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court was applying the rule against impeachment of one's own witness to the evidence presented and that failure by plaintiff to make a submissible case resulted therefrom. Under this interpretation, *Zabol* does not appear to be a continuance of any liberalizing trend evidenced in *Wells v. Goforth*.<sup>64</sup> At the very least, this decision seems to be an indication that the Missouri Supreme Court intends to maintain the rule against impeachment of one's own witness in its present form.

DAVID M. BROWN

## PRECONCEPTION TORT—THE NEED FOR A LIMITATION

### *Renslow v. Mennonite Hospital*<sup>1</sup>

In October, 1965, Emma Renslow, then thirteen years old, was given two transfusions of Rh-positive blood. Her own blood had an Rh-negative characteristic and was sensitized by the transfusions. She had no knowledge of the improper transfusions or of the incompatibility of the transfused blood with her own. Approximately nine years after the transfusions, Renslow gave birth to a daughter, Leah, who was born with serious hemolytic defects. The mother sued the defendant hospital and physician on her own behalf for her personal injuries. The mother also brought suit as next friend on behalf of her daughter for injuries suffered by the child. For the child's cause of action, it was alleged that the injuries resulted from the negligent blood transfusions more than seven years prior to the infant's conception. The trial court dismissed the infant's action because the alleged injury had been inflicted before the infant was conceived. The appellate court reversed.<sup>2</sup> The Supreme Court of Illinois affirmed the appellate court and held that the infant's petition had stated a cause of action.

Whether an infant should be allowed a cause of action for prenatal injuries sustained as a result of negligent conduct occurring prior to the infant's conception is a relatively new issue.<sup>3</sup> A brief history of the cause of

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64. 443 S.W.2d 155 (Mo. En Banc 1969). The Missouri Supreme Court changed the rule against impeachment of one's own witness to allow the use of prior inconsistent statements in order to impeach one's own witness where that witness is the adverse party in a civil case.

1. 67 Ill. 2d 348, 367 N.E.2d 1250 (1977).

2. *Renslow v. Mennonite Hosp.*, 40 Ill. App. 3d 234, 351 N.E.2d 870 (1976).

3. Although no Missouri court has ruled on this question, the Eighth Circuit, in accordance with Missouri's belief of the Missouri law would hold that an infant that is born alive has a cause of action for injuries suffered as a result of

action for prenatal injury may lend a better perspective to this question. The common law rule and the rule in this country for many years was that an infant had no cause of action for tortious injuries sustained while the infant was *en ventre sa mere* (within the mother's womb).<sup>4</sup> A reason often cited by courts denying such a cause of action was that a fetus had no identity apart from its mother; an infant negligently injured before birth thus had no right to recover.<sup>5</sup> This rule was followed strictly during the first half of this century.<sup>6</sup> Beginning with *Bonbrest v. Kotz*,<sup>7</sup> the rule was rapidly abandoned; at present every state that has dealt with the issue permits an infant a cause of action for prenatal injuries sustained as a result of a defendant's negligent conduct while the infant was in the womb.<sup>8</sup> Although a cause of action has been recognized in the child, the parents generally have no cause of action in their own behalf for the infant's prenatal injuries.<sup>9</sup> Underlying this view is the recognition that a fetus and its

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negligent acts occurring prior to the infant's conception. *Bergstreser v. Mitchell*, 577 F.2d 22 (8th Cir. 1978). There have been other cases analogous to *Renslow*. *Jorgensen v. Meade Johnson Labs., Inc.*, 483 F.2d 237 (10th Cir. 1973) (strict liability cause of action granted for prenatal injuries allegedly resulting from the mother's consumption of the defendant's oral contraceptive product); *Piper v. Hoard*, 107 N.Y. 73, 13 N.E. 626 (1887) (cause of action granted for alleged fraudulent misrepresentations made by the defendant to the plaintiff's mother prior to the plaintiff's conception); *Park v. Chessin*, 60 App. Div. 2d 80, 400 N.Y.S.2d 110 (1977) (complaint stated a cause of action for wrongful life for alleged negligence of obstetricians in failing to warn parents prior to conception that another child would likely suffer from genetic disease).

4. *Smith v. Brennan*, 31 N.J. 353, 356-59, 157 A.2d 497, 498-503 (1960).

5. *Zepeda v. Zepeda*, 41 Ill. App. 2d 240, 248, 190 N.E.2d 849, 852 (1963), *cert. denied*, 379 U.S. 945 (1964).

6. *See, e.g., Drobner v. Peters*, 232 N.Y. 220, 133 N.E. 567 (1921); *Berlin v. J.C. Penney Co.*, 339 Pa. 547, 16 A.2d 28 (1940).

7. 65 F. Supp. 138 (D.D.C. 1946).

8. *See, e.g., Huskey v. Smith*, 289 Ala. 52, 265 So. 2d 596 (1972); *Womack v. Buchhorn*, 384 Mich. 718, 187 N.W.2d 218 (1971); *Steggall v. Morris*, 363 Mo. 1224, 258 S.W.2d 577 (En Banc 1953) (dictum); *Sylvia v. Gobeille*, 101 R.I. 76, 220 A.2d 222 (1966); *Seattle-First Nat'l Bank v. Rankin*, 59 Wash. 2d 288, 367 P.2d 835 (1962); *Annot.*, 40 A.L.R.3d 1222 (1971). In *Hall v. Murphy*, 236 S.C. 257, 113 S.E.2d 790 (1960), the court restricted its decision to permitting a cause of action where the prenatal injuries were sustained at a time when the infant was a viable fetus. However, the trend appears to be toward permitting an infant to maintain an action for prenatal injuries regardless of the viability of the fetus at the time the injury was sustained. *See, e.g., Daley v. Meier*, 33 Ill. App. 2d 218, 178 N.E.2d 691 (1961); *Sinkler v. Kneale*, 401 Pa. 267, 164 A.2d 93 (1960).

9. *Smith v. Brennan*, 31 N.J. 353, 364, 157 A.2d 497, 503 (1960); *Steggall v. Morris*, 363 Mo. 1224, 1231-32, 258 S.W.2d 577, 580-81 (En Banc 1953). Although the parents have no cause of action for the infant's prenatal injuries, they have been allowed a cause of action for the wrongful death of an infant who is born alive but later dies as a result of prenatal injuries negligently inflicted while the infant was a viable fetus. *E.g., Steggall v. Morris*, 363 Mo. 1224, 258 S.W.2d 577 (En Banc 1953); *Leahy, C.C. Pitts Sand & Gravel, Inc.*, 419 S.W.2d 820 (Tex. 1967). In addition some jurisdictions have held that there is a cause of

mother are separate organisms from the time of conception.<sup>10</sup>

Because Leah Renslow sustained injury at the moment of or immediately after conception, *Renslow* is a prenatal injury case.<sup>11</sup> However, it differs slightly from the traditional prenatal injury action. In the traditional case the fetus is injured by tortious conduct occurring *after* the fetus is conceived.<sup>12</sup> *Renslow* granted a cause of action for prenatal injuries resulting from negligent conduct which occurred several years *prior* to the infant's conception. It is difficult to regard conduct as wrongful toward a person who is not yet conceived at the time of the act. However, this difficulty should not pose a barrier to a *Renslow* type cause of action. The question should not be whether the *tortious action* occurred prior to or after conception, but rather whether the *injury* occurred at the time of or after conception.<sup>13</sup> The recognition of a cause of action for prenatal injuries sustained as a result of negligent acts occurring prior to the infant's conception is a logical extension of the development in prenatal injury law.<sup>14</sup>

Nevertheless, there are several possible arguments against recognition of such a cause of action. An argument certain to be heard from the medical profession is that permitting such an action to be maintained

action for the wrongful death of a viable fetus which is stillborn as a result of prenatal injuries. *E.g.*, *Chrisafogeorgis v. Brandenburg*, 55 Ill. 2d 368, 304 N.E.2d 88 (1973); *Evans v. Olson*, 550 P.2d 924 (Okla. 1976). However, Missouri courts have denied a cause of action for the wrongful death of a viable fetus that is stillborn as a result of prenatal injuries. *State ex rel. Hardin v. Sanders*, 538 S.W.2d 336 (Mo. En Banc 1976).

10. See *Bennett v. Hymers*, 101 N.H. 483, 485, 147 A.2d 108, 110 (1958).

11. A prenatal injury action should be distinguished from a wrongful life suit. The plaintiff in a prenatal injury action is attempting to hold the defendant liable for prenatal injuries allegedly resulting from the defendant's negligence. In an action for wrongful life, the plaintiff instead is alleging that had the defendant not been negligent, the infant would not have been born. Comment, *An Unreasonable Limitation on a Physician's Liability in a Wrongful Life Suit*, 12 NEW ENGLAND L. REV. 819, 820 (1977); Note, *Torts—Wrongful Birth and Wrongful Life*, 44 MO. L. REV. 167, 177 (1979). Courts generally have denied a cause of action for wrongful life, often on the grounds that damages would be impossible to measure. See, *e.g.*, *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967); *Dumer v. St. Michael's Hosp.*, 69 Wis. 2d 766, 233 N.W.2d 372 (1975). *But see* *Park v. Chessin*, 60 App. Div. 2d 80, 400 N.Y.S.2d 110 (1977).

12. See, *e.g.*, *Womack v. Buchhorn*, 384 Mich. 718, 187 N.W.2d 218 (1971); *Mallison v. Pomeroy*, 205 Or. 690, 291 P.2d 225 (1955).

13. See *Jorgensen v. Meade Johnson Labs., Inc.*, 483 F.2d 237 (10th Cir. 1973).

14. There appears to be no reason why Missouri courts would not make such a logical extension and recognize a cause of action for prenatal injuries resulting from negligent conduct occurring prior to the infant's conception. *Bergstreser v. Mitchell*, 577 F.2d 22, 25 (8th Cir. 1978). See *State ex rel. Hardin v. Sanders*, 538 S.W.2d 336 (Mo. En Banc 1976); *Steggally v. Morris*, 363 Mo. 1224, 258 S.W.2d 577 (En Banc 1953).

would create an unreasonable burden on that profession.<sup>15</sup> In addition, as forcefully asserted by Justice Ryan in his dissent to *Renslow*,<sup>16</sup> the tremendous expansion in recent years of recognized tort causes of action has increased costs to the public to such an extent that to allow maintenance of *Renslow* type actions might make the economic burden on the public unbearable.<sup>17</sup> It could be argued that the lack of precedent for such a cause of action speaks against its recognition.<sup>18</sup> Recognition of such a cause of action also might give rise to many cases involving stale claims first asserted forty or fifty years after the negligent conduct.<sup>19</sup> Finally, there is an argument that the difficulty in proving the causal connection between the preconception tort and the infant's injury will lead to speculation and conjecture by the jury regarding causation and open the door for a flood of fraudulent and fictitious claims.<sup>20</sup>

The preceding arguments do not warrant rejection of the *Renslow* type action. The argument that this cause of action would create an unreasonable burden on the medical profession might be well received by some. However, this in itself is not an adequate reason for giving members of the medical profession preferential treatment or immunity from liability for negligence.<sup>21</sup>

Regardless of the accuracy of the claim that the economic burden on the public will become worse if *Renslow* type actions are allowed, the public has a direct interest in seeing that such a cause of action does exist. An infant born and forced to live with serious mental or physical injuries or deformities may eventually become a public charge.<sup>22</sup> In addition, the notion that all persons shall have a remedy for tortiously inflicted injuries should not be abandoned merely because the tort occurs before the injured person's conception.<sup>23</sup>

15. See *Park v. Chessin*, 88 Misc. 2d 222, 231, 387 N.Y.S.2d 204, 211 (Sup. Ct. 1976), *modified*, 60 App. Div. 2d 80, 400 N.Y.S.2d 110 (1977).

16. 67 Ill. 2d at 372, 367 N.E.2d at 1262.

17. *Id.* at 378-80, 367 N.E.2d at 1265-66. According to this rationale, the "traditional limits of tort law" have been relaxed in recent years so as to oblige the tort theory of spreading the loss over a large base. The greater number and size of verdicts that have resulted have in turn resulted in greatly increased costs of health, automobile, and malpractice insurance, creating a severe economic burden on individual members of the public. *Id.*

18. See *Smith v. Brennan*, 31 N.J. 353, 359, 157 A.2d 497, 500 (1960).

19. This argument was raised in *Renslow* but rejected by the court. 67 Ill. 2d at 358-59, 367 N.E.2d at 1255.

20. See *Sinkler v. Kneale*, 401 Pa. 267, 278, 164 A.2d 93, 98 (1960) (Bell, J., dissenting).

21. *Park v. Chessin*, 88 Misc. 2d 222, 231, 387 N.Y.S.2d 204, 211 (Sup. Ct. 1976), *modified*, 60 App. Div. 2d 80, 400 N.Y.S.2d 110 (1977).

22. *Day v. Nationwide Mut. Ins. Co.*, 328 So. 2d 560, 562 (Fla. Dist. Ct. App. 1976). "Where the injury or deformity is caused by the fault of another, fairness dictates that the financial needs of such child should be borne by the tortfeasor rather than the taxpayer."

23. See *Bennett v. Hymers*, 101 N.H. 483, 485, 147 A.2d 108, 110 (1958).

A mere lack of precedent also should not cause a rejection of the infant's claim. A similar rationale was popular earlier in this century to justify the denial of a cause of action in traditional prenatal injury cases.<sup>24</sup> However, the right to recover in those situations evolved from court decisions;<sup>25</sup> a similar fate should befall the lack of precedent argument in the present context. "The novelty of an asserted right and the lack of common-law precedent therefor are not valid reasons for denying its existence."<sup>26</sup>

There is no doubt that problems of stale claims will arise where a *Renslow* type cause of action is recognized. Existing statutes of limitation could ameliorate this problem in many circumstances.<sup>27</sup> However, even in

24. White, *The Right of Recovery for Prenatal Injuries*, 12 LA. L. REV. 383, 390 (1952).

25. See *Womack v. Buchhorn*, 384 Mich. 718, 720-22, 187 N.W.2d 218, 222 (1971); *Sinkler v. Kneale*, 401 Pa. 267, 270-71, 164 A.2d 93, 94-96 (1960).

26. *Russick v. Hicks*, 85 F. Supp. 281, 285 (W.D. Mich. 1949).

27. See *Laughlin v. Forgrave*, 432 S.W.2d 308 (Mo. En Banc 1968); RSMo § 516.105 (Supp. 1976); RSMo § 516.140 (1969). Under § 516.140, malpractice actions against hospitals, physicians, surgeons, and others are barred unless commenced within two years from the date of the negligent act. *Laughlin v. Forgrave*, 432 S.W.2d 308 (Mo. En Banc 1968). This section was in effect when the *Renslow* action was commenced. Because *Renslow* was a negligence action against a hospital and physician and was begun more than nine years after the negligent conduct, it appears that had the action been commenced in Missouri, it would have been barred. See *Barnhoff v. Aldridge*, 327 Mo. 767, 38 S.W.2d 1029 (1931); Davis, *Tort Liability and the Statutes of Limitation*, 33 MO. L. REV. 171 (1968).

However, application of § 516.140 to *Renslow* type actions could result in the anomalous situation in which the limitation period of two years would expire before the infant-plaintiff ever had the right to sue (there would be no injury to the infant until conception). The response of Missouri courts is difficult to forecast. If the court were to view such an outcome with disfavor, it might construe RSMo § 516.170 (1969), in such a way as to toll the running of the two-year period in *Renslow* type actions. This might not be a very difficult step to make because a disability under § 516.170 can toll the two-year limitation period for medical malpractice actions in § 516.140. *Jaime v. Neurological Hosp. Assoc.*, 488 S.W.2d 641 (Mo. 1973).

The tolling provisions of § 516.170 would not be applicable, however, to RSMo § 516.105 (Supp. 1976), which is a new statute of limitation regarding medical malpractice actions. See RSMo §§ 516.105, .170 (Supp. 1976). This provision, which replaces the medical malpractice portion of § 516.140, became effective in 1976 and is specifically excepted from the tolling provisions of § 516.170.

This new medical malpractice statute does contain its own tolling provision with regard to infants less than ten years of age, who would have until their twelfth birthday to bring the action. RSMo § 516.105 (Supp. 1976). With the exception of "foreign object" cases (where the so-called "discovery rule" is adopted) and in cases involving infants less than ten years of age, the same "two years from the date of the act of neglect" period is retained. The statute provides that in no event shall any medical malpractice action be commenced more than ten years from the "date of the act of neglect complained of." *Id.*

The RSMo § 516.105 (Supp. 1976) and RSMo § 516.140 (1969), could prevent the instigation of many stale claims in *Renslow* type medical malpractice

states where the statutes of limitation would not prevent stale claims arising under this cause of action,<sup>28</sup> the possibility of stale claims and the resulting difficulty of defense should not be sufficient reasons to deny the cause of action entirely.

Although there undoubtedly will be considerable difficulty in establishing causal connection in prenatal injury cases in which the negligent act complained of occurred prior to the infant's conception,<sup>29</sup> the mere danger of fictitious claims is not a valid reason for a blanket denial of the cause of action.<sup>30</sup> Courts have always had to deal with the danger of fictitious claims and have adequately prevented such claims by requiring the presentation of sufficient evidence and by adherence to the rules of evidence.<sup>31</sup>

No one argument, nor all of them combined, justifies total nonrecognition of a cause of action for prenatal injuries sustained as a result of negligent conduct which occurred prior to the infant's conception. However, even if it is agreed that, at least in some cases, an infant should be permitted to bring such a lawsuit, there must be some limit upon this right. The need for such a limitation can be illustrated in scenarios.

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actions. It appears, however, that stale claims would not be adequately prevented by the Missouri statutes of limitation where the *Renslow* type action was for other than medical malpractice. See RSMo § 516.100, .120(4) (1969).

There are no Missouri court decisions in regard to the applicability of the Missouri statutes of limitation to preconception negligence suits. But, in a *Renslow* type action that was commenced approximately five years after the alleged preconception negligent conduct, the Eighth Circuit, relying on the applicable tolling provisions for infants, held that neither RSMo § 516.140 (1969) nor RSMo § 516.105 (Supp. 1976) would bar the infant's action. *Bergstreser v. Mitchell*, 577 F.2d 22 (8th Cir. 1978). However, since the action was brought less than five years following the negligent act, the *Bergstreser* court did not have before it the question of whether a *Renslow* type action would be barred by RSMo § 516.105 (Supp. 1976) if commenced more than ten years after the preconception negligent act. Consequently, the *Bergstreser* court did not rule on that issue. See *Bergstreser v. Mitchell*, 577 F.2d 22, 26 (8th Cir. 1978).

28. The existing statutes of limitations in most states would fail to prevent stale claims from arising under *Renslow* type actions. See, e.g., *Tomlinson v. Siehl*, 459 S.W.2d 166 (Ky. 1970); *Ayers v. Morgan*, 397 Pa. 282, 154 A.2d 788 (1959). As demonstrated by the *Renslow* decision, the statute of limitation in effect when the action was brought would not obviate the possible stale claims that could arise from such actions. See ILL. ANN. STAT. ch. 83, §§ 15, 22 (Smith-Hurd 1966). Under those sections an action for personal injury must be commenced within two years of the accrual of the cause of action; if the plaintiff is an infant at the time of accrual, he may bring the action within two years after reaching majority. *Id.*

29. See Note, *The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries*, 110 U. PA. L. REV. 554 (1962); RESTATEMENT (SECOND) OF TORTS § 869, comment d (Tent. Draft No. 16, 1970).

30. *Battalla v. State*, 10 N.Y.2d 237, 241, 176 N.E.2d 729, 731, 219 N.Y.S.2d 34, 37 (1961). See *Bennett v. Hymers*, 101 N.H. 483, 486, 147 A.2d 108, 110 (1958).

31. *Smith v. Brennan*, 31 N.J. 353, 366, 157 A.2d 497, 503-04 (1960).

*Scenario one*—A hospital staff physician negligently administers medication to a young girl. The drug radically alters the girl's chromosome structure, and years later she gives birth to a daughter whose chromosome structure is damaged by the alteration in the mother's chromosomes. This damage is not detected because no outward deformity appears. Several years later, the daughter gives birth to a child suffering from a deformity resulting from the damage to the chromosome structures of the mother and grandmother. It is quite possible, if the holding and reasoning of *Renslow* are followed, that the deformed infant will be able to maintain an action against the hospital which two generations earlier provided the drug to the infant's grandmother.

*Scenario two*—A fifteen-year-old girl, while crossing a street, is struck by a negligently driven automobile. As a result, the girl sustains multiple fractures of her pelvis. Eight years later, the girl gives birth to an infant. The child sustains prenatal injuries because of a previously undetected malformation in the mother's pelvis. The malformation resulted from the improper healing of the pelvis following the fracture eight years earlier. As the *Renslow* court did not limit the child's cause of action to medical malpractice actions, it would be possible for the injured infant to maintain an action against the driver of the automobile. Thus, the mother could recover for her personal injuries shortly after the accident, and the infant could recover for prenatal injuries several years later. The defendant could be subjected to recurring litigation.

*Scenario three*—A thirteen-year-old girl becomes involved in drug abuse. Seven years after stopping the use of drugs, the girl gives birth to an infant with defective internal organs. The defect resulted from the mother's earlier drug use. Since the early 1960's, a number of states have abrogated the doctrine of parental immunity in certain types of negligence actions.<sup>32</sup> If *Renslow* is followed in such a jurisdiction, the infant could maintain an action against his mother for prenatal injuries sustained as a result of the mother's drug abuse years before the child's conception.

In view of the potential problems illustrated above, it is evident that the *Renslow* type cause of action should be limited in some way. First, recognition of this cause of action without limitation could pose problems, not only in measuring the insurance risk, but also in the possibility of claims by successive generations.<sup>33</sup> Second, recognition of an unlimited cause of action would subject many defendants to the burden of defending

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32. *Plumley v. Klein*, 388 Mich. 1, 5-6, 199 N.W.2d 169, 171 (1972). See, e.g., *Goller v. White*, 20 Wis. 2d 402, 122 N.W.2d 193 (1963). Missouri has indicated that the doctrine of parental immunity will not bar an action where the policy reasons for the doctrine are not applicable. See *Brennecke v. Kilpatrick*, 336 S.W.2d 68 (Mo. En Banc 1960).

33. Justice Ward suggested that the doctrine of parental immunity, as set out in *Renslow*, 67 Ill. 2d at 371, 367 N.E.2d at 1261.



stale claims. Although the stale claim problem does not justify denial of the cause of action, it could justify a limitation. Finally, to allow an infant to maintain such an action against his mother or father could result in the danger that the parental immunity doctrine was designed to prevent, *i. e.*, strife between family members and the resultant disruption of domestic tranquility.<sup>34</sup>

There are several judicial limitations which could be applied to restrict the breadth of the *Renslow* holding. The negligence concepts of duty, proximate cause and unforeseeable plaintiff could be applied to this area to deny a cause of action in what a court deemed to be appropriate circumstances. The broad tort concept of duty (the idea that an actor cannot be liable to another person if he owes no "duty" to the other) could be utilized so that a court might find that the defendant owed no duty to the plaintiff who was conceived several years after the negligent act. A court also might declare that the defendant's negligent act several years prior to the plaintiff's conception was not a sufficiently direct cause of the plaintiff's injury on which to base liability, *i. e.*, that it was not the *proximate* cause of injury.<sup>35</sup> Closely related to proximate cause is the unforeseeable plaintiff concept.<sup>36</sup> Under this doctrine a defendant owes no duty to those persons to whom injury from his conduct could not reasonably be anticipated or foreseen.<sup>37</sup> Thus, a court could state that the infant-plaintiff, conceived several years after the defendant's negligent act, was a person to whom harm could not have been reasonably anticipated, and the defendant would therefore not be liable for the infant-plaintiff's injuries.

These tort concepts are unacceptable limitations on *Renslow* type causes of action. The issue of the existence of duty is a question of law.<sup>38</sup> Legal duties are "merely conclusory expressions that, in cases of a par-

34. Prevention of strife between family members which might result from intrafamily litigation was traditionally the public policy rationale for the doctrine of parental immunity. *Schenk v. Schenk*, 100 Ill. App. 2d 199, 204, 241 N.E.2d 12, 14 (1968). Many courts have dismissed the "family strife" rationale in certain negligence actions, often on the grounds that the family harmony is disrupted by the negligent act, before there is any litigation. *See, e.g.*, *Hebel v. Hebel*, 435 P.2d 8, 13 (Alaska 1967). However, it is questionable whether this reasoning would apply if the negligent act of the parent occurred years before the infant was conceived. In addition the public would seem to have an interest in denying an infant a *Renslow* type action against his father or mother; if the action was permitted to be maintained, it could result in a parent being liable to his or her child for negligent acts committed by the parent, while the parent was only an infant. *See Note, The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries*, 110 U. PA. L. REV. 554, 584 (1962).

35. *Edgerton, Legal Cause* (pt. 2), 72 U. PA. L. REV. 343, 360-61 (1924).

36. *Prosser, The Minnesota Court on Proximate Cause*, 21 MINN. L. REV. 19, 21, 31 (1936).

37. *Id.* at 31-32.

38. *Shelton, Unforeseeable Plaintiff in Negligence Law*, 61 COLUM. L. REV. 1401, 1418 (1961).

ticular type, liability should be imposed for damage done."<sup>39</sup> Similarly, proximate cause is often an abbreviated way for a court to express a certain result,<sup>40</sup> that result frequently based on the judges' personal conception of justice.<sup>41</sup> The unforeseeable plaintiff concept is likewise one used by courts to manifest results that the courts deem to be just.<sup>42</sup> Because judicial limitations imposed in one decision could be expanded in a subsequent case, such restrictions could be unpredictable and seemingly arbitrary. Consequently, they would not constitute an effective restraint on this cause of action. A more uniform and easily ascertainable method of defining the boundaries of the *Renslow* cause of action is needed.

As mentioned previously, applicable statutes of limitation could bar some *Renslow* type actions.<sup>43</sup> A statute barring actions not commenced within a fixed time from the date of the negligent act would restrict this cause of action to some extent.<sup>44</sup> However, application of a statute of this nature would be an arbitrary and fortuitous limitation. The fortuity of the time of conception would be the only distinction between an allowable preconception cause of action and one that was barred. With a statute of limitation of this type, the limitation period could expire before the child even had the right to sue (the infant-plaintiff would not sustain the injury until conception). Moreover, such a statute of limitation scheme would not prevent the situation in which the injured infant could maintain a *Renslow* type action against his natural mother or father. For these reasons, a single-faceted statute of limitation would not be an adequate constraint on this cause of action.

Despite the objections to a simple statute of limitation as a tool for limiting recovery for preconception torts, some statutory scheme should be developed to accomplish this goal. A statute would be a more effective limitation than judicial application of tort concepts like duty and proximate cause. A statute would provide certainty and consistency; judicial limitations would be subject to expansion in any later decision.<sup>45</sup>

39. *Tarasoff v. Regents of the Univ. of Cal.*, 17 Cal. 3d 425, 434, 551 P.2d 334, 342, 131 Cal. Rptr. 14, 22 (1976).

40. *White*, *supra* note 24, at 401.

41. See *Edgerton*, *supra* note 35, at 345-46.

42. See *Prosser, Palsgraf Revisited*, 52 MICH. L. REV. 1 (1953).

43. See *Laughlin v. Forgrave*, 432 S.W.2d 308 (Mo. En Banc 1968); RSMo § 516.105 (Supp. 1976); RSMo § 516.140 (1969).

44. However, without specific language to the contrary, the application of the doctrine of "continuing negligence" could nullify the effectiveness of such a statute of limitation. See *Puro v. Henry*, 32 Conn. Supp. 118, 342 A.2d 65 (1975), in which CONN. GEN. STAT. ANN. § 52-584 (West 1960), which provides that medical malpractice actions must be commenced within three years of the date of the act or omission complained of, did not bar an action more than three years after a medical operation where the action sought damages for leaving a foreign object in the plaintiff's body. The court said that the failure of the defendants to publish the plaintiff's name in the Missouri School of Law Scholarship Repository, 1979

45. See *Prosser*, *supra* note 42; *White*, *supra* note 24, at 401.

Accordingly, a statute is proposed that would expressly restrict this cause of action in terms of both potential defendants and potential plaintiffs. In an attempt to strike a balance between the rights of infants injured before birth due to a negligent act before conception and the public interest in minimizing stale claims and in ensuring that liability is not expanded too far, a statute is recommended which would provide three specific limitations on preconception tort actions. First, the statute should exclude the natural parents of the infant as possible defendants. This would promote the public interest in preventing the disruption of family harmony that could result from permitting an infant to maintain a *Renslow* type action against his own father or mother. The second limitation would be a bar on all *Renslow* type actions against all other real persons if not commenced within five years from the date of the negligent conduct. This second limit, however, would not apply to actions against members of the medical profession or medical institutions for negligent performance in rendering professional services. This restraint would protect most members of the public from the difficulty of defending stale claims that could arise from *Renslow* type actions, and also would reduce the prospect of recurring litigation. Members of the medical profession, institutions such as hospitals, and corporations might have to face recurring litigation and stale claims. The lack of protection for these categories of defendants admittedly is rather arbitrary. This distinction can be justified on the grounds that these defendants generally are better able to bear the burdens of large recoveries, recurring litigation, and defending stale claims than private individuals, not only because of the relatively greater insurance coverage carried by such defendants, but also for the fact that such defendants can spread these costs (including increased insurance premiums) by increases in the price of products or services.<sup>46</sup> Finally, as to possible plaintiffs, the third facet of this proposed statute would limit recovery to situations where the plaintiff is a member of the first generation to follow the preconception negligent act. It is suggested that in conjunction with this "first generation" limitation, an additional limit be applied barring all *Renslow* type actions for medical malpractice if not commenced within five years from the date of *birth*. An action for medical malpractice brought by a member of the first generation to follow the negligent act would be barred unless commenced within five years after the date of birth.<sup>47</sup> This would lessen the problems that an institution, such as a hospital, would otherwise face in measuring insurance risks and in being subject to claims from successive generations.

46. See Cooperrider, *A Comment on the Law of Torts*, 56 MICH. L. REV. 1291 (1958).

47. The result would be much different if a traditional statute of limitation was applied to a *Renslow* type cause of action. Many states provide that if the plaintiff was an infant at the time the cause of action accrued, he has until a certain period after reaching majority in which to bring the action. See, e.g., *Graham v. Sisco*, 248 Ark. 6, 449 S.W.2d 949 (1970).

This three-fold statutory limitation is proposed as an attempt to balance the public interest in preventing liability from extending beyond certain bounds with the need to protect the rights of infants suffering prenatal injuries. The content of the statute is not nearly as important as the need for some kind of limitation. The legislature is the proper authority to specify public policy and set the substance of the limitation.

There are possible problems posed by the proposed statute. For example, the courts would have to deal with the interaction of such a statute with the existing statutes of limitation. A court probably should interpret the statute as controlling over existing statutes of limitation to the extent that they are in irreconcilable conflict.<sup>48</sup> A more important consideration, however, is the constitutionality of such a proposal. A statute which denies a cause of action to some persons while allowing it to others who are similarly situated, *e.g.*, the suggested one-generation limit, could be held unconstitutional on grounds of violating due process or equal protection.<sup>49</sup> A similar constitutional problem might arise with a statute which completely denies a cause of action against a certain category of defendants, such as the suggested exclusion of the infant's natural parents as possible defendants.<sup>50</sup> These constitutional difficulties, as well as the proper social and public policy direction for the statute will have to be considered by the legislatures, and eventually by the courts, as the boundaries of this new preconception tort are developed.

It has been said that an infant has a right to begin his life with both a sound mind and a sound body.<sup>51</sup> In at least some situations an infant should be allowed to maintain an action for prenatal injuries sustained as a

48. See *Laughlin v. Forgrave*, 432 S.W.2d 308 (Mo. En Banc 1968) (a special statute of limitation controls over a general one to the extent that they are in conflict and cannot be harmonized).

49. Statutes of limitation providing that medical malpractice actions must be commenced within two years from the date of the negligent act have been upheld in the face of constitutional (due process) attack by courts using a "reasonableness" standard. *Owen v. Wilson*, 260 Ark. 21, 537 S.W.2d 543 (1976) (implying that if the limitation period was so short that it was, as a practical matter, a denial of the right, it would be unreasonable); *Laughlin v. Forgrave*, 432 S.W.2d 308 (Mo. En Banc 1968). In Missouri, a statute of limitation will not be a denial of due process unless the "time allowed for commencement of the action and the date fixed when the statute commences to run are clearly and plainly unreasonable." *Id.* at 314.

50. See *Emberson v. Buffington*, 228 Ark. 120, 306 S.W.2d 326 (1957) (portion of statute that provided that persons related to the driver of an automobile have no cause of action against the driver for personal injuries resulting from the driver's negligence held to violate Arkansas Constitution); *Wright v. Central DuPage Hosp. Ass'n*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976) (provision of statute limiting recovery in medical malpractice actions to \$500,000 held to be violative of Illinois Constitution of 1870). See also *Smith v. Brennan*, 31 N.J. 353, 364, 157 A.2d 497, 503 (1960).