

Wrongful life claims and negligent selection of gametes or embryos in infertility treatments: A quest for coherence

Noam Gur*

*This article discusses an anomaly in the English law of reproductive liability: that is, an inconsistency between the law's approach to wrongful life claims and its approach to cases of negligent selection of gametes or embryos in infertility treatments (the selection cases). The article begins with an account of the legal position, which brings into view the relevant inconsistency: while the law treats wrongful life claims as non-actionable, it recognises a cause of action in the selection cases, although the selection cases bear a relevant resemblance to wrongful life claims. The article then considers arguments that may be invoked in an attempt to reconcile the above two strands of the law. Three of these counterarguments consist in attempts to distinguish the selection cases from wrongful life claims. It is argued that these attempts fail to reveal a valid basis for treating these situations differently. A fourth possible counterargument levels against the present analysis a charge of *reductio ad absurdum*. It is shown that this argument suffers from a fundamental flaw caused by confusion between different senses of the term "identity". Finally, the article discusses possible changes to the legal position that could rectify the problem. It argues that one of these changes, which focuses on legal redress for violation of personal autonomy, is particularly apt to resolve the problem at hand, but also highlights the need for further inquiry into the broader implications of introducing this form of redress into the law of torts.*

The cases discussed in this article – cases of reproductive liability¹ – involve tensions that no legal analysis can completely dissolve. In this area, even the best solution is no more than the best possible *compromise* between valid considerations that pull in opposite directions, nowhere near a perfect solution; and there is more than one defensible solution. Nevertheless, there are some basic requirements with which the solution must comply if it is to be minimally tenable or even to deserve being called a "solution". One such requirement is that it must exhibit a reasonable degree of *coherence*; a legal scheme that is fundamentally inconsistent is no solution at all. It is this type of deficiency that is the focus of this article. The article critically analyses a problem of inconsistency in English law, between the legal position on the type of case commonly known as "wrongful life" claims and the provision in s 1A of the *Congenital Disabilities (Civil Liability) Act 1976* (UK).²

The analysis falls into three parts. First, the article describes the legal position regarding wrongful life claims and the provision in s 1A of the Act, and explains why the relationship between them exhibits a problematic discrepancy.³ Secondly, the article considers a number of

* LLB (Jerusalem), BCL, MPhil, DPhil (Oxford), Lecturer in Law, Queen Mary University of London. I am grateful for the helpful comments of Jonathan Herring on an earlier version of the article and of participants in a medical law and ethics graduate seminar and the Medical Law and Ethics Discussion Group at Oxford. I also thank Stephen Blamey for a helpful discussion of the philosophical aspects of the article.

Correspondence to: n.gur@qmul.ac.uk.

¹ That is, civil cases arising from malpractice in treatment or advice related to conception or pregnancy.

² Or, more precisely, the part of the provision referring to "the selection" of an embryo or gametes. This will be spelled out later in the article.

³ For other references to this problem see, for example, Jackson A, "Wrongful Life and Wrongful Birth: The English

possible counterarguments, that is, arguments that may be invoked in an attempt to reconcile the law regarding wrongful life claims and s 1A of the Act. It contends that these counterarguments ultimately fail to reconcile these two elements of the law. Thirdly, the article discusses relevant considerations regarding the desirable solution to the above problem of inconsistency.

I. THE PROBLEM INTRODUCED

Consider first the type of case known as a wrongful life claim. In this type of case, the claimant argues that but for the defendant's negligence he or she would not have been born and, *ipso facto*, would not have suffered a disability or illness by which he or she is afflicted. A paradigmatic example is a claim brought by a disabled child against a medical practitioner for negligently failing to diagnose his or her disability (or the condition that led to it) prenatally, where it is assumed that the disability itself is not one that could have been prevented or cured, and a proper diagnosis would have led the child's mother to have an abortion. The state of affairs that would have ensued from a proper diagnosis, then, is not healthy existence of the claimant, but rather *non-existence* of the claimant.⁴ Thus, the claim implies that the claimant's life itself is a compensable damage (a wrongful life), and, as will be seen immediately, it is precisely this implication that makes it difficult to accept such a claim.⁵

The common law position regarding this type of claim finds its expression in the case of *McKay v Essex Area Health Authority*.⁶ The facts of the case involved a misdiagnosis of rubella (German measles) in a pregnant woman, which led to the birth of a severely disabled child. The Court of Appeal ruled that a claim on behalf of the child showed no reasonable cause of action,⁷ for reasons connected with its character as a wrongful life claim. Thus, for example, it was held that acceptance of such a claim would be contrary to public policy as an affront against the cherished tenet of the sanctity of human life.⁸ It would contain the message that the law regards "the life of a handicapped child as not only less valuable than the life of a normal child, but so much less valuable that it was not worth preserving".⁹ Furthermore, the court held that it would be impossible to determine the amount of damages due in such a case, as this would necessitate a comparison between the value of living as a disabled person and the value of *non-existence* ("the undiscovered country from whose bourn no traveller returns"),¹⁰ which the court has no means of knowing.¹¹ Incidentally, it should be added that the latter, epistemic difficulty is connected with

Conception" (1996) 17 *Journal of Legal Medicine* 349 at 370; Jackson E, *Medical Law: Text, Cases, and Materials* (Oxford University Press, Oxford, 2010) pp 724, 760. See also Scott R, "Reconsidering 'Wrongful life' in England After Thirty Years: Legislative Mistakes and Unjustifiable Anomalies" (2013) 72 *Cambridge Law Journal* 115, where the author offers a general critique of the law on wrongful life claims, as part of which she claims that the above anomaly raises questions about the strength of the objections to wrongful life claims under the common law established in *McKay v Essex Area Health Authority* [1982] 1 QB 1166. Some of Scott's arguments are discussed in the final part of the article.

⁴ This is an aspect of what has been labelled in philosophical discourse "the non-identity problem". The term "non-identity" here signifies the fact that, since the child's existence in the above type of scenario is unavoidably impaired, the only alternatives to bringing the child into a state of impaired existence are to bring no-one into existence or to bring another child (a non-identical child) into existence instead of the existing one. For a discussion of the problem see, for example, Parfit D, *Reasons and Persons* (Oxford University Press, Oxford, 1984) pp 351-380; Woodward J, "The Non-Identity Problem" (1986) 96 *Ethics* 804.

⁵ For an instructive philosophical discussion which challenges some of the perceived barriers against wrongful life liability, see Shiffrin S, "Wrongful Life, Procreative Responsibility, and the Significance of Harm" (1999) 5 *Legal Theory* 117.

⁶ *McKay v Essex Area Health Authority* [1982] 1 QB 1166.

⁷ Affirming a decision to strike out this claim.

⁸ *McKay v Essex Area Health Authority* [1982] 1 QB 1166 at 1180, where Stephenson LJ notes: "To impose such a duty towards the child would, in my opinion, make a further inroad on the sanctity of human life which would be contrary to public policy" and at 1188, where Ackner LJ notes: "Such a proposition runs wholly contrary to the concept of the sanctity of human life."

⁹ *McKay v Essex Area Health Authority* [1982] 1 QB 1166 at 1180 (Stephenson LJ).

¹⁰ *McKay v Essex Area Health Authority* [1982] 1 QB 1166 at 1189 (Ackner LJ).

¹¹ *McKay v Essex Area Health Authority* [1982] 1 QB 1166 at 1181, where Stephenson LJ notes: "[H]ow can a judge put a value on the one or the other [that is, an 'after life' or non-existence], compare either alternative with the injured child's life in this world and determine that the child has lost anything, without the means of knowing what, if anything, it has gained?"

another, logical difficulty that some writers have found in the proposition implicit in wrongful life claims, namely, the proposition “I would have been better off dead”: the observed difficulty is that the nonexistence *of* people cannot be attached *to* people in the manner implied by this proposition. By definition, there are no non-existing people. Thus, if I had not come into existence, *I* would not have been better or worse – I would simply not have “been”.¹²

Unlike the child’s claim in *McKay*, wrongful life claims by children born after the passing of the *Congenital Disabilities (Civil Liability) Act 1976* (UK) on 22 July 1976 are governed by the Act itself. However, the substantive rule regarding these claims remains unchanged. This can be inferred from s 4(5) in conjunction with s 1(2) of the Act, which, in effect, adopt the Law Commission’s recommendation that there should be no liability for “wrongful life”.¹³ Section 4(5) defines the scope and effect of the Act as follows:

This Act applies in respect of births after (but not before) its passing, and in respect of any such birth it replaces any law in force before its passing, whereby a person could be liable to a child in respect of disabilities with which it might be born.”

Section 1(2) provides that civil liability to a child born disabled may arise due to occurrences that:

- (a) affected either parent of the child in his or her ability to have a normal, healthy child; or
- (b) affected the mother during her pregnancy, or affected her or the child in the course of its birth, so that the child is born with disabilities which would not otherwise have been present.

Further elucidation as to the purpose of this provision can be found in the Law Commission’s explanatory note on its counterpart in the *Congenital Disabilities (Civil Liability) Bill* (UK). The note explains that:

[t]he clause gives the child no right of action for “wrongful life” ... Subsection (2)(b) is so worded that, but for the occurrence giving rise to a disabled birth, the child would have been born normal and healthy (not that it would not have been born at all).¹⁴

There is, therefore, sufficient basis to conclude that the Act has not changed the legal position on wrongful life claims – these claims remain non-actionable.

Now consider s 1A of the Act, which was incorporated into the Act through s 44 of the *Human Fertilisation and Embryology Act 1990* (UK). Section 1A refers to a disability which results from the following occurrences in an infertility treatment: “an act or omission in the course of the selection, or the keeping or use outside the body, of the embryo ... or of the gametes used.” The section provides (albeit by a slightly different and more composite formulation) that a disability resulting from such occurrences is to be regarded as damage actionable at the suit of the child against the person responsible for the relevant act or omission.¹⁵ Now, the difficulty with s

¹² See, for example, Heyd D, *Genethics: Moral Issues in the Creation of People* (University of California Press, Berkeley, 1992) pp 35-37.

¹³ Law Commission, *Report on Injuries to Unborn Children*, Report No 60 (Cmnd 5709, 1974) at [89]: “We do not think that, in the strict sense of the term, an action for ‘wrongful life’ should lie.”

¹⁴ Law Commission, n 13.

¹⁵ Section 1A reads as follows:

- (1) In any case where –
 - (a) a child carried by a woman as the result of the placing in her of an embryo or of sperm and eggs or her artificial insemination is born disabled,
 - (b) the disability results from an act or omission in the course of the selection, or the keeping or use outside the body, of the embryo carried by her or of the gametes used to bring about the creation of the embryo, and
 - (c) a person is under this section answerable to the child in respect of the act or omission,the child’s disabilities are to be regarded as damage resulting from the wrongful act of that person and actionable accordingly at the suit of the child.

1A is the reference to *the selection* of an embryo or gametes. It will be argued that this part of s 1A is inconsistent with the legal position regarding wrongful life cases.

The inconsistency begins to surface with the recognition that acts or omissions in the course of the selection of an embryo or gametes may not only determine whether the child will be born healthy, but may also determine whether a given child will or will not be born.¹⁶ If, instead of the gametes or embryo that were selected and that resulted in the existing child, other gametes or another embryo had been selected (situations referred to here as “the selection cases”), then the existing child would not have been born. The alternative embryo or gametes selected in this hypothetical scenario would possibly have developed successfully into a child, but that child would have been *another child*, not the existing one.¹⁷ This would have been the case not only if those alternative gametes or embryo had originated from other persons (another man, woman, or both), but also if they had originated from the same persons – for just as siblings are not considered to be one individual, so too the hypothetical child and actual child in the above selection scenario should not be considered to be one individual.¹⁸

The corollary of the above paragraph is that the claim of a child in a selection case pursuant to s 1A of the Act implies that, but for the defendant’s negligence, he or she would not have been born. This, however, is a feature of wrongful life claims, which elsewhere in the law has prompted objections that led to a rejection of the claim. There appears, therefore, to be an inconsistency between the law’s approach to wrongful life claims and its approach to the selection cases under the Act.¹⁹

(2) Subject to subsection (3) below and the applied provisions of section 1 of this Act, a person (here referred to as “the defendant”) is answerable to the child if he was liable in tort to one or both of the parents (here referred to as “the parent or parents concerned”) or would, if sued in due time, have been so; and it is no answer that there could not have been such liability because the parent or parents concerned suffered no actionable injury, if there was a breach of legal duty which, accompanied by injury, would have given rise to the liability.

(3) The defendant is not under this section answerable to the child if at the time the embryo, or the sperm and eggs, are placed in the woman or the time of her insemination (as the case may be) either or both of the parents knew the risk of their child being born disabled (that is to say, the particular risk created by the act or omission).

(4) Subsections (5) to (7) of section 1 of this Act apply for the purposes of this section as they apply for the purposes of that but as if references to the parent or the parent affected were references to the parent or parents concerned.

¹⁶ This would be the case when the relevant act or omission affects (or even consists in) the selection itself.

¹⁷ It should be noted, incidentally, that in addition to being “another child” in the *numerical* sense, that child would also have been *qualitatively* different (for an explanation of the numerical/qualitative identity distinction, see the body text accompanying nn 34-36; see further Olson E, “Personal Identity” in Zalta EN (ed), *Stanford Encyclopedia of Philosophy* (Winter 2010), <http://plato.stanford.edu/entries/identity-personal/>). This is so because the chance that any two gametes of one person would have the same combination of chromosomes is infinitesimally small, 1 in 8,388,608 (which is calculated from the fact that each gamete takes 23 single chromosomes from 23 pairs of chromosomes that form the genetic composition of a person). And, except for cases where an embryo divides into two, the chance that any two embryos originating from the same pair of people would be identical is even smaller, 1 in 7.037×10^{13} , as this would occur only if *both* the sperm cells and the egg cells from which the embryos originate are identical.

¹⁸ It is worth clarifying that the above argument does not depend on the view that numerical personal identity over time (that is, what it takes for the same person to persist from one time to another) is determined by physical facts, rather than psychological facts. Even the supposition that psychological facts are the *only* determinants of numerical personal identity would be compatible with the argument, unless one adopts (and is somehow capable of bearing out) the incredible supposition that two different sets of reproductive cells would result in one and the same human mind.

¹⁹ The wording “an act or omission in the course of the selection” might be construed more narrowly, as including only acts or omissions that did not affect, or consist in, the selection itself (for example, causing contamination of the gametes or embryo in the course of selecting them). This narrow understanding of the provision, however, is linguistically contrived (and not likely to be what the legislature had intended). For acts or omissions other than the selection itself (but done in the course of the selection) can be subsumed under another part of s 1A, namely, the “use outside the body” of the embryo or of the gametes. Under the narrow understanding, then, the term “selection” in the provision becomes a redundancy. The analysis herein will proceed on the less contrived understanding of the provision (which includes the selection cases) so as to verify whether it is inconsistent with the non-actionability of wrongful life claims.

II. COUNTERARGUMENTS

The article now turns to consider arguments that may be invoked in an effort to counter the claim just made by demonstrating the coherence of the current legal position. It will be seen that these arguments ultimately fail to achieve their objective.

A. Can the selection cases be distinguished from wrongful life cases?

One possible type of response to the above claim attempts to distinguish the selection cases from wrongful life cases. There appear to be three possible ways in which this could be attempted, which will be considered in turn.

Attempt No 1

The first attempt at distinguishing the two situations in question is based on the following factual difference between them: in the selection cases, the defendant can be said to have directly brought about the disability (by selecting a defective gamete or embryo), whereas in the paradigmatic case of wrongful life claims, a case such as *McKay*, the child has not been injured by the defendants, but rather by a disease which has infected the mother without fault on anybody's part;²⁰ the defendants failed to diagnose the disease, and their misdiagnosis meant that an abortion did not occur.

This factual difference, the argument continues, suggests that the relevant public policy consideration in cases such as *McKay* in fact concerns only the issue of *abortion*; namely, the material consideration that explains the outcome in *McKay* is not a general concern with the supposition that non-existence (a state of death) might in some cases be better than existence (a state of life), but rather a fear that acceptance of the claim would imply that an abortion should have been performed²¹ – that it was morally wrong not to perform an abortion.²² In the selection cases, on the other hand, the expressive significance of accepting the claim contains no message about the moral appropriateness of abortion, but only the message that non-existence would be better than existence in the relevant disabled state.

The first thing to note about Attempt No 1 is that it depends for its success on the absence of an entailment relationship between two statements: (i) a statement that existence in a given state of disability is worse than non-existence; and (ii) a statement that an act of abortion should be performed. In other words, it is presupposed by Attempt No 1 that the first statement does not entail the second (an assumption that will be called Non-Entailment). Without presupposing Non-Entailment, Attempt No 1 could not contend, as it does, that liability in the selection cases implies the first statement *without* implying the second. However, whether Non-Entailment is actually correct partly depends on a more general question of ethical theory, namely, the question of what determines the moral appropriateness of an act. Thus, for instance, deontologist ethics²³ and rule-consequentialism²⁴ are far more auspicious to Non-Entailment than act-consequentialism, according to which the moral correctness of an act turns on the desirability of its consequences.

²⁰ *McKay v Essex Area Health Authority* [1982] 1 QB 1166 at 1178.

²¹ A similar concern finds expression in Lord Ackner's statement that he "cannot accept that the common law duty of care to a person can involve, without specific legislation to achieve this end, the legal obligation to that person, whether or not in utero, to terminate his existence": *McKay v Essex Area Health Authority* [1982] 1 QB 1166 at 1188. See contra Dimopoulos P and Bagaric M, "The Moral Status of Wrongful Life Claims" (2003) 32 *Common Law World Review* 35 at 37.

²² This would go over and above the message sent by merely *permitting* abortion, which is something English law did long ago in *Abortion Act 1967* (UK), s 1.

²³ From a deontologist standpoint, as epitomised by Kant's moral theory, whether there is a moral duty to perform an act does not turn on an evaluation of the act's consequence, but on an evaluation of a universalisable maxim from which the act ensues. As Kant's Categorical Imperative commands, "Act only in accordance with that maxim through which you can at the same time will that it become a universal law": see Kant I, *Groundwork of the Metaphysics of Morals*, 4:421; *Critique of Practical Reason*, 5:72; *The Metaphysics of Morals*, 6:389.

²⁴ Or, at least, a full-blooded version of rule-consequentialism (what Brad Hooker calls full rule-consequentialism: see Hooker B, "Rule Consequentialism" in Zalta EN (ed), *Stanford Encyclopedia of Philosophy* (Spring 2011), <http://plato.stanford.edu/entries/consequentialismrule/>), which is a theory that not only uses a consequentialist criterion to select rules that should guide practical deliberation, but also contends that such rules determine the moral quality of an action within their ambit (regardless of the action's consequences).

From an act-consequentialist viewpoint, Non-Entailment would hold true only in a limited subset of cases, that is, where an abortion would have consequences other than terminating the pregnancy, such that they tip the balance *against* performing it; for example, ill consequences for the mother that outweigh the adversities that the child would suffer as a result of being born disabled. In all other cases, the act-consequentialist is bound to reject Non-Entailment and, to this extent, reject also Attempt No 1. These observations detract from the cogency of Attempt No 1, as they show that, in at least some of the cases to which it purports to apply, Attempt No 1 relies on contested premises of ethical theory.

In the previous paragraph it was pointed out that Attempt No 1 hinges on an assumption that is open to challenge from the viewpoint of moral theory. But the troubles for Attempt No 1 do not end here. There is another problem that it runs into if Non-Entailment is, *arguendo*, accepted as true. Attempt No 1 suggests that the relevant public policy consideration in cases such as *McKay* in fact concerns only the issue of *abortion*; namely, the notion that acceptance of the claim would imply that abortion should have been performed. This, however, invites the question of *whether* acceptance of the claim in a case such as *McKay* would actually imply that abortion should have been performed. No doubt, such a decision would signify that the defendants' conduct was wrongful, but the conduct in question in this case – the conduct in dereliction of their medical duty – is not a failure to perform an abortion, but rather a failure to diagnose the disease. The determination of whether or not to have an abortion always depends on a decision of the *mother* – a decision that, in this case, she was not called upon to make since her rubella was not diagnosed. The duty of medical practitioners is not to tell the mother whether she should have an abortion; rather, their duty in such a situation is to diagnose medical problems properly, to bring them to the parents' attention, and to inform them of the consequences and risks of possible medical treatments.²⁵ And there is obviously nothing problematic in saying that medical practitioners should take care to make correct diagnoses and inform their patients accordingly – indeed, it would be absurd to deny this. Now, it is also true that awarding damages in a case such as *McKay* would imply that existence in the relevant state of disability is worse than non-existence. But this, we are assuming *arguendo*, does not entail that an act of abortion should be performed – that is the very assumption dubbed above Non-Entailment, without which Attempt No 1 cannot even begin to make sense. Thus, Attempt No 1 is doomed to failure because its core contention depends on a denial of its essential moral presupposition – for the former to be true, the latter must be false.²⁶

Attempt No 2

The second possible attempt at distinguishing the selection cases from wrongful life cases contends that the difference between them lies not in public policy considerations to do with the sanctity of life and the social image of the disabled, but in considerations on the other side of the balance, that is, considerations for accepting the claim. These considerations, the argument continues, are decisively weightier in the selection cases, because in these cases the defendant has direct involvement in causing the disability itself (by selecting a defective gamete or embryo), which means that she is more blameworthy than the defendants in *McKay*, who only failed to diagnose a disease which has infected the mother without fault on anybody's part.

Attempt No 2 seems to rely on a supposition that a careless act which brings about a harm involves a greater degree of blameworthiness than a careless omission with regard to a pre-existing harm, such as failing to avert the harm or warn the claimant about it. However, even if this supposition holds good in some contexts of human conduct, it clearly does not hold good where the relationship between the parties is such that it gives rise to positive duties on the defendant's part, as in the case of a physician-patient relationship. In the context of such a relationship, the act/omission distinction has little or no relevance for the degree of blameworthiness involved. Thus, the fact that a physician's failure to diagnose a disease – a

²⁵ *McKay v Essex Area Health Authority* [1982] 1 QB 1166 at 1192, where Griffiths LJ notes that: "the duty of the medical profession can be no more than to advise her of her right to have an abortion and of the pros and cons of doing so. If there is a risk that the child will be born deformed, that risk must be explained to the mother, but it surely cannot be asserted that the doctor owes a duty to the foetus to urge its destruction." See also Jackson A, n 3 at 361.

²⁶ See further comments on the relation between abortion and wrongful life claims in Shapira A, "Wrongful Life Lawsuits for Faulty Genetic Counselling: Should the Impaired Newborn Be Entitled to Sue?" (1998) 24 *Journal of Medical Ethics* 369 at 371-372; Dimopoulos and Bagaric, n 21 at 51-52.

failure that may amount to gross negligence – might be seen as an omission instead of an act can hardly be regarded as a fault-mitigating fact in and of itself, since diagnosing diseases is an integral and central part of the role of a physician. And there can conceivably be negligent acts in the course of selecting gametes or an embryo that are no more blameworthy than a careless misdiagnosis of the kind alleged in *McKay* (where the defendants were alleged to have mislaid blood samples from the mother or confused them with blood samples of other patients).²⁷ It appears, therefore, that Attempt No 2 fails to reveal a valid basis for treating wrongful life cases and the selection cases differently.

Attempt No 3

A third possible attempt at distinguishing the selection cases from wrongful life claims consists in the following argument: in the paradigmatic case of wrongful life claims the assumption is that a correct diagnosis would have led to an abortion, and, thus, the child's claim implies a statement of the type: "but for the defendant's negligence, I would not have been born". On the other hand, the argument proceeds, the typical scenario in the selection cases is quite different; there the assumption is that, but for the malpractice, another embryo or other gametes would have been selected. In this type of case, then, the child's claim does not imply simply "but for the defendant's negligence, I would not have been born", but rather "but for the defendant's negligence, I would have been born as another child". Here, according to Attempt No 3, lies the difference between wrongful life claims and the selection cases.

It is contended that Attempt No 3 is an erroneous argument. Its error lies in a too literal understanding of what is, in fact, merely a figure of speech. The proposition "I would have been born as another child" cannot be plausibly understood to mean that "I would have been born as another child" in the literal sense of these words.²⁸ What it really means – or, at least, must mean on any plausible understanding – is that, if other gametes or another embryo had been selected, another child would have been born (child B), not "I" (child A).²⁹ So it remains true that, but for the defendant's negligence, child A would not have been born; and since the claim before the court is a claim of child A, and no other child, it does in fact bear the earmark of a wrongful life claim: but for the defendant's negligence, the claimant would not have been alive.³⁰ Thus, Attempt No 3 turns out to be another failed attempt at distinguishing the selection cases from wrongful life claims.³¹

Before turning to the next argument, it is worth devoting another brief word to the rhetorical manoeuvre that gives Attempt No 3 its degree of surface tenability. There are instances of linguistic laxity where a person may speak of himself hypothetically as being another person, without meaning this in any strict literal sense or, at least, without reflecting on whether the literal

²⁷ *McKay v Essex Area Health Authority* [1982] 1 QB 1166 at 1172-1173.

²⁸ Nor is its intended meaning likely to be "I would have been born in another body", unless a proponent of Attempt No 3 is somehow capable of adducing a convincing argument which shows that (i) there is an independent incorporeal entity (soul) that can incarnate as alternative bodies; (ii) the same incorporeal entity embodied in the claimant would have transmuted into the other, hypothetical child; and (iii) personal identity consists solely in that type of incorporeal essence. And even if the unconventional task of proving these three assumptions were to be somehow fulfilled, a proponent of Attempt No 3 would still be required to explain why a similar transmutation would *not* occur in a wrongful life case where, following an abortion, the mother conceives again.

²⁹ And, as noted earlier, this is true even if the alternative gametes or embryo selected were of the same parents; just as two siblings are not regarded as one and the same person, the hypothetical child and actual child in the above selection scenario should not be regarded as one person.

³⁰ The fact that another child (B) would have been born is irrelevant because the claim before the court is a claim of child A, and, thus, to place the claimant in the position he or she would have been had the tort not taken place means to place A in a position equivalent to non-existence. Moreover, even if the hypothetical life of another child (B) *were* relevant, it would not be a factor that distinguishes the selection cases from wrongful life claims, because a similar factor may apply in a standard wrongful life claim; a mother who undergoes an abortion due to the diagnosis of a medical condition in her fetus (A) may then re-conceive and have another child (B).

³¹ It is worth emphasising that (like the main argument of this article) the above response to Attempt No 3 does not hinge on the supposition that numerical personal identity over time is determined by physical facts rather than psychological ones. Even assuming that the *only* determinants of numerical personal identity over time are psychological facts, a person advocating Attempt No 3 would still have to come up with a convincing explanation of how two different sets of reproductive cells could possibly result in one and the same human mind, and why that remarkable occurrence would come about in the selection cases (and yet not in a standard wrongful life case where the mother re-conceives).

meaning of his words is logically and metaphysically possible. For example, one may make a statement of the form “if I were you, I would have done X”. What is really meant by such a statement, however, is: “if I were in your situation, I would have done X”. Or, as another example, imagine a person, A, saying: “I wish I were B” (where B is another person, say, a famous actor, a sports star, or an acclaimed musician). The content of this wish is an impossibility not just for contingent reasons. It is an impossibility in virtue of the very nature of identity.³² If A were asked to reflect on the matter, she would probably rephrase her statement by saying that her wish is to possess some of B’s qualities, for example, B’s skills in the relevant field, or to be as famous and rich as B, or the like.³³ A’s original statement was merely a figure of speech allowed for by the flexibility of ordinary language. And it is precisely by trading on this type of figure of speech that Attempt No 3 gains the external appearance of a tenable argument, but, as explained above, there is no real substance behind this exterior.

B. *Reductio ad Absurdum*?

This subsection briefly considers another possible counterargument to the claim about inconsistency in the law. This counterargument does not attempt to distinguish the selection cases from wrongful life claims, but contends instead that the analysis of the selection cases is susceptible to a *reductio ad absurdum*. This is so, the contention goes, because, just as it was claimed here that the selection of other gametes or another embryo would have resulted in another person, so too, it could be said that any prenatal injury changes the identity of the child born; had it not been for the injury, there is a sense in which the child would have been another person.

The above *reductio* contention must be rejected as incorrect. In fact, it is *not* the case that any prenatal injury has the same implications that the selection of other gametes or another embryo has for the identity of the child born. To get a clear view of this, one should first bring to mind a distinction between two senses of the term “identity”, which philosophers refer to as *numerical* and *qualitative* identity. Numerical identity is the sense of identity invoked when it is said that this and that are *one and the same*, namely, that they are one thing rather than two.³⁴ Qualitative identity, on the other hand, is the sense of identity invoked when it is said that two (or more) things are exactly similar in all respects.³⁵ Their qualitative identity does not turn them into one – they remain multiple. The sense of identity relevant to the main philosophical question regarding personal identity over time (namely, the question of what it takes for the same person to persist from one time to another) is the numerical sense, as virtually all discussions of this question assume that it is possible for a person to change (for example, by ageing).³⁶ And the same sense of identity (or non-identity) is the primary sense relevant to the present argument about the selection cases: by statements such as “had other gametes or another embryo been selected, another child would have been born” it is meant, first and foremost, another child numerically (and, incidentally, also qualitatively),³⁷ not just a child who is numerically the same but qualitatively different. This, however, is precisely what distinguishes the selection cases from cases of prenatal injury. A prenatal injury is intuitively seen as causing a qualitative change to one fetus, in existence before and after the injury, rather than changing the numerical identity of the fetus (or of the resulting child). Thus, for example, parents whose fetus suffers a prenatal injury would normally conceive of this event as an adverse change caused to the same fetus, rather than a replacement of one fetus (and future child) with another.³⁸

³² If A and B are numerically not identical (that is, if A and B are not two names for one person), A *could not possibly* be B.

³³ In other words, that he would be qualitatively more similar to B, but not numerically identical to him. The distinction between qualitative and numerical identity will be explicated in the following section.

³⁴ Olson, n 17, section 2.

³⁵ Olson, n 17, section 2.

³⁶ Olson, n 17, section 2.

³⁷ See comment in n 17.

³⁸ Compare McMahan J, “Wrongful Life: Paradoxes in the Morality of Causing People to Exist” in Coleman J and Morris C (eds), *Rational Commitment and Social Justice: Essay for Gregory Kavka* (Cambridge University Press, Cambridge, 1998) pp 208-247.

Thus far several possible counterarguments have been considered and rejected. As the author can think of no other tenable or seemingly tenable counterargument, it is proposed that the inconsistency in the law has been sufficiently borne out. Next, the article discusses some relevant considerations regarding the solution to this problem.

III. THE WAY FORWARD: RELEVANT CONSIDERATIONS

There are two alternative ways in which the inconsistency discussed above could be resolved. The first (Alternative 1) is to recognise a cause of action for wrongful life.³⁹ The second (Alternative 2) is to repeal the part of s 1A of the Act which refers to *the selection* of an embryo or gametes; or, at least, to restrict this part of s 1A by means of judicial interpretation, such that the words “an act or omission in the course of the selection” would be rendered to include only acts or omissions that did not affect, or consist in, the selection itself (for example, causing contamination of the gametes or embryo in the course of selecting them).⁴⁰ This alternative would exclude a wrongful life cause of action arising from s 1A.

It is worth stressing that the existing inconsistency in the law does not, in and of itself, lend a greater degree of support to any *one* of the above alternatives over the other. Nor is this anomalous state of the law, as one commentator seems to have suggested,⁴¹ a reason to doubt the strength of the objections to wrongful life action.⁴² The fact of there being an inconsistency in the law is a reason for reforming the law so as to render it consistent, but, in and of itself, it is indifferent as to *how* exactly this should be achieved, namely, whether it should be achieved by opting for Alternative 1 or Alternative 2. In particular, the legislator’s choice to recognise a cause of action in the selection cases cannot serve as a meaningful indication of a weakness in the objections to wrongful life claims, since this legislative choice seems to have been made with little or no awareness of the equivalence between the selection cases and wrongful life claims – to this extent, it was an inadvertent change in the legal position.⁴³ The choice between Alternative 1 and Alternative 2, therefore, should be approached without prior disposition and be made purely on the merits of these alternative solutions.

So, which of these alternative solutions is preferable? An attempt to conclusively answer this question would necessitate an inquiry wider than the scope of this article (in ways specified below). Instead of undertaking such an inquiry, this section will highlight, and offer brief comments on, a number of key factors relevant for the choice between the above solutions. These include: (i) the increasingly common use of genetic and reproductive medicine; (ii) the relationship between the actionability and the scope of wrongful life claims; (iii) the relationship between wrongful life claims and the so-called wrongful birth claims; and (iv) the possible relevance of the “conventional award” introduced in *Rees v Darlington Memorial NHS Trust*.⁴⁴ These factors, it will be suggested, may have significant bearing on the proper balance between pertinent normative considerations, namely, on the one hand, the wish to avoid an inroad into the value of human life and social image of disabled people as a consequence of recognising a cause of action for wrongful life; and, on the other hand, the wish to mark the wrong done by the negligent conduct of a physician, deter future malpractice, and provide financial aid to the disabled child and his or her family.

³⁹ Proponents of this alternative, however, may support a legal defence for a physician who refuses to perform an abortion for conscientious reasons. See in this connection *Abortion Act 1967* (UK), s 4.

⁴⁰ A legislative modification of s 1A would be preferable to a judicial solution through the above interpretation, because, as noted earlier, the latter is based on a linguistically contrived understanding of the current provision (which is not likely to be what the legislature had intended) – see note 19. However, in the absence of a legislative action, a judicial solution may be called for after all.

⁴¹ Scott, n 3 at 116.

⁴² Subsequently, though, Scott turns to consider the objections to wrongful life claims on their merits: n 3 at 126-154.

⁴³ As usefully shown by Scott’s glosses on the parliamentary discussion in which the relevant clause of the draft Bill was raised: n 3 at 119-123.

⁴⁴ *Rees v Darlington Memorial NHS Trust* [2004] 1 AC 309.

A. The increasing use of genetic and reproductive medicine

The competing normative considerations mentioned in the previous paragraph are as relevant today as they were when *McKay* was decided, but it is important to bring to mind a change in the factual landscape that may bear on the balance between them. The increasing availability and proliferating use of medical practices such as genetic screening, testing, and counselling, and of means of assisted reproduction, has created new forms of reliance upon medical practitioners in the context of conception and birth, and, correspondingly, new forms of medical malpractice that may be followed by the birth of a disabled child. This, in turn, may intensify the need for legal redress in this type of situation.⁴⁵ This is so simply because the greater the potential for a certain wrongful conduct (malpractice) to occur and the more people it may affect, the stronger the reason for law to step in so as to disincentivise that type of wrongful conduct and remedy its consequences.

There is also, however, a sense in which the increasingly common recourse to genetic and reproductive medicine may strengthen the reasons *against* legal redress in wrongful life cases. How so? First, the reality of frequent recourse to genetic and reproductive medicine is likely to form a particularly fertile ground for wrongful life claims to arise. This, in turn, means that a judicial recognition of wrongful life as actionable could gain recurrent manifestation through a multiplicity of cases. And, although the number of cases involved can only make a quantitative, rather than a qualitative, difference, it is nonetheless arguable that the more common and recurrent the judicial recognition of wrongful life claims would be, the greater the inroad into the sanctity of human life and social esteem of disabled people. Secondly, if, due to technological possibility, parental and medical conceptions will become worryingly influenced by what might be called a “quest-for-the-perfect-child” culture – whereby perceived shortcomings in a child too readily raise questions about the worth of his or her life – this, too, may reinforce the courts’ position against wrongful life claims. Against the backdrop of such cultural currents, it would become especially important that courts serve as a gatekeeper helping to ensure that society’s moral conceptions are not predominantly shaped – and, indeed, led astray – by the sheer fact of technological possibility.

The last point leads directly to the next relevant factor: the relationship between the actionability and the *scope* of wrongful life claims, and related “slippery slope” considerations.

B. Actionability, scope, and slippery slopes

Commentators calling for recognition of a cause of action in wrongful life claims do not normally maintain that *any* physical or mental condition could give rise to this cause of action. Rather, they acknowledge that, since the but-for scenario in a wrongful life claim would have led to non-existence of the claimant, the claim should succeed only if the claimant’s medical condition is *severe enough* to outweigh the goods in life (this proviso will be referred to as “the severity requirement”). Now, the severity requirement may be relevant not only as a criterion that determines *which* medical conditions could give rise to a wrongful life claim (assuming the actionability of wrongful life), but also, indirectly, as a consideration to be taken into account in deciding whether wrongful life claims should be regarded as actionable at all. This is so because, arguably, the task of drawing a hard and fast line between truly severe disabilities (which would give rise to a cause of action) and less-than-extremely-severe disabilities (which would not be actionable) is a task that in itself implicates serious difficulties.⁴⁶ As Amos Shapira notes by way of example:

How would blindness, for instance, be classified? Or deafness? Or diabetes? Or Down’s syndrome? Or being born missing a limb? The protagonists of this view [that is, of recognising a cause of action for

⁴⁵ See related comments in Shapira, n 26 at 370.

⁴⁶ Compare Shapira, n 26 at 373.

wrongful life subject to the severity requirement] failed to offer any classification of degrees of disability.⁴⁷

Although Shapira himself ultimately takes the view that wrongful life claims should be recognised as actionable, the above classificatory difficulty can be seen as a factor weighing against such recognition. On this line of thought, the best way to avoid the difficulty of distinguishing between sufficiently and insufficiently severe disorders is simply to regard all wrongful life claims as non-actionable.

Against this line of thought, it is worth considering a recent account offered by Rosamund Scott, in which the severity requirement features, not as a consideration *against* the actionability of wrongful life claims, but rather as a consideration *for* their actionability.⁴⁸ Scott discusses the discrepancy between *McKay* and s 1A of the Act as part of a wider critique of the law on wrongful life claims. Her suggestion for legal reform is to recognise a cause of action for wrongful life. But, in advocating this measure of reform, she stresses the importance of the severity requirement and expresses confidence in the effective possibility of drawing and maintaining the line between medical conditions that meet this requirement and medical conditions that do not. In this connection, she argues that the severity requirement would actually be fulfilled only with regard to “very few”⁴⁹ medical conditions and in “surprisingly rare”⁵⁰ circumstances. Scott provides a few examples of medical conditions that she believes might satisfy the requirement, such as Tay-Sachs, Lesch-Nyans syndrome, and severe cases of Epidermolysis bullosa or rubella.⁵¹ By contrast, she notes with regard to Down’s syndrome that “it is almost certain that a child born with the condition could not (reasonably) say that it is so severe that life’s burdens outweigh its goods”.⁵² As indicated above, Scott’s arguments about the severity requirement are not merely incidental to her position, but rather an integral part of her advocacy of the actionability of wrongful life claims; for she believes that the “expressivist objection” against wrongful life claims “is at its weakest when the basis for the wrongful life action is the judgment that a child’s condition is likely to be of sub-zero quality”.⁵³ In other words, restricting the cause of action in wrongful life claims to only exceptionally severe medical conditions would, according to Scott, ensure that the potential affront against the sanctity of life is kept to a minimum.

This observation, however, seems to depend on Scott’s assumption that the line between eligible and ineligible medical conditions for the purpose of wrongful life claims could be safely drawn and remain relatively fixed at the point she envisages for it – which is an assumption not free from doubt.⁵⁴ Although slippery slope arguments are somewhat prone to misuse, they are not

⁴⁷ Shapira, n 26 at 373.

⁴⁸ Scott, n 3.

⁴⁹ Scott, n 3 at 131.

⁵⁰ Scott, n 3 at 118.

⁵¹ Scott, n 3 at 131.

⁵² Scott, n 3 at 135. It is interesting to contrast the fewness of actionable medical conditions which Scott envisages with the much more extensive list of conditions which the Human Fertilisation and Embryology Authority regards as sufficiently serious to warrant a pre-implantation genetic diagnosis. This contrast arguably goes to reinforce (if indirectly) the doubts raised below as to Scott’s argument.

⁵³ Scott, n 3 at 150.

⁵⁴ Scott argues that the case law on the withdrawal of life-sustaining treatment from severely disabled neonates, where judges have been required to determine whether the child’s life would be so afflicted as to be intolerable, illustrates that a similar judicial assessment could be properly conducted in the context of wrongful life claims (Scott, n 3 at 134-137). But the treatment withdrawal cases cited by Scott seem to demonstrate, more than anything else, the extremely difficult and highly controversial nature of this type of severity assessment. Moreover, there is a strong reason to doubt the suggested analogy between these cases and wrongful life cases: one of the main factors that impel judges to maintain a stringent severity requirement in withdrawal treatment cases is the drastic implications of a decision to withdraw life-sustaining treatment, namely, bringing about the death of a child. This factor is absent from wrongful life cases, where the only operative effect of a decision is the award or withholding of monetary compensation.

always wrong; and the present context appears to be a context where they can be appropriately invoked.⁵⁵ The envisaged slippery slope is not necessarily one that descends all the way down to scenarios involving wrongful life claims in respect of personal attributes such as a child's eye colour or complexion (following mistaken genetic advice on such attributes).⁵⁶ While such scenarios cannot be ruled out as impossible, their likelihood in the near future seems rather low. Instead, the slippery slope concern here focuses on the possibility of distinguishing physical or mental *illnesses* or medically recognised *disabilities* according to their severity. There are a number of reasons for this concern, including the following facts:

- (i) The misfortunes and adversities associated with different medical conditions is a matter that hardly lends itself to precise quantification, and cannot be easily (if at all) located on a common comparative metric against the goods in life – at least not with the level of certainty and convergence of opinion that is necessary for consistent application of the severity requirement.
- (ii) Even the effects of a *single type* of medical condition may vary in intensity from one case to another,⁵⁷ thus making it harder to set clear lines between types of condition by reference to their severity.
- (iii) Technological development in the fields of genetic and reproductive medicine may continue to drive up the level of expectations, on the part of parents and society at large, for fewer defects in born children – an attitude which may affect judges too, thus gradually eroding the severity requirement.

The above risk of a slippery slope finds vivid illustration in the development of French law following the case of *Perruche*⁵⁸ (a development described by Scott in the aforementioned article).⁵⁹ In *Perruche*, the Cour de cassation awarded damages to a child affected by rubella in a wrongful life action. The case was followed by another wrongful life action in which the Cour de cassation ruled in favour of children with Down's syndrome.⁶⁰ Subsequent public controversy – and, in particular, an uproar on the part of French disabled groups and medical practitioners – led the French Parliament to enact a law overturning this line of decisions and rendering wrongful life claims non-actionable.⁶¹

None of what is said above is meant to suggest that slippery slope considerations are a *decisive* reason against recognising a cause of action in wrongful life claims. All that the above comments suggest, instead, is that a decision to opt for the actionability of wrongful life claims should take into account the actual scope of actionable cases in which it is likely to eventuate, and the risk for this scope to extend beyond the confines it was initially meant to have.

C. Wrongful life and wrongful birth claims

As noted earlier, one of the main considerations in favour of recognising a cause of action in wrongful life claims is the desire to provide legal redress so as to mark the wrong done by a negligent physician, deter future malpractice, and financially assist the disabled child and his or her family. In this connection, however, the following question may be posed: could not the need for legal redress be met through a claim by the *parents* (rather than the child) that would steer clear of the “wrongful life” implication that is integral to the child's claim?

This question invokes a type of claim known as *wrongful birth* claim. In a wrongful birth claim, the parents seek recovery for damage they claim to have suffered in connection with the birth and its consequences, for example, costs incurred by the parents in meeting the child's

⁵⁵ For a valuable analysis of the presuppositions and defining characteristics of slippery slope arguments, see Schauer F, “Slippery Slopes” (1985) 99 *Harvard Law Review* 361-383.

⁵⁶ Compare Shapira, n 26 at 374.

⁵⁷ As Scott explicitly recognises with regard to Down's syndrome: Scott, n 3 at 135.

⁵⁸ Cour de cassation, 17 November 2000, reported in JCP 2000 II 10438.

⁵⁹ Scott, n 3 at 151.

⁶⁰ Cour de cassation, 28 November 2001, reported in JCP 2002 II 10018.

⁶¹ *Loi n° 2002-303 du 4 mars 2002 relative aux droits des malades et à la qualité du système de santé* (France), Art 1. The Article reads: “Nul ne peut se prévaloir d'un préjudice du seul fait de sa naissance” (no-one can bring an action for damage due to the sole fact of his birth).

medical needs as a disabled child.⁶² Unlike wrongful life claims, wrongful birth claims have been largely treated by courts in the United Kingdom as actionable,⁶³ which suggests that these claims are deemed to be inoffensive, or at least significantly less offensive than wrongful life claims, from the standpoint of relevant public policy. If this approach is warranted, compensation for wrongful birth damage should be seen as an alternative (and a preferable) form of legal redress to the family, and, thus, the need for legal redress would lose some⁶⁴ of its force as a reason for accepting wrongful life claims (as well as children's claims in the selection cases).⁶⁵ This would also bear on the proper response to the inconsistency problem discussed in this article; namely, it would weaken the case for Alternative 1 (recognising a cause of action for wrongful life), thus rendering Alternative 2 (treating the child's claim in the selection cases as non-actionable) a stronger candidate for solving the problem.

However, the assumption that wrongful life and wrongful birth claims merit different treatment is by no means indisputable, and has in fact come under some criticism.⁶⁶ After all, like wrongful life claims, wrongful birth claims imply that the child's existence is a harm, and although the life in question is not the claimant's own life, it is nonetheless the life of his or her own child. It should come as little surprise, then, that this type of claim, too, has been argued to have repugnant implications for the value of human life and the social image of the disabled, as well as potentially adverse effects on the child's self-perception and the parent-child relationship.⁶⁷ And although there are certain relevant distinctions between wrongful life and wrongful birth claims that may render the latter *somewhat* more agreeable to our intuitive moral judgments,⁶⁸ given how fine and nuanced these distinctions are, the question remains whether the law should rely on them as a basis for different treatment. The answer to this question may turn, in part, on a further one: namely, whether there is an alternative form of legal redress that is even *less* open to challenge on public policy grounds. If there is such other form of redress, it may obviate the need to resort to the more problematic solution of wrongful birth damage. The question of whether such other form of redress exists leads directly to the next and final part of the discussion, which concerns the "conventional award" introduced in *Rees v Darlington Memorial NHS Trust*⁶⁹ and its possible relevance to the cases in question.

⁶² Another example of such damage is pain and suffering during pregnancy and labour.

⁶³ See, for example, *Rand v East Dorset Health Authority* [2000] Lloyds Rep Med 181; *Hardman v Amin* [2000] Lloyd's Rep Med 498; *Lee v Taunton and Somerset NHS Trust* [2001] 1 FLR 419; *McLelland v Greater Glasgow Health Board* [2002] SLT 446; *Lillywhite v University College London Hospitals' NHS Trust* [2005] EWCA Civ 1466; *Farraj v King's Healthcare Trust and Cytogenic DNA Services Ltd* [2006] EWHC 1228. See also Hoyano LCH, "Misconceptions About Wrongful Conception" (2002) 65 *Modern Law Review* 883 at 892-896. For a helpful discussion of the father's status in a wrongful birth claim, see Mulheron R, *Medical Negligence: Non-Patient and Third Party Claims* (Ashgate: Farnham, 2010) pp 243-245, 247-260.

⁶⁴ The word "some" is used here since a cause of action for wrongful birth may fall short of catering for the child needs, for example, where the biological parents' role in rearing the child comes to an early end because the child has been put up for adoption or placed in local authority care, or where the parents are unable or unwilling to sue for other reasons: see Hilliard L, "Wrongful Birth: Some Growing Pains" (1985) 48 *Modern Law Review* 224 at 225; Jackson A, n 3 at 364.

⁶⁵ Compare *McKay v Essex Area Health Authority* [1982] 1 QB 1166 at 1178, where Stephenson LJ notes: "The importance of this cause of action to this child is somewhat reduced by the existence of ... the mother's claims, which, if successful, will give her some compensation in money or in care." But see contra Jackson A, n 3 at 363-364.

⁶⁶ See, for example, Trindade F and Cane P, *The Law of Torts in Australia* (3rd ed, Oxford University Press, Oxford, 1999) p 434 (arguing that the dissimilar treatment of these claims represents an inconsistency); Hensel WF, "The Disabling Impact of Wrongful Birth and Wrongful Life Actions" (2005) 40 *Harvard Civil Rights-Civil Liberties Law Review* 141 at 164-170 (referring to the differentiation between these claims as a "false dichotomy"). See also *McFarlane v Tayside Health Board* [2000] 2 AC 9 at 83 where Lord Steyn notes that "coherence and rationality demand that the claim by the parents should also be rejected".

⁶⁷ Hensel, n 66 at 152; Shapira, n 26 at 374. See also *Sherlock v Stillwater Clinic* 260 NW 2d 169 at 177 (Minn, 1977).

⁶⁸ For example: (i) wrongful birth claims may have less of a paradoxical feel to them since they do not rely on a (hypothetical) scenario involving the claimant's own non-existence; (ii) given the identity of the claimants in a wrongful birth claim (that is, the parents, rather than the child), the decision is likely to be more responsive than the decision in a wrongful life claim to the way in which the child's disability affects the freedom, financial resources, and lifestyle of the parents as autonomous individuals; and (iii) the assessment of damages in wrongful birth claims may be somewhat easier than in wrongful life claims, as it does not require any form of insight into the state of non-existence. In such a claim the law is not required to place the claimants in a position equivalent to their non-existence.

⁶⁹ *Rees v Darlington Memorial NHS Trust* [2004] 1 AC 309.

D. The “conventional award” in *Rees*

The claimant in *Rees* was a woman with a severe visual disability, who, due to her fear of not being able to look after a child properly in her condition, underwent a sterilisation operation. The operation was negligently performed at a hospital managed by the defendants, and the claimant subsequently conceived and gave birth to a (healthy) child.⁷⁰ The case reached the House of Lords which ruled (by a majority of four against three) that, while the claimant could not recover the costs of bringing up the child,⁷¹ she should nonetheless be given a “conventional award” of £15,000. Before considering the relevance of this award to the problem discussed here, it should be noted that its exact doctrinal nature was subject to disagreement among the majority: Lord Bingham pointed out that, while the award is not nominal, it is also not meant to be compensatory. It was described by him as an award that “would afford some measure of recognition of the wrong done [to the mother]”,⁷² namely, the negligent conduct that denied her “the opportunity to live her life in the way that she wished and planned”.⁷³ Lord Nicholls seemed to concur with this classification, noting that the award should be made to “recognise” that the parent has suffered a legal wrong.⁷⁴ The language employed by Lords Millett and Scott, on the other hand, denotes a compensatory understanding of this award,⁷⁵ with Lord Millett referring to the relevant damage to be compensated for as the “injury to the parents’ autonomy” (that is, the aspect of their autonomy which consists in the right to limit the size of their family).⁷⁶

On either approach, this award is not given in respect of the *birth and existence of the child*, and so it does not seem to bear an offensive message from the standpoint of public policy concerning the sanctity of life. It is precisely this innocuous nature of the award in *Rees* that makes it worthwhile to consider whether it could properly be used in the cases discussed in this article. If it could, then granting this type of award to the parents in *McKay*-like cases and in the selection cases (and repealing the part of s 1A of the Act which refers to the selection cases) would be a particularly appealing solution; for it would simultaneously satisfy the requirement of consistency, the need for legal redress (or at least some measure of it),⁷⁷ and the wish to avoid sending the ethically contentious message that life or birth itself can amount to harm. However, two conditions must be met in order to render the *Rees* award an appropriate route of response to the situations in question: the first condition is that there must be an adequate basis for analogy in view of the rationale of the award in *Rees* – this rationale must be shown to apply to the circumstances of the cases discussed here. The second condition is that the type of award granted in *Rees* must itself be a doctrinally sound and desirable development of the law. A full inquiry into whether these conditions hold will not be pursued here, but an outline of the main issues to be considered in such an inquiry will be offered.

Could the rationale of the award in *Rees* be applicable to the cases under consideration? The circumstances of *McKay* seem apt to be subsumed under the rationale of this award, whether the award is conceived of as compensatory or not. In the circumstances of *McKay*, too, the mother suffered a wrong that seriously compromised her personal autonomy. The wrong in this case is the defendants’ negligent misdiagnosis of her illness, in dereliction of their duty of care as medical practitioners. The compromised aspect of her autonomy is the opportunity to make an adequately informed decision on whether to have an abortion or not. It is presupposed by this argument that personal autonomy includes more than just a formal possibility to choose a course of action; autonomy and its valuable essence are not fully instantiated when an agent makes a

⁷⁰ This case belongs to a category often referred to as “wrongful conception” claims.

⁷¹ The House of Lords’ decision concerned only the “extra” costs attributable to the mother’s disability in bringing up the child. These had been the only costs held to be recoverable by the Court of Appeal, a decision which the defendant appealed.

⁷² *Rees v Darlington Memorial NHS Trust* [2004] 1 AC 309 at 317.

⁷³ *Rees v Darlington Memorial NHS Trust* [2004] 1 AC 309 at 317.

⁷⁴ *Rees v Darlington Memorial NHS Trust* [2004] 1 AC 309 at 319.

⁷⁵ *Rees v Darlington Memorial NHS Trust* [2004] 1 AC 309 at 349-350, 356.

⁷⁶ *Rees v Darlington Memorial NHS Trust* [2004] 1 AC 309 at 350.

⁷⁷ See comment in n 64.

choice on the basis of misleading information about facts pertinent to her choice,⁷⁸ such as the incorrect blood test result provided to the mother in *McKay*.⁷⁹ And, like the mother's choice in *Rees*, the mother's choice in *McKay* has dramatic implications for her future life. So, if the mother in *Rees* is entitled to a "conventional award", it is hard to see why the mother in *McKay* should not be entitled to the same award.

What about the selection cases? Could the parents' situation in these cases come under the rationale of the "conventional award"? How pronounced the inroad into the parents' *autonomy* is in this context may depend on the circumstances of the particular case at hand. For example, it may depend on whether the gametes or embryo selection process involved a negligently performed genetic testing of the relevant gametes or embryo, whose results were reported to and relied upon by the parents. But even in the absence of such circumstances a tenable argument can be made for extending the "conventional award" to the selection cases. Negligent acts or omissions in the selection process, in breach of a medical duty of care, constitute a wrong; this wrong is a departure from the course of events that the parents contemplated and were entitled to expect when they opted for infertility treatment; and this, in turn, will have a dramatic impact on their future lives. These features could be argued to provide a sufficient basis for granting the "conventional award" by recourse to the rationale of *Rees*. The assessment of this argument, however, is left for another occasion.

In closing, a brief comment is warranted on the second condition mentioned above, concerning the doctrinal soundness and desirability of the "conventional award" granted in *Rees*. This issue raises some particularly difficult questions. If, as stated by Lord Bingham, the award was not compensatory, the question arises: what type of award *was it*? As his Lordship pointed out, it was not a nominal award. Moreover, it was not regarded as an award of punitive damages, nor could it be thus regarded since the common law prerequisites for the award of punitive damages were not met in this case.⁸⁰ On this approach, then, the decision in *Rees* appears to have created a new category of award, consisting in a fixed amount that is meant to recognise a wrong done regardless of whether it resulted in harm. This, however, is a radical change of legal doctrine with potentially far-reaching implications, which therefore deserves a more systematic and extensive discussion than that which we find in *Rees*. It is possible that the majority intended their ruling to apply narrowly, namely, strictly and only to circumstances where a child is born following negligence connected to *vasectomy or sterilisation*. But a judge can neither prevent future judges from drawing analogies between cases nor stipulate away the need for law to treat like cases alike, that is, according to the same principle; and the principle underlying *Rees* may be applicable to a range of cases extending beyond those involving vasectomy or sterilisation, and even beyond cases of reproductive liability.

The potential for the "conventional award" to expand may be somewhat attenuated when it is viewed as a compensatory award, because, on this approach, the award cannot be granted unless some damage is identified, for example, an injury to the claimant's autonomy. Moreover, the compensatory version may seem less vulnerable to challenge on doctrinal grounds, as it is defined in terms of an existing category of award, rather than a newly invented one. However, even the compensatory version of the award prompts difficult questions. For example: is the sum of £15,000 really sufficient to compensate for a serious injury to autonomy, such as the denial of the opportunity to decide whether to have a child or not?⁸¹ If the award is compensatory, why should it be fixed, rather than adjustable in response to the severity of the injury to autonomy as it may vary from one case to another, or from one context to another?⁸² To what other situations, within

⁷⁸ Certainly not when the cause of error – medical malpractice – is not one of the risks that she should be expected to take into account in her decision.

⁷⁹ Due to the misdiagnosis, she was not actually opting for the alternative she believed herself to be opting for, namely, continuing a pregnancy with a healthy fetus.

⁸⁰ That is, the prerequisites laid down in *Rookes v Barnard* [1964] AC 1129: (i) oppressive, arbitrary or unconstitutional actions by the servants of the government; or (ii) conduct on the defendant's part that was calculated to make a profit for herself which may well exceed the compensation payable to the claimant; or (iii) an express statutory authorisation as to the award of such damages in the relevant situation.

⁸¹ See *Rees v Darlington Memorial NHS Trust* [2004] 1 AC 309 at [77], where Lord Hope raises similar doubts.

⁸² Compare *Rees v Darlington Memorial NHS Trust* [2004] 1 AC 309 at [76]. The relatively modest size and fixed nature of this award seem to be at odds with a compensatory aim. They are probably best explained as "external" constraints

and outside the context of reproductive liability, could this type of award be applicable? And what impact would its extension have on the conceptual structure of tort law? However attractive the idea of autonomy-based redress may be as a solution to the cases at hand, it should not be resorted to without adequate examination of the broader spectrum of cases and considerations encompassed by the above questions.

IV. CONCLUSION

This inquiry began with an account of the legal position on wrongful life claims and the selection cases, which brought into view the inconsistency between them: while the law treats wrongful life claims as non-actionable, it recognises a cause of action in the selection cases, although the selection cases bear a relevant resemblance to wrongful life claims.

It then turned to consider a number of possible counterarguments, that is, arguments that may be invoked in an attempt to reconcile the above two strands of the law. Three of these counterarguments consisted in attempts to distinguish the selection cases from wrongful life claims so as to justify the difference in their respective outcomes. It was found that all three attempts fail to reveal a valid basis for treating these situations differently. A fourth counterargument contended that the present analysis of the selection cases is susceptible to a *reductio ad absurdum*. This argument, it was observed, trades on confusion between two senses of the term “identity”, namely, a numerical sense and qualitative sense. Once the confusion between these two senses had been dispelled, it became apparent that no *reductio ad absurdum* follows from the analysis.

Finally, the article considered possible ways of reforming the law so as to rectify its inconsistency. The primary alternatives for such reform are either recognising a cause of action in wrongful life claims or revoking the presently recognised cause of action in the selection cases. It was noted that the choice between these alternatives should take account of conflicting normative considerations, such as the wish to avoid an affront against the sanctity of life on the one hand, and the wish to recognise and redress the wrong done by a negligent health care professional on the other hand. Within this normative framework, however, a number of additional factors were highlighted which hold particular significance for the above choice. These factors include the increasingly common recourse to genetic and reproductive medicine; the likely scope of a cause of action in wrongful life claims; and the availability of alternative forms of award, such as the award of damages in wrongful birth claims or an autonomy-related award of the type granted in *Rees v Darlington Memorial NHS Trust*.⁸³ The latter type of award, it was observed, may provide a particularly appealing solution to the problem under consideration. For, first, the cases discussed here can be tenably argued to involve a violation of autonomy analogous to the one found in *Rees*. Secondly, resolving these cases by recourse to an autonomy-related award would provide a consistent solution that both satisfies the need for legal redress (or at least some measure of it) and steers clear of the ethically contentious implication that life or birth itself can amount to harm. It was observed, however, that the merit of this solution depends on broader questions regarding the doctrinal soundness and desirability of introducing an autonomy-related award into the law of torts. These questions extend beyond the ambit of reproductive liability cases and, as such, deserve an inquiry of their own.

imposed on the award in order to secure that it does not become effectively indistinguishable from compensation for costs ensuing from the child's existence.

⁸³ *Rees v Darlington Memorial NHS Trust* [2004] 1 AC 309.