Wrongful life claims: an update from the SCC

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On March 24, 2022, the Supreme Court of Canada (SCC) refused leave to appeal from the Ontario Court of Appeal's (ONCA) decision in *Florence v Benzaquen*, 2021 ONCA 523 (*Florence*). This decision effectively closes the door on claims of physician negligence towards future children, or children prior to conception, often known as "wrongful life" claims. Wrongful life claims involve claims by a child against a physician or other medical provider, resulting from birth defects. The child claims that but for the negligence of the medical provider, they would not have been born (and suffered injuries). These claims differ from claims for personal injury to the infant (or mother) arising from negligent care during the pregnancy and/or delivery.

The parties in *Florence* included Ms. Florence, her husband, and their three children – triplets who were born prematurely at 26 weeks of gestation, resulting in life-altering disabilities. Prior to conceiving the triplets, Ms. Florence was prescribed Serophene, a fertility drug, by the respondent physician, Dr. Benzaquen, which resulted in the premature birth. The triplets asserted a claim in their own right that Dr. Benzaquen owed them a duty of care. They alleged that Dr. Benzaquen knew, or ought to have known, that prescription of Serophene could cause the children harm. The claim was dismissed by the chambers judge on the basis that it had no reasonable prospect of success, as it was not a claim that was recognized at law. This decision was appealed to the ONCA.

The appellants in *Florence* claimed that prescription of Serophone was contraindicated in this case, and was therefore a breach of Dr. Benzaquen's duty of care toward the plaintiff children. The ONCA held that this consideration was relevant to the *standard of care* that Dr. Benzaquen was obligated to provide to Ms. Florence. However, there was no *duty of care* owed to a future unborn child. Further, the court held that physicians would be placed in an "unworkable" or "impossible" position due to the inherent conflict of interest that would arise from owing a duty of care to both the patient, and the patient's future children simultaneously. Ultimately, the ONCA dismissed the appeal and held that claims against physicians for alleged negligence that occurred pre-conception will "[…] necessarily result in a determination that the claims are not viable in law."

Application in Alberta

The SCC's denial of leave to appeal in this case indicates that physicians do not owe a duty of care toward future children and that these claims are not recognized in Canada. This development is similar in effect to existing Alberta jurisprudence:

- In *Keys v Mistahia Regional Health Authority,* (2001) 291 AR 97, [2001] AJ No 461 (ABQB) (*Keys*),the child plaintiff brought a claim in relation to tragic birth injuries that resulted in cerebral palsy. While the court stated that the defendant clinicians had a duty of care to Liam while in his fetal state, Liam's rights were inchoate and would only crystalize at birth.
- In *RKP v Borkent*, 2005 ABQB 42 (*Borkent*), a pregnant mother, struggling with drug addiction, suffered a suspected miscarriage; although, the physician did not follow up to confirm the miscarriage. The plaintiff child was born with partial fetal alcohol syndrome due to her mother's continued drug use during pregnancy. The doctor acknowledged a duty of care toward the child prior to birth, but took the position that she had met the standard of care as it was reasonable to assume that the bleeding was in fact, a miscarriage. The court ultimately held that the doctor did not owe a duty of care to RKP "on the facts." At most, the court found that the obligation that was owed to the plaintiff, prior to birth, was to advise the mother about the need for follow-up testing.

Key takeaways

The SCC's denial of leave to appeal in *Florence* has likely closed the door on claims of wrongful life in Canada.

The overriding policy reason for the *Florence* decision is the conflict between the interest of unborn future child and the pregnant patient and concerns that this conflict could cause an undesirable "chilling effect" on physicians, such that physicians provide treatment to pregnant patients that would deprive the patients of their autonomy and freedom of informed choice in their medical care.

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