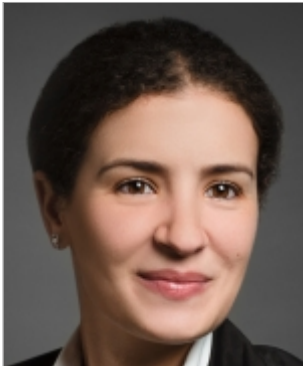


## Surrogacy

# A Canadian first: Surrogacy fees awarded as cost of future care

By Michelle Quinn



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(July 13, 2017, 11:15 AM EDT) -- A Canadian court has for the first time awarded damages for surrogacy fees in *Wilhelmson v. Dumma* 2017 BCSC 616.

Mikaela Wilhelmson, the plaintiff, survived a horrific, high-speed, head-on collision that killed three other people, including her boyfriend. The collision occurred in Surrey on Aug. 13, 2011. She was the sole survivor.

In the wake of the collision, she was flown by air ambulance to Vancouver General Hospital (VGH) and was resuscitated back to life when she arrived at the emergency department. She was taken to the operating room and surgery was performed to repair her diaphragm, to reconnect her small and large bowels and to attempt to reconstruct her abdominal wall. She was in a medically induced coma for almost four weeks and spent a total

of 39 days in the traumatic care unit of VGH. In less than a month, Wilhelmson underwent nine more surgeries. The trial judge, Justice Neena Sharma commented that it was "*astounding*" that she survived.

Wilhelmson's family physician testified. He drew an analogy between Wilhelmson's situation after the accident to a "*shattered vase that was able to be glued back together after being dropped; even if all the pieces were fitted together with the finest techniques available and the vase could still fulfil many of the functions it did before being shattered, it would never be the same.*"

In early 2016, Wilhelmson became pregnant. However, based on medical advice she terminated the pregnancy. Two expert reports regarding Wilhelmson's ability to conceive and then carry a child were tendered at trial.

One report was written by Dr. Albert Yuzpe. He was qualified as an expert entitled to give opinion evidence in the fields of infertility, gynecology and obstetrics and reproductive medicine. His opinion to the court was that Wilhelmson should not carry a pregnancy because the extent of her abdominal injuries represents "*a significant risk*" to her health and welfare. Given all those factors, Yuzpe's opinion was that surrogacy would be the best option for her to approach pregnancy considering her health and welfare.

In Canada, the law prohibits payment for women to carry another woman's eggs and act as a surrogate. However, Yuzpe confirmed that many women have safely received that service in the United States, where it is legal. He estimated that the price can be anywhere from \$50,000 to \$100,000 per pregnancy.

Justice Sharma found (at para. 128): "Based on the medical evidence presented, I find on a balance of probabilities that Ms. Wilhelmson will have significant difficulties conceiving a child in the future as a direct result of her abdominal injuries from the accident. I also find as a fact that Ms. Wilhelmson would be putting her health and welfare at great risk, to an unreasonable degree, if she were to carry a baby. I have no doubt that the best option for Ms. Wilhelmson to have a biological child would be to hire a surrogate."

On this specific issue, plaintiff's counsel argued that the damages for cost of future care should

include costs for a gestational carrier (a "surrogate"), as the accident left her fertile but unable to carry her own child to term.

The defendants' counsel submitted that the plaintiff's inability to have a child, together with the recent termination of a pregnancy, should be only under the award for non-pecuniary damages. Justice Sharma disagreed and held that the medical evidence overwhelmingly supported the conclusion that a surrogate was medically necessary. The plaintiff's counsel relied on Canadian case law as legal precedent for covering private clinic cost and U.S. health care expenses, and argued that the surrogacy fees Wilhelmson claimed fell into those categories. The defendants' counsel asserted that a specific award for surrogacy fees would be contrary to public policy and in contravention of s. 6 of the *Assisted Human Reproduction Act*, S.C. 2004, c.2 (AHRA) which makes it illegal to pay a woman to be a surrogate in Canada.

Again, the court rejected this argument and articulated (at para. 375) that: "... a specific award for surrogacy fees is more appropriate than assuming her loss is adequately compensated for within the award for non-pecuniary damages. While the lost ability to carry a child to term certainly has caused Ms. Wilhelmson pain and suffering, deserving of recognition within the non-pecuniary damages, the fact that she is unable to carry a child leads to a distinct future cost to allow her to have a biological child — the cost of hiring a surrogate. I find this cost is medically necessary and reasonable. Its necessity arose directly from the accident; therefore the cost must be borne by the defendant."

Justice Sharma awarded Wilhelmson \$100,000 for surrogacy fees for two pregnancies. This award is certainly unique and is an important development for personal injury law practitioners.

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