Prenatal Injuries Caused by Negligence Prior to Conception: An Expansion of Tort Liability

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

Few areas of tort law have undergone a more radical reversal of legal reasoning than that of prenatal injury. This reversal is dramatically reflected by the recent decision of the Illinois Supreme Court in Renslow v. Mennonite Hospital. The court in Renslow resolved an issue of first impression in Illinois when it permitted an action for prenatal injuries which resulted from negligent conduct occurring prior to conception. Judicial recognition of the right to recover for prenatal injuries which result in injury or death to the later-born infant is a recent development in tort law. Renslow broadened this concept to include pre-conception injuries and thus marked an expansive advancement from prior historical restrictions.

At early common law, it was recognized that a prenatal injury afforded no foundation for an action in damages. The underlying rationale was that the unborn child was not recognized as having an existence separate from its mother. This rule was strictly adhered to despite the fact that civil, ecclesiastical and admiralty courts frequently afforded the unborn child in esse status. The rule forbidding prenatal recovery changed because of developing scientific proof that a fetus has a separate existence in the mother’s womb. However, consistent with the then popular view that an unborn child’s existence commenced with viability, the right to recover

2. For purposes of this article, the term pre-conception refers to any time prior to conception and the term prenatal refers to the time between conception and birth.
8. Viability is the ability to live, grow, and develop; viable is capable of living, as a newborn or a fetus which has reached a stage, usually twenty-eight weeks or older, which will permit it to live outside the uterus. TABER’S CYCLOPEDIC MEDICAL DICTIONARY V-22 (13th ed. 1977) [hereinafter cited as TABER’S].

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was, for a time, limited to those who had matured to a viable stage at the
time of injury. This restriction assured the courts that there was life in the
womb capable of existence independent of the mother.

In time the courts realized that the viability criterion was arbitrary and,
in an effort to provide more protection for the unborn child, began to
recognize liability even when the child had not attained viability status at the
time of the injury. This recognition was prompted by an awareness that a
fetus is a separate entity and should therefore be afforded a legal status at
conception. Today, the majority of jurisdictions permit recovery for prenatal
injuries incurred at any stage of fetal development.

The issue of recovery for prenatal injuries, in its brief existence, has
generated considerable controversy. Each case raises an assortment of
unique and difficult social and legal issues, such as the legal status to be
afforded a fetus, the reasonableness of recognizing a duty to a person not
yet in being, the scope of protection to be afforded a potential child and
the difficulties of proof and causation. The extension of liability to pre-
conception negligence raises even more troublesome questions about what
kinds of injuries should be, and what kinds of injuries can be, equitably
redressed under our existing tort system. For this reason, Renslow, the first

The term viability was similarly defined by the United States Supreme Court in Roe v.
Wade, 410 U.S. 113 (1973), as "potentially able to live outside the mother's womb, albeit with
artificial aid." 410 U.S. at 160 (quoting L. HELLMAN & J. PRITCHARD, WILLIAMS OBSTETRICS
493 (14th ed. 1971); DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1689 (24th ed. 1965)). The
Court noted that viability usually occurs at about seven months, but may occur as early as 24
weeks. Roe, which held a Texas criminal abortion statute unconstitutional, noted that the state
has an important and legitimate interest in protecting the potentiality of human life. This
interest increases as the woman approaches term, and at the point the fetus reaches viability,
becomes compelling. The Court chose viability as the line of demarcation because at that point
the fetus has the capability of meaningful life outside the womb. The Court concluded that
when a fetus reaches viability, the state may prohibit the mother from obtaining an abortion,
except when necessary to protect the life or health of the mother.

9. E.g., Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946); Amann v. Faidy, 415 Ill. 422,
114 N.E.2d 412 (1953).


approximately six weeks pregnant); Damasiewicz v. Gorsuch, 197 Md. 417, 79 A.2d 550 (1951);
108 (1958); Sinkler v. Kneale, 401 Pa. 267, 164 A.2d 93 (1960) (mother one month pregnant);
N.E.2d 691 (1961) (mother approximately one month pregnant); Kelly v. Gregory, 282 App.


15. E.g., Amann v. Faidy, 415 Ill. 422, 114 N.E.2d 412 (1953); Graf v. Taggert, 43 N.J.
303, 204 A.2d 140 (1964).
case in Illinois to allow an action for pre-conception negligence, commands the detailed scrutiny of any attorney practicing in this area of the law. Its significance, however, does not end there. Additionally, Renslow represents the first time that the Illinois Supreme Court has passed on the question of a right of action for injuries sustained in utero during a previable stage of development.

This comment will assess the reasoning of the court's holding in Renslow. Toward that end, it is necessary to review the cases in Illinois and other jurisdictions which established prenatal injury law. Related topics that will be discussed include viability, the concept of liability premised upon duty and the significance of the elements of foreseeability and causation. Finally, the problems presented by Renslow and the merits of the decision will be explored.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY OF RENSLOW

Emma Renslow, individually and on behalf of her minor daughter, Leah Ann, brought an action in negligence and wilful and wanton misconduct against the Mennonite Hospital and its Director of Laboratories. Damages were sought for personal injuries sustained by Leah Ann while a fetus. At first glance, the facts in Renslow seem to be indistinguishable from those in earlier prenatal cases. However, peculiar to Renslow was the fact that Leah Ann's injuries were the result of negligent acts committed against her mother many years before Leah Ann was conceived.

The complaint alleged that in October of 1965, when Emma Renslow was thirteen years of age, she was admitted to the defendant hospital. At that time, the defendant doctor was in charge of the defendant hospital's laboratory division. Twice during her treatment, Emma was transfused with Rh-positive blood. Her Rh-negative blood was not compatible with, and was sensitized by, the Rh-positive blood. It was not until December of 1973, when she underwent a routine blood test after becoming pregnant, that Emma Renslow became aware of an adverse reaction caused by the transfusions. The sensitization of her blood ultimately resulted in prenatal damage to Leah Ann's hemolytic processes. By necessity, delivery was prematurely induced. Leah Ann was born on March 5, 1974, jaundiced and

16. The term sensitized means made susceptible to a specific substance. TABER'S, supra note 8, at S-33.
17. The term hemolytic pertains to the breaking down of red blood cells. TABER'S, supra note 8, at H-29.
18. "Jaundice is a condition characterized by yellowness of skin, whiteness of eyes, mucous membranes, and body fluids, due to deposition of bile pigment resulting from excess bilirubin (hyperbilirubinemia) in the blood. It may be caused by obstruction of bile passageways, excess destruction of red blood cells (hemolysis), or disturbances in functioning of liver cells." TABER'S, supra note 8, at J-1.
suffering from hyperbilirubinemia.\textsuperscript{19} Her life was in grave danger. Immediately after birth, she required one complete exchange transfusion of her blood and another shortly thereafter. It was alleged that Leah Ann's nervous system and various other organs were permanently damaged.

The portion of the complaint which sought damages for Leah Ann's injuries was dismissed at the trial stage. The trial court decided, as a matter of law, that there was no actionable tort because Leah Ann was not conceived at the time of the negligent acts. The Fourth District Appellate Court reversed, finding "no logical reason to deny recovery to a person simply because he had not been conceived when the wrongful conduct took place."\textsuperscript{20} The appellate court noted that although the tortious act occurred before Leah Ann's conception, she was not injured until after conception. When viewed in this perspective, \textit{Renslow} was merely another action for prenatal personal injuries, distinguishable only by the fact that the injuries were caused by pre-conception conduct. This distinction was not enough to convince the court to bar the plaintiff's action.\textsuperscript{21}

The Illinois Supreme Court granted leave to appeal. The sole question presented was whether a child, not conceived at the time negligent acts were committed against its mother, had an action against the tortfeasors for its injuries resulting from their misconduct.

\textbf{Prior Case Law}

\textit{Prenatal Injury Cases}

The first case in the United States to discuss recovery for prenatal injuries was the landmark case of \textit{Dietrich v. Inhabitants of Northampton},\textsuperscript{22} decided in 1884 by the Supreme Judicial Court of Massachusetts. The \textit{Dietrich} court dismissed an action for the wrongful death of a nonviable fetus which had died after a premature birth.\textsuperscript{23} The decision rested on the

\begin{itemize}
  \item[\textsuperscript{19}] The term hyperbilirubinemia refers to an excessive amount of bilirubin in the blood. \textit{Taber's}, \textit{supra} note 8, at H-69. Bilirubin is the orange-colored or yellowish pigment in bile which is carried to the liver by the blood. It is produced from hemoglobin of red blood cells in the bone marrow, in the spleen and elsewhere. It is changed chemically in the liver, and finally excreted. \textit{Taber's}, \textit{supra} note 8, at B-27.
  \item[\textsuperscript{20}] 40 Ill. App. 3d 234, 240, 351 N.E.2d 870, 874 (1976).
  \item[\textsuperscript{21}] Id. at 239, 351 N.E.2d at 874.
  \item[\textsuperscript{22}] 138 Mass. 14 (1884). In \textit{Dietrich}, the plaintiff, who was four or five months pregnant, slipped and fell on a negligently maintained roadbed. As a result, she suffered a miscarriage. There was evidence that the child lived for ten to fifteen minutes after the miscarriage. \textit{Id.} at 14-15.
  \item[\textsuperscript{23}] Since \textit{Dietrich} involved injury to a non-viable fetus, it was not the most opportune case in which to introduce recovery for prenatal injuries to the law of torts. The \textit{Dietrich} court was, in all likelihood, hesitant to create a duty to an unborn child because of the absence of a developed medical science at that time. Comment, \textit{Negligence and the Unborn Child: A Time for Change}, 18 S.D.L. Rev. 204, 206 (1973) [hereinafter cited as \textit{A Time for Change}].
\end{itemize}
absence of precedent\textsuperscript{24} and the then-popular concepts that a child could not survive outside its mother’s womb before birth and that a child had no legally recognizable existence separate from its mother upon which to predicate a duty. Damage to the unborn child, said the court, “which was not too remote to be recovered for at all was recoverable by [the mother].”\textsuperscript{25} \textit{Dietrich} provided the precedent and reasoning which was to be followed for years.\textsuperscript{26}

\textit{Dietrich} was adopted as dispositive in 1900 by the Illinois Supreme Court in \textit{Allaire v. St. Luke’s Hospital},\textsuperscript{27} which denied recovery to a plaintiff who, at the time of injury, was a viable fetus.\textsuperscript{28} The rationale of the court’s holding was that the defendant owed no independent duty to the child because “a child before birth is, in fact, a part of the mother and is only severed from her at birth.”\textsuperscript{29} Justice Boggs, whose vigorous dissent\textsuperscript{30} was relied upon in subsequent cases allowing recovery for prenatal injuries, questioned whether it was “sacrificing truth to a mere theoretical abstraction to say the injury was not to the child but wholly to the mother”\textsuperscript{31} when the fetus was independently viable at the time of the injury.\textsuperscript{32} Medical science has demonstrated, said Justice Boggs, that

\begin{quote}
[A]t a period of gestation in advance of the period of parturition the foetus is capable of independent and separate life, and
\end{quote}

\textsuperscript{24} The court in \textit{Dietrich} commented: “But no case, so far as we know, has ever decided that, if the infant survived, it could maintain an action for injuries received by it while in its mother’s womb.” 138 Mass. at 15.

\textsuperscript{25} \textit{Id.} at 17.

\textsuperscript{26} Cases relying on \textit{Dietrich} were: Stanford v. St. Louis-S.F. Ry., 214 Ala. 618, 108 So. 566 (1926); \textit{Allaire v. St. Luke’s Hosp.}, 184 Ill. 359, 56 N.E. 638 (1900); Buel v. United Rys., 248 Mo. 126, 154 S.W. 71 (1913); Steemper v. Kline, 128 N.J.L. 455, 26 A.2d 489 (1942); Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1931); Berlin v. J.C. Penney Co., 339 Pa. 547, 16 A.2d 28 (1940); Gorman v. Budlong, 23 R.I. 169, 49 A. 704 (1901); Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S.W.2d 944 (1935); Lipps v. Milwaukee Elec. Ry. & Light Co., 164 Wis. 272, 159 N.W. 916 (1916). In a few cases, recovery was barred on the theory that there was a contract and therefore no duty was owed. Nugent v. Brooklyn Hts. Ry., 154 App. Div. 667, 139 N.Y.S. 367 (1913); Walker v. Great N. Ry., 28 L.R. Ir. 69 (1890). In \textit{Walker}, the defendant-carrier had contracted to carry the plaintiff's mother. The court denied recovery to plaintiff in a personal injury action, holding that the defendant owed no duty to the plaintiff while she was in her mother's womb because the defendant had no knowledge as to the plaintiff’s presence.

\textsuperscript{27} 184 Ill. 359, 56 N.E. 638 (1900). In \textit{Allaire}, the expectant mother, nine months pregnant, boarded an elevator within the defendant hospital and was injured therein. Her later born child sued for his prenatal injuries.

\textsuperscript{28} The cases adopting \textit{Dietrich}, including \textit{Allaire}, disregarded the fact that the communication of a shock to the mother in \textit{Dietrich} was the sole injury to the infant. \textit{See LAWYER’S MEDICAL CYCLOPEDIA}, supra note 6.

\textsuperscript{29} 184 Ill. at 368, 56 N.E. at 640.

\textsuperscript{30} Mr. Justice Boggs distinguished \textit{Allaire} from \textit{Dietrich} on the basis that the unborn child in \textit{Dietrich} had not attained a state of viability whereas the unborn child in \textit{Allaire} was viable when injured. \textit{Id.} at 372-73, 56 N.E. at 642 (Boggs, J., dissenting). This is a distinction frequently drawn.

\textsuperscript{31} \textit{Id.} at 370, 56 N.E. at 641.

\textsuperscript{32} \textit{Id.}
that though within the body of the mother, it is not merely a part of her body, for her body may die in all its parts and the child remain alive and capable of maintaining life when separated from the dead body of the mother. 33

The dissent of Justice Boggs thus became the first inroad into the doctrine precluding recovery for prenatal injuries.

Despite the eloquent dissent of Justice Boggs, Dietrich and Allaire reflected the status of judicial thought in the United States over the next forty-six years. While courts occasionally disagreed with this view, and many judges dissented from opinions upholding it, it was not until 1946 that changes occurred. 34 A rapid series of cases, commencing with Bonbrest v. Kotz, 35 brought about what has been termed the most abrupt reversal ever to take place in the law of torts. 36 Bonbrest, decided by the United States District Court for the District of Columbia, initiated the shift by departing from Dietrich and becoming the first case to recognize a common law action for prenatal injuries. 37 Bonbrest is particularly significant because it established viability as the minimum liability standard. 38 It quoted with approval the following observation of the Supreme Court of Canada 39 in a factually similar case:

If a child after birth has no right of action for prenatal injuries, we have a wrong inflicted for which there is no remedy . . . for . . . there is a residuum of injury for which compensation cannot be had save at the suit of the child. If a right of action be

33. Id. at 370, 56 N.E. at 641. Mr. Justice Boggs further stated:
The law should, it seems to me, be, that whenever a child in utero is so far advanced in pre-natal age as that, should parturition by natural or artificial means occur at such age, such child could and would live separable from the mother and grow into the ordinary activities of life, and is afterwards born and becomes a living human being, such child has a right of action for any injuries wantonly or negligently inflicted upon his or her person at such age of viability, though then in the womb of the mother. That proposition having been established, that an adjustment of damages with the mother could not preclude the child would naturally and necessarily follow. Id. at 374, 56 N.E. at 642.


37. The Bonbrest court distinguished Dietrich as follows: "[H]ere we have not, as in the Dietrich case, an injury transmitted from the actor to a person through his . . . mother before he became a person . . . but a direct injury to a viable child. . . ." 65 F. Supp. at 140.
38. Note, The Law and the Unborn Child: The Legal and Logical Inconsistencies, 46 NOTRE DAME LAW. 349, 356 (1971). Although Bonbrest limited its holding to injuries sustained by a viable fetus, it noted, rather significantly, that "apart from viability, a non-viable fetus is not a part of its mother." 65 F. Supp. at 140.
denied to the child it will be compelled, without any fault on its part, to go through life carrying the seal of another's fault. . . .

In allowing recovery for personal injuries sustained by a surviving infant injured during delivery, the court recognized that an infant has a legal existence separate from its mother at such time as it is capable of independently sustaining its life.

The turnabout started by *Bonbrest* in other jurisdictions was paralleled in Illinois. In 1953, the Illinois Supreme Court, in *Amann v. Faidy*, added impetus to the *Bonbrest* doctrine by recognizing an action for prenatal injuries to a fetus. However, as in *Bonbrest*, recovery was predicated on the existence of viability at the time of injury. The court overruled *Allaire* and allowed an action for the wrongful death of a child who was injured while a viable fetus and who died after birth as a result of the injury. In support of its decision, the court dismissed each of the grounds traditionally urged in support of the rule denying a viable child an action for prenatal injuries. These grounds include: (1) the absence of precedent; (2) the difficulty of establishing a causal relation between a prenatal injury and the condition of the child and the possibility of fictitious claims therefrom; and (3) the lack of a duty to the unborn child because it has no separate being apart from its mother.

With respect to the lack of common law precedent, the court stated that

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40. *Id.* at 345. In *Montreal Tramways*, the Supreme Court of Canada held that a child was entitled to recover for prenatal injuries, rejecting the defenses: (1) that a child was not *in esse* at the time of the accident, but was a part of the mother; and (2) that a contractual obligation with the child was absent. This case was actually the first to break away from *Dietrich* and allow an action for prenatal injuries. *Bonbrest*, however, was the first in the United States to sustain a prenatal injury action. Prior to *Bonbrest*, the Pennsylvania decision of *Kine v. Zuckerman*, 4 Pa. D. & C. 227 (1924), acknowledged recovery. This decision was, however, overruled by the Pennsylvania Supreme Court in *Berlin v. J.C. Penney Co.* 339 Pa. 547, 16 A.2d 28 (1940).

41. "[A] viable child . . . while dependent for its continued development on sustenance derived from its peculiar relationship to its mother, is not a 'part' of the mother in the sense of a constituent element . . . . Modern medicine is replete with cases of living children being taken from dead mothers." 65 F. Supp. at 140.

42. 415 Ill. 422, 114 N.E.2d 412 (1953).

43. The first state supreme court to permit a viable child to recover was the Ohio Supreme Court in *Williams v. Marion Rapid Transit, Inc.*, 152 Ohio 114, 87 N.E.2d 334 (1949). Other jurisdictions shortly followed the lead of *Bonbrest* by recognizing the capacity of the infant to sue for prenatal injuries. In fact, the Supreme Judicial Court of Massachusetts in effect, overruled its holding in *Dietrich* in *Keyes v. Construction Serv., Inc.*, 340 Mass. 633, 165 N.E.2d 912 (1960), when it said:

We think it advisable that in respect to the subject of prenatal injury the law of this Commonwealth should be in general in harmony with that of the large and growing proportion of the other States which have adopted in principle the rule proposed by Judge Boggs. There is no need to reverse the *Dietrich* decision which doubtless was right when rendered but we recognize that in view of modern precedent its application should be limited to cases where the facts are essentially the same.

340 Mass. at 637, 165 N.E.2d at 415. See also *Lawyer's Medical Cyclopeda*, supra note 6, at § 37.30.

44. 415 Ill. at 428, 114 N.E.2d at 415.
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nothing in the common law denied such a right to injured children. To the contrary, the court noted that a child can "have a legacy, can own an estate, and a guardian can be assigned to it." The court further observed that an unborn child is recognized by criminal and admiralty law. Thus, the court concluded that the processes of the law do not withhold from a child the right to protect and preserve its person and property.

In response to the argument that it was difficult to prove a causal relation between the injury and the damage, the Amann court recalled the observation of a California appellate court in Scott v. McPheeters that "[t]he difficulty of obtaining proof of the wrong should prompt greater leniency in affording the remedy, rather than a denial of plain justice." The court observed that physicians of today would have little trouble with the problem of proof even though the problem might have been insurmountable long ago and that the fear of fraudulent claims should have no bearing on whether legitimate claims are heard.

The third ground upon which recovery has been denied, the identity of mother and child, was likewise rejected by the Amann court. In support of its position, the court cited medical authorities on the proposition that an infant, while unborn, reaches a stage during gestation where it can live outside of its mother. In light of these "outmoded timeworn fictions," the court granted to the plaintiff an action against the defendant hospital.

Following Amann, the Illinois Supreme Court in Rodriguez v. Patti extended an action for prenatal personal injuries to an infant who was injured while a viable fetus and who survived. The court found the holding of Amann to be decisive of the legal issues before it.

Then, eight years later, the Appellate Court for the First District went one step further and, in two decisions allowed liability to attach for previable injuries. In Daley v. Meier, the court permitted an infant, who survived after sustaining injuries when his mother was approximately two

45. Id. at 429, 114 N.E.2d at 416 (quoting with approval the Supreme Court of Georgia in Tucker v. Howard L. Carmichael & Sons, Inc., 208 Ga. 201, —, 65 S.E.2d 909, 910 (1951)).
46. 415 Ill. at 429-30, 114 N.E.2d at 416.
47. 33 Cal. App. 2d 629, 92 P.2d 678 (1939).
48. Id. at 637, 92 P.2d at 682.
49. 415 Ill. at 432, 114 N.E.2d at 417 (quoting with approval from Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691, 695 (1951)).
50. 415 Ill. 496, 114 N.E.2d 721.
months pregnant, to maintain an action for prenatal injuries. In so holding, the court recognized that an action for prenatal injuries is not dependent upon viability. Even though Amann\textsuperscript{53} employed the viability standard, Daley relied on the overall reasoning and tenor of that decision.\textsuperscript{54} In particular, Daley relied on the statements in Amann that lack of precedent should not bar recovery where a wrong has been committed,\textsuperscript{55} proof of a causal relation between the injury \textit{en ventre sa mere}\textsuperscript{56} and subsequent damage is no longer as speculative\textsuperscript{57} and the reasons which have been advanced in support of nonliability are insubstantial.\textsuperscript{58}

The identical question formulated in Daley was raised in Sana v. Brown.\textsuperscript{59} In Sana, the plaintiff was born four and one-half months after an automobile accident in which her mother sustained injuries. The defendant filed a motion to dismiss the complaint as to the plaintiff-child on the ground that she was not viable at the time of the injury. The appellate court found Daley to be controlling on the issue that an action for prenatal injuries is not dependent on viability and remanded with directions to overrule defendant’s motion to dismiss.\textsuperscript{60}

Finally, in Chrisafogeorgis v. Brandenberg,\textsuperscript{61} prenatal injury recovery was broadened by the Illinois Supreme Court to permit a wrongful death action on behalf of a child who was injured while viable and thereafter born dead. The only fact in Chrisafogeorgis which was different from Amann was the time of death. In Amann, the child died after delivery while in Chrisafogeorgis the child was stillborn. The character of injury, however, was identical because the child in each case was injured while viable. The court noted that the basic question in both cases was the legal significance of viability. Therefore, the court found in Chrisafogeorgis, that it was a natural development from the Amann holding to allow an action for injuries sustained by a viable fetus who was stillborn. By 1973, the barriers to a right

\textsuperscript{53} 415 Ill. 422, 114 N.E.2d 412 (1953).
\textsuperscript{54} 33 Ill. App. 2d at 223, 178 N.E.2d at 694.
\textsuperscript{55} Id.
\textsuperscript{56} \textit{En ventre sa mere} is a term meaning “in its mother’s womb.” BLACK’S LAW DICTIONARY 619 (4th rev. ed. 1968).
\textsuperscript{57} 415 Ill. at 430, 114 N.E.2d at 417.
\textsuperscript{58} Id. at 432, 114 N.E.2d at 417.
\textsuperscript{60} Id. at 426, 183 N.E.2d at 187. In only two cases, Rapp v. Hiemenz, 107 Ill. App. 2d 382, 246 N.E.2d 77 (1969), and Green v. Smith, 51 Ill. App. 3d 856, 366 N.E. 2d 961 (1977), have Illinois courts recently denied prenatal actions. The facts in \textit{Rapp and Green} are, however, as recognized by the courts, markedly different from those in Daley. In Rapp and Green, the injuries were inflicted at a time when the fetuses were nonviable and thereafter, the children were born dead. In contrast, although the child in Daley was injured while in a previable stage of development, it was born alive. At no time was there a viable fetus in \textit{Rapp or Green} capable of independent existence. Id. at 387, 246 N.E.2d at 79.
\textsuperscript{61} 55 Ill. 2d 368, 304 N.E.2d 88 (1973).
of action for prenatal injuries had been irrevocably penetrated throughout
the United States. 62

Pre-Conception Cases

Throughout the history of prenatal injury actions at common law, the
lack of a person in existence to whom a duty of care could be owed has often
troubled the courts. 63 Few jurisdictions have been confronted with cases
involving pre-conception tortious conduct. However, those which have
faced this problem have concluded that the plaintiff need not be in existence
at the time of the negligent conduct in order to recover.

In Piper v. Hoard, 64 the New York Court of Appeals recognized a right
of action for nonphysical pre-conception tortious conduct. Piper involved a
suit for financial damage suffered by the plaintiff-child as a result of a fraud
perpetrated on her mother before the plaintiff’s conception. The court
allowed the action, reasoning that the plaintiff was the person harmed by the
fraud even though she was not born when the fraud was committed. Even
though the plaintiff, individually, was not in the mind of the defendant when
he perpetrated the fraud, she belonged to the class of persons contemplated
by the defendant when he made his misrepresentations. 65

The United States Court of Appeals for the Tenth Circuit, in Jorgenson
v. Meade Johnson Laboratories, 66 allowed an action to be maintained by
surviving children even though the negligent act causing their injuries
occurred prior to conception. The father brought suit against a pharmaceu-
tical company seeking to hold it liable for the creation of a mongoloid
condition in his twin daughters. The complaint averred that the mother of
the twins used birth control pills manufactured by the defendant company

64. 107 N.Y. 73, 13 N.E. 626 (1887).
65. The court said:
It is true the plaintiff was not born when the fraudulent representations were made. Still they were made by defendant to the plaintiff’s mother for the purpose of inducing a marriage between the parents, and if they had been true, the plaintiff would have been the owner of this particular property. In this way she is the very person injured by the fraud, and although not individually in the mind of the defendant when he perpetrated that fraud, yet, as filling the position of heir to her father, she belongs to the class which defendant had in contemplation when he represented to the mother that the heir of Frederick would have the farm. In this way it may be claimed that defendant had in view the plaintiff and the rights he alleged she would have.
66. 483 F.2d 237 (10th Cir. 1973). Although the Renslow appellate court decision relied on Jorgensen to support its holding, the Illinois Supreme Court disregarded Jorgensen, saying that the decision focused on causation in permitting a cause of action for pre-conception tortious conduct. 67 Ill. 2d at 356, 367 N.E.2d at 1254.
and became pregnant after she ceased taking the pills. The pills allegedly altered the mother's chromosome structure, thus creating a mongoloid deformity in the viable fetus. The court, although recognizing that the pleadings could not be interpreted as being limited to pre-conception developments, indicated that tortious conduct occurring prior to conception is actionable on behalf of an infant ultimately injured by the wrong. The court observed that "[i]f the view prevailed that tortious conduct occurring prior to conception is not actionable in behalf of an infant ultimately injured by the wrong, then an infant suffering personal injury from a defective food product, manufactured before his conception, would be without a remedy."

An action was brought in a New York court by the parents on behalf of the estate of their minor daughter in *Park v. Chessin*. The central issue was whether there exists after birth a right to make claim for pain and suffering resulting from a tort committed prior to conception. The complaint claimed that the mother of the deceased plaintiff gave birth to a child in June of 1969. The child was born with polycystic kidneys and died shortly thereafter. The defendant doctor advised the mother that she could safely become pregnant again. Upon so doing, she gave birth to a second child who suffered from polycystic kidneys, which resulted in the child's death. The estate of this infant-decedent sought damages for the pain suffered by her after her birth based upon the tort committed prior to conception. The court upheld the right to bring the action because the second infant child was a "potential being with essential reality at the time of the act." The court noted that:

Once having been born alive, particularly where, as here, the child was foreseeable and within the contemplation of the defendants, where defendants are claimed to have been aware of or should

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67. The court explained:
However, in giving the complaint the favorable consideration required we must weigh with the remainder of the complaint the allegations that 'a Mongoloid deformity was created within the viable fetus of the minor plaintiffs during the period of development prior to birth . . . ' and that the ' . . . viable fetus of the minor plaintiffs were exposed to the altered chromosome structure within the mother's body . . . ' Thus the pleading should not be construed as being limited to effects or developments before conception.

483 F.2d at 239.

68. *Id.* at 240.

69. 88 Misc. 2d 222, 387 N.Y.S.2d 204 (1976).


71. The court said:
Since the decedent's conception took place after the alleged tort committed by defendants, and since the child was a potential being with essential reality at the time of the act, for she belonged to a class which defendants could foresee and had in contemplation when they made the alleged misrepresentation to the mother and committed the alleged tort, defendants had in view the decedent. In this way, according to *Piper*, it can be claimed there was a "foreseeability".

88 Misc. 2d at 227, 387 N.Y.S.2d at 208.
have been aware of the danger that said child might or would be born with such defects, and malady, said child assuredly comes within the "orbit of the danger" for which defendants could be held liable.\(^{72}\)

The defendants, said the court, being members of the medical profession, are not "unreasonably burdened if held liable in damages for the injuries caused to those who depend on it for their very lives . . . ."\(^{73}\)

No Illinois court prior to June 10, 1976, when the appellate court opinion in *Renslow* was decided, had been confronted with a case involving an injury occasioned by negligent conduct prior to conception. In fact, the Illinois prenatal decisions had, until that time, restricted recovery to "persons" who were, at the very least, already conceived at the time of injury.\(^{74}\) After *Daley* and *Sana* abandoned viability as a requirement, the Illinois decisions had a twofold concern with whether the injured fetus survived and if it did not, whether it was viable when injured. Among the principal reasons advanced for allowing an action for a prenatal injury was the recognition that a fetus has an existence independent of its mother and is thus capable of sustaining injury.

This restriction of recovery to fetuses might lead one to conclude that under Illinois law only "persons" can be injured and that a fetus becomes a person capable of sustaining injury only if the injury occurs during gestation. It is true that each case in Illinois has at least implicitly recognized that a person must be in existence at the time of the negligent conduct to maintain an action. However, this is because no Illinois court had the occasion to consider a pre-conception injury case prior to *Renslow*.

One Illinois case did, however, allude to the possibility of recovery for pre-conception negligent conduct. In *Zepeda v. Zepeda*,\(^{75}\) a case often described as one for "wrongful life," an action was brought by an illegitimate child against his natural father. The plaintiff alleged that the defendant fraudulently induced the plaintiff's mother to have sexual relations with him by promising to marry her. When the defendant did not marry plaintiff's mother, plaintiff was born a bastard. The issue before the court was whether a tort can be inflicted simultaneously with conception. The court indicated that this issue seemed to be the natural result of the course of recent law

\(^{72}\) *Id.* at 230, 387 N.Y.S.2d at 210.

\(^{73}\) *Id.* at 231, 387 N.Y.S.2d at 211. "Specializing physicians owe a degree of care to their patients greater than the ordinary general practitioner . . . . Unlike other professions, the medical profession deals not with money or property but with the continuance of life and avoidance of death . . . ." *Id.*


which had been allowing actions for injury closer and closer to the moment of conception.

In reference to the possibility of allowing recovery for pre-conception negligent conduct, the appellate court remarked:

But what if the wrongful conduct takes place before conception? Can the defendant be held accountable if his act was completed before the plaintiff was conceived? Yes, for it is possible to incur, . . . 'a conditional prospective liability in tort to one not yet in being.' It makes no difference how much time elapses between a wrongful act and a resulting injury if there is a causal relation between them.\textsuperscript{76}

The court concluded that it was not important whether the plaintiff's life began during or after the negligent conduct. The plaintiff, said the court, cannot be viewed as a "person" in the traditional sense of the word. What is significant is that the plaintiff "is a person now and he was a potential person"\textsuperscript{77} capable of existing independently at the time of the negligent act.

Although the \textit{Zepeda} court labeled the wrong committed by the defendant a tort, it concluded that any such creation of a new tort should be undertaken by the legislature because of the potentially far-reaching effects of such a decision. The court's reason for deferring to the legislature was not that the establishment of a cause of action alleging pre-conception misconduct should lie only with the legislature; rather, the court was concerned with the flood of litigation threatened by the establishment of such a cause of action.

\textbf{RENDSLOW V. MENNONITE HOSPITAL}

The main concern of the \textit{Renslow} court was whether there was a duty owed to this plaintiff by the defendant. In addressing this issue, the court considered several elements which historically have been necessary to the imposition of a duty in negligence actions: namely, whether the plaintiff falls within the class of persons to whom the defendant owes a duty,\textsuperscript{78} whether the consequences of the defendant's conduct were foreseeable,\textsuperscript{79} and whether this was an interest to which the law desired to extend protection.\textsuperscript{80}

The Illinois Supreme Court had not, until \textit{Renslow}, confronted the question of the existence of the right of action for injuries sustained \textit{in utero} during previable fetal development. The complaint in \textit{Renslow} contained no

\textsuperscript{76} \textit{Id.} at 250, \textit{190 N.E.2d} at 853.
\textsuperscript{77} \textit{Id.} at 253, \textit{190 N.E.2d} at 855.
\textsuperscript{78} See \textit{Prosser, supra} note 36, at \S\ 53.
\textsuperscript{79} \textit{Id.} at \S\ 43.
\textsuperscript{80} See \textit{Prosser, supra} note 36, at \S\S\ 54 & 56.
allegations that viability had been realized when the injuries were sustained. Thus, before it could be determined whether the plaintiff fell within the class of persons threatened by the defendant’s conduct, thereby imposing a duty on the plaintiff, the court had to decide whether the right to sue should turn on the viability of the fetus at the time of injury.

**Practical Difficulties in Determining Viability**

In deciding whether viability should be a prerequisite to an action for personal injuries, the *Renslow* court analyzed two crucial factors: (1) the uncertainties and practical difficulties of devising a satisfactory viability standard; and (2) precedents rejecting viability as the determinant of liability.

Courts and commentators alike have for years recognized the practical difficulties of determining when independent life begins in the fetus. Even though the point at which a fetus is capable of surviving apart from its mother has receded due to developments in medical technology, proof of viability is not much easier today than it was years ago. There is no effective way to determine in a borderline case whether a fetus was viable at the moment of injury. It has been said that viability is not determined solely by the age of the fetus; it is rather dependent upon numerous variables such as the age and health of the expectant mother. Because there is no clear line of demarcation, courts have often been forced to decide arbitrarily whether a fetus was capable of independent life at the time of injury. Since the viability limitation is not practical as a test of recovery, the age of the fetus at the time of injury should not be controlling in establishing liability.

The inequities and inconsistencies of the viability standard also have raised serious doubts about its fairness. Most significantly, the viability

81. See notes 82-86 and accompanying text, supra.
84. See 21 VILL. L. REV. 994 (1975-1976); PROSSER, supra note 36, at § 55.
86. Cf. LAWYER'S MEDICAL CYCLOPEDIA, supra note 6, § 37.31 (serious doubt as to whether age of fetus should be controlling).
87. The court in Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 stated:
In the last few years a change has taken place in the law pertaining to prenatal physical injuries. . . . judges were troubled by the unfairness of holding that a child *en ventre sa mere* was a human being for inheritance and property rights and not one if it suffered tortious physical injury . . . . Gradually thereafter various jurisdictions permitted actions for prenatal injuries if a child was viable at the time of injury and if it survived birth . . . , but generally the viability of the child at the time of injury became the criterion upon which recovery rested . . . . The law has slowly come to
criterion has been seen as bearing no relevance to the harm which results from the wrongful prenatal conduct of another. Whether the child is viable at the time of injury or not, he or she frequently sustains the identical harm after birth and thus, should be given the same opportunity for redress. The primary reason for allowing prenatal recovery, the injustice of denying recovery, applies to tortious conduct to a child be he a fetus of three months or eight months at the time of injury. The viability rule limits recovery to viable fetuses for the same reason that *Dietrich* denied all recovery, that is, because no duty of care is owed to an unborn child. Hence, the same criticisms which led to the demise of *Dietrich* can be used to rebut the viability doctrine.

The court in *Renslow* recognized these problems and concluded that the degree of maturity reached by the child at the time of injury should not be the decisive criterion for recovery. The court noted that viability is a "most unsatisfactory criterion since [viability] is a relative matter, depending on the health of mother and child and many other matters in addition to the stage of development." Along with the length of pregnancy, said the court, viability depends on other factors such as the weight and race of the child and available life-sustaining techniques. Further, the court pointed out that denial of claims for injuries to the previable fetus often prevents meritorious claims because "there is substantial medical authority that congenital structural defects caused by factors in the prenatal environment can be sustained only early in the previable stages."

realize these uncertainties and the viability test is being abandoned. Now complaints are being sustained where the pleaded facts show that the child was not or might not have been, viable when the injury occurred.

41 Ill. App. 2d at 248-49, 190 N.E.2d at 852-53.

As for the notion that the child must have been viable when the injuries were received, which has claimed the attention of several of the states, we regard it as having little to do with the basic right to recover, when the foetus is regarded as having existence as a separate creature from the moment of conception.

401 Pa. at 273, 164 A.2d at 96.


90. LAWYER'S MEDICAL CYCLOPEDIA, *supra* note 6, § 37.31.

91. *Id.*

92. *Id.*


94. 67 Ill. 2d at 353, 367 N.E.2d at 1252-53. In fact, it is an established medical proposition that the crucial period of intrauterine development is the first trimester, long before viability. During this time the fetus is most susceptible to environmental influences. Note, *The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries*, 110 U. Pa. L. Rev. 154, 563 (1962).
After noting the difficulties in devising a competent viability test and recalling that the appellate court in Illinois in two decisions\(^9\) had rejected the viability requirement, the Illinois Supreme Court in \textit{Renslow} renounced viability as a requirement in common law actions for prenatal injuries. The analysis, however, did not end there. Still to be decided by the court was the primary and most troublesome issue of whether an action exists on behalf of an infant born alive for injuries resulting from a negligent act occurring prior to conception. At this point, the court turned to an analysis of duty and foreseeability.

\textit{Duty: Not a Static Concept}

Fundamentally, a negligence action requires the existence or imposition of a duty owed to the plaintiff, breach of that duty and injury proximately caused thereby.\(^{96}\) The term "duty" is so nebulous and its boundaries so indistinct that one commentator has observed that "[t]here is a duty if the court says there is a duty."\(^{97}\) The court's pronouncement is often a mirror of the policy and social requirements of the time and community.\(^{98}\) The duty required is that the actor conform to the legal standard of reasonable conduct in the light of the apparent risk.\(^{99}\) This standard of conduct is determined by balancing the risk and the probability and extent of the harm against the value of the interest which the actor is seeking to protect and the expediency of the course pursued. For this reason, negligence is "relative to the need and the occasion"\(^{100}\) and is rarely reducible to precise rules.

There are two commonly recognized classes of duties. A duty may be owed to a particular person because of an existing relationship between the parties or because that person is a member of a general class to which a duty is owed. The former has been defined as "an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another."\(^{101}\) At issue is whether the defendant is under any obligation for the benefit of the particular plaintiff.\(^{102}\) As to the latter:

\[\text{In all cases in which any person undertakes the performance of}\]


\(^{98}\) \textit{Id.}

\(^{99}\) PROSSER, \textit{supra} note 36, at § 53.

\(^{100}\) \textit{Id.} at § 31.

\(^{101}\) \textit{Id.} at § 53.

an act, which if not done with care and skill, will be highly
dangerous to the persons or lives of one or more persons, known
or unknown, the law, ipso facto, imposes, as a public duty the
obligation to exercise such care and skill. Duty is not limited to persons who have relied on the defendant’s conduct.
Instead, it extends to persons who the defendant could reasonably have anticipated would be endangered by the negligent conduct.

Foreseeability of harm as to the person in fact injured is one limitation
of the scope of duty in a negligence action. This limitation requires that
the plaintiff bring himself within the class of persons threatened
by the defendant’s conduct before the conduct complained of will be termed
negligent. The leading example of this principle is found in Palsgraf v. Long Island R. Co.
In Palsgraf, Judge Cardozo, speaking for a majority
of four, refused to impose liability on the defendant. Negligence, he said, is


105. Prosser, supra note 36, at § 43; Palsgraf v. Long Island R. R., 248 N.Y. 339, 162 N.E. 99, 229 N.Y.S. 339 (1928). Foreseeability of harm as to the person in fact injured is to be
distinguished from foreseeability that an injury might result from the negligent act complained
of. The latter is an essential prerequisite to the requirement of proximate cause. Ney v. Yellow
Cab Co., 2 Ill. 2d 74, 79, 117 N.E.2d 74, 78-79 (1954). Proximate cause, however, is not in issue
here.

106. James, supra note 63, at 781.

107. 248 N.Y. 339, 162 N.E. 99, 229 N.Y.S. 339 (1928). In Palsgraf, a passenger was
running to catch one of the defendant’s trains. An employee of the defendant was assisting the
passenger in boarding the train and in so doing, dislodged a package from the passenger’s arms.
The package contained fireworks which exploded. The explosion overturned some scales a
distance away which fell on the plaintiff who was standing on the station platform. Nothing
about the package indicated that it contained explosives. The only negligence complained of
was the action of the employee in assisting the passenger.
a relationship or duty between the parties founded on foreseeability of harm to the particular plaintiff injured. You cannot have "negligence in the air, so to speak . . . ." Judge Cardozo further stated that the conduct of defendant's employees

if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relative to her it was not negligence at all. Nothing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed . . . . If no hazard was apparent to the eye of ordinary vigilance, an act innocent and harmless, at least to outward seeming, with reference to her, did not take to itself the quality of a tort because it happened to be a wrong . . . with reference to someone else . . . . What the plaintiff must show is a "wrong" to herself.

In other words, plaintiff cannot be "the vicarious beneficiary of a breach of duty to another," but must sue in his own right. Under the Palsgraf rule, the inquiry into foreseeability is not limited to the physical range of foreseeable harm or to mere proximity in time or space, nor is it restricted to situations where the defendant had knowledge as to exactly how the accident would occur. Rather, it is concerned with the natural forces and human conduct that were likely to intervene and the consequences likely to result in view of these interventions. In all likelihood, if the defendant's employees in Palsgraf had known or had reason to know that the package contained fireworks, their negligence would have encompassed all people within the probable area of the explosion, including the plaintiff.

The Cardozo theory of foreseeability was adopted in Illinois in the 1974 case of Cunis v. Brennan. There, in discussing the factors that condition the imposition of a duty in a negligence action, the court said, "the occurrence involved must not have been simply foreseeable . . . it must have been reasonably foreseeable." The key to the question of

108. Id. at 341, 162 N.E. at 99-100, 229 N.Y.S. at 341 (quoting F. Pollack, Torts 455 (11th ed. 1920)). Three judges dissented in the Palsgraf case. Judge Andrews expressed their view that negligence does not depend upon a relation between the plaintiff and defendant. Rather, there is a duty toward the world at large not to be negligent to any person. 248 N.Y. at 350, 162 N.E. at 103, 229 N.Y.S. at 350 (Andrews, Crane & O'Brien, J.J., dissenting).

109. Id. at 341, 344, 162 N.E. at 99-100, 229 N.Y.S. at 341, 344.

110. Id. at 342, 162 N.E. at 100, 229 N.Y.S. at 342.

111. James, supra note 63, at 782.

112. 248 N.Y. at 344, 162 N.E. at 100, 229 N.Y.S. at 344.

113. James, supra note 63, at 782.

114. 248 N.Y. at 345, 162 N.E. at 101, 229 N.Y.S. at 344.

115. 56 Ill. 2d at 372, 308 N.E.2d 617 (1974). Renslow noted that Cunis questioned whether duty was limited by the scope of foreseeability. Cunis held that no duty arises unless harm is reasonably foreseeable. See note 116 infra. Presented to the Renslow court was a different issue: Are there areas of foreseeable harm where no duty arises?

116. 56 Ill. 2d at 375-76, 308 N.E.2d at 619. The court noted "[t]he creation of a legal duty requires more than a mere possibility of occurrence." Id. at 376, 308 N.E.2d at 619.
reasonableness is what the reasonably prudent person would have foreseen was likely to happen at the time of the conduct.117

The Renslow court disagreed with the defendants' assertion that they owed no duty to the plaintiff because her injuries had not been reasonably foreseeable. Unlike Palsgraf, where "[n]othing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed,"118 the injuries to Leah Ann Renslow were medically predictable. Medical authorities since the 1940's have recognized the effects of the Rh-negative and Rh-positive factors upon hemolytic disease.119 They have long known that sensitization occurs in 90% of Rh-negative women who have received multiple transfusions of Rh-positive blood and that about 85% of white Americans and a higher percentage of blacks and Chinese Americans are Rh-positive.120 Similarly, it is common knowledge that the Rh-positive fetus of the Rh-negative woman previously sensitized is "at high risk."121 Rh-positive blood should never be transfused to a Rh-negative female who is under the age of menopause. For these reasons, routine Rh-typing has been established practice since at least 1961.122 Thus, unlike the facts of Cunis v. Brennan,123 where the circumstances were "tragically bizarre and may be unique,"124 the injuries to Leah Ann Renslow were not extraordinary.

Mr. Justice Dooley, concurring in Renslow, agreed that it was foreseeable that this thirteen-year-old girl would grow up, marry and become pregnant. The defendant hospital and doctor, who were held to the standard of knowledge of experts, "were chargeable with the knowledge of what she

117. Id.
122. That the routine identification of Rh types in blood of donors and recipients is necessary to avoid transfusion hazards is substantiated throughout medical literature. The practice of transfusing Rh positive blood into Rh negative recipients is unacceptable in women of child-bearing age because stimulation of the Rh antibody in a mother could cause hemolytic disease in her Rh positive children. 3 LAWYER'S MEDICAL CYCLOPEDIA, supra note 6, at § 24.31 (Rev. 1970).
123. 56 Ill. 2d 372, 308 N.E.2d 617 (1974). In Cunis, as a result of a collision between two automobiles at an intersection, plaintiff was thrown thirty feet to a parkway where one of his legs was impaled on a protruding drain pipe. The court held that there was no duty on the part of the defendant village to make the pipe safe for the plaintiff because the remote possibility of the occurrence did not give rise to a legal duty.
124. Id. at 377, 308 N.E.2d at 620.
and her child would encounter as a result of the wrongful transfusion of blood."

Although the majority imposed a duty on the defendants, they did not base their decision solely on the fact that the risk of injury to Leah Ann Renslow was foreseeable. The court recognized that there are many interests to which the law has not extended protection from injury even where such injury may be readily foreseen. This reflects the desire of the courts to limit liability for negligence in certain instances. In such situations, there is no need to consider foreseeability; the courts halt their inquiry before they reach this issue. One area in which duty had until quite recently been limited, notwithstanding the fact that the injuries might have been foreseeable, was that of prenatal injury recovery. Thus, though the harm to the plaintiff in Renslow was foreseeable, the plaintiff at the time of the act was by no means one to whom a duty traditionally would be owed.

The Illinois Supreme Court, however, refused to be limited by the idea of a "traditional duty," emphasizing that duty is not a "static concept." It pointed out that the notion of duty has progressed, expanded and changed throughout the law of negligence. A prime example, observed the court, is the law of prenatal injuries which evolved from two generations of refusal to recognize a duty owed to an unborn child to readily finding a duty in most instances today. Further, the court noted that it has long been recognized by Illinois courts that a duty may exist to one who is unknown and remote in time and place.

The recognition that duty fluctuates with changing social conditions and changing human relations gave the Renslow court the flexibility it needed to find a duty to this plaintiff. In holding that there exists a right to be born free from prenatal injuries foreseeably caused by a breach of duty to a child's mother, the court stated: "We therefore find it illogical to bar relief for an act done prior to conception where the defendant would be liable for this same conduct had the child, unbeknownst to him, been conceived prior

125. 67 Ill. 2d at 365, 367 N.E.2d at 1258.
126. Id. at 354, 367 N.E.2d at 1253. The court used Dean Leon Green's observations which were quoted with approval in Cunis v. Brennan:

"However valuable the foreseeability formula may be in aiding a jury or judge to reach a decision on the negligence issue, it is altogether inadequate for use by the judge as a basis of determining the duty issue and its scope. The duty issue, being one of law, is broad in its implication: the negligence issue is confined to the particular case and has no implications for other cases. There are many factors other than foreseeability that may condition a judge's imposing or not imposing a duty in the particular case."


to his act.""}\(^{129}\) In essence, the court found a ""conditional prospective liability in tort to one not yet in being.""\(^{130}\)

**Causation: Infinite Liability**

A controversial aspect of the *Renslow* decision was whether it was bottomed solely on the element of causation. Mr. Justice Moran, writing for the majority, expressly denied this, stating that policy lines must be drawn somewhere to narrow the scope of actionable causation. He criticized causation as the sole determinant of liability, saying:

> [c]ausation cannot be the answer; in a very real sense the consequences of an act go forward to eternity, and back to the beginning of the world. Any attempt to impose responsibility on such a basis would result in infinite liability for all wrongful acts, which would ""set society on edge and fill the courts with endless litigation.""\(^{[3]}\)

The court refused to discard the traditional duty limitation in favor of a causation formula. Rather, it reaffirmed the concept of duty as a method by which to direct and control the common law.

Although Mr. Justice Moran made it clear that the decision was premised on duty rather than causation as the determinant of liability, Mr. Justice Ryan dissented. He feared that although the majority opinion couched its decision in terms of duty and foreseeability, as a practical matter it had focused wholly upon the element of causation and ""abandoned the traditional fault concept of liability premised upon duty and foreseeability.""\(^{132}\) He noted that tort law in recent years had changed its focus from fault to causation because of sympathy for individuals who, through no fault of their own, suffer damages. The legal concepts of duty and foreseeability, he said, had become mere fictional avenues by which the courts could reach desired ends. With this decision, Justice Ryan said, the court had carried the movement toward ""exalting"" the causation element one step too far, resulting in the imposition of an intolerable burden on the public in the form of insurance premiums.\(^{133}\)

Further, Justice Ryan was concerned that the majority decision abrogated the touchstone of the law of negligence: foreseeability. Under the circumstances of *Renslow*, there was indeed a possibility that the injury complained of would result from the acts of the defendant but, Justice Ryan

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129. 67 Ill. 2d at 357, 367 N.E.2d at 1255. The court further held that the liability announced in *Renslow* would be given prospective application. *Id.* at 359, 367 N.E.2d at 1256.


131. 67 Ill. 2d at 356, 367 N.E.2d at 1254.

132. *Id.* at 372, 367 N.E.2d at 1262 (Ryan, J., dissenting). Mr. Justice Ryan appears to be referring to causation in fact, as opposed to proximate causation.

133. *Id.* at 377-79, 367 N.E.2d at 1265.
suggested, more is required for the imposition of a legal duty than a mere possibility of occurrence. The court has, by finding a duty of care owed to a nonexistent entity, noted Justice Ryan, reached the conclusion that where there is causation, all results are foreseeable. Neither causation nor foreseeability, without more, is a satisfactory foundation upon which to predicate liability, he concluded.

As Justice Ryan suggested, the law cannot hold one perpetually responsible for the remote consequences of a single act. Liability standards must exist and policy standards, e.g., policy limitations provisions, must be enforced with uniformity. Justice Ryan is also correct in noting the obvious: causation alone provides no limitation of liability because the chain of events “causing” a single result can be endless. But Renslow did not establish causation as the liability requirement in the case. Nor did the case vitiate the long established criteria for pleading a negligence action in Illinois. The Renslow majority affirmed the necessity of pleading and subsequently proving a duty, its breach, causation and proximately resulting damages. Furthermore, to embrace the substance of the Ryan dissent, one must ignore the fact that this case went to the Supreme Court on review of an order dismissing the complaint. There was no evidence; nor was there a trial. Therefore, the “factual questions” attendant to proof of causation were not before the court, and thus, could not have been decided by this opinion. The case was decided, and properly so, on the legal issue of duty rather than the factual issue of causation.

**RENSLOW: ITS IMPLICATIONS**

Renslow may be looked upon with disfavor by critics as being a considerable extension of existing authority. To the contrary, Renslow is a natural development of prenatal injury law. The idea that a duty may exist to one foreseeably harmed though he be remote in time and space is not new to Illinois courts. The cases allowing relief to infants for injuries incurred in their previable states themselves reflect the willingness of the courts to extend a duty to persons whose existence was not apparent at the time of the act.

Not only is Renslow a natural development of prenatal injury law, but

135. Wintersteen v. National Cooperage & Woodenware Co., 361 Ill. 95, 197 N.E. 578 (1935). In *Wintersteen*, the defendant loaded a railway boxcar with barrels and shipped them to plaintiff’s employer. Plaintiff was injured when a barrel fell out of the car upon him. Defendant argued that he owed no duty of care to plaintiff inasmuch as there was no contract between plaintiff and defendant. The court held that the “duty to exercise ordinary care to avoid injury to another does not depend upon contract, privity of interest or the proximity of relationship between the parties. It extends to remote and unknown persons.” *Id.* at 103, 197 N.E. at 582.
it is illustrative of the flexibility of the common law. Change and development alter social ideas and the common law, in order to remain effective in today’s jurisprudence, must keep abreast of these changes and deal with the current problems of society. It is the function of the courts to keep the common law in touch with life by constantly re-evaluating and actively updating it.

Numerous arguments have been advanced and accepted by the courts to support the theory that an action should lie to recover damages for negligently inflicted prenatal injuries. It has been said that: (1) natural justice demands recognition of a legal right of a child to start life unimpaired by defects resulting from injuries caused by the negligence of another;\textsuperscript{136} (2) no wrong should go without redress;\textsuperscript{137} and (3) because the law recognizes the separate existence of an unborn child for purposes of providing protection in the descent and devolution of property, the law should recognize its separate existence for purposes of redressing tortious conduct.\textsuperscript{138} By analogy, the law should apply such arguments to permit recovery for pre-conception injuries as well.

There is clearly a paradox inherent in a system of liability which allows a child to recover for injuries sustained subsequent to his conception but not for injuries sustained prior to his conception. Certainly the child is no less injured in the latter situation than in the former. The child in either case is born with a disability resulting from another’s negligence and should be given the same opportunity for redress. There is no valid justification for penalizing a child who, through no fault of his or her own, was born with a disability resulting from pre-conception negligent conduct. This theory comports with the notion that there exists throughout all stages of development prior to birth an interest in potential life that should be protected by the courts. A tortfeasor should not be absolved of liability for his negligent act simply by the fortuitous fact that his conduct occurred prior to the plaintiff’s conception.

A recognition of liability under these circumstances is in keeping with the traditional philosophy underlying tort law that for every wrong there should be a remedy.\textsuperscript{139} In the eighteenth century, Blackstone observed:

\begin{itemize}
\item \textsuperscript{136} Radiation and Preconception Injuries, supra note 7, at 432; 62 Am. Jur. 2d Prenatal Injuries § 4 (1972).
\item \textsuperscript{139} Park v. Chessin, 88 Misc. 2d 222, 387 N.Y.S.2d 204 (1976). “It is fundamental to our common law system that one may seek redress for every substantial wrong . . . .” Id. at 230, 387 N.Y.S.2d at 210 (quoting Battalla v. State, 10 N.Y.2d 237, 240, 176 N.E.2d 729, 730, 219 N.Y.S.2d 34, 36 (1961)).
\end{itemize}
"For wherever the common law gives a right or prohibits an injury, it also
gives a remedy by action; and, therefore, wherever a new injury is done, a
new method of remedy must be pursued."\textsuperscript{140} That principle was contem-
porarily restated in \textit{Wintersteen v. National Cooperage & Woodenware Co.,}\textsuperscript{141} when the court said that "the law is presumed to furnish a remedy
for the redress of every wrong."\textsuperscript{142} Although the dissenting opinions in
\textit{Renslow} intimate that to allow an action for pre-conception injuries is to
penetrate "outer space in the world of law,"\textsuperscript{143} the court has, in expanding
the duty owed in prenatal cases to pre-conception negligent conduct, carried
the reasoning of Blackstone to a logical conclusion.

This is not to say that \textit{Renslow} will not, as do all precedent-setting
cases, generate a variety of troublesome questions for the practitioner, the
courts and the legislature. As emphasized by the dissenters, it can be argued
that \textit{Renslow} has changed the concept of "duty" in Illinois tort law. It is
arguable that the decision bypasses the rule that for one to maintain a suit for
personal injuries, the negligent conduct must be directed either to the person
of the suer, a relative, or one upon whom he is dependent. Prior to the
appellate court opinion of June 10, 1976, it had been seemingly unques-
tioned in Illinois that a "person" claiming injury must have been, at the
very least, conceived at the time of injury.\textsuperscript{144} The only Illinois case to
consider an analogous situation, \textit{i.e.}, a non-physical tort committed upon a
plaintiff simultaneously with conception, was \textit{Zepeda v. Zepeda,}\textsuperscript{145} where
the court, although suggesting in dictum that a child could be injured before
or at the time it was conceived, concluded that the ramifications of extend-
ing a cause of action for wrongful life to a plaintiff not a being in existence
were too far-reaching. The court refused to allow the action and suggested
new legislation as a remedy.

\textsuperscript{140} 3 W. Blackstone Commentaries\textsuperscript{*} 123 (quoted in Renslow v. Mennonite Hosp., 67 Ill. 2d 348, 360, 367 N.E.2d 1250, 1256 (1977) (Dooley, J., concurring)).
\textsuperscript{141} 361 Ill. 95, 197 N.E. 578 (1935).
\textsuperscript{142} Id. at 103, 197 N.E. at 582.
\textsuperscript{143} 67 Ill. 2d at 360, 367 N.E.2d at 1256 (Dooley, J., concurring).
\textsuperscript{144} Brief for Appellant at 5, Renslow v. Mennonite Hosp., 67 Ill. 2d 348, 367 N.E.2d 1250 (1977); Chrisafogeorgis v. Brandenberg, 55 Ill. 2d 368, 304 N.E.2d 88 (1973); Rodriguez v. Patti, 415 Ill. 496, 114 N.E.2d 721 (1953); Amann v. Faidy, 415 Ill. 422, 114 N.E.2d 412 (1953); Rapp v. Hiemenz, 107 Ill. App. 2d 382, 246 N.E.2d 77 (1969); Sana v. Brown, 35 Ill. App. 2d 245, 183 N.E.2d 187 (1962); Daley v. Meier, 33 Ill. App. 2d 218, 178 N.E.2d 691 (1961). In \textit{Rapp} the second district appellate court denied recovery for the death of a stillborn child because there was no evidence that the child was viable at the time of injury. This decision reinforced the notion that there must be a person, either in being or capable of being at the time of injury. Brief for Appellant at 6, Renslow v. Mennonite Hosp., 67 Ill. 2d 348, 367 N.E.2d 1250 (1977).
\textsuperscript{145} 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), cert. denied, 379 U.S. 945 (1964). \textit{Zepeda} did not involve physical injury to the plaintiff. Rather, \textit{Zepeda} was an action for damages by the defendant's illegitimate son in which the child claimed he was injured in his person, property, and reputation by the defendant's causing him to be born a bastard.
As have Illinois courts, other jurisdictions have traditionally recognized that "the defendant could owe no duty of conduct to a person who was not in existence at the time of his action."\textsuperscript{146} Duty is viewed as a relation between parties, a concept founded on foreseeability of harm to the plaintiff in fact injured.\textsuperscript{147} In \textit{Renslow}, the plaintiff alleged that a transfusion permanently injured her mother by sensitizing the latter's blood. Thus, the person "in fact injured" was the plaintiff's mother in the first instance. It was only through the injury to her mother that the plaintiff sustained injury.\textsuperscript{148} It can be argued that creating a duty to a being not in existence at the time of injury is a classic illustration of the "negligence in the air"\textsuperscript{149} condemned by Judge Cardozo in \textit{Palsgraf}.

Another troublesome issue addressed by the dissenters is that \textit{Renslow} could, in effect, impose interminable prospective liability upon physicians in that they could be subject to claims literally decades after a negligent act.\textsuperscript{150} It is not beyond the realm of possibility that an action could be maintained by successive individuals in the chain of heredity or transmitted genetically as a result of a nuclear accident, exposure to radiation or use of drugs.\textsuperscript{151} It can be argued that this runs contrary to the traditional desire of the judiciary to encourage complete discovery, litigation of issues while the facts are still discoverable and expeditious termination of litigation.\textsuperscript{152} It further frustrates the primary purpose of the Limitations Act.\textsuperscript{153} That act was designed to further justice by terminating the uncertainty of claims and foreclosing unlimited liability.\textsuperscript{154} In construing the Limitations Act, the judiciary has, in the past, carved out exceptions and applied it to situations which it was not designed to encompass. At some point, it may be argued, a line must be drawn. Exceptions to the statute must be limited and justified so as not to pervert its intentions. \textit{Renslow}, it might be said, opens doors to further extensions of the Limitations Act.

\textsuperscript{146} PROSSER, \textit{supra} note 36, at § 55.
\textsuperscript{149} \textit{Id.} at 10.
\textsuperscript{153} ILL. REV. STAT., ch. 83, § 15 (1975).
\textsuperscript{154} Gates Rubber Co. v. USM Corp., 508 F.2d 603 (7th Cir. 1975).
Renslow does not, however, stand for the proposition that every person who suffers injury as a result of pre-conception negligent conduct will be entitled to recovery. To the contrary, if the concept of duty was, in fact, modified by the supreme court in Renslow, the modification correlated directly to the facts of the case. It must be remembered that cases are decided on the basis of the facts peculiar to them. Renslow is no exception. The court must, in each case, consider "[t]he likelihood of injury, the magnitude of the burden of guarding against it and the consequences of placing that burden on the defendant."

In Renslow, the medical probability was great that the transfusion of Rh-negative blood into the Rh-positive blood of a woman of childbearing age could cause hemolytic disease in her children. The magnitude of the burden imposed on the defendants to guard against injuries such as these must be considered in light of the fact that the defendants are in the medical profession. Emma Renslow, on the other hand, was unaware that she was given the wrong type of blood and had no knowledge of the potential dangers to her later born children as a result thereof. To require that physicians guard against transfusing their patients with mistyped blood is not only "a reasonable burden but encourages responsible medical treatment and advisement."

Imposing such a "burden" is unarguably in the public interest. The unique factual situation in Renslow justifies the conclusion reached by the court and vitiates any argument that the decision creates open-ended liability for every tortfeasor who injures someone who later gives birth to a child.

One concern expressed by Justice Ryan, dissenting in Renslow, was that the expansion of tort law by the majority effectively imposed a strain on the public. He argued that the notion of "spreading the risk" among the public has, in recent years, expanded to accommodate more and more individuals. Mr. Justice Ryan noted that juries sympathetic to unfortunate plaintiffs have increased the size of verdicts. As a result, the price of spreading the loss has been inflated to such outlandish proportions that the

157. Id.
158. For example, assume a twelve-year-old female suffers a fractured pelvis and abdominal and spinal injuries in an automobile collision between herself and the defendant, who is a truck driver with a fifth grade education. At twenty-five years of age, she gives birth to a child who is born with cerebral palsy caused by a troublesome delivery resulting from her deformed pelvis. Further, assume perfect liability as to the defendant and none as to the female. Can the mother or the child bring an action against the tortfeasor? This situation appears to be beyond the scope of Renslow. Clearly, the defendant truck driver has no responsibility to warn the mother to be cautious about later pregnancies. Renslow, on the other hand, presents perfect circumstances under which to impose liability on technicians to exercise reasonable care within their area of expertise.
159. 67 Ill. 2d at 373, 367 N.E.2d at 1262 (Ryan, J., dissenting).
cost to the public is no longer insignificant. Automobile insurance rates have skyrocketed, health insurance premiums have increased dramatically and the cost of malpractice insurance has created havoc in the medical world. The public, said Mr. Justice Ryan, has in various ways expressed dissatisfaction with the burden placed upon them. They have been searching for alternatives to circumvent this by advocating no-fault insurance and other legislation designed to limit or modify recovery. Nevertheless, the courts have continued to expand the areas of recovery. Rather, said Mr. Justice Ryan, they must establish boundaries and limits to liability in accordance with the fault concept of tort recovery.

It is beyond question, as Mr. Justice Ryan intimates, that the law must weigh the interest for which the plaintiff demands protection with the interest of the public. But, in balancing the two interests, a court must consider the circumstances peculiar to the case before it. The issues addressed by Mr. Justice Ryan were not before the court. Rather, as Mr. Justice Dooley, in his concurring opinion pointed out, Mr. Justice Ryan "uses this case as a vehicle to complain of" 160 our present system of tort law.

Of further concern to legal theorists has been the difficulty of proving a causal connection between negligence and damage in prenatal injury cases. 161 According to one authority, medical testimony and medical proof of causes may be less than reliable in pre-conception cases. 162 However, the difficulty of establishing causation is not an appropriate or valid basis for denying relief. Causation and damages present evidentiary issues which should not be confused with the right to bring an action. The plaintiff has the burden of pleading and proving the causal connection between the negligent act and the resulting injuries. Therefore, rather than acting as a bar to the initiation of the suit, the element of causation should foreclose or mitigate recovery if too speculative. 163

This is not to say that the difficulty of establishing proof in pre-conception cases is not indeed good reason for exercising caution in allowing recovery. However, as far as causation is concerned, surely there will be cases in which the difficulties of proof are no more frequent and no greater than that presented by other medical problems. 164 The difficulties of proof of causal connection are not peculiar to the field of pre-conception torts. 165 The mere difficulty of proving a fact is certainly not good reason for disallowing

160. Id. at 370, 367 N.E.2d at 1261 (Dooley, J., concurring).
162. Radiation and Preconception Injuries, supra note 7, at 431.
163. Prosser, supra note 36, at § 55.
165. Prosser, supra note 36, at § 55.
a cause of action. It seems logical that the courts should "follow scientific discoveries one step further and hold that so long as causation can be proved, compensation should be allowed."\textsuperscript{166} If the causal connection can be proved, "the law cannot afford to deny recovery for pre-conception injuries if a child is born and lives with a handicap created by defendant's [negligence] under such circumstances that he would be liable if conception had already taken place."\textsuperscript{167}

CONCLUSIONS

The body of law dealing with prenatal injuries is continually restructuring itself to keep pace with medical science and changing notions of legal duty. It has, over its brief lifespan, run the gamut from recognizing a duty only to viable fetuses to recognizing that an infant has a legal existence during its entire prenatal life to recognizing, in \textit{Renslow}, a prospective duty to a child not yet conceived at the time of the negligent act. While the long-range effects of the extension of duty in \textit{Renslow} to one not in being at the time of the negligent act remain to be seen, the judiciary will, in all likelihood, as noted by the majority in \textit{Renslow}, draw distinctions on a case-by-case basis between those harms which should be recompensed and those which should not.

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\textsuperscript{166} \textit{Radiation and Preconception Injuries}, \textit{supra} note 7, at 432.
\textsuperscript{167} \textit{Id.}