DUTY OF CARE IN WRONGFUL LIFE CASES

Does such a duty exist in Canada?

INTRODUCTION
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“Wrongful Life” – refers to a claim brought by a child, usually born with disabilities, against a physician, where it is alleged that but for the negligent act or omission of the defendant, the child would never have been born.
“Wrongful Birth” – refers to a claim brought by a parent(s) of a child born with disabilities against a physician, where it is alleged that but for the negligent act or omission of the defendant the child would not have been born (because the pregnancy would have been terminated) or would not have been born disabled.
• “Wrongful Conception/Pregnancy” – refers to a claim *brought by a parent* of a healthy child against a physician where it is alleged that but for the negligent act or omission of the defendant the child would never have been born
Note that “Wrongful Birth” and “Wrongful Conception” involve claims by and on behalf of the parent(s).

These claims have been generally accepted in Canada and remain valid.
• “Wrongful Life” cases

• Does or should a physician/health care provider owe a duty of care to an unconceived or unborn child?

• If no duty is owed, the child, once born, has no right of action for any injuries or economic losses that may result from negligent care
• “Congenital Disabilities and the Law” – Robert Roth
• “Paxton v. Ramji: Principled Legal Consistency” – Darryl Cruz
• McKay v. Essex Area Health Authority [1982] 1 Q.B. 1166 (Eng. C.A.)

“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.”

“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 with that owed to the mother.” - Lacroix
• Category 1 – cases where the harm to the child was caused by the negligent act or omission of the health care provider

• Category 2 - cases where, but for the negligent act or omission of the health care provider, the child would not have been born at all

• *Lacroix v. Dominique*, per Twaddle J.A.
“I cannot accept that the common law duty of care to a person can involve, without specific legislation to achieve this end, the legal obligation to that person, whether or not in utero, to terminate his existence”

Per Ackner L.J. in McKay
“To impose such a duty towards the child would, in my opinion, make a further inroad on the sanctity of human life which would be contrary to public policy. 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…” Stephenson L.J., *McKay*
• “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.”

• *JU and Another v. See Tho Kai Yin* [2005] 4 Sing. L.R. 96 (Singapore H.C.)
“But how can a court begin to evaluate non-existence, ‘The undiscover’d country from whose bourn No traveller returns?’ No comparison is possible and therefore no damage can be established which a court could recognise. This goes to the root of the whole cause of action.” – per Ackner L.J. in *McKay*. 
“The only right on which she can rely as having been infringed is 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.” – per Stephenson L.J. in McKay
Questions to consider:

1. Have the courts correctly approached the duty of care analysis in these cases?

2. If not, what is the correct approach?

3. Where should the proper analysis take us – duty or not? If so, what is its scope?
• Thank you