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THE INTERSECTION OF MEDICAL FACTORS AND LEGAL RESPONSIBILITY IN SURROGACY ARRANGEMENTS: LOSS OF CHANCE AS A COMMON LAW ELEMENT IN POTENTIAL SURROGACY DISPUTES

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Abstract: ***The contribution addresses the complex issues and legal dilemmas that arise – or will increasingly arise in the future – for courts when dealing with questions of liability related to surrogacy. As explained in the article, the very arrangement per se entails certain risks associated not only with assisted reproduction procedure followed by potential obstetric complications during the childbirth but also generally with the protection of the health of the pregnant woman and the foetus. The contribution explores how questions of liability could be approached through the loss of chance doctrine in tort law, a concept originating in the common law tradition. However, it emphasises that these approaches are far from straightforward, given the significant evidentiary challenges in establishing causation in medical disputes, as well as the ethical and moral considerations regarding the allocation of responsibility. By analysing these issues, the article aims to provide a conceptual framework for understanding the legal and ethical complexities surrounding surrogacy liability, highlighting the potential role of comparative perspectives and doctrinal analysis in informing future judicial decisions.***

Key words: ***Surrogacy; Tort Law; Loss of Chance; Legal Liability; Health-Related Risks; History; Surrogacy Agreements; Commissioning Couple; Surrogate Mother; Fertilisation; Childbirth; Complications; Causal Nexus***

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1. INTRODUCTION

Involuntary childlessness can generate a range of serious socio-emotional consequences for infertile couples and individuals. Attitudes toward infertility, especially in family-oriented cultures, may result in one's fear of possible humiliation and stigmatisation, and eventually lead to isolation. Infertile people may also experience anger, guilt, depression, or even grief.[1]

The ability to create new life holds deep significance for many people. Yet, infertility remains a challenge for a substantial number of couples, affecting an estimated

[1] Katarzyna Osmenda, 'Surrogacy versus artificial womb technology: the future of reproduction in the European Union' (2024) 29(1) *Teisės apžvalga / Law Review* 41.

10 to 15 percent of the population.[2] Thanks to advances in reproductive medicine, new opportunities have emerged for individuals and couples to have genetically related children. Surrogacy represents one such option when other reproductive techniques have failed or are not applicable. However, it continues to raise numerous ethical and legal concerns that remain the subjects of ongoing debate.[3] The aim of this article is to analyse the potential liability issues arising from surrogacy arrangements, with particular emphasis on medical harm and evidentiary uncertainty, and to assess whether the loss of chance doctrine may serve as a suitable conceptual tool for addressing causation and responsibility in such disputes. The article explores whether and how such liability issues could be approached through the loss of chance doctrine in tort law, a concept originating in the common law tradition. At the same time, it emphasises that the application of this doctrine is far from straightforward, given the significant evidentiary difficulties in establishing causation in medical disputes, as well as the ethical and moral considerations involved in attributing responsibility.

2. SELECTED HIGHLIGHTS FROM THE HISTORY OF SURROGACY

Surrogacy can be traced back to antiquity. Babylonian law and Biblical narratives already describe arrangements in which a woman bore a child on behalf of another, as illustrated by the stories of Sarah and Hagar or Rachel and Bilhah in the Book of Genesis. Similar concepts appear in Hindu mythology, where Balarama, though born by Rohini, is regarded as the son of Devaki. From the Middle Ages onward, reproductive services were occasionally provided in exchange for payment.[4]

These early practices relied on sexual intercourse and correspond to what is now termed traditional surrogacy, in which the surrogate is both the genetic and gestational mother,[5] a feature associated with increased emotional and legal complexity.

Modern surrogacy emerged in the United States in the late 20th century, with the first legally arranged case organised in 1976 and a decisive breakthrough occurring in 1985 with the first successful gestational surrogacy following in vitro fertilisation and embryo transfer.[6] The year 1985 marked a significant advance in the field of gestational surrogacy, when Utian and colleagues documented the first successful pregnancy

[2] See also some statistical data, confirming that infertility is a pressing public health issue affecting an estimated 12 %–28 % of couples worldwide at any given time and approximately 17.5 % of individuals at some point in their lives', according to World Health Organization estimates. In Slovakia, recent analyses suggest that roughly 15 %–20 % of couples experience infertility, and the country's total fertility rate remains below replacement level at around 1.49 children per woman, reflecting broader demographic trends and increasing demand for assisted reproductive technologies. See World Health Organization, *Infertility Prevalence Estimates, 1990–2021* (Geneva, 2023) https://iris.who.int/server/api/core/bitstreams/a22ced65-46b1-4482-bf85-058719fec649/content accessed 08 July 2025; and World Bank, *Fertility Rate, Total for the Slovak Republic* (SP.DYN.TFRT.IN) in Federal Reserve Bank of St. Louis, FRED Economic Data https://fred.stlouisfed.org/series/SPDYNTFRTINSVK accessed 08 July 2025.

[3] Oleg M Reznik and Yuliia M Yakushchenko, 'Legal Considerations Surrounding Surrogacy in Ukraine' (2020) 73(5) *Wiadomości Lekarskie* 1048.

[4] Nayana Hitesh Patel and others, 'Insight into Different Aspects of Surrogacy Practices' (2018) 11(3) *Journal of Human Reproductive Sciences* 212 https://doi.org/10.4103/jhrs.JHRS_138_17 accessed 30 May 2026.

[5] Viveca Söderström-Anttila and others, 'Surrogacy: Outcomes for Surrogate Mothers, Children and the Resulting Families—a Systematic Review' (2016) 22(2) *Human Reproduction Update* 260 https://doi.org/10.1093/humupd/dmv046 accessed 30 May 2026.

[6] Susan C Klock and Steven R Lindheim, 'Gestational Surrogacy: Medical, Psychosocial, and Legal Considerations' (2020) 113(5) *Fertility and Sterility* 889 https://doi.org/10.1016/j.fertnstert.2020.03.016 accessed 30 May 2026; William H Utian, Linda Sheean and James M Goldfarb, 'Successful Pregnancy after in Vitro Fertilization and Embryo Transfer from an Infertile Woman to a Surrogate' (1985) 313(21) *New England Journal of Medicine* 1351 https://doi.org/10.1056/nejm198511213132112 accessed 30 May 2026.

achieved through in vitro fertilisation (IVF) followed by embryo transfer to a surrogate uterus. The embryo recipient was a friend of the couple; the biological mother had previously undergone a hysterectomy due to uterine rupture at 28 weeks of gestation. The pregnancy progressed without complications and resulted in the birth of a healthy child.[7]

Since then, surrogacy has developed into a global phenomenon closely intertwined with advanced reproductive medicine.

However, unlike its historical predecessors, contemporary surrogacy is inseparably linked to sophisticated medical procedures and their inherent risks, including assisted reproduction techniques, pregnancy-related complications, and potential harm to both the surrogate mother and the foetus. This transformation from a predominantly social arrangement into a medically mediated process fundamentally alters the nature of legal responsibility and creates complex questions of causation and liability—issues that form the central focus of this article and provide the context for examining the applicability of the loss of chance doctrine in surrogacy-related disputes.

3. TYPOLOGIES AND MOTIVATIONS BEHIND SURROGACY ARRANGEMENTS

Agreements can be altruistic, where the surrogate mother receives no reward for carrying, giving birth to, and handing over the child, or commercial, where she is compensated with a pre-agreed amount for this 'service'. Some authors also refer to a so-called third model—the compensatory model, but we believe this label is inaccurate. If the surrogate mother is reimbursed for necessary expenses related to protecting her health during pregnancy or for actual financial losses, she would not have incurred, but for the surrogacy, this does not constitute a 'reward' but a reimbursement. This form of compensation can, in fact, be part of the altruistic model, as it remains outside of any commercial motivation. The opposite also holds true: reimbursement of necessary expenses related to surrogacy can be one of the items paid to surrogate mothers, but it would be separate from any "reward" paid not as compensation, but as profit.[8]

Notwithstanding the limitations of the law, what has emerged is a practice of surrogacy founded on 'altruistic' values, encouraged by prohibitions on commercialism and the misconception that surrogates may receive only reasonable expenses if legal parenthood is to be achieved.[9] Surrogacy organisations have emerged in this context to offer support on a not-for-profit basis. This involves guiding surrogates and intended parents through arrangements based on experience and good practice.[10] There are two main types of surrogacy:

- **Traditional surrogacy** – the surrogate mother becomes pregnant using her own oocyte, which is fertilised by the intended father's sperm, most commonly through artificial insemination rather than IVF; she is therefore genetically related to the child.

[7] Utian, Sheean and Goldfarb (n 6).
[8] Ibid.
[9] Patricia Fronek, 'Current Perspectives on the Ethics of Selling International Surrogacy Support Services' (2018) 8 *Medicolegal and Bioethics* 11.
[10] Nuffield Council on Bioethics, *Bioethics Briefing Note—Surrogacy Law in the UK: Ethical Considerations* (London, 2023) https://cdn.nuffieldbioethics.org/wp-content/uploads/Surrogacy-law-in-the-UK-ethical-considerations.pdf accessed 10 July 2025.

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- **Gestational surrogacy** – the surrogate mother carries an embryo created from the gametes of the intended parents or donors and has no genetic link to the child.[11]

A gestational surrogate may be a family member, a friend, or an individual recruited through a surrogacy agency or a clinic specialising in assisted reproduction. Depending on the arrangement, the process can remain entirely anonymous, or the intended parents may choose to establish direct contact with the surrogate. Surrogacy is an option for heterosexual couples, same-sex female couples, or single women whose medical conditions prevent them from carrying a pregnancy, as well as for same-sex male couples or single men.[12]

In most cases, the decision to pursue surrogacy arises from medical indications that preclude a woman from achieving or safely sustaining a pregnancy. The primary indication for surrogacy is the absence of a functional uterus, whether congenital or acquired. Young women with normal ovarian function may lose their uterus due to severe obstetric complications, such as heavy postpartum bleeding or uterine rupture, which can also result in foetal demise. Uterine diseases, including cervical cancer, may necessitate hysterectomy and subsequently lead to infertility. Additional indications include significant uterine malformations or recurrent pregnancy loss. Surrogacy may also be considered when a woman suffers from serious health conditions—such as cardiac or renal diseases that would pose substantial risks to her life during pregnancy, provided she is otherwise healthy enough to care for the child after birth, and her life expectancy is deemed acceptable. The procedure can also be an option in cases of biological inability to conceive or carry a pregnancy, as well as for couples who have experienced repeated IVF failure despite the availability of good-quality embryos.[13]

From the perspective of indications, medical reasons may thus be complemented by social one, for example, same-sex partnerships (where natural conception is not possible), single men without the possibility of motherhood, or situations in which a woman could technically carry a pregnancy, but surrogacy is preferred for ethical or social reasons.[14]

Beyond medical and social indications, surrogacy also represents a pathway to parenthood for individuals and couples who are unable to adopt a child, for instance, due to sexual orientation, advanced age, or not meeting the legal requirement of marriage.[15] In the case of gay couples, either the traditional form of surrogacy is used, where the egg is fertilised with the sperm of one of the partners through assisted reproduction, or neither partner is the biological parent. In the latter case, the egg also does not come from the surrogate mother but from an egg donor, and the embryo is then implanted into the body of the gestational surrogate for the purpose of carrying and delivering the child (so-called embryo transfer). In this scenario, where neither the couple for whom the surrogate is carrying the child nor the surrogate herself has any biological connection to the child, a situation arises in which the child effectively has up to five parents.[16]

[11] Helen Prosser and Natalie Gamble, 'Modern Surrogacy Practice and the Need for Reform' (2016) 4(3) *Journal of Medical Law and Ethics* 257.
[12] Pedro Brandão and Nicolás Garrido, 'Commercial Surrogacy: An Overview' (2022) 44(12) *Revista Brasileira de Ginecologia e Obstetrícia* 1141 https://doi.org/10.1055/s-0042-1759774 accessed 30 May 2026.
[13] Söderström-Anttila and others (n 5).
[14] Writing Group on behalf of the ESHRE Ethics Committee, 'Ethical Considerations on Surrogacy' (2025) 40(3) *Human Reproduction* 420 https://doi.org/10.1093/humrep/deaf006 accessed 30 May 2026
[15] For more details see: Using a Surrogate Mother: What You Need to Know' *WebMD* https://www.webmd.com/infertility-and-reproduction/using-surrogate-mother accessed 19 May 2025.
[16] Erik Dosedla and others, *Reprodukčné a sexuálne práva [Reproductive and Sexual Rights]* (Wolters Kluwer SR 2024) 82.

The United Kingdom is an example of a country that has adapted its legislation from the early stages of surrogacy. Among its advocates was Natalie Smith,[17] who emphasised that the culture of surrogacy, based on value judgments, was from the outset (around 2002) intended to support different arrangements. The Human Fertilisation and Embryology Act 2008 extended eligibility beyond married couples to include civil partners, same-sex couples and unmarried couples living in an enduring family relationship,[18] as well as the single applicants.[19] Although comprehensive national statistics on children born through surrogacy are not available in the United Kingdom, the number of parental orders—commonly used as an indicator of surrogacy activity—has increased in recent years. This suggests a continuing rise in the use of surrogacy arrangements, although the exact number of children born through surrogacy remains unknown.

4. FACTORS TO BE CONSIDERED PRIOR TO ENTERING INTO A SURROGACY ARRANGEMENT

Before the start of any surrogacy arrangement, it is crucial to assess the conditions that contribute to the physical and psychological safety of both the gestational carrier and the future child. The surrogate must undergo detailed medical screening as well as psychological evaluation to ensure that she is emotionally prepared to go through pregnancy and childbirth. Research has shown that the emotional state of a pregnant woman can influence the psychological development and well-being of the foetus. For gestational surrogacy, the ideal age range for the surrogate is between 21 and 45 years. She should have a history of at least one full-term pregnancy without serious complications, and she should not have had more than five deliveries or more than three caesarean sections. A surrogate must not engage in smoking, drinking alcohol, or using other addictive substances. A stable lifestyle and a supportive home and social environment are essential. Informed consent must be obtained after a thorough psychological evaluation. Additionally, testing for infectious diseases such as HIV, hepatitis B and C, and syphilis is mandatory. Any behaviour or condition that might endanger the health of the child must be ruled out before proceeding. These criteria are based on the recommendations of the American Society for Reproductive Medicine (ASRM) and provide a professional framework; however, national legal regulations remain inconsistent across countries.[20]

Surrogate mothers, especially those facing adverse socioeconomic circumstances, often have limited autonomy in their decision-making, as they are under pressure to secure a better future for themselves and their families. Many are unaware of the risks involved and lack adequate psychological and legal support. This issue is particularly prominent in developing countries, where women frequently enter into such arrangements in the hope of improving their living conditions. Surrogacy is often

[17] Natalie Smith is one such campaigner. Between 2014 and 2017 Natalie was a board member of Surrogacy UK

[18] Human Fertilisation and Embryology Act 2008, c 22 (UK).

[19] Natalie Smith, 'Mapping out a future for the UK's law on surrogacy' (2016) 4(3) *Journal of Medical Law and Ethics* 237.

[20] Practice Committee of the American Society for Reproductive Medicine and Practice Committee of the Society for Assisted Reproductive Technology, 'Recommendations for Practices Using Gestational Carriers: A Committee Opinion' (2022) 118(1) *Fertility and Sterility* 65 https://doi.org/10.1016/j.fertnstert.2022.05.001 accessed 30 May 2026.

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perceived as a last resort, and in some cases, women are coerced into these roles without fully understanding the consequences of their commitment.[21]

Surrogate mothers often face complex emotional and relational challenges throughout pregnancy, particularly in their interactions with the intended parents. The psychological stress they experience may stem from various factors, including financial hardship, the need to keep the pregnancy secret, fear of bonding with the child, the emotional impact of postnatal separation, coerced caesarean delivery, suppression of lactation, and strain on their marital relationship. In some cases, surrogate mothers conceal the true purpose of the pregnancy from their own children by presenting the baby as a sibling and later informing them of the sibling's "death" after birth, in an effort to hide that the child was given to the commissioning parents. These circumstances may give rise to a variety of internal family narratives and coping mechanisms. However, such strategies often deepen the emotional burden on the surrogate mother and may have serious psychological consequences for her own children. This highlights the critical need for targeted emotional and psychosocial support for surrogate mothers and their families during the surrogacy journey.[22]

5. THE ONSET OF EXPOSURE TO HEALTH-RELATED RISK FACTORS AND POTENTIAL COMPLICATIONS

The most common risks associated with surrogacy are obstetric complications. In singleton pregnancies, such complications generally do not occur more frequently in surrogate mothers; on the contrary, they may be less common, as surrogates are typically young and healthy. However, it is important to remember that no pregnancy is entirely without risk.[23] On the other hand, IVF pregnancies are linked to a greater risk of complications such as hypertension, preeclampsia, foetal growth restriction, and bleeding, when compared to naturally conceived pregnancies. These pregnancies also have a higher incidence of preterm birth and intrauterine foetal death. Therefore, in surrogacy arrangements involving IVF, close monitoring is essential to minimise potential risks and to ensure the best possible outcomes for both the surrogate and the child.[24]

One of the challenges that may hinder a successful pregnancy is implantation failure, even when fertilisation and embryo transfer to the surrogate's uterus have been technically successful. Pregnancy may not occur if the embryo fails to implant into the endometrial lining. Several factors can contribute to implantation failure, with the most common including suboptimal embryo quality, reduced endometrial receptivity, or unfavourable immunological conditions that interfere with successful implantation.[25]

Even when embryo implantation is successful and the pregnancy progresses, the surrogate mother remains exposed to the same medical risks and complications as any pregnant woman. These may include ectopic pregnancy or spontaneous miscarriage, both of which can affect the outcome of the surrogacy and may also pose risks to the

[21] Brandão and Garrido (n 12).
[22] Marjan Goli and others, 'A reproductive health-care program for surrogate mothers: A mixed methods study' (2022) 11 *Journal of Education and Health Promotion* 250 https://doi.org/10.4103/jehp.jehp_437_21 accessed 30 May 2026.
[23] Brandão and Garrido (n 12).
[24] Ursula Zollner and Johannes Dietl, 'Perinatal Risks after IVF and ICSI' (2013) 41(1) *Journal of Perinatal Medicine* 17 https://doi.org/10.1515/jpm-2012-0097 accessed 30 May 2026.
[25] Carol Coughlan and others, 'Recurrent Implantation Failure: Definition and Management' (2014) 28(1) *Reproductive BioMedicine Online* 14 https://doi.org/10.1016/j.rbmo.2013.08.011 accessed 30 May 2026.

surrogate mother's health.[26] Such conditions often require surgical intervention, most commonly in the form of laparoscopic or intrauterine procedures. These interventions carry not only the typical risks associated with surgery, such as bleeding or infection, but also the potential for damage to the reproductive organs, which may result in reduced fertility or even permanent loss of fertility.[27]

Pregnancy, childbirth, and the postpartum period may involve various complications, including hypertension, preeclampsia, eclampsia, gestational diabetes, urinary tract infections, urinary incontinence, and potentially life-threatening intrapartum haemorrhage. However, these health risks are common to pregnancy in general and are not unique to surrogacy. In addition to the physical aspects, surrogacy may also be accompanied by emotional distress, as many surrogates experience psychological difficulties after relinquishing the child.[28]

Caesarean section rates are believed to be higher among surrogate mothers—not only due to requests from the intended parents, but also because these women often come from lower socioeconomic backgrounds and tend to receive antenatal care at private clinics, even though, under different circumstances, they would typically be treated within the public healthcare system. The high emotional and financial investment associated with these pregnancies may influence both parental and obstetric decision-making, potentially contributing to higher caesarean section rates.[29]

As the risks for the surrogate mother increase with multiple pregnancies, only a single embryo transfer is acceptable in surrogacy.[30] While there is no single judicial precedent that explicitly limits the number of embryos to a *single embryo transfer* in surrogacy contexts, **clinical and professional guidelines in assisted reproductive technology strongly support the practice of transferring one embryo per cycle to minimise the health risks associated with multiple gestations**. In particular, recommendations from leading reproductive medicine bodies, such as the European Society of Human Reproduction and Embryology (ESHRE) and the American Society for Reproductive Medicine (ASRM), endorse single embryo transfer as a standard approach in IVF and gestational carrier cycles for appropriate patients, with exceptions only in specific clinical circumstances.[31]

The gestational carrier should be fit for pregnancy as judged by appropriate medical and psychological criteria. All medical risks increase with age[32] and a complicated reproductive history. Thus, it is imperative to assess potential gestational carriers according to a protocol which includes an assessment of general health, number

[26] Maria Simopoulou and others, 'Risks in Surrogacy Considering the Embryo: From the Preimplantation to the Gestational and Neonatal Period' (2018) *BioMed Research International* 6287507 https://doi.org/10.1155/2018/6287507 accessed 30 May 2026.

[27] See Michaela Sklenárová, 'Prípustnosť náhrady "stratenej šance" v slovenskom deliktnom práve [Admissibility of Compensation for "Loss of Chance" in Slovak Tort Law]' (2022) 6 *Súkromné právo* https://www.legalis.sk/clanky/3161/pripustnost-nahrady-stratenej-sance-v-slovenskom-deliktnom-prave accessed 15 June 2025.

[28] Patel and others (n 4).

[29] Brandão and Garrido (n 12).

[30] ESHRE Guideline Group on the Number of Embryos to Transfer and others, 'ESHRE Guideline: Number of Embryos to Transfer during IVF/ICSI' (2024) 39(4) *Human Reproduction* 647 https://doi.org/10.1093/humrep/deae010 accessed 30 May 2026.

[31] The European Society of Human Reproduction and Embryology Guideline group and others, *Number of embryos to transfer during IVF/ICSI* (2023) https://www.eshre.eu/-/media/sitecore-files/Guidelines/Embryo-transfer/1--ESHRE-ET-Guideline---Main-document.pdf accessed 30 April 2026.

[32] Gabriele Saccone and others, 'Maternal and perinatal complications according to maternal age: a systematic review and meta-analysis' (2022) 159(1) *International Journal of Gynecology & Obstetrics* 43 https://doi.org/10.1002/ijgo.14100 accessed 30 May 2026.

of previous pregnancies and possible complications, as well as previous mode of delivery, especially C-sections. Ideally, she should have completed her family, but with the increasing age of first pregnancy, especially in high- and moderate-income countries, it is acceptable for her to have successfully completed one pregnancy. Ideally, her age should be between 25 and 40 years of age.[33]

Children born through gestational surrogacy show no significant differences in birth outcomes compared to those conceived naturally, including birth weight and rates of preterm birth.[34] Mothers in families formed through gestational surrogacy exhibited similar levels of both positive and negative relational patterns as those in naturally conceived families. However, their interactions with the children were somewhat less positive, likely due to the lack of a genetic connection. Across all family types, children showed good psychological adjustment and did not present elevated behavioural problems. While the absence of a genetic link may slightly influence mother–child interaction, it is the overall quality of family relationships that plays a decisive role in the child's well-being, regardless of the mode of conception.[35]

> K. Jandová also takes into account the role of oxytocin in influencing the intensity of a pregnant woman's response to maternal instincts and in the formation of a strong emotional bond with the foetus, which makes the separation of the mother from the newborn difficult and may potentially trigger postpartum depression. If a surrogate mother remains sexually active during pregnancy, the level of oxytocin released during orgasm may in some cases induce uterine contractions, potentially leading to premature birth or threatening the pregnancy. Additionally, the aforementioned inhibition of lactation and the interruption of physical contact between the mother and the child may, from a developmental psychology perspective, disrupt the natural attachment bond.[36]

It should be emphasised that where the legal framework provides a lawful basis for surrogacy agreements, it is essential that their design and content also take into account the health risks faced by surrogate mothers. Because surrogacy arrangements are typically established through private agreements, comprehensive data collection and long-term monitoring are often limited.[37] At the same time, healthcare providers continue to operate within a framework that traditionally views the pregnant woman and the foetus as separate patients.

It should be emphasised that where the legal framework provides a lawful basis for surrogacy agreements, their design and content should adequately reflect the health risks faced by surrogate mothers. Given the varying levels of risk and the diversity of interests involved in surrogacy arrangements—particularly those of the surrogate mother, the foetus, and the intended parents—it is difficult to envisage, how these factors could be adequately reflected in systematic data collection and translated into reliable assessments of the associated risks.[38] We therefore consider surrogacy to remain primarily within the sphere of private-law relationships. Nevertheless, this should not preclude the collection of relevant data concerning maternal–foetal complications,

[33] Writing Group on behalf of the ESHRE Ethics Committee (n 14).
[34] Söderström-Anttila and others (n 5).
[35] Susan Golombok and others, 'Families Created through Surrogacy: Mother–Child Relationships and Children's Psychological Adjustment at Age 7' (2011) 47(6) *Developmental Psychology* 1579 https://doi.org/10.1037/a0025292 accessed 30 May 2026.
[36] Dosedla and others (n 16) 112-113.
[37] Kalsang Bhatia and others, 'Surrogate pregnancy: An essential guide for clinicians' (2009) 11(1) *The Obstetrician & Gynaecologist* 49 https://doi.org/10.1576/toag.11.1.49.27468 accessed 30 May 2026.
[38] Raymond De Vries, 'Obstetrics ethics and the invisible mother' (2017) 7(3) *Narrative Inquiry in Bioethics* 215 https://doi.org/10.1353/nib.2017.0068 accessed 30 May 2026.

obstetric outcomes, or postnatal adaptation, as such information may contribute significantly to a better understanding of the medical and psychosocial implications of surrogacy arrangements.

In this ambit, it will be especially important that any contractual arrangement clearly delineates the scope of the surrogate mother's autonomy in relation to the pregnancy and childbirth. Just as she cannot be forced to undergo an abortion, she likewise cannot be compelled not to have one if, for various reasons, she decides not to carry the pregnancy to term.

6. LOSS OF CHANCE AS AN AMBIGUOUS CONCEPT WITHIN CIVIL TORT LAW

Loss of Chance is a technique or instrument used as a judicial remedy available to individuals and the public administration when the need arises to overcome the difficulties of proving the causal link. The starting point for this concept is the loss of a particular or real opportunity or possibility for the subject to obtain a benefit or advantage, caused by the action or omission of a third party. To address the loss of opportunity, one must look at the ultimate certainty and the uncertainty of what would have occurred had the action or inaction of another person not taken place. Ultimately, the Civil Code,[39] in § 444 in conjunction with § 449, states that in cases of personal injury, compensation is awarded for pain and suffering, diminished quality of life, or reimbursement of medical expenses. Compensation for a 'lost' chance as a separate category is absent.

This is precisely why its rationale is derived primarily from tort law, which becomes particularly significant when we deal specifically with the issue of personal injury. Although this concept is by no means unfamiliar to the common law doctrine, our case law refers to it in certain decisions, albeit with a very inconsistent and unclear meaning.[40]

Particular attention should be paid to the Draft Principles of European Tort Law.[41] It was established that the patient who has suffered harm bears the loss sustained according to the likelihood of another outcome had it not been for the act or omission. Thus, where a causal link is absent, it is evidence that the opportunity has been lost, since the possibility never existed.

The main elements leading to the admissibility of loss of chance are the causal link between the medical action or omission and the harm to the patient, as well as the uncertainty as to whether other events would have occurred or whether the relevant circumstances would have occurred differently.[42]

However, as stated by the Supreme Court of the Slovak Republic, '*due to the very nature of the human body, it is often very difficult to link a specific consequence (a deterioration in health) to a particular cause.*'[43] The core of evidence in medical disputes lies in proving the causal link, the burden of which rests with the plaintiff, since it is the establishment of a causal connection between the unlawful intervention and the harm

[39] Act No. 40/1964 Coll, Civil Code, as amended.
[40] Sklenárová (n 27).
[41] European Group on Tort Law, *Principles of European Tort Law (PETL)* https://max-eup2012.mpipriv.de/index.php/Principles_of_European_Tort_Law_(PETL) accessed 29 June 2025.
[42] Daniel Martínez Cristóbal, 'La pérdida de oportunidad en el ámbito de la salud: la relación de causalidad y la protección del derecho a la integridad física y moral indemnizable en España [The loss of opportunity in the health field: the causal link and the protection of the right to compensable physical and moral integrity in Spain]' (2023) 10(1) *Revista Eurolatinoamericana de Derecho Administrativo.* https://doi.org/10.14409/redoeda.v10i1.12566 accessed 30 May 2026.
[43] Judgment of the Supreme Court of the Slovak Republic, 30 January 2007, Case No. 2 Cdo/73/2006.

incurred (in this case, damage to health) that forms the basis for any potential award of non-pecuniary damages.

The reason our modus operandi is the loss of chance is also explained by M. Sklenárová, who, citing other sources, points out that insisting strictly on one hundred percent causality — where it is not objectively possible — would, in many cases, lead to unjust outcomes for the injured party. That is why various alternatives are being sought to enable a 'more equitable distribution of liability for harm.' And one of the alternatives mentioned is precisely the theory of 'loss of chance.'[44]

In the jurisprudence of Slovak courts, medical malpractice—i.e., providing health care *non lege artis*—is sometimes, in the judgment of the District Court Bratislava II (Slovakia), 25 October 2018, Case No. 8C/99/2011, cited as an example of 'loss of chance', although it generally stems from the causality between the malpractice and the resulting damage. Nevertheless, the reasoning often states that,

> Regarding the question of whether earlier diagnosis would have resulted in the patient's survival, it was noted that the later the oesophageal perforation is detected, the lower the chances of survival. No one can say with certainty whether the patient would have survived if the perforation had been detected immediately; if the perforation had not occurred, the patient would have survived.

From this, it can be inferred that, even if Slovak courts do not explicitly label it as a 'loss of chance,' the concept of the temporal aspect leading to the causality of damage is still relevant when awarding compensation for non-material harm. If we were to look for relevant case law from Slovak courts concerning the 'loss of chance,' particularly due to its operability in the Common Law system, we would likely find little inspiration. On the other hand, a case of medical malpractice leading to a 'loss of chance,' based on a claim of so-called wrongful birth, could serve as a useful example.[45]

The Dutch Supreme Court recognised the claim of **wrongful life**, awarding damages to Kelly Molenaar, a severely disabled child, and her parents due to the midwife's negligence in failing to advise on prenatal genetic testing. The Court upheld prior findings that proper testing would have led to pregnancy termination and that the midwife's professional error caused foreseeable harm. Compensation covered the costs of Kelly's care, pain and suffering suffered by her and her parents, and the mother's psychiatric treatment. Importantly, the Court clarified that damages addressed the violation of the parents' rights, not the fact of Kelly's existence itself.[46]

In parallel, there is another example of the 'loss of chance,' which has been framed in Nicolas Perruche case (France, 2001), where the courts recognised that medical negligence in failing to inform the mother of the risks of congenital rubella deprived the parents of the opportunity to make an informed decision about pregnancy termination. This claim allowed the parents to recover damages for the lost opportunity to avoid the birth of a child with severe disabilities. The case illustrates how the *loss of chance* doctrine can operate in civil law systems to address situations where negligence diminishes the probability of a favourable outcome, rather than directly causing harm itself.[47]

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[44] Sklenárová (n 27).
[45] Judgment of the District Court Bratislava II, 25 October 2018, Case No 8C/99/2011.
[46] Hoge Raad der Nederlanden, *Baby Kelly* (18 March 2005) ECLI:NL:HR:2005:AR5213 https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:HR:2005:AR5213 accessed 30 June 2026.
[47] M Spriggs and J Savulescu, 'The Perruche judgment and the "right not to be born"' (2002) 28(2) *Journal of Medical Ethics* 63 https://doi.org/10.1136/jme.28.2.63 accessed 30 May 2026.

The doctrine has also been examined in the context of reproductive medicine. McLean argues that negligent interference with assisted reproduction procedures may constitute a legally relevant loss of reproductive opportunity, even where causation in the strict sense cannot be fully established. Such reasoning is directly applicable to surrogacy arrangements, where medical negligence, and more specifically reproductive negligence, may reduce the probability of a successful pregnancy or the birth of a healthy child rather than directly and deterministically cause harm.[48]

7. EVALUATING LOSS OF CHANCE IN RISKS ASSOCIATED WITH SURROGACY

Surrogacy raises a wide range of legal, ethical, and practical issues that require contractual solutions. We have examined[49] the implications of a high-risk pregnancy within this legal framework, particularly as to who should fairly bear the healthcare costs if they significantly exceed the original expectations — especially when such a situation cannot be attributed to anyone in terms of subjective fault or liability.

However, the situation is different when complications during pregnancy result from the surrogate mother's conduct — for example, from engaging in risky behaviour, failing to comply with prescribed restrictions or a medically recommended lifestyle, neglecting regular medical check-ups or medication regimens, or not abstaining from activities that could harm the foetus. In such cases, would it not be appropriate to consider the surrogate mother's responsibility? And what legal consequences should arise if she approaches the pregnancy in this manner?

Another issue arises regarding mandatory medical check-ups: who has the right to be present, how frequently they should occur, what types of tests are involved, and what risks are associated with them? It seems essential that the contract regulates restrictions during pregnancy, such as prohibiting certain activities, imposing obligations to adhere to treatment or rest regimes, and potentially even addressing sexual abstinence if it may pose a risk to foetal development.

It is not uncommon for a miscarriage to occur. Who bears liability for the resulting damage? Could this be grounds for imposing contractual penalties if there is reason to believe the surrogate mother failed to follow the agreed-upon measures? Or might the commissioning couple have legal grounds to assert a **loss of chance** claim here as well — the chance to have a healthy child, which was lost despite being possible and expected?

The concept of **loss of chance**[50] could also be viewed particularly from the perspective of the child — the loss of the chance to be born healthy, without disability, or free from complications that, although possibly later managed, are causally linked to the surrogate's failure to follow medical and lifestyle guidelines. On the other hand, it is not only the child who may suffer the loss of what should have been the gain of an opportunity; similarly, the commissioning couple as well may experience the loss of the chance to have a child through this arrangement. Under certain circumstances, even the

[48] Sheila McLean, 'Reproductive negligence and the loss of a chance' (2007) 15 *Medical Law Review* 1; Kirsty Horsey and Julie McCandless, 'Reproductive Harm, Social Justice and Tort Law: Rethinking "Wrongful Birth" and "Wrongful Life" Claims' in Kirsty Horsey (ed), *Diverse Voices in Tort Law* (Bristol University Press 2024) 79 https://hdl.handle.net/2134/31111894.v1 accessed 30 May 2026.

[49] Andrea Erdősová, 'Náhradné materstvo vo svetle zodpovednostných mechanizmov, neistôt a možných riešení [Surrogacy in Light of Liability Mechanisms, Uncertainties, and Possible Solutions]' (2025) 77(2) *Justičná revue* 137.

[50] Anton Dulak, 'Strata šance a niektoré ďalšie spôsoby riešenia neistej kauzality [Loss of Chance and Certain Other Approaches to Addressing Uncertain Causation]' (2017) 69(8–9) *Justičná revue* 964.

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surrogate mother may suffer harm — whether during the process of assisted reproduction, throughout the pregnancy, during childbirth, or in various contexts after the birth.

What if prenatal examinations reveal foetal abnormalities, or if the woman's health deteriorates to the extent that continuing the pregnancy endangers her well-being? Could this also serve as grounds for claiming non-pecuniary damages — and if so, would such a claim be relevant only in the case of subjective fault on the part of the surrogate?

The contract must also anticipate extraordinary situations: for example, the death of one of the intended parents, the couple's divorce after embryo transfer, the refusal of the child by the commissioning couple after birth, or even the surrogate mother's refusal to relinquish the child.

How should one deal with a situation where the surrogate mother disappears, moves to another country, and has no intention of returning? What legal remedies are available to the commissioning couple in such a case?

Finally, what if the biological father of the child, one of the commissioning couple, no longer lives with his legal wife and is raising the child with another partner, while the legal wife (still a contracting party) claims rights to the child?

However, if we base our reasoning on the concept of *loss of chance* in medical disputes, it is more likely that liability will rest with the healthcare provider. For them, surrogacy—when viewed in a broader context—represents potentially increased risks compared to those typically undertaken in other arrangements, including standard cases of assisted reproduction. We perceive the increased complexity and responsibility particularly through the involvement of a greater number of interested parties.

> The court holds that, in assessing this aspect of liability for damage, it is necessary to strengthen the weaker position of the patient in relation to the healthcare provider by not requiring full proof of the causal link in question. It is sufficient to demonstrate a so-called loss of chance, or loss of expectation, in the sense that due to the conduct of the healthcare institution—which was undoubtedly not in accordance with the law—the patient lost the chance that, without the improper medical intervention, the harm to their health would have been lesser or possibly none at all.[51]

8. CAUSAL LINK AND CASE-SPECIFIC ASSESSMENT

As mentioned above, in the context of surrogacy, increasing attention is being paid not only to the issue of direct harm to health resulting from pregnancy, its premature (e.g. forced) termination, or childbirth itself, but also to the question of non-pecuniary harm that the surrogate mother may suffer as a consequence of psychological and emotional distress. Such harm may take the form of post-traumatic stress disorder, postpartum depression, or trauma associated with the sudden separation from the child after it is handed over to the intended parents.

Emotional experience is highly individual and depends on numerous factors, including psychological resilience, personal life circumstances, and the presence or absence of emotional support from close relations. The risk of developing post-traumatic stress disorder (PTSD) may increase in proportion to the severity of financial hardship, lack of a stable background, insufficient support from family or a partner, or the underlying reasons and motivations that led the surrogate to undertake the pregnancy on

[51] Judgment of the Regional Court in Prešov, 28 November 2016, case No. 8Co/298/2015.

behalf of someone else. In some cases, however, the experience of having performed an altruistic act can be emotionally rewarding and positively perceived by the surrogate.[52]

A different matter arises when we speak of harm to reproductive and/or sexual health as a result of complications associated with pregnancy or childbirth. Such consequences may be either temporary or permanent, but in either case, they can represent a significant interference with the surrogate's bodily integrity.

In general, the concept of loss of chance in medical disputes is based on the statistical likelihood—had the medical procedure been performed *lege artis*—of full recovery, complete prevention of death, or the prolongation of the patient's life by a certain period of time. If the patient proves that, had they been aware of the risks, they would not have undergone the procedure, the healthcare provider (doctor) is liable.[53]

However, when we turn our attention to the issue of surrogacy, the standard for proving a *non lege artis* medical approach would not differ from cases involving medical negligence in the context of obstetric and gynaecological care during pregnancy, childbirth, or postpartum.

A different approach might be taken, however, if the loss of chance were based on the premise that the physician did not necessarily act negligently (*non lege artis*), but that the surrogate mother should have known—and could have reasonably been informed—about the specific risks and complications associated both with assisted reproduction and childbirth.[54]

The complexity of such a pregnancy lies not only in the medical dimension but also requires a holistic approach that considers psychological experience, physiological changes, and more. And yet, outside the physician or the reproductive clinic coordinating the surrogacy arrangement, it is unrealistic to expect that the surrogate mother has, or is able to obtain, all the necessary information herself.

As also reasoned by the Constitutional Court of the Czech Republic, a 100% certainty of causation is unrealistic, unattainable, and unsustainable. In medical procedures, establishing a clear causal link between an act and its consequences is inherently difficult, as the human body functions through a complex chain of causes and effects. The essence of medical intervention lies in attempting to influence and redirect these natural processes, which is, by definition, an artificial interference with the body's normal functioning. It is therefore often challenging to determine whether a particular medical procedure was the sole or even primary cause of a harmful outcome.[55]

As regards the degree of causality, the matter is significantly more complex and, as we elaborate further, often impossible to determine in cases of non-pecuniary damage. Moreover, the harm may be caused by a different underlying factor. It is generally accepted that the cause of a cause is also considered a cause of the resulting damage.[56]

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[52] V Jadva, S Imrie and S Golombok, 'Surrogate Mothers 10 Years On: A Longitudinal Study of Psychological Well-Being and Relationships with the Parents and Child' (2015) 30(2) *Human Reproduction* 373 https://doi.org/10.1093/humrep/deu339 accessed 30 May 2026.

[53] Compare this with the **judgment of the Supreme Court of the Slovak Republic, 9 November 2011, Case No. 6 Cdo 168/2010**, where the timely detection and diagnosis of a heart defect could have prevented more extensive damage to the heart and lungs. Earlier intervention—prior to the point at which the organs were already impaired—might have halted or at least slowed the hypertrophy of the right ventricle and the development of pulmonary hypertension, thereby contributing to an extension of the patient's life.

[54] Judgment of the Supreme Court of the Czech Republic, 29 April 2015, Case No. 25 Cdo 1381/2013.

[55] Decision of the Constitutional Court of the Czech Republic, Ref No I. ÚS 1919/08.; also see: *'Causality in biological processes is, in fact, always only a matter of greater or lesser probability.'* (**Judgment of the Regional Court in Bratislava, 29 September 2020, Case No. 16 Co/250/2018).**

[56] Lat. *causa causae est etiam causa causanti*.

We may add—*a minori ad maius*—that this applies even more so to pregnancy and childbirth, where, despite appropriate medical care, the due diligence of both the attending physician and the surrogate mother, and a well-chosen clinical management plan, complications may still arise from naturally occurring factors inherent in the woman's physiology. Even procedures conducted *lege artis* may ultimately lead to consequences that would not have occurred in another patient, and which medical science cannot predict in advance.

This raises an essential question: who should bear responsibility for such harm? If, for example, the surrogate mother experiences massive blood loss, secondary complications requiring surgical intervention, damage to reproductive organs, or is subsequently advised to suspend or even permanently abandon reproductive plans due to the life-threatening nature of future pregnancies—then, in sum, her pregnancy may constitute not only a health injury but also the loss of a real chance to have biological children of her own.

A particularly interesting line of reasoning is offered by A. Doležal and T. Doležal. In it, we can observe several parallels that may arise in connection with harm to the health of a surrogate mother resulting from pregnancy or complications during or after childbirth. These authors describe a case in which a reckless young man is driving a car at high speed. The road had recently been covered with large pieces of gravel, and as he drives fast, he kicks up one of the stones, which strikes a pedestrian in the face.

What is the cause, the authors ask? And the answers, which attempt to establish causality, may differ significantly. Some might say it is the responsibility of the parents who let an irresponsible youth drive unsupervised. Others might claim the fault lies in the poor road surface, ever since its construction. Still others might blame defective materials or poor maintenance. A physics teacher might talk about speed, objects, mass, and the force exerted on the object. And we might add that questions could also arise about the partial fault of the pedestrian for being inattentive, or the liability of the road authority that failed to prevent the harm with proper signage, traffic restrictions, or other safety measures.[57]

In many ways, this resembles the hypothetical situation we construct to justify that similar complexity would arise in the context of surrogacy and in proving damage or loss of chance, not because we could not describe the harm, nor because we couldn't find a connection to the act of undertaking a surrogate pregnancy. But what will the true cause of the harm be—and, more importantly, who will bear the liability?

Will it be the surrogate mother who knowingly undertook the risks and voluntarily accepted them? Or the commissioning couple, who received the "benefit" of a child born to them by the surrogate? Or will it be the healthcare professional who, although having informed the surrogate mother of the risks, may still be held liable on the basis of objective factors, as is often the case in medical torts, where fault is not necessarily examined?

This remains *terra incognita*—uncharted territory—which the law will eventually have to address through the framework of civil liability.

Causality in such cases will therefore be more a matter of fair attribution of responsibility.[58] This means that, in cases involving loss of chance in surrogacy, it will likely be necessary to seek a *morally* just decision about who should bear the burden of

[57] Adam Doležal and Tomáš Doležal, *Kauzalita v civilním právu se zaměřením na medicínsko-právní spory [Causation in Civil Law with a Focus on Medico-Legal Disputes]* (Ústav státu a práva AV ČR 2016) 37, 52.
[58] Doležal and Doležal (n 57) 52.

liability—particularly when it is not possible to determine, for example, that the harm to health arose from subjective fault or that medical negligence occurred.

9. CONCLUSION

It is relevant to situate the discussion against the backdrop of recent constitutional developments in the Slovak Republic. In September 2025, the National Council adopted a package of amendments to the Constitution that, *inter alia*, prohibit surrogacy and related agreements to carry a pregnancy for the benefit of others by embedding this prohibition within the framework of national identity and family law.[59] Such a constitutional ban implies that surrogacy agreements concluded domestically may be regarded as constitutionally invalid, raising questions about their legal effects and the recognition of resulting parentage arrangements. At the same time, however, it is foreseeable that intended parents may continue to engage surrogate services abroad or otherwise circumvent the domestic prohibition, contributing to cross-border reproductive practices and reproductive tourism with multiple legal implications for the status of children and parentage rights.[60]

While caring for a surrogate mother, it is the professional obligation of the obstetrician to support the well-being of the pregnant woman and her foetus, to support the pregnant woman's goal for the pregnancy, and to provide appropriate care regardless of the patient's plan to keep or relinquish the child. The obstetrician must make recommendations that are in the best interests of the pregnant woman and her foetus, regardless of prior agreements between her and the intended parents.[61]

In individual cases of surrogacy, many previously unclarified situations may arise from the perspective of legal liability. It will be extremely challenging—especially for courts—to strike a balance when addressing questions of causality and the burden of responsibility. Potential harm may, in fact, affect all participants in the arrangement.

The loss of a chance for a better life without harm—whether in terms of physical health or quality of life—may affect the surrogate mother, the commissioning couple (especially if they lose the opportunity to have a child through surrogacy), and ultimately even the child. The harm in question need not be limited to physical injury; it may also include other forms of suffering. This evokes morally controversial legal claims such as *wrongful birth* and *wrongful life*.[62]

For medicine, the primary concern remains the maternal-foetal well-being and the benefit of both the surrogate mother and the child. For legal professionals, however, surrogacy opens a wide spectrum of legal and ethical challenges—namely, how to

[59] National Council of the Slovak Republic, 'Parliament Approved the Constitutional Amendment' (26 September 2025 https://www.nrsr.sk/web/Default.aspx?MasterID=57273&sid=udalosti/udalost accessed 1 October 2025.

[60] Zsófia Nagy and Andrea Erdősová, 'Surrogacy in wartime' (2024) 49(2) *Prawo i Więź* 185; Emily Jackson, *Medical law: Text, cases, and materials* (6th edn, Oxford University Press 2022).

[61] American Congress of Obstetricians and Gynecologists Committee on Ethics, 'ACOG committee opinion number 397, February 2008: surrogate motherhood' (2008) 111(2 Pt 1) *Obstetrics & Gynecology* 465 https://doi.org/10.1097/aog.0b013e3181666017 accessed 30 May 2026.

[62] Christopher P. Moutos and John Y. Phelps, 'Wrongful birth and wrongful life lawsuits in obstetrics and gynecology' (2024) 231(6) *American Journal of Obstetrics and Gynecology* 611 https://doi.org/10.1016/j.ajog.2024.05.040 accessed 30 May 2026; Adam Doležal, 'Wrongful life, wrongful birth žaloby – etické a právní úvahy [Wrongful Life and Wrongful Birth Claims - Ethical and Legal Considerations]' (2014) 3(3) *Časopis zdravotnického práva a Bioetiky* 38 https://medlawjournal.ilaw.cas.cz/index.php/medlawjournal/article/view/58 accessed 18 June 2025.

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regulate these questions in legislation in a way that promotes the greatest possible legal predictability and protection for all parties involved.