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# Torts Prior to Conception: A New Theory of Liability: *Renslow v. Mennonite Hospital*, 40 Ill. App. 3d 234, 351 N.E.2d 870 (1976); *Park v. Chessin*, 88 Misc. 2d 222, 387 N.Y.S.2d 204 (Sup. Ct. 1976)

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Note

# Torts Prior to Conception: A New Theory of Liability

*Renslow v. Mennonite Hospital*, 40 Ill. App. 3d 234, 351 N.E.2d 870 (1976); *Park v. Chessin*, 88 Misc. 2d 222, 387 N.Y.S.2d 204 (Sup. Ct. 1976).

## I. INTRODUCTION

Historically, an unborn child was deemed to have no inherent rights in the field of torts,[1] although such rights were granted in areas such as property or criminal law when it proved beneficial to the child.[2] Case law relating to tort liability for the benefit of infants, however, has expanded rapidly in recent years.

This note will summarize the law[3] of torts which harm infants, with special focus on an area just beginning to emerge—that of liability for torts committed prior to an infant's conception.

The area of preconceptional torts has been discussed in connection with radiation injuries caused by another's negligent conduct,[4]

1. *See, e.g.*, Allaire v. St. Luke's Hosp., 184 Ill. 359, 56 N.E. 638 (1900); Dietrich v. Northampton, 138 Mass. 14 (1884); Drabbels v. Skelley Oil Co., 155 Neb. 17, 50 N.W.2d 229 (1951) (representing the Nebraska view).
2. *See, e.g.*, Bonbrest v. Katz, 65 F. Supp. 138, 140 (D.D.C. 1946); Zepeda v. Zepeda, 41 Ill. App. 2d 240, 248, 190 N.E.2d 849, 853 (1963), *cert. denied*, 379 U.S. 945 (1964). *See generally* A. MILUNSKY & G. ANNAS, GENETICS AND THE LAW, 29 (1976); A. WILKERSON, THE RIGHTS OF CHILDREN—EMERGENT CONCEPTS IN LAW AND SOCIETY 49-60 (1973); Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 NOTRE DAME LAW. 349, 351-54, 362-69 (1971); 18 S.D.L. REV. 204, 204-05 n.7, 213 n.74 (1973).
3. *See generally* Annot., 22 A.L.R.3d 1441 (1968); Annot., 40 A.L.R.3d 1222 (1971).
4. For example, a parent could be exposed to radioactive materials, which could damage his chromosomal structure, and injure the child once conceived. Radiation damages have been alleged in at least one unreported federal district court case. *See* Estep & Forgotson, *Legal Liability for Genetic Injuries from Radiation*, 24 LA. L. REV. 1, 1 n.2 (1963). Especially with the probability of more nuclear activity in the future, the threats of more radiation damages are very real indeed. *See generally* Estep & Forgotson *id*; Comment, *Radiation and*

and in the area of genetics and genetic screening.[5] Preconceptional tort injuries are those by which the negligent conduct occurs prior to the conception of the child.[6] The injury attaches to either the father or mother but does not harm him or her. However, the harm attaches immediately to the child at conception. Thus, by the time the child is born, an injury has occurred from an act that took place prior to conception, but that has left him to suffer its consequences throughout the remainder of his life.

Tort law has long abided by the theory that for every wrong there is a remedy.[7] Although a whole new horizon could emerge if preconceptional tort recovery is permitted, the children injured by such torts have been wronged and should not be denied recovery merely because they were not in being at the time the tort was committed. The traditional tort elements of negligence can be applied very exactly to this area to allow the needed recovery:

> [I]f recovery is denied, we know that many individuals often through no fault of their own, will go through life uncompensated for the infirmity, inconvenience, and financial sacrifice caused by another's actions for which he would be legally liable but for the lack of an identifiable legal entity and specific proof of causal connection. This loss will be no less painful, costly, or real because the wrongful impact occurred before conception.[8]

The area of preconceptional torts cannot be considered without a discussion of the area of prenatal injuries and wrongful life, for a suit based on a preconceptional tort must arise out of, and be brought under either of these two theories.

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*Preconception Injuries: Some Interesting Problems in Tort Law*, 28 SW. L.J. 414 (1974).

5. *See* A. MILUNSKY & G. ANNAS, *supra* note 2; Annas & Coyne, *"Fitness" for Birth and Reproduction: Legal Implications of Genetic Screening*, 9 FAM. L.Q. 463 (1975); Capron, *Informed Decisionmaking in Genetic Counseling: A Dissent to the "Wrongful Life" Debate*, 48 IND. L.J. 581 (1973); Waltz & Thigpen, *Genetic Screening and Counseling: The Legal and Ethical Issues*, 68 NW. U.L. REV. 696 (1973).
6. Preconception injuries were first discussed in Morgan v. United States, 143 F. Supp. 580 (D.N.J. 1956) (dismissed on the ground of a two year statute of limitations and on the now reversed Pennsylvania doctrine disallowing all claims for prenatal injuries). *See also* Zepeda v. Zepeda, 41 Ill. App. 2d 240, 250-51, 190 N.E.2d 849, 853-54 (1963), *cert. denied*, 379 U.S. 945 (1964) (dicta); Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 506, 93 S.E.2d 727, 729 (1956) (concurring opinion).
7. > The absence of precedent should afford no refuge to those who by their wrongful act, if such be proved, have invaded the right of an individual . . . . And what right is more inherent, and more sacrosanct, than that of the individual in his possession and enjoyment of his life, his limbs and his body?
   Bonbrest v. Kotz, 65 F. Supp. 138, 142 (D.D.C. 1946).
8. Estep & Forgotson, *supra* note 4, at 46.

This note examines two recent cases in the area of preconceptional torts: *Renslow v. Mennonite Hospital*,[9] which involved prenatal injuries incurred from a negligent preconceptional act, and *Park v. Chessin*,[10] which concerned a suit in wrongful life arising out of a negligent preconceptional act. The scope of this note will be limited to an anlysis of the cause of action accruing in favor of the infant, through an application of the elements of negligence.[11]

## II. PRECONCEPTIONAL TORT RESULTING IN PRENATAL INJURIES

In *Renslow*,[12] the infant plaintiff, through her mother, brought an action against a hospital and physician for prenatal, personal injuries sustained by her because of a negligent blood transfusion to her mother some eight years prior to her birth. In 1965, when the mother was 13 years old, she was given two transfusions of blood in the defendant hospital. The transfusions were of the wrong blood type, and caused the sensitization of her blood. This fact was not discovered until eight years later during routine testing of blood during her pregnancy. The physicians determined that the life of the infant plaintiff was in danger, and they induced labor, which resulted in a premature live birth of the plaintiff.

9. 40 Ill. App. 3d 234, 351 N.E.2d 870 (1976).
10. 88 Misc. 2d 222, 387 N.Y.S.2d 204 (Sup. Ct. 1976).
11. Although both *Renslow* and *Park* involve claims by the parents for their own expenses and mental suffering, those causes of action will not be discussed. For cases focusing on the parents' causes of action rather than that of the child, see Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967); Coleman v. Garrison, 349 A.2d 8 (Del. 1975); Aronoff v. Snider, 292 So. 2d 418 (Fla. Dist. Ct. App. 1974); Betancourt v. Gaylor, 136 N.J. Super. 69, 344 A.2d 336 (1975); Cox v. Stretton, 77 Misc. 2d 155, 352 N.Y.S.2d 834 (Sup. Ct. 1974); Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975); Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974).

    Although this note is limited to the cause of action accruing in favor of an infant born alive, an equally debatable issue today is the wrongful death damages accruing in favor of infants stillborn. *See* State v. Sanders, 538 S.W.2d 336 (Mo. 1976); Cardwell v. Welch, 25 N.C. App. 390, 213 S.E.2d 382, *cert. denied*, 287 N.C. 465, 215 S.E.2d 623 (1975); Yow v. Nance, 29 N.C. App. 419, 224 S.E.2d 292, *cert. denied*, 290 N.C. 312, 225 S.E.2d 833 (1976) (no causes of action accruing in favor of the infants for wrongful death actions); Evans v. Olson, 550 P.2d 924 (Okla. 1976); Presley v. Newport Hospital, 365 A.2d 748 (R.I. 1976) (allowing causes of action in wrongful death for negligence causing the infants to be stillborn).
12. 40 Ill. App. 3d 234, 351 N.E.2d 870 (1976).

Plaintiff was born suffering personal injuries which included permanent damages to her nervous system and brain.

The appellate court held that a cause of action existed on the behalf of the infant for any injuries sustained as a result of the negligent transfusion, even though it occurred several years prior to the child's conception.[13] Before an analysis of the court's decision, a history of prenatal injuries is necessary.

A prenatal injury is one suffered by a child while yet unborn, the extent of which cannot become known until after birth.[14] The claim in such cases is that "but for" the defendant's negligence, the child would have been born a normal child.[15] The plaintiff has the burden of showing that the defendant's conduct was the direct cause of injury. If the plaintiff meets this burden, damages are measured by comparing the child as he exists to the normal child he would have been.[16]

The first case deciding this issue was *Dietrich v. Northampton.*[17] The case involved a woman who miscarried as a result of her fall on a defective highway. The child lived for only a few moments. The court, in an opinion by Justice Holmes, held that a child subsequently born alive would have no cause of action for injuries sustained by him while in his mother's womb. The court ruled that the unborn child was not viewed as having an independent existence apart from his mother.[18] This precedent remained until 1946. The theory that a child had no separate existence, however, had been questioned as early as 1900. In *Allaire v. St. Luke's Hospital,*[19] a viable fetus was injured by the negligent operation of an elevator by the hospital in which the mother was riding. Although the majority followed *Dietrich*, a dissent argued for recognition of prenatal rights in a viable unborn child if later born alive.[20]

The reversal of *Dietrich* came in 1946. *Bonbrest v. Katz*[21]

13. *Id.* at 240, 351 N.E.2d at 874.
14. "Occurring, existing or taking place before birth." WEBSTER'S THIRD NEW WORLD DICTIONARY 1790 (1971).
15. Comment, *Wrongful Birth: The Emerging Status of a New Tort*, 8 ST. MARY'S L.J. 140, 156-58 (1976) (describing prenatal injuries and distinguishing them from suits brought in wrongful life discussed in text accompanying note 42 *infra*).
16. *Id.* at 156-57.
17. 138 Mass. 14 (1884).
18. *Id.* at 15.
19. 184 Ill. 359, 56 N.E. 638 (1900).
20. *Id.* at 368, 56 N.E. at 640 (Boggs, J., dissenting).
21. 65 F. Supp. 138 (D.D.C. 1946). Although *Bonbrest* has traditionally been known for the reversal of *Dietrich*, a state court in 1924 accom-

held a physician liable for injuries to a viable fetus when brought in a tort action by the child after his birth. The decision thus began a trend that completely rejected the *Dietrich* view. *Bonbrest* emphasized the various inconsistencies in the property, criminal and tort laws as applied to the unborn.[22] *Bonbrest*, however, allowed recovery to the child only if there was direct injury to him, if he survived birth and if he was viable[23] at the time of the injury.

The viability standard withstood attack for several years, but it began to be disregarded as an arbitrary basis in *Hornbunkle v. Plantation Pipe Lines.*[24] There, the Georgia Supreme Court held that a child prenatally injured anytime after conception could recover if subsequently born alive.[25] The modern trend of courts considering the viability question appears to allow recovery for the child regardless of when the injury occurred as long as the child is subsequently born alive.[26]

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plished the same purpose, by allowing recovery for the infant, injured when viable. Kine v. Zuckerman, 4 Pa. D. & C. 227 (1924).

22. 65 F. Supp. at 140. For cases and articles concerning more in depth analysis of the property and criminal rights of infants, see note 2 *supra.*

23. Viability is defined as "[c]apability of living. A term used to denote the power a new-born child possesses of continuing its independent existence." BLACK'S LAW DICTIONARY 1737 (4th ed. rev. 1968).

24. 212 Ga. 504, 93 S.E.2d 727 (1956). The arbitrariness of the viability standard was best described by Professor Prosser:

> Viability of course does not affect the question of the legal existence of the foetus, and therefore of the defendant's duty; and it is a most unsatisfactory criterion, since it is a relative matter, depending on the health of mother and child and many other matters in addition to the stage of development. Certainly the infant may be no less injured; and all logic is in favor of ignoring the stage at which it occurs.

W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 55, at 337 (4th ed. 1971) (footnotes omitted).

25. 212 Ga. at 505, 93 S.E.2d at 728. The concurring opinion in *Hornbuckle* was one of the first to raise the preconception issue: "If a baby can sue for injuries sustained five seconds after conception, as the majority rules, why not allow such suits for injuries before conception, even unto the third and fourth generations?" *Id.* at 506, 93 S.E.2d at 729 (Duckworth, C.J., concurring).

26. For a complete listing as of that date of the states still adhering to the viability standard and those that have abandoned it, see 18 S.D.L. REV. 204, 204-05 n.7, 213 n.74 (1973). Since that writing, Florida, in Day v. Nationwide Mut. Ins. Co., 328 So. 2d 560 (Fla. Dist. Ct. App. 1976), has joined the states abandoning the viability standard.

It has been encouraged that all courts should abandon the arbitrary viability standard, especially since it is apparent that the most vital stages of development, and thus the stages in which the most physical harm can occur to the infant are the first three months of development. *See* Note, *The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries*, 110 U. PA. L. REV. 554, 563 (1962).

Thus, the questions faced by the courts are: (1) if the major concern is to give a remedy to a child for a wrong done by another's negligence, should viability or any other point in time bar a remedy, and (2) should the recovery be different if the injury took place prior to conception but all the necessary elements of negligence can be shown?[27] The court in *Renslow*, although allowing the child recovery, basically avoided these issues.

The court first rejected the case the defendants contended was controlling—*Morgan v. United States*.[28] *Morgan* appears to be the first case to consider the preconceptional tort issue. The fact situation was very similar to that in *Renslow*, and the court found that no cause of action accrued in favor of the child. Pennsylvania at that time, however, followed *Dietrich* and allowed no recovery for any type of prenatal injury. *Renslow*, therefore, properly rejected *Morgan*, in light of the fact that Pennsylvania no longer follows *Dietrich*[29] and in light of the fact that Illinois courts have allowed recovery for prenatal injuries.[30]

*Renslow* relied on *Jorgensen v. Meade Johnson Laboratories*,[31] a case that allowed a cause of action for preconception injuries. In *Jorgensen*, a woman had taken oral contraceptives prior to the conception of her twin daughters. The parents, being the plaintiffs in the action, asserted that these contraceptives had damaged the chromosomal structure of the mother, which created a mongoloid deformity in the viable fetuses of the daughters, causing death to one, and severe injuries to the other. The court found that there

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27. Dictum in Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied*, 379 U.S. 945 (1964), was directed to this very point:

> But what if the wrongful conduct takes place before conception? Can the defendant be held accountable if his act was completed before the plaintiff was conceived? Yes, for it is possible to incur, as Justice Holmes phrased it in the *Dietrich* case, "a conditional prospective liability in tort to one not yet in being." It makes no difference how much time elapses between a wrongful act and a resulting injury if there is a causal relation between them.

*Id.* at 250, 190 N.E.2d at 853.

28. 143 F. Supp. 580 (D.N.J. 1956).
29. Sinkler v. Kneale, 401 Pa. 267, 164 A.2d 93 (1960) (allowing recovery for prenatal injuries).
30. Amann v. Faidy, 415 Ill. 422, 114 N.E.2d 412 (1953). *See generally* 51 CHI.-KENT L. REV. 227, 229-31 (1974) (summary of Illinois law in the area).
31. 483 F.2d 237 (10th Cir. 1973). *Jorgensen* has received relatively little attention from commentators probably because it, too, tended to avoid the main issues. *See generally* Comment, *supra* note 4, at 418; Comment, *supra* note 15, at 148; A. MILUNSKY & G. ANNAS, *supra* note 2, at 6.

was a cause of action on the ground that the injury was to a viable fetus. The court stated that, "the pleading should not be construed as being limited to the effects of developments before conception."[32] Thus, even though the tortious conduct took place prior to conception, the court treated it as a prenatal, personal injury suit.[33]

*Renslow* followed similar reasoning. Although the injury cannot attach to the child until conception, the court only superficially considered the elements of negligence necessary to sustain the action, and particularly seemed to avoid the preconception issue.

Regardless of the somewhat superficial reasoning apparent in *Renslow*, the result should be a worthy precedent for other actions brought on a theory of preconceptional tort. The court supported *Jorgensen* in reaffirming the proposition that the time factor for tortious conduct may be extended not only to anytime after conception, but also to anytime prior to conception if resulting injury and causation can be proved. This decision further established the fact that a theory for preconceptional torts is becoming more tenable.

*Renslow* recognized that a great injury had been done to the child by the doctor's negligence, and that had the correct blood been transfused eight years before, a normal child could have been born. Because of this preconceptional tort, the court reasoned that harm by way of a prenatal injury had attached to the child. The chain of causation was definite, and the court was correct in allowing a recovery.

## III. PRECONCEPTIONAL TORT RESULTING IN WRONGFUL LIFE SUIT

The claim in *Park v. Chessin*[34] was brought for the infant plaintiff Lara, by the mother and father as legal representatives for their child, who lived for two and one-half years, but was deceased at the time of the action. The child suffered from polycystic kidneys, an hereditary disease. The suit was brought in wrongful life[35] by the infant, for pain and suffering sustained by the child after her birth.

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32. 483 F.2d at 239.
33. *See* Comment, *supra* note 15, at 148 (critisism of the *Jorgensen* decision).
34. 88 Misc. 2d 222, 387 N.Y.S.2d 204 (Sup. Ct. 1976).
35. For background in the wrongful life area, see Tedeschi, *On Tort Liability for "Wrongful Life,"* 1 ISRAEL L. REV. 513 (1966); Note, 55 MINN. L. REV. 58 (1970).

The mother had given birth to another child before Lara. That child also died of polycystic kidneys shortly after birth. After the death of the first child, the defendants, specialists in the field of obstetrics, advised the parents that there was no reason why a future pregnancy would result in a congenitally defective child. The parents asserted that the defendants failed to take the necessary genetic tests to ascertain the probability that it was a hereditary disease, which in fact it was, and entirely on the defendant's advice, the parents did conceive another child. The court denied the motion to dismiss, and allowed the cause of action for a preconceptional injury brought in wrongful life.[36]

The suit in this case was for wrongful life, not for prenatal injuries. The distinction between the two is an important one. A wrongful life action is distinguished from an action for prenatal injuries[37] in that it is brought when the defendant did not cause the actual injury himself, but his conduct was a cause contributing to the plaintiff's conception and birth. The tortious conduct asserted in wrongful life actions is that the defendant should have known and advised the parents that for a particular reason a normal child could never have been born—and thus have given an option to the parents to abort if the child was already conceived, or not to conceive in the first instance.[38] A wrongful life action seeks damages for the birth itself, rather than for a distinct injury caused prior to birth.[39]

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36. To allow a cause of action for such a suit is worthy in itself:
> If one considers that the so-called "unborn plaintiff," one who was conceived but not yet born at the time of the injury, has only within the last thirty years been allowed recovery for prenatal injuries, it becomes apparent that a major legal change is required to allow the unconceived plaintiff a cause of action.

Comment, *supra* note 4, at 418 (footnotes omitted).

37. *See* note 15 *supra.*

38.
> Since the decedent's conception took place after the alleged tort committed by defendants, and since the child was a potential being with essential reality at the time of the act, for she belonged to a class which defendants could foresee and had in contemplation when they made the alleged misrepresentation to the mother and committed the alleged tort, defendants had in view the decedent. . . . Why, therefore, under such circumstances 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[?]

88 Misc. 2d at —, 387 N.Y.S.2d at 208 (emphasis supplied).

39. For a suggested analysis of how damages can be determined in wrongful life cases, see Note, *supra* note 35, at 62-67.

Wrongful life suits have not been favored by the courts for a variety of reasons.[40] A reflection upon the variety of suits brought under wrongful life will demonstrate some of the problems with which the courts have been faced.

The first case to consider a wrongful life suit seriously was *Zepeda v. Zepeda*.[41] That case involved a suit by an infant son seeking damages against his father because he was an illegitimate child. The court recognized that a wrong had been done to the child but refused a cause of action for public policy reasons:

> Recognition of the plaintiff's claim means creation of a new tort: a cause of action for wrongful life. The legal implications of such a tort are vast, the social implications would be staggering. . . . Encouragement would extend to all others born into the world under conditions they might regard as adverse.[42]

Dictum in that case, however, strongly supported the proposition that if physical injury of some kind were inflicted on a child prior to his conception, he should be granted a cause of action.[43]

The first case brought in wrongful life for actual physical injuries rejected the cause of action so emphatically that it has been

40. Four courts have explicitly rejected the wrongful life actions when brought by the infant. Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied*, 379 U.S. 945 (1964) (cause of action denied for public policy reasons); Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967) (denied cause of action because damages were found to be too uncertain); Stewart v. Long Island College Hosp., 35 App. Div. 2d 531, 313 N.Y.S.2d 502 (1970), *aff'd*, 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1972) (denied cause of action because of lack of precedent); Williams v. State, 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966) (denied cause of action because of lack of precedent).

41. 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied*, 379 U.S. 945 (1964).

42. *Id.* at 259-60, 190 N.E.2d at 858.

43. So let us go still further and take a third suppositive case, where the wrongful act also takes place before conception but the injury attaches at the moment of conception. . . . If a child is born malformed or an imbecile because of the genetic effect on his father or mother of a negligently or intentionally caused atomic explosion, will he be denied recovery because he was not in being at the time of the explosion?

*Id.* at 256-61, 190 N.E.2d at 854.

Williams v. State, 18 N.Y.2d 481, 483, 223 N.E.2d 343, 344, 296 N.Y.S.2d 885, 887 (1966), involved another illegitimacy case where the infant plaintiff claimed negligence of the state in failing to provide the proper care and protection for his mother in a mental hospital, which resulted in a rape upon the mentally deficient mother, causing the plaintiff to be born illigitimate. The court of appeals held that to allow recovery they would have to invent a new ground for suit, that the damages of being illegitimate could not be measured and also found it difficult to owe a duty to one not yet in being.

relied upon by other courts to deny a cause of action. In *Gleitman v. Cosgrove*,[44] the allegations of negligence were that the doctors failed to advise Mrs. Gleitman that she might give birth to a deformed child because of her contraction of rubella (German measles) during her pregnancy. As a result of this negligence, she did not seek an abortion and subsequently gave birth to a deformed child.[45] The difficulty the plaintiffs in *Gleitman* and in several later cases[46] confronted, but not present in *Park*, is that the child was already conceived when a doctor was consulted. All of these cases, thus, had to consider abortion, which was not then legal,[47] as the only alternative that the parent could have taken to prevent the birth of their possibly deformed child. In these instances,[48] the courts found no cause of action because even if the doctors had informed the mother of the possibility that her child might have some sort of physical or mental injury, an abortion would have been illegal, and there was no plausible way the child could not have been born. One of the reasons, therefore, why the wrongful life suit presented in *Park* seems to be more plausible is that the doctors' negligence did not occur after conception, but rather, plaintiffs assert it was on the doctors' explicit misrepresentations that they decided to conceive another child.[49]

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44. 49 N.J. 22, 227 A.2d 689 (1967).
45. Although based somewhat on public policy reasons, the major thrust of the court's holding was that to ascertain damages in such a case they would have to compare the child as it existed then to non-existence, since the child sought damages for life itself. The court denied that damages could be measured by comparing the child with a normal child because that was not the option. The child in suing for wrongful life, was asking for a value to be placed on "non-existence" which the court concluded could not be done.
    > This Court cannot weigh the value of life with impairments against the nonexistence of life itself. By asserting that he should not have been born, the infant plaintiff makes it logically impossible for a court to measure his alleged damages because of the impossibility of making the comparison required by compensatory remedies.

    *Id.* at 28, 227 A.2d at 692.
46. Stewart v. Long Island College Hosp., 35 App. Div. 2d 531, 313 N.Y.S. 2d 502 (1970), *aff'd*, 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1972); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975).
47. Abortion was not held to be constitutional until Roe v. Wade, 410 U.S. 113 (1973).
48. *See* note 46 *supra*.
49. Other wrongful life cases have recently been brought seeking damages for life based on unsuccessful sterilization operations resulting in the birth of a child. These cases, although interesting are not particularly relevant to the issue at hand since they involve the birth of a healthy child, and are suits merely to get damages for the ex-

The court in *Park* relied on two basic theories which warranted a cause of action. The first theory was that a defendant could owe a duty to one not yet in being. The court, relying upon *Zepeda*, stated that "[i]t makes no difference how much time elapses between a wrongful act and a resulting injury if there is a causal relation between them."[50] It also relied on *Piper v. Hoard*,[51] where a woman over twenty years of age was permitted to maintain an action for financial damages suffered by her as a result of a fraud perpetrated on her mother before the mother's marriage and her own conception.[52]

The court in *Park* found the other New York cases dealing with wrongful life[53] not dispositive of the issue because they involved wrongful life actions brought for negligence occurring after the infants' conceptions.

The second theory relied upon in *Park*, was that for every proven wrong there should be a remedy, and every child that can prove such a wrong ought to be compensated just as anyone else would be compensated for personal injuries. "[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."[54]

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pense of raising that child. *See* LaPoint v. Shirley, 409 F. Supp. 118 (W.D. Tex. 1976); Stills v. Gratton, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976); Coleman v. Garrison, 349 A.2d 8 (Del. 1975); Aronoff v. Snider, 292 So. 2d 418 (Fla. Dist. Ct. App. 1974); Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971); Betancourt v. Gaylor, 136 N.J. Super. 69, 344 A.2d 336 (1975); Cox v. Stretton, 77 Misc. 2d 155, 352 N.Y.S.2d 834 (Sup. Ct. 1974); Terrell v. Garcia, 496 S.W.2d 124 (Tex. Civ. App. 1973), *cert. denied*, 415 U.S. 927 (1974); Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974).

50. 41 Ill. App. 2d at 250, 190 N.E.2d at 853.

51. 107 N.Y. 73, 13 N.E. 626 (1887).

52. It is true, the plaintiff was not born when the fraudulent representations were made. Still they were made by defendant to plaintiff's mother for the purpose of inducing a marriage between her parents, and, if they had been true, the plaintiff would have been the owner of this particular property. In this way she is the very person injured by the fraud, and, although not individually in the mind of defendant when he perpetrated that fraud, yet . . . she belongs to the class which defendant had in contemplation . . . In this way it may be claimed that defendant had in view the plaintiff, and the rights he alleged she would have. Why should not the plaintiff be permitted to hold the defendant to his representations?

*Id.* at 79-80, 13 N.E. at 630.

53. Howard v. Lecher, 53 App. Div. 2d 420, 386 N.Y.S.2d 460 (1976); Stewart v. Long Island College Hosp., 35 App. Div. 2d 531, 313 N.Y.S.2d 502 (1970), *aff'd*, 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1972).

54. Endresz v. Friedberg, 24 N.Y.2d 478, 483, 248 N.E.2d 901, 903, 301 N.

The court in *Park* also considered the other traditional objections to the wrongful life cause of action. On the damage issue, the court determined that although damages were speculative, they were no more so than in any other personal injury suit.[55] The public policy argument was not found to be compelling in *Park*. "Although fraud, extra litigation and a measure of speculation are, of course, possibilities, it is no reason for a court to eschew a measure of its jurisdiction."[56]

The wrongful life cause of action was correctly allowed in *Park* because it was not the type of action that would open the floodgates for all types of wrongful life suits. It would serve as precedent for only a limited type of case: (1) where the child suffers physical injury because of the defendant's negligence and misrepresentations, and (2) where the plaintiff can establish the direct chain of causation from the preconceptional tort to the resulting injury.

*Park* indicated that other courts have long put off a valid cause of action for wrongful life because it appeared to be novel. Recognizing that plaintiffs must sustain their burden of proof at a trial on the merits, the court allowed an important action for a preconceptional tort to be brought in wrongful life.

## IV. PRECONCEPTION INJURIES—PROOF PROBLEMS AND PUBLIC POLICY ARGUMENTS

### A. Elements of Negligence as Applied to a Preconceptional Tort

Although *Renslow* and *Park* approached the preconception issue from different perspectives, each recognized that the child had been damaged by another's negligence and therefore should be compensated for that damage.[57]

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Y.S.2d 65, 68-69 (1969). The court also relied on Batalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961): "It is fundamental to our common-law system that one may seek redress for every substantial wrong." *Id.* at 240, 176 N.E.2d at 730, 219 N.Y.S.2d at 36.

55. 88 Misc. 2d at —, 387 N.Y.S.2d at 211.

56. *Id.* at —, 387 N.Y.S.2d at 210.

57. The statute of limitations has not proven to be a problem in the few preconceptional cases brought, such as *Renslow*, where the injury took place eight years after the initial tortious conduct. The reason for this is that when an injury is not discoverable for a certain period of time following a tort, the statute does not begin to run until the injury occurs.

> Quite recently there have been a wave of decisions meeting the issue head-on, and holding that the statute will no longer be construed as intended to run until the plaintiff has in fact

Although both courts applied tort elements of negligence to the preconception issue, a further analysis is necessary. In any negligence action, the plaintiff must show that the defendant owed a duty to the plaintiff to exercise the required care and skill, that the duty was breached, and that the plaintiff was injured as a foreseeable result of that breach.[58]

The first factor to be considered is that of the standard of care required of the defendants. In the cases referred to in this note,[59] the defendants were either hospitals or physicians. A physician, because of his specialized training, is required not only to exercise reasonable care, but also to act in accordance with at least the minimum standards of his specialized knowledge and ability.[60]

The next consideration is whether the defendant owed a duty of care to the plaintiff. Courts for years have been involved in the issue of whether one can owe a duty to another not yet in being.[61] On first analysis, the initial reaction might be that no duty exists. Recent decisions, however, have held no bar.[62] A defendant can owe a duty to anyone who is "foreseeable."[63] It does not necessarily follow that a person has to be living or even conceived at the

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discovered he has suffered injury, or by the exercise of reasonable diligence, should have discovered it.

W. PROSSER, *supra* note 24, at 144. Another recent case, Shack v. Holland, — Misc. 2d —, 389 N.Y.S.2d 988 (Sup. Ct. 1976), further allowed an action on behalf of an individual who was negligently injured some 22 years prior to bringing suit, when the plaintiff was a nonviable fetus. The court allowed recovery of damages from the physicians because the statute of limitation period had tolled during his minority.

58. *See, e.g.*, Troppi v. Scarf, 31 Mich. App. 240, 245, 187 N.W.2d 511, 513 (1971).
59. Jorgensen v. Meade Johnson Laboratories, 483 F.2d 237 (10th Cir. 1973); Morgan v. United States, 143 F. Supp. 58 (D.N.J. 1956); Renslow v. Mennonite Hosp., 40 Ill. App. 3d 234, 351 N.E.2d 870 (1976); Park v. Chessin, 88 Misc. 2d 222, 387 N.Y.S.2d 204 (Sup. Ct. 1976).
60. W. PROSSER, *supra* note 24, § 32, at 161. "Upon the same basis, a physician who is possessed of unusual skill or knowledge must use care which is reasonable in the light of his special ability and information, and may be negligent where an ordinary doctor would not." *Id.*
61. This discussion began with the prenatal injury cases discussed *supra*, as to whether a duty could be owed to one conceived and not born, and has continued to include those not yet conceived.
62. Jorgensen v. Meade Johnson Laboratories, 483 F.2d 237 (10th Cir. 1973); Renslow v. Mennonite Hosp., 40 Ill. App. 3d 234, 351 N.E.2d 870 (1976); Park v. Chessin, 88 Misc. 2d 222, 387 N.Y.S.2d 204 (Sup. Ct. 1976).
63. W. PROSSER, *supra* note 24, § 43, at 250.

time to be "foreseeable" to the defendant. An example proposed[64] might serve to demonstrate the point. A baby food manufacturer produced baby food prior to a child's conception. The company was negligent in the manufacture, and a year later a baby was seriously harmed by eating the defective food. The child was not even conceived at the time of the tortious conduct, but yet that child was clearly foreseeable to the manufacturer at the time of production.

In both *Renslow* and *Park* there were excellent arguments that indeed the child was foreseeable to the defendants. The court in *Renslow* stated:

> such conduct on the part of the defendants caused damage to the unborn infant which resulted in permanent physical injuries to the infant. We emphasize that the defendants are a doctor and a hospital. There has been no showing that the defendants could not reasonably have foreseen that the teenage girl would later marry and bear a child and that the child would be injured as the result of the improper blood transfusion.[65]

Further, in *Park*, the foreseeability of the infant to the physicians was just as great, where the parents on the very advice and misrepresentation of the defendants did in fact conceive the plaintiff.[66]

If a duty of care to the unconceived infant can be found, the plaintiff must show that the defendant breached that duty and as a foreseeable result of that breach the plaintiff was injured.[67] A breach can be shown by comparing the action of the defendant to other individuals in similar circumstances to ascertain whether the defendant acted within the reasonable limits of his discretion. Concerning the fact situation presented in *Renslow*, few would argue that the transfusion of the wrong type of blood was not a breach of the duty of care. In *Renslow*, it seemed that the defendants themselves were aware that their breach had caused injury to the infant. This is shown by the fact that immediately upon discovering the sensitization of the mother's blood, labor was induced because "medical diagnosis determined that the life of her unborn child was in jeopardy."[68]

In *Park*, the plaintiff would have to show that the defendants knew or should have known the parents were potential carriers of the disease, and that tests were available to determine if they were

64. *See* James, *Scope of Duty in Negligence Cases*, 47 NW. U.L. REV. 778, 788 (1953).
65. 40 Ill. App. 3d at 239, 351 N.E.2d at 874.
66. 88 Misc. 2d at —, 387 N.Y.S.2d at 207.
67. *See* James, *supra* note 64, at 785, 788.
68. 40 Ill. App. 3d at 235, 351 N.E.2d at 871.

carriers.[69] She then would have to prove that there was a direct chain between the negligence of the doctors and the resulting injury. She would have to prove that were it not for the doctor's negligence, the parents would never have conceived.

> If the doctor's negligence were pre-conceptional, then the plaintiff would have to show that she would have taken steps to avoid becoming pregnant or that if she did become pregnant, she would have had the pregnancy terminated unless additional tests showed that the fetus would not be afflicted with the defective genetic condition.[70]

The last factor in the plaintiff's case requires proof that some damage cognizable at law was suffered. In *Park*, and *Renslow* both infants suffered extreme physical injuries. The injuries suffered by these plaintiffs involved none of the remoteness of injury involved in the illegitimacy cases[71] or those involving healthy, but unwanted children.[72] The courts in prenatal preconception cases need to compare the child as he exists to a normal child. As in any other personal injury suit, recovery should be allowed for the real expenses involved, including pain and suffering.[73]

If brought under wrongful life, the difficulty of assessing damages, which appeared to be a barrier in *Gleitman*,[74] should be avoided. The plaintiff in *Park* explicitly asked for pain and suffering damages caused by the tortious conduct before her conception, resulting in wrongful life.[75]

### B. Public Policy Considerations

Because it can be shown that all negligence elements are applicable to preconceptional tort injury cases,[76] the lack of precedent

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69. 88 Misc. 2d at —, 387 N.Y.S.2d at 207.
70. Waltz & Thigpen, *supra* note 5, at 755.
71. Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied*, 379 U.S. 945 (1964); Williams v. State, 18 N.Y.2d 481, 223 N.E.2d 343, 296 N.Y.S.2d 885 (1966).
72. *See* note 59 *supra*.
73. *See* Comment, *supra* note 15, at 156-58.
74. 49 N.J. at 28, 227 A.2d at 692.
75. It should still be possible, however, in a case involving great individual suffering, to determine that a child's not having been born would have been preferable to a life with extreme disabilities. Although damages would be difficult to determine, as they are in many other types of cases, the fixing of damages for a particular individual in a particular fact situation should not be so difficult as to constitute an unsurmountable barrier to recovery.

    Waltz & Thigpen, *supra* note 5, at 765.
76. For a good discussion of how the wrongful life cases fit within the traditional framework of tort law, see Note, *supra* note 35. Many of

should be no bar to recovery. Prosser stated that a lack of pre-precedent is not sufficient reason for denying a cause of action.[77] Tort law, historically, has grown from judicial rather than legislative action. This is because the type of conduct in a tort makes it unlikely that advance notice to prospective tortfeasors would deter wrongful acts. Also it is difficult to anticipate all the different factual situations where torts may arise.[78]

Some imaginative thinking is needed by modern courts to allow recovery in preconceptional injury cases. Professor Keeton, in his article on "creative continuity" states:

> Any legal system, to remain viable over a span of time, must have the flexibility to admit change. To find solutions for a succession of differing problems in a continuously changing context, it must be creative. . . . Creativity must build upon a solid foundation of continuity. Modern developments in tort law present acutely the problem of accommodation of these competing demands for change and stability.[79]

### C. Status of the Law in Nebraska

The Nebraska courts have not had the occasion to hear an infant injury case since *Drabbels v. Skelly Oil Co.*[80] The court in that decision followed the *Dietrich* view which rejected any cause of action on behalf of the infant. Because every court presented with this issue in recent years has overruled the *Dietrich* rationale, it would appear that Nebraska would do so also. It is not suggested, however, that the Nebraska Supreme Court would adopt a cause of action for a preconceptional injury without first modifying the *Drabbels* view. It is recommended, however, that when Nebraska is presented with such an issue, its courts permit recovery for a child harmed by another's negligence, even if the child was not in existence at the time of the tort.

## V. CONCLUSION

As in any negligence action, the elements of an action for a tort committed prior to conception must be demonstrated by the plain-

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the same points for wrongful life apply equally well in the preconception area.

77. W. PROSSER, *supra* note 24, § 54, at 327-28. "It is the business of the courts to make precedent where a wrong calls for redress . . . ." *Id.* at 328.

78. 41 N.Y.U. L. REV. 212, 212 (1966).

79. Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463, 463 (1962) (footnotes omitted).

80. 155 Neb. 17, 50 N.W.2d 229 (1951).

tiff. There have been inequities in infant tort law for many years, when infants were denied causes of action even though the elements of negligence were shown. Several courts have come forward recently and allowed causes of action when the infant has obviously been damaged through the fault of another, prior to the infant's conception.

These courts have recognized that to deny recovery on such bases as public policy, lack of precedent, or speculative damages, is merely a way of avoiding the issues that need to be confronted.

The infants in these cases have been injured severely. Public policy demands that those responsible for such injuries bear the burden of compensating these infants for the damages with which they have been born. It is necessary that more courts in the future follow this precedent so the infants may be allowed the recovery they deserve. "The concept of the right of every child to be physically, mentally and emotionally 'well-born' is fundamental to human dignity."[81]

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81. J. PRITCHARD & P. MCDONALD, WILLIAM'S OBSTETRICS 8 (15th ed. 1976).