Paxton et al. v. Ramji

[Indexed as: Paxton v. Ramji]

92 O.R. (3d) 401

Court of Appeal for Ontario,
Moldaver, Feldman and Juriansz JJ.A.
October 14, 2008

Torts -- Negligence -- Duty of care -- Unborn child -- Doctor prescribing teratogenic drug to patient on understanding that patient could not become pregnant -- Patient becoming pregnant and giving birth to severely damaged child -- Doctor not having duty of care to child.

The defendant prescribed an acne drug, Accutane, to the plaintiff D. Accutane is a teratogenic drug that carries the risk of causing fetal malformation. The defendant was aware that D's husband had had a vasectomy 4 1/2 years earlier. The vasectomy failed, and the plaintiff J was conceived. J was born with considerable damage caused by the Accutane. She sued the respondent for negligence in prescribing the Accutane to D. D and other members of J's family brought only derivative claims under the Family Law Act, R.S.O. 1990, c. F.3 and did not pursue a claim for breach of a duty of care owed directly to them by the doctor. The trial judge found that J's claim was not one for "wrongful life", which is not recognized in Canadian law, but rather was for causing J's disabilities. She found that the defendant owed a duty of care to J before conception not to prescribe Accutane to D without taking all reasonable steps to ensure that D would not become pregnant while taking the drug. However, she found that the defendant met the standard of care by relying on the father's vasectomy as an effective form of birth control. The action was

dismissed. J appealed and the defendant cross-appealed.

Held, the appeal should be dismissed; the cross-appeal should be allowed.

By asking whether or not a claim should be characterized as one for wrongful life, Canadian courts have asked the wrong question. The governing analysis is that set out in Anns v. Merton London Borough Council and the cases following Anns. In order to determine whether the defendant could be liable in negligence to J, the question was not whether her claim could be characterized as one for wrongful life, but whether he owed her a duty of care. There is no settled jurisprudence in Canada on the question whether a doctor can be in a proximate relationship with a future child who was not yet conceived or born at the time of the doctor's impugned conduct. The proposed duty of care thus does not fall within an established category of relationship giving rise to a duty of care. Nor is there an existing category of recognized relationship that can be extended by simple analogy to impose, or refuse to impose, a duty of care on a doctor to a future child of the doctor's female patient. The potential for harm to a fetus while in utero from exposure to Accutane is clearly foreseeable. However, policy considerations militate against a finding of the necessary proximity. If a doctor owes a duty of care to a future child of a female patient, the doctor could be put in an impossible conflict of interest between the best interests of the future child and the best interests of the patient in deciding whether to prescribe a teratogenic drug or to give the patient the opportunity to choose to take such a drug. That conflict could have an undesirable chilling effect on doctors, who might be prompted to offer treatment to some female patients that might deprive them of their autonomy and freedom of informed choice in their medical care. Moreover, a doctor has an indirect relationship with a future child. It is the female patient whom the doctor advises and who makes the treatment decisions affecting herself and her future child. The doctor cannot advise or take instructions from a future child, and may not be in a [page402] position to fulfill a duty of care to take all reasonable precautions to protect a future child from harm caused by a teratogenic drug.

Even if there was a sufficient degree of proximity between the parties to base a prima facie duty of care, residual policy considerations at the second stage of the Anns test make the imposition of the proposed duty unwise. Recognizing a duty of care by a doctor to a future child of a female patient would affect the doctor's existing legal obligation, which is to the patient. Recognizing the proposed duty would also have implications for society as a whole. Our legal and medical systems recognize that a woman has the right, in consultation with her doctor, to choose to abort a fetus. Until a child is born alive, a doctor must act in the best interests of the mother. That obligation is consistent with the need to preserve a woman's bodily integrity, privacy and autonomy rights. The trial judge erred in law in finding that the defendant owed a duty of care to a potential future child when prescribing Accutane to his patient.

Cases referred to

Anns v. Merton London Borough Council, [1978] A.C. 728, [1977] 2 All E.R. 492, [1977] 2 W.L.R. 1024, 75 L.G.R. 555, 141 J.P. 527 (H.L.), apld

Bovingdon (Litigation Guardian of) v. Hergott (2008), 88 O.R. (3d) 641, [2008] O.J. No. 11, 2008 ONCA 2, 290 D.L.R. (4th) 126, 233 O.A.C. 84, 55 C.C.L.T. (3d) 142, 163 A.C.W.S. (3d) 492 [Leave to appeal to S.C.C. refused [2008] S.C.C.A. No. 92]; Cherry (Guardian ad Litem of) v. Borsman, [1992] B.C.J. No. 1687, 94 D.L.R. (4th) 487, [1992] 6 W.W.R. 701, 16 B.C.A.C. 93, 70 B.C.L.R. (2d) 273, 12 C.C.L.T. (2d) 137, 34 A.C.W.S. (3d) 1030 (C.A.) [Leave to appeal to S.C.C. refused [1992] S.C.C.A. No. 472, [1993] 2 S.C.R. vi, 99 D.L.R. (4th) vii, 152 N.R. 240n]; Lacroix (Litigation Guardian of) v. Dominique, [2001] M.J. No. 311, 2001 MBCA 122, 202 D.L.R. (4th) 121, [2001] 9 W.W.R. 261, 156 Man. R. (2d) 262, 6 C.C.L.T. (3d) 212, 106 A.C.W.S. (3d) 747 [Leave to appeal to S.C.C. refused [2001] S.C.C.A. No. 477, 289 N.R. 202]; McKay v. Essex Area Health Authority, [1982] 2 All E.R. 771, [1982] Q.B. 1166 (C.A.); Syl Apps Secure Treatment Centre v. D. (B.), [2007] 3 S.C.R. 83,

[2007] S.C.J. No. 38, 2007 SCC 38, 284 D.L.R. (4th) 682, 365 N.R. 302, J.E. 2007-1512, 227 O.A.C. 161, 49 C.C.L.T. (3d) 1, 39 R.F.L. (6th) 245, 159 A.C.W.S. (3d) 464, EYB 2007-122390, consd

Other cases referred to

Ahmed v. Stefaniu, [2006] O.J. No. 4185, 275 D.L.R. (4th) 101, 216 O.A.C. 323, 155 A.C.W.S. (3d) 457 (C.A.); Arndt v. Smith, [1997] 2 S.C.R. 539, [1997] S.C.J. No. 65, 148 D.L.R. (4th) 48, 213 N.R. 243, [1997] 8 W.W.R. 303, J.E. 97-1422, 92 B.C.A.C. 185, 35 B.C.L.R. (3d) 187, 35 C.C.L.T. (2d) 233, 72 A.C.W.S. (3d) 185, revg on another issue, [1994] B.C.J. No. 1137, [1994] 8 W.W.R. 568, 93 B.C.L.R. (2d) 220, 21 C.C.L.T. (2d) 66, 47 A.C.W.S. (3d) 1095 (S.C.); Bannerman v. Mills (1991), Aust. Torts Rpts. 81-079 (N.S.W.S.C.); Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); Bruggeman v. Schimke, 718 P.2d 635, 239 Kan. 245 (1986); Cattanach v. Melchior (2003), 215 C.L.R. 1, [2003] H.C.A. 38 (Aust. H.C.); Childs v. Desormeaux, [2006] 1 S.C.R. 643, [2006] S.C.J. No. 18, 2006 SCC 18, 266 D.L.R. (4th) 257, J.E. 2006-986, 210 O.A.C. 315, [2006] R.R.A. 245, 39 C.C.L.T. (3d) 163, 30 M.V.R. (5th) 1, 147 A.C.W.S. (3d) 719, EYB 2006-104570; Cockrum v. Baumgartner, 95 Ill. 2d 193, 447 N.E.2d 385 (1983); Cooper v. Hobart, [2001] 3 S.C.R. 537, [2001] S.C.J. No. 76, 2001 SCC 79, 206 D.L.R. (4th) 193, 277 N.R. 113, [2002] 1 W.W.R. 221, J.E. 2001-2153, 160 B.C.A.C. 268, 96 B.C.L.R. (3d) 36, 8 C.C.L.T. (3d) 26, 110 A.C.W.S. (3d) 943; Curlender v. Bioscience Laboratories, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980); Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967); Dehler v. Ottawa Civic Hospital (1980), 29 O.R. (2d) 677, [1980] O.J. No. 3499, 117 D.L.R. (3d) 512, 6 A.C.W.S. (2d) 45 (C.A.), affg (1979), 25 O.R. (2d) 748, [1979] O.J. No. 3468, 101 D.L.R. (3d) 686, 14 C.P.C. 4, [1979] 3 A.C.W.S. 297 (H.C.J.); [page403] Design Services Ltd. v. Canada, [2008] S.C.J. No. 22, 2008 SCC 22, EYB 2008-132987, J.E. 2008-985, 55 C.C.L.T. (3d) 1, 64 C.C.L.I. (4th) 159, 69 C.L.R. (3d) 1, 293 D.L.R. (4th) 437, 165 A.C.W.S. (3d) 952, 374 N.R. 77; Dobson (Litigation Guardian of) v. Dobson, [1999] 2 S.C.R. 753, [1999] S.C.J. No. 41, 174 D.L.R. (4th) 1, 214 N.B.R. (2d) 201, 45 C.C.L.T. (2d) 217, 33 C.P.C. (4th) 217, 44 M.V.R. (3d) 1, 89 A.C.W.S. (3d) 410; Duval v. Seguin (1973),

1 O.R. (2d) 482, [1973] O.J. No. 2185, 40 D.L.R. (3d) 666 (C.A.); Edwards v. Law Society of Upper Canada, [2001] 3 S.C.R. 562, [2001] S.C.J. No. 77, 2001 SCC 80, 206 D.L.R. (4th) 211, 277 N.R. 145, J.E. 2001-2152, 153 O.A.C. 388, 34 Admin. L.R. (3d) 38, 8 C.C.L.T. (3d) 153, 13 C.P.C. (5th) 35, 110 A.C.W.S. (3d) 944; Garrison v. Medical Center of Delaware, Inc., 581 A.2d 288 (Del. 1989); Harbeson v. Parke-Davis Inc., 98 Wn.2d 460, 656 P.2d 483 (Wash. 1983); Harriton v. Stephens (2004), 59 N.S.W.L.R. 694 (C.A.), affd (2006), 226 C.L.R. 52, 226 A.L.R. 391 (Aus. H.C.); Healey v. Lakeridge Health Corp., [2006] O.J. No. 4277, 38 C.P.C. (6th) 145, 152 A.C.W.S. (3d) 372 (S.C.J.); Holland v. Saskatchewan, [2008] S.C.J. No. 43, 2008 SCC 42, EYB 2008-136658, J.E. 2008-1434, 167 A.C.W.S. (3d) 427, 376 N.R. 316, 294 D.L.R. (4th) 193, [2008] 9 W.W.R. 193, 311 Sask. R. 197, 58 C.C.L.T. (3d) 1; Jones (Guardian ad litem of) v. Rostvig, [1999] B.C.J. No. 647, 44 C.C.L.T. (2d) 313, 86 A.C.W.S. (3d) 980 (S.C.); Kamloops (City) v. Nielsen, [1984] 2 S.C.R. 2, [1984] S.C.J. No. 29, 10 D.L.R. (4th) 641, 54 N.R. 1, [1984] 5 W.W.R. 1, J.E. 84-603, 66 B.C.L.R. 273, 11 Admin. L.R. 1, 29 C.C.L.T. 97, 8 C.L.R. 1, 26 M.P.L.R. 81, 26 A.C.W.S. (2d) 453; Kealey v. Berezowski (1996), 30 O.R. (3d) 37, [1996] O.J. No. 2460, 136 D.L.R. (4th) 708, 9 O.T.C. 1, 31 C.C.L.T. (2d) 143, 64 A.C.W.S. (3d) 478 (Gen. Div.); Krangle (Guardian ad litem of) v. Brisco, [2002] 1 S.C.R. 205, [2002] S.C.J. No. 8, 2002 SCC 9, 208 D.L.R. (4th) 193, 281 N.R. 88, [2002] 3 W.W.R. 45, J.E. 2002-235, 161 B.C.A.C. 283, 98 B.C.L.R. (3d) 1, 9 C.C.L.T. (3d) 195, 111 A.C.W.S. (3d) 264; Kush v. Lloyd, 616 So. 2d 415 (Fla. 1992); Lininger v. Eisenbaum, 764 P.2d 1202, 12 BTR 1692 (Colo. 1988); Lovelace Medical Center v. Mendez, 805 P.2d 603, 111 N.M. 336 (1991); McFarlane v. Tayside Health Board, [2000] 2 A.C. 59, [1999] 4 All E.R. 961, [2000] 1 F.C.R. 102, [1999] 3 W.L.R. 1301, 52 B.M.L.R. 1 (H.L.); Mickle v. Salvation Army Grace Hospital, [1998] O.J. No. 4683, 166 D.L.R. (4th) 743, 81 O.T.C. 23, 83 A.C.W.S. (3d) 866 (Gen. Div.); Mustapha v. Culligan of Canada Ltd., [2008] S.C.J. No. 27, 2008 SCC 27, EYB 2008-133554, J.E. 2008-1083, 55 C.C.L.T. (3d) 36, 165 A.C.W.S. (3d) 954, 293 D.L.R. (4th) 29, 375 N.R. 81, 238 O.A.C. 130; Nelson v. Kruzen, 678 S.W.2d 918 (Tex. 1984); Odhavji Estate v. Woodhouse, [2003] 3 S.C.R. 263, [2003]

S.C.J. No. 74, 2003 SCC 69, 233 D.L.R. (4th) 193, 312 N.R. 305, J.E. 2004-47, 180 O.A.C. 201, 11 Admin. L.R. (4th) 45, 19 C.C.L.T. (3d) 163, 127 A.C.W.S. (3d) 178; O'Toole v. Greenberg, 477 N.E.2d 445, 64 N.Y.2d 427 (1985); Parkinson v. St. James and Seacroft University Hospital NHS Trust, [2001] E.W.C.A. Civ. 530, [2002] Q.B. 266, [2001] 3 All E.R. 97, [2001] 3 W.L.R. 376, [2001] 2 F.L.R. 401, [2002] 2 F.C.R. 65 (C.A.); Procanik v. Cillo, 97 N.J. 339, 478 A.2d 755 (1984); Rees v. Darlington Memorial NHS Trust, [2003] U.K.H.L. 52, [2004] 1 A.C. 309, [2003] 4 All E.R. 987, [2003] 3 F.C.R. 289, [2004] P.I.Q.R. 181, 75 B.M.L.R. 69 (H.L.); Rouse v. Wesley, 494 N.W.2d 7, 196 Mich. App. 624 (1992); Spillane (Litigation Guardian of) v. Wasserman, [1992] O.J. No. 2607, 13 C.C.L.T. (2d) 267, 42 M.V.R. (2d) 144, 37 A.C.W.S. (3d) 412 (Gen. Div.); Suite v. Cooke, [1995] J.Q. no 696, [1995] R.J.Q. 2765, J.E. 95-2058, [1995] R.R.A. 849, 58 A.C.W.S. (3d) 961 (C.A.), affg [1993] J.Q. no 98, [1993] R.J.Q. 514, J.E. 93-366, 15 C.C.L.T. (2d) 15; Turpin v. Sortini, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982); University of Arizona Health Sciences Center v. Superior Court, 136 Ariz. 579, 667 P.2d 1294 (1983); Urbanski v. Patel, [1978] M.J. No. 211, 84 D.L.R. (3d) 650 (Q.B.); Viccaro v. Milunsky, 406 Mass. 777, 551 N.E.2d 8 (1990); Waller v. James (2006), 226 C.L.R. 136, 226 A.L.R. 457 (Aus. H.C.); Watt v. Rama, [1972] V.R. 353 (Aust. Full Ct.); [page404] Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.), [1997] 3 S.C.R. 925, [1997] S.C.J. No. 96, 152 D.L.R. (4th) 193, 219 N.R. 241, [1998] 1 W.W.R. 1, J.E. 97-2059, 121 Man. R. (2d) 241, 39 C.C.L.T. (2d) 155, 31 R.F.L. (4th) 165, 74 A.C.W.S. (3d) 811; Zeitsov v. Katz (1986), 40(2) P.D. 85 (Isr. S. Ct.)

Statutes referred to

Family Law Act, R.S.O. 1990, c. F.3, s. 66

Authorities referred to

Andresen, Margot, "Accutane registry compulsory in US, but not Canada" (2006) 174(12) C.M.A.J. 1701

Dorland, Dorland's Illustrated Medical Dictionary, 31st ed. (Philadelphia: Saunders Elsevier, 2007)

Stretton, Dean, "Wrongful Life and the Logic of Non-Existence" (2006) 30(3) Melbourne U.L. Rev. 972

APPEAL and CROSS-APPEAL from the judgment of Eberhard J., [2006] O.J. No. 1179, 2006 CanLII 9312 (S.C.J.) dismissing a negligence action.

Paul J. Pape and Susan M. Chapman, for appellants/respondents by way of cross-appeal.

Darryl A. Cruz and Sarit E. Batner, for respondent/appellant by way of cross-appeal.

The judgment of the court was delivered by

[1] FELDMAN J.A.: -- Where a doctor looks after a woman who is pregnant or who may become pregnant, the doctor owes a duty of care to the woman as the patient. In discharging this duty of care, a doctor must always consider and advise the woman of the material risks of any prescription or procedure on a potential future child. The issue in this case is whether a doctor also owes a tort law duty of care to a future child (i.e., a child subsequently born) of the doctor's patient.

[2] The acne drug, Accutane, is a teratogenic [See Note 1 below] drug that carries the risk of causing fetal malformation. The respondent, Dr. Shaffiq Ramji, prescribed Accutane to Dawn Paxton, the mother of the appellant child, Jaime Paxton, on the understanding that the mother would not become pregnant while taking the drug. The doctor's understanding was based on the fact that the appellant's father had had a vasectomy 4 1/2 years earlier that [page405] had been successful up to that time. Unfortunately, the vasectomy failed just when the Accutane was prescribed and the appellant was conceived. She was born with considerable damage caused by the Accutane and she sued the respondent for negligence in prescribing the Accutane to her mother. The appellant's parents and siblings brought only derivative claims under the Family Law Act, R.S.O. 1990, c. F.3, and at trial, did not pursue a claim for breach of a duty of care owed directly to them by the doctor.

[3] The trial judge found that the respondent owed a duty of care to the appellant before conception not to prescribe Accutane to her mother without taking all reasonable steps to ensure that the mother would not become pregnant while taking the drug. However, the trial judge also found that the respondent doctor met the standard of care by relying on the father's vasectomy as an effective form of birth control. The trial judge thus dismissed the appellant child's action against the doctor.

[4] The appellant child appeals the trial judge's finding that the respondent doctor met the standard of care. The respondent cross-appeals the conclusion that he owed a duty of care to the appellant before or after conception. [See Note 2 below] Although I agree with the result reached by the trial judge that the action should be dismissed, I do so because I conclude that the respondent doctor owed no duty of care to the appellant, Jaime Paxton.

Facts

[5] Dawn Paxton was 25 years old with three children when she began to see Dr. Ramji as her family doctor in 1997. She had had acne since her teens and had been prescribed and used a number of topical acne treatments. However, she continued to be concerned about her acne. In 2001, she heard about the acne drug Accutane, and requested it from Dr. Ramji. Because she was involved in becoming pregnant as a surrogate mother at that time, she could not be prescribed Accutane. She returned to Dr. Ramji in 2002, again requesting Accutane. Dr. Ramji assessed her acne as "inflammatory" with "ice-pick scarring on the face, neck, chest, upper back". [page406]

[6] In 2001, Dr. Ramji had taken a continuing education course for the prescription of Accutane. Because Accutane is a teratogenic drug that may cause birth defects if it is taken during pregnancy, the manufacturer developed a "Pregnancy Protection Mainpro-C Program" ("PPP") that doctors are to implement before prescribing the drug to women of childbearing potential, in order to try to ensure they will not become pregnant while taking the medication. Dr. Ramji learned the details of the PPP at the course. The content of the PPP as

summarized by the trial judge, at para. 134 of her reasons, is as follows:

> Effective contraceptive measures must be used for at least one month before Accutane treatment during and/or at least one month following the discontinuation of treatment. It is recommended that two reliable forms of contraception be used simultaneously unless abstinence is the chosen method. Pregnancy occurring during treatment with Accutane and for one month after its discontinuation, carried the risk of fetal malformation. Females should be fully counseled on the serious risk to the fetus, should they become pregnant while undergoing treatment.

[7] In addition to the PPP, in March 2001, Health Canada forwarded a "Dear Doctor" letter from the manufacturer of Accutane advising doctors about the necessity of complying with the PPP:

> Accutane[TM]Roche[R] is a teratogen, and all female patients of childbearing potential must be counselled prior to and throughout therapy. Should you not already have a copy of the Pregnancy Prevention Program[C], please call 1-877-882-2263 ext. 101 to order. Patients must use effective contraception for one month before beginning 'Accutane' therapy, during, and one month following discontinuation of therapy. Note that "effective" contraception is defined as two reliable forms of contraception used simultaneously, unless abstinence is the chosen method. Two negative pregnancy tests must be obtained prior to start of therapy. A monthly assessment of the patient should be performed. A negative pregnancy test must be obtained before each prescription renewal is issued . . . .

[8] Dr. Ramji discussed with Dawn Paxton the necessity that she not become pregnant while taking Accutane. He determined that her husband had had an effective vasectomy 4 1/2 years earlier and that she had no other sexual partners.

[9] He gave her a pregnancy test on January 15, 2002 that

came back negative, following which she commenced taking Accutane. After taking the drug for one month, she returned on February 14, 2002 and had a second pregnancy test, which also came back negative. However, because of the timing of the second test, this result was erroneous and did not show that Dawn Paxton had become pregnant sometime before February 14, 2002, her husband's vasectomy having failed after 4 1/2 years. She continued with the Accutane, unaware that she was pregnant. There [page407] was no evidence whether the Accutane had already caused the injury to the fetus by the time of the second negative pregnancy test.

[10] In March, Dawn Paxton stopped taking Accutane because she was not feeling well. She saw Dr. Ramji in April and learned at that time that she was pregnant. She elected not to abort.

[11] Jaime Paxton was born with a number of severe disabilities as a result of her exposure to Accutane while in utero, including a right facial palsy, seizures, generalized hypotonia, megalencephaly of the left occipital lobe of the brain, prominent dysmorphic features, hearing loss, anotia (absent right ear) and microtia (malformed left ear).

Reasons of the Trial Judge

[12] The trial judge approached the issues by first quantifying the damage claims, then assessing the standard of care, and finally determining whether the doctor owed a duty of care to Jaime Paxton.

[13] The trial judge quantified all the heads of damages claimed by and on behalf of the respective appellants but denied the claim for punitive damages: see paras. 39-73. No appeal is brought from the quantification of damages. There is an appeal from the trial judge's decision not to award punitive damages against the respondent. Punitive damages were sought on the basis that the respondent had altered his clinical notes respecting his medical treatment of Dawn Paxton. The trial judge found that although the respondent's conduct deserved censure, she believed that the College of Physicians and Surgeons would be taking some action, and that in such

circumstances, the rare remedy of punitive damages would be inordinate.

[14] The trial judge addressed two issues regarding the standard of care for prescribing Accutane. The first was whether, based on the nature and extent of Dawn Paxton's acne condition, Accutane was an indicated treatment. On this issue, the trial judge considered her scarring from the acne and whether her subjective desire to use the drug was relevant to the doctor's clinical judgment on whether to prescribe Accutane. Having considered the expert and other evidence, the trial judge found that Dr. Ramji did not fall below the standard of care in deciding that Accutane was an indicated treatment for Dawn Paxton's acne: see paras. 101-13.

[15] The second question was whether Dr. Ramji met the standard of care for prescribing Accutane to a woman of childbearing potential. The trial judge described this standard as "based on [page408] requiring effective contraception when prescribing Accutane" (para. 133). The trial judge assessed Dr. Ramji's decision to rely on the 4 1/2 year vasectomy by reference to the PPP and by comparison to what a reasonable and competent family physician would have done in like circumstances.

[16] The trial judge found on the evidence that Dawn Paxton was confident about the efficacy of the vasectomy and that further counselling regarding birth control, or the need for an abortion if she became pregnant while on Accutane, would not have made a difference to her decision to take Accutane because of that confidence. The trial judge also concluded that, because of the statistical reliability of a 4 1/2 year vasectomy, [See Note 3 below] the introduction of a further form of birth control such as a condom would have reduced the likelihood of pregnancy by only a statistically infinitesimal amount. Finally, although Dr. Ramji did not follow exactly all of the steps in the PPP for prescribing Accutane, the trial judge concluded that the deficiencies in procedure "were not causative of the event that occurred" (para. 154). She concluded that Dr. Ramji met the standard of care by relying on the 4 1/2 year vasectomy as an effective form of birth control when prescribing Accutane: see

paras. 139-54.

[17] The final issue dealt with by the trial judge was whether Dr. Ramji owed a duty of care to Jaime Paxton. As noted above, Jaime Paxton was the only plaintiff asserting a direct claim for negligence against Dr. Ramji. The claims by her mother, father, and three siblings were confined to derivative claims under the Family Law Act for loss of care, guidance and companionship.

[18] The trial judge concluded that Dr. Ramji owed a duty of care to Jaime at the time he prescribed Accutane to her mother. She described the duty as follows, at para. 208:

> I find that Dr. Ramji owed a duty to the unconceived child of a woman of child bearing potential seeking Accutane not to prescribe it unless he was satisfied, in accordance with the standard of care required of a reasonable and competent doctor in similar circumstances, that she would not become pregnant while taking the drug.

[19] Before concluding that this duty was owed by the doctor to the unconceived child, the trial judge considered the question whether Jaime's claim should be characterized as one for "wrongful life". A claim for wrongful life has been defined as a claim brought by a child against a doctor or other health-care provider [page409] for allowing a child to be born with birth defects where, but for the wrongful act or omission of the doctor, the child would not have been born at all. In the words of the trial judge, liability in such cases is framed "but for the negligence I would not have been born" (para. 156). The trial judge found persuasive the decision of the Manitoba Court of Appeal in Lacroix (Litigation Guardian of) v. Dominique, [2001] M.J. No. 311, 202 D.L.R. (4th) 121 (leave to appeal to S.C.C. refused [2001] S.C.C.A. No. 477, 289 N.R. 202), where that court held that Canadian law does not recognize an action for "wrongful life". She concluded that existing case law supports this legal position: see paras. 157-66.

[20] The trial judge considered whether or not Jaime's claim

was properly characterized as one for wrongful life. She analyzed the question in the following manner. For Jaime's claim to be characterized as one for wrongful life, it would be because, had Dr. Ramji adhered to the PPP in counselling Dawn Paxton to use two forms of birth control while on Accutane, Jaime may not have been born. She found that a claim framed that way would be one for "wrongful life" and is not legally cognizable in Canada.

[21] However, in the trial judge's view, the claim should not be thought of as one for wrongful life (i.e., not one where the claim against Dr. Ramji was because Jaime should not have been born), but should instead be considered in the following way. If Dr. Ramji had abided by his duty not to prescribe Accutane to Dawn Paxton if she was a woman of childbearing potential, then Jaime could have been conceived, but with no exposure to Accutane. In that case, "but for" the prescription of a drug that is contraindicated for women of childbearing potential, Jaime would have been born without defects. Framed this way, the claim against Dr. Ramji is not a claim for wrongful life, but for causing Jaime's disabilities. The trial judge concluded that because the claim is not one for "wrongful life", Jaime was asserting a cause of action that the court would recognize: see paras. 185-210.

[22] Having found that Dr. Ramji owed a duty of care to the unconceived child of a woman of childbearing potential, the trial judge returned to the standard of care in order to assess the doctor's liability. She approached the liability issue by asking whether Dr. Ramji was entitled to be satisfied that Dawn Paxton was not a woman of childbearing potential. The trial judge found that in Ontario, a doctor will meet the standard of care if the doctor is satisfied that a woman is not of childbearing potential because she is abstinent, the PPP is followed, she has had a [page410] hysterectomy, is menopausal, is surgically sterilized, or if her only partner has had a 4 1/2 year vasectomy: see paras. 212-13. Because Paul Paxton, Dawn Paxton's only sexual partner, had had a successful vasectomy some 4 1/2 years earlier, the trial judge found that Dawn Paxton could not be characterized as a woman of childbearing potential and Accutane was therefore no longer

contraindicated. She concluded that Dr. Ramji thus met the standard of care and did not breach his duty of care to the unconceived potential child of his patient by prescribing the Accutane: see para. 215. Accordingly, the trial judge dismissed the claim against him.

Issues on Appeal

[23] The appellant's appeal to this court challenges the trial judge's finding that Dr. Ramji met the standard of care when he prescribed Accutane to Dawn Paxton. However, before considering the standard of care, the court must first determine whether Dr. Ramji owed a duty of care to the future child of Dawn Paxton.

[24] The following are the issues raised on the appeal:

(1) Did Dr. Ramji owe a duty of care to the future child of Dawn Paxton?

(2) If a duty of care was owed, did the trial judge err in finding that Dr. Ramji met the standard of care when he relied on Paul Paxton's 4 1/2 year vasectomy?

(3) If a duty of care was owed, did the trial judge err by finding that Dr. Ramji met the standard of care when he prescribed Accutane to Dawn Paxton without performing a risk/benefit analysis, given that Dawn Paxton was not prepared to have an abortion if she became pregnant while on Accutane?

(4) Did the trial judge err by not awarding punitive damages against Dr. Ramji for altering his clinical notes?

Analysis

(1) Duty of care

[25] The issue whether a child born with birth defects should be entitled to successfully assert a negligence claim against a doctor or other health-care provider for harm suffered before birth has tested the mettle of many courts both in this country and [page411] internationally. [See Note 4 below] Often the analysis has focused on the difficulties associated with imposing a duty of care on a doctor towards a future child to give the child's mother (or his/her parents) the opportunity to avoid the child's conception or to abort the fetus. This type of claim is commonly referred to as one for wrongful life. Courts

have been troubled by the difficulties in assessing damages where the assessment would be based on a comparison between the value of the plaintiff's existence in a disabled state and the value of non-existence: see Dean Stretton, "Wrongful Life and the Logic of Non-Existence" (2006) 30(3) Melbourne U.L. Rev. 972, at p. 973.

[26] Courts in most foreign common-law jurisdictions have refused to recognize claims for wrongful life. In the seminal decision of McKay v. Essex Area Health Authority, the English Court of Appeal refused to recognize a claim for wrongful life on the basis of both legal principle and public policy. The High Court of Australia recently rejected wrongful life claims in Harriton v. Stephens and in Waller v. James. In the United States, most states have rejected wrongful life actions, beginning with the highly influential decision of the Supreme Court of New Jersey in 1967 in Gleitman v. Cosgrove. In the three states where wrongful life actions have been allowed, courts have generally restricted [page412] liability to special damages, such as for extraordinary medical expenses, and have refused to award general damages for pain and suffering because of the impossibility of comparing existence with non-existence. [See Note 5 below]

[27] Wrongful life claims are not to be confused with claims labelled wrongful birth. [See Note 6 below] Actions for wrongful birth are brought by the parents (rather than by the child) who claim that their child would not have been conceived or born but for the doctor's negligence. In such claims, the parents seek damages associated with the birth and care of a child. Wrongful birth claims may arise from the birth of a healthy, but unplanned, child as in cases where a doctor is alleged to have negligently performed a sterilization procedure. More commonly, wrongful birth claims involve the birth of a disabled child, as in cases where parents would have elected not to conceive a child had they received accurate genetic counselling about the likelihood that their child would be born with a disability, or to abort a child had they received advice regarding harm that can be caused in utero by such diseases as rubella. International courts have generally allowed claims by parents for wrongful birth, but have divided on what damages are

recoverable. [See Note 7 below]

[28] In Canada, where claims against medical professionals have been brought by children born with disabilities, some courts have approached such claims from the vantage point of whether or not the claim is accurately characterized as one for wrongful life. If the claim is seen as one for wrongful [page413] life, then courts have typically held that such a claim should not be recognized at law. Where the claim is found not to attract the wrongful life label, then courts have concluded that a claim lies for the injury the doctor caused to the child before birth. The trial judge's decision in this case and the Manitoba Court of Appeal's decision in Lacroix reflect this approach to determining whether or not the proposed cause of action should be recognized.

[29] In my view, by asking whether or not the claim before the court should be characterized as one for wrongful life, Canadian courts have asked the wrong question. In Canada, the governing tort law analysis for determining whether a person will be held liable in negligence for harm done to another is that mandated by the Supreme Court of Canada in a line of cases following the decision of the House of Lords in Anns v. Merton London Borough Council, [1978] A.C. 728, [1977] 2 All E.R. 492 (H.L.). This line of authority began with Kamloops (City) v. Nielsen, [1984] 2 S.C.R. 2, [1984] S.C.J. No. 29 and includes Cooper v. Hobart, [2001] 3 S.C.R. 537, [2001] S.C.J. No. 76; Edwards v. Law Society of Upper Canada, [2001] 3 S.C.R. 562, [2001] S.C.J. No. 77; Odhavji Estate v. Woodhouse, [2003] 3 S.C.R. 263, [2003] S.C.J. No. 74; Childs v. Desormeaux, [2006] 1 S.C.R. 643, [2006] S.C.J. No. 18; [page414] Syl Apps Secure Treatment Centre v. D. (B.), [2007] 3 S.C.R. 83, [2007] S.C.J. No. 38; Design Services Ltd. v. Canada, [2008] S.C.J. No. 22, 2008 SCC 22; and Holland v. Saskatchewan, [2008] S.C.J. No. 43, 2008 SCC 42.

[30] According to this authority, the first question a court must ask is whether there is a duty of care owed by the defendant to the plaintiff. This question is answered by determining whether the proposed cause of action fits within an established category of relationship giving rise to a duty of

care. Where the relationship between the plaintiff and defendant is of a type that has already been judicially recognized as giving rise to a duty of care, or is analogous to a recognized category, a court "may usually infer that sufficient proximity is present and that if the risk of injury was foreseeable, a prima facie duty of care will arise": Childs, at para. 15; see also Cooper, at para. 36; Design Services, at para. 27; and Mustapha v. Culligan of Canada Ltd., [2008] S.C.J. No. 27, 2008 SCC 27, at para. 5.

[31] Where a duty of care is found to exist, the court will go on to determine the standard of care and whether the defendant met that standard. If the defendant's conduct fell below the standard of care, and if the plaintiff sustained damages as a result, which were caused in fact and in law by the defendant's breach, then the defendant has breached the duty of care and is responsible in law for the damage suffered: see Mustapha, at para. 3.

[32] If, however, the proposed duty of care is a novel one not previously judicially recognized, then the court must conduct what the Supreme Court of Canada refers to as the Anns test to determine whether the alleged wrongdoer owes a duty of care to the plaintiff. The test includes three components which are considered in a two-stage process: (1) reasonable foreseeability of harm; (2) proximity; (3) policy factors. The first stage determines whether there is a prima facie duty of care by analyzing reasonable foreseeability and whether there is a sufficiently close and direct relationship of proximity, including policy considerations that affect the relationship. The second stage considers whether, despite finding a prima facie duty of care, there are residual policy reasons to reject a duty of care.

[33] The Supreme Court recently described the two-stage process for determining the existence of a duty of care in Syl Apps, at para. 24, as follows:

> To determine whether there is a prima facie duty of care, we examine the factors of reasonable foreseeability and proximity. If this examination leads to the prima facie

conclusion that there should be a duty of care imposed on this particular relationship, it remains to determine whether there are nonetheless additional policy reasons for not imposing the duty. [page415]

[34] Abella J., writing for the court in Syl Apps, described the factors of reasonable foreseeability and proximity that are considered at the first stage of the Anns test (paras. 25-26 and 30):

> The basic proposition underlying "reasonable foreseeability" is that everyone "must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour" (Donoghue v. Stevenson, [1932] A.C. 562 (H.L.), per Lord Atkin, at p. 580). The question is whether the person harmed was "so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected" (Donoghue v. Stevenson, at p. 580).
>
> There must also be a relationship of sufficient proximity between the plaintiff and defendant. The purpose of this aspect of the analysis was explained by Allen Linden and Bruce Feldthusen in Canadian Tort Law (8th ed. 2006) as being to decide "whether, despite the reasonable foresight of harm, it is unjust or unfair to hold the defendant subject to a duty because of the absence of any relationship of proximity between the plaintiff and the defendant" (p. 304).
>
> . . . . .
>
> Depending on the circumstances of the case, the factors to be considered in the proximity analysis include the parties' expectations, representations and reliance (Cooper, at para. 34). There is no definitive list.

[35] If a prima facie duty of care is found, then at the second stage of the Anns test, the court assesses whether there are residual policy considerations that militate against finding a new duty of care. Abella J. described the second stage, at para. 31:

If a prima facie duty of care is found to exist based on reasonable foreseeability and proximity, it is still necessary for a court to submit this preliminary conclusion to an examination about whether there are any residual policy reasons which make the imposition of a duty of care unwise.

[36] However, policy considerations also play a role in the initial determination of a prima facie duty of care. The importance of policy considerations at both stages was emphasized by Abella J., at paras. 31-33 of Syl Apps:

As noted in Cooper, "the Donoghue v. Stevenson foreseeability-negligence test, no matter how it is phrased, conceals a balancing of interests. The quest for the right balance is in reality a quest for prudent policy" (para. 29).

This means, the Court recognized, that policy is relevant at both the "proximity" stage and the "residual policy concerns" stage of the Anns test. The difference is that under proximity, the relevant questions of policy relate to factors arising from the particular relationship between the plaintiff and the defendant. In contrast, residual policy considerations are concerned not so much with "the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally" (Cooper, at para. 37).

The possibility of some blending of policy considerations was noted by McLachlin C.J. and Major J. in Cooper: [page416]

> Provided the proper balancing of the factors relevant to a duty of care are considered, it may not matter, so far as a particular case is concerned, at which "stage" [policy is considered]. The underlying question is whether a duty of care should be imposed, taking into account all relevant factors disclosed by the circumstances. [para. 27]

[37] Thus, in order to determine whether Dr. Ramji can be liable in negligence to Jaime Paxton, the question confronting the court is not whether her claim is one that should be

characterized as wrongful life, but whether he owed her a duty of care.

Does the claim fall within, or is it analogous to, a recognized duty of care?

[38] The question of a doctor's legal proximity with a future child (whether conceived or not yet conceived) at the time of the doctor's impugned conduct has been considered by Canadian courts in a number of contexts. It is important to keep in mind that, in discussing a duty of care that may be owed to a future child, these types of claims only arise where the child is born alive, since only a child who is born alive can assert a cause of action. As McLachlin J. stated in Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.), [1997] 3 S.C.R. 925, [1997] S.C.J. No. 96, at p. 942 S.C.R.: "A child may sue in tort for injury caused before birth. However, only when the child is born does it have the legal status to sue and damages are assessed only as of the date of birth" (citations omitted). [See Note 8 below] [page416]

[39] The issue has arisen in cases where a child has sued a doctor for injuries suffered while in utero where the injuries were allegedly caused by the doctor. It has also arisen where it is claimed that the doctor allowed a child to be conceived or born in circumstances where the parents would have decided against having the child if the doctor had given them timely information that there was the possibility of harm to their future child.

[40] A review of some examples of the leading appellate decisions will demonstrate that Canadian courts have taken different approaches to the question whether there can be a proximate relationship between a doctor and a future child. The first is the 1992 decision of the British Columbia Court of Appeal in Cherry (Guardian ad Litem of) v. Borsman, [1992] B.C.J. No. 1687, 94 D.L.R. (4th) 487 (C.A.), leave to appeal to S.C.C. refused [1993] 2 S.C.R. vi, [1992] S.C.C.A. No. 472. In that case, a doctor negligently injured a fetus while in the process of performing an abortion. The child was born alive and sued the doctor for the injuries.

[41] The British Columbia Court of Appeal held that the doctor owed the mother a duty to perform the abortion properly, but he also owed a duty of care to the fetus not to cause it harm if the abortion was unsuccessful. The court found that an alleged lack of proximity between the doctor and the fetus should not be a barrier to imposing a duty of care: "We think the law would be wanting and badly flawed if it found itself in the position of having to deny any remedy to this infant plaintiff because of what at first glance may appear to be established principles of negligence" (p. 504 D.L.R.).

[42] The second is the Manitoba Court of Appeal's decision in 2000 in Lacroix. In that case, the doctor prescribed a teratogenic drug for epilepsy to the mother, but failed to advise her of the risk to a fetus if she were to become pregnant while taking the drug. The mother became pregnant while taking the drug and the child suffered harm in utero as a result. While both the child and the parents sued the doctor for damages caused by the drug, the parents' cause of action was barred by operation of the relevant statutory limitation period.

[43] In assessing in what circumstances a child's cause of action should be recognized, the court in Lacroix observed that cases involving a claim by a child born with abnormalities generally fall within one of two categories (para. 24):

> (i) cases in which the abnormalities have been caused by the wrongful act or omission of another; and
>
> (ii) cases in which, but for the wrongful act or omission, the child would not have been born at all. [page418]

If the claim fell within the first category, the doctor would be liable for causing direct damage, but if it fell into the second category, there could be no liability because that would be an action for wrongful life.

[44] In discussing the second category of cases, the court referred, at paras. 32-36, to the 1982 decision in McKay v. Essex Area Health Authority, where the English Court of Appeal held that doctors cannot owe a duty to a fetus to terminate its existence, or to give its mother the opportunity to do so. At

para. 33 in Lacroix, the court referred to one of Stephenson L.J.'s reasons for this conclusion: "To impose such a duty towards the child would, in my opinion, make a further inroad on the sanctity of human life which would be contrary to public policy" (p. 781 All E.R.). The court also referred to the view of the English Court of Appeal that there is no such cause of action because it would be impossible to assess damages for such a wrong. In the words of Griffith L.J., at p. 790 All E.R. of McKay:

> To my mind, the most compelling reason to reject this cause of action is the intolerable and insoluble problem it would create in the assessment of damage . . . In a claim for wrongful life how does the court begin to make an assessment? The plaintiff does not say, "But for your negligence I would have been born uninjured"; the plaintiff says, "But for your negligence I would never have been born." The court then has to compare the state of the plaintiff with non-existence, of which the court can know nothing; this I regard as an impossible task.

The Manitoba Court of Appeal found the reasoning in McKay to be persuasive (para. 37).

[45] The court in Lacroix therefore had to determine whether the child's action against the doctor fell within the first category, because it was based on prescribing the epilepsy drug, or if it fell within the second category, because it was based on an allegation that the mother would not have become pregnant had she known the risks of the drug.

[46] The court concluded that there was no liability on the doctor because the case was in the second "wrongful life" category of cases. The court stated, at paras. 40-41:

> The mother in the present case testified that, if she had been advised of the danger, she would have avoided pregnancy, testimony which was accepted by the trial judge. . . .
>
> It is thus quite clear that, if the doctor had fulfilled his duty of care to the mother, the child would not likely have been born. The fact that the child's injury was caused

by the medication does not result in liability against the doctor as he was under no duty of care to the child. And the damages as in McKay v. Essex Area Health Authority, supra, are impossible to assess. [page419]

[47] The third case is a recent decision of this court in Bovingdon (Litigation Guardian of) v. Hergott (2008), 88 O.R. (3d) 641, [2008] O.J. No. 11 (C.A.), leave to appeal to S.C.C. refused [2008] S.C.C.A. No. 92. There, the doctor prescribed a fertility drug to his patient without providing full information to her regarding the increased risk of having twins and of premature birth with twins and the potential attendant problems that could result for the babies. The mother and her twins sued the doctor for the disabilities the twins suffered as a result of their premature birth.

[48] There was no issue in that case that the doctor owed a duty of care to his patient, the woman, to provide her with full information to choose whether or not to take the fertility drug, Clomid, which does not directly cause any damage to a fetus and is therefore not contraindicated during pregnancy.

[49] In deciding the doctor's liability to the twins, this court rejected as unhelpful the two-category approach adopted by the Manitoba Court of Appeal in Lacroix. For example, because it was the epilepsy drug in Lacroix that caused the injury to the fetus, the cause of action could well have been viewed not as one for wrongful life, but as one where the act of the doctor in prescribing the drug caused the damage.

[50] The same is true in the present case. On the one hand, the appellant's action could be viewed as a claim for wrongful life in the sense that, accepting the trial judge's finding that Accutane was an indicated treatment for Dawn Paxton's acne, the duty on the doctor must have been to ensure that Jaime Paxton would never be conceived, making her claim one for wrongful life. On the other hand, in the trial judge's view, the appellant's action was not a claim for wrongful life because the doctor's duty was to refuse to prescribe Accutane to Dawn Paxton as a woman of childbearing potential. Had the doctor discharged this duty, Jaime Paxton would have been born

healthy.

[51] The different ways of viewing the claims in Lacroix and in the present case illustrate that the categories posited in Lacroix are malleable and do not provide a rigorous analytical framework for deciding the issue whether the proposed duty of care should be recognized.

[52] In Bovingdon, rather than deciding whether the claim fell within one or other of the Lacroix categories, the court asked whether the doctor owed a duty of care to the unconceived future children when prescribing the fertility drug to the mother. The court held that the doctor did not owe a duty of care to the twins before conception, but only to the mother to provide her with sufficient information to choose whether to take the drug. As the mother was entitled to take the risk of [page420] prematurity, the doctor could not owe a separate duty of care to the future children to protect them from that risk, as that duty would contradict the mother's right to choose her treatment based on her own needs and her own best judgment. The court left open the question whether a doctor would owe a duty of care to a future child where the drug being prescribed to the female patient was contraindicated during pregnancy and would cause damage to a fetus -- the issue in both this case and in Lacroix. [See Note 9 below]

[53] Having reviewed these authorities, I believe it is fair to say that there is no settled jurisprudence in Canada on the question whether a doctor can be in a proximate relationship with a future child who was not yet conceived or born at the time of the doctor's impugned conduct. The Supreme Court of Canada has not had the opportunity to address the issue. The proposed duty of care thus does not fall within an established category of relationship giving rise to a duty of care.

[54] Nor, in my view, is there an existing category of recognized relationship that can be extended by simple analogy to impose, or refuse to impose, a duty of care on a doctor to a future child of the doctor's female patient. For example, in Canada, a mother does not owe a duty of care to her fetus: Dobson (Litigation Guardian of) v. Dobson, [1999] 2 S.C.R. 753,

[1999] S.C.J. No. 41. A mother and her fetus are not separate legal entities. This was explained by the Supreme Court of Canada in Winnipeg Child and Family Services, where McLachlin J. stated, at pp. 944-45 S.C.R.:

> Before birth the mother and the unborn child are one in the sense that "[t]he 'life' of the foetus is intimately connected with, and cannot be regarded in isolation from, the life of the pregnant woman". It is only after birth that the fetus assumes a separate personality. Accordingly, the law has always treated the mother and unborn child as one. (Citations omitted)

[55] However, even though the mother and fetus would be in a relation of proximity if they were assumed to be separate legal entities, for policy reasons, including "(1) the privacy and autonomy rights of women and (2) the difficulties inherent in articulating a judicial standard of conduct for pregnant women" (Dobson, at pp. 767-68 S.C.R.), the mother owes no duty of care in law to her fetus and cannot be sued by her child after birth. In my view, it is clear that a mother's relationship with her fetus is unique and the types of policy considerations that apply to that relationship [page421] cannot be applied by analogy to the relationship of other persons with a woman's future child.

[56] Another potentially analogous category is the recognized duty relationship between a woman's future child and a driver of a motor vehicle. Where a driver is negligent and is in an accident involving a pregnant woman, if her child is subsequently born alive and suffers damage as a result of the accident, the child may sue the driver: Duval v. Seguin (1973), 1 O.R. (2d) 482, [1973] O.J. No. 2185 (C.A.). [See Note 10 below] Such a case would fall into the first established category of proximity identified by the Supreme Court of Canada in Cooper, at para. 36: when the defendant's act causes foreseeable physical harm to the plaintiff.

[57] In my view, the relationship between a doctor and a future child of a patient cannot be viewed as analogous to the relationship between a user of the roadway and a woman's future

child. Doctors, unlike other third parties, are in a unique relationship with a patient's future child, by virtue of the recognized common-law duty that doctors owe to the pregnant woman who is their patient. This distinction gives rise to significant policy considerations that are not present in the context of an unrelated third-party user of the roadway and that make it inappropriate to treat this category as analogous.

[58] A third potentially analogous category is the duty of care that a doctor may owe to a non-patient third party for harm arising out of the doctor's treatment of a patient: see, for example, Ahmed v. Stefaniu, [2006] O.J. No. 4185, 275 D.L.R. (4th) 101 (C.A.); Spillane (Litigation Guardian of) v. Wasserman, [1992] O.J. No. 2607, 13 C.C.L.T. (2d) 267 (Gen. Div.); Urbanksi v. Patel, [1978] M.J. No. 211, 84 D.L.R. (3d) 650 (Q.B.). In these cases, however, the nature of the doctor's duty of care to the third party and the legal basis for imposing a duty of care are not fully developed. [See Note 11 below] For that reason, I would not view these cases as establishing the basis for an analogous category between a doctor and a future child, if viewed as a third-party non-patient. Even if these cases could be considered as establishing a potentially analogous category, once again, the unique policy considerations that arise in the context of the relationship between a future child of a female patient and the patient's doctor tell against drawing an analogy. [page422]

[59] To summarize, I consider the proposed duty to be a novel one. The court must therefore proceed with the two-stage Anns test to determine whether the proposed duty of care should be recognized in law.

Performing the Anns test

Stage one: Prima facie duty of care

(i) Reasonable foreseeabililty

[60] The question of the reasonable foreseeability of possible harm to a future child by actions or omissions of the mother's doctor in prescribing teratogenic medication to the mother is, in my view, not a difficult one. The answer is

demonstrated by the PPP that doctors consult when they prescribe Accutane to women of childbearing capacity. That protocol provides steps the doctor is to take to try to ensure that the woman will not become pregnant while taking the drug because of its teratogenic effects on fetuses. It is potential future children who are at risk and who are at the forefront of the contemplation of the drug manufacturer, of Health Canada and of the medical profession. The potential for harm to a fetus while in utero from exposure to Accutane is clearly foreseeable.

[61] When deciding the duty of care, one can get into a logical quagmire if the foreseeability question is approached not from the point of view of the foreseeability of harm, but rather the foreseeability of conception. The trial judge looked at the foreseeability of conception when she decided that Dr. Ramji met the standard of care. She concluded that he was entitled to view Dawn Paxton as a woman who was not of childbearing potential because of her husband's vasectomy. Therefore, there was no potential child to look out for. [See Note 12 below]

[62] Similarly, one could argue that harm to a future child is not foreseeable if the future child is not foreseeable, for example, if the people involved are using reliable birth control. That approach, however, confuses the duty of care with the standard of care. If, as a matter of law, there is a duty of care not to [page423] harm a future child by prescribing a teratogenic drug to a woman of childbearing capacity, then the doctor may meet the standard of care by taking all reasonable steps to try to ensure that his patient does not become pregnant while taking the drug.

[63] However, a similar approach to the foreseeability question in the duty of care analysis is unproductive and, in my view, incorrect. Of course if there is no one to whom a duty can be owed, then there is no duty. But as long as there is the potential for a future child to be born who may be affected by a teratogenic drug being prescribed to a woman who is of childbearing capacity, then at the first stage of the Anns test, the harm to that future child is reasonably foreseeable.

(ii) Proximity

[64] Having concluded that it is reasonably foreseeable that a doctor can cause harm to a future child by prescribing teratogenic medication to a woman who is or may become pregnant, the court must still determine whether the doctor and the future child are in a "close and direct relationship" of proximity that makes it fair and just that the doctor should owe a duty of care to the future child. In my view, in this case, as in Syl Apps, it is policy considerations that militate against a finding of the necessary proximity.

[65] In Syl Apps, the Supreme Court identified the potential for conflicting duties as a policy consideration and, indeed, "the deciding factor" weighing against a finding of a relationship of proximity (para. 41). In that case, the issue was whether a treatment centre, which was treating a child apprehended by the Children's Aid Society, owed a duty of care to the family of that child. The court held that, because of the statutory duties that the treatment centre owed to the child to act in her best interests, there would be an inevitable conflict of interest if the treatment centre also owed a duty of care to the family. Faced with that conflict, the treatment centre might well hesitate to pursue the child's best interests for fear of breaching its duty to the family.

[66] The prospect of conflicting duties is similarly present here. If a doctor owes a duty of care to a future child of a female patient, the doctor could be put in an impossible conflict of interest between the best interests of the future child and the best interests of the patient in deciding whether to prescribe a teratogenic drug or to give the patient the opportunity to choose to take such a drug. That conflict was recognized by the Manitoba Court of Appeal in Lacroix, where a teratogenic epilepsy drug was [page424] necessary for the health of the mother. At paras. 38-39, the court identified the concern as follows:

> Can it be said that the doctor owed the future child a duty of care not to prescribe a medication for the mother which he knew carried the risk of injuring a fetus?

> The imposition of such a duty would immediately create an irreconcilable conflict between the duty owed by the doctor to the child and that owed to the mother. The medication was properly prescribed to treat the mother's epilepsy. Without it, any fetus she might conceive would be at even greater risk from a seizure than from the medication. Surely the doctor cannot withhold the medication from the mother, and put her at risk, for the sake of avoiding risk to a yet unconceived fetus which might be at even greater risk if the mother's epilepsy went uncontrolled.

[67] In Lacroix, one consideration that moved the court in terms of the potential conflict of duties was that, if the mother did not receive the epilepsy medication and if she were to have a seizure while pregnant, the fetus would be at greater risk from that seizure than from the drug. This extra risk factor will not be present in all cases where a teratogenic drug is being prescribed. For example, there is no evidence of extra risk posed to a fetus if its mother's acne condition is not treated by Accutane. Nevertheless, the clear potential for conflicting duties remains between acting in the best interests of the mother and of a future child.

[68] These conflicting duties could well have an undesirable chilling effect on doctors. A doctor might decide to refuse to prescribe Accutane to a female patient, even where it is indicated and the patient agrees to fully comply with the PPP, in order to avoid the risk of a lawsuit brought by a child who is conceived despite compliance with the PPP or because the mother fails to comply with the PPP. Thus, imposing a duty of care on a doctor to a patient's future child in addition to the existing duty to the female patient creates a conflict of duties that could prompt doctors to offer treatment to some female patients in a way that might deprive them of their autonomy and freedom of informed choice in their medical care.

[69] In Bovingdon, the court recognized the same policy issue in holding that a doctor does not owe a duty of care to a future child when prescribing Clomid, a fertility drug, to the mother. To impose a duty of care to the future child not to

cause harm to such a child could have created an incentive for the doctor to refuse to prescribe Clomid and to deny women the choice of taking fertility drugs to assist them in becoming pregnant and having children.

[70] In Winnipeg Child and Family Services, the Supreme Court of Canada also identified conflicting interests of the fetus [page425] and the mother as a policy reason for not imposing on a pregnant woman a duty of care to the fetus (at p. 949 S.C.R.):

> The potential for intrusions on a woman's right to make choices concerning herself is considerable. The fetus' complete physical existence is dependent on the body of the woman. As a result, any intervention to further the fetus' interests will necessarily implicate, and possibly conflict with the mother's interest. Similarly, each choice made by the woman in relation to her body will affect the fetus and potentially attract tort liability.

[71] A second policy consideration that militates against the conclusion that there could be a proximate relationship between a doctor and a future child arises from the indirect aspect of this relationship. For legal proximity to exist, the relationship must be both "close and direct". Although a doctor's actions can, in some cases, directly harm a future child, the doctor's relationship with a future child is necessarily indirect. As Spigelman C.J. of the New South Wales Court of Appeal put it in his decision in the majority in Harriton v. Stephens, the relationship is "mediated" through the patient.

[72] The Harriton case involved what has been labelled a wrongful life claim. It did not involve the prescription of a teratogenic drug, but rather the failure of a doctor to provide a female patient who had contracted Rubella during the first trimester of pregnancy with information about the likelihood of birth defects to enable her to make an informed choice about whether to end the pregnancy. [See Note 13 below] The majority of the court held that the doctor did not owe a duty of care to the future child in those circumstances. In the words of

Spigelman C.J., at [paras. 25-27]:

> In the cases before the Court, the relationship is mediated through the parents, to whom the provider of medical services owes duties which overlap, in substantial measure, with those said to be owed to the child.
>
> . . . . .
>
> The persons whom the medical provider "ought reasonably have in contemplation", in Lord Atkin's words, are, in my opinion, the parents, particularly the mother. Any decision will be theirs or hers alone. Whether they, or she, take into consideration the interests of the child is a matter for them, or her.

(Citations omitted) [page426]

[73] I agree. The doctor acts by providing advice and information to the mother, including, where teratogenic drugs are being prescribed, the potential effects on a fetus. In the case of a drug that is not teratogenic, and where the only issue is informed consent, the patient takes the information and makes the decision. Although women take care to ensure that their babies will be born healthy, they may decide that certain risks of possible harm to a fetus, such as the risk of multiple births and possible prematurity involved with fertility drugs, are minimal and are worth taking to obtain the benefit of the drug. Because women are autonomous decision makers with respect to their own bodies, they neither make the decision on behalf of the future child, nor do they owe a duty to act in the best interests of a future child: see Dobson, at pp. 780-81 S.C.R., and Winnipeg Child and Family Services, at pp. 947-49 S.C.R.

[74] In the case of a teratogenic drug, the issue is more complicated. The woman must still make an informed decision about whether to take the drug but, in the case of Accutane, the doctor may not prescribe the drug without also enlisting the agreement of the woman not to become pregnant. That agreement is implemented through the PPP program, which includes pre-prescription pregnancy tests and the use of sufficient birth control protection to try to prevent conception. In relation to the use of birth control, the doctor

can do no more than enlist the agreement of the woman that she will use the necessary precautions not to become pregnant. The doctor cannot ensure that she will follow through with that agreement.

[75] In that way, the doctor's relationship with a future child is necessarily indirect. Not only can the doctor not advise or take instructions from a future child, the doctor may not be in a position to fulfill a duty of care to take all reasonable precautions to protect a future child from harm caused by a teratogenic drug. Could a doctor ever be sufficiently confident that his or her female patient (and her partner) will always diligently use effective birth control, or practice abstinence, which is one of the accepted birth control methods under the PPP?

[76] The conflicting duties that would be owed by a doctor to a female patient and to her future child (whether conceived or not yet conceived) in prescribing medication to the female patient, together with the indirect relationship between a doctor and a future child, reflect two aspects of the same reality. Because the woman and her fetus are one, both physically and legally, [See Note 14 below] it is the woman whom the doctor advises and who makes the treatment [page427] decisions affecting herself and her future child. The doctor's direct relationship and duty are to the female patient. That relationship and that duty of care prevent a relationship of the requisite proximity between the doctor and future child because the interests of the mother and her future child may possibly conflict, as noted by the Supreme Court of Canada in Winnipeg Child and Family Services, at p. 949 S.C.R.

Stage two of the Anns test: Residual policy considerations

[77] Having concluded that no prima facie duty of care arises, it is not necessary to go on to conduct the second stage of the Anns test. However, even if this court were prepared to conclude that there was a sufficient degree of proximity between the parties to base a prima facie duty of care, in my view, residual policy considerations at the second stage of the Anns test make the imposition of the proposed duty

unwise.

[78] As the Supreme Court noted in Cooper, because policy considerations form part of a balancing of factors to determine whether there is a duty of care in any case, policy considerations may often be applied at either stage of the analysis. The policy issues of conflicting duties and the indirectness of the relationship are also relevant at the second stage of the Anns test, which is concerned with "the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally": Odhavji Estate, para. 51.

[79] Recognizing a duty of care by a doctor to a future child of a female patient would affect the doctor's existing legal obligation, which is to the patient. Recognizing the proposed duty would also have implications for society as a whole for several reasons. One is that our legal and medical systems recognize that a woman has the right, in consultation with her doctor, to choose to abort a fetus. Imposing a duty of a care on a doctor to a future child would interfere with the exercise of that right. Another implication for society as a whole is that, until a child is born alive, a doctor must act in the best interests of the mother. This obligation is consistent with society's recognition of the need to preserve a woman's "bodily integrity, privacy and autonomy rights": Dobson, at p. 769 S.C.R.

[80] Having pointed to these policy considerations that negative the imposition of the proposed duty, I acknowledge that there are also potentially undesirable consequences to society if the proposed duty is not recognized. A child born with disabilities as a result of medical treatment that would have been actionable in negligence if a duty of care were recognized will not be able to receive full compensation for the damage suffered, including the [page428] cost of lifetime care, loss of income and pain and suffering. This is a serious concern, which is only somewhat mitigated by the compensation that can be claimed by the parents from the doctor for the breach of duty to them both, or only to the mother, at least for the ongoing cost of the care of the child: see Krangle

(Guardian ad litem of) v. Brisco, supra.

[81] Unfortunately, whenever the court concludes that there is no duty of care, a party who has been affected by another's conduct will not be able to recover in tort for the loss. In those situations, if there is to be a remedy, it is best left to the legislature to create and implement. It is for the legislature to consider and assess all of the policy issues and to determine whether and in what circumstances a remedy should be available to a child born with disabilities as a result of the conduct of the mother's doctor, as well as the nature and extent of any remedy.

[82] The other issue that arises if a doctor does not owe a duty of care to a future child, is how to protect society's interest in ensuring that doctors meet the standard of care when prescribing a teratogenic drug to a woman of childbearing capacity. One may ask, if the doctor does not owe a duty to a future child, then to what duty does the standard attach? In order to allow teratogenic drugs to be available for prescription, society must be confident that such drugs are prescribed responsibly, having in mind the protection of future children.

[83] I believe there are at least two answers to this issue. One is that a doctor owes a duty of care to the patient to properly prescribe Accutane and provide full information about the material risks that the drug poses to herself and to a future child if she were to become pregnant. If the doctor breaches that duty to the mother by failing to meet the standard of care for prescribing Accutane, the doctor will be liable to the mother for damages she suffers as a consequence of giving birth to a child with disabilities caused by the drug.

[84] The other answer is that doctors, as professionals, have professional and ethical responsibilities and obligations to maintain prescribed standards of practice. They are trusted to maintain these standards of practice and are also regulated by their professional bodies. In the case of Accutane, there is ongoing assessment in the medical community of the

effectiveness of the PPP and whether further measures are required to prevent harm to the fetus in utero. For example, in the United States, the Food and Drug Administration ("FDA") recently tightened restrictions on the prescription of Accutane to women of childbearing potential, because of the number of women in that [page429] country who continued to become pregnant while taking the drug. In March 2006, the FDA imposed the "iPLEDGE" program that requires all patients taking the drug to register, complete an informed consent form, obtain risk counselling and comply with the PPP. The program further requires that all physicians register with iPLEDGE prior to prescribing the drug: see Margot Andresen, "Accutane registry compulsory in US, but not Canada" (June 6, 2006) 174(12) C.M.A.J. 1701. Whether such requirements should be made mandatory on doctors in Canada by professional obligation or legislation is something for the relevant oversight bodies to decide.

[85] Therefore, even without imposing a duty of care on a doctor to a future child of a female patient, there are safeguards in place -- and ways to improve these safeguards as needed -- to protect society's interest in preventing children from being unnecessarily affected by Accutane and other teratogenic drugs.

Conclusion on duty of care

[86] Applying the Anns test, I have concluded that the trial judge erred in law in finding that Dr. Ramji owed a duty of care to a potential future child when prescribing Accutane to Dawn Paxton. My conclusion and analysis do not turn on whether the claim is characterized as a claim for damages for wrongful life. Both in the case of Lacroix and in this case, the doctor prescribed a teratogenic drug that harmed the fetus, once conceived, and allegedly did not take sufficient steps to try to ensure that his patient did not become pregnant while taking the drug. Both cases could be characterized in some respects as wrongful life claims and in other respects as claims for harm caused by the doctor. However, deciding whether the claim is appropriately characterized as one for wrongful life is to decide the wrong question because it does not address the duty

analysis, which is the analysis a court must apply to determine whether a duty of care is owed and, as a consequence, whether an action for negligence lies in a particular case.

Other Issues on Appeal: Standard of Care and Punitive Damages

[87] Because I have concluded that Dr. Ramji did not owe a duty of care to the future child of Dawn Paxton, the issue whether he complied with the standard of care is moot. This court cannot properly assess the applicable standard of care when there is no duty to which the standard would be applied. The punitive damages issue is also moot. [page430]

Conclusion

[88] For the above reasons, I would dismiss the appeal. [See Note 15 below] If the respondent is requesting costs, further brief submissions should be made in writing within three weeks of the release of these reasons.

Appeal dismissed; cross-appeal allowed.

Notes

Note 1: A teratogen is any agent or factor that induces or increases the incidence of abnormal prenatal development: Dorland's Illustrated Medical Dictionary, 31st ed. (Philadelphia: Saunders Elsevier, 2007), p. 1906. Classes of teratogens include radiation, maternal infections, chemicals and drugs.

Note 2: This issue was improperly raised by way of cross-appeal by the respondent. A cross-appeal is properly taken from the order of the court, not from the reasons for judgment. This issue should have been raised by the respondent as part of his response to the appeal and been included in the respondent's factum. Each side could have been permitted to exceed the 30-page limit, if necessary, to deal with this issue.

Note 3: The evidence at trial was that vasectomies fail at a rate of 1/10th of 1 per cent. Clinically, this happens most

often immediately following the vasectomy: see reasons, para. 91.

Note 4: In Canada, see, for example, Mickle v. Salvation Army Grace Hospital, [1998] O.J. No. 4683, 166 D.L.R. (4th) 743 (Gen. Div.); Lacroix (Litigation Guardian of) v. Dominique, supra; Arndt v. Smith, [1994] B.C.J. No. 1137, [1994] 8 W.W.R. 568 (S.C.), overturned on another issue [1997] 2 S.C.R. 539, [1997] S.C.J. No. 65; Jones (Guardian ad litem of) v. Rostvig, [1999] B.C.J. No. 647, 44 C.C.L.T. (2d) 313 (S.C.); Dehler v. Ottawa Civic Hospital (1979), 25 O.R. (2d) 748, [1979] O.J. No. 3468, 101 D.L.R. (3d) 686 (H.C.J.), at pp. 695-97 D.L.R., affd (1980), 29 O.R. (2d) 677, [1980] O.J. No. 3499, 117 D.L.R. (3d) 512 (C.A.). In the United Kingdom, see, for example, McKay v. Essex Area Health Authority, [1982] 2 All E.R. 771, [1982] Q.B. 1166 (C.A.). In the United States, see, for example, Kush v. Lloyd, 616 So. 2d 415 (Fla. 1992); Viccaro v. Milunsky, 406 Mass. 777, 551 N.E.2d 8 (Mass. 1990); Garrison v. Medical Center of Delaware, Inc., 581 A.2d 288 (Del. 1989); Lininger v. Eisenbaum, 764. P.2d 1202, 12 BTR 1692 (Colo. 1988); Bruggeman v. Schimke, 718 P.2d 635, 239 Kan. 245 (1986); Procanik v. Cillo, 97 N.J. 339, 478 A.2d 755 (1984); Nelson v. Kruzen, 678 S.W.2d 918 (Tex. 1984); Cockrum v. Baumgartner, 95 Ill. 2d 193, 447 N.E.2d 385 (1983); Harbeson v. Parke-Davis Inc., 98 Wn.2d 460, 656 P.2d 483 (Wash. 1983); Turpin v. Sortini, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982); Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978). In Australia, see, for example: Bannerman v. Mills (1991), Aust. Torts Rpts. P81-079 (N.S.W.S.C.); Harriton v. Stephens (2004), 59 N.S.W.L.R. 694 (C.A.), affd (2006), 226 C.L.R. 52, 226 A.L.R. 391 (Aus. H.C.); Waller v. James (2006), 226 C.L.R. 136 (Aus. H.C.). In Israel, see, for example, Zeitsov v. Katz (1986), 40(2) P.D. 85 (Isr. S. Ct.)

Note 5: The Court of Appeal of California in Curlender v. Bioscience Laboratories, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980), awarded general damages in an action for wrongful life, but this aspect of the decision was subsequently overruled by the Supreme Court of California in Turpin v. Stortini. That court restricted liability in wrongful life claims to special damages. The Supreme Court of Washington followed Turpin in

Harbeson v. Parke-Davis Inc., as did the Supreme Court of New Jersey in Procanik v. Cillo. The majority of the Supreme Court of Israel allowed a claim for wrongful life in 1986 in Zeitsov v. Katz. The court was divided on the issue of how damages should be measured.

Note 6: Some courts have further distinguished between wrongful birth and wrongful conception or wrongful pregnancy: see Kealey v. Berezowski (1996), 30 O.R. (3d) 37, [1996] O.J. No. 2460, 136 D.L.R. (4th) 708 (Gen. Div.). Nothing turns on this distinction for present purposes and so both types of claims are referred to here as wrongful birth.

Note 7: In Australia, see Cattanach v. Melchior (2003), 215 C.L.R. 1, [2003] H.C.A. 38 (Aust. H.C.), where the majority of the High Court permitted recovery of upbringing costs in a wrongful birth claim arising from a failed sterilization that resulted in the birth of a healthy child. In the U.K., courts have allowed recovery of pregnancy-related costs and the extra costs attributable to a child's disability in wrongful conception and wrongful birth claims, but have refused to award damages for the costs of raising a healthy, though unintended, child: see McFarlane v. Tayside Health Board, [2000] 2 A.C. 59, [1999] 4 All E.R. 961 (H.L.); Rees v. Darlington Memorial NHS Trust, [2004] 1 A.C. 309, [2003] 4 All E.R. 987 (H.L.); Parkinson v. St. James and Seacroft University Hospital NHS Trust, [2002] Q.B. 266, [2001] E.W.C.A. Civ. 530 (C.A.). In the U.S., some states permit full recovery of upbringing costs for both healthy and disabled children, while the majority of states do not permit recovery of upbringing costs for healthy children. To give only a few examples of the extensive U.S. caselaw, see University of Arizona Health Sciences Center v. Superior Court, 667 P.2d 1294, 136 Ariz. 579 (1983); Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967); Lovelace Medical Center v. Mendez, 805 P.2d 603, 111 N.M. 336 (1991); Rouse v. Wesley, 494 N.W.2d 7, 196 Mich. App. 624 (1992); O'Toole v. Greenberg, 477 N.E.2d 445, 64 N.Y. 2d 427 (1985). In Canada, courts have awarded upbringing costs to parents for disabled children while in their parent's care: see, for example, Krangle (Guardian ad litem of) v. Brisco, [2002] 1 S.C.R. 205, [2002] S.C.J. No. 8. Some Canadian courts have refused to award upbringing costs for

the costs of raising a healthy, but unintended child and have confined damages to pregnancy-related costs and lost income: see Kealey v. Berezowski, where the parent's cause of action was referred to as wrongful pregnancy rather than wrongful birth. Other courts have been prepared to award damages for upbringing costs of a healthy child, but require that the benefits of the child to the parent be considered in the damages assessment: Suite v. Cooke, [1993] J.Q. no 98, [1993] R.J.Q. 514 (S.C.), affd [1995] J.Q. no 696, [1995] R.J.Q. 2765 (C.A.).

Note 8: McLachlin J. quoted, at p. 942 S.C.R., from the Australian decision of the Supreme Court of Victoria in Watt v. Rama, [1972] V.R. 353 (Aust. Full Ct.) at pp. 360-61 V.R. for the explanation of why the right to sue does not exist before birth. This quote reads in part as follows:

> On the birth the relationship crystallized and out of it arose a duty on the defendant in relation to the child . . . [A]s the child could not in the very nature of things acquire rights correlative to a duty until it became by birth a living person, and as it was not until then that it could sustain injuries as a living person, it was, we think, at that stage that the duty arising out of the relationship was attached to the defendant, and it was at that stage that the defendant was, on the assumption that his act or omission in the driving of the car constituted a failure to take reasonable care, in breach of the duty to take reasonable care to avoid injury to the child . . . .

Consequently, when analyzing whether a doctor owes a prima facie duty of care and the nature of the doctor's "relationship" with the future child, it is at the point in time when there is only the potential for a child to be conceived or born that the doctor acts or omits to act in a way that results in the harm. However, in law, the duty of care is owed to the child who is born, as no duty of care can attach or crystallize until the child is born alive with the injuries.

Note 9: When this court released its decision in Bovingdon, the trial judge's decision in the present case was under appeal to this court and the appeal had not yet been argued.

Note 10: Section 66 of Ontario's Family Law Act states: "No person is disentitled from recovering damages in respect of injuries for the reason only that the injuries were incurred before his or her birth."

Note 11: See the discussion of these cases and others in Healey v. Lakeridge Health Corp., [2006] O.J. No. 4277, 38 C.P.C. (6th) 145 (S.C.J.).

Note 12: When discussing the foreseeability question as part of the duty of care analysis, the trial judge may have fallen into this logical quagmire by again addressing the foreseeability of Dawn Paxton becoming pregnant. In contrast with the trial judge's conclusion on the lack of foreseeability of pregnancy in relation to whether Dr. Ramji met the standard of care, in the duty part of her analysis, the trial judge found that "potential pregnancy was foreseeable and foreseen by reason of Dawn Paxton being a woman of child bearing potential" (para. 181).

Note 13: The New South Wales Court of Appeal heard Harriton together with Waller v. James. The latter case also involved a claim for wrongful life. In Waller, a child conceived by in vitro fertilization sought damages arising from disabilities he suffered as a result of a hereditary blood clot disorder that was genetically transmitted to the child from his father. The claim alleged that the respondent doctor and fertilization clinic failed to investigate the father's genetic deficiency and failed to advise the parents about its potential consequences to their future child.

Note 14: Winnipeg Child and Family Services, pp. 944-45 S.C.R.

Note 15: The effect of dismissing the appeal is to uphold the trial judge's order dismissing the action. It is not necessary to allow the cross-appeal, which was improperly brought from the trial judge's reasons and not from her order.
