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COMMENTS

Parental Liability for Preconception Negligence: Do Parents Owe a Legal Duty to Their Potential Children?

*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.*¹

INTRODUCTION

We live in a society where the value of human life is paramount. It should therefore go unquestioned that a child has the right to be born with a sound mind and body, "to the fullest extent possible."²

There has been recognition of an infant's right to recover for injuries caused by another's negligence prior to the infant's birth.³ Judicial recognition of these prebirth torts has created a potential new cause of action: parental tort liability to a defective child,⁴ born alive, for injuries resulting from a parent's negligence prior to conception.

This Comment will attempt to analyze this potential cause of action and its ramifications. First, an overview of the current law relating to prenatal and preconception torts will be discussed.⁵ Second, the parental immunity doctrine will be reviewed with emphasis being placed on its existence as a possible bar to parental liability.⁶ Third, an analysis of a parent's duty to an unconceived child will be made to determine whether or not potential parents shall owe a legally cognizable duty to their future child.⁷ Finally, specific limitations which may be imposed on such a parental duty

1. 3 W. BLACKSTONE, COMMENTARIES *123.

2. Beal, "Can I Sue Mommy?": An Analysis of a Woman's Tort Liability for Prenatal Injuries to Her Child Born Alive, 21 SAN DIEGO L. REV. 325 (1984).

3. See *infra* notes 36-57 and accompanying text. This trend includes recognition of causes of action for postconception as well as preconception negligence.

4. The term "defective child" will be used throughout this Comment. The author uses this term only to depict an infant born with mental and/or physical abnormalities. No other connotations of this term are intended.

5. There will be discussion as to the law relating to prenatal injuries. There are parallels that exist between prenatal injuries and the proposed cause of action. Indeed, courts have stated that the case law on prenatal injuries is the "best available means" for predicting how the courts should rule on claims for preconception injuries. See *Bergstreser v. Mitchell*, 577 F.2d 22, 25 (8th Cir. 1978).

6. See *infra* notes 58-95 and accompanying text.

7. See *infra* notes 96-168 and accompanying text.

of care will be discussed.⁸

I. PRENATAL AND PRECONCEPTION TORTS

A. *An Overview of Prenatal Torts*

The first case to address the issue of an infant's right to recover for injuries sustained while *in utero*⁹ was *Dietrich v. Inhabitants of Northampton*.¹⁰ In *Dietrich*, Justice Holmes established a precedent

8. See *infra* notes 169-96 and accompanying text. This Comment will not consider the subject of wrongful death. The focus will be made on the live birth of a defective child with the assumption that the child survives for a substantial period of time.

It is also necessary to distinguish other types of actions from the one under examination. A *wrongful life* action may be brought by either the parent or child, against a defendant, usually a doctor or hospital. The plaintiff's assertion is that due to the defendant's negligence, the child was allowed to be born. In essence, the plaintiff contends that because of the defective condition of the child, the child would have been better off not being born.

The term "wrongful life" originated in the case of *Flores ex rel. Zepeda v. Zepeda*, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied*, 379 U.S. 945 (1964). In *Zepeda*, a child unsuccessfully brought suit against his biological father for being born illegitimate. *Id.* at 262-63, 190 N.E.2d at 859. There are presently three states that have allowed wrongful life actions: California, Washington and New Jersey. California was the first state to permit a wrongful life cause of action. Specifically, in *Turpin v. Sortini*, 31 Cal. 3d 220, 223-24, 643 P.2d 954, 955-56, 182 Cal. Rptr. 337, 339 (1982), the California Supreme Court allowed a child's wrongful life action against a physician for failing to properly diagnose and advise the child's parents of a hereditary hearing defect in the child's older sibling. However, the court limited the child's recovery to special damages, disallowing any recovery based on general damages. *Id.* at 239, 643 P.2d at 966, 182 Cal. Rptr. at 349. The second state to allow a recovery for wrongful life was Washington. In *Harbeson ex rel. Harbeson v. Parke-Davis, Inc.*, 98 Wash. 2d 460, 463, 656 P.2d 483, 487 (1983), two children were born with severe birth defects caused by their mother's ingestion of the drug Dilantin. The defendant physicians did not advise the mother of the potential severity of birth defects that could result from ingestion of this drug during pregnancy. As the California Supreme Court did in *Turpin*, the *Harbeson* court limited the children's recovery to extraordinary expenses required due to their conditions. *Id.* at 483, 656 P.2d at 497. The third state to recognize wrongful life was New Jersey. *Procanik ex rel. Procanik v. Cillo*, 97 N.J. 339, 343-44, 478 A.2d 755, 758 (1984). In *Procanik*, the defendant physicians were negligent in diagnosing the mother's German measles in the first trimester of her pregnancy. Therefore, she was deprived of the choice of terminating her pregnancy. *Id.* at 344, 478 A.2d at 758. Like the California and Washington courts, New Jersey limited recovery to special damages. *Id.* at 356, 478 A.2d at 764. See also Note, *Child v. Parent: A Viable New Tort of Wrongful Life?*, 24 ARIZ. L. REV. 391 (1982) (where the author denounces such a cause of action).

A *wrongful conception* or *wrongful birth* action is similar. The plaintiff's contention is that due to the defendant's negligence, the child was conceived. These actions usually arise when a doctor negligently prescribes an improper contraceptive, or when a sterilization procedure is negligently performed, thus allowing conception to take place. See *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975), where the Texas Supreme Court became the first United States court to allow recovery for wrongful birth. The court, however, limited the parents' damages to pecuniary expenses necessary for the child's care. See also Comment, *Wrongful Birth: The Emerging Status of a New Tort*, 8 ST. MARY'S L.J. 140, 144 (1976).

9. "*In utero*" means in the uterus. It refers to the entire normal gestation period. It is the period of pregnancy; when the child is being carried by the mother. WEBSTER'S INTERNATIONAL DICTIONARY 2525 (3d ed. 1971).

10. 138 Mass. 14 (1884).

which denied an infant the right to recover for injuries sustained while *in utero*. This holding stood for sixty-two years.¹¹

In *Dietrich*, a woman who was four to five months pregnant fell and was injured while walking on a defective highway maintained by the defendant.¹² As a result of this fall, she suffered a miscarriage. The premature child survived only ten to fifteen minutes.¹³ A wrongful death action was asserted on behalf of the deceased child.¹⁴

In denying the action, Justice Holmes stated that the unborn child did not have *locus standi*¹⁵ in court. His theory, which became known as the entity theory, was that the mother and the fetus were really one, that they could not be separated and, therefore, that the child could never sue on his own behalf.¹⁶ Any injuries that may have been received by the child were too remote to be recoverable by the child, but could be recovered by the mother.¹⁷

Some of the reasoning employed by Justice Holmes may appear unfounded by someone reading the case today. However, based on the state of existing medical knowledge at Holmes' disposal when the opinion was written, the outcome is understandable.¹⁸ The gradual demise of the *Dietrich* holding, however, was to begin shortly.

In *Allaire v. St. Lukes Hospital*,¹⁹ a child was born severely crippled due to the defendant's negligent conduct while caring for the child's mother during her pregnancy. The child was denied a cause of action²⁰ based upon the reasoning of the *Dietrich* decision. How-

11. See *infra* notes 12-23 and accompanying text. See also *Allaire v. St. Luke's Hosp.*, 184 Ill. 359, 56 N.E. 638 (1900) (where the court denied recovery on the strength of the *Dietrich* decision).

12. 138 Mass. at 14.

13. *Id.* at 15.

14. *Id.*

15. *Id.* at 16. *Locus standi* refers to an individual's right to appear "in a court of justice, or before a legislative body, on a given question." BLACK'S LAW DICTIONARY 848 (5th ed. 1979).

16. Justice Holmes considered the mother and the fetus to be inseparable. He considered the mother and the fetus to be one legal entity, thus preventing the fetus from having any legal rights. 138 Mass. at 16.

17. *Id.* at 17. The *Dietrich* opinion implies that the only duty owed by the defendants was to the mother and that this duty did not extend to her unborn child.

18. When the *Dietrich* opinion was written, medical science was not nearly as advanced as it is today. In *Renslow ex rel. Renslow v. Mennonite Hosp.*, 67 Ill.2d 348, 355, 367 N.E.2d 1250, 1254 (1977), the Illinois Supreme Court noted that, "[a]s medical science progressed, the courts took notice that a fetus is a separate human entity prior to birth. . . . Thus, various courts have gradually come to recognize that the embryo, from the moment of conception, is a separate organism that can be compensated for negligently inflicted prenatal harm." See also *infra* note 32 and accompanying text.

19. *Allaire*, 184 Ill. 359, 56 N.E. 638 (1900), *overruled in*, *Amann v. Faigy*, 415 Ill. 422, 114 N.E.2d 412 (1953).

20. 184 Ill. at 368, 56 N.E. at 640.

ever, in his well known dissenting opinion, Justice Boggs laid the foundation for the demise of Justice Holmes' entity theory.²¹

Justice Boggs argued that viability should be the stage at which a child should be allowed to maintain an action.²² Justice Boggs explained that to say that a fetus or unborn child is viable means that it is sufficiently developed to be able to live outside the mother's womb, either under normal conditions or, according to authorities, even in an incubator.²³

The viability test was finally accepted by a court in *Bonbrest v. Kotz*.²⁴ Specifically, the District Court of the United States for the District of Columbia said of a fetus:

True, it is in the womb, but it is capable now of extra-uterine life—and while dependent for its continued development on sustenance derived from its peculiar relationship to its mother, it is not a "part" of the mother in the sense of a constituent element—as that term is generally understood.²⁵

In *Bonbrest*, the viable infant child was injured when she was removed from her mother's womb through alleged professional malpractice by the defendant physicians.²⁶ The *Bonbrest* court took note of the fact that a child has rights as an individual, stating that there is no right more inherent and sacrosanct than an individual's right to the possession and enjoyment of his life with the full use of his limbs and body.²⁷ The court went on to observe that "[i]f a right of action be denied to the child it will be compelled, without any fault on its part, to go through life carrying the seal of another's fault and bearing a very heavy burden of infirmity and inconvenience without any compensation therefor."²⁸

Criticism of the viability standard stemmed from its imposition of an arbitrary time period as the determinative factor.²⁹ Commentators argued that there was no single point in time when a court could conclude that an unborn child could survive outside the

21. *Id.* at 368-74, 56 N.E. at 640-42 (Boggs, J., dissenting).

22. *Id.* at 370, 56 N.E. at 641 (Boggs, J., dissenting).

23. *Id.* See also 59 AM. JUR. 2D *Parent & Child* § 151 (1969).

24. *Bonbrest v. Kotz*, 65 F. Supp. 138 (D.D.C. 1946).

25. *Id.* at 140.

26. *Id.* at 139.

27. *Id.* at 142.

28. *Id.* at 141-42 (quoting the Supreme Court of Canada in *Montreal Tramways v. Leveille*, 4 D.L.R. 337, 345 (1933)).

29. *Sylvia ex rel. Sylvia v. Gobeille*, 101 R.I. 76, 79, 220 A.2d 222-23 (1966). In *Sylvia*, the Supreme Court of Rhode Island summarized the arguments for and against the viability theory. The court concluded: "In our judgment there is no sound reason for drawing a line at the precise moment of the fetal development when the child attains the capability of an independent existence, and we reject viability as a decisive criterion." *Id.* at 79, 220 A.2d at 223. See also Comment, *Recovery for Prenatal Injuries: The Right of a Child Against Its Mother*, 10 SUFFOLK U.L. REV. 582, 587 (1976).

mother's womb.³⁰ In response to this criticism, a noticeable shift took place in the law of recognizing the rights of a fetus as a separate entity. Courts began to employ a biological approach to determine when a fetus became a separate entity.³¹ Under this biological theory, the fetus is treated as a separate organism from the time of conception,³² not at its viable stage.³³

The declining judicial attitude towards the viability standard and the trend towards acceptance of the biological approach are well founded. Rejection of the viability standard, and acceptance of the biological theory, should center on issues of public policy. Should one child be allowed recovery for prenatal injuries, and another denied, merely because he is a little more advanced in fetal life? This question should be answered in the negative. It is irrelevant whether or not a child was viable at the time it was injured. The child will still incur the same harm after birth. Therefore, there is no sound reason for denying a child, injured while in a previable state, an opportunity for redress.³⁴ It is fundamental that justice dictates the recognition of a cause of action when a fetus, later born alive, has been negligently injured.³⁵

With this background at our disposal, it is necessary to examine how courts have considered suits to recover for injuries due to another's negligence prior to conception.

B. *An Overview of Preconception Torts*³⁶

A case of paramount importance which considered an infant's right to recover for injuries received due to another's preconception

30. *Id.*

31. In *Kelly v. Gregory*, 282 A.D. 542, 543-44, 125 N.Y.S.2d 696, 697 (1953), *appeal granted*, 283 A.D. 914, 129 N.Y.S.2d 914 (1954), the court held that the legal entity of a child begins with the biological separability of a fetus from its mother. This, the court said, coincides with conception and, therefore, if born alive, a child may recover for prenatal injuries received due to the tortious conduct of another anytime at or after conception, regardless of viability. *Id.* at 544-45, 125 N.Y.S.2d 697-98.

32. See *Renslow*, 67 Ill. 2d 348, 355, 367 N.E.2d 1250, 1254 (citing *Sinkler ex rel. Sinkler v. Kneale*, 401 Pa. 267, 273, 164 A.2d 93, 96 (1960); *Smith ex rel. Smith v. Brennan*, 31 N.J. 353, 366, 157 A.2d 497, 504 (1960); *Bennet ex rel. Bennett v. Hymers*, 101 N.H. 483, 485, 147 A.2d 108, 110 (1958)). In *Renslow*, the Supreme Court of Illinois acknowledged that "[i]t is by now commonly accepted that at conception the egg and sperm unite to jointly provide the genetic material requisite for human life. Thus, various courts have gradually come to recognize that the embryo, from the moment of conception, is a separate organism" *Id.*

33. See *supra* note 23.

34. See *Smith ex rel. Smith v. Brennan*, 31 N.J. 353, 367, 157 A.2d 497, 504 (1960).

35. Note, *Preconception Negligence: Reconciling an Emerging Tort*, 67 GEO. L.J. 1239, 1257 (1979).

36. Preconception torts are those that occur prior to the uniting of the sperm and egg. The preconception tortious conduct results in injury to the infant during its prenatal development. Thus, by the time of birth, an injury which has occurred as a result of an act perpetrated prior to conception has left the child "to suffer its

negligence was *Renslow ex rel. Renslow v. Mennonite Hospital*.³⁷ In *Renslow*, the Supreme Court of Illinois was confronted with a suit, dismissed by the trial court, against a doctor and a hospital for pre-conception negligence brought by a mother on behalf of her minor daughter.³⁸ The complaint alleged that, at age thirteen, the plaintiff's mother was negligently transfused twice with Rh-positive blood by the defendants.³⁹ This transfusion was not compatible with the mother, thus causing a sensitization of the mother's Rh negative blood.⁴⁰ It was alleged that this sensitization of the mother's blood caused prenatal damage to the plaintiff's hemolytic processes, thus inducing a premature birth. Plaintiff further alleged that, as a result of the defendants' pre-conception negligence, she suffered permanent damage to various organs, her brain and her nervous system.⁴¹

In allowing a cause of action for pre-conception negligence, the court in *Renslow* recognized the impropriety of disallowing an infant's claim merely because she was not yet in existence at the time of the tortious conduct. Because an infant could recover for prenatal injuries induced while in a pre-viable stage,⁴² the court acknowledged that a defendant could be liable to one "whose existence was

consequences throughout the remainder of his life." Note, *Torts Prior to Conception: A New Theory of Liability*, 56 NEB. L. REV. 706, 707 (1977).

37. 67 Ill. 2d 348, 367 N.E.2d 1250 (1977). The first case to address the issue of a pre-conception negligence claim was *Morgan ex rel. Morgan v. United States*, 143 F. Supp. 580 (D.N.J. 1956). In *Morgan*, the parents of an infant afflicted with birth defects brought an action against the United States under the Federal Tort Claims Act. The parents alleged that the negligent blood transfusion given to the mother, a patient at an Army hospital about one year before the child's conception, caused the child's birth defects. The district court dismissed the suit on the grounds that Pennsylvania had not yet recognized a prenatal cause of action. *Id.* at 584.

The first case in which a pre-conception negligence cause of action was recognized was *Jorgensen ex rel. Jorgensen v. Meade Johnson Laboratories, Inc.*, 483 F.2d 237 (10th Cir. 1973). In *Jorgensen*, the father asserted claims as administrator for the estate of one of his twin daughters, who died at the age of three and one-half years, and as next friend of the surviving twin daughter. He alleged that the twins' afflictions with Down's syndrome were caused by chromosomal abnormalities in their mother, which were alleged to have resulted from their mother's use of the defendant's oral contraceptives. 483 F.2d at 238. The district court granted the defendant's motion to dismiss on the grounds that only the legislature should create rights pertaining to pre-conception claims. *Jorgensen*, 336 F. Supp. 961, 962-63 (W.D. Okla. 1972). The Tenth Circuit determined that because the Oklahoma courts would have handled the plaintiff's claim of injuries as one of causation, to be determined by competent medical proof, the district court was incorrect in concluding that such a cause of action must await legislative action. 483 F.2d at 240.

38. 67 Ill. 2d at 348-49, 367 N.E.2d at 1250-51.

39. *Id.* at 349, 367 N.E.2d at 1251.

40. *Id.*

41. *Id.* at 350, 367 N.E.2d at 1251.

42. This author is assuming that the infant is in a jurisdiction which has rejected the viability standard. See *supra* notes 23 and 32.

not apparent at the time of [the defendants'] act."⁴³ This recognition of a cause of action for prenatal injuries, sustained as a result of negligent acts occurring prior to the infant's conception, is a "logical extension of the development in prenatal injury law."⁴⁴

The *Renslow* court applied basic tort principles in adopting this cause of action. Operating under the theory that the purpose of tort law is to redress a wrong, Justice Dooley stated in his concurring opinion:

"*** It is axiomatic that every person owes a duty to all persons to exercise ordinary care to guard against any injury which may naturally flow as a reasonably probable and foreseeable consequence of his act, and the law is presumed to furnish a remedy for the redress of every wrong. This duty to exercise ordinary care to avoid injury to another does not depend upon contract, privity of interest or the proximity of relationship between the parties. It extends to remote and unknown persons."⁴⁵

Thus, the court in *Renslow* did not hold that the existence of the plaintiff at the time of the tortious conduct was necessary to a finding of a duty.⁴⁶ However, as set forth above, the injury had to be a reasonably probable and foreseeable result, in order for a duty to arise.⁴⁷

The same reasoning was employed by the court in *Park v. Ches-sin*.⁴⁸ *Park* was a wrongful life action⁴⁹ by a mother and father, on behalf of their infant child, against an obstetrician for erroneously advising the mother that she could have another child without fear of its being born with the fatal hereditary disease known as polycystic kidney disease.⁵⁰ The newborn child only survived for two and one-half years.⁵¹ The *Park* court affirmed the lower court's denial of a motion to dismiss the wrongful life cause of action asserted on

43. 67 Ill. 2d at 357, 367 N.E.2d at 1255.

44. Note, *Preconception Tort—The Need for a Limitation*, 44 Mo. L. Rev. 143, 145 (1979).

45. 67 Ill. 2d at 364-65, 367 N.E.2d at 1258 (Dooley, J., concurring) (quoting *Wintersteen v. National Cooperage & Woodenware Co.*, 361 Ill. 95, 103, 197 N.E. 578, 582 (1935) (citations omitted)). For a more extensive discussion of the duty concept, see *infra* notes 96-150 and accompanying text.

46. 67 Ill. 2d at 357-60, 367 N.E.2d at 1255-56.

47. *Id.* at 358, 367 N.E.2d at 1255.

48. 60 A.D.2d 80, 400 N.Y.S.2d 110 (1977), *rev'd*, *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978).

49. See *supra* note 8 for a discussion of wrongful life actions.

50. 60 A.D.2d at 83, 400 N.Y.S.2d at 111. The plaintiff, six years earlier, had given birth to a child with this disease. The child lived five hours before dying. Plaintiffs contended that the defendants "gave them the medically inaccurate advice that the chances of having any future baby with polycystic kidney disease were 'practically nil' inasmuch as the disease was not hereditary." *Id.* Polycystic kidney disease is a fatal hereditary disease with a substantial probability of recurrence. *Id.*

51. *Id.*

behalf of the child.⁵² The court aptly reasoned that by allowing this wrongful life action it was not acting outside of the scope of existing tort principles.⁵³ The court based its holding on the fact that the plaintiffs had affirmatively sought a specific medical opinion of the defendants with regard to having another child with the specific polycystic kidney disease, and that the obstetrician's negligence was directly responsible for the physical injury of another. Thus, the court held that compensation to the injured party for all physical and mental suffering was due.⁵⁴

In summation, the case law shows a clear trend toward allowing a cause of action on behalf of an infant for injuries received due to the negligence of another, either during the prenatal stage or prior to conception. As to prenatal claims, the trend is to afford the child legal rights to bring such an action from the moment of conception.⁵⁵ In allowing claims for preconception torts, modern courts do not bar the child from bringing suit merely because he or she was not yet in existence at the time of the negligent conduct.⁵⁶ The child's injury must have been a reasonably probable and foreseeable result of the negligent conduct.⁵⁷

The question then arises as to whether the child's parent or parents can be made to answer for such a cause of action.

II. THE PARENTAL IMMUNITY DOCTRINE

A. *The Foundation*

The parental immunity doctrine may be a defense to an infant's claim⁵⁸ against its parents for a preconception tort. The doctrine stands for the general proposition that an *unemancipated minor* may not maintain an action in tort against his or her parents.⁵⁹ This judicially created doctrine has been in existence for nearly one hundred years.⁶⁰ In fact, for a number of years, the doctrine was a

52. *Id.* at 88, 400 N.Y.S.2d at 114.

53. *Id.* at 86-87, 400 N.Y.S.2d at 113-14.

54. *Id.* at 86, 400 N.Y.S.2d at 113.

55. *See supra* notes 31-33 and accompanying text.

56. *See supra* notes 46-54 and accompanying text.

57. *Id.*

58. Throughout this discussion of an infant's right to bring an action against his or her parents, it must be remembered that, generally, an infant cannot personally bring an action on his or her own behalf. The infant must be represented by a legally authorized individual, such as a guardian or next friend. *See generally* 42 AM. JUR. 2D *Infants* § 155 (1969).

59. 59 AM. JUR. 2D *Parent & Child* § 151 (1969). This doctrine of immunity is based on the public policy of "protecting family unity, domestic serenity, and parental discipline." *Id.*

60. As will be noted, the doctrine was first announced in 1891. It has lasted to date. However, as will be discussed, it has been severely modified, if not totally abro-

complete bar to a child's suit against his or her parent.⁶¹ The doctrine's roots are in three cases, known as the "Great Trilogy," decided around the turn of the century.⁶²

The first of these three cases, *Hewlett v. George*,⁶³ was decided in 1891. In *Hewlett*, the minor daughter brought a civil suit against her mother for wrongfully confining her in an insane asylum.⁶⁴ It was not clear from the evidence presented whether or not the daughter was living in her mother's house when the suit commenced.⁶⁵ However, the daughter, who had subsequently married, was living apart from her husband at the time.⁶⁶ The court reasoned that if the plaintiff was married, the parent-child relationship may have been dissolved, thus possibly allowing the plaintiff to successfully maintain an action against the parent.⁶⁷

The *Hewlett* court emphasized the traditional obligations of parents and their children. It found that certain reciprocal duties existed between a parent and child. Duties, such as a parent's duty to "care for" and "guide" the child, and a child's duty to "aid" and "obey" the parent, prevent the maintenance of such an action.⁶⁸

The court then concluded that on the basis of family harmony and public policy, a child could not maintain a civil suit against its parent.⁶⁹ The court held that:

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.⁷⁰

The court continued by acknowledging that the state's criminal law gave a minor protection from parental violence and other abusive activities.⁷¹ It is, therefore, evident that the *Hewlett* court's intention was to restrain the legal rights of minors so as to maintain a stable, family-oriented society.⁷²

gated. For an excellent detailed examination of the parental immunity doctrine, see Beal, *supra* note 2, at 325, 335-37.

61. See *infra* notes 68-84 and accompanying text.

62. *Id.*; see also *infra* notes 63, 73 and 79.

63. 68 Miss. 703, 9 So. 885 (1891).

64. *Id.* at 704, 9 So. at 886.

65. *Id.* at 711, 9 So. at 887.

66. *Id.*

67. *Id.* The court's reasoning was that by marrying, the relationship of parent and child would dissolve, at least insofar as that "relationship imposed the duty upon the parent to protect and care for and control, and the child to aid and comfort and obey." *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

The two cases that followed *Hewlett* expanded the *Hewlett* court's ruling. In *McKelvey v. McKelvey*,⁷³ the Supreme Court of Tennessee denied a minor child's suit against her parents for cruel and inhuman treatment.⁷⁴ As in *Hewlett*, the *McKelvey* court gave much attention to policy justifications and the importance of family harmony in denying the child's action.⁷⁵

The *McKelvey* court, in asserting its position, expanded the *Hewlett* court's ruling. It analogized the child-parent relationship with that of a husband and wife.⁷⁶ The court asserted that the unity of the husband and wife, by virtue of the marriage relationship, prevented intramarital civil suits.⁷⁷ However, the court noted that once the relationship was ended by divorce, the former husband and wife could sue each other.⁷⁸ This reasoning suggests that the Tennessee courts would have allowed a suit by a child against its parents if the family relationship had already been ended.

The final case of the trilogy is an example of the inequitable consequences that were often reached by adherence to the parental immunity doctrine. In *Roller ex rel. Million v. Roller*,⁷⁹ the Supreme Court of Washington held that a fifteen-year-old girl did not have a cause of action for civil damages against her father as a result of his conviction for raping her.⁸⁰ In denying the minor child's claim on public policy grounds, the court reviewed the *Hewlett* decision.⁸¹ Additionally, the *Roller* court noted two other justifications for the parental immunity doctrine. The first was the court's apprehension that if it allowed a minor to recover from its parents then, in the event of the child's death, the parents, as the child's heirs, might receive the judgment back.⁸² The second reason expressed by the *Roller* court involved the public interest in the financial welfare of the other minor members of the family.⁸³ Specifically, the court feared that by allowing one minor child to recover from its parents, other minor children of the family might be cheated out of their potential shares of the parents' estate.⁸⁴

For a number of years following these three cases, the courts de-

73. 111 Tenn. 388, 77 S.W. 664 (1903).

74. *Id.* at 389, 77 S.W. at 664.

75. *Id.* at 391, 77 S.W. at 664-65.

76. *Id.* at 391, 77 S.W. at 665.

77. *Id.*

78. *Id.* at 392, S.W. at 665.

79. 37 Wash. 242, 79 P. 788 (1905).

80. *Id.* at 243-47, 79 P. at 788-89. In *Roller*, the defendant father had been convicted and sentenced for committing the rape of his minor daughter prior to her instituting the civil action. *Id.* at 243, 79 P. at 788-89.

81. *Id.* at 246, 79 P. at 789.

82. *Id.* at 244-45, 79 P. at 789.

83. *Id.* at 245, 79 P. at 789.

84. *Id.*

nied a minor's right to recover from its parents, at least in civil court. The courts were adamant in their refusal to risk the disruption of the social fabric of the family. As will be discussed, however, when viewed retrospectively, this focus of the early courts may have been naive.

B. *Abrogation of the Doctrine*

The justifications set forth for preventing an infant's recovery are anachronistic today.⁸⁵ The needs of society and the structure of the family are changing and evolving. Society has become increasingly complex. The advancements made in such fields as science, transportation and communications have required a reexamination of our basic notions of justice.⁸⁶

There has been growing recognition within the law, of the inequities of parental immunity. Much of this judicial distaste has arisen because the doctrine can be employed as an umbrella rule that prevents recovery to an entire class on the sole ground that they are minors, and any suit by them against their parents would dissolve family harmony.⁸⁷ Modern courts have questioned the early rationale that preservation of family harmony and domestic relations requires that a child be denied recovery for injuries caused by a parent.⁸⁸ As one court has stated, "[w]hen the wrong has been committed, the harm to the basic fabric of the family has already been done and the source of rancor and discord already introduced into family relations."⁸⁹

85. For a contrary view, see Thomas *ex rel.* Inmon v. Inmon, 268 Ark. 221, 594 S.W.2d 853 (1980), where the Supreme Court of Arkansas, after expressing its strong belief in the "sanctity" of the family unit, said that the parental immunity doctrine is not "a legal anachronism." The court went on to say: "But it is deemed better public policy that occasional injuries of this kind go unrequited rather than encourage or tolerate proceedings so repugnant to natural sentiments concerning family relations." *Id.* at 223, 594 S.W.2d at 854 (quoting Rambo v. Rambo, 195 Ark. 832, 836, 114 S.W.2d 468, 470 (1938)). *Inmon* concerned the denial of a two and one-half year old child's suit against grandparents standing in *loco parentis*, for injuries due to their negligence. *Id.* at 223, 594 S.W.2d at 854.

86. The courts of the earlier cases, which laid the groundwork for the parental immunity doctrine, could not have foreseen the advancements society has made. The role of the automobile in family life could not have been contemplated. Also, the medical advancements made with regard to health care could not have been foreseen by these courts at the end of the nineteenth century.

87. Nocktonick *ex rel.* Matson v. Nocktonick, 227 Kan. 758, 766-67, 611 P.2d 135, 140-41 (1980) (court allowed infant's recovery of damages in an action brought against a parent for injuries received from the mother's negligence in operation of a motor vehicle). This discussion of parental immunity deals only with the right of unemancipated children to bring suit against their parents.

88. *Id.* at 766, 611 P.2d at 140; Sorensen v. Sorensen, 369 Mass. 350, 360, 339 N.E.2d 907, 913 (1975).

89. *Sorensen*, 369 Mass. at 360, 339 N.E.2d at 913 (minor child allowed to recover against father for injuries received in car accident due to father's negligence).

One noted jurist has stated that, "[t]o tell [the crippled child and the parents] that the pains must be endured for the peace and welfare of the family is something of a mockery."⁹⁰ Indeed, the court in *Sorensen v. Sorensen* was correct when it said:

[A]brogation of the parental immunity doctrine [i]s the proper approach in light of modern conditions and conceptions of public policy. Children enjoy the same right to protection and to legal redress for wrongs done them as others enjoy. Only the strongest reasons, grounded in public policy, can justify limitation or abolition of those rights.⁹¹

The majority of states have rejected the doctrine as a complete bar to a minor child's cause of action.⁹² It does not appear, then, in light of this judicial attitude toward abrogation of the parental immunity doctrine,⁹³ that a child would be denied the right to seek a tort remedy against his or her parents for their preconception negligence. The domestic tranquility and family harmony so avidly argued for in earlier cases,⁹⁴ could very possibly have already been disrupted by the birth of a defective child. To deny such a defective child the right to bring an action against his or her parents would clearly deny the child its legal rights. Denying a child such an action would be allowing an injury to take place without redress. This

90. *Badigian v. Badigian*, 9 N.Y.2d 472, 482, 174 N.E.2d 718, 724, 215 N.Y.S.2d 53, 43 (1961) (Fuld, J., dissenting).

91. *Sorensen*, 369 Mass. at 359, 339 N.E.2d at 912.

92. For a detailed analysis of the current status of the parental immunity doctrine as applied to each state jurisdiction, see Beal, *supra* note 2, at 335-37.

There are presently nine states which uphold the doctrine as a complete bar to child-parent actions for negligence. They are: *Owens v. Auto Mut. Indem. Co.*, 235 Ala. 9, 177 So. 133 (1937); *Inmon*, 268 Ark. 221, 594 S.W.2d 853 (1980); *Vaughan ex rel. Vaughan v. Vaughan*, 161 Ind. App. 497, 316 N.E.2d 455 (1974); *Bondurant v. Bondurant*, 386 So. 2d 705 (La. Ct. App. 1980); *Hewlett*, 68 Miss. 703, 9 So. 885 (1891); *Teramano v. Teramano*, 6 Ohio St. 2d 117, 216 N.E.2d 375 (1966); *Matarese v. Matarese*, 47 R.I. 131, 131 A. 198 (1925); *Campbell v. Grottemeyer*, 222 Tenn. 133, 432 S.W.2d 894 (1968); *Ball v. Ball*, 73 Wyo. 29, 269 P.2d 302 (1954).

The first state to abolish total immunity was Wisconsin in *Goller ex rel. Holden v. White*, 20 Wis. 2d 402, 122 N.W.2d 193 (1963). However, the *Goller* approach maintains parental immunity in two areas. The first is where the alleged negligent activity involves a parent exercising authority over his/her child. 20 Wis. 2d at 413, 122 N.W.2d at 198. The second area is where the alleged negligent activity involves a parent exercising his or her own discretion in providing food, housing, shelter and other health care services. *Id.*

The California Supreme Court has taken an altogether different approach in deciding the worthiness of the parental immunity doctrine. In *Gibson v. Gibson*, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971), the court adopted a reasonable *parent* standard. The court enunciated its new standard by asking "what would an ordinarily reasonable and prudent *parent* have done in similar circumstances?" 3 Cal. 3d at 921, 479 P.2d at 653, 92 Cal. Rptr. at 293. This approach addresses the apparent dichotomy presented by the parental immunity doctrine: recognition of the inherent sanctity of the parent-child relationship and of the often inequitable consequences of the application of the parental immunity doctrine.

93. *Id.*

94. See *supra* notes 63-84.

is not the function of the law.⁹⁵

Parental immunity, however, is only one possible barrier to a child's action against its parent for a preconception tort. There are other obstacles which must be overcome before such an action will be recognized, particularly, judicial recognition of a parental duty of care to a potential child.

III. PARENTAL DUTY TO A POTENTIAL CHILD

A. *In General*

If courts are to recognize an infant's cause of action against its parents for preconception negligence, then it must be established that the potential parents owe a duty to their prospective children.⁹⁶

95. *See supra* note 1.

96. The primary focus of this Comment is the recognition of the existence of a parental duty of care to potential offspring and an analysis of how such a duty may be breached. However, elementary to establishing a negligence cause of action such as the one being proposed, is proving not only a duty and breach, but also causation and damages. W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 164-65 (5th ed. 1984).

In proving causation one must show both causation in fact and proximate or legal cause. Cause in fact is essentially a factual determination of whether the plaintiff's injuries were actually caused by the defendant. *Id.* at 264-65. Whereas legal, or proximate cause, is basically a question of legal policy: "whether the policy of the law will extend the responsibility for the conduct to the consequences which have in fact occurred." *Id.* at 273. It is, therefore, arguable that questions of legal cause may be answered the same as would be questions of duty. *Id.*; *see also supra* notes 97-109 and accompanying text. No matter what approach is taken, the plaintiff must prove some causal relationship between the defendant's conduct and the plaintiff's injuries.

Thus, it is clear that problems of proof with regard to injuries caused by preconception activity may exist. Actions for such injuries may be effectively prevented until medical advances are made. Where lack of medical and scientific proof would result in conjecture and speculation, a court must dismiss the cause of action. However, "the mere difficulty of proving a fact is not a very good reason for blocking all attempts to prove it." *Smith ex rel. Smith v. Brennan*, 31 N.J. 353, 365, 157 A.2d 497, 503 (1960). Difficulties in proving an element of recovery should not result in a court's arbitrarily denying a cause of action. "Recognition of a cause of action now would provide future claimants with the opportunity to present additional techniques and theories that may be acceptable to a court." Comment, *Preconception Torts: A Look at Our Newest Class of Litigants*, 10 TEX. TECH. L. REV. 97, 118 (1978). *See also*, Note *The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries*, 110 U. PENN. L. REV. 554 (1962).

The final element of a cause of action for negligence is damages. W. KEETON, *supra*, at 164-65. Clearly the mental and/or physical injuries suffered by a defective child constitute damages. The courts may have difficulty in assessing the damages and how the injured parties should be compensated. *See supra* note 8 for a discussion regarding how courts ruling on wrongful life claims have dealt with this problem. The difficulty in determining compensable damages should not deter courts from recognizing the cause of action asserted here. As the United States Supreme Court has stated:

Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts.

Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563 (1931).

In other words, potential parents will be required to conform to a certain standard of conduct.

It is accepted that all members of society owe a duty to use care with regard to their conduct, and that this "care" is owed to anyone who might be foreseeably injured by the individual's negligent conduct.⁹⁷ This duty to exercise ordinary care to avoid injury to another has been extended to include remote and unknown individuals as well.⁹⁸

In general, courts will find a duty where a reasonable person would acknowledge it and agree that it exists.⁹⁹ Duty is not a "static concept;" nor is it sacrosanct.¹⁰⁰ Duty is an expression of all policy considerations that cause the law to assert that a certain plaintiff is entitled to protection.¹⁰¹ In California, for example, it is fundamental that "[e]very one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person."¹⁰²

Further, the California Supreme Court has held that:

A departure from this fundamental principle involves the balancing of a number of considerations; the major ones are the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach. . . .¹⁰³

In analyzing the concept of duty, Justice Tobriner perceptively remarked that the imposition of a duty on an individual is essentially a "conclusory expression that, in cases of a particular type, liability should be imposed for the damage done."¹⁰⁴ Recognition

97. Fleming, *The Scope of Duty in Negligence Cases*, 54 NW. U.L. REV. 778, 800 (1953); see also *Rowland v. Christian*, 69 Cal. 2d 108, 112, 443 P.2d 561, 564, 70 Cal. Rptr. 97, 100 (1968) (en banc).

98. *Wintersteen v. National Cooperage & Woodenware Co.*, 361 Ill. 95, 197 N.E. 578 (1935). This author asserts that potential children, those who have not yet even been conceived, fall under the classification of remote and unknown.

99. W. KEETON, *supra* note 96, § 53, at 359.

100. *Renslow*, 67 Ill. 2d at 356, 367 N.E.2d at 1254.

101. *Id.* (citing W. PROSSER, LAW OF TORTS § 53, at 325-26 (4th ed. 1971); Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 15 (1953); White, *The Right of Recovery for Prenatal Injuries*, 12 LA. L. REV. 383, 401 (1952)).

102. CAL. CIV. CODE § 1714 (West 1985).

103. *Rowland*, 69 Cal. 2d 108, 112-13, 443 P.2d 561, 564, 70 Cal. Rptr. 97, 100. Application of these considerations will be discussed *infra* notes 109-50 and accompanying text.

104. *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal. 3d 425, 434, 551 P.2d 334, 342, 131 Cal. Rptr. 14, 22 (1976) (en banc).

of a duty owed by prospective parents to their potential children is essential if courts are to recognize a child's cause of action for parental preconception negligence.

B. *Recognizing a Duty*

When an infant child brings an action against a parent for preconception negligence, a court should not arbitrarily deny the action. Instead, a court should adjudicate the case by resorting to factors of public policy and common law notions of duty.¹⁰⁵ As was previously stated,¹⁰⁶ there are a number of factors to be considered when determining whether or not a duty of care is owed to one not yet in existence.¹⁰⁷ Some of these factors have been accepted by the California courts in delineating a legal duty.¹⁰⁸ The most important of these factors are foreseeability, the burden to be incurred, and public policy considerations. Each of these factors will be discussed separately.

1. *Foreseeability.*—Foreseeability is an essential prerequisite to acknowledgment of a legal duty by a court. Foreseeability entails that which a reasonably prudent person would take into consideration in "guiding practical conduct."¹⁰⁹ The foreseeable consequences that must be considered in the context of parental conduct are injuries to their future child. One illustration of the foreseeability of harm is in the field of preconception genetic counseling.

Genetic counseling is a health care device available to society. Science now possesses the technology to identify individuals who carry abnormal genes and chromosomes, and risk conceiving a child with a genetic disease.¹¹⁰ With time, the ability to identify additional conditions and diseases will expand.¹¹¹ Preconceptional genetic counseling is usually desired by individuals who know that a certain condition has existed in their family previously and are afraid of such a condition recurring.¹¹² The advances made in the field of genetics allow prospective parents to make well informed

105. See *Rowland*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97, and *supra* note 97 and accompanying text. See also *Curlender v. Bio-Science Laboratories*, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980); Comment, *supra* note 96, at 119; and, *infra* note 144 and accompanying text.

106. See *supra* note 103 and accompanying text.

107. What is being asserted is really a "contingent prospective" duty owed to a potential child by its parents. This term was coined by Justice Holmes in *Dietrich*, 138 Mass. at 16.

108. 69 Cal. 2d at 112-13, 443 P.2d at 564, 70 Cal. Rptr. at 100.

109. Fleming, *supra* note 97, at 782.

110. Green, *Genetic Technology: Law and Policy for the Brave New World*, 48 IND. L.J. 559, 560 (1973).

111. *Id.*

112. Robinson, *Genetics and Society*, 1971 UTAH L. REV. 487 (1971).

decisions about their childbearing plans.¹¹³ The risks of having genetically defective children are communicated to the potential parents by the medical experts.¹¹⁴

A geneticist first establishes a diagnosis of the patient. The condition will then be explained to the patient in terms of the potential risk it poses to them and the potential child.¹¹⁵ In essence, a geneticist informs potential parents whether they have a genetic abnormality and whether they are carriers who risk conceiving a child with the genetic abnormality. Foreseeability of injury to the child is at its maximum when a potential parent has this knowledge given by the genetic counselor. This knowledge makes the potential parent extremely aware of the gravity of the potential injury. This knowledge of the parent should be considered by a court in determining whether or not to recognize a parent's legal duty toward their potential child.

2. *Extent of the Burden.*—Another important factor to be considered by the courts in recognizing a duty of care of potential parents is the extent of the burden that would be placed upon them.¹¹⁶ Should a couple who plan on conceiving a child act, with regard to their bodies, without any reasonable restrictions? Such a couple should not treat their bodies with impunity. Medical advice on the possible effect of the parents' present activities on a future child should be sought. Regular health care of a potential mother prior to conception is beneficial to the potential mother and thus to her potential child.¹¹⁷ By engaging in such a program of health, a physician can detect acquired diseases and other abnormalities prior to conception. Thus, measures can be taken to "eradicate them or, at least, to minimize their deleterious effects."¹¹⁸

113. Note, *Father and Mother Know Best: Defining the Liability of Physicians for Inadequate Genetic Counseling*, 87 YALE L.J. 1488, 1493 (1978).

114. Kushnick, *When to Refer to a Geneticist*, 235 A.M.A. J. 623, 624 (1976). Advice given to a patient by a geneticist revolves around the "odds and stakes" involved in reproduction. Robinson, *supra* note 112, at 488. Precise figures are not always available; therefore, parents must be satisfied with approximate orders of risk. Nitowsky, *Genetic Counseling: Objectives, Principles and Procedures*, 19 CLINICAL OBSTETRICS & GYNECOLOGY 919, 931 (1976).

Recurrence risks generally fall into the following three classifications:

(1) those in which the recurrence risk may be only slightly higher than the random risk for all births in the population; (2) those in which there is a high risk, of the order of 1/10 or greater; and (3) those in which there is a moderate risk of recurrence on the order of less than 1/10 and usually less than 1/20.

Id.

115. *Id.*

116. *See supra* note 103.

117. J. PRITCHARD & P. MACDONALD, WILLIAMS OBSTETRICS 304 (16th ed. 1980).

118. *Id.*

The burdens placed on a woman to prevent possible injury to her potential child may require her to restrict her occupational and personal lifestyle prior to conception.¹¹⁹ As one commentator has said:

The public policy debate will be between the protection of the fetus during the period it is most susceptible to injury and the willingness of the state to impose a standard of conduct on a woman during what could be a substantial period of time when she is in fact not pregnant.¹²⁰

Women with a "chronic" and "severe" drinking problem may be burdened with controlling these problems before conceiving a child. Medical professionals discourage such women from conceiving a child.¹²¹ Women who take drugs may be required to stop their drug intake prior to conceiving a child,¹²² at least to the extent recommended by a physician.

A man or woman's social life may even be burdened to the extent of minimizing their sexual activity where one or both of them have a sexual disease. The effects of a disease, sexually transmitted, can include injury to the fetus.¹²³ Contracting syphilis prior to conception could possibly result in developmental problems for the fetus.¹²⁴ A mother who has herpes and conceives may transmit problems to a developing fetus.¹²⁵ Sexual intercourse should thus be either discontinued, at least until the condition is brought under control, or exercised with extraordinary care, taking all possible precautions against allowing conception.¹²⁶ Since the gravity of the harm to the potential child is so extreme, the burden of sexual restraint would appear justified.

The burden on prospective parents to seek professional assist-

119. Beal, *supra* note 2, at 362.

120. *Id.* at 368.

121. Many children born with the defects of "fetal alcohol syndrome" had parents who were heavy drinkers in the past, but stopped drinking while members of Alcoholics Anonymous for one and one-half years. Fetal Alcohol Syndrome has been described as:

[A] common pattern of craniofacial, limb, and cardiovascular defects associated with prenatal and postnatal growth retardation in the offspring of alcoholic mothers. All the children subsequently demonstrated impaired fine and gross motor function. The perinatal mortality rate was 17 percent. At seven years of age, 44 percent of the survivors had an IQ below 80, compared to 9 percent in a control group.

J. PRITCHARD & P. MACDONALD, *supra* note 117, at 320-21.

122. *Id.* at 321.

123. Robertson, *Toward Rational Boundaries of Tort Liability for Injury to the Unborn: Prenatal Injuries, Preconception Injuries, and Wrongful Life*, 1978 DUKE L.J. 1401, 1439 (1978).

124. R. BENSON, HANDBOOK OF OBSTETRICS AND GYNECOLOGY 516-17 (7th ed. 1980).

125. *Id.* at 529-30.

126. See Comment, "You Wouldn't Give Me Anything, Would You?": Tort Liability for Genital Herpes, 20 CAL. W.L. REV. 60 (1983) (discussing tort liability of a sex partner for transmitting herpes to the other partner, without the partner's knowledge).

ance, or to restrict their lives in specified ways, would appear to be slight when measured against the potential gravity of harm inflicted on a child.¹²⁷ It is a reasonable burden which courts should consider in the recognition and imposition of a parental duty of care to their prospective children.

3. *Public Policy Considerations.*—In addition to foreseeability and the extent of the burden imposed, public policy considerations are of major importance when recognizing a legal duty.¹²⁸ The first policy consideration is the potential for defective children to become wards of the state.¹²⁹ It is not disputed that society has a direct interest in providing mentally and physically handicapped citizens with the assistance necessary to their welfare. However, it is asserted here that society also has a direct interest in limiting, when possible, the injuries suffered by its citizens. Recognition of a duty on potential parents would serve such a purpose.

A second policy consideration is, that by holding parents liable for their negligent conduct prior to conception, a proper allocation of fault as between tortfeasors would result. If parents cannot be held liable for their acts, then judgments may be sought against other parties, particularly physicians and hospitals. If a plaintiff knows that he or she will not be allowed a cause of action against his or her parents, and the parents as well as the physicians were negligent, then excessive judgments may be sought against the physicians and/or hospital. Holding parents to a duty of care would be an equitable solution to this possibility.¹³⁰

127. W. KEETON, *supra* note 96, at 171.

128. *See supra* note 103 and accompanying text.

129. *See* Robinson, *supra* note 112, at 489. An argument may be made that since parents will be supporting the defective child until he or she reaches majority age, there is no reason that the child should receive more compensation from the parents. To answer this argument, one should consider what happens after the child reaches majority age. If the parents stop supporting the child, the state will have to undertake the support. A judgment against the parents could be used to offset this. Moreover, this money judgment could be put into a trust fund for the child's benefit. A substantial amount of income could be derived from such a fund, which could provide for much of the child's support after he or she reached majority age. And what if the parents simply refuse to support their defective child? A judgment against the parents would protect the child and the state from such a situation. As one author has stated in discussing compensation for genetically deficient children:

Although a monetary judgment for pain and suffering cannot make them "whole," any more than it actually does for most injured persons, it may provide some balm for the inner wounds of congenitally defective children if it is spent so as to bring some compensating joy, and the feeling of being "special" in a good sense, into their lives.

Capron, *Tort Liability in Genetic Counseling*, 79 COLUM. L. REV. 618, 655 (1979).

130. This does not mean to say that other tortfeasors should or would be exonerated from liability. They would still be liable for their tortious conduct to whatever extent it existed.

A final policy consideration in recognizing such a parental duty would be that of deterrence. Imposition of a duty of care on potential parents prior to conception would have the effect of decreasing the number of genetically deformed children born into society. Parents would be much more conscientious about their health care plans and the possibility of conceiving genetically diseased children. Such a deterrent effect could result in a decrease in the burden placed on society for maintenance of special institutions.¹³¹ There are statutes enacted in some states aimed at effectuating this policy of deterrence,¹³² as well as preventing the spread of communicable diseases.¹³³ In California, for example, the state legislature has established the requirement of a premarital examination before a marriage license will be granted.¹³⁴ If one of the applicants has syphilis or another type of communicable infection, the marriage license will not be issued.¹³⁵ A further attempt by the legislature to deter the spread of sexual diseases was demonstrated by the enactment of section 3198 of the California Health and Safety Code.¹³⁶ Specifically, section 3198 provides that “[a]ny person who . . . exposes any person to or infects any person with any venereal disease; or any person infected with a venereal disease in an infectious state who knows of such condition and who marries or has sexual intercourse, is guilty of a misdemeanor.”¹³⁷ Statutes such as this depict a definite recognition of social dilemmas and the need to control these problems.

C. Parental Knowledge and Recognition of a Duty of Care

One final argument for the recognition and imposition of a duty of care on prospective parents must be asserted here. When a parent or an infant brings an action against a medical professional for

131. Most of the children born with serious genetic defects end up in special institutions with the financial cost to society estimated at several billion dollars per year. See Robinson, *supra* note 112, at 489.

132. For example, see CAL. HEALTH & SAFETY CODE § 309 (West Supp. 1986), where the legislature has stated: “It is the policy of the State of California to make every effort to detect, as early as possible, . . . preventable heritable disorders leading to mental retardation or physical defects.” *Id.* This statute continues by authorizing the State Department of Health Services to establish a genetic disease unit to promote a statewide program of testing information and counseling services. *Id.*

133. CAL. CIV. CODE § 4300 (West 1983).

134. *Id.* See also 6 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Husband & Wife* § 22 (Supp. 1984).

135. *Id.* In addition, CAL. CIV. CODE § 4300(b) (West 1983) requires that female applicants furnish proof of immunization from German measles, unless they have been surgically sterilized or are over 50 years of age. *Id.*

136. CAL. HEALTH & SAFETY CODE § 3198 (West 1979).

137. *Id.* Thus, the language of this statute would appear to create a legal duty, on individuals with knowledge that they have a venereal disease, not to have intercourse. This legislative intent can possibly be expanded to cover an infected individual’s duty not to have intercourse and conceive a child.

injuries to a defective child due to the physician's negligence prior to conception,¹³⁸ it must be shown that the doctor's act of failing to inform the parents of a risk was the proximate cause of the injuries. In other words, it must be demonstrated that the "injury was a foreseeable risk 'of the treatment given' and that a reasonable person properly informed of the medical dangers associated with the available procedures and with nontreatment, would not have submitted to the procedure."¹³⁹

Logic would seem to support the proposition that when a doctor informs parents of highly possible risks, and the parents do not follow the physician's recommendations, resulting in a child being born with severe defects, the child's defective condition was a foreseeable risk of not accepting the doctor's recommendations. Therefore, the parents' failure to accept the doctor's advice is the proximate cause of the defective child's condition.

Further, society puts a heavy burden on medical professionals to adequately inform their patients of potential risks.¹⁴⁰ Accordingly, these professionals are held to a very high standard of care.¹⁴¹ It is reasonable to expect individuals to adhere to a medical professional's recommendations.¹⁴² For, just as a doctor may be legally liable for giving incorrect advice,¹⁴³ individuals should not be allowed to ignore this advice and injure another person. In a fairly recent California case, the court made reference to this issue in the context of a parent receiving adequate knowledge of potential risks from a physician.

In *Curlender ex rel. Curlender v. Bio-Science Laboratories*,¹⁴⁴ the court held that a minor child stated a cause of action against a medical testing laboratory for personal injuries due to the laboratory's

138. See *Bergstreser v. Mitchell*, 577 F.2d 22 (8th Cir. 1978); *Renslow*, 67 Ill. 2d 348, 367 N.E.2d 1250; see also *supra* note 28 and accompanying text.

139. Note, *supra* note 113, at 1509.

140. W. KEETON, *supra* note 96, at 190.

141. *Id.* at 185. Professor Keeton has stated that:

[I]f a person in fact has knowledge, skill, or even intelligence superior to that of the ordinary person, the law will demand of that person conduct consistent with it. . . . Professional persons . . . are required not only to exercise reasonable care in what they do, but also to possess a standard minimum of special knowledge and ability.

Id.

142. For a contrary view, see Capron, *supra* note 129, at 661, where the author states that:

To hold parents liable for a . . . "breach" [comparable to that of a doctor's breach] would depend upon concluding either that, independent of genetic counseling, they are already under a special duty of care toward their children, or that such a special duty ought to be created for matters of genetics.

143. See *supra* note 60 and accompanying text.

144. *Curlender ex rel. Curlender v. Bio-Science Laboratories*, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980), modified in, *Turpin v. Sortini*, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982) (en banc) (damages allowable as special damages only).

failure to detect Tay-Sachs disease in her parents.¹⁴⁵ The child's parents had retained the defendant laboratories to perform specific tests on them to determine whether either of them were carriers of genes which would result in the conception of a child afflicted with Tay-Sachs.¹⁴⁶ Of interest here is dictum stated in the court's opinion in *Curlender*. In discussing the non-liability of the medical profession when parents proceed with a pregnancy despite adequate warnings by the physicians, the court said, "[U]nder such circumstances, we see no sound public policy which should protect those parents from being answerable for the pain, suffering and misery which they have wrought upon their offspring."¹⁴⁷

These statements seem to depict a judicial attitude in California toward recognizing an infant's right to be born into the world whole, and the parents' duty to heed medical advice. The *Curlender* decision implies that this right should not be denied an infant merely because it is his or her parents whose actions caused the injury, even if these actions occurred prior to the infant's conception.

It is, therefore, arguable that in California a parent may owe a duty to an unconceived child to avoid negligent conduct resulting in injury to the child. Such a duty would conform to the traditional concepts of tort law.¹⁴⁸ Public policy considerations¹⁴⁹ and emerging scientific fields¹⁵⁰ lend further support for the creation and recognition of such a parental duty to the unborn child. This new duty would require parents to conform to the standard of care of reasonably prudent prospective parents.

D. Application of this Duty of Care

When determining whether or not parents have conformed to the

145. 106 Cal. App. 3d at 815, 165 Cal. Rptr. at 480. *Curlender* was a wrongful life action against the testing laboratory and a physician. The court reasoned that, "a reverent appreciation of life compels recognition that plaintiff, however impaired she may be, has come into existence as a living person with certain rights." *Id.* at 829, 165 Cal. Rptr. at 488.

146. *Id.* at 816, 165 Cal. Rptr. at 480.

147. *Id.* at 829, 165 Cal. Rptr. at 488. However, in an apparent response to the dictum of the *Curlender* court, the California Legislature enacted section 43.6 of the Civil Code. It states in pertinent part:

(a) No cause of action arises against a parent of a child based upon the claim that the child should not have been conceived or, if conceived, should not have been allowed to have been born alive.

CAL. CIV. CODE § 43.6 (Deering 1981).

The cause of action being discussed in this Comment is not a wrongful life action, but rather a negligence cause of action. It remains to be seen what effect section 43.6 would have on this type of action.

148. See *supra* note 45 and accompanying text.

149. See *supra* notes 128-35 and accompanying text.

150. See *supra* notes 106-11 and accompanying text.

proper standard of care, the reasonableness of their conduct is a factor in the analysis. Conduct is unreasonable where a foreseeable danger is involved,¹⁵¹ and the defendant acts or does not act, knowing danger may possibly result.¹⁵² It must be determined whether the defendant's acts or omissions were unreasonable. The allegedly negligent conduct must be examined "in the light of the possibilities apparent to him at the time."¹⁵³ "As the gravity of the possible harm increases, the apparent likelihood of its occurrence need be correspondingly less to generate a duty of precaution."¹⁵⁴ When a parent undertakes affirmative conduct, he or she also undertakes a duty to take reasonable precautions to protect others from injury,¹⁵⁵ in this context a potential child. A negative duty thus arises to refrain from unreasonably dangerous conduct.¹⁵⁶

Examination of a few hypothetical scenarios will illustrate how this parental duty of care may be breached. Consider a situation where a child is born severely deformed due to abnormal chromosomal changes arising from the mother's preconception drug abuse.¹⁵⁷ Could the mother or father or both be said to have been negligent in allowing conception? Assuming one of them or both were aware of their own drug abuse, can they be said to have acted reasonably if they did not seek medical advice on the possible effects of their prior drug abuse? If such a couple desires to have a child it would be negligent of them not to seek medical advice. The foreseeability of harm to the potential child would undoubtedly be present.¹⁵⁸ Moreover, the burden of seeking professional advice is outweighed by the potential gravity of harm inflicted on the child.¹⁵⁹ Under these conditions, prospective parents have not met their duty of care to their future child.

Now consider the situation where a father's sperm is knowingly diseased. The father and mother engage in sexual intercourse, causing conception. As a result of the parents' conduct, this new separate entity¹⁶⁰ is "infected" with the disease at conception.¹⁶¹ If this infant was born defective due to the infection of the father's sperm

151. RESTATEMENT (SECOND) OF TORTS § 282 comment g (1965).

152. *Id.*

153. W. KEETON, *supra* note 96, at 170.

154. *Id.* at 171.

155. Flemming, *supra* note 97, at 801.

156. *Id.*

157. Robertson, *supra* note 123, at 1439; *see also supra* notes 91-92 and accompanying text.

158. *See supra* notes 109-15 and accompanying text for discussion of foreseeability.

159. *See supra* notes 116-21 and accompanying text for discussion of burden.

160. *See supra* notes 31-32 and accompanying text.

161. *See Pace, Civil Liability for Pre-natal Injuries*, 40 MOD. L. REV. 141, 153 (1977) (considering the validity of proposed legislation of the English Law Commission).

at conception, should this child be denied a recovery? There was an injury,¹⁶² and there was a negligent act that caused the injury. Was there a duty on the part of the parents toward the disabled infant? As one commentator has noted:

[I]f a child has a legal right to begin life with a sound mind and body, . . . there is a correlative duty on its parents . . . to avoid producing conception where the circumstances are likely to result in the birth of a disabled child. In other words, the remedy is sought not for being born, but "for compensation for the disability resulting from the sexual intercourse."¹⁶³

The infant plaintiff, in asserting that his parents breached a duty owed to him, would argue that his disability was a foreseeable risk of the parents' negligent conduct, specifically, their negligent intercourse. This conduct, it would be argued, was unreasonable, for duty can be measured by the scope of the risk which an individual's conduct "foreseeably entails."¹⁶⁴ The parents' conduct would be negligent because it contemplates an undue threat of harm from a specific kind of risk.¹⁶⁵ Thus, a duty to a child prior to conception is breached if intercourse resulting in conception caused injury to the newborn infant.

Finally, consider the situation where a middle-aged couple desire a child, but are told by a medical professional that they risk conceiving a child with Down's syndrome.¹⁶⁶ Can they be said to have acted reasonably when they proceed to conceive a child who is born with this disease? Is the parents' conduct reasonable in conceiving when the geneticist tells them they are in a very high risk group for transmitting sickle cell anemia or Tay-Sachs disease?¹⁶⁷ It would be difficult to argue that the parents in the above situations acted rea-

162. The injury occurred at conception. The infection of the father's diseased sperm at conception caused the injury to the new separate entity. See *supra* notes 116-21 and accompanying text.

163. Pace, *supra* note 161, at 153. This possibility as a basis of parental liability assumes that the parents, or at least the father, was aware of his diseased sperm. But see *supra* note 151, where California Civil Code section 43.6 could be argued to bar such a cause of action against parents. This argument is without merit because the remedy is not sought for being born, "but 'for compensation for the disability resulting from the sexual intercourse.'" Pace, *supra* note 161, at 153.

164. Flemming, *supra* note 97, at 781.

165. *Id.* at 784.

166. See Robinson, *supra* note 112, at 489. "[W]omen over 35 . . . have a 1 1/2% risk of having a baby with an abnormal chromosome constitution, of which Down's syndrome (mongolism) is one of the principal and most distressing conditions. The 10% of pregnant women who are 35 years of age or older are responsible for the birth of 50% of the children with Down's syndrome." *Id.*

Approximately 7000 of these children are born per year in the United States, the majority ending their lives in institutions for the retarded. *Id.*

167. See Kushnick, *supra* note 114, at 624, where the author discusses high recurrence risks in major mutant gene disease, such as "25%, or one in four, for autosomal recessive conditions," such as sickle cell anemia and Tay-Sachs disease.

sonably. They were aware of the foreseeable harm to the child. The gravity of potential harm increased, but they did not take reasonable precautions against this harm.¹⁶⁸

These are just some examples of how a child's cause of action against its parents for their preconception negligence might arise, and how parents may breach their duty to their potential child. Attention must now be given to limiting this new duty of care.

E. Limiting the Parental Duty of Care

1. *Constitutional Considerations.*—There are certain constitutional safeguards afforded all citizens. Among these are rights of privacy.¹⁶⁹ Among the more recognized rights within the zone of privacy, which are considered to be fundamental, are marriage,¹⁷⁰ procreation,¹⁷¹ contraception,¹⁷² family decision making,¹⁷³ child-rearing,¹⁷⁴ and a woman's decisions relating to abortion.¹⁷⁵ Imposition of a duty of care on prospective parents would certainly affect an individual's exercise of these fundamental rights.

Arguments calling for a limitation on these rights would be difficult. Although parents do have a constitutional right to marry, procreate, and make decisions regarding their family, do they have a right to cause an injury to an innocent child? Should the parents negligent conduct prior to conception be treated any differently from the conduct of any other tortfeasor? An answer to these questions would require a court to balance the interests of a potential parent's right to treat his or her body with impunity, and the right of a child to be born with a sound mind and body.¹⁷⁶ In *Roe v.*

168. See *supra* notes 151-56 and accompanying text. Dean Prosser has stated that: [I]f the risk is an appreciable one, and the possible consequences are serious, the question is not one of mathematical probability alone. The odds may be one thousand to one that no train will arrive at the very moment that an automobile is crossing a railway track, but the risk of death is nevertheless sufficiently serious to require the driver to look for the train and the train to signal its approach.

W. KEETON, *supra* note 96, at 171.

169. The first United States Supreme Court case to acknowledge the right of marital privacy as being within the "penumbra" of specific guarantees of the Bill of Rights, was *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

170. *Loving v. Virginia*, 388 U.S. 1 (1967); *Zablocki v. Redhail*, 434 U.S. 374 (1978). See also *Perez v. Sharp*, 32 Cal. 2d 711, 198 P.2d 17 (1948).

171. *Buck v. Bell*, 274 U.S. 200 (1927); *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

172. *Griswold*, 381 U.S. 479; *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

173. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

174. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

175. *Roe v. Wade*, 410 U.S. 113 (1973).

176. When a regulation affects a citizen's fundamental rights, the courts will apply strict standards of review. For example, in his well known, concurring opinion, Justice White stated:

"Where there is a significant encroachment upon personal liberty, the State

Wade, although the Supreme Court of the United States protected a mother's right to decide whether or not to have children once she is pregnant, the Court's opinion did not say whether a mother could be negligent in carrying out her decision.¹⁷⁷

The *Roe* court took note that no constitutional right is absolute.¹⁷⁸ Thus, it is clear that one does not have an unlimited right to treat one's body with impunity.¹⁷⁹ However, it is very possible that claims of parental preconception negligence might be subject to constitutional limitations.¹⁸⁰

2. *Other Considerations.*—One possible problem that needs to be considered in recognizing a cause of action for parental preconception negligence, is the fear of a flood of frivolous lawsuits commenced by children against their parents.¹⁸¹ Such fears should not be treated any differently than other types of actions merely because they involve child-parent suits. Courts should not refuse to consider such suits to redress an injury simply because the plaintiff might have problems in proving his case.¹⁸² Nor should a court decline to consider such cases for the reason that to provide redress might possibly "give rise to fraudulent claims."¹⁸³ The trial courts of this country maintain a large degree of control by adherence to established rules of evidence and requirements of sufficient evidence, to protect against the possibility of fraudulent recoveries.¹⁸⁴

Another consideration is the fear that recognition of such a cause

may prevail only upon showing a subordinating interest which is compelling." *Bates v. Little Rock*, 361 U.S. 516, 524. See also *McLaughlin v. Florida*, 379 U.S. 184. But such statutes, if reasonably necessary for the effectuation of a legitimate and substantial state interest, and not arbitrary or capricious in application, are not invalid under the Due Process Clause. *Zemel v. Rusk*, 381 U.S. 1.

Griswold, 381 U.S. at 504 (White, J., concurring).

It is, therefore, clear that if a state regulates in the area of fundamental rights, it must show a compelling interest for doing so. Strong arguments can be made that the state does have a compelling interest in maintaining the quality of its citizenry.

In support of the proposition that no right is absolute and beyond state regulation, it has been held that even though procreation is a natural and constitutionally protected right, citizens do not have any rights which dominate over the common welfare of society. See *Smith v. Command*, 231 Mich. 409, 415, 204 N.W. 140, 142 (1925).

177. See generally Note, *supra* note 35, at 1260-61.

178. *Roe*, 410 U.S. at 155.

179. *Id.* at 154.

180. The author acknowledges the paramount importance of constitutional considerations in imposing a duty on potential parents prior to conception. However, due to the breadth of the subject, a truly comprehensive presentation of constitutional issues is outside the scope of this Comment.

181. *Smith ex rel. Smith v. Brennan*, 31 N.J. 353, 366, 157 A.2d 497, 504 (1960).

182. *Steggall v. Morris*, 363 Mo. 1224, 258 S.W.2d 577, 580 (1953) (en banc).

183. *Id.*

184. 31 N.J. at 366, 157 A.2d at 504 (1960); see also *Steggall*, 363 Mo. at 1231, 258 S.W.2d at 580.

of action would result in the imposition of unlimited liability on subsequent generations.¹⁸⁵ This fear is understandable. The thought of a child suing its grandparents for their negligent conduct two generations earlier seems unreasonable.¹⁸⁶ However, this is no reason for a blanket denial of the proposed cause of action. As the court in *Renslow ex rel. Renslow v. Mennonite Hospital*¹⁸⁷ pointed out in considering the same question, "when such a case is presented, the judiciary will effectively exercise its traditional role of drawing rational distinctions, consonant with current perceptions of justice, between harms which are compensable and those which are not."¹⁸⁸ Also, as will be discussed below,¹⁸⁹ state legislatures can play a role in decreasing the potential of perpetual liability by enactment of special statutes of limitation. Nevertheless, there is a recurring fear that by allowing such a cause of action to exist, family harmony and cohesiveness will be severely impaired.¹⁹⁰ It is possible that such an action will cause disruption within the family unit. However, this is no reason for a blanket denial of such an action by the child. It is reasonable to say that the advantages gained by the child and society generally outweigh the possibility of family discord that recognition of such a cause of action might have.

IV. SPECIFIC RECOMMENDATIONS

It is necessary to recognize the need for specific limitations on an action by a child against its parents for preconception torts. Parental liability to a child for preconception torts should be predicated on instances of gross negligence only.¹⁹¹ When the parents actually had knowledge that their child would be born defective, liability should be based on whether they acted or failed to act accordingly. Recognizing such a limitation could be a judicial aid to sufficiently controlling the feared onslaught of fraudulent and frivolous claims.¹⁹² It would impose liability only where the parents, in effect, acted willfully and recklessly toward their child. It would pre-

185. Note, *supra* note 44, at 152.

186. The fear, in the context of allowing a child-parent suit, would be that recognition of a cause of action against a parent would set a precedent for allowing unlimited liability on previous generations.

187. 67 Ill. 2d 348, 367 N.E.2d 1250 (1977).

188. *Id.* at 358, 367 N.E.2d at 1255.

189. See *infra* note 197 and accompanying text.

190. See *supra* notes 63-92 and accompanying text.

191. See Comment, *Recovery for Prenatal Injuries: The Right of a Child Against Its Mother*, 10 SUFFOLK U.L. REV. 582, 587 (1976) (where the author advocated holding a mother liable to her defective child only for gross negligence resulting in prenatal injuries).

192. See *supra* notes 181-84 and accompanying text.

vent parental liability where the parents' negligence was ordinary. Such a limitation could accurately diminish the class of potential defendants.

A second possible limitation would be the enactment of special statutes of limitations by the legislature to diminish the possibility of unlimited liability on future generations.¹⁹³ For example, one such statute might contain a requirement that an infant's suit be brought within three years from the time of the infant's birth. Such a time period might ensure the availability of important evidence necessary for such a cause of action. In addition, a legislative prohibition on all preconception claims of those not born within the first generation of the negligent parents may be enacted. This would be a solution to the feared problem of an infant bringing suit against more remote generations. A final statutory limitation might be to limit these types of actions to situations where the parents were cohabitating at the time of their negligence. This would allow the judiciary to formulate a more cognizable legal duty.

Finally, a case by case analysis should be utilized by the judiciary in developing the parameters of this potential cause of action. Resort to the common law should be made. The common law is constantly evolving and changing; it must conform to ever increasing technological, economic and social changes.¹⁹⁴ Judges of today possess sufficient skill, insight and resourcefulness to determine whether or not precedents should be created or extended.¹⁹⁵ The strength of our legal system lies in its ability to discover answers for novel problems arising in many different contexts. Our legal system must be creative.¹⁹⁶

CONCLUSION

The rights of the infant child have been significantly expanded. Since the initial pronouncement by Justice Holmes that a child could not recover for injuries received while *in utero*,¹⁹⁷ courts have slowly recognized that such a holding was inequitable. The courts first took notice that an infant's right to be free from personal injury begins at its viable stage.¹⁹⁸ Courts then began to accept the notion that the infant's right begins at an even earlier stage, at conception.¹⁹⁹ Finally, this trend continued so that the infant's rights were

193. See Note, *supra* note 185, at 152 (where a five year limit was suggested for suits arising from the preconception negligence of physicians and hospitals).

194. *Park*, 60 A.D.2d at 88, 400 N.Y.S.2d at 114.

195. *Bonbrest*, 65 F. Supp. at 142.

196. Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463 (1962).

197. See *supra* notes 10-20 and accompanying text.

198. See *supra* notes 19-28 and accompanying text.

199. See *supra* notes 29-32 and accompanying text.

recognized in certain circumstances to exist prior to its conception.²⁰⁰

It now appears that the courts have created a potential cause of action by an infant against its parents for their negligence prior to the child's conception. Such a suit, in the majority of states today, would survive the defense of parental immunity.²⁰¹ In addition, there are numerous policy considerations and legal factors present that would justify the courts imposition of a legal duty on prospective parents.²⁰² Under limited circumstances, and with the availability of certain judicial and legislative safeguards, a preconception negligence cause of action against parents should be afforded an injured child. Such an action is necessary to deter tortious acts "that otherwise would be granted a type of immunity from legal sanction."²⁰³ Recognition of this cause of action is necessary if the rights of a fetus and child are to be fully protected.²⁰⁴

It is elementary that for every injury there should be a remedy.²⁰⁵ The law of negligence has its development in the common law, "whose great virtue is its adaptability to the conditions and needs of changing times."²⁰⁶ Thus, legal recognition of a child-parent cause of action for preconception negligence is a necessary and proper result of society's development. The legal system should adapt accordingly.

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200. See *supra* notes 36-54 and accompanying text.

201. See *supra* notes 59-92 and accompanying text.

202. See *supra* notes 97-150 and accompanying text.

203. Note, *supra* note 35, at 1260-61.

204. *Id.*

205. See W. BLACKSTONE, *supra* note 1, at 123.

206. 31 N.J. at 362, 157 A.2d at 501.

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