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Legal Duty to the Unborn Plaintiff: Is There a Limit

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COMMENTS

LEGAL DUTY TO THE UNBORN PLAINTIFF: IS THERE A LIMIT?

I. Legal Duty in the Law of Negligence—An Historical Overview

Two of the elements essential to any actionable negligence are the existence of a "legal duty"¹ owing to the plaintiff by the defendant, and a breach of that duty.² This breach may consist of either affirmative negligent acts or negligent failures to act,³ but some duty owing to the plaintiff must be present for that plaintiff to maintain an action against the negligent defendant.⁴ The defendant's legal duty to the plaintiff extends only so far as that plaintiff has a correlative right by reason of his relationship with the defendant.⁵ Beyond the scope, therefore, of a particular right vested in the plaintiff, the defendant owes him no legal duty.⁶ Where there is no duty, there can be no breach and, consequently, no cause of action for negligence.⁷

This Comment will trace the history of the legal duty requirement in prenatal injury cases and examine the factors, such as increased medical knowledge, which contributed to its expansion and evolution. In addition, it will examine the various approaches used by courts in deciding whether to grant a cause of action for prenatal injuries. Finally, this Comment will analyze the recent decisions in

1. "Legal duty" has been defined as "[t]hat which the law requires to be done or forborne to a determinate person or the public at large, correlative to a vested and coextensive right in such person or the public, and the breach of which constitutes negligence." BLACK'S LAW DICTIONARY 1039 (4th ed. rev. 1968). Cf. *People v. McGreal*, 4 Ill. App. 3d 312, 321, 278 N.E.2d 504, 510 (1971). " 'Legal duty' is that which the law requires be done or forborne by [i.e., to] a determinate person." *Id.*, citing *Pennsylvania Co. v. Frana*, 13 Ill. App. 91, 98 (1883).

2. F. WHARTON, TREATISE ON THE LAW OF NEGLIGENCE § 3, at 3 (2d ed. 1878) [hereinafter WHARTON]. The other elements of actionable negligence are "[i]nadvertence" and "injury." *Id.*

3. *Heaven v. Pender*, 11 Q.B.D. 503, 507 (1883).

4. *Pittsburgh, Ft. W. & C. Ry. v. Bingham*, 29 Ohio St. 364, 369 (1877).

5. See note 1 *supra*. See also WHARTON, *supra* note 2, § 24, at 17.

6. *Western Md. R.R. v. Kehoe*, 83 Md. 434, 451, 35 A. 90, 94 (1896) (citing *Kahl v. Love*, 37 N.J.L. 5, 8 (1874)).

7. *Id.*

which a legal duty was found for preconception negligence and will discuss, in connection with the present state of medical knowledge, some of the ramifications which this extension of legal duty may have on future prenatal injury litigation.⁸

A. To Whom Is A Duty Owed?

It has been noted that "[i]n civil issues the right to enforce [a legal] duty must reside in individuals,"⁹ in "persons determinate."¹⁰ Indeed, there has been virtually no change in the definition of legal duty since Dr. Francis Wharton wrote those words in his famous treatise on negligence in 1878:¹¹ now, as then, the duty must be owed to a determinate *person*¹² in whom some coextensive right has vested before an action in negligence will lie. This rule was followed steadfastly by courts in many early negligence cases.¹³ The United States Supreme Court, in articulating the rationale for the limitation on actionable negligence imposed by the requirement of legal duty,¹⁴ expressed a fear which would be echoed, either expressly or impliedly, in nearly all of the subsequent opinions denying recovery for the negligent infliction of prenatal injuries:¹⁵ "[This] restriction on the right to sue for [negligence] in the exercise of employments . . . is plainly necessary to restrain the remedy from being pushed to an impracticable extreme."¹⁶ Without the

8. Since they are separate and distinct from actions for personal injury, this Comment will not, for the most part, deal with so-called "wrongful death" actions, which owe their existence or non-existence to state statutes and not the common law.

9. WHARTON, *supra* note 2, § 24, at 17.

10. *Id.*

11. Compare the definition of "legal duty" in WHARTON, § 24, at 17, with the definition of that term in the most recent edition of BLACK'S LAW DICTIONARY, quoted at note 1 *supra*.

12. According to the prevailing American view (see 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 18.2, at 1018-19 & 1019 n.4 (1956)), a reasonably foreseeable plaintiff, or a member of a foreseeable class of plaintiffs, would qualify as a "determinate" person. See *id.* at 1018. See also RESTATEMENT (SECOND) OF TORTS § 281(b) (1965).

13. See, e.g., Crane Elev. Co. v. Lippert, 63 F. 942, 945 (7th Cir. 1894); Toadvine v. Cincinnati, N.O. & T.P. Ry., 20 F. Supp. 226, 227 (E.D. Ky. 1937); Salmon v. Delaware, L. & W. R.R., 38 N.J.L. 5, 11 (1875); Brown v. Boorman, 11 Cl. & F. 1, 44, 8 Eng. Rep. 1003, 1018-19 (H.L. 1844); Ferguson v. Earl of Kinnoull, 9 Cl. & F. 251, 289, 8 Eng. Rep. 412, 426 (H.L. 1842).

14. Savings Bank v. Ward, 100 U.S. 195, 202 (1879).

15. See, e.g., Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 359, 78 S.W.2d 944, 949-50 (1935).

16. 100 U.S. at 202.

restraint of legal duty, the Court said, “[t]here would be no bounds to actions [for] negligence”¹⁷

B. Legal Duty and the Unborn Plaintiff

Reflecting an adherence to the letter of the law, courts found that a child could not maintain an action for prenatal injuries since, at the time of the alleged infliction of injury, it was not a person and therefore could be owed no duty.¹⁸ The original position of American courts,¹⁹ enunciated in 1884,²⁰ was that a child *en ventre sa mere* is merely a part of its mother,²¹ a non-entity²² which could enjoy legal rights and legal personality only after birth.²³ And even when courts expanded the notion of who was a “determinate person” within the definition of “legal duty,” unborn children were denied a right of action for their prenatal injuries.

In 1928, the New York Court of Appeals decided “the most discussed and debated of all torts cases.”²⁴ In *Palsgraf v. Long Island Railroad*,²⁵ the court held, in the now famous opinion by Chief Judge Benjamin N. Cardozo, that duty in a negligence action extends only to those persons within a definite area of danger.²⁶ Judge William S. Andrews, author of the equally famous *Palsgraf* dissent, said that

17. *Id.*

18. Some of the cases relying on the absence of duty as a basis for denying recovery for prenatal injuries are cited in note 96 *infra*. See also *Bliss v. Passanesi*, 326 Mass. 461, 95 N.E.2d 206 (1950).

19. See text accompanying notes 57-59 *infra*.

20. *Dietrich v. Northampton*, 138 Mass. 14 (1884) (per Holmes, J.).

21. *Id.* at 17.

22. *Id.* at 16. Cf. *Thellusson v. Woodford*, 31 Eng. Rep. 117 (Ch. 1798), wherein the court, in reply to the contention that a devise for the life of a child *en ventre sa mere* was void because the unborn child was a non-entity, said:

Let us see, what this non-entity can do. He may be vouched in a recovery, though it is for the purpose of making him answer over in value. He may be an executor. He may take under the Statute of Distributions. . . . He may take by devise. He may be entitled under a charge for raising portions. He may have an injunction; and he may have a guardian.

Id. at 163 (citation omitted).

23. Even today, the right of action for prenatal injuries is dependent upon the plaintiff's survival of birth; only thereafter do the rights of a person accrue to him under the law. See *Gordon, The Unborn Plaintiff*, 63 Mich. L. Rev. 579, 587 (1965). See also text accompanying notes 124 & 137 & note 140 *infra*.

24. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 43, at 254 (4th ed. 1971) [hereinafter PROSSER].

25. 248 N.Y. 339, 162 N.E. 99 (1928).

26. *Id.* at 343, 162 N.E. at 100.

“[d]ue care is a duty imposed on each one of use to protect society from unnecessary danger, not to protect [determinate plaintiffs] alone,”²⁷ but he noted that “[a]n unborn child may not demand immunity from personal harm.”²⁸

This position was “relied upon as dispositive and controlling”²⁹ until 1946, when a federal district court held that a fetus “capable of living outside the womb”³⁰ was a person³¹ and had a right of action in negligence “for injuries wrongfully committed upon its person while in the womb of its mother.”³²

By 1972, the District of Columbia and every state which confronted the issue had recognized some right of action in a child for its prenatal injuries.³³ Some jurisdictions even recognized that right of action from the moment of the plaintiff’s conception,³⁴ extending

27. *Id.* at 349, 162 N.E. at 102 (Andrews, J., dissenting).

28. *Id.* at 348, 162 N.E. at 102 (Andrews, J. dissenting) (citing *Drobner v. Peters*, 232 N.Y. 220, 133 N.E. 567 (1921)).

29. *Bonbrest v. Kotz*, 65 F. Supp. 138, 139 (D.D.C. 1946).

30. *Id.* at 140.

31. *Id.*

32. *Id.* at 142.

33. *E.g.*, *Huskey v. Smith*, 289 Ala. 52, 265 So. 2d 596 (1972); *Scott v. McPheeters*, 33 Cal. App. 2d 629, 92 P.2d 678, *aff’d per curiam*, 93 P.2d 562 (1939) (decision based on statute); *Tursi v. New England Windsor Co.*, 19 Conn. Supp. 242, 111 A.2d 14 (Super. Ct. 1955); *Worgan v. Greggo & Ferrara, Inc.*, 50 Del. 258, 128 A.2d 557 (1956); *Bonbrest v. Kotz*, 65 F. Supp. 138 (D.D.C. 1946); *Stokes v. Liberty Mut. Ins. Co.*, 213 So. 2d 695 (Fla. 1968); *Hornbuckle v. Plantation Pipe Line Co.*, 212 Ga. 504, 93 S.E.2d 727 (1956); *Rodriguez v. Patti*, 415 Ill. 496, 114 N.E.2d 721 (1953); *Wendt v. Lillo*, 182 F. Supp. 56 (N.D. Iowa 1960) (recognizing rule under Iowa law); *Hale v. Manion*, 189 Kan. 143, 368 P.2d 1 (1962); *Cooper v. Blanck*, 39 So. 2d 352 (La. Ct. App. 1923) (civil-law decision); *Damasiewicz v. Gorsuch*, 197 Md. 417, 79 A.2d 550 (1951); *Keyes v. Construction Serv., Inc.*, 340 Mass. 633, 165 N.E.2d 912 (1960); *Womack v. Buchhorn*, 384 Mich. 718, 187 N.W.2d 218 (1971); *Rainey v. Horn*, 221 Miss. 269, 72 So. 2d 434 (1954); *Steggall v. Morris*, 363 Mo. 1224, 258 S.W.2d 577 (1953); *White v. Yup*, 85 Nev. 527, 458 P.2d 617 (1969); *Bennett v. Hymers*, 101 N.H. 483, 147 A.2d 108 (1958); *Smith v. Brennan*, 31 N.J. 353, 157 A.2d 497 (1960); *Woods v. Lancet*, 303 N.Y. 349, 102 N.E.2d 691 (1951); *Gay v. Thompson*, 266 N.C. 394, 146 S.E.2d 425 (1966); *Williams v. Marion Rapid Transit, Inc.*, 152 Ohio St. 114, 87 N.E.2d 334 (1949); *Jorgensen v. Meade Johnson Laboratories, Inc.*, 483 F.2d 237 (10th Cir. 1973), *rev’g* 336 F. Supp. 961 (W.D. Okla. 1972) (applying Oklahoma law); *Mallison v. Pomeroy*, 205 Or. 690, 291 P.2d 225 (1955); *Sinkler v. Kneale*, 401 Pa. 267, 164 A.2d 93 (1960); *Sylvia v. Gobeille*, 101 R.I. 76, 220 A.2d 222 (1966); *Hall v. Murphy*, 236 S.C. 257, 113 S.E.2d 790 (1960); *Shousha v. Matthews Drivursel Serv., Inc.*, 210 Tenn. 384, 358 S.W.2d 471 (1962); *Leal v. C.C. Pitts Sand & Gravel, Inc.*, 419 S.W.2d 820 (Tex. 1967); *Seattle-First Nat’l Bank v. Rankin*, 59 Wash. 2d 288, 367 P.2d 835 (1962); *Panagopoulos v. Martin*, 295 F. Supp. 220 (S.D. W. Va. 1969) (declaring West Virginia law); *Puhl v. Milwaukee Auto. Ins. Co.*, 8 Wis. 2d 343, 99 N.W.2d 163 (1959).

34. *See* cases cited in note 138 *infra*.

personality—and legal duty—to the newly-conceived fetus.³⁵ In these jurisdictions, the restraint of legal duty had been extended so that the law would recognize the human being from its earliest moment of prenatal life as a separate entity *in esse*.³⁶

In 1973, a federal circuit court granted a cause of action for injuries sustained as the result of negligent acts committed before the conception of the plaintiff, when it could in no way be argued that plaintiff was “in being” at the time of the defendant’s allegedly tortious conduct.³⁷ The court dispensed with the requirement of legal duty³⁸ in its effort to arrive at a just decision precisely because there could have been no feasible argument for calling someone not yet conceived a “determinate person.”³⁹ But four years later, the Supreme Court of Illinois reaffirmed the concept of *legal duty*.⁴⁰ In a dramatic decision,⁴¹ the court extended legal duty to defendants who committed negligent acts eight years before the conception of the plaintiff,⁴² finding in the child a coextensive “right to be born free from [foreseeable] prenatal injuries.”⁴³

II. Rights of the Unborn Plaintiff: The Great Contradiction

A. Rights of the Unborn Plaintiff at Common Law

The law has long recognized and protected the interests of unborn children.⁴⁴ In 1765, Blackstone, in his *Commentaries*,⁴⁵ wrote:

35. Medically, the term *fetus* refers to “the developing young in the human uterus *after the end of the second month* [of pregnancy]. . . . [I]t becomes an *infant* when it is completely outside the body of the mother. . . .” DORLAND’S ILLUSTRATED MEDICAL DICTIONARY 547 (24th ed. 1965) (emphasis added) [hereinafter DORLAND’S]. But for the purposes of this Comment, the term *fetus* will be used to denote the unborn child throughout its prenatal life. Cf. the definitions of *zygote* and *embryo*, *id.* at 1723, 478-79.

Although personality has been extended to the newly-conceived fetus, birth is still the donor of legal personality and legal rights. See note 23 *supra*. But see section VIII *infra*.

36. One court went so far as to say that the finding of the unborn plaintiff to be *in esse* was “beside the point.” See note 141 and accompanying text *infra*.

37. *Jorgensen v. Meade Johnson Laboratories, Inc.*, 483 F.2d 237 (10th Cir. 1973), *rev’d* 336 F. Supp. 961 (W.D. Okla. 1972). See notes 161-68 and accompanying text *infra*.

38. See text accompanying notes 167 & 168 *infra*.

39. See note 1 *supra*.

40. See *Renslow v. Mennonite Hosp.*, 67 Ill. 2d 348, 357, 367 N.E.2d 1250, 1254 (1977). See also text accompanying notes 201-06 *infra*.

41. *Renslow v. Mennonite Hosp.*, 67 Ill. 2d 348, 367 N.E.2d 1250 (1977), *aff’g* 40 Ill. App. 3d 234, 351 N.E.2d 870 (1976).

42. See text accompanying notes 184-87 *infra*.

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

44. In *Wallis v. Hodson*, 26 Eng. Rep. 472 (Ch. 1740), an English court, relying on Roman

An infant *in [sic] ventre sa mere*, or in the mother's womb, is supposed in law to be born for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate, made to it. It may have a guardian assigned to it; and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born.⁴⁶

One English court went so far as to say that children *en ventre sa mere* "are entitled to *all* the privileges of other persons."⁴⁷

American courts took the same view when they began to adopt the English common law rules of property. In 1834, the Supreme Judicial Court of Massachusetts confronted the issue of whether a child born almost nine months after the death of its grandfather was entitled to share in the grandfather's bequest,⁴⁸ which was to be shared by any grandchildren of the testator "as [might] be living at [his] decease."⁴⁹ The court said that a child was to be considered *in esse* throughout its prenatal life,⁵⁰ holding that "a child *en ventre sa mere* is a person [and] is to all intents and purposes a child, as much as if born in the [grandfather's] lifetime."⁵¹

B. "Part of Its Mother": The Rule of *Dietrich v. Northampton*

Though an unborn child was considered a person from its conception for the purpose of various property rights, it was not so in the law of torts. With the first American prenatal injury case,⁵² there developed an inconsistency in the law which allowed an unborn

civil law, held that a posthumous child (one born after the death of its father) was entitled to an accounting of its father's estate. The court stated that "both by the rules of common and civil law, [the unborn child is], to all intents and purposes, a child, as much as if born in [its] father's life-time." *Id.* at 473. Following the reasoning in *Wallis*, the court in *Doe v. Clarke*, 126 Eng. Rep. 617 (C.P. 1795), interpreted the meaning of "children" in a will to include a child *en ventre sa mere*. *Id.* at 618. Still earlier cases include *Marsh v. Kirby*, 21 Eng. Rep. 512 (Ch. 1634) (gift of rents and profits to a child *en ventre sa mere* held to be valid); *Hale v. Hale*, 24 Eng. Rep. 25 (Ch. 1692) (posthumous child held to be within the meaning of a trust created for children of testator who might be living at his death); *Burdet v. Hopegood*, 24 Eng. Rep. 484 (Ch. 1718) (gift over to testator's cousin in case testator should leave no son at the time of his death held not to have taken effect owing to birth of posthumous son).

45. W. BLACKSTONE, COMMENTARIES (1765) [hereinafter BLACKSTONE].

46. *Id.*, vol. 1, at *130.

47. *Thellusson v. Woodford*, 31 Eng. Rep. 117, 164 (Ch. 1798) (emphasis added).

48. *Hall v. Hancock*, 32 Mass. (15 Pick.) 255 (1834).

49. *Id.* at 257.

50. *Id.*

51. *Id.* at 258. Compare this quote with the quote from *Wallis v. Hodson* at note 44 *supra*.

52. *Dietrich v. Northampton*, 138 Mass. 14 (1884).

child to enforce its rights in certain property, but which afforded the child no remedy for the often permanent physical injuries it suffered while in its mother's womb. Fifty years after it held that a child in the womb of its mother was a person for the purpose of inheritance,⁵³ the Supreme Judicial Court of Massachusetts held that no cause of action could lie for the negligent infliction of prenatal injuries upon a fetus. In *Dietrich v. Northampton*,⁵⁴ Massachusetts' highest court dealt with a wrongful death action⁵⁵ brought under the following set of facts: a woman about five months pregnant fell on the defendant's defective highway, went into premature labor, and gave birth to a child which survived for only "ten or fifteen minutes."⁵⁶ Justice Oliver Wendell Holmes, delivering the opinion of the court, cited the lack of precedent in favor of such an action. He said that "no case, so far as we know, has ever decided that, if the infant survived, it could maintain an action for injuries received by it while in its mother's womb."⁵⁷ Justice Holmes concluded that "the unborn child was a part of [its] mother"⁵⁸ at the time of the infliction of the injury which caused its death, and he held that no civil duty could be owed to one not yet in being.⁵⁹ That decision remained the undisputed law in every American jurisdiction for the next sixty-two years.⁶⁰

Walker v. Great Northern Railway Co. of Ireland,⁶¹ decided in 1891, greatly enhanced the impact of the *Dietrich* rule. In *Walker*, a pregnant woman was negligently injured while a passenger on defendant's railway. As a result, it was claimed, the woman's baby was born with permanent injuries. The court discussed in great

53. See *Hall v. Hancock*, 32 Mass. (15 Pick.) 255 (1834), and text accompanying note 51 *supra*.

54. 138 Mass. 14 (1884).

55. Although wrongful death actions are separate and distinct from actions for personal injury (see note 8 *supra*), it is one of the great ironies of the law relating to prenatal injuries that decisions in this field for more than half a century (see text accompanying note 60 *infra*) were based, not upon a prior personal injury decision, but upon the decision in this wrongful death action.

56. 138 Mass. at 15.

57. *Id.*

58. *Id.* at 17.

59. *Id.* at 16.

60. See the discussion of *Bonbrest v. Kotz*, 65 F. Supp. 138 (D.D.C. 1946), which flatly rejected the rule in *Dietrich*, in the text accompanying notes 102-16 *infra*.

61. 28 L.R. Ir. 69 (Q.B. 1891). Indeed, this was the first case in which the plaintiff infant survived his prenatal injuries.

detail the cases and commentaries relating to the status of the unborn child at common law.⁶² But despite its acknowledgement of the common law decisions which held that unborn children were entitled to all the privileges of other persons,⁶³ the *Walker* court concluded that the defendant, as a carrier, owed a duty only to its passenger, the mother, and not to her unborn child.⁶⁴ Although Justice William O'Brien, in a concurring opinion, said that he would see "[no] injustice in the abstract in . . . an action [for prenatal injuries] being held to lie,"⁶⁵ the passage of his opinion which became so often quoted by proponents of what became known as the *Dietrich-Walker* rule⁶⁶ was: "[O]n what a boundless sea of speculation in evidence this new idea [of allowing a cause of action for prenatal injuries] would launch us."⁶⁷ The court in *Walker* was obviously not prepared to enter upon that "sea of speculation." Instead, this influential decision served to reinforce and perpetuate the rule in *Dietrich*⁶⁸ which said, in effect, that, in the eyes of the law, the unborn plaintiff was not a person to whom a duty could be owed.

The American case which overshadowed *Dietrich* in many ways was *Allaire v. St. Luke's Hospital*.⁶⁹ In that turn of the century Illinois case, the minor plaintiff alleged that he had suffered permanent physical injuries as the result of the negligent operation of a hospital elevator in which his mother was a passenger while he was a viable unborn child.⁷⁰ The Supreme Court of Illinois concurred⁷¹

62. See, e.g., *id.* at 73. See also notes 44-47 and accompanying text *supra*.

63. 28 L.R. Ir. at 73. See note 47 and accompanying text *supra*.

64. 28 L.R. Ir. at 79. This ruling by the *Walker* court was instrumental in the denial of the cause of action in *Nugent v. Brooklyn Heights R.R.*, 154 App. Div. 667, 139 N.Y.S. 367 (2d Dep't 1913). See notes 86-92 and accompanying text *infra*.

65. 28 L.R. Ir. at 81 (O'Brien, J., concurring).

66. See Note, *The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries*, 110 U. of Pa. L. Rev. 554, 561 (1962).

67. 28 L.R. Ir. at 81 (O'Brien, J., concurring). See, e.g., *Nugent v. Brooklyn Heights R.R.*, 154 App. Div. 667, 672, 139 N.Y.S. 367, 371 (2d Dep't 1913); *Magnolia Coca Cola Bottling Co. v. Jordan*, 124 Tex. 347, 353, 78 S.W.2d 944, 946 (1935).

68. See cases cited in note 67 *supra*. See also Note, *supra* note 66, at 559.

69. 184 Ill. 359, 56 N.E. 638 (1900), *aff'g* 76 Ill. App. 441 (1898). The case was "cited as an authority in almost every [prenatal injury] case thereafter . . ." *Stemmer v. Kline*, 19 N.J. Misc. 15, 19, 17 A.2d 58, 60 (Cir. Ct. 1940). It became "a leading case on the subject [of prenatal injuries], . . . cited and followed by courts of review of many . . . jurisdictions." *Smith v. Luckhardt*, 299 Ill. App. 100, 103, 19 N.E.2d 446, 448 (1939).

70. The injury to the child in *Allaire* was alleged to have been inflicted ten days before the birth of the infant plaintiff. 184 Ill. at 360, 56 N.E. at 638.

with the view expressed in *Dietrich* that no precedent existed for granting the cause of action sought by the unborn plaintiff.⁷² The court went on to express in the clearest terms the rule which every subsequent decision cited in denying a right of action for one's prenatal injuries:⁷³ "[A] child before birth is, in fact, a part of [its] mother, and is only severed from her at birth. . . ."⁷⁴ The court noted that there was no authority for holding that a legal duty can be owed to that which is not *in esse* in fact,⁷⁵ so as to render some negligent act a breach of that duty and thus actionable at law.⁷⁶

III. "Natural Justice": The Fetus Becomes a Person

A. The *Allaire* Dissent

The first, and for many years the strongest, challenge to the basic premise of the *Dietrich* case was made by Justice Carroll C. Boggs of the Illinois Supreme Court in his *Allaire* dissent.⁷⁷ Justice Boggs did not contradict Justice Holmes' opinion in *Dietrich*, but interpreted it as holding that no duty of care could be owed to the infant in *Dietrich* because it "was too little advanced in foetal life to survive its premature birth."⁷⁸ He was then able to distinguish *Allaire* from the *Dietrich* case by seizing upon the concept of *viability*, that period of intrauterine development when an infant is able to live outside its mother's womb,⁷⁹ and finding that the fetus in *Allaire* had a separate existence—and was thus owed a duty—from the moment of viability.⁸⁰ In so finding, Justice Boggs held that a child who is born alive should have a right of action for the prenatal injuries it sustained while a viable fetus.⁸¹ In an opinion noted for

71. In fact, the supreme court's *per curiam* opinion consisted almost entirely of the opinion of the appellate court below. See 184 Ill. at 365-68, 56 N.E. at 639-40.

72. *Id.* at 367-68, 56 N.E. at 640.

73. See, e.g., cases cited in note 18 *supra* & note 96 *infra*.

74. 184 Ill. at 368, 56 N.E. at 640.

75. *Id.* The validity of the argument which states that to regard a child as a person for property rights was a "fiction" indulged in by the law was challenged as early as 1798 in *Thellusson v. Woodford*, quoted at note 22 *supra*. See also text accompanying notes 88-89 *infra*.

76. See text accompanying notes 1-7 *supra*.

77. 184 Ill. at 368, 56 N.E. at 640 (Boggs, J., dissenting).

78. *Id.* at 372, 56 N.E. at 642 (Boggs, J., dissenting).

79. See the definitions of "viability" and "viable" in DORLAND's, *supra* note 35, at 1689.

80. 184 Ill. at 374, 56 N.E. at 642 (Boggs, J., dissenting).

81. *Id.* (Boggs, J., dissenting).

its "independent and logical thought,"⁸² Justice Boggs laid down the influential foundation for the argument that the law should keep abreast of medical advances⁸³ when he said:

[I]t is but to deny a palpable fact to argue there is but one life, and that [it is] the life of the mother. Medical science and skill and experience have demonstrated that at a period of gestation in advance of the period of parturition the foetus is capable of independent and separate life, and that, though within the body of the mother, it is not merely a part of her body. . . .⁸⁴

Justice Boggs questioned a common law which would regard a prenatal injury as having been inflicted upon a human being if the child had died as a result, but which, if the child survived the injury, would deny the infant the right to recover damages occasioned by it by denying the infant's very existence.⁸⁵ He was not alone in his disagreement with the common law. In 1913, the Appellate Division of the New York Supreme Court, Second Department,⁸⁶ rejected the notion that an unborn child, though considered a person and entitled to protection of his property rights, was "not in existence" for the purpose of protecting his physical and mental health.⁸⁷ Disagreeing with the *Allaire* majority's view that recognition of the unborn child's existence for its benefit in the law of property was "a mere legal fiction,"⁸⁸ the appellate division said that "[i]t is not helpful to characterize [the unborn child's] existence as fictitious as to property rights. The rights are accorded to it."⁸⁹ The court critically analyzed the result at common law which protected the rights of ownership but which disregarded the safety of the owner.⁹⁰ "In such argument," the court stated, "there is not true sense of proportion in the protection of rights. The greater is denied; the . . . lesser . . .

82. *Nugent v. Brooklyn Heights R.R.*, 154 App. Div. 667, 674, 139 N.Y.S. 367, 372 (2d Dep't 1913).

83. *Compare Bonbrest v. Kotz*, 65 F. Supp. 138, 143 (D.D.C. 1946), *quoted in text* accompanying note 116 *infra*.

84. 184 Ill. at 370, 56 N.E. at 641 (Boggs, J., dissenting).

85. *Id.* at 372, 56 N.E. at 641 (Boggs, J., dissenting).

86. *Nugent v. Brooklyn Heights R.R.*, 154 App. Div. 667, 139 N.Y.S. 367 (2d Dep't), *appeal dismissed*, 209 N.Y. 515, 102 N.E. 1107 (1913). In this case, the defendant was charged with negligently starting a railway car while plaintiff's mother was getting off. The mother fell, and, thirty-six days later, the plaintiff was born with severe physical and mental injuries.

87. 154 App. Div. at 672, 139 N.Y.S. at 370.

88. 184 Ill. at 368, 56 N.E. at 640.

89. 154 App. Div. at 672, 139 N.Y.S. at 370 (emphasis added).

90. *Id.* at 672, 139 N.Y.S. at 370-71.

is respected."⁹¹ But the New York court's words were dictum,⁹² and for nearly fifty years after it was written, Justice Boggs' *Allaire* dissent⁹³ failed to convince even one jurisdiction to allow a cause of action for prenatal injuries.⁹⁴

B. *Bonbrest v. Kotz*: The Viable Fetus is a Person to Whom a Duty May be Owed

In the years following the *Allaire* decision,⁹⁵ American courts of review were unanimous in denying the right of action for prenatal injuries.⁹⁶ But lower courts were beginning to find great fault with the reasoning of the courts which denied that right.⁹⁷ In 1924, a Pennsylvania trial court granted a cause of action to a child who was *en ventre sa mere* at the time of the alleged infliction of injury.⁹⁸ The court pointed out that "[m]odern scientific research in the domain of embryology has demonstrated that the foetus is an identity independent of the mother."⁹⁹ Thus, it held that "an unborn child who

91. *Id.* at 672, 139 N.Y.S. at 371.

92. The *Nugent* court, despite its strong dictum against the rule in *Dietrich*, indicating that it would probably favor a cause of action in an ordinary case of prenatal injuries, ruled against the infant plaintiff on the narrow ground that a carrier can owe no duty of care to an unborn child, but only to the child's mother, the passenger, to whom the carrier owed a contractual obligation. 154 App. Div. at 673, 139 N.Y.S. at 372 (citing *Walker v. Great N. Ry.*, 28 L.R. Ir. 69 (Q.B. 1891)).

93. See notes 77-85 and accompanying text *supra*.

94. But see cases cited in notes 98 & 101 *infra*.

95. 184 Ill. 359, 56 N.E. 638 (1900).

96. See, e.g., *Stanford v. St. Louis-San Francisco Ry.*, 214 Ala. 611, 108 So. 566 (1926); *Newman v. City of Detroit*, 281 Mich. 60, 274 N.W. 710 (1937); *Buel v. United Rys.*, 248 Mo. 126, 154 S.W. 71 (1913); *Drobner v. Peters*, 232 N.Y. 220, 133 N.E. 567 (1921); *Berlin v. J.C. Penney Co.*, 339 Pa. 547, 16 A.2d 28 (1940); *Gorman v. Budlong*, 23 R.I. 169, 49 A. 704 (1901); *Magnolia Coca Cola Bottling Co. v. Jordan*, 124 Tex. 347, 78 S.W.2d 944 (1935); *Lipps v. Milwaukee Elec. Ry. & Light Co.*, 164 Wis. 272, 159 N.W. 916 (1916).

97. See *Nugent*, cited at note 86 *supra* (dictum); *Drobner v. Peters*, 194 App. Div. 696, 186 N.Y.S. 278 (1st Dep't), *rev'd*, 232 N.Y. 220, 133 N.E. 567 (1921); *Cooper v. Blanck*, 39 So. 2d 352 (La. Ct. App. 1923) (civil-law decision not published until 1949).

98. *Kine v. Zuckerman*, 4 Pa. D. & C. 227 (Dist. Ct. 1924).

99. *Id.* at 228. The court said further that the fetus

has its own independent blood circulation, and draws from its mother only the elements which nourish it and stimulate its growth. This in itself would require us to disregard the common law rule which merges the mother and child into one being during this period, and would justify us in advancing the time at which the child acquires all the rights of an individual, and thus make the law conform with the fact. Nevertheless, whether the assignment of a legal personality to the unborn child be based upon scientific truth or upon legal fiction, the reason for the adoption of this view is stronger when we are dealing with the health of the individual, and his ability

receives injuries while *quick in the womb*, which are due to the negligence of another, *can*, if it survive, maintain an action for the damages which it suffers in life as a result of such negligence."¹⁰⁰

But it was not until 1946 that a common law court of major influence took issue with the *Dietrich* rule and dismissed it on its face.¹⁰¹ In *Bonbrest v. Kotz*,¹⁰² the United States District Court for the District of Columbia, echoing the "strong dissent"¹⁰³ by Justice Boggs in *Allaire*, distinguished *Dietrich* from the case before it by stressing the viability of the child in the case at bar. The court pointed out that Holmes, in his *Dietrich* opinion, denied that a right of action for prenatal injuries existed in "an infant *dying before it was able to live separated from its mother*."¹⁰⁴ The child in *Bonbrest* was a viable unborn child¹⁰⁵ which, by definition,¹⁰⁶ indicates an ability to live separate from the protection of its mother's womb.¹⁰⁷ In addition, the *Bonbrest* court contradicted the "difficulties of proof"¹⁰⁸ argument enunciated in *Walker*¹⁰⁹ by calling it no argument at all.¹¹⁰ The *Bonbrest* court also reinforced the idea, first put forth in the *Allaire* dissent,¹¹¹ which influenced every court that followed its rejection of the *Dietrich* decision:¹¹² "The law is presumed to keep

after birth to seek his complete happiness and perform his full duty as a citizen and member of society, than when we are dealing merely with his property rights.

Id.

100. *Id.* at 230 (emphasis added). The unborn child is said to be "quick in the womb" when it makes its first recognizable movements *in utero*, usually from the sixteenth to the eighteenth week of pregnancy. DORLAND's, *supra* note 35, at 1261 ("quickening"). It is notable that one of the meanings ascribed to the term *quick* is "Alive." *Id.*

101. A few earlier decisions had contradicted the *Dietrich* rule, but with little influence on courts in subsequent prenatal injury cases: *Scott v. McPheeters*, 33 Cal. App. 2d 629, 92 P.2d 678, *aff'd per curiam*, 93 P.2d 562 (1939) (decision based on statute); *Cooper v. Blanck*, 39 So. 2d 352 (La. Ct. App. 1923) (civil-law decision); *Montreal Tramways Co. v. Leveille*, [1933] 4 D.L.R. 337 (civil-law decision).

102. 65 F. Supp. 138 (D.D.C. 1946).

103. *Id.* at 139 n.3 (citing *Allaire*).

104. *Id.* at 140 (quoting *Dietrich v. Northampton*, 138 Mass. 14, 16) (emphasis added by the *Bonbrest* court).

105. 65 F. Supp. at 140.

106. See DORLAND's, *supra* note 35, at 1689.

107. *Id.* See also *Bonbrest v. Kotz*, 65 F. Supp. at 141.

108. See note 203 *infra*.

109. 28 L.R. Ir. 69 (Q.B. 1891).

110. 65 F. Supp. at 143.

111. See text accompanying notes 83-84 *supra*.

112. See, e.g., *Renslow v. Mennonite Hosp.*, 67 Ill. 2d 348, 367 N.E.2d 1250 (1977); *Smith v. Brennan*, 31 N.J. 353, 157 A.2d 497 (1960); *Kelly v. Gregory*, 282 App. Div. 542, 125

pace with the sciences and medical science certainly has made progress since 1884 [when *Dietrich* was decided]."¹¹³

So, in 1946, the law finally recognized something which had actually been known for many years, certainly before the *Dietrich* case was decided: a viable fetus is not merely "a part of [its] mother,"¹¹⁴ but is a distinct entity, capable of life. And for the first time, a court utilized scientific facts to show the separate nature of the fetus and its mother,¹¹⁵ and struggled with notions of "natural justice."¹¹⁶

In truth, there was ample medical and legal knowledge available at the time *Dietrich* was decided which would have supported a granting of the cause of action in that case. More than a century before, Blackstone had stated that "[l]ife is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb."¹¹⁷ Furthermore, it was known in 1860 that the unborn child was sometimes capable of movement in its mother's womb as early as ten weeks following conception, and that such activity was generally begun by the end of the fourth month of intrauterine life.¹¹⁸ If, as Blackstone stated, life begins in the eyes of the law as soon as the infant is able to stir in the womb, then in all probability the plaintiff in *Dietrich*, and most certainly the plaintiff in *Allaire*, should have been deemed living beings at the time of the infliction of their injuries, and the courts in those cases should have found that, as such, a legal duty was owed them.

C. A New Rule Takes Hold

After *Bonbrest*¹¹⁹ there was a wave of cases granting a cause of action for prenatal injuries to a viable fetus.¹²⁰ Without restraint, courts began to reject the doctrine of nonliability established by the

N.Y.S.2d 696 (3d Dep't 1953).

113. 65 F. Supp. at 143.

114. Cf. *Dietrich*, 138 Mass. at 17; *Allaire*, 184 Ill. at 368, 56 N.E. at 640.

115. See *Bonbrest*, 65 F. Supp. at 140-41 & nn. 8, 11, 13 & 14.

116. *Id.* at 142.

117. BLACKSTONE, *supra* note 45, vol. 1, at *129.

118. 1 T. BECK, ELEMENTS OF MEDICAL JURISPRUDENCE 277 (11th ed. 1860).

119. 65 F. Supp. 138 (D.D.C. 1946).

120. See, e.g., *Tucker v. Howard L. Carmichael & Sons, Inc.*, 208 Ga. 201, 65 S.E.2d 909 (1951); *Amann v. Faigy*, 415 Ill. 422, 114 N.E.2d 412 (1953) (overruling *Allaire*); *Woods v. Lancet*, 303 N.Y. 349, 102 N.E.2d 691 (1951); *Williams v. Marion Rapid Transit, Inc.*, 152 Ohio St. 114, 87 N.E.2d 334 (1949).

Dietrich decision.¹²¹ The *Dietrich* rule, which stated that the unborn child was but a part of its mother,¹²² gradually came to be replaced by one which recognized the medical knowledge available to courts regarding prenatal development. As one writer put it, "[t]he fact is that the infant lives *with* its mother while in its prenatal state, rather than being 'a part of the mother'. . . ."¹²³ The new rule adopted by courts concerned itself with the viability of the unborn plaintiff and the separate existence which a viable child has from its mother. In short, courts had begun to declare that a viable fetus who survived birth was a person to whom a duty could be owed and in whom there existed the right to bring an action for negligently inflicted prenatal injuries. This modern position has been followed by all of the jurisdictions which have considered this issue.¹²⁴

IV. The Impact of Medical Knowledge Upon the Law: The Abandonment of Legal Duty

A. The Biological Approach: The Viability Rule is Rejected

As the law began to take notice of the growing body of available medical knowledge, the erroneous belief that *viability* constituted the origin of separate being fell under increasing criticism. Medicine emphasizes that the crucial period of prenatal development during which the fetus would be most susceptible to environmental influences is the first trimester of pregnancy, long before viability.¹²⁵ Indeed, there is substantial medical authority that certain congenital defects occasioned by environmental factors can be sustained *only* within the earliest stages of *previable* development.¹²⁶ Increased

121. 138 Mass. 14, 16 (1884). See text accompanying note 59 *supra*.

122. 138 Mass. at 17. See text accompanying note 58 *supra*.

123. Gaines, *The Infant's Right of Action for Prenatal Injuries*, 1951 Wis. L. Rev. 518, 524 (emphasis added).

124. PROSSER, *supra* note 24, § 55, at 336. See *Sox v. United States*, 187 F. Supp. 465 (E.D.S.C. 1960); *Bonbrest v. Kotz*, 65 F. Supp. 138 (D.D.C. 1946); *Scott v. McPheeters*, 33 Cal. App. 2d 629, 92 P.2d 678 (1939) (decision based on statute); *Tursi v. New England Windsor Co.*, 19 Conn. Supp. 242, 111 A.2d 14 (Super. Ct. 1955); *Tucker v. Howard L. Carmichael & Sons, Inc.*, 208 Ga. 201, 65 S.E.2d 909 (1951); *Damasiewicz v. Gorsuch*, 197 Md. 417, 79 A.2d 550 (1951); *Williams v. Marion Rapid Transit, Inc.*, 152 Ohio St. 114, 87 N.E.2d 334 (1949); *Mallison v. Pomeroy*, 205 Or. 690, 291 P.2d 225 (1955); *Seattle-First Nat'l Bank v. Rankin*, 59 Wash. 2d 288, 367 P.2d 835 (1962).

125. See, e.g., E.M. HETHERINGTON & R. PARKE, *CHILD PSYCHOLOGY* 58-59 (1975) [hereinafter *CHILD PSYCHOLOGY*].

126. It has been noted that "[t]he vulnerable period for the nervous system is from

medical knowledge as to the effects of irradiation,¹²⁷ the causes of certain infectious diseases¹²⁸ and the importance of nutritional factors¹²⁹ and blood disorders¹³⁰ indicate that healthy fetal development may depend upon factors existing at the time of, or even prior to, conception.¹³¹ Therefore, a viability limitation on the right of action presented a potential of working injustice. This injustice becomes manifest when it is realized that the results of the negligent actor's conduct are the same whether the fetus was viable or not.

Not many years after the *Bonbrest* case, courts came to regard the viability limitation as not only unjust but unworkable. There was an increasing awareness that the concept of viability is highly relative, and that expanded knowledge and improved care have lengthened the period during which the fetus can survive outside the mother's womb.¹³²

In 1953, a New York appellate court became the first court to expand the right of action for prenatal injuries to allow a surviving infant to bring an action for injuries it sustained while a nonviable fetus.¹³³ Taking a biological approach in arriving at its decision, the

fifteen to twenty-five days [after conception], for the eye from twenty-four to forty days, for the heart from twenty to forty days, and for the legs from twenty-four to thirty-six days" *Id.* at 58 (citation omitted).

127. See Epstein, *Medical Genetics: Recent Advances with Legal Implications*, 21 *Hastings L.J.* 35, 46 & n.62 (1969). See also Gordon, *The Unborn Plaintiff*, 63 *Mich. L. Rev.* 579, 616 (1965).

128. *CHILD PSYCHOLOGY*, *supra* note 125, at 60.

129. See Note, *The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries*, 110 *U. of Pa. L. Rev.* 554, 582 & n.182 (1962).

130. *CHILD PSYCHOLOGY*, *supra* note 125, at 57, 60-61.

131. Genetic characteristics in the mother at the time of conception "may play an important role in the appearance of abnormalities" in the unborn child. *Id.* at 59. The cause of action in *Jorgensen v. Meade Johnson Laboratories, Inc.*, discussed in text accompanying notes 155-68 *infra*, was predicated on a change in a mother's chromosomal structure, allegedly due to the negligence of the defendant, which occurred prior to the conception of the plaintiff. 483 F.2d 237, 239 (10th Cir. 1973).

Other conditions existing in the mother at the time of or prior to conception may affect fetal development. For instance, "[t]he increase in miscarriage and infant . . . mortality rates are directly correlated with the degree of high blood pressure in pregnant women [and] [i]nfants of diabetic mothers have a relatively high proportion of infant mortality and abnormalities" *CHILD PSYCHOLOGY*, *supra* note 125, at 60.

132. It is possible, though most unusual, for an infant born premature after only six months of intrauterine life to survive. *Id.* at 57. And, as one court stated it, "age is not the sole measure of viability, and there is no real way of determining in a borderline case whether or not a fetus was viable at the time of the injury, unless it was immediately born." *Smith v. Brennan*, 31 *N.J.* 353, 367, 157 *A.2d* 497, 504 (1960).

133. *Kelly v. Gregory*, 282 *App. Div.* 542, 125 *N.Y.S.2d* 696 (3d Dep't 1953). *New York*

court in *Kelly v. Gregory*¹³⁴ said that legal separability—the existence of a distinct being, separate from its mother, to whom a duty can be owed—should be recognized from the moment of biological separability.¹³⁵ That moment, the court found, occurs at conception.¹³⁶ In so finding, the New York court held that an injury sustained “at any period of [its] prenatal life” is actionable by a surviving infant, so long as he can prove the effect of the tort on him.¹³⁷

B. The Causative Approach: Liability Without Duty

Today, some fifteen states have come to recognize, either expressly or impliedly, a right of action in the unborn plaintiff, irrespective of its viability at the time of the negligent infliction of injury.¹³⁸ But a common theme developed from the *Kelly* case which indicated a total abandonment of the requirement of legal duty, one

courts have been consistently at the fore of progressive movements in the law relating to prenatal injuries. It was a New York court which rendered the first majority opinion questioning the basic premise of the *Dietrich-Walker* doctrine of nonliability. See *Nugent v. Brooklyn Heights R.R.*, 154 App. Div. 667, 139 N.Y.S. 367 (2d Dep't 1913) (dictum). It was a New York court which was the first to directly contradict and reject the *Dietrich* rule. See *Drobner v. Peters*, 194 App. Div. 696, 186 N.Y.S. 278 (1st Dep't 1921) (reversed on appeal). New York was one of the first states to follow the landmark decision in *Bonbrest*. See *Woods v. Lancet*, 303 N.Y. 349, 102 N.E.2d 691 (1951). And the New York Supreme Court was the first state court to grant a cause of action for prenatal injuries caused by preconception negligence. See *Park v. Chessin*, 88 Misc. 2d 222, 387 N.Y.S.2d 204 (Sup. Ct. 1976), *aff'd*, 60 App. Div. 2d 80, 400 N.Y.S.2d 110 (2d Dep't 1977). See also notes 170-79 and accompanying text *infra*.

134. 282 App. Div. 542, 125 N.Y.S.2d 696 (3d Dep't 1953).

135. *Id.* at 543, 125 N.Y.S.2d at 697.

136. *Id.* at 544, 125 N.Y.S.2d at 697.

137. *Id.* at 545, 125 N.Y.S.2d at 698 (emphasis added).

138. See, e.g., *Stokes v. Liberty Mut. Ins. Co.*, 213 So. 2d 695 (Fla. 1968) (by implication); *Tucker v. Howard L. Carmichael & Sons, Inc.*, 208 Ga. 201, 65 S.E.2d 909 (1951) (language recognizing right of action not limited to viable fetuses); *Daley v. Meier*, 33 Ill. App. 2d 218, 178 N.E.2d 691 (1961); *Torigian v. Watertown News Co.*, 352 Mass. 446, 225 N.E.2d 926 (1967) (by implication); *Womack v. Buchhorn*, 384 Mich. 718, 187 N.W.2d 218 (1971); *White v. Yup*, 85 Nev. 527, 458 P.2d 617 (1969) (viability not mentioned in statement of rule); *Bennett v. Hymers*, 101 N.H. 483, 147 A.2d 108 (1958); *Smith v. Brennan*, 31 N.J. 353, 157 A.2d 497 (1960); *Kelly v. Gregory*, 282 App. Div. 542, 125 N.Y.S.2d 696 (3d Dep't 1953); *Gay v. Thompson*, 266 N.C. 394, 146 S.E.2d 425 (1966) (recognizing rule without mentioning viability); *Sinkler v. Kneale*, 401 Pa. 267, 164 A.2d 93 (1960); *Sylvia v. Gobeille*, 101 R.I. 76, 220 A.2d 222 (1966); *Delgado v. Yandell*, 468 S.W.2d 475 (Tex. Civ. App.), *appeal denied per curiam*, 471 S.W.2d 569 (Tex. 1971); *Seattle-First Nat'l Bank v. Rankin*, 59 Wash. 2d 288, 367 P.2d 835 (1962) (viability not mentioned in statement of rule); *Kwaterski v. State Farm Mut. Auto. Ins. Co.*, 34 Wis. 2d 14, 148 N.W.2d 107 (1967).

of the essential elements of any actionable negligence.¹³⁹ Courts began to echo that portion of *Kelly* which said that the prenatal injury will be actionable “[i]f the child . . . can prove the effect on him of the tort”¹⁴⁰ This focus on causation allowed the courts to avoid a consideration of the legal status of the fetus and required only the establishment of a causal link between the defendant’s wrongdoing and the resultant injury to the plaintiff. Duty thus became a “non-element” of the tort, and a finding that the fetus is a “person in being” became “beside the point.”¹⁴¹

Employment of this causative approach had several positive effects on the law relating to prenatal injuries. It all but destroyed the medical and logical inaccuracies of the viability rule,¹⁴² thus protecting the unborn plaintiff from the moment of its conception.¹⁴³ And while it led to a demise of the *legal duty* element of negligence, the causative approach gave courts the opportunity to articulate a prenatal *right* of the unborn plaintiff,¹⁴⁴ one which has had and will continue to have significant ramifications in this area of law:¹⁴⁵ “[J]ustice requires that the principle be recognized that a child has a legal right to begin life with a sound mind and body.”¹⁴⁶

V. The Courts Turn Full Circle: Liability Can be Owed to One Not Yet in Being

As early as 1956, at a time when courts were just beginning to

139. See text accompanying notes 1-7 *supra*.

140. Compare 282 App. Div. at 545, 125 N.Y.S.2d at 698 with *Hornbuckle v. Plantation Pipe Line Co.*, 212 Ga. 504, 504-05, 93 S.E.2d 727, 728 (1956) (“If a child born after an injury sustained at any period of its prenatal life can prove the effect on it of a tort, it [has] a right to recover.”); with *Daley v. Meier*, 33 Ill. App. 2d 218, 224, 178 N.E.2d 691, 694 (1961) (“[A]n infant, who was born alive and survives, can maintain an action to recover for prenatal injuries, medically provable as resulting from the negligence of another, even if it had not reached the state of a viable fetus at the time of the injury.”); and with *Bennett v. Hymers*, 101 N.H. 483, 486, 147 A.2d 108, 110 (1958) (“[I]f a child born alive after an injury sustained at any period of its prenatal life can prove the damage was caused by the tort it makes out a right to recover . . .”).

141. *Smith v. Brennan*, 31 N.J. 353, 364, 157 A.2d 497, 503 (1960).

142. See notes 125-32 and accompanying text *supra*.

143. See cases cited in note 138 *supra*.

144. If courts continue to recognize in the unborn the “right to be well born,” they will be able to find a correlative *duty* owing to the unborn, making any negligent act which causes an infant to be born with some defect actionable at law. See the definition of “legal duty,” *supra* note 1. See also sections VII & VIII *infra*.

145. See section VIII *infra*.

146. *Smith v. Brennan*, 31 N.J. 353, 364, 157 A.2d 497, 503 (1960).

overturn the viability limitation on the right of action for prenatal injuries, there was an attempt, in a federal court action,¹⁴⁷ to extend that right of action even further than was allowed in *Kelly v. Gregory*.¹⁴⁸ Specifically, in *Morgan v. United States*,¹⁴⁹ recovery was sought for injuries sustained by the infant plaintiff as the result of allegedly injurious conduct which occurred more than two years before the infant was born. The United States District Court for the District of New Jersey, applying Pennsylvania law,¹⁵⁰ denied the cause of action because the prevailing Pennsylvania case at that time flatly denied recovery for any prenatal injuries.¹⁵¹

A different result might well have been reached had *Morgan* been decided four years later. In 1960, the Pennsylvania Supreme Court overruled its pre-*Bonbrest* decision,¹⁵² finding that the fetus has a separate existence "from the moment of conception."¹⁵³ Moreover, the supreme court noted that all of the cases upon which it had relied in its pre-*Bonbrest* decision had since been either expressly overruled or strictly limited in their application.¹⁵⁴

Despite these changes in the law after *Morgan*, the next federal court to examine the issue (of whether an infant could maintain an action for injuries it sustained as the result of tortious conduct which occurred before it was conceived) made its decision, not on the basis of the recent trend in the law, but upon *Morgan*. In *Jorgensen v. Meade Johnson Laboratories, Inc.*,¹⁵⁵ the United States

147. *Morgan v. United States*, 143 F. Supp. 580 (D.N.J. 1956).

148. 282 App. Div. 542, 125 N.Y.S.2d 696 (3d Dep't 1953). See text accompanying notes 133-37 *supra*.

149. 143 F. Supp. 580 (D.N.J. 1956).

150. The alleged tort in *Morgan* occurred in Pennsylvania, and whether a cause of action accrued to the plaintiff is governed by the law of that state. *Id.* at 584. See 28 U.S.C. § 1346(b) (1970).

151. See *Berlin v. J.C. Penney Co.*, 339 Pa. 547, 16 A.2d 28 (1940).

152. *Id.*

153. *Sinkler v. Kneale*, 401 Pa. 267, 273, 164 A.2d 93, 96 (1960).

154. *Id.* at 269, 164 A.2d at 94. The court in *Berlin*, cited at note 151 *supra*, decided its case on the authority of *Allaire v. St. Luke's Hosp.*, 184 Ill. 359, 56 N.E. 638 (1900); *Dietrich v. Northampton*, 138 Mass. 14 (1884); *Ryan v. Public Serv. Coordinated Transp.*, 18 N.J. Misc. 429, 14 A.2d 52 (Sup. Ct. 1940); *Drobner v. Peters*, 232 N.Y. 220, 133 N.E. 567 (1921). By the time the Pennsylvania Supreme Court decided *Sinkler* in 1960, those cases had been overruled or strictly limited by the following cases: *Amann v. Faidy*, 415 Ill. 422, 114 N.E.2d 412 (1953); *Keyes v. Construction Serv., Inc.*, 340 Mass. 633, 165 N.E.2d 912 (1960) (limiting *Dietrich* to wrongful death actions involving nonviable fetuses); *Smith v. Brennan*, 31 N.J. 353, 157 A.2d 497 (1960); *Woods v. Lancet*, 303 N.Y. 349, 102 N.E.2d 691 (1951).

155. 336 F. Supp. 961 (W.D. Okla. 1972).

District Court for the Western District of Oklahoma sustained the defendant's motion to dismiss the action, citing *Morgan*¹⁵⁶ and *Walker*¹⁵⁷ as precedent.¹⁵⁸ The district court not only ignored the shift in the law in the sixteen years since *Morgan*, but apparently took no notice whatsoever of the long line of cases emanating from *Bonbrest*¹⁵⁹ which had destroyed the applicability of the *Dietrich-Walker* rule.¹⁶⁰

The United States Court of Appeals for the Tenth Circuit reversed the lower court ruling in *Jorgensen*,¹⁶¹ becoming the first American court to allow a cause of action for preconception negligence. In that case, it was alleged that the plaintiffs, twin girls, were born Mongoloids as the result of their mother's use of the defendant's oral contraceptive product before they were conceived.¹⁶² The complaint alleged that the defendant company was liable for its negligent manufacture of the product, and for breach of its express and implied warranties that the product was safe for human consumption.¹⁶³ As to the novelty of granting a cause of action for "preconception injury,"¹⁶⁴ the court of appeals said that, although the mother's chromosome structure was injuriously altered prior to the conception of the plaintiffs, the injury to the plaintiffs did not (and indeed could not) occur until after they were conceived.¹⁶⁵ Moreover, the court said:

If the view prevailed that tortious conduct occurring prior to conception is not actionable in behalf of an infant ultimately injured by the wrong, then an infant suffering personal injury from a defective food product, manufactured before his conception, would be without remedy. Such reasoning runs counter to the various principles of recovery which [the law] recognizes for those ultimately suffering injuries proximately caused by a defective product or instrumentality manufactured and placed on the market by the defendant.¹⁶⁶

156. 143 F. Supp. 580 (D.N.J. 1956).

157. 28 L.R. Ir. 69 (Q.B. 1891). See text accompanying notes 61-68 *supra*.

158. 336 F. Supp. at 962-63.

159. 65 F. Supp. 138 (D.D.C. 1946). See note 124 *supra*.

160. See text accompanying notes 57-58 & 61-68 *supra*.

161. 483 F.2d 237 (10th Cir. 1973).

162. 336 F. Supp. at 961-62.

163. 483 F.2d at 238-39.

164. *Id.* at 239.

165. *Id.*

166. *Id.* at 240.

The focus of the *Jorgensen* court, like that of so many courts since *Kelly v. Gregory*,¹⁶⁷ was upon causation. The court of appeals was correct when it said that to sustain the cause of action upon a finding of causation would be in accord with "the predominant view that an action may be maintained for prenatal injuries negligently inflicted if the injured child is born alive."¹⁶⁸ But it was also correct when it said that, though the negligent manufacture of the injury-causing product predated the plaintiffs' conception, the injury to the plaintiffs was sustained by them only *after* conception. And it has long been accepted that the fetus is a person to whom a duty may be owed from the moment of conception.¹⁶⁹

Then, in 1976, the New York Supreme Court became the first state court to deem "viable"¹⁷⁰ an action by a "'child' after its birth for 'conscious pain and suffering' based upon a tort committed upon it *prior to its conception*."¹⁷¹ In *Park v. Chessin*,¹⁷² the Trial Term of the New York Supreme Court for Queens County held that the parents of a deceased two and one-half year-old child had a cause of action, on the child's behalf, for the preconception malpractice of the defendants, two specialists in the field of obstetrics. The complaint alleged that the doctors failed to inform the parents of the risk that the child would be born with the same congenital defects which had appeared in and caused the death of the mother's first child.¹⁷³ The plaintiff-child *was* born suffering from the same congenital disease that had afflicted her sibling, and the plaintiff, too, died as a result of that disease. In granting the cause of action, the *Park* court found that a medical specialist can be held accounta-

167. 282 App. Div. 542, 125 N.Y.S.2d 696 (3d Dep't 1953). See cases cited in note 140 *supra*.

168. 483 F.2d at 240.

169. See text accompanying notes 133-37 *supra*.

170. *Park v. Chessin*, 88 Misc. 2d 222, 229, 387 N.Y.S.2d 204, 209 (Sup. Ct. 1976), *aff'd*, 60 App. Div. 2d 80, 400 N.Y.S.2d 110 (2d Dep't 1977). The term "viable" in this context should not be confused with the concept of *fetal viability*, discussed in the text accompanying note 79 *supra*. The *Park* court's repeated use of the term is undoubtedly as a synonym of the word "maintainable."

171. 88 Misc. 2d at 229, 387 N.Y.S.2d at 209 (emphasis in original).

172. 88 Misc. 2d 222, 387 N.Y.S.2d 204 (Sup. Ct. 1976), *aff'd*, 60 App. Div. 2d 80, 400 N.Y.S.2d 110 (2d Dep't 1977). Moreover, it was alleged that the doctors affirmatively advised the child's parents that the chances of the second child being born with the congenital polycystic kidney disease which caused the death of the first child were "practically nil." *Id.* at 83, 400 N.Y.S.2d at 111.

173. 88 Misc. 2d at 224-25, 387 N.Y.S.2d at 206-07.

ble for negligent acts committed by him before the plaintiff was conceived. It said that "[i]t makes no difference how much time elapses between a wrongful act and a resulting injury *if there is a causal relationship between them.*"¹⁷⁴ The court found that the causal link between the defendants' malpractice and the plaintiff's injuries had been sufficiently established;¹⁷⁵ and, since the defendants' advice encouraged the mother to become pregnant, the court found that the resulting child was foreseeable to them.¹⁷⁶ Equating foreseeability with duty, the court held that the plaintiff had stated a valid cause of action. In effect, the law had turned full circle in the ninety-two years since Justice Holmes' opinion in *Dietrich v. Northampton*.¹⁷⁷ courts had begun to find that a man might indeed "incur . . . liability in tort to one not yet in being."¹⁷⁸ Unfortun-

174. *Id.* at 227, 387 N.Y.S.2d at 208 (quoting *Zepeda v. Zepeda*, 41 Ill. App. 2d 240, 250, 190 N.E.2d 849, 853 (1963)) (emphasis added by the *Park* court).

175. 88 Misc. 2d at 227-28, 387 N.Y.S.2d at 208. The court rhetorically asked: "Why . . . should not the plaintiff decedent be permitted to hold these defendants in damages, since the defendants' wrongful acts are alleged to have caused the procreation of the being whom they intended and ultimately injured . . . [?]" *Id.* (citations omitted) (emphasis added).

176. *Id.*

177. 138 Mass. 14 (1884).

178. *Id.* at 16. On December 12, 1977, the Appellate Division of the New York Supreme Court affirmed the decision of the trial term in *Park v. Chessin*. 60 App. Div. 2d 80, 400 N.Y.S.2d 110 (2d Dep't 1977). The cause of action relevant to this Comment, that made on behalf of the Parks' dead second child, was upheld by the appellate court in what is likely to become a most controversial opinion. The court determined that the complaint stated a valid cause of action for "wrongful life," becoming the first court of review to so hold. The controversy lies in the concept of "wrongful life" itself. For, in actions claiming such a count, the wrong for which damages are sought is the very existence of the plaintiff. In the past, the "wrongful life" cause of action has been rejected, *inter alia*, on the ground that it would be impossible to determine that the infant involved would be better off non-existent than alive (see *Karlsons v. Guerinet*, 57 App. Div. 2d 73, 79-80, 394 N.Y.S.2d 933, 937 (4th Dep't 1977)) and on the ground that the damages would be impossible of calculation (see *Gleitman v. Cosgrove*, 49 N.J. 22, 28-29, 227 A.2d 689, 692 (1967); *Williams v. New York*, 25 App. Div. 2d 907, 908, 269 N.Y.S.2d 786, 787 (3d Dep't), *aff'd*, 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966)). While the appellate division in *Park* noted this, 60 App. Div. 2d at 87-88, 400 N.Y.S.2d at 114, the court made no attempt to dispose of those issues in recognizing the cause of action. If and when this case comes before the New York Court of Appeals, then, the high court will have no legal reasoning from the opinions below upon which to base a reversal of its past rejections of the "wrongful life" concept.

But the court of appeals need not decide the issue of "wrongful life" in *Park v. Chessin*. The holding of the appellate division does not rest upon the "wrongful life" issue at all. It merely states that "the portion of the complaint which seeks recovery on behalf of the [deceased] infant for injuries and conscious pain and suffering caused by defendants' negligence should be permitted to stand." *Id.* at 88, 400 N.Y.S.2d at 114. Indeed, the court addressed itself to a right which has been gaining recognition in actions for prenatal injuries:

ately, in recognizing a right of action for preconception negligence, the *Park* court did not adequately address itself to the exact limits of the duty owed by the defendants to the plaintiff. If that duty is

the "right to be well born." See notes 144-46 and accompanying text *supra* & notes 243-44 and accompanying text *infra*. The court said that the defendants' negligence "may . . . be said to be tortious to the fundamental right of a child to be born as a whole, functional human being." 60 App. Div. 2d at 88, 400 N.Y.S.2d at 114 (emphasis added). It would be sufficient if the court of appeals decided an appeal in the *Park* case on traditional prenatal negligence grounds, while considering the more novel issues of whether a cause of action may lie for preconception negligence and whether the so-called "right to be well born" is cognizable at law. This would be consonant with the analysis of the concurrence in the appellate division. See *id.* at 88-89, 400 N.Y.S.2d at 115 (Cohalan, J. Pres., concurring in part & dissenting in part). The dissent, however, argued that the action in *Park* is one for "wrongful life," regardless of the claim that damages were being sought "for injuries and conscious pain and suffering," and that such actions had been rejected by the appellate division in the past. *Id.* at 92-93, 400 N.Y.S.2d at 117 (Titone, J., dissenting). To support its view, the dissent cited cases wherein the parents, but for the defendants' alleged negligence, would have aborted the children involved. *Id.* (Titone, J., dissenting) (citing *Stewart v. Long Island College Hosp.*, 35 App. Div. 2d 531, 313 N.Y.S.2d 502 (2d Dep't 1970), *aff'd*, 30 N.Y.2d 695, 238 N.E.2d 616, 332 N.Y.S.2d 640 (1972); *Greenberg v. Kliot*, 47 App. Div. 2d 765, 367 N.Y.S.2d 966 (2d Dep't), *appeal denied*, 37 N.Y.2d 707, 337 N.E.2d 618, 375 N.Y.S.2d 1026 (1975)). But those cases are distinguishable from *Park v. Chessin*. The appellate division in *Stewart*, for instance, said that "the cause of action by the infant plaintiff for the defendant hospital's failure to abort her mother [i.e., her mother's pregnancy] and thus terminate [the plaintiff's] life is not cognizable at law . . ." 35 App. Div. 2d at 531, 313 N.Y.S.2d at 503 (emphasis added). In *Park* there was no question of the defendants' failure to terminate the existence of the plaintiff after conception, and the court was thus not lending its support to such a result when it upheld the infant's cause of action. The *Park* infant's complaint, unlike that of the infant plaintiff in *Stewart*, did not assert a breach of duty owed to her parents (in this case, the duty to the parents being one to render accurate medical advice as to whether to conceive another child). Nor did the *Park* infant, unlike the infant in *Stewart*, claim in any way that her life should have been terminated at some time prior to birth. The claim of the *Park* infant was solely for the injuries, pain and suffering she sustained during her life. It was the claim of the parents, also plaintiffs in the case, and not the child, that they should have been given the opportunity not to bring a second child into the world: "Had the parents known of the substantial possibility of [the second child being born with the same disease as caused the death of their first child] they would not have conceived [that second child]." 60 App. Div. 2d at 94, 400 N.Y.S.2d at 118 (Titone, J., dissenting) (quoting plaintiffs' affirmation opposing defendants' motion to dismiss the complaint) (emphasis added by Justice Titone).

The *Park* complaint clearly states a cause of action for negligence according to the classic formulation of Chief Judge Cardozo in *Palsgraf*, which has been the law of New York for half a century. See notes 25-26 and accompanying text *supra*. See also 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 18.2, at 1018-19 (1956). In *Park*, both the plaintiff and the risk of injury were within Cardozo's "orbit of foreseeable risk." A duty was owed by the defendant doctors to conduct themselves in such a manner as would avoid the sustaining of foreseeable harm by the child. The right of the infant plaintiff to be well born should be recognized, and for the violation of that right, the plaintiff should be given access to legal remedy via a cause of action for negligence.

deemed to be the same duty owed to the child's parents—to have prevented the conception of another congenitally ill child—a problematic result would follow: had the defendants fulfilled that duty to the plaintiff, said plaintiff would never have come into existence! However, if the duty owed to the Park child is analyzed as a duty to see that the child be “well born,” then allowing the cause of action seeking compensation for the injuries which accompanied the child's birth would be well within the power of the court.¹⁷⁹ Then, too, there would be no derogation of the precept that “[n]o liability can arise . . . except out of a duty disregarded.”¹⁸⁰

VI. *Renslow v. Mennonite Hospital*: A Reaffirmation of Legal Duty

A. Liability for Preconception Negligence

In 1977, the Supreme Court of Illinois handed down a decision¹⁸¹ which could signal a radical change from the way courts traditionally view the concept of legal duty as it relates to the law of negligence.¹⁸² In *Renslow v. Mennonite Hospital*,¹⁸³ Illinois' highest court, in a four to three decision, granted a cause of action to an infant plaintiff for the prenatal injuries which were allegedly the result of negligent acts committed against its mother eight years before the infant was conceived. By so deciding, the Illinois Supreme Court became the first state court of last resort to recognize a right of action for preconception negligence.

The complaint in *Renslow* alleged that in October of 1965, when plaintiff's mother was thirteen years old, the defendants, a hospital and its Laboratory Division chief, twice transfused the mother, whose blood type was and is A-Rh negative, with A-Rh positive blood.¹⁸⁴ It was further alleged that, as a result of those transfusions,

179. See note 178 *supra*. See also notes 144-46 and accompanying text *supra* & notes 243-44 and accompanying text *infra*.

180. *Drobner v. Peters*, 232 N.Y. 220, 224, 133 N.E. 567, 568 (1921).

181. *Renslow v. Mennonite Hosp.*, 67 Ill. 2d 348, 367 N.E.2d 1250 (1977).

182. See section VII *infra*.

183. 67 Ill. 2d 348, 367 N.E.2d 1250 (1977), *aff'g* 40 Ill. App. 3d 234, 351 N.E.2d 870 (1976).

184. 67 Ill. 2d at 349, 367 N.E.2d at 1251; 40 Ill. App. 3d at 235, 351 N.E.2d at 871. The rhesus, or “Rh,” factor is defined as “a-substance or one of a group of substances that is present in the red blood cells of a large majority of persons . . . and is capable of inducing [an] intense [negative] reaction under suitable circumstances (as in repeated transfusion of Rh-positive blood to an Rh-negative person)” WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1947 (unabr. ed. 1964) [hereinafter WEBSTER'S]. The precise “suitable circum-

the mother's blood was sensitized, causing prenatal damage to plaintiff's hemolytic processes when it was conceived eight years later.¹⁸⁵ Finally, plaintiff alleged that the damage to her hemolytic processes endangered her life, necessitating her induced premature birth and two complete transfusions of her blood shortly thereafter.¹⁸⁶ Plaintiff sought damages for her injuries, which included permanent damage to her brain and nervous system.¹⁸⁷

stance" posited by the editors of WEBSTER'S as inducing an intense reaction, the "repeated transfusion of Rh-positive blood to an Rh-negative person," occurred in the *Renslow* case. For a discussion of the "intense reaction" to the transfusions in *Renslow*, see note 185 and accompanying text *infra*.

185. 67 Ill. 2d at 349, 367 N.E.2d at 1251; 40 Ill. App. 3d at 235, 351 N.E.2d at 871. The introduction of Rh-positive blood into the plaintiff's mother made her blood susceptible, or "sensitized," to *hemolysis*, the destruction of red blood cells through the loss of hemoglobin, the agent in red blood cells which transports oxygen through the blood.

The process of sensitization has been described as follows:

Rh blood incompatibility is the most . . . destructive [of blood incompatibilities]. The incompatibility between an Rh-positive baby and an Rh-negative mother can cause . . . infant death through *erythroblastosis*, a destruction of the red blood corpuscles resulting in an inadequate supply of oxygen to the fetus. Antigens are produced in the blood of the Rh-positive fetus and transmitted through the placenta to the blood of the Rh-negative mother; toxic antibodies are produced in the mother's blood and are returned to the infant [*sic*], resulting in *erythroblastosis*. . . .

CHILD PSYCHOLOGY, *supra* note 125, at 61 (emphasis in original).

In *Renslow*, the plaintiff asserted that defendants discovered that they had administered incompatible blood to plaintiff's mother, but that they at no time informed the mother or her family. 67 Ill. 2d at 349; 367 N.E.2d at 1251. The mother herself was never aware that she had been improperly transfused, and she was certainly never aware of the sensitization which took place in her blood as a result of the defendants' transfusions, until it was discovered during a routine blood test after she became pregnant eight years later. 40 Ill. App. 3d at 235, 351 N.E.2d at 871. By that time, the unborn child had contracted *hemolytic jaundice*. *Id.* See text accompanying notes 186-87 *infra*.

The following are definitions of some of the medical terms used in this note:

antigen . . . [A substance], which, when foreign to the blood stream stimulates the formation of . . . antibod[ies]. . . .

erythroblastosis [fetalis] . . . [A] hemolytic anemia of the fetus , caused by the transplacental transmission of maternally formed antibody, usually secondary to an incompatibility between the blood group of the mother and that of her offspring, characterized by increased numbers of nucleated red cells in the . . . blood

hemolysis . . . [T]he separation of [the oxygen-carrying agent of the blood] from the corpuscles

hemolytic [jaundice] . . . [A] rare . . . generally hereditary disease characterized by periods of excessive hemolysis due to abnormal fragility of the red corpuscles which are small and spheroidal. . . .

DORLAND'S, *supra* note 35, at 106, 511, 663, 767 (emphasis added).

186. 67 Ill. 2d at 349-50, 367 N.E.2d at 1251; 40 Ill. App. 3d at 235, 351 N.E.2d at 871.

187. *Id.* at 350, 367 N.E.2d at 1251; 40 Ill. App. 3d at 235, 351 N.E.2d at 871.

The defendants contended that there was no right of action in the plaintiff since they owed no duty of care to her in 1965.¹⁸⁸ The substance of their argument was that the child was not yet in being at the time of the transfusions to her mother; and that her injuries were thus not reasonably foreseeable at that time. The trial court agreed with the defendants and dismissed the complaint.

The Appellate Court of Illinois reversed,¹⁸⁹ finding "no logical reason to deny recovery . . . simply because [the plaintiff] had not yet been conceived when the wrongful conduct took place."¹⁹⁰ The court disagreed with defendants' contention that the plaintiff's injuries were unforeseeable at the time of their allegedly negligent transfusions. On the contrary, the appellate court found that the defendants, since they were a hospital and a doctor, could reasonably have foreseen that their thirteen year-old patient would marry and bear a child who would be injured as the result of their improper blood transfusions.¹⁹¹

The court further found that, under Illinois case law, a surviving infant may recover for prenatal injuries sustained by it.¹⁹² That was precisely the situation presented in *Renslow*. And, although the court distinguished between past cases and the case before it,¹⁹³ it pointed out that in other areas of tort law, as long as duty and causation could be proven, liability has not been barred simply because the allegedly wrongful conduct occurred long before the resultant injury.¹⁹⁴ Thus, in a unanimous decision, the court granted the plaintiff's cause of action and remanded the case to the trial

188. 40 Ill. App. 3d at 235, 351 N.E.2d at 871. Under then-existing Illinois case law, a child might recover for prenatal injuries sustained at any time *during the pregnancy* of its mother. *Daley v. Meier*, 33 Ill. App. 2d 218, 178 N.E.2d 691 (1961). But the defendants argued that, since the allegedly tortious conduct complained of occurred eight years *before* the pregnancy of the plaintiff's mother, the complaint stated no cause of action. 40 Ill. App. 3d at 235, 351 N.E.2d at 871.

189. 40 Ill. App. 3d 234, 351 N.E.2d 870 (1976).

190. *Id.* at 240, 351 N.E.2d at 874.

191. *Id.* at 239, 351 N.E.2d at 874.

192. *Id.* See *Sana v. Brown*, 35 Ill. App. 2d 425, 183 N.E.2d 187 (1962); *Daley v. Meier*, 33 Ill. App. 2d 218, 178 N.E.2d 691 (1961).

193. 40 Ill. App. 3d at 237, 351 N.E.2d at 872.

194. *Id.* at 239, 351 N.E.2d at 874. The court in this context cited *Skinner v. Anderson*, 38 Ill. 2d 455, 231 N.E.2d 588 (1967) (negligence in designing of ventilation system); *Laukkanen v. Jewel Tea Co.*, 78 Ill. App. 2d 153, 222 N.E.2d 584 (1966) (negligence in construction of supermarket pylon).

court. On appeal, the Illinois Supreme Court affirmed,¹⁹⁵ finding that the defendants owed a duty to the minor plaintiff when they improperly transfused her mother eight years before she was conceived.

Although the supreme court affirmed the appellate court's ruling, however, it disagreed with some of that court's reasoning. The supreme court, like the court below, found that the injuries to the plaintiff were foreseeable at the time of the transfusions to its mother.¹⁹⁶ But the supreme court substantiated *its* view by noting the advance of medical knowledge in recent years. In finding that plaintiff's prenatal injuries were reasonably foreseeable by the defendants, the court declared that

[t]he basic understanding of Rh-negative and Rh-positive effects upon hemolytic [*sic*] disease of the newborn has been a medical fact since the 1940's. . . . It has long been known that sensitization occurs in 90% of Rh-negative women who have received multiple transfusions of Rh-positive blood [and] that the Rh-positive fetus of an Rh-negative woman previously sensitized is [borne by her] "at high risk." . . . Thus, it has been pointed out that "it must be an absolute rule that Rh-positive blood is never transfused to an Rh-negative female who is below the age of menopause."¹⁹⁷

The court also differed with what it called "[t]he implication in the appellate court's opinion that duty and foreseeability are identical"¹⁹⁸ The supreme court cited two cases on point, namely *Jorgensen*¹⁹⁹ and *Park*,²⁰⁰ wherein the courts employed an approach which focused upon causation in finding liability in negligence. The *Renslow* court noted, however, that to find liability on the basis of causation alone, absent an existing duty, would result in infinite liability for all wrongful acts.²⁰¹ While writers have denied that a duty problem was ever real to the courts,²⁰² the Supreme Court of

195. 67 Ill. 2d 348, 367 N.E.2d 1250 (1977).

196. *Compare* 67 Ill. 2d at 354, 367 N.E.2d at 1253 with 40 Ill. App. 3d at 239, 351 N.E.2d at 874.

197. 67 Ill. 2d at 353-54, 367 N.E.2d at 1253 (citations omitted).

198. *Id.* at 354, 367 N.E. 2d at 1253.

199. 483 F.2d 237 (10th Cir. 1973).

200. 88 Misc. 2d 222, 387 N.Y.S.2d 204 (Sup. Ct. 1976), *aff'd*, 60 App. Div. 2d 80, 400 N.Y.S.2d 110 (2d Dep't 1977).

201. 67 Ill. 2d at 356, 367 N.E.2d at 1254.

202. "In fact, considerations of duty are never the substantive reasons for a decision, but only the legal sounding explanation for it." White, *The Right of Recovery for Prenatal Injuries*, 12 La. L. Rev. 383, 401 (1952). See also Payne, *Foresight and Remoteness of Damage in Negligence*, 25 Modern L. Rev. 1, 18 (1962).

Illinois reaffirmed the utility of the concept of legal duty as the means to curb the potential flood of litigation in these cases, including false claims, the fear of which has plagued courts for decades.²⁰³ The court found that, since a defendant, under existing law, may be held liable to a person from the moment of his conception,²⁰⁴ "it [was] illogical to bar relief for an act done prior to conception where the defendant would be liable for this same conduct had the child, unbeknownst to him, been conceived prior to his act."²⁰⁵ The court thus extended the duty owed to the plaintiff's mother at the time of her transfusions to the child herself, finding in the child "a right to be born free from [foreseeable] prenatal injuries"²⁰⁶

Finally, the court found support for its extension of duty in the fact that medical advances have been achieved which can "mitigate or, in some cases, totally alleviate a child's prenatal harm."²⁰⁷ It is clear from its opinion that the court deplored the negligent acts of the defendants, but it cited "sound social policy" as the requiring factor for the extension of duty in the case before it.²⁰⁸ For the first time in nearly a quarter century, a court had attempted to find a duty owing to an unborn plaintiff. Clearly, however, there existed no relationship between the defendants and the plaintiff in 1965 from which a duty could be said to arise,²⁰⁹ and *only* social policy

203. See, e.g., *Stanford v. St. Louis-San Francisco Ry.*, 214 Ala. 611, 108 So. 566 (1926). It has been noted that

difficulty of proof should not be a valid reason for . . . denying recovery [since it is] a question of evidence, and not one of tort. It would be far better to allow the injured plaintiff to present his case for what it is worth, subject to all the safeguards that have grown up in the evidentiary field, and under appropriate instructions from the court regarding the legal weight of such evidence. Actual injury is surely capable of clear medical proof, in view of the advanced state of medical science today. It is entirely practical to allow recovery only on such clear proof, and deny it where the claim is not proved. Under such circumstances, the possibility that speculative or fraudulent claims will possibly be made . . . is simply one of adequate proof.

Note, *Prenatal Injury: Recovery or Anomaly?*, 14 Mont. L. Rev. 128, 134-35 (1953).

204. See cases cited in note 192 *supra*.

205. 67 Ill. 2d at 357, 367 N.E.2d at 1255.

206. *Id.* See section VIII *infra*.

207. 67 Ill. 2d at 358, 367 N.E.2d at 1255.

208. *Id.*

209. The requisite relationship between plaintiff and defendant may be merely the existence of the plaintiff in a foreseeable class of persons who might be endangered by defendant's negligent conduct. See *RESTATEMENT (SECOND) OF TORTS* § 281(b) (1965). The possibility that the thirteen year-old girl in this case would someday give birth to the plaintiff does not, of itself, place the plaintiff within such a foreseeable class. See note 231 and accompanying text *infra*.

considerations could have enabled the court to find for the injured child.

B. The Extension of Legal Duty: Reality or Fiction?

The three dissenting *Renslow* justices, in separate opinions, strongly expressed the view that the possibility of disastrous social consequences far outweighed any benefit which might accrue to the plaintiff. Chief Justice Daniel P. Ward noted that granting the cause of action in *Renslow* created problems, such as "how to measure the insurance risk"²¹⁰ and how to protect defendants from lawsuits generations hence for some genetic injury which was caused many years before.²¹¹

Justice Robert C. Underwood voiced the same fears.²¹² In his view, the majority's finding that the defendants owed a duty to the plaintiff was unsubstantiated. He stated that "foreseeability is not conclusive as to the existence of a duty,"²¹³ and he advocated retention of the rule limiting liability to "post-conception injuries."²¹⁴

Justice Howard C. Ryan viewed the majority's decision, contrary to its claim to have found a duty owing to the plaintiff,²¹⁵ "as a tacit acceptance of causation as the sole determinant of liability."²¹⁶ He said that the court's decision, admittedly based on social policy considerations,²¹⁷ was "symptomatic" of an increasing judicial tendency to expand the traditional limits of tort liability.²¹⁸ Justice Ryan noted that "[a]n ever-broadening concept of duty has evolved" in an effort to spread the cost of damages suffered by innocent persons, bringing more and more plaintiffs under a "protective umbrella."²¹⁹ In addition, he contended that, once plaintiffs were granted a cause

210. 67 Ill. 2d at 371, 367 N.E.2d at 1261 (Ward, C.J., dissenting).

211. *Id.* (Ward, C.J., dissenting). The majority's answer to this argument was that "the case at bar [was] clearly distinguishable [from cases involving genetic injury]." *Id.* at 358, 367 N.E.2d at 1255. The court was "confident that when such a case [was] presented, the judiciary [would] effectively exercise its traditional role of drawing rational distinctions, consonant with current perceptions of justice, between harms which are compensable and those which are not." *Id.*

212. *Id.* at 372, 367 N.E.2d at 1262 (Underwood, J., dissenting).

213. *Id.* (Underwood, J., dissenting).

214. *Id.* (Underwood, J., dissenting).

215. *See id.* at 359, 367 N.E.2d at 1255-56 (per Moran, J.).

216. *Id.* at 374, 367 N.E.2d at 1263 (Ryan, J., dissenting).

217. *See* note 208 and accompanying text *supra*.

218. 67 Ill. 2d at 378, 367 N.E.2d at 1265 (Ryan, J., dissenting).

219. *Id.* (Ryan, J., dissenting).

of action under this umbrella, "sympathetic juries . . . have managed to inflate the size of verdicts."²²⁰ The justice deplored the result which, in his opinion, the majority's holding was bound to have on the general public: a significant increase in insurance costs and, in turn, an increase in medical costs as well.²²¹

VII. Ramifications of the Extension of Duty in *Renslow*

The potential adverse ramifications of the *Renslow* decision, as expressed by that court's three dissenters, are very real possibilities. Most telling was the observation by Chief Justice Ward that to allow a cause of action for preconception negligence could lead to "possible exposure of a defendant to claims by successive generations of plaintiffs who complain of genetic injury" as well.²²² Similarly, Justice Underwood recognized that extending duty to one not yet conceived "permits a lawsuit to be filed 50 or 60 years after the negligent act from which it arose."²²³ Indeed, if the *Renslow* decision were to be relied upon as precedent by other state courts, there would be no limit to actions for prenatal injury. And the *raison d'être* of the legal duty requirement in actionable negligence²²⁴ would be defeated.

This is perhaps the most disconcerting potential effect of the extension of duty to the plaintiff in *Renslow*: that decision, like *Bonbrest v. Kotz*²²⁵ and *Kelly v. Gregory*²²⁶ before it, could be the beginning of a trend in the law, this one leading to potentially un-

220. *Id.* (Ryan, J., dissenting).

221. *Id.* (Ryan, J., dissenting).

222. *Id.* at 371, 367 N.E.2d at 1261 (Ward, C.J., dissenting). This is not mere speculation. It has been known for some time that irradiation, for instance, can cause "mutational changes that may be transmissible to the descendants of the irradiated fetus." Gordon, *The Unborn Plaintiff*, 63 Mich. L. Rev. 579, 616 (1965).

223. 67 Ill. 2d at 372, 367 N.E.2d at 1262 (Underwood, J., dissenting). As another *Renslow* dissenter explained:

If the mother in this case had received the transfusion at the age of two or three, if she gave birth at the age of 40, and if the action were not brought until the child reached majority, then nearly 60 years would have elapsed between the negligent act and the institution of the suit. Under [the majority's] decision, [too], in cases where certain deficiencies are passed from generation to generation, . . . a cause of action [could] be maintained by any individual at any point in the chain of heredity.

Id. at 376-77, 367 N.E.2d at 1264 (Ryan, J., dissenting).

224. See text accompanying notes 16 & 17 *supra*.

225. 65 F. Supp. 138 (D.D.C. 1946).

226. 282 App. Div. 542, 125 N.Y.S.2d 696 (3d Dep't 1953).

limited liability for birth defects. The history of the law relating to prenatal injuries illustrates that when a court of major influence expands the right of action at common law, courts across the country take the opportunity to expand that right in their jurisdictions as well.²²⁷

It is not difficult to understand why the *Renslow* court decided the case as it did. The danger of transfusing Rh-positive blood into an Rh-negative woman is discoverable to any layman reading *Webster's Dictionary*;²²⁸ the defendants in *Renslow* were a doctor and a hospital. Surely they should be held to a professional standard of care. But to say that the defendants owed a duty to the plaintiff at the time they injured her mother—eight years before she was conceived—would be to ignore the facts. The defendants could not have contemplated the unborn child of their thirteen year-old patient in 1965, as both the Appellate Court²²⁹ and the Supreme Court²³⁰ of Illinois contended, any more than the thirteen year-old girl herself could have contemplated giving birth to the plaintiff at that time, though such occurrence was certainly in the realm of possibility. "The creation of a legal duty requires more than a mere possibility of occurrence."²³¹ By the court's logic, a doctor would be deemed to foresee as determinate, and thus owe a duty to, the future

227. See sections III(C) & IV(B) *supra*.

228. See note 184 *supra*.

229. 40 Ill. App. 3d at 235, 351 N.E.2d at 871.

230. 67 Ill. 2d at 365, 367 N.E.2d at 1258 (Dooley, J., concurring).

231. *Cunis v. Brennan*, 56 Ill. 2d 372, 376, 308 N.E.2d 617, 619 (1974), *quoted in Renslow v. Mennonite Hosp.*, 67 Ill. 2d 348, 376, 367 N.E.2d 1250, 1264 (1977) (Ryan, J., dissenting). Justice James A. Dooley, in an opinion concurring with that of the court, attempted to respond to the dissents by pointing out that, under existing statutory law, a statute of limitations does not run against a minor, so that a suit could be instituted more than twenty years after a negligent act without the *Renslow* decision. *Id.* at 370, 367 N.E.2d at 1261 (Dooley, J., concurring), *citing* Ill. Rev. Stat. ch. 83, § 22 (1975). In addition, Justice Dooley reminded the dissenters that, in the case of a defective product, no cause of action arises until injury to the plaintiff. 67 Ill. 2d at 370, 367 N.E.2d at 1261 (Dooley, J., concurring). But *Renslow* was not a products liability case, and, if it were, there would be no problem with analogizing it to the *Jorgensen* case decided by the Tenth Circuit Court of Appeals. See note 235 *infra*. Justice Dooley responded to the dissenters' fear of potentially unlimited liability for genetic injury by saying that that issue was not before the court. 67 Ill. 2d at 370, 367 N.E.2d at 1261 (Dooley, J., concurring). In his words, "It is the duty of this court to address itself to the issues presented by the particular litigation." *Id.* (Dooley, J., concurring). But if, as he states, the decision of the court should turn solely upon the particular issues presented by the plight of the *Renslow* baby, so, too, should the holding of the court be limited to the facts of that case. See text accompanying note 242 *infra*.

children of a newborn girl when treating her in the delivery room. A negligently inflicted injury to the newborn child, perhaps one affecting her chromosome structure,²³² would make the doctor liable not only to the infant herself but to any children she might have, twenty or thirty years later, who were injured as a result.

While there should certainly be a public policy which favors the protection of innocent, helpless infants, there must also be a strong public policy upholding the reasonable expectations of individuals that they not be exposed to limitless liability for an indeterminate amount of time because of some inadvertent act. This is the reason for the existence of statutes of limitations, and, specifically, it is the reason for the relatively short duration of statutes of limitations for negligence.²³³

But the *Renslow* decision might have an unexpected effect on future prenatal injury litigation: it may cause a contraction of the currently recognized right of action which allows recovery from the moment of conception. *Legal duty* does not exist merely because a court extends it to the case at bar in order to arrive at the result it seeks. There must be some relationship²³⁴ between plaintiff and defendant from which the duty can be said to arise.²³⁵ And the plaintiff must have some right which the actor has an obligation to protect, which right defines the limits of the actor's duty.²³⁶ Contrary to the *Renslow* court's contention,²³⁷ the *possibility* that plaintiff's mother would someday bear children created no relationship between the plaintiff and the defendants in 1965,²³⁸ when plaintiff's mother was

232. Long-term irradiation of the newborn, for instance, could be capable of producing such a result. See note 222 *supra*.

233. See, e.g., N.Y. CIV. PRAC. LAW §§ 211-214 (McKinney 1976). While certain actions must be commenced within twenty, ten, or even six years (see *id.* §§ 211-213), actions for negligently inflicted personal injuries or injuries to property must be commenced within three years. *Id.* § 214. In the case of negligently inflicted injuries involving medical malpractice, the limitation of time is even shorter—two years and six months. *Id.* § 214-a.

234. See note 209 *supra*.

235. See note 5 and accompanying text *supra*. In the area of products liability, *cf.* text accompanying notes 161-66 *supra*, the requisite relationship between the unborn plaintiff and the negligent defendant giving rise to a duty of care can certainly be found to exist, as it does between any two parties in a products liability case. The reasoning of the Tenth Circuit in *Jorgensen* (see notes 165-66 and accompanying text *supra*) thus can be said to have a sound legal basis.

236. See note 6 and accompanying text *supra*.

237. 67 Ill. 2d at 359, 367 N.E.2d at 1255-56.

238. See text accompanying note 231 *supra*.

herself only a child, and no duty could be owed to the Renslow baby at the time of the defendants' negligent acts. And since there can be no actionable negligence in the absence of a duty owing to the plaintiff by the defendants,²³⁹ other courts might look upon the *Renslow* decision as an example of an irresponsible exercise of judicial discretion. As a result, courts might be much more restrictive in allowing actions for prenatal negligence in an attempt to halt or reverse the trend toward unlimited liability.

VIII. Conclusion

The Illinois Supreme Court in *Renslow* took an important step in reaffirming the utility of the concept of legal duty.²⁴⁰ The law cannot continue to allow actions for negligence where two of the elements essential to such actions—a legal duty to the plaintiff and a breach of that duty—are lacking.²⁴¹ But there must truly *be* a duty before a finding of it can be made by a court. In *Renslow* there was no duty. And if no duty is present, but the facts of the instant case demand a finding for the plaintiff, a court should be able to rely on social policy (which was, in fact, the basis for the *Renslow* decision)²⁴² in making a ruling limited to the facts before it.

It is unlikely, however, that courts will have to, or should have to, rely solely upon social policy in granting causes of action for prenatal negligence. For it would be a logical development of the law if courts were to recognize, as a matter of law, the "right to be born free from [foreseeable] prenatal injuries."²⁴³ Such a right would be correlative to the duty they would find owing to the plaintiff. This right has come to be called "the 'right to be well born.'"²⁴⁴

239. See note 7 and accompanying text *supra*.

240. See 67 Ill. 2d at 357, 367 N.E.2d at 1254-55. ◊

241. If there is no legal duty, there can be no breach of duty. See text accompanying note 2 *supra*.

242. See text accompanying note 208 *supra*.

243. 67 Ill. 2d at 357, 367 N.E.2d at 1255. Compare this quote with *Endresz v. Friedberg*, 24 N.Y.2d 478, 483, 248 N.E.2d 901, 903, 301 N.Y.S.2d 65, 68-69 (1969) ("[N]atural justice . . . requires recognition of the legal right of every human being to begin life unimpaired by physical or mental defects resulting from the negligence of another.") and *Smith v. Brennan*, 31 N.J. 353, 364, 157 A.2d 497, 503 (1960) ("[J]ustice requires that the principle be recognized that a child has a legal right to begin life with a sound mind and body.").

244. Ament, *The Right to Be Well Born*, 2 J. of Legal Med. 24, 27 (No. 6 1974). The right to be well born has been defined as "the right of an unborn child to such prenatal care, physically, mentally, and emotionally, as will maximize the unborn child's quality of life after birth." *Id.*

Recognition of it would make others liable in negligence for any inadvertent acts or omissions which adversely affect the health of the future child, providing it with the most comprehensive possible protection from harm.

Recognition of such a right, however, would still leave open the possibility of infinite liability, especially in the area of genetic injury. To protect against this result, state legislatures would do well to pass laws designed specifically to limit liability for prenatal negligence. One way to accomplish this would be to limit liability to the first generation injured by the negligence, allowing recovery for the inability to conceive healthy children. The plaintiff would then be on notice that his children would be born with the same genetic defect and that conception of them would be at his own risk. Another way to limit liability for prenatal negligence would be to set a strict limit on the number of years which may elapse between the occurrence of the tortious act and the realization of the resultant injury before the right of action on the negligence would lapse.²⁴⁵ In this way, only those cases with the best possible means of proof, due to proximity in time, would come to court, lessening the chance that false claims will glut our already overcrowded courts.

Some change must be made in the law relating to prenatal injuries. While it is improper for courts to find negligence without legal duty, it is equally improper to purport to find a duty where none exists. With the knowledge of medical science presently available, it would be impossible to deny protection against negligence to a fetus from the moment of its conception. But until some definite steps are taken to prevent unlimited liability for all negligent acts, the law should not follow the precedent set in *Renslow v. Mennonite Hospital*.²⁴⁶

Instead, legislatures should move to enact laws to define the limits of the legal duty which may be owed to the unborn plaintiff.²⁴⁷

245. At least one state legislature has already passed such a law. Under an amendment to New York's Civil Practice Law and Rules, a child may no longer wait until three years after reaching majority to commence an action for medical malpractice. The new law requires an infant to commence an action for medical malpractice within ten years after the cause of action accrues. N.Y. CIV. PRAC. LAW § 208 (McKinney 1976), as amended by ch. 109, § 7, 1975 N.Y. Laws 134, 137. Thus, if an action for medical malpractice accrues to an infant aged 3, the child must commence his action by the time he is 13.

246. 67 Ill. 2d 348, 367 N.E.2d 1250 (1977).

247. See note 245 and accompanying text *supra*.

Courts should prevent as much as possible the levying of excessive damages against defendants in prenatal injury cases, balancing compensation of the plaintiff at bar with the knowledge that excessive verdicts will surely lead to higher insurance rates and an eventually greater burden to the public at large.²⁴⁸ At the same time, the law, either through the legislatures or the courts, should recognize and enforce an infant's right to be well born,²⁴⁹ which would provide the infant with legal recourse against preconception, as well as postconception, negligence.²⁵⁰ For there is no reason why, in a proper case, a cause of action for preconception negligence should not lie: regardless of when the negligent act occurred, the injury to the infant was sustained—and could only have been sustained—after conception.²⁵¹ And courts have been unanimous over the last quarter century in holding that the unborn plaintiff, from the moment of conception, is a person to whom a duty may be owed.²⁵²

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248. See text accompanying notes 218-21 *supra*.

249. See notes 144-46 & 243-44 and accompanying text *supra*.

250. See text accompanying note 244 *supra*.

251. See note 165 and accompanying text *supra*.

252. See text accompanying notes 133-38 & cases cited in note 138 *supra*.