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## MEDICAL MALPRACTICE LAW

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### Supreme Court Takes Another Look At Wrongful Birth Cases in *Canesi v. Wilson*

A wrongful birth claim arises from the loss of the opportunity to have terminated the pregnancy of a child with severe birth defects. In *Canesi v. Wilson*, the New Jersey Supreme Court revisited these claims and discussed the difference between wrongful birth and informed consent cases. 158 N.J. 490 (1999).

The *Canesi* opinion also explains why medical causation is not an essential element of a wrongful birth claim. It is essential for all lawyers who handle medical malpractice cases to be aware of this important decision.

The significance of *Canesi* is best understood in the light of prior decisions by the Court regarding wrongful birth claims. The justices first considered a wrongful birth claim in *Gleitman v.*

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*Cosgrove*, 49 N.J. 22 (1967). In *Gleitman*, the plaintiff's mother had German measles during the first trimester of her pregnancy, and the plaintiff was born with serious birth defects.

The *Gleitman* Court observed that the plaintiff did not claim he could have been born without defects, but rather that he should not have been born at all. "In other words, he claims that the conduct of defendants prevented his mother from obtaining an abortion which would have terminated his existence and that his very life is 'wrongful.'" Id. at 28. The Court recognized the difficulty of assessing damages for the "wrongful life" claim brought by such a child:

The infant plaintiff would have us measure the difference between his life with defects against the utter void of nonexistence, but it is impossible to make such a determination. This Court cannot weigh the value of life with impairments against the nonexistence of life itself. By asserting that he should not have been born, the infant plaintiff makes it logically impossible for a court to measure his alleged damages because of the impossibility of making the comparison required by

compensatory remedies. Id. at 28.

The Court therefore held that the infant did not have a claim cognizable at law. The Court simultaneously rejected the parents' claim for emotional damages or even the expenses of raising a child with birth defects, citing "substantial policy reasons" against the award of damages for the denial of the opportunity to have an abortion. Id. at 30.

The combination of *Roe v. Wade*, 410 U.S. 113 (1973), and substantial advances in medical technology made re-examination of these issues inevitable. The New Jersey Supreme Court first revisited the controversy in *Berman v. Allan*, 80 N.J. 421 (1979), a case involving a child born with Down syndrome.

The *Berman* Court affirmed *Gleitman's* denial of the child's 'wrongful life' claim, reiterating that "the gist of the infant's complaint is that had defendants informed her mother of the availability of amniocentesis, [the child] would have never come into existence." Id. at 426. The Court ratified *Gleitman's* holding that there is no claim for "wrongful life," reasoning that it would be "literally impossible" to "measure the difference in value between life in an impaired condition and the 'utter void of non-existence.'" Id. at

427.

However, the *Berman* Court permitted a limited "wrongful birth" claim by the parents. *Id.* at 430-31. The justices discarded *Gleitman's* conclusion that public policy barred the award of damages for the loss of a chance to have an abortion. The Court held that a physician who deprives a mother of the opportunity to terminate a pregnancy is liable for the damages resulting from the "wrongful birth" of the child. *Id.* at 431-32. The Court allowed the parents to recover damages for their "emotional anguish upon their realization that they had given birth to a child afflicted with Down syndrome." *Id.* at 433.

However, the Court continued to hold that the parents could not be compensated for the costs of raising such a child, because it would be unfair to provide the parents with all the benefits of having a child, including "the love and joy they will experience," but impose upon the defendants the "enormous expenses attended upon her rearing." *Id.*

The high court returned to these issues in *Schroeder v. Perkel*, 87 N.J. 53 (1981), where the plaintiffs were not advised that they were carriers of cystic fibrosis and therefore deprived of the chance to avoid having a second child with this disease. The Supreme Court recalled that it did not allow the parents to recover the cost of raising the child in *Berman*. However in *Schroeder*, the plaintiffs only sought the "extraordinary medical expenses of raising a child with cystic fibrosis," which distinguished their claim from that of the Bermans. *Id.* at 68.

The *Schroeder* Court allowed compensation for the "extraordinary costs provided they prove the probability of not only for the necessity and reasonableness of the cost of the therapy but also that it be provided by someone other than themselves." *Id.* at 69. The justices concluded that "our decision in this case merely advances the frontier a little further." *Id.* at 71.

The Court again confronted these issues in *Procanik by Procanik v. Cillo*, 97 N.J. 339 (1984), where the mother was not advised that she was infected with German measles, and her son was born with multiple birth defects. The parents sought damages for the infant's pain and suffering and "impaired childhood," and for their own emotional distress and med-

ical expenses. *Id.* at 343. The Court reviewed *Gleitman*, *Berman* and *Schroeder*, and held that the infant is also entitled to seek damages for the extraordinary expenses associated with the child's special needs, a limited claim for wrongful life:

Whatever logic inheres in permitting parents to recover for the cost of extraordinary medical care incurred by a birth-defective child, but in denying the child's own right to recover those expenses, must yield to the inherent injustice of that result. The right to recover the often crushing burden of extraordinary expenses visited by an act of medical malpractice should not depend on the "wholly fortuitous circumstance of whether the parents are available to sue." *Procanik*, at 351-52.

However, the *Procanik* Court again concluded that an infant's wrongful life claim for "pain and suffering and for a diminished childhood presents insurmountable problems." *Id.* at 353. The fact that the infant never had a chance to enjoy a normal life, and the inability to "measure non-existence or to compare non-existence with the pain and suffering of his impaired existence" compelled the conclusion that the judicial system was not capable of evaluating or awarding such damages. *Id.*

#### The *Canesi* Decision

The Supreme Court returned to these difficult issues in *Canesi v. Wilson*, where the plaintiff was prescribed Provera, a drug intended to induce menstruation. Approximately two weeks after taking the drug, plaintiff discovered that she was pregnant with twins. The prescribing doctor did not provide plaintiff with any information regarding any side effects associated with Provera, despite the fact that at the time the *Physicians' Desk Reference* (PDR) warned that a woman who was pregnant while taking Provera should be advised of the risk that the fetus could suffer from limb reduction.

The plaintiff then came under the care of a second doctor who again told her not to be concerned about taking Provera. One of the twins died during the pregnan-

cy; and the second twin was born with bilateral limb reduction.

The plaintiffs sued the doctors, asserting that if they had known of the risk of birth defects associated with Provera they would have terminated the pregnancy. The complaint also brought a claim on behalf of their child for the suffering associated with the birth defects.

The defendants moved for summary judgment because the plaintiffs could not provide expert testimony that the Provera had actually caused the limb reduction. The defendants supported this claim with the fact that, after the child's birth, the warning about limb reduction had been withdrawn from the PDR. The trial court granted the defendants' motion and the Appellate Division affirmed, holding that the plaintiffs "must establish that the taking of Provera caused [their child's] limb reduction abnormalities." *Canesi v. Wilson*, 295 N.J. Super. 354, 362 (App. Div. 1996).

However, in a decision that serves as a primer on both wrongful birth and informed consent law, the Supreme Court reversed. The Court first explained that both wrongful birth and informed consent claims are based upon the patient's right of self-determination.

However, in an informed consent case, there must be "medical causation. That is, a causal connection between the undisclosed risk and the injury ultimately sustained." *Canesi*, 158 N.J. at 505, citing *Grasser v. Kitzis*, 230 N.J. 216, 221-22 (App. Div. 1988). Proof of medical causation, however, is not an element of a wrongful birth claim.

The Court explained the important distinction between the two causes of action, noting that in sum, the informed consent and wrongful birth causes of action are similar in that both require the physician to disclose those medically accepted risks that a reasonably prudent patient in the plaintiff's position would deem material to her decision. *Id.* at 506.

These causes of action, however, have important differences, according to the justices. They encompass different compensable harms and measures of damages. In both causes of action, the plaintiff must prove not only that a reasonably prudent patient in her position, if apprised of all material risks, would have elected a different course of treatment or care. *Id.* In an informed consent case, the plaintiff

must also meet a two-pronged test of proximate causation: she must prove that the undisclosed risk actually materialized and that it was medically caused by the treatment. *Id.*

In a wrongful birth case, on the other hand, a plaintiff need not prove that the doctor's negligence was the medical cause of her child's birth defect. Rather, the test of proximate causation is satisfied by showing that an undisclosed fetal risk was material to a woman in her position; the risk materialized, was reasonably foreseeable and not remote in relation to the doctor's negligence; and, had plaintiff known of that risk, she would have terminated her pregnancy. *Id.* The emotional distress and economic loss resulting from this lost opportunity to decide for herself whether or not to terminate the pregnancy constitute plaintiff's damages. *Id.*

Based upon this analysis, the *Canesi* Court held that the informed consent claim was properly dismissed because the plaintiff was unable to demonstrate "a causal relationship between the drug and the defect that afflicts their son." *Id.* at 507.

However, the Court concluded that the plaintiffs were entitled to pursue the wrongful birth claim. The justices explained that in a wrongful birth case the parents do not have to prove that the doctor's negligence caused the defect but rather only that the doctor's negligence deprived the plaintiffs of "the opportunity to decide whether or not to become parents of a child with a congenital defect." *Id.* at 503. As such, "medical causation" is not an element of a wrongful birth claim.

The violation of the interest in self-determination that undergirds a wrongful birth cause of action consists of the parents' lost opportunity to make the personal decision of whether or not to give birth to a child who might have birth defects. ... The claim in a wrongful birth action can arise when a physician fails to provide adequate genetic counseling [citing *Schroeder*], fails to detect a discoverable fetal defect

or to inform the parents thereof, [citing *Berman*], fails to interpret test results properly, [citing *Procanik*], or fails to warn of a child being born with a defect." *Id.* at 501-02.

The Court emphasized that "The doctor's duty is to *communicate* to the patient enough material information to allow her to make an 'informed choice concerning the continuation of pregnancy.'" *Id.* at 509, (emphasis in original). The Court observed that a number of factors, referred to as "maternal indicators," have been recognized and accepted as material in determining whether a risk should be disclosed to a particular pregnant patient:

Accepted maternal indicators include exposure to drugs, irradiation, or infection; diabetes, mental retardation, or PKU; a familial pattern of inherited disorders; metabolic or biochemical disorders; known or suspected chromosomal abnormalities; multiple miscarriages or still births; infertility; consanguinity or incest; previous child with any kind of genetic abnormality; age over 35; possession of a recessive gene; and membership in an ethnic group at risk for a certain defect (i.e., African-Americans and sickle-cell anemia; Ashkenazi Jews and Tay' Sachs Syndrome). *Id.* at 511, n.5.

The *Canesi* Court noted that the PDR in use at the time advised warnings should have been given about bilateral limb reduction and other potential birth defects. The Court reiterated that although the PDR does not by itself establish the standard of care, citing its recent opinion in *Morlino v. Medical Center of Ocean County*, 152 N.J. 563, 580 (1998), the plaintiff also relied upon two expert witnesses who testified that the standard of care required that the patient be informed of the PDR warnings.

Therefore, the *Canesi* Court concluded that the defendants should have known that a reasonably prudent patient in the

plaintiff's position would have attached significance to the risks associated with Provera, and thus there was sufficient evidence to determine that the defendants breached their duty of disclosure.

The justices then explained the application of proximate causation to a wrongful birth case, taking into consideration that plaintiffs offered no evidence that the Provera caused the limb reduction and that the warning regarding the limb reduction had been withdrawn from the PDR. The Court nevertheless explained that the relevant inquiry "is not whether the doctor's negligence caused the fetal defect," but rather "whether the doctors' inadequate disclosure deprived the parents of their deeply personal right to decide for themselves whether to give birth to a child who could possibly be afflicted with a physical abnormality." *Id.* at 515.

Given this standard, there was "sufficient evidence in the record of this case to enable a jury to make that determination." *Id.* Thus, "Legal or proximate cause is clearly an essential element of a wrongful birth cause of action. Medical causation, however, is not." *Id.* at 514.

### Analysis

*Canesi* does leave open certain issues. In particular, the Court saved for another day the issue of whether the parents will prevail if the child is born with a genetic birth defect totally unrelated to a drug. For example, if the *Canesi*'s child had been born with Down syndrome. A strongly worded dissent by Justice Stewart Pollock contends that the majority "eliminates the requirement of proximate cause." *Id.* at 530.

However, Justice Daniel O'Hern, in a concurring opinion, suggested that the birth defect must "parallel" the undisclosed risk. *Id.* at 518. Nevertheless, *Canesi* represents the New Jersey Supreme Court's latest thoughts regarding wrongful birth and informed consent cases. It is a thoughtful and thorough analysis of profound and difficult issues, and should be carefully studied by every attorney handling wrongful birth and informed consent cases. ■