recoverable since they were a foreseeable consequence of a negligently performed sterilization. *Flowers v. District of Columbia*, 478 A.2d 1073, 1076, 1080.

Fla.

Fla.1992. Quot. and cit. in conc. and diss. op., coms. cit. in conc. and diss. op. The parents of a child born with a genetic impairment sued a hospital district and several physicians for failure to discover the mother's genetic abnormality prior to the child's birth. The trial court dismissed the child's "wrongful life" claim and granted summary judgment for most of the defendants on the parents' "wrongful birth" claim on limitations grounds. The court of appeals affirmed in part and reversed in part, but certified to this court based on conflict of decisions and a question of great public importance regarding the statute of repose. This court, answering that the statute of repose began to run from the date of the negligent advice and not the date of the impaired child's birth, quashed in part, approved in part, and remanded, holding, inter alia, that the tort of "wrongful life," referring to liability for suffering caused by a birth defect, was not cognizable, but that the "wrongful birth" tort, encompassing all extraordinary expenses caused by the impairing condition for the duration of the child's life expectancy, was cognizable. A concurring and dissenting justice argued that the "benefits rule" of recovery was not applicable in every case of wrongful birth, as under the facts here the birth of a genetically impaired child did not confer a "special benefit" on the parents. *Kush v. Lloyd*, 616 So.2d 415, 427.

Fla.1984. Cit. in diss. op., quot. in fn. to diss. op. Parents sued physician and professional association for "wrongful birth" of two children following husband's vasectomy. Trial court entered judgment for parents. Appellate court affirmed as to liability but affirmed in part and reversed in part as to damages. This court affirmed, stating that special costs related to rearing a defective child were recoverable as damages, but ordinary childrearing expenses were not. The dissent argued for application of the benefits rule, recognizing a right to recovery but requiring mitigation where the interest which was harmed was also benefitted. *Fassoulas v. Ramcy*, 450 So.2d 822, 827, 828.

Fla.App.

Fla.App.1983. Com. (e) quot. in case quot. in disc. Parents brought this medical malpractice action against an obstetrician and a hospital because of the retardation and palsy suffered by their infant since birth. The plaintiffs claimed that the medical defendants negligently failed to diagnose and effectively remedy the infant's oxygen deprivation just before birth. The defendants denied this and advanced the theory, supported by expert testimony and other proof, that the child's abnormalities were congenital. The district court of appeal held that the jury's verdict for the defendants was tainted by evidence they improperly adduced to show that the special therapy and education required by the minor plaintiff, as a result of his condition however caused, was available to his family from charitable or governmental resources at little or no cost. The collateral source rule foreclosed the cross-examination of the parents' expert witness concerning the availability of therapy at a reduced cost through charities and the like, and the error in allowing such cross-examination was reversible. If there had to be a windfall, it was more just that the injured party profit rather than the wrongdoer be relieved of full responsibility from his wrongdoing. The judgment was therefore reversed and the case remanded for a new trial. *Stanley v. U.S. Fidelity & Guar. Co.*, 425 So.2d 608, 613-614, decision quashed and remanded 452 So.2d 514.

Fla.App.1982. Cit. in fn. to diss. op. The plaintiffs went to the defendant physician, who performed a vasectomy on the plaintiff husband. Thereafter, the wife conceived and gave birth to two children, one of whom had severe congenital defects. The plaintiff brought suit based on medical malpractice for the two "wrongful births," and specially pled various items of consequential damages, including a claim for past and future expenses for the care and upbringing of the two children. The jury returned a special verdict in favor of the plaintiffs, and the defendants appealed. This court reversed and remanded, holding that the parents were not entitled to damages for past and future rearing expenses unless the child was born with substantial physical or mental defects, in which event, the parents would be entitled to recover the special medical and educational expenses, apart from normal rearing costs, associated with raising such a child to majority. The dissent would have held that in this situation the jury should be instructed to assess costs of raising the normal, healthy child to majority, assess the reasonable costs of supporting the abnormal child for its natural life span, and allow an offset for the value of the children's aid, comfort and society. *Ramcy v. Fassoulas*, 414 So.2d 198, 203, decision approved 450 So.2d 822 (1984). See above case.

Fla.App.1980. Cit. in disc. Quot. in fn. in diss. op. A jury found that physician-employees of a hospital had negligently performed a tubal ligation on a woman, resulting in her pregnancy and the subsequent birth of a child. The woman was awarded damages for medical expenses, lost wages, and pain and suffering resulting from the pregnancy, but, on appeal, the sole issue for consideration was the inclusion in the final judgment of \$19,500, which was assessed for past and future costs of raising the child, offset by the value of his love and companionship. The court, following the majority rule, reversed the lower court on this issue, relying on the proposition that a parent cannot be said to have been damaged by the birth and rearing of a normal, healthy child. The dissent argued that the jury verdict should be affirmed, stating that, inasmuch as the court's decision was based upon public policy considerations, a well-instructed jury would better express the view and conscience of the community. *Public Health Trust v. Brown*. 388 So.2d 1084, 1085-1086.

Ga.

Ga.1990. Quot. in fn., cit. in case cit. in fn. A doctor and his associates failed to counsel a 37-year-old woman on the risks of pregnancy associated with her increased maternal age and failed to inform her concerning the availability of amniocentesis. After the woman gave birth to a child with Down's Syndrome, the parents sued for wrongful birth. The trial court denied the defendants' motion to dismiss, holding, inter alia, that a wrongful birth action was maintainable under Georgia law. The intermediate appellate court affirmed in part, agreeing that such an action was viable and that the parents' extraordinary child-care expenses should not be offset by the emotional benefits of parenthood. Reversing, this court held that there was no cause of action for wrongful birth in Georgia and that the trial court should have granted the defendants' motion for summary judgment. The court noted that in jurisdictions where wrongful birth actions were recognized, there was no consensus whether damages should be offset by emotional or other benefits accruing to the parents by reason of the life, love, and affection of the impaired child. *Atlanta Obs. & Gyn. Group v. Abelson*. 260 Ga. 711, 398 S.E.2d 557, 562, on remand 198 Ga.App. 632, 403 S.E.2d 253 (1991).

Ga.1984. Cit. in disc. The plaintiff mother sued the defendant hospital for negligence and fraudulent misrepresentation when, after a sterilization procedure was performed, she gave birth to a child with a club foot. This court affirmed the lower court, holding that a cause of action for wrongful pregnancy existed. However, on the issue of damages, the court held that the economic consequences of birth and childrearing were burdens differing in species from the benefits flowing from parenthood. Because the "offset" approach to damages attempts to weigh one against the other, the court refused to apply the rule as a measure of damages. Therefore, the costs of raising a child were not recoverable. *Fulton-DeKalb Hosp. Authority v. Graves*, 252 Ga. 441, 314 S.E.2d 653, 655.

Idaho

Idaho, 1984. Cit. in sup. The parents of a child born with multiple birth defects brought a wrongful birth action against the physician, alleging that if the physician had not failed to diagnose rubella at the time of diagnosing the pregnancy, the parents would have chosen an abortion. The trial court granted the physician's motion for summary judgment. This court affirmed in part, reversed in part, and remanded. The court held that the parents had a valid claim and could recover medical costs, damages for emotional distress (though emotional benefits attributable to the birth of the child should be considered), and expenses for the support of the child beyond the age of majority if the child is still dependent upon the parents. *Blake v. Cruz*, 108 Idaho 253, 698 P.2d 315, 320.

III.

III.1983. Quot. in diss. op. The plaintiffs brought suit against two physicians seeking to recover damages for wrongful pregnancies. The trial court dismissed the counts insofar as they set out claims for the expenses of rearing the children. The

cases were consolidated on appeal and the appellate court reversed and remanded. Leave was granted to the defendants to appeal to this court. This court reversed, holding that the plaintiffs' childrearing costs were not recoverable because the existence of normal healthy life was not a compensable wrong. The dissent argued that the plaintiff's childrearing costs should be recoverable, but that they should be offset to a certain degree by the benefits of parenthood. *Cockrum v. Baumgartner*, 95 Ill.2d 193, 69 Ill.Dec. 168, 447 N.E.2d 385, 393, certiorari denied 464 U.S. 846, 104 S.Ct. 149, 78 L.Ed.2d 139 (1983).

Ill.App.

Ill.App.1981. Cit. and quot. in disc. The issue raised by these two consolidated cases was whether the parents of a healthy child, born as a result of a negligently performed sterilization operation or a negligent misdiagnosis of pregnancy, may recover as an element of damages the expenses of raising and educating the child. In both cases the trial court dismissed the claims for these expenses. This court stated that ethical and moral considerations aside, the cases herein were analytically indistinguishable from an ordinary malpractice action. The defendants argued that for reasons of policy, damages should be limited to pregnancy and birth-related expenses. This court stated, however, that it could not endorse a view that effectively nullified the parents' fundamental right to control their reproductivity by providing that its violation does not result in injury. The court stated that, to the extent that s 920 had been used to permit the emotional rewards of parenthood to offset its financial costs, that section had been misapplied. The court stated that the section provided that a benefit to the plaintiff, caused by the defendant's tortious act, may be considered in mitigation of the plaintiff's injury only where the benefit is to the same interest that was harmed. Therefore, the judgments of the lower courts were reversed and remanded. *Cockrum v. Baumgartner*, 99 Ill.App.3d 271, 54 Ill.Dec. 751, 753, 425 N.E.2d 968, 970, judgment reversed 95 Ill.2d 193, 69 Ill.Dec. 168, 447 N.E.2d 385 (1983), certiorari denied 464 U.S. 846, 104 S.Ct. 149, 78 L.Ed.2d 139 (1983).

Ind.

Ind.2003. Quot. in disc., cit. in diss. op. Patient brought a medical-malpractice action against physician, seeking damages that included expenses of raising and educating her child born following an unsuccessful sterilization procedure. The trial court denied defendant's motion for a determination that the costs of raising a healthy child were not recoverable, and the court of appeals affirmed. Reversing and remanding, this court held that damages for an allegedly negligent sterilization procedure did not include costs of raising a subsequently conceived normal, healthy child. A dissent would adopt and apply Restatement Second of Torts § 920 in this case. A second dissent argued that if plaintiff proved negligence, then she was entitled to damages proximately caused by tortfeasor's breach of duty, including expenses of raising a child. *Chaffee v. Seslar*, 786 N.E.2d 705, 707, 709.

Ind.App.

Ind.App.2001. Quot. in sup., coms. (a), (b), and (f) quot. in ftm. in sup. After mother who gave birth to a healthy child conceived subsequent to an allegedly negligent sterilization procedure filed a proposed complaint for medical malpractice with the Indiana Department of Insurance against physician who performed the procedure, physician filed a motion in trial court for a preliminary determination. The trial court held that plaintiff could seek recovery of child-rearing costs. Affirming, this court held, inter alia, that plaintiff was not required to mitigate her damages by choosing abortion or adoption. Defendant, however, was entitled to present evidence of benefits resulting from child's birth to limit the amount of the recovery. *Chaffee v. Seslar*, 751 N.E.2d 773, 788, 789, opinion vacated 786 N.E.2d 705 (Ind.2003). See above case.

Iowa

Iowa, 1984. Quot. but not fol. In this wrongful pregnancy action the plaintiff sought interlocutory appeal of the dismissal of a count of her petition. This court affirmed. The defendant physician allegedly negligently performed a therapeutic abortion.

and the plaintiff had a healthy, normal baby. As part of her claim, the plaintiff sought recovery of the childrearing expenses. This court held that, for policy reasons, the parent of a healthy, normal child could not recover rearing expenses from a physician who negligently performed a therapeutic abortion. The court rejected the "benefits" rule, providing for the rearing expenses offset by the benefit that having the child conferred on the parent. *Nanke v. Napier*, 346 N.W.2d 520, 522, 523.

Kan.

Kan.1986. Cit. in case quot. in disc. A deformed child sued his doctor for wrongful life, alleging that, but for the doctor's negligence in giving improper genetic counseling to his parents, he would not have been born to experience the pain and suffering attributable to his genetic deformities. The trial court dismissed the complaint for failure to state a claim on which relief could be granted, holding that being born was not a compensable injury. Affirming, this court held that an action for wrongful life was not judicially recognized in Kansas. The court reasoned that a legal right not to be born was alien to the public policy of protecting and preserving human life and would involve a weighing of life against nonlife, a calculation that could not rationally be made. *Bruggeman By & Through Bruggeman v. Schimke*, 239 Kan. 245, 718 P.2d 635, 640.

Kan.1985. Quot. in disc. The plaintiff, who had undergone an unsuccessful sterilization operation and later delivered a normal, healthy child, sued the hospital and the surgeons for damages, including the costs of rearing the child to majority, alleging that the operation had been negligently performed. The trial court held that the mother could not recover as damages the projected costs of rearing her unplanned child. Affirming, this court held that, in a medical malpractice action for negligent sterilization, the projected cost of rearing a normal, healthy child to majority could not be recovered because the birth of a healthy child was not a legal wrong for which damages should or may be awarded. The court refused to follow the "benefits" rule, which allows the recovery of damages but requires a deduction for the benefits the parents will receive by virtue of having a normal child. *Byrd v. Wesley Medical Center*, 237 Kan. 215, 699 P.2d 459, 464.

La.

La.1988. Cit. in disc. The parents of an albino child sued a surgeon on behalf of themselves and the child for medical malpractice in failing to sterilize the child's mother. The trial court denied the defendant's motion to dismiss, and the intermediate appellate court dismissed the child's claim for wrongful life and limited the elements of recoverable damages to pregnancy and delivery expenses and loss of consortium. Affirming in part and reversing in part, this court held that the parents, upon proper proof, could recover for expenses incurred during the pregnancy and delivery and for loss of consortium because these were foreseeable consequences of the doctor's alleged negligent acts and omissions, but the parents could not recover special expenses for the child's deformity. *Pitre v. Opelousas General Hosp.*, 530 So.2d 1151, 1155.

La.App.

La.App.1987. Cit. in diss. op., cit. in conc. and diss. op. A married couple engaged a physician to perform a bilateral tubal ligation in conjunction with the delivery of their second child to prevent any further pregnancies. Although the doctor performed the operation, it was unsuccessful, and the mother conceived and gave birth to a third child who was afflicted with albinism. The parents sued the physician and the hospital at which the unsuccessful operation occurred, seeking, among other things, compensation for damages that the mother and father each alleged they suffered as a result of the deformed child's conception and birth. Affirming in part, reversing in part, and remanding the trial court's denial of the defendants' motion to dismiss, this court held that the parents could not recover for emotional distress or for the expenses of rearing the deformed child but were limited to receiving the medical expenses that resulted from the unplanned conception. A dissent and a concurring and dissenting opinion both argued that the plaintiffs should be allowed to recover for their emotional distress as well as the expenses involved in rearing the deformed child. The minority opinions rejected the majority's argument that the benefits of parenthood far outweighed any of the monetary burdens involved and reasoned that those benefits should be used only to mitigate the amount of damages sustained. *Pitre v. Opelousas General Hosp.*, 517 So.2d 1019, 1029, judgment

affirmed in part, reversed in part 530 So.2d 1151 (1988). See above case.

Me.

Me.1986. Cit. in conc. and diss. op. After the plaintiff underwent a tubal ligation performed by the defendant doctor, she conceived and gave birth to a sixth child. The plaintiff sued the doctor for damages for negligent failure to comply with the standard of care of medical practice in performing the tubal ligation. The lower court denied the doctor's motion to dismiss and reported the case to this court, which limited the scope of recoverable damages and affirmed the lower court's order as modified. The concurring and dissenting opinion argued that the plaintiff should have been able to recover the potential costs of rearing the child under the Restatement's "benefit rule," which provided that when the defendant's tortious conduct caused harm but also conferred a benefit to the plaintiff, the value of that benefit should be considered in mitigation of damages to the extent that it was equitable. *Macomber v. Dillman*, 505 A.2d 810, 816.

Md.

Md.1984. Cit. in sup., quot. in ftm. in disc. A physician appealed from a judgment for the plaintiff in this negligent sterilization action. This court affirmed. The plaintiff had a healthy, normal baby following a negligent sterilization. The trial court instructed the jury that, as part of the damages award, it could consider the cost of raising the child to majority, less the benefit conferred on the parents by having the child. This court adopted the "benefits" rule in negative sterilization actions, and noted that Maryland used the "benefits" rule and the mitigation of damages rule in other civil actions. *Jones v. Malinowski*, 299 Md. 257, 473 A.2d 429, 435.

Mass.

Mass.1990. Cit. in disc., quot. in ftm. The parents of a healthy child born after a sterilization procedure sued the doctor who had performed the sterilization. The trial court found the doctor liable for the negligent performance of the procedure, and reported to the intermediate appellate court the issue of damages, which was transferred to this court. This court held that parents may recover the cost of rearing a healthy child if their reason for seeking sterilization was grounded in economic or financial considerations. The court also noted that the trier of fact should offset any benefit the parents would receive from having the child against the cost of rearing the child. *Burke v. Rivo*, 406 Mass. 764, 551 N.E.2d 1, 5.

Minn.App.

Minn.App.1986. Cit. in sup., com. (d) cit. in sup. The plaintiff sued a bank for conversion of bonds, alleging that absent any agreement with the plaintiff, the bank intentionally refused to transfer all of the bonds in his "safe-keeping" account to another bank, even though the bank knew the bonds were owned by the plaintiff. The trial court found for the plaintiff, awarding him both compensatory and punitive damages. This court affirmed, holding that the interest earned by the plaintiff on the converted bonds was not a result of their conversion, but of the bank's decision not to seek recovery of that interest, and therefore the benefits rule did not require the compensatory damages to be reduced by the amount of the earned interest. *Gits v. Norwest Bank Minneapolis*, 390 N.W.2d 835, 838.

Mo.

Mo.1992. Com. (b) quot. in disc. Parents sued a physician for medical malpractice and breach of contract, seeking, inter alia, damages for the reasonable costs of raising and educating their child born after the defendant negligently performed a tubal ligation. The trial court dismissed those claims, but the intermediate appellate court reversed. Affirming the trial court, this

court embraced a limited damages theory of recovery, entitling the plaintiffs to recover damages for emotional distress, lost wages, pain and suffering associated with a second corrective procedure, and any permanent impairment suffered by the parents as a result of the pregnancy, the delivery, or the second corrective procedure. It noted that it was difficult to apply strict tort principles, which included mitigation, to a full recovery rule, contrary to the plaintiffs' contention that a full recovery rule was more in keeping with strict tort principles. It noted that the benefits rule embraced by the dissent also ran contrary to a strict application of tort principles, under which damages from invasion of one interest were not diminished by showing that another interest had benefited. *Girdley v. Coats*, 825 S.W.2d 295, 298.

Mo.App.

Mo.App. 1984. Com. (b) cit. in diss. op. (Erron. cit. as § 920b.) Decedent's brother brought a wrongful death suit against the owner and the driver of a truck that collided with decedent's car. Plaintiff objected to a remark made by defense counsel in his closing argument concerning the pecuniary gain realized by plaintiff when jointly held property passed to him on his brother's death, but was overruled. The trial court entered judgment on a jury verdict for defendants, and the court of appeals affirmed. Plaintiff's objection was properly overruled when it failed to inform the court of its basis or of the relief sought, and for the same reason it was not preserved for appellate review. The dissent contended that it was error to permit defendants to argue that plaintiff's pecuniary gain mitigated the damages he suffered as a result of his brother's death. *Meyer v. Clark Oil Co.*, 686 S.W.2d 836, 839.

Mont.

Mont. 1990. Cit. in disc. A partnership of doctors sued an accounting firm for breach of professional duty after it recommended a corporate reorganization that had an adverse effect on the partnership's industrial revenue bond financing. The trial court entered judgment on a jury verdict for the partnership. Affirming, this court held, inter alia, that evidence supported the jury's finding of breach of duty, that claims existed mutually in both contract and tort, that the claim was not time-barred, and that the accounting firm was not entitled to an offset due to tax benefits realized by individual doctors after the reorganization. The court observed that an offset would not do equity, since the loss of the financing and the accompanying result of higher interest costs for loans required by the partnership were unrelated to the tax benefits to which the partnership would have been entitled if the accounting firm had done its job properly. *Billings Clinic v. Peat Marwick Main*, 244 Mont. 324, 797 P.2d 899, 912.

Neb.

Neb. 2008. Quot. in diss. op. Taxpayers sued accountant for accounting malpractice, alleging that accountant's failure to timely file their state and federal tax returns caused them to incur interest and penalties on their taxes. After a jury returned a verdict for taxpayers, the trial court denied accountant's motion for judgment n.o.v. Reversing in part, this court held, inter alia, that taxpayers failed to show that they suffered damages from paying interest on the late taxes, because they had the use of the money during the period of late payment; thus, judgment n.o.v. was appropriate as to that portion of damages awarded by the jury. The dissent argued that, if taxpayers' harm was offset by the benefit of their having use of the money, the burden of proving the offset fell on accountant. *Frank v. Lockwood*, 275 Neb. 735, 754, 749 N.W.2d 443, 458.

N.H.

N.H. 1982. Cit. in disc., quot. but not fol. The defendant doctor performed a faulty sterilization on the plaintiff wife, and the wife became pregnant. The wife and the husband brought suit for wrongful birth, and the husband brought suit for loss of consortium. The court below certified questions for review by the state supreme court. In answer to these questions the court found first that New Hampshire recognized a cause of action for wrongful conception and birth of a healthy child that resulted from a negligently performed sterilization. Second, damages were limited to hospital and medical expenses of the

pregnancy, costs of sterilization, pain and suffering, and loss of the mother's wages. The court specifically rejected recovery for the costs of raising the child with a setoff for the benefits of raising the child enjoyed by the parents. Third, the court held that the husband could recover for his loss of consortium. *Kingsbury v. Smith*. 122 N.H. 237. 442 A.2d 1003, 1005, 1006.

N.J.Super.

N.J.Super.2002. Quot. and cit. but not fol. Parents of child born with severe birth defects brought medical-malpractice action against doctors and medical practice. The trial court found in favor of individual doctors but against medical practice. Reversing and remanding, this court held, inter alia, that trial judge erred in instructing jury to consider joy and benefit parents received from child in determining award for emotional-distress damage against doctor. *Lodato ex rel. Lodato v. Kappy*, 353 N.J.Super. 439, 442, 443. 803 A.2d 160, 161, 162.

N.J.Super.1987. Cit. and quot. in sup., com. (a) quot. in sup. A patient sued his oral surgeon for medical malpractice on the theory of lack of informed consent after his lip became partially paralyzed as a result of surgery. The trial court reserved decision, and this court held that since the operation was properly performed, the surgeon should not have to pay compensable damages. The court stated that because the patient also received some special benefit from the surgery, that benefit should be considered in a jury charge on mitigation of damages. *Gracia v. Meiselman*. 220 N.J.Super. 317, 531 A.2d 1373, 1377, 1378.

N.M.

N.M.1991. Quot. but dist., cit. in sup., cit. in appendix to op.; coms. (a) and (b) cit. in sup. and cit. in appendix to op. A husband and wife brought a medical malpractice action against the medical center whose physician employee negligently performed a tubal ligation upon the wife, alleging that they conceived and bore a normal, healthy child as a result of the unsuccessful operation. The trial court granted the center's motion for partial summary judgment, holding that the costs of raising a healthy child to majority were not recoverable. The court of appeals reversed. On certiorari, the supreme court affirmed the court of appeals, adopting its analysis, and remanded to the trial court, holding that plaintiffs had a legally protected interest in their family's financial security that was invaded by defendant's negligence, and that this invasion was an injury entitling them to recover the reasonable expenses of raising their child to majority. Plaintiffs could also recover damages for pain and emotional distress associated with pregnancy and birth, and while the emotional distress caused by the presence of an additional family member was not compensable, neither did the emotional benefits of having another healthy child offset the economic costs of rearing the child. *Lovell Medical Center v. Mendez*. 111 N.M. 336, 805 P.2d 603, 613, 614, 620.

N.Y.Sup.Ct.App.Div.

N.Y.Sup.Ct.App.Div.1983. Quot. in disc. A husband and wife brought this action in negligence after the defendant doctor performed an unsuccessful vasectomy resulting in the birth of the plaintiffs' child. The lower court found liability and allowed damages for pain and suffering, costs of delivery, lost wages and several other items, but denied recovery of the ordinary costs of rearing the child. This court, unwilling to hold that the birth of an unwanted but healthy child constituted an injury to the parents, affirmed, rejecting the approach of several jurisdictions that allowed recovery by taking into consideration that a benefit had been conferred upon the parents and then offsetting the damages accordingly. *Weintraub v. Brown*. 98 A.D.2d 339, 470 N.Y.S.2d 634, 640.

N.Y.Sup.Ct.

N.Y.Sup.Ct.1984. Quot. and cit. but dist. A cancer patient sued a hospital and her treating physicians, seeking damages for

injuries received as a result of negligent cobalt and radium treatment. The defendants moved for summary judgment, arguing that the plaintiffs failed to state a claim because there could be no cause of action where the benefits of the lifesaving treatment outweighed the injuries complained of. This court denied the motion, holding that a physician had a duty to minimize injury and that a breach of that duty was negligence even where the physician acted to save a life. *Scott v. Brooklyn Hosp.*, 125 Misc.2d 765, 480 N.Y.S.2d 270, 271-273.

N.C.

N.C.1986. Cit. in conc. and diss. op. A woman became pregnant and gave birth to a child after a physician failed to replace her intrauterine device. When the child's parents sued the doctor for medical malpractice, the trial court dismissed the action, but the intermediate appellate court reversed in part. Affirming, this court held that, although the plaintiffs may recover for expenses associated with the pregnancy, they may not recover for the costs of rearing their child. The concurring and dissenting opinion argued that the majority was wrong to formulate a special rule of damages in this case. It reasoned that basic common law rules of damages would allow the plaintiffs to recover all damages that proximately flowed from the defendant's negligence, subject to a setoff for the value of benefits received by the plaintiffs by having a healthy child. *Jackson v. Bumgardner*, 318 N.C. 172, 347 S.E.2d 743, 754.

N.C.1985. Cit. in conc. and diss. op. A child born with Down's Syndrome and its parents and siblings brought actions for wrongful life and wrongful birth against a health service, a doctor, and a nurse, alleging that the defendants' negligent failure to provide the parents with genetic counseling and to advise them of the availability of amniocentesis prevented the mother from terminating the pregnancy. The trial court dismissed the child's and the siblings' claims for relief. The intermediate appellate court reversed the directed verdicts against the parents on their wrongful birth claim and also reversed the dismissal of the child's claim for wrongful life. Affirming in part, reversing in part, and remanding, this court held that claims for wrongful birth and wrongful life were not cognizable at law in the jurisdiction. A concurring and dissenting opinion argued that the doctor was negligent and that the plaintiffs were entitled to recover compensation for childbirth expenses in addition to pain and suffering; the damages would be subject to an offset or reduction by any benefits the doctor could prove the parents received from the birth of the child. *Azzolino v. Dingfelder*, 315 N.C. 103, 337 S.E.2d 528, 541, cert. denied 479 U.S. 835, 107 S.Ct. 131, 93 L.Ed.2d 75 (1986).

Ohio

Ohio, 1989. Quot. but not fol., com. (b) quot. in disc. A woman who conceived and gave birth to a baby after undergoing a tubal ligation sued the doctors and the hospital for childrearing costs, alleging the defendants' negligence. The trial court granted summary judgment for the defendants on the ground that there was no legally cognizable claim for wrongful pregnancy and held, as a matter of law, that the plaintiff could not recover costs of raising a healthy child. The intermediate appellate court affirmed. This court also affirmed, stating that the "benefits rule" was inappropriate in wrongful pregnancy cases because it was impossible to place a price on a child's benefits to her parents, but that damages in such cases should be limited to the costs of the pregnancy. *Johnson v. University Hospitals*, 44 Ohio St.3d 49, 540 N.E.2d 1370, 1373, 1374.

Ohio App.

Ohio App.1989. Quot. in disc., coms. (d) and (f) cit. in disc. Landowners sued a neighboring quarry alleging that the quarry's commercial use of the ground water caused the level of the water table in the artesian aquifer underlying their land to drop, thereby dewatering and polluting their wells. The trial court's initial grant of summary judgment in favor of the quarry was affirmed by the intermediate appellate court, but the supreme court reversed and remanded. On remand, the trial court overruled the quarry's motion to dismiss and the jury awarded the landowners damages. Affirming, this court held, inter alia, that the quarry was not entitled to a reduction in damages in the amount of the increase in value of the landowner's property due to their property being annexed by the city. The court reasoned that the annexation of the property was not a direct result

of the pumping of water by the quarry that led to the drop in the water table. *Cline v. American Aggregates Corp.*, 64 Ohio App.3d 503, 582 N.E.2d 1. 4.

Okl.

Okl.1987. Cit. and quot. in ftn., com. (b) quot. in ftn. and cit. in case quot. in disc. In separate cases, two women who underwent medical procedures for sterilization sued their treating physicians for negligence after the plaintiffs gave birth to normal, healthy children, seeking, inter alia, recovery of the costs of raising the children. The trial courts concerned submitted certified questions to this court as to the recovery of such costs. This court held that the costs were not recoverable because a parent could not be said to have been damaged by the birth of a normal, healthy child. *Morris v. Sanchez*, 746 P.2d 184, 186, 187.

Pa.

Pa.1986. Quot. in disc. A child was born with a virulent form of neurofibromatosis, which was transmitted genetically by his father. On the child's behalf, the parents sued the doctors who had failed to advise them of the danger of having a child with the disease. The trial court dismissed the child's complaint, and the intermediate appellate court affirmed. Affirming, this court held that the child had no cause of action for the alleged injury of his birth. The court reasoned that, under the benefit rule of the Restatement, it had no way of comparing how the value of nonexistence to the plaintiff would be mitigated by the special benefit of existence that had been conferred on him by the defendant's tortious conduct. *Ellis v. Sherman*, 512 Pa. 14, 515 A.2d 1327, 1329.

Pa.1982. Cit. in ftn., quot. in conc. and diss. op. The plaintiff alleged that she underwent a bilateral tubal ligation performed by the defendant doctor in the defendant hospital. She alleged that the defendants negligently performed the sterilization operation and breached express and implied warranties that the operation would prevent future pregnancies. She subsequently became pregnant and gave birth by caesarean section. She brought this action in assumpsit and trespass. The court of common pleas dismissed the complaint and sustained plenary objections in the nature of a demurrer by the physician and the hospital. The superior court reinstated the plaintiff's complaint and this appeal followed. The state supreme court vacated the superior court's order and remanded to the trial court, stating that the complaint alleged facts that, if proven, would have entitled the plaintiff to relief under the basic principles of the law of contract and tort for costs associated with the pregnancy and delivery of the child, but that the financial and emotional costs of raising a healthy child were not compensable. A concurring and dissenting opinion stated that recovery should be permitted under the benefit rule to seek damages for the cost of rearing her child, offset by the value of the child's aid, comfort, and society. Another concurring and dissenting opinion rejected the application of the position outlined in the Restatement of Contracts 2d supporting the recovery of damages due to emotional disturbance, in the case of the birth of an unwanted child. *Mason v. Western Pennsylvania Hosp.*, 499 Pa. 484, 453 A.2d 974, 976, 977.

Pa.1981. Cit. in conc. op. The husband and wife plaintiffs brought this action in trespass and assumpsit seeking damages from two defendant doctors. After having had two children who had inherited the husband's genetic defect and its accompanying disease, the plaintiffs decided not to have any other children. The husband subsequently underwent a vasectomy, which was performed by one of the defendants. The wife, however, became pregnant and elected to have an abortion, which was performed by the other defendant. Although the defendant assured the plaintiffs that the operation was a success, the wife gave birth to a child who also suffered from the genetic defect and disease. The plaintiffs brought this suit seeking damages for wrongful birth and maintenance of the genetically deformed child, as well as for mental distress suffered as a result of having an unwanted child. The plaintiffs also sought damages on behalf of the child for wrongful life. The appellate court affirmed the trial court's dismissal of the child's claim, denied the parents' claim for damages for mental anguish, and allowed the parents to recover damages for the cost of rearing the child. On appeal, the court held, per curiam, that the plaintiffs were entitled to bring a cause of action to recover expenses for the birth and maintenance of the child and were also entitled to bring an action to recover for mental distress. Because the court divided on the issue of whether the

infant could bring an action for wrongful life, the appellate court's denial was affirmed. One of the opinions filed in support of the holding, which allowed the parents' claim for expenses and mental distress, recognized that the expenses of rearing the child were a direct result of the defendants' negligent acts, and the emotional anguish was a foreseeable risk within the defendants' contemplation. The opinion further asserted that the defendants could introduce evidence that the unwanted child brought joy, companionship, and affection to its parents to offset any damages awarded. *Speck v. Finegold*. 497 Pa. 77. 439 A.2d 110, 117.

Pa.Super.

Pa.Super.2002. Quot. in dist., subsec. (d) and illus. 9 quot. in sup. Real estate developers sued attorney and his law firm for breach of contract and negligence for firm's representation of them in connection with a land sales agreement. Jury awarded plaintiffs damages for breach of contract and bad faith, and trial court granted plaintiffs' motion to mold verdict to award damages for legal malpractice arising from defendants' negligent representation of plaintiffs in negotiations and at trial. This court affirmed in part, holding, *inter alia*, that the actions that jury found constituted breach of contract and legal malpractice did not directly confer any benefit on property held by plaintiffs, nor did those actions directly result in any increase in value of plaintiffs' property. Thus, the court rejected defendants' assertion that their tortious conduct conferred a benefit on plaintiffs that should diminish amount of plaintiffs' recovery. *Gorski v. Smith*. 812 A.2d 683, 709.

Pa.Super.1981. Cit. and quot. in sup., cit. in conc. and diss. op. and quot. in fn. to conc. and diss. op. Mother brought an action against the physician who performed an unsuccessful tubal ligation and against the hospital where the operation was performed, for damages arising out of the wrongful birth of a normal, healthy child. The lower court sustained the defendants' demurrer to the complaint and the plaintiff appealed. This court found that the complaint, which alleged a duty on the part of the defendants, a breach of that duty and damages proximately caused by that breach, stated a claim for negligence in the performance of the tubal ligation that resulted in the wrongful birth. The court also found that the mother's complaint, which alleged an express warranty, supported by consideration, that the operation would result in sterility, stated a claim for breach of contract. The court held that the value of the child's aid, comfort and society during the parent's life expectancy should be considered as offsetting the cost of rearing the unplanned child under the benefit rule. Accordingly, the judgment of the lower court was reversed, and the case was remanded. The concurring opinion agreed that a cause of action for the wrongful birth of a normal child existed and outlined the tort principles upon which the damages should be based. The concurring and dissenting opinion argued that the awarding of pregnancy-related costs would be the most appropriate measure of damages since such costs are readily ascertainable and not subject to speculation. *Mason v. Western Pennsylvania Hospital*. 286 Pa.Super. 354, 428 A.2d 1366. 1370, 1371, 1379, order vacated 499 Pa. 484, 453 A.2d 974 (1982). See above case.

Pa.Super.1979. Cit. in disc. and quot. in fn. and cit. in diss. and conc. op. A husband, a victim of neurofibromatosis and father of two children who were also victims of the disease, and his wife sought to prevent the reoccurrence of the disease in a child conceived in the future. One of the defendants performed a vasectomy upon the husband and assured him that he was sterile. The wife became pregnant and the couple went to another doctor, who performed an abortion and assured the wife that the abortion was a success even though she informed him that she still felt pregnant. The wife gave birth to a premature child who also had neurofibromatosis. The parents brought an action against both doctors individually and on behalf of the infant for wrongful life and to recover for past and future pecuniary expenses incurred for the care and treatment of the infant, and sought to recover damages for emotional, mental and physical injuries and expenses suffered as a result of the birth of the child. The lower court sustained the defendants' preliminary objections to allegations of negligence, breach of contract, and misrepresentation, which resulted in terminating the suit on the ground that the action was contrary to law and public policy. The appellate court held that no legally cognizable cause of action was stated on behalf of the infant because there was no precedent holding that a child has a fundamental right to be born as a whole human being and the law is incapable of measuring damages in a situation involving choice of life in an impaired state or nonexistence. The court reversed with respect to the parents' claim for past and future pecuniary expenses incurred for the care and treatment of the child and resulting in the natural course of things from the defendants' negligence. The court affirmed the judgment with respect to recovery for emotional distress and stated that the fact that the plaintiffs did not want the child did not alter the quality and nature of pain and suffering experienced during parenthood. One judge, concurring and dissenting, stated, *inter alia*, that the

majority discussed cases in which the benefit rule, which would reduce damages by an amount representing the benefit that any child would bring to his parents, had been applied but did not actually say whether it would apply the rule or not. He also said that if the majority, by stating that the tortfeasors were liable for all damages in the natural course of things, meant to imply that the damages would not be diminished by the benefits, then he would disagree. This judge also stated that a plaintiff should be compensated for emotional distress that is the result of the negligence. *Speck v. Finegold*, 268 Pa.Super. 342, 408 A.2d 496, 506, 513, affirmed in part, reversed in part 497 Pa. 77, 439 A.2d 110 (1981). See above case.

R.I.

R.I.1997. Cit. in case cit. in disc., cit. in conc. and diss. op., quot. in ftn. to conc. and diss. op. Parents sued a gynecological specialist following the birth of their second child, alleging negligent performance by defendant of a sterilization procedure on plaintiff wife. The trial court certified questions of law. Adopting the limited-benefit rule regarding the measure of damages, this court held, in part, that recovery was allowable for various medical expenses, lost wages, and damages for loss of consortium, but no recovery was available for emotional distress arising out of the birth of a healthy child; if the child suffered from congenital defects, special medical and educational expenses beyond normal rearing costs, as well as damages for emotional distress, were available. The partial dissent argued in favor of a rule that would allow full recovery for all damages proximately resulting from a defendant's negligence while also permitting the jury to mitigate or reduce any award by the value of the benefit conferred on a plaintiff by the child's birth. *Emerson v. Magendantz*, 689 A.2d 409, 412, 416, 422, 423.

Tenn.

Tenn.1987. Quot. in disc., coms. cit. in disc. A mother who gave birth to a healthy baby after undergoing a tubal ligation sued her doctors, the hospital, and the manufacturer of the sterilization technique for emotional distress, loss of income, medical expenses, and the costs of raising the child. The defendants' motion to dismiss the claim for the expense of rearing a healthy child was denied, but on interlocutory appeal, the court of appeals reversed, holding that damages were limited to the costs immediately related to the pregnancy and birth of the child. This court affirmed and remanded, holding that public policy placed the obligations of childrearing on the parents, and it was not the role of the judiciary to shift that burden elsewhere. *Smith v. Gore*, 728 S.W.2d 738, 743, 744.

Tex.

Tex.1984. Cit. in disc., cit. in ftn. to conc. op. Parents brought wrongful birth and wrongful life suits against a doctor, alleging that in reliance on his negligent advice they did not terminate a pregnancy, and as a result had a child afflicted with a genetic disease. The trial court granted summary judgment for defendant, holding that the wrongful birth claim was barred by the statute of limitations, and that Texas did not recognize a cause of action for wrongful life. The supreme court reversed on the statute of limitations issue, but affirmed the holding that no cause of action for wrongful life existed in Texas. The court reasoned that awarding damages in a wrongful life case required weighing life against nonlife, a calculation that could not rationally be made. A concurring opinion noted that inability to prove the extent of damages was not fatal to a negligence action, but asserted that a plaintiff in a wrongful life action could not establish the existence of an injury. *Nelson v. Krusen*, 678 S.W.2d 918, 924, 928.

Tex.App.

Tex.App.2001. Cit. in case cit. in disc. Beneficiary sought removal of executor of decedent's will, which also provided for executor's appointment as trustee of trust, alleging that executor breached his fiduciary duties and charged excessive executor fees. The trial court refused to remove executor but awarded damages to the trust. Reversing in part and rendering, this court held, *inter alia*, that the fact that the executor fee generated an estate-tax deduction of \$1.5 million did not justify the trial

court's reduction by that amount of the jury's finding that the executor fee was unreasonable and excessive by \$2.2 million. The court said that no authority supported an offset for tax benefits. *Lee v. Lee*, 47 S.W.3d 767, 777.

Tex.App.1982. Quot. in disc. The plaintiffs sued a doctor for damages for the cost of rearing a child born to them after the alleged negligent performance of a tubal ligation on the wife. The trial court dismissed the suit with prejudice. On appeal, the plaintiffs argued that the birth of a healthy, unplanned child was not a benefit that equaled or exceeded the cost of the child's upbringing as a matter of law. This court recognized that other jurisdictions had adopted the benefits rule, which stated that when the defendant's tortious conduct caused harm to the plaintiff or to his property and in so doing conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred was considered in mitigation of damages, to the extent that this was equitable. However, while the court took notice of this and other views, it upheld the proposition that the benefit of having a child could not be equated with or diminished by the economic burden of rearing that child, and affirmed the dismissal. *Hickman v. Myers*, 632 S.W.2d 869, 870.

Utah

Utah, 1988. Quot. in disc., cit. in conc. and diss. op. After a woman who had been sterilized became pregnant and gave birth to a normal child, she sued in federal court the physician who had performed the sterilization procedure, alleging that he had failed to warn her that the procedure might fail or inform her of alternative procedures. The district court certified questions to the state supreme court, inquiring whether wrongful pregnancy resulting in the birth of a normal child was a tort and, if so, inquiring as to the appropriate measure of damages. This court stated that the woman had a cause of action in tort and that she could recover all foreseeable proximate damages caused by the negligence, including pain and mental suffering, the medical costs of the pregnancy and second sterilization, and lost wages. The court refused to allow the recovery of the costs of rearing a child, rejecting the "benefits rule," adopted in many states, which permitted damages for estimated childrearing expenses less the benefits that the parents would experience in having a normal child. A concurring and dissenting opinion contended that childrearing expenses were clearly foreseeable costs of the negligence and argued for the adoption of the benefits rule. *C.S. v. Nielson*, 767 P.2d 504, 511, 521.

Va.

Va.1986. Cit. but not fol. Two women sought abortions, which failed, and subsequently two children were born. In separate cases, the women sued the physician for wrongful pregnancy, seeking damages related to the unsuccessful abortion, the continuing pregnancy, childbirth, and the costs of rearing the child to majority. In one case, the trial court awarded damages to the plaintiff; on appeal, the physician challenged only the allowance of damages for the costs of rearing the child to majority. In the other case, the trial court sustained a demurrer to the motion for judgment on the ground that no such action could be maintained, and the plaintiff appealed. Reversing and remanding both cases, this court held that an action for wrongful pregnancy or wrongful conception could be maintained in the state but that the plaintiffs were not entitled to recover for expenses of rearing the children to majority. The court recognized that some courts allowed child rearing costs but limited the recovery by requiring that it be offset by the value of any benefits conferred on the parents by the existence of the child. The court rejected this theory because it placed the parent in the degrading position of disparaging her child to prove that the expenses of rearing him exceeded the benefits derived from his existence. The court also declined to apply the rule that a plaintiff must act reasonably to mitigate her damages. Application of this principle might raise an issue whether the plaintiff should have submitted to another abortion or put the child up for adoption. *Miller v. Johnson*, 231 Va. 177, 343 S.E.2d 301, 306.

Wash.

Wash.1984. Cit. in disc., quot. in fn., cit. in case cit. in fn., com. (b) cit. in fn. In an action by parents against a physician to recover the cost of rearing the child born after an unsuccessful sterilization operation, the trial court held in a partial summary

judgment that these costs could not be recovered. This court affirmed, holding that it was impossible to establish with reasonable certainty whether the child's birth damaged its parents and that recovery would invite disparagement of the child. It declined, therefore, to permit the parents' damages award to be reduced by the value of the benefit conferred by the parent-child relationship, noting that to do so would permit the jury to reduce damages to the parents' pecuniary interest by the benefit to the parents' nonpecuniary interest. *McKernan v. Aasheim*, 102 Wash.2d 411, 687 P.2d 850, 853.

Wash.1983. Cit. in disc. Parents and their children brought this action against the United States and others for medical malpractice and failure to inform of the material risks of treatment. The action was based upon medical care that the plaintiff mother received from physicians employed by the United States at an army medical center. The defendant doctors prescribed Dilantin, an anticonvulsant drug for the plaintiff mother's epilepsy, and she gave birth to a healthy child while on the drug. The plaintiffs informed their three doctors that they were considering having other children and inquired about the risks of taking Dilantin during pregnancy. They relied on the doctors' assurance about the possibility of certain birth defects and decided to have two more children. These children were diagnosed as suffering from fetal hydantoin syndrome. Had the plaintiffs been informed of these potential birth defects they would not have had any other children. The federal district court certified questions of law to the state supreme court. This court held that the parents could maintain an action for wrongful birth, and the children could maintain an action for wrongful life. The physicians' duty to inform the parents of the risks associated with Dilantin extended to the unconceived children. The district court had held that this duty was breached by the doctors' failure to conduct a search for information concerning the correlation between the drug and birth defects. The parents' recovery could include medical expenses attributable to the children's births and to their defective condition, as well as damages for the parents' emotional injury caused by the births of defective children. *Harbeson v. Parke-Davis*, 98 Wash.2d 460, 656 P.2d 483, 493.

W.Va.

W.Va.1995. Quot. in ftn. State brought fraud action against securities trader, alleging additionally that trader aided and abetted state investment division in breaching its fiduciary duty to its investment fund by engaging in market speculation. The trial court directed a verdict against trader on the fiduciary duty claim, then entered judgment on a jury verdict finding constructive fraud. Reversing and remanding, this court agreed that one who acted with another to facilitate the other's breach of fiduciary duty was liable, but held that whether trader aided and abetted breach was a question of fact. It also set aside the jury verdict because of an erroneous jury instruction. In discussing damages, the court explained that while it was not appropriate to offset losses from one breach against gains from another, it was permissible to offset losses against gains resulting from the same breach. Finally, the court believed that the measure of damages here depended upon whether any breach was willful or innocent and the extent of the benefit, if any, that trader's wrongdoing conferred on state. *State v. Morgan Stanley & Co., Inc.*, 194 W.Va. 163, 459 S.E.2d 906, 919.

Wis.

Wis.2001. Subsec. (2) quot. in ftn. in sup., com. (c) cit. in disc. Motorist brought negligence action against driver with whom he was involved in a car accident, seeking recovery of medical expenses amassed in treating his injuries. Plaintiff's medical insurers asserted their subrogation interests in the amounts they had paid on plaintiff's behalf. The trial court limited plaintiff's award of medical-expense damages to the amount actually paid by plaintiff and his insurers. Reversing and remanding, this court held that plaintiff was entitled to seek recovery of the reasonable value of the medical services rendered, without limitation to the amount paid. Limitation of damages to amounts paid was contrary to the Wisconsin rule of valuation of medical-expense damages, the collateral-source rule, and principles of subrogation. *Koffman v. Leichtfuss*, 246 Wis.2d 31, 630 N.W.2d 201, 210.

Wis.1990. Quot. in disc., coms. (b) and (f) quot. in disc. Parents sued their physician for the costs involved in raising a normal, healthy child conceived after an allegedly negligent sterilization operation. The trial court ruled that the plaintiffs could recover the costs but that the costs must be offset by any benefits the plaintiffs received by virtue of the presence of the

child in their lives. Reversing, the intermediate appellate court held that the plaintiffs' claim was barred on public policy grounds. Reversing and remanding, this court held that the plaintiffs could recover the costs of raising the child to the age of majority and rejected the defendant's argument that the plaintiffs should have selected either abortion or adoption as a method of mitigating damages. The court stated that it was not equitable to apply the benefit rule because it was precisely to avoid the benefit of another child that the plaintiffs sought out the defendant in the first place. *Marciniak v. Lundborg*, 153 Wis.2d 59, 450 N.W.2d 243, 247-249.

Wis.App.

Wis.App.1994. Cit. and quot. in diss. op., com. (b) cit. and quot. in diss. op. (Erron. cit. as § 920b.) Adult children whose parents were killed in an automobile accident brought a wrongful death action against the other driver involved in the accident and the driver's insurer and sued decedents' underinsured motorist insurer for loss-of-inheritance damages, claiming that, as a result of their parents' untimely deaths, the size of their expected inheritances had been diminished. The trial court denied plaintiffs' motion in limine to bar introduction of evidence of life insurance proceeds plaintiffs received following parents' death, and this court affirmed. The dissent argued that decedents' underinsured motorist insurer should not be entitled to offset, against plaintiffs' wrongful death recovery, the benefit plaintiffs obtained from their parents' premature death because they were the beneficiaries of their father's life insurance policy. *Schaefer v. American Family Mut. Ins. Co.*, 182 Wis.2d 380, 514 N.W.2d 16, 22.

Wyo.

Wyo.1982. Cit. and quot. but not fol., cit. and quot. in fn. to spec. conc. op., and cit. in conc. and diss. op. The plaintiffs, parents of children who were born after the defendant doctor had performed sterilization operations on the plaintiff mothers, brought wrongful pregnancy actions against the doctor, the hospital, and a surgical tool manufacturer on their own behalf, and wrongful life actions against the defendants on behalf of the children. The trial court granted judgment on the pleadings in favor of the defendants, and the plaintiffs appealed. This court affirmed the trial court on the wrongful life actions and refused to recognize such a cause of action. The court reversed as to the wrongful pregnancy actions and held that the plaintiffs were entitled to damages should they be able to prove negligence on the part of the defendants. The court held that damages would be limited to medical expenses, lost wages, and pain and suffering. A specially concurring opinion would have applied the Restatement (Second) of Torts § 920 in assessing damages. The section would have taken into account any benefit the wrongfully born children provided the parents. A concurring and dissenting opinion would have affirmed the trial court on all counts and would not have recognized a wrongful pregnancy cause of action. *Beardsley v. Wierdsma*, 650 P.2d 288, 291, 293, 294, 297.

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