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The wrongfulness or rightfulness of actions for wrongful life

Evelyn Ellis and Brenda McGivern

Courts in Australia and the United Kingdom have emphatically rejected claims for "wrongful life", that is to say actions brought by disabled children conceived or born after negligence on the part of a medical practitioner. This article analyses the judicial decisions and reveals that the reasoning of the courts is much less clear than it would at first appear. The judgments are inconsistent and demonstrate how extensive in practice are the consequences of the divergence between the High Court of Australia and the House of Lords over the applicability of the Caparo test for the existence of a duty of care.

INTRODUCTION

In these technologically advanced times, pregnancies and births are sometimes a consequence in part at least of the negligence of a health professional. There are a number of ways in which this can come about. There may be negligence in the performance of a sterilisation or other procedure involving the reproductive organs of either parent. Another possibility is that negligent advice may be given in connection with a person or couple's capacity to reproduce, or regarding the effects of a disease on the unborn or future children of that person or couple. Finally, a genetic condition (in a prospective parent or unborn child) may be negligently undiagnosed, or misdiagnosed. In each case, a consequence of the health professional’s negligence is that a couple may conceive a child and/or proceed with a pregnancy in circumstances where they would otherwise have avoided doing so.

In addition to various ways in which negligence might occur, the context in which that negligence arises may vary widely. The pregnancy may result from assisted fertilisation or from natural conception. In some cases, parents will have actively chosen not to have another child; other cases concern those who have wanted a child but were concerned not to have a disabled child. The role played by the health professional across the spectrum of cases therefore varies similarly.

Difficult legal questions are posed in all these types of situation. Foremost are whether either the parents or the child (especially one born disabled) has a right to sue the health professional who acted negligently. Actions brought by parents have come generally to be known as actions for “wrongful birth”, while those brought by the child are referred to as “wrongful life” actions. Focusing on the

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2 For example, in vitro fertilisation (IVF).

3 The phrase “wrongful birth” was disapproved by McHugh and Gummow JJ in Cattanach v Melchior (2003) 215 CLR 1 at 32, because it suggests that the birth is wrongful while, in fact, it is the doctor’s conduct which is wrongful.

4 In Harriton v Stephens (2006) 226 CLR 52;[2006] HCA 15 at [8]-[14]. Kirby J argued that the term “wrongful life” should be avoided inter alia because it has been borrowed from a different context (namely, actions in the United States by illegitimate children against their fathers, seeking damages for the disadvantages resulting from their illegitimate status), because it is misleading as to the damage alleged and because it is emotive. For reasons that will be discussed further below, Kirby J would prefer to refer to actions for “wrongful suffering” (see in particular at [155]) although he accepted that the expression “wrongful life” has entered the legal lexicon.
law in Australia and the United Kingdom, this article is primarily concerned with whether the child should be permitted to sue for wrongful life. It is essential to an understanding of the relevant principles to examine also how the law has developed in relation to parental claims for wrongful birth.5

It should, at this early stage, be noted that claims for wrongful life have been resoundingly rejected by courts in both Australia and the United Kingdom.6 It may therefore be questioned why any further consideration or analysis of the issue is relevant. The following observations are made in answer, at least in part, to that question.

Wrongful life claims are novel and controversial, attracting significant judicial and academic debate and difference.1 The manner in which the courts deal with such difficult claims illuminates the theoretical underpinnings of the law of negligence generally. Importantly, the courts’ approaches to the analysis and application of the law of negligence help to predict the ways in which it will develop. Further, an analysis of the existing law in relation to wrongful life, and the reasons given in support of it, facilitates debate and review, enabling law reformers, scholars, interest groups and the courts themselves to consider whether there is a need for reform; if so, in what respect and on what basis.

DUTY OF CARE OWED TO AN UNBORN CHILD
The first large group of cases alleging prenatal injury arose in the United States of America and, in general, liability was denied.8 Two main reasons were advanced for this. The first was that a legal duty of care could not, it was said, be owed to a non-existent person; the child in the womb was considered to have no independent legal existence but rather to be still a part of its mother. To this, there are clearly a number of possible responses. Most obviously, it can be argued that an action in the tort of negligence only crystallises and becomes complete when damage occurs; in the case of a careless act which causes injury to a fetus, the damage occurs when the child is born and by that time he or she has achieved the status of a legal person.7 A second line of argument is that legal systems do not deny fetuses rights in other respects; most recognise some rights, eg through restrictions on the right to abortion. In addition, in terms of the direction of legal policy, it would seem highly undesirable to deny the fetus all legal rights because this would discourage the manufacturers of drugs and food products from testing that these articles caused no damage to unborn babies.

The other basis on which liability in respect of prenatal injury was sometimes denied in the early American cases was causation: it was difficult in practice to prove that the defendant’s act caused the subsequent disability of the child. This problem has diminished with the advent of modern technologies such as ultrasound scanning.

5 For an early and influential discussion of this area, see Tedeschi G “On Tort Liability for ‘Wrongful Life’” (1966) 1 Israel L Rev 513.
6 In Australia, this occurred at the highest level, with the High Court of Australia recently and overwhelmingly refusing to recognise that such claims gave rise to any cause of action in negligence: Harriton v Stephens (2006) 226 CLR 52; [2006] HCA 15; Waller v James (2006) 226 CLR 136; [2006] HCA 16. In the United Kingdom, while the issue never reached the House of Lords, the Court of Appeal unanimously rejected such claims under the common law: McKay v Essex Area Health Authority [1982] QB 1166. The court also stated obiter (at 1178) that the Congenital Disabilities (Civil Liability) Act 1976 (UK) barred any child born after 22 July 1976 from having a cause of action for wrongful life. These decisions are discussed further below.
8 For a British example of rejection of such a claim, see Waller v Great Northern Railway Co (1891) 28 LR Ir 69.
9 On this analysis, however, no action would lie at the suit of the child’s estate where the injury is so severe as to cause the death of the unborn child.
By the mid-20th century, however, a trend had emerged in the United States in favour of liability in negligence towards a fetus and the Supreme Court of Canada also held in Montreal Tramways v Leveille [1933] 4 DLR 337 that there could be liability under the civil law of Quebec to an unborn child.

Australian law on the possibility of owing a legal duty of care to a fetus was effectively settled in 1971 by Watt v Rama [1972] VR 353. A pregnant woman and her unborn child were injured in a road accident caused by the defendant’s admitted negligence. The Full Court of the Supreme Court of Victoria faced the preliminary question of whether a duty of care could be owed to an unborn claimant. Winneke CJ and Pape J, in a joint judgment, reiterated a principle fundamental to the common law of negligence, namely that there is no such thing as a legal duty of care in the abstract. The law instead imposes a duty to take reasonable care not to injure a person whom it should reasonably have been foreseen might be injured by a careless act or neglect. It is the reasonable foreseeability of harm arising from one’s conduct which in many types of cases not only gives rise to the duty of care to avoid inflicting such harm but also provides the test for determining whether a person injured by the careless conduct of another falls within the class of persons to whom a duty of care is owed. In Watt v Rama itself, the defendant’s careless act occurred while he was driving his car on a public highway. Winneke CJ and Pape J held that it was at that time reasonably foreseeable that this careless act might cause injury to a pregnant woman in the car with which he collided and might also cause the child she was carrying to be born in an injured condition. These circumstances constituted a potential relationship capable of imposing a duty on the defendant in relation to the child when it was born. On the birth, the relationship crystallised and out of it arose a duty on the defendant in relation to the child. In all cases in which the principle of Donoghue v Stevenson [1932] AC 562 is invoked, Winneke CJ and Pape J pointed out that the facts establishing the breach of duty occur before the claimant’s cause of action accrues; this is because the cause of action does not arise until the damage accrues and, for this purpose, it does not matter whether the plaintiff is in existence at the time when the facts constituting the breach of duty occurred.10 Watt v Rama was followed by the New South Wales Court of Appeal in X and Y (by her Tutor X) v Pal (1991) 23 NSWLR 26, a case involving a negligent act which had occurred before the mother became pregnant.

The question of potential liability for injuries negligently inflicted on an unborn child was resolved in the United Kingdom by legislation rather than by the common law. The Thalidomide disaster of the 1950s and 1960s had alerted the public to the possibility of injuries to the unborn for which damages might be thought appropriate. The issue was referred to the Law Commission11 and the end-product was the Congenital Disabilities (Civil Liability) Act 1976 (UK). This creates a corpus of rules enabling a child born alive after 22 July 1976 to sue in respect of injuries sustained prenatally. However, Burton v Islington Health Authority [1993] QB 204, decided in 1993, concerned children born in 1967. The claims were allowed to proceed to trial because the English Court of Appeal held that the common law of England did, by the date of these children’s birth, recognise a right to damages in respect of prenatal injury. The House of Lords subsequently refused leave to appeal on this issue, so the matter was effectively settled. All the members of the Court of Appeal accepted the conclusion of the Victorian court in Watt v Rama.

Thus, it is clear that in the common law world a legal duty of care can clearly be owed to an unborn child not to cause a negligent injury to it, at least in cases where that child is subsequently born alive.12

FOR WHAT LOSSES WILL THE LAW PROVIDE A REMEDY?

A much more difficult question is what form an injury caused by a health professional must take in order to be redressable in law. In other words, for what types of harm can a claim be made? Normal

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10 The third judge in the Supreme Court, Gillard J, arrived at the same conclusion, although he stated that a duty of care could be recognised even as regards an unborn fetus.
12 For further discussion of the view that actions for wrongful life are a type of action for wrongful prenatal injury, see Cane P, “Injuries to Unborn Children” (1977) 51 ALJ 704.
principles would seem to require that a child, caused a prenatal physical injury which was the foreseeable result of a negligent act, should be able to obtain damages to compensate for that physical injury. That this is, indeed, the case is demonstrated by cases such as Watt v Rama [1972] VR 353. What, however, is the situation where the damage alleged is the actual birth? This will usually be a foreseeable consequence of the defendant’s negligence but is it the kind of damage for which the law will provide compensation? Can the creation of a life amount to a legal harm? In particular, in the context of wrongful life actions, can the creation of a disabled life constitute a legal harm?

WRONGFUL BIRTH ACTIONS
Can the birth of a healthy child be treated as a loss to the parents?
The courts have had to wrestle with these kinds of question in wrongful birth claims, where parents seek damages to compensate for the costs of raising an unplanned child. Again, the matter was discussed first by courts in the United States. Most American States today deny claims for the recovery of the costs of child-rearing in wrongful birth cases on the ground of public policy, at least where the child is healthy. However, a small number allow such claims and some permit a judicial compromise, whereby recovery is allowed for costs of child-rearing but the award is offset by an allowance for the emotional and other benefits derived by the parents as a consequence of the unexpected birth.

Until recently, Australian courts had arrived at contradictory decisions on the question of child-raising costs in wrongful birth actions. The earliest English authorities denied recovery for child-raising costs. However, the tide turned in Thake v Maurice [1985] 2 WLR 215, where Peter Pain J awarded damages in respect of expenses of the birth, the mother’s loss of wages and the cost of bringing the (healthy) child up until her 17th birthday. The English Court of Appeal then followed this approach in Emeh v Kensington, Chelsea and Westminster Area Health Authority [1985] QB 1012; the child was disabled but, although the judges in several places made reference to this, they did not appear to base their judgment on it. There followed a number of British cases at first instance in which damages were awarded to compensate for child-raising costs in wrongful birth claims.

However, a judicial volte-face was performed by the House of Lords in 1999, McFarlane v Tayside Health Board [2000] 2 AC 59 concerned the unplanned arrival of a healthy child, after negligent hospital advice about the reliability of the husband’s vasectomy. The parents brought an action claiming, inter alia, £100,000 for the cost of the child’s upkeep until she was 18. The House unanimously rejected this claim. Lord Slynn concluded that no consensus international view emerged on wrongful birth. He held Mrs McFarlane entitled to general damages for the pain and inconvenience of the pregnancy and birth and to any associated special damages. Equally he would have held her entitled, had she claimed them, to damages for loss of earnings. And he firmly rejected the argument (as did other members of the House) that her losses were due to her own failure to undergo an abortion or to arrange an adoption, in other words that this had interrupted the chain of causation or constituted a novus actus. The difficult question for Lord Slynn was the availability of child-rearing damages. He was not attracted to the American set-up because of the difficulty of quantification. In the end, he based his decision on the underlying principles of the law of negligence, as understood in English law; he concluded that, in a case such as the present in which

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13 See further Emerson v Magendantz; 689 A 2d 409 (1997).
14 For example, Sherlock v Stillwater Clinic 260 NW 2d 169 (1977), where the Supreme Court of Minnesota held that such a compromise was “at best a mortal attempt to do justice in an imperfect world”.
16 See eg Scauciaga v Powell 123 SJ 406 (1979); Udale v Bloomsbury Health Authority [1983] 1 WLR 1098.
17 For example, Benarr v Kettering Health Authority (19880 138 NLJ 179; Allen v Bloomsbury Area Health Authority [1993] 1 WLR 1098; Allan v Greater Glasgow Health Board [1998] SLT 580. But see also comments to the opposite effect in Jones v Berkshire Area Health Authority (unreported, 2 July 1986); Gold v Haringey Health Authority [1988] QB 481.
18 Not that it had been argued in the case.
19 For further discussion of the different approaches of the British and Australian courts to the legal parameters of the duty of care, see below.
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the allegation was one of economic loss, there needed to be an especially close link between the act and the damage. The doctor, he said, undertakes a duty of care in regard to the prevention of pregnancy: it does not follow that the duty includes also avoiding the costs of rearing the child if born and accepted into the family. He considered that it would not be “fair, just or reasonable” to impose on the doctor liability for the consequential responsibilities to bring up a child. The doctor does not assume responsibility for those economic losses and, if a patient wants to be able to recover such costs, he or she must do so by an appropriate contract.

Lord Steyn relied on a judicial attempt at common sense rather than legal principle. For him, the decisive issue was the distinction between “corrective” and “distributive” justice. He argued that it would be possible to view a case like McFarlane simply from the perspective of corrective justice; this requires somebody who has harmed another without justification to indemnify that other. On this approach, the parents’ claim for the costs of child-raising must succeed. However, one may also approach the case from the vantage point of distributive justice; this requires a focus on the just distribution of burdens and losses among members of a society. If the matter is approached this way, Lord Steyn suggested that it would be appropriate to ask, say, commuters on the London Underground whether damages should be granted in a situation such as McFarlane. He was convinced that an overwhelming number of men and women would say “no” because they felt it would be morally unacceptable to award such damages. He concluded: “Instinctively, the traveller on the Underground would consider that the law of tort has no business to provide legal remedies consequent upon the birth of a healthy child, which all of us regard as a valuable and good thing” (at 82). He went on (at 82):

It is my firm conviction that where courts of law have denied a remedy for the cost of bringing up an unwanted child the real reasons have been grounds of distributive justice. That is, of course a moral theory. It may be objected that the House must act like a court of law and not like a court of morals. That would only be partly right. The court must apply positive law. But judges’ sense of the moral answer to a question, or the justice of the case, has been one of the great shaping forces of the common law. What may count in a situation of difficulty and uncertainty is not the subjective view of the judge but what he reasonably believes that the ordinary citizen would regard as right.

Lord Steyn would not, therefore, allow the recovery of child-raising costs but he did approve of damages to compensate Mrs McFarlane for her pain and suffering in pregnancy and childbirth. He also hinted that there might be force in the argument that damages would be payable where the child was disabled.

Lord Hope of Craighead agreed with Lord Steyn that Mrs McFarlane should receive damages in respect of the pain and suffering associated with the birth. However, he went on to hold that it would not be just, fair and reasonable to allow full recovery for the cost of raising the child, taking no account of the benefits which she brought, since the value of those benefits was incalculable. His conclusion was therefore also that the costs of raising a child could not be recovered. Lord Clyde took a different tack, saying that the policy issues were too finely balanced to be decisive. He approached the case on the basis that the real question was the extent of the losses which could be claimed for. The claim here he analysed as one for economic loss following upon negligently given advice. In this context, he thought it right to have regard to the extent of the liability which the defendants could reasonably have thought they were undertaking and he concluded that the cost of maintaining the child went far beyond any liability which they could reasonably have thought they were undertaking. Like the other members of the House, he therefore rejected the claim for child-raising costs. He did, however, accept the claim in relation to Mrs McFarlane’s pain and suffering.

Lord Millett approached the matter differently. He favoured the view taken by the other members of the House that the costs of raising the child are irrecoverable because the birth of a “normal, healthy” child is a blessing. However, unlike the others, he would not have awarded damages for the pain of giving birth (because it was inseparable from the other head of damage) but he would have awarded a conventional sum for the injury the McFarlanes sustained through losing the freedom to

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20 For a scathing analysis of such judicial reasoning, see Hoyano LCH, “Misconceptions about Wrongful Conception” (2002) 65 MLR 883.
limit the size of their family. They had, in his view, been denied an important aspect of their personal autonomy and for this they should receive damages.

The controversial nature of wrongful birth claims was graphically demonstrated some four years later when the High Court of Australia, by a majority decision, arrived at the opposite conclusion to the House of Lords. The case was *Cattanach v Melchior* (2003) 215 CLR 1. Dr Cattanach had performed a sterilisation operation on Mrs Melchior who nevertheless gave birth to a healthy son. She sued Dr Cattanach for damages in the Supreme Court of Queensland in respect of this birth.\(^{21}\) The primary judge found that Dr Cattanach had been negligent in failing to inform his patient that the sterilisation might not be effective;\(^ {22}\) he also held that this negligence was a material cause of the pregnancy. The primary judge therefore awarded damages to Mr and Mrs Melchior, to include a sum of some $105,000 for the costs of bringing the child up until he was 18. The Queensland Court of Appeal dismissed the appeal but special leave was granted for an appeal to the High Court of Australia on the sole issue of whether such damages were recoverable. The High Court held, by four votes to three, that the reasonable costs of raising the child were recoverable.

McHugh and Gummow JJ delivered a joint opinion. It was argued for Dr Cattanach that, as a matter of the policy of the law, the birth of a healthy child is not a legal harm for which damages may be recovered. The policy of the law suggested was said to reflect an underlying societal view of the value of human life. In addition, it was contended that it was against the policy of the law to meddle with the concept of life and the stability of the family unit, including the apprehended harm the child would suffer on learning later in life that it had been the successful subject of a wrongful birth action. However, McHugh and Gummow JJ were unconvinced by these arguments and commented that the policy of the law was an essentially fluid matter. They went on to hold that the argument that the cost of bringing up the child should be offset by the benefits he brought was an illogical one; it confused the different legal interests involved here. In assessing damages, it is impermissible in principle to balance the benefits to one legal interest against the loss occasioned to a separate legal interest. The benefits received from the birth of a child are not legally relevant to the head of damage which compensates for the economic cost of maintaining the child. They therefore concluded that damages for the cost of raising the child were recoverable and they did so on the basis that this was essentially a claim in respect of a financial loss, not a complaint about the creation of a life.

Kirby J distinguished the English cases on the factual basis that the defendant there was usually the National Health Service, whereas in Australia it was usually an individual physician or health care facility; concern to protect the viability of the overstretched NHS might justify resort to the notion of “distributive justice” but this argument, he said, would not apply in Australia. He concluded (at 68):

> Ordinary principles of tort liability would entitle the victims of the appellants’ wrong to recover from the appellants all aspects of their harm that are reasonably foreseeable and not too remote. By the application of that test the inclusion in the parents’ damage of a component for the costs of child-rearing involved no legal or factual error. Neither did the omission to deduct from that sum an allowance for estimates of the joys and like benefits derived, or proved likely to be derived, from the birth of the child. On the contrary, the provision of a zone of immunity to the appellants would have involved legal error.

To make such a deduction would, in Kirby J’s words, be to compare “apples to oranges” (at 66). He concluded that the case was one about economic loss, not pure but consequent on physical injury (pregnancy and childbirth) to the mother.\(^ {23}\)

Callinan J agreed that the appellants had been negligent and that the respondents as a result would incur significant expense. That expense would not have been occasioned had the doctor not given negligent advice. This meant that all of the various touchstones for, and none of the relevant disqualifying conditions against, an award of damages for economic loss were present. He went on to say that no identifiable, universal principle of public policy dictated any different result: the damages

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\(^{21}\) Mrs Melchior had been a public patient, so there was no question of liability in contract.

\(^{22}\) This risk was exacerbated by a childhood operation of which Dr Cattanach knew.

\(^{23}\) This view was confirmed by the Supreme Court of Victoria in *Caven v Women’s and Children’s Health* [2007] VSC 7.
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claimed in this kind of case are not indeterminate and their award was consistent with the underlying notion that damages in tort serve as a deterrent.

The four judges in the majority in the High Court therefore ruled that damages were recoverable for the financial costs of child-raising. Gleeson CJ dissented, proceeding from the premise that the claim was not for financial loss consequent upon personal injury, nor damage to property. It was a claim for pure economic loss arising out of a relationship. It could therefore not be said that legal principle led inexorably to the conclusion that damages must be awarded. On the contrary, Gleeson CJ maintained that this was really a claim for a new head of economic loss which must be justified by cogent reasoning which had not been demonstrated. He concluded that the claim displayed all the features that have contributed to the law’s general reluctance to impose a duty of care to avoid causing economic loss. In particular, the liability sought to be imposed was indeterminate. It was difficult to relate coherently to other rules of the common law and statute. It was based upon a concept of financial harm that was imprecise; and that imprecision could not be concealed by an arbitrary limitation of a particular claim in subject matter or time. It was, he said, incapable of rational or fair assessment. Furthermore, it involved treating as actionable damage, and as a matter to be regarded in exclusively financial terms, the creation of a human relationship that was socially fundamental. He pointed out that the accepted approach in Australia to liability in negligence is that the law should develop novel categories of negligence incrementally and by analogy with established categories. However, he held that the recognition of a claim to child-raising damages went beyond that and was “unwarranted” (at 24).

Hayne J, also dissenting, held that the ordinary costs of upbringing, in other words those not referable to the special needs of a particular child, should not be recoverable. However, he went on to say that other considerations would arise if the child had special needs which required expenditure; in such a case, the parent could seek to demonstrate the costs incurred in meeting those needs without in any way denying or diminishing the benefits of being a parent to the child. Heydon J argued that human life is incapable of having a monetary value placed upon it and he was clearly concerned by the argument that harm would be caused to the child on learning subsequently of the action. Can the birth of a disabled child be treated as a loss to the parents?

Despite the division of judicial opinion in Cattanach v Melchior, the outcome of the case represents an attractive measure of practical justice.25 It was not, therefore, long before the English courts began to think again about the unbending approach taken in McFarlane. This occurred in particular in cases involving disability. In Rand v East Dorset Health Authority (2000) Lloyds Rep Med 181, negligent ante-natal screening failed to detect Down Syndrome. But for this negligence, the mother would have opted for a termination.25 Notwithstanding McFarlane, the parents recovered for the financial consequences flowing from the child’s disability. The judge held that this situation was different in principle because it did not involve awarding damages in consequence of the child’s existence as such. The damages instead reflected the extra costs involved in bringing up a handicapped child.

The difficulty with this conclusion, of course, is that it suggests that a handicapped life is less valuable than a healthy one.26 On the other hand, it gives practical recognition to the fact that the disabled child will need special provision which will cost money. This dilemma was faced by the English Court of Appeal in 2001 in Parkinson v St James and Seacroft University Hospital NHS Trust [2001] 3 All ER 97. Mrs Parkinson underwent a negligently performed sterilisation. She subsequently

25 Under United Kingdom law a termination was available in such circumstances.

26 The majority of the High Court of Australia in Cattanach v Melchior (2003) 215 CLR 1 expressly refused to distinguish between healthy and disabled children in wrongful birth claims. McHugh and Gummow JJ held (at 35-36): “The differential treatment of the worth of the lives of those with ill health or disabilities has been a mark of the societies and political regimes we least admire. To prevent recovery in respect of one class of child but not the other, by reference to a criterion of health, would be to discriminate by reference to a distinction irrelevant to the object sought to be achieved, the award of compensatory damages to the parents.”
conceived her fifth child. She was warned by her consultant that the baby might be born with a disability but she chose not to have a termination. A son was then born with serious physical and psychological disabilities. The Court of Appeal allowed her to recover damages in respect of the extra costs of bringing the child up which were attributable to his disability, but they denied damages for the general costs of upbringing. Brooke LJ concluded that McFarlane had not decided the issue of damages in respect of a disabled child, so the matter was at large as far as the Court of Appeal was concerned. He held that the birth of a child with congenital abnormalities was a foreseeable consequence of the surgeon’s negligence; that there was a very limited group of people who might be affected by this negligence (basically, just the Parkinsons); that the surgeon could be deemed to have assumed responsibility for the foreseeable consequences of his negligence; that the purpose of the operation had been to prevent Mrs Parkinson from conceiving any more children, including children with congenital abnormalities, and the surgeon’s duty of care was strictly related to the proper fulfilment of that purpose; that parents in Mrs Parkinson’s position had been entitled to recover damages in such circumstances in the 15 years between the decisions in Emeh and McFarlane, so that this decision was not a radical step into the unknown; that an award of damages in this situation would be fair, just and reasonable; and, if the principle of distributive justice were called on, the ordinary person would consider it to be fair for the law to make an award in such a case. Brooke LJ appeared to confine this ruling to cases where the child is born with what he called a “significant” disability, which he conceded would have to be decided on a case-by-case basis.

Hale LJ stressed the serious impact which pregnancy and childbirth have for the mother’s bodily integrity and personal autonomy and she made it clear that her legal sympathies lay in favour of compensating the mother in cases of wrongful birth. He held that, on the normal principles of tort liability, once it was established that the pregnancy had been wrongfully caused, compensation should be payable for all the consequences, whether physical or economic, which are capable of sounding in damages. McFarlane constituted a limitation on the damages which would otherwise be recoverable on normal principles; however, there was no reason to take that limitation any further than it was taken in McFarlane itself. Hale LJ went on to hold (at 123):

A disabled child needs extra care and extra expenditure. He is deemed, on this analysis, to bring as much pleasure and as many advantages as does a normal healthy child … This analysis treats a disabled child as having exactly the same worth as a non-disabled child. It affords him the same dignity and status. It simply acknowledges that he costs more.

Rees v Darlington Memorial Hospital NHS Trust [2003] 3 WLR 1091 was decided shortly afterwards. The English Court of Appeal had there permitted a disabled mother to recover damages for the extra costs attributable to her disability in rearing a healthy child. The mother suffered a visual disability which she felt made her unable to discharge the ordinary duties of a mother and she had therefore sought sterilisation; this was performed negligently. The hospital trust challenged the decision as inconsistent with McFarlane. The claimant sought to uphold the decision but also claimed the whole cost of bringing up the child, inviting the House of Lords to reconsider its decision in McFarlane.

Lord Bingham observed that there were broadly three solutions which the House of Lords could have adopted in McFarlane. The first was to allow full damages against the tortfeasor for the cost of rearing the child, subject to the ordinary limitations of reasonable foreseeability and remoteness, with no discount for joys, benefits and support. The second would have been to allow damages to be recovered in full for the reasonable costs of rearing an unplanned child to an age when that child might be expected to be economically self-reliant, whether the child is healthy or disabled, but with a deduction from the amount of such damages for the joys and benefits received, and the potential economic support derived, from the child. The third route was to say that no damages may be recovered where the child is born healthy. Lord Bingham commented that an orthodox application of the ordinary principles of tort would lead to the first solution; he was therefore not surprised that courts in a number of other jurisdictions, including the majority in the High Court of Australia in Cattanach v Melchor, had opted for this solution. The second solution had been adopted by six State courts in the United States but Lord Bingham thought the objections to it insuperable: any attempt to quantify the joys brought by a child or any economic benefit it might bring would be an exercise in pure speculation in which no court should engage. The House in McFarlane had opted for the third solution on policy grounds which included an unwillingness to regard a child as a financial liability.
and nothing else, a recognition that the rewards of parenthood cannot be quantified, and a sense that to award potentially very large sums of damages to the parents of a healthy child against the hard-pressed NHS would offend the community’s sense of how public resources should be allocated. Lord Bingham accepted the overall conclusion in McFarlane but added what he described somewhat euphemistically as one “gloss” (at 1097): the parent in this sort of situation has undoubtedly suffered a legal wrong and he questioned the fairness of a rule which restricted recovery in respect of this wrong simply to damages for the pregnancy and birth (at 1097):

To speak of losing the freedom to limit the size of one’s family is to mask the real loss suffered in a situation of this kind. This is that a parent … has been denied, through the negligence of another, the opportunity to live her life in the way that she wished and planned.

He therefore concluded that the McFarlane type of award (for the pain of pregnancy and birth) was inadequate and, instead, he supported the view expressed by Lord Millett in McFarlane that there should also be a conventional (not compensatory) award in recognition of the injury to the autonomy of the parents. Lord Millett had thought in McFarlane that that sum should be £5,000 but Lord Bingham preferred £15,000, to be added to the sum awarded in respect of the pregnancy and birth.

Lord Nicholls agreed with Lord Bingham. Lord Millett was of the same view but added (at 1126):

McFarlane decides that the costs of bringing up a normal, healthy child must be taken to be outweighed by the incautable blessings which such a child brings to his or her parents and do not sound in damages. Parkinson decides that the additional costs of bringing up a disabled child are recoverable in damages. It may be that strict logic demands a different answer. A disabled child is not “worth” less than a healthy one. The blessings of his or her birth are no less incautable … But the law does not develop by strict logic; and most people would instinctively feel that there was a difference, even if they had difficulty in articulating it.

Lord Scott of Foscote considered McFarlane correct because of the uniqueness of human life and held that there was no difference between it and Rees from this point of view. However, he agreed that a conventional sum would be appropriate. He also said that a distinction might need to be drawn between a case where the avoidance of the birth of a child with a disability was the very reason why the parent sought the medical treatment to avoid conception and a case where the treatment was just provided to avoid conception. Parkinson was a case in the latter category. In such a case, he did not think that there was any sufficient basis for treating the expenses occasioned by the disability as falling outside the McFarlane principle. However, it might be otherwise where the very purpose of the sterilisation operation was to prevent the birth of a disabled child.

By a majority of four to three, the House of Lords therefore allowed the appeal; they ruled that damages should not be awarded in respect of the mother’s disability but that a conventional award of £15,000 should be available.

Lord Steyn, in the minority, disagreed with the award of a conventional sum, regarding it as “a backdoor evasion” of the legal policy enunciated in McFarlane. However, as he had hinted in McFarlane, he considered that the principle it embraced was confined to the birth of a healthy child and that Parkinson was correctly decided. He would also have allowed damages reflecting the extra costs attributable to her disability to the disabled mother. Lord Hope and Lord Hutton agreed with Lord Steyn.

This recent tranche of cases leaves English law in a state of considerable disarray. The outcome in Rees was that the House held unanimously that the healthy parents of a healthy child cannot claim for the cost of bringing it up, although the mother can claim for the pain and suffering of pregnancy and birth. It was also held, by a majority of four to three, that the disabled mother of a healthy child cannot claim the extra cost of upbringing due to her disability. However, the majority held in favour of the conventional sum of £15,000, payable to the disabled mother of a healthy child (the actual decision in Rees) and also to the healthy mother of a healthy child. An important issue which remains unresolved as a matter of English law is the status of the decision in Parkinson. In other words, can the parent of a disabled child still claim the extra costs of upbringing due to the disability? Three of the seven Law Lords in Rees approved of the decision in Parkinson, three of them disapproved of it, and the position of the seventh (Lord Millett) was ambiguous (although, as can be seen from his remarks quoted above, he seemed more likely to support than disapprove it).
**WRONGFUL LIFE ACTIONS**

Can being born disabled found a cause of action in a child?

Despite the unfortunate aspects of current English law, certain conclusions can be drawn from the cases on wrongful birth which are germane to actions for wrongful life brought by children.

First, the Australian courts have proved willing to award damages, not for the creation of a life, but in recognition that there are economic costs associated with raising a child. This rationale does not provide support for actions complaining of wrongful life; indeed, the majority of the High Court in *Cattanach* was at pains to show that wrongful birth actions represent merely the application of normal principles of tort law, albeit to special circumstances, and to differentiate them sharply from complaints about the creation of life. However, there is also a strong hint in *Cattanach* that corrective justice and deterrence have their part to play in relation to negligence on the part of health professionals and this element could perhaps also be called into play to bolster a claim in respect of wrongful life.

Second, despite the negativity of *McFarlane*, United Kingdom courts have – perhaps counterintuitively – made more of a gesture in the direction of damages for the creation of life. They reject the argument that, at least in the case of the birth of a healthy child, the matter should be rationalised in terms of economic loss. Instead, they opt for the award of a conventional sum in recognition of the parents’ loss of autonomy. In so doing, they recognise that a compensable legal wrong has occurred and, moreover, one which has arisen purely out of the creation of life. If parents have a choice about whether or not to create a life, perhaps the child itself should also be permitted an area of autonomy, especially around issues of disability and suffering. In addition, in their apparent willingness to recognise that extra harm occurs where a disabled child is born, the British courts may be supportive of the argument that a disabled child has a stronger claim to damages than a healthy child.27

As will be seen below, these broad indications in the case law on wrongful birth are to some extent borne out by the decisions on wrongful life.

**Decisions on wrongful life**

The leading authority on the common law status of wrongful life claims in the United Kingdom is the Court of Appeal’s decision in *McKay v Essex Area Health Authority* [1982] QB 1166.28 A child born with severe disabilities, following in utero rubella infection, brought a negligence action against her local health authority and her mother’s doctor. She claimed damages, saying that, but for the defendants’ negligence, her mother would have terminated the pregnancy. The Court of Appeal unanimously held that the claim disclosed no reasonable cause of action and that wrongful life claims could not be recognised by English law. Stephenson and Ackner LJJ based that rejection on the grounds that the defendants did not breach their duty not to injure the plaintiff prenatally; her disabilities were the result of rubella, and were not caused by any want of care on the part of the defendants (at 1178 (Stephenson LJ), at 1189 (Ackner LJ)); neither defendant was under any duty to terminate the pregnancy and her mother could not be recognised by English law. Stephenson and Ackner LJJ based that rejection on the grounds that the defendants did not breach their duty not to injure the plaintiff prenatally; her disabilities were the result of rubella, and were not caused by any want of care on the part of the defendants (at 1178 (Stephenson LJ), at 1189 (Ackner LJ)); neither defendant was under any duty to terminate the child’s life (at 1180 (Stephenson LJ)).

Despite the unfortunate aspects of current English law, certain conclusions can be drawn from the cases on wrongful birth which are germane to actions for wrongful life brought by children.

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27 See also the remarks of Phillips J in *Burton v Islington Health Authority* [1993] QB 204.

28 This case has continued to be an influential authority in wrongful life claims internationally, e.g., in particular, in Canada and Australia (for Canada see *Arditi v Smith* [1994] 8 WWR 568; *Jones v Rostvig* [1999] 44 CCLT (2d) 312; *Lacroix v Dominique* [2001] MBCA 122; *Mickle v Salvation Army Grace Hospital* (1988) 166 DLR (4th) 743; for Australia, see discussion below). In the United States of America, early support for wrongful life claims is to be found in the Californian decision of *Curlender v Bio-Science Laboratories* 106 Cal App 3d 811; 165 Cal Rptr 477 (1980). However, the *Curlender* case is unusual. It has subsequently been criticised and distinguished and must now be regarded as being of limited persuasive weight: see eg *Turpin v Sorini* 182 Cal Rptr 337 (1982). Three States continue to allow recovery for wrongful life on a limited basis, being the special costs associated with the child’s disability (California: *Turpin v Sorini* 182 Cal Rptr 337 (1982); Washington: *Harbeson v Parke-Davis Inc* 656 P 2d 483 (1983); New Jersey: *Procanik v Cillo* 478 A 2d 755 (1984)). However, most States have rejected wrongful life claims, largely following the early decision of *Gleitman v Cosgrove* 227 A 2d 689 (1967) in which the Supreme Court of New Jersey, pointing to the impossibility of comparing life with non-existence, held that the child had no valid action as the alleged negligence did not give rise to damage “cognizable at law” (at 692). Indeed, *Gleitman* was referred to in support of the decision in *McKay v Essex Area Health Authority* [1982] QB 1166 at 1182-1183.
The wrongfulness or rightfulness of actions for wrongful life

LJ, at 1188 (Ackner LJ); and it would be impossible to assess compensatory damages since this would involve comparing the plaintiff’s disabled life with non-existence (at 1181-1182 (Stephenson LJ), at 1189 (Ackner LJ)). Stephenson LJ stated (at 1184):

I do not think it matters whether the injury is not an injury recognised by the law or the damages are not damages which the law can award. Whichever way it is put, the objection means that the cause of action is not cognisable or justiciable or “reasonable”.

In any event, public policy considerations militated against the recognition of the plaintiff’s (novel) cause of action (at 1184). These considerations included that the recognition of such actions would make an unacceptable inroad on the principle of the sanctity of life, expose medical practitioners to liability for “trivial abnormalities”, and open the door for actions to be brought by children against their mothers for failing to abort (at 1180-1181 (Stephenson LJ), at 1188 (Ackner LJ)).

Griffiths LJ, while dissenting on a procedural point, concurred with the rejection of the plaintiff’s cause of action, stating (at 1193):

I would reject this novel cause of action because I see no way of determining which plaintiffs can claim; that is, how gravely deformed must the child be before a claim will lie; and secondly because of the impossibility of assessing the damage it has suffered.

The decision in McKay involved births occurring pre-1976. The Court of Appeal nevertheless held obiter that wrongful life actions are also prohibited in the United Kingdom by s 1(2)(b) of the Congenital Disabilities (Civil Liability) Act 1976 (UK) because that section requires that, when the negligence occurs after conception, the child must be born “with disabilities which would not otherwise be present”; this formulation is not apt to cover cases where negligence has deprived the mother of the opportunity to abort a damaged fetus. Given this reading of the Act, the development of the common law in this area was effectively halted in the United Kingdom. However, such a view of the statute is not free from doubt and Markesinis and Deakin argue, first, that the Act merely abolishes common law claims by children “in respect of disabilities”;

Con genital Disabilities (Civil Liability) Act 1976 (UK), s 4(5).

they assert that the child’s claim might be formulated as one for financial loss “caused by”, and! not “in respect of”, the disabilities. Second, they draw attention to s 1(2)(a) of the Act which deals with pre-conception negligence and provides that damages may be obtained for negligence which “affected either parent …. in his or her ability to have a normal, healthy child”; this, they suggest, might enable a child to argue that negligent genetic advice gives rise to a claim for damages for birth in a damaged state. Such a claim would amount to one for wrongful life because the individual child in question would never have been born if the negligent advice had not been given. In addition, the 1976 Act has been amended since the decision in McKay. The Human Embryology and Fertilisation Act 1990 (UK) added a new s 1A which creates liability for negligence in the course of IVF. The child’s disabilities are treated as actionable damage where “the disability results from an act or omission in the course of the selection, or the keeping or use outside the body, of the embryo … or of the gametes used”. Such a claim is effectively one for wrongful life since the individual child claimant would not have existed had it not been for the negligence.

Claims for wrongful life have also never succeeded before the Australian courts. The High Court of Australia determined the common law in this regard in two decisions, delivered together in May 2006: Waller v James; Waller v Hoolahan and Harriton v Stephens. Prior to these proceedings,

29 Stephenson LJ stated (at 1180) that such a duty “may be owed to the mother, but it cannot be owed to the child”.

30 Of these two bases, Griffiths LJ (at 1192) identified the assessment of damages, which he described as an “intolerable and insoluble problem”, as the most compelling reason to reject the cause of action.


33 These actions had been tried together and resulted in a single judgment, Waller v James (2006) 226 CLR 136; [2006] HCA 16 (Waller).

there were only two reported actions in which Australian courts considered claims for wrongful life.35 Of these, only *Bannerman v Mills* [1991] Aust Torts Reports 81-079 involved what is now considered a “typical” wrongful life claim. It was brought by a child born disabled as a result of contracting rubella in utero, who alleged that the defendant doctors were negligent in failing to provide adequate advice to her mother, including advice to terminate the pregnancy. The action was summarily dismissed by Master Greenwood of the Supreme Court of New South Wales who, relying heavily on the reasoning of the English Court of Appeal in *McKay*, held that the action was unarguable at law because “the tort of wrongful life is not known to the common law and even if it were it would not be possible to assess any damage in monetary terms” (at 68,663).

*Edwards v Blomeley* [2002] NSWSC 46036 was both a wrongful life claim by a child born disabled and a wrongful birth37 claim by her parents. Whether the child had a valid cause of action was determined separately as a preliminary issue. For these purposes, the parties agreed that the defendant had, before the plaintiff child’s conception, been negligent in his treatment of her father in that he had negligently carried out a vasectomy and then wrongly advised that the procedure had been successful. As a result of that negligence, the plaintiff child had been conceived. She was born suffering from a rare chromosomal disorder, which produced profound intellectual and physical disabilities. Studdert J rejected the claim on a number of grounds. Breach of a reasonable standard of care having been conceded, he found that the plaintiff failed to make out any other of the necessary elements of a claim in negligence. Principally, he did not accept that the defendant had owed the child a duty of care that would support her action, which he described as “a duty to prevent her conception, or to give to her parents advice such as would have prevented her conception” (at [62]).38 Additionally, he found that on an application of the commonsense principle, the child in *Edwards* must also fail on causation since her disabilities were genetic not iatrogenic (at [69]). Further, he held that it was not possible to award damages for her disabilities since that would necessitate first identifying the damage she suffered, and then assessing damages by comparing the value of her current (damaged) state with the state she would have been in absent the defendant’s negligence. Since the child’s case was that she would not have been conceived without the defendant’s negligence, identifying the relevant damage, and then assessing appropriate damages, would involve the “impossible exercise” of comparing “the value of non-existence with the value of existence in a disabled state” (at [72]-[75]). Finally, Studdert J identified three “weighty” policy considerations that militated against the recognition in Australia of a cause of action in negligence for wrongful life (at [114]-[121]): such recognition would erode the value of human life, devalue the perceived worth of disabled persons in the community, and potentially expose the mother of a child born disabled to liability for her failure to terminate the pregnancy (at [191]).

The facts in *Edwards* can be distinguished from the more typical wrongful life cases in that the defendant’s negligence was only incidentally associated with the nature of resultant child’s disabilities.39 However, there are obvious parallels40 in Studdert J’s reasoning in that case with his

35 *Bannerman v Mills* [1991] Aust Torts Reports 81-079, *Edwards v Blomeley* [2002] NSWSC 460. A third was sought to be brought outside the limitation period, but the plaintiff was denied leave to do so: *Hayne v Nyst* (unreported, Sup Ct, Qld, 17 October 1995).

36 This case was one of three cases heard by heard by Studdert J of the Supreme Court of New South Wales on 11 and 12 March 2002, in which similar issues were raised. The other matters were the forerunners of the High Court *Harrison and Waller* actions: *Harrison v Stephens* [2002] NSWSC 461 and *Waller v James* [2002] NSWSC 462 on the same dates (at [4]).

37 More specifically, the parents’ claim could be classified as one for wrongful conception, being a parental claim that a child ought never to have been conceived (as opposed to wrongful birth claims in which it is alleged that an already conceived fetus would, but for the negligence, have been aborted). Some writers treat these claims as being distinct from wrongful birth claims (see eg Todd, n 7), while others treat them as a subset of wrongful birth claims (see eg Stretton, n 7). In this article, the latter approach has been adopted.

38 Studdert J remarked (at [63]-[64]): “Consistent with authority, it seems to me that the only duty owed by the defendant to the third plaintiff was a duty not to cause injury to her, be it by act or omission, and whether in her mother’s womb or not. In my opinion, the conclusion that the defendant’s only duty to the third plaintiff was that which I have defined determines the outcome of this matter.”

39 This is not necessarily because the claim involves a pre-conception tort. For example, if the vasectomy had been performed because the parents knew there was a risk of passing on a chromosomal disorder and had sought to avoid pregnancy for that
reasoning in his first-instance judgments rejecting the more conventional wrongful life claims in Harriton v Stephens [2002] NSWSC 461 (Harriton (No 1) and Waller v James [2002] NSWSC 462 (Waller (No 1). This is perhaps best explained by the fact that he heard all three matters together.\textsuperscript{41}

Harriton concerned a claim brought on behalf of a child born severely disabled, having contracted rubella in utero. The child’s mother had consulted a doctor and told him that she was concerned that she was pregnant and that she might have rubella. The doctor sent her for a blood test and, having the pathology report, he confirmed that she was pregnant but advised her, inaccurately, that her illness was not rubella. For the purposes of the proceedings, the parties agreed that, had the defendant diagnosed Mrs Harrington with rubella and informed her of the risk of the plaintiff being disabled, she would have terminated the pregnancy. It was also agreed that the defendant’s failure to do so was negligent.\textsuperscript{42}

Waller concerned two actions, tried together, brought on behalf of a child conceived by IVF and subsequently born with a genetic disorder inherited from his father that resulted in severe disabilities. The defendants were health care practitioners involved in the parents’ infertility treatment and antenatal care. For the purposes of the proceedings, it was agreed that the defendants should have investigated, and advised the plaintiff’s parents in respect of, the father’s genetic condition, but did not do so. It was also agreed that had the plaintiff’s parents been properly advised, they would either not have proceeded with IVF using the father’s sperm or, if informed following pregnancy, would have terminated the pregnancy.

While there are some important differences between the facts in Waller and those in Harriton,\textsuperscript{43} the claims share fundamental commonalities. Critically, a “normal” life was never possible for either of the plaintiffs (that is, absent the negligence complained of, they could not have been born without their disabilities). Rather, each argued that, absent the alleged negligence, he or she would not have been born at all.

At first instance, Studdert J articulated two preliminary questions (common to both actions)\textsuperscript{44} that fell to be determined as preliminary issues:

- if the defendant/s failed to exercise reasonable care in their management of the plaintiff’s parents, and but for that failure the plaintiff would not have been born, does the plaintiff have a cause of action against the defendant/s; and
- if so, what categories of damages are available?

He went on to reject each of the plaintiff’s claims on grounds similar to those articulated in Edwards. He answered the first question in the negative (principally on the basis that there was no relevant duty of care)\textsuperscript{45} and, while the second question was thereby rendered otiose, he nevertheless determined that

\textsuperscript{41} See Harriton v Stephens (2006) 226 CLR 52 at [47]; see also at [24]-[27] and the references cited therein.

\textsuperscript{42} See above, n 33; Edwards v Blomeley [2002] NSWSC 460 at [4].

\textsuperscript{43} In that the relevant conduct failed to meet a reasonable standard of care. It is important to note that there was no concession or agreement that any duty of care was owed to the plaintiff (as opposed to the plaintiff’s mother).

\textsuperscript{44} In Waller v James (2006) 226 CLR 136 at [27]-[30] Kirby J pointed to these as including: first, that the Waller child’s disabilities were qualitatively different from the disabilities that affected the plaintiff in Harriton (in the latter, the disabilities resulted from rubella infection in utero, while in Waller, the disabilities were the result of an inherited genetic condition and, possibly, the events surrounding the plaintiff’s birth and associated neo-natal care). Second, the factual matrix in Waller was more complex (unlike Harriton, the action was against more than one defendant, involved allegations of both pre- and post-conception negligence, and included claims of both wrongful life and negligently inflicted prenatal injuries). Finally, the Waller actions included wrongful birth claims by the parents (although these were stayed pending the determination of the validity of the child’s wrongful life claim).

compensatory damages would in the circumstances be unassessable. Appeals were heard and determined concurrently but both were dismissed by a majority of the New South Wales Court of Appeal. In the majority of the Court of Appeal, Spigelman CJ stated in Harriton v Stephens; Waller v James; Waller v Hoolahan (2004) 59 NSWLR 694 at [11] that the appropriate starting point was “not a principle concerned with the computation of damage but the identification of the loss which the appellants have suffered and the determination of whether there was a duty with respect to that kind of loss”. Beginning with the duty of care, he held that the scope of the defendants’ duty not to harm an unborn (or not yet conceived) child did not extend to encompass conduct which, if properly performed, would have led to termination of the pregnancy or non-conception. His reasons for rejecting such a duty were threefold:

1. The asserted duty “did not reflect values generally, or even widely, held in the community” and its recognition would be inconsistent with “the most important aspect of the ethical basis of legal duties” (at [20]-[21]).

2. He found that the relationship between each of the plaintiffs and the defendants was not sufficiently “direct” (at [28]), instead being mediated by the parents. He noted that the conduct complained of did not relate to the health of the child, but to whether he or she would be born at all. Ultimately, the decision regarding the continuation or termination of the pregnancy lay with the mother (at [25]-[27]).

3. Public policy considerations did not justify such an expansion of the duty owed to an unborn child, those considerations including that the facts in Waller raised questions of scope and indeterminate outcome of liability (at [30]), and that “[the] identification of what is to be regarded as ‘acceptable’ physical characteristics of children is a field into which the law should not, at least at this stage of the development of knowledge, in my opinion, enter. Specifically, the law should be very slow to decide how much ‘disability’ is to be regarded as acceptable” (at [31]).

The second majority judge, Ipp JA, focused on the application of the compensatory principle (more specifically, the impossibility of its application), which he described as the “cornerstone of tort law” (at [215]), to negligence actions for wrongful life. He held that, since the damage in wrongful life claims was not capable of calculation, it was not actionable (at [252], [318]-[320]). Both Spigelman CJ (at [32], [38]) and Ipp JA (at [287]-[288], [350]) also rejected the plaintiffs’ appeal to the concept of corrective justice as effecting a departure from the requirement on plaintiffs in a negligence claim to identify some particular, recognised, harm (damage) suffered as a result of the conduct complained of.

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47 Harriton v Stephens; Waller v James; Waller v Hoolahan (2004) 59 NSWLR 694 (Harriton; Waller (No 2)), per Spigelman CJ and Ipp JA, Mason P dissenting. For a detailed review of the judgments see Kapterian, n 7 at 338-340.
48 This approach was distinguished from that adopted by Ipp JA, who began his analysis with the application of the compensatory principle (as to which, see discussion below).
49 This phrase was used by Crennan J to explain the relationship: Harriton v Stephens (2006) 226 CLR 52 at [239].
51 See also at [43] (Spigelman CJ).
52 He held that policy considerations did not justify a material deviation from the compensatory principle (at [321]-[351]).
In dissent, Mason P noted that the duty of care owed to a woman by her doctor can extend to the fetus she carries (or to her yet-unconceived child) (at [112]). He held that the scope of that duty is not necessarily limited to an obligation not to cause harm or injury (at [111]). He found no inconsistency between the duties owed to the mother and the recognition of a duty properly to advise the mother being owed to the child (at [115]). That duty was breached by the same conduct, the admitted failure to properly diagnose and advise the plaintiffs’ mothers, which precluded any informed parental decision not to conceive or not to abort the fetus (at [123]). While he agreed with the proposition that it would be unjust to allow recovery for an injury the law does not recognise, he viewed the assertion that “life is not an injury” as question-begging, rather than a self-evident legal proposition (at [144]). In his view, “there is no conceptual difference between the critical event that generates the parents’ recognised ‘wrongful birth’ or ‘wrongful conception’ claims and the child's putative ‘wrongful life’ claim. For all three, the creation of life is the main trigger of the claim” (at [137]).

Mason P also criticised Ipp JA’s reliance on the compensatory principle, characterising it as a principle of assessment (of damages), not a means of identifying damage (at [126]). However, he acknowledged (at [146]) the legitimacy of approaching a novel tort problem by considering whether courts can make a rational and just comparison between the plaintiff’s condition affected and unaffected by the impact of the defendant’s conduct. If the two divergent lines cannot be depicted then the law has no framework for attempting the “costing” exercise.

Unlike the majority judges, he did not consider that comparison to be impossible (as opposed to difficult) (at [157]). Since Mason P found that the plaintiffs succeeded on the ordinary principles of negligence, he did not found his judgment on the application of the compensatory principle of “corrective justice”.

The decisions in Harriton; Waller (No 2) were appealed to the High Court of Australia, with the court delivering separate but related judgments: Harriton v Stephens (2006) 226 CLR 52; Waller v James (2006) 226 CLR 136. Crennan J delivered the leading majority judgments, with which Gleeson CJ, Gummow and Heydon JJ agreed. Hayne J agreed in part with Crennan J (differing principally in that he declined to rule against the existence of a duty of care) (at [176]) and delivered his own supplementary reasons. Callinan J delivered his own short judgment in support of the majority position.

Crennan J ruled against the plaintiffs on “the main issue”, denying the existence of a cause of action in negligence in the circumstances. This was determined principally by denying the existence of a relevant duty of care, which was in turn linked to the absence of damage. She held that the impossibility of comparing existence with non-existence meant that it would be impossible to assess damages according to the compensatory principle and, in those circumstances, there was no actionable damage. This reasoning also effectively disposed of the secondary issue, the appropriate heads of damages.

54 In particular, see Harriton v Stephens (2006) 226 CLR 52 at [170].
55 Although the bulk of Callinan J’s reasons concerned policy considerations, he expressly disavowed policy (or even the common law) as the basis for his judgment, instead stating in Harriton v Stephens (2006) 226 CLR 52 at [206]: “It is not logically possible for any person to be heard to say ‘I should not be here at all’, because a non-being can say nothing at all.”
57 Harriton v Stephens (2006) 226 CLR 52 where Crennan J stated (at [276]): “A duty of care cannot be clearly stated in circumstances where the appellant can never prove (and the trier of fact can never apprehend) the actual damage claimed, the essential ingredient in the tort of negligence.”
By contrast, Kirby J (dissenting) concluded that the plaintiffs’ actions fell within an established duty of care, the doctors’ duty to avoid causing prenatal injury. As to compensation, he noted the application of the compensatory principle to the actions but held that the necessary comparison between the plaintiffs’ disabled life and non-existence did not defeat their claims. He found that there was no need or basis for the plaintiffs to prove damage using some novel “comparator”. Rather, he reasoned that since the plaintiffs would not have had any economic needs absent the defendants’ negligence, special damages were clearly recoverable. As to general damages, he held that the comparison with non-existence was one that could be undertaken, noting that such comparisons had been made by courts in other contexts, and that the invocation of a legal fiction (here referring to the hypothetical non-existent plaintiff as a comparator) is not in itself reason to preclude recovery. He concluded that, on an application of legal principle, the plaintiffs were entitled to general damages for proved pain and suffering and to special damages for “needs created by the negligence”. Finally, he held that there were no policy considerations that would warrant rejecting wrongful life claims, against his conclusions of principle. Indeed, he said that to deny the plaintiffs’ actions would erect an immunity around health care providers whose negligence had resulted in the birth of a child into a life of suffering.

“OH, WHAT A TANGLED WEB WE WEAVE”: IDENTIFYING THE ISSUES IN WRONGFUL LIFE CLAIMS

English and Australian courts have thus robustly denied the existence of a right of action for wrongful life. However, the precise basis of that denial remains somewhat muddy and, more particularly, attempts to analyse it in terms of tort theory reveal a number of inconsistencies and absences of clarity. The two concerns consistently repeated in the decisions are, first, that life cannot be a legal injury and, second, that courts are unable or unwilling to measure compensation. How those considerations attach and apply to the requirements for a valid cause of action in negligence has, however, been decidedly less consistent.

Duty of care

As has already been seen, there is no doubt that a duty of care can be owed to a child before its birth or conception. However, it is not enough to assert a duty of care simpliciter. Rather, an action for negligence depends on proving a duty of care having some particular scope or content, albeit at a fairly high level of abstraction.

The formulation of the relevant duty has clear implications for its acceptance or rejection. As the High Court of Australia noted in *Sullivan v Moody* (2001) 207 CLR 562 at [50]:

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63 Harriton v Stephens (2006) 226 CLR 52 at [87].
69 Outlined above. See also Todd, n 7 at 538.
Different classes of case give rise to different problems in determining the existence and nature or scope, of a duty of care. Sometimes the problems may be bound up with the harm suffered by the plaintiff … Sometimes they may concern the need to preserve the coherence of other legal principles, or of a statutory scheme which governs certain conduct or relationships. The relevant problem will then become the focus of attention in a judicial evaluation of the factors which tend for or against a conclusion, to be arrived at as a matter of principle.

Australian judges have variously described the relevant duty of care (being that which would be sufficient to satisfy the first element of a negligence action for wrongful life) as a duty to

- prevent the plaintiff’s birth or conception;
- give such advice to the plaintiff’s mother during pregnancy as would or could deprive the plaintiff of the opportunity of life;
- properly diagnose and advise the mother of the plaintiff in utero; or
- avoid causing prenatal injury to the plaintiff in utero.

The approach to the duty of care issue of the “majority position” judges (that is, the English Court of Appeal and the Australian judges who have ruled against the validity of wrongful life actions) is that its existence and extent are inseparable from, and ought to be determined by reference to, the damage claimed to have been suffered by the plaintiff. Their formulations of the relevant duty have the avoidance of life at their heart. By characterising the loss the subject of the claim as life, and in holding that life is not a legal injury, these judges conclude that the relevant duty (to avoid life) does not exist.

Further, the majority judges’ refusal to recognise a relevant duty of care is supported by reference to the purported inconsistency or incoherence between the existence of such a duty and other legal principles or duties. In *McKay*, Stephenson LJ held that the recognition of a duty to terminate life would make an unacceptable inroad on the principle of the sanctity of human life (at 1180), and that the recognition of wrongful life actions would expose medical practitioners to liability in respect of “trivial” abnormalities (at 1181) and would open the door for handicapped children to bring actions against their mothers for failing to have an abortion (at 1181). In *Harriton*, Crennan J held that to recognise a duty of care owed by a doctor to a fetus to advise the mother, so that she could terminate her pregnancy in the interest of the fetus in not being born, may not be compatible with the doctor’s

73 Edwards v Blomeley [2002] NSWSC 460 at [62]; *Harriton v Stephens* [2002] NSWSC 460 at [62]. Similarly, see *Harriton v Stephens; Waller v James; Waller v Hoolahan* (2004) 59 NSWLR 694 at [13] per Spigelman CJ, who describes the relevant duty as encompassing “conduct which, if it had been properly performed without negligence, would have led to termination of the pregnancy or non-conception”.

74 *Harriton v Stephens* [2002] NSWSC 461 at [21]; *Waller v James* [2002] NSWSC 462 at [36]. See also *Harriton v Stephens* (2006) 226 CLR 52 at [249] per Crennan J, who described the relevant duty as one “to advise the mother so that she can terminate a pregnancy in the interest of the foetus in not being born”.


77 *McKay v Essex Area Health Authority* [1982] QB 1166 at 1178 (Stephenson LJ); see also at 1188 where Ackner LJ described the duty as one to terminate the plaintiff’s existence.

78 *McKay v Essex Area Health Authority* [1982] QB 1166. See also Griffiths LJ (at 1192) who referred to a duty to urge the plaintiff’s destruction.

79 *McKay v Essex Area Health Authority* [1982] QB 1166. Ackner LJ.

duty of care to the mother, and may introduce conflict or incoherence into the body of relevant legal principle. Both Crenn and Callinan JJ also considered that the recognition of wrongful life claims against doctors would be inconsistent with protecting parents from claims by their children for failing to abort (and hence inconsistent with the mother’s autonomous right not to abort). Additionally, Crenn J stated that allowing a disabled person to claim her own existence as actionable damage would be both inconsistent with statutes prohibiting differential treatment of the disabled, and incompatible with the law’s sanction of those who wrongfully take a life.

In contrast, the minority judges (those who have recognised a cause of action for wrongful life) have characterised the relevant duty as falling within the scope of more general, recognised, duties: to avoid prenatal injury and to provide adequate diagnosis and advice to the plaintiff child’s mother during her pregnancy. The former characterisation, that of Kirby J, continues to reflect the concept of formulating the duty by reference to the kind of loss claimed. It differs from the majority approach by categorising the loss differently, treating the compound concept of “life with disabilities” as a kind of physical injury. Mason’s formulation of the relevant duty of care in Harriton; Waller (No 2) is not focused on loss at all. Rather, it simply extends the existing duty of doctors adequately to diagnose, treat and advise their patients to the unborn children of those patients.

These marked differences in approach to determining the duty of care in the various wrongful life judgments is reflective of the unsettled state of the law relating to this element of negligence, particularly in Australia. While it is obviously outside the scope of this article to explore fully the English and Australian courts’ approaches to duty of care, it is notable that in the 1990s a marked split in “methodology” emerged between the two jurisdictions, which culminated in 2001 in Australia’s rejection of the English courts’ approach enunciated in Caparo. That “three-stage” approach determines the existence of a duty of care according to the “necessary ingredients” of reasonably foreseeable damage, proximity and consideration of whether the imposition of a duty is “fair, just and reasonable” in the circumstances.

In Sullivan v Moody (2001) 207 CLR 562 at [49] the High Court of Australia criticised the centrality of proximity and fairness to the Caparo test, pointing to the danger that judges and practitioners, when confronted by a novel problem, would seek to give the test a utility beyond that which was originally intended. The court stated that the concept of proximity “gives little practical guidance in determining whether a duty of care exists in cases that are not analogous to cases in which a duty has been established” (at [48]) and did not represent the law in Australia. Further, the third stage of the Caparo inquiry raised the danger that “the matter of foreseeability (which is often incontestable) having been determined, the succeeding questions will be reduced to a discretionary judgment based upon a sense of what is fair, and just and reasonable as an outcome in the particular case” (at [49]). Indeed, this last concern may find support in Lord Steyn’s judgment in McFarlane v

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85 This approach is reflective of the use of incrementalism, determining duties of care in accordance with recognised categories of duty and by way of analogy: Perre v Anand Pty Ltd (1999) 198 CLR 180 at [94]; Esso Australia Resources Ltd v Federal Commissioner of Taxation (1999) 201 CLR 49 at [100]; Brodie v Singleton Shire Council (2001) 206 CLR 512 at [214], [317].
86 Kirby J did not, in fact, use this term; rather, it was the plaintiffs’ characterisation of loss, which Kirby J appeared tacitly to accept: see Harriton v Stephens (2006) 226 CLR 52 at [71], [118].
87 Rogers v Whitaker (1992) 175 CLR 479.
89 See eg X (minors) v Bedfordshire County Council [1995] 2 AC 633; McFarlane v Tayside Health Board (2000) 2 AC 59.
90 The so-called three-stage test enunciated in Caparo Industries plc v Dickman [1992] AC 605 at 617-618. The High Court instead restated the neighbourhood test enunciated by Lord Atkin in Donoghue v Stephenson [1932] AC 562 at 580.
Tayside Health Board [2000] 2 AC 59 at 82-83, which has been cited as demonstrating a move in England from the Caparo approach “towards a vision of adjudication of negligence cases as a dialogue between the muses of ‘distributive justice’ and ‘corrective justice’”. 92

Australia’s rejection of the Caparo approach perhaps best explains the majority’s negative response to the plaintiffs’ appeals to corrective justice in the determination of duty in the Harriton and Waller cases. 93 It also explains the pains taken by the High Court to distinguish policy issues from those of legal principle and to confine policy issues to supportive, but not determinative, considerations in the disposition of the appeals. 94 By contrast, Kirby J (the High Court’s only proponent of the three-stage Caparo test) 95 supported his dissent by reference to notions of corrective justice, stating that it would be “offensive to justice and the proper purpose of the law of negligence” 96 to deny recovery to the plaintiffs based on the difficulties associated with comparing life to non-existence. Kirby J criticised the majority of the High Court’s approach 97 to formulating the relevant duty of care (and, by necessary extension, their characterisation of the relevant loss) as being at too high a level of specificity. 98 In essence, his criticism was that, while recognising the interdependence of the various elements of a negligence action, 99 the specific conduct required of the defendant is more properly considered at the breach stage of inquiry, and the specific loss suffered by the plaintiff is more properly considered with causation. 100 Kirby J treated the scope of the recognised duty of doctors to avoid causing prenatal injuries as being sufficiently broad to encompass the plaintiffs’ claims in Harriton and Waller.

The characterisation of the duty as one to kill or to take away life anyway appears objectionable, with or without an appeal to fairness. That was not the nature of the duty pleaded against the defendants, 101 nor is it the only or necessary duty to support an action for wrongful life. Wrongful life claims, at least insofar as they have been brought against medical practitioners, do not rely on the assertion (of law) that the plaintiff ought to have been aborted, but rather on the factual assertion that the plaintiff would have been aborted. Further, characterising the duty as one to kill involves the assertion of a positive duty, which should be avoided where duties can be framed in the negative, particularly where the positive characterisation of a duty predetermines or conflates the question of its breach. 102

However, it is more difficult to challenge the characterisation of the relevant duty as a duty to avoid the plaintiff’s birth/conception (or the related duty to provide the plaintiff’s mother with an opportunity to terminate the pregnancy). Clearly, it has at its focus the concept of foreseeable harm (that harm being characterised as life). Kirby J’s dissenting approach also has reasonably foreseeable harm at its heart, but that harm is more broadly characterised as physical injury (disability). It may be

92 Wairy v Wyong Shire Council (2005) 223 CLR 422 at [65] (Gummow J).
93 Harriton v Stephens (2006) 226 CLR 52 at [208], [274]-[275]. See also Harriton v Stephens; Waller v James; Waller v Hoolahan (2004) 59 NSWLR 694 at [32], [38] (Spigelman CJ); at [287]-[288], [350] (Ipp JA).
97 As well as that of Ipp JA in Harriton v Stephens; Waller v James; Waller v Hoolahan (2004) 59 NSWLR 694.
100 He stated (at [70]): “Lifting considerations relating to the breach and damage elements into the duty element of the tort threatens the continued relevance of the duty of care in the negligence context … [It] is desirable that determinations on points of law be framed with a sufficient degree of generality to make them useful in later cases where the facts are necessarily different but where the concepts will necessarily be the same.”
102 See eg Graham Barclay Oysters Pty Ltd v Ryan (2002) 211 CLR 540 at [191]-[192].

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argued that Mason P’s approach incorporates physical injury as foreseeable harm since it is in that context that the duty to provide proper diagnosis and advice has evolved. The principal difference between the majority and minority approaches lies in the specificity of the foreseeable harm the subject of the duty.

As Gummow J commented in Vairy v Wyong Shire Council (2005) 223 CLR 422 at [60]:

[The] determination of the existence and content of a duty is not assisted by looking first to the damage sustained by the plaintiff and the alleged want of care in that regard by the defendant. This is because the duty of care is a question of law, while damage and breach are questions of fact. The determination of a duty of care must necessarily take into account certain matters of fact, including the circumstances in which the purported negligence is said to arise and the nature of the risk of harm to the plaintiff, but this is done against the background that the existence of a duty of care falls to be determined at a “higher level of abstraction” than the remaining elements of negligence.

What is reasonably foreseeable depends on the circumstances and must be assessed at the time of the alleged negligence, without the benefit of hindsight. In wrongful life cases, the question is whether the foreseeable risk of physical injury to a fetus arising from a doctor’s failure to provide a reasonable standard of prenatal care is of the “same general character” as the harm suffered by the plaintiff child in a wrongful life claim. If so, then at this first broad phase of the negligence inquiry, the (recognised) duty to avoid physical injury would be sufficient to found a valid cause of action. If one includes in the circumstances (which are common to wrongful life claims) that no exercise of reasonable care could lessen the fact or nature of the fetus being affected by disabilities, then this would lead to the conclusion that the foreseeable harm resulting from any want of care must be of a different kind. This reasoning would lend support, therefore, to the majority approach to formulating the relevant duty of care.

On the other hand, if one were to inject the duty inquiry, including the characterisation of foreseeable harm for that purpose, with the concepts of fairness and corrective justice, then a different result might be yielded. It is certainly coherent to conceptualise “life with disabilities” as falling within the same general kind of damage as physical injury. That characterisation of the foreseeable risk of harm would also be supported by notions of coherency with existing duties (the duties owed by a doctor to the unborn child of a pregnant patient, and to provide a reasonable standard of diagnosis and advice to the pregnant patient herself).

It appears, therefore, that a duty sufficient to found a cause of action for wrongful life is unlikely to find broad support in the Australian courts. On the other hand, the English courts’ adoption and development of the Caparo test could lend a stronger theoretical basis to the minority judges’ approach to characterising the relevant duty of care. Perhaps paradoxically, the English courts’ acceptance and development of the concept of fairness as being central to the formulation of a duty of care may, in the absence of legislative intervention, influence later courts to reconsider the “majority position” judges’ narrow characterisation of the relevant duty in wrongful life cases.

105 Chapman v Hearse (1961) 106 CLR 112 at 120.
106 See eg Minister Administering the Environmental Planning and Assessment Act v San Sebastian Pty Ltd [1983] 2 NSWLR 268 at 295-296; Neindorf v Junkovic (2005) 80 ALJR 341 at [55].
107 In each of the cases outlined above, the issue was not a generalised failure to diagnose or warn. Rather, each case concerned circumstances that pointed to the need to test for, or provide advice about, a particular condition. Each of those conditions were of such a nature that, at the time of the breach, the exercise of reasonable care could only avoid the fact of the plaintiff’s birth or conception, not her or his disabled state.
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However, even if the relevant duty were characterised broadly as one to avoid physical injury (by providing a reasonable standard of diagnosis and advice), this would not avoid the fundamental question of whether the plaintiff in a wrongful life action had suffered compensable harm. Rather, that issue would be shifted to be determined as part of the causation inquiry.

**Breach of duty**

As already seen, the decided cases have proceeded on the basis that the defendants had failed to exercise reasonable care. Before moving on, however, it is important to highlight the centrality of reasonableness to the determination of the relevant standard of care.\(^{109}\)

One of the concerns advanced against the recognition of a valid cause of action for wrongful life is that such recognition would potentially expose the mother of a child born disabled to liability for her failure to terminate her pregnancy.\(^ {109}\) That concern is, however, unconvincing. The autonomy of persons to make decisions about their own health care is well recognised.\(^ {111}\) There is no duty on one person to undergo surgery for the benefit of another,\(^ {112}\) including one’s unborn child.\(^ {113}\) Further, women are not required to terminate their pregnancies in order to mitigate their claim for damages, including in wrongful birth cases, precisely because to impose such a requirement would go beyond what was reasonable.\(^ {114}\) In the circumstances, it is unrealistic to anticipate that the recognition of a duty to take reasonable care to avoid causing injury to a fetus (including by taking reasonable care to avoid that child’s birth) would manifest in a woman’s liability to her disabled child for failing to terminate her pregnancy.\(^ {115}\) Even if a duty of care was owed by a pregnant woman to her fetus (which, given the distinct nature of the maternal/fetal relationship, in itself is controversial),\(^ {116}\) it seems clear that the concept of reasonableness would defeat any action in negligence asserting that that duty was breached by the woman’s failure have an abortion.

**Causation and remoteness**

Assuming a duty is owed and has been breached, the next question is whether that breach of duty has caused the plaintiff damage. The problems associated with the wrongful life plaintiff needing to prove loss are at least as critical (if not more so) to the question of causation as to the existence of a duty of care. Further, this stage of the negligence inquiry is at its most specific,\(^ {117}\) requiring proof the plaintiff has in fact suffered (reasonably foreseeable) harm and, if so, that the actual harm suffered by the plaintiff could have been avoided absent the defendant’s negligence.

Putting aside, for these purposes, the legal recognition of loss, it seems clear that the losses formulated by both the majority judges (life) and the minority judges (prenatal injury or suffering as a

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\(^{112}\) *McFall v Shimp* (1978) 10 Pa D & C 3d 90 [AQ: pl check citation correct].

\(^{113}\) *Re MB (Medical Treatment)* [1997] 2 FLR 426; *St George’s Healthcare NHS Trust v S; R v Collins, Ex parte S* [1998] 3 WLR 936.


\(^{115}\) It has been noted that “The maternal-fetal relationship is so unique in nature that the recognition of a doctor’s duty to give advice regarding termination must be seen as conceptually distinct from a woman’s subsequent decision regarding whether to undergo a termination. The two are not merely steps along the same logical continuum, separated by a matter of degrees, but are instead qualitatively distinct”: *Grey A, “Harriton v Stephens: Life, Logic and Legal Fictions”* (2006) 28 Syd L Rev 545 at 552. See also the criticisms of *Kirby J in Harriton v Stephens* (2006) 226 CLR 52 at [111]-[116].


\(^{117}\) See eg *Minister Administering the Environmental Planning and Assessment Act v San Sebastian Pty Ltd* [1983] 2 NSWLR 268 at 295-6; *Neindorf v Jankovic* (2005) 80 ALJR 341 at [55].
life in being) would be reasonably foreseeable kinds of loss and the issue of remoteness would, therefore, not be problematic in the wrongful life context. The principal hurdle will be in proving factual causation. Proof that the defendant’s negligent conduct materially increased the risk of the loss that eventuated will be sufficient to establish factual causation.\(^{118}\) On the other hand, if the risk of that loss eventuating could not be lessened by the exercise of reasonable care, then the plaintiff will fail on causation.\(^ {119}\)

Even if the relevant loss for the purposes of formulating a duty of care could be construed so broadly as prenatal injury,\(^ {120}\) it seems clear that physical injury itself cannot be the specific loss that was caused. This is because wrongful life plaintiffs have, at the time of the alleged negligence, already suffered the physical cause/s of their disabilities and therefore no conduct on the part of the defendant can affect the degree of risk of that damage eventuating. At the time of the alleged negligence, the only way to avoid the consequences of the physical damage is to avoid, or reduce the risk of, the plaintiff being born.\(^ {121}\) Thus, the only possible formulations of loss that could succeed at the causation stage of inquiry are either life or the compound concepts of “suffering as a life in being” and “life with disabilities”.

**Distinguishing damage and damages**

Once the wrongful life plaintiff has been able to prove that he or she has suffered loss as a result of the defendant’s breach of duty, the focus shifts to compensation. This requires that the plaintiff’s loss be compensable in nature, and that compensation be awarded for the value of that loss.

Regrettably, many of the wrongful life judgments conflate the concepts of loss and compensation. For example, Ipp JA’s judgment in Harriton; Waller (No 2) confuses these issues,\(^ {123}\) as is reflected by his identification of the compensator principle as the “cornerstone of tort law”.\(^ {124}\) Similarly, in Harriton, Kirby J treated the application of the compensatory principle as central to “the damage issue”, effectively subsuming the one into the other.\(^ {125}\) Having simply described (in the context of determining the existence of a duty of care) the plaintiff’s loss as “physical damage”,\(^ {126}\) he moved on to issues of assessment. He thus largely elided the fundamental question of whether the plaintiff had suffered any legally recognised loss and, if so, the precise nature of that loss.\(^ {127}\) On a more general level, there is a lack of consistency between, and clarity within, judgments as to whether the asserted impossibility of comparing existence and non-existence is directed towards the absence of any

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\(^{120}\) As was the approach of Kirby J in *Harriton* and *Waller* and, arguably, the approach of Mason J in *Harriton; Waller (No 2)*.

\(^{121}\) Or, in the cases of wrongful conception, the physical causes are a necessary and unavoidable consequence of the plaintiff’s identity.

\(^{122}\) This formulation of causation is consistent with the comments above that the relevant duty is not a duty to kill, but rather a duty to take reasonable care to avoid the plaintiff’s birth. The causation inquiry underscores the unsatisfactory nature of formulating the relevant duty in absolute terms.

\(^{123}\) *Harriton v Stephens; Waller v James; Waller v Hoolahan* (2004) 59 NSWLR 694 at [234]-[237], [271], [279], [320]-[321]. See also commentary in Stretton, n 7 at fn 207.

\(^{124}\) *Harriton v Stephens; Waller v James; Waller v Hoolahan* (2004) 59 NSWLR 694 at [215]. See also Spigelman CJ’s criticism of this approach at [2]-[6]. It is generally accepted that damage, not compensation, is the gist of an action in negligence: see also Fleming, n 111, p 216, cited in *Harriton v Stephens* (2006) 226 CLR 52 at [218] (Crennan J).

\(^{125}\) *Harriton v Stephens* (2006) 226 CLR 52 at [78]-[109]; see also commentary in Grey, n 115 at 552.

\(^{126}\) *Harriton v Stephens* (2006) 226 CLR 52 at [71].

\(^{127}\) Recognising that the negligence inquiry becomes progressively more specific, so that, even if a broad description of loss may suffice to impose a duty of care, by the time one addresses causation and compensation, the actual loss suffered by the plaintiff must be identified with precision as to its nature and extent: see eg Kirby J’s own comments in *Neindorf v Jankovic* (2005) 80 ALJR 341 at [55].
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...cognisable loss, 128 or to rendering the compensation principle inoperable, 129 or both. 130 While they are clearly related, the issues of damage and damages are distinct and ought to be treated as such. 131

Assessment of damages

It is axiomatic that the aim of compensation (or the compensation principle) is to place the victim, as nearly as money is able, in the position the plaintiff would have been in had he or she not sustained the wrong. 132 In wrongful life cases, this raises the problem that, absent the negligence, the plaintiff would not have existed, which has led a number of judges and commentators to object that such an comparison is impossible. 133 However, while superficially attractive, the appeal to non-existence as an obstacle to assessing damages is open to challenge on a number of bases.

First, the application of the compensation principle, even outside the wrongful life context, is readily acknowledged as imperfect and imprecise. 134 The limitations of placing a monetary value on non-monetary losses are obvious. It is, however, routinely said that difficulty in assessment is no reason to deny compensation. 135 As Kirby J pointed out, courts have been willing to assign monetary values to “intangible injuries and nebulous losses”, doing so on the basis of making a practical approximation of their value. 136

Second, it has been argued that in practice the purpose of compensation is to ameliorate the effects of a tort. 137 That argument is supported by the award, in personal injury cases, of compensation both for the plaintiff’s loss of capacity as well as for newly created needs arising from the tort. 138 Finally, damages are limited to recognised heads, so that the extent of any pre- and post-tort comparison is limited by the purpose of evaluating those distinct heads.

It follows that, while it is certainly accepted that it would be impossible to contemplate the existential nature of non-existence, 139 there is little practical impediment to contemplating the needs that might arise from life or “life with disabilities” on the one hand and, on the other, the total absence of those needs without life. 140 On this basis, and putting aside the hurdle of cognisable loss, it is...
arguable that all of the plaintiff child’s needs (including the costs of upbringing, as well as medical and care costs) would be recoverable on the ordinary application of the compensation principle. However, since non-existence necessarily entails a complete absence of capacity, there could be no recovery for any heads of damage relating to any loss of capacity. Further, there are good reasons for arguing that general damages should not be awarded. The competing considerations are that, on the one hand, given the plaintiff’s life, he or she has both the pain and suffering associated with her or his disabilities; on the other hand, the plaintiff has also gained the value of cognition (even if limited), sensory perception and experience of human relationships which would have been impossible without existence.

The primary difficulty with the assessment of damages in wrongful life cases seems to stem from attempts to limit compensation to only those needs arising from the plaintiff’s disabilities, while denying compensation for more general needs. The problem with such an approach is that compensation would be assessed as though the physical disability was the loss caused by the defendant’s negligence and that, therefore, only the losses associated with that harm would have been avoided absent the negligence. This is clearly contrary to the factual basis for wrongful life claims, where the physical cause of the disability is not the result of the defendant’s conduct; rather, that conduct results in the manifestation of the (unavoidable) disability through the plaintiff’s birth. The loss, therefore, that could have been avoided with the exercise of reasonable care is of a different kind from disability per se: it is life with disabilities (or life itself). On the application of ordinary principles, there is no reason for the compensatory response to such a loss to distinguish, within the recognised heads of damages, between “ordinary” and disability-related needs.

To the extent that the comparison between existence and non-existence is problematic, that problem is, it is submitted, more closely associated with the characterisation of the plaintiff’s loss and its recognition as loss, than with the process of assessment of damages.

Characterising loss (damage)

As has been seen throughout the discussion above, the principal challenges facing decision-makers in wrongful life cases are identifying the nature of the harm suffered by the plaintiff as a result of the defendant’s negligence and characterising such harm as compensable loss at law. As to the first of these, the specificity with which the nature of the harm needs to be formulated increases during the course of the negligence inquiry. Thus, if not at the duty stage, then at least by the causation stage, that formulation must reflect the precise nature of the harm that is said to arise from the defendant’s negligent conduct. Further, that harm must be characterised as compensable loss for the action to succeed.

Identifying the harm

The “minority position” judges have described the nature of the harm as “physical damage”,141 or “suffering as a life in being”142 (which is similar to the “life with disabilities”143 concept pressed by the plaintiffs). These formulations reflect that the essence of the wrongful life plaintiff’s claim is not that life itself is harmful, but that the plaintiff’s disabled state, arising through birth, is.

As has been argued above, even if physical damage is a sufficient formulation of foreseeable loss for the purposes of establishing a duty of care, it is not a formulation of harm that would succeed at the causation stage of inquiry in a wrongful life case. The plaintiff will ultimately need to be able to point to more specific harm that could be said to be avoidable absent the defendant’s negligence.

141 Harriton v Stephens (2006) 226 CLR 52 at [71] (Kirby J). This characterisation is also implicit in Waller v James (2006) 226 CLR 136 at [37] (Kirby J) and, arguably, in Harriton v Stephens; Waller v James; Waller v Hoolahan [2004] NSWCA 93 at [117]-[121] (Mason P).

142 Harriton v Stephens (2006) 226 CLR 52 at [118], [39], [40], [85] (Kirby J). See also Waller v James (2006) 226 CLR 136 at [38], [41] (Kirby J); Harriton v Stephens; Waller v James; Waller v Hoolahan [2004] NSWCA 93 at [115]-[116], [134]-[135] (Mason P).

143 This was the description of the relevant damage alleged by the plaintiffs in Harriton v Stephens (2006) 226 CLR 52 (see at [219]) and Waller v James (2006) 226 CLR 136 (see at [86]).
Accordingly, it is submitted that, of the two minority formulations of harm, the compound concept of “suffering as a life in being” is the more viable.

The “majority position” judges have tended to characterise the plaintiffs’ loss simply as “life” (or having been born)\(^\text{144}\) or, in some cases, as “life with disabilities”.\(^\text{145}\) To the extent that the latter formulation is used, it is with the following focus: “[t]hough what gives rise to the cause of action is not just life but life with defects, the real cause of action is negligence in causing life.”\(^\text{146}\)

In essence, the loss in wrongful life cases as formulated by the “minority position” judges takes its nature from the plaintiff’s disabilities, whereas the fundamental character of the relevant loss as formulated by the “majority position” judges is life.

**Harm as compensable loss**

Having formulated the harm in question, the issue becomes whether that harm constitutes compensable loss. The determination of this issue reveals one of the few common grounds (in approach rather than outcome) between the minority and majority positions: that is, in order to succeed, the wrongful life plaintiff needs to establish that he or she was somehow “worse off” as a result of the defendant’s negligence.\(^\text{147}\) It is in this evaluation that the comparison between existence and non-existence re-emerges, but in this context that comparison goes to the qualitative nature of the two states (rather than the more pragmatic comparison that may be made when assessing heads of damages). The “majority position” is that, since no person can contemplate the nature and value of non-existence, such a comparison is impossible. However, there is little further reasoning to support this bald assertion.

Proponents of the “minority position” argue that similar comparisons are made in other contexts (such as decisions about whether the withdrawal or withholding of life-sustaining treatment is in the best interests of an incapable person). Although these comparisons are made in a different context,\(^\text{148}\) and with a different aim, the essence (and possibility) of the comparison is difficult to distinguish. Further, it may be objected against the impossibility argument that many comparisons made between a plaintiff’s injured life and her or his hypothetical uninjured life require significant conjecture and guesswork in any event.\(^\text{149}\) Since the law is demonstrably able to operate in a similar way (using a hypothetical comparative life) and in analogous contexts, it is submitted that the purported impossibility of comparing existence with non-existence is best rationalised as an expression of the courts’ unwillingness, rather than inability, to engage in the comparison.

However, even if it is possible to compare existence and non-existence, the question of whether any harm is compensable will not be **determined** by undertaking that comparison and finding that the plaintiff is somehow “worse off” by having been born. For example, it is certainly possible to point to circumstances in which a person, having suffered some emotional upset following another’s negligent conduct, may be readily described as being “worse off” as a result of that conduct. Absent anything more, however, that person would have no claim in negligence because mere emotional upset is not a

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\(^{145}\) *Harriton v Stephens* (2006) 226 CLR 52 at [233], [253] (Crennan J); *Waller v James; Waller v Hoolahan* [2004] NSWCA 93 at [43]-[44], [50] (Spigelman CJ); *Edwards v Blomeley* [2002] NSWSC 460 at [75]. See also *McKay v Essex Area Health Authority* [1982] QB 1166 at 1183-1184 (Stephenson LJ).


\(^{147}\) *Harriton v Stephens* (2006) 226 CLR 52 at [103]-[104] (Kirby J), at [251] (Crennan J); *Waller v James; Waller v Hoolahan* [2004] NSWCA 93 at [43]-[44] (Spigelman CJ). See also *McKay v Essex Area Health Authority* [1982] QB 1166 at 1181 (Stephenson LJ); at 1189 (Ackner LJ).

\(^{148}\) In the exercise of the courts’ inherent parens patriae or statutory welfare jurisdictions.

\(^{149}\) See eg comments in *De Sales v Ingrilli* (2002) 212 CLR 338 at [141]-[142]. See also *Hanlon v Hanlon* [2006] TASSC 1 at [146]; *McKenzie v Lichter* [2005] VSC 61 at [65].
compensable loss. Thus, assessing that a plaintiff has been adversely affected by the defendant’s negligence is a necessary, but insufficient, step in characterising the plaintiff’s harm as compensable loss. Fundamentally, it seems, the characterisation of loss as being compensable (or not) is a function of policy considerations.

It has been argued that in wrongful life actions, the only “viable” formulations of loss are life simpliciter and the compound concepts of “suffering as a life in being” or “life with disabilities”. The first of these (life) would, it is submitted, be too broad to be characterised as compensable loss in either Australia or the United Kingdom. Such a characterisation would offend the repeated principle and policy that all human life is equally and inherently valuable at law (the sanctity of human life principle).

Further, in most wrongful life cases, it is inconsistent with the true basis of the plaintiff’s claim. Finally, the recognition of life as a compensable injury would open the door for claims being brought by physically healthy children whose births would have been avoided absent a defendant’s wrongdoing. The prospect of allowing such claims is clearly not contemplated, even by the “minority position” judges.

This leaves for consideration the compound formulations of loss (life with disabilities or suffering as a life in being). The primary difficulty with these formulations is that, necessarily, they depend on distinguishing between claims brought by disabled plaintiffs and those brought by “healthy” children. Such a comparison is arguably inconsistent with the sanctity of life principle.

However, in the United Kingdom that comparison has, since McKay, become an established part of the courts’ assessment of wrongful birth cases. In that jurisdiction, therefore, any objection to characterising life with disabilities as a compensable loss would depend on different considerations of policy (which, in the United Kingdom, is expressed in terms of what is “fair, just and reasonable”, which phrase is arguably sufficiently broad to incorporate considerations of corrective justice).

Arguably, therefore, there is scope in the United Kingdom for life with disabilities to be characterised as compensable loss. By way of contrast, the Australian courts’ rejection of the “fair, just and reasonable” formulation of policy, together with its refusal in the wrongful birth context to

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151 For example, the reasons articulated for limiting recovery for psychological upset include “(i) that psychiatric harm is less objectively observable than physical injury and is therefore more likely to be trivial or fabricated and is more captive to shifting medical theories and conflicting expert evidence, (ii) that litigation in respect of purely psychiatric harm is likely to operate as an unconscious disincentive to rehabilitation, (iii) that permitting full recovery for purely psychiatric harm risks indeterminate liability and greatly increases the class of persons who may recover, and (iv) that liability for purely psychiatric harm may impose an unreasonable or disproportionate burden on defendants”: Tame v New South Wales (2002) 211 CLR 317 at [193] (Gummow and Kirby JJ). The conclusion that policy drives the characterisation of loss is unsurprising given the close association in the law of negligence between the concepts of loss and duty of care. See similar considerations in respect of limiting recoverability for pure economic loss (in particular, the duty owed in respect of such loss) in Perre v Apand (1999) 198 CLR 180 at [32]-[33], [101]-[105].

152 That is, those that would be both sufficient to found a duty of care and to satisfy the element of causation.


154 For example, in Harriton v Stephens (2006) 226 CLR 52 (see at [219]) and Waller v James (2006) 226 CLR 136 (see at [86]) the plaintiffs did not plead life (simpliciter) but rather “life with disabilities” as the injury in question. See also comments of Kirby J at [118].

155 See eg Zepeda v Zepeda 190 NE 2d 849 at 858 (1963). See also McKay v Essex Area Health Authority [1982] QB 1166 at 1181 (Stephenson LJ).

156 See eg McKay v Essex Area Health Authority [1982] QB 1166 at 1181 (Stephenson LJ).

157 McFarlane v Tayside Health Board [2000] 2 AC 59 at 82-83 (Lord Styn). See also commentary in Vairy v Wyong Shire Council (2005) 223 CLR 422 at [65] (Gummow J).

The wrongfulness or rightfulness of actions for wrongful life

distinguish between disabled and “healthy” children,\(^\text{159}\) makes it unlikely that any formulation of loss that depended on such a distinction would be recognised as compensable.

**CONCLUSION**

Despite the rejection by the United Kingdom and Australian courts of claims for wrongful life, the matter is, as a matter of law and logic, by no means settled. In the United Kingdom, an argument might still be mounted (at least in the House of Lords) that such claims are not, in fact, precluded by the *Congenital Disabilities (Civil Liability) Act 1976* (UK); were this successful, support might be derived from the existing decisions of the higher courts which, as has been seen, demonstrate perceptible sympathy for treating disabled children differently from healthy ones. Such an approach is, moreover, arguably able to be accommodated through the three-stage test for the legal duty of care, in particular the element of fairness, justice and reasonableness.

Wrongful life claims under the common law of Australia are more difficult to advance. Nevertheless, the underlying principles of law remain unsettled in this area, in particular in relation to the formulation of the legal duty of care. It may, indeed, prove possible, consistent with legal principle, to articulate a cognisable legal duty of care to prevent “life with disabilities” or “suffering as a life in being”. In addition, there are no insuperable arguments of principle which prevent “life with disabilities” or “suffering as a life in being” from becoming a recognised and compensable head of loss.

It seems unlikely that the legislatures in either jurisdiction will consider the issue of wrongful life a legislative priority. Accordingly, the difficult legal and ethical questions in relation to it will probably continue to confront the courts and require analysis in the light of existing understanding in relation to the law of negligence. If the United Kingdom courts do, indeed, find occasion to address wrongful life again and arrive at a new approach, it will be fascinating to watch the response of the Australian judiciary in this protracted intellectual contest.

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