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PRECONCEPTION TORT LAW IN AN ERA OF ASSISTED REPRODUCTION: APPLYING A Nexus Test for Duty

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INTRODUCTION

For five years, a husband and wife have been trying, without success, to conceive a child. They have thought about adopting but would prefer, if possible, to have a their own biological child. The couple undergo testing at a fertility clinic and discover that the husband’s sperm count is extremely low. Specialists at the clinic tell the husband and wife not to be discouraged, because there is a procedure, already used by thousands of couples, that can help them conceive. Clinic doctors can harvest eggs from the wife and sperm from the husband for in vitro fertilization (IVF). Since the husband’s sperm count is too low for ordinary IVF, doctors will assist the process by injecting a single sperm cell into one of the eggs to create a zygote for implantation in the wife’s uterus.¹

The couple choose to undergo the procedure, and fertilization is achieved. Unfortunately, the egg is damaged during the sperm injection process, and the child suffers birth defects. The parents sue on behalf of themselves for the added costs of raising a child with birth defects and on behalf of the child for personal injuries arising out of the fertility clinic’s negligence. The court allows the parents’ claim but dismisses the child’s claim on three grounds: first, the child has no cause of action in negligence because the clinic doctors did not owe a duty of care to a person who was not yet conceived at the time of their negligent act (penetration of the egg with the injection pipette);² second, even if there were a duty of care, the child cannot

¹ For a discussion of intracytoplasmic sperm injection (ICSI), the procedure upon which this hypothetical is based, see infra notes 352-61 and accompanying text.

² See, e.g., Albala v. City of New York, 429 N.E.2d 786, 788 (N.Y. 1981) (holding that there is no preconception duty of care even where harm to a later-conceived child is foreseeable).

* This Note is dedicated to my wife, Rosemary, and my children, Sarah and Christopher, for all their love and support. I would like to express my deep gratitude to Professor Benjamin Zipursky, who provided invaluable guidance, insight, and encouragement throughout the writing of this Note. I would also like to thank Erik Parens of The Hastings Center for advising me about assisted reproductive technologies that implicate preconception negligence.

2555
claim that she suffered a net injury because the doctors conferred
upon her the offsetting benefit of life itself;3 and third, creating a duty
to future persons is a policy matter of broad implications that is best
left to the legislature.4

The above hypothetical both illustrates some of the legal obstacles
faced by plaintiffs injured as a result of negligent acts occurring prior
to conception and demonstrates how emerging reproductive
technologies may pose risks of preconception harm. Preconception
torts have been the basis for numerous state and federal cases over
the past three decades.5 Although there were only a handful of
preconception claims before the 1970s, this area of tort law has been
expanding in recent years for at least four reasons: first, improved
medical techniques for tracing injuries to causes predating
conception;6 second, the expanding use of medical procedures that
have the potential to injure a woman in such a way that a
subsequently-conceived child might be injured;7 third, the discovery of
harm from drugs, especially diethylstilbestrol (DES), which can cause
injury both to individuals exposed in utero and to their children;8 and
fourth, human exposure to toxic substances that have the potential to
alter chromosome structure in parents, resulting in deformities in their
offspring.9 Intentional manipulation of human reproductive cells
apparently has not yet given rise to a valid preconception tort claim,10
but this eventuality is all but assured in an age of rapidly developing
genetic and assisted reproductive technology.11

3. See infra notes 294-96 and accompanying text.
4. See Albala, 429 N.E.2d at 788.
5. See infra Part I.B.
6. See infra Part I.B.1.b-c; see Elizabeth F. Collins, An Overview and Analysis:
Prenatal Torts, Preconception Torts, Wrongful Life, Wrongful Death, and Wrongful
Birth: Time for a New Framework, 22 J. Fam. L. 677, 677 (1983-84); see generally
Deborah K. Andrews, Recognizing a Cause of Action for Preconception Torts in Light
of Medical and Legal Advancements Regarding the Unborn, 53 UMKC L. Rev. 78, 80-
93 (1984) (reviewing prenatal and preconception tort cases arising out of advances in
medical knowledge); cf. Note, The Impact of Medical Knowledge on the Law Relating
to Prenatal Injuries, 110 U. Pa. L. Rev. 554, 554-62 (1962) (describing how advances in
medical science paved the way for prenatal tort causes of action).
7. See infra Part I.B.1.a.
8. See infra Part I.B.2; see also John B. Maynard, Note, Third-Generation-DES
10. The word "manipulation" is used narrowly here to mean the physical
disruption or alteration of reproductive cells, as opposed to the mere handling of
reproductive cells that is necessary for ordinary IVF. At least one plaintiff has made
a preconception tort claim based upon negligent IVF. See Doolan v. IVF America
however, the court held that the plaintiff's claim was for wrongful life and therefore
did not constitute a true preconception tort claim. Id. at *9-*12. See infra Part I.C. for
a discussion of the difference between preconception tort claims and wrongful life
claims.
11. A recent report that a team of scientists intends to clone a human being within
the next two years heightens concerns about potential harms through assisted
Many courts have weighed policy considerations in deciding whether to allow preconception tort causes of action. This Note, however, suggests that in determining whether to allow preconception tort claims, courts should base their decisions on traditional negligence doctrine rather than policy. Furthermore, this Note argues that courts should not look for a "relationship" between plaintiff and defendant giving rise to a duty of care because this is an inappropriate test for duty in the preconception tort context. Rather, in evaluating a preconception duty of care, courts should determine whether there was a nexus between the alleged injurious activity and the conception and birth of a future child.

Part I of this Note provides an outline of state and federal case law on prenatal and preconception torts. A review of the early rejection and subsequent recognition of prenatal tort claims is necessary to understand the evolution of preconception negligence. This part continues by dividing preconception torts into four categories of cases: medical malpractice, pharmaceutical products, auto accidents, and toxic substance exposure. Because a variety of preconception claims arise in the medical malpractice context, that section is further divided into three subcategories: negligent surgery cases, in which a negligently performed Caesarean section or abortion leads to developmental abnormalities in a subsequent pregnancy; Rh factor incompatibility cases, in which a doctor negligently fails to administer Rho-GAM to a mother whose Rh factor is incompatible with that of reproduction. See Sarah Delaney, Scientists Prepare to Clone a Human: Experiment to Target Infertile Couples, Wash. Post, Mar. 10, 2001, at A16; Jeremy Manier, Potential Perils Born in Cloning: Risks Great Even in Animals, Researchers Say, Chi. Trib., Mar. 4, 2001, at 1 (noting that the majority of cloned animals die before birth and those born alive "often suffer from ultimately fatal defects of the heart, lungs, kidneys, brain or immune system"). Because human cloning has not yet been attempted, this Note will set aside analysis of human cloning for another day.


14. Professor Greenberg has undertaken a helpful analysis of preconception torts in an article which provides an extensive survey of cases by jurisdiction. See Julie A. Greenberg, Reconceptualizing Preconception Torts, 64 Tenn. L. Rev. 315, 320-35 (1997). Greenberg provides a brief synopsis of cases by category, dividing the existing case law into three sections: medical malpractice, products liability, and other cases. Id. at 335-341. This Note focuses on an analysis by category and adds automobile accidents and toxic substance exposure to the medical malpractice and products liability categories. See infra Part I.B.

her fetus, creating a condition (sensitization) that can harm later-conceived children; and rubella cases, in which a doctor negligently fails to immunize a woman for rubella and she subsequently conceives a child suffering defects attributable to congenital rubella syndrome.

Part II of this Note discusses two reasons why courts must develop a more principled approach to preconception negligence. First, there is currently disarray among and within jurisdictions in handling such cases, resulting in discordant holdings that prevent a coherent approach to preconception tort law. Second, the emergence of advanced medical technologies threatens to increase the incidence of preconception tort claims. Because the recognition of a preconception tort claim will often hinge on the question of whether there is a duty to an unconceived person, Part III of this Note analyzes the duty element of negligence law in the context of preconception torts. While some have suggested that the duty of care in negligence cases is the sum total of policy considerations, the first subsection of Part III proposes a doctrinal approach that employs a nexus test for establishing the duty of care. The second subsection applies the nexus test for duty to the various types of preconception tort cases that have been presented to the courts to date, as well as to emerging assisted reproductive technologies.

I. PRENATAL AND PRECONCEPTION TORT JURISPRUDENCE

Preconception tort claims have spawned a rich line of case law exploring the outer boundaries of the duty and proximate cause elements of the tort of negligence. This part begins with a brief examination of prenatal torts cases, which foreshadow the conceptual challenges presented by the subsequent preconception claims. The majority of this part is then devoted to a close analysis of state and federal preconception tort cases. The preconception negligence cases reveal that courts sometimes find a duty of care and other times balk at the concept of a duty to future persons. Those courts that find a duty often proceed to struggle with the issue of proximate cause. Some jurisdictions resort to policy judgments in ruling on the permissibility of preconception negligence claims, while others hold that the policy considerations attendant upon the finding of a preconception tort cause of action are so momentous that such a decision is properly left to the legislature.

17. See infra Part I.B.1.c.
A. The Recognition of Prenatal Tort Causes of Action

Before commencing an analysis of preconception torts, it is helpful to discuss the genesis of the parent category: prenatal torts. For more than sixty years, the leading authority on the issue of prenatal torts was the 1884 Massachusetts case of Dietrich v. Northampton, which rejected the plaintiff's cause of action. In Dietrich, a woman who was four or five months pregnant suffered a miscarriage when she fell on a negligently-maintained road. The plaintiff, as administrator, sued on behalf of the miscarried child, who died ten or fifteen minutes after birth. Judge Holmes, denying the cause of action, announced that there could be no duty of care to an unborn child.

An Irish court reached a similar conclusion in Walker v. Great Northern Railway Co. of Ireland, an 1891 case involving a pregnant woman injured in a railroad accident. In an influential concurring opinion, Justice O'Brien of the Walker court explained his objection to a prenatal tort cause of action:

[T]here are instances in the law where rules of right are founded upon the inherent and inevitable difficulty or impossibility of proof. And it is easy to see on what a boundless sea of speculation in evidence this new idea would launch us. What a field would be opened to extravagance of testimony, already great enough—if Science could carry her lamp, not over certain in its light where people have their eyes, into the unseen laboratory of nature...

The Dietrich decision was bolstered further by the Supreme Court of Illinois in the 1900 case of Allaire v. St. Luke's Hospital. In Allaire, a pregnant woman was injured in a hospital elevator accident, causing her son, the plaintiff, to be born "greatly and sadly crippled for life." The majority framed the issue as follows: "Had the plaintiff... such distinct and independent existence that he may maintain the action, or was he, in view of the common law, a part of his mother?" Citing Dietrich and Walker, the majority chose the
latter alternative. In a sharp dissent, however, Justice Boggs posed his own pointed question: "[I]s it not sacrificing truth to a mere theoretical abstraction to say the injury was not to the child, but wholly to the mother?"

The Supreme Court of Canada, in a 1933 decision, presaged the reversal of the Dietrich rule by allowing a cause of action to a child injured in utero when her mother was thrown from a tram car. The compelling language of the Montreal Tramways v. Leveille majority opinion, which strikes a chord similar to Justice Boggs' dissent in Allaire, is worth quoting at length:

If a child after birth has no right of action for pre-natal injuries, we have a wrong inflicted for which there is no remedy, for ... there is a residuum of injury for which compensation cannot be had save at the suit of the child. If a right of action be denied to the child it will be compelled, without any fault on its part, to go through life carrying the seal of another's fault and bearing a very heavy burden of infirmity and inconvenience without any compensation therefor. To my mind it is but natural justice that a child, if born alive and viable, should be allowed to maintain an action in the Courts for injuries wrongfully committed upon its person while in the womb of its mother.

Courts in the United States, however, continued follow Dietrich until 1946, when, in a case that Dean Prosser characterized as the catalyst for a "spectacular reversal of the no-duty rule[]" the D.C. Circuit held that a child born alive may maintain an action for prenatal injuries. Justifying its departure from Dietrich, the court in Bonbrest v. Kotz wrote: "The law is presumed to keep pace with the sciences and medical science certainly has made progress since 1884." By 1971, the Bonbrest rule, allowing recovery for prenatal injuries to children born alive, was accepted in every American jurisdiction. Although some early decisions indicated that viability was the earliest point at which a fetus could allege a cognizable injury, the difficulty of establishing the point of viability led the majority of

30. The majority also noted the following consideration: "If the action can be maintained, it necessarily follows that an infant may maintain an action against its own mother for injuries occasioned by the negligence of the mother while pregnant with it. We are of the opinion that the action will not lie." Id. at 640.
31. Id. at 641.
33. Id. at 345.
36. Id. at 143.
37. See Keeton et al., supra note 34, § 55, at 368 & n.15 (citing 40 A.L.R.3d 1222 (1971), the Second Restatement of Torts, § 869, and various cases across jurisdictions for the proposition that a child born alive can recover for prenatal injuries arising from another's tort).
jurisdictions to allow recovery for injuries inflicted at any time after conception.\(^{38}\) The new rule, however, was not without its detractors. Particularly noteworthy was Chief Judge Duckworth of the Georgia Supreme Court, who wrote a concurring opinion in *Hornbuckle v. Plantation Pipe Line Company*.\(^{39}\) The *Hornbuckle* majority extended Georgia common law to allow infants to recover for tortious injuries suffered at any time after conception.\(^{40}\) Chief Judge Duckworth protested the scope of the court's holding:

> The ruling of the majority in this case extends [Georgia law] to allow the child to maintain a suit for damages to the cell from which it came, even though the cell had been conceived ten seconds. . . . If a baby can sue for injuries sustained five seconds after conception . . . why not allow such suits for injuries before conception, even unto the third and fourth generations?\(^{41}\)

Writing in 1956, Duckworth was more likely aspiring to achieve hyperbole than attempting to put his finger on a controversy that would gain increasing significance with advances in biomedical knowledge. Nevertheless, his question about liability for harms at the cellular level prior to conception is increasingly relevant in the present era of advanced assisted reproductive technologies that implicate preconception harms.

**B. Preconception Tort Cases**

Although preconception tort claims did not arise in significant numbers until the 1970s, there were a handful of precursors from the 1880s to the 1960s. An analysis of preconception torts should begin at the point when the cause of action was just a gleam in Judge Holmes' eye in *Dietrich*, the former leading case on prenatal torts.\(^{42}\) In *Dietrich*, Holmes rejected the idea of a cause of action for a child who suffered a prenatal injury.\(^{43}\) In dicta, however, Holmes speculated about the difficulties that would arise "if 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."\(^{44}\) This problem of recognizing a duty to nonexistent persons remains the central difficulty in preconception tort liability.

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38. *Id.* § 55, at 368-69.
39. 93 S.E.2d 727 (Ga. 1956).
40. *Id.* at 728.
41. *Id.* at 729 (Duckworth, C.J., concurring).
42. See *Dietrich v. Northampton*, 138 Mass. 138 (1884); *supra* text accompanying notes 20-23.
43. *Id.* at 15. ("[N]o case, so far as we know, has ever decided that, if the infant survived, it could maintain an action for injuries received by it while in its mother's womb.").
44. *Id.* at 16.
Three years after *Dietrich*, the New York Court of Appeals, in *Piper v. Hoard*, decided a preconception tort claim in favor of the plaintiff. In *Piper*, Andrew Piper devised his property to his two sons, James and Frederick, on the condition that if Frederick died without children his share of the land would go to James. Before he had any children, however, Frederick conveyed his land to the defendant, John Hoard. In order to prevent the land from reverting to James upon Frederick's death, Hoard approached Catherine Hagel and encouraged her to marry Frederick Piper and bear his children. Hoard falsely represented to Catherine that if she had children with Frederick, the children would stand to inherit land, when in reality the birth of such children would ensure that Hoard would hoard the land, so to speak. Catherine married Frederick and bore a daughter, who later became the plaintiff in the action against Hoard. The plaintiff claimed that she should be awarded the land because the defendant had acquired it through illicit means: namely, fraud against the plaintiff's mother. The court acknowledged that the alleged fraud was perpetrated before the plaintiff was conceived. Nevertheless, the court found privity between the plaintiff and defendant because the plaintiff was the product of the marriage brought about by Hoard's fraud and she would have owned the land if the defendant's representations had been true. The court glossed over the anomaly that if the defendant had not perpetrated the fraud against the plaintiff's mother, the plaintiff would not have existed.

*Piper* was a property case, and property law has a tradition of recognizing the rights of future persons. The plaintiff in *Zepeda v. Zepeda*, who made a claim of preconception fraudulent misrepresentation in the family context, benefited from no such tradition. In *Zepeda*, the defendant promised to marry the plaintiff's mother, who had sexual intercourse with the defendant in reliance on his word. The defendant could not fulfill his promise because he was already married. The plaintiff, conceived during the affair, sued his biological father for injury to "his person, property and reputation by

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46. *Id.* at 628.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* at 631.
53. *Id.*
54. *See* Restatement (Second) of Torts § 869 cmt. a (1977) (describing how property law and criminal law recognized the legal status of unborn children before there was a prenatal tort cause of action).
56. *Id.* at 851.
57. *Id.*
causing him to be born an adulterine bastard." The court held that the plaintiff, who claimed mental suffering and defamation, had not suffered a legally cognizable injury. While the court admitted "it would be pure fiction to say that the plaintiff suffer[ed] no injury," it was reluctant to create a cause of action for bad parenting or wrongful life. In principle, however, the Zepeda court reasoned that it was possible for liability to attach to a preconception tort. The court began its analysis with a hypothetical, a practice emulated in many subsequent preconception tort cases. The court reasoned that a child injured by a faulty space heater purchased prior to his birth would not be denied a cause of action simply because he did not exist at the time of manufacture or purchase. The Zepeda court stated: "It makes no difference how much time elapses between a wrongful act and a resulting injury if there is a causal relation between them." Going even further, the court suggested that a plaintiff might be able to recover for non-physical injuries arising out of preconception torts.

By the time of the Zepeda case, courts had come a long way in both recognizing prenatal tort causes of action and acknowledging the possibility of preconception tort claims. Soon after Zepeda, preconception negligence claims would sprout up in a variety of settings. The next sections undertake an analysis of preconception negligence claims in four different contexts: medical malpractice, pharmaceutical products, auto accidents, and toxic substance exposure.

1. Preconception Torts in the Medical Context

Preconception negligence claims have arisen most frequently in the area of medical malpractice. This is primarily because the care provided by obstetricians/gynecologists, if negligent, has the potential to injure a subsequently conceived child. As the cases below illustrate, however, a doctor-patient relationship between a physician and a potential mother does not automatically create a duty of care flowing from the doctor to the patient's future children. The availability of a preconception medical malpractice cause of action depends on the jurisdiction and the context within which the medical care was provided.

58. Id.
59. Id. at 855-56.
60. Id. at 856, 858. See infra Part I.C. for a definition and discussion of the wrongful life cause of action.
61. Id. at 853.
62. Id.
63. Id.
64. See id. at 854 (citing Piper v. Hoard, 13 N.E. 626 (N.Y. 1887)).
a. Negligent Surgery Cases

A doctor’s negligence in performing surgery on the reproductive organs of a potential mother raises the possibility that a future child will be harmed. The cases in this section explore whether a surgeon has a duty not only to avoid harm to her patient, but also to prevent injury to her patient’s future children.

An early case in which a surgical procedure led to a preconception tort claim on behalf of the child is Bergstreser v. Mitchell.\textsuperscript{65} In \textit{Bergstreser}, the plaintiff’s mother alleged that her doctor negligently performed a Caesarean section while delivering one child, leading to a uterine rupture during her pregnancy with her next child.\textsuperscript{66} The latter child, delivered by emergency Caesarean section, suffered brain damage from lack of oxygen.\textsuperscript{67} The circuit court, applying Missouri law, found it compelling that the Missouri Supreme Court had, like many other courts, expanded tort law to compensate prenatal injuries to children born alive.\textsuperscript{68} The opinion states:

\begin{quote}
[T]he Missouri Supreme Court has... refused to be bound by outmoded common law and has declined to allow an injury to be suffered without a remedy . . . . We think that the Missouri Supreme Court would permit an infant, born alive, to bring an action for injuries resulting from negligent acts occurring prior to conception.\textsuperscript{69}
\end{quote}

The Eighth Circuit thus permitted a preconception tort claim arising out of negligent surgery.

The New York Court of Appeals took a different view in \textit{Albala v. City of New York},\textsuperscript{70} rejecting preconception tort liability. In \textit{Albala}, a woman underwent an abortion during which her uterus was accidentally perforated.\textsuperscript{71} Four and a half years later, she gave birth to a son suffering brain damage.\textsuperscript{72} The parents sued the hospital on behalf of the child, alleging that the damage to the mother’s uterus during the prior abortion caused the son’s brain damage.\textsuperscript{73} While the court acknowledged that a negligent abortion could foreseeably harm a later-conceived child, it refused to find a duty of care based exclusively on foreseeability of harm.\textsuperscript{74} The majority was concerned

\begin{footnotes}
65. 577 F.2d 22 (8th Cir. 1978).
67. \textit{Id.}
68. \textit{Id.} at 25 & n.3 (citing Hardin v. Sanders, 538 S.W.2d 336, 337 (Mo. 1976); Steggall v. Morris, 258 S.W.2d 577 (Mo. 1953)).
71. \textit{Albala}, 429 N.E.2d at 787.
72. \textit{Id.}
73. \textit{Id.}
74. \textit{Id.} at 788.
\end{footnotes}
that recognizing a cause of action would, first, "require the extension of traditional tort concepts beyond manageable bounds,"\(^75\) and second, "have the undesirable impact of encouraging the practice of 'defensive medicine.'"\(^76\) On the latter issue, the court reasoned that a doctor might stop short of rendering all necessary medical care to a female patient if such care raised the specter of legally actionable harm to a future child.\(^77\)

More than a decade after *Albala*, the United States District Court in Massachusetts rejected tort claims by two children arising out of negligent surgery on their mother before they were conceived.\(^78\) In *Lareau v. Page*, the prospective mother underwent cranial surgery, and doctors injected a contrast dye, Thorotrast, into her skull for monitoring purposes.\(^79\) A few years later, she married and started a family.\(^80\) Fourteen years after the surgery, the plaintiffs' mother began experiencing headaches and seizures, and doctors discovered a hardened mass in her skull attributable to the Thorotrast.\(^81\) After being advised by her doctor of a slight tumor risk and viewing a news program about Thorotrast's dangers, the mother in *Lareau* alleged severe emotional distress.\(^82\) Her two children, a daughter and son, claimed loss of consortium and emotional injuries.\(^83\)

The *Lareau* court dismissed the daughter's claim because she was conceived after her mother knew about the harm from the contrast dye, and the court did not want to create a situation where parents could create perpetual loss of consortium claims by conceiving more children after suffering an injury.\(^84\) Because the son was born after the surgery, but before his mother knew of her injury, his claim merited further analysis.\(^85\) Most significantly, the court determined that his claim for emotional injuries failed on grounds of proximate cause rather than duty.\(^86\) The court reasoned that, "it is simply not reasonably foreseeable that, nineteen years after the injection, Christopher's mother would be subject to a hyped-up television report... and would thereby be rendered such an 'emotional wreck'..."

\(^{75}\) Id. at 787.
\(^{76}\) Id. at 788.
\(^{77}\) Id. A dissenting judge in *Albala* lamented that although the facts of the case "meet the essential negligence law prescriptions of foreseeability and causation... the right to recover is now denied because of the novelty of this groundbreaking suit, the possibility that it will lead to an unknown number of similar claims and on other policy grounds." Id. at 789.
\(^{79}\) Id. at 923.
\(^{80}\) Id.
\(^{81}\) Id. at 923-24.
\(^{82}\) Id. at 923.
\(^{83}\) Id. at 929-30.
\(^{84}\) See id.
\(^{85}\) Id. at 930-33.
\(^{86}\) Id. at 931.
as would cause separation anxiety on the part of her then seven year old son.\textsuperscript{87}

In an even more recent case, \textit{Martin v. St. John Hospital and Medical Center},\textsuperscript{88} a Michigan court of appeals recognized a wrongful death cause of action for a child who died as the result of a negligent Caesarean section performed on her mother during a previous pregnancy. The deceased child's mother in \textit{Martin} delivered a healthy child by Caesarean section and became pregnant again the following year.\textsuperscript{89} During the second delivery, she suffered a ruptured uterus at the location of the Caesarean incision, causing the second child to be stillborn.\textsuperscript{90} The court framed the issue as “whether the parents of a fetus, viable before death, can maintain a wrongful death action based on surgical procedures performed on the mother’s reproductive organs before conception.”\textsuperscript{91} In finding a legally cognizable cause of action, the court focused on two factors: (1) the timing of the injury to the fetus, and (2) the relationship between the negligent procedure and the fetal injury.\textsuperscript{92} The timing of the injury was crucial because Michigan law did not permit a cause of action for a pre-viability injury to a stillborn child.\textsuperscript{93} The court held that the timing of the negligent act was irrelevant, analogizing the negligent repair of the mother's uterus and death of the subsequently conceived child to the negligent repair of a furnace in summertime leading to the death of a child by inhalation of fumes in the winter.\textsuperscript{94} The court declared: “We would conclude that the injury occurred when the fumes were released, not when the furnace was repaired.”\textsuperscript{95} More significantly, the court looked at relevant Michigan cases and indicated that a logical connection between the type of care provided by the doctor and the subsequent pregnancy was an important factor in establishing a duty of care flowing from the doctor to the later-conceived child.\textsuperscript{96} On a policy level, the \textit{Martin} court, unlike the \textit{Albala} court, was more concerned with fairness than with the possibility of opening the floodgates of litigation.\textsuperscript{97}

\begin{footnotes}
\item[87] Id.
\item[89] Id. at 788.
\item[90] Id.
\item[91] Id.
\item[92] Id. at 789-90.
\item[93] Id. at 789.
\item[94] Id.
\item[95] Id.
\item[96] Id. at 788-90. The \textit{Martin} court noted that failure to administer a rubella test to a woman who plans to become pregnant implicates a duty to a later-conceived child because the purpose of the rubella test is, in large part, to prevent rubella syndrome in developing fetuses. See \textit{id.} at 789 (discussing \textit{Monusko v. Postle}, 437 N.W.2d 367 (Mich. Ct. App. 1989)). For a discussion of \textit{Monusko}, see \textit{infra} text accompanying notes 155-60.
\item[97] See \textit{id.} at 790.
\end{footnotes}
In the preconception surgery cases, a doctor's affirmative act of negligence, or misfeasance, results in harm to a future child. Most preconception medical malpractice claims, however, arise out of a physician's failure to act, or nonfeasance. The next two sections deal primarily with nonfeasance, where a doctor's failure to immunize a prospective mother results in harm to a later-conceived child.

b. Rh Factor Sensitization Cases

There is a line of preconception tort cases addressing medical negligence by physicians who create or, more commonly, fail to counteract a blood incompatibility detrimental to a subsequently conceived child. Almost all of the jurisdictions that have reviewed such cases have permitted a cause of action. A close examination of the cases, however, reveals that uniformity in outcome is not tantamount to uniformity of approach.

Renslow v. Mennonite Hospital is a key case establishing a preconception tort cause of action against doctors who negligently cause an Rh factor compatibility problem between a mother and her later-conceived child. The plaintiff's mother in Renslow had Rh-negative blood, but a doctor mistakenly transfused her with Rh-positive blood at age thirteen. Due to the doctor's mistake, her blood became "sensitized," a condition in which the prospective mother's blood would attack an Rh-positive fetus. When the woman became pregnant eight years later, her Rh-positive child (the plaintiff) suffered irreversible brain, nervous system, and organ damage. The Renslow court framed the issue as one of duty: "Plaintiff herein asks us to reexamine our notions of duty, and to find, in essence, a contingent prospective duty to a child not yet conceived but foreseeably harmed by a breach of duty to the child's mother." The majority noted that traditional negligence doctrine requires the breach of a duty owed to the plaintiff, an element not satisfied by the showing of a breach of duty to another person. The court, however, found that the intimate relationship between mother and child justified the finding of a duty flowing from doctor to child under the

98. See Black's Law Dictionary 1015 (7th ed. 1999) (defining misfeasance as "[a] lawful act performed in a wrongful manner").
99. See id. at 1076 (defining nonfeasance as "[t]he failure to act when a duty to act existed").
102. Id.
103. Id.
104. Id. at 1254.
105. Id.
theory of "transferred negligence." The \textit{Renslow} court explicitly declined to base its decision on proximate cause because of the arbitrary line drawing inherent in setting the outer boundary of legal causation.\textsuperscript{107} Rather, the court "reaffirm[ed] the utility of the concept of duty as a means by which to direct and control the course of the common law."\textsuperscript{108} The court declared that a child has "a right to be born free from prenatal injuries foreseeably caused by a breach of duty to the child's mother."\textsuperscript{109}

The Indiana Supreme Court, fifteen years after \textit{Renslow}, recognized a preconception tort cause of action for injuries stemming from Rh factor sensitization.\textsuperscript{110} The doctor in \textit{Walker v. Rinck} failed to administer Rho-GAM to counteract the formation of harmful antibodies during the plaintiffs' mother's first pregnancy.\textsuperscript{111} Over the next nine years, the mother gave birth to three children (the plaintiffs) who suffered health complications attributed to their mother's Rh factor sensitization.\textsuperscript{112} In recognizing a cause of action for preconception tort, the \textit{Walker} court evaluated three factors relevant to the existence of a duty of care: "(1) the relationship between the parties, (2) the reasonable foreseeability of harm to the person injured, and (3) public policy concerns."\textsuperscript{113} The court had no difficulty concluding that the foreseeability and public policy prongs were satisfied.\textsuperscript{114} More significantly, however, the court had little trouble establishing a relationship between the doctor and the future children injured through his negligence.\textsuperscript{115} The court reasoned: "The giving of Rho[-]GAM was to protect future fetuses of Mrs. Walker from developing injuries in utero. We believe that under those circumstances, Dr. Rinck owed a duty to the Walker children . . . "\textsuperscript{116} The court found it important that the plaintiffs were foreseeable third-party beneficiaries of the relationship between the defendant doctor

\begin{footnotes}
\item[106] \textit{Id.} at 1255 (citing William L. Prosser, \textit{Palsgraf Revisited}, 52 Mich. L. Rev. 1, 20-22 (1953)).
\item[107] \textit{Id.} at 1254.
\item[108] \textit{Id.} The court added that it would be "illogical to bar relief for an act done prior to conception where the defendant would be liable for the same conduct had the child, unbeknownst to him, been conceived prior to his act." \textit{Id.} at 1255.
\item[109] \textit{Id.} A dissenting judge in \textit{Renslow} criticized the majority for employing a false duty analysis and abandoning "the fault theory of tort law in favor of a system based merely upon causation." \textit{Id.} at 1263 (Ryan, J., dissenting). According to the dissent, "[a] holding which finds a duty of care owed to an entity which is not in existence must be considered the classic illustration of 'negligence in the air.'" \textit{Id.} at 1264.
\item[111] \textit{Id.} at 592; see Karen J. Carlson et al., \textit{The Harvard Guide to Women's Health} 533 (1996). Rho-GAM usually prevents sensitization where the mother has not yet developed antibodies to the fetus' Rh factor. See Carlson et al., \textit{supra}, at 533.
\item[112] \textit{Walker}, 604 N.E.2d at 592-93.
\item[113] \textit{Id.} at 594.
\item[114] \textit{Id.} at 595.
\item[115] See \textit{id.} at 594-95.
\item[116] \textit{Id.} at 595.
\end{footnotes}
and their mother.\textsuperscript{117} At the same time, the court found the connection between the medical care provided and the harm to the subsequently conceived children significant to the finding of a duty.\textsuperscript{118} Responding to the defendant's argument that creating a preconception tort cause of action is a matter for the legislature, the court declared: "it is the traditional role of the highest court of a state to determine the common law of that state even if such determination results in an innovative growth of the common law."\textsuperscript{119}

In another Rh factor case, \textit{Graham v. Keuchel},\textsuperscript{120} the court permitted a preconception tort cause of action, employing an analysis echoing \textit{Walker}. The \textit{Graham} court found a duty of care flowing directly to the child instead of being transferred through the mother.\textsuperscript{121} The court concluded that a doctor has a duty not only to treat a prospective mother with due care, but also to guard against harms to foreseeable offspring conceived in the future.\textsuperscript{122} In \textit{Graham}, the doctors failed to detect an Rh factor incompatibility in a prior pregnancy.\textsuperscript{123} As a result, they failed to immunize the plaintiff's mother with Rho-GAM, leading to the harm suffered by the subsequently conceived plaintiff.\textsuperscript{124} Significantly, the court noted that the injured child, though not conceived at the time of the mother's treatment, "was within the zone of danger that Rho-GAM was designed to guard against."\textsuperscript{125} Unlike \textit{Renslow}, the \textit{Graham} court was not troubled by the issue of proximate cause, stating that "the direct causal connection between failure to prevent sensitization and the subsequent birth of the child with fatal condition is crystal clear."\textsuperscript{126} Rather, the \textit{Graham} court focused on whether the mother's conception of a child after her blood had become sensitized represented a supervening cause of the child's injury (in this case, death). The court held that a mother's ordinary negligence in conceiving the child would not relieve the doctors of liability.\textsuperscript{127} Willfulness or recklessness in conceiving a child with the knowledge of sensitization and the risks entailed, however, would form a

\textsuperscript{117} Id.
\textsuperscript{118} See id.
\textsuperscript{119} Id. at 594. Chief Justice Shepard dissented on grounds that a preconception tort cause of action would expose doctors "to decades or even generations of potential liability" and would occasion "ugly lawsuits" in which parents could "create liability . . . by choosing to conceive." \textit{Id.} at 597-98 (Shepard, C.J., dissenting).
\textsuperscript{120} 847 P.2d 342 (Okla. 1993).
\textsuperscript{121} See id. at 365.
\textsuperscript{122} Id.
\textsuperscript{123} Id. at 365-66.
\textsuperscript{124} Id. at 366. The court noted that Rho-GAM is administered seventy-two hours prior to delivery in cases where the mother's Rh factor differs from that of the child. \textit{Id.} at 346-47 & nn.7, 14, & 19; see also Carlson et al., \textit{supra} note 111, at 533.
\textsuperscript{125} \textit{Graham}, 847 P.2d at 365.
\textsuperscript{126} Id.
\textsuperscript{127} Id. at 348.
supervening cause cutting off liability. The court concluded that supervening causation was an issue of fact to be determined by a properly instructed jury.

On the heels of Graham, the Missouri Supreme Court faced the issue of preconception negligence in a case where, due to a lab technician’s error, doctors failed to immunize a woman’s blood during an Rh factor incompatible pregnancy. The child in the subsequent pregnancy suffered from erythroblastosis fetalis (EBF), a condition in which the fetus’ system is “constantly under attack.” The baby “sustained devastating pulmonary, cardiovascular and neurological damage.” The Lough v. Rolla Women’s Clinic court focused on the duty element of negligence. The court cited the Renslow nexus requirement for imposition of a duty approvingly, stating that “the very reason for the RhoGAM treatment is to benefit later-conceived children of the mother.” The majority then criticized Albala for creating a “‘blanket no-duty rule.” It also questioned the Albala court’s fears about opening the floodgates of litigation and creating conditions in which doctors practice defensive medicine. The court noted that since the child is the only party who physically benefits from the administration of Rho-GAM, there is no treatment benefiting the mother that a doctor would forego for fear of liability to a future child.

Like other courts that have held in favor of causes of action for preconception torts, the Lough court stated that “[i]t is unjust and arbitrary to deny recovery . . . simply because [the child] had not been conceived at the time of [the defendant’s] negligence.” The majority offered the following hypothetical to illustrate its point:

Assume a balcony is negligently constructed. Two years later, a mother and her one-year-old child step onto the balcony and it gives way, causing serious injuries to both the mother and child. It would be ludicrous to suggest that only the mother would have a cause of action against the builder but, because the infant was not conceived at the time of the negligent conduct, no duty of care existed toward the child.

128. Id.
129. Id. at 353-54.
130. See Lough v. Rolla Women’s Clinic, 866 S.W.2d 851 (Mo. 1993) (en banc).
131. Id. at 852.
132. Id.
133. Id. at 854 (“The basic question in this case is whether a duty exists.”).
134. Id. at 853 (citing Renslow v. Mennonite Hosp., 367 N.E.2d 1250, 1253 (1977)).
135. Id. (quoting Keeton et al., supra note 34, § 55, at 369).
136. Id. See supra text accompanying notes 76-77 for a discussion of the Albala court’s policy concerns.
137. See id.
138. Id. at 854.
139. Id.
The court's hypothetical highlights that there are classes of negligence cases in which no one would question the existence of a duty to future persons. The hypothetical also illustrates that the duty element is about enforcing the obligation to avoid foreseeable injuries and thus serves a fairness function in negligence law.

In *Sweeney v. Preston*, the Supreme Court of Mississippi reversed a county circuit court's grant of summary judgment to the defendant in an Rh sensitization case involving the death of two infants. The mother in *Sweeney* conceived one of the deceased children before she knew her blood was sensitized and one after her doctor informed her about her condition. The *Sweeney* majority did not tackle the issue of preconception tort liability. In a noteworthy dissent, however, the chief justice stated that he would bar the action not only on statute of limitations grounds, but also because the parents' independent act of conceiving a child after knowing the mother's blood was sensitized served as an "intervening cause" cutting off the doctor's liability.

The dissent analogized the case to one in which a lawyer warns a client of a defective title and the client proceeds to buy the property anyway. The dissent also pointed to fairness and policy reasons for denying a cause of action:

The majority not only holds Dr. Preston responsible for these two tragic deaths, but tells the Sweeneys they will have a cause of action for every child the Sweeneys attempt in the future who dies shortly after birth, or who is born maimed and deformed.

Instead of worrying about his patients when he lies down to sleep at night, Dr. Preston can look forward to the very good chance of being a court defendant the remainder of his life. With this burden it will take a very soft pillow to give him much sleep. It would be far better if physicians in small towns could spend their time worrying about their patients [rather] than lawsuits such as the majority today authorizes.

While the dissent's fairness and policy arguments are gripping, they are superfluous in the face of the supervening cause analysis, which yields the same result.

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140. 642 So. 2d 332 (Miss. 1994). The circuit court in *Sweeney* had granted summary judgment on the ground that the plaintiff was barred by a two-year statute of limitations for medical negligence actions. *Id.* at 332-33. The Mississippi Supreme Court held that the statute did not bar the claim because it "does not begin to run until the injured party discovers or should have discovered the negligent act and its relationship to the injury sustained." *Id.* at 333.

141. *Id.*

142. See *id.*

143. *Id.* at 342 (Hawkins, C.J., dissenting).

144. *Id.*

145. *Id.* at 341.
Early last year, the Supreme Court of New Jersey held in favor of preconception tort liability in an Rh factor sensitization case.\textsuperscript{146} In \textit{Lynch v. Scheininger}, the trial court had ruled that the parents' conception of the child plaintiff with knowledge that the mother's blood was sensitized formed a supervening cause cutting off the doctor's liability.\textsuperscript{147} The intermediate appellate court disagreed with the supervening cause analysis and reversed.\textsuperscript{148} The New Jersey Supreme Court ultimately held that the parents' decision to conceive was not a superseding cause as a matter of law, but rather was an issue for the jury.\textsuperscript{149} In addition, the court stated that the jury might need to be instructed on the doctrine of avoidable consequences, which "proceeds on the theory that a plaintiff who has suffered an injury as the proximate result of a tort cannot recover for any portion of the harm that by the exercise of ordinary care he could have avoided."\textsuperscript{150}

The \textit{Lynch} court rejected the idea that a doctor is under no duty to guard against injuries to children who are not conceived at the time that medical care is provided.\textsuperscript{151} The court explained that "foreseeability as a determinant of duty is of sufficient breadth to accommodate the principle that in appropriate circumstances a physician's duty should extend to children conceived after the physician's negligence occurred."\textsuperscript{152} In response to the argument that recognition of a preconception tort cause of action will cause unlimited liability, the court expressed confidence that proximate cause doctrine would limit claims that were too remote.\textsuperscript{153}

c. Rubella Cases

It is commonly known within the medical community that if a woman contracts rubella (German measles) during the early stages of a pregnancy, her child is at a high risk for severe birth defects.\textsuperscript{154} In two preconception medical malpractice cases, the plaintiffs alleged harms from the negligent failure to immunize their respective mothers.

\textsuperscript{147} Id. at 119.
\textsuperscript{148} Id.
\textsuperscript{149} Id. at 128.
\textsuperscript{150} Id. at 125. (citing Keeton et al., \textit{supra} note 34, § 65, at 458-59).
\textsuperscript{151} Id. at 126.
\textsuperscript{152} Id. at 126-27.
\textsuperscript{153} Id. at 127. Several state high courts have been presented with preconception Rh sensitization cases but have failed to undertake a probing preconception tort analysis. The Connecticut and Maine Supreme Courts rejected preconception Rh sensitization claims because the applicable statute of limitations had expired. See McDonald v. Haynes Med. Lab., Inc., 471 A.2d 646, 649-50 (Conn. 1984); Kennedy v. McLean, 555 A.2d 1057, 1058 (Mass. 1989). The Supreme Court of Colorado upheld a physician's liability for harms arising out of preconception Rh sensitization, but analyzed the claim as "an ordinary prenatal injury tort." Empire Casualty Co. v. St. Paul Fire & Marine Ins. Co., 764 P.2d 1191, 1196 (Colo. 1988).
\textsuperscript{154} See Carlson et al., \textit{supra} note 111, at 538.
against rubella. The cases yielded divergent results, based upon a
distinction in the doctor-patient relationship.

In Monusko v. Postle, the Michigan Court of Appeals allowed a
child's preconception negligence claim against a doctor who failed to
immunize the child's mother against rubella. The plaintiff's mother
had received care for several years from the defendant physicians in
connection with conceiving and bearing children. When she went to
the medical clinic to have her intrauterine device (IUD) removed in
order to have another child, doctors failed to offer her testing or
immunization for rubella. When she became pregnant the following
year, her child developed congenital rubella syndrome and suffered
physical and mental injuries associated with the condition. Relying
on a duty analysis, and noting the rubella tests are "designed
specifically to alleviate the sort of injuries we have in this case," the
Monusko court held that the child had a cause of action based on
preconception negligence.

The Supreme Court of Massachusetts reached a decision different
from the Monusko court in a subsequent preconception rubella
immunization case. In McNulty v. McDowell, the plaintiff's mother
saw the defendant physician twice for gynecology visits regarding use
of an IUD for contraception. The physician did not recommend
that the plaintiff's mother get a rubella shot. About a year after her
second visit with the doctor, the mother gave birth to a baby girl (the
plaintiff) who suffered from "numerous congenital defects
attributable to congenital rubella syndrome, including deafness,
blindness, severe mental retardation and heart defects." As in other
preconception medical care cases, the court evaluated the connection
between the doctor's treatment and the subsequent pregnancy in
order to determine whether a duty existed. The court concluded
that "the sparse contacts between [the mother] and [the doctor] and
the fact that these contacts were made not in anticipation of
pregnancy, but rather to avoid it, are insufficient to establish ... a
duty." The court thus denied a preconception tort cause of action.

156. Id. at 369.
157. Id. at 368.
158. Id.
159. Id.
160. Id. at 369-70.
161. See McNulty v. McDowell, 613 N.E.2d 904, 907-08 (Mass. 1993). For an in-
depth analysis of McNulty, see Mark L. Monopoli, Comment, McNulty v. McDowell:
Recognizing Preconception Tort in the Commonwealth?, 29 New Eng. L. Rev. 763
162. McNulty, 613 N.E.2d at 905.
163. See id.
164. Id. at 906.
165. Id.
166. Id. at 907.
because there was no logical connection between the type of care provided and the birth of a future child. Although the outcomes of preconception medical malpractice cases have been divergent, the McNulty and Monusko decisions, taken together, suggest a harmonizing principle: a nexus between the medical care provided and the conception or birth a future child is enough to create a preconception duty of care.

2. Pharmaceutical Products Cases

The state and federal courts have issued several opinions on preconception tort liability for pharmaceutical companies. The first of these, Jorgensen v. Meade Johnson Laboratories,167 involves birth control pills. All but one of the subsequent cases have arisen out of the use of the drug DES.168 Cases involving harm from defective pharmaceutical products are typically analyzed under the rubric of strict products liability.169 In the preconception tort context, however, courts curiously have looked beyond injury and actual causation and turned to an assessment of duty and proximate cause.

In Jorgensen, the plaintiffs' mother took birth control pills from May through November of 1966.170 In July of the following year, she gave birth to twins suffering from Down's Syndrome, one of whom died at age three.171 The complaint alleged that the birth control pills had "altered the chromosome structure within the body of the [mother]... and as a result thereof, a Mongoloid deformity was created" in the twin plaintiffs.172 The district court dismissed the claim, stating that a preconception tort was not a cognizable claim in Oklahoma and that creating such a cause of action was a matter for the legislature.173 The Sixth Circuit vacated the dismissal, noting that "the right to sue for prenatal injury has generally evolved from court decisions."174 On the substantive issue, the court used a hypothetical

167. 483 F.2d 237 (10th Cir. 1973).
169. See, e.g., Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069 (N.Y. 1989) (applying strict products liability to a claim involving harm to the child of woman who ingested DES while pregnant). Under a strict products liability theory of recovery, fault is of diminished significance. See Keeton et al., supra note 34, § 98, at 692-93. The doctrine arose out of the following considerations: first, manufacturers are in the best position to avoid harms and spread losses; second, strict liability increases the incentive for manufacturers to prevent accidents; and third, manufacturers should be liable for harms caused by their products even where fault is hard to prove under traditional negligence doctrine. Id.
170. Jorgensen, 483 F.2d at 238.
171. Id.
172. Id. at 239 (quoting the complaint on behalf of plaintiff Pamela B. Jorgensen, the surviving twin).
173. Id.
174. Id. at 241.
to point out the fundamental problem inherent in a blanket rejection of preconception tort claims: "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."175

The New York Court of Appeals rejected preconception tort liability in Enright v. Eli Lilly & Co.,176 the first of several cases alleging third generation harm from the drug DES. In Enright, the plaintiff's grandmother took DES during her pregnancy with the plaintiff's mother, who developed reproductive system deformities as a result of her exposure to the drug.177 Because of her mother's reproductive system abnormalities, the plaintiff was born prematurely, afflicted with cerebral palsy and other complications ultimately attributable to her mother's DES exposure.178 The trial court dismissed the case for failure to state a cognizable claim, but the intermediate appellate court reinstated the case on the theory of strict products liability.179 The Court of Appeals acknowledged that in Albala it "left open the question whether a different result might obtain under a strict products liability theory."180 In Enright, however, the court found no basis for departing from Albala's no-duty rule in preconception tort cases.181

In reaching its decision, the Enright court focused on three issues. First, it expressed concern that, owing to the controversial nature of the drug, DES plaintiffs might be treated as a "favored class for whose benefit all traditional limitations on tort liability must give way."182 The court concluded that it was not going to permit a cause of action simply because DES was involved.183 Second, akin to the defensive medicine concern in Albala, the Court of Appeals worried about "the dangers of overdeterrence—the possibility that research will be discouraged or beneficial drugs withheld from the market...[if] we are asked to recognize a legal duty toward generations not yet conceived."184 The court was not worried about underdeterring drug companies from inflicting injuries because "manufacturers remain amenable to suit by all those injured by exposure to their product, a

175. Id. at 240.
177. Enright, 570 N.E.2d at 199.
178. Id.
179. Id. at 200.
180. Id. at 202.
181. Id. For a detailed discussion of Albala, see supra text accompanying notes 70-77.
182. Id. at 201.
183. Id. at 202.
184. Id. at 204.
class whose size is commensurate with the risk created." 185 Third, the
court noted that the plaintiff failed to meet the requirements of a
statute governing DES litigation requiring actual contact with the
drug in order to make out a cause of action. 186

The Supreme Court of Ohio found the Enright decision persuasive
when it held against a third generation DES cause of action in Grover
v. Eli Lilly & Co. 187 The Grover court decided the issue on a certified
question from the federal district court in the Northern District of
Ohio. 188 The district court put the question as follows:

Does Ohio recognize a cause of action on behalf of a child born
prematurely, and with severe birth defects, if it can be established
that such injuries were proximately caused by defects in the child's
mother's reproductive system, those defects in turn being
proximately caused by the child's grandmother ingesting a defective
drug (DES) during her pregnancy with the child's mother? 189

In Grover, the plaintiff's mother was born with an impaired cervix due
to in utero exposure to DES. 190 The plaintiff, as in Enright, was born
prematurely, suffering from cerebral palsy. 191 Although the opinion
gives some attention to the question of duty, the case was ultimately
decided on grounds of proximate cause. The court concluded:
"Because of the remoteness in time and causation, we hold that
Charles Grover does not have an independent cause of action." 192

185. Id. at 203 (emphasis added). The class of persons exposed to DES would
include a pregnant woman who ingested DES and the child who was developing
inside her uterus at the time of ingestion. A grandchild suffering birth defects as a
result of his or her mother's reproductive abnormalities traceable to DES would not
have any actual exposure to the drug and thus would be outside the class. The dissent
in Enright focused on the majority's deterrence argument, criticizing it as an example
of both flawed reasoning and improper policy judgment. Id. at 207 (Hancock, J.
dissenting). The dissent said that even if deterrence were relevant, the court should
be no "less concerned with deterring the development of unsafe drugs which may
cause latent damage to the third generation than to the second." Id.

186. Id. at 202 (citing N.Y. C.P.L.R. 214-c). The Enright dissent argued that "two
fundamental principles of justice" weighed in favor of a cause of action for the
plaintiff. Id. at 209. First, the plaintiff, who suffered "a wrong of enormous
proportions which inflicted grievous injuries on her and countless other innocent
persons," should not be without a remedy. Id. Second, under the principle that "like
cases should be treated alike," a plaintiff who "is damaged no less than other victims
of DES who make up the class" should be allowed to recover. Id.

Todd Paul Myers, Casenote, Ohio Rejects Preconception Cause of Action for DES

188. Grover, 591 N.E.2d at 697.

189. Id.

190. Id. at 702.

191. Id.

192. Id. at 700. The Grover dissent, however, pointed out that the majority was
inconsistent when "in one breath it correctly states that 'we are required to assume
that Charles Grover[s'] . . . injuries were proximately caused by his mother's exposure
to DES,' but then ultimately concludes that '[b]ecause of remoteness in time and
causation . . . [he] does not have an independent cause of action.'" Id. at 702 n.4
In the most recent third generation DES case, an Illinois appellate court denied a cause of action without reaching the substance of the claim. In Sparapany v. Rexall Corp., the plaintiffs' grandmother ingested DES in the 1950s, exposing their mother to the drug in utero. Their mother "developed an incompetent cervix and a malformed uterus." As a result, one of the plaintiffs was stillborn and the other suffered serious birth defects. The only issue on appeal was whether the Illinois Supreme Court's decision in Renslow, allowing preconception tort claims, was prospective only and thus barred the plaintiffs' cause of action.

The Sparapany court held that the plaintiffs' claims were precluded by plain language in the Renslow opinion limiting its application to "cases arising out of future conduct." Because the plaintiffs' grandmother ingested DES twenty years prior to the Renslow decision, the defendant's negligent action was deemed outside the scope of Renslow's prospective holding. The court refused to remark on the permissibility of preconception pharmaceutical claims triggered by activity after the date of the Renslow decision. A specially concurring justice voiced concern about the "unnecessarily premature cut-off of claims by DES grandchildren." The concurring opinion points out that while the Renslow court expressed concerns about the "potential for perpetual claims arising for chemical accident or long-term radiation exposure," the likelihood that "DES generations will . . . cease at the third-generational stage . . . is probably assured."

Wells v. Ortho Pharmaceutical Corp. is a non-DES pharmaceuticals case in which preconception negligence was claimed. The plaintiff in Wells alleged that her mother's use of a spermicide contraceptive jelly proximately caused five birth defects: "(1) a cleft

(Resnick, J., dissenting) (quoting majority opinion). The dissent could "discern no sound basis, in law or public policy, for holding that there is no duty owed" to the plaintiff. Id. at 702. Moreover, the dissent noted that "in strict products liability claims, unlike causes of action sounding in negligence, the concepts of duty and foreseeability are of diminished significance." Id. at 703.


Id. at 1100.

Id.

Id.

Id. See supra text accompanying notes 100-09 for a discussion of Renslow v. Mennonite Hosp., 367 N.E.2d 1250 (Ill. 1977).

Sparapany, 618 N.E.2d at 1101 (quoting Renslow, 367 N.E.2d at 1256).

Id.

Id. See id. at 1101-02.

Id. at 1102 (Greiman, J., specially concurring).

Id. (quoting Renslow, 367 N.E.2d at 1250).


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Id. (quoting Renslow, 367 N.E.2d at 1250).


lip; (2) an abnormal formation and shortening of her right hand; (3) the absence of the distal joint of her right ring finger; (4) the complete lack of a left arm; and (5) only partial development of the left clavicle and shoulder." The plaintiff claimed that the spermicide caused the defects through one of four mechanisms: "(1) injury to a sperm that ultimately fertilizes an egg; (2) injury to an unfertilized egg; (3) injury to a fertilized egg or zygote; or (4) injury to the developing fetus, either by direct contact with the fetus or by absorption by the mother." Two medical experts testified to the possibility of preconception injury through the first two mechanisms. While the court ultimately found the fourth mechanism the most plausible, it did not rule out the alternative theories. Neither the district court nor the circuit court, however, explicitly evaluated the permissibility of a preconception tort cause of action in the pharmaceuticals context.

The near universal denial of a cause of action for preconception harm from pharmaceutical products is striking in light of the doctrine of strict liability for products that are unreasonably dangerous in manufacture or design. The next section reveals a similar phenomenon in automobile accident cases. While harm arising out of automobile accidents is almost universally actionable, courts have been reluctant to allow a cause of action for individuals harmed as a result of car accidents occurring before they were conceived.

3. Preconception Automobile Accident Cases

Claims of preconception negligence have met their strongest opposition in the automobile accident context. Three courts have evaluated preconception car accident claims, and not one has recognized a cause of action. This approach makes sense in that a driver can be expected to foresee harm to a woman he strikes with his car but cannot be expected to foresee, and guard against, harm to a child the injured woman conceives several years after the accident. At the same time, singling out preconception car accident claims for

205. Id. at 267.
206. Id. at 268.
207. Id. at 273, 275-76 n.18.
208. See id. at 292.
209. Id. at 292 n.39.
210. See Restatement (Second) of Torts § 402A (1965) ("One who sells any product in a defective condition unreasonably dangerous to the user or consumer... is subject to liability for physical harm thereby caused to the ultimate user or consumer... "). The Restatement indicates that liability attaches "although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller." Id.
211. See Green, supra note 18, at 1423 (commenting that liability properly attaches where automobile accidents give rise to injuries that could not reasonably have been foreseen).
across-the-board rejection is anomalous in light of the near-universal duty of care that attaches to operating an automobile.\textsuperscript{212}

The Supreme Court of Georgia evaluated a preconception automobile accident claim and held for the defendant in \textit{McAuley v. Wills}.\textsuperscript{213} The prospective mother in \textit{McAuley} was rendered paraplegic in a car accident with the defendant.\textsuperscript{214} Almost a year and a half after the accident, she gave birth to a child who "died the following day from cardiac arrest caused by the infant's inability, due to the mother's paraplegia, to pass through the fetal course in an uneventful manner."\textsuperscript{215} The trial court dismissed the case on the ground that the defendant driver could not owe a duty of care to a child not conceived when the car accident occurred.\textsuperscript{216} The court of appeals, sitting en banc, affirmed the trial court, with five judges holding that the claim was barred by a two-year statute of limitations, two judges concurring on the ground that proximate cause was lacking, and three judges dissenting.\textsuperscript{217} The Georgia Supreme Court agreed with the concurrence and affirmed the dismissal based on proximate cause.\textsuperscript{218}

Significantly, the \textit{McAuley} court noted: "To the extent that the trial court ruled that a person owes no duty of care toward an unconceived child, we must disagree."\textsuperscript{219} The court cited \textit{Bergstreser, Jorgensen}, and \textit{Renslow} as precedents for a preconception duty of care.\textsuperscript{220} However, the majority found that "the delivery of the child in a manner incompatible with the mother's paraplegia constituted an intervening act not reasonably foreseeable at the time of the car crash," thus ending the chain of proximate causation.\textsuperscript{221}

Eight years after \textit{McAuley}, a California court of appeals reviewed a preconception automobile accident tort claim and reached the same

\textsuperscript{212} See id.
\textsuperscript{213} 303 S.E.2d 258 (Ga. 1983).
\textsuperscript{214} Id. at 258.
\textsuperscript{215} Id.
\textsuperscript{216} Id.
\textsuperscript{217} Id. at 258-59.
\textsuperscript{218} Id. at 260-61.
\textsuperscript{219} Id. at 260.
\textsuperscript{220} Id. See supra text accompanying notes 65-69, 100-09, 170-75 for discussions of \textit{Bergstreser v. Mitchell}, 577 F.2d 22 (8th Cir. 1978), \textit{Renslow v. Mennonite Hosp.}, 367 N.E.2d 1250 (Ill. 1977), and \textit{Jorgensen v. Meade Johnson Labs.}, 483 F.2d 237 (10th Cir. 1973), respectively.
\textsuperscript{221} \textit{McAuley}, 303 S.E.2d at 260. Two judges wrote dissenting opinions in \textit{McAuley}. Judge Weltner's dissent disagreed with the majority's proximate cause determination. Id. at 261-63 (Weltner, J., dissenting). Judge Smith's dissent stated that proximate cause was a question for the jury and that the viability of the plaintiff's claim properly hinged on the issue of duty. Id. at 264 (Smith, J., dissenting). According to the Smith dissent, "the defendant owed a duty of care to avoid preconception injury to McAuley's child." Id. at 266. Smith was not concerned about deferring to the state legislature with regard to creating a novel cause of action because "[r]ecognition of a preconception tort is a proper exercise of [the] court's lawmaking function." Id. at 265-66.
outcome, though by different reasoning.\footnote{See Hegyes v. Unjian Enter. Inc., 286 Cal. Rptr. 85 (Cal. Ct. App. 1991).} In Hegyes v. Unjian Enterprises, the plaintiff's mother, as a result of injuries suffered in a car accident with the defendant's employee, "was fitted with a lumbo-peritoneal shunt."\footnote{Id. at 86.} When the mother became pregnant two years later, the fetus pressed against the shunt, necessitating a premature delivery by Caesarean section.\footnote{Id.} The plaintiff alleged personal injuries arising out of the premature delivery, not the prenatal contact with the shunt.\footnote{Id. at 86 & n.2} The only issue on appeal in Hegyes was stated as follows: "Does a negligent motorist owe a legal duty of care to the subsequently conceived child of a woman who is injured in an automobile accident?"\footnote{Id. at 87.} The court answered this question in the negative, holding that there is no preconception duty of care in the absence of products liability or professional negligence.\footnote{Id. at 89.}

Although the facts of Hegyes do not suggest a "wrongful life" cause of action, the majority began its analysis with wrongful life because the plaintiff asserted that theory and because wrongful life was "analytically similar" to the plaintiff's claim.\footnote{Id. at 88. See infra Part I.C. for a discussion of wrongful life doctrine.} The court identified a "prevailing principle" limiting recovery in wrongful life cases to circumstances where a special relationship gives rise to a duty of care, an element found lacking in Hegyes.\footnote{Id. at 93.} Analyzing several preconception tort cases from other jurisdictions, the court recognized an important distinction. In wrongful life cases, the negligence of the defendant causes the conception or birth of a child who happens to be disabled, whereas in preconception tort cases, the negligence of the defendant causes the disability itself.\footnote{See id. at 94.}

The Hegyes majority criticized the Renslow\footnote{See supra text accompanying notes 100-09 for a discussion of Renslow v. Mennonite Hosp., 367 N.E.2d 1250 (Ill. 1977).} and Bergstreser\footnote{See supra text accompanying notes 65-69 for a discussion of Bergstreser v. Mitchell, 577 F.2d 22 (8th Cir. 1978)).} courts for improperly expanding prenatal tort law to include preconception negligence.\footnote{Id. at 95-96.} The court found three New York cases persuasive, most notably Albala,\footnote{Hegyes, 286 Cal. Rptr. at 95-96.} in which the court asked presciently, "were we to establish liability in this case, could we logically preclude liability in a case where a negligent motorist collides with another vehicle containing a female passenger who..."
subsequently gives birth to a deformed child?"  Although the McAuley court declined to impose liability on a motorist for preconception negligence on grounds of proximate cause, the Hegyes majority cited McAuley as authority for the absence of a duty of care. This is especially striking in that McAuley explicitly rejected the Georgia trial court's finding of no duty.

The majority in Hegyes pointed out an interesting conundrum relevant in many preconception tort cases. If the treating physician failed to warn the plaintiff's mother of possible harms to future children caused by the internal injuries sustained, then an "intervening act of malpractice" would serve to cut off a defendant's liability. On the other hand, if the doctor advised the plaintiff's mother of the risks and she decided to have a child regardless, then the plaintiff's intervening act of conception would serve to cut off liability. In either scenario, the defendant's liability is cut off by an intervening negligent act or omission.

On the basis of foreseeability, the Hegyes court distinguished medical cases finding a preconception duty of care from auto accident cases implicating a possible preconception duty. While a doctor's actions might foreseeably lead to the conception of a child, a motorist's actions do not bear any relation to the conception and birth of children. The court admitted that the injury in the Hegyes case was within the realm of foreseeable possibility, but held that a "mere possibility of occurrence" is not enough to establish foreseeability sufficient to create a duty of care. In support of its holding, the court contrasted the presence of statutorily-created preconception duties in the medical context against the absence of such duties in motor vehicle statutes. From a fairness viewpoint, the majority declared that the implications of finding a duty of care would be "staggering" because every time the plaintiff conceived another child, the defendant might "once again be hailed [sic] into court."

235. Hegyes, 286 Cal. Rptr. at 97 (quoting Albala, 429 N.E.2d at 788) (emphasis omitted).
236. Id. at 99.
238. Hegyes, 286 Cal. Rptr. at 99.
239. Id.
240. See id. at 101.
241. Id.
242. Id. at 103.
243. Id. at 100-01 (noting that California Vehicle Code § 17150 creates liability for injuries to persons, but that the definition of "person" in California Civil Code § 29 includes only individuals already conceived).
244. Id. at 93. Associate Justice Johnson, dissenting in Hegyes, claimed that the California Supreme Court had already created a preconception duty of care. Id. at 105 (Johnson, J., dissenting) (noting that in the wrongful life case Turpin v. Sortini, 643 P.2d 954 (Cal. 1982), the California Supreme Court stated that if the plaintiff's deafness had stemmed from the defendant's tort rather than natural causes, recovery would have been permitted). Even if the case were one of first impression, however,
A third plaintiff tested the viability of an auto accident preconception tort claim in *Taylor v. Cutler,* a New Jersey case. In *Taylor,* the defendant, driving while intoxicated, became involved in a car accident with the plaintiff's mother, causing multiple, serious injuries. The plaintiff's mother was hospitalized over twenty-five times and underwent more than fifteen surgeries. Seven years after the accident, she conceived and bore a son (the plaintiff) who had to be delivered by Caesarean section due to his mother's pelvic injuries. The child suffered from craniosynostosis, a condition in which injuries to the head and face impair hearing and vision. Doctors attributed the child's birth defects to the fact that his developing skull was situated amid his mother's "broken, deformed pelvic bones." While the court expressed sympathy for the child, it upheld the trial court's determination that the defendant did not owe

Johnson argued that a duty of care should be found under the factors enunciated in *Rowland v. Christian,* 443 P.2d 561 (Cal. 1968), namely, the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care, and the availability, cost and prevalence of insurance for the risk involved.

*Hegyes,* 286 Cal. Rptr. at 111. Johnson's dissent labored mainly over the issue of foreseeability and concluded that the court's function is not to determine whether the particular injury is a foreseeable result of the particular action of the defendant. *Id.* at 112. Rather, the court's task is to "evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced." *Id.* (citing *Ballard v. Uribe,* 715 P.2d 624 (Cal. 1986)). Once this threshold has been passed, duty is established, and the case may go to a jury. *Id.*

The *Hegyes* dissent registered some noteworthy arguments in applying the remaining *Rowland* factors to the plaintiff's claim. On the fairness of imposing a burden on motorists, the dissent stated: "Compared to the millions of people toward whom drivers already owe a duty of care, the handful of post-conceived children whose injuries they might proximately cause represent an infinitesimal increment—like a single sliver of straw dropped on a haystack." *Id.* at 116. The dissent expressed skepticism that "the present burden is so heavy and drivers already are so careful we should not increase the burden or enhance the degree of care any further than we already have." *Id.* The ready availability of car insurance to cover plaintiffs' injuries without raising insurance rates appreciably helped tip the balance in favor of imposing a duty of care. *Id.*

245. 703 A.2d 294 (N.J. Super. Ct. App. Div. 1997). The New Jersey Superior Court's decision was affirmed by the New Jersey Supreme Court in a four-sentence per curiam opinion. See *Taylor v. Cutler,* 724 A.2d 793 (N.J. 1999). The New Jersey Supreme Court expressed its substantial agreement with the appellate court's reasoning. See *id.* at 793.
246. *Taylor,* 703 A.2d at 295.
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.* at 295-96.
a duty of care to an unconceived child, and there was no cause of action for preconception negligence. 251

The Taylor court determined that the plaintiff's cause of action hinged on the existence of a duty of care grounded in the concept of foreseeability. 252 As in Hegyes, the Taylor majority recognized a distinction between foreseeability in the context of duty and foreseeability in the context of proximate cause. 253 In the duty context, the question is "whether or not probable harm to one in the position of th[e] injured plaintiff... should reasonably have been anticipated from defendant's conduct." 254 In the proximate cause context, the issue is "whether the specific act or omission of the defendant was such that the ultimate injury to the plaintiff was a reasonably foreseeable result." 255 Ultimately, the court stated that the recognition of a duty of care hinged on whether the defendant knew or should have known that unconceived children were at risk of injury from the defendant's tortious conduct. 256 The court concluded that the defendant had no way of knowing that her negligent driving posed a risk of harm to a child born seven years later. 257

The Taylor court offered two hypotheticals to illustrate the unreasonable expansion of liability represented by the imposition of a preconception duty of care on motorists. First, the court suggested that a negligent driver should not be held liable if a person he injures blacks out while driving seven years later and injures a third party. 258 Second, the court suggested that a driver should not be held liable for child abuse if his negligence causes psychiatric damage to another motorist, who in turn abuses a child conceived after the accident. 259 In concluding its foreseeability analysis, the court added that the unconceived child "was not within the 'zone of danger' created by defendant's negligent operation of her vehicle." 260 From a policy standpoint, the court characterized the deterrent effect of preconception liability as "speculative at best." 261

251. Id. at 296, 303.
252. Id. at 296-97.
253. Id. at 297.
255. Id. (quoting Hill, 380 A.2d 1107).
256. Id. at 299.
257. Id. at 299-300.
258. Id. at 300.
259. Id.
260. Id.
261. Id. Judge Dreier, dissenting in Taylor, would have remanded the case to the trial court with the instruction that a preconception cause of action is permissible in the auto accident context. Id. at 306 (Dreier, P.J., dissenting). Dreier's dissent posed its own hypothetical, asserting that if a driver crashed into a building, resulting in its collapse ten months later, a newborn child injured in the collapse would be able to make a claim against the driver. Id. at 304. "If we then change the structure from a building to the mother's pelvis... we have translated the hypothetical to the matter which we now review." Id. The dissent reasoned that "it is neither far-fetched nor
Courts have refrained from letting preconception automobile cases go to trial even though the harm in such cases is limited to a small class of plaintiffs, namely, children conceived by mothers with uterine injuries from prior car accidents. The next section looks at preconception toxic exposure cases, where the class of plaintiffs potentially harmed can, by contrast, span generations.

4. Toxic Substance Exposure Cases

A final preconception negligence category has arisen out of exposure to toxic substances. Most of the cases within this category involve employees who were exposed to a toxic substance and claimed that their exposure led to chromosomal abnormalities in their children. In some cases, however, the plaintiff has claimed a prenatal injury, and the defendant employer has sought dismissal on the ground that the exposure occurred prior to the plaintiff's conception, before a duty of care existed.

In a case reminiscent of the negligently-repaired furnace hypothetical posed by the Martin court, an Indiana court of appeals affirmed a jury's denial of recovery to a child injured in utero from his mother's exposure to carbon monoxide. The plaintiff in Second National Bank v. Sears, Roebuck & Co. was not conceived at the time the defendant's employee installed a furnace in the child's prospective residence. When the child's mother was seven months pregnant with the plaintiff, a downdraft in the furnace flue pipe exposed her to carbon monoxide fumes. The plaintiff's claim that his cerebral palsy was attributable to the defective installation of the furnace was allowed to proceed to a jury, which rendered a verdict for the defendant. The argument that Sears did not owe a duty of care to an unconceived individual does not appear to have been raised, but the fact that the case was allowed to proceed to trial indicates that the court found the duty element satisfied.

Two New York cases have evaluated liability where a party alleged that injuries stemmed from preconception exposure to ethylene oxide ("EtO"). In Catherwood v. American Sterilizer Co., the plaintiff

lacking reasonable foreseeability to imagine that a later-conceived child gestating within the damaged structure of the mother's pelvis might be injured." Id. According to Dreier's dissent, principles of proximate cause would serve to cut off liability in situations where a long delay or intervening act between accident and injury rendered the plaintiff's claim less compelling. Id. at 305.

262. See supra text accompanying notes 94-95.
264. Id. at 230.
265. Id.
266. Id.
claimed that her chromosomal birth defect was proximately caused by her mother’s preconception exposure to EtO in the workplace. The court, pointing out that New York does not recognize a preconception duty of care, dismissed the plaintiff’s claim. The opinion expressed concern about “the proliferation of frivolous claims and claims where proof presents a hardship to defendants.”

*Mann v. H.W. Anderson Products, Inc.* is noteworthy in that the defendant raised preconception negligence as a shield against liability. The plaintiff in *Mann* alleged that his mother’s exposure to EtO in the workplace, while pregnant, caused his birth defects. The defendant, in support of its motion for summary judgment, countered “that the plaintiff was not harmed in utero, but, rather, that his condition was genetically predetermined before he was conceived, which would render his claim a legally untenable preconception tort.” While the court found merit in the defense’s argument, it decided that the plaintiff’s competing claim of postconception injury precluded judgment for the plaintiff as a matter of law.

Utility workers brought an unsuccessful claim for damages from preconception exposure to nuclear radiation in the Illinois federal case *Coley v. Commonwealth Edison Co.* Two male Commonwealth Edison (“ComEd”) employees who worked at the same facility fathered children, three years apart, who suffered from the chromosomal disorder Trisomy 18. The court granted summary judgment to the defendant on two grounds: first, ComEd’s compliance with regulations precluded a finding of negligence; and second, there was scant scientific evidence connecting Trisomy 18 to paternal radiation exposure. Rather than holding that the defendant owed no duty of care to the plaintiff, the court ruled that no reasonable jury could find for the plaintiff in light of the applicable regulations and the facts presented.

As in the *Mann* case, the defendant in *Hitachi Chemical Electro-Products, Inc. v. Gurley* unsuccessfully raised preconception negligence as a shield to liability. In *Hitachi*, two plaintiffs alleged

269. Id. at 706.
270. Id.
271. Mann, 246 A.D.2d at 73.
272. Id. at 70.
273. Id. at 73.
274. Id. at 73-74.
276. Id. at 626. The disorder is one in which maternal or paternal chromosome 18 fails to divide during the reproductive process, causing a chromosome deficiency and shortened lifespan in the child. Id.
277. Id. at 628-29.
278. Id. at 629-30.
279. Id.
birth defects from exposure to hazardous chemicals through their parents, three of whom were employees at a Hitachi semi-conductor factory. The Georgia Court of Appeals pointed out that the plaintiffs had not sought compensation for preconception negligence, but rather had made an ordinary prenatal tort claim. Moreover, the Hitachi court affirmed the trial court’s conclusion that “even if plaintiffs’ complaint had specifically sought preconception damages, Hitachi’s contention that such a claim is barred by common law is without merit.” The court quoted the Georgia Supreme Court’s statement in *McAuley* that “at least in some situations, a person should be under a duty of care toward an unconceived child.”

The United States Supreme Court has not ruled directly on the permissibility of preconception tort causes of action. In *UAW v. Johnson Controls, Inc.*, however, Justice White’s concurring opinion, joined by Justices Rehnquist and Kennedy, noted the growing acceptance of preconception tort claims. *Johnson Controls* was a class action suit brought by female workers contesting the defendant employer’s policy of prohibiting all fertile women from performing tasks exposing them to lead in concentrations exceeding Occupational Health and Safety Administration (OSHA) standards. White’s concurrence noted the employer’s interest in avoiding preconception liability:

> Common sense tells us that it is a part of the normal operation of business concerns to avoid causing injury to third parties ... if for no other reason than to avoid tort liability .... This possibility of tort liability is not hypothetical; ... an increasing number of courts have recognized a right to recover even for prenatal injuries caused by torts committed prior to conception.

White’s comments about preconception torts are only a sidebar within a concurring opinion, but they demonstrate the expanding reach and growing import of preconception negligence law.

**C. Distinguishing Wrongful Life Claims from Preconception Torts**

Wrongful life claims are those in which a plaintiff asserts both an impaired existence and negligence on the part of the defendant which

281. *Id.* at 867-68.
282. *Id.* at 868.
283. *Id.*
284. *Id.*
285. *Id.* (quoting *McAuley v. Wills*, 303 S.E.2d 258, 260 (Ga. 1983)).
287. *Id.* at 213 (White, J., concurring).
288. *Id.* at 190-92.
289. *Id.* at 212-13 (White, J., concurring).
caused the existence but not the specific impairment. There are three main factual predicates to wrongful life cases: (1) negligent performance of a sterilization operation, resulting in the birth of an unplanned child who happens to be impaired; (2) failure to provide genetic counseling (or the provision of inaccurate genetic counseling), leading to the birth of a child with a genetic defect; or (3) failure to offer amniocentesis, thus depriving parents of the opportunity to abort a child with an abnormality. Some wrongful life claims might be categorized as preconception torts in that a negligent act by the tortfeasor leads to the conception of a person with an impaired existence. Wrongful life claims, however, are significantly different from the preconception cases discussed in the previous section. In a wrongful life claim, the plaintiff would not have enjoyed the offsetting benefit of existence were it not for the negligent act of the defendant. In preconception tort cases, the plaintiff would have enjoyed existence without impairment if not for the defendant's negligence. Courts have generally rejected wrongful life claims on the basis that allowing a cause of action would entail an improper policy judgment that nonexistence is preferable to existence in an impaired state. In addition, wrongful life claims run counter to the Second Restatement of Torts position: "When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages." The benefit rule poses an insurmountable challenge to plaintiffs who have the negligent act of the defendant to thank for their very existence.

The Massachusetts Supreme Judicial Court, for example, held that a physician whose negligent genetic counseling led to the conception and birth of an impaired child could not be held liable for the child's injuries. The plaintiff's parents in *Viccaro v. Milunsky* consulted with a genetics specialist "concerning the possibility that [the mother] might have, or be a carrier of, a genetic disorder known as ectodermal

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294. See *Restatement (Second) of Torts* § 920 (1977) (stating the rule that a plaintiff cannot recover if the defendant's tort conferred a benefit outweighing any harm inflicted on the plaintiff).


296. *Restatement (Second) of Torts* § 920.

297. *Viccaro*, 551 N.E.2d at 9, 12.
After being assured that the mother did not have the disease, the couple bore a son who was "severely afflicted with anhidrotic ectodermal dysplasia." The parents brought a claim, on the son's behalf, for wrongful life. The court rejected this claim because "there is a fundamental problem of logic if [the child] were allowed to recover against the defendant.... The almost universal rule in this country is that a physician is not liable to a child who was born because of the physician's negligence." The majority opinion stated that the physician simply did not breach any duty.

A recent Massachusetts lower court opinion provides a nice illustration of the distinction between preconception tort and wrongful life. In Doolan v. IVF America (MA), Inc., the plaintiff's parents were known carriers of the gene for cystic fibrosis. They asked the defendant IVF clinic to perform a test for the disease on the embryo that was ultimately implanted in the mother. The clinic advised the parents that the embryo did not have the genetic mutation for cystic fibrosis, when in fact the embryo contained the mutation. The plaintiff child, afflicted with cystic fibrosis, attempted a preconception tort claim, but the court concluded that the case was for wrongful life. The court reasoned that the plaintiff's claim was "not that the alleged negligence of the defendants caused him to be born with cystic fibrosis, but rather that the alleged negligence... denied his parents the opportunity to choose not to conceive and give birth to him."

II. THE INCONSISTENCY AND INADEQUACY OF CURRENT PRECONCEPTION TORT LAW

A substantial body of preconception tort case law has developed over the past thirty years. This part explores the inconsistency of the analytical approaches and outcomes of these cases. Problematically, a child who enters the world "carrying the seal of another's fault" might recover in one jurisdiction but be left without a remedy in another. In addition, this part suggests that the emergence of advanced assisted reproductive technologies implicating preconception injury, as well as the prospect of preconception gene therapy, makes it increasingly

298. Id. at 9.
299. Id.
300. Id. at 12.
301. Id.
302. See id. at 13.
304. Id. at *2.
305. Id. at *2-3.
306. Id. at *4.
307. Id. at *9.
308. Id. at *11-12.
likely that courts will face an influx of preconception tort claims. As such, the time is ripe for courts to develop a better approach to preconception negligence to meet the challenges posed by advances in science and medicine.

A. Disarray Among and Within Jurisdictions

On the surface, courts seem to be consistent in the way they handle various types of preconception tort claims. For example, seven out of nine courts that have reviewed Rh sensitization cases have permitted a cause of action based on preconception negligence. The two jurisdictions holding otherwise did so on the basis of statutes of limitations rather than common law tort principles. All five jurisdictions that have examined third generation DES claims have denied them. Likewise, all three courts that have been presented with preconception claims arising out of car accidents have denied a cause of action. More broadly, courts that have evaluated causes of action based upon preconception negligence have generally found that the existence or nonexistence of a duty of care flowing to the unconceived child is critical to the analysis.

Beneath this patina of uniformity, however, a more complicated picture may be uncovered. Even where the outcomes of cases are consistent, the legal analyses employed by the courts are often very different. For example, in the Rh sensitization cases, where the physician-patient relationship usually creates a duty of care, four courts did not undertake a duty analysis, focusing instead on statutes of limitations. Two of these concluded that recovery was barred because the relevant statute ran from the date the mother was injured or should have discovered her injury. Implicit in these holdings is that the relevant injury was to the mother, not the later-conceived child, thus undercutting the idea of a duty of care to the child.

While the courts have been more consistent in the denial of third generation DES claims, this consistency diminishes if the DES cases are placed in the broader category of pharmaceutical products cases. In denying a third generation DES claim, the New York Court of Appeals worried about making DES plaintiffs "a favored class for

310. See supra Part I.B.1.b and accompanying notes.
311. See supra note 153.
312. See supra Part I.B.2 and accompanying notes.
313. See supra Part I.B.3.
315. See supra Part I.B.1.b and accompanying notes.
316. See supra note 153.
whose benefit all traditional limitations on tort liability must give way.\textsuperscript{317} Ironically, however, the DES cases are the only pharmaceutical products preconception claims to date in which a cause of action has been denied.\textsuperscript{318} \textit{Jorgensen} (birth control pills) and \textit{Wells} (spermicide jelly) may be distinguished from the third generation DES claims in that the injuries in \textit{Jorgensen} and \textit{Wells} occurred shortly after the negligent conduct, whereas the injuries in the DES cases occurred decades afterward.\textsuperscript{319} Courts, however, have not barred preconception Rh sensitization claims even though the harms in many of those cases are realized several years after the negligent activity.\textsuperscript{320} Moving to the auto accident cases, the \textit{Taylor} and \textit{Hegyes} courts denied preconception tort claims, holding that the motorist owed no duty of care to the future child of the accident victim.\textsuperscript{321} The \textit{McAuley} court, in contrast, affirmed the existence of a duty of care but chose to deny relief on grounds of proximate cause.\textsuperscript{322}

The jurisdictional division in preconception torts is sharpest between New York and Georgia. New York has articulated a bright-line no duty rule, barring claims in the medical care,\textsuperscript{323} pharmaceutical products,\textsuperscript{324} and toxic substance\textsuperscript{325} contexts. Georgia, on the other hand, has allowed preconception claims to proceed in both pharmaceutical products\textsuperscript{326} and toxic substances\textsuperscript{327} cases. The Georgia Supreme Court would have gone so far as to allow a preconception tort claim arising from an auto accident had a physician’s intervening act of negligence not subverted the element of proximate cause.\textsuperscript{328} Most jurisdictions that have found a preconception duty of care have, like Georgia, found such a duty across contexts.\textsuperscript{329} The New Jersey courts, however, have found a duty to the unconceived in Rh sensitization cases,\textsuperscript{330} but not in automobile accident cases.\textsuperscript{331}

\textsuperscript{318} See supra Part I.B.2.
\textsuperscript{319} See supra Part I.B.2.
\textsuperscript{320} See supra Part I.B.1.b.
\textsuperscript{321} See supra Part I.B.3.
\textsuperscript{322} See McAuley v. Wills, 303 S.E.2d 258, 259-260 (Ga. 1983).
\textsuperscript{323} See supra text accompanying notes 70-77.
\textsuperscript{324} See supra text accompanying notes 176-86.
\textsuperscript{325} See supra text accompanying notes 267-74.
\textsuperscript{326} See supra text accompanying notes 204-09.
\textsuperscript{327} See supra text accompanying notes 280-85.
\textsuperscript{328} See supra text accompanying notes 213-21.
\textsuperscript{329} For example, the Michigan courts have allowed preconception tort claims in both negligent surgery and rubella cases. See supra text accompanying notes 88-97, 155-60. Missouri has upheld preconception negligence claims in both medical malpractice and Rh sensitization cases. See supra text accompanying notes 65-69, 130-39. The Oklahoma courts have allowed preconception claims in the context of both Rh sensitization and harm from pharmaceutical products. See supra text accompanying notes 120-29, 170-75.
\textsuperscript{330} See supra text accompanying notes 146-53.
\textsuperscript{331} See supra text accompanying notes 245-61.
Although there have been multiple preconception tort cases over the past thirty years, there is no consensus among, and sometimes within, jurisdictions about the framework of analysis. This may prove problematic at a time when the emergence of new genetic and assisted reproductive technologies promises to lend added significance to this area of tort law. As advances in medical science enable doctors to manipulate reproductive cells and the DNA contained within prior to conception, the possibility of harm through preconception negligence will be greatly magnified.

B. Medical Advances and Preconception Torts

Preconception claims are still relatively rare, but cutting-edge reproductive technologies pose the risk of an increased incidence of preconception and multigenerational injuries. The current state of disarray within the courts becomes even more troublesome in light of emerging reproductive technologies, and possibly gene therapy, which threaten to expand upon the number and character of preconception tort claims.

Preconception negligence claims to date can be put in two fault-based categories. Cases belonging to the first category are those in which the tortfeasor's negligence causes the ultimate harm to the plaintiff but does not cause the plaintiff's conception. The medical malpractice, pharmaceutical products, auto accident, and toxic substance cases all fit within this category. Renslow, for example, illustrates this category of case. The doctor in Renslow negligently transfused a female, Rh-negative patient with Rh-positive blood and thus was responsible for the harm to the later-conceived Rh-positive child. The doctor, however, had nothing to do with his patient's independent act of conceiving a child.

The second category consists of cases in which the negligent actor is responsible for the conception of the plaintiff but is not otherwise responsible for the harm suffered. The wrongful life cases comprise this category. For example, in Viccaro, the physician's negligent genetic counseling was directly responsible for the parents' decision to conceive a child. The child's ectodermal dysplasia, however, was a genetic disorder stemming from natural causes, not from any medical intervention.

334. See supra text accompanying notes 100-109 for a discussion of Renslow.
336. See id.
What the courts have not faced, but is on the near horizon, is a third possibility—a case in which the tortfeasor is responsible, through preconception negligence, for both conception and specific injury. With the mapping of the human genome and the attendant promise of breakthroughs in gene therapy, an illustrative hypothetical is easy to imagine. Take, for example, a husband and wife of Jewish ancestry who have decided not to have children because the husband carries the recessive gene for Tay-Sachs and their children would have a one in four chance of suffering from this terrible disease. With the advent of germ-line gene therapy in the coming years, suppose that the husband could undergo a procedure in which the Tay-Sachs gene is excised from his reproductive cells. Let us imagine further that a doctor performs the gene therapy technique negligently and the result is a daughter who does not suffer from Tay-Sachs but instead suffers from a genetic defect causing moderate impairment over a normal lifespan. Under the current wrongful life jurisprudence of most jurisdictions, the child's cause of action should be barred because she would not have been conceived if it were not for the services provided by the gene therapist, and she cannot claim that the life she has, impaired though it might be, is worse than no life at all. Such a scenario tests the outer limits of wrongful life doctrine.

In light of recent developments in gene mapping, the previous hypothetical is within the realm of educated conjecture rather than science fiction. It is not necessary to speculate, however, in order to encounter assisted reproductive technologies (ARTs) that simultaneously provide avenues for conception and raise risks of injury. Two ARTs currently in practice fit this description.

In vitro ovum nuclear transplantation (IVONT) applies the technique used to clone Dolly the sheep to the context of human

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339. See Lawrence K. Altman, Genomic Chief Has High Hopes, and Great Fears, for Genetic Testing, N.Y. Times, June 27, 2000, at F6 (reporting on the statements of Francis S. Collins, head of the Human Genome Project of the National Institutes of Health, about the genetic testing and gene therapy implications of human genome mapping).

340. See Stedman's Medical Dictionary 504 (26th ed. 1995) (indicating that Tay-Sachs, which is transmitted by a recessive gene, causes blindness, seizures, and, ultimately, death within the first few years of life).

341. See Altman, supra note 339 (indicating that, according to Francis S. Collins of the Human Genome Project, gene therapy should be available for most diseases by the year 2040); see also LeRoy Walters & Julie Gage Palmer, The Ethics of Human Gene Therapy 62 (1997) (indicating that "[g]erm-line gene therapy involves a therapeutic genetic alteration in germ-line cells... including gametes (reproductive cells, such as sperm and egg cells) as well as the cells from which they are derived"). Walters and Palmer note that germ-line therapy is advantageous because the genetic improvements are passed down to succeeding generations. Id. at 62-63.

342. See Wade, supra note 338.
assisted reproduction. Though the procedure has not yet been successful in a documented case, IVONT is designed to assist infertile women who wish to have their own biological children. Doctors remove the nucleus from a donated egg and replace it with the nucleus of an egg from the infertile prospective mother. The resulting “hybrid egg” is fertilized in vitro and implanted in the infertile woman’s womb. While IVONT may confer the benefit of biological parenthood on women who in the past would have been limited to adoption or conventional egg donation, scientists and ethicists have raised concerns about the riskiness of the procedure. One problem is that the nuclear DNA from the prospective mother is not the only material relevant to the formation of the resulting baby. The mitochondrial DNA in the donated egg’s cytoplasm will also contribute to the genetic composition of the child. In addition, the donor egg’s cytoplasm, which surrounds the mother’s nucleus, plays a role in how the genes are expressed. Researchers are unsure, at this point, about the consequences of combining one woman’s genetic information with another, usually younger, woman’s cytoplasm. One developmental biologist told the New York Times that “similar experiments in mice have resulted in abnormalities that were passed on to succeeding generations” and that “we have no idea what the potential is for birth defects, or problems in children in the next generation.” Even if IVONT is proven to be free of inherent genetic injury, there remains the possibility that human error in carrying out nuclear transfer could result in harm to a child conceived with the hybrid egg.

Unlike IVONT, intracytoplasmic sperm injection (ICSI) is an ART that has enjoyed widespread use since it was first attempted in 1992. ICSI assists a couple in conceiving a child when the prospective father is infertile due to insufficient numbers of sperm (oligospermia), a total

344. Id.
345. Id.
346. Id.
347. Id.
349. See Grady, supra note 343.
350. Id.
351. Id. (quoting Temple University developmental biologist Keith Latham).
352. See E.R. Te Velde et al., Concerns About Assisted Reproduction, 351 Lancet 1524 (1998) (indicating that as of 1995 about 50,000 ICSI procedures had been attempted worldwide and “[t]ens of thousands of ICSI children must have been born since the technique was introduced”). But see Carl Djerassi, Sex in an Age of Mechanical Reproduction, 285 Science 53 (1999) (providing a more conservative estimate that over 10,000 babies have been born by means of ICSI since 1992).
absence of sperm in the ejaculate (azoospermia), or abnormalities in the sperm that impede fertilization (e.g., insufficient mobility). ICSI specialists achieve fertilization in vitro by injecting a single sperm from the father into the cytoplasm of the mother's egg, which is subsequently implanted in the mother's uterus. ICSI differs from ordinary IVF in several respects. With ICSI, first, there is mechanical penetration of the egg, using a pipette, during the fertilization process; second, it is possible to select the particular sperm that will fertilize the egg, and third, it is possible to achieve fertilization with sperm which, due to abnormalities, would otherwise be unable to penetrate the egg. The birth defect risks posed by ICSI are summarized nicely in an article describing mild cognitive developmental delays in children conceived by ICSI compared with children conceived naturally or by IVF:

The ICSI procedure involves fertilisation by injection of a single sperm directly into an oocyte, often with spermatozoa with impaired mobility and morphology. These defects may reflect an underlying abnormality in the sperm, therefore, use of these sperm may lead to an increased incidence of abnormalities in the child. Also, infertile men with oligospermia or azoospermia have an increased incidence of chromosomal anomalies... that may be transmitted to their children. By selecting a single sperm for injection the ICSI technique bypasses the usual process of natural selection which occurs both during natural conception and in conventional IVF, resulting in a greater chance of fertilization with abnormal sperm. Finally, ICSI involves physical disruption of the cell membrane of the oocyte and introduction of extraneous material into the oocyte, together with the sperm.

The literature has given mixed reviews on the safety of ICSI, and some have suggested that it is still too early, and the available subjects

355. Id.
356. See Gianpiero Palermo et al., Pregnanacies after Intracytoplasmic Injection of Single Spermatozoon into an Oocyte, 340 Lancet 17, 18 (1992); see also J.Y. Nau, Regulating ICSI in France, 345 Lancet 377 (1995) (noting that ICSI "does away with the element of 'competition' that spermatozoa face with other modes of fertilisation"). Nau also quotes Professor Georges David, founder of a center for the conservation of sperm, as follows: "ICSI is one of the largest upheavals to the human race because for the first time it is possible to modify and suppress certain selection mechanisms of reproduction." Id.
357. See E. Kristine Steele et al., Science Versus Clinical Adventurism in Treatment of Azoospermia, 353 Lancet 516 (1999) (noting that in traditional IVF, genetically defective sperm are less likely to fertilize an egg, whereas "[i]n ICSI, natural selection processes are eliminated, therefore any sperm injected into an oocyte might have damaged DNA").
358. Bowen et al., supra note 353, at 1529.
359. Compare M. Bonduelle et al., Mental Development of 201 ICSI Children at 2
for study are too few, for an accurate assessment of risk. However, the weight of authority has sided with the position that ICSI presents a risk of harm more significant than the risks entailed by ordinary IVF or natural conception.

Leaving aside the idea that informed consent might relieve doctors of liability to child as well as mother, the potential for preconception negligence claims arising out of IVONT and ICSI is clear. With medical ethicists worried that these types of techniques “are already taking place without the oversight that ... is necessary,” courts can play a role in deterring such risky procedures by eliminating existing barriers to preconception causes of action, particularly those involving multigenerational harms.

How society should use knowledge about the human genome and the human reproductive process to realize benefits is a question fraught with policy considerations. But how courts should analyze individual tort claims alleging harm from preconception negligence arising out of gene therapy or assisted reproduction is not strictly a question of policy. Indeed, the traditional elements of negligence are equipped to handle preconception tort claims. Because many preconception negligence claims have turned on the element of duty, the next part explains how a preconception duty of care is consistent with the duty of care to existing persons in other negligence cases.

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Years of Age, 351 Lancet 1553 (1998) (claiming that “[t]here is no indication that ICSI children have a slower mental development than the general population”), with Bowen et al., supra note 353, at 1529 (asserting that “there is an increased risk of mild delays in development [of children conceived by ICSI] at 1 year when compared with children conceived by routine IVF or conceived naturally”).

360. See, e.g., M. M. Hawkins & C. L. R. Barratt, Letter to the Editor, Intracytoplasmic Sperm Injection, 286 Science 51 (1999). Hawkins, a specialist in childhood cancer, and Barratt, a specialist in reproductive biology and genetics, indicate that “[m]ore ICSI offspring must be studied before we can satisfactorily address the question of a birth defect excess.” Id. They note that a study designed to include birth defects with an incidence of one in every thousand births would require an ICSI group of 20,000 and a control group of the same number. Id. By contrast, one of the largest ICSI studies thus far began with 423 ICSI offspring and was expanded to include 877 ICSI offspring, Id.

361. See Bowen et al., supra note 353, at 1529, 1532 (noting an increased risk of developmental delays in one-year-old children conceived by ICSI); Gina Kolata, New Questions About Popular Fertilization Technique, N.Y. Times, Mar. 30, 1999, at F10 (noting a report that “injection can damage proteins in the egg that push and pull chromosomes into line before cell division and that ... ICSI skews the egg’s otherwise orderly removal of proteins from sperm”); Palermo et al., supra note 356, at 18 (indicating the possibility of damage to the egg during ICSI due to the “characteristics of the injection pipette or of the micromanipulation technique”); Steele et al., supra note 357, at 516 (stating that “potentially damaged sperm are being used for ICSI and the long-term outcome of such pregnancies is still unknown”); Te Velde et al., supra note 352, at 1524 (noting that “concerns have been expressed about the potential and long-term hazards faced by ICSI offspring ... includ[ing] genetic damage, cytoplasmic changes, contamination of sperm, or other damage caused by the technique itself”).

III. A Nexus Test for Duty and Its Application

Although it is possible for an intentional tort to give rise to preconception liability, the preconception tort cases to date have been causes of action in negligence. Of the four elements of negligence (duty, breach, causation and injury), duty has taken center stage in preconception tort law, with causation playing a significant supporting role. Breach is of diminished importance because the issue is not whether the duty breached was the duty owed, but whether there was a duty of care to one not yet in existence. Injury is likewise of diminished significance because there is generally no dispute that the plaintiff has suffered a harm; even in a wrongful life case there may no question that the plaintiff has suffered an injury in the form of a birth defect, but the offsetting benefit rule serves to preclude recovery.

Many courts, understandably, have turned to duty as a means of limiting liability in the difficult preconception tort line of cases. The argument that negligence law is grounded in duties of care owed to others and that such duties cannot be owed to persons who do not exist would appear to make a good deal of sense. This Note, however, adopts the position that courts have been too quick to end the inquiry with the duty element and that causation, specifically proximate cause, should be the decisive factor in making out a triable case for preconception negligence in most contexts.

A. The Nexus Test

The courts that focus on the duty element of negligence in preconception tort cases can generally be divided into two extremes. On the one hand, courts such as the New York Court of Appeals have taken a doctrinal approach and pointed out the fundamental flaw inherent in announcing a duty of care to persons not yet in existence. On the other hand, courts such as the California Court of Appeals eschew the rigid, formalistic approach and subscribe to the

363. For example, an assailant who injured a woman in a way that caused injury to a subsequently-conceived child could be sued for the intentional preconception tort of battery. In such a case, duty of care would be irrelevant, and the later-conceived child would be able to argue a theory of transferred intent. See Keeton et al., supra note 34, § 8, at 37-39.
364. See id., § 30, at 164-65.
365. See Dobbs, supra note 290, § 290, at 791.
366. See id. at 789-91.
367. See Restatement (Second) of Torts § 920 (1977) ("Benefit to Plaintiff Resulting from Defendant's Tort"); see also supra notes 294-96 and accompanying text for a discussion of the offsetting benefit rule.
369. See Albala, 429 N.E.2d at 788.
view that duty is a stand-in for policy considerations which judges must balance when deciding whether to allow a cause of action.\(^\text{370}\) A court, however, need not stray from conventional negligence doctrine, including a bona fide duty element, to permit a preconception tort claim. In assessing duty, the natural tendency for courts is to ask the question: duty to whom? In nonfeasance cases, a duty of care may be predicated on a relationship (for example, landlord-tenant or doctor-patient) between the negligent actor and the injured party.\(^\text{371}\) A preexisting relationship between the parties, however, is not the only type of connection that is significant in the duty analysis of negligence cases. The logical connection between the category of activity in which the tortfeasor engaged and the category of activity in which the plaintiff was engaged when she suffered the injury is also relevant to the finding of a duty. A review of *Palsgraf v. Long Island Railroad*,\(^\text{372}\) the seminal case on duty, will serve as a good starting point for this analysis.

In *Palsgraf*, a man carrying a nondescript package jumped aboard a moving train and looked as if he were about to lose his balance and fall backwards.\(^\text{373}\) One of the defendant’s employees gave him a push from behind and another pulled him aboard the train.\(^\text{374}\) In doing so, they dislodged the package from his arm.\(^\text{375}\) The package, which contained fireworks, hit the ground and exploded.\(^\text{376}\) The explosion caused scales to fall from a nearby wall and injure the plaintiff, Mrs. Palsgraf, who had been standing on the railroad platform.\(^\text{377}\) Judge Cardozo, writing for the majority, rejected Mrs. Palsgraf’s cause of action on the ground that the railroad employees may have breached a duty of care in the way they handled the man boarding the train, but they did not breach a like duty of care to the plaintiff.\(^\text{378}\)

Scholars have pointed out that *Palsgraf* stands for the proposition that a cause of action in negligence must be founded upon the breach of a duty personal to the plaintiff.\(^\text{379}\) That the railroad employees breached a duty of care to the man attempting to board the train was not enough to create a cause of action for the plaintiff, who was

\(^{370}\) See Hegyes, 286 Cal. Rptr. at 89.


\(^{372}\) 162 N.E. 99 (N.Y. 1928).

\(^{373}\) Id. at 99.

\(^{374}\) Id.

\(^{375}\) Id.

\(^{376}\) Id.

\(^{377}\) Id.

\(^{378}\) Id. at 100-01.

situated outside the ambit of the duty of care but happened to be
injured as a result of the breach. Duty skeptics have pointed out that
Palsgraf may tell us that the duty must flow to the proper party before
a plaintiff gets her day in court, but it does not tell us where the duty
comes from in the first place.380 As Dean Prosser has put it: "These
are shifting sands, and no fit foundation. There is a duty if the court
says there is a duty; the law, like the Constitution, is what we make
it."381 Prosser accuses Cardozo of "stating dogmatic propositions
without reason or explanation."382 Furthermore, if duty is about a
relationship between defendant and plaintiff, Prosser charges Cardozo
with myopically ignoring that "Mrs. Palsgraf was a passenger [and
from the moment that she bought her ticket the defendant did in fact
owe her a duty of the highest care."383 Prosser is conspicuously
dismissive of an opinion which, at the time of his critique, had been
good law for twenty-five years and had been followed in numerous
jurisdictions. Still standing after more than seventy years, Cardozo's
opinion in Palsgraf enjoys an enduring significance that renders
Prosser's skepticism suspect. Palsgraf may even help clarify the issue
of how it is that a person can have a duty to one not yet conceived.

At the very outset of his opinion, immediately after stating the facts
of the case, Cardozo focuses on the relationship between the
defendant's activity and the plaintiff's injury: "The conduct of the
defendant's guard, if a wrong in its relation to the holder of the
package, was not a wrong in its relation to the plaintiff, standing far
away. Relatively to her it was not negligence at all."384 This language
supports the concept that negligence with respect to one party does
not automatically establish negligence to other parties injured as a
result of the same act. The next sentences in the opinion, however,
add greater dimension to the duty inquiry. Cardozo writes: "Nothing
in the situation gave notice that the falling package had in it the
potency of peril to persons thus removed. Negligence is not
actionable unless it involves the invasion of a legally protected
interest, the violation of a right."385 In these latter two sentences,
Cardozo signals that he is analyzing the duty issue when he discusses
"legally-protected interest" and "violation of a right." In assessing
duty, however, he is not merely looking for a relationship between
defendant and plaintiff, but a connection between the falling package
and a danger to plaintiff that would justify the finding of a duty.
Relationship in this sense is different from that of carrier to passenger,
or person in defendant's class to person in plaintiff's class. To

381. Id. at 15.
382. Id. at 7.
383. Id.
385. Id.
determine whether a duty is present, Cardozo appears to examine the relationship between the category of activity in which the defendant was engaged (negligently dislodging an ordinary package) and the category and manner of injury that the plaintiff suffered (injured by a scale knocked from a wall as the result of an explosion). This part of the duty analysis may be termed a categorical approach to duty or a nexus test for duty, as distinct from the duty-breach nexus necessary to establish a negligence claim.\footnote{386}

Although the term nexus is nowhere in the opinion, Cardozo highlights the absence of a connection between the category of the defendant's negligent activity and the category of danger that was created. He writes:

> The purpose of the [defendant's] act, as well as its effect, was to make [the man's] person safe. If there was a wrong to him at all, which may very well be doubted, it was a wrong to a property interest only, the safety of his package. Out of this wrong to property, which threatened injury to nothing else, there has passed, we are told, to the plaintiff by derivation or succession a right of action for the invasion of an interest of another order, the right to bodily security.\footnote{387}

In short, Cardozo appears to be saying that there is no reasonable connection between pushing a man with a package aboard a train and detonating an explosion that injures a woman standing on a nearby platform. "The risk reasonably to be perceived defines the duty to be obeyed,"\footnote{388} and here the risk was dislodging and damaging the man's package.

Cardozo emphasizes, however, that "a like result would follow if the interests were the same."\footnote{389} He provides the following illustration:

> One who jostles one's neighbor in a crowd does not invade the rights of others standing at the outer fringe when the unintended contact casts a bomb upon the ground. The wrongdoer as to them is the man who carries the bomb, not the one who explodes it without suspicion of the danger.\footnote{390}

Therefore, even allowing that the railroad employees created a risk of physical injury to the man boarding the train, there is still no nexus between their activity and the injury to Mrs. Palsgraf. Her physical injury was of a different kind than would be anticipated from pushing a man aboard a train and knocking a package from his arm.

*Palsgraf* is relevant to the preconception tort analysis because it is a leading case on duty which holds that not all harmful activity is

\footnote{386. See Keeton et al., *supra* note 34, § 30, at 164.}
\footnote{387. *Palsgraf*. 162 N.E. at 100.}
\footnote{388. *Id.*}
\footnote{389. *Id.*}
\footnote{390. *Id.*}
actionable. If railroad employees triggering harm to a ticketed passenger on a train platform is not actionable, it is understandable why courts would be reluctant to allow claims for acts harmful to the unconceived. This approach, however, assumes that duty is about relationships between persons and not about logical connections between types of activity and types of harm. Analyzing Prosser's approach to duty helps to sharpen the distinction between these competing conceptions of duty.

Prosser argues that courts, despite Palsgraf, routinely apply the principle of transferred negligence. He poses a hypothetical in which a delivery truck driver passes a visibly empty cardboard box in a driveway:

Two minutes later, coming down the driveway, he negligently runs over the box. Negligently, because he knows it is there, it may be owned by some one, and it has some small value. In the meantime a two-year-old child, whose presence could not reasonably be anticipated, has concealed himself in the box. Is the defendant liable for the death of the child?

I cannot believe that any court ever will say no.

In Prosser's illustration, there is no special relationship between the driver and the child, and it is not foreseeable from the driver's perspective that the child could have entered the box. Therefore, although the driver may have had a duty to avoid property damage to the box, he cannot be said to have owed a duty of care to the child obscured within. This assumes that foreseeability as a duty determinant is a matter purely of foresight. As Professor Green has argued, however, the announcing of a duty of care often involves hindsight. It is the court's role to evaluate the facts and circumstances of a case and make an after-the-fact judgment about whether members of society should be under a duty of care in similar circumstances in the future.

A comparison of the child-in-the-box hypothetical with Palsgraf brings the contrasting analyses of Prosser and Cardozo into sharp relief. On the facts of Prosser's hypothetical, a court would be justified in announcing a duty of care, without resorting to transferred negligence, because a driver should never run over a box large enough to contain a child. It is foreseeable that a young child would be attracted to a box as a plaything. It is also foreseeable that a young child would climb inside a box that was big enough to accommodate him. Although a reasonable person may not have contemplated the

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392. See id. at 20-21.
393. See Green, supra note 18, at 1418. See also Robertson, supra note 13, at 1437 (suggesting that Professor Green's hindsight approach is best suited to determining the scope of duty in preconception tort cases).
possibility of a child in the box, he should have done so. The court plays a role in shaping careful behavior when it announces that drivers are under a duty to guard against physical injury as well as property damage when they encounter a large box on a road or driveway. One can imagine that people who drive vehicles for a living are so advised as part of their training. Framing it in terms of a nexus test for duty, the question to be answered is as follows: Is there a connection between driving over a large cardboard box and injuring a child? The answer is yes, because the inclination of a child to play inside a box creates a sufficient nexus between the driver’s activity (running over a box) and the child’s manner of injury (getting run over while playing inside a box). This case is easier than Palsgraf because the injury is direct, and the proximate cause issues over which Judge Andrews labored in the Palsgraf dissent are not present.394

Although Palsgraf looks somewhat like the child-in-the-box hypothetical, it differs in significant respects relevant to the finding of duty. Absent notice of an explosive device, there is no nexus between being too rough with someone while helping him aboard a train and setting off an explosion that injures a woman standing nearby. If the child-in-the-box case were the first of its kind, and the reviewing court, finding a duty, upheld a cause of action for wrongful death, word of the case would undoubtedly filter through the public and put drivers on notice that they should swerve out of the way when they encounter a box in the road, rather than heedlessly running it over. In short, the public would be under a court-sanctioned duty to refrain from driving over boxes for fear of killing children. In contrast, if Cardozo had found a duty flowing to the plaintiff in Palsgraf, is it likely that railroad employees would be on notice not to push or pull teetering passengers aboard a train for fear that doing so might trigger an explosion injuring someone a short distance away? Owing to its sheer improbability, it is highly unlikely that the announcement of such a duty would have any impact whatsoever, except perhaps to overdeter railroad employees from coming to the assistance of passengers.

The foregoing analysis bears particular relevance to the question of duty in the preconception tort context because there can be no special or prior relationship to an injured party who did not exist at the time of a defendant’s negligent act. Since a duty in such circumstances cannot be predicated on a relationship between the individuals, it must be predicated, if at all, on a nexus between the tortfeasor’s activity and the plaintiff’s position in relation to that activity. In many preconception tort categories, the finding of such a nexus, and a correlative duty, is justified. In difficult cases, courts have been reluctant to announce a duty of care because of their wish to limit

liability, but principles of proximate cause may serve this purpose. Although it might seem to be a matter of mere semantics whether courts choose to employ duty or proximate cause to restrict causes of action, the choice is important. The duty element, as its name implies, is a means by which the courts tell citizens that they are under an obligation to exercise care so as not to harm others.395 By rejecting claims on grounds of proximate cause, courts can affirm the obligation to exercise due care, while at the same time relieve defendants of liability where the injury is too far removed or too clouded by intervening events. The next section illustrates how the nexus test can be put into practice in preconception tort cases.

B. Applying the Nexus Test for Duty to Preconception Cases

This part fleshes out the preconception tort analysis by applying the nexus test for duty, articulated in the last section, to the various factual contexts in which preconception tort cases arise. In fact, some courts have already applied what appears to be a nexus test for duty, even if they have not labeled it as such.396 While it is not feasible in this Note to evaluate the particulars of every case within each general category of preconception tort, it will suffice to apply the nexus test to the facts of some typical cases in each category.

1. Negligent Surgery

The negligent performance of a Caesarean section leading to injury of a subsequently-conceived child is a preconception claim that has arisen in two cases.397 This factual scenario is easy to analyze under a nexus test for duty because of the close connection between the doctor's activity (cutting open and repairing a woman's uterus) and the category of risk to the future child (suffering injury as a result of premature birth due to rupture of a negligently-repaired uterus). The facts of these cases bear some resemblance to Prosser's child-in-the-box scenario.398 The case for a duty of care seems more compelling in the hypothetical child-in-the-box case because of the certainty of immediate injury if the box the driver runs over has a child in it. The negligent Caesarean section cases, however, could be viewed as more compelling from a duty standpoint in that there is a much greater chance that there will be a child in the uterus, albeit removed in time. The difficulty in permitting a cause of action has to do with the later-

395. See Keeton et al., supra note 34, § 53, at 356.
398. See Prosser, supra note 380, at 20-21; see also supra text accompanying notes 391-92.
conceived child's removal in time from the negligent act, suggesting that if the claim is to be barred at all, it should be barred on grounds of proximate cause.

A negligent preconception surgery case would be more difficult to make if, in addition to the remoteness of the plaintiff in time, there were also an attenuated connection between the category of the surgical procedure and the harm to the unconceived child. For example, let us assume that negligent performance of heart surgery on a young woman leads to insufficient blood flow to a later-conceived child. The child suffers brain damage as a result of improper blood flow. While such an eventuality might appear somewhat foreseeable in hindsight, the case for imposition of liability is weaker under a nexus test for duty. The link between heart surgery on a young woman and poor blood flow to a later-conceived child is less direct and therefore less compelling than the link between uterine surgery and premature birth of a subsequent child as a result of a weakened uterus.

2. Rh Sensitization

With the exception of Renslow, the Rh sensitization cases share a similar factual background. A woman becomes pregnant with a baby that has an incompatible Rh factor. If the woman's blood becomes sensitized, an eventuality well known to the medical community, there is a risk of injury to any later-conceived children with incompatible Rh factors. The doctors fail to take steps to prevent sensitization of the mother's blood, and a few years later, a subsequently-conceived child with an incompatible Rh factor suffers harm.

In this factual setting, the nexus between the doctor's activity (failing to prevent sensitization of the mother's blood) and the child's injury (birth defects as a result of sensitization) is compelling. The link is formed by medical knowledge about the results of sensitization. Once again, the cause of action is best restricted, if at all, on grounds of causation, specifically supervening cause. If the prospective mother has been advised, prior to conception, that her doctors negligently failed to prevent sensitization in a prior pregnancy, then her act of conceiving another child might be deemed a supervening cause of the child's injury. The close connection between the failure to prevent sensitization and the risk of injury to subsequent children, however, merits the finding of a duty of care.

400. See Carlson, supra note 111, at 532-33.
3. Failure to Immunize for Rubella

The two preconception tort cases involving failure to immunize against rubella provide a nice illustration of the nexus test for duty. In Monusko, the court found a duty of care to protect a future child from fetal rubella syndrome where the defendant doctor was providing care for the plaintiff's mother in connection with conceiving and bearing a child. In McNulty, by contrast, the court found no duty of care to guard against fetal rubella syndrome where the physician was providing contraceptive care. The opposite outcomes of Monusko and McNulty suggest that it is not the fact of a relationship between the plaintiff's mother and the defendant that is the key to the formation of a duty. Rather, it is the connection between the defendant's activity and the potential harm to a later-conceived child. The birth of the Monusko plaintiff, and harm from fetal rubella syndrome, should have been within the contemplation of the defendant doctor because he was providing care connected to conception and childbearing. The same cannot be said of the McNulty case, where the defendant physician was providing care aimed at preventing the conception and birth of a child.

4. Pharmaceutical Products

Most of the preconception claims in the pharmaceuticals context have arisen out of DES ingestion. A woman takes DES while pregnant, causing her child to develop uterine tumors. The woman's child, in turn, conceives and bears a child who suffers physical defects as a result of the uterine tumors. The nexus between providing a drug to prevent miscarriage and the birth of a grandchild suffering defects would appear to fail a nexus test for duty. The duty element, however, should not be as significant in this type of case because principles of strict products liability apply, rendering the duty element of diminished importance.

There is one way, however, in which a relevant nexus might nevertheless be established. Drug companies are charged with guarding, through clinical trials, against a multitude of risks that might be posed by their products. If the manufacturer should have known, through proper clinical trials, that DES posed a risk of uterine tumors, then the nexus is established. Once knowledge or constructive

404. See supra Part I.B.2.
405. See Keeton et al., supra note 34, § 99, at 694-95.
knowledge of the risk of uterine tumors in the child is established, the
nexus between the uterine tumors and the malformation of the future
child exposed to such tumors is no longer far-fetched. As with the
negligent surgery cases, the line might be drawn at defects closely
connected with the bodily integrity of a developing fetus. For
example, if DES caused heart defects rather than uterine tumors, it
would be difficult to establish a nexus between a mother’s weak heart
and her child’s developmental injury, even if actual causation could be
established in such a case.

5. Auto Accidents

The preconception auto accident cases have presented great
obstacles to plaintiffs, usually on the ground that a driver cannot owe
a duty of care to the future child of someone he injures through
negligent operation of an automobile. The general reasoning is that
if a driver strikes another car with a female passenger inside, it is not
reasonably foreseeable that such a collision will do harm to a child
conceived by the woman at some future time. The Taylor court began
its analysis of such a case, appropriately, with a discussion of
Palsgraf. A comparison of the preconception auto accident cases
and the facts of Palsgraf is helpful in sorting out the duty issue. In
Palsgraf, there was no reasonable connection between dislodging a
train passenger’s package and setting off an explosion resulting in
physical injury to a bystander. The absence of a nexus between
defendant’s category of activity and plaintiff’s category of injury is not
as clear in the preconception car accident cases.

Of the types of injuries to be guarded against while driving a car, it
may be said that physical injury is the most important, with property
damage and emotional harm taking a back seat. Therefore, the
physical injury suffered by a preconception tort plaintiff is within the
primary type of harm a driver should guard against while operating a
vehicle. The difficulty arises in the manner of the injury. In a typical
car accident case, the driver has breached a duty to an existing person
who is usually within the range of visual apprehension at the time of
the accident. To say that a driver owes a duty to one not yet in
existence would appear to fulfill Cardozo’s warning that “[l]ife will
have to be made over, and human nature transformed, before
prevision so extravagant can be accepted as the norm of conduct.” But
the finding of a duty of care in this context is not as improbable as
it seems at first blush. A court might conclude that injury to a

409. Palsgraf v. Long Island R.R., 162 N.E. 99, 99 (N.Y. 1928); see also supra text
accompanying notes 372-78 (discussing Palsgraf in greater detail).
410. Palsgraf, 162 N.E. at 100.
woman's uterus is among the risks of physical harm within the orbit of negligent driving. If injury to a woman's uterus is a foreseeable harm, this might create a close enough nexus between negligent driving and injury to future children to justify the finding of a duty, admittedly a matter of close judgment. By announcing a duty of care to guard against harm to later-conceived children, a court would be merely adding to an undoubtedly massive list of potential physical harms that could flow from negligent driving, many of them improbable from the standpoint of foresight. Even if the nexus test is not met, the fact that driving carries with it an almost universal duty of care, reflected in a system of mandatory insurance, counsels in favor of finding a duty in most car accident cases.\footnote{See Keeton et al., supra note 34, § 84, at 602-03.}

In order to construct a car accident roughly equivalent to \textit{Palsgraf}, we need to plant explosive material in the glove compartment of a car struck by a negligent driver. Let us say that the negligent driver strikes the other vehicle, injuring its driver, and the material in the glove compartment explodes, causing injury to a pedestrian standing on a nearby sidewalk. A court is unlikely to announce that drivers have a duty of care to guard against harms to pedestrians caused by dangerous explosives concealed in other motorists' cars. This type of case is one in which the courts would be hard-pressed to announce a duty. The hindsight perspective is once again instructive. A negligent driver injuring both a woman and her subsequently conceived child might, in hindsight, recognize that if he had the opportunity to do things over again, he would have been mindful of the potential harm to both injured parties. On the other hand, the negligent driver who triggered the explosion injuring the pedestrian might justifiably feel no obligation to guard against a similar harm in the future because it was not connected closely enough with his negligent activity.

If the courts are troubled by the granting of a cause of action where a driver's negligence gives rise to an injury to a child born many years after the risky conduct, such a cause of action can be barred on proximate cause grounds. By rejecting the cause of action on grounds of proximate cause, a court can nevertheless affirm the idea that drivers are under an obligation to guard against the harm. The finding of a duty vindicates, to some extent, the claimant who argues that he has been injured through wrongful conduct. Proximate cause is a means for the court to deny a cause of action because of remoteness in time or causal chain, not because of the absence of an obligation or duty.
6. Toxic Substance Exposure

Cases involving toxic substance exposure are ones in which the duty element is of the least importance. The release of toxic substances that might potentially alter the chromosomal structure of human beings and visit harms upon their children can be put in the category of highly risky conduct for which strict liability should apply.\textsuperscript{412} Although toxic substance exposure should create a cause of action for any person who is injured as a result of the exposure, future children are generally excluded from the class of plaintiffs who may recover. If courts are to employ any duty analysis at all in such cases, there certainly should be a duty on the part of toxic substance producers and handlers to prevent multigenerational harms. Medical knowledge about the connection between certain toxic substances and chromosomal injuries supplies the required nexus. If a court is to restrict the cause of action, it should be on grounds of proximate cause, a doctrine less concerned with enforcing the appropriate level of care and more concerned with limiting liability for harms mediated by intervening events and the passage of time.

7. Assisted Reproduction: IVONT and ICSI

The nexus between a fertility specialist's use of an assisted reproductive technique and the conception of a future child is compelling. If a duty of care to a future person can exist, such a duty is most obvious where a physician's activity is specifically directed at bringing about the existence of the person. For this reason, the cutting-edge assisted reproductive techniques IVONT and ICSI pass the nexus test for duty with flying colors.\textsuperscript{413}

Since the preconception duty of care is clear in assisted reproduction cases, courts should focus on the elements of causation and injury. In many cases, causation may be hard to prove because of the possibility that naturally occurring genetic factors, and not the fertility specialist's intervention, were responsible for a child's birth defects. Even where causation is established, the plaintiff will have to show that he suffered an actual injury by proving that he would have been born unimpaired if the doctor had exercised due care. In a case involving ICSI, a plaintiff might allege that fertilization by penetrating an egg with an injection pipette was the cause of a birth defect. If the plaintiff can show that he would have been born unimpaired had the procedure been performed carefully, then the injury element will be satisfied. If the plaintiff had no chance to be born healthy without

\textsuperscript{412} See id. § 78, at 545-59, for a discussion of abnormally dangerous materials and activities to which the strict liability rule applies in many English and American jurisdictions.

\textsuperscript{413} For an in-depth discussion of IVONT and ICSI, see supra Part II.B.
ICSI, however, then the claim may be barred as one for wrongful life.\textsuperscript{414}

If a fertility clinic performs ICSI where the child had a chance to be conceived through ordinary IVF, an interesting problem is presented. The child can allege that her claim is not one for wrongful life because there was at least a chance, albeit a small one, that the same sperm and egg would have come together to create the same child if the doctors had chosen regular IVF over ICSI. The child might choose not to allege, as in a wrongful life claim, that she would prefer nonexistence to her current condition. Rather, she might claim that she would gladly have been born unimpaired through routine IVF, rather than impaired through ICSI.

CONCLUSION

Preconception negligence is already a significant area of tort law. Over the past thirty years, numerous plaintiffs have brought claims alleging injuries resulting from negligent activity prior to their conception. This area of the law promises to become even more important as interventions affecting human reproduction at the cellular level grow more feasible. To date, preconception tort cases have usually arisen where defendants engaged in risky conduct, but did not intend to have an impact on future persons. With the advent of advanced assisted reproductive technologies like IVONT and ICSI, as well as the possibility of inheritable genetic modification and human cloning, the setting has shifted. It is now not only possible, but also likely, that medical interventions targeted at creating or enhancing future persons will cause injuries to some of those persons. Gene therapy and assisted reproductive technologies that act upon reproductive cells prior to conception hold out great promise, but they also pose risks of harm. The time is ripe for courts to develop a consistent approach to preconception negligence grounded in traditional tort doctrine.

In the current state of the law, some courts are skeptical about whether otherwise negligent actors can owe a duty of care to persons not yet in existence. The plaintiff is hard pressed to establish a relationship between himself and the defendant giving rise to a duty. This obstacle can be overcome if courts focus on a different type of relationship: the nexus between the category of activity in which the defendant engaged and the category and manner of harm the plaintiff suffered. In most types of cases presented thus far, and certainly in cases involving assisted reproduction, such an approach will enable the plaintiff to clear the duty hurdle. Courts may still limit causes of action on grounds of proximate cause, but doing so does not involve a

\textsuperscript{414} For a discussion of wrongful life, see \textit{supra} Part I.C.
determination that the defendant had no obligation to avert the harm suffered by the plaintiff. In some cases where recovery to date has been denied, however, a focus on proximate cause rather than duty may allow the plaintiff to be made whole where a remedy might otherwise not have been available.