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INDEMNITY FOR THE COST OF REARING WANTED CHILDREN FROM UNWANTED PREGNANCIES

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"Wrongful pregnancy" is the trendy label that is sometimes used to describe tortious circumstances in which a parent seeks damages in respect of the cost of raising a child who would not have been born but for some health care provider's mistreatment or mistaken advice. The cause of action, property styled, is negligence. Typical scenarios involve failed contraception, botched sterilisation, or improper genetic counselling. In each of these instances, the alleged act of negligence is said to occur some time prior to conception. The end result is usually antithetical to the very purpose of the services offered by the health care provider: a woman becomes pregnant where her pregnancy was not merely unplanned but actually planned against. It is in this sense that the pregnancy is said to be "wrongful".

Some courts have attempted to distinguish the term "wrongful pregnancy" from its conceptual predecessor, "wrongful birth" (see *Kealey v Berezowski* (1996) 30 OR (3d) 37). The latter term is meant to characterise an action commenced by the parent of a child who is born with injuries stemming from a pre-existing condition. Typical scenarios involve failed abortion or improper genetic screening. In each of these instances, the health care provider's act or omission is not the cause in fact of the child's condition. Rather, the tortious conduct is to be found in the health care provider's post-conception negligent interference with the woman's lawful right to terminate the pregnancy. In such cases it is alleged that the child, though intentionally conceived, would not have been brought into the world if the parent had been fully informed about the extent of the injuries that the child would suffer on its birth. Because it was a planned event, the pregnancy cannot be described as "wrongful". Rather it is the consequent birth that is said to be "wrongful".

If ever a theoretical advantage was to be gained through this neat conceptual distinction, it would appear to be lost in situations such as the one with which the English Court of Appeal was faced in *R. v Croydon Health Authority, The Times*, 13 December 1997. R and her husband wanted to conceive a child. And so they did, thinking all the while that R was perfectly healthy. She had been subjected to a thorough medical examination just four months earlier by her new employer, the Croydon

Health Authority. Unfortunately, complications arose during her pregnancy. After suffering from a pulmonary embolism, R was admitted to hospital. The health team quickly diagnosed her condition: primary pulmonary hypertension (PPH), an untreatable condition of the pulmonary aorta which limits life expectancy and, because she was pregnant, put R in jeopardy of sudden death. From the time that she was diagnosed until nearly two months after her child was delivered, R was never made aware of her substantially reduced life expectancy. Even worse, she was not told about the risk of death that she faced during childbirth until just before her caesarean section took place. When, finally, she was told, she was jolted by the realisation that "if she survived the birth, she was unlikely to cope with the upbringing of the child and was unlikely to survive long enough to see the child to independence". Not surprisingly, R experienced deep anxiety both during childbirth and afterwards. Her anxiety resulted in reactive depression.

Interestingly, it was not the failure properly to warn R about the risks and complications that she faced during childbirth that motivated her litigation against the authority. R was not merely seeking general damages for the pain and suffering experienced during her pregnancy and afterwards. The reason she commenced an action was to demand the future costs of rearing her newly born daughter. Despite the fact that her pregnancy ended well-the PPH did not decrease her own life expectancy and her daughter is both healthy and much loved-R claimed that her pregnancy was unwanted.

The claim that R's was an unwanted pregnancy is odd. Unlike the typical "wrongful pregnancy" scenarios, R and her husband had planned the conception of their child. Consequently, R's claim required the supposition of six counter-factual causal conditions. The following argument was advanced. Roughly four months prior to the onset of her pregnancy, R had been subjected to a thorough medical examination by her then prospective employer, the authority. At the time of her physical examination, the authority radiologist failed to detect an abnormality of her main pulmonary artery. Had the radiologist not been negligent, the abnormality would have been reported to the defendant's occupational health physician. The occupational physician, had he known about the abnormality, would have been obliged to inform R's general practitioner. Upon receiving that information, her general practitioner would have referred R to a cardiologist. R would then have made an appointment to see the cardiologist, who would have correctly diagnosed the PPH and relayed that information to R. Finally, upon being told by the cardiologist about PPH and the risks associated with pregnancy for someone with that condition, she and her husband would have jointly elected not to conceive a child. As counsel stated, "if the plaintiff had known what she should have known about her own condition, including in particular the risks of pregnancy and the limitations upon her own ability to fulfill the role of a

mother as she had wished, she would not have had the child, and therefore the child should be regarded as an `unwanted child' from the outset".

Notwithstanding the fact that none of these six links in the causal chain was certain to occur, the defendant, somewhat surprisingly, admitted that R would not have become pregnant but for the radiologist's neglect. But it did not admit that the pregnancy was unwanted, nor that R's daughter should be regarded as an unwanted child. It also denied liability for any past or future care costs associated with the rearing of the child. At trial, Astill J was convinced by the plaintiff's argument that there was no difference in principle between the case advanced and the "unwanted births" cases arising from a failed vasectomy or failed sterilisation. It was held that R was entitled to, inter alia, the reasonable costs of rearing her daughter to the age of 18.

The English Court of Appeal disagreed. The court was prepared to award damages for general pain and suffering caused by the radiologist's failure to detect the pulmonary abnormality (including the complications of pregnancy attributable to PPH, a heart catheterisation and complications during a hysterectomy which likely would have been avoided if PPH had been diagnosed earlier and the exacerbation of R's reactive depression). But their Lordships were unwilling to award damages for the upbringing of the child. The rationale was that R's loss of opportunity to evaluate the arguments for and against pregnancy "would hardly be a significant head of damages when in the result the hazards of pregnancy are negotiated without disaster, and she gives birth to a healthy and much-loved child". After acknowledging that the failure to prove damages (with respect to the loss of opportunity to evaluate the arguments for and against pregnancy) was a sufficient basis upon which to dispose of the appeal, the court stated, obiter, that the duty of care owed by the radiologist to R did not extend to activities wholly unconnected with R's employment. Since the radiologist had reviewed R's x-ray merely in the context of her application for employment, the court held that this case "is not to be compared with a gynaecologist performing a sterilisation operation". As Kennedy LJ described the scope of the relationship between R and the authority's radiologist, "her domestic circumstances were not his affair".

The facts in Croydon might be seen to provide a new twist in unwanted pregnancy litigation. In essence, the English Court of Appeal was asked to revisit the thorny issue of whether and when a hospital should be required to indemnify the cost of raising a healthy, much-loved child who was born as a result of a health care provider's neglect. However, the interesting difference between this case and its English predecessors (see, for example, *Walkin v South Manchester Health Authority* [1995] 1 WLR 1543; *Allen v Bloomsbury Health Authority* [1993] 1 All ER 651; *Thake v Maurice* [1986] QB 644; *Emeh v Kensington and Chelsea and*

Westminster Area Health Authority [1985] QB 1012) is that, here, the child's conception was planned by her parents. Unlike any of the earlier cases, R's unwanted pregnancy was not unwanted from the outset.

Given this interesting twist, it could be said that Croydon causes a wrinkle in the so-called distinction between "wrongful pregnancy" and "wrongful birth". Although R's pregnancy was not planned against, as is usually the case in "wrongful pregnancy" actions, the radiologist's neglect did occur prior to conception. The radiologist's pre-conception neglect distinguishes Croydon from the typical "wrongful birth" cases. Yet the allegation made was not that the health care provider failed to prevent the conception of the child. Rather, it was that the radiologist's neglect somehow interfered with R's lawful right to terminate her pregnancy, an allegation usually associated with "wrongful birth" claims. But those situations generally involve a failure to terminate the pregnancy of a child laden with a pre-existing condition. R's child was born healthy.

The preferable view of Croydon is that the issue raised involved neither a "wrongful pregnancy" nor "wrongful birth". The case exemplifies the manner in which these labels can obfuscate, rather than clarify, the true issues raised by proceedings of this nature. Because the court was asked both at trial and on appeal to regard the claim as if it were no different in principle from the "unwanted births" cases, the court was quick to analyse it primarily as a dispute about damages. True, in cases where the pre-conception negligence is that of an obstetrician, gynaecologist or genetic counsellor, the dispute usually centres around damages. Because there exists an obvious legal nexus between plaintiff and defendant in those cases, the only difficulty lies in assessment. Where a child was planned against but born healthy and wanted, the court is forced to canvass a number of complex policy factors (see *Kealey v Berezowski*; C R Symmons, "Policy Factors in Actions for Wrongful Birth" (1987) 50 MLR 269; J H Scheid, "Benefits vs Burdens: The Limitations of Damages in Wrongful Birth" (1985) 23 J Fam Law 57). One interesting question that arises in this context is the extent to which the recovery of damages is or ought to be analogous to recovery for pure economic loss (see *Walkin*).
But Croydon is not in this class of cases. The health care provider was a radiologist who had never met R and knew nothing of her other than her age and the fact that she had applied for a job. His mistake was made during an examination that was held prior to conception and was wholly unconnected to her pregnancy. It is true that the conception of their child was undertaken by R and her husband in ignorance of R's actual medical condition. Had they known what they ought to have known, R's pregnancy would have been unwanted. But they were not told about R's actual condition until much later. Thus it was only just before childbirth that the continuation of R's pregnancy became unwanted. For precisely this reason, R's claim could only be framed as if it were an "unwanted birth" case.

Curiously, the English Court of Appeal began its analysis with questions such as: "when is pregnancy itself an injury?" and "what damages flow from the loss of opportunity to evaluate the risks associated with getting pregnant where a child is born healthy and much-loved?" It is suggested that these difficult inquiries about the nature of damages should not have been the starting point. It is certainly true, as other courts have recognised, that "wrongful pregnancy" cases sometimes stand at the intersection between liability and damages (see *Kealey v Berezowski* at 62-63). But there is no reason to further complicate the law of damages as applied to pre-conception torts-as Croydon does-by analysing potential damage issues prior to establishing that there is a sufficient legal nexus between the plaintiff and the defendant.

In Croydon Kennedy LJ held that the resolution of the damages issue was "sufficient to dispose of the appeal". Given that the court held there to be no compensable loss, this much is true. But determination of claims of this kind ought to begin by addressing whether the loss in question is within the scope of the duty owed to the plaintiff by the health care provider, leaving the difficult policy issues confronted in the assessment of damages to situations where their resolution is necessary in order to adjudicate the dispute. This point was recognised by Chadwick J, who felt it necessary to write separate reasons: "[i]t is only if [the duty] question is answered in the affirmative that it becomes necessary to consider the further question whether any damages can be claimed in respect of the normal expenses and trauma of a planned pregnancy or the costs of bringing up a wanted child".

Two curiosities emerge from Croydon: (a) the defendant authority was quick to admit that the radiologist's neglect was the cause of R's pregnancy; and (b) the majority of the English Court of Appeal was quick to characterise the central issue raised as the assessment of damages rather than the existence of a duty of care. Both appear to be the result of confusion generated by an imprecise use of labels such as "unwanted birth", "wrongful pregnancy" and "wrongful birth". Tort cases stemming from unwanted and other unfortunate pregnancies are by nature complex and fascinating. A fortiori, it is incumbent upon legal scholars and the judiciary to employ a consistent terminology that is straightforward and useful.

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