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David L. Mogel

Preconception Torts Not Actionable in New York

Plaintiffs' attempts to redress injuries sustained before birth, long the subject of litigation,[183] have spawned several distinct theories of liability.[184] In New York, for example, prenatal injuries, involving trauma inflicted during intrauterine development, are actionable.[185] When the plaintiff's birth is itself the alleged wrong,

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[183] Note, *Preconceptional Tort Liability*—Renslow v. Mennonite Hospital, 27 DE PAUL L. REV. 891, 891 (1978). In Dietrich v. Northampton, 138 Mass. 14, 17 (1884), the Supreme Court of Massachusetts, speaking through Justice Holmes, ruled that there could be no cause of action on behalf of an infant injured while in his mother's womb. This was the prevailing view for the next 62 years. *See, e.g.,* Buel v. United Rys., 248 Mo. 126, 132-33, 154 S.W. 71, 73 (1913); Drobner v. Peters, 232 N.Y. 220, 224, 133 N.E. 567, 568 (1921); Gorman v. Budlong, 23 R.I. 169, 170, 49 A. 704, 707 (1901). *But see* Korman v. Hagen, 165 Minn. 320, 325-26, 206 N.W. 650, 652 (1925); Kine v. Zuckerman, 4 Pa. D. & C. 227, 230 (1924). In 1946, however, a cause of action for prenatal injury was recognized in Bonbrest v. Kotz, 65 F. Supp. 138, 142 (D.D.C. 1946). The *Bonbrest* decision signalled "the most spectacular abrupt reversal of a well settled rule in the whole history of the law of torts." W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 55, at 336 (4th ed. 1971); Robertson, *Toward Rational Boundaries of Tort Liability for Injury to the Unborn: Prenatal Injuries, Preconception Injuries and Wrongful Life,* 1978 DUKE L.J. 1401, 1402. Initially, a number of courts chose to recognize viability as the point at which the fetus acquired a right of action for injuries sustained. *See, e.g.,* Hale v. Manion, 189 Kan. 143, 146-47, 368 P.2d 1, 3 (1962); Mitchell v. Couch, 285 S.W.2d 901, 906 (Ky. 1955). Since the theoretical basis for denying recovery for prenatal injury was that the unborn fetus had no independent existence, *see, e.g.,* Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 357-58, 78 S.W.2d 944, 948-49 (1935), it was not surprising that some courts found a valid cause of action by asserting the fetal capacity for independent survival. This viability theory, however, has been criticized as "irrational and illogical," Note, *Preconception Injuries: Viable Extension of Prenatal Injury Law or Inconceivable Tort?,* 12 VAL. U.L. REV. 143, 153 (1977), and most courts have opted to recognize prenatal torts regardless of the viability of the fetus. *See, e.g.,* Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 504-05, 93 S.E.2d 727, 728 (1956); Daley v. Meier, 33 Ill. App. 2d 218, 224, 178 N.E.2d 691, 694 (1961); Smith v. Brennan, 31 N.J. 353, 367, 157 A.2d 497, 504 (1960). Moreover, no court granting a remedy for prenatal injury has subsequently denied recovery because the fetus was nonviable at the time of the injury. Todd v. Sandidge Constr. Co., 341 F.2d 75, 79 (4th Cir. 1964) (Haynsworth, J., dissenting). At least one commentator has reached the conclusion that "the viability rule is dead in causes of action for prenatal injuries brought by living infants." Robertson, *supra,* at 1418.

[184] Apart from prenatal injury, *see* note 183 *supra,* recovery has been sought under at least two other theories: preconception tort, *see* Bergstreser v. Mitchell, 577 F.2d 22, 26 (8th Cir. 1978); Jorgensen v. Meade Johnson Laboratories, Inc., 483 F.2d 237, 241 (10th Cir. 1973); Renslow v. Mennonite Hosp., 67 Ill. 2d 348, 358, 367 N.E.2d 1250, 1255 (1977), and wrongful life, *see* Zepeda v. Zepeda, 41 Ill. App. 2d 240, 245-46, 190 N.E.2d 849, 851 (1963); Becker v. Schwartz, 46 N.Y.2d 401, 406, 386 N.E.2d 807, 809, 413 N.Y.S.2d 895, 897 (1978); Williams v. State, 18 N.Y.2d 481, 482, 223 N.E.2d 343, 343, 276 N.Y.S.2d 885, 886 (1966).

[185] Byrn v. New York City Health and Hosps. Corp., 31 N.Y.2d 194, 200, 286 N.E.2d 887, 888, 335 N.Y.S.2d 390, 392 (1972), *appeal dismissed,* 410 U.S. 949 (1973); Endresz v. Friedberg, 24 N.Y.2d 478, 483, 248 N.E.2d 901, 903, 301 N.Y.S.2d 65, 68-69 (1969); Woods v. Lancet, 303 N.Y. 349, 357, 102 N.E.2d 691, 695 (1951); Kelly v. Gregory, 282 App. Div. 542, 543, 125 N.Y.S.2d 696, 696 (3d Dep't 1953). Prenatal injury has been defined as that "suf-

however, recovery for such "wrongful life" has been denied.[186] The viability of yet a third basis for liability, namely, preconception injuries to a parent causing defects in a plaintiff infant, had remained an open question in New York.[187] Recently, however, in *Albala v. City of New York*,[188] the Court of Appeals held that such preconception torts are not actionable.[189]

In *Albala*, the infant plaintiff had been born brain-damaged.[190] The complaint alleged that the defect stemmed from the defendants' negligent performance of an abortion on the plaintiff's mother[191] approximately 4 years before the plaintiff had been conceived.[192] The defendants' motion for summary judgment was granted at special term and affirmed by the Appellate Division, First Department.[193]

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fered by a child while yet unborn," Note, *Torts Prior to Conception: A New Theory of Liability*, 56 NEB. L. REV. 706, 709 (1977), or as "injuries inflicted on an infant *en ventre sa mere* [in the womb of the mother]," Robertson, *supra* note 183, at 1402. Most accurately, it may be considered an injury resulting from tortious conduct occurring before birth but after conception. *See* Comment, *Preconception Torts: Foreseeing the Unconceived*, 48 U. COLO. L. REV. 621, 622-23 (1977).

[186] Becker v. Schwartz, 46 N.Y.2d 401, 412, 386 N.E.2d 807, 812, 413 N.Y.S.2d 895, 901 (1978). Actions in wrongful life are "suits by children alleging that they have been damaged by the very fact of their birth, and who seek compensation for their wrongful life." Comment, *Wrongful Birth: The Emerging Status of a New Tort*, 8 ST. MARY'S L.J. 140, 141-42 (1976). It is essentially a "legal cry of 'I wish I had never been born.' " 13 AKRON L. REV. 390, 390 n.7 (1979); *see* Zepeda v. Zepeda, 41 Ill. App. 2d 240, 245-46, 190 N.E.2d 849, 851 (1963), *cert. denied*, 379 U.S. 945 (1964); Williams v. State, 18 N.Y.2d 481, 482, 223 N.E.2d 343, 343, 276 N.Y.S.2d 885, 886 (1966).

[187] There is disagreement in the literature on the basic concept of preconception tort. Some sources define it as "an action seeking damages for prenatal injuries occasioned by wrongful conduct occurring prior to the infant's conception," Note, *Preconceptional Tort Liability*, *supra* note 183, at 891 n.5. Others have taken the position that "[p]reconception injuries are those injuries which an individual receives as a result of damage to the genetic structure of one or both of his parents (or other ancestor) prior to his conception." Comment, *Radiation and Preconception Injuries: Some Interesting Problems in Tort Law*, 28 SW. L.J. 414, 415 n.7 (1974); *see* Note, *Preconception Injuries*, *supra* note 183, at 144. Significantly, no New York decision had addressed the issue until recently.

[188] 54 N.Y.2d 269, 429 N.E.2d 786, 445 N.Y.S.2d 108 (1981).

[189] *Id.* at 271-72, 429 N.E.2d at 787, 445 N.Y.S.2d at 109; *see* note 187 and accompanying text *supra*.

[190] 54 N.Y.2d at 271, 429 N.E.2d at 787, 445 N.Y.S.2d at 109.

[191] *Id.* The abortion left Ruth Albala, the plaintiff's mother, with a punctured uterus, for which she recovered $175,000 in settlement of her malpractice claim. *Id.* It was this uterine flaw that allegedly caused the plaintiff's injury. *Id.*

[192] *Id.* The abortion was performed on December 27, 1971, and the infant plaintiff, conceived in September of 1975, was born on June 3, 1976. *Id.*

[193] Albala v. City of New York, 78 App. Div. 2d 389, 393, 434 N.Y.S.2d 400, 403 (1st Dep't), *aff'd*, 54 N.Y.2d 269, 429 N.E.2d 786, 445 N.Y.S.2d 108 (1981). Judge Bloom, who wrote the appellate division majority opinion, noted that despite the recent "explosive ex-

On appeal, a divided Court of Appeals affirmed.[194] Judge Wachtler, writing for the majority,[195] initially observed that the theory of recovery underlying prenatal injuries was inapplicable to the case at bar because in prenatal, as opposed to preconception torts, the mother and fetus are independent entities, each of whom is owed a separate duty of care.[196] Furthermore, although the Court distinguished its decision in *Park v. Chessin*,[197] which had denied a cause of action for wrongful life, it nonetheless observed that the "central concern" of *Park*, namely, the "staggering implications" of imposing liability for a less than perfect birth, was relevant to preconception torts.[198] Indeed, upon conceding that the injury to the *Albala* plaintiff was foreseeable, the Court held that since the scope of preconception tort liability could neither reasonably nor practicably be limited, the cause of action should not be recognized.[199]

Dissenting, Judge Fuchsberg agreed with the majority that the facts of the case at bar satisfied the classic prerequisites of a negli-

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pansion of tort law," no new causes of action had been developed. 78 App. Div. 2d at 391, 434 N.Y.S.2d at 402. The court concluded that recognition of a cause of action in preconception tort would have to await an initiative by the legislature or by the Court of Appeals. *Id.* at 393, 434 N.Y.S.2d at 403. Judge Carro dissented, arguing that "[t]he action now before us is the strongest, clearest case for the extension of the prenatal injury doctrine to preconception injury." *Id.* at 396, 434 N.Y.S.2d at 405 (Carro, J., dissenting).

[194] 54 N.Y.2d at 275, 429 N.E.2d at 789, 445 N.Y.S.2d at 111.

[195] All the judges concurred except Judge Fuchsberg, who dissented, and Judge Meyer, who took no part in the decision.

[196] *Id.* at 272, 429 N.E.2d at 787, 445 N.Y.S.2d at 109.

[197] Park v. Chessin, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978). In *Park*, the plaintiff's mother lost a child, shortly after birth, to polycystic kidney disease. *Id.* at 406-07, 386 N.E.2d at 809, 413 N.Y.S.2d at 897. It was alleged that, as a result of the defendant's representations that the disease was not hereditary, the Parks had had another child who was born with the same affliction. *Id.* at 407, 386 N.E.2d at 809, 413 N.Y.S.2d at 897. The essence of the claim was that had the parents been given proper information, the plaintiff would not have been born. *Id.* at 408, 386 N.E.2d at 810, 413 N.Y.S.2d at 898. The Court dismissed that part of the complaint seeking damages for "wrongful life" as failing to state a cause of action cognizable under New York law. *Id.* at 412, 386 N.E.2d at 812, 413 N.Y.S.2d at 901.

The *Park* Court identified two defects in the plaintiff's contentions. First, the infant, by being born, had not suffered any legal injury. The Court considered the question whether nonexistence was preferable to life in a disabled state more philosophical than legal. *Id.* at 411, 386 N.E.2d at 812, 413 N.Y.S.2d at 900. Second, on a more practical level, the Court was unable to ascertain the plaintiff's damages based on such a comparison, concluding that "[r]ecognition of so novel a cause of action requiring, as it must, creation of a hypothetical formula for the measurement of an infant's damages is best reserved for legislative, rather than judicial, attention." *Id.* at 412, 386 N.E.2d at 812, 413 N.Y.S.2d at 901.

[198] 54 N.Y.2d at 272-73, 429 N.E.2d at 788, 445 N.Y.S.2d at 110.

[199] *Id.* at 273-74, 429 N.E.2d at 788, 445 N.Y.S.2d at 110.

gence cause of action: foreseeability and causation.[200] Judge Fuchsberg further contended that the majority's reluctance to recognize a preconception tort cause of action for fear of precipitating unbounded litigation was more properly a matter of legislative concern.[201] Concluding that the majority's fears were, in any event, unwarranted, the dissent urged recognition of the plaintiff's "meritorious and legally cognizable" claim.[202]

It is submitted that the *Albala* Court too readily dismissed all preconception tort causes of action. All preconception torts are not similar, and indeed, may be classified in accordance with two factors: the time of injury to the mother and the time of injury to the infant. In the case of a "pure" preconception tort, both injuries are complete upon conception, as when, for example, the plaintiff's chromosomal structure is affected by radiation or medication administered to the mother.[203] In other cases, however, although the injury to the mother is complete before conception, the injury to the infant does not occur until after conception.[204] In *Albala,* for example, the child's brain injury was sustained at some point subsequent to conception.[205] Clearly, since the gravamen of the action in the latter case is prenatal injury, a tort *already* recognized in New York,[206] it appears that at least this variety of preconception tort should be cognizable.[207]

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[200] *Id.* at 275, 429 N.E.2d at 789, 445 N.Y.S.2d at 111 (Fuchsberg, J., dissenting).

[201] *Id.*

[202] *Id.*

[203] *See* Jorgensen v. Meade Johnson Laboratories, Inc., 483 F.2d 237, 239 (10th Cir. 1973) (allegations that birth control pills had altered the plaintiff's mother's chromosome structure leading to the plaintiff's genetic defects); Zepeda v. Zepeda, 41 Ill. App. 2d 240, 250-51, 190 N.E.2d 849, 854 (1963). *See generally* Comment, *supra* note 187.

[204] *See* Bergstreser v. Mitchell, 577 F.2d 22, 24 (8th Cir. 1978) (injury occurring during delivery); Renslow v. Mennonite Hospital, 67 Ill. 2d 348, 350, 367 N.E.2d 1250, 1251 (1977) ("the negligent force . . . had its impact upon the infant in its prenatal state"); Zepeda v. Zepeda, 41 Ill. App. 2d 240, 250, 190 N.E.2d 849, 853-54 (1963).

[205] The *Albala* Court indicated that the injuries had been sustained "during gestation." 54 N.Y.2d at 271, 429 N.E.2d at 787, 445 N.Y.S.2d at 109. This distinction between pre and postconception onset of injury, to some degree, has been drawn in other jurisdictions. In Renslow v. Mennonite Hospital, 67 Ill. 2d 348, 367 N.E.2d 1250 (1977), an infant alleged injury as a result of a negligent blood transfusion given to her mother several years before the infant plaintiff's conception. 67 Ill. 2d at 349, 367 N.E.2d at 1251. The Supreme Court of Illinois found, *inter alia,* that the plaintiff had a right to be born free of "prenatal injuries foreseeably caused by a breach of duty to the child's mother." *Id.* at 357, 367 N.E.2d at 1255. A concurring opinion noted that the holding did not reach genetically transmitted injuries. *Id.* at 370, 367 N.E.2d at 1261 (Dooley, J., concurring).

[206] *See* note 185 and accompanying text *supra.*

[207] Recognition of an infant's right to bring an action for a tort committed before con-

It is further submitted that the Court of Appeals properly could have recognized even "pure" preconception torts. Concededly, as noted by the *Albala* Court, and as previously pronounced in *Park*, there is no right to a perfect birth.[208] It is suggested, nonetheless, that the theoretical difficulties that led the *Park* Court to deny a remedy for wrongful life should not hinder judicial recognition of preconception torts.[209] The *Park* Court, called upon to weigh the value of an impaired human life against the value of nonexistence, eschewed such balancing as a philosophical, rather than a legal, exercise.[210] No such impediment exists with respect to preconception torts, however, because the recovery sought is for calculable injuries.[211] Recognition of a preconception tort, moreover, would not involve judicial endorsement of a right to be born without defects. Instead, the cause of action contemplates no more than the right of an infant to be compensated for negligently inflicted injuries.[212]

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ception is not totally alien to New York jurisprudence. In Piper v. Hoard, 107 N.Y. 73, 13 N.E. 626 (1887), the defendant fraudulently induced the plaintiff's mother to marry. *Id.* at 75, 13 N.E. at 628. The Court allowed the child to recover her promised inheritance even though, at the time of the tortious conduct, the plaintiff child had not been conceived. *Id.* at 79, 13 N.E. at 630. As noted in Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921), for property interest purposes, "a legal personality is imputed to an unborn child." *Id.* at 222, 133 N.E. at 567. It is further suggested that the *Albala* Court could have found for the plaintiff merely by fashioning a minor extension to the preexisting tort remedy for prenatal injury. In Renslow v. Mennonite Hosp., 67 Ill. 2d 348, 358, 367 N.E.2d 1250, 1255 (1977), for example, the court stated that when an action for genetic harm was presented, the court would define the limits of recovery in accordance with logic and "current perceptions of justice." *Id.* Surely, the *Albala* Court could have similarly confined itself to "whether there can be a recovery under the circumstances of the instant case." *Id.* at 370, 367 N.E.2d at 1261 (Dooley, J., concurring). Indeed, as was noted by the dissent in the appellate division, *Albala* presented the most favorable set of facts imaginable for the extension of prenatal recovery. 78 App. Div. 2d at 396, 434 N.Y.S.2d at 405 (Carro, J., dissenting). "[T]he case law on prenatal injuries is the best available means of predicting the rule which the . . . courts would apply to claims for preconception injuries." Bergstreser v. Mitchell, 577 F.2d 22, 25 (8th Cir. 1978).

[208] 54 N.Y.2d at 273, 429 N.E.2d at 788, 445 N.Y.S.2d at 110; Becker v. Schwartz, 46 N.Y.2d 401, 411, 386 N.E.2d 807, 812, 413 N.Y.S.2d 895, 900 (1978).

[209] "[P]reconception tort cases alone do not present the logical and theoretical problems of wrongful life suits." 13 AKRON L. REV. 390, 397 (1979); *see* Note, *Preconceptional Tort Liability, supra* note 183, at 895.

[210] 46 N.Y.2d at 411, 386 N.E.2d at 812, 413 N.Y.S.2d at 900. The plaintiffs in *Park*, by seeking recognition of a less than perfect birth as an injury to the child, asked the Court to conclude that an impaired existence is of less value than not being born at all. As the Court noted, this is in conflict with the "very nearly uniform high value which the law and mankind has placed on human life." *Id.*

[211] 54 N.Y.2d at 275, 429 N.E.2d at 789, 445 N.Y.S.2d at 111 (Fuchsberg, J., dissenting).

[212] The *Albala* Court, although acknowledging that *Park* presented a different proposi-

In summary, it appears that the Court of Appeals properly could have sanctioned all preconception torts. Nevertheless, it appears that the *Albala* Court, in an effort to restrict the expansion of prenatal liability, unnecessarily obfuscated this advancing field of tort law.

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tion regarding the calculation of damages, 54 N.Y.2d at 272-73, 429 N.E.2d at 787, 445 N.Y.S.2d at 109, failed to recognize a more fundamental distinction. The damages question is an outgrowth of, and secondary to, an essential theoretical divergence between the cases. In *Park*, the Court was troubled by the prospect of a "judicial recognition of the birth of a defective child as an injury to the child." 46 N.Y.2d at 411, 386 N.E.2d at 812, 413 N.Y.S.2d at 900. No such development was involved in *Albala* because redress was sought for the physical injury inflicted upon the child. 54 N.Y.2d at 271, 429 N.E.2d at 787, 445 N.Y.S.2d at 109. This crucial distinction is more than a computational difference, it is the difference between the recognition of an unprecedented right and the endorsement of a right already judicially legitimized. Robertson, *supra* note 183, at 1444; 13 AKRON L. REV. 390, 397 (1979).