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Preconceptional Tort Liability - Renslow v. Mennonite Hospital

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PRECONCEPTIONAL TORT LIABILITY— *RENSLOW V. MENNONITE HOSPITAL*

The infant who is forced to live out its life bearing the burden of infirmities caused by the tortious conduct of another presents a compelling problem. Thus, over the years, prenatal tort liability[1] has been the subject of much judicial consideration. While the early common law afforded no recovery for an infant who was injured while in the mother's womb,[2] the more contemporary approach has been to permit actions for fetal injuries sustained during any point of intrauterine development.[3] Changes in social policy and advancements in medical knowledge have also contributed to the view that the fetus should be recognized as a distinct legal personality entitled to the protection of law.[4]

The area of preconceptional tort liability[5] involves a different aspect of the prenatal tort liability problem. In this type of negligence action, the plaintiff is not in existence at the time of the wrongful conduct. In order to recognize a right of recovery for such a plaintiff, courts have been forced not only to consider the social implications and medical justifications, but also to reconsider the function and development of the traditional elements of negligence. Recovery for preconceptional tort liability has met with approval in only a handful of jurisdictions.[6] Recently, however, the Illinois Supreme Court in *Renslow v. Mennonite Hospital*[7] permitted an infant to sue for prenatal injuries caused by tortious conduct that occurred before the child's conception.

The plaintiff, Leah Ann Renslow, alleged in a six-count complaint for negligence and willful and wanton misconduct[8] that in October of

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1. For purposes of this Note, prenatal tort liability will refer to a cause of action seeking recovery for the mental anguish and expenditures resulting from physical and mental deformities sustained before the infant's birth. *See* Jacobs v. Theimer, 519 S.W.2d 846 (Tex. Civ. App. 1975).

2. *See* note 11 and accompanying text *infra*.

3. *See* notes 15-19 and accompanying text *infra*.

4. *See* note 14 and accompanying text *infra*.

5. Preconceptional tort liability, for purposes of this Note, will refer to an action seeking damages for prenatal injuries occasioned by wrongful conduct occurring prior to the infant's conception.

6. *See* note 19 and accompanying text *infra*.

7. 67 Ill.2d 348, 367 N.E.2d 1250 (1977) [hereinafter referred to as *Renslow*].

8. On January 22, 1975, a complaint was filed by Emma Renslow on her own behalf and on behalf of her minor daughter, Leah Ann, seeking damages for personal injuries sustained as a result of the alleged misconduct of the defendants. Counts I to V of the complaint involved the allegations of Emma Renslow on her own behalf and were not before the appellate or supreme court on appeal. *Id.* at 349, 367 N.E.2d at 1251.

1965, the defendants, Mennonite Hospital and Dr. Hans Stroink, wrongfully transfused Rh-positive blood into a thirteen year old girl, Emma Renslow. Emma Renslow's Rh-negative blood was incompatible with and sensitized by the Rh-positive blood. This fact was not discovered until 1973 when, pregnant with Leah Ann, Emma Renslow was subjected to routine blood testing. Subsequent medical diagnosis determined that the unborn child's life was endangered; thus, labor was induced resulting in the premature live birth of Leah Ann. It was further alleged that as a consequence of the preconceptional sensitization of her mother's blood, the plaintiff suffered injuries including permanent damage to her nervous system and brain.[9]

After briefly considering the history of prenatal and preconceptional tort liability, this Note will discuss and analyze the three most significant issues debated by the Illinois Supreme Court in *Renslow*. First, should the stage of fetal development at which the prenatal injuries attach determine liability? Second, should the concept of foreseeability of injuries to the plaintiff play a large role in imposing a legal duty in a case of first impression? Finally, must there be a person in existence before a duty of care may be owed? In conclusion,

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9. Emma Renslow was admitted to the defendant hospital where the defendant doctor headed the laboratory division. In the course of her treatment at the hospital, on Oct. 8 and again Oct. 9, 1965, Emma was given two transfusions of 500 c.c. each of whole blood. The medical diagnosis in 1973 determined that the sensitization of the mother's blood had caused prenatal damage to the unborn child's hemolytic processes which put her life in jeopardy and necessitated her induced premature birth. The plaintiff was born on March 25, 1974, jaundiced and suffering from hyperbilirubemia. She required an immediate, complete exchange transfusion of her blood which was followed by another shortly thereafter. The plaintiff suffered from permanent damage to various organs, her brain and nervous system. Renslow v. Mennonite Hosp., 40 Ill. App.3d 234, 235, 351 N.E.2d 870, 871 (4th Dist. 1976).

Based upon perceived common law principles of negligence, the trial court dismissed the counts seeking damages for prenatal injuries because the plaintiff was not conceived at the time of the alleged infliction of injury. Although the trial court's reason for dismissing counts VI to X of the complaint was that the person for whom those counts sought relief was not conceived at the time of the alleged infliction of injury, the trial court's order apparently means that the injury was sustained by the mother prior to the child's conception. As the appellate court correctly pointed out, "[t]he child herself could not possibly have suffered personal injuries prior to the time she was conceived." *Id.* at 237, 351 N.E.2d at 872.

The Fourth District Appellate Court reversed the trial court's judgment and found the complaint sufficient to state a cause of action. 40 Ill. App.3d at 234, 351 N.E.2d at 870. The appellate court found no reason to dismiss the action simply because the plaintiff had not yet been conceived when the tortious conduct took place. *Id.* at 240, 351 N.E.2d at 874. The Illinois Supreme Court, in an opinion written by Justice Moran, affirmed the decision of the appellate court and remanded the case to the trial court for further proceeding. Renslow v. Mennonite Hosp., 67 Ill.2d 348, 367 N.E.2d 1250 (1977). Justice Ryan dissented, charging that the majority's decision conflicts with fundamental principles of common law negligence. Justice Dooley wrote a concurring opinion which responded in large part to Justice Ryan's argument and took issue, to a certain degree, with the majority's use of foreseeability in establishing a legal duty.

this Note will examine the future impact of the *Renslow* decision upon such areas as liability for radiation and chemical accidents, "wrongful life" actions, and prenatally injured stillborn fetuses.

THE NATURE OF PRENATAL AND PRECONCEPTIONAL TORT LIABILITY

The first American case to confront the question of the legal status of the fetus on the subject of prenatal injuries due to tortious conduct was *Dietrich* v. *Inhabitants of Northhampton,*[10] a Massachusetts Supreme Court decision. In *Dietrich,* Justice Holmes held that an unborn child could not be viewed as having a separate, independent existence apart from the mother sufficient to sustain a cause of action on the infant's own behalf.[11] This position was generally followed by American courts[12] until some sixty years later when a federal district

10. 138 Mass. 14, 52 Am. Rep. 242 (1884). In *Dietrich,* a woman, five months pregnant, was negligently injured on a highway resulting in the premature live birth of her child who died fifteen minutes later. The infant was denied a right of recovery for its prenatal injuries.

11. Although *Dietrich* was brought as a wrongful death action, Justice Holmes indicated that since there existed no precedent for allowing the action, the infant could not have maintained the action even had he survived. *Id.* at 15, 52 Am. Rep. at 243. *But see* Note, *The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries,* 110 U. PA. L. REV. 554, 558 n.25 (1962) which cites other authorities who have criticized Justice Holmes' lack of precedent argument.

Walker v. Great Northern R.R. Co., 28 L.R.Ir. 69 (Q.B. 1891), which is usually cited along with *Dietrich,* contains a clearer articulation of the reasons for denying an action for prenatal injuries. In *Walker,* the complaint alleged that a child *in utero* sustained prenatal injuries while the mother was a passenger on the defendant's train and was born malformed as a result. In denying relief, the court asserted that absent privity between the railroad company and the injured child, no independent duty could be owed to the plaintiff. In addition, the court emphasized the insurmountable problems in proving the causal relation between the prenatal injury and the subsequent apparent damage: "There are instances in the law where rules of right are founded upon the inherent and inevitable difficulty or impossibility of proof." *Id.* at 81. Problems of proving the causal relation have loomed large as a reason for denying relief in prenatal injury cases even where, as in *Dietrich,* the problem of establishing the causal connection is minimal. *See* note 77 and accompanying text *infra.*

The early common law had recognized only a few cases in which an unborn child had a separate, independent existence apart from its mother. *See, e.g.,* Damasiewicz v. Gorsuch, 197 Md. 417, 79 A.2d 550 (1951), in which a Maryland appellate court noted that a child in its mother's womb was regarded under common law principles as a legal personality from the time of conception for purposes of taking an estate or to claim damages in admiralty. Further, the common law recognized the crime of murder if a live-born child should later die as a consequence of an assault while *in utero. See* Del Tufo, *Recovery for Prenatal Torts: Actions for Wrongful Death,* 15 RUTGERS L. REV. 61, 66 n.24 (1960) for a comprehensive cataloguing of these common law cases.

12. For a comprehensive listing of the *Dietrich* line of cases, *see* Del Tufo, *Recovery for Prenatal Torts: Actions for Wrongful Death,* 15 RUTGERS L. REV. 61, 62 n.6 (1960). Based on the *Dietrich* foundation, later courts denying relief generally have done so for the following reasons: (1) that there was a lack of precedent and stare decisis; (2) that while in the mother's womb, a child has no independent existence apart from its mother; (3) that since the child is

court overturned the *Dietrich* precedent.[13] This later decision recognized a right of recovery for prenatal personal injuries sustained by an unborn infant after it had reached the viability stage of intrauterine development. This rather abrupt reversal of the general stance denying direct recovery can be viewed as a judicial recognition of the advancement of medical knowledge concerning congenital malformations.[14] Today, the majority of jurisdictions allow recovery for infants negligently injured during the prenatal stage of viability.[15] In addition, some courts, contemporaneous with the expansion of medical science, have discarded the criterion of viability and have allowed recovery for injuries sustained ever closer to the moment of conception.[16]

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part of the mother, the wrong will be remedied when the mother sues and recovers for her injuries; (4) that proof of causation would, at best, be difficult and overly speculative; and (5) that the creation of new rights is the province of the legislature and not the judiciary. *See* note 77 and accompanying text *infra*.

13. Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946). The *Bonbrest* court recognized a right of action in a child injured as a result of professional malpractice during its removal from the mother's womb. Importantly, the factual situation was significantly different from that in *Dietrich*. In *Bonbrest*, the injury was related directly to a viable fetus while in *Dietrich*, the injury was transmitted through the mother before the fetus had attained viability. Recognizing the difficulty of remoteness in the latter situation, the *Bonbrest* court distinguished *Dietrich* on its factual difference and held that the child could not be denied recovery simply because it was a "part" of its mother. Justice McGuire, writing for the majority, asserted: "True, it is in the womb, but it is capable now of extrauterine life—and while dependent for its continued development on sustenance derived from its peculiar relationship to its mother, it is not a 'part' of the mother in the sense of a constituent element. . . ." *Id.* at 140. For further discussion of *Bonbrest, see* Comment, *Negligence and the Unborn Child: A Time for Change*, 18 S.D. L. REV. 204, 209 (1973).

14. The *Bonbrest* court's recognition of the advancement of medical science since *Dietrich* served to dispel the fears of difficulty of proof. Indeed, the *Dietrich* court itself suggested that if the difficulties of proof could be overcome, "a man might owe a civil duty and incur a conditional prospective liability in tort to one not yet in being. . . ." Dietrich v. Inhabitants of Northhampton, 138 Mass. at 16, 52 Am. Rep. at 54.

15. For a comprehensive listing of those jurisdictions and cases allowing this type of recovery, *see* Gordon, *The Unborn Plaintiff*, 63 MICH. L. REV. 579, 585 nn.36, 37, 38 (1965).

16. The criterion of fetal viability has endured increasing attacks from the courts. *See* Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 93 S.E.2d 727 (1956) (child born after sustaining tortious injury at any point after conception has a right of action for such injuries); Daley v. Meier, 37 Ill. App.2d 218, 178 N.E.2d 691 (1st Dist. 1961) (recovery allowed for previable injuries medically provable as resulting from the negligence of the defendant); Bennett v. Hymers, 101 N.H. 483, 147 A.2d 108 (1958) (cause of action for previable injuries, recognized on basis that that difficulty of proof should not bar recovery for a wrong if the elements of a tort are present); Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960) (child who was in his mother's womb and was injured in an automobile collision caused by the defendant's negligence was entitled to recover though previable at the time of the injury because of medical science's recognition that the fetus is a distinct entity); Sinkler v. Kneale, 401 Pa. 267, 164 A.2d 93 (1960) (recovery allowed for previable injuries since the fetus is regarded as having separate existence from the moment of conception). For a criticism of the viability theory, *see* Comment, *A New Theory in Prenatal Injuries: The Biological Approach*, 26 FORDHAM L. REV. 684, 687-88 (1957-58).

The emerging trend to allow recovery for injuries sustained up to the moment of conception is the result of two fundamental premises. First, there is a growing judicial recognition of the incongruity of imposing or denying liability on the basis of a medically indeterminable moment of intrauterine development.[17] Second, it is inherently unjust to deny a cause of action where a child is physically or mentally deformed for life as a result of prenatal injuries caused by the tortious misconduct of another.[18] These considerations compel the recognition of a right of action for prenatal injuries occasioned by tortious conduct occurring prior to conception.[19]

THE *RENSLOW* DECISION

In Illinois, the development of prenatal tort liability has paralleled the growth in other jurisdictions.[20] However, as a result of *Renslow,*

17. *See* note 16 *supra.*

18. *See* note 19 *infra.*

19. Apparently, only three cases since the *Dietrich* decision of 1884 have recognized a cause of action for a preconceptional tort. Piper v. Hoard, 107 N.Y. 73, 13 N.E. 626 (1887), was the first case to recognize preconceptional tort liability, allowing recovery by certain heirs who were injured by the defendant who fraudulently induced the heirs' mother into marriage in order to gain the heirs' estate. The court found no basis for denying recovery when the then unconceived plaintiffs were foreseeable in that they were the very objects whose injuries were being contemplated by the defendant at the time of his wrongful conduct. *Id.* at 79, 13 N.E. at 630. In a later case, Jorgensen v. Meade Johnson Laboratories, Inc., 483 F.2d 237 (10th Cir. 1973), a federal court of appeals allowed recovery for prenatal injuries sustained as a result of the wrongful conduct of a drug manufacturer occurring before the conception of the plaintiff. In that case, it was alleged that the birth control pills used by the mother and manufactured by the defendant altered the chromosomal structure of the mother's body to produce mongoloid deformities in her children. Also, in Park v. Chessin, 387 N.Y.S.2d 204 (1976), the court allowed an action by an infant where the defendant doctors failed to warn the mother, a previous victim of rubella, of the risks to fetuses during subsequent pregnancies.

20. In Illinois, the development of prenatal tort liability has paralleled the growth in other jurisdictions. Allaire v. St. Luke's Hosp., 184 Ill. 359, 56 N.E. 638 (1900) (Boggs, J., dissenting) by virtue of its strong dissent, became the springboard for later critical analysis of the doctrine barring recovery. *See* Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946); Amann v. Faidy, 415 Ill. 422, 114 N.E.2d 412 (1953). Justice Boggs in his dissent in *Allaire* found Holmes' notion in *Dietrich* that the unborn child is part of the "bowels" of its mother illogical when applied to an infant who is viable and capable of living independent of its mother. *Id.* at 370, 56 N.E. at 641.

For a thorough discussion of the *Allaire* decision, *see* Arnold, *Prenatal Injuries: A Treatment and Prognosis of the Law,* 18 DEPAUL L. REV. 439, 442 (1969). *Allaire* was reaffirmed in Smith v. Luckhardt, 299 Ill. App. 100, 19 N.E.2d 446 (1st Dist. 1939) wherein the court refused to take action on the ground that legislative reform was the only instrument of change in that area. However, in 1953, the Illinois Supreme Court changed the law existing since 1900 to conform with Justice Bogg's dissent in *Allaire.* Amann v. Faidy, 415 Ill. 422, 114 N.E.2d 412 (1953) (overruling *Allaire*) and a companion case, Rodriguez v. Patti, 415 Ill. 496, 114 N.E.2d 721 (1953). In Daley v. Meier, 33 Ill. App.2d 218, 178 N.E.2d 691 (1st Dist. 1961), the court recognized an action to recover for prenatal injuries medically provable as resulting from the negligence of another even if it had not reached the state of a viable fetus at the time of the injury. For further discussion of the erosion of the viability requirement in Illinois, *see* note 35

Illinois courts now have extended prenatal tort liability to acts occurring prior to conception. In *Renslow*, the plaintiff brought an action under the theory of prenatal tort liability which is grounded upon common law negligence.[21] Essentially, the concept of negligence mandates that all persons owe to others a duty to exercise due care to guard against injury which may naturally flow as a reasonably probable and foreseeable consequence of their conduct.[22] The legal formula for negligence requires the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately resulting from that breach.[23] In the area of prenatal tort liability in Illinois, prior to *Renslow*, however, there was an additional requirement that the infant be viable at the time of the alleged injury.[24]

The Criterion of Fetal Viability

Viability,[25] as a criterion for affording recovery for prenatal injuries occurring during intrauterine development, was first proposed in Il-

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and accompanying text *infra*. Dicta in Zepeda v. Zepeda, 41 Ill. App.2d 240, 190 N.E.2d 849 (1st Dist. 1963), recognized the growing trend of allowing actions for injuries sustained closer to the moment of conception.

21. In *Renslow*, the plaintiff argued against the necessity of establishing fetal viability as a condition precedent to recovery. 67 Ill.2d at 352, 367 N.E.2d at 1253. *See* notes 22-24 and accompanying text *infra* for discussion of negligence elements in Illinois. The plaintiff further contended that a legal duty was owed because the medical likelihood of a child's being born with neurological infirmities was a foreseeable consequence of the defendant's conduct. Brief and Argument of Appellees at 17-20, Renslow v. Mennonite Hosp., 67 Ill.2d 348, 367 N.E.2d 1250 (1977). Finally, the plaintiff alleged that the defendant's failure to exercise due care in the transfusion of the mother's blood directly produced the injuries for which recovery was sought. 67 Ill.2d at 350, 367 N.E.2d at 1251.

22. Waynick v. Chicago's Last Dep't Store, 269 F.2d 322 (7th Cir. 1959), *cert. denied*, 362 U.S. 903 (1959); Hardware State Bank v. Cotner, 55 Ill.2d 240, 302 N.E.2d 257 (1973); Lorang v. Heinz, 108 Ill. App.2d 451, 248 N.E.2d 785 (2d Dist. 1969); Garrett v. S.N. Nielson Co., 49 Ill. App.2d 422, 200 N.E.2d 81 (1st Dist. 1964).

23. Lasko v. Meier, 394 Ill. 71, 67 N.E.2d 162 (1946); Fugate v. Sears, Roebuck & Co., 12 Ill. App.3d 656, 299 N.E.2d 108 (1st Dist. 1973); Apato v. BeMac Transport Co., 7 Ill. App.3d 1099, 288 N.E.2d 683 (1st Dist. 1972). The element of proximate cause requires a showing that the injury was a natural and probable consequence of the negligent act. The growing trend is to discard the concept of foreseeability in the determination of the proximate cause issue. *See* 1 DOOLEY, MODERN TORT LAW § 903 (1977).

24. Amann v. Faidy, 415 Ill. 422, 114 N.E.2d 412 (1953); Rodriguez v. Patti, 415 Ill. 496, 114 N.E.2d 721 (1953).

25. Viability is the time at which a child is capable of being delivered and remaining alive separate from and independent of the mother. Viability normally occurs 26-28 weeks after the fetus' conception. Chrisafogeorgis v. Brandenberg, 55 Ill.2d 368, 374, 304 N.E.2d 88, 92 (1973); *See generally* Discussion of Recent Decisions, Damages for the Wrongful Death of a Fetus—*Proof of Fetal Viability*, 51 CHI.-KENT L. REV. 227, 240 (1974) for a discussion of the medical considerations relevant to proving fetal viability.

linois by Justice Boggs' dissent in *Allaire v. St. Luke's Hospital.*[26] The *Allaire* case held that there was no right of recovery for injuries to the plaintiff while in the mother's womb. Implicitly recognizing the common law "principle" that the plaintiff must have had a distinct and independent existence when the alleged injuries were inflicted,[27] Justice Boggs disagreed with the majority's assertion that a legal right begins only at birth.[28] He suggested instead that a legal right accrues when the fetus is capable of independent and separate life.[29] Responding in part to the inherent presumption that the law must keep pace with the sciences,[30] Illinois courts followed Justice Boggs' theory and conferred a right of recovery upon infants who were viable when prenatally injured.[31] Couched in terms of the common law "principle" requiring that the plaintiff be "in esse" or in existence when injured,[32] many other jurisdictions have extended recovery for injuries to previable infants,[33] thus, conforming to what medical science has long known—that a child is in existence from the moment of conception.[34] Yet, prior to *Renslow,* the Illinois Supreme Court

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26. 184 Ill. 359, 56 N.E. 638 (1900) (Boggs, J., dissenting).

27. For a critical analysis of the historical validity of this purported principle, *see* note 76 and accompanying text *infra.*

28. The majority in *Allaire* contended that the common law had not allowed an infant to maintain an action for injuries sustained before its birth. 184 Ill. at 368, 56 N.E. at 640. Justice Boggs rejected the majority's argument that prior to its birth an infant has no existence apart from its mother. He apparently directed his argument toward Blackstone's proposition that in contemplation of the common law, "[l]ife begins . . . as soon as an infant is able to stir in the mother's womb." *Id.* at 371, 56 N.E. at 641.

29. *Id.* at 370, 56 N.E. at 641. Justice Boggs stated:

> Medical science and skill and experience have demonstrated that at a period of gestation in advance of the period of parturition the foetus is capable of independent and separate life, and that though within the body of the mother it is not merely a part of her body, for her body may die in all of its parts and the child remain alive and capable of maintaining life, when separated from the dead body of the mother. If at that period a child so advanced is injured in its limbs or members, and is born into the living world suffering from the effects of the injury, is it not sacrificing truth to a mere theoretical abstraction to say the injury was not to the child, but wholly to the mother?

Id.

30. Bonbrest v. Kotz, 65 F. Supp. 138, 143 (D.D.C. 1946).

31. *See* note 20 and accompanying text *supra.*

32. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 777 (1961).

33. A previable fetus is one which is incapable of surviving in the external world if separated from its mother.

34. The effort by a small minority of courts to extend legal protection to an infant from the moment of its conception has taken two approaches: (1) the biological-separability approach; and (2) the causation approach. "Biological separability" was defined by the court in Puhl v. Milwaukee Auto Ins. Co., 8 Wis.2d 343, 99 N.W.2d 163 (1959):

> 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

had not decided whether a surviving child has a cause of action for prenatal injuries sustained in a previable stage of development.[35]

Responding to the plaintiff's complaint in *Renslow*, the defendants relied on *Amann v. Faidy*[36] to contend that the plaintiff had failed to state a cause of action for prenatal tort liability because there was no allegation that the plaintiff was viable when injured.[37] *Amann* had predicated prenatal tort liability upon the proposition that only "persons" could be injured, and the fetus would attain that status only when viable.[38] Nevertheless, the *Renslow* court held in favor of the plaintiff, discarding the requirement of fetal viability.[39] Justice Moran, speaking for the majority, pointed out that viability was an inherently unsatisfactory requirement because it was a point in time incapable of exact measurement.[40] He further supported the court's position by emphasizing the harshness of denying claims for injuries to the previable fetus when "substantial medical authority [dictates] that congenital structural defects caused by the prenatal environment can be sustained only early in the previable stages."[41] By rejecting

> a conditional liability on the tort-feasor. 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 liability because of no damage to a legal person.

Id. at 356, 99 N.W.2d at 170. *See also* Kelly v. Gregory, 282 App. Div. 542, 125 N.Y.S.2d 696 (1953) where it was held: "We ought to be safe in this respect by saying that legal separability should begin where there is biological separability." *Id.* at 543, 125 N.Y.S.2d at 697.

The causation approach focuses upon the establishment of the causal relation between the infant's injury and the defendant's wrongful conduct and avoids consideration of the legal status of the fetus. *See* Sinkler v. Kneale, 401 Pa. 267, 64 A.2d 93 (1960) which upheld the complaint of a child injured in the first month of its gestation. The *Sinkler* court stated: "[t]he question is primarily one of causation, and since medical proof of that is necessary, we now remove the bars from it *in limine*." *Id.* at 274, 164 A.2d at 96. *See also* Kine v. Zuckerman, 4 Pa. 227 (1924) for a discussion of this approach. For a discussion of the usage of this approach in the area of preconceptional tort liability, *see* notes 69-71 and accompanying text *infra*.

35. Some appellate courts have answered this question in the affirmative. *See* Sana v. Brown, 35 Ill. App.2d 425, 183 N.E.2d 187 (1st Dist. 1962) (extending the right of action to a surviving infant injured during the previable stage); Daley v. Meier, 33 Ill. App.2d 218, 178 N.E.2d 691 (1st Dist. 1961) (rejecting the viability standard).

36. 415 Ill. 422, 114 N.E.2d 412 (1953).

37. Brief and Argument of Appellant at 5, Renslow v. Mennonite Hosp., 67 Ill.2d 348, 367 N.E.2d 1250 (1977).

38. Brief and Argument of Appellant at 6. While the defendants correctly pointed out that *Amann* was based upon the proposition that only "persons" can be injured, they erroneously suggested that according to *Amann* the fetus becomes a person subject to injury "if the injury occurs during gestation and if the child is born alive." The more accurate interpretation of *Amann* is that the fetus must have attained viability at the time of injury in addition to a live-birth. *See* Discussion of Recent Decisions, Damages for the Wrongful Death of a Fetus—*Proof of Fetal Liability*, 51 CHI.-KENT L. REV. 227, 230 (1973).

39. 67 Ill.2d at 353, 367 N.E.2d at 1253.

40. *Id.* at 352, 367 N.E.2d at 1252.

41. *Id.* at 352-53, 367 N.E.2d at 1252-53. *See generally* Note, *The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries*, 110 U. PA. L. REV. 554, 563 (1962).

the defendants' argument, the *Renslow* court implicitly overruled *Amann*. But, as properly suggested by one Illinois appellate court, the opinion in *Amann* "should be considered in the light of its overall reasoning and tenor." [42] *Amann* was based upon the difficulty of proving the causal relation between the prenatal injury and the subsequent apparent damage. However, the *Amann* decision is no longer in accord with modern medical science.[43] The *Renslow* court's decision to discard the necessity of establishing fetal viability represents a significant extension of the early position of the common law and reflects the logical culmination of the growing erosion of the viability criterion in Illinois.

Legal Duty and the Role of Foreseeability

As mentioned above,[44] the formula for negligence requires the existence of a duty to the injured party. In simplest form, a legal duty is a judicially recognized obligation to exercise ordinary care to avoid injury to another.[45] The concept of foreseeability, in large part, determines the risks and responsibilities that fall within the scope of a legal duty of care.[46] Accordingly, what the reasonable person foresees or should foresee defines the extent of his liability. The defendants in *Renslow* alleged that the neurological injuries complained of were not reasonably foreseeable at the time of their conduct.[47] The *Renslow* court rejected this contention and emphasized that contemporary medicine specifically recognized that improper multiple transfusions of blood posed significant risks.[48]

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42. Daley v. Meier, 33 Ill. App.2d 218, 223, 178 N.E.2d 691, 694 (1st Dist. 1961). The "tenor" of *Amann* reflects a concern with the difficulties of proof.

43. For a comprehensive discussion of the general medical considerations, *see* Note, *The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries*, 110 U. PA. L. REV. 554, 565-80 (1962).

44. *See* note 23 and accompanying text *supra*.

45. Kay v. Ludwick, 87 Ill. App.2d 114, 230 N.E.2d 494 (Fourth Dist. 1967). *See* Schutt v. Terminal R.R. Ass'n., 79 Ill. App.2d 69, 223 N.E.2d 264 (Fifth Dist. 1967).

46. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 146 (4th ed. 1971).

47. Brief and Argument of Appellant at 16-19, Renslow v. Mennonite Hosp., 67 Ill.2d 348, 367 N.E.2d 1250 (1977).

48. 67 Ill.2d at 353-54, 367 N.E.2d at 1253. Justice Ryan in his dissent, however, spoke of the potential injustice such a decision would work upon doctors subjected to a claim perhaps half a century from the time of their wrongful conduct. He feared that under the majority's theory of foreseeability, doctors could be held liable for unforeseeable consequences. *Id.* at 376, 367 N.E.2d at 1264 (Ryan, J., dissenting). Justice Dooley, in his concurring opinion, responded by charging that Justice Ryan misconceived the nature of foreseeability in determining "unforeseeability" through the measure of time. *Id.* at 369-70, 367 N.E.2d at 1261 (Dooley, J., concurring). Justice Dooley's contention appears to be the more accurate one because the concept of foreseeability is concerned with the *likelihood* of injury to a particular interest and not the period of *time* it takes for the injury to attach. *See* Tom Olesker's Exciting World of Fash-

The appellate court in *Renslow* extended a legal duty to the plaintiff wholly on the basis of foreseeability of harm.[49] Although the *Renslow* majority rejected the appellate court's finding that foreseeability and duty are identical in scope,[50] Justice Dooley, in his concurring opinion, disagreed, stating "foreseeability . . . [is] the most important test in determining duty."[51] In his view, since Emma Renslow would someday become pregnant, the defendants were under a duty to correctly type her blood so as to avoid the risk of harm to the potential child that would result from a wrongful transfusion to the mother. However, Justice Dooley refused to confront the societal implications of imposing duty, treating such implications as "foreign to the question presented here."[52]

Justice Dooley's seemingly myopic loyalty to the traditional concept of foreseeability conflicts with the common law's preoccupation with broad considerations of social policy.[53] Perhaps, in partial support of Justice Dooley's position, foreseeability can play a significant role in those negligence actions involving familiar patterns of conduct. But where the circumstances are novel, as in *Renslow*, the law must impose a legal duty on the basis of its potential societal consequences rather than the manipulation of the obscure boundaries of foreseeability.[54] In this regard, the majority in *Renslow* correctly pointed

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ion, Inc. v. Dun & Bradstreet, Inc., 61 Ill.2d 129, 334 N.E.2d 160 (1975); Lipsey v. Michael Reese Hosp., 46 Ill.2d 32, 262 N.E.2d 450 (1970); Green, *Foreseeability in Negligence Law*, 61 COLUM. L. REV. 1401 (1961).

49. Renslow v. Mennonite Hosp., 40 Ill. App.3d at 239, 351 N.E.2d at 874 (4th Dist. 1976).

50. *Citing* Cunis v. Brennen, 56 Ill.2d 372, 308 N.E.2d 617 (1974), an Illinois case which held that no legal duty arises unless harm is reasonably foreseeable. The *Renslow* court, nevertheless, contended that the existence of a legal duty is not to be based solely upon the factor of foreseeability. 67 Ill.2d at 354, 367 N.E.2d at 1253-54.

51. *Id.* at 364, 367 N.E.2d at 1258 (Dooley, J., concurring).

52. *Id.* at 370, 367 N.E.2d at 1261. Dissenting in *Renslow*, Justice Underwood pointed out potential adverse implications if such an action were allowed: "the likelihood of suits filed decades after the alleged negligence occurred, the difficulty of proving or defending against such claims, the impossibility of acturarial measurement of the risks involved, successive recoveries by unborn abnormal generations affected by genetic changes. . . ." *Id.* at 372, 367 N.E.2d at 1262 (Underwood, J., dissenting).

53. *See* Kreitz v. Behrensmeyer, 149 Ill. 496, 36 N.E. 983 (1894) where the court defined the common law:

> [I]t is a system of elementary rules and of general declarations of principles, which are continually expanding with the progress of society, adopting themselves to the gradual changes of trade, commerce, arts, inventions, and the exigencies and usages of the country.

Id. at 502, 36 N.E. at 984. *But see* Lipps v. Milwaukee Elec. Ry. & Light Co., 164 Wis. 272, 159 N.W. 916 (1916), which emphasized that the concept of negligence is concerned solely with the individual involved in the litigation.

54. However valuable the concept of foreseeability is to remain in future negligence actions, its vitality is minimal in cases of first impression. *See* Green, *The Palsgraf Case*, 30 COLUM. L.

out that there are areas of foreseeable harm in which no duty arises.[55] Thus, policy considerations, traditional rules of law, and common experience must also weigh heavily in the analysis of the duty issue.

To measure the social desirability of imposing a legal duty, three factors should be considered: who may best prevent the hazard, the economic magnitude of the risk, and who may best absorb the loss.[56] In *Renslow*, the plaintiff persuasively argued for the imposition of a legal duty on the basis of these factors.[57] The court explicitly recognized that the defendants were in the best position to prevent the hazard since the medical field had effectively developed techniques capable of mitigating a child's prenatal harm. Although not articulated by the *Renslow* court, the magnitude of the risk of harm to the plaintiff in the form of mental and physical deformities also appears to compel the finding of a legal duty. In addition, the inference may be drawn from the *Renslow* court's resolution of the duty issue in favor of the plaintiff that hospitals and doctors may serve as a broader financial base upon which to absorb the loss than the limited resources of the injured individual.[58]

Legal Existence and the Scope of a Legal Duty

The scope of a legal duty is also limited to a certain extent by traditional rules of law which have been developed over many years.[59] It is generally agreed that as a condition precedent to re-

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REV. 789 (1930). Indeed, Cardozo's own decisions subsequent to Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 162 N.E. 99 (1928) (where Justice Cardozo first articulated the importance of foreseeability in determining the scope of a legal duty) have indicated that other factors have greater weight in defining a legal duty. *See* H.R. Moch Co., Inc. v. Rensselaer Water Co., 247 N.Y. 160, 159 N.E. 896 (1928); Wagner v. Int'l Ry. Co., 232 N.Y. 176, 133 N.E. 437 (1921).

55. The *Renslow* court pointed out three areas of foreseeable harm in which no duty has arisen: (1) no duty to rescue a person foreseeably harmed; (2) no duty to a third person foreseeably injured while witnessing another harmed by a tortfeasor; and (3) in most cases, no duty to one without a legally identifiable existence. 67 Ill.2d at 355, 367 N.E.2d at 1253.

56. Lance v. Senior, 36 Ill.2d 516, 224 N.E.2d 231 (1967). These factors have been recognized by subsequent Illinois courts. *See* Mieher v. Brown, 54 Ill.2d 539, 301 N.E.2d 307 (1973); Barnes v. Washington, 56 Ill.2d 22, 305 N.E.2d 535 (1973).

57. Brief and Argument of Appellees at 18-19, Renslow v. Mennonite Hosp., 67 Ill.2d 348, 367 N.E.2d 1250 (1977).

58. Prosser states that the real problem in determining the duty is "whether the defendants in such cases should bear the heavy negligence losses of a complex civilization, rather than the individual plaintiff." W. PROSSER, HANDBOOK OF THE LAW OF TORTS 257 (4th ed. 1971). The defendants, hospitals and doctors can best bear the economic burden of loss since they are in a position to distribute the loss to the general public.

59. 67 Ill.2d at 375, 367 N.E.2d at 1263 (Ryan, J., dissenting).

covery, a plaintiff must show that a legal duty was owed to him.[60] The *Renslow* defendants argued that there must be a person in being to whom a duty of reasonable care may be owed. Since the plaintiff had not been conceived at the time of the alleged negligent conduct, the defendants asserted that they were not required to exercise a duty of care toward the plaintiff.[61]

In rejecting the defendants' argument, the *Renslow* court accurately perceived that *Dietrich* and its progeny indicate that a legal duty could be owed only to one with a legally identifiable interest.[62] The common law proposition was that the unborn child's legal personality began at birth.[63] However, the growing medical and scientific recognition of the unborn child as a separate entity from the mother compelled the courts to extend the common law concepts of liability. Through the use of the legal fiction that an infant is "in esse" prior to birth,[64] the courts have found the existence of duties owed to infants closer and closer to the moment of conception.[65] Yet, as in

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60. Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1023 (1928). *See* note 23 and accompanying text *supra*.

61. Brief and Argument of Appellant at 8-14, Renslow v. Mennonite Hosp., 67 Ill.2d 348, 367 N.E.2d 1250 (1977).

62. 67 Ill.2d at 355, 367 N.E.2d at 1255-56.

63. Justice Holmes in *Dietrich* said that he knew of no case which held that an infant could maintain an action for injuries received while in the mother's womb. This isolated statement evolved into the proposition that the common law afforded no recovery for an infant injured before its birth. Dietrich v. Inhabitants of Northhampton, 138 Mass. 14, 52 Am. Rep. 242 (1884). *See also* Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921); Lipps v. Milwaukee Elec. Ry. & Light Co., 164 Wis. 272, 159 N.W. 916 (1916); Walker v. Great N. R.R. Co., 28 L.R.Ir. 69 (Q.B. 1891).

The viability requirement, adopted by the majority of jurisdictions after *Bonbrest*, 65 F. Supp. 138 (D.D.C. 1946), was based upon the judicial determination that the fetus, capable of quasi-independent life, is existent in fact for purposes of common law recovery. Although not born, the viable fetus is capable of surviving severance from its mother. Those courts allowing recovery for prenatal injuries sustained by a viable infant apparently have refused to deny the action simply because the child is located "in utero" rather than in the external world. *See* note 15 and accompanying text *supra*.

64. A legal fiction is a device which attempts to conceal the fact that a judicial decision is not in harmony with the existing law. Note, *The Fictions of the Law: Have They Proved Useful or Detrimental to Its Growth?*, 7 HARV. L. REV. 249, 262 (1893). For a comprehensive look at legal fictions, *see* Fuller, *Legal Fictions*, 25 ILL. L. REV. 363, 513, 865 (1930).

65. Early common law cases refused to recognize the legal fiction of the civil law that an unborn child may be regarded as born for some legal purposes connected with the acquisition and preservation of real and personal property. Later courts recognized viability as a criterion sufficiently compatible with the requirement articulated by Lord Coke that the child must have reached some degree of quasi-independent life at the moment of the tortious act. This, of course, is a legal fiction, for a viable child is not existent in fact until birth. Thus, if the expectation of birth is the courts' underlying reason for implying existence to a viable fetus, the stage of development of the fetus at the time of the wrongful act is immaterial. Yet, the court, recognizing actions for prenatal injuries sustained before viability, have attempted to couch their deci-

Renslow, where the tortious conduct occurs prior to the plaintiff's conception, the plaintiff at the time of the act was in no sense a separate entity to which the traditional concept of duty might be owed. Thus, the *Renslow* court was constrained to reexamine this evolved condition of legal existence.

Strong authority exists in favor of limiting the scope of a legal duty to injured plaintiffs who were in existence at the time of the tortious conduct.[66] For example, Justice Ryan, in his dissent in *Renslow*, remained unwilling to discard this rule of law which he believed had developed over many years, and which he viewed as fundamental to the traditional concept of duty. He asserted that the majority's decision abandoned the traditional fault concept of liability based upon duty and foreseeability, adopting, instead, a theory of recovery based upon the element of causation.[67] Under the causation theory of liability, a legal duty is purportedly owed not only to those reasonably expected to be harmed from the misconduct but also to those who are in fact injured.[68] The only burden upon the plaintiff would be to establish the elements of breach of a legal duty and causation.[69]

There is, at most, only partial support for Justice Ryan's argument of causation. Of those jurisdictions that have allowed an action for preconceptional tort liability, many have focused upon proving causa-

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sions in terms of the physiologically independent "existence" of the embryo from the moment of its conception. Even so, a fetus of this degree of maturity is certainly not in the existent form contemplated by the early common law. *See* Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 93 S.E.2d 727 (1956); Daley v. Meier, 33 Ill. App.2d 218, 178 N.E.2d 691 (1st Dist. 1961); Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960); Sinkler v. Kneale, 401 Pa. 267, 164 A.2d 93 (1960).

66. The problem of whether a non-existent person may be owed a duty of care has continually plagued the courts in the area of prenatal tort liability. Most decisions allowing recovery have stressed the requirement of fetal viability. *See* Comment, *Negligence and the Unborn Child: A Time for Change*, 18 S.D. L. REV. 204, 213 n.74 (1973) for a comprehensive listing of these cases. Some courts have stressed the moment of conception. *See* note 16 *supra*. The only purpose of these requirements could be to show that the plaintiff was in existence at the time of the tortious conduct. *See* James, *Scope of Duty in Negligence Cases*, 47 NW. L. REV. 778, 789 (1953).

67. 67 Ill.2d at 372, 367 N.E.2d at 1262.

68. If Justice Ryan were correct, the majority's position would parallel that of Justice Andrews' dissent in Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 163 N.E. 99 (1928) (Andrews, J., dissenting). In that decision, the majority held that a legal duty may be owed only to foreseeable plaintiffs. *Id.* at 341, 162 N.E. at 100. Justice Andrews, on the other hand, asserted that a legal duty may be owed not only to those whom harm might reasonably be expected to result but also to those who are in fact injured. *Id.* at 347, 162 N.E. at 103 (Andrews, J., dissenting). *See* Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1 (1953) for a different perspective on *Palsgraf*.

69. *Id.* at 354, 162 N.E. at 105. *But see* Prosser, *supra* note 80 at 24 for a critical discussion of the imposition of liability on the basis of causation.

tion and avoided the traditional negligence analysis.[70] However, Justice Ryan is incorrect in his conclusion that the majority established liability solely on the basis of causation. The majority specifically cited two causation cases and explicitly rejected imposing liability wholly on such a basis.[71] The *Renslow* court emphasized that even if causation was used, policy lines would still have to be drawn to narrow the area of actionable causation.[72] Thus, the majority properly reaf-

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70. *See, e.g.*, Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 93 S.E.2d 727 (1956); LaBlue v. Specker, 358 Mich. 558, 100 N.W.2d 445 (1960); Bennett v. Hymers, 101 N.H. 483, 147 A.2d 108 (1958); Kelly v. Gregory, 282 App. Div. 542, 125 N.Y.S.2d 696 (1953); Sylvia v. Gobielle, 101 R.I. 76, 220 A.2d 222 (1966); Puhl v. Milwaukee Auto Ins. Co., 8 Wis.2d 343, 99 N.W.2d 163 (1959).

71. The *Renslow* majority opinion cited Jorgensen v. Meade Johnson Laboratories, Inc., 483 F.2d 237 (10th Cir. 1973) and Park v. Chessin, 88 Misc.2d 222, 387 N.Y.S.2d 204 (1976). In *Jorgensen*, a woman purchased and used oral contraceptives for several months prior to the conception of her two children. The plaintiff alleged that these contraceptives altered the chromosomal structure within the body of the mother, creating a mongoloid deformity in the viable fetuses and resulting in the death of one child and severe injuries to the other. The *Jorgensen* court allowed the cause of action. In the *Park* case, the plaintiff-mother gave birth to a child who died of polycystic kidneys, an hereditary disease. The parents alleged in their complaint that the defendant-doctors had failed to take the necessary genetic tests to determine whether the mother could transmit this disease to subsequent children. Acting entirely on the defendant's advice, the parents conceived another child. This child also died of polycystic kidneys. The *Park* court allowed this wrongful death action based on a preconceptional tortious act.

Justice Dooley's concurring opinion, which can be viewed in part as a response to Justice Ryan's dissent, asserted even more clearly than the majority that the court had not eliminated the traditional elements of negligence in favor of the causation test. Differing with the majority's interpretation of *Jorgensen* and *Park*, Justice Dooley viewed neither case as focusing upon causation and asserted instead that both decisions were based upon the traditional fault concept of liability. He further contended that both cases, particularly *Jorgensen*, could stand as proper authority for the plaintiff's action. 67 Ill.2d at 362-63, 367 N.E.2d at 1258 (Dooley, J., concurring).

However, an examination of *Jorgensen* does not reveal support for Justice Dooley's position. The tenth circuit court of appeals in *Jorgensen* explicitly chose to treat the action as one of causation and not of duty and foreseeability. 483 F.2d at 240. *Park*, on the other hand, reflects extensive preoccupation with the traditional elements of negligence and comports with Justice Dooley's construction. *See* Note, *Torts Prior to Conception: A New Theory of Liability*, 56 NEB. L. REV. 706, 712-17 (1977) for a critical analysis of the *Park* decision. Thus, while the plaintiffs strenuously argued for an imposition of liability on the basis of *Jorgensen*, this case as well as the other causation-oriented cases can only provide partial support for the action. Brief and Argument of Appellees at 13-16, Renslow v. Mennonite Hosp., 67 Ill.2d 348, 367 N.E.2d 1250 (1977). The fundamental consideration which underlies *Jorgensen*, and the other cases recognizing this type of action, is the legal right to begin life with a sound mind and body. *See* Park v. Chessin, 387 N.Y.S.2d 204, 210 (1976); Womack v. Buchhorn, 384 Mich. 718, 725, 187 N.W.2d 218, 222 (1971); Sylvia v. Gobeille, 101 R.I. 76, 220 A.2d 222 (1966); Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960) (holding that if wrongful conduct interferes with that right, damages for such harm shall be recoverable by the child). *See also* Note, 63 HARV. L. REV. 173 (1949). The more fundamentally correct approach would be to apply the traditional elements of negligence, as successfully accomplished in *Park*, 387 N.Y.S.2d at 210-11. The likelihood of harm to a forseeable class of persons is sufficient to establish tort liability.

72. 67 Ill.2d at 356, 367 N.E.2d at 1254. If a legal duty were to be extended to all those in fact injured by an actor's wrongful conduct, as asserted by Justice Andrews in Palsgraf v. Long

firmed the utility of legal duty, and its accompanying considerations of foreseeability, social policy, traditional rules of law, and logic,[73] in circumscribing liability.

Various courts and commentators also have asserted that it is unnecessary to limit the scope of a legal duty to existent plaintiffs.[74] This seems to be the more accurate position. The requirement of legal existence can be traced back to Justice Holmes' mandate in *Dietrich* [75] that there be a live-born infant at the time of the tortious conduct. Yet, Justice Holmes' statement was not derived from the common law, since the common law provided no authority on either side of the question. This "rule," then, reflects not a common law principle but rather a realization of the practical difficulties that the courts would encounter in extending a legal duty to a nonexistent entity.[76] Thus, the continual progress of the medical sciences since

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Island R.R. Co., 248 N.Y. 339, 162 N.E. 99 (1928) (Andrews, J., dissenting), there would still be a need to limit liability. As Dean Prosser wrote:

> It is of no aid to say, with Andrews, that the question is one of "practical politics," or with Edgerton that it is merely one of "justice." All of the law is a combination of both, and neither has been defined to the satisfaction of anyone. It is cold comfort either to the lawyer seeking to decide how to decide whether to settle his case, or the judge seeking to decide how to decide it, to be told that there is "little to guide us other than common sense."

See Prosser, *supra* note 68, at 24.

73. *See* note 78 and accompanying text *infra*.

74. *See* note 19 and accompanying text *supra*. *See also* James, *Scope of Duty in Negligence Cases*, 47 NW. U. L. REV. 778, 788-89 (1953); Note, *The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries*, 110 U. PA. L. REV. 554, 566 n.77 (1962); Case and Comment, *Report of the Scottish Law Commission on Antenatal Injury*, 1974 JUR. REV. 83.

75. *See* notes 10 and 11 *supra*.

76. Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 162 N.E. 99 (1928) is the leading American case on the subject of the scope of a legal duty. *Palsgraf* required that, as a condition precedent to recovery, the negligent conduct must harm a foreseeable interest. *Id.* at 347, 162 N.E. at 101. However, as one commentator asserted, "The limitation of the *Palsgraf* case contains no requirement that the interests within the range of peril be known or identified in the actor's mind, or even be in existence at the time of the negligence." James, *Scope of Duty in Negligence Cases*, 47 NW. U.L. REV. 778, 788 (1953); *See* Kine v. Zuckerman, 4 Pa. D. & C. 227, 230 (1924); 63 HARV. L. REV. 173 (1949); Seavy, Book Review, 45 HARV. L. REV. 209, 210 (1931). There are those who apparently must believe, however, that this requirement of existence is part of the traditional fault concept of liability. *See* note 66 *supra;* Renslow v. Mennonite Hosp., 67 Ill.2d at 375, 367 N.E.2d at 1263 (Ryan, J., dissenting). Those who espouse the former view have phrased their position in conclusory fashion.

In Allaire v. St. Luke's Hosp., 184 Ill. 359, 56 N.E. 638 (1900), the court reviewed both *Dietrich* and Walker v. Great Northern R.R. Co., 28 L.R.Ir. 69 (1891), and denied recovery on the ground that no authority could be found to show that a legal duty had ever been held to arise toward that which *was not* in existence in fact. Ironically, this same lack of authority argument spawned an expanse of case law mandating the converse "principle" that a legal duty must be owed to that which *is* existent in fact. However, this position is as groundless as the former, since there is an equal absence of authority establishing its validity. Indeed, the only conclusion to be derived from the common law is that there simply was no authority on either side of the question. J. SALMOND, LAW OF TORTS, 346 (10th ed., Stallybraus, 1945z. Thus,

Dietrich and the concomitant mitigation of the problems of proving causation necessitate the abrogation of the requirement of existence.[77]

Logic also compels the extension of the scope of legal duty. The *Renslow* court found it illogical to bar relief for an act done prior to

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subsequent courts that recognized recovery for prenatal injuries sustained by viable fetuses, and in some cases by non-viable fetuses, in a sense missed the mark. Their strained efforts to impute existence to a prenatally injured infant were largely directed toward Justice Holmes' mandate requiring a live-born infant at the time of the act, a requirement the validity of which is highly questionable. As the court stated in Damasiewicz v. Gorsuch, 197 Md. 417, 79 A.2d 550 (1951):

> The only logical basis for denying recovery by a child for an injury while "en ventre sa mere" (in its mother's womb) is that stated by Justice Holmes. He based it upon a common law which had no positive existence, but is derived from an isolated statement by Lord Coke, which is itself modified in the same sentence by the suggestion that the law in many cases has consideration for the unborn child by reason of the expectation of its birth.

Id. at 429, 79 A.2d at 560.

The failure to extend a legal duty to infants prenatally injured by preconceptional wrongful conduct must rest upon the same fundamental and practical considerations dealt with in the area of prenatal tort liability. Thus, if the common law provided no authority on the issue of whether a duty is owed only to existent entities, the appropriate analysis must be directed toward the other factors which serve to influence the determination of legal duties.

77. Five factors have been suggested to determine the existence of a legal duty. *See* Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014 (1928), 29 COLUM. L. REV. 255 (1929) (reprinted in L. GREEN, JUDGE AND JURY (1930)). These five factors are helpful in critically analyzing the early common law position denying recovery for prenatal injuries. Translated into Green's "factors," the early common law position can be viewed in the following manner: (1) the ethical or moral factor—there is no life to be guarded apart from the mother's at the time of the actor's conduct; (2) the economic factor—the fictitious claims and false testimony would bear heavily upon the resources of the defendant; (3) the prophylactic factor—the defendant's desire to exercise care and solicitude would be for the mother and not the child born apart from her; (4) the justice factor—man's obligations are determined from his viewpoint, and he generally reckons life from the time of the child's birth; and (5) the administration factor—the claims would be incapable of proof. For a further discussion of these factors, *see* Magnolia Coca Cola Bottling Co. v. Jordon, 124 Tex. 347, 78 S.W.2d 944 (1935).

These fundamental difficulties have been effectively attacked by contemporary authorities. *See* Comment, *Negligence and the Unborn Child: A Time for Change*, 18 S.D. L. REV. 204 (1973); James, *Scope of Duty in Negligence Cases*, 47 NW. U. L. REV. 778 (1953); 63 HARV. L. REV. 173 n.50 (1949). The remaining obstacle in these actions is the inherent difficulty of proof. As Justice O'Brien stated in Walker v. Great Northern R.R. Co., 28 L.R.Ir. 69 (1891), "There are instances in the law where rules of right are founded upon the inherent and inevitable difficulty or impossibility of proof." *Id.* In Damasiewicz v. Gorsuch, 197 Md. 417, 79 A.2d 550 (1951) the court incisively argued that in the days of Coke, Blackstone, and Holmes, difficulty of proof presented insurmountable issues left to be resolved with very little known about the physiological status of the fetus. Thus, the progressive enlightenment of the medical sciences compels the erosion of the argument denying recovery.

There is, therefore, a growing deterioration of the need to consider the legal status of the unborn child at the time of the wrongful conduct. *See* Jorgensen v. Meade Johnson Laboratories, Inc., 483 F.2d 237, 240 (10th Cir. 1973); Renslow v. Mennonite Hosp., 40 Ill. App.3d 234, 351 N.E.2d 870 (4th Dist. 1976); Smith v. Brennan, 31 N.J. 353, 361, 157 A.2d 497, 503 (1960); Sinkler v. Kneale, 401 Pa. 267, 271, 164 A.2d 93, 96 (1960). *See also* Note, *Legal Protection to Unborn Children*, 15 HARV. L. REV. 313 (1902).

conception when the defendant's knowledge of fetal existence is irrelevant for purposes of contemporary prenatal tort liability.[78] The wrongful character of the act would be the same whether occurring prior to or subsequent to conception.[79] Indeed, the exact moment of conception is medically indeterminable[80] and, in this sense, totally inadequate for purposes of establishing the point in time when liability attaches.

Renslow comports with the traditional concept of common law negligence because it was reasonably foreseeable by both the defendants' doctor and hospital that thirteen year old Emma Renslow would "grow up, marry and become pregnant."[81] Thus, the plaintiff was within the range of peril foreseeable by the defendants at the time of the wrongful transfusion of blood, and for this reason as well as for the pressing considerations of social policy and logic, she was entitled to the protection afforded by a legal duty of care.

THE IMPACT OF THE *RENSLOW* DECISION

The subject of preconceptional tort liability has most often been raised in connection with the possibility of recovery for an infant's

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78. 67 Ill.2d at 357. *See* 2 F. HARPER & F. JAMES JR., THE LAW OF TORTS § 18.3, at 1030 (1956) where the authors state:

> A Texas court has said that a reasonable man "reckons life from the time of birth. His conscious care and solicitude are for the expectant mother and not for the unborn child apart from her!" If this amazing statement means that present traumatic injury to a pregnant woman cannot reasonably be seen to endanger the foetus or the after-born child, it flies in the face of medical knowledge which is widely shared (in its rough outlines) by laymen. If it is meant in any narrower sense, it misses the point. If I negligently run into a bakery truck, my "conscious care and solicitude" may be only for the solitary driver, the truck, and the pies. Yet if the back of the truck is filled with children, I am liable to them too if they are hurt. And the improper canning of baby food today is negligence to a child born next week or next year, who consumes it to his injury.

79. *See* Zepeda v. Zepeda, 41 Ill. App.2d 240, 190 N.E.2d 849 (1st Dist. 1963) where the court emphasized the irrefutable logic of allowing this action:

> 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 and 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 250-51, 190 N.E.2d at 854.

80. *See* J. DELEE & J. GREENHILL, PRINCIPLES AND PRACTICE OF OBSTETRICS 96 (8th ed. 1943); 4B R. GORDY-GRAY, ATTORNEYS' TEXTBOOK OF MEDICINE, § 311.30 (3d ed. 1977). Proof of conception also has concerned some judges. *See, e.g.*, Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 507, 93 S.E.2d 727, 730 (1956) (dissenting opinion).

81. 67 Ill.2d at 365, 367 N.E.2d at 1258.

prenatal injuries caused by radiation and chemical accidents.[82] The dissenting opinion in *Renslow* raised fears of the likelihood of suits filed decades after the alleged negligence by successive generations of abnormal infants affected by genetic changes.[83] Indeed the possibility of perpetual liability looms large as an argument against recognition of this action. Ultimately, the general public would be forced to bear the economic burden of these negligence actions. Manufacturers compelled to pay massive negligence losses would mitigate the economic impact by increasing the prices of their products. Insurance companies required to satisfy claims for prenatal injuries would distribute the cost of these payments to the general public in the form of increased premium rates. In response to these considerations, the *Renslow* majority qualified the right to recovery with two significant limitations. First, the damage cannot by its nature be self-perpetuating, and second, the plaintiff cannot be a remote descendant.[84] Thus, the scope of preconceptional tort liability in Illinois should be confined sufficiently to the factual situation presented in *Renslow*, reducing in large part the potential injurious ramifications of this decision.

Preconceptional tort liability also has been discussed in relation to recoveries for "wrongful life."[85] A wrongful life action seeks damages for the birth itself rather than for a distinct prenatal injury. The *Renslow* decision is not a persuasive authority for this type of action because of the overriding legal, social and judicial considerations which effectively preclude the recognition of such a right.[86] Bearing

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82. *See* S. Estep & E. Forgotson, *Legal Liability for Genetic Injuries from Radiation*, 24 LA. L. REV. 1 (1963); Comment, *Radiation and Preconception Injuries: Some Interesting Problems in Tort Law*, 28 SW. L.J. 414 (1974).

83. 67 Ill.2d at 371-81, 367 N.E.2d at 1264 (Ryan, J., dissenting).

84. *Id.* at 358, 367 N.E.2d at 1255.

85. *See generally* Park v. Chessin, 387 N.Y.S.2d 204 (1976); 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).

86. *See, e.g.*, Zepeda v. Zepeda, 41 Ill. App.2d 240, 190 N.E.2d 849 (1st Dist. 1963). In this case, the plaintiff was the infant son of the defendant. The plaintiff alleged that the defendant fraudulently induced the mother to have sexual intercourse with him through false promises of marriage. As a result of the sexual contact, the plaintiff was conceived and thereafter born. He sought damages for the deprivation of his right to be a legitimate child, to have a normal home, to have a legal father, to inherit from his father, and for being stigmatized as a bastard. While the court recognized that the elements of a preconceptional tort were present, it refused to create an action for wrongful life:

> It is not the suits of illegitimates which give us concern, great in numbers as these may be. What does disturb us is the nature of the new action and the related suits which would be encouraged. Encouragement would extend to all others born into the world under conditions they might regard as adverse. One might seek damages for being born of a certain color, another because of race; one for being born with a

in mind that an action for damages is implicit in any remedy for a tortious wrong, most courts would continue to deny an action for wrongful life on the basis that recovery of damages, which are speculative at best, would have staggering societal implications.

The future significance of the *Renslow* decision may lie in its effect on Illinois wrongful death actions. Essentially the Wrongful Death Statute of Illinois allows recovery for those actions maintainable by the infant had it survived.[87] In the area of prenatal tort liability, one Illinois Supreme Court decision permitted survivors of a stillborn fetus to sue for its wrongful death where the injuries were sustained while the fetus was in a viable state.[88] Since the *Renslow* court rejected viability as a criterion for recovery, the decision should constitute strong precedent for abrogating the necessity of establishing viability as a condition precedent to recovery.[89] However, this is not to suggest that viability can serve no purpose. The Illinois Wrongful Death Statute clearly requires the death of a "person" in order to recover damages.[90] The viable fetus can be characterized properly as a "person" since it is capable of survival in the external world outside

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hereditary disease, another for inheriting unfortunate family characteristics; one for being born into a large and destitute family, another because a parent has an unsavory reputation.

Id. at 260, 190 N.E.2d at 858.

87. ILL. REV. STAT. ch. 70, §§ 1, 2 (1975). This statute states in part:

> Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages. . . .

The relevant portion of the statute allows recovery for those actions maintainable by the infant had he survived birth. Clearly, those actions would be grounded upon common law tort principles. Thus, the arguments pertaining to prenatal injuries apply with equal weight to wrongful death recovery. *See* Discussion of Recent Decisions, *Damages for the Wrongful Death of a Fetus—Proof of Fetal Viability*, 51 CHI.-KENT L. REV. 227 (1974).

88. Chrisafogeorgis v. Brandenberg, 55 Ill.2d 368, 304 N.E.2d 88 (1973). In *Chrisafogeorgis*, the decedent's mother, while in her 36th week of pregnancy, was struck by the defendant's automobile as she walked across a street in September of 1966. Emergency surgery failed to save the infant who allegedly died as a result of the accident. The court, relying on Amann v. Faidy, 415 Ill. 422, 114 N.E.2d 412 (1953) held that there could be a recovery under the Wrongful Death Act for the wrongful death of a viable fetus born dead as a result of prenatal injuries. *See* note 38 *supra*.

89. *See* Discussion of Recent Decisions, *Damages for the Wrongful Death of a Fetus—Proof of Fetal Viability*, 51 CHI.-KENT L. REV. 227, 228 n.17 (1974) for a comprehensive listing of those jurisdictions permitting an action for the wrongful death of a stillborn fetus, prenatally injured while viable. However, the viability limitation is as objectionable in wrongful death actions as in prenatal tort liability actions. *See* Del Tufo, *Recovery for Prenatal Torts: Actions for Wrongful Death*, 15 RUTGERS L. REV. 61, 78 (1960).

90. *See* note 87 *supra*.

of the mother's womb. Thus, viability can be used as a meaningful determinant to signify the point in time after which fetal death may occur for purposes of wrongful death recovery.[91]

CONCLUSION

The *Renslow* court in a well-reasoned opinion recognized a right of action for preconceptional tort recovery and again demonstrated that the genius of the common law lies in its flexibility and capacity for adaptation.[92] To suggest that this decision abandons traditional concepts of tort liability is to ignore the fundamental principle that the common law, by way of damages, gives redress for personal injuries inflicted by the wrongful negligence of another.[93] The *Renslow* decision has shown that the inherent problems of proof and the implicit inability of the courts to conceptualize the legal existence of a potential life should not serve to deny a right of action where justice and social policy demand it.[94] The overriding judicial concern in *Renslow* for the rights of the prenatally injured child has created for the time being, the desirable consequence of forcing doctors and hospitals to exercise additional care and caution in the administration of blood transfusions. Indeed, as the plaintiff successfully argued in *Renslow*, "[t]o require doctors and hospitals to guard against the transfusion of patients with mistyped blood is a burden of profoundly reasonable proportions."[95]

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91. Such a construction may be in conflict with the statutory intent. *See* Recent Decisions, *Damages for the Wrongful Death of a Fetus*, note 89 *supra* at 232-33. However, there is strong medical authority in favor of adopting such a construction of viability. *See* A. MILUNSKY, GENETICS AND THE LAW 39 (1976). Practical difficulties of determining fetal death should not bar the use of viability as the stage after which the death of a "person" may occur. *See* D. DANFORTH, OBSTETRICS AND GYNECOLOGY 264 (1966).

By construing the word "person" in the Wrongful Death Act to include the viable fetus, the court in *Chrisafogeorgis* may have implicitly suggested that the infant need not actually be born alive before death, but simply have attained the degree of maturity at death where it could have survived in the external world if death had not ensued.

92. 67 Ill.2d at 362, 367 N.E.2d at 1254. *See* Amann v. Faidy, 415 Ill. 422, 432-34, 114 N.E.2d 412, 418 (1953).

93. Allaire v. St. Luke's Hosp., 184 Ill. 359, 369-70, 56 N.E. 638, 641 (1900) (Boggs, J., dissenting).

94. The decision also rejected countervailing considerations of cost. It has been suggested that the public has reached the point where it can no longer bear the economic burden of our present-day system of tort law. 67 Ill.2d at 373, 367 N.E.2d at 1263 (Ryan, J., dissenting). Indeed, the rising cost of medical malpractice insurance, and its inflammatory effect upon the cost of individual health care, perhaps compels the rejection of such a tort action.

95. Brief and Argument of Appellees at 19, Renslow v. Mennonite Hosp., 67 Ill.2d 348, 367 N.E.2d 1250 (1977).