

WISCONSIN MEDICAL MALPRACTICE LAW
FAILS TO FULLY COMPENSATE FOR
NEGLIGENTLY PERFORMED ABORTIONS

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INTRODUCTION.....	141
I. WOMEN WHO UNDERGO NEGLIGENTLY PERFORMED ABORTION PROCEDURES CAN FACE DEVASTATING COSTS AND TRAUMA AS A RESULT OF THEIR INJURY	145
A. Medical Malpractice and Wisconsin’s Negligence Standard.....	145
B. Medical Malpractice in the Abortion Context	146
C. Dealing with Infertility Resulting from a Negligently Performed Abortion	149
i. Medical Remedies to Infertility	149
ii. Adoption as an Alternative to Medical Remedies	150
II. MALPRACTICE DAMAGES IN WISCONSIN ARE INSUFFICIENT TO FULLY COMPENSATE VICTIMS OF NEGLIGENTLY PERFORMED ABORTIONS	152
A. Malpractice Damages in Wisconsin.....	153
B. Economic Damages in Wisconsin	154
i. Are Fertility Treatments and Adoption Costs Reasonably Likely?	155
ii. Do the Costs of Fertility Treatments and Adoption Stem from the Injury?	156
C. Noneconomic Damages in Wisconsin	158
D. The Problem with Damages in Wisconsin.....	161
E. Proposed Changes to Wisconsin’s Jury Instructions	163
CONCLUSION	164

INTRODUCTION

Under Wisconsin’s medical malpractice law, the victim of a negligently performed abortion will likely receive economic damages from lost wages and the medical costs associated with the injury, along with noneconomic damages

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for pain and suffering.¹ However, she is likely to be grossly undercompensated for future costs that she may incur in the pursuit of a child in the future. These could be for fertility treatments and/or adoption and the associated emotional costs of both. The costs associated with fertility treatments, adoption, and other non-traditional methods of having a child are exorbitant.²

Negligently performed abortions may leave a woman infertile.³ In vitro fertilization (IVF) is one fertility treatment a woman may pursue to try and combat the infertility that resulted from a negligently performed abortion.⁴ While there are various treatments to combat infertility,⁵ this article limits its study of fertility treatments to IVF. IVF costs between \$12,000 and \$17,000 per cycle.⁶ *The New England Journal of Medicine* recommends that a woman undergo at least six cycles of IVF treatments to maximize her chance of success.⁷ A woman who pursues the medically recommended number of treatments can expect to spend at least \$72,000.⁸ Despite massive costs, IVF is

1. See Wis. STAT. §§ 655.009, 893.55 (2009-10). Provided that the victim of medical malpractice can establish liability, the jury will be asked “what sum of money will fairly and reasonably compensate plaintiff for past health care services” and “future health care services.” 2 WIS. CIVIL JURY INSTRUCTIONS COMM. & UNIV. OF WIS. LAW SCH., WISCONSIN JURY INSTRUCTIONS: CIVIL 1756 (Supp. 2011) [hereinafter WISCONSIN JURY INSTRUCTIONS: CIVIL 1756]; 2 WIS. CIVIL JURY INSTRUCTIONS COMM. & UNIV. OF WIS. LAW SCH., WISCONSIN JURY INSTRUCTIONS: CIVIL 1758 (2010) [hereinafter WISCONSIN JURY INSTRUCTIONS: CIVIL 1758].

2. See Peter A. Clark, *Embryo Donation/Adoption: Medical, Legal and Ethical Perspectives*, INTERNET J.L., HEALTHCARE & ETHICS (2009), http://www.ispub.com/journal/the_internet_journal_of_law_healthcare_and_ethics/volume_5_number_2_45/article/embryo_donation_adoption_medical_legal_and_ethical_perspectives.html (last modified Mar. 22, 2009, 4:36 PM) (citing GREGORY E. PENCE, CLASSIC CASES IN MEDICAL ETHICS: ACCOUNTS OF THE CASES AND ISSUES THAT DEFINE MEDICAL ETHICS 102 (5th ed. 2008)); *Adoption Costs – How Much Does It Cost to Adopt?*, ADOPTION.COM, <http://costs.adoption.com> (last visited Apr. 16, 2011) [hereinafter *Adoption Costs*].

3. See Kathy Steward Northern, *Procreative Torts: Enhancing the Common-Law Protection for Reproductive Autonomy*, 1998 U. ILL. L. REV. 489, 497 (1998) (discussing abortion malpractice as a traditional malpractice claim).

4. In vitro fertilization is “the process of fertilization by manually combining an egg and sperm in a laboratory dish.” *In Vitro Fertilization: IVF*, AM. PREGNANCY ASS’N, <http://www.americanpregnancy.org/infertility/ivf.html> (last updated May 2007). IVF procedures may use an egg from the woman who wishes to carry and parent the child, or it can come from a donor. *Id.*

5. See Clark, *supra* note 2.

6. *Id.* An IVF cycle is a one-month period that includes taking hormones and other medical injections, an egg retrieval procedure, an embryo transfer procedure, and a pregnancy test. See *Lupron IVF Protocol and Sample Calendar for In Vitro Fertilization Step by Step*, ADVANCED FERTILITY CTR. OF CHI., <http://www.advancedfertility.com/sampleivfcalendar.htm> (last visited Apr. 16, 2011) [hereinafter *Sample IVF Calendar Schedule*].

7. Beth A. Malizia et al., *Cumulative Live-Birth Rates After In Vitro Fertilization*, 360 NEW ENG. J. MED. 236, 237 (2009). For example, after six cycles, a woman under the age of thirty-five has a 65-86% chance of having a successful IVF treatment. *Id.* at 239.

8. Multiplying \$12,000 by 6 is \$72,000. Clark, *supra* note 2.

the preferred method of treatment for women with blocked or damaged Fallopian tubes, which are both potential consequences of negligently performed abortions.⁹ Further, the exorbitant costs are no guarantee that a woman will conceive. Nearly three-fourths of women who have tried IVF and spent between \$10,000 and \$100,000 still did not become pregnant.¹⁰

Some women may forego IVF altogether. For others, IVF will fail. Alternatively, a woman may turn to adoption.¹¹ The cost of adoption depends upon whether the mother pursues a public, private, or international adoption.¹² Adopting through the state is generally the least expensive type of adoption partially due to state subsidies, translating into relatively little or no cost to adoptive parents.¹³ “[P]rivate adoptions can range from \$5,000 to \$40,000 or more.”¹⁴ The cost of a private adoption depends on a variety of factors including services provided from a private adoption agency, travel expenses if the child is in a different area than the potential adoptive parent, birthmother expenses, prenatal care and delivery costs, and state filing requirements.¹⁵ A woman may also choose to adopt internationally, which can cost between \$7,000 and \$30,000.¹⁶

The available statistics on those who obtain abortions coupled with the costs of IVF and adoption show that these women who undergo negligently performed abortions will not be able to afford IVF or adoption later.¹⁷ The abortion rate is more than four times higher for a woman living below the federal poverty level than for a single woman earning over \$29,000 a year.¹⁸

9. *Fact Sheet: In Vitro Fertilization (IVF)*, CHILDBIRTH SOLUTIONS, INC., <http://www.childbirthsolutions.com/articles/preconception/invitrofact/index.php> (last visited Apr. 16, 2011). I discuss IVF treatments because of the massive costs associated with such treatments. See EVELINA WEIDMAN STERLING & ANGIE BEST-BOSS, *BUDGETING FOR INFERTILITY: HOW TO BRING HOME A BABY WITHOUT BREAKING THE BANK* 89-91 (2009).

10. Clark, *supra* note 2.

11. Marianne Berry et al., *Preparation, Support, and Satisfaction of Adoptive Families in Agency and Independent Adoptions*, 13 *CHILD & ADOLESCENT SOC. WORK J.* 157, 166 (1996). About fifty percent of adoptive parents using state adoptions cite infertility as their reason for adopting. *Id.* at 165 tbl.2. About eighty percent of adoptive parents using private adoptions cite infertility as their reason for adopting. *Id.*

12. See *Adoption Costs*, *supra* note 2.

13. *Id.*; see also *Adoption Assistance (Also Called Adoption Subsidy): Who Is Eligible and Where Do I Find More Information?*, ADMIN. FOR CHILDREN & FAMILIES, http://www.acf.hhs.gov/acf_services.html (follow “Frequently Asked Questions About Adoptions” hyperlink; then follow “Adoption Assistance (also called adoption subsidy): Who is eligible and where do I find more informa” hyperlink) (last visited Apr. 16, 2011).

14. *Adoption Costs*, *supra* note 2.

15. *Id.*

16. *Id.*

17. See Clark, *supra* note 2; *Adoption Costs*, *supra* note 2. There are different costs associated with both IVF treatments and adoption. Those costs can be incurred exclusively or concurrently.

18. See Rachel K. Jones et al., *Patterns in the Socioeconomic Characteristics of Women Obtaining Abortions in 2000-2001*, 34 *PERSP. ON SEXUAL & REPROD. HEALTH* 226, 228 (2002); *Quick Facts on Abortion and Contraception*, CALL TO JUSTICE (Jan. 19, 2007),

Women who statistically earn under \$13,000 a year obtain fifty percent of abortions.¹⁹ Although there is no one reason why poor women obtain more abortions, it is somewhat attributable to an increase in unintended pregnancies.²⁰ Further, 75% of women obtaining abortions indicate that they cannot afford a child—indicating that they will not be able to afford subsequent fertility treatments or adoption.²¹

Part I of this article briefly describes medical malpractice torts and the standard of reasonable care for a medical professional. It provides a background on malpractice cases that arose in the abortion context.²² Part I also establishes that a woman can end up infertile or sterilized as a result of abortion procedures and discusses her subsequent alternatives to have a child.

Part II addresses the state of malpractice law in Wisconsin. This part explains the statutory definitions of economic and noneconomic damages and what is included in each of those categories, concluding that the cost of fertility treatments and adoptions are not expressly included in either definition. Part II concludes with an explanation of how the different categories of damages leave women with inadequate remedies when a jury cannot find that the high costs are warranted and the jury instructions are insufficient. It discusses the challenges counsel face in convincing a jury of the treatment's necessity.

Inadequate jury awards leave the woman who underwent the negligent abortion procedure bearing the costs of trying to have a child. Wisconsin medical malpractice law forces the victim of a negligently performed abortion to bear the costs of obtaining fertility treatments or adopting. The law fails to

http://www.rerc.org/calltojustice/abortion_quickfacts.php (“The abortion rate among women living below the federal poverty level (\$9,570 for a single woman with no children) is more than 4 times that of women above 300% of the [federal] poverty level (44 vs. 10 abortions per 1,000 women.”); see also Lawrence B. Finer & Stanley K. Henshaw, *Disparities in Rates of Unintended Pregnancy in the United States, 1994 and 2001*, 38 PERSP. ON SEXUAL & REPROD. HEALTH. 90, 93 tbl.1 (2006).

19. Women under age twenty-five obtain over 50% of the abortions in the United States. GUTTMACHER INST., FACTS ON INDUCED ABORTION IN THE UNITED STATES 1 (2011), available at http://www.guttmacher.org/pubs/fb_induced_abortion.pdf. Additionally, women between the ages of fifteen and twenty-four have an average income of \$12,966. *Selected Characteristics of People 15 Years Old and Over by Total Money Income in 2008, Work Experience in 2008, Race, Hispanic Origin, and Sex*, U.S. CENSUS BUREAU, http://www.census.gov/hhes/www/cpstables/032009/perinc/new01_019.htm (last visited Apr. 16, 2011).

20. “[T]he rate of unintended pregnancies among poor women (below 100% of poverty) is nearly four times that of women above 200% of poverty (112 vs. 29 per 1,000 women).” GUTTMACHER INST., *supra* note 19, at 2.

21. *Id.* at 1; see also Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSP. ON SEXUAL & REPROD. HEALTH 110, 112, 113 tbl.2. (2005).

22. The damages discussed may be similar for those women who have undergone a negligently performed abortion and any other negligently performed gynecological procedure that has led to infertility or sterility. Abortion is singled out in this article because of the increased risks associated with the procedure. It was also chosen because of the bias a jury may have due to the nature of the procedure.

adequately instruct the jury on the actual consequences of the negligent procedure. The jury instructions should be changed and the law should be updated to include the costs of fertility treatments and adoption in the definition of economic damages.

I. WOMEN WHO UNDERGO NEGLIGENTLY PERFORMED ABORTION PROCEDURES CAN FACE DEVASTATING COSTS AND TRAUMA AS A RESULT OF THEIR INJURY

Women who are rendered sterile or infertile by a negligently performed abortion procedure may bring a medical malpractice claim against the doctor.²³ Women must prove the negligence standard to win in a tort claim of medical malpractice.²⁴ The negligence standard in medical malpractice cases is unique to the profession.²⁵

A. *Medical Malpractice and Wisconsin's Negligence Standard*

There are three alternative theories a patient may argue in a medical malpractice case: 1) a negligence claim based on a medical professional's failure to exercise reasonable care; 2) a battery claim based on a lack of consent; and 3) a negligence claim based on the lack of information provided to the patient regarding the risks associated with a procedure.²⁶ This article focuses on women who base their negligence claim on a medical professional's failure to exercise reasonable care²⁷ when performing an abortion.

A negligence cause of action based on the failure to exercise reasonable care for any procedure requires an understanding of reasonable care.²⁸ Reasonable care is not the same for an ordinary individual and a medical

23. See Northern, *supra* note 3, at 497 (discussing abortion malpractice as a traditional malpractice claim).

24. See *id.*

25. See *id.*

26. *Id.*

27. Fisher v. Simon, 112 N.W.2d 705, 707 (Wis. 1961) ("Prosser states the elements requisite to a cause of action based on negligence as follows: (1) a legal duty to conform to a standard of conduct for the protection of others against unreasonable risks; (2) a failure to conform to the standard; (3) a reasonably close causal connection between the conduct and the resulting injury; and (4) actual loss or damage resulting to the interests of another.").

28. See MacPherson v. Buick Motor Co., 111 N.E. 1050, 1053 (N.Y. 1916). United States law, through the voice of Judge Learned Hand, has set out that establishing reasonable care for the ordinary individual means looking to a reasonable person standard and a balancing test using the probability of harm, the gravity of the potential harm, and the burden of using a less dangerous method along with the utility of keeping the same course of action. United States v. Carroll Towing Co., 159 F.2d 169, 173 (2nd Cir. 1947); see also Colton v. Foulkes, 47 N.W.2d 901, 904 (Wis. 1951) (citing Hamus v. Weber, 226 N.W. 392, 393 (Wis. 1929)).

professional.²⁹ “When a claim arises out of highly specialized conduct requiring professional training, . . . the alleged tortfeasor’s conduct is compared with the conduct of others who are similarly situated and who have had similar professional training.”³⁰ This holds medical professionals to the standard of their peers.³¹ This method for establishing reasonable care is unique to the profession; medical professionals decide for themselves the standard to which they are held.³² Based on the professional custom rule, a victim must establish that her injury resulted when the medical professional’s actions diverged from standard customs.³³

B. Medical Malpractice in the Abortion Context

Abortions constitute a significant portion of today’s surgical procedures.³⁴ Approximately 1.5 million abortions are performed each year.³⁵ All abortion procedures have the potential for medical malpractice suits.³⁶

Numerous cases of medical malpractice stem from negligently performed abortions.³⁷ Discussion of the cases alleging malpractice in the abortion context often revolves around informed consent, a woman’s right to choose, and

29. Theodore Silver, *One Hundred Years of Harmful Error: The Historical Jurisprudence of Medical Malpractice*, 1992 WIS. L. REV. 1193, 1194 (1992); see also *Nowatske v. Osterloh*, 543 N.W.2d 265, 270 (Wis. 1996).

30. *Nowatske*, 543 N.W.2d at 270. In other jurisdictions, a special rule called the “professional custom rule” binds medical professionals, which provides that “the duty of care physicians owe their patients is measured not by ordinary notions of reasonableness but by customary practice among physicians.” Silver, *supra* note 29.

31. See *Nowatske*, 543 N.W.2d at 270.

32. Silver, *supra* note 29, at 1213; see also *Nowatske*, 543 N.W.2d at 270.

33. See *Nowatske*, 543 N.W.2d at 270. The professional custom rule is relevant because it requires expert testimony. Many cases involving medicine require expert testimony because the medical practice demands “special knowledge or skill or experience on subjects which are not within the realm of the ordinary experience of mankind, and which require special learning, study, or experience.” *Weiss v. United Fire & Cas. Co.*, 541 N.W.2d 753, 757 (Wis. 1995) (citing *Cramer v. Theda Clark Mem’l Hosp.*, 172 N.W.2d 427, 428-29 (Wis. 1969)). Further, fees and costs are not awarded in a medical malpractice negligence case. See *Guzman v. St. Francis Hosp.*, 2001 WI App 21, ¶ 5, 623 N.W.2d 776. Therefore, the costs of experts come directly from the plaintiff’s pocket and potential awards they receive. Those costs take away from any monies awarded for other reasons, which the woman could use to offset any costs associated with having a child. Although *Ferdon v. Wis. Patients Comp. Fund* later overruled *Guzman* on the grounds that the cap on noneconomic damages in medical malpractice cases violated the equal protection provision of the Wisconsin Constitution, the court did not overrule the fact that fees are not awarded in medical malpractice cases. See *Ferdon v. Wis. Patients Comp. Fund*, 2005 WI 125, 701 N.W.2d 440.

34. Northern, *supra* note 3, at 490.

35. *Id.*

36. See *id.* at 497.

37. 3A DAVID W. LOUISELL & HAROLD WILLIAMS, *MEDICAL MALPRACTICE* §§ 17G.23[3] (2010).

wrongful birth, none of which are issues discussed in this article.³⁸ This article focuses on the medical professional's negligence. Since all of the above procedures require careful monitoring of the devices used and most are invasive procedures, medical negligence can cause serious injury to a woman undergoing them.³⁹

The procedures women undergo to have an abortion are different based on the gestation period.⁴⁰ Vacuum aspiration,⁴¹ dilation and curettage,⁴² and medical abortions⁴³ are the most common procedures used to terminate the pregnancy in the first twelve weeks.⁴⁴ In the second trimester, the dilation and evacuation method⁴⁵ is the most commonly used method.⁴⁶ In the third

38. See Northern, *supra* note 3, at 490, 494; see, e.g., Thomas W. Strahan, *Negligent Physical or Emotional Injury Related to Induced Abortion*, 9 REGENT U. L. REV. 149, 150 (1997).

39. See LOUISELL & WILLIAMS, *supra* note 37.

40. *Types of Abortion Procedures*, AM. PREGNANCY ASS'N, <http://www.americanpregnancy.org/unplannedpregnancy/abortionprocedures.html> (last updated Jan. 2007).

41. 6-V ATTORNEYS' DICTIONARY OF MEDICINE V-121470 (2009) (directs to the definition as "vacuum curettage.") A vacuum curettage is "[t]he removal of material from the uterus, after dilation of the cervix, by means of a hollow curet and suction." Cannula (a slender plastic tube) is inserted into the vagina, through the cervix and into the uterus. Suction is applied by means of a syringe or vacuum pump to extract the tissue. 6-V ATTORNEYS' DICTIONARY OF MEDICINE V-121473 (2009).

42. MAUREEN PAUL ET AL., A CLINICIAN'S GUIDE TO MEDICAL AND SURGICAL ABORTION 5 (1999). Dilation and curettage is the use of a sharp instrument to remove the tissue from inside the uterus. See *id.* at 115.

43. Am. Coll. Obstetricians & Gynecologists, *Medical Management of Abortion*, 106 OBSTETRICS & GYNECOLOGY 871, 871 (2005). Examples include Misoprostol, alone or with Mifepristone or Methotrexate. *Mifepristone and Misoprostol for Abortion*, UNIV. OF MICH. HEALTH SYS., <http://www.uofinhealth.org/health-library/tw1291> (last updated Sept. 22, 2010).

44. See LOUISELL & WILLIAMS, *supra* note 37.

45. Dilation and evacuation is a dilation of the cervix and the surgical evacuation of the contents of the uterus, using vacuum aspiration, forceps, or a combination of both. See *Dilation and Evacuation (D&E) for Abortion*, WEBMD.COM, <http://www.webmd.com/a-to-z-guides/dilation-and-evacuation-de-for-abortion#tw2465> (last updated Sept. 29, 2008) [hereinafter *Dilation and Evacuation*].

46. LOUISELL & WILLIAMS, *supra* note 37.

trimester, amniocentesis⁴⁷ is the preferred method of abortion.⁴⁸ These procedures are very different, but all can lead to similar malpractice claims.⁴⁹

Vacuum aspiration, dilation and curettage, medical abortions, dilation and evacuations, and amniocentesis can lead to immediate injury if negligently performed.⁵⁰ Vacuum aspiration can lead to damage to the cervix, perforation of the uterus, or infection.⁵¹ The risks associated with dilation and curettage are the same as those for a vacuum aspiration, except that with dilation and curettage there is an increased risk the physician will perforate the uterus.⁵²

Medical abortions, sometimes referred to as pharmaceutical abortions, have different risks when negligently administered, and most risks are associated with prescribing the drugs to women for whom they are contraindicated.⁵³ Side effects of medical abortions can include fever and heavy bleeding, which may require a blood transfusion to remedy.⁵⁴ In addition, the

47. Amniocentesis is the removal of fluid from the amniotic sac. *Induction Abortion*, WEBMD.COM, <http://women.webmd.com/induction-abortion> (last updated Sept. 29, 2008). Induction abortions are also used, which is the induction of labor using medicines. *Id.* The medications are injected into the amniotic sac, the vagina, or a vein. *Id.* The cervix may be dilated prior to either procedure. *Id.*

48. LOUISELL & WILLIAMS, *supra* note 37. States have different laws regarding late-term abortions. GUTTMACHER INST., STATE POLICIES ON LATER-TERM ABORTIONS (2011), available at http://www.guttmacher.org/statecenter/spibs/spib_PLTA.pdf. In Wisconsin, after viability of the fetus (as opposed to into the third trimester) a later-term abortion is only permitted when there is a threat to the woman's health. *Id.*

49. See Northern, *supra* note 3.

50. See *Considering Abortion: Explore All Your Options*, OPTION LINE, <http://www.optionline.org/questions/considering-abortion/> (last visited Apr. 16, 2011) [hereinafter *Considering Abortion*]. Such procedures can also lead to injury to the fetus, which, if not properly terminated, may be carried to term and delivered. See *id.* Those delivered fetuses may face Cerebral Palsy, premature delivery, brain, respiratory, bowel, and eye problems. *Id.*

51. See *Surgical Abortion Procedures*, AM. PREGNANCY ASS'N, <http://www.americanpregnancy.org/unplannedpregnancy/surgicalabortions.html> (last updated Nov. 2006); see also ATTORNEYS' DICTIONARY OF MEDICINE, *supra* note 41.

52. *Surgical Abortion Procedures*, *supra* note 51; see also PAUL ET AL., *supra* note 42.

53. See *Who Should Not Use Medication Abortion?*, MEDICATION ABORTION, <http://www.medicationabortion.com/questions/notuse.html> (last updated Sept. 2009). The Mifepristone/Misoprostol treatment is contraindicated for women with "[c]onfirmed or suspected ectopic pregnancy," "[a]llergy to [M]ifepristone," "[a]llergy to [M]isoprostol," "[c]hronic systematic use of corticosteroids," "[c]oagulopathy," "[c]urrent anticoagulant therapy," "[c]hronic adrenal failure," "[i]nherited porphyries," and "IUD *in situ*." *Id.* The Methotrexate/Misoprostol treatment is contraindicated for women with an "[a]llergy to [M]ethotrexate," "[a]llergy to [M]isoprostol," "[c]oagulopathy," "[s]evere anemia," "[a]cute or chronic renal disease," "[a]cute or chronic hepatic disease," "[a]cute inflammatory bowel disease," "[u]ncontrolled seizure disorders," and "IUD *in situ*." *Id.* Taking Misoprostol alone is contraindicated for women with an "[a]llergy to [M]isoprostol" and "IUD *in situ*." *Id.*; see also Am. Coll. Obstetricians & Gynecologists, *supra* note 43, at 876.

54. See *What Are the Side Effects and Complications of Medication Abortion*, MEDICATION ABORTION, <http://www.medicationabortion.com/questions/complications.html> (last updated Sept. 2009) [hereinafter *Side Effects and Complications of Medication Abortion*].

pharmaceuticals Methotrexate, Misoprostol, and Mifepristone (three medical abortion drugs) are not recommended for women who have an intrauterine device (IUD) in place, are anemic, have bleeding or seizure disorders, have diseases of the liver or kidney, or have acute inflammatory bowel disease.⁵⁵ Medical professionals overlooking such recommendations could cause serious side effects.⁵⁶

Dilation and evacuation can lead to “damage to [the] uterine lining or [the] cervix, perforation of the uterus, infection, and blood clots.”⁵⁷ Amniocentesis or induction abortions have similar risks.⁵⁸ In rare cases, a victim may also face trauma from an accidental injection of saline or other medications.⁵⁹

If any of the above procedures are performed negligently, a woman may face complications such as heavy bleeding, infection, incomplete abortion, sepsis, complications with anesthesia, damage to the cervix, scarring of the uterine lining, perforation of the uterus, damage to internal organs, and death.⁶⁰

C. *Dealing with Infertility Resulting from a Negligently Performed Abortion*

In addition to the costs of medical treatment to fix immediate and critical injuries, the injured woman may also find herself sterile or with low fertility as a result of the physician’s negligence.⁶¹ If the injured woman later decides that she wants a child, she may undergo costly IVF treatments or pursue adoption as a result of her discovered infertility.⁶²

i. Medical Remedies to Infertility

There are high costs associated with infertility. Some negligently injured women may require costly testing to confirm and explore the degree to which

55. *Medical Abortion Procedures*, AM. PREGNANCY ASS’N, <http://www.americanpregnancy.org/unplannedpregnancy/medicalabortions.html> (last updated May 2004).

56. See *Side Effects and Complications of Medication Abortion*, *supra* note 54.

57. *Surgical Abortion Procedures*, *supra* note 51; see also *Dilation and Evacuation*, *supra* note 45.

58. *Surgical Abortion Procedures*, *supra* note 51; see also *Induction Abortion*, *supra* note 47.

59. See *Surgical Abortion Procedures*, *supra* note 51.

60. *Considering Abortion*, *supra* note 50; cf. *Surgical Abortion Procedures*, *supra* note 51 (showing that regardless of the left or right lean of the source the dangers of abortion remain relatively the same).

61. Strahan, *supra* note 38, at 203-08. Symptoms related to “cervical incompetence” were found among 75% of women who underwent forced dilation for abortion or to evacuate “the retained products of conception.” Barry G. Wren, *Cervical Incompetence: Aetiology and Management*, 2 MED. J. AUSTL. 1146, 1146-47 (1973). A weak cervix may also be unable to carry the weight of a later pregnancy. *Id.*

62. See Berry et al., *supra* note 11, at 165 tbl.2; Clark, *supra* note 2. Although this list is not exhaustive, it covers the range of options an infertile or sterile woman has when trying to have a child.

they can or cannot bear a child.⁶³ They may try multiple methods of other fertility treatments before turning to IVF or may consult with many medical professionals, all of which are costly endeavors.⁶⁴

As a result of infertility, some women turn to IVF.⁶⁵ The IVF procedure involves removing eggs from a woman's ovary, fertilizing those eggs in a laboratory, and then placing those fertilized eggs in a uterus (that may or may not belong to the woman who initially donated the eggs).⁶⁶ This procedure can cost between \$12,000 and \$17,000 per attempt at pregnancy, called a cycle.⁶⁷ Women spend anywhere from \$10,000 to \$100,000 and up on IVF treatments.⁶⁸ As if the cost were not daunting enough, seventy-five percent of prospective parents who try IVF treatments end their attempts childless.⁶⁹ Should a medical professional negligently perform an abortion, a woman may spend close to \$100,000 for several unsuccessful cycles of IVF treatments.⁷⁰

ii. Adoption as an Alternative to Medical Remedies

Some individuals turn to adoption as an alternative to IVF or other medical assistance to procuring a child.⁷¹ Adoption gives a prospective parent the advantage of choice, but it has drawbacks concerning costs and method. It also does not provide a prospective parent with a child who is biologically related to the parent.⁷² Parents can take three main avenues when choosing a form of adoption: the foster care system, a domestic private agency, or an international adoption agency—a method that has increased in popularity recently.⁷³ The costs of adoption vary depending on which form of adoption the parent chooses.⁷⁴

Adopting from the U.S. foster care system is generally the least expensive type of adoption. It usually involves little or no cost, and states often provide

63. See STERLING & BEST-BOSS, *supra* note 9, at 75-81.

64. See *id.* at 82-89.

65. See *id.* at 89.

66. 3-I ATTORNEYS' DICTIONARY OF MEDICINE I-59604 (2009).

67. Clark, *supra* note 2. One IVF cycle is a one-month period that includes a period of taking hormones and other medical injections, an egg retrieval procedure, an embryo transfer procedure, and a pregnancy test. See *Sample IVF Calendar Schedule*, *supra* note 6.

68. See Clark, *supra* note 2.

69. *Id.*; see also PENCE, *supra* note 2, at 102. Even the more generous figures only increase the rate of pregnancy by five percent. *Id.* at 116.

70. See Clark, *supra* note 2.

71. See Berry et al., *supra* note 11.

72. *Adopt Definition*, MERRIAM-WEBSTER DICTIONARY ONLINE, <http://www.merriam-webster.com/dictionary/adopt> (last visited Apr. 16, 2011) (“[T]o take voluntarily (a child of other parents) as one's own child.”).

73. See *About the Children Who Need Families*, ADOPTION.COM, <http://adopting.adoption.com/child/about-the-children-who-need-families.html> (last visited Apr. 16, 2011).

74. See *Adoption Costs*, *supra* note 2.

subsidies to adoptive parents.⁷⁵ However, some prospective adoptive parents may avoid the foster care system because the children may be more likely to have special needs.⁷⁶ Children in the public system may be older, have siblings that should be kept together, have disabilities that manifest themselves physically, emotionally, or mentally, or have a combination of disabilities.⁷⁷ A prospective parent may find these characteristics undesirable.

Because of the perceived disadvantages of foster care adoption, some would-be adoptive parents choose to adopt through private agencies instead of utilizing public adoptions.⁷⁸ In addition, couples prefer adopting children with the same ethnic background.⁷⁹ This makes the demand for white, healthy babies skyrocket since most couples looking to adopt are white, which must increase the cost of private adoption.⁸⁰ Although private agencies are more costly, they are often preferred because they can expedite the process and provide a closer match to the criteria that an adoptive parent specifies.⁸¹ The estimated cost of private adoptions ranges from \$5,000 to \$40,000.⁸² These estimates include costs not associated with foster care adoptions, including numerous additional fees for adoption agency services, birthmother care, state requirements, and travel expenses.⁸³

Given current trends and popularity, parents may also choose to look internationally for a child. The rate of international adoptions has dramatically increased in the past decade, nearly tripling since 1992.⁸⁴ This may be due to

75. *Id.*

76. *About the Children Who Need Families*, *supra* note 73.

77. *Id.*

78. *See Adoption Agency – Private vs Public*, CHILD ADOPTION MATTERS, <http://child-adoption-matters.com/adoption-agency.html> (last visited Apr. 16, 2011) [hereinafter *Adoption Agency*].

79. *See* Gregory Pence, *De-Regulating and De-Criminalizing Innovations in Human Reproduction*, 39 CUMB. L. REV. 1, 12 (2008-09) [hereinafter *Innovations in Human Reproduction*]; *About the Children Who Need Families*, *supra* note 73.

80. *See Innovations in Human Reproduction*, *supra* note 79; *About the Children Who Need Families*, *supra* note 73; *Adoption Costs*, *supra* note 2.

81. *See Adoption Agency*, *supra* note 78.

82. “Agency and private adoptions can range from \$5,000 to \$40,000 or more depending on a variety of factors including services provided, travel expenses, birthmother expenses, requirements in the state, and other factors.” *Adoption Costs*, *supra* note 2. “Such demand lets many adoption agencies charge substantial fees for their services. . . . The average couple in 2002 seeking to adopt a baby paid agencies nearly \$20,000. Some couples pay over \$100,000 in their quest for a healthy toddler.” *Innovations in Human Reproduction*, *supra* note 79; Laura Mansnerus, *Market Puts Price Tag on the Priceless*, N.Y. TIMES, Oct. 26, 1998, at A1.

83. *Adoption Costs*, *supra* note 2.

84. Allison McGevna & Associated Press, *Domestic vs. International Adoption: Are Celebrities Overlooking American Children?*, FOXNEWS.COM (April 3, 2009), <http://www.foxnews.com/entertainment/2009/04/03/domestic-vs-international-adoption-celebrities-overlooking-american-children/>; *see also Adoption Statistics: Numbers & Trends*, ADOPTION.COM, <http://statistics.adoption.com/information/adoption-statistics-numbers-trends.html> (last visited Apr. 16, 2011) (citing United States Department of State).

the increase in foreign adoptions by celebrities.⁸⁵ Madonna, Angelina Jolie, Mia Farrow, Julie Andrews, and Meg Ryan have all adopted children internationally.⁸⁶ Prospective parents cite a number of reasons (some based on fact, some based on assumption) for preferring foreign adoptions to its domestic alternative: 1) international adoptions may involve a shorter waiting period; 2) the chances of adopting a same-race child are increased if they choose the country from which they wish to adopt; 3) inter-country adoptions are not open adoptions; 4) birthparents from other countries will be less likely to change their minds; and 5) children living in overseas orphanages will not have been exposed to the abuse and neglect they face in the United States.⁸⁷ The cost of an international adoption can range from \$7,000 to \$30,000.⁸⁸

The costs associated with procuring a child can snowball. If a woman's journey toward having a child starts with fertility treatments, namely IVF treatments, there is a 75% chance she will not become pregnant.⁸⁹ After the IVF treatments fail, the injured woman may still want a child and may be willing to forgo having a biological child. A woman would then look to adoption and incur the additional costs of adoption, if she could bear such costs.

II. MALPRACTICE DAMAGES IN WISCONSIN ARE INSUFFICIENT TO FULLY COMPENSATE VICTIMS OF NEGLIGENTLY PERFORMED ABORTIONS

The two Wisconsin medical malpractice statutes are included in the chapters entitled "Health Care Liability and Injured Patients and Families Compensation"⁹⁰ and "Limitations of Commencement of Actions and Proceedings and Procedure for Claims Against Governmental Units."⁹¹ Those statutes, along with the related jury instructions, leave women who have undergone negligently performed abortions undercompensated because of how the Wisconsin statutes and jury instructions define punitive, economic, and noneconomic damages. Those definitions, when explained through jury instructions, are too vague to provide for full recovery.

85. See McGevna & Associated Press, *supra* note 84.

86. *Id.*

87. *Should You Adopt Internationally?*, FAMILY EDUCATION, <http://life.familyeducation.com/adoption/transracial-adoptions/45783.html> (last visited Apr. 16, 2011).

88. *Adoption Costs*, *supra* note 2.

89. Clark, *supra* note 2.

90. See WIS. STAT. § 655.009 (2009-10).

91. See *id.* § 893.55.

A. *Malpractice Damages in Wisconsin*

There are two statutes in Wisconsin addressing compensation for medical malpractice, section 655.009, and section 893.55.⁹² Section 655.009 governs actions against health care providers and is found in the chapter on Health Care Liability and Injured Patients and Families Compensation. Under section 655.009, “[t]he court or jury, whichever is applicable, shall determine the amounts of medical expense payments previously incurred and for future medical expense payments.”⁹³ This leaves the damage amounts to the sole discretion of the factfinder, subject to the limitations of section 893.55.⁹⁴

There are three kinds of damages in Wisconsin: economic damages, noneconomic damages, and punitive damages.⁹⁵ Economic damages compensate for losses and expenses, either already incurred or incurred in the future.⁹⁶ They include medical costs.⁹⁷ Noneconomic damages can compensate for pain and suffering, loss of enjoyment, and loss of consortium.⁹⁸ Punitive damages are damages that are added to both economic and noneconomic damages because of the “wanton, reckless, malicious, or oppressive character of the acts.”⁹⁹ However, punitive damages are not available under Wisconsin medical malpractice law.¹⁰⁰

Wisconsin Statute section 893.55(5)(e) does not allow punitive damages in medical malpractice actions.¹⁰¹ Without punitive damages, plaintiffs are only able to receive economic and noneconomic damages.¹⁰² In *Lund v. Kokemoor*, the Wisconsin Court of Appeals determined that the legislature intended plaintiffs in medical malpractice actions to only receive compensatory

92. *Id.* §§ 655.009, 893.55; *see also* WISCONSIN JURY INSTRUCTIONS: CIVIL 1756, *supra* note 1; WISCONSIN JURY INSTRUCTIONS: CIVIL 1758, *supra* note 1.

93. WIS. STAT. § 655.009(2).

94. *See id.* § 893.55.

95. *See* THE LAW OF DAMAGES IN WISCONSIN (Russell M. Ware ed., 5th ed. 2010); *see also* WIS. STAT. § 893.55; WISCONSIN JURY INSTRUCTIONS: CIVIL 1756, *supra* note 1; WISCONSIN JURY INSTRUCTIONS: CIVIL 1758, *supra* note 1.

96. George Coppolo, *Damages: Medical Malpractice*, STATE OF CONN. OFF. LEGIS. RES. (Jan. 2, 2004), <http://www.cga.ct.gov/2004/rpt/2004-R-0002.htm>. *See generally* THE LAW OF DAMAGES IN WISCONSIN, *supra* note 95.

97. Coppolo, *supra* note 96; *see* 1 THE LAW OF DAMAGES IN WISCONSIN, *supra* note 95, § 9.5; *see also* WIS. ADMIN. CODE INS § 17.26(3)(c) (2010).

98. WIS. STAT. § 893.55(4)(a).

99. 22 AM. JUR. 2D *Damages* § 539 (2003).

100. *Lund v. Kokemoor*, 537 N.W.2d 21, 21 (Wis. Ct. App. 1995).

101. *Id.* at 23. “Lund and Stafsholt ... filed a medical malpractice action against Kokemoor, a neurosurgeon, for injuries they allegedly sustained following surgical procedures performed by Kokemoor. The plaintiffs’ complaint alleged a cause of action for negligence and sought punitive damages as a result of the “outrageous, callous and reckless” nature of Kokemoor’s conduct.” *Id.* at 21-22. The court found that the statutes did not allow for punitive damages in medical malpractice cases. *Id.* at 23.

102. *See id.* at 23 (“[C]ompensatory damages’ include all recoverable damages (beyond nominal damages) other than punitive or exemplary damages.”) (citing 1 THE LAW OF DAMAGES IN WISCONSIN § 1.5 (1994)).

damages, or damages that were “economic” in nature.¹⁰³ They found that neither chapter 655 regarding Health Care Liability nor chapter 893 regarding Limitations on Commencement of Actions permitted punitive damages in medical malpractice actions.¹⁰⁴ The lack of punitive damages decreases the award that a plaintiff may use to offset the costs of litigation or future costs.¹⁰⁵

B. Economic Damages in Wisconsin

Compensatory damages become the only real form of relief for women injured in a negligently performed abortion procedure. The Wisconsin Statutes break down compensatory damages stemming from medical malpractice into two subcategories: economic and noneconomic damages.¹⁰⁶ Economic damages are “compensation for monetary losses and expenses, which the plaintiff has incurred, or is *reasonably likely* to incur in the future, as a result of the defendant’s negligence.”¹⁰⁷ This includes medical expenses from medical, nursing, and rehabilitation services, along with the costs of supplies and pharmaceuticals.¹⁰⁸

Economic damages are neither statutorily defined nor entirely defined in Wisconsin case law.¹⁰⁹ The judge or jury decides the economic damages award, adding medical payments incurred prior to the date of judgment with any future payments that are required after the date of judgment.¹¹⁰ The injured woman must show that the medical expenses were, or will be, incurred for the treatment of the injury in dispute.¹¹¹ She must also prove her expenses are reasonable.¹¹² The plaintiff must prove that the defendant’s negligence caused, at least proximately, the expenses.¹¹³ Some examples of economic damages

103. *See id.* at 23.

104. *Id.*

105. When a plaintiff cannot get punitive damages, and yet is most likely required to pay expert witnesses to testify as to the professional customs, the cap on noneconomic damages is much more limited than previously thought. *See* B. Sonny Bal, *The Expert Witness in Medical Malpractice Litigation*, 467 CLINICAL ORTHOPAEDICS & RELATED RES. 383, 384 (2009).

106. WIS. STAT. § 893.55(4) (2009-10).

107. Coppolo, *supra* note 96 (emphasis added). Although this pertains specifically to the Connecticut statutory law regarding economic and noneconomic damages, there is substantial overlap. The report has a clear and concise breakdown on what is considered economic and noneconomic damages.

108. WIS. ADMIN. CODE INS § 17.26(3)(c) (2010).

109. There are three statutes that reference “economic damages,” and none of those statutes defines the term. *See* WIS. STAT. §§ 26.09(3)(c), 893.55(1d)(a), 893.55(4)(e).

110. *See id.* § 655.009(2).

111. Coppolo, *supra* note 96; *see* 1 THE LAW OF DAMAGES IN WISCONSIN, *supra* note 95, § 9.5.

112. Coppolo, *supra* note 96; *see* 1 THE LAW OF DAMAGES IN WISCONSIN, *supra* note 95, § 9.5.

113. Coppolo, *supra* note 96; *see* 1 THE LAW OF DAMAGES IN WISCONSIN, *supra* note 95, § 9.16.

include loss of wages or income and loss of earnings and earning capacity, which may include the loss of benefits from pensions, medical care, custodial care, and funeral expenses.¹¹⁴

Although one may interpret medical expenses as including the future costs of IVF and adoption, there are two potential problems. The first problem is whether the jury will decide if fertility treatments and adoption costs are reasonably likely. The second is whether the jury will decide if the costs related to these options stem from the injury.

i. Are Fertility Treatments and Adoption Costs Reasonably Likely?

Since economic damages are considered compensation for expenses incurred or reasonably likely to be incurred as a result of the negligent injury, a jury may decide that a woman should be compensated for the costs of fertility treatments or adoption that she is reasonably likely to incur in her endeavor to have a child later in life. To determine if the costs of IVF and other fertility treatments are reasonably likely, the factfinder determines the likelihood that the victim will want a child in the future and the associated costs.¹¹⁵ Both of those determinations are speculative at best.

However, the likelihood that the victim will want a child is high.¹¹⁶ Not only does the average American woman have a child in her lifetime, there is also no evidence that the statistics change for a woman who has undergone an abortion.¹¹⁷ In fact, 18% of women who have abortions will be pregnant again within the next twelve months.¹¹⁸

But along with the statistics on childbearing and the victim's personal testimony, the jury will also hear that the woman has had an abortion. Ignoring the potential biases of jurors would be naive when it comes to an issue as controversial as abortion.¹¹⁹ Some jurors may discount the likelihood that a

114. Coppolo, *supra* note 96. *See generally* THE LAW OF DAMAGES IN WISCONSIN, *supra* note 95.

115. *See* WISCONSIN JURY INSTRUCTIONS: CIVIL 1758, *supra* note 1.

116. *See* Jack Gillum, *Number of Households with Kids Hits New Low*, USA TODAY, Feb. 26, 2009, at 10B, available at http://www.usatoday.com/news/nation/census/2009-02-25-families-kids-home_N.htm. Forty-six percent of all households have a child under eighteen years old living in the household. *Id.* This does not include those households that have children over the age of eighteen or children not living in the household. *Id.* The data come from the Census' most recent Current Population Survey. *Id.*

117. *See id.* *See generally* *Abortion Complications*, AFTER ABORTION, <http://www.afterabortion.org/1999/abortion-complications/> (last updated Nov. 23, 1999).

118. *Abortion Complications*, *supra* note 117.

119. Further, the plaintiff's decision to use a "for cause" or peremptory strike to keep biased individuals off the jury may not alleviate the problem. *See generally* Coburn R. Beck, Note, *The Current State of the Peremptory Challenge*, 39 WM. & MARY L. REV. 961, 963-65 (1998). The plaintiff's attorney can use their "for cause" strikes to eliminate those who could not find in their client's favor based on a negative answer to a certain question; for example, one question could be, "Would you be able to find for a plaintiff who underwent an abortion and was injured in that procedure by the negligence of a medical professional?" *See id.* at

woman who has had an abortion will desire a child in the future, despite evidence to the contrary; some jurors may assume that any injury results from the woman's choice to have the abortion procedure rather than from the negligence of the medical professional.

Further, the jury will have to determine the methods that individual victims will undergo to medically aid a pregnancy and their costs.¹²⁰ This will require substantial and complex expert testimony.¹²¹ Even with expert medical professional testimony, treatments such as IVF and fertility treatments are not guaranteed, and their success depends on a variety of factors that an expert will not know at the time of trial.¹²²

ii. Do the Costs of Fertility Treatments and Adoption
Stem from the Injury?

Even if the plaintiff can prove that the costs of IVF and adoption are reasonably likely, she must still show that the costs of one or both options stem from the injury.¹²³ It is debatable whether IVF treatment expenses stem from the injury. The plaintiff's side will argue that any future costs associated with becoming pregnant should be included in the future medical expenses since the infertility stems from the medical professional's negligence and childbearing is a major life activity.¹²⁴ A good lawyer will point out that when a woman has an injured uterus, not only is her physical body harmed, but the injury also affects

963-64. The plaintiff's attorney can also use the peremptory strikes. *Id.* at 964. However, no amount of questioning can reveal all the underlying presuppositions or biases a jury may have regarding the women that undergo abortions.

120. See WISCONSIN JURY INSTRUCTIONS: CIVIL 1758, *supra* note 1; see also Comment, WISCONSIN JURY INSTRUCTIONS: CIVIL 1758, *supra* note 1 ("To sustain an award for future health care expenses, two criteria must be met: (1) there must be expert testimony of permanent injuries requiring future medical treatment and the incurring future medical expenses; and (2) an expert must establish the cost of such medical expenses.") (citing *Weber v. White*, 2004 WI 63, ¶ 20, 681 N.W.2d 137 (Wis. 2004)).

121. See *Weber*, 2004 WI 63, ¶ 20. The expert will not have all of the information at the time of trial for two main reasons. The first reason is that given the conjectural nature of fertility treatments and their effectiveness, we do not know if the method the expert recommends at the time of trial will actually work. See *Clark*, *supra* note 2. Furthermore, because of the statute of limitations regarding medical malpractice suits, the injured woman will be litigating her suit relatively close to the date of her negligently performed abortion. See WIS. STAT. § 893.55(1m)(a) (2009-10). Medical malpractice actions, with some exceptions, must be filed within three years from the date of injury. *Id.* Because women under the age of twenty-five obtain fifty percent of all abortion procedures, it may be over ten years before she desires to have a child. See generally GUTTMACHER INST., *supra* note 19.

122. See *Clark*, *supra* note 2.

123. See *Coppolo*, *supra* note 96; see 1 THE LAW OF DAMAGES IN WISCONSIN, *supra* note 95, § 9.16.

124. See *Bragdon v. Abbott*, 524 U.S. 624, 638 (1998). The Supreme Court said the ability to reproduce is a major life activity. *Id.* at 638. The case held that HIV is an impairment under the Americans with Disabilities Act, because it was an impairment from the moment of infection that substantially limited respondent's ability to reproduce, which was a major life activity. *Id.* at 638-39.

her ability to bond with a child and be a mother.¹²⁵ The defense will argue that becoming pregnant and having a child is a choice; therefore, the costs should not be included in medical expenses, even though the infertility may stem from the defendant's negligence.¹²⁶

Since economic damages are considered compensation for expenses incurred or reasonably likely to be incurred as a result of the negligent injury, a jury may decide that a woman should be compensated for the costs of adoption that she is reasonably likely to incur in her endeavor to have a child later in life.¹²⁷ However, even if a jury does want to provide monies in economic damages for adoption costs, a jury has no current instruction on what kind of adoption that should be, given that a women may choose between public, private, or international adoptions.¹²⁸ There is no indication that a jury must find the cheapest route to compensation.¹²⁹

Further, if a jury decides to award the woman the lowest amount for adoption costs, the amount for a public adoption, there is no guarantee that the woman will be eligible for a public adoption.¹³⁰ A number of factors—none of which are taken in isolation—may make a woman ineligible for a public adoption, such as source of income, being unmarried, or lacking a support system that the government requires.¹³¹ One solution for the jury is to award costs associated with public adoptions and require a would-be private adopter to pay any extra costs. However, that restricts the options of a woman who wishes to adopt privately or internationally who cannot bear the additional costs of such an adoption.¹³²

125. "How much is a man worth—a whole man? A whole man if they have injured part of him, the injury to part of him must affect all of him." MOE LEVINE, MOE LEVINE ON ADVOCACY 45 (2009).

126. See Bragdon, 524 U.S. at 659 (Rehnquist, J., dissenting).

127. See, e.g., Coppolo, *supra* note 96. See generally THE LAW OF DAMAGES IN WISCONSIN, *supra* note 95.

128. See *About the Children Who Need Families*, *supra* note 73.

129. See WISCONSIN JURY INSTRUCTIONS: CIVIL 1758, *supra* note 1; see also Comment, WISCONSIN JURY INSTRUCTIONS: CIVIL 1758, *supra* note 1.

130. See, e.g., *Where Do I Begin? Answers to Your Questions About Adoption and Foster Care*, MICH. ADOPTION RES. EXCHANGE, <http://www.mare.org/Info/FAQ.html> (last visited Apr. 16, 2011). Some qualifications to adopt through the state include: be eighteen years old or older; be of good moral character; understand the care which must be provided to the children, or express a willingness to learn how to provide that care; have enough time to provide care and supervision; have a specific source of income, and be capable of managing that income; be of such physical, mental, and emotional health to be able to properly care for the children; be willing to work with a child's birth or adoptive family, and be able to show that willingness; be able to assure the proper care and safety of children by willing to comply with the licensing rules for foster homes. See *id.* Medical statements are also required. *Id.*

131. See *id.*

132. See *Adoption Costs*, *supra* note 2.

C. *Noneconomic Damages in Wisconsin*

If the factfinder concludes that the costs of IVF or adoption are not includable under economic damages because they do not fulfill the statutory requirements, these costs may fall under noneconomic damages.¹³³ The Wisconsin statute addressing medical malpractice remedies indicates that noneconomic damages are compensation for the injury a plaintiff may face from pain and suffering, loss of enjoyment of normal activities, and loss of consortium.¹³⁴ This may include compensation for loss of love and affection, loss of the benefits and pleasures of life, loss of bodily functions, and mental distress.¹³⁵ Other sources cite permanent impairment of loss of function and loss of the ability to enjoy life's pleasures as additional noneconomic damages.¹³⁶ If the costs of IVF and adoption are not included in economic damages, the plaintiff would have to seek an award for noneconomic damages in one of the categories above to cover these costs.¹³⁷

In the fertility treatment and adoption context, a jury would be charged with deciding to what extent the infertility has impaired the woman's ability to enjoy motherhood and what sum would fairly and reasonably compensate her for that impairment.¹³⁸ For example, to win an award for pain, suffering, and disability or disfigurement, a jury is asked to "consider to what extent [her] injuries have impaired and will impair [her] ability to enjoy the normal activities, pleasures, and benefits of life."¹³⁹ The jury is not asked to determine

133. See WIS. STAT. § 893.55(5) (2009-10). When identifying noneconomic damages, the factfinder must decide how much should be awarded for each individual category. See *id.* Section 893.55(5) reads:

Every award of damages under ch. 655 shall specify the sum of money, if any, awarded for each of the following for each claimant for the period from the date of injury to the date of award and for the period after the date of award, without regard to the limit under sub. (4) (d):

- (a) Pain, suffering and noneconomic effects of disability.
- (b) Loss of consortium, society and companionship or loss of love and affection.
- (c) Loss of earnings or earning capacity.
- (d) Each element of medical expenses.
- (e) Other economic injuries and damages.

134. *Id.* § 893.55(4)(a).

135. *Id.*

136. See, e.g., Coppolo, *supra* note 96; 1 THE LAW OF DAMAGES IN WISCONSIN, *supra* note 95, §§ 7.4, 7.11

137. See, e.g., Coppolo, *supra* note 96; 1 THE LAW OF DAMAGES IN WISCONSIN, *supra* note 95, §§ 7.4, 7.11

138. See 2 WIS. CIVIL JURY INSTRUCTIONS COMM. & UNIV. OF WIS. LAW SCH., WISCONSIN JURY INSTRUCTIONS: CIVIL 1767 (1999) [hereinafter WISCONSIN JURY INSTRUCTIONS: CIVIL 1767].

139. 2 WIS. CIVIL JURY INSTRUCTIONS COMM., UNIV. OF WIS. LAW SCH., WISCONSIN JURY INSTRUCTIONS: CIVIL 1768 (1998) [hereinafter WISCONSIN JURY INSTRUCTIONS: CIVIL 1768].

how much is required to make her whole, or to put her in the same place she was before the injury, but rather how much will compensate her for her current infertility.¹⁴⁰ That might lead to a disjointed jury award that does not cover the cost of procuring a child, but does cover the harm the infertility causes the plaintiff.

Noneconomic damages are capped in Wisconsin at \$750,000.¹⁴¹ Although \$750,000 seems reasonable on its face, that amount is not guaranteed.¹⁴² In order to win an award of noneconomic damages, a plaintiff must show that such damages are warranted.¹⁴³

Even if the jury decides to award noneconomic damages, a woman in Wisconsin may remain undercompensated because noneconomic damages are capped at \$750,000.¹⁴⁴ The purpose of the section 893.55 cap has conflicting objectives. On one hand it strives to “provid[e] adequate compensation to the victims of medical malpractice,” but it also strives to “ensure affordable and accessible health care.”¹⁴⁵ In order to balance both objectives, the legislature

140. See WISCONSIN JURY INSTRUCTIONS: CIVIL 1767, *supra* note 138; WISCONSIN JURY INSTRUCTIONS: CIVIL 1768, *supra* note 139.

141. WIS. STAT. § 893.55(4)(d) (2009-10). “The legislature further finds that the limitation of \$750,000 represents an appropriate balance between providing reasonable compensation for noneconomic damages associated with medical malpractice and ensuring affordable and accessible health care.” *Id.* § 893.55(1d)(b).

142. See 2 WIS. CIVIL JURY INSTRUCTIONS COMM. & UNIV. OF WIS. LAW SCH., WISCONSIN JURY INSTRUCTIONS: CIVIL 1750.2 (1998) [hereinafter WISCONSIN JURY INSTRUCTIONS: CIVIL 1750.2]; 2 WIS. CIVIL JURY INSTRUCTIONS COMM. & UNIV. OF WIS. LAW SCH., WISCONSIN JURY INSTRUCTIONS: CIVIL 1766 (2009) [hereinafter WISCONSIN JURY INSTRUCTIONS: CIVIL 1766]; WISCONSIN JURY INSTRUCTIONS: CIVIL 1767, *supra* note 138; WISCONSIN JURY INSTRUCTIONS: CIVIL 1768, *supra* note 139; 2 WIS. CIVIL JURY INSTRUCTIONS COMM. & UNIV. OF WIS. LAW SCH., WISCONSIN JURY INSTRUCTIONS: CIVIL 1770 (2006).

143. See WISCONSIN JURY INSTRUCTIONS: CIVIL 1750.2, *supra* note 142; WISCONSIN JURY INSTRUCTIONS: CIVIL 1766, *supra* note 142; WISCONSIN JURY INSTRUCTIONS: CIVIL 1767, *supra* note 138; WISCONSIN JURY INSTRUCTIONS: CIVIL 1768, *supra* note 139; WISCONSIN JURY INSTRUCTIONS: CIVIL 1770, *supra* note 142.

144. See WIS. STAT. § 893.55(4)(d).

The legislature further finds that the limitation of \$750,000 represents an appropriate balance between providing reasonable compensation for noneconomic damages associated with medical malpractice and ensuring affordable and accessible health care. This finding is based on actuarial studies provided to the legislature, the experiences of other states with and without limitations on noneconomic damages associated with medical malpractice, the testimony of experts, and other documentary evidence presented to the legislature.

Id. § 893.55(1d)(b). Also, “The legislature concludes that the number chosen is neither too high nor too low to accomplish the goals of affordable and accessible health care, is a reasonable and rational response to the current medical liability situation, and is reasonably and rationally supported by the legislative record.” *Id.* § 893.55(1d)(c).

145. *Id.* § 893.55(1d)(a).

capped the amount of noneconomic damages a plaintiff may be awarded and imposed requirements on health care providers in the state.¹⁴⁶

Under section 893.55, health care providers are required to carry liability insurance and must participate in the Injured Patients and Families Compensation Fund.¹⁴⁷ The legislature rationalizes this requirement by pointing out that economic damages are still unlimited and therefore a victim who can be compensated under economic damages will be fully compensated.¹⁴⁸ Nevertheless, a victim may not be fully indemnified if she suffered large noneconomic damages (i.e., pain and suffering) compared to relatively small economic damages (i.e., medical costs).

The legislature cites several justifications for limiting the noneconomic damages that victims can be awarded.¹⁴⁹ First, unlimited noneconomic damages provide a disincentive for physicians to practice in Wisconsin.¹⁵⁰ The statute asserts that unlimited noneconomic damages lead to high insurance premiums, that is, if insurance companies are willing to provide professional limited liability coverage at all.¹⁵¹ The effect a high award has on a health care professional's bottom-line also serves as a disincentive.¹⁵² Second, restricting noneconomic damages limits the incentive for health care professionals to practice "defensive medicine."¹⁵³ Defensive medicine has been proven to increase the cost of health care generally.¹⁵⁴ Third, limiting noneconomic damages gives more predictability to insurers, which in turn allows those insurers to set more risk-reflective premiums.¹⁵⁵ Fourth, limiting noneconomic damages protects the financial integrity of the Injured Patients and Families Compensation Fund by providing more predictability in awards.¹⁵⁶ This allows

146. *Id.* The legislature determined this based on "documentary evidence, testimony received at legislative hearings, and other relevant information." *Id.*

147. *See id.*

148. *See id.*

149. *See* § 893.55(1d)(a)1.

150. *See id.*

151. *See id.* This was based on a 2003 U.S. Congress Joint Economic Committee Report, a 2003 Federal Department of Health and Human Services study, and a 2004 Office of the Commissioner of Insurance Report. *See id.*

152. *See id.* This was recognized by a 2003 U.S. Congress Joint Economic Committee Report, a 2003 Federal Department of Health and Human Services Study, and a 2004 Office of the Commissioner of Insurance Report. *See id.*

153. *See id.* § 893.55(1d)(a)2.

154. *Id.* This was recognized by a 2002 Federal Department of Health and Human Services Study, a 2003 U.S. Congress Joint Economic Committee Report, a 2003 Federal Government Accounting Office Study, and a 2005 Office of the Commissioner of Insurance Report. *See id.*

155. *See id.* § 893.55(1d)(a)3. This was recognized by a 2003 Federal Department of Health and Human Services Study. *See id.*

156. *See id.* § 893.55(1d)(a)4. This was recognized by a 2005 Legislative Fiscal Bureau Memo, a 2001 Legislative Audit Bureau Report, and a 2005 Office of the Commissioner of Insurance Report. *See id.*

the Fund's Board of Governors to approve assessments for health care providers that are reasonable.¹⁵⁷

D. The Problem with Damages in Wisconsin

Even after being awarded significant economic damages and a reasonable amount for noneconomic damages, it is probable that a woman will find herself undercompensated. Economic damages are nothing more than a reimbursement of monies paid or monies owed and lost income.¹⁵⁸ There is no extra money awarded for unanticipated expenditures.¹⁵⁹ The only extra monies available come from noneconomic damages.¹⁶⁰ Even the combination of economic and noneconomic damages will not fully compensate a woman for the future costs of having a child. A woman's total award (economic plus noneconomic damages) is first reduced by the costs of litigation, such as filing fees and expert witness costs.¹⁶¹ Then, the lawyer will take one-third of the total award as his contingency fee.¹⁶² After that, the woman will pay off her outstanding medical bills.¹⁶³

To understand the significance of the problem of damages, consider the following hypothetical. A woman's negligently performed abortion caused a perforated uterus. As a result of her injury, the jury awards \$20,000 for medical expenses (which she owes), \$30,000 for lost wages, and the jury awards noneconomic damages contemplating both the recommended amount for IVF (\$100,000)¹⁶⁴ and a private adoption (\$40,000),¹⁶⁵ intending that the woman will want to attempt IVF, fail to become pregnant, and then adopt a child.¹⁶⁶ This makes her total award \$190,000.

157. *See id.* This was recognized by a 2005 Legislative Fiscal Bureau Memo, a 2001 Legislative Audit Bureau Report, and a 2005 Office of the Commissioner of Insurance Report. *See id.*

158. *See, e.g.,* Coppolo, *supra* note 96. *See generally* THE LAW OF DAMAGES IN WISCONSIN, *supra* note 95.

159. *See, e.g.,* Coppolo, *supra* note 96. *See generally* THE LAW OF DAMAGES IN WISCONSIN, *supra* note 95.

160. *See* WIS. STAT. § 893.55(5).

161. *See* Weber v. White, 2004 WI 63, ¶ 20, 681 N.W.2d 137 (Wis. 2004).

162. Standard contingency fee agreements provide for a one-third fee for the attorney representing the client in a medical malpractice case. *See* JAMES K. CARROLL ET AL., AM. BAR ASS'N TORT TRIAL & INS. PRACTICE SECTION, REPORT ON CONTINGENT FEES IN MEDICAL MALPRACTICE LITIGATION (2004). Although the one-third is not a required amount, the Wisconsin Rules of Professional Conduct for Attorneys establishes that the percentage of a contingency fee must be reasonable. *See* WIS. SUP. CT. R. 20:1.5(a) (2009-10).

163. *See* WIS. STAT. §§ 427.101-.105.

164. *See* Clark, *supra* note 2.

165. *See* Adoption Costs, *supra* note 2.

166. I have chosen to choose the highest award amount to signify how a high award may not fully compensate. I have chosen not to award pain and suffering or other awards for simplicity.

First, court costs and expert fees of \$50,000 are deducted.¹⁶⁷ This decreases her award to \$140,000. Then, subtracting one-third attorney's fees of \$46,200, she has \$93,800 remaining. Next, we subtract the \$20,000 of medical expenses. So after all the mandatory payments she must make, she walks away from the case with \$73,800. This leaves her undercompensated. She must choose between 1) exhausting her resources trying for a biological child when she may or may not conceive, 2) giving up on having a biological child and adopting, or 3) spending her own money to supplement what is lacking. To the extent that the jury discounts her award even further, the options continue to evaporate.

Further, awarding costs of either IVF or adoption with either economic or noneconomic damages requires a jury to decide unknowable factors: whether the plaintiff will choose to have children,¹⁶⁸ whether she would want to try fertility treatments first or adopt, and what kind of adoption she would choose. A woman is statistically likely to have children; however, some women choose not to have children.¹⁶⁹ The jury must determine whether it is "reasonably likely" that the plaintiff will choose to have a child in the future.¹⁷⁰

The jury's interpretation of the reasonably likely standard may also be colored by a jury's impression of a woman who has undergone an abortion.¹⁷¹ It would not be unreasonable to see how a jury could make the leap from "she did not want a child now" to "she may never want a child, even in light of statistics to the contrary."¹⁷²

After the jury decides that the woman is reasonably likely to want a child in the future, they must decide what costs the woman is reasonably likely to incur in her endeavor to have a child.¹⁷³ The jury must decide if the woman is reasonably likely to start with IVF, desiring a biological child of her own, or start directly with adoption.¹⁷⁴ Although there is no special instruction on frugality in the jury instruction, intuitively, a jury may not be willing to award a

167. Although the costs of fees and experts will vary case by case, one site quoted \$50,000 as a minimum. *See, e.g., How Much Will It Cost to File a Medical Malpractice Case?*, DR. BRUCE G. FAGEL & ASSOCS., http://www.fagellaw.com/FAQ/How_Much_Will_it_Cost_.aspx (last visited Apr. 16, 2011).

168. *See* Gillum, *supra* note 116; *see also* STERLING & BEST-BOSS, *supra* note 9; Berry et al., *supra* note 11.

169. *See* Gillum, *supra* note 116.

170. *See* WISCONSIN JURY INSTRUCTIONS: CIVIL 1768, *supra* note 139.

171. Although there is very little research available on what factors juries typically consider when they are shut behind the doors of their deliberation room, it seems in line with what we know about our own nature to assume they bring their own opinions of such a controversial issue into the jury room. *See* Coppolo, *supra* note 96.

172. *See id.*; *Abortion Complications*, *supra* note 117.

173. *See* Coppolo, *supra* note 96. *See generally* THE LAW OF DAMAGES IN WISCONSIN, *supra* note 95.

174. This decision may be simplified for the jury based on whether the woman has fertility problems or is completely incapable of carrying a child as a result of the negligent procedure. In the case of the woman who is completely incapable of carrying child, the jury would only have to address the adoption issue.

woman exorbitant amounts of the defendant's money when a lesser amount would do.¹⁷⁵

For example, because of the likely failure of IVF treatments, a jury may conclude that the woman should abandon the idea of having a biological child and instead adopt. Given that 75% of all IVF attempts end in failure,¹⁷⁶ it would be easy for a court to instruct a jury not to expect negligent defendants to bear the costs of something so speculative. However, it is also not contested that most parents would prefer a child that is biologically related to them.¹⁷⁷ If a jury finds that some IVF treatments are warranted, they then must decide how many and at what cost.¹⁷⁸ They must determine the quality and the cost of the fertility specialist she may seek and how many rounds of IVF the plaintiff may undergo.¹⁷⁹ *The New England Journal of Medicine* asserted that undergoing at least six cycles maximizes the chances a woman has of giving birth.¹⁸⁰ However, rounds can range from one to at least eleven for some women.¹⁸¹

Given that there is so much for a jury to think about that is not mentioned in the jury instructions, it would be easy for a jury to get side-tracked or confused and leave a plaintiff undercompensated for the economic and noneconomic losses she has suffered.

This leaves the woman undercompensated for the injury inflicted by a medical professional during the course of a negligently performed abortion. The injured woman may be undercompensated for any future costs of fertility treatments and adoption costs. Those costs may include one treatment alone, or several cycles of IVF, plus the additional costs of adoption depending on the woman.¹⁸²

E. Proposed Changes to Wisconsin's Jury Instructions

To fully compensate the victim of a negligently performed abortion, the jury instructions should be changed to specifically include future fertility treatment and adoption costs as future medical expenses. The costs of fertility treatments and adoption costs should be included in economic damages, as opposed to the capped noneconomic damages, which would continue to leave a woman undercompensated. Based on the bias a jury may have toward

175. See WISCONSIN JURY INSTRUCTIONS: CIVIL 1768, *supra* note 139.

176. See Clark, *supra* note 2.

177. See *id.*

178. See WISCONSIN JURY INSTRUCTIONS: CIVIL 1768, *supra* note 139.

179. See *id.*

180. Patti Neighmond, *Study: Sixth Time May Be Charm for In Vitro*, NPR (Jan. 21, 2009), <http://www.npr.org/templates/story/story.php?storyId=99654924>. "A woman younger than 35, for example, had a 65 to 86 percent chance of giving birth after six IVF cycles." *Id.* Beth Israel Deaconess Medical Center, Harvard Medical School, and Boston IVF conducted the research for the study. See *id.*

181. See, e.g., Melissa Ford, *How Many IVF Cycles Are Enough?*, BLOGHER.COM (Apr. 16, 2009, 6:53 AM), <http://www.blogger.com/how-many-ivf-cycles-are-enough>.

182. See Clark, *supra* note 2; *Adoption Costs*, *supra* note 2.

abortions, a jury should not decide if a woman will want a child in the future. Rather, the jury should be instructed that a woman within her childbearing years should be presumed to want a child in the future, unless she stipulates otherwise.¹⁸³

The cost of fertility treatments and adoption should be expressly included in economic damages. Economic damages are more fitting because fertility treatments and adoption costs are all expenses that are incurred by the victim and must be compensated for.¹⁸⁴ Since a woman was fertile before the abortion, adoption and IVF costs will be additional to those costs she normally would have paid to bear a child in the future absent the injury.

CONCLUSION

A woman who has undergone a negligently performed abortion is likely to be grossly undercompensated for future actual costs that she may incur from fertility treatments and adoption because the Wisconsin Statutes and related jury instructions do not expressly provide for an award for those expenses.¹⁸⁵ The economic damages section of the award will cover the medical costs relating to repairing the damage of a negligent abortion procedure.¹⁸⁶ While the economic damages will help cover the woman's immediate health risks, she may still find herself infertile and unable to have a child.¹⁸⁷ The noneconomic damages award will provide for the pain and suffering the jury decides resulted from a negligent procedure, but that award may not be sufficient to absorb all of the costs of having a child later.¹⁸⁸

Having a child results in steep costs when one must undergo fertility treatments or pay adoption fees. At the very lowest, the costs start at \$5,000 and may cost up to several hundreds of thousands of dollars if a woman were to go through several cycles of IVF treatment and a private adoption.¹⁸⁹ It is cost-efficient to tell a plaintiff that they must stick to the cheapest route possible and only use public adoption.¹⁹⁰ However, this option precludes a woman from

183. Women under the age of twenty-five obtain over half of the abortions in the United States. See GUTTMACHER INST., *supra* note 18; see also Jones et al., *supra* note 18, at 228.

184. See WIS. ADMIN. CODE INS § 17.26(3)(c) (2010); see also Coppolo, *supra* note 96.

185. Costs of repairing the damage from the negligent procedure, unless it relieves the infertility, does not cover the costs of IVF or adoption unless a separate amount is awarded by the jury for such future costs. Since the woman underwent an abortion when the negligence occurred, it is reasonable to assume that she was, in fact, fertile prior to the procedure. Therefore to be whole again she should be able to have a child, as she could before the procedure.

186. See WIS. STAT. §§ 655.009(2), 893.55 (2009-10); WISCONSIN JURY INSTRUCTIONS: CIVIL 1756, *supra* note 1; WISCONSIN JURY INSTRUCTIONS: CIVIL 1758, *supra* note 1.

187. See Northern, *supra* note 3; *Who Should Not Use Medication Abortion?*, *supra* note 53.

188. See WIS. STAT. § 893.55(4).

189. See Clark, *supra* note 2; *Adoption Costs*, *supra* note 2.

190. See *Adoption Costs*, *supra* note 2.

2011]

WISCONSIN MEDICAL MALPRACTICE LAW

165

having her own biological child because of another's negligence. Further, giving the woman a take-it-or-leave-it choice between foster care adoption, which admittedly has its downsides and unknowns, and paying for her own private adoption, seems unfair.

In sum, Wisconsin's law on medical malpractice damages insufficiently compensates women who have undergone negligently performed abortions because a jury cannot adequately determine the award necessary given the speculative nature of the damages. Wisconsin needs to improve its jury instructions regarding medical malpractice in abortion procedures by including the costs associated with fertility treatments and/or adoption costs. Without such an instruction, the jury is left to their own devices and biases when determining remedies in a tort action.