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Birth of Preconception Torts in Missouri, The

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The Birth of Preconception Torts in Missouri

Lough v. Rolla Women's Clinic[1]

I. INTRODUCTION

The term "'preconception tort' refers to negligent conduct which occurred prior to the plaintiff's conception."[2] Every jurisdiction permits a child born alive to maintain a cause of action for prenatal injuries.[3] However, "[a] perplexing problem that remains in this area is whether claims should be permitted where the harmful contact with the mother occurs even before the child is conceived . . . ."[4] In *Lough v. Rolla Women's Clinic*,[5] the Missouri Supreme Court found such a claim to constitute a valid cause of action in Missouri.[6]

This Note examines the legal development of preconception tort doctrine with particular focus on the foreseeability, statute of limitations, and policy issues flowing from the duty a defendant owes to an unborn plaintiff.[7]

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1. 866 S.W.2d 851 (Mo. 1993).

2. *Id.* at 853 (footnote omitted).

3. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 55, at 368 (5th ed. 1984). A prenatal injury occurs when harm to a pregnant woman results in injury to her later born child. *Id.* at 367.

4. *Id.* at 369.

5. 866 S.W.2d 851 (Mo. 1993).

6. *Id.* at 854.

7. As Judge Holstein noted, the term "preconception tort" is something of a misnomer. *Lough*, 866 S.W.2d at 853 n.1. Tort recovery requires negligent conduct that produces an injury to the plaintiff. The injury in preconception tort cases actually occurs after conception. *Id.*

Preconception torts must be distinguished from other torts falling under the broad category of prenatal injuries. *See* KEETON ET AL., *supra* note 3, § 55, at 367-73. Generally, the cases divide along two lines: (1) tortious injuries to the mother that cause harm to the child, and (2) acts or omissions by the defendant that cause an unwanted child to be born. KEETON ET AL., *supra* note 3, § 55, at 367. The latter category includes the torts of wrongful birth, wrongful life, and wrongful pregnancy. KEETON ET AL., *supra* note 3, § 55, at 370. Missouri does not recognize a cause of action for either wrongful life or wrongful birth. Wilson v. Kuenzi, 751 S.W.2d 741, 746 (Mo.), *cert. denied*, 488 U.S. 893 (1988); MO. REV. STAT. § 188.130 (1986). However, Missouri courts recognize a claim for wrongful pregnancy as a form of medical malpractice. Girdley v. Coats, 825 S.W.2d 295, 296 (Mo. 1992); Miller v. Duhart, 637 S.W.2d 183, 188 (Mo. Ct. App. 1982). This Note focuses on the former

II. FACTS AND HOLDING

During her first pregnancy in 1984, Sandra Lough received prenatal care from Dr. Fortin and Dr. White at the Rolla Women's Clinic in Rolla, Missouri.[8] As part of that care, the clinic sent a blood sample to the Phelps County Regional Medical Center for analysis.[9] Test results showed that Mrs. Lough's Rh factor was negative, however, the lab technician misrecorded it as Rh positive.[10]

Justin Lough was born later that year with Rh positive blood.[11] During Justin's delivery, Mrs. Lough's immune system became sensitized to Rh positive blood and began to develop antibodies to attack future invasion.[12] Because of the error in recording Mrs. Lough's Rh factor, her doctors failed to administer RhoGAM, a drug designed to counter the adverse reaction to Justin's Rh positive blood.[13]

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category of cases, specifically those cases resulting from harm to the mother prior to conception of the later born injured child.

Furthermore, it is important to distinguish between a prenatal injury claim where but for the defendant's negligence the child would have been born healthy, and a wrongful life claim where the child had no chance to be born healthy. In the wrongful life case, but for the negligent conduct, the child would not have come into existence and would never have been born. Many courts deny such claims because of the necessity of measuring the value of existence in an impaired condition against the value of a right to never have existed. *See, e.g.*, Siemieniec v. Lutheran Gen. Hosp., 512 N.E.2d 691, 697-98 (Ill. 1987) (distinguishing a wrongful life claim from the preconception tort cause of action in Renslow v. Mennonite Hosp., 367 N.E.2d 1250 (Ill. 1977)). See *infra* notes 39-52 and accompanying text for a discussion of *Renslow*.

8. *Lough*, 866 S.W.2d at 852.

9. *Id.*

10. *Id.* The presence of the D red blood cell antigen in a patient's blood is the major cause of Rh factor incompatibility. Those who do not possess the D antigen are said to be Rh negative, while those with the antigen are Rh positive. RAMZI S. COTRAN ET AL., ROBBINS PATHOLOGIC BASIS OF DISEASE 527 (4th ed. 1989). Rh factor incompatibility may produce erythroblastosis fetalis, the condition suffered by the plaintiff, Tyler Lough. *Id.* See *infra* note 16 for a discussion of this condition.

11. *Lough*, 866 S.W.2d at 852.

12. *Id.*

13. "Administered within 72 hours of a woman giving birth to a child with an Rh factor different from hers, RhoGAM suppresses the mother's immune system response, preventing the sensitization" that occurred in Mrs. Lough's case. *Id.* *See infra* note 16.

Mrs. Lough became pregnant with Tyler in 1986.[14] Like Justin, Tyler's blood was Rh positive.[15] Throughout her pregnancy, the antibodies developed to fight Rh positive blood attacked Tyler's system and he developed a condition known as erythroblastosis fetalis ("EBF").[16] The condition produced "devastating pulmonary, cardiovascular and neurological damage,"[17] and "Tyler Lough was born with multiple, irreversible, profound disabilities."[18]

Tyler sued based on the negligent conduct of the lab technician in misrecording Mrs. Lough's Rh factor.[19] The trial court granted the defendants' motion for summary judgment, finding no cognizable cause of action for preconception torts under Missouri law.[20]

The Missouri Court of Appeals, Southern District reversed the decision, concluding that Missouri would recognize a cause of action for preconception torts.[21] The Missouri Supreme Court granted transfer to consider this issue

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14. *Lough*, 866 S.W.2d at 852.

15. *Id.*

16. *Id.* "[E]rythroblastosis fetalis may be defined as a hemolytic disease in the newborn caused by blood-group incompatibility between the mother and the child." COTRAN ET AL., *supra* note 10, at 527. During delivery or abortion of a prior child (or by the mistaken transfusion of Rh positive blood), the mother is exposed to the antigens in the Rh positive blood of the child. Thereafter, her blood becomes sensitized to the antigens, developing antibodies that attack Rh positive red blood cells.

When a subsequent fetus inherits Rh positive blood from the father, the antibodies in the mother's sensitized Rh negative blood will cross the placenta and destroy the red blood cells of the fetus. Depending on the severity of erythroblastosis fetalis, the infant may be stillborn, suffer complications, or recover fully. COTRAN ET AL., *supra* note 10, at 527-29. In the vast majority of cases, an anti-D immunoglobulin (such as RhoGAM) administered to the Rh negative mother within 72 hours of delivery of each Rh positive child will prevent the mother's immune system from becoming sensitized and developing antibodies that attack the red blood cells of a future fetus. COTRAN ET AL., *supra* note 10, at 529; *see Lough*, 866 S.W.2d at 852-53.

17. *Lough*, 866 S.W.2d at 852.

18. *Id.*

19. *Id.* at 853. Carolyn Lough, Tyler's guardian and conservator, brought the suit in his behalf. The named defendants included Dr. White, Dr. Fortin, Rolla Women's Clinic, Inc., the lab technician Kathy Jadwin, Dr. Brannemann, Dr. Wiench, Dr. Goyette, and Pathology Lab Consultants, Inc. The complaint alleged that Jadwin, an employee of the Phelps County Regional Medical Center, was an agent of Dr. Brannemann, Dr. Wiench, Dr. Goyette, and Pathology Lab Consultants, Inc. *Id.*

20. *Id.* at 852.

21. *Id.* The unpublished opinion of the Court of Appeals is Lough v. Rolla Women's Clinic, Inc., No. 18163, 1993 WL 43887 (Mo. Ct. App. Feb. 19, 1993).

of first impression.[22] After thoroughly reviewing the cases from other jurisdictions,[23] the court addressed the fundamental issue of whether the defendant owes a duty to the plaintiff when the negligent conduct occurred prior to conception.[24] The Missouri Supreme Court reversed the judgment of the trial court and remanded the case for further proceedings.[25] The court held that preconception torts may be actionable in Missouri,[26] a duty existed under the facts of this case,[27] and the Missouri medical malpractice statute of limitations did not bar recovery.[28]

III. LEGAL BACKGROUND

A. The Development of Preconception Tort Doctrine

"For wherever the common law gives a right or prohibits an injury, it also gives a remedy by action; and, therefore, wherever a new injury is done, a new method of remedy must be pursued."[29] However, the common law recognized no duty to an unborn plaintiff and refused to allow recovery for prenatal injuries.[30] Refusing to follow the doctrine set forth by Justice Holmes in *Dietrich v. Inhabitants of Northampton*,[31] the court in *Bonbrest v. Kotz*[32] began "a rather spectacular reversal of the no duty rule."[33] Today, all jurisdictions allow a later-born child to state a claim for prenatal injuries.[34]

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22. *Lough*, 866 S.W.2d at 852; *see* MO. R. CIV. P. 83.03.

23. *Lough*, 866 S.W.2d at 853-54.

24. *Id.*

25. *Id.* at 856.

26. *Id.* at 854.

27. *Id.*

28. *Id.* at 855-56.

29. 3 WILLIAM BLACKSTONE, COMMENTARIES *123.

30. Dietrich v. Inhabitants of Northampton, 138 Mass. 14, 17 (1884); Allaire v. St. Luke's Hosp., 56 N.E. 638, 639-40 (Ill. 1900). The dissent in Allaire strongly criticized the decision and began the move toward recognition of prenatal injuries. *Id.* at 640-42 (Boggs, J., dissenting).

31. 138 Mass. 14 (1884).

32. 65 F. Supp. 138 (D.D.C. 1946). In reversing the existing trend, the Bonbrest court noted that "the common law is not an arid and sterile thing, and it is anything but static and inert." *Id.* at 142.

33. KEETON ET AL., *supra* note 3, § 55, at 368.

34. KEETON ET AL., *supra* note 3, § 55, at 368. An issue that remains unsettled is whether the fetus must be viable at the time of the negligent conduct in order to state a cognizable claim for prenatal injury. KEETON ET AL., *supra* note 3, § 55, at 367-70. *See, e.g.*, the Missouri cases considering this issue in the context of wrongful death, including: Rambo v. Lawson, 799 S.W.2d 62 (Mo. 1990); Connor v. Monkem

Relying on the early prenatal tort cases, the first cases to consider claims for preconception torts refused to recognize a cause of action.[35] Then, in a 1973 products liability action, the Tenth Circuit rejected prior reasoning and allowed a cause of action for preconception injury to stand.[36] Stating, "we are persuaded that the Oklahoma courts would treat the problem of the injuries alleged here as one of causation and proximate cause, to be determined by competent medical proof,"[37] the court remanded the case to the district court for further proceedings.[38]

Co., No. 64884, 1994 WL 493561 (Mo. Ct. App. Sept. 13, 1994), *transferred to* Mo. Sup. Ct. Sept. 13, 1994. *See also* MO. REV. STAT. § 1.205 (Supp. 1994) (stating that life begins at conception).

For additional information regarding the history and development of prenatal and preconception tort doctrine, *see, e.g.*, McAuley v. Wills, 303 S.E.2d 258, 259-60 (Ga. 1983); Renslow v. Mennonite Hosp., 367 N.E.2d 1250, 1251-53 (Ill. 1977); RESTATEMENT (SECOND) OF TORTS § 869 (1977); KEETON ET AL., *supra* note 3, § 55, at 367-70; 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, 678-86 (1984); Deborah K. Andrews, Comment, *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); Marisa L. Mascaro, Note, *Preconception Tort Liability: Recognizing a Strict Liability Cause of Action for DES Grandchildren*, 17 AM. J. L. & MED. 435, 437-46 (1991); Vik Ed Stoll, Note, *Preconception Tort—The Need for a Limitation*, 44 MO. L. REV. 143, 143-45 (1979); Ronald F. Chase, Annotation, *Liability for Prenatal Injuries*, 40 A.L.R.3d 1222 (1971); Annotation, *Liability for Child's Personal Injuries or Death Resulting from Tort Committed Against Child's Mother Before Child was Conceived*, 91 A.L.R.3d 316 (1979).

35. *See, e.g.*, Morgan v. United States, 143 F. Supp. 580, 584 (D.N.J. 1956) (Federal Tort Claims Act case applying Pennsylvania law). The *Morgan* court relied on Berlin v. J.C. Penney Co., 16 A.2d 28, 28 (Pa. 1940). The *Berlin* court noted that "[a]t early common law the mother and child until birth were considered as one, the child was not deemed to have an existence independent of the parent." *Id.* Looking to decisions such as *Dietrich*, 138 Mass. at 17, short of legislative action, the court refused to establish a cause of action for prenatal torts. *Berlin*, 16 A.2d at 28.

36. Jorgensen v. Meade Johnson Lab., 483 F.2d 237, 241 (10th Cir. 1973) (construing Oklahoma law). The strict liability claim arose when the plaintiffs alleged that birth control pills taken prior to the mother's pregnancy altered the chromosome structure in her body. After she ceased taking the pills, she gave birth to Mongoloid twins. In an action for the surviving twin, the plaintiff alleged that the defendant's birth control pills caused the deformity. *Id.* at 238-39.

37. *Id.* at 240.

38. *Id.* at 241.

The issue reached the Illinois Supreme Court in *Renslow v. Mennonite Hospital*,[39] a case involving the negligent transfusion of Rh positive blood which sensitized the mother's Rh negative blood and injured the later conceived plaintiff.[40] The trial court dismissed the claim because the plaintiff was not "at the time of the alleged infliction of the injury conceived."[41] The Illinois Supreme Court recognized that the plaintiff was not a separate entity to whom the defendant owed a traditional duty of care at the time of the negligent conduct.[42] However, the plaintiff asked the court to find a "contingent prospective duty to a child not yet conceived but foreseeably harmed by a breach of duty to the child's mother."[43] Acknowledging that duty is essentially an expression of policy interests,[44] the court concluded that "[l]ogic and sound policy require a finding of legal duty in this case."[45] "[T]here is a right to be born free from prenatal injuries foreseeably caused by a breach of duty to the child's mother."[46] In light of substantial medical advances that can mitigate or prevent harm to an unborn child, "sound social policy requires the extension of duty in this case."[47] The court conceded that few prior cases reached the same result, but noted several courts and commentators had argued existence is not a prerequisite to finding a legal duty at the time of a wrongful act.[48]

Finally, the court addressed the defendants' concern that allowing a preconception tort cause of action would lead to perpetual liability across several generations.[49] The defendants offered the example of a nuclear accident causing genetic damage to an ancestor and resulting in successive generations of plaintiffs suing a single defendant.[50] The court distinguished the defendants' hypothetical situation from the facts in *Renslow*, noting the damage was not self-perpetuating and the defendant was not a remote descendant of the person harmed by the negligent act.[51] The court

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39. 367 N.E.2d 1250 (Ill. 1977).

40. *Id.* at 1251. *See supra* note 16 for a discussion of this condition.

41. *Id.* at 1251 (quoting trial court).

42. *Id.* at 1254.

43. *Id.*

44. *Id.*

45. *Id.* at 1255.

46. *Id.*

47. *Id.* Because the duty established by the court extended to a new class of plaintiffs, the court gave the rule prospective application, applying only to the *Renslow* plaintiff and future conduct. *Id.* at 1256.

48. *Id.* at 1255-56.

49. *Id.* at 1255.

50. *Id.*

51. *Id.*

concluded, "[w]e feel confident that when such a case is presented, the judiciary will effectively exercise its traditional role of drawing rational distinctions, consonant with current perceptions of justice, between harms which are compensable and those which are not."[52]

The acceptability of a preconception tort cause of action reached the Eighth Circuit in *Bergstreser v. Mitchell*, a diversity action requiring interpretation of Missouri law.[53] The case arose when the defendants were alleged to have negligently performed a caesarean section during a prior pregnancy.[54] As a result, the mother's uterus ruptured during her later pregnancy with the plaintiff, and the plaintiff was injured during an emergency caesarean delivery.[55] Similar to the defendants in *Lough*, the defendants argued Missouri would not recognize a cause of action for preconception torts and the claim was barred by the statute of limitations.[56] The court found a cause of action for preconception torts consistent with Missouri prenatal tort doctrine and the few cases that had previously considered the issue.[57] Furthermore, the Missouri two year statute of limitations and its tolling provision for minors began to run when the plaintiff came into being and not at the time of the negligent conduct.[58] As the plaintiff filed his claim within

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52. *Id.*

53. 577 F.2d 22, 23-24 (8th Cir. 1978) (construing Missouri law). The case reached the court on interlocutory appeal of a controlling question of law where there is substantial ground for difference in opinion. 28 U.S.C. § 1292(b) (1988). The court characterized the case as "an unusual and novel [question of law] upon which few courts have had an opportunity to express any opinion whatsoever." *Bergstreser*, 577 F.2d at 23-24.

54. *Bergstreser*, 577 F.2d at 24.

55. *Id.*

56. *Id.* at 25.

57. *Id.* The court cited *Jorgensen* (*see supra* notes 36-38 and accompanying text), *Renslow* (*see supra* notes 39-52 and accompanying text), and Park v. Chessin, 387 N.Y.S.2d 204 (N.Y. Sup. Ct. 1976). Subsequently, *Park* was overruled by Albala v. City of New York, 445 N.Y.S.2d 108 (N.Y. 1981) and the New York line of cases refusing to recognize a preconception tort cause of action. *See infra* notes 104-25 and accompanying text.

Also, the court noted the overwhelmingly favorable trend among commentators in favor of a cause of action recognizing preconception torts. *Bergstreser*, 577 F.2d at 25 n.4 (citing twelve sources addressing the subject).

58. *Bergstreser*, 577 F.2d at 26. The defendants argued that the statute should begin to run at the time of the negligent conduct. However, since the plaintiff did not exist at the time of the negligence, the tolling provision for minors was inapplicable. *Id.*

The court did not decide whether the statute of limitations in effect at the time of the negligent act (MO. REV. STAT. § 516.140 (1969) or the revised medical

the grace period associated with the tolling provision of the statute, his claim was not barred under Missouri law.[59]

Eleven years after the decision in *Renslow,* a Michigan plaintiff brought an action alleging that the defendants' failure to test and immunize her mother for rubella prior to pregnancy resulted in rubella related injury to the plaintiff.[60] The court defined the issue as "whether or not a child, when born alive, has a cause of action for injury arising out of preconception negligent conduct,"[61] in other words, "[w]hether there was a duty under these circumstances to a plaintiff who was not in being at the time of a wrongful act."[62] The court concluded that "[i]t is readily foreseeable that someone not immunized may catch rubella and, if pregnant, bear a child suffering from rubella syndrome."[63] Because the immunization and test were designed specifically to prevent rubella syndrome in later born children, the court found the defendant owed a duty of care to the plaintiff.[64] Thus, a cause of action for preconception injury was found to exist.[65]

The dissent voiced concern about potential liability that might extend across several generations to the original defendant.[66] Furthermore, as discussed in *Albala v. City of New York,*[67] recognizing a cause of action may make physicians practice defensive medicine, forcing them to choose whether to administer treatment to save a mother's life, considering the treatment might one day harm a future born child.[68] The dissent viewed this as extending "traditional tort concepts beyond reasonable bounds."[69] Therefore, the dissent concluded the defendants owed no duty to the plaintiff.[70]

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malpractice statute of limitations (MO. REV. STAT. § 516.105 (Supp. 1976) applied to the case. *Bergstreser,* 577 F.2d at 26. The court stated the result would be the same regardless which statute applied. *Id.*

59. *Id.*

60. Monusko v. Postle, 437 N.W.2d 367, 368 (Mich. Ct. App. 1989).

61. *Id.* (quoting the Michigan trial court).

62. *Id.* at 368-69 (quoting *Renslow,* 367 N.E.2d at 1269 (Dooley, J., concurring)).

63. *Id.* at 369.

64. *Id.* at 369-70.

65. *Id.* at 369.

66. *Id.* at 371 (MacKenzie, Presiding J., dissenting). For example, negligent conduct altering a young girl's chromosome structure and passed to successive generations might result in a suit by the girl's granddaughter eighty-one years after the negligent conduct. *Id.*

67. 445 N.Y.S.2d 108 (N.Y. 1981); *see infra* notes 104-25 and accompanying text.

68. *Monusko,* 437 N.W.2d at 371-72 (MacKenzie, Presiding J., dissenting).

69. *Id.* at 372 (MacKenzie, Presiding J., dissenting).

70. *Id.*

Following the logic of *Albala*, the Indiana Third District Court of Appeals declined to recognize a cause of action for preconception torts in *Walker v. Rinck*.[71] *Walker* involved negligent typing of the mother's blood and the failure to administer RhoGAM following the birth of an older child.[72]

On facts which for legally relevant purposes were indistinguishable from *Walker*, the Indiana First District Court of Appeals in *Yeager v. Bloomington Obstetrics and Gynecology, Inc.* refused to follow the majority holding in *Walker*.[73] Instead, the court adopted the view of the dissent in *Walker*, calling for the adoption of a cause of action for negligent preconception injuries.[74] The court reversed the decision of the trial court and found the plaintiff's complaint sufficient to state a cognizable claim.[75]

In order to resolve the conflict between the circuits, the Indiana Supreme Court granted transfer of the Walker case.[76] The court concluded the defendant owed a duty to the plaintiff because Mrs. Walker's health would not be affected by receiving RhoGAM, a treatment designed to protect future fetuses from injuries in utero.[77] Potential harm to future conceived children was readily foreseeable and no potential conflict existed between helping the mother with a treatment that might harm a later conceived child.[78] "[A]n analysis of duty based upon relationship, foreseeability and public policy compels the conclusion that [the defendant] owed a duty to the [plaintiff children] to use reasonable care concerning the administration of RhoGAM to their mother."[79]

The court concluded that the parents' knowledge of the risks associated with having future children was not an intervening, superseding cause

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71. 566 N.E.2d 1088 (Ind. Ct. App. 1991), *vacated*, 604 N.E.2d 591 (Ind. 1992).

72. *Id.* at 1088-89.

73. 585 N.E.2d 696, 697 (Ind. Ct. App. 1992).

74. *Id.* at 699 (adopting by reference the analysis in *Walker*, 566 N.E.2d at 1090 (Stanton, J., dissenting)).

75. *Id.* at 700.

76. Walker v. Rinck, 604 N.E.2d 591, 593 (Ind. 1992).

77. *Id.* at 595.

78. *Id.*

79. *Id.* The questions of whether the defendants breached their duty of care and whether their breach was the proximate cause of the injury are issues of fact to be decided at trial. *Id.*

See also Empire Casualty Co. v. St. Paul Fire and Marine Ins. Co., 764 P.2d 1191, 1192-93 (Colo. 1988) (allocating losses among insurance companies). The case involved a child who developed EBF as a result of a physician mistyping the mother's blood during an earlier pregnancy. The Colorado Supreme Court concluded that the claim was valid under ordinary prenatal tort principles, and it was not a wrongful life cause of action. *Id.* at 1196-97.

absolving the defendants of liability.[80] To break the causal chain, an intervening, superseding cause must not be foreseeable at the time of the tortious act.[81] It was foreseeable at the time of the defendant's negligent failure to administer RhoGAM that the mother might become pregnant again in the future.[82] "Because this course of events was foreseeable at the time of the alleged negligent acts, it cannot be an intervening, superseding cause of the . . . children's alleged injuries."[83]

Finally, the court noted the plaintiff's claim was not barred by the Indiana statute of limitations.[84] While recognizing that the statute might allow a child to bring an action against a physician who failed to properly administer RhoGAM many years before, the court noted that it must follow the statute of limitations set forth by the legislature.[85] The court pointed out that the legislature has the power to amend the statute of limitations to limit potential liability.[86] However, the potential flood of litigation resulting from

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80. *Walker*, 604 N.E.2d at 596.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* The statute required that an action against a health care provider be filed within two years of the negligent act. However, a tolling provision allowed minors under the age of six to file any time before turning eight. *Id.*

85. *Id.*

86. *Id.* Following recognition of preconception torts by the Illinois Supreme Court in *Renslow*, the Illinois legislature amended the statute of limitations to require that a claim must be brought within eight years of the incident. *Id.* at 596 n.2. The current statute reads:

> § 13-212. Physician or hospital.
>
> (b) Except as provided in Section 13-215 of this Act, no action for damages for injury or death against any physician, dentist, registered nurse or hospital duly licensed under the laws of this State, whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be brought more than 8 years after the date on which occurred the act or omission or occurrence alleged in such action to have been the cause of such injury or death where the person entitled to bring the action was, at the time the cause of action accrued, under the age of 18 years; provided, however, that in no event may the cause of action be brought after the person's 22nd birthday. If the person was under the age of 18 years when the cause of action accrued and, as a result of this amendatory Act of 1987, the action is either barred or there remains less than 3 years to bring such action, then he or she may bring the action within 3 years of July 20, 1987 . . . .

735 ILL. COMP. STAT. ANN. 5/13-212 (Smith-Hurd 1991).

suits by second and third generation plaintiffs had not materialized in other jurisdictions.[87]

While recognizing the existence of a cause of action for preconception torts, other courts have found the plaintiff's injury, on the facts of a particular case, to be too remote to recognize a duty of care.

For example, in *McAuley v. Wills*,[88] the mother brought a wrongful death action for the death of her infant child.[89] Prior to conception she suffered injuries in an automobile accident and became a paraplegic.[90] Subsequently she married and gave birth to a child. Because of the mother's paraplegia, the infant was unable to pass properly through the fetal course and died from cardiac arrest.[91] Shortly afterwards, the mother sued the driver of the car for preconception negligence.[92] The court held that "at least in some situations, a person should be under a duty of care toward an unconceived child."[93] However, the injuries resulting to the child were too remote to hold the driver responsible for the child's death.[94]

The mother in *Hegyes v. Unjian Enter., Inc.*[95] was involved in an automobile accident with the defendant, and as a result, she was fitted with a medical device called a lumbo-peritoneal shunt.[96] The mother later became pregnant, and the baby was delivered prematurely to avoid injury to the mother (not the infant) caused by the fetus pressing against the shunt.[97] Like other California courts, the court failed to distinguish wrongful life claims from other types of preconception tort claims. Instead, all "claims brought by infants for negligence occurring prior to their conception" are treated as claims

87. *Walker*, 604 N.E.2d at 597. The dissent disagreed, anticipating a long liability tail extending into the third generation following some medical treatments that might be administered. *Id.* (Shepard, C.J., dissenting).

88. 303 S.E.2d 258 (Ga. 1983).

89. *Id.* at 258.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 260.

94. *Id.* The court noted that if the accident left the mother "wholly unable to give birth to a child," damages would be recoverable by her in a personal injury action against the driver. If the mother was not "wholly unable to give birth to a child," the failure to properly deliver the child considering the mother's paraplegia constituted an "intervening act not reasonably foreseeable at the time of the car crash." *Id.*

95. 286 Cal. Rptr. 85 (Cal. Ct. App. 1991).

96. *Id.* at 86.

97. *Id.* The plaintiff child claimed no injury in utero, only those injuries resulting from premature delivery 51 days prior to term. *Id.* at 86 n.2.

for wrongful life.[98] "California does recognize the existence of a cause of action for damages sustained as a result of a defendant's preconception negligence. However, case law imposes liability only where there is a 'special relationship' between the defendant and the mother giving rise to a duty to the minor plaintiff."[99] Liability is found where the defendant's conduct is "inextricably related to the inevitable future pregnancy . . . ."[100] The court found that no special relationship exists between a motorist and a child conceived several years after the mother's involvement in an accident with that motorist.[101] Deeply concerned about the ability to draw lines short of unlimited duty,[102] the court found that a motorist owes no duty to the child and is not liable for injuries suffered by the child.[103]

New York has steadfastly refused to recognize a cause of action for preconception injury. In *Albala v. City of New York*,[104] the New York Court of Appeals declined to allow recovery based on policy grounds, stating, "[w]e are of the opinion that the recognition of a cause of action under these circumstances would require the extension of traditional tort concepts beyond manageable bounds . . . ."[105] The court began by distinguishing preconception torts from prenatal torts, noting that with a prenatal tort "there are two identifiable beings [the mother and the fetus] within the zone of danger each of whom is owed a duty independent of the other and each of whom may be directly injured."[106] Next, the court distinguished the preconception tort claim from a claim for wrongful life.[107]

Addressing the question of duty, the court expressed its concern about the limits of potential liability, noting that "foreseeability alone is not the hallmark

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98. *Id.* at 89 (citing Turpin v. Sortini, 643 P.2d 954 (Cal. 1982)). *But see supra* note 7.

99. *Hegyes*, 286 Cal. Rptr. at 90.

100. *Id.*

101. *Id.* at 93.

102. *Id.* at 97.

103. *Id.* at 101.

104. 445 N.Y.S.2d 108 (N.Y. 1981). The case involved a mother whose uterus was perforated during a prior abortion, allegedly resulting in brain damage to the plaintiff born over four years after the negligent abortion. *Id.* at 109.

105. *Id.*

106. *Id.* (citing Woods v. Lancet, 102 N.E.2d 691 (N.Y. 1951)).

107. *Id.* (citing Park v. Chessin, 413 N.Y.S.2d 895, 900 (N.Y. 1978)). In *Park* the court found that a cause of action for "wrongful life demands a calculation of damages dependent upon comparison between the Hobson's choice of life in an impaired state and nonexistence. This comparison the law is not equipped to make." 413 N.Y.S.2d at 900. In *Albala*, if the mother's uterus had not been previously perforated, the child would have been born healthy. 445 N.Y.S.2d at 109.

of legal duty for if foreseeability were the sole test we could not logically confine the extension of liability."[108]

Finally, the court suggested that recognition of the tort might lead to the practice of defensive medicine.[109] Concluding that the law cannot provide a remedy for every harm, the court found that the balance of policy interests weighed in favor of rejecting the plaintiff's preconception tort claim.[110]

Catherwood v. American Sterilizer Co., another New York case, involved a mother exposed to chemicals while employed by the defendant.[111] After the last exposure, the plaintiff was born with chromosomal damage.[112] Following *Albala*, the court dismissed the negligence action and considered the applicability of the *Albala* holding to claims outside of negligence.[113] The court noted that the *Albala* decision involved determinations based on public policy.[114] The plaintiff's injuries were "foreseeable, causally related and resulted in ascertainable damages."[115] However, "[t]he decision was the exercise of the court's duty to limit liability where policy so demanded."[116] Based on this precedent, the court found recognizing a duty in a products liability action inconsistent with the policies of the New York Court of Appeals and declined to allow the plaintiff's cause of action.[117]

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108. *Albala*, 445 N.Y.2d at 110 (citations omitted). The court used an example of a mother whose uterus was punctured in an auto accident instead of by a physician. Since the result is the same in both cases, why would the driver of the automobile not also be liable for causing the injury? *Id.*

109. *Id.*

> A physician faced with the alternative of saving a patient's life by administering a treatment involving the possibility of adverse consequences to later conceived offspring of that patient would, if exposed to liability of the magnitude considered in this case, undoubtedly be inclined to advise against the treatment rather than risk the possibility of having to recompense a child born with a handicap. Accordingly, society as a whole would bear the cost of our placing physicians in a direct conflict between their moral duty to patients and the proposed legal duty to those hypothetical future generations outside the immediate zone of danger.

Id.

110. *Id.* at 110-11.

111. 498 N.Y.S.2d 703, 704 (N.Y. Sup. Ct. 1986), *aff'd*, 511 N.Y.S.2d 805 (N.Y. App. Div. 1987).

112. *Id.*

113. *Id.* at 705.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 706.

The New York Court of Appeals addressed the applicability of the *Albala* holding in a products liability context in *Enright v. Eli Lilly and Co.*[118] The case involved the question of whether liability of diethylstilbestrol ("DES") manufacturers should extend to third generation plaintiffs.[119] Recognizing courts and the legislature have often expressed concern for DES cases and their unique problems of proof,[120] the court declined to adopt a cause of action not available in other cases simply because this case involved DES.[121] *Enright* differed from *Albala* only because the mother suffered injury from DES exposure instead of medical malpractice.[122] While the manufacturer is in a better position to pay for the losses associated with defective products, the same issues present in *Albala* exist in a products liability case.[123] Reasserting its position in *Albala*, the court noted that recognition of a cause of action "could not be confined without the drawing of artificial and arbitrary boundaries. For all we know, the rippling effects of DES exposure may extend for generations. It is our duty to confine liability within manageable limits."[124] Thus, the court concluded, "the distinctions between this case and *Albala* provide no basis for a departure from the rule that an injury to a mother which results in injuries to a later-conceived child does not establish a cause of action in favor of the child against the original tortfeasor."[125]

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118. 568 N.Y.S.2d 550 (N.Y. 1991).

119. *Id.* at 551. DES is a synthetic estrogen manufactured by approximately 300 companies and distributed to pregnant women between 1947 and 1971 to prevent miscarriage. The Food and Drug Administration banned the drug in 1971 after studies showed that in utero exposure might result in rare forms of vaginal and cervical cancer among teen-age women. *Id.* at 552.

In *Enright*, the plaintiff alleged that the grandmother took DES, causing in utero exposure to the mother, thus injuring the mother's reproductive system. Subsequently this injury led to the premature birth of the plaintiff in an injured condition. *Id.* at 551.

120. *Id.* at 552-53.

121. *Id.* at 553.

122. *Id.*

123. *Id.* at 554-55.

124. *Id.* at 555.

125. *Id.* at 556. The Supreme Court of Ohio reached the same conclusion in Grover v. Eli. Lilly & Co., 591 N.E.2d 696, 700-01 (Ohio 1992). The court found that the plaintiff's injuries were not a result of direct exposure to DES but from the mother's in utero exposure to the drug ingested by the grandmother. Because of "remoteness in time and causation" the court held that the plaintiff did not have an independent cause of action against the DES manufacturers. "A pharmaceutical company's liability for the distribution or manufacture of a defective prescription drug does not extend to persons who were never exposed to the drug, either directly or in utero." *Id.*

B. Statute of Limitations

Prompted by a concern for stale claims after the decision in *Renslow*, the Illinois legislature modified the statute of limitations applying to preconception tort cases to provide that a claim must be filed within eight years of the negligent act.[126] As in *Lough*, the statute of limitations argument is often raised in the context of preconception tort cases.[127]

For example, in an EBF case where a physician failed to administer RhoGAM after a prior delivery, the Arizona Court of Appeals thoroughly reviewed the application of the statute of limitations in the context of a wrongful death action brought by the child's mother.[128] The court concluded the statute of limitations begins to run at the time of injury. However, in some cases the injury does not occur at the time of the medical malpractice.[129] In a case involving administration of RhoGAM, if the mother decides not to have a any more later born children, then no injury ever occurs.[130] Only when she becomes pregnant with a subsequent Rh positive child will injury actually occur.[131] Thus, the court concluded that injury actually occurred at the moment of conception, and not the moment of birth of the later child.[132] Since no injury could occur until the mother either conceived or gave birth to the second child, the action was filed within the three year statute of limitations period.[133]

Like many states, Missouri revised its statute of limitations for medical malpractice actions as a response to the perceived medical malpractice crisis.[134] The current statute provides that a claim against health care

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126. 735 ILL. COMP. STAT. ANN. 5/13-212(b) (Smith-Hurd 1991). *See supra* note 86 and accompanying text.

127. *See, e.g., Bergstreser*, 577 F.2d at 26; *Walker*, 604 N.E.2d at 596-97.

128. Kenyon v. Hammer, 688 P.2d 1016, 1017-20 (Ariz. Ct. App. 1983). The statute of limitations provided that an action filed on behalf of a minor under the age of seven would begin to run the earlier of the minor's seventh birthday or at death. The cause of action must then be filed within three years. ARIZ. REV. STAT. ANN. § 12-564 (1992); *Kenyon*, 688 P.2d at 1017.

129. *Kenyon*, 688 P.2d at 1019.

130. *Id.*

131. *Id.*

132. *Id.* The court stated this in dicta, as it was not necessary to the decision in the case. Regardless of whether injury occurred at the moment of conception or at the birth of the second child, the action was within the three year statute of limitations. *Id.*

133. *Id.* at 1019-20.

134. Strahler v. St. Luke's Hosp., 706 S.W.2d 7, 10 (Mo. 1986) (quoting Thea Andrews, Comment, *Infant Tolling Statutes in Medical Malpractice Cases: State Constitutional Challenges*, 5 J. LEGAL MEDICINE 469, 486 (1984)).

providers must be brought within two years of the date of the negligent act,[135] except a minor under ten years old has until the twelfth birthday to bring the claim.[136] However, in *Strahler v. St. Luke's Hospital*, the Missouri Supreme Court found the exception requiring that an action be brought within two years of a minor's tenth birthday violates a minor's right to seek remedy in the courts under Article I, Section 14 of the Missouri Constitution.[137]

'While such provisions no doubt go some distance in alleviating the problems of malpractice insurers and health care providers, they do so only at a high cost. Their effect is to bar the malpractice suits of minors without regard to the validity of their claims or the fact that the minors are wholly innocent in failing to timely pursue their claims. Such a result seems to unfairly penalize the blameless minor in order to protect the potentially negligent health care provider.'

Id. *See also* James Bartimus et al., *Protecting Plaintiff's Rights in the Medical Malpractice "Crisis,"* 53 UMKC L. REV. 27, 32-37 (1984).

For a discussion of the history and development of the Missouri medical malpractice statute of limitations, *see* Laughlin v. Forgrave, 432 S.W.2d 308, 311-13 (Mo. 1968); *Lough*, 866 S.W.2d at 856-58 (Smith, Special J., dissenting).

135. MO. REV. STAT. § 516.105 (1986). The statute reads in full:

516.105. Actions against health care providers (medical malpractice)

All actions against physicians, hospitals, dentists, registered or licensed practical nurses, optometrists, podiatrists, pharmacists, chiropractors, professional physical therapists, and any other entity providing health care services and all employees of any of the foregoing acting in the course and scope of their employment, for damages for malpractice, negligence, error or mistake related to health care shall be brought within two years from the date of occurrence of the act of neglect complained of, except that a minor under the full age of ten years shall have until his twelfth birthday to bring action, and except that in cases in which the act of neglect complained of its introducing and negligently permitting any foreign object to remain within the body of a living person, the action shall be brought within two years from the date of the discovery of such alleged negligence, or from the date on which the patient in the exercise of ordinary care should have discovered such alleged negligence, whichever date first occurs, but in no event shall any action for damages for malpractice, error, or mistake be commenced after the expiration of ten years from the date of the act of neglect complained of.

136. *Id.*

137. 706 S.W.2d at 11-12.

The statutory limitation period, as applied to minors, violates their right of access to our courts under Mo. Const. art. I, § 14 and renders vacant the guarantee contained in this constitutional provision which declares in no uncertain terms "that the courts of justice shall be open to every person, and certain remedy afforded for every injury to person. . . ." To the extent that it deprives minor medical malpractice claimants the right

Thus, a minor plaintiff has at least until the age of majority to file a claim under the expanded holding in *Strahler*.[138]

IV. THE INSTANT DECISION

A. The Majority Opinion

After setting forth the procedural posture of the case,[139] Judge Holstein cited cases from other jurisdictions addressing the preconception tort issue.[140] Judge Holstein noted that "every court addressing the specific issue presented here has consistently allowed an action for recovery by a child born with EBF following a defendant's failure to administer RhoGAM to an Rh negative woman who has given birth to an Rh positive child."[141] The court then reviewed the holdings of the New York cases refusing to recognize a preconception tort cause of action and referred to by Dean Prosser as a "blanket no-duty rule."[142] Judge Holstein concluded it was speculation to say that liability cannot be "confined to manageable boundaries if preconception torts are permitted."[143] Furthermore, the possibility that a

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> to assert their own claims individually, makes them dependent on the actions of others to assert their claims, and works a forfeiture of those claims if not asserted within two years, the provisions of § 516.105 are too severe an interference with a minors' state constitutionally enumerated right of access to the courts to be justified by the state's interest in remedying a perceived medical malpractice crisis.

Id. (footnote omitted).

138. *See id.*; Boley v. Knowles, No. WD 47959, 1994 WL 256209, at *3 (Mo. Ct. App. June 14, 1994), *transferred to* Mo. Sup. Ct. Sept. 20, 1994; Ventimiglia v. Cutter Lab., 708 S.W.2d 772, 774 (Mo. Ct. App. 1986), *overruled by* Speck v. Union Elec. Co., 731 S.W.2d 16 (Mo. 1987).

Prior to adoption of Mo. Rev. Stat. § 516.105, the medical malpractice statute of limitations required that an action be

> 'brought within two years from the date of the act of neglect complained of . . .,' Mo. Rev. Stat. § 516.140 (1969), unless the prospective plaintiff was a minor, in which case the limitations period was tolled until the plaintiff reached the age of twenty-one years. Mo. Rev. Stat. § 516.170 (1969).

Bergstreser, 577 F.2d at 26.

139. *Lough*, 866 S.W.2d at 852-53.

140. *Id.* at 853.

141. *Id.*

142. *Id.* (citing KEETON ET AL. *supra* note 3, § 55, at 369). *See supra* notes 104-25 and accompanying text for a review of the New York line of cases.

143. *Lough*, 866 S.W.2d at 854.

physician may be forced to choose a course of treatment less beneficial to the mother to avoid harm to future children is not present in the facts of this case.[144] Allowing recovery in an EBF case does not lead a physician to forego beneficial treatment to the mother.[145]

Next, the court employed a hypothetical situation to illustrate the holding of the case.

> The reason for not adopting a rule that would absolutely bar claims for preconception torts is demonstrated by the following hypothetical: 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 the 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. It is unjust and arbitrary to deny recovery to Tyler simply because he had not been conceived at the time of Kathy Jadwin's negligence.[146]

Judge Holstein then turned to the question of whether a duty existed in the case.[147] He concluded that each of the factors outlined in *Hyde v. City of Columbia*[148] favors a finding of duty in this case.[149] The court stated:

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144. *Id.*

145. *Id.* (citing *Walker*, 604 N.E.2d at 596). Similarly, the court concluded that although Ohio and Georgia had not allowed recovery in the preconception tort cases under review, both courts would likely recognize a cause of action "where there is no intervening cause and the treatment of the mother is specifically designed to benefit the later conceived child." *Id.*

146. *Id.* Determining when the injury occurred, the court in Martin v. St. John Hosp. & Medical Ctr., 517 N.W.2d 787, 789 (Mich. Ct. App. 1994) (wrongful death action on behalf of a fetus stillborn as a result of a negligent caesarean in a previous pregnancy) cited this analogy with approval. The court offered an additional analogy:

> For example, assume a party had his furnace repaired and the work was defective so that the next heating season fumes are released killing a newborn child. We would conclude that the injury occurred when the fumes were released, not when the furnace was repaired. Nor would the infant be denied a cause of action because it was not in existence at the time of the negligent repair.

Id. at 789-90.

147. *Id.*

148. 637 S.W.2d 251 (Mo. Ct. App. 1982).

149. *Lough*, 866 S.W.2d at 853. *See infra* note 175 outlining the policy factors Missouri courts look to in assessing duty.

> Individual cases involving "preconception torts" can be sensibly analyzed under existing principles of tort law to determine if a duty exists in a particular case. Just as there is not a duty in every case when a plaintiff is alive at the time of some allegedly negligent conduct, there will not be a duty in every case where allegedly negligent conduct harms a plaintiff not yet conceived. It is sufficient to say that in this case, a duty exists.[150]

Finally, the court focused on the medical malpractice statute of limitations.[151] Judge Holstein found the holdings of *Walker* and *Bergstreser* highly persuasive on the question of whether Tyler Lough's preconception tort claim should be barred.[152] "[U]nder the terms of the statute," Tyler had until he turns twelve to bring his cause of action.[153] Furthermore, the holding in *Strahler* expanded the two year limitation for minors.[154] Given that Tyler was less than ten years old when the action was filed, his claim was not barred by the statute of limitations.[155]

Having concluded that Missouri would recognize a preconception tort cause of action,[156] that a duty existed in this case,[157] and that the claim was not barred by the medical malpractice statute of limitations,[158] the court reversed and remanded the case to the trial court for further proceedings.[159]

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150. *Lough*, 866 S.W.2d at 853.

151. *Id.* at 855. *See supra* notes 134-38 and accompanying text.

152. *Lough*, 866 S.W.2d at 855. Analogous to *Lough*, both *Walker* and *Bergstreser* involved situations where the plaintiff was conceived more than two years after the negligent conduct. *Id.*

153. *Id.* The court stated:

> While it is true that § 516.105 commences running of the two-year period at the time of the negligent conduct rather than the time of the injury, the statute, in equally clear and unequivocal terms, excludes actions by a minor under ten years of age from the two-year limit. Under the terms of the statute, Tyler, being under ten years of age, has until his twelfth birthday to bring this action. To hold otherwise requires reading words into the statute which are not there. Where no ambiguity exists, there is no room for construction.

Id. (citing Jones v. Director of Revenue, 832 S.W.2d 516, 517 (Mo. 1992)).

154. *Id.* at 856. *See supra* notes 137-38 and accompanying text.

155. *Lough*, 866 S.W.2d at 856.

156. *Id.* at 854.

157. *Id.*

158. *Id.* at 856.

159. *Id.* Judge Benton, Judge Thomas, and Judge Price concurred in the majority opinion of the Court. Judge Robertson did not participate in the decision.

B. The Dissenting Opinion

Special Judge Smith began the dissenting opinion by concurring with the majority's recognition of a preconception tort cause of action on the facts of this case.[160] However, the dissent diverted from the majority with regard to whether the statute of limitations barred the plaintiff's claim.[161]

Special Judge Smith first reviewed the history and development of the Missouri medical malpractice statute of limitations,[162] noting specifically that "more than two years had elapsed between 'the date of occurrence of the act of neglect complained of' and plaintiff's conception."[163] While the majority concluded that the exception for minors should apply in this case, the dissent disagreed.[164] "The question not addressed by the majority is whether the minor exception applies where no injured minor exists until more than two years after the act of neglect."[165]

Special Judge Smith then concluded that the exception for minors is a disability exception intended to provide minors with an opportunity to bring an action on their own behalf.[166] Such a statute "must be viewed within the

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160. *Id.* (Smith, Special J., dissenting) Judge Limbaugh and Chief Justice Covington concurred in the dissenting opinion. The fact that the medical procedure involved was specifically designed to benefit a later conceived child, and not a procedure designed to benefit the mother which incidentally harms a later conceived child was of particular importance in the dissent's recognition of a liability in preconception tort cases. *Id.*

161. *Id.*

162. *Id.* at 856-58 (Smith, Special J., dissenting). *See also* Laughlin v. Forgrave, 432 S.W.2d 308, 311-13 (Mo. 1968).

163. *Id.* at 858 (Smith, Special J., dissenting) (quoting MO. REV. STAT. § 561.105 (1986)).

164. *Id.*

165. *Id.* Regarding this question, Special Judge Smith believed the statute was ambiguous.

> It could mean, as the majority holds, that the "minor exception" serves to preserve a cause of action past the limitation period "in the air" until a minor arrives to claim it. On the other hand it could mean that the "minor exception" applies only to authorize a minor sustaining damage within the two year limitation period an additional period of time determined by his legal disability to bring the action.

Id.

166. *Id.* The dissent defined "disabilities" exceptions as those directed at persons who are not legally authorized to pursue legal remedies on their own behalf. "Disabilities" exceptions are contrasted with "impracticalities" exceptions which deal with cases where parties are prevented from bringing action because of events beyond their control, such as removal from the jurisdiction or improper acts by the defendant. *Id.*

context of the legislative attempts to regulate the number and timeliness of malpractice actions."[167]

The dissent questioned the majority's reliance on *Walker* and *Bergstreser* as persuasive authority, since both cases assumed that the exception for minors in the statute of limitations applies regardless of the amount of time passing between the negligent act and the plaintiff's conception.[168] That assumption is the fundamental difference between the majority and the dissent.

> During the two year period after the occurrence plaintiff had not been conceived and therefore could sustain no damage, and no cause of action existed. He was not under any legal disability for disability connotes existence, which plaintiff did not have. He incurred no legal disability until after the time established in § 516.105 had passed. Prior to reaching a status of disability the time specified in the statute had expired and with it plaintiff's after arising cause of action.[169]

The dissent concluded by noting the legislature had determined any injustice to the plaintiff "is outweighed by the benefits to the public health and weal from restriction of malpractice litigation."[170] The court must be bound by that determination.[171]

V. COMMENT

Referring to *Albala* as a "thinly reasoned case" ruling "that a child has no cause of action for preconception torts upon the mother," Prosser and Keeton argue for a less restrictive approach:

> The reasons for denying such claims involve the problems of proof and proximate causation arising, for example, from the imposition of liability

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167. *Id.* at 859 (Smith, Special J., dissenting).

168. *Id.*

169. *Id.* (citations and footnote omitted). The dissent continued:

> It is presumptively possible, although admittedly remote, that, given the number of years during which a woman is capable of child-bearing, the cause of action here could be brought, under the majority reasoning, fifty or more years after "the date of the occurrence of the act of neglect complained of." I am unable to conclude that § 516.105 was intended by the General Assembly to allow time frames of that magnitude. The plaintiff was not the patient nor even the fetus of the patient at the time of the act of neglect.

Id.

170. *Id.* at 860 (Smith, Special J., dissenting).

171. *Id.*

> upon a chemical, drug or power company for future generations of genetically mutated children resulting from toxic chemicals or radioactive waste. These are indeed staggering problems, that will have to be dealt with carefully in future toxic tort contexts such as these, but they by no means require that a blanket no-duty rule be applied in preconception injury cases where such problems do not exist.[172]

Others argue that preconception torts should be treated as any other negligence claim, subject to the traditional tort requirements of duty, breach, proximate cause, and damage without undue regard for the possibility of perpetual liability.[173] The fact that the court in *Lough* could find no cases denying recovery to a plaintiff suffering from EBF indicates fundamental policy analysis must focus on where to draw the liability line in more speculative cases.[174]

As indicated by the court in *Lough*, it is clear that existing principles of tort law may be used to determine whether a duty exists in a preconception tort case such as *Lough*.[175] Little doubt exists as to the sound policy behind allowing a cause of action where the defendant negligently failed to provide

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172. KEETON, *supra* note 3, § 55, at 369.

173. *See, e.g.*, Andrews, *supra* note 34, at 97.

174. *Lough*, 866 S.W.2d at 853.

175. *Id.* at 854.

Duty means that a party is required to act in a particular manner or risk being subject to liability for injury to the person to whom the duty is owed. RESTATEMENT (SECOND) OF TORTS § 4 (1965). "Any question of duty depends upon a calculus of policy considerations." *Lough*, 866 S.W.2d at 854. "[D]uty is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection." KEETON, *supra* note 3, § 53, at 358.

A relationship that the law recognizes as establishing a duty of care is essential between the injured party and the party inflicting the injury. Hyde v. City of Columbia, 637 S.W.2d 251, 257 (Mo. Ct. App. 1982) (citing Zuber v. Clarkson Constr. Co., 251 S.W.2d 52, 55 (Mo. 1952)). In Missouri, the existence of a duty is determined by weighing several policy factors, including: "the social consensus that the interest is worthy of protection; the foreseeability of harm and the degree of certainty that the protected person suffered injury; moral blame society attaches to the conduct; the prevention of future harm; considerations of cost and ability to spread the risk of loss; the economic burden upon the actor and the community[;] and others." *Hyde*, 637 S.W.2d at 257 (citations omitted).

In some cases the duty is deemed to arise as a result of the relationship between the parties. Hoover's Dairy, Inc. v. Mid-American Dairymen, Inc., 700 S.W.2d 426, 432 (Mo. 1985). However, foreseeability of harm to the particular plaintiff remains the dominant factor in determining the existence of a duty on behalf of the defendant. *Lough*, 866 S.W.2d at 854.

a treatment designed specifically to benefit a later conceived child.[176] Furthermore, traditional duty analysis provides a means of denying preconception claims that are too remote to be reasonably foreseeable at the time of the negligent conduct. Thus, when a future mother is injured in an automobile accident, public policy considerations prevent the defendant driver from being liable to a later conceived child.[177]

While traditional duty analysis may be used to limit preconception tort claims involving pharmaceuticals and genetic defects appearing several generations beyond the negligent act, it becomes much more difficult to express sound policy reasons for drawing the line anywhere short of a "blanket no-duty rule."[178] Perhaps these problems are most apparent in the multi-generational cases involving preconception torts and DES.[179] New York chose to avoid the problem of perpetual and unforeseeable claims by establishing a "blanket no-duty rule" that has been heavily criticized.[180] Other courts (generally considering facts similar to those involving plaintiffs with EBF) have allowed a cause of action for preconception torts but have limited the holdings to allow for reconsideration in cases of perpetual liability.[181] Thus, the facts of the specific case are an important factor overshadowing a court's consideration of the underlying policy considerations required to find a legal duty and recognize a preconception tort cause of action.[182] For example, in cases similar to EBF, where the doctor fails to administer treatment designed to protect the later born plaintiff, the facts support adoption of a cause of action. In other cases, the facts supporting recognition of a duty are much less compelling.

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176. *See supra* notes 75-79 and accompanying text.

177. *See supra* notes 94-103 and accompanying text.

178. *See supra* notes 104-25 and accompanying text. The court in *Albala* believed that "recognition of a cause of action" would extend "traditional tort concepts beyond manageable bounds." Albala v. City of New York, 445 N.Y.S.2d 108, 109 (N.Y. 1981).

179. *See, e.g.*, Mascaro, *supra* note 34, at 435-50.

180. *See supra* note 170 and accompanying text.

181. Renslow v. Mennonite Hosp., 367 N.E.2d 1250, 1255 (Ill. 1977); Walker v. Rinck, 604 N.E.2d 591, 596 (Ind. 1992) (recognizing that the legislature would act as it had in passing the Indiana Medical Malpractice Act if the opinion revived the medical malpractice crisis in Indiana); *Lough*, 866 S.W.2d at 854.

182. Determination of duty is a question of law. *Hyde*, 637 S.W.2d at 257. However, a court is more likely to find the underlying policy considerations necessary to support a cause of action for preconception torts in a case involving failure to administer RhoGAM, resulting in development of EBF in a later conceived plaintiff. The issue then becomes whether a later plaintiff can rely on that precedent in another type of preconception tort case, such as a DES case involving third generation liability.

Nearly everyone would agree that the potential for staggering preconception tort liability in the context of toxic tort and pharmaceutical litigation calls for some limitation on perpetual liability.[183] While some courts and commentators indicate traditional duty analysis is sufficient to limit long liability tails,[184] others suggest these claims can best be curtailed by statutes of limitation,[185] or other legislative action.[186]

The majority in *Lough* appears comfortable with the use of duty analysis to limit remote preconception torts similar to any other tort cause of action.[187] However, the dissent suggests that the Missouri statute of limitations should be interpreted to prohibit preconception claims, even in the context of an EBF case.[188]

Thus, we are left to ponder the value of *Lough* as precedent for future preconception tort cases founded on less appealing fact patterns, such as a third generation DES granddaughter claim.[189] Missouri courts have been less aggressive than even the New York courts in expanding recovery for DES plaintiffs.[190]

While *Lough* provides persuasive authority for the proposition that a duty should extend to the third generation plaintiff, it is unlikely that the Missouri Supreme Court would reach such a result on the facts of a third generation DES granddaughter claim.[191] Although the Missouri statute of limitations,

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183. *See supra* note 170 and accompanying text.

184. *See, e.g., Lough*, 866 S.W.2d at 854.

185. *See, e.g.*, Collins, *supra* note 34, at 708; Stoll, *supra* note 34, at 152 (proposing a three part statute of limitations that (1) excludes the natural parents of the infant plaintiff as defendants in a cause of action, (2) bars preconception tort actions five years after the negligent conduct except for medical defendants such as doctors and hospitals, and (3) limits recovery to the first generation of plaintiffs following the preconception act).

186. *See, e.g., Walker*, 604 N.E.2d at 597; *Albala*, 445 N.Y.S.2d at 111 (Fuchsberg, J., dissenting).

187. *Lough*, 866 S.W.2d at 854.

188. *Id.* at 856 (Smith, Special J., dissenting).

189. *See* Mascaro, *supra* note 34, at 446-50.

190. Zafft v. Eli Lilly & Co., 676 S.W.2d 241, 247 (Mo. 1984) (refusing to adopt the "market share liability" concept to allow DES plaintiffs to recover without proof of the actual manufacturer). The court stated, "[t]here is insufficient justification at this time to support abandonment of so fundamental a concept of tort law as the requirement that a plaintiff prove, at a minimum, some nexus between wrongdoing and injury." *Id. See generally* Mike D. Murphy, Note, *Market Share Liability New York Style: Negligence in the Air?*, 55 MO. L. REV. 1047 (1990) (discussing market share liability in the context of New York DES cases).

191. *E.g.*, the facts of Enright v. Eli Lilly & Co., 568 N.Y.S.2d 550, 551 (N.Y. 1991); *see supra* notes 118-25 and accompanying text.

as interpreted by the majority in *Lough*, might not prevent perpetual claims, most certainly the Missouri Supreme Court would find that no duty exists based on the public policy factors set forth in *Hyde*[192] and *Lough*.[193] Such a result is consistent with both traditional tort principles and the policies expressed by the commentators.[194]

VI. CONCLUSION

Following persuasive authority regarding EBF cases, the Missouri Supreme Court reached the proper result in *Lough*, while constraining the holding to provide judicial limitations to Missouri preconception tort doctrine. *Lough* provides a sound doctrine for analyzing each case on its particular facts. Thus, the case offers precedent for protecting deserving plaintiffs such as Tyler Lough, while simultaneously protecting the medical community from remote perpetual liability claims that may arise.

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192. 637 S.W.2d at 257.
193. 866 S.W.2d at 854.
194. *See supra* note 172 and accompanying text.