

Toombes v Mitchell

Wrongful conception: Analysis and discussion for doctors and lawyers

Susan Rodway QC

Victoria Butler-Cole QC

Starting soon....

🐦 The implication: her child should not have been born, impacts on all of us who are disabled.

🐦 If you haven't heard of this case yet, it should worry you. That a GP could be held liable for the fact that a child with a disability was brought into existence is horrifying

- 🐦 Folic acid doesn't prevent 100% of cases, it was warned as a risk if not taken & a lack does not cause this type of spina bifida.
- 🐦 The judge in this case is wrong, out of order and unfit to judge. Hope this judgement is overturned at appeal. Shame on the parents who brought this case and on those who advised them to do so.

 This ruling will bring the NHS to its knees

...

The Facts

- 27 February 2001 C mother appt with Dr. Mitchell for pre-conception advice
- Asks about folic acid and told 'not necessary'
- Advice to start attempts to conceive immediately
- C conceived shortly after this
- C born with a form of spina bifida (lipomeningocele)

Preliminary Legal Issues

- Action was brought by C not her parents so not 'wrongful birth'
- No suggestion injury should have been discovered antenatally
- No allegation re termination
- D contended this was a claim for 'wrongful life' which is repugnant to the law

- C alleged negligent advice from D to mother caused C to be born in an injured state
- Non negligent advice would have led to delayed conception
- C accepted this would have led to conception of a genetically different individual
- D agreed later conception normal on BOP

Misunderstanding

- So the case was ***not*** about whether folic acid would have been effective in preventing SB
- No genetic cause
- Later birth of healthy brother (albeit with v high dose folic acid pre-conception and first trimester)
- Statistically later conception normal, healthy child

Congenital Disability (Civil Liability) Act 1976

- *an Act to make provision as to civil liability in the case of children born disabled in consequence of some person's fault*

(1) If a child is born disabled as the result of such an occurrence before its birth as is mentioned in subsection (2) below, and a person (other than the child's own mother) is under this section answerable to the child in respect of the occurrence, the child's disabilities are to be regarded as damage resulting from the wrongful act of that person and actionable accordingly at the suit of the child.

(2) An occurrence to which this section applies is one which –(a) affected either parent of the child in his or her ability to have a normal, healthy child;

Lambert J

- [2020] EWHC 3506
- Trial of preliminary issue of law
- Based upon agreed facts
- Without prejudice to the facts being tried should C succeed

Lambert J

- C was a child born disabled
- The 'occurrence' was sexual intercourse prior to conception in a folic acid deprived state
- D was answerable to C in respect of this
- Hence C disability regarded as actionable damage resulting from wrongful act of D

Is this novel?

Misunderstanding

*...her child should not have been born,
impacts on all of us who are disabled...*

- sensational headlines “ I should not have been born”
- Not at all what C says
- Hidden disability ambassador
- ”Find a way not an excuse”

Analysis ...

- C is a living individual with a disability
- The Act enables her (since 1976!) to sue D for negligence
- The rub is the negligence being pre-conception
- Does this offend justice?
- What about negligence in IVF?

Defences built into the Act

(4) In the case of an occurrence preceding the time of conception, the defendant is not answerable to the child if at that time either or both of the parents knew the risk of their child being born disabled

(5) The defendant is not answerable to the child, for anything he did or omitted to do when responsible in a professional capacity for treating or advising the parent, if he took reasonable care having due regard to then received professional opinion applicable to the particular class of case; but this does not mean that he is answerable only because he departed from received opinion."

Second trial 2021

- The issues to be decided:
- What was said at the February 2001 consultation and what should have been said
- Was mother already pregnant?
- What would mother have done if given correct advice

2021 The evidence

- Mother most concerned re waiting to conceive due to length of time on contraceptive pill
- Mother asked about folic acid
- Dr. Mitchell had no independent recollection of the consultation and was forced to rely upon his contemporaneous note and his 'standard practice'.
- His note was woefully inadequate with the only reference to folic acid being '*folate if desired*'.

HH Judge Coe QC

- Preferred evidence of mother
- Dr Mitchell did not explain relationship folic acid and prevention SB
- Said folic acid supplement 'not necessary' if diet good
- Did not follow 'standard practice' (which would have been correct)

The evidence contd/

- Mother not pregnant
- Mother would have delayed conception if correct advice
- Dr Mitchell agreed if advice as mother said then this was negligent

Is there a problem?

Areas of concern :

- length of time after the event
- Doctors are rushed and cannot make proper notes
- Folic acid would not necessarily have prevented SB
- Another assault on medical profession
- Floodgates

Discussion

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