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NOTES


I. INTRODUCTION

Diethylstilbestrol (DES)\(^1\) is a drug which was administered to an estimated three million pregnant women between 1941 and 1971 for the purpose of preventing miscarriage.\(^2\) The ingestion of DES by mothers during pregnancy has been found to cause adenocarcinoma, a fast spreading and deadly disease which may require radical surgery.\(^3\) The ingestion of DES also caused adenoses, precancerous vaginal and cervical growths which may spread to other areas of the body. Women who suffer from this condition must be monitored bi-annually by biopsy\(^4\) or colposcopic\(^5\) examinations. A large percentage of the daughters of these women have contracted these and other related diseases; another large percentage suffer emotional distress in anticipation of developing a manifestation of some disease.

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1. Diethylstilbestrol is a crystalline synthetic estrogenic substance capable of producing all the pharmacologic and therapeutic responses attributed to natural estrogens. STEDMAN'S MEDICAL DICTIONARY 394 (24th ed. 1982).


3. See Heinonen, "Diethylstilbestrol in Pregnancy: Frequency of Exposure and Usage Patterns", 3 CANCER 573, 576 (Mar. 1973); LaBarthe, "Design and Preliminary Observations of National Cooperative Diethylstilbestrol Adenoses Project", 51 J. OF OBST. AND GYN. 453, 457 (1978). These studies indicate that the use of DES by pregnant women was greater in the Massachusetts area than in other parts of the country. See also, Berger & Goldstien, "Impaired Reproductive Performances in DES-Exposed Women", 55 OBSTET. GYNECOL. 25 (1980); Barnes, Colton, Gunderstein, Noller, Tilley, Strama, Towsend, Hatab & O'Brien "Fertility & Outcome of Pregnancy in Women Exposed in Utero to Diethylstilbestrol", 302 N. ENG. J. MED. 609 (1980).

4. A biopsy is "[t]he process of removing tissue from living patients for diagnostic examination." STEDMAN'S MEDICAL DICTIONARY 192 (24th ed. 1982).

5. A colposcope is an instrument that "magnifies cells of the vagina and cervix in vivo to allow direct observation and study of these tissues." STEDMAN'S MEDICAL DICTIONARY 301 (24th ed. 1982).
attempt to allay some of their fears, the women in the latter category undergo the periodic examinations which are painful, traumatic, and expensive. These women present a difficult legal issue when seeking recourse for their emotional distress because they do not display physical manifestations of harm. In Payton v. Abbott Labs the plaintiffs, commonly referred to as "DES daughters", were denied a cause of action for redress from the drug companies that may have negligently manufactured, marketed, and promoted the drug. The Supreme Judicial Court was faced with the difficult problem of delineating guidelines as to who could recover and who would be responsible for injuries sustained as the result of the negligent manufacturing of DES.

The plaintiffs brought a class action suit in the United States District Court for the District of Massachusetts against the defendant corporations that have manufactured the drug DES. The plaintiffs, who allegedly had been exposed to the drug in utero, sought recovery for the defendants' negligence in marketing the drug as a preventative of miscarriages before adequately testing it. The plaintiffs did not have any of the symptoms of the illnesses linked to DES, but were emotionally distressed by the potential manifestation of such illnesses.

The district court sought certification of questions of Massachusetts law from the Supreme Judicial Court. The issues of negligence and causation were not before the court in Payton.

The defendants included Abbott Laboratories, Eli Lilly and Co., Merck & Co., Inc., Rexall Drug Co., E.R. Squibb & Sons, Inc., and Upjohn Co. The plaintiffs in this class action included all women: 1) who were exposed to diethylstilbestrol "DES" in utero; 2) whose exposure occurred in Massachusetts; 3) who were born in Massachusetts; 4) who were domiciled in Massachusetts when they received notice of the action; and 5) who have not developed uterine or vaginal cancer. Payton v. Abbott Labs. 83 F.R.D. 382, 386 (D. Mass. 1979).

7. Conversely, women who have contracted one of the diseases proven to have been caused by transmission of DES from the mother to the fetus state a cause of action for relief. See Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980).
9. Id. at 574-75, 437 N.E.2d at 190.
10. The issues of negligence and causation were not before the court in Payton. 386 Mass. at 545, 437 N.E.2d at 174. The certified questions assumed that the defendant was negligent and that the negligence caused the plaintiff's injuries. Id.
11. The plaintiffs in this class action included all women:
   "1) who were exposed to diethylstilbestrol "DES" in utero;
   2) whose exposure occurred in Massachusetts;
   3) who were born in Massachusetts;
   4) who were domiciled in Massachusetts when they received notice of the action; and
   5) who have not developed uterine or vaginal cancer."
14. Id. at 543, 437 N.E.2d at 173.
15. Id. at 542-43, 437 N.E.2d at 173.
Court because Massachusetts law was not settled on the issues presented.\textsuperscript{16}

In a lengthy decision, the Supreme Judicial Court responded to the district court's request by first stating that Massachusetts did not recognize a cause of action for negligent infliction of emotional distress absent physical harm.\textsuperscript{17} The court advanced the various policy reasons that favored this result, most notably the fear of frivolous and fictitious lawsuits and the imposition of undue liability on those who are merely negligent.\textsuperscript{18} The court then applied a wrongful life theory and held that the plaintiffs would be barred from recovery if a trier of fact concluded that a plaintiff would probably not have been born except for the mother's ingestion of DES.\textsuperscript{19} The court based this result on the theory that measuring such damages, a comparison

\textsuperscript{16} The certified questions were stated as follows:

1. 'Does Massachusetts recognize a right of action for emotional distress and anxiety caused by the negligence of a defendant, in the absence of any evidence of physical harm, where such emotional distress and anxiety are the result of an increased statistical likelihood that the plaintiff will suffer serious disease in the future?'

\textit{Id.} at 544, 437 N.E.2d at 174.

2. 'If the trier of fact concludes that a plaintiff would probably not have been born except for the mother's ingestion of DES, is that plaintiff barred from recovery because of physical or emotional damage suffered as a result of the mother's ingestion of DES?'

\textit{Id.} at 557, 437 N.E.2d at 181.

3. 'Does Massachusetts recognize a right of action for injury to a plaintiff \textit{in utero} resulting from ingestion of a drug by her mother?'

\textit{Id.} at 560, 437 N.E.2d at 182 (emphasis in original).

3a. 'If the answer to question 3 is affirmative, is such a right of action available to a plaintiff whose mother ingested the drug prior to your Honorable Court's decision in \textit{Torigan v. Watertown News Co.}, 352 Mass. 446, [225 N.E.2d 926] (1967), assuming that it is not established that the fetus was probably viable at the time of the injury?'. . . .

3b. 'If the answer to question 3 is affirmative, is such right of action available under any circumstances to a plaintiff whose mother ingested the drug prior to your Honorable Court's decision in \textit{Keyes v. Construction Servs., Inc.}, 340 Mass. 633, [165 N.E.2d 912] (1960)?'

\textit{Id.} at 564, 437 N.E.2d at 185.

4. 'Assuming that the evidence does not warrant a conclusion that the defendants conspired together, or engaged in concerted action, or established safety standards through a trade association, may the defendant manufacturers, who probably supplied some of the DES ingested by the mothers of the plaintiff class be held liable to members of the plaintiffs' class when neither the plaintiffs nor defendants can identify which manufacturer's DES was ingested by which mothers?'

\textit{Id.} at 570, 437 N.E.2d at 188.

\textsuperscript{17} \textit{Id.} at 544-57, 437 N.E.2d at 174-81.

\textsuperscript{18} \textit{Id.} at 552-53, 437 N.E.2d at 178-79.

\textsuperscript{19} \textit{Id.} at 557-60, 437 N.E.2d at 181-82.
of the value of life to that of non-life, is beyond the competence of the judicial system. Further, the court stated that Massachusetts did recognize a cause of action for injury to a plaintiff in utero resulting from ingestion of a drug by her mother. The court noted that this conclusion was in accord with recent Massachusetts case law rejecting the argument based, in part, from the fear of speculative damages. The court stated that the possibilities of fictitious claims and recovery of damages based on speculation should not bar an action for injuries whose existence can be proven by medical evidence. Finally, the court found that it could not actually answer the district court’s inquiry as to whether the named defendants could be held liable to a member of the plaintiff’s class where neither the plaintiff nor defendant could identify which manufacturer’s product was ingested by plaintiff’s mother. The court stated that this question did not assume that the plaintiffs would be able to establish that the defendants were negligent and that the question of identity was separate from that of negligence. The court did indicate, however, that it would reject the market share liability theory, and that recovery might be permissible from those defendants to the extent of their participation in the DES market.

Although Payton dealt specifically with four issues, this note primarily will analyze the court’s holdings concerning recovery for negligently inflicted emotional distress unaccompanied by physical

20. Id. at 559, 437 N.E.2d at 182.
21. Id. at 560-64, 437 N.E.2d at 182-85.
22. Id.
23. Id. at 563, 437 N.E.2d at 184.
24. Id. at 570, 437 N.E.2d at 188.
25. Id.
26. Id. at 571-74, 437 N.E.2d at 188-90. For more information on the “market share” theory of recovery, see Sindell v. Abbott Laboratories, 163 Cal. Rept. 132, 145-46 607 P.2d 924, 937-38, 27 Cal. 3d 588, 612-13. In Sindell, the court held that women afflicted with a disease caused by DES could recover from the defendant drug companies on a market share liability theory. Id. Under this theory each defendant will be liable for the proportion of the judgment represented by its share of that market unless it demonstrates that it could not have made the product which caused the plaintiff’s injuries. In effect, this theory shifts the required burden of proof from plaintiff to defendant to guarantee that plaintiffs will prevail on the causation issue. In Payton, the court rejected the market share theory on the grounds that public policy favors the development and marketing of better drugs and that imposition of such a broad liability would impede such medical advancements. 368 Mass. at 573-74, 437 N.E.2d at 189-90.
27. 386 Mass. at 570-74, 437 N.E.2d at 188-90. The court’s response indicates that, on an adequate record, it would perhaps relax the traditional identification requirement to a standard somewhere in between the liberal market share theory and the strict notion that in order for a party to be held negligent for an injury the party must be identified as a cause of the injuries. Id. at 574, 437 N.E.2d at 190.
Injury and for wrongful life. First, the note will trace the development of law in the areas of emotional distress and wrongful life, and the rationale underlying the court’s holdings will be summarized. The court’s treatment of the issue of emotional distress will then be analyzed in light of the prevailing policy considerations which militate against recovery when there is no physical injury and examined as to the applicability of past precedent of “bystander” cases. The note will also discuss the court’s holding that there can be no recovery for a claim of wrongful life. The note will then demonstrate that with regard to issues of emotional distress, the prevailing policy considerations that militate against recovery for emotional distress in a case such as Payton are insufficient to invalidate the plaintiff’s claim for relief and the court’s reliance of “bystander” cases is in fact misplaced. With regard to the court’s holding that recovery will be barred on a claim for wrongful life, the note will illustrate that the policy considerations may not be sufficient in this case to justify denial of relief and that the court may have imposed a barrier to recovery which is inappropriate in the present case.

II. The Developing Law

A. Recovery for Emotional Distress

1. Background

Courts have been reluctant to recognize the infliction of mental disturbance as an independent tort where the defendant’s conduct is merely negligent. The major argument advanced in support of this is the danger of vexatious suits and frivolous claims. 28 Thus, when a defendant’s negligence causes only mental distress, without accompanying physical injury or consequences, and no other independent basis for tort liability is present, the majority view is that there can be no recovery. 29 Therefore, when emotional distress is negligently inflicted, proof of physical impact, injury or manifestation is required to sustain a cause of action. 30

30. The plaintiffs in Payton and in similar DES cases could, in the alternative, claim that they in fact suffered “physical harm” at the cellular level as a result of their exposure to DES. Under this approach, plaintiffs would argue that there is a microscopic process by which normal genital-tract cells in a female are altered as a result of DES
In 1897, Massachusetts adopted the “impact rule” to deal with claims of emotional distress in *Spade v. Lynn & Boston R.R.* The court denied relief for mental distress unless it was preceded by some form of bodily injury. In the early 1900’s, however, Massachusetts began to allow “parasitic recovery” for negligently inflicted emotional distress. Under this theory, plaintiffs could recover for emotional distress as an additional element of damages if the defendant's negligence directly caused physical injuries. The degree of emotional distress was irrelevant, and even the most trivial claims could “attach” themselves to physical injury and be recovered. The term “physical”, as used for applying a “physical consequence” rule, has been articulated as an indication that the condition or illness for which recovery is sought is one that can be objectively determined.

exposure so they become more susceptible than normal cells to being transformed into malignant cells. The plaintiffs may also argue that even if DES is not found to have caused “physical harm” to every member of the plaintiff class, the transmission of DES to the fetus in utero constitutes an “impact” sufficient to permit recovery for emotional distress under the already well-established “impact rule”. Plaintiff’s Brief to Mass. SJC on Ques. 1, 3 and 4 at 10, Paylon. If the plaintiffs could prove these theories at trial, the fact that Massachusetts does not recognize negligent infliction of emotional distress absent physical injury would be irrelevant. Unfortunately, however, both these alternative theories must be established by expert medical testimony which, considering the likelihood that opposing counsel will introduce his own expert testimony to the contrary, results in a battle of the experts thereby making the alternative theories difficult to establish in court. It therefore remains important to deal with the issue of negligent infliction of emotional distress in DES cases when there is no evidence of accompanying physical injury.

32. *Id.* at 290, 47 N.E. at 89. The plaintiff in *Spade* had been a passenger on a crowded car of the Lynn & Boston railroad. An employee of the railroad was found to be negligent in the removal of an unruly passenger thus frightening the plaintiff, causing him emotional shock and consequent physical injury. *Id.* at 285-86. Justice Allen recognized emotional distress as an injury and admitted that the denial of relief was based on administrative convenience:

The exemption from liability for mere fright, terror, alarm, or anxiety does not rest on the assumption that these do not constitute an actual injury. They do in fact deprive one of enjoyment and of comfort, cause real suffering, and to a greater or less extent disqualify one for the time being from doing the duties of life.

[T]he real reason for refusing damages sustained from mere fright . . . rests on the ground that in practice it is impossible satisfactorily to administer any other rule.

*Id.* at 288, N.E. at 88-89.
34. *See in re* United States, 418 F.2d 264, 269 (1st Cir. 1969). In that case the court
The issue of recovery for emotional distress also appeared in cases in which the plaintiff was not a direct victim of the defendant’s negligence, but was a bystander witnessing an accident in which a third party was injured by defendant’s negligence. With the surge of “bystander recovery” cases infiltrating the courts, many jurisdictions adopted the “zone of danger” theory of recovery. For example, in a typical “bystander” case a plaintiff who witnesses the occurrence of an injury to another would be allowed to recover for negligent infliction of emotional distress if he or she were in the “zone of danger”; that is if it were possible that the plaintiff could have been physically injured himself.

In Dziokonski v. Babineau, however, Massachusetts adopted the landmark theory promulgated by Dillon v. Legg, which allowed recovery to a bystander plaintiff regardless of whether he or she was within the “zone of danger”. Under the Dillon approach, the plaintiff was required to state the usual elements of a negligence claim and prove that the plaintiff suffered a “substantial physical injury as a result of the shock and trauma.” The Dziokonski court, therefore, held that a person who negligently caused emotional distress which led to physical injuries may be liable for those injuries even if the injured person was neither threatened with nor sustained any

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36. 375 Mass. 555, 380 N.E.2d 1295 (1978). In Dziokonski, a child was struck by a bus operated by defendant. The child’s mother was in the immediate vicinity and went to the scene where she found her child lying on the ground. The mother died in the ambulance as a result of physical and emotional shock, distress, and anguish. Id. at 557, 380 N.E.2d at 1296. The father “suffered an aggravated gastric ulcer, a coronary occlusion, physical and emotional shock, distress, and anguish as a result of the injury to his daughter and the death of his wife.” Id.; see also Ferriter v. Daniel O’Connell’s Sons, Inc., 381 Mass. 507, 413 N.E.2d 690 (1980) (children and wife of worker who was seriously injured as a result of employer’s negligence had cause of action against employer sufficient to withstand motion for summary judgment for shock and resulting physical impairment from seeing him in the hospital).

37. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

38. 375 Mass. at 568, 380 N.E.2d at 1302.

39. 68 Cal. 2d at 731, 441 P.2d at 914, 69 Cal. Rptr. at 74.
direct physical harm.\textsuperscript{40} The court stated that the "so-called 'impact' rule" of \textit{Spade}\textsuperscript{41} was no longer a necessary predicate to recovery for emotional distress\textsuperscript{42} and that the "zone of danger" rule lacked logical support.\textsuperscript{43}

A minority of courts have recognized a cause of action for negligent infliction of emotional distress unaccompanied by physical injury\textsuperscript{44}. This minority has refused to allow the requirement of physical harm to stand as an artificial bar to recovery, but instead has applied foreseeability and duty as the governing standard.\textsuperscript{45} The minority view recognizes that fears of unlimited liability and fraudulent claims are valid concerns but ones which must be weighed against a plaintiff\'s serious emotional injury directly caused by defendant\'s negligence.\textsuperscript{46}

2. The \textit{Payton} Court\'s Treatment of Negligent Infliction of Emotional Distress

In addressing the issue of whether a cause of action for negli-
gent infliction of emotional distress exists unless accompanied by physical injury, the Payton court,\textsuperscript{47} relying heavily on Dziokonski,\textsuperscript{48} held that to recover for negligent infliction of emotional distress the plaintiff must allege and prove that he or she suffered physical harm as a result of defendant's conduct.\textsuperscript{49} The court stated that "the physical harm suffered must either cause or be the result of the alleged emotional distress," be discernable "by objective symptomatology and substantiated by expert medical testimony," and the emotional distress accompanying the physical injury must be reasonably foreseeable.\textsuperscript{50} The court stated that it was "unwilling . . . to impose upon the judicial system and potential defendants the burden of dealing with claims of damages for emotional distress that are trivial, evanescent, temporary, feigned, or imagined, in order to insure that occasional claims of a more serious nature receive judicial resolution."\textsuperscript{51}

Justice Wilkins, joined by two other justices, dissented from the majority's treatment of recovery for emotional distress.\textsuperscript{52} Justice Wilkins pointed out that objective corroboration of the emotional distress alleged was available in that accepted medical practice indicated the need for the plaintiffs to undergo periodic examinations that were expensive, traumatic and painful.\textsuperscript{53}

Justice Wilkins also noted that the rationale underlying the majority view rested upon three assumptions and those assumptions were not valid in Payton.\textsuperscript{54} As to the first assumption, that emotional distress which did not manifest itself physically was normally trivial, the dissent asserted that Massachusetts had allowed recovery for minor emotional distress unrelated to the physical injury which accompanied it\textsuperscript{55} and, more importantly, emotional distress was not

\textsuperscript{47} The justices in the majority of the emotional distress issue were Chief Justice Hennessey and Justices Lynch, O'Connor and Nolan. See 386 Mass. at 540, 578, 437 N.E.2d at 172, 192.
\textsuperscript{48} See supra notes 37-44 and accompanying text.
\textsuperscript{49} 386 Mass. at 555, 437 N.E.2d at 180.
\textsuperscript{50} Id. at 556-57, 437 N.E.2d at 181.
\textsuperscript{51} Id. at 555, 437 N.E.2d at 180.
\textsuperscript{52} Id. at 578, 437 N.E.2d at 192 (Wilkins, Liacos and Abrams, J.J., dissenting).
\textsuperscript{53} Id. at 578-79, 437 N.E.2d at 192.
\textsuperscript{54} Id. at 579-81, 437 N.E.2d at 192-93. See also RESTATEMENT (SECOND) OF TORTS § 436A comment b (1965).
always trivial.\footnote{386 Mass. at 579, 437 N.E.2d at 193 (Wilkins, Liacos and Abrams, J.J., dissenting).} The second assumption, that physical harm guaranteed the genuineness of the claim, the dissent noted that the court had rejected the fear of fraudulent claims as a basis for denying a cause of action for emotional distress and had recognized that this was a jury question.\footnote{Id. at 580, 437 N.E.2d at 193 (Wilkins, Liacos and Abrams, J.J., dissenting) (citing Dziokonski, 375 Mass. at 566, 380 N.E.2d at 1307).} The third assumption, that the defendant's fault is not so great as to require making good a purely mental injury, the dissent stated that the degree of defendant's fault, whether reckless, intentional or negligent, bears no relation to the genuineness or existence of claim.\footnote{Id. at 581, 437 N.E.2d at 193-94 (Wilkins, Liacos and Abrams, J.J., dissenting).} Justice Wilkins stated that he strongly opposed the inhibited foresight of the majority: "The inertia which results from reliance on a 'majority view' guarantees a glacial development of the law."\footnote{Id.}

B. Recovery for "Wrongful Life"

1. Background

The prototypical "wrongful life" claim is an action by a genetically or congenitally defective infant against a physician for negligently failing to prevent the infant's birth.\footnote{See generally Note, Wrongful Life and a Fundamental Right to be Born Healthy: Park v. Chessin; Becker v. Schwartz, 27 BUFFALO L. REV. 537 (1978).} Typically, a physical examination will negligently fail to detect or warn a pregnant woman of a possible birth defect. The mother of the defective infant alleges that had she been aware of the potential deformity she would have aborted the pregnancy. In essence it is an action seeking damages for birth itself and it does not allege that the physician's negligence caused the deformity.\footnote{Id.}

Recovery for a wrongful life cause of action has been denied for primarily four reasons. First, it has been asserted that the measurement of damages is impossible because the normal measure of damages would compare the condition that the plaintiff would have been in, had the defendant not been negligent, with the plaintiff's impaired condition as a result of the negligence.\footnote{Gleitman v. Cosgrove, 49 N.J. 22, 28, 227 A.2d 689, 692 (1967). There, the child's mother contracted rubella while pregnant and the doctor failed to inform the patient of the possibility of the child being born with birth defects. The child was born with severe birth defects. Id. at 24-25, 229 A.2d at 690.} In such a case, the
measure of damages would be the difference between the plaintiff's life with defects and no life at all, and such a determination is impossible to make.63

The second reason advanced to deny a cause of action for wrongful life is that the infant has not suffered any damage cognizable at law by being brought into existence.64 The underlying rationale of this view is that "life—whether experienced with or without a major physical handicap—is more precious than non-life."65

It has been suggested, however, that although nonexistence should not be encouraged over life, the focus should be concentrated on the child's impaired state.66 Damages then could be assessed in the form of pain and suffering to be endured during the life of the child as well as any special pecuniary loss resulting from the impaired condition.67

Recently, the California Supreme Court in *Turpin v. Sortini*,68 questioned whether the public policy consideration of disavowing the sanctity and value of less than perfect human life provides a sound basis for rejecting the child's tort action.69 First, the court asserted that it was difficult to imagine how an award of damages to a severely handicapped or suffering child would "disavow" the value of life.70 Second, the court noted that our society places the highest value on human life, but to state that as a "matter of law" impaired life was preferable to nonexistence was inaccurate and unjust.71

63. *Id.*

64. Berman v. Allan, 80 N.J. 421, 428-29, 404 A.2d 8, 12 (1979). In Berman, plaintiff alleged that due to her advanced age at the time she conceived, the risk that the child would be afflicted with Down's Syndrome was sufficiently great so as to warrant the defendant to inform her of the risk and of the availability of amniocentesis. *Id.* at 425, 404 A.2d at 10.

65. *Id.* at 429, 404 A.2d at 12.


67. *Id.* at 831, 165 Cal. Rptr. at 489.

68. 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982). The *Turpin* court limited recovery to special damages (i.e., those which are not the necessary or inevitable result of an injury, e.g., medical expenses and loss of earnings) for extraordinary expenses necessary for treatment of the hereditary ailment; and not general damages (i.e., those which flow directly from the injury, e.g., pain and suffering).

69. *Id.* at 232-33, 643 P.2d at 961-62, 182 Cal. Rptr. at 344-45.

70. *Id.* at 233, 643 P.2d at 961-62, 182 Cal. Rptr. at 344-45.

71. *Id.* at 233, 643 P.2d at 926, 182 Cal. Rptr. at 345.
2. The Payton Court's Treatment of Wrongful Life

Essentially, the Payton majority\textsuperscript{72} applied the rationale that other courts have used to deny recovery for a wrongful life cause of action. The court held that even if a trier of fact found by a preponderance of the evidence that the plaintiff would not have been born except for her mother's ingestion of DES, the plaintiff would be barred from recovery for a physical or emotional harm.\textsuperscript{73} In so holding the court expressed its concern regarding the difficulty of assessing damages, stating that an attempt to make such a comparison would be beyond the competence of the judicial system.\textsuperscript{74}

Chief Justice Hennessey dissented from the majority opinion on this issue primarily because he found the full scope of the majority's view as being adverse to basic tort principles.\textsuperscript{75} Hennessey viewed the court's holding as providing "a negligent manufacturer of a life sustaining product with an excuse from liability whenever it can show that its product probably saved a plaintiff's life."\textsuperscript{76} The Chief Justice also objected to the use of the "wrongful life" rationale as a determinative factor in barring recovery in Payton. He stated that the problem with the rationale was its basis on the failure to warn,\textsuperscript{77} whereas in Payton, the plaintiffs also alleged inadequate testing as a basis of the defendant's negligence. Thus, because the plaintiff's state of life was caused by the drug, and not the defendant's negligence, the rationale applied in "wrongful life" cases was not applicable in Payton.\textsuperscript{78}

III. Analysis

A. Emotional Distress

1. Policy

Various policy reasons have been asserted against the recognition of negligent infliction of emotional distress absent physical injury as a valid cause of action. One such reason is the lack of knowledge and medical technology in the area of mental illness.\textsuperscript{79}

\textsuperscript{72} The justices in the majority on the issue of wrongful life were Wilkins, Liacos, Abrams, O'Connor, Nolan and Lynch. 386 Mass. at 540, 575, 437 N.E.2d at 172, 190.
\textsuperscript{73} 386 Mass. at 559, 437 N.E.2d at 182.
\textsuperscript{74} Id.
\textsuperscript{75} Id. at 575-76, 437 N.E.2d at 190-92 (Hennessey, C.J., dissenting).
\textsuperscript{76} Id. at 576, 437 N.E.2d at 191.
\textsuperscript{77} Id. at 577-78, 437 N.E.2d at 192.
\textsuperscript{78} Id.
\textsuperscript{79} 386 Mass. at 552-53, 437 N.E.2d at 175.
The development of medical science, however, has advanced sufficiently so as to enable a causal link between the psychic damage suffered and shock or fright caused by the defendant to be established.\(^{80}\) It is difficult, if not impossible to draw a clear legal line between physical injury caused by emotional distress and pure emotional distress.\(^{81}\) Emotional or mental distress, in some circumstances, may have a debilitating effect on an individual's capacity to carry on the normal functions of life. Today, society recognizes mental disturbances to be as severe an injury as many physical illnesses.\(^{82}\) The emotional distress alleged in *Payton* clearly is caused by the taking of a drug which is medically proven to cause cancer and other diseases.\(^{83}\) The "DES Daughters" participate in painful and traumatic periodic examinations to detect DES-related potential illnesses, thus providing the causal connection between the distress suffered and the negligence of the defendant.

Perhaps the most persuasive policy reason advanced for the physical injury requirement is that it serves as a screening device to false claims. It has been asserted, however, that the courts are equipped to deal with fictitious lawsuits when they arise. The judge or jury is able to distinguish between those claims which are real and those which are contrived.\(^{84}\) The Supreme Judicial Court has previously stated that "we constantly depend on efficient investigations

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\(^{80}\) Sinn v. Burd, 486 Pa. at 152, 404 A.2d at 678. In *Sinn* action was brought against the driver of an automobile which struck and killed a child, to recover psychological damage sustained by the child's sister and to recover for damages sustained by the child's mother due to the emotional stress arising from her observation of the accident. *Id.* at 150-52, 404 A.2d at 674-75. It has been assumed that medical science is unable to establish that the psychic injuries in fact resulted from defendant's negligence but the development of psychiatric tests and the refinement of diagnostic techniques has led some authorities to conclude that science can establish with reasonable medical certainty the existence and severity of emotional harm. *Recent Developments—Summary Judgment Improper Where Plaintiffs Allege Severe Mental Distress Despite Their Absence from Location of Tortious Activity—Prince v. Pitson Co.,* 63 GEO. L.J. 1179, 1184-85 (1975). Also "[t]here is no reason to believe that the causal connection involved [in emotional injuries] is any more difficult for lawyers to prove or for judges and jurors to comprehend than many other which occur elsewhere in the law . . . "[I]n any event, difficulty of proof should not bar the plaintiff from the opportunity of attempting to convince the trier of fact of the truth of her claim." Neiderman v. Brodsky, 436 Pa. 392, 403, 261 A.2d 84, 87 (1970) (quoting Falzone v. Busch, 45 N.J. 559, 561, 214 A.2d 12, 15-16 (1965)).

\(^{81}\) *Restatement (Second) of Torts* § 436A comment c (1965). "This becomes a medical or psychiatric problem, rather than one of law." *Id.*

\(^{82}\) For example, social security disability benefits are received for mental disability. 20 C.F.R. § 404, 1505 (1983).

\(^{83}\) *Physicians Desk Reference* 1125-26 (1983).

and on juries and trial judges to sift evidence in order to determine the facts and arrive at proper verdicts. Experience has shown that courts are quite adequate for this task. Further, the court has stated that "administrative difficulties do not justify the denial of relief for serious invasions of mental and emotional tranquility." Thus, it is clear that the Payton court falls prey to its own criticisms.

The Payton court has classified negligently inflicted emotional distress cases into two categories; one in which physical injury accompanies the distress. This classification is both overinclusive and underinclusive when viewed in light of its purported purpose of screening false claims. It is overinclusive because it permits recovery for emotional distress when the suffering accompanies or results in any physical injury, however trivial. It is underinclusive because it mechanically denies plaintiffs with valid and provable claims access to the courts. Payton exemplifies the latter category. The objective proof that a majority of courts believe is necessary to ensure the credibility of a claim was readily available in Payton. Medical records could have provided as evidence that the drug was taken and that the plaintiffs had undergone painful and potentially traumatic examinations. It is highly unlikely that these women would go to such lengths if they did not experience some mental distress over the possibility of contracting cancer or other DES-related illness.

While the foregoing indicates the court's concern over protecting the interest of the judicial system, it has effectively granted protection to the interest of alleged tortfeasors. In requiring proof of physical harm, the court alleviated its fear of imposing unlimited or unduly burdensome liability. Although fear of unlimited liability is a valid concern, this concern should be weighed against plaintiff's serious emotional injury which has resulted directly from defendant's negligence. It is possible to allay the court's concern by employing a "duty" and "foreseeability" analysis. The focus of this

87. See supra notes 1-17 and accompanying text.
88. 386 Mass. at 543, 437 N.E.2d at 172.
89. Duty has been defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another. W. PROSSER, supra note 36, § 53, at 331. See also James, Scope of Duty in Negligence Cases, 47 NW. U.L. REV. 778 (1953).
90. While duty is a question of law, foreseeability is a question of fact for the jury. Wierum v. RKO General, Inc., 15 Cal. 3d 40, 539 P.2d 36, 123 Cal. Rptr. 468 (1975). The inquiry is whether it was foreseeable that such harm would occur. See Dillon v.
analysis is whether the defendant owed a legal duty to the plaintiff instead of whether there is physical injury. Foreseeability is a controlling factor in determining one's legal duty. If such an analysis were applied in Payton, the focus would be on whether manufacturers of DES could have reasonably foreseen that the fetuses of the pregnant woman would suffer harm instead of whether they can demonstrate physical symptoms.

2. Dziokonski

In refusing to recognize a cause of action for negligent infliction of emotional distress absent physical harm, the Payton court relied primarily on its decision in Dziokonski. Dziokonski was a typical "bystander" case. Thus, it was reasonable for the court to require additional evidence of the plaintiff's harm such as physical symptoms, given the more tenuous relationship of the plaintiff alleging emotional distress due to an injury to a third party.

In Payton, however, the plaintiffs were direct victims of the

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91. Although the common law has not required every person to be bound by a legal duty to every other person, the concept of duty is most often applied in situations where persons are in a special relationship, reliance of one person on another is high, and it is foreseeable that a person will be endangered by defendant's conduct. E.g., Union Pacific Ry. v. Chappier, 66 Kan. 649, 654, 72 P. 281, 283 (1903); Pulka v. Edelman, 40 N.Y.2d 781, 785-86, 358 N.E.2d 1019, 1022, 390 N.S.2d 393, 396-97 (1976); Riss v. City of New York, 22 N.Y.2d 579, 582-83, 240 N.E.2d 860, 861, 293 N.Y.S.2d 897, 899 (1968); H.R. Moch v. Rensselaeer Water Co., 247 N.Y. 160, 169-70, 159 N.E. 896, 899 (1928); see also, Prosser, Palisgraph Revisited, 52 MICH. L. REV. (1953); Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

92. A person may be liable "only to those who are foreseeably endangered by [his] conduct and only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous." 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 18.2, at 1018 (1956).

93. Jurisdictions have applied such a "foreseeability" standard with successful and equitable results. See supra notes 36-57 and accompanying text.

94. See supra notes 37-44 and accompanying text.

95. See also Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

96. In certified question three of Payton, the court held that a plaintiff can recover damages for injury in utero as a result of her mother's ingestion of a drug. 386 Mass. at 564, 437 N.E.2d at 182. The issue of prenatal injury was first encountered in Massachusetts in Dietrich v. Northampton, 138 Mass. 14 (1884). The Dietrich court denied recovery for prenatal injury on the grounds of lack of precedent and that the unborn child was a part of the mother at the time of injury. Thus any damage to it which was not too remote to be recovered for at all was recoverable by her. Id. at 17. The court reaffirmed the Dietrich rule in Bliss v. Passanesi, 326 Mass. 461 (1950), in which the court stated that
defendant's alleged negligent conduct. Because DES was prescribed to the plaintiffs for the prevention of miscarriages it was specifically aimed at those who, at the time of ingestion, were fetuses. Despite this crucial difference, the Payton court analogized the facts before it to Dziokonski and found that because the plaintiffs in Payton demonstrated no physical injuries or manifestations, they did not meet the standard set forth in Dziokonski: a plaintiff alleging negligent infliction of emotional distress must suffer a substantial physical injury as a result of the shock of trauma.97

Whether Dziokonski was decided correctly is not the controlling factor in this analysis. Rather, the court should have focused on whether Dziokonski was the correct precedent upon which to base its decision. In a situation in which the alleged harm is inflicted directly on the plaintiff, the standard should not be the same as when the alleged harm is indirect. This issue of negligent infliction of emotional distress of a direct victim is one of first impression in Massachusetts. The court, however, should not have grasped the holding of Dziokonski so quickly without taking into consideration the critical factor that in Dziokonski the plaintiff was a bystander who claimed emotional distress resulting from injury to another, while in Payton the plaintiff was a direct victim of the alleged negligence.

3. Distinction Without a Difference—The Physical Injury Requirement

Although the Supreme Judicial Court has clearly indicated its reluctance to compensate for emotional distress unaccompanied by physical injury when negligently inflicted, Massachusetts has recog-

problems are created by allowing recovery, mainly the difficulty of causation. Id. at 462, see also Cavanaugh v. First Nat'l Stores, Inc., 329 Mass. 179 (1952). Subsequently, the court in Keyes v. Construction Serv., Inc., 340 Mass. 633 (1966), held that the administrator of the estate of an infant who dies from injuries suffered in utero was allowed to recover for the infant's injuries. Id. at 637. The court distinguished Dietrich on the ground that the plaintiff in Keyes was injured after it became viable. Id. In Torigan v. Watertown News Co., 352 Mass. 446, 225 N.E.2d 926 (1967), the court held that the plaintiff's estate stated a cause of action even though the injuries were sustained before viability. Id. at 448, 225 N.E.2d at 927. The court reasoned that the element of speculation was not present to any greater extent than in the usual tort claim. Id. at 448-49, 225 N.E.2d at 927. In Leccesse v. McDonough, 361 Mass. 64, 279 N.E.2d 339 (1972), however, recovery was denied to the administrator of the estate of an infant who was stillborn. In Mone v. Greyhound Lines Inc., 368 Mass. 354, 331 N.E.2d 916 (1975), the court overruled Leccesse and stated that stillbirth does not render the measurement of damages any less capable of calculation than in cases of live birth. Id. at 360, 331 N.E.2d at 920. Thus, Massachusetts now recognizes injury to a fetus as a valid cause of action.

97. See supra notes 37-44.
nized a cause of action for emotional distress unaccompanied by physical injury when inflicted recklessly or intentionally. To recover for emotional distress absent physical injury in Massachusetts, the defendant's conduct must have been "extreme and outrageous," beyond all possible bounds of decency" and "utterly intolerable in a civilized community." The rationale articulated for this standard is twofold: First, one whose conduct is extreme and outrageous deserves to be punished more so than one who is negligent; and secondly, such conduct insures the genuineness of the claim.

The Supreme Judicial Court held in *Agis v. Howard Johnson Co.* that an employee's severe emotional distress caused by her employer's extreme and outrageous conduct in firing her constituted a cause of action even though no physical injury resulted. The court in *Agis* composed a set of guidelines which purported to alleviate the fear of frivolous litigation. Recently, the supreme judicial court reaffirmed its belief that emotional distress is a valid independent tort worthy of recognition. The court in *Simon v. Solomon,* permitted the plaintiff to recover for emotional distress due to the damage to her property recklessly caused by the defendant. The plaintiff in *Simon* also alleged negligent infliction of emotional distress and although the court did not reject the claim, the court

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(1) that the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct. . . ; (2) that the conduct was 'extreme and outrageous,' was 'beyond all possible bounds of decency' and was 'utterly intolerable in a civilized community . . . ; (3) that the actions of the defendant were the cause of plaintiff's distress. . . ; and (4) that the emotional distress sustained by the plaintiff was 'severe' and of a nature 'that no reasonable man could be expected to endure it.'

99. *Id.* at 144-45, 355 N.E.2d at 318-19 (citations omitted).

100. 371 Mass. 140, 355 N.E.2d 315 (1976). Plaintiff was fired arbitrarily from her position as a waitress when the manager threatened to fire the waitresses in alphabetical order until the identity of the person who had been stealing from the restaurant was discovered. *Id.* at 144, 355 N.E.2d at 318. The plaintiff was granted relief for emotional distress, mental anguish and loss of wages. *Id.* at 141, 355 N.E.2d at 317.

101. *Id.* at 144, 355 N.E.2d at 318.

102. *Id.; see supra* note 99.

103. 385 Mass. 91, 431 N.E.2d 556 (1982). Soloman lived in a low rent apartment and when the manager attempted to evict her for nonpayment of rent, Soloman contended that she did not owe any because of the landlord's violation of the "quiet enjoyment" statute. Sewage flooded her apartment thirty times which left her withdrawn, depressed, ashamed, unable to work or care for her children. *Id.* at 93, 431 N.E.2d at 557.

104. *Id.* at 97, 431 N.E.2d at 562.
avoided it on the basis that a sizeable recovery for reckless infliction of emotional distress had been awarded which was deemed sufficient.\textsuperscript{105}

By imposing the physical injury requirement, the supreme judicial court has drawn a distinct line between those cases in which one suffers great emotional distress in anticipation of contracting cancer and those in which one suffers emotional distress due to employment termination or extensive property damage. The arbitrariness of this distinction demonstrates the difficulty of distinguishing between reckless and negligent conduct in emotional distress cases and raises the question of whether a significant difference in treatment is warranted. If the court had analyzed \textit{Payton} in terms of extending the recklessness standard instead of relying on \textit{Dziokonski}, it would first have examined the policy reasons advanced for allowing an emotional distress cause of action without proof of physical injury when recklessly inflicted. The main reason for allowing such a cause of action is to insure the genuineness of the claim through the degree of the defendant’s fault. This goal does not appear to be attained by allowing plaintiffs to recover for distress due to loss of a job while preventing recovery to plaintiffs who can insure the genuineness of the claim by medical examinations and tests. Such an example demonstrates the inequitable results of arbitrary line drawing. While some may readily and correctly argue that line drawing is necessary in judicial decision making, the \textit{Payton} case may not be an appropriate one in which to draw such a preclusive line. As Justice Wilkins aptly noted in his dissent, the degree of a defendant’s fault bears no relation to the genuineness or existence of a claim.\textsuperscript{106} Therefore, had the court examined the rationale and effects of the public policy reasons advanced in favor of a cause of action for recklessly inflicted emotional distress absent physical injury, it would have also recognized a cause of action when the injury results from defendant’s negligence.

B. \textit{Wrongful Life}

The wrongful life issue in \textit{Payton} was one of first impression in Massachusetts. The \textit{Payton} court, therefore, found it appropriate to examine other jurisdiction’s rejections of such claims in order to place an additional burden on the women allegedly injured by the drug DES in their attempts to recover damages. In holding that

\textsuperscript{105} \textit{Id.} at 98-99, 431 N.E.2d at 562.

\textsuperscript{106} 386 Mass. at 581, 437 N.E.2d at 193 (Wilkins, J., dissenting).
plaintiff would be barred from recovery for physical or emotional distress suffered as a result of the mother's ingestion of DES if the trier of fact concluded that the plaintiff would not have been born had the mother never ingested the drug, the supreme judicial court adopted the defendant's theory that a wrongful life analogy should be applied to Payton. Because DES was taken to prevent miscarriage, defendants asserted that if it had not been for their drug, the mother would have miscarried and the plaintiff would not be alive today; thus, plaintiff should be content to be alive at all.

A major problem with the majority's decision on the wrongful life issue is that the rationale that the courts have used to deny recovery for a wrongful life cause of action is not applicable to the Payton facts. As stated by Chief Justice Hennessey in his dissent, wrongful life analogies assume that the negligence complained of is a failure to warn, typically a doctor's failure to warn a pregnant woman of probable birth defect. The plaintiffs in Payton, however, were alleging inadequate testing of the drug, which renders unnecessary the metaphysical calculations involved in wrongful life cases. The plaintiffs in Payton were not suing the defendants for negligent manufacturing and marketing of a drug that caused unwanted life; rather, they were suing for negligent production and promotion of a drug that caused cancer and other abnormalities of the reproductive tract. Therefore, Chief Justice Hennessey was correct in his assertion that "[t]he harm complained of is not life, but suffering by a living person, flowing from negligent conduct toward a potential life. These are familiar concepts, and do not require comparisons between life-with-injury and no-life. . . ."

To overcome the problem of assessing damages, the plaintiffs could be awarded damages based on a comparison between the consequences of the defendants' negligence in the promotion of DES as a miscarriage preventive and plaintiff's state had the defendants instead, in the exercise of due care, manufactured and marketed a product which was safe and fit for its intended purpose. This is the typical manner in which damages are measured in an ordinary negli-

107. Id. at 557-58, 437 N.E.2d at 181.
108. Id. at 559, 437 N.E.2d at 182.
109. Id. at 557-58, 437 N.E.2d at 181.
110. Id. at 575, 437 N.E.2d at 191 (Hennessey, C.J., dissenting); see supra notes 61-72 and accompanying text.
111. 386 Mass. at 578, 437 N.E.2d at 192 (Hennessey, C.J., dissenting).
112. Id. at 577-78, 437 N.E.2d at 192 (Hennessey, C.J., dissenting).
113. Id. at 578, 437 N.E.2d at 192 (Hennessey, C.J., dissenting).
gence action.\textsuperscript{114}

Even accepting the majority view that a wrongful life analysis was appropriate in\textit{Payton}, the court may not have been justified in readily adopting the prevailing view which bars recovery.\textsuperscript{115} The major reasons that have been advanced in opposition to such a wrongful life cause of action are: First the difficulty in measuring damages, and second that the value of life is so great that any life, however impaired, is better than no life at all.\textsuperscript{116} With respect to the first reason, it offends one’s sense of justice to think that the difficulty of a task should be determinative of whether an injured party may be compensated. Courts have been faced with tasks of similar difficulty, such as measuring pain and suffering, and have circumvented the problem.\textsuperscript{117} Moreover, the measure of damages in wrongful life cases need not be determined by comparing and appraising states of life and non-life, but instead damages can be awarded by measuring the pain and suffering such a plaintiff endures during his life, in addition to any special pecuniary loss resulting from the impaired condition.\textsuperscript{118}

The second major policy reason offered to bar recovery in such cases is the fear of disavowing the value of life.\textsuperscript{119} Although few people would argue with the importance and pricelessness of human life, there is no sound basis for creating an irrebuttable presumption at law that any existence is better than nonexistence.\textsuperscript{120} The crucial focal point is the realization that such plaintiffs exist and suffer due to the negligence of others and therefore, we “need not be concerned with the fact that had the defendant not been negligent the plaintiff might not have come into existence at all.”\textsuperscript{121}

In essence, the court’s holding on the wrongful life issue effectively provides a negligent manufacturer of a life sustaining product with an excuse from liability whenever it can demonstrate that its product probably saved a life.\textsuperscript{122} This consequence is inconsistent

\begin{footnotes}
\item[115] See supra notes 61-72 and accompanying text.
\item[116] See supra notes 63-66 and accompanying text.
\item[119] See supra notes 63-66 and accompanying text.
\item[122] 386 Mass. at 577, 437 N.E.2d at 192.
\end{footnotes}
with the fundamental principles of tort liability that a person injured by another’s negligence is deserving of redress.\textsuperscript{123}

Although the court denied recovery on the issue of “wrongful life”, it will be extremely difficult for the defendants to prove that they were in fact responsible for the plaintiff’s birth.\textsuperscript{124} This is of little consolation, however, to many women if it is shown by a preponderance of the evidence that they would not have otherwise been born. Perhaps the most frightening factor of \textit{Payton} is that it applies to both physical and emotional harm. Therefore, even women who can prove they have contracted cancer or another disease particular to DES, may be barred from recovery on the basis of such a wrongful life analysis.

**IV. Conclusion**

The court in \textit{Payton v. Abbott Laboratories}\textsuperscript{125} has promulgated standards and guidelines for the plaintiffs which are difficult, if not impossible to meet, in effect leaving women who have been injured with no redress, a notion which is contrary to the underlying foundation of tort law.

Regarding the issue of emotional distress, the \textit{Payton} court held that when such distress is negligently inflicted, it must be accompanied by physical injury to be recoverable. Regarding the issue of wrongful life, the \textit{Payton} court held that “DES Daughters” would be barred from recovery for physical or emotional injury suffered as a result of their mothers’ ingestion of DES if the trier of fact concluded that they would not have been born had the mother never ingested the drug. If the wrongful life analogy is applied successfully to DES cases similar to \textit{Payton}, the “DES Daughters” will be barred from recovery for physical or emotional injury even though there is evidence to prove that such injury was caused by a defendant’s negligence.

Judicial conservatism does not call for reaching beyond the scope of the problem and applying nonapplicable doctrines. This is what the court achieved by ruling that a “wrongful life” analysis was appropriate in \textit{Payton}. The result of \textit{Payton} is that thousands of wo-

\textsuperscript{123} For example, doctors who are found negligent are not permitted to escape liability although they save lives every day; and rescuers are held liable if they negligently increase the risk of harm to the person they attempt to save. \textit{E.g.}, Robbins v. Footer, 553 F.2d 123 (D.C. Cir. 1977); Cobbs v. Grant, 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972).

\textsuperscript{124} 386 Mass. at 560, 437 N.E.2d at 182.

\textsuperscript{125} 386 Mass. 540, 437 N.E.2d 171 (1982).
men may remain remediless on the theory that they are fortunate to be alive at all.

The ramifications of *Payton* are simply that women who have been affected by a negligently manufactured drug cannot recover for their anxiety or mental distress at the prospect of future physical injury; and even women who do demonstrate physical harm may be barred from recovery based on a "wrongful life" analysis.

The real issue presented by *Payton* is whether the common law should adapt to the realities and complexities of contemporary society, or leave large numbers of injured Massachusetts women without relief. Apparently, the Supreme Judicial Court chose the latter. It is disheartening to see the law so close to achieving symmetry between judicial thinking and the perils of modern society and then halt abruptly at a time when it is so crucial. It is critical that the law keep abreast of modern medicine, technology, and society if the principles of tort law are to continue to have any meaning.

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