PRECONCEPTION TORT AS A BASIS FOR RECOVERY

Albala v. City of New York, 78 A.D.2d 389, 434 N.Y.S.2d 401 (1981)

In *Albala v. City of New York*,[1] the Supreme Court of New York, Appellate Division, realizing the novelty of preconception torts[2] as a basis for a cause of action, refused to extend such an unprecedented right to an infant plaintiff.[3]

Appellant, an infant plaintiff, brought a negligence suit against the City of New York[4] for injuries allegedly resulting from a perforation of his mother's uterus during an abortion procedure at a city hospital[5] almost four years prior to his conception.[6] The Supreme Court, New York County, entered summary judgment against the infant plaintiff

1. 78 A.D.2d 389, 434 N.Y.S.2d 400 (1981).

2. A preconception tort refers to tortious conduct occurring prior to the plaintiff's conception and resulting in injuries to the plaintiff. *E.g.*, Bergstreser v. Mitchell, 577 F.2d 22 (8th Cir. 1978); Renslow v. Mennonite Hospital, 67 Ill. 2d 348, 367 N.E.2d 1250 (1976). *See* notes 66-74 *infra* and accompanying text. A prenatal tort, on the other hand, involves a tortious act committed subsequent to the plaintiff's conception. *E.g.*, Allaire v. St. Luke's Hosp., 184 Ill. 359, 56 N.E. 638 (1900) (infant plaintiff was born crippled because his mother, while still pregnant with plaintiff, was thrown to the floor of an elevator in which she was riding), *overruled,* Amann v. Faidy, 415 Ill. 422, 114 N.E.2d 412 (1953); Dietrich v. Inhabitants of Northampton, 138 Mass. 14 (1884) (infant plaintiff was miscarried and subsequently died because its mother tripped on a negligently maintained highway). *See generally* Note, *Torts Prior to Conception: A New Theory of Liability,* 56 NEB. L. REV. 706 (1977); Comment, *Preconception Torts: A Look at Our Newest Class of Litigants,* 10 TEX. TECH. L. REV. 97 (1978); Note, *Preconception Torts: Foreseeing the Unconceived,* 48 U. COLO. L. REV. 621 (1977); 27 DE PAUL L. REV. 891 (1978).

3. 78 A.D.2d at 390-93, 434 N.Y.S.2d at 401-03.

4. Appellant brought suit through his father in accordance with New York civil practice law concerning representation of infants, N.Y. CIV. PRAC. LAW § 1201 (McKinney 1976), which reads in part: "[A]n infant shall appear by the guardian of his property or, if there is no such guardian, by a parent having legal custody . . . ."

Appellant contended that he suffered brain damage as a result of his mother's perforated uterus. 78 A.D.2d at 390, 434 N.Y.S.2d at 401. The original complaint alleged five causes of action. The first two asserted that appellant was injured as a result of medical malpractice and the negligent treatment of his mother. The third alleged that appellant's mother, unaware of the risks of an abortion, did not give informed consent to the consequential injury to appellant. The fourth and fifth causes of action were on behalf of each parent for loss of appellant's companionship and services and for present and future medical expenses.

5. Appellant's mother underwent an abortion in December 1971. In June 1973 she filed a malpractice suit against the performing physician, and the suit was settled in June 1979 for $175,000. The *Albala* court held that the causes of action set forth on behalf of appellant's parents were encompassed in the settlement of the prior malpractice suit. *Id.* at 393, 434 N.Y.S.2d at 403.

6. Appellant was born June 3, 1976, indicating his conception occurred near September 1975, approximately three years, nine months after the abortion. *Id.* at 390, 434 N.Y.S.2d at 401.

for failure to state a valid cause of action.[7] On appeal, the New York Supreme Court, Appellate Division, affirmed and *held*: A tort committed against the mother of an unconceived child that results in injury to the child during gestation does not give the child a cause of action.[8]

Actionable negligence consists of three elements:[9] a duty[10] to observe some standard of care,[11] a breach of that duty, and an injury suffered as a consequence of the breach.[12] Within the framework of

7. *Id.* at 393, 434 N.Y.S.2d at 402.

8. *Id.* at 393, 434 N.Y.S.2d at 403.

9. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 30 (4th ed. 1971).

10. *See* National Sav. Bank v. Ward, 100 U.S. 195, 202 (1879). A duty in negligence cases may be defined as "an obligation to which the law will give recognition and effect, to conform to a particular standard of conduct towards another." W. PROSSER, *supra* note 9, § 53, at 324. Typically, courts have tried to define the scope of duty in terms of foreseeability, *see* Kahn v. James Burton Co., 5 Ill. 2d 614, 622, 126 N.E.2d 836, 840 (1955) (every person owes a duty to all others to exercise ordinary care to guard against injury naturally flowing as a foreseeable consequence), but as yet "no universal test . . . has been formulated." W. PROSSER, *supra* note 9, § 53, at 325. Two competing lines of thought have developed. The first limits the range of liability to those persons, known or unknown, likely to be affected by the negligent act. Seavey, Book Review, 45 HARV. L. REV. 209, 210 (1931). *See* Cunis v. Brennan, 56 Ill. 2d 372, 376, 308 N.E.2d 617, 619 (1974); Seavey, *Principles of Torts,* 56 HARV. L. REV. 72, 75-85 (1942). The opposing view suggests that a negligent party owes a duty to all those injured as a proximate result of the negligent act, regardless of the likelihood of the injury. Wintersteen v. National Cooperage & Woodenware Co., 361 Ill. 95, 103, 197 N.E. 578, 582 (1935); Christianson v. Chicago, St. P., M. & O. Ry., 67 Minn. 94, 97, 69 N.W. 640, 641 (1896); Dodge v. McArthur, 126 Vt. 81, 83, 223 A.2d 453, 454 (1966). *See generally* Green, *The Duty Problem in Negligence Cases,* 28 COLUM. L. REV. 1014 (1928). In the second approach, the duty concept is left as "a shortened statement of a conclusion . . . [that] the particular plaintiff is entitled to protection." W. PROSSER, *supra* note 9, § 53, at 325-26.

11. Generally, every person is expected to exercise the prudence of an ordinary, reasonable person. W. PROSSER, *supra* note 9, § 32, at 149-66. When the individual is a physician or medical expert, both a minimum standard of professional competence and the exercise of a standard of care reflecting that competence are required. *Id.* § 32, at 161. *See, e.g.,* McHugh v. Audet, 72 F. Supp. 394, 399 (M.D. Pa. 1947) (a physician must exercise the skill generally used by physicians and surgeons of ordinary skill and learning in the practice of the profession). *See generally* McCoid, *The Care Required of Medical Practitioners,* 12 VAND. L. REV. 549 (1959).

12. Generally, courts hold that the defendant's actions must proximately cause the plaintiff's injuries. This relationship is often expressed in the terms that "but for" the defendant's act, plaintiff's injury would not have occurred. W. PROSSER, *supra* note 9, §§ 41-42. *See, e.g.,* Daly v. Illinois Central R.R., 248 Iowa 758, 761, 80 N.W.2d 335, 337 (1957) (proximate cause is the predominating cause without which the injury would not have occurred); Hughes v. Children's Clinic, P.A., 269 S.C. 389, 398, 237 S.E.2d 753, 757 (1977) (act may be deemed the proximate cause only when without such negligence the injury would not have occurred). Duty and causation are distinct entities. The former is a question of law to be determined by the court, and the latter is a question of fact to be determined by a jury. W. PROSSER, *supra* note 9, § 37, at 205-06. It is an important distinction, for any attempt to impose a duty on the basis of causation would result in infinite responsibility. Prosser, *Palsgraf Revisited,* 52 MICH. L. REV. 1, 24 (1953).

these elements, delineating the scope of duty has perplexed the courts.[13] Historically, one had a cause of action for negligence only when there was a breach of some duty owed to him.[14] This forced the injured party to characterize himself within the class of people to whom the wrongdoer owed a duty.

The theory of preconception torts developed out of the law of negligence[15] and the common law maxim *ubi jus, ibi remedium*.[16] As the law of personal injuries to unborn children developed, courts hesitated to expand the class of unborn children beyond those with a separate, physically recognizable existence at the time of the negligent act;[17] the law refused to recognize "negligence in the air, so to speak."[18] This sentiment was reflected in the early cases[19] that dealt with injuries sustained by infants while *en ventre sa mère*.[20]

In 1884 the Supreme Court of Massachusetts, in *Dietrich v. Inhabitants of Northampton*,[21] became the first court to address the issue of recovery for prenatal injuries. In *Dietrich* the mother suffered a miscarriage of the infant plaintiff when she tripped on a negligently maintained highway. Justice Holmes, writing for the court, denied any cause of action for injuries sustained by the child before birth.[22] The

13. *See* note 10 *supra*. This consternation is especially evident in the area of prenatal injuries. *See* notes 21-56 *infra* and accompanying text.

14. W. PROSSER, *supra* note 9, § 53, at 324. The Supreme Court in National Sav. Bank v. Ward, 100 U.S. 195 (1879), noted the necessity of the duty restriction "to restrain the remedy from being pushed to an impracticable extreme." *Id.* at 202.

15. *See* Zepeda v. Zepeda, 41 Ill. App. 2d 240, 249-53, 190 N.E.2d 849, 853-55 (1963), *cert. denied*, 379 U.S. 945 (1964).

16. Where there is a right there is a remedy. *E.g.*, Damasiewicz v. Gorsuch, 197 Md. 417, 440, 79 A.2d 550, 560 (1951); Steggall v. Morris, 363 Mo. 1224, 1233, 258 S.W.2d 577, 581 (1953). *See* Keyes v. Construction Serv., Inc., 340 Mass. 633, 635, 165 N.E.2d 912, 914 (1960) (injuries inflicted on unborn child a manifest wrong that could not go without redress); Tobin v. Grossman, 24 N.Y.2d 609, 619, 249 N.E.2d 419, 424, 301 N.Y.S.2d 554, 561 (1969) (ideally every injury should have a remedy); Battalla v. State, 10 N.Y.2d 237, 240, 176 N.E.2d 729, 730, 219 N.Y.S.2d 34, 36 (1961) (it is fundamental that one may seek redress for every substantial wrong); Williams v. Marian Rapid Transit, Inc., 152 Ohio St. 114, 124, 87 N.E.2d 334, 338 (1949) (it is elementary that if a wrong is committed there should be a remedy).

17. *See* notes 21-38 *infra* and accompanying text.

18. F. POLLOCK, LAW OF TORTS 468 (13th ed. 1929). For a court to find liability, the law required that some relationship exist between the plaintiff and defendant. This relationship is encompassed in the concept of duty. *See* notes 10 & 13 *supra* and accompanying text.

19. *See* notes 21-38 *infra* and accompanying text. *See generally* Comment, *Negligence and the Unborn Child: A Time for Change*, 18 S.D.L. REV. 204 (1973).

20. In its mother's womb. BLACK'S LAW DICTIONARY 479 (5th ed. 1979).

21. 138 Mass. 14 (1884).

22. *Id.* at 17.

court reasoned that the child as a fetus was not separable from its mother and therefore, apart from its mother, was owed no duty of care.[23] Only the mother, to whom a duty was owed, could recover damages for personal injuries resulting from the defendant's negligence.[24] The court held that the infant had to be biologically separable from its mother at the time of injury in order to have a cause of action. This remained precedent until 1946, but not without criticism.[25]

---

23. *Id. Accord,* Drobner v. Peters, 232 N.Y. 220, 224, 133 N.E. 567, 568 (1921) (defendant owes no duty to an unborn child apart from the duty owed to the mother), *overruled,* Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1953); Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 360, 78 S.W.2d 944, 950 (1935) (defendant owes no duty to unborn child apart from the duty to avoid injuring the mother), *overruled,* Leal v. C.C. Pitts Sand & Gravel, Inc., 419 S.W.2d 820 (Tex. 1967); Walker v. Great Northern Ry. of Ire., 28 L.R. Ir. 69, 88 (1891) (Johnson, J., concurring) (no legal duty is owed to that which is not *in esse* in fact).

The first Restatement of Torts, 4 RESTATEMENT OF TORTS § 869 (1939), reflected this belief as well:

> A person who negligently causes harm to an unborn child is not liable to such child for the harm.
>
> *Comment*:
>
> a. The rule stated in this Section is applicable only to unintended harms to the mother or to the child. It prevents recovery by the child after its birth for any of the consequences of negligent conduct before birth. On the other hand, in an action by the mother for a tort which has caused her physical harm, damages can be included for the pain, suffering and mental distress caused by the death of the child before birth or immediately afterwards.
>
> A person designated by statute to maintain an action for causing death can not maintain an action for a negligent act committed before the birth of a child which causes the death of the child either before or after birth.

24. 138 Mass. at 17. Holmes did raise the philosophic possibility of "a conditional prospective liability in tort to one not yet in being," *id.* at 16, but dismissed it for lack of practicability and precedent, *id.* at 16-17. Later courts, however, attached great importance to it. *See* note 51 *infra* and accompanying text.

25. Kine v. Zuckerman, 4 Pa. D. & C. 227 (County Ct. 1924) (allowed recovery for prenatal injuries on the basis that there was no logical reason for denying compensation to one injured by the commission of a wrong where causation could be established) (effectively overruled by Berlin v. J.C. Penney Co., 339 Pa. 547, 16 A.2d 28 (1940)). Also recognizing recovery were Scott v. McPheeters, 33 Cal. App. 2d 629, 92 P.2d 678 (Dist. Ct. App. 1939) (based on statute), *aff'd per curiam,* 33 Cal. App. 2d 640, 93 P.2d 562 (1939); Cooper v. Blanck, 39 So. 2d 352 (La. App. 1923) (based on statute); and Montreal Tramways v. LaVeille, [1933] 4 D.L.R. 337 (Can.) (based on civil law).

Courts questioned the inconsistency of recognizing a fetus as *in esse* for the purposes of property law, *see, e.g.,* Stemmer v. Kline, 128 N.J.L. 455, 468, 26 A.2d 684, 688 (1942) (Brogan, J., dissenting); *In re* Holthausen's Will, 175 Misc. 1022, 1024, 26 N.Y.S.2d 140, 143 (1941); *see generally* 4 H. TIFFANY, THE LAW OF REAL PROPERTY, § 112, at 391 (3d ed. 1939), while treating it as a "nonentity" in tort recovery actions. Often cited in this controversy is Thellusson v. Woodford, 4 Ves. 227, 31 Eng. Rep. 117 (Ch. 1798), in which Justice Buller said:

> Let us see what this non-entity can do. He may be vouched in 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

Among the early dissenters from the *Dietrich* rationale, Justice Boggs of the Illinois Supreme Court proved most influential. In *Allaire v. St. Luke's Hospital*,[26] the first case involving a surviving infant plaintiff,[27] the majority followed *Dietrich* and denied recovery because the child sustained the injuries while still a part of his mother.[28] Justice Boggs criticized the majority for "sacrificing truth to a mere theoretical abstraction"[29] in its refusal to recognize that the child as a viable fetus suffered injuries distinct from those of the mother.[30] Clearly, he argued, a fetus capable of independent survival was equally capable of sustaining an independent tort with a separate cause of action.[31]

Despite Justice Boggs' separability argument, an uncompromising majority of courts followed the *Dietrich* rationale[32] for fear of the con-

---

under a charge for raising portions. He may have an injunction; and he may have a guardian.

Id. at 322, 31 Eng. Rep. at 163. *See generally* Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 NOTRE DAME LAW. 349 (1971); Comment, *supra* note 19. *See also* 1 W. BLACKSTONE, COMMENTARIES *129.

26. 184 Ill. 359, 368, 56 N.E. 638, 640 (1900), *overruled,* Amann v. Faidy, 415 Ill. 422, 114 N.E.2d 412 (1953).

27. *Allaire* was the first American case involving a surviving infant plaintiff. Walker v. Great Northern Ry. of Ire., 28 L.R. Ir. 69 (1891), an Irish case decided nine years earlier, also involved a surviving infant plaintiff.

28. 184 Ill. at 365-68, 56 N.E. at 639-40. The court made no distinction of the fact that the mother in this case was ten days from delivery when the negligent act, causing her to miscarry the plaintiff, occurred.

29. *Id.* at 370, 56 N.E. at 641 (Boggs, J., dissenting).

30. Justice Boggs stated:

> The law should, it seems to me, be that whenever a child in utero is so far advanced in prenatal age as that, should parturition by natural or artificial means occur at such age, such child could and would live separable from the mother, and grow into the ordinary activities of life, and is afterwards born, and becomes a living human being, such child has a right of action for any injuries wantonly or negligently inflicted upon his or her person at such age of viability, though then in the womb of the mother.

Id. at 374, 56 N.E. at 642 (Boggs, J., dissenting).

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

32. *E.g.,* Buel v. United Rys., 248 Mo. 126, 131-32, 154 S.W. 71, 72 (1913) (statute requiring a railroad company to pay a fine for any person dying from an injury resulting from the railway's negligence did not apply to an unborn child), *overruled,* Steggall v. Morris, 363 Mo. 1224, 258 S.W.2d 577 (1953); Drobner v. Peters, 232 N.Y. 220, 223, 133 N.E. 567, 568 (1921) (holding that injuries inflicted were to the mother and as such only she had a cause of action), *overruled,* Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951); Gorman v. Budlong, 23 R.I. 169, 175, 49 A. 704, 707 (1901) (holding that a child could not maintain an action for injuries sustained while in the womb, for at the time of injury the mother and child were one), *overruled,* Sylvia v. Gobielle, 101 R.I. 76, 220 A.2d 222 (1966); Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 360, 78 S.W.2d 944, 950 (1935) (holding that, tested by the knowledge and experience of the ordinary prudent man, defendant owed no duty to an unborn child), *overruled,* Leal v. C.C. Pitts Sand & Gravel, Inc., 419 S.W.2d 820 (Tex. 1967); Lipps v. Milwaukee Elec. Ry. & Light Co., 164 Wis.

sequences that might follow such a divergence. In *Walker v. Great Northern Railway*,[33] Justice O'Brien, concurring, emphasized the difficulty in proving that a negligent act committed prior to a child's birth was the proximate cause of the infant's injuries.[34] This impediment would undoubtedly lead to a proliferation of fictitious claims[35] and leave juries in the untenable position of having to decide on the basis of mere conjecture whether a defendant's actions were responsible for an infant's prenatal injuries.[36] Furthermore, critics argued, no common-

272, 276, 159 N.W. 916, 917 (1916) (holding that because a fetus does not have a separate existence at the time of the injury, no separate rights can accrue to it).

33. 28 L.R. Ir. 69.

34. "[T]here are instances in the law where rules of right are founded upon the inherent and inevitable difficulty or impossibility of proof. And it is easy to see what a boundless sea of speculation in evidence this new idea would launch us." *Id.* at 81 (O'Brien, J., concurring). *Accord,* Stanford v. St. Louis-S.F. Ry., 214 Ala. 611, 108 So. 566 (1926), *overruled,* Wolfe v. Isbell, 291 Ala. 327, 280 So. 2d 758 (1973); Allaire v. St. Luke's Hosp., 184 Ill. 359, 56 N.E. 638 (1900), *overruled,* Amann v. Faidy, 415 Ill. 422, 114 N.E.2d 412 (1953); Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S.W.2d 944 (1935), *overruled,* Leal v. C.C. Pitts Sand & Gravel, Inc., 419 S.W.2d 820 (Tex. 1967); Puhl v. Milwaukee Auto. Ins. Co., 8 Wis. 2d 343, 99 N.W.2d 163 (1959), *overruled on other grounds, In re* Estate of Stromsted, 99 Wis. 2d 136, 299 N.W.2d 226 (1980). *See* Taylor, *Iatrogenic Injury Compensation,* 17 MED. SCI. & L. 25 (1977) ("[i]n the complexity of modern medicine it is not always possible to ascribe a result to a single cause"). *But see* Scott v. McPheeters, 33 Cal. App. 2d 629, 637, 92 P.2d 678, 682 (1939) (difficulty of obtaining proof should prompt greater leniency in affording a remedy rather than a denial of plain justice); Smith v. Brennan, 31 N.J. 353, 365, 157 A.2d 497, 503 (1960) (difficulties of proof are not peculiar to the area of prenatal torts, and the mere difficulty of proving a fact is not a good reason for blocking all attempts to prove it); Woods v. Lancet, 303 N.Y. 349, 356, 102 N.E.2d 691, 695 (1951) (it is an inadmissible concept that uncertainty of proof can ever destroy a legal right; the questions of causation are no different in kind from ones arising in thousands of other negligence cases); Steggall v. Morris, 363 Mo. 1224, 1231, 258 S.W.2d 577, 580 (1953) (if a plaintiff cannot prove his case no judgment will be permitted to stand; certainly courts will not refuse to entertain suits for redress of wrongs because a plaintiff would have difficulty proving his case); Seattle-First Nat'l Bank v. Rankin, 59 Wash. 2d 288, 292, 367 P.2d 835, 837-39 (1962) (difficult causation issues are no reason to deny the sufficiency of a pleading; difficulty of proof does not prevent the assertion of a legal right).

35. *See, e.g.,* Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 360, 78 S.W.2d 944, 950 (1935), *overruled,* Leal v. C.C. Pitts Sand & Gravel, Inc., 419 S.W.2d 820 (Tex. 1967). *But see* Damasiewicz v. Gorsuch, 197 Md. 417, 437, 79 A.2d 550, 559 (1951) (the argument that fraudulent claims will overwhelm the courts should have no weight to prevent legitimate claims from being heard; faked contentions present no novel question to judicial bodies); Tobin v. Grossman, 24 N.Y.2d 609, 615-16, 249 N.E.2d 419, 422, 301 N.Y.S.2d 554, 558-59 (1969) (discussing psychological injuries, the court noted that fraud, extra litigation, and a measure of speculation are possibilities, but those are not reasons for a court to deny a logical legal right); Puhl v. Milwaukee Auto. Ins. Co., 8 Wis. 2d 343, 355, 99 N.W.2d 163, 170 (1959) (court noted that fraudulent claims are not unknown to the law and that adequate safeguards against such claims can be devised), *overruled on other grounds, In re* Estate of Stromsted, 99 Wis. 2d 136, 299 N.W.2d 226 (1980).

36. *See* Stanford v. St. Louis-S.F. Ry., 214 Ala. 611, 108 So. 566 (1926); Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921), *overruled,* Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691

law precedent recognized a cause of action for injuries sustained *in utero*.[37] The power to create such a cause of action lay within the province of the legislature, not the judiciary.[38]

In 1946 *Bonbrest v. Kotz*[39] initiated the most "abrupt reversal of a well settled rule" in the history of torts.[40] The court reasoned that if the tortious conduct occurred subsequent to the unborn infant's viability,[41] a separate judicial being existed and possessed a common-law right of recovery[42] for any injuries it sustained. Such recovery was predicated

(1951); Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S.W.2d 944 (1935), *overruled,* Leal v. C. C. Pitts Sand & Gravel, Inc., 419 S.W.2d 820 (Tex. 1967).

37. *E.g.,* Dietrich v. Inhabitants of Northampton, 138 Mass. 14 (1884); Newman v. City of Detroit, 281 Mich. 60, 274 N.W. 710 (1937), *overruled,* Womack v. Buchhorn, 384 Mich. 718, 187 N.W.2d 218 (1971); Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921), *overruled,* Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951); Sinkler v. Kneale, 401 Pa. 267, 164 A.2d 93 (1960) (Bell, J., dissenting). *But see* note 42 *infra*.

38. Justice O'Brien, concurring, aptly stated this in Walker v. Great Northern Ry. of Ire., 28 L.R. Ir. 69 (1891):

> The law is in some respects a stream that gathers accretions with time from new relations and conditions. But it is also a landmark that forbids advance on defined rights and engagements; and if these are to be altered, if new rights and engagements are to be created, that is the province of legislation and not of decision.

Id. at 82 (O'Brien, J., concurring). *See* Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951) (Lewis, J., dissenting); Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921), *overruled,* Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951); Sinkler v. Kneale, 401 Pa. 267, 164 A.2d 93 (1960) (Bell, J., dissenting); Berlin v. J.C. Penney Co., Inc., 339 Pa. 547, 16 A.2d 28 (1940). *But see* note 56 *infra*.

39. 65 F. Supp. 138 (D.D.C. 1946).

40. W. PROSSER, *supra* note 9, § 55, at 336.

41. Viability is defined as: "That stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life support systems." BLACK'S LAW DICTIONARY 1404 (5th ed. 1979). *See generally* 51 CHI.-KENT L. REV. 227 (1974) (discussing medical aspects involved in proving fetal viability).

42. Bonbrest v. Kotz, 65 F. Supp. 138, 142 (D.D.C. 1946). The court believed the law should recognize medical science's teaching that the fetus is separate from the mother, *id.* at 141 n.14, and grant it the same rights in the law of negligence as it was granted in the law of property and crime, *id.* at 140.

In reaching its conclusion, the court dismissed the lack of precedent argument on the ground that "the common law is not an arid and sterile thing, and it is anything but static and inert. . . . [T]he common law has been and is sufficiently elastic to meet changing conditions." *Id.* at 142. Other courts dealing with the prenatal injury issue have reiterated this belief. *E.g.,* Amann v. Faidy, 415 Ill. 422, 433, 114 N.E.2d 412, 418 (1953) (the common law's most outstanding characteristic is its adaptability and capacity for growth); Steggall v. Morris, 363 Mo. 1224, 1230, 258 S.W.2d 577, 579 (1953) (if inability to find any precedent at common law were a good reason to deny an injured person a remedy, the common law would never have reached the embryo stage); Smith v. Brennan, 31 N.J. 353, 362, 157 A.2d 497, 501 (1960) (the law of negligence is primarily common law the great virtue of which is its adaptability to the conditions and needs of changing times); Woods v. Lancet, 303 N.Y. 349, 355, 102 N.E.2d 691, 694 (1951) (when traditional com-

on the child being born alive.[43] Many jurisdictions thereafter invoked *Bonbrest's* "viability standard" as the sole determinant in deciding whether a child had a cause of action for prenatal injuries.[44] Soon, however, courts began to recognize the medical uncertainty of determining exactly when viability occurs[45] and began to disregard viability as an arbitrary and unjust test for deciding a defendant's liability.[46]

Expanding the scope of *Bonbrest* and its progeny, which limited recovery to injuries incurred by viable fetuses, the court in *Kelly v. Gregory*[47] recognized an infant's right of recovery for injuries caused before the infant became viable. In *Kelly* a negligently driven automobile struck the infant plaintiff's mother, who was in her first trimester of pregnancy, and allegedly caused the child to be born seriously handicapped. Characterizing viability as merely a condition under which life would continue,[48] the court argued that "legal separability" should

---

mon-law rules of negligence result in injustice, it is the duty of the court to bring the law into accordance with present day standards of wisdom and justice).

It should be noted that the court in *Bonbrest* distinguished Dietrich v. Inhabitants of Northampton, 138 Mass. 14 (1884), on two grounds: that the plaintiff in that case was not viable at the time of injury and that the injury had been transmitted organically through the mother. In the case at bar the fetus had been directly injured through medical malpractice on its removal from the womb. 65 F. Supp. at 140.

43. 65 F. Supp. at 142. Although tangential to the topic of this Comment, it is interesting to note that as the viability requirement has eroded, *see* notes 47-56 *infra* and accompanying text, the requirement that the plaintiff be born alive has come under attack. *See, e.g.,* Mone v. Greyhound Lines, Inc., 368 Mass. 354, 331 N.E.2d 916 (1975); Endresz v. Friedberg, 24 N.Y.2d 478, 248 N.E.2d 901, 301 N.Y.S.2d 65 (1969); Note, *Torts Prior to Conception: A New Theory of Liability, supra* note 2, at 708 n.11.

44. *E.g.,* 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); Steggall v. Morris, 363 Mo. 1224, 258 S.W.2d 577 (1953); Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951).

45. Viability is an imprecise measure, especially as the refinements of pediatric care make it possible for smaller and smaller infants to survive. *See generally* Note, *The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries,* 110 U. PA. L. REV. 554 (1962).

46. *See* notes 47-56 *infra* and accompanying text. Robertson, *Toward Rational Boundaries of Tort Liability for Injury to the Unborn: Prenatal Injuries, Preconception Injuries and Wrongful Life,* 1978 DUKE L.J. 1401, 1416, argues that

> [s]ince essentially all of the vital organs take form at a very early stage of fetal life, the most serious postnatal difficulties result from injuries occurring in the first trimester of pregnancy—long before viability. From a medical point of view, therefore, it makes little sense to condition recovery on the viability of the fetus at the time of the injury.

Dean Prosser argues that all logic is in favor of ignoring the stage at which the injury occurs. W. PROSSER, *supra* note 9, § 55, at 337.

47. 282 A.D. 542, 125 N.Y.S.2d 696 (1953) (extending Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951), which limited recovery to children injured when viable).

48. The court reasoned:

> We know something more of the actual process of conception and foetal development

commence with "biological separability," which begins at conception.[49] The Wisconsin Supreme Court adopted this theory in *Puhl v. Milwaukee Automobile Insurance Co.*[50] and explained that although a fetus was not a legal person in the full sense, it was a separate entity with a potential personality. Prenatal injuries suffered by such a being imposed a conditional liability[51] on the tortfeasor. As the fetus developed biologically from potentiality to reality, so did the wrong, which became complete at birth.[52]

In *Smith v. Brennan*[53] the New Jersey Supreme Court expanded *Kelly's* "biological separability" rationale. Recalling the principle "that a child has a legal right to begin life with a sound mind and body,"[54] the *Smith* court held that an infant plaintiff could recover for

---

now than when some of the common law cases were decided; and what we know makes it possible to demonstrate clearly that separability begins at conception. The mother's biological contribution from conception on is nourishment and protection; but the foetus has become a separate organism and remains so throughout its life.

282 A.D. at 543-44, 125 N.Y.S.2d at 697.

49. The court noted that in the law of property, the distinction between viability and nonviability was immaterial as to the time of vestiture, *id.* at 545, 125 N.Y.S.2d at 698, and implied that there should not be such a distinction in the law of negligence. *See* note 25 *supra*.

50. 8 Wis. 2d 343, 99 N.W.2d 163 (1959), *overruled on other grounds, In re* Estate of Stromsted, 99 Wis. 2d 136, 299 N.W.2d 226 (1980).

51. Conditional liability was a term first used by Justice Holmes. *See* note 24 *supra*. Numerous courts now use it to indicate a liability to a class yet unconceived, with liability becoming fixed upon conception or birth. *See, e.g.,* Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied,* 379 U.S. 945 (1964); Endresz v. Friedberg, 24 N.Y.2d 478, 248 N.E.2d 901, 301 N.Y.S.2d 65 (1969).

52. Judge Hallows explained the biological-separability theory as follows:

Under this theory an unborn infant is not treated as a legal person but as a separate entity or human being in the biological sense from conception having a potentiality of personality which is not realized until birth. Injuries suffered before birth impose a conditional liability on the tortfeasor. This liability becomes unconditional, or complete, upon the birth of the injured separate entity as a legal person. If such personality is not achieved, there would be no liabilty because of no damage to a legal person.

8 Wis. 2d at 356, 99 N.W.2d at 170. *See* Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 505, 93 S.E.2d 727, 728 (1956); Steggall v. Morris, 363 Mo. 1224, 1231, 258 S.W.2d 577, 581 (1953); Bennett v. Hymers, 101 N.H. 483, 485, 147 A.2d 108, 109-10 (1958). *See generally* White, *The Right of Recovery for Prenatal Injuries,* 12 LA. L. REV. 38 (1952); 26 FORDHAM L. REV. 684 (1958).

Although beyond the scope of this Comment, there appears to be a fundamental inconsistency in the law relating to the rights of the unborn. On the one hand, the fetus is protected against the tortfeasor from wrongful conduct, while on the other, the mother is allowed to abort. *See* Kader, *The Law of Tortious Prenatal Death Since* Roe v. Wade, 45 MO. L. REV. 639 (1980).

53. 31 N.J. 353, 157 A.2d 497 (1960).

54. *Id.* at 359, 157 A.2d at 503. *Accord,* Jorgensen v. Meade Johnson Laboratories, 483 F.2d 237 (10th Cir. 1973); 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); Womack v. Buchhorn, 384 Mich. 718, 187

negligently inflicted injuries regardless of whether it had a separate biological-legal identity when the tortious act was committed.[55] The timing of the tortious conduct affected neither the extent of the child's injuries nor the desirability of the defendant's conduct.[56]

If a fetus need not have a separate legal identity at the time of the tortious act,[57] logic allows an infant plaintiff to sue for injuries resulting from an act committed prior to conception.[58] One court has rejected this view, but most have accepted it.[59]

N.W.2d 218 (1971); Endresz v. Friedberg, 24 N.Y.2d 478, 248 N.E.2d 901, 301 N.Y.S.2d 65 (1969); Sylvia v. Gobeille, 101 R.I. 76, 220 A.2d 222 (1966). *See* Note, *Torts Prior to Conception: A New Theory of Liability, supra* note 2:

> 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 . . . . The concept of the right of every child to be physically, mentally and emotionally 'well born' is fundamental to human dignity.

Id. at 722 (footnotes omitted). *Contra,* Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978).

55. 31 N.J. at 359, 157 A.2d at 503. *Accord,* Sinkler v. Kneale, 401 Pa. 267, 273, 164 A.2d 93, 96 (1960) (viability at the time of injury has little to do with the basic right to recover, the primary question being one of causation); Sylvia v. Gobeille, 101 R.I. 76, 79, 220 A.2d 222, 224 (1966) (causation, not viability, is the test).

56. *See* Kine v. Zuckerman, 4 Pa. D. & C. 227, 230 (County Ct. 1924). The emphasis was no longer on the defendant's rights but on the plaintiff's. One has no right to hide behind the law when one's conduct caused injury to another. This is not a business transaction in which the law invites reliance for the ordering of affairs. Smith v. Brennan, 31 N.J. 353, 361, 157 A.2d 497, 501 (1960).

The court also rejected the argument that to recognize such a right required legislation. "The law of negligence is primarily common law, whose great virtue is its adaptability to the conditions and needs of changing times." *Id.* at 362, 157 A.2d at 501. The tort rule denying recovery was determined by courts and should therefore equally be within courts' province to change. Numerous other courts have shared this belief. *E.g.,* Tucker v. Howard L. Carmichael & Sons, Inc., 208 Ga. 201, 65 S.E.2d 909 (1951); Burke v. Smith, 69 Mich. 380, 37 N.W. 838 (1888); Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951); Sinkler v. Kneale, 401 Pa. 267, 164 A.2d 93 (1960). Most jurisdictions now allow recovery for injuries occurring at any time after conception. W. PROSSER, *supra* note 9, § 55, at 337.

For a complete listing of the states still adhering to the viability standard and those that have abandoned it, see Note, *Preconception Injuries: Viable Extension of Prenatal Injury Law or Inconceivable Tort,* 12 VAL. U. L. REV. 143, 143-44 n.4 (1977); Annot., 40 A.L.R.3d 1222 (1971).

57. It is immaterial whether the injury attaches at conception or at birth when it can be shown that an infant has been born with injuries resulting from the wrongful act of another. *See* Smith v. Brennan, 31 N.J. 353, 367, 157 A.2d 497, 504 (1960).

58. Justice Duckworth foresaw this eventuality in Hornbuckle v. Plantation Pipe Line Corp., 212 Ga. 504, 506, 93 S.E.2d 727, 729 (1956) (Duckworth, J., concurring). Reacting to the court's removal of the viability standard for prenatal injury recovery, he argued: "If a baby can sue for injuries sustained five seconds after conception . . . why not allow such suits for injuries before conception . . . ?" *Id.* at 506, 93 S.E.2d at 729.

59. *See* notes 60-74 *infra* and accompanying text.

Four years prior to *Smith*, the United States District Court in New Jersey dismissed this proposition in *Morgan v. United States*.[60] The *Morgan* court held that a child who had not been conceived when its mother was negligently given an improper blood transfusion had no right of recovery for injuries resulting from the tortious act.[61]

The court in *Zepeda v. Zepeda*[62] gave favorable consideration to a child's cause of action for injuries resulting from a preconception tort but denied the child's cause of action against her father for her illegitimate conception. The court analogized the situation to one in which an infant was injured by a defective household device manufactured prior to the child's conception. In such a case, the court reasoned, the manufacturer would have incurred conditional prospective liability[63] to anyone injured by the product, including those not yet in being.[64] Nevertheless, the *Zepeda* court denied the cause of action on public policy grounds despite admitting that the father had committed a tort against his child.[65]

No court was squarely faced with this issue again until 1976 in *Ren-*

60. 143 F. Supp. 580 (D.N.J. 1956).

61. *Id.* at 584. The court based its decision on Pennsylvania law. At the time, Berlin v. J.C. Penney Co., 339 Pa. 547, 16 A.2d 28 (1940) (no recovery for prenatal injuries), was still controlling. *Berlin*, "a relic harkening back to Victorian antiquarian law and medicine," 19 A.T.L.A. NEWSLETTER 237 (1976), was disapproved twenty years later in Sinkler v. Kneale, 401 Pa. 267, 164 A.2d 93 (1960).

62. 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied*, 379 U.S. 945 (1964). This case involved an adulterine bastard suing his father for damages. Plaintiff's father, married to another woman, induced plaintiff's mother to have sexual relations on the promise of marriage.

63. Conditional prospective liability involves a duty to one not yet conceived. *See* note 51 *supra*.

64. The applicability of product liability law should not be overlooked as a useful tool for analyzing preconception tort cases. In both product liability and preconception tort cases, the act of negligence precedes the injury. Many courts allowing recovery for prenatal injury use principles of product liability to strengthen their reasoning. *E.g.*, Scott v. McPheeters, 33 Cal. App. 2d 629, 92 P.2d 678, *aff'd per curiam*, 93 P.2d 562 (1939); 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); Kine v. Zuckerman, 4 Pa. D. & C. 227 (County Ct. 1924). *See* Grant v. Australian Knitting Mills, Ltd., [1935] All E.R. 209 (reprint):

> It may be said that the duty is difficult to define, because when the act of negligence in manufacture occurs there was no specific person towards whom the duty could be said to exist: the thing might never be used: it might be destroyed by accident or it might be scrapped, or in many ways fail to come into use in the normal way: in other words the duty cannot at the time of manufacture be other than potential or contingent, and only can become vested by the fact of actual use by a particular person.

Id at 217. *Cf.* Dietrich v. Inhabitants of Northampton, 138 Mass. 14, 16 (1884) ("a man might owe a civil duty and incur a conditional prospective liability in tort to one not yet in being").

65. The court did admit that the injurious stigma of being conceived out of wedlock, although not physical, was nevertheless real. 41 Ill. App. 2d at 258, 190 N.E.2d at 857. Noting the

slow v. Mennonite Hospital.[66] In a fact situation virtually identical to *Morgan*,[67] a sharply divided[68] Illinois Supreme Court held that barring relief for a preconception tort was illogical when the defendant would be liable if, unbeknown to him, the plaintiff had already been conceived.[69] Logic and sound policy required the court to find a legal duty to those yet unconceived.[70] The United States Court of Appeals for the Eighth Circuit reiterated this sentiment in *Bergstreser v. Mitchell*.[71] The court noted the overwhelming commentary favoring recognition of causes of action for prenatal and preconception torts.[72] Interpreting

---

proliferation of claims that would arise if such a cause of action were recognized, however, the court affirmed the lower court's dismissal of the case.

Cases involving the "wrongful birth" or "wrongful life" cause of action are now being raised more frequently in the courts. *E.g.,* Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967); Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975). It should be noted that courts generally are reluctant to entertain wrongful life cases because to do so would involve creating "a brand new ground for suit." Williams v. State, 18 N.Y.2d 481, 483, 223 N.E.2d 343, 344, 276 N.Y.S.2d 885, 887 (1966). For further discussion on this topic, see Proslowe, *An Action for "Wrongful Life,"* 38 N.Y. U. L. REV. 1078 (1963); Tedeschi, *On Tort Liability for "Wrongful Life,"* 1 ISRAEL L. REV. 513 (1966); Comment, *Wrongful Birth: The Emerging Status of a New Tort,* 8 ST. MARY'S L.J. 140 (1976).

66. 67 Ill. 2d 348, 367 N.E.2d 1250 (1977).

67. In *Renslow* the plaintiff's mother received an improper blood transfusion eight years prior to conceiving the infant plaintiff. As a result plaintiff suffered permanent brain damage. *Id.* at 349, 367 N.E.2d at 1251.

68. The four to three decision had a plurality opinion with three justices filing separate dissents.

69. *See* notes 55-56 *supra* and accompanying text. The court, however, did not base its conclusion on causation but on a duty owed to those foreseeably harmed by the defendant's act, even though they be unknown or even nonexistent at the time. 67 Ill. 2d at 355-58, 367 N.E.2d at 1254-55. *See* notes 10 & 12 *supra*.

The fear has been expressed that recognition of a cause of action for preconception torts could lead to perpetual claims when the tort caused a genetic aberration. *See* Comment, *Radiation and Preconception Injuries: Some Interesting Problems in Tort Law,* 28 SW. L.J. 414 (1974); note 74 *infra*. The court dismissed this problem by noting that the case at bar did not involve a self-perpetuating injury. The court did say that if a case arose in which the plaintiff suffered from such a self-perpetuating injury, a court would "exercise its traditional role of drawing rational distinctions, consonant with current perceptions of justice, between harms which are compensable and those which are not." 67 Ill. 2d at 358, 367 N.E.2d at 1255.

70. 67 Ill. 2d at 357, 367 N.E.2d at 1255.

71. 577 F.2d 22 (8th Cir. 1978). In *Bergstreser* the mother had undergone a Caesarean section in Missouri in 1972. Subsequently she conceived the infant plaintiff. Allegedly due to the first Caesarean section, plaintiff's mother's uterus ruptured prior to delivery. The rupture necessitated a second Caesarean section, during which plaintiff suffered a period of hypoxia and/or anoxia. As a result plaintiff now suffers from permanent brain damage.

72. *Id.* at 25 n.4.

Missouri law,[73] the Eighth Circuit affirmed a finding that no logical reason existed to justify denying recovery to a child plaintiff simply because the child had not yet been conceived at the time of the tortious act.[74] The court in *Albala v. City of New York*, however, did not share this view.[75]

In *Albala* the New York Supreme Court, Appellate Division, held that an infant plaintiff did not possess the right to recover for injuries resulting from a tort committed against his mother prior to his conception.[76] Justice Bloom, writing for the court, noted that this was a case of first impression.[77] Looking for guidelines from other cases, the court quoted extensively from *Williams v. State*,[78] in which the New York Court of Appeals recognized that a lack of precedent in itself was not "an unscalable barrier."[79] The *Albala* court, however, maintained that it could not now declare a cause of action where none had ever existed.[80] Citing a number of cases, including *Kelly v. Gregory*,[81] the court contended that previous expansions of tort liability had not recognized new wrongs but had merely allowed the withdrawal of long

73. This was a diversity case involving a mother, residing in Colorado, and a team of Missouri physicians.

74. 577 F.2d at 26. The court also discussed when the statute of limitations should begin to run for the infant plaintiff in such a case. It noted that under the Missouri statute an infant plaintiff injured before the age of 10 had until he was 12 to commence an action. *See* MO. REV. STAT. § 516.105 (1978). The court rejected the argument that the tolling provision for minors would not apply because the plaintiff was not *in esse* at the time of the negligent act. It held instead that the plaintiff was the recipient of the negligent conduct when he came into being, and that was sufficient to invoke the tolling statute. 577 F.2d at 26.

This ruling appears to coincide with Urie v. Thompson, 337 U.S. 163 (1949), in which the Court noted that the purpose of the statute of limitations is to force a plaintiff to assert his claim within a given period of time after he has notice of the injury. Prior to such notice the statute of limitations should not run. *Id.* at 169.

One commentator has suggested that a special statute of limitations should be created to handle claims involving chromosomal aberrations. Steefel, *Preconception Torts: Foreseeing The Unconceived,* 48 U. COL. L. REV. 621, 627 n.34 (1977). England has passed such a statute, which runs 30 years after the time of irradiation. Nuclear Installations Act, 1965, c. 65, § 14(1).

75. 78 A.D.2d 389, 434 N.Y.S.2d 400 (1981).

76. *Id.* at 392, 434 N.Y.S.2d at 403.

77. *Id.* at 390, 434 N.Y.S.2d at 402.

78. 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966).

79. 78 A.D.2d at 391, 434 N.Y.S.2d at 402. The Court of Appeals is the highest court of review in New York.

80. *Id.* The court refused to "declare that to be an actionable wrong which the law had found before to be no wrong at all." *Id.*

81. 282 A.D. 542, 125 N.Y.S.2d 696 (1953).

acknowledged immunities.[82]

The court analyzed *Park v. Chessin*,[83] which involved a fact situation bearing marked similarities to *Albala*.[84] Dismissing the wrongful life denomination given *Park* by the Court of Appeals,[85] the *Albala* Court reduced *Park* to the rule that a third party cannot recover when damaged by a wrong committed against another.[86] Applying this principle to *Albala*, the court decided that the appellant had no cause of action for a tort committed against his mother.[87] A contrary decision would involve creating a new cause of action, a step clearly beyond the bounds of the judicial process.[88]

In concluding, the court refused to follow the cases cited by the dissent.[89] Although *Jorgensen v. Meade Johnson Laboratories, Inc.*,[90]

82. 78 A.D.2d at 391-92, 434 N.Y.S.2d at 402-03. The majority noted that hospitals are no longer immune from the negligent acts of their employees, Bing v. Thunig, 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y.S.2d 3 (1957), and that manufacturers are now liable for an implied warranty of merchantability, Greenberg v. Lorenz, 9 N.Y.2d 195, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1961). Furthermore, the removal of exemptions based on gender and infant viability has revealed causes of action for loss of consortium by a woman, Millington v. Southeastern Elevator, 22 N.Y.2d 498, 239 N.E.2d 897, 293 N.Y.S.2d 305 (1968), and for prenatal injuries by an infant injured any time after conception, Kelly v. Gregory, 282 A.D. 542, 125 N.Y.S.2d 696 (1953).

The court made special note that although the right to damages for psychological injuries was recognized in Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961) (infant plaintiff allowed to recover for psychological damages suffered from fright and hysteria during a fall from a ski lift precipitated by defendant's failure to secure a belt around the plaintiff), such recovery was limited by Tobin v. Grossman, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969) (mother who heard car crash and, upon reaching the accident, saw her child lying on the ground was denied a cause of action for her own mental injuries), to those injuries not resulting from a wrong committed against another.

83. 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978). The *Albala* court cited the case as *Park v. Chessin*. *Park* was consolidated on appeal with *Becker v. Schwartz*, and the case was styled *Becker v. Schwartz* in the New York Court of Appeals.

84. In *Park*, plaintiff's mother had given birth to a child with polycystic kidney disease. The child died five hours later. After her doctor incorrectly told her that the chances that future children would have the disease were "practically nil," she conceived the plaintiff, who was born with the same disease and died two and one-half years later. The infant plaintiff, through its parents, brought suit for pain and suffering incurred prior to its death. Albala v. City of New York, 78 A.D.2d at 392, 434 N.Y.S.2d at 403.

85. The New York Court of Appeals, in modifying a lower court decision, Park v. Chessin, 88 Misc. 2d 222, 387 N.Y.S.2d 204 (Sup. Ct. 1976), dismissed the suit for wrongful life inasmuch as it failed to allege ascertainable damages. *See* Becker v. Schwartz, 46 N.Y.2d 401, 411-12, 386 N.E.2d 807, 812, 413 N.Y.S.2d 895, 900 (1978).

86. 78 A.D.2d at 392, 434 N.Y.S.2d at 403.

87. *Id.*

88. The court qualified its holding as subject to instructions from "superior judicial authority or by the Legislature." *Id.*

89. *See* notes 90-93 *infra* and accompanying text.

90. 483 F.2d 237 (10th Cir. 1973). This case involved a woman who suffered genetic aberra-

Bergstreser v. Mitchell,[91] and *Renslow v. Mennonite Hospital*[92] all recognized an infant's right to recover for injuries resulting from a preconception tort, the *Albala* court summarily dismissed each of them. The majority noted that *Jorgensen* and *Bergstreser* were based on the speculation of federal courts as to how the respective state courts would have decided the issue;[93] that *Renslow* was written by a sharply divided court;[94] and that *Renslow* and *Bergstreser* both were influenced[95] by *Park v. Chessin*,[96] a lower court decision, subsequently dismissed by the New York Court of Appeals.[97]

Justice Carro, dissenting,[98] argued for the extension of the prenatal injury doctrine to preconception torts.[99] He noted that all recent cases involving such actions allowed recovery.[100] In puncturing the mother's uterus, the defendants breached their duty of care to both the mother and those who foreseeably would be harmed in the future.[101] He

---

tions in the chromosomal structure of her ovum that allegedly were caused by birth control pills manufactured by the out-of-state defendant. As a result of these aberrations, plaintiffs' twins suffered from Asiatic Mongolism. The court, in recognizing the plaintiffs' right of recovery, reasoned that if an infant could not recover for a preconception tort, "then an infant suffering personal injury from a defective food product, manufactured before his conception, would be without remedy." *Id.* at 240. *See* note 64 *supra*.

91. 577 F.2d 22 (8th Cir. 1978). *See* notes 71-74 *supra* and accompanying text.

92. 67 Ill. 2d 348, 367 N.E.2d 1250 (1977). *See* notes 66-70 *supra* and accompanying text.

93. Both were diversity cases. *See* notes 73 & 90 *supra*.

94. *See* note 68 *supra*.

95. Renslow v. Mennonite Hospital, 67 Ill. 2d 348, 356, 367 N.E.2d 1250, 1254 (1976), cited *Park* as a case recognizing a cause of action for a preconception tort but faulted the *Park* court's reliance on causation rather than the traditional duty concept as a basis for its decision. Bergstreser v. Mitchell, 577 F.2d 22, 25 (8th Cir. 1978), cited *Park* as one of three cases addressing the preconception tort issue, all of which recognized the child's cause of action.

96. 88 Misc. 2d 222, 387 N.Y.S.2d 204 (Sup. Ct. 1976), *modified*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978).

97. Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978).

98. 78 A.D.2d at 393, 434 N.Y.S.2d at 403 (Carro, J., dissenting).

99. *Id.* at 396-97, 434 N.Y.S.2d at 405-06 (Carro, J., dissenting).

100. Justice Carro referred to the following cases: Jorgensen v. Meade Johnson Laboratories, Inc., 483 F.2d 237 (10th Cir. 1973), *see* note 90 *supra* and accompanying text; Bergstreser v. Mitchell, 448 F. Supp. 10 (E.D. Mo. 1977), *aff'd*, 577 F.2d 22 (8th Cir. 1978), *see* notes 71-75 *supra* and accompanying text; Renslow v. Mennonite Hospital, 67 Ill. 2d 348, 367 N.E.2d 1250 (1977), *see* notes 66-70 *supra* and accompanying text. Albala v. City of New York, 78 A.D.2d at 394-95, 434 N.Y.S.2d at 404-05 (Carro, J., dissenting).

101. In comparing the case at bar with other cases involving preconception torts, *see* note 100 *supra* and accompanying text, Justice Carro stated:

> [*Albala*] is simpler and more direct than any of the cases in which a right of recovery has thus far been upheld. The defendants violated their duty of care to plaintiff's mother and negligently punctured her uterus. It was foreseeable that she, a young married wo-

pointed out the inconsistency involved in granting recovery for an act committed one moment after conception while denying it for an act committed the second before.[102]

Citing the court's analysis in *Zepeda*,[103] Justice Carro concluded that little difference existed between the case at bar and the hypothetical example of an infant injured by a product negligently manufactured prior to the child's conception.[104]

The *Albala* case is an example of an attempt to rationalize a misconception of justice. In contrast to other courts considering the preconception tort issue,[105] the court in *Albala* failed to analyze the duty concept[106] and the progressive attitude of recent courts in compensating infant plaintiffs for injuries caused by torts committed prior to their birth.[107]

The court apparently based its conservative decision on the premise that a court should not recognize a cause of action where none had previously existed.[108] Although this principle is reasonable in some situations,[109] its application in this case is dubious.[110] *Albala* did not involve circumstances in which the stability of the law affects people's

---

man, would again conceive. She did, and plaintiff was born brain damaged as a result. To afford relief is consistent with common law principles.

78 A.D.2d at 396-97, 434 N.Y.S.2d at 405 (Carro, J., dissenting).

102. 78 A.D.2d at 397, 434 N.Y.S.2d at 405 (Carro, J., dissenting).

103. 41 Ill. App.2d 240, 190 N.E.2d 849 (1963), *cert. denied,* 379 U.S. 945 (1964). *See* notes 62-64 *supra* and accompanying text.

104. 78 A.D.2d at 396, 434 N.Y.S.2d at 405 (Carro, J., dissenting).

105. *See* notes 90-92 *supra*.

106. Arguably, the court, in dismissing the suit, by implication found no duty. This, however, is a very unsatisfactory explanation.

107. In Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied,* 379 U.S. 945 (1964), the court noted:

> [T]he present course of the law [is moving toward] permitting actions for physical injury ever closer to the moment of conception. . . . The significance of this course is this: if recovery is to be permitted an infant injured one month after conception, why not if injured one week after, one minute after, or at the moment of conception? It is inevitable that the date will be further retrogressed.

Id. at 249, 190 N.E.2d at 853. *See* notes 90-92 *supra*.

108. *See* notes 80-82 *supra* and accompanying text.

109. For example, the principle is reasonable in a business transaction in which the law invites reliance to order one's affairs. *See* note 56 *supra*.

110. Surely the majority does not mean to insinuate that conduct resulting in injury to a fetus or new born infant is not a wrong, yet, this appears to be the logical conclusion of the majority's argument. The fact that the defendant does not have a duty to the plaintiff may result in a non-actionable wrong, *see* note 14 *supra* and accompanying text, but this does not make the conduct any more desirable. *See* note 56 *supra* and accompanying text.

behavior[111] but, rather, simply involved negligent conduct resulting in injuries to others.[112] Courts should not allow defendants in situations such as *Albala* to mask their tortfeasance behind poorly reasoned, archaic precedent.[113] Justice Carro's dissent is persuasive on this point.

Justice Carro's dissent implies that if a person's negligent act is incorporated into an object or another person, the actor should be responsible to those subsequently injured as a result of his negligence.[114] The *Albala* defendants breached the duty of care befitting their profession in performing the abortion procedure on the plaintiff's mother.[115] The defendants were in essence "preparing" the mother's uterus to carry any children she might subsequently conceive.[116] By puncturing her uterus, the physicians, like the manufacturer who negligently produced a household appliance, breached a duty to the class of individuals foreseeably affected by the negligent act.[117] The question of whether an act is any less wrong because certain members of that class were individually unknown or not *in esse* at the time of the act has been definitively answered by courts and commentators, with the exception of *Albala*, in the negative.[118]

The majority's application of *Park v. Chessin*[119] is misguided. In *Park*, as in other wrongful life cases,[120] the plaintiffs' alleged injury was life itself.[121] The analogy by the court of a wrongful life case to one such as *Albala*, in which the defendant's acts are directly responsi-

111. *See* note 56 *supra*.

112. *See* 78 A.D.2d at 394, 434 N.Y.S.2d at 404 (Carro, J., dissenting).

113. *See* note 56 *supra*.

114. Justice Carro relied heavily on the analogy between a preconception tort resulting in injury to an infant and an item manufactured prior to an infant's conception that results in the same. 78 A.D.2d at 398, 434 N.Y.S.2d at 406 (Carro, J., dissenting). *See* notes 63-64 & 103-104 *supra* and accompanying text.

115. *See* notes 5 & 11 *supra*.

116. It is not uncommon for women to abort a defective fetus with the hope of later bearing a healthy child. *See* Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967) (wrongful life suit in which mother contended that but for the doctor's statement that her child would not be affected by her contraction of German measles she would have aborted the plaintiff).

117. *See* note 10 *supra*; notes 63-70 *supra* and accompanying text.

118. *See* notes 62-74 & 90 *supra* and accompanying text.

119. 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978). *See* notes 83-88 *supra* and accompanying text.

120. Most wrongful life cases argue that but for the defendant's negligence, the plaintiff would not have been born. *See* note 65 *supra*.

121. But for the defendant's incorrect advice, plaintiff would not be alive. *See* note 84 *supra*.

ble for the infant plaintiff's injuries, clearly lacks logic.[122] Furthermore, by reducing *Park* to the principle that "a wrong committed against one which results in damage to another is not actionable by the other"[123] the court contradicts *Park's* dismissal of the infant's complaints on the basis that they failed to allege ascertainable damages[124] and not that the damages resulted from an unactionable wrong committed against another.

Courts should continue to increase their receptivity to infant plaintiffs' demands to be compensated for injuries resulting from defendants' negligent acts.[125] Additionally, courts should ignore cases such as *Albala* that represent an outmoded judicial approach[126] and unnecessarily produce an unjust result.

B.A.R.

---

122. *See* Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967). The *Gleitman* court observed that the infant plaintiff would have to argue

> not that he should have been born without defects but that he should not have been born at all. In the language of tort law he says: but for the negligence of defendants, he would not have been born to suffer with an impaired body. In other words, he claims that the conduct of defendants prevented his mother from obtaining an abortion which would have terminated his existence, and that his very life is "wrongful."

Id. at 28, 227 A.2d at 692. The court noted that it could not "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.

If it were not for life itself, the infant plaintiff would not exist. The plaintiff's cause of action undercuts the very ground on which he needs to rely in order to prove his damages. Tedeschi, *supra* note 65, at 519.

123. 78 A.D.2d at 392, 434 N.Y.S.2d at 403.

124. Park v. Chessin, 46 N.Y.2d 401, 411-12, 386 N.E.2d 807, 812, 413 N.Y.S.2d 895, 900 (1978).

125. Less than 40 years ago, courts would not recognize a cause of action for injuries resulting from tortious conduct committed prior to the plaintiff's birth. *See* notes 17-38 *supra* and accompanying text. In most jurisdictions a cause of action is now recognized for injuries caused any time after conception, *see* notes 39-56 *supra* and accompanying text, and, in at least three jurisdictions, a cause of action is allowed for damages caused by wrongful acts committed prior to the plaintiff's conception, *see* notes 66-74 & 90 *supra* and accompanying text.

126. Analogous to this suggestion, Berlin v. J.C. Penney Co., 339 Pa. 547, 16 A.2d 28 (1940), was disapproved because of its outmoded approach. *See* note 61 *supra*.