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Appellate Division Recognizes Preconception Tort Liability in Favor of DES Granddaughter

Judith M. Reilly

even upon a finding of prejudicial error.[37] In *Lucas*, the court analyzed the "fairness of the trial, not the culpability of the prosecutor"—a standard less protective of the defendant's rights than the constitutional harmless error test.[38] Thus, it is suggested that where the integrity of the prosecution has been called into question, the prosecution should bear the burden of proving an absence of prejudice, and the defendant should be protected by the standard most protective of his rights—the constitutional harmless error standard.[39]

John R. Marcil

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American courts uniformly recognize a child's right to sue for injuries sustained prior to birth,[1] yet only a minority of jurisdictions have been willing to extend prenatal tort liability[2] to include

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[37] *Id.*

[38] *Id.* at 27, col. 1. The court adopted the rationale in *Munoz*, *see supra* note 23 and accompanying text, regarding the application of the nonconstitutional harmless error test. *Id.* "In order to prevail on a post-trial motion to set aside a verdict a defendant must prove by a preponderance of the evidence some error or misconduct, and that the claimed error or misconduct created a substantial risk of prejudice." *Id.*; *see* People v. Rhodes, 92 A.D.2d 744, 745, 461 N.Y.S.2d 81, 83 (4th Dep't 1983).

[39] *See supra* note 27 and accompanying text. It is submitted that an unlicensed attorney deceives the court, the defendant, and the public. If the implicit trust given to the office of the district attorney is assured by proper qualifications, licensing and oaths, an individual who fails to provide such assurances should not benefit from a presumption that no unfairness occurred. At a minimum, the burden should be on the people to show that prosecution by an unlicensed attorney did not prejudice the defendant. Justice should be the ultimate goal; it may be *assured* by a retrial, or merely *approximated* by upholding a conviction.

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[1] *See* Robertson, *Toward Rational Boundaries of Tort Liability For Injuries to the Unborn: Prenatal Injuries, Preconception Injuries and Wrongful Life*, 1978 DUKE L.J. 1401, 1402. American jurisdictions achieved unanimity in recognizing prenatal tort actions when the Alabama Supreme Court decided Huskey v. Smith, 289 Ala. 52, 265 So.2d 596 (1972). Robertson, *supra*. In *Huskey*, the court recognized and overruled Alabama's position as the only remaining state denying recovery for prenatal tort injuries. *See Huskey*, 289 Ala. at 54, 265 So. 2d at 597-98.

[2] W. KEETON, D. DOBBS, R. KEETON & D. OWENS, PROSSER AND KEETON ON TORTS § 55, at 367 (5th ed. 1984) [hereinafter PROSSER & KEETON]. The area of prenatal injuries can be

actions for injuries resulting from acts committed prior to conception.[3] The New York Court of Appeals has steadfastly refused such an expansion,[4] on the ground that New York does not recognize preconception tort liability under common-law negligence principles.[5] Recently, however, in *Enright v. Eli Lilly & Co.*,[6] the Appellate Division, Third Department, held that a child, injured as a result of her mother's exposure to diethylstilbestrol (DES),[7] could maintain a preconception tort action against the drug manufacturer on a strict products liability theory.[8]

In *Enright*, the plaintiff's grandmother ingested DES in 1960 while pregnant with the plaintiff's mother.[9] As a result, the plaintiff's mother developed abnormalities in her reproductive system, which rendered her unable to carry the plaintiff to term[10] and caused the plaintiff to be born prematurely and to suffer severe

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divided into two categories: (1) those where the tortious conduct inflicts injury on the unborn child through the body of the mother; and (2) those where the tortious conduct results in the birth of an unwanted child. *Id.* For the purposes of this Survey, the discussion of prenatal injuries will deal mainly with those falling into the former category.

[3] *See, e.g.*, Bergstresser v. Mitchell, 577 F.2d 22, 23-26 (8th Cir. 1978) (court allowed child to maintain action for negligent Caesarean section performed on mother several years before plaintiff's conception and also noted unusual and novel nature of issue); Jorgensen v. Meade-Johnson Labs., 483 F.2d 237, 240-41 (10th Cir. 1973) (first case to allow preconception tort action); Renslow v. Mennonite Hosp., 67 Ill. 2d 348, 356-58, 367 N.E.2d 1250, 1255-58 (1977) (court allowed cause of action for infant plaintiff where mother suffered negligent transfusion nine years prior to conception and noted that result reached had "not yet been widely recognized"); Monusko v. Postle, 175 Mich. App. 269, 275-76, 437 N.W.2d 367, 369-70 (court allowed action by infant against physician who failed to test mother for rubella prior to conception), *appeal denied*, 433 Mich. 869 (1989).

[4] *See* Albala v. City of New York, 54 N.Y.2d 269, 271-72, 429 N.E.2d 786, 787, 445 N.Y.S.2d 108, 108-09 (1981).

[5] *Id.* The court affirmed the Appellate Division's dismissal of the plaintiff's action, stating that the recognition of an action under the circumstances would require an extension of traditional tort concepts beyond manageable bounds. *Id.*

[6] 155 A.D.2d 64, 553 N.Y.S.2d 494 (3d Dep't 1990).

[7] *See* Note, *The DES Causation Conundrum: A Functional Analysis*, 32 N.Y.L. SCH. L. REV. 939, 939 (1987). DES, a synthetic estrogen, was prescribed as a miscarriage preventative between 1947 and 1971. *Id.* DES was eventually taken off the market when a statistical correlation was discovered between maternal ingestion of the drug and the development of a rare form of vaginal cancer in female offspring. *Id.*

[8] *Enright*, 155 A.D.2d at 70, 553 N.Y.S.2d at 497. The court's holding recognized the plaintiff's cause of action in strict products liability, a theory which is separate and distinct from negligence. *See id.* For a view of strict products liability as applied in New York, see Voss v. Black & Decker Mfg. Co., 59 N.Y.2d 102, 109-11, 450 N.E.2d 204, 208-10, 463 N.Y.S.2d 398, 402-04 (1983), and Codling v. Paglia, 32 N.Y.2d 330, 339-42, 298 N.E.2d 622, 626-28, 345 N.Y.S.2d 461, 467-70 (1973).

[9] *Enright*, 155 A.D.2d at 66, 553 N.Y.S.2d at 495.

[10] *Id.*

and permanent disabilities.[11] The plaintiff's parents commenced an action on behalf of the infant-plaintiff against several drug manufacturers under the theories of negligence, strict products liability, breach of warranty, and fraud.[12]

The Supreme Court, Chenango County, dismissed all of the plaintiff's claims, stating that New York did not recognize preconception tort liability.[13] However, the Appellate Division, Third Department, while adhering to New York's policy of denying a preconception tort action in negligence, reversed the dismissal of the plaintiff's cause of action in strict products liability.[14]

Writing for the majority, Justice Casey noted that the necessity of establishing manageable bounds for liability, a consideration underlying the Court of Appeal's reluctance to expand liability in negligence,[15] was conspicuously absent in a strict products liability action.[16] Based on the strong policy favoring a remedy for DES victims,[17] and the legislative intent behind the recent enactment of New York's toxic tort statute of limitations[18] and revival statute,[19] the court concluded that the plaintiff, though not a DES

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[11] *Id.*

[12] *Id.* The complaint alleged that recovery would be sought on the basis of alternative liability and/or enterprise liability and/or market share liability if it could not be proven which defendant had actually manufactured the DES ingested by the plaintiff's grandmother. *Id.*

[13] *Id.* at 66, 553 N.Y.S.2d at 495; *see* Albala v. City of New York, 54 N.Y.2d 269, 271-72, 429 N.E.2d 786, 787, 445 N.Y.S.2d 108, 109 (1981) (New York does not recognize cause of action for preconception tort). *See generally* Survey, *Preconception Torts Not Actionable in New York*, 56 ST. JOHN'S L. REV. 618 (1982) (discussing *Albala* and New York's approach to preconception tort actions).

[14] *Enright*, 155 A.D.2d at 70, 553 N.Y.S.2d at 497.

[15] *See Albala*, 54 N.Y.2d at 273-74, 429 N.E.2d at 788, 445 N.Y.S.2d at 110.

[16] *See Enright*, 155 A.D.2d at 70, 553 N.Y.S.2d at 497. Under a strict products liability theory, once a defect is established, the liability of the manufacturer extends to any person who is thereby affected, regardless of privity, forseeability, or due care. *See* Codling v. Paglia, 32 N.Y.2d 330, 342, 298 N.E.2d 622, 628, 345 N.Y.S.2d 461, 469-70 (1973).

[17] *Enright*, 155 A.D.2d at 70, 553 N.Y.S.2d at 497.

[18] CPLR 214-c (McKinney 1990). CPLR 214-c changed the statute of limitations accrual date from the date of injury to the date of discovery for all actions based on injuries caused by toxic substances. *Id.* Prior to its enactment, a cause of action accrued at the time of exposure, regardless of whether it could reasonably have been perceived that an injury would result. *See Enright*, 155 A.D.2d at 68, 553 N.Y.S.2d at 496; *see also* Steinhardt v. Johns-Manville Corp., 54 N.Y.2d 1008, 1010, 430 N.E.2d 1297, 1299, 446 N.Y.S.2d 244, 246 (1981) (court refused to make date of discovery accrual date, leaving such decision up to legislature).

[19] Ch. 682, § 4 [1986] N.Y. LAWS 1567 (McKinney). This statute provided a one year period wherein a plaintiff, injured by the latent effects of one or more of five toxic substances (DES included), could commence an action which would otherwise be timebarred.

daughter, was nonetheless a DES victim, and therefore entitled to bring a preconception tort action in strict products liability.[20]

Dissenting, Justice Weiss asserted that the majority overstepped its bounds in setting aside the established rule of not recognizing preconception torts in New York.[21] He maintained that the decision to fashion a new remedy would be better left to the legislature,[22] and argued that the majority misconstrued the legislature's intent in enacting the toxic tort revival statute.[23] It was Justice Weiss's contention that the purpose of the statute was merely to allow an action that otherwise would be time barred, and not, as asserted by the majority, to provide a cause of action for future generations not yet conceived at the time of the tort.[24]

While it appears that the court in *Enright* correctly recognized the need to afford this particular plaintiff a remedy, it is submitted that it failed to establish a compelling doctrinal argument sufficient to persuade the Court of Appeals to abandon its traditional denial of preconception tort liability actions. The court should have found that a preconception tort action is a logical extension of prenatal tort liability, for although the tortious conduct occurs prior to conception, the injury is not sustained until after conception, at which time the tort is complete.

In *Albala v. City of New York*,[25] the New York Court of Appeals, although denying a preconception tort action in negligence, left open the question as to whether a cause of action in strict products liability would be permitted.[26] In *Enright*, the Appellate Division seized the opportunity to allow such an action[27] and justi-

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Id.

[20] *Enright*, 155 A.D.2d at 68-70, 553 N.Y.S.2d at 496-97.

[21] *Id.* at 71, 553 N.Y.S.2d at 498 (Weiss, J., dissenting).

[22] *Id.* (Weiss, J., dissenting).

[23] *Id.* at 73-74, 553 N.Y.S.2d at 500 (Weiss, J., dissenting).

[24] *Id.* (Weiss, J., dissenting).

[25] 54 N.Y.2d 269, 429 N.E.2d 786, 445 N.Y.S.2d 108 (1981).

[26] *See id.* at 274 n.*, 429 N.E.2d at 788 n.*, 445 N.Y.S.2d at 110 n.*. The Court of Appeals in *Albala* distinguished its case from Jorgensen v. Meade-Johnson Labs., 483 F.2d 237, 241 (10th Cir. 1973), where a preconception tort action was recognized. *Albala*, 54 N.Y.2d at 274 n.*, 429 N.E.2d at 788 n.*, 445 N.Y.S.2d at 110 n.*. Since *Jorgensen* was decided on a strict products liability theory, the *Albala* court was not concerned with its policy considerations since *Albala* dealt with negligence. *Id.*; *see* Catherwood v. American Sterilizer Co., 130 Misc. 2d 872, 874, 498 N.Y.S.2d 703, 705 (court acknowledged that *Albala* preserved issue with respect to strict products liability for future decision), *aff'd*, 126 A.D.2d 978, 511 N.Y.S.2d 805 (4th Dep't 1986), *appeal dismissed*, 70 N.Y.2d 782, 515 N.E.2d 908, 521 N.Y.S.2d 222 (1987).

[27] *Enright*, 155 A.D.2d at 70, 553 N.Y.S.2d at 497 (court reasoned that need to limit

fied its decision by acknowledging a trend toward expanding recovery in DES cases[28] and other DES policy considerations.[29] In addition, the court relied on the legislature's recently enacted toxic tort statute, including the revival provision, both of which also apply to substances other than DES.[30] Yet, the court restricted a preconception tort action to those affected by DES only, and ignored those injured by other toxins,[31] and thereby committing a grave injustice against victims of toxins other than DES. Moreover, since the statute was adopted to extend the time in which an action may be brought[32] and not to provide a remedy for future generations,[33] the court erred in relying on the statute to justify the recognition of a cause of action for an injury occurring prior to conception.

A more persuasive approach in support of preconception liability in New York would have been to concentrate on an analysis of prenatal tort liability.[34] In *Enright*, the tortious conduct occurred when the DES was administered,[35] but the tort was not

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liability was absent in strict products liability action).

[28] *Id.* at 67-70, 553 N.Y.S.2d at 495-98.

[29] *See id.* The *Enright* court noted that "[t]he distinguishing factor is DES." *Id.* at 68, 553 N.Y.S.2d at 496.

[30] *See* CPLR 214-c; *see also supra* note 18 (discussion of CPLR 214-c).

[31] *See Enright*, 155 A.D.2d at 67-70, 553 N.E.2d at 495-98 (court's rationale failed to consider effect of its holding on victims of other kinds of toxic poisoning). CPLR 214-c encompasses exposure to any toxin by way of "absorption (e.g., phenoxy herbicides), contact (e.g., insidious chemicals, *cf.* Ward v. Desachem Co., C.A.N.Y. 1985, 771 F.2d 663), ingestion (e.g., the DES cases), inhalation (e.g., the asbestos cases), or injection (shots and presumably implants)." CPLR 214-c commentary at 631 (McKinney 1990). Furthermore, by liberally interpreting section 214-c, substantial justice may be insured in cases involving those toxins which do not fit neatly into one of the aforementioned categories of exposure. *Id.*; *see e.g.*, Prego v. City of New York, 147 A.D.2d 165, 166, 541 N.Y.S.2d 995, 996 (1989) (court held statute includes AIDS virus).

[32] *See* Governor's Memorandum on Approval of 214-c, *reprinted in* [1986] N.Y. LEGIS. ANN. 288 (purpose of enactment to remedy injustices created by application of date of exposure rule). In *Fleischman v. Eli Lilly & Co.*, the New York Court of Appeals noted that New York's date of exposure rule was resulting in numerous DES cases being barred by the statute of limitations. Fleischman v. Eli Lilly & Co., 62 N.Y.2d 888, 894, 467 N.E.2d 517, 520, 478 N.Y.S.2d 853, 857 (1984), *cert. denied*, 469 U.S. 1192 (1985).

[33] *See Enright*, 155 A.D.2d at 74, 553 N.Y.S.2d at 500 (Weiss, J., dissenting). Justice Weiss "[found] no indication, direct or by inference, demonstrating a legislative intent to extend the provisions of the statute to generations of plaintiffs who were unconceived at the time a forbearer was exposed." *Id.* (Weiss, J., dissenting).

[34] *See* PROSSER & KEETON, *supra* note 2 (discussing prenatal tort liability); *see also* Robertson, *supra* note 1, at 1402-04 (discussing prenatal injuries as "injuries inflicted on an infant *en ventre sa mere* [in the womb of the mother]"); Note, *Torts Prior to Conception: A New Theory of Liability*, 56 NEB. L. REV. 706, 709 (1977) (defining prenatal injuries as those "suffered by a child while yet unborn").

[35] *Enright*, 155 A.D.2d at 66, 553 N.Y.S.2d at 495.

complete until the plaintiff was injured when premature labor was induced.[36] This type of injury can therefore be categorized as a prenatal injury,[37] for which a cause of action already exists in New York.[38] While the *Albala* court found prenatal tort cases to be distinguishable,[39] it appears that the only distinction between a prenatal and a preconception tort action is the time at which the wrongful act occurs.[40] Thus, to allow such an arbitrary time restric-

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[36] *Enright*, 155 A.D.2d at 66, 553 N.Y.S.2d at 495. This situation can be distinguished from what one commentator has labeled a "pure" preconception tort, wherein both injuries are complete upon conception, as in a case where chromosome structure is altered. *See* Survey, *supra* note 13, at 621.

[37] *See* Comment, *Preconception Torts: A Look at Our Newest Class of Litigants*, 10 TEX. TECH. L. REV. 97, 100 n.20 (1978). "The phrase prenatal theory is a misnomer in the sense that *all* injuries suffered by a child prior to birth are in fact, a prenatal injury, regardless of when the tortious conduct occurred." *Id.* Furthermore, some courts consider the timing of the tortious conduct, in relation to the time of the conception of the plaintiff, irrelevant to the stating of a cause of action. *See* Jorgensen v. Meade-Johnson Labs., 483 F.2d 237, 240 (10th Cir. 1973); *see also* Renslow v. Mennonite Hosp., 67 Ill. 2d 348, 354, 367 N.E.2d 1250, 1253 (1977) (delay between negligent act and injury to plaintiff did not bar recovery).

[38] *See* Woods v. Lancet, 303 N.Y. 349, 357, 102 N.E.2d 691, 695 (1951).

[39] *See Albala*, 54 N.Y.2d at 273, 429 N.E.2d at 788, 445 N.Y.S.2d at 109. The *Albala* majority maintained that prenatal tort cases involve injury to two legally identifiable beings, and therefore have no bearing on a preconception tort case. *Id.* The court distinguished the present case from Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951), wherein a prenatal tort action was found to exist. *See Albala*, 54 N.Y.2d at 273, 429 N.E.2d at 788, 445 N.Y.S.2d at 109. In *Woods*, the court found that two identifiable beings existed in the zone of danger at the time of the tort, each of whom was owed a duty. *Woods*, 303 N.Y. at 357, 102 N.E.2d at 695. The *Albala* court reasoned that one not yet conceived was not an identifiable being. *Albala*, 54 N.Y.2d at 273, 429 N.E.2d at 787, 445 N.Y.S.2d at 109. Therefore, the court denied the existence of a duty to the plaintiff, thus negating a preconception tort action in negligence. *See id.* It appears, however, that the *Albala* court erred in failing to address the issue, since there is some authority for the proposition that a finding of two legally identifiable beings is no longer a prerequisite to a prenatal tort action in New York. *See* Kelly v. Gregory, 282 A.D. 542, 544-45, 125 N.Y.S.2d 696, 697-98 (3d Dep't 1953). In *Kelly*, in order to provide an action for a plaintiff injured in the third month of prenatal development, the viability standard previously followed was abandoned, and an action was found to lie for injuries sustained any time after conception. *Id.*

If a fetus need not have a separate legal identity at the time the tortious act was committed, a plaintiff should be afforded the right to sue for injuries developed after conception as the result of harmful conduct committed prior to conception. *See* Comment, *Preconception Tort as a Basis for Recovery*, 60 WASH. U.L.Q. 275, 284 (1982-83). "The question should not be whether the *tortious action* occurred prior to or after conception, but rather whether the *injury* occurred at the time of or after conception." Comment, *Preconception Torts — The Need for a Limitation*, 44 MO. L. REV. 143, 145 (1979); *see also* Bennett v. Hymers, 101 N.H. 483, 485, 147 A.2d 108, 110 (1958) (noting injustice and harshness of such reasoning).

[40] *See* Comment, *Recognizing a Cause of Action for Preconception Torts in Light of Medical and Legal Advancements Regarding the Unborn*, 53 UMKC L. REV. 78, 79 n.8 (1984) (factor distinguishing prenatal from preconception tort action is timing of tortious

tion to defeat a genuinely compensable injury clearly contradicts the goal of the *Albala* court which sought to set guidelines for liability "in a manner which avoids the drawing of artificial and arbitrary boundaries."[41]

Lastly, although the *Enright* court had laudable goals in recognizing preconception torts, the boundaries of liability the court attempted to set[42] may prove to be insufficient.[43] An additional limitation on liability should be set to restrict standing in a preconception tort action to the first generation to discover the effects of the tortious conduct.[44] Such a limitation would permit the recognition of preconception tort liability without imposing too harsh a burden on potential defendants.[45]

The timing of the tortious conduct in no way diminishes the devestating effects wrought by drugs such as DES. New York courts, however, in adhering to a policy denying preconception tort actions, have disregarded the needs of an entire class of plaintiffs. It is urged that the New York Court of Appeals, in order to remedy

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conduct and not when harmful effects occur).

[41] *Albala*, 54 N.Y.2d at 273, 429 N.E.2d at 788, 445 N.Y.S.2d at 110. In *Albala*, the Appellate Division maintained that the court could not create a cause of action where one did not already exist. *See* Albala v. City of New York, 78 A.D.2d 389, 391, 434 N.Y.S.2d 400, 402 (1st Dep't), *aff'd*, 54 N.Y.2d 269, 429 N.E.2d 786, 445 N.Y.S.2d 108 (1981). It appears, however, that the recognition of a preconception tort action would actually be no more than the withdrawal of a time restriction between the tortious conduct and the resulting injury. *See* Comment, *Preconception Torts: Forseeing the Unconceived*, 48 U. COLO. L. REV. 621, 623 (1977).

[42] *Enright*, 155 A.D.2d at 70, 553 N.Y.S.2d at 498. The court in *Enright* felt that the manufacturer's legal responsibility for birth defects brought about by DES would be adequately limited because the plaintiff, in order to be successful, still had the burden of proving all of the elements of a strict products liability cause of action, including the "difficult" question of proximate cause. *Id.*

[43] *Cf.* Comment, *Legal Duty to the Unborn Plaintiff: Is There a Limit?*, 6 FORDHAM URB. L.J. 217, 249 (1978) (discussing limitless liability which would exist if "genetic injury" were actionable).

[44] *See* Note, *From Prenatal to Preconception Torts—Beyond the Logical to the Absurd?*, 2 WHITTIER L. REV. 503, 518 (1980) (rationalizing such approach as imposing upon subsequent generations form of actual or constructive notice as to tortious act and its possible consequences); Comment, *supra* note 43 (suggesting that to allow most immediate victim remedy would relieve defendant of obligation to defend himself in series of actions brought by successive generations stemming from one tortious incident). This premise is also consistent with the limitation set forth in *Enright*, for once a person becomes aware of an injury and decides to conceive, this decision can be viewed as a superseding cause, severing the causal chain, and negating the liability of the manufacturer to future generations. *See* Comment, *supra* note 41, at 631 (parent becomes proximate cause of child's injuries by conceiving child while aware of risk).

[45] *Cf.* Howard v. Lecher, 42 N.Y.2d 109, 113, 366 N.E.2d 64, 66, 397 N.Y.S.2d 363, 366 (1982) (dilemma of law is limiting legal consequences to controllable degree).

this injustice, extend the area of prenatal tort liability to include an action for injuries resulting from tortious acts committed prior to conception. The recognition of preconception tort liability in New York would effectuate a right common to all: to be compensated for injuries resulting from the wrongful conduct of another.

Judith M. Reilly