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Surrogate Motherhood and Tort Liability: Will the New Reproductive Technologies Give Birth to a New Breed of Prenatal Tort

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SURROGATE MOTHERHOOD AND TORT LIABILITY: WILL THE NEW REPRODUCTIVE TECHNOLOGIES GIVE BIRTH TO A NEW BREED OF PRENATAL TORT?

I. INTRODUCTION

The advances in medical science and the exigent search for means by which infertile couples[1] may participate in the joys of parenting have spurred an increasing use of new reproductive technologies.[2] Among these methodologies are *in vitro* fertilization (IVF),[3] artificial insemination,[4] surrogate motherhood,[5] egg donation,[6] artificial embryona-

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[1] Approximately one out of every ten couples of childbearing age in the United States is infertile. W. FINEGOLD, ARTIFICIAL INSEMINATION 121 (2d ed. 1976).

[2] *See infra* notes 3-8 and accompanying text. Louise Joy Brown, the first test-tube baby, was born to Lesley Brown in England on July 25, 1978. N.Y. Times, June 16, 1982, § 4, at 22, col. 1. For a discussion of how the first test-tube baby was conceived and born, by the two scientists who developed the technique, see R. EDWARDS & P. STEPTOE, A MATTER OF LIFE (1980). Since 1978, numerous children throughout the world have been conceived using these new reproductive technologies. France's first test-tube baby was born on February 25, 1982. N.Y. Times, Feb. 25, 1982, at 16, col. 6. The world's first test-tube quadruplets were born in Australia on January 6, 1984. *Id.*, Jan. 6, 1984, at 2, col. 3. The first baby conceived via embryo transfer technique was born in the United States on February 3, 1984. *Id.*, Feb. 4, 1984, § 1, at 6, col. 1. Australia witnessed the first baby born of a frozen embryo on April 10, 1984. *Id.*, Apr. 11, 1984, § 1, at 16, col. 4. To illustrate the breadth of the advances in the new methods of procreation, it has been reported that Dr. Cecil Jacobsen at the George Washington University Medical School has fertilized a chimpanzee egg *in vitro* with chimpanzee sperm and implanted the fertilized egg into the abdomen of a male chimpanzee who later delivered a healthy baby chimpanzee by Caeserean section. L. ANDREWS, NEW CONCEPTIONS 261 (1984).

[3] *In vitro* is defined: "In an artificial environment, referring to a process or reaction occurring therein, as in a test tube or culture media." STEDMAN'S MED. DICTIONARY 723 (5th unabr. lawyer's ed. 1982). In IVF, the physician performs a minor operation on the wife in order to remove an egg from her ovary, and places it in a shallow dish (hence, the term "test-tube baby") containing a special medium and sperm. If the egg is fertilized, the physician then implants the fertilized egg (embryo, for the purposes of this Note) back into the womb of the mother. L. ANDREWS, *supra* note 2, at 5. For a more comprehensive description of the IVF procedure, see Edwards & Fowler, *Human Embryos in the Laboratory*, 223 SCI. AM. 44 (1970).

[4] In artificial insemination, the woman visits her physician when she is about to ovulate. Assuming the position for a pelvic examination, the physician implants sperm into the vagina, either via a syringe, injecting the sperm near the cervix, or by inserting sperm into a diaphragm-like cervical cap which the woman will wear for the following four to six hours. L. ANDREWS, *supra* note 2, at 5.

[5] For women who cannot conceive or carry a child for one of any number of reasons, another woman, a surrogate mother, agrees to be inseminated with the sperm of the husband to carry the baby to term. *Id.* at 6. Although this is the typical surrogate mother arrangement, it can take various forms: 1) the surrogate can be artificially inseminated with anonymous donor sperm; 2) the wife's egg can be fertilized by her husband's sperm *in vitro* and, once fertilized, implanted into the surrogate; or 3) the wife's egg can be fertilized by her husband's sperm in the conventional manner and, once fertilized, the egg will be flushed out and then implanted into the surrogate.

[6] In this technique, a microscopic egg of a woman donor is transferred into a woman who cannot produce her own egg or whose egg cannot travel to the uterus. It is the hope of the childless couple that once the egg is implanted inside the woman, it will be fertilized by the husband's sperm through natural intercourse. *Id.*

tion,[7] and embryo adoption.[8] The popularity of these technologies,[9] however, has prompted a myriad of legal and ethical problems.[10] Coupled with the virtual lack of legislation in these areas,[11] the problems are a reality. Furthermore, the existing, albeit scant, case law pertaining to the utilization of these new modes of reproduction sheds no light on the future resolution of the legal problems that will arise as these technologies continue to be employed.[12]

It seems inevitable that new causes of action will evolve as more childless couples resort to the use of the new reproductive methodologies. The prenatal tort claims abounding in precedent today lay a firm foundation for the recognition of a new form of tort liability. In light of the inapplicability of the parent-child immunity doctrine, tort liability

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[7] In artificial embryonation, the husband and wife utilize a fertile woman who agrees to be inseminated with the husband's sperm. Four to five days after fertilization, the physician flushes out the embryo and implants it into the wife, who will then carry the baby to term. *Id.*

[8] If the woman has an ovarian or tubal problem and the husband is sterile, another woman is voluntarily inseminated by the sperm of a donor. Once fertilized, the embryo is flushed out after five days and implanted into the wife for normal maturation and birth. In embryo adoption, unlike egg donation or artificial insemination, the embryo has genes from neither parent. *Id.* at 7. For purposes of simplicity in this Note, egg donation, embryonation, and embryo adoption will be categorized as embryo transfer (ET).

[9] Test-tube baby clinics are becoming increasingly available. At least two such clinics exist in England, five in Australia, and others in Italy, France, Sweden, and Germany. L. ANDREWS, *supra* note 2, at 124-25. A list of centers in the United States offering IVF, ET and surrogate mother programs can be found *id.* at 311-18 app. E.

[10] A selection of law review articles discussing the ethical and legal problems presented by IVF, ET, artificial insemination, and surrogate motherhood can be found in L. ANDREWS, *supra* note 2, at 298-310 app. D.

[11] The only semblance of federal statutory law governing any of the new reproductive technologies is the HEW report regarding research involving human IVF and ET. *Ethics Advisory Board of the Department of Health, Education, and Welfare, Report and Conclusions: HEW Support of Research Involving Human in Vitro Fertilization and Embryo Transfer*, 44 Fed. Reg. 35,034 (1979). Currently, only two state IVF statutes exist. L. ANDREWS, *supra* note 2, at 297 app. D. Most existing state legislation in this area deals with fetal research which may affect IVF, ET, or embryo freezing. See *id.* at 297-98 app. D. for a complete listing. For a list of state statutes governing artificial insemination, see *id.* at 300-01 app. D. To date, there exists no state legislation dealing with surrogate motherhood, although a few states are considering such laws. *E.g.*, 10 (Legislative Notes) FAM. L. REP. (BNA) No. 20, at 1273 (Mar. 20, 1984)(HB 1595, Maryland, would sanction surrogate parenthood arrangements under certain conditions, setting forth provisions which must be incorporated into a surrogate parenthood agreement). There are, however, laws governing a process which affects surrogate mother contracts, namely, statutes that prohibit payment in connection with adoption. L. ANDREWS, *supra* note 2, at 303 app. D. Adoption law plays a dominant role in typical surrogate motherhood arrangements because the contracting mother must legally adopt the child after the surrogate mother gives birth and turns the baby over to her. *Id.* at 226-33.

[12] An inventory of case law pertaining to surrogate motherhood, IVF, and artificial insemination is contained in L. ANDREWS, *supra* note 2, at 302-03 app. D.

predicated on the surrogate motherhood arrangement may permit an infant born with mental infirmities or physical abnormalities to recover damages from the surrogate for the injuries caused as a result of the surrogate's inadequate prenatal care.

This Note will first examine briefly the history of prenatal torts, and present the status of recovery today. The Note will then examine the history and current status of the doctrine of parent-child immunity in the United States. Concentrating on these two concepts, the nature of a tort claim by an injured child for prenatal injuries proximately caused by the surrogate mother's negligent conduct, based upon medical evidence of the effects of inadequate prenatal care on the health of the developing fetus, will be investigated. It will be suggested that the imposition of liability on the negligent surrogate mother is the only just and fair method by which an infant may seek redress for its injuries.

II. Prenatal Tort Liability

A. *History of Prenatal Tort Liability*

> Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb.[13]
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> The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.[14]

Consonant with this view of the inherent importance of life and the preservation of one's mental and physical faculties, modern courts have afforded relief to injured plaintiffs for prenatal torts[15] proximately caused

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[13] 1 W. Blackstone, Commentaries *129.

[14] *Id.*

[15] Prenatal injuries are those injuries sustained by the plaintiff-child while *en ventre sa mere* (in the womb of the mother). Often synonymously classified as prenatal tort claims are actions for wrongful life and wrongful birth. Wrongful life actions are brought by an unplanned child seeking recovery for injuries sustained because of negligent failure to prevent its birth. The claims are generally disfavored by the courts based on the view that an impaired life is better than no life at all. For a discussion of wrongful life claims, see generally W. Prosser & W. Keeton, Prosser and Keeton on the Law of Torts § 55, at 370-73 (5th ed. 1984); Kashi, *The Case of the Unwanted Blessing: Wrongful Life*, 31 U. Miami L. Rev. 1409 (1977); Tedeschi, *On Tort Liability for "Wrongful Life"*, 1 Israel L. Rev. 513 (1966), *reprinted in* 7 J. Fam. L. 465 (1967); Note, *Child v. Parent: A Viable New Tort of Wrongful Life?*, 24 Ariz. L. Rev. 391 (1982); Comment, *"Wrongful Life": The Right Not to Be Born*, 54 Tul. L. Rev. 480 (1980).

Wrongful birth claims have been asserted by the parents of an unplanned child based on the negligence of a doctor or hospital in failing to disclose or to warn the parents of genetic

by the wrongdoing of another. However, the stream of judicial decisions recognizing the extension of tort liability to encompass injuries to an unborn child has traced a turbulent course of acceptance.

1. Early Cases

Recovery for prenatal injuries was first considered in *Dietrich v. Northampton*.[16] In *Dietrich*, the mother of the deceased child, when approximately four to five months pregnant, slipped on a defect in the highway and fell, resulting in a miscarriage.[17] The court held that there is no cause of action for injuries sustained *in utero*[18] because the fetus is a part of the mother[19] and no duty is owed to one not yet in being.[20] The court further asserted that the child, "although not directly injured, unless by a communication of the shock to the mother, was too little advanced in foetal life to survive its premature birth."[21] The focus of this decision appeared to be the point of viability[22] of the fetus.

In accord with *Dietrich*, the court in *Allaire v. St. Luke's Hospital*[23] held that an infant cannot maintain a cause of action for injuries received before birth.[24] In *Allaire*, both the mother and the unborn child received physical injuries as the result of an elevator accident in the hospital

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disease, or where abortions or sterilization have failed or there has been a negligent prescription of drugs that failed to prevent pregnancy. For a discussion of wrongful birth claims, see generally W. PROSSER & W. KEETON, *supra*; Rogers, *Wrongful Life & Wrongful Birth: Medical Malpractice in Genetic Counseling and Prenatal Testing*, 33 S.C.L. REV. 713 (1982); Note, *Wrongful Birth and Emotional Distress Damages: A Suggested Approach*, 38 U. PITT. L. REV. 550 (1977); Comment, *Wrongful Life and Wrongful Birth Causes of Action—Suggestions for a Consistent Analysis*, 63 MARQ. L. REV. 611 (1980).

The common thread running throughout these tort actions is the recognition of injuries sustained while in the womb of the mother. However, injury to the child is not a requisite to institute a wrongful birth action. *See* Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971) (harm caused to mother by pharmacist's breach of duty in negligently refilling oral contraceptive prescription with tranquilizers).

[16] 138 Mass. 14 (1884).

[17] *Id.*

[18] *Id.* at 15. *In utero* is defined as: "Within the uterus; not yet born." BLAKISTON'S GOULD MEDICAL DICTIONARY 697 (4th ed. 1979).

[19] *Dietrich*, 138 Mass. at 17.

[20] *Id.* at 16.

[21] *Id.* at 15.

[22] Viability is the "[c]apability of living." It usually connotes a fetus that has reached 500 grams in weight and 20 gestational weeks, a stage at which a fetus is "sufficiently developed to live outside of the uterus." STEDMAN'S MEDICAL DICTIONARY 1556 (5th unabr. lawyer's ed. 1982).

[23] 184 Ill. 359, 56 N.E. 638 (1900) (*per curiam*) (overruled by Amann v. Faidy, 415 Ill. 422, 114 N.E.2d 412 (1953)).

[24] *Id.*

where the mother was due to give birth.[25] In support of its holding, the court asserted that the child has no existence apart from its mother.[26] It maintained that the fetus is not a person and that the child is severed from its mother only upon birth.[27] It further stated that injury resulted to the mother, not to the plaintiff-child. The court also considered the lack of precedent affording relief, under such circumstances, to be a major factor in its decision denying the plaintiff-child redress for its injuries.[28] The court declared that if the action were maintained, the natural consequence would be for the infant to sue the mother for injuries sustained by the negligence of the mother while pregnant.[29]

In *Stanford v. St. Louis-San Francisco Ry. Co.*,[30] the court relied on *Dietrich* and *Allaire* in holding that a representative of a deceased child may not maintain a cause of action for prenatal injuries.[31] In *Stanford*, the pregnant mother was injured owing to the defendant-railroad's negligence while she was descending from a train, resulting in the premature birth and subsequent death of the child.[32] While the court acknowledged that "a legal personality is imputed to an unborn child as a rule of property for all purposes beneficial to the infant at birth but not for purposes working to its detriment," it determined that, in agreement with *Dietrich*, the damage to the unborn child was too remote to be compensated.[33] The court also emphasized the reasoning in *Allaire*, that a child is a part of the mother before birth and is severed from her at birth, thus precluding recovery for injuries sustained while in the womb of the mother.[34]

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[25] *Id.* at 360, 56 N.E. at 638.

[26] *Id.* at 368, 56 N.E. at 640.

[27] *Id.*

[28] *Id.*

[29] *Id.* In contrast, it is the objective of this Note to lay a foundation for recovery of injuries sustained *in utero* by the child of a surrogate motherhood arrangement.

In *Allaire*, Justice Boggs, dissenting, asserted that precedents are only guides—that they should not be viewed as the sole factor in shaping the law. *Id.* Acknowledging that the common law recognizes that life begins when an infant "is able to stir in the mother's womb," and that an individual can be convicted of murder if he unlawfully beats a pregnant woman, causing not only the mother to die, but also the infant to die shortly after birth, he deduced that the child should be able to recover if injured but survives. *Id.* at 371-72, 56 N.E. at 641. Justice Boggs believed that "natural justice" dictates that a child should be able to institute a claim for injuries sustained while in the womb of the mother. *Id.* at 374, 56 N.E. at 642.

[30] 214 Ala. 611, 108 So. 566 (1926) (overruled by Huskey v. Smith, 289 Ala. 52, 265 So. 2d 596 (1972)).

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.* at 612, 108 So. at 567.

In *Magnolia Coca Cola Bottling Co. v. Jordan*,[35] the court held that damages could not be recovered for the death of a child caused by negligently-inflicted prenatal injuries.[36] In this case, a truck struck the mother's automobile, causing it to collide with a parked automobile. The mother was crushed against the steering wheel and other parts of the car, causing the premature birth of twins, one of whom died nineteen days later as a result of the prenatal injuries sustained as a result of the accident.[37] In denying recovery, the court reasoned that the decisions protecting an unborn child in property rights "do not support the imposition of liability upon others for torts indirectly committed against a prospective human being, one unseen and unknown, and who may never have an independent existence."[38] It pointed to the inability at that time to draw the "line" between viability and non-viability.[39] The court further contended that no duty is owed to an unborn child, apart from the duty to avoid harming the mother.[40] The refusal to recognize a cause of action for prenatal injuries was also prompted by the alleged impossibility of establishing a causal link between the death or condition of the child and the injury, except via speculation or conjecture.[41]

The basic reasons advanced by these and other early judicial decisions for precluding recovery by a child, or its representative, for negligently-inflicted prenatal injuries were: 1) lack of precedent,[42] 2) absence of duty toward the unborn child,[43] 3) difficulty in proving causation,[44] 4) fear of fictitious or fraudulent claims,[45] or 5) fear of a child being able to maintain an action against its mother for injuries resulting from her negligence while pregnant.[46]

2. The Turning Point

In 1939, however, *Scott v. McPheeters*,[47] the first case to allow recovery for prenatal injuries, laid the foundation for this new breed of tort

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[35] 124 Tex. 347, 78 S.W.2d 944 (1935) (overruled by Leal v. C.C. Pitts Sand and Gravel, Inc., 419 S.W.2d 820 (Tex. 1967)).

[36] *Id.*

[37] *Id.*

[38] *Id.* at 357, 78 S.W.2d at 948.

[39] *Id.* at 359, 78 S.W.2d at 949.

[40] *Id.* at 360, 78 S.W.2d at 950.

[41] *Id.*

[42] *E.g.*, *Allaire*, 184 Ill. at 368, 56 N.E. at 640.

[43] *E.g.*, Drobner v. Peters, 232 N.Y. 220, 223, 133 N.E. 567, 568 (1921) (overruled by Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951)).

[44] *E.g.*, *Jordan*, 124 Tex. at 360, 78 S.W.2d at 950.

[45] *Id.*

[46] *E.g.*, *Allaire*, 184 Ill. at 368, 56 N.E. at 640.

[47] 33 Cal. App. 2d 629, 92 P.2d 678, *aff'd per curiam*, 33 Cal. App. 2d 629, 93 P.2d 562 (1939).

liability. The prenatal injury sustained in this case originated from the physician's negligent use of metal clamps and forceps in the process of delivering the child from its mother's womb, causing permanent paralysis.[48] The court found the infant's viability at the time of injury to be a key factor in permitting recovery.[49] In light of the possibility that the child may have been able to exist apart from its mother at the time of injury, the court asserted that "[t]he difficulty of obtaining proof of the wrong should prompt greater leniency in affording the remedy, rather than a denial of plain justice. . . . Law is progressive and should lend its aid to secure justice rather than to block it."[50] The court further recognized that the law should attempt to keep pace with the developments of science and the ever-changing conditions of the world.[51]

A further step toward acknowledging a cause of action for prenatal injuries was taken in *Bonbrest v. Kotz*.[52] This case was the first to consider viability in ascertaining whether recovery can be afforded to an unborn, viable child who sustained injuries while in its mother's womb. In *Bonbrest*, the child was injured by the physician's negligence during delivery.[53] The Court of Appeals for the District of Columbia held that a viable child, while dependent upon its mother for its continued nourishment and growth, is not a "part" of the mother and is capable of extrauterine life.[54] The court was cognizant of civil and property law which regarded a child *en ventre sa mere* as a human being from the moment of conception[55] and declared that it is a "natural justice" to allow a child, if born alive and viable, to maintain a cause of action for injuries wrongfully committed while *in utero*.[56] The court reasoned that:

> [t]he absence of precedent should afford no refuge to those who by their wrongful act, if such be proved, have invaded the right of an individual. . . . And what right is more inherent, and more sacrosanct, than that of the individual in his possession and enjoyment of his life, limbs and his body?[57]

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[48] *Id.* at 630, 92 P.2d at 679.

[49] *Id.* at 636, 92 P.2d at 681-82.

[50] *Id.* at 637, 92 P.2d at 682-83.

[51] *Id.* at 637, 92 P.2d at 683. "Precedents are valuable so long as they do not obstruct or destroy progress." *Id.*

[52] 65 F. Supp. 138 (D.C. Cir. 1946).

[53] *Id.* at 139.

[54] *Id.* at 140.

[55] *Id.*

[56] *Id.* at 142.

[57] *Id.* The court was concerned with the right of the individual, not with the possibility of other causes of action being brought in bad faith or with difficulties of proof. *Id.*

Although *Bonbrest* recognized viability as the pivotal factor in permitting recovery, *Kelly v. Gregory*[58] extended the scope of recovery to nonviable fetuses. In this case, an automobile struck and knocked down an expectant mother, causing prenatal injuries to the three month old fetus.[59] The court held that a child born alive is entitled to relief for prenatal injuries sustained any time after conception as the result of another's negligent conduct.[60] It reasoned that legal separability should begin where there is a biological separability.[61] The court noted that knowledge about the actual process of conception and fetal development is greater now than when some of the earlier common law cases, which refused recovery to nonviable fetuses, were decided.[62] This contention was supported by the court's observation that a mother's biological contribution from conception is nourishment and protection but that the fetus has a separate existence. The fact that the fetus cannot survive if the nourishment and protection are severed before the point of viability does not obliterate the separability; it merely describes the "conditions under which life will not continue."[63] Hence, *Kelly* set forth the proposition that viability is no longer the standard for determining recovery for prenatal injuries.

Countering the early courts' reasons for denying recovery, subsequent courts have recognized a cause of action for prenatal injuries because: 1) courts have acknowledged that the fetus has a separate existence from the mother;[64] 2) the law recognizes the separate existence of an unborn child for the purpose of protecting property rights and protecting it from criminal conduct;[65] 3) the wrong caused by the negligence of another

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[58] 282 A.D. 542, 125 N.Y.S.2d 696 (1953).

[59] *Id.*

[60] *Id.*

[61] *Id.* at 543, 125 N.Y.S.2d at 697. *See infra* note 64.

[62] *Kelly*, 282 A.D. at 544, 125 N.Y.S.2d at 697.

[63] *Id.*

[64] *E.g.*, Damasiewicz v. Gorsuch, 197 Md. 417, 441, 79 A.2d 550, 559 (1951). "Separate existence" can be best explained by the following excerpt:

> While it is a fact that there is a close dependence by the unborn child on the organism of the mother, it is not disputed today that the mother and the child are two separate and distinct entities; that the unborn child has its own system of circulation of the blood separate and apart from the mother; that there is no communication between the two circulation systems; that the heart beat of the child is not in tune with that of the mother but is more rapid; that there is no dependence by the child on the mother except for sustenance. It might be remarked here that even after birth the child depends for sustenance upon the mother or upon a third party. It is not the fact that an unborn child is part of the mother, but that rather in the unborn state it lived with the mother, we might say, and from conception on developed its own distinct, separate personality.

Stemmer v. Kline, 128 N.J.L. 455, 466, 26 A.2d 684, 687 (1942) (Brogan, J., dissenting) (overruled by Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960)).

[65] *E.g.*, Amann v. Faidy, 415 Ill. 422, 429, 114 N.E.2d 412, 416 (1953).

warrants remedy;[66] 4) lack of precedent should not be a bar to recovery where a wrong has been committed;[67] and 5) fear of fraudulent claims and difficulty of proof should not deny a cause of action to one injured by another's negligent conduct.[68]

B. *Present Status for Recovery*

These early cases formed the impetus for the recognition of liability for prenatal injuries. Every American jurisdiction today allows an injured child subsequently born alive, regardless of viability at the time of injury, to recover for damages sustained by another's negligence while *en ventre sa mere*.[69] One problem remains for which there is, as yet, no complete agreement. Some jurisdictions allowing recovery have been presented with cases that involved only fetuses which were viable at the time the injury occurred. These courts, however, have stated in dictum that recovery must be limited to such cases. When actually confronted with the issue, however, almost all of the jurisdictions have permitted recovery even though the fetus was only a few weeks old.[70] The courts' lack of consensus poses little threat to an infant's right of action.

The prevalent recognition of claims for prenatal injuries sets the stage for an infant to obtain redress for prenatal injuries resulting from the utilization of surrogate motherhood arrangements.

III. The Doctrine of Parent-Child Immunity

A. *A Historical Perspective of the Parent-Child Immunity Doctrine in the United States*

Abrogation of parent-child immunity has gained widespread acceptance in American jurisdictions. This immunity rule denies a minor child

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[66] *E.g.*, Bennett v. Hymers, 101 N.H. 483, 486, 147 A.2d 108, 110 (1958).

[67] *E.g.*, Steggal v. Morris, 363 Mo. 1224, 1226, 258 S.W.2d 577, 579 (1953).

[68] *E.g.*, Smith v. Brennan, 31 N.J. 353, 366, 157 A.2d 497, 503 (1960).

[69] *E.g.*, Simon v. Mullin, 34 Conn. Supp. 139, 380 A.2d 1353 (1977); Daley v. Meier, 33 Ill. App. 2d 218, 178 N.E.2d 691 (1961). For a more expansive listing and discussion of liability for prenatal injuries, see W. Prosser & W. Keeton, *supra* note 15, at 367; Restatement (Second) of Torts § 869 (1979 & App., Reporter's Note 1982); Gordon, *The Unborn Plaintiff*, 63 Mich. L. Rev. 579 (1965); Note, *Tort Recovery for the Unborn Child*, 15 J. Fam. L. 276 (1976-77); Note, *The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries*, 110 U. Pa. L. Rev. 554 (1962).

Courts have also permitted parents to recover in a wrongful death action if the child was born alive and subsequently died as a result of the original injury. *E.g.*, Porter v. Lassiter, 91 Ga. App. 712, 87 S.E.2d 100 (1955); Chrisafogeorgis v. Brandenberg, 55 Ill. 2d 368, 304 N.E.2d 88 (1973). *Contra, e.g.*, Graf v. Taggert, 43 N.J. 303, 204 A.2d 140 (1964); Endresz v. Friedberg, 24 N.Y.2d 478, 248 N.E.2d 901, 301 N.Y.S.2d 65 (1969). For a discussion of wrongful death cases, see generally Note, *Tort Recovery for the Unborn Child*, 15 J. Fam. L. 276 (1976-1977); Note, *Recovery for Tortious Death of the Unborn*, 33 S.C.L. Rev. 797 (1982); Note, *Torts—Wrongful Death—Recovery for Wrongful Death of a Stillborn Fetus Examined*, 21 Vill. L. Rev. 994 (1976).

[70] W. Prosser & W. Keeton, *supra* note 15, at 368.

a cause of action for personal injuries inflicted by its parents.[71] The recognition of parent-child tort liability, however, is not free from limitations and has incurred numerous obstacles on its journey through the judicial system. An examination of its history and current status will assist the reader in understanding its inapplicability to the surrogate mother arrangement.

1. "The Great Trilogy"

The "great trilogy" of cases established the rule of parent-child immunity: *Hewlettete v. George*,[72] *McKelvey v. McKelvey*,[73] and *Roller v. Roller*.[74] The pinnacle case questioning the sanction of parental authority vis-a-vis injuries to an unemancipated child caused by the parent's negligence appeared in the Supreme Court of Mississippi in 1891. In *Hewlettete v. George*, the court held:

> The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent.[75]

The court's decision was devoid of both judicial precedent and reasoning; it merely determined that an action for false imprisonment did not lie against the parent in order to preserve family harmony.[76]

Relying heavily on *Hewlettette*, the court in *McKelvey v. McKelvey* denied recovery by a minor child against her father and stepmother for cruel and inhuman treatment on the basis of preservation of family harmony.[77] But the *McKelvey* court went further; it also recognized a common law right of the father to control and chastise his child.[78] Moreover, the court analogized parent-child immunity to interspousal immunity, proclaiming in dicta, under the interspousal immunity doctrine, that neither husband nor wife can maintain an action against the other for wrongs occurring during their marriage, by virtue of the rights and duties arising from the marital relation itself.[79]

In *Roller v. Roller*, the disruption of family harmony and parental discipline was an invalid argument for denying recovery to a daughter for

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[71] *Id.* § 122, at 904.
[72] 68 Miss. 703, 9 So. 885 (1891).
[73] 111 Tenn. 388, 77 S.W. 664 (1903).
[74] 37 Wash. 242, 79 P. 788 (1905).
[75] *Hewlettette*, 68 Miss. at 711, 9 So. at 887.
[76] *Id.* In this case the daughter was wrongfully confined in an insane asylum.
[77] *McKelvey*, 111 Tenn. at 388, 77 S.W. at 664.
[78] *Id.*
[79] *Id.* at 389, 77 S.W. at 665.

the rape committed against her by her father because the family unit had already dissolved.[80] The *Roller* court was compelled to analogize parent-child immunity to interspousal immunity but also proffered the argument that if liability were found, the parent might reacquire the child's tort damages, should the child predecease the parent.[81] Permitting this action would tend to allow a tortfeasor to profit from his wrong. The court also contended that the public has an interest in the financial well-being of the minor members of the family unit, and reasoned that affording recovery to an injured child could deplete the parent's assets which would otherwise be available to the plaintiff's siblings.[82] This veil of immunity, however, has been pierced with exceptions as an increasing number of parent-child tort actions have confronted the judiciary.[83]

2. Exceptions to the Parent-Child Immunity Doctrine

Although the courts generally adhere to the parent-child immunity rule barring negligence actions brought by an unemancipated child against its parent, they have recognized that the doctrine is inapplicable under certain circumstances. The exceptions consist of the following:

a) when the family relationship no longer exists (*e.g.*, when the child is emancipated)[84] or has been temporarily abandoned (*e.g.*, when the parent tortiously injures the child, intentionally, wantonly, or, in some jurisdictions, with gross negligence);[85]

b) in actions arising in motor vehicle negligence cases, where the injuries were caused by the parent's negligent driving;[86]

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[80] *Roller*, 37 Wash. at 243, 79 P. at 789.

[81] *Id.*

[82] *Id.* Other justifications for parent-child immunity often advanced by the courts are: 1) maintenance of parental discipline and control, *e.g.*, Small v. Morrison, 185 N.C. 577, 584, 118 S.E. 12, 15 (1923); and 2) fear of fraud and collusion between family members, *e.g.*, Barlow v. Iblings, 261 Iowa 713, 722, 156 N.W.2d 105, 110 (1968). The latter justification, however, merits little weight since an emancipated child may have more of an incentive to develop a scheme by which to recover tort damages. Moreover, an argument can be made that permitting such suits would not destroy family harmony and tranquility since harmony is disrupted when the tort occurs. *E.g.*, Petersen v. Honolulu, 51 Hawaii 484, 488, 462 P.2d 1007, 1009 (1969).

[83] A good evaluation of the "great trilogy" of cases can be found in Hollister, *Parent-Child Immunity: A Doctrine in Search of Justification*, 50 FORDHAM L. REV. 489 (1982).

[84] *E.g.*, Martinez v. Southern Pac. Co., 45 Cal. 2d 244, 288 P.2d 868 (1955); Logan v. Reaves, 209 Tenn. 631, 354 S.W.2d 789 (1962).

[85] *E.g.*, Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951); Cowgill v. Boock, 189 Or. 282, 218 P.2d 445 (1950)(*en banc*).

[86] *E.g.*, Ooms v. Ooms, 164 Conn. 48, 316 A.2d 783 (1972); Triplett v. Triplett, 34 N.C. App. 212, 237 S.E.2d 546 (1977).

c) where the parental tortfeasor's negligence resulted in the death of a party or parties;[87]

d) where the parent's negligent conduct entailed a breach of duty primarily owed to the general public;[88]

e) where the injuries were caused while the parent was engaged in a vocational, business, or employment activity not privy to his parental responsibilities;[89]

f) where the parent is covered by liability insurance;[90]

g) where a parent lacked custody and control of his unemancipated child at the time the tortious act occurred;[91]

h) where the parent has abdicated his parental responsibilities;[92] or

i) in an action for contribution from the parent whose negligence contributed to the child's injuries.[93]

However, these limitations on immunity are being extended as more and more jurisdictions decide to abrogate parent-child immunity.

B. Abrogation of the Parent-Child Immunity Doctrine

The first attempt at balancing the child's right to institute an action for negligently-inflicted injuries and the parent's responsibilities in rearing and disciplining his child was made in *Goller v. White*.[94] The court in *Goller* abrogated the parent-child immunity doctrine except in circumstances where the negligent conduct involved either "an exercise of parental authority . . . or an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental

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[87] Courts have held that the parental immunity doctrine does not apply where the parent has died. *E.g.*, Barnwell v. Cordle, 438 F.2d 236 (5th Cir. 1971); Johnson v. Myers, 2 Ill. App. 3d 844, 277 N.E.2d 778 (1972). *Contra* McNeal v. Administrator of Estate of McNeal, 254 So. 2d 521 (Miss. 1971); Wooley v. Parker, 222 Tenn. 104, 432 S.W.2d 882 (1968). However, the rule serves as a bar in actions where the child, or both the child and parent, dies and a claim is instituted by the child's representative. *E.g.*, Orefice v. Albert, 237 So. 2d 142 (Fla. 1970) (conformed to 239 So. 2d 46 (Fla. Dist. Ct. App. 1970)).

[88] *E.g.*, Cummings v. Jackson, 57 Ill. App. 3d 68, 372 N.E. 2d 1127 (1978).

[89] *E.g.*, Signs v. Signs, 156 Ohio St. 566, 103 N.E.2d 743 (1952); Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952) (*en banc*).

[90] *E.g.*, Sorensen v. Sorensen, 369 Mass. 350, 339 N.E.2d 907 (1975). Under those conditions, the action is not between the child and the parent but between the child and the parent's insurance company. Some courts, however, refuse to recognize liability insurance coverage as a basis for maintaining a claim by an unemancipated child against the parent, or the parent's estate, for injuries proximately caused by the parent's negligent conduct. *E.g.*, Owens v. Auto Mut. Indem. Co., 235 Ala. 9, 177 So. 133 (1937).

[91] Apparently, under these circumstances, the action would not seriously disrupt the family relationship. *E.g.*, Bondurant v. Bondurant, 386 So. 2d 705 (La. Ct. App. 1980).

[92] *E.g.*, Hoffman v. Tracy, 67 Wash. 2d 31, 406 P.2d 323 (1965).

[93] *E.g.*, Walker v. Milton, 263 La. 555, 268 So. 2d 654 (1972).

[94] 20 Wis. 2d 402, 122 N.W.2d 193 (1963).

services, and other care."[95] After *Goller*, the trend of most American courts has been to abolish the immunity, either totally or partially, while others have retained the rule.[96]

In those states recognizing abrogation of parental tort immunity, the bar against immunity is not always absolute. Some courts have held that parental liability does not exist in cases where the parent's negligent act involved the negligent supervision of an unemancipated child[97] or the negligent entrustment of a dangerous instrumentality to an unemancipated child.[98] Other jurisdictions that have completely abolished parental tort immunity have declared that the inadequacy of the parent's insurance coverage will not affect the ability of the injured child to maintain a cause of action against its parent for injuries sustained by the parent's negligent conduct.[99] In a few cases, however, parental liability has not been extended to situations in which the negligent conduct of the parent involved either an exercise of reasonable parental authority over the child or an exercise of parental discretion with respect to provisions for the care of the child.[100]

The applicability of these exceptions is uncertain; each jurisdiction must be examined in order to determine the scope of the abrogation, if any, of parental immunity. The right of action against a parent for injuries caused by his negligent conduct is particularly critical when faced with a prenatal injury claim, alleging tortious conduct by the surrogate mother.

IV. CHILD VERSUS MOTHER

Surrogate motherhood relationships are generating a multitude of perplexing problems for the contracting parents, the surrogate mother, and the judiciary. One major issue bound to arise from this unique

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[95] *Id.* at 413, 122 N.W.2d at 198.

[96] For a more comprehensive discussion of parent-child immunity, see generally W. PROSSER & W. KEETON, *supra* note 15, § 122, at 907; Ingram & Barder, *The Decline of the Doctrine of Parent-Child Tort Immunity*, 68 ILL. B.J. 596 (1980); Comment, *Child v. Parent: Erosion of the Immunity Rule*, 19 HASTINGS L.J. 201 (1967); Comment, *Tort Actions Between Members of the Family—Husband & Wife—Parent & Child*, 26 Mo. L. REV. 152 (1961). For a survey of parent-child immunity in the United States, see Hollister, *supra* note 83, at 528 app. A recent decision by the Ohio Supreme Court has abolished the doctrine of parent-child immunity in Ohio. Kirchner v. Crystal, 15 Ohio St. 3d 326, 474 N.E.2d 275 (1984).

[97] *E.g.*, Holodook v. Spencer, 36 N.Y.2d 35, 324 N.E.2d 338, 364 N.Y.S.2d 859 (1974); Thoreson v. Milwaukee & Suburban Transp. Co., 56 Wis. 2d 231, 201 N.W.2d 745 (1972).

[98] *E.g.*, Nolechek v. Gesuale, 46 N.Y.2d 332, 385 N.E.2d 1268, 413 N.Y.S.2d 340 (1978), *modified*, Garrett v. Holiday Inns, Inc., 58 N.Y.2d 253, 447 N.E.2d 717, 460 N.Y.S.2d 774 (1983); Howes v. Hansen, 56 Wis. 2d 247, 201 N.W.2d 825 (1972).

[99] *E.g.*, D'Ambrosio v. D'Ambrosio, 60 Misc. 2d 886, 304 N.Y.S.2d 154 (1969).

[100] *E.g.*, Gross v. Sears, Roebuck & Co., 158 N.J. Super. 442, 386 A.2d 442 (1978); Sixkiller v. Summers, 680 P.2d 360 (Okla. 1984).

relation is the liability of the surrogate mother for tortious conduct which results in injury to her child. As aptly stated in *Smith v. Brennan*:[101]

> [J]ustice requires that the principle be recognized that a child has a legal right to begin life with a sound mind and body. If the wrongful conduct of another interferes with that right, and it can be established by competent proof that there is a causal connection between the wrongful interference and the harm suffered by the child when born, damages for such harm should be recoverable by the child.[102]

This right, coupled with the recognition of both recovery for prenatal injuries and the inapplicability of parent-child immunity, should afford an avenue by which a child carried by a surrogate mother can seek redress for negligently-inflicted injuries.

A. The Inapplicability of the Doctrine of Parent-Child Immunity

The doctrine of parent-child immunity should not represent a hindrance to a child's right of action against the surrogate mother for negligently-inflicted prenatal injuries. This immunity rule actually lends support for recognizing a suit sounding in tort.

The nature of the surrogate mother relationship is vastly different from that of the conventional method of propogating the human species. The major rationale underlying the reluctance to impose liability on a natural mother for poor prenatal care seems inapplicable to this unique arrangement called surrogate motherhood. In a surrogate mother situation, the childless couple seeks a suitable woman to serve as the "carrier," either through an independent quest or an established, reputable surrogate mother clinic.[103] After genetic screening and physical and psychological examinations of the contracting parents and the potential surrogate mother,[104] the parties enter into a contract whereby the surrogate mother

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[101] 31 N.J. 353, 157 A.2d 497 (1960).

[102] *Id.* at 364, 157 A.2d at 503. *Accord* Keyes v. Construction Serv., Inc., 340 Mass. 633, 635, 165 N.E.2d 912, 914 (1960) (overruling Dietrich v. Northampton, 138 Mass. 14 (1884)). *See generally* Note, *Parental Liability for Prenatal Injury*, 14 COLUM. J.L. & SOC. PROBS. 47, 77-81 (1978) (discussion of child's right to be born sound).

[103] L. ANDREWS, *supra* note 2, at 203-07.

[104] The contracting parents are screened for genetic disorders in cases where the husband and wife transfer their fertilized egg to the surrogate mother or where the husband donates his sperm to inseminate the surrogate mother artificially. The surrogate mother is screened for genetic disorders in cases where she is artificially inseminated by the contracting husband's sperm or that of a donor. In the first situation described, the contracting parents are the "natural" (*i.e.*, genetic) parents, while the surrogate is merely the gestational mother; in the latter situation, the contracting father (or donor) and the surrogate mother are the true genetic parents. *Id.* at 203-07.

will carry the infant for the contracting parents.[105] The surrogate mother assumes her part of the contract with complete knowledge of the consequences of her acts.[106] Among the innumerable provisions incorporated into the typical surrogate mother contract are those expressly requiring the surrogate mother to adhere to an approved program of prenatal care, in addition to express prohibitions against detrimental or risky activities.[107]

The mere fact that the surrogate mother enters into a contractual agreement to carry the infant for the contracting parents imposes upon the surrogate a higher standard of care than that imposed on a mother in the traditional childbearing role. The vast majority of courts undoubtedly would be reluctant to find the latter liable for injuries sustained as a result of negligent prenatal care. The basis for that position is understandable and can be distinguished from the scenario by which a gestational surrogate is employed.

The policy justifications for parent-child immunity shed light on the differences between an action against the "natural" mother and an action against the surrogate mother. In those states retaining at least partial

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[105] *Id.* at 216.

[106] The surrogate mother agrees to carry and nurture the unborn child and then relinquish the baby to the genetic parents after its birth in consideration for a stipulated sum of money for her services, and for the payment of all necessary expenses and medical costs incurred during the gestation period, the time of birth, and recovery. This feature of the surrogate mother contract is one of the major concerns of surrogate motherhood arrangements. The exchange of money in return for carrying the baby to full term has been challenged as a violation of the adoption laws since payment is expressly prohibited in adoption procedures. *E.g.*, Black, *Legal Problems of Surrogate Motherhood*, 16 NEW ENG. L. REV. 373, 378-87 (1981); Keane, *Legal Problems of Surrogate Motherhood*, 1980 SO. ILL. UNIV. L.J. 147, 156-61; Comment, *Artificial Insemination and Surrogate Motherhood—A Nursery Full of Unresolved Questions*, 17 WILLIAMETTE L.J. 913, 944-47 (1981). The exchange of money has been interpreted to constitute a form of baby selling, thereby invalidating the contracts. *See generally* Black, *supra*; Keane, *supra*; Comment, *supra* for a discussion of the problems of surrogate motherhood relative to black markets for babies. However, a surrogate mother cannot be expected to undertake this responsibility for purely altruistic purposes; the payment of money is appropriate to compensate her for her time, labor, and services. Sappideen, *The Surrogate Mother—A Growing Problem*, 6 U. NEW S. WALES L.J. 79, 93-96 (1983). Moreover, adoption laws were created to eliminate the baby black market once prevalent in society and thus serve no useful purpose with respect to surrogate motherhood arrangements. Rushevsky, *Legal Recognition of Surrogate Gestation*, 7 WOMEN'S RTS. L. REP. 107, 117 (1982). The complexities of this problem, however, are beyond the scope of this Note. For enlightening discussions on the problems arising from surrogate mother contracts, see generally the law review articles cited in L. ANDREWS, *supra* note 2, at 303-04 app. D.

[107] The types of provisions contained in most surrogate mother contracts are best illustrated in L. ANDREWS, *supra* note 2, at 233-36. A multitude of problems arise regarding the validity of enforceability of these contracts. It is uncertain whether recovery can be granted under contract law. An analysis of the feasibility of contract actions brought by the injured child is beyond the scope of this Note. See the law review articles cited *id.* at 303-04 for a discussion of the validity or enforceability of surrogate mother contracts.

immunity, the courts have based their rationale on the preservation of the familial relationship and have advanced numerous justifications for this rule. It has been contended that an assertion of a claim against the parent would disrupt the unity of the family.[108] An action against the parent also was said to threaten or deplete the family's assets which would otherwise be allocated to the other minor family members[109] and usurp the parents' ability to discipline their children effectively.[110]

On the other hand, a surrogate mother's relationship to the child *is not* based on a continuing familial relationship and *cannot* pose a threat to the discipline of that child for the family harmony. Moreover, since the surrogate mother is not a family member, she cannot pose a threat to the depletion of family assets, nor can she be held responsible for ensuing hostilities from the maintenance of such a suit. These traditional policy justifications have no bearing on the surrogate mother and are thus inapplicable.

Even if, by any stretch of the imagination, immunity is to be deemed appropriate, exceptions to this rule have been carved out, illustrating the very point of this argument: a surrogate mother stands in the position as a third party to the child.[111] The parent is absolved from immunity where the injuries were caused while the parent was engaged in a vocational, business, or employment activity *not* associated with his parental responsibilities.[112] This exception acknowledges that occasions exist when the parent and child do not stand in relation to each other as family members. It further acknowledges that when the child is injured while the parent was acting in a non-familial fashion, the parent assumes the position of a third party and can be held liable for harm proximately caused by his negligent conduct. Similarly, the surrogate mother, by nature of her arrangement with the contracting parents, is engaged for the sole purpose of carrying the infant to term. Her conduct cannot be viewed as anything other than a business or employment activity; thus, her relationship to the child is unequivocally that of a third party.

Furthermore, when a parent tortiously or intentionally injures the child, the family relationship is deemed to have been temporarily abandoned, thus precluding parental immunity.[113] In light of this exception, the surrogate mother's role under the contract merits stronger weight for permitting a child redress for the harm caused by the surrogate mother's conduct. Since the surrogate mother has been in-

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[108] *E.g.*, Eschen v. Roney, 127 Ga. App. 719, 194 S.E.2d 589 (1972).

[109] *Id.*

[110] *E.g.*, Begley v. Kohl and Madden Printing Ink Co., 157 Conn. 445, 254 A.2d 907 (1969).

[111] Even the exceptions are based on the parents' detachment from the familial relationship. *See infra* notes 112-14 and accompanying text.

[112] *E.g.*, Felderhoff v. Felderhoff, 473 S.W.2d 928 (Tex. 1971).

[113] *E.g.*, Attwood v. Estate of Attwood, 276 Ark. 230, 633 S.W.2d 366 (1982).

formed of the nature of the contract and has consented to its terms, subsequent acts which are prohibited under the contract, express and implied, amount to nothing less than willful or intentional misconduct. Therefore, the surrogate mother would also be excepted from immunity under this analysis.

In those states abolishing the immunity rule, either totally or partially, circumstances may arise which reinstate parental tort immunity.[114] The principle inquiry in these circumstances is whether the alleged negligent act involves an exercise of reasonable parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care.[115] The discretion afforded parents seems to recognize that they sometimes can be careless or forgetful. Moreover, what may be considered negligent in one situation may be appropriate in another. Consequently, negligence is determined by taking all factors into consideration and assessing whether or not the discretion exercised by the parent went beyond a reasonable level.

The surrogate mother's conduct does not fall within the realm of this "exception" to the abrogation of the parent-child immunity rule. The surrogate mother neither exercises parental duties nor assumes any parental responsibilities for the child after its birth. The surrogate's sole purpose is to carry the infant to term, employing the best possible prenatal care. No justifiable application of this "reasonable discretion" principle exists vis-à-vis surrogate motherhood.

Even if it could be argued that the surrogate mother is the parent, without assuming the attendant responsibilities, liability under the "reasonable discretion" standard would fail instantaneously. The surrogate mother's conduct with respect to tobacco smoking, drug ingestion, alcohol consumption, and improper diet could not be adjudged as an exercise of reasonable parental discretion. The following case exemplifies this contention.

In *Grodin v. Grodin*,[116] the son and father instituted an action against the mother and doctor for damages to the son's teeth, allegedly resulting from the use of medication during pregnancy. In *Grodin*, the physician assured the mother that it was impossible for her to become pregnant. As a result of these assurances, she continued to take her medication, Tetracycline. After she consulted with a different physician who informed her that she was seven or eight months pregnant, she ceased taking the medication. The son developed teeth that were brown and discolored due to the ingestion of the drug.[117] The court noted that a child may maintain a cause of action against a parent for injury suffered as a result of the

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[114] *See supra* text accompanying notes 108-10.

[115] *See infra* text accompanying notes 116-24.

[116] 102 Mich. App. 396, 301 N.W.2d 869 (1980).

[117] *Id.*

ordinary negligence of the parent.[118] The court further acknowledged exceptions to this law, relying primarily on the discretion afforded to parents in providing for their children.[119] It held that when the alleged negligent conduct of the parent involves an exercise of reasonable parental discretion regarding the provision of necessities, such as food, clothing, housing, medical and dental services, and other care, parent-child immunity will preclude an action by the child.[120]

In analyzing the applicability of this exception to the facts of the case, the appellate court reiterated the trial court's assessment of this exception:

> The policy underlying the exceptions is "that within the framework of parental authority and discretion, parents must be accorded immunity from litigation which in fact would disrupt family harmony and unity. The immunity is limited to transactions which are essentially parental . . . ." Thus, this Court finds [this] exception asks essentially whether the defendant's behavior involves the exercise of parental discretion in an area in which such discretion is ordinarily or reasonably employed.[121]

The key words in this analysis are "reasonably employed;" the real issue was whether the mother's discretion in taking the drug was reasonable.

The court also relied on *Womack v. Buchhorn*[122] by asserting that *Womack* does not limit those who may be liable for negligently-inflicted prenatal injury. It simply referred to the wrongful conduct of "another."[123] The court in *Grodin* thus stated that "the litigating child's mother would bear the same liability for injurious, negligent conduct as would a third person."[124]

The decision to continue taking medication during pregnancy was deemed to be an exercise of the mother's discretion.[125] The court advanced the following analytical framework for assessing the reasonableness of the allegedly negligent conduct: "The reasonableness of the risk of harm whether analyzed in terms of duty, proximate cause or a specific standard

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[118] *Id.* at 400, 301 N.W.2d at 870. The court relied on Plumley v. Klein, 388 Mich. 1, 199 N.W.2d 169 (1972), which overruled the doctrine of intrafamilial tort immunity.

[119] *Grodin*, 102 Mich. App. at 400, 301 N.W.2d at 870. The other exception noted by the court arises when the alleged negligent act involves an exercise of reasonable parental authority over the child. *Id.*

[120] *Id.* at 401, 301 N.W.2d at 871.

[121] *Id.* at 399, 301 N.W.2d at 870 (citations omitted).

[122] 384 Mich. 718, 187 N.W.2d 218 (1971).

[123] *Grodin*, 102 Mich. App. at 400, 301 N.W.2d at 870.

[124] *Id.*

[125] *Id.*

of care turns on how the utility of the defendant's conduct is viewed in relation to the magnitude of the risk thereby created."[126]

The rationale in *Grodin* is especially pertinent to a surrogate mother-child tort action. Employing this rationale, the magnitude of the risk created by the surrogate's decision to engage in harmful conduct is great. Whether the reasonableness of this risk is analyzed in terms of duty, causation, or some specific standard of care, the surrogate mother's knowledge of the impending pregnancy and the extensive guidelines and provisions to which she has agreed warrant a finding of unreasonableness if she deviates from abstention. Her freedom to exercise discretion in matters of prenatal care is restricted the moment she is impregnated. The determination of reasonableness under these circumstances precludes the invocation of parental immunity for the alleged negligent conduct.

The previously-described analysis of the surrogate mother's relationship to the unborn child illustrates the surrogate's potential liability for negligently-inflicted prenatal injuries.

B. The Gestational Environment and the Health of the Fetus

The behavior of the surrogate mother during pregnancy is of monumental concern to the contracting parents[127] and focuses on the best interests of the unborn child. Inherent in the surrogate motherhood arrangement is the responsibility of the surrogate mother to abstain from tobacco smoking, alcohol consumption and drug ingestion, and to adhere to a program of good nutrition. Following a program of appropriate prenatal care is part and parcel of the agreement—a duty owed primarily to the unborn child.[128] As a result of the myriad of advances in medical

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[126] *Id.* at 401, 301 N.W.2d at 871. The appellate court disagreed only with the trial court's procedural application of the law. It stated that the reasonableness of the parental discretion afforded by this exception is an issue for the jury and, in this case, the motion for summary judgment should have been denied. The case was therefore reversed and remanded to ascertain the reasonableness of the mother's conduct in continuing to ingest the medicine. If found to be unreasonable, the defendant-mother would not be protected by parental immunity. *Id.*

[127] The parents, however, are not alone in their desire to protect the infant. The states have taken an interest in protecting a child through the *parens patriae* doctrine, which gives the state power to protect those of its members who are unable to protect themselves and are in need of its protection. *E.g.*, Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (state, as *parens patriae*, may restrict parents' control; "rights of parenthood are [not] beyond limitation"). The states have also taken an express interest in protecting prenatal life. *E.g.*, Roe v. Wade, 410 U.S. 113, 154 (1973) ("state may properly assert important interests in . . . protecting potential life"); Jefferson v. Griffin Spalding County Hosp. Auth., 247 Ga. 86, 89, 274 S.E.2d 457, 460 (1981) (*per curiam*) (intrusion into couple's life outweighed by duty of state to protect living unborn human).

[128] Although the surrogate mother's freedom of action would be restricted, "denying [this] cause of action would abridge [the] child's right to be born with a sound mind and body and would deny society's *parens patriae* interest." Note, *supra* note 101, at 79. In ascertaining

science and the state of knowledge regarding fetal growth and development, the effects of the maternal environment on the fetus are more discernible than ever before.[129]

1. Nutrition

Nutrition is perhaps the most important factor in the proper development of the fetus.[130] An inadequate maternal diet is often the leading cause of a large number of malformations in newborns.[131] This is evinced by reduced brain weight and smaller head circumference of the infant.[132] Malnutrition also impairs fetal brain development.[133] In fact, severe malnutrition during the first six months can cause permanent mental deficiency in the infant.[134] In addition, prematurity is frequently the result of poor nutrition in mothers.[135]

Studies of the effects of various nutritional deficiencies on developing fetuses have shown startling results. A lack of iodine, which is essential

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whether intervention is appropriate, the courts would have to consider the nature of the "parental" conduct entailed and the extent of the infringement upon the surrogate mother's right of autonomy. *Id.* at 77-80; Note, *Constitutional Limitations on State Intervention in Prenatal Care*, 67 VA. L. REV. 1051 (1981). The latter commentator believes that the more effective means of preventing prenatal injury, rather than allowing suits in order to deter deleterious conduct, would be state intervention in prenatal health care by imposing requirements or restrictions on expectant mothers. *Id.* at 1051-52, 1064-65. The rationale advanced, which supports the contention that permitting suits would not deter conduct which could cause prenatal injury, imports the contention that the expectant mother would not anticipate a law suit. In addition, it has been claimed that a suit would create tension in the parent-child relationship and would not shift the economic risk because the parents would invariably support the child. *Id.* at 1051-52 n.5. In a surrogate motherhood arrangement, however, the recognition of such suits would not be as oppressive as with the conventional mode of parenthood since the surrogate would not be classified as the mother or participant in raising and educating the child. Being duly informed and having given written consent to the terms of the contract, the imposition of liability would promote good health care or deter engaging in surrogate motherhood arrangements until the contract's legality is ascertained.

[129] Several authors have suggested that a mother who gives birth to a child in the conventional manner should be liable for injuries inflicted owing to harmful prenatal conduct. Shaw, *The Potential Plaintiff: Preconception and Prenatal Torts*, in GENETICS AND THE LAW II 228 (A. Milunsky & G. Annas eds. 1980); Note, *Parental Liability for Prenatal Injury*, 14 COLUM. J.L. & SOC. PROBS. 47, 84-88 (1978); Note, *Recovery for Prenatal Injuries: The Right of a Child Against Its Mother*, 10 SUFFOLK U.L. REV. 582 (1976).

[130] A. MONTAGU, PRENATAL INFLUENCES 57 (1962); B. LUKE, MATERNAL NUTRITION 125 (1979).

[131] A. MONTAGU, *supra* note 130, at 80.

[132] B. LUKE, *supra* note 130, at 126. Although there is a close correlation between head circumference and brain size, there is no concrete evidence to indicate that brain size in humans is related to intelligence. *Id.* at 127.

[133] Douglass, *Prenatal risks: an obstetrician's point of view*, in RISKS IN THE PRACTICE OF MODERN OBSTETRICS 1, 12 (S. Aldjem ed. 1972).

[134] Brown & Freehafer, *Prenatal risks: a pediatrician's point of view*, in RISKS IN THE PRACTICE OF MODERN OBSTETRICS 28, 45 (S. Aladjem ed. 1972).

[135] A. MONTAGU, LIFE BEFORE BIRTH 38 (1964).

for the production of thyroid hormones, may cause a child to be born with goiter or signs of cretinism.[136] A vitamin D deficiency in the mother, arising from insufficient dietary intake, malabsorption, or lack of sunlight, will cause rickets in the newborn, a disease characterized by softening of the bones.[137] Studies performed with animals demonstrate that vitamin A is essential for the actual formation of the organs of the fetus during early pregnancy. When mothers are deprived of this vitamin, the infants are frequently born with underdeveloped major organs and various other defects.[138] Those deprived of Vitamin B_{12} during pregnancy give birth to young suffering from hydrocephaly.[139] Riboflavin, one of the members of the B_2 complex, is essential to the development of the jaws, teeth and palate. A deficiency of riboflavin can cause malocclusion of the jaws and teeth and even perhaps cleft palate.[140] An insufficient intake of calcium, which is necessary for the proper development of the teeth and proper growth of bone, could result in rickets.[141] The expectant mother, however, should be reluctant to commence a program of dietary supplements, unless given her physician's approval and recommendation of a specific supplement because a multivitamin supplement may also prove to be harmful to the unborn child.[142]

2. Alcohol Consumption

Alcohol consumption during pregnancy can be extremely dangerous to the fetus. Children born of heavy drinkers have demonstrated physical abnormalities, retarded growth and developmental delay on follow-up

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[136] R. STEVENSON, THE FETUS AND NEWLY BORN INFANT: INFLUENCES OF THE PRENATAL ENVIRONMENT 301 (1973). The features of cretinism are retarded bone growth, ossification, and, in the case of untreated cretinism, mental retardation. *Id.*

[137] *Id.* at 304.

[138] A. MONTAGU, *supra* note 135, at 43.

[139] *Id.* Hydrocephalus is an abnormal accumulation of cerebrospinal fluid in and around the brain, evidenced by an enlarged skull and weak or retarded mentality. 2 J. SCHMIDT, ATTORNEYS' DICTIONARY OF MEDICINE H-102 (1984).

[140] *Id.*

[141] *Id.*

[142] *Id.* One case was reported evincing an unusual and severe combination of birth defects in a child born to a woman who was taking the multivitamin Pregnavite Forte F (Bencard) in the periconceptional period. The case was reported to the Committee on Safety of Medicines, which had received reports of 61 adverse reactions to this and fourteen related iron and iron-vitamin compound preparations between January 1964 and February 1983. Eight of the reports related congenital malformations. The manufacturers confirmed that no formal systematic study had been conducted to test the safety of Bencard in the first trimester and that they were never aware of any untoward reaction from it. David, *Unusual Limb-Reduction Defect in Infant Born to Mother Taking Periconceptional Multivitamin Supplement* (No. 8375) LANCET 507 (Mar. 3, 1984) (letter to the editor).

examinations at a mean age of one year.[143] The children born of alcoholic mothers generally exhibit a condition termed "Fetal Alcohol Syndrome" (FAS). The abnormalities most consistently observed with FAS are prenatal and postnatal growth retardation, microencephaly (an abnormal smallness of the head), an unusual facial pattern, minor joint and limb abnormalities, and cardiac malformations. In some instances, severe brain malformation is observed.[144] Alcohol consumption has also been found to cause reduced birth weights in infants whose mothers' average intake of absolute alcohol measured thirty milliliters (one ounce) per day.[145] Also associated with maternal drinking of as little as thirty milliliters per week, is an increased risk of spontaneous abortion.[146] Alcohol is ingested in other forms as well. The effects of cough syrups, mouthwashes, and alcohol-based "tonics" can display typical FAS characteristics.[147]

3. Tobacco Smoking

Millions of normal healthy children are born to women who are heavy smokers; that does not, however, obviate the danger.[148] Tobacco smoke includes gas which robs the blood of oxygen;[149] the nicotine which is absorbed from the smoke is known to act on nerve cells and the respiratory centers.[150] The major effect of cigarette smoking on the developing fetus is growth retardation.[151] The most common effect of maternal smoking, however, is prematurity of birth.[152] As a consequence,

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[143] Golden, Sokol, Kuhnert, & Bottoms, *Maternal Alcohol Use and Infant Development*, 70 PEDIATRICS 931, 933 (1982).

[144] Chernick, Childiaeva, & Ioffe, *Effects of maternal alcohol intake and smoking in neonatal electroencephalogram and anthropometric measurements*, 146 AM. J. OBSTET. & GYNECOL. 41, 45 (1983). Studies of moderate or minimal drinking effects have not yet established a safe level. Council on Scientific Affairs, Am. Med. Ass'n, *Fetal Effects of Maternal Alcohol Use*, 249 J.A.M.A. 2517, 2520 (1983) [hereinafter cited as "Council Report"].

[145] Council Report, *supra* note 144, at 2517.

[146] *Id.*

[147] Chasnoff, Diggs, & Schnoll, *Fetal Alcohol Effects and Maternal Cough Syrup Abuse*, 135 AM. J. DIS. CHILD. 968 (1981).

[148] A. MONTAGU, *supra* note 135, at 102.

[149] *Id.*

[150] *Id.* at 101.

[151] R. STEVENSON, *supra* note 136, at 96.

[152] Longo, *Some Health Consequences of Maternal Smoking: Issues Without Answers*, in PRENATAL DIAGNOSIS AND MECHANISM OF TERATOGENESIS 13, 16 (W. Nyhan & K. Jones eds. 1982) (reprinted from 18(3A) BIRTH DEFECTS 13, 16 (1981) (Part A of Annual Review of Birth Defects, 1981 March of Dimes Defects Foundation)). Studies have indicated that the risk of premature delivery is 36-47% greater and that approximately 13% of all preterm births can be attributed to smoking. A. MONTAGU, *supra* note 135, at 101.

It has been suggested that there may be an interaction of maternal nutrition and smoking. The theory is that the reduced fetal weight associated with the smoking mother

premature children are often less able to handle the stresses of life resulting from other causes. These children can experience some illness, weakness of various organs that may cause trouble later in life, lower intellectual capacity and, in some extreme cases, death.[153] Spontaneous abortion has also been found to occur more frequently in smoking mothers.[154] The rate of fetal death occurring after twenty weeks of gestation also increases significantly with the level of maternal smoking.[155] Recent studies also show a positive correlation between maternal smoking and possible congenital malformations.[156] In addition, maternal use of marijuana during pregnancy has been associated with smaller infant size at birth and features considered compatible with fetal alcohol syndrome.[157]

4. Drug Ingestion

All ingested drugs are capable of passing through the placenta from the mother to the child. The effects of drugs on the developing fetus depend upon the specific drug ingested, the quantity taken, and the period of pregnancy in which the drug was consumed.[158] Studies of the effects of narcotics addiction during pregnancy demonstrate a high prematurity rate, reduced birth rate, and symptoms of drug withdrawal.[159] Drug

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results from reduced food intake and therefore reduced availability of nutrients. Longo, *supra*, at 152. Yet, it appears that smoking women have higher food intakes than non-smoking women during pregnancy. Picone, Allen, Schramm, & Olsen, *Pregnancy outcome in North American Women. I. Effects of diet, cigarette smoking, and psychological stress on maternal weight gain*, 36 AM. J. CLIN. NUTR. 1205, 1211 (1982). Perhaps it can be best explained by noting that the nicotine in smoke has a number of effects which may increase heat loss from the body and impair the efficiency of the utilization of dietary energy. *Id.* It also has been shown to increase metabolic rates in humans and may have a substantial effect on caloric requirements. *Id.*

[153] A. MONTAGU, *supra* note 135, at 103.

[154] *Id.* The risk of spontaneous abortion is 30-70% higher in smoking mothers and increases with the number of cigarettes smoked. Longo, *supra* note 152, at 16. A 1949 study of the effects of smoking in 112 German women who were smokers, compared with 1,381 non-smoking mothers, revealed an abortion rate of 22.5% in smoking mothers as compared to 7.4% in non-smoking mothers. Prematurity, stillbirths, vomiting, difficult labors, and edema were also more frequent in the smoking mothers. A. MONTAGU, *supra* note 135 at 110.

[155] Longo, *supra* note 152, at 16.

[156] *Id.* at 18.

[157] Hingson, Alpert, Day, Dooling, Kayne, Morelock, Oppenheimer, & Zuckerman, *Effects of Maternal Drinking and Marijuana Use on Fetal Growth and Development*, 70 *Pediatrics* 539, 544 (1982).

[158] A. MONTAGU, *supra* note 130, at 323.

[159] *Id.* at 325. The symptoms include excitement, marked irritability, excessive crying, sleeplessness, tremors and convulsions, respiratory difficulties, feeding difficulties, vomit-

addiction during pregnancy is almost certain to result in the birth of a child who shows signs of drug addiction. If the child survives, it will probably exhibit a birth weight smaller than a normal child and therefore will be more vulnerable to other stresses.[160] Stillbirths and spontaneous abortions are also common effects of drug addiction.[161]

Antibiotics may produce malformations involving the eyes, nervous system, viscera, cardiovascular system, or skeleton.[162] For example, Tetracycline causes brown staining of the teeth and may effect the bony structure, even causing premature cessation of the growth of the long bones.[163] Streptomycin, another antibiotic, may affect the auditory nerve.[164]

Analgesics may also produce teratogenic effects.[165] Mild analgesics include substances like aspirin. The effects of aspirin, however, remain inconclusive. One study indicated a slight increase in the number of congential anomalies when the mothers took aspirin in the first sixteen weeks of pregnancy.[166] Large doses of aspirin taken constantly seem to reduce birth weight significantly.[167] Darvon, another mild analgesic, may produce drug dependency in the newborn.[168]

These effects illustrate the risks involved when an expectant woman deviates from proper prenatal care.[169] In recognizing a cause of action

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ing, diarrhea, yawning, sneezing, and fever, the severity of which bears a direct relation to the dose taken. *Id.*

[160] A. MONTAGU, *supra* note 135, at 83.

[161] A. MONTAGU, *supra* note 130, at 326.

[162] *Id.* at 340.

[163] Douglass, *supra* note 133, at 7.

[164] *Id.*

[165] Teratogenesis is defined as "embryonic maldevelopment leading to teratism [a congenital anomaly or monstrosity] or serious congenital defects." BLAKISTON'S GOULD MED. DICTIONARY 1357 (4th ed. 1979).

[166] Yaffe & Catz, *Drugs and the intrauterine patient*, in RISKS IN THE PRACTICE OF MODERN OBSTETRICS 82, 90 (S. Aladjem ed. 1972).

[167] Niederhoff & Zahradnik, *Analgesics During Pregnancy*, 75 AM. J. MED. 117, 118 (1983). Aspirin given to mice and rats on the sixth to last day of pregnancy produced high death rates in fetuses or cleft lips. A. MONTAGU, *supra* note 135, at 82.

[168] Yaffe & Catz, *supra* note 166, at 92.

[169] The presence of high states of anxiety and stress has been shown to be the causal element of a variety of abnormalities in pregnancy. Studies have demonstrated that a negative maternal attitude can give rise to a significant increase in perinatal death and congenital anomalies. Laukaran & Van den Berg, *The relationship of maternal attitude to pregnancy outcomes and obstetric complications*, 136 AM. J. OBSTET. & GYNECOL. 374 (1980). Premature birth and fetal growth retardation are frequently considered to be complications of maternal anxiety or life stress. Newton, Binu, Maskrey, & Phillips, *Psychological Stress in Pregnancy and its Relation to the Onset of Premature Labour*, 2 BR. MED. J. 411, 413 (1979); Pollard, *Effects of stress administered during pregnancy on reproductive capacity and subsequent development of the offspring of rats: prolonged effects on the litters of a second pregnancy*, 100 J. ENDOCRINOL. 301, 304 (1984)

It is interesting to note that since New York State legalized abortion, a decrease in the

predicated on negligent prenatal care, the primary concern should be the fact that the child has suffered an injury and will continue life with the injury or deformity—an injury or deformity which could have been avoided had the surrogate mother complied with the terms of the contract and fulfilled her duty towards the child by exercising reasonable care. It is well settled that third parties cannot injure a fetus without incurring tort liability;[170] allowing a surrogate mother to escape liability would be highly unjust. The only requisite for recovery should be the fulfillment of the basic elements of tort liability.

Even in light of the nebulous validity or enforceability of the contract,[171] imposing tort liability on a surrogate mother predicated on negligent prenatal care should have two beneficial effects: the deterrence of surrogate motherhood arrangements until its associated problems are resolved and the promotion of good prenatal health care by the surrogate mothers who enter into these contracts, thus serving both the contractual interests of the parties involved and, more importantly, the best interests of the child.

C. *The Essence of Tort Liability*

"The law of negligence is primarily common law, whose great virtue is its adaptability to the conditions and needs of changing times."[172] The

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incidents of malformations, like cleft palate, has been observed. Pollard, *supra* at 305. For an interesting discussion of studies focusing on the effects of psychosocial stress and anxiety during pregnancy, see Gorsuch & Key, *Abnormalities of Pregnancy as a Function of Anxiety and Life Stress*, 36 PSYCHOSOM. MED. 352 (1974); Newton & Hunt, *Psychosocial stress in pregnancy and its relation to low birth rats*, 288 BR. MED. J. 1191 (1984).

A surrogate mother could experience greater stresses resulting from the role she assumes in nurturing another woman's child. For example, the surrogate may worry excessively about the consequences of the arrangement if the child is born deformed and the contracting couple refuses to take the child. Or, perhaps, since the surrogate mother is merely "renting" her womb, she may not sense a duty towards the fetus and therefore will not pursue a proper course of prenatal care as stipulated in the agreement. A claim predicated on negligent exposure to stress would be difficult to support. While statistics detailing the effects of stress and anxiety are available, the task of proving causation in a specific case would probably be futile. Even *if* the state of stress could be causally linked to the damage, it is doubtful that negligence could be demonstrated. Science has not progressed sufficiently to enable individuals to control their emotions to this extent or to establish that one state of mind is more culpable than another in an attempt to determine negligent "feelings." However, it is suggested that surrogate mother clinics make available to the surrogate mothers on-going counseling to help alleviate undue stress or tension and to cope with this new experience. Parker, *Surrogate Motherhood: The Interaction of Litigation, Legislation and Psychiatry*, 5 INT'L J.L. & PSCYHIATRY 341, 353 (1982).

[170] *See supra* note 69.

[171] For a list of selected legal publications discussing the status of surrogate mother contracts, see L. ANDREWS, *supra* note 2, at 303-04 app. D.

[172] Simon v. Mullin, 34 Conn. Supp. 139, 147, 380 A.2d 1353, 1357 (1977) (recognition that a child has a cause of action for prenatal injuries sustained any time after conception).

inherent flexibility of tort law affords a remedy where it is recognized that a plaintiff's interests have been violated by the negligent conduct of another.[173] When a surrogate mother has pursued a course of prenatal care proven to be deleterious to the health and well-being of the fetus and injury results, justice demands a remedy. As eloquently stated in *Woods v. Lancet*:

> Precedent is merely a guide; its absence never a bar. . . . The absence of precedent should give no immunity to one who by his wrongful act has invaded the right of an individual. No right is more inherent, more sacrosanct, than that of an individual in his possession and enjoyment of his life, his limbs, and his body. The law is not static and inert, but is sufficiently elastic to meet changing conditions. It is presumed to keep pace with present-day concepts. To deny the infant relief . . . is not only a harsh result, but its effect is to do reverence to an outmoded, timeworn fiction not founded on fact and within common knowledge untrue and unjustified.[174]

In addressing the issue of recovery predicated on tortious conduct, it is mandatory to examine the applicability of the traditional formula necessary to state a cause of action for which relief may be sought: duty, breach, causation, and damages.[175]

1. Duty

> Duty is largely grounded in the natural responsibilities of social living and human relations, such as have the recognition of reasonable men; fulfillment is had by a correlative standard of conduct.[176]

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[173] "For wherever the common law gives a right or prohibits an injury, it also gives a remedy by action; and, therefore, wherever a new injury is done, a new method of remedy must be pursued." 3 W. BLACKSTONE, COMMENTARIES *123.

"Simply because the question is new does not mean that it is invalid. . . . So it is life itself which determines what particular interest will outweigh another. The judicial process by nature is a scheme of evaluating the varying forces which make society." Renslow v. Mennonite Hosp., 67 Ill. 2d 348, 360, 367 N.E.2d 1250, 1256 (1977) (Dooley, J., concurring).

[174] 278 App. Div. 913, 914, 105 N.Y.S.2d 417, 418 (dissent), *rev'd*, 303 N.Y. 349, 102 N.E.2d 691 (1951).

[175] *See generally* W. PROSSER & W. KEETON, *supra* note 15, § 30, at 164-65 (elements of claim).

[176] Lemaldi v. De Tomaso of America, Inc., 156 N.J. Super. 441, 447, 383 A.2d 1220, 1223 (1978).

Duty is not a static concept;[177] it is not predicated solely on foreseeability,[178] albeit often used synonymously or in conjunction with proximate cause.[179] Duty may be simplisticly summarized as that obligation imposed upon each of us to exercise due care toward others to whom unreasonable threats of harm might reasonably be expected to result.[180] American courts have held that the extension of the duty concept to prenatal injury claims is warranted, particularly in light of substantial medical advances.[181]

Courts have also extended the imposition of duty in prenatal injury actions to the father of the unborn infant. In *People v. Yates*,[182] the court held that the father willfully and unlawfully omitted to furnish necessary food, clothing, shelter or medical attendance for his child.[183] The court stated that the father had assumed a duty to the unborn child, five months in gestation, by reason of the paternity in the pregnancy.[184] The only difference the court found in the care owed to an unborn child is that provision of these necessities must be made indirectly through the mother, who acts as an intermediary in oxygenating and nourishing the fetus.[185]

The surrogate mother stands on the same footing as the father in *Yates*. If a duty rightfully can be imposed on a father for failing to furnish necessities to the pregnant mother for the benefit of the fetus, it is incomprehensible how a surrogate mother, whose sole responsibility is to exercise the most stringent care while carrying the child to term, could escape liability for similar willful and unlawful conduct. The surrogate assumes a grave duty to act reasonably the moment she is impregnated. The identity of the negligent actor is irrelevant; the crux of the problem is whether a duty to the unborn child existed, and, if answered in the affirmative, whether the resultant injury was proximately caused by a breach of that duty.

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[177] *E.g.*, *Renslow*, 67 Ill. 2d at 355, 367 N.E.2d at 1254.

[178] *Id.* at 354, 367 N.E.2d at 1253.

[179] *See* W. PROSSER & W. KEETON, *supra*, note 15, § 53, at 358. A discussion of the duty problems can be found in Green, *The Duty Problem in Negligence Cases*, (pts. 1 & 2) 28 COLUM. L. REV. 1014 (1928), 29 COLUM L. REV. 255 (1929); Morison, *A Re-examination of the Duty of Care*, 11 MOD. L. REV. 9 (1948); Prosser, *Palsgraf Revisited*, in SELECTED TOPICS ON THE LAW OF TORTS 191 (1954).

[180] *See, e.g.*, Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 162 N.E. 99 (1928) (issue of foreseeability discussed in terms of duty).

[181] *See supra* notes 64-68.

[182] 114 Cal. App. Supp. 782, 298 P. 961 (1931) (*per curiam*). *Accord* People v. Sianes, 134 Cal. App. 355, 25 P.2d 487 (1933).

[183] *Yates*, 114 Cal. App. Supp. at 786, 298 P. at 963.

[184] *Id.* at 787, 298 P. at 963. *See, e.g.*, Shack v. Holland, 89 Misc. 2d 78, 389 N.Y.S.2d 988 (1976) ("[A] conditional prospective liability to a fetus is created when an unborn child's mother is not sufficiently informed of the risks, hazards and alternatives of the delivery procedure administered, and such liability attaches upon the birth of the child. . . .").

[185] *Yates*, 114 Cal. App. Supp. at 788, 298 P. at 963.

Negligence is behavior which should be recognized as involving unreasonable danger to another.[186] This risk of danger is based upon the knowledge of existing facts and some reasonable belief that harm may follow.[187] The woman's affirmative act of seeking the opportunity to serve as a surrogate establishes that she is willing to assume a special role in carrying the infant. The woman desiring to become a surrogate mother knows, or should know, that she will have to comply with certain requirements. These requirements are not only contractual terms to adhere to a suitable course of prenatal care but are, in themselves, standards to be incorporated into the degree of due care to which the surrogate mother must conform. In this situation, the risk is that maternal tobacco smoking, alcohol consumption, drug ingestion, or malnutrition could cause physical or mental abnormalities. If this danger is not apparent to anyone else, it is apparent, or should be apparent, to the surrogate or to one in the position of the surrogate.[188]

The term "risk" does not adequately describe the seriousness of the possible harm. While injury is not an automatic consequence if the surrogate mother smokes or drinks, safeguarding against possible harm is a matter of acting or not acting. The realization that the affirmative act of engaging in deleterious, or possibly deleterious, behavior could cause injury, dictates that there is a duty of avoidance, whether expressly or impliedly incorporated into the surrogate mother contract; the duty to exercise due care in carrying the infant is a heightened one. Considering the social value of the interest in protecting prenatal life, it is apparent that the duty is paramount. Balancing the probability and gravity of the damage that may occur to the fetus with the utility of possessing the freedom to smoke, drink, ingest drugs, pursue a poor diet, and participate in other harmful activities for nine months illustrates the absurdity of not recognizing a duty of the surrogate mother to conform to a high standard of due care towards the fetus. Giving a woman the right to decide whether or not to terminate her pregnancy does not mean that she has a right to create a defective offspring.[189] If it can be conceded that once a pregnant woman has "abandoned her unfettered right to abort" and and subsequently decides to continue her pregnancy, thereby incurring a "conditional prospective liability,"[190] logic dictates the recognition of a duty by the surrogate mother to conduct herself in a manner consistent with the moral fabric of society, the expectations of the

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[186] W. PROSSER & W. KEETON, *supra* note 15, § 31, at 170.

[187] Seavey, *Negligence—Subjective or Objective?*, 41 HARV. L. REV. 1, 5-7 (1927).

[188] *See* W. PROSSER & W. KEETON, *supra* note 15, § 31, at 170 (definition of risk).

[189] Roe v. Wade, 410 U.S. 113 (1973).

[190] Shaw, *supra* note 129.

contracting parents and, more importantly, the best interests of the child.[191]

No relationship is as vital to the essence of life as is the intimacy between womb mother and developing fetus. To absolve the gestational mother from liability for injuries caused by her negligent conduct or to remain oblivious to the affirmative duty owed to the fetus by the very nature of its dependency on the surrogate would obliterate the meaning of justice deemed intrinsic in the law of torts.

2. Breach

Negligence is defined as:

> the failure to exercise the care that the circumstances justly demand. It embraces wilfull as well as unintentional disregard of duty. It is not a term of fixed and measured meaning. It takes its content always from specific circumstances, and its meaning varies as the context of surrounding circumstances change.[192]

In the surrogate motherhood arrangement, once duty has been established, a breach of that duty is readily observable. When a surrogate

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[191] By the same token, if the surrogate's physician advised the surrogate mother of defects in the developing fetus and the surrogate mother failed to abort, the child should be able to maintain an action for failing to abort. If the contract provided that the surrogate abort in the event the physician detected physical deformities, a duty would be imposed on the surrogate mother to abort. Since the surrogate mother entered into the contract cognizant of possible ramifications and expectations, suit for recovery of monetary damages should not present any problem even though the validity or enforceability of a surrogate mother contract is still an issue. The breach of that duty would result in liability, attaching either to the contracting parents or the child under the theory of third party beneficiary. *See* E. FARNSWORTH, CONTRACTS § 10.5 (1982) (rights of beneficiaries). Absent express provisions mandating abortion if defects are diagnosed, the duty to abort could be implied when viewed against the contract *in toto*. However, constitutional issues permeate the questions of the validity and enforceability of such contracts and whether recovery can be granted under contract law. The constitutional implications, however, are beyond the scope of this Note. Discussions of the constitutionality of surrogate mother contracts can be found in Black, *supra* note 106, at 387-92; Grad, *Legislative Responses to the New Biology: Limits and Possibilities*, 15 UCLA L. REV. 480, 485-88 (1968); Rushevsky, *supra* note 106, at 110-13; Comment, *The Surrogate Child: Legal Issues and Implications for the Future*, 7 J. JUV. L. 80, 85-88 (1983).

Recovery under tort law may not be as complicated. A suit by the child alleging that the surrogate mother breached her duty in nurturing a healthy fetus is, in reality, a suit for wrongful life. To date, only two states allow wrongful life claims. Turpin v. Sortini, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982); Call v. Kezirian, 135 Cal. App. 3d 189, 185 Cal. Rptr. 103 (1982); Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980); Harbeson v. Parke-Davis, Inc., 98 Wash. 2d 460, 656 P.2d 483 (1983) (*en banc*). See *supra* note 15 for a list of law review articles that discuss wrongful life claims.

[192] People *ex rel.* Wallace v. Labrenz, 441 Ill. 618, 624, 104 N.E.2d 769, 773, *cert. denied*, 344 U.S. 824 (1952).

mother, after being fully apprised of the import of her responsibilities to the contracting parents and to the fetus, fails to abstain from tobacco smoking, drug ingestion, alcohol consumption, or to adhere to a proper nutritional diet, her conduct will have culminated in a breach of the duty owed to the fetus. Breach of that duty results from the surrogate's unreasonable conduct in exercising an improper course of prenatal care. Her digression from due care results in culpability greater than ordinary negligence. The surrogate's behavior should have regarded as reckless, defined as follows:

> The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.[193]

Whether defined in terms of ordinary negligence or recklessness, pursuing a course of conduct known by the surrogate mother to be laden with risk cannot be excused. Moreover, a certain store of knowledge must be imputed to the surrogate mother, should she demonstrate an absence of appreciation for her role in carrying another couple's child.[194]

Upon a showing of negligent or reckless conduct, an elaborate assessment of the surrogate's breach of duty is unnecessary, other than to ascertain the causal link between the damage and the negligent act. Only after sufficient evidence has been presented to demonstrate the causal relation between the damage and the negligence may the court then allow recovery for the plaintiff-infant.

3. Causation

Medical assistance has proven itself to be an asset for injured plaintiffs in their prayers for relief. This fact is especially true in cases involving prenatal injuries.[195] Although proof may be difficult, courts have chosen to rely on a causation test to determine if the injury sustained is traceable

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[193] RESTATEMENT (SECOND) OF TORTS § 500 (1965).

[194] *See* W. PROSSER & W. KEETON, *supra* note 15, §32, at 185 (presumed level of knowledge discussed).

[195] *E.g.*, Sinkler v. Kneale, 401 Pa. 267, 272, 164 A.2d 93, 95 (1960). Speculative questions about causation still arise, however. *Compare Sinkler*, 401 Pa. at 267, 164 A.2d at 93 (allowing plaintiff to trace the injury to the wrongful act) *with* Puhl v. Milwaukee Automobile Ins. Co., 8 Wis. 2d 343, 99 N.W.2d 163 (1959) (determining plaintiff was unable to meet her burden of proof). An informative discussion about the causation issue in prenatal injury claims can be found in Lintgen, *supra* note 69, at 554.

to another's wrongful act.[196] While the legal cause need not be the sole or predominant cause of injury,[197] it is necessary that the actor's conduct be a substantial or material factor causing the injury.[198] A tort claim for prenatal injury where the action is instituted against the surrogate mother does not pose extraordinary causation problems. The tests employed are identical to those utilized in the typical prenatal injury cases; the difference lies only in the identity of the defendant.

The health and well-being of the fetus is, for the most part, dependent upon the surrogate mother. When it can be demonstrated that the surrogate's drug ingestion, tobacco smoking, alcohol consumption, or improper diet caused the resultant damage, liability will be extended to her. As in many prenatal tort claims, instances will occur where the injury cannot successfully be traced to the unreasonable conduct. For example, causation may be difficult to establish when the surrogate mother smokes only a few cigarettes or consumes a minimal to moderate amount of alcohol. The miniscule intake of tobacco smoke or alcohol could have been the causal element responsible for the injury but the medical evidence linking these given quantities is inconclusive, lending itself to speculation and conjecture. As long as competent medical evidence establishes the causal relation and damage to the child, recovery will be allowed.[199]

Asserting a cause of action seeking recovery for prenatal injury deserves recognition equal to a claim for property rights by an unborn child.[200] Refusal based on the identity of the negligent actor is abhorrent to the senses of justice, fairness, and logic. Lack of precedent or recognition of antiquated rules should not prevent the formation of law conducive to changing times. "When these ghosts of the past stand in the path of justice clinking their medieval chains, the proper course for the judge is to pass through them undeterred."[201]

4. Damages

Proof of damage is an essential element of the child's case. The amount of recovery is directly related to the severity of the injury caused by the

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[196] *E.g.*, Day v. Nationwide Mutual Ins. Co., 328 So. 2d 560 (Fla. Dist. Ct. App. 1976).

[197] RESTATEMENT (SECOND) OF TORTS § 430 comment d (1965); James & Perry, *Legal Cause*, 60 YALE L.J. 761 (1951).

[198] W. PROSSER & W. KEETON, *supra* note 15, § 41, at 267; RESTATEMENT (SECOND) OF TORTS § 431 (1965). This situation is not to be mistaken as an application of the "but for" test. While causation-in-fact is essential to liability, liability based on causation in fact would open a Pandora's box, holding the surrogate mother responsible for results beyond her control.

[199] *E.g.*, Woods v. Lancet, 303 N.Y. 349, 351, 102 N.E.2d 691, 692 (1951).

[200] *E.g.*, *Day*, 328 So. 2d at 562.

[201] *Woods*, 303 NY at 355, 102 N.E.2d at 694 (quoting Lord Atkin in United Australia, Ltd. v. Barclay's Bank, Ltd., 1941 A.C. 1, 29).

surrogate mother's negligent conduct. In addition to compensatory damages, the injured child should be able to recover both nominal damages, to vindicate his rights, and punitive damages, as a form of punishment, exemplifying the legal consequences of neglecting the affirmative duty intrinsic in surrogate mothering.

V. The Reasonably Prudent Expectant Surrogate: A Suggested Standard of Care

The legal creation of the "reasonable man of ordinary prudence" has given flexibility to the determination of tort liability.[202] The conduct of the reasonable man varies with the situation that confronts him. The reasonableness standard takes into account, among other characteristics, the physical attributes of the actor and the degree of knowledge, skill, and intelligence required under the circumstances. The gist of the standard is that the actor should conduct himself with that degree of care ordinarily exercised by a reasonable, prudent man of like characteristics, under similar circumstances.[203]

Surrogate mothering and the concomitant legal complexities which may inevitably surface provide a firm foundation on which to create a new standard of liability, fashioned around the reasonable person standard. Presently, no established standard applies solely to cases in which parents negligently injure their children; some commentators[204] and three courts[205] have suggested such a standard.

Utilizing a "reasonably prudent expectant surrogate" standard would permit a case-by-case determination of liability rather than categorizing classes of tort actions regardless of negligent conduct. The surrogate mother would be held to a standard of reasonableness, irrespective of the specific nature of these acts. An examination of the qualities possessed by the reasonably prudent expectant surrogate is vital to understand how the standard will be applied when courts are initially confronted with this unique tort claim. Moreover, the use of this carefully fashioned

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[202] *See* W. Prosser & W. Keeton, *supra* note 15, § 32, at 173-75 (description of the "reasonable man of ordinary prudence").

[203] *See, e.g.*, Boyce v. Brown, 51 Ariz. 416, 77 P.2d 455 (1938) (reasonable professional); Hill v. City of Glenwood, 124 Iowa 479, 100 N.W. 522 (1904) (reasonable blind person); Roth v. Union Depot Co., 13 Wash. 525, 43 P. 641 (1896) (reasonably careful child of same age, intelligence, maturity, training and experience).

[204] Note, *Parental Liability for Prenatal Injury*, 14 Colum. J.L. & Soc. Probs. 47, 85 (1978); Note, *Recovery for Prenatal Injuries: The Right of a Child Against Its Mother*, 10 Suffolk U.L. Rev. 582, 606 (1976); Comment, *The "Reasonable Parent" Standard: An Alternative to Parent-Child Tort Immunity*, 47 U. Colo. L. Rev. 795 (1976).

[205] Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971); Grodin v. Grodin, 102 Mich. App. 396, 301 N.W.2d 869 (1980); Miller v. Leljedal, 71 Pa. Commw. 372, 455 A.2d 256 (1983).

standard of care would achieve the most equitable outcome in an area which is both unprecedented and unfamiliar to the courts and to the legal profession in general.

A. *Moral Qualities*

Negligence and morality are not inseparable elements in defining the limits of acceptable behavior. "The standard man evaluates interests in accordance with the valuation placed upon them by the community sentiment crystallized into law."[206] The "standard man" is not absolved of liability if his values are incongruent with those of the community; he also is not exempted from liability if he believes that his values are in accord with those of the community.[207] Although surrogate motherhood may raise a few eyebrows, the moral qualities of this undertaking cannot be ignored. The factors which determine the community's values with respect to surrogate motherhood include the role that the surrogate mother plays in prenatal development and the right of the child to begin life with a sound mind and body. Incorporated into the community's value system is the protection of its children, living and unborn. Placing the future of an unborn child into the hands of a virtual stranger mandates that the standard of the surrogate's conduct be elevated, despite the value the surrogate may place upon her role. Her conduct must conform with the reasonable standard of due care that the community views as consistent with its underlying moral fabric.

B. *Intelligence*

An objective standard of reasonableness is also applied with respect to intelligence. A claim that the defendant acted in the best fashion she knew is insufficient. As stated in *Vaughan v. Menlove*,

> Instead, therefore, of saying that the liability for negligence should be co-extensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe.[208]

Encompassed in the analysis of intelligence is the actor's ability to estimate the effects of his acts when viewed against existing factors.[209] It seems reasonable to conclude that the average prudent person would know the consequences of an expectant woman's indulgence in cigarettes,

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[206] Seavy, *supra* note 187, at 10.
[207] *Id.*
[208] 3 Bing. (N.C.) 468, 475, 132 Eng. Rep. 490, 493 (1837).
[209] Seavy, *supra* note 187, at 12.

alcohol, drugs, or poor nutritional habits. An even more reasonable conclusion is that a woman serving as a surrogate mother possesses the ability to estimate the effects of inadequate prenatal care. A major factor to be incorporated into the reasonably prudent expectant surrogate standard is an objective requisite level of intelligence presumed to be possessed by the surrogate—that is, knowing that drug ingestion, alcohol consumption, tobacco smoking, and poor diet involve considerable risk to the developing fetus. This factor is especially true in light of her involvement with the surrogate motherhood clinic, or hospital, and the contracting parents.[210]

C. *Physical Characteristics*

The standard person would be identical to an expectant surrogate. The surrogate mother must conduct herself as the reasonable person would conduct herself if pregnant. The added ingredient to this assumption of like physical characteristics[211] is that the child is being carried for another couple. This factor presupposes a special duty to the unborn child—an elevated standard of care to ensure the child's continuing health and well-being.[212] A reasonably prudent expectant surrogate would abstain from harmful acts during pregnancy. The only demands placed upon an expectant surrogate relate to the precautions the surrogate mother must take to compensate for the restrictions placed upon her by reason of the pregnancy. Thus, the reasonably prudent expectant surrogate takes into account the limitations placed upon her acts while carrying the infant; conduct which defies these limitations is clearly unreasonable.

D. *Belief and Knowledge*

The belief and knowledge of the actor do not determine if his conduct was negligent. In light of the existing facts surrounding the situation, the actor's belief that he was using reasonable care is immaterial.[213] Moreover, it is conceded that all persons do not possess the identical store of

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[210] The surrogate mother will generally be fully apprised of the surrogate mothering process, its requirements regarding prenatal care, and possible risks posed by her conduct.

[211] *See* RESTATEMENT (SECOND) OF TORTS § 283C comments a & c (actor to conform to standard of reasonable person of similar physical characteristics). An objective test is applied to determine negligence; the mental and emotional characteristics of the allegedly negligent surrogate mother are immaterial. "The law takes no account of the infinite variety of temperament, intellect and education which make the internal character of a given act so different in different men." O. W. HOLMES, THE COMMON LAW 108 (1881).

[212] *See supra* text accompanying notes 202-17.

[213] Hankins v. Harvey, 248 Miss. 639, 160 So. 2d 63 (1964).

knowledge.[214] Liability is not premised on the actor's lack of requisite knowledge, but because he failed to acquire that knowledge.[215] In the surrogate mother situation, the woman who claims she was not aware of the consequences of smoking, drinking or other harmful acts is not excused from liability. This knowledge is expected of an actor in the surrogate mother's position, whether or not expressly provided in the surrogate motherhood contract or imputed to her by reason of her undertaking. The surrogate exhibits negligent behavior by failing to acquire the knowledge which is an essential part of her task as surrogate mother. More importantly, "[wo]men who engage in certain activities or come into *certain relationships* with people or things are under peculiar obligation to acquire knowledge and experience about that activity, person, or thing."[216] Undoubtedly the surrogate mother is under a "peculiar obligation to acquire knowledge" about the expectations of her role as a surrogate and the risks involved should she engage in harmful activities. Under this suggested standard, the surrogate mother is obligated to possess superior knowledge about the effects of her behavior on the developing fetus and to understand that her conduct will be deemed unreasonable if she deviates from the accepted course of prenatal care.

This suggested standard, however, does not disregard the power vested in the expectant surrogate mother by virtue of her position. It takes into consideration that parents are sometimes forgetful or careless; the standard retains enough elasticity to afford latitude for error.[217] The benefit of the reasonably prudent expectant surrogate standard is its ability to allow the child redress for injuries sustained via the negligent acts of the surrogate mother while at the same time protecting the surrogate's discretion.

In light of the increasingly rapid reliance on the new reproductive technologies, the reasonably prudent expectant surrogate standard would balance the interests of both the surrogate mother and the child who is beginning its new life through the miraculous marriage of medical science and the natural physiology.

VI. Conclusion

A growing number of childless couples have resorted to the assistance of scientifically-controlled reproductive technologies. The future looks

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[214] See Seavy, *supra* note 187, at 18, for an account of the reasons explaining the absence of a standard of knowledge.

[215] *Id.* at 18.

[216] James, *The Qualities of the Reasonable Man in Negligence Cases*, 16 Mo. L. Rev. 1, 12 (1951) (emphasis added).

[217] Arguing that the application of such a standard would usurp the parents' ability to exercise discretion in raising and disciplining their children merits little, if any, weight since the discretion will be a factor in the jury's determination of negligence.

especially promising for couples who desire offspring through the use of surrogate motherhood. The utilization of surrogate mother arrangements will undoubtedly generate a new stream of tort liability actions. In light of the recognition of prenatal injury claims and the inapplicability of parent-child immunity, courts may be confronted with a tort action by a child who has sustained prenatal injuries as a result of the surrogate mother's negligent prenatal care.

Recovery in such a case would be justified on the basis that the surrogate mother assumed a momentous and devout duty to the child. This duty to abstain from harmful prenatal conduct emanates from the surrogate's relationship to the unborn child. The surrogate assumes the position of a third party, thereby holding herself liable for damages proximately caused by her negligent acts. The surrogate mother, however, should be held to a heightened standard of care; not only is she cognizant of the risks involved if she indulges in harmful conduct, but she is vested with the sole responsibility of ensuring, to the best of her ability, the fetus' continuing good health and well-being. The contract into which she entered merely evidences the nature of her role. Whether the prohibitions against tobacco smoking, drug ingestion, alcohol consumption, or adherence to an improper diet are express conditions of the contract or implied conditions of the surrogate mother's role, her failure to abstain from these prenatal vices constitutes a duty whose breach could cause grave physical and mental injuries.

With the advances and aid of medical science, the demonstration of the causal relationship between the prenatal injuries and the surrogate mother's negligence does not present any unique obstacles not present in other prenatal injury cases. In addition, the identity of the negligent actor should not pose a threat to the redress afforded to an infant who must endure life with permanent damage—damage caused by an individual who will not participate in raising and educating the child. Recovery will neither cure an ailment nor perfect an anomoly; however, compensation is the sole means by which society may pay reverence to the value of life and show compassion to an innocent child who must pay the price for the negligence of another. To deny recovery is to deny justice.

The most justiciably manageable manner by which to adjudge these cases is the creation of a new reasonableness standard specifically designed to determine negligence in these circumstances. A reasonably prudent expectant surrogate standard would presume a superior level of knowledge by the surrogate mother. This store of knowledge would include that knowledge possessed by an actor of like characteristics, acting under like circumstances. The surrogate mother would be required to know that poor nutrition, tobacco smoking, alcohol consumption, and drug ingestion involve substantial risk to the welfare of the fetus and that behavior contrary to that expected of an identical pregnant actor in the community is unreasonable. The surrogate's belief in the nature of her acts is immaterial, as are her emotional and mental characteristics.

The strength of the reasonably prudent expectant surrogate standard is its ability to permit a case-by-case determination of negligence. The standard would permit the child redress for prenatal injuries caused by the surrogate mother's negligent conduct while maintaining the degree of discretion inherent in the surrogate mother's role in the relationship.

Recognition of this new tort liability and the application of the reasonably prudent expectant surrogate standard do not alleviate all of the problems which may accompany surrogate motherhood. They do, however, reflect society's concern for the value of health and life, and attempt to compensate injured children in order to help relieve the burdens they must endure.

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