

Question 2.

In both Australia, and around the world, the question of entitlement to recover in cases of wrongful life/wrongful death has long been discussed. As it currently stands, parents are able to sue in wrongful birth cases,¹ but the child is unable to recover damages in cases of wrongful life.² However, there is significant dispute over this matter, illustrated by the 4:3 majority in *Cattanach v Melchior* ((2003) 199 ALR 131) and the 2:1 majority in *Harriton v Stephens* ([2004] NSWCA 93, [43])³. The key question here, is can the basic principles of the tort of negligence be applied to cases of wrongful birth or wrongful life? I argue that in both instances, while it seems counterintuitive, when the calculus of negligence is applied to these cases, it is found that recovery for damages should be allowed. It is also necessary to analyse the policy considerations that have had some weight on the outcome of the precedent setting cases, which will illustrate that they are unpersuasive in arguing that a different means should be used in dealing with cases of wrongful birth and wrongful life.

Wrongful birth is defined as being a failure to warn of the risk of failed sterilisation, diagnose a foetal abnormality or disability and failure to take 'reasonable care' in performing a sterilisation, abortion or advising on contraceptives.⁴ The first claim of this nature was in the United Kingdom in 1979, and allowed for the recovery of pregnancy costs.⁵ Thus the precedent has been set that there can be recovery in wrongful birth instances, however the question remains whether the normal principles of negligence apply to these situations. Within the constructs of the calculus of negligence, a defendant is liable for 'physical damage that is reasonable foreseeable, reasonable preventable and caused by his conduct'⁶ and other kinds of damage that is reasonable foreseeable to have arisen from the physical damage.⁷ It would logically follow that a pregnancy that is not desired by the parents constitutes physical damage. Furthermore, bodily autonomy is a legally protected interest, which would further suggest that an unwanted pregnancy is physical damage, and thus wrongful birth is a negligent act.⁸

¹ *Cattanach v. Melchior* (2003) 199 ALR 131, 132.

McFarlane v. Tayside Health Board [1999] 4 All ER 961, 998.

² *McKay v Essex Area Health Authority* [1982] 1 QB 1166 (CA), 1177H-1178C.

Harriton v Stephens; Waller v James; Waller v Hoolahan [2004] NSWCA 93, [43]

³ Owen Bradfield, 'Healthy law makes for healthy children: *Cattanach v Melchior*' (2005) 12 *Journal of Legal Medicine* 305, 306.

⁴ Laura Hoyano, 'Misconceptions about Wrongful Conception', (2008) 65 *Modern Law Review* 883, 886.

⁵ *Scuriaga v. Powell* [1979] 123 SJ 406, 421.

⁶ Dean Stretton, 'The Birth Torts: Damages for Wrongful Birth and Wrongful Life' (2005) 10 *Deakin Law Review* 319, 352.

Wyong Shire Council v. Shirt (1980) 146 CLR 40, 99.

⁷ *Overseas Tankship (UK) Ltd v. Miller Steamship Co Pty Ltd* [1967] 1 AC 617, 642.

⁸ *Health & Community Services (NT), Department of v. J W B & S M B* (1992) 175 CLR 218

The issue of severing causation by not aborting or adopting out the child is addressed by the principle from *Mahony v J Kruschich (Demolitions) Pty Ltd*⁹. As keeping the child is a foreseeable and non-negligent consequence of the breach, the chain of causation is not severed. Furthermore, this failure to adopt out or abort cannot possibly be seen as a failure to mitigate damage, due to the controversial, sensitive and sometimes religiously opposed nature of such activities.¹⁰ Furthermore, the requirements for recovery as defined in *Perre v. Apand Pty Ltd*¹¹, are met in cases of wrongful birth. Known reliance, vulnerability, control, knowledge of the risk and its magnitude, and ascertainable class of plaintiffs are obviously clear aspects of the relationship between the medical professional and the plaintiff.

Thus, it is evident that wrongful birth actions may be neatly classified by the calculus of negligence. There are, however, a number of mitigating policy considerations which have fuelled the debate as to whether or not a party can claim for wrongful birth. The foremost of these is the assessment of the value of the child and the impact on family relationships of recovery. There is 'the blessing' concept, that each and every child is a blessing and therefore an individual should not be able to claim. However, the flaw with this plan is that it argues that there is no damage overall, as the emotional benefits of raising a child outweigh the financial costs.¹² Furthermore, the blessing idea can be further rejected solely by the concept of contraception, abortion, abstinence and other means of not getting pregnant. These measures are often used by persons, because they believe that a child *would not* be a blessing. If every child were a blessing, surely the life goal of all humans would be to have as many children as possible? Individuals who accidentally become pregnant may not view the child as a blessing, but rather may feel morally obliged to rear the child.¹³ It is quite clear that a severely disabled child will not be considered a blessing by parents who are forced to rearrange their lives, delay their hopes and dreams, solely for this child – the consequence of negligence.¹⁴

Another policy consideration, albeit a weak one, is the idea of the child feeling denigrated by its very existence being considered 'damage'. In *Cattanach v Melchior* ((2003) 199 ALR 131), it was argued that to offer a sum of money as the value of a human relationship is to treat the child as a commodity. What if parents, in an attempt to reduce the offset due to emotional gains from having the child, denigrate their child by attempting to convince the judge that the emotional benefits are very small?¹⁵ This argument fails; however, as it falsely assumes that an offset should be made for emotional benefits. This is as 'when one of two separate interests is benefited in consequence of a wrongful act, the

⁹ *Mahony v J Kruschich (Demolitions) Pty Ltd* (1985) 156 CLR 522, 532.

¹⁰ *Cattanach v. Melchior* (2003) 199 ALR 131, 186.

¹¹ *Perre v. Apand Pty Ltd* (1999) 198 CLR 180, 198.

¹² Dean Stretton, 'The Birth Torts: Damages for Wrongful Birth and Wrongful Life' (2005) 10 Deakin Law Review 319, 343.

Cattanach v. Melchior (2003) 199 ALR 131, 141.

¹³ *McFarlane v Tayside Health Board* [1999] 4 All ER 961,1011.

¹⁴ Dean Stretton, 'The Birth Torts: Damages for Wrongful Birth and Wrongful Life' (2005) 10 Deakin Law Review 319, 353.

¹⁵ *McFarlane v Tayside Health Board* [1999] 4 All ER 961, 988.

benefit cannot be set off against an injury to the other.¹⁶ Emotional and financial benefits are clearly different interests, and therefore there would be no offsetting of the damages. Further in regards to the concept of recovery harming and distressing the child, it is clear that any distress would be outweighed by the benefit of financial security.

Therefore, it is logical to follow that actions of wrongful birth should have recovery for damages available, according to the basic principles of negligence. Does it then follow that actions of wrongful life should too allow recovery? Current precedent argues not, however I am of the opinion that this is a legal anomaly. Existing leading authorities hold that there is a duty of care to the foetus¹⁷, or rather, to the person that that foetus is to become¹⁸. This duty has been variously described as a duty to give advice to the mother during pregnancy, properly diagnose prenatal risks, avoid causing injury to the plaintiff during pregnancy,¹⁹ and prevent the plaintiff's birth or conception²⁰. In terms of causation and the application of the 'but for' test, the disability is not directly caused by the doctor, but rather by genetics, which has been argued to break the chain of causation.²¹ However, the doctor is able to prevent this damage, which is the 'crucial point'²², and allows the chain of causation not to be broken. Furthermore, the reasonable steps that the defendant is required to take to avoid physical damages in normal negligence actions is readily applied to cases of wrongful life. By preventing the child from being born, the damage is being prevented. This is the *only* way to prevent the damage, and is therefore the content of the duty.²³

A significant issue of contention, however, arises when damages are to be awarded. How is it possible to place the plaintiff in the same position as if the negligence had not occurred, if the plaintiff would not exist but for the negligence? It has been argued that this cannot be done, and therefore there ought be no compensation.²⁴ However, Stretton argues that pain, suffering, and economic loss can be calculated as if the plaintiff would have been a healthy living plaintiff but for the negligence.²⁵ This is as in a state on non-existence, the

¹⁶ *Public Trustee v Zoanetti* (1945) 70 CLR 266, 269.

¹⁷ *McKay v Essex Area Health Authority* [1982] 1 QB 1166.

Edwards v Blomeley [2002] NSWSC 460, 494.

Harriton v Stephens [2002] NSWSC 461, 456.

¹⁸ E Ellis and McGivern B, 'The wrongfulness or rightfulness of actions of wrongful life' (2007) 15 Tort Law Review 135, 151.

Watt v Rama [1972] VR 353, 341.

¹⁹ *Harriton v Stephens* [2002] NSWSC 461, 489.

²⁰ *Edwards v Blomeley* [2002] NSWSC 460, 500.

²¹ *McKay v Essex Area Health Authority* [1982] 1 QB 1166, 1201.

²² *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506, 534.

²³ E Ellis and McGivern B, 'The wrongfulness or rightfulness of actions of wrongful life' (2007) 15 Tort Law Review 135, 151.

²⁴ Gisele Kapterian, 'Waller and Australian negligence law: is there a place for wrongful life?' (2006) 13 Journal of Legal Medicine 336, 337.

Harriton v Stephens; *Waller v James*; *Waller v Hoolahan* [2004] NSWCA 93

²⁵ Penny Dimopoulos and Mirko Bagaric, 'Why wrongful birth actions are right' (2003)

plaintiff would have suffered no pain and suffering. Therefore the recovery entitlements can be easily recovered according to the normal principles of negligence.

As in actions of wrongful birth, there are key policy arguments against recovery, which in this case have prevented actions of wrongful birth from occurring in the past. The key idea here is the concept of 'contravening the sanctity of life'²⁶. However, assuming that the 'sanctity of life' means that human life is always preferable to non-existence, then why is there abortion? Why is passive euthanasia allowed? As in the idea of a child always being a blessing in wrongful birth actions, the court should here, award damages to ensure that the child's existence is not worse than non-existence. This policy argument ought to fail in persuading the court, as it is incoherent with legal principles on other issues.

In conclusion, I argue that moral standings should not and cannot determine whether a parent or child is entitled to damages as a result of wrongful birth or wrongful life cases. As I have argued, both actions can succeed under the normal principles of negligence, and it is a legal incongruity to allow wrongful birth actions to succeed but not wrongful life actions.

11 *Journal of Legal Medicine* 230, 248.

²⁶ Dean Stretton, 'The Birth Torts: Damages for Wrongful Birth and Wrongful Life' (2005) 10 *Deakin Law Review* 319, 361.

Academic Sources:

Dean Stretton, 'The Birth Torts: Damages for Wrongful Birth and Wrongful Life' (2005) 10 Deakin Law Review 319.

E Ellis and McGivern B, 'The wrongfulness or rightfulness of actions of wrongful life' (2007) 15 Tort Law Review 135.

Gisele Kapterian, 'Waller and Australian negligence law: is there a place for wrongful life?' (2006) 13 Journal of Legal Medicine 336.

Laura Hoyano, 'Misconceptions about Wrongful Conception', (2008) 65 Modern Law Review 883.

Owen Bradfield, 'Healthy law makes for healthy children: Cattanach v Melchior' (2005) 12 Journal of Legal Medicine 305.

Penny Dimopoulos and Mirko Bagaric, 'Why wrongful birth actions are right' (2003) 11 Journal of Legal Medicine 230.