

Recent Developments in Obstetric Negligence Law
Wrongful Pregnancy, Wrongful Birth, Wrongful Continuation of Pregnancy
And Wrongful Death

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In recent years, the issues of wrongful pregnancy, wrongful birth, wrongful continuation of pregnancy and wrongful death have engendered controversy among the lawyers, physicians and the general public. These cases raise important public policy, moral and ethical issues. The purpose of this paper is to provide a summary from the principals underlying wrongful pregnancy, wrongful birth, wrongful continuation of pregnancy and wrongful death litigation.

1. Wrongful Pregnancy

Wrongful pregnancy has been defined as an action brought by the parents of a child as a result of preconception negligence by the defendant.¹ They typical wrongful pregnancy case involves a negligently performed sterilization procedure that has resulted in the conception of an unexpected and, at least initially, unwanted child.² Still other cases arise in the context of sterilization procedures which failed, but not through any fault on the part of the defendant. In these cases, the allegations of negligence are based on a duty fully to inform the patient of the risk of failure of even a properly performed sterilization procedure.³

One of the first reported wrongful pregnancy cases in Canada was *Cataford*⁴ in which the defendant surgeon negligently conducted a ligature of the fallopian tubes. The female plaintiff already had 10 children at the time this sterilization procedure was performed. For months post-surgery, the plaintiff was found to be pregnant and subsequently gave birth to a healthy baby boy.

¹ The Honourable Madam Justice Lax (Ontario Superior Court), *Wrongful Life, Wrongful Pregnancy, Wrongful Birth*, Ontario Trial Lawyer's Association Spring Conference 1997.

² See, for example, *Cataford et al. v. Moreau* (1978), 114 D.L.R. (3d), 585 (Que. S.C.-Deschenes C.J.) (hereinafter "*Cataford*"); *Kealey et al. v. Berezowski et al.* (1996), O.R. (3d) 37 (Ont. Gen. Div.) (hereinafter "*Kealey*").

³ An example of this type of case is *Joshi (Guardian ad litem of) v. Wooley*, [1995] B.C.J. No. 113 (B.C.S.C.) (hereinafter "*Joshi*")

⁴ *Supra* note 2.

A. Whether a Recognized Action Exists

In *Cataford*, claims were advanced on behalf of the female plaintiff who underwent the surgery, her husband and the unexpected child. Deschenes C. J. held that, in principle, the plaintiffs had the right to recover damages that constituted an immediate and direct consequence of the defendant's fault.⁵

It is clear from *Cataford* and the subsequent case law that, in wrongful pregnancy claims, the adult female plaintiff, the mother of the unexpected child, has a viable claim. The adult male plaintiff, the father of the unexpected child, also has a claim, but this claim is derivative in that it flows from the mother's loss.⁶ The unexpected child, however, does not have any claim. Such claims, which are asserted on the child's behalf for damages suffered in being born, and are broadly known as wrongful life claims, are rejected as being entirely without foundation. In *Cataford* the child plaintiff's claim is denied on the basis that it is clearly impossible to compare the situation of the infant post-birth with the situation he would have been in if he had not been born.⁷ Thus the law is clear that no duty is owed by a doctor to a fetus not to allow it to be conceived and then born.

B. Factors Considered in Determining Liability

The following factors are considered by the courts in determining whether the defendant surgeon conducted a sterilization procedure is negligent:

1. *Standard of Care*

Whether the procedure is recognized within the medical community.⁸

Expert testimony as to whether the manner in which the procedure was conducted was appropriate.⁹

⁵ Supra note 2 at p.10 of the Quicklaw judgment. Such recovery is based on the language of article 1075 of the Civil Code which parallels that used to define the common law concepts of causation and remoteness.

⁶ The distinction between the mother's and father's claims is based on the notion that a duty of care is owed by the defendant doctor to the mother and is not deemed to extend to the father.

⁷ *Cataford*, supra note 2 at p.9.

⁸ *Doiron et al. v. Orr et al.*(1978), 20 O.R. (2d) 71 (Ont. H.C.J.) (hereinafter "Doiron")

⁹ *Grey v. Webster* (1984), 14 D.L.R. (4th) 706 (N.B.Q.B.)(hereinafter "Grey")

Those criteria are the same as those employed in all obstetric negligence cases, including those for injuries arising during labour and delivery, which do not fall within any of the categories delineated in this paper, for example, cases of shoulder dystocia, breech birth and consequences of fetal-maternal blood loss or fetal asphyxia.¹⁰

2. *Standard of Disclosure*

Whether the defendant surgeon advised of the chance that the procedure would not succeed and that an unwanted pregnancy might occur and recommended use of alternate methods of birth control;¹¹

3. *Causation*

The effect of non-disclosure on the plaintiff as determined via application of the *Riebl v. Hughes*¹² modified objective standard for disclosure (discussed in greater detail below under the heading “Wrongful Birth”);¹³

How long after the sterilization procedure the pregnancy occurred.¹⁴

¹⁰ In this regard see the shoulder dystocia/brachial plexus nerve injury cases, *Fashola (Next friend of) v. Salvation Army Grace Hospital*, [1992] O.J. No. 1107 (Ont. Gen. Div.); *Pierre (Next friend of) v. Marshall*, [1993] A.J. No. 1095 (Alta. Q.B.); *Fleury (Next friend of) v. Woolgar*, [1996] A.J. No. 52 (Alta. Q.B.); and *Brown (Litigation Guardian of) v. Sarraf*, [1998] O.J. No. 3746 (Ont. Gen. Div.); see also breech birth cases such as *Anderson v. Salvation Army Maternity Hospital*, [1989], N.S.J. No. 339 (N.S.T.D.); *Gleason (Guardian ad litem of) v. Bulkley Valley District Hospital*, [1996] B.C.J. No. 1744 (B.C.S.J.); *Martin v. Listowel Memorial Hospital* [1998] O.J. No. 3126 (Ont. Gen. Div.) (varied on appeal with respect to damages at [2000] O.J. No. 4015) (C.A.); *Brimacombe v. Mathews*, [1999] B.C.J. No. 90 (B.C.S.C.) and *Bauer (Litigation guardian of) v. Seager*, [2000] M.J. No. 356 (Man. Q.B.). The causation analysis in these cases also parallels that employed in wrongful pregnancy cases and wrongful birth cases (See factors relevant in determining causation as outlined below). Some also emphasize the “material contribution” analysis of causation set out in cases such as *Athey v. Leonati* (1996), 140 D.L.R. (4th) 235 at pp. 239-240.

¹¹ *Ibid*; *Suite v. Cooke*, [1995] A.Q. no. 696 (Que. C.A.).

¹² [1980] 2 S.C.R. 880 (Laskin C.J.). This application of this test in the obstetric negligence context was more recently reiterated in *Hollis v. Dow Corning Corp.* [1995] 4 S.C.R. 634 (La Forest J.).

¹³ *Grey, Supra* note 9 at p.6 of the Quicklaw judgment. In this particular case the Court has the advantage of knowing the plaintiff’s behaviour following a second tubal ligation, namely, her failure to use alternate methods of birth control despite her knowledge that the success of the procedure was not guaranteed. Indeed, the defendant’s failure to inform was not deemed to be the cause of her damages in this circumstance. See also *Dendaas (Taylor) et al. v. Yackel* (1980) 109 D.L.R. (3d) 455 (B.C.S.C.) (hereinafter “*Dendaas*”).

¹⁴ *Mummery v. Olsson*, [2001] O.J. No. 226 (Ont. S.C.J.)

As in other classes of medical malpractice claims, the issue of medical record keeping is relevant to finding a breach of the standard of disclosure in the obstetric negligence context. In *Kealey*¹⁵, Lax J. states that, where notes are absent, there is no reason for a physician to recall the details of conversations with patients. She further notes that a patient is likely to recall at least the substance of the discussion with a doctor and that, where the patient's recollection is supported by other evidence, there is no reason not to rely on it.¹⁶

C. Damages

1. *The Adult Female Plaintiff*

According to the case law, the following classes of damages are available to the adult female plaintiff who bears an unexpected child as a result of wrongful pregnancy:

a) General Damages

Damages for loss of enjoyment of life for the interruption of sexual relations for four months after the sterilization operation;¹⁷

Damages for the inconvenience of the pregnancy and the anxiety concerning the arrival of a child (where the plaintiff already has a large number of children);¹⁸

Damages for the suffering inherent in confinement;¹⁹ and

Damages for suffering and inconvenience relating to a subsequent sterilization procedure to correct the negligence.²⁰

¹⁵ *Supra* note 2.

¹⁶ *Supra* note 2 at page 7 of the Quicklaw judgment. See also the unreported decision of Juriansz J. in *Simon v. Lusic* (oral reasons for judgment delivered October 20, 2000), currently under appeal, regarding record keeping obligations beyond obstetric context.

¹⁷ *Cataford, supra* note 2; *Kealey, supra* note 2.

¹⁸ *Ibid.*

¹⁹ *Cataford, supra* note 2.

²⁰ *Cataford, supra* note 2; *Kealey, supra* note 2.

Damages for emotional trauma suffered where the woman who becomes pregnant following a negligent sterilization procedure feels compelled to undergo an abortion due to her reasonable fear that, the negligence might negatively affect fetal development;²¹

Damages for the emotional burden resulting from the birth of an additional child in circumstances where a previous child with special needs has taxed the woman's resources to the maximum.²²

b) Pecuniary Damages

Pecuniary damages are available to adult female plaintiffs in cases of wrongful pregnancy as follows:

Damages for lost wages due to maternity leave;²³

Damages to compensate for "start up costs" as a result of the pregnancy;²⁴

Damages for loss of future income for delayed re-entry into the workforce, at least in extreme circumstances.²⁵

2. *The Adult Male Plaintiff*

The case law demonstrates that the adult male plaintiff whose partner gives birth to an unexpected child as a result of negligence with respect to sterilization is entitled to damages falling under the following heads:

²¹ See, for example, *Cryderman v. Ringrose*, [1978] 3 W.W.R. 481 (S.C. Alta.). In this case, damages under this head were awarded to a woman who had undergone a sterilization procedure involving closure of the fallopian tubes by way of introduction of silver nitrate (which procedure was actually performed three times due to concern it had not been conducted properly) and subsequently became pregnant and underwent an abortion because of fear that the three applications of silver nitrate could injure the developing fetus. See also *Lebrun v. Graham*, [1995] A.J. No. 560 and *Dendaas vs. Yackel*, supra note 11.

²² *Joshi*, supra note 3 at 18-19.

²³ See *Mummery v. Olsson*, [2001] O.J. No. 226 (S.C.J. – Forstell J.).

²⁴ *Ibid.*

²⁵ See *Joshi*, supra note 3 where mother had chosen sterilization because she already had three children, one of whom had special needs and required constant supervision and assistance until such time as he would be in school full-time.

a) General Damages

Damages for loss of consortium following the negligent sterilization procedure and the subsequent corrective sterilization procedure;²⁶

One can speculate that other categories of general damages might be available if the adult male plaintiff is adversely affected psychologically by his partner's wrongful pregnancy, as long as his partner brings a claim from which his claim may be derived.

b) Pecuniary Damages

Damages for loss of income due to parental leave taken at the time of the child's birth.²⁷

In *Cataford*, pecuniary damages for the cost of maintaining the unexpected child from his birth age of majority were held not to be compensable.²⁸ In reaching this conclusion, Deschenes C.J. purposefully avoided the question of whether the cost of maintaining a child constitutes a damage for which the defendant must assume the burden. Instead, he concluded that, if there is a burden, it is more compensated for by the benefits to be derived by the presence of a new child. An actual cost-benefit calculation was provided in this regard.

A cost-benefit analysis was subsequently applied in the Quebec case of *Suite v. Cooke*.²⁹ In that case, however, the trial judge concluded on the evidence that damages should be awarded for child-rearing costs. This decision was upheld by the Quebec Court of Appeal,³⁰ which recognized that such awards can no longer be regarded as contrary to public policy.³¹

²⁶ *Cataford*, *supra* note 2 at p.11.

²⁷ *Kealey*, *supra* note 2 at p.24.

²⁸ Compare with the English case of *Emeh v. Kensington and Chelsea Westminster Health Authority*, [1984] 3 All E.R. 1044 (C.A.) in which maintenance costs were awarded in similar circumstances.

²⁹ [1993] R.J.Q. 514 (Que. S.C.).

³⁰ [1995] R.J.Q. 514 (Que. C.A.)

³¹ The court of Appeal reviews the French, English and American case law and adopts the English view that damages for child-rearing should be awarded in appropriate circumstances, namely, those in

In the earlier Ontario judgment in *Doiron*,³² the Court had directly addressed the public policy issue underlying the right to recover for maintenance of a child. Despite the fact that the Court dismissed the plaintiffs' action and was not required to rule on this point, Garrett J. clearly stated that the concept that child-rearing be paid for by someone other than the child's parents on account of an unwanted mistake is "just simply grotesque".³³ Clearly, the trend of the Quebec Courts in *Suite* represents a significant departure from this more traditional approach which may initially have developed as a result of the child's traditional role in supporting the family not only emotionally, but financially as well. This role is generally less pronounced in North American society today, although still prevalent in certain immigrant communities.

Yet another approach is suggested by Madam Justice Lax in *Kealey*.³⁴ This approach, which is critical of the type of cost-benefit analysis employed by Deschenes C. J. in *Cataford*, involves i) a determination of the purpose of the sterilization that resulted in the unplanned pregnancy and ii) a consideration as to whether the negligence prevents the parents from fulfilling their responsibilities to the child or compromises in any way the relationship of mutual support and dependency which arose on the child's birth.³⁵ In the course of setting out her approach, Lax J. suggested that, where the sterilization is sought for economic reasons and its failure imposes an economic burden on the plaintiffs, damages for the cost of raising the child might be compensable. She concluded, however, on the facts of the case before her, that there was no such burden and, consequently, no damages should be awarded.

Interestingly, in setting out her approach in *Kealey*, Lax J. refers to *Cherry (Guardian ad litem of) v. Borsman*,³⁶ to be discussed in greater detail below under the heading "Wrongful Continuation of Pregnancy", in which the child who was born following the doctor's negligence actually suffered debilitating physical injuries. It is unclear from her judgment whether such physical injury to the fetus is a prerequisite for a successful claim for child-rearing costs. Clearly, the matter has not been definitively decided and will likely be revisited in future cases.

which the burden and inconvenience, both financial and emotional, outweighs the joys associated with child rearing (see pp. 18 – 19 of the Quicklaw judgment).

³² *Supra* note 8.

³³ *Ibid.* at p. 3 of the Quicklaw judgment.

³⁴ *Supra* note 2 at p. 20 of the Quicklaw judgment.

³⁵ *Ibid.*, at p. 22.

³⁶ (1991), 75 D.L.R. (4th) 668 (B.C.S.C.).

II Wrongful Birth

Wrongful birth is defined as an action brought by the parents of a child as a result of post-conception negligence by a defendant, who is generally a doctor. This action typically arises in situations in which the fetus is disabled in utero, generally (but not exclusively) as a result of genetic or congenital defects and the defendant doctor negligently fails to diagnose the condition or fails to inform the mother of the risk so she can opt for an abortion.³⁷ It also arises in situations of negligence during labour and delivery. A separate category of wrongful birth cases concerns claims arising out of unsuccessful termination of a pregnancy. This type of claim will be discussed below under the separate heading “Wrongful Continuation of Pregnancy”.

A. Whether a Recognized Action Exists

Wrongful birth claims are recognized in Canadian law. One of the first reported cases of this nature is *Muxlow (Next Friend of) v. King*³⁸ which concerns a physician’s failure to diagnose a premature rupture of the membrane 18 weeks into the pregnancy and the subsequent birth of a completely disabled child who was totally dependant on the plaintiff mother. This case, was reported in the context of a motion to strike the jury notice at the end of the evidence at trial. The jury notice was in fact struck, at which point the action was dismissed on consent.

A detailed analysis of the nature of actions for wrongful birth is provided in later cases such as *Arndt v. Smith*,³⁹ and *R.H. v. Hunter*.⁴⁰ *Arndt* arose in the context of a physician’s failure properly to advise the expectant mother of certain risks of congenital injury to the fetus as a result of the mother having contracted chicken pox during the pregnancy. The child was born with congenital varicella syndrome caused by the infection and suffered from brain damages that permanently affected her esophageal motility. As a result, she was unable to swallow into her stomach and had a tendency to aspirate stomach contents into her lungs. Consequently, she was required to be tube-fed. She also suffered from breathing problems, had a reduced life expectancy and required constant care.

³⁷ See *Cherry (Guardian ad litem of) v. Borsman* (1991), D.L.R. (4th) 668 (B.C.S.C.).

³⁸ [1990] O.J. No. 2689 (Ont. Gen. Div.).

³⁹ (1994), 93 B.C.L.R. (2d) 220 (B.C.S.C.), reversed by the British Columbia Court of Appeal [1995] B.C.J. No. 1416 (B.C.C.A.); appeal judgment reversed by the Supreme Court of Canada [1997] 2 S.C.R. 539 (hereinafter “*Arndt*”).

⁴⁰ [1996] O.J. No. 2065 (Ont. Gen. Div.)(liability) and [1996] O.J. No. 4477 ((Ont. Gen. Div.) damages)(hereinafter “*R.H.*”).

The Supreme Court of Canada in *Arndt* clarified that wrongful birth actions were permissible and that such actions brought by the mother are founded in the duty of care owed to her by the defendant doctor. On the precise facts of the case, however, the majority of the Supreme Court of Canada concluded that the action was properly dismissed by the trial judge. The issue of whether a duty of care is owed to the father had already been addressed by the trial judge, who concluded on the authority of *Tremblay v. Daigle*⁴¹ that only a derivative duty, based on that owed to the mother, could be owed to the father.⁴² Given certain comments in *Freeman v. Sutter*,⁴³ however, one cannot help but wonder whether, in a case where a father attends the obstetric appointments, has regular communication with the obstetrician and, together with the mother, receives advice with respect to the congenital and/or genetic abnormalities from the doctor, a direct duty of care might extend to him as well.

R.H. concerned two doctors' failures to inform parents sufficiently about the risk that their children would be born with Duchenne's muscular dystrophy. In this case, the jury found that the adult plaintiffs had a viable claim for damages due to wrongful birth and damages were awarded.⁴⁴

Often, wrongful birth claims are brought in conjunction with actions on the part of plaintiff child for wrongful life. As indicated under the heading "Wrongful Pregnancy" above, wrongful life actions involve claims by the unwanted/unexpected child who seeks damages for being born. The Canadian judicial community's blatant rejection of wrongful life as a cause of action on public policy grounds is readily apparent in wrongful birth cases.

In *Arndt*,⁴⁵ the wrongful life claim initially advanced by the child plaintiff was abandoned prior to trial. Notwithstanding, the trial judge, Hutchinson J., took the opportunity presented by the case to summarize the current state of the law governing wrongful life, with reference to the leading British and American case law concerning this cause of action. In particular, Hutchinson J. quoted the English Court of Appeal in

⁴¹ (1989), 62 D.L.R. (4th) 634 at 665 (S.C.C.).

⁴² *Supra*, note 38.

⁴³ [1996] M.J. No. 246 (Man. C.A.) at p.2 of the Quicklaw judgment in which the Court of Appeal, in dealing with a claim brought by a father alone, suggests that, had the father been a patient of the defendant doctors or consulted or received advice from them (or, at the very least, was privy to her instructions from them) there may have been some basis for an independent claim.

⁴⁴ *Supra*, note 39.

⁴⁵ *Supra*, note 38.

*McKay et al. v. Essex Area Health Authority et al.*⁴⁶, which concerned negligent failure to diagnose rubella during pregnancy and the subsequent birth of a child with severe disabilities, as follows:

this child has not been injured by either defendant, but the rubella which has infected the other without fault on anybody's part... The only right on which she can rely as having been infringed as a right not to be born deformed or disabled, which means, for a child deformed or disabled before birth by nature or disease, a right to be aborted or killed; or, if that last plain word is thought dangerously emotive, deprived of the opportunity to live after being delivered from the body of her mother... how can there be duty to take away life? How indeed can it be lawful?⁴⁷

To impose such a duty [to terminate the child's life] toward the child would, in my opinion, make a further inroad on the sanctity of human life which would be contrary to public policy. It would mean regarding the life of a handicapped child as not only less valuable than the life of a normal child, but so much less valuable that it was not worth preserving...⁴⁸

Hutchison J. also refers to the American case, *Becker v. Schwartz*⁴⁹, which concerns negligent failure to diagnose Down Syndrome, in which Judge Jansen, speaking for the majority, stated:

...Whether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and the theologians. Surely the law can assert no competence to resolve the issue, particularly in view of the very nearly uniform high value which the law and mankind has placed on human life, rather than its absence...(812)

Thus, the Supreme Court of Canada has made it abundantly clear that there is no recognized claim for wrongful life in Canada.⁵⁰

⁴⁶ [1982] 2 All E.R. 771 (C.A.).

⁴⁷ *Ibid.* at 779 – 780.

⁴⁸ *Ibid.* at 781.

⁴⁹ (1978), 386 N.E. Reporter 2d 807 (N.Y.C.A.).

⁵⁰ Further Canadian cases dismissing claims for wrongful life include *Lacroix (Litigation Guardian of) v. Dominique*, [1999] M.J. No. 397 (Man. Q.B.), *Jones v. Rostvig*, [1999] B.C.J. No. 647 (B.C.S.C.) and *Mickle v. Salvation Army Grace Hospital Windsor Ontario*, [1998] O.J. No. 4683. A detailed review of the American case law concerning the issue of wrongful life is provided in Madam Justice Lax's paper entitled *Wrongful Life, Wrongful Pregnancy, Wrongful Birth*, *supra* note 1.

B. Factors Considered in Determining Liability

The factors considered in determining liability in a wrongful birth case are described in the Supreme Court of Canada majority in *Arndt v. Smith* as follows:

1. *Standard of Disclosure*

Disclosure of material risks associated with carrying the pregnancy to term;

Disclosure of non-material risks that would be of significance to the particular patient concerned as determined by questions asked by the patient during the disclosure process.⁵¹

2. *Causation*

What the reasonable patient in the circumstances of the plaintiff would have done if faced with the same situation and a consideration of any particular concerns for the patient; and

Any special consideration affecting the particular patient in determining whether that patient would have refused treatment or provided with all the information about the possible risks;

The extent of the plaintiff's questioning about risks associated with the maternal illness concerned; the absence of a specific and clearly expressed concern;

The plaintiff's desire for more children; and

The plaintiff's suspicion of the mainstream medical profession.

All these factors which arise out of the *Reibl v. Hughes* modified objective test, go to whether the adult female plaintiff acting reasonably in the circumstances would have followed the defendant doctor's advice and/or would have acted on the information given if disclosure had been complete.

In the course of delineating the above, criteria, Cory J., speaking for the majority, highlights the inherent difficulty in applying the modified objective test, namely, assessing which aspects of the plaintiff's personal circumstances should be attributed to the reasonable person. Ultimately, he determines that the modified objective tests must

⁵¹ Another relevant factor specified in more recent case law is whether the patient comprehended instructions regarding medication use. See, for example, *Lacroix, supra* note 50 at p.4 of the Quicklaw judgment in which the Jewers J. held that the defendant breached the standard of disclosure in describing the dangers of using epilepsy drugs during pregnancy.

be taken to possess the patient's reasonable beliefs, fears, desires and expectations become apparent through the patient's questions. Further, the patient's concerns must be reasonably based. In this way, the test eliminates from consideration patients' honestly held but idiosyncratic and unreasonable or irrational beliefs.⁵²

C. Damages

1. *The Adult Female Plaintiff*

The following categories of damages have been held to be compensable to the adult female plaintiff in cases of wrongful birth;

a) General Damages

Damages for the stress, anxiety and burden involved in raising a child with disabilities;⁵³

b) Pecuniary damages

Damages for future care costs, provided that, as a result of the negligence, the child is not healthy and requires care exceeding the cost of raising a healthy child;⁵⁴

Damages for out-of-pocket expenses;⁵⁵

Past income loss (including loss of commission) and future income loss where a parent is forced to become a medical manager of the disabled child's care;⁵⁶

Home modifications;⁵⁷ and

⁵² *Arndt, supra* note 39 at p.7-8 of the Quicklaw judgment.

⁵³ *R.H. v. Hunter* at 4 para 19 of the Quicklaw judgment. See also the provisional assessment of damages in *Lacroix, supra* note 50 cf. *Mickle, supra* note 50 in which Zuber J. refuses to award general damages of this nature provisionally on the basis of the defect being congenital and undetected by the defendant, as opposed to having been inflicted by the defendant.

⁵⁴ *Ibid.* (See Table of Damages at pp.12-14 of the Quicklaw judgment); See provisional awards of damages in *Mickle, supra* note 50.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

Attendant care expenses.⁵⁸

2. *The Adult Male Plaintiff*

As mentioned above, the only action a father may have in situations of wrongful birth is as a derivative action based on the action brought by the child's mother.⁵⁹ Such derivative claims have been found sufficient to permit a father to recover pecuniary damages in appropriate circumstances. The father in *R.H. v. Hunter*, for example, was awarded damages for future care costs on a derivative basis for his intention, despite his divorce from the mother, who was the primary care giver, to remain involved in the care and upbringing of his two children. In the absence of derivative claim or a direct relationship with the defendant doctor, foreseeability of the potential economic impact upon the father is not sufficient to support a cause of action.⁶⁰

III. Wrongful Continuation of Pregnancy

The tort of wrongful continuation of pregnancy is as a subcategory of wrongful birth claims. Wrongful continuation of pregnancy cases concern action brought by parents for a physician's negligent conduct of an abortion or failure to detect a continuing pregnancy after a failed (but not negligently performed) abortion which, in turn results in an unwanted birth.

A. Whether a Recognized Action Exists

An early example of a wrongful pregnancy case is *Friedette v. Wiebe*⁶¹ in which a general practitioner performed an abortion via suction and curettage on the plaintiff, a 17-year-old single high school student, while she was one month pregnant. Although the abortion was performed properly, the procedure failed and the plaintiff remained pregnant. The continuing pregnancy was not discovered until approximately 17 weeks into the pregnancy due to the negligence on the part of both the plaintiff and the defendant doctor.⁶² When, at approximately the 17th or 18th week of the pregnancy, the plaintiff discovered she was in fact pregnant, she did not want to go ahead with the

⁵⁸ Ibid.

⁵⁹ Ibid. at p.5, citing *Freeman v. Sutter*, *supra* note 43.

⁶⁰ Ibid. at pp.5-6.

⁶¹ (1986), D.L.R. (4th) 534 (B.C.S.C.)(hereinafter "*Friedette*")

⁶² The plaintiff failed to arrange a post-operative check-up by the defendant, despite having been told to do so. The defendant failed to examine the pathology report which would have indicated an absence of fetal tissue in the sample (a clear indication that the procedure was unsuccessful). Further, she later signed off on the unread report.

abortion, as at that stage it would have required induction of premature labour. Ultimately, the plaintiff gave birth to healthy twins.

The adult female plaintiff sued for pecuniary and non-pecuniary damages arising out of the continued pregnancy and the twins' birth. The Court held that she did indeed have a cause of action and awarded damages.⁶³ This action is obviously based on the defendant doctor's duty of care to the adult plaintiff. Clearly, it is reasonably foreseeable that a negligently performed abortion may harm the mother. Although the father of the child did not bring a claim, he would presumably have a derivative claim based on that owed to the mother.

As noted, *Fredette* concerned a claim for wrongful pregnancy brought by the mother only. It is clear from the later case of *Cherry (Guardian ad Litem of) v. Borsman*,⁶⁴ that, in limited cases, the child who is born following a failed abortion also has a recognized cause of action. The law is clear, however, that such action is not an action for wrongful life.

In *Cherry*, the defendant specialist in obstetrics and gynecology performed an abortion on the adult female plaintiff, unbeknownst to the defendant, the procedure failed and the fetus was not aborted. This failure was found at trial to be the result of an incorrect estimate of gestational age and the consequent use of the wrong size curette. The child was subsequently born with a number of serious debilitating complications affecting her physical, mental, and social well-being.⁶⁵ These complications were found to be a direct result of the failed abortion. The trial judge found that the defendant breached his duty of care, not only to the mother, but also the child plaintiff.

In determining the duty of care owed by the defendant to the fetus, the Court of Appeal employed ordinary negligence principles. It specified at the outset that the case did not involve an action for "wrongful life", as the plaintiffs did not assert a legal obligation to the fetus to terminate its life.⁶⁶

Rowles J.A., speaking for the Court, holds that it is clearly foreseeable that a negligently performed abortion may affect a fetus and that the defendant had a duty to

⁶³ The defendant in *Fredette* argued that Ms. Fredette failed to mitigate her damages by refusing an abortion at the 17 – 18 week mark (see pp. 4 - 5 of the Quicklaw judgment). The Court held that the mitigation argument must fail since the decision to not undergo a further abortion was reasonable in light of the fact that induction of premature labour tends to be highly difficult procedure both physically and psychologically.

⁶⁴ *Supra* note 37 (hereinafter "*Cherry*").

⁶⁵ *Ibid.*, at pp. 5 – 6 of the Quicklaw judgment.

⁶⁶ Compare with *McKay v. Essex Area Health Authority*, [1982] 2 All E.R. 771 (C.A.).

prevent this foreseeable harm.⁶⁷ He notes, however, that two factors complicate the analysis of the duty owed:

At common law a fetus is not a “person” with its own rights and does not become a person until it is born alive; and

There is an apparent conflict of interest between the defendant’s duty to the adult plaintiff to abort the fetus and any alleged duty of care to the infant plaintiff.

Rowles J.A. deals with these factors as follows:

In my view finding that there was duty owed by the defendant doctor to the infant plaintiff is not conferred upon the fetus the status of legal personhood. It did not put the defendant in the impossible situation of owing a duty to one person to terminate the existence of another person. Had the abortion been successfully completed, the infant plaintiff would have had no rights. Her rights only arose when and because she was born alive. At that point she became an independent legal entity who could claim compensation for the injuries suffered in utero...⁶⁸

I find no conflict in the duties owed by the defendant doctor to the respective plaintiffs. Dr. Borsman owed a duty to the adult plaintiff to perform the abortion with due care and he owed a duty to the infant plaintiff not to injure her. The injuries inflicted upon the fetus resulted in the rights which accrued to the child upon her live birth. Had the abortion been effective, her cause of action would not have arisen.⁶⁹

We think that a surgeon on performing an abortion in a case such as this owes a duty of care to the mother to perform this task properly but at the same time owes a duty of care to the fetus not to harm it if he should fail in meeting the duty of care he owes to the mother.⁷⁰

⁶⁷ *Supra* note 37 at p. 14.

⁶⁸ *Ibid.*, at p. 14.

⁶⁹ *Ibid.*, at p. 15.

⁷⁰ *Ibid.*

B. Factors Considered in Determining Liability

The following factors are considered by the courts in determining whether the defendant doctor who negligently performs an abortion is negligent:

1. *Standard of Care*

Whether the doctor conducted a thorough investigation of gestational age of the fetus;

Whether the doctor used appropriate instruments in conducting the abortion;

Whether the doctor performed the procedure safely and correctly.

Whether the doctor carefully reviewed the pathology report to ensure the abortion has been successful.⁷¹

2. Causation

This generally self-evident in wrongful continuation of pregnancy cases but obviously involves a consideration of whether breach of the standard of care in one or more of the ways described above gave rise to the birth and, where applicable, the injuries suffered by the child.

C. Damages

The few Courts that have tried wrongful continuation of pregnancy cases have awarded damages on the following bases:

1. *The Adult Female Plaintiff*

a) General Damages

In wrongful continuation of pregnancy cases, general damages are awarded for the

⁷¹ For all these factors see *Fredette*, *supra* note 61 at pp. 3 – 4 and *Cherry*, *supra* note 37 at pp. 4 – 14.

extra burden cast on the mother for having children at an early age,⁷² which, in *Fredette*, encompassed damages for the following:

Anxiety, inconvenience resulting from her pregnancy and the birth of the children having taken place in difficult circumstances;⁷³

Physical suffering resulting from her pregnancy and the birth of the children having taken place in difficult circumstances;

Loss of amenities and loss of enjoyment of life resulting from her pregnancy and the birth of the children having taken place in difficult circumstances;

An understandable concern that the twins might have been injured by the failed abortion;

Difficulties in caring for the children (held to be limited to the period during which the mother was caring for the children on her own).⁷⁴

b) Pecuniary Damages

According to the British Columbia Court of Appeal in *Cherry*, in wrongful continuation of pregnancy damages are available to the adult plaintiff in appropriate circumstances. The trial judge in *Cherry* awarded pecuniary damages to the adult plaintiff as follows:

Past care award for adult plaintiff including loss of past income;

Award to adult plaintiff for future wage loss; and

Special damages.

In *Fredette*, no damages were awarded for the cost of raising the twins on the grounds that the plaintiff had planned to have two or three children in any event. In the light of the assessment of damages in wrongful pregnancy and wrongful birth cases, it is interesting to speculate whether the Court would have awarded pecuniary damages had the plaintiff established that she intended never to have any children.

⁷² The actual award was in fact reduced by half on account of the Court's finding of contributory negligence (at p. 7).

⁷³ In *Cherry*, supra note 37, the mother was awarded damages for pain and emotional distress.

⁷⁴ For all these factors see pp. 6 – 7.

2. *The Infant Plaintiff*

a) General Damages

The trial judge in *Cherry* awarded general damages to the infant plaintiff but the precise basis for these damages is not discussed. This award was not contested on appeal.

b) Pecuniary Damages

The trial judge in *Cherry* awarded pecuniary damages to the infant plaintiff as follows:

Costs of future care (including a management fee);

Cost of future housing;

Loss of future income, including lost opportunity to enter into a permanent interdependency relationship.⁷⁵

These awards were upheld in principal and, in most cases, with respect to the quantum by the Court of Appeal. In fact, the Court of Appeal increased the award for the infant plaintiff's future loss of earnings, criticizing the trial judge's approach, which reduced the liability of the defendant by basing the calculation on the infant plaintiff's life expectancy at birth. That life expectancy had in fact been reduced by the defendant's negligence. The Court of Appeal refused to allow the defendant to benefit from the results of his negligence in assessing damages for future loss of earnings.⁷⁶

The above consideration of the types of damages awarded to each plaintiff in wrongful pregnancy cases appears to underscore Canadian common law courts' general tendency not to award child-rearing costs to parents, regardless of the circumstances. Instead, where there is a harm to the child, the award (which is based on the additional costs incurred due to the child's injuries) is made directly to that child.

IV. *Wrongful Death*

Probably the simplest obstetric negligence claims in terms of analysis are claims for wrongful death. Wrongful death claims are claims brought by parents or other family members arising out of stillbirths, in other words, the death of the fetus prior to or at the time of birth, due to obstetric negligence.

⁷⁵ See p. 17 – 18 of the appeal judgment for a summary.

⁷⁶ *Ibid.*, at p. 33 – 34.

A. Whether a Recognized Cause of Action Exists

It is clear from the case law that no wrongful death claim can be brought on behalf of the stillborn child. This is based on the principle firmly established by the Supreme Court of Canada that a fetus has no legal status until it is a child, born alive and viable. Only after birth can a child be recognized for certain legal purposes including eligibility for compensation for injuries sustained in utero. The rights crystallize only upon a live birth.⁷⁷

Further, no damages are available to the parents or other relatives for the loss of the child per se. This is because the principle outlined above prevents the operation of s. 61(1) of the Family Law Act, R.S.O. 1990, c. F.3 1990, c. F.3 (or equivalent legislation in other provinces) where the fetus has not been born alive.⁷⁸ Given that at common law there was no claim for damages for bereavement, such legislation is the only possible source of such damages. Where the legislation does not apply (because it is purely derivative, arising out of the entitlement of the deceased person personally to maintain an action for damages if he or she had not died),⁷⁹ damages for bereavement/loss of companionship are not available.⁸⁰ Notwithstanding, damages are still available to the parents for the consequences of the wrongful death on them personally.⁸¹

B. Factors Considered in Determining Liability

1. *Standard of Care*

The factors at play in determining whether the standard of care has been breached are those noted in the context of wrongful pregnancy cases involving negligent sterilizations. These same considerations apply in all cases of medical negligence.

⁷⁷ *Winnipeg Child and Family services (Northwest Area) v. DFG*, [1997] 3 S.C.R. 925.

⁷⁸ See *Seede et al. v. Cameco et. al.* (1985), 50 O.R. (2d) 218 (S.C.), affirmed (1986), 55 O.R. (2d) 352 (C.A.), leave to appeal to the Supreme Court of Canada dismissed June 23, 1986, SCC Bulletin, 1986, at p. 906.

⁷⁹ *Gibbons v. Port Hope and District Hospital*, [1998] O.J. No. 5397 (Ont. Gen. Div.).

⁸⁰ Possibly the only jurisdiction that grants a right of action to parents for the loss of a fetus is Louisiana which does so on the basis of an article in its Civil Code that states that an unborn child shall be considered a natural person for whatever relates to its interests from the moment of conception. This article explicitly permits actions for wrongful death. See *Bellard v. South Central Bell Telephone Company et al.* 96-1426 (La. App. 3 cir. 8/27/97), 702 So. 2d. 695.

⁸¹ See *Martin v. Mineral Springs Hospital* [2001] AJ No. 78 (Alta. QB – Rowbotham J.) (hereinafter “Martin”).

2. *Standard of Disclosure*

The standard of disclosure is not discussed in any detail in the wrongful death case law. This is probably due to the overall emphasis on negligent conduct with respect to pre-delivery and delivery procedures and the fact that, once the situation reaches an emergency level, as is often the case when complications arise during labour and delivery, many procedures would be performed without the luxury of complete disclosure.

3. *Causation*

The relevant standard in determining causation is that applied in the wrongful pregnancy cases and in medical negligence cases in general.

C. Damages

In *Martin* and *Bekke*, the only class of damages held to be available to parents who claimed damages following a stillbirth is generally damages for psychological conditions, for example, serious depression, resulting from inability to bond with one's child and/or from labour and delivery in the face of knowledge that the fetus had already died. In *Martin*, the award also encompassed a small amount to compensate for future caesarian sections required because of the fear of having another vaginal delivery. Obviously, in these cases the only possible basis for pecuniary damages is lost income on account of psychological disturbance following a stillbirth.

Conclusion

Controversy will continue to surround the questions raised by cases of wrongful pregnancy, wrongful birth, wrongful continuation of pregnancy and wrongful death until such time as the Supreme Court of Canada clarifies the principles and enunciates the standards with respect to this challenging area of law. The evolution of the law in this area promises to give rise to many fascinating debates concerning the application of ethical norms and public policy to judicial decision-making and the legislative process.