PRECONCEPTION TORT LIABILITY — THE DUTY TO THIRD GENERATIONS: 
ENRIGHT V. ELI LILLY & CO.

INTRODUCTION

Diethylstilbestrol ("DES") is a synthetic estrogen hormone invented by British researchers in 1937.¹ DES was used to treat a variety of health conditions, and beginning in 1947, was prescribed for the purpose of preventing miscarriages.² Because DES was never patented, the approval of the Food and Drug Administration ("FDA") was the only requirement needed by pharmaceutical drug manufacturers to produce the drug.³ By 1952, the FDA had declared DES to be "generally recognized . . . as safe."⁴ However, in 1971, DES was discovered to be the specific cause of vaginal cancer in female offspring of women who had ingested DES ("DES daughters") and was banned by the FDA.⁵ By this time, DES had been taken by several million pregnant women.⁶ Consequently, four to six million mothers and their offspring were exposed to the drug.⁷ While a number of DES daughters have contracted vaginal and cervical cancer, the vast majority of injuries to DES daughters are pre-cancerous vaginal abnormalities.⁸ In most DES litigation, plaintiffs have encountered a number of legal problems such as the running of the statute of limitations, the absence of a cause of action for prenatal or preconception injury, and the inability to identify the manufacturer

2. Id. at 577, 436 N.E.2d at 184, 450 N.Y.S.2d at 778. New Drug Applications ("NDAs") were submitted to the FDA by pharmaceutical companies requesting approval of its use for the treatment of engorged breasts, vaginitis, excessive menstrual bleeding, symptoms related to menopause and, a few years later, prostate cancer in males. Id. at 576, 436 N.E.2d at 183-84, 450 N.Y.S.2d at 777-78.
3. Id. at 576, 436 N.E.2d at 183, 450 N.Y.S.2d at 777.
4. Id. at 577, 436 N.E.2d at 184, 450 N.Y.S.2d at 778.
5. Id.
6. Id.
7. D. THOMPSON, M.D., EVERY WOMAN'S HEALTH 618 (3d ed. 1985). Adverse effects of DES on male offspring are rare; however, abnormal genitalia and possibly testicular cancer may be linked to DES exposure. Id. In March 1990, J. David Roberts filed a $2 million lawsuit in a Washington, D.C. federal district court against the drug manufacturer, Eli Lilly & Co., alleging that his daughter's clear-cell adenocarcinoma, a rare vaginal cancer, was caused by Mr. Roberts' exposure to DES as a fetus. ABA L.J., June 1990, at 14.
8. Note, DES and a Proposed Theory of Enterprise Liability, 46 FORDHAM L. REV. 963, 964-65 (1978). Adenosis is "tissue placed abnormally on the cervix or vagina", and is the most consistently present abnormality. Id. at 965 n. 10.
who produced the ingested drug. However, New York is one of several states that have taken steps to protect the rights of DES victims. For example, in 1978, the New York Legislature enacted Public Health Law section 2500-c which specifically recognized the link between prenatal exposure to DES and an unusual type of vaginal or cervical cancer in female offspring. This legislation was designed to locate, monitor and establish programs for DES daughters. In Enright v. Eli Lilly & Co., a case involving preconception tort liability, the New York Supreme Court, Third Department Appellate Division, confirmed New York’s truly aggressive position toward recovery for those injured by DES. The court held that the plaintiff, Karen Enright, had a strict products liability cause of action against the drug manufacturer for birth defects resulting from her grandmother's ingestion of DES while pregnant with the plaintiff’s mother. In reaching its decision, the court distinguished this case from prior New York cases denying preconception tort causes of action for the sole reason that this case involved DES. The court balanced the legislative policy favoring a remedy for DES injuries against the significant consequences of recognizing a novel cause of action for preconception tort liability. The court in Enright stressed the dictates of common-law justice and fairness along with the insidious nature and long dormancy period of DES injuries as a basis for favoring a remedy for DES injuries.

The Enright case is significant in that it is the first New York case to allow a preconception tort and is unique in that it involved DES and a third generation plaintiff. This Note discusses the evolution of prenatal torts as well as cases which have considered whether or not a cause of action exists for children conceived after tort injury to the parent. In addition, this Note examines the New York policy concerns regarding preconception liability both within

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9. Id. at 968-72.
10. Id. at 969-71. See infra notes 224-46 and accompanying text.
14. Id. at —, 553 N.Y.S.2d at 497-98.
15. Id. at —, 553 N.Y.S.2d at 497.
16. Id. at —, 553 N.Y.S.2d at 495-97.
17. Id. at —, 553 N.Y.S.2d at 497-98.
18. Id. at —, 553 N.Y.S.2d at 497.
20. See infra notes 72-167 and accompanying text.
the context of DES litigation as well as generally. Finally, this Note analyzes the implications of *Enright* to future New York preconception tort cases and concludes that the DES situation is an exceptional case and does not replace New York policy disfavoring preconception tort claims.

FACTS AND HOLDING

During 1959 and 1960, Rosemary Whitmore Hickson was prescribed and ingested diethylstilbestrol ("DES") while pregnant with Patricia Enright. Although on January 29, 1960, Patricia Enright was born with a malformed uterus, uterine and cervical dysfunction, and squamous metaplasia as a result of her mother's ingestion of DES, the implications of the injuries were not detected until she herself became pregnant. Patricia Enright was unable to maintain a full-term pregnancy, and on August 9, 1981, she prematurely gave birth to a daughter, Karen Enright, who has cerebral palsy and suffers from grand mal seizures and other congenital defects.

In 1988, Patricia Enright and her husband filed suit against various manufacturers of DES on behalf of themselves and their daughter, Karen. Damages were sought for the emotional and physical injuries which Patricia Enright suffers as a victim of DES as well as for the physical injuries, pain and suffering which her daughter suffers. Husband and father, Earl Enright, asserted both a derivative cause of action and a cause of action for the emotional damages associated with his inability to ever have a healthy child. Relying on New York's nonrecognition of preconception tort liability, the defendants filed motions for summary judgment.

The New York Supreme Court, Chenango County, addressed several issues including: (1) whether a third generation plaintiff could assert a cause of action against a drug manufacturer of DES; (2) whether New York recognizes a shared theory of liability whereby

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21. See infra notes 168-232 and accompanying text.
22. See infra notes 233-314 and accompanying text.
24. *Id.* at —, 533 N.Y.S.2d at 226. Squamous means "scalelike" and metaplasia is "conversion of one kind of tissue into a form that is not normal for that tissue." *Am. JUR. P.O.F.3d*, *Taber's Cyclopedic Medical Dictionary* 1040, 1614 (15th ed. 1988).
25. *Enright*, 141 Misc.2d at —, 533 N.Y.S.2d at 226. It was noted by the court that Patricia Enright allegedly had four spontaneous abortions "before and after the birth of Karen Enright." *Id.* at —, 533 N.Y.S.2d at 226.
26. *Id.* at —, 533 N.Y.S.2d at 224.
27. *Id.* at —, 533 N.Y.S.2d at 230.
28. *Id.* at —, 533 N.Y.S.2d at 230.
29. *Id.* at —, 533 N.Y.S.2d at 226.
all manufacturers of DES may be held jointly responsible for injuries suffered, and (3) whether New York’s revival statute, which is a procedural device that revives an otherwise time-barred remedy, is unconstitutional.\(^{30}\)

In response to the first issue, the trial court held that New York does not recognize preconception tort liability.\(^{31}\) Relying on policy considerations articulated in Albala v. City of New York,\(^{32}\) the court in Enright stated that expanding liability to include preconception torts would “require the extension of traditional tort concepts beyond manageable bounds.”\(^{33}\) Furthermore, the court declared that foreseeability alone can neither establish a legal duty nor has such a duty been mandated statutorily or at common-law.\(^{34}\) The court also stated that these policy considerations were considered applicable to strict liability causes of action as well.\(^{35}\) The Enrights argued that in a footnote in Albala, the court had recognized a preconception cause of action based in strict liability.\(^{36}\) However, the trial court relied on the holding in Catherwood v. American Sterilizer Co.\(^{37}\) which held that the footnote in Albala only preserved the strict products liability issue for later cases, such as Catherwood, and that because of policy considerations surrounding ingestion and exposure cases, liability should be limited to situations in which a duty to the un conceived can be established.\(^{38}\) Finally, the court quoted portions of the revival

\(^{30}\) Id. at —, 533 N.Y.S.2d at 226. The revival statute permitted, for a one-year period from its effective date, the revival of DES causes of action previously dismissed or never brought. N.Y. PUB. HEALTH LAW § 4 (McKinney 1986). The court also discussed whether, pursuant to the revival statute, a derivative claim could be brought by the child’s father and a cause of action based upon his inability to have a healthy child born of the marriage. Enright, 141 Misc. 2d at —, 533 N.Y.S.2d at 226. In addition, the court analyzed whether New York would recognize the parents’ cause of action based upon the emotional injuries they suffered from the birth of an impaired child. Id. at —, 533 N.Y.S.2d at 226. In resolving these issues, the court discussed the purpose of the revival statute as well as New York policy opposing recovery for emotional injuries resulting from the birth of an impaired child and concluded that these claims should be dismissed. Id. at —, 533 N.Y.S.2d at 226.

\(^{31}\) Id. at —, 533 N.Y.S.2d at 227.


\(^{33}\) Enright, 141 Misc. 2d at —, 533 N.Y.S.2d at 227.

\(^{34}\) Id. at —, 533 N.Y.S.2d at 227.

\(^{35}\) Id. at —, 533 N.Y.S.2d at 227.

\(^{36}\) Id. at —, 533 N.Y.S.2d at 227.


\(^{38}\) Id. at —, 498 N.Y.S.2d at 705-06. Such policy considerations included the “proliferation of frivolous claims and claims where proof presents a hardship to defendants.” Id. at —, 498 N.Y.S.2d at 706. Because Catherwood only involved a second generation unconceived plaintiff, these policy concerns were considered doubly applicable in Karen Enright’s third generation suit. Enright, 141 Misc. 2d at —, 533 N.Y.S.2d at 227.
statute along with its legislative history in support of its holding that the statute was specifically enacted to provide a remedy to a select group of plaintiffs which did not include the Enrights.\(^3\) Additionally, within the revival statute itself, a cause of action for personal injuries caused by exposure to DES "upon or within the body" was interpreted by the trial court as the legislature's way of establishing some predictability as to those persons entitled to sue.\(^4\) Thus, both of Karen Enright's claims were dismissed as were the claims of her parents which were posited upon Karen's claims.\(^5\) Therefore, the issues remaining were applicable only to the claims filed by Karen Enright's parents on behalf of themselves.\(^6\)

Turning to the second issue, the court discussed theories of liability utilized in other jurisdictions in similar situations in which identification of the manufacturer who produced the product is impossible to determine.\(^7\) Traditionally, in order to maintain a products liability cause of action, the plaintiff was required to prove that the defendant produced, manufactured, sold or was somehow responsible for the product which caused the injury.\(^8\) However, innovative counsel, as a way of imposing liability upon one or more of the manufacturers, have utilized alternative theories such as the concerted action theory which imposes joint and several liability upon all those who manufactured the drug regardless of whether they manufactured the drug which the plaintiff ingested.\(^9\) Because the concerted

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3. Id. at —, 533 N.Y.S.2d at 227. For example, statements such as "an identifiable group of victims" and "currently known categories of victims" were emphasized. Id. at —, 533 N.Y.S.2d at 227.
4. Id. at —, 533 N.Y.S.2d at 227.
5. Id. at —, 533 N.Y.S.2d at 228.
6. Id. at —, 533 N.Y.S.2d at 228-30.
7. Enright, 141 Misc. 2d at —, 533 N.Y.S.2d at 228. The four theories included concerted action, alternative liability, enterprise liability and market share liability. Id. at —, 533 N.Y.S.2d at 228.
9. Annotation, Defective Product - Enterprise Liability, 22 A.L.R 4TH 183, 184 (1983). Conracted action liability imposes joint and several liability upon all those who, in pursuance of a common plan or design to commit a tortious action, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or who ratify and adopt the wrongdoer's actions for their benefit. Restatement (Second) of Torts § 876 (1977). Alternative liability provides that "where the conduct of two or more actors is tortious, and it is proved that harm has been caused by the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm." Restatement (Second) of Torts § 433B(3) (1965). Enterprise liability is a hybrid theory which incorporates parts from both concerted action and alternative liability theories. Note, DES and a Proposed Theory of Enterprise Liability, 46 Fordham L. Rev. 974 (1978). Under enterprise liability, the plaintiff must prove there is a high probability that her injury was caused by the tortious behavior of some one of the defendants - a modification of al-
action theory had been allowed in an earlier Appellate Division case, the court in Enright reluctantly allowed Patricia Enright and her husband to proceed on such a theory.\textsuperscript{46}

In addressing the constitutionality of New York's revival statute, the court noted that "exceptional circumstances must be demonstrated to warrant legislative intervention in reviving a cause of action which is time barred."\textsuperscript{47} Relying on the legislative history of the statute, which stresses the nondetectability of DES injuries until years later, the court concluded that the requisite "exceptional circumstances" test was easily met.\textsuperscript{48}

In summary, the court granted the defendants' motions for summary judgment dismissing Karen Enright's preconception tort claim and all claims of Karen's parents which were posited upon Karen's claim.\textsuperscript{49} Cross appeals were filed with the New York Supreme Court, Appellate Division, Third Department.\textsuperscript{50}

Because New York's highest court had recently adopted a market share theory of liability in DES cases and had sustained the constitutionality of New York's revival statute, the only disputed issue on appeal was whether Karen Enright's preconception tort claim should be allowed.\textsuperscript{51} The appellate court's analysis began with Albala which was a preconception tort action brought on behalf of an infant plaintiff who was born brain damaged four years after his mother's

\textsuperscript{ternative liability. In addition, she must show that the defendants concertedly adhered to a dangerous, industrywide safety standard in their manufacture of the injury-producing product.}

\textit{Id.} Under the market share theory of liability, once the plaintiff has "joined the manufacturers of a 'substantial share' of the relevant market in the action and has submitted a prima facie case supporting her allegations, the burden of proof shifts to each defendant to demonstrate that it could not have made the substance that injured the plaintiff." Note, \textit{Market Share Liability: An Answer to the DES Causation Problem}, 94 HARV. L. REV. 668, 672 (1981).

\textsuperscript{46} Enright, 141 Misc. 2d at \textendash, 533 N.Y.S.2d at 228-29. In Bichler v. Eli Lilly & Co., 55 N.Y.2d 571, 580, 436 N.E.2d 182, 185-86, 450 N.Y.S.2d 776, 779-80 (1982), defendants failed to contest plaintiff's concerted liability theory by motion or exception to charge; thus, the theory was affirmed although no opinion was expressed as to its continued applicability in future DES cases.

\textsuperscript{47} Enright, 141 Misc. 2d at \textendash, 533 N.Y.S.2d at 229-30.

\textsuperscript{48} Enright, 141 Misc.2d at \textendash, 533 N.Y.S.2d at 230.

\textsuperscript{49} Id. at \textendash, 533 N.Y.S.2d at 228, 230. The drug manufacturers were not entitled to summary judgment on the mother's claim. Id. at \textendash, 533 N.Y.S.2d at 228.


\textsuperscript{51} Id. at \textendash, 553 N.Y.S.2d at 495. Patricia and Earl Enright did not brief the emotional damages issue or Mr. Enright's claim seeking damages based upon the lost ability to have a healthy child within this marriage. Id. at \textendash n.1, 553 N.Y.S.2d at 495 n.1. In Hymowitz v. Lilly & Co., 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941, cert. denied, 110 U.S. 350 (1989), the Court of Appeals approved the market share theory of liability, which limits a manufacturer's liability to its market share, and upheld the revival statute's constitutionality. Id. at 511-514, 539 N.E.2d at 1078-79, 54 N.Y.S.2d at 950-52.
uterus was perforated while undergoing an abortion. In *Albala*, the New York Court of Appeals held that the child’s cause of action against the doctors who damaged his mother’s uterus prior to the child’s conception was not cognizable under New York’s laws because of the potential for unlimited liability and the undesirable effect of encouraging the practice of defensive medicine. However, in reviewing the policy considerations which formed the basis of the *Albala* opinion and other New York preconception tort cases such as *Catherwood*, the appellate court in *Enright* reached a different conclusion. The court in *Catherwood* had stated that it would be inappropriate to allow a preconception tort action when a date-of-injury statute of limitations is used because expiration of the cause of action could occur prior to conception of the plaintiff. Because New York had replaced its date-of-injury statute of limitations with a date-of-discovery rule for almost all toxic torts, the policy consideration voiced in *Catherwood* was no longer applicable. However, the court in *Enright* did not overturn *Catherwood*. Instead, the *Enright* case was distinguished from other preconception tort cases because it involved DES. The court in *Enright* stated that “products liability law cannot be expected to stand still where innocent victims face inordinately difficult problems of proof.” The court also concluded that the enactment of the revival statute by New York’s legislature was further proof of the state’s commitment to furnish a remedy for DES victims. Finally, the court discussed the New York cases, *Bichler v. Eli Lilly & Co.* and *Hymowitz v. Eli Lilly & Co.*, which involved DES. The court considered these cases to be indicative of New York’s policy favoring a remedy for DES victims. For example, like the court in *Hymowitz*, the court in *Enright* stated that the manufacturers should not be able to hide behind a curtain and expect innocent DES victims to bear the costs of a

53. *Id.* at 273-74, 429 N.E.2d at 788-89, 445 N.Y.S.2d at 110.
55. *Catherwood*, 130 Misc.2d at —, 498 N.Y.S.2d at 706.
57. *Id.* at —, 553 N.Y.S.2d at 496.
58. *Id.* at —, 553 N.Y.S.2d at 496-97.
59. *Id.* at —, 553 N.Y.S.2d at 497 (quoting *Bichler v. Lilly & Co.*, 55 N.Y.2d 571, 436 N.E.2d 182, 450 N.Y.S.2d 776 (1982), which held that the plaintiff, who contracted cancer due to prenatal exposure to DES, could successfully sustain a products liability action against a pharmaceutical manufacturer).
60. *Enright*, 155 A.D.2d at —, 553 N.Y.S.2d at 497.
64. *Enright*, 155 A.D.2d at —, 553 N.Y.S.2d at 497.
DES injury simply because of its long dormancy period, especially where the legislature has consciously created an expectation of recovery by reviving hundreds of DES cases.65 Thus, based upon New York's policy favoring DES victims and the broad applicability of strict products liability theories, the appellate court granted Karen Enright's cause of action in strict products liability for injuries sustained because of her mother's exposure to DES in utero.66 Therefore, the defendants' motions for summary judgment, which had previously been granted, were modified to allow Karen Enright's cause of action.67 However, the court in Enright stressed that the DES situation is an exceptional case and that the preconception tort issue requires the striking of a delicate balance between competing policy considerations which arise when tort liability is extended beyond traditional bounds.68

The dissent in Enright argued that the majority had engaged in "judicial overreaching" by allowing a preconception tort cause of action which conflicted with the established rule in New York denying preconception tort liability under common-law negligence principles.69 The dissent also stated that the cases cited by the majority in support of its decision were irrelevant because they did not involve preconception torts, but rather other issues pertaining to DES litigation.70 In addition, the dissent argued that the toxic tort revival statute should be interpreted literally and that direct contact between a plaintiff and DES should be a prerequisite to a strict products liability cause of action.71

BACKGROUND

PRENATAL TORTS

Although the common-law had recognized that an unborn child was entitled to legal protection, this protection only existed within the context of criminal and property law, not tort law.72 This

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65. Hymowitz, 73 N.Y.2d at 507, 539 N.E.2d at 1075, 541 N.Y.S.2d at 947.
66. Enright, 155 A.D.2d at —, 553 N.Y.S.2d at 497. Under a products liability theory, once a defect in design or manufacture is detected, liability is extended to all persons affected regardless of foreseeability, privity or due care and this is what the Enright court was referring to regarding the "absence of the necessity of establishing manageable bounds." Id. at —, 553 N.Y.S.2d at 496-97.
67. Id. at —, 553 N.Y.S.2d at 497.
68. Id. at —, 553 N.Y.S.2d at 495-96.
69. Id. at —, 553 N.Y.S.2d at 498.
70. Id. at —, 553 N.Y.S.2d at 498-99.
71. Id. at —, 553 N.Y.S.2d at 500.
72. See, e.g., Hall v. Hancock, 32 Mass. (15 Pick.) 255, 259 (1834) (holding that a child born nine months after its grandfather's death was entitled to share in the grandfather's bequest to be shared by grandchildren of the testator "as [might] be living at
PRECONCEPTION TORTS

view was illustrated in 1884 by the first American case involving tort liability for prenatal injuries, *Dietrich v. Northampton*. In *Dietrich*, a pregnant woman fell on a road in Northampton which resulted in premature labor and the birth of a child who lived less than fifteen minutes. The child's estate sued the city of Northampton for its negligent maintenance of the road. However, the Massachusetts Supreme Judicial Court upheld the common-law rule that there was no remedy for such injuries. The unborn child was part of the mother at the time of the injury, and no duty could be owed to one not yet in existence.

In 1891, an influential decision was handed down by an Irish court in *Walker v. Great Northern Railway of Ireland*. In *Walker*, a pregnant woman and her unborn child sustained injuries while passengers on a railway. The woman brought suit against the railway for the injuries to her child. The court discussed at great length the common-law rights of unborn children. However, the court held that because the unborn child's existence was unknown to the railway at the time of the accident, there was no contract of carriage between the child and the railway and the railway owed no duty to the child. In addition, the court stated that allowing a cause of action for prenatal injuries would result in "a boundless sea of speculation." Thus, the court relied on the principle that a child *en ventre sa mere*, that is, "in its mother's womb," was not an entity separate from its mother and, therefore, was not entitled to legal redress for tortious prenatal misconduct.

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73. 138 Mass 14 (1884).
74. Id. at 14-15.
75. Id. at 15.
76. Id.
77. Id. at 17.
78. 28 L.R. Ir. 69 (Q.B. 1890).
79. Id. at 70.
80. Id.
81. Id. at 73.
82. Id. at 78.
83. Id. at 81. This often quoted statement became known as the *Dietrich-Walker* rule. Comment, *Legal Duty to the Unborn Plaintiff: Is There A Limit?*, 6 FORDHAM URB. L.J. 217, 224 (1978). It will also be referred to as the "difficulties of proof rule."
84. Comment, 6 FORDHAM URB. L.J. at 219.
In *Allaire v. St. Luke's Hospital*, a case decided in 1900, Ada Allaire went to St. Luke's Hospital to give birth to her son. Ada Allaire was seriously injured and her unborn child was permanently disabled as a result of an elevator accident at the hospital. Ada settled with the hospital regarding her personal injuries and damages but brought a cause of action for injuries sustained by her son. In a per curiam opinion, the Illinois Supreme Court held that no cause of action for the child could be maintained. The court reasoned that:

>a child before birth is, in fact, a part of the mother, and is only severed from her at birth, . . . [t]hat an unborn child may be regarded as in [being] for some purposes, when for its benefit, is a mere legal fiction, which, . . . has not been indulged in by the courts of common law to the extent of allowing an action by an infant for injuries occasioned before its birth.

In a powerful dissent, Justice Boggs challenged the *Dietrich* proposition that no duty of care could be owed to the infant which is "too little advanced in foetal life to survive its premature birth." Boggs argued that once a fetus reaches viability, that fetus should be considered a separate legal entity. His analysis was based on a number of theories. First, he stated that common-law precedents are general principles which should be applied to the facts of each case and, because of the diversity of factual situations, these principles must continue to grow and expand. In this case, the "governing principle" was that damages are awarded for personal injuries inflicted by the neglect or wrong of another. Therefore, he argued that this case was "embraced within the limits of the principle . . . and it is clear that recovery could have been maintained at common-law unless the fact the plaintiff was unborn when the alleged injuries were inflicted would have operated to deny a right of action." According to Justice Boggs, such a denial should not occur when the plaintiff is unborn but viable.

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85. 184 Ill. 359, 56 N.E. 638 (1900).
86. Id. at 360, 56 N.E. at 638.
87. Id. at 362-63, 56 N.E. at 639.
88. Id. at 363, 56 N.E. at 638-39.
89. Id. at 365-68, 56 N.E. at 639-40.
90. Id. at 368, 56 N.E. at 640. The "fiction" referred to concerned the law's acknowledgement at the time of an unborn child's property rights. Id. at —, 56 N.E. at 640.
91. Id. at 372, 64 N.E. at 642 (Boggs, J., dissenting).
92. Id. at 390, 56 N.E. at 641 (Boggs, J., dissenting).
93. See infra notes 94-106 and accompanying text.
94. *Allaire*, 184 Ill. at 369, 56 N.E. at 640 (Boggs, J., dissenting).
95. Id. at 369-70, 56 N.E. at 641 (Boggs, J., dissenting).
96. Id. at 370, 56 N.E. at 641 (Boggs, J., dissenting).
97. Id.
Second, Boggs discussed property and criminal law principles pertaining to the inherent rights of the unborn in both areas of law and questioned the court's nonrecognition of these common-law principles in the area of tort law. Boggs stated:

In the case at bar the infant, when the injury was inflicted, had, as the declaration alleged, reached that advanced stage of foetal life which would have, according to the experience of mankind, and according to the medical learning of the age, endowed it with such vitality and vigor, and with members and faculties so far complete and mature, that it could have maintained independent life, and the death of the mother would not have deprived it of life. It is but natural justice that such an infant, if born alive, should be allowed to maintain an action in the courts for injuries so wrongly committed upon its person while so in the womb of the mother.

Next, Boggs distinguished Dietrich on the basis of viability. While the child in Dietrich was born four to five months premature, the child in Allaire had been carried full-term and was within ten days of his anticipated birth date at the time of the accident. Therefore, Boggs argued that the infant was capable of existing separate from his mother at the time of the accident and should not have been denied a cause of action.

Finally, Boggs addressed the Walker "lack of duty" argument. In Walker, the railway did not know of the unborn child's existence nor was any consideration given for the child's transportation. However, in Allaire, St. Luke's Hospital "knew of the condition of the mother, and of the existence of the plaintiff in her womb, contracted with direct reference to the safety and care of both mother and child and received compensation for the performance of a duty to both." Boggs concluded that it would be "abhorent to every impulse of justice or reason to deny such a child a right of action against such physician to recover damages for the wrongs and injuries inflicted by such physician." Between 1900 and 1946, Boggs's dissent was noted by some courts.

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98. Id. at 371, 56 N.E. at 614 (Boggs, J., dissenting).
99. Id. at 372, 56 N.E. at 641-42 (Boggs, J., dissenting).
100. Id. at 372, 56 N.E. at 642 (Boggs, J., dissenting).
101. Id. at 359, 56 N.E. at 638, 642 (Boggs, J., dissenting).
102. Id. at 372-73, 56 N.E. at 642 (Boggs, J., dissenting).
103. Id. at 373, 56 N.E. at 642.
104. Id.
105. Id.
106. Id. at 373-74, 56 N.E. at 642.
but never followed. Finally, in 1946, the landmark case of Bonbrest v. Kotz was decided by the United States District Court for the District of Columbia. The case of Bonbrest was a medical malpractice case initiated on behalf of an infant injured during delivery. The court relied on the logic of Montreal Tramways v. Leveille, a Canadian Supreme Court case which had stated:

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

The district court insisted that the recent developments in science and medicine regarding the unborn human fetus as an entity separate from its mother could not be ignored. Consequently, the court dismissed Dietrich on its face and called the Walker "difficulties of proof" argument no argument at all. A court, for the first time, had recognized that a viable fetus was not just a part of its mother, but a separate entity to whom the physician's duty extended and in whom there existed the right to bring an action for negligently inflicted prenatal injuries.

The case of Bonbrest received virtually instant acceptance by courts in all jurisdictions. However, with the recognition of an

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109. Id.
110. Id. at 139.
111. 4 D.L.R. 337 (Can. 1933).
112. Id. at 345.
113. Bonbrest, 65 F. Supp. at 140-41. The court discussed what medicine and science had discovered regarding the human fetus's unique separateness, and stated that the fetus or embryo is an unmistakable human being by the eighth week of gestation. Id. at 140.
114. Id. at 142-43.
115. Id. at 140-43.
unborn's cause of action came two additional questions: first, whether a child must be born alive in order to maintain a cause of action or whether a cause of action can be maintained on the child's behalf if an injury is inflicted upon the pregnant mother and the child is stillborn due to the injury; and, second, whether it is unjust to limit causes of action strictly to viable fetuses.

WRONGFUL DEATH

In order to answer the first question, courts have usually relied on an analysis of the applicable wrongful death statute to determine whether a viable fetus is recognized as a "person" by the legislature. The Minnesota Supreme Court, in *Verkennes v. Corniea*, allowed recovery for the death of a stillborn fetus which, prior to death, had reached viability. The court did not require a live birth because the stillborn fetus was considered a "person" within the meaning of the state's wrongful death statute. The majority of courts have adopted this view and rejected a live-birth requirement. However, a number of jurisdictions have determined that their state wrongful death statute "does not include unborn fetuses within the statutory definition of persons." These states have determined that according to property and criminal law, the rights of

118. Id. See infra notes 141-150 and accompanying text.
120. Id. at § 55, at 369.
121. 229 Minn. 365, 38 N.W.2d 838 (1949).
122. Id. at —, 38 N.W.2d at 839.
123. Id. at —, 38 N.W.2d at 841.
124. Robertson, 1978 DUKE L.J. at 1423-25. There are several arguments in support of a no live-birth requirement:

(1) It is incongruous to allow a cause of action to a live infant injured prior to birth but to deny it to one whose injury was so severe that it died from it. The effect of the live-birth requirement is to permit the tortfeasor inflicting the greatest injury to avoid liability.
(2) Allowing an action is in accord with the weight of current authority.
(3) The difficulty of proof of causation of death-producing injury is no greater than the difficulty of proof in cases involving disability-producing injury to infants who survive.
(4) Live birth is an arbitrary point from which to measure life or personhood.
(5) The wrongful death statute is punitive in nature, and there is just as much reason to punish a wrongdoer where the unborn infant dies before birth as where it survives to live birth.
(6) Not to allow recovery would be to permit a wrong without a remedy. If the fetus is recognized as a life separate from its mother, certain elements of damage can only be compensated in an action by the unborn child.
(7) Allowing a wrongful death action is a "reasonable and natural development" of the rule allowing recovery by infants born alive.

Id. at 1424-25.

125. Id. at 1425.
the unborn ripen at the child's live birth. The jurisdictions denying application of wrongful death statutes to unborn fetuses have held that such an analogy should be extended to tort law.

**VIABILITY REQUIREMENT**

The pre-*Bonbrest* cases had denied a cause of action to an unborn child because it had been held that a duty of care could not be owed to someone who was not an independent "person" at the time of injury. The early post-*Bonbrest* cases considered a viable fetus to be an independent person because the fetus had the capacity to survive outside the womb; therefore, these courts were able to retain personhood as the basis for finding a duty. However, as medical knowledge continued to grow, the viability requirement fell under increasing criticism. Viability was considered a poor standard for justifying recovery because "it was difficult to assess, irrelevant to proof of causation, and an arbitrary bar to legal redress."

In 1953, in *Kelly v. Gregory*, the New York Supreme Court, Appellate Division, rejected the "viability" requirement. In *Kelly*, the plaintiff's mother was struck by a car while crossing the street; she was three months pregnant with the plaintiff who was born

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126. *Id.* at 1425-26.
127. *Id.* at 1426-27. In support of this restrictive interpretation of the wrongful death statutes, these courts have made a variety of arguments:

1. The considerations of justice that support compensation of the living infant are absent. There is no deformity to live with, no pecuniary injury, and no pain and suffering.
2. Since there is no pecuniary loss to the infant, the award of damages is purely punitive, not compensatory.
3. Drawing a line at birth is no more arbitrary than drawing it anywhere else and perhaps less so than drawing it at the point at which the fetus becomes "quick" or "viable", since birth is a tangible and concrete event.
4. The problems concerning proof of causation and of damages are greatly reduced as is the danger of speculative and fraudulent claims.
5. The real damages suffered by the parents can be recovered by them separately. Thus, disallowing the fetus's cause of action reduces the likelihood of double recovery.

*Id.* at 1426.
128. See *supra* notes 72-90 and accompanying text.
129. See *supra* notes 91-116 and accompanying text.
130. Comment, 6 FORDHAM URB. L.J. at 230.
131. 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, 680 (1983-84). The first trimester is a crucial period in terms of the fetus's susceptibility to environmental factors. Comment, 6 FORDHAM URB. L.J. at 231. In addition, "increased medical knowledge as to the effects of irradiation, the causes of certain infectious diseases and the importance of nutritional factors and blood disorders indicate that healthy fetal development may depend upon factors existing at the time of, or even prior to conception." *Id.* at 230-31.
132. 282 A.D. 542, 125 N.Y.S.2d 696 (1953).
133. *Id.* at —, 125 N.Y.S.2d at 697.
"weakened and debilitated and otherwise physically handicapped." The court took a biological approach in reaching its decision and stated:

While the point at which the foetus becomes viable has been of usefulness in drawing some legal distinctions, the underlying problem that has troubled the judges who have written on the subject of recovery for pre-natal injuries, has been in fixing the point of legal separability from the mother.

We ought to be safe in this respect in saying that legal separability should begin where there is biological separability. We know something more of the actual process of conception and foetal development now than when some of the common law cases were decided; and what we know makes it possible to demonstrate clearly that separability begins at conception. Thus, the court held that injuries sustained by the unborn child "at any period of [its] prenatal life" due to the negligence of another are actionable by the surviving infant. Today, the majority of jurisdictions which allow prenatal tort actions permit recovery for injuries sustained at any stage of fetal development.

In 1965, one commentator stated that "[t]he battle in jurisprudence is almost over." He referred specifically to the twenty-year struggle which had ensued prior to the recognition of an unborn plaintiff's right of action in tort. However, during the brief history of prenatal law, the issues surrounding prenatal injuries have engendered significant controversy. The cases had raised "an assortment of unique and difficult social and legal issues, such as the legal status to be afforded a fetus, the reasonableness of recognizing a duty to a person not yet in being, the scope of protection to be afforded a potential child and the difficulties of proof and causation." The development of preconception tort liability would raise still more issues.

Preconception Tort Liability

In 1973, the United States Court of Appeals for the Tenth Cir-
cuit, in *Jorgensen v. Meade Johnson Laboratories, Inc.*, became the first American court to allow a cause of action for preconception negligence. The complaint alleged that birth control pills taken by the mother had caused chromosomal changes in her body which had led to the mongoloid condition of her twins. A suit was brought on behalf of the twins for the personal injuries which they had sustained due to their retardation, deformity, and for pain and suffering. The action had been dismissed by the United States District Court for the Western District of Oklahoma which had concluded that no cause of action for preconception injuries existed in Oklahoma, the source of the applicable substantive law, and that such a right could only be created by the legislature. The court of appeals reversed the lower court, reasoning that although the mother’s chromosome structure was injured prior to conception, the plaintiffs’ mongoloid deformities did not occur until after conception. The court recognized that prior decisions had long accepted the theory that a duty may be owed to a fetus from the moment of conception. Therefore, the court stated that the pleading should be construed to include the effects of the defendant’s drug both before and after conception. In addition, the appellate court stated:

> If the view prevailed that tortious conduct occurring prior to conception is not actionable in behalf of an infant ultimately injured by the wrong, then an infant suffering personal injury from a defective food product manufactured before his conception would be without remedy. Such reasoning runs counter to the various principles of recovery which [the law] recognizes for those ultimately suffering injuries proximately caused by a defective product or instrumentality manufactured and placed on the market by a defendant.

Therefore, the court of appeals reasoned that if causation and proxim-
mate cause could be proven, the majority view would support “an action . . . for prenatal injuries negligently inflicted if the injured child is born alive.”

In 1977, the Illinois Supreme Court in *Renslow v. Mennonite Hospital* became the first state court of last resort to grant a cause of action to an infant for preconception negligence. In *Renslow*, eight years prior to conception, the plaintiff’s mother had received the wrong blood type during a transfusion which had sensitized the mother’s immune system which then caused prenatal hemolysis of the plaintiff’s blood cells. The complaint alleged that the prenatal damage to the plaintiff’s red blood cells had endangered her life and had caused her premature birth. The plaintiff sought damages for injuries which included permanent damage to her brain and nervous system. The trial court dismissed the complaint because the defendants owed no duty of care to the child prior to conception.

However, the Appellate Court of Illinois reversed, stating that there was “no logical reason to deny recovery . . . simply because [the plaintiff] had not yet been conceived when the wrongful conduct took place.” Although the defendants argued that the plaintiff’s injuries were unforeseeable at the time of her mother’s blood transfusion, the appellate court disagreed. The court noted that the defendants were a doctor and a hospital and could have foreseen that a thirteen year-old patient — plaintiff’s mother-to-be — would at some point marry and have a child who could be harmed as a result of improper blood transfusions. In addition, the appellate court found that other areas of tort law did not bar recovery simply because the wrongful conduct occurred before the injury.

On appeal, the Illinois Supreme Court affirmed but disagreed.
with the appellate court's conclusion that "duty and foreseeability are identical in scope." Instead, the supreme court required a showing that the likelihood of harm due to the defendants' negligence was foreseeable by the tortfeasors and also that their conduct had violated a duty which, had it been performed, would have precluded the harm. The court remarked that because the plaintiff was not in existence at the time of the defendants' wrongful conduct, the traditional notions regarding duty of care would seem inapplicable. However, the court stated that "duty is not sancrosant in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." Thus, because courts grant relief for injuries incurred prior to viability, the court found it illogical to bar relief for preconception liability since the defendant would be liable for the same offense had the child, even without defendant's knowledge, been conceived prior to his act.

NEW YORK'S APPROACH TO PRECONCEPTION LIABILITY

Relatively few jurisdictions have granted recovery for preconception torts and, until recently, New York's position has been that no cause of action may be sustained by a child for preconception injuries to the mother. In 1976, a New York trial court, in Park v. Chessen, allowed the wrongful life claim of an infant afflicted with polycystic kidney disease based upon the preconception malpractice of the two defendant obstetric specialists. The infant had died at the age of two and one-half years from the same congenital defects which had caused the death of the Park's first child. Prior to the second child's conception, the parents had sought the advice and medical care of the defendants regarding the possibility of having another child similarly afflicted. The complaint, brought by the parents on the child's behalf, alleged that the risk of having another child born with the same congenital defects as their first child was

163. Renslow, 67 Ill. 2d at —, 367 N.E.2d at 1253, 1261.
164. Id. at —, 367 N.E.2d at 1255.
165. Id. at —, 367 N.E.2d at 1254.
166. Id. at —, 367 N.E.2d at 1254. (citing Prosser on Torts § 53, at 325-26 (4th ed. 1971); Prosser, Palsgraf Revisited, 52 Mich. L. Rev. 1, 15 (1953); White, The Right of Recovery for Prenatal Injuries, 12 La. L. Rev. 383, 401 (1952)).
167. 67 Ill. 2d at —, 367 N.E.2d at 1255.
170. Id. at —, 387 N.Y.S.2d at 206-07, 212.
171. Id. at —, 387 N.Y.S.2d at 206.
172. Id. at —, 387 N.Y.S.2d at 206-07.
never communicated to the parents by the doctors. 173 The trial court had allowed the cause of action and stated that medical specialists may be held liable for preconception negligent acts. 174 The court said that “[i]t makes no difference how much time elapses between a wrongful act and a resulting injury if there is a causal relationship between them.” 175 The trial court noted that the causal link between the defendants’ malpractice and the child’s injuries had been established, and the doctors’ advice had influenced the mother’s decision to become pregnant. 176 The court stated that the birth of the child was foreseeable to the doctors; however, foreseeability was not a “necessary ingredient” for sustaining liability. 177 The court also stated that once causation was established, the infant should be compensated for the injuries if the infant is born alive. 178 The fact that the infant was not in existence at the time of the malpractice was of no relevance to the court. 179

However, the New York Court of Appeals in Becker v. Swartz 180 modified the Park decision by refusing to recognize a wrongful life claim. 181 In Becker, the defendant physicians failed to inform the expectant parents about the availability of an amniocentesis test which could have detected that the fetus was afflicted with Down’s Syndrome and would have precipitated a decision on the parent’s part to end the pregnancy; the failure to terminate the pregnancy resulted in the live birth of a child afflicted with Down’s Syndrome. 182 The court in Becker noted that there was no basis statutorily or at common-law for granting the impaired child a cause of action. 183 The court also discussed the “staggering implications” of any law which would allow claims because the child was less than perfect. 184 Finally, the court in Becker stated that sentiment should be put aside when faced with a novel cause of action. 185

Wrongful life cases are distinguishable from other preconception tort cases, such as those involving DES, in which the plaintiff claims that the alleged negligence caused life in an impaired state versus life
in an unimpaired state. In wrongful life cases, the plaintiff asks the court to calculate damages dependant upon a comparison between life in an impaired state and nonexistence. Nevertheless, the arguments used in Becker have been applied to other preconception tort cases. For example, the New York Court of Appeals in Albala, expressed the same concerns as the court in Park regarding preconception tort liability. In Albala, the plaintiff's mother suffered from a perforated uterus after a negligently performed abortion. Approximately four and one-half years later, the plaintiff was born brain damaged as a result of his mother's perforated uterus.

The New York Court of Appeals discussed a variety of policy considerations in support of its holding that the child did not have a cause of action against the doctors who negligently performed his mother's abortion. Such considerations included the possibility of unlimited liability. The court stated, for example, that if a negligent motorist hits another vehicle containing a female passenger whose uterus is punctured as a result of the accident and she later gives birth to an impaired child, the negligent motorist would be liable to the child. The court agreed that imposing perimeters of liability is a proper legislative concern, but that in preconception tort cases, liability could not be judicially established in a practical and reasonable manner. However, the court in Albala stated that this decision encompassed policy considerations which were unique to negligence actions and that the area of products liability may require a different analysis.

In Catherwood v. American Sterilizer Co., the plaintiff, who was conceived after her mother's exposure to ethylene oxide, a chemical used to sterilize materials that cannot withstand steam or heat, argued that the Albala decision was not dispositive of her

187. Id.
188. Catherwood, 130 Misc. 2d at —, 498 N.Y.S.2d at 706. See infra notes 204-11 and accompanying text.
190. Id. at 271, 429 N.E.2d at 787, 445 N.Y.S.2d at 109.
191. Id.
194. Id.
195. Id. at 273-74, 429 N.E.2d at 788, 445 N.Y.S.2d at 110.
196. Id. at 274, 429 N.E.2d at 788, 445 N.Y.S.2d at 110.
However, the court in *Catherwood* interpreted *Albala* as neither disallowing a cause of action for preconception injuries based on a theory other than negligence nor allowing a cause of action based in strict products liability. Thus, the court assessed the policy considerations surrounding a preconception strict liability action. The court was concerned with the need for "limitation of liability in exposure and ingestion cases" and the "proliferation of frivolous claims and claims where proof presents a hardship to defendants." In addition, the court found that no duty to the unconceived had been recognized in New York. Thus, the court dismissed the case.

**PRODUCTS LIABILITY: DIETHYlstilbestrol ("DES")**

DES plaintiffs must face a variety of legal hurdles including the identification of the drug manufacturer, the running of the statute of limitations, and the nonrecognition of prenatal and/or preconception torts. However, the applicability of preconception tort liability within the context of DES litigation has not been the focal point of these cases because the majority of plaintiffs were already conceived at the time of DES ingestion by their mothers. Thus, DES suits involving the extension of duty under tort law to someone not yet conceived, including claims brought by third generations, are just beginning to emerge.

Although New York is facing the issue of preconception torts within the context of DES for the first time, the state's interest in providing relief for DES victims is apparent both legislatively and juridically. 

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200. *Id.* at —, 498 N.Y.S.2d at 705.
201. *Id.* at —, 498 N.Y.S.2d at 705.
202. *Id.* at —, 498 N.Y.S.2d at 706.
203. *Id.* at —, 498 N.Y.S.2d at 706.
204. *Id.* at —, 498 N.Y.S.2d at 706.
In 1978, the New York Legislature enacted legislation to assist DES victims because it considered "[t]he effective identification, screening, diagnosis, care and treatment of persons who have taken [DES], or who have been exposed to DES prenatally [to be] of paramount public importance." However, one of the principal problems facing DES plaintiffs was the inability to comply with the New York statute of limitations which was based on a date-of-injury rule. Therefore, in 1986, the New York Legislature enacted the Toxic Tort Revival Statute which abolished the "date-of-injury" rule and adopted a "discovery" statute of limitations. The statute applies to persons exposed to the latent effects of five substances, including diethylstilbestrol. By abandoning the date-of-injury rule and adopting a discovery statute of limitations, the New York Legislature intended to relieve the harsh consequences inflicted upon parties whose causes of action were time-barred before the injuries were even detected. In addition, a one-year window from the effective date of the act was opened. For one year, persons exposed to one of the five substances were able to resurrect a cause of action which was previously dismissed because the statute of limitations had run or, if they had never filed but were now time-barred under the "date-of-injury" rule, a claim could still be filed during this one-year period.

Another fundamental barrier which DES plaintiffs face is an inability to identify the exact manufacturer of the DES which caused

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208. See infra notes 209-32 and accompanying text.
210. Besser v. E.R. Squibb & Sons, Inc., 146 A.D.2d 107, —, 539 N.Y.S.2d 734, 736-38 (1989). This case involved the interplay between two New York statutes, the "revival statute" and the "borrowing statute." The case contains a review of the legislative history and a statutory interpretation of both statutes. Id. at —, 539 N.Y.S.2d at 735-40. For example, the court stated that the revival statute was concerned solely with "the harshness of a time-bar that focused on a victim's exposure to a toxic substance", and that its remedial purpose was "merely to remove the obstacle of the last exposure rule, not to repeal the salutary purposes underlying the borrowing statute." Id. at —, 539 N.Y.S.2d at 737.
211. N.Y. PUB. HEALTH LAW § 4 (McKinney 1986).
212. Id. The other four substances are tungsten-carbide, asbestos, chlordane, and polyvinyl-chloride. Id.
213. Besser, 146 A.D.2d at —, 539 N.Y.S.2d at 737-38 (1989). A discovery statute of limitations allows an injured party to assert a cause of action within a certain number of years from the date of discovery of the injury. PROSSER & KEETON, supra note 117, § 30, at 165-67. On the other hand, a statute of limitations based on "last exposure" begins to run at the time of the victim's exposure. Id.
the injuries, as is generally required in a products liability action.\textsuperscript{216} However, a variety of approaches have been adopted by courts, including those of New York, which aid plaintiffs in overcoming this causation problem.\textsuperscript{217} In \textit{Bichler v. Eli Lilly & Co.},\textsuperscript{218} the New York Court of Appeals allowed a concerted action theory of liability which was later replaced by the market share theory.\textsuperscript{219} The concerted action theory makes those who take part in the wrongdoer's act, in pursuance of a common design or plan to commit a tortious act, equally liable.\textsuperscript{220} The court assessed the challenge facing plaintiffs who are unable to identify the drug company that manufactured the DES which caused the injuries.\textsuperscript{221} The court in \textit{Bichler} stated that because of the "unusual DES fact pattern," its decision would entail more than just a straight application of products liability law.\textsuperscript{222} The court recognized that some DES cases could be "prosecuted within well-established principles of products liability as those principles have been adapted to the manufacturing and marketing of prescription drugs."\textsuperscript{223} However, the court in \textit{Bichler} was concerned about the far more common DES case in which the identity of the drug manufacturer is unknown and undeterminable.\textsuperscript{224} The court insisted that "products liability law cannot be expected to stand still where innocent victims face 'inordinately difficult problems of proof.'"\textsuperscript{225}

In \textit{Hymowitz v. Eli Lilly & Co.},\textsuperscript{226} the New York Court of Appeals decided two issues pertaining to DES litigation — one involving the market share theory of liability and the other involving New York's revival statute.\textsuperscript{227} The court in \textit{Hymowitz} assessed the merits of the concerted action theory and the alternative liability approach, which imposes joint and several liability upon all defendants who ac-

\textsuperscript{216} \textit{Hymowitz}, 73 N.Y.2d at 504, 539 N.E.2d at 1073, 541 N.Y.S.2d at 945. All brands of DES had the same chemical composition; thus, pharmacists used whatever was available from approximately 300 manufacturers who produced the drug making the identification process, coupled with the long latency period, even more difficult. Id. at 503, 539 N.E.2d at 1072, 541 N.Y.S.2d at 944.

\textsuperscript{217} Note, Market Share Liability: An Answer to the DES Causation Problem, 94 Harv. L. Rev. 668, 668 (1981).

\textsuperscript{218} 55 N.Y.2d 571, 436 N.E.2d 182, 450 N.Y.S. 777 (1982).

\textsuperscript{219} \textit{Bichler}, 55 N.Y.2d at 581, 436 N.E.2d at 186, 450 N.Y.S.2d at 780.

\textsuperscript{220} Prosser & Keeton, supra note 117, § 46, at 322-23.

\textsuperscript{221} \textit{Bichler}, 55 N.Y.2d at 579, 436 N.E.2d at 185, 450 N.Y.S.2d at 779.

\textsuperscript{222} Id. at 580, 436 N.E.2d at 185, 450 N.Y.S.2d at 779.

\textsuperscript{223} Id. at 579, 436 N.E.2d at 185, 450 N.Y.S.2d at 779.

\textsuperscript{224} Id. There is usually a time lapse from the ingestion of DES to the manifestation of injury and then an additional delay after that before determining that DES was probably the cause. Note, 46 Fordham L. Rev. at 972.

\textsuperscript{225} \textit{Bichler}, 55 N.Y.2d at 579-80, 436 N.E.2d at 185, 450 N.Y.S.2d at 779 (quoting Caprara v. Chrysler Corp., 52 N.Y.2d 114, 123, 417 N.E.2d 545, 436 N.Y.S.2d 251 (1981)).


\textsuperscript{227} \textit{Hymowitz}, 73 N.Y.2d at 502-16, 539 N.E.2d at 1071-80, 541 N.Y.S.2d 944-52.
ted tortiously without requiring a showing of express or tacit understanding. The court considered the market share concept to be the appropriate method for DES cases. The court stated that the market share approach apportions liability according to the overall culpability of each defendant, using a national market as the measuring device, and is not based on causation. Thus, recovery against a DES manufacturer became possible without identification of the specific drug producer that caused the injury. In reaching its decision, the court in Hymowitz noted New York's policy toward DES litigation:

Indeed, it would be inconsistent with the reasonable expectations of a modern society to say to these plaintiffs that because of the insidious nature of an injury that long remains dormant, and because so many manufacturers, each behind a curtain, contributed to the devastation, the cost of injury should be borne by the innocent and not the wrongdoers. This is particularly so where the Legislature consciously created these expectations by reviving hundreds of DES cases. Consequently, the ever-evolving dictates of justice and fairness, which are the heart of our common-law system, require formation of a remedy for injuries caused by DES.

Once again, the state's interest in providing relief to DES victims was readily apparent.

ANALYSIS

A New York Supreme Court, Appellate Division, Third Department, in Enright v. Eli Lilly & Co. granted the granddaughter of a woman who had ingested DES the right to proceed on a strict products liability theory against certain DES drug manufacturers. Relying on the New York policy favoring a remedy for DES victims, the appellate court held that the creation of arbitrary generational limits in the area of DES litigation would insulate drug manufacturers and "dilute the economic incentive to turn out safe products." Although the result in Enright is different from prior New York decisions denying preconception torts, the decision is nevertheless consistent with the analysis of the New York courts which have em-

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228. Id. at 505, 539 N.E.2d at 1074, 541 N.Y.S.2d at 946.
229. Id. at 505-09, 539 N.E.2d at 1074-76, 541 N.Y.S.2d at 946-48.
230. Id. at 512, 539 N.E.2d at 1078, 541 N.Y.S.2d at 950.
231. Id.
232. Id. at 507, 539 N.E.2d at 1075, 541 N.Y.S.2d at 947.
234. Id. at —, 553 N.Y.S.2d at 497.
235. Id. at —, 553 N.Y.S.2d at 498.
236. See supra notes 168-204 and accompanying text.
phasized public policy considerations.\textsuperscript{237}

In \textit{Albala v. City of New York},\textsuperscript{238} the plaintiff was conceived and born after his mother underwent a negligently performed abortion which allegedly resulted in the plaintiff’s brain damage.\textsuperscript{239} Although the majority and dissent in \textit{Albala} both noted that the injuries to the plaintiff were causally related, foreseeable and resulted in verifiable damages, the court still denied liability.\textsuperscript{240} Fearing undistinguishable parameters of liability as well as encouraging defensive medicine, it denied the child a cause of action for the alleged preconception malpractice of the defendants.\textsuperscript{241} Thus, in \textit{Albala}, the court left unresolved New York policy regarding preconception tort causes of action within the context of products liability.\textsuperscript{242} This issue was addressed five years later in \textit{Catherwood v. American Sterilizer Co.}.\textsuperscript{243}

In \textit{Catherwood}, a New York trial court stated that had this been a negligence action, the decision in \textit{Albala} would have been controlling and a determination in favor of defendants imminent.\textsuperscript{244} However, \textit{Catherwood} was an exposure case based on strict products liability and, therefore, presented an issue of first impression.\textsuperscript{245} Although the court in \textit{Catherwood} reached the same conclusion as in \textit{Albala} and denied the plaintiff’s preconception tort cause of action, this decision was reached after careful assessment of the policy concerns unique to strict products liability litigation rather than a simple extension of \textit{Albala} denying all preconception torts.\textsuperscript{246} The court in \textit{Catherwood} agreed that there may not be many policy reasons for limiting liability in cases involving strict liability without fault.\textsuperscript{247} However, the court determined that ingestion or exposure cases should be an exception.\textsuperscript{248} Specifically, the court held that it seemed “incongruous to allow an action for preconception tort in an exposure

\begin{footnotes}
\item[237] See infra notes 238-51 & accompanying text.
\item[239] Id. at 271, 429 N.E.2d at 787, 445 N.Y.S.2d at 109-09.
\item[240] Id at 273, 429 N.E.2d at 788, 445 N.Y.S.2d at 110.
\item[241] Id. at 273-74, 429 N.E.2d at 788, 445 N.Y.S.2d at 110.
\item[242] Id.
\item[244] Id. at —, 498 N.Y.S.2d at 705.
\item[245] Id. at —, 498 N.Y.S.2d at 705. Rebecca Lee Patterson was conceived subsequent to her mother’s exposure to ethylene oxide which resulted in chromosomal damage to Rebecca and was the basis of this suit brought on her behalf. Id. at —, 498 N.Y.S.2d at 704.
\item[246] Id. at —, 498 N.Y.S.2d at 705-07.
\item[247] Id. at —, 498 N.Y.S.2d at 705. The court discussed a footnote in \textit{Albala} which suggested that there may not be policy reasons to limit liability in preconception torts involving a products liability theory. Id.
\item[248] Id. at —, 498 N.Y.S.2d at 706.
\end{footnotes}
case while applying a statute of limitations which accrues on date of last exposure." 249 The end result would be accrual long before conception, and the court questioned how a plaintiff not in existence at the time could sustain a cause of action. 250 Consequently, the plaintiff's cause of action was denied. 251

Although Enright involved an ingestion case which, arguably, fits within the parameters of the Catherwood decision, there have been several responses to this comparison. 252 For example, the dissent in Catherwood distinguished Albala not based on policy concerns but because Albala only applied to medical malpractice actions. 253 Therefore, the dissent in Catherwood contended that preconception tort actions should be available in a products liability setting. 254 Also, the court in Enright stated that the Catherwood statute of limitations policy concern was alleviated by New York's subsequent abandonment of the date-of-injury rule and its replacement with a date-of-discovery rule. 255

In strict products liability cases, once a causal relationship has been established, the liability of the manufacturer is extended to all persons affected, regardless of foreseeability, privity or due care. 256 Thus, the court in Enright stated that it was not faced with the same policy concerns as in Catherwood and was able to recognize a strict products liability cause of action due to the conspicuous absence of the necessity of establishing manageable bounds as espoused in Albala and affirmed in Catherwood. 257

However, the court in Enright was emphatic about the fact that the overriding policy concern in this case was DES. 258 In this regard, the court stated that New York's interest in protecting the rights of DES victims is supported both by case law and legislation. 259 In Bichler v. Lilly & Co., 260 the New York Court of Appeals allowed a DES daughter to pursue any joint tortfeasor. 261 The court recognized the difficulties which threaten recovery for the majority of victims, such as the inability to pinpoint the manufacturer directly responsi-

249. Id. at —, 498 N.Y.S.2d at 706.
250. Id. at —, 498 N.Y.S.2d at 706.
251. Id. at —, 498 N.Y.S.2d at 707.
252. See infra notes 253-256 and accompanying text.
254. Id. at —, 511 N.Y.S.2d at 806-07 (Callahan & Green, JJ., dissenting).
255. Enright, 155 A.D.2d at —, 553 N.Y.S.2d at 496.
256. Id. at —, 553 N.Y.S.2d at 496.
257. Id. at —, 553 N.Y.S.2d at 496.
258. Id. at —, 553 N.Y.S.2d at 496-97.
259. Id. at —, 553 N.Y.S.2d at 496-97.
261. Id. at 580-81, 436 N.E.2d at 186, 450 N.Y.S.2d at 780.
ble, and, therefore, extended the application of concerted action liability to include DES victims.\textsuperscript{262} The court stated that DES litigation was an area of law in which products liability could not be expected to stand still.\textsuperscript{263} In addition, the court in \textit{Hymowitz v. Lilly & Co.}\textsuperscript{264} modified the personal injury rules because "the present circumstances call for recognition of a realistic avenue of relief for plaintiffs injured by DES."\textsuperscript{265} Although a preconception tort was not involved in either the \textit{Bichler} or \textit{Hymowitz} case, the court in \textit{Enright} stated that both cases declared New York's policy favoring relief for DES victims.\textsuperscript{266}

In addition to New York case law supporting the state's position regarding DES victims, the New York Legislature has also displayed considerable flexibility in allowing DES victims a remedy.\textsuperscript{267} For example, in 1986, a date-of-discovery rule was adopted in place of the old date-of-injury rule for essentially all toxic torts.\textsuperscript{268} The new statute of limitations allows an injured party to assert a cause of action within three years from the date of discovery of the injury regardless of the date of exposure.\textsuperscript{269} Additionally, in order to eliminate the unfairness of the date-of-injury rule, a one-year window was opened which allowed DES victims the opportunity to bring a cause of action where previously barred by the old date-of-injury rule.\textsuperscript{270}

The dissent in \textit{Enright} argued that this decision involved considerable judicial overreaching because New York had never recognized preconception tort liability.\textsuperscript{271} While preconception torts were denied in both \textit{Albala} and \textit{Catherwood}, these decisions were not reached simply because they involved preconception torts.\textsuperscript{272} Rather, the decisions were made after each court carefully analyzed the policy concerns pertaining to the specific case.\textsuperscript{273} Therefore, \textit{Enright} cannot be assessed strictly in terms of New York's prior decisions denying preconception tort liability, but must also incorporate New York's policies regarding assistance for DES victims.\textsuperscript{274}

A very narrow reading of the \textit{Enright} decision would allow future preconception tort causes of action where the injuries were

\textsuperscript{262} Id. at 579-80, 436 N.E.2d at 185, 450 N.Y.S.2d at 779.
\textsuperscript{263} Id. at 579-80, 436 N.E.2d at 185, 450 N.Y.S.2d at 779.
\textsuperscript{264} 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941 (1989).
\textsuperscript{265} Id. at 507, 536 N.E.2d at 1075, 541 N.Y.S.2d at 947.
\textsuperscript{266} Enright, 155 A.D.2d at —, 553 N.Y.S.2d at 496-97.
\textsuperscript{267} Enright, 155 A.D.2d at —, 553 N.Y.S.2d at 497.
\textsuperscript{268} See supra notes 9-11 and accompanying text.
\textsuperscript{269} N.Y. PUB. HEALTH LAW § 2 (McKinney 1978).
\textsuperscript{270} Id. at § 4.
\textsuperscript{271} Enright 155 A.D.2d at —, 553 N.Y.S.2d at 498 (Weiss, J., dissenting).
\textsuperscript{272} See supra notes 192-203 and accompanying text.
\textsuperscript{273} See supra notes 192-203 and accompanying text.
\textsuperscript{274} Enright, 155 A.D.2d at —, 553 N.Y.S.2d at 496-97.
caused by DES and thus grounded in strict products liability. The Enright court “neither fashioned a new remedy out of sympathy nor overturned established legal principles.” Instead, it adhered to New York’s policy favoring a remedy for DES victims and concluded that Karen Enright’s allegations adequately met the requirements of a strict products liability cause of action. Although recognition of a preconception tort was considered to be the main issue on this appeal, the court shifted its focus to the fact that DES was involved, and it is from this standpoint that the case was resolved. However, according to the dissent, the only way to resolve this case was by application of New York precedent regarding preconception torts. The dissent argued that Albala is the law in New York with respect to medical malpractice and common-law negligence cases. The dissent noted that a preconception tort was denied in Albala because to allow it would “require the extension of traditional tort concepts beyond manageable bounds.” In addition, the dissent stated that no reliance should be placed on the footnote in Albala which suggests that preconception tort litigation in strict products liability may be allowed.

The dissent also distinguished Bichler and Hymowitz because neither of these cases involved preconception plaintiffs but rather DES victims injured in utero. The dissent was not influenced by the fact that the plaintiff’s injuries were caused by DES but rather considered the Enright decision to be in direct conflict with New York’s policy regarding preconception torts.

However, the Enright decision cannot be so broadly construed as to suggest that New York has opened the door for all preconception tort cases. In allowing the plaintiff a cause of action in strict products liability, the court reasoned that:

although plaintiff is not a “DES daughter” — one who was exposed to DES while in utero — she may be no less a victim of the devastation wrought by DES than her mother, who is a DES daughter, and we see no sound basis for denying plaintiff her day in court along with her mother.

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275. Id. at —, 553 N.Y.S.2d at 496-97.
276. Id. at —, 553 N.Y.S.2d at 498.
277. Id. at —, 553 N.Y.S.2d at 498.
278. Id. at —, 553 N.Y.S.2d at 495-96.
279. Id. at —, 553 N.Y.S.2d at 498 (Weiss, J., dissenting).
280. Id. at —, 553 N.Y.S.2d at 498-99 (Weiss, J., dissenting).
281. Id. at —, 553 N.Y.S.2d at 499 (Weiss, J., dissenting).
282. Id. at — n.1, 553 N.Y.S.2d at 499 n.1 (Weiss, J., dissenting).
283. Id. at —, 553 N.Y.S.2d at 499 (Weiss, J., dissenting).
284. Id. at —, 553 N.Y.S.2d at 498 (Weiss, J., dissenting).
285. Id. at —, 553 N.Y.S.2d at 497.
286. Id. at —, 553 N.Y.S.2d at 497.
Thus, the court’s decision was based entirely on the DES factor and should not be considered a new policy favoring all preconception tort plaintiffs.287 In terms of legislation, the dissent cited Besser v. Squibb & Sons288 as support for the contention that New York’s toxic tort revival statute applies only to DES users and persons in utero.289 However, Besser did not involve a preconception tort but involved a statutory interpretation of New York’s revival statute.290 As stated by the dissent, the literal language of the statute applies to every action for personal injury or injury to property caused by “the latent effects of exposure to [DES] upon or within the body.”291 Yet, this was not interpreted by the court in Besser to mean that no duty to unconceived generations exists.292 The court was concerned instead with ascertaining the legislature’s intent rather than adhering “slavishly to the statute’s literal language.”293 It held that the “primary impetus behind enactment of the revival statute was to relieve the harsh results of New York’s exposure-based statute of limitations, which, due to the latent effects of exposure to some toxic substances, might have expired before the injured party even knew of his injuries.”294 Thus, the dissent’s reliance on this case within the context of preconception torts was misplaced.295

Furthermore, the future impact of the Enright decision is unlikely to reach “beyond manageable bounds” as suggested by the dissent.296 It is true that the traditional fault concept is premised upon foreseeability and duty, and causation cannot be the single determinative factor.297 However, in determining to whom a duty is owed, the court must consider not only foreseeability of harm but social policy as well.298 According to Dean Prosser, “in the end the court will decide whether there is a duty on the basis of the mores of the community, ‘always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind.’”299 The court in Enright

287. Id. at —, 553 N.Y.S.2d at 498.
290. Besser, 146 A.D.2d at —, 539 N.Y.S.2d at 735.
293. Id. at —, 539 N.Y.S.2d at 737.
294. Id. at —, 539 N.Y.S.2d at 738.
295. See supra notes 285-87 and accompanying text.
296. See supra notes 275-77 and accompanying text.
298. Id. at —, 367 N.E.2d at 1263 (Ryan, J., dissenting).
made it clear that this case was distinguishable on its facts from other New York cases regarding preconception torts because of DES; therefore, the result was clearly a social policy decision.\(^{300}\) As a result, its usefulness in preconception tort cases involving something other than DES should be minimal.\(^{301}\)

If the Enright decision is broadly construed in subsequent cases as precedent favoring all preconception torts, the legislature has the authority to limit both the Enright type cause of action and other preconception claims.\(^{302}\) This can be accomplished by expressly restricting the potential plaintiffs and defendants and by striking a balance between the rights of preconception plaintiffs and the public's interest in minimizing stale claims.\(^{303}\) First, the statute could exclude the natural parents as potential defendants, thus preventing disruption of the public's interest in family harmony.\(^{304}\) Second, a statute of limitations could be set barring claims against nonmedical persons or places if not commenced within a certain number of years from the date of the negligent conduct.\(^{305}\) Members of the medical profession could be excluded since they are better prepared to bear the burdens of large recoveries.\(^{306}\) Finally, in terms of Enright type cases, the statute could limit recovery to plaintiffs from certain generations; for example, "the first generation to follow the preconception negligent act."\(^{307}\) Such restrictions are for the legislatures and courts to consider; however, limitations are possible.\(^{308}\)

Considering the vast changes which have occurred in the area of prenatal injury law, the Enright decision is a natural development.\(^{309}\) In Kelly v. Gregory,\(^{310}\) New York became the first state to expand the right of action for injuries incurred prior to viability, which reflects its willingness to extend the duty of care to protect persons whose existence is not readily apparent.\(^{311}\) In addition, the New

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\(^{300}\) Enright, 155 A.D.2d at —, 553 N.Y.S.2d at 496.

\(^{301}\) See supra note 278 and accompanying text.

\(^{302}\) See infra notes 303-08 and accompanying text.

\(^{303}\) Comment, Preconception Tort: The Need For A Limitation, 44 Mo. L. Rev. 143, 152 (1979).

\(^{304}\) Id.

\(^{305}\) Id.

\(^{306}\) Id.

\(^{307}\) Id. The statutory limitations should balance the need to protect the rights of persons suffering from prenatal injuries with the public's interest in precluding liability from advancing beyond certain bounds. Id. at 153.

\(^{308}\) Id.

\(^{309}\) See supra notes 72-204 and accompanying text.

\(^{310}\) 282 A.D. 542, 125 N.Y.S.2d 696 (1953).

York Supreme Court in Park v. Chessin became the first state court to allow a child a cause of action for conscious pain and suffering based upon a preconception tort. Although Park was later modified, given the present trends in the law, the timing of a tortfeasor's negligence may soon become irrelevant.

CONCLUSION

In its decision to allow Karen Enright a preconception tort cause of action in strict products liability, the New York Supreme Court, Appellate Division, used the same analysis as applied in prior New York cases involving DES, and demonstrated the state's flexibility in affording a remedy to DES victims. The court in Enright v. Eli Lilly & Co. balanced the concerns associated with preconception tort causes of action against the devastating effects of DES and considered its decision to have struck a delicate balance. The Enright decision is also compatible with the underlying purpose of New York legislation, such as the Toxic Tort Revival Statute, which was enacted to assist DES victims who had been shut out by the "date-of-exposure" rule. Thus, the State of New York has made its position quite clear, both legislatively and judicially, in favoring a remedy for DES victims. The decision in Enright simply extends this logic and demonstrates the willingness of the state of New York to enforce this policy.

EPILOGUE

Subsequent to the completion of this Note, the New York Court of Appeals reversed the Supreme Court, Appellate Division and dismissed Karen Enright's preconception tort cause of action. The court stated that a DES cause of action does not present any unique features which would justify the extension of liability to third generation plaintiffs. The court admitted that both the New York Legis-
lature and New York courts have removed legal barriers to tort recovery in the past simply because of the "peculiar injustice" which DES litigation worked.\textsuperscript{322} According to the court, the enactment of these "special rules" was justified because of the "insurmountable barriers" facing DES victims.\textsuperscript{323} However, the court characterized Karen Enright's preconception tort claim as something "significantly different" than the removal of a legal barrier unique to DES victims.\textsuperscript{324} According to the court, the policy concerns espoused in \textit{Albala v. City of New York},\textsuperscript{325} an earlier preconception tort case in which the court refused to recognize a cause of action on behalf of the child, were equally applicable to the present case regardless of the fact that DES was involved.\textsuperscript{326}

The court refuted the plaintiff's second argument, that because \textit{Enright} was a strict products liability cause of action, it involved different policy considerations than those addressed in \textit{Albala} which was a negligence action.\textsuperscript{327} The court refused to extend a strict products liability cause of action to Karen Enright because of several countervailing policy concerns.\textsuperscript{328} First, the court noted the "staggering implications" which could result if DES exposure has a "rippling effect" which extends for generations.\textsuperscript{329} The court stated that in order to confine liability within manageable limits, a cause of action should only be allowed to those who were exposed to DES in utero or

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\textsuperscript{322} Id. at 2.

\textsuperscript{323} Id.

\textsuperscript{324} Id. at 3.


\textsuperscript{326} \textit{Enright}, 1991 WL 18192 at 3. The court in \textit{Albala} held that to allow the child a cause of action would "require the extension of traditional tort concepts beyond manageable bounds". \textit{Albala}, 54 N.Y.2d at 271-72, 429 N.E.2d at 787, 445 N.Y.S.2d at 109.

\textsuperscript{327} \textit{Enright}, 1991 WL 18192 at 4.

\textsuperscript{328} Id. The court agreed that recovery is often more likely in a strict products liability action than in an ordinary negligence action because the manufacturer of a defective product is held strictly liable for the injury caused by their products regardless of foreseeability, privity, or due care. \textit{Id.} at 4-5. In addition, the court stated that imposing liability on the manufacturer is based on a policy of deterrence which encourages the development of safer products. \textit{Id.} at 5. The court noted that although the purpose of imposing liability on a negligent tortfeasor is also based on a deterrence policy, in the area of products liability, "the need for deterrence . . . may have added weight" considering the risks involved in a product which could reach a broad range of potential victims. \textit{Id}.

\textsuperscript{329} Id. \textit{See supra} notes 192-93 and accompanying text.
who ingested DES. Second, the majority stated that because manufacturers were still amenable to suit by those persons injured by exposure to DES, limiting their liability would not impair the deterrent purposes of tort liability. In addition, the need for the tort system to provide a deterrent effect is somewhat diminished because the Food and Drug Administration exercises primary responsibility for prescription drug safety. Finally, the court stated that because of the dangers of overdeterrence and "the possibility that research will be discouraged or beneficial drugs withheld from the market", public policy endorses the availability of prescription drugs despite their risks.

In a lengthy dissent, Justice Hancock characterized the court’s decision to be "an abrupt change in the course of New York strict products liability jurisprudence, a cut-back on recent precedent and a rejection of policy established by the Legislature and accepted by our court."

First, Justice Hancock argued that the 1986 Toxic Tort Revival Statute had been enacted for the express purpose of remedying a fundamental injustice in New York law which had denied relief to persons suffering injuries from the latent effects of DES and other substances. Second, Justice Hancock stated that the New York

330. Id.
331. Id.
332. Id.
333. Id. at 6.
334. Id. at 7 (Hancock, J., dissenting). Justice Hancock stated that "[t]he matrix of social policy and legal precedent on which Karen Enright founds her claim has been constructed by the Legislature and our court." Id. Justice Hancock discussed the broad language in the toxic tort revival statute and the legislative history and stated that the majority’s "unduly constricted construction" of the statute was inconsistent with the basic notion that "remedial statutes are to be liberally construed to effectuate their aims and to promote justice." Id. at 8 (Hancock, J., dissenting). Justice Hancock also rebutted each of the majority’s arguments as follows: First, Justice Hancock was not persuaded by the majority’s fear of a proliferation of claims which could result if a third-generation plaintiff is granted a cause of action. He discussed repeated admonitions by New York’s highest court that this “floodgates of litigation” fear is not "a ground for denying a cause of action" and "... if a cognizable wrong has been committed, ... there must be a remedy, whatever the burden of the courts." Second, Justice Hancock stated that the majority’s suggestion that permitting a cause of action for Karen Enright could discourage researchers or cause beneficial drugs to be withheld from the market was inconsequential since the production and marketing of DES and other harmful products used by pregnant women stopped more than a generation ago. Additionally, the dissent espoused that even if deterrence is a relevant issue, society should not be "any less concerned with deterring the development of unsafe drugs which cause latent damage to the third generation than to the second." Finally, Justice Hancock described the majority’s statement that liability should stop at Karen’s mother’s generation because it is "commensurate with the risk" as "simply a statement of the court’s own policy determination as to where the risk and, hence, the liability stops." Id. at 9-10 (Hancock, J., dissenting).
335. Id. at 7-8 (Hancock, J., dissenting).
Court of Appeals in *Hymowitz v. Eli Lilly and Co.*[^336] had created a means for a DES victim to recover precisely because of the unique characteristics of DES and the underlying policy of the Toxic Tort Statute.[^337] Justice Hancock contended that the sole remaining question was "whether the remedy for DES victims made possible by the Legislature in [the Toxic Tort Revival Statute] and given effect by our court in *Hymowitz* should be withheld from a granddaughter who suffers injuries from this wrong."[^338] According to Justice Hancock, if social and economic considerations exist which warrant an arbitrary cut-off point in these kinds of cases, such a statute of repose could be engrafted on the Toxic Torts legislation.[^339] However, Justice Hancock noted that New York Legislature has not chosen to do this.[^340]

Additionally, Justice Hancock discussed what he considered to be two fundamental principles of justice which mandated that Karen Enright be permitted to prove her case, even if no clearly discernible legal or policy guidelines existed.[^341] First, he stated that because Karen Enright is a victim whose injuries could reach enormous proportions, she should be properly compensated pursuant to the judicial system.[^342] Second, relying on the basic principle that "like cases should be treated alike", Justice Hancock stated that Karen Enright was damaged no less than other DES victims and if they are permitted to recover for their injuries, then Karen Enright should also be permitted to recover.[^343]

In summary, Justice Hancock stated that:

> Our established strict products liability jurisprudence mandated by considerations of "justice and common sense", the compelling social policies prompting the adoption of [the] Toxic Torts bill, decisions in other jurisdictions allowing recovery for preconception torts and the legal commentary all call for a decision permitting Karen Enright to prove her claim. Yet the majority denies her this right. This decision ... amounts to an exercise in discretion and line drawing reflecting social and economic policy choices which should be made not by judges but by legislators.[^344]

[^337]: *Enright*, 1991 WL 18192 at 8 (Hancock, J., dissenting).
[^338]: Id.
[^339]: Id. at 10 (Hancock, J., dissenting).
[^340]: Id.
[^341]: Id.
[^342]: Id.
[^343]: Id. at 11-12 (Hancock, J., dissenting).
[^344]: Id. at 12 (Hancock, J., dissenting) (citations omitted).
CONCLUSION

The New York Court of Appeals could have affirmed the decision of the Supreme Court, Appellate Division and allowed Karen Enright a strict products liability claim without eviscerating New York's traditional limitations on preconception liability. Both the majority and the dissent agree that New York has shown legislative and judicial solicitude for DES victims. The special policies pertaining to DES victims which the Legislature has adopted and which New York courts have implemented should apply equally to Karen Enright's claim because she is no less a victim of DES than was her mother or grandmother. Instead of adhering to these special policies, the New York Court of Appeals has contrived its own policy considerations and arbitrarily determined where the risk and, therefore, the liability stops.

The Enrights' lawyer, Leonard Finz, may request that the New York Legislature respond to this issue. He is also considering asking the United States Supreme Court to review the case. According to Mr. Finz, this decision has left thousands of "victims of a calamity of overwhelming proportions without a legal remedy."

Margaret M. Hershiser—'91

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346. Id. at 10.
348. Id.
349. Id.