REVISITING WRONGFUL LIFE CLAIMS IN CANADA — CAN THERE BE A CAUSE OF ACTION? BOVINGDON V. HERGOTT

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1. Introduction

As recent Ontario decisions demonstrate, Canadian courts, together with much of the common law world, continue to grapple with "wrongful life" claims in an incomplete and even confused manner. While the courts continue to reject claims for wrongful life, judicial reasoning in recent decisions such as that of the Ontario Court of Appeal in *Bovingdon v. Hergott*[1] reveals the absence of a clear and consistent rationale to justify the continued rejection of wrongful life claims. The *Bovingdon* decision is of particular interest and concern since it leaves the door open to the possibility of a sustainable wrongful life claim without setting out any clear set of principles to determine whether such claims would, or ought to be, recognized. In the end, we are left with a superficial and thus potentially vulnerable line of judicial reasoning. While affirming that the physician owes a duty of care to the mother that is *not* co-extensive to the children, the court in *Bovingdon* nevertheless strained to leave the door open for courts in the future to recognize wrongful life claims.

The decision in *Bovingdon* suggests an urgent need to revisit the juridical status of wrongful life claims in Canada. Our analysis will follow three lines of inquiry. First, we will review the constituent elements of the so-called "birth torts"[2] in order to define clearly what constitutes "wrongful life", and, more specifically, why it has not been recognized in law. Second, we will review recent international

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1. [2008] ONCA 2 (C.A.), affg in part [2006] O.J. No. 4672 (QL), 275 D.L.R. (4th) 168, 83 O.R. (3d) 465 (S.C.J.).
2. For an extensive discussion of this subject, see Dean Stretton, "The Birth Torts: Damages for Wrongful Birth and Wrongful Life" (2005), 10 Deacon L. Rev. 319.

jurisprudence from the common law world to establish the extent to which courts continue to reject wrongful life claims. Finally, we will consider recent Canadian jurisprudence, in particular, the decision of the Ontario Court of Appeal in *Bovingdon*. We submit that cases such as *Bovingdon* suggest that the reasoning underlying the rejection of wrongful life claims is vulnerable and still open to attack.

As we shall see, the court in *Bovingdon* gave short shrift to the policy concerns that historically have informed judicial rejection of wrongful life claims. And, so, rather than interrogate in substantive ways the problems that inhere when judges are asked to compare existence with non-existence in assessing a plaintiff's damages, the decision of the court limited itself to an analysis of tort law principles and the autonomy of women in medical decision-making. In our reading of *Bovingdon*, we want to underscore the need for Canadian courts to re-assert the principled framework laid out authoritatively in *McKay v. Essex Area Health Authority*.[3] More to the point, what is needed is a clear and consistent line of judicial reasoning grounded firmly on the two fundamental propositions underlying the widespread rejection of wrongful life claims in the common law world, namely:

1. There is no public policy interest in making a physician owe a duty of care to an unborn child to see that the child is not born.
2. It is impossible in concrete terms for judges to assess damages in wrongful life claims since this entails comparing the value of a disabled life to the value of having no life at all.

2. Wrongful Life Claims in Canada — The Historic Position

In a recent issue of the *Torts Law Journal*,[4] Professor Margaret Fordham observed that the term "wrongful life" historically has been "used to describe an action brought by a disabled child against the doctor or other medical professional who failed to diagnose that [the child] was likely — or even certain — to be born with disabilities, either because of a congenital (normally chromosomal) defect, or as a result of a disease contracted in utero".[5] Put simply, in a wrongful life claim, "the child argues that, had the risk of certainty of disability been known, its parents would either have avoided its conception or would have had it aborted".[6]

3. [1982] 1 Q.B. 1166 (C.A.).
4. Margaret Fordham, "A life less ordinary — The rejection of actions for wrongful life" (2007), 15 T.L.J. 123 at pp. 123-52.
5. *Ibid.,* at p. 124.

It is important to maintain the distinction between claims for *wrongful life* and claims for *wrongful birth*. The latter category refers to instances where "the parents of a child who would not have been conceived or born but for a doctor's negligence claim damages for the cost of raising the child".[7] Damages for wrongful birth may include "the pain suffering and economic loss associated with pregnancy, including labour pains, medical bills, maternity clothes, loss of income during pregnancy and (less commonly) the cost of moving or extending the house in anticipation of accommodating an extra member".[8]

Historically, Canadian courts have allowed recovery for wrongful birth, but not for wrongful life. Rejection of wrongful life claims rests on the principles set out in the leading common law decision of the English Court of Appeal in *McKay*.[9] In *McKay*, a child who contracted rubella *in utero* brought a claim against the defendant physician for his alleged failure to diagnose the illness. The mother alleged that had she been alerted to the illness and its consequences for her pregnancy, she would have procured an abortion.[10]

In *McKay*, the Court of Appeal held that the claim should be struck on two grounds: first, because it was contrary to public policy, and second, because it put the court in the impossible position of having to determine how to measure compensating a plaintiff for the harm of being born. Significantly, Stephenson L.J. reasoned that to allow the child's cause of action would be to devalue the life of the disabled plaintiff, as he noted:[11]

> To impose such a duty towards the child would, in my opinion, make a further inroad on the sanctity of human life . . . It would mean regarding the life of a handicapped child as not only less valuable than the life of a normal child, but so much less valuable that it was not worth preserving, and it would even mean that a doctor would be obliged to pay damages to a child infected with rubella before birth who was in fact born with some mercifully trivial abnormality. These are the consequences of the necessary basic assumption that a child has a right to be born whole or not at all, not to be born unless it can be born perfect or "normal", whatever that may mean.

Stephenson L.J. noted that in circumstances such as these, the only duty owed to the fetus by the defendant physician was a duty not to

6. *Ibid.*
7. *Ibid.*
8. Stretton, "The Birth Torts", *supra,* footnote 2, at p. 321.
9. *McKay*, *supra,* footnote 3, at pp. 1180-181.
10. *Ibid.,* at p. 1172.
11. *Ibid.,* at p. 1180-181.

injure it. As Professor Fordham observed, since the defendant had not failed in this duty, the only way the plaintiff could frame the case was to assert that it had:[12]

> a right not to be born deformed or disabled, which means, for a child deformed or disabled before birth by nature or disease, a right to be aborted or killed; or, if that last plain word is thought dangerously emotive, deprived of the opportunity to live after being delivered from the body of her mother.

Accordingly, the court noted that while there was a duty on the defendant to provide the mother with the information necessary to determine whether she would choose to have an abortion, there was no coextensive duty to the child to advise the mother of such. As noted above, the court concluded that such a duty would be contrary to public policy.

Moreover, Stephenson L.J. noted that the plaintiff's claim could not succeed since the damages being alleged were not ascertainable:[13]

> Judges have to pluck figures from the air in putting many imponderables into pounds and pence . . . But in measuring the loss caused by shortened life, courts are dealing with a thing, human life, of which they have some experience; here, the court is being asked to deal with the consequences of death for the dead, a thing of which it has none . . . If difficulty in assessing damages is a bad reason for refusing the task, impossibility of assessing them is a good one . . . If there is no measure of damage which is not unjustified and indeed unjust, courts of law cannot entertain claims of a child affected with pre-natal damage against those who fail to provide its mother with the opportunity to end its life, however careless or unskilful they may have been and however liable they may be to the mother for that negligent failure.

The reasoning in *McKay* was echoed by the Canadian courts in the 2001 decision of the Manitoba Court of Appeal in *Lacroix (Litigation Guardian of) v. Dominique*.[14] In that case, the Court of Appeal confirmed that no legal action existed for wrongful life.[15]

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12. *Ibid.,* at p. 1178.
13. *Ibid.*, at pp. 1181-182.
14. [1999] M.J. No. 397 (QL), [1999] 12 W.W.R. 38, 141 Man. R. (2d) 1 (Man. Q.B.), affd 202 D.L.R. (4th) 121, [2001] 9 W.W.R. 261, 246 W.A.C. 262 (Man. C.A.), leave to appeal to S.C.C. refused [2001] S.C.C.A. 477. All citations are to the decision of the Manitoba Court of Appeal.
15. But, see *Bovingdon, supra,* footnote 1, and *Petkovic (Litigation Guardian of) v. Olupona* (2002), 11 C.C.L.T. (3d) 91 (S.C.J.), motion by the defendant Olupona for leave to appeal the dismissal of his motion to strike out part of Petkovic's action for damages for wrongful life dismissed [2002] O.J. No. 3411 (QL), 30 C.C.L.T. (3d) 266 (Div. Ct.).

Lacroix involved a claim against the defendant physician for damages sustained as a result of the birth of the infant plaintiff with severe mental and physical abnormalities. Prior to becoming pregnant with her first child, the mother, an epileptic, sought the advice of her family physician. The concern of both she and her husband was that it might be unsafe to start a family while the wife was on medication to control her epilepsy. The family physician referred the couple to the defendant neurologist. The nature and quality of the advice received by the mother was contested at trial. The parents argued that the physician failed to counsel them to avoid pregnancy and failed to inform them of possible risks to the fetus through the use of the drug. The defendant contested this version of events, arguing that he had alerted the parents to the risks involved. The trial judge accepted the plaintiffs' evidence. The mother became pregnant within two years of the consultation and gave birth to a healthy child. Six months later she became pregnant again. The infant plaintiff was subsequently born with severe physical abnormalities and was diagnosed as being developmentally delayed.[16]

At trial, the judge held that the defendant physician did not owe a duty to the child to facilitate her non-existence. In so doing, the trial judge noted that the tort of wrongful life was not recognized in Canadian law. The decision was appealed to the Manitoba Court of Appeal. Writing for the Court of Appeal, Twaddle J.A. affirmed the decision of the trial judge. In so doing, he offered a framework — the so-called "two-category approach" as it was described in *Bovingdon* — to be applied in cases involving a claim by a child born with abnormalities. Specifically, Twaddle J.A. noted that these cases generally fall within one of two categories:

1. cases in which the abnormalities have been caused by the wrongful act or omission of another, and
2. cases in which, but for the wrongful act or omission, the child would not have been born at all.[17]

Twaddle J.A. noted that cases falling within the first category are recognized at law and cited the decision of *Webster v. Chapman* as an example.[18] In that case, the child's abnormalities were caused by the mother's ingestion of a medication prescribed by the defendant physician. Twaddle J.A. noted that in this instance, the "primary finding" of negligence was the doctor's "failure to consult a specialist

16. *Lacroix, supra,* footnote 14.
17. *Ibid.*, at para. 24.
18. (1997), 126 Man. R. (2d) 13, 155 D.L.R. (4th) 82, [1998] 4 W.W.R. 335 (C.A.), leave to appeal to S.C.C. refused 159 D.L.R. (4th) vii.

on a more timely basis to obtain advice concerning the advisability of continuing his patient on the medication, advice, which, if given, would have been to discontinue the medication immediately".[19]

Twaddle J.A. elaborated that cases within the second category typically involve "the failure of a doctor to warn the mother of the risk of giving birth to an abnormal child *as a result of a factor over which the doctor has no control*".[20] In such cases the "risk" is apparent before conception (for example, incompatible hereditary characteristics); in other cases, the risk should have been detected after conception but before birth (*i.e.* a failure to advise of the availability of an amniocentesis test).[21] Twaddle J.A. noted that in all of these cases, the physician's negligence had not *caused* injuries to the child; rather, the only "consequence of the doctor's negligence is that the mother has been deprived of the option of avoiding conception or of having an abortion".[22] In these types of cases, Twaddle J.A. noted the parents' claim is for "wrongful birth" while the child's claim is for "wrongful life".

Relying on *McKay*, Twaddle J.A. observed that cogent and compelling arguments exist to preclude wrongful life claims in Canada.[23] Speaking to the consequences of allowing the child's claim to proceed, Twaddle J.A. noted:

> The plaintiffs' counsel is on firmer ground in making the submission that this case is closer to the first category of cases where the harm is caused by the doctor's negligent action. The cause of the harm was established as the medication which the doctor prescribed for the mother's use, not a hereditary characteristic or an infection. 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.[24]
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> . . . . .

19. *Lacroix, supra,* footnote 14, at para. 27.
20. *Ibid.*, at para. 27 (emphasis added).
21. *Ibid.*
22. *Ibid.*
23. *Ibid.,* at para. 37.
24. *Ibid.,* at paras. 38-39.

> 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.[25]

3. Wrongful Life Claims — Pre-Bovingdon Jurisprudence

Along with *Lacroix*, a number of other Canadian cases have considered wrongful life claims. An early decision on this subject was the decision of the British Columbia court in *Cherry (Guardian ad litem of) v. Borsman*.[26] In *Cherry*, the plaintiff infant brought an action against the defendant physician on the basis of an injury that was caused by negligence during an attempted abortion. The trial judge found the defendant physician negligent on the basis of the ordinary "neighbour" principle established in *Donoghue v. Stevenson*,[27] and not on the basis of "wrongful life".[28]

On appeal to the British Columbia Court of Appeal, the defendant physician argued that to impose a duty to the fetus would be inconsistent with the duty he owed to the mother to terminate the pregnancy. Specifically, the physician argued that because his duty was to his patient (the mother), he could have no legal proximity to the child. The British Columbia Court of Appeal disagreed. The court held that the defendant had a duty of care to the mother to perform his task properly, and also a duty of care to the fetus not to harm it if he should fail in meeting the duty of care he owed to the mother.[29] The physician asserted that this was a "wrongful life" case and, accordingly, should not be allowed to proceed. For their part, the plaintiffs alleged that the case was to be determined on ordinary negligence principles. The Court of Appeal agreed with this position on the basis that the plaintiffs were not asserting a legal obligation to the fetus to terminate its life, as was the position in *McKay*.[30]

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25. *Lacroix*, *supra*, footnote 14, at para. 41.
26. (1992), 94 D.L.R. (4th) 487, [1992] 6 W.W.R. 701, 28 W.A.C. 93 (B.C.C.A.), leave to appeal to S.C.C. refused 99 D.L.R. (4th) vii.
27. [1932] A.C. 562 (H.L.).
28. *Cherry, supra,* footnote 26, at p. 503.
29. *Ibid.*, at p. 504. "We think a surgeon on performing an abortion in a case such as this owes a duty of care to the mother to perform his task properly but at the same time owes a duty of care to the fetus not to harm it if he should fail in meeting the duty of care he owes to the mother."
30. *Cherry*, *ibid.*, at p. 503. However, see the decision of the Ontario Superior Court of Justice in *Paxton v. Ramji*, [2006] O.J. No. 1179 (QL) at para. 164, 146 A.C.W.S. (3d) 913 (S.C.J.). In *Paxton*, the court noted that it is

Another early case involving a wrongful life claim was the decision of the British Columbia Supreme Court in *Arndt v. Smith*.[31] In *Arndt*, a mother contracted chicken pox while pregnant and, as a result, her child was born with disabilities. The plaintiff mother alleged that if the doctor had properly advised her of the risk of injury to the fetus, she would have terminated the pregnancy. Notwithstanding the fact that the infant's claim was abandoned before trial, the trial judge noted in his decision that: "There is no viable suit in this province for 'wrongful life', *i.e.,* a claim by a person born with disabilities asserting he or she should not have been born at all."[32] Accordingly, Hutchinson J. found that the abandonment at trial of the plaintiff infant's claim was "well founded".[33]

Jones (Guardian ad litem of) v. Rostvig[34] is another case that considered the viability of wrongful life claims. In *Jones*, a mother and a child brought an action in negligence against the defendant physician. The mother was of advanced maternal age and alleged:

1. a failure on the part of the defendant physician to prescribe amniocentesis and other prenatal tests that would have alerted her to the fact that the fetus had Down syndrome, and
2. a failure to provide her and her husband with prenatal genetic information indicating that the infant would suffer from Down syndrome thereby affording her with the opportunity to terminate the pregnancy in a timely manner.[35]

At trial, the judge determined that law recognizes the parents' claim for costs related to raising the child until the age of majority. However, the court noted that the child's claim for future income loss and care costs was not recognized. Distinguishing *Cherry*, the trial judge noted that:[36]

> I do not accept the contention that *Cherry* supports the claim advanced here. There is no harm caused to the fetus by anything the doctor

"misconceived" to argue that *Cherry* represents a decision that recognizes a "wrongful life" claim. *Cherry* was also distinguished in *Lacroix, supra,* footnote 14, at para. 25.

31. [1994] 8 W.W.R. 568, 93 B.C.L.R. (2d) 220, 21 C.C.L.T. (2d) 66 (B.C.S.C.), revd 126 D.L.R. (4th) 705, [1995] 7 W.W.R. 378, 100 W.A.C. 57, revd on other grounds [1997] 2 S.C.R. 539, 148 D.L.R. (4th) 48, [1997] 8 W.W.R. 303.
32. *Ibid.,* at para. 1.
33. *Ibid.*
34. (1999), 44 C.C.L.T. (2d) 313 (B.C.S.C.).
35. *Ibid.,* at para. 6.
36. *Ibid.,* at para. 16.

> negligently did, or failed to do. The harm to the fetus, in respect of which damages flowed here, relates solely to the genetic condition of the fetus.

The British Columbia Supreme Court further noted that it was unable to 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 fetus to terminate its life. Adopting the reasoning in *McKay*, the court thus concluded that the plaintiff infant had not alleged any cognizable duty or recoverable damages in this case.[37] Accordingly, the infant's claim was dismissed.

For a time, it appeared that the *Lacroix* decision had brought some degree of certainty to this area. However, the viability of wrongful life claims was recently re-examined by a string of decisions of the Ontario Superior Court of Justice beginning with *Petkovic v. Olupona*.[38] In *Petkovic*, the infant was born with congenital abnormalities, including spina bifida and hydrocephalus. His mother claimed that negligence on the part of the defendant physician during prenatal care deprived her of the knowledge that her son would be born with the abnormalities and that, had she known, she would have had an abortion. Prior to trial, the defendant physician brought a motion to strike out part of the claim for damages for wrongful life. The motion was dismissed by the Superior Court of Justice, which held that it was not clear, obvious and beyond doubt that there was no action available for wrongful life.[39] In considering the issues on appeal, the Divisional Court noted that there were conflicting decisions on the issue of whether summary judgment should be granted in relation to claims advancing "wrongful life". The court determined that it would not be an efficient use of resources to strike this portion of the claim before trial.[40] Accordingly, the motion for leave to appeal the dismissal of the defendant's motion was dismissed.

Another pre-trial motion that considered the viability of wrongful life claims was *McDonald (Litigation Guardian of) v. O'Herlihy*.[41] In that case, a child was born with a neural tube defect. The plaintiffs brought a negligence action against the mother's physician for wrongful birth and wrongful life. Specifically, the plaintiffs alleged that the defendants were negligent in failing to diagnose defects at 22 weeks' gestation. A motion was brought on behalf of the defendant physician to strike portions of the plaintiffs' claim under rule

37. *Ibid.,* at para. 22.
38. *Petkovic, supra,* footnote 15.
39. *Petkovic*, *ibid.*
40. *Ibid*., at para. 27.
41. (2005), 5 C.P.C. (6th) 178 (S.C.J.).

21.01(1)(b) of the Rules of Civil Procedure on the basis that it disclosed no reasonable cause of action. The Ontario Superior Court of Justice dismissed the motion, noting that matters of law that have not been fully settled should not be disposed of at the interlocutory stage.[42] Interestingly, the court noted that although the overwhelming weight of authority suggests that a cause of action does not exist for wrongful life, there was no binding Ontario or Canadian authority speaking to this matter and, therefore, the matter should proceed to trial.[43]

At trial, the judge concluded that the legal questions surrounding a "wrongful life" claim were moot and did not warrant determination due to the fact that the jury indicated that the defendant physicians had not been negligent in their care of the plaintiff mother.[44] This decision was appealed to the Ontario Court of Appeal.[45] Affirming the decision of the trial judge, the Court of Appeal noted:[46]

> The trial judge concluded that liability questions could be put to the jury and fairly determined by them without instruction on "wrongful life". Even if the appellants' trial counsel misunderstood how the trial judge intended to proceed, as was alleged before this court, there was no error or miscarriage of justice. The respondents owed the same duty of care and were held to the same standard of care in respect of the appellant mother and the fetus.

The Alberta Court of Queen's Bench recently faced a pre-trial motion to strike out an infant's claim on the basis that it disclosed no reasonable cause of action. In *Holowaychuk v. Hodges*,[47] the plaintiffs, who were mother and daughter, brought an action against the defendant physician after the daughter was born with serious physical and mental disabilities. The mother's action against the defendant physician was for wrongful birth while the daughter's action against the defendant physician was for wrongful life. The statement of claim alleged that the defendant physician was negligent in failing to inform the mother that she had a chromosomal abnormality. The mother asserted that if she had been informed of such, she would have procured an abortion. Prior to trial, the defendant physician brought a motion for leave to determine a point of law before trial, *i.e.* whether a cause of action for wrongful life existed in Canada. The Alberta Court of Queen's Bench dismissed the

42. *Ibid.,* at para. 16.
43. *Ibid.,* at para. 14.
44. *Ibid.*
45. *McDonald-Wright v. O'Herlihy* (2007), 220 O.A.C. 110 (C.A.).
46. *Ibid.,* at para. 18.
47. [2003] A.J. No. 287 (QL), 2003 ABQB 201 (Q.B.).

defendant physician's motion. In so doing, the court noted that: "While a determination of the point of law in favour of Dr. Hodges may dispose of [the child's] claim, it would not result in a great saving of time and money nor a considerable simplification of remaining issues."[48] The court noted that it had not yet been decided by a court in Alberta whether a cause of action for wrongful life existed.

Finally, the Ontario Superior Court of Justice confronted the issue of wrongful life in its 2006 decision in *Paxton v. Ramji*.[49] In *Paxton*, the mother was prescribed acne medication. Her husband had undergone a vasectomy four and a half years earlier. The mother became pregnant, although a pregnancy test falsely indicated that she was not pregnant at first. As a result of the in-womb exposure to the medication, the child was born with serious physical abnormalities. The mother, father and child brought an action for damages against the physician. Specifically, they alleged that but for the defendant physician's prescription of the drug, the child would have been born without defects.[50] Reviewing the evidence, the court noted that the facts of this case gave rise to two potential causes of action:

1. the doctor's failure to follow the Pregnancy Protection Program prescribed for the use of Accutane, and
2. the doctor's prescription of Accutane in the face of a direct contra-indication to a woman of childbearing potential.[51]

With respect to the first cause of action, namely, the failure to follow the Pregnancy Protection Program, the court noted that this resulted in the infant plaintiff being conceived when, but for the failure, she would not have been conceived.[52] On this point, the court cited the evidence of the mother who testified that she would have complied with the defendant physician's advice to use a condom, from which it can be inferred that she would have continued the Accutane but the infant plaintiff would not have been born. The court noted that this type of claim must be characterized as wrongful life.[53] Relying on *Lacroix*, the court noted that wrongful life claims are not recognized in Canada and that, therefore, the child had no viable cause of action on this basis.[54]

With respect to the second cause of action, namely the doctor's

48. *Ibid.,* at para. 17.
49. *Paxton, supra,* footnote 32.
50. *Ibid.,* at para. 77.
51. *Ibid.,* at para. 76.
52. *Ibid.,* at para. 209.
53. *Ibid*., at para. 209.
54. *Ibid.,* at paras. 170 and 209.

prescription of Accutane in the face of a direct contraindication to a woman of childbearing potential, the court noted that this action created a scenario where, but for the alleged negligence, the infant plaintiff would have had a life without birth defects; therefore, this would not be a "wrongful life" claim.[55] The court noted that it would be willing to recognize such a cause of action.[56] However, it went on to observe that, in satisfying himself that the plaintiff mother and her sole sexual partner had the benefit of an effective form of birth control by way of a vasectomy four and a half years earlier, the physician had met the standard of care for the prescribing of the drug, which carried teratogenic dangers.[57] Accordingly, it concluded that Accutane was no longer contraindicated and the defendant physician could not be said to have breached the standard of care in prescribing it. The claim was dismissed and the court noted that the child had no legally recognized claim against the physician.

4. Wrongful Life Claims — Recent International Jurisprudence

Prior to examining the decision of the Ontario Court of Appeal in *Bovingdon*, it will be useful to consider a number of international cases that have addressed the question of wrongful life. As we shall see, in the majority of these cases, courts have affirmed that there is no viable cause of action for wrongful life.

Perhaps the most significant decision to emerge from the common law world in recent years was that of the Australian High Court in *Harriton v. Stephens*.[58] In *Harriton*, the infant plaintiff brought an action against her mother's family physician for damages sustained *in utero*. The agreed statement of facts indicated that prior to the birth of the plaintiff, her mother had experienced a fever and noticed a rash. Thinking that she might be pregnant, the plaintiff's mother contacted her family physician. She explained to her physician that she might be pregnant and expressed concern that her illness might be rubella. On her physician's advice, the plaintiff's mother underwent blood testing to determine whether she was pregnant and whether she had been exposed to the rubella virus. The lab reports revealed that the plaintiff's mother did in fact have rubella. Despite this, the defendant

55. *Ibid.,* at para. 209.
56. *Ibid.*, at para. 209.
57. *Ibid.,* at para. 215.
58. (2006), 226 A.L.R. 391 (H.C.A.). The majority judgment in *Harriton* was written by Crennan J. (Kirby J. dissenting).

physician reassured the mother that the rubella virus had not caused her symptoms.[59]

The court in *Harriton* noted that it was agreed by all parties that if a duty of care existed, the defendant physician was negligent in informing Mrs. Harriton that she did not have rubella and in failing to arrange further and more detailed blood testing. It was further agreed that the defendant physician was under a duty to advise Mrs. Harriton of the high risk that a fetus exposed to the rubella virus would be born profoundly disabled. Finally, all parties were in agreement that, had Mrs. Harriton been advised of these risks, she would have terminated the pregnancy.[60] The infant plaintiff argued that the defendant physician had a duty "to diagnose rubella and then advise Mrs. Harriton that the only way to prevent a very high risk of bearing a child with a grievous injury caused by rubella would be to terminate the pregnancy".[61]

Writing for the majority of the court in *Harriton*, Crennan J. addressed the problems that inhere in quantifying damages in these cases. To this end, Crennan J. relied on a fundamental tenet of tort law, namely, that in order to establish a cause of action in negligence, a plaintiff must demonstrate that damage was sustained and that there existed a duty of care on the part of the defendant to avoid causing such damage. On this point, Crennan J. cited with approval a passage from Professor Fleming's treatise, *The Law of Torts*, in which he notes:[62]

> Actual damage or injury is a necessary element (the gist) of tort liability for negligence. Unlike assault and battery or defamation, where violation of a mere dignitary interest like personal integrity or reputation is deemed sufficiently heinous to warrant redress, negligence is not actionable unless and until it results in damages to the plaintiff.

Crennan J. noted that a plaintiff must establish that he or she has been "left worse off as a result of the negligence complained about, which can be established by the comparison of the plaintiff's damage or loss caused by the negligent conduct, with the plaintiff's circumstances absent the negligent conduct".[63] In the context of wrongful life

59. *Ibid.*, at paras. 20-21. The initial consult with Mrs. Harriton was undertaken by Dr. Max Stephens. Dr. Paul Stephens, Dr. Max Stephens' son (a general practitioner in partnership with his father) conveyed the test results to Mrs. Harriton and assured her that she did not have rubella.
60. *Ibid.*, at para. 19.
61. *Harriton*, *supra*, footnote 58, at para. 221.
62. J. Fleming, *The Law of Torts*, 9th ed. (Sydney: Law Book Co., 1998), p. 216. Cited from *Harriton, ibid.,* at para. 218.
63. *Harriton*, *ibid.*, at para. 251.

claims, Crennan J. noted that this comparison was problematic insofar as it required the court to compare a disabled life with non-existence. Crennan J. noted that because non-existence cannot be experienced, a court could make no logical assessment of whether it is preferable to live with profound disabilities. To the plaintiff's submission that damages should simply be assessed by comparing the plaintiff's life with that of a healthy child, Crennan J. noted that this would require that the court compare the plaintiff's life with a legal fiction. On this point, he noted:[64]

> The common law is hostile to the creation of new legal fictions and the use of legal fictions concealing unexpressed considerations of social policy has been deprecated. Employment of either of the legal fictions proposed would have the effect of excepting the appellant from the need to come within well-settled and well-understood principles of general application to the tort of negligence. Also, the heads of damages sought to be recovered reveal the conceptual difficulty of assessing damages in respect of the appellant's claim. The appellant relies on conventional awards of damages in personal injury. However, there cannot have been any damage to the appellant's earning capacity and none was claimed. In respect of the appellant's special pain and disabilities caused by rubella, it was suggested that a comparison could be made in the light of the ordinary range of usual experience of pain and disabilities. As to medical and care needs, on the actual comparator, nothing is recoverable.

Applying these principles to the case at hand, Crennan J. noted:[65]

> A life without special pain and disabilities was never possible for the appellant, even before any failures by Dr. Paul Stephens. Approaching the task of assessing general and special damages, as suggested, has the effect of making Dr. Paul Stephens liable for the disabilities, which he did not cause.

Accordingly, Crennan J. concluded that an assessment of the plaintiff's damages through the ordinary principles of tort law was not possible.

Notwithstanding his finding on the issue of damages, Crennan J. turned to consider whether the defendant physician owed a duty of care to the infant plaintiff and, if so, the extent of this duty. Recall that the duty of care postulated in respect of the infant plaintiff was, as noted above, "a duty upon [the defendant physician] to diagnose rubella and then advise Mrs. Harriton that the only way to prevent a very high risk of bearing a child with grievous injury caused by rubella would be to terminate the pregnancy".[66]

64. *Harriton*, *ibid.,* at para. 269.
65. *Ibid.,* at para. 270.

After a careful review of the jurisprudence of other jurisdictions, Crennan J. noted that:[67]

> [It] is not to be doubted that a doctor has a duty to advise a mother of problems arising in her pregnancy, and that a doctor has a duty of care to the fetus which may be mediated through the mother. However, it must be mentioned that those duties are not determinative of the specific question here, namely, whether the particular damage claimed in this case by the child engages a duty of care. To superimpose a further duty of care on a doctor to a foetus (when born) to advise the mother so that she can terminate a pregnancy in the interest of the foetus in not being born, which may or may not be compatible with the same doctor's duty of care to the mother in respect of her interests, has the capacity to introduce conflict, even incoherence, into the body of relevant legal principle.

Accordingly, the appeal was dismissed.

The Australian High Court reached a similar conclusion in the companion appeal to *Harriton*, *Waller v. James*; *Waller v. Hoolahan*.[68] In that case, following in vitro fertilization, a child was born suffering from Alpha-proteinase (ATS) deficiency inherited from his father. The infant subsequently commenced a claim against the physicians involved in his father's care. Specifically, the child alleged that if his parents had been alerted to the fact that ATS deficiency could be transmitted genetically, they would have delayed attempts to conceive until after suitable testing had been undertaken or would have found donor sperm, or, if conception had already occurred, would have terminated the pregnancy.[69] Writing for the majority in *Waller*, Kirby J. dismissed the infant plaintiff's claims on the basis of the reasoning established in *Harriton*.

The High Court of Singapore in the 2005 decision of *JU and Another v. See Tho Kai Yin* recently considered the viability of wrongful life claims.[70] In *JU*, the mother and infant brought claims against the defendant physician for his alleged failure to advise the plaintiff mother of tests available to detect chromosomal abnormalities and for his failure to warn the mother that her age heightened the risk of such abnormalities developing in the fetus. The infant was subsequently born with Down syndrome. At trial, the

66. *Harriton, supra,* footnote 58, at para. 221.
67. *Ibid.,* at para. 249.
68. (2006), 266 A.L.R. 257 (H.C.A.) (hereafter *Waller*).
69. It is significant to note that the claim against one of the defendant physicians also involved an allegation that he had been negligent in managing the mother's pregnancy.
70. [2005] 4 Sing. L.R. 96 (H.C.).

mother testified that had she been aware of the testing available, she would have asked her doctor to perform these tests. She further pleaded that had she been made aware of the condition of the fetus, she would have terminated her pregnancy.[71]

The Singapore High Court found that the plaintiff was not credible, and that if she did not have an amniocentesis done in time, it was by deliberate choice. The court noted that it was unlikely that she would have had an abortion given the fact that the fetus was male and that it would put her in better standing with her in-laws who did not approve of the marriage of their son to a woman ten years his senior. Furthermore, the court held that because the mother had previously suffered from cancer, she had been told that it would have been unlikely for her to conceive. The court noted that under these circumstances, causation was not made out, as it was not convinced that the mother would, in fact, have terminated the pregnancy.[72]

Notwithstanding its findings on credibility, the court did go on to consider the viability of wrongful life claims generally. Relying on *McKay*, the court noted that at common law, a disabled child had no cause of action for wrongful life. Speaking to the public policy reasons that colour this issue, the court noted that:[73]

> Such claims would be contrary to public policy as a violation of the sanctity of human life. The common law position has been adopted by the English, Canadian and Australian courts. One such English case cited by the defendants is *McKay* where the appellate court struck out the claim of a mother whose child was born disabled as a result of an infection of rubella (German measles) while the child was in her womb. The mother had sued the health authority and the doctor who had looked after her for allowing the child to be born alive. The doctor's alleged negligence was in misleading the mother as to the advisability of an abortion and failing to inform or advise her of its desirability.

The court further noted that even if there was a breach of the duty on the part of the defendant physician before the child was born, "that breach did not cause the child to suffer from Down syndrome — the cause was genetic". Accordingly, the claims of both plaintiffs were dismissed.[74]

In the United States, wrongful life claims are statute-barred in all but three states. It is important to note that American courts have consistently rejected wrongful life claims. A brief synopsis of the most significant American decisions will be canvassed below.

71. *Ibid.,* at para. 51.
72. *Ibid.,* at para. 75.
73. *Ibid.,* at para. 96.
74. *Ibid.,* at para. 100.

Becker v. Schwartz[75] involved an action for wrongful birth and wrongful life against the defendant physician. The parents alleged that the defendant's failure to advise of an increased risk of Down syndrome born to women over 35 or the availability of an amniocentesis resulted in the birth of a child with Down syndrome. The parents alleged that had they undergone the test and the test had indicated the presence of Down syndrome in their child, they would have terminated the pregnancy.[76]

In the companion case to *Becker*, *Park v. Chessin*, a mother had given birth to a child afflicted with polycystic kidney disease. The parents consulted their doctor to determine the likelihood of possible recurrence in future children and were allegedly advised that the chances of conceiving a second child afflicted with the disease were "practically nil". A second child was subsequently born with the disease and the parents later learned it was an inherited condition. They asserted that had they known this, they would have chosen not to conceive again.[77] Both *Becker* and *Park* were heard together and Jasen J. wrote the decision of the majority of New York's Court of Appeals. Jasen J. concluded that a child does not have the fundamental right to be born as a whole, functional being, and damages recoverable on behalf of infants were not ascertainable. Specifically, the court noted:[78]

> There is no precedent for recognition at the Appellate Division of "the fundamental right of a child to be born as a whole, functional human being" . . . Whether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and the theologians . . . Not only is there to be found no predicate at common law or in statutory enactment for judicial recognition of the birth of a defective child as an injury to the child; the implications of any such proposition are staggering. Would claims be honored, assuming the breach of an identifiable duty, for less than a perfect birth? And by what standard or by whom would perfection be defined? . . . Simply put, a cause of action brought on behalf of an infant seeking recovery for wrongful life demands a calculation of damages dependent upon a comparison between the Hobson's choice of life in an impaired state and non-existence. This comparison the law is not equipped to make.

Accordingly, the claims of the plaintiff infants were dismissed.

Another significant American decision is that of the Supreme

75. 386 N.E. 2d 807 (Court of Appeals of New York 1978).
76. *Ibid.,* at para. 810.
77. *Ibid.,* at para. 809.
78. *Ibid.,* at para. 812.

Court of New Jersey in *Procanik v. Cillo*.[79] In that case, the plaintiff infant sought damages for birth defects allegedly caused by the defendants' failure to diagnose rubella in the first trimester of his mother's pregnancy. The infant alleged that the defendants negligently deprived his parents of the choice of terminating the pregnancy. Accordingly, the plaintiff infant claimed both general and special damages from the defendants.

Affirming an earlier decision of the California Supreme Court,[80] the court in *Procanik* held that a plaintiff infant may recover special damages in a wrongful life action but may not recover general damages. To the claim for general damages, the court noted that these were not ascertainable. The court noted that in this case, the plaintiff infant never had a chance of being born as a normal, healthy child. His only choice was a life burdened with handicaps or no life at all.[81]

Finally, the Supreme Court of South Carolina recently entered into the debate over the viability of wrongful life claims in its decision in *Willis v. Wu*.[82] In *Willis*, the infant plaintiff brought an action against the defendant physician for failing to properly interpret the mother's ultrasounds and failing to diagnose hydrocephalus in the child *in utero*. The child was subsequently born alive with several brain lobes missing.[83] The Supreme Court of South Carolina held that South Carolina does not recognize a common law cause of action for wrongful life brought by or on behalf of a child born with congenital defects. The court noted that the reasoning behind this lack of recognition is based on the impossibility of proving that being terminated by elective abortion is better than being born and living a life with disabilities. On this point, the court noted that it is untenable to maintain that a child who had already been born should have the chance to prove it would have been better off if it had never been born at all. Significantly, the court noted, "the minority of Courts allowing a wrongful life action have not focused on this question".[84]

Outside the common law world, wrongful life claims have had limited success. In 2001, the French Cour de Cassation affirmed a lower court ruling that had awarded the infant plaintiff damages for "wrongful life".[85] In that case, the plaintiff, Nicholas Perruche, was born with severe disabilities. Evidence revealed that four weeks into

79. 478 A. 2d 755 (N.J. Sup. Ct. 1984).
80. See *Turpin v. Sortini*, 182 Cal. Rptr. 337 (Cal. Sup. Ct. 1982).
81. *Procanik, supra,* footnote 79, at para. 6.
82. 362 S.C. 146 (S.C. Sup. Ct. 2004).
83. *Ibid.,* at para. 150.
84. *Ibid.,* at para. 162.
85. *Perruche*, Cass. ass. plén., Nov. 17, 2000, JCP 200 II 10,438.

his gestation, his four-year-old sister had contracted the German measles. Worrying about the effect that exposure to the measles could have on the fetus, the mother-to-be told her physician that if she tested positive for the measles, she wished to have an abortion. The blood tests returned contradictory results. Rather than seeking to clarify the results, the defendant physician told his patient that she could "safely continue her pregnancy". Affirming the lower court judgment that had awarded the plaintiff damages, the Cour de Cassation noted that since the defendant's errors "had prevented Mrs. Perruche from exercising her choice to end the pregnancy in order to avoid the birth of a handicapped child, the latter can ask for compensation for damages resulting from his handicap".[86] Similarly, the Supreme Court of Israel recently allowed a wrongful life claim.[87] A claim for wrongful life has also been upheld pursuant to the Dutch Civil Code in the Netherlands.[88]

5. The Decision of the Court of Appeal in Bovingdon

As the discussion above demonstrates, it is widely recognized that courts in the common law world have "struggled" for decades over the legitimacy of "wrongful life" claims at law. At the heart of this struggle is what the court in *Bovingdon* defined as the "key question", namely, "if a child would not have been born at all without the doctor's negligence, can such a child sue the doctor for the value of the difference between a life burdened with physical or mental defects and no life at all?".[89] As we have seen, other fundamental questions flow logically from this first consideration. For instance, how can the courts compensate a child for having been born? How do judges assign damages in ways that measure the value of no life as opposed to a "damaged life"? In *Bovingdon*, the court went so as far as to invoke a metaphysical perspective asking, "does it make sense to allow such an action, given that if the child had not been born, he or she would not have been able to bring the action at all?".[90]

It will be useful to review briefly the facts in *Bovingdon*. In *Bovingdon*, an action was brought against the physician by the mother, grandmother and sister of twin girls and by the girls themselves, who were born severely disabled. The action was based

86. *Ibid.* Public outcry following the release of *Perruche* ultimately led to a legislative ban on these claims.
87. *Zeitsov v. Katz* (1986) 40(2) PD 85 (Sup. Ct.).
88. *Leids Universitair Medisch Centrum v. Kelly Molenaar*. Hoge Road, 18 March 2005, Rvd W 2005, 42.
89. *Bovingdon, supra,* footnote 1, at para. 37.
90. *Ibid.*

on the physician's alleged failure to provide the mother with the information necessary to make an informed decision about whether to begin taking the fertility drug, Clomid. It was alleged that the physician failed to inform the would-be mother of the full extent of the risks of taking the drug, of the potential of having twins, of the potential for premature birth, and of the possible injury to the twins arising as a result.

At trial, the jury found the doctor negligent for failing to provide the necessary information to the would-be mother. The jury also found on the issue of causation that the would-be mother would not have taken Clomid if she had been properly informed of the attendant risks. One of the most compelling issues to emerge from the *Bovingdon* trial was the trial judge's decision that, as a matter of law, *the physician owed a duty of care to the twins and, since he breached that duty, they were entitled to recover damages, as were their parents.*[91] The trial judge reasoned that this was not a case of *wrongful life* since this was not a case where the doctor's negligence merely caused the twins to be born; rather, the doctor's negligence caused the twins to be born, and to be born with injuries. Further, the trial judge reasoned that the prescribed Clomid caused the twinning at conception, the twinning in turn caused the premature births, and premature births caused the damage to the children. In short, it was the decision to prescribe Clomid, without a full and proper warning of risks to the would-be mother, which established the causal chain to the injuries.[92]

The appeal was made on three grounds: first, that the jury's verdict on causation was unreasonable; second, that the trial judge erred in concluding that this case was outside the ambit of wrongful life actions, since Canadian jurisprudence does not recognize this as a cause of action; third, the trial judge erred in the interpretation and application of the Supreme Court of Canada's decision in *Krangle v. Brisco*.[93]

The second enumerated ground is of central concern to our analysis. The question is whether the trial judge erred in holding that the infants' claim did not constitute a "wrongful life" claim. If these claims are found to be claims for "wrongful life", is there a cause of action in Ontario for "wrongful life"? As we have seen, in assessing such claims, the court in *Bovingdon* posed the following "key question": "if a child would not have been born at all without the doctor's negligence, can such a child sue the doctor for the value of the

91. *Bovingdon v. Hergott* (S.C.J.), *supra,* footnote 1, at paras. 9-10.
92. *Ibid.,* at para. 17.
93. [2002] 1 S.C.R. 205.

difference between a life burdened with physical or mental defects and no life at all?".[94]

One of the major shortcomings of the *Bovingdon* appeal decision is that this "key question" is never confronted fully. To be sure, Feldman J.A. raised at least nominally the policy concerns expressed in *McKay*.[95] She acknowledged, for instance, the conceptual problems presented by the notion of "non-existence" and the difficulties courts encounter in attempting to compensate disabled plaintiffs for having been born. In this regard, the court clearly was cognizant of the rationale, as expressed authoritatively in *McKay*, that continues to inform judicial rejection of wrongful life claims in the common law world. At the same time, Feldman J.A. was prepared to interrogate this rationale, invoking the argument advanced by some academics and activists that courts should ignore the conceptual problems associated with the non-existence issue, and focus instead on achieving "full compensation" for disabled plaintiffs and their families.[96]

For those who would defend continued judicial rejection of wrongful life claims, Feldman J.A.'s rationale here is especially troubling. Feldman J.A. does little more than suggest that it might be plausible to dismiss the non-existence issue, thereby giving short shrift to the long line of judicial reasoning, grounded in policy analysis and traditional tort law principles, which holds that the problem of quantifying damages for wrongful life is fatal in law to recognizing these claims.

The point here is that the court in *Bovingdon* appeared to be chipping away at the principles established in *McKay*, albeit in subtle ways and without a clear sense of purpose or direction. After all, in the *Bovingdon* decision, Feldman J.A. determined that the case at bar did not require her to deal with the viability of the wrongful life claim but rather whether the defendant owed a duty of care to the plaintiffs. What, then, was the purpose of identifying wrongful life as a "key question", only to set it aside as tangential to the case at hand?

In addition to chipping away at the *McKay* framework, Feldman J.A. called into question the viability of the "two-category approach" established in *Lacroix*.[97] The court in *Bovingdon* described the *Lacroix* framework as inadequate in that it fails to provide "a coherent theory that can assist the courts in making the difficult decision of when a child should be able to recover damages from a

94. *Bovingdon* (S.C.J.), *supra,* footnote 1.
95. *Supra*, footnote 3.
96. *Bovingdon* (C.A.), *supra,* footnote 1, at para. 54.
97. *Supra*, footnote 14.

doctor for being born with disabilities".[98] For the appeal court in *Bovingdon*, the second category — the wrongful life category — was "fairly clear". Such instances involve cases where the damage to the child was not caused in any way by the physician's negligence. Rather, the doctor's negligence in such cases usually entails failure to inform patients of risks, improperly performing tests, failing to disclose fully or properly test results; in short, failures that effectively prevent the parents from "choosing to avoid conceiving a child who could be born with disabilities or the mother from terminating a pregnancy where damage has already occurred".[99]

According to the Court of Appeal, the problem with the *Lacroix* two-category approach is that it allowed the court to overlook the possibility that the facts of that case belonged to the first category — where the physician may have caused or contributed to damage by either damaging the fetus *in utero*, and also may have caused or allowed the child to be born. According to the appeal decision in *Bovingdon*, the difficulty with the *Lacroix* decision is that the court here "effectively overlooked the damage and placed the case in category two".[100] As Feldman J.A. observed, "[i]n my view, with respect, *Lacroix* fits much more easily into category one than does the case at bar".[101] In *Lacroix*, the epilepsy drug actually harmed the child. In the *Bovingdon* case, the Clomid had no pharmacological effect on the children. Dr. Hergott did not cause the damage to the children. Rather, by failing to give Mrs. Bovingdon all the information she needed to decide whether to take the drug to augment her fertility, he caused or contributed to the birth of the twins.[102]

The court in *Bovingdon* went on to reason that prescribing Clomid was not contraindicated and was not in itself a negligent act. Accordingly, the trial judge erred by finding that the case at bar fell into the first category rather than the second category established by *Lacroix*. According to Feldman J.A. both *Lacroix* and the *Bovingdon* case involved a failure to provide the mother with "full information so that she could choose the course of action she wished to take".[103] Accordingly, Feldman J.A. concluded that the physician owed no duty to the unborn child in this case.[104]

98. *Bovington* (C.A.), *supra*, footnote 1, at para. 55.
99. *Ibid.,* at para. 56.
100. *Ibid.,* at para. 58.
101. *Ibid.*
102. *Ibid.*
103. *Ibid.,* at para. 60.
104. On this latter point, the Court of Appeal relies on the decision of the

What is not clear in the court's reasoning here is why the case at bar, which Feldman J.A. held clearly did *not* involve a wrongful life claim, should occasion reconsideration of the viability of wrongful life claims at law. In this regard, it is not helpful, or even necessary, for Feldman J.A. to characterize the *Lacroix* framework as "inadequate" while offering no principled framework to stand in its place. After all, as Feldman J.A. reasoned, the policy concern of whether a wrongful life claim should exist at law was "obviated" in the case at bar. As Feldman J.A. noted,[105]

> Furthermore, it is undecided whether the courts of this province would necessarily dismiss every claim for "wrongful life". A proper consideration of this question would require the court to address the policy issue of whether such claims should exist in our law. In this case, the issue is obviated because I have found that although the doctor breached his duty of care to the mother to give her full information to allow her to make an informed decision about whether to take Clomid, he owed no duty of care to the unborn children when prescribing Clomid to a woman who wished to become pregnant.

Moreover, Feldman J.A.'s concern about the adequacy of *Lacroix*'s two-category approach as an effective "mechanism" to determine whether a cause of action exists could easily be dealt with in concrete ways by relying upon expert evidence to determine causation. In short, it was simply not necessary to question the validity of *Lacroix* in order to determine the chain of causation. As we have seen, Feldman J.A. was able to determine definitively that the Clomid had "no pharmalogical effect" on the children in question. In this way, the *Lacroix* framework can continue to assist courts in making what Feldman J.A. acknowledged as the "difficult decision" of when a child is entitled to damages for being born with disabilities.[106]

6. Conclusion

The *Bovingdon* decision constitutes a lost opportunity to make a clear, definitive statement rejecting wrongful life claims in law. Since this was a case where the court had a full evidentiary record before it, it should have seized the opportunity to make a clear finding and set the parameters of a principled framework to inform judicial reasoning in this field. Feldman J.A. was correct to observe that

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Supreme Court of Canada in *Dobson (Litigation Guardian of) v. Dobson*, [1999] 2 S.C.R. 753, 174 D.L.R. (4th) 1, 214 N.B.R. (2d) 201.

105. *Bovingdon* (C.A.), *supra,* footnote 1, at para. 73.

106. *Ibid.,* at para. 55.

judicial consideration of the viability of wrongful life claims will require the courts to consider the relevant policy issues. Yet, unlike courts elsewhere in the common law world, the court in *Bovingdon* provided no such consideration. Indeed, while leaving the door open for sustainable wrongful life claims, the court in *Bovingdon* provided no sustained, compelling policy rationale to justify undermining the principles laid out in *McKay* or the approach established in Canadian jurisprudence by *Lacroix*.

The principles established authoritatively by *McKay*, and affirmed by courts throughout the common law world, continue to militate against judicial recognition of wrongful life claims. Since no compelling policy reasons exist to justify allowing wrongful life claims, it is clear that plaintiffs who wish to advance such claims face an uphill battle. Ultimately, the Supreme Court of Canada will need to determine this issue.