WRONGFUL LIFE

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Introduction

The significant advances that have occurred in medical technology and genetic screening over the past decades have resulted in the opening of a "Pandora's box of legal ills,"[1] and it is evident that physical suffering that once would have been considered attributable to the hands of fate can now be contemplated as an actionable injury. One of the most ethically complex of these "legal ills" is the proposed tortious action for "wrongful life."[2] The success of this action is dependent upon the judicial acceptance that in certain circumstances life can be a compensable harm. Unsurprisingly, the need for a judicial incursion into the depths of metaphysics and existentialism in order to determine the fundamental question of whether life can constitute actionable damage, combined with the inherent policy concerns which surround such a claim, has led to a widespread judicial reluctance to countenance the recognition of such an action.[3] The High Court of Australia in

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[1] Alexander Morgan Capron "Tort liability in Genetic Counselling" (1979) 79 Colum. L. Rev. 618 at 619.

[2] It must be noted that the label has come under criticism for its emotive connotations, see, for example, Kirby J in *Harriton v Stephens* (2006) 226 ALR 391 (HCA) at [3]; Joseph S Kashi, "The Case of the Unwanted Blessing: Wrongful Life" (1977) 31 U. Miami L. Rev. 1409 at 1432; Allan F Hanson, "Suits for Wrongful Life: Counterfactuals and the Non-existence Problem" (1996) 5 S. Cal. Interdisc. L. J. 1 at 9,23; David Hirsch, "Rights and Responsibilities in wrongful birth, wrongful life cases" (2006) 29 U.N.S.W.L.J. 233 at 235; Dean Stretton "The Birth Torts: Damages for Wrongful Birth and Wrongful Life" (2005) 10 Deakin L. Rev. 319 at 348.

[3] Twenty-four states in the US have denied the claim, for the comprehensive list see Kirby J's judgment in *Harriton v Stephens* at n 102. See also *McKay v Essex Area Health Authority* [1982] QB 1166 (CA) (Hereafter *McKay*); *JU v See Tho Kai Yin* [2005] 4 SLR 96 (HC of Singapore); Lacroix v Dominique [2001] DLR (4th) 121 (ManCA). The claim has however been recognised in three state jurisdictions in the US, see *Turpin v Sortini* 182 Cal.Rptr. 337 (Cal 1982); *Harbeson v Parke-Davis Inc* 656 P.2d 483 (9th Cir 1983); *Procanik v Cillo* 97 N.J 339 (NJ 1984). See also, *Zeitzov v Katz* (1986) 40 PD 85 (Supreme Court of

Harriton v Stephens [4] has undertaken a comprehensive examination of the viability of the action, and the decision provides an excellent platform from which to discuss the intrinsically intertwined issues of law and policy that the proposed claim involves. Kirby J's persuasive dissent in *Harriton* does reveal the inherent weaknesses of some of the proposed policy objections to the claim and indicates that the pronounced aversion to the action, arising from some of the supposedly intractable concerns of policy, has been significantly overstated. However, it is apparent that the majority judgment must ultimately prevail. Both the inability of the claim to fall neatly within the defined parameters of the framework of the tort of negligence, and the significant policy implications of such an action, ultimately outweigh the perceived injustice of denying financial recovery to a plaintiff whose life with disabilities is attributable to a doctor's negligence.

A. The wrongful life claim and Harriton v Stephens; Waller v James

It is important at the outset to distinguish a claim for wrongful life from the related tortious action of "wrongful birth." While an action for wrongful birth involves a parental claim for damages arising from an unwanted birth caused by medical negligence,[5] the wrongful life action is conversely premised on a claim by a disabled child alleging that but for the negligence of a medical practitioner he or she would not have been born. The claim is usually generated by misconduct such as inadequate genetic testing or a doctor's failure to detect foetal abnormalities,[6] and the High Court of Australia was granted the opportunity to examine the feasibility of the action in the joint appeals

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Israel); *Perruche* judgment, Cass.Ass.Plen, 17.11.00,J.C.P. G2000 11-10438, 2309 (Cour de Cassation*)*.

[4] (2006) 226 ALR 391 (hereafter *Harriton*).

[5] The High Court of Australia has allowed recovery of the costs of bringing up a healthy child in *Cattanach v Melchior* (2003) 199 ALR 131, in contrast, the House of Lords rejected the claim in *McFarlane v Tayside Health Board* [1999] 3 WLR 1301. However, in *Parkinson v St James and Seacroft University Hospital NHS Trust* [2002] QB 266 the English Court of Appeal allowed the recovery of expenses arising specifically from a child's disability. See generally Stephen Todd, "Wrongful Conception, Wrongful Birth and Wrongful Life" (2005) 3 Sydney L. Rev. 525 at 527-537.

[6] Christopher J Grainger, "Wrongful Life: A Wrong Without a Remedy" (1994) 2 Tort Law Review 164 at 164. In *Harriton,* the misconduct involved a failure to detect in-vitro exposure to rubella antibodies.

of *Harriton v Stephens* and *Waller v James*.[7] The governing principles of law were delivered in *Harriton*, in which the claim was rejected by a 6:1 majority. Crennan J delivered the leading judgment (which was adopted by Gleeson CJ, Gummow and Heydon JJ) while separate majority judgments were delivered by Hayne and Callinan JJ. In their denial of the claim the majority judgments were clearly influenced by the stringent requirements of legal principle. In contrast, Kirby J, as the sole dissentient, delivered a forceful judgment that was clearly impelled by the perceived imperatives of social justice. It is clear that the fundamental issues to be considered in determining the action's viability are whether the claim can fall within the defined boundaries of the negligence framework, and whether issues of policy propel or repel recognition of the action. These are discussed in turn.

B. Existence of a Duty of Care

While the recognition of a duty to take care is the key element of an action in negligence,[8] in wrongful life jurisprudence the issue as to whether a duty can be recognised has not proved to be a pivotal concern for a number of jurisdictions.[9] This particular issue was briefly dispensed with by Crennan J in *Harriton*. Her Honour simply held that a duty of care was unable to exist as the particular damage claimed by the appellant was not legally cognisable.[10] It is thus clear, as Grey notes, that for the majority the issues of duty and damage were intrinsically linked.[11] Such reasoning meant that Crennan J did not need to determine the duty issue pursuant to the policy implications arising from the recognition of a duty. However, as her Honour did in fact give "consideration" to these issues of policy,[12] this will be explored separately in the examination of policy below. In contrast to the conflation of the issues of duty and damage favoured by Crennan J, Kirby J warned against the unnecessary lifting of the damage

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[7] (2006) 226 ALR 457 (hereafter *Waller*). In *Waller,* the misconduct involved negligent advice about genetic defects.

[8] *Grant v Australian Knitting Mills Ltd* [1936] AC 85 (PC).

[9] See the discussion of Anthony Jackson, "Action for wrongful life, wrongful pregnancy and wrongful birth in the United States and England" (1995) Loy. L.A. Int'l & Comp. L.J. 535 at 563; Grainger, above n 6, at 167.

[10] *Harriton,* ,above n 4,, at [243].

[11] Alice Grey, "Harriton v Stephens: Life, Logic and Legal Fictions"(2006) 28 Sydney L. Rev. 545 at 549.

[12] Harriton, ,above n 4,, at [243].

consideration into the judicial determination of whether a duty of care existed.[13] This analysis enabled Kirby J to assert that as the prerequisite element of foreseeability existed between the medical practitioner and the foetus, the duty owed to the appellant fell within the scope of the established duty of care to prevent pre-natal injuries.[14] It is indeed clear that a consideration of the nature of damage is better confined to the damage inquiry alone as the conflation of the issues of damage and duty does appear to "subvert the traditional structure" of the cause of action in negligence, and to "threaten the continued relevance" of the duty consideration.[15] Therefore, the complexities arising from the recognition of legally cognisable loss in a wrongful life claim should not pre-determine the duty of care issue. However, contrary to what Stretton has argued,[16] this finding in itself does not entail that the duty issue is concluded. As the duty element of the negligence framework is inherently policy driven,[17] the policy implications surrounding the recognition of the duty are of fundamental importance. These concerns will be examined shortly.

1. Causation

As Belsky writes, seldom has a potential lack of causation played a "decisive role" in the judicial denial of the wrongful life claim.[18] However, owing to the medical reality that the physician is not himself responsible for the creation of the child's disabilities, a pertinent question is raised as to what damage the physician's negligent conduct can be regarded to have caused. In *Harriton* this difficulty was overcome

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[13] Ibid, at [69]–[70].

[14] Ibid, at [71]–[72]. Hayne J also favoured this analysis, ibid, at [176].

[15] Kirby J, ibid, at [69], see also *Neindorf v Junkovic* [2005] 222 ALR 631 at 643–646; John G Fleming, *The Law of Torts* (4th ed 1998) at 117–118.

[16] Dean Stretton, "Harriton v Stephens, Waller v James: Wrongful Life and the logic of non-existence" [2006] Melb. U.L. Rev. 972 at 981.

[17] See, for example, *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 (CA), at 293-294 per Cooke P, at 305-306 per Richardson J, at 312 per Casey J and at 293-294 per Hardie Boys J; *Rolls Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA) at [58]. See generally, Todd *The Law of Torts in New Zealand* (5th ed, 2009) at 139-142, Fleming above n15 at 153-154, W.V.H Rodgers, *Winfield and Jolowicz on Tort* (17th ed, Sweet and Maxwell, London 2006) at 111-113.

[18] Alan J Belsky, "Injury as a Matter of Law, is this the answer to the Wrongful Life Dilemma?" (1993) 22 U. Balt. L. Rev. 185 at 220, see also Timothy J. Dawe "Wrongful Life: Time for a Day in Court" (1990) 51 Ohio St. L.J. 473 at 478.

by the appellant's formulation that the medical practitioner was responsible for the creation of a "life with disabilities."[19] If it is accepted that "life with disabilities" can constitute damage (as discussed below) it is arguable that there should be no real difficulty in establishing causation. The judicial treatment of causation has recently become marked by an increasingly liberal attitude,[20] and thus this requirement of the negligence framework should not of itself provide an impediment to the recognition of the claim. As Kirby J argued, the appellant would not have been born had it not been for the physician's negligent conduct in failing to inform the appellant's mother of risks to the foetus.[21] Thus, this negligence can indeed be viewed to have been a cause of the appellant's "life with disabilities."[22] However, as noted by Hayne J, the establishment of causation will also be dependent upon the mother's confirmation that upon the receipt of the requisite advice she would have elected to abort the foetus.[23] Admittedly, the need for this subjective determination, although not uncommon in tort/delict cases, may create difficulties, as the judiciary could be required to determine the reliability of the patient's testimony.[24] However, the potential need for a subjective determination should not in itself result in a finding of lack of causation. The House of Lords has acknowledged that the judicial establishment of causation is primarily concerned with "making a value judgment on responsibility,"[25] and it is evident that the negligent physician can easily be considered to be responsible for the plaintiff's "life with disabilities."

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[19] *Harriton,* above n 4, at [245].

[20] See, for example, *Kuwait Airways v Iraq Airways Co* [2002] 2 AC 883 (HL), *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32 (HL), as noted by Margaret Fordham, "A Life Less Ordinary: The rejection of actions for Wrongful Life" (2007) 15 TLJ 123 at 133, see also Harvey Teff, "Condoning Wrongful Suffering" (2007) 15 Torts Law Review 7 at 9.

[21] *Harriton,* above n 4, at [39].

[22] For further examination of this point see, Belsky, above n 18, at 221; Robert Lee, "To be or not to be: is that the question" in Robert Lee and Derek Morgan (eds) *Birthrights: Law and Ethics at the Beginnings of Life* (Routledge, London, 1989) at 177; Grainger above n6 at 171; Philip Hersch "Tort Liability for Wrongful Life" (1983) 6 U.N.S.W.L.J. 133 at 136; Stretton, above n2, at 354, Stretton, above n16, at 994-995; Tony Weir, "Wrongful Life: Nipped in the Bud" [1982] C.L.J 225 at 226. In contrast, see *McKay*, above n 3, at 1181 per Stephenson LJ and 1188 per Ackner LJ.

[23] *Harriton,* above n 4, at [178].

[24] Gisele Kapterian, "Harriton, Waller and Australian negligence law: is there a place for wrongful life?"(2006) 13 JLM 336 at 344.

[25] *Kuwait Airways v Iraq Airways Co* [2002] 2 AC 883 (HL) at [74] per Lord Nicholls.

2. Ascertainment of Harm and Quantification of Damages

It is clear law that in order to succeed in a claim for negligence, a plaintiff must have suffered legally cognisable damage because of the negligent conduct in question,[26] and, if so, that his or her damages are to be quantified pursuant to the compensatory principle established in *Livingstone v Rawyards Coal Co*.[27] Undertaking an examination of the limited corpus of wrongful life jurisprudence, it readily becomes apparent that these well-established elements of the negligence framework have proven to be significant obstacles towards the judicial recognition of the claim. In order to determine if a plaintiff has suffered harm because of the defendant's negligence, the court must compare the "damage or loss caused by the negligent conduct" with the plaintiff's circumstances "absent the negligent conduct."[28] The compensatory principle similarly requires the court to compare the plaintiff's current position with the pre-tort position that the plaintiff "would have been in had he not sustained the wrong."[29] In the wrongful life context a strict application of these principles would require the court to delve into the mysteries of non-existence. It is therefore unsurprising that these hurdles to recovery proved to be insurmountable for the majority in *Harriton*.

At the heart of the wrongful life action lies the premise that life itself is capable of being recognized to be a legal injury. The ethical implications of such an assertion have proved to be troubling for many judiciaries. In the earlier stages of wrongful life jurisprudence, the concept that life itself could constitute a loss was rejected pursuant to a deeply-held judicial belief in the preciousness" of life.[30] The judicial refusal to recognise the essential element of harm was thus closely entwined with considerations of public policy. However, it is apparent that as wrongful life jurisprudence developed, denial of the occurrence

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[26] *J R Munday v London County Council* [1916] 2 KB 311 (CA) at 334 per Lord Reading CJ; *Donoghue v Stevenson* [1932] AC 562 (HL) at 619 per Lord MacMillan.
[27] *Livingstone v Rawyards Coal Co* [1880] 5 App Cas 25 (HL).
[28] *Harriton,* above n 4, at [251].
[29] *Livingstone v Rawyards Coal Co* above n27 at 39.
[30] *Gleitman v Cosgrove* 49 N.J 22 (NJ 1967) at 31 per Weintraub J. See also *Berman v Allan* 404 A 2d 8 (1979), *Stewart v Long Island College Hospital* 296 NYS 2d 41 (NY 1968), *Phillips v United States* 508 F.Supp. 537 (U.S. Dist.Ct., S.C. 1980)

of loss began to be based upon the grounds of logic alone.[31] Such reliance on the strictures of legal principle to refute the occurrence of harm is clearly evident in the majority judgments of *Harriton*. As acknowledged by Crennan J, the evaluation of damage for a wrongful life plaintiff would logically require a comparison between a life with disabilities and non-existence. Arguing that such an evaluation was simply "impossible" as there is no present field of human learning that would enable a person "experiential access" to non-existence, it was therefore held that the wrongful life action was unable to be countenanced.[32] Crennan J's strong emphasis that this "practical forensic difficulty" was a concern wholly independent from related policy objections[33] revealed a clear desire to highlight that denial of the action was founded upon the stringent requirements of legal principle alone. Sole reliance on the rigid parameters of the negligence framework in order to justify rejection of the claim was also evident in the judgements of both Hayne and Callinan JJ.[34] The majority's recourse to the strictures of logic is undeniably forceful. One can validly question whether identifiable loss has occurred if the limitations of human knowledge mean that the purported damage is unable to be measured. Owing to the human inability to evaluate and comprehend the concept of non-existence, an intrinsic uncertainty exists as to whether it can confidently be asserted that an injury has occurred. How can a comparison ever assuredly be made when one of the comparators is a concept of which no knowledge exists? Such difficulties do not lend themselves to an easy resolution.

These particular complexities were briefly dealt with by Kirby J in his wider discussion as to the quantification of general damages. Clearly influenced by the apparent injustices occasioned by the refusal to recognise the action,[35]His Honour was undeterred by the perplexities raised by the recognition of damage. He reasoned that a life of "severe and unremitting suffering" would unquestionably be worse than non-existence, and because the judiciary was constantly concerned with line-

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[31]See, for example, *Blake v Cruz* 698 P 2d 315 (Idaho 1984); *Smith v Cote* 513 A 2d 341 (N.H 1986); *Cowe v Forum Group Inc* 575 NE 2d 63 (Ind.1991), *JU v See Tho Kai Yin* [2005] 4 SLR 96.

[32]*Harriton,* above n 4, at [252]-[253].

[33]Ibid, at [254].

[34]Ibid, at [170]-[173] per Hayne J), at [206] per Callinan J.

[35] Ibid, at [85], [96], [101].

drawing, such a factual determination should not prove to be excessively troubling. [36] The issue of loss was therefore seen to pose little difficulty to the recognition of the action. Following this reasoning of Kirby J, it is apparent that the success of the action would require judicial acceptance that non-existence can, in certain circumstances, be a preferable alternative to a life of severe disabilities. This proposition clearly faces the same logical hurdle that, in the present fields of intellectual understanding, such an assertion can only ever be based upon pure hypothesis. However, proponents of the action vigorously argue that such a contention is by no means foreign to judicial thinking. In particular, it has frequently been asserted that such a judicial determination is often required to be made in the discontinuation of medical treatment cases.[37] This argument is superficially persuasive. However, as noted by Crennan J, this postulated analogy is inherently misconceived. Not only is there a fundamental difference in law, if not in ethics, between the passivity of non-intervention and the active execution of abortion, it is also apparent that a "forensic establishment of damage" is not required in discontinuation cases.[38] Little weight should therefore be placed on what is essentially a misplaced analogy. However, Kirby J's point must be conceded that though the situations may not be analogous, they do indicate that contemplations of non-existence are not unknown to judicial thinking.[39]

Surprisingly, it has been the complexities arising from the requisite application of the compensatory principle to quantify the plaintiff's purported damages, rather than the issue of the damage itself, that have been at the forefront of the judicial debate surrounding the action.[40] Logically, it would seem that a judicial focus on the

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[36] Ibid, at [105] and [108].

[37] See for example Belsky ,above n 18, at 223-229; Grainger, above n 6, at 169; Kapterian, above n 24, at 344; Derek Morgan and Ben White, "Everyday Life and the Edges of Existence: wrongs with no name or the wrong name?" (2006) 29 U.N.S.W.L.J. 239 at 245; Stretton, above n 16, at 987-989; Stretton, above n 22, at 357; Harvey Teff, "The Action for "Wrongful Life" in England and the United States" (1985) 34 Int'l & Comp. L.Q. 423 at 433-435; Jackson, above n 9, at 566, Weir, above n 22, at 228.

[38] *Harriton,* ,above n 4, at [256], see also *Re J (A Minor) (Wardship:Medical Treatment)* [1991] Fam 33 (CA) at 46.

[39] Ibid, n 4 at [95].

[40] See, for example, *Becker v Schwartz* 413 NYS 2d 895 (NY 1978); *Elliot v Brown* 36a So 2d 546 (Ala. 1978); *Kush v Lloyd* 616 So 2d 415 (Fla. 1992); *Speck v Finegold* 408 A. 2d. 496 (Pa. 1979); Fordham, above n 20, at 134-135; Hanson, above n 2, at 16, Deana Pollard, "Wrongful Analysis in Wrongful Life Jurisprudence" (2003) 55 Ala. L. Rev. 327 at 353.

quantification of damages is misplaced if damage itself is unable to be identified. As noted by Robertson J in *Nelson v Krausen*[41] any discussion of damages is "purely gratuitous" as it presupposes that the plaintiff has established the element of harm.[42] Crennan J's brief and separate treatment of the issues raised by the application of the compensatory principle appears to illustrate an implicit acceptance of such reasoning. It can be accepted, as was acknowledged by Crennan J, [43] that the general difficulty of quantifying intangible loss should not of itself justify rejection of a claim. However, Crennan J convincingly reasoned that there lies a fundamental distinction between tasks of mere difficulty and tasks of pure "impossibility." Her Honour argued that the application of the compensatory principle would necessitate the same "impossible comparison" that was required for the evaluation of the purported loss, and thus damages were simply unable to be quantified.[44] Therefore, the established parameters of the negligence framework once again hindered the claim's recognition.

In contrast, Kirby J, clearly motivated by an underlying desire to achieve social justice for a "victim of suffering,"[45] was prepared to award both special and general damages for the appellant. Seemingly influenced by the reasoning of the US cases that have allowed the claim, Kirby J proposed that special damages would be recoverable as the appellant would not have had any economic needs if the respondent had exercised reasonable care.[46] Kirby J's proposition that special damages should be awarded can well be viewed as a judicial compromise between the rigours of logic and the perceived requirements of justice. At first glance the award of special damages does appear desirable, as the comparison between life with disabilities and non-existence would be avoided. However, it is clear that Kirby J's analysis suffers from flaws. Although Kirby J asserts that the impediment to awarding recovery of special damages has been "founded in policy considerations, not law,"[47] a compelling objection to Kirby J's proposition ironically arises from the logic of the law alone.

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[41] *Nelson v Krausen* 678 SW 2d 918 (1984).
[42] Ibid, at 928.
[43] *Harriton,* above n 4, at [265], see also Teff ,above n 39, at 435.
[44] Ibid, at [265].
[45] Ibid, at [153].
[46] Ibid, at [87].
[47] Ibid, at [93].

Kirby J's analysis faces the same criticism that has been levelled at the reasoning of US judges, namely that, in the absence of a determination of whether legally cognisable harm has been occasioned, the presence of financial costs is not in itself adequate to award damages.[48] As Kirby J in his discussion on special damages eschewed the issue of whether a loss had occurred, his proposition in regards to the award of special damages therefore lacks persuasive strength.

In contrast to the approach of the US state jurisdictions, that have only been prepared to award special damages in their recognition of the wrongful life action,[49] Kirby J was undeterred by the difficulties surrounding the award of general damages. Though admitting that the complexities raised by the application of the compensatory principle, were the "principal" argument[50] in the respondent's favour, his Honour ultimately found this argument to be unpersuasive. Kirby J argued that the judiciary is well accustomed to assigning arbitrary values for "nebulous losses," and reasoned, relying on the discontinuation of treatment analogy, that the valuation of damages could not be considered to be an "impossible" task.[51] Significantly, such reasoning was firmly founded upon His Honour's insistence that there should be limits to logic where a conclusion that was "offensive to justice" would otherwise result.[52]

In order for Kirby J's assertions to be considered, it is first necessary to accept that a life with disabilities can, in certain circumstances, be a fate worse than non-existence. Even if such a proposition were hypothetically correct, difficulties still arise with his Honour's reasoning in regards to the quantification of this purported damage. It can be accepted that the courts are frequently compelled to engage in a rough

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[48] See for example, David H. Pace " The Treatment of Injury in Wrongful Life Claims" (1986) 20 Colum. J.L. & Soc. Probs. 145 at 156-158; Grey, above n 11, at 552-554; Nicolette M. Prilaux "Conceptualising Harm in the Case of the Unwanted Child" (2002) 9. J. Health L. 337 at 342. For a contrasting view see Kenneth A. Warner "Wrongful Life Goes Down Down Under" (2007) 123 L.Q.R 209 at 211; Tom Faunce, "Abandoning the Common Law: Medical Negligence, Genetic Tests and Wrongful Life in the Australian High Court" (2007) 14 JLM 469 at 475.

[49] *Turpin v Sortini* 182 Cal.Rptr. 337 (Cal 1982); *Harbeson v Parke-Davis Inc* 656 P.2d 483 (9th Cir 1983); *Procanik v Cillo* 97 N.J 339 (NJ 1984).

[50] *Harriton,* above n 4, at [78].

[51] Ibid, at [83], [95].

[52] Ibid, at [101].

approximation of damages.[53] However, as noted by Crennan J, the intangible injuries that require a rough approximation of damages normally fall within the scope of the judiciary's common experience, or are alternatively apprehended through evidence led from medical experts.[54] Problems clearly arise with a concept that falls outside the bounds of plausible contemplation. Proponents of the claim have confronted this troubling dilemma in a variety of ways. Two justices of the Israeli Supreme Court, allowing the claim in *Zeitzov v Katz,* [55] bypassed such complexities through the comparison of the disabled plaintiff with a hypothetical healthy child. Though such a construct has received some limited academic support,[56] it is apparent that such judicial reasoning is inherently flawed. As Crennan J argues, this "awkward, unconvincing and unworkable legal fiction" would have the effect of holding the physician liable for disabilities which he did not cause.[57] Furthermore, such a construct is inherently undesirable as it would entail compensatory provision for the lost opportunity of a life of health. Such an option clearly could never have been possible for a wrongful life claimant.[58] Another argument that has gained some academic support is the postulation that the value of zero can be assigned to non-existence. It is accordingly proposed that, if the burdens of life outweigh the benefits, damages can be duly quantified.[59] Such a supposition flounders for a variety of reasons. The assignment of the value of zero to the state of non-existence is faced by the recurring logical quandary that, in the present state of human knowledge, any value placed on non-existence is a quintessentially arbitrary figure. The enigma that is non-existence defies any such haphazard attempts at valuation. Therefore, it must be concluded that the judiciary will be simply unable to quantify the wrongful life

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[53] See Fleming, above n 15, at 476; Teff, above n 37, at 435; Jackson, above n 9, at 570.
[54] *Harriton,* above n4, at [253].
[55] *Zeitzov v Katz* (1986) 40 (2) PD85 (Supreme Court of Israel), discussed in David Heyd, "Are 'Wrongful Life' Claims Philosophically Valid? A Critical Analysis of a Recent Court Decision" (1986) 21 Isr. L. Rev. 574.
[56] Amos Shapira, "Wrongful life lawsuits for faulty genetic counselling: Should the impaired newborn be entitled to sue?" (1998) 24 Journal of Medical Ethics 372 at 374.
[57] *Harriton,* ,above n 4, at [276] see also Carel J.J.M Stolker, "Wrongful Life: The Limits of Liability and Beyond" (1994) 43 Int'l & Comp. L.Q. 521 at 531.
[58] See Priaulaux ,above n 4 at 8, 342; Todd, above n 5, at 541.
[59] See Dawe, above n 18, at 496-497; Stretton, above n 16, at 993.For a slight variation of this argument which posits that any value can be assigned to non-existence, see, for example, Grainger, above n 6, at 173; Teff, above n 37, at 433.

plaintiff's damages, or, more importantly, to recognise that a life with disabilities can constitute a legally cognisable loss.

Without doubt, the difficulties posed by the nature of loss in a wrongful life claim, and by the application of the compensatory principle, are considerable, and the contrast between the majority's and Kirby J's treatment of these issues is significant. The majority's recourse to legal principle in their denial of the claim differs greatly from Kirby J's strong emphasis on the requirements of underlying policy to justify the claim's recognition. The determination as to whether damage is able to be legally recognised and quantified can therefore be formulated as a struggle between the rigours of legal principle against the ideals of social justice. The inability of the proposed action to fall neatly within the parameters of the established negligence framework does indicate that the tools of the common law are ill-equipped to deal with such a claim.[60] Therefore, in order for damage to be recognised, a judicial manipulation of the well-established principles of negligence law would be required. We must then question whether such an extension, which would create an undesirable incoherence in the law, could be validated by the supposed injustices which denial of the claim effects. The English Law Commission has emphasised that if the grounds of policy compel recognition of the claim, judicial reliance on the strictures of logic should not constrain the Action's success.[61] Such sentiments have also been echoed in a variety of judicial pronouncements.[62] It is accordingly necessary to turn to the arguments of policy that have been employed to justify both recognition and rejection of the wrongful life claim.

C. Policy

1. Sanctity of Life and Devaluation of the disabled.

While Crennan J's denial of the wrongful life claim in *Harriton* was firmly founded upon the intrinsic impossibility of ascertaining damage,

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[60] *McKay*, above n 3, per Griffiths LJ.

[61] English Law Commission, *Law Commission Report on Injuries to Unborn Children* (Law Com.No.60 1974) at 89.

[62] See for example, *McKay,* above n 3, at 1188 per Stephenson LJ; *Procanik v Cillo* 97 NJ 339 (NJ 1984) at 351 per Pollock J; *Curlender v Bio-Science Laboratories* 165 Cal Rptr 477 (Cal 1980) at 488; *Harriton,* above n 4, at [101] per Kirby J.

her Honour did concede that concerns of policy lent support to the rejection of the action.[63] Unsurprisingly, considerations of policy have always played an integral role in the denial of the wrongful life claim. A judicial determination that non-existence would be preferable to a life with disabilities inevitably raises questions as to the proposed value of human life, and has the potential to occasion significant societal revulsion. The pronounced judicial unease that has surrounded the action has primarily been attributable to the fear that the recognition of the claim would offend the deeply held societal belief in the sanctity of human life.[64] It is however apparent that this once inviolable notion has been weakened by the increasingly liberalised judicial and legislative treatment of the laws concerning abortion, withdrawal of medical treatment, and suicide.[65] Two questions thus arise. First, does recognition of a wrongful life claim result in a further "inroad on the sanctity of human life"?[66] Second, if this is the case, does the changing nature of our legal and social mores mean that such a result can now be countenanced?

It can be readily accepted that the wrongful life action does not demand a remedy of specific performance- a remedy that would necessitate the plaintiff's death.[67] However, contrary to the assertions of some commentators[68] this does not in itself justify the assertion that the

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[63] *Harriton,* ibid, at [277].

[64]See, for example, *McKay,* above n 3, at 1180-1181; *Gleitman,* above n 31, at 31; *Philips,* above n 31, at 534; *Berman v Allan* 404 A 2d 8 (NJ 1979) at 12-13

[65] See the discussion in Margaret Fordham, "A Life without Value" [2005] Sing J. Legal Stud.395 at 400; Teff, above n 37, at 431, Morgan and White, above n 37, at 249, Pollard, above n 40 at 330, Mark Strasser, "Wrongful Life, Wrongful Birth, Wrongful Death, and the Right to Refuse Treatment; Can Reasonable Jurisdictions Recognise All But One?" (1999) 64 Mo. L. Rev 29 at 75. On the doctrine generally see, Glanville Lleweyln Williams, *The Sanctity of Life and The Criminal Law* (Konpf, New York, 1957); Peter Singer, *Rethinking Life and Death: The Collapse of Our Traditional Ethics* (Text Publishing, Melborune 1994).

[66] *McKay*, above n 3, at 1180 per Stephenson LJ.

[67] Stolker, above n 57, at 525.

[68] See, for example, Grainger, above n6, at 168,173; Jackson, above n9, at 569; Anne Morris and Severine Santier, "To Be or Not to Be: Is that the Question? Wrongful Life and Misconception" (2003) 11 Med Law Rev 167 at 180; Strasser, above n 65 at 40; Teff, above n 37 at 434, Michael B Kelly, "The Rightful Position in Wrongful Life Actions" (1991) 42 Hastings L.J 505 at 541; James Bopp, Barry A. Bostrom and Donald A. McKinney, "The 'Rights' and 'Wrongs' of Wrongful Birth and Wrongful Life: A Jurisprudential Analysis of Birth Related Torts" (1989) 27 Duq. L. Rev. 461 at 504; Fordham, above n 20, at 138.

sanctity of life doctrine is left unviolated by recognition of the claim. A judicial acceptance that non-existence can be considered to be preferable to life does threaten the sanctity or inviolability of life principle. Though Kirby J asserts that no threat is posed to the doctrine, as the claim is premised on a life of suffering,[69] there is clearly no basis to ignore the reality that the wrongful life plaintiff is seeking recompense for a negligent action which has led to the creation of a life. This has led to both the academic and judicial assertions that the physician's negligent conduct can only ever be viewed as having conferred a benefit upon the plaintiff.[70] Such a sentiment is encapsulated by Griffith LJ's proposal in *McKay v Essex Area Health Authority*[71] that there should be "rejoicing" over the hospital's mistake that bestowed upon the plaintiff the gift of life.[72] While it is incontestable that the sanctity of life principle remains a fundamental tenet of the law,[73] this principle, as noted by Kirby J, has become subject to a number of qualifications.[74] Indeed, Crennan J's acknowledgement of the judicial pronouncement in *Cattanach v Melchior*[75] that life is no longer always to be viewed as a "blessing"[76] arguably indicates an acceptance that the concept of life as an unqualified benefit no longer pervades judicial thinking. Therefore, though it can be accepted that the wrongful life claim does present a threat to the sanctity of life doctrine, it is apparent that the doctrine is no longer treated as the moral absolute that it once was.

Though Crennan J placed little emphasis on the sanctity of life doctrine itself, her Honour did place strong emphasis on the related policy objection which posits that recognition of the claim effectively amounts to a devaluation of disabled life. The supposition that the recognition

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[69] *Harriton,* above n 4, at [118], see also, *Curlender v Bio-Science Lab* 165 Cal. Rptr. 477 (1980) at 488; Morris and Santier ibid, at 8.

[70] See, for example, *Berman,* above n 30, at 12-13,*Gleitman,* above n 30, at 31, Penny Dimopoulos and Mirko Bagaric "The Moral Status of Wrongful Life Claims" (2003) 32 Comm. L. World Rev. 35 at 55, Stephen Todd, "Review: Tort" NZ L. Rev. 793 at 802.

[71] Above n 3.

[72] Ibid, at 1193.

[73] See, for example, s 8 Bill of Rights Act 1990, Art 6.1 International Covenant on Civil and Political Rights 1966.

[74] *Harriton,* above n 4, at [117]. See also above n 68.

[75] *Cattanach v Melchior* (2003) 199 ALR 131 (HCA).

[76] *Harriton*, above n 4, at [258] referring to *Cattanach* ibid, at [79] per McHugh and Gummow JJ, at [141]-[155] per Kirby J, at [195]-[198] per Hayne J.

of the wrongful life action equates to a judicial acceptance that a disabled life lacks any sense of worth has pervaded both judicial and academic discourse,[77] and this concern was evident in Crennan J's judgment. Arguing that the action's implicit insinuation that the disabled appellant would have been better off not to have been born was "odious and repugnant," Crennan J forcefully posited that there was no evidence that the appellant could not experience pleasure or find life rewarding.[78] In contrast to Crennan J's belief in the repugnance of the claim, Kirby J argued that the recognition of the action would conversely provide a form of "practical empowerment" for the plaintiff. [79] This empowerment, it was espoused, would be occasioned through a much needed financial injection granting the appellant access to greater opportunities in life. The positions of the two judges were thus diametrically opposed.

At first sight Kirby J's analysis does appear compelling. It is clear that the financial injection provided by an award of damages would give the wrongful life plaintiff the opportunity to access services and care that may not be adequately provided for by the State.[80] Moreover, as Teff writes, provision of State financial aid for the disabled is not viewed as morally offensive, and there is thus no reason why financial relief provided through an award of damages should instigate any societal opprobrium.[81] However, it must be conceded that when the nature of State financial provision is compared with the damages awarded under a wrongful life claim, a fundamental disparity between the differing monetary provisions emerges. The provision of State compensation is not dependent on the morally fraught determination that non-existence

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[77] See for example, *McKay*, above n 3, per Stephenson LJ at 1180-118, Wendy F. Hensel, "The Disabling Impact of Wrongful Birth and Life Actions" (2005) 40 Harv. C.R.-C.L. L. Rev. 141 at 174-176, 194-195 Therese M Lysaght, "Wrongful Life, The Strange Case of Nicholos Perruche" [2002] Human Life Review 165 at 168-169, Todd, above n70, at 801, Dimpoulos and Bagaric, above n 70, at 53, Kathleen Gallagher "Wrongful Life: Should the Action be Allowed?"(1987) 47 La. L. Rev 1319 at 1326.

[78] *Harriton,* above n 4, at [258] and [260]. For commentary on the positive aspects of disabled life, see Adrienne Asch, "Disability Equality and Prenatal Testing: Contradictory or Compatible?"(2003) 30 Fla. St. U. L. Rev. 315 at 332; Hensel, above n 77, at 185-186.

[79] Ibid, at [122].

[80] For acknowledgment of the gaps in State provisions see, Office for Disability Issues *Work in Progress 2009: The Annual Report From the Minister for Disability Issues to the House of Representatives on Implementing the New Zealand Disability Strategy* (2009) at 3; Goggin G, and Newell C, *Disability in Australia: Exposing a Social Apartheid* (2005) at 63-71.

[81] Teff, above n 37, at 438.

would have been preferable to the recipient's life. Therefore, though the provision of State funds for the disabled is not seen to devalue the disabled, it must be emphasised that this financial provision cannot be considered analogous to the damages awarded under the wrongful life action. Moreover, though advocates of the action espouse that the provision of damages equates to a tangible demonstration of judicial compassion for the plaintiff,[82] such emotive pronouncements lack merit. As Dimopoulos and Bagaric reason, the judicial sentiment of sympathy for a plaintiff is not a prerequisite for an award of compensation.[83] Finally, Kirby J's declaration that the action can be viewed as a form of liberation for the disabled is also weakened by empirical evidence that disabled members of society regard the claims as far from empowering. The formation by disabled persons in France of "the Collective to stop discrimination against the disabled," in response to the *Cour de Cassation's* recognition of the claim in *Perruche,*[84] illustrates that the some of those whom Kirby J asserts can be assisted by the claim are in fact deeply offended by the moral implications of its prospective success.[85] This negative reaction serves to illustrate that a deep gulf exists between Kirby J's well formulated arguments of principle and the reality that the logical foundation upon which the claim is premised is considered to be instinctively insulting by those whom it seeks to protect.

2. Implications of the recognition of a duty to take care

The duty element of the tort of negligence often involves a "wide-ranging inquiry into matters of policy,"[86] and it is apparent that judicial consideration of the duty of care in the wrongful life setting has operated as a "mechanism for the introduction of normative concepts."[87] The pervasive influence that concerns of policy have had on the duty consideration was clearly reflected in Stephenson LJ's

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[82] See, for example, Booth and Ballantyne "High Court shuts out wrongful life claims" (2006) 80 Law Institute Journal 40 at 43, Faunce, above n 48, at 477, Stretton, above n2, at 362, Jackson, above n 9, at 578-579, 611.
[83] Dimopoulos and Bagaric, above n70, at 54.
[84] For discussion of the case and its consequences, see Ewing, "The *Perruche* Case*"* (2002) J. Law & Fam. Stud, 317, at 318-319; Morris and Santier, above n 68, at 185-188, Lysaught, above n 77, at 165-169.
[85] As noted by Todd, above n 72, at 802.
[86] Todd above n17 at 140.
[87] Kapterian, above n 24, at 343.

surmise in *McKay* that the recognition of a duty to take care was untenable as the duty owed to the foetus would equate to a "duty to abort or kill."[88] Such a supposition, which is closely entwined with the judicial fear of encroachment upon the sanctity of life doctrine, is unfounded. As noted by Kirby J in *Harriton*, there is no legal right in existence which enables a medical practitioner to compel a mother to undergo an abortion.[89] Hence, the "duty to kill" proposition is misconceived. However, this leads us to the question as to what the proposed duty of care owed by the medical practitioner to the foetus would entail. Kirby J's adaptation of Griffiths LJ's formulation in *McKay,* that the duty of care owed would be to advise of risks to the foetus in order to grant the mother the opportunity of electing a termination of the foetus,[90] seems sound. It is evident that in light of the current laws surrounding abortion, the scope of the duty could not feasibly include a duty to take a life. This proposed objection is therefore inherently weak.

A policy objection of greater significance is the potential implication that judicial recognition of the duty could lead to a correlative duty of care owed to the foetus being imposed upon a mother. Such a duty would be breached if, upon the receipt of medical advice that the foetus is likely to be disabled, the mother declined to have an abortion and elected to continue the pregnancy. Although a prospect of such a filial action in these circumstances has been considered to be acceptable by one US state jurisdiction,[91] it has generally been received with pronounced disfavour in both judicial and academic discourse.[92] The

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[88] *McKay,* above n 3, at 1178 per Stephenson LJ.

[89] *Harriton,* above n 4, at [112]. See also Jackson, above n 9, at 553, Dimpoulos and Bagaric, above n70, at 52, Hersch, above n 22, at 139. It must be noted that the right to refuse medical procedures is stated in s11 *New Zealand Bill of Rights Act* 1990. For the common law, see *Smith v Auckland Hospital Board* [1965] NZLR 191 (CA); *Re T* [1993] Fam 95; *Re B* [2002] 2 All ER 449 (HC).

[90] Ibid, at [115]-[116]. Slight variations of this proposed duty have been widely endorsed by commentators, see, for example, Morgan and White, above n 37, at 244; Shapira, above n 56, at 370; Jackson, above n 9, at 554; Morris and Santier, above n 68, at 177; Grainger, above n 6, at 166; Dimopoulos and Bagaric, above n 70, at 52; Hersch, above n22, at 140.

[91] *Curlender*, above n 62, at 488.

[92] See for example *McKay*, above n 3, at 1181 per Stephenson LJ; Jackson, above n 9, at 554; Morris Ploscowe "An Action for Wrongful Life" (1963) 38 N.Y.U. L. Rev. 1078 at 1080; Belsky, above n18, at 240-243; Hensel, above n77, at 179-180. In contrast see Dimpoulos and Bagaric, above n 70, at 44 .

significant judicial unease surrounding the prospect of this filial action was acknowledged and endorsed by both Crennan and Callinan JJ in *Harriton*.[93]

However, although the implications of a potential tortious action against the mother are generally regarded to be inherently insupportable, it must be emphasised that Kirby J's well argued dissent reveals some flaws of this proposed policy objection. As his Honour argues the deep-seated concern about the potential risk of familial fracture appears to overlook the fact that the underlying motivation which lies behind the action is a desire for monetary gain.[94] As tortious actions are normally driven by the existence of "deep-pocketed defendant[s],"[95] it is very unlikely that an action against the mother would fulfill this desire for financial reward. Additionally, as the plaintiff in a wrongful life action is typically a "profoundly disabled" infant,[96] it is generally the parents of the child who instigate the wrongful life suit.[97] This must also weaken the proposed objection for, as Fordham notes, it is highly improbable that a mother would bring a claim against herself.[98] The most compelling argument facing the policy objection concerns the paramountcy which the law accords to the rights of autonomy and bodily integrity of potential mothers. As Kirby J argues, not only would these rights mean the nature of the maternal-foetal relationship would be different from the doctor-foetal relationship, but they would also entail, if a duty was nevertheless recognised, that the judiciary would be most reluctant to hold such a duty had in fact been breached.[99]As Mussell and others write, the autonomy of potential mothers is currently a "sovereign" principle of the law.[100] Thus, although inter-familial torts have been recognised by

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[93]*Harriton,* above n 4, Crennan J at [250], Callinan J at [205].

[94] Ibid, at [131].

[95] Keith Mason "Fault, Causation and Responsibility: Is Tort Law Just an Instrument of Corrective Justice?" in Ian R Freckleton and Danuta Mendelson (eds) *Causation in Law and Medicine* (Ashgate Publishing Company, Aldershot, 2002) at 145.

[96] *Harriton,* above n4, at [131].

[97] For example, in both *Harriton v Stephens; Waller v James* the actions were brought by the parents of the appellants. This was also the case in *Perruche*, see Lysaught, above n77, at 166.

[98] Fordham, above n20, at 143, see also Stretton, above n 16, at 983.

[99] *Harriton,* above n 4, at [132]-[133]. See also Morgan and White, above n37, at 244, Rosamund Scott "Maternal Duties to the Unborn? Soundings from the Law of Tort" (2000) 8 Med. L. Rev. 1 at 68.

[100] Veronica English, Rebecca Mussell, Julian Sheather, andAnn Somerville, "Autonomy

the common law,[101] it is apparent that exceptions have been made for expectant mothers.[102] Therefore, in our current legal settings, where the judiciary is loathe to interfere with the maternal-foetal relationship, it is apparent that this proposed risk of a filial action is overstated.

Perhaps the most pressing issue of policy in regards to the duty owed by the physician arises from the complexities surrounding the nature of the child's interest which the duty of care would serve to promote. As previously discussed, the duty can never be formulated as a duty to abort. However, the duty owed does require competent advice to be given to the mother about potential risks to the foetus, in order for the opportunity to be given to the mother to abort in the foetus's interests. Thus, as noted by Crennan J, the judicial recognition of a duty of care, would logically entail the common law's recognition of an "interest of a foetus in its own termination."[103] Placing the ethical implications of such an interest to one side, it should be noted that the child's interest can only be promoted through the mother herself, pursuant to her informed decision to abort.[104] This raises difficulties, for as acknowledged by Crennan J, the court is not able to "infer from a mother's decision to terminate, that her decision is in the best interests of the foetus which she is carrying."[105] It is clearly apparent, as noted in *Becker v Schwartz*[106] that abortions are often undertaken for purely self-regarding motives.[107] Thus, it may be hard to deduce that the decision to abort an impaired foetus has been made to promote its interests.[108]

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and Its Limits: What Place for the Public Good?" in Sheila McLean (ed) *First Do No Harm: Law, Ethics and Healthcare* (Ashgate, Aldershot, 2006), see also Scott, ibid, at15-19.

[101] See, for example, *Hahn v Conley* (1971) 126 CLR 276.

[102] See, for example, *Dobson v Dobson* [1999] 2 SCR 753 (maternal immunity from negligent driving that injured the foetus); *Winnipeg Child and Family Services (NorthWest Area) v G (DF)* [1997] 3 SCR 925 (maternal immunity from lifestyle choices that could affect the foetus). For favourable comment on these decisions, see generally, Scott above n99 at 35-42 Todd n17 at 298-299. However, it must be noted an action against the mother for negligent driving causing pre-natal injury has been recognised in two Australian cases, *Lynch v Lynch* (1991) 25 NSWLR 411 (NZWCA); *Bowditch v McEwan* [2002] QCA 172.

[103] *Harriton,* above n 4, at [245].

[104] Shapira, above n 56, at 370.

[105] *Harriton,* above n 4, at [247].

[106] *Becker v Schwartz* 386 N.E 2d 807 (NY 1978).

[107] Ibid, at 815.

[108] See Todd, above n 70, at 802, Raanan Gillon, "Wrongful Life Claims" (1998) 24 Journal of Medical Ethics 363 at 364; Kelly, above n 68, at 546-547; *Harriton v Stephens* (2004) 59 NSWLR 694 (NSWCA) at 742-743 per Ipp JA.

Although even a self-regarding motive does not of itself preclude some incidental benefit to the foetus, it must inevitably be asked whether any such interest can validly be recognised. Proponents of the action attempt to refute such concerns, by proposing that a potential mother's choice to abort stems from the primary concern about the welfare of potential offspring and an intuitive instinct to act in the best interests of the foetus.[109] While it would be desirable to think that such assertions, which generously paint potential parents in the most philanthropic of lights, do reflect the underlying motivation for the election of abortions, it would be naïve to consider that this proposition accurately reflected reality. This therefore brings us to the conclusion that Crennan J's concern about the potential conflict which would occur between the duty owed to the mother and the duty owed to the foetus,[110] is well justified. Although Kirby J argues that such reasoning would logically apply to the duty owed to prevent pre-natal injuries,[111] his Honour does not adequately deal with the profound distinction which exists between the two duties. The responsible conduct of a physician in the pre-natal injury context results in a healthy child, while responsible conduct in the wrongful life context results in a foetal abortion.[112] Thus, though Kirby J's argument may appear initially persuasive, it is, upon closer examination, flawed. The potential conflict between duties is indeed a cause for considerable concern.

3. The prospect of actions for "minor defects"

A pertinent concern of policy for the English Court of Appeal in *McKay* was the possibility that recognition of the wrongful life action could lead to actions brought by children with "trivial abnormalities".[113] This apprehension was reflected in Crennan J's assertion that there was a lack of certainty about the class of persons to whom the duty was owed.[114] Kirby J did acknowledge that actions for minor defects were possible because minor injuries are not apprehended as categorically

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[109] See Belsky, above n 18, at 229, Shapira, above n 56, at 370, Jackson, above n 9, at 533, Morris and Santier, above n 68, at 179, Schoordjk cited in Stolker, above n 57, at 527.
[110] *Harriton,* above n 4, at [249]. For commentary on the undesirability of such conflict see generally, Robert Blank and Janna C. Merrick, *Human Reproduction, Emerging Technologies, and Conflicting Rights* (CQ Press, Washington D.C., 1995), Scott above n99.
[111] Ibid, at [75]. For the scope of this duty, see *Watt v Rama* [1972] VR 353 (VSC).
[112] This point is well made by Ipp JA in *Harriton v Stephens*, above n108 at 741-742.
[113] *McKay*, above n 3, at 1180-1181.
[114] *Harriton*, above n4, at [261].

different in ordinary personal injury cases.[115] However, his Honour argued that there were "insuperable practical hurdles" threatening the success of such actions for "minor defects." One of these hurdles was the impossibility of showing, under the compensatory principle, that non-existence would be preferable to a life with a minor defect.[116] Undoubtedly, an action brought by a plaintiff with a minor disability would fail in light of the inability to prove that non-existence would have been the desired alternative. However, it is this very proposition which brings us to a fundamental policy objection to the claim. While we can accept that non-existence is not to be preferred to a life with a minor disability, the question inevitably arises as to what point a disability ceases to be a "minor defect" and is capable of being recognised as one which results in "severe and unremitting suffering,"[117] rendering the prospect of non-existence to be formulated as the preferred alternative. The necessity for the judiciary to determine the spectrum of disabilities that could be considered to render life to be a worse fate than non-existence is a task that cannot be contemplated with any equanimity.[118] Kirby J rightly acknowledges that the judiciary is frequently engaged in the task of line-drawing, and it can be accepted that the law is replete with grey areas. Yet, no guidance is given in the judgment as to how such a precarious line is to be drawn. As Grey notes, it would appear that Kirby J would make this determination based upon a value judgment alone.[119] Such a value judgment, though, would arguably be so "crude and speculative,"[120] that it can reasonably be questioned whether the judiciary should be required to engage in this line drawing in the first place. We are brought back once again to the fundamental objection that the judiciary is essentially ill-equipped to explore the enigmatic nature of non-existence. It can be asked how it would ever be possible to determine the severity of disabilities that would render life to be a fate worse than non-existence when the concept of non-existence itself lies beyond human comprehension.

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[115] Ibid, at [125].
[116] Ibid, at [126].
[117] Ibid,at [105].
[118] See Hensel, above n 77, at 181-182; Todd above n5 at 540; Speigelman CJ in *Harriton v Stephens* ,above n 108, at 702.
[119] Grey, above n 11, at 553.
[120] Dimpoulos and Bagaric, above n 70, at 63.

4. Deterrence and Corrective Justice

Normative appeals to the deterrent function of the law of tort are often employed to support the wrongful life claim.[121] Such reasoning was certainly evident in Kirby J's judgment when his Honour asserted that the rejection of the action would offer no legal deterrent to professional carelessness and irresponsibility.[122] Difficulties arise with such an argument. As Todd writes, one can point to many negligence cases where the Judiciary has employed the deterrence argument to either favour or disfavour the imposition of a duty, and there appears to be no principled basis which lies behind the judicial choice to reject or rely upon this policy argument in such cases.[123] Accordingly, it is wrong to claim that the deterrence argument holds any unique significance in the wrongful life context, as it is apparent that such reasoning can be employed at the judiciary's whim to support the recognition of any proposed duty of care. Moreover, while it is clear that deterrence of negligent medical conduct is a laudable objective, it is questionable whether this objective would be satisfied by the recognition of the claim. It must first be emphasised that the general effectiveness of the deterrent policy of the law of tort has been questioned, as it is unclear whether the prospect of tortious liability impacts on behaviour generally.[124] Furthermore, it is an insurance company that generally bears the brunt of the pecuniary costs in cases of professional misconduct.[125] Such concerns can be translated into the wrongful life context where it is accepted that it will be the insurers of the negligent doctor who will be asked to absorb the costs of the physician's negligence.[126] The assertion that prudent behaviour of physicians will be promoted by pecuniary penalty[127] must therefore be considerably

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[121] See, for example, Belsky, above n 18, at 188; Capron, above n 1, at 649, 657; Grainger, above n 6, at 174; Shapira, above n 56, at 370; *Gleitman,* n 30, at 703 per Jacobs J in dissent; *Harbeson,* above n 49, at 496.

[122] *Harriton,* above n 4, at [153].

[123] Todd above n17 at 156-157.

[124] For a helpful summary of these criticisms see Gary T. Swhartz, "Reality in the Economic Analysis of Tort Law: Does Tort Law Generally Deter?" (1994) 42 UCLA L. Rev. 377 at 380-390. The deterrence theory has been widely criticised, see generally, Richard L. Abel, "A Critique of Torts" (1990) 37 UCLA L. Rev.785; John G. Fleming, "Is There a Future for Torts? (1984) 44 La. L. Rev 1193; Stephen D. Sugarman "Doing Away with Tort Law" (1985) 73 Cal. L. Rev. 555.

[125] Swhartz, ibid, 380-390.

[126] Morgan and White, above n 37, at 247; see also Kapterian, above n 24, at 350.

[127] Belsky, above n 18, at 244.

weakened when it is considered that the financial repercussions of such a penalty will be transferred to an insurance company. Hayne J also persuasively argues that as the doctor's liability for a wrongful life claim is dependent upon the mother's confirmation that she would have elected an abortion, the claim would only have indirect effects on the promotion of careful medical practice.[128] Finally, if history were to repeat itself, it could be argued that the widespread strike of gynaecologists and obstetricians that occurred following the *Perruche* judgment[129] is indicative of the fact that recognition of the claim may not invariably result in an amelioration of the quality of medical care.

In light of the debate surrounding the effectiveness of the deterrent policy of the law of tort, heavy reliance cannot be placed on the proposition that recognition of the claim will promote increased standards of medical care. It is however also apparent that the desire to compensate the child may arise from a "pre-reflective wish" to penalise the negligent medical practitioner.[130] This sentiment was captured in Kirby J's assertion that denial of the claim would erect an immunity around health care providers who provide negligent care and enable them to escape scot-free and without penalty.[131] The question therefore arises as to whether an action in tort would provide the most appropriate mechanism to sanction professional misconduct. Callinan J proposes that it is to be expected that a negligent medical practitioner would be severely disciplined by a relevant disciplinary body,[132] and this argument is sound. Though the basic precepts of justice and fairness do indeed require that negligent medical practitioners are held accountable for their misconduct,[133] a tortious action is not the only means by which this objective can be accomplished. Arguably, the sanctions imposed by a disciplinary body would be a more effective penalty than the pecuniary penalty provided by an award of damages given that, as already discussed, the award would be absorbed by the physician's insurers.

Undoubtedly, the strongest policy argument in favour of the

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[128] *Harriton,* above n 4, at [181].
[129] See Lysaught, above n 7, at 166-167; Ewing, above n 84, at 318.
[130] Dimopoulos and Bagaric, above n 70, at 44.
[131] Above n 4 at [101], [303].
[132] Ibid, at [205].
[133] Jackson, above n 9, at 575.

recognition of the wrongful life is the perceived injustice of leaving a child whose life with disabilities is attributable to the negligence of another without a financial remedy. It is apparent that the normative underpinnings which have compelled judicial and academic support of the claim have been largely premised on the need to alleviate the exorbitant costs arising from the plaintiff's life with disabilities.[134] It is therefore widely claimed that the recognition of the action amounts to a direct application of the policy of tort law to promote corrective justice.[135] Here it must first be emphasised that these claims are weakened by the fact that while there lies deep academic disagreement as to the normative foundations of the concept of corrective justice,[136] the writers who make such claims conveniently avoid deeper discussion as to what this elusive concept entails. It appears that such pronouncements are simply based on the general conception that corrective justice is "centrally concerned with the payment of compensation for certain losses."[137] If this is the general conception of corrective justice upon which the assertions are based, it is initially necessary to explore whether a valid need for compensation even exists for the wrongful life claimant. Crennan J in *Harriton* implied that this apparent need was overstated as the appellant was "entitled to look to the State and her devoted parents" for the financial support that she required.[138] Such an argument has obvious shortcomings. It is apparent that State provision of financial aid often falls short of meeting the financial needs of those with severe disabilities.[139] Moreover, parental devotion does not necessarily equate to parental ability to alleviate these

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[134] See, for example, Kapterian, above n 24, at 349-350; Hersch, above n 22, at 148; Stretton, above n 2, at 559; Shapira, above n 56, at 374; Hanson, above n 2, at 4; Morgan and White, above n 37, at 247; Morris and Santier, above n 68, at 193; Booth and Ballatyne, above n 82, at 42; Hirsch, above n 2, at 288.

[135] See, for example, Kapterian ibid, at 349-350; Fordham, above n 20, at 148; Grey, above n 11, at 559; Teff, above n 24, at 440; Philip G. Peters Jr "Rethinking Wrongful Life, Bridging the Gap between Tort and Family Law" (1992) 67 Tul. L. Rev. 397 at 298; *Gleitman* above n30 at 695 (dissenting opinion).

[136] Jules Coleman and Arthur Ripstein "Loss, Agency, and Responsibility for Outcomes: Three Conceptions of Corrective Justice" in Jules Coleman and Joel Feinberg (eds) *Philosophy of Law* (7th ed, Thomson/Wadsworth, Belmont CA, 2004) at 546.

[137] Ibid, at 546. See also Tony Honore *The Morality of Tort Law* in David G Owen (ed) *Philosophical Foundations of Tort Law* (1995) at 79; Richard A. Posner "The Concept of Corrective Justice; Recent Theories of Tort Law" in Saul Levmore (ed) *Foundations of Tort Law* (Oxford University Press, New York, 1994) at 59.

[138] *Harriton,* above n 4, at [271].

[139] Stretton, above n 16, at 997; Morris and Santier, above n 68, at 170.

financial requirements.

Opponents of the action argue that the financial needs of the child can be satisfactorily accommodated through recognition of the parental action for wrongful birth.[140] Such an argument is problematic. First, as noted by Kirby J, it is clear that the parents who reap the financial benefits of a wrongful birth award are under no compulsion to apply the money to ameliorate their disabled child's standard of living.[141] Second, there are practical difficulties surrounding the proposition that the wrongful birth action can act as a substitute for the wrongful life claim. Owing to statutory bars in some jurisdictions, the parents of the child may often be legally precluded from bringing a wrongful birth claim against the negligent physician.[142] Third, it is uncertain whether the judiciary will be willing to award damages for wrongful birth past the child's age of majority.[143] In contrast, it is clear, as demonstrated by the *Perruche* judgment, that damages for wrongful life action are likely to be awarded past the plaintiff's age of majority.[144] Accordingly, the proposition that a wrongful birth action can abate the financial needs of the wrongful life plaintiff should not carry great force in the denial of the claim. It is beyond contention that the accumulated expenses of a disabled life cannot be guaranteed to be met by either the State, parental provision, or the related tortious action of wrongful birth.

The financial strain caused by a wrongful life plaintiff's "life with disabilities" has led many to assert that the tenets of fairness and justice compel recognition of the claim.[145] Such an argument does have some immediate attraction. It is of course desirable for those who are placed under financial strain, because of the negligent conduct of others, to be

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[140] Todd, above n 5, at 541, Mason, McCall Smith, Laurie, *Law and Medical Ethics* (6th ed, 2002) at 202.

[141] *Harriton,* above n 4, at [147]-[148].

[142] For example, due to the expiry of the relevant statutory limitation period in New South Wales the appellant's parents in *Harriton* were precluded from bringing a wrongful birth claim, see Grey, above n 11, at 547. For discussion of such an occurrence in the US, see Pace ,above n 48 at 164.

[143] In *Cattanach* the claim was limited to the age of majority. However, the issue is currently unresolved as the judgement does leaves open the possibility for the claim to be extended to costs after the child's age of majority. See generally, Todd, n5 at 533, Rachel Young, "Cattanach v Melchior" (2003) 11 JLM 153 at 156.

[144] In *Procanik v Cillo,* above n 49, damages were also awarded past the age of majority, see generally, Pace, above n 48, at 164.

[145] See above n 134.

granted financial recompense. The promotion of corrective justice(as it is commonly understood) is certainly a worthy ideal, yet we are once again faced with difficulties when relying on this argument. As the purpose of corrective justice is to compensate a loss,[146] it would first need to be accepted that loss has been occasioned for the wrongful life plaintiff. As already examined, such a recognition of loss is not possible within the present boundaries of the negligence framework. We are therefore led to question whether a need for corrective justice is, in itself, enough to warrant an extension of the traditional limits of liability law. For Crennan J the answer was firmly in the negative. Arguing that a need for corrective justice could never be determinative of a novel claim in negligence, the appellant's appeal to this normative function of the law of tort was rejected.[147] In contrast, it seems clear that Kirby J was impelled by the thinking underlying the principles of corrective justice to minimise the intractable difficulties presented by the ambiguities surrounding non-existence.[148] Unquestionably, Crennan J's reasoning must prevail. An underlying desire to supplement State welfare provisions is not sufficient to justify a radical reformulation of the judicial concept of damage. To erode the foundations of established legal principle in order to promote the inherently vague concept of corrective justice is an approach that is quite simply untenable.

Conclusion

It is clear that the negligence framework should not be extended so as to include the wrongful life action within its ambit. Although some of the policy objections to the action have been overstated this concession does not entail that the claim should be recognised. The fact that a life with disabilities is unable to be recognised as a loss under the present boundaries of negligence law weighs heavily in favour of the action's rejection. Moreover, the troubling policy concerns which surround recognition of the claim lend further support to such a conclusion. Not only would a judicial recognition of the action result in an undesirable conflict of duties, it would also require the judiciary to take on the unenviable task of determining when a life with disabilities is not worth

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[146] See, Honore, above n 134, at 79; Perry, above n 133, at 546; Jules L. Coleman "The Practice of Corrective Justice" in David G. Owen (ed) *Philosophical Foundations of Tort Law* (1995) at 57.

[147] *Harriton,* above n 4, at [275].

[148] Ibid, at [155].

living. Unsurprisingly such a judicial determination is considered to be deeply offensive by many disabled members of the community. While the proposition that the underlying policies of tort law demand recognition of the action does have some emotive appeal, it ultimately lacks persuasive force. To found a duty upon the perceived need to promote policies that have been subjected to considerable criticism is an approach that is clearly unsound. Therefore, we are drawn to the conclusion that, in the words of Crennan J, "life with disabilities, like life, is simply not actionable.