

HARRITON v STEPHENS*
WALLER v JAMES**

WRONGFUL LIFE AND THE LOGIC OF NON-EXISTENCE

DEAN STRETTON†

[In Harriton and Waller, the High Court considered for the first time whether ‘wrongful life’ constitutes a valid cause of action in Australia. The Court held it does not, first because establishing damage in wrongful life cases would require an impossible comparison between existence and non-existence, and second because the recognition of wrongful life actions would be contrary to sound legal policy. This case note argues that these conclusions were unjustified. The ‘impossible comparison’ argument ignores the comparisons between existence and non-existence routinely made in other contexts, while the policy concerns prove to be groundless on critical examination. The Court’s refusal to recognise wrongful life actions was flawed as a matter of principle, policy, and justice.]

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* (2006) 226 ALR 391 (*‘Harriton’*).

** (2006) 226 ALR 457 (*‘Waller’*).

† BA (Hons), LLB (Hons) (ANU); Barrister and Solicitor of the Supreme Court of the Australian Capital Territory. I am grateful to Kai Xi Liu and the Editorial Board, Katie Weir and Mae Tanner for their helpful comments and suggestions.

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I INTRODUCTION

Common law jurisdictions have generally been hostile to actions for ‘wrongful life’,¹ where a disabled plaintiff born as a result of medical negligence sues the negligent doctor for the pain and suffering and the financial costs of life with disabilities.² The High Court considered wrongful life for the first time in *Harriton* and *Waller*. In *Harriton*, the plaintiff’s disabilities resulted from her mother’s exposure to rubella during pregnancy. In *Waller*, the plaintiff’s disabilities resulted from a genetic blood clotting disorder. In both cases, the plaintiffs *owed their very existence* to the doctor’s conduct. If the negligence had not occurred — if the doctors had properly informed the parents of the risks of disease and disability — then the parents, who did not want a disabled child, would have prevented or terminated the pregnancies, and the plaintiffs would never have been born. The fact that the doctors were responsible for the disabled plaintiffs’ very existence placed the claims in the category of wrongful life.³

The High Court held by a 6:1 majority (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ; Kirby J dissenting) that wrongful life is not a valid cause of action. It was held that the plaintiffs could not prove they had suffered damage, because proving damage would require an impossible comparison between the plaintiffs’ present state — life with disabilities — and non-existence (the state in which they would have been had the negligence not occurred).⁴ The majority also gave policy reasons for rejecting wrongful life actions.⁵ The result is that, where a child is born as a result of medical

¹ The term ‘wrongful life’ is misleading, most obviously because what is wrongful is the *negligence*, not the plaintiff’s life. However, the term is too ubiquitous not to use: cf *Harriton* (2006) 226 ALR 391, 392–5, 428 (Kirby J), where his Honour preferred ‘wrongful suffering’.

² See, eg, *McKay v Essex Area Health Authority* [1982] QB 1166 (‘*McKay*’); *Gleitman v Cosgrove*, 227 A 2d 689 (NJ, 1967); *Jones (Guardian Ad Litem of) v Rostvig* (1999) 44 CCLT (2d) 313; *Harriton v Stephens* (2004) 59 NSWLR 694. In contrast, a ‘wrongful birth’ action arises where the *parents* of a disabled or non-disabled child who was born through medical negligence sue the negligent doctor for the costs of the pregnancy, birth and (in some cases) upbringing: *Harriton* (2006) 226 ALR 391, 426 (Kirby J), 442 (Crennan J).

³ Wrongful life may also result from other conduct creating a risk of an unwanted disabled child being born, such as negligently performed sterilisation or abortion, or negligent advice or diagnosis concerning sterilisation, pregnancy or contraception: see *Harriton* (2006) 226 ALR 391, 442 (Crennan J).

⁴ *Ibid* 431–2 (Hayne J), 438–9 (Callinan J), 449, 453 (Crennan J); *Waller* (2006) 226 ALR 457, 468 (Hayne J), 470 (Callinan J), 473–4 (Crennan J). The reasoning of Crennan J was adopted by Gleeson CJ, Gummow and Heydon JJ in both cases.

⁵ *Harriton* (2006) 226 ALR 391, 449, 451–2 (Crennan J); *Waller* (2006) 226 ALR 457, 473–4 (Crennan J).

negligence, Australian common law — in line with jurisprudence in the UK,⁶ Canada,⁷ and most US states⁸ — will recognise an action by the parents for wrongful birth, but not an action by the child for wrongful life.⁹

It will be argued that *Harriton* and *Waller* were incorrectly decided. Contrary to the High Court, wrongful life actions are consistent with ordinary tort law principles; the ‘impossible comparison’ argument fails; and the policy arguments against recovery are weak. By depriving wrongful life plaintiffs of the means to secure the care and treatment they deserve, the High Court has inflicted a serious injustice.

II PROCEEDINGS AND FACTS

The parties in *Harriton* and *Waller* agreed on a set of facts to allow the determination of two threshold issues at a joint preliminary hearing in the Supreme Court of New South Wales: whether wrongful life is a valid cause of action; and if so, what categories of damages are recoverable.¹⁰

In the Supreme Court, Studdert J held that wrongful life is not a valid cause of action, and that no damages are recoverable.¹¹ This decision was upheld by the Court of Appeal,¹² and by the High Court.¹³ Since wrongful life was rejected as a cause of action, the matters never reached a full hearing.

⁶ See, eg, *McFarlane v Tayside Health Board* [2000] 2 AC 59 (*McFarlane*), where the House of Lords allowed damages for wrongful birth, but not for the ordinary costs of raising the child to maturity; *Rees v Darlington Memorial Hospital NHS Trust* [2003] QB 20, which largely followed *McFarlane*; *McKay* [1982] QB 1166, where wrongful life actions were disallowed.

⁷ *Arndt v Smith* [1997] 2 SCR 539; *Krangle v Brisco* [2002] 1 SCR 205, which allowed damages for wrongful birth, but not for the ordinary costs of raising the child to maturity; *Jones (Guardian Ad Litem of) v Rostvig* (1999) 44 CCLT (2d) 313, which disallowed wrongful life claims; *Arndt v Smith* (1994) 93 BCLR (2d) 220, which disallowed wrongful life claims in obiter.

⁸ Most US states allow damages for wrongful birth, excluding the ordinary costs of raising the child to maturity: see Dean Stretton, ‘The Birth Torts: Damages for Wrongful Birth and Wrongful Life’ (2005) 10 *Deakin Law Review* 319, 323–4. On wrongful life, see especially *Gleitman v Cosgrove*, 227 A 2d 689 (NJ, 1967) and *Becker v Schwartz*, 386 NE 2d 807 (NY, 1978), both of which disallowed wrongful life actions, and were widely followed in other US jurisdictions. Only three US states permit recovery for wrongful life: California (*Turpin v Sortini*, 643 P 2d 954 (Cal, 1982) (*Turpin*), which allowed special, but not general, damages for wrongful life); New Jersey (*Procanik v Cillo*, 478 A 2d 755 (NJ, 1984), which followed *Turpin*); and Washington (*Harbeson v Parke-Davis Inc*, 656 P 2d 483 (Wash, 1983), which also followed *Turpin*).

⁹ See *Cattanach v Melchior* (2003) 215 CLR 1, which allowed damages for wrongful birth, including the ordinary costs of raising the child to maturity, although those costs are now excluded by state legislation: see *Civil Liability Act 2002* (NSW) s 71; *Civil Liability Act 2003* (Qld) s 49A; *Civil Liability Act 1936* (SA) s 67.

¹⁰ Three cases were heard together: *Edwards v Blomeley* [2002] NSWSC 460 (Unreported, Studdert J, 12 June 2002) (*Edwards*), which involved a failed vasectomy; *Harriton v Stephens* [2002] NSWSC 461 (Unreported, Studdert J, 12 June 2002), which concerned a failure to diagnose rubella; *Waller v James* [2002] NSWSC 462 (Unreported, Studdert J, 12 June 2002), which was about a failure to investigate and warn of genetic disorder. The plaintiff in each case was unsuccessful, but the *Edwards* decision was not appealed.

¹¹ *Harriton v Stephens* [2002] NSWSC 461 (Unreported, Studdert J, 12 June 2002) [82]; *Waller v James* [2002] NSWSC 462 (Unreported, Studdert J, 12 June 2002) [69]. Strictly, since there was no valid cause of action, the question of damages did not arise.

¹² *Harriton v Stephens* (2004) 59 NSWLR 694.

¹³ *Harriton* (2006) 226 ALR 391; *Waller* (2006) 226 ALR 457. The judgments in *Waller* are briefer and largely incorporate, by reference, the more detailed reasoning in *Harriton*. This case note will therefore refer mostly to *Harriton*.

A Harriton: Negligent Failure To Diagnose Rubella

Alexia Harriton was born on 19 March 1981 with severe congenital disabilities, caused by her mother, Olga, having been exposed to rubella during the first trimester of pregnancy.¹⁴ In August 1980, Olga had visited her general practitioner, Dr Max Stephens, because she thought she might be pregnant, and was concerned that her recent fever and rash might have been rubella. Dr Stephens ordered blood tests. The pregnancy test was positive, while the rubella test result was inconclusive but stated: ‘If no recent contact or rubella-like rash, further contact with this virus is unlikely to produce congenital abnormalities.’¹⁵

Olga received these test results from Dr Paul Stephens, the son of Dr Max Stephens, who worked at the same practice. Dr Paul Stephens listened to Olga’s history, reassured her that her illness was not rubella, and referred her to a gynaecologist for further management of the pregnancy.

The reassurance was a mistake. Since Olga *had* recently had a ‘rubella-like rash’, proper practice would have been to order a follow-up blood test for rubella antibodies. Had the test been ordered, it would have shown that Olga did in fact have rubella. Such a diagnosis would have revealed the risks of congenital abnormalities for the foetus, which would have led Olga to terminate the pregnancy lawfully. As it was, she was not diagnosed, the pregnancy was not terminated, and Alexia was born with disabilities including blindness, deafness, mental retardation, spasticity and the need for 24-hour lifelong care.

Since the limitation period for a wrongful birth action had expired,¹⁶ Alexia herself (by her father and tutor, George Harriton) brought proceedings against Dr Paul Stephens.

B Waller: Negligent Failure To Investigate and Warn of a Genetic Disorder

Lawrence and Deborah Waller visited their general practitioner because they had experienced trouble conceiving a child.¹⁷ After a test showed that Lawrence had a low sperm count and motility, the practitioner referred them to a fertility specialist, Dr Christopher James. The referral letter noted that Lawrence had anti-thrombin 3 (‘AT3’) deficiency, a genetic condition that causes blood clots. Dr James discussed the condition with the Wallers, but did not investigate it further or provide advice in relation to it. He arranged fertility and other tests (performed by the infertility treatment clinic, Sydney IVF), and recommended that the Wallers begin in vitro fertilisation (‘IVF’) treatment. They did so, and Deborah became pregnant.

When the pregnancy was confirmed, Dr James referred Deborah to an obstetrician, Dr Brian Hoolahan, for antenatal care. Dr Hoolahan ordered tests that ruled out Down syndrome, but he did not investigate the AT3 deficiency or provide any advice in relation to it.

¹⁴ For discussion of the facts, see *Harriton* (2006) 226 ALR 391, 395–6 (Kirby J).

¹⁵ *Ibid* 395.

¹⁶ *Harriton v Stephens* [2002] NSWSC 461 (Unreported, Studdert J, 12 June 2002) [5]; see *Limitation Act 1969* (NSW) s 14.

¹⁷ For discussion of the facts, see *Waller* (2006) 226 ALR 457, 458–9 (Kirby J).

Keeden Waller was born on 10 August 2000. He had inherited genetic AT3 deficiency from Lawrence, but because this had not been diagnosed at the time of birth, Keeden was discharged from hospital on 14 August 2000. A day later he was brought back to hospital suffering cerebral thrombosis. The thrombosis resulted from his AT3 deficiency, and caused severe permanent disability including brain damage, cerebral palsy, uncontrolled seizures and the need for lifelong care.

On the agreed facts, Dr James, Sydney IVF and Dr Hoolahan should have investigated Lawrence's AT3 deficiency and advised the Wallers that there was a 50 per cent chance of the deficiency being transmitted to any children. Had they done so, Deborah would have delayed IVF until tests to rule out transmission were available, used donor sperm, or terminated the pregnancy. As it was, she was not informed, Keeden was born, and the disabilities soon followed. Keeden brought proceedings (by his tutor Deborah) against Dr James, Sydney IVF and Dr Hoolahan.¹⁸

III JUDGMENTS AND ISSUES

A *Justice Crennan*

The leading majority judgment was delivered by Crennan J, and adopted by Gleeson CJ, Gummow and Heydon JJ. Crennan J held that the doctor's alleged duty of care to the child should not be recognised, because that duty could be incompatible with the doctor's existing duty of care to the mother, thereby 'introduc[ing] conflict, even incoherence, into the body of relevant legal principle'.¹⁹

Crennan J also accepted what may be called the 'impossible comparison' argument. Ordinary tort principles require plaintiffs 'to prove actual damage or loss' — to prove they are 'worse off as a result of the negligence' than they would otherwise have been.²⁰ In the case of wrongful life, this requires establishing that non-existence — the state in which the plaintiff would be had there been no negligence — 'is preferable to life with disabilities', which is the state the plaintiff is in 'as a result of the negligence'.²¹ However, as a court lacks 'experiential access to non-existence',²² any such comparison between existence and non-existence is 'impossible',²³ and no damage (nor indeed any duty of care) can be established.

¹⁸ On the agreed facts, Keeden also alleged separate causes of action against Dr Hoolahan and two additional defendants (Illawarra Health Service and an obstetrician, Dr Phillip Paris-Brown) for negligence during delivery and neonatal care (including diagnosis and treatment of the AT3 deficiency): *Waller v James* [2002] NSWSC 462 (Unreported, Studdert J, 12 June 2002) [6]. In addition, Lawrence and Deborah Waller brought a wrongful birth action against the five defendants, though this was stayed by agreement of the parties pending resolution of Keeden's wrongful life claim: *Harriton v Stephens* (2004) 59 NSWLR 694, 724 (Ipp JA).

¹⁹ *Harriton* (2006) 226 ALR 391, 448 (citations omitted).

²⁰ *Ibid* 449.

²¹ *Ibid*, where Crennan J upheld the Court of Appeal's reasoning.

²² *Ibid*.

²³ *Ibid*.

Similarly, the purpose of *damages* is to place the plaintiff, so far as possible, in the same position as if the negligence had not occurred — a principle which, when applied to wrongful life, would require another impossible comparison between existence and non-existence.²⁴ Therefore, no damages can be awarded.

Crennan J also raised policy concerns about: the ‘risk of a parent being sued by the child’ for wrongful life;²⁵ devaluing the lives of the disabled;²⁶ the possibility of claims for trivial disabilities;²⁷ differential treatment of the disabled;²⁸ and infringement of the principle that the killing of disabled and non-disabled people is equally culpable.²⁹ Her Honour concluded that ‘[l]ife with disabilities, like life, is not actionable’,³⁰ and hence wrongful life actions must fail.

B Justice Hayne

Hayne J stressed that *harm* or *damage* is an essential element of negligence,³¹ and that these concepts necessarily require a comparison.³² The required comparison is between ‘what would have been and what is’ — between ‘the [actual] position of the particular plaintiff’, and the position in which the plaintiff would have been ‘had the tort not been committed.’³³ In wrongful life actions, this would require a comparison between life with disabilities (the plaintiff’s actual position) and non-existence (the position in which the plaintiff would have been had the tort not been committed). However, ‘[a]s the reasons of Crennan J demonstrate,’³⁴ such a comparison is impossible; hence wrongful life actions must fail for lack of provable damage.

Hayne J thus endorsed the same ‘impossible comparison’ argument as Crennan J, although his Honour did not rely on additional policy arguments, and preferred to ‘leave aside any consideration of what [the lack of provable damage] might suggest about the existence of a duty of care.’³⁵

Finally, his Honour rejected the view that promotion of careful medical practice would justify extending the ordinary concept of damage to allow wrongful life actions.³⁶ The extended concept of damage ‘would, at best, have only indirect effects on the promotion of careful medical practice’,³⁷ because it

²⁴ Ibid 453.

²⁵ Ibid 449.

²⁶ Ibid 451–2.

²⁷ Ibid 452.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid 456.

³¹ Ibid 429–31.

³² Ibid 431–2.

³³ Ibid 431.

³⁴ Ibid.

³⁵ Ibid 429. Crennan J, in contrast, held that the lack of provable damage meant there was no duty of care: at 447, 450.

³⁶ Ibid 434; cf at 408, 428, where Kirby J argued that the recognition of wrongful life actions is justified as a matter of policy for its promotion of careful medical practice.

³⁷ Ibid 434.

would apply only in those limited cases where the mother is inclined to prevent or terminate pregnancy.³⁸

C Justice Callinan

Callinan J noted that there are ‘policy concerns arguing in both directions’,³⁹ but thought the issue of wrongful life could be decided ‘on logic’ alone.⁴⁰ The plaintiffs, his Honour said, claimed damages ‘upon the basis that [they] should never have been born’.⁴¹ However ‘[i]t is not logically possible for any person to be heard to say’⁴² that they should never have been born, because if they *had* never been born then they ‘would not have been able to say anything at all.’⁴³ Hence the action must fail.

If the ‘logic’ here is difficult to follow, that is perhaps because it is a complete non sequitur: a *non-being’s* inability to say something (such as that he or she should never have been born) hardly prevents a plaintiff who *does* exist from saying the same thing. Nevertheless, the broader point — reading charitably — is presumably that if the plaintiffs had never been born, they would not exist, and so would have no voice, no perspective — nothing on which to base any kind of comparison. To the extent, then, that it does not rest on an elementary logical error, Callinan J’s judgment appears to repeat the ‘impossible comparison’ argument of Crennan and Hayne JJ.

D Justice Kirby

Kirby J held, in dissent, that wrongful life actions can succeed on ‘ordinary principles of negligence law’.⁴⁴ His Honour saw the issues of breach and causation as straightforward, since the parties agreed that if a duty of care was owed then it was breached,⁴⁵ and the defendant’s conduct was clearly *a* cause (though not the *sole* cause) of the plaintiff’s suffering, since the suffering would have been avoided if the negligent conduct had not occurred.⁴⁶ The remaining issues were duty of care, damage and damages, and policy.

Although wrongful life actions differ in some respects from other cases, Kirby J saw the doctor’s alleged duty of care as ‘unremarkable’,⁴⁷ and as ‘within

³⁸ This argument appears to overlook the fact that even a small risk of an action in negligence may provide a significant incentive to provide careful medical practice.

³⁹ *Harriton* (2006) 226 ALR 391, 437.

⁴⁰ *Ibid* 438.

⁴¹ *Ibid* 438–9. Callinan J’s statement is misleading, since a wrongful life action does not entail that ‘in some cosmic sense’ the plaintiff should never have been born: Sherry F Colb, *Better To Have Never Been Born? Wrongful Life Litigation* (21 May 2003) FindLaw <<http://writ.news.findlaw.com/colb/20030521.html>>. A wrongful life action merely entails that *if* the negligence had not occurred, *then* the plaintiff would never have been born.

⁴² *Harriton* (2006) 226 ALR 391, 439.

⁴³ *Waller* (2006) 226 ALR 457, 470.

⁴⁴ *Harriton* (2006) 226 ALR 391, 428; see also *ibid* 467.

⁴⁵ *Harriton* (2006) 226 ALR 391, 399.

⁴⁶ *Ibid* 399–400.

⁴⁷ *Ibid* 408.

the [established] duty owed by persons such as the [defendant] to take reasonable care to prevent prenatal injuries to a person such as the [plaintiff].⁴⁸

On damage and damages, Kirby J held that the ‘impossible comparison’ argument ‘falls away entirely’ for special damages (the costs of gratuitous care and medical treatment).⁴⁹ Since the plaintiff ‘would not have any economic needs had the defendant exercised reasonable care’,⁵⁰ the negligence has caused a loss and the plaintiff could recover accordingly: ‘In this respect, at least, the assessment of the appellant’s damages presents no unusual or peculiar problem whatsoever.’⁵¹ Moreover, the ‘impossible comparison’ argument fails even for general damages (pain and suffering), because the courts have ‘for some time ... been comparing existence with non-existence in other legal settings’,⁵² such as withdrawal of treatment cases, and ‘it is arguable that a life of severe and unremitting suffering is worse than non-existence.’⁵³ In such cases, general damages could be awarded.

Kirby J also rejected several policy arguments against recovery, noting that they rely on ‘a misunderstanding of the tort of negligence [or] a distorted characterisation of wrongful life claims.’⁵⁴ Conversely, erecting an immunity around health care providers whose negligence has caused profound and lifelong suffering would fail to encourage proper medical care and responsibility.⁵⁵ Recovery should therefore be permitted.

The key issues in *Harriton* and *Waller* were thus duty of care, damage, damages, and policy. These will be examined in turn.

IV DUTY OF CARE

Although a foetus has no legal rights until birth,⁵⁶ doctors treating pregnant women have a duty to avoid causing damage to the foetus, since such damage

⁴⁸ Ibid 406. See also *Waller* (2006) 226 ALR 457, 463 (Kirby J).

⁴⁹ *Harriton* (2006) 226 ALR 391, 411.

⁵⁰ Ibid (emphasis in original).

⁵¹ Ibid. While this shows that the ‘impossible comparison’ argument fails on the issue of *damages*, it omits to address the question of *damage*. What damage has the doctor’s conduct caused that could justify an award of special damages alone (without general damages)? The damage could not consist of the plaintiff’s economic needs, since Kirby J held that ‘[t]his is not a case involving pure economic loss’: at 408. The damage could be specified as the plaintiff’s life with disabilities, but general damages would also then be recoverable: at 416. Thus, contrary to what Kirby J appeared to hold at 411–12, the award of special damages alone (without general damages) would appear unjustified.

⁵² Ibid 413.

⁵³ Ibid 415.

⁵⁴ Ibid 416.

⁵⁵ Ibid 408, 428.

⁵⁶ See, eg, *Paton v British Pregnancy Advisory Service Trustees* [1979] QB 276, 279 (Baker P); *C v S* [1988] QB 135, 140 (Heilbron J); *Re F (In Utero)* [1988] Fam 122, 138 (May LJ); *B v Islington Health Authority* [1991] QB 638, 644 (Potts J); *De Martell v Merton and Sutton Health Authority* [1993] QB 204, 213 (Phillips J); *Burton v Islington Health Authority* [1993] QB 204, 226 (Dillon LJ); *Re MB (Medical Treatment)* [1997] 2 Fam Law R 426, 440 (Butler-Sloss LJ); *St George’s Healthcare NHS Trust v S* [1999] Fam 26, 48 (Judge LJ); *K v T* [1983] 1 Qd R 396, 400 (Williams J) (Supreme Court); *A-G (Qld) ex rel Kerr v T* [1983] 1 Qd R 404, 406 (Campbell CJ, Andrews SPJ and Connolly J) (Court of Appeal); *A-G (Qld) ex rel*

may cause damage to the legal person whom the foetus will become.⁵⁷ The duty is discharged by exercising reasonable care and skill in providing medical advice or treatment.⁵⁸ Doctors in wrongful life cases would appear to fall under this duty, '[u]nless some disqualifying consideration operates'.⁵⁹

Crennan J suggested three disqualifying considerations: first, the wrongful life plaintiff suffers no damage (as the 'impossible comparison' argument is said to show); second, a duty of care to the child would conflict with the doctor's existing duty of care to the mother; and third, if a duty to the child were recognised, children could sue parents for wrongful life.⁶⁰

A *The Wrongful Life Plaintiff Suffers No Damage*

It was 'not to be doubted' that the doctor in wrongful life cases owes the child a *general* duty of care.⁶¹ What Crennan J denied is that there is a duty in respect of 'the *particular* damage claimed in [wrongful life]'.⁶² That is, Crennan J held that the doctor's duty extends only to certain *types* of (alleged) physical damage, not to the damage alleged in wrongful life, because that alleged damage, according to the 'impossible comparison' argument which Crennan J accepted, is not really damage at all. The 'impossible comparison' argument was thus thought to exclude a duty of care.

However, a duty of care *is* precisely a general duty to avoid physical or financial harm. The duty is not broken down into multiple sub-duties according to specific *types* of physical damage.⁶³ Thus, if the doctor in wrongful life cases owes the child a general duty to avoid physical damage — as Crennan J granted — then the doctor *does* owe the child a duty of care, and the duty issue ends there. The complaint that an alleged type of physical damage is not *really* damage is then relevant to damage, not duty.⁶⁴

The 'impossible comparison' argument, therefore, does not threaten the existence of a duty of care. In any case, it will be shown that the 'impossible

Kerr v T (1983) 46 ALR 275, 277 (Gibbs CJ); *Yunghanns v Candoora No 19 Pty Ltd* [1999] VSC 524 (Unreported, Gillard J, 15 December 1999) [75]–[86].

⁵⁷ See *Watt v Rama* [1972] VR 353; *Burton v Islington Health Authority* [1993] QB 204, 226 (Dillon LJ); *De Martell v Merton and Sutton Health Authority* [1993] QB 204, 213 (Phillips J); *Edwards v Blomeley* [2002] NSWSC 460 (Unreported, Studdert J, 12 June 2002) [54]. The duty can even exist prior to conception: *X v Pal* (1991) 23 NSWLR 26.

⁵⁸ *Harriton* (2006) 226 ALR 391, 417 (Kirby J).

⁵⁹ *Ibid* 406 (Kirby J). See also *McKay* [1982] QB 1166, 1178 (Stephenson LJ), where the defendants conceded that a duty of care was owed.

⁶⁰ *Harriton* (2006) 226 ALR 391, 447–9.

⁶¹ *Ibid* 448 (Crennan J). The reason is that, even if wrongful life itself involves no damage (as the 'impossible comparison' argument claims), the doctor in wrongful life cases can still cause damage to the child in *other* ways — for example, by advising the pregnant patient to play rugby, or take thalidomide, or drink copious quantities of alcohol. This is sufficient to attract a (general) duty of care.

⁶² *Ibid* (emphasis added).

⁶³ *Ibid* 407 (Kirby J). *Contra* the approach I mistakenly adopted in *Stretton*, above n 8, 352.

⁶⁴ This may explain Hayne J's reluctance to agree with Crennan J on the duty of care issue: *Harriton* (2006) 226 ALR 391, 429; *Waller* (2006) 226 ALR 457, 468.

comparison' argument fails on the issue of damage;⁶⁵ and as such, it fails on the issue of duty as well.

B Conflict with Existing Duty of Care

If life with disabilities can be worse than non-existence (as Crennan J thought wrongful life plaintiffs must claim),⁶⁶ then the interests of mother and foetus may conflict. It may be in the mother's interest to have a baby, but in the foetus's interest to be aborted, or it may be in the mother's interest to abort, but in the foetus's interest to be born. The doctor's alleged duty to the foetus — the duty 'to advise the mother so that she can terminate a pregnancy in the interest of the foetus in not being born'⁶⁷ — may thus conflict with the doctor's existing duty to act in the interests of the mother (who may in contrast have an interest in giving birth). Hence, Crennan J concluded, the duty to the foetus should not be recognised: to do so would 'introduce conflict, even incoherence, into the body of relevant legal principle'.⁶⁸

This argument has several flaws. First, as noted above, the doctor in wrongful life *does* owe the child a general duty of care, and the duty issue ends there. A conflict between duties of care would be relevant to breach, not duty, since it would bear on whether the defendant took reasonable precautions against the risk of injury.⁶⁹ The 'conflicting duties' argument could therefore show, at most, that there is no breach of duty in *particular* cases of conflict between duties; it could not show that there is no breach of duty in wrongful life generally.

Second, the duty to the wrongful life plaintiff is fulfilled

if reasonable care is exercised in detecting foreseeable risks which may befall the foetus; warning of those risks where the reasonable person would have done so; and taking reasonable care in providing advice and guidance to the patient or sending the patient to those who can give such advice.⁷⁰

These same obligations (perhaps in addition to others) would also surely be owed to the mother. If so, the doctor's duties to the foetus and mother *cannot* conflict, since the former are a subset of the latter. If A is a subset of B, A is consistent with B.

Third, a potential conflict between two duties of care does not, in general, suggest that one of the duties must cease to exist. The driver of a car, for example, may face a choice between a head-on collision that will injure his or her passenger, or swerving into a pedestrian. Here the duty not to injure the passenger⁷¹ plainly conflicts with the duty not to injure the pedestrian:⁷² one

⁶⁵ See below Part V.

⁶⁶ *Harriton* (2006) 226 ALR 391, 447.

⁶⁷ *Ibid* 448 (Crennan J).

⁶⁸ *Ibid* (citations omitted).

⁶⁹ *Ibid* 408 (Kirby J).

⁷⁰ *Ibid* 417 (Kirby J). The doctor is of course not required to take *unreasonable* steps to fulfil the duty to the foetus or mother, such as persuading the mother to have an abortion, or giving misleading advice about disability: at 418 (Kirby J).

⁷¹ See, eg, *Cook v Cook* (1986) 162 CLR 376.

cannot achieve both aims. Yet it hardly follows that the driver has a duty to passengers but not pedestrians.⁷³ Similarly, a construction, mining or manufacturing firm may find that the only way it can avoid causing economic loss to a client is to increase the speed of work on a particular project, at the cost of a slight decline in worker safety. Here the duties owed to the client⁷⁴ and to the employees⁷⁵ conflict; yet it hardly follows that only *one* of those duties can exist. It does appear that where two duties are *fundamentally* irreconcilable, one of them must cease to exist;⁷⁶ but Crennan J did not attempt to show that the duties proposed in wrongful life satisfy this description.

Fourth, the doctor's duty to the child 'has the same potential in *every* case'⁷⁷ of prenatal negligence — not just in wrongful life — 'to conflict with the duty owed to the mother.'⁷⁸ In *any* case where a doctor treats a pregnant patient, for example, it may be in the foetus's interest to undergo corrective surgery that will pose a risk to the mother, or in the mother's interest to take medication that will harm the foetus.⁷⁹ Since the doctor's duties to mother and foetus may thus conflict in *any* case, Crennan J's argument 'would logically apply to exclude the duty owed by [doctors] to unborn children in respect of [*all*] prenatal injuries.'⁸⁰ However, a general prenatal duty of care exists, as Crennan J conceded.⁸¹

Fifth, the alleged incompatibility between duties 'fails to explain why the suggested duty should yield to an existing duty. Reasons may exist in a particular case for favouring the propounded duty to the child over that already in existence to the mother.'⁸² It cannot automatically be assumed that the duty to the mother should take precedence.

⁷² See, eg, *Anikin v Sierra* (2004) 211 ALR 621, where a duty was owed to a pedestrian; *Chapman v Hears* (1961) 106 CLR 112, where a duty was owed to a bystander who stopped at the scene of the accident.

⁷³ A further duty is owed to other road users: *March v E & M H Stramare Pty Ltd* (1991) 171 CLR 506. This duty might also conflict with the duty owed to a passenger or pedestrian, but it does not follow that it does not exist. Rather, the conflict of duties would bear on the question of breach.

⁷⁴ See, eg, *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515, where it was held that a duty to prevent economic loss to a client would be owed in cases where 'salient features' such as 'vulnerability' (the inability of the plaintiff to protect its own interests) are present.

⁷⁵ See, eg, *Czatyрко v Edith Cowan University* (2005) 214 ALR 349; *Andar Transport Pty Ltd v Brambles Ltd* (2004) 217 CLR 424, where a duty was owed by employers to employees to ensure a safe system of work in both cases.

⁷⁶ See *Sullivan v Moody* (2001) 207 CLR 562, 582 (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ): 'People may be subject to a number of duties, at least provided they are not irreconcilable. ... But if a suggested duty of care would give rise to inconsistent obligations, that would ordinarily be a reason for denying that the duty exists.' The context indicates that 'inconsistent obligations' does not mean obligations that conflict in occasional cases, but obligations that are fundamentally inconsistent and conflict in all (or almost all) cases.

⁷⁷ *Harriton* (2006) 226 ALR 391, 409 (Kirby J) (emphasis added).

⁷⁸ *Ibid.*

⁷⁹ See, eg, *Lacroix v Dominique* (2001) 202 DLR (4th) 121, where the mother was prescribed epilepsy medication causing birth defects; *Paxton v Ramji* (2006) 146 ACWS (3d) 913, where the mother was prescribed acne medication causing birth defects. Neither case involved wrongful life, since the doctors were not responsible for the plaintiffs' existence.

⁸⁰ *Harriton* (2006) 226 ALR 391, 409 (Kirby J).

⁸¹ *Ibid.* 448.

⁸² *Ibid.* 409 (Kirby J).

The ‘conflict between duties’ argument is therefore ‘impossible to justify.’⁸³

C *Suing Parents for Wrongful Life*

Crennan J held that there is ‘no logical distinction ... between a duty of care upon a doctor as proposed [in wrongful life], and a correlative duty of care upon a mother or parents’.⁸⁴ Just as the doctor could be liable to the child through his or her failure to give proper advice, so the parents could be liable to the child for failing ‘to undergo an abortion in circumstances where the mother receives competent medical advice that ... her child would be disabled.’⁸⁵ Recognising the duty of care alleged in wrongful life actions would thus create a ‘risk of a parent being sued by the child’⁸⁶ for wrongful life, thereby creating a further ‘lack of coherence in principle’.⁸⁷

It is not clear, however, what this ‘lack of coherence’ would be, since ‘Australian law does not recognise any principle of parental immunity in tort.’⁸⁸ If the suggestion is rather that actions against parents could cause substantial ‘disturbance of family life’,⁸⁹ then this is implausible, since the wrongful life plaintiff ‘is typically a profoundly disabled infant who has little, if any, personal awareness of the proceedings.’⁹⁰ That is, the parents typically initiate the action themselves (on behalf of the child), and the child is typically oblivious, so the potential for discord is difficult to discern.

In any case, a right of action against the parents would arise only where their failure to choose an abortion was deemed unreasonable. Since abortion is a sensitive matter of individual conscience, courts are rightly loath to make that finding.⁹¹ In addition, concerns about suing parents, if accepted, would only prevent children from suing parents; they would not prevent children from suing doctors,⁹² which makes such concerns irrelevant to wrongful life.

Finally, since the duty proposed in wrongful life cases is the *same* duty that applies to *all* prenatal negligence, exclusion of that duty would again logically

⁸³ Ibid 408 (Kirby J).

⁸⁴ Ibid 449.

⁸⁵ Ibid 420 (Kirby J), where his Honour chose not to endorse this suggestion. See also *McKay* [1982] QB 1166, 1181 (Stephenson LJ).

⁸⁶ Ibid 449 (Crennan J). This appears to be primarily a policy argument, but as it is directed specifically at the existence of a duty of care, it will be convenient to deal with it here.

⁸⁷ Ibid.

⁸⁸ Ibid 421 (Kirby J) (citations omitted).

⁸⁹ *Edwards v Blomeley* [2002] NSWSC 460 (Unreported, Studdert J, 12 June 2002) [119]; *Harriton v Stephens* [2002] NSWSC 461 (Unreported, Studdert J, 12 June 2002) [71]; *Waller v James* [2002] NSWSC 462 (Unreported, Studdert J, 12 June 2002) [66]. See also *McKay* [1982] QB 1166, 1181 (Stephenson LJ), 1188 (Ackner LJ).

⁹⁰ *Harriton* (2006) 226 ALR 391, 421 (Kirby J).

⁹¹ Ibid 421–2 (Kirby J). See, eg, *Cattanach v Melchior* (2003) 215 CLR 1, 79–80 (Hayne J), 108 (Callinan J); *Melchior v Cattanach* [2001] Aust Torts Reports ¶81-597, 66 630 (Holmes J); *McFarlane v Tayside Health Board* [2000] 2 AC 59, 81 (Lord Steyn), 113 (Lord Millett); *Kealey v Berezowski* (1996) 136 DLR (4th) 708, 740–1 (Lax J); *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47, 79 (Kirby ACJ); *Emeh v Kensington and Chelsea and Westminster Area Health Authority* [1985] QB 1012, 1019 (Waller LJ), 1024 (Slade LJ). *Contra CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47, 87 (Meagher JA).

⁹² *Harriton* (2006) 226 ALR 391, 421–2 (Kirby J); *Harriton v Stephens* (2004) 59 NSWLR 694, 718 (Mason P).

exclude *any* prenatal duty of care. Yet a general prenatal duty of care exists, as Crennan J conceded.⁹³

The arguments of Crennan J, therefore, do not undermine the claim that the doctor in wrongful life cases owes the plaintiff a duty of care. The duty owed is the same duty that applies to prenatal treatment generally. Since on the agreed facts of *Harriton* and *Waller* any duty of care owed was breached, the next issue is whether the doctor's conduct in wrongful life causes legally recognised damage.

V ESTABLISHING DAMAGE: THE 'IMPOSSIBLE COMPARISON' ARGUMENT

Prenatal negligence causing a life of disability would ordinarily be held to involve legally recognised damage.⁹⁴ In wrongful life, however, the 'impossible comparison' argument is said to exclude that finding.⁹⁵ The argument claims that a comparison between existence and non-existence would be *necessary* in order to establish damage, but also that such a comparison is *impossible* — meaning that no damage can be established.

This argument was held to be decisive in *Harriton*,⁹⁶ *Waller*⁹⁷ and many previous authorities.⁹⁸ It deserves careful scrutiny. It will be argued that a comparison with non-existence is indeed necessary in wrongful life cases, but that this comparison is possible.

A Necessity of a Comparison with Non-Existence

Since damage is an element of the tort of negligence, 'a plaintiff needs to prove actual damage or loss'⁹⁹ — either physical or financial — in order to recover damages. 'Inherent in that principle is the requirement that a plaintiff is left worse off as a result of the negligence'¹⁰⁰ than he or she would otherwise have been.

This does *not* in general mean a plaintiff must prove that his or her very existence, his or her life as a whole, is worse as a result of the negligence.¹⁰¹ A wrongful *birth* plaintiff, for example, does not need to prove that his or her overall quality of life has decreased since the birth of his or her unplanned child.¹⁰² Rather, to establish damage, plaintiffs need only prove that, as a result

⁹³ *Harriton* (2006) 226 ALR 391, 448.

⁹⁴ See, eg, *Watt v Rama* [1972] VR 353; *X v Pal* (1991) 23 NSWLR 26; *Simpson v Diamond* [2001] NSWSC 925 (Unreported, Whealy J, 5 November 2001); revd [2003] NSWCA 373 (Unreported, Meagher and Ipp JJA and Young CJ in Eq, 16 December 2003), although not on this point.

⁹⁵ *Harriton* (2006) 226 ALR 391, 431 (Hayne J), 449 (Crennan J).

⁹⁶ *Ibid* 432 (Hayne J), 449, 451 (Crennan J).

⁹⁷ (2006) 226 ALR 457, 468 (Hayne J), 472–4 (Crennan J).

⁹⁸ See, eg, *Gleitman v Cosgrove*, 227 A 2d 689 (NJ, 1967); *Becker v Schwartz*, 386 NE 2d 807 (NY, 1978); *McKay* [1982] QB 1166. Virtually *every* authority disallowing wrongful life actions has relied on the 'impossible comparison' argument, together with policy concerns.

⁹⁹ *Harriton* (2006) 226 ALR 391, 449 (Crennan J).

¹⁰⁰ *Ibid*.

¹⁰¹ *Ibid* 415 (Kirby J).

¹⁰² *Cattanach v Melchior* (2003) 215 CLR 1, 36 (McHugh and Gummow JJ), 57 (Kirby J), rejecting as irrelevant the 'blessing' argument, which claims the plaintiff's overall quality of life has

of the negligence, they are in *some* respect physically or financially worse off than they would otherwise have been. If the negligence has also *benefited* the plaintiff in some respect, the benefit will not negate a finding of negligence, but may offset damages awarded in respect of the same interest.¹⁰³

The case is somewhat different, however, when ‘life’ is pleaded as part of the damage.¹⁰⁴ In *Harriton* and *Waller*, the damage was pleaded as ‘life with disabilities’.¹⁰⁵ Since this apparently refers to the plaintiff’s *life as a whole* (with disabilities), a plaintiff who pleads damage in this way commits himself or herself to showing that his or her life as a whole (with disabilities) is worse than the alternative of non-existence. This is because, again, the respect in which one claims to have suffered damage (life with disabilities) must be a respect in which one is worse off than the alternative (non-existence) — otherwise the claimed damage is not really damage. In this sense, as Crennan J noted, the plaintiff who pleads the damage as ‘life with disabilities’ must on ordinary principles ‘contest her own existence.’¹⁰⁶

It will later be argued that a wrongful life plaintiff could plead the damage simply as ‘disability’, rather than as ‘*life* with disabilities’.¹⁰⁷ Even then, however, establishing damage would require — as with all negligence actions — a comparison between ‘the [actual] position of the particular plaintiff’¹⁰⁸ (including the damage or loss allegedly suffered),¹⁰⁹ and the position in which the plaintiff would have been ‘had the tort not been committed.’¹¹⁰ This is because it is only through such a comparison that one can determine whether the plaintiff is in some respect ‘worse off’ as a result of the negligence.

The first step in the ‘impossible comparison’ argument is therefore correct. To establish *damage* in wrongful life, it is necessary on ordinary principles to compare the plaintiff’s actual position (involving disability) with the position in which the plaintiff would otherwise have been, namely non-existence. This point was (correctly) conceded by the plaintiff in *Harriton*,¹¹¹ though not in *Waller*.¹¹²

B *Impossibility of the Comparison*

Establishing damage in wrongful life requires a comparison with non-existence: a comparison between a situation in which an individual exists and a situation in which that individual does not exist, made for the purpose of

increased since the birth of her child; cf 73 (Hayne J), 127 (Heydon J), who acknowledged this argument.

¹⁰³ Ibid 37–9 (McHugh and Gummow JJ), 66 (Kirby J). Thus, financial benefits may offset damages for financial loss, increases in the plaintiff’s enjoyment of life may offset damages for loss of enjoyment of life, and so on.

¹⁰⁴ See *Harriton* (2006) 226 ALR 391, 415 (Kirby J).

¹⁰⁵ Ibid 441 (Crennan J); *Waller* (2006) 226 ALR 457, 468 (Hayne J), 472 (Crennan J).

¹⁰⁶ *Harriton* (2006) 226 ALR 391, 449.

¹⁰⁷ See below Part VI(C).

¹⁰⁸ *Harriton* (2006) 226 ALR 391, 431 (Hayne J).

¹⁰⁹ Ibid 449 (Crennan J).

¹¹⁰ Ibid 431 (Hayne J).

¹¹¹ Ibid 449 (Crennan J).

¹¹² (2006) 226 ALR 457, 465 (Kirby J), where his Honour noted that counsel had argued before the High Court that the appropriate ‘comparator’ was an ordinary, healthy plaintiff.

establishing whether the individual is (in some respect) better or worse off in one of those situations than in the other. The second stage of the ‘impossible comparison’ argument claims that such comparisons are ‘impossible’¹¹³ — not merely ‘difficult or problematic [but] impossible’.¹¹⁴

Echoing *McKay*,¹¹⁵ Crennan J held that a comparison with non-existence would be possible only if one could understand the *nature* of non-existence based on experience or proven facts. However, her Honour held that we *cannot* experience or prove the nature of non-existence: ‘no present field of human learning ... would allow a person experiential access to non-existence’¹¹⁶ — and so we cannot understand its nature. Thus, while ‘[p]hysical damage such as a broken leg [can be understood through] common experience [and] more complex physical damage [can be understood through] evidence ... from medical experts’,¹¹⁷ there is no such basis on which to understand non-existence. *Imagining* non-existence would be insufficient, as it would ‘not [be] based on experience, or on a proved sub-stratum of fact’.¹¹⁸ Therefore, although ‘philosophers and theologians’ may be capable of ‘apprehending the ideas of non-being, nothingness and the afterlife’,¹¹⁹ a court is not: it lacks the relevant experience or proven facts.

However, the concept of non-existence is not as intellectually demanding as Crennan J seemed to find it. Philosophers and theologians aside, even children can ‘apprehend the idea’: they can understand perfectly well what is meant by the non-existence of fairies, for example, or leprechauns, or six-foot antennas coming out of one’s head. The concept is hardly difficult. Nor is it outside common experience. On a good day, one experiences the non-existence of pain; on a sunny day, of rain. An only child experiences the non-existence of siblings; an orphan, of parents; a widow, of a spouse. We experience the non-existence of gods, or of all gods but one; of perpetual motion machines; of cures for cancer and AIDS; and of aborted or miscarried or unconceived children. Our experience of the world is *rife* with non-existence. What we do not experience is simply our *own* non-existence.

Accordingly, if the claim that one cannot understand or experience non-existence is to have any plausibility, it will have to be taken to mean: first, that one cannot experience one’s *own* non-existence; or, second, that one cannot imagine *what it is like* (‘from the inside’) to be nonexistent. *These* claims are plainly true. Indeed, they are *trivially* true, which lends Crennan J’s reasoning a specious plausibility. However, *neither* claim entails that comparisons with non-existence are impossible.

In relation to the first claim, one need not experience something firsthand in order to compare it with something else. The fact that a particular judge may

¹¹³ *Harriton* (2006) 226 ALR 391, 449 (Crennan J).

¹¹⁴ *Ibid* 453 (Crennan J).

¹¹⁵ [1982] QB 1166, 1180–1 (Stephenson LJ), 1189 (Ackner LJ), 1192 (Griffiths LJ), where their Lordships asserted that non-existence cannot be sufficiently known or experienced to make possible a comparison with non-existence.

¹¹⁶ *Harriton* (2006) 226 ALR 391, 449.

¹¹⁷ *Ibid* 449–50.

¹¹⁸ *Ibid* 450.

¹¹⁹ *Ibid* 449 (citations omitted).

never have had a broken leg, for example, would not stop him or her from comparing a plaintiff's negligently caused broken leg with a hypothetical unbroken leg, and awarding damages based on that comparison. Similarly, the fact that a judge has never experienced his or her own non-existence would not stop him or her from comparing a plaintiff's negligently caused disabled existence with hypothetical non-existence, and awarding damages based on that comparison.

In relation to the second claim, one need not be able to imagine what something is like ('from the inside') in order to compare it with something else. One cannot, for example, imagine what it is like to be *unconscious*: there is nothing unconsciousness is *like*, no (conscious) experience to be imagined.¹²⁰ Yet one *can* compare unconsciousness with consciousness and say, for example, that it is better to be awake and having pleasant, conscious experiences, than to be comatose. Indeed, that very comparison leads to the award of damages for loss of enjoyment of life.¹²¹ Similarly, the fact that a judge cannot imagine what it is like to be nonexistent would not stop him or her from comparing a plaintiff's negligently-caused disabled existence with hypothetical non-existence, and awarding damages based on that comparison.

On examination, then, the claims that appear to support the 'impossible comparison' argument do not support it at all: they do *not* exclude the possibility of comparisons with non-existence. What remains, then, is the mere *assertion* that such comparisons are impossible. That assertion is refuted by the fact that such comparisons *are* possible — indeed frequent — in law and common sense.

C Comparisons with Non-Existence in Law

It has been observed that:

while the idea of comparing the value of someone's present existence with a state of non-existence may seem strange, and to some people repugnant, there is nothing inherently *illogical* about it. That is to say, nothing in principle prevents us from assigning relative values to both conditions and then calculating damages in a manner consistent with legal theory. Moreover, there are several types of situation in which such a comparison is either implicitly or expressly made with legal sanction.¹²²

Kirby J similarly noted: 'The proposition that it is impossible to value [or compare] non-existence is undermined by the fact that, for some time, the courts have been comparing existence with non-existence in other legal settings.'¹²³

The clearest example of a comparison in law between existence and non-existence occurs in withdrawal of treatment cases. There, courts consider

¹²⁰ Thomas Nagel, 'Death' in Peter Singer (ed), *Applied Ethics* (1986) 9, 11.

¹²¹ *Skelton v Collins* (1966) 115 CLR 94. Since comparisons with unconsciousness are possible in this context, and since 'the non-economic loss to be compensated for in a case of deprivation of consciousness is not different from the loss to be compensated for in a case of death': at 102 (Kitto J), it follows that comparisons with non-existence are also possible. See also below Part V(C).

¹²² Harvey Teff, 'The Action for "Wrongful Life" in England and the United States' (1985) 34 *International and Comparative Law Quarterly* 423, 433 (emphasis in original).

¹²³ *Harriton* (2006) 226 ALR 391, 413.

whether it is in a patient's interests to continue to exist, or to cease to exist as a result of the withdrawal of life-sustaining medical treatment. The assumption is that non-existence may be better for the patient than an irreversible coma or intolerable pain and suffering. 'Thus, courts have declared lawful the withdrawal of life-sustaining medical treatment from severely disabled newborns and adults and from the terminally ill.'¹²⁴

Similarly, Kirby J discussed the case of *Re A (Children) (Conjoined Twins: Surgical Separation)*¹²⁵ where '[t]he English Court of Appeal authorised separation surgery on conjoined twins in order to preserve the life of one twin, although doing so would result in the death of the other.'¹²⁶ The decision was criticised,¹²⁷ but it was not suggested that the Court had managed the impossible by considering whether it was in each twin's interest to undergo the surgery that would end the existence of one of them. A comparison with non-existence was clearly made, and, ipso facto, was possible.

It is also instructive to consider statutes that prohibit abortion subject to exceptions, such as the future child being 'seriously handicapped'.¹²⁸ As the mother's welfare is covered by separate exceptions,¹²⁹ the 'seriously handicapped' exception is plausibly for the child's benefit: the child would be better off not existing than existing with a serious handicap.¹³⁰ Reference to 'the mother, or the unborn child, ha[ving] a severe medical condition that ... justifies [abortion]'¹³¹ likewise assumes that the mother or foetus may be better off if the foetus did not exist. While such value judgements are disputable, a comparison with non-existence is clearly being made, and, ipso facto, is possible. Conversely, it is often suggested that disabled existence, far from being worse than non-existence, is in fact much better — highly 'valuable',¹³² 'rewarding',¹³³ or a great 'gift'.¹³⁴ If so, 'this very premise logically entails the measurability in principle of non-existence'.¹³⁵

¹²⁴ Ibid (citations omitted). See, eg, *Re J (A Minor) (Wardship: Medical Treatment)* [1991] Fam 33, in the case of a disabled newborn; *Re B (Adult: Refusal of Medical Treatment)* [2002] 2 All ER 449, in the case of disabled adults; *Airedale NHS Trust v Bland* [1993] AC 789, in the case of a terminally ill patient.

¹²⁵ [2001] Fam 147.

¹²⁶ *Harriton* (2006) 226 ALR 391, 413.

¹²⁷ See, eg, Sally Sheldon and Stephen Wilkinson, "'On the Sharpest Horns of a Dilemma": *Re A (Conjoined Twins)*' (2001) 9 *Medical Law Review* 201; Suzanne Uniacke, 'Was Mary's Death Murder?' (2001) 9 *Medical Law Review* 208; John Harris, 'Human Beings, Persons and Conjoined Twins: An Ethical Analysis of the Judgment in *Re A*' (2001) 9 *Medical Law Review* 221; Helen Watt, 'Conjoined Twins: Separation as Mutilation' (2001) 9 *Medical Law Review* 237; Jenny McEwan, 'Murder by Design: The "Feel-Good" Factor and the Criminal Law' (2001) 9 *Medical Law Review* 246; Michael Freeman, 'Whose Life Is It Anyway?' (2001) 9 *Medical Law Review* 259; Barbara Hewson, 'Killing Off Mary: Was the Court of Appeal Right?' (2001) 9 *Medical Law Review* 281.

¹²⁸ See, eg, *Criminal Code Act 1983* (NT) s 174(1)(ii); *Criminal Law Consolidation Act 1935* (SA) s 82A(1)(a)(ii); *Abortion Act 1967* (UK) c 87, s 1(1)(d).

¹²⁹ *Criminal Code Act 1983* (NT) s 174(1)(i); *Criminal Law Consolidation Act 1935* (SA) s 82A(1)(a)(i); *Abortion Act 1967* (UK) c 87, s 1(1)(a)–(c).

¹³⁰ *McKay* [1982] QB 1166, 1180 (Stephenson LJ).

¹³¹ *Health Act 1911* (WA) s 334(7)(a).

¹³² *Harriton* (2006) 226 ALR 391, 451 (Crennan J).

¹³³ Ibid 452 (Crennan J).

¹³⁴ *McKay* [1982] QB 1166, 1193 (Griffiths LJ).

¹³⁵ Teff, above n 122, 433 (emphasis in original). See also below Part VII(A).

A further comparison with non-existence concerns the award of damages (albeit nominal damages) for loss of expectation of life.¹³⁶ Such an award necessarily recognises that the plaintiff has suffered a loss in the sense that the ‘lost years’ — the additional years he or she would have lived if the negligence had not occurred — would have been better for him or her, and would have been of greater value to him or her, than the non-existence that is now expected to take their place. This is inescapably a comparison with non-existence. It has also been held that a plaintiff with reduced life expectancy can recover damages for loss of *enjoyment* of life, including ‘not only the impaired (or los[t]) enjoyment during the *shortened* years, but also that of the *lost* years.’¹³⁷ This again recognises that the plaintiff’s future non-existence is worse than, or represents a loss compared with, the ‘lost years’ he or she would otherwise have lived — yet another comparison with non-existence.

The plaintiff who suffers reduced life expectancy can also recover damages for loss of the income he or she would have earned during the ‘lost years’.¹³⁸ This too recognises that the ‘lost years’ would have been better (more profitable) for the plaintiff than, and ipso facto can be compared with, the non-existence (death) that is now expected to take their place. In having his or her life expectancy reduced, however, the plaintiff has in one respect *saved* money, because he or she will no longer have to spend money on personal living expenses during the ‘lost years’: bluntly, ‘a dead man has no personal expenses.’¹³⁹ For this reason, damages for income during the ‘lost years’ are discounted for the personal expenses the plaintiff would have incurred if he or she had been alive during those years.¹⁴⁰ Here, then, is yet another comparison between the dead (or nonexistent) and the living, with a discount applied because the dead are in one respect better off, in that they do not incur the costs of living.

D Comparisons with Non-Existence in Common Sense

Common sense also compares existence with non-existence. If asked in retrospect whether we would prefer never to have been born, most of us would answer ‘no’: we *are* glad to exist — life *is* better than non-existence. This is not because non-existence is *bad*, but because non-existence is nothingness, and so has *zero* value, whereas life is for the most part *good*, and so has *greater* than zero value.¹⁴¹ For the same reason, we would prefer to continue living than to die or be killed. The situation in which we continue to exist is better for us than the situation in which we cease to exist, because life has greater value than zero, and so is better than non-existence. But this is not *always* so. Given a choice between

¹³⁶ *Sharman v Evans* (1977) 138 CLR 563.

¹³⁷ *Ibid* 596 (Murphy J) (emphasis added). See especially *Skelton v Collins* (1966) 115 CLR 94, which accepted the same principle.

¹³⁸ *Skelton v Collins* (1966) 115 CLR 94; *Sharman v Evans* (1977) 138 CLR 563; *James Hardie & Co Pty Ltd v Roberts* (1999) 47 NSWLR 425 (Court of Appeal), for which special leave was refused by the High Court: ‘Quantification of Damages’ (2000) 21(7) Leg Rep SL 3.

¹³⁹ J A Jolowicz, ‘Damages — Prospective Loss of Earnings — Reduced Expectation of Life’ [1960] *Cambridge Law Journal* 160, 163; *Sharman v Evans* (1977) 138 CLR 563, 582 (Gibbs and Stephen JJ).

¹⁴⁰ See above n 138.

¹⁴¹ Cf Nagel, above n 120, 10.

being killed painlessly now, and being tortured to death over the next several hours, one would rationally choose the former: although in the torture case one lives for longer, the extra hours of existence are so bad, so excruciating, that the value of those extra hours is less than zero, worse than simply ceasing to exist.

Kirby J illustrated the point this way:

Consider the situation of a newborn child who has a very limited life span and has no capacity to think or appreciate his or her surroundings and is only capable of experiencing unrelenting and excruciating pain. In such a case, many people might think that non-existence would be preferable to existence, particularly where heroic measures were necessary to keep the patient alive.¹⁴²

This rationale also applies to animals: the owners of an ailing pet may reasonably decide that it is in the pet's interests to cease to exist, rather than to continue a life of severe and unrelenting pain. Although there are important moral and legal differences between humans and animals (which may mean, for example, that active euthanasia is justified for animals, but not humans), *both* can have an existence worse than non-existence.

These dozen or so examples drawn from law and common sense do not all involve assessment of tortious damage or damages,¹⁴³ but 'one cannot escape the fact that they entail a ... comparison between existence and non-existence'¹⁴⁴ — that is, a comparison between a situation in which an individual exists, and a situation in which that individual does not exist, made for the purpose of establishing whether the individual is in some respect better or worse off in one of those situations than in the other. It follows that comparisons with non-existence are legally and logically possible. Assertions to the contrary must be rejected. The 'impossible comparison' argument fails.

E Justice Crennan's Response

Crennan J considered only one of the above examples: that of withdrawal of treatment cases. Her Honour held that an analogy between such cases and wrongful life 'is not apt, chiefly because [withdrawal of treatment] cases do not require a forensic establishment of damage by reference to non-existence.'¹⁴⁵ By this her Honour presumably meant to deny that withdrawal of treatment cases involve a comparison with non-existence. Her Honour continued:

The comparisons generally called for (in a non-tortious context) are between continuing medical treatment prolonging life and discontinuing medical treatment which may hasten death, always determined by reference to the best interests of the child or person unable to decide for themselves.¹⁴⁶

However, this is precisely the problem: withdrawal of treatment cases compare a situation in which the patient continues to exist (through continued treatment) with a situation in which the patient does not exist (through withdrawal of

¹⁴² *Harriton* (2006) 226 ALR 391, 415.

¹⁴³ *Ibid* 450 (Crennan J).

¹⁴⁴ *Ibid* 413 (Kirby J).

¹⁴⁵ *Ibid* 450.

¹⁴⁶ *Ibid*.

treatment), to determine which is in the patient's best interests. This is manifestly a comparison with non-existence.

Crennan J then stated:

It is possible for a court to receive evidence allowing it to undertake a balancing exercise in respect of [continuing versus withdrawing treatment] before making a decision. ... [S]uch comparisons involve matters of degree and lack the absolute quality of a comparison between a life with disability (or suffering) and death.¹⁴⁷

The relevance of these statements is unclear, since even if they were true, it would hardly follow that withdrawal of treatment cases do *not* involve a comparison with non-existence. In any case, wrongful life *would* require a balancing exercise involving evidence and matters of degree. A court would require evidence of the degree of pain, suffering, pleasure and enjoyment in the plaintiff's life, and would need to balance these factors to determine whether the plaintiff's life was, on the whole, worse than non-existence. One might add that since death is absolute and irreversible, a comparison with non-existence for the purpose of ordering fatal withdrawal of life support is plainly more 'absolute' than a comparison with non-existence for the purpose of assessing damages.

Finally, Crennan J asserted:

The analogy between [wrongful life] and the [withdrawal of treatment] cases is also inapt because of the clear distinction between death accelerated by non-intervention or the withholding of medical treatment and death by the intervention of lawful abortion ...¹⁴⁸

Again, whatever relevance this assertion may have, it fails to show — indeed *obviously* fails to show — that withdrawal of treatment cases do not involve a comparison with non-existence.

In sum, the 'impossible comparison' argument fails because comparisons with non-existence are routinely made — and are therefore possible — in law and common sense. Crennan J's response fails to show otherwise. With the major obstacle to the establishment of damage removed, the *nature* of the damage in wrongful life — together with the damages recoverable — may now be ascertained.

VI RECOVERABLE DAMAGES

A *Damages for Life with Disabilities*

Withdrawal of treatment cases show that 'a life of severe and unremitting suffering [can be] worse than non-existence.'¹⁴⁹ Logically, then, if the wrongful life plaintiff had a sufficiently low quality of life, that life *would* be worse than non-existence, and his or her life with disabilities *would* constitute damage. The situation would be rare, but '[i]n extreme cases, it may be a valid contention.'¹⁵⁰

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid* 450–1.

¹⁴⁹ *Ibid* 415 (Kirby J).

¹⁵⁰ *Ibid.*

The agreed facts do not disclose whether Alexia Harriton's or Keeden Waller's existence is worse than non-existence. One suspects not,¹⁵¹ although a court would have to decide this on the facts.¹⁵² That task is plainly difficult, but no more so than in withdrawal of treatment cases — and probably less so, since the outcome concerns damages rather than life or death. '[C]ourts are continually concerned with such line drawing'.¹⁵³

If the plaintiff *does* establish damage in the form of life with disabilities (worse than non-existence), what damages would be recoverable? On ordinary principles, a defendant is liable for reasonably foreseeable kinds of loss or damage that occur as a part or as a result of the negligently caused damage or injury.¹⁵⁴ Pain, suffering, medical costs and the costs of gratuitous care¹⁵⁵ are all reasonably foreseeable kinds of loss or damage that occur as a part of life with disabilities. On ordinary principles, the doctor would therefore be liable for these. In addition, because the damage pleaded is the plaintiff's life or existence as a whole (with disabilities), gratuitous care costs would plausibly include not only the costs of *extraordinary* or *additional* care (attributable to the disability), but also the costs of *basic* parental care — the basic costs of raising and maintaining a child, including amounts spent on food, clothing and transport; for these upbringing costs equally occur as a part of the plaintiff's life with disabilities.

B *Objection Based on the Compensatory Principle*

According to the 'compensatory principle',¹⁵⁶ the purpose of damages is to place the plaintiff, so far as money can, 'in the same position as he or she would have been in if ... the tort had not been committed'¹⁵⁷ — in other words, to compensate him or her for the respects in which the negligence has made him or her worse off. In wrongful life, this would require a comparison between the plaintiff's actual state, and the state in which he or she would have been but for the negligence — namely, non-existence — to determine the respects in which he or she has been made worse off and is to be compensated. Proponents of the

¹⁵¹ Ibid 452 (Crennan J).

¹⁵² Ibid 416 (Kirby J).

¹⁵³ Ibid (citations omitted).

¹⁵⁴ *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd; The Wagon Mound [No 2]* [1967] 1 AC 617, 643 (Lord Reid); *Mahony v J Kruschich (Demolitions) Pty Ltd* (1985) 156 CLR 522.

¹⁵⁵ Gratuitous care costs are treated as a form of economic damage or loss incurred by the plaintiff himself or herself: see *Cattanach v Melchior* (2003) 215 CLR 1, 26 (Gummow and McHugh JJ), 97 (Callinan J); *Griffiths v Kerkemeyer* (1977) 139 CLR 161, where there was liability for the market value of reasonably foreseeable gratuitous care. This point has been approved: see *Van Gervan v Fenton* (1992) 175 CLR 327; *Kars v Kars* (1996) 187 CLR 355; *CSR Ltd v Eddy* (2005) 222 ALR 1.

¹⁵⁶ The principle was most famously formulated in *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39 (Lord Blackburn).

¹⁵⁷ *Haines v Bendall* (1991) 172 CLR 60, 63 (Mason CJ, Dawson, Toohey and Gaudron JJ); see also *Husher v Husher* (1999) 197 CLR 138, 142–3 (Gleeson CJ, Gummow, Kirby and Hayne JJ), where their Honours endorsed the same principle.

‘impossible comparison’ argument accordingly object that the assessment of damages is impossible.¹⁵⁸

The objection dissolves, however, once it is accepted (as argued above) that comparisons with non-existence are possible. In the hypothetical situation where the plaintiff does not exist, the plaintiff — precisely *because* he or she does not exist — incurs no pain, suffering or financial costs. The actual plaintiff *does* incur these things. In these respects, then, the actual plaintiff *is* worse off than zero, *is* worse off than the alternative of non-existence, and can be compensated accordingly.¹⁵⁹ The compensation should notionally be sufficient to balance or reduce the pain, suffering and expenses caused by the negligence to zero — the same approach followed in other personal injury cases.

Unlike other cases, however, the wrongful life plaintiff could not recover damages for loss of earning capacity. This is because a nonexistent plaintiff has *zero* earning capacity, and the *actual* plaintiff’s earning capacity could not possibly be *less* than zero. Hence no loss of earning capacity can be suffered in wrongful life. It may also be appropriate to discount the wrongful life plaintiff’s damages for any financial benefits brought about by the negligence¹⁶⁰ — in effect, any benefits brought by the plaintiff’s existence with disabilities. Potentially, this could include statutory welfare benefits and future earnings, since neither of these would be obtained without the negligence. However, no discount is applied for standard disability pensions, gifts, or insurance payouts,¹⁶¹ and a discount for future earnings is unlikely, given that the plaintiff’s severe disabilities would almost invariably preclude employment.

C Damages for Disability

The case for wrongful life succeeds on ordinary principles, at least in extreme cases where existence is worse than non-existence. The plaintiff in such cases can plead the damage as ‘life with disabilities’, and satisfy the requirement of being worse off in respect of the damage pleaded (since his or her life with disabilities will be worse than the alternative of non-existence). Usually, however, the plaintiff’s existence will be *better* than non-existence. Pleading the damage as ‘life with disabilities’ will then be futile, since the plaintiff will *not* satisfy the requirement of being worse off in respect of the damage pleaded (for his or her life with disabilities will *not* be worse than the alternative of non-existence).

It is submitted that this problem can be overcome by pleading the damage not as ‘life with disabilities’, but simply as ‘disability’. Since ‘disability’ does not refer to the plaintiff’s life as a whole, and since negligence law does not in general require the plaintiff to prove that his or her life as a whole is worse off as

¹⁵⁸ *Harriton* (2006) 226 ALR 391, 453 (Crennan J). *McKay* [1982] QB 1166, 1182 (Stephenson LJ), 1188 (Ackner LJ), 1193 (Griffiths LJ).

¹⁵⁹ See, eg, *Sharman v Evans* (1977) 138 CLR 563, 575–6 (Gibbs and Stephen JJ), where their Honours made similar comparisons with non-existence.

¹⁶⁰ *National Insurance Co of New Zealand Ltd v Espagne* (1961) 105 CLR 569; *Manser v Spry* (1994) 181 CLR 428.

¹⁶¹ See *National Insurance Co of New Zealand Ltd v Espagne* (1961) 105 CLR 569.

a result of the negligence,¹⁶² pleading the damage as ‘disability’ would *not* require the plaintiff to show that his or her life as a whole is worse than the alternative of non-existence. Rather, it would require the plaintiff to show that the *disability* is worse than the alternative of non-existence. A comparison with non-existence would still thus be required, but the comparison would relate to a single *aspect* of the plaintiff’s life, the disability, rather than the plaintiff’s life as a whole.

If it is accepted that comparisons with non-existence are possible, then disability — considered in itself, without suggesting anything about the value of the disabled person’s life as a whole — surely *is* worse than non-existence. For disability is, to varying degrees, a painful and burdensome condition, whereas non-existence involves no such painful and burdensome condition. In this sense, disability represents a loss compared with non-existence, and is therefore worse. Again, this is not to say the plaintiff’s *life as a whole* is worse than non-existence; merely that *one aspect* of it is. Just as the nonexistent are in one respect better off than the living, in that they do not incur living expenses,¹⁶³ so the nonexistent are better off than the disabled, in that they do not suffer the painful and burdensome condition of disability.

By pleading the damage as ‘disability’ rather than ‘*life with disabilities*’, the wrongful life plaintiff can therefore establish damage *even if* his or her life is better than non-existence.

D *Objection Based on Causation*

Pleading the damage as ‘disability’ is likely to encounter the objection that the doctor in wrongful life cases ‘[does] not cause’ the plaintiff’s disabilities.¹⁶⁴ Crennan J noted the distinction between ‘suing the doctor for causing physical damage, being the disability’, and ‘suing the doctor for causing a “life with disabilities”’, holding that the disability ‘is immediately caused by’ rubella (or by AT3 deficiency), not by the doctor’s conduct.¹⁶⁵ The doctor, it has been held, could not possibly be liable for the plaintiff’s disabilities, ‘since these were already in existence before the doctor was consulted.’¹⁶⁶

However, while ‘[d]octors seldom cause their patients’ illnesses ... they may be liable in negligence for the pain and cost of treating an illness that would have been prevented or cured by reasonable medical intervention.’¹⁶⁷ Further, a doctor *can* be liable for a condition that was already in existence before he or she was consulted, *if* his or her reasonable intervention would have prevented its continuation (and so prevented the occurrence of legally recognised damage).¹⁶⁸ In wrongful life, the doctor’s reasonable intervention — proper advice and

¹⁶² See *Harriton* (2006) 226 ALR 391, 415 (Kirby J); *Cattanach v Melchior* (2003) 215 CLR 1, 36 (McHugh and Gummow JJ), 57 (Kirby J).

¹⁶³ *Sharman v Evans* (1977) 138 CLR 563, 575–6 (Gibbs and Stephen JJ).

¹⁶⁴ *Harriton* (2006) 226 ALR 391, 454 (Crennan J).

¹⁶⁵ *Ibid* 447. See also *McKay* [1982] QB 1166, 1177–9 (Stephenson LJ), 1188 (Ackner LJ).

¹⁶⁶ *McKay* [1982] QB 1166, 1189 (Ackner LJ).

¹⁶⁷ *Harriton v Stephens* (2004) 59 NSWLR 694, 714 (Mason P).

¹⁶⁸ See, eg, *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47, where there was liability for failure to diagnose pre-existing pregnancy.

treatment — would have prevented the plaintiff's birth. Since legally recognised damage does not accrue until birth,¹⁶⁹ *reasonable intervention would have prevented the occurrence of legally recognised damage*. Conversely, because the doctor did *not* provide reasonable intervention, he or she has *allowed* the plaintiff to sustain legally recognised damage in the form of disability suffered by a born person.

Consequently, the doctor in wrongful life claims can allow or prevent physical damage, and can be held — by both common sense and the 'but for' test — to have caused the plaintiff's disability.¹⁷⁰ The doctor's conduct is not the *sole* or *direct biological* cause of that damage, but it is *a* cause, which is the crucial point.¹⁷¹ A wrongful life claim pleading the damage as 'disability', rather than 'life with disabilities', will therefore pass the ordinary tests of causation, and the plaintiff will be entitled to damages accordingly.

The heads of damages that would be recoverable if the claim were pleaded in this way would on ordinary principles include the reasonably foreseeable pain and suffering, medical costs and gratuitous care costs resulting from the disability.¹⁷² However, because 'life' would not form part of the damage pleaded, the damages for gratuitous care would be limited to the *additional* costs attributable to the disability. That is, the damages for gratuitous care would not include upbringing costs, since upbringing costs are properly attributed to the plaintiff's very existence, rather than to the disability that constitutes the damage. As before, it may be appropriate to discount the damages for any financial benefits brought about by the negligence,¹⁷³ including future earnings if the disability does not preclude employment.

It would appear, then, that counsel for the *Harriton* and *Waller* plaintiffs made a tactical error by pleading the damage as 'life with disabilities': this committed them, even if they did not realise it, to proving that the plaintiffs' lives were worse than non-existence — a task that could have been avoided, and their cases made more plausible, by pleading the damage simply as 'disability'.¹⁷⁴

¹⁶⁹ See above n 56.

¹⁷⁰ See *March v E & M H Stramare Pty Ltd* (1991) 171 CLR 506, 515–17 (Mason CJ), 522–3 (Deane J), 524 (Toohey J), 525 (Gaudron J), where their Honours endorsed the common sense and 'but for' tests as the primary tests of legal causation.

¹⁷¹ *Ibid* 512 (Mason CJ); *Medlin v State Government Insurance Commission* (1995) 182 CLR 1, 6–7 (Deane, Dawson, Toohey and Gaudron JJ); *Henville v Walker* (2001) 206 CLR 459, 480 (Gaudron J), 490 (McHugh J), where their Honours permitted recovery where negligence was *a* material cause of the damage, even though not the *sole* cause.

¹⁷² *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd; The Wagon Mound [No 2]* [1967] 1 AC 617, 643 (Lord Reid); *Mahony v J Kruschich (Demolitions) Pty Ltd* (1985) 156 CLR 522, where there was liability for reasonably foreseeable kinds of damage; *Griffiths v Kerkemeyer* (1977) 139 CLR 161, where there was liability for the market value of reasonably foreseeable gratuitous care.

¹⁷³ See *National Insurance Co of New Zealand Ltd v Espagne* (1961) 105 CLR 569; *Manser v Spry* (1994) 181 CLR 428.

¹⁷⁴ If, contrary to the arguments given here, wrongful life involves no physical damage, then damages might still be recoverable through the principles governing pure economic loss: see *Stretton*, above n 8, 361.

VII POLICY CONCERNS

The case for wrongful life succeeds on ordinary principles, whether or not the plaintiff's life with disabilities is worse than non-existence. However, as Crennan J¹⁷⁵ and previous authority have held, there may be policy grounds for overriding these principles and for refusing to recognise wrongful life actions. The majority in *Harriton* and *Waller* accepted four main policy arguments.¹⁷⁶

A *Devaluing the Lives of Disabled People*

A common objection to wrongful life claims, often connected to the phrase 'sanctity of life',¹⁷⁷ is that 'it is odious and repugnant to devalue the life of a disabled person by suggesting that such a person would have been better off not to have been born [than to have been born] into a life with disabilities.'¹⁷⁸ On the contrary, Crennan J held that 'all human beings are valuable',¹⁷⁹ and that even '[a] seriously disabled person can find life rewarding'.¹⁸⁰

Her Honour evidently did not mean 'odious, repugnant, and true'. The point was that the suggestion is *false*: the lives of seriously disabled people do not have less, but rather have *more*, value than non-existence, because those lives are 'valuable' and 'rewarding'. If so, non-existence can be valued and compared — precisely what her Honour's 'impossible comparison' argument denies. Thus, if Crennan J has not yet believed 'six impossible things before breakfast' (as the White Queen in *Through the Looking-Glass* managed to do),¹⁸¹ her Honour at least appears to have believed one impossible thing before the *Harriton* and *Waller* decisions: that comparisons with non-existence are not only *impossible*, but also *possible*. Her Honour has endorsed a logical contradiction.

Logical consistency aside, withdrawal of treatment cases and common sense show that a severely disabled existence *can* be worse than non-existence. Feigning ignorance of this fact would itself be repugnant. It is better to accept it and provide an appropriate remedy:

Contrary to devaluing plaintiffs in wrongful life actions, awarding damages in a case such as this would provide the plaintiff with a degree of practical empowerment. Such damages would enable such a person to lead a more dignified existence. They would provide him or her with a better opportunity to participate in society than he or she might otherwise enjoy where the burden of

¹⁷⁵ *Harriton* (2006) 226 ALR 391, 451–2.

¹⁷⁶ Kirby J also discussed and refuted several other policy arguments: *ibid* 416–28.

¹⁷⁷ See, eg, *McKay* [1982] QB 1166, 1180 (Stephenson LJ) ('sanctity of human life'), 1188 (Ackner LJ) ('sanctity of human life'), 1193 (Griffiths LJ) ('the gift of life'); *Edwards v Blomeley* [2002] NSWSC 460 (Unreported, Studdert J, 12 June 2002) [119] ('the precious nature of human life'); *Harriton v Stephens* [2002] NSWSC 461 (Unreported, Studdert J, 12 June 2002) [71] ('the precious nature of human life'); *Waller v James* [2002] NSWSC 462 (Unreported, Studdert J, 12 June 2002) [66] ('the precious nature of human life'); *Harriton v Stephens* (2004) 59 NSWLR 694, 701 (Spigelman CJ) ('sanctity of life'), 742, 747 (Ipp JA) ('sanctity of life'); *Harriton* (2006) 226 ALR 391, 450 (Crennan J) ('value (or sanctity) of human life').

¹⁷⁸ *Harriton* (2006) 226 ALR 391, 451 (Crennan J).

¹⁷⁹ *Ibid*.

¹⁸⁰ *Ibid* 452 (citations omitted).

¹⁸¹ Lewis Carroll, 'Through the Looking-Glass' in Martin Gardner (ed), *The Annotated Alice* (1970) 170, 251.

care and maintenance falls on the disabled person's family, on charity or on social security.¹⁸²

Disability and carer support allowances currently cover only a fraction of the cost of care and treatment for severe disability, leaving most of the burden on the severely disabled person and his or her family.¹⁸³ Unless the legislature changes its mind, a remedy in tort will often be the only hope for wrongful life plaintiffs to secure the means for proper care and medical treatment. In these circumstances, allowing wrongful life actions could hardly be said to devalue life:

It is one of the hallmarks of a compassionate society that care and treatment is made available to the severely disabled. To suggest that [wrongful life plaintiffs] are somehow impugning life itself by seeking just recompense for even the cost of care is quite irrational, indeed disturbing.¹⁸⁴

The 'devaluing life' argument would in any case be irrelevant to wrongful life actions brought on the basis of 'disability' (rather than '*life* with disabilities'), since there is no suggestion in such cases that the plaintiff's existence is worse than non-existence.

B *Specifying the Gravity of Disability*

Crennan J suggested there is a 'lack of certainty about the class of persons'¹⁸⁵ who could recover for wrongful life:

Is it only ... persons whose disability is so severe they could be said to constitute a group for whom life is not worth living? Other categories of established negligence ... do not discriminate between those damaged by a breach of the duty on the basis of the severity or otherwise of the damage.¹⁸⁶

The argument appears to be that if the severely disabled could recover damages for wrongful life, then so too could plaintiffs with relatively minor or trivial disabilities, such as a squint — a conclusion that is thought to be undesirable or absurd.¹⁸⁷

One response to this objection is that it 'trivialises' the plaintiff's claim: 'To suggest that the appellant's disabilities are analogous to a squint is absurd and insulting.'¹⁸⁸ This response is inadequate, however, since the point of the argument is *not* that severe and trivial disabilities are analogous, but simply that *if* recovery is allowed for severe disabilities, then it *must* logically be allowed for trivial disabilities too.

¹⁸² *Harriton* (2006) 226 ALR 391, 419 (Kirby J).

¹⁸³ See Greg McIntosh and Janet Phillips, *Disability Support and Services in Australia* (16 October 2002) Parliament of Australia: Parliamentary Library <<http://www.aph.gov.au/library/intguide/SP/disability.htm>>. See also Centrelink, *How Much Disability Support Pension Do I Get?* (2006) <http://www.centrelink.gov.au/internet/internet.nsf/payments/pay_how_dsp.htm>, which explains that in 2006 the maximum fortnightly disability support pension allowance for an individual is A\$499.70.

¹⁸⁴ *Harriton v Stephens* (2004) 59 NSWLR 694, 716 (Mason P).

¹⁸⁵ *Harriton* (2006) 226 ALR 391, 452.

¹⁸⁶ *Ibid.*

¹⁸⁷ See, eg, *McKay* [1982] QB 1166, 1181 (Stephenson LJ), 1188 (Ackner LJ), 1193 (Griffiths LJ).

¹⁸⁸ *Harriton* (2006) 226 ALR 391, 419–20 (Kirby J).

A second response is that ‘a plaintiff who suffers from “minor defects” will hardly be able to show ... that non-existence would have been preferable.’¹⁸⁹ While this response is decisive if wrongful life plaintiffs *are* committed to showing that non-existence would have been preferable, it is inadequate if, as argued, they are *not* so committed.

A more forceful response is that actions for minor or trivial disabilities would face difficulties. Breach and causation would be difficult to prove, since the risk of minor conditions may not warrant disclosure or testing, and that risk would be less likely to lead to an abortion even if it *were* disclosed.¹⁹⁰ Further, damages for minor disability would themselves be minor: there would be little pain and suffering, and economic losses would be offset to zero by the plaintiff’s likely future earnings¹⁹¹ (since a minor disability does not prevent full-time employment). This outcome is hardly absurd.

If it is further objected that the very *possibility* of actions for minor or trivial disability is absurd, then this assertion should simply be rejected. Since ordinary principles place no lower limit on the severity of damage required to found a cause of action¹⁹² — recovery for minor damage is permitted — the fact that wrongful life plaintiffs could also in principle recover for minor damage or disability is not an objection at all, but rather confirmation that the case for wrongful life is based on a consistent application of ordinary principles.

C Differential Treatment of Disabled People

Crennan J held that:

to recognise a cause of action at the suit of a person living a life with disabilities would occasion incompatibility with other areas of law. Such incompatibility is pervasive [and includes incompatibility with] [s]tatutes ... [that] prohibit differential treatment of the disabled.¹⁹³

To clinch the argument, her Honour alluded to National Socialism: ‘differential treatment of the worth of the lives of those with ill health or disabilities has been a mark of the societies and political regimes we least admire.’¹⁹⁴

This argument cannot succeed. First, since wrongful life actions arise out of *prenatal* negligence causing suffering, to allow recovery ‘would say nothing about how disabled individuals, such as the [plaintiff], *once born*, are to be treated.’¹⁹⁵

Second, the argument misunderstands discrimination. Anti-discrimination statutes do not prohibit *all* differential treatment of the disabled (such as where a

¹⁸⁹ Ibid 420.

¹⁹⁰ Ibid.

¹⁹¹ See *National Insurance Co of New Zealand v Espagne* (1961) 105 CLR 569; *Manser v Spry* (1994) 181 CLR 428, where financial benefits brought by the negligence were offset against damages for financial losses.

¹⁹² See *Harriton* (2006) 226 ALR 391, 420 (Kirby J), 452 (Crennan J).

¹⁹³ Ibid 452.

¹⁹⁴ Ibid, where Crennan J quoted *Cattanach v Melchior* (2003) 215 CLR 1, 35–6 (McHugh and Gummow JJ).

¹⁹⁵ *Harriton* (2006) 226 ALR 391, 419 (Kirby J) (emphasis added) (citations omitted).

quadriplegic is refused a job as a lumberjack), but only where the disabled person:

- is treated less favourably on the basis of the disability itself (rather than on the basis of other, *relevant* considerations);¹⁹⁶ or
- is *unreasonably* made to comply with a requirement, compliance with which is made harder as a result of the disability.¹⁹⁷

There is no reason to believe — and Crennan J made no attempt to show — that wrongful life actions appeal to irrelevant considerations or unreasonable requirements. Nor did her Honour attempt to show how wrongful life actions differ from *other* negligence actions where the award of damages for negligently caused disability is clearly *not* discriminatory.¹⁹⁸ As McHugh and Gummow JJ observed in *Cattanach v Melchior*, '[i]t is a beguiling but misleading simplicity to invoke the broad values which few would deny and then glide to the conclusion that they operate to [exclude the plaintiff's claim]'.¹⁹⁹ By raising the broad values of disabled rights in opposition to wrongful life claims without attending to details, Crennan J has fallen into this fallacy.

In short, 'there is no support for the suggestion that actions for wrongful life are inconsistent with legislation prohibiting discrimination on the basis of disability.'²⁰⁰

As for 'differential treatment of the worth of the lives of those with ill health or disabilities', two senses of 'worth' or 'value' must be distinguished.²⁰¹ On the one hand, disease and disability tend to decrease the value of one's life in the sense that they decrease its quality: they make one's experiences less valuable or desirable. The lives of the severely ill or disabled clearly have less value in *this* sense, because such lives — in comparison with the lives of healthy and non-disabled people — tend to be shorter, contain more pain and suffering, and fewer of the complex relationships, projects and activities that make human life distinctively valuable. The fact that severely ill or disabled people's lives contain less value in *this* sense is precisely what makes their condition unfortunate. To recognise this is not Nazism, but common sense.

On the other hand, a decrease in the *quality* of one's life, or in other words, of the value of the experiences *within* it, does not entail a corresponding decrease in the value or worth of the *person*.²⁰² All persons have *equal* basic moral and legal rights, even where their quality of life is different. Indeed, it is precisely *because* wrongful life plaintiffs are recognised as moral and legal persons — with the equal rights and value this entails — that they should be entitled, in relevant cases, to a remedy in tort. Non-persons have no legal rights. Thus, far from

¹⁹⁶ See, eg, *Disability Discrimination Act 1992* (Cth) s 5; *Anti-Discrimination Act 1977* (NSW) s 49B(1)(a).

¹⁹⁷ See, eg, *Disability Discrimination Act 1992* (Cth) s 6; *Anti-Discrimination Act 1977* (NSW) s 49B(1)(b).

¹⁹⁸ *Harriton* (2006) 226 ALR 391, 419 (Kirby J).

¹⁹⁹ (2003) 215 CLR 1, 35.

²⁰⁰ *Harriton* (2006) 226 ALR 391, 419 (Kirby J) (citations omitted).

²⁰¹ Jeff McMahan, *The Ethics of Killing: Problems at the Margins of Life* (2002) 241.

²⁰² *Ibid* 234–5.

denying the plaintiffs' value as persons, wrongful life actions proceed on the premise that these plaintiffs have the same moral and legal rights that are enjoyed by all persons. The analogy to Nazism is tawdry and inapt.

D *The Equal Culpability of Killing*

Crennan J also saw wrongful life actions as inconsistent with the fact that the killing of disabled people is as culpable as the killing of non-disabled people:

No person guilty of manslaughter or murder is entitled to defend the accusation on the basis that the victim would have been better off, in any event, if he or she had never been born. All human lives are valued equally by the law when imposing sentences on those convicted of wrongfully depriving another of life.²⁰³

Again, this argument confuses two senses of 'value'. On the one hand, the total value of the experiences or future life of which a person is deprived when he or she is killed varies greatly from person to person. When a young person is killed, for example, he or she is deprived of far more life than when an older person is killed, and so the total value of the life a young person loses is generally far greater. When a happy, popular and healthy person is killed, the life of which he or she is deprived has greater quality, and so is more valuable or desirable, than when an ill and miserable hermit is killed. And when a healthy, non-disabled person is killed, the value of the life he or she loses is generally greater than the value of the life that a severely disabled person loses — again because the latter's life will tend to be shorter, contain more pain and suffering, and fewer of the complex relationships, projects and activities that make human life distinctively valuable.

On the other hand, this divergence in the total value of the experiences or future life of which different people are deprived when they are killed does not suggest for a moment that the killing of some people is intrinsically less culpable, either morally or legally, than the killing of others. Again, all people have *equal* basic rights, including an equal *right* to life, even where their *quality* of life varies significantly. Thus, even if a person would have been better off never existing — or would *now* be better off not existing — his or her life remains *his or her own*. It is not for anybody else to take away that life without proper consent (and perhaps, as many argue, not even *with* consent); to do so would be murder. Hence, the recognition of wrongful life claims is consistent with the principle that the killing of disabled and non-disabled people is equally culpable; for the recognition that some people's lives contain less valuable *experiences* does not entail that those people have less value as persons. It is the latter that is crucial for the culpability of killing.

If anti-discrimination statutes and the equal culpability of killing are Crennan J's clearest examples of 'incompatibility' between wrongful life actions and other areas of law, it is safe to say there is no such incompatibility, 'pervasive' or otherwise. The policy arguments of the majority must therefore be rejected.

²⁰³ *Harriton* (2006) 226 ALR 391, 452.

VIII SUMMARY OF THE CASE FOR WRONGFUL LIFE

The barriers to recovery in *Harriton* and *Waller* were the ‘impossible comparison’ argument and legal policy. The former ignores the comparisons between existence and non-existence routinely made in other contexts, while the policy concerns prove to be groundless on critical examination. The doctor’s conduct in wrongful life cases causes physical damage in the form of disability suffered by a born person, or life with disabilities. That damage, and the suffering and costs flowing from it, are within the ordinary prenatal duty of care, are reasonably foreseeable, and, on the ordinary tests of causation, are caused by the doctor’s negligent conduct. Damages for wrongful life should therefore be recoverable on ordinary principles. Since there is also much to be said for encouraging, even if ‘only indirect[ly]’,²⁰⁴ proper medical advice and treatment,²⁰⁵ and for providing wrongful life plaintiffs with the means to secure the care and treatment they deserve,²⁰⁶ wrongful life actions are consistent with sound legal principle and policy.

IX CONCLUSION

The High Court had an opportunity to display bravery and integrity by reaching, as it managed to do for wrongful birth,²⁰⁷ a controversial but legally correct decision on a matter of considerable social importance. Instead the Court regressed, depriving the plaintiffs of a legally justified remedy by resort to inconsistent logic and ill-considered policy. While Keeden Waller may yet see the benefit of his parents’ wrongful birth action,²⁰⁸ the High Court — for all its rhetoric of disabled rights — has deplorably cast Alexia Harriton and her family into the indifferent hands of the legislature. The denial of wrongful life claims in *Harriton* and *Waller* was an unjust decision — a decision that, probably unlike the plaintiffs themselves, would have been better off not existing.

²⁰⁴ Ibid 434 (Hayne J).

²⁰⁵ Ibid 408, 428 (Kirby J).

²⁰⁶ Ibid 419 (Kirby J).

²⁰⁷ *Cattanach v Melchior* (2003) 215 CLR 1.

²⁰⁸ See *Harriton v Stephens* (2004) 59 NSWLR 694, 724 (Ipp JA).