Preconception Torts Are Not Actionable in New York

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Plaintiffs' attempts to redress injuries sustained before birth, long the subject of litigation, have spawned several distinct theories of liability. In New York, for example, prenatal injuries, involving trauma inflicted during intrauterine development, are actionable. When the plaintiff's birth is itself the alleged wrong,
however, recovery for such "wrongful life" has been denied.\textsuperscript{188} The viability of yet a third basis for liability, namely, preconception injuries to a parent causing defects in a plaintiff infant, had remained an open question in New York.\textsuperscript{187} Recently, however, in \textit{Albala v. City of New York},\textsuperscript{188} the Court of Appeals held that such preconception torts are not actionable.\textsuperscript{189}

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

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

\textsuperscript{191} Id. at 271-72, 429 N.E.2d at 787, 445 N.Y.S.2d at 109 (1981).

\textsuperscript{192} Id. at 271, 429 N.E.2d at 787, 445 N.Y.S.2d at 109.

\textsuperscript{193} Id. The abortion left Ruth Albala, the plaintiff's mother, with a punctured uterus, for which she recovered $175,000 in settlement of her malpractice claim. \textit{Id}. It was this uterine flaw that allegedly caused the plaintiff's injury. \textit{Id}.

\textsuperscript{194} Id. The abortion was performed on December 27, 1971, and the infant plaintiff, conceived in September of 1975, was born on June 3, 1976. \textit{Id}.

\textsuperscript{189} Albala v. City of New York, 78 App. Div. 2d 389, 393, 434 N.Y.S.2d 400, 403 (1st Dep't), aff'd, 54 N.Y.2d 269, 429 N.E.2d 788, 445 N.Y.S.2d 108 (1981). Judge Bloom, who wrote the appellate division majority opinion, noted that despite the recent "explosive ex-
On appeal, a divided Court of Appeals affirmed. Judge Wachtler, writing for the majority, initially observed that the theory of recovery underlying prenatal injuries was inapplicable to the case at bar because in prenatal, as opposed to preconception, torts, the mother and fetus are independent entities, each of whom is owed a separate duty of care. Furthermore, although the Court distinguished its decision in Park v. Chessin, which had denied a cause of action for wrongful life, it nonetheless observed that the "central concern" of Park, namely, the "staggering implications" of imposing liability for a less than perfect birth, was relevant to preconception torts. Indeed, upon conceding that the injury to the Albala plaintiff was foreseeable, the Court held that since the scope of preconception tort liability could neither reasonably nor practicably be limited, the cause of action should not be recognized.

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

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

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

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

Id. at 272-73, 429 N.E.2d at 788, 445 N.Y.S.2d at 110.

Id. at 273-74, 429 N.E.2d at 788, 445 N.Y.S.2d at 110.
gence cause of action: foreseeability and causation. Judge Fuchsberg further contended that the majority’s reluctance to recognize a preconception tort cause of action for fear of precipitating unbounded litigation was more properly a matter of legislative concern. Concluding that the majority’s fears were, in any event, unwarranted, the dissent urged recognition of the plaintiff’s “meritorious and legally cognizable” claim.

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

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200 Id. at 275, 429 N.E.2d at 789, 445 N.Y.S.2d at 111 (Fuchsberg, J., dissenting).
201 Id.
202 Id.
203 See Jorgensen v. Meade Johnson Laboratories, Inc., 483 F.2d 237, 239 (10th Cir. 1973) (allegations that birth control pills had altered the plaintiff’s mother’s chromosome structure leading to the plaintiff’s genetic defects); Zepeda v. Zepeda, 41 Ill. App. 2d 240, 250-51, 190 N.E.2d 849, 854 (1963). See generally Comment, supra note 187.
204 See Bergstrøsør v. Mitchell, 577 F.2d 22, 24 (8th Cir. 1978) (injury occurring during delivery); Renslow v. Mennonite Hospital, 67 Ill. 2d 348, 350, 367 N.E.2d 1250, 1251 (1977) (“the negligent force... had its impact upon the infant in its prenatal state”); Zepeda v. Zepeda, 41 Ill. App. 2d 240, 250, 190 N.E.2d 849, 853-54 (1963).
205 The Albala Court indicated that the injuries had been sustained “during gestation.” 54 N.Y.2d at 271, 429 N.E.2d at 787, 445 N.Y.S.2d at 109. This distinction between pre and postconception onset of injury, to some degree, has been drawn in other jurisdictions. In Renslow v. Mennonite Hospital, 67 Ill. 2d 348, 367 N.E.2d 1250 (1977), an infant alleged injury as a result of a negligent blood transfusion given to her mother several years before the infant plaintiff’s conception. 67 Ill. 2d at 349, 367 N.E.2d at 1251. The Supreme Court of Illinois found, inter alia, that the plaintiff had a right to be born free of “prenatal injuries foreseeably caused by a breach of duty to the child’s mother.” Id. at 357, 367 N.E.2d at 1255. A concurring opinion noted that the holding did not reach genetically transmitted injuries. Id. at 370, 367 N.E.2d at 1261 (Dooley, J., concurring).
206 See note 185 and accompanying text supra.
207 Recognition of an infant’s right to bring an action for a tort committed before con-
It is further submitted that the Court of Appeals properly could have recognized even “pure” preconception torts. Concededly, as noted by the Albala Court, and as previously pronounced in Park, there is no right to a perfect birth. It is suggested, nonetheless, that the theoretical difficulties that led the Park Court to deny a remedy for wrongful life should not hinder judicial recognition of preconception torts. The Park Court, called upon to weigh the value of an impaired human life against the value of nonexistence, eschewed such balancing as a philosophical, rather than a legal, exercise. No such impediment exists with respect to preconception torts, however, because the recovery sought is for calculable injuries. Recognition of a preconception tort, moreover, would not involve judicial endorsement of a right to be born without defects. Instead, the cause of action contemplates no more than the right of an infant to be compensated for negligently inflicted injuries.

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

preconception tort cases alone do not present the logical and theoretical problems of wrongful life suits.” 13 Akron L. Rev. 390, 397 (1979); see Note, Preconceptional Tort Liability, supra note 183, at 885.

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

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