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RECONSIDERING "WRONGFUL LIFE" IN ENGLAND AFTER THIRTY YEARS: LEGISLATIVE MISTAKES AND UNJUSTIFIABLE ANOMALIES

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ABSTRACT. *Under English law a child born disabled, for instance by Tay Sachs disease, as a result of negligent embryo selection by preimplantation genetic diagnosis ('PGD'), can sue the relevant health professionals by means of a 1990 amendment to the Congenital Disabilities (Civil Liability) ('CD') Act 1976. By contrast, a second child conceived outside the* in vitro *fertilisation ('IVF') clinic, whose Tay Sachs is not detected* in utero *by means of prenatal diagnosis, can have no claim against the relevant health professionals due to the decision in* McKay and Another v Essex Area Health Authority*, which held that a child can have no claim for so-called "wrongful life". This paper argues that this difference is anomalous and inequitable. It highlights the inadvertent way in which the legislative exception was crafted and shows that there are no relevant differences between the selection practices of PGD and PND that would in any event justify such different treatment. It critiques the English common law position on wrongful life by analysing the ethical and legal foundations of such a claim, arguing that the action should be permitted on the basis of a certain degree of severity, namely where a future child is likely to think that his or her life is not worth living. The analysis makes particular reference to developments since McKay in the law relating to the selective non-treatment of neonates, selective abortion, wrongful birth, and the action for wrongful life itself, as well as to the legal position of pregnant women in relation to the fetus, and the critique by people with disabilities of the practices of PGD and PND. The paper argues that* McKay *and those parts of the CD Act that purport to deny a claim for wrongful life to children born outside the IVF context should be revisited when the opportunity arises. The duty that health professionals already owe prospective parents to advise of a condition in a developing fetus that would give rise to serious impairments in the future child (which sounds in an action for so-called "wrongful birth") should be owed at the same time to the future child, realised by advice to the pregnant woman, where a child is likely to be born with a condition that is so severe that any goods in life are outweighed by the burdens.*

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I. INTRODUCTION

The decision in *McKay and Another v Essex Area Health Authority*,[1] which held that a child can have no claim for so-called "wrongful life", has lain untouched for thirty years in English law – indeed so long that one might well think it is not worth revisiting. There are several reasons, however, to reconsider the strength of the decision as it now stands. Surprisingly perhaps, the grounds for the first of these have existed ever since the 1990 amendment to the Congenital Disabilities (Civil Liability) Act 1976 ('CD' Act) which, apparently unintentionally,[2] appears to allow a claim for wrongful life in the context of assisted reproductive treatment ('ART'). The implication is that a child born disabled – for instance by Tay Sachs disease as a result of negligent embryo selection by preimplantation genetic diagnosis ('PGD')[3] – could sue the relevant health professionals. By contrast, a second child conceived outside the *in vitro* fertilisation ('IVF') clinic, whose Tay Sachs is not detected *in utero* by means of prenatal diagnosis ('PND'), could have no claim against the relevant health professionals due to the decision in *McKay*. Unless there is a satisfactory justification for this difference this is anomalous and inequitable. Moreover, in the light of the expansion of both PGD and PND – related technologies that grow in tandem – it is one that requires examination. Indeed, the grant of an action for wrongful life in the context of ART and its selection techniques (even if unintentional) raises questions about the strength of the ethical, legal and policy objections to the action for wrongful life under the common law established in *McKay*. A second reason to examine the strength of the decision concerns the development of the case-law relating to the withdrawal of treatment from severely impaired neonates, on which there was little law at the time of *McKay* itself, but on which the judges nevertheless relied in part. Third, since *McKay*, the 'disability ground' of the Abortion Act 1967 (as amended by the

[1] [1982] 1 Q.B. 1166, discussed below.
[2] Relevant parts of the Parliamentary debate are discussed below.
[3] PGD involves removing a single cell from a day 3 embryo and testing it for a serious genetic condition. Those that have tested positive for a serious genetic condition are sometimes termed 'affected embryos'. For further discussion, see e.g. R. Scott, C. Williams, K. Ehrich and B. Farsides, "The Appropriate Extent of Preimplantation Genetic Diagnosis: Health Professionals' Views on the Requirement for a 'Significant Risk of a Serious Genetic Condition'" (2007) 15 Med. Law Rev. 320–56. The current legal criteria for PGD are noted below.

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Human Fertilisation and Embryology ('HFE') Act 1990), discussion of which forms part of the reasoning in *McKay*, has been considered in the courtroom (both directly and indirectly)[4] and has, more particularly, received considerable scholarly attention. Fourth, there have been significant decisions overseas: in *favour* of the action in France (the *Perruche* case)[5] and the Netherlands (the *Kelly* case)[6] and, more recently, *against* in our much closer legal relative – Australia (*Harriton v Stephens*).[7] Aspects of the decisions in these cases, particularly the latter, aid in a re-evaluation of the decision in *McKay* itself.

I argue that the common law should permit an action for wrongful life for children born outside the ART context, in line with the action available (but apparently never used)[8] to those born as a result of ART, including PGD. Not to allow the common law action is anomalous and unjust. Paradoxically, this was in fact the rationale for the amendment to the 1976 Act, which was intended to put children born through ART

[4] See respectively *Jepson v The Chief Constable of West Mercia Police Constabulary* [2003] EWHC 3318 and e.g. *Parkinson v St James and Seacroft University Hospital N.H.S. Trust* [2002] Q.B. 266, both of which are discussed below.

[5] Cass. Ass. Plén., 17 November 2000, *Perruche*, J.C.P. 2000.II.10438, rapp. P. Sargos, which concerned the birth of a rubella-affected child, discussed below. The mother, when pregnant, had shown signs of rubella and sought testing. The laboratory failed to conduct the necessary tests and her doctor negligently advised that there was no risk to the fetus. The Cour de Cassation awarded damages to the child in a wrongful life action. A. Morris and S. Saintier, "To Be or Not to Be: Is that the Question? Wrongful Life and Misconceptions" (2003) 11 Med. Law Rev. 167–294, 175. The boy's serious disabilities "included severe developmental delay, deafness, partial blindness, and heart problems". P. Lewis, "The Necessary Implications of Wrongful Life Claims" (2005) 12 E.J.H.L.135–153, p. 135. See also S. Taylor, "The Development of Medical Liability and Accident Compensation in France", in E. Hondius (ed.), *The Development of Medical Liability* (Cambridge 2010) 71, 105–106. Taylor notes that the decision in *Perruche* was seen as "the most extreme manifestation of a developing compensation culture" (p. 92). Changes to the compensation system were introduced by the Law of 4 March 2002, ibid. p. 93.The parts of relevance to the wrongful life action are discussed below.

[6] *Leids Unversitair Medisch Centrum v Kelly Molenaar*, no. C03/206, RvdW 2005, 42 (18 March, 2005), discussed below. The case concerned an obstetrician's failure to test the fetus in a pregnancy which resulted in the birth of a severely disabled child, despite the fact that the mother had advised him of a hereditary genetic condition in the father's family. Liability was admitted on the defendant's part. The Supreme Court, the Hoge Raad, held that the mother, father and the child were each entitled to compensation. E. Hondius, "The Development of Medical Liability in the Netherlands", in E. Hondius (ed.), *The Development of Medical Liability*, pp. 147–148. In 2003, it was reported that the child "cannot walk, talk or properly recognise her parents; has deformed feet; is believed to be in constant pain; and has had several heart operations. By the age of 2½ she had been admitted to hospital nine times due to 'inconsolable crying'". T. Sheldon, "Court Awards Damages to Disabled Child for Having Been Born" (2003) 326 B.M.J. 784, p. 784. J.K. Mason and G. Laurie, *Law and Medical Ethics* (Oxford 2010) 8th edn, para.10.72, note that the Hoge Raad awarded damages for "material and emotional damage" to both of the parents and the child.

[7] (2006) 226 C.L.R. 52, discussed below. The case concerned the failure of a doctor to diagnose rubella in a pregnant woman and to advise her of the subsequent risks to the fetus. A child was later born who suffered from severe disabilities. As described by Kirby J., dissenting, at [20], these "include blindness, deafness, mental retardation and spasticity". He noted further that "she will require constant supervision and care for the rest of her life". The leading judgment was given by Crennan J. Gleeson C.J., Gummow and Heydon JJ. agreed. The remaining judges were Hayne and Callinan JJ. and Kirby J., dissenting. All apart from Kirby J. (dissenting) and Hayne J. (who did not decide the point) held that the doctor did not owe the child a duty of care. Crennan, Gummow, Hayne, Callinan JJ. and Gleeson C. J., held that damage was an essential ingredient of the tort of negligence and that it was impossible to make the comparison necessary to determine damage in this case.

[8] As confirmed by a Westlaw search, 11 January 2013.

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in the same legal position as those born as a result of "natural" conception but, seemingly unintentionally, went further than this. Although the common law should permit an action for wrongful life, however, I argue that the circumstances in which a disability could give rise to this claim are surprisingly rare: a person only has a claim for wrongful life where the negligent conduct of health professionals has resulted in his or her being born with a condition that is so severe that any goods in life are outweighed by the burdens. Other cases, in which the disability or disease is less severe, may instead continue to give rise to an action by the parents for so-called "wrongful birth".[9]

Section II discusses the amendment to the HFE Act that provides for a wrongful life claim in the ART context and compares the process of selection in the IVF/PGD and PND contexts in order to determine whether there are any relevant differences between the two contexts. Section III starts by outlining the decision in *McKay* and its key arguments barring the action generally at common law and then analyses these, including with reference to relevant aspects of the law overseas, as well as legal and ethical literature.

II. The (Unintentional) Legislative Exception: Wrongful Life and Art

A. Congenital Disabilities Act, section 1A

As originally enacted, section 1 of the CD Act gives a cause of action to a child born injured as the result of an occurrence affecting either of its parents in his or her ability to have a normal healthy child, or the mother during her pregnancy, or the mother or the child in the birth process, causing the child to be born with disabilities that he or she would not otherwise have had.[10] Such disabilities are to be regarded as "damage" resulting from the wrongful act of the relevant third party. With regard to the issue of duty (subject to certain other points), a person is answerable to the child if he owed a duty of care to the parent, although no injury need be suffered by the parent,[11] so the child's claim under the Act derives from the breach of duty to his or her parent. As can be seen above, the Act applies both to occurrences affecting the gametes of either parent pre-conception, or to the developing embryo and fetus *in utero*.

When the original HFE Act was enacted in 1990, Parliament extended this section by adding section 1A. This allows for liability where "a child carried by a woman as the result of the placing in her of

[9] E.g. as in *Rand v East Dorset Health Authority* [2000] 56 B.M.L.R. 39, which concerned the birth of a child with Down's syndrome.

[10] The wording is quoted in the final section of this article.

[11] Section 1(3).

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an embryo or of sperm and eggs or her artificial insemination is born disabled",[12] and the disability is caused by an act or omission in the course of the "selection, or the keeping or use outside the body, of the embryo carried by her or of the gametes used to bring about the creation of the embryo".[13] In such a case the child's disabilities are to be considered as "damage" caused by the negligence and are "actionable accordingly at the suit of the child".[14] There is an exception to liability where either or both parents knew of the "particular risk created by the act or omission".[15] In practice this could now refer to the somewhat unlikely scenario in which, following a cycle of IVF and PGD, there are no 'non-affected' embryos to transfer and, despite having undertaken IVF and PGD to avoid the birth of a child with a serious genetic condition, a couple elects to have an 'affected' embryo transferred to the woman's uterus. This is permissible under the HFE Act 1990, as amended by the HFE Act 2008, and as interpreted in the Human Fertilisation and Embryology Authority's ('HFEA') *Code of Practice*, provided that there are no non-affected embryos that could be preferred.[16]

Section 1A could be applicable in either of two ways, depending on whether the case concerns negligent "keeping" or "use" on the one hand or negligent "selection" on the other, and there is an important difference between these. Turning to the first case, where an embryo or gametes are *damaged ex utero* (and this had led to "damage" in the subsequently born child), prior to the negligence that embryo had the potential to result in the birth of a non-disabled child and those gametes had the potential to form an embryo (when mixed appropriately) that would give rise to the birth of a child without a disability. In the case of the embryo, the negligent damage obviously occurs post-conception and in the case of the gametes it occurs pre-conception. In the former case, although we are considering an embryo that has not yet implanted *in utero*, the case is conceptually analogous to the negligently damaged fetus, in the sense that the embryo is damaged so as to give rise to disabilities that it *would not otherwise have had*. The scenario of the negligently damaged *fetus* gives rise to a claim under the original section 1 of the Act. So those parts of section 1A that refer to damage by "keeping" or "use" of the embryo can be understood as a straightforward extension of section 1 "from the fetus", as it were, "to the embryo". Indeed, this appears to have been Parliament's intention, as Kenneth Clarke M.P.'s repeated reassurances that the section was

[12] Section 1A(1)(a).
[13] Section 1A(1)(b).
[14] Section 1A(1)(c).
[15] Section 1A(3).
[16] HFEA, *Code of Practice* (8th edn, 2009, updated 2011), in force Oct 2011, T86 and T87, "Interpretation of Mandatory Requirements", Box 10C.

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intended to put children born through ART in the same legal position as those born "naturally" demonstrate.[17]

However, the implications of the second scenario, involving "selection", do not appear to have been thought through, either by the drafters or by Mr Clarke when he was defending the clause (as it then was) in Parliament. Consider now the scenario in which an embryo is created by IVF, tested by negligently performed PGD and then transferred to the woman's uterus when it is actually an embryo that, if a successful pregnancy were to develop, would give rise to the birth of a disabled child. That particular child had *no other way of being born* than as a disabled one. Despite this, under section 1A s/he can claim in respect of those disabilities. The same would be true if gametes had been negligently tested and then mixed to form an embryo that was subsequently transferred to the woman's uterus, or simply transferred as gametes for the purposes of artificial insemination. Under section 1A, then, the case of the negligent *selection* of an embryo or gametes that could only ever have given rise to the birth of a disabled child gives rise to a claim on behalf of that child for being born *as* that disabled child: in essence, this is the foundation (at least) of a claim for wrongful life, though I shall discuss further below the very serious degree of disability that should form the gist of such a claim. Since neither the drafters nor Mr Clarke were aware that an action for wrongful life was being established in this way, not surprisingly no thought was given to the question of the requisite degree of disability, since the section was simply portrayed as being analogous to a claim in respect of prenatal injury to the fetus, as in the first scenario discussed above.

The lack of awareness on the then Government's part that a wrongful life claim was being created by means of part of the wording in section 1A can be seen from a review of the Parliamentary debate, rather late in the day, in which the relevant clause of the draft bill was raised.[18] Queries about the clause were led by Mr Alton, who observed:

> The new clause raises important new questions, which were not debated in the Lords, in Committee or on Second Reading. It has been brought in with only 24 hours notice. Only a few hon. Members spotted that it introduces a wholly new principle into our law. It means that if a doctor fails to remove and discard an embryo that may in some way be disabled, the doctor can subsequently be sued. That will place pressure on the medical profession to destroy embryos and to incorporate eugenics into medical ethics. That is wholly unacceptable…[19]

[17] See the discussion below.
[18] Clause 11, Human Fertilisation and Embryology Bill 1989.
[19] HC Deb. vol. 174, cols. 992–993 (20 June 1990).

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Apparently not appreciating the relevance of this line of enquiry, Mr Clarke responded that the clause "is designed to afford protection to the children in question … and it does not raise the great moral issues with which … the hon. Gentleman is consistently concerned".[20] In due course, he stated:

> New clause 11 is designed essentially to give children born as a result of these treatments the same rights against people who have caused him or her injury as a result of some default or negligence as those that have been given to children born naturally … [under] the Congenital Disabilities (Civil Liability) Act 1976. That measure was passed to give children legal remedies in respect of wrongful action or omissions that took place before the child was born or, perhaps, even conceived. It deals with wrongful acts or omissions where the negligence of those carrying out the treatment has led to the child being born disabled…. New clause 11 is merely trying to ensure that that protection is given to children born as a result of AID. It would put them on the *same footing as children born naturally*.[21]

Later Mr Alton pressed again:

> Is the Secretary of State saying that it would be a matter of negligence and the clinic would be open to be sued if it had failed to detect an embryo that went on to become a Down's syndrome child, and that failure to destroy that embryo would open the way for an action?[22]

Mr Clarke responded:

> It would do so no more than the failure to destroy a foetus carrying Down's syndrome could be the cause of action with natural childbirth. … The hon. Gentleman believes that there will be a cause of action against doctors for failing to terminate a pregnancy likely to produce a disabled child, but I do not believe that. There is no distinction between an IVF pregnancy and a natural pregnancy for the purpose. It can happen with a natural pregnancy and, conceivably – although it is slightly less likely – happen with an IVF pregnancy. We have not reached the position in this country – I hope that we never will – where a failure on the part of the doctor to pressurise a mother, against her will, to abort a handicapped child would be a cause of action. That is not the case. There is absolutely no difference between an IVF case and a natural childbirth case. *Nothing new is being created here*.[23]

Contrary to Mr Clarke's insistence that, if enacted, the clause would merely put children born through ART on "all fours" with children

[20] *Ibid*. col. 994.
[21] *Ibid*. cols. 995–996, my emphasis.
[22] *Ibid*. col. 999.
[23] *Ibid*. col. 1000, my emphasis.

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conceived naturally,[24] so far as the term "selection" in section 1A is concerned, something new was indeed being created. This means that it was understandable for Ms Primarolo still to be seeking clarification, and for Ms Winterton to be querying in some puzzlement:

> Is not it true that a child conceived and born naturally will not be screened in the first part of its life? However, a child conceived by IVF will be screened because no gynaecologist or doctor would want to reimplant a woman with an embryo that was not perfect. If by any mischance a disabled child was born, would it have the right to sue the clinic or the doctor for having been born?[25]

(The first parts of her objection are factually incorrect on two counts: first, pregnant women *are* routinely offered screening and testing; second, IVF embryos are *not* routinely screened or tested, but may be tested for a serious genetic condition if the couple requests this.[26]) In response Mr Clarke observed that "[t]he parents might sue, but I cannot see *how on earth* a child would bring an action to obtain compensation for the fact that it was not destroyed at the embryonic stage. I could not put together a claim for loss or damages in such circumstances"; and, in an attempt to end the debate, he stated: "I do not think that we can take the matter much further".[27] Despite this, Ms Primarolo was still concerned about the scope of the clause,[28] and questions were then pressed by Mr Hughes, to which Mr Clarke responded (in part), trying to delineate his understanding of when an action could arise:

> An action could arise in a case where a child would have been born able bodied if someone had not been negligent. It would arise where the embryo was healthy and developing normally, but, *as a result of some default on the part of someone responsible for the care of that child, it was damaged* and the child was born disabled. In precisely such a case new clause 11 could give rise to an action. *If a child is born disabled because the embryo was naturally damaged from the beginning and everybody behaved properly, no cause of action arises*.[29]

However, what Mr Clarke does not address at this point is precisely the scenario in which an embryo is "naturally damaged", to use his phrase, and someone *has* been negligent in the selection of it, since the process of selection is a process encompassed under the clause (now section 1A). It was thus entirely understandable for Mr Alton to be concerned

[24] *Ibid.*
[25] *Ibid.* cols. 1000–1001.
[26] The relevant legal criteria for PGD are detailed in Schedule 2 of the HFE Act 1990, as amended by the HFE Act 2008.
[27] HC Deb. vol. 174, col. 1001 (20 June 1990), my emphasis.
[28] *Ibid.* col. 1001.
[29] *Ibid.* col. 1002, my emphases.

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(earlier in the debate) that "[s]erious handicap is not specified. The doctor may have doubts about cosmetic disability. I have in mind a cleft palate, a club foot or a hare lip. As the clause is drawn, that will be a reason why the doctor will have to remove and discard the embryo."[30] Strikingly, in his concerns about the section as drafted, Mr Alton was correct: on its face that part of the section that refers to "selection" would give rise to a claim for being born as, for instance, a child with a relatively minor impairment, despite the fact that such a child had no other way of being born.

Leaving to one side the inadvertent way in which a claim for wrongful life was put on our statute books, when the law that respectively permits and disallows the actions for wrongful life in the ART and non-ART contexts respectively is viewed side by side, the position could be perceived either as stigmatising, or privileging, the now relatively common use of ART.[31] Not only is ART quite common but, in any event, parents using such treatment will typically also undergo the standard kinds of PND that most other parents use; this means that ART-conceived pregnancies then "come under the umbrella", if you like, of all prenatal care more generally, so that differences in the way conception occurs become irrelevant. Common screening and testing practices include nuchal fold screening (possibly followed by amniocentesis or chorionic villus sampling, forms of PND) for Down's syndrome, or PND for cystic fibrosis or Tay Sachs disease. (I discuss which of these conditions, if any, could be serious enough to give rise to an action for wrongful life in Section III.) Indeed, PND is specifically recommended after PGD. Parents who have conceived either way are also likely to choose to have a 20-week anomaly scan to detect serious anomalies, such as spina bifida, in the fetus. In all these cases they rely on the information and advice of the relevant health professionals, including doctors and laboratory staff. Are there any differences – relevant to the case for the action for wrongful life – between negligent selection by IVF with PGD (which would give rise to an action under section 1A of the CD Act) on the one hand and negligent selection by PNS and PND on the other (which could not give rise to an action for wrongful life due to the decision in *McKay*)? How do the 'selection processes' operate in either context?

[30] *Ibid*. col. 993.

[31] According to the Human Fertilisation and Embryology Authority ("HFEA"): "45,264 women had IVF treatment in 2010. These women had 57,652 cycles of treatment in 2010, an increase of 5.9% on the previous year… There were 12,714 babies born in 2009 as a result of IVF treatment using womens' [*sic*] own fresh eggs." *Latest UK IVF figures – 2009 and 2010*, http://www.hfea.gov.uk/ivf-figures-2006.html. Further: "In 2009, 232 patients underwent 288 PGD treatment cycles. … In 2009 there were 86 live births resulting in 100 babies." *Latest UK pre-implantation genetic diagnosis* (PGD) figures – 2009, http://www.hfea.gov.uk/1271.html.

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In the context of IVF, an embryo could be tested for a serious genetic condition by means of PGD.[32] That testing process may "select" – in the sense of "identify" – one or more "affected" embryos. As a result, one or more non-affected embryos may then be transferred to the woman's uterus, who relies on that prior selection process in consenting to that transfer. Both parents have to consent under the HFE Act 1990 (as amended) and the woman at common law.[33] If parents are correctly advised that a given embryo has tested positive for a serious genetic condition by means of PGD and if there is at least one other non-affected embryo to transfer, then the affected one must be discarded by law; the prospective parents then have the option to have the non-affected embryo transferred to the woman's uterus (but are never compelled to do so). If there are no other non-affected embryos to transfer, they are likely not to have the affected one transferred but, under the amended HFE Act, it could be (since it would not be "preferred" to another embryo or embryos). If, as a result of negligence in the selection process of PGD, the prospective parents are negligently *not* advised that an embryo is affected with a serious genetic condition and they consent to it being transferred, and if a live birth follows, then that child may have a claim for wrongful life under section 1A of the CD Act. The parents, who relied on that negligent process of selection, may also have an action for wrongful birth at common law.

In the case of PNS/PND, the screening and testing relates to an already established pregnancy, but it will be seen that this is not a relevant difference for the purposes of the legitimacy of a wrongful life action. There may be screening of the developing fetus, via the pregnant woman, and testing of blood and other samples. On occasion, such screening and testing will establish that the future child would be affected by a serious disability: in such cases the testing selects – in the sense of "identifies" – a fetus as one with an anomaly, just as PGD may select – in the sense of "identify" – a given embryo as one that is affected by a serious genetic condition. Compared with PGD, in relation to which we have seen that the prospective parents do not have sole discretion to use an affected embryo in treatment,[34] it would then be for the pregnant woman (in consultation with her partner if she wishes), relying on the professional process of selection as "identification", to

[32] This would be on the basis of the criteria noted in above n 26.

[33] A couple must consent in writing to the use of their embryos (and gametes) in their treatment, HFE Act 1990 (as amended), Sched. 3 paras 1(1) and 2(1). The validity of consent is assessed by the common law requirements of capacity, information as to nature and purpose and voluntariness. Regarding each of these elements, see respectively *Re MB* [1997] 2 F.L.R. 426, *Chatterton v Gerson* [1981] 1 All E.R. 257, *Re T* (*Adult: Refusal of Treatment*) [1992] 4 All E.R. 649.

[34] The legal prohibition against preferring an affected PGD embryo was the subject of considerable debate and some criticism, for instance by members of the deaf community, at the time of the passing of the HFE Act 2008.

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choose whether or not to terminate the pregnancy. The reason for this sole discretion likely inheres, in part at least, in the fact that in this case a pregnancy is already established and the law shrinks from compelling termination in any circumstances. Health professionals are well aware that the major purpose of any PNS or PND is to give parents a certain degree of knowledge about the developing fetus and with it the option, should they choose, of avoiding the birth of a child with a serious disability, as their long-standing liability in a potential wrongful birth action in English law confirms.[35] That said, parents do not necessarily choose to terminate when aware of the particular risk and health professionals' liability in a wrongful birth action would cease at this point, just as we have seen that section 1A of the CD Act would exclude liability to the child in the parallel situation in the ART context. Following the provision of PNS/PND, a woman might be said to "consent" to the continuation of her pregnancy when informed that the fetus is not affected: for instance, if as a result of negligence in the selection process of PND, she is not advised that there is a "substantial risk" of a "serious handicap" in her future born child, she will not be able to avail herself of the legal option to terminate under the disability ground of the Abortion Act.[36] The autonomy that is at stake in the lost opportunity to terminate is legally protected to some degree by the possibility of a wrongful birth action, damages for which include some recognition (one that will probably see further judicial development) of an autonomy interest on the part of the parents.[37] As noted, such an action would also be available to parents using IVF and PGD. However, notwithstanding the strong conceptual and clinical parallels between the processes of selection in the course of IVF/PGD and PNS/PND, where the negligent performance of the PNS/PND gives rise to the birth of a seriously disabled child (which the parents would

[35] E.g. *Rand v East Dorset Health Authority* [2000] 56 B.M.L.R. 39.

[36] The relevant part of section 1(1) of the Abortion Act 1967 as amended by the HFE Act 1990 reads: "Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith … (d) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped".

[37] Damages are currently recognised in respect of the possible impact on parents of raising a disabled child (beyond, that is, the financial costs of so doing) necessarily described, for the purposes of the law of negligence, as "physical consequences giving rise to … loss of amenity" (Newman J. in *Rand v East Dorset Health Authority*, [2000] 56 B.M.L.R. 39, at p. 114) and further supported with reference to the protection due to autonomy interests (currently by means of a "conventional award") in surrounding case law. This strand originated in the judgment of Lord Millet in *McFarlane v Tayside Health Board* [2000] 2 AC 59 (which held that the birth of a healthy child following a negligent sterilisation amounts to pure economic loss in relation to which no duty of care is owed) and is discussed below. It was then taken up by the majority of the House of Lords in *Rees v Darlington Memorial* N.H.S. *Trust* [2004] 1 AC 309 (which concerned whether a disabled mother could recover damages (for the extra costs of child-raising associated with her own disability) for the birth of a healthy child following a negligently performed sterilisation), discussed below. See further e.g. R. Scott, *Choosing Between Possible Lives: Law and Ethics of Prenatal and Preimplantation Genetic Diagnosis* (Oxford 2007), ch. 2.

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have aborted if non-negligently advised), the child can have no claim due to the decision in *McKay*, to which I now turn.

III. The Common Law Position: Wrongful Life and 'Natural' Conception

A. McKay and Another v Essex Area Health Authority

The first claimant was born with disabilities caused by rubella because her mother, the second claimant, had relied on the advice of her doctor that she and her then unborn child had not been infected. If informed correctly the mother would have terminated her pregnancy. It was alleged that the child had suffered "serious damage to her neural tissues", full particulars of which were to be provided later.[38] The defendant doctor and health authority sought to strike out the action as "disclos[ing] no reasonable cause of action…".[39] The Court of Appeal, disagreeing with Lawson J. below, complied and struck out the claim.[40]

The main arguments for the court's rejection of the claimants' case were: that the gist of the action is a claim for being born, but that a doctor cannot be under a duty to terminate the life of a fetus, which would threaten the sanctity of life; that there is no right to be born "whole" or not at all; that the first claimant had suffered no damage and that, at the same time, it would be impossible to assess damages because the court can know nothing of non-existence; that to allow the action could open the way for claims against mothers for failing to abort; that such actions devalue the life of those with disabilities; and that such actions were in any event barred (though not retrospectively) under the CD Act. I now analyse key points relevant to these arguments in turn.

B. 'A Right to be Aborted or to be Born Whole or Not At All'

In holding that the claimant's case was "a highly reasonable and arguable cause of action",[41] Lawson J. held that the "real complaint was not that 'she was born at all' – 'wrongful entry into life' – but that she was 'born with deformities'".[42] In response in the Court of Appeal Stephenson L.J. argued that the first claimant had been injured by the rubella rather than any conduct on the defendants' part and therefore that the only right she could claim had been infringed was one not to be born disabled, which in this case must mean a right to be aborted with a corresponding duty on the part of the defendants to abort her.

[38] Para 11 of the Statement of Claim, cited by Stephenson L.J. [1982] 1 Q.B. 1166, at p. 1172G.
[39] RSC Ord. 18, r. 19(1)(a).
[40] [1982] 1 Q.B. 1166, Stephenson, Ackner and Griffiths L.JJ.
[41] *Ibid.* Stephenson L.J. at p. 1175D.
[42] *Ibid.*

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Accordingly, contrary to Lawson J., her claim was for "wrongful life",[43] which also meant a right to be "born whole or not at all".[44] In this light, he argued that for the defendants to owe the fetus a duty to abort it would "make a further inroad into the sanctity of life".[45] Ackner L.J. concurred.[46]

First, there is no reason why a wrongful life action implies a right to be "born whole or not at all". Rather, as I shall discuss in the next section, rightly understood the action must turn on a certain very serious degree of disability in a child.[47] Second, rather than there being a duty to abort the fetus on the health professionals' part, which could not be realised on any reasonable view of human relationships because of the position of the mother in relation to the fetus (and which in any event could not be realised by the laboratory that tests the blood sample in such a case), the duty in question is owed to the *child*, realised by advice to the *mother*, to the effect that there is a risk of a certain degree of (very serious) disability in her future child. This has been recognised in subsequent case-law, notably the French case of *Perruche*[48] (in favour of the claim, which emphasised the mother's right to elect to abort when duly informed) and the dissenting judgment of Kirby J. in the Australian High Court decision in *Harriton*[49] (in which the majority were against the claim). At this point it should be recalled that relevant health professionals are already under a duty in English law to advise the mother about the risk of disability in a future child in order to avoid a possible wrongful birth action by the mother. While Griffiths L.J. understood, correctly in my and others' view (for instance Kirby J. in *Harriton*[50]) that it was wrong to assert that the doctor owed the fetus a duty to "urge its destruction" and argued instead that s/he

[43] *Ibid.* at pp. 1178 G, 1179A-E.
[44] *Ibid.* at p. 1181A.
[45] *Ibid.* Stephenson L.J. at p. 1180H.
[46] *Ibid.* at p. 1188B-C. A concern with the sanctity of life has also been a major theme in relevant US cases both before and after the US Supreme Court's decision in *Roe v Wade*, 35 L.Ed.2d 147 (1973) (which established a pregnant woman's right to abort her fetus for any reason until the end of the second trimester as an aspect of her right to privacy). See e.g. *Berman v Allan*, 404 A.2d 8 (1979) (which concerned a failure to advise a 38-year-old woman who later gave birth to a child with Down's syndrome of the possibility of amniocentesis), in which Pashman J. observes, at p. 12: "One of the most deeply held beliefs of our society is that life whether experienced with or without a major physical handicap is more precious than non-life."
[47] See also e.g. A. Shapira, "'Wrongful Life' Lawsuits for Faulty Genetic Counselling: Should the Impaired Newborn be Entitled to Sue?" (1998) 24 J.M.E. 369–375, p. 373. However, Shapira is concerned that judges will not be able to draw the relevant lines.
[48] Cass. Ass. Plén., 17 November 2000, *Perruche*, J.C.P. 2000. II.10438. A. Morris and S. Saintier, note 5 above, p. 178.
[49] (2006) 226 C.L.R. 52, Kirby J. holds that the "case falls within the duty owed by persons such as the respondent to take reasonable care to prevent pre-natal injuries to a person such as the appellant" (at [66] Kirby J. also emphasised that liability encourages "proper standards of care" (at [101]), an argument rejected by Hayne J. (against the claim) on the mistaken ground that not all mothers would in any event abort (at [180]–[181]). See also A. Grey, "*Harriton v Stephens*: Life, Logic and Legal Fictions" [2006] 28 Sydney Law Rev. 544, 559–560.
[50] (2006) 226 C.L.R. 52. Kirby J. refers to a patient seeking a doctor's "*advice* and care" (at [72], my emphasis).

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was only under a duty to provide a "balanced explanation of risks…", he rejected the action for reasons discussed below.[51]

C. 'No Damage and Impossible to Assess Damages'

1. What is the damage?

The dispute between Lawson J. and the Court of Appeal in *McKay* as to whether the child's claim should be understood as for being *born per se* or for *disability* (or disease) *per se* has continued to be central to judicial reasoning for and against the claim for wrongful life.[52] Indeed, the point is typically the key to judicial rejection or acceptance of the claim. On the view of the Court of Appeal in *McKay*, since the first claimant had no other way of being born than as a severely disabled child once infected with the rubella, for which the defendants were not responsible, not only had she suffered no damage – since (as we have seen) the court held that she could have no right to be aborted – but also it would be impossible to assess damages on the normal basis by which a court attempts to "put the injured party in the condition in which he or she was before being injured".[53] As Stephenson L.J. put it:

> The only loss for which those who have not injured the child can be held liable to compensate the child is the difference between its condition as a result of their allowing it to be born alive and injured and its condition if its embryonic life had been ended before its life in the world had begun. But how can a court of law evaluate that second condition and so *measure the loss to the child*?[54]

Further, according to Ackner L.J.:

> What the doctor is blamed for is causing or permitting her to be born at all. Thus, the compensation must be based on a comparison between the value of non-existence (the doctor's negligence having deprived her of this) and the value of her existence in a disabled state. But how can a court begin to evaluate non-existence, 'the undiscovered country from whose bourn no traveller returns'? No *comparison is possible and therefore no damage can be established* which a court could recognise. This goes to the *root of the whole cause of action*.[55]

Griffiths L.J. agreed, holding:[56] "To my mind, the most compelling reason to reject this cause of action is the intolerable and insoluble

[51] [1982] 1 Q.B. 1166, Griffiths L.J. at p. 1181E.
[52] See e.g. the majority judgment of Crennan J. in *Harriton* (2006) 226 C.L.R. 52, compared with the dissenting judgment of Kirby J.
[53] [1982] 1 Q.B. 1166, Stephenson L.J. at p. 1181C.
[54] *Ibid.* Stephenson L.J. at p. 1181E, my emphasis.
[55] *Ibid.* Ackner L.J. at p. 1189D, my emphasis.
[56] *Ibid.* Griffiths L.J. at p. 1192F.

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problem it would create in the assessment of damage." (He continued by outlining the basis for damages for "personal injury".)

In these extracts, the judges appear to run together the difficulties, as they see them, of establishing *damage* and determining *damages*. This is most apparent, perhaps, in Griffiths L.J.'s use of the phrase "assessment of damage". As we saw earlier, both Stephenson and Ackner L.JJ. also rejected the idea of birth as damage on the public policy ground that this would threaten the sanctity of life. More recently, this line of reasoning was affirmed by the majority in *Harriton*.[57] It has also been the basis for rejection of the claim in several US states as well as in Canada.[58] The sanctity of life point is related to the damages point in that the argument that assessing damages is impossible may well conceal policy judgments.[59]

At one level it is right that *if* the claim is for birth *per se* and *if* damages are assessed using the standard comparative basis described, then it is very difficult both to determine *damage* and to quantify *damages* because the state of non-existence cannot be known. More particularly, the state of non-existence is no state at all since, prior to her conception, the first claimant in *McKay* did not exist in any form, so that there was no-one or no being who could experience non-existence. This means that, although this point does not appear to have been recognised in this way by the judges, in one way they were right to assert that formulating damages on this basis is not just difficult, but "impossible".[60] The difficulty could be supported with reference to David Heyd, who observes from an ethical perspective that "the comparison between life and non-existence is blocked by two considerations: the valuelessness of non-existence as such and the unattributability of its alleged value to individual subjects".[61] Do we therefore have to accept that a child born into a wrongful life has not been damaged or harmed? What is the gist of the action? These questions are the focus of this section, and I address the issue of damages below.

Arguably, the gist does not lie in birth *per se* (per the Court of Appeal), nor in disability *per se* (per Lawson J.) and for this reason there is merit in both sides of the argument on this point. Rather, it lies

[57] (2006) 226 C.L.R. 52, per Crennan J. at [252].
[58] *Ibid.* See e.g. Crennan J.'s review of US and Canadian law at [232]–[235].
[59] On this point see H. Teff, "The Action for 'Wrongful Life' in England and the United States" (1986) 34 I.C.L.Q. 423-441, p. 431. Teff (p. 433) suggests this is particularly apparent given the accompanying judicial preference for life. See also A. Capron, "Tort Liability in Genetic Counseling" (1979) 79 Colum. L. Rev. 618, 650, who suggests that in this way courts are "not announcing purely rational conclusions derived from legal principles but are instead proclaiming their personal views on certain value-laden 'facts'". See especially *Gleitman v Cosgrove* 49 N.J. 22 (which rejected a claim for wrongful life by a child affected by rubella).
[60] [1982] 1 Q.B. 1166, Griffiths L.J. at p. 1193A.
[61] D. Heyd, *Genethics: Moral Issues in the Creation of People* (Berkeley 1992), 37.

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in *being born under certain conditions*, namely when the burdens in life (for example, pain and suffering) are so severe that they outweigh any compensating goods (for example, pleasure(s) in it).[62] In such a case, we might say that there is a "serious risk", as Jonathan Glover has put this (mindful of the fallibility of third-party judgments), that (if the child were able to reflect rationally on this) s/he would consider that her or his life is 'not worth living'.[63] The reason that the conditions of birth must be so extreme lies in what has been dubbed the 'non-identity' problem, as analysed by Derek Parfit.[64] The point here is that (twinning aside) any given embryo or fetus can only be born as one particular person, and it is only if s/he is born with a condition that is so severe that any goods in life are outweighed by the burdens that s/he can have any complaint about being born. The quality of such a life is sometimes described as 'sub-zero'.[65] In discussions of ethics, this analysis is advocated for instance by Alan Buchanan *et al*: "The child in a wrongful life case has been given something – life – that because of its awful quality he or she should not have been given and has thereby been wronged."[66] The analysis can be extended to include the notion of rights, as for instance Buchanan *et al* have expressed this:

> The right in question is the right of the child who does exist with a life not worth living not to have been brought into existence with such a life …. The act of creating the person also creates the right that it violates – the person and his or her rights come into existence together.[67]

On this basis, it is only when negligent prenatal advice gives rise to the birth of a child (which the parents would otherwise have aborted as a fetus) whose condition is so severe that any goods in life are outweighed by the burdens that s/he may have a claim for wrongful life, ethically speaking.[68] In effect, in such a case the burdens of disease or disability are so great that it is *not in the child's interests to be born*. Clearly a child *has* interests once it is born (and from sentience onwards as a fetus), although prior to self-consciousness and the development of the capacity for autonomy it will not be able to *take* an interest in its

[62] For a similar emphasis on a certain requisite degree of severity for the legal claim, see e.g. H. Teff, note 59 above, p. 437 and pp. 440-441 on the likely rarity of such cases. On severity in relation to the ethical claim, see e.g. S. Wilkinson, *Choosing Tomorrow's Children: the Ethics of Selective Reproduction* (Oxford 2010), ch. 3, section 3.2; J. Savulescu, "Is there a 'Right not to be Born?' Reproductive Decision-making, Options and the Right to Information" (2002) 28 J.M.E. 65.

[63] J. Glover, *Choosing Children: Genes, Disability and Design* (Oxford 2006), 60.

[64] D. Parfit, *Reasons and Persons* (Oxford 1984), ch. 16.

[65] See e.g. S. Wilkinson, note 62 above, ch. 3, section 3.2.

[66] A. Buchanan, D. Brock, N. Daniels and D. Wikler, *From Chance to Choice: Genetics and Justice* (Cambridge 2000), 236.

[67] *Ibid.* p. 236.

[68] *Ibid.*

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welfare.[69] Can we then say that such a child has been harmed or damaged, ethically and (ultimately) legally speaking?

If it were possible for such a person to express her preferences, arguably we could make sense of her statement that she would prefer not to be alive and that she has been harmed by being born. In so doing, we would not have to think that, if the preference were fulfilled, she would somehow be present in the alternative state of non-existence. As noted above, this would be a mistake. Rather, we would be invoking a normative conception of harm in which a person is understood to be worse off in the world in which she is born than in the alternative world, where that alternative world is understood as an *artefact* or a *construct*, for the purpose of moral, and ultimately legal, reasoning. In the same way, we can make sense of the preference expressed by someone suffering greatly at the end of his life to the effect that he would prefer not to be alive (or, put another way, thinks he would be 'better off dead'), so that continued existence constitutes a harm to him. We could also say that he does not think it is in his interests to continue living. Again, in such a case we would not be thinking that, if his preference were fulfilled, he would somehow be present in an alternative state of non-existence. We would only be recognizing that he prefers to end his life (so that non-existence is preferable) and that continued existence constitutes a harm to him.[70] I consider the implications of this analysis for the legal assessment of damages in due course.

Focusing now on the question of the severity of harm, very few conditions appear to be severe enough to risk giving rise to a wrongful life, but one might be Tay-Sachs; another might be Lesch-Nyans syndrome; a third could be severe cases of Epidermolysis bullosa ('EB'); a fourth could be severe cases arising from rubella.[71] With reference to this question of severity, in the Court of Appeal in *McKay* Stephenson L.J. himself suggested that *if* a court had to decide the issue, it would hold that it was *better to be born* except in extreme cases of mental and physical disability, citing *Croke (A Minor) v Wiseman*.[72] Somewhat

[69] B. Steinbock, *Life Before Birth* (New York 1992), 56.

[70] For a compatible analysis, see e.g. S. Wilkinson, note 62 above, ch. 3, section 3.2.

[71] For descriptions, see e.g. National Tay-Sachs and Allied Diseases Association, Inc. http://www.ntsad.org/pages/t-sachs.htm; National Institute of Neurological Disorders and Stroke, http://www.ninds.nih.gov/disorders/lesch_nyhan/lesch_nyhan.htm; N.H.S. Direct Health Encyclopaedia, "Epidermolysis bullosa", http://www.nhs.direct.nhs.uk/articles/article.aspx?articleId=560&PrintPage=1. In R. Scott *et al*, note 3 above, we noted that a PGD scientist whom we interviewed observed that one clinician had given a talk in which he/she had said that the only condition in relation to which he/she could recall that people had said they would prefer not to be born was Epidermolysis bullosa. People with this condition are, of course, in fact able to reflect on their lives. On the possible effects of rubella, see Kirby J in *Harriton v Stephens* (2006) 226 C.L.R. 52 at [20] where he refers to "catastrophic disabilities" and at [105] where he speaks of "unremitting suffering".

[72] [1982] 1 Q.B. 1166, Stephenson L.J. at p. 1182E. *Croke (A Minor) v Wiseman* [1982] 1 W.L.R. 71 concerned a trial for damages only, relating to admitted negligence on the part of a hospital in

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oddly, here he seems to make a comparison between life and death, despite having held that courts can do no such thing. Not surprisingly perhaps, he then swiftly reiterates that the courts have no business "weighing life against death", and reaffirms his "on principle" dismissal of the action.[73] What is most striking here is his implicit recognition of the fact that (if it were the court's job to have a view on this) being born under certain conditions may not be in a person's interests.

There has in fact been long-standing judicial and academic recognition of the significance of burden, typically expressed as "suffering", in a wrongful life action. It can be traced back to the successful US case of *Curlender v Bio-Science Laboratories*, which concerned Tay-Sachs disease, in which Jefferson P.J. stressed that "[t]he reality … is that such a plaintiff both exists and suffers, due to the negligence of others".[74] Academic support for this approach can be found as far back as the work of Peter Cane in 1977.[75] As we saw earlier, Lawson J. in *McKay* distinguished between life and the disabilities in that life. Further, in *Harriton*, citing *Curlender* with approval, Kirby J. likewise emphasises the importance of suffering.[76] As for its degree, at one point he states that "a life of severe and unremitting suffering is worse than non-existence".[77] (This is in line with my analysis above and I return to this below when I discuss the assessment of damages.) At the same time, implicitly addressing the issue of causation, he argues that although the defendants were not responsible for the condition itself they were responsible for the claimant suffering its *consequences.*[78] For these reasons, Kirby J. suggests that the term "wrongful life", although in common use, is a misnomer and that "wrongful suffering" would be preferable.[79] In a somewhat similar fashion, in the French case of *Perruche* the Conseiller-Rapporteur, Pierre Sargos, emphasised that "it is not the child's birth or life which constitutes the harm … the compensable harm is solely that flowing from the handicap which will impose on the child throughout his life suffering, costs, constraints and deprivation".[80] The Cour de Cassation accepted that "since the child

which the claimant, when 21 months old, suffered a cardio-respiratory arrest while being examined. This led him to suffer from severe spastic quadriplegia and he was going to need constant care and attention for the rest of his substantially diminished expectation of life.

[73] [1982] 1 Q.B. 1166, Stephenson L.J. at p. 1182E.

[74] (1980) 165 Cal. Rptr. 477.

[75] P. Cane, "Injuries to Unborn Children" (1977) 51 *Australian Law Journal* 704, 719. See also H. Teff, note 59 above, p. 438.

[76] (2006) 226 C.L.R. 52 at [59].

[77] *Ibid.* at [105].

[78] *Ibid.* Kirby J. at [118], [120] and [39]. (See also Mason P., dissenting, in the Supreme Court of New South Wales (Court of Appeal) (2004) 59 N.S.W.L.R. 694.)

[79] *Ibid.* Kirby J. at [6], [155].

[80] Rapport de M. Pierre Sargos, http://www.courdecassation.fr/agenda/arrets/arrets/99-13701arr.htm, at [49], as cited in P. Lewis, note 5 above, p. 137.

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exists, the issue is not his birth but his disabilities".[81] It held that "since the faults of the doctor and the laboratory … had prevented [the pregnant woman] from exercising her choice to abort a severely handicapped child, the latter could claim compensation for the loss resulting from the handicap and caused by the faults."[82] Likewise in the Netherlands, the Court of Appeal in the *Kelly* case emphasised that the negligence caused the damage from which the child suffers.[83] (The Hoge Raad did not explicitly address the defence argument that the doctor's negligence was not causally connected to the harm suffered by the child.[84])

On my argument so far, while it may be helpful to emphasise suffering rather than life *per se* as the basis for the action, care has to be taken that the condition which it is argued gives rise to the action is very likely to be so severe that the life will be of sub-zero quality: the claim is for *life under certain conditions*. For this reason, as I discuss in the next section, it is not clear that the experience of Down's syndrome, in relation to which successful cases followed *Perruche*,[85] could rightly be viewed as giving rise to an action for wrongful life. Importantly, if the action is understood as depending on a certain level of severity, then Crennan J.'s objection, for the majority in *Harriton*, that "other categories of established negligence, in which a duty of care exists, do not discriminate between those damaged by a breach of duty on the basis of the severity or otherwise of the damage"[86] is not in point because the *damage*, and with it the *duty*, do not crystallise unless a certain (and extreme) degree of severity, as far as third parties can reasonably judge this, is reached.

In the case of *McKay* itself, the first claimant was conceived as a child who would be born without disability or disease and it was only because of a non-negligent cause that she became infected, *in utero*, with the rubella. Nevertheless, both the first and second defendants were involved in the causal chain that led to her birth – affected as she was by rubella – by reason of their negligent advice (and information)

[81] As expressed by A. Morris and S. Saintier, note 5 above, p. 185 (who cite M. Fabre-Magnan "Avortement et responsabilité médicale", R.T.D.C. 2001, 307).
[82] *Ibid.* p. 175.
[83] H.F.L. Nys and J.C.J. Dute, "A Wrongful Existence in the Netherlands" (2004) 30 J.M.E. 393; see also J.K. Mason and G. Laurie, note 6 above, para. 10.70, on the Court of Appeal's position that the child's suffering was a direct result of the negligence.
[84] E. Hondius, note 6 above, p. 154.
[85] A. Dorozynski, "Highest French Court Awards Compensation for 'Being Born'" (2001) 323 B.M.J. 1384. The case reference is Cass. Ass.Plén. 28 November 2001, J.C.P. 2002.II.10018, conclusions Sainte-Rose, note Chabas, and the decisions are noted in A. Duguet, "Wrongful Life: The Recent French Cour de Cassation Decisions" (2002) 9 E.J.H.L.139, 145. For an academic suggestion that Down's syndrome might qualify, see e.g. K. Warner, "Wrongful Life Goes Down Under" (2007) 123 L.Q.R. 209, 212.
[86] (2006) 226 C.L.R. 52, Crennan J. at [261].

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to the mother, who would otherwise have aborted.[87] We do not know enough to determine whether her condition was so severe that her life was one of sub-zero quality, since further details were to be provided at trial. Despite this, *if* it had been accepted that she would most likely have thought this of her life, then she should have had a cause of action to the effect that she should not have been born under such conditions. Can judges make such judgments? The case-law on the withdrawal of treatment from severely disabled or diseased neonates suggests that they can.

2. Drawing the line: the relevance of the law on the withdrawal of treatment from severely disabled neonates

At the time of *McKay*, the defendants' counsel argued that "the only English authority of any relevance to the present case" was *Re B (A Minor) (Wardship: Medical Treatment)*, which concerned whether treatment should be continued or withdrawn from a child born with Down's syndrome.[88] There, as the first defendants' counsel in *McKay* put it, "the court had no hesitation in deciding that the [requisite] operation should take place despite the known grave disabilities of the child".[89] Referring to this case in his judgment, Stephenson L.J. observed:

> *Like this court when it had to consider the interests of a child born with Down's syndrome* … I would not answer until it is necessary to do so the question whether the life of a child could be so certainly "awful" and "intolerable" that it would be in its best interests to end it and it might be considered that it had a right to be put to death. But that is not this case. We have no exact information about the extent of this child's serious and highly debilitating congenital injuries – the judge was told that she was partly blind and deaf – but *it is not and could not be suggested that the quality of her life is such that she is certainly better dead*, or would herself wish that she had not been born or should now die. I am therefore compelled to hold that neither defendant was under any duty to the child to give the child's mother an opportunity to terminate the child's life. That duty may be owed to the mother, but it cannot be owed to the child.[90]

The suggestion that a fetus could have a right against the defendants to be aborted has been discussed, and dismissed, above. The other point

[87] On causation see e.g. A. Morris and S. Saintier, note 5 above, pp. 187-188, who suggest (at p. 188, emphasis in original) that the disabled life of a child affected by rubella "has two causes: the rubella *and* the doctor's negligence". Morris and Saintier distinguish between the contraction of rubella *per se* and the fact of having to live with its consequences.

[88] [1981] 1 W.L.R. 1421. Cited in *McKay v Essex A.H.A.* [1982] 1 Q.B. 1166, by Stephenson L.J. at p. 1169E-F

[89] [1982] 1 Q.B. 1166, Michael Hutchison Q.C. and Terence Coghlan, at p. 1169F.

[90] *Ibid.* Stephenson L.J. at p. 1180E-G, my emphasis.

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that Stephenson L.J. is making here is that – just as in *Re B* – there was no evidence in this case that the first claimant had a life that was not in her interests. His reasoning is problematic in two ways.

First, full evidence as to the claimant's condition was due to be submitted in the trial that the successful strike-out action foreclosed. Second, arguably it is misleading to refer to the effects of rubella (even though these are variable), which for instance in *Harriton* were described by Kirby J. as "catastrophic" and as giving rise to a life of "severe and unremitting suffering",[91] in the same breath (as it were) as the effects of Down's syndrome. (This is not to make a judgment about whether the claimant either in *McKay* or *Harriton* had/have lives that are not worth living and here I note that Crennan J., for the majority in *Harriton*, observed that it had not been pleaded "as a fact" that the claimant in that case could experience no pleasure.[92] Even so, the issue would be whether that pleasure was far outweighed by her pain and suffering.) Although the effects of Down's syndrome are variable, it is almost certain that a child born with the condition could not (reasonably) say that it is so severe that life's burdens outweigh its goods. Indeed, this must have been implicitly understood by the judges in *Re B* itself and no doubt rightly contributed towards the decision that treatment should continue to be given to the child in that case. In effect then, in passing judgment with the necessarily limited evidence about the claimant's condition on a motion to strike out the claim, Stephenson L.J. places reliance on the thought that the first claimant's life was not one that was so burdened that it was not in her interests to be born. For his part, Ackner L.J. only notes the limits of the decision in *Re B* for the purposes of dismissing the point that a neonate could have a right to be put to death.[93] However, both judges clearly contemplated the possibility of future judges deciding in a given case that a child's condition could be so severe that it is not in his or her interests to continue to receive medical treatment.[94] (Moreover, as we saw above, Stephenson L.J. alluded at one point to the idea of birth being "preferable" except in the case of extreme "mental and physical disability".)

Subsequent case-law has demonstrated this, as for instance in *Re T (a minor) (wardship: medical treatment)*,[95] in which (rather controversially) it was not thought to be in a very young child's best interests to receive a liver transplant. The current leading case is the 2005 Court of Appeal decision in *Portsmouth Hospitals N.H.S. Trust v Wyatt and another*,[96] in which a baby was born prematurely at 26 weeks

[91] (2006) 226 C.L.R. 52, Kirby J. at [20] and [105] respectively.
[92] *Ibid.* Crennan J. at [260].
[93] [1982] 1 Q.B. 1166, Ackner L.J. at p. 1188D-E.
[94] *Ibid.* Stephenson L.J. at p. 1180E; Ackner L.J. at p. 188E.
[95] [1997] 1 All E.R. 906.
[96] (2005, CA) EWCA Civ 1181.

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with respiratory problems. The question over a series of legal hearings was whether to ventilate her if she succumbed to infection which led or might lead to a collapsed lung and which antibiotics would not cure. The Court of Appeal held that, in determining what was in a child's best interests, the welfare of the child was paramount and the court had to consider that question from the "assumed point of view" of the patient.[97] In terms that are now very familiar in medical law, it also held that there was a strong presumption in favour of a course of action that would prolong life, but that was rebuttable. This is testament to the fact that the courts have now long recognised that the "sanctity of life" is not absolute.[98] The court confirmed earlier case-law to the effect that "best interests" encompassed medical, emotional and all other welfare issues.[99] It suggested that the court should undertake a "balancing exercise", weighing up all the factors and perhaps draw up a "balance sheet".[100]Although the term "balance sheet", with its "accountancy ring", may be somewhat unfortunate in the context of discussions about human life, the central idea that in some cases any goods in life might reasonably be judged, from the assumed point of view of the person in question, to be outweighed by the burdens, is now the accepted basis of the decisions in cases concerning the withdrawal of treatment from children who lack capacity in English law. In this way, Kirby J. is right to assert in *Harriton* that judges can and indeed do have to draw such lines, contrary to academic suggestions – following the hearing in the court below – that it was inappropriate or impossible for them to do so.[101] And overall, developments in the law since *McKay* have clearly confirmed that continued life, as supported by medical treatment, is sometimes judged not to be in the interests of a born child.

It is the idea that on some (rare) occasions the burdens in life may be so severe that they outweigh any goods in it that is central to my, and for instance Glover's, Wilkinson's, Buchanan *et al*'s and Kirby J.'s analysis of the claim for wrongful life. With reference to the interests of the child, this could either be expressed by saying that it is not in a child's *interests* to be born under certain conditions or that this is not in his or her *best interests*. In both cases this can be understood as a prospective welfare judgment about the child once born and with a view to which 'preemptive action' can be taken, by means of abortion. Understood in this way, Crennan J.'s objection, for the majority in *Harriton*, that the "neonate cases" are "not apt, chiefly because the

[97] *Ibid.* at [87], per Wall L.J.

[98] *Airedale N.H.S. Trust v Bland* [1993] A.C. 789, in which the House of Lords affirmed that it was lawful to withdraw artificial nutrition and hydration from a patient in persistent vegetative state.

[99] See e.g. *Re MB* [1997] 2 F.L.R. 426, at p. 439.

[100] (2005, CA) EWCA Civ 1181 at [87].

[101] See e.g. S. Todd, "Wrongful Conception, Wrongful Birth and Wrongful Life" [2005] Sydney Law Rev. 536, 540.

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wardship cases do not require a forensic establishment of damage by reference to non-existence" falls away.[102] Crennan J. was also concerned that the neonate cases entail judgments about the withdrawal of medical treatment but abortion entails the active termination of life.[103] However, it is not clear what can really turn on this in assessing the legitimacy of the wrongful life action, since in both cases the actions (that is, termination or withdrawal of treatment) are legal in appropriate circumstances.

Turning directly to the issue of abortion, the claim for wrongful life entails the judgment that there is a serious risk that the burdens of life in a given state will be so severe, outweighing any possible goods, that the relevant health professional owes a duty to the child, at the prenatal stage, to advise the pregnant woman of these risks, so that she can decide whether to end her pregnancy. Indeed, unless the legality of the withdrawal of treatment becomes an issue post-birth for any given child, termination at the fetal stage represents that child's only chance of avoiding a life that (from her or his assumed point of view) s/he would think is not worth living, given the current state of the law.[104] As such, analysis of the claim also requires that we look at the basis for termination on the grounds of disability in the future child in English law.

3. The legal grounds for recognising the fetus's interests in termination: the relevance of the law on selective abortion

Under the relevant section of the Abortion Act 1967 (as amended by the HFE Act 1990) abortion is legal at any stage before birth if two doctors have formed an opinion in good faith that "there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped".[105] The terms "substantial risk" and "serious handicap" have not received full judicial consideration in the context of abortion, although if the *Jepson v The Chief Constable of West Mercia Police Constabulary*[106] case had proceeded they may have done so. However, the term "serious handicap" has been indirectly considered in the wrongful birth case law, in which judges have held that a wrongful birth action cannot

[102] (2006) 226 C.L.R. 52, Crennan J. at [256].
[103] *Ibid.*
[104] That is, the illegality of euthanasia.
[105] Note 36 above.
[106] [2003] EWHC 3318. When the police decided not to pursue a prosecution, the claimant succeeded in obtaining permission to proceed with a claim for judicial review of that decision. However, the hearing was then suspended pending a renewed police investigation. In due course the Crown Prosecution Service ("CPS") announced that, following an extensive review of evidence of various kinds, it would not prosecute the doctors in the case.

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succeed unless a child has "significant disabilities" rather than "minor defects or inconveniences".[107]

One question with which the courts would have had to grapple if the *Jepson* case had gone ahead is whether this ground of the Abortion Act can only be interpreted as protecting *fetal* interests or whether it might also be able to protect *parental* interests. This issue relates to the degree of seriousness that is required for the term "serious handicap".[108] As Sally Sheldon and Stephen Wilkinson first argued, it is only where a future child would have a condition that is so severe that any goods in life are outweighed by the burdens that termination could be said to be in the *fetus's* interests.[109] We might think of conditions possibly giving rise to such a life as 'very serious'. Whether the term "serious handicap" can include conditions such as Down's syndrome is one on which the claimant in *Jepson* may have planned to submit argument.[110] Since a person with Down's syndrome is very likely to have a life worth living, so that it could not fairly be said to be in the interests of a *fetus* with Down's syndrome to be terminated, the question arises as to whether possible parental interests in choosing whether or not to have a child with Down's syndrome can be accommodated within the meaning of "serious" under the Act. I have argued elsewhere that they should be, particularly where a disability in a future child has the potential seriously to impact on the parents' interests in reproduction and child-raising, and arguably this could be true of Down's syndrome.[111] Negligent failure to advise of the risk of Down's syndrome would give rise to an action on behalf of the *parents* for wrongful birth and there have been successful actions relating to this condition,[112] but arguably not to an action on the *child's* part for wrongful life, contrary to the two subsequent Down's syndrome decisions of the Cour de Cassation.[113]

For the purposes of my discussion of the wrongful *life* action, however, it is not controversial (at least for those who accept the moral and legal legitimacy either in full or on occasion of abortion) that termination can sometimes be understood to be in the *fetus's* interests. This is where it would be born with a condition that rendered his or her life, as a child, of sub-zero quality, although there may well be disagreement as to which conditions could possibly give rise to such a life and I have

[107] [2002] Q.B. 266, Brooke L.J. at p. 283. The point is further discussed in R. Scott, note 37 above, chs. 2 and 3.
[108] For a full discussion, see R. Scott, note 37 above, ch. 2.
[109] S. Sheldon and S. Wilkinson, "Termination of Pregnancy for Reason of Foetal Disability: are there Grounds for a Special Exception in Law?" (2001) 9 Med. Law Rev. 85.
[110] Her brother apparently has Down's syndrome. http://www.telegraph.co.uk/opinion/main.jhtml?xml=/opinion/2005/03/20/do2001.xml&sSheet=/opinion/2005/03/20/ixop.html.
[111] R. Scott, note 37 above, ch. 2.
[112] E.g. *Rand v East Dorset Health Authority* [2000] 56 B.M.L.R. 39.
[113] Cass. Ass.Plén. 28 November 2001, J.C.P. 2002.II.10018.

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already noted that very few are likely to do so.[114] Stephenson L.J. himself acknowledged this as a possible basis, and on his view the preferred basis, for this ground of the Act.[115] For this reason, Crennan J.'s objection (for the majority in *Harriton*) that "[a] court is not able to infer from a mother's decision to terminate a pregnancy that her decision is in the best interests of the foetus which she is carrying",[116] which may generally be true in all cases where a fetus would as a child have a life that is worth living, is not in point when the requisite severity of a child's condition for the purposes of a wrongful life action is properly understood. Moreover, where termination can legitimately be understood as being in the *fetus's* interests, this will be consistent with the basis of the law relating to the withdrawal of treatment from neonates. The idea of such consistency has been discussed in a favourable light, for instance, by a Royal College of Obstetricians and Gyaecologists' report on third-trimester terminations.[117] The main legal difference between the two contexts then concerns the illegitimacy of "active" means to end life in the case of the neonate.[118]

Before I address the assessment of damages for the purposes of a wrongful life action, it should be stressed that the requirement for a "serious handicap" in the disability ground of the Abortion Act has important implications for the scope either of a child's action for wrongful life or for the parents' action for wrongful birth (in relation to the same, or a less serious condition).[119] Contrary to Stephenson L.J.'s suggestion in *McKay* that a wrongful life claim "would even mean that a doctor would be obliged to pay damages to the child infected with rubella before birth who was in fact born with some mercifully trivial abnormality",[120] (a point which he saw as following from "the necessary basic assumption that a child has a right to be born whole or not at

[114] If the moral and legal legitimacy of abortion is not accepted, of course, this does not hold. An anti-abortion strand is particularly apparent in those parts of US case-law in which also a wrongful birth action has been rejected. For further discussion, see e.g. R. Scott, note 37 above, ch. 3.

[115] [1982] 1 Q.B. 1166, Stephenson L.J. at pp. 1178H–1180A. He notes that this section of the Act gives rise to a duty to advise the pregnant woman about the fetus's condition, so that she has the option of termination (at p. 1180C). Although he notes that the disability ground of the Act did not (then) apply to the viable fetus, when the Abortion Act was amended by the HFE Act 1990, terminations on this ground became lawful until birth.

[116] (2006) 226 C.L.R. 52 at [247].

[117] RCOG Ethics Committee, *A Consideration of the Law and Ethics in Relation to Late Termination of Pregnancy for Fetal Abnormality* (RCOG Press, March 1998), para 5.7.2(d).

[118] On the relevance of the 'neonate case-law', see also A. Morris and S. Saintier, note 5 above, pp. 173–174.

[119] See R. Scott, note 37 above, ch. 2.

[120] [1982] 1 Q.B. 1166, Stephenson L.J. at pp. 1180H–1181A. In *McKay v Essex A.H.A.*, Griffiths L.J. also adverts to the possibility of a child "born with only a slight deformity" when a risk of a greater one had not been the subject of prenatal advice, suggesting that if such a claim were rejected then a claim for a more serious "injury", as he puts it, could only be brought on the unknowable basis that "it were better dead than alive" (at p. 1193B). Taking a similar line to these judges and commenting on the decision below the High Court decision in *Harriton*, see also D. Stretton, "The Birth Torts: Wrongful Birth and Wrongful Life" (2005) 10 Deakin L. Rev. 319, 364, who suggests that "even the trivially disabled could claim".

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all",[121] which I rejected above), a child born with such an abnormality would have no such claim because the damage – being born into a condition that is so severe that life is not in his or her interests – would not in reality have materialised. Neither could the parents sue using a wrongful birth action which, as noted above, requires "significant disabilities" and not "minor defects or inconveniences".[122] For this reason there would be no question, were a claim for wrongful life generally to be allowed in English law, of children starting to bring actions for being born in less than advantageous conditions, a point which formed the basis of the very early much-cited and, unsurprisingly, unsuccessful US case of *Zepeda v Zepeda*.[123] The possibility of such actions, particularly in relation to wrongful birth, is sometimes mooted as part of a critique of the practices of PGD and PND, as if parents generally are in pursuit of so-called "perfect" children and would go as far as to terminate pregnancies in which the fetus is in some way "imperfect".[124] Such claims undermine the importance of the moral and legal interests at stake on parents' part in wrongful birth cases, or on children's part if wrongful life cases were permitted beyond the ART context. Further, an action in relation to a condition that did not satisfy the grave severity required for a child's wrongful life action or the lesser degree required for the parents' wrongful birth action will not satisfy the requirements for the breach of the standard of care or the materialisation of the damage (and hence the scope of the duty) in these actions.[125]

So far in this Section C, I have identified the harm (or damage) in a wrongful life case, argued (with reference to the law regarding non-treatment of neonates) that judges can draw the lines that are necessary to identify when such harm occurs and argued (with reference to the law on selective abortion) that in a few cases abortion on the grounds of disability can be understood as being in the fetus's (and future child's interests). Both these lines of argument confirm the ethical and legal foundation of the claim for wrongful life. I now turn to consider the assessment of damages in a wrongful life action.

4. The assessment of damages

The standard principle for the assessment of damages in tort, as noted above, is to try to put the claimant in the position he was in before the

[121] [1982] 1 Q.B. 1166, Stephenson L.J. at p. 1181A.
[122] [2002] Q.B. 266.
[123] *Zepeda v Zepeda*, 41 IllApp 2d 240 (1963). For discussion see H. Teff, above n 59, who argues, p. 429, that "*Zepeda* and its progeny … both trivialised and distorted the notion of 'wrongful life'".
[124] In reality, there is no evidence that parents actually seek perfection either by PND or PGD. In any event, those using PGD will rapidly see how selecting against minor features (or in favour of positive ones) is something of a hypothetical luxury given the constraints placed on PGD in the first place by the very finite resource that embryos are. See R. Scott, above n 37, ch. 3 (on PND) and chs. 4 and 5 (on PGD).
[125] *Ibid*. ch. 3.

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tort was committed. We have seen that the judges in *McKay* and the majority in *Harriton* held that it is impossible to determine damages in the case of wrongful life because non-existence cannot be known. Ethically speaking, I have supported a conception in which the harm of wrongful life is that of being born with a condition that is so severe that the burdens of existence outweigh the goods. It follows from this that, in suitably extreme cases, *not* to exist – in the sense of not to have to endure terrible suffering – would be preferable, either looking prospectively on behalf of an existing fetus or thinking about the existence of a child once born. This formulation invokes a normative conception of harm in which a person is understood to be worse off in the world in which s/he is born than in the alternative world, where that alternative world is understood as an artefact or a construct, for the purpose of moral (and in turn legal) reasoning. As Kirby J.'s analysis of the assessment of damages in *Harriton* shows, to which I now turn, such a construction can also be deployed for legal purposes.

Kirby J. works with the standard comparative compensatory principle because the appellant's case was argued this way. He notes that the principle is subject to various "qualifications", including that "assessing damages is always a practical exercise in approximation";[126] that "the courts have been willing to assign monetary values to many intangible injuries and nebulous losses",[127] a point made also by Tony Fleming, whose work Kirby J. here cites[128] and by Harvey Teff;[129] and that "difficulties of quantification do not preclude relief where it is accepted that the plaintiff has suffered actionable damage".[130] Turning to the application of the compensatory principle in this case he highlights the importance of justice over logic.[131] He also suggests that since courts do make comparisons between existence and non-existence in other legal contexts it is not sustainable to assert that one cannot put a value on non-existence.[132] Here he cites the 'neonate' cases, observing that although such cases do not entail the assessment of damages, they

[126] (2006) 226 C.L.R. 52 at [82], footnote omitted.

[127] *Ibid.* at [83].

[128] "[S]ymbolic awards are regularly made for pain and suffering, even for loss of expectation of life." Fleming, *The Law of Torts*, 9th ed (1998) pp. 184–185 (footnote omitted). (2006) 226 C.L.R. 52 Kirby J. at [83]. Note also H. Teff, above note 59, p. 435: "*[A]ll* awards for nonpecuniary loss are arbitrary, conventional sums, largely determined by a rough and ready tariff. In the last analysis they are more intelligible as a general vindication of rights, or as reasonable solace for the plaintiff's condition, than as a purported restoration of the *status quo*." (Emphasis in original, footnote omitted.) On the "inherent" imprecision of damages, see A. Capron, above note 59, p. 648, and further p. 649.

[129] H. Teff, above note 59. On the comparison between someone's present existence and the state of non-existence, he observes, p. 433: "[N]othing in principle prevents us from assigning relative values to both conditions and then calculating damages in a manner consistent with legal theory."

[130] (2006) 226 C.L.R. 52, Kirby J. at [84].

[131] *Ibid.* at [85].

[132] *Ibid.* at [95].

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do involve judges comparing existence with non-existence.[133] Strictly speaking it can only really be said that such cases entail the judgment that continued existence is not in the best interests of a given neonate: although, as noted above, the implication of such a judgment may be that not to have to exist in a given condition would be preferable, courts have been wary of expressing the point this way.[134] After some discussion of cases from other contexts in which courts, having struggled to find comparators, have ultimately favoured justice over logic, Kirby J. returns to the majority's argument that there is no comparator in such a case and emphasises that logic should not bar recovery where there is suffering.[135] He stresses that the comparator of non-existence is "hypothetical … a creature of legal reasoning only" and that "there are limits to the insistence on this fictitious comparator" where this leads to injustice, by which I take him to mean something like that emphasising that non-existence cannot be known is ultimately unhelpful, or besides the point, in the quest for justice and loses sight of (properly understood) the normative role of the construct of 'non-existence' in the argument.[136] Following this, and working with the compensatory principle, he notes that the appellant is required to show a loss which here must mean showing that non-existence would have been preferable,[137] and suggests that this may well be true in extreme cases, citing also the law's recognition that it is lawful to permit doctors to agree to requests to withdraw life-sustaining treatment in cases of severe pain and suffering (that is, despite such treatment).[138] He concludes that it is "arguable that a life of severe and unremitting suffering *is* worse than non-existence",[139] (presumably where non-existence is understood hypothetically) and that determining when this is *actually* so – that is, drawing the relevant line – is simply part of the stuff of judicial business.[140] Accordingly, he concludes that general damages should be recoverable for "proved pain and suffering".[141]

[133] *Ibid.* He also notes that sometimes courts that have rejected the wrongful life action have done so not because of the difficulties of determining damages but on the basis that existence is always preferable, citing H. Teff's discussion of the fact that such a judgment requires that a value be put on non-existence, note 59 above, p. 433.

[134] See e.g. *Airedale N.H.S. Trust v Bland* [1993] A.C. 789, at p. 868C-D, per Lord Goff: "[T]he question is not whether it is in the best interests of the patient that he should die. The question is whether it is in the best interests of the patient that his life should be prolonged by the continuance of this form of medical treatment or care."

[135] (2006) 226 C.L.R. 52, Kirby J. at [96].

[136] *Ibid.* at [101].

[137] *Ibid.* at [104].

[138] *Ibid.*

[139] *Ibid.* at [105], my emphasis. As noted above, in *McKay v Essex A.H.A.* [1982] 1 Q.B. 1166, Stephenson L.J. himself expressed a similar view, at p. 1182E.

[140] Contrary e.g. to the views of A. Shapira, note 47 above, p. 373, who raises queries e.g. about Down's syndrome or missing limbs.

[141] (2006) 226 C.L.R. 52, Kirby J. at [109].

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So, in order to work with the compensatory principle for the purposes of the law of tort, one can acknowledge the legal (and ethical) construct that non-existence is (given the lack of a subject to experience it) and place particular emphasis on the harms that accrue at the point of existence, stressing the purpose of damages, as Kirby J. puts it, as compensation for "proved pain and suffering". This is compatible with the ethical account described above in which I suggested that, although no-one can experience non-existence (which is no state at all), we can nevertheless make the normative claim that in extreme cases not to exist – in the sense of not to have to endure terrible suffering – could be said to be preferable, either looking prospectively on behalf of an existing fetus or thinking about the existence of a child once born.

Before we leave the relationship between logic and justice, note that in *McKay* itself Stephenson L.J. suggests that, if he thought public policy favoured the action, he would not let logic stand in its way; and with regard to public policy, recall that he was particularly concerned about the sanctity of life, since he understood or construed a wrongful life action as implying a duty to kill the fetus on the defendant's part, an understanding that I stressed earlier was flawed.[142] Moreover, although the Law Commission declined to recommend an action for wrongful life (for reasons discussed below relating to its concerns for the medical profession), it nevertheless observed that: "Law is an artefact and, if social justice requires that there should be a remedy given for a wrong, then logic should not stand in the way. A measure of damages could be artificially constructed."[143] Interestingly, in the *Kelly* case, the Dutch Hoge Raad rejected the argument that the unknowability of non-existence was an obstacle to the assessment of damages, holding that Article 6:97 of the Dutch Civil Code requires that the court determine damages to fit the nature of the situation.[144]

As for special damages, as Kirby J. notes in *Harriton*, these do not require comparison in any event and present no conceptual obstacles to calculation.[145] Further, damages for the care that relates to a child's disability are the major component of parents' wrongful birth claims. Although it might be objected that the special damages element of a wrongful birth claim should instead suffice for the child, so far as special damages are concerned the point of the wrongful life claim would be to allow the child him/herself to claim for the cost of medical and other care. Otherwise, as was argued for instance by the claimant's counsel in the *Perruche* case, there is only the wrongful birth claim in which the child is necessarily cast – to some degree – as a "loss

[142] [1982] 1 Q.B. 1166, Stephenson L.J. at p. 184G.
[143] Law Commission, *Report on Injuries to Unborn Children*, (1974) No. 60, Cmnd 5709, para 89.
[144] E. Hondius, note 6 above, p. 155.
[145] (2006) 226 C.L.R. 52, Kirby J. at [87].

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(or burden)", whereas allowing him to claim "enhances" his dignity;[146] and there is also no guarantee either that parents will claim or that funds will be appropriately disbursed from their damages if they do.[147] Similarly, in the Dutch *Kelly* case, the Hoge Raad held that giving compensation to the child would enable Kelly to live with as much dignity as possible.[148] Likewise in *Harriton* Kirby J. referred to the way the damages "would provide the plaintiff with a degree of practical empowerment … [which] … would enable such a person to lead a more dignified existence."[149]

Since wrongful life claims would likely be of a very high value (at least where a claimant has a reasonable life expectancy), the distributive justice concerns that have influenced some of the negligence decisions of the English courts for the last 14 years should be addressed.[150] In *McFarlane v Tayside Health Board*, which concerned a negligent sterilisation, the House of Lords took the old law in a new direction and held that the birth of a healthy child following a negligent sterilisation constitutes pure economic loss in relation to which no duty of care is owed.[151] In particular, Lord Steyn's reason for rejecting the parents' claim rested on what he identified as concerns of "distributive justice", suggesting that it may be pertinent to consider what the public would think: "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."[152] He suggested that the public would be mindful of the point "that many couples cannot have children and others have the sorrow and burden of looking after a disabled child".[153] Later he observed that, if he had to, he would say that, on *Caparo* principles it was not fair, just and reasonable to impose the duty in this case.[154]

Two responses should be made in answer to a possible distributive justice objection to the claim for wrongful life. The first concerns the subsequent development of the law on wrongful birth. In *McFarlane* Lord Steyn conceded that in the case of a child born with a disability

[146] Cass. Ass. Plén., 17 December 2000, J.C.P. 2000. II.10438, as discussed in A. Morris and S. Saintier, note 5 above, p. 186. The meaning of the notion of "dignity" is of course contested. For criticism of the parental action as a "substitute", see H. Teff, note 59 above, p. 430.

[147] On this point see also T. Weir, "The Unwanted Child" [2002] Edinburgh L.R. 244, 249: "If the decision was not worse for the defendants, it was better for the child, since the money would be his, not apt to be dissipated by the parents' fecklessness or on their death."

[148] E. Hondius, note 6 above, p. 155.

[149] (2006) 226 C.L.R. 52 at [122].

[150] In the first instance, see *Frost v Chief Constable of South Yorkshire Police* [1999] 2 A.C. 455, which concerned police officers' unsuccessful claim for compensation for the psychiatric damage they sustained as a result of the Hillsborough football stadium disaster.

[151] [2000] 2 A.C. 59.

[152] *Ibid.* at p. 82.

[153] *Ibid.*

[154] *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605.

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"the rule may have to be different".[155] Against this backdrop, in *Parkinson v St James and Seacroft University Hospital N.H.S. Trust*, which concerned a negligent sterilisation, coupled with the subsequent birth of a child with "severe learning difficulties", the Court of Appeal held that damages for the extra costs of raising a child with a disability were recoverable.[156] Taking note of Lord Steyn's reasoning, Brooke L.J., after a very thorough review of *McFarlane*, specifically noted that, "if principles of distributive justice are called in aid, I believe that ordinary people would consider that it would be fair for the law to make an award in such a case, provided that it is limited to the extra expenses associated with the child's disability", an approach to concerns relating to distributive justice that has also been adopted in other cases.[157] In essence, Brooke L.J.'s reasoning may reflect the competing "pull" of corrective justice in the face of very serious harm. The decision in *Parkinson* was explicitly approved by three of the judges in *Rees v Darlington Memorial N.H.S. Trust*, which concerned a negligently performed sterilisation on a disabled woman and the subsequent birth of a healthy child, and in which the House of Lords held that the mother could not recover damages for the extra costs of child-raising associated with her disability.[158] Three others expressed some doubts about the decision, and Lord Millett did not express a view. Of particular relevance to the doubting judges, so far as the present discussion is concerned, was a concern about the foreseeability of disability, and the fairness or otherwise of liability in relation thereto, in the case of a failed sterilisation.[159] However, arguably the three judges in favour of the rule in *Parkinson* were right to hold that the disability was, as a matter of law, a foreseeable consequence of the birth in that case. Moreover, most wrongful birth (and wrongful life) cases are likely to concern negligent PND, performed specifically so as to give the pregnant woman the option of avoiding the birth of a disabled child.[160]

The second point concerns the relationship between a wrongful birth and a wrongful life action. Were the latter to be accepted in law, while parents may continue to receive some damages in relation to their

[155] [2000] 2 A.C. 59 at p. 84.
[156] [2002] Q.B. 266.
[157] *Ibid*. at [50]. See also e.g. *Hardman v Amin* (2001) 59 B.M.L.R. 58 and *Lee v Taunton and Somerset N.H.S. Trust* [2001] 1 F.L.R .419.
[158] [2004] 1 A.C. 309, per Lords Hutton (at [91]), Hope (at [57]) and Steyn (at [35]) (the latter two dissenting in *Rees* itself).
[159] *Ibid*. per Lord Bingham (at [9]), with whom Lord Nicholls agreed (at [19]), and also Lord Scott (at [147]).
[160] Indeed, in *Rees* (ibid.) Lord Scott, who had been concerned about the question of foreseeability, noted at [147]: "It might be otherwise in a case where there had been particular reason to fear that if a child were conceived and born it might suffer from some inherited disability. And, particularly, it might be otherwise in a case where the very purpose of the sterilisation operation had been to protect against that fear."

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amenity and autonomy interests,[161] they would no longer receive special damages under a wrongful birth action for the cost of raising a necessarily profoundly disabled child; rather, as noted above, the child would be the recipient of the damages, which the parents (and/or other carer/s) would deploy on his or her behalf: thus, the latter claim would be a *substitute* for the special damages element of a wrongful birth claim.[162] The funds would now belong to the *child*, not the parents, in recognition of the wrong done to him/her in being born with such profound disabilities. As for the extent of these damages, as we have seen, *Parkinson* permits damages for the extra costs of raising a child that arise from his or her disability. If deemed appropriate, a wrongful life action could likewise be limited to these extra costs, that is, to the extra costs of living associated with a person's disability. As for the situation after a child's majority, the special damages element of a wrongful birth claim has also provided for the care of a child as an adult.[163] For this reason, there would not necessarily be a significant difference between the amount of damages in either case. More generally, questions could be considered about how the costs of care in relation to any high-value claim, including for example one for serious prenatal or personal injury, are and should be calculated, particularly given the effect of section 2(4) of the Law Reform (Personal Injuries) Act 1948, which says: "In an action for damages for personal injuries… there shall be disregarded, in determining the reasonableness of any expenses, the possibility of avoiding those expenses or part of them by taking advantage of facilities available under the National Health Service Act 1977…".[164] However, it is beyond my scope to address this issue here.

I now turn to consider whether pregnant women should also be potential defendants in wrongful life actions.

D. 'No Bar to Maternal Liability'

In *McKay* itself, Stephenson and Ackner L.JJ. warned that if the court allowed an action for wrongful life this would open the courts' doors to claims by disabled children against their mothers for failing to terminate their pregnancies.[165] Ackner L.J. built his warning on the first and

[161] See note 37 above.
[162] A similar point is made in relation to the objection of doctors and insurers to the *Perruche* decision in T. Weir, note 147 above, p. 249.
[163] See e.g. *Nunnerley v Warrington H.A.* [2000] Lloyd's Rep. 170, and *Anderson v Forth Valley Health Board* (1997) 44 B.M.L.R. 108 (Ct Sess. (OH)). In both cases the costs of the care of a child into adulthood were recoverable.
[164] This question has been brought to public attention, for instance, by Christine Tomkins, Chief Executive of the Medical Defence Union. See e.g. "N.H.S. Compensation System Unsustainable, Says Insurer", http://www.guardian.co.uk/society/2013/jan/11/N.H.S.-compensation-unsustainable-insurer. Accessed 11 January 2013.
[165] [1982] 1 Q.B. 1166, Stephenson L.J. at p. 1181B.

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second claimants' concession that "if the duty of care to the foetus involved a duty on the doctor, albeit indirectly, to prevent its birth, the child would have a cause of action against its mother, who had unreasonably refused to have an abortion",[166] and cited the Law Commission's warnings, as he put it, for the potential for "disruption of family life and bitterness … between parent and child".[167]

As has already been argued, there is no question of a wrongful life action imposing a duty on a doctor, even "albeit indirectly" (whatever that could really mean here) to terminate fetal life. Rather, the duty, owed to the child, entails the provision of advice to the pregnant woman in particular, about the health status of a developing fetus so that she may in turn decide, in discussion with the father if she wishes and, as the law stands, with the support of medical opinion under the terms of the Abortion Act, to terminate a pregnancy in which there is a substantial risk of her child being born seriously disabled. However, since there is no duty on the doctor to terminate the pregnancy, the question does fairly arise as to whether the mother could herself be under a duty to do so. It is worth considering the idea of moral and legal obligations with regard to this issue in turn.

Morally speaking, a pregnant woman (and her partner) could be thought to have a *prima facie* duty (with medical aid) to terminate the life of a fetus where the future child's life is likely to be highly burdened with suffering and insufficient compensating goods. However, when we consider the idea of such a duty we should reflect on the possible moral and psychological costs to the prospective parents in termination itself: for instance, is termination against their religious or moral views about the destruction of fetal life? Is this their last chance of having a child? If the termination must occur late in pregnancy, does it pose considerable risks to the pregnant woman? In my view, given parents' highly personal and emotional interests in any given pregnancy, at best we can say they have a duty to terminate "where possible", as Jonathan Glover has.[168] Or, put another way, we should be mindful of what costs they can reasonably be expected to bear. What about the law?

The traditional mechanism to avoid liability in this context is the doctrine of intrafamilial immunity, which is founded on concerns about protecting family relations. Liability for negligent driving by a pregnant woman (where this damages the fetus she carries) is the one exception to maternal immunity under the CD Act, as recommended

[166] *Ibid.* at p. 1188G.

[167] Pearson Commission, *Royal Commission on Civil Liability and Compensation for Personal Injury* (1978), para. 1465. For R. Gillon, this is a reason to reject claims for wrongful life all together. R. Gillon, "'Wrongful Life Claims'", (1998) 24 J.M.E. 363, 364.

[168] J. Glover, note 63 above, p. 60. Glover writes of a "test" of "urg[ing] avoidance where possible", noting that "presumably [this is] in line with the thinking of most potential parents".

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by the Law Commission.[169] The reason lies in the presence of compulsory third-party insurance in the driving context, coupled with the policy that victims of road-accidents should be compensated. It is *also* the case that when a pregnant woman drives her car in such a way as negligently to injure the fetus she carries, no highly significant personal interests are invoked on her part, notably in self-determination (understood as the interest in making highly personal choices) or bodily integrity. For this reason, determining the relevant standard of care in relation to the duty that she owes to her developing fetus is not problematic.[170] Indeed, at the same time that she owes a duty of care in the way she drives her car to avoid prenatal injury to her fetus, she also owes a duty to third parties in the car, to other road users and to pedestrians to avoid negligently injuring them. This, in addition to the insurance point, gives further support to the imposition of maternal prenatal liability in the driving context.

By contrast, to attempt to determine whether a woman breaches a duty to the fetus to *abort* it will come up against a woman's very personal moral interests in self-determination and bodily integrity, supported to some degree by legal rights, for instance in refusing medical treatment intended for the benefit of the fetus.[171] I first developed this argument, which is also to be found in relevant case-law of the Canadian Supreme Court,[172] in the context of moral and legal analysis of the idea of maternal duties to the fetus in the medical treatment context. It is relevant also in the context of a child's possible suit for wrongful life. In *Harriton*, Kirby J. first notes the possibility of maternal liability in the driving context and suggests that disruption to family relationships is not really an issue in the context of wrongful life claims since the child claimant is likely to be "profoundly" disabled, and that in any event such cases would be all about money;

[169] Congenital Disabilities (Civil Liability) Act 1976, s. 2, as recommended in the Law Commission, note 144 above, para. 55.

[170] See the analysis in R. Scott, *Rights, Duties and the Body: Law and Ethics of the Maternal-Fetal Conflict* (Oxford 2002) ch. 6.

[171] E.g. *Re M.B.*, note 33 above, discussed in *ibid*. ch 3. For recognition of the relevant sensitivities, see also A. Capron, note 59 above, p. 664: "[T]he problem of drawing lines would be unusually difficult and sensitive. Which diseases are 'bad enough' that abortion (or nonconception) is mandatory, rather than merely acceptable? As one moves away from the few polar cases substantial disagreement is likely about whether each disease is burdensome enough that to run the risk of its occurring in one's offspring would be irresponsible."

[172] *Winnipeg Child and Family Services (Northwest Area) v D.F.G.* (1996) [1997] 152 D.L.R. (4th) 193. This case in fact concerned solvent abuse by a pregnant woman, which might legitimately be judged to constitute unreasonable conduct toward the fetus. However, policy reasons strongly weighed against restricting maternal autonomy. Compare *Dobson v Dobson* [1999] 2 Can S.C.R. 753, which concerned a boy's suit against his mother for prenatal injuries sustained as a result of her negligent driving. The Supreme Court overturned the decision of the Court of Appeal for New Brunswick, holding – apparently on policy grounds – that no such action can lie. At the same time, however, the Court held that it may well be appropriate for the legislature to create an exception to maternal tort immunity in the context of negligent driving. Both cases are discussed extensively in R. Scott, note 170 above, ch. 6.

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nevertheless, in the final analysis he suggests that the real stumbling block to maternal liability for wrongful life will lie in determining the maternal standard of care and, accordingly, he likewise rejects the idea of maternal liability for failure to abort.[173]

In short, although we might say that a woman has a *prima facie* moral duty to terminate (in the relevant circumstances), it is very difficult for third parties accurately to say when, if ever, she breaches this duty. This is because it is very hard appropriately to weigh the very personal and emotional interests at stake, that is, to determine what personal and emotional costs she can reasonably be expected to bear. This stumbling block also rightly bars the idea of a legal claim against her. Thus, although for Crennan J. (for the majority in *Harriton*) it appears that maternal immunity would follow as a matter of logic if healthcare professionals were to be found liable, and that to make the mother immune would be contrary to principle,[174] recognition of a claim for wrongful life against health professionals, who already owe a duty to parents (recognised in the wrongful birth action) in respect of the very same instances of conduct can, and should, be distinguished from the idea of such a claim against a child's mother. In the *Kelly* case, the Hoge Raad likewise saw no difficulty with the idea that the child should be able to sue relevant health professionals, but not the mother.[175]

To summarise the legal relationship between the doctor, the mother and the fetus: the pregnant woman, as proxy for the future child, is able to consider its interests (both welfare and autonomy-oriented) provided that health professionals give her accurate advice about the fetus's condition.[176] Equipped with advice to the effect that a fetus has a condition that is likely to render his or her life not worth living as a born child, she is very likely to choose to terminate her pregnancy. However, although she may have a *prima facie* moral duty to do so, it is very hard to say she has an absolute one and for this and other reasons the law should stay its hand if she elects not to terminate, rather than seek to impose liability towards her child for not having done so, with all the difficulties inherent in attempting to determine whether she is in breach of that duty.

In the penultimate section of this paper, I briefly consider the argument that wrongful life actions would devalue the lives of people with disabilities.

[173] (2006) 226 C.L.R. 52, Kirby J. at [127]–[133], who cites the Canadian cases noted above.
[174] *Ibid.* Crennan J. at [250].
[175] E. Hondius, note 6 above, p. 155.
[176] On the idea of a duty being owed to the (future) child to advise the mother in relevant ways, see also A. Morris and S. Saintier, note 5 above, p. 178.

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E. 'A Threat to the Value of the Life of Disabled People'

In *McKay*, Stephenson L.J. suggested that a wrongful life action "would mean regarding the life of a handicapped child as not only less valuable than the life of a normal child, but so much less valuable that it was not worth preserving"[177] and for this reason would further threaten the sanctity of life. This was also an important objection for Crennan J. for the majority in *Harriton*.[178] Although a very serious objection, it is one that can be met.

First, the development since *McKay* of the case-law relating to the withdrawal of treatment from severely impaired neonates should be recalled: while the analysis in such cases continues to begin with a presumption in favour of preserving life, that is only a starting point and in some cases a best interests judgment is made that continued life is not in the interests of a given child because the burdens of living (including the administration of medical treatment) far outweigh any goods in it. The conditions of life in such cases are therefore on a par with those in a wrongful life case as I and others have delineated the scope of the claim. Importantly, in both cases, it is not that *third parties* judge that a given child's life is "not worth preserving" and thereby implicitly devalue it; it is that third parties attempt to judge that the *child* (if able to make the judgment) would not consider his or her life worth living. As the neonate cases show, it is a judgment that is and can rarely be made.

Second, the suggestion that a wrongful life action would devalue the life of people with disabilities is a serious and familiar objection to the practices of PNS, PND, PGD and the accompanying parental action for wrongful birth.[179] There are a number of important strands to the 'disability critique' of these practices and the law suit that protects parental interests in them, the most prominent of which is probably the "expressivist objection", which might be said to be encapsulated in the statement of Lord Justice Stephenson above.[180] Further, the relationship between the disability critique and selection practices is a large topic in its own right.[181] Here I can only note that this objection is at its weakest when the basis for the wrongful life action is the judgment that a child's condition is likely to be of sub-zero quality. It seems plausible

[177] [1982] 1 Q.B. 1166, Stephenson L.J. at p. 1180H.

[178] (2006) 226 C.L.R. 52, Crennan J. at [263]. Note, however, that the fetus is not a legal person (see e.g. *Re M.B.* [1997] 2 F.L.R. 426) and, on many views, not a moral one. For a contrary moral view, see J. Finnis, "The Rights and Wrongs of Abortion: A Reply to Judith Thomson" (1973) 2 Phil. & Pub. Aff. 117.

[179] As discussed in e.g. J. Glover, note 63 above, pp. 29-36.

[180] There is also the "loss of support argument" which suggests that there will be less support to people with disabilities as a result of such practices, including e.g. by means of a reduction in research or research funding: *ibid*. ch. 3.

[181] For discussion, see e.g. S. Wilkinson, note 62 above, ch. 6; R. Scott, note 37 above, ch. 1.

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to judge that this might be so in cases of a condition such as Tay Sachs, and perhaps very severe cases arising from rubella (as Kirby J. argued in *Harriton*). By contrast, as I have already noted, it would be very surprising to suggest that a child with Down's syndrome might think this about her life.

Arguably, for this reason it was inappropriate and unhelpful (both to the "cause" of the wrongful life action and for people with disabilities) for the Cour de Cassation subsequently to have decided the two wrongful life cases in favour of children born with Down's syndrome.[182] This appears further to have fuelled the public reaction to the *Perruche* line of cases.[183] This included criticism from associations of parents of disabled children (that was particularly strong in relation to the Down's syndrome cases),[184] as well as from doctors.[185] The French Parliament hastily passed legislation intended to prohibit wrongful life actions in the Law of 4 March 2002, Article 1.[186] This is entitled "solidarity towards handicapped people".[187] Article 1-I states that birth cannot constitute damage founding a claim. In fact, as noted earlier, *Perruche* itself distinguished between birth and the significant harms that may flow from it and, as others have noted, on this basis it is arguable that the legislation does not in fact bar wrongful life claims; however, such prohibition was clearly the intention of Parliament.[188] Article 1-I states that compensation can, however, be awarded to the parents (in what we would term a "wrongful birth" action),[189] but that compensation can only be given for their "prejudice moral" (emotional upset) in having a disabled child.[190] Article 1-II advises that all disabled people, regardless of the cause of their disability, have a right to the "solidarity" of the nation, in other words to state financial support.[191] The degree of such support may of course depend on political will.

I turn finally to the argument that the CD Act simply bars any common law claim.

[182] Cass. Ass. Plén. 28 November 2001, J.C.P. 2002.II.10018.
[183] A. Dorozynski, note 85 above, p. 1384.
[184] *Ibid.* See also J.K. Mason and G. Laurie, note 6 above, para. 10.68.
[185] The reaction is also described in S. Taylor, note 5 above, p. 105, and in A. Morris and S. Saintier, note 5 above, pp. 188-191. See further P. Lewis, note 5 above and T. Weir, note 147 above.
[186] *Loi no 2002-303 du 4 mars 2002 relative aux droits des malades et à laqualité du système de santé*, Art. 1.
[187] A. Morris and S. Saintier, note 5 above, p. 189.
[188] *Ibid.* p. 189; S. Taylor, above n 5, p. 106.
[189] Provided they can show a "faute caractérisée", a novel concept in French civil law that may be close to "faute lourde", which is again not precisely defined, S. Taylor, note 5 above, pp. 105–106.
[190] *Ibid.* p. 106.
[191] Article 1-III advises that the National Consultative Committee on Disabled Persons will evaluate the "material, emotional and financial, situation of disabled people" and present its conclusions to Parliament and government; but there is no obligation to act on these recommendations. A. Morris and S. Saintier, note 5 above, pp. 189–190.

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F. *'The Congenital Disabilities Act 1976 Bars all Claims'*

All of the judges in *McKay*, which was heard prior to the 1990 amendment to the CD Act, held that an action for wrongful life was barred prospectively by that Act. Stephenson L.J. refers to Ackner L.J.'s explanation of the Act, who cited the first part of section 1 (paraphrased earlier) which reads in part:

(2) An occurrence to which this section applies is one which –
  (a) affected either parent of the child in his or her ability to have a normal, healthy child; or
  (b) affected the mother during her pregnancy, or affected her or the child in the course of its birth, so that the child is born with disabilities which would not otherwise have been present.[192]

The judges chose only to discuss section 1(2)(b), presumably (reasonably) construing the rubella as an "occurrence" that "affected" the mother during her pregnancy. Ackner L.J. observes:

> Subsection (2)*(b)* is so worded as to import the assumption that, but for the occurrence giving rise to a disabled birth, the child would have been normal and healthy – not that it would not have been born at all. Thus, the object of the Law Commission that the child should have no right of action for 'wrongful life' is achieved.[193]

But no person was answerable in negligence for the rubella itself and, as Ackner L.J. reasons, the section is worded so that, if it were not for the "occurrence" the child could otherwise have been born without disabilities rather than not born "at all". In addition, Ackner L.J. cites section 4(5), which stipulates that the Act "replaces any law in force before its passing, whereby a person could be liable to a child in respect of disabilities with which it might be born".

It is difficult to quibble with the thought that the scenario of rubella best fits under section 1(2)(b) of the Act. However, no consideration was given to section 1(2)(a), which refers to an occurrence that "affected either parent of the child in his or her ability to have a normal, healthy child". Could this be construed to include the negligent provision of PND? It might be argued that the failure to advise, as a result of PND, that a fetus had a genetic or other condition (including for instance rubella) that would result in disability in the born child is an "occurrence" affecting either parent in his or her "ability to have a normal, healthy child". For instance, Ian Kennedy and Andrew Grubb have suggested, in the context of negligent genetic counselling, that "ability" could be understood as "opportunity" to have a non-disabled

[192] [1982] 1 Q.B. 1166, Ackner L.J. at p. 1186G–H.
[193] *Ibid*. at pp. 1186H–1187A, emphasis in original.

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child.[194] One problem with this, though not an insurmountable one, might be that the section refers to "either parent" but not at any point to "both"; logically however, the birth of a child with a disability is something that affects both parents. The response could be that "either" does not *exclude* "both".

An alternative route would be to challenge the view held in *McKay* that all common law claims were henceforth excluded by the Act. For instance, Jane Fortin has argued that a wrongful life claim is not an action "'*in respect of disabilities*' themselves", as required under section 4(5), since "[the doctor] had no part in their cause or effect"; rather it is a claim in respect of a doctor's omission to advise "on the unborn child's potential quality of life, *in the light of those disabilities*".[195] This may be consistent with my (and others') argument that a claim for wrongful life is not for disability *per se*, nor for life *per se;* it is a claim for being born under conditions of such severity that the burdens outweigh the goods, so that it is not in her or his interests to be born. Arguably, although not based on life *per se*, this understanding would be sufficient to take the action out of the clutches of section 4(5) of the Act. That said, it was clearly the intention of the Law Commission, in the report on which the Act was based, to exclude liability for such claims and this is stressed by Ackner L.J. in *McKay* itself.[196] However, despite what we saw earlier to be the Law Commission's apparent sympathies for justice over logic when appropriate, the Commission actually put considerable weight on the thought that such actions "would place an almost intolerable burden on medical advisers in their socially and morally exacting role", suggesting that "[t]he danger that doctors would be under subconscious pressures to advise abortions in doubtful cases through fear of an action for damages is, we think, a real one", as Ackner L.J. specifically noted.[197] Yet, even in *McKay* itself, Griffiths L.J. observed that he did not find this line of reasoning "convincing", emphasising that the decision whether to abort (in such cases) always lies with the mother and also the *advisory* role, both in relation to the risk of disability and in relation to the possibility of termination, of the medical profession.[198] More recently, the weaknesses in the Law Commission's reasoning have been noted by Kirby J. in *Harriton.*[199] Unsurprisingly perhaps, thirty-eight years after the

[194] I. Kennedy and A. Grubb, *Medical Law: Text with Materials*, 3rd edn (London 2000), 1552.
[195] J. Fortin, "Is the 'Wrongful Life Action Really Dead?" [1987] J.S.W.L. 306, p. 310, emphases in original.
[196] Law Commission, note 143 above, para 89; *McKay v Essex A.H.A.* [1982] 1 Q.B. 1166, Ackner L.J. at p. 1187A.
[197] [1982] 1 Q.B. 1166, Ackner L.J. at p. 1187B. This fear was also highlighted by the Law Commission, note 143 above, para. 89, as well by the Pearson Commission, note 167 above, para. 1485.
[198] [1982] 1 Q.B. 1166, Griffiths L.J. at p. 1192D-F.
[199] (2006) 226 C.L.R. 52, Kirby J. at [113]–[116].

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Commission's report, its views look very outdated given the legal liability that such professionals already have in relation to the wrongful birth action and the increasingly professional and, concomitantly, accountable role of the medical and health-care professional. In short, the basis of this aspect of the report and, with it, the Act, should be reconsidered.[200]

IV. Conclusions

Health professionals already owe prospective parents a legal duty to advise of a condition in a developing fetus that would give rise to serious impairments in the future child.[201] That duty should be owed at the same time to the future child, realised by advice to the parents, notably the pregnant woman, where a child is likely to be born with a condition that is so severe that any goods in life are outweighed by the burdens. Albeit inadvertently, Parliament allowed for an action for wrongful life in the ART context, which includes the selection processes at stake in PGD. It is inequitable and anomalous that the parallel situation of the negligent provision of PND cannot give rise to a claim for wrongful life on the part of a child. In the light of the growth of PND and PGD, coupled with the conceptual and clinical parallels between PND and PGD selection processes and the analysis of the strengths and, in particular, weaknesses of the decision in *McKay*, both that decision and those parts of the CD Act that purport to deny a claim for wrongful life to children born outside the ART context, should be revisited. This is so notwithstanding that, fortunately, conditions of life that would be sufficiently severe to give rise to an action for wrongful life appear rare.

[200] For similar criticism see H. Teff, note 59 above, p. 437.
[201] See discussion above of the terms of the disability ground of the Abortion Act 1967 (as amended) and wrongful birth case-law.

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