

LEGAL AND ETHICAL CONTROVERSIES OF WRONGFUL BIRTH AND WRONGFUL LIFE CLAIMS IN REPRODUCTIVE HEALTH

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ABSTRACT

The concepts of wrongful birth and wrongful life are controversial legal issues that arise when a child is born as a result of a healthcare provider's negligence, such as failure to diagnose a condition, provide proper genetic counselling, or perform an abortion. Wrongful birth refers to a claim brought by parents who argue that they were denied the opportunity to prevent the birth of a child, typically due to medical error, while wrongful life is a claim made on behalf of the child, arguing that they should never have been born due to the same type of negligence. The damages in these cases typically revolve around the costs of raising a child with disabilities or other conditions that were not anticipated by the parents. The legal frameworks for such claims vary across jurisdictions, with some courts recognising the right to recover damages, while others reject these claims based on philosophical, ethical, or practical concerns. This paper explores the legal principles, controversies, and ethical implications surrounding these types of claims.

1.0 INTRODUCTION

The claims for "wrongful birth" of a healthy or disabled child and "wrongful life",¹ are recent developments in medical jurisprudence. Such claims are usually determined by the general principles of tort law, but inevitably the prevailing views within the courts across the jurisdictions turn to the moral questions in which policy considerations loom large.²

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¹ Kelly E. Rhinehart, *The Debate Over Wrongful Birth and Wrongful Life* (2002) 26 Law & Psychol. Rev 141, at 155-156, stated: "Wrongful life is a legal cause of action in which a congenitally-diseased child sues the doctor, claiming that but for the negligence of the doctor, the child would not have been born into a life of pain and suffering."

² Two types of policy considerations are established in negligence: first, policy considerations which concern the actions, activities and connections between defendant and plaintiff, and whether it is reasonable to attribute duty of care, breach of duty, causation and remoteness of damage. In *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317, at 475, McHugh J stated: "... reasonable foreseeability is a compound conception of fact and value, policy considerations affecting the defendant or persons in similar situations arguably enter into the determination of whether the defendant ought reasonably to have foreseen that his or her acts or omissions were 'likely to injure your neighbour'. It is unnecessary in this case to determine whether that is so. But whether or not such policy matters are a factor in the foresight issue, the concept of 'likelihood' in Lord Atkin's formulation does not require the defendant to take into account remote possibilities of harm. The defendant is no more bound to take them into account than he or she is entitled to take into account only those risks whose chance of occurring is more probable than not. Rather as Walsh J said in *Miller Steamship Co Pty Ltd v Overseas Tankship (UK) Ltd*, the defendant must consider 'whether [a] risk exists, and if any such risk exists at all, whether it may reasonably be disregarded'. To go further and divide risks that must be avoided into those that are far-fetched or fanciful and those that are not is to attempt to give the subject of negligence a degree of definition that it cannot carry." Callinan J at 530-531, stated: "Whilst it may be accepted

In a claim for wrongful birth, where the mother or both parents complain for example, that a botched sterilisation resulted in the birth of an unplanned child, courts have taken different approaches regarding recovery on different heads of damages. The first allows full recovery without offset – upbringing and pregnancy costs irrespective of the health status of the child.³ The second allows full recovery with offset – upbringing costs, weighed against the benefits the child will bring.⁴ The third allows recovery for pregnancy and additional disability costs where either the child or mother is disabled.⁵ The fourth allows “pregnancy costs only” whether or not the child is disabled.⁶ The last approach denies recovery for either pregnancy or upbringing costs.⁷

In a claim for wrongful life, the child may, for example, have been born disabled, where the child’s mother had wrongful sterilisation or an unsuccessful abortion. The child argues that his or her very existence is “wrongful”, in the sense that the child’s life has been so blighted by injury or disability that it would have been preferable that he or she had not come into existence. Clearly, the philosophical and ethical issues here are formidable. In these cases; somewhat similar to the wrongful birth litigation, there are three approaches to recovery. The first approach allows recovery of general damages – pain, suffering, and disability costs.⁸

that a plaintiff is entitled to avail herself of whatever remedies are available to her, it is important that a decision and the reasoning leading to it, in an unusual case, which this one is, be in harmony with, so far as is possible, available related causes of action, and the common law as a whole or, as it was put by this court in *Sullivan v Moody* (2001) 183 ALR 404, at 416, that they not offend the ‘coherence of the law.’ The facts of this case might conceivably have given rise to actions in negligent misstatement (if that action is not confined to claims for economic loss) and defamation. That these causes of action may also be available on the facts of the case, and would then be governed by special rules affected by policy considerations, is relevant to the question whether the appellant should recover damages for ‘nervous shock’ on the basis of those facts.” Secondly, policy considerations may take a further step beyond actions, activities and connections between defendant and plaintiff, on further considerations, whether or not liability is necessary on moral or social grounds. In *Caparo Industries Plc v Dickman* [1990] 2 AC 605, at 633, Lord Oliver stated: [L]imits have been found by the requirement of what has been called a ‘relationship of proximity’ between plaintiff and defendant and by the imposition of a further requirement that the attachment of liability for harm which has occurred be ‘just and reasonable.’ But although the cases in which the courts have imposed or withheld liability are capable of an approximate categorisation, on looks in vain for some common denominator by which the existence of the essential relationship can be tested. Indeed it is difficult to resist a conclusion that what have been treated as three separate requirements are, at least in most cases, in fact merely facets of the same thing, for in some cases the degree of foreseeability is such that it is from that alone that the requisite proximity can be deduced, whilst in others the absence of that essential relationship can most rationally be attributed simply to the court’s view that it would not be fair and reasonable to hold the defendant responsible. ‘Proximity’ is, no doubt, a convenient expression so long as it is realised that it is no more than a label which embraces not a definable concept but merely a description of circumstances from which, pragmatically, the courts conclude that a duty of care exists. There are, of course, cases where, in any ordinary meaning of the words, a relationship of proximity (in the literal sense of ‘closeness’) exists but where the law, whilst recognising the fact of the relationship, nevertheless denies a remedy to the injured party on the ground of public policy.”

³ *Cattanach v Melchior* (2003) 215 CLR 1.

⁴ *Udale v Bloomsbury Area Health Authority* [1983] 1 WLR 1098.

⁵ *Emeh v Kensington and Chelsea and Westminster Area Health Authority* [1985] 1 QB 1012.

⁶ *McFarlane v Tayside Health Authority* [2000] 2 AC 59.

⁷ *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309.

⁸ *Curlender v Bio-Science Laboratories* (1980) 106 Cal. App. 3d 811.

The second approach allows special damages, which includes medical costs,⁹ while the last approach denies recovery completely on the basis of lack of legally cognizable injury.¹⁰

From this analysis, case law will be examined from USA, UK, Canada, Australia, Ireland and other African countries.

2.0 WRONGFUL BIRTH CLAIMS

The plaintiff under this claim must proof four elements of negligence against the defendant that:

- (a) there was in existence of a patient-doctor relationship between the parties;
- (b) the doctor negligently failed to disclose to the parents the risk of having a child with a genetic or congenital disease;
- (c) the plaintiff suffered damage; and
- (d) the doctor's negligence caused that damage.¹¹

The award of damages which courts consider under this situation includes pregnancy costs and upbringing costs.

In the United States, there are divergent decisions on birth torts which are a matter for State, rather than Federal, law. An action for wrongful birth and wrongful life was first considered in *Gleitman v Cosgrove*.¹² The parents of a rubella syndrome child brought an action against a physician on three counts who allegedly had advised them that the mother's contraction of rubella during pregnancy would not affect the foetus. The first count was on behalf of the plaintiff for his birth defect, the second count was by his mother for the effects on her

⁹ *Turpin v Sortini* (1982) 31 Cal.3d 220.

¹⁰ *McKay v Essex Area Health Authority* [1982] 1 QB 1166; *Harriton v Stephens* (2006) 226 CLR 52. McMahon & Binchy, *Law of Torts* (4th ed, Bloomsbury professional 2013), para 33.51: "Let us now consider the developing law on claims for 'wrongful birth' and 'wrongful life'. This subject can best be understood in the light of changes internationally in science, technology and culture. Formerly, life tended to be regarded with awe, most generally expressed in religious or quasi-religious terms. Abortion, euthanasia and suicide were considered violative of the obligation resting on everyone to respect the right to life. Social attitudes, backed by law, sought to channel the creation and rearing of children into the model of lifelong marriage. Today, the international picture is quite different. Against the backdrop of reduced adherence to religious values and a greater emphasis on individualised norms of autonomy and privacy, there is widespread legalised access to abortion and contraception; assisted human reproduction involves the creation of embryos outside the womb, as well as previously unimaginable processes of gestational surrogacy, backed by pre-implantation genetic testing."

¹¹ In *Becker v Schwartz* (1978) 46 N.Y 2d 401, at 410, the New York Court of Appeals analysed the common law jurisprudence on "wrongful life", "wrongful birth" or "wrongful conception" and stated that: "Irrespective of the label coined, plaintiffs' complaints sound essentially in negligence or medical malpractice. As in any cause of action founded upon negligence, a successful plaintiff must demonstrate the existence of a duty, the breach of which may be considered the proximate cause of the damages suffered by the injured party." Similarly, the United Kingdom Court of Appeal in *Emeh v Kensington and Chelsea and Westminster Area Health Authority* [1985] 1 QB 1012, at 1028, had admitted that both wrongful conception and wrongful birth are recognised types of damage. Purchas LJ stated: "... I see no reason for the courts to introduce into the perfectly ordinary, straightforward rules of recovery of damages, whether they are damages flowing from a breach of contract or from tort, ... The ordinary rules of remoteness of damage, once the question of a break in the causation has been disposed of, can apply equally well to cases of this sort."

¹² (1967) 227 A.2d 689; 49 N. J 22.

emotional state caused by her son's condition, while the third count was by his father for the costs incurred in caring for the plaintiff.

The Supreme Court of New Jersey denied the wrongful life because it considered that it was impossible to measure damages between non-existence and existence¹³; likewise, the parents' claim for wrongful birth¹⁴: the Supreme Court was of the view that the plaintiff's cause of action did not give rise to damages cognizable at law¹⁵.

The Supreme Court of New Jersey also rejected the parents' wrongful birth claim. However, in *Berman v Allan*,¹⁶ the Supreme Court of New Jersey overruled¹⁷ *Gleitman v Cosgrove*¹⁸ in

¹³ (1967) 227 A.2d 689, at 692; 49 N. J. 22, at 28, Proctor J stated: "The normal measure of damages in tort actions is compensatory. Damages are measured by comparing the condition plaintiff would have been in, had the defendants not been negligent, with plaintiff's impaired condition as a result of the negligence. The infant plaintiff would have us measure the difference between his life with defects against the utter void of non-existence, but it is impossible to make such a determination. This Court cannot weigh the value of life with impairments against the non-existence of life itself. By asserting that he should not have been born, the infant plaintiff makes it logically impossible for a court to measure his alleged damages because of the impossibility of making the comparison required by compensatory remedies."

¹⁴ *Ibid.*, at 29, Proctor J stated: "The mother and father stand in a somewhat different position from the infant. They are equally subject to the factual circumstance that no act by the defendants could have decreased the likelihood that the infant would be defective. ... A considerable problem is raised by the claim of injury to the parents. In order to determine their compensatory damages a court would have to evaluate the denial to them of the intangible, unmeasurable, and complex human benefits of motherhood and fatherhood and weigh these against the alleged emotional and money injuries. Such a proposed weighing is similar to that which we have found impossible to perform for the infant plaintiff. When the parents say their child should not have been born, they make it impossible for a court to measure their damages in being the mother and father of a defective child."

¹⁵ *Gleitman v Cosgrove* (1967) 227 A.2d 689; 49 N. J. 22, at 30-31, Proctor J stated: "The right to life is inalienable in our society. A court cannot say what defects should prevent an embryo from being allowed life such that denial of the opportunity to determine the existence of a defective child in embryo can support a cause for action. Examples of famous persons who have had great achievements despite physical defects come readily to mind, and many of us can think of examples close to home. A child need not to be perfect to have a worthwhile life. ... Though we sympathize with the unfortunate situation in which these parents find themselves, we firmly believe the right of their child to live is greater than and precludes their right not to endure emotional and financial injury. We hold therefore that the second and third counts of the complaints are not actionable because the conduct complained of, even if true, does not give rise to damages cognizable at law; and even if such alleged damages were cognizable, a claim for them would be precluded by countervailing public policy supporting the preciousness of human life."

¹⁶ (1979) 80 N. J. 421.

¹⁷ *Ibid.*, at 431-432, Pashman J held: "In light of changes in the law which have occurred in the 12 years since *Gleitman* was decided, the second ground relied upon by the *Gleitman* majority can no longer stand in the way of judicial recognition of a cause of action founded upon wrongful birth. The Supreme Court's ruling in *Roe v Wade* (1973) 410 U.S. 113, clearly establishes that a woman possesses a constitutional right to decide whether her foetus should be aborted, at least during the first trimester of pregnancy. Public policy now supports, rather than militates against, the proposition that she not be impermissibly denied a meaningful opportunity to make that decision. As in all other cases of tortious injury, a physician whose negligence has deprived a mother of this opportunity should be required to make amends for the damage which he has proximately caused. Any other ruling would in effect immunize from liability those in the medical field providing inadequate guidance to persons who would choose to exercise their constitutional right to abort fetuses which, if born, would suffer from genetic defects."

¹⁸ (1967) 227 A.2d 689, 49 N. J. 22.

the light of the decision of the United States Supreme Court in *Roe v Wade*¹⁹ on the constitutional right of access to abortion.

After *Roe v Wade*,²⁰ courts generally became willing to recognise claims for wrongful birth claims arising from the negligence of doctors who failed to diagnose or inform the mother of the child's potential deformity which the mother has a constitutional right whether or not to carry the foetus to term²¹.

In the United Kingdom, the successive developments of wrongful birth claims followed the English Court of Appeal decision which allowed damages for losses arising from the pregnancy in a wrongful birth of a healthy child by a woman who had undergone a negligently performed and unsuccessful abortion in *Scuriaga v Powell*.²² It was a claim brought for breach of contract but not in negligence and there was no claim for upbringing costs. Watkins J rejected public policy arguments that award of damages would make the child unhappy. However, public policy considerations were considered in *Udale v Bloomsbury Area Health Authority*.²³ Jupp J said:

[t]he considerations that particularly impress me are these: (1) It is highly undesirable that any child should learn that a court has publicly declared his life or birth to be a mistake – a disaster even –and that the he or she is unwanted or rejected. Such pronouncements would disrupt families and weaken the structure of society. (2) A plaintiff such as Mrs. Udale would get little or no damages because her love and care for her child and her joy, ultimately, at his birth, would be set off against and might cancel out the inconvenience and financial disadvantages which naturally accompany parenthood. By contrast, a plaintiff who nurtures bitterness in her heart and refuses to let her maternal instincts take-over would be entitled to large damages. In short virtue would go unrewarded; unnatural rejection of womanhood and motherhood would generously compensated. This, in my judgment, cannot be just. (3) Medical men would be under subconscious pressure to encourage abortions in order to avoid claims for medical negligence which would arise if the child were allowed to be born. (4) It has been assumption of our culture from time immemorial that a child coming

¹⁹ (1973) 410 U.S. 113, the United States Supreme Court stated the circumstances in which the woman's right to abortion and the State's right to protect *potential* life, held thus: (a) at 150, that a foetus is not a person but "*potential*" life is involved; (b) at 153, the right of privacy is broad enough to encompass a woman's decision whether or not to terminate her pregnancy, (c) at 163, for the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician, (d) at 163, for the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health, (e) at 163-164, for the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

²⁰ *Roe v Wade* (1973) 410 U.S. 113.

²¹ *Ibid.* See *Becker v Schwartz* (1978) 46 NY 2d 401; *Greco v United States* (1995) 893 P.2d 345, *Bader v Johnson* (1997) 675 NE 2d 1119.

²² (1979) 123 SJ 406. (Unreported). See Michael Jones, *Medical Negligence* (4th ed, Sweet & Maxwell 2008).

²³ [1983] 1 WLR 1098.

into the world, even if, as some say, ‘the world is a vale of tears’, is a blessing and an occasion for rejoicing. ... One may look at the cost of the layette and the sudden necessity of having to find more ample accommodation in assessing the damages for the unwanted pregnancy, without regarding the child as unwanted. One has to bear in mind here that the child has, up until the age of 4 years 2 months, in fact lived in that house without the extension. It has not of course been built. Accordingly, in my view, it is proper to increase the award of damages with this in mind when awarding general damages for the pain, suffering, inconvenience, anxiety and the like ...”²⁴

In *Emeh v Kensington and Chelsea and Westminster Area Health Authority*,²⁵ the Court of Appeal rejected the policy arguments to recover damages for the birth of a child, whether healthy or disabled, as a result of unsuccessful sterilisation operation²⁶.

Similarly in *Thake v Maurice*,²⁷ the Court of Appeal disregarded policy considerations for pain and suffering, although recovery for upbringing costs was denied²⁸.

In more recent times, the House of Lords in *McFarlane v Tayside Health Authority*²⁹ held that a claim for the costs of caring for a healthy, normal child was a claim for pure economic loss in respect of which it had to be shown that it was fair, just and reasonable to impose liability, and, in the circumstances, the claim did not satisfy the requirement of being fair, just, and reasonable³⁰. However, the wife’s claim for expenses caused directly by the

²⁴ *Udale v Bloomsbury Area Health Authority* [1983] 1 WLR 1098, at 1109-1110.

²⁵ [1985] 1 QB 1012.

²⁶ *Ibid.*, at 1021-1022, Waller LJ stated: “I do not find the arguments in favour of the public policy objection convincing. If public policy prevents a recovery of damages, then there might be an incentive on the part of some to have late abortions. On the other hand, damages can be awarded which may in some cases be an encouragement and help to bring up an unplanned child. I see the comparison which can be made between the case of a child whose mother receives damages, and the case of another child whose mother does not, as being something which is unfortunate, but which is something which cannot be helped. ... the court should not be too ready to lay down lines of public policy; and I would reject the argument ... that public policy requires that damages should be confined in the way in which it has been submitted.”

²⁷ [1986] 1 QB 644.

²⁸ *Ibid.*, at 683, Kerr LJ stated: “... I respectively differ from ... the claim for ante-natal pain and suffering should be extinguished by the happiness of the post-natal events. The joy of parents at the birth of a healthy child, though with the consequent time and trouble which needs to be devoted to its upbringing, are both virtually impossible to assess in terms of money. It is therefore right that in law they should be treated as cancelling each other out. But awards of damages for pain and suffering are an everyday feature of our law, and it was not suggested on behalf of the defendant that such damages are irrecoverable in principle for the discomfort and pain of pregnancy and delivery when these occur normally and without adverse incidents.”

²⁹ [2000] 2 AC 59.

³⁰ *Ibid.*, at 95, Lord Hope stated: “In the light of the very different solutions which have been adopted in these various jurisdictions it is, I think, possible to draw these conclusions. The question for the court is ultimately one of law, not of social policy. If the law is unsatisfactory, the remedy lies in the hands of the legislature. It can be changed by the Scottish Parliament. As to the law, it has not been suggested that the costs of rearing the child are too remote, in the sense that they were not a reasonably foreseeable consequence of the defender’s negligence. For my part, I would regard these costs as reasonably foreseeable by the wrongdoer. But in the field of economic loss foreseeability is not the only criterion that must be satisfied. There must be a relationship of

pregnancy and birth was allowed³¹.

The plaintiffs were a married couple with four children and they decided that they did not want any more children and that the husband should undergo a vasectomy. The operation was performed and the husband submitted sperm samples to the hospital where a surgeon employed by the defendants informed the husband that his sperm counts were negative and that contraceptive measures were no longer necessary. The plaintiffs acted on that advice; however, the wife became pregnant and, after a normal pregnancy and labour, gave birth to a healthy child.

The plaintiffs brought two claims against the defendant for wrongful conception on behalf of the wife for the pain and suffering, and wrongful birth on behalf of both plaintiffs for the upbringing costs.

The House of Lords awarded the plaintiffs general damages of a conventional sum for denial of their personal autonomy to limit their size of the family and being the victims of legal wrong.

On the claim for wrongful birth, the House of Lords unanimously agreed by different approaches with different reasons on legal policy that neither the wife nor husband could be allowed recovery for the upbringing of a healthy child in view of the incongruity that would be involved in imposing a maintenance obligation on defendant while allowing the parents to retain the joys and benefits of parenthood.

Their Lordships applied two approaches: first, distributive justice,³² and secondly, whether it would be fair, just and reasonable to impose liability.³³

Lord Slynn in his speech balked at extending the duty of care owed to the plaintiffs to cover economic loss³⁴. However, Lord Steyn premised his decision on the theory of distributive

proximity between the negligence and the loss which is said to have been caused by it and the attachment of liability for the harm must be fair, just and reasonable. The mere fact that it was reasonably foreseeable that the pursuers would have to pay for the costs of rearing their child does not mean that they have incurred a loss of the kind which is recoverable.”

³¹ *Ibid.*, at 84, Lord Steyn stated: “The considerations of distributive justice which militated against the claim for the cost of bringing up Catherine do not apply to the claim for a solatium. The constituent elements of a claim in delict are present. There is nothing objectionable to allowing such a claim. And such limited recovery is supported by a great deal of authority worldwide.”

³² *McFarlane v Tayside Health Authority* [2000] 2 AC 59, Lords Steyn, Clyde, and Millett.

³³ Lords Slynn and Hope.

³⁴ Lord Slynn stated (at 75): “The doctor undertakes a duty of care in regard to the prevention of pregnancy: it does not follow that the duty includes also avoiding the costs of rearing the child if born and accepted into the family. Whereas I have no doubt that there should be compensation for the physical effects of the pregnancy and birth, including of course solatium for consequential suffering by the mother immediately following the birth, I consider that it is not fair, just or reasonable to impose on the doctor or his employer liability for the consequential responsibilities, imposed on or accepted by the parents to bring up a child. The doctor does not assume responsibility for those economic losses. If a client wants to be able to recover such costs he or she must do so by an appropriate contract.”

justice of individuals on morality and law as opposed to the duty of care³⁵. Lord Steyn concluded thus:

[I]t is legitimate in the present case to take into account considerations of distributive justice. That does not mean that I would decide the case on grounds of public policy. On the contrary, I would avoid those quicksand. Relying on principles of distributive justice I am persuaded that our tort law does not permit parents of a healthy unwanted child to claim the costs of bringing up the child from a health authority or a doctor. If it were necessary to do so, I would say that the claim does not satisfy the requirement of being fair, just and reasonable.³⁶

In *Parkinson v St. James and Seacroft University Hospital NHS Trust*,³⁷ in a claim relating to the birth of a disabled child taken by healthy parents, the English Court of Appeal created an exception and distinguished its facts from those of the decision of the House of Lords in *McFarlane*'s case of a healthy child, and allowed recovery for extra cost of bringing up the disabled child. The plaintiff, a mother of four children living with her husband, was referred by her doctor to a hospital managed and administered by the defendants for a sterilisation operation. The operation was carried out negligently and ten months later the plaintiff conceived a child. The plaintiff was warned by a consultant at the hospital that the child might be born with a disability but she declined to have her pregnancy terminated, which resulted in the birth of her fifth child, who was born with severe disabilities.

The plaintiff brought a claim in negligence against the defendants and the trial court found for the plaintiff to recover damages for the costs of providing for her child's special needs relating to his disabilities but not for the basic costs of his maintenance.

On appeal, the Court of Appeal held that, in cases of wrongful birth, although parents were not able to recover the costs of upbringing and caring for a normal, healthy child from the health authority or doctor, since such claims did not satisfy the requirements of being fair, just and reasonable, they might be entitled to an award of compensation for the extra expenses associated with bringing up a child with a significant disability, since the birth of a child with congenital abnormalities was a foreseeable consequence of a surgeon's negligence. Hale LJ in finding for the plaintiff, proposed a "deemed equilibrium" theory³⁸, stating:

³⁵ Lord Steyn stated (at 82): "[T]o explain decisions denying a remedy for the cost of bringing up an unwarranted child by saying that there is no loss, no foreseeable loss, no causative link or no ground for reasonable restitution is to resort to unrealistic and formalistic propositions which mask the real reasons for the cost of bringing up an unwanted child the real reasons have been grounds of distributive justice. That is of course, a moral theory. It may be objected that the House must act like a court of law and not like a court of morals. That would only be partly right. The court must apply positive law. But judges' sense of the moral answer to a question, or the justice of the case, has been one of the great shaping forces of the common law. What may count in a situation of difficulty and uncertainty is not subjective view of the judge but what he reasonably believes that the ordinary citizen would regard as right. ... The truth is that tort law is a mosaic in which the principles of corrective justice and distributive justice are interwoven. And in situations of uncertainty and difficulty a choice sometimes has to be made between the two principles."

³⁶ *McFarlane v Tayside Health Authority* [2000] 2 AC 59, at 83.

³⁷ [2002] 1 QB 266.

³⁸ *Parkinson v St. James and Seacroft University Hospital NHS Trust* [2002] 1 QB 266, at 293-294.

The difference between a normal and a disabled child is primarily in the extra care that they need, although this may bring it with extra expenditure. It is right, therefore, that the parent who bears those **extra** burdens should have a claim.³⁹

Two years later, the House of Lords reconsidered this approach in *Rees v Darlington Memorial Hospital NHS Trust*.⁴⁰ The plaintiff, who was severely visually handicapped and feared that her lack of sight would prevent her from being able to care for a child, underwent a sterilisation operation which was negligently performed at a hospital managed by the defendants. The plaintiff subsequently conceived and gave birth to a healthy child whose father did not wish to be involved with his upbringing. The plaintiff brought a claim in negligence against the defendants.

At trial, the judge held that she was not entitled to recover damages for any of the costs of providing for the child. On appeal, the majority of the Court of Appeal concluded that, although damages could not be recovered in respect of costs arising from the birth of a healthy child, in the case of a child born with a disability it was fair, just and reasonable for the parent who was disabled to recover by way of damages the additional costs attributable to her disability in bringing up the child.

The defendants further appealed to the House of Lords. The issue for consideration was whether the additional costs of bringing up a normal, healthy child which are attributable to the fact that one of the parents is disabled are recoverable while the plaintiff sought the extension in *Parkinson's* case and moved the House of the Lords to depart from its previous decision in *McFarlane's* case. Thus, the decision of the Court of Appeal was reversed, their Lordship's holding by a majority of four⁴¹ to three⁴² that since, having regard to the impossibility of quantifying the benefits of parenthood and the inappropriateness of regarding a child solely as a financial liability, considerations of what was fair, just and reasonable and principles of distributive justice precluded an award of damages against a doctor or health authority in respect of the costs of bringing up a normal healthy child, the claimant could not recover any such costs nor those extra costs which might be preferable to her disability; but that since she was the victim of a legal wrong which had denied her the opportunity to live in the way she had planned, it was unjust that she should be denied any recompense, apart from an award relating to the pregnancy and birth only, and that, accordingly, a measure of recognition for that wrong would be afforded by a conventional award in the sum of £15,000.

³⁹ *Ibid.*, at 295.

⁴⁰ [2004] 1 AC 309.

⁴¹ Lords Bingham, Nicholls, Millett and Scott.

⁴² Lords Steyn, Hope and Hutton.

The majority decision of the House of Lords formulated a new rule without differentiation⁴³ as a "gloss" on the decision in *McFarlane*'s case to compensate the plaintiff for pregnancy and birth costs rather than making award for extra costs on condition of her disability. Lord Bingham stated:

This solution is in my opinion consistent with the ruling and rationale of *McFarlane*. The conventional award would not be, and would not be intended to be, compensatory. It would not be the product of calculation. But it would not be nominal, let alone a derisory, award. It would afford some measure of justice than the pure *McFarlane* rule.⁴⁴

Lord Millett observed that the award of a modest sum would not go far towards the costs of rearing a child:

It would not reflect the financial consequences of the birth of a normal, healthy child; but it would not be meant to. They are not the proper subject of compensation for the reasons stated in *McFarlane*. A modest award would, however, adequately compensate for the very different injury to the parents' autonomy; moreover it would be available without proof of financial loss, and so would not attract the distaste or moral repugnance which was the decisive factor in *McFarlane*.⁴⁵

Lord Steyn, in his dissenting speech⁴⁶, stated:

Unlike the position of the disabled child, it is not possible to regard the disabled mother of a healthy and normal child as unaffected by the principle in *McFarlane*. On the contrary, an award of damages in the present case is only possible if an exception is created. That this is so becomes even clearer

⁴³ *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309, Lord Bingham stated (at 317-318): "I would for my part apply this rule ..., without differentiation, to cases in which either the child or the parents is (or claims to be) disabled. (1) While I have every sympathy with the Court of Appeal's view that Mrs Parkinson should be compensated, it is arguably anomalous that the defendant's liability should be related to a disability which the doctor's negligence did not cause and not to the birth which it did. (2) The rule favoured by the Court of Appeal majority in the present case inevitably gives rise to anomalies such as those highlighted by Waller LJ in paragraphs 53-54 of his dissenting judgment. (3) It is undesirable that parents, in order to recover compensation, should be encouraged to portray either their children or themselves disabled. There is force in the points made by Kirby J in paragraphs 163-166 of his judgment in *Melchior*. (4) In a case such as ours, which seeks to make public provision for the consequences of disability, the quantification of additional costs attributable to disability, whether of the parent or the child, is a task of acute difficulty. This is highlighted by the inability of the claimant in this appeal to give any realistic indication of the additional costs she seeks to recover."

⁴⁴ *Ibid*, at 317.

⁴⁵ *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309, at 350.

⁴⁶ *Ibid*., at 328, Lord Steyn stated: "I regard the idea of a conventional award in the present case as contrary to principle. It is a novel procedure for judges to create such a remedy. There are limits to permissible creativity for judges. In my view the majority have strayed into forbidden territory. It is also a backdoor evasion of the legal policy enunciated in *McFarlane*. If such a rule is to be created it must be done by Parliament. The fact is, however, that it would be a hugely controversial legislative measure. It may well be that the Law Commissions and Parliament ought in any event, to consider the impact of the creation of a power to make a conventional award in cases under consideration for the coherence of the tort system."

if one considers the grounds of legal policy which underpin *McFarlane* as I have explained them.⁴⁷

Lord Hutton, also dissenting, considered that where the mother is disabled, it is not unjust, unfair or unreasonable to award damages for the extra costs of bringing up the child⁴⁸. He stated:

In considering whether damages should be awarded there is, in my view, a clear distinction between a disabled mother and a mother in normal health. It is right, in my opinion, to recognise and give effect to this distinction in laying down a principle to guide courts of first instance notwithstanding that a mother who is not disabled may face the serious difficulties... The fact that hard cases can be pointed to very close to the line which divides recovery from non-recovery does not invalidate the principle itself.⁴⁹

In Canada, the courts are not disposed to award recovery for healthy children. In *Kealey v Berezowski*,⁵⁰ the plaintiff, who had two children and did not want another child, attended the defendant for tubal litigation which failed and resulted to the birth of the third child, healthy and normal. The plaintiff brought an action for damages for the costs of rearing the child. The Ontario Supreme Court referred to public policy considerations which impose an obligation on parents to maintain the child, and denied recovery for upbringing costs of the child⁵¹. Lax J concluded:

The particular damage sustained in this case is an unplanned and undesired pregnancy. There is no damage caused by the defendant's negligence which prevents Ashley's parents from fulfilling their responsibilities to her or compromises in any way the relationship of mutual support and dependency which, as matter of law, arose on her birth. Accordingly, the child-rearing costs in this case are not a compensable loss.⁵²

⁴⁷ *Ibid.*, at 325.

⁴⁸ *Ibid.*, at 342.

⁴⁹ *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309, at 342.

⁵⁰ (1996) 136 DLR (4th) 708.

⁵¹ *Ibid.*, at 739-740, Lax J stated: "From the moment of birth, parents and children have mutual obligations to care for and support one another. Parents have a legal duty to provide the 'necessaries of life' to their children failing which they are subject to criminal sanctions: ... Every parent has an obligation to provide support to a child, in accordance with need, during the dependency: ... Children have a corresponding obligation to support their parents if able to do so. ... If public policy must be invoked, these statutory provisions suggest to me that, as a matter of public policy, the financial responsibilities associated with the care and upbringing of a child are the responsibilities of parents. In a wrongful pregnancy case, the question then becomes to what extent, if at all, the defendant's negligence impairs the plaintiff's ability to meet those responsibilities to the unplanned child or compromises the relationship of mutual support and dependency between parent and child. It is for this reason ... that in wrongful pregnancy cases, it is the court's function to find the interest which a successful sterilization would have protected in order to determine whether the consequences of the failed sterilization constitute a genuine injury or a 'blessed event'."

⁵² *Kealey v Berezowski* (1996) 136 DLR (4th) 708, at 740.

However, it appears that recovery for upbringing costs is not precluded by public policy where the parents had decided to limit their family size for economic reasons⁵³.

In a claim for disabled children, courts are more willing to allow recovery where the child is born with disability. In *Krangle v Brisco*,⁵⁴ the plaintiff's child was born with Down syndrome. The plaintiff brought a claim against the defendant for the cost of raising the child based on the defendant's failure to advise the plaintiff of availability of testing which would have revealed the Down syndrome, in which case she would have had an abortion. The trial court allowed recovery for the costs of supporting the child up to the age of 19 but declined to award damages after that age on the ground that it was in his best interest as an adult go then to a publicly funded group home. Shortly after the trial, the support provisions of the British Columbia *Family Relations Act* 1996 were amended⁵⁵. The plaintiff appealed to the Court of Appeal and argued that she would continue to provide for the needs of the child even after he turned age 19. The majority allowed the appeal, while McEachem CJ B.C., dissenting, stated "that to apply the recently amended provisions to this case would deprive the defendant of a vested right".

The issue before the Supreme Court of Canada was whether the parents were entitled to damages for the cost of caring for adult care. The Court held that they were not. McLachlin CJ stated:

When a disabled person becomes an adult, the burden of his or her care shifts from the parents to society as a whole, and it is accepted as and just that the continued burden of care of disabled adults should be spread over society generally. At one time, it may well have been the moral responsibility of parents to care for a disabled child for as long as they lived. But for some decades now, that moral responsibility has shifted to British Columbia society as a whole, as expressed by legislation enacted and preserved by successive governments. No evidence was presented for the proposition that it is shameful or wrong for parents to accept the benefits provided by the government which allow adult disabled children to be cared for under the social security network of the state. Great as social and medical progress may be, disability will inevitably strike some members of society, randomly and irrationally. It is not immoral for a society to say that when this happens, the burden will not be confined to the individual and his family, but will be shared by society as a whole.⁵⁶

⁵³ *Kealey v Berezowski* (1986) 136 DLR (4th) 708, at 738, Lax J stated: "... public policy arguments are not determinative of the issue here one way or the other. Moreover, to draw a distinction between children born with disabilities and those born healthy seems wrong. Every life has value. But, the financial and emotional burdens imposed on parents who are charged with the responsibility of caring for a disabled child are far more apparent to me than the financial and emotional burdens imposed on the [plaintiffs] here. I do not think that this is merely a question of the measure of damages. Rather, it goes to the question of whether or not there is in fact an injury to redress."

⁵⁴ [2002] 1 SCR 205.

⁵⁵ Family Relations Act, R.S.B.C. 1996, c. 128, were amended by S.B.C. 1997, c. 20. Section 88(1) stated that "[e]ach parent of a child is responsible and liable for the child's support. Section 87 defined 'child' as including an adult over age 19 who 'is unable, because of illness, disability or other cause, to withdraw from their charge or to obtain the necessities of life'".

⁵⁶ *Krangle v Brisco* [2002] 1 SCR 205, at para 40.

In Australia, prior to the decision in *Cattanach v Melchior*⁵⁷, the New South Wales Court of Appeal in *CES v Superclinics (Australia) Pty Ltd*⁵⁸ where the plaintiff claimed damages for the loss of an opportunity to terminate pregnancy, allowed damages for pregnancy costs but denied upbringing costs.⁵⁹ Priestley JA stated:

... the plaintiff chose to keep her child. The anguish of having to make the choice is part of the damage caused by the negligent breach of duty, but the fact remains, however compelling the psychological pressure on the plaintiff may have been to keep the child, the opportunity of choice was in my opinion real and the choice made was subsequent cost of rearing the child. ... The plaintiff, having chosen to keep the child in the human way that as I have said I think most people in the community would approve of, is not entitled to damages for the financial consequences of having made that difficult but ordinary human choice.⁶⁰

In *Cattanach v Melchior*,⁶¹ the plaintiffs had agreed not to have more children on account of their financial situation; they already had two children. The first named plaintiff went for tubal ligation to be performed by the defendant. The procedure was unsuccessful and the first named plaintiff became pregnant, which resulted to the birth to a healthy child. The plaintiffs brought a claim for damages for the costs of raising and maintaining the child. The defendant argued that the birth of a healthy child was not a physical damage to the first named plaintiff and should not be compensated.

The only fundamental issue before the Court was whether parents could recover the costs of rearing a healthy child arising from the negligence of the defendant. The High Court of Australia, by a majority of four⁶² to three⁶³, allowed damages for the cost rearing a healthy child. Kirby J stated:

The comparatively modest amount allowed in this case evidences no exaggerations or excess. Such amounts have been allowed in the past in Australia, England, South Africa and elsewhere without promoting legislative intervention. Keeping in mind the financial costs of the care of the child, the allowance for the costs of child-rearing is hardly exceptional in terms of common law principle. To deny it would be. Any such denial

⁵⁷ [2003] 215 CLR 1.

⁵⁸ (1995) 38 NSWLR 47.

⁵⁹ In *Dahl v Purnell* (1993) 15 QLR 33, the District Court of Queensland allowed full recovery for the birth of a child arising from a failed vasectomy on the application of tort principles. Pratt DCJ held, at 13: "It can now be accepted that notions of public policy would not be a bar in the United Kingdom to recovery in an unwanted child case under the heads of damage with which this Court is concerned. In my opinion the same approach should be taken in Queensland."

⁶⁰ *CES v Superclinics* (1995) 38 NSWLR 47, at 78-79.

⁶¹ (2003) 215 CLR 1.

⁶² McHugh, Gummow, Kirby and Callinan JJ.

⁶³ Gleeson CJ, Hayne and Heydon JJ.

would be arbitrary. As such, denial is the business, if of anyone, of Parliament not the courts.⁶⁴

Thus, the High Court of Australia rejected the decision of the House of Lords, on similar facts, in *McFarlane v Tayside Health Board*.⁶⁵ McFarlane's approach was supported by Gleeson CJ in *Cattanach v Melchior*⁶⁶ in his minority judgment⁶⁷.

In Ireland, the approach of the courts to birth torts irrespective of a healthy or disabled child is affected by a constitutional provision as to the right to life.⁶⁸

Thus, wrongful birth claims arising from foetal abnormality or negligence of a doctor will be defeated on basis that there is no entitlement to an abortion unless there is a substantial risk to the life of the mother.⁶⁹

The Irish jurisprudence, having regard to decisions of other common law countries considers the birth of a child to be a blessing. This view was supported in *Byrne v Ryan*,⁷⁰ which denied to compensation for child rearing expenses, having regard to Article 40.3.3 of the Constitution. The female plaintiff underwent a tubal ligation operation in order to be sterilised at the defendant's hospital. The operation was performed but later the female plaintiff discovered that she was pregnant. None of the doctors who attended to her during the course of her pregnancy had informed her that her sterilisation procedure had failed. The plaintiffs brought a claim for damages against the defendants.

⁶⁴ *Cattanach v Melchior* (2003) 215 CLR 1, at para 180.

⁶⁵ [2002] 2 AC 59.

⁶⁶ (2003) 215 CLR 1.

⁶⁷ *Ibid.*, at para 24-35, he stated: "... Medical negligence resulted in human reproduction and a parent-child relationship, from which flowed the obligations reflected in the damages that were awarded at trial. Attention is then concentrated upon some of the financial consequences of that relationship. ... The parent-child relationship is the immediate cause of the anticipated expenditure which the respondents seek to recover by way of damages. If they have suffered actionable damage, it is because of the creation that relationship and responsibilities it entails. ... The coming into existence of the parent-child relationship is critical to the actionable damage of which the respondents complain. That relationship has multiple aspects and consequences; some economic, and some non-economic; some beneficial to the parents, and some detrimental. The case for the respondents treat that relationship as a source of economic loss or harm for which the law of negligence will make the appellants liable in damages. ... The common law does not allow a person to treat his or her own birth as actionable damage, just as it does not allow the death of a human being to be complained of as an injury. Where it is the parent-child relationship that is in question, the law imposes obligations, in support and protection of the child, which are difficult to reconcile with a recognition of the relationship as damage. ... A child is not a commodity that can be sold, or otherwise disposed of, in order to mitigate hardship to a parent. The legal incidence of the parent-child relationship can only lawfully be avoided by adoption. ... The recognition of the family as the natural and fundamental group unit of society, which is repeatedly expressed in international instruments, in conjunction with declarations of the need to provide for the care and protection of children, is not easy to reconcile with the idea of the parent-child relationship as something the law will regard as an element of actionable damage."

⁶⁸ Article 40.3.3 states: "The State acknowledge the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right."

⁶⁹ In *Attorney-General v X* [1992] 1 IR 1, Finlay CJ stated (at 51): "The obligation to implement this guarantee is imposed not on the Oireachtas only, but on each branch of the State which exercises the powers of legislation, executing and giving judgment on those laws."

⁷⁰ [2009] 4 IR 542.

The court allowed recovery for general damages – pain, suffering and inconvenience during pregnancy and childbirth which were conceded by the defendant – but did not make an award for the costs of rearing the child. (The parents had not sought to assert such an entitlement.) Kelly J stated:

I am also of opinion that the conclusion which I have arrived at blends more harmoniously with the constitutional order which obtains in this jurisdiction than would a decision to the contrary. The value which the Constitution places upon the family, the dignity and protection which it affords to human life are matters which are, in my view, better served by a decision to deny rather than allow damages of the type claimed.⁷¹

In a related development in *Hurley Ahern v Moore*,⁷² the plaintiff, following a failed sterilisation carried out by the defendant, became pregnant and gave birth by emergency caesarean section. The court endorsed the approach to child-rearing costs that Kelly J had favoured in *Byrne's* case. As regards compensation for the actual pregnancy and birth, Ryan J held that the damage was not limited to the moment of birth alone but extended to the short period following birth, before the baby died, on the principle of foreseeability of damage⁷³.

In a wrongful birth claim, there are situations when defendant denies liability following refusal of the plaintiff to undergo abortion at early stage of the pregnancy for religious reasons or other matters. In *The Premier of the Western Cape Province v Loots NO*,⁷⁴ the plaintiff went for sterilisation at the defendant hospital which involved a laparoscopic intervention in respect of both fallopian tubes. It was later discovered that the defendant had mistakenly occluded the round ligaments of the plaintiff instead of her fallopian tubes, this means that the plaintiff had not been sterilised at all. The plaintiff, on discovery of the pregnancy, was advised the option of abortion, which she refused on religious grounds. The plaintiff brought a claim for damages arising from pain and suffering during the pregnancy and the subsequent birth, but not for child rearing costs.

The issue for consideration on causation was whether the defendant's negligent conduct was sufficiently linked to the damage suffered by the plaintiff or whether the plaintiff's decision

⁷¹ *Ibid.* Cf the decision of the Supreme Court of Appeal, South Africa in the case of *Stewart v Botha* [2008] ZASCA 84, at para 23-28.

⁷² [2013] IEHC 72.

⁷³ *Ibid.*, Ryan J stated: "I think it would be difficult to justify a rule that cut-off recovery in respect of tragic and affecting circumstances that framed and exacerbated the recoverable pain, suffering and inconvenience. The experiences that followed and resulted from the negligence in this case were a continuum. That might not arise in other circumstances; no two cases are the same as a review of the permutations of facts in the cases reveals. The defendants were negligent. The plaintiffs suffered injury, loss and damage as a result. It would be illogical as well as unjust to deny recovery of any damages or indeed of any significant part of the damages. The traumatic experiences and losses are in principle recoverable and there is no countervailing consideration in this case. The injury, pain, suffering, inconvenience, disappointment, nuisance and mental distress must together be taken into account. They arise from the defendants' wrong and amount to or are intimately associated with the compensable injuries and furnish the context of the suffering that resulted."

⁷⁴ [2011] ZASCA 32.

to continue with the pregnancy constituted a *novus actus interveniens*. The Court held that a sufficient causal connection had been established. Brand JA observed:

The fact that the refusal of an abortion became another factual cause of the same consequence does not detract from this reality. Yet it is recognised in principle that even where the plaintiff's conduct does not break the factual chain, it can still interrupt legal causation. But in order to qualify as a *novus actus interveniens* in the context of legal causation, the plaintiff's conduct must be unreasonable. Reasonable conduct on the part of the plaintiff cannot free the defendant from the imputation of liability. Even unreasonable conduct on the part of the plaintiff will not always absolve the defendant. Whether it will do so, depends on the facts of the particular case.⁷⁵

3.0 Wrongful life

I now turn to consider briefly claims for wrongful life, as distinct from wrongful birth. The plaintiff in a claim for wrongful life argues that his or her existence is, in itself, wrongful, on the basis that he or she suffers from such disabling or otherwise damaging injuries as to have rendered it preferable that he or she should not have been let live – most obviously by having never existed through contraception or by having been aborted at an early stage.⁷⁶

In *Curlender v Bio-Science Laboratories*,⁷⁷ the child of the plaintiffs was severely impaired by the defendants' negligence in conducting certain tests of the child's parent, which, if properly done, would have revealed whether either of the parents were carriers of genes which would result in the conception and birth of a child with Tay-Sachs disease. The California Court of Appeals held that an afflicted child could maintain an action and could recover damages for the pain and suffering to be endured during the limited life span available to such a child, as well as special pecuniary loss resulting from the impaired condition⁷⁸.

⁷⁵ *Premier of the Western Cape Province v Loots No* [2011] ZASCA 32, at para 20.

⁷⁶ In *Bovingdon v Hergott* (2008) 290 DLR (4th) 126, at para 37-38, the Ontario Court of Appeal, Canada took an extensive review of general approach across the jurisdictions in claims dealing with "wrongful life". Feldman JA expressed: "The common law world has struggled for the past several decades with the debate over whether a child born with defects or injuries suffered in utero or upon conception can sue a doctor for negligence. In deciding whether to recognize a 'wrongful life' claim, the key question is, if a child would not have been born at all without the doctor's negligence, can such a child sue the doctor for the value of the difference between a life burdened with physical or mental defects and no life at all? How can the child be compensated for being born? How can a court give damages that measure the value of no life versus a damaged life? And from a metaphysical point of view, does it make sense to allow such an action, given that if the child had not been born, he or she would not have been able to bring the action at all? Many courts, such as English Court of Appeal in *McKay v Essex Area Health Authority* [1982] 1 QB 1166, originally rejected wrongful life claims on the basis that attempting to compensate a person for being alive is contrary to public policy. However, in other jurisdictions, particularly some American states, courts have concluded that abstract philosophical difficulties cannot justify denying compensation to a child born with disabilities in part because of a doctor's negligence, and whose survival and support will require significant funds throughout his or her life. ... As courts have continued to encounter and to struggle with the issue in different types of fact situations, they have sought to narrow the class of claims for which there can be no recovery by a child born injured or disabled where there has been medical negligence."

⁷⁷ (1980) 106 Cal.App.3d 811.

⁷⁸ Jefferson (Bernard), P.J stated (at 829): "The circumstances that the birth and injury have come hand in hand caused other courts to deal with the problem by barring recovery. The reality of the 'wrongful life' concept is that such a plaintiff both *exists* and *suffers*, due to the negligence of others. It is neither necessary nor just to

The Supreme Court of California by a majority affirmed this decision in *Turpin v Sortini*.⁷⁹ However, recovery was limited to special damages. Kaus J stated:

In sum, we conclude that while a plaintiff-child in a wrongful life action may not recover general damages for being born impaired as opposed to not being born at all, the child – like his or her parents – may recover special damages for the extraordinary expenses necessary to treat the hereditary ailment.⁸⁰

A similar approach was taken in the United Kingdom in *McKay v Essex Area Health Authority*.⁸¹ The infant plaintiff was born disabled as a result of an infection of rubella suffered by her mother, the second plaintiff, while the child was in the womb. The child alleged that, but for the negligence of the defendants, a health authority and a doctor, the mother would have had an abortion. The child claimed damages on the ground of the doctor's failure to treat the rubella, and against both defendants for her having "suffered entry into a life in which her injuries are highly debilitating, and distress, loss and damage".

The English Court of Appeal held that the doctor had been under no legal obligation to the foetus to terminate its life; that the child's claim was contrary to public policy as being a violation of the sanctity of human life and that the claim could not be recognised because the court could not evaluate non-existence for the purpose of awarding damages for its denial.⁸² Griffiths LJ stated:

[T]he most compelling reason to reject this cause of action is the intolerable and insoluble problem it would create in the assessment of damage. The basis of damages for personal injury is the comparison between the state of the plaintiff before he was injured and his condition after he was injured. This is often a hard enough task in all conscience and it has an element of

retreat into meditation on the mysteries of life. We need not be concerned with the fact that had defendants not been negligent, the plaintiff might not have come into existence at all. The certainty of genetic impairment is no longer a mystery. In addition, a reverent appreciation of life compels recognition that plaintiff, however impaired she may be, has come into existence as a living person with certain rights."

⁷⁹ (1982) 31 Cal.3d 220.

⁸⁰ *Ibid.*, at 239. In *Procanik By Procanik v Cillo* (1984) 97 N. J 339, at 343, the Supreme Court of New Jersey by a majority restricted the infant's claim to special damages on the premise that "man does not know whether non-life would have been preferable to an impaired life" and concluded that an infant plaintiff might recover as special damages the extraordinary medical expenses attributable to his affliction, but that he might not recover general damages for emotional distress or for an impaired childhood.

⁸¹ [1982] 1 QB 1166.

⁸² *McKay v Essex Area Health Authority* [1982] 1 QB 1166, at 1183-1184, Stephenson LJ stated: "Judicial opinion expressed in the American decisions can, I think, be summarised in the following propositions. (1) Though what gives rise to the cause of action is not just life but life with defects, the real cause of action is negligence in causing life. (2) Negligent advice or failure to advise is the proximate cause of the child's life (though not of its defects). (3) A child has no right to be born as a whole, functional being (without defects). (4) It is contrary to public policy, which is to preserve human life, to give a child a right not to be born except as a whole, functional being, and to impose on another a corresponding duty to prevent a child being born except without defects, that is, a duty to cause the death of an unborn child with defects. (5) It is impossible to compare the life of a child born with defects and non-existence as a human being. (6) Accordingly, by being born with defects a child has suffered no injury cognizable by law and if it is to have a claim for being so born, the law must be reformed by legislation."

artificially about it, for who can say that there is any sensible correlation between pain and money? Nevertheless, the courts have been able to produce a broad tariff that appears at the moment to be acceptable to society as doing rough justice. But the whole exercise, difficult as it is, is anchored in the first place to the condition of the plaintiff before the injury which the court can compare and evaluate. In a claim for wrongful life how does the court begin to make an assessment? The plaintiff does not say, 'But for your negligence I would have been born uninjured.' The plaintiff says, 'But for your negligence I would never have been born.' The court then has to compare the state of the plaintiff with non-existence, of which the court can know nothing; this I regard as an impossible task.⁸³

In Australia, the High Court of Australia also denied a claim of wrongful life in *Harriton v Stephens*.⁸⁴ The plaintiff had severe congenital disabilities that had been caused by her mother's infection – the rubella virus – during her pregnancy which caused the disability of the plaintiff after her birth.

The Court held by a majority of 6⁸⁵ to 1⁸⁶ that the plaintiff's claim is not cognizable in law and failed to prove that he had suffered damage.

Crennan J concluded:

[T]he damage claimed is not amenable to being determined by a court by the application of legal method. A duty of care cannot be clearly stated in circumstances where the plaintiff can never prove (and the trier of fact can never apprehend) the actual damage claimed, the essential ingredient in the tort of negligence. The plaintiff cannot come within the compensatory principle for measuring damages without some awkward, unconvincing and unworkable legal fiction. To except the plaintiff from complying with well-established and well-known principles, integral to the body of doctrine concerning negligence applicable to all plaintiffs and defendants in actions in all other categories of negligence, would occasion serious incoherence in that body of doctrine and would ignore the limitations of legal method in respect of the plaintiff's claim.⁸⁷

Similarly in Canada, the Court of Appeal of Manitoba rejected a claim of wrongful life in *Lacroix (Guardian of) v Dominique*.⁸⁸ Twaddle J.A stated:

The vast majority of courts which have dealt with a claim for wrongful life have rejected it both on the ground that imposition of such a duty to the

⁸³ *McKay v Essex Area Health Authority* [1982] 1 QB 1166, at 1192-1193.

⁸⁴ (2006) 226 CLR 52.

⁸⁵ Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ.

⁸⁶ Kirby J.

⁸⁷ *Harriton v Stephens* (2006) 226 CLR 52, at para 276.

⁸⁸ (2001) 202 DLR (4th) 121.

future child would be contrary to public policy and on the ground that it is impossible to assess the value of the child's loss.⁸⁹

The Ontario Court of Appeal endorsed this approach in *Bovingdon v Hergott*.⁹⁰

In South Africa, the Supreme Court of Appeal declined recognition of a cause of action in a wrongful life claim in the case of *Stewart & Anor v Botha & Anor*.⁹¹ The plaintiffs' child was born with severe congenital defects following the negligent conduct of the defendant whom the mother consulted during her pregnancy failed to inform her of congenital defects in the foetus she was carrying, alleged that she would have undergone a termination of pregnancy and consequently the child would not have been born. Snyders AJA concluded:

The essential question that is asked when enquiring into wrongfulness for purposes of delictual liability is whether the laws should recognise an action for damages caused by negligent conduct and that is the question that falls to be answered in this case. ... whatever perspective one views the matter the essential question that a court will be called upon to answer ... is whether the particular child should have been born at all. That is a question that goes so deeply to the heart of what it is to be human that it should not even be asked of the law.⁹²

In the latter case of *H v Fetal Assessment Centre*,⁹³ however, the Constitutional Court of South Africa expressed its willingness to contemplate recovery of damages for "wrongful life", which it reformulated as a "wrongful suffering" claim by a child, laying emphasis on the constitutional and statutory provisions which expressly protect the best interest of the child⁹⁴. The plaintiff was born with Down syndrome and suffered other congenital defects requiring dependence and continuing caring. The plaintiff alleged the defendant had failed to warn the mother of the high risk of the child being born with Down syndrome. The Constitutional Court considered the viability of the cause of action without deciding the merits of the claim but it took the position that the courts should be permitted to consider whether the common law might develop to recognise the claim⁹⁵. The Court set aside the

⁸⁹ *Ibid.*, at para 30.

⁹⁰ (2008) 290 DLR (4th) 126.

⁹¹ [2008] ZASCA 84.

⁹² *Stewart & Anor v Botha & Anor* [2008] ZASCA 84, at para 28.

⁹³ [2014] ZASCA 34.

⁹⁴ Froneman J noted (at para 69): "Under the Constitution children have the right to have their best interests be given paramount importance in every matter concerning them. That includes a pre-natal medical expert misdiagnosis that results in the child being born with a disability. When parents do not claim for the medical expenses in those circumstances, as they are entitled to, the choice is to let loss lie with the child or to burden the medical experts with the loss that they would have been legally liable for to the parents anyway. A conceivable option is that the best interests of the child may require that the loss should not in those circumstances lie with the child. Translated into legal terms, that would mean that there may be a legal duty not to cause that loss. Failure to do so might breach that duty and infringe the child's right under section 28(2) of the Constitution."

⁹⁵ *Cf. Ibid.*, para 49: "That our law, including our common law, must conform to the values of the Constitution and that its development must promote the 'spirit, purport and objects of the Bill of Rights' is the given starting point for determining the viability of the child's claim in the circumstances of this case. The particular values and rights that are at the forefront are those of equality, dignity and the right of children to have their best interests considered of paramount importance in every matter concerning them."

decision of the trial court and ordered retrial. It acknowledged that a child's claim might potentially be found to exist⁹⁶. Froneman J stated:

Whether it does so exist and in what form, needs to be decided ... within our constitutional imperative that the decision must accord with constitutional rights and values, which must include considering the best interests of the child. This also applies to any other manner in which the claim may be reformulated.⁹⁷

4.0 IMPLICATIONS FOR NIGERIAN LAW

How would Nigerian courts respond to the developing jurisprudence on wrongful birth and wrongful life? The answer is by no means clear. On one approach, it may be argued that Nigerian culture is strongly pro-natalist and still generally unreceptive to a consumerist philosophy. The birth of a child, even when not anticipated and the result of negligent healthcare (such as a failed sterilisation) may be regarded not as an injury, but as a blessing. On another approach, it may be argued that the victims of negligent healthcare should not be deprived of a remedy by reason of such broad philosophical considerations which the victims do not necessarily share. Indeed, the fact that they have sued for compensation is a clear demonstration that they do not have a philosophical or moral objection to compensation being awarded. Moreover, the very poor level of maternal and neo-natal healthcare in Nigeria may be considered a reason for imposing liability in cases of proven negligence rather than for creating a barrier to compensation on somewhat amorphous and debatable grounds.

Perhaps the approach most congenial to Nigerian culture would be for the courts to recognise the action for wrongful birth but limit compensation (as in Ireland) to damages (general and special) directly related to the pregnancy and labour. Claims for wrongful life would appear to be out of harmony with the Nigerian cultural approach to the value of unborn life.

⁹⁶ *H v Fetal Assessment Centre* [2014] ZASCA 34, at para 81.

⁹⁷ *Ibid*, at para 81.