GROVER V. ELI LILLY & CO.
DES EXPOSURE: THE RIPPLING EFFECTS STOP HERE

INTRODUCTION

The basic purpose of the law of torts is to afford compensation for injuries sustained by one person as the result of the conduct of another.[1] In *Grover v. Eli Lilly & Co.*,[2] the Ohio Supreme Court acted to curtail this purpose. The Court held that the grandson of a woman who ingested the defective prescription drug, diethylstilbestrol,[3] could not recover for injuries which were proximately caused by his mother's in utero exposure to the drug.[4] Although the Court did not accept an absolute rule precluding future actions based on preconception torts,[5] the Court's failure to allow such an action in the *Grover* case displayed a lack of foresight as to the evolving function of tort law.

This Note first discusses the nature of DES,[6] prenatal torts,[7] and preconception torts.[8] The Note then reviews product liability law in Ohio.[9] The remainder of the Note analyzes the Grover decision[10] and discusses its impact on public policy.[11]

BACKGROUND

The Unique Nature of DES

DES is a synthetic estrogenic substance capable of producing the same effects as natural estrogens.[12] It was first developed in England in 1938.[13] DES was less expensive than natural estrogen and less painful to administer.[14] Consequently, it became the preferred source of hormone therapy.[15] In 1941, the FDA first approved the use of DES in the United States for a variety of medical problems

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1 W. PAGE KEETON ET AL, PROSSER AND KEETON ON THE LAW OF TORTS §1, at 6 (5th ed. 1984).

2 591 N.E.2d 696 (Ohio 1992).

3 In this Note, the drug, diethylstilbestrol, will be referred to by its common abbreviation, DES.

4 *Grover*, 591 N.E.2d at 701.

5 *Id.* at 698 n.1.

6 *See infra* notes 12-25 and accompanying text.

7 *See infra* notes 26-38 and accompanying text.

8 *See infra* notes 26-38 and accompanying text.

9 *See infra* notes 39-50 and accompanying text.

10 *See infra* notes 77-103 and accompanying text.

11 *See infra* notes 104-108 and accompanying text.

12 PHYSICIANS' DESK REFERENCE 1227 (45th ed. 1991).

13 Laura A. Abrams, *Comment, The DES Dilemma: A Study in How Hard Cases Make Bad Law*, 59 U. Cin. L. Rev. 489, 491 (1990).

14 *Id.*

15 *Id.*

but limited to uses unrelated to pregnancy.[16] By 1947, the use of DES expanded to include the prevention of miscarriages.[17] Between 1947 and 1971, DES was manufactured by several hundred companies and ingested by several million pregnant women.[18]

The FDA banned the drug's use by pregnant women in 1971[19] after mounting evidence revealed that DES was ineffective at preventing miscarriages and increased the risk of vaginal and cervical cancer to females exposed to the drug in utero.[20] Because this cancer may not develop in those women exposed in utero until well after they reach their late teens and early twenties,[21] the victim may not realize the harm until decades after exposure.[22] Due to the insidious[23] nature of

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16 Bichler v. Eli Lilly & Co., 436 N.E.2d 182, 183 (N.Y. 1982). DES was used for the treatment of vaginitis, engorgement of the breasts, excessive menstrual bleeding and symptoms of menopause. *Id.*

17 *Id.* at 184.

18 Abrams, *supra* note 13, at 493. Estimates of the number of offspring exposed to DES in utero vary dramatically. Cori Vanchieri, *DES Related Cancers Under Renewed Scrutiny*, 84 J. NAT'L. CANCER INST. 565 (April 1992). The numbers range from 2 million to 9 million. *Id.* In the United States there exist no registries of DES exposed mothers and/or in utero exposed offspring. *Id.* Registries do exist in The Netherlands, France, and Australia. *Id.*

19 DES was never entirely banned by the FDA and is still used today for the treatment of problems unrelated to pregnancy, such as prostate cancer, breast cancer and menopause. Victor E. Schwartz & Liberty Mahshigan, *Failure to Identify the Defendant in Tort Law: Towards a Legislative Solution*, 73 Cal. L. Rev. 941, 945 (1985).

20 *See* Arthur L. Herbst et. al., *Adenocarcinoma of the Vagina: Association of Maternal Stilbestrol Therapy with Tumor Appearance in Young Women*, 284 NEW ENG. J. MED 878 (1971). *See also* Bichler v. Eli Lilly & Co., 436 N.E.2d at 183; 34 Fed. Reg. 576b (1971). The effects of prenatal exposure to DES generally manifest themselves in structural deformities, adenosis, and clear-cell adenocarcinoma. Abrams, *supra* note 13, at 493. Structural abnormalities develop in the form of ridges in the vagina or a hood over the cervix. *Id.* at 493 n.39. Andenosis is a potentially precancerous growth on the vagina and cervix which can spread to other areas of the body. *Id.* at 493 n.40 Clear-celled adenocarcinoma is a form of rare and deadly cancer. *Id.* at 493 n.41. Risk factors for the development of clear cell adenocarcinoma of the vagina were determined by a retrospective study of patients with documented in utero exposure to DES. Arthur L. Herbst, et al., *Risk Factors for the Development of Diethylstilbestrol-Associated Clear Cell Adenocarcinoma; A Case-Control Study*, 154 AM. J. OBSTETRICS & GYNECOLOGY 814-22 (1986). A group of 158 patients with clear cell adenocarcinoma were compared with 1,848 patients without cancer. *Id.* Potential risk factors were determined to be the age and the pregnancy history of the mother, DES dosage patterns, use of other hormones, and birth month, weight, and age of menarche of the daughter. *Id.* Using multivariate logistic regression, the significant risk factors were identified as in utero DES exposure before the 12th week of gestation, winter conception, and a maternal history of at least one prior spontaneous abortion. *Id.*

21 A psychological self-concept impact study conducted on young women exposed to DES in utero revealed a trend showing that DES subjects tend to describe themselves as positively emerged. M. A. Shafer et. al., *Self-Concept in the Diethylstilbestrol Daughter*, 63 OBSTETRICS & GYNECOLOGY 815-19 (June 1984). The authors suggest that their findings indicate that young women exposed to DES may be using protective denial in their attempt to cope with their DES exposure. *Id.* The authors further suggest that physicians need to be aware of the psychological impact of DES exposure when treating their patients. *Id. See also* CYNTHIA L. ORENBERG, DES: THE COMPLETE STORY 70-74, 132 (1981).

22 William J. Stilling, Enright v. Eli Lilly & Co.: *Recognizing DES Granddaughter's Preconception Strict Product Liability Claim*, 17 J. CONTEMP. L. 175, 176 (1991).

23 The word insidious denotes diseases which progress with few or no symptoms to indicate their gravity. STEDMAN'S MEDICAL DICTIONARY 714 (5th Unabridged Lawyer's ed. 1992). Insidious diseases are carcinogenic, mutagenic, or teratogenic conditions. WILLIAM W. LOWRANCE, OF ACCEPTABLE RISK: SCIENCE AND THE DETERMINATION OF SAFETY 26-27 (1976). Carcinogens are any cancer producing substances. STEDMAN'S MEDICAL DICTIONARY at 223. Mutagens are agents that cause the production of a mutation. *Id.* at 912 Teratogens are any drugs or agents that cause abnormal development. *Id.* at 1418.

DES and the latent manifestation[24] of the injuries caused by exposure to the drug, legal debate abounds concerning liability.[25]

Legal Liability Beyond the Traditional Tort

Prior to 1946, if a pregnant woman was injured, causing her child to be born in an injured or deformed state, the child was precluded from bringing any cause of action against the tortfeasor.[26] Courts determined that a defendant had no legal duty to an individual who did not exist at the time of his tortious act,[27] and furthermore that allowing such causes of action would launch the law into "a boundless sea of speculation."[28]

As early as 1900, the judiciary realized that tort law needed to keep pace with medical science.[29] This realization did not culminate into a legal cause of action for a child harmed in utero until 1946 when the United States District Court for the District of Columbia decided *Bonbrest v. Kotz*.[30] However, the *Bonbrest* Court allowed recovery to a child *only* if there was a direct injury, the child survived the birth, and the child was viable[31] at the time the injury took place.[32]

The viability standard, however, remains a difficult one to distinguish and maintain.[33] Hence, the modern trend of courts is to disregard the issue of viability

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24 A disease is manifested at the time when there appears an outward, perceptible sign of the disease and not at the time that the cause of the disease has been discovered. Harper v. Eli Lilly & Co., 575 F. Supp. 1359, 1362 (N.D. Ohio 1983).

25 The devastating effects of DES and the liberal methods of recovery allowed to Plaintiffs have been well documented in many sources. *See, e.g.*, Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069 (N.Y. 1989), *cert. denied*, 493 U.S. 944 (1989); Sindell v. Abbott Labs., 607 P.2d 924 (Cal. 1980), *cert. denied*, 449 U.S. 912 (1982); Bichler v. Eli Lilly & Co., 436 N.E.2d 182 (N.Y. 1982); David J. Murray, *The DES Causation Conundrum: A Functional Analysis*, 32 N.Y.L. SCH. L. Rev. (1987); Randy S. Parlee, Comment, *Overcoming the Identification Burden in DES Litigation: The Market Share Liability Theory*, 65 MARQ. L. REV. 609 (1982); Ann M. Biebel, *DES Litigation and the Problem of Causation*, 51 INS. COUNS. J. 223 (1984); Richard Delgado, *Beyond Sindell: Relaxation of Cause-In-Fact Rules for Indeterminate Plaintiffs*, 70 CAL. L. REV. 881 (1982); Arthur Downey & Kenneth Gulley, *Theories of Recovery of DES Damage; Is Tort Liability the Answer?*, 4 J. LEGAL MED. 167 (1983); Barry S. Roberts & Charles F. Royster, *DES and the Identification Problem*, 16 AKRON L. REV. 447 (1983).

26 *E.g.*, Dietrich v. Inhabitants of Northamption, 138 Mass. 14 (1884); Allaire v. St. Luke's Hosp., 56 N.E. 638 (Ill. 1900), *overruled by*, Amann v. Faidy, 114 N.E.2d 412 (Ill. 1953); Drobner v. Peters, 133 N.E. 567 (N.Y. 1921).

27 *See Dietrich*, 138 Mass. at 17.

28 Walker v. Great Northern Railway, 28 L.R.Ir. 69, 81-82 (Q.B. 1891) (O'Brien, J., concurring), *quoted in* W. PAGE KEETON ET. AL., PROSSER & KEETON ON THE LAW OF TORTS § 55 at 367 & n.3 (5th ed. 1984).

29 *See* Allaire v. St. Luke's Hosp., 56 N.E. 638, 640 (Ill. 1900) (Boggs, J., dissenting).

30 65 F. Supp. 138 (D.D.C. 1946). In *Bonbrest*, the court allowed a child to bring a cause of action against a doctor for injuries suffered during the process of delivery.

31 Viability is defined as "[c]apability of living. A term used to denote the power a new-born child possesses of continuing its independent existence." BLACK'S LAW DICTIONARY 1737 (4th ed. rev. 1968).

32 *Bonbrest*, 65 F. Supp. at 141.

33 Stilling, *supra* note 22, at 178. The arbitrary nature of such a standard was described by Professor Prosser when he stated:

and allow recovery for a child *regardless of when* the injury occurred provided that the child is subsequently born alive.[34] Consequently, "[o]nce courts began to recognize a duty of care to a fetus *before viability*, no great intellectual leap was necessary to justify the imposition of liability for harm that occurred prior to conception."[35]

The first case to allow a cause of action for a preconception tort was *Jorgensen v. Meade Johnson Labs., Inc.*[36] The *Jorgensen* case was based on products liability law. The court, in allowing a cause of action based on wrongful conduct prior to the plaintiff's conception, focused upon causation, rather than upon traditional concepts of legal duty.[37]

The first case to recognize a cause of action for a preconception tort based on a negligence theory was *Renslow v. Mennonite Hosp.*[38] The *Renslow* Court directed its focus on the concept of legal duty and held that "there is a right to be born free from prenatal injuries foreseeably caused by a breach of duty to the child's mother."[39]

To date, only a handful of courts has addressed the issue of legal liability to a child harmed by a preconception tort.[40] Although only a small number of courts

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> Viability of course does not affect the question of the legal existence of the foetus, and therefore of the defendant's duty; and it is a most unsatisfactory criterion, since it is a relative matter, depending on the health of mother and child and many other matters in addition to the stage of development. Certainly the infant may be no less injured; and all logic is in favor of ignoring the stage at which it occurs.

WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 55, at 337 (4th ed. 1971) (footnotes omitted).

34 Stilling, *supra* note 22, at 178.

35 *Id.* (empasis added). The term preconception tort describes a situation in which a child is pursuing liability against a party for a second injury that flows from an initial injury to the child's parent that occurred prior to the child's conception. Grover v. Eli Lilly & Co., 591 N.E.2d 698 (Ohio 1992).

36 483 F.2d 237 (10th Cir. 1973). In *Jorgensen*, the plaintiff alleged that his daughters were born with Down's Syndrome caused by defective birth control pills his wife ingested prior to their birth. *Id.* at 238-39. The district court dismissed the complaint and the court of appeals reversed and remanded, holding that a person not in being at the time of the tortious conduct could advance a cause of action. *Id.* at 239.

37 *Id. See also* Renslow v. Mennonite Hosp., 367 N.E.2d 1250, 1254 (Ill. 1977) The *Renslow* Court, in discussing the analysis used by the *Jorgensen* Court, criticized the focus on causation rather than duty and stated that "any attempt to impose liability on such a basis would result in infinite liability for all wrongful acts, which would 'set society on edge and fill courts with endless litigation.'" *Id.* (*citing* William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 24 (1953)).

38 367 N.E.2d 1250 (Ill. 1977). In *Renslow*, the plaintiff brought a cause of action on behalf of herself and her minor daughter alleging that the defendant negligently transfused RH-negative blood into her RH-positive system. *Id.* at 1251. The transfusion, although occurring several years prior to the child's conception, caused sensitization of the mother's blood which subsequently resulted in prenatal injuries to the child. *Id.*

39 *Id.* at 1255. In addressing the role of duty to "narrow an area of actionable causation," the court "reaffirm[ed] the utility of the concept of duty as a means by which to direct and control the course of common law." *Id.* at 1254. However, the court went on to state that "examples of changing notions of legal duty in the area of products liability, as well as the progressive expansion on duty in prenatal cases already documented, demonstrate that duty is not a static concept." *Id.*

40 *See, e.g.*, Albala v. City of New York, 429 N.E.2d 786 (N.Y. 1981) (child has *no* cause of action for doctor's negligence during an abortion performed on the mother four years prior to the child's conception);

have confronted the issue of preconception torts, an abundance of authority on the topic exists.[41]

Product Liability Law in Ohio

"In Ohio the law in the field of products liability has had a slow, orderly and evolutionary development."[42] In 1958, Ohio established an action in tort for the recovery of personal injuries based upon a manufacturer's breach of an express warranty.[43] The doctrine of strict liability in tort was adopted in Ohio in 1966.[44] In order for a party to recover based upon a theory of strict liability in tort , it must be proven that: (1) the product manufactured and sold by the defendant contained a defect; (2) the defect existed when it left the hands of the defendant; and (3) the defect was a direct and proximate cause of the plaintiff's injury.[45]

In 1977, Ohio's law of strict liability was expanded by the adoption of Section 402A of the Restatement (Second) of Torts[46] which now governs strict liability for

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Monusko v. Postle, 437 N.W.2d 367 (Mich. Ct. App. 1989) (child has a cause of action for a doctor's failure to inoculate the child's mother with the rubella vaccine prior to the child's conception); Enright v. Eli Lilly & Co., 570 N.E.2d 198 (N.Y. 1991), *cert. denied*, 112 S. Ct. 197 (1991) (child has *no* cause of action against a prescription drug manufacturer for failure to warn the child's mother of dangers of the drug which caused injury to the mother's reproductive system years prior to the child's conception); McMahon v. Eli Lilly & Co., 774 F.2d 830 (7th Cir. 1985) (child has a cause of action against a prescription drug manufacturer for failure to warn the child's mother of dangers of the drug which caused injury to the mother's reproductive system years prior to the child's conception).

41 Grover v. Eli Lilly & Co., 591 N.E.2d 696, 701 n.3 (Ohio 1992) (Resnick, J., dissenting) (acknowledging that there exists "an abundance of authority on preconception torts which deserves consideration."). *See, e.g.* W. PAGE KEETON ET. AL., PROSSER & KEETON ON THE LAW OF TORTS § 369 (5th ed. 1984); Annotation, *Liability for Child's Personal Injuries or Death Resulting from Tort Committed Against Child's Mother Before Child was Conceived*, 91 A.L.R. 3d 316 (1979); Monusko v. Postle, 437 N.W.2d 367 (Mich. Ct. App. 1989); Comment, *Recognizing a Cause of Action for Preconception Torts in Light of Medical and Legal Advancements Regarding the Unborn*, 53 UMKC L. REV. 78 (1984).

42 Lonzrick v. Republic Steel Corp., 218 N.E.2d 185, 194 (Ohio 1966).

43 *Id. See* Rogers v. Toni Home Permanent Co., 147 N.E.2d 612 (1958). In *Toni*, the Plaintiff purchased a home permanent kit from a retailer, used it as intended and suffered injuries to her head and scalp because of defects in the product. *Id.* at 613. The Court determined that representations in national advertising were express warranties under which the Plaintiff could bring an action for breach of this warranty without contractual privity. *Id.* at 616.

44 Lonzrick v. Republic Steel Corp., 218 N.E.2d 185 (Ohio 1966). The Court in *Lonzrick* held that a party may bring an action in tort based on breach of an implied warranty, without any contractual relation between Plaintiff and Defendant. *Id.* at 192. The rationale for adoption of strict liability in tort was noted in Leichtamer v. Am. Motors Corp., 424 N.E.2d 568 (Ohio 1981). "The doctrine of strict liability evolved to place liability on the party primarily responsible for the injury occurring, that is, the manufacturer of the defective product." *Id.* at 575 (*citing* Greenman v. Yuba Power Products, Inc., 377 P.2d 897 (Cal. 1963)). "Any distinction based upon the source of the defect undermines the policy underlying the doctrine that the public interest in human life and safety can best be protected by subjecting manufacturers of defective products to strict liability in tort when the products cause harm." *Id.*

45 State Auto Mutual Ins. Co. v. Chrysler Corp., 304 N.E.2d 891, 894 (Ohio 1973).

46 Temple v. Wean United Inc., 364 N.E.2d 267, 271 (Ohio 1977). *See* RESTATEMENT (SECOND) OF TORTS § 402A (1965). That section reads as follows:

Special Liability of Seller of Product for Physical Harm to User of Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

defective products in Ohio.[47] In determining liability under a section 402A analysis, the focus should be on the product and the nature of the defect rather than the conduct of the manufacturer.[48]

The theory of strict liability has been used as a basis for recovery for injury suffered as a result of a manufacturer's failure to warn adequately of dangers associated with the use of the product.[49] The claimant in such a case must prove that the manufacturer knew, or should have known, in the exercise of ordinary care, of the risk about which it failed to warn.[50] Additionally, no liability will be found unless it can be shown that the manufacturer failed to take the same precautions as that of a reasonable person who was presenting a product to the public.[51] Therefore, the standard imposed upon the defendant in a strict liability claim based upon an inadequate warning is the same as that imposed in a negligence claim based upon an inadequate warning.[52] Due to the similarities, courts have encountered difficulty in distinguishing negligence claims from those founded on strict liability where the defect for section 402A purposes is asserted to be a lack of adequate warning.[53]

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

47 Crislip v. TCH Liquidating Co., 556 N.E.2d 1177, 1180 (Ohio 1990).

48 Cremeans v. International Harvester Co., 452 N.E.2d 1281, 1284 (Ohio 1983).

49 *See, e.g.*, Seley v. G.D. Searle & Co., 423 N.E.2d 831 (Ohio 1981); Crislip, 556 N.E.2d at 1180.

50 *Crislip*, 556 N.E.2d at 1182.

51 *Id.*

52 *Id.*

53 *Seley*, 423 N.E.2d at 837. "[I]n strict liability cases the focus is not on the *conduct* of the manufacturer, but on the *condition* of the product." *Id.* In a Section 402A action, the duty is one of strict liability to which "care" is irrelevant. *Id.* "The issue is whether the warning is inadequate, not how it came to be so." *Id.* "While the knowability of a risk or hazard [in a strict liability for failure to warn action] should be irrelevant . . . it would seem to be extending strict liability too far to require a manufacturer to bear the costs of accidents to a few who were victimized by an unknowable risk . . . ." KEETON ET. AL., *supra* note 1, §99 at 697-98. Undeniably, this area of the law remains confusing to both courts and counsel!

STATEMENT OF THE CASE

Charles Grover was prematurely born on November 22, 1981.[54] Charles suffers from cerebral palsy and other serious injuries.[55] Plaintiffs allege that these injuries were the result of Charles' premature birth and that such birth was proximately caused by Charles' grandmother's ingestion of DES.[56]

In 1952 and 1953, June Rose, grandmother of Charles Grover, was prescribed and ingested DES.[57] During this time, June became pregnant and gave birth to Candace Grover, mother of Charles Grover.[58] While in utero, Candace was exposed to the DES ingested by her mother, June Rose.[59]

At the age of 22, Candace Grover discovered that she suffered from cervical abnormalities which were caused by her in utero exposure to DES.[60] Six years later, Candace became pregnant and gave birth to her second son, Charles.[61] Candace's pregnancy with Charles remained uncomplicated until September, 1981 when a Shirodkar procedure[62] was performed in an attempt to prevent a premature birth due to an incomplete cervix.[63] Charles Grover was subsequently born 11 weeks premature.[64]

On behalf of themselves and their two minor sons, Candace and Brent Grover[65] filed suit against Cooper Laboratories, Inc. and Eli Lilly & Co.[66] in Federal District Court alleging strict liability, negligence and breach of warranty.[67] The pharmaceutical companies filed several Motions for Summary Judgment, one of which stated that Charles Grover's tort claims must be dismissed as Ohio does not recognize a cause of action on behalf of a child who was not concieved at the

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54 Brief of Petitioners at 1, Grover v. Eli Lilly & Co., 591 N.E.2d 696 (Ohio 1992) (No. 90-1030).

55 *Grover*, 591 N.E.2d at 697. Charles suffers from Athetoid Cerebral Palsy. Brief of Petitioners, *supra* note 54, at 2. Charles is confined to a wheelchair for most activities and walks with the assistance of leg braces, a walker and adult support. *Id.* Charles also requires assistance when feeding and toileting. *Id.*

56 *Grover*, 591 N.E.2d at 697.

57 *Id.*

58 *Id.*

59 *Id.*

60 Brief of Petitioners, *supra* note 54, at 2.

61 *Id.*

62 A Shirodkar procedure is performed by placing a suture in the cervix.

63 Brief of Petitioners, *supra* note 54, at 2.

64 *Id.*

65 Brent Grover is the father of Charles and Robbie Grover and is acting as his sons' representative.

66 Hereinafter referred to as "the pharmaceutical companies."

67 *Grover*, 591 N.E.2d at 697. The Complaint alleged, inter alia, liability to Charles and Candace Grover for injuries they sustained as a result of the Defendants' manufacture and distribution of DES, liability to Charles' parents for the loss of their son's services, and liability to Robbie Grover for mental suffering caused by Charles' injuries and their impact on the family. See Complaint, Grover v. Eli Lilly & Co., 591 N.E.2d 696 (Ohio 1992) (No. 90-1030).

time of the alleged tort.[68] The District Court certified a question of law to the Ohio Supreme Court, as this issue was one of first impression.[69]

Certified Question of Law

The certified question presented to the Ohio Supreme Court stated: "Does Ohio recognize a cause of action on behalf of a child born prematurely, and with severe birth defects, if it can be established that such injuries were proximately caused by defects in the child's mother's reproductive system, those defects in turn being proximately caused by the child's grandmother ingesting a defective drug (DES) during her pregnancy with the child's mother?"[70]

The Supreme Court's Answer to the Certified Question of Law

The Supreme Court of Ohio answered the certified question in the negative.[71] Although the Court declined to adopt an "absolute no duty rule" as to a cause of action for preconception torts,[72] the Court held that because of the remoteness in both time and causation, "a pharmaceutical company's liability for the distribution or manufacture of a defective prescription drug does not extend to persons who were never exposed to the drug, either directly or in utero."[73] The Court noted that the pivotal question in ascertaining liability was "whether the drug companies should have known, at the time that it was prescribed, that DES could cause a birth defect that would result in the delivery of a premature child twenty or thirty years later."[74] Based upon the Court's evaluation of that pivotal question, the Court determined as a matter of law that such a birth defect was not foreseeable.[75]

In a strong dissent,[76] Justice Resnick stated that "there can be no question that pharmaceutical companies should have known the dangers of [DES]."[77] Justice Resnick, noting the "insidious nature" of DES,[78] stated that the majority, in its decision, failed to consider the uniqueness of the drug.[79] "To hold under these circumstances that Charles Grover's injuries were not foreseeable is to ignore an entire body of scientific information which was available or could have easily

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68 *Grover*, 591 N.E.2d at 697.
69 *Id.*
70 *Id.*
71 *Id.* at 700.
72 *Id.* at 698 n.1.
73 *Id.* at 700-01.
74 *Id.* at 700 n.2.
75 *Id.* at 700.
76 The court's decision was based on a 4-3 vote.
77 *Grover*, 591 N.E.2d at 702 (Resnick, J., dissenting).
78 *Id.*
79 *Id.* at 703.

become available with a measure of care concerning the effects of DES on subsequent generations."[80]

ANALYSIS

For the purpose of evaluating the certified question before it, the Ohio Supreme Court assumed that Charles Grover was able to prove that his injuries were proximately *caused* by his mother's in utero exposure to DES.[81] Therefore, although a direct causal link between the defective product and Charles' injuries was deemed established, the Court concluded that "because of the remoteness of time and causation, . . . Charles Grover does not have an independent cause of action."[82] Due to this conflicting language regarding *causation*, the basis for the majority's denial of a cause of action to Charles Grover remains unclear.[83] Furthermore, because the Court addressed tort causes of action in general and interchanged language peculiar to negligence and strict liability, the specific impact of this decision is precarious at best.

Assessing the Manufacturers' Knowledge

To find liability in a strict liability for failure to warn case, Ohio law requires that a plaintiff prove that the manufacturer "knew or should have known, in the exercise of ordinary care, of the risk or hazard about which it failed to warn."[84] The majority, in discussing the impact of such knowledge, found that "even if knowledge of [DES'] 'dangerous propensities' is sufficient to create liability to the women exposed to the drug in utero, this same knowledge does not automatically justify the extension of liability to those women's children."[85] The Court precluded Charles Grover from pursuing his cause of action without analyzing the most crucial issue in this case: Whether knowledge of DES' dangerous propensities extended to include harm to the offspring of females exposed to DES in utero.

The Court appears to be selecting an arbitrary cut-off point as to where foreseeability and causation will no longer allow a cause of action in tort. However, the Court gives little indication as to how it arrived at such a point. If DES manufacturers "knew or should have known" that females exposed to the drug in utero would be born with defective reproductive systems, then does it not

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80 *Id.*

81 *Id.* at 697.

82 *Id.* at 700.

83 *Id.* at 702 n.4 (Resnick, J., dissenting). "The reason for the majority's holding is not clear because in one breath it correctly states that 'we are required to assume that Charles Grover can prove that his injuries were proximately caused by his mother's exposure to DES,' but then ultimately concludes that 'because of the remoteness in time and causation, we hold that Charles Grover does not have an independent cause of action.'" *Id.* (emphasis omitted).

84 Crislip v. TCH Liquidating Co., 556 N.E.2d 1177, 1182-83 (Ohio 1990).

85 *Grover*, 591 N.E.2d at 700.

follow that those same manufacturers "knew or should have known" that some of those females would choose to employ those reproductive systems in the future?[86]

Where these women would not reach childbearing age until at least 16 years after their birth, could or should the manufacturers have known that DES could cause a birth defect in those women exposed in utero that would result in the delivery of an injured child twenty or thirty years later?[87] The majority, with little justification for its position, decided that the answer to such a valid and pertinent question was *no*.[88]

In reaching this decision, the majority engaged in a narrow analysis of what the manufacturer knew or should have known. Evidence exists indicating that in the 1930s and 1940s, the manufacturers of DES had available information which indicated that the drug caused reproductive tract abnormalities and cancer in exposed animal offspring.[89] The duty of a drug manufacturer to warn of dangers associated with the drug extends beyond any actual knowledge the manufacturer gains from research it performs to include knowledge available to an expert through scientific literature.[90] Where such knowledge is vital to establishing liability, the court's indication that "this generalized knowledge" is not sufficient to impose liability for injuries to a third party that occur 28 years later is far too superficial of an analysis of what the manufacturer knew or should have known.[91]

Determining Foreseeability, or Lack Thereof

The Court, in analyzing the issue of foreseeability, did not adequately account for the unique nature of DES[92] and the threat it poses to future generations.[93] This nature was, however, addressed by the Ohio legislature. In an effort to deal with the latent hazards of DES, and to preserve a right to pursue a remedy, the legislature sought to protect those injured by allowing a suit to be advanced within

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86 *See Id.* at 703 (Resnick, J., dissenting).

87 *Id.* at 699.

88 *See Id.* at 700.

89 *See Id.* at 702; Bichler v. Eli Lilly & Co., 436 N.E.2d 182 (N.Y. 1982); Needham v. White Labs., 639 F.2d 394 (7th Cir. 1981), *cert. denied*, 454 U.S. 927 (1981).

90 McEwen v. Ortho Pharmaceutical Corp., 528 P.2d 522, 528-29 (Or. 1974).

91 *Grover*, 591 N.E.2d at 700.

92 *See* supra notes 12-25 and accompanying text.

93 "American courts are struggling to accommodate common law tort doctrines to the peculiar characteristics of toxic substance litigation." David P.C. Ashton, *Decreasing The Risks Inherent in Claims for Increased Risk of Future Disease*, 43 U. MIAMI L. REV. 1081, 1084 (1989). Considerable debate exists as to whether the present legal system is capable of dealing with personal injuries resulting from "industrial processes and products." *Id. See also* William R. Ginsberg & Lois Weiss, *Common Law Liability for Toxic Torts: A Phantom Remedy*, 9 HOFSTRA L. REV. 859 (1981); Pamela J. Strand, Note, *The Inapplicability of Traditional Tort Analysis to Environmental Risks: The Example of Toxic Waste Pollution Victim Compensation*, 35 STAN. L. REV. 575 (1983).

two years of when the plaintiff reasonably discovered the existence of the injury incurred.[94]

In discussing foreseeability, the Court notes that if an actor's conduct creates a risk of harm to a certain class of plaintiffs, and such risk of harm actually injures a person of a different class to whom the actor could not reasonably have anticipated injury, then the actor is not liable to the party injured.[95] However, this statement erroneously assumes that Charles Grover's "class" could not be foreseeable.

Injuries to the reproductive organs of Charles Grover's mother were deemed foreseeable.[96] The harm to Charles was inextricably linked to those same foreseeable injuries in his mother's reproductive organs. Therefore, although Charles may be in a different "class" than his mother, that "class" is not automatically unforeseeable merely because it may have been ignored or overlooked by the manufacturer.

Plaintiffs aver that scientific information regarding the risks of DES to reproductive organs of those exposed in utero was available to manufacturers as early as 1930.[97] In light of this scientific information and the Ohio legislature's special accommodation for actions brought pursuant to injury caused by DES,[98] to

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[94] *See* OHIO REVISED CODE ANN. § 2305.10. (Anderson 1991). The text of that statute states in part:

> An action for bodily injury . . . shall be brought within two (2) years after the cause of action thereof arose . . .
>
> For purposes of this section, a cause of action for bodily injury which may be caused by exposure to diethylstilbestrol or other non-steroidal synthetic estrogens, including exposure before birth, arises upon the date on which the plaintiff learns from a licensed physician that he has an injury which may be related to such exposure, or upon the date on which by the exercise of reasonable diligence he should have become aware that he has an injury which may be related to such exposure, whichever date occurs first . . ."

See also Elmer I. Swartz & Byron S. Krantz, *Statute of Limitations in Cases of Insidious Diseases*, 12 CLEV. MAR. L. REV. 225, 232 (1963) ("For statute of limitations purposes in respect to insidious diseases, courts now have undertaken to adopt and apply a fair and reasonable standard to meet the exigencies of the situation.").

Subsequent to the *Grover* decision, the Ohio Supreme Court determined that the language of R.C. § 2305.10, regarding the accrual date of a cause of action for DES-related injuries, was unconstitutional. Burgess v. Eli Lilly & Co., 609 N.E.2d 140 (Ohio 1993). The Court determined that the portion of the statute which triggered the tolling of the statute of limitations "upon the date on which the plaintiff learns from a licensed physician that he has an injury which *may be related to such exposure* . . . " is too tenuous to protect plaintiffs. *Id.* at 141. The court held that their previously adopted "discovery" rule for the accrual of product liability claims should also apply to DES claimants. *Id.* at 144. That rule states that "when an injury does not manifest itself immediately, the cause of action arises upon the date on which the plaintiff is informed by competent medical authority that he has been injured, or upon the date on which, by the existence of reasonable diligence, he should have become aware that he has been injured, whichever date occurs first." *Id.* (*citing* O'Sricker v. Jim Walter Corp., 447 N.E.2d 727, 732 (Ohio 1983)).

[95] *Grover*, 591 N.E.2d at 700 (*citing* RESTATEMENT (SECOND) OF TORTS § 281 cmt. c (1965)).

[96] *See* McMahon v. Eli Lilly & Co., 774 F.2d 830 (7th Cir. 1985).

[97] *Grover*, 591 N.E.2d at 702 (Resnick, J., dissenting).

[98] *See* OHIO REVISED CODE ANN. § 2305.10 (Anderson 1991).

hold that Charles was not foreseeable would be to ignore the "very fact of the insidious nature of DES."[99]

A more thorough inquiry into what the manufacturer knew or should have known would have led the Court to a sound determination of foreseeability. Unfortunately, the Court chose a more cursory route on its way to precluding a cause of action for Charles as well as others in his "class."

Public Policy and the Implications of the Grover Decision

The Court relied upon *Enright v. Eli Lilly & Co.*,[100] as persuasive authority.[101] As in *Enright*, the Ohio Supreme Court predicated its decision to preclude liability for Charles Grover's claim on the basis of such a claim's impact on public policy. The Court appears to be concerned that the "imposition of liability would invoke 'staggering implications' and 'rippling effects,'" upon the legal system.[102] However, as noted in an earlier decision by the Ohio Supreme Court,[103] an increased possibility of litigation is not a valid reason for denying a judicial forum.[104]

The same Court that denied a cause of action to Charles Grover once stated that "[i]t is the business of the law to remedy wrongs that deserve it, even at the expense of a 'flood of litigation'; and it is a pitiful confession of incompetence on the part of any court of justice to deny relief upon the ground that it will give courts too much work to do."[105] Furthermore, the general improbability of preconception torts[106] resulting in actionable injuries as well as the practical problems associated with proof and causation[107] will no doubt keep courts protected from the possibilities of a "floodgate of litigation."[108]

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99 *See Grover*, 591 N.E.2d at 702 (Resnick, J., dissenting); Enright v. Eli Lilly & Co., 570 N.E.2d 198, 207 (N.Y. 1991) (Hancock, J., dissenting), *cert. denied*, 112 S. Ct. 197 (1991).

100 570 N.E.2d 198 (N.Y. 1991), *cert. denied*, 112 S. Ct. 197 (1991).

101 In *Enright*, the N.Y. Court of Appeals held that a child has no cause of action in negligence or strict liability against a prescription drug company who manufactured DES if the child was never exposed to the drug in utero. *Id.* at 203. The *Enright* Court, noting that the rippling effects of DES exposure may extend for generations, stated that "it is our duty to confine liability within manageable limit." *Id.*

102 *Grover*, 591 N.E.2d at 702 (Resnick, J., dissenting).

103 Schultz v. Barberton Glass Co., 447 N.E.2d 109 (Ohio 1983).

104 *Id.* at 111. In *Schultz*, the Court first allowed a cause of action for Negligent Infliction of Serious Emotional Distress without a contemporaneous physical injury. *Id.* The Court, in addressing policy arguments of increased litigation, noted that an increased judicial caseload is not an acceptable reason for denying justice. *Id.* "Even if the caseload increases, the 'proper remedy' is an expansion of the judicial machinery, not a decrease in the availability of justice." *Id.* (*citing* Battalla v. State, 176 N.E.2d 729, 731 (N.Y. 1961)).

105 *Id.* (*citing* William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939)).

106 Medical knowledge regarding development prior to conception may hinder a Plaintiff's ability to prove cause in fact. *See* Note, *The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries*, 110 U. PA. L. REV. 554, 565-569 (1962).

107 Plaintiffs are not generally able to establish a causal connection between their injury and a specific manufacturer that produced the pills causing that injury. Note, *Market Share Liability: An Answer to the*

Although harmed irreparably by the tortious conduct of another, Charles Grover and others like him will have to go through life uncompensated. However, the cost of such tortious conduct will not go unpaid.

"Recognizing a cause of action for preconception torts serves a twofold purpose."[109] First, a deterrent force is added to tort law by requiring those responsible for inflicting debilitating physical injuries upon children to pay for the additional costs needed to enable the child to adapt to a society that is geared toward those without such injuries.[110] Such a requirement would prevent a windfall for the tortfeasor as well as help to alleviate from both society and the child's family the enormous costs associated with raising a handicapped child.[111] Second, it would keep with the traditional notion of compensation via the body of tort law.[112] Therefore, the result of recognizing a cause of action for preconception torts would help to promote an accurate economic distribution of costs and permit an effective allocation of society's resources.[113]

The *Grover* decision burdens the citizens of the State of Ohio by requiring them to pay for the tortious conduct of large drug manufacturers. By not allowing Charles Grover his day in court and his chance to prove his cause of action for the tort committed upon him, the burden will seem that much heavier.

DES Causation Problem, 94 HARV. L. REV. 668, 669-670 (1981). The drug was often sold under its generic name and many prescription records have been lost or destroyed since the time the drug was prescribed. *Id.* at 670.

108 David S. Steefel, *Preconception Torts: Foreseeing the Unconceived*, 48 U. COLO. L. REV. 621, 639 (1977).

109 *Id.* at 625.

110 *Id.*

111 *Id.*

112 *Id.*

113 *Id.* at 626. "[T]o the extent that the tort law is compensatory, it is irrelevant whether the Plaintiff exists when the tortious conduct initially occurs." *Id.* at 625. "If the child is born alive, the injury will have been incurred by a separate human being who may have to bear the consequences of the injury for life." *Id.* Courts, "responding to changing social needs and social conditions, have inch by inch, case by case, moved the law beyond privity of contract and beyond liability to the ultimate purchaser, beyond the manufacturer, beyond actual negligence, and some courts, even beyond strict liability to enterprise liability, openly using policy-based justifications such as the superior ability of manufacturers and sellers both to recognize and cure defects, and to minimize and spread the risk among all consumers." Judith S. Kaye, *The Human Dimension in Appellate Judging: A Brief Reflection on a Timeless Concern*, 73 CORNELL L. REV. 1004, 1012 (1988).

Permitting recovery for preconception torts would be consistent with the developing doctrine of tort law, enterprise liability. Steefel, *supra* note 108, at 625. Enterprise liability theory seeks to: (1) prevent as many tort-like losses as is economically feasible; (2) distribute, as fairly as possible, among various segments of the consuming public, the costs of prevention or the costs of insuring against tort-like losses which will nonetheless occur; (3) encourage individual members of society to rationally decide about the use of their personal resources; and (4) avoid the creation of distortions in the use of the market place as a tool for best allocating society's total limited resources. Howard C. Klemme, *The Enterprise Liability Theory of Torts*, 47 U. COLO. L. REV. 153, 177-78 (1976). *See also* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961); Roland N. McKean, *Products Liability: Trends and Implications*, 38 U. CHI. L. REV. 3 (1970).

CONCLUSION

"Any legal system, to remain viable over a span of time, must have the flexibility to admit change."[114] After the *Grover* decision, the viability of tort law in Ohio remains questionable. While the Court was required to assume that Charles could prove a direct causal link between the tortious conduct of the pharmaceutical companies and his injuries, the Court determined that too much time had passed to allow Charles a chance to advance his cause of action.

"To find solutions for a succession of differing problems in a continuously changing context [the legal system] must be creative."[115] By relying on traditional and stagnant concepts of duty and foreseeability, the Ohio Supreme Court has shown no creativity.

Although the Court did not accept a "blanket no-duty rule" regarding causes of action for preconception torts, their failure to provide guidelines as to when such causes of action may be advanced leaves potential litigants guessing, and the rest of us paying the bill.

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[114] Robert E. Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463, 463 (1962).
[115] *Id.*