"Can I Sue Mommy?" An Analysis of a Woman's Tort Liability for Prenatal Injuries to her Child Born Alive†

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Now that the courts are recognizing the right of a fetus to be protected from the negligence of others, it is only a short step to allow a fetus to recover for negligent prenatal care. This article discusses how the recognition of prenatal injury recovery and the demise of the parental immunity doctrine present a dilemma to the courts in choosing between the child's right to be born free of injuries and a woman's right to control her own body.

INTRODUCTION

> The U.S. Supreme Court recently cast this nation's vote in favor of a mother's right to privacy as against a child's right to life before birth. But the court did not deal with societal concern for the quality of a fetal life not aborted. It appears then that society may still recognize the right of a child to begin life with a sound mind and body, the right to be well born.[1]

It would be difficult to set forth an argument that a child does not have the right, to the fullest extent possible, to be born with a sound mind and body. In fact, the medical profession recognizes the fetus as an individual patient, in addition to its mother, as it relates to prenatal care.[2] In tort law, many states have recognized the individ-

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1. Ament, *The Right to Be Well Born,* 2 J. LEGAL MED. Nov.-Dec. 1974, at 24, 25.

2. J. PRITCHARD & P. MACDONALD, WILLIAMS OBSTETRICS at vii (16th ed. 1980).

ual status of the prenatal infant.[3]

Since 1946, state courts have made a dramatic change in the common law by recognizing that a child born alive may recover for injuries sustained as a viable fetus[4] caused by the negligence of another.[5] Some courts have gone further and allowed recovery for injuries occurring while the fetus is in a nonviable state[6] or even for negligent acts committed prior to conception which result in injuries to the developing fetus at a later time.[7]

These developments, taken in conjunction with the abrogation of the common law doctrine of parental immunity by a majority of the states,[8] may force a direct confrontation between a woman's right to control her own body and the child's right to be well born. The potential legal framework for lawsuits by children born alive for prenatal injuries caused by the negligent conduct of their mothers has been unknowingly created by the state courts.

In *Grodin v. Grodin*,[9] the intermediate appellate court of Michigan recognized this potential by allowing a child to sue his mother for prenatal injuries.[10] In acknowledging the woman's duty, and that a breach of that duty may result in liability to her child,[11] the *Grodin* decision recognized a cause of action which may have a dramatic impact upon a woman's ability to control her own body, free from judicial sanction.

This article will examine four issues. First, the law concerning the ability of children born alive to recover for prenatal injuries will be reviewed. Second, an analysis will be made of the law concerning parental immunity as it affects the potential lawsuits of children against their mothers. Third, the current medical literature will be examined to determine whether an expert witness can establish a

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3. *See infra* notes 40-45 and accompanying text.

4. Viability has been defined to denote the time when a fetus has a reasonable potential for subsequent survival if it was removed from the womb. J. PRITCHARD & P. MACDONALD, *supra* note 2, at 587.

5. *See infra* notes 40-45 and accompanying text.

6. *See infra* note 41 and accompanying text.

7. Renslow v. Mennonite Hosp., 67 Ill. 2d 348, 357, 367 N.E.2d 1250, 1255 (1977); Bergstresser v. Mitchell, 577 F.2d 22, 26 (8th Cir. 1978) (interpreting Missouri law); Jorgensen v. Meade Johnson Lab. Inc., 483 F.2d 237, 240-41, (10th Cir. 1973) (interpreting Oklahoma law). *But see* Albala v. City of New York, 54 N.Y.2d 269, 274, 429 N.E.2d 786, 788-89, 445 N.Y.S.2d 108, 110 (1981).

8. From 1884 until 1963, the vast majority of state courts accepted the theory that a parent could not be held personally liable to her unemancipated child if her negligence caused the child to be injured. *See infra* note 51 and accompanying text. In the last twenty years, however, an increasing number of courts have either totally or partially abrogated the doctrine of parental immunity. *See infra* notes 63-68 and accompanying text. To date, no state court of last resort has considered the impact of the abrogation of parental immunity as it might apply to prenatal torts.

9. 102 Mich. App. 396, 301 N.W.2d 869 (1980).

10. *Id.* at 400, 301 N.W.2d at 871.

11. *Id.*

cause and effect relationship between prenatal care by a woman and the occurrence of physical and mental defects in children. Finally, the potential child versus mother lawsuits for prenatal injuries will be analyzed to determine if the courts will be able to delineate a legally sound definition of a woman's duty to her potential child.[12]

PRENATAL INJURIES

Historical Background of Prenatal Torts

Dietrich v. Northampton[13] was the first decision in the United States which considered the question of whether recovery would be allowed for the negligent infliction of prenatal injuries. Justice Oliver Wendell Holmes set forth the legal reasoning and justifications for the denial of recovery.

Dietrich was a wrongful death case asserted on behalf of a child who did not sustain personal injuries, but who was born prematurely due to the injuries sustained by the mother.[14] The legal basis of the cause of action was a statute allowing any "person" to maintain an action against the negligent party by an administrator for the loss of one's life.[15] The child "survived" approximately ten or fifteen minutes after birth in the sense that the child exhibited motion in its limbs for that period of time.[16]

Justice Holmes stated that the issue before the court was whether the child could have been said to have become a person recognized by the law as capable of having *locus standi* in court. He held that such recognition could not be accorded to an unborn child who was *part of the mother* at the time that the injury was sustained.[17] This was Justice Holmes' analysis even though he assumed that a person may owe a civil duty to a fetus and thereby incur a "conditional

12. This article will restrict its analysis to the unemancipated child born alive asserting a cause of action against its mother for the negligent infliction of prenatal injuries. The possible liability of the father for his actions toward the fetus is beyond the scope of this article. If any such liability will ever be recognized, it will most assuredly be an outgrowth of the development of a mother's liability. Any discussion of a wrongful death cause of action for a child born alive who subsequently dies or for the stillborn fetus is also beyond the scope of this discussion. Additionally, the intriguing area of wrongful life causes of action may someday relate to this area, but are better left for the proper time, if and when the cause of action analyzed in this article receives widespread recognition.

13. 138 Mass. 14 (1884).

14. *Id.* at 15.

15. *Id.* at 14.

16. *Id.* at 15.

17. *Id.* at 16.

prospective liability" in tort to one not yet in being.[18]

The essence of Justice Holmes' opinion was that the fetus was a part of his mother and did not possess his own legal personality, *i.e.*, the fetus simply did not exist from a legal viewpoint.[19] However, based upon the sketchy facts of the case, it is unclear on exactly what grounds Justice Holmes based this opinion.

As a general rule, "legal personality," *i.e.*, the conferring of legal rights upon a person which can be asserted in a court of law, begins at birth. But in some areas of the law, such as property law, rights have been held to vest in the infant while *in utero* provided it is subsequently born alive and if such vesting is of benefit to the infant.[20] Thus the "legal fiction" was created that a child *in utero*, if born alive, would be deemed to have already been born if it would be to its advantage. In other words, the child was deemed to have a conditional legal personality.[21]

If the facts in *Dietrich* were that the child in fact lived for ten to fifteen minutes, then the concept of legal personality would have vested in the child at birth, and the child should have been deemed a person under the statute. Therefore, if Justice Holmes denied relief on grounds of a lack of legal personality, he redefined that concept and adopted the untenable proposition that even after one is accorded legal personality and the right to sue for one's wrongful death, that legal capacity is conditioned on one's ability to survive after a live birth.[22]

However, the legal commentators and the courts which followed the *Dietrich* approach appear to have interpreted the decision as a rejection of the civil law "birth for benefit" approach. The decision is seen as an acceptance of the biological view that the unborn child has no separate existence and is merely part of the mother. The logical conclusion is that there can be no cause of action on the infant's behalf, but only on behalf of the mother.[23]

Justice Holmes' view was predicated on a medical basis which was arguably known to be unsound at the time of the decision.[24] His view

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18. *Id.* at 15.
19. *Id.* at 17.
20. Gordon, *The Unborn Plaintiff*, 63 MICH. L. REV. 579, 582 (1965).
21. Pace, *Civil Liability for Pre-Natal Injuries*, 40 MOD. L. REV. 141, 141 (1977).
22. Gordon, *supra* note 20, at 588.
23. Pace, *supra* note 21, at 141-42.
24. "The unpredictable, post-estatic moment when a chance-selected sperm meets, joins, and penetrates an equally chance-chosen human ovum, is never marked by any recognizable sign. . . . Yet at that precise instant there is set in motion a most unbelievably automatic precision-controlled, multibillion-numbered series of cell divisions, differentiations, and interorientations." 5B LAWYERS' MEDICAL CYCLOPEDIA OF PERSONAL INJURIES AND ALLIED SPECIALTIES § 37A.2, at 158 (rev. vol. 1972) [hereinafter cited as LAWYERS' MEDICAL CYCLOPEDIA]. *See also* W. PROSSER, LAW OF TORTS § 55 at 336

has been labeled Justice Holmes' "entity theory." His view denies a separate recovery on behalf of the child on the hypothesis that the mother and fetus are one.[25] Even though this is apparently contradictory to Justice Holmes' assumption of a legal duty to the fetus, the most widely accepted reasoning is that traditional tort law requires that a duty be owed to a determinate person. That person can only be the woman, since the fetus does not exist but is a mere part of the woman.[26]

State courts adhered to the *Dietrich* decision for the next seventy-nine years and refused to recognize a cause of action for prenatal injuries to a child subsequently born alive.[27] A major change occurred with the celebrated District of Columbia decision in *Bonbrest v. Kotz*.[28] *Bonbrest* was the first decision to directly challenge and reject the reasoning of Justice Holmes.[29]

Consistent with the concerns of the courts in parental immunity cases, the court in *Bonbrest* noted that the general rule of tort law is to allow a remedy where a wrong has occurred. What could be more sacrosanct, the court reasoned, than the right of the individual to the enjoyment of life with the full use and possession of his limbs and body?[30] The justices noted the civil law doctrine of "birth for benefit" and could not justify deeming a fetus a human being under the civil law, but a non-entity under the common law.[31]

The *Bonbrest* opinion turned to the problem of the difficulty of proof which has been previously identified by legal scholars as the very issue which caused the courts initially to refuse to recognize the cause of action.[32] The court held this concern to be irrelevant to recognizing the cause of action. Rather, the difficulty of proof was properly a concern of the trial court in determining on a case-by-case

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(4th ed. 1971).

25. Comment, *Wrongful Death and the Unborn: An Examination of Recovery After Roe v. Wade*, 13 J. FAM. L. 99, 101 (1973-74).

26. Comment, *Legal Duty to the Unborn Plaintiff: Is There a Limit?*, 6 FORDHAM URB. L.J. 217, 218 (1978).

27. Note, *Preconception Negligence: Reconciling an Emerging Tort*, 67 GEO. L.J. 1239, 1245 (1979).

28. 65 F. Supp. 138 (D.D.C. 1946).

29. *But see* Korman v. Hagen, 165 Minn. 320, 206 N.W. 650 (1925). The Minnesota Supreme Court allowed a cause of action for injuries sustained by a child during delivery. The issue was not even presented to the court whether the "child" was a fetus or a living child at the time the injuries were sustained. *See also* White, *The Right of Recovery for Prenatal Injuries*, 12 LA. L. REV. 383, 387 n.17 (1952).

30. 65 F. Supp. at 141-42.

31. *Id.* at 140-41.

32. *See supra* note 24 and accompanying text.

basis whether the plaintiff had sustained his burden of proof.[33]

A major portion of the opinion was an attack on Justice Holmes' "entity theory" which the court recognized as biologically unsound. Yet, its decision instituted a new controversy regarding viability which haunts the courts today. The facts before the court concerned injuries sustained by a viable fetus. The court held that modern medical literature considered a viable fetus to be a separate entity capable of independent life. The law had not been keeping pace with medical and scientific progress; Holmes' "entity theory," as it concerned a viable fetus, could not stand. A viable fetus injured and subsequently born alive had a right to sue for its prenatal injuries.[34]

The majority of state courts followed *Bonbrest*[35] and the viability standard it used.[36] Legal commentators applauded the state courts' willingness to allow a cause of action for an injury to a viable fetus subsequently born alive, but there has been an almost universal condemnation of the courts' stopping at the point of viability. It has been criticized because the viability concept is an indeterminate concept depending upon the individual development of a specific fetus and there is no way to actually know if a particular fetus is viable unless it is immediately born.[37]

In attacking this legal theory the viability standard has been criticized as merely an attempt to circumvent the precedent of Holmes' "entity theory" instead of formulating a new rule. The criticism zeros in on the true issue of public policy that the *degree* of fetal development at the time of the injury should have no bearing on whether the plaintiff was an entity to whom the alleged tortfeasor owed a duty.[38] If we recognize that natural justice allows one to be born with a healthy mind and body, it is an uncontrovertible fact that the process of nature has been irrevocably set in motion at the time of conception, and an injury after that point in time will lead to a person in being who will be permanently affected by the injuries

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33. 65 F. Supp. at 142-43.

34. *Id.*

35. Annot., 40 A.L.R.3d 1222, 1227 (1971).

36. Allaire v. St. Luke's Hospital, 184 Ill. 359, 368, 56 N.E. 638, 640 (1900) (Boggs, J. dissenting), *overruled by* Amann v. Faidy, 415 Ill. 422, 432, 114 N.E.2d 412, 417-18 (1953). In dissenting from the Illinois Supreme Court's holding denying recovery for prenatal injuries, Justice Boggs eloquently referred to the concept of natural justice that requires an infant to be allowed to recover for injuries sustained as a fetus. Only six years after *Dietrich,* Justice Boggs pointed out that a viable fetus was not considered a part of the mother. He reasoned that if a child could be removed from its mother and survive by natural or artificial means, it should be able to recover for injuries sustained during that period of time even though not born until completion of the normal cycle of gestation.

37. Note, *Parental Liability for Prenatal Injury,* 14 COLUM. J.L. & SOC. PROBS. 47, 56 (1978).

38. Note, *supra* note 27, at 1247.

sustained.[39]

Current Status of the Recognition of Prenatal Injury Recovery

Three jurisdictions apparently remain in the shadow of the *Dietrich* decision and do not recognize recovery for prenatal injuries.[40] As indicated, the majority of states have rejected *Dietrich* and followed the District of Columbia's reasoning in *Bonbrest*. As of this writing, of the states which have been confronted with the specific issue of whether a cause of action may be maintained for prenatal injuries sustained by a child subsequently born alive, nine states have allowed recovery for injuries sustained from the time of conception,[41] and eleven states have allowed it from the point of viability.[42] Fifteen

39. White, *supra* note 29, at 395-96.

40. Nebraska has never been confronted with the specific issue of whether a child born alive can recover for prenatal injuries, but has only discussed the issue in the context of the wrongful death of a fetus. In Drabbels v. Skelly Oil Co., 155 Neb. 17, 22, 50 N.W.2d 229, 232 (1951), the Nebraska Supreme Court held that as to wrongful death actions, it "adhere[d] to the rule that an unborn child is a part of the mother until birth, and as such, has no judicial existence." Interestingly, the court specifically mentioned that the issue of prenatal recovery for a child born alive was not before it, and it would leave the determination of that issue to a time when it arose in an adversary context. *See also* Egbert v. Wenzl, 199 Neb. 573, 576, 260 N.W.2d 480, 482 (1977). Arizona has only been confronted with a prenatal injury recovery when interpreting the right of recovery of a stillborn infant under the wrongful death statute. This case did not reach the Supreme Court. Kilmer v. Hicks, 22 Ariz. App. 552, 554, 529 P.2d 706, 707 (1975) (no wrongful death cause of action for a viable fetus). It can only be assumed Arizona has not recognized any type of prenatal injury cause of action. Virginia was presented with the same fact situation and reached a similar conclusion. Lawrence v. Craven Tire Co., 210 Va. 138, 142, 169 S.E.2d 440, 441 (1969) (no wrongful death action for stillborn child).

41. Wolfe v. Isbell, 291 Ala. 327, 333-34, 280 So. 2d 758, 763 (1973); Simon v. Mullin, 34 Conn. Supp. 139, 147, 380 A.2d 1353, 1357 (1977); Day v. Nationwide Mut. Ins. Co. 328 So. 2d 560, 562 (Fla. Dist. Ct. App. 1976); Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 504-5, 93 S.E.2d 727, 728 (1956); Renslow v. Mennonite Hosp., 67 Ill. 2d 348, 357, 367 N.E.2d 1250, 1255 (1977); Bennett v. Hymers, 101 N.H. 483, 486, 147 A.2d 108, 110 (1958); Smith v. Brennan, 31 N.J. 353, 367, 157 A.2d 497, 504 (1960); Sinkler v. Kneale, 401 Pa. 267, 273-74, 164 A.2d 93, 96 (1960); Sylvia v. Gobeille, 101 R.I. 76, 79, 220 A.2d 222, 224 (1966). *But see* Stern v. Miller, 348 So. 2d 303, 308 (Fla. 1977) (denial for wrongful death of stillborn).

42. Scott v. McPheeters, 33 Cal. App. 2d 629, 637, 92 P.2d 678, 683-84 (1939), *cited with approval in* Justus v. Atchison, 19 Cal. 3d 564, 570, 565 P.2d 122, 126, 139 Cal. Rptr. 97, 101 (1977); Wendt v. Lillo, 182 F. Supp. 56, 62-63 (N.D. Iowa 1960) (predicting Iowa decision based on modern trend); Damasiewicz v. Gorsuch, 197 Md. 417, 440, 79 A.2d 550, 561 (1950); Steggall v. Morris, 363 Mo. 1224, 1233, 258 S.W.2d 577, 581 (1953); Weaks v. Mounter, 88 Nev. 118, 121-22, 493 P.2d 1307, 1309 (1972) (dicta); Stetson v. Easterling, 274 N.C. 152, 156, 161 S.E.2d 531, 534 (1968); Williams v. Marion Rapid Transit Inc., 152 Ohio St. 114, 128-29, 87 N.E.2d 334, 340 (1949); Evans v. Olson, 550 P.2d 924, 927 (Okla. 1976); Mallison v. Pomeroy, 205 Or. 690, 697, 291 P.2d 225, 228 (1955); Seattle-First Nat. Bank v. Rankin, 59 Wash. 2d 289, 291, 367

states have recognized a wrongful death recovery for the death of a viable fetus, with all courts recognizing that in order to maintain the wrongful death action, the fetus must have been able to maintain an action for personal injuries if it had lived.[43] Massachusetts and Michigan have extended wrongful death recovery to the pre-viable fetus.[44] It can be assumed that all of these states will allow a child born alive to maintain such an action.

Ten states have not been confronted with the issue either in the context of wrongful death or a cause of action asserted by a living child.[45] Thus, thirty-seven states recognize explicitly or by implication the right of recovery for prenatal injuries from at least the point of viability and ten states are noncommittal. It could be safely assumed that when these ten states are confronted with the issue, the majority of them will at least allow recovery from the point of viability if not from conception, because no court has explicitly rejected the theory in modern times. In light of the majority of courts allowing recovery for prenatal injuries sustained by a child born alive, this analysis must turn to the present status of the doctrine of parental immunity in prohibiting lawsuits by children against their parents.

P.2d 835, 838 (1962); *see also* White v. Yup, 85 Nev. 527, 534, 458 P.2d 617, 621 (1969) (allowed wrongful death of viable fetus); Woods v. Lancet, 303 N.Y. 349, 357, 102 N.E.2d 691, 695 (1951); Endresz v. Friedberg, 24 N.Y.2d 478, 485-86, 248 N.E. 2d 901, 905, 301 N.Y.S.2d 65, 70-71 (1969) (denied wrongful death action for stillborn fetus). *But cf.* Kelly v. Gregory, 282 A.D. 542, 545, 125 N.Y.S.2d 696, 698 (1953) (allowed recovery from the time of conception).

43. Worgan v. Greggo and Ferrara, Inc., 50 Del. 258, 260, 128 A.2d 557, 558 (1956); Britt v. Sears, 150 Ind. App. 487, 497-98, 277 N.E.2d 20, 21 (1971); Hale v. Manion, 189 Kan. 143, 145-47, 368 P.2d 1, 3 (1962); Orange v. State Farm Mut. Auto Ins. Co., 443 S.W.2d 650, 651 (Ky. 1969); Danos v. St. Pierre, 383 So. 2d 1019, 1021 (La. App. 1980); Verkennes v. Corniea, 229 Minn. 365, 371, 38 N.W.2d 838, 841 (1949); Rainey v. Horn, 221 Miss. 269, 283, 72 So. 2d 434, 439-40 (1954); Salazar v. St. Vincent Hosp., 95 N.M. 150, 155, 619 P.2d 826, 828-29 (1980); Fowler v. Woodward, 244 S.C. 608, 612-13, 138 S.E.2d 42, 43-44 (1964); Shousha v. Matthews Drivurself Serv. Inc., 210 Tenn. 384, 396, 358 S.W.2d 471, 476 (1962); Leal v. C.C. Pitts Sand and Gravel Inc., 419 S.W.2d 820, 821 (Tex. 1967); Nelson v. Peterson, 542 P.2d 1075, 1077 (Utah 1975); Vaillancourt v. Medical Center Hosp. of Vt., 139 Vt. 138, 141, 425 A.2d 92, 95 (1980); Baldwin v. Butcher, 155 W. Va. 431, 437, 184 S.E.2d 428, 434 (1971); Kwaterski v. State Farm Mut. Auto Ins. Co., 34 Wis. 2d 14, 22, 148 N.W.2d 107, 111 (1967); *see also* Rice v. Rizk, 453 S.W.2d 732, 735 (Ky. 1970); Pehrson v. Kistner, 301 Minn. 299, 302, 222 N.W.2d 334, 336 (1974); Occhipinti v. Rheem Mfg. Co., 252 Miss. 172, 177, 172 So. 2d 186, 189 (1965). *But see* Puihl v. Milwaukee Auto. Ins. Co., 8 Wis. 2d 343, 356-57, 99 N.W.2d 163, 169-71 (1960) (condemned the viability rule).

44. Torigian v. Watertown News Co., 352 Mass. 446, 448-49, 225 N.E.2d 926, 927 (1977); Womack v. Buckhorn, 384 Mich. 718, 725, 187 N.E.2d 218, 222 (1971).

45. South Dakota, North Dakota, Alaska, Hawaii, Idaho, Colorado, Arkansas, Montana, Maine, and Wyoming.

PARENTAL IMMUNITY

Overview of the Doctrine of Parental Immunity[46]

The doctrine of parental immunity in tort is a relatively new theory in the history of American common law.[47] Prior to its recognition in 1884, there were no reported English or American cases which barred a cause of action against a parent by a child arising out of tortious actions, or contract or property matters.[48] The recognition of parental immunity in tort in the United States is credited by legal scholars and the courts to three cases now labeled the "great trilogy."[49]

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46. The following issues are relevant to a full discussion of the doctrine of parental immunity, but are beyond the scope of this article: (1) parental liability to an unemancipated child for the intentional infliction of injury; (2) parental liability to an emancipated child for negligent or intentional injury; (3) liability of one standing *in loco parentis* to a child for injuries sustained by negligent or intentional acts; (4) parental liability to a child who is injured while an unemancipated minor, but who commences the lawsuit when emancipated; and (5) the liability of a child to a parent for the negligent or intentional infliction of injury to another child.

47. The doctrine of parental immunity is simply that a child cannot sue his parent and a parent cannot sue his child in tort for personal injuries sustained arising out of a negligent or intentional act. *See* W. PROSSER, *supra* note 24, § 122, at 865. This does not mean a parent has no duty to prevent or avoid injuring his child, but that the immunity arises to prevent the parent from being held legally liable to the child for compensatory damages. *See generally* Owens v. Auto Mut. Indem. Co., 235 Ala. 9, 12, 177 So. 133, 136 (1937); Turner v. Turner, 304 N.W.2d 786, 787 (Iowa 1981); Dunlap v. Dunlap, 84 N.H. 352, 372, 150 A. 905, 915 (1930). Based upon public policy reasons, the courts merely refuse to recognize the cause of action and the child is barred from suing. The major reasons offered to justify the theory were that domestic tranquility and parental discipline and control would be disrupted by allowing the cause of action. The only logical conclusion to be drawn from these justifications is that an uncompensated tort will supposedly maintain peace in the family and respect for the parent even though the act complained of is rape, a brutal beating, or very serious and disabling injuries. W. PROSSER, *supra,* note 24, § 122 at 866. This article will restrict its discussion to the analysis of parental immunity dealing with parental liability to an unemancipated natural child who has been injured by the negligent act of one or both of his parents.

48. Comment, *Tort Actions Between Members of the Family - Husband & Wife - Parent & Child,* 26 MO. L. REV. 152, 182 (1961) [hereinafter cited as Comment, *Tort Actions*]; Note, *Intrafamilial Tort Immunity in New Jersey: Dismantling the Barrier to Personal Injury Litigation,* 10 RUT.-CAM. L. REV. 661, 670 (1979). Prior to the trilogy, discussed *infra* note 49, there were a few decisions addressing the issue of liability of one standing *in loco parentis* to a child, but these cases were literally ignored in subsequent decisions. Comment, *Child v. Parent: Erosion of the Immunity Rule,* 19 HASTINGS L.J. 201, 202 (1967) [hereinafter cited as Comment, *Erosion*].

49. The first case in the trilogy was Hewellette v. George, 68 Miss. 703, 9 So. 885 (1891). The lawsuit concerned a claim of a minor daughter for personal injuries sustained due to the actions of her mother. *Id.* at 711, 9 So. at 887. The Mississippi Supreme Court, without citing to any prior case law or statutory authority, created the foundation for the parental immunity doctrine. The court noted the facts were unclear as to whether the minor child was emancipated or not and if she was in fact living with her

After the trilogy, there was a methodical progression of lawsuits which appeared before the various state courts. Their decisions recognized and upheld the doctrine of parental immunity.[50] From that point in time, commentators have documented its decline and characterized it as illustrating the "orthodox process of judicial legislation by exception, elaboration and interpretation."[51]

In recognizing and upholding the doctrine of parental immunity, and to justify the exceptions, the fifty state court jurisdictions devel-

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mother in a traditional parent-child relationship. The minor child was married at the time of the incident, but she was separated from her husband. *Id.* However, Justice Woods, writing for the court, recognized that in the traditional parent-child relationship where the parent has responsibility for the child and the child has a reciprocal duty to obey, a civil action for injury to the minor child could not be recognized. Public policy forbids such an action to preserve the family and the harmony of society. A child's only course of redress was the criminal law which protected her from parental violence and wrongdoing. *Id.*

The Tennessee Supreme Court followed Mississippi twelve years later in McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903). The court agreed with *Hewellette* that a child's sole remedy was to resort to the criminal laws for punishing the parent's gross misconduct. Within the parent-child relationship, a parent has a duty to maintain, protect, and educate the child with the corresponding right to custody and control. The right included the ability to sustain and inflict moderate chastisement upon the child. Again, without citing to prior authority beyond *Hewellette,* the court upheld what it called the "well settled rule controlling the relation of father and child." *Id.* at 393, 77 S.W. at 665.

Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905), completed the trilogy with probably the most repulsive factual situation of any parental immunity case. A daughter was suing for personal injuries sustained as a result of being raped by her father. In apparent ignorance of the *McKelvey* decision, the Washington Supreme Court followed *Hewellette* and developed further reasoning to "uphold" the parental immunity doctrine. In denying the child's right to recovery, the court recognized the interests society has in preserving harmony in domestic relations. It rejected the plaintiff's assertion that there could be no harmony to protect in a family where a father had committed a heinous crime of rape upon his own daughter. *Id.* The court was also concerned that if the child recovered and subsequently died, the very parent sued might recover the monies. It was also concerned that suits of this kind threatened the family resources and endangered the financial welfare of other minor members of the family. *Id.* at 245, 79 P. at 789.

Despite the seemingly barbaric result in *Roller,* the court foresaw the type of issues which are being addressed in this paper. It appears the court was willing to deny recovery to an obviously worthy claim because it did not know where it could draw the line in future child-parent cases. It could not see what "type" of claim it could allow and still hold to the strong public policy of preserving the family unit. This inability to develop a workable definition of the duty of a parent to a child reappeared in virtually every immunity case which followed the trilogy. This finally led the courts to take the step of recognizing specific exceptions to the general rule of nonliability and avoid the issue of defining a parent's general duty to a child.

50. Comment, *Tort Actions, supra* note 48, at 182.

51. *Id.* at 217. Some of the most common exceptions allowing recovery were when (1) the child and parents were deceased when the lawsuit was commenced; (2) the parents were deceased when the lawsuit was commenced; (3) the parent was engaged in vocational or business activity at the time of the injury; (4) the parent intentionally injured the child; and (5) the parent had relinquished custody or abdicated his parental responsibility.

For a complete review of the development and/or demise of the parental immunity doctrine, see Annot., 6 A.L.R. 4th 1066 (1981).

oped somewhat of a consensus that the following reasons justified maintaining it as a viable doctrine:[52]

(1) Society's concern for the preservation of the family unit;[53]
(2) Society's concern for the preservation of parental authority;[54]
(3) The injured child already has a remedy in criminal proceedings or in removal from his parent's custody;[55]
(4) The preservation of the family exchequer;[56]
(5) The suggested analogy between the relationship of husband and wife immunity;[57]
(6) The possibility that the parent could inherit any judgment the child might recover;[58]
(7) The possibility that frivolous claims might flood the courts;[59]
(8) The danger of fraud and collusion between the parties in cases involving insurance.[60]

For approximately the next thirty years, the courts continued to accept the rationale and uphold the doctrine while creating exception after exception.[61] Finally in 1963, the Wisconsin Supreme Court took the first major step which reversed the trend. Wisconsin started the assault by recognizing a general duty of a parent to a child and abolishing the general rule of nonliability in the landmark case of *Goller v. White*.[62]

In *Goller*, Wisconsin abolished the doctrine leaving two "immunity exceptions" which still protected the parents.[63] Since *Goller*, fourteen states have abrogated parental immunity either totally or with certain limited immunity exceptions.[64] Ten states have abolished the doctrine while restricting their holding to the specific case before them indicating that they will proceed on a case-by-case ba-

52. *See Defining the Parent's Duty After Rejection of Parent-Child Immunity: Parental Liability for Emotional Injury to Abandoned Children*, 33 VAND. L. REV. 775, 777-78, 794 (1980).
53. *E.g.*, Bahr v. Bahr, 478 S.W.2d 400, 402 (Mo. 1972).
54. *E.g.*, Barlow v. Iblings, 261 Iowa 713, 716, 156 N.W.2d 105, 107 (1968).
55. *E.g.*, Pedigo v. Rowley, 101 Idaho 201, 205, 610 P.2d 560, 564 (1980).
56. *E.g.*, Orefice v. Albert, 237 So. 2d 142, 145 (Fla. 1970).
57. *E.g.*, Downs v. Poulin, 216 A.2d 29, 32 (Me. 1966).
58. *E.g.*, Nocktonick v. Nocktonick, 227 Kan. 758, 761, 611 P.2d 135, 137 (1980).
59. *See, e.g.*, Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905).
60. *E.g.*, Hastings v. Hastings, 33 N.J. 247, 251, 163 A.2d 147, 150 (1960).
61. The majority of courts have systematically relied upon three of the justifications listed above: (1) to preserve the family harmony unit, (2) to preserve parental authority, and (3) to prevent fraud and collusion. Comment, *Parental Immunity: The Case for Abrogation of Parental Immunity in Florida*, 25 U. FLA. L. REV. 794, 798 (1973).
62. 20 Wis. 2d 402, 122 N.W.2d 193 (1963).
63. *Id.* at 413, 122 N.W.2d at 198.
64. *See infra* notes 142, 186, 191 and accompanying text.

sis.[65] Seven states have abolished the doctrine at least in the area of automobile liability.[66] Twelve states remain loyal to the doctrine,[67]

65. *See infra* notes 122, 126 and accompanying text.

66. *See infra* note 73 and accompanying text.

67. The states that continue to uphold immunity as an absolute bar are clearly in the minority. However, ten of them continue to maintain the doctrine as an absolute bar in parent-child actions arising out of a negligent act. Owens v. Auto Mut. Indem. Co., 235 Ala. 9, 12, 177 So. 133, 136 (1937); Thomas v. Inmon, 268 Ark. 221, 223, 594 S.W.2d 853, 854 (1980); Vaughan v. Vaughan, 161 Ind. App. 497, 500, 316 N.E.2d 455, 457 (1974); Louisiana by Statute: LA. REV. STAT. ANN. § 9:571 (West 1965). *See also* Bondurant v. Bondurant, 386 So. 2d 705, 706 (La. Ct. App. 1980); Hewellette v. George, 68 Miss. 703, 711, 9 So. 885, 887 (1891), *cited with approval in* McNeal v. Adm.'r of Estate of McNeal, 254 So. 2d 521, 523 (Miss. 1971); Teramano v. Teramano, 6 Ohio St. 2d 117, 119, 216 N.E.2d 375, 377 (1966); Workman v. Workman, 498 P.2d 1384, 1386-87 (Okla. 1972); Matarese v. Matarese, 47 R.I. 131, 134, 131 A. 198, 199-200 (1925), *cited with approval in* Castellucci v. Castellucci, 96 R.I. 34, 37, 188 A.2d 467, 468 (1963); Campbell v. Gruttemeyer, 222 Tenn. 133, 140, 432 S.W.2d 894, 900 (1968); Ball v. Ball, 73 Wyo. 29, 56-57, 269 P.2d 302, 314 (1954).

The major justification for retention of the doctrine is to prevent family deterioration or to promote family harmony which in turn is beneficial to the public at large. *See* Ball v. Ball, 73 Wyo. 29, 56-57, 269 P.2d 302, 314 (1954); Campbell v. Gruttemeyer, 222 Tenn. 133, 139, 432 S.W.2d 894, 899 (1968); Vaughan v. Vaughan, 166 Ind. App. 491, 500, 316 N.E.2d 455, 457 (1974); Workman v. Workman, 498 P.2d 1384, 1387 (Okla. 1972); McNeal v. Adm.'r of Estate of McNeal, 254 So. 2d 521, 523 (Miss. 1971); Owens v. Auto Mut. Indem. Co., 235 Ala. 9, 10, 177 So. 133, 134 (1937). The Arkansas Supreme Court as recently as 1980 explicitly held the doctrine is not a legal anachronism and that to allow a child to sue his parent is "repugnant to natural sentiments concerning family relations." Thomas v. Inmon, 268 Ark. 221, 223, 594 S.W.2d 853, 854 (1980) (quoting Rambo v. Rambo, 195 Ark. 832, 834, 114 S.W.2d 468, 469 (1938)).

Another major concern is the likelihood of fraud and collusion when an intrafamily suit is allowed. *Id.* This is of particular concern when insurance is available to satisfy the judgment. These two concerns are theoretically inconsistent. The decisions hold this type of suit severely disrupts the family, but there is an equal belief that it in fact brings the family together in order to profit from the negligent wrong of the parent. This may be considered twisted reasoning, yet it may confirm the view of dissenting Justice May of Arkansas that the doctrine is no longer needed. The only time an action would be maintained is when the real party in interest is the insurance company. *Id.* at 224, 594 S.W.2d at 855 (Mays, J. dissenting).

Justice Mays' thesis was that tort suits are not commenced unless there is a deep pocket from which the child can recover. Therefore, discussions of family harmony are irrelevant; whatever disruption there is was caused by the injury itself. The suit is merely an attempt to compensate the child and/or family to provide financial assistance for the necessary care and treatment.

Two jurisdictions have not clearly been confronted with the issue of parental immunity. In the only case in South Dakota, the court upheld the doctrine. It applied Minnesota law which was binding on the particular litigation. Kloppenburg v. Kloppenburg, 66 S.D. 167, 167, 280 N.W. 206, 206 (1938). The decision lacks any discussion of whether applying Minnesota law was contrary or repugnant to the public policy of South Dakota. An admittedly debatable conclusion can be drawn that the court would recognize the doctrine, yet the 1938 decision may provide no hint since Minnesota has since rejected the doctrine. Anderson v. Stream, 295 N.W.2d 595 (Minn. 1980).

Despite the lack of prior authority, it can be inferred that Utah would recognize and uphold the doctrine. In Rubalcava v. Gisseman, 14 Utah 2d 344, 384 P.2d 389 (1963), the Utah court upheld interspousal immunity by relying on foreign decisions which upheld the parental immunity doctrine. *Id.* at 347, 384 P.2d at 393. As recently as 1978, the court cited *Rubalcava* with approval indicating its primary concern there was with the protection of family harmony. Hull v. Silver, 577 P.2d 103, 103 (Utah 1978).

and six other jurisdictions clearly allow recovery if the tortious act was willful or wanton.[68]

An in-depth analysis of the current status of parental immunity is necessary in order to understand the availability of a cause of action of a child against its mother.[69] The majority of states have not completely abolished the doctrine, and serious questions arise whether the case of a fetus injured by its mother falls into any number of the "exceptions" which continue to allow immunity. Therefore, a specific review of the parental immunity decisions will be made followed by an analysis of the probability of those jurisdictions entertaining a cause of action by a child against its mother for negligently inflicted prenatal injuries.

Specific Analysis of Parental Immunity and Prenatal Recovery

This analysis will traverse the maze of common law decisions which have restricted the doctrine, and it will conclude with those states that have totally abrogated parental immunity. Each section will also compare the states' position on the recognition of prenatal recovery and demonstrate the likelihood that child versus mother liability will be recognized. This analysis is painstakingly thorough in order to demonstrate that the fifty state jurisdictions have not reached a consensus on parental liability, but rather have reached varied results along a wide spectrum.

Immunity Abolished for Automobile Accidents Only

Over the years, courts have found certain exceptions to the parental immunity doctrine.[70] In allowing recovery for negligent acts, courts have not addressed the general issue of whether the parent has a general duty to his unemancipated child. Instead, the decisions framed the issue as whether there should be an exception based on

68. The remaining six jurisdictions have unquestionably denied recovery for the negligent acts of a parent toward a child, but clearly refuse to uphold such a bar when the parental act is willful and wanton. Horton v. Reaves, 186 Colo. 149, 156, 526 P.2d 304, 308 (1974); Coleman v. Coleman, 156 Ga. App. 533, 534, 278 S.E.2d 114, 114 (1981). *See also* Maddox v. Queen, 150 Ga. App. 408, 410, 257 S.E.2d 918, 919-20 (1979), MacGrath v. Hoffman, 156 Ga. App. 240, 244, 274 S.E.2d 631, 633 (1980); Mhanke v. Moore, 197 Md. 61, 69-70, 77 A.2d 923, 926 (1951); Sanford v. Sanford, 15 Md. App. 390, 395, 290 A.2d 812, 816 (1972); Pullen v. Novak, 169 Neb. 211, 215, 99 N.W.2d 16, 25 (1959); Chaffin v. Chaffin, 239 Or. 374, 381, 397 P.2d 771, 774 (1964); Oldman v. Bartshe, 480 P.2d 99, 100-01 (Wyo. 1971).

69. The 18 states that have remained loyal to the doctrine will not be considered. *See supra* notes 67-68.

70. *See supra* note 51.

the fact that the family unit or family harmony was irrelevant or not in need of protection.[71] The exceptions have been justified from the broadly stated rule that there is no need for parental immunity for acts of parents which do not arise out of the parental relationship, nor when the parent has temporarily abandoned his parental role.[72] Seven jurisdictions have chosen to find an additional exception for the ordinary use of an automobile.[73] In the states that have allowed this new exception by case decision, there is a clear division of authority as to why the suits should be allowed.[74]

Schenk v. Schenk,[75] an often cited Illinois Appellate Court opinion, allowed the cause of action based on the premise that injuries related to an automobile accident do not fall within the parent-child relationship. A father sued his daughter for injuries sustained while he was crossing a street.[76] The court held that at the time of the accident, both father and daughter were exercising their rights with their corresponding duties of care on the public streets and with no direct connection with the family relationship. It held this was conduct outside of the family relationship and not directly connected with the family purposes and objectives. Under these facts the court was not attempting to supervise everyday family conduct, but was simply recognizing the rights of the public at large.[77]

This decision could be interpreted as recognizing a new exception to the immunity doctrine likened to the situations of employer-employee cases or intentional torts. However, implicit in the decision is a total rejection of the family harmony argument that suits allowed between a parent and an unemancipated child are disruptive to the family unit. In fact, the Illinois Appellate Court rejected this inter-

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71. *See supra* note 61.

72. Comment, *Erosion*, *supra* note 48, at 206.

73. Two states allow recovery by statute: Connecticut, CONN. GEN. STAT. § 52-572c (West Supp. 1983-1984), North Carolina, N.C. GEN. STAT. § 1-539.21 (1983). *See also* Ooms v. Ooms, 164 Conn. 48, 51, 316 A.2d 783, 785 (1972); Snow v. Nixon, 52 N.C. App. 131, 135, 277 S.E.2d 850, 852-53 (1981). Five states allow recovery by common law decision. Williams v. Williams, 369 A.2d 669, 673 (Del. 1976); Ard v. Ard, 414 So. 2d 1066, 1070 (Fla. 1982); Schenk v. Schenk, 100 Ill. App. 2d 199, 206, 241 N.E.2d 12, 15 (1968); Smith v. Kauffman, 212 Va. 181, 186, 183 S.E.2d 190, 194 (1971); Lee v. Comer, 224 S.E.2d 721, 725 (W. Va. 1976).

74. The use of the automobile in the United States is an everyday occurrence for most Americans. Obviously, it is an integral activity of the family as transportation for vacation, schools, extracurricular activities, shopping for family needs, etc. Plaintiffs' attorneys throughout the nation came to question whether the use of the automobile by a parent was necessarily an act arising out of the parent-child relationship. In addition, due to the intense state involvement in the licensing of automobiles, automobile insurance has become mandatory in many states. Insurance has become pervasive through mandatory or voluntary compliance with obtaining minimum limits of liability coverage. *See* Comment, *supra* note 61, at 798.

75. 100 Ill. App. 2d 199, 206, 241 N.E.2d 12, 15 (1968).

76. *Id.* at 200, 241 N.E.2d at 12.

77. *Id.* at 205-06, 241 N.E.2d at 15.

pretation of "family harmony" stating it was more narrowly drawn. The protection of "family harmony" was limited to suits inviting endless litigation over what is or is not ordinary negligence *in the operation of the household.*[78] The allowance of the suit itself was not the type of disruption parental immunity desired to protect, but the litigation of the issue of what was negligent conduct within the parent-child relationship.

The Delaware Supreme Court impliedly adopted this reasoning in attempting to explain a prior decision allowing a child versus parent lawsuit arising out of an automobile accident. In *Williams v. Williams*,[79] the Delaware court had allowed such an action apparently on the sole ground that the presence of insurance vitiated all the justifications for parental immunity.[80] However, in *Schneider v. Coe*,[81] when confronted with a case of negligent parental supervision, the court explained the *Williams* decision by stating that driving an automobile was not unique to the parent-child relationship and does not bring into question the validity of state supervision of parental control, authority and discretion of raising a child.[82]

The *Williams-Schneider* rationale seemingly goes one step further than the Illinois Appellate Court in *Schenk* because the plaintiffs in *Williams* were out of state at the time of the accident, presumably on a family trip or vacation of some kind.[83] A literal reading of *Schenk* would appear to allow recovery only if the act of driving the automobile did not go to the fulfillment of family purposes or objectives. In fact, the Illinois Appellate Court has held immunity applies when the injuries occurred where the automobile was being used to transport the mother and son to a college the son was considering attending in the following year.[84] The importance of the reasoning is that the courts narrowed the concept of family harmony by holding the lawsuit itself was not disruptive.

The majority of courts abolishing parental immunity for automobile accident injuries have relied upon the prevalence of insurance coverage. Virginia's highest court stated that the availability of insurance caused the doctrine to become a legal anachronism.[85] West

78. *Id.*
79. 369 A.2d 669 (Del. Super. Ct. 1976).
80. *Id.* at 673.
81. Schneider v. Coe, 405 A.2d 682 (Del. Super. Ct. 1979).
82. *Id.* at 684.
83. 369 A.2d at 669-70.
84. Eisele v. Tenuta, 83 Ill. App. 3d 799, 802, 404 N.E.2d 349, 350 (1980).
85. Smith v. Kauffman, 212 Va. 181, 185, 183 S.E.2d 190, 194 (1971).

Virginia and Florida courts succinctly stated the reasoning for all the courts by noting that where insurance exists, a suit by a child for injuries sustained will be beneficial to the family relationship rather than detrimental.[86] As the Delaware court had blatantly acknowledged in *Williams*, this type of suit was not a truly adversarial situation, but rather a situation where *both* parties are seeking to recover from the insurance carrier to provide for the child so as not to deplete the family assets.[87]

This approach to abrogating parental immunity has been severely criticized as being legally weak and untidy.[88] It is argued that the major weakness in this approach is that such language could be precedent for a radical change in tort law for deciding liability. The mere presence of insurance without additional justification has never before been the basis for recognizing a cause of action.[89] However, these decisions can be interpreted as eliminating the justification for parental immunity due to the fact that the insurance coverage protects the family assets and allegedly increases family harmony by compensating the injured child. As will be demonstrated *infra*,[90] the courts acknowledge that the mere abrogation of parental immunity does not recognize a legal duty between parent and child.[91] These decisions also demonstrate the modern trend that any threat of fraud or collusion has been rejected as a basis to deny recognition of a cause of action. A mere opportunity for such conduct should not in itself prevent an honest and meritorious claim.[92]

The criticism of this line of cases does have some merit when viewing a subsequent decision of the Virginia Supreme Court. In *Wright v. Wright*,[93] the court was presented with a negligent supervision case where it upheld the parental immunity doctrine without addressing the issue of whether the availability of insurance should be controlling.[94] There may be a valid argument that homeowners insurance coverage is not as prevalent as automobile liability insurance, but there is enough concern for the leaders of the insurance industry to advocate a household members exclusion to eliminate coverage for this type of negligent act.[95] The courts could avoid the

86. Lee v. Comer, 224 S.E.2d 721, 724 (W. Va. 1976); Ard v. Ard, 414 So. 2d 1066, 1069 (Fla. 1982).

87. 369 A.2d at 672.

88. Thuillez, *Parental Nonsupervision: The Tort That Never Was*, 40 ALB. L. REV. 336, 349 (1976).

89. *Id.* at 349.

90. *See infra* text accompanying note 194.

91. *See infra* text accompanying notes 200-206.

92. *See, e.g.*, Lee v. Comer, 224 S.E.2d 721, 725 (W. Va. 1976).

93. 213 Va. 177, 191 S.E.2d 223 (1972).

94. *Id.* at 179, 191 S.E.2d at 225.

95. Casey, *The Trend of Interspousal and Parental Immunity - Cakewalk Liability*, 45 INS. COUNS. J. 321, 331-34 (1978).

potential inconsistency demonstrated by the Virginia court by clarifying their decisions as the Delaware court did in stating that the function of driving an automobile is simply not the type of act that falls under the rubric of the family relationship. The duty is ordinarily owed apart from the family relation.[96]

Of the states which have abrogated parental immunity in automobile cases, three allow recovery for prenatal injuries sustained after viability[97] and three from the time of conception.[98] It would appear that in these jurisdictions, if a woman negligently injures the fetus while driving an automobile, she will be liable to her child for any injuries or deformities resulting from those acts. But, as demonstrated above, the underlying reasoning of the courts in recognizing a cause of action may limit the duty owed by the mother to the fetus.[99]

In two states which have abolished immunity by statute, the scope of the liability is defined as those acts arising out of the operation of a motor vehicle.[100] Therefore, a woman could be held liable to her fetus not only for injuries due to her negligent driving, but also in situations such as riding with a driver known to her to be intoxicated, and even possibly for acts revolving around alighting from or getting into an automobile.[101]

The Illinois and Delaware courts must determine if the injury to a fetus as a result of the woman's use of an automobile arises out of the parental relationship.[102] The issue does not seem to be any different for a fetus in the womb than for a child who is riding in the car.[103] However, it could be construed that the entire time a woman carries a fetus, she is fulfilling a family purpose or objective. This

96. *See supra* notes 79-82 and accompanying text.

97. Worgan v. Greggo and Ferrara, Inc., 50 Del. 258, 260, 128 A.2d 557, 558 (1956); Stetson v. Easterling, 274 N.C. 152, 157, 161 S.E.2d 531, 534 (1968); Baldwin v. Butcher, 155 W. Va. 431, 437, 184 S.E.2d 428, 434 (1971).

98. Simon v. Mullin, 34 Conn. Supp. 139, 147, 380 A.2d 1353, 1357 (1977); Day v. Nationwide Mut. Ins. Co., 328 So. 2d 560, 562 (Fla. Dist. Ct. App. 1976). *But see* Stern v. Miller, 348 So. 2d 303, 308 (Fla. 1977) (denial of wrongful death of stillborn); Renslow v. Mennonite Hosp., 67 Ill. 2d 348, 357, 367 N.E.2d 1250, 1255 (1977).

99. *See supra* notes 70-96 and accompanying text.

100. *See supra* note 73.

101. The Connecticut and North Carolina courts have seemingly come to two completely opposite views, based on interpretation of their particular statutes, as to what acts are included within the definition of "arising out of the operation of a motor vehicle." *See* Ooms v. Ooms, 164 Conn. 48, 316 A.2d 783 (1972) (upholding immunity for a mother who allowed her three year old child to leave the car and cross a highway where he was injured). *Compare* Snow v. Nixon, 52 N.C. App. 131, 277 S.E.2d 850 (1981) (holding statute allowed recovery in situation similar to that in *Ooms*).

102. *See supra* notes 75-84.

103. *See supra* note 82 and accompanying text.

analysis would seemingly fail; it ignores the courts' main concern with protecting family harmony from litigation. This concern determines what is ordinary negligence in the operation of a household.[104]

The remaining jurisdictions that allow recovery when there is liability insurance should allow recovery for prenatal injuries.[105] The same policy considerations are present. Recovery now allowed for injuries sustained while the child is in a fetal state should not be significant. What is implied but never recognized in these prior decisions is that there is in fact an existing duty between parent and child. These courts did not acknowledge the need to address this issue, on the basis that the duty is the same one that has already been recognized for third parties. However, as will be demonstrated, many jurisdictions view the abolition of immunity and the recognition of a duty as two separate issues. As long as these jurisdictions limit their scope of inquiry to automobile accidents, they will not be forced to address the issue of just what the scope of parental duty is.

Abrogation of Immunity on a Case-by-Case Basis

Nine jurisdictions abrogated immunity to a greater degree when faced with lawsuits similar to those discussed above involving automobile accidents.[106] With a majority of these decisions less than ten years old, the courts acknowledge that the modern trend and proper approach in light of modern conditions and conceptions of public policy dictate a relaxation if not abolition of the parental immunity doctrine.[107] The near unanimity in reasoning is striking as is the unanimous agreement to retain a certain aspect of the immunity of parents. These decisions show that the growing trend is to abolish the crude, blanket immunity with far greater concern given to just what acts, if any, the courts want to protect from state scrutiny. The general theme of the decisions is a continuing concern for the preservation of the family unit. All courts were willing to abolish blanket immunity, but reserved the right in future cases to "protect" the parents in the exercise of "parental authority and discretion,"[108] or "parental discipline, care and control,"[109] or "parental control and

104. *See supra* note 77 and accompanying text.

105. *See supra* notes 85-87.

106. Hebel v. Hebel, 435 P.2d 8, 15 (Alaska 1967); Streenz v. Streenz, 106 Ariz. 86, 89, 471 P.2d 282, 285 (1970); Pedigo v. Rowley, 101 Idaho 201, 205, 610 P.2d 560, 564 (1980); Turner v. Turner, 304 N.W.2d 786, 787-88 (Iowa 1981); Nocktonick v. Nocktonick, 227 Kan. 758, 767, 611 P.2d 135, 148 (1980); Black v. Solmitz, 409 A.2d 634, 639-40 (Me. 1979); Sorenson v. Sorenson, 369 Mass. 350, 365-66, 339 N.E.2d 907, 916 (1975); Fugate v. Fugate, 582 S.W.2d 663, 669 (Mo. 1979); Merrick v. Sutterlin, 93 Wash. 2d 411, 416, 610 P.2d 891, 893 (1980).

107. *E.g.*, Sorenson v. Sorenson, 369 Mass. 350, 359, 339 N.E.2d 907, 912 (1975).

108. Turner v. Turner, 304 N.W.2d 786, 788-90 (Iowa 1981); Nocktonick v. Nocktonick, 227 Kan. 758, 770, 611 P.2d 135, 142 (1980).

109. Hebel v. Hebel, 435 P.2d 8, 14 (Alaska 1967).

discipline,"[110] or parental supervision.[111]

The exact meaning of these categories of parental behavior is unclear and will only be surmised in future decisions when the courts are presented with concrete, factual situations. The essence appears to center around the concept of family life which can include the right to custody and the right to control and discipline the child within the parental duty to support and properly care for the child.[112] This refinement of the immunity doctrine tends to ratify the holding of the Delaware court that the act complained of must go specifically to parental authority and not the general classification of the family relationship or objectives as enumerated by the Illinois court.[113]

Consistent with the prior cases discussed, the presence of insurance coverage had an indelible effect upon half of the state courts.[114] A similar, but more controlling factor was that the unemancipated child was being denied a right to recover compensation merely because of its status, *i.e.*, class discrimination.[115] In a further refinement of the West Virginia and Florida courts' reasoning that the allowance of the action would be beneficial rather than disharmonious to the family unit,[116] a number of courts recognized that the disruption is caused by the negligent act and subsequent injury, not the lawsuit itself.[117] The recovery by the child goes to repairing the disruption that has occurred.

Arizona is the only state in this group of nine that denies recovery

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110. Fugate v. Fugate, 582 S.W.2d 663, 669 (Mo. 1979).

111. Pedigo v. Rowley, 101 Idaho 201, 205, 610 P.2d 560, 564 (1980) (dicta). The court in *Pedigo* upheld the immunity doctrine in a case of negligent parental supervision. In defining the immunity, the court indicated the doctrine was not absolute and in the uncharted area outside of parental supervision a child would not be denied redress for its injuries.

112. Fugate v. Fugate, 582 S.W.2d 663, 669 (Mo. 1979).

113. *See supra* notes 75-84 and accompanying text.

114. Streenz v. Streenz, 106 Ariz. 86, 88, 471 P.2d 282, 284 (1970); Hebel v. Hebel, 435 P.2d 8, 15 (Alaska 1967); Nocktonick v. Nocktonick, 227 Kan. 758, 768, 611 P.2d 135, 141 (1980); Sorenson v. Sorenson, 639 Mass. 350, 362, 339 N.E.2d 907, 913-14 (1975).

115. Streenz v. Streenz, 106 Ariz. 86, 88, 471 P.2d 282, 284 (1970); Turner v. Turner, 304 N.W.2d 786, 787 (Iowa 1981); Nocktonick v. Nocktonick, 227 Kan. 758, 769, 611 P.2d 135, 140 (1980); Hebel v. Hebel, 435 P.2d 8, 15 (Alaska 1967); Black v. Solmitz, 409 A.2d 634, 635 (Me. 1979); Sorenson v. Sorenson, 369 Mass. 350, 359-60, 339 N.E.2d 907, 912 (1975).

116. *See supra* note 86 and accompanying text.

117. Nocktonick v. Nocktonick, 227 Kan. 758, 768, 611 P.2d 135, 141 (1980); Sorenson v. Sorenson, 369 Mass. 350, 360, 339 N.W.2d 907, 913-14 (1975).

for prenatal injuries to a child born alive.[118] If the above interpretation is correct, these jurisdictions would most likely allow a child to sue its mother for prenatal injuries. They have acknowledged that the injury itself is disruptive to the family unit, and that compensation will rebuild the harmony. The acts of a woman to her fetus do not fall within the parameters of parental authority and the rearing of a child. If they remain consistent with their policy justifications, they have no choice but to recognize that this scenario justifies abolition of parental immunity. The remaining issues are whether these jurisdictions will in fact recognize a duty on the part of the woman.

New York Approach

In 1961, Judge Fuld, dissenting in an opinion of the New York Court of Appeals which upheld the parental immunity doctrine, succinctly expressed the view which would echo throughout future decisions of other jurisdictions up to the present: "To tell them [the crippled child and parents] that the pains must be endured for the peace and welfare of the family is something of a mockery."[119] At the time, he saw that the doctrine was so riddled with exceptions that the public policy reasons for its existence had lost their meaning.[120] Liability insurance was available to compensate the injured child and it was ludicrous to deny a child a remedy when the parent committed a negligent act which had nothing to do with the family relationship.[121]

Eight years later, in *Gelbman v. Gelbman,*[122] the court of appeals took heed of Judge Fuld's criticisms and totally abolished parental immunity. The court acknowledged that the main argument of the protection of family harmony was no longer viable to uphold the immunity doctrine.[123] Also, the threat of fraudulent or collusive suits could be adequately dealt with by the judicial system, as this threat had not prevented the courts from allowing a cause of action in other

118. Kilmer v. Hicks, 22 Ariz. App. 552, 553-54, 529 P.2d 706, 707 (1975); Wendt v. Lillo, 182 F. Supp. 561, 562 (N.D. Iowa 1960) (predicting Iowa decision based on modern trend); Hale v. Manion, 189 Kan. 143, 147, 368 P.2d 1, 3 (1962); Keyes v. Constr. Serv. Inc., 340 Mass. 633, 637, 165 N.E.2d 912, 915 (1960) (allowed from point of viability for prenatal injuries if subsequently born alive). *Cf.* Torigian v. Watertown News Co., 352 Mass. 446, 448-49, 225 N.E.2d 926, 927 (1977) (extended to previable fetus in wrongful death action); Steggal v. Morris, 363 Mo. 1224, 1233, 258 S.W.2d 557, 581 (1953); Seattle-First Nat. Bank v. Rankin, 59 Wash. 2d 289, 292, 367 P.2d 835, 838 (1962). Maine, Alaska and Idaho have not dealt with the issue. *See supra* note 45 and accompanying text.

119. Badigian v. Badigian, 9 N.Y.2d 472, 482, 174 N.E.2d 718, 724, 215 N.Y.S.2d 35, 43 (1961) (Fuld, J. dissenting).

120. *Id.* at 476, 174 N.E.2d at 721, 215 N.Y.S.2d at 39.

121. *Id.* at 479, 174 N.E.2d at 723-24, 215 N.Y.S.2d at 41.

122. 23 N.Y.2d 434, 437, 245 N.E.2d 192, 193, 297 N.Y.S.2d 529, 530-31 (1969).

123. *Id.* at 438, 245 N.E.2d at 193, 297 N.Y.S.2d at 532.

areas of the law.[124]

In *Gelbman*, the court made an additional holding that would prove to be particularly significant in later interpretations of parental liability to children. It acknowledged what the states in the first two classifications avoided—that it was not creating a new cause of action or duty, but merely removing the barrier to recovery that formerly prohibited compensation after liability had been established.[125] When faced with the issue of whether a parent could be held liable for negligent supervision of his child, the court of appeals in *Holodook v. Spencer*[126] relied upon this lack of duty to refuse to recognize the cause of action.

New York State required that a parent, according to his means, provide his child with adequate food, clothing, shelter, medical attention, and education. Failure to meet these minimum standards would result in criminal sanctions or loss of custody of one's child. Parents were also required to provide proper guidance for and control over their children.[127] When the court reviewed New York law beyond these minimum duties and sanctions, it found it had never recognized any other duties of a parent to a child that when breached would allow a civil damage recovery.[128] The law was silent regarding allowing a cause of action by the child against the parent.

The court refused to give such recognition at that time. It saw the danger of judicial determination of just what would constitute a breach of this duty; it concluded that probably all injuries to children could be avoided by closer supervision. Additionally, as a matter of public policy, it was unwilling to impose a reasonable person standard or a code of conduct for the raising of children. It was the court's belief that the obligations of a parent to a child derived their strength from natural instinct, love, and morality, and not from minimum standards or negative compulsions set by law with corresponding sanctions.[129]

The significance of the New York court's approach is that when it comes to the care, nurturing, and supervision of the child by the parent, the issue is now not one of immunity, but one of duty. In essence, the court has held that criminal sanctions and child abuse and neglect laws adequately protect the child while at the same time rec-

124. *Id.* at 438-39, 245 N.E.2d at 194, 297 N.Y.S.2d at 532.
125. 23 N.Y.2d at 438-39, 245 N.E.2d at 194, 297 N.Y.S.2d at 532.
126. 36 N.Y.2d 35, 324 N.E.2d 338, 364 N.Y.S.2d 859 (1974).
127. *Id.* at 44-45, 324 N.E.2d at 342, 364 N.Y.S.2d at 866-67.
128. *Id.* at 45, 324 N.E.2d at 343, 364 N.Y.S.2d at 867.
129. *Id.* at 49-51, 324 N.E.2d at 345-46, 364 N.Y.S.2d at 870-71.

ognizing the legal tradition of minimum state interference in the day-to-day raising of a family.[130] The New York Court of Appeals concluded that if in fact it is presented with a recognized duty ordinarily owed apart from the family relation, the law will not withhold its sanctions merely because the parties are parent and child.[131]

The New York Court of Appeals has allowed recovery for prenatal injuries at least from the time of viability;[132] the latest lower court decision, which has been the most recent decision in almost twenty years, allows recovery from the time of conception.[133] As indicated, the New York courts have never recognized a duty on the part of a woman to protect a fetus from injury during the gestation period, and it is not clear that the courts would readily do so.

In the recent decision of *Albala v. City of New York*,[134] the courts refused to allow recovery for preconception negligence. Even though the injuries were foreseeable, the court refused to recognize a duty because it could not be defined in a reasonable and practical manner.[135] If conception occurs before the act causing the injury, the fetus is an identifiable being within the zone of danger. In the case of fetus versus mother, the actual tortfeasor is partially responsible for the identifiable being's creation. Therefore, the minimal requirements of duty are present as required by New York law: identifiable beings within the zone of danger and foreseeable risk.[136] However, the court requires more before recognizing a duty; it looks to concerns of public policy and whether the court can apply the standard uniformly.[137]

In *Holodook*, the court at least implies that the present criminal and custodial laws are sufficient to protect the child from parental negligence;[138] beyond these minimum safeguards, New York courts have not recognized a specific duty of the mother to her fetus.[139] This argument is severely weakened by the fact the New York courts have adopted the "well born" approach in prenatal injury cases against third parties by recognizing the legal right of every human being to begin life unimpaired by physical or mental defects due to the negligence of another.[140] Therefore, the major concerns

130. *Id.* at 50-51, 324 N.E.2d at 346, 364 N.Y.S.2d at 870-71.
131. *Id.* at 50-51, 324 N.E.2d at 346, 364 N.Y.S.2d at 871-72.
132. Woods v. Lancet, 303 N.Y. 349, 357-58, 102 N.E.2d 691, 695 (1951); *see also* Endresz v. Friedberg, 24 N.Y.2d 478, 485-88, 248 N.E.2d 901, 905, 301 N.Y.S.2d 65, 70-72 (1969) (denied a wrongful death action for stillborn fetus).
133. Kelly v. Gregory, 282 A.D. 542, 545, 125 N.Y.S.2d 696, 698 (1953).
134. 54 N.Y.2d 269, 429 N.E.2d 786, 445 N.Y.S.2d 108 (1981).
135. *Id.* at 273-74, 429 N.E.2d at 788, 445 N.Y.S.2d at 10.
136. *Id.* at 272, 429 N.E.2d at 787, 445 N.Y.S.2d at 109.
137. *Id.* at 273-74, 429 N.E.2d at 788, 445 N.Y.S.2d at 110.
138. *See supra* notes 127-130 and accompanying text.
139. *See supra* notes 127-128 and accompanying text.
140. Endresz v. Friedberg, 24 N.Y.2d 478, 483, 248 N.E.2d 901, 903, 301

expressed in *Albala* are not present here unless the duty cannot be practically and uniformly applied. This will be explored in the next section.

The Goller Approach

Wisconsin was the first jurisdiction to abolish immunity in *Goller v. White*,[141] but the court retained immunity protection in two areas of the parent-child relationship. Four states followed the *Goller* decision,[142] but the Minnesota Supreme Court recently rejected its approach and adopted a new standard developed by the California Supreme Court.[143] The *Goller* approach retained immunity in the following two areas:

(1) where the alleged negligent act involves an exercise of parental authority over the child; and

(2) where the alleged negligent act involves an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care.[144]

The experience of these states in interpreting the *Goller* exceptions has resulted in inconsistent results and arbitrary distinctions.[145] This difficulty in interpretation was one of the main reasons the Minne-

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N.Y.S.2d 65, 68-69 (1969).

141. 20 Wis. 2d 402, 122 N.W.2d 193 (1963).

142. Rigdon v. Rigdon, 465 S.W.2d 921, 923 (Ky. 1971); Plumley v. Klein, 388 Mich. 1, 8, 199 N.W.2d 169, 172-73 (1972); Silesky v. Kelman, 281 Minn. 431, 442, 161 N.W.2d 631, 638 (1968), *overruled by* Anderson v. Stream, 295 N.W.2d 595, 601 (Minn. 1980); France v. A.P.A. Transp. Corp., 56 N.J. 500, 505, 267 A.2d 490, 494 (1970). *See also* Gross v. Sears Roebuck & Co., 158 N.J. Super. 442, 445-46, 386 A.2d 442, 444 (App. Div. 1978); Carey v. Davison, 181 N.J. Super. 283, 287-88, 437 A.2d 338, 341 (Law Div. 1981); Felderhoff v. Felderhoff, 473 S.W.2d 928, 933 (Tex. 1971).

143. Anderson v. Stream, 295 N.W.2d 595, 598, 601 (Minn. 1980).

144. 20 Wis. 2d at 413, 122 N.W.2d at 198. Kentucky has adopted the *Goller* approach, but not the specific language of the exceptions, opting to add to the first exception the "reasonable exercise of parental authority" and generalizing exception two to "provisions for the care and necessities of the child." Rigdon v. Rigdon, 465 S.W.2d 921, 923 (Ky. 1971). The Texas court followed the *Rigdon* language. Felderhoff v. Felderhoff, 473 S.W.2d 928, 933 (Tex. 1971). The court stated that the *Rigdon* language was substantially similar to the *Goller* and *Silesky* approaches. *Id.* at 931. The *Silesky* approach added "reasonable" to the first exception, but retained the original language of the second exception as stated in *Goller*. *See* Silesky v. Kelman, 281 Minn. 431, 442, 161 N.W.2d 631, 638 (1968). New Jersey has apparently followed *Goller* by way of dicta. France v. A.P.A. Transp. Corp., 56 N.J. 500, 505, 267 A.2d 490, 494 (1970). *See also* Carey v. Davison, 181 N.J. Super. 283, 287-88, 437 A.2d 338, 341 (Law Div. 1981). Michigan followed *Silesky*, but amended the second exception to read as "reasonable" instead of "ordinary" parental discretion. Plumley v. Klein, 383 Mich. 1, 8, 199 N.W. 2d 169, 172-73 (1972).

145. Note, *supra* note 48, at 677.

sota court ultimately rejected the doctrine.[146] The harshest criticism of the doctrine as enunciated by legal scholars,[147] and the California[148] and Minnesota[149] Supreme Courts is that it is seen as intolerable that if a parent's actions are immune, he may act negligently with total impunity. This criticism is in reality a public policy debate of the merits of the immunity doctrine itself which has always allowed the parent total freedom in his actions. The Wisconsin court was not setting a standard of conduct by retaining immunity for certain actions.[150] It was this very intent of retaining immunity coupled with the language used to define the exceptions that the Minnesota court saw as the fatal flaw in the *Goller* approach.

Beyond the public policy debate of the continuing validity of the parental immunity doctrine, the Minnesota Supreme Court held that the *Goller* approach was theoretically inconsistent. Even though the intent of *Goller* was to retain the cloak of immunity for two areas of parental conduct, in reality the courts had interpreted these "exceptions" as definitions of parental duties thereby imposing by implication a "reasonable parent" standard of conduct.[151] Assuming the ex-

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146. Anderson v. Stream, 295 N.W.2d 595, 598 (Minn. 1980).

147. Comment, *The "Reasonable Parent" Standard: An Alternative to Parent-Child Tort Immunity*, 47 U. COLO. L. REV. 795, 807 (1976).

148. Gibson v. Gibson, 3 Cal. 3d 914, 921, 479 P.2d 648, 653, 92 Cal. Rptr. 288, 292-93 (1971).

149. Anderson v. Stream, 295 N.W.2d 595, 598 (Minn. 1980).

150. 20 Wis. 2d at 412-13, 122 N.W.2d at 198.

151. The Minnesota court noted that when it adopted the *Goller* standards, it added to the first exception the word "reasonable" in describing parental authority. Anderson v. Stream, 295 N.W.2d 595, 598 (Minn. 1980). *See supra* note 144 and accompanying text. The court believed that a literal interpretation of an *un*reasonable parental act was that the parent would not be immune. However, this construction would be coextensive with the conclusion that the parent was negligent. Thus, the parent would only be immune when he nonnegligently exercised his parental authority. This analysis would completely contradict the meaning of immunity and would in reality be defining a duty or standard of conduct. The court felt the same analysis could be drawn with the word "ordinary" in the second exception. 295 N.W.2d at 598.

This argument may be particularly applicable to the Michigan approach which inserted "reasonable" into both exceptions. *See supra* note 144. Wisconsin could argue that this is a misreading of their language or merely problems caused by Michigan's modifying it. A review of Wisconsin's first exception shows it does not include just reasonable, but all parental authority exercised by a parent. The second exception talks of ordinary parental discretion. "Ordinary" is defined as: "regular; usual; normal; common; often recurring; according to established order; settled; customary; . . . ." BLACK'S LAW DICTIONARY 1249 (rev. 4th ed. 1968). It can be argued that "ordinary" describes the *type* of act, for example, a parent ordinarily has the duty and discretion to decide if a child needs a doctor when he is sick, but it may be unreasonable to wait five days when the child has 105° fever.

Thus, a parent is immune from tort liability for negligently failing to provide necessary medical care; this is ordinarily the responsibility of a parent in the day-to-day upbringing of a child. At the same time, even though the parent is immune from civil suit, the parent may lose custody of the child if the child is determined to be dependent or neglected under the state statute. WIS. STAT. ANN. § 48.13 (West 1979 & Supp. 1983-1984). Based on this analysis, Wisconsin does not have the same problems as Minnesota

ceptions to liability are just that, and not standards of conduct, there remains further disagreement as to what type of parental conduct falls within the exceptions.

The Wisconsin court has interpreted the first exception of "parental authority" as embracing the area of discipline.[152] The second exception is limited to legal obligations of providing for the health, morals, and well-being of the child. A failure to provide such necessities will result in state intervention under child neglect and dependency laws. It does not protect all acts arising out of the parent-child relationship, but just those parental acts which the parent is legally obligated to provide to a child.[153] Thus, the care a parent gives to a child on a day-to-day basis is not covered by the exception.[154]

The Texas, Kentucky, and Michigan Supreme Courts have not had a chance to interpret these exceptions, but the Michigan Court of Appeals has done so in two cases which directly contradict the Wisconsin court's interpretation.[155] The court interprets the first exception to include not only parental discipline, but the obligation to supervise the child's behavior. It concluded that it would be impossible to distinguish between parental acts of authority and parental acts of supervision. In order to supervise a child, there is some

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and Michigan because the word "reasonable" is not used in the exceptions.

152. Thoreson v. Milwaukee, 56 Wis. 2d 231, 246, 201 N.W.2d 745, 753 (1972).

153. Cole v. Sears Roebuck & Co., 47 Wis. 2d 629, 634, 177 N.W.2d 866, 868-69 (1970).

154. The application of this interpretation to specific cases results in immunity for failure to instruct a child on how to safely alight from a bus and cross a highway, *i.e.*, for failure to educate; but the day-to-day supervision of the child's physical activities are not immune. Lemmen v. Servais, 39 Wis. 2d 75, 78-79, 158 N.W.2d 341, 343 (1968). Liability without immunity will lie for injuries to one's child when:

(1) allowed by a parent to ride on the sidebar of a tractor. Goller v. White, 20 Wis. 2d 402, 404, 122 N.W.2d 193, 193-94 (1963);

(2) failure to supervise a two-year-old playing on a swingset. Cole v. Sears Roebuck & Co., 47 Wis. 2d 629, 630, 177 N.W.2d 866, 868 (1970); and

(3) failure to supervise a two-year-old at home alone who later runs out of the house and is struck by a car. Thoreson v. Milwaukee, 56 Wis. 2d 231, 233, 201 N.W.2d 745, 753 (1972). *See also* Howes v. Hansen, 56 Wis. 2d 247, 261, 201 N.W.2d 825, 826 (1972) (child injured by lawnmower; held, parent was not immune).

There is seemingly little difference between failure to instruct a child on crossing a highway and teaching a child not to leave the house. It is the opinion of at least one jurisdiction that *Lemmen* has been impliedly rejected in subsequent cases and that Wisconsin is now consistently and narrowly interpreting the exception to exclude immunity protection for all negligent supervision cases involving the day-to-day care of a child. Carey v. Davison, 181 N.J. Super. 283, 288-89 n.1, 437 A.2d 338, 341 n.1 (Law Div. 1981).

155. Paige v. Bing Constr. Co., 61 Mich. App. 480, 233 N.W.2d 46 (1975); McCallister v. Sun Valley Pools, Inc., 100 Mich. App. 131, 298 N.W.2d 687 (1980).

amount of discipline involved.[156]

Working under the same theory, the Wisconsin and Michigan courts have dramatically different immunity doctrines in that Michigan law protects the parents in almost all acts arising out of the parent-child relationship and Wisconsin law severely restricts immunity to discipline and failure to properly provide for the physical and intellectual needs of the child. In substance, the Wisconsin court has adopted the California and Minnesota Supreme Courts' "reasonable parent"[157] standard by implication. In all decisions of the Wisconsin Supreme Court that refused to grant parents immunity, the court, without citing authority, recognized a legal duty of the parents to supervise a child in the day-to-day upbringing of the child. The subsequent breach of that duty resulted in liability.[158] The Wisconsin court has impliedly held that the duty of parental supervision in tort was created by the abolition of parental immunity.[159]

The *Goller* approach was the first attempt to establish that parental immunity was the exception and liability would be the general rule. The Wisconsin court has apparently been successful in severely limiting the remaining immunity protections, yet the courts that have attempted to improve upon the theory have succeeded in reaching totally contradictory and confusing results. The failure of the theory to provide consistent results is due to the inability of the

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156. Paige v. Bing Constr. Co., 61 Mich. App. 480, 485-86, 233 N.W.2d 46, 48-49 (1975); McCallister v. Sun Valley Pools, Inc., 100 Mich. App. 131, 139, 298 N.W.2d 687, 691 (1980).

157. *See infra* notes 212-229 and accompanying text.

158. *See supra* notes 152-154 and accompanying text.

159. This analysis was recently rejected by the New Jersey court which has also adopted the *Goller* approach. France v. A.P.A. Transp. Corp., 56 N.J. 500, 505, 267 A.2d 490, 494 (1970). But the court restricted its analysis to automobile accidents only. The issue has not been presented to the court since that time, but the Superior Court, Appellate Division, interpreted the holding to apply to all parent-child relationships and that such exceptions are to be strictly construed. Gross v. Sears, Roebuck & Co., 158 N.J. Super. 443, 447, 386 A.2d 442, 445 (App. Div. 1978). The Appellate Division was consistent with Wisconsin in disallowing immunity when a father injured a child with a lawnmower. *Id.* However, the most recent New Jersey decision by the Superior Court, Law Division, confronted the issue from the *Holodook* "duty approach." Carey v. Davison, 181 N.J. Super. 283, 290-91, 437 A.2d 338, 343 (Law Div. 1981). *But see* Fritz v. Anderson, 148 N.J. Super. 68, 73-74, 371 A.2d 833, 834-35 (Law Div. 1977) (refused to extend *France* beyond auto accident cases).

In *Carey*, the New Jersey Supreme Court found it has never recognized a legal duty which will allow a parent to be liable to the child if breached. It did point out, however, that there is a recognized legal duty to a child from one who has a special relationship with the child that requires protecting the child from injury, for example, a school principal. 181 N.J. Super. at 292, 437 A.2d at 343. The court refused to recognize the legal duty of the parent to the child, but held that one would state a cause of action which would survive a motion to dismiss if it was alleged the father had a special relationship to a daughter when he voluntarily attempts to guide her safely across a highway and allegedly does so negligently. *Id.* at 292, 437 A.2d at 343-44. *See also* Convery v. Maczka, 163 N.J. Super. 411, 415-16, 394 A.2d 1250, 1252-54 (Law Div. 1978) (unclear if court recognized a legal duty of a parent or the "special relationship" duty).

courts to uniformly define what acts are still immune and what acts are subject to liability.

All of these jurisdictions allow recovery for prenatal injuries against third parties. Two states allow recovery for previable injuries,[160] and the remaining three cut off liability at the time of viability.[161] As set forth above, the *Goller* approach retains two immunity exceptions.[162] This discussion of prenatal injury recovery of a child will be limited to the second exception since the first deals with "parental authority" which none of the jurisdictions have interpreted to mean the nourishment and medical care of the child. The language of the first exception on its face precludes further discussion that it would be applicable to a woman's negligent prenatal care of the fetus.

It could be argued that if the woman injures the fetus due to the ingestion of drugs, failing to provide proper nourishment, or placing her body in a position to receive an injurious physical blow, such actions fall under the second exception. The Wisconsin court has held that this exception relates directly to the legal duties of parents to provide and protect a child in order to maintain the child's physical and mental health as dictated by statutory requirements. Failure to do so will result in the child being declared a dependent or neglected child with the parents possibly losing custody to the state.[163]

If one assumes the standards which apply to a child born alive also apply to the unborn fetus, the mother's failure to properly provide for the fetus would result in immunity from civil liability. If the Wisconsin court agreed with this analysis, it would be similar to an implied holding of the New York court that the neglect and dependency custodial statutes are a sufficient way to protect a child; if not, the child is removed from the custody of the natural parent.[164] The weakness of this argument is that even if the statutes applied to the unborn child,[165] the probability of state authorities becoming aware

160. Womack v. Buckhorn, 384 Mich. 718, 725, 187 N.W.2d 218, 222 (1971); Smith v. Brennan, 31 N.J. 357, 367, 157 A.2d 497, 504 (1960).

161. Orange v. State Farm Mut. Auto. Ins. Co., 443 S.W.2d 650, 651 (Ky. 1969); Leal v. C.C. Pitts Sand and Gravel Inc., 4199 S.W.2d 820, 821 (Tex. 1967); Kwaterski v. State Farm Mut. Auto Ins. Co., 34 Wis. 2d 14, 22, 148 N.W.2d 107, 111 (1967). *But see* Puhl v. Milwaukee Auto. Ins. Co., 8 Wis. 2d 343, 356-57, 99 N.W.2d 163, 169-71 (1960) (for outright condemnation of the viability rule).

162. *See supra* note 144 and accompanying text.

163. *See supra* note 153 and accompanying text.

164. *See supra* notes 130-131 and accompanying text.

165. *See* WIS. STAT. ANN. § 48.02(2) (West 1979) (defines child as a person who is less that 18 years of age). *See also supra* note 151 and accompanying text.

of an endangered fetus would be remote and the likelihood is far greater that the state will learn of the neglect after the child is born and the child is already deformed.

The critics of the *Goller* approach find it intolerable that a third party would be held liable for such acts, but not a parent.[166] However, it has been advocated that the relationship between a woman and her fetus is simply different from that between the fetus and third parties.[167] The Wisconsin court recognized this fact by acknowledging the state's extraordinary power to define minimum standards of conduct. When presented with the issue, it may determine that a civil remedy for the child is not warranted unless the state legislature decides to act under its police power.

This analysis fails under the Michigan court's approach which replaced the word "ordinary" with "reasonable" in the second exception.[168] In *Grodin v. Grodin,*[169] the Michigan intermediate court agreed with the above argument that the mother's ingestion of tetracycline fell under the second exception relating to parental discretion with respect to a child's needs. They held it was for the jury to determine if this was a "reasonable act" and if not, they would not be prevented by the immunity exception from holding the mother liable.[170]

This interpretation demonstrates the validity of the Minnesota Supreme Court's criticism that the exception to liability is not an exception at all, but rather a standard of conduct which if violated will result in liability, *i.e.*, if it determines that she is not immune, the jury has in fact determined the mother was negligent.

The one assumption made under any of these arguments is that the parent in fact has a legally recognized duty to the child in the first instance. Even though the New Jersey court adopted the *Goller* approach, the decision of its Superior Court injected the *Holodook* analysis that rejection of parental immunity did not create new causes of action.[171] Even if the conduct does not fall within either exception, there still must be a legal duty which has been breached in order to allow the cause of action.

The analysis will be the same as the New York court's, that the neglect and dependency statutes will be construed as the only adequate remedy; or it will be seen as recognizing a legal duty, the breach of which will result in civil liability for compensatory damages. If it can be construed as a litmus test, the court in *Grodin*

166. *See supra* note 149 and accompanying text.
167. Note, *supra* note 27, at 1259.
168. *See supra* note 144 and accompanying text.
169. Grodin v. Grodin, 102 Mich. App. 396, 301 N.W.2d 869 (1980).
170. *Id.* at 401, 301 N.W.2d at 871.
171. *See supra* note 159 and accompanying text.

recognized, without citation to precedent, that a woman's duty to her fetus to prevent injuries caused by her own negligence was the same duty as that of a third person.[172]

Reasonable Parent Standard

In 1971 the California Supreme Court attempted to strike a balance between the *Goller* approach and total abrogation of parental immunity. In the case of *Gibson v. Gibson*,[173] the court abolished parental immunity and set forth a duty defined as the "reasonable parent standard." The explicit standard is as follows: "what would an ordinarily reasonable and prudent parent have done in similar circumstances?"[174]

The court, in attempting to resolve many of the problems which have concerned other state courts, recognized the parent-child relationship is unique in some respects and one cannot blindly apply traditional concepts of negligence.[175] However, it refused to accept the notion that in certain or all areas of child rearing, a parent could act in any manner and then hide behind the defense of parental immunity.[176] Thus, the standard it accepted was the traditional one of reasonableness, but viewed in light of the parental role.[177] The court hoped to eliminate the arbitrary line drawing that constantly confronts courts that have accepted the *Goller* approach[178] of retaining immunity under the ambiguous phrase of "parental authority and discretion."

The Minnesota Supreme Court recently followed the California Supreme Court in adopting this approach.[179] However, the majority of jurisdictions have either rejected or ignored the "reasonable parent" standard even though there has been overwhelming scholarly

172. 102 Mich. App. at 400-01, 301 N.W.2d at 870.
173. 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971).
174. *Id.* at 921, 479 P.2d at 653, 92 Cal. Rptr. at 293.
175. *Id.* at 921, 479 P.2d at 652, 92 Cal. Rptr. at 292.
176. *Id.* at 921, 479 P.2d at 652-53, 92 Cal. Rptr. at 292.
177. *Id.* at 921, 479 P.2d at 653, 92 Cal. Rptr. at 293.
178. *Id.* at 922, 479 P.2d at 653, 92 Cal. Rptr. at 293. *See also* notes 144-171 and accompanying text.
179. *See* Anderson v. Stream, 295 N.W.2d 595, 601 (Minn. 1980). Minnesota Justice Rogosheske dissented and pointed out that Minnesota was the first state to do so since California adopted the theory ten years before. *Id.* at 602 (Rogosheske, J. dissenting). This argument is particularly compelling in that the majority of courts have either reaffirmed the parental immunity doctrine in total, or partially or totally abolished the doctrine, without adopting the *Gibson* approach. *See infra* note 196 and accompanying text.

approval of it.[180] The majority are unwilling to leave the parent subject to liability based on a general standard of conduct.[181] The desire appears to be an adoption of a "go-slow" approach of dismantling parental immunity on a case-by-case basis. These jurisdictions also feel it is impossible for a jury to determine what standard to apply due to the nation's diversity in religious, ethnic and cultural backgrounds.[182]

Justice Rogosheske's dissent in *Anderson v. Stream*[183] clearly enunciated the major criticisms of the nation's jurists on why the "reasonable parent" standard is unacceptable:

> First, the objective standard encourages parents to disparage the favored American principle of freedom of choice in family matters by holding out the possibility of an insurance recovery if a parent is willing to expose his conduct and judgment to public scrutiny. Second, jury verdicts based on a reasonable parent standard in this value-laden area do not inspire public confidence, since they would necessarily substitute parental judgments based upon the individual juror's views of proper or ideal child-rearing practices. The tendency toward arbitrary and intrusive standards of good parenting, which stems from the fact that most jurors have strong views in this area due to their personal experiences as parents and children, cannot be alleviated by precise instructions. The reasonable parent standard thus invites a recovery-oriented parent to gamble that a jury will find him negligent. Moreover, since the jury must consider the family context and the parent is the best, and perhaps only, witness capable of expressing the personal, cultural and socio-economic principles by which he raises his children, the danger of collusion is significant. These are not the type of claims our adversary system of factfinding is equipped to impartially resolve, and the parent's incentive for an opportunity to influence the result is so great as to further undermine the process.[184]

The proponents of the standard believe its main value is its flexibility. It relieves the court of the inflexible *Goller* approach in that a parent no longer has the "right" to neglect or abuse his child. The child is protected and yet the parent has latitude in raising the child if his conduct is reasonable. However, even the proponents acknowledge the validity of the argument that there is no acceptable judicial scrutiny of a "reasonable parent."[185] Therefore, the argument as to the effectiveness of the standard is in reality not a legal analysis, but

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180. *See, e.g.*, Comment, *Parental Immunity: California's Answer*, 8 IDAHO L. REV. 179, 187 (1971); Note, *The Parent-Child Tort Immunity Law in Massachusetts*, 12 NEW ENGL. L. REV. 309, 331 (1976); Note, *supra* note 48, at 679; Comment, *Parent-Child Tort Immunity in Oklahoma: Some Consideration for Abandoning the Total Immunity Shield*, 12 TULSA L. J. 545, 553 (1977); Comment, *supra* note 147, at 808; Comment, *supra* note 61, at 801.

181. *E.g.*, Merrick v. Sutterlin, 93 Wash. 2d 411, 416, 610 P.2d 891, 893 (1980).

182. *E.g.*, Pedigo v. Rowley, 101 Idaho 201, 205, 610 P.2d 560, 563 (1980). Minnesota summarily rejected this contention stating that the legal system places great faith in juries and there is no compelling reason to distrust their effectiveness in the parent-child context.

183. 295 N.W.2d 595 (Minn. 1980).

184. *Id.* at 602.

185. Comment, *supra* note 147, at 809.

a clashing of the Minnesota court majority's optimistic view of the enlightened jury system and Justice Rogosheske's pessimistic opinion of human nature.

California and Minnesota courts allow prenatal injury recovery as against third persons at least from the point of viability.[186] The two states should readily accept a prenatal injury cause of action because it fulfills the intent of the courts to allow a child a remedy for injuries sustained by parental conduct.[187] It would be assumed that the standard should be what an ordinarily reasonable and prudent pregnant woman would have done in similar circumstances.[188]

The merging of the doctrines of parental liability and prenatal injury recovery may force the California and Minnesota courts to extend prenatal recovery at least to the time of conception. By cutting off liability at the time of viability the courts would allow a woman to act with impunity toward the fetus up until that time. California and Minnesota courts adopted the reasonable parent standard for an explicit reason: a parent should be judged in all of her actions toward her child and not escape liability based on parental immunity. Rather, she should avoid liability if her actions were reasonable under the circumstances.[189] It will be difficult for the courts to avoid modifying the prenatal recovery cause of action if they wish to fulfill the main purpose of allowing a parent to be liable to her child for tortious acts.

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186. CAL. CIV. CODE § 29 (West 1982). This code section appears to allow recovery for prenatal injuries from the time of conception if the child is subsequently born alive. But California's Third Appellate District seemed to believe that whether the fetus was viable would be a factor in determining whether the child, born alive, had a cause of action. Scott v. McPheeters, 33 Cal. App. 2d 629, 636, 92 P.2d 678, 681 (1939); Norman v. Murphy, 124 Cal. App. 2d 95, 98, 268 P.2d 178, 180 (1954) (affirms its holding in *Scott* by way of dicta). *See also* Verkennes v. Corniea, 229 Minn. 363, 371, 38 N.W.2d 838, 841 (1949) (allowed wrongful death recovery of viable fetus); Pehrson v. Kistner, 301 Minn. 299, 302, 222 N.W.2d 334, 336 (1974) (allowed wrongful death recovery of a viable fetus).

187. *See supra* notes 175-177 and accompanying text.

188. *See supra* note 174. The main concern of the critics of this standard are arguably not present in this type of action. However, it could be argued that ethnic, cultural, and religious beliefs may affect the type of prenatal care a woman will follow; a jury may have an unrealistic view of how a woman should care for her body during this period of fetal development. In addition, the possible problem of financial inability to obtain proper prenatal care could become an issue.

189. *See supra* notes 175-177 and accompanying text.

Eight states do not recognize the doctrine of parental immunity.[190] Of the eight, only the Vermont Supreme Court has alluded to the possible difficulties of allowing unlimited liability of a parent. It stated at the end of an opinion, almost as an afterthought, "[T]here is a great variation from state to state upon the right of recovery, *as contrasted to the right to sue*, according to the nature of the claim, the agency of the injury or even the presence or absence of insurance. These decisions must wait the development of the facts."[191] The Vermont court apparently acknowledges that the failure to recognize parental immunity does not create legal duties and that the nature and the extent of the parent's liability will have to be developed on a case-by-case basis.

All eight states allow prenatal injury recovery at least from the point of viability of the fetus.[192] Despite the unrestricted holdings of these states regarding parental immunity, it may be foolhardy to surmise that they will allow a cause of action by a child born alive against its mother for prenatal injuries. None of these jurisdictions have been confronted with the explicit issue of what the legal duty of a parent is. They have not been forced to delineate whether the duty of a parent to a child is the same duty owed by the public at large. If there is a recognized duty of a third party to the child, does this same general duty apply to the parent, or will the duty be more or less restrictive? The issue could be restated as whether the classification of "parent" is legally significant in defining the duty.[193]

Additionally, if the act of the parent is peculiar to the parent-child relationship, will the courts maintain there has always been such a

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190. Petersen v. City of Honolulu, 51 Hawaii 484, 487-88, 462 P.2d 1007, 1009 (1970); Rupert v. Stienne, 90 Nev. 397, 404-05, 528 P.2d 1013, 1018 (1974); Briere v. Briere, 107 N.H. 432, 436, 224 A.2d 588, 590 (1966). *See also* Sargent v. Ross, 111 N.H. 388, 396, 308 A.2d 528, 533 (1973) (interprets *Briere* as abolishing parental immunity); Guess v. Gulf Ins. Co., 96 N.M. 27, 31, 627 P.2d 869, 871 (1981); Nuelle v. Wells, 154 N.W.2d 364, 366-67 (N.D. 1967); Falco v. Pados, 444 Pa. 372, 382-83, 282 A.2d 351, 357 (1971); Elam v. Elam, 275 S.C. 132, 137, 268 S.E.2d 109, 112 (1980); Wood v. Wood, 135 Vt. 119, 121-22, 370 A.2d 191, 193 (1977).

191. Wood v. Wood, 135 Vt. 119, 122, 370 A.2d 191, 193 (1977) (emphasis added).

192. North Dakota and Hawaii have not considered the issue. *See supra* note 45 and accompanying text. Weaks v. Mounter, 88 Nev. 118, 123-24, 493 P.2d 1307, 1309 (1972) (dicta); White v. Yup, 85 Nev. 527, 534, 458 P.2d 617, 621 (1969) (allowed wrongful death action of a viable fetus); Bennett v. Hymers, 101 N.H. 483, 486, 147 A.2d 108, 110 (1958); Salazar v. St. Vincent Hosp., 95 N.M. 150, 155, 619 P.2d 826, 828-29 (1980); Sinkler v. Kneale, 401 Pa. 267, 273-74, 164 A.2d 93, 96 (1960); Fowler v. Woodward, 244 S.C. 608, 612-13, 138 S.E.2d 42, 43-44 (1964); Vaillancourt v. Medical Center Hosp. of Vt., 139 Vt. 138, 141, 425 A.2d 92, 95 (1980).

193. Hurst v. Titus, 77 A.D.2d 157, 159-60, 432 N.Y.S.2d 938, 940 (1980) (mother held liable for starting a fire on the stove which injured the minor child; the duty was defined on the basis that the mother breached a duty owed to the world at large).

duty, or will they possibly acknowledge that abolishing parental immunity did not create new duties? If they recognize a duty, there is no guarantee that some courts will opt for a "reasonable parent" standard. Some may refuse to recognize a duty for certain parental duties covered by child abuse, neglect, and dependency statutes. The essence of this analysis is that in individual cases, the courts may revert to a case-by-case approach, a *Goller* exception rationale, or even a "reasonable parent" standard when confronted by specific factual situations which arise out of the unique relationship of parent and child.

THE DUTY OF A WOMAN TO THE EMBRYO-FETUS

Even if the courts are willing to recognize the standing of a fetus to sue and to abolish the parental immunity doctrine, liability for the mother of an injured fetus is not automatic. The courts must first recognize a duty on the part of a woman to her fetus that can be equitably and uniformly applied.

Recognition of the Duty

The Michigan Appellate Court in *Grodin* recognized a duty on the part of a woman to her fetus from the time of conception. She will be held to a standard of conduct similar to that of a third party requiring her to refrain from negligent conduct that results in injuries to a fetus who is subsequently born alive. A breach of that duty will result in liability to the child.[194] The question remains whether the other state court jurisdictions will also recognize such a duty. This article has established that thirty jurisdictions would be receptive to the recognition of a duty owed by a woman to her embryo-fetus.[195]

The majority of jurisdictions should recognize such a duty to remain consistent with their policy justifications as set forth in their decisions abolishing parental immunity and recognizing the right of a child born alive to recover for prenatal injuries. Allowing children a cause of action against their parents is no longer seen in and of itself as threatening the family unit.[196] The injury sustained and the *lack* of compensation is viewed as more of a threat to the integrity of the family unit.[197] In the prenatal recovery cases, difficulty of proof

194. 102 Mich. App. at 400, 301 N.W.2d at 870-71.
195. *See supra* notes 40-45 and accompanying text.
196. *See supra* notes 77, 119, 135, 170, 184-185.
197. *See supra* notes 86-87, 119-121, 175-176, 190-191.

has been rejected as a valid basis for denying the cause of action.[198] It is almost universally accepted that a child forced to live with deformities for his entire life is entitled to compensation whether the injuries occurred prior to or after birth.

The major reservation of all courts that have opted for less than complete abrogation of immunity has been the concern of "invading" the family unit by dictating to parents how to raise their children.[199] The issue of prenatal injury to a fetus, however, is separate and distinct, and totally removed from the issue of parent-child supervision. The only effect a suit of this kind has on the parent-child relationship is due to the time and trouble of pursuing the suit itself. As stated above, the courts no longer recognize this as legally significant. In fact, the suit fulfills the goal of compensating the child born alive for the violation of his right to be free of negligently inflicted prenatal injuries while at the same time strengthening the family unit by freeing it of the continuing obligations of supporting the disabled child.

The replenishment of financial resources will only be true if insurance is available, but a suit of this type generally will not be commenced unless such financial resources are available. Thus, it would be totally inconsistent with the modern trend of cases for the courts to refuse to recognize this cause of action. Any argument on a social policy level in opposition to its recognition has already been advanced and rejected by the courts. However, the intellectual discussion of social policy goals cannot always be transferred into a workable legal concept that can be applied by the courts in an equitable and consistent manner.

Definition of the Duty: The Possibility of Prenatal Injury by the Mother

Before discussing the parameters of the duty, it is necessary to examine the possible injuries that might occur to the developing fetus due to the negligence of the mother. In defining the boundaries of the duty, it will be necessary to keep in mind the dangers against which that duty is designed to guard. Therefore, one must turn to the current medical knowledge regarding the woman's care of her body and its effect on the development of the fetus.

It is now known that congenital defects can occur not only from heredity, but from certain environmental factors called teratogens which are any substance that causes developmental malfunctions or monstrosities. Therefore, a child can be deformed as the sole result of genetic inheritance or from teratogenic agents which are intro-

198. *See supra* note 35 and accompanying text.
199. *See supra* notes 54, 75-77, 81-82, 108-111, 125-131, 159, 181, 191.

duced into the woman's body during fetal development.[200]

The period of fetal development is commonly referred to by the medical community as the gestation period.[201] During this period of gestation, the child undergoes a series of quite uniform and accurately predictable changes. It is normally broken down into three stages: the ovum, the embryo, and the fetus.[202] In a layperson's description of the developmental process, the first third of the gestation development is devoted to rapid development of all major organs and systems in the body. The second stage concentrates on perfecting the organ system and improving their intercommunication—the ability to work together as a functioning whole. The third stage is mainly concerned with the overall growth of the fetus and organs.[203]

During the gestation period, the fetus can be injured by a physical force inflicted upon a woman or from exposure of the woman to an external teratogenic agent which enters her body and is transmitted to the fetus through the placenta.[204] Even though the fetus has a distinct physiological individuality, the way in which it responds to the mother's anatomic and metabolic environment is of critical importance at every stage of development in determining if it will be born a healthy, normal child or with congenital deformities.[205]

The greatest danger of inducing malformations of the fetus is during the first trimester or third of the gestation period.[206] During those first few weeks of embryonic development, external influences such as physical force applied to the embryo or teratogenic agents introduced into the woman's body may cause congenital defects in the embryo when those same influences may not injure a fully developed fetus.[207] However, possible injury to the fetus is not limited to the first trimester and external forces or teratogenic agents may affect the fetus throughout the gestation period resulting in brain damage, behavioral disturbances, growth retardation, and gross birth defects.[208]

A woman must be cognizant of the fact that the application of external force or trauma may ultimately injure the fetus. Externally

200. Note, *The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries*, 110 U. PA. L. REV. 554, 562 (1962).
201. 5B LAWYERS' MEDICAL CYCLOPEDIA § 37.2b, at 10.
202. *Id.* at 10-11.
203. *Id.* at § 37A.2, at 159.
204. Note, *supra* note 200, at 555.
205. Ament, *supra* note 1, at 25.
206. E. SANDBERG, SYNOPSIS OF OBSTETRICS 124 (10th ed. 1978).
207. Ament, *supra* note 1, at 25.
208. *Id.*

induced trauma upon the woman can result in inadequate fetal oxygenation or reduce maternal cardiac output so as to supply insufficient nourishment to the placenta for proper fetal development.[209] Additionally, even though the fetus is well cushioned in the womb, direct physical injury to the fetus can occur with severe trauma; a woman should avoid dangerous activities with a high risk of severe bodily harm.[210] Current medical research firmly establishes that certain choices a woman makes as to the risk of harm to her own body may in fact risk injuring the fetus.

The threat of direct physical harm to a fetus appears to be the least of a woman's problem in protecting the fetus. The voluntary introduction by the woman of teratogenic agents into her body during the gestation period constitutes one of the greatest threats. In particular, the use of certain drugs, prescription, non-prescription, or illegal, poses one of the greatest threats. In fact, the recommended standard medical practice advises that no drugs should be administered during pregnancy unless the benefit to the woman clearly outweighs the possible detrimental effect on the fetus. It has been unequivocably established that many drugs cross the placenta and affect the fetus.[211]

The vulnerability to the drugs by the developing embryo or fetus has been demonstrated repeatedly. Sedatives, tranquilizers, morphine, heroin, and methadone may all lead to physical or mental defects in a child.[212] Congenital defects of the fetus due to the woman's drug intake will occur most likely in the first trimester, and there is the possibility of internal organ damage from the fourth month on.[213] Medical research has even found that common aspirin, which was previously believed to be harmless, adversely affects the fetus.[214]

Another common "drug" which may have devastating effect is alcohol. Excessive alcohol intake by the woman during the gestation period can produce abnormal changes in the fetus. Chronic alcoholism may lead to fetal maldevelopment which is commonly referred to as fetal alcohol syndrome.[215] This heavy intake of alcohol may result in physical growth and mental retardation, particularly to the crainofacial area, the child's limbs, and cardiovascular system.[216] One study has even suggested there may be adverse effects to the

209. J. PRITCHARD & P. MACDONALD, *supra* note 2, at 177-83.
210. *Id.* at 318.
211. MacDonald, *Pregnancy*, in ATTORNEYS' TEXTBOOK OF MEDICINE § 305.11 (R. Gray, ed., 3rd ed. 1980).
212. E. SANDBERG, *supra* note 206, at 117-18.
213. C. BARNES, MEDICAL DISORDERS IN OBSTETRIC PRACTICE 484 (4th ed. 1974).
214. MacDonald, *supra* note 211, § 305.11.
215. J. PRITCHARD & P. MACDONALD, *supra* note 2, at 320.
216. E. SANDBERG, *supra* note 206, at 118.

fetus if the woman had been an alcoholic, but had stopped drinking during pregnancy.[217]

The pregnant woman who smokes tobacco may also be harming the fetus. It is known that women who smoke tend to have children with a lower birth weight.[218] It appears that smoking impairs fetal growth, and the more cigarettes that are smoked during the gestation period, the greater the impairment of fetal growth.[219] Further research in the area may lead to discoveries of other adverse effects on the fetus, but a woman is now discouraged from smoking during the pregnancy as it impairs the fetus' chance for a successful birth, and can lead to serious complications or injuries to the child which may be fatal during delivery.[220]

The effects of sexually transmitted diseases can be harmful to the fetus. If the woman contracted syphilis before, at the time of, or after conception, it may cause developmental problems in the fetus.[221] Herpes Genitalis is especially devastating and it is advised that even after cure a woman should use contraceptives with long term follow-up care before attempting to conceive a child due to the high probability of adverse effects upon fetal development.[222]

A number of common diseases contracted by a woman prior to, at the time of, or after conception may cause congenital defects. Rubella, or German measles, has been shown to cause congenital abnormalities if the disease occurs in the first trimester. It is highly recommended that a prospective mother be vaccinated prior to conception to prevent the likelihood of contracting certain diseases.[223]

A woman may be endangering the embryo or fetus even when she is attempting to prevent conception. Failure in the diagnosis of pregnancy frequently occurs in the early stages after conception.[224] If a woman is using oral contraceptives during early pregnancy, there is a possibility that congenital defects in the fetus may occur. Even though the cause and effect has not been firmly established, the medical community strongly recommends that a woman stop using oral contraceptives until it can be established that she is not pregnant.[225]

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217. J. PRITCHARD & P. MACDONALD, *supra* note 2, at 321.
218. R. BENSON, HANDBOOK OF OBSTETRICS AND GYNECOLOGY 126 (7th ed. 1980).
219. J. PRITCHARD & P. MACDONALD, *supra* note 2, at 942.
220. MacDonald, *supra* note 211, § 305.12.
221. R. BENSON, *supra* note 218, at 516-17.
222. *Id.* at 529-30.
223. *Id.* at 363.
224. J. PRITCHARD & P. MACDONALD, *supra* note 2, at 261.
225. *Id.* at 1019.

Finally, a woman may expose the fetus to possible injury when working in the home or in the workplace. It has been verified that cooking gas in excessive amounts, lead, mercury, arsenic, copper, phosphorous, bromill, and iodide are all capable of damaging the fetus if these substances enter a woman's body.[226] If a woman is exposed to these substances on a regular basis either at home or at work, she is possibly endangering normal fetal development which may result in congenital deformities.

In reviewing the current medical literature, it is undisputed that a woman may place her child, or more appropriately, the embryo or fetus, in a position of peril which may result in physical or mental harm. The potential for injury is not limited to the time of conception, but may occur prior to conception and throughout her pregnancy. More importantly, or more legally significant, is that the majority if not all of these risks can be eliminated if the woman is aware of the dangers and takes the necessary steps to prevent fetal exposure. In order to do this, the woman can take affirmative action to prevent risks, such as being vaccinated, but she may also have to severely alter her occupational or personal life even before conception to eliminate the risks enumerated above. Even if the risk of exposure is not present until after conception, the difficulty of detecting early pregnancy may force a woman to alter her lifestyle for a significant period of time before conception.

Thus, medical experts will be able to establish in many cases that the woman's actions resulted in harm to the fetus. The scope of a woman's duty not to harm her fetus is explored in the following section which contains a discussion of an equitable duty rule.

The Parameters of the Duty

Even though public policy favors recognizing a woman's duty to protect her embryo-fetus, *from the point of conception,*[227] the ability of the courts to define the duty may prohibit its recognition or severely limit the scope of the duty to fetuses that are in a viable state. Medical science has established the ovum-embryo-fetus as a separate, independent organism from that of the mother, but the ability to determine *when* conception occurs and *when* the fetus is viable is not so easily determined on a consistent basis.[228] These problems do in fact go to the issues of proof, but more importantly they are an integral part of the determination of the *commencement* of the duty.

A legal duty does not exist merely because a court extends it to

226. M. MONTAGU, PRENATAL INFLUENCES 357-58 (1962).

227. *See supra* notes 38-39 and accompanying text.

228. *See supra* note 37 and accompanying text; *see infra* notes 242-245 and accompanying text.

the particular situation in order to arrive at the result it seeks. There must be some relationship between the plaintiff and the defendant from which the duty can be said to arise. The plaintiff must have some right which the defendant has some obligation to protect. This right defines the limits of the defendant's duty.[229] The right recognized in all prenatal cases has been the right to be born free of mental and physical defects. The judicial concern has focused on the "relationship." The issue is whether a tortfeasor can have a legally recognized "relationship" with something which is conceived but not yet born alive.

As the courts have indicated, tort law traditionally required the imposition of a duty only when the tortfeasor acts toward a determinate person or human being.[230] The courts first rejected a fetus as a determinate person or as having legal personality even if born alive.[231] Later, the majority recognized the fictional relationship between the actor and the viable fetus,[232] which made sense when the fetus could live outside the womb even though it did not. The extension of liability to the previable fetus was more a product of difficulty of justification and application than a strict adherence to the determination of a legal relationship with a determinate person. No one would argue that a previable fetus is capable of independently living outside the womb, for it is the antithesis of the definition of previability.

A pragmatic analysis seems to be that the courts have determined that *once the child is born alive*, it is a specific human being deserving of compensation regardless of whether it was a separate entity at the time the injury was inflicted.[233] The legal fiction of the existence of a relationship between the tortfeasor and the fictional plaintiff is apparently acceptable to the courts after conception because something exists regardless of whether one agrees it is a human being or not.

The court as a matter of law will determine when the fetus has suffered an invasion of its bodily integrity and is entitled to legal protection.[234] In the recognition of this duty, a court must set forth, according to general tort principles, what the standard of conduct is for the particular duty. While the duty may vary in each common

229. Pace, *supra* note 21, at 147.
230. Comment, *supra* note 26, at 218.
231. *See supra* notes 19-22 and accompanying text.
232. *See supra* notes 34-36 and accompanying text.
233. W. PROSSER, *supra* note 24, § 53, at 326-27.
234. *Id.*, § 37 at 206 (existence of a duty in a negligence case is a question of law).

law jurisdiction, the general standard of conduct would be what a reasonable and prudent person would do under the same or similar circumstances.[235] An additional related requirement of a duty is that it is reasonably foreseeable that the acts of the tortfeasor will injure the plaintiff. The consequences of one's acts could go on for eternity and the controversy as to how far the common law will allow liability to be imposed[236] is centered on the argument of what is reasonably foreseeable.[237]

This argument has raged under the labels of "duty" and "proximate cause" by courts and legal commentators, but as William Prosser has stated, the issues are the same:

> [I]t must be repeated that the question is in no way one of causation and never arises until causation has been established. It is rather one of the fundamental policies of the law, as to whether the defendant's responsibility should extend to such results.[238]

Therefore, the issue that will confront the courts is to determine when, once the medical community can find the causal relationship between the injuries of the child and the acts of a woman after conception and during prenatal development, a woman's responsibility should extend to such a result as a matter of public policy.

The crux of this decision will be whether the courts will hold as a matter of public policy that a woman should be held to a standard of conduct *toward her own body* long before the actual duty arises due to her continuing ability to conceive. Because of the fictional relationship that will be imposed between a woman and a "being" inside of her own body, the problem of knowledge of the existence of that being will be paramount.

The standard of conduct which a community demands must be an external and objective one.[239] One of the most difficult questions is what the actor may be required to know.[240] The minimum standard of knowledge is based upon what is common knowledge in the community.[241] A standard which assumes a woman knows when she has conceived may result in the imposition of a duty on a woman to use

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235. *Id.*

236. The courts have universally recognized that in order to establish that a person is liable or negligent there must be:

(1) a duty recognized to conform to a certain standard of conduct,

(2) a breach of duty which is the failure to conform to the standard,

(3) a reasonably close causal connection between the conduct and the resulting injury, and

(4) actual loss or damage resulting to interests of another.

Id. § 30.

237. *Id.*, § 53, at 326-27.

238. *Id.*, § 43, at 250.

239. *Id.*, § 32, at 150.

240. *Id.* at 157.

241. *Id.* at 159-60.

care in the treatment of her body long before conception actually occurs.

The early stages of pregnancy are difficult to diagnose with any degree of certainty. There are only subtle changes during the first month of pregnancy.[242] Most frequently, mistakes in diagnosis are made in the first several weeks of pregnancy.[243] Within two weeks after the first missed menstrual period, tests can be 95% to 98% accurate in detecting pregnancy.[244] However, there are three positive signs of pregnancy which are: (1) fetal heart action separate and distinct from the mother's own heart action; (2) perception of active fetal movement; and (3) recognition of the fetus radiologically. These tests are only valid at nineteen weeks, twenty weeks, and sixteen weeks after conception respectively.[245] It is apparent then, that a woman cannot be reliably informed that she is in fact pregnant until weeks after conception.

Additionally, there are factors which commonly prevent a woman from going to a physician to determine if she is pregnant. It has been well documented that fear and apprehension are commonly associated with a woman's first impression that she is pregnant even if she wants the child. This includes the fear of the unknown, fear of the pain during labor and delivery, fear of death, fear of economic consequences of pregnancy and motherhood, resentment of the imminent loss of personal independence and attractiveness, resentment of the child as a potential competitor for the husband's love and affection, and uncertainty about the parental role.[246]

At the same time one considers these factors, the medical community recommends that well before pregnancy, comprehensive health care of the mother should be provided to benefit not only her, but to benefit the health of the child-to-be as well.[247] Such a program of care should start as soon as a pregnancy is anticipated.[248] Dangerous activities that could risk bodily harm should be prohibited and the introduction of high risk external substances like alcohol and other drugs into the woman's body should cease.[249] As established earlier,

242. 5B LAWYERS' MEDICAL CYCLOPEDIA, *supra* note 24, § 37.3a, at 13.
243. J. PRITCHARD & P. MACDONALD, *supra* note 2, at 261-62.
244. 5B LAWYERS' MEDICAL CYCLOPEDIA, *supra* note 24, § 37.3a, at 13.
245. J. PRITCHARD & P. MACDONALD, *supra* note 2, at 261-62.
246. R. BENSON, *supra* note 218, at 447-48.
247. J. PRITCHARD & P. MACDONALD, *supra* note 2, at 304.
248. *Id.* at 305.
249. *Id.* at 318-21.

the fetus is most susceptible to injury during the first trimester.[250]

All of these factors can cause a great degree of uncertainty in determining *when* the mother has a duty to refrain from acts which may ultimately injure the fetus. It can be argued that this is merely a proof question: how much proof is necessary for the jury to determine when in fact the mother knew or should have known that she was pregnant? This argument may be valid for a planned pregnancy where the mother has on-going prenatal or even preconception medical care and where she is informed by her attending physicians of the inherent risks of exposing her body to the possibility of physical harm or drug use which will ultimately harm the fetus. However, even in the situation of a "planned" pregnancy the problems are obvious.

Will the courts hold a mother to a standard of conduct to refrain from using her own body as she pleases if she is attempting to become pregnant and knows of the inherent dangers, but she and her mate are unsuccessful for weeks, months, or even years? What is common knowledge to the community, or to the community of prospective mothers, on how a woman can use or abuse her body during the time she is trying to get pregnant and cannot confirm it? Is it customary for all prospective mothers to seek preconception medical care and advice?

There is a general rule in tort law that engaging in certain activities, or standing in certain types of relationships to others, will obligate the actor to rid herself of ignorance. In other words, liability may be imposed on a woman for remaining ignorant by failing to make intelligent inquiry as to what she does not know.[251] If a couple intends to have a child, do we require the woman to seek out information on what she should or should not do to her body during the time she may be pregnant and does not know it?

All of these questions pertain to the intended or planned pregnancy. The issue becomes further complicated by the *un*intended pregnancy. If contraceptive devices fail or if the woman herself, or in agreement with her partner, prefers for neither of them to use contraceptive devices, should the woman be held to the same standard of conduct as a woman who intends to use abortion as a contraceptive device, but then determines she wants to have the child? At what point does she have a duty not to injure the fetus?

The ramifications of exactly what point in time the woman will be subject to a duty to the embryo-fetus will have a dramatic impact on the ability of a woman to use her body as she pleases. If she is subject to liability from the point when she intends to have the child or

250. *See supra* notes 26-28 and accompanying text.
251. W. PROSSER, *supra* note 24, § 32, at 160.

from the point when she fails to prevent conception but with no particular intent to conceive, a woman will be subject to stringent standards of conduct not otherwise required of the public in general. This argument would be moot if the woman knew or could have known exactly when conception occurred, but due to the normal time lag before she does know, these issues are particularly relevant. Whether the courts, as a matter of public policy, want to subject a woman to a standard of conduct for possibly long periods of time because she *might* be pregnant and *might* injure the fetus is controversial.

This controversy is imminent because the *particular* standard of conduct in a single case will be based on what conduct of the woman was reasonable under the particular circumstances *vis-a-vis* the embryo-fetus. This question in our common law courts is to be determined in all doubtful cases by the jury. The public insists that its conduct be judged in part by the person on the street rather than by lawyers or judges.[252] Any competent trial lawyer will argue to a jury that if a woman is not using contraception during intercourse, she knew or should have known that she could conceive. As a matter of public policy, the courts must decide if this question should be left to the jury for a case-by-case determination.

One may argue that public policy demands that a woman be subjected to this standard if she chooses not to use some form of contraception. It is logical to impose liability when the mother acting reasonably knew or should have known she was pregnant. It is difficult to know when conception occurs, but it does not seem unreasonable for a woman to act in such a way that will protect a fetus if she is capable of conception. Also, if the gravity of harm to the fetus is greatest in the first trimester, the embryo-fetus' rights are being severely compromised if the woman can act with impunity until she actually knows she is pregnant.

Therefore, the courts which protect the fetus from the point of conception have a workable standard by imposing a reasonable standard of conduct on the woman for the benefit of the fetus. However, the multiple problems of (1) the medical uncertainty of diagnosis of conception in the first trimester; (2) when a woman should reasonably know she might be pregnant and seek medical advice with the attendant psychological factors mitigating against early diagnosis; and (3) whether the standard is different for women intending to

252. *Id.*, § 37, at 207.

become pregnant from women merely capable of becoming pregnant, may cause the courts to accept the time of actual knowledge of pregnancy to be the point when they impose a legal duty of care.

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. Thus, the theoretically simple standard of "knew or should have known" becomes in reality very complex, which if left to a jury on a case-by-case basis, could result in extremely disparate determinations of when in fact the legal duty of care attached to the woman. The critical importance of when the duty attaches cannot be cloaked in the issue of difficulty of proof in individual cases, but is an issue of law in applying a standard to a class of individuals in a consistent, reasonable manner.

If one is dealing with a jurisdiction where prenatal recovery is only allowed from the point of viability, the problem of knowledge of pregnancy is probably not present except in a minority of cases. The major problem will be one of public policy of continuing to allow a woman to act with impunity to the fetus for a certain period of its growth, and then arbitrarily imposing a strict standard of conduct *after* the period the fetus was most susceptible to injury. Along with the inherent problems due to the nebulous concept of viability,[253] the courts adhering to the viability standard may be quickly forced to reject it with the option of confronting the multiple problems of applying a point-of-conception standard.

The issue becomes further complicated in those states allowing recovery for prenatal injuries caused by preconception acts. One commentator has set forth the scenario of a thirteen-year-old child's use of illegal drugs which ultimately cause defective internal organs in a child born seven years later.[254] The issue is again one of which standard of knowledge will be thrust upon the prospective mother. This ultimately dictates a standard of conduct as to the use of her body prior to the conception of the child. In this situation, the tension between a woman's freedom of bodily integrity and a fetus' right to be well-born becomes immense for the prospective mother in making decisions at a time when she most likely has not even considered whether or not to have a child. This could cause a woman to be subject to a standard of conduct for her entire lifetime prior to the conception of her child which could result in legal liability.

Not even considering what knowledge a woman had or should

253. *See supra* notes 36-37 and accompanying text.

254. Note, *Preconception Tort—The Need for a Limitation*, 44 MO. L. REV. 143, 149 (1979).

have had, the issue of foreseeability is paramount. From common experience, it can probably be assumed that all women desire to have a child at some point in their lives; if not, they at least desire the freedom to *choose* whether or not to conceive. The mere desire to have a child may mean a woman should reasonably foresee that how she treats her body throughout her lifetime could ultimately injure her child. The logic of this argument may be consistent with the protection of the child to be well-born, but borders on the nonsensical in reality. An alternative may be the imposition of a duty to determine at the time one intends to become pregnant whether any prior acts may now result in exposing the fetus to injury. Again, the question arises as to whether such a duty can be imposed on a woman who merely fails to prevent conception and after becoming pregnant decides to allow the pregnancy to continue.

The ultimate issue in determining the definition or scope of the duty is determining matters of public policy in light of a woman's constitutional right to abort a fetus. If a mother has injured a fetus which is known to definitely exist, and if she is still allowed to abort, the state may be encouraging the termination of prospective life. If a woman desires to take the chance that, due to her acts before or after conception, she may give birth to a deformed child, should the state encourage her to accept that burden, or should it add a factor mitigating against it by imposing the possibility of a lawsuit by her child after birth?

A credible criticism of these concerns would be that since a suit would probably never occur without insurance being available, it is not realistic to assume a woman would ever consider the question. Yet, it cannot be readily assumed that the public policy determinations of a court will be realized; a court may be concerned merely with appearing to condone or encourage a certain type of conduct. The ultimate question appears to be whether the state should have the right to impose liability upon a woman if she knowingly desires to take the chance of having a defective child knowing she will love, care for, and nurture that child to the same degree if not more than if it were healthy.

These problems are most aptly summed up by William Prosser in *The Law of Torts*:

> It is fundamental that the standard of conduct which is the basis of the law of negligence is determined by balancing the risk in the light of the social value of the interest threatened, and the probability and extent of the harm, against the value of the interest which the actor is seeking to protect,

and the expedience of the course pursued.[255]

All of these considerations are applicable to the determination of whether to impose a duty upon a woman for the health and well-being of her child.[256] The issue that must be addressed is whether the child's "right" to be well-born is important enough to severely compromise a woman's right to use her body as she pleases.

CONCLUSION

The Michigan appellate court in *Grodin v. Grodin*[257] recognized that by allowing prenatal injury recovery and by abolishing parental immunity, a child born alive would be able to recover against its mother for prenatal injuries caused by her acts. However, the recognition of this duty by the state courts will have tremendous implications for the women of this country and how they conduct their everyday lives.

255. W. PROSSER, *supra* note 24, § 32, at 149.

256. A review of the United States Supreme Court decisions relating to right of privacy does not help clarify whether recognizing a cause of action between mother and child has constitutional implications. It is suggested that if there is a constitutional issue, it depends upon the point in the gestation process that liability attaches to the woman for her negligent acts toward the fetus. This issue is better left for further analysis if and when another jurisdiction follows *Grodin*.

257. 102 Mich. App. 396, 301 N.W.2d 869 (1980).