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,

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183 Note, Preconceptional Tort Liability—Renslow v. Mennonite Hospital, 27 De Paul L. Rev. 691, 691 (1978). In Dietrich v. Northampton, 138 Mass. 14, 17 (1884), the Supreme Court of Massachusetts, speaking through Justice Holmes, ruled that there could be no cause of action on behalf of an infant injured while in his mother's womb. This was the prevailing view for the next 62 years. See, e.g., Buel v. United Rys., 248 Mo. 126, 132-33, 154 S.W. 71, 73 (1913); Drobnar v. Peters, 232 N.Y. 220, 224, 133 N.E. 567, 568 (1921); Gorman v. Budlong, 23 R.I. 169, 170, 49 A. 704, 707 (1901). But see Korman v. Hagen, 165 Minn. 320, 325-26, 206 N.W. 650, 652 (1926); Kine v. Zuckerman, 4 Pa. D. & C. 227, 230 (1924). In 1946, however, a cause of action for prenatal injury was recognized in Bonbrest v. Kotz, 65 F. Supp. 138, 142 (D.D.C. 1946). The Bonbrest decision signalled "the most spectacular abrupt reversal of a well settled rule in the whole history of the law of torts." W. Prosser, HANDBOOK OF THE LAW OR TORTS § 55, at 336 (4th ed. 1971); Robertson, Toward Rational Boundaries of Tort Liability for Injury to the Unborn: Prenatal Injuries, Preconception Injuries and Wrongful Life, 1978 DUKE L.J. 1401, 1402. Initially, a number of courts chose to recognize viability as the point at which the fetus acquired a right of action for injuries sustained. See, e.g., Hale v. Manion, 189 Kan. 143, 146-47, 388 P.2d 1, 3 (1962); Mitchell v. Couch, 285 S.W.2d 901, 906 (Ky. 1955). Since the theoretical basis for denying recovery for prenatal injury was that the unborn fetus had no independent existence, see, e.g., Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 357-58, 78 S.W.2d 944, 948-49 (1935), it was not surprising that some courts found a valid cause of action by asserting the fetal capacity for independent survival. This viability theory, however, has been criticized as "irrational and illogical." Note, Preconception Injuries: Viable Extension of Prenatal Injury Law or Inconceivable Tort?, 12 VA. U.L. Rev. 143, 153 (1977), and most courts have opted to recognize prenatal torts regardless of the viability of the fetus. See, e.g., Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 504-05, 93 S.E.2d 727, 728 (1956); Daley v. Meier, 33 Ill. App. 2d 218, 224, 178 N.E.2d 691, 694 (1961); Smith v. Brennan, 31 N.J. 353, 367, 157 A.2d 497, 504 (1960). Moreover, no court granting a remedy for prenatal injury has subsequently denied recovery because the fetus was nonviable at the time of the injury. Todd v. Sandidge Constr. Co., 341 F.2d 75, 79 (4th Cir. 1964) (Haynsworth, J., dissenting). At least one commentator has reached the conclusion that "the viability rule is dead in cases of action for prenatal injuries brought by living infants." Robertson, supra, at 1418.

however, recovery for such "wrongful life" has been denied.\textsuperscript{186} The viability of yet a third basis for liability, namely, preconception injuries to a parent causing defects in a plaintiff infant, had remained an open question in New York.\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}

\begin{footnotes}

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

\textsuperscript{190} 54 N.Y.2d at 271, 429 N.E.2d at 787, 445 N.Y.S.2d at 109.

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

\textsuperscript{192} \textit{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{193} \textit{Albala v. City of New York}, 78 App. Div. 2d 389, 393, 434 N.Y.S.2d 400, 403 (1st Dep't), aff'd, 54 N.Y.2d 269, 429 N.E.2d 786, 445 N.Y.S.2d 108 (1981). Judge Bloom, who wrote the appellate division majority opinion, noted that despite the recent "explosive ex-
On appeal, a divided Court of Appeals affirmed. 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, 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 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. 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 “the 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 infant, by being born, had not suffered any legal injury. The Court considered the question whether nonexistence was preferable to life in a disabled state more philosophical than legal. Id. at 411, 386 N.E.2d at 812, 413 N.Y.S.2d at 900. Second, on a more practical level, the Court was unable to ascertain the plaintiff’s damages based on such a comparison, concluding that “recognition 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.

54 N.Y.2d 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 Bergstreser v. Mitchell, 577 F.2d 22, 24 (8th Cir. 1978) (injury occurring during delivery); Renslow v. Mennonite Hospital, 67 Ill. 2d 348, 350, 367 N.E.2d 1250, 1251 (1977) ("the negligent force... had its impact upon the infant in its prenatal state"); Zepeda v. Zepeda, 41 Ill. App. 2d 240, 250, 190 N.E.2d 849, 853-54 (1963).
205 The Albala Court indicated that the injuries had been sustained "during gestation." 54 N.Y.2d at 271, 429 N.E.2d at 787, 445 N.Y.S.2d at 109. This distinction between pre and postconception onset of injury, to some degree, has been drawn in other jurisdictions. In Renslow v. Mennonite Hospital, 67 Ill. 2d 348, 367 N.E.2d 1250 (1977), an infant alleged injury as a result of a negligent blood transfusion given to her mother several years before the infant plaintiff's conception. 67 Ill. 2d at 349, 367 N.E.2d at 1251. The Supreme Court of Illinois found, inter alia, that the plaintiff had a right to be born free of "prenatal injuries foreseeably caused by a breach of duty to the child's mother." Id. at 357, 367 N.E.2d at 1255. A concurring opinion noted that the holding did not reach genetically transmitted injuries. Id. at 370, 367 N.E.2d at 1261 (Dooley, J., concurring).
206 See note 185 and accompanying text supra.
207 Recognition of an infant's right to bring an action for a tort committed before con-
It is further submitted that the Court of Appeals properly could have recognized even "pure" preconception torts. Concededly, as noted by the Albala Court, and as previously pronounced in Park, there is no right to a perfect birth. 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.
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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