

# Harriton v Stephens: *Life, Logic and Legal Fictions*

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## 1. Introduction

*Harriton v Stephens*<sup>1</sup> presented the High Court with an opportunity to consider the validity of wrongful life actions under Australian law. This opportunity has been a long time coming: the seminal English decision of *McKay v Essex Area Health Authority*<sup>2</sup> was handed down over 20 years ago, as were many of the principal judgments in other jurisdictions.<sup>3</sup> The questions of law and policy surrounding wrongful life actions remain as complex, and as controversial, as ever. Yet the law's response is now of even greater importance, as the ability to avert chronic disabilities by terminating pregnancy, or avoiding conception altogether, increasingly becomes a legitimate and common clinical choice.

As wrongful life cases are inevitably seen to require the assertion that a disabled plaintiff 'would be better off not to have been born',<sup>4</sup> courts are frequently tempted into speculative navel-gazing regarding the impossibility of comparing life to non-existence. Scant attention is paid to the medical decision-making context in which actions for wrongful life cases arise, and to the fact that, within this context, tort law must play its established role of setting standards and redressing wrongs. *Harriton v Stephens* did not buck this trend, and it is ultimately for this reason that the plaintiff's claim was rejected.

This paper will commence with an analysis of the determinative finding in *Harriton*: namely, the majority's proposition that Alexia Harriton could not demonstrate that she had suffered any harm capable of being understood or assessed by the court. Next, it will consider the asserted inconsistency between actions for wrongful life, and general tort principles that govern the relationship between a pregnant woman and her doctor. Finally, the paper will locate wrongful life actions within the broader discourse regarding the underlying objectives of tort law. I will ultimately suggest that the High Court should have recognised the validity of actions for wrongful life.

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<sup>1</sup> (2006) 226 ALR 391 (hereafter *Harriton J*).

<sup>2</sup> [1982] QB 1166 (hereafter *McKay*).

<sup>3</sup> For example, *Gleitman v Cosgrove* 227 A 2d 689 (1967) (hereafter *Gleitman*); *Curlender v Bio-Science Laboratories* 165 Cal Rep 477 (1980) (hereafter *Curlender*); *Turpin v Sortini* 182 Cal Rep 337 (1982); *Procanik v Cillo* 478 A 2d 755 (1984).

<sup>4</sup> *Gleitman*, id at 711 (Weintraub CJ).

## 2. *Background*

Actions for wrongful life<sup>5</sup> are claims brought by disabled plaintiffs who assert that, but for the negligent behaviour of the defendant, they would not be in existence and hence would not be suffering the pain and impairment associated with their disability. Such claims typically arise when a doctor fails to diagnose the presence of a foetal abnormality, and hence does not inform the woman who is carrying the foetus of the risk that her child will be born disabled. As a result of this failure, the woman is deprived of the opportunity to procure an abortion. Wrongful life claims have also arisen in respect of negligent conduct that occurred before conception. This was the case in *Waller v James*,<sup>6</sup> a wrongful life case handed down at the same time as *Harriton*. In that case, the defendant negligently failed to advise Mr and Mrs Waller (the plaintiff's parents) that a disease from which Mr Waller suffered was genetically transmissible.<sup>7</sup> Mrs Waller subsequently underwent IVF treatment, and was implanted with an embryo affected by the disease. Had she been properly advised, she could have taken one of several courses of action to avoid conceiving, and ultimately giving birth to, a child affected by a serious and permanent disability.<sup>8</sup>

Wrongful life claims are not to be confused with actions for wrongful birth, which were recognised as valid by the High Court in *Cattanach v Melchior*.<sup>9</sup> Wrongful birth claims are brought by the parents of a child who would not have been born but for the negligence of the defendant. The child in these cases may be healthy or disabled. If the child is disabled, the parents will be able to recover the costs of care arising from that disability, until the child reaches the age of 18.<sup>10</sup> In contrast, where the child itself brings an action, as in claims for wrongful life, there seems to be no principled reason for restricting an award of damages to those costs incurred before the plaintiff becomes an adult.<sup>11</sup>

5 The label 'wrongful life' has attracted strong criticism for being unduly emotive, and because it identifies the plaintiff's life, rather than the suffering that he or she endures, as the ultimate source of complaint: see *Harriton*, above n1 at 393–395 (Kirby J); Joseph Kashi, 'The Case of the Unwanted Blessing: Wrongful Life' (1977) 31 *U Miami LR* 1409 at 1432; Harvey Teff, 'The Action for 'Wrongful Life' in England and the United States' (1985) 34 *ICLQ* 423 at 427–428.

6 *Waller v James*; *Waller v Hoolahan* (2006) 226 ALR 457 (hereafter *Waller*).

7 The relevant disease was antithrombin 3 (AT3) deficiency, which affects the propensity of the blood to clot. The facts of *Waller* are similar to those in the Californian case of *Curlender*, above n3. In that case, a wrongful life action was successfully brought against a pathology laboratory which negligently failed to detect the presence of Tay-Sachs disease (a genetically transmittable condition) in the plaintiff's father.

8 See *Waller*, above n6 at 471 (Crennan J).

9 (2003) 215 CLR 1 (hereafter *Cattanach*). Wrongful birth claims were in fact recognised in the earlier cases of *Dahl v Purnell* (1992) 15 Qld Lawyer Reps 33, *Veivers v Connolly* [1995] 2 Qd R 326 and *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47 (hereafter *CES*). However, *Cattanach* was the first High Court decision on the issue.

10 Tort law reform has significantly affected the damages available in actions for wrongful birth, particularly in respect of healthy children. Section 71(1)(a) of the *Civil Liability Act 2002* (NSW) was implemented in response to the High Court's decision in *Cattanach*, *ibid*, and prevents recovery of the costs associated with rearing a child born as the result of another's negligence. However, by virtue of s71(2), parents *are* able to recover for additional costs associated with any disability suffered by such children.

11 Teff, above n5 at 431

### 3. *Facts*

The facts of *Harriton* are reasonably simple. Alexia Harriton was born ‘profoundly, incurably and tragically disabled.’<sup>12</sup> Her disabilities resulted from exposure to the rubella virus whilst *in utero*. In August 1980, Dr Max Stephens,<sup>13</sup> a general practitioner, was called to the home of Olga Harriton. Mrs Harriton informed the doctor that she had been suffering from a fever and rash and was concerned that these might be symptomatic of rubella. She explained that this was a source of anxiety to her, as she believed she was pregnant. Dr Stephens recommended that she undergo blood testing to determine whether she was pregnant, and whether she had contracted rubella. Mrs Harriton did so. On 22 August 1980, she contacted Dr Paul Stephens, who was also a general practitioner in partnership with his father, Dr Max Stephens. He advised her that the pathology report indicated that she was pregnant, but that she had not been suffering from rubella.

It was common ground between both parties that Dr Stephens Jr provided a substandard level of diagnosis and advice. A prudent and reasonable medical practitioner in 1980<sup>14</sup> would have recommended a second type of blood test that would have confirmed the presence of rubella in Mrs Harriton’s case. Upon a diagnosis of rubella, such a practitioner would also have informed a pregnant woman of the high risk that her child would be born severely disabled, and that termination was the only way to prevent this from occurring. It was accepted that Mrs Harriton would have procured an abortion if advised of the risks of continuing with her pregnancy, and that an abortion would have been legal in these circumstances. However, due to Dr Stephen’s conduct, Mrs Harriton lacked the necessary knowledge to make this choice. Consequently, Alexia was born suffering from blindness, deafness, mental retardation and spasticity. She requires care 24 hours per day, and will continue to require this level of care for the rest of her life.

### 4. *Procedural History*

#### A. *The Supreme Court of New South Wales*

Due to the expiry of the relevant statutory limitation period,<sup>15</sup> Alexia’s parents were unable to commence a wrongful birth action in their own names to recover the costs associated with her disability.<sup>16</sup> Alexia’s father, George Harriton,

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12 *Harriton*, above n1 at 435 (Callinan J).

13 Now deceased.

14 Section 50 of the *Civil Liability Act 2002* (NSW) provides that the standard of care to which medical practitioners must adhere is determined by reference to conduct that is widely accepted as competent by peer professional opinion at the time the service is provided. This largely reflects the common law test established in *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118.

15 *Limitation Act 1969* (NSW), s14(1)(b).

16 Even though tort law reform has limited the damages available in wrongful birth actions, the Harritons (if successful in their claim) could have recovered the costs associated with Alexia’s disability: see above n10.

therefore brought an action on her behalf in contract and tort<sup>17</sup> against Dr Paul Stephens. In the Supreme Court of New South Wales,<sup>18</sup> Studdert J made an order that the following two questions be determined separately:

1. If the defendant failed to exercise reasonable care in his management of the plaintiff's mother and, but for that failure the plaintiff's mother would have obtained a lawful termination of the pregnancy, and as a consequence the plaintiff would not have been born, does the plaintiff have a cause of action against the defendant?
2. If so, what categories of damages are available?<sup>19</sup>

Studdert J found against the plaintiff with respect to the first question, and did not therefore need to consider the second.

### **B. *The Court of Appeal***

Alexia appealed to the Court of Appeal on four grounds.<sup>20</sup> The appeal failed,<sup>21</sup> with Spiegelman CJ and Ipp J finding in favour of the respondent. Mason P dissented.

Spiegelman CJ ultimately held that no relevant duty of care existed. In arriving at this conclusion, he drew upon underlying policy arguments regarding the sanctity of life, contending that duties of care must reflect values widely held in the community.<sup>22</sup> The question of whether any 'damage' had occurred was also determinative. His Honour found that for this aspect of the claim to succeed, it would have to be demonstrated, from the perspective of Alexia, that non-existence was preferable to life with disabilities.<sup>23</sup> The plaintiff's case was not argued on this basis, according to Spiegelman J, but on the basis that her parents would have

17 The case was originally pleaded on the grounds of negligence alone. However the plaintiff sought, and was granted, leave to amend the statement of claim such that a claim in contract was pleaded in the alternative. The contractual claim was based on the argument that Alexia was a beneficiary of the contract between her mother and Dr Stephens.

18 Pursuant to Pt 31, r2 of the *Supreme Court Rules* 1970 (NSW) (now r28.2 *Uniform Civil Procedure Rules* 2002 (NSW)). The order was made at the request of the defendant, and with the plaintiff's consent.

19 See *Harriton v Stephens* [2002] NSWSC 461 (hereafter *Harriton (Supreme Court)*) at [2] (Studdert J). At the same time, Studdert J handed down two other decisions rejecting actions for wrongful life: *Edwards v Blomeley* [2002] NSWSC 460 and *Waller & Ors v James & Ors* [2002] NSWSC 462. For an overview of these cases, see Rachel Young, 'Harriton v Stephens; Edwards v Blomeley; Waller v James' (2002) 10 *JLM* 163.

20 For details of the grounds of appeal, see *Harriton (by her tutor) v Stephens; Waller (by his tutor) v James; Waller (by his tutor) v Hoolahan* (2004) 59 NSWLR 694 (hereafter *Harriton (Court of Appeal)*) at 728 (Ipp JA).

21 In this same judgment, the court dismissed an appeal against Studdert J's decision in *Waller & Ors v James & Ors* [2002] NSWSC 462. For an overview of the Court of Appeal's decision, see Bill Madden, 'Wrongful Life: 'Born Disabled to a Catastrophic Degree'' (2004) 42(10) *Law Society Journal* 70.

22 *Harriton (Court of Appeal)*, above n21 at 700–701 (Spiegelman CJ).

23 *Id* at 702–705 (Spiegelman CJ).

sought a termination according to their own wishes and concerns.<sup>24</sup> Ipp JA focused upon the plaintiff's inability to prove that legally cognisable damage had occurred.<sup>25</sup> He also found that it was impossible to engage in a meaningful assessment of damages according to ordinary tort principles.<sup>26</sup>

In dissent, Mason P stated that the two main arguments against wrongful life claims were the proposition that life cannot constitute a legal injury, and the suggestion that damages are impossible to assess.<sup>27</sup> His Honour rejected both these arguments. He asserted that the first merely constituted a 'question-begging conclusion'<sup>28</sup> and suggested that the High Court's decision in *Cattanach*<sup>29</sup> demonstrated that the creation of life could indeed constitute actionable damage.<sup>30</sup> In response to the second argument, Mason P found that the essence of the plaintiff's claim was her present needs, and that this should therefore form the basis for the assessment of damages.<sup>31</sup>

Alexia's appeal to the High Court was ultimately dismissed, with six judges finding in favour of the respondent. Crennan J wrote the principal judgment, with which Gleeson CJ, Gummow and Heydon JJ agreed. Callinan and Hayne JJ each prepared separate judgments. Kirby J offered the sole dissenting judgment.

## 5. *Analysis*

The principal issue to be determined in the case was whether Dr Stephens owed a duty of care to Alexia to provide Mrs Harriton with the necessary advice to enable her to procure an abortion, and thus bring about Alexia's non-existence.<sup>32</sup> From the outset, two distinct approaches to addressing this issue can be discerned. For the majority, the questions of whether a duty of care existed and whether the plaintiff had suffered legally cognisable damage were inextricably linked. Given that damage is the 'gist' of an action in negligence,<sup>33</sup> reasoned the majority, the existence of a duty of care cannot be established in the abstract. Rather, a plaintiff must prove that the defendant owes a duty to avoid the particular kind of harm that has eventuated.<sup>34</sup> In contrast, Kirby J placed less emphasis on the relevance of the

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24 *Id* at 704–705 (Spiegelman CJ).

25 *Id* at 733–735 (Ipp JA).

26 *Id* at 728–732 (Ipp JA).

27 *Id* at 707 (Mason P).

28 *Id* at 717 (Mason P).

29 See above n9.

30 *Harriton (Court of Appeal)*, above n20 at 718 (Mason P).

31 *Id* at 721 (Mason P).

32 The parties submitted an agreed statement of facts for the purposes of determining the threshold questions of whether a duty of care existed, and of what damages would be available with respect to a breach of any such duty. As such, issues of breach and causation were of secondary importance to the decision: *Harriton*, above n1 at 440–441 (Crennan J).

33 See *Williams v Milotin* (1957) 97 CLR 465. See also Harold Luntz & David Hambly, *Torts: Cases and Commentary* (5<sup>th</sup> ed, 2002) at 335, 535; John Fleming, *The Law of Torts* (9<sup>th</sup> ed, 1998) at 216, cited in *Harriton* *id* at 407 (Crennan J).

34 *Harriton*, *ibid*. For a more detailed discussion on this point, see *Harriton (Court of Appeal)*, above n20 at 733–735 (Ipp JA).

question of damage to the existence of a duty of care.<sup>35</sup> His Honour was content to conclude that the case fell within the established duty of care that a doctor owes to a foetus to avoid causing it prenatal injury.<sup>36</sup>

As a result of this difference in approach, the question of damage looms much larger in the reasoning of the majority than it does in Kirby J's judgment. Indeed, the failure of the plaintiff to prove harm according to 'well-settled and well-understood principles'<sup>37</sup> of tort law was ultimately the downfall of her claim.<sup>38</sup> As such, it is appropriate to deal with this issue first.

#### A. *Did Alexia Suffer Legally Cognisable Harm?*

##### (i) *The Majority*

Negligence, unlike other kinds of tort, is not actionable per se.<sup>39</sup> Plaintiffs must prove that they have suffered some loss or harm that equates to damage in the eyes of the court. In order to do this, Crennan J asserts, a plaintiff needs to show that he or she has been:

... left worse off as a result of the negligence complained about, which can be established by the comparison of a plaintiff's damage or loss caused by the negligent conduct, with the plaintiff's circumstances absent the negligent conduct.<sup>40</sup>

In Alexia's case, this principle prompted the comparison that so troubled the High Court (and, indeed, most of the other courts that have considered actions for wrongful life):<sup>41</sup> the comparison of her life and its attendant suffering with non-existence.<sup>42</sup>

Numerous courts have concluded that they cannot engage in an assessment of this kind.<sup>43</sup> However, two distinct arguments have been advanced as to why this is so.<sup>44</sup> The first involves the assertion that as the law values each person's life

<sup>35</sup> *Harriton*, id at 407 (Kirby J).

<sup>36</sup> Id at 408 (Kirby J). The existence of a medical practitioner's duty to avoid causing prenatal injury was recognised in *X and Y (By Her Tutor X) v Pal* (1991) 23 NSWLR 26 (hereafter *Pal*).

<sup>37</sup> *Harriton*, id at 454 (Crennan J).

<sup>38</sup> Id at 447 (Crennan J).

<sup>39</sup> For a discussion of the distinction between torts that are actionable per se, and those that depend upon proof of damage, see Peter Cane, *The Anatomy of Tort Law* (1997) at 89.

<sup>40</sup> *Harriton*, above n1 at 449 (Crennan J). See also the comments of Hayne J at 431.

<sup>41</sup> See, for example, *Procanik v Cillo*, above n3 at 763–764 (Pollock J); *Berman v Allan* 404 A 2d (1979) (hereafter *Berman*) 11 (Pashman J); *Gleitman*, above n3 at 692 (Procter J); *McKay*, above n2 at 1189 (Lord Ackner); *Kush v Lloyd* 616 So 2d 415 (1992), 423 (Overton, Grimes, Harding, Barket & Kogan JJ).

<sup>42</sup> *Harriton*, above n1 at 431–432 (Hayne J), 438–439 (Callinan J), 449 (Crennan J). See also the comments of Spiegelman CJ in the Court of Appeal (*Harriton (Court of Appeal)*, above n20 at 701).

<sup>43</sup> See the expansive list of authorities on this point cited in the judgment of Studdert J: *Harriton (Supreme Court)*, above n19 at [49].

<sup>44</sup> For a discussion of the various ways in which courts have rejected plaintiffs' assertions that they have suffered injury, see David Pace, 'The Treatment of Injury in Wrongful Life Claims' (1986) 20 *Columbia Journal of Law and Social Problems* 145 at 147–151.

equally (the sanctity of life principle), a plaintiff cannot argue that non-existence would be preferable to his or her life with disabilities.<sup>45</sup> Because we all suffer ‘from some ailments or defects, whether major or minor’,<sup>46</sup> courts must refuse to say that any individual’s life is so burdensome as to be less preferable than non-existence. The problematic comparator according to this argument is life with disabilities. In contrast, the second argument that courts have employed to reject the comparison between disabled life and non-existence posits *non-existence* as the troublesome comparator. Because non-existence, by definition, cannot be experienced, a court logically can make no assessment of whether it is preferable to life with profound disabilities.<sup>47</sup>

It is the second argument that was adopted by the majority in *Harriton*. This is perhaps unsurprising: because the argument is based purely on logic, it avoids any need for what Mason P in the Court of Appeal termed ‘spurious invocation of legal and ethical principles upholding the sanctity of life’.<sup>48</sup> It offers a value-neutral way to rebuff the plaintiff’s claim, allowing the court to sidestep murky issues of policy and morality surrounding the acceptability of abortion, the sanctity of life and the perceived worth of disabled individuals in society.<sup>49</sup> This is not to say that the majority refrains from expressing the opinion that the plaintiff’s claim offends against the sanctity of life principle. Indeed, this view is articulated particularly strongly in the joint judgment.<sup>50</sup> It is suggested that it is precisely because Alexia’s claim could be disposed of on the grounds of logic that the majority were able to voice such strong support for the sanctity of life principle. As an ‘additional observation’,<sup>51</sup> this support is relatively uncontroversial. Had it been posited as a determinative reason for rejecting the claim, however, it might have been seen as a somewhat unpalatable judicial excursion into morality, less easily accepted in the present day than it was when the first wrongful life cases were decided.

The majority places great emphasis on the contention that damage is logically impossible to prove: although such an argument has always served as a prominent reason for courts to reject wrongful life claims, it really becomes *the* determinative factor<sup>52</sup> behind the outcome in *Harriton*.<sup>53</sup> As the argument is based on pure logic, it seems unassailable. Logical propositions cannot be argued on their terms because ‘logic is conservative: the conclusions of a valid inference are contained within the premises.’<sup>54</sup> By asking a plaintiff to compare her present circumstances with her circumstances had the misconduct not occurred, the law presumes the

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45 See, for example, *Berman*, above n41 at 13; *Blake v Cruz* 698 P 2d 315 (1984), 322 both cited in *Pace*, id at 147–148.

46 *Berman*, *ibid*, cited in *Pace*, id at 148.

47 *Harriton*, above n1 at 449–451 (Crennan J).

48 *Harriton (Court of Appeal)*, above n20 at 717 (Mason P).

49 See *Harriton*, above n1 at 450 (Crennan J).

50 *Id* at 451–452 (Crennan J).

51 *Id* at 451 (Crennan J).

52 In conjunction with the related issue of the impossibility of assessing damages.

53 This is particularly apparent from the remarks of Callinan J: *Harriton*, above n1 at 438–439. See also 429, 432 (Hayne J) and 440 (Crennan J).

54 Charles Pigden, ‘Naturalism’ in Peter Singer (ed), *A Companion to Ethics* (1991) at 423.

existence of two states of being.<sup>55</sup> Where the plaintiff would not have existed had the defendant behaved as expected, the analysis must end where it begins. However, it is precisely the hermetic nature of logical propositions that must temper our urge to place undue weight on the proof of damage argument. Their force as stand-alone contentions should not be confused with their significance in the context of the plaintiff's claim as a whole, and the broader issues that surround it. Kirby J makes several comments to this effect, reasoning that in responding to novel problems, the court should not elevate cold logic above the collective wisdom of the law.<sup>56</sup>

(ii) *Kirby J*

Unfortunately, Kirby J's alternative approach to the question of damage also suffers from flaws. This is primarily because his Honour subsumes the question of whether *damage* has occurred into his discussion of whether *damages* are capable of quantification. Under a heading entitled 'The damage issue', Kirby J asserts that:

[t]he principal argument of the respondent for rejecting this appeal was that it was impossible to quantify the appellant's loss according to the compensatory principle. This, so it was said, was because one cannot compare existence with non-existence because no one has any experience with non-existence.<sup>57</sup>

In countering this proposition, Kirby J follows an approach adopted by a number of courts in the United States that have accepted wrongful life claims.<sup>58</sup> This approach involves addressing the determination of special and general damages separately, based on the conclusion that the 'impossible comparison' between life and non-existence does not need to be made when considering special damages. Kirby J explains the reason for this:

Because a plaintiff in a wrongful life action would not have *any* economic needs had the defendant exercised reasonable care, a loss in this regard is directly caused by the defendant's negligent acts and omissions.<sup>59</sup>

This approach is problematic. The task of quantifying damages is not the same as answering the threshold question of whether the plaintiff has incurred loss or harm that the law recognises as damage.<sup>60</sup> The mere presence of financial costs that would not have existed without the negligence of the defendant is not sufficient to warrant recovery, without a consideration of whether these costs result from legally cognisable harm.<sup>61</sup> On the reasoning adopted by Kirby J, a healthy child born as a result of a doctor's negligence could bring an action to recover for his or

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55 For commentary on this point, see Teff, above n5 at 433.

56 *Harriton*, above n1 at 410–411 (Kirby J).

57 *Id* at 409 (Kirby J).

58 See, for example, *Turpin v Sortini*, above n3; *Procanik v Cillo*, above n3; *Harbeson v Parke-Davis Inc Wash* 656 P 2d 483 (1983).

59 *Harriton*, above n1 at 411 (Kirby J).



her 'economic needs', on the basis that none of these expenses would have been incurred without the doctor's negligence. Nothing in Kirby J's judgment indicates that he would consider an action of this kind to be acceptable.

Nevertheless, Kirby J ultimately does consider the issue of whether a comparison can be made between non-existence and life with disabilities, although as a consequence of the approach outlined above, this analysis takes place in the context of his discussion regarding general damages.<sup>62</sup> His Honour acknowledges the difficulties inherent in determining whether non-existence may be considered preferable to life with disabilities, both as a general question,<sup>63</sup> and as a matter of fact in individual cases.<sup>64</sup> However, he concludes that such a comparison is possible. Although his Honour does not clearly elucidate *how* such a task would be undertaken, it is implicit in his reasoning that a court would essentially be required to make a value judgment by reference to the present degree of suffering experienced by the plaintiff.<sup>65</sup> This kind of decision, Kirby J reasons, would be analogous to those made by courts in the context of end-of-life decision-making and withdrawal of medical treatment.<sup>66</sup>

### **B. Assessing Damages**

The majority's belief that life with disabilities could not be rationally compared to non-existence also prompted their conclusion that no meaningful assessment of damages could be made.<sup>67</sup> Just as proof of damage requires a comparison between the plaintiff's present position, and the position in which he or she would have been had the defendant's negligence not occurred, assessment of damages is governed by the compensatory principle.<sup>68</sup> According to this principle, compensation must (as far as is possible) restore the plaintiff to the position in which he or she would have been absent the negligent conduct. As Alexia would not have existed were it not for the negligence of Dr Stephens, the majority found

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60 See Luntz & Hambly, above n33 at 535. This point has been made in a number of wrongful life cases in the United States: see *Becker v Schwartz* 386 NE 2d 807 (1978), 812; *Nelson v Krusen* 678 SW 2d 918 (1984), 928 (cited in Pace, above n44 at 150). In the context of his discussion about the existence of a duty of care, Kirby J makes a brief remark asserting that Alexia had suffered damage. His sole reason for this was that her claim was in respect of physical injury, which therefore falls within the type of harm that the defendant had a duty to avoid: *Harriton*, above n1 at 408. It is submitted that this in no way constitutes a determinative response to the question of whether damage had occurred.

61 This becomes apparent if we consider, for example, the position of negligence law with respect to pure economic loss before the case of *Hedley Byrne & Co v Heller & Partners* [1964] AC 465.

62 *Harriton*, above n1 at 413–416 (Kirby J).

63 *Id* at 415 (Kirby J).

64 *Id* at 416 (Kirby J).

65 *Id* at 415 (Kirby J).

66 *Ibid*. For criticism of this analogy, see *Harriton*, above n1 at 450–451 (Crennan J). See also *Harriton (Court of Appeal)*, above n20 at 704 (Spigelman CJ), 738 (Ipp JA).

67 *Harriton*, *id* at 453 (Crennan J).

68 *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 at 39 (Lord Blackburn); *Husher v Husher* (1999) 197 CLR 138 at 142–143 (Gleeson CJ, Gummow, Kirby and Hayne JJ).

that damages could not be assessed without the creation of ‘some awkward, unconvincing and unworkable legal fiction.’<sup>69</sup>

It is agreed that the assessment of damages would necessarily entail a legal fiction. Realistically, the compensation payable to Alexia would have to be determined by reference to the position of a healthy child, rather than by reference to non-existence. However, it is submitted that such a fiction is neither awkward nor unconvincing once it is accepted that the plaintiff has suffered damage caused by the defendant. Once the threshold question of damage has been determined in favour of the plaintiff, the assessment of damages becomes, fundamentally, a practical matter.

### ***C. Do Wrongful Life Claims Conflict with Existing Duties of Care?***

Having determined that Alexia’s claim did not satisfy the fundamental requirements of an action in negligence, the majority judges expanded their analysis to consider the place of wrongful life claims among general tort principles. In particular, they looked to the potential effect of such actions upon recognised duties of care that characterise the tripartite relationship between mother, foetus and doctor. This analysis was prompted by the decision in *Sullivan v Moody*,<sup>70</sup> where the High Court identified the need to preserve coherence with existing legal principles and duties as a guiding tenet in the assessment of novel tort claims.<sup>71</sup> The threat of incoherence posed by Alexia’s claim was said to arise in two respects.

#### *(i) A Medical Practitioner’s Conflicting Duties*

The first concern, raised by Crennan J, was the conflict that could occur if courts imposed a

duty of care on a doctor to a foetus (when born) to advise the mother so that she can terminate a pregnancy in the interest of the foetus in not being born, which may or may not be compatible with the same doctor’s duty of care to the mother in respect of her interests.<sup>72</sup>

In framing this issue, Crennan J acknowledged that courts have for some time accepted that doctors owe a duty of care to a foetus to avoid causing it prenatal injury.<sup>73</sup> The operative distinction between actions for prenatal injury and those for wrongful life is the available course of action that could have been taken to prevent harm from occurring. In cases for prenatal injury, the harm could have been averted had the doctor behaved responsibly, resulting in a healthy child. In cases for wrongful life, the only way to prevent harm from occurring would have been to terminate the pregnancy (or avoid conception), resulting in no child. Despite this difference, there is no reason in principle why actions for prenatal injury should

<sup>69</sup> *Harriton*, above n1 at 456 (Crennan J).

<sup>70</sup> (2001) 207 CLR 562.

<sup>71</sup> *Id* at 580. Crennan J refers to this passage in her judgment: *Harriton*, above n1 at 447.

<sup>72</sup> *Harriton*, *id* at 448 (Crennan J).

<sup>73</sup> *Ibid*. The principal Australian authority on this point is *Pal*, above n36.

not give rise to precisely the same conflict between the interests of mother and child that Crennan J identified with respect to actions for wrongful life.

Certainly, the conflict between the mother's interests and those of the foetus is more starkly apparent in cases where abortion is the treatment option under consideration. As Crennan J observes, a woman's decision regarding whether or not to terminate a pregnancy is 'bound up with individual freedom and autonomy'.<sup>74</sup> Further, even though abortion law in New South Wales is not quite so supportive of this notion of individual autonomy, it is guided by the mental and physical health of the woman seeking a termination.<sup>75</sup> At first glance, prenatal injury cases do not raise the same spectre of divergent duties for a doctor. In these cases, the necessary treatment has tended either to involve no detriment to the woman carrying the foetus, or to be coincident with the woman's own interests. In the seminal Australian case on prenatal injury,<sup>76</sup> for example, the relevant harm for which the child was able to recover arose out of a doctor's failure to diagnose and treat the mother's syphilis.<sup>77</sup> Yet there is nothing inherent in prenatal injury cases which guards against inconsistency in the separate duties owed to mother and foetus. Consider, for example, a doctor treating a pregnant woman who is suffering from HIV. Prudent medical practice recommends the use of anti-retroviral drugs by pregnant women to reduce the risk of maternal-foetal transmission.<sup>78</sup> However, in some cases, this may increase drug resistance in the woman, and compromise her later treatment.<sup>79</sup> If a doctor failed to advise the woman to use anti-retroviral medication and so lower the risk of perinatal transmission, and this failure was a material cause of the child's subsequent infection with HIV, that child could presumably bring an action for prenatal injury against the doctor. Yet the doctor would also owe a duty to the mother to warn her of the potential risks associated with the treatment.

The possibility that medical practitioners may be required to satisfy two conflicting duties of care does not, therefore, derive from any feature unique to actions for wrongful life. Instead, it reflects an incoherence that is already present in the law due to the 'difficulty that the courts have had in articulating the relationship between a woman and the foetus she is carrying.'<sup>80</sup> As Jenny Morgan

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74 *Harriton*, *ibid*.

75 *Crimes Act* 1900 (NSW) s83, as interpreted in *R v Wald* [1971] 3 DCR (NSW) 25 at 29 (Levine DCJ). See also *CES*, above n9 at 59–60 (Kirby A-CJ).

76 *Pal*, above n36.

77 For a full description of the facts of this case, see *X v A Pal; Y v A Pal* (Unreported, Supreme Court of New South Wales, Sully J, 16 February 1990) 3–7; *Pal*, *id* at 34–35 (Clarke JA).

78 There is a substantial amount of medical research on this topic. See for example D Heather Watts, 'Management of Human Immunodeficiency Virus Infection in Pregnancy' (2002) 346(24) *New England Journal of Medicine* 1879.

79 See Gonzague Jourdain, Nicole Ngo-Giang-Huong, Sophie Le Coeur, Chureeratana Bowonwatanuwong, et al, 'Intrapartum Exposure to Nevirapine and Subsequent Maternal Responses to Nevirapine-Based Antiretroviral Therapy' (2004) 351(3) *New England Journal of Medicine* 229.

80 Jenny Morgan, 'Foetal Imaginings: Searching for a Vocabulary in the Law and Politics of Reproduction' (2000) 12 *Canadian Journal of Women & the Law* 371 at 373.

has observed, the acceptance of claims for prenatal injury depends upon acknowledging, at least to some extent, that a foetus possesses interests independent to those of its mother, even if such interests cannot be acted upon unless and until the child is born.<sup>81</sup> This is inconsistent with the tendency of the law in other contexts, such as cases concerning the refusal of medical treatment by pregnant women, to deny that a foetus has any separate rights or interests whatsoever.<sup>82</sup> Wrongful life cases simply provide another context where there is a dearth of legal principle to govern competing interests.

It should also be noted that while a doctor may owe separate, and possibly conflicting, duties to mother and foetus, the actual burden of these duties is unlikely to be onerous. Wrongful life cases typically involve a failure to diagnose a particular condition afflicting a foetus and to advise the mother that termination is the only available means of preventing the child from being born with disabilities. As such, a doctor would almost always be able to discharge his or her duty to both parties by the provision of adequate information about the benefits and detriments posed to each by any available course of action.

(ii) *A Mother's Duty to Terminate Her Pregnancy*

Both Crennan and Callinan JJ raised a second concern regarding the potential for wrongful life actions to disturb coherence within tort principles.<sup>83</sup> Callinan J articulated the problem in the following terms:

Absolute coherence [within the law], if the appellant were to succeed here, would require that a mother, who knew of, but failed to abort a foetus likely to emerge at full term seriously disabled, be liable to that child, a prospect that I suspect few would contemplate with equanimity.<sup>84</sup>

This argument has been raised by a number of other courts that have considered wrongful life claims,<sup>85</sup> but it is ultimately unconvincing. First, neither Callinan nor Crennan JJ offer any significant justification as to why it is so undesirable that a child be permitted to sue his or her mother in these circumstances.<sup>86</sup> While the arguments against judicial acceptance of such claims are persuasive, there are also several strong reasons in favour of their recognition. Kirby J outlines several of these reasons in his judgment, including the practical reality that such proceedings

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81 Id at 403, discussing John Seymour, *Fetal Welfare and the Law: A Report of an Inquiry Commissioned by the Australian Medical Association* (1995) at 49.

82 Morgan, id at 382–387, 403.

83 *Harriton*, above n1 at 437–438 (Callinan J), 449 (Crennan J). Callinan J, however, seemed to accept that a desire for coherence should not necessarily be determinative if other factors supported recognition of the claim.

84 Id at 438 (Callinan J).

85 See, for example, *McKay*, above n2 at 1181 (Stephenson LJ) and *Curlender*, above n3 at 488 (Jefferson PJ).

86 As is apparent from his comment at 438 (see above n84), Callinan J rejects the proposition out of hand. Crennan J merely observes that the idea has attracted judicial and legislative disapproval in the United Kingdom and California (*Harriton*, above n1 at 449).

tend only to be brought in the presence of ‘an insurer or other deep pocket’.<sup>87</sup> At the very least, given that the validity of intra-familial torts is itself unresolved, it seems premature to cite the undesirability of these actions as a reason to reject wrongful life claims.<sup>88</sup>

In addition, it is strongly arguable that the right of a child to sue its mother in respect of a failure to terminate her pregnancy is *not* the ‘logical corollary’<sup>89</sup> to recognition of wrongful life actions. Consider the experience of a pregnant woman, for whom ‘[e]very waking and sleeping moment, in essence, her entire existence, is connected to the foetus she may potentially harm’.<sup>90</sup> The maternal-foetal relationship is so unique in nature that the recognition of a doctor’s duty to give advice regarding termination must be seen as conceptually distinct from a woman’s subsequent decision regarding whether to undergo a termination.<sup>91</sup> The two are not merely steps along the same logical continuum, separated by a matter of degrees, but are instead qualitatively distinct. To argue otherwise is to once more resort to a rather unsophisticated jurisprudence regarding the status of the foetus, which, upon recognising that a foetus has interests that third parties must respect, presumes an equivalence between those third parties and the woman carrying the foetus.<sup>92</sup>

#### **D. The Purposes of Tort Law**

Where wrongful life claims have been recognised, courts have tended to argue that the fundamental purposes of tort law demand that they look past the logical and legal difficulties inherent in these actions. The first of these purposes is the pursuit of corrective justice. This entails the normative proposition that innocent people should not bear the financial burden of harm caused by the negligent actions of another.<sup>93</sup> The second purpose relates to tort law’s role in setting standards of conduct.<sup>94</sup>

##### *(i) Corrective Justice*

The dissenting judges in both the Court of Appeal and High Court decisions placed strong emphasis on the need for corrective justice. The basis for this line of reasoning was the practical reality that plaintiffs in wrongful life cases:

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87 *Id* at 421 (Kirby J).

88 This is especially the case given that Australian courts have recognised the rights of children to sue their mothers in respect of negligent acts committed whilst pregnant, in the specific context of motor vehicle accidents: *Lynch v Lynch (By her Tutor Lynch)* (1991) 25 NSWLR 411.

89 *Harriton*, above n1 at 420 (Kirby J).

90 *Dobson v Dobson* [1999] 2 SCR 753 at 770 (Lamer CJ, Gonthier, Cory, Iacobucci and Binnie JJ).

91 This point is made by Kirby J in his judgment: see *Harriton*, above n1 at 421–422.

92 See *Morgan*, above n80.

93 See for example *Curlender*, above n3 at 489 (Jefferson PJ). See also the dissenting opinion of Jacobs J in *Gleitman*, above n3 at 703.

94 See *Gleitman*, *ibid*. See also *Curlender*, *id* at 486–487 (Jefferson PJ).

... exist and suffer due to the assumed negligence of others who had represented professional competence in relation to medical procedures they embarked upon for reward.<sup>95</sup>

Neither Kirby J nor Mason P suggested that this fact alone could establish liability.<sup>96</sup> However, Kirby J felt that it would frustrate the ‘proper purpose of the law of negligence’<sup>97</sup> to deny recovery to a plaintiff injured through the fault of another solely because of the logical difficulties associated with comparing life to non-existence.<sup>98</sup> This argument is compelling, as it acknowledges the unavoidable fact that ‘[a] medical practitioner who has been neglectful ... escapes scot-free’,<sup>99</sup> and recognises the consequences for the plaintiff if the claim is denied. Indeed, courts that have recognised wrongful life claims have usually done so on the basis of similar reasoning.<sup>100</sup>

The majority judges offered little in the way of a direct response to this point.<sup>101</sup> Callinan J acknowledged that rejecting Alexia’s claim led to the somewhat anomalous outcome that:

a person such as she, catastrophically disabled, will recover nothing, whilst, if after the moment of conception, she had suffered negligently caused injury, even of a much lesser kind, she may be able to recover.<sup>102</sup>

However, his Honour did not ultimately find that this justified extending established tort principles to encompass actions for wrongful life.

Crennan J proffered two reasons as to why considerations of corrective justice did not support recognition of Alexia’s claim. The first of these was the somewhat unconvincing suggestion that there is no real need for courts to dispense corrective justice ‘when a person is affected by rubella ... for which no-one is responsible’.<sup>103</sup> The flaws in this proposition are obvious. The issue of ‘responsibility’ for a plaintiff’s illness is ultimately a question of causation, and in *Harriton* was a matter that remained unresolved.<sup>104</sup> Many medical negligence claims arise in respect of conditions that a doctor did not, as such, cause. This will usually be the case where the claim is in respect of a failure to diagnose an illness

95 *Harriton (Court of Appeal)*, above n20 at 705–706 (Mason P). See also the similar comment made by Kirby J: *Harriton*, above n1 at 413.

96 See the comment of Mason P to this effect: *Harriton (Court of Appeal)*, id at 706.

97 *Harriton*, above n1 at 414 (Kirby J).

98 *Ibid.*

99 *Ibid.*

100 See, for example, *Curlender*, above n3 at 489 (Jefferson PJ).

101 Ipp JA in the Court of Appeal, however, devotes considerable attention to the matter: *Harriton (Court of Appeal)*, above n20 at 744–745.

102 *Harriton*, above n1 at 438 (Callinan J).

103 *Id* at 456 (Crennan J). Harvey Teff has commented on the tendency of courts in wrongful life cases to underplay the causative role of the defendant doctor, thus minimising the extent of culpability and the corresponding need for corrective action: Teff, above n5 at 440.

104 See *Harriton*, id at 399–400 (Kirby J).

such as cancer<sup>105</sup> or syphilis.<sup>106</sup> However, this does not prevent a court from finding that a doctor is the *legal* cause of harm. Once the issue of causation is determined, it should have no bearing on the need or otherwise for corrective justice.

In addition, Justice Crennan reasoned that a plea for corrective justice depends upon the identification of a legally recognisable wrong or harm that needs correcting.<sup>107</sup> Corrective justice therefore has little role to play as a guiding principle in a novel tort claim such as Alexia's, the object of which is determining whether a wrong has occurred. Her Honour did not believe that harm could be established for the purposes of corrective justice merely by reference to broader principles such as fairness or community welfare.<sup>108</sup> In a narrow sense, these observations are no doubt true. However, they do not really address the essence of the argument that supports recovery in the context of wrongful life cases. This argument does not assert that the defendant's behaviour is *per se* wrong, and therefore in need of correction. Rather, it points to the reality that an individual is left totally without redress as a consequence of another's substandard conduct, largely because existing tort principles are simply inapplicable to his or her situation, and suggests that this is a reason for extending tort principles to treat such conduct as wrong. Ultimately, however, it must be remembered arguments of this nature have not carried significant weight in the past, as is demonstrated by the unanimous rejection of the plaintiff's claim in *Sullivan v Moody*.<sup>109</sup> In this sense, it is perhaps unsurprising (although in the author's view, disappointing) that the view adopted by Kirby J proved unpersuasive for a majority of the High Court in *Harriton*.

(ii) *Setting Standards*

Kirby J advanced a second line of reasoning closely related to his assertion that the careless doctor, rather than the innocent plaintiff, should bear financial responsibility for his errors. This argument focused upon the future consequences of failure to recognise a duty of care: namely, the fact that it would immunise medical practitioners against liability with respect to certain careless conduct.<sup>110</sup> This prospect was not considered at length by the majority. Callinan J was mollified by the fact that a doctor in the position of Dr Stephens could expect to be 'very severely disciplined by the relevant disciplinary body'.<sup>111</sup> Hayne J was the only judge in the majority to refute the suggestion that recognition of wrongful life actions is necessary to encourage careful medical practice. He observed that for

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105 For example, *O'Shea v Sullivan* (1994) Aust Torts Reports 81–273.

106 For example, *Pal*, above n36.

107 *Harriton*, above n1 at 455–456 (Crennan J).

108 *Harriton*, *ibid*.

109 See above n70. In this case, the High Court unanimously rejected the proposition that social workers and doctors owed a duty of care to the father of a child that they examined on suspicion of sexual abuse, for damage caused by the negligent way in which their investigations were carried out.

110 *Harriton*, above n1 at 414–415 (Kirby J).

111 *Id* at 438 (Callinan J).

causation to be established in wrongful life cases, a plaintiff would have to demonstrate that his or her mother would have terminated the pregnancy once warned of the risk of disability.<sup>112</sup> His Honour reasoned that because a doctor's ultimate liability would depend upon the individual decision of his or her patient regarding termination of the pregnancy, recognition of the asserted duty 'would, at best, have only indirect effects on the promotion of careful medical practice.'<sup>113</sup>

Hayne J's argument ignores the fact that the duty of care owed by medical practitioners is often mediated by the subjective decisions of individual patients. This is the case, for example, with respect to a doctor's duty to warn of risks material to a particular procedure or treatment.<sup>114</sup> A doctor who fails to warn a patient will only be liable if it can be shown that the patient would have chosen not to undergo the procedure upon hearing of its attendant risks.<sup>115</sup> Yet this does not mean that the law should refrain from imposing a duty upon doctors to warn their patients. Nor does it mean that doctors will refrain from warning simply because any potential liability depends upon patients proving that they would have made a particular decision.<sup>116</sup> Similar questions of causation arise across the spectrum of negligence cases, and are not a convincing reason for refusing to acknowledge a duty of care.

## 6. Conclusion

The choice faced by courts when deciding the validity of wrongful life actions is not an appealing one. Both of the available options are beset by problems and inadequacies. The difficulties associated with proving harm are certainly not easy to surmount. To do so requires the making of imprecise value judgments, and a certain amount of line drawing. However, these difficulties *are* surmountable, a fact that is easy to forget if undue emphasis is placed on the narrow, logical analysis of the majority. Further, there is every reason to conquer them in the case of a plaintiff who has suffered the most grievous injuries due to the negligence of a medical practitioner. Logic might have demanded the outcome reached by the High Court in *Harriton*, but fairness demands another.

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112 Id at 433–434 (Hayne J).

113 Id at 434 (Hayne J).

114 *Rogers v Whitaker* (1992) 175 CLR 479.

115 Instead of proving that they would have abstained from the particular procedure or treatment altogether, patients in failure to warn cases may also succeed by proving that they would have pursued an alternative, safer path (such as finding a more qualified surgeon or delaying surgery until such time as the risk was diminished: see, for example, *Chappel v Hart* (1998) 195 CLR 232).

116 Of course, wrongful life cases can be distinguished from failure to warn cases on the basis that the person responsible for making the decision is not the person to whom the relevant duty is owed. But such a distinction is not relevant to the question of whether a duty of care serves to promote prudent medical practice.