

The Rights of Action of an Unborn Child

Gemma Healy-Murphy
April 2020

While a “wrongful life” claim is a novel question of law, it is certainly not a rare one. Such a claim has been examined by the Canadian courts on several occasions and, most recently, by the Ontario Superior Court of Justice in [*Florence v. Benzaquen*](#)¹.

What is a Claim for “Wrongful Life”?

It is settled law that a child can sue for injuries as a result of negligence committed while in the womb by third-party tortfeasors, once born alive. Common examples are medical negligence during the labour and delivery process or as a result of injuries sustained in a motor vehicle accident where the force of the impact causes injury to the foetus.²

A claim for wrongful life, however, is one that is asserted by a parent or child for a pregnancy that results in a birth where the child has birth defects or genetic disorder and where it is argued that but for the negligence of the defendant, the child would not have been born.

Facts

In *Florence*, the Court considered the duty of care owed to a future unborn child, i.e. a child not yet conceived, by an obstetrician / gynecologist who had prescribed a fertility drug to the plaintiff mother. A triplet pregnancy ensued and ended in premature birth of the infants, all of whom have been diagnosed with cerebral palsy as a result of their prematurity.

The plaintiffs argued that the infants were born prematurely as a result of the number of fetuses carried *in utero*. But for the alleged negligence of the defendant doctor in

¹ *Florence v. Benzaquen*, 2020 ONSC 1534 (CanLII)

² *Liebig v. Guelph General Hospital*, 2010 ONCA 450, 321 D.L.R. (4th) 378.

prescribing the fertility drug, the triplets would not have been born. This is a wrongful life claim.

Law

In *Florence*, Justice Wilson examined a variety of cases where an infant's right of action has been denied in consideration of whether the *Florence* triplets have a valid claim at law in circumstances where the infants were yet to be conceived at the time the alleged negligence occurred, i.e. the prescription of the fertility drug.

The Court in *Bovingdon (Litigation Guardian of) v. Hergott*³, on very similar facts, found that there was no duty of care owed by the defendant doctor to future children not to cause them harm in prescribing fertility drugs to the mother.

In *Paxton v. Ramji*⁴, the defendant doctor prescribed Accutane, a drug for the treatment of acne. The plaintiff became pregnant shortly thereafter, and her child was born with both physical and mental disabilities. The court concluded that there was no duty of care owed by the mother's doctor to a potential future child.

In *Dobson (Litigation Guardian Of) v. Dobson*⁵, an infant could not sue his mother for damages arising from her negligence while she was driving on the basis that there can be no duty of care imposed on a woman towards her subsequently born child.

The Supreme Court of Canada dismissed the infant's claim in *Lacroix (Guardian of) v. Dominique*⁶. The infant could not sue for physical and cognitive abnormalities caused by epilepsy medication prescribed to the mother while pregnant.

³ *Bovingdon (Litigation Guardian of) v. Hergott*, 2008 ONCA 2, 88 O.R. (3d) 641, leave to appeal dismissed, [2008] S.C.C.A. No. 92

⁴ *Paxton v. Ramji*, 2008 ONCA 697, 92 O.R. (3d) 401, leave to appeal dismissed, [2008] S.C.C.A. No. 508

⁵ *Dobson (Litigation Guardian Of) v. Dobson*, 1999 CanLII 698 (SCC), [1999] 2 S.C.R. 753

⁶ *Lacroix (Guardian of) v. Dominique*, 2001 MBCA 122, 202 D.L.R. (4th) 121, leave to appeal dismissed, [2001] S.C.C.A. No. 477

Analysis

The crux of the issue for Justice Wilson in *Florence* was whether the triplet infants can claim in negligence against the doctor who prescribed the fertility medication to their mother? Or should the triplets' claim be struck from the statement of claim for want of a reasonable cause of action?

The plaintiffs argued that despite prior cases, the law in this area is not settled and the triplets' claim is a novel one that is factually different than other cases the court has considered. Justice Wilson disagreed, essentially finding that the triplets' claim had no possibility of success.

The fact that a woman who takes fertility medication can have multiple eggs fertilize does not establish a relationship of proximity between the prescribing doctor and her unborn children. To impose such a duty of care to the unborn children not to cause harm in addition to the duty of care to the mother could create a conflict of interest in terms of the treatment offered to the woman.

As such, and while the defendant doctor owed a duty of care to the mother, no such duty was found owing to the unconceived triplets. Therefore, the doctor cannot be found to be negligent in the provision of care to the triplets.

Why the Reluctance?

The courts have been reticent to impose such a duty of care for several reasons. *Florence* highlights interesting commentary from the leading decisions in this regard.

To establish a duty of care would place the defendant doctor in an impossible position because of competing duties owed. Doctors would likely regularly find themselves in the irreconcilable and unworkable position of having to decide whether a duty to the woman to provide the required, or indeed requested, care trumps the duty to any future children of that woman.

Further, to prefer a duty of care to an unborn child in this way may well result in stripping the woman of her autonomy to give informed consent. In *Bovingdon*, the Court discussed the potential difficulties with same:

Because the doctor's duty with this type of drug is only to provide information sufficient to allow the mother to make an informed choice, it cannot be said that the children have a right to a drug-free birth. Nor can the doctor owe a duty to the children that is co-extensive with his duty to the mother. To frame the duty in that way is to overlook the fact that the choice

is the mother's; she is entitled to choose to take the drug and risk conceiving twins without considering their interests. If she does, the children have no complaint against her or the doctor. [...]

I conclude that in this case, the appellant had no duty of care to the future children not to cause them harm in prescribing Clomid to the mother. The doctor owed a duty of care only to the mother, which duty consisted of ensuring that she possessed knowledge sufficient to make an informed decision whether to take Clomid. This knowledge included the increased risk of conceiving twins arising from the drug, the increased potential for premature birth in a twin pregnancy, and the possible harm to the children that could result from premature birth.

In *Lacroix*, the Court further noted that it would be impossible to assess damages in such cases. The decision in *Bovingdon* elaborates further on this point:

How can the child be compensated for being born? How can a court give damages that measure the value of no life versus a damaged life? And from a metaphysical point of view, does it make sense to allow such an action, given that if the child had not been born, he or she would not have been able to bring the action at all?

There are good reasons, ethical and otherwise, as to why no duty of care should be owed to an unconceived child.

Looking Forward

Justice Wilson recognizes that *Bovingdon* may have left the door ajar for wrongful life claims depending on the facts. Indeed, we will likely continue to see these types of claims put before the court in an effort to secure the future of infant plaintiffs, such as the *Florence* triplets, who will need a lifetime of care.

There are, however, good public policy reasons to not recognize any duty of care to a child not yet conceived. We anticipate that the court will continue to hold that there is no tenable claim in law for “wrongful life”.