In 1971 it was recognized that sickness and maternity also cause unavoidable interruptions in earnings that should be covered by an employment income replacement system. Accordingly, benefits were introduced into the unemployment insurance scheme to provide protection in these events. Benefits to cover adoptive leave were added in 1984. Sickness, maternity and adoptive benefits are referred to as "special benefits".

Prior to a recent amendment to the Act, a woman was required to take a certain portion of her maternity leave before the birth of her child. Now she can take most or all of the leave after the birth. These last amendments to the Act raise questions about the continuing validity of the original rationale for maternity benefits. As stated in the 1981 Task Force report, *Unemployment Insurance in the 1980s*,

> When introduced [maternity benefits] were intended to protect the mother from an earnings interruption caused by the physical incapacity to work or look for work in the period surrounding the birth. In practical terms, however, the benefits have been used more to enable the mother to care for the child after the birth and less because of her strict physical incapacity to work.

The Task Force observed that for the great majority of claimants physical incapacity extending through the full eligibility period of 15 weeks is extremely unlikely. In effect, women are now using maternity benefits for the purpose of protecting wages lost through both physical incapacity and remaining out of the workforce to care for a child immediately after birth. The Task Force felt that in these circumstances it was difficult to justify the provision of maternity leave and benefits on the sole basis of physical incapacity.

The difference between the two purposes served by maternity benefits is of significance in considering the effect of section 15 of the *Charter*. If an important reason for maternity leave and benefits is to allow for a period of post-natal care of, and adjustment to, the baby, as we would suggest, the rules restricting benefits to the female parent must be questioned.

Fathers also have an interest in being involved in the care of their new-born children, yet the law does not give them the same opportunity afforded mothers to provide that care, because maternity benefits are available only to women. Women have also argued against the present system on the basis that continuing to treat women as primarily responsible for child care has consequences that work to the economic disadvantage of women in the long run.

There is a fundamental question whether 'equality' means the same treatment for men and women, or whether differences between men and women should be accommodated, where they are relevant in a particular context, by specific legislative provisions. We think that the latter approach is required. It is important, however, that lawmakers consider the essential ways in which the sexes differ and legislate with a view to only those specific differences. Using this approach, we suggest that the law should recognize that childbirth relates only to women but that the child-rearing function is the responsibility of both sexes. Except where the rationale for a provision relates to the physical act of bearing a child, men and women should receive the equal benefit and protection of the law.

It is possible that the courts might be prepared to sustain the current limitation of childbirth-related benefits to women. Section 15(1) of the *Charter* is qualified by section 15(2), which permits certain affirmative action programs, and by section 1,