

Birth Control and the Liability of Physicians and Pharmacists

I. INTRODUCTION

Traditionally it was thought "repugnant to social ethics with respect to the family establishment" for the parents of an unwanted child to be able to sue a third person whose neglect contributed to the mishap.¹ During the last five years, appellate courts in an increasing number of jurisdictions have found that when a woman is exposed to the risks of pregnancy because of a physician's or pharmacist's negligence in providing contraceptive procedures or medication, that person and her family may have a cause of action for damages against the negligent party.² The most common examples include a lack of due care by a surgeon in the performance of a sterilization operation, and a pharmacist filling a prescription for birth control pills with another pharmaceutical. This article will discuss the theories upon which the causes of action are founded, the policy considerations that arise from the situations of various types of potential plaintiffs, and the extent of damages recoverable. Among the popular issues in this evolving area are the asserted immoral conduct of complaining parties and the imposition of liability for the entire expense of raising a child.

II. THE THEORIES UPON WHICH THE CAUSES OF ACTION ARE FOUNDED

A. THE DEVELOPMENT OF BIRTH CONTROL RELATED CAUSES OF ACTION

Until the late 1960's the controversial nature of birth control and traditional notions of parental responsibility kept courts from recognizing that any individual rights accompany the use of birth control aids. The morality of birth control has been the center of contro-

¹Note, *The Birth of A Child Following an Ineffective Sterilization Operation as Legal Damage*, 9 UTAH L. REV. 808, 815 (1965).

²*Custudio v. Bauer*, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967); *Coleman v. Garrison*, 281 A. 2d 616 (Del. Super, 1971); *Troppi v. Scarf*, 31 Mich. App. 240, 187 N.W. 2d 511 (1971); *Doer v. Villate*, 74 Ill. App. 2d 332, 220 N.E. 2d 767 (1966); *Bishop v. Byrne*, 265 F. Supp. 460 (S.D. W. Va. 1967); *Jackson v. Anderson*, 230 So. 2d 503 (Fla. App. 1970).

versy, especially in religious circles.³ Anglo-American jurisprudence traditionally has held those who engage in sexual activities accountable for the results, without redress against third parties.⁴

In 1965 the United States Supreme Court held in *Griswold v. Connecticut*⁵ that a state's prohibition of the use of contraceptives or advice as to their use interfered with "a right of privacy older than the Bill of Rights."⁶ After that landmark decision, courts began to hold that this right of privacy guarantees private affirmative remedies as well as protection from State regulation.⁷

Although a California Court of Appeals noted in 1967 that since *Griswold* ". . . the giving of information, instruction and medical advice to married persons as to the means of preventing conception is now clothed in a cloak of constitutional protection,"⁸ courts in other jurisdictions had been denying relief to persons victimized by birth control negligently prescribed or administered.⁹ *Custudio v. Bauer*¹⁰ recognized a cause of action for the injury of pregnancy and childbirth resulting from a negligently performed sterilization opera-

³Dombroff and Lifshitz, *Overpopulation: No Strength in Numbers*, 6 FAMILY L. Q. 93 (1972).

⁴"But it is a rule, founded in decency, morality, and policy, that [the parents] shall not be permitted to say after marriage, that they had no connection, and therefore that the offspring is spurious . . ." Goodright v. Moss, 2 Cowp. 591, 594, 98 Eng. Rep. 1257, 1258 (1777).

⁵381 U.S. 479 (1965)

⁶ Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

We deal with a right of privacy older than the Bill of Rights — older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions. *Id.* at 485.

The Court noted that the zone of privacy is found within the penumbras of several constitutional rights. For a symposium discussion of *Griswold*, see 64 MICH. L. REV. 197 (1965). For a general discussion of the privacy issue, see WESTEN, PRIVACY AND FREEDOM (1967).

⁷See *supra* note 2.

⁸*Custudio v. Bauer*, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).

⁹*Christensen v. Thornby*, 192 Minn. 123, 255 N.W. 620 (1934); *Milde v. Leigh*, 75 N.D. 418, 28 N.W. 2d 530 (1947) (recovery barred by the statute of limitations); *Bathke v. Rahn*, 46 Cal. App. 2d 694, 116 P.2d 640 (1941) (recovery barred by statute of limitations); *Shaheen v. Knight*, 11 Pa. D. & C.2d 41, 6 Lyc. 19 (C.P. Lycoming County 1957); *Zepeda v. Zepeda*, 41 Ill. App.2d 240, 190 N.E.2d 849 (1963) *cert. denied*, 379 U.S. 945 (1964); *Ball v. Mudge*, 64 Wash. 2d 247, 391 P.2d 201 (1964); *Williams v. State*, 46 Misc. 2d 824, 260 N.Y.S. 2d 953 (Ct. Cl. 1965) (allowing recovery), *rev'd* 25 App. Div. 2d 906, 269 N.Y.S. 2d 786, *reversal aff'd*, 18 N.Y. 2d 481, 223 N.E. 2d 343, 276 N.Y.S. 2d 885 (1966).

¹⁰251 Cal. App. 2d at 318, 59 Cal. Rptr. at 471.

tion.¹¹ The theories of recovery that the court held sufficient against the demurrer were medical negligence (malpractice), negligent and intentional misrepresentations, and failure to effect contracted for and warranted performance by the surgeon.¹²

The *Custudio* case was the first reported decision to recognize a right to compensation for any injury or inconvenience as a result of negligent birth control. Although the trend of decisions is to follow suit,¹³ and the conclusions of commentators are nearly universally in applause,¹⁴ the dimensions of the cause of action remain undefined. The pregnancy at issue in *Custudio* was the plaintiff-couple's tenth child. In the other major cases allowing recovery, the situations were similar. In *Coleman v. Garrison*,¹⁵ a Delaware court held that an action would lie in tort against a physician whose negligent performance of a sterilization operation resulted in the couple's sixth child.

¹¹The California Supreme Court, in the 1969 abortion decision of *People v. Belous*, 71 Cal. 2d 954, 80 Cal. Rptr. 354, 458 P.2d 194, cited *Custudio* with approval and noted "[t]he fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgment of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex." 71 Cal. 2d at 963, 80 Cal. Rptr. at 359, 458 P.2d at 199.

¹²251 Cal. App.2d at 318, 59 Cal. Rptr. at 471.

¹³See *supra* note 2.

¹⁴Significant Development, *Damages — Question of Harm Resulting from a Druggist's Dispensing Tranquilizers Instead of the Prescribed Birth Control Pills Held to Be an Issue for the Jury*, 52 BOSTON U. L. REV. 189 (1972); Note, *Misfeasance in the Pharmacy, A Bundle of "Fun, Joy and Affection?"* 8 CAL. WESTERN L. REV. 341 (1972); Recent Decision, *Parents Allowed Recovery of Expenses in Having and Rearing an Unwanted Child Where Pharmacist Negligently Dispensed Birth Control Pills*, 3 CUMBERLAND-SAMFORD L. REV. 220 (1972); Recent Cases, *Torts — Cause of Action for Birth of Unwanted Child Due to Negligent Dispensing of Oral Contraceptives*, 76 DICKINSON L. REV. 402 (1972); Note, *Negligence — Damages — Birth of Healthy But Unplanned Child Due to Pharmacist's Negligence Held a Compensable Injury*, 3 SETON HALL L. REV. 492 (1972); Note, *Troppi v. Scarf: Recovery of Damages for Breach of Duty Leading to an Unwanted Child*, 17 S. DAKOTA L. REV. 516 (1972); Note, *Damages — Negligently Filled Prescription for Birth Control Pills Results in Recovery for Birth of Normal Child*, 40 U.M.K.C. L. REV. 264 (1972); Case Noted, *Liability of a Pharmacist for Negligently Dispensing Oral Contraceptives*, 26 U. MIAMI L. REV. 456 (1972); Note, *Redressing a Blessing: The Question of Damages for Negligently Performed Sterilization Operations*, 33 U. PITT. L. REV. 886 (1972); Note, *Torts — Unplanned Parenthood and the Benefit Rule*, 8 WAKE FOREST L. REV. 159 (1972); Comment, *Torts: Recovery for Wrongful Life*, 11 WASHBURN L. J. 286 (1972); Note, *Torts — Contraception — Determination of Damages for the Negligent Dispensing of an Oral Contraceptive Resulting in the Birth of an Unplanned Child*, 18 WAYNE L. REV. 1221 (1972); Current Decision, *Torts — Damage Suits Against Pharmacists and Physicians Based on Negligence in Birth Control Treatments*, 13 WM. & MARY L. REV. 666 (1972).

Compare: Case Noted, *The Birth of a Child Following an Ineffective Sterilization Operation as Legal Damage*, 9 UTAH L. REV. 808 (1965).

¹⁵281 A. 2d 616 (Del. Super, 1971).

In *Troppi v. Scarf*,¹⁶ a Michigan court allowed a couple to recover for the birth of their eighth child. The court noted that all contraception is within the constitutionally protected "zone of privacy" of marital relationships.¹⁷

Therefore, although little doubt remains that most courts will not deny recovery to married persons on policy grounds, the question remains as to how the law will and should treat unmarried persons, minors, adulterers, and others who engage in extra-marital sexual relationships. This question will be explored in depth below.

B. THEORIES OF TORT AND CONTRACT RECOVERY

The courts have also not been clear in specifying which wrongful acts actuate a family interest damage award.

The Custudios' complaint alleged negligent treatment in the performance of the sterilization operation by a defendant physician, negligent treatment in failing to correctly apprise the plaintiff of the consequences of the operation, malpractice predicated on the negligent failure to fully advise the wife of the procedures available for her treatment, negligent misrepresentation, fraud and deceit, and breach of contract. On appeal from a judgment entered on the sustaining of a general demurrer to the complaint, each count was found to be sufficient.¹⁸

The Troppis complained that the defendant pharmacist negligently filled a prescription for birth control pills with a mild tranquilizer. The dismissal of the complaint was reversed by the Michigan court.¹⁹ A pharmacist impliedly warrants that he has delivered the drug prescribed, and he is liable on breach of warranty for injuries resulting from a mistake in giving the wrong drug. In such a case, a strict liability is imposed since the pharmacist is held to insure the quality and safe condition of the drugs.²⁰ Therefore, in drug cases, the plaintiff need not show any knowledge of defects or negligence on the part of the pharmacist. A recent California case noted that in a strict liability action against a manufacturer of seller or a prescription drug, it is for the jury to determine whether or not a drug was properly prepared and marketed and proper warning given.²¹

Generally, the duty of an adequate warning by a manufacturer of a drug is discharged by giving warnings of hazards to physicians who

¹⁶ 31 Mich. App. 240, 187 N.W. 2d 511 (1971).

¹⁷ *Id.*, 187 N.W. 2d at 517.

¹⁸ 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).

¹⁹ 31 Mich. App. 240, 187 N.W. 2d 511 (1971).

²⁰ PROSSER, HANDBOOK OF THE LAW OF TORTS (4th ed. 1971) (hereinafter cited as PROSSER) § 97 at 650; Annot., 79 A.L.R. 2d 332 (1961).

²¹ Carmichael v. Reitz, 17 Cal. App.3d 958, 95 Cal. Rptr. 381 (1971). *Also see* Love v. Wolf, 226 Cal. App. 2d 378, 38 Cal. Rptr. 183 (1964); Magee v. Wyeth Laboratories, Inc., 214 Cal. App. 2d 340, 29 Cal. Rptr 322 (1963).

may in the exercise of their medical judgment decide to use the drug. Absent special circumstances, known or foreseeable in the exercise of due care by the manufacturer, there is no duty to warn the patient of the hazards of using the drug.²²

Regarding prescribing physicians, California courts have held that it is "inappropriate to impose liability without fault upon a medical doctor who prescribes a prescription drug as a medicine of his choice by applying the doctrine of strict products liability merely because ingestion of the drug produced untoward results."²³

It is likely that cases involving birth control pills will remain few and limited to cases involving such obvious errors as were involved in *Tropi*. Most people assume that when an unplanned pregnancy occurs while the mother is taking the pills, the cause is patient failure, such as failing to stay on the schedule or being within the statistical category for which the drugs are ineffective. The courts have refused to find any express or implied warranty arising from such words as "when taken as directed, the tablets offer 100% protection."²⁴ In a suit against a manufacturer privity will likely impose no problems, even when a physician gives the patient a free sample of the manufacturer's product.²⁵ The California Supreme Court recently clarified the requirements for recovery under a theory of strict liability for "defective" products in *Cronin v. J.B.E. Olson Corporation*.²⁶ The court noted that although the efforts of the Restatement (Second) of Torts § 402A and many California cases was to relieve plaintiffs from problems of proof inherent in negligence claims, the new principles in practice rarely led to a different result than would have been reached under negligence principles. Therefore, it is *not* necessary for the plaintiff to show that the product was "unreasonably dangerous," but merely that it was defective in design or manufacture. Another barrier to strict liability was thereby removed, but the drug must still be shown to be defective.

Besides the defenses that may arise (*e.g.*, improper use of the product in not adhering to instructions), the greatest difficulty any plaintiff will have in the area of strict liability for a defective birth control pill, diaphragm, etc., is that the processes of the female reproductive system, when undisturbed, do not function perfectly.

²²*Carmichael v. Reitz*, 17 Cal. App. 3d 958, 989, 95 Cal. Rptr. 381, 400.

²³*Id.* at 979, 95 Cal. Rptr. at 393. *Perlmutter v. Beth David Hospital*, 308 N.Y. 100, 123 N.E.2d 792 (1954); *Cronin v. J.B.E. Olson Corporation*, 8 Cal. 3d 121, 104 Cal. Rptr. 433, 501 P.2d 1153 (1972).

²⁴*Whittington v. Eli Lilly & Co.*, 333 F. Supp. 98 (S.D.W. Va. 1971).

²⁵*Gottsdanker v. Cutter Laboratories*, 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (1960); *Magee v. Wyeth Laboratories, Inc.*, 214 Cal. App. 2d 340, 29 Cal. Rptr. 322 (1963).

²⁶8 Cal. 3d 121, 104 Cal. Rptr. 433, 501 P.2d 1153 (1972).

Therefore, it would be unreasonable to expect an artificial agent to achieve perfection when acting upon those processes.²⁷

C. THE FAILURE OF THE "WRONGFUL LIFE" THEORY

Another conceivable cause of action would be one based on a "wrongful life" theory. In such an action a child could bring suit against the physician or pharmacist (or the child's parents) for negligent or intentional acts which caused his birth in disadvantageous circumstances (illgitimacy, mental or physical defects, or possibly simply not being planned for). Appellate courts have uniformly refused to recognize such a cause of action.²⁸ The courts have found the area too enmeshed with policy considerations which can only be resolved by legislatures. The courts are especially fearful to recognize that life under any circumstances can be better than never having been born.

In summary, the successful cases to this date have been based on relatively well-recognized tort theories, such as malpractice by a physician and negligent prescription-filling by a pharmacist. Also, the cases allowing recovery have all involved births into families consisting of legally married parents with large numbers of children. The courts, however, have not clearly stated that recovery would be limited to persons in such narrow circumstances on such narrow theories. An analysis of future development of contraception-related causes of action begins with the two major hurdles courts leaped in granting recovery — *ab initio*: legal damage and public policy.

III. THE EXTENT OF DAMAGES RECOVERABLE

A. OVERCOMING THE COLLATERAL BENEFIT RULE

Although the case was on appeal from a demurrer, the *Custudio* court wrote a penetrating and pioneering essay on damages. It noted that the delivery of the child and all the attending discomforts were foreseeable consequences of negligent performance of the steriliza-

²⁷Whittington v. Eli Lilly & Co., 333 F. Supp. 98 (S.D.W. Va. 1971) at 100-101. Other cases with facts similar to *Troppi*, but in which relief was denied include: *Maley v. Armstrong*, No. 83195 (Iowa Dist. Ct., Linn. County, Jan. 1967); *Coloff v. Hi Ho Shopping Center, Inc.*, No. 168070 (Wash. Super. Ct., Pierce County, 1966) (recovery allowed for medical expenses and aggravation of varicose veins, but not wife's pain and suffering nor expense of raising the unwanted child); *Szcerbiak v. Fair Drugs, Inc.*, No. 356-463 (Wis. Cir. Ct., Milwaukee County, Oct. 1969); Note, *Unwanted Pregnancy and the Pill — The Question of Liability of the Manufacturer*, 41 U. CINN. L. REV. 335 (1972).

²⁸*Zepeda v. Zepeda*, 41 Ill. App. 240, 190 N.E. 2d 849 (1963), *cert. denied*, 379 U.S. 945 (1964); *Williams v. State*, 46 Misc. 2d 824, 260 N.Y.S. 2d 953 (Ct. Cl. 1965), *rev'd* 25 App. Div. 2d 906, 269 N.Y.S. 2d 786, *reversal aff'd*, 18 N.Y. 2d 481, 223 N.E. 2d 343, 276 N.Y.S. 2d 885 (1966); *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967).

tion operation. Then it was noted that if the mother had died in childbirth, the husband and surviving children would be compensated by the physician in an action for wrongful death for the value of her "society, comfort, care, protection and right to receive support which they lost."²⁹ Also, if the mother was crippled, the physician would be liable to her for her injuries, and to her husband for loss of services and medical expenses. Therefore, it was clear to the court that where the mother survives without any physical injury, there is still loss in that "[s]he must spread her society, comfort, care, protection and support over a larger group."³⁰

The California court then noted that the appropriate measure of damages in the case at bar would be "the amount necessary to replenish the family exchequer so that the new arrival will not deprive the other members of the family of what was planned as their just share of the family income."³¹ Thus, the landmark case recognized the cause of action for negligent sterilization as compensating a change in family status and injury to family interests.

This stance was unique to the law. For many years prior to the *Custudio* decision there had been a judicial debate over the validity of the proposition that an unplanned birth of a child is of such a benefit to *any* family as to outweigh any inconveniences. Although where suit is brought in contract or in tort the damages of childbirth resulting from the respective breach or tortious act are clearly foreseeable, further rules of damages have been applied by courts to reduce or deny relief.

Most of the earlier cases used the overriding benefit theory.³² The notion is found in the Restatement of Torts §920:

Where the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred upon the plaintiff a special benefit to the interest which was harmed, the value of the benefit conferred is considered in mitigation of damages, when this is equitable.

Accordingly, a Pennsylvania court stated:

To allow damages in a suit such as this would mean that the physician would have to pay for the fun, joy and affection which plaintiff Shaheen will have in the rearing and educating of this defendant's [sic] fifth child.³³

²⁹ 251 Cal. App. 2d at 323, 59 Cal. Rptr. at 476.

³⁰ *Id.*

³¹ *Id.* at 324, 59 Cal. Rptr. at 477.

³² The theory was first applied to this cause of action in *Christensen v. Thornby*, 192 Minn. 123, 255 N.W. 620 (1934). Further refinements were added by *Shaneen v. Knight*, 11 Pa. D. & C. 2d 41, 6 Lyc. 19 (C.P. Lycoming Co. 1957), and *Ball v. Mudge*, 64 Wash. 2d 247, 391 P.2d 201 (1964).

³³ *Shaheen v. Knight*, 11 Pa. D. & C. 2d at 45-46, 6 Lyc. at 23.

A later case arising in Washington, *Ball v. Mudge*,³⁴ reached a similar result, but on grounds which allowed for the consideration of more circumstances. The court allowed a jury to deny recovery since it could have concluded that the blessing of the child outweighed the costs.³⁵ Implicit was the idea that some children might not be as welcome as was the child in that case.

Therefore, the *Custudio* court stood alone in its refusal to indulge assumptions of the overriding joy of parenthood. The sterilization operation was desired to protect the family exchequer and other interests including Mrs. Custudio's mental and emotional health, as well as her kidneys and bladder. It was clear to the court that no benefit flowed to *those* interests from the birth of an unplanned child.³⁶ The Restatement calls for mitigation only when the interest receiving the benefit is the same interest which was harmed.

Later cases adopted and refined this new "weighing test."³⁷ The recent case of *Troppi v. Scarf*,³⁸ decided by the Michigan Court of Appeals, contains the most extensive exposition of the weighing test for negligent birth control cases. The court saw the damages resulting from the economic burden of a child to be "inextricably related," and did not attempt to separate such elements as pain and suffering from the economic costs of an unplanned child. "[T]he benefits of the unplanned child may be weighed against all the elements of claimed damage."³⁹

It therefore appears that the development of the law of negligent sterilization has reached the point where damages may vary greatly. Damages may range from nothing (or merely the expenses of the unsuccessful operation or prescription) to the entire expense of raising a child *plus* compensation for pain and suffering and any loss, social (disgrace, interference with family plans) or economic (lost inheritance or current support share). The primary factor, then, is the plaintiffs' social situation, under the Michigan court's formula. The cases since *Troppi* have uniformly applauded this new broadened approach.⁴⁰ The courts have moved from finding overriding benefit as a matter of law to charging the finder of fact with allocating damages according to the social impact of the child upon the parents.

Therefore, the task in each case is to perform a careful analysis of the precise purposes for which contraception or sterilization was

³⁴ 64 Wash. 2d 247, 391 P.2d 201 (1964).

³⁵ *Id.* at 250, 391 P.2d at 204.

³⁶ 251 Cal. App.2d at 325, 59 Cal. Rptr. at 476.

³⁷ See *supra* note 2.

³⁸ 31 Mich. App. 240, 187 N.W. 2d 511.

³⁹ *Id.*, 187 N.W. 2d at 518.

⁴⁰ See *supra* note 2.

desired. As the *Troppe* court said: "A rational legal system must award damages that correspond with these differing injuries. The benefit rule will serve this objective."⁴¹ Both the individual's interests and the "family interests" must be examined as to extent of benefit as well as injury.

In dicta, the Michigan court noted an "unwed co-ed" was likely to suffer greater injury from a pregnancy than would a couple which was merely delaying having children. It was specifically noted that the co-ed's "family interests" would in no way be enhanced.⁴²

In light of the most recent decisions, a proper approach would start with an enumeration of the reasons for which the student desired to be free from risk of conception. The obvious reasons include completion of her education without children and other basic timing considerations, the desire to become pregnant only by a legal husband, mobility, lack of financial resources, and the like. It is clear that none of these interests are benefited by the birth of even a healthy and beautiful child to a young woman in those circumstances. Many of the hardships were recognized by the United States Supreme Court in the recent abortion cases.⁴³

These same factors would be even more accentuated if the preg-

⁴¹ 31 Mich. App. 240, 187 N.W. 2d 511, 518.

⁴² *Id.*

⁴³ The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation. *Roe v. Wade*, ___ U.S. ___, 93 S. Ct. 705 (1973).

[I]t would be physically and emotionally damaging to Doe to bring a child into her poor 'fatherless' family . . . *Doe v. Bolton*, ___ U.S. ___, 93 S. Ct. 739 (1973).

Elaborate argument is hardly necessary to demonstrate that child-birth may deprive a woman of her preferred life style and force upon her a radically different and undesired future. For example, rejected applicants under the Georgia statute are required to endure the discomforts of pregnancy; to incur the pain, higher mortality rate, and aftereffects of childbirth; to abandon educational plans; to sustain loss of income; to forgo the satisfactions of careers; to tax further mental and physical health in providing childcare; and, in some cases, to bear the lifelong stigma of unwed motherhood, a badge which may haunt, if not deter, later legitimate family relationships. Concurring opinion of Justice Douglas to both decisions, ___ U.S. at ___, 93 S. Ct. at 756.

nant woman was an unmarried minor. The social impact described above would be all the more powerful. However, the impact of a pregnancy on a woman engaged in adultery may or may not be significant depending on the particular situation of the parties engaging in the conduct. The woman and her husband may welcome a birth or abhor it depending on factors too numerous to attempt to list here.

Even within the category for which the cause of action is clearly recognized — a married couple with a legally established family — the recoverable damages may vary greatly according to both the reasons for the avoidance of conception and the actual impact which results from the childbirth. For instance, if the only reason that contraception was desired was because of a fear of physical harm to the mother, and no such harm resulted, damages would be nominal at best. If plaintiffs simply wished to avoid the burden of parenthood, recovery would depend on additional factors. In other words, if the parents were economically incapacitated to raise children, the recovery must include the complete cost of raising the child. However, if the parents are wealthy and merely want to maintain their mobility, there is far less *need* for compensation. Nevertheless, the actual cost of raising a child in a lavish environment is obviously greater than in others and such factors as lost wages might be larger. It seems that a thoughtful definition of “social impact” would account for the need for compensation. The equitable considerations called for by the Restatement would play a key role here.

It is quite likely that juries will efficiently perform the task of mapping out the spectrum of damages recoverable by parties in varying circumstances. These types of distinctions are often left to juries. A female juror who herself has never been able to bear children is not likely to feel strong sympathies for the married couple who had to cancel a vacation due to the birth of a beautiful perfectly formed child. However, it is not difficult for most jurors to sympathize with the crushing effect of unwed motherhood on the mother and often on the putative father. The financial burdens in the latter case are much more absolute, less relative to the prior family status of the parents, and less subject to diminution by the “joys of parenthood.”

It appears from a review of all the cases in this developing area that although each court espoused broad principles as to why recovery should or should not be allowed, in each case the types of considerations mentioned above were at work. It appears that common sympathies based on the particular circumstances of the complaining parties called forth the appropriate “rule” of computation of damages. Therefore, it also seems likely that whatever “rule” is adopted in any jurisdiction, recovery will continue to be based upon the emotional reactions of the trier of fact. These emotional

reactions will, of course, be closely akin to the "public policy" considerations which plagued the courts of first impression.

B. ADOPTION, ABORTION AND MITIGATION OF DAMAGES

Mitigation of damages raises fundamental and currently volatile questions of social policy. Some earlier writers argued that adoption seems to be a relatively suitable mitigation of damages, especially for someone such as an unwed mother. However, no court has ever proposed requiring such a course of conduct. The avoidable consequences rule requires only that *reasonable* measures be taken to avoid any further injury once one is injured. A woman generally loves her children regardless of the great burden imposed by the birth; consequently, she is not required to part with her own children to be considered to have taken reasonable action. The *Troppe* court was particularly explicit when it noted:

A child will not be taken from his mother without her consent, without regard to whether the child was conceived or born in wedlock, unless the child is neglected or the mother is unfit. The mother's right to keep the child is not dependent on whether she desired the conception of the child.⁴⁴

This reasoning easily carries over to abortion as a reasonable mitigation of damages. Despite the availability of legal abortions now, such action should never be required of a woman.⁴⁵ In the opinion which invalidated the Texas abortion statute, the Supreme Court noted that it was not saying that it favors abortions.⁴⁶ Implicitly then, one should not assume that the constitutional right is a definition of "reasonable" within the meaning of the avoidable consequences rule. Many reasonable persons consider aborting an unborn child to be far less reasonable than adoption when the consequences

⁴⁴ 31 Mich. App. 240, 187 N.W. 2d 511, 518.

⁴⁵ *People v. Barksdale*, 8 Cal. 3d 320, 105 Cal. Rptr. 1, 503 P.2d 257 (1972). See *supra* note 43.

⁴⁶ We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.

In addition, population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem.

Our task, of course is to resolve the issue by constitutional measurement free of emotion and predilection. *Roe v. Wade*, ___ U.S. at ___, 93 S. Ct. at 708-709.

to the "child" and attitudes toward preservation of "life" are considered.

IV. THE PUBLIC POLICY CONSIDERATIONS

A. POPULATION CONTROL AND THE BENEFITS OF HEALTHY CHILDREN

All the cases in this developing field have been a reaction to the particular circumstances of the complaining parties. The courts have espoused a "rule" to deal with negligent sterilization in their respective jurisdictions, but the varying results can be more easily explained by the nature of the expectations of the complaining parties than by any radically different view of contraception, sterilization, or even torts.

The overriding benefit theory was first espoused by a Minnesota court in *Christensen v. Thornby*.⁴⁷ In that case, a man underwent a vasectomy because he feared that additional children would threaten his wife's health. After the operation, his wife became pregnant, and gave birth to a healthy child. The plaintiffs' claim for damages for anxiety and expenses of raising a child was denied.

In *Shaheen v. Knight*⁴⁸ a Pennsylvania court reached the same result in similar circumstances. Although it appeared that the operation was performed for contraceptive, rather than therapeutic, purposes, this fact did not, in the absence of other special circumstances, overcome the benefit presumption.

A Washington court followed the same rationale in *Ball v. Mudge*⁴⁹ where most of the evidence centered around how normal, healthy and dearly loved the child was.

The extreme situations of the Troppis, Custudios, and Colemans have already been noted. These circumstances led the courts to read public policy differently and thereby allow formulation of a "rule" more favorable to the plaintiffs.

If one accepts as a desirable goal the proposition that for every wrong there is a remedy, one must examine the policy considerations which have moved the respective courts to formulate different rules, one allowing recovery and one not.⁵⁰ It is clear that courts have been far more willing to allow recovery to married persons who

⁴⁷192 Minn. 123, 255 N.W. 620 (1934).

⁴⁸11 Pa. D. & C. 2d 41, 6 Lyc. 19 (C.P. Lycoming Co. 1957).

⁴⁹64 Wash. 2d 247, 391 P.2d 201 (1964).

⁵⁰One commentator has noted that the approach allowing recovery is based on the view that tort law can be reduced to a single broad principle that an act causing harm to another is wrong and should be remedied unless justified, as opposed to the view that judicial intervention must be justified by a societal recognition of a duty and harm from breach of that duty. See Note, 52 BOSTON U. L. REV. 189, 190, *supra* note 14; Cf. PROSSER, *supra* note 20, at 2-3.

desired to avoid childbirth because they have inadequate economic resources to raise an additional child than they have been to grant recovery to married persons who, after the child is born, feel little economic impact.

At first glance the reason for allowing recovery appears to be simple. As the *Tropi* court noted: "In theory at least, the imposition of civil liability encourages potential tortfeasors to exercise more care in the performance of their duties, and, hence, to avoid liability-producing negligent acts."⁵¹

Despite the increasing recognition by courts of the desirability of population control⁵² and an increasing desire to impose liability for personal injury,⁵³ other policy considerations will likely continue to play an important role in the outcome of contraception-related suits. Even if the appellate courts recognize a "rule" favorable to plaintiffs, juries will continue to inject popular feelings into their assessment of damages.⁵⁴

In California, it appears to be firmly established that the public policies against birth control will not prevent recovery as a matter of law, at least in situations involving large indigent legally recognized families. The *Custudio* court clearly stated that

[i]t is generally recognized that a sterilization operation for therapeutic purposes to protect the physical or mental health of the patient, is not against public policy.

It has been suggested that such an operation for the purpose of family limitation motivated solely by personal or socioeconomic considerations is likewise not antithetical to public policy.⁵⁵

The *Tropi* court dealt with the policy issue as follows:

Contraceptives are used to prevent the birth of healthy children. To say that for reasons of public policy contraceptive failure can result in no damage as a matter of law ignores the fact that tens of millions of persons use contraceptives daily to avoid the very result which the defendant would have us say is always a benefit, never a detriment. Those tens of millions of persons, by their conduct, express the sense of the community.⁵⁶

⁵¹ 31 Mich. App. 240, 187 N.W. 2d 511, 517. Also see generally PROSSER, *supra* note 20, § 4, at 23, and HARPER AND JAMES, TORTS, § 15, p.742.

⁵² See *supra* note 45.

⁵³ See discussion of strict liability, notes 25-27 *supra*.

⁵⁴ The *Custudio* court answered the early commentators by noting that "[t]he emotional injury to the child can be no greater than that to be found in many families where 'planned parenthood' has not followed the blueprint," and noted that the unexpected child is more likely to be loved if it brings the wherewithal to make support possible. 251 Cal. App. 2d at 324, 59 Cal. Rptr. at 477.

⁵⁵ 251 Cal. App. 2d at 317, 59 Cal. Rptr. at 472. See also *Jessin v. County of Shasta*, 274 Cal. App. 2d 737, 79 Cal. Rptr. 359 (1969), which relied on *Custudio* and *Griswold* to hold that California has no public policy prohibiting consensual sterilization operations, and that nontherapeutic sterilization operations are legal in California where competent consent has been given.

⁵⁶ 31 Mich. App. 240, 187 N.W. 2d 511, 517.

These policy statements are adequate when dealing with the goal of preventing conception as a result of sexual relationships between married persons. At least since *Griswold*,⁵⁷ no state has attempted to prevent contraception by married persons.

B. SEXUAL MORES

States have continued to take an active interest in preventing extra-marital sexual relationships. Therefore, assuming the existence of recognized damages, the policy considerations which surround less "socially desirable" sexual relations must be investigated. The more that conduct is deplorable, the more we tend to think of the limitations of proximate cause. The sexual relationships between husband and wife do not supersede a physician's or pharmacist's breach of duty and the resulting pregnancy, especially if the defendant has made any guarantees. Professor Prosser noted the following:

We must distinguish between active forces and passive situations created by the defendant. If the defendant spills gasoline about the premises, he creates a dangerous "condition" and his act may be culpable because of the danger of fire. When a spark ignites the gasoline, the condition (or situation) has done as much to bring about the fire as the sparks; and since that is the very risk which the defendant has created, he will not escape liability.⁵⁸

The *Custudio* court added that the intercourse is not an intervening cause because "[i]t is difficult to conceive how the very act the consequences of which the operation was designed to forestall can be considered unforeseeable."⁵⁹ The key issue is whether extra-marital sex constitutes a superseding cause. In the case of an unmarried person relying on a physician or pharmacist to exercise proper care in assisting her with avoiding conception, the subsequent sexual activities may be viewed with disfavor by a court. The Restatement (Second) of Torts §302B deals with the conflicting policy considerations which arise if the pharmacist or physician is negligent:

An act or omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal.⁶⁰

⁵⁷381 U.S. 479 (1965).

⁵⁸PROSSER, LAW OF TORTS (3d ed. 1965), note 7 at 286. See PROSSER, *supra* note 20, at 274.

⁵⁹251 Cal. App. 2d at 316, 59 Cal. Rptr. at 472. In cases dealing with a pharmacist's failure to furnish the correct pills, cause-in-fact may be an especially difficult hurdle. Whether the action is based on breach of warranty or negligence, the plaintiff must prove that the incorrect pills were sold to her.

⁶⁰Comment e:

[Situations in which the actor is required to anticipate intentional or even criminal misconduct of others include] where the actor's

This same problem may exist for assumption of risk and contributory negligence. Public opinion regarding contraception has changed widely enough that it is generally conceded that a married couple receiving contraceptive aid does not act at its peril.⁶¹ Also, by analogizing to the reasoning of the Restatement's position when considering negligence, a court may find that persons involved in more illicit activities do not assume the risk and are not contributorily negligent when relying on a professional's assistance.

It is crucial to recovery that a plaintiff fully explain that the violation of a law regulating sexual conduct or other intentionally illicit conduct should not receive an inordinate amount of weight when the court or the jury is considering proximate cause, assumption of risk, contributory negligence *per se*, or in the subjective assessment of damages.

California has no statute prohibiting fornication and its laws do little to proscribe premarital or extra-marital sex.⁶² The concept that

own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such misconduct, which a reasonable man would take into account

Comment f:

[In deciding when an actor is to be so held] [f]actors to be considered are the known character, past conduct, and tendencies of the person whose intentional conduct causes the harm, the temptation or opportunity which the situation may afford him for such misconduct, the gravity of the harm which may result, . . . together with the burden of the precautions which the actor would be required to take

See PROSSER, *supra* note 20, at 173-74, 282.

⁶¹See *supra* note 2.

⁶²Relevant sections of the CALIFORNIA PENAL CODE (West 1970, Supp. 1972) are as follows:

§ 261.5:

Unlawful sexual intercourse is an act of sexual intercourse accomplished with a female not the wife of the perpetrator where the female is under the age of 18 years. [The female is not considered to have performed any illegal act.]

§ 269a:

Every person who lives in a state of cohabitation and adultery is guilty of a misdemeanor

§ 269b:

If two persons, each being married to another, live together in a state of cohabitation and adultery, each is guilty of a misdemeanor

§ § 269a, 269b have been construed as follows:

In the absence of a statutory provision to the contrary, participation in an act of sexual intercourse on the part of an unmarried woman does not constitute adultery on her part, but amounts simply to fornication. Neither can she be punished as an aider or abettor. See *In re Cooper*, 162 Cal. 81, 121 P.318 (1912).

Although living in a state of cohabitation *and* adultery is prohibited, neither simple fornication or adultery nor living in a state of cohabitation and fornication has been made a crime in California. Therefore the legislature has determined

no one should be allowed to base a cause of action upon his own illegal conduct led a few early courts to hold that a plaintiff who was violating the criminal law could not recover for any injury received while so engaged. This "clean hands" theory of contributory negligence *per se* has generally been discarded.⁶³ Courts now accept the rule that a breach of a statute by the plaintiff is to stand on the same footing as a violation by the defendant.⁶⁴

The plaintiff's violation of a statute will not be held to be contributory negligence unless the statute was designed to protect the plaintiff in his activities. In many jurisdictions, it would be difficult to deny that at least one purpose of the sex proscription statutes is to prevent the birth of illegitimate children. Therefore, it would appear that the plaintiff is complaining about a result which the statute was enacted to protect him from, and that his own disregard for the law has caused the risk. This approach can be questioned now that the "clean hands" doctrine has been rejected. More significantly, every statutory sex proscription in California seems to be concerned with open and notorious conduct contrary to the official morality of the community.⁶⁵ Illegitimacy and private conduct are *not* major concerns of the California criminal law.

An obvious exception to this statement is the law dealing with "illegal intercourse."⁶⁶ There the law is concerned with proscription of even completely private conduct. It is important to note that the female is not considered to have performed any illegal act. But the "clean hands" notion was based more on "immorality" of conduct, rather than illegality. It is likely that many reasonable persons today would consider a minor female to have been immoral to consent to sexual intercourse. It is arguable that the likelihood that young persons will not take adequate precautions to prevent pregnancy and the great disruption to a young girl's life which a pregnancy causes, are major reasons why such intercourse is proscribed. However, when the young woman has, in fact, taken all prudent steps to avoid pregnancy (short of abstention), her age and judgment cease to be relevant. The critical factor determining pregnancy then is the physician's or pharmacist's exercise of due care. With proper care by the *professional*, the statute can only be concerned with the openness or notoriety of the conduct, and not with the birth of children.

This reasoning is equally applicable to the father. Regardless of whether a sterilization operation on him failed or the mother's birth

by implication that such conduct shall not be criminal. See *In re Lane*, 58 Cal. 2d 99, 22 Cal. Rptr. 857, 372 P.2d 897 (1962).

⁶³ PROSSER, *supra* note 20, at 202.

⁶⁴ *Id.* at 203; Restatement of Torts § 375 (1939).

⁶⁵ See *supra* note 62.

⁶⁶ CAL. PEN. CODE § 261 (West 1970); see *supra* note 62.

control failed, the birth of children is no concern of the criminal law where persons can assume that physicians and pharmacists properly perform their duties.

These problems with contributory negligence through illegal or illicit conduct may or may not create an assumption of risk argument on similar grounds. The crucial difference is that knowledge of the risk must be shown for assumption of risk. Therefore, a defendant must not only show that the plaintiff engaged in immoral conduct, but also that the plaintiff knew the risk involved in such conduct. As the plaintiff is defeating the contributory negligence defense, the assumption of risk defense will likewise fall.

Even if the cause of action is grounded on strict liability or a breach of warranty, there is a special type of "contributory negligence" or assumption of risk which has its place as a defense. Restatement (Second) of Torts, § 402A, comment *n*, notes that

. . . the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

The California courts have held accordingly.⁶⁷ Such a situation seems unlikely in the area of pregnancy prevention.

It is probable that a defendant may urge that any warranty should be voided because it encourages an act contrary to the general morality, even if fornication is not illegal. The California legislature has spoken indirectly to this issue. Welfare and Institutions Code § 10053.2, enacted in 1971, allows any welfare recipient of child-bearing age to receive contraceptives without cost or anyone else's consent, and without regard to marital status, age, or parenthood.⁶⁸

⁶⁷Martinez v. Nichols Conveyor, etc. Co., 243 Cal. App. 2d 795, 52 Cal. Rptr. 842 (1966); Carmichael v. Reitz, 17 Cal. App. 3d 958, 95 Cal. Rptr. 381 (1971).

⁶⁸ Family planning services shall be offered to all former, current or potential recipients [of financial assistance] of childbearing age, age fifteen to forty-four, inclusive, and provided to those former, current or potential recipients wishing such services. Such services shall be offered and provided without regard to marital status, age, or parenthood. Notwithstanding any other provisions of law, the furnishing of these family planning services shall not require the consent of anyone other than the person who is to receive them

Family planning services shall include, but not be limited to:

(a) Medical contraceptive services such as diagnosis, treatment, supplies, and followup.

. . . .
CAL. WELF. AND INST. CODE § 10053.2 (West 1972).

Also in 1971, CAL. BUS. AND PROF. CODE § 101 (West Supp. 1972) was amended to exclude advertising of contraceptives from a list of felonies, now

Use of contraceptives, therefore, by a woman of between 15 and 18 years of age cannot be said to be contrary to public policy. Recognizing that a girl of that age has a cause of action against a negligent physician or pharmacist does no more to encourage illicit sexual activities than allowing her to obtain contraceptives, per statute, in the first place. Contraception is a method of coping with social realities, and does not necessarily encourage immorality.

If any doubt remains as to whether contraception by unmarried persons (or at least by unmarried *minors*) is contrary to public policy, the United States Supreme Court has recently given indications as to how a state should treat such categories of people in the area of birth control.

In *Eisenstadt v. Baird*,⁶⁹ the Court validated as a general proposition the concept that married and unmarried persons must be treated alike by state laws controlling contraception. A rational relationship of the classification to a valid state interest could not be found. It was noted that *if* deterrence of premarital sex could be a valid state goal, "the effect of the ban on distribution of contraceptives to unmarried persons has at best a marginal relation."⁷⁰ Furthermore, the Court could conceive of no health goals which would be advanced by restricting contraception by unmarried persons to a greater degree than done for married persons.⁷¹ The affirmed Court

making such advertising legal for any purpose.

However, further attempts to equate the contraception rights of minors to those of others have, to this date, failed in California. For three straight years the legislature has passed, but the Governor has vetoed, a bill, the 1972 version of which reads as follows (SB 433):

Notwithstanding any other provisions of the law, a minor who has been determined to be sexually active may give consent to the furnishing of medical care related to the use, fitting and dispensing of contraceptive devices or drugs, and such consent shall not be subject to disaffirmance because of minority. The consent of the parent or parents shall not be necessary in order to authorize such medical care. The physician or surgeon may at his option advise the parent or parents of such medical care.

Although the goal of the bill was to lessen abortions, unwanted babies, and runaways (a girl can leave home, declare herself self-supporting, and then obtain contraceptives without her parents' knowledge), the Governor said the bill "represents an unwarranted intrusion into the prerogatives of parents [by the government]." He also felt that the proposed law would amount to "tacit approval by the state of such sexual activity." Veto message by Governor Ronald Reagan, December 21, 1973. The CALIFORNIA CIVIL CODE (West 1973) allows an unmarried pregnant minor to get medical care related to her pregnancy without her parents' consent (§ 34.5), and it allows an "independent" person at least 15 years of age to consent to medical care. The physician may advise the parents (§ 34.6). See Article, *An Inventory: The Emerging Rights of the Physically Ill Family Member*, 6 U.C.D. L. REV. 133 (1973).

⁶⁹ 405 U.S. 438 (1972).

⁷⁰ *Id.* at 488, quoting the concurring opinion of Justice Goldberg in *Griswold*, 381 U.S. 479 (1965).

⁷¹ 405 U.S. at 450.

of Appeals opinion was approvingly quoted as follows:

To say that contraceptives are immoral as such, and are to be forbidden to unmarried persons who will nevertheless persist in having intercourse, means that such persons must risk for themselves an unwanted pregnancy, for the child, illegitimacy, and for society, a possible obligation of support. Such a view of morality is not only the very mirror image of sensible legislation, we consider it conflicts with fundamental human rights.⁷²

Furthermore, in the recent case invalidating most criminal abortion laws, *Roe v. Wade*,⁷³ the principal plaintiff was a pregnant *single* woman. In that case, the Supreme Court also noted that one of the primary reasons which are advanced to explain historically the enactment of criminal abortion laws in the 19th century, and used to justify their continued existence, is that they discourage illicit sexual conduct. The State did not even attempt to advance such a theory as justification in that case, however.⁷⁴

The issues regarding minors are not settled quite as clearly due to the fact that children have always been considered intrinsically different from adults. Hence, courts will usually find the necessary rational relationship between the classification and the differential treatment.⁷⁵ However, *Eisenstadt* throws serious doubt on some "rational relationships'" validity. Also, that decision noted that if such a relationship be allowed, the classification may then be subject to the test of whether it has a *necessary* relationship to a *compelling* state interest (per *Griswold*) which the Court, in dicta, seriously doubted.⁷⁶

⁷²*Id.* at 452-453, quoting 429 F. 2d at 1402. The *Griswold* court also noted that restrictions on contraceptives are destructive of families rather than fostering them. 381 U.S. at 485.

The *Eisenstadt* court also applauded the Court of Appeals for stating the following:

If the prohibition [on the distribution of contraceptives to unmarried persons] . . . is to be taken to mean that the same physician who can prescribe for married patients does not have sufficient skill to protect the health of patients who lack a marriage certificate, or now may be currently divorced, it is illogical to the point of irrationality.

405 U.S. at 438, quoting from 429 F. 2d at 1401.

⁷³ — U.S. —, 93 S. Ct. 705 (1973).

⁷⁴ — U.S. at —, 93 S. Ct. at 724. In April of 1972, the United States Supreme Court decided *Stanley v. Illinois*, 405 U.S. 645. There it was recognized that an unwed father has the same rights with respect to his children, upon the death of the mother, as do other fathers. The Court noted that the law will "recognize those family relationships unlegitimized by a marriage ceremony." 405 U.S. at 651. See Article, *Plight of the Putative Father in California Child Custody Proceedings: A Problem of Equal Protection*, 6 U.C.D. L. REV. 1 (1973).

⁷⁵*In re Spencer*, 149 Cal. 396, 86 P. 896 (1906); *People v. Walton*, 70 Cal. App. 2d Supp. 862, 161 P.2d 498 (1945); *In re Weber*, 149 Cal. 392, 86 P. 809 (1906).

⁷⁶ 405 U.S. at 477.

V. CONCLUSION

The traditional notions of parental responsibility must still be dealt with by plaintiffs in birth control related causes of action. Despite recent cases in several jurisdictions recognizing a modern view of sexual responsibility the circumstances surrounding the plaintiffs' sexual relations will continue as important facts to be dealt with.

The causes of action may be based on medical negligence, negligent or intentional misrepresentation, failure to effect contracted for or warranted performance by a surgeon, breach of warranty for supplying the incorrect drug, or possibly for "defective" drugs.

Courts only recently recognized that the birth of a child is not always more of a benefit than a detriment. Damages may vary greatly, depending on the financial and family status of the plaintiffs. The recovery can include the entire expense of raising the child, with no requirement of mitigation likely. The entire social impact of the child on the parents and the family should be examined in assessing damages.

Problems arise when there are circumstances which make both the impact greater and the plaintiffs' conduct more deplorable. When the parents were involved in illicit sexual activities, defenses will undoubtedly be raised. However, the more recent decisions and the Restatement views would not disallow recovery for such reasons. This is especially true when the trends of legislation and of constitutional cases are considered.

It remains incalculable, though, to what extent the emotional reactions of the trier of fact will be swayed by the "immorality" of the parents' conduct. Therefore, it is still imperative that the plaintiffs clearly counter the policy objections raised, regardless of their lack of foundation in current law.

Scientific birth control is seen by many persons as an important ingredient in our society. The welfare and happiness of millions of families depend on its being administered properly; the future of our way of life may depend on its being trusted. Such trust may hinge on breaches of it being compensable for people in any reasonable situation.

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