HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE, CALLINAN, HEYDON AND CRENNAN JJ

ALEXIA HARRITON (BY HER TUTOR GEORGE HARRITON) APPELLANT

AND

PAUL RICHARD STEPHENS RESPONDENT

Harriton v Stephens [2006] HCA 15
9 May 2006
S229/2005

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation:

B W Walker SC with G P Segal and D H Hirsch for the appellant (instructed by Maurice Blackburn Cashman)

S J Gageler SC with J K Kirk for the respondent (instructed by Blake Dawson Waldron)

CATCHWORDS

Harriton v Stephens

Torts – Medical negligence – Wrongful life – Birth of severely disabled child – Agreed for the purposes of separate questions at first instance that the respondent doctor failed to diagnose the mother's rubella infection during pregnancy – Doctor failed to warn the mother of the risk of serious disability as a consequence of the rubella infection – Whether the appellant child born with disabilities can recover from the doctor.

Duty of care – Medical practitioners – Whether the doctor owed the child a duty of care to diagnose rubella and advise the child's mother in relation to the termination of the pregnancy – Foreseeability of risk to the appellant – Whether the facts of the case fall within the established duty of care which medical practitioners owe to foetuses to take reasonable care to prevent pre-natal injury – Vulnerability of the appellant – Relevance of duty of care owed to the appellant's mother.

Damage – Whether a life with disabilities is actionable damage – Whether it is possible to prove damage by comparing a life with disabilities with non-existence.

Damages – Assessment – Measure of damages – Compensatory principle – Non-existence as a comparator – Comparison to child born without disability – Whether claim for special damages quantifiable – Whether only special damages may be awarded – Corrective justice.

Public policy – Principle of the sanctity of human life – Whether life is capable of constituting a legally cognisable injury – Effect on disabled people of awarding damages for wrongful life – Whether it would be appropriate to award damages in respect of minor defects in circumstances where a child's mother would have terminated her pregnancy had she been warned of the risk of such defects – Whether disabled child could sue his or her mother for failing to terminate her pregnancy – Whether awarding damages for wrongful life would undermine familial relationships – Relevance of unforeseen advances in genetic science.

Statutes – Whether common law can be developed by analogy with legislation – Whether it is possible to develop the common law by analogy in circumstances where there is no relevant legislative provision in any Australian jurisdiction – Relevance of legislature's inaction.

Words and phrases – "wrongful life", "wrongful birth".

Civil Liability Act 2002 (NSW), ss 70, 71.
Civil Liability Act 2003 (Q), s 49A.
Civil Liability Act 1936 (SA), s 67.

1 GLEESON CJ. I have had the advantage of reading in draft form the reasons for judgment of Crennan J.

2 I agree that the appeal should be dismissed with costs, for the reasons given by her Honour.

GUMMOW J. The appeal should be dismissed with costs.

I agree with the reasons of Crennan J.

5 KIRBY J. In *Cattanach v Melchior*[1] this Court decided that the parents of an unplanned child, born following the negligence of a medical practitioner, could claim damages for the cost of raising that child. This type of action has become known as an action for "wrongful birth"[2]. The decision in *Cattanach* followed earlier like decisions in other Australian courts supporting such recovery[3]. The holding in that case was not challenged in this appeal.

6 The Court is now required to decide whether a child, born with profound disabilities, whose mother would have elected to terminate her pregnancy had she been aware that there was a real risk of the child being born with such disabilities, is entitled to damages where a medical practitioner negligently failed to warn the mother of that risk. Such actions have been called "wrongful life" actions. This is a value-loaded label. An alternative, namely, "wrongful suffering", has been suggested. However designated, such proceedings have received a generally hostile reception from courts in Australia and elsewhere. Many academic commentators have regarded them as insupportable[4]. Yet others have considered that they are compatible with the established principles of the tort of negligence[5].

7 There is no legislation and no settled judicial authority in Australia to resolve the content of the law. It is therefore the duty of this Court to do so in the

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1 (2003) 215 CLR 1 (McHugh, Gummow, Kirby and Callinan JJ; Gleeson CJ, Hayne and Heydon JJ dissenting).

2 Regarding this choice of label see *Cattanach* (2003) 215 CLR 1 at 32 [68].

3 See, eg, *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47; *Veivers v Connolly* [1995] 2 Qd R 326.

4 See, eg, Todd, "Wrongful Conception, Wrongful Birth and Wrongful Life", (2005) 27 *Sydney Law Review* 525 at 538-541; Dimopoulos and Bagaric, "The Moral Status of Wrongful Life Claims", (2003) 32 *Common Law World Review* 35; Pace, "The Treatment of Injury in Wrongful Life Claims", (1986) 20 *Columbia Journal of Law and Social Problems* 145; Tedeschi, "On Tort Liability for 'Wrongful Life'", (1966) 1 *Israel Law Review* 513.

5 See, eg, Teff, "The Action for 'Wrongful Life' in England and the United States", (1985) 34 *International and Comparative Law Quarterly* 423 at 427; Cane, "Injuries to Unborn Children", (1977) 51 *Australian Law Journal* 704 at 720; Grainger, "Wrongful Life: A Wrong Without a Remedy", (1994) 2 *Tort Law Review* 164; Capron, "Tort Liability in Genetic Counseling", (1979) 79 *Columbia Law Review* 618 at 661; Stretton, "The Birth Torts: Damages for Wrongful Birth and Wrongful Life", (2005) 10 *Deakin Law Review* 319 at 320, 364.

usual way. It must proceed by analogous reasoning from past decisions, drawing upon any relevant considerations of legal authority, principle and policy[6].

"Wrongful life" and the danger of labels

8 The label "wrongful life" has been criticised as "unfortunate"[7], "ill-chosen"[8], "uninstructive"[9] and "misleading and decidedly unhelpful"[10]. In my view, its use, even as a shorthand phrase, should be avoided[11].

9 First, it has been borrowed from another context. The expression was originally used in the United States of America to describe claims brought by healthy but "illegitimate" children against their fathers, seeking damages for the disadvantages caused by reason of their illegitimacy[12]. Such actions are quite different from "modern" wrongful life actions because, among other things, the alleged wrong is not in any meaningful sense the cause of the plaintiff's existence[13].

10 Secondly, the epithet "wrongful life" is seriously misleading. It misdescribes the essential nature of the complaint. The plaintiff in a wrongful life action does not maintain that his or her existence, as such, is wrongful[14]. Nor

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6 *Mutual Life & Citizens' Assurance Co Ltd v Evatt* (1968) 122 CLR 556 at 563; *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197 at 252; *Northern Territory v Mengel* (1995) 185 CLR 307 at 347; *Cattanach* (2003) 215 CLR 1 at 42 [102].

7 Teff, "The Action for 'Wrongful Life' In England and the United States", (1985) 34 *International and Comparative Law Quarterly* 423 at 425.

8 Kashi, "The Case of the Unwanted Blessing: Wrongful Life", (1977) 31 *University of Miami Law Review* 1409 at 1432.

9 *Harriton v Stephens* [2002] NSWSC 461 at [8].

10 *Lininger v Eisenbaum* 764 P 2d 1202 at 1214 (1988). See also *Viccaro v Milunsky* 551 NE 2d 8 at 9 n 3 (1990); *Hester v Dwivedi* 733 NE 2d 1161 at 1163-1164, 1169 (2000).

11 Contra *Berman v Allan* 404 A 2d 8 at 11 (1979).

12 *Zepeda v Zepeda* 190 NE 2d 849 at 858 (1963).

13 See Tedeschi, "On Tort Liability for 'Wrongful Life'", (1966) 1 *Israel Law Review* 513 at 533.

14 *Hester* 733 NE 2d 1161 at 1169 (2000); *Viccaro* 551 NE 2d 8 at 9 n 3 (1990).

does the plaintiff contend that his or her life should now be terminated. Rather, the "wrong" alleged is the negligence of the defendant that has directly resulted in present suffering. Professor Peter Cane identified this distinction, stating "[t]he plaintiff in [wrongful life] cases is surely not complaining that he was born, simpliciter, but that because of the circumstances under which he was born his lot in life is a disadvantaged one"[15].

11 Thirdly, the expression is apt to obscure potentially important differences between actions brought by or on behalf of children who would not have existed but for the negligence of another. Such actions may arise out of varying circumstances. For instance, the negligence complained of may be a failure to make an accurate diagnosis or a failure to warn the plaintiff's parents. It may precede, or it may follow, conception[16]. The range of potential defendants includes medical practitioners, manufacturers of pharmaceuticals, genetic testing laboratories and possibly even the child's parents[17]. The extent of the child's disabilities is another variable. By lumping all such cases under the one description there is a danger that important factual distinctions will be overlooked or obscured[18].

12 Fourthly, by referring to actions such as the present as actions for "wrongful life", there is a risk that they will be perceived as the opposite of actions for "wrongful birth". The latter actions are distinguishable on several grounds[19]. Actions for "wrongful life" are brought by or for the child. Actions for "wrongful birth" are commenced at the instance of the parents[20]. Additionally, "wrongful life" actions are often said to raise concerns about the relative values of existence and non-existence. Such concerns are absent in a case of "wrongful birth". Yet the two actions share certain similarities. One

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15 Cane, "Injuries to Unborn Children", (1977) 51 *Australian Law Journal* 704 at 719.

16 See *Waller v James* [2006] HCA 16 at [28].

17 Although see below these reasons at [127]-[133].

18 *Curlender v Bio-Science Laboratories* 165 Cal Rptr 477 at 481, 486 (1980).

19 See *Harriton (by her tutor Harriton) v Stephens* (2004) 59 NSWLR 694 at 743 [315]-[319].

20 Actions for wrongful birth are sometimes distinguished from so-called actions for wrongful conception. The difference between these labels appears to turn on the fact that wrongful conception consists of negligence resulting in conception while wrongful birth, according to those who draw this distinction, involves negligence that deprives a pregnant woman of the opportunity to undergo an abortion or negligence that fails to effect an abortion.

important similarity is that they both require a birth. Another is that they both involve the contention that the child would not have been born but for the negligence of the defendant. Unless the similarities and differences are properly acknowledged, considerations favouring parental claims might be disregarded in claims brought by or for the child[21].

13 Fifthly, the words "wrongful life" implicitly denigrate the value of human existence. Arguably, because of the law's respect for human life[22], the label has caused judges to recoil from affording remedies in "wrongful life" cases. It discourages dispassionate legal analysis[23]. It is essential that the availability of actions such as the present be determined by reference to accepted methods of judicial reasoning rather than by invoking emotive slogans and the contestable religious or moral postulates that they provoke[24].

14 Notwithstanding this analysis, in these reasons I will have to use the phrase "wrongful life". The term is consistently used in the reasons of the other members of this Court and in the reasons of the courts below. Its use is ubiquitous in the legal literature. To adopt a more fitting description would risk confusion[25]. However, the appeal should be approached with full awareness of the shortcomings in the label "wrongful life". It must be decided by reference to legal analysis, not emotive labels or slogans.

The agreed facts

15 This appeal was heard concurrently with two other appeals concerning the permissibility of wrongful life actions[26]. The facts were agreed between the parties for the purposes of determining whether the appellant had a cause of

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21 *Harriton* (2004) 59 NSWLR 694 at 706 [69]; *Lininger* 764 P 2d 1202 at 1214 (1988).

22 See *Wilson v The Queen* (1992) 174 CLR 313 at 341.

23 *Harriton* (2004) 59 NSWLR 694 at 706-707 [69]; Teff, "The Action for 'Wrongful Life' in England and the United States", (1985) 34 *International and Comparative Law Quarterly* 423 at 427-428; Kashi, "The Case of the Unwanted Blessing: Wrongful Life", (1977) 31 *University of Miami Law Review* 1409 at 1431-1432.

24 *Berman* 404 A 2d 8 at 20 (1979); *In re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147 at 155.

25 *Lininger* 764 P 2d 1202 at 1204 n 2 (1988).

26 *Waller* [2006] HCA 16.

action against the respondent and, if so, what heads of damages were available in respect of it[27].

16 Alexia Harriton is the appellant in this Court. In early August 1980, before her birth, her mother, Mrs Olga Harriton, experienced a fever and noticed a rash. Suspecting that she might be pregnant, she contacted Dr Max Stephens, who was a medical practitioner in general practice. Dr Max Stephens (who has since died) was the father of Dr Paul Stevens ("the respondent"). He was also in general practice. On 13 August 1980, Dr Max Stephens attended on Mrs Harriton. She informed him that she believed that she might be pregnant. She expressed concern that her illness might be rubella (commonly known as German measles).

17 On Dr Max Stephens's advice, Mrs Harriton underwent blood testing to determine whether she was pregnant and whether she had been exposed to the rubella virus. The testing was performed by Macquarie Pathology Services. Dr Max Stephens recorded the following clinical history: "Urgent,? pregn,? recent rubella contact." On 21 August 1980, the Pathology Service reported to Dr Max Stephens in the following terms:

> "Rubella – 30
>
> If no recent contact or rubella-like rash, further contact with this virus is unlikely to produce congenital abnormalities."

18 Mrs Harriton consulted the respondent on 22 August 1980. She supplied him with substantially the same history as she had given to his father. The respondent was in possession of the pathology report. He advised her that she was pregnant but assured her that her symptoms were not caused by the rubella virus.

19 It was common ground that, assuming that a relevant duty of care existed, the respondent was negligent in informing the appellant that she did not have rubella and in failing to arrange further and more detailed blood testing. It was also agreed that, in 1980, a reasonable medical practitioner in the position of the respondent would have advised Mrs Harriton of the high risk that a foetus which had been exposed to the rubella virus would be born profoundly disabled. Finally, the parties agreed that, had Mrs Harriton received competent medical advice, she would have terminated the pregnancy.

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27 Facts further to those stated here may be found at *Harriton* (2004) 59 NSWLR 694 at 725-726 [189]-[204].

20 Alexia Harriton was born on 19 March 1981. She suffered from catastrophic disabilities as a consequence of exposure to the rubella virus *in utero*. Her disabilities include blindness, deafness, mental retardation and spasticity. She will require constant supervision and care for the rest of her life.

The decisional history

21 *Decision at first instance*: By her tutor and father, Mr George Harriton, the appellant sued the respondent in the Supreme Court of New South Wales. Her claim was pleaded in tort and contract. She claimed damages for pain and suffering, loss of amenities, medical expenses and under the principle in *Griffiths v Kerkemeyer*[28]. Damages for a loss of earning capacity were not claimed[29]. Her parents did not commence proceedings in their own names. By reason of the expiry of the relevant limitation period, they are now precluded from doing so[30].

22 Pursuant to Pt 31 r 2 of the Supreme Court Rules 1970 (NSW)[31] and with the consent of both parties, Studdert J on 25 February 2002 ordered that there be a separate determination of the following questions[32]:

> "1. If the [respondent] failed to exercise reasonable care in his management of the [appellant's] mother and, but for that failure the [appellant's] mother would have obtained a lawful termination of the pregnancy, and as a consequence the [appellant] would not have been born, does the [appellant] have a cause of action against the [respondent]?
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> 2. If so, what categories of damages are available?"

23 Relying heavily on the decision of the English Court of Appeal in *McKay v Essex Area Health Authority*[33], in which the admissibility of wrongful

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28 (1977) 139 CLR 161.

29 Counsel for the appellant submitted otherwise during argument and in written submissions but the appellant's pleadings do not make a claim for damages for a loss of earning capacity.

30 *Harriton* (2004) 59 NSWLR 694 at 724 [179].

31 See now Uniform Civil Procedure Rules 2005 (NSW), r 28.2.

32 *Harriton* [2002] NSWSC 461 at [2].

33 [1982] QB 1166.

life actions was rejected[34], Studdert J answered the first question in the negative[35]. The second question therefore did not need to be decided. His Honour identified several reasons why the appellant lacked a cause of action.

24 First, he found that whilst a health care provider owes a duty of care to an unborn child to take reasonable care to avoid causing that child physical injuries *in utero*, that duty did not include an obligation to give advice to the mother of an unborn child that could deprive that unborn child of the opportunity of life[36].

25 Secondly, Studdert J held that there was no breach of the accepted duty of care that health care providers owe to unborn children to guard against acts or omissions which might cause physical injury because the respondent did not do anything which caused her mother to contract the rubella virus[37]. Nor was the respondent negligent in failing to take prophylactic measures either to ameliorate the risk of the appellant's being infected with rubella or to reduce the severity of the appellant's disabilities. It was accepted by the appellant that no such measures exist[38].

26 Thirdly, Studdert J considered that, to recover for negligence, the appellant's claim necessitated a comparison between her present position and the position that she would have been in but for the respondent's negligence. As the appellant would not have been born had the respondent exercised reasonable care, Studdert J found such a comparison was "an impossible exercise"[39].

27 Finally, Studdert J found that public policy considerations militated against recognising wrongful life actions. He stated that recognising wrongful life actions would erode the value of human life; undermine the perceived worthiness of those born with disabilities; open the door to actions brought by anyone born with a disability regardless of the severity of their disability; enable children born with disabilities to sue their mothers for failing to undergo an

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34 See below these reasons at [49]-[51].

35 Judgment was delivered concurrently with judgments in two other wrongful life actions, *Waller v James* [2002] NSWSC 462 and *Edwards v Blomeley* [2002] NSWSC 460. Studdert J also found for the defendants in these actions for substantially the reasons that he gave in *Harriton*.

36 *Harriton* [2002] NSWSC 461 at [21].

37 *Harriton* [2002] NSWSC 461 at [25].

38 *Harriton* [2002] NSWSC 461 at [26].

39 *Harriton* [2002] NSWSC 461 at [33].

abortion if advised of the risk of disability; and place unacceptable pressure on the cost of insurance premiums of medical practitioners[40].

28 Studdert J also rejected the appellant's alternative action in contract. On the basis of this Court's decision in *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*[41], it had been argued for the appellant that she enjoyed a derivative cause of action as a beneficiary of the contract between the respondent and her mother[42]. In rejecting this argument, Studdert J found that the agreed facts did not enable him to find that the contract created a trust in favour of the appellant[43] and that, in any case, such action did not avoid the foregoing problems of how damages could be assessed[44].

29 *Decision of the Court of Appeal*: The appellant appealed to the New South Wales Court of Appeal[45]. A majority of that Court (Spigelman CJ and Ipp JA; Mason P dissenting) dismissed the appeal. Spigelman CJ found that no relevant duty of care was owed to the appellant by the respondent. The principal reasons that led the Chief Justice to this conclusion were the absence of the requisite degree of directness in the relationship between the appellant and the respondent[46] and of any clear moral support for the existence of the alleged duty[47]. Spigelman CJ also found that the agreed statement of facts did not include sufficient information for it to be established that the appellant would have been better off had she not been born, proof of which he considered necessary for the appellant to succeed[48].

30 In Ipp JA's view, the main difficulty with the appellant's action was that damages could not be quantified because of the impossibility of comparing

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40 *Harriton* [2002] NSWSC 461 at [71].

41 (1988) 165 CLR 107.

42 *Harriton* [2002] NSWSC 461 at [73]-[77].

43 *Harriton* [2002] NSWSC 461 at [78].

44 *Harriton* [2002] NSWSC 461 at [79].

45 *Harriton* (2004) 59 NSWLR 694. The Court of Appeal heard the appeal in this matter together with appeals against the decision in *Waller* [2002] NSWSC 462.

46 *Harriton* (2004) 59 NSWLR 694 at 701-702 [25]-[33].

47 *Harriton* (2004) 59 NSWLR 694 at 699-701 [12]-[23].

48 *Harriton* (2004) 59 NSWLR 694 at 704 [45]-[46].

existence with non-existence[49]. Ipp JA would also have rejected the appellant's action on the basis of the absence of a duty of care[50] and causation[51]. He cited a number of policy arguments militating against recognition of the interest asserted by the appellant[52]. It is convenient to address these policy arguments later in these reasons[53].

31 In dissent, Mason P identified the argument that "life" cannot be a legal injury and the supposed impossibility of quantifying the appellant's damage as the main barriers to the appellant's succeeding in her action. His Honour was not persuaded by these arguments. In relation to the argument that life itself cannot constitute a legal injury, Mason P perceived this as a question-begging statement which contained its own conclusion. It did not supply a reason for denying relief[54]. Mason P also drew attention to the fact that the creation of life is the main trigger of the damage in wrongful birth actions and that it was not clear why the "life cannot be a legal injury" argument should have more force in the context of wrongful life than in the context of wrongful birth[55].

32 Mason P also rejected the proposition that the appellant's action should be disallowed by reason of the impossibility of determining the damage she suffered. He did so for several reasons[56]. These included that the law values other intangible losses and explicitly or implicitly weighs existence against non-existence in other legal contexts.

33 *Grant of special leave*: By special leave, the appellant now appeals to this Court. The questions requiring determination are the same as those in the courts below. They are (1) whether a wrongful life action constitutes a valid cause of action and, if so, (2) what heads of damages are recoverable[57]. The appellant

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49 *Harriton* (2004) 59 NSWLR 694 at 737-738 [265]-[271].

50 *Harriton* (2004) 59 NSWLR 694 at 748 [351].

51 *Harriton* (2004) 59 NSWLR 694 at 748-749 [353]-[363].

52 *Harriton* (2004) 59 NSWLR 694 at 744-748 [321]-[351].

53 See below these reasons at [110]-[152].

54 *Harriton* (2004) 59 NSWLR 694 at 717 [131], 719 [144].

55 *Harriton* (2004) 59 NSWLR 694 at 718 [136]-[137].

56 *Harriton* (2004) 59 NSWLR 694 at 721-722 [157]-[162].

57 See above these reasons at [22].

abandoned her contractual action before this Court, electing to rely exclusively on the tort of negligence.

The absence of a trial

34 A threshold consideration which must be borne in mind in deciding this appeal is the fact that the appellant has not yet had a trial. As such, the facts available to this Court are brief and unelaborated. While the parties doubtless had in mind cost-saving and tactical considerations in adopting the abbreviated course they did, it is often important, in cases concerning the tort of negligence, that appellate courts have the benefit of comprehensive findings based on full evidence[58]. Because of the location of the burden of proof, a paucity of evidence usually works to the detriment of the party bringing the action.

35 Especially in novel claims asserting new legal obligations, the applicable common law tends to grow out of a full understanding of the facts. To decide the present appeal on abbreviated agreed facts risks inflicting an injustice on the appellant because the colour and content of the obligations relied on may not be proved with sufficient force because of the brevity of the factual premises upon which the claim must be built[59]. Where the law is grappling with a new problem, or is in a state of transition, the facts will often "help to throw light on the existence of a legal cause of action – specifically a duty of care owed by the defendant to the plaintiff"[60]. Facts may present wrongs. Wrongs often cry out for a remedy. To their cry the common law may not be indifferent.

36 Notwithstanding these difficulties, this Court, like the courts below, must decide the contest applying established law to the abbreviated facts. This process yields an answer favourable to the appellant despite the unfavourable forensic procedure she adopted.

Confining the issues

37 *The breach issue*: Two issues can be exposed which do not present any real problem for this Court. The first is the breach element of the tort of negligence. As already mentioned, the parties agreed that, if the respondent

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58 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 561-562 [123]; *Hester* 733 NE 2d 1161 at 1168 (2000).

59 *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486 at 518 [91].

60 *Woolcock* (2004) 216 CLR 515 at 565-566 [138] applying *E (A Minor) v Dorset County Council* [1995] 2 AC 633 at 694 per Sir Thomas Bingham MR.

owed the appellant a relevant duty of care, the respondent had breached that duty[61].

38 *The causation issue*: Secondly, although contested by the respondent, it is clear, in my view, that no real difficulty arises over causation. The respondent pointed to several factual considerations which, he submitted, sustained a finding adverse to the appellant on causation. These considerations included the fact that the respondent had played no part in the appellant (or her mother) actually contracting rubella; the absence of any measures which could have been taken to reduce either the risk that the appellant would be infected with rubella or the severity of the appellant's disabilities once she had been exposed to that virus; and that no other life was possible for the appellant than the one she was living.

39 These submissions are unconvincing[62]. Had it not been for the respondent's negligence, the appellant would not have been born. The suffering, expenses and losses of which she now complains would therefore have been avoided. True, the respondent did not give rise to, or increase, the risk that the appellant would contract rubella. However, he did, through his carelessness, cause the appellant to suffer, as she still does, the consequences of that infection[63]. As Mason P observed in the Court of Appeal, "[d]octors seldom cause their patients' illnesses. But 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."[64]

40 In the present case, the only way in which the appellant's suffering could have been prevented was by terminating the pregnancy. The respondent's negligence deprived the appellant's parents of the opportunity to act on that preventative measure. As such, the respondent was a cause of the appellant's damage.

The issues for determination

41 Once the breach and causation issues are put aside, three main issues remain for determination of the legal liability of the respondent to the appellant. They are:

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61 See above these reasons at [19].

62 Cf Trindade and Cane, *The Law of Torts in Australia*, 3rd ed (1999) at 476.

63 Todd, "Wrongful Conception, Wrongful Birth and Wrongful Life", (2005) 27 *Sydney Law Review* 525 at 539-540; Jackson, "Wrongful Life and Wrongful Birth: The English Conception", (1996) 17 *Journal of Legal Medicine* 349 at 353-354.

64 *Harriton* (2004) 59 NSWLR 694 at 714 [110].

(1) *The duty of care issue*: Did the respondent owe the appellant a relevant duty of care? Does this case fall within the duty a health care provider owes to take reasonable care to avoid causing pre-natal injury to a foetus?

(2) *The damage issue*: Is the appellant's damage capable of being quantified? Do the suggested difficulties of quantification arise in relation to all of the heads of damages pleaded by the appellant?

(3) *The policy issues*: Assuming that a relevant duty of care was owed to the appellant and that her damage is capable of quantification, are there any policy considerations that should preclude this Court from upholding the claim? Are there countervailing considerations that support recognition of the appellant's cause of action?

42 Before examining these questions it is helpful to consider Australian and overseas decisions on wrongful life actions.

Australian authorities on wrongful life actions

43 Other than the present case, and the appeals in *Waller v James*[65], heard at the same time, there have only been three reported wrongful life actions brought in Australia. In each case, the plaintiff failed.

44 The first was *Bannerman v Mills*[66]. The plaintiff there was born with severe defects as a result of contracting rubella from her mother while a foetus. The facts of the case are not entirely clear from the report. However, it appears that the mother, while pregnant with the plaintiff, had consulted the defendants about her infection. The plaintiff alleged that the defendants were negligent in failing to advise her, among other things, to terminate her pregnancy. The defendants brought a motion for summary dismissal of the proceedings on the basis that no reasonable cause of action was disclosed. A Master of the Supreme Court of New South Wales, after surveying decisions in the United Kingdom and the United States, dismissed the plaintiff's action on the basis that it was unarguable as a matter of law.

45 The next case was *Hayne v Nyst*[67]. That was a proceeding commenced by a mother in her own right and on behalf of the child. The mother had given birth

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65 (2004) 59 NSWLR 694.

66 (1991) Aust Torts Reports ¶81-079.

67 Unreported, Supreme Court of Queensland, 17 October 1995.

to a child who had contracted rubella *in utero*. An application for leave to bring the proceedings outside the applicable limitation period was ultimately discontinued with the apparent acquiescence of counsel for both sides. However, Williams J commented that, in any event, he did not consider that the child had a viable cause of action.

46 The third case was *Edwards v Blomeley*[68]. The plaintiff there was the seventh child born to her parents. Before she was conceived, her father, Mr Edwards, had approached the defendant, a medical practitioner, for a vasectomy. That operation failed. The parties agreed that the defendant had not only negligently performed the vasectomy but, contrary to indications from sperm count tests, subsequently advised Mr Edwards that the procedure had been successful. Acting in reliance on this advice, Mr Edwards engaged in unprotected sexual intercourse with his wife. This resulted in the plaintiff's conception. At birth it was found that the child suffered from *cri du chat* syndrome. This is a rare chromosomal disorder that causes severe intellectual and physical disabilities.

47 In the Supreme Court of New South Wales, Studdert J rejected the child's action for want of a relevant duty of care. His Honour stated[69] "I cannot accept that the defendant owed to the ... plaintiff a duty to prevent her conception, or to give to her parents advice such as would have prevented her conception". Studdert J also rejected the action on the basis of causation[70] and the impossibility of assessing the damage that the plaintiff suffered[71]. Finally, his Honour considered that public policy militated against recognition of the plaintiff's action. He found that wrongful life actions, among other things, erode the sanctity of human life and devalue members of society living with disabilities[72]. The parallels with Studdert J's reasoning in the present case are obvious[73].

48 The preponderance of decisions on wrongful life actions in countries other than Australia is also against the appellant. It is useful to identify the leading international authorities and their reasoning.

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68 [2002] NSWSC 460.

69 [2002] NSWSC 460 at [62].

70 [2002] NSWSC 460 at [69].

71 [2002] NSWSC 460 at [72]-[75].

72 [2002] NSWSC 460 at [119].

73 See above these reasons at [23]-[27].

Overseas authorities on wrongful life actions

49 *United Kingdom*: The most important decision in the United Kingdom is that of *McKay*[74]. In that case a mother and her daughter sued the defendants for negligently misinterpreting tests of the mother's blood for the rubella virus, with the result that the mother was not properly advised of the risk that her infection with rubella presented to her daughter *in utero*[75].

50 The defendants brought a motion to strike out the daughter's claim on the ground that it failed to disclose a reasonably arguable cause of action. That motion was granted by a Master of the High Court. However, it was overturned by Lawton J on appeal. In the Court of Appeal, Stephenson and Ackner LJJ, in separate reasons, restored the orders of the Master. In dissent, Griffiths LJ would have upheld the orders made by Lawton J on the basis that the issue to be determined was not so straight-forward that it should be summarily decided[76]. However, because this was a minority view, his Lordship proceeded to hold that wrongful life actions should not be recognised by English law[77]. In retrospect, and in the light of the later development of authority in England on the proper approach to strike-out applications in cases of such a kind, it can probably be said that Griffiths LJ's initial conclusion (that there should first be a trial) was one that would probably now be followed[78].

51 Stephenson LJ, who wrote the principal reasons for the majority in *McKay*, held that the daughter's action was unarguable. In his Lordship's opinion this was because (1) the defendants' negligence had merely caused her birth, as opposed to her disabilities[79]; (2) wrongful life actions postulate a duty to terminate life and this would make an unacceptable inroad on the principle of the sanctity of human life[80]; (3) such actions would expose medical practitioners to

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74 [1982] QB 1166. See also *P's Curator Bonis v Criminal Injuries Compensation Board* 1997 SLT 1180.

75 [1982] QB 1166 at 1174.

76 [1982] QB 1166 at 1191.

77 [1982] QB 1166 at 1193.

78 See, eg, *E (A Minor)* [1995] 2 AC 633 at 694; cf *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 79 ALJR 755 at 796 [228]; 214 ALR 92 at 149.

79 [1982] QB 1166 at 1178.

80 [1982] QB 1166 at 1180-1181.

liability in respect of "mercifully trivial abnormalit[ies]"[81]; (4) they would open the door for wrongful life actions to be brought against mothers for failing to abort[82]; and (5) it would be impossible to assess damages because one cannot compare the daughter's disabled position with non-existence[83]. In addition to these arguments, the Court of Appeal obviously placed considerable weight on the fact that, not long before proceedings were commenced (but after the daughter's birth), Parliament had enacted the *Congenital Disabilities (Civil Liability) Act* 1976 (UK)[84]. That Act, which did not apply to the daughter's claim[85], expressly prohibited wrongful life actions[86]. It had been drafted pursuant to recommendations of the Law Commission[87].

52 *Canada*: Few actions for wrongful life have been reported in Canada. Those that have been have failed[88]. All but two were struck out before trial[89].

53 In *Arndt v Smith*[90], a wrongful life action was commenced in respect of severe mental and physical disabilities suffered by a child as a result of her

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81 [1982] QB 1166 at 1181.

82 [1982] QB 1166 at 1181.

83 [1982] QB 1166 at 1181-1182.

84 [1982] QB 1166 at 1177-1178, 1182, 1187, 1192.

85 The Act only applied to children born on or after 22 July 1976. The daughter was born on 15 August 1975.

86 Section 1(2)(b).

87 Law Commission, *Report on Injuries to Unborn Children*, Law Com No 60, (1974) Cmnd 5709 at 45-54.

88 Reference is sometimes mistakenly made to the decision of the Manitoba Court of Appeal in *Lacroix (Litigation Guardian of) v Dominique* (2001) 202 DLR (4th) 121 as though it were a wrongful life action (see, eg, *Cattanach* (2003) 215 CLR 1 at 146 [407] n 654). In that case, the infant suffered disabilities caused by a drug prescribed for her mother while she was pregnant. The damage could have been averted by human agency other than by performing an abortion. Twaddle JA at 133 [38] appeared to acknowledge that *Lacroix* was not a wrongful life action.

89 *Mickle v Salvation Army Grace Hospital* (1998) 166 DLR (4th) 743 and *Patmore v Weatherston* [1999] BCJ No 650 were wrongful life actions struck out before trial. But see *Bartok v Shokeir* (1998) 168 Sask R 280.

90 (1994) 93 BCLR (2d) 220.

mother becoming infected while pregnant with the virus which causes chickenpox. While actions for wrongful birth and wrongful life were commenced, at trial, the wrongful life action was abandoned. Citing *McKay*, Hutchison J stated that the[91]:

> "decision to abandon the claim for wrongful life on behalf of their child was most appropriate. By doing so, they quite properly accepted the inevitable finding of this court that no such action lies."

54 In *Jones (Guardian ad litem of) v Rostvig*[92], an infant born with Down's syndrome brought an action against his mother's medical practitioner for failing to recommend that the mother undergo testing which would have shown that, if born, he would be affected by the syndrome. Macaulay J found for the defendant, adopting the reasoning in *McKay*[93].

55 *Singapore*: In a recent decision in *JU v See Tho Kai Yin*[94], the High Court of Singapore rejected an action for wrongful life. The plaintiff in that case was an infant born with Down's syndrome. He sued his mother's obstetrician and gynaecologist, alleging a negligent failure to advise his mother of tests available to detect chromosomal abnormalities and to warn her that, at her age, there was an increased risk of such abnormalities. Relying on *McKay*, the Court held that the plaintiff lacked a valid cause of action[95].

56 *United States*: In the United States, one of the earliest and most frequently cited decisions on wrongful life is *Gleitman v Cosgrove*[96]. The evidence adduced in that case indicated that the plaintiff's mother had consulted the defendant medical practitioners when she was pregnant with the plaintiff. She advised the defendants that approximately one month after falling pregnant she had fallen ill with rubella. The defendants reassured her that this would have no effect on the foetus[97]. Subsequently, the child was born in a seriously impaired condition. The plaintiff's mother gave evidence that, if she had been informed of the risk of grave disability that her infection with rubella presented to the child, she would

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91 (1994) 93 BCLR (2d) 220 at 227 [28].

92 (1999) 44 CCLT (2d) 313.

93 (1999) 44 CCLT (2d) 313 at 318-320 [18]-[22].

94 [2005] 4 SLR 96.

95 [2005] 4 SLR 96 at 120 [95]-[99].

96 227 A 2d 689 (1967).

97 227 A 2d 689 at 690 (1967).

have sought an abortion[98]. Summary judgment was entered for the defendants. That judgment was affirmed by the Supreme Court of New Jersey.

57 Proctor J (with whom Weintraub CJ and Francis J agreed) considered that the impossibility of assessing the plaintiff's damage was the main obstacle in the path of his action[99]. His Honour stated[100]:

> "The infant plaintiff would have us measure the difference between his life with defects against the utter void of nonexistence, but it is impossible to make such a determination. This Court cannot weigh the value of life with impairments against the nonexistence of life itself. By asserting that he should not have been born, the infant plaintiff makes it logically impossible for a court to measure his alleged damages because of the impossibility of making the comparison required by compensatory remedies."

58 Since *Gleitman*[101], wrongful life actions have been rejected in several jurisdictions of the United States[102]. Relief has been denied for disabilities

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98 227 A 2d 689 at 691 (1967).

99 His Honour also considered that the action was precluded by public policy considerations concerning the sanctity of human life: see 227 A 2d 689 at 693 (1967).

100 227 A 2d 689 at 692 (1967).

101 Which was followed by the Supreme Court of New Jersey in *Berman* 404 A 2d 8 (1979).

102 Alabama (*Elliott v Brown* 361 So 2d 546 (1978)); Arizona (*Walker v Mart* 790 P 2d 735 (1990)); Colorado (*Lininger* 764 P 2d 1202 (1988)); Connecticut (*Kyle and Donnelly v Candlewood Obstetric-Gynecological Associates* 6 Conn L Rptr 532 (1992)); Delaware (*Garrison v Medical Center of Delaware Inc* 581 A 2d 288 (1989)); Florida (*Kush v Lloyd* 616 So 2d 415 (1992)); Georgia (*Atlanta Obstetrics & Gynecology Group v Abelson* 398 SE 2d 557 (1990)); Indiana (*Cowe v Forum Group Inc* 575 NE 2d 630 (1991)); Kansas (*Bruggeman v Schimke* 718 P 2d 635 (1986)); Idaho (*Blake v Cruz* 698 P 2d 315 (1984)); Illinois (*Williams v University of Chicago Hospitals* 688 NE 2d 130 (1997)); Louisiana (*Pitre v Opelousas General Hospital* 530 So 2d 1151 (1988)); Maryland (*Kassama v Magat* 792 A 2d 1102 (2002)); Massachusetts (*Viccaro* 551 NE 2d 8 (1990)); Michigan (*Proffitt v Bartolo* 412 NW 2d 232 (1987)); Nevada (*Greco v United States* 893 P 2d 345 (1995)); New Hampshire (*Smith v Cote* 513 A 2d 341 (1986)); New York (*Becker v Schwartz* 386 NE 2d 807 (1978)); North Carolina (*Azzolino v Dingfelder* 337 SE 2d 528 (1985)); Ohio (*Hester* 733 NE 2d 1161 (2000)); Pennsylvania (*Speck v Finegold* 439 A 2d 110 (1981)); Texas (*Nelson v Krusen* 678 SW 2d 918 (1984));

(Footnote continues on next page)

resulting from rubella[103], Down's syndrome[104], muscular dystrophy[105], albinism[106], haemophilia[107], hereditary blindness[108], neurofibromatosis[109] and spina bifida[110].

59 Despite this weight of decisional authority, wrongful life actions have been upheld in the United States on a number of occasions[111]. The first such decision was *Curlender v Bio-Science Laboratories*[112]. The plaintiff sued a genetic testing laboratory. Before she was born, her parents had retained the services of the laboratory to determine whether they were carriers of Tay-Sachs disease. That disease is an ultimately fatal degenerative neurological disorder. The plaintiff alleged that the test was negligently performed with the result that her parents erroneously believed that they were not carriers of the causative gene. The plaintiff was born with Tay-Sachs disease. It was estimated that the plaintiff would only live to the age of four. She required substantial and expensive care.

60 Jefferson PJ (with whom Lillie and Rimerman JJ agreed) considered that the essential question was whether the birth of the plaintiff, in her disabled

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West Virginia (*James G v Caserta* 332 SE 2d 872 (1985)); Wisconsin (*Dumer v St Michael's Hospital* 233 NW 2d 372 (1975)).

103 *Dumer* 233 NW 2d 372 (1975); *Strohmaier v Associates in Obstetrics & Gynecology PC* 332 NW 2d 432 (1982); *Blake* 698 P 2d 315 (1984); *Smith* 513 A 2d 341 (1986); *Walker* 790 P 2d 735 (1990).

104 *Becker* 386 NE 2d 807 (1978); *Berman* 404 A 2d 8 (1979); *Phillips v United States* 508 F Supp 537 (1980); *James G* 332 SE 2d 872 (1985); *Azzolino* 337 SE 2d 528 (1985); *Garrison* 581 A 2d 288 (1989); *Atlanta Obstetrics* 398 SE 2d 557 (1990).

105 *Nelson* 678 SW 2d 918 (1984).

106 *Pitre* 530 So 2d 1151 (1988).

107 *Siemieniec v Lutheran General Hospital* 512 NE 2d 691 (1987).

108 *Lininger* 764 P 2d 1202 (1988).

109 *Speck* 439 A 2d 110 (1981); *Ellis v Sherman* 515 A 2d 1327 (1986).

110 *Hester* 733 NE 2d 1161 (2000).

111 There are also instances where courts have refused motions to strike out wrongful life actions: see, eg, *Ahsan v Olsen* 4 Conn L Rptr 282 (1991); *Quinn v Blau* 21 Conn L Rptr 126 (1997).

112 165 Cal Rptr 477 (1980) (CA).

condition, was an "injury" cognisable at law as a civil wrong. Holding that it was, his Honour emphasised the need to focus on the plaintiff in her present condition rather than on metaphysical and theological concerns. He stated[113]:

> "The reality of the 'wrongful-life' concept is that such a plaintiff both *exists* and *suffers*, due to the negligence of others. It is neither necessary nor just to retreat into meditation on the mysteries of life. We need not be concerned with the fact that had defendants not been negligent, the plaintiff might not have come into existence at all."

Jefferson PJ concluded that damages were recoverable for pain and suffering which the plaintiff would endure whilst she lived as well as any pecuniary loss resulting from her disabilities[114].

61 *Curlender* was overruled, in part, by the Supreme Court of California in *Turpin v Sortini*[115]. That was a wrongful life action arising out of hereditary deafness. The Court held that general damages could not be awarded, principally on the basis that they were impossible to assess because of the need to compare existence with non-existence[116]. However, a majority of that Court affirmed *Curlender* in so far as it held that special damages were available in a wrongful life action on the basis that such damages are "both certain and readily measurable"[117]. The decision in *Turpin* has been followed by the Supreme Courts of New Jersey[118] and Washington[119].

The duty of care issue

62 *Deciding the existence of a duty*: In this appeal, the first issue of law is whether the respondent owed the appellant a relevant duty of care. In Australia, there is no settled methodology or universal test for determining the existence of

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113 165 Cal Rptr 477 at 488 (1980) (emphasis in original).

114 165 Cal Rptr 477 at 489-490 (1980).

115 182 Cal Rptr 337 (1982).

116 182 Cal Rptr 337 at 346-347 (1982). Contra at 349.

117 182 Cal Rptr 337 at 348 (1982).

118 *Procanik v Cillo* 478 A 2d 755 (1984).

119 *Harbeson v Parke-Davis Inc* 656 P 2d 483 (1983).

a duty of care[120] such as is provided in most common law countries by the *Caparo* test[121]. The inability of this Court to agree on a principle of general application is unfortunate[122]. "[C]onfusion approaching chaos has reigned."[123] This is evident in decisions such as *Northern Sandblasting Pty Ltd v Harris*[124], *Perre v Apand Pty Ltd*[125], *Crimmins v Stevedoring Industry Finance Committee*[126] and *Graham Barclay Oysters Pty Ltd v Ryan*[127].

63 However, in practice, the absence of an agreed legal formula has not caused difficulty for the overwhelming majority of tort actions. Most tort actions fall within a recognised duty of care category. Of the actions that fall outside, or lie on the boundary of, an established duty category, the test of reasonable foreseeability will ordinarily provide guidance in determining whether a duty is in fact owed. This is not because satisfying this test is sufficient to establish a duty of care. This Court has repeatedly affirmed that this is not the case[128]. Rather, it is because, in so far as physical injuries arising from a positive act are

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120 *Sullivan v Moody* (2001) 207 CLR 562 at 578-579 [48]; McHugh, "Introduction: Sydney Law Review Torts Special Issue", (2005) 27 *Sydney Law Review* 385 at 389-390.

121 *Caparo Industries Plc v Dickman* [1990] 2 AC 605 at 617-618, disapproved in *Sullivan* (2001) 207 CLR 562 at 579 [49] per Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ.

122 See, eg, *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 215-216 [88]-[92]; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 616-617 [211]; *Woolcock* (2004) 216 CLR 515 at 538 [48].

123 *Woolcock* (2004) 216 CLR 515 at 536 [45] per McHugh J. See also *Perre* (1999) 198 CLR 180 at 262-263 [230], 286 [288].

124 (1997) 188 CLR 313.

125 (1999) 198 CLR 180.

126 (1999) 200 CLR 1.

127 (2002) 211 CLR 540.

128 *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at 268 [35]; *Sullivan* (2001) 207 CLR 562 at 573 [25], 576 [42], 583 [64]; *Graham Barclay* (2002) 211 CLR 540 at 555 [9], 624 [234] and [236], 664-665 [323]; *Tame v New South Wales* (2002) 211 CLR 317 at 331 [12], 339 [46], 355 [103], 401 [249], 428 [330].

concerned, it is accepted that if the reasonable foreseeability test is satisfied, the elusive additional component of a duty of care will generally exist[129].

64 Furthermore, instruction on the duty issue can be secured from several "salient features"[130] that have been identified as potentially relevant to the existence of a duty. In *Sullivan v Moody*[131] three particular considerations were identified which will often point against the existence of a duty. These were (1) that finding a duty of care would cut across or undermine other legal rules[132]; (2) that the duty asserted would be incompatible with another duty[133]; and (3) that to recognise a duty would expose the defendant to indeterminate liability[134].

65 Elsewhere, factors capable of supporting a duty of care have been identified. These include (1) vulnerability on the part of the plaintiff[135]; (2) special control[136]; or (3) knowledge[137] possessed by the defendant about the circumstances that gave rise to the damage suffered by the plaintiff.

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129 *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 44; *Jaensch v Coffey* (1984) 155 CLR 549 at 581-582; *Hawkins v Clayton* (1988) 164 CLR 539 at 576; *Neindorf v Junkovic* (2005) 80 ALJR 341 at 354 [56]; 222 ALR 631 at 645-646.

130 *Perre* (1999) 198 CLR 180 at 253 [198].

131 (2001) 207 CLR 562.

132 (2001) 207 CLR 562 at 580-581 [53]-[54].

133 (2001) 207 CLR 562 at 581-582 [55]-[60].

134 (2001) 207 CLR 562 at 582-583 [61]-[63].

135 See, eg, *Perre* (1999) 198 CLR 180 at 194-195 [11]-[13], 202 [41]-[42], 204 [50], 225-226 [118]-[119], 236 [149]-[151], 259-260 [215]-[217], 290 [298], 328 [416]; *Graham Barclay* (2002) 211 CLR 540 at 577 [84], 597 [149], 664 [321]; *Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) 217 CLR 469 at 493 [85], 495 [92]. See Stapleton, "The golden thread at the heart of tort law: protection of the vulnerable", (2003) 24 *Australian Bar Review* 135 at 141-149.

136 See, eg, *Perre* (1999) 198 CLR 180 at 201 [37]-[38], 326 [408]-[409]; *Graham Barclay* (2002) 211 CLR 540 at 558 [20], 577 [83]-[84], 579-580 [90]-[91], 597-599 [149]-[152], 630-631 [248]-[250], 664 [321].

137 See, eg, *Graham Barclay* (2002) 211 CLR 540 at 577 [84], 630 [248]; *Woolcock* (2004) 216 CLR 515 at 547 [74], 577 [174].

66 *An established duty category exists*: Originally, the common law accepted a principle that, because legal personality arises at birth, duties cannot be owed to a person before that person is born[138]. However, it is now established that health care providers owe a duty to an unborn child to take reasonable care to avoid conduct which might foreseeably cause pre-natal injury. Such a duty has been held to exist even before conception[139]. Once the child is born, the damage accrues in law and the child is able to maintain an action for damages. Unless some disqualifying consideration operates, the present case falls within the duty owed by persons such as the respondent to take reasonable care to prevent pre-natal injuries to a person such as the appellant.

67 In the Court of Appeal, Ipp JA, whose reasons were supported in this Court by the respondent, considered that the interest asserted by the appellant was distinguishable from that of an unborn child in respect of pre-natal injuries. His Honour gave the following reasons for adopting this distinction[140]:

> "The [appellant is] required to assert, as part of [her] cause of action, that, as a matter of causation, had the [respondent] not been negligent, [she] would not be alive in [her] disabled condition. But no such allegation forms part of the cause of action of a plaintiff suing for damages for injuries caused to the foetus in utero."

Ipp JA also said[141]:

> "There is a further significant distinction. In order to prove that, but for the [respondent's] negligence, [she] would not have been born, the [appellant] would have to prove that [her mother] would have terminated [her] pregnancy lawfully. ... This ... forms no part of the claim for damages by a child for injuries caused to the foetus in utero."

68 The appellant does indeed need to prove the matters to which Ipp JA refers in order to succeed in her action. However, these are not matters directly relevant to the issue of the existence of a duty of care, but to the issue of causation[142]. Needless to say, the question of causation cannot be entirely quarantined from the duty of care element. None of the definitional elements of

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138 See, eg, *Watt v Rama* [1972] VR 353.

139 *X and Y (By Her Tutor X) v Pal* (1991) 23 NSWLR 26.

140 *Harriton* (2004) 59 NSWLR 694 at 742 [302].

141 *Harriton* (2004) 59 NSWLR 694 at 742 [304].

142 See *Harriton* (2004) 59 NSWLR 694 at 716 [125]-[126] per Mason P.

the tort of negligence stand alone[143]. This is particularly so in relation to the duty of care, which is intimately bound to the other elements constituting the integrated tort of negligence. Thus, it is relevant, in deciding whether a duty of care exists, to ask (among other things) how the postulated duty might be discharged[144] and the type of damage to which it relates[145]. But this does not alter the fact that it is a mistake to fragment duty categories in an artificial fashion.

69 Primarily, the duty of care issue is concerned with the directness of the association between the injurer and the injured. In *Donoghue v Stevenson*[146], Lord Atkin stated that "there must be, and is, some *general* conception of *relations* giving rise to a duty of care". In *Neindorf v Junkovic*[147], I proffered three reasons why enquiries relating to the duty of care should, as Lord Atkin indicated, be made at a relatively general level of abstraction. These were that (1) the duty concept is already overworked and unduly complex; (2) particularising the duty of care to too great a level of specificity carries with it the risk of eliding questions of law and fact; and (3) making specific enquiries at the duty stage subverts the traditional structure of the cause of action in negligence, which is designed to pose increasingly specific questions as each successive element falls for decision.

70 There are additional reasons supporting this approach. Lifting considerations relating to the breach and damage elements into the duty element of the tort threatens the continued relevance of the duty of care in the negligence context. For this reason, it is important to avoid unnecessarily conflating the different components of the cause of action. Furthermore, defining the content of the duty of care to an excessive degree would diminish the precedential value of decisions on duty. Decisions that cast duties of care in narrow terms are of limited assistance to litigants and to judges in future cases. As a matter of practicality, it is desirable that determinations on points of law be framed with a

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143 *Neindorf* (2005) 80 ALJR 341 at 352 [50]; 222 ALR 631 at 644.

144 See, eg, *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431 at 478 [122]. See also Fleming, *The Law of Torts*, 9th ed (1998) at 117-118.

145 *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 487; *Sullivan* (2001) 207 CLR 562 at 579 [50].

146 [1932] AC 562 at 580 (emphasis added).

147 (2005) 80 ALJR 341 at 352-354 [49]-[56]; 222 ALR 631 at 643-646. See also *Jones v Bartlett* (2000) 205 CLR 166 at 184-185 [57]; *Vairy v Wyong Shire Council* (2005) 80 ALJR 1 at 8-9 [25]-[27]; 221 ALR 711 at 718-719; Fleming, *The Law of Torts*, 9th ed (1998) at 117-118.

sufficient degree of generality to make them useful in later cases where the facts are necessarily different but where the concepts will necessarily be the same[148].

71 The duty owed by health care providers to take reasonable care to avoid causing pre-natal injury to a foetus is sufficiently broad to impose a duty of care on the respondent in this case. In order to discharge that duty, the respondent did not need to engage in conduct that was significantly different from conduct that would ordinarily be involved in a medical practitioner's fulfilling the pre-natal injury category of duty. Furthermore, the damage involved immediate, discernible physical damage, which the duty relating to pre-natal injuries ordinarily encompasses. This is not a case involving pure economic loss or another type of loss which is distinguishable from physical damage that could take this case outside the ambit of the pre-natal injury duty of care.

72 Subject to what follows, therefore, the appellant's case on the duty issue is an unremarkable one in which she sues a medical practitioner for failure to observe proper standards of care when she was clearly within his contemplation as a foetus, *in utero* of a patient seeking his advice and care. She was thus in the standard duty relationship for such a case. She evidenced the important "salient feature" of vulnerability to harm (in the event great harm), should the respondent not observe proper standards of case with respect to her. Denying the existence of a duty amounts, in effect, to the provision of an exceptional immunity to health care providers. The common law resists such an immunity[149].

73 *Conflicting duties*: It is suggested that a significant impediment to recognising a duty of care in this case is that it would potentially conflict with the duty the respondent owed to the appellant's mother[150]. The fact that a putative duty may conflict with an existing duty has been identified as a reason for not recognising the first-mentioned duty[151]. However, while this concern may initially appear persuasive, closer analysis reveals that it is impossible to justify. There are at least three reasons why this is so.

74 First, it is strongly arguable that the fact that a defendant is under conflicting duties of care is a consideration more satisfactorily accommodated under the rubric of breach than duty[152]. For the reasons which I explained above,

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148 Fuller, *The Morality of Law*, rev ed (1969) at 46-49.

149 *Lanphier v Phipos* (1838) 8 Car & P 475 at 479 [173 ER 581 at 583].

150 See reasons of Crennan J at [248]-[250].

151 See above these reasons at [64]. See also *Winnipeg Child and Family Services (Northwest Area) v G (DF)* [1997] 3 SCR 925 at 947 [34], 959-960 [56].

152 See Buckley, *The Law of Negligence*, 4th ed (2005) at 18.

the structure of the tort of negligence is threatened by injecting the duty element with too much content[153]. This Court has recognised that the existence of conflicting obligations is a relevant consideration in determining whether a defendant lived up to the required standard of care[154]. In the event that a defendant's legal duties are divided between a mother and the foetus, this will bear upon whether there has been a breach of either duty. A mere potential for conflict will not prevent a duty of care arising.

75 Secondly, this argument would logically apply to exclude the duty owed by medical practitioners to unborn children in respect of pre-natal injuries. Such a duty has the same potential in every case to conflict with the duty owed to the mother. For example, a medical practitioner may decide to withhold treatment from a foetus on the basis that such treatment, while necessary to address a risk of injury to the foetus, would be harmful or conceivably harmful to the pregnant woman. However, it is not suggested that the duty of care concerning pre-natal injuries should be abolished.

76 Thirdly, invoking suggested incompatibility between duties as a reason for refusing to recognise a new duty 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.

77 *Conclusion*: In the result, the respondent owed the appellant a relevant duty of care.

The damage issue

78 *Unquantifiability of damage?* The principal argument of the respondent for rejecting this appeal was that it was impossible to quantify the appellant's loss according to the compensatory principle. This, so it was said, was because one cannot compare existence with non-existence because no one has any experience with non-existence. In the words of the philosopher Ludwig Wittgenstein, "[d]eath is not an event of life. Death is not lived through."[155] Accordingly, the

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153 See above these reasons at [69]-[70].

154 See, eg, *Giannarelli v Wraith* (1988) 165 CLR 543 at 572; *Manley v Alexander* (2005) 80 ALJR 413 at 415 [11], 419-420 [43]-[44]; 223 ALR 228 at 230-231, 236-237.

155 *Tractatus Logico-Philosophicus*, (1958) at 185 [6.43II].

respondent submitted that because damage is the gist of the tort of negligence[156], the appellant's action must fail.

79 The cogency of this argument has divided legal scholars. It appealed to Professor Harold Luntz, who stated in his influential text on damages that[157]:

> "Conceptually [wrongful life] actions are not reconcilable with tort principles, since in accordance with such principles they involve a comparison between being born with a handicap and non-existence, a comparison which it is impossible to make in money terms."

80 On the other hand, Professor John Fleming found this argument unconvincing[158]:

> "Objection [to wrongful life actions] is made on the supposedly value-free ground that it is legally and logically impossible to assess damages on a comparison between non-existence and life even in a flawed condition. Yet such comparison is not required with respect to added (medical) expenses, which are moreover recognised in parental claims. Also symbolic awards are regularly made for pain and suffering, even for loss of expectation of life."

81 *The compensatory principle*: The principle governing the assessment of compensatory damages in tort, invoked by the respondent, was stated by Lord Blackburn in *Livingstone v Rawyards Coal Co* in the following terms[159]:

> "[W]here any injury is to be compensated by damages, in settling the sum of money to be given for ... damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation".

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156 *Cox Bros (Australia) Ltd v Commissioner of Waterworks* (1933) 50 CLR 108 at 119; *John Pfeiffer Pty Ltd v Canny* (1981) 148 CLR 218 at 241-242; *Tame* (2002) 211 CLR 317 at 388 [208].

157 Luntz, *Assessment of Damages for Personal Injury and Death*, 4th ed (2002) at 641 [11.8.8]. See also Luntz and Hambly, *Torts: Cases and Commentary*, 5th ed (2002) at 433 [7.2.19].

158 Fleming, *The Law of Torts*, 9th ed (1998) at 184-185 (footnote omitted).

159 (1880) 5 App Cas 25 at 39.

82 This principle has been endorsed by this Court on many occasions[160]. However, it is subject to numerous qualifications, three of which are relevant to this appeal. First, assessing damages is always a practical exercise in approximation[161]. There can never be an *exact* equivalence between a personal injury and money. Obviously, a court cannot restore the appellant to her pre-tort position by way of an award of damages any more than it can restore plaintiffs in everyday personal injury cases to their pre-tort position.

83 Secondly, notwithstanding the compensatory principle, the courts have been willing to assign monetary values to many intangible injuries and nebulous losses. Thus, Fleming pointed to examples in the personal injury context, namely, pain and suffering and loss of expectation of life[162]. Outside the personal injury context lie many other examples including injury to intangibles such as reputation and deprivation of liberty[163]. Merely because the damage is imperfectly translated into monetary terms will not necessarily preclude a court from awarding compensation in respect of that damage. It is a mistake to think otherwise.

84 Thirdly, it has long been established that difficulties of quantification do not preclude relief where it is accepted that the plaintiff has suffered actionable damage[164]. A judge faced with a paucity of evidence must simply do the best that he or she can to assess the extent of the plaintiff's loss. So much is clear law[165]. There is no reason to conclude that it is otherwise in a wrongful life case.

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160 See, eg, *Registrar of Titles v Spencer* (1909) 9 CLR 641 at 645; *Butler v Egg and Egg Pulp Marketing Board* (1966) 114 CLR 185 at 191; *Pennant Hills Restaurants Pty Ltd v Barrell Insurances Pty Ltd* (1981) 145 CLR 625 at 646; *Todorovic v Waller* (1981) 150 CLR 402 at 412; *Johnson v Perez* (1988) 166 CLR 351 at 367, 371; *Haines v Bendall* (1991) 172 CLR 60 at 63; *Nominal Defendant v Gardikiotis* (1996) 186 CLR 49 at 54.

161 *Cattanach* (2003) 215 CLR 1 at 56 [144].

162 Regarding damages for a loss of expectation of life see especially *Skelton v Collins* (1966) 115 CLR 94 at 98.

163 Cf *Ruddock v Taylor* (2005) 79 ALJR 1534; 221 ALR 32.

164 *Fink v Fink* (1946) 74 CLR 127 at 143; *Story Parchment Co v Paterson Parchment Paper Co* 282 US 555 at 563 (1931).

165 Luntz, *Assessment of Damages for Personal Injury and Death*, 4th ed (2002) at 101-102 [1.96].

85 *Application of the compensatory principle*: It was not disputed by the appellant that the compensatory principle applies to this case. The appellant did not submit that this Court should fashion a new principle in order to do justice to her case, such as by comparing the appellant with a hypothetical "normal" person[166]. The question thus becomes whether the compensatory principle, and the necessity for the appellant to postulate that careful conduct on the part of the respondent would have averted her life of suffering, denies her a legal remedy for the accepted lack of care and the profound (and unquestioned) damage the appellant suffers and the costs she incurs every day of her life. The respondent urged the logic of his argument. However, as Justice Oliver Wendell Holmes famously observed, the life of legal systems derived from the common law of England has not been fashioned by logic alone[167]. It is the product of experience, judgment and opinion offered by the judges[168].

86 The problem in the present case is, in large part, an outcome of new technology that permits genetic and other tests to identify grave foetal defects *in utero* and medical and social changes that permit abortions to occur in some such cases that once would have been impossible, unprofessional or even criminal. To apply logic alone would be to defy the wisdom of the law in responding to a novel problem. It is necessary to draw on past examples expressed in very different circumstances. But it is also necessary to adapt those principles to the circumstances of the present case in the present time[169].

87 S*pecial damages for needs created*: It is important to observe that the "impossible comparison" argument, as Fleming pointed out[170], falls away entirely in so far as special damages are concerned[171]. This includes damages under the principle in *Griffiths v Kerkemeyer*[172]. Because a plaintiff in a wrongful life action would not have *any* economic needs had the defendant exercised

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166 Cf *Waller* [2006] HCA 16 at [39].

167 Holmes, *The Common Law*, (1881) at 1.

168 *CSR Ltd v Eddy* (2005) 80 ALJR 59 at 83 [91]; 222 ALR 1 at 29. Cf *Scott v Davis* (2000) 204 CLR 333 at 373 [121].

169 *CSR* (2005) 80 ALJR 59 at 83-84 [95]; 222 ALR 1 at 30.

170 See above these reasons at [80].

171 Cf Pace, "The Treatment of Injury in Wrongful Life Claims", (1986) 20 *Columbia Journal of Law and Social Problems* 145 at 156-158.

172 (1977) 139 CLR 161. See *CSR* (2005) 80 ALJR 59 at 71 [39], 82-83 [90], 84-85 [100], 87 [111]; 222 ALR 1 at 13, 28, 31, 34.

reasonable care, a loss in this regard is directly caused by the defendant's negligent acts and omissions. In this respect, at least, the assessment of the appellant's damages presents no unusual or peculiar problem whatsoever. Courts in some jurisdictions in the United States have acknowledged this fact and awarded special damages in wrongful life actions whilst denying general damages[173].

88 This approach has been criticised on the basis that it would be incongruous to award *only* special damages. For instance, in *Turpin*[174], in the Supreme Court of California, Mosk J, who would have awarded both general and special damages, reasoned that an "order is internally inconsistent which permits a child to recover special damages for a so-called wrongful life action, but denies all general damages for the very same tort"[175]. In *Procanik v Cillo*, Schreiber J, who would have rejected wrongful life actions *in toto*, stated that the "position that the child may recover special damages despite the failure of his underlying theory of wrongful life violates the moral code underlying our system of justice from which the fundamental principles of tort law are derived"[176].

89 A variant of this criticism is stated by the Court of Appeals of Michigan in *Strohmaier v Associates in Obstetrics & Gynecology PC*[177]:

> "The special damages that are claimed cannot be considered in a vacuum separate from the reality that, but for the alleged negligence, plaintiff would not exist. Plaintiff's damages, general and special, consist of the difference between his present life with defects and no life at all. Plaintiff's economic liabilities, like the daily pain and suffering he must endure, are a part and parcel of his life with birth defects. Therefore, this Court cannot view those economic losses apart from the incalculable benefit of life conferred upon plaintiff by the events antecedent to his birth. Consequently, we conclude that plaintiff's special damages are as incognizable as any general damages for pain and suffering."

90 Such criticisms are not convincing. The reasoning in *Strohmaier* offends the principle that a collateral benefit under one head of damage, enjoyed as a result of the defendant's tort, cannot be applied to offset, still less to destroy, a

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173 See above these reasons at [61].

174 See above these reasons at [61].

175 182 Cal Rptr 337 at 349 (1982).

176 478 A 2d 755 at 772 (1984).

177 332 NW 2d 432 at 435 (1982).

separate head[178]. Furthermore, it would be a curious result if special damages were denied for the needs created because of difficulties arising in the assessment of general damages when special damages will normally constitute the greater part of the damages claimed in a wrongful life action.

91 A claim for damages under one head of damage can be denied while allowing the residue of a claim. Consider, for instance, an action that includes a claim for damages in respect of a diminution of earning capacity following negligently inflicted personal injury. If that lost capacity would have been applied to derive earnings in contravention of the criminal law, a claim for damages in respect of that loss may be denied[179]. Yet damages may be awarded under other heads.

92 In short, criticisms of awarding special damages while denying general damages buy into a specious "all or nothing" mentality. I know of no other situation where a claim for damages is denied in totality, regardless of the fact that quantifiable damage has been sustained under certain heads, merely because objections exist to awarding damages under another head. Appealing to "the moral code underlying our system of justice"[180] in explanation for so doing hardly furnishes a compelling reason for such an approach.

93 It follows that by ordinary principles, at least special damages are recoverable in a case such as the present. There is no difficulty in the computation of such damage. In my view this application of basic principles of law discloses starkly that the impediment to recovery is founded in policy considerations, not law.

94 But are general damages recoverable in accordance with the compensatory principle?

95 *Comparing existence and non-existence*: The proposition that it is impossible to value non-existence is undermined by the fact that, for some time, the courts have been comparing existence with non-existence in other legal settings. Thus, courts have declared lawful the withdrawal of life-sustaining

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178 *Cattanach* (2003) 215 CLR 1 at 37-39 [84]-[91]; *Restatement (Second) of Torts*, §920, comment *b*.

179 *Meadows v Ferguson* [1961] VR 594; *Burns v Edman* [1970] 2 QB 541; *Lee v McClellan* (1995) 127 FLR 383.

180 *Procanik* 478 A 2d 755 at 772 (1984).

medical treatment from severely disabled newborns[181] and adults[182] and from the terminally ill[183]. The 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[184]. Such cases are distinguishable from the present. Unlike the case at hand, they are not concerned with assigning a monetary figure to the difference between existence and non-existence. However, one cannot escape the fact that they entail a judicial comparison between existence and non-existence. Furthermore, some courts which have denied wrongful life actions have done so not because the damage cannot be quantified but because they consider that existence will always be preferable to non-existence[185]. As Professor Harvey Teff points out, "[p]aradoxically, this very premise logically entails the measurability *in principle* of non-existence"[186].

96 *Guidance from another context*: The appellant has unarguably suffered, and continues to suffer, significant pain and discomfort which she would not have had to endure had the respondent acted with reasonable care. It would be wrong to deny compensation where resulting damage has occurred merely because logical problems purportedly render that damage insusceptible to precise or easy quantification. As Pollock J stated in *Procanik*[187], reflecting the observations of Holmes J[188] already mentioned:

> "Law is more than an exercise in logic, and logical analysis, although essential to a system of ordered justice, should not become an instrument of injustice. Whatever logic inheres in permitting parents to recover for the cost of extraordinary medical care incurred by a birth-

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181 See, eg, *In re J (A Minor) (Wardship: Medical Treatment)* [1991] Fam 33.

182 See, eg, *Re BWV; Ex parte Gardner* (2003) 7 VR 487; *Re B (adult: refusal of medical treatment)* [2002] 2 All ER 449.

183 See, eg, *Airedale NHS Trust v Bland* [1993] AC 789.

184 *In re A (Children)* [2001] Fam 147.

185 See, eg, *Blake* 698 P 2d 315 at 322 (1984).

186 Teff, "The Action for 'Wrongful Life' in England and the United States", (1985) 34 *International and Comparative Law Quarterly* 423 at 433 (emphasis in original). See also *Goldberg v Ruskin* 499 NE 2d 406 at 411 (1986).

187 478 A 2d 755 at 762 (1984). See also at 765, 771.

188 See above these reasons at [85].

> defective child, but in denying the child's own right to recover those expenses, must yield to the injustice of that result."[189]

97 The pitfalls of adopting an inflexible approach on this issue can be seen from another legal context where a supposedly impossible comparison was initially invoked to justify acceptance of a wrong without a remedy. Several cases in the United Kingdom raised the question whether a pregnant woman, who was dismissed from her employment by reason of her becoming pregnant, was entitled to relief under the *Sex Discrimination Act* 1975 (UK) ("the SDA"). The statutory test for unlawful discrimination required a comparison of the claimant's treatment with the treatment which an employee of the other sex would have received in similar circumstances[190].

98 In *Turley v Allders Department Stores Ltd*[191] Bristow J, applying the statutory formula, held that claims for relief under the SDA by women who had been dismissed from their employment, allegedly on the grounds of their becoming pregnant, must fail because the comparison contemplated by the SDA was impossible because there is no masculine equivalent of a pregnant woman. Bristow J stated[192]:

> "In order to see if [the applicant] has been treated less favourably than a man the [SDA requires one to] compare like with like, and you cannot. When she is pregnant a woman is no longer just a woman. She is a woman, as the Authorised Version of the Bible accurately puts it, with child, and there is no masculine equivalent."

99 The issue subsequently arose in *Hayes v Malleable Working Men's Club and Institute*[193]. In that case, Waite J made the following remarks about the decision in *Turley*[194]:

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189 See also *Harriton* (2004) 59 NSWLR 694 at 719-720 [149]; *Berman* 404 A 2d 8 at 12 (1979); *Curlender* 165 Cal Rptr 477 at 488 (1980); *Goldberg* 499 NE 2d 406 at 410-411 (1986).

190 SDA, s 1(1).

191 [1980] ICR 66.

192 [1980] ICR 66 at 70.

193 [1985] ICR 703.

194 [1985] ICR 703 at 705.

> "The logic appears flawless. Sex discrimination consists (according to its statutory definition) of treatment of a member of one sex less favourable than the treatment given to a member of the other sex. If you dismiss a woman on the ground of her pregnancy, no one can say that you have treated her less favourably than you would treat a man, because nature has ensured that no man could ever be dismissed upon the same ground."

100 Notwithstanding these concessions, Waite J declined to follow *Turley* on the ground that, on his reading of the SDA, a strict comparison was not required. His Lordship's approach was later confirmed by the English Court of Appeal in *Webb v EMO Air Cargo (UK) Ltd*[195]. In that case, Glidewell LJ stated that holding that the dismissal of a pregnant woman was not contrary to the SDA because of the impossibility of making a comparison "would be so lacking in fairness and in what I regard as the proper balance to be struck in the relations between employer and employee that we should only [accede to that argument] if we are compelled by the wording of the [SDA] to do so"[196].

101 The judicial discourse in the State Supreme Court in the present case and in other like Australian and overseas cases has been permeated by a search for the appropriate "comparator". It looms large in the reasons of the majority in this Court[197]. It has resulted in a conclusion that such a "comparator" does not exist because the posited "comparator" is a foetus whose life would have been terminated by a medical practitioner acting with due care. To this apparently logical argument the foregoing cases afford two answers that, for me, are applicable and compelling. First, the comparator contemplated in this case, non-existence, is purely hypothetical – a fiction, a creature of legal reasoning only. No one is now suggesting the actual death of the appellant. Indeed, it is her very existence that gives rise to the pain, suffering and expense for which she brings her action. And secondly, there are limits to the insistence on this fictitious comparator where doing so takes the law into other inconsistencies and to a conclusion that is offensive to justice and the proper purpose of the law of negligence. A medical practitioner who has been neglectful and caused damage escapes scot-free. The law countenances this outcome. It does nothing to sanction such carelessness. It offers no sanction to improve proper standards of care in the future.

102 *Can non-existence ever be preferable?* It is often assumed in the cases that the only obstacle posed by the compensatory principle to the appellant is that

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195 [1992] 2 All ER 43.

196 [1992] 2 All ER 43 at 52.

197 Reasons of Hayne J at [167]-[172], reasons of Callinan J at [205], reasons of Crennan J at [252]-[253].

of comparing existence and non-existence. However, there is an additional hurdle created by the principle.

103 In order to recover damages, the compensatory principle requires a plaintiff to show he or she has lost something as a result of the defendant's tort. In other words, a plaintiff needs to establish that he or she is worse off in some respect than he or she would otherwise have been. In ordinary personal injury actions, it is not necessary for a plaintiff to establish that, all in all, his or her life is worse than it would have been but for the defendant's tort[198]. A plaintiff who suffers an injury, which is not sufficiently severe to lead him or her to think that the quality of life is materially less than it would have been but for that injury, is still entitled to bring an action for, and recover damages in respect of, that injury. The compensatory principle does not put such a person out of court.

104 The position is somewhat different in the case of wrongful life actions. The compensatory principle, if applied in full rigour, requires the appellant to show that, because of the respondent's negligence, she is worse off than she otherwise would have been. Yet, the only way for a person who owes her existence to the respondent's negligence to establish a loss is to show that the alternative, non-existence, would have been preferable[199]. In order to succeed the appellant is required to show that, in light of her present and prospective suffering, non-existence would (in retrospect) have been preferable. In extreme cases, it may be a valid contention[200]. Clearly, people can sometimes express a preference for non-existence. The law has recognised this by declaring it lawful, in certain circumstances, for medical practitioners to accede to requests by the terminally ill to cease treatment that is keeping them alive but at the price of subjecting them to intolerable pain and suffering[201]. It is also reflected in changes to the law on suicide[202].

105 Furthermore, it is arguable that a life of severe and unremitting suffering is worse than non-existence. 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

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198 Stretton, "The Birth Torts: Damages for Wrongful Birth and Wrongful Life", (2005) 10 *Deakin Law Review* 319 at 352.

199 See *Harriton* (2004) 59 NSWLR 694 at 704-705 [46]-[50]; *Gleitman* 227 A 2d 689 at 711 (1967).

200 See *Turpin* 182 Cal Rptr 337 at 345-346 (1982).

201 See above these reasons at [95].

202 See, eg, *Crimes Act* 1900 (NSW), s 31A.

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. In the Supreme Court of the United States, Brennan J suggested that control over the moment and circumstances of death was one of the most important of all rights. He thereby clearly postulated the right in some circumstances to be protected by the law in giving effect to such a preference[203].

106 A more pressing problem than that of deciding the question of whether non-existence can sometimes be preferable to existence is the difficulty of deciding when this is factually so. Spigelman CJ adverted to this difficulty, stating[204]:

> "The identification of what is to be regarded as 'acceptable' physical characteristics of children is a field into which the law should not, at least at this stage of the development of knowledge, in my opinion, enter. Specifically, the law should be very slow to decide how much 'disability' is to be regarded as acceptable. Is, for example, hereditary deafness enough?"[205]

107 Professor Stephen Todd has voiced similar concerns[206]:

> "Do we really want courts deciding whether a disability is sufficiently serious to justify a mother making a decision to terminate a pregnancy? Where exactly might the line be drawn? And why? If the court does not make the decision then it must depend solely on that of the mother or father or both. Many parents, if given the choice, would decide to terminate pregnancies where the disabilities fall far short of those suffered by [the appellant]. Indeed, supposedly minor or cosmetic disabilities can have a very serious impact, both socially and financially, on the kind of life that the child in question might expect to live."

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203 *Cruzan v Director, Missouri Department of Health* 497 US 261 at 302-303 (1990). Cf Price, "Fairly Bland: an alternative view of a supposed new 'Death Ethic' and the BMA guidelines", (2001) 21 *Legal Studies* 618; Keown, "Restoring the sanctity of life and replacing the caricature: a reply to David Price", (2006) 26 *Legal Studies* 109.

204 (2004) 59 NSWLR 694 at 702 [31].

205 Regarding hereditary deafness see *Turpin* 182 Cal Rptr 337 (1982) discussed above these reasons at [61].

206 Todd, "Wrongful Conception, Wrongful Birth and Wrongful Life", (2005) 27 *Sydney Law Review* 525 at 540.

108 While I acknowledge these arguments, sight should not be lost of the fact that courts are continually concerned with such line drawing[207]. Furthermore, neither the appellant nor her parents are asking the courts to declare lawful the termination of her existence. To this extent the hypothesis of non-existence is an abstract one suggested by an established legal principle. In fact, it is a red herring to claim that it presents, in a case of the present kind, the agony of judicial decision over termination of life. In our society such agony normally happens in medical circumstances. It usually involves medical practitioners and patients rather than judges. The spectre of termination in the appellant's case is now a theoretical construct. It is not a practical matter.

109 *Conclusion on damages*: For the foregoing reasons, subject to what follows, I would hold that, on the birth of the child in a case such as the present, general damages for proved pain and suffering and special damages for needs created by the negligence of a medical practitioner in respect of a foetus *in utero* are recoverable in an action brought by or for that child.

Policy issues and their resolution

110 *Supposed policy arguments*: It remains for me to consider whether any policy reasons exist that would warrant rejecting wrongful life actions although they are consistent with established tort doctrine. Numerous policy arguments have been suggested in the courts below and in other cases. None of these arguments is convincing. Some of them are premised on a misunderstanding of the tort of negligence. Most depend upon what I regard as a distorted characterisation of wrongful life claims. A number seem to rest on religious beliefs rather than on the application of legal doctrine in a secular community. In today's world a steady adherence to secularism in the law is more important to a mutually respectful civil society than before[208]. Judges have no right to impose their religious convictions (if any) on others who may not share those convictions[209].

111 *The suggested duty to kill*: One of the more absurd arguments that has been raised against wrongful life actions (possibly stemming from the inapt label) is that they impose a duty to kill. Stephenson LJ assumed as much in

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207 *Cattanach* (2003) 215 CLR 1 at 61 [158]; *Insurance Commission (WA) v Container Handlers Pty Ltd* (2004) 218 CLR 89 at 127 [116].

208 *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95 at 122 [76].

209 *Cattanach* (2003) 215 CLR 1 at 53 [137].

McKay when he posed the question[210] "how can there be a duty to take away life?" Similarly, in *Jones*, Macaulay J stated[211] "I cannot logically reconcile the duty owed to the mother predicated upon the mother's right to choose whether or not to abort *with a duty owed to the foetus to terminate life*". Sometimes, this charge is made in a more qualified form. For instance, in the present proceedings, Ipp JA in the Court of Appeal suggested that wrongful life actions involve "the proposition that the foetus should have been terminated"[212].

112 It is axiomatic that wrongful life actions do not entail the proposition that the foetus *should* have been terminated. Less still do they impose a *duty* to kill. It would be impossible to comply with any such duty considering that medical practitioners can never compel an expectant mother to undergo an abortion[213]. A defendant in a wrongful life action will discharge his or her duty of care 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. Sometimes, the duty can be discharged by doing nothing[214]. If a mother chooses to continue a pregnancy or to conceive in the first place where a proper, careful and informative warning has been given, that is her decision to make[215]. No liability will accrue to the health care provider if a mother adopts such a course having been accurately advised of the risks and competently treated.

113 A related argument for rejecting wrongful life actions is that, as a practical matter, such actions would impose pressure on medical professionals to counsel women to undergo abortions[216]. For instance, in a United Kingdom Royal Commission report, it is claimed that, if the courts countenanced wrongful life

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210 [1982] QB 1166 at 1179.

211 (1999) 44 CCLT (2d) 313 at 320 [21] (emphasis added).

212 *Harriton* (2004) 59 NSWLR 694 at 742 [301].

213 Cf *St George's Healthcare NHS Trust v S* [1999] Fam 26.

214 As was held in *Neindorf* (2005) 80 ALJR 341; 222 ALR 631. See especially at 80 ALJR 341 at 346 [14]; 222 ALR 631 at 635.

215 *Harriton* (2004) 59 NSWLR 694 at 701 [27]; *McKay* [1982] QB 1166 at 1192.

216 See, eg, reasons of Callinan J at [205]. The same argument has been advanced in the wrongful birth context: see, eg, *Udale v Bloomsbury Area Health Authority* [1983] 1 WLR 1098 at 1109; [1983] 2 All ER 522 at 531.

actions, "a doctor would be obliged to urge a woman to have an abortion if there was the slightest chance that her child would be born defective"[217].

114 Contentions of this nature, like the suggestion that wrongful life actions would impose a duty to kill, betray a fundamental misunderstanding of the principles of the tort of negligence. They overlook the tests of reasonable foreseeability and reasonable care. Wrongful life actions could not arise for failing to persuade women to undergo abortions. Nor could they lie, as it is sometimes suggested[218], where there was a failure by the defendant to prevent a child from being born. This is simply not what a duty of care in negligence entails.

115 In *McKay*, Griffiths LJ, subject to one qualification, accurately expressed the legal duty that recognising wrongful life actions would create[219]:

> "The decision whether or not to have an abortion must always be the mother's; the duty of the medical profession can be no more than to advise her of her right to have an abortion and of the pros and cons of doing so. If there is a risk that the child will be born deformed, that risk must be explained to the mother, but it surely cannot be asserted that the doctor owes a duty to the foetus to urge its destruction. Provided the doctor gives a balanced explanation of the risks involved in continuing the pregnancy, including the risk of injury to the foetus, he cannot be expected to do more, and need have no fear of an action being brought against him."

116 I would endorse this passage with the exception of the proposition that, if there is a risk of deformity, that risk must be explained. Whether in a particular case a possible risk requires investigation or explanation depends on available technology, proper practice and application of the tests of reasonable foreseeability and reasonable care.

117 *"Life" as a legal injury*: Most of the decisions in which an action for wrongful life has been denied have relied upon the argument that "life" itself cannot amount to a legal injury because so to hold would violate the "sanctity of

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217 Royal Commission on Civil Liability and Compensation for Personal Injury, *Report: Volume One*, (1978) Cmnd 7054-I at 311 [1485]. See also Law Commission, *Report on Injuries to Unborn Children*, Law Com No 60, (1974) Cmnd 5709 at 34 [89].

218 See, eg, Watson, "Edwards v Blomeley; Harriton v Stephens; Waller v James: Wrongful Life Actions in Australia", (2002) 26 *Melbourne University Law Review* 736 at 736.

219 [1982] QB 1166 at 1192.

human life"[220]. The special features and uniqueness of human life are indeed fundamental principles in the law[221]. But they do not represent absolute principles. They are subject to numerous qualifications. For example, in certain circumstances, such as in some cases of self-defence, it is lawful to kill another human being. The fact that life-sustaining medical treatment can be withdrawn or withheld, the limited acceptance of abortion, and the abrogation of the common law offences of suicide and attempted suicide[222] in some jurisdictions are further examples of qualifications to the principles.

118 This argument against allowing actions for wrongful life depends upon a false characterisation of such actions. It is not life, as such, which a plaintiff in a wrongful life action claims is wrongful. It is his or her present suffering as a life in being[223]. Nor, for reasons which I have set out, does the plaintiff assert that a duty to kill should be imposed on defendants[224]. Once the real character of an action for wrongful life is understood, it is apparent that it does not infringe the special precious features of human life.

119 *Effect on disabled members of society*: In *McKay*, Stephenson LJ asserted that allowing wrongful life actions "would mean regarding the life of a handicapped child as not only less valuable than the life of a normal child, but so much less valuable that it was not worth preserving"[225]. This argument is also without justification. Like the argument based on the principle of the sanctity of human life, it evaporates when what is at stake in a wrongful life action is properly understood.

120 Wrongful life actions arise out of allegedly negligent conduct which causes suffering. Were this Court to allow this appeal, the decision would contribute to the requirement that health care providers such as the respondent exercise reasonable care to detect and warn of risks which a foetus faces. This

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220 See, eg, *McKay* [1982] QB 1166 at 1180, 1188.

221 International Covenant on Civil and Political Rights [1980] *Australian Treaty Series* 23, Art 6.1. See also First Optional Protocol to the International Covenant on Civil and Political Rights [1991] *Australian Treaty Series* 39; Universal Declaration of Human Rights, Art 3.

222 See generally, Williams, *The Sanctity of Life and the Criminal Law*, (1958), ch 7. Cf *Cruzan* 497 US 261 at 302-303 (1990).

223 See above these reasons at [10].

224 See above these reasons at [111]-[112].

225 [1982] QB 1166 at 1180. See also reasons of Crennan J at [258]-[263].

would say nothing about how disabled individuals, such as the appellant, once born, are to be treated[226]. Accordingly, there is no support for the suggestion[227] that actions for wrongful life are inconsistent with legislation prohibiting discrimination on the basis of disability.

121 It could not seriously be suggested that awarding damages to an infant who sustained pre-natal injuries would demean that infant or lower him or her in the eyes of others. This is so even if, because of the extent of those injuries and before birth, medical opinion would have advised the infant's mother of her entitlement to terminate her pregnancy. How is such an infant materially different from an infant bringing an action for wrongful life? As Kaus J said in *Turpin*[228]:

> "[I]t is hard to see how an award of damages to a severely handicapped or suffering child would 'disavow' the value of life or in any way suggest that the child is not entitled to the full measure of legal and nonlegal rights and privileges accorded to all members of society."

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

123 *A supposed problem of "minor defects"*: The respondent submitted that, if wrongful life actions were upheld in a case such as the present, it would be possible that children, born with putative "minor defects" or some "mercifully trivial abnormality"[229], might claim damages in respect of such defects and that it would be inappropriate for the law to accede to such a claim.

124 This concern is also meritless. Mason P rightly pointed out that it "trivialises the [appellant's claim] to suggest that accepting the cause of action would entitle a child born with a very minor disability, such as a squint, to sue

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226 *Hester* 733 NE 2d 1161 at 1168 (2000); Grainger, "Wrongful Life: A Wrong Without a Remedy", (1994) 2 *Tort Law Review* 164 at 168.

227 Reasons of Crennan J at [262]-[263].

228 182 Cal Rptr 337 at 344-345 (1982).

229 *McKay* [1982] QB 1166 at 1180-1181.

the doctor for not advising an abortion"[230]. The catastrophic injuries suffered by the appellant, and by persons like her, cannot be equated with a squint. To suggest that the appellant's disabilities are analogous to a squint is absurd and insulting. However, there are even more profound problems with this argument.

125 In terms of legal principle, minor injuries are not apprehended as categorically different from non-minor injuries in ordinary personal injury cases. It is not apparent why such a distinction is necessary as a disqualification in wrongful life actions. None of the arguments militating against recognising wrongful life actions apply with more force to wrongful life actions brought in respect of "minor defects".

126 Even if there were a convincing reason of principle for regarding the magnitude of the disability as going other than to the extent of the damage (a doubtful proposition), there would be insuperable practical hurdles confronting wrongful life actions brought in respect of "minor defects". For one thing, a plaintiff who suffers from "minor defects" will hardly be able to show, as required by the compensatory principle[231], that non-existence would have been preferable. Such actions would probably also encounter difficulties in establishing causation, that is, that if properly advised of the risk of congenital defects, the mother would have aborted her pregnancy. Equally, proving breach of the duty of care would be problematic. For instance, in wrongful life actions arising out of a failure to diagnose or a failure to warn, depending on the evidence, it may often be reasonable for the defendant to abstain from conducting tests for "minor defects" or from warning the prospective mother about such risks. In the case of some parents, there would be moral and religious inhibitions that would restrain resort to termination for a defect such as a squint.

127 *Effect on familial relationships*: An argument against wrongful life actions which has enjoyed support in the cases is that, if wrongful life actions against medical practitioners are countenanced, the logical corollary is that an action should also lie against the child's mother who refuses to undergo an abortion in circumstances where the mother receives competent medical advice that, in all probability, her child would be disabled. Thus, in *McKay*, Stephenson LJ stated that permitting wrongful life actions would entail "the opening of the courts to claims by children born handicapped against their

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230 (2004) 59 NSWLR 694 at 717 [135].

231 See above these reasons at [104].

mothers for not having an abortion"[232]. In a similar vein, in *Curlender*, Jefferson PJ, with whom Lillie and Rimerman JJ concurred, stated[233]:

> "If a case arose where, despite due care by the medical profession in transmitting the necessary warnings, parents made a conscious choice to proceed with a pregnancy, with full knowledge that a seriously impaired infant would be born, that conscious choice would provide an intervening act of proximate cause to preclude liability insofar as defendants other than the parents were concerned. Under such circumstances, we see no sound public policy which should protect those parents from being answerable for the pain, suffering and misery which they have wrought upon their offspring."

128 The possibility of litigation of such a kind has occasioned expression of judicial revulsion[234]. It has been condemned on the grounds that it would have the "potential for the disturbance of family life [and] the fabric of society"[235] and "provide a basis for ... interfamilial [sic] warfare"[236].

129 The flaws in this reasoning are so obvious that they scarcely require expression[237]. First, it is not unknown in Australia for children to sue their parents in tort. Australian law does not recognise any principle of parental immunity in tort[238]. Thus, actions against parents by their children are not uncommon in the context of motor vehicle accidents. It has been held that children even enjoy a right of action against their mothers in respect of pre-natal

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232 [1982] QB 1166 at 1181. See also at 1188 per Ackner LJ.

233 165 Cal Rptr 477 at 488 (1980).

234 Reasons of Callinan J at [205].

235 *Edwards* [2002] NSWSC 460 at [119].

236 Ploscowe, "An Action for 'Wrongful Life'", (1963) 38 *New York University Law Review* 1078 at 1080.

237 A similar argument has been raised in the wrongful birth context. In *Cattanach* it was rejected as "speculation" ((2003) 215 CLR 1 at 36 [79] per McHugh and Gummow JJ) and "judicial fantasy" ((2003) 215 CLR 1 at 56 [145] of my own reasons).

238 *Hahn v Conley* (1971) 126 CLR 276.

injuries sustained as a result of the mother's negligent driving[239]. There is no evidence that such proceedings have resulted in any disintegration of the family.

130 It is true that there are distinctions between actions seeking damages in respect of personal injuries and actions for wrongful life. Most notably, the latter, unlike the former, involve the proposition that, but for the negligence of the defendant, the plaintiff would not have existed. Yet the suggestion that, when compared with run-of-the-mill personal injury actions, wrongful life actions are liable to provoke familial discord is highly contestable. It is possible, perhaps even likely, that a child who suffers from debilitating disabilities might hold greater resentment towards his or her mother if those disabilities flowed from, say, the mother's negligent driving, rather than from a decision not to submit to an abortion once the mother discovered that her child would suffer from such disabilities.

131 Secondly, this argument ignores the reality of tort litigation. The plaintiff in a wrongful life case is typically a profoundly disabled infant who has little, if any, personal awareness of the proceedings. Accordingly, it is difficult to see how a wrongful life action, if exceptionally commenced against the mother, would be apt to fracture the familial relationship. The reality is that wrongful life actions, like wrongful birth actions, are about money rather than love or family feelings[240]. For such actions to be viable in the first place there normally has to be an insurer or other deep pocket.

132 Thirdly, just because it is held that a wrongful life action lies against a negligent health care provider, it does not necessarily follow that such an action would lie against the mother. There is a clear difference in the relationship between a child and a health care provider, on the one hand, and between a child and his or her mother, on the other. Particularly important to the former is the professional association involved. In the latter, considerations of the mother's own autonomy and bodily integrity would have to be given full weight[241]. The relationships are fundamentally different. If this Court were to hold that a wrongful life action existed in the present proceedings against the respondent, that decision would say nothing at all about whether such an action lay against the mother.

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239 See, for example, *Lynch v Lynch* (1991) 25 NSWLR 411; *Bowditch v McEwan* [2003] 2 Qd R 615.

240 *Cattanach* (2003) 215 CLR 1 at 56 [145]; *Hester* 733 NE 2d 1161 at 1168 (2000).

241 *Dobson v Dobson* [1999] 2 SCR 753 at 768-769 [23].

133 Fourthly, as a practical matter, it is highly unlikely that any court would conclude that a mother's decision to decline to undergo an abortion would constitute a breach of any duty of care owed to the foetus[242]. Such a duty would only be breached if the trier of fact decided that a reasonable person in the mother's position would have terminated the pregnancy. While the gravity of the harm and the likelihood of the risk of injury might be given weight in favour of a finding of a breach of duty, the right of a woman to be free to make unencumbered choices regarding such serious questions as procreation and abortion would be an overriding consideration pointing against breach[243].

134 *The influence of legislative change*: Since 2002, the legislatures of all Australian jurisdictions have enacted legislation[244] that has reduced, or eliminated, the ability of plaintiffs to sue in tort. The chief stated purpose of such legislation has been to reduce the cost of insurance premiums[245], particularly for public liability and medical negligence insurance[246]. A national inquiry, established to make recommendations on how this objective should be realised, was required to proceed on the assumption that "[t]he award of damages for

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242 See *Emeh v Kensington and Chelsea and Westminster Area Health Authority* [1985] QB 1012 at 1019, 1024-1025, 1027-1028. Although cf Glover, *Causing Death and Saving Lives*, (1977) at 147-149.

243 Waters, "Wrongful Life: The Implications of Suits in Wrongful Life Brought by Children against their Parents", (1981-1982) 31 *Drake Law Review* 411; Capron, "Tort Liability in Genetic Counseling", (1979) 79 *Columbia Law Review* 618 at 662-666.

244 The most relevant legislation includes the *Trade Practices Amendment (Liability for Recreational Services) Act* 2002 (Cth); *Civil Liability Act* 2002 (NSW); *Civil Liability Amendment (Personal Responsibility) Act* 2002 (NSW); *Wrongs and Other Acts (Public Liability Insurance Reform) Act* 2002 (Vic); *Wrongs and Other Acts (Law of Negligence) Act* 2003 (Vic); *Personal Injuries Proceedings Act* 2002 (Q); *Civil Liability Act* 2003 (Q); *Civil Liability Act* 2002 (WA); *Volunteers (Protection from Liability) Act* 2002 (WA); *Wrongs (Liability and Damages for Personal Injury) Amendment Act* 2002 (SA); *Law Reform (Ipp Recommendations) Act* 2004 (SA); *Civil Liability Act* 2002 (Tas); *Civil Law (Wrongs) Act* 2002 (ACT); *Personal Injuries (Liabilities and Damages) Act* 2003 (NT); *Personal Injuries (Civil Claims) Act* 2003 (NT).

245 *Harriton* (2004) 59 NSWLR 694 at 722 [164] per Mason P.

246 Spigelman, "Negligence and insurance premiums: Recent changes in Australian law", (2003) 11 *Torts Law Journal* 291 at 293.

personal injury has become unaffordable and unsustainable as the principal source of compensation for those injured through the fault of another"[247].

135 In the present case, in the Court of Appeal, Ipp JA suggested that, in this legislative climate, it would be wrong for a court to expand the range of interests protected by tort law by recognising an action for wrongful life. His Honour said[248]:

> "Generally speaking, at the present time, when legislatures throughout the country have legislated or have foreshadowed legislation restricting liability for negligence, it would be quite wrong to expand, by judicial fiat, the law of negligence into new areas."

136 Before considering this issue, it is appropriate to make some preliminary observations about the legislative intervention. First, while there has been a long history of legislation affecting the ambit of the law of torts[249], on the whole, previous changes have been context-specific and supplementary in nature. However, the legislation identified by Ipp JA, by making substantial alterations to the principles of reasonable foreseeability[250] and causation[251], has intruded upon the doctrine of the common law of torts[252].

137 Secondly, although all Australian jurisdictions have enacted legislation sharing a similar general objective, there are significant differences between the laws of the several jurisdictions. This has resulted in a reduction of the earlier relative uniformity of the law of torts as emanating from this Court. This country

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247 Terms of Reference to the Review of the Law of Negligence: see Panel of Eminent Persons, *Review of the Law of Negligence: Final Report*, (2002) at ix.

248 *Harriton* (2004) 59 NSWLR 694 at 746 [337] (citations omitted). Studdert J in *Edwards* [2002] NSWSC 460 at [120] also appears to have taken this consideration into account in denying recovery. Cf McHugh, "Introduction: Sydney Law Review Torts Special Issue", (2005) 27 *Sydney Law Review* 385 at 390-391.

249 Spigelman, "Negligence: the Last Outpost of the Welfare State", (2002) 76 *Australian Law Journal* 432 at 437-440.

250 See, eg, *Civil Liability Act* 2002 (NSW), s 5B(1).

251 See, eg, *Civil Liability Act* 2002 (NSW), s 5D.

252 McDonald, "Legislative Intervention in the Law of Negligence: The Common Law, Statutory Interpretation and Tort Reform in Australia", (2005) 27 *Sydney Law Review* 443 at 446-448.

now faces the real prospect of a "crazy quilt" of tort legislation, akin to that existing in the United States[253].

138 Thirdly, the legislation is fundamentally restrictive. The obstacles for plaintiffs seeking damages in tort, especially where the damages are sought in respect of personal injury, have been considerably increased[254]. For instance, in New South Wales, the "far-fetched or fanciful" formula for reasonable foreseeability stated by Mason J in *Wyong Shire Council v Shirt*[255] has been replaced by one of "not insignificant"[256]. This Court's decision in *Rogers v Whitaker*[257] has been partly confined. The principle in *Bolam v Friern Hospital Management Committee*[258] has been resurrected in a modified form[259]. Exemplary and aggravated damages have been abolished in personal injury cases[260]. Of special relevance to the present appeal is the hostile legislative reaction to this Court's decision in *Cattanach*[261]. Provisions preventing recovery of damages in wrongful birth cases have been enacted in New South Wales[262], Queensland[263] and South Australia[264].

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253 Sugerman, "United States Tort Reform Wars", (2002) 25 *University of New South Wales Law Journal* 849 at 852.

254 See Spigelman, "Tort law reform: An overview", (2006) 14 *Tort Law Review* 5 at 11-12.

255 (1980) 146 CLR 40 at 47.

256 See *Civil Liability Act* 2002 (NSW), s 5B(1).

257 (1992) 175 CLR 479.

258 [1957] 1 WLR 582; [1957] 2 All ER 118.

259 See *Civil Liability Act* 2002 (NSW), s 5O.

260 See *Civil Liability Act* 2002 (NSW), s 21.

261 (2003) 215 CLR 1.

262 *Civil Liability Act* 2002 (NSW), s 71.

263 *Civil Liability Act* 2003 (Q), s 49A.

264 *Civil Liability Act* 1936 (SA), s 67.

139 The notion that statutory provisions can cause the common law to alter its course is not new[265]. In *McKay*, the English Court of Appeal was clearly influenced by the then recent enactment of the British legislation prohibiting wrongful life actions[266]. In *Pilmer v Duke Group Ltd (In Liq)*[267] this Court considered whether common law notions of contributory negligence, affected by apportionment legislation enacted in all Australian jurisdictions, could diminish awards of equitable compensation for breach of fiduciary duty. Unanimously, that question was answered in the negative[268]. That answer was given principally on the ground that to admit a "defence" of contributory negligence in that context would be opposed to the character of fiduciary duties[269]. Although I agreed with that conclusion, I acknowledged that both equity and the common law were susceptible to influence by statutory changes[270]:

> "I do not consider that equitable remedies (any more than those of the common law) are chained forever to the rules and approaches of the past. Nor do I find the notion of developing equitable rules (any more than those of the common law[271]) by reference to statutory developments as uncongenial as, on occasion, this Court has done[272]. The idea that the common law develops in 'imitation' of statutes is not a recent one[273]. A

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265 See Gummow, *Change and Continuity: Statute, Equity, and Federalism*, (1999) at 11-18; Atiyah, "Common Law and Statute Law", (1985) 48 *Modern Law Review* 1; Pound, "Common Law and Legislation", (1908) 21 *Harvard Law Review* 383.

266 See above these reasons at [51].

267 (2001) 207 CLR 165 at 230 [170].

268 (2001) 207 CLR 165 at 201-202 [86]-[87], 228-232 [165]-[176].

269 (2001) 207 CLR 165 at 201-202 [86], 230-231 [171].

270 (2001) 207 CLR 165 at 230 [170].

271 *Osmond v Public Service Board of NSW* [1984] 3 NSWLR 447 at 465; Kelly, "The Osmond Case: Common Law and Statute Law", (1986) 60 *Australian Law Journal* 513; *Ralevski v Dimovski* (1986) 7 NSWLR 487 at 493; cf *Esso Australia Resources Ltd v Commissioner of Taxation* (1998) 83 FCR 511 at 519-526.

272 *Lamb v Cotogno* (1987) 164 CLR 1 at 11-12; cf *Cotogno v Lamb (No 3)* (1986) 5 NSWLR 559 at 570-572.

273 *Pearson v Pulley* (1668) 1 Chan Cas 102 at 102 [22 ER 714 at 715]; cf *Erven Warnink Besloten Vennootschap v J Townend & Sons (Hull) Ltd* [1979] AC 731 at 743.

> similar notion was sometimes reflected in equitable remedies, particularly in relation to defences based on statutes of limitations[274]. Furthermore, all equitable and legal principles must today operate in a universe dominated by the star of statute. It would be surprising if the gravitational pull of statute, felt everywhere else in the law, did not penetrate into the expression and re-expression of non-statutory rules[275]."

140 In the common law of torts, the recent turn of the Australian judicial tide in favour of defendants[276] may not be wholly unrelated to legislative developments. Although the reversal of previous approaches, effected by the courts, preceded the enactment of the most recent legislation, the legislation was widely anticipated. The judicial reversals have arguably gathered momentum since those enactments. This development presents an important issue of judicial methodology. If the courts are, in fact, relying on legislative policy as a reason for altering the course of the common law of torts, that reliance should be disclosed[277]. Without such disclosure, the appropriateness of such reliance could never properly be considered and contested[278].

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274 *Knox v Gye* (1872) LR 5 HL 656 at 674; Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies*, 3rd ed (1992) at 785-786 [3415].

275 See *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 12-13 [33], 27 [83], 45-47 [128]-[130]; *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 61-62 [23], 89-90 [105].

276 See Luntz, "Round-up of cases in the High Court of Australia in 2003", (2004) 12 *Torts Law Journal* 1 at 1-2; Luntz, "Turning points in the law of torts in the last 30 years", (2003) 15 *Insurance Law Journal* 1 at 22; Luntz, "Torts Turnaround Downunder", (2001) 1 *Oxford University Commonwealth Law Journal* 95.

277 See *Wong v The Queen* (2001) 207 CLR 584 at 622 [102]; *Cattanach* (2003) 215 CLR 1 at 104 [291]; *Woolcock* (2004) 216 CLR 515 at 573 [160]; *Johnson v The Queen* (2004) 78 ALJR 616 at 626-627 [41]; 205 ALR 346 at 359; *Travel Compensation Fund v Tambree t/as R Tambree and Associates* (2005) 80 ALJR 183 at 197-198 [66]-[67]; 222 ALR 263 at 281; *Osmond* [1984] 3 NSWLR 447 at 462-464; *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 259-261; *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 at 418-421.

278 Mason, "The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience", (1986) 16 *Federal Law Review* 1 at 5; Mason, "Future Directions in Australian Law", (1987) 13 *Monash University Law Review* 149 at 159.

141 While I adhere to the views that I expressed in *Pilmer*[279], in the present case there are significant arguments against developing the common law by analogy with legislation or by reference to a trend said to exist in such legislation. Most obviously, as a practical matter, it is difficult to see how this Court could confidently develop the common law in general conformity with legislation where different approaches have been taken in different jurisdictions and where, in other jurisdictions, no relevant law has been enacted. How could the courts set the common law in a parallel course when the legislatures themselves have struck off in a number of different directions[280]?

142 Attempts to reformulate the common law in this way would also throw up many imponderables. Discerning the purpose lying behind legislation is often an arduous exercise. Yet it is an immeasurably more difficult exercise to discover what Parliament intended for the law where it has abstained from expressly spelling out what the law should be, as the New South Wales Parliament has on the issue of wrongful life. As Mason P noted in the Court of Appeal[281], s 70 of the *Civil Liability Act* 2002 (NSW) provides that the restriction on wrongful birth actions contained in s 71 "does not apply to any claim for damages by a child in civil proceedings for personal injury ... sustained by the child pre-natally". Therefore, so far as New South Wales is concerned, Parliament has left the particular question to the courts.

143 Professor Patrick Atiyah has warned that it is futile to engage in speculation about a failure to legislate because numerous explanations may exist to explain the inaction[282]. They might include a lack of interest, satisfaction with the existing common law, or an absence of agreement on what any different law should be[283]. Professor Atiyah also suggested that to engage in such speculation would be a constitutional mistake on the basis that Parliament's purpose, unless it

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279 See also *Cotogno v Lamb (No 3)* (1986) 5 NSWLR 559 at 568-570; *Gray* (1998) 196 CLR 1 at 25 [80].

280 *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 at 669; *Esso* (1999) 201 CLR 49 at 61-62 [23] and [25]; *R v Iby* (2005) 63 NSWLR 278 at 290 [77]-[78].

281 *Harriton* (2004) 59 NSWLR 694 at 722-723 [165].

282 Atiyah, "Common Law and Statute Law", (1985) 48 *Modern Law Review* 1 at 26.

283 See also Stapleton, "Duty of Care Factors: a Selection from the Judicial Menus", in Cane and Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming*, (1998) 59 at 68.

is realised in legislation, has no legal value whatsoever[284]. Each of these arguments militates against any reliance by this Court in the present case on the tort "reform" legislation as a reason for disallowing this appeal.

144 On the particular issue before this Court in this appeal the several legislatures of Australia have been totally silent. By inference, they have left it to the courts to perform their constitutional functions unimpeded by legislation[285]. The courts should do their duty in the normal way[286]. That duty, in a novel case, involves the provision of an answer that accords with established judicial authority. Necessarily, to address the novel features of the case, untouched by past decisional authority, this Court must reason by analogy. It must develop legal principle and legal policy to the extent that these are relevant[287].

145 *Irrelevance of the parental action*: A further argument that has frequently been advanced against recognising wrongful life actions is that the law, by way of an action for wrongful birth, already provides relief for the consequences of medical negligence that results in the birth of disabled children[288]. Proponents of this argument have sought to bolster it by asserting that wrongful birth actions, unlike wrongful life actions, do not give rise to problems in terms of quantifying the damages[289].

146 While it may be agreed that, where a wrongful life action lies, it is likely that a wrongful birth action would also exist, with respect, it is little short of astonishing that this line of reasoning has been entertained as a serious answer to wrongful life actions.

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284 Atiyah, "Common Law and Statute Law", (1985) 48 *Modern Law Review* 1 at 26-27. Cf *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 537 [44]-[45].

285 Cf reasons of Callinan J at [206].

286 *Brodie* (2001) 206 CLR 512 at 594 [211].

287 *Woolcock* (2004) 216 CLR 515 at 566 [139].

288 See, eg, reasons of Callinan J at [200]; *Harriton* (2004) 59 NSWLR 694 at 747-748 [349]; *McKay* [1982] QB 1166 at 1178; Watson, "Edwards v Blomeley; Harriton v Stephens; Waller v James: Wrongful Life Actions in Australia", (2002) 26 *Melbourne University Law Review* 736 at 749; Pace, "The Treatment of Injury in Wrongful Life Claims", (1986) 20 *Columbia Journal of Law and Social Problems* 145 at 166.

289 Todd, "Wrongful Conception, Wrongful Birth and Wrongful Life", (2005) 27 *Sydney Law Review* 525 at 538-541.

147 Wrongful birth actions are claims brought by parents in *their* own right for loss incurred by *them* by reason of the birth of an unplanned or unexpected child. Because the courts in Australia eschew any concern with the manner in which damages awards, once ordered, are used[290], parents who recover any such damages are, at present, under no legal obligation to apply any damages recovered for the benefit of the child[291]. On this basis, damages recovered in wrongful birth actions are prone to dissipation by the parents[292]. As well, there is no guarantee that the damages would correspond with the extent of the child's loss and suffering. Nor is there any assurance that the parents would be willing, or able, to pursue a wrongful birth action. Whether in the particular case a parental action lies is fortuitous[293].

148 More fundamentally, this argument would lead to an incongruous result whereby the existence of one action (the parental action) is presented as a reason for denying another action, although it is vested in a different legal person and is designed to vindicate injury to a different legal interest. The fact that a parental action may lie is therefore not ultimately relevant to the determination of this appeal, except in so far as it may give rise to a possible problem of the overlapping of damages awards and the adoption of a common law rule that prevents double recovery for the same losses.

149 *Prospects of genetic progress*: In the Court of Appeal, Ipp JA suggested that unknowable advances in genetic science should encourage the courts to stay their hand in any development of tort law and stop short of protecting the interest asserted by the appellant. His Honour reasoned[294]:

> "[D]iscoveries and potential discoveries in the field of genetics should make courts cautious in altering established principle so as to

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290 *Todorovic* (1981) 150 CLR 402 at 412.

291 In some jurisdictions in the United States courts have imposed a fiduciary duty on parents who recover damages in a wrongful birth action (see, eg, *Garrison* 581 A 2d 288 (1989)), and in Canada parents hold the damages on trust for the child (*Krangle v Brisco* (2000) 184 DLR (4th) 251).

292 Luntz, *Assessment of Damages for Personal Injury and Death*, 4th ed (2002) at 641 [11.8.8].

293 *Turpin* 182 Cal Rptr 337 at 348 (1982). See also *Nelson* 678 SW 2d 918 at 934 (1984).

294 *Harriton* (2004) 59 NSWLR 694 at 746 [338]. See also Todd, "Wrongful Conception, Wrongful Birth and Wrongful Life", (2005) 27 *Sydney Law Review* 525 at 540-541.

> accommodate claims for wrongful life. At this stage of genetic science it is simply not possible to know what consequences would follow from the making of such changes."

150 I agree with Ipp JA that there are many imponderables presented to the law by advances in genetic, specifically genomic, science. However, I disagree with his Honour's solution which is that, in this respect, the judges should place the common law into a deep freeze. This has not been the usual response of the judges to a time of rapid social and technological change. Quite the contrary.

151 In medical science, there will always be imponderables. If Ipp JA's argument were taken to its logical conclusion, there would be no future for tort law in the field of medical negligence. The courts would opt out with a unilateral self-denying ordinance on the basis of the possibility (by no means certain) that the several legislatures of Australia, within their respective areas of responsibility, will energetically address the countless problems requiring legal solutions. Part of the genius of the tort of negligence in the common law has been its malleability and versatility, which permit it to respond to the exigencies of changing times[295]. One of the values of a constitutional federation is the scope that it leaves for local innovation to stimulate the eventual emergence of national standards[296]. With reasonable care as the touchstone of liability, the action of negligence has adapted to circumstances which would have been inconceivable when *Donoghue v Stevenson*[297] was written. The injunction against judging conduct with the benefit of technological hindsight[298] provides a safeguard for defendants. So does the current judicial mood that has constrained the provision of remedies[299], reversing previous remedial and communitarian doctrines[300].

152 Whether this Court likes it or not, genetic testing and other sophisticated technology is playing an increasingly significant role in reproductive decision-making and subsequent life support to the profoundly disabled. In light of this, it would be erroneous for tort law in Australia to opt out of its function of

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295 *Scott v Davis* (2000) 204 CLR 333 at 370 [109]; *Brodie* (2001) 206 CLR 512 at 591-592 [203]; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 50 [72].

296 *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 152 [3].

297 [1932] AC 562.

298 *Roe v Minister of Health* [1954] 2 QB 66 at 83-84.

299 See above these reasons at [140].

300 *Neindorf* (2005) 80 ALJR 341 at 359-360 [84]-[85]; 222 ALR 631 at 653.

expressing the rules that govern the rights and obligations of parties in relevant relationships[301]. Tort law, by the threat of a liability to pay damages, can stimulate and require those who offer genetic services to take reasonable care in delivering those services. The prospects of discoveries in genetic science support, rather than detract from, the need for judicial elaboration of tort law in this area. As Justice Allen Linden has said[302]:

> "[T]ort actions force us to consider novel questions of morality, ethics and economics in a rational way in a dignified setting – not in the streets or in the legislatures, where the public interest so often is ignored or even rejected in favour of special interests."

Conclusions

153 Denying the existence of wrongful life actions erects an immunity around health care providers whose negligence results in a child who would not otherwise have existed, being born into a life of suffering. Here, that suffering is profound, substantial and apparently lifelong. The immunity would be accorded regardless of the gravity of the acts and omissions of negligence that could be proved. The law should not approve a course which would afford such an immunity and which would offer no legal deterrent to professional carelessness or even professional irresponsibility[303].

154 In virtually all matters where wrongful life remedies would be available by the application of common law principles, legislatures in Australia would ultimately have the last word. But just as parliaments have their functions in our governance and law-making, so have the courts. The courts develop the common law in a principled way. They give reasons for what they do. They constantly strive for the attainment of consistency with established legal principles as well as justice in the individual case.

155 In the present appeal, that approach favours the provision of damages to the appellant whose life of profound suffering and costly care is a direct result of the agreed negligence of the respondent. That is why this case is not really to be labelled as one about wrongful life. The appellant's life exists. It will continue to exist. No one suggests otherwise. The question is who should pay for the

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301 See *Greco* 893 P 2d 345 at 354 (1995).

302 Linden, "Torts Tomorrow – Empowering the Injured", in Mullany and Linden (eds), *Torts Tomorrow: A Tribute to John Fleming*, (1998) 321 at 322.

303 *Gleitman* 227 A 2d 689 at 703 (1967); *Goldberg* 499 NE 2d 406 at 412 (1986). Cf *D'Orta-Ekenaike* (2005) 79 ALJR 755 at 810-811 [314]-[317]; 214 ALR 92 at 169-170.

suffering, loss and damage that flow from the respondent's carelessness. That is why the proper label for the appellant's action, if one is needed, is "wrongful suffering". The ordinary principles of negligence law sustain a decision in the appellant's favour. None of the propounded reasons of legal principle or legal policy suggests a different outcome.

Orders

156 The appeal should be allowed with costs. The judgment of the Court of Appeal of the Supreme Court of New South Wales should be set aside. In place of that judgment it should be ordered that the appeal to that Court be allowed with costs. The orders of Studdert J should be set aside. The respondent should pay the appellant's costs in the Supreme Court of New South Wales. The questions formulated by Studdert J should be answered as follows:

1. Yes.

2. The categories available in personal injuries cases.

157 The proceedings should be remitted to the Supreme Court of New South Wales for trial in accordance with these answers.

158 HAYNE J. The essential facts in this appeal can be stated shortly. The appellant was born suffering from severe physical and intellectual disabilities. Her mother had rubella during the first trimester of pregnancy. The appellant alleges that if her mother had been given proper medical advice, her mother would have lawfully terminated the pregnancy. Nothing that the respondent doctor did, or failed to do, is alleged to have contributed to the appellant developing any of the disabilities from which she suffers. But it is alleged that if proper advice had been given to the appellant's mother, the appellant would not have been born.

159 The appellant has sued the doctor in negligence, alleging that he should have advised her mother of the risks of the appellant being born with severe disabilities and should have counselled her that "the only way to prevent" a child suffering these disabilities throughout its life would be to terminate the pregnancy. Whether the doctor failed to act with reasonable care and skill has not been decided. It is said that there are more fundamental reasons why the appellant's action should fail.

160 The procedural history of the matter, and a more detailed description of the relevant facts, are set out in the reasons of Crennan J. Reference is made in her Honour's reasons to a number of decisions of courts of other jurisdictions deciding issues like those that arise here. I need make no detailed reference to any of those matters. I agree with Crennan J that the appellant has not suffered what the law should recognise as "damage". I prefer to leave aside any consideration of what that might suggest about the existence of a duty of care. Because an essential element of the cause of action for negligence, damage, cannot be established, the appellant's action must fail. The appeal should be dismissed with costs.

What is damage?

161 Since *Donoghue v Stevenson*[304], to establish a cause of action for negligence it has been necessary to demonstrate that the defendant owed the plaintiff a duty of care, to prove a breach of that duty, and to prove damage of which the breach of duty was a cause. Having regard to the origins of the modern tort of negligence in the old action on the case, damage has been seen as the gist of the action for negligence. But none of these three elements of the tort of negligence – duty, breach, or damage – is self-defining. Over recent decades the courts have considered difficult questions about duty of care and causation of damage by breach. The decisions that have been made yield no single overarching principle that may be understood as uniting them. In this case a central, and the determinative, question is what does the law recognise as

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304 [1932] AC 562.

"damage"? That question is separate and distinct from questions of duty or causation. To decide the question, it is necessary to consider the place that is to be given to the tort of negligence in the fabric of the law as a whole.

162 Deciding what is "damage" cannot be undertaken as an exercise in syllogistic logic. The statement of the premise of a syllogism would inevitably embrace the conclusion which is said to follow from it. The real task will be found to lie in identifying what would be the content of the relevant premise. In particular, what constitutes "damage"?

163 While the task must begin from an understanding of the place of the law of negligence in the fabric of the law, it must also begin with a clear recognition of the difficulties and limitations that are inherent in attempting to classify the law, or the purposes of particular branches of the law. Classification of judge-made law is hazardous because the common law is a practical instrument which does not develop by reference only to considerations of theoretical harmony and taxonomic elegance. It is only "[f]or convenience, [that] the law creates certain pigeon-holes (labelled: property, contract, tort, and so on) in which it may file the rather untidy facts of life"[305].

164 There is not, and never has been, any wholly accurate and concise definition of what should be placed in the pigeon-hole marked "tort". Nonetheless, as Holmes pointed out[306]:

> "Be the exceptions more or less numerous, the general purpose of the law of torts is to secure a man indemnity against certain forms of harm to person, reputation, or estate, at the hands of his neighbors, *not because they are wrong, but because they are harms*." (emphasis added)

By contrast, the chief focus of the criminal law can be seen to be the infliction of punishment by the State for commission of certain conduct or contravention of stipulated standards. That is, tort focuses chiefly upon harm, crime focuses chiefly upon fault. Yet the tort of negligence requires proof of fault.

165 As was pointed out in *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd*[307], it is not useful to attempt to divide the litigious world into only two parts, one marked "civil" and the other marked "criminal". The litigious world is more complex than that. And as Windeyer J pointed out in

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305 Paton, *A Text-Book of Jurisprudence*, 3rd ed (1964) at 118.

306 Holmes, *The Common Law*, (1881) at 144.

307 (2003) 216 CLR 161 at 198 [114].

Uren v John Fairfax & Sons Pty Ltd[308], "the roots of tort and crime ... are greatly intermingled". No doubt this historical intermingling contributes to the considerable overlapping that can be seen between the purposes to which the law of tort and the criminal law seek to give effect. Because both the law of tort and the criminal law have several and overlapping purposes and effects, it is incomplete to see the former as concerned only with harm and its compensation, and the latter as concerned only with fault and its punishment. Yet that does not deny the central importance played in the law of tort by the concept of compensation for harm.

166 So much appears from the remedy which is granted to a plaintiff who succeeds in an action for negligence. Upon proof of damage, the plaintiff will be awarded damages. Demonstrating no more than that a person owed another a duty of care and acted without reasonable care will not suffice to establish the cause of action. Absent proof of damage, a claim for negligence must fail. Leaving aside the anomaly presented by the power to award exemplary damages[309], the damages that are awarded in an action for negligence are damages to compensate the plaintiff for the harm that is suffered as a result of the defendant's negligence. The well-known basic rule[310] is that those damages are to be assessed as the sum which will, so far as possible, put the plaintiff in the position the plaintiff would have been in had the tort not been committed.

167 At once it can be seen that measuring the damages that are to be awarded to a plaintiff who has demonstrated that he or she has suffered damage, of which the defendant's breach of a duty of care owed to the plaintiff was a cause, requires the making of a comparison. It invites attention to the position in which the plaintiff would have been had the tort not been committed and the position in which the plaintiff is shown now to be. Often that comparison is not easily made. Very often, the results of the comparison are not readily expressed as a sum of money. Pain and suffering, loss of enjoyment of life, and the like are not readily measured in dollars[311]. But pecuniary compensation is the best remedy the law has for harms sustained by a person even where those harms do not represent an inroad upon a person's financial or material assets.

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308 (1966) 117 CLR 118 at 149. See also *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 7-8 [16] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

309 *Gray v Motor Accident Commission* (1998) 196 CLR 1.

310 *Livingstone v Rawyards Coal Company* (1880) 5 App Cas 25 at 39 per Lord Blackburn.

311 *Owners of Steamship "Mediana" v Owners, Master and Crew of Lightship "Comet"* (*The "Mediana"*) [1900] AC 113 at 116.

168 To say of a plaintiff that he or she has suffered "damage" or "harm" likewise invites comparison between what would have been and what is. That inquiry cannot be made in the abstract. First, it directs attention to the position of the particular plaintiff, not some hypothetical class of persons of which the plaintiff might be said to be a member. But secondly, and critically, it requires identification of the condition of, or state of affairs concerning, that plaintiff which would have existed had the tort not been committed. This second step is required not just for the purposes of assessing the extent of relief (by way of damages) that is to be allowed, it is a step that is required at the logically prior point of identifying whether the plaintiff has suffered damage. Deciding whether the plaintiff has suffered harm, and what that harm is, requires comparison.

169 In the appellant's written submissions it was said that she had suffered "grievous injury". It is necessary to understand how that expression is used in this case. It is not used to describe the condition of, or state of affairs concerning, the appellant as differing from some condition or state that previously existed or was previously enjoyed *by her*. Nor is it used to describe any physical or economic consequence that is alleged to have been caused by any negligent act or omission of the doctor, other than the consequence that the appellant's mother did not terminate her pregnancy and the appellant was born.

170 The appellant contended that she demonstrated that she had suffered damage (that she had in the relevant sense suffered "injury" or "harm") by comparing her condition with not having been born. The appellant expressly disavowed the argument that the appropriate comparison is with the "ordinary", "able" or "average" person. The appellant insisted that the proper comparison is with "not having been born" because, so the argument ran, the comparison that must be made is with what would have been the case if the doctor had not been negligent. If the doctor had not been negligent, the appellant's mother would have terminated the pregnancy. As the reasons of Crennan J demonstrate, it is not possible to compare the appellant's life with non-existence. Rather, in order for the appellant's life to be viewed as an "injury" or "harm", it is logically necessary to compare her life with that of another person.

171 Indeed, a comparison of that kind (a comparison between the plaintiff's condition and the condition of some other person) is implicit in the use of expressions like "grievous injury". That is, by using expressions like "injury" or "harm" the appellant implicitly invited comparison between her condition and the condition of a person who does not have the disabilities she has. So, too, other descriptions given of the damage, or harm, for which the appellant seeks redress implicitly invited the same comparison. Thus, when it was said that she seeks redress for having and living with "disabilities", "deficits", "injuries" or the like, those descriptions, in the end, point to the disabilities the appellant has and hinge upon her comparing her past, present and expected physical and intellectual state and capacities with some hypothetical "ordinary", "able" or "average" person. (I leave aside any consideration of what exactly those words "ordinary", "able" or

"average" may encompass and any consideration of the difficulties inherent in their use or application.) A comparison with that other hypothetical person is necessarily implicit in the descriptions given by the appellant of her "injury" because the appellant herself has never had a life free from the disabilities she has. But for the reasons stated earlier, a comparison of that kind does not show that the appellant has suffered what the law recognises as damage.

172 It is because the appellant cannot ever have and could never have had a life free from the disabilities she has that the particular and individual comparison required by the law's conception of "damage" cannot be made. Because she has never had and can never have any life other than the life she has, with the disabilities she has, she cannot show that she has suffered damage, as that legal concept is now understood, as a result of a failure to give the advice she says her mother should have been given.

173 Although this conclusion is determinative, it is as well to recognise, and deal with, some further aspects of the appellant's arguments which, together, could be understood as advancing reasons for extending the legal concept of "damage" to include living with the disabilities the appellant has. The features of the appellant's arguments relevant to this aspect of the matter can be summarised as follows. The appellant's disabilities are very severe. She needs constant care. An important element of her case is that the risks of which her mother should have been advised were so grave that termination of the pregnancy would have been warranted. The circumstances of the case might therefore be said to be both exceptional and confined. If the doctor was negligent, why should the cost of providing care not fall upon a party who is shown to be negligent rather than upon the appellant's parents or society at large?

174 Neither the severity of the appellant's disabilities, nor the (in this case, assumed) demonstration of duty coupled with want of reasonable care, compels the conclusion that living with her disabilities should be recognised as a form of damage. It is as well to explain why that is so. In doing that, it is necessary to touch upon some aspects of questions of causation and policy.

175 The appellant's case is that a reasonable doctor would have advised the appellant's mother of the *risks* of her being delivered of a child with severe disabilities and would have advised her that the only way to avoid the risks coming to pass was to terminate the pregnancy. In this case, the risks came to pass. The appellant has severe disabilities. But if the asserted negligence is a failure to recognise and advise of risks, what is to be done in the case where the risks are not fully realised? Is the child of a woman whose doctor should have advised her of the risks consequent upon exposure to rubella to have an action against the doctor if the child has *any* form of adverse consequence from the mother's exposure and can show that the mother would have chosen lawfully to terminate the pregnancy? Or is the concept of "damage" to be confined to cases

where the risk of severe disabilities is substantially realised? What would be the principle which would warrant confining recovery in that way?

176 These questions provoke examination of some steps that lie behind the appellant's contentions about what is "damage". In particular, they provoke some limited reference to some aspects of questions of duty and causation. The appellant contends that her mother's doctor owed a duty of care to the appellant, not just her mother. For present purposes, the existence of a duty of care may be accepted[312]. It is a duty that the appellant cannot enforce until after birth. Only then does she have legal personality to enforce the duty. But that does not deny the existence of the duty.

177 The appellant contends that to discharge the duty, the doctor should have offered information and advice to her mother. But her mother would then have been confronted by the choice of terminating the pregnancy or not. Determining the lawfulness of a termination focuses upon the pregnant woman's circumstances – especially upon her health[313]. That inquiry examines the reasonable belief of the doctor who performs the termination but is not directly concerned with the subjective beliefs of the mother. It is, essentially, an objective inquiry. If termination is lawful, the woman must choose whether to take that course. That choice is wholly subjective.

178 A mother may think it right to take account of all sorts of considerations in deciding whether to terminate a pregnancy. Not least among those considerations are her religious and other beliefs. The choice is hers to make. For a court to decide what a plaintiff's mother would have done if confronted by proper information and advice about the risks of continuing with a pregnancy, it may well be necessary to explore the matters that the mother would or may have taken into consideration in reaching her decision. Necessarily, that would be a difficult[314] and intrusive inquiry. That does not mean that a rule must be adopted which avoids making such inquiries. But what it may be thought to point to is some questions about causation.

179 The duty posited, owed by the doctor to the unborn, is said to require the doctor to give advice and information to the mother. Whether it would be lawful to terminate the pregnancy is a question decided objectively. How the mother would act in response to proper advice and information would be a matter for her

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312 cf *Watt v Rama* [1972] VR 353.

313 *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47 at 59-60 per Kirby ACJ, 80 per Priestley JA.

314 cf *Rosenberg v Percival* (2001) 205 CLR 434.

choice. If, given proper information and advice, the woman concerned would have chosen not to terminate the pregnancy, a doctor's failure to give proper information or advice to the mother during pregnancy could not be said to have caused the child, when born, any damage, however broadly "damage" is understood. At least to this extent a doctor's liability to the child would then depend upon the particular subjective views of the mother.

180 But in a case where it is shown that the mother *would* have terminated the pregnancy, the subjective nature of the considerations which inform the mother's choice about termination may well be thought to be insufficient reason to conclude that the doctor's failure to tender proper advice was not a cause of the plaintiff being born. And if that is so, rather than pointing to some issue about causation, the interjection of the element of the mother's choice reveals only that there will be a significant number of cases where, because the mother would not have terminated the pregnancy, the doctor who negligently failed to proffer advice about the risks of continuing with the pregnancy would not be liable to the child.

181 The importance of this observation is that it reveals that to adopt a rule which would extend the concept of "damage", whether by inviting comparison between the life the plaintiff has and the kind of life which others have, or by describing the consequence of the asserted negligence as "living with disabilities", in the name of promoting careful practice by doctors, would be to adopt a rule whose engagement in a particular case would depend upon the mother's choice. Such a rule would, at best, have only indirect effects on the promotion of careful medical practice.

182 There is, then, no basis demonstrated for departing from the established rule that the law recognises as "damage" the difference between what the particular plaintiff is or has and what that plaintiff was or would have had. The appellant's disabilities in this case are not a form of damage. She could have had no life other than the life she has. The common law should not be developed in the way for which the appellant contended.

183 The appeal should be dismissed with costs.

184 CALLINAN J. The question that this appeal raises is one that has exercised the minds of philosophers, theologians, scientists, legislators and lawyers throughout the world: may a child born profoundly disabled who probably would have been aborted by her mother had she been informed of the child's likely condition at birth, as she should have been, but negligently was not, by the medical practitioner responsible for her, sue the practitioner for damages?

185 There has been no trial. The facts that I summarize have been taken as correct for the purposes of deciding the questions posed at this stage of the proceedings.

The facts

186 In early August 1980, believing herself to be pregnant, Mrs Harriton became particularly concerned when she suffered an acute illness which manifested itself by fever and rash. On 13 August 1980, she consulted a general practitioner who is now deceased. She told him that she thought she might be pregnant, and was aware that rubella, which she believed she may have contracted, could produce congenital abnormalities in an unborn child. The practitioner advised her that when she was well enough to do so, she should provide a blood sample to determine whether she was in fact pregnant, and whether her illness was rubella. A pathologist, who analyzed the specimen of blood which she gave pursuant to the general practitioner's advice, reported to him that Mrs Harriton was pregnant, and that if there had been no recent contact or rubella-like rash, further contact with the virus would be unlikely to produce congenital abnormalities. After the report had been provided to the general practitioner, Mrs Harriton consulted his son, with whom he was in partnership, the respondent, Dr Paul Stephens. She recounted her history to him. He confirmed to her that she was pregnant, but that the acute illness of which she had complained, was not rubella.

187 The respondent referred Mrs Harriton to a gynaecologist and obstetrician for the management of her pregnancy. This is what his referral note stated:

> "Herewith Mrs Olga Harriton. (illegible) LMP [last menstrual period] 15/7/80. +ve preg test. She had ? viral illness 2/52 ago and rubella titre 30. I have reassured her that she has no problems. Could you please see and continue. Paul. PS: Morning sickness. Debendox PRN."

188 The respondent should not have given the reassurance that he did to Mrs Harriton. There was a further blood test which a prudent medical practitioner would have recommended, an "IgM" blood test. Had it been performed, it would have yielded positive results for rubella antibodies, and a diagnosis of rubella would have been made.

189 Prudent medical practice in 1980 required a medical practitioner to advise a pregnant woman who had suffered rubella in the first trimester of her pregnancy (as Mrs Harriton had), that there was a very high risk that the unborn child would suffer grievous injury, more correctly, disability, as a result of the rubella infection. The advice would have included that the only way to prevent a child from so suffering throughout the child's life would be to terminate the pregnancy.

190 It would not have been unlawful for Mrs Harriton to act on advice of that kind and to terminate the pregnancy.

191 The appellant was born profoundly, incurably and tragically disabled. In order to survive, she will need, as she has done throughout her life, constant care and attention.

192 Whether after conception some measures may have been taken to alleviate the effects of the infection did not arise for consideration. The case proceeded on the basis that Mrs Harriton, had she been advised of the matters of which the respondent failed to advise her, would have terminated the pregnancy, and the appellant would never have been born.

The proceedings at first instance

193 By her tutor, her father, the appellant has sued the respondent in the Supreme Court of New South Wales. The facts that I have stated, although not determined, have been agreed for the purposes of the disposition of the threshold point that arises, whether the appellant can maintain her action against the respondent.

194 In her prayer for relief, the appellant claimed damages "representing the extraordinary past and future medical and care costs created by her disabilities; damages pursuant to the principle in *Griffiths v Kerkemeyer*[315] [that is for care gratuitously provided]; interest; and costs".

195 The threshold point was decided at first instance adversely to the appellant by Studdert J[316].

196 His Honour did not doubt that a relevant duty of care can be owed to an unborn child, indeed that the duty may be owed to a child not even conceived at the time of a negligent act, provided that the child be within the class to whom

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315 (1977) 139 CLR 161.

316 *Harriton v Stephens* [2002] NSWSC 461.

the duty is owed, but that, because the only duty which the appellant was owed, was not to harm her, she could not recover.

197 Not surprisingly, the question which had to be answered by Studdert J had been considered in many other jurisdictions throughout the world. In his careful and comprehensive judgments in this, and similar cases argued at the time, Studdert J referred to many of these, and to statements of principle in other cases in this Court, which did not raise precisely this, or even any very similar sort of claim. It is unnecessary for me to repeat his Honour's review of those authorities.

The appeal to the Court of Appeal of New South Wales

198 The appellant appealed unsuccessfully to the Court of Appeal of New South Wales (Spigelman CJ and Ipp JA, Mason P dissenting)[317].

199 Spigelman CJ sought first to identify the loss suffered by the appellant, and asked whether there was a duty with respect to that kind of loss. In answering that question, a court had to be attentive, his Honour said, to the ethical foundation for the relevant legal principles. The duty asserted by the appellant did not reflect values generally, or even widely, held in the community. There was no sufficiently direct relationship between the respondent and the appellant to support the appellant's claim.

200 Ipp JA was of the opinion that the case was one in which the compensatory principle could simply not be applied: it was impossible to compare existence, even in a profoundly disabled state, with non-existence. His Honour was unable to find any supporting justifications in policy, for a refashioning of the compensatory principle in such a way as to enable damages to be awarded to the appellant. The considerations of policy to which his Honour referred were that the notion of "sanctity of life" militates against recognition of any duty for which the appellant contended. Increasing knowledge of genetics should make courts extremely cautious in varying legal principle to accommodate a law of the kind for which the appellant contended. In any event, there was a remedy available to parents, to whom a disabled child was born if medical negligence caused the disability, and that should suffice.

201 In dissent, Mason P pointed out that the common law strived to ensure that a claim for damages, even a novel one, attract the full range and measure of damages usually allowed. In his opinion, responsibility of a doctor treating a pregnant woman, extends to the foetus, and is a different duty from the duty not to cause harm or injury. The respondent's negligence precluded the making of any informed decision by the parents. His Honour took the view that there was

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317 *Harriton (by her tutor Harriton) v Stephens* (2004) 59 NSWLR 694.

no conceptual difference between the critical event that might enable parents to sue, and a child's putative claim that he or she should not have been born. The appellant should not fail because she is unable to demonstrate the monetary value of non-existence. Any contention to the contrary offends the principle that the wrongdoer bears the evidential onus of establishing the existence and value of offsets and collateral advantages said to stem from the wrong. The judicial equation of pre-birth non-existence and death arguably offends against the principle of judicial agnosticism.

The appeal to this Court

202 In this Court the appellant advances the same arguments as in the courts below. Reference was again made to like cases in many other jurisdictions. The appellant sought to place particular emphasis upon a decision of the Supreme Court of Israel[318] in which as a result of medical negligence a woman was not advised of the possibility of the transmission of an hereditary illness which could affect any child whom she might conceive. She became pregnant, and gave birth to a boy to whom the hereditary disease was passed, and who, in consequence, was severely disabled. The Supreme Court of Israel held that non-life was preferable to impaired life, and that the wrongdoer should compensate the child so that his quality of life would be better as far as money could help. Two judges of the Court, Ben-Porat DP and Barak J, in holding that the child could recover, said that the amount of damages awarded should be as much as he had lost due to his impaired situation. The decision was however tellingly criticized in an article written by David Heyd[319] who pointed out that the reasoning necessarily involved the erection of a fiction which the Court nowhere acknowledged in the reasons for judgment[320].

203 The appellant also placed weight upon *Burton v Islington Health Authority*[321]. But that case does not in my opinion assist her. It was a case in which the plaintiff suffered injury after he had been conceived, and as a result directly of the defendant's negligent treatment of his mother and himself during the confinement and delivery. The issue was quite different from the issue here. It was in substance whether any distinction should be drawn between injuries suffered immediately after birth, and injuries after conception[322].

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318 *Zeitsov v Katz* (1986) 40(2) PD 85.

319 Heyd, "Are 'Wrongful Life' Claims Philosophically Valid? A Critical Analysis of a Recent Court Decision", (1986) 21 *Israel Law Review* 574.

320 (1986) 21 *Israel Law Review* 574 at 584-585.

321 [1993] QB 204.

322 [1993] QB 204 at 219.

204 In her submissions in this Court, the appellant acknowledged the necessity to confront the problem of seeking to make a comparison between non-being and disabled being. Her contention was that but for the negligence of the respondent, there would have been a state of affairs (necessarily non-being) which would include neither the pain and suffering arising from the physical condition, nor any incapacity to earn income. It was not argued that the comparison should be between the appellant and a perfect child. Vicissitudes of life should be taken into account. Questions of degree are inevitably involved. A court should not shrink, indeed common law courts generally have not shrunk from making the best approximations that they can, well understanding that perfection or precision in any assessment of general damages, particularly in cases of personal injury, is impossible. Inevitably, many policy considerations were touched upon in argument. A wariness of eugenics, selective breeding, was sensible but does not justify a principle that a negligent act causing the birth of a profoundly disabled child should be left without a remedy.

The disposition of the appeal

205 There are many other policy concerns arguing in both directions the relevance and significance of which may well vary according to the philosophical, theological and perhaps even economic perceptions of those called upon to give consideration to them. Some of them are touched upon in *Cattanach v Melchior*[323], in particular by the minority in that case. The matters which influenced Mason P in reaching his dissenting opinion are all weighty ones of legal and social concern. There are also these. Defensive medicine, practised as a result of a decision favourable to the appellant, could lead to a greater readiness on the part of practitioners to counsel abortion[324]. The damages in a case of this kind, unless in some way arbitrarily restricted, are likely to be very great. Should the state therefore rather than the doctor support the child? To seek to compare for the purpose of assessing damages, non-existence with the state of existence is impossible. Nonetheless, that practical impossibility should

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323 (2003) 215 CLR 1.

324 It must be emphasized that I raise this as a practical concern. Of course there are "the tests of reasonable foreseeability and reasonable care" (reasons of Kirby J at [114]) which may serve to protect a doctor in a legal dispute. But decisions of this Court can affect people's lives and decisions *before* legal proceedings are initiated or even contemplated. And even if they are contemplated, those legal tests have on occasion been interpreted to produce what Professor Atiyah has described as a "damages lottery" (Atiyah, *The Damages Lottery*, (1997)), and it seems to me that many doctors might not find them particularly reassuring (consider, eg, *Rogers v Whitaker* (1992) 175 CLR 479).

be outflanked by the erection of a fiction involving a comparison between an ordinary, non-disabled life and a disabled life. Throughout the history of the common law, fictions have been devised and applied as if they represented the true position. Modern jurisprudence leans against fictions. There should be coherence in the law. Absolute coherence, if the appellant were to succeed here, would require that a mother, who knew of, but failed to abort a foetus likely to emerge at full term seriously disabled, be liable to that child, a prospect that I suspect few would contemplate with equanimity. Why should the wrongdoer be obliged to pay damages to the parents, but not to the person actually afflicted? But on the other hand, the law does from time to time impose arbitrary limits and boundaries. One of the purposes of the law of tort is to set standards, and in that respect, it operates as a deterrent to careless conduct. On the other hand however, there are some departures from proper standards which do not attract damages, for example, by reason of indeterminacy of a kind spoken of in cases of claims for economic loss[325]. On the basis of the facts stated, there is every reason to expect that a person in the position of the respondent will however be appropriately very severely disciplined by the relevant disciplinary body. The consequence of failing to allow this appellant to recover, is that a person such as she, catastrophically disabled, will recover nothing, whilst, if after the moment of conception, she had suffered negligently caused injury, even of a much lesser kind, she may be able to recover. A case of this kind is so different from any other, and goes so much to the heart of diverse theological and philosophical opinion, that the courts should leave it to the legislators to state the law to govern it.

206 What I have just said is not a comprehensive statement of all of the policy considerations which have troubled the minds of those who have already had to deal with this type of problem. I do not however need to make a comprehensive review of those considerations, any more than I need to undertake another review of all of the authorities, an exercise which has been very helpfully performed in the courts below. I do not need to do these because I would decide the case neither on policy grounds, the common law or any adaptation of it, the law of other jurisdictions, nor on the basis of other cases in Australian jurisdictions so far decided, none of which are sufficiently similar to this case to assist in resolving it, but on logic. The appellant's case propounds these propositions. "Had my mother been properly advised, she would have caused me to be aborted. I would never therefore have come into existence as a formed human being. I am, in consequence, entitled to damages upon the basis that I should never have been born." It is not logically possible for any person to be heard to say "I should not be here at all", because a non-being can say nothing at all. If this conclusion is unacceptable to some, or many, it is for the legislature, and the legislature

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

alone, to say so, and in terms which would enable some principled basis of assessment of damages. It has not.

207 I would dismiss the appeal with costs.

208 HEYDON J. I agree with Crennan J.

209 CRENNAN J. This appeal and two appeals in *Waller v James* and *Waller v Hoolahan*[326] ("the *Waller* cases") were heard consecutively and much of what is said in the reasons in this case applies also to the *Waller* cases. The submissions in the *Waller* cases bore on the issues in this case and they have also been taken into account. By majority (Spigelman CJ and Ipp JA, Mason P dissenting) the New South Wales Court of Appeal[327] dismissed an appeal brought by the plaintiff Alexia Harriton (the appellant in this Court) against a judgment in the Supreme Court of New South Wales (Studdert J) dismissing with costs a claim for damages against Dr Paul Richard Stephens ("Dr P R Stephens"), a general medical practitioner.

210 Alexia Harriton was born on 19 March 1981 with severe congenital disabilities caused by the rubella virus with which her mother, Mrs Harriton, had been infected in the first trimester of her pregnancy. Mrs Harriton had an acute illness with a fever and rash in early August 1980. On 13 August 1980 she consulted Dr Max Stephens, father of the respondent in this Court, Dr P R Stephens, and told him she was concerned that she might be pregnant and that her recent illness might be rubella. She told him she was aware that rubella in early pregnancy could produce congenital abnormalities in an unborn child. Dr Max Stephens advised Mrs Harriton to have a blood test to determine whether she was pregnant and whether she was suffering from rubella. On 21 August 1980 Macquarie Pathology Services reported:

> "Rubella – 30
>
> If no recent contact or rubella-like rash, further contact with this virus is unlikely to produce congenital abnormalities.
>
> Preg test – positive."

211 On 22 August 1980 Mrs Harriton consulted Dr P R Stephens and informed him that she had had a fever and a rash and was concerned that her recent illness was rubella. Dr P R Stephens then had the Macquarie Pathology Services report. He informed Mrs Harriton that she was pregnant and assured her that her illness was not rubella.

212 Mrs Harriton had had rubella and Alexia Harriton's congenital disabilities as a result of rubella include blindness, deafness, mental retardation and spasticity. She is unable to care for herself and requires continuous care which she will need for the rest of her life. Her claims for damages include special damages for past and future medical and care costs and general damages for pain

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326 [2006] HCA 16.

327 *Harriton (by her tutor Harriton) v Stephens* (2004) 59 NSWLR 694.

and suffering. Additionally, a claim for loss of income based upon the average weekly wage and the average life expectancy was raised in submissions. Any claim which Mrs Harriton has against Dr P R Stephens is statute barred.

213 The parties prepared an agreed statement of facts for the purposes only of a separate determination under the provisions of Pt 31 of the Supreme Court Rules 1970 (NSW) of the following questions:

> "1. If the defendant failed to exercise reasonable care in his management of the plaintiff's mother and, but for that failure the plaintiff's mother would have obtained a lawful termination of the pregnancy, and as a consequence the plaintiff would not have been born, does the plaintiff have a cause of action against the defendant?
>
> 2. If so, what categories of damages are available?"

214 Studdert J answered "No" to the first question, so the second question did not arise. Those answers were premised on findings that Dr P R Stephens's duty to the appellant was a duty not to injure her and she was not born disabled because of any breach of that duty by him. Further, Studdert J found that the impossibility of determining damage suffered by the appellant and the impossibility of assessing compensatory damages supported rejection of the claim. The trial judge also noted what he called weighty considerations of public policy against recognising a "wrongful life" claim. Whilst it is not relevant to the present appeal, the appellant also failed in a claim as a beneficiary of any trust or contract between Mrs Harriton and Dr P R Stephens.

215 The appellant appealed to the Court of Appeal contending that Studdert J erred in law in not concluding that Dr P R Stephens's duty to the appellant extended to providing to her mother all information about her medical condition, in failing to recognise that being born disabled was legally cognisable damage and in failing to recognise the appellant's claims as a matter of consistent legal policy when (if not statute barred) a claim is available to the mother to recover the costs of the child's care arising out of the same events[328]. It was also contended that his Honour erred in regarding the difficulty of assessing damages as a bar to such a claim.

The issues

216 The main issue is whether the appellant/child who was born disabled has a cause of action in negligence against the respondent/doctor on the agreed facts

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

which stated that the doctor failed to advise the child's mother during her pregnancy of circumstances which would have led the child's mother to obtain a lawful termination of that pregnancy. If such a cause of action exists, the next issue is whether the heads of damages are limited to, or different from, damages generally available in claims for personal injury.

217 Consideration of the nature of the damage in this case, and the principles relevant to assessment of damages, leads to the result that the appellant has no cause of action against Dr P R Stephens.

218 To have a cause of action in negligence the appellant needs to show damage suffered by her and a duty of care on Dr P R Stephens to avoid that damage. In Fleming, *The Law of Torts*, it is stated[329]:

> "Actual damage or injury is a necessary element ('the gist') of tort liability for negligence. Unlike assault and battery or defamation, where violation of a mere dignitary interest like personal integrity or reputation is deemed sufficiently heinous to warrant redress, negligence is not actionable unless and until it results in damage to the plaintiff."

The question of what, if any, categories of compensatory damages are available only arises when actual damage or injury, together with breach of a duty of care and causation, are established.

219 Because of the agreed statement of facts, questions of breach of any duty of care (if one were established) and of any causal connection between the breach of duty and the claimed damage, characterised as "life with disabilities", received less attention in argument than questions of whether the damage as alleged was legally cognisable, whether a duty of care as alleged existed, and whether, if calculating damages according to compensatory principles was virtually impossible, the damage could be treated as actionable. The phrase "legally cognisable" is used here to mean "capable of being known or recognised for the purposes of judicial proceedings". These latter issues differed from the question which was considered in *Cattanach v Melchior*[330].

220 The agreed statement of facts relevantly included the following facts:

> "16. It would have been prudent medical practice in 1980 to advise a pregnant woman who had rubella in the first trimester of her

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329 9th ed (1998) at 216 (footnotes omitted).

330 (2003) 215 CLR 1.

pregnancy that there was a very high risk that the unborn child would suffer grievous injury as a result of the rubella infection.

17. In these circumstances, prudent medical practice would have been to counsel a woman that the only way to prevent a child from suffering these injuries throughout its life would be to terminate the pregnancy.

18. Had the rubella been diagnosed, [Mrs Harriton] would have exercised her lawful right to terminate the pregnancy.

...

22. The plaintiff did not become infected in utero with rubella by reason of any negligence on the part of the defendant."

221 The specific duty of care postulated in respect of Alexia Harriton was a duty upon Dr P R Stephens to diagnose rubella and then advise Mrs Harriton that the only way to prevent a very high risk of bearing a child with grievous injury caused by rubella would be to terminate the pregnancy. The agreed facts do not cover whether it was known in Australia in 1980 that the effects of rubella may be variable[331] or whether treatment to ameliorate the effects of rubella was available[332]. It is only because Mrs Harriton did not have an abortion or miscarry but continued the pregnancy to term that Dr P R Stephens could be liable for his failures to diagnose rubella and advise of rubella's consequences as identified in the agreed statement of facts.

222 The issue here has arisen elsewhere in both common law and civil law jurisdictions because of advances in reproductive medicine including diagnostic testing during pregnancy. Typically claims have been advanced that a medical practitioner was negligent in failing to provide sufficient information to a mother concerning the risk of foetal abnormality and as a result of such negligence the mother's pregnancy was not terminated and the child was born into a life with disabilities.

223 The appellant's counsel eschewed labelling the appellant's claim a "wrongful life" claim and emphasised that what was wrongful was Dr P R Stephens's failures to diagnose rubella and to advise. It was those failures

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331 cf *Gleitman v Cosgrove* 227 A 2d 689 at 703-705 (1967).

332 cf *Sylvia v Gobeille* 220 A 2d 222 (1966). In that case, the plaintiff alleged the defendant doctor should have administered gamma globulin to her mother as such treatment would have decreased the likelihood of the plaintiff's defects caused by rubella.

which were said to have caused or materially or effectively caused the damage, namely Alexia Harriton's "life with disabilities". However, such claims have come to be recognised internationally for some decades as "wrongful life" claims[333]. The term encompasses claims by disabled children for alleged negligence after conception, including cases such as the instant case involving rubella[334], and claims based on negligent medical advice or diagnosis prior to conception concerning the possible effect of treatment administered to the mother[335], contraception or sterilisation[336], or genetic disability[337], and

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333 See *Becker v Schwartz* 386 NE 2d 807 at 810, esp fn 4 (1978); see also *Curlender v Bio-Science Laboratories* 165 Cal Rptr 477 at 481-483 (1980).

334 For example, in Australia, *Bannerman v Mills* (1991) Aust Torts Reports ¶81-079; *Hayne v Nyst* unreported, Supreme Court of Queensland, 17 October 1995; in the United Kingdom, *McKay v Essex Area Health Authority* [1982] QB 1166; in the United States of America, *Gleitman v Cosgrove* 227 A 2d 689 (1967); *Dumer v St Michael's Hospital* 233 NW 2d 372 (1975); *Strohmaier v Associates in Obstetrics & Gynecology* 332 NW 2d 432 (1982); *Blake v Cruz* 698 P 2d 315 (1984); *Procanik v Cillo* 478 A 2d 755 (1984); *Smith v Cote* 513 A 2d 341 (1986); *Proffitt v Bartolo* 412 NW 2d 232 (1987); *Walker v Mart* 790 P 2d 735 (1990); *Bonta v Friedman* 111 Cal Rptr 2d 194 (2001); as to Germany, see Stolker, "Wrongful Life: The Limits of Liability and Beyond", (1994) 43 *International and Comparative Law Quarterly* 521; in France, *Perruche* Cass. ass. plén., Nov. 17, 2000, noted in 2000 Bull. Civ. No. 9, 15. The claim was denied in all cases except *Procanik v Cillo* and *Perruche*.

335 *Lacroix v Dominique* (2001) 202 DLR (4th) 121; *Harbeson v Parke-Davis Inc* 656 P 2d 483 (1983).

336 For example, in Australia, *Edwards v Blomeley* [2002] NSWSC 460; in the United States of America, *Elliott v Brown* 361 So 2d 546 (1978); *Speck v Finegold* 439 A 2d 110 (1981); *Pitre v Opelousas General Hospital* 530 So 2d 1151 (1988).

337 For example, in Australia, *Waller v James* [2006] HCA 16; in Canada, *Jones (Guardian ad litem of) v Rostvig* (1999) 44 CCLT (2d) 313; in Singapore, *JU v See Tho Kai Yin* [2005] 4 SLR 96; in the United States of America, *Curlender v Bio-Science Laboratories* 165 Cal Rptr 477 (1980); *Turpin v Sortini* 182 Cal Rptr 337 (1982); *Nelson v Krusen* 678 SW 2d 918 (1984); *Bruggeman v Schimke* 718 P 2d 635 (1986); *Lininger v Eisenbaum* 764 P 2d 1202 (1988); *Viccaro v Milunsky* 551 NE 2d 8 (1990); *Kush v Lloyd* 616 So 2d 415 (1992); *Schloss v The Miriam Hospital* unreported, Rhode Island Superior Court, 11 January 1999; *Moscatello v University of Medicine and Dentistry of New Jersey* 776 A 2d 874 (2001); *Johnson v Superior Court of Los Angeles County* 124 Cal Rptr 2d 650 (2002); *Paretta v Medical Offices for Human Reproduction* 760 NYS 2d 639 (2003); in Israel, *Zeitsov v Katz* (1986) 40(2) PD 85. The claim was denied in all cases except *Turpin v Sortini*, *Curlender v Bio-Science Laboratories* and *Zeitsov v Katz*.

contradistinguishes such claims from "wrongful birth" claims by parents for the costs of raising a child whether healthy[338] or disabled[339], whose unplanned birth occurs as a result of medical negligence. There have been numerous instances where claims of wrongful birth and wrongful life have been brought concurrently.

224 While precise facts have differed, a comparative survey reveals that many courts have recognised the difficulty and novelty of the question of whether life with congenital defects can be recognised as damage, at the suit of a disabled person who would not exist in the absence of the alleged negligence[340]. Speaking generally, such claims have been resisted in common law jurisdictions. It appears that on the very few occasions when such claims have been allowed the results have not always been uncontroversial and legislatures have reacted to such decisions, or acted proleptically, to restrict or prohibit such suits[341].

225 A right of action and a duty of care are inseparable[342]. In a case like this, the existence and extent of a duty of care can usefully be considered by reference to the nature of the damage suffered[343] because a cardinal principle of imposing liability for negligence in novel circumstances is that the party complained of should owe to the party complaining a duty to take care, which the law can recognise as a matter of principle[344], and that the party complaining should be

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

339 *Parkinson v St James and Seacroft University Hospital NHS Trust* [2002] QB 266.

340 For example, *McKay v Essex Area Health Authority* [1982] QB 1166 at 1177, 1186 and 1193.

341 Roper, "An Open Question in Utah's Open Courts Jurisprudence: The Utah Wrongful Life Act and *Wood v University of Utah Medical Center*", (2004) *Brigham Young University Law Review* 893 at 894. See Hondius, "The Kelly Case – Compensation for undue damage for wrongful treatment", in Gevers, Hondius and Hubben (eds), *Health Law, Human Rights and the Biomedicine Convention*, (2005) 105 at 112.

342 *Smith v Jenkins* (1970) 119 CLR 397 at 418 per Windeyer J.

343 *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 487 per Brennan J; *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at 290 [104] per Hayne J. See also *Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) 217 CLR 469 at 472 [1] per Gleeson CJ; cf *Vairy v Wyong Shire Council* (2005) 80 ALJR 1 at 16 [62] per Gummow J; 221 ALR 711 at 727.

344 *Sullivan v Moody* (2001) 207 CLR 562 at 579-580 [50] and [53] per Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ.

able to prove that actual loss or damage has been suffered as a consequence of a breach of that duty[345]. Proving that actual loss or damage has been suffered requires proof of interference with a right or interest recognised as capable of protection by law[346].

226 Decisions from overseas jurisdictions where the same issue and identical questions have arisen may assist, despite not being binding, because determining, as a matter of law, whether a duty of care exists or not falls to be considered at a "higher level of abstraction"[347] than, for example, factual questions of breach, turning on local normative standards, and causation.

The position elsewhere

227 In the United Kingdom, the English Court of Appeal in *McKay v Essex Area Health Authority*[348] unanimously rejected such a claim by a child affected by rubella as disclosing no reasonable cause of action against her local health authority and her mother's doctor. The reasoning deals with objections to such a cause of action which have been raised in numerous courts before and since. In finding neither defendant was under any duty to the child to give the child's mother an opportunity to terminate the child's life, Stephenson LJ said[349]:

> "That duty may be owed to the mother, but it cannot be owed to the child.
>
> To impose such a duty towards the child would, in my opinion, make a further inroad on the sanctity of human life which would be contrary to public policy. It would mean regarding the life of a handicapped child as not only less valuable than the life of a normal child, but so much less valuable that it was not worth preserving, and it would even mean that a doctor would be obliged to pay damages to a child infected with rubella before birth who was in fact born with some mercifully trivial abnormality."

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345 *Donoghue v Stevenson* [1932] AC 562 at 619 per Lord Macmillan.

346 *Cattanach v Melchior* (2003) 215 CLR 1 at 15 [23] per Gleeson CJ.

347 *Shirt v Wyong Shire Council* [1978] 1 NSWLR 631 at 639 per Glass JA.

348 [1982] QB 1166 at 1171 per Stephenson LJ. It should be noted that Griffiths LJ rejected the claim along with the majority but dissented in the result of the case concerning the question of whether the claim should have been summarily dismissed for failing to disclose a sustainable cause of action.

349 [1982] QB 1166 at 1180.

228 He then went on to recognise that a court could not evaluate non-existence for the purpose of determining whether a disabled child had lost anything by being born[350].

229 Stephenson LJ also referred, with approval, to the approach underpinning the *Congenital Disabilities (Civil Liability) Act* 1976 (UK)[351] which precludes suits for wrongful life by children born after 22 July 1976[352], following recommendations made by the English Law Commission's *Report on Injuries to Unborn Children*[353].

230 Ackner LJ said[354]:

> "But how can a court begin to evaluate non-existence, 'the undiscovered country from whose bourn no traveller returns?' No comparison is possible and therefore no damage can be established which a court could recognise. This goes to the root of the whole cause of action."

231 Griffiths LJ said[355]:

> "To my mind, the most compelling reason to reject this cause of action is the intolerable and insoluble problem it would create in the assessment of damage."

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350 [1982] QB 1166 at 1181.

351 [1982] QB 1166 at 1182.

352 Section 4(5).

353 Law Com No 60, (1974) Cmnd 5709. Paragraph 89 states:

> "Such a cause of action [ie a claim for 'wrongful life'], if it existed, would place an almost intolerable burden on medical advisers in their socially and morally exacting role. The danger that doctors would be under subconscious pressure to advise abortions in doubtful cases through fear of an action for damages is, we think, a real one."

Similar policy considerations were noted in the Report of the Canadian Royal Commission on New Reproductive Technologies entitled *Proceed with Care*, (1993), vol 2 at 957-959.

354 [1982] QB 1166 at 1189.

355 [1982] QB 1166 at 1192.

232 In *Gleitman v Cosgrove*[356], an early cognate decision in the United States of America, to which the Court was referred in *McKay*[357], a majority of the Supreme Court of New Jersey found that it was impossible to determine the difference between a life with defects and "the utter void of nonexistence"[358] and determined that the child's complaint was "not actionable because the conduct complained of, even if true, does not give rise to damages cognizable at law"[359]. In denying a concurrent claim by the parents claiming they were denied their right to an abortion in the circumstances, the Court found that even if their damage were cognisable to the law, their claim would be precluded by the "countervailing public policy supporting the preciousness of human life"[360]. While the objection to the parents' claim may be affected by the decision in *Roe v Wade*[361], the objection to the child's claim continued to be influential in American jurisprudence concerning wrongful life even as it developed after *Roe v Wade*[362]. Courts in California, New Jersey and Washington have permitted "wrongful life" claims and the recovery of special damages associated with a plaintiff's disabilities[363] and the Superior Court of Connecticut has declined to strike out such a claim summarily[364]. Stephenson LJ noted in *McKay*[365] that *Gleitman v Cosgrove*[366] had been preceded by an article by Tedeschi[367] which dealt with the

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356 227 A 2d 689 (1967).

357 [1982] QB 1166 at 1182.

358 227 A 2d 689 at 692 (1967) per Proctor J.

359 227 A 2d 689 at 692 (1967) per Proctor J.

360 227 A 2d 689 at 693 (1967) per Proctor J.

361 410 US 113 (1973).

362 410 US 113 (1973).

363 *Turpin v Sortini* 182 Cal Rptr 337 (1982), overruling in part the earlier decision of the Court of Appeal in *Curlender v Bio-Science Laboratories* 165 Cal Rptr 477 (1980) which is the only American court to have awarded general damages; *Harbeson v Parke-Davis Inc* 656 P 2d 483 (1983); *Procanik v Cillo* 478 A 2d 755 (1984).

364 *Quinn v Blau* 21 Conn L Rptr 126 (1997).

365 [1982] QB 1166 at 1182.

366 227 A 2d 689 (1967).

367 "On Tort Liability for 'Wrongful Life'", (1966) 1 *Israel Law Review* 513.

issue of the impossibility of comparing two alternatives of non-existence and existence with disease.

233 Many other American states have rejected "wrongful life" claims both before and after *Roe v Wade*[368] for a variety of reasons, but two recur. First, such a claim requires an impossible comparison between a life with disability and non-existence such that the damage claimed, that is a life with disabilities, is not cognisable to the law and, secondly, *damages* in respect of that *damage* are not ascertainable. These objections have led a number of courts, since *Gleitman v Cosgrove*[369], to continue to find that life is not actionable damage or compensable injury at the suit of a disabled child[370]. The trial judge has conveniently dealt with some of the American cases[371].

234 It appears that numerous state legislatures in the United States since *Roe v Wade*[372] have prohibited a person from maintaining a cause of action or receiving an award of damages based on a claim that, but for the negligent conduct of another, the foetus would have been aborted[373]. Lesser legislative restrictions include excluding parents from the class of persons against whom such a claim might be made and restricting damages to special damages associated with disease, defect or handicap[374].

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368 410 US 113 (1973).

369 227 A 2d 689 (1967).

370 See *Becker v Schwartz* 386 NE 2d 807 (1978) and *Kassama v Magat* 792 A 2d 1102 (2002) each of which contains a relevant summary of case law.

371 *Harriton v Stephens* [2002] NSWSC 461 at [12], [35]-[49]; see also *Edwards v Blomeley* [2002] NSWSC 460 at [33]-[43] and Pollard, "Wrongful Analysis in Wrongful Life Jurisprudence", (2004) 55 *Alabama Law Review* 327.

372 410 US 113 (1973).

373 Roper, "An Open Question in Utah's Open Courts Jurisprudence: The Utah Wrongful Life Act and *Wood v University of Utah Medical Center*", (2004) *Brigham Young University Law Review* 893 at 895, fn 12.

374 Roper, "An Open Question in Utah's Open Courts Jurisprudence: The Utah Wrongful Life Act and *Wood v University of Utah Medical Center*", (2004) *Brigham Young University Law Review* 893 at 895, fn 12.

235 In Canada, such claims have not been recognised[375]. The Court of Appeal in Manitoba has rejected a wrongful life claim on the grounds of public policy and because of the impossibility of assessing damages[376], although the Saskatchewan Court of Appeal has declined to uphold the summary dismissal of such a claim[377].

236 A wrongful life claim has been allowed by the Supreme Court of Israel[378]. It is reported that two judges in a majority of four (of a bench of five judges) deal with the difficulty of comparing life with disability with non-existence, by employing for the purposes of assessing damages a legal fiction as a comparator, namely "life as a healthy child"[379].

237 As to Europe's civil law jurisdictions, it is reported that in Germany, a year before *McKay*[380], a mother's wrongful birth claim for the extra costs of bringing up a handicapped child affected by rubella was allowed by the German Supreme Court but it rejected the child's concurrent wrongful life claim[381].

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375 Nelson and Robertson, "Liability for Wrongful Birth and Wrongful Life", (2001) 2(3) *Isuma: Canadian Journal of Policy Research* 102.

376 *Lacroix v Dominique* (2001) 202 DLR (4th) 121.

377 *Bartok v Shokeir* (1998) 168 Sask R 280.

378 *Zeitsov v Katz* (1986) 40(2) PD 85, as discussed in Heyd, "Are 'Wrongful Life' Claims Philosophically Valid? A Critical Analysis of a Recent Court Decision", (1986) 21 *Israel Law Review* 574.

379 Heyd, "Are 'Wrongful Life' Claims Philosophically Valid? A Critical Analysis of a Recent Court Decision", (1986) 21 *Israel Law Review* 574 at 584ff.

380 [1982] QB 1166.

381 Stolker, "Wrongful Life: The Limits of Liability and Beyond", (1994) 43 *International and Comparative Law Quarterly* 521, translating the Bundesgerichtshof, 18 January 1983, *Juristenzietung* (1983) at 450, "*dass in Fällen wie dem vorliegenden überhaupt die Grenzen erreicht und überschritten sind, innerhalb derer eine rechtliche Anspruchsregelung tragbar ist*" as "in cases like the present the limits have definitely been reached and overstepped within which a legal claim is acceptable" (see fn 2 at 521).

238 A wrongful life claim which appears to have been based on contract has been allowed in France[382]. A claim has been upheld under the Dutch Civil Code in the Netherlands[383].

The appeal to the New South Wales Court of Appeal

239 In the instant case Spigelman CJ found the proposed duty of care should not be accepted because it did not reflect values generally or even widely held in the community, it involved a "highly contestable" notion that Alexia Harriton would have been better off not being born, the relationship between doctor and child (formerly the foetus) was mediated through the parents and the damage complained of was not "legally cognisable damage" as it involved impossible comparison between life with disability and non-existence[384]. He agreed with Ipp JA's analysis of the difficulties of applying the compensatory principle to the appellant's claim.

240 Ipp JA agreed with Spigelman CJ that it is impossible to use non-existence as a comparator and found that if damages were not capable of measurement, the damage claimed will not be actionable and no duty of care will arise[385].

241 Mason P, in dissent, found the disabilities were "in one sense caused by the negligence of the [doctor]"[386] and that it would be inconsistent[387] to disallow recovery for a wrongful life claim given the result in *Cattanach v Melchior*[388]. He considered that compensation for a wrongful life could be allowed on the application of the ordinary principles of tort. He regarded the essence of the appellant's complaint as her "present and future suffering and the needs it creates"[389]. The steps in his reasoning were first to recognise that wrongful life

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382 *Perruche* Cass. ass. plén., Nov. 17, 2000, noted in 2000 Bull. Civ. No. 9, 15.

383 See *Leids Universitair Medisch Centrum v Kelly Molenaar*, Hoge Raad 18 maart 2005, RvdW 2005, 42 as discussed in Hondius, "The Kelly Case – Compensation for undue damage for wrongful treatment", in Gevers, Hondius and Hubben (eds), *Health Law, Human Rights and the Biomedicine Convention*, (2005) 105.

384 (2004) 59 NSWLR 694 at 701 [24], 705 [54].

385 (2004) 59 NSWLR 694 at 737 [266], 739 [280].

386 (2004) 59 NSWLR 694 at 715 [116].

387 (2004) 59 NSWLR 694 at 718 [136]-[137].

388 (2003) 215 CLR 1.

389 (2004) 59 NSWLR 694 at 721 [155].

involves physical damage being the disability, which is reasonably foreseeable[390], reasonably preventable[391] and caused by the doctor's conduct of omitting to give advice and treatment[392]. It appears the treatment to which Mason P was referring was termination of the pregnancy as no other treatment was under consideration in the case. The appellant adopts the reasoning and conclusions of Mason P in the Court of Appeal.

Duty of care

242 In *Sullivan v Moody* in the joint judgment of five Justices, it was stated[393]:

> "Different classes of case give rise to different problems in determining the existence and nature or scope, of a duty of care. Sometimes the problems may be bound up with the harm suffered by the plaintiff, as, for example, where its direct cause is the criminal conduct of some third party. Sometimes they may arise because the defendant is the repository of a statutory power or discretion. Sometimes they may reflect the difficulty of confining the class of persons to whom a duty may be owed within reasonable limits. Sometimes they may concern the need to preserve the coherence of other legal principles, or of a statutory scheme which governs certain conduct or relationships. The relevant problem will then become the focus of attention in a judicial evaluation of the factors which tend for or against a conclusion, to be arrived at as a matter of principle."

243 In the present appeal, particular significance attaches to the need to preserve the coherence of legal principles, as emphasised in *Sullivan v Moody*[394]. In what follows, consideration will be given to the nature of the damage alleged and to the difficulty of confining the proposed duty of care to grievously disabled persons, a suggestion made during the argument for the appellant. The conclusion will be reached that the nature of the damage alleged is not such as to be legally cognisable in the sense required to found a duty of care. That conclusion will make it unnecessary to determine the other matters referred to, but as they were fully argued, consideration will be given to them.

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390 (2004) 59 NSWLR 694 at 713-714 [107]-[112].

391 (2004) 59 NSWLR 694 at 714-716 [114]-[121].

392 (2004) 59 NSWLR 694 at 715 [116], 716 [121]-[123].

393 (2001) 207 CLR 562 at 579-580 [50] (footnotes omitted).

394 (2001) 207 CLR 562 at 580 [50].

244 It was not Dr P R Stephens's fault that Alexia Harriton was injured by the rubella infection of her mother. Once she had been affected by the rubella infection of her mother it was not possible for her to enjoy a life free from disability. The agreed facts assert that Dr P R Stephens should have treated Mrs Harriton differently, in which case rubella would have been diagnosed. However, on the agreed facts, it was not possible for Dr P R Stephens to prevent the appellant's disabilities. Dr P R Stephens would have discharged his duty by diagnosing the rubella and advising Mrs Harriton about her circumstances, enabling her to decide whether to terminate her pregnancy; he could not require or compel Mrs Harriton to have an abortion.

245 It is important to an understanding of the right or interest which the appellant is seeking to protect, to maintain the distinction between suing the doctor for causing physical damage, being the disability[395], and suing the doctor for causing a "life with disabilities", as the case was put by the appellant in this Court. The former is immediately caused by rubella, whereas the latter is said to be immediately, or materially, or effectively caused by the doctor's failure to advise the mother such that her response would have been to obtain a lawful abortion. In the Court of Appeal, Spigelman CJ was of the opinion that it is not "possible to avoid or obfuscate the fact that an action by a disabled child, as distinct from an action by the parents, involves an assertion *by the child* that it would be preferable if she or he had not been born"[396]. This raises the difficult question of whether the common law could or should recognise a right of a foetus to be aborted, or an interest of a foetus in its own termination, which is distinct from the recognised right of a foetus not to be physically injured whilst *en ventre sa mère*, whether by a positive act[397] or by an omission[398].

246 It is an important consideration in determining whether a duty of care as alleged exists that it is only Mrs Harriton who was entitled to terminate her pregnancy lawfully in New South Wales, by reference to her physical and mental health[399].

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395 (2004) 59 NSWLR 694 at 713-714 [109]-[110] per Mason P.

396 (2004) 59 NSWLR 694 at 701 [24].

397 *Watt v Rama* [1972] VR 353 at 360-361; *Lynch v Lynch* (1991) 25 NSWLR 411 at 416-417; *R v King* (2003) 59 NSWLR 472 at 486 [73]. See also *Burton v Islington Health Authority* [1993] QB 204.

398 *X and Y (By Her Tutor X) v Pal* (1991) 23 NSWLR 26.

399 *Crimes Act* 1900 (NSW), s 82; *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47 at 53-54, 59-61.

247 A court is not able to infer from a mother's decision to terminate a pregnancy that her decision is in the best interests of the foetus which she is carrying. The law does not require that considerations of the mother's physical and mental health, which may render an abortion lawful, should be co-incident with the interests of her foetus.

248 Equally, a mother with an ethical, moral or religious objection to abortion is entitled to continue her pregnancy despite risks identified by her doctor to her physical and mental health or despite being advised by her doctor that rubella may have affected the foetus she carries. In the context of wrongful birth claims, the decision of parents not to have even a lawful abortion has been respected by the law[400]. In commenting on wrongful birth claims, and parental decisions not to have an abortion, in Fleming, *The Law of Torts*[401], it is stated that "it is not unreasonable for a woman to decline an abortion". Such decisions are bound up with individual freedom and autonomy. The duty of care proposed to the foetus (when born) will be mediated through the mother. The damage alleged will be contingent on the free will, free choice and autonomy of the mother. These circumstances can be expected to make it difficult for a court to assume that a possible conflict between the interests of mother and child would be "exceptional"[402] and to complicate the task of a court in formulating normative standards of conduct against which breach of such a duty of care could be assessed.

249 It is not to be doubted that a doctor has a duty to advise a mother of problems arising in her pregnancy, and that a doctor has a duty of care to a foetus which may be mediated through the mother[403]. However, it must be mentioned that those duties are not determinative of the specific question here, namely whether the particular damage claimed in this case by the child engages a duty of care. To superimpose a further duty of care on a doctor to a foetus (when born) to advise the mother so that she can terminate a pregnancy in the interest

doctor's duty of care to the mother in respect of her interests, has the capacity to introduce conflict, even incoherence, into the body of relevant legal principle[404].

250 A further consideration is that there would be no logical distinction to be made between a duty of care upon a doctor as proposed, and a correlative duty of care upon a mother or parents who decline to have an abortion and choose to continue a pregnancy despite being informed of the risk of disability to the child. Such conduct would then be the intervening immediate cause of the damage claimed. The appellant's answer to this difficulty was that the mother's current right to make a choice and to terminate the pregnancy lawfully or not could not be cut down by recognising the right of a child to sue in respect of a life with disability. But this answer exposes rather than resolves the possible lack of coherence in principle occasioned by the appellant's claim. The risk of a parent being sued by the child in these circumstances was recognised in the United Kingdom in *McKay*[405] and in California in *Curlender v Bio-Science Laboratories*[406]. Further, the need to protect parents from such suits has been addressed both by the United Kingdom legislature[407] and by the Californian legislature[408].

Damage

251 Because damage constitutes the gist of an action in negligence, a plaintiff needs to prove actual damage or loss and a court must be able to apprehend and evaluate the damage, that is the loss, deprivation or detriment caused by the alleged breach of duty. Inherent in that principle is the requirement that a plaintiff is left worse off as a result of the negligence complained about, which can be established by the comparison of a plaintiff's damage or loss caused by the negligent conduct, with the plaintiff's circumstances absent the negligent conduct. In the Court of Appeal, Spigelman CJ recognised that in cases of this kind, to find damage which gives rise to a right to compensation it must be established that non-existence is preferable to life with disabilities[409]. A right

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404 *Sullivan v Moody* (2001) 207 CLR 562 at 581-582 [55]-[62].

405 [1982] QB 1166 at 1188 per Ackner LJ.

406 165 Cal Rptr 477 (1980).

407 *Congenital Disabilities (Civil Liability) Act* 1976 (UK), s 1(1) excepts "the child's own mother" from such a liability.

408 Cal. Civ. Code §43.6(a): "No cause of action arises against a parent of a child based upon the claim that the child should not have been conceived or, if conceived, should not have been allowed to have been born alive."

409 (2004) 59 NSWLR 694 at 701 [24].

capable of being protected by the law of tort, to not exist (or to be aborted), must necessarily require the comparison which Spigelman CJ identified. The appellant's counsel conceded correctly that it is the usual principles of tort liability which compel the appellant to contest her own existence.

252 A comparison between a life with disabilities and non-existence, for the purposes of proving actual damage and having a trier of fact apprehend the nature of the damage caused, is impossible. Judges in a number of cases have recognised the impossibility of the comparison and in doing so references have been made to philosophers and theologians as persons better schooled than courts in apprehending the ideas of non-being, nothingness and the afterlife[410].

253 There is no present field of human learning or discourse, including philosophy and theology, which would allow a person experiential access to non-existence, whether it is called pre-existence or afterlife. There is no practical possibility of a court (or jury) ever apprehending or evaluating, or receiving proof of, the actual loss or damage as claimed by the appellant. It cannot be determined in what sense Alexia Harriton's life with disabilities represents a loss, deprivation or detriment compared with non-existence. Physical damage such as a broken leg is within the common experience of a trier of fact who then has no difficulty apprehending the loss, deprivation or detriment claimed. With more complex physical damage, outside the common experience of a trier of fact, evidence can be led from medical experts to assist the trier of fact to apprehend the loss, deprivation or detriment by comparison with prior circumstances, which can also be the subject of evidence. The same applies with loss or deprivation which is economic. Imaginative access to non-existence, not based on experience, or on a proved sub-stratum of fact, cannot assist a court or jury in the forensic tasks necessary to determine a claim such as that of the appellant.

254 The practical forensic difficulty is independent of arguments about the value (or sanctity) of human life and any repugnance evoked by the appellant's argument that her life with disabilities is actionable. This objection to the cause of action is in no way affected or diminished by shifts in any absolute value given to human life (if such shifts have occurred), occasioned by liberalised abortion laws or other developments in the law in respect of lawful discontinuation of medical treatment where the welfare of a suffering person is the main consideration. A duty of care cannot be stated in respect of damage which cannot be proved by persons alleging such a duty has been breached, and which cannot be apprehended by persons said to be subject to the duty, and which cannot be apprehended or evaluated by a court (or jury).

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410 *Edwards v Blomeley* [2002] NSWSC 460 at [75]; see also *McKay v Essex Area Health Authority* [1982] QB 1166 at 1189; *Gleitman v Cosgrove* 227 A 2d 689 at 692 (1967).

255 It was submitted for the appellant that if the majority's rejection of a cause of action in the Court of Appeal on this basis is a legal principle, it is a flawed legal principle or a legal principle wrongly applied because the law has shown itself regularly as capable of balancing a present life of suffering against a therapeutically accelerated death as evidenced in a number of cases in the *parens patriae* jurisdiction[411]. It was next contended that the "impossible comparison" argument was either an aspect, or a corollary, of the "sanctity of life" argument, which did not preclude recovery in *Cattanach v Melchior*[412].

256 The cases involving discontinuation of medical treatment have been conveniently collected by Spigelman CJ in the Court of Appeal[413]. Analogy to decisions in the *parens patriae* jurisdiction is not apt, chiefly because the wardship cases do not require a forensic establishment of damage by reference to non-existence. 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. It is possible for a court to receive evidence allowing it to undertake a balancing exercise in respect of those two possible courses of action[414] before making a decision. As accepted in *In re J (A Minor) (Wardship: Medical Treatment)*[415], such comparisons involve matters of degree and lack the absolute quality of a comparison between a life with disability (or suffering) and death. The analogy between this case and the wardship 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, a difference recognised in *In re J*[416].

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411 *In re J (A Minor) (Wardship: Medical Treatment)* [1991] Fam 33; *In re T (A Minor) (Wardship: Medical Treatment)* [1997] 1 WLR 242; [1997] 1 All ER 906.

412 (2003) 215 CLR 1.

413 (2004) 59 NSWLR 694 at 704 [45] citing *Airedale NHS Trust v Bland* [1993] AC 789; *In re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147; *Re B (adult: refusal of medical treatment)* [2002] 2 All ER 449; *Re BWV; Ex parte Gardner* (2003) 7 VR 487.

414 *In re J (A Minor) (Wardship: Medical Treatment)* [1991] Fam 33; *In re T (A Minor) (Wardship: Medical Treatment)* [1997] 1 WLR 242; [1997] 1 All ER 906.

415 [1991] Fam 33 at 44 per Lord Donaldson of Lymington MR.

416 [1991] Fam 33 at 46 per Lord Donaldson of Lymington MR.

257 These considerations highlight the differences between claims for wrongful birth and wrongful life. These differences show the latter cannot be considered incremental claims in relation to the former. Damage was not in issue in *Cattanach v Melchior*[417]. The Court there was not considering whether the damage claimed was capable of being evaluated by a court. Likewise in *Watt v Rama*[418] there was evidence of damage capable of being evaluated by the Court and the question was whether established principle could encompass that damage. In the present case, the damage claimed cannot be the subject of evidence or forensic analysis. This highlights the need to distinguish between considerations going to the existence of a duty of care and considerations going to breach, a distinction referred to by Gummow J in *Vairy v Wyong Shire Council*[419]. The Court in *Cattanach v Melchior*[420] was considering whether the law would require a doctor defendant to bear certain costs. That question was resolved by reference to "general principles, based upon legal values"[421], and legal policy considerations, encompassing the corporate welfare of the community, coherence and fairness[422], a common law technique for dealing with novel claims[423]. Considering the question here by reference to that technique exposes many formidable obstacles to recognition of the appellant's claim. Another problem is the difficulty of assessing damages, in respect of the damage, a topic to be discussed later in these reasons. Not every claim for damage is actionable. The principles of negligence are designed to set boundaries in respect of liability. The analytical tools therefor, such as duty of care, causation, breach of duty, foreseeability and remoteness, all depend for their employment on damage capable of being apprehended and evaluated.

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417 (2003) 215 CLR 1.

418 [1972] VR 353.

419 (2005) 80 ALJR 1 at 17-18 [70]-[73]; 221 ALR 711 at 730-731.

420 (2003) 215 CLR 1.

421 (2003) 215 CLR 1 at 8 [2] per Gleeson CJ.

422 (2003) 215 CLR 1 at 32-35 [70]-[76] per McHugh and Gummow JJ, 52-53 [136]-[137]

The value of life

258 There is nothing in the majority's rejection of the "blessing" argument in *Cattanach v Melchior*[424] or in their disinclination to bar a wrongful birth claim because of the law's recognition of broad underlying values of the importance of life[425], which prevents the additional observation in this case 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 into a life with disabilities.

259 In the eyes of the common law of Australia all human beings are valuable in, and to, our community, irrespective of any disability or perceived imperfection. The premises upon which cases are conducted in the *parens patriae* jurisdiction, which have already been mentioned, do not contradict that proposition. While Alexia Harriton's disabilities are described in the agreed statement of facts, her disabilities are only one dimension of her humanity. It involves no denial of the particular pain and suffering of those with disabilities to note that while alive, between birth and death, human beings share biological needs, social needs and intellectual needs and every human life, within its circumstances and limitations, is characterised by an enigmatic and ever-changing mixture of pain and pleasure related to such needs.

260 The Court knows very little about Alexia Harriton but it is possible for the Court to infer that Alexia Harriton is no different in this respect from fellow human beings, despite the fact that her grave disabilities include mental retardation. A seriously disabled person can find life rewarding[426] and it was not contended to the contrary on behalf of the appellant. It was not contended as a fact that Alexia Harriton cannot experience pleasure[427]. The Court was informed Alexia Harriton commanded the devotion of her parents.

261 Arguments giving primacy to the value of Alexia Harriton's life, which are additional to and independent of the arguments based on the forensic

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424 (2003) 215 CLR 1 at 36 [79] per McHugh and Gummow JJ, 54-60 [141]-[153] per Kirby J; see also at 72-74 [195]-[198] per Hayne J.

425 (2003) 215 CLR 1 at 35-36 [77]-[78] per McHugh and Gummow JJ, 55-56 [142]-[145] per Kirby J, 108-109 [301] per Callinan J.

426 *In re J (A Minor) (Wardship: Medical Treatment)* [1991] Fam 33 at 46-47 per Lord Donaldson of Lymington MR.

427 *Portsmouth Hospitals NHS Trust v Wyatt* [2005] 1 WLR 3995 at 4001 [26] and 4011 [46]; see also *Airedale NHS Trust v Bland* [1993] AC 789 and *In re a Ward of Court (withholding medical treatment) (No 1)* [1996] 2 IR 73.

impossibility of proving and apprehending the nature of the damage claimed, highlight the lack of certainty about the class of persons to whom the proposed duty is owed. Is it only owed to 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, in which a duty of care exists, do not discriminate between those damaged by a breach of the duty on the basis of the severity or otherwise of the damage.

262 A further consideration is 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 the law. Such incompatibility is pervasive but can be illustrated by two examples. Statutes advancing equality of treatment in our legal system prohibit differential treatment of the disabled, which may have as its wellspring, or be otherwise connected with, eugenic anxieties[428]. As was noted in the judgment of McHugh and Gummow JJ in *Cattanach v Melchior*[429], 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.

263 To allow a disabled person to claim his or her own existence as actionable damage, is not only inconsistent with statutes prohibiting differential treatment of the disabled, but it is also incompatible with the law's sanction of those who wrongfully take a life. 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.

The compensatory principle

264 The fundamental principle governing the assessment of compensatory damages is well settled. As stated in *Husher v Husher*[430]:

> "A person who is physically injured by the negligence of another may suffer damage in a number of ways. As has long been established, the damages to be awarded to the victim are 'that sum of money which will

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428 See, for example, the *Disability Discrimination Act* 1992 (Cth); the *Anti-Discrimination Act* 1977 (NSW); the *Anti-Discrimination Act* 1998 (Tas); the *Equal Opportunity Act* 1995 (Vic); and the *Discrimination Act* 1991 (ACT).

429 (2003) 215 CLR 1 at 35-36 [78].

430 (1999) 197 CLR 138 at 142-143 [6] per Gleeson CJ, Gummow, Kirby and Hayne JJ (footnote omitted).

> put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation'."

Providing compensation if liability is established is the main function of tort law; compensation is "[t]he one principle that is absolutely firm, and which must control all else"[431]; if the principle cannot be applied the damage claimed cannot be actionable.

265 Many examples demonstrating the principle were referred to in the Court of Appeal[432]. Whilst Mason P did not consider that the impossibility of a comparison between life with disability and non-existence should bar the claim, he recognised the damages issues were "quite profound"[433]. It can be accepted that mere difficulty in the calculation of damages is not a bar to recognising a cause of action, especially when damages conventionally awarded in personal injuries can assist[434]. However, it is not possible on the facts of this case to apply the compensatory principle. Alexia Harriton's condition before the alleged breach of duty of care by Dr P R Stephens was that she was a foetus affected by rubella. The comparison which is called for on the agreed facts is a comparison between her life with disabilities and the state of non-existence in which she would have been, absent the doctor's alleged carelessness in failing to advise her mother, which advice would have led her mother to obtain a lawful abortion. It is not that the comparison is difficult or problematic. It is impossible, for the reasons already explained.

266 To posit that the necessary comparison can be achieved by comparing Alexia Harriton's "notional life without disabilities" with her actual "life with disabilities" (the comparator used in *Zeitsov v Katz*[435] and suggested by the appellant in the *Waller* cases) depends on a legal fiction. So too does a comparison of her "life with disabilities" with the life of "someone otherwise comparable with her in all respects except for her suffering and her needs", the

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431 *Skelton v Collins* (1966) 115 CLR 94 at 128 per Windeyer J.

432 (2004) 59 NSWLR 694 at 698-699 [3]-[8] per Spigelman CJ, 728-730 [215]-[230] per Ipp JA.

433 (2004) 59 NSWLR 694 at 723 [169]; see also *Edwards v Blomeley* [2002] NSWSC 460 at [33]-[43] per Studdert J.

434 *Rees v Darlington Memorial Hospital NHS Trust* [2003] QB 20; see also *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44.

435 (1986) 40(2) PD 85.

"fictional healthy person"[436]. In the United States, courts of the three states which have recognised recovery of special damages for a child/plaintiff's disabilities (California, New Jersey and Washington) have, on occasion, frankly acknowledged that the inherent problems arising out of the impossibility of comparing a life with disabilities with non-existence and the related problem of assessing damages, have been put to one side for reasons of social or economic policy. For example, in *Curlender*[437], the only case in the United States in which general damages were awarded, the Court said[438]:

> "The reality of the 'wrongful-life' concept is that such plaintiff both *exists* and *suffers*, due to the negligence of others. It is neither necessary nor just to retreat into meditation on the mysteries of life. We need not be concerned with the fact that had defendants not been negligent, the plaintiff might not have come into existence at all."

267 In *Turpin v Sortini*[439], overruling the result in *Curlender*[440] in disallowing the claim for general damages, but allowing the claim for special damages, the Court stated that it would be illogical and anomalous to permit only parents, not the child, to recover such costs. It can be conceded this would be a forceful argument if the child's damage were the same. It is not; it is profoundly different, as already explained.

268 After *Turpin*[441], in *Procanik v Cillo* (allowing special damages) the Court said[442]:

> "Our decision to allow the recovery of extraordinary medical expenses is not premised on the concept that non-life is preferable to an impaired life, but is predicated on the needs of the living. We seek only to respond to the call of the living for help in bearing the burden of their affliction."

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436 Adopted also by the appellant in the *Waller* cases, in the alternative**.**

437 165 Cal Rptr 477 (1980).

438 165 Cal Rptr 477 at 488 (1980) per Jefferson PJ, with whom Lillie and Rimerman JJ agreed.

439 182 Cal Rptr 337 (1982).

440 165 Cal Rptr 477 (1980).

441 182 Cal Rptr 337 (1982).

442 478 A 2d 755 at 763 (1984) per Pollock J.

269 The common law is hostile to the creation of new legal fictions[443] and the use of legal fictions concealing unexpressed considerations of social policy has been deprecated[444]. Employment of either of the legal fictions proposed would have the effect of excepting the appellant from the need to come within well-settled and well-understood principles of general application to the tort of negligence. Also, the heads of damages sought to be recovered reveal the conceptual difficulty of assessing damages in respect of the appellant's claim. The appellant relies on conventional awards of damages in personal injury. However, there cannot have been any damage to the appellant's earning capacity and none was claimed. In respect of the appellant's special pain and disabilities caused by rubella, it was suggested that a comparison could be made in the light of the ordinary range of usual experience of pain and disabilities. As to medical and care needs, on the actual comparator, nothing is recoverable.

270 A life without special pain and disabilities was never possible for the appellant, even before any failures by Dr P R Stephens. Approaching the task of assessing general and special damages, as suggested, has the effect of making Dr P R Stephens liable for the disabilities, which he did not cause. The manifold difficulties in assessing damages in respect of the claim have been discussed conveniently and comprehensively by Ipp JA[445]. The analytical tool for measuring damages, the compensatory principle, depends for its utility and execution on proof of the actual damage suffered.

Corrective justice

271 Finally, the appellant's submissions included a submission that "corrective justice" or "practical justice" would permit the appellant to recover despite the inherent difficulties her claim posed in the light of established principles. The argument ran that the appellant is suffering, the suffering is causally linked to Dr P R Stephens's conduct and the suffering will go uncompensated if the cause of action is not recognised. No-one would deny that Alexia Harriton's circumstances are tragic. She is entitled to look for support to both the state and her devoted parents.

272 In confirming the rejection in Australia of the three-stage approach in *Caparo Industries Plc v Dickman*[446], which had the effect of adding questions of

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443 *Scott v Davis* (2000) 204 CLR 333 at 375-376 [128]

what was "fair, just and reasonable" to questions of duty of care and foreseeability of damage, the Court said in *Sullivan v Moody*[447]:

> "The question as to what is fair, and just and reasonable is capable of being misunderstood as an invitation to formulate policy rather than to search for principle. The concept of policy, in this context, is often ill-defined. There are policies at work in the law which can be identified and applied to novel problems, but the law of tort develops by reference to principles, which must be capable of general application, not discretionary decision-making in individual cases."

273 In Prosser and Keeton, *On Torts*[448], it is stated:

> "It is sometimes said that compensation for losses is the primary function of tort law and the primary factor influencing its development. It is perhaps more accurate to describe the primary function as one of determining when compensation is to be required. Courts leave a loss where it is unless they find good reason to shift it. A recognized need for compensation is, however, a powerful factor influencing tort law. Even though, like other factors, it is not alone decisive, it nevertheless lends weight and cogency to an argument for liability that is supported also by an array of other factors."

274 Aristotelian notions of "corrective justice"[449], requiring somebody who has harmed another without justification to indemnify that other, and "distributive justice"[450], requiring calculation of benefits and losses and burdens in society, were referred to by Lord Steyn in *McFarlane v Tayside Health Board*[451], for the purpose of explicating the dynamic interrelationship between differing values, which values need to be considered when faced with a novel claim in negligence. The Aristotelian backdrop to the notions of "corrective justice" and "distributive justice" was a community whose common good included laws, both reflecting the community's common values and enabling individual members to achieve reasonable objectives[452]. However, there remains a problem in Aristotle's

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447 (2001) 207 CLR 562 at 579 [49] per Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ.

448 5th ed (1984) at 20 (footnote omitted).

449 Nicomachean Ethics V,2:1131a1; 3:1131b25; 4:1132b25.

450 Nicomachean Ethics V,3:1131b28; 3:1132b24, 32.

451 [2000] 2 AC 59 at 82.

452 Nicomachean Ethics V,1:1129a27ff; 1129b15.

analysis, relevant to this submission. In emphasising "corrective justice", even as added to by his consideration of "distributive justice", Aristotle left unexplored the dependence of "correction" on the prior establishment of principles. As Finnis[453] puts it, "'[c]orrection' and 'restitution' are notions parasitic on some prior determination of what is to count as a crime, a tort, a binding agreement, etc". The values of fairness, coherence, and the corporate welfare of the community or community expectations as referred to in *Cattanach v Melchior*[454], are not considered singly, in isolation from each other or from relevant matters, particularly the doctrines and well-established principles determining what constitutes negligence.

275 Putting aside doubt as to whether a need for "corrective justice" arises when a person is affected by rubella, for which no-one is responsible, a need for "corrective justice" alone could never be determinative of a novel claim in negligence. Moreover, to the extent that it may be a factor to be taken into account when considering a novel claim, a need for "corrective justice" is not a persuasive factor here. The claim here is to extend a boundary in respect of liability for compensation when the liability is precluded by "an array of other factors"[455].

Conclusion

276 In the present case the damage claimed is not amenable to being determined by a court by the application of legal method. A duty of care cannot be clearly stated in circumstances where the appellant can never prove (and the trier of fact can never apprehend) the actual damage claimed, the essential ingredient in the tort of negligence. The appellant cannot come within the compensatory principle for measuring damages without some awkward, unconvincing and unworkable legal fiction. To except the appellant from complying with well-established and well-known principles, integral to the body of doctrine concerning negligence applicable to all plaintiffs and defendants in actions in all other categories of negligence, would occasion serious incoherence in that body of doctrine and would ignore the limitations of legal method in respect of the appellant's claim.

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453 Finnis, *Natural Law and Natural Rights*, (1980) at 178-179.

454 (2003) 215 CLR 1 at 29 [60], 30-31 [65], 32-33 [70], 33-35 [73]-[77] per McHugh and Gummow JJ, 55-56 [142]-[145] per Kirby J, 81-89 [224]-[242] per Hayne J, 108-109 [301] per Callinan J.

455 Prosser and Keeton, *On Torts*, 5th ed (1984) at 20.

277 The other considerations, the autonomy of a mother in respect of any decision to terminate or continue a pregnancy, the problematic nature of the right or interest being asserted, the uncertainty about the class of persons to whom the proposed duty would be owed and the incompatibility of the cause of action with values expressed generally in the common law and statute all support the conclusion that the appellant does not have a cause of action against the respondent on the agreed facts. For these reasons *Cattanach v Melchior*[456] represents the present boundary drawn in Australia by the common law (subject to retreat of the legislatures in New South Wales[457], South Australia[458] and Queensland[459]) in respect of claims of wrongful birth and wrongful life. Life with disabilities, like life, is not actionable.

278 The decision of the majority of the Court of Appeal should be upheld. The appeal should be dismissed with costs.

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456 (2003) 215 CLR 1.

457 *Civil Liability Act* 2002 (NSW), ss 70 and 71.

458 *Civil Liability Act* 1936 (SA), s 67.

459 *Civil Liability Act* 2003 (Q), ss 49A(2) and 49B(2).