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Commentary on *Emerson v. Magendantz*

LUCINDA M. FINLEY

INTRODUCTION

The desire to control fertility and childbearing has long been a human imperative. Recognizing how fundamentally the “decision whether to bear or beget a child” can affect one’s life, in the early 1970s the US Supreme Court gave constitutional protection to this decision in landmark cases involving access to contraception and abortion.¹ Even before constitutional law recognized a woman’s right to control her reproductive destiny, courts grappled with repercussions of medical negligence that impinged on this right. These cases fall into two distinct categories: cases involving women who did not want any children or additional children, and cases involving women who wanted children free from congenital disease or disability.² These cases typically present medical malpractice claims involving the failure properly to perform a tubal ligation or vasectomy,³ or failure to inform a parent of the likelihood a pregnancy would result in a child with birth defects or a genetic disease, thereby depriving a woman of her right to make an informed decision about whether to conceive, or if already pregnant, to have an abortion.⁴

¹ Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); Roe v. Wade, 410 U.S. 113 (1973).

² See Barbara Pfeiffer Billauer, *The Sperminator as a Public Nuisance: Redressing Wrongful Life Claims in New Ways (Aka New Tricks for Old Torts)*, 42 U. ARK. LITTLE ROCK L. REV. 1 (2019).

³ See, e.g., Custodio v. Bauer, 59 Cal. Rptr. 463 (1967) (failed sterilization procedure led to unwanted pregnancy and childbirth); Christensen v. Thornby, 255 N.W. 620 (Minn. 1934) (husband’s failed vasectomy led to wife’s unwanted pregnancy that threatened her health).

⁴ Many of the earliest cases in this category arose from the rubella epidemic and involved claims that a doctor negligently failed to inform the pregnant woman of the risks of having a disabled child due to German measles exposure. See, e.g., Gleitman v. Cosgrove, 227 A.2d 689 (N.J. 1967); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975). Some states have statutorily banned wrongful birth actions that involve a claim that but for a physician’s negligence a woman

Along the way, courts have used various names to identify these claims. The terminology, and judicial receptivity to the claims, varies according to whether the plaintiff is the child born with a disabling condition, or the parents who wanted to avoid having a child. When the claim is brought on behalf of a child who never would have been conceived, or would have been aborted, but for the defendant's negligence, courts have called the claim "wrongful life." All but a few states reject such claims, reasoning that "[w]hether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and the theologians."⁵ In contrast, when the claim is brought by parents for damages resulting from an unwanted pregnancy and subsequent birth, courts commonly use the term "wrongful birth,"⁶ and these claims are widely allowed. Some courts further refine the terminology, using the terms "wrongful conception" or "wrongful pregnancy" for those cases where a failed sterilization procedure results in the birth of a healthy child.⁷

THE MEASURE OF DAMAGES

While courts have overwhelmingly approved claims for wrongful birth, wrongful pregnancy, or wrongful conception, determining the measure of damages has been fraught with contention. Only one state high court has denied recovery outright, reasoning that the birth of a healthy child presents no compensable injury.⁸ All the other state courts to have addressed these claims do recognize that there is some injury from an unwanted pregnancy, but the majority of courts allow only limited recovery, which generally includes the costs of the initial failed sterilization procedure and of the subsequent corrective procedure, medical expenses for prenatal care and the childbirth and

would have chosen to abort. See Cailin Harris, *Statutory Prohibitions on Wrongful Birth Claims and Their Dangerous Effects on Parents*, 34 B.C.J. L. & SOC. JUST. 365 (2014).

⁵ Becker v. Schwartz, 386 N.E.2d 807, 812 (N.Y. 1978). Only California, Washington, and New Jersey permit "wrongful life" claims by the disabled child. See Curlender v. Bio-Science Labs., 165 Cal. Rptr. 477 (1980); Procanik v. Cillo, 478 A.2d 755 (N.J. 1984); Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 495 (Wash. 1983). See generally Barbara Pfeiffer Billauer, "Wrongful Life" in the Age of *Crispr-Cas*, 142 PENN STATE L. REV. (2020).

⁶ Speck v. Finegold, 439 A.2d 110 (Pa. 1981).

⁷ See James v. Caserta, 332 S.E.2d 872, 879 (W. Va. 1985); Chaffee v. Seslar, 786 N.E.2d 705 (Ind. 2003).

⁸ Szekeres v. Robinson, 715 P.2d 1076, 1079 (Nev. 1986).

immediate postpartum care.⁹ Some courts also allow damages for emotional distress¹⁰ and lost wages related to the pregnancy.¹¹

The major disagreement involves the cost of raising the healthy child. Only two state courts allow full recovery for child rearing costs. Courts denying full recovery raise public policy arguments such as resistance to categorizing a healthy child as a harm,¹² or allege difficulty in valuing these claims.¹³ The most common rationale that courts give for denying full recovery for the costs of rearing a healthy child is based on what has been called the benefit offset rule. This rule, derived from *Restatement (Second) Torts* §920, provides that the costs of rearing a healthy child should be offset by the benefits, either emotional or economic, that the child brings to the parents' lives.

The case of *Emerson v. Magendantz*¹⁴ presents a classic wrongful pregnancy fact pattern of a failed sterilization operation, and sets forth the issue of the appropriate measure of damages in stark relief. This makes it an excellent vehicle to investigate the romanticized stereotypes about children, rooted in ideology that presumes the centrality and unmitigated joy of motherhood in women's lives, that permeate the reasoning of courts that bar full recovery. By the time *Emerson* was decided in 1997, thirty six US jurisdictions had approved the validity of wrongful birth claims, including wrongful conception and pregnancy. In Rhode Island, however, the matter was still one of first impression, and the Rhode Island Supreme Court extensively surveyed the various approaches taken by other courts.

EMERSON V. MAGENDANTZ

Diane and Thomas Emerson already had one child and determined they could not afford another when Emerson sought a tubal ligation from obstetrician gynecologist Dr. Henry Magendantz. The operation was a failure, and a year later Emerson gave birth to a daughter, Kirsten, born with congenital deformities. After the birth, Emerson underwent a second tubal ligation. She and her husband later brought suit, claiming that she suffered severe physical pain and emotional distress, required additional invasive medical treatment and sustained lost wages and diminished earning capacity.

⁹ See, e.g., *James*, 332 S.E.2d at 879.

¹⁰ See, e.g., *Speck*, 439 A.2d 110.

¹¹ See, e.g., *Miller v. Johnson*, 343 S.E.2d 301, 305 (Va. 1986).

¹² See, e.g., *Johnson v. Univ. Hosps. of Cleveland*, 540 N.E.2d 1370, 1378 (Ohio 1989).

¹³ See, e.g., *McKernan v. Aasheim*, 687 P.2d 850, 855 (Wash. 1984).

¹⁴ 689 A.2d 409 (R.I. 1997).

Additionally, the Emersons sought recompense for their existing and future obligations to financially care for their daughter.

Defendant Magendantz moved to dismiss the complaint, contending that Rhode Island law should not recognize a tort claim for a failed sterilization procedure because the resulting child was a “precious gift.” The trial court, seeking definitive guidance on the legal issues at the heart of the motion to dismiss, certified to the Rhode Island Supreme Court the questions of whether this tort claim should be allowed, and, if so, what damages should be awarded. After an extensive review of existing precedent, the Supreme Court, following the majority of American jurisdictions, held that a cause of action existed for negligent performance of sterilization when a patient subsequently becomes pregnant and delivers a child. The court, however, offered no independent analysis of the reasons for allowing the claim or of the nature of the interests harmed.

The court then turned its attention to the measure of damages, noting the three different types of remedies that other courts had allowed: limited recovery consisting of the expenses of and pain and suffering from pregnancy and delivery and the subsequent sterilization; full recovery for all foreseeable damages including the costs of child rearing; and full recovery but with the costs of child rearing offset by the benefits derived by the parents from having a healthy child.

Faced with these alternatives regarding the damage claim, by a 3:2 vote the court rejected both full recovery including child rearing costs for a healthy child, and the benefit offset approach, and instead adopted the limited recovery rule, albeit a variant which excludes the mother’s emotional distress incident to the pregnancy. In support of their decision, the *Emerson* majority reasoned that “the public policy of this state would preclude the granting of rearing costs for a healthy child whose parents . . . have decided to retain the child as their own with all the joys and benefits that are derived from parenthood.”¹⁵ The fact that the parents decided to keep the child rather than pursue abortion or adoption “constitutes most persuasive evidence that the parents consider the benefit of retaining the child to outweigh the economic costs of child rearing.”¹⁶

If the child, such as Kirsten Emerson, was born with congenital defects, the *Emerson* majority decided that the parents could recover the extraordinary costs of raising a disabled child that exceeded the costs associated with rearing a nondisabled child. The majority further expanded the allowable damages for

¹⁵ 689 A.2d at 413.

¹⁶ *Id.*

a disabled child when the physician had reason to know that there was a likelihood that any pregnancy resulting from a failed sterilization could result in a physically or mentally handicapped child. In these circumstances – which did not apply to the Emersons – the parents would be able to recover all of the costs of raising the child throughout its life, offset only by any governmental benefits received, plus emotional distress from the disability.¹⁷

Two justices, while concurring with the decision to recognize the wrongful pregnancy cause of action, dissented from the limitation on recoverable damages. The dissenters noted that the case was a straightforward medical malpractice action, and thus should be treated in accordance with the normal tort principle that all foreseeable damages are recoverable – and the costs of raising a child that results from a failed sterilization are certainly foreseeable. The dissent chastised the majority's treatment of parents' decision to keep a child rather than choose adoption or abortion as evidence that the parents considered the child a benefit. Such an equation, the dissent argued, amounts to a denial of a woman's constitutionally protected right to not have children.¹⁸ The dissent stopped short, however, of permitting full recovery including all child rearing costs, in all situations. They recommended following the decisions of the Supreme Judicial Court of Massachusetts in *Burke v. Rivo*,¹⁹ and the Connecticut Supreme Court in *Ochs v. Borrelli*,²⁰ which denied recovery for child rearing costs when the reason the parents sought sterilization was to prevent birth defects or a health risk to the mother, and the resulting pregnancy and child were healthy. In this instance, these courts and the *Emerson* dissenters reasoned, the harm the parents sought to prevent had in fact not happened, so for them the healthy child could not be considered a foreseeable and compensable injury.

THE FEMINIST JUDGMENT

Professor Katharine Silbaugh, writing as Justice Silbaugh, offers a rewritten majority opinion that in significant aspects tracks the reasoning of the *Emerson* dissent in adopting the rule of full recovery for all foreseeable damages, including child rearing costs for a healthy child. But Silbaugh also significantly departs from the dissent, criticizing the *Burke* and *Ochs* decisions on

¹⁷ *Id.* at 414.

¹⁸ *Id.* at 416 (Bourcier, J., dissenting). The dissent cited *Griswold v. Connecticut*, 381 U.S. 479 (1975); *Eisenstadt v. Baird*, 405 U.S. 438 (1972), and *Roe v. Wade*, 410 U.S. 113 (1973), as establishing the right to decide to not have children.

¹⁹ 551 N.E.2d 1 (Mass. 1990).

²⁰ 445 A.2d 883 (Conn. 1982).

which it relies as inviting an inquiry into a woman's reasons for wanting to avoid pregnancy that inherently undermines the autonomy of her choice, and risks basing recovery on paternalistic value judgments about her reasons for not wanting a child. Silbaugh's opinion is distinctly feminist in two significant ways: (1) she relies on liberal feminist theory to assert women's reproductive autonomy and choice²¹ not to become a parent as a paramount value that is not only constitutionally protected, but should also be fully protected by tort law; and (2) she focuses on women's experiences, needs, and perspectives as the relevant lens for legal policy, rather than romanticized stereotypes divorced from reality about the costless joys of children.

In contrast with the *Emerson* majority, which simply concluded that it would recognize a cause of action because the overwhelming majority of other courts have allowed this claim, Justice Silbaugh analyzes the reasons why unwanted pregnancy, even when it results in a healthy child, should be considered a compensable harm. She notes that US constitutional law protects the right to decide not to become a parent not only because of abstract interests in autonomy, but also because of the recognition that pregnancy, and the mental, physical, and financial strains of child rearing, can in fact harm women's physical health and economic prospects and ability to participate equally in society.

As Silbaugh points out, the joys of pregnancy and child rearing blithely assumed by the *Emerson* majority are not unmitigated. Childbearing can lead to economic loss from child rearing costs and diminished career opportunities, and also can be accompanied by physical harm and mental anguish. Silbaugh draws on the everyday lived experiences of women, for whom it is normal to go to great lengths to avoid pregnancy and its sequelae (i.e. having a child), as proof enough of its non benign status. She deftly uses this aspect of women's experience to eviscerate defendant Magendantz's argument that having a child can never be a harm because children invariably bring precious joy. The efforts of the vast majority of women routinely to attempt to avoid pregnancy for most of their fertile years demonstrates that women do not see pregnancy and child rearing as a precious joy that outweighs all its burdens.

Silbaugh's focus on the compensable injury as the impairment of reproductive autonomy is significant, because it keeps the focus on the interests of the plaintiff who wanted to not have a child, and avoids the conundrum that has tripped up judges of whether a healthy child should be considered an

²¹ See, e.g., MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 19–26 (3d ed. 2013) (describing liberal feminist legal theory and its focus on women's autonomy and reproductive choice).

“injury.” Under Silbaugh’s analysis, when a woman wants to avoid having a child for any reason, and seeks sterilization to prevent this outcome, the costs of rearing the child that results from the failed sterilization are foreseeable consequences of the physician’s negligence toward the woman, regardless of whether the child is healthy or disabled.

Silbaugh’s emphasis on women’s reproductive autonomy and the experiential burdens of pregnancy and child rearing brings into sharp relief the ways in which the majority approach denies women the full range of compensation to which they would otherwise be entitled by traditional tort law principles routinely applied in contexts other than pregnancy. In discussing why the so called benefit offset rule should be rejected, Silbaugh notes that conventional negligence law bars the use of a benefit to one type of human interest to mitigate damages from harm to a different type of interest, as in using emotional benefit to offset economic harm. As she trenchantly points out, even when a child does bring great emotional benefit to parents, they cannot take these benefits to the bank. That so many courts have misapplied this general rule in pregnancy related cases is but another example of the law’s difficulty in addressing the complex reality of pregnancy to women’s lives, blinded perhaps by a moralistic preference for child bearing.

Silbaugh’s analysis suggests that the real motivating public policy that leads courts to limit recovery seems to be the notion that women are meant to be mothers, and that a woman’s desire to avoid childbearing is inevitably misguided in retrospect, because she has failed to embrace the joy. As Silbaugh points out, the ideology underlying the cases that deny full recovery is that doctors who fail to sterilize a woman have actually done both that woman and society a favor. The burdens of children on women become invisible, and the logic of women’s reproductive choice not to become a mother becomes, as she puts it, “idiosyncratic or selfish.”

Silbaugh’s feminist embrace of women’s autonomy and respect for their reproductive choices also is apparent when she rejects the damages limitation endorsed by the dissenters in *Emerson*. The dissenters embraced full recovery for child rearing costs only when the reason a woman wanted to avoid pregnancy was to avoid the economic burden of a child. But they rejected full recovery when the reason a woman wanted to be sterilized was to avoid a disabled child or adverse health effects of pregnancy, and she survived the pregnancy and had a nondisabled child. Silbaugh refuses to inquire into the motivations for pregnancy prevention and declines to stigmatize some choices. She expresses concern that once one starts down the slippery slope of privileging some reasons for wanting to avoid pregnancy over others, moralistic judgment can inevitably creep into the legal calculation. Her

position is far more consistent with valuing autonomy, and it also recognizes that even when the wish to avoid pregnancy is based on one set of reasons that do not materialize, there can still be an adverse impact of even a healthy child on a woman's economic and social well being.

Silbaugh's rewritten opinion draws on this complex reality of mothering when she exposes the "sentimentality" of the actual opinion's view of the "benefit" of child rearing, imposed at the expense of the mother who may experience it in an entirely different fashion. The original decision assumes that a woman's decision not to abort or put the child up for adoption is persuasive proof that she considers the child a joyful benefit, completely without any economic or emotional burden on her life. By imposing the Hobson's choice of receiving no compensation for the costs of rearing a healthy child from the negligent physician, or aborting the pregnancy or putting the child up for adoption – choices that may go against personal morality – the original *Emerson* opinion was completely divorced from any experiential idea of what pregnancy and mothering involves.

Silbaugh also recognizes the complex reality of mothering when she criticizes cases, such as the actual *Emerson* majority, and the Florida decision of *Fassoulas v. Ramey*²² on which it relied, that deny damages for healthy children but permit damages for the extraordinary costs of raising a child with disabilities. Silbaugh points out that the assumption that a child with disabilities invariably presents burdens that outweigh any benefits is a "breathtaking double insult," both to parents who derive great joy from their children with disabilities, and to parents like the Emersons who had good reasons for determining that even a healthy child would present too great a burden in their lives.

GOING FURTHER AND IMPLICATIONS

If Silbaugh's reasoning that women's reproductive autonomy and lived experiences matter more than romanticized stereotypes about mothering had been adopted by a state's highest court in 1997, it could have influenced subsequent courts to align recovery in wrongful birth cases with traditional tort principles of full recovery for all damages caused by the negligence. Her articulation of why childbearing can adversely impact women's lives, even when they deeply love and value their children, has been fully borne out by subsequent sociological research. It is now fully empirically established that the emotional and

²² 450 So. 2d 822 (Fla. 1984).

economic burdens of child rearing affect women differently than men. Women bear a larger share of the child rearing responsibilities.²³ Women also experience diminished earnings when they become mothers, while men tend to experience increased income when they become fathers.²⁴ This motherhood wage penalty is most pronounced in low wage jobs, which exacerbates overall gender inequality in wages for the women who can least afford it.²⁵ With the groundwork laid by Silbaugh, this research could lead even more courts to understand why permitting recovery of all the costs of rearing the child that results from a negligently performed sterilization is essential to redressing the harm and advancing women's equality.

In addition to discussing the burdens of child rearing on women, Silbaugh could have gone further by more explicitly considering the significant relational aspects of motherhood on other family members. This concept is evidenced by concerns Emerson may have had regarding the impact of Kirsten's birth on her already existing child. Whatever family resources exist will now have to be split between the children, as will the parents' time and attention. These are consequences that Emerson went to great lengths to avoid, and they could be alleviated by the full recovery for child rearing costs adopted in Silbaugh's feminist rewritten opinion.

Silbaugh's forceful advocacy for the full recovery principle also could have influenced courts in other countries, which, like the majority in *Emerson*, make concerted efforts to review preexisting cases in order to choose what degree of damages to allow. Prior to *Emerson*, in the United Kingdom, the prevailing view was that the normal tort principle of recovery for all foreseeable loss applied, and thus child rearing costs were fully compensable. By 1999 the sentiment in the UK had changed, influenced by the accumulating weight of US authority as exemplified by *Emerson*. In 1999, the House of Lords, at that time the supreme appellate court that declared binding law for all civil cases in the UK, ruled in *Macfarlane and Another v. Tayside Health Board* (Scot.),²⁶ that compensation for child rearing costs and diminished post birth income would no longer be recoverable. This was a case where a

²³ Jill E. Yavorsky, Claire M. Kamp Dush, & Sarah J. Schoppe-Sullivan, *Production of Inequality: Gender Division of Labor across the Transition to Parenthood*, 77 J. MARRIAGE & FAM. 662, 663 (2015).

²⁴ Michelle J. Budig & Paula England, *The Wage Penalty for Motherhood*, 66 AM. SOC. REV. 204 (2001).

²⁵ Michelle J. Budig, *The Fatherhood Bonus and the Motherhood Penalty: Parenthood and the Gender Gap in Pay*, THIRD WAY (Sept. 2, 2014) <https://www.thirdway.org/report/the-fatherhood-bonus-and-the-motherhood-penalty-parenthood-and-the-gender-gap-in-pay>

²⁶ [2000] 2 AC 59 (HL) (appeal taken from Scot.).

vasectomy performed on the husband failed, and the wife became pregnant and bore a fifth child that the couple alleged they could not afford. Since the *MacFarlane* court surveyed the American cases, one wonders what would have happened to law on the international scene if *Emerson* had been decided by the feminist Justice Silbaugh? Would it have turned the entire tide of British cases post *MacFarlane* on its head?²⁷ If so, that in turn might have influenced courts in the United States to stop insulating negligent defendants from the full costs and effects of malpractice when it comes to pregnancy generating harms.

The feminist voice of Justice Silbaugh, focusing on how women actually are affected by unwanted pregnancy and child rearing, and valuing women's reproductive autonomy, could have changed the tide depriving women of their due, and shielding a defendant from foreseeable acts of malpractice. The rewritten feminist opinion reminds us that to accomplish this end, a diversity of judicial voices influenced by feminist theory certainly counts.

EMERSON v. MAGENDANTZ, 689 A.2D 409
(R.I. 1997)

JUSTICE KATHARINE B. SILBAUGH DELIVERED
THE OPINION FOR THE COURT

On April 27, 1995, Justice Ragosta of the superior court certified two questions of law to this court pursuant to R.I. G.L. § 9-24-27:

1. Is there a cause of action under Rhode Island law when a physician negligently performs a sterilization procedure and the patient subsequently becomes pregnant and delivers a child?
2. If so, what is the measure of damages?

The facts giving rise to these certified questions may be summarized as follows from the pleadings and the documents filed by the parties in the superior court and in this court.

Following the birth of her first child, plaintiff Diane Emerson made a decision not to have more children and sought medical intervention to prevent any future conceptions. Emerson was motivated by a desire to avoid the expenses associated with supporting a larger family. She chose to undergo

²⁷ In 2003 Australia reversed the trend back when the court in *Cattanach v. Melchior*, (2003) 215 CLR 1 (Austl.), held the negligent doctor could be held responsible for the costs of raising and maintaining a healthy child.

a tubal ligation surgical procedure performed by defendant Henry Magendantz, MD, a gynecologist who advised Emerson about her sterilization options. Magendantz failed to advise Emerson about the risks of failure from a tubal ligation at any time before or after surgery.

A few months after her sterilization surgery, Emerson discovered that she was pregnant, despite her tubal ligation. She gave birth to Kirsten Emerson in early 1992, after which she chose to undergo a second tubal ligation surgery. Emerson and her husband filed a complaint against Magendantz alleging that his negligence both in performing the procedure and in failing to inform Emerson of any postsurgical risk of becoming pregnant led to significant damage to each of them. Emerson alleged that she suffered severe pain from pregnancy and childbirth as well as from additional invasive medical treatment pursuant to both the pregnancy and the second tubal ligation. In addition, both Emersons alleged that they have suffered mental anguish and distress arising from the unwanted pregnancy, as well as lost wages and earning capacity associated with both the pregnancy and the additional child rearing burdens of a second child. Finally, the complaint alleges that Magendantz's negligence has imposed on the Emersons an obligation to expend substantial resources for the medical care and child rearing expenses of Kirsten, who has already required substantial resources due to severe congenital health issues.

Magendantz moved to dismiss the complaint, arguing that there is no cognizable claim for wrongful pregnancy under Rhode Island law, and in response to that motion, Justice Ragosta certified the two questions to us.

I IS THERE A CAUSE OF ACTION UNDER RHODE ISLAND LAW
WHEN A PHYSICIAN NEGLIGENTLY PERFORMS A STERILIZATION
PROCEDURE AND THE PATIENT SUBSEQUENTLY BECOMES
PREGNANT AND DELIVERS A CHILD?

The question posed is an issue of first impression in this state. Of the numerous courts that have considered the question, however, all but one recognize a cause of action for negligent performance of sterilization procedures whether performed on a woman or on a man.¹

The thirty five other states that have allowed the claim vary widely, however, in their treatment of the appropriate measure of damages. While the near unanimity of courts that recognize the claim might lead us to provide a cursory affirmative answer to the first certified issue, the relationship between

¹ The lone case to deny a cause of action for negligent performance of sterilization procedures is *Szekeres v. Robinson*, 715 P.2d 1076 (Nev. 1986).

the first and the second issue is too tightly woven to allow us this cursory answer. We conclude that an examination of the reasoning for and against a cause of action is essential to understanding the contours of the wrong, which in turn informs the appropriate measure of damages.

Defendant Magendantz argues in his brief that Rhode Island should decline to recognize a cause of action in these situations because viewing the birth of a child as a legally compensable injury is “offensive to the public sentiment that the birth of a child is one of life’s most precious gifts.” Yet according to this logic, Magendantz has taken it as his professional medical calling voluntarily to perform elective sterilization procedures that have as their sole purpose depriving adults of, in his own words, “one of life’s most precious gifts.” We cannot comprehend why Magendantz would offer sterilization services if he believed his own argument, and we consider his routine medical practice evidence that he does not. Further, extending the logic of his argument, were Magendantz to fail each time he contracted to perform a sterilization procedure, his medical ineptitude would actually have bestowed a precious benefit on his poorly served patients. Indeed, one Pennsylvania court that denied a cause of action *in contract* for these cases offered just such a rationale: “To allow damages in a suit such as this would mean that the physician would have to pay for the fun, joy, and affection which plaintiff[] will have in the rearing and education of [their] fifth child.” *Shaheen v. Knight*, 11 Pa. D & C. 2d 41, 45 46 (1957). This reasoning seems to cast a woman’s desire to avoid prospective parentage as always misguided retrospectively.

But the law firmly respects and protects a woman’s autonomous decision not to have children, and recognizes that interference with this decision undoubtedly can lead to harm. In 1965, the United States Supreme Court recognized that a married couple’s decision to prevent conception during sexual relations is a constitutionally protected right. *Griswold v. Connecticut*, 381 U.S. 479 (1965). The court did not explore in depth the reasons that a couple would decide against procreation, defending instead a privacy of decision making in doing so. Yet it is difficult to see how the prevention of pregnancy can be a coherent decision worthy of constitutional protection if it were not possible for pregnancy – especially an unwanted one – to be a harm. Indeed, in *Roe v. Wade*, 410 U.S. 113 (1973), the court articulated the harm a pregnancy *can* impose on a woman who does not wish to bear a child, and that reasoning bears repeating in response to defendant Magendantz’s argument that “the birth of a child is one of life’s most precious gifts”:

The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm

medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it.

Id. at 153

When the Supreme Court later confirmed the basic holding of *Roe* in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), it again connected women's economic and social well being to reproductive control, confirming that the "ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Id.* at 836. Applying this insight, Emerson's decision to prevent conception through sterilization could understandably be made to enhance her economic and social prospects, and so the pregnancy in question can inflict damages to those interests. Limiting future reproduction is an essential component of autonomy and liberty for women. Interfering with it through medical negligence therefore logically inflicts a grave harm.

The Supreme Court in *Roe v. Wade* carefully evaluated a balancing of interests, including women's right to control their own reproductive lives and the state's interest in protecting potential life, then confirmed that balancing more recently in *Planned Parenthood v. Casey*. Given these decisions, it would be remarkable were this court to accept Magendantz's argument that bearing a child that a woman had undergone surgery to prevent placed only blessings, and no countervailing burdens, on that woman. Magendantz's contention that it would offend public policy to recognize a cause of action precisely because it would "declare that a birth is a legally compensable injury," flies in the face of the very reasons articulated in *Roe* for protecting a woman's reproductive choice: bearing and raising a child *can be* injurious to a woman, and it is for her to evaluate the potential benefits and burdens to her of that pregnancy given her individual life circumstances and experiences, as well as her personal valuation of them based on her values and interests.

In short, a negligently performed sterilization that results in an unwanted pregnancy and birth of a child inflicts an "injury" because tort law defines injury as "invasion[s] of any legally protected interest of another." RESTATEMENT (SECOND) OF TORTS § 7(I) (Am. Law Inst. 1965). A woman's autonomous right to decide whether or not to become pregnant and have a child has been recognized as an interest legally protected by the US Constitution for over thirty years.

Defendant further argues that recognizing the Emersons' claim would be inconsistent with 10 R.I. Gen. Laws § 7-1, which recognizes that the loss of a viable fetus is a compensable wrong. In his brief, Magendantz asserts that to "allow parents to claim that it is not the death or injury, but the *birth* of a child that is a wrong amounts to a seemingly insurmountable paradox." But it is no paradox at all when one recognizes that on balance some pregnancies confer a benefit and some a burden according to a woman's circumstances and values. The reproductive rights cases are premised on that logic.

In essence, defendant's reasoning that a child is *always* a blessing and a benefit would render a woman's exercise of her constitutionally protected right not to reproduce both illogical and invisible. We decline to ignore the clear implication of the rights afforded women to make reproductive decisions: often, the birth of a child does inflict an injury, one of enough significance to overcome the government interests expressed in those cases. Thus, a woman can have compelling and constitutionally protected reasons for wanting to avoid pregnancy by obtaining a tubal ligation. The failure of the medical procedure due to negligence inflicts a direct injury recognized in the articulation of the constitutional right of reproductive autonomy, and this right surely deserves recognition in the private law of torts. The interests invaded by Dr. Magendantz's malpractice have analogs across tort law, and appreciation of the right invaded helps us to evaluate the second certified question: how should damages for this cause of action be measured?

II IF SO, WHAT IS THE MEASURE OF DAMAGES?

Perhaps in anticipation of our decision to follow the overwhelming majority of states that recognize a cause of action for pregnancy resulting from a failed sterilization due to negligence, both parties focus their attention on the measure of damages. As a general matter, a defendant physician is liable for all foreseeable damages to a plaintiff patient for medical malpractice in the provision of medical care. On the issue of compensable damages for this cause of action, however, there is little consensus among other jurisdictions, yet the distinctions they have entertained provide us with a range of alternatives for answering this question. The larger set of jurisdictions allow for limited recovery, while a smaller set of jurisdictions permit more expansive recovery.

Standard rules of proximate cause and foreseeability point toward recovery for all categories of ordinary damages in a case where medical malpractice leads to losses. Medical malpractice actions frequently include recovery for medical expenses, pain and suffering, emotional distress, lost wages, and other foreseeable economic harm. We use as a starting premise in determining what

measure of damages should be permitted to a victim of medical malpractice the same unquestioned basic common law rule of damages that we have applied in all negligence cases for centuries. We have always permitted the victim of a negligent tortfeasor to recover for all of the injuries and damages that can be proven to have been reasonably foreseeable and proximately caused by the tortfeasor's negligence. *Atlantic Tubing & Rubber Co. v. International Engraving Co.*, 528 F.2d 1272 (1st Cir. 1976), cert. denied, 429 U.S. 817 (1976); *Hueston v. Narragansett Tennis Club, Inc.*, 502 A.2d 827, 830 (R.I. 1986); *Prue v. Goodrich Oil Co.*, 140 A. 665, 666 (R. I. 1928). *See also* RESTATEMENT (SECOND) TORTS § 917 (1979);¹ MINZER, NATES, KIMBALL, AXELROD & GOLDSTEIN, DAMAGES IN TORT ACTIONS, chs. 1, 2 (1996);⁴ HARPER, JAMES, & GRAY, THE LAW OF TORTS, §§20.4, 20.5 at 130-39 (2d ed. 1986).

In the case of failed sterilization procedures, however, a majority of jurisdictions have departed from this rule. Only two states, New Mexico and Wisconsin, follow traditional tort principles to permit the recovery of all damages foreseeably and proximately caused by the negligent defendant. *Lovelace Med. Ctr. v. Mendez*, 805 P.2d 603 (N.M. 1991); *Marciniak v. Lundborg*, 450 N.W.2d 243 (Wisc. 1990). The most common position across jurisdictions that recognize this cause of action is to allow recovery for a limited set of damages, primarily for expenses related to the unwanted pregnancy and birth of the child, but not including recovery for the costs of child rearing.

Under the limited recovery rule, jurisdictions frequently grant compensation to the plaintiffs for the medical expenses of the ineffective sterilization procedure, for the medical and hospital costs of the pregnancy, for the expense of a subsequent sterilization procedure, for loss of wages, and sometimes for emotional distress arising out of the unwanted pregnancy and loss of consortium to the spouse arising out of the unwanted pregnancy. They also generally include medical expenses for prenatal care, delivery, and postnatal care. In other words, these damages are highly limited in time, focused on the events surrounding the pregnancy and childbirth. The *type* of harm is not the sticking point for these states, but rather continuing the damages paid throughout the child's minority for ongoing expenses. We think that the length of time that the plaintiffs will suffer economic harm is hardly a meaningful limitation. If it is daunting for a court to imagine the awesome expenses associated with raising a child to the age of majority, we are cognizant that these expenses are in fact imposed on the plaintiff by the defendant's negligence.

The reasons for limiting recovery vary. Some courts claim that calculating the actual damage to parents requires an unacceptable level of speculation.

For example, the Supreme Court of Washington in *McKernan v. Aasheim*, 687 P.2d 850 (Wash. 1984), has made some pertinent comments:

We believe that it is impossible to establish with reasonable certainty whether the birth of a particular healthy, normal child damaged its parents. Perhaps the costs of rearing and educating the child could be determined through use of actuarial tables or similar economic information. But whether these costs are outweighed by the emotional benefits which will be conferred by that child cannot be calculated. The child may turn out to be loving, obedient and attentive, or hostile, unruly and callous. The child may grow up to be President of the United States, or to be an infamous criminal. In short, it is impossible to tell, at an early stage in the child's life, whether its parents have sustained a net loss or net gain.

Id. at 855²

This court's cautionary qualifier that "perhaps" child rearing costs might be able to be calculated is entirely unwarranted. Actuarial tables and economic information about the costs of raising a child are readily available through numerous federal and state agencies. The United States Department of Agriculture (USDA) has produced an annual report since 1960 on the expenditure on children by families. The Bureau of Labor Statistics gathers consumer expenditure statistics often used by state level child welfare agencies to set a benchmark for child support. The costs of education are carefully tracked by governmental education departments and accrediting agencies and financial institutions, and are routinely calculated when making investment and financial aid determinations. When compared with pain and suffering damages, emotional distress damages, or loss of consortium damages, the lifetime cost of raising and educating a child is relatively easy to calculate. We are not persuaded that this element of damage requires so much speculation that we should depart from our ordinary practices.

As for the expressed concern about the speculative value to the parents of the child's accomplishments, the difficulty of commensurability pervades remedies in tort law. See Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56 86 (1993). For example, we allow recovery for wrongful death, yet we know that no amount of money replaces a loved one whose life is ended due to the negligence of another. When we

² This argument assumes that a parent receives an economic benefit, a "net gain," from a child's accomplishment, such as becoming president of the United States. There was a time when the legal status of the child included ownership of the child's productivity, see, e.g., VIVIANA ZELIZER, *PRICING THE PRICELESS CHILD* (1985), but the law of the family has developed beyond that kind of calculation, as we discuss at greater length below.

allow recovery for loss of consortium or for pain and suffering, we contemplate substituting financial payments under circumstances where we realize that those payments are not direct equivalents to the loss at hand. Only a failure of imagination lets us see the need for monetary damages for those losses, yet prevents us from grasping the harms and ongoing economic costs associated with a pregnancy by an individual who underwent surgery to prevent it.

Other jurisdictions explicitly depart from the normal proximate cause rules in medical malpractice actions based on faulty sterilization for policy reasons that aren't always clearly articulated. In *Johnson v. University Hospitals of Cleveland*, 540 N.E.2d 1370, 1377 (Ohio 1989), the Supreme Court of Ohio, after considering rules adopted by the various states, suggested that it would not mechanically apply the rules of proximate cause and foreseeability because the "strict rules of tort should not be applied to an action to which they are not suited, such as a wrongful pregnancy case, in which a doctor's tortious conduct permits to occur the birth of a child rather than the causing of an injury." *Id.* at 1378. In *Cockrum v. Baumgartner*, 447 N.E.2d 385 (Ill. 1983), the Supreme Court of Illinois stated that they would not "rigidly and unemotionally . . . apply the tort concept that a tortfeasor should be liable for all of the costs he has brought upon the plaintiffs," because, as Justice Holmes famously stated, "the life of the law is not logic but experience," and their experience led them to conclude that it was more reasonable to deny child rearing costs than to "abstractly apply[] a rule not suited for the circumstances in this character of case." *Id.* at 390.

We are unpersuaded that requiring a physician who commits malpractice to pay for all foreseeable consequences of that malpractice demonstrates either an emotional or an unusually rigid, strict, or abstractly formalistic response to the circumstances of the case. We do agree, though, that the life of the law is not based solely on logic, but also on experience. In our experience, a person who seeks surgical intervention to avoid becoming pregnant has taken a difficult step consistent with her understanding, born of experience, that the birth of a child would dramatically alter her life course, emotionally, socially, and economically. When these significant and foreseeable costs are imposed on her as a result of medical malpractice, justice requires us to take notice.

While some courts consider the damages too speculative, and others argue that they should be rejected for policy reasons grounded in experience or reasonableness, most courts focus on the idea that the birth of a child following an unwanted pregnancy confers an emotional benefit of such value that it washes away the costs of raising that child. Joy is in equipoise with burden, nullifying losses associated with child rearing against choice. The courts that take this approach do acknowledge that the costs of child rearing

can be a compensable loss, but balance against these costs the benefits derived by the parents, either economic or emotional, from having a healthy child. *See, e.g.*, *Univ. of Ariz. Health Sciences Centr. v. Superior Court of Ariz.*, 667 P.2d 1294 (Ariz. 1983); *Ochs v. Borrelli*, 445 A.2d 883 (Conn. 1982); *Burke v. Rivo*, 551 N.E.2d 1 (Mass. 1990). Ordinarily, these courts intuit that the values are equal.

These courts refer to this offset as the “benefit rule.” According to this rule, when, in addition to inflicting an injury on a plaintiff, a defendant also simultaneously confers a benefit on that plaintiff, the benefit should be subtracted from the burden in the calculation of damages. This reasoning would preclude granting rearing costs for a healthy child whose parents have decided to forego the option of adoption and have decided to retain and raise the child with all the joys and benefits that presumably are derived from parenthood. According to this reasoning, their decision to forego the option of releasing the child for adoption constitutes persuasive evidence that the parents consider the benefit of retaining the child to outweigh the economic costs of child rearing. *See, e.g.*, *Fassoulas v. Ramey*, 450 So.2d 822 (Fla. 1984).

Courts that rely on this benefit rule cite to the RESTATEMENT (SECOND) TORTS § 920 (Am. Law Inst.1979), which provides:

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

These jurisdictions reason that this provision provides for full recovery for all damages proximately resulting from a physician’s negligence, while also permitting the factfinder to mitigate or reduce any damage award by what may be proven to be the value of the benefit conferred upon the plaintiff parent or parents by the birth of the child. Yet the RESTATEMENT only permits offsetting of damages by benefits to the *same interest of the plaintiff that was harmed*. That is to say, economic benefits may be subtracted from economic harms, emotional benefits from emotional harms. The RESTATEMENT does not support the offsetting of interests that are different in type, such as the economic loss of child rearing costs offset with the emotional gains of having a child. Comment b to RESTATEMENT § 920 makes this explicit, giving as examples that a court cannot offset economic gain to reduce pain and suffering damages, nor can a court reduce damages for loss of consortium because a spouse is no longer obligated to economically support the lost loved one. As the Wisconsin Supreme Court noted in

Marciniak, “[p]roperly applied in the negligent sterilization context, the ‘same interest’ rule would require that the economic damages involved in raising the child be offset by corresponding economic benefits, and that emotional harms be offset by emotional benefits, and so on.” 450 N.W.2d at 249. See Joseph S. Kashi, *The Case of the Unwanted Blessing: Wrongful Life*, 31 U. MIAMI L. REV. 1409, 1415 (1977). This court reasoned that the parents presumably knew what emotional benefits they were foregoing by not having a child, and that it would be unfair “to not only force this benefit upon them but to tell them they must pay for it as well.” *Id.* The court also declined to offset economic benefits because it deemed any economic benefits that a child might bring to parents to be insignificant. *Id.*

This case illustrates the wisdom of the “same interest” limitation on the “benefit rule.” To the extent that raising a child confers the emotional benefits so hoped for by these courts, there is simply no way to take those emotional benefits to the bank when a wronged plaintiff seeks to house, clothe, feed, and educate the child that results from defendant’s negligence. Even at the most practical level, these jurisdictions ignore the reasons that the offset benefits must be limited to the same interests.

The “benefit rule” is problematic for additional reasons, linked to our answer to the first certified question. Courts that rush past meaningful evaluation of why there must be a cause of action in these cases – because there is a real harm to a fundamental constitutionally protected interest in reproductive autonomy – fail to recognize that the exercise of the constitutionally protected decision to avoid pregnancy is entirely routine in the experience of women. A woman who chooses not to become pregnant believes that for her, in her life circumstances, a child is a greater burden than benefit. By focusing on the benefits of raising children, some courts appear to minimize the burdens of caregiving, as if a labor of love is both priceless and costless. Caregivers know otherwise. Not only does the care of children require enormous financial resources of parents, but it also exacts additional financial opportunity costs, impairing a parent’s earning capacity. Women’s earning capacity is particularly adversely impacted by having children. In addition, the emotional content of caregiving is both joyful and burdensome, such that even the nonfinancial aspects of parenting cannot be assumed to keep a parent “in the black.” Attachment and responsibility exact pain and suffering on parents just as they impart joy.

Courts that deploy soaring rhetoric to the effect that life’s greatest joys are found in child rearing make a person’s decision not to have children, or additional children, seem idiosyncratic or selfish, as if it were an error from which she was fortuitously rescued by the defendant’s malpractice. This belies

how ordinary it is for people to seek to prevent pregnancy. Day in and day out, countless individuals, women in particular, go to great lengths to prevent pregnancy, not out of a large scale miscalculation of benefits and burdens, but after a considered judgment about that balance. Although children can be joyful, the sheer regularity of the choice to prevent pregnancy suggests that the balance is often tilted toward burden. Those courts that invoke the “benefit rule” substitute their own feelings about children for the clearly revealed preference of every patient who seeks sterilization procedures. This is sentimentality, not justice.

Just as courts romanticize the benefits of children in order to deny malpractice victims compensation for their costs, some courts also demean the value of children with disabilities by recognizing that for them, unlike for a non-disabled child, a parent has been harmed by the imposition of an unwanted pregnancy and can recover for lifelong expenses. For example, in *Fassoulas v. Ramey, supra*, the Florida Supreme Court rejected child rearing costs for a normal healthy child after a failed vasectomy, but observed that in the case of a child with a physical or a mental disability, special medical and educational expenses beyond normal rearing costs should be allowed because the “financial and emotional drain associated with raising such a child is often overwhelming to the affected parents.” *Fassoulas*, 450 So. 2d at 824.

How quickly the Florida court turns from characterizing the birth of a child as a blessing and a joy, to comprehending that raising a child can pose a financial and emotional drain that overwhelms affected parents. According to the Florida court, a child with a disability is an injury, while a healthy child is not. We reject this reasoning because it is a breathtaking double insult, both to parents who derive tremendous joy from children with disabilities and to the many parents of healthy children who find that the financial and emotional strain of a healthy child is not worth the joys, and who therefore, like the Emersons, seek to prevent the birth of future children.

Magendantz seeks to avoid even the costs of raising a child with a disability. He urges that if we adopt the reasoning in *Fassoulas*, we should limit it by holding that only where a physician is placed on notice, in performing a sterilization procedure, that the parents have a reasonable expectation of giving birth to a child with a physical or a mental disability, should the entire cost of raising such a child be within the ambit of recoverable damages. While Kirsten Emerson was born with a disability that increases the Emersons’ expenses compared with a healthy child, the Emersons were not motivated by fear of disability when they sought sterilization. They were motivated by economic concerns, feeling that they could not afford the ordinary child rearing costs of a second child, whether perfectly healthy or not. By

defendant's logic, because the Emersons sought to avoid *any* expenses from raising children, they should not be able to recover the *greater* expenses associated with Kirsten's disability, nor any of her ordinary child rearing expenses.

Some courts have based their recovery rules on the reasons that a plaintiff wished to avoid a pregnancy. For example, in *Burke v. Rivo*, the court held that there is no harm when a patient seeks sterilization to avoid giving birth to a child with a disability, and a failed sterilization leads to the birth of a healthy child. The Massachusetts court allows recovery for child rearing costs of a healthy child only if the plaintiff can show that she sought the sterilization for financial reasons. Ostensibly, this rule avoids paying child rearing expenses where a patient might want to raise a child, but seeks to avoid pain and complications from pregnancy and delivery. *Burke*, 551 N.E.2d at 5 6.

We think the search for motivations for a sterilization procedure cannot be administered without inviting speculation or self serving testimony, or a distasteful interrogation of patients prior to their seeking sterilization procedures. Accordingly, we decline to structure an inquiry into the motivations for preventing a pregnancy, just as we decline to base damages recovery on the value placed on one child over another. Given how widespread and routine the desire to prevent pregnancy is, we recognize that many individuals have multiple overlapping reasons to prevent a pregnancy, and an effort to sort out these reasons may unnecessarily stigmatize some reasons and pathologize this routine choice. We instead choose to follow the holdings in both New Mexico and Wisconsin, the two jurisdictions that follow traditional tort rules and allow recovery for all foreseeable damages arising from malpractice in this context by adopting a full recovery rule without offsetting either the economic or the emotional benefits to be derived from having a healthy child. *Mendez*, 805 P.2d at 611 15; *Marciniak*, 450 N.W.2d at 247 50.

Understanding the reasons for allowing the cause of action in the first instance aids in considering the appropriate measure of damages. Once we appreciate that the benefit theory can be characterized as ideological rather than factual, in that it resists entirely the logic of exercising reproductive freedom by choosing sterilization, we can set aside its strained application to these cases and resort to the conventional rules of tort damages.

These cases have puzzled courts unnecessarily. One issue in particular, raised in a number of courts, requires our comment. Some courts go about assuming the benefit of a child to a plaintiff by noting that the plaintiff had an opportunity to either terminate her pregnancy or place her child for adoption. The fact that she chose instead to raise her child, say these courts, proves that the child is more benefit than burden. *See Univ. of Ariz. Health Sciences Ctr.*,

667 P.2d 1294; *Jones v. Malinowski*, 473 A.2d 429 (Md. 1984); *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169 (Minn. 1977).

Emerson sought sterilization to avoid being presented with either of these options. She may have known she would not choose to terminate a pregnancy. The right recognized in *Roe v. Wade*, and reaffirmed in *Casey*, is the right to decide whether *or not* to terminate a pregnancy, and a woman should not be penalized by tort law for whichever she decides to do. Emerson is already parent to a child, and may not have wanted her child to experience the loss of a sibling placed for adoption. This hardly negates the costs of raising Kirsten. Emerson may have feared that given Kirsten's disability, she would not find care as dedicated as the Emersons would provide. Emerson may have predicted that despite the expenses of raising a child, she would experience an emotional attachment that would make placing the child for adoption impossible.

Courts who resist this cause of action also sometimes argue that it is a dignitary harm to a child to have a parent litigate their birth as an injury. Courts most often express this concern when the parents of a healthy child seek damages; their corresponding silence when parents seek compensation for an unwanted pregnancy that results in a child with a disability speaks volumes about the value judgments being made about children with disabilities. This professed concern about the psychological impact of a lawsuit on the child ignores the fact that the financial costs of child rearing are real even to a parent with tremendous attachment to a child, perhaps even because of that attachment, which may fuel self sacrifice for which the Emersons did not volunteer. As the court noted in *Marciniak*, the parents':

suit is for costs of raising the child, not to rid themselves of an unwanted child. They obviously want to keep the child. The love, affection, and emotional support any child needs they are prepared to give. But the love, affection and emotional support they are prepared to give do not bring with them the economic means that are also necessary to feed, clothe, educate and otherwise raise the child.

450 N.W.2d at 246

It would be unrealistic and callous to recharacterize the parents' dilemma of attachment as a benefit pure and simple, much less a benefit cancelling out the extraordinary financial burdens of child rearing. To do so would once again resist the logic that drives the overwhelming majority of women to, under some circumstances and for some period of time, seek out a variety of means to avoid pregnancy and childbirth. Cognizance of that logic requires that we fully compensate the Emersons for their damages.

For these reasons, we answer the certified questions as follows:

1. When a physician negligently performs a sterilization and there is a subsequent pregnancy and child, the patient has a cause of action for medical malpractice.
2. The measure of damages is the same as in any other malpractice action, and should include all foreseeable damages including the costs of rearing the child to adulthood, regardless of whether the child is born healthy or with a disability. Any emotional benefits that the child brings to the parents should not be offset against the economic costs of child rearing.