WRONGFUL LIFE AND SOCIAL JUSTICE

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ABSTRACT

The High Court of Australia has recently ruled against the claimants in an action in negligence seeking compensation for their personal difficulties resulting from their birth with physical and intellectual impairments; a case of what has become generally known as the 'wrongful life' action. This article provides an analysis of the judicial reasoning in the context of approaches to the wrongful life action internationally.

Critical to the outcome in these cases is the way in which the court characterises the legal issues of 'causation' and 'damage'. On close scrutiny this is not the self-evident matter that initially appears to be so, which is an important reason why the action has met with some success in other jurisdictions.

There follows an evaluation of the policy background for wrongful life claims and an argument for just compensation consistent with a theory of legal obligation in the common law. It is argued that, contrary to the predominant judicial and academic opinions to date, there are no strong policy grounds for the out-and-out rejection of these claims.

The author concludes that the opportunity was available for an outcome which could satisfy policy concerns whilst reasonably attending to practical considerations and social fairness to the claimants.

In the tort of negligence a 'wrongful life' action is one in which a child plaintiff is maintaining an action for damages usually against a medical practitioner who was responsible for the pre-natal care of, and advice concerning the pregnancy to, the mother. The basic contention is that the defendant failed to

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exercise reasonable care in diagnosing an injury to the foetus or identifying a risk of such injury and advising the mother so that she could decide whether to exercise her lawful choice to terminate the pregnancy.[1] It follows that there must be evidence that she would have done so. As a result of this failure the child was born with permanent disabilities of a serious nature which constitute the injury from which he or she is now suffering. That damage often takes the form of 'Down's syndrome', but may consist of other kinds of physical and psychological affliction for which the child seeks to recover damages from the defendant.[2] It is the child's own action; distinct from any action that the mother herself may have against the defendant in negligence, which latter is referred to in terms of 'wrongful birth'.[3]

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1 It is, therefore, an essential premise in the plaintiff's argument, that lawful abortion be available in the jurisdiction. Absence of such was another 'policy' ground for denial of liability in American cases prior to 1973. As to whether the mother *would* have opted for a termination, this is an evidentiary matter relating to the issue of causation, therefore highly relevant to the outcome of the controversy. It may at first sight appear paradoxical that in the 'wrongful birth' action, the defendant's argument that given the availability of abortion and the plaintiff's desire to avoid birth, the plaintiff ought to have mitigated her loss by electing for an abortion, when raised has been rejected. However yet another 'policy' factor endorses the consensual view in *Harriton v Stevens* that it is solely the mother's choice.

2 A somewhat wider variety of grievances have been pursued as putative damage in the U.S.A. than in other jurisdictions, for example an unsuccessful action brought by a child against his father for causing him to be born illegitimate; *Zepeda v Zepeda* 190 N.E. 2d 849 (1963). See also M. Linde, 'Liability to Bastard for Negligence Resulting in his Conception', 18 *Stanford Law Review*, (1966) 530.

3 The mother's action for wrongful birth has been recognised by the common law, for example in Australia by the High Court in *Cattanach v Melchior* (2003) 215 CLR 1. In England and Wales the action has had a brief and chequered history. In *Udale v Bloomsbury Area Health Authority* [1983] 2 All E.R. 522 the plaintiff was awarded damages for pain and suffering and loss of income but denied damages for maintenance of the child. In *Emeh v Kensington Area Health Authority* [1985] Q.B. 1012 damages included a sum for the child's maintenance, as was the case in *Thake v Maurice* [1986] 1 Q.B. 644. In *McFarlane v Tayside Health Board* [1999] 4 All E.R. 961 the House of Lords held that general damages representing the cost of maintenance of a healthy child were not recoverable under English law. Following this decision the Court of Appeal has awarded damages related to the disabled child's special needs and care but not for the ordinary costs

In the majority of jurisdictions the wrongful life claim has met with a resounding judicial rebuff. The High Court has recently added Australia to that list with a majority decision of 6:1 (Kirby J. dissenting) in the case of *Harriton v Stephens.*[4] In August 1980, Mrs. Harriton, believing herself to be pregnant, became acutely unwell with fever and a rash. She consulted a general practitioner over this, explaining that she was worried that she might have contracted rubella and was aware that this could produce congenital abnormalities in an unborn child. She was advised that when she was well enough she should have a blood sample taken to determine whether she was in fact pregnant and whether she had contracted rubella. In due course the report of the blood analysis advised that Mrs. Harriton was indeed pregnant and that if there had been no recent contact with rubella any further contact with the virus would be unlikely to result in congenital abnormalities in the foetus. At her next consultation she was informed that she was pregnant but that she had not been suffering from rubella. A daughter, the plaintiff, Alexia, was born in March 1981. She suffered from the most profound disabilities as a consequence of contact with the rubella virus *in utero*, including blindness, deafness, mental retardation and spasticity, such that she would require total care for the rest of her life.

It was agreed that the defendant was negligent in advising Mrs. Harriton that she did not have rubella and failing to arrange further, more detailed, testing. It was also agreed that in 1980 a reasonable general practitioner would have done so and would

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of living; *Parkinson v St.James and Leecroft University Hospital N.H.S. Trust* [2001] 3 All E.R. 97. This in effect would leave special needs unattended to by the common law once the child attains the age of majority.

In *Cattanach v Melchior* the award of damages included the costs of rearing the child to the age of majority. The decision has been repudiated by legislation in New South Wales (s.71 Civil Liability Act 2002), Queensland (s.49A Civil Liability Act 2003) and South Australia (s.67 Civil Liability Act 1936). See also, generally, D. Stretten, 'Damages for Wrongful Birth and Wrongful life', (2005) 10 *Deakin Law Review* 319; P. Cane, 'Injuries to Unborn Children', (1977) 51 *Australian Law Journal* 704, S. Todd, 'Wrongful Conception, Wrongful Birth and Wrongful Life', 27 *Sydney Law Review*, (2005) 525.

4 (2006) 226 ALR 391.

have advised Mrs. Harriton that there was a high risk that a foetus which had been exposed to rubella would be born with very serious disabilities.[5] It was further agreed that had this been explained Mrs. Harriton would have terminated the pregnancy. The contentious issue was whether, in relation to any duty of care which the defendant doctor might owe to the plaintiff as a foetus, the disabilities which Alexia suffered from at birth were legally capable of constituting actionable damage.

At first instance the Supreme Court of New South Wales[6]held that any duty owed to the foetus by the defendant could not include an obligation to provide advice which could deprive the unborn child of an opportunity for life, and that the defendant had done nothing to contribute to the mother's contracting of rubella[7]. The Court of Appeal, (Mason P. dissenting) dismissed the plaintiff's appeal.[8]The plaintiff appealed to the High Court.

I. THE LAW IN OTHER JURISDICTIONS

For the U.K. legislation now specifically denies recovery of damages for the child in the wrongful life action.[9] This endorses the common law position in England and Wales. In *McKay v Essex Area Health Authority*[10] the plaintiff was a six year-old girl whose mother had contracted rubella early in the pregnancy. A blood sample had been sent to the defendant's laboratory but the virus had not been detected and she was therefore misadvised and continued the pregnancy. The child was born partly blind and deaf. At first instance the judge reversed a decision of the

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5 In cases involving medical negligence evidentiary difficulties over the breach issue often arise due to the time lapse between the date of events and the date of trial. An excellent example of this is *BT v Oei* [1999] NSWSC 1082.

6 (2002) NSWSC 461.

7 Mrs.Harriton's own action for wrongful birth was statute barred, the limitation period having expired.

8 (2004) 59 NSWSC 694.

9 ss.1; 4(5) *Congenital Disabilities (Civil Liability) Act* 1976. This applies to children born after 22 July 1976.

10 [1982] 2 All E.R. 780.

Master to strike out the plaintiff's claim as disclosing no reasonable cause of action, ruling that the claim was not one for damage resulting from wrongful entry into life, but rather for damage resulting from birth with disabilities, and that this constituted a reasonable and arguable cause of action. The case was complicated by the plaintiff's argument that had the rubella virus been detected at this early stage, an injection of globulins could have reduced the likelihood of further damage to the foetus, although it could not reverse or ameliorate any damage which had already eventuated.[11] On appeal, however, the Court of Appeal unanimously rejected the plaintiff's claim in negligence, holding that the damage had not been caused by the defendant's negligence but rather by an act of nature for which the defendant was in no way responsible.[12] More broadly the court was influenced by policy factors concerning the 'sanctity of human life'[13] and the repugnance of a conclusion which by inference would regard the life of a handicapped person as not worthwhile.[14] To assess damages according to normal principles

[11] This would, one would think, involve a different difficulty for the plaintiff in the form of the 'lost chance'. This has been rejected by the House of Lords in *Gregg v Scott* [2005] 2 WLR 268. See also, for example, *Phipson nominees Pty Ltd v French* (1988) Aust Torts Reports 80–196. If the action can be framed in contract the position appears to be different; *Chaplin v Hicks* [1911] 2 KB 786.

[12] [1982] 2 All E.R. 771 at 780.

[13] A variation of this appears in some of the cases; the 'damage' caused by the burden of pregnancy and childbirth is totally offset by the happiness delivered by the child. In *C.E.S. v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47 at 87, Meagher JA. opined '…there should be rejoicing that the hospital's mistake bestowed the gift of life upon the child.' In *Udale v Bloomsbury Area Health Authority* [1983] 2 All E. R. 522 at 527 Jupp J. was 'inevitably reminded of the Gospel (John 16:21). A woman when she is in travail hath sorrow, because her hour hath come: but as soon as she is delivered of the child, she remembereth no more the anguish, for joy that a man is born into the world.' The author has been unable to find any empirical evidence either to support or refute this proposition.

[14] [1982] 2 All E.R. 771 at 781. 'Six reasons of public policy' are canvassed briefly by counsel for the plaintiff in *Thake v Maurice* [1986] 1 Q.B. 644 at 650-657. In fact the policy factors have met with a considerable variation of judicial opinion; see C.R. Symmons, 'Policy Factors in Actions for Wrongful Birth', 50 *Modern Law Review* (1987) 269. The policy factors variously raised in relation to the child's claim for wrongful birth are mostly the same.

in such a case, it was reasoned, would involve a comparison of a life with disabilities, and no life at all.[15] Whilst there would arise on the defendant's part a duty of care in negligence towards the mother, as well as a duty to avoid acts or omissions which would cause harm to the foetus *in utero*,[16] no duty could arise to counsel action which would result in its destruction.[17]

The wrongful life action has found some limited success in the U.S.A. In *Gleitman v Cosgrove*[18] the New Jersey Supreme Court rejected the child's claim on the grounds that an assessment of damages would be impossible and that to award damages for loss of an opportunity to abort would be contrary to public policy.[19] This remained the general position in the U.S.A. until the decision of the New York Supreme Court in *Park v Chessin.*[20] Mrs. Park had previously given birth to a child suffering from a kidney disease who lived only for a few hours. She subsequently consulted the defendant medical practitioners as to whether any future pregnancy was likely to be afflicted with the same prospect and was advised in the negative. Relying on this she again became pregnant and gave birth to another child with the same disease who died in early infancy. An action for damages on behalf of the child was allowed. The decision itself was short-lived. In *Becker v Schwartz*[21] the New York Court of Appeals rejected the child's claim on grounds of policy. The court should

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15 [1982] 2 All E.R. 771 at 780–781.

16 Such a duty was first recognised in Australia in *Watt v Rama* (1972) VR 353.

17 As with the duty towards the unborn child with respect to the defendants acts or omissions it is uncontroversial that, for the purposes of the action in negligence, to qualify as a plaintiff the child must be born alive, see, for example, *Park v Chessin* 400 N. Y. S. 2d 110 (1977). An action brought by the mother for an unwanted pregnancy is a different matter, since it has been held that the pregnancy itself sounds in damages as 'pain and suffering', see, for example, *Melchior v Cattanach* [2001] QCA 246.

18 49 N.J. 22, 227 A.2d 689 (1967). See also H. Teff, ' The Action for 'Wrongful Life' in England and the United States', 34 *International and Comparative Law Quarterly*, (1985) 423.

19 The position on abortion has been affected by U.S. Supreme Court's interpretation of the Bill of Rights in *Roe v Wade* 35 L.ed. 2d. 147 (1973).

20 400 N.Y.S. 2d 110 (1977.)

21 46 N.Y. 2d 401 (1978).

not be seen to endorse a view that a child's life was not worthwhile.

The wrongful life action was received into California state law, however, in *Curlender v Bio-Science Laboratories.*[22] The defendant medical laboratories had carried out tests to determine whether the plaintiff's parents were carriers of Tay-Sachs disease. Relying on the erroneous negative result the wife conceived and the plaintiff daughter was born with the disease. The California Court of Appeal upheld her claim for damages for pain and suffering caused for the duration of her life-span, plus damages for the costs of her care to the extent that these had not been recovered by the parents themselves. The crucial distinction in *Curlender* is that the approach of the court to the issue of damage differed from what had become the norm. It was not axiomatic that the law should involve itself in a comparison of an existence with disabilities and non-existence to address the matter of damage. The damages awarded could properly be related to the pain and suffering endured by the plaintiff in her lifetime as a result of contracting Tay-Sachs disease and the additional financial burdens imposed upon her because of it. *Curlender v Bio-Science Laboratories* was followed in part by the California Supreme Court in *Turpin v Sortini*.[23] Owing to the negligence of the defendant doctors the plaintiff child's parents were unaware of a hereditary condition which caused the child to be born with total deafness. Whilst the court declined to award general damages on the familiar policy grounds, the court awarded damages related to the extraordinary financial costs borne by the plaintiff because of her deafness. The Washington Supreme Court followed suit in *Harbeson v Parke-Davis Inc.*[24] Mrs.Harbeson had been prescribed a drug to control her epilepsy. She enquired of the defendants whether the drug might result in birth defects and was advised that use of the drug during pregnancy might cause cleft palate. However the defendants had conducted no literature search to ascertain whether there was any risk of serious impairment to the foetus, and Mrs. Harbeson

22 165 Cal. Rptr. 477 (1980).

23 182 Cal. Rptr. 337 (1982).

24 98 Wash. 2d 460 (1983).

subsequently gave birth to two daughters both of whom suffered growth deficiencies and retardation due to the effects of the drug. Following *Turpin v Sortini* the court awarded damages for the plaintiffs' medical expenses, insofar as these had not been awarded to the parents, as special damages, whilst declining to award general damages on the ground that it would require comparison of the children's' existence with non-existence.[25]

II. THE HIGH COURT'S DECISION

The most detailed judgment delivered in the High Court, with which Gleeson CJ., Gummow, Hayne and Heydon JJ., agreed, was delivered by Crennan J., in which she expanded on the *rationes* provided by the lower courts.

A. *Duty of care*[26]

Her Honour reasoned that recognising a duty of care in a wrongful life action requires an identification of a right or interest capable of legal protection in the foetus itself, rather than

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[25] In France a decision of the Cour de Cassation of 17 November 2000; *arret: Perruche*, Bull; Ass. Plen no. 9, to award damages under Article 1382 of the Code Civile to a teenage boy who had been born with severe mental and physical disabilities has been abrogated by special statute after fierce political lobbying on the part of the medical insurers. The statute states: "nobody can claim to have been harmed simply by being born"; Proposition du loi 10 January 2002. The equivalent of the wrongful birth action remains. A more recent decision of a court of the Netherlands to award damages for wrongful life to a severely disabled nine year-old girl in an action against a midwife may yet share the same fate as the French judging by some statements in the legislative assembly and by some jurists in the Universities; *Molenaar*, 26 March 2003, Het Gerechtshof, Haag. However if I am correct in the view set out in this paper as to the identification of damage, the French statute may yet not be the end of the matter, since the plaintiff is not claiming to have been harmed simply by virtue of being born.

The Cour de Cassation does not issue reasons but the outcome of a further *arret* could be consistent with that of *Perruche*. The Civil Liability Act 2002 (NSW), whilst abrogating the High Court's decision in *Cattanach v Melchior*, does not preclude 'any claim for damages by a child for personal injury … sustained by the child pre-natally or during birth'. (s.70(2)).

[26] (2006) 226 ALR 391 at 447–449.

via the mother. It poses the uncomfortable question of whether the common law does, or ought to, vindicate a right of the foetus to be aborted, or an interest in its own termination, since on the agreed facts that was the only way in which the plaintiff's present disabilities could have been avoided. This is inescapably different to an existing duty of care to avoid acts or omissions which may cause injury to the child *en ventre sa mere.*

It was Mrs.Harriton's decision alone as to whether or not to undergo an abortion,[27] and elsewhere the law recognises that where this is a lawful possibility this is a decision she may make in her own best interests and not necessarily those of the foetus. Then a recognised legal right of the mother may conflict with any posited 'right' of the unborn child, with the further complication that, should the mother decide to continue the pregnancy to term in the light of her full knowledge as to its condition, she then, it must follow, has caused the posited 'damage'. If a doctor lies under a duty of care in this way it is difficult in principle to appreciate why a mother would not.[28]

B. *Damage*[29]

The very gist of the action in negligence is damage suffered by the plaintiff, since the action is compensatory. This inevitably involves a proposition that the plaintiff has in some way been left worse off by the action of the defendant and requires a comparison of the plaintiff's condition following the defendant's tort with that pertaining absent the tort, which again brings one back to the imponderable comparison of the virtues of existence and non-existence. It cannot be determined, then, in what sense Alexia Harriton's present life with her disabilities represents a 'loss'. For the same reasons it would in any event not be possible to assess the damages in the normal way according to the compensatory principle.[30] On the plaintiff's averment, had the

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27 See, for example, *Planned Parenthood of Missouri v Danforth* (1976) U.S. 52; *Paton v Trustees of BPAS* [1978] 2 All E.R. 987*; Emeh v Kensington Area Health Authority* [1985] Q.B. 1012 at 1024–1025, per Slade LJ.

28 Statutory immunity for the mother is provided in the U.K. by s.1 *Congenital Disabilities (Civil Liability) Act* 1976.

29 (2006) 226 ALR 391 at 449–451.

30 *restitutio in integrum.*

defendant doctor exercised reasonable care towards her she would simply not be here.

C. *The value of life*

Whilst her Honour notes that it is not the case that the common law invariably regards the preservation of human life as paramount[31], she opines that

> '… it is odious and repugnant to devalue the life of a disabled person by suggesting that such a person would have been better off not to have been born into a life with disabilities. In the eyes of the common law of Australia all human beings are valuable in, and to, our community, irrespective of any disability or perceived imperfection. A seriously disabled person can find life rewarding.'[32]

The outcome of *Harriton v Stephens* is a clear one and it is undeniably in accord with the preponderance of authority elsewhere as well as statutory movements.[33] However it is, I think, relevant and worthwhile to consider the decision and the principles accepted by the court rather more broadly in relation to their social implications.[34]

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[31] A judicial examination appears in *Airedale N.H.S. Trust v Bland* [1993] 2 W.L.R. 317. See in particular the speech of Hoffman LJ. at 349. See also Kirby J. (2006) 226 ALR 391 at 415.

[32] (2006) 226 ALR 391 at 451. I suggest *supra* that it is quite possible to agree with this sentiment whilst supporting a different outcome in actions of this kind. Kirby J. thought that the description of the action as 'wrongful life' implicitly denigrates the value of human life but that the problem lies with the description itself; (2006) 226 ALR 391 qt 394–-5. He observes that the term has been somewhat carelessly extrapolated from a different social context (at 393). Mason J. opined that 'The labels themselves have contributed to instinctive opposition to certain claims'; [2004] NSWCA 93 q5108.

[33] Possibly an unstated influence upon the thinking of the majority was the statutory fate of *Cattanach v Melchior* in some of the states (see n.3 *supra*) and the limitations placed upon the awards of damages for personal injury by the state legislatures as a result of pressure from the insurance industry.

[34] In a strong dissenting judgment Kirby J. addresses some of these matters; (2006) 226 ALR 391at 392–428.

III. PUBLIC POLICY AND THE DUTY OF CARE[35]

Some of the arguments founded upon by the majority are readily met with a countervailing view. Damages are awarded for negligence in 'wrongful birth' actions and a public policy argument that this somehow sounds in deprecating the child's birth or life, or childbirth generally, no longer prevails.[36] It more simply represents a fact of life that childrearing involves financial expense which must be borne, usually by the parents. The same is true whether the child is disabled or not, only in the case of the former the expense is greater, a fact which surely does not need to be established by empirical evidence, although it could be. To award damages in a wrongful life action, then, would in this respect be consistent with existing principle, and as readily, if not more readily, reflective of the former fact than of an attitude that the life of a disabled person is somehow unworthy or not to be accorded respect or dignity equivalent to that of others. Indeed insofar as money can go towards improving a quality of life an award of damages can assist understanding and respect. We do not seriously object to providing someone with a wheelchair on the ground that it implies that a person who cannot walk does not merit equal dignity.[37]

What of the public policy argument that it would be socially unacceptable to hold a mother liable in tort towards her child? Liability can and does arise in a context in which the mother must have third party liability insurance.[38] More broadly, it must be accepted that in principle if a treating doctor owes a duty of care to the foetus based on the foresight principle then a mother surely would, and it would be significantly a broader one. But

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35 See also C.R. Symons, 'Policy Factors in Actions for Wrongful Birth', (1987) 50 *Modern Law Review* 269.

36 Again it has to be said that the American decisions tend towards the more pragmatic approach; see, for example, *Thill v Modern Erecting Co.* (1969) 284 Minn. 508.

37 See also Kirby J. (2006) 226 ALR 391 at 419.

38 Under s.2 of the U.K. Act of 1976 a mother can be held liable in negligence in respect of injury to the foetus caused by her driving of a motor vehicle. See n.9 *supra.*

liability would only result where there is a breach of the duty, and this must take account of the normal personal freedom of the mother.[39] Beyond the insurance context in negligence case law provides no example of child suing mother.[40] Yet in the imagined event of wealthy mother somehow clearly in breach of her duty of care to the child with resulting serious injuries, it is not self-evident, it is suggested, that the 'social repugnance' argument should have priority. More specifically, where abortion is available to a woman it is a matter of statute, and one would not expect a court to entertain a proposition of common law that flies in the face of it.

IV. THE ISSUE OF DAMAGE

The problem concerning assessment of damages in the wrongful life action which concerned the majority of the court and so many of the other benches can be met quite readily, one would think, by the observation that the relevant legal history is that the court will 'guess', at any particular time, at a monetary value of a

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[39] See, for example, J.G.Fleming, *An Introduction to the Law of Torts*, pp.32–33. There is currently at least no pressing case for a blanket immunity from liability that the denial of a duty of care effectively provides, and which could actually work to the detriment of the family in some circumstances.

[40] In *McKay v Essex Area Health Authority* [1982] 2 All E.R. 780 at 787, Ackner LJ. endorses the view of the Royal Commission on Injuries to Unborn Children (U.K.) Law Com No.60, 1974, Cmnd 7054–1, para. 1465, to the effect that such an action would result in personal friction and has the potential for disruption of family life. See also M. Ploscowe, 'An Action for Wrongful Life', 38 *New York University Law Review*, (1963) 1078, A. Capron, 'Tort Liability in Genetic Counselling', 79 *Columbia Journal of Law and Social Problems*, (1979) 618. It might be ventured in opposition to this that financial burdens which cannot be met may equally be a source of tension. In addition since the child will invariably be suing through a 'next friend', as a practical matter it seems unlikely that it would be pursued unless it was perceived on balance to be advantageous to the family. For a more general comment on intra-familial litigation see J.G. Fleming, *An Introduction to the Law of Torts*, pp.8-13. In *Harriton v Stephens* Kirby J. addresses this argument at (2006) 226 ALR 391 at 420–421. See also the comments of McMurdo P. in *Melchior v Cattanach* [2001] QCA 246. Potential for litigation more broadly is dicussed in J.Waters 'Wrongful Life: The Implications of Suits in Wrongful Life Brought by Children Against Their Parents', 31 *Drake Law Review*, (1981–1982) 411.

physical injury, for example the loss of a leg, or an illness, for the purposes of compensation. Mrs. Donoghue's gastro-enteritis turned out to be worth one hundred pounds.[41]

There is really, it is submitted, no legal problem with assessment. The problem really lies with the identification of the wrongful life damage, and here, it is suggested, it is a matter of how one conceives of this damage.

This appears to be a matter of choice.[42] There is no argument that is compelling.[43] The majority decided to proceed on the basis of logic. Logic in legal reasoning is both valid and valuable, but it is not binding and legal history testifies to this.[44] The dissenting judgments in *Harriton v Stephens* take a very different position on both the identification of damage and the related issue of causation. On this view the gravamen of the plaintiff's claim should properly be perceived not as a complaint against existence but rather as essentially related to a life with significant and undeniable suffering.[45] A different appreciation can be had of the dichotomy between the defendant's breach of duty and the plaintiff's damage.[46] If the complaint is conceived of in terms of as a life with suffering, the defendant's acknowledged failure to act with appropriate care is readily understood as a cause of

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41 Although the action was settled, the point holds.

42 Reflecting on the common law generally, B.N. Cardozo acknowledges 'A broad field … in which rules may, with approximately the same convenience, be settled one way or the other'; *The Nature of the Judicial Process*, p.65.

43 Kirby J. notes that the matter has divided scholars; (2006) 226 ALR 391 at 409.

44 Kirby J. refers to the famous observation of Oliver Wendell Holmes, *The Common Law*, 1881, p.1; that the basis of the common law has been experience, not logic. (2006) 226 ALR 391 at 411. See also J.Stone, *Precedent and Law*, Ch.2.

45 Kirby J. (2006) 226 ALR 391 at 393 citing P. Cane, 'Injuries to Unborn Children' 51 *Australian Law Journal* (1977) 704 at 719: 'the plaintiff in (Wrongful Life) cases is surely not complaining that he was born, simpliciter, but that because of the circumstances under which he was born his lot in life is a disadvantaged one'.

46 See also D. Pace, 'The Treatment of Injury in Wrongful Life Claims', 20 *Columbia Journal of Law and Social Problems*, (1986) 145.

that.[47] Where a person has suffered injury at the hands of another's tort the common law has taken its broad brief as to be to provide a remedy.[48]Personal injuries take pride of place in this; the common law entertains a duty of care in relation to physical injury more readily than any other type of harm, such as property damage or economic loss.[49]

More broadly, if we can accept that the child's disability represents a 'loss', if only in the sense that it represents a financial burden over and above those normally pertinent to everyday life for a non-disabled person, where should the loss properly lie?[50] In relation to legal principle it is indeed well for the purpose of understanding and legal analysis, as far as possible, to treat the elements of a negligence action as conceptually distinct. But these elements relate to each other and particularly in a novel case, it can be important to keep the

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47 Kirby J. concludes that the defendant, through carelessness, caused the plaintiff to suffer the consequences of contact with the virus, and in depriving the parents of an opportunity to act, provided a legal cause of the damage; (2006) 226 ALR 391 at 399-400. Mason P in the Court of Appeal observed 'doctor's seldom cause their patients illnesses. But they may be liable in negligence for the pain and cost of treating an illness that would have been prevented or cured by reasonable medical intervention'. [2004] 59 NSWLR 694 at 710.

48 *ubi jus ibi remedium* (where there is a right there is a remedy) *Ashby v White* (1703) 2 Ld. Raym. 955.

49 Yet the court has previously abandoned logic in respect of a claim for negligently-inflicted economic loss. In *Seale v Perry* (1982) VR 193, a will prepared by the defendants was not executed according to statutory requirements and as a result a gift to the plaintiff beneficiary failed. The Supreme Court of Victoria rejected the plaintiff's claim, partly on the ground that the plaintiff had lost nothing. The gift to the plaintiff had never vested, and one cannot lose what one does not have. The High Court, overruling *Seale v Perry* in *Hill v Van Erp* [1997] 188 CLR 159, side-stepped this logical approach, regarding the failed gift as a real and valuable loss to the plaintiff. The historical trend is for the courts to recognise a new duty situation in tort more readily in relation to physical injury than for economic loss.

50 Lord Steyn in *McFarlane v Tayside Health Board* [1999] 4 All E.R. 522 at 531, proffers a view of the relevance of 'distributive justice' very different from my own, but in fairness it is a threadbare version, and it is readily countered in its own terms by Hale LJ. In *Parkinson v St.James and Seecroft N.H.S. Trust* [2001] 3 All E.R. 97 at 120.

conventional distinctions in focus when considering perceptions concerning the claims of social policy. To impose a duty of care in the *Harriton* situation does not widen the duty of care. A duty of care was already owed by the doctor. It goes to the content of that duty; what the average competent doctor can reasonably be expected to do.[51] The negligence was basic and fundamental and the consequences for the individual at the far end of the spectrum in terms of seriousness.[52] There was no issue of 'indeterminacy'. It would seem to be a case perfectly within the theory and modern practice of loss-spreading through the vehicle of insurance.[53] Yet the outcome is such that the loss lies on the individual who cannot afford to bear it. On the face of it this does not seem to be socially 'just'.

V. A CASE FOR 'JUST' COMPENSATION

I have not entered into any detailed discussion of the various policy factors which have, in different sources, been raised in relation to the claim for wrongful life, partly because there are such discussions elsewhere, and in part because of a view that most readers will be well able for themselves to evaluate their merits.[54] I would only go further here to say that there are some

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[51] It should be borne in mind that an outright denial of duty on policy grounds costs the common law in terms of flexibility and militates against fairness between the parties in other ways. For this argument more generally see K.A.Warner 'Proximity and the Duty of Care in Recent Applications of Negligence Law', 4 *University of Notre Dame Law Review*, (2002) 145. Against this, it may be argued that that the exclusion of duty provides certainty in the law, but then, so did *Winterbottom v Wright* (1842) 10 M. & W. 109 prior to *Donoghue v Stevenson* [1932] A.C. 562.

[52] In relation to civil law F.H. Lawson and B.S. Markesinis note 'often the outcome of such problems seemed to depend more on the presence or absence of fault on the part of the defendant than on the nature or causative potency of his conduct'. *Tortious Liability for unintentional harm in the Common Law and Civil Law*, Vol. I, p.30.

[53] See J.G. Fleming, *An Introduction to the Law of Torts*, p.8.

[54] For example I have little to say with regard to the proposition that to contemplate abortion on the ground that the foetus is afflicted is to entertain a view that the life of the child born with incapacities is less 'valuable' in some sense than that of the child without. With all respect, the observations of Crennan J. in relation to this, in *Harriton v Stevens*, simply miss the

which, in the absence of psychological or empirical research, appear so speculative as to be unworthy of any guiding influence upon the law, and others which founder on the rock of logic which paradoxically has proved fatal to the majority of the child plaintiffs. An example of the former, not herewithin previously mentioned, is that the discovery of the very fact of this legal suit by the child at some time later in life will, or at least can, somehow operate to the child's psychological or emotional detriment.[55] An easy answer to this is that the suit has already been issued and indeed litigated, and if later in life the child, (hereafter; 'Ena', for ease of reference) becomes a law student or for other reasons an avid reader of the law reports, then Ena will indeed make that discovery regardless as to whether the case was won or lost. In this scenario then, the personal detriment following Ena's discovery of the facts has no relationship to the outcome of the case, and it becomes irrelevant to consider whether any detriment does actually occur, or as to the chances of any such detriment occurring.

However the proposition is not so easily answered, since a stronger version of the argument, (and for this purpose I will simply assume that detriment will occur), is that a successful outcome will encourage other such law suits and therefore lead to a greater number of 'detriments'. Now it does become necessary, I suggest, somehow, if only in a rough and ready rather than any sort of scientific way, to assess the 'detriment'. I will here dismiss the view that an assumption of detriment is enough to qualify (say because Ena realises that her mother would have undergone an abortion and is bound to find that thought distressing), although, in case of disagreement, even if I am wrong on this it does not dispose of the issue.

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mark, and I would argue to the contrary. If we contemplate the matter as one of discrimination, certainly we are treating the two children differently. But discrimination is as capable of being meritorious as unmeritorious. I think, for example, that the blind man attempting to negotiate his way in the street would agree with this. *Cf. Haley v London Electricity Board* [1965] A.C. 778.

55 Jupp J. in *Udale v Kensington Area Health Authority* [1983] 2 All E.R. 522 at 531, for example, speaks of it as 'highly undesirable'. Kirby J. observes that the argument appears to overlook the reality of the child's condition. (2006) 226 ALR 391 at 421.

For detriment alone is not a forceful enough consideration to influence the path of the law in a novel situation. Indeed the very intrusion of the notion of detriment into our legal thinking seems to invite a corollary consideration, that of 'benefit'. On some sort of general 'social justice' or 'utilitarian' approach we would need to take into our calculation as to the social merits of the outcome the benefits, at least to Ena, in comparison to her detriment.[56] This is necessarily a more sophisticated exercise but surely worthier than a matter of mere assertion as a guiding force in our jurisprudence. Lord Steyn's version of 'distributive justice', as expressed in *McFarlane v Tayside Health Board* , with all respect hangs by a thread; an intuition as to public sentiment, incapable in itself of providing forceful guidance.[57]

There are two other, related arguments against imposing liability, which I think can be disposed of as a matter of analysis. The first is the relatively familiar one that an imposition of liability in the medical field is liable to result in the adoption of 'defensive' medical practice. Arguably there exists already enough tort liability generally in the field of medical practice to achieve this and any such further imposition would not amount to a significant increase of burden.[58] However, in the majority of the cases the contested argument simply did not concern the medical practice; the issue of breach, or 'negligence', being uncontroversial.[59] The controversial question was rather whether the defendant ought, at least to some degree, be held liable at law for the plaintiff's condition in life.

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[56] I know that in relation to classical utilitarianism separate individuals as such have no intrinsic importance but this has since been much refined. A thorough discussion can be found in H.L.A. Hart, *Essays in Jurisprudence and Philosophy*, Part VI, essay 9.

[57] [1999] 4 All E.R. 961 at 977.

[58] It must be viewed as an unlikely possibility. Most of the cases involve the conducting of routine tests, and one would need some convincing that, (a) as a matter of professional practice this would be abandoned, and (b) as a matter of law this would escape the scrutiny of the tort of negligence if it was.

[59] Where breach is in issue, as with 'causation', experience shows that the plaintiff's case, as a matter of law, more often than not becomes extremely difficult. See, for example, *Distillers Co (Biochemicals) Ltd v Thompson* [1971] A.C. 458.

The second of these arguments, which has it that the imposition of liability upon the defendant is to usher in a social pressure to counsel, or even urge, the termination of a pregnancy,[60] is surely, at least on the present state of the law, to strike wide of the mark, confusing as it does the existence of a duty of care on the defendant's part towards the plaintiff, with the content of that duty. For in the usual case it is no part of the defendant's duty to counsel mother at all. The duty includes informing mother of the problem. It is the failure to do so which is the focal point in the duty of care and therefore a key premise in the crucial rule-statement.

What remains as a significant barrier to Ena's claim is the proposition that mother's doctor did not *cause* her condition for which she seeks damages, and it is this seemingly fundamental argument against an imposition of liability that lastly I seek to address. Most often it is indeed true to say that the guiding principle for the operation of negligence law is that if the defendant has caused damage to the plaintiff, the defendant ought to be obliged to make reparation. I want to, however, put forward an alternative formulation which is equally capable, I suggest, of giving rise to a moral obligation, in that if the defendant bears a responsibility for the damage to the plaintiff, the defendant ought to be obliged to make reparation. To cause X is not the same as to be responsible for X, although doubtless one would admit that if D has indeed caused result X, then in some sense D *is* responsible for X. However what I am putting forward is two propositions which may exist in the alternative, both of which may give rise to a moral obligation which in turn has viability as a legal principle.[61]

For a broad illustration I turn to the doctrine of vicarious liability in tort law. To begin with, the well-established and plain fact is

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[60] See, for example, B.Kennedy, ''The Trend Toward Judicial Recognition of Wrongful Life: a Dissenting View', 31 *UCLA Law Review*, (1983) 473 at 501.

[61] It may be that I could derive some broad support for this approach from N.MacCormick, *Legal Right and Social Democracy*, pp.211- 219. Although Professor MacCormick is by no means addressing the same issue, he does appear to agree that a person not at fault for the plaintiff's damage may yet appropriately be brought under an obligation make reparation for it.

that as a legal principle the master is held responsible for the tortious conduct of the servant. The tort is that of the tortfeasor, not that of the employer, and one strives to avoid any confusion of this situation in understanding how the principle works. To say that the master has *caused* damage to a third party, and that that is why the master is brought under an obligation to make reparation for it, would be to fall into that very confusion. For the master's responsibility for the servant's tort has nothing to do with cause. That responsibility is generated by other factors. Although traditional features of vicarious liability such as 'control' and 'ability to direct' on the part of the master have not lost all significance in contemporary society,[62] it is now more or less frankly accepted that the fundamental rationale for the principle lies in its signal success as a loss-spreading mechanism in industrialised economies.[63]

Let me move to a more specific example which I venture to say is undeniably consistent with current legal principle. D, a builder, builds a house for P. The house is built so poorly that it soon falls down. The builder's conduct has caused the damage to P. This is a circumstance in which a moral obligation arises for D to make reparation and when called upon the common law, in terms of legal principle, can endorse this. Equally the common law may in principle call upon the local council to make the reparation.[64] Again the local council did not cause the house to fall down, so if an obligation of this type arises it must be for a different reason. In practice many such reasons have been presented to justify this sort of liability, but I do not need to go into them specifically to make the point that I am trying to establish here, that somehow the council can be said to bear a responsibility for P's harm, and, incidentally, cannot be seen as having caused P's harm.[65]

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62 See, for example, *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16; *Hollis v Vabu Pty Ltd* (2001) HCA 44.

63 See J.G. Fleming *The Law of Torts* 9th. ed. p.411..

64 See. for example, *Sutherland Shire Council v Heyman* (1985) 157 CLR 424.

65 In one of the earliest decisions, *Dutton v Bognor Regis U.D.C.*, Lord Denning M.R. went straight to policy considerations: 'who in justice ought to bear (the loss)? I should think those who were responsible… In the first place the builder was responsible… In the second place the council's inspector was responsible.' [1972] 1 Q.B. 373 at 397. Stamp LJ. saw

In the context of medical practice the issue of causation is often closely linked to the conceptualisation of the damage,[66] with the 'but for' test again capable of producing two opposite answers, depending upon how one views the factual events.[67] But the proposition of being responsible for the plaintiff's harm is frequently more persuasive than a proposition that the defendant has caused the plaintiff's harm. We can consider, for example, a defendant's failure to advise of a risk inherent in a surgical procedure.[68] In this circumstance there is no need for the plaintiff to point to any fault in the conduct of the surgery itself, and the causation question is addressed to a different factual issue. Rather than asking 'what was the cause of the plaintiff's harm?' the question can more appropriately be posed 'was the defendant's conduct a responsible cause of the harm?'

The above concludes the basic argument I want to make in relation to moral obligation and legal principle as pertinent to the wrongful birth claim, and I continue only to point to some matters of relative detail which I believe endorse the view that these claims are perfectly supportable in principle and that should the courts choose to do so this would resemble in reality nothing approaching an excursion into uncharted territories.[69] I alluded above to reasons which may be advanced for recognising that an obligation may arise only by virtue of a party bearing a

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causation in effect as a matter of responsibility: 'In my judgment he who shows the green light in circumstances such as these causes the consequential injury'. (at 410).

66 This was recognised by Lord Hoffman in *Environment Agency v Empress Car Co.* [1999] 2 A.C. 22 at 29.

67 See also dicta of Gaudron J. in *Chappel v Hart* (1998) 195 CLR 232 at 238.

68 See, for example, *Chappel v Hart* (1998) 195 CLR 232; *Rosenberg v Percival* (2001) 205 CLR 434.

69 I do not, of course, argue that a moral principle is identical with a legal principle. I accept that there is a relationship between the two concepts, and my position is that where a moral principle exists this is *a* reason for the common law to recognise the situation as within legal principle, and further, more specifically, that wrongful life is such the case. Even a strong exponent of the view that moral principle is distinguishable from legal principle, such as Hart, does not, as I understand it, contend that the two are without relationship. See, for example, H.L.A.Hart, *The Concept of Law*, 2nd. ed. pp.172–180. An analysis of a number of influential theories on this relationship is to be found in H.L.A.Hart, *Essays on Bentham*, Ch.VI.

responsibility for the harm of another. Modern case law provides two particularly pertinent examples in the notions of 'assumption of responsibility' and 'reliance', that is an assumption of responsibility on the part of the defendant, together with some sort of reliance upon the exercise of reasonable care by the plaintiff.[70] These features would seem at least capable of application to the wrongful life situation.

I am conscious that earlier I maintained the term 'damage' in relation to the obligation created in the defendant who bears a responsibility. I have not lost sight of the fact that the term itself has in the case law itself occupied a prominent part in the controversy. This may well deserve greater consideration than I wish to devote to it here, but in most of the cases, those concerning doctors who attended the plaintiff's mother, *prima facie* the doctor's responsibility does not embrace the pregnancy itself, which resulted from a prior decision of the mother, but does relate to the unusual condition which afflicts the child at birth and of which he or she now complains.

On this reasoning then, the damage which is properly within the purview of the defendant's responsibility is indeed the extraordinary living costs which the child will face because of the physical and/or intellectual incapacity.

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[70] In Australian law, for example, *Shaddock & Associates v Parramatta City Council* (1986) 36 ALR 385; *Pyranees Shire Council v Day; Eskimo Amber Pty Ltd v Pyranees Shire Council* (1998) 192 CLR 330; *Perre v Apande Pty Ltd* (1999) 198 CLR 180.