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REN SLOW v. MENNONITE HOSPITAL: PRENATAL INJURIES AND A PRE-EXISTENCE DUTY

Although the development of the law in the area of prenatal injuries is a relatively recent phenomenon at common law, it has undergone radical and sweeping changes during its brief lifespan. Less than one hundred years ago the question of whether one owed a duty of care toward a fetus was considered, for the first time, by the common law courts. At that time and for nearly one half century thereafter, the courts were unwilling to acknowledge the existence of such a duty. The rationale most often advanced as the basis for this denial was that a child en ventre sa mere was not recognized as having an existence separate from its mother. Gradually, with the aid of analogy to policy decisions in other areas of law, application of basic principles of natural justice, and recognition of developments in medical technology, limited recognition was given to the legal existence of the fetus.

This very deliberate evolution toward the extension of a right of action for prenatal injuries has progressed from stage to stage as a result of a series of judicial compromises between the age-old adversaries—idealism and realism. The idealists reasoned that the failure to, at first, recognize and later expand the cause of action was violative of the established presumption

1. Dietrich v. Inhabitants of Northampton, 138 Mass. 14 (1884). Dietrich was the first common law court to deal with the question of a cause of action for prenatal injuries. Justice Holmes wrote the opinion of the Dietrich court in which the cause of action was denied. Justice Holmes stated:

[I]f we should assume, irrespective of precedent, that a man might owe a civil duty and incur a conditional prospective liability in tort to one not yet in being, and if we should assume also that causing an infant to be born prematurely stands on the same footing as wounding or poisoning, we should then be confronted by the question raised by the defendant, whether an infant dying before it was able to live separated from its mother could be said to have become a person recognized by the law as capable of having a locus standi in court. . . .

138 Mass. at 16.

2. En ventre sa mere is a term descriptive of an unborn child in its mother's womb. BLACK'S LAW DICTIONARY 619 (rev. 4th ed. 1968).

3. See, e.g., Allaire v. St. Luke's Hosp., 184 Ill. 359, 56 N.E. 638 (1900); Dietrich v. Inhabitants of Northampton, 138 Mass. 14 (1884). In Dietrich, the rationale for denying the cause of action was that the "unborn child was a part of the mother at the time of the injury, any damage to it which was not too remote to be recovered for at all was recoverable by her . . . ." 138 Mass. at 17.

4. Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946). Bonbrest held that an infant, born alive, could have a cause of action for prenatal injuries provided the injuries occurred while the child was a viable fetus.
that for every wrongful injury the courts should afford a remedy. In opposition, the realists countered that, at first, recognition and thereafter extension of the cause of action would create practical problems of proof and dangers of fictitious claims. This recurrent dialogue has been the underlying issue in virtually every case in which the question of recognition or expansion of the duty of care owed to a fetus has been considered.

This dialogue reappeared recently when the Illinois Appellate Court considered the question of duty toward a fetus in Renslow v. Mennonite Hospital. Prior to Renslow, the basic question in prenatal injury cases was at what stage of post-conception fetal development must the negligent act occur to be actionable. It was in this context that the Renslow decision achieved its ultimate moment. In Renslow, the court faced the question of whether a child, born alive, may have a cause of action for prenatal injuries resulting from another's preconception conduct.

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5. See Allaire v. St. Luke's Hosp., 184 Ill. 359, 56 N.E. 638 (1900) (Boggs, J., dissenting). In his dissenting opinion in Allaire, Boggs stated:

At the common law actions were maintainable to recover damages occasioned by injuries to the person of the plaintiff, whether inflicted intentionally or through the negligence of the defendant. The governing principle illustrated by such cases is, that the common law, by way of damages, gave redress for personal injuries inflicted by the wrong or neglect of another. 184 Ill. at 369-70, 56 N.E. at 641.

6. See Walker v. Great Northern Ry. Co., 28 L.R. Ir. 69 (Q.B. 1891). In Walker, a woman far advanced in pregnancy took passage on the defendant's train. There was a train accident whereby the mother and the child were seriously injured, so that the child was born a cripple. The action was brought by the child to recover damages. The Walker court took the narrow view that the child could recover only if it had contracted with the defendant or if the defendant owed the child a duty of care. The court held there was no recovery since the defendant neither knew of the child's existence nor had established contractual relations with him. However, it is Justice O'Brien's concurring opinion which has been cited most often by the American courts which denied the cause of action for prenatal injuries. See, e.g., Allaire v. St. Luke's Hosp., 184 Ill. 359, 56 N.E. 638 (1900); Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921). O'Brien was inspired by the need to protect the courts from "a boundless sea of speculation in evidence this new idea would . . . launch . . ." 28 L.R. Ir. at 81-82 (O'Brien, J., concurring).

7. See Amann v. Faidy, 415 Ill. 422, 428-29, 114 N.E.2d 412, 415-16 (1953). The Amann opinion lists the major arguments advanced on each side of the conflict over recognition of the cause of action for prenatal injuries. The chief grounds cited in those decisions against the cause of action have been (1) the lack of precedent; (2) fear of fictitious claims; (3) the absence of a duty to the child since it was part of its mother. The major arguments advanced for the recognition of the cause of action have been (1) a viable child should be regarded as a separate entity; (2) the law recognizes the separate existence of a fetus in property and criminal law; (3) a remedy should exist for the wronged plaintiff; (4) lack of precedent should be no bar where a wrong has been committed.


9. Id.
RENSSL: THE RECOGNITION OF A DUTY

In Renslow, the minor plaintiff, Leah Ann, by her mother as next friend, sought damages for personal injuries suffered by Leah Ann while a fetus. In 1965, Leah Ann's then future mother, Emma, who was thirteen years old at the time, was admitted to the defendant hospital in which the defendant doctor headed the laboratory. In the course of her treatment there Emma, on two consecutive days, was given transfusions of 500 c.c. whole blood taken from the doctor's laboratory. Emma's blood type was then and at the time of trial A-RH negative, but the blood transfusion she received on each occasion was A-RH positive. The end result of this negligent transfusion by the defendants was that Emma's blood was sensitized. Emma did not discover her sensitized condition until eight years later, in 1973, during a routine blood test while pregnant with Leah Ann. The medical diagnosis determined that the life of her then unborn child was in jeopardy. Emma was admitted to the hospital in March of 1974, and labor was induced resulting in the premature live birth of her daughter. Newborn Leah Ann was jaundiced and required two immediate and complete transfusions to save her life. As a result of the sensitization of her mother's blood, Leah Ann suffered personal injuries including permanent damage to her nervous system and brain.

The trial court, on defendants' motions, dismissed Leah Ann's claim for failure to state a cause of action. The sole question presented on review was whether the defendants owed a duty of care to the infant plaintiff who was not yet in existence at the time their alleged negligent conduct occurred.

HISTORICAL PERSPECTIVE

The Illinois Appellate Court prefaced its analysis of the issue presented for review with a brief developmental history of the

10. A certain substance is present in the blood of about 85 percent of all caucasian people—their blood is called Rh-positive; the remaining 15 percent who lack it are called Rh-negative. If the Rh-negative mother has ever had a transfusion of Rh-positive blood, she will produce antibodies which will remain in her blood. If there is a high concentration of these antibodies in her blood, they will injure the blood cells of her baby. When the baby is born complications will set in. B. MILLER, The Complete Medical Guide 234 (rev. ed. 1966).

11. Sensitization is the process or state of becoming sensitized (or allergic) to the Rh factor, as when an Rh-negative woman is pregnant with an Rh-positive fetus. Sensitization results when some of the blood of a sensitized person is injected into a normal person. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1389-1400 (25th ed. 1974).


13. Id. at 235, 351 N.E.2d at 871.

14. Id. at 239, 351 N.E.2d at 874. The defendants claimed that since the plaintiff was not in existence at the time of their allegedly negligent conduct, the injuries to her were not foreseeable.
major decisions in the area of prenatal injuries. The first English
or American court to deal with the question of recovery for the
effects of injuries sustained by a child en ventre sa mere was the
Massachusetts Supreme Court in Dietrich v. Inhabitants of
Northampton.\(^\text{15}\)

In Dietrich, action was commenced by the administrator of
a child born prematurely when its mother suffered a miscarriage
as a result of a fall on defendant's negligently maintained street.
The child lived for only fifteen minutes after birth, and since
it could not survive outside of the mother's womb, the court
denied a right of action.\(^\text{16}\) The Dietrich court's rationale was that
since no precedent could be found to support the existence of such
a cause of action, a child en ventre sa mere was not legally recog-
nized as having an existence (upon which a duty could be predi-
cated) separate from its mother.\(^\text{17}\) When compared with
Dietrich, the Renslow holding shows the complete reversal in
legal thought with regards to an injured fetus. The Dietrich
requirement of an existing and self-sustaining fetus, at the time
the negligent act occurred, was held not to be a requirement at
all in Renslow, where the negligent conduct occurred eight years
prior to conception.

Implicit in the Dietrich holding was the admission that there
might be a right of action for prenatal injuries extended to a
child who survived birth, since the court relied on the fact that
the child was not "quick" at birth.\(^\text{18}\) However, the decision was

\(^{15}\) 138 Mass. 14 (1884).
\(^{16}\) Id. at 15.
\(^{17}\) Id. But see Amann v. Faidy, 415 Ill. 422, 114 N.E.2d 412 (1953),
where the Illinois Supreme Court, in reference to Dietrich, pointed
out that:

It has been said that Justice Holmes, unable to find any precedent
for the action for prenatal injuries, believed that the common law
afforded no remedy, whereas a more accurate statement, according
to Salmond ..., would have been that there was no English au-
thority on either side of the question .... [T]here is no common-
law precedent denying recovery ....

Id. at 429, 114 N.E.2d at 416 (citation omitted). See Thelussion v. Wood-
ford, 31 Eng. Rep. 117, 163 (Ch. 1798), where to the contention that a
child en ventre sa mere was a non-entity, Butler, J., said:

Let us see what this non-entity can do. He may be vouched in a
recovery, though it is for the purpose of making him answer in
value. He may be an executor. He may take under the Statute
of Distributions. He may take by devise. He may be entitled under
a charge for raising portions. He may have an injunction; and he
may have a guardian.

See Comment, The Impact of Medical Knowledge on the Law Relating

\(^{18}\) 138 Mass. at 15-17. This statement as to an infant being "quick"
was in response to the plaintiff's attempted analogy between Dietrich
and Lord Coke's statement on rights of a fetus in the criminal law "which
seems to have been accepted as the law in England, to the effect that
if a woman is quick with child, and takes a potion, or if a man beats
her, and the child is born alive and dies of the potion or battery, this
is murder." 138 Mass. at 15. The Dietrich court held that this attempted
not so limited by later courts who consistently cited Dietrich as authority for the proposition that no duty could be owed to a fetus whether or not it was advanced enough to survive birth. For example, the Illinois Supreme Court in Allaire v. St. Luke's Hospital, a case in which a surviving minor child, by his mother, alleged he suffered permanent physical injuries as a result of the negligent operation of an elevator in which his mother was riding while the plaintiff was a viable fetus, denied recovery in reliance on Dietrich.

The ultimate significance of Allaire, however, was not the majority opinion, but rather the dissenting opinion of Justice Boggs which was to have a major impact on the eventual recognition of a duty to avoid prenatal injuries. Boggs distinguished the facts in Allaire from those in Dietrich, upon which the majority relied, and reasoned that Dietrich was not good authority in a case where the injury was to a viable fetus later born alive. Boggs surmised that but for the fact that the plaintiff was a fetus when the alleged injury occurred, and therefore believed not to have its own existence, a right of action would have been extended to him. He then reasoned that analogy hurt the plaintiff's case. Holmes said that even if Coke's statement on criminal liability could apply with equal weight to a case concerning civil liability, the word "quick" describes a fetus capable of living apart from its mother, and it was because the Dietrich fetus was not capable of separate existence that he died shortly after birth. Thus Dietrich alludes to a rudimentary recognition of the "viability" stage in fetal development to later grant a cause of action for prenatal injuries.

19. 184 Ill. 359, 56 N.E. 638 (1900).
20. Id. at 367, 56 N.E. at 640.
21. Id. at 368, 56 N.E. at 640 (Boggs, J., dissenting). Boggs' dissent was the beginning of the movement for the cause of action for prenatal injuries, which culminated in the recognition of the cause of action in Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946). Boggs felt that, in view of the experience of mankind and the advances of medical science, a child, later born alive, should be given a cause of action for injuries sustained while viable, since it was "but natural justice that such an infant, . . . be allowed to maintain an action . . . ." 184 Ill. 359, 372, 56 N.E. at 642 (emphasis added). The natural justice rationale was later used by the Supreme Court of Canada which recognized the cause of action for prenatal injuries in Montreal Tramways v. Leveille, 4 D.L.R. 337, 345 (1933). When the cause of action was finally recognized for good in the United States, the federal district court, in Bonbrest, expressly relied on the natural justice rationale, thereby culminating the movement which began with Boggs' dissent and swept two nations (Canada and United States). 63 F. Supp. 138, 142. See Gordon, The Unborn Plaintiff, 63 Mич. L. Rev. 579, 585 (1965).
22. Allaire v. St. Luke's Hosp., 184 Ill. 359, 372-73, 56 N.E. 638, 642 (1900). Boggs distinguished Dietrich in that there the child was injured indirectly and was not yet viable, but in Allaire the child was injured directly while viable. Boggs also distinguished Walker v. Great Northern Ry. Co., 20 L.R. Ir. 69 (Q.B. 1871), upon which the Allaire majority also relied. He distinguished Walker in that there the action was denied because the defendant did not know of the fetus' existence and had contracted only with its mother, but in Allaire the hospital knew the fetus existed and that its mother was soon to give birth.
although for a part of gestation a fetus may be regarded as a mere extension of its mother, once a fetus has reached "viability" it was illogical to deny it a right of action.24

Although the Boggs dissent was acknowledged as being well-reasoned,25 no jurisdiction in the United States26 allowed a cause of action for prenatal injuries until Bonbrest v. Kotz.27
There a federal district court faced the issue of whether there was a right of action for a surviving infant who sustained injuries as a result of malpractice which occurred in the course of delivery. The Bonbrest court distinguished Dietrich, as Boggs had in his Allaire dissent, and held that an infant born alive may have a cause of action for prenatal injuries sustained when viable.28

Subsequent to Bonbrest, a shift in the law toward recognition of a cause of action for prenatal injuries became apparent.29
The Supreme Court of Illinois first allowed recovery for the effects of prenatal injuries in Amann v. Faidy.30 The issue raised in Amann was whether a cause of action existed for

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24. Id. at 370, 56 N.E. at 641.
25. See, e.g., Drobnr v. Peters, 232 N.Y. 220, 221-22, 133 N.E. 567 (1921). The Drobnr court held that the child, when born alive, could not recover for prenatal injuries caused by the fall of its mother into a hole in the sidewalk left open by the defendant. Although it appeared as if the court was going to allow the course of action on a theory similar to that of Boggs, it bowed to the great weight of authority which held against recovery. Id. at 223-24, 113 N.E. at 567-68.
28. The Bonbrest court did not overrule the Dietrich decision, but rather distinguished it.

But on the assumed facts here we have not, as in the Dietrich case, 'an injury transmitted from the actor to a person through his own organic substance, or through his mother, before he became a person' standing 'on the same footing as an injury transmitted to an existing person through other intervening substances outside him ....' but a direct injury to a viable child .... 

Id. at 140 (emphasis added). The grounds upon which Bonbrest was distinguished from Dietrich were precisely the same grounds upon which Boggs distinguished Dietrich in his dissent in Allaire v. St. Luke's Hosp., 184 Ill. 359, 372-73, 56 N.E. 638, 642 (1900). See note 22 supra.
Beginning with a decision in the District of Columbia in 1946, a rapid series of cases, many of them expressly overruling prior holdings, have brought about what was up till that time the most spectacular abrupt reversal of a well settled rule in the whole history of the law of torts .... So rapid has been the overturn that after the lapse of a scant twenty-three years from the beginning, it is now apparently literally true that there is no authority left still supporting the older rule.
30. 415 Ill. 422, 114 N.E.2d 412 (1953).
wrongful death caused by injuries to a viable fetus who died after surviving birth. Although the Amann court could have distinguished Allaire, they seized upon the opportunity to overrule it, and thereby determined that the same standard would apply in prenatal injury and wrongful death cases.\textsuperscript{31}

The viability limitation on recovery for prenatal injuries announced in Amann was followed in Illinois until Daley v. Meier.\textsuperscript{32} The Illinois Appellate Court in Daley faced the situation involving action for prenatal injuries sustained by the surviving minor child. The injuries occurred after only one month of pregnancy. The sole issue presented on appeal was whether a child, born alive, may have a cause of action for negligently inflicted prenatal injuries regardless of the fact that he was a nonviable fetus at the time of the injury. The Daley court prefaced its holding with a review of the cases in which other jurisdictions have rejected the viability limitation on facts analogous to Daley, and added that lack of Illinois precedent was not a bar to recovery where a wrong has been committed.\textsuperscript{33} The Daley court allowed the cause of action for a surviving minor child even where the injuries occurred before the fetus became viable.\textsuperscript{34}

\textit{Daley} represented the broadest Illinois extension of the duty of care owed to a surviving fetus prior to Renslow.\textsuperscript{35} In

\textsuperscript{31} Amann v. Faidy, 415 Ill. 422, 432, 114 N.E.2d 412, 417-18 (1953). Since Amann was a wrongful death action and Allaire was an action for personal injuries, the Amann decision could have been distinguished on its facts from Allaire. However, the Amann court reasoned that the right to recover under the wrongful death statute was dependent upon the right to recovery in personal injury actions. Because the Wrongful Death Act allows recovery only where 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' . . . , the result depends upon the right of one negligently injured en ventre sa mere to recover for those injuries. 415 Ill. at 423, 114 N.E.2d at 413 (citation omitted). Therefore, implicit in the Amann holding was the recognition of a cause of action for prenatal injuries to a viable fetus. This implication was confirmed as fact later the same year in Rodriguez v. Patti, 415 Ill. 496, 114 N.E.2d 721 (1953), where the supreme court, citing Amann as controlling, allowed a cause of action, by a child born alive, for prenatal injuries sustained while a viable fetus.

\textsuperscript{32} 33 Ill. App. 2d 218, 178 N.E.2d 691 (1961).

\textsuperscript{33} Id. at 220, 178 N.E.2d at 691-92:


To the defendant's argument that there was no Illinois precedent for the plaintiff's cause of action in Daley, the court replied that the lack of precedent would not be a bar to recovery when a wrong has been committed. 33 Ill. App. 2d 218, 223, 178 N.E.2d 691, 694 (1961).

\textsuperscript{34} 33 Ill. App. 2d 218, 224, 178 N.E.2d 691, 694 (1961).

\textsuperscript{35} Once Daley had been decided, the Illinois courts recognized a
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Renslow, as in Daley, the minor plaintiff was born alive and sustained the aggrieved injuries after conception. It is, therefore, only the fact that the negligent conduct in Renslow occurred prior to conception which distinguishes it from Daley, and it is through this distinguishing factor that the Renslow defendants sought to escape liability. According to the Renslow court, the substance of the defendants' contention was that they owed no duty of care to the minor plaintiff prior to her conception.  

APPELLATE COURT ANALYSIS

The Renslow court first pointed out that the case was one of first impression, since a preconception duty of care was never before recognized in Illinois. Then the court turned its attention to the authorities cited by the defendants.

Defendants first relied on Morgan v. United States. As to the alleged facts, Morgan and Renslow were quite similar. In Morgan, one of the claims asserted was for prenatal injuries to a child as a result of an improper blood transfusion into its mother two years before the child was born. The Morgan court followed the substantive law of Pennsylvania expressed in Berlin v. J.C. Penny.

Berlin involved the denial of a cause of action for prenatal injuries to an infant born alive. The Berlin court cited authorities denying the cause of action, including the since overruled Illinois decision in Allaire v. St. Luke's Hospital, and held there was no cause of action independent of a statute. Berlin, however, was overruled by the Supreme Court of Pennsylvania in Sinkler v. Kneale, where it was held that a child born alive could recover for prenatal injuries even if not viable at the time the injuries were sustained. Therefore, as the Renslow court

cause of action by a child, born alive, for prenatal injuries which were caused by the defendant's negligent conduct occurring at any time after conception. Thus absent a recognition of a cause of action for preconception conduct, which was fulfilled by Renslow, Daley extended liability for prenatal injuries as far as possible under the then existing Illinois law.

37. Id. at 237, 351 N.E.2d at 872.
38. 143 F. Supp. 580 (D.N.J. 1956). In Morgan, the second count of a complaint alleged that a woman received an improper blood transfusion in a hospital in February of 1953, and that thereafter, in June of 1955, she gave birth to a child. The child suffered permanent physical defects as a result of the negligent transfusion.
40. See notes 19-20, 43 and accompanying text supra.

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
pointed out, the defendants’ reliance on Morgan, since it was effectively overruled by Sinkler, was misplaced.48

Defendants next cited Hornbuckle v. Plantation Pipe Line, as authority for their contention that a fetus has a cause of action when born alive but only if the tortious act occurred after conception.44 Hornbuckle concerned a cause of action for a live child for tortious injuries sustained while the child was en ventre sa mere. The Supreme Court of Georgia held that the child could recover if it was born alive after sustaining an injury at any period of its prenatal life, and could prove the effect of a tort on it.45 Hornbuckle did not limit the right of recovery to tortious conduct occurring after conception, but rather the injury complained of must occur after conception. The Renslow court noted that Hornbuckle did no more than state the obvious since a prenatal injury to a fetus could not possibly have been sustained until after conception.46

After dismissing Hornbuckle as authority for the defendants, the Renslow court reached the most important point in its opinion with the examination of Jorgenson v. Meade Johnson Laboratories.47 Jorgenson dealt with a prenatal personal injury action which in fact consisted of two separate claims for two mongoloid twins. Although both twins had survived birth, one died three and one half years thereafter and her action was in the nature of a survival action. The facts were that the defendant had negligently manufactured the birth control pills used by the plaintiffs’ mother prior to conception. The negligent conduct here, as in Renslow, was alleged to have occurred prior to conception. In Jorgenson, the defendant’s pills caused chromosome damage to the mother which was transferred through her

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47. 483 F.2d 237 (10th Cir. 1973).
to the twins at their conception, and the prenatal injuries resulted from the exposure of the plaintiffs, while viable, to the damaged condition.

The central issue in Jorgenson was whether the defendant manufacturer owed a duty of care to the plaintiffs who were not yet in existence when the negligent act occurred, but who were thereafter injured while viable as a result. At trial the district court, on the defendant's motion, dismissed the claim for failure to state a cause of action. The trial court held any such extension of duty was for the legislature and not the courts to decide.

On review the United States Court of Appeals reversed the trial court. Since the complaint alleged that the injuries were to viable fetuses as required by Oklahoma law, the court concentrated on whether the fact that the tortious conduct occurred prior to conception should have any bearing on the defendant's liability. The Jorgenson court held the cause of action existed even though the negligent conduct occurred before conception.

The Renslow court relied heavily on Jorgenson since it was the only authoritative case cited by either party with a fact situation analogous to Renslow. In Renslow as well as Jorgenson, although the tortious conduct had occurred before the children were conceived, the injuries were not sustained until after conception. When considered in this perspective both cases were ordinary prenatal injury actions. The only peculiarity is that in each case the injuries were caused by preconception negligent acts. The Renslow court, after analyzing Jorgenson, concluded

49. Id. at 963.
51. The Jorgenson court said 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 remedy," Id. at 240.
53. Renslow v. Mennonite Hosp., 40 Ill. App. 3d 234, 239, 351 N.E.2d 870, 874 (1976), where the Renslow court while comparing the similarities of Renslow and Jorgenson stated:

While the tortious act had allegedly occurred before the children were conceived, they were not alleged to have been injured until after conception. That is precisely what happened here. When analyzed in this manner, Jorgenson and the present case are simply cases involving actions for prenatal personal injuries. The only peculiarity is that both cases involve prenatal injuries which are al-
it was authority for the plaintiff's position.\textsuperscript{54}

Once the \textit{Renslow} court had settled that the mere fact that the negligence occurred prior to conception in and of itself was no bar to the plaintiff's cause of action, they examined whether or not the injury to the plaintiff was reasonably foreseeable.\textsuperscript{55} The court here emphasized that the defendants were a doctor and a hospital.\textsuperscript{56} The court then disagreed with the defendants' contention that the results of their negligence were not foreseeable, since there was no showing by the defendants below that they could not reasonably have foreseen that the minor plaintiff would have been injured as a result of their negligence.\textsuperscript{57}

After holding the effects of the defendants' conduct were reasonably foreseeable,\textsuperscript{58} the \textit{Renslow} court then acknowledged that Illinois law has recognized a cause of action for prenatal injuries to children born alive, and also that tort liability has never been barred in Illinois merely because the tortious conduct occurred long before the resulting injury as long as duty and causation have been established.\textsuperscript{59} The court, therefore, held that there was "no logical reason to deny recovery to a person simply because he had not been conceived when the wrongful conduct took place."\textsuperscript{60}

\textbf{DUTY BEFORE EXISTENCE: A LOGICAL EXTENSION?}

As to the \textit{Renslow} holding, the question which remains, in light of Illinois and American common law, is whether \textit{Renslow} is a logical extension of the duty owed in prenatal injury cases. Throughout the history of the prenatal injury actions at common law, the lack of a person in being to whom a duty of care could be owed has often troubled the courts although it should not have resulted from preconception negligent conduct. Jorgenson supports the position of the plaintiff. Jorgenson supports the position of the plaintiff. Jorgenson supports the position of the plaintiff. Jorgenson supports the position of the plaintiff. Jorgenson supports the position of the plaintiff.

\textsuperscript{54} See note 53 supra.


\textsuperscript{56} \textit{Id.} at 239, 351 N.E.2d at 874. Doctors as professional men "who undertake . . . work calling for special skill, are required not only to exercise reasonable care in what they do, but also to possess a standard minimum of special knowledge and ability." \textit{W. PROSSER, THE LAW OF TORTS} 161 (4th ed. 1971). See McCoid, \textit{The Care Required of Medical Practitioners}, 12 \textit{VAND. L. REV.} 549 (1959).

\textsuperscript{57} \textit{Renslow v. Mennonite Hosp.}, 40 Ill. App. 2d 234, 239, 351 N.E.2d 870, 874 (1976). The court here emphasized that there was no showing by the defendants, in the lower court, that they could not have reasonably foreseen that the plaintiff would be injured as the end result of their preconception conduct. In emphasizing this defect in the \textit{Renslow} defendants' case, the \textit{Renslow} court shows what future defendants in a \textit{Renslow}-type action must show. They must show the results of their alleged negligent preconception conduct were not foreseeable.

\textsuperscript{58} \textit{Id.}

\textsuperscript{59} \textit{Id.}

\textsuperscript{60} \textit{Id.} at 240, 351 N.E.2d at 874.
where the child was subsequently born alive. Several areas of the law for some time now have granted the fetus the rights of a person in being in many situations whenever it was necessary to prevent injustice. In fact, for a child born alive, equity has already recognized a cause of action for preconception wrongful conduct as evidenced by Piper v. Hoard.

In Piper, the New York Court of Appeals recognized that an infant could have a cause of action for equitable fraud committed before his conception. In Piper, the defendant induced the plaintiff's then future mother into a marriage based on the representation that if she married a certain man their children would inherit land. The representations were false and the plaintiff, born more than one year after the marriage, inherited nothing. The Piper court reasoned that although the defendant did not have the individual plaintiff in mind when the wrongful conduct occurred, the plaintiff was the very person injured as a result of the wrongful act. Based upon this rationale, the Piper court allowed the cause of action even though, as in Renslow, the wrongful act occurred prior to the plaintiff's conception.

Although analogies to the situation in which other areas of the law have granted legal protection to a fetus have persuasive impact upon the logic of Renslow, the reasonableness of the extension of duty to a person not yet in existence must be examined against the landmark decision in Palsgraf v. Long Island Railroad. The Palsgraf opinion of Justice Cardozo has had such a significant affect on the concept of duty in negligence law that its examination is essential to any discussion concerning duty.

In Palsgraf, action was brought against the defendant railroad company for injuries sustained by the plaintiff from falling debris after an explosion allegedly resulting from the defendant's negligence. Cardozo stated that any question of proxi-
mate cause was anterior to the question of whether the defendant owed a duty toward the plaintiff. As to the question of the limits of duty he responded that the "risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is the risk to another or to others within the range of apprehension." This does not mean the defendant must foresee the exact manner in which the injury will occur provided the possibility of an injury was clear to the ordinary prudent man. Cardozo's opinion has been adopted in many jurisdictions as the theory upon which duty, and therefore liability, in negligence cases was predicated.

The Cardozo theory of duty was adopted by the Illinois Supreme Court in Cunis v. Brennan. In Cunis, the plaintiff was injured after he was thrown from a car following an automobile collision. He landed on a parkway owned and maintained by the defendant village, and upon impact with the ground his leg was impaled on a broken pipe allegedly left exposed due to the defendant's negligence. The Cunis court applied the Cardozo test of duty. The Cunis court held the defendant owed no duty of care to the plaintiff since the occurrence was not reasonably foreseeable.

The fact that, in Cunis, Illinois adopted the Cardozo theory of duty has a definite impact on the reasonableness of the Renslow extension of duty to include a plaintiff not yet in existence at the time the negligent conduct occurred. Although Car-

dropped an innocent looking package, which unknown to the agents, contained fireworks. The fireworks exploded as the box hit the ground and the plaintiff was injured by a falling scale which was jarred by the concussion of the blast.

68. Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 162 N.E. 99 (1928). "The law of causation, remote or proximate, is thus foreign to the case before us. The question of liability is always anterior to the question of the measure of the consequences that go with liability." Id. at 344, 162 N.E. at 101.

69. Id. at 344, 162 N.E. at 100.

70. "It was not necessary that the defendant should have had notice of the particular method in which an accident would occur, if the possibility of an accident was clear to the ordinarily prudent eye." Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928).

71. See note 66 supra.

72. 56 Ill. 2d 372, 308 N.E.2d 617 (1974). In Cunis, the court denied recovery by the plaintiff because he did not establish as a matter of law that the defendant owed him a duty of care. The occurrence involved "must have been reasonably foreseeable." Id. at 376, 308 N.E.2d at 619.

73. See note 72 supra.

dozo placed limits on the duty concept, there was no requirement that those within the “orbit of danger” be known to the defendant or that they even be in existence at the time of the negligent act.\textsuperscript{75} Although the Cardozo theory adds considerable weight to the logic of \textit{Renslow}, even prior to its adoption in \textit{Cunis}, the existing Illinois law may have been broad enough to accommodate the scope of the \textit{Renslow} decision. Illinois courts have consistently held that the duty to exercise ordinary care does not rest on the proximity of the relationship between the parties but rather it can extend to remote and unknown persons.\textsuperscript{76} It is evident, therefore, that in a theoretical sense the concept of duty, as it has evolved in Illinois and in the United States, experienced little strain, if any, in the accommodation of the \textit{Renslow} “non-existent plaintiff.” However, the recognition of a duty in a given situation also depends upon policy considerations which may overshadow and even totally eclipse any theoretical argument, however logical, such as the theory upon which \textit{Renslow} is based.\textsuperscript{77}

\textsuperscript{75} 2 \textsc{Harper} \& \textsc{James}, \textit{The Law of Torts} 1030 (1956); James, \textit{Scope of Duty in Negligence Cases}, 47 \textit{Nw. U.L. Rev.} 778 (1953).

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. The limitation of the \textit{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.

\textit{Id.} at 788 (emphasis added).

\textsuperscript{76} See, e.g., \textit{Laukkanen v. Jewel Tea Co.}, 78 Ill. App. 2d 153, 222 N.E.2d 584 (1966). Here, plaintiff was injured by a windblown pylon support in front of a store. Defendant, a professional architect, was alleged negligent in not designing the pylon to withstand winds of foreseeable velocity. The defendant claimed he had no contract with the plaintiff but the court found him liable for breach of duty to the plaintiff. The central issue was whether “defendants failed to exercise that degree of care in the performance of professional duties imposed upon them as members of a licensed profession . . . .” \textit{Id.} at 161, 222 N.E.2d at 588. This holding could apply to professional doctors as in \textit{Renslow}. The \textit{Laukkanen} court, speaking on foreseeability which could be easily adapted to the \textit{Renslow} situation, held that “Negligence which proximately causes injury will require the negligent actor to respond in damages for the harm suffered, where the injury is foreseeable, regardless of the prior relationship of the parties.” \textit{Id.} at 162, 222 N.E.2d at 589.

\textsuperscript{77} 2 \textsc{Harper} \& \textsc{James}, \textit{The Law of Torts} 1052 (1956); James, \textit{Scope of Duty in Negligence Cases}, 47 \textit{Nw. U.L. Rev.} 778 (1953).

The ultimate question is whether such a duty \textit{should} be imposed as a matter of policy. This in turn will depend on the balancing of several factors, viz., the burden it would put on defendant’s activity; the extent to which the risk is one normally incident to that activity; the risk and the burden to plaintiff; the respective availability and cost of insurance to the two parties; the prevalence of insurance in fact; the desirability and effectiveness of putting the pressure to insure on one rather than the other, and the like. A judicious regard for such realistic considerations might justify liability in some situations and not in others even where there is no basis in doctrine for such a distinction.
Renslow v. Mennonite Hospital

Renslow: The Policy Implications

As has been the case with every extention of duty, the over-riding question the Renslow court had to face was whether such a duty should have been imposed as a matter of policy. Whether the law imposes a duty depends upon considerations extrinsic to and at times in spite of the logical appeal of a plaintiff's case. A "judicious regard" for such variables as the likelihood of the injury, the magnitude of the burden of guarding against it, and the desirability and effectiveness of placing the burden on the defendant might cause different results in the recognition or non-recognition of duty in cases in which otherwise there is no theoretical distinction. As a result the concept of duty must not be considered as being "sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.

Policy considerations have had an enormous impact on the development of the cause of action for prenatal injuries. Often in the past, while denying the cause of action, the courts have hidden some very real policy considerations (upon which their decisions were probably based) under the guise of rationale such as lack of precedent, no duty, and legislative responsibility.

An example of policy considerations strong enough to defeat a cause of action for preconception wrongful conduct was seen in Zepeda v. Zepeda. Prior to Renslow, the Illinois Appellate Court in Zepeda was the only other Illinois court to deal with a cause of action for preconception wrongful conduct. The wrongful conduct in Zepeda was the fraudulent seduction of a woman (plaintiff's then future mother) under a promise of marriage. The defendant was married at the time and knew he could not marry the plaintiff's mother. As a result of the

Id. at 808.

77. See note 7 supra. See, e.g., Lance v. Senior, 36 Ill. 2d 516, 224 N.E.2d 231 (1967).

After the event, hindsight makes every occurrence foreseeable, but whether the law imposes a duty does not depend upon foreseeability alone. The likelihood of injury, the magnitude of the burden of guarding against it and the consequences of placing that burden upon the defendant, must be taken into account.

Id. at 518, 224 N.E.2d at 233.

78. See note 60 infra.


81. See note 7 supra; Comment, The Impact of Medical Knowledge on the Law-Relating to Prenatal Injuries, 110 U. Penn. L. Rev. 554 (1962) [hereinafter cited as Impact of Medical Knowledge].

82. See Impact of Medical Knowledge, supra note 82.

83. See Impact of Medical Knowledge, supra note 82.

defendant's fraudulent preconception conduct, the surviving infant plaintiff was born out of wedlock. Although the Zepeda court came to the conclusion that the defendant had committed a tortious act, the cause of action for "wrongful life" was not extended to the plaintiff.85

The Zepeda court's refusal to recognize the cause of action was founded on public policy. In view of the overwhelming number of illegitimate births, the Zepeda court feared that recognition of a cause of action for "wrongful life" would create a flood of litigation.86 The court held that the declaration of such a cause of action was more properly a legislative responsibility.87

In light of the Zepeda policy considerations, Renslow appears to be inconsistent with Zepeda. However, unlike the Zepeda court, the Renslow court could not easily refer the task of recognition of the cause of action to the legislature.88 Not only is there a constitutional mandate directing Illinois courts to remedy wrongful injuries where the legislature is silent,89 but also the Zepeda court, in dictum, clearly recognizes a Renslow-type cause of action.90 Even more significant is the fact that in Jorgenson,

85. Id. at 262-63, 190 N.E.2d at 859.
86. Id. at 260, 190 N.E.2d at 858.
87. We have decided to affirm the dismissal of the complaint. We do this, despite our designation of the wrong committed herein as a tort, because of our belief that lawmaking, while inherent in the judicial process, should not be indulged in where the result could be as sweeping as here. The interest of society is so involved, the action needed to redress the tort could be so far-reaching, that the policy of the State should be declared by the representatives of the people.
89. ILL. CONST. art. 1, § 12 (1970). "Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person . . . . He shall obtain justice by law, freely, completely, and promptly." In the commentary to section 12 it is stated that the word "shall" was substituted for "ought to" to make the statement of the principle more emphatic. ILL. ANN. CONST. art. 1, § 12, Commentary at 556 (Smith-Hurd 1971). See Skelly Oil Co. v. Universal Oil Products Co., 338 Ill. App. 79, 86 N.E.2d 875 (1949). In Skelly, the court stated that the Illinois Constitution provides a clear mandate to the courts to provide a remedy wherever the legislature has failed to provide one.
upon which the Renslow court heavily relied, the court founded its recognition of the cause of action for preconception wrongful conduct on rationale similar to the Zepeda dictum. Therefore, although the Renslow court did not mention Zepeda in its opinion, it would appear that the "flood of litigation" argument would not be detrimental to the Renslow holding.

The type of policy considerations which would be more detrimental in a complicated medical malpractice case like Renslow are problems of proof and fictitious claims. In all probability the problems of proof and the fear of fictitious claims were the main and underlying reasons the development of the cause of action for prenatal injuries was hindered in its early stages.

Beginning with Bonbrest, the influence which advances in medical science had on these antiquated policy considerations came to the forefront. To the problems of proof and fictitious claims, the Bonbrest court replied that "[t]he law was presumed to keep pace with the sciences and medical science certainly has made progress since 1884." The Bonbrest reasoning has come to dominate modern cases, such as Renslow, in which a cause of action for prenatal injuries has been allowed even when the causal connection was much more complex.

But what if the wrongful conduct takes place before conception? Can the defendant be held accountable if his act was completed before the plaintiff was conceived? Yes, for it is possible to incur, as Justice Holmes phrased it in the Dietrich case, 'a conditional prospective liability in tort to one not yet in being.' It makes no difference how much time elapses between a wrongful act and a resulting injury . . . . Suppose, before the child was conceived, a manufacturer negligently made a space heater and sold it to a retailer who retained it in his store. After the infant's birth his mother purchased the heater and used it in the room of her child who was burned because of its faulty preparation. Would there not be a right of action against the manufacturer despite the fact the negligence took place before the child was conceived?


If 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 remedy. Such reasoning runs counter to the various principles of recovery which Oklahoma recognizes . . . .

92. See Impact of Medical Knowledge, supra note 82, at 559-60.

It is likely, however, that the proof problem played a larger part in influencing decisions than these courts were willing to acknowledge in their opinions, for none of the other reasons are very persuasive. The fact that the common law provided remedies in analogous areas weakens the argument for legislative responsibility; many of the reasons for stare decisis are inapplicable in tort law; and the 'no duty' argument does no more than assume its conclusion. One of the criticisms often leveled at the common-law judicial process is the reluctance of courts to articulate their holdings expressly in terms of public policy. (emphasis added).


94. See Impact of Medical Knowledge, supra note 82, at 561.
Although there are complex prenatal injury cases in which problems of proof may still exist, there are also many situations in which the causal connection is traceable and the injury reasonably foreseeable.\textsuperscript{95} \textit{Renslow} represents one of the situations in which advances in medical knowledge have shown not only that there is a great likelihood of such an injury under the proper circumstances, but also that such an injury is well within the range of foreseeability of modern doctors and hospitals.\textsuperscript{96} Also, the burden of placing the duty to prevent such injuries on today's medical men is not unreasonable in light of the great advancements in the knowledge about the RH factor in the last thirty years.\textsuperscript{97} In addition, there is also a great benefit to society if such a duty is placed on today's doctors and hospitals since it would result in reasonable safeguards to reduce the occurrence of such injuries as well as the cost, grief, and litigation which accompany the injuries. Thus the policy rationale which in the past has prevented the recognition and extension of the duty of care in many prenatal injury cases are eviscerated by the logic and reason of \textit{Renslow}.

\textbf{CONCLUSION}

In the wake of \textit{Renslow}, the appropriate question is what impact will the decision have on Illinois prenatal injury law. Any long-range effects of the \textit{Renslow} case cannot be predicted with certainty. The reason for the uncertainty, however, is not due to any defect in the logic of the \textit{Renslow} holding itself. After \textit{Renslow}, the duty concept, although it extends to preconception conduct, is still dependent upon the reasonable foreseeability of the situation in question.\textsuperscript{98} Of course, reasonable foreseeability is dependent upon man's experiences and in some cases, his medical knowledge.\textsuperscript{99} Therefore, it is rather the uncertainty of where man's experiences and medical discoveries will lead which make any long-range predictions of the ultimate impact of \textit{Renslow} tenuous.\textsuperscript{100} However, some concrete observations about the impact of \textit{Renslow} on plaintiffs and defendants in prenatal injury actions arising after \textit{Renslow} may be made.

\begin{footnotes}
\footnote{96. See Impact of Medical Knowledge, supra note 82, at 554-55.}
\footnote{97. Id.}
\footnote{98. See notes 72-74 and accompanying text supra.}
\footnote{100. See Impact of Medical Knowledge, supra note 82, at 601: "The scope of liability under the present prenatal injury rule is as broad as the present competence of medical science to establish the fact of causation. It will be subject to further widening in response to the expansion of medical knowledge."
}
In a complaint in a prenatal injury action (as in all negligence actions), the plaintiff must allege sufficient facts to enable the court to find a duty owed by the defendant to the plaintiff and a breach of that duty. In light of *Renslow* a plaintiff may now state a cause of action by alleging the existence of a duty and its breach as a result of the defendant's preconception conduct. However, the plaintiff must keep in mind that, in Illinois, the pleadings "shall be liberally construed with a view to doing substantial justice between the parties." Therefore, plaintiffs will most probably have a more difficult task in stating a cause of action as the time period between the alleged negligent conduct and conception elongates and the occurrence becomes less foreseeable.

Those who are defendants in a *Renslow*-type action must face an extension of their liability. Defendants may no longer merely move for dismissal on grounds that the plaintiff was not in existence when the negligence occurred. In their endeavor to attack the reasonable foreseeability of the occurrence, defendants should keep in mind that, in the interest of substantial justice, may be reluctant to extend defendant liability too far.

Finally, the question of whether a *Renslow*-type cause of action exists in Illinois is not yet settled. The *Renslow* defendants' appeal by certificate of importance has been granted.

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101. Cunis v. Brennan, 56 Ill. 2d 372, 308 N.E.2d 617 (1974). In Cunis, the court stated that "[t]his question, i.e., whether the defendant and the plaintiff stood in such a relationship to one another that the law imposed upon the defendant an obligation of reasonable conduct for the plaintiff's benefit, is one of law for determination by the court." Id. at 374, 308 N.E.2d at 618. See, e.g., Falsgraf v. Long Island R.R. Co., 248 N.Y. 339, 162 N.E. 99 (1928). It is pointed out in James, *Scope of Duty in Negligence Cases*, 47 Nw. U.L. Rev. 778, 815 (1953), that as is the case with any other issue, "the judge will leave the question to the jury if it is a debatable one . . . ." Therefore, it must be remembered that it is not always the judge who decides whether the defendant owes the plaintiff a duty of care. This is true especially in more complex cases. These statements, as to whether the plaintiff has stated a cause of action, assume that the plaintiff also alleges prenatal injury as a result of the defendant's breach of duty. See, e.g., Lasko v. Meier, 394 Ill. 71, 67 N.E.2d 162 (1946); Schueller v. Mueller, 193 Ill. 402, 61 N.E. 1044 (1901).


103. ILL. REV. STAT. ch. 110, § 33(3) (1975).

104. Plaintiffs' difficulties here would be primarily due to problems of proving causation, as well as the court's policy interest in not over-burdening the defendant.

105. See text accompanying notes 57 & 96 supra.

106. Under Illinois Supreme Court Rule 316, there can be an appeal from a final judgment by the appellate court to the supreme court upon the certification by that same appellate court. This method of appeal is used where the case decided by the certifying appellate court "involves a question of such importance that it should be decided by the Supreme Court." ILL. REV. STAT. ch. 110A, § 316 (1975).
and now the ultimate recognition of a cause of action for preconception negligent conduct is in the hands of the Illinois Supreme Court. The precise determination of Renslow by the Illinois Supreme Court cannot be predicted with certainty. However, the court's decision will be made with the knowledge that the appellate decision recognized that modern courts "are . . . not placed in solitary confinement with the duties of yesterday, but are free to recognize new duties and standards of conduct where the factual realities require that they do or should exist." Due to the Renslow expansion of the cause of action for prenatal tortious conduct beyond the artificial barrier of a plaintiff's existence, the courts will be called upon to balance the interests of the parties in order to do substantial justice in each and every case.

The scale of substantial justice may not always tip in favor of recognition of a plaintiff's cause of action, but when the constantly changing conditions of modern life demand the recognition of a new standard of conduct, as in Renslow, the courts must act.

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107. Kay v. Ludwick, 87 Ill. App. 2d 114, 118, 230 N.E.2d 494, 497 (1967). Kay involved an action by a four year old child against his host for the loss of the heel on his foot. The child suffered the injury when he attempted to climb on the host's riding lawn mower.

108. Id.

109. Id. In response to a question as to lack of precedent upon which to decide the case, the Kay court responded that "[m]an's ingenuity in inventing mechanical devices which in their operation may cause injury to his fellow man seems unlimited. This fact together with constant changing social conditions lead constantly to judicial recognition of new duties and new standards of conduct." Id. at 118, 230 N.E.2d at 497.