

BIRTH TRUAMA AND THE DUTY OF CARE

Presented by:

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Barristers and Solicitors

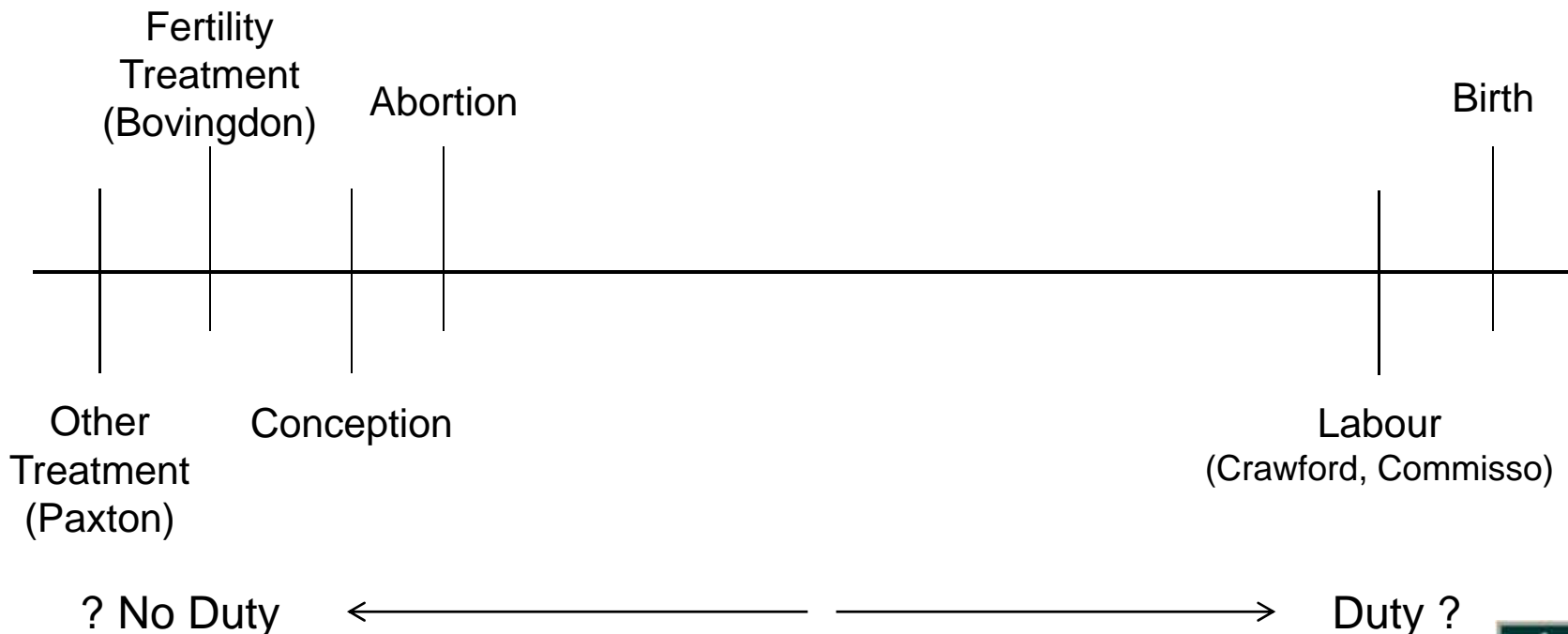
THE FUNDAMENTAL QUESTION

DO DOCTORS AND NURSES OWE A DUTY OF CARE TO AN UNBORN CHILD BORN ALIVE?

- EVERY CASE EVER DECIDED BUT TWO SAY: YES
- PAXTON (2008) Ont. C.A. SAYS: NO
- BOVINGDON (2008) Ont. CA. SAYS: NO

DUTY OF CARE

- IS IT DIFFERENT DEPENDING ON WHERE ON THE CONTINUUM OF CARE NEGLIGENCE OCCURS



DUTY OF CARE vs STANDARD OF CARE

DUTY OF CARE

- Forseeability
- Proximity
- Policy

➤ If no duty, no damages paid for negligent conduct

STANDARD OF CARE

- Requires a Duty of Care
- Damages paid if standard not met

PAXTON

FACTS:

- mom seeks acne treatment
- acne drug (Accutane) causes risk of abnormal fetal development
- mom does not intend pregnancy, husband has had vasectomy, current pregnancy test negative
- MD prescribes drug
- mom gets pregnant
- disabled child born

PAXTON

RESULTS:

“The issue whether a child born with birth defects should be entitled to successfully assert a negligence claim against a doctor... for harm suffered before birth has tested the mettle of many courts...”

PAXTON

“The question of a doctor’s legal proximity with a future child (whether conceived or not yet conceived) at the time of the doctor’s impugned conduct...”

PAXTON

“... Canadian courts have taken different approaches to the question whether there can be a proximate relationship between a doctor and a future child.”

PAXTON

“The conflicting duties that would be owed by a doctor to a female patient and to her future child (whether conceived or not yet conceive) in prescribing medication to the female patient, together with the indirect relationship between a doctor and a future child, reflect two aspects of the same reality”.

CONCLUSION

- Duty of care analysis ought not to apply
- Standard of care analysis resolves all concerns
- Either Paxton is wrongly decided; comments about conceived child obiter; or reasoning does not apply later on the continuum of care

DUTY OF CARE

- Is it different depending on where on the continuum of care negligence occurs