

2014

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Bruce Feldthusen

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Recommended Citation

Bruce Feldthusen, "Suppressing Damages in Involuntary Parenthood Actions: Contorting Tort Law, Denying Reproductive Freedom, and Discriminating Against Mothers" (2014) 29:1 Can J Fam L 11.

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**SUPRESSING DAMAGES IN
INVOLUNTARY PARENTHOOD
ACTIONS: CONTORTING TORT LAW,
DENYING REPRODUCTIVE FREEDOM
AND DISCRIMINATING AGAINST
MOTHERS**

Bruce Feldthusen*

Abstract: “Involuntary parenthood” actions are negligence actions, usually medical malpractice cases involving a failed sterilization, inadequate warning about the risks of pregnancy, or a failed abortion. In Canada, they will soon also involve product liability claims against negligent birth control manufacturers, providers and regulators. This article considers whether the parents’ damages ought to include the cost of raising the child. No Canadian appellate court has ever ruled on this point, although it has been adjudicated extensively by the highest courts elsewhere in the common law world. At least 7 different rules limiting such recovery have been endorsed in the Canadian lower courts. Most of the limiting rules are unique to involuntary parenthood cases, deviating from the outcome that would prevail were the standard rules of negligence law applied. Many have no rational foundation. This article concludes that the failure to compensate parents for the cost of raising the child cannot be justified. Rather the refusal to compensate for reasonable child rearing expenses constitutes discrimination against parents, especially women who are mothers. This discrimination is sometimes, perhaps often, perpetrated by judges who refuse to accept and protect a woman’s right to reproductive freedom. These mothers are

* Professor, Faculty of Law, University of Ottawa (Common Law Section). The author would like to thank the anonymous reviewers for their helpful comments.

under-compensated, and the medical establishment that failed them is under-deterred.

INTRODUCTION

This article deals with the ambiguous and unsettled state of Canadian tort law in cases of “involuntary parenthood.” More specifically, it concentrates on the various and inconsistent rules regarding whether parents may recover for the cost of rearing a child born of an involuntary pregnancy; if so, on what basis and to what extent; and if not, why not.

The scope of recoverable damages for “involuntary parenthood” has generated many controversial judicial decisions from the highest courts in the common law world.¹ Yet the issue has not been ruled on by a single Canadian appellate court outside Quebec, let alone considered by the Supreme Court of Canada.² This is probably about to change. Several Canadian law firms have launched class actions relating to a problem with Alysena birth control pills. Product lots containing extra placebo pills in place of active pills

¹ In the past 15 years, there have been two decisions from the UKHL: *McFarlane v Tayside Health Board*, [2000] 2 AC 59, [1999] 4 All ER 961 [*McFarlane*]; and *Rees v Darlington Memorial Hospital NHS Trust*, [2003] UKHL 52, [2004] 1 AC 309 [*Rees*]. There has been one from the High Court of Australia where the majority rejects the holding in both UK cases: *Cattanach v Melchior*, [2003] HCA 38, (2003), 199 ALR 131 [*Cattanach*]. There has been lively debate among in the judges in each case.

² Nor has there been a flood of reported trial decisions. Possibly the stakes have been too low to support the cost of appellate litigation. Only a few cases have awarded damages for the cost of raising a healthy child, and if they did, at present an award of \$150,000 for the cost of rearing the child would be considered generous. See *infra* note 98.

reached the market. Involuntary births may have resulted.³ Suddenly, settling the parameters for damages in involuntary parenthood cases has become a pressing question.

Involuntary parenthood cases include cases that have been traditionally described as either “wrongful pregnancy” or “wrongful birth” cases. In *Kealey v. Berezowski*, Lax J explained the distinction between “wrongful birth” and “wrongful pregnancy” cases as follows:⁴

In a wrongful pregnancy case the act is always pre-conception. The claimants are parents who allege that the defendant's negligence has caused an unwanted pregnancy and birth. The negligence often occurs through a failed sterilization or through the preparation or dispensing of a contraceptive medication. The claim has been advanced for children born healthy and for those born unhealthy. In either case, the child is unplanned. Courts have recognized the viability of this claim which may be advanced in contract or tort, although it is more usually advanced in tort. Courts have diverged on the appropriate measure of damages.

A "wrongful birth" case normally arises in an action instituted by parents of a child who is

³ See *Alysen Birth Control/Apotex Inc. Class Action*, online: Watkins Law Professional Corporation <<http://www.watkinslawforthepeople.com>>; and *Alysen Birth Control Class Action*, online: Merchant Law Group LLP <<https://www.merchantlaw.com>>. This author has done some consulting on one of these files with a plaintiffs' firm.

⁴ *Kealey v Berezowski*, [1996] OJ No 2460, 30 OR (3d) 37 [*Kealey*] at para 37-38.

born with birth defects as a result of a planned pregnancy. The legal basis for the cause of action derives from the post-conception interference by the tortfeasor with the mother's lawful right to terminate the pregnancy had an informed decision been available to her.

It turns out that these traditional categories are not necessary for present purposes. Although these labels are well-established and descriptively accurate, there is no reason to treat the parents' claims for the cost of child rearing in "wrongful pregnancy" cases differently from how such claims are treated in the "wrongful birth" cases. The courts do not differentiate between them on damage questions. Judges move seamlessly from one line of authority to the other when reviewing the state of the law. Instead, this article will employ Professor Adjin-Tettey's term, "involuntary parenthood" to encompass both "wrongful pregnancy" and "wrongful birth."⁵

It is possible, however, that the distinction between pre- and post-conception negligence will remain important in the entirely different sort of claim for "wrongful life" with which the involuntary parenthood claims are often confused. "Wrongful life" claims were described in *Kealey* as follows:⁶

"Wrongful life" claims . . . are normally advanced by the infant plaintiff or on his or her behalf and sometimes together with a derivative claim by the parents. These claims can arise pre-

⁵ See Elizabeth Adjin-Tettey, "Claims of Involuntary Parenthood: Why the Resistance?" in Jason Neyers, Erika Chamberlain & Stephen Pitel, eds, *Emerging Issues in Tort Law*, (Portland: Hart Publishing, 2007) 85 at 85-6. See generally Dean Stretton, "The Birth Torts: Damages for Wrongful Birth and Wrongful Life" (2005) 10 *Deakin L Rev* 319.

⁶ *Kealey*, *supra* note 4 at para 37.

conception as in the case of a failed sterilization or post-conception as in the case of a failed abortion or improper genetic screening. A "wrongful life" claim alleges that the tortfeasor, invariably a physician, owes a duty of care to the child which is breached by the physician's failure to give the child's parents the opportunity to terminate his or her life.

It is critical to distinguish the parents' "wrongful pregnancy" or "wrongful birth" claims from the child's own claim for "wrongful life." No Canadian court has ever recognized a child's independent cause of action for "wrongful life," although the question is actively open today, at least in Ontario.⁷ Some of the objections to recognizing a "wrongful

⁷ Claims by a child based on pre-conception negligence have been rejected twice in Ontario. See *Paxton v Ramji*, 2008 ONCA 697, 92 OR (3d) 401 and *Bovingdon v Hergott*, 2008 ONCA 2, 88 OR (3d) 641. The courts preferred to take a standard "novel duty" approach rather than to employ the "wrongful life" label and the baggage that accompanies that label. In *Liebig (Litigation Guardian of) v Guelph General Hospital*, 2010 ONCA 450, [2010] OJ No 2580 [*Liebig*] the court confirmed that the decisions in *Paxton* and *Bovingdon* had not altered ". . . the very long and well-established line of cases. . . , holding that an infant, once born alive, may sue for damages sustained as a result of the negligence of health care providers *during labour and delivery* [emphasis added]." The open question concerns cases that arise from the factual circumstances captured by the "wrongful birth" cases, but not the "wrongful pregnancy cases" where the negligence occurs post-conception, but prior to labour and delivery. In *McDonald-Wright (Litigation guardian of) v O'Herlihy*, [2005] OJ No. 1636, 75 OR (3d) 261 such a claim was not struck out, but failed on the issue of standard of care. The consequences of refusing to allow the child to recover are cushioned in a jurisdiction that allows the parents to recover child rearing costs fully, or for exceptional child care costs related to a child born with a disability. However, the question of whether the parents may recover for care expenses expected to be incurred after the child reaches the age of

life” claim arise from quantification difficulties similar to those raised in the parental claims. However, the two core concerns in “wrongful life” are unique to the child’s claim. In Canada especially, there is a concern about the possibility that conflicting duties of care to the mother and to the child might arise if the child’s “wrongful life” claim were recognized.⁸ Second, there is a judicial aversion to regarding the birth of a child, particularly one’s own birth, as a legal wrong. Neither of these concerns applies to “involuntary parenthood” actions which deal with the parents’ claims for losses *they* suffer when *their* rights of “reproductive autonomy” are breached.⁹ Nevertheless, one suspects that the failure to distinguish clearly the child’s claim for wrongful birth from the parents’ claim for involuntary pregnancy has prejudiced the parental plaintiffs.

“Involuntary parenthood” actions are negligence actions. To date, the Canadian cases have all been medical malpractice cases. The typical involuntary parenthood case has involved a failed sterilization, inadequate warning about the risks of pregnancy, or a failed abortion.¹⁰ There is no logical

majority is unsettled. If the parents cannot recover these projected post-majority costs, this may be an unmet need for the child. Parents were allowed to recover a small percentage of projected care costs after the child reached the age of majority in *Krangle (Guardian ad litem of) v Brisco*, [1997] BCJ No 2740, 154 DLR (4th) 707 [*Krangle*], approved in *Bovingdon* at para 85. This was a contingency should the child not be placed in publically funded care as expected. See also *Kealey*, *supra* note 4 at para 98, and *Petkovic (Litigation guardian of) v Olupona*, [2002] OJ No 1269 where a motion to strike out a claim *by the child* for care costs in adulthood was dismissed.

⁸ See e.g. *Paxton, Bovingdon, & Leibig, ibid.*

⁹ This term is also used by Adjin-Tettey, *supra* note 5 at 85.

¹⁰ A comprehensive and detailed breakdown is offered by Sanda Rodgers, “A Mother’s Loss Is the Price of Parenthood: The Failure of Tort Law to Recognize Birth as Compensable Reproductive Injury”

reason why the damage rules for involuntary parenthood should be any different in a medical malpractice case than they would be in a class action based on a defective product such as the one involving Alysena.

There are at least seven different approaches to govern the recovery of the cost of rearing the child in an involuntary parenthood claim that enjoy some judicial support in Canada.¹¹ Taking the Australian and UK positions into account, there is overwhelming support for allowing the parents to recover for at least some costs related directly to the birth and pregnancy itself. In addition, most courts favour recovery for special care costs related to rearing a child born with a disability. Recent cases have allowed at least limited recovery for the cost of rearing a healthy child. However, there is no single clear position in Canada. Obviously, there must be something special about reproductive autonomy to have turned an otherwise simple variant of settled medical malpractice law into such a jumble.

This article examines and evaluates why so many judges refuse to award full compensation for the foreseeable cost of rearing a child, whether healthy or born with a disability. It examines a series of arguments that have been relied upon to defeat or limit the parents' claims. First, it considers the argument that the birth of a child does not constitute a compensable loss. It then considers the modified position that the birth of a healthy child does not constitute a loss, but the birth of a child born with a disability does. Next it

(2009) 44 SCLR (2d) 161 at 164-5. See also Adjin-Tettey, *supra* note 5 at 86-7.

¹¹ In *Bevilacqua v Altenkirk*, 2004 BCSC 945, [2004] BCJ No 1473 [*Bevilacqua*], the court identified four such possibilities at paras 84-87, derived from the three identified in *Kealey*, *supra* note 4 at para 96. See also the five options identified by Kirby J in *Cattanach*, *supra* note 1 at para 235.

considers several arguments that purport to accept the full recovery model, but in effect collapse into much more restrictive positions. Finally, it reviews two highly unusual compromise positions – the conventional sum and non-pecuniary loss approaches. The article will conclude that the various refusals to allow or to limit compensation for the cost of rearing the child cannot be justified. Parents should be permitted to recover damages related to the pregnancy and birth itself and also damages for the full costs of raising the child whether born healthy or born with a disability. Foreseeability of loss should be the governing concept as it is in other malpractice cases. This position represents the view of the majority of the Australian High Court,¹² and has also been adopted in New Brunswick.¹³

¹² *Cattanach*, *supra* note 1. The result was subsequently modified by legislation in three Australian states, essentially to restrict recovery to the extra cost of raising a child born with a disability. The *Civil Liability Act 2002* (NSW) s 71 prohibits recovery for the cost of rearing a healthy child, but allows recovery (except for associated loss of earnings) for additional losses associated with raising a child born with a disability. The *Civil Liability Act 2003* (Qld), ss 49A and 49B also excludes damages related to the cost of raising a healthy child. However, the exclusion only applies to a child born as a result of a failed contraceptive or sterilisation *procedure* (emphasis added), not an IVF procedure or antenatal negligence. It may not cover a product liability claim based on defective birth control. The *Civil Liability Act 1936* (SA), s 67 precludes recovery for the costs of rearing a healthy child only, and this prohibition also applies to product liability claims.

¹³ *Stockford v Johnston Estate*, 2008 NBQB 118, [2008] NBJ No 122 [*Stockford*]. See also *MS v Baker*, 2001 ABQB 1032, [2001] AJ No 1579. The child had serious health problems for the first five years, and was healthy thereafter. The court apparently approved full recovery applying the scope of the risk test from *Kealey*, *supra* note 4. This was in *obiter* because the plaintiff failed to establish negligence.

NO RECOVERY FOR THE COST OF REARING A HEALTHY CHILD

At one end of the spectrum is the approach that holds that the cost of rearing a child is not a compensable head of damages. Under this approach both parents¹⁴ may recover damages for their own losses associated with the pregnancy and childbirth itself, such as lost income, out-of-pocket expenses, and medical expenses.¹⁵ However, nothing is awarded for the cost of raising the child. This restriction is usually supported by observations about the inherent value of human life and the social importance of the family. One Alberta judge, in *obiter*, has

¹⁴ The Canadian courts routinely allow the father to recover for his own losses relating to the birth and pregnancy itself. The few overt challenges to the father's right to claim have been rejected. See e.g. *RH v Hunter*, [1996] OJ No. 4477 [*Hunter*] at paras 22 - 31; *Krangle*, *supra* note 7 at para 117. A stand-alone claim by the father was dismissed in *Freeman v Sutter*, [1996] MJ No 246 (CA), the court holding that the father's claim must be derivative of the mother's. In some jurisdictions the father may be permitted to claim damages for loss of consortium. See e.g. *Cattanach*, *supra* note 1 where the mother claimed all the direct costs related to the pregnancy, the father claimed for loss of consortium, and they claimed jointly for the cost of raising the child.

¹⁵ An example of what these damages might consist is found in *Kealey*, *supra* note 4 at para 96:

Having regard to the unplanned pregnancy exacerbated by the round ligament strain, the stress and difficulty of caring for two young children and working full-time during this pregnancy, the labour and delivery, and the re-sterilization, all necessitated by the defendant's negligence, I award general damages of \$30,000.

To date there is no clear position about an entitlement to damages for opportunity costs incurred by a parent choosing to leave the workforce to care for the child.

expressed a preference for this position.¹⁶

The “no recovery” position takes various shapes. Its distinguishing feature is the premise, often stated as if it were self-evident, that it is wrong for society to award monetary damages which attempt to reflect the value/cost of human life. In addition to the implicit philosophical and religious bases of such a position, some judges offer nothing more than a moral hunch to support denying the parents’ claim for the cost of rearing the child. The judge may refer to the various ways in which the state demonstrates the importance of human life and its support for families and child rearing.¹⁷ Some judges have propped up this argument by observing that such damages would be unpopular with the mythical public transit passenger.¹⁸ Others say the action commodifies the value of the child’s life. Still others may go so far as to declare that awarding such damages would be repugnant.¹⁹ In their pure form, these arguments lead to the conclusion that no damages whatsoever should be allowed for child-rearing expenses.

In *Rees*, L Steyn quoted with approval the following words of L Millet in *McFarlane*:²⁰

¹⁶ *MY v Boutros*, 2002 ABQB 362, [2002] AJ No 480. The court would not have allowed recovery for cost of rearing a healthy child, or recovery for the additional exceptional expenses of raising a child born with a disability.

¹⁷ See e.g. *Kealey*, *supra* note 4 at 62. “The birth of a child is a blessing” is a related argument, discussed below under offsetting benefits.

¹⁸ See e.g. L Hutton in *Rees*, *supra* note 1 at para 89 quoting Lady Hale in *Parkinson v St James and Seacroft University Hospital NHS Trust*, [2002] QB 266 (CA) [*Parkinson*]; Kirby J in *Cattanach*, *supra* note 1 at para 135 criticizing L Steyn in *Parkinson*.

¹⁹ See generally Adjin-Tettey, *supra* note 5 at 103-109.

²⁰ L Steyn in *Rees supra* note 1 at para 28. He went on to say:

In my opinion the law must take the birth of a normal, healthy baby to be a blessing, not a detriment. In truth it is a mixed blessing. It brings joy and sorrow, blessing and responsibility. The advantages and the disadvantages are inseparable. Individuals may choose to regard the balance as unfavourable and take steps to forgo the pleasures as well as the responsibilities of parenthood. They are entitled to decide for themselves where their own interests lie. *But society itself must regard the balance as beneficial. It would be repugnant to its own sense of values to do otherwise. It is morally offensive to regard a normal, healthy baby as more trouble and expense than it is worth* [Emphasis added by L Steyn].

The fatal weakness of this line of argument is that there is no logical connection between the value of human life as society must weigh it (assuming it must), and the parents' medical malpractice claim for pecuniary damages.²¹ McHugh and Gummow JJ put this well in *Cattanach*:²²

First, are the underlying values respecting the importance of human life, the stability of the

These I believe to be themes which led the Law Lords sitting in the case to reject the claim for the cost of bringing up the healthy child (in *McFarlane*): see Lord Slynn of Hadley, at 75C and 76C; my judgment, at 83D-E; Lord Hope of Craighead, at 97C-D; Lord Clyde, at 103 B-D; Lord Millett, at 111C-D.

²¹ If there is a rational connection, it would be that assisting parents with the expenses of child rearing would support, not violate, these essential values.

²² *Cattanach*, *supra* note 1 at para 767. See also J K Mason, "A Turn-up Down Under: McFarlane in the Light of Cattanach", (2004) 1:1 *SCRIPTed* 119.

family unit and the nurture of infant children until their legal majority an essential aspect of the corporate welfare of the community? Secondly, if they are, can it be said there is a general recognition in the community that those values demand that there must be no award of damages for the cost to the parents of rearing and maintaining a child who would not have been born were it not for the negligent failure of a gynaecologist in giving advice after performing a sterilisation procedure?

Allowing an affirmative answer to the first question, nevertheless the answer to the second must be that the courts can perceive no such general recognition that those in the position of Mr. and Mrs. Melchior should be denied the full remedies the common law of Australia otherwise affords them. It is a beguiling but misleading simplicity to invoke the broad values which few would deny and then glide to the conclusion that they operate to shield the appellants from the full consequences in law of Dr. Cattnach's negligence.

How can one explain why some judges continue to deny the parents' claim in the absence of a rational connection between the trumpeted core values and the parents' claim? Possibly some proponents of the inherent value of life have wrongly conflated objections to a child's wrongful life claim with objections to involuntary parenthood claims. Involuntary parenthood claims do not value the worth of the child. It is true that at the time of the operative negligence, whether pre- or post-conception, the mother did not wish to become or remain pregnant. The action deals with the consequences to the parents of a pregnancy that was unwanted *at the time the tort was committed*. The guiding principle of tort damages is *restitutio*

in integrum – put the parents in the position they would have been in had the tort not been committed. The “had the tort not been committed” point of reference arises long before the child is born. It is not necessarily true, or even more likely than not to be true, that by the time of the birth or afterwards the child is an unwanted child. Once the unwanted pregnancy is established and accepted as a matter of fact, and certainly once the child is born, the child may well be a wanted child. Recovery should not depend on whether the child is loved or loathed. The wrong is rooted in the damage to the mother’s right to reproductive autonomy. There is nothing inherent in the “involuntary parenthood” action that requires that the parents have an objection of any sort to the child who is eventually born. There is nothing about the “involuntary parenthood” action that suggests that the parents are seeking damages for a “wrongful child.”

The right of a woman, or a woman and her partner acting in concert, to make reproductive choices lies at the core of the involuntary parenthood action. Lord Bingham put it more broadly saying the mother’s interest is “the opportunity to live her life in the way that she wished and planned.”²³ The involuntary parenthood action deals with the parents’ claim to recover pecuniary damages they suffer as the result of negligently inflicted damage to their right to reproductive autonomy. It is quite possible that the “inherent value of human life” rhetoric is simply a device employed to constrain reproductive autonomy. There is arguably a rational connection between these core values and the background facts of involuntary parenthood such as abortion and sterilization. Having failed to outlaw reproductive autonomy, this is a line of argument that would appeal to judges who wish to constrain it.

In Canada, Australia and the UK, a woman has a right, however constrained in practice, to use birth control, to

²³ *Rees, supra* note 1 at para 8.

undergo sterilization and to undergo an abortion.²⁴ Some judges in Australia and the UK have argued that these are not “rights,” but merely “freedoms.”²⁵ This can only mean that these judges believe that the mother is entitled to consume these medical services (the freedom), but has no right to full compensation if the medical services are performed negligently. There are people who object to the existence and exercise of some or all aspects of reproductive autonomy. Included among them are judges, some of whom allow their objections to influence their judgment in involuntary parenthood cases. If they insist on limiting the reproductive autonomy of women and families, they should do so explicitly and justify their position openly. It is disingenuous to pay lip service to reproductive freedom and to simultaneously gut it.²⁶

There are numerous reasons why a woman and her partner might wish to prevent pregnancy or birth. They may involve health concerns for the mother or the putative child. They may involve financial or lifestyle concerns. One partner’s reasons may differ from the others. Decisions may be based on all these factors and more. Some observers may believe that they would have made a different choice in the same circumstances. Others may feel the mother’s choice was irrational, or repugnant. Provided the exercise of reproductive autonomy is lawful, which it should be as part of the right to bodily autonomy, the mother is entitled to make it. The law should be compelled to respect a woman’s reproductive

²⁴ See e.g. *Kealey*, *supra* note 4 at para 59; *Cattanach*, *supra* note 1 per Gleeson CJ at para 3 and 8, and per McHugh & Gummow JJ at para 66; *Rees*, *supra* note 1 per L Bingham at para 8, and per L Millet at para 123.

²⁵ See *Cattanach*, *supra* note 1 per Gleeson CJ at para 23; *Rees*, *supra* note 1 per L Hope at para 70.

²⁶ For example, contrast the words of Gleeson CJ in *Cattanach*, *supra* note 1 at paras 3 and 8 with his comment in para 23.

autonomy in the same way as it protects bodily autonomy and integrity. One entirely foreseeable consequence of the wrong is that the parents are now incurring the cost of rearing a child that they would not have incurred but for the medical negligence. Ordinarily the law of torts would attempt to make an award of damages that would put the parents in the position they would have been in had the tort not been committed, as far as money is able to do so.

The departure from the ordinary rules of negligence law is a common characteristic in involuntary parenthood cases. *Prima facie*, negligent defendants ought to be held fully liable for all reasonably foreseeable loss to foreseeable plaintiffs caused by their negligent breach of their duty of care.²⁷ Involuntary parenthood actions are, after all, negligence actions that fall within a well-recognized sub-category, medical malpractice. The courts may properly determine that the ordinary rules of negligence law must be abrogated or modified in a particular type of case. However, we should be very wary when they do so. The law of negligence is replete with rules and exceptions applied in an unjustified and discriminatory fashion to the detriment of women and members of minority groups.²⁸ Involuntary parenthood actions deal primarily with

²⁷ See per L Hutton in *Rees*, *supra* note 1 at para 98. See also Adjin-Tettey, *supra* note 5 at paras 87, 90, and 92. At para 100 the author points out that foreseeability is the rule in other medical malpractice cases based on the loss of patient autonomy. The “ambit of the wrongdoing” challenge to foreseeability is discussed below.

²⁸ Adjin-Tettey, *supra* note 5, effectively employs gender discrimination as the lens with which to view the courts’ failure to compensate for child rearing costs. She has published other analyses of gender discrimination in tort law. See e.g. “Discriminatory Impact of Application of *Restitutio in Integrum* in Personal Injury Claims” in Justice Robert Sharpe & Kent Roach, eds, *Taking Remedies Seriously* (Ottawa: CIAJ, 2010) 119; “Sexual Wrongdoing: Do the Remedies Reflect the Wrong?” in Janice Richardson & Erika Rackley, eds, *Feminist Perspectives on Tort Law* (New York: Routledge, 2012);

the uniquely female aspects of reproductive autonomy and with damage inflicted on mothers.²⁹ The refusal to compensate for the quantifiable and foreseeable costs of rearing a child discriminates against parents, but especially against women who are mothers.³⁰ Such discrimination requires a convincing justification.

and “Replicating and Perpetuating Inequalities in Personal Injury Claims through Female Specific Contingencies” (2004) 49 McGill L J 309. See also Rodgers, *supra* note 10; Bruce Feldthusen, “Discriminatory Damage Quantification in Civil Actions for Sexual Battery” (1994) 44 UTLJ 133 (failure to recognize pecuniary losses suffered by female plaintiffs in civil sexual battery cases); and Bruce Feldthusen, “Civil Liability for Sexual Assault in Aboriginal Residential Schools: The Baker Did It” (2007) 22 CJLS 61 (failure to apply standard rules imposing joint and several liability for indivisible harm).

²⁹ Fathers may also recover, but the father’s claim is derivative of the mother’s. See *Freeman v Sutter*, *supra* note 14.

³⁰ Women with children are an especially vulnerable group. See Xuelin Zhang, “Earnings of Women With and Without Children” (2009) 10:3 Perspectives on Labour and Income 5 <<http://www.statcan.gc.ca/pub/75-001-x/2009103/article/10823-eng.htm>> accessed 6 Aug 2014. Women spend about twice the time doing unpaid child care as do men. See Anne Milan, Leslie-Ann Keown & Covadonga Robles Urquijo, “Families, Living Arrangements and Unpaid Work”, in Statistics Canada, *Women in Canada: A Gender-based Statistical Report*, Catalogue No 89-503-X (Ottawa: Statistics Canada, 2011) <<http://www.statcan.gc.ca/pub/89-503-x/2010001/article/11546-eng.pdf>> accessed 6 Aug 2014.

**ONLY EXCEPTIONAL CARE COSTS ALLOWED FOR
CHILD BORN WITH A DISABILITY³¹**

A widely favoured exception to the pure “no recovery” position allows, in addition to the costs related to the pregnancy itself, damages for the extra care costs related to the special needs of a child born with a disability. Under this approach, damages for the cost of raising a healthy child remain unrecoverable. This exceptional treatment in the case of a child born with a disability is probably the law in the UK.³² Several Canadian courts have supported this position.³³ This is also the statutory rule in three Australian states.³⁴

The popularity of the disability exception is not surprising. The damages claimed are familiar to our legal

³¹ As explained below, the use of terms such as “born with a disability” versus “healthy child” is unnecessary and every attempt to avoid this terminology has been made herein. The use of the terms “disabled child,” and “normal child,” quite common in the UK and Australia one assumes from *Rees, supra* note 1 and *Cattanach supra* note 1, is less common in Canada where it would usually be regarded as offensive.

³² This was the rule established in *Parkinson, supra* note 18. It appears this is still the law in the UK after *Rees, supra* note 1. This is discussed *infra* in the text accompanying notes 74-81.

³³ *Cherry (Guardian ad litem of) v Borsman*, [1992] BCJ No 1687, 16 BCAC 93; *Joshi (Guardian ad litem of) v Wooley*, [1995] BCJ No 113, 4 BCLR (3d) 208. Such recovery was approved in *Kealey, supra* note 4, but without necessarily ruling out recovery for the cost of raising a healthy child in an appropriate case. See *infra* notes 42-48 and accompanying text. The right to recover the cost of exceptional care was conceded, and the further right of the parents to recover for the cost of exceptional care after the child reached the age of majority was approved in the Ontario Court of Appeal in *Bovingdon v Hergott, supra* note 7.

³⁴ *Supra* note 12.

system. They will resemble those routinely claimed in a serious personal injury case. The costs that the parents will incur are apparent and possibly enormous. No caring society should let those costs fall where they land by chance, let alone when they arise from medical misadventure. The question is not why the law allows recovery for the costs of meeting special needs, but rather why it does not also compensate the logically identical costs of rearing a so-called healthy or normal child.

Several judges have observed, quite properly, that the law ought not to distinguish between the worth of a healthy child and a child born with a disability. Fortunately, it is not necessary to do so. It is an error to describe the results of involuntary parenthood in such terms, whether recovery is allowed or not. What is in issue is the right to recover damages for the cost raising a child. What is not in issue is the value of the child. The point is not whether the child was born with a disability. The point is not whether the child has a formally recognized disability. The point is what it will cost to provide the requisite level of care for the child. The basic costs of rearing a child will vary according to each child's needs. It costs more to feed, house, clothe and educate some children than others. It is superfluous, demeaning and misleading to identify the child as having been born with a disability, let alone as being disabled, for the purposes of awarding damages in an involuntary parenthood action.

One could try to justify the distinction between "basic" and "special" child rearing expenses on the basis of quantum. The basic costs are surprisingly modest.³⁵ The parents' expenses and the corresponding damage awards are likely to be larger, much larger, in the case of special needs. Such a distinction would work like catastrophic loss insurance, with a large deductible for the cost of rearing a healthy child. Arguably this is a rational response to the social problem of

³⁵ *Infra* note 97.

involuntary parenthood. But it is not a common law tort, corrective justice approach. It is an exceptional approach dependent on an unnecessary exercise of discrimination.

One could try to justify the distinction between “basic” and “special” child-rearing expenses on the basis of credibility in proof of loss. Lax J in *Kealey* attempts to do this:³⁶

Moreover, to draw a distinction between children born with disabilities and those born healthy seems wrong. Every life has value. But, the financial and emotional burdens imposed on parents who are charged with the responsibility of caring for a disabled child are far more apparent to me than the financial and emotional burdens imposed on the Kealeys here. I do not think that this is merely a question of the measure of damages. Rather, it goes to the question of whether or not there is in fact an injury to redress.

Evidently, Lax J’s view was that happy families do not experience a loss when deprived of their reproductive autonomy.

L Millet was perhaps more candid when he expressed the following view in *Rees*:³⁷

A disabled child is not “worth” less than a

³⁶ *Kealey*, *supra* note 4 at para 97.

³⁷ *McFarlane*, *supra* note 1 at para 112. L Millet did not find it necessary to resolve whether parents of children born with disabilities should be able to recover their extra costs over and beyond the £15,000 conventional sum he awarded to the parent of a healthy child. The conventional sum approach is discussed immediately below.

healthy one. The blessings of his or her birth are no less incalculable. Society must equally “regard the balance as beneficial.” But the law does not develop by strict logic; and most people would instinctively feel that there was a difference, even if they had difficulty in articulating it. Told that a friend has given birth to a normal, healthy baby, we would express relief as well as joy. Told that she had given birth to a seriously disabled child, most of us would feel (though not express) sympathy for the parents. Our joy at the birth would not be unalloyed; it would be tinged with sorrow for the child's disability. Speaking for myself, I would not find it morally offensive to reflect this difference in an award of compensation that the birth of a child born with a disability would generate.

These remarks appear to transcend the question of parental care costs and focus on the injury to the child *per se*. Perhaps L Millet is dealing with what he suspects are the non-pecuniary detriments of raising a child born with a disability? Interestingly, neither he nor anyone else has been prepared to consider explicitly the “setoff of benefits” approach in the case of children with need for special care.

There is no valid justification for distinguishing care costs on the basis of disability. McHugh and Gummow JJ put it well in *Cattanach*.³⁸

The reliance upon values respecting the importance of life is made implausible by the reference to the postulated child as “healthy.” The differential treatment of the worth of the

³⁸ *Cattanach*, *supra* note 1 at para 78.

lives of those with ill health or disabilities has been a mark of the societies and political regimes we least admire. To prevent recovery in respect of one class of child but not the other, by reference to a criterion of health, would be to discriminate by reference to a distinction irrelevant to the object sought to be achieved, the award of compensatory damages to the parents.

The only purpose served by dividing recoverable damages into two categories – child-rearing costs for healthy children and child-rearing costs for so-called disabled children – is to preserve a rule that denies recovery for the costs of rearing a healthy child. The justifications for refusing to compensate for the ordinary costs of care are inadequate. If the law simply allowed recovery for the costs of rearing any child born from an involuntary parenthood, the need to discriminate on the ground of disability, however benevolent it may seem, would disappear.³⁹

FULL RECOVERY WITHIN THE “AMBIT OF WRONGDOING”

There are several judicial approaches to child-rearing damages for wrongful pregnancy that give nominal approval to full recovery under the basic rules of tort law. However, the “pure full recovery” approach has only been approved in two

³⁹ Admittedly, the view that nothing should ever be awarded for the cost of child-rearing regardless of whether the child is born healthy or with a disability is equally logical. For all the reasons given earlier, it is also utterly flawed.

jurisdictions: Australia⁴⁰ and New Brunswick.⁴¹ In the other examples the courts impose limits to full recovery not ordinarily employed elsewhere in negligence law.

The “ambit of recovery” line of argument rejects “foreseeability” as the standard limiting rule to bound recovery for involuntary parenthood. Instead, it posits that claims to recover the cost of rearing the child are claims for pure economic loss. It concludes that ordinary negligence law governing economic loss would employ a different limiting rule than foreseeability, and restrict recovery to losses that fell within the “ambit of the wrongdoing.”

This “ambit of recovery” approach was first proposed by Lax J in *Kealey*.⁴²

Although courts which have considered wrongful pregnancy cases have purported to follow ordinary principles of negligence law to allow recovery, a closer analysis of the cases suggests that, foreseeable or not, damages are by

⁴⁰ *Cattanach*, *supra* note 1. The result was subsequently modified by legislation in three Australian states, essentially to restrict recovery to the extra cost of raising a child born with a disability. See *supra* note 12.

⁴¹ *Stockford v Johnston Estate*, *supra* note 13. See also *MS v Baker*, *supra* note 13. The child had serious health problems for the first five years, and was healthy thereafter. The court apparently approved full recovery applying the scope of the risk test from *Kealey*, *supra* note 4. This was in *obiter* because the plaintiff failed to establish negligence.

⁴² This was first approved in *Kealey*, *supra* note 4, and followed subsequently in *Hunter*, *supra* note 14 at para 20; and in *Mummery v Olsson*, [2001] OJ No 226 [*Mummery*]. It was approved by L Scott in *Rees*, *supra* note 1 at para 145, but rejected in the same case by L Millet at para 112.

and large awarded when the plaintiff is within the ambit of the defendant's wrongdoing. By this I mean that the consequences of the failed sterilization causes [sic] an actual impairment to the interest which the sterilization sought to protect. In my view, this is evident from each of the seminal wrongful pregnancy cases resulting in the birth of a healthy child in the United States, England and Canada.

According to this line of argument, a mother who had undergone a failed sterilization might recover the cost of rearing a healthy child if the purpose of sterilization had been to protect her from the economic consequences of pregnancy.⁴³ On the other hand, a mother who sought sterilization to avoid a child being born with a hereditary disease would not, on this theory, have suffered any loss if the child were born without the disease.⁴⁴

The “ambit of the wrongdoing” approach from *Kealey* has been employed in Ontario to permit recovery of exceptional extra care costs in the case of children born with

⁴³ See also *MS v Baker*, *supra* note 13.

⁴⁴ This example was used by Chamberland J in the Court of Appeal in *Suite c Cooke*, [1993] RJQ 514, 15 CCLT (2d) 15 (Sup Ct), *aff'd* [1995] RJQ 2765 (CA); and quoted in *Kealey*, *supra* note 4 at para 75. In *Kealey* at para 89 the court said:

I wish to make clear that the result in this case does not finally determine whether, in all cases, damages for child-rearing costs are or are not recoverable. This is not a case where a sterilization was sought to protect a mother's health and the mother became ill, impairing her ability to care for the child. Nor is it a case where a sterilization was sought to avoid the transmission of a hereditary condition and the child was born diseased. This is not a case of economic necessity, imposing unreasonable financial burdens on an impoverished family.

disabilities,⁴⁵ and to refuse recovery in the case of a healthy child.⁴⁶ It was explicitly adopted in the 2008 New Brunswick decision in *Stockford v. Johnston Estate* to allow the cost of raising a healthy child.⁴⁷ It has not found favour elsewhere in Canada, or in the UK or Australia.

There are practical shortcomings with the “ambit of the wrongdoing” approach. How will the court ever discover the parents’ true motive after the fact, if indeed there was any common single motive? Self-serving, often unverifiable testimony is inevitable, from the parents and the defendants. The prospect of distasteful and symbolically damaging testimony is a legitimate concern. Similar reasons underlie the reason for rejecting a purely subjective test of causation in medical malpractice cases.⁴⁸

It is probable that financial considerations will be one consideration among several in involuntary pregnancy cases. A liberal interpretation of what degree of financial motivation will meet the ambit of the wrongdoing test could render the restriction relatively meaningless. The approach in *Kealey* raises the opposite concern. Lax J’s judgment would seem to require the law to distinguish between the “impoverished”⁴⁹

⁴⁵ *Hunter*, *supra* note 14 at para 20. Liability was based on a failure to refer the mother to a genetic consultation. The children were born with multiple sclerosis. The total damage award was almost \$3m, almost \$2m for the cost of child rearing. It is unclear whether by following *Kealey* the court in *Hunter* was adopting the “within the ambit of the wrongdoing” approach, or simply allowing the exceptional costs of care as recoverable regardless.

⁴⁶ *Mummery*, *supra* note 42. Although it was not an issue in *Bovingdon*, *supra* note 7, the facts are consistent with the ambit of the wrongdoing test.

⁴⁷ *Supra* note 13.

⁴⁸ *Reibl v Hughes*, [1980] 2 SCR 880.

⁴⁹ *Kealey*, *supra* note 4 at para 89.

parents who may recover and the middle class parents who may not.⁵⁰ Rules based explicitly on *ad hoc* considerations of distributive justice are rare in the common law of torts where corrective justice usually carries the day. It is curious how they seem to trump corrective justice in involuntary parenthood cases.⁵¹

There are also doctrinal objections to the “ambit of the wrongdoing” approach. Most fundamentally is the characterization of the claim as one for “economic loss.” Here we may run into an aversion to calling a pregnancy an “injury” or a “loss.” However, it is difficult to imagine a more fundamental interference with the primary right to personal autonomy and integrity that negligence law protects.⁵² An unwanted pregnancy is a clear example of a physical as opposed to an economic intrusion.⁵³ The cost of raising a child born of an unwanted pregnancy is a consequential economic loss, consequential on physical interference. It is not a pure economic loss. Foreseeability, not ambit of the wrongdoing, is the proper test in such cases.

Even if one were to describe the claim as one for pure economic loss, which it is not, the ambit of the wrongdoing approach cannot be justified doctrinally. The approach to economic loss that attracted Lax J is specific to negligent

⁵⁰ Lifestyle choices are not respected under this approach.

⁵¹ Consider also the concern that liability for ordinary child rearing costs might damage the National Health Services expressed by Kirby J in *Cattanach*, *supra* note 1 at para 178 and approved by L Bingham in *Rees*, *supra* note 1 at para 6. The amounts at issue are unlikely to bankrupt any national health service. Nor is a case made for why the mothers have to subsidize the National Health Service.

⁵² See Allan Beever, *Rediscovering the Law of Negligence* (Portland: Hart Publishing, 2007) at ch 2.

⁵³ *Ibid*, at ch 12.

misrepresentation, a cause of action with a very different foundation than medical malpractice or other types of economic loss claims.⁵⁴ The judge was inspired by an excellent article written by Professor Chapman analysing a rule of law established in Canada's leading negligent misrepresentation case involving pure economic loss, *Hercules Management v. Ernst & Young*.⁵⁵ The defendants were employed by a corporation to prepare corporate audits as required under statute. Shareholders of the corporation foreseeably relied on the negligently prepared statements to make private investment decisions. Although the court recognized sufficient proximity based on this reasonable foreseeability, liability was denied at the second stage of the *Anns* framework because of the possibility of indeterminate liability. The court adopted what is sometimes called the "end and aim" rule to restrict the scope of recovery in misrepresentation to losses suffered within the context of the purpose for which the report was given. The corporation itself was therefore owed a duty of care. The duty did not extend to individual shareholders' private investment decisions. Courts in other jurisdictions would employ the "end and aim" test at the proximity stage to define the type of relationship that would support the duty.⁵⁶ Although not its purpose when employed as part of the proximity analysis, the

⁵⁴ The duty in misrepresentation is based on the defendant's assumption of responsibility and the plaintiff's reliance, and not governed by *Donoghue v Stevenson*, [1932] AC 462. Some wrongful birth cases, but not all, can be explained under both approaches. See Gordon T Houseman, "Wrongful Birth as Negligent Misrepresentation" (2013), 71 UT Fac L Rev 9. The reliance-based duties in misrepresentation derived from *Hedley Byrne v Heller*, [1964] AC 465 are entirely different from those at the heart of other claims for pure economic loss. See Beever, *supra* note 52 at ch 12.

⁵⁵ *Hercules Management v Ernst & Young*, [1997] 2 SCR 165.

⁵⁶ *Caparo v Dickman*, [1990] UKHL 2, [1990] 2 AC 605; and *Esanda Finance Corp v Peat Markwick Hungerfords* (1997), 188 CLR 241, [1997] HCA 8.

“end and aim rule” effectively eliminates the potential for indeterminate liability.

Neither proximity nor indeterminacy is problematic in an involuntary parenthood case. The issues present in *Hercules* bear no relationship to those in an involuntary parenthood case. The type of indeterminacy that has concerned some judges in involuntary parenthood cases, if it really is an indeterminacy problem at all, is not addressed by an “ambit of the wrongdoing” test.⁵⁷ In addition, the duty in misrepresentation is one that the defendant voluntarily assumes and ought therefore to be restricted to precisely what duty was assumed. Even if one could argue that the duty in an involuntary parenthood case was voluntarily assumed, the duty so assumed would be assumed to the mother, and would be the duty to prevent pregnancy or birth. Preventing pregnancy or birth was the “end and aim” of the medical service. The cost of raising the child falls precisely within the ambit of the wrongdoing. The mother’s motives are irrelevant.⁵⁸ The mother’s position is analogous to the corporation that commissioned the audit in *Hercules*, not to the third party shareholders seeking to take advantage of a service provided to others for a different purpose.

Foreseeability is the limiting concept in ordinary negligence law. Even if the involuntary parenthood claim were

⁵⁷ In *Cattanach*, *supra* note 1 at paras 30-39 Gleeson J develops the indeterminacy argument derived from the fact that a family might claim damages for a broad range of items including gifts, weddings, university education, and so on. The “ambit of wrongdoing” limit does not address this concern. Gleeson’s examples illustrate more of a potential problem of rule imprecision than of indeterminacy. The same potential problem could exist in any future care assessment in a serious personal injury case, and the courts have developed guidelines to address it. See *infra* text accompanying notes 94-97.

⁵⁸ See L Millet in *McFarlane*, *supra* note 1 at 1003.

described as one for pure economic loss, that does not in and of itself change this. There is no functional or doctrinal justification for replacing foreseeability with an “ambit of the wrongdoing” approach in an involuntary parenthood case.

OFFSETTING BENEFITS

On the surface, the “offsetting benefits” position is the opposite of the inherent “value of life” position. Courts that adopt the offset position purport to accept that the plaintiffs are entitled to full compensation for the cost of child rearing. However, they set off the inherent benefit of raising a child. Although not inevitable, in practice such courts assume that these benefits meet or exceed the cost of raising a healthy child.⁵⁹ They therefore award nothing for the costs of raising a healthy child. Damages for the extra exceptional cost of raising a child who has special needs may, however, be compensable. Those who take the “offsetting benefits” position arrive by a different route at the same place as members of the “inherent value of life” school of thought. It is not certain that they do so for different reasons.

The “offsetting benefits” approach is another example of employing a legal rule in an involuntary parenthood case that is not used in standard negligence law. The benefits of raising a child are largely non-pecuniary.⁶⁰ By definition they

⁵⁹ Quebec is a firm adherent to this approach. See *Cataford c Moreau*, [1978] JQ no 302, 114 DLR (3d) 585 (Sup Ct); and *Suite c Cooke*, *supra* note 44. The approach was rejected in *Kealey*, *supra* note 4 but the court would have assessed the net benefit at zero had it adopted it. According to L Bingham in *Rees*, *supra* note 1, no judge favoured the net benefit approach in either *McFarlane*, *supra* note 1 or in *Cattanach*, *supra* note 1.

⁶⁰ There may be pecuniary benefits such as government support related to child-rearing. None of the objections to offsetting non-pecuniary benefits apply to these. One should insist only that these collateral benefits are treated like collateral benefits in other cases, unless a

cannot be measured accurately in money, even assuming perfect information. A court may assign a monetary value to a non-pecuniary benefit or loss, but the figure must be arbitrary given the nature of the loss. In contrast, the costs of raising a child are pecuniary. They may be difficult to quantify accurately and fairly, perhaps particularly so in an involuntary parenthood case, but in theory it can be done.⁶¹ The law ought not to offset pecuniary losses with non-pecuniary benefits. Like should be offset against like. The law does not offset an award for lost earning capacity against the assumed joy of unemployed leisure.⁶² The law would not reduce pecuniary damages awarded under Fatal Accidents legislation if there were evidence that the late husband was a nasty individual who made his wife's life miserable.⁶³ No precedent for offsetting pecuniary damages with non-pecuniary benefits in negligence has ever been cited in an involuntary parenthood case.

The conclusion that every child constitutes a net benefit to parents is false. At best, it is an unproven generalization. Every child does not generate “. . . innumerable benefits in the form of personal satisfaction and happiness . . .”⁶⁴ for every parent. Pretending otherwise does not make it so. Some unwilling parents will have chosen originally not to have an additional child precisely because they anticipated that another child would not bring them much joy. A fictional

compelling case for deviating from the general rule is made. See *Stockford*, *supra* note 13 where it is assumed that deducting pecuniary benefits is a simple exercise of the collateral source rule.

⁶¹ This is a legitimate concern, discussed *infra* in the text accompanying notes 94-97.

⁶² See *Cattanach*, *supra* note 1 per McHugh & Gummow JJ at paras 85-90. This was criticized unconvincingly by Gleason CJ at para 37.

⁶³ *Stockford*, *supra* note 13 at para 107.

⁶⁴ *Kealey*, *supra* note 4 at para 82. *Contra* see J Ellis Cameron-Perry, “Return of the burden of the ‘blessing’” (1999), 149 NLJ 1887.

public transit passenger might think such parents misguided or worse. But this is a lawful choice. The parents are better-placed than the courts to assess the net benefits to them of having an additional child. Then too, there are the children who “only a mother could love.” Parents may love their children without experiencing much parental satisfaction or happiness. They may not love their child at all.

In theory, these problems might be addressed by evidence. Courts do assess non-pecuniary damages and the amounts awarded could be informed by evidence of comparative loss. The same could be done with non-pecuniary benefits. In several Canadian cases, when declining to compensate for the cost of raising a child, the courts have observed that the parents were *in fact* experiencing the joys of child rearing.⁶⁵ None have yet to deal with a parent testifying that the child brought no joy, a realistic possibility, although it would be distasteful and potentially damaging to the child. The courts understandably do not want to adopt a rule that encourages parents to give self-serving and symbolically unattractive testimony that might well harm the child. More fundamentally, if the law were to begin to refine the quantification of the joys of parenthood, the law would be treating a child, and for that matter, human life, like a commodity. No court has ever indicated a desire to do so.

Most judges are aware of the legitimate difficulties of attempting to quantify the value of parental satisfaction and joy in individual cases. However, the decisions to refuse to

⁶⁵ This seems to have been the dominant reason for denying care damages in *Kealey*, *supra* note 4. Cf. *Fredette v Wiebe* (1986) 4 BCLR (2d) 184, 29 DLR (4th) 534, a case in which the mother testified she would have wanted a child eventually, just not at the time when she was a teenaged single mother. The reasons are unclear but she may have recovered pecuniary damages, and did recover non-pecuniary damages, related to the accelerated birth.

compensate because of the impossibility of quantifying, or to simply assume that the benefits exceed or offset the cost of raising the child, do not follow logically from these difficulties.⁶⁶ The pecuniary costs of child rearing can be quantified as accurately in these cases as in standard personal injury cases. The quantification difficulties arise from the offsetting approach, not from the damages claim itself. The logical solution is to follow the ordinary rules of negligence law and to abandon entirely the futile attempt to offset non-pecuniary benefits.

It is interesting to speculate as to why some judges conclude that the impossibility of making the offset approach work justifies an assumption that there is a net benefit to child rearing, as opposed to a perfect set-up or net loss. Perhaps they believe that the benefits of child rearing *should* always outweigh the costs, and that the state ought not to support parents who feel otherwise. The offsetting benefits approach could be employed in an effort to justify that decision. The similarity to the inherent value of life school of thought is evident in such an approach. Another possibility is that some judges sincerely believe that the benefits of raising a child always *do in fact* outweigh the costs. They would then have a sincere belief in the risk of over-compensation.⁶⁷ The question remains why such a speculative and unquantifiable “risk” is considered a more serious problem than ignoring patient

⁶⁶ There are two variants of the argument. One is that there is a net benefit. This is the Quebec approach. See *supra* note 60. The other is that the impossibility of making the calculation in itself justifies denying the claim. See eg L Millet in *Rees*, *supra* note 1 at para 111 taking issue with Lady Hales’ “deemed equilibrium” concept in *McFarlane*, *supra* note 1.

⁶⁷ This explanation is easier to reconcile with the otherwise illogical decision to allow recovery for extra exceptional care costs related to raising a child born with a disability, but not allowing for basic costs of raising a child born healthy. See above section “Only Exceptional Care Costs Allowed for Child Born with a Disability” at p 17.

choice, under-compensating parents, and under-detering medical malpractice.

DUTY TO MITIGATE: ABORTION AND ADOPTION

Reproductive freedom could be a two-edged sword. If a woman becomes pregnant against her wishes she will sometimes, depending on local access problems, have the option of undergoing a safe abortion. Of course the law cannot require her to do so, but a few judges have observed that a failure to abort or place the child for adoption could constitute a failure to mitigate damages.⁶⁸

It is understandable that no Canadian court has actually recognized a duty to mitigate by abortion or adoption. In other contexts, tort law is reluctant to impose duties to mitigate that interfere with legitimate rights to make personal choices.⁶⁹ Duties to mitigate are usually employed in a business context.⁷⁰ A duty to mitigate by abortion is a particularly dangerous line of argument. Abortion is an intensely personal matter. Few judges, and certainly those who are in the “inherent value of human life” school of thought, would wish the law to develop rules that effectively and symbolically promoted abortion as

⁶⁸ See e.g. *Keats v Pearce* [1984] NJ No 271, 48 Nfld & PEIR 102; and *Kealey*, *supra* note 4 at para 87. In *Leek v Vaidyanathan*, 2011 ONCA 46, the court declined to resolve the question on a preliminary motion holding a trial record was required to consider the question.

⁶⁹ See e.g. the discussion on limits to the duty to mitigate in the context of catastrophic injury in Canada’s leading personal injury damages decision, *Andrews v Grand & Toy Alberta*, [1978] 2 SCR 229 [*Andrews*]

⁷⁰ In a personal injury case the plaintiff must mitigate by making a rational treatment choice, *Janiak v Ippolito*, [1985] 1 SCR 146. The failure to terminate a pregnancy or place for adoption is unlikely to be regarded as irrational.

birth control.⁷¹ A requirement to mitigate by placing the child for adoption avoids some of the abortion baggage. But it too would thrust the court unnecessarily into the volatile and value-laden relationships amongst the state, women, and families.⁷²

Finally, such a duty to mitigate would apply to damages related to the pregnancy and birth itself, and also to damages for the extra costs of raising a child born with a disability. The duty to mitigate by abortion or adoption would effectively eliminate entirely the action for involuntary parenthood. Experience has shown us that few judges are inclined to go that far.

CONVENTIONAL SUMS AND NON-PECUNIARY DAMAGES

In 1999, the UK House of Lords (“UKHL”) held unanimously

⁷¹ The case for imposing a duty to mitigate by abortion may appear stronger in wrongful birth cases which themselves arise from negligently performed abortions. It might seem more difficult for a mother in such a case to argue, for example, that she had principled objections to abortion. This line of reasoning is false. There is no factual basis to distinguish someone who has once elected an abortion from someone who has not. See *Fredette*, *supra* note 65.

⁷² In *McFarlane*, *supra* note 1 L Steyn said:

I cannot conceive of any circumstances in which the autonomous decision of the parents not to resort to even a lawful abortion could be questioned. For similar reasons the parents' decision not to have the child adopted was plainly natural and commendable. It is difficult to envisage any circumstances in which it would be right to challenge such a decision of the parents. The starting point is the right of parents to make decisions on family planning and, if those plans fail, their right to care for an initially unwanted child. The law does and must respect these decisions of parents which are so closely tied to their basic freedoms and rights of personal autonomy.

See also *Rees*, *supra* note 1 at para 136 per L Scott.

in *McFarlane v. Tayside Health Board* that the cost of rearing a healthy child was not recoverable.⁷³ In 2001, the EWCA held in *Parkinson v. St James and Seacroft University Hospital NHS Trust* that the mother could recover the additional costs of raising a child born with severe disabilities.⁷⁴ *Parkinson* was not appealed. In 2003, the UKHL decided *Rees v. Darlington Memorial Hospital NHS Trust*.⁷⁵ *Rees* arose from a failed sterilization undergone by a mother who had a serious visual disability. She believed she would not be able to properly parent a child should she give birth to one. Her child was born healthy. The seven Lords in *Rees* unanimously affirmed the decision in *McFarlane* to disallow claims for the cost of rearing a healthy child.⁷⁶

The holding in *Parkinson* was not in issue in *Rees*. Nevertheless, the majority in *Rees* seems to have supported the right to recover additional special care costs.⁷⁷ Three of the seven Lords would have distinguished *Rees* from *McFarlane* and allowed the mother to recover the cost of raising a healthy child.⁷⁸ A majority of four would not allow the mother to

⁷³ *Supra* note 1.

⁷⁴ *Supra* note 18.

⁷⁵ *Supra* note 1.

⁷⁶ As will be evident from what follows, the impact of *McFarlane*, *supra* note 1, is now mitigated because the mother will be entitled to a £15,000 conventional sum according to the decision in *Rees*, *supra* note 1.

⁷⁷ *Rees*, *supra* note 1 per L Steyn at para 35, L Hope at para 57, L Hutton and para 91, and possibly L Scott at para 147. L Millet did not find it necessary to decide. Strictly speaking, the holding in *Parkinson*, *supra* note 18 was not at issue in *Rees*. L Bingham at para 8 and L Nichols at para 18 would not permit recovery for the extra costs of care.

⁷⁸ *Rees*, *supra* note 1 per L Steyn at para 48, per L Hope at para 78 & per L Hutton at para 98.

recover her pecuniary damages. This majority held that the mother was entitled instead to recover a “conventional sum” of £15,000 in recognition of the damage to her reproductive autonomy.⁷⁹ Two of those four would have preferred to overrule *Parkinson* had that decision been in issue. They favoured awarding only that conventional sum in all cases, regardless of whether the claim was for ordinary child rearing expenses, or for exceptional expenses related to special needs.⁸⁰ L Bingham described the conventional award as follows:⁸¹

This solution is in my opinion consistent with the ruling and rationale of *McFarlane*. The conventional award would not be, and would not be intended to be, compensatory. It would not be the product of calculation. But it would not be a nominal, let alone a derisory, award. It would afford some measure of recognition of the wrong done. And it would afford a more ample measure of justice than the pure *McFarlane* rule.

It is difficult to regard the conventional sum approach as anything other than an attempt to find a compromise amongst the strongly competing positions found in the involuntary parenthood case law.⁸² There is nothing inherently

⁷⁹ *Rees*, supra note 1 per L Bingham at para 8, per L Nichols at para 17, per L Millet at para 125, & per L Scott at para 148.

⁸⁰ *Rees*, supra note 1, per L Bingham at para 9, & per L Nicholls at para 18.

⁸¹ *Rees*, supra note 1 at para 8.

⁸² The HL has never been keen to reverse its previous decisions. *McFarlane*, supra note 1 had been decided only a few years earlier. Subsequent to the arguments, but before the decision in *Rees*, supra note 1, the majority of the HC of Australia had rejected *McFarlane* in *Cattanach*, supra note 1. L Steyn at para 46 made it clear he regarded the conventional sum approach as an attempt to circumvent *McFarlane*.

wrong with compromise, provided it is scrutinized as such. In assessing this compromise it is important to keep in mind what L Steyn called the “heterodox nature of the proposed solution”⁸³ and to recall the concern expressed earlier about deviating from ordinary tort rules, especially when doing so has a discriminatory impact.

On the surface, awarding a conventional sum appears to be a win-win solution. The mother’s right to reproductive autonomy was symbolically affirmed in eloquent prose by L Bingham. It was recognized with an award of damages. Those who believe that the birth of a child can never be the subject of damages should also be satisfied. This approach severs completely the mother’s recovery from the cost of rearing the child. This is what *Rees* really stands for.

The problem is that the mother was not fully compensated. Indeed, the UKHL would not even admit that she was entitled to compensation. And as discussed earlier, the inherent value of life argument does not logically support limiting the mother’s claim in the first place.

There seem to be only two senses in which this can be called a “win-win” situation. The first is to regard it as a fresh approach to the setoff exercise. The court would be recognizing that there is a net cost to raising a healthy child. What would be new is that setoff of non-pecuniary benefits would be less than the full cost of care. No one in *Rees* supported the conventional award on this basis. The setoff approach is inherently flawed. Adjusting the arbitrary numbers does not change this.

Alternatively, this conventional sum could be called a “win” on purely pragmatic grounds. Mothers would have to accept that whatever the merits of their claim, this is as good as it is going to get. Something is better than nothing. Although it

⁸³ See *Rees*, *supra* note 1 per L Steyn at para 45.

is far less than the cost of raising a healthy child, £15,000 is not a derisory sum.

Pragmatic compromise is the essence of tort law. The overwhelming majority of cases are settled one way or another. There was nothing stopping the parties in *Rees* from settling for £15,000. However, a judicially imposed compromise of this sort is unheard of. As L Steyn pointed out, there is no authority for adopting the conventional sum approach in the UK or elsewhere.⁸⁴ Judicial decisions are not compromises, in legal theory or in fact. The principled application of legal rules may well result in each party achieving something. The defendant may be found negligent, but recovery reduced because the plaintiff's own negligence contributes to the loss, for example. That is quite different from a court adopting a rule that effectively tries to give something to everyone because the judges cannot agree on who is entitled to what.

In *Rees*, L Hope raised a different objection to the conventional sum approach. He explained the role of conventional sums in assessing claims for general damages in UK law. Some damages are not capable of monetary quantification so conventional sums are used to establish a comparative, if arbitrary, scale of loss.⁸⁵ He then pointed out that the effect of the conventional sum approach in *Rees* was to reject the quantifiable claims for special damages and allow recovery only for the non-quantifiable general damages.⁸⁶ This

⁸⁴ *Rees*, *supra* note 1 at para 46. He also felt it was impermissible for a court to adopt this solution.

⁸⁵ One problem with this critique is that a fixed conventional sum for each case eliminates the comparative injury approach which is the very reason for conventional awards according to L Hope.

⁸⁶ *Rees*, *supra* note 1 at paras 70-74.

he found objectionable.⁸⁷ It is not certain that L Bingham would have accepted this description of his conventional sum solution, let alone intended it. It does appear, however, that this is exactly what the courts of British Columbia have done.

A remarkable thing happened in British Columbia on July 14 and July 15, 2004. Decisions in *Bevilacqua v. Altenkirk*,⁸⁸ and then in *Roe v. Dabbs*,⁸⁹ were released in the Supreme Court by two different judges. Both were involuntary parenthood decisions involving claims for the cost of rearing a healthy child. Neither decision was referred to in the other. By striking coincidence, the novel reasons for judgment in each were virtually identical.

Both judges held that the parents were entitled to compensation, but that the cost of raising a healthy child was not a true measure of the loss. Rather, the parents were to be compensated for their non-pecuniary losses flowing from the involuntary parenthood. Significantly, both judges were convinced that awarding the cost of care without offsetting the non-pecuniary benefits would over-compensate the parents.⁹⁰

⁸⁷ The point would have to be made differently in Canada. The Supreme Court of Canada has eliminated the various types of general damages that L Hope was describing. Instead, it established a global head of non-pecuniary loss capped at \$100,000 in 1978 CAD. The court also rejected the comparative loss criterion for determining the amount. Instead, non-pecuniary damages were supposed to be quantified based on the plaintiff's need for solace. See *Andrews*, *supra* note 69.

⁸⁸ *Supra* note 11.

⁸⁹ *Roe v Dabbs*, 2004 BCSC 957, [2004] BCJ No 1485.

⁹⁰ *Bevilacqua*, *supra* note 11 at para 115; *Roe*, *ibid* at 196-201. Certainly there was no over-compensation in the end result. In *Roe*, after looking at damage awards in similar cases (which were assessed on different bases) the court awarded \$55,000 in non-pecuniary damages to the mother. Making similar comparisons in *Bevilacqua*, the court awarded “. . . \$30,000 to Mrs. Bevilacqua, the bulk of

However, they both recognized the practical difficulties with the offset approach.

In denying pecuniary damages, the BC courts reasoned that the cost of rearing a healthy child did not constitute a loss, but rather a redistribution of family resources. In their opinion, the family does not have fewer resources after the tort. They believe that the negligence merely redistributes resources among family members to account for the costs occasioned by the new child. It is true that an unplanned child does not necessarily reduce family income.⁹¹ It increases family expenses. This is a loss. This line of argument does not advance the case for denying recovery one bit. It is simply a more cumbersome, if apparently more orthodox method of seeking compromise than the conventional sum approach.

In fairness, in *Bevilacqua* Globerman J does an excellent job of raising different, but related and legitimate concerns.⁹² It is true that the amount that a parent may elect to spend on rearing a child is determined in part by parental choice about how to allocate family resources. Some parents may see university education as a necessity and others not. The law cannot regard unconstrained parental choice as the basis upon which to quantify damages caused by the tortfeasor. There must be some objective test or measure to control for this.

One possible solution could be to adopt the "Actual

which would be to compensate her for pregnancy and childbirth” and \$20,000 to the father, “primarily to compensate him for the readjustments he has had to make in response to the financial burdens of providing for [the child].” *Supra* note 11 at 214

⁹¹ This ignores the reduction in income incurred if one or both parents reduce their earnings to make time to care for the child.

⁹² *Supra* note 9 at paras 124-143.

Anticipated Expenditure” approach. This could rely on aggregate data about what level of expenditure a family of a particular size with a particular income typically spends on raising an additional child.⁹³ Such a combination of objective and subjective measure of loss is not unknown in personal injury cases.⁹⁴ It is also true, however, that the AAE approach favours wealthier parents who may elect to devote more resources to rearing a child than those parents who lack the resources to do so. At some point the elusive line between loss and investment benefit becomes of concern. There is much to be said for limiting recovery by some objective measure independent of family wealth. Of course, there is much to be said for that in other areas of tort law as well.

The solution to these difficulties according to the decisions in *Bevilacqua* and *Roe* is to deny the claim for pecuniary loss altogether and to award modest amounts for non-pecuniary damages. This was correctly criticized by L Hope in *Rees*.⁹⁵ It under-compensates the plaintiffs. It allows the court to pull a number out of a hat with no foundation, and leaves no objective basis for an appeal as to quantum. It employs a comparative loss approach to non-pecuniary damages that has been rejected by the Supreme Court of Canada.⁹⁶ There is a better way. The courts could employ data about what the average Canadian family of a certain size regardless of income would spend rearing an additional child. Or, the courts could adopt an evidence-based conventional sum to compensate for the pecuniary cost of raising a child. Either of these solutions would address the legitimate quantification

⁹³ *Bevilacqua*, *supra* note 9 at para 124.

⁹⁴ For example, in *Andrews*, *supra* note 69, the court used government data to determine what percentage of income the average Canadian spent on basic necessities.

⁹⁵ *Rees*, *supra* note 1 at paras 70-74.

⁹⁶ *Andrews*, *supra* note 69.

difficulties, and reduce the need for costly, unreliable expert evidence. The actual awards for the ordinary costs of rearing a healthy child would probably be much less than usually assumed.⁹⁷

CONCLUSION

Only a single Canadian court has yet approved recovery in an involuntary parenthood case for the full cost of raising a child.⁹⁸ Other Canadian courts have adopted no fewer than five different rules to limit such damages. The uncertainty in the law is unacceptable. In each of the limiting cases the damage limit was exceptional in that no such limit is employed in any other area of negligence law. As such, in each case the damage limit discriminates against parents, particularly mothers. These limits effectively require parents to subsidize medical malpractice.

⁹⁷ For example, in *Cattanach*, *supra* note 1 the parents were granted about \$100,000 CAD for child rearing. See *Gleeson* CJ at para 17. In *Kealey*, *supra* note 4, had the court recognized the claims, child rearing costs would have been assessed at about \$140,000. Christopher Sarlo argues that it is possible to raise a child on about \$3,000-\$4,000 a year, and even less if parents only include necessary expenses and are careful with their dollars. Christopher A Sarlo, *The Cost of Raising Children*, online: The Fraser Institute <<http://www.fraserinstitute.org/uploadedFiles/fraser-ca/Content/research-news/research/publications/MeasuringCostChildren.pdf>>. Sarlo's estimates do not include the cost of child care. Other estimates run between \$10,000 and \$20,000/ year depending on several variables. See e.g. United States Department of Agriculture, *USDA Cost of Raising a Child Calculator*, online: USDA Center for Nutrition Policy and Promotion <<http://www.cnpp.usda.gov>>. Paul Henman, *Updated Costs of Raising Children – September Quarter 2012*, (The University of Queensland: Social Policy Unit, School of Social Work and Human Services) estimated the total costs at about \$200,000 AUD. To date there is no clear position about an entitlement to damages for losses incurred by a parent choosing to leave the workforce to care for the child.

⁹⁸ *Stockford*, *supra* note 13.

The more interesting question is how the law ever developed as it did, contorting one accepted rule of negligence law after another. There are legitimate concerns about how to measure the costs of child care, and more fundamentally about whether these costs are a proper measure of damages. But most of these difficulties are not unique to involuntary parenthood cases, and others are amenable to ready solution. They do not warrant denying or drastically restricting the parents' claims. Instead the "solutions" have proven worse than the initial concerns. Parents should be entitled to recover the foreseeable costs of raising any child born in an involuntary parenthood situation, subject to an appropriate limiting principle to reflect the fact that parents cannot be allowed to effectively determine their own subjective standard of child care.

There is no denying that some judges do not accept that a woman has a right to reproductive freedom, a right to *not* have a child. Nor do some accept that this right should be protected by ordinary negligence law. Involuntary parenthood actions seem too often to provide another opportunity for opponents and proponents of reproductive freedom to stage real and symbolic battles. So far, the mothers, the fathers and their children are losing to the medical profession. What an odd script.

The child awards in the typical involuntary parenthood case are likely to be too small to justify an unsuccessful party in mounting an appeal.⁹⁹ The stakes in a defective birth control pill class action will more than justify either side pursuing appeals, even to the Supreme Court if they get leave. There is no reason that the ultimate judicial rulings on damages for the cost of raising a child will differ in the class actions from in the malpractice cases. There is a reasonable prospect that the appellate courts will finally endorse a standard tort law approach to damages for child care in involuntary parenthood

⁹⁹ *Supra* note 97.

actions. However, the Australian experience shows us that the issue may not ultimately be settled by the courts. The same arguments that have been raised against full recovery in the courts may arise again in the legislatures. In addition, as in Australia, we may see a legislative determination to protect product manufacturers, especially pharmaceutical manufacturers, from the consequences of their negligence.¹⁰⁰

¹⁰⁰ *Supra* note 12.