Wrongful Conception, Wrongful Birth and Wrongful Life

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Professor Harold Luntz is one of Australia's leading torts lawyers. Australian academics, practitioners and judges turn frequently to his writings when they want to know about the state of the law and when seeking insights about where it is, or ought to be, going. They know that they are relying on an impeccable source carrying a clear stamp of authority. So I am delighted and honoured to contribute to this collection of essays, and in this way to mark Harold's many and wide-ranging contributions to the understanding and development of this absorbing area of law.

1. Introduction

The question whether a doctor is under a legal duty to take care when treating a patient does not normally raise serious difficulties of principle. Certainly there are virtually unlimited opportunities for contentious disputes about a doctor's civil liability, but these are not usually about the existence or the scope of the duty which the doctor owes to the patient or about the kind of damage in respect of which he or she may be held liable. Rather, the argument in medical cases is likely to be about whether there has been a breach of the doctor's duty, or whether any breach was a cause of the harm of which the plaintiff complains. Exceptionally, however, a question about the very nature of a doctor's obligation or duty, or its extent, needs to be resolved. Recent decisions concerning claims for damages for (so-called) wrongful conception, wrongful birth and wrongful life[1] provide us with some controversial examples. In very general terms, the cases all involve allegations that negligence by a doctor or other health professional in relation either to a patient or to the patient's partner has caused a child to come into existence, that had proper care been taken the child would not have been born, and that by reason of the birth either the parents or the child have suffered loss or damage. The cases are bound to be controversial because, at their core, they raise the question of whether, or to

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1 These descriptions are convenient, but they have been criticised as emotive and as implicitly denigrating life: Harvey Teff, 'The Action for "Wrongful Life" in England and the United States' (1985) 34 *ICLQ* 423 at 427–428. Their use in this article is not intended to carry any moral judgment or to point towards any particular conclusion.

what extent, the expense associated with the unplanned or unwanted existence of a human being ought to be recognised in law as amounting to damage of a kind which can found an action in tort for negligence.[2]

Let us consider some different ways in which this question can arise. A person wishing to avoid having a child may undergo a sterilisation operation which turns out to be unsuccessful, with the result that the patient (if female) or the patient's partner (if the patient is male) unexpectedly conceives, and an unplanned child subsequently is born. So also a parent may allege that his or her doctor gave wrong advice about the efficacy of a sterilisation operation, or, perhaps, about the parent's ability to conceive a child, with the consequence that other contraceptive measures were not taken and, once again, an unplanned child is born.[3] The patient and/or his or her partner may then bring an action alleging that the doctor or surgeon was negligent in performing the operation or giving the advice, and may seek to recover the costs of bringing up the child. We can call this an action for wrongful conception, because the central allegation is that the defendant ought to be held responsible for not preventing the child from being conceived.[4]

Another kind of case is where a woman is wrongly informed that she is not pregnant, and by the time she finds out the truth it is too late for her to have an abortion. Again, a pregnant woman who undergoes an ultrasound scan may be misinformed that her unborn child is healthy, and accordingly, she loses the opportunity to have an abortion and later gives birth to a disabled child. In either case the mother may allege that negligence by her doctor or radiologist has caused her to continue with a pregnancy that is not wanted or is no longer wanted, and to suffer the expenses of raising the child. These, then, are actions for wrongful birth, as the plaintiff complains about the wrongful continuation of an existing unwanted pregnancy or of an initially wanted pregnancy that the mother would have wished to terminate. In common with wrongful conception cases they raise policy issues about the 'loss' involved in the birth of a child, but also can raise different concerns about the nature of the defendant's duty, the cause of any loss and the impact of the law concerning abortion.

Actions for wrongful conception or wrongful birth are both actions which may be brought by one or both of the parents of an unplanned child. An action brought by the child himself or herself, in circumstances where he or she suffers from a disability or disadvantage, may be termed an action for wrongful life. It raises different issues of policy and, as we shall see, acute difficulties of principle.

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2 The cases nearly all involve negligent doctors who undoubtedly owe a duty of care in treating their patients, leading to a debate as to whether the question is about the scope of the defendant's duty of care or the recoverability of a particular head of damage. The latter seems the better view, but the question need not be resolved. In *Rees v Darlington Memorial NHS Hospital Trust* [2004] 1 AC 309 (hereafter *Rees*) 322–323 (Lord Steyn), 328–329 (Lord Hope), 338 (Lord Hutton) and 344–345 (Lord Millett), four members of the House of Lords maintained that the question at heart is one of policy, and that provided this is understood, the different methods of analysis should yield the same result.

3 Similar questions can arise in relation to an allegedly negligent manufacturer of a contraceptive, as to which see *Richardson v LRC Products Ltd* [2000] PIQR 164.

4 There may be differences between the position of the mother and the father, but these will not be explored here.

We will consider first the parents' claim. In the case of the action for wrongful conception, the House of Lords on the one hand, and the High Court of Australia on the other, have taken very different approaches and have come to divergent conclusions. Secondly, we will examine the claim by a child who seeks compensation for being born in a disabled state or condition in the light of different opinions recently expressed in a leading decision of the New South Wales Court of Appeal.

2. The Parents' Claim

A claim for wrongful conception involves sharply competing questions of policy and principle.[5] If we focus immediately on the heart of the dispute, we must ask whether it is appropriate or possible to put an economic value on the life of a child – whether, as it is sometimes put, the parents' claim 'commodifies' the child – or whether the claim can be seen as a straightforward application of ordinary principle, under which a victim of negligent conduct can recover damages representing his or her consequential financial loss. The decisions are founded ultimately on the choice which is made between these two views. The choice also can be expressed as that between applying concepts of distributive and corrective justice,[6] but the same underlying policy concerns are involved.

A. McFarlane v Tayside Health Board

Most wrongful conception decisions in the United Kingdom initially were in favour of allowing the parents to recover full damages.[7] However, in *McFarlane v Tayside Health Board*,[8] the House of Lords held that a mother could claim general damages for the pain, suffering and inconvenience of pregnancy and childbirth, and for associated expenses, but that the parents could not recover the costs of bringing up their child. All of their Lordships rejected any suggestion that failure by a pregnant woman to undergo an abortion or arrange an adoption on discovering that she was pregnant could be a new act, which broke the chain of causation between the negligence and the birth. But the parents' claim still should fail. Lord Slynn declined to set off the intangible, non-economic benefits of parenthood against the economic costs of caring for the child, regarding this as well-nigh

5 Laura Hoyano, 'Misconceptions about Wrongful Conception' (2002) 65 *Mod LR* 882; Adrian Whitfield, 'The Fallout from *McFarlane*' (2002) 18 *Tolley's Journal of Professional Negligence* 234; Cordelia Thomas, 'Claims for Wrongful Pregnancy and Damages for the Upbringing of the Child' (2003) 26 *UNSWLJ* 125; Ben Golder, 'From *McFarlane* to *Melchior* and Beyond: Love, Sex, Money and Commodification in the Anglo-Australian Law of Torts' (2004) 12 *TLJ* 128.

6 *McFarlane v Tayside Health Board* [2000] 2 AC 59 (hereafter *McFarlane*) at 82–83 (Lord Steyn).

7 *Thake v Maurice* [1986] QB 644 at 670 (Lord Kerr); *Emeh v Kensington and Chelsea and Westminster Area Health Authority* [1985] QB 1012; *Robinson v Salford Health Authority* [1992] 3 Med LR 270; *Allen v Bloomsbury Health Authority* [1993] 1 All ER 651; *Crouchman v Burke* (1997) 40 BMLR 163; contrast *Udale v Bloomsbury Area Health Authority* [1983] 1 WLR 1098.

8 *McFarlane*, above n6; Tony Weir, 'The Unwanted Child' [2000] 59 *CLJ* 238; Kenneth Norrie, 'Failed Sterilisation and Economic Loss: Justice, Law and Policy' (2000) 16 *Tolley's Journal of Professional Negligence* 76; Michael Jones, 'Bringing Up Baby' (2001) 9 *Tort L Rev* 14.

impossible. The choice was between awarding all costs or excluding those for child rearing. He favoured the latter approach, on the grounds that it was not fair and reasonable to impose liability, and that the doctor should not assume responsibility for these costs. Lord Steyn's solution focused on the idea of distributive justice. Ordinary citizens would consider that there should be a just distribution of burdens and losses in society and that the law of tort has no business to provide legal remedies consequent upon the birth of a healthy child. This would be founded upon an inarticulate premise as to what was morally acceptable. Lord Hope said that it would not be fair and reasonable to leave the benefits of parenting out of account, yet their value was incalculable. Accordingly, the costs could not be recovered, because it could not be shown that overall they would exceed the benefits. Lord Clyde thought that relieving the parents of their financial obligations went beyond reasonable restitution for the wrong. He would allow the mother's claim for solatium, but no other costs. Lastly, Lord Millett accepted the main argument that the birth of a child is a blessing. He said in truth it is a mixed blessing, but society must regard the balance as beneficial. The advantages and disadvantages of parenthood are inextricably bound together, and it would be subversive of the mores of society for parents to enjoy the advantages but transfer the responsibilities to others. His Lordship considered that this reasoning also led to the rejection of the mother's claim for the loss associated with her pregnancy. However, he would allow a conventional sum representing the parents' loss of their personal autonomy and their freedom to limit the size of their family.

McFarlane did not decide whether a claim might lie where the unplanned child suffers from a disability. This question was considered in *Parkinson v St James and Seacroft University Hospital NHS Trust*.[9] The claimant, a mother of four children living with her husband, underwent a negligently performed sterilisation operation. She later conceived her fifth child, the marriage then broke down, and three months later she gave birth to the child, who suffered from severe disabilities. It was held that the claimant was entitled to recover damages in respect of the costs of providing for her child's special needs and care relating to his disability, but not for the basic costs of his maintenance. In deciding this the court needed to give guidance as to what constituted a 'significant disability' giving rise to a right to compensation. Brooke LJ said that this would have to be decided on a case by case basis, that the expression would include disabilities of the mind and that it would not include minor defects or inconveniences. Hale LJ referred to the statutory definitions in welfare legislation identifying those whose special needs required special services, and saw no difficulty in using the same definition in the present context. The extra expenses attributable to a child's disability were seen as falling outside the ordinary and inextricable calculus of benefits and burdens associated with the birth of a child. As Hale LJ observed, this analysis treats a disabled child as having exactly the same worth as a non-disabled child. It affords the child the same dignity and status. It simply acknowledges that the child costs more.

9 [2002] QB 266 (hereafter *Parkinson*); Oliver Quick, 'Damages for Wrongful Conception' (2002) 10 *Tort L Rev* 5.

B. Rees v Darlington Memorial Hospital NHS Trust

In *Rees v Darlington Memorial Hospital NHS Trust*,[10] in another variation on *McFarlane*, the *mother* suffered from a disability. She had undergone a sterilisation operation because she suffered from a severe visual handicap which she feared would prevent her from properly looking after a child. Having later conceived and given birth to a healthy child, she sought damages to recover the costs of providing for the child. While ordinary costs were precluded, the question was whether the mother's special difficulties could be taken into account. The Court of Appeal,[11] in a majority decision, held that just as the parent of a child with significant disability was entitled to compensation for providing for the child's special needs associated with his or her disability, so too was a disabled parent entitled to the extra costs in discharging his or her responsibility towards a healthy child. However the House of Lords, in a 4 to 3 decision, allowed the appeal and also introduced a significant 'gloss' on the holding in *McFarlane*. Lord Bingham of Cornhill accepted and supported a rule of legal policy which precluded recovery of the full cost of bringing up an unplanned child, yet questioned the fairness of a rule which denied the victim of a legal wrong any recompense at all beyond the immediate expenses of pregnancy and birth. The real loss was that the parent, particularly the mother, had been denied by negligence the opportunity to live his or her life in the way that he or she wished and planned. Lord Bingham accordingly supported the suggestion favoured by Lord Millett in *McFarlane* that there should be a conventional award to mark the plaintiff's injury and lost autonomy. This sum, fixed at £15 000, would not be the product of calculation but would be some measure of recognition for the wrong done. It would be in addition to any award for pregnancy and birth and would be applied without differentiation to all cases, including those in which either the child or the parent was disabled. Lord Nicholls, Lord Millett and Lord Scott agreed that there should be an award of this sum, but Lord Millett did not decide whether the extra costs where the child is disabled might also be recoverable and Lord Scott said that he might allow them if the purpose of the sterilisation was to avoid conception of a disabled child.

Lord Steyn, giving a minority view, thought that *McFarlane* was critically dependent on the birth of a healthy and normal child and that *Parkinson* was rightly decided, but recognised that there were cogent objections to the disabled plaintiff's claim. The benefits of having a healthy child being incalculable, the court should not give damages because it should not go into a calculation which involved weighing up possible family circumstances of different mothers. However his Lordship was persuaded that the injustice of denying a limited remedy to a seriously disabled mother outweighed these considerations and, accordingly, would have dismissed the appeal. He regarded the idea of a conventional award in the instant case as contrary to principle and as a backdoor evasion of the legal policy enunciated in *McFarlane*. There were limits to

10 *Rees*, above n2; Peter Cane, 'Another Failed Sterilisation' (2004) 120 *LQR* 189; Anne Morris, 'Another Fine Mess … The Aftermath of *McFarlane* and the Decision in *Rees v Darlington Memorial Hospital NHS Trust*' (2004) 20 *Tolley's Journal of Professional Negligence* 2.

11 *Rees v Darlington Memorial Hospital NHS Trust* [2002] 2 WLR 1483.

permissible creativity for judges and in his view the majority had strayed into forbidden territory. Lord Hope and Lord Hutton similarly favoured allowing damages where either the mother or the child was disabled and rejected a conventional award.

C. Cattanach v Melchior

Contemporary developments in Australia contrast markedly with those in the United Kingdom. In *Cattanach v Melchior*,[12] another failed sterilisation case, the High Court of Australia in a 4 to 3 decision was not persuaded by the policy considerations against recovery, and upheld a trial judge's decision to award damages against a negligent obstetrician for the cost of raising an unplanned child. The majority view was that the defendant could be held liable on the application of ordinary principles of negligence. McHugh and Gummow JJ thought that the expression 'wrongful birth' was misleading,[13] because what was wrongful was not the birth but the negligence of the doctor. The defendant sought merely the proscription of a particular head of recovery of damages. But no novel head of damages was involved. The plaintiffs' loss was not the coming into existence of the parent-child relationship but simply the expenditure that the plaintiffs had incurred or would incur in the future. If this was causally connected to the negligence and reasonably foreseeable then it ought to be recoverable. Kirby J maintained that in the real world, cases of this kind were about money, not love or the preservation of the family unit. The notion that in every case the birth of a child was a 'blessing' represented a fiction that the law should not accept in the absence of objective evidence bearing it out. In any event the parents' claim was simply for economic loss consequential upon physical injury to the mother. To deny such recovery was to provide a zone of legal immunity to medical practitioners engaged in sterilisation procedures that was unprincipled and inconsistent with established legal doctrine. Furthermore, the emotional benefits of parenthood were different in quality from the costs incurred in child-raising and should be ignored in calculating the recoverable damages.

Gleeson CJ, in dissent, saw the coming into existence of the parent-child relationship as an integral aspect of the damage of which the plaintiffs complained. That relationship had multiple aspects and consequences, some economic and some non-economic, some beneficial to the parents and some detrimental. The claim here was for a new head of liability for pure economic loss arising out of the relationship, yet it displayed all the features that had contributed to the law's reluctance to impose a duty of care to avoid causing economic loss. First, the liability sought to be imposed was indeterminate. Even if limited to adverse financial consequences to the parents, as opposed to siblings and others, there was

12 (2003) 215 CLR 1 (hereafter *Cattanach*); John Seymour, '*Cattanach v Melchior*: Legal Principles and Public Policy' (2003) 11 *TLJ* 208; Penny Dimopoulos & Mirko Bagaric, 'Why Wrongful Birth Actions are Right' (2003) 11 *JLM* 230; Kylie Weston-Scheuber, 'Victory for Reluctant Parents: *Cattanach v Melchior*' (2003) 26 *UNSWLJ* 717; Peter Cane, 'The Doctor, the Stork and the Court: A Modern Morality Play' (2004) 120 *LQR* 23.

13 *Cattanach*, above n12 at 32 (McHugh & Gummow JJ). Their Honours were using the expression 'wrongful birth' here as including wrongful conception.

no reason to restrict the claim to costs until the child reached any particular age or to any particular form of discretionary expenditure. Secondly, there was a problem of legal coherence. The law imposed many obligations on parents in support and protection of a child which were difficult to reconcile with the idea that creating the parent-child relationship could be actionable damage. A child was not a commodity that could be disposed of in order to avoid hardship to a parent. Thirdly, the proposed liability was based upon a concept of financial harm that was imprecise and selective. When the parents had spent the money itemised in their claim, they would have an adult son. His Honour disputed that some of the detrimental financial consequences of the relationship could be selected and all others, financial and non-financial, ignored. Finally, the claim was incapable of rational or fair assessment. It involved treating, as actionable damage, and as a matter to be regarded in exclusively financial terms, the creation of a human relationship that was socially fundamental.

Political reaction to *Cattanach* was negative. In Queensland, where the case originated, legislation was quickly introduced to reverse it. Section 49A of the *Civil Liability Act* 2003 (Qld) provides that in the case of failed sterilisation procedures a court cannot award damages for economic loss arising out of the costs ordinarily associated with rearing or maintaining a child. Section 49B provides similarly in the case of failed contraceptive procedures or advice. These provisions do not appear to cover a claim for wrongful birth where the plaintiff has lost the opportunity of terminating her pregnancy. Legislation in New South Wales[14] and South Australia[15] is more widely drawn to cover these and other cases where damages are sought for the costs of raising a child, but with specific exceptions in respect of the extra costs associated with the upbringing of a disabled child.[16] Elsewhere, of course, *Cattanach* applies.

The effect of these provisions is to bring the law in the states concerned broadly in line with that in the United Kingdom. However, a significant imponderable is that the provisions say nothing about the notion of the parents' loss of autonomy, to which matter we will return. But first we need to evaluate the contrasting decisions in *McFarlane* and *Cattanach*. Accordingly we must look more closely at the merits of the arguments underlying claims for the costs of bringing up a child.

D. Nature of the Damage

Let us consider the nature of the damage of which the parents complain. This is important, because the majority in *Cattanach* took the view that the parents' claim was maintainable simply on the application of ordinary principles of negligence. In particular, Kirby J considered that the loss was consequential upon physical injury to the mother by reason of pregnancy and childbirth.[17] If this is right it is possible to see the claim as no different in principle from any other claim for physical injury and consequential economic loss. But the better view is that the

14 *Civil Liability Act* 2002 (NSW) s71.

15 *Civil Liability Act* 1936 (SA) s67.

16 In all three states the legislation does not cover claims for wrongful life, which are considered below.

17 *Cattanach*, above n12 at 57–58.

loss is purely financial, and this certainly was accepted by the House of Lords in *McFarlane*[18] and by Gleeson CJ in *Cattanach*.[19] The complaint is not about the consequences to the mother of the physical aspects of birth and of any injury and pain that she herself has suffered, but is about the consequences to the parents of the existence of a child and the creation of a relationship pursuant to which there are legal and moral obligations to expend money on, and provide support for, the child. Indeed, in *Cattanach* the father was also a plaintiff and he certainly suffered no physical consequences. Kirby J dismissed the father's position, contending that his claim was 'made concrete' by the physical injury suffered by the mother and that it would be artificial to sever it from that of the mother. Yet even if we accept that the claims should be seen as made in common, which is doubtful as the father's arguably can stand alone, the mother's claim involves the unique physiological event of pregnancy and childbirth and can be seen as quite different in nature from an ordinary claim involving physical injury and consequential economic loss. Indeed, if the mother is treated as suffering physical injury we might be driven to accept that an action for consequential expenses based on *Donoghue v Stevenson*[20] could lie against the negligent manufacturer of a contraceptive. However, it is not very easy to distinguish upbringing expenses from other expenses associated with the birth, which the majority of their Lordships in *McFarlane* were prepared to allow. Seemingly they should stand or fall together. Lord Millett in dissent took this view and, accordingly, thought that the other expenses ought to be rejected as well.

This is not an arid argument about labels. Rather, the very special nature of the damage which is alleged to be actionable — financial loss by way of expenditure on the child — suggests that the majority approach in *Cattanach* is not a policy-free application of ordinary principle. The view that 'legal principle' can tell us whether Dr Cattanach should have been held responsible for the cost of rearing the unplanned child might be called a fairy tale.[21] Even if the loss is characterised as consequential upon physical damage to the mother, the claim nonetheless has unique features and requires a decision in a novel area of law. The courts must make judgments on matters involving controversial questions of moral and philosophical principle, and to these we will now turn.

E. Appraisal

There are good arguments on both sides. But those that deny the parents' claim ultimately are persuasive and should prevail. They are in essence that financial loss is not recoverable without special justification; that the existence of a child cannot be treated as legally recognisable loss or damage or that it is impossible to measure any damage; that treating the existence of a child as a loss to the parents is inconsistent with many other rules affecting the parent-child relationship; that the determination of which expenses are and which are not to be the subject of an

18 *McFarlane*, above n6 at 79 (Lord Steyn), 89 (Lord Hope), 99–100 (Lord Clyde) and 109 (Lord Millett).

19 *Cattanach*, above n12 at 14 (Gleeson CJ).

20 [1932] AC 562.

21 Cane, above n12 at 26.

award of damages must necessarily be selective and unprincipled; and that the damages are potentially indeterminate both as to their nature and their amount. Let us consider some aspects of these reasons in a little more detail.

The core contention is that the birth of a healthy child should not in law be treated as 'harm' or a 'loss'. Lord Millett made the point very clearly in *McFarlane*. His Lordship said that parents may choose to regard the birth of a healthy and normal baby as harm, but that 'plaintiffs are not normally allowed, by a process of subjective devaluation, to make a detriment out of a benefit', and that 'it is morally offensive to regard a normal healthy baby as more trouble than it is worth'. This leads us to consider whether we ought to characterise all money expended on a child as a 'loss'. Why separate the expense incurred by the parents in providing for their child from the emotional benefit to the parents in providing for his or her happiness, self-esteem and security and in showing that he or she is a loved and wanted member of the family? Certainly we should at least recognise that the answer involves judgment and the making of a choice. It is not a matter merely of quantifying a loss.

If, contrary to this view, we accept that parents have suffered a loss in paying for a child's upbringing, we must decide how it ought to be quantified. In particular, we need to determine which expenses ought to be included and which excluded, and whether there should be an offsetting of any prospective financial benefits. In his judgment in *Cattanach*, Gleeson CJ asked some pertinent questions. Why not include wedding expenses, or costs of tertiary education? Why distinguish between child-rearing costs and the adverse effects on the career prospects of the parents? Why exclude the natural and moral obligations owed by children to parents and the financial consequences in later years that may entail? Commentators who support the majority view in *Cattanach* usually accept that there must be some limit on what can and cannot be claimed. So a partial answer to his Honour's questions might be to limit the damages to, say, the upbringing expenses that are reasonably ascertainable and objectively necessary. But solutions of this kind do not deal with the possible financial advantages to the parents and why these must be ignored. As for the disadvantages, many of the expenses involved in bringing up a child – like private school fees, presents and holidays – are perfectly reasonable but not 'necessary'. A court seeking to compensate only for strictly necessary expenses is not quantifying a loss but is choosing to award a lesser sum precisely because the award of a proper compensatory sum is unpalatable or even offensive. Furthermore, once a court compensates not for the reasonable expenses of *this* parent but the necessary expenses of *any* parent, the amount of the award will tend towards a uniform sum in every case. Perhaps, then, we should start thinking about whether a conventional award of general damages representing the parents' loss of autonomy, as in *Rees*, provides a better solution.

Before doing so we should seek to resolve any uncertainties about when the *McFarlane* rule ought to apply. One question is whether there should be different treatment for an action in contract in the case of private medical treatment.[22]

22 In *McFarlane*, above n6 at 99, Lord Clyde recognised that actions in contract may give rise to different issues than those in tort.

Seemingly, upbringing costs would be a natural and ordinary consequence in the case of a breach of a promise guaranteeing the efficacy of a sterilisation and also, perhaps, in the case of a negligent breach of contract without any guarantee.[23] But there can be policy controls on recovery in contract as well as in tort. An example is the continuing debate, going back to *Addis v Gramophone Co Ltd*,[24] about limits upon damages in contract for upset and distress. Furthermore, there may be concurrent liability, subject to any limits or exclusions in the contract, where the cause of action is for negligence,[25] and the ambit of the two causes of action usually will be coextensive.[26] Accordingly, it is both arguable and, it is suggested, appropriate that the policy denying upbringing costs should apply at least to an action for negligent breach of contract. Indeed, the same policy clearly ought to apply in the case of an action against the retailer of a contraceptive for breach of an implied warranty of quality. Recovery in the case of an express guarantee could depend on the terms of the contract and whether a specified or ascertainable sum is agreed as payable on failure of the guarantee.

The next question is whether a mother's or a child's disability ought to be taken into account as giving rise to a right to damages. The reasoning of Lord Millett in *Rees* is helpful. His Lordship observed that the costs of bringing up a healthy child are infinitely variable, not only according to the needs of the child but according to the circumstances of the parents and other members of the family. To the extent that a mother's disability has any effect it simply increases the amount of the costs which she reasonably incurs, costs which were held by *McFarlane* to be irrecoverable. Furthermore, the costs will gradually disappear as the child grows up, to be overtaken by advantages. And costs due to the birth and due to the disability cannot be disentangled: they are a single cost with composite causes. But where it is the child who is disabled the costs are attributable either to the birth of the child or the fact the child is disabled and they do not diminish but are present throughout. So Lord Millett thought that a line should be drawn between costs referable to the characteristics of the parent and those referable to the characteristics of the child. In the latter case he preferred to leave the question open, but would not find it morally offensive to reflect the difference between a healthy and a disabled child in an award of damages.

Introducing a special rule if the mother (or father?) is disabled thus would be inappropriate and unworkable. The position is different where the child is disabled. One solution, which has support in *Rees* from Lord Scott, is to allow damages representing the extra disability costs at least in wrongful birth as opposed to wrongful conception cases. In the latter the mother did not wish to become pregnant or to give birth at all. But in wrongful birth cases the mother did wish to become pregnant, but due to the defendant's failure to diagnose or to advise that

23 See *Thake v Maurice*, above n7 (a pre-*McFarlane* decision).

24 [1909] AC 488.

25 *Bryan v Maloney* (1995) 182 CLR 609 at 619–622 (Mason CJ, Deane & Gaudron JJ); *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145; *Riddell v Porteous* [1999] 1 NZLR 1 at 9 (Blanchard J).

26 *Frost v Tuiara* [2004] 1 NZLR 782.

the foetus was suffering from an abnormality, she lost the opportunity to terminate the pregnancy.[27] Here the child was desired, so the parents would have incurred upbringing costs had they terminated the pregnancy and conceived another child, and the risk of the mother giving birth to a disabled child was specifically the reason for undergoing the diagnostic test. The defendant's responsibility relates to the disability rather than the birth, and damages for the disability expenses alone can be seen as well justified.[28] But we can go further, for disability expenses can be seen as justifiable in wrongful conception cases as well. Sometimes the very reason for a person to seek sterilisation is the risk of conceiving a disabled child, which consequence again should be within the defendant's contemplation. More broadly, even where there is no special risk but a disabled child is born, the disability expenses can be seen as falling outside the ordinary and inextricable calculus of benefits and burdens associated with the birth of a child and, accordingly, as falling outside the core principle in *McFarlane*. So the principle recognised in *Parkinson* ought to apply. If necessary we should grasp the nettle and recognise that *to the extent that a child is disabled* the birth does involve a loss to the parents. In the words of one commentator, the birth of a handicapped child is surely a matter for condolence, whereas that of a healthy child is (despite the expense) a reason for congratulation.[29]

F. Loss of Autonomy

We should turn now to consider the award of a conventional sum to compensate for the mother's or the parents' loss of autonomy in controlling the size of her or their family, without proof of financial loss.[30] The minority in *Rees* rejected this solution, partly because it was put forward only at a late stage of the proceedings and, so it was said, had not been fully argued through. But convincing justifications can be advanced in its support. A claim for loss of autonomy is conceptually quite different from a claim for the costs of bringing up a child. The same objections of principle do not apply, and the focus is on the impact of the child on the lives of the parents rather than on the unwanted costs of, or expenditure on, the child. A conventional award also avoids a key vice of the wrongful conception action, that it can compensate for major discretionary expenditure of well-to-do parents. In *Rees*, Lord Bingham recognised that underpinning the decision in *McFarlane* was a sense that to award potentially very large sums to parents of normal and healthy children against a National Health Service always in need of funds to meet pressing demands would rightly offend the community's sense of how public

27 *Rand v East Dorset Health Authority* [2000] Lloyd's Rep Med 181; *Hardman v Amin* [2000] Lloyd's Rep Med 498; *Lee v Taunton & Somerset NHS Trust* [2001] 1 Fam LR 419.

28 On this view it may sometimes be necessary to bring into account the law governing abortion. If at the time of the alleged negligence an abortion would have been illegal the plaintiff's claim must fail, as the lost opportunity could only have been turned to value by a breach of the law: *Rance v Mid-Downs Health Authority* [1991] 2 WLR 159; *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47.

29 Weir, above n8 at 241.

30 A comparable innovation perhaps was the award to an estate of a conventional sum for loss of expectation of life: see *Benham v Gambling* [1941] AC 157.

resources should be allocated. By contrast, the award of a conventional sum recognises that the parents have suffered a real loss, but evaluates the loss at the same level for all. It introduces a desirable element of certainty and predictability into the quantum of damages.

There is an unavoidable element of arbitrariness in setting the appropriate sum. In *Rees*, no explanation is given for fixing it at £15 000. Of course, the loss is necessarily uncertain in financial terms and there can be no 'correct' figure. But should courts outside the United Kingdom accept this solution, the quantification of the claim could be further explored. There are various ways of looking at this question. One approach might be to focus on necessary expenses in coping with restrictions on autonomy in a deserving case. This might include, say, expenses of childcare until the child reaches school age in order to allow a single parent to remain in employment. Or perhaps the quantum should be such as to give the parents a period of time to re-order their lives and adjust to their new circumstances. Ultimately the court must search for a sum that can be widely recognised as reasonably fair, taking into account the loss of choice about lifestyle, the allocation of resources and the like. Fixing general damages in this way must be impressionistic rather than calculated.

In Australia the legislative reversals of *Cattanach* do not deal with a possible claim for loss of autonomy, no doubt because the relevant state legislatures would not have had it in mind. But there are no formal bars, and a claim of this kind remains to be explored.

A conventional sum should not be awarded in wrongful birth cases where the child is disabled. Here the initial pregnancy was not unwanted, and in these circumstances the defendant might be seen as responsible for the disability costs but not for any loss of autonomy. The parents decided for themselves to exercise their autonomy, and had the mother terminated the pregnancy on receiving proper advice, she would have had the opportunity of conceiving another child. In these circumstances the defendant could not reasonably be expected to anticipate that his or her negligence would cause the loss. More doubtful is the case of an unplanned pregnancy where the child is not disabled but the mother is wrongly advised that she is not pregnant. Here, one or other parent simply failed to take steps to prevent the pregnancy. The pregnancy is unwanted and perhaps, as in sterilisation cases, the parents ought to be able to sue.

Finally, brief speculation about future developments is due. Judicial recognition of the notion of a loss of autonomy suffered by parents of unplanned children may be one harbinger of a newly developing field of tortious liability. Perhaps a similar notion is involved in another recent decision of the House of Lords, in *Chester v Afshar*.[31] Here, a doctor was held liable for failing to warn a patient of a small but unavoidable risk of surgery, this notwithstanding that the patient could not show that, had she been warned, she would not have undergone surgery at some time in the future when the risk would have been precisely the

31 [2004] 3 WLR 927. The earlier decision of the High Court of Australia in *Chappel v Hart* (1998) 195 CLR 232 is quite similar.

same. A majority of their Lordships took the view that the duty owed by the defendant was intended not only to help minimise the risk to the patient, but also to vindicate her right of autonomy and to enable her to make an informed choice about when, where and in what circumstances to undergo the treatment. Again, protection from interference with personal autonomy and dignity underlies recently accorded recognition of a remedy for the misuse of private information, in New Zealand as a new tort of invasion of privacy,[32] and in England as a development of the action for breach of confidence.[33] These various developments perhaps can be recognised as responses of the common law to an emerging human rights-based jurisprudence in European and national laws. They may mark the beginnings of an attempt to determine what the notion of autonomy might cover and to develop an integrated theme of decision-making in this field.[34]

3. The Child's Claim

A. Harriton v Stephens, Waller v James and *Waller v Hoolahan*

Thus far we have considered the claims of the parents arising out of loss or damage to them caused by an unplanned conception or birth. We should now turn to consider a claim by the child himself or herself. This kind of claim usually is described as a claim in respect of 'wrongful life' and poses problems which are truly unique.[35] These are explored in three consolidated appeals of the New South Wales Court of Appeal in *Harriton v Stephens*, *Waller v James* and *Waller v Hoolahan*.[36]

In *Harriton v Stephens* the appellant's mother had a fever and a rash and also thought that she might be pregnant. She had a blood test, after which her doctor, the respondent, gave her a misleading assurance that her illness was not rubella. However, a prudent general practitioner would have arranged for an IgM blood test, which would have been positive for rubella antibodies. Had the rubella been diagnosed, Mrs Harriton would have exercised her lawful right to terminate her pregnancy. As a consequence of the rubella infection the appellant (Alexia) was born suffering from severe congenital disabilities.

In *Waller v James* and *Waller v Hoolahan* the appellant's father had a genetic

32 *Hosking v Runting* [2005] 1 NZLR 1; Rosemary Tobin, 'Yes, Virginia, there is a Santa Claus: The Tort of Invasion of Privacy in New Zealand' (2004) 12 *TLJ* 95. In *ABC v Lenah Game Meats Ltd* (2001) 208 CLR 199, the question of whether a tort of invasion of privacy should be recognised in Australia was left open by the High Court of Australia. See Megan Richardson, 'Whither Breach of Confidence: A Right of Privacy for Australia?' (2002) 26 *MULR* 381.

33 *Campbell v MGN Ltd* [2004] 2 WLR 1232.

34 For a leading discussion of the concept and its possible meanings see Gerald Dworkin, *The Theory and Practice of Autonomy* (1988).

35 Philip Peters, Jr, 'Rethinking Wrongful Life: Bridging the Boundary between Tort and Family Law' (1992) 67 *Tulane LR* 397; Carel Stolker, 'Wrongful Life: The Limits of Liability and Beyond' (1994) 43 *ICLQ* 521; Penny Dimopoulos & Mirko Bagaric, 'The Moral Status of Wrongful Life Claims' (2003) 32 *CLWR* 35.

36 (2004) 59 NSWLR 694 (hereafter *Harriton*).

deficiency known as anti-thrombin 3 deficiency (AT3 deficiency) which was genetically transmittable and could give rise to cerebral thrombosis in his children. He and his wife sought advice from the respondents concerning in vitro fertilisation, but the respondents did not investigate Mr Waller's AT3 deficiency and did not advise Mr and Mrs Waller about its potential consequences. Mrs Waller became pregnant and gave birth to a son (Keeden) with a genetic AT3 deficiency and cerebral thrombosis. Had Mr and Mrs Waller been advised about Mr Waller's AT3 deficiency, they would have ensured that an embryo without the AT3 deficiency was implanted in Mrs Waller, or used donor sperm, or obtained a lawful termination of Mrs Waller's pregnancy. And had another embryo been used, Mrs Waller might have given birth to another child, but that child would not have been the appellant.

Both appellants claimed damages from the respondents, alleging that they were liable for causing the appellants to suffer harm or loss in living their profoundly disabled lives. A core difficulty facing the appellants was proving actionable damage, for had the respondents not been negligent they would not be living at all. On the majority view this was the decisive objection. Spigelman CJ and Ipp JA both held that the claims should fail, because neither appellant could establish that non-existence would be preferable to life with disabilities or could demonstrate the monetary value of non-existence. By contrast, Mason P considered that it was legitimate to approach the problem by making a comparison between the appellants' condition affected and unaffected by the impact of the respondents' conduct, and that on this basis the claims ought to be allowed to proceed.

B. Appraisal

The reasoning in *Harriton* reflects the debate in many decisions overseas, particularly those in the United States. The two most common reasons why wrongful life claims have failed are because courts have held that life itself cannot be a legal injury, and because courts are unable or unwilling to measure compensation that involves comparing the harm of living with that of never having lived at all.[37] The minority of cases that allow such claims are based on the defendant's responsibility for having created an impaired life. They are premised, not on the concept that non existence is preferable to an impaired life, but on the policy that law should respond to the call of the living for help in bearing the burden of their affliction.[38] So we need to weigh up the competing arguments.

Let us attempt to focus on what can be accepted and what can be seen as the key points of controversy. First, we can agree with Mason P in *Harriton* that there is no separate issue of causation. A medical adviser's negligence in failing to warn the parents that a foetus is or might be disabled is at least a cause in fact of the

37 Harold Luntz, *Torts: Cases and Commentary* (5th ed, 2002) at 433. In the United States see, for example, *Becker v Schwartz* 413 NYS 2d 895 (1978). In England see *McKay v Essex Area Health Authority* [1982] 1 QB 1166. In Canada see *Lacroix v Dominique* (2001) 202 DLR (4th) 121.

38 See, for example, *Procanik v Cillo* 478 A 2d 755 (1984). In Israel see *Zeitzoff v Katz* [1986] 40(2) PD 85.

child's loss.[39] While the doctor does not cause the existence of the disabilities, he or she does cause the child to be born in a disabled condition, by depriving the parents of the opportunity of preventing the birth. In that sense the negligence is a cause, and we can move on to the question whether the doctor ought to be held liable for causing a loss of that kind.

Secondly, it is clear that if wrongful life claims are to be allowed, they must be based on a special rule of liability. We can agree again with Mason P that the compensatory principle is a means of assessment and is not a means of identifying 'damage' where that is the gist of the cause of action. Measuring loss in assessing damages is different from determining liability. But normally a defendant can only be liable in respect of a loss that is at least measurable on a comparative basis, as both Spigelman CJ and Ipp JA emphasise. In a personal injury claim, the particular plaintiff's pre-existing state, not a notional 'average' person, is the comparator. In determining whether damage has been inflicted the court takes the position of the plaintiff before and after the negligence. But in wrongful life cases there is no measurable loss if ordinary principle is to be applied. It cannot be said that a child with disabilities is worse off than if he or she had never been born at all. So the child's claim has to be put on a basis different from other claims.

Ipp JA helpfully explains how the child's interest in the mother having an opportunity of preventing his or her conception or birth is distinguishable from other, arguably similar, interests. In particular, a claim on behalf of a foetus injured in the womb does not involve the proposition that the foetus should have been terminated and is based on the established compensatory principle; a mother can seek the lawful termination of a pregnancy, but the foetus has no rights in this respect; the interest of a disabled person on a life support system is in whether his or her life should be preserved, by balancing his or her existing quality of life against death should treatment be withdrawn, whereas the disabled child's interest is in not being conceived or born; and the parents of a disabled child have a financial interest in recovering the expenses of bringing up the child, which does not raise the same difficulties (and to which we shall return). Ipp JA also points out that the question in issue does not involve offsetting the value of non-existence, nor does it put an evidential onus on the defendant. The child's damages are not 'reduced' by identifying his or her pre-accident condition. The problem is one of determination of the damages alleged to have been sustained, not one involving the amount by which otherwise determined damages are to be reduced.

Accordingly, we should turn now to the question whether a special rule for wrongful life claims ought to be recognised. In attempting to formulate a rule it would be possible to hive off what would otherwise be some particularly controversial applications. So the type of claim described by Mason P as involving a 'dissatisfied life' could be excluded. Any rule could be confined to loss attributable to physical disabilities or characteristics, as opposed to social or financial disadvantages. For example, we need not be driven to accept claims by

39 Compare *McKay v Essex Area Health Authority* [1982] QB 1166 at 1181 (Stephenson LJ) and 1188 (Ackner LJ).

children complaining about the disadvantages and stigma of illegitimacy. Such claims invariably have been rejected overseas.[40] Again, there are special policy implications involved in claims by disabled children against their parents for conceiving them or allowing them to be born. These also could be excepted from any general rule, in the same way that claims by a child against its mother for negligence during pregnancy causing injury to the foetus can be treated as falling into a special category of their own.[41]

The rule might, therefore, be that a person who negligently gives advice or administers treatment to a prospective parent which deprives the parent of the opportunity of terminating a pregnancy or avoiding a conception by reason of undesired physical disabilities or characteristics of the child owes a duty of care to the child. A practical advantage of a rule of this kind is that damages are retained under the control of the court and are not at risk of dissipation by the parents.[42] But it is strongly arguable that the policy of the law should not support such a rule, for the following reasons.

First, in deciding whether to recognise a rule of liability the courts should seek to promote underlying coherence in the law. At the most general level, it is not desirable to admit claims that cannot be justified by the application of well accepted principle. If this factor stood on its own then it would not necessarily be given substantial weight. But it does not stand alone and should play a part in the balancing exercise.

Secondly, we must identify the disabilities or characteristics which would allow the rule to be invoked. Mason P said that it trivialised the particular claims to suggest that there would be a cause of action available to children born with minor disabilities. But the problem cannot be summarily dismissed in this way. Do we really want courts deciding whether a disability is sufficiently serious to justify a mother making a decision to terminate a pregnancy? Where exactly might the line be drawn? And why? If the court does not make the decision then it must depend solely on that of the mother or father or both. Many parents, if given the choice, would decide to terminate pregnancies where the disabilities fall far short of those suffered by Alexia Harriton and Keeden Waller. Indeed, supposedly minor or cosmetic disabilities can have a very serious impact, both socially and financially, on the kind of life that the child in question might expect to live. Again, advances in techniques of genetic modification referred to by Ipp JA are likely to raise problems that are truly intractable. How might a court deal with a genetic

40 See, for example, *Zepeda v Zepeda* 190 NE 2d 849 (1963).

41 In *Dobson v Dobson* [1999] 2 SCR 753, a majority of the Supreme Court of Canada thought that recognising a duty owed by the driver of a car to her unborn child would result in extensive and unacceptable intrusions into the bodily integrity, privacy and autonomy rights of women, and could render the most mundane decision taken in the course of their daily lives subject to judicial scrutiny. By contrast, in *Lynch v Lynch* (1991) 25 NSWLR 411 and *Bowditch v McEwan* (2003) 2 Qd R 615, it was held that claims of this kind could be maintained. The mother's freedom of action in respect of her driving was already restricted by her duty of care to users of the highway. She would not have to take any further precautions to avoid liability to her born-alive child.

42 Harold Luntz, *Assessment of Damages for Personal Injury and Death* Sydney (4th ed, 2002) at 461.

deficiency which shortens a child's anticipated life or the effects of which might emerge in later years? How might a failure in advice about or testing of genes affecting mental health or behaviour be treated? The problem is one of principle, not of measuring a loss. No principled line could be drawn in determining what is and is not actionable. The whole spectrum of claims would have to be admitted as potentially actionable. We can reasonably question whether it would be desirable for the courts to make decisions about the 'loss' suffered by plaintiffs in living their lives with their particular and unique genetic profile.

This brings us to the third reason for declining to admit these claims. In *Harriton* it was common ground that any action by the child was mediated through negligent advice or treatment given to the mother or father. So the parents themselves have an action for the loss they have suffered by reason of the birth. We have seen already that claims for wrongful birth do not pose the same difficulties in concept or policy as claims for wrongful conception, for the parents' complaint is in respect of the financial loss caused by the birth of a child with disabilities, rather than by an unwanted birth per se. In this case, we can compare the parents' position caused by the negligence with what it would have been without the negligence. They have a child with disabilities, and but for the negligence they would either have had a child without the disabilities or would have had no child at all. In either case, an award of damages representing the costs attributable to the disabilities should be recoverable. The objections to the wrongful conception action concerning the calculation of the damages do not arise. The parents can recover reasonable expenses attributable to the disability without any formal limit as to the child's age or in time. Again, the parents' action can more easily cope with possible complaints about negligent treatment or advice in the field of genetics. If, say, due to a medical adviser's negligence a child lacked a desired genetic attribute, the parents would have an action if they could establish that its absence had caused them to suffer financial loss in bringing up the child. But, absent a contract to achieve a particular result, there would otherwise be no damage to support their claim.

Finally, we can come back to the core objection. Sadly, the plaintiff in a wrongful life action could not have had a different and better life. The courts cannot give compensation for being in this world with whatever disadvantages that may entail. They *can* compensate parents for the expenses involved in coping with their child's disabilities. These are justifiable, ascertainable and calculable. Sometimes the parents may not be able to sue because, for example, the claim is statute-barred. This very difficulty faced the parents in the *Harriton* case. But the courts cannot for this reason create a new cause of action which is not otherwise supportable on a weighing of relevant considerations of policy and principle.

4. Conclusion

The recent upsurge in decisions concerning damages for unplanned children may not have ended. Various uncertainties remain in the different jurisdictions. In England the position of the parents of disabled children remains to be determined. In Australia, in states where *Cattanach* applies, some difficult questions about the

extent of the parents' recoverable damages can be anticipated. In states where legislative controls have been introduced, there remains scope for actions for disability expenses and, possibly, for interference with parental autonomy. And the action for wrongful life is due to be argued before the High Court of Australia in appeals in *Harriton* and both *Waller* cases,[43] and has yet to be considered by the House of Lords.

The merits of these various claims have been the subject of extended debate. In *Cattanach* in particular the differing opinions are advanced with very considerable power and conviction. My view, in essence, is that claims for wrongful conception or birth raise special concerns of policy and morality and that they therefore require special treatment. In this fundamental respect they are no different from the unceasing stream of decisions limiting or negating liability for negligence where the claim is on the boundary of existing principle or, indeed, is entirely novel. The courts are constantly drawing lines, here and elsewhere. In the instant case the approach taken by the House of Lords achieves a better balance in resolving the concerns raised by the cases than that of the majority in the High Court of Australia, at least on the assumption that disability expenses remain recoverable. On either view, there is no warrant for the courts to uphold a wrongful life claim by a disabled child, which must confront serious objections of principle. These are avoided by a parent's claim for wrongful birth. The problem of overlapping claims also disappears.

43 On 29 April 2005 the High Court granted leave to appeal in all three cases.