• COURT OF APPEAL RECONSIDERS APPROACH IN "WRONGFUL LIFE" CLAIM •

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The Ontario Court of Appeal has clarified the approach to be taken in considering claims by children who have been born with disabilities. It is well established in Canadian law that there is no cause of action for "wrongful life". In other words, a child is not entitled to sue for damages to compensate for being born. While this decision did not consider whether such a cause of action could ever exist, it provides a useful analysis of the issues.

JUDGMENT: ONTARIO SUPERIOR COURT OF JUSTICE

In *Bovingdon v. Hergott*, [2006] O.J. No. 4672 (QL), 83 O.R. (3d) 465 (S.C.J.), Mr. and Mrs. B and their twin daughters (the Plaintiffs) brought an action against Mrs. B's obstetrician, Dr. H. Dr. H prescribed Clomid, a drug intended to stimulate ovulation, to Mrs. B. Subsequently, she became

pregnant with twins, both of whom were born prematurely by emergency Caesarean section on December 2, 1992. Both children suffer from cerebral palsy and severe disabilities due to their premature birth.

The Plaintiffs alleged that Dr. H was negligent in failing to adequately inform Mrs. B about the risks associated with Clomid, including misstating the risk of having twins. They alleged that the Clomid caused the twin pregnancy, which caused the premature births, and which in turn caused the injury/disability to the twins.

Dr. H testified that his usual practice when advising patients about the risks of Clomid was to provide them with a leaflet from the manufacturer which stated that the risk of twins was nearly ten percent. He would also advise them that in his clinical experience, and based on the lower dosages that were prescribed in Canada, the risk of twins was in the three to five per cent range.

The Plaintiffs argued that while Mrs. B would not have terminated the pregnancy, Dr. H's failure to adequately inform her of the risks associated with Clomid deprived her of the choice to attempt pregnancy without taking a fertility drug. Mrs. B had a previous history of miscarriage, and her first child had been born prematurely. Mrs. B denied that she was given any information about the risk of twinning and testified that she would not have taken the drug had she known there was any risk of having twins.

JURY DECISION

The jury found that Dr. H was negligent in failing to adequately disclose the material risks associated with Clomid and awarded the Plaintiffs almost $12 million. Specifically, the jury found that he understated the risk of increased twinning associated with taking Clomid. The jury concluded that the disabilities to the twins would not have occurred but for Dr. H's negligent advice, and that a reasonable person in Mrs. B's position would not have taken the drug if properly advised.

REASONING OF JUSTICE G.I. PARDU

Justice Pardu disagreed with the position of the defendant that the action was unsustainable because it was a claim for "wrongful life". In considering this argument, she noted that claims by children born with disabilities are divided into two categories: cases where the injury has been caused by the wrongful act or omission of another; and cases in which, but for the wrongful act or omission, the child would not have been born at all (*i.e.* wrongful life). She held that it was not a wrongful life case, but rather, it was a case in which the injury was caused by the wrongful act or omission of Dr. H.

Mrs. B sought the advice of Dr. H to help her achieve a healthy pregnancy. In failing to advise her of the risks, it was foreseeable that those risks might arise. Justice Pardu stated that there was no policy reason to deny recovery to the twins in this situation.

DECISION OF THE ONTARIO COURT OF APPEAL

The defendant physician appealed the jury's finding on the issue of whether his negligence caused Mrs. B to take the Clomid, as being unreasonable and contrary to the evidence. In *Bovingdon v. Hergott*, [2008] O.J. No. 11 (QL), 88 O.R. (3d) 641 (C.A.), the Court of Appeal found that it was open to the jury to infer from the evidence that in advising Mrs. B that the risk of twins was three to five per cent, she understood that Dr. H was minimizing the risk down to zero.

On the issue of whether this was properly a claim for "wrongful life", the Appeal Court was of the view that the two-category approach did not provide a coherent theory to assist courts in determining whether a child could recover damages from a physician for being born with injuries. The Court of Appeal determined that the correct approach would be to apply principles of negligence law, and to determine whether there was a duty of care owed to the unborn fetus.

The Court held that the doctor did not owe a duty of care to the future children not to cause them harm by prescribing Clomid to their mother. Dr. H owed a duty of care to Mrs. B to ensure that she possessed sufficient knowledge about the material risks of treatment so as to make an informed decision whether to take Clomid. In the result, the twins did not have a cause of action against the physician.

IMPLICATIONS

Courts in Canada have long struggled with articulating a coherent theory of liability, which also addresses public policy concerns relating to compensating someone who is born disabled. In this case, rather than determining whether the claim was properly "categorized" as a wrongful life claim, which was the approach taken by the trial judge, the Appeal Court first looked at negligence principles.

The Court found that the twins had no cause of action because the doctor did not owe a duty of care to the unborn children. Since there was no duty of care owed, it was not necessary for the Court to determine whether and in what circumstances the courts may recognize a cause of action for wrongful life.

[*Editor's note*: Kathryn Frelick is a partner in Miller Thomson's Health Industry Practice Group. She would like to acknowledge the assistance of Alia Karsan in writing this article.]