

Wrongful Life Actions as a Means of Regulating Use of Genetic and Reproductive Technologies

Shaun D. Pattinson*

Introduction

The developing reproductive and genetic technologies present increasing possibilities for attempts to choose or influence the traits or prospects of children before their birth, and, where another's conduct results in the birth or conception of a child with traits or prospects considered unsatisfactory by the child or its parents, the law of tort¹ presents itself as a candidate for obtaining a remedy. Thus, it seems appropriate to explore the potential of tort law to regulate use of the genetic and reproductive technologies.

This paper will begin by outlining the types of tort actions available against those responsible for the conception or birth of a child who has allegedly unsatisfactory traits or prospects. Focusing on what have been termed "wrongful life" actions, I will ask whether such actions are justifiable, before examining the only English wrongful life case.

1.1 Civil Actions and the Genetic and Reproductive Techniques

There are a number of theoretically possible causes of action available following the conception or birth of a child with allegedly unsatisfactory traits or prospects. I will first outline the main candidates, in the form of ideal-typical categories of possible types of action. These categories are not meant to describe those causes of action recognised in any particular jurisdiction.

The types of action can be classified under headings as follows.²

*Shaun Pattinson is a PhD student at the Sheffield Institute of Biotechnological Law and Ethics, University of Sheffield, Sheffield, U.K.

The author would like to acknowledge the financial support provided by the British Academy, Arts and Humanities Research Board.

¹Many of the points made with regard to the law of tort are equally applicable to its civil law equivalent, i.e., the law of delict.

²The following labels are also used by Kennedy and Grubb. See I. Kennedy & A. Grubb, *Medical Law: Text with Materials*, 2d ed. (London: Butterworths, 1994) at 927-1006. Nonetheless, these categories exhibit slight definitional differences from those of Kennedy and Grubb.

Actions by the parents:

- (a) wrongful conception/pregnancy; and
- (b) wrongful birth.

Actions by the child:

- (c) prenatal injury; and
- (d) wrongful life.

The “wrongful conception or pregnancy” action occurs where the negligent conduct of another leads to the birth of a child that the parents do not want at all. For example, where there has been negligent failure of a sterilisation operation, vasectomy, contraceptive device, fertility diagnosis or a negligently performed abortion. This action involves a claim for losses attributable to an unwanted pregnancy.

Parents might also wish to bring a “wrongful birth action” alleging a negligent failure to prevent the conception or birth of a child with a particular trait (e.g., a congenital defect), or a negligent failure to ensure the birth of a child with a particular trait. The type of situation I have in mind exists when, for example, there is a negligent failure to advise the parents of the risk of having a child with a congenital abnormality. Other examples include a negligent failure to carry out a prenatal diagnostic technique (at all or with due care) when this would have disclosed a congenital defect. In the future, this type of action could arise as a result of undesired consequences following from negligent attempts at conducting germ-line gene therapy, or cloning. The wrongful birth action involves a claim for the loss of an opportunity to have a particular child (paradigmatically, the loss of opportunity to terminate a “defective” fetus), and thus the emotional and financial costs of bringing up the resultant child.

It is also possible to envisage situations where the child, or a person on the child’s behalf, might allege negligence. The “prenatal injury” action involves a claim by (or on behalf of) a child born in a damaged condition alleging that its injury was caused by the negligence of another before its birth. The negligent act might occur before conception (e.g., negligent failure to offer the mother pre-conception immunisation against rubella), before implantation (e.g., negligent IVF treatment), during gestation (e.g., negligent prescription of drugs to a pregnant woman, or the pregnant woman’s negligent use of drugs, such as, perhaps tobacco or alcohol), or during birth (e.g., negligent delivery). Essentially, it involves a claim for the losses associated with being born injured where the injury is the result of someone’s negligent conduct. If the loss is characterised as loss resulting from a failure to abort after the occurrence of the defect, it is a different type of action. It is an action for “wrongful life.”

The “wrongful life” action exists where the child seeks a financial award for its birth with allegedly unsatisfactory traits or prospects, in circumstances where if the alleged negligence had not occurred it would not have been conceived or born

at all.³ The defendant is alleged to have negligently failed to prevent the child's conception or birth, where it is born with unsatisfactory traits or prospects. This alleged negligent omission might occur prior to conception (e.g., failure to advise the parents of the risk of their future child inheriting a genetic defect; or the negligent use of a cloning technique to create a child); before implantation (e.g., negligent selection of a less than optimal embryo for implantation); or during gestation (e.g., negligent failure to advise the mother on the likely condition of her child). This action involves a claim, by the resultant child, for the losses consequent on being conceived or born with allegedly unsatisfactory traits or prospects.

As will be obvious to many readers, some of these potential actions are much wider than those recognised by various legal systems. Having outlined the possibilities I will now focus on just one, wrongful life actions.

1.2 Presuppositional Moral Framework

Arguments for or against wrongful life actions will inevitably presuppose a particular moral perspective. The moral framework used as a basis for this paper rests on the moral theory of the American philosopher Alan Gewirth. His theory runs contrary to contemporary trends by attempting to ground a particular moral principle in reason. Gewirth argues that beings able to voluntarily pursue chosen purposes (agents) deny that they are such beings if they do not accept, and act in accordance with, the Principle of Generic Consistency (PGC). Thus, he purports to offer a rationally necessary justification for the claim that those beings able to understand practical precepts are bound by the PGC as the supreme principle of morality.

Given the radical nature of this claim, it is not surprising to find a great deal of academic resistance to it. Every stage of the argument to the PGC has been critically probed by some of the world's most respected philosophers. I base my argument on it because I do not consider that anyone has yet raised a successful objection. The argument itself can be found in Gewirth's book *Reason and Morality*.⁴ Gewirth has addressed many of his critics,⁵ and Deryck Beyleveld addresses criticisms made up until 1990.⁶ Also, even if the argument is on final analysis unsuccessful, the arguments in this paper can be read as arguments from stated presuppositions. In short, I am in this paper seeking not to defend the PGC, but to apply it to the factual situations of wrongful life actions.

³Note: my definition of wrongful life actions is narrower than that used by some commentators.

⁴A. Gewirth, *Reason and Morality* (Chicago: University of Chicago Press, 1978).

⁵See e.g., A. Gewirth, "Replies to My Critics" in E. Regis, ed., *Gewirth's Ethical Rationalism: Critical Essays with a Reply by Alan Gewirth* (Chicago: University of Chicago Press, 1984) at 192.

⁶See D. Beyleveld, *The Dialectical Necessity of Morality: An Analysis and Defense of Alan Gewirth's Argument to the Principle of Generic Consistency* (Chicago: University of Chicago Press, 1991).

This principle, the PGC, requires all agents to act in accordance with the generic rights of agents—rights to the generic features (categorical needs) of agency. These rights are both positive, and negative, i.e., rights to assistance and of non-interference. The rights are ranked according to the degree that their object is needed for action at all or for successful action: the criterion of degrees of needfulness for action. And the positive rights are limited by, *inter alia*, two provisos. The first, the own unaided effort proviso, states that agents only have positive rights to acquire/maintain their possession of the generic features where they cannot do so by their own unaided effort. The second, the comparable cost proviso, states that agents are not required to aid another where the cost of aid is the same as or greater than the need of the other for aid, where costs/needs are measured by the criterion of degrees of needfulness for action.

It has been argued elsewhere, that the application of this principle to objects in the empirical world requires us to treat all beings who display the attributes of agency as agents possessing generic rights, and to grant duties of protection to all other beings who might possibly be agents.⁷

Many other things can be said about this principle, but for present purposes this should be sufficient.

2.1 Potential Justifications for “Wrongful-Life” Actions

Before exploring the availability of wrongful life actions within particular jurisdictions, I wish to determine whether such actions are justifiable in principle. Since my paper rests on the moral theory of Alan Gewirth, I shall look at whether a legal system consistent with the PGC could permit wrongful life actions.

To avoid unnecessary complications I will assume, for present purposes, that the existence of the tort of negligence is itself consistent with the PGC, and that not implanting or aborting a developing child is, at least in relevant circumstances, consistent with the PGC.⁸ I make these assumptions here so that it is possible to look at the specific issues raised by wrongful life actions without being distracted by related issues.

⁷See D. Beyleveld & S. Pattinson, “Proportionality under Precaution: Justifying Duties to Apparent Non-agents” (1998) [unpublished paper] on file with the author; D. Beyleveld & S. Pattinson, “Precautionary Reasoning as a Link to Moral Action” forthcoming in M. Boylan, ed., *Medical Ethics* (Upper Saddle River, N.J.: Prentice-Hall, 2000). For convenience, in this paper I shall refer to beings who must be presumed to be agents as agents.

⁸Some of the issues raised by these assumptions are discussed elsewhere. On the degree of moral status possessed by the unborn child, see *e.g.* Beyleveld and Pattinson (1998) *ibid.*; Beyleveld and Pattinson 2000, *ibid.*, and D. Beyleveld, “The Moral Status of the Human Embryo and Fetus” forthcoming in D. Beyleveld & H. Haker, eds., *Ethics of Genetics in Human Procreation* (Aldershot, Hants.: Ashgate, 2000).

The aim of a wrongful life action is to obtain money for (or in the name of) a child born with allegedly unsatisfactory traits or prospects who would not have been born had the defendant acted differently. For such an action to be justified, where its requirements are satisfied (a) the plaintiff must be entitled to this money, (b) the action must be an appropriate means of obtaining it, and (c) the defendant must have an obligation to provide it. In such actions, the plaintiff is the child conceived/born with allegedly unsatisfactory traits or prospects, and the defendant is the person without whose conduct the plaintiff would not have been conceived or born.

These conditions would appear to be satisfied if the defendant has inflicted a wrong on the plaintiff—i.e., failed to fulfil his duties to that child—entitling the plaintiff to compensation from the defendant. I will explore this possibility—possibility one—in the following section (2.2).

Where the defendant has not inflicted a wrong on the plaintiff, a wrongful life action might be an appropriate means of obtaining a monetary award to which the plaintiff is entitled for other reasons. I will address this possibility—possibility two— below (2.3).

2.2 Possibility One

The first possible justification for wrongful life actions requires a wrong to have been done to the child born or conceived with unsatisfactory traits or prospects, which entitles that child to compensation from the person(s) responsible.

A wrong might have been done to such a child if it has been harmed. However, many philosophers have questioned whether a child could be harmed by conduct causing it to be conceived or born where the only alternative was for it not to have been conceived or born.

This raises an objection referred to by Parfit as the “non-identity problem.” This objection is, perhaps, best conveyed using one of Parfit’s thought experiments involving a 14 year-old girl.

The girl chooses to have a child. Because she is so young, she gives her child a bad start in life. Though this will have bad effects throughout the child’s life, his or her life will, predictably, be worth living. If this girl had waited for several years, she would have had a different child, to whom she would have given a better start in life.⁹

Using this example, Parfit argues that such a child, born to a 14 year old mother, is not harmed merely because a child born later would be in a better position, as

⁹D. Parfit, *Reason and Persons*, 2d ed. (Oxford: Clarendon Press, 1987) at 358.

these would be two different children. According to Parfit, the child born was not harmed because that child's only alternative was not to exist at all: "the girl's decision was *not* worse for *this* child."¹⁰

Feinberg expands this point using a different thought experiment, whereby a couple conceive a child knowing there is a risk that it will have a genetic deformity. He argues that such a couple do not harm that child, because "to be harmed is to be put in a worse condition than one would otherwise be in (to be made 'worse off'), but if the negligent act had not occurred [the child] would not have existed at all."¹¹

Nonetheless, according to Feinberg, such a child will have been "wronged" where its condition is "so severe as to render his life not worth living."¹²

Parfit and Feinberg are claiming that to be harmed is to be made "worse off" relative to one's alternatives. According to this definition of harm, a child's conception/birth cannot harm it unless that specific child could have been in an alternative less/non-harmed state. This, they argue, leads to the conclusion that (a) a 14 year-old girl cannot harm the specific child to which she gives birth by merely giving birth to it; and (b) conceiving a child in the knowledge that it will have a genetic defect cannot harm that specific child.

This definition of harm does not, however, receive universal assent. Harris contests Feinberg's definition of harm, preferring to define harm as putting an individual into a position "in which that individual is disabled or suffering in some way or in which his interests or rights are frustrated."¹³

For Harris, to be harmed is to be put in "a disabling or hurtful condition, even though that condition is only marginally disabling and *even though it is not possible for that particular individual to avoid the condition in question.*"¹⁴ Thus, Harris, explicitly rejects the idea that being made "worse off" relative to one's alternatives is a necessary condition of being harmed.

Insofar as being put into a position in which one's "interests or rights are frustrated" constitutes harm, Harris' re-definition appears contradictory. For one's interests or rights to be capable of frustration, it must be possible for one's interests

¹⁰*Ibid.* at 359 [emphasis added]. Parfit goes on to argue that it can nonetheless be wrong for a child to be born to a 14 year old girl: "it *would have been* better if she had waited and had a child later" [emphasis added] (*ibid.* at 360). See 2.3 for a discussion of this type of claim.

¹¹J. Feinberg, *The Moral Limits of the Criminal Law. Volume 1: Harm to Others* (New York: Oxford University Press, 1984) at 102.

¹²*Ibid.* at 102. He also argues that where a child has not been harmed or wronged, the mother's act can be wrong where it involves "wantonly introducing a certain evil into the world" (*ibid.* at 103). See below, 2.3, for a discussion of this type of claim.

¹³J. Harris, *Clones, Genes, and Immortality* (Oxford and New York: Oxford University Press, 1998) at 109.

¹⁴*Ibid.* [emphasis added].

or rights to be fulfilled (i.e., not frustrated), which presupposes the possibility of an alternative non/less-harmed position in which they are fulfilled. Thus, if Harris' rejection of Feinberg's definition is to be meaningful, he must be arguing that being made worse off is a sufficient, but not a necessary condition for being harmed.

This means that Harris' definition of harm is wider than Feinberg's definition. However, both Harris and Feinberg purport to offer coherent definitions of harm. Since I am wedded to the belief that the only defensible moral theory is that justified by Alan Gewirth, I will address this conflict in terms of the PGC.

Under the PGC, a wrong can only be done to an individual where that individual's (actual or presumed) rights have been violated. Thus, under the PGC, for a wrong to be done to an individual who matters morally that individual must have been made worse off relative to its alternatives.¹⁵ It follows that, insofar as Harris' re-definition of harm does not presuppose an alternative less/non-harmed state, it cannot be used to show that any wrong has been done to the child conceived/born with unsatisfactory traits or prospects.

It also follows that Feinberg's claim that a child can be wronged by its birth/conception, if it has a life not worth living, is to be subject to the same requirement. So a child can only be wronged in a sense relevant to the claim that we owe it duties to prevent that wrong, if it has been made worse off relative to its alternatives. Moreover, the PGC does not permit us to assume that another agent's life is not worth living. I (any agent) can decide that my life is not worth living—and release others from the burden of their obligations towards me—but no one else is entitled (without my consent) to decide for me that my life is not worth living.

Thus, we need to ask whether it is possible for the defendant's conduct to have made the plaintiff worse off relative to the plaintiff's alternatives. There are a number of metaphysical stories that could be told where it would be the case that an individual agent has been made "worse off" by its mere conception or birth. If an individual's defining properties were capable of manifesting in a better alternative existence, it has been made worse off by this not occurring.

An example of the type of metaphysical story that I have in mind would be where the following three conditions are satisfied simultaneously. First, it being possible for that agent—i.e., the plaintiff—to be separate from its damaged body while remaining the same agent (i.e., Descartes' concept of duality). Second, it being possible for that (detached) agent to have an alternative *ex corporeal* existence, or to be embodied in a less damaged body. Third, it being possible for

¹⁵Since, in the abstract, the PGC grants rights to the generic features (i.e., the categorical needs) of agency, "worse off" is measured in terms of an agent's possession of the generic features.

that alternative existence to be better for that agent vis-à-vis its possession of the object of its rights (i.e., the generic features of agency).¹⁶

If such conditions are not simultaneously possible then it is not possible for an agent to be made worse off relative to its alternatives by its conception or birth no matter how bad its traits or prospects, or the defendant's conduct. And such metaphysical stories, depending on such unprovable metaphysical assumptions, are highly implausible.

It follows that it is highly implausible that a wrong has been done to a child by another's conduct causing it to be conceived/born no matter how bad its traits or prospects, or the other's conduct. If in the absence of the defendant's conduct X (any agent) would not have existed then the defendant's conduct cannot be taken to constitute a wrong to X.¹⁷ Thus, if wrongful life actions are to be justified it cannot be on the basis that a wrong has been done to the child conceived/born with unsatisfactory traits or prospects.

2.3 Possibility Two

Another possibility is that wrongful life actions are justified where the action is an appropriate means of obtaining a monetary award to which the plaintiff is entitled despite not being the subject of a wrong. If this possible justification is to be successful it must satisfy the three conditions stated above, i.e., (a) the plaintiff must be entitled to this money, (b) the action must be an appropriate means of obtaining it, and (c) the defendant must have an obligation to provide it.

Under the PGC, the plaintiff child might, indeed, be entitled to the type of monetary award obtainable after a successful tort action, even though the defendant has done no wrong to the plaintiff. The PGC grants positive rights (i.e., rights to assistance) to children (as presumed agents) who cannot by their own unaided effort acquire or maintain the capacities necessary for them to act or act successfully. Therefore, in some circumstances, a wrong will be done to a child denied financial support where its condition is such that financial support is necessary for it to acquire or maintain these capacities for itself. A child born/conceived with unsatisfactory traits or prospects might well be in such a position.

¹⁶Any other metaphysical scenario where the plaintiff would be in a better position will involve similar conditions. For example, the plaintiff would have a better existence if that agent were identical to its genome (there being a statistical possibility that any given genome could be exactly repeated), any environmental differences would have no effect on its identity, and its conception in a different time or place would have put that agent in a better position (say, because it has wealthier parents or is born into a society able to remedy any genetic defects). Such a scenario involves at least as many assumptions.

¹⁷Even if the defendant's intention had been to inflict a wrong on the plaintiff, the fact remains that, in the absence of the defendant's conduct, the plaintiff would not have existed. Thus, unlike say attempted murder, in a wrongful life scenario the defendant's conduct did not have the potential to harm the plaintiff.

But is a wrongful life action an appropriate means of obtaining this financial support? Since any duty to aid the child will fall on all agents able to provide it at less than comparable cost to themselves, it would seem that tax funded schemes, such as social security and healthcare systems, are more appropriate mechanisms. Moreover, the tort system is a far from perfect means of providing financial support for those in need. For example, it is notoriously slow, expensive, inefficient, and its requirements are extremely difficult to fulfil. Thus, for a cause of action for wrongful life to provide the appropriate means of preventing such a wrong, the existing supportive mechanisms must be less adequate than the tort system. On this point, one theorist states:

[I]n the USA...niggardly public health services may leave the handicapped in inadequate or poor care. Litigation and judicially ordered compensation offer the disadvantaged a humane level of provision that the political system often denies. In Canada, provincial health insurance plans make available medical and related services for the handicapped, but they operate on the usual insurance principles of subrogation....In the U.K., however, there may be somewhat reduced need for the wrongful life action to be able to reinforce principles of social justice. If the standards of public provision of health services fall, however, the action may be necessary for the maintenance of individual welfare.¹⁸

If the plaintiff is entitled to a monetary award, which the tort system is (in the circumstances) best placed to provide, it must still be shown that the defendant has an obligation to provide the plaintiff with a monetary award.

Where the defendant's conduct has involved no wrong to the plaintiff, the fact that the defendant is a member of a class under an obligation to provide the plaintiff with financial support, does not seem a good enough reason to place all the burden on his shoulders. For the defendant, a successful tort action is costly (even where the defendant is insured it might affect the premium) and is likely to result in damage to the defendant's professional reputation. Thus, allowing a child to sue persons for their conduct, without which they would not have been conceived/born, appears to be unjustified where the defendant threatens no greater wrong to the plaintiff than the population as a whole.

What about where the defendant's conduct constitutes a wrong? We have seen that it cannot be a wrong to the plaintiff child, but can it nonetheless be a wrong? Some theorists appear to argue that the defendant's conduct can constitute a victimless wrong. For example, Feinberg argues that a mother who brings into existence a child who has unsatisfactory traits or prospects might, in some circumstances, commit the wrong of "wantonly introducing a certain evil into the

¹⁸B.M. Dickens, "Wrongful Birth and Life, and Wrongful Death before Birth, and Wrongful Law" in S. McLean, ed., *Legal Issues in Human Reproduction* (Aldershot, Hants.: Gower, 1989) 80 at 95.

world.”¹⁹ According to Harris, “[i]t can be wrong to create an individual in a harmed condition even where the individual is benefited thereby. The wrong will be the wrong of bringing avoidable suffering into the world or of choosing a world with more suffering rather than one with less.”²⁰

I reject this line of argument, because under the PGC all moral obligations are derived from the rights of agents, which, in practice, generates duties to presumed agents. Thus, under the PGC, no wrong is committed by wantonly introducing evil or suffering into the world unless this involves the non-fulfilment of duties to presumed agents. To be clear, there are many ways in which it is possible to fail in one’s duties to agents without actually harming any specific agent. For example, if in a wrongful life scenario the defendant’s intention was to increase the net suffering in the world, it is plausible to argue that such an intention displays a character predisposing towards the violation of the rights of agents, and, as such, constitutes a wrong to agents. Nonetheless, the PGC does not countenance the possibility of victimless wrongs; for a wrong to be committed there must be actual or potential harm to an agent or agents.

This does, however, leave open the possibility that the defendant’s conduct might be a wrong to a person other than the plaintiff child. Under the PGC, circumstances can be envisaged where a wrong might be done to others by the birth of a child with certain undesired traits or prospects. For example, in the current climate where postnatal support for parents is often less than optimal, a parent who is unable to make the emotional and financial sacrifices necessary to bring up a severely disabled child and is not emotionally strong enough to give their child up for adoption, might be caused a wrong where the conduct of another leads to the birth of such a child.

If a person other than the plaintiff child is wronged by the defendant’s conduct, can this justify giving the child a cause of action as a means of acquiring financial support to which it is entitled for reasons other than the defendant’s conduct?

Prima facie, it appears that any claim grounded on a wrong done to a person other than the child ought to be brought by (or on behalf of) the person on whom the wrong is inflicted, by actions such as wrongful birth actions. However, the person suffering the wrong might not have a tort claim, and, even if he has, this will not necessarily lead to the fulfilment of the needs of the child. Nonetheless, a successful wrongful life suit threatens to impose liability on the defendant that is disproportionate to the defendant’s wrong, especially where the person suffering the wrong does have a tortious claim. Thus, it would appear to be an inappropriate means of addressing the child’s needs. Even if I am wrong in this conclusion,

¹⁹Feinberg, *supra* note 11 at 103.

²⁰Harris, *supra* note 13 at 111.

wrongful life actions would only be justified as a temporary means of providing financial support to some of those who ought to be given more direct aid.

I conclude that wrongful life actions do not appear to be justified.

3. Judicial and Legislative Responses to Wrongful Life Actions in the U.K.

The only U.K. case on the feasibility of a wrongful life action is the English case of *McKay v. Essex Area Health Authority*.²¹ In this case a pregnant woman contracted rubella in the early months of her pregnancy, and it was alleged that the doctor had been negligent in failing to discover and treat the infection, and in not advising the mother of the risks of the child being born with abnormalities and of her legal rights to have an abortion under the *Abortion Act*. An action for wrongful life was pursued on the child's behalf.

The Court of Appeal rejected the child's common law claim for three reasons. First, the court held that the doctor did not owe the child a duty of care to ensure its existence was terminated before birth, on the grounds that this was contrary to public policy and "runs wholly contrary to the concept of the sanctity of human life."²² This has been questioned by commentators on the ground that this was not the relevant duty of care,²³ despite Stephenson L.J.'s statement that "the only duty which either defendant can owe to the unborn child infected with disabling rubella is a duty to abort or kill her."²⁴ For example, Fortin argues, "the child's claim might have received a more sympathetic consideration from the court, had it concentrated on the doctor's failure to advise on the risks to the foetus of its mother having suffered from a rubella infection."²⁵ She argues that the court should "accept the existence of a duty on the doctor to advise the mother on behalf of the unborn child of the risks of it being born with defects."²⁶

Jackson agrees, arguing that the physician owes the child a duty to advise the parents competently.²⁷

²¹*McKay v. Essex Area Health Authority*, [1982] 1 Q.B. 1166, 2 All E.R. 771 (C.A.) [hereinafter *McKay* cited to Q.B.].

²²*Ibid.* at 1188, Ackner L.J.. See also Stephenson L.J. at 1180.

²³Many commentators have also argued that the existence of duty of care is not contrary to public policy, see e.g. A. Jackson, "Wrongful Life and Wrongful Birth" (1996) 17 J. Leg. Med. 349 at 360-363. One argument put forward by the Court of Appeal in support of this claim was finding a duty of care would open "the courts to claims by children born handicapped against their mothers for not having an abortion" (*McKay, ibid.* at 1181, Stephenson L.J.). This objection has little force, because if the justification of wrongful life actions did not encompass claims brought against mothers, they could easily be excluded from liability.

²⁴*McKay, supra* note 21 at 1178.

²⁵J.E.S. Fortin, "Is the 'Wrongful Life' Action Really Dead?" (1987) J. Social Welfare L. 306 at 307.

²⁶*Ibid.* at 308.

²⁷Jackson, *supra* note 23 at 352-353 and 354.

Fortin and Jackson argue that a wrong has been done to the child by the physician's negligent advice to the mother. According to Fortin, not permitting wrongful life claims violates the child's "right to have his decision to live or die, made for him by the mother, in the light of all the available information on the risks of his being born with defects," commits an "injustice of the doctor avoiding liability altogether," and would deprive the child "of a sum of money essential to ease his disabled life."²⁸ I will address each claim in turn.

The claim that the child has a right to have its mother choose its non-existence over its existence with unsatisfactory traits or prospects is problematic to say the least. This type of argument falls within the first possible type of justification for wrongful life actions, i.e., Possibility One (2.2). Thus, I have already argued against any such "right," on the grounds that to allow a child to be conceived or born where the alternative for it is non-existence cannot be a wrong to the child, that is, it cannot violate its rights.

The claim that not to allow wrongful life actions commits the "injustice of the doctor avoiding liability altogether" is problematic, because the doctor might more appropriately be subject to an action by a person who he has injured. For example, injustice could be prevented by allowing a claim by the parents (or on their behalf) for wrongful birth (as was the case in *McKay*).

The claim that not to allow a wrongful life action would deprive the child "of a sum of money essential to ease his disabled life" falls quite clearly within the second type of justification for wrongful life actions, i.e., Possibility Two (2.3). This type of claim is limited by the need to provide a sufficient reason for holding the defendant solely responsible for the provision of this sum of money.

The second reason used by the court in *McKay* to reject the child's claim was that the claim involved no legally recognised injury, and the "disabilities were caused by rubella and not by the doctor."²⁹ I have already indicated my support for the first part of this claim that the child has not been injured, although it doesn't follow from this that a wrongful life action must fail. The second part of this claim is misguided because the alleged negligence did not rest on the fact that the mother got rubella but on the doctor's failure to advise the mother of this and its implications.

The third ground used by the Court of Appeal to reject the child's claim for wrongful life was stated most clearly by Griffith L.J. as follows.

The most compelling reason to reject this cause of action is the intolerable and insoluble problem it would create in the assessment of

²⁸Fortin, *supra* note 25 at 308.

²⁹*McKay*, *supra* note 21 at 1189, Ackner L.J.

damage. The basis of damages for personal injury is the comparison between the state of the plaintiff before he was injured and his condition after he was injured....In a claim for wrongful life how does the court begin to make an assessment?...[T]he plaintiff says, 'But for your negligence I would never have been born.' The court then has to compare the state of the plaintiff with non-existence, of which the court can know nothing; this I regard as an impossible task.³⁰

According to Fortin, this argument “puts the cart before the horse and allows the difficulties of assessment to determine the existence of a right of action.”³¹ Indeed, it is not coherent to look at what the measure of damages should be until the reason for allowing the right of action has been determined.³² Thus, to reject a claim because of difficulties in using one measure of damages is very much to put the cart before the horse. If wrongful life actions are justified on the basis that the child has a right to financial support, the damages must seek to address this need. In contrast, if damages are justified on the basis that a wrong has been done to the plaintiff child, then the damages must track any loss actually sustained by the plaintiff, and this might indeed involve the difficulty alleged by Griffith L.J.

McKay also contained unanimous *obiter* to the effect that wrongful life actions were precluded under the *Congenital Disabilities (Civil Liability) Act* (U.K.) 1976.³³ Stephenson L.J. stated that this Act “has the effect...of depriving any child born after its passing on July 22, 1976, of this cause of action.”³⁴ This has been questioned by numerous academics.³⁵ Kennedy and Grubb argue that s. 1A of the Act, introduced since by s.44 of the *Human Fertilisation and Embryology Act 1990*,³⁶ permits an action by the child for the negligent selection of an embryo.³⁷ Thus, “[p]arliament by enacting section 1A has clearly recognised a ‘wrongful life’ claim.”³⁸ None of this, however, shows that wrongful life actions are defensible, as opposed to possible, under English law.

Conclusion

Wrongful life actions offer potential as a means of regulating some uses of, or failures to use, the developing reproductive and genetic technologies. In theory,

³⁰*McKay*, *supra* note 21 at 1192-1193.

³¹Fortin, *supra* note 25 at 310.

³²The requirements that plaintiffs have to establish to succeed in a wrongful life actions should also be dependent on the justification of wrongful life actions.

³³c.28, s. 1(2)(b), s .4(5). The intention of the Law Commission Report, on which this Act was based, was to prevent wrongful life actions. See U.K., Law Commission, *Report on Injuries to Unborn Children* (1974) Cmnd 5709.

³⁴*McKay*, *supra* note 21 at 1178. The child in *McKay* itself was born before this date.

³⁵See *e.g.* Fortin, *supra* note 25 at 312, and Jackson, *supra* note 23 at 366-368.

³⁶c.37.

³⁷Kennedy & Grubb, *supra* note 2 at 977.

³⁸*Ibid.*

this action could be invoked to regulate the negligent use of any prenatal genetic diagnostic technique, some negligent uses of IVF, and even negligent attempts to create a child using a cloning technique, such as the one used to produce Dolly the sheep. However, I have argued that, when analysed in terms of the claims being made by plaintiffs pursuing wrongful life actions, these actions are difficult to justify.

Since no wrongful life action has succeeded in the U.K., this conclusion might appear to lack controversiality. However, many commentators have criticised the U.K. position, and developments in other common law jurisdictions suggest a degree of judicial support for wrongful life actions. For example, in *Curlender v. Bio-Science Laboratories*,³⁹ the California Court of Appeal allowed a wrongful life claim in full. Although *Curlender* was heavily restricted by the Supreme Court of California in *Turpin v. Sortini*,⁴⁰ the revised approach still allowed the plaintiff's claim for damages incurred as a result of the congenital defects.⁴¹ Even in the U.S., however, the judiciary is divided as to whether to allow wrongful life actions. Although the *Turpin* approach has been followed in two other U.S. jurisdictions,⁴² wrongful life claims have been rejected in others.⁴³ Thus, my claim that wrongful life actions appear to lack a principled justificatory basis finds itself on one side of a very heated judicial and academic debate.

My conclusion does not affect the other potential tort actions and regulatory mechanisms capable of regulating attempts to use genetic and reproductive techniques to influence the traits of children before they are born.⁴⁴ It does, however, emphasise the theoretical tensions caused by stretching existing legal mechanisms to encompass developing areas.

³⁹(1980) 165 Cal. Rptr. 477.

⁴⁰(1982) 643 P. 2d 954.

⁴¹See J.K. Mason, J.K. McCall Smith & R.A. McCall Smith, *Law and Medical Ethics*, 5th ed. (London: Butterworths, 1999) at 163.

⁴²By the Washington Supreme Court in *Harbeson v. Parke-Davis Inc.* (1983) 656 P. 2d 483; the New Jersey Supreme Court in *Procanik v. Cillo* (1984) 478 A. 2d 755.

⁴³See *e.g.* in Michigan, *Proffitt v. Bartolo* (1987) 412 N.W. 2d 232; and Indiana, *Cowe v. Forum Group Inc.* 575 N.E. 2d 630.

⁴⁴See *e.g.* D. Beyleveld & S. Pattinson, "Legal Regulation of Assisted Procreation, Genetic Diagnosis, and Gene Therapy" forthcoming in D. Beyleveld & H. Haker, eds., *supra* note 8.