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Personality in Illinois Prenatal Tort Law

CASE COMMENTS

PERSONALITY IN ILLINOIS PRENATAL TORT LAW

Renslow v. Mennonite Hospital

INTRODUCTION

"Are lawyers, courts, big government dulling America's moral sense?" This question headlined a recent *U.S. News and World Report* article[1] in which the writer noted a trend in America away from traditional notions of personal responsibility for the common good to a new attitude of evasion of duty with accountability for actions imposed from without. Cited in the article as evidence of drift away from duty and responsibility was a case, *Renslow v. Mennonite Hospital*,[2] handed down August 8, 1977, by the Illinois Supreme Court, wherein a minor plaintiff brought an action in tort for injuries suffered through the alleged negligence and misconduct of the defendant hospital and doctor. The case's novelty lay in the fact that the conduct, transfusions given the plaintiff's mother, antedated the conception of the plaintiff by several years. Consideration here of the court's treatment of the principles of duty and personality is intended primarily to locate this precedent-making decision within the context of prior Illinois Supreme Court cases, and secondarily to show the application of traditional legal concepts and principles to a new sphere of interests created and increasingly enlarged by advances in medical science. More broadly, this comment may be seen as a very brief description of the jurisprudence of this area of tort law and of the process whereby the social ramifications of these advances have been mediated into conclusions of law.

THE CONCEPTUAL FRAMEWORK

The right to bring suit for prenatal injuries in cases like *Renslow* is controlled by judicial treatment of the anomalous relation of legal entities presented by mother and fetus during pregnancy. The difficulty of determining when and for what purposes one

1. *U.S. News and World Report* (Sept. 26, 1977).
2. Renslow v. Mennonite Hospital, 67 Ill. 2d 348, 367 N.E.2d 1250 (1977) [hereinafter cited as *Renslow*].

person may be said to have become two had led legal analysts to frame their syllogism in this way: all right-holders are legal persons; no unborn child is a legal person; hence, no unborn child is a right-holder.[3] As a non-right-holder, the unborn child was unable to complain in court of injuries suffered *in utero*. Live birth, as a clear and unimpeachable point of reference, was taken as the necessary personalizing moment for the purposes of bringing an action in tort. Also, since tort law is the regulation of conduct between persons who mutually hold and owe rights and duties as such,[4] the putative defendant in tort could owe no legal duty or standard of conduct to one without personal existence. No liability could attach either before birth or at any point after conduct for injuries to the unborn. Live birth signalled the first moment at which a duty might be imposed on other persons for the benefit of the child.

The development of tort doctrine, typified in Illinois cases prior to *Renslow*, was accomplished by modification of the middle or existential term of the legal syllogism. In this way, the moment of legal personality of the unborn (and hence of a possible duty to it) was pushed back from live birth to other identifiable points during pregnancy, especially that of viability, the moment at which the fetus can sustain life apart from the mother. *Renslow* represents a movement back beyond live birth, viability, previability or even conception. In this it demonstrates the formal completion of the concept of personality in this area of the law. Analysis here of the *Renslow* decision will center briefly on its facts and holding, followed by presentation of prior case law which will serve as a background for final treatment of the issues of duty and personality raised in the Justices' opinions.[5]

THE FACTUAL SITUATION

In 1965, when Emma Renslow, the plaintiff's mother, was 13 years of age, the defendant hospital and doctor gave her two large transfusions of Rh-negative blood. These transfusions were incom-

3. *Cf.* Stemmer v. Kline, 128 N.J. 455, 26 A.2d 489 (1942), discussed in Cowen, *An Agenda for Jurisprudence*, 49 CORNELL L.Q. 609, 622 (1964).

4. This working definition of tort may be compared with others given in PROSSER, LAW OF TORTS §§ 1-2 (4th ed. 1971), in which the difficulty of giving a single, comprehensive definition is discussed. The analysis of *Renslow* is intended to apply only to such other tort suits as come within the parameters of the definition given.

5. The opinion of the majority in *Renslow* was delivered by Mr. Justice Moran, with Justices Goldenhersh and Clark joining. The late Mr. Justice Dooley filed a concurring opinion. Justices Underwood and Ryan and Chief Justice Ward dissented, and each filed an opinion.

patible with her own Rh-positive blood and left it in a sensitized state. Neither the improper substitution of Rh factors nor its effects on Emma were discovered until December, 1973, when she was pregnant with Leah Ann Renslow, the plaintiff. Labor was induced in March, 1974, to avoid possible damage or death to the plaintiff as a result of injury due to her mother's sensitized blood.[6] Prematurely born, the plaintiff suffered from jaundice and hyperbilirubinemia, a condition caused by obstruction of the flow of bile from the liver and gall bladder to the intestine.[7] A complete transfusion of blood was given the plaintiff at birth and another shortly thereafter. Plaintiff brought suit, alleging that the sensitization of her mother's blood through defendants' negligence and misconduct led to oxygen deprivation to the tissues of her body, resulting in permanent damage to various organs, her brain and nervous system.[8]

The plaintiff's suit was dismissed at the trial level because she was not in existence at the time of the defendants' tortious conduct and hence had no cause of action. The trial court did not reach the issue of duty. On appeal, the dismissal was reversed; the court there held that non-existence would not bar an action where duty and causality could be found.[9] The case was accordingly remanded for consideration of those issues.

A certificate of importance brought the case before the Illinois Supreme Court to decide the issues of law presented. The court framed its inquiry in terms of one question: does a child not conceived at the time negligent acts were committed against its mother have a cause of action against the tortfeasor for its injuries resulting from that conduct?[10]

ILLINOIS SUPREME COURT HOLDING

The threshold question before the court in *Renslow* was whether the plaintiff could complain of the results of conduct that had preceded her physical existence. Clearly she could not on the basis of the controlling Illinois law with its requirement of viability prior to conduct.[11] Plaintiff's injuries must have started at a point soon after her conception in the summer or fall of 1973. The discovery in December of that year of the possibility of harm from

6. 367 N.E.2d at 1251.
7. *Id.*
8. *Id.*
9. Renslow v. Mennonite Hospital, 40 Ill. App. 3d 234, 351 N.E.2d 870 (1976).
10. 367 N.E.2d at 1251.
11. Rodriguez v. Patti, 415 Ill. 496, 114 N.E.2d 721 (1953).

her mother's sensitized blood prompted induction of labor in March, 1974, as the earliest point at which the plaintiff was able to sustain life apart from her mother, *i.e.*, was viable. The alleged tortious conduct of the defendants had occurred in 1965. The court, however, reviewed viability as the first moment of legal personality in the light of recent evidence showing that it varies considerably according to the race and weight of the fetus.[12] Noting also that clearly meritorious claims arising from fetal injury suffered during a previable stage were arbitrarily cut off, the court rejected the viability standard as a precondition of a common law tort action, significantly defined no new standard and allowed the plaintiff to press her action.[13]

Issues surrounding the concept of duty were the court's second consideration: did the defendants owe the plaintiff any standard of conduct prior to her conception? A legal duty and the standard of care that arises in law from it can be imposed only as to actions whose results were reasonably foreseeable at the time of their commission.[14] Illinois cases had defined the concept of foreseeability to include injuries to those whose existence was not apparent to the tortfeasor at the time of his conduct, as when an action results in harm to remote and unknown persons.[15] In the *Renslow* case, however, the defendants' conduct occurred in 1965, at a time when the plaintiff's "existence" was not only not apparent but was wholly devoid of any indicium of substantive, physical presence. The majority nonetheless found that it was not unforeseeable in 1965 that the plaintiff's mother might well become pregnant and that their actions on her might have deleterious effects on any eventual child. Also, the issue of foreseeability was presented in the context of an appeal of a motion to dismiss so that the court was obliged to accept the validity of all facts well-pleaded. Assuming foreseeability as a necessary condition of plaintiff's action, the court passed to the issue of duty as a narrower, sufficient factor in assessing liability.

The concept of duty encompasses a more restricted range of actions than either causality or foreseeability.[16] It is, furthermore, a general legal concept and represents the judicial reflection of socie-

12. *See* PROSSER, LAW OF TORTS § 55 (4th ed. 1971), cited in 367 N.E.2d at 1252.

13. 367 N.E.2d at 1252-53.

14. Green, *Foreseeability in Negligence Law*, 1961 COLUM. L. REV. 1401, 1417-18, cited in Cunis v. Brennan, 56 Ill. 2d 372, 375, 308 N.E.2d 617, 618 (1974).

15. Wintersteen v. Nat'l Cooperage and Woodenware Co., 361 Ill. 95, 197 N.E.2d 578 (1935).

16. Cunis v. Brennan, 56 Ill. 2d 372, 308 N.E.2d 617 (1974).

ty's sense of what one person owes others as members of a community.[17] In finding that the instant defendants owed the plaintiff a duty, the court relied on its holding in *Dini v. Naiditch*,[18] in which a defendant's negligent actions gave rise both to the plaintiff-husband's suit for personal injuries and to the plaintiff-wife's suit for loss of consortium. The defendant's breach of duty to the husband was thus transferred to the wife by reason of the existing relationship linking the two. So also in *Renslow*, the majority found that in breaching their duty of professional conduct to the mother, the defendants became liable as well for the injuries they caused the daughter.[19] Breach of duty to the one was transferred for the protection of the other so that the plaintiff could enforce her right to be born free of the effects of the defendants' harmful actions.

Logic and sound policy were cited by the court in support of its holding. The court stated that it was illogical to allow recovery to one not apparently existent when injured and deny recovery to another potentially injured when not actually existent at all.[20] The lapse of time between conduct and injury was held not to be a disabling impediment to suit where causality could be found. The advance in curative medical techniques was also cited as enhancing the holding's prophylactic usefulness.[21] The court countered the argument that its holding might impose perpetual liability, as to successive generations of families whose genetic material had been damaged through radiation, by noting that the injury in the instant case was not self-perpetuating but would end in this generation with the death of the plaintiff. The court also looked forward to principled judicial treatment of future cases in the same area.[22] The case was then remanded for consideration of the factual issues of foreseeability, causality and damages.

Most strictly analyzed, the facts and holding in *Renslow* do not describe a pre-conception tort, a term whose meaning should be limited to situations in which the genetic material transmitted to the child from the parents had been damaged, as by the effects of medical treatment or radiation.[23] Here, while the defendants' con-

17. 367 N.E.2d at 1254.
18. Dini v. Naiditch, 20 Ill. 2d 406, 170 N.E.2d 881 (1960).
19. 367 N.E.2d at 1255.
20. *Id.*
21. *Id.*
22. *Id.*
23. *See* the distinctions proposed in Note, *Preconception Injuries: Viable Extension of Prenatal Injury or Inconceivable Tort*, 12 VAL. U.L. REV. 143, 144-46 (1977),

duct antedated the plaintiff's conception by several years, the injury she suffered occurred at an early stage of her gestation. Had Leah Ann been removed from her mother's womb prior to that stage (if this were possible), she would have suffered no ill effects from defendants' conduct. In addition to eliminating the viability standard of legal personality, the Illinois Supreme Court has also allowed recovery for prenatal injuries that follow at some remove from the conduct that caused them.[24] This analysis, however, leaves untouched the necessity of the concept of contingent personality, as it will be developed here, as a legal theory to instrument the right-to-be-born-sound rationale adopted by the court.

ANALYSIS OF PRIOR CASE LAW

In finding a right in the plaintiff to be born free of prenatal injuries caused by defendants' breach of duty, the *Renslow* court built on a foundation of personal law laid in America by Mr. Justice Holmes in his opinion in *Dietrich v. Inhabitants of Northhampton.*[25] In that case, an action for wrongful death resulting from injuries negligently inflicted on a fetus was dismissed due to the decedent's lack of separate existence at the time of the conduct despite live birth after a gestation of four or five months. Holmes rejected analagous criminal law (*per* Lord Coke) which allowed prosecution for homicide of wilful conduct resulting in live birth of the affected fetus with death following thereafter.[26] Noting that the injured unborn had not yet "reached [any] degree of quasi-independent life," Holmes found the decedent had been a part of the mother at the time of conduct, hence without standing to complain of injuries suffered *in utero.*

It should be clear, however, that the holding in *Dietrich* rested on a factual determination based on the fetus' stage of development. As such, it did not reach the issue of whether the common identity of mother and unborn might end at some point prior to live birth. More importantly, Holmes' logic schematized the events of the

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with which this comment may profitably be read. Illinois may be added to the list of states that have adopted the right-to-be-born-sound theory of recovery, discussed in the note cited above at 156-57.

24. Another statement of this point is that the court has expanded the class of persons affected by negligent actions to include those who enter it after the specific conduct. The concept of contingent personality allows the better view that the class of affected persons includes all those who have existence as a factual condition or logical possibilty.

25. Dietrich v. Inhabitants of Northhampton, 138 Mass. 14 (1884).

26. *Id.* at 15-16.

prenatal injury case so that, whether injury followed conduct immediately or at a later time, both had to be preceded in time by the personal existence of both parties. Personality was thus seen as the prerequisite of rights and duties arising in this area of tort law. While the decedent in *Dietrich* became a person in law through live birth, his right to a standard of conduct ripened only after the conduct for which a duty could be found. Medical science in Holmes' day was largely unable to link conduct with injury following long after; today, medicine is increasingly able to pinpoint such causal relationships. The threshold legal question however is not the temporal and spatial relationship of conduct to injury, but whether the conduct was done to a person, to a right-holder, to whom a duty might be owed. The requirement of personality prior to conduct and *a fortiori* to injury is central to *Dietrich*, to the other cases that follow, as well as to *Renslow*, and it presents conceptual problems that the majority in *Renslow* only partially answered.

The question of prenatal personality not posed by Holmes in *Dietrich* was first answered in Illinois in *Allaire v. St. Luke's Hospital*.[27] There, an expectant mother was involved in the fall of an elevator at the hospital where her nine-month-old fetus was to be delivered. Labor followed the fall, and the child was born alive with severe injuries. The Illinois Supreme Court upheld dismissal of the minor plaintiff's suit on the ground that his "distinct and independent existence" had begun only after his injuries.[28] This court's test was clearly stricter than Holmes' suggested minimum of "some degree of quasi-independent life."

Dissenting from the majority in *Allaire*, Mr. Justice Boggs attacked the extension of the *Dietrich* rationale to the facts of *Allaire* precisely on the basis of the unborn's evident separability from its mother at the time of the defendant's conduct. In arguing against live birth as the substantive determinant of personality, Boggs stated:

> [W]henever a child *in utero* is so far advanced in prenatal age as that, should parturition by natural or artificial means occur at such age, such child could and would live separable from the mother and grow into the ordinary activities of life, and is afterwards born and becomes a living human being, such child has a right of action for any injuries wantonly or negligently inflicted upon his or her

27. Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N.E. 638 (1900).
28. *Id.* at 642.

> person at such age of viability, though then in the womb of the mother.[29]

Thus, the decision in *Allaire* closed the door left ajar in *Dietrich*, but not until Mr. Justice Boggs had announced and defined the key concept of viability.

In addition to the conceptual problems of personality and duty and the factual problems of the causal and cognitive link of conduct and injury, courts outside Illinois had found the lack of a contract between an injured unborn and a common-carrier defendant a bar to recovery, even assuming personality.[30] This lack of contractual obligation was overcome in a Canadian case, *Montreal Tramways Co. v. Leveille*,[31] in which the court held the defendant liable in tort and, more importantly, found a right of action in a viable fetus, subsequently born alive. Though based on civil law principles derived from Justinian,[32] this precedent-making decision of the Canadian Supreme Court was extensively quoted by Judge McGuire in the first American case, *Bonbrest v. Katz*,[33] to find a common law right of action for malpractice in a viable fetus. The court distinguished *Dietrich* factually and recognized the viable unborn as a person, able both to suffer harm *in utero* and after live birth to complain of its injuries. The decision thus modified the middle term of the classic legal syllogism by substituting pre-viable for unborn, thereby allowing the viable fetus, born alive, to sue for recovery.

The finding of personality in *Bonbrest* undermined the substantive basis of *Allaire*, which soon after was overruled in Illinois by *Amann v. Faidy*.[34] There the court accepted viability as the per-

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29. *Id.* at 650.

30. Nugent v. Brooklyn Heights R. Co., 154 App. Div. 667, 139 N.Y.S. 367 (1913).

31. Montreal Tramways Co. v. Leveille, [1933] S.C. Rep. 456.

32. The Canadian Supreme Court, *per* Justice Lamont, cited Justinian in *Leveille*, as follows: DIGEST 1.5.7: Qui in utero perinde ac si in rebus humanis esset, custoditur, quoties de commodis ipsius partas quaeritur. (An unborn child is taken care of just as much as if it were in existence in any case in which the child's own advantage comes in question.); DIGEST 1.5.26: Qui in utero sunt in toto paene jure civili inteliguntur in rerum natura esse. (Unborn children are in almost every branch of the civil law regarded as already existing.) Alan Rodger, in his comment in [1974] JUR. REV. 83, includes another cite, DIGEST 50.16.231, in discussing the use of this Roman principle in Scots law of prenatal injury but objects that its use in this area is counter to the Roman rule of liability and hence derives no authority from Roman law as it is received into Scots law. Even without authority, the Roman principle demonstrates an enviable simplicity and elegance.

33. Bonbrest v. Katz, 65 F. Supp. 138 (D.D.C. 1946).

34. Amann v. Faidy, 415 Ill. 422, 114 N.E.2d 412 (1953).

sonalizing moment and allowed suit to be brought under a wrongful death statute by the administratrix of a viable fetus injured *in utero* and dying of its injuries shortly after live birth. The court cited the viable fetus' distinct identity from its mother, in fact and as recognized analagously in property and criminal law, together with the rationale *ubi jus, ibi remedium,* as the bases for its holding. The increase in medical knowledge silenced the "argument *ad terrorem*" raised as to proof of causality. *Rodriguez v. Patti*,[35] in that same term, saw the recognition of a common law right of action in the viable fetus. Because it was brought by a minor plaintiff on a common law right of action for damages in tort, *Rodriguez* may be said to have been the controlling statement of Illinois law in this area prior to *Renslow.*

Substitution of viability for live birth as the substantive determinant of personality and of the possibility of duty assured that the rights of the viable unborn would be protected so long as it was alive. With death *in utero,* however, and still birth, the injured fetus' right of action would be extinguished at its death unless revived by operation of a wrongful death statute. In *Chrisafogeorgis v. Brandenburg,*[36] the court recognized that live birth was no longer required for a finding of personality by holding that a viable fetus, injured *in utero* and later stillborn, had become a person *in utero* and was thus within the saving provisions of the wrongful death statute, thereby allowing the fetus' administrator to bring an action for its injuries and death.

The conceptual contours of viability soon proved to be less sharply defined than those of live birth and hence less suitable as a clear criterion of personality. Viability is affected by the race and weight of the fetus together with the length of pregnancy. Medical advances push the possiblity of separate fetal existence farther back in pregnancy, and the possibility of test-tube fetal environments is no longer inconceivable.[37] Responsive to demands for substantive justice, activist courts are reluctant to deny claims on so capricious

35. Rodriguez v. Patti, 415 Ill. 496, 114 N.E.2d 721 (1953).

36. Chrisafogeorgis v. Brandenburg, 55 Ill. 2d 368, 304 N.E.2d 88 (1973). *Amann* differs from *Chrisafogeorgis* in that the *Amann* decedent, viable when injured, was born alive and was thus regularly included within the provisions of the wrongful death statute. The decedent in *Chrisafogeorgis* was stillborn though viable when injured so that the court could recognize intrauterine personality through viability even without subsequent live birth and thereby allow recovery under the wrongful death statute. Personality even through viability had nonetheless preceded injury.

37. *See* the discussion and notes in *Preconception Injuries, supra* note 23, at 160-61.

a basis, especially since medical science is able to frame the probability of causal links between conduct and injury with ever narrower limits.[38] Thus, in *Daley v. Meier*,[39] an Illinois appellate court allowed a suit brought by a one-month-old fetus. Citing the New Jersey case *Keely v. Gregory*,[40] for the proposition that the legal entity of the child begins at conception, the court rejected the requirement of viability and looked instead to the union of sperm and egg as the moment at which a separate identity of person may be said to have come into existence.[41]

In going behind the requirement of conception for legal personality, announced in *Daley*, the *Renslow* court has undermined the holding of *Rapp v. Hiemenz*,[42] and made it doubtful that a similar case will be similarly decided in the future. In *Rapp*, recovery under a wrongful death statute was denied where the stillborn plaintiff had received its injuries prior to viability. If, as *Daley* holds, a separate identity of person exists in the fetus as of conception, or, according to *Renslow*, even earlier, the rationale of *Chrisafogeorgis* in finding personality even in the stillborn would tend to obviate any impediment to a suit brought by the administrator of such person's estate under a wrongful death statute. A finding of no duty in such a case would be incongruous.

FINAL TREATMENT OF *RENSLOW*

With this development in mind, the court's holding in *Renslow* appears both more amazing and less satisfactory. Assuming a causal and cognitive link between defendants' conduct and plaintiff's injuries, *i.e.*, assuming causality and foreseeability, the court still had to conceptualize a way in which the person of the plaintiff preceded the defendants' conduct. This is true without regard to the majority's attempt to finesse the problem of duty by means of the device of transferred negligence. Duty cannot create persons; neither can foreseeability. Tort law is an area of the private law of persons, as Holmes made clear in *Dietrich*.[43]

The court's answer, passed over without comment in the opinion, was to disengage the concept of personality from any substan-

38. Note, *The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries*, 110 U. PA. L. REV. 554 (1962), cited in 367 N.E.2d at 1253.

39. Daley v. Meier, 33 Ill. App. 2d 218, 178 N.E.2d 691 (1961).

40. Kelly v. Gregory, 282 App. Div. 542, 125 N.Y.S.2d 696 (1953).

41. 178 N.E.2d at 694. *See also* Sana v. Brown, 35 Ill. App. 2d 425, 183 N.E.2d 187 (1962).

42. Rapp v. Hiemenz, 107 Ill. App. 2d 382, 246 N.E.2d 77 (1969).

43. 138 Mass. at 15-16.

tive determinants, from live birth, viability, quickness or even conception, as necessary personalizing moments in the plaintiff's existence. In so doing, the court removed the last vestige of the Holmesian requirement of a physical indicium of personality.[44] Of course, only persons who have some indicium of physical existence can bring causes of action, but, by pushing recognition in law of personality back beyond even conception, the court has found personal existence without physical presence. But if it has no physical presence, what quality of being does this person have; what was "there" at the time of the defendants' conduct? The plaintiff's existence in 1965 consisted in the logical possibility of her existence later, in 1973, when that distinct but indeterminate potentiality made an appearance in factual reality, in the waking life of consciousness. Conception would seem clearly such an appearance, as would viability. The concept of personality employed by the court is thus a wholly formal, wholly logical construction having no necessary specific substantive underpinning.[45] Only in this way could the person of the plaintiff be said to have existed prior to the defendants' conduct.

The effect of *Renslow* is to remove time and space determinants from the legal definition of personality and to open the concept up as a logically infinite range of human possibilities, awaiting a substantive appearance. By removing physical requirements of personality, except as facts susceptible of direct proof, the court has brought judicial treatment of the concept to its logical endpoint. Henceforth, the legal issue of personality in this area of tort law will be settled affirmatively on the basis of any showing of existence in fact of an injured plaintiff. In this way, personality has become a question of fact in Illinois tort law.

The difficulty in using this substantively empty concept arises when one seeks to pinpoint which conduct resulted in the injury

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44. *Cf.* Ford, *The Totalitarian Justice Holmes*, 159 CATHOLIC WORLD 114 (1944), for a discussion of *Dietrich* in the light of Holmes' purported materialist point of view. While the *Renslow* court abandoned the attempt to find a physical *terminus a quo* of legal personality, it did not abandon Holmes' schematization of the events of the personal injury action, in which personality of both parties must precede conduct and injury. Without this scheme, this tort would cease to be personal and would take on the character of strict liability.

45. The resort to legal formalism on the part of activist courts is an aspect suggested by *Renslow* that lies outside the scope of this comment. One may note the irony involved in the use of a formalistic, logically projected concept of personal existence in a time marked by attempts to define a person's being in terms of individually rooted consciousness. On the return to formalism in the name of substantive justice, *cf.* Gilmore, Book Review, 86 YALE L.J. (1977).

that is the basis of the tort action. Such conduct must be causally linked to the injury, but mere causality sets no limits on how far back the causal chain can go. But for the past, the present would not be as it is. A comprehensive survey of any action would result in an infinite regress into all preceding causes and effects; all of existence would be engulfed in liability as movement was made along the "seamless web" of history in which possibilities are actualized and effects are traced back to causes.[46] The court accordingly found causality a necessary but insufficient indication of the range of actions which may be said to result in compensable harm.

Finding causality inadequate, the court reaffirmed the legal principle of duty as a limiting factor of liability.[47] The means used to find a duty to the plaintiff was to derive it from the duty that the defendants owed the plaintiff's mother. The court reasoned that the defendants might reasonably have foreseen the eventual physical existence of the plaintiff as a possibility latent in the mother in 1965; they therefore found a duty in the defendants to maintain a professional standard of care to protect that existence from prenatal injury. Pinpointing the relation of the plaintiff and her mother as the link between defendants' conduct and the plaintiff's injuries has the effect of limiting the holding's precedential value and of palliating perhaps the sense that the defendants were unfairly held liable on a novel theory of duty to non-existent persons.

In fact, however, the device of transferred negligence is factually inappropriate and tends to weaken the logic of the court's holding on the issue of personality. As Mr. Justice Underwood pointed out in his dissent,[48] a wife's right to sue for loss of consortium due to negligent injury to her husband is bottomed on an existing relationship among persons. Here no such relationship existed except that of the factual existence of the mother and the logical existence of the plaintiff as a possibility of the mother, as envisioned by the majority. It is only by virtue of this link that the defendants' breach of duty to the mother can transfer to the daughter. But as a logical possibility of an existent person, *i.e.*, as a part of her mother, the plaintiff cannot sue. Foreseeable harm to the mother cannot create a duty to the plaintiff, who can sue in her own right or not at all, as *Dietrich* made clear. Defendants' negligence cannot therefore

46. *Cf.* Unger, *Law in Modern Society* 114 (1976), for a discussion of the problems of specificity and generality in historical analysis.

47. 367 N.E.2d at 1254.

48. *Id.* at 1261-66.

have transferred in 1965. Perhaps it transferred in 1973, the year of the injury. In that case, duty would attach only after the conduct, a replay of *Dietrich*. On the majority's analysis, the defendants were held to a duty imposed either before the fact of plaintiff's separate possession of legal rights or after the fact of conduct. Neither case is possible or consistent with the formalization of the concept of personality through which a person, contingent in 1965, was allowed to sue upon becoming actual in 1973. The majority thus ended by holding that the plaintiff was a person in 1965, if not *in re*, then *in spe*, for the purposes of bringing suit, but that the defendants' duty in 1965 or 1973 was owed not to her but to her mother. Use of transferred negligence obscured the logic of the majority's holding and was not in fact necessary.

In his concurring opinion, the late Mr. Justice Dooley pointed the way to a more satisfactory approach, that of finding a contingent breach of duty to the contingent person of the plaintiff in 1965, made actual in 1973 upon her existence and injury in fact.[49] In this way, the plaintiff's existence, later evidenced by her conception, may be said logically to have preceded the defendants' conduct, which in 1965 set in motion the possibility of harm that came to a factual realization in the plaintiff in 1973, the year of the onset of injury and hence of the accrual of the action. Once personality as a logical possibility is seen to precede conception, the gap between conduct and injury can be treated as a question of causality only and is no longer dispositive of the issue of duty in that there was no time when the defendants might not have owed a standard of conduct to the plaintiff, existent logically or factually. From this, it is clear that judicial activity must henceforth focus on the principle of duty as a limit on liability for prenatal injury. Here, for example, had the defendants exercised the professional community's standard of care in 1965, the court still could have allowed plaintiff's suit, found a right in the plaintiff to be born sound, but denied recovery for failure to show a breach of duty on the part of the defendants. The posture of the case as an appeal of a motion to dismiss prevented factual determination of the issue of duty so that the last action of the court in *Renslow* was to remand the case for such consideration by a trier of fact.

CONCLUSION

The fundamental issue in *Renslow* appears not to have been causality, foreseeability or even duty. The key was recognition of

49. *Id.* at 1256-61.

the contingent personality of the plaintiff in 1965. In so doing, the court recognized the existence of an infinite range of human possibilities it was the duty of those then living to protect and safeguard. Seen in this light, the warning of the magazine writer as to a drift from traditional principles of duty and respect for human personality seems clearly misconceived. Responsibility necessarily precedes accountability. The Illinois Supreme Court in *Renslow* has correctly acknowledged that persons are responsible for those who will come after as well as those now existing. The concept of contingent personality suggested here is no more fictional than the existence of the logical possibilities which people plan for and against in everyday experience. It obviates no factual test of causality or foreseeability and reaffirms the principle of duty as a more limited, judicial reflection of society's good sense and acceptance of responsibility. If, in the end, the court failed to realize the full potential of its conceptual reworking of legal personality, it has nevertheless defined a sphere of interests in law which other courts may wish to protect as well.