

# Recent Decisions

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## **JONES (GUARDIAN AD LITEM OF) v. ROSTVIG**

The question of recovery of damages arising from the birth of a child has been addressed regularly by Courts in all parts of Canada, particularly in the past two decades. A recent decision of the British Columbia Supreme Court (B.C.S.C.) makes no new law in relation to this issue, but nevertheless provides a concise and thoughtful analysis of why Courts decide these cases as they do.

The case is *Jones (Guardian ad litem of) v. Rostvig*, [1999] B.C.J. No. 647. Liam Jones, the infant plaintiff, was diagnosed with Down syndrome shortly after he was born. This took his parents, Kelly Rae Short and Leonard Jones, by surprise. They advanced claims of negligence against Dr. Rostvig, Ms. Short's family physician, alleging that Dr. Rostvig negligently failed to send Ms. Short for mid-trimester amniocentesis and failed to provide pre-natal genetic information. The parents sought damages for past and future care and housing costs for Liam. A claim was also advanced on behalf of Liam seeking damages for future income loss and care costs.

The reported decision arises from a summary interlocutory application to dismiss Liam's claim for damages. To introduce his decision, Macaulay J. framed the issue as follows: does a doctor owe an unborn fetus a duty of care to terminate life where the foetus would otherwise be born with Down syndrome and if so, can the child, once born, recover losses for future income or cost of care?

Before dealing with this issue directly, Macaulay J. outlined the broad categories of claims respecting the unborn that have been before the courts: unwanted conception following a failed medical sterilization procedure; unwanted birth following a failed medical abortion; loss of opportunity to have an abortion following failure to be provided with necessary medical information or advice; and physical damage to the fetus as a result of a medical procedure during gestation.

This was the characterization employed in the earlier B.C.S.C. decision in *Kangle v. Brisco* (1997), 154 D.L.R. (4th) 707. In *Kangle*, the Court also dealt with a case of loss of opportunity to have an abortion because of negligently inadequate advice. Although there was no claim for damages advanced directly on behalf of the infant, the Court commented that since the defendant caused no physical damage to the infant (who was born with congenital deficits), the sole basis for the infant to claim non-pecuniary or loss of income damages was the fact that the infant had been born, and the law did not permit recovery for this.

Counsel for the plaintiffs in *Jones* argued that future pecuniary loss was a recognized head of damage under Canadian law based on *Cherry v. Borsman* (1992), 94 D.L.R. (4<sup>th</sup>) 487 (B.C.C.A.) and *Bartok v. Shokeir* (1998), 171 Sask. R. 67 (Sask. Q.B.). Macaulay J. distinguished *Cherry* on the basis that it involved a failed abortion procedure which injured the foetus, in breach of the duty of care owed to a foetus not to injure it. In *Bartok*, the Court declined to strike because of the complexity of the issue but Macaulay J. did not consider this decision binding upon the B.C. Court.

Counsel for the plaintiffs also relied upon two U.S. cases which permitted recovery of extraordinary medical and rehabilitation expenses in wrongful life claims arising out of hereditary conditions. Macaulay J. was not persuaded by these cases and instead looked to *McKay v. Essex A.H.A.*, [1982] 2 All E.R. 771 (C.A.) and to *Becker v. Schwartz*, 386 N.E. 2d 807 (New York C.A. 1978). After quoting at length from *Becker* Macaulay J. concluded:

I cannot logically reconcile the duty owed to the mother predicated upon the mother's right to choose whether or not to abort with a duty owed to the foetus to terminate life. The latter leaves no room for choice and is inherently inconsistent with the former...I conclude that the infant plaintiff has neither alleged any cognizable duty or recoverable damages.

Therefore, the application to strike the claim advanced on behalf of Liam was granted. The balance of the claims by the parents remain and presumably will be litigated.

## Comment

This decision provides a concise survey of the last 20 years of Canadian case law on the issue of whether, when and what damages are recoverable consequent upon the birth of less than fully healthy children. Until very recently it could reasonably be predicted that the claim would arise from unwanted conception following an ineffective medical procedure such as sterilization or abortion, or from damage caused to the foetus during one of these procedures. Claims of the first category would be dismissed; claims of the second category could be allowed in the appropriate circumstances.

In the brave new world of genetic information and testing Courts will with increasing frequency be faced with the new variant of “wrongful life” claim illustrated by this case. It is unlikely that Courts will relax their resistance to such claims made on behalf of infants. Macaulay J.’s framing of the issue at the outset of the decision clearly telegraphed his ultimate disposition. The livelier issue will be whether a breach of duty to the mother to afford her the opportunity to choose to abort a foetus should give rise to liability and damages. The *Kangle* decision referred to in this case is already under appeal. The *Jones* case, if it proceeds to trial, should also provide grist for the mill of debate on this issue.