"WRONGFUL BIRTH": AN IRONIC NAME FOR A CAUSE OF ACTION IN THE LAW OF MEDICAL MALPRACTICE

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Introduction to the Problem: Mickle v. Salvation Army Grace Hospital

On November 18, 1991, at the Salvation Army Grace Hospital, Windsor, Ont., Sarah Mickle was born with CHILD syndrome (congenital hemihypoplasia ichthyosis erythroderma and limb deficiencies), consisting of severe malformation of her limbs, hip and shoulder as well as an intense and widespread skin disorder. What followed was a medical negligence suit brought in the Ontario Court (General Division), which has exposed the legal defects of the so-called tort of "wrongful birth", recognized by the Supreme Court of Canada in 1997. No doubt the ethical and emotional consequences will continue to put parents of children born disabled through real-life tragedies, but malpractice lawyers should think twice about having them played out on the stage of the civil courtroom.

During an ultrasound examination conducted at 16 weeks, the technologist at the Grace Hospital, under the supervision of a staff radiologist, found no fetal abnormalities. In the action, *Mickle v. Salvation Army Grace Hospital*,[1] Sarah's parents alleged that if the ultrasound had been performed at 18-20 weeks, there would have been a better chance of detecting the deformities. In the trial judge's description, the basis of the claim was that Sarah's mother "was deprived of her right to choose abortion and thus prevent the birth of Sarah Mickle". The action was dismissed on traditional medical malpractice principles. The trial judge, Zuber J., accepted the defence experts' explanation as to the quality of the ultrasound films

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1. (1998), 166 D.L.R. (4th) 743, [1998] O.J. No. 4683 (QL) (Gen. Div.) (released October 26, 1998).

and the prevalence of 16-week ultrasound examinations in 1991. Although he found no liability, he assessed damages for extraordinary costs, subrogation and future care. When it came to assessing general damages, however, he could not assess them, for the following reason:[2]

> To characterize Sarah's existence as a form of harm would be an extraordinary denigration of the value of her life. The acceptance of such a notion would surely also denigrate the value of the lives of all those who suffer from serious disabilities. I am unable to characterize the presence of this bright, beautiful, courageous (albeit seriously physically challenged) child as a form of harm that should be translated into an assessment of general damages.

In retrospect it is clear that this inability of a court of justice to characterize the birth of a live child as a form of harm, when the alleged malpractice did not cause the harm, was a telltale sign that there existed substantive defects in the underlying theory of liability.

Arndt v. Smith

Zuber J. traced the origin of the issue to the constitutional right to abortion on demand, as recognized in the two landmark cases, *Roe v. Wade*[3] in the United States and *R. v. Morgentaler, Smoling and Scott*[4] in Canada. He then followed the reasoning of the Supreme Court of Canada in *Arndt v. Smith*.[5] Apart from an unremarkable discussion among the panelists of the top court on the effect of the British Columbia *Limitation Act*,[6] their split decision centred on the trial judge's application of the "modified objective test" for causation in informed consent cases (established in *Reibl v. Hughes*,[7] *viz.* whether a person in the plaintiff's position would have accepted or declined treatment had she been properly informed of the medical facts and consequences). In *Arndt*, the majority of the Supreme Court panel agreed with the trial judge's judgment dismissing the action and found that the failure to disclose some of the risks to the fetus associated with maternal chickenpox did not affect the plaintiff's decision to carry the fetus to term. "Thus," according to Zuber

2. *Ibid.*, at para. 87.
3. 410 U.S. 113 (1973),
4. [1988] 1 S.C.R. 30, 37 C.C.C. (3d) 449, 62 C.R. (3d) 1.
5. [1997] 2 S.C.R. 539, 25 C.C.L.T (2d) 233.
6. R.S.B.C. 1979, c. 236.
7. [1980] 2 S.C.R. 880, 114 D.L.R. (3d) 1, 14 C.C.L.T. 1.

J., "the claim for wrongful birth slipped quietly into Canadian tort law simply as a type of medical malpractice case without any fundamental analysis or delineation of the extent of such a claim".[8]

Zuber J. agreed with the trial judge in *Arndt*, who approved the abandonment of the suit for "wrongful life" on behalf of the baby.[9] In *Mickle*, the infant's claim for "wrongful life" was similarly struck out on preliminary motion.[10] These cases do not reach the level of moral and legal debate surrounding the right to refuse treatment, such as those cases involving Jehovah's Witnesses and donor blood transfusions.[11] Since the purpose of tort law is to restore victims to the position they were in prior to the commission of the wrong, it is a logical impossibility for a child to recover damages for having been allowed to be born.

Both *Arndt* and *Mickle*, therefore, concern the claims of the mothers for "wrongful birth", namely the violation of the right to an abortion by a failure to alert them of the risk or existence of birth defects. Although Zuber J. expressed his discomfort with the reasoning in *Arndt*, he applied the informed consent test on the basis that the Supreme Court in *Arndt* had recognized "wrongful birth" as a subhead of medical negligence. His finding that the mother would not necessarily have known about the existence or severity of the condition even at 18-20 weeks or that she may not have chosen to terminate the pregnancy was inextricably linked with his analysis of the evidence of the standard of care of ultrasound diagnostic examinations in 1991:[12]

> I further observe that the condition of asymmetrical limb development is a very long way from those very tragic cases in which it is revealed that the fetus is devastatingly disabled, both mentally and physically. In these circumstances, I cannot conclude that a reasonable woman in Kelly Mickle's circumstances

8. *Mickle*, *supra*, footnote 1, at para. 9.
9. *Ibid.*, at para. 5.
10. *Ibid.*, at para. 11.
11. The Jehovah's Witness cases, in which the risks involved in refusing blood transfusions are weighed against the religious beliefs of patients in need of surgery, involve a contest of wills and legal rights. The existence of surgical alternatives to transfusion such as "bloodless surgery" also muddies the waters. As to the right of the state to intervene in the case of a child of a Jehovah's Witness family, see *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, 122 D.L.R. (4th) 1, 78 O.A.C. 1. In stark contrast, the case of wrongful life exists in a legal vacuum. There is no right not to be born. Nor is there a right to be born that is in competition with the expectant mother's right to obtain a termination.
12. *Mickle*, *supra*, footnote 1, at para. 73.

would choose abortion. Thus, in my view, apart altogether from the issue of negligence, this action must fail.

Nowhere in the law of negligence are the constituent elements of duty, standard of care and damage (causation) so intertwined as in medical malpractice. Whereas a plaintiff must establish all of the elements, the defence can prevail by eliminating but one. This "organic" quality of the legal cause of action is a function of the therapeutic link between treatment and physical condition. By making a ruling on causation (the failure to give informed consent would not have altered the outcome), the Supreme Court was able to dispose of the case by ruling on one point. In fairness, it is plain from the opening paragraphs of each of the opinions that the court was presented with the causation question as a narrow question on appeal. From a tactical perspective, it appears that by failing to risk having the court rule on the overall viability of the cause of action, counsel for the defendants permitted the cause of action to be recognized by default. Consequently, Zuber J. seems to have felt bound by *Arndt* despite his express discomfort that the case failed to deal with more fundamental issues.

Deconstructing the Elements of the "Wrongful Birth" Fallacy

Wrongful birth is a legal *trompe d'oeil* in the sense that most of the constituent elements of an actionable wrong appear to exist, but they are brought together by intellectual sleight of hand. The existence of a medical duty of care of a physician toward a mother is unquestionable. (In contrast, the duty to the unborn is a legal and ethical minefield.) The standard of care of diagnostic treatments in the prenatal context, a thorny factual issue, is nevertheless also a feasible legal inquiry. It is also possible for the legal mind to see causation, in the *Reibl v. Hughes* sense, as a proper question: would the mother have chosen to abort the fetus had she known about the congenital defect or risk thereof? It is in failing to scrutinize what the damage is, as opposed to how it was caused, that the courts have allowed a false tort to be established.

"Damage" is both a substantive and a remedial element of negligence law. The plaintiff must have suffered damage to recover. But that damage also determines what the successful plaintiff can recover to the extent that money can place her in the position she was in prior to the wrongdoing. The "damage" to the mother in a "wrongful birth" case is identical to that "suffered" by the newborn

and which proved the fallacy of "wrongful life": the fact that a disabled baby was born is not harm. In expressing the foregoing statement, it is beyond the scope of this article to compare the relative physical, emotional and moral consequences of childbirth with those of abortion. The court, similarly, sitting as an arbiter of a civil *lis*, cannot decide whether the mother is worse off having given birth than if she would have been had she terminated the pregnancy.

According to a straight-up traditional tort analysis, one might consider the lengthier and more painful experience of pregnancy and childbirth and the less painful, intrinsically shorter and short*ening* experience of abortion. This is about as close to compensable harm as the factual paradigm allows. The practical issue is whether the court can award damages for future care and extraordinary costs. These claims are necessarily derivative, under the *Family Law Act*,[13] and are contingent on the existence of an injury suffered by the child for which the child possesses a viable cause of action. Although the parent is legally obligated to care for the child until age of majority, it is the obligation to pay these costs and not the costs themselves that arises from what has happened to the mother. Thus, not only is the court not competent to find the mother worse off for having given birth to a live child, it is also legally inappropriate to circumvent the child's lack of remedy by inventing an independent right to compensation on the part of the maternal parent for *her* having been subjected to the birth.

In *Arndt* and in *Mickle* (albeit reluctantly), the courts have entirely bypassed the foregoing analysis. These courts have done so by characterizing the damage as an interference with the right to choose an abortion. Although this appears to have been implicit in the *Arndt* court's reasons, in *Mickle* Zuber J. specifically traced the origin of the tort of wrongful birth back to the time when abortion was decriminalized. On the facts, this is precisely the right that has been affected in terms of looking for remedies available to the mother. The problem with this approach, however, is that the interference with the *right* to choose an abortion is not a physical harm *per se* because characterizing the consequence of the malpractice in question (childbirth) as harm is not justiciable. Recognition of the right in *Morgentaler* is properly characterized as a civil liberty and the right did not confer any economic or legal status or advantage in the law of torts. It was established in *Stoffman v. Vancouver General*

13. R.S.O. 1990, c. F.3, s. 61

Hospital[14] that a public hospital, although created by government, was not part of the government and therefore not subject to the *Canadian Charter of Rights and Freedoms*. The line of cases in which the Charter has been invoked without success in civil disputes against institutional defendants illustrates the point that "public" rights of citizens suffer interference every day by private parties, or public parties acting in private capacities without any legal remedy. Without entering into the issue of the actionability of "negligent" violation of Charter rights, it suffices to say that these cannot be invoked *against* the defendants in a medical malpractice suit. The relationship between an expectant mother and a hospital, ultrasound clinic, technologist or obstetrician is governed entirely by private civil law.

The Medico-Legal Implications of the Wrongful Birth Decisions

The *Mickle* decision prompted coverage in the *Medical Post*, a national professional news publication.[15] In the February 2, 1999 issue the column alerted doctors to both *Mickle* and *Arndt*, under the headline: "Wrongful Birth Case Instructive for All". The subhead read: "Parents sued their doctor for neglecting to diagnose defects in their unborn child. Although the plaintiffs did not win their case, wrongful birth is now recognized as a viable course of legal action."

Studies and treatises have been published for decades on the effect of malpractice litigation on the conduct of doctors and on the clinical standard of care.[16] Few would deny that there is some effect. Obstetricians, for example, have been known to conduct tests on a newborn's cord blood gas as a matter of course to avoid lawsuits arising from bad results in difficult vaginal births, to obtain proof that perinatal asphyxia did not occur.[17] It is premature to speculate what the effect of fear of wrongful birth litigation will be in the

14. [1990] 3 S.C.R. 483, 76 D.L.R. (4th) 700, [1991] 1 W.W.R. 577.
15. Michael Fitz-James, "Wrongful Birth Case Instructive for All", *The Medical Post* (February 2, 1999), p. 31.
16. See Akazaki, "Medical Malpractice in Crisis" (1999), 21 Adv. Q. 163 at pp. 173-76 for an introductory survey of this topic. See also Keeton, "Compensation for Medical Accidents" (1973), 121 U. Pa. L.R. 590 at p. 598 and Sappideen, "Look Before You Leap: Reform of Medical Malpractice Liability" (1991), 13 Syd. L. Rev. 523 at p. 540.
17. *Second International Symposium on Perinatal Asphyxia* (June 8, 1992), pp. 101-102.

ultrasound clinic and on obstetrical practice. For example, will the concern lead to more of these scans, contrary to medical trends against the frequency of their use? If Zuber J. was concerned about the effect of the *Arndt* decision on the common law, will the case also lead to inappropriate defensive medicine? It is incumbent on all parties to the medico-legal question to reconsider the issue. Plaintiffs' lawyers will face this very question in advising clients about the merits of pursuing a wrongful birth case. The proper discharge of their professional obligations will have to involve knowledge of the acceptance of the tort by the Supreme Court of Canada, informing the client of this state of the law, and then explaining the difficulties of actually making out a case and recovering an award of damages. It is the thesis of this article that the cause of action is untenable under the law of torts. In order for Zuber J.'s complaint with the Supreme Court decision in *Arndt* to be rectified, the top court will need to rule on the point again. Until then, the legal and medical professions will be left to exercise their own judgment. Paradoxically, a plaintiff must once again advance such a case through the courts before the essential defects of the claim for wrongful birth are exposed.