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RECONCEIVING TORT LIABILITY FOR "WRONGFUL LIFE"

CRAIG PURSHOUSE*

ABSTRACT. *It is widely assumed that English law adopts a restrictive approach towards tort actions for "wrongful life". This article reveals the true legal position to be much more complex. A broad distinction exists between cases where the wrong occurred before or at conception and those where it occurred during pregnancy, with claims usually being permitted in the former scenario but not in the latter. In this article, I expose this bifurcation as arbitrary before examining potential solutions for remedying it.*

KEYWORDS: *wrongful life*, *congenital disabilities*, *negligence*, *tort*, *medical law*.

I. INTRODUCTION

Wrongful life actions, which I shall define as claims brought by children where a defendant's wrong has caused their very existence (usually in a disabled condition), are not permitted in most common law jurisdictions.[1] At first sight, English law appears to accord with this pattern. The leading case is *McKay v Essex A.H.A.*[2] Mary McKay's mother was infected with rubella during pregnancy, which was known to cause birth defects. After the defendants' carelessness led to blood tests and samples being mislaid, Mrs. McKay was inaccurately told that she was not infected with the disease. She therefore never considered an abortion and

*Centre for Private Law and Centre for Medical Ethics and Law, the University of Hong Kong, Hong Kong. Email: craigjp@hku.hk.
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[1] See *Harriton v Stephens* [2006] HCA 15, (2006) 226 C.L.R. 52 (Australia); *Lacroix (Guardian of) v Dominique*, 2001 MBCA 122, 202 D.L.R. (4th) 121 (Manitoba, Canada), *Florence v Benzaquen*, 2021 ONCA 523, 462 D.L.R. (4th) 251 (Ontario, Canada); *J.U. and another v See Tho Kai Yin* [2005] SGHC 140, [2005] 4 S.L.R. 96 (Singapore). For a survey of the position across a range of jurisdictions, see A. Ruda, "'I Didn't Ask to be Born': Wrongful Life from a Comparative Perspective" (2010) 1 Journal of European Tort Law 204, 205–08.

[2] [1982] Q.B. 1166 (C.A.).

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gave birth to the claimant, whose disabilities included partial blindness and deafness.

This type of case is distinct from prenatal injury claims (or "liability for post-natal injuries resulting from prenatal events"[3]). Examples of such actions might include a doctor negligently prescribing a pregnant woman a teratogenic drug that causes birth defects or an abusive partner punching the expectant mother with the result that she gives birth prematurely. Children born with disabilities in such circumstances may be able to show that but for the defendant's wrongful prenatal conduct, they either would have avoided the disability altogether, or at least that any impairment would have been less severe.[4] Allowed under the Congenital Disabilities (Civil Liability) Act 1976 and, residually, at common law,[5] this type of claim has been described as "legally uncontroversial".[6]

By contrast, for Mary McKay the disability, or risk of disability, was already present before any wrongdoing occurred. But for the defendants' negligence, she would not have been born without a disability: her mother would have had an abortion. Unlike the typical claim for prenatal injuries, the defendants' negligence has not deprived her of existence without a disability. She would either be born with one or not exist at all.

The Court of Appeal's reasons for rejecting the claim can be briefly summarised: there was no duty to terminate the foetus's life; the claim violated the sanctity of life; there were difficulties with identifying the actionable damage and calculating damages; and the claim devalued the lives of disabled people.[7] I will return to this reasoning later. For present purposes, the important point is that in this strike-out application all of the judges were "unanimously of the opinion that the infant plaintiff's claim for what has been called 'wrongful life' discloses no reasonable cause of action".[8]

[3] *Dobson v Dobson*, 1999 Can. L.I.I. 689, [1999] 2 S.C.R. 753 (S.C.C.), at [103] (Major J.).

[4] For example, part of the claim in *McKay*, though not in issue before the Court of Appeal, was based upon the failure of one of the defendants to arrest the spread of the rubella damage by the injection of globulins. Although this treatment could not reverse any damage already done to the unborn child, it could have reduced the likelihood of further damage.

[5] See *Burton v Islington H.A.; De Martell v Merton and Sutton H.A.* [1993] Q.B. 204 (C.A.). Such common law actions are now very unlikely given that the 1976 Act applies to all births after its passing (s. 4(5), though note potential exceptions related to novel forms of damage discussed elsewhere in this article). The limitation period for children begins three years from the age of majority and so has now passed for those born before 1976. For those with a mental disability that prevents them from bringing a claim, it runs from the date they gain the capacity to claim (Limitation Act 1980, ss. 28(6), 38(2)). There may well be people born before 1976 who lack capacity and who have not yet had a claim brought on their behalf but the common law action is a dead letter in all but those rare cases.

[6] *Waller v James* [2006] HCA 16, (2006) 226 C.L.R. 136, at [17] (Kirby J.). Cf. M. Brazier, "Parental Responsibilities, Foetal Welfare and Children's Health" in C. Bridge (ed.), *Family Law Towards the Millennium: Essays for P.M. Bromley* (London 1997); S. Sheldon, "ReConceiving Masculinity: Imagining Men's Reproductive Bodies in Law" (1999) 26 Journal of Law & Society 129; C. Bowden, "Is the Unequal Treatment of Maternal and Paternal Liability Under the Congenital Disabilities (Civil Liability) Act 1976 Justified?" (2022) 30 Medical Law Review 457.

[7] A summary of further reasons that have been given for rejecting these claims can be found in *Harriton v Stephens* [2006] HCA 15, at [205] (Callinan J.).

[8] *McKay v Essex* [1982] Q.B. 1166, 1171 (Stephenson L.J.).

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Mary McKay was born in 1975 and so the case was decided at common law but the Court of Appeal held, obiter, that had she been born after the passing of the Congenital Disabilities (Civil Liability) Act 1976 it too would have ruled out a claim. More recently, the Court of First Instance in Hong Kong SAR arrived at a similar conclusion. The Law Amendment and Reform (Consolidation) Ordinance (Cap. 23) ("LARCO") substantially replicates the 1976 statute. In *Lam Wing Hei v Hospital Authority*[9] – a claim brought by a child who alleged that the defendant's negligent failure to inform her mother of her chromosomal abnormality deprived her mother of the opportunity to terminate the pregnancy, with the result that the claimant was born with CHARGE syndrome – the Court of First Instance held that LARCO prevents wrongful life claims. Notably, since *Lam Wing Hei* was a claim brought *after* the passing of the Ordinance, it is part of the *ratio* of the case.

Read together, *McKay* and the 1976 Act appear to foreclose wrongful life claims in England. After detailing this apparent bar in Section II, I then contend in Section III that this first impression is, in fact, highly misleading. First, the 1976 Act only applies to claims in respect of *disabilities* and so wrongful life claims built around novel forms of damage may fall outside the scope of the legislation.

Second, and more significantly, the 1976 Act *creates* wrongful life actions, which will be detailed in Section IV and V. Specifically, these are: (1) infertility treatment actions under section 1A as inserted by the Human Fertilisation and Embryology Act 1990; and (2) actions based on the interpretation of section 1(2)(a) of the 1976 Act in *Toombes v Mitchell*.[10] I will refer to these inroads into the prima facie exclusion of liability for wrongful life as "conception claims" to distinguish them from the type of case that follows a similar fact pattern to *McKay*, which I shall call "pregnancy claims". I then argue in Section VI that there is no convincing reason for this dichotomy and so English law's laws treatment of this enclave is arbitrary.

This arbitrariness provides us with a reason for reforming the law. How, then, should this be done? A key hurdle faced by those wishing to impose liability for wrongful life is reconciling these actions with the requirement in negligence for claimants to show that they have suffered actionable damage. Attempts to do this have been advanced in the literature. The strongest involve: (1) a counterfactual account whereby life with disabilities constitutes damage when it is on-balance bad;[11] and (2) a non-counterfactual view, whereby life is damage when one is placed in a

[9] [2018] HKCFI 1167, [2018] 2 H.K.L.R.D. 1441.
[10] [2020] EWHC 3506, [2021] 2 W.L.R. 661.
[11] R. Scott, "Reconsidering 'Wrongful Life' in England after Thirty Years: Legislative Mistakes and Unjustifiable Anomalies" [2013] 72 C.L.J. 115.

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position where one suffers from disabilities.[12] In Section VI, I argue that while both of these proposals, when placed next to the current legislation, constitute much more principled ways of permitting wrongful life claims, there may still be compelling reasons for excluding liability in this context. I then conclude in Section VII that the governing legislation requires repeal or, at the very least, radical reform.

Before beginning, some caveats. First, my primary object is English law but, given that they share a similar statutory framework, most of my conclusions will apply to Hong Kong.[13] I also make use of other common law decisions in my analysis, particularly those of the High Court of Australia where the most detailed judicial examination of wrongful life has taken place.

Second, although the factual matrix of wrongful life actions can also generate wrongful birth claims by parents,[14] and these may provide an (imperfect) avenue for holding negligent defendants accountable,[15] my focus is on claims by children. While some of the criticisms of wrongful life discussed below have also been directed at wrongful birth claims (such as the idea that they lead to litigation that is demeaning to disabled people), the damage problem is less acute. In wrongful birth cases, the pregnant woman planned to have the expense of raising a healthy child but now has the extra cost associated with raising a child with disabilities. Unlike in wrongful life claims, these cases do not require an assessment of whether the child is harmed by existence. It may be, though, that any reform efforts directed at wrongful life claims should be broadened to encompass wrongful birth and other reproductive negligence actions.

Third, there is a vast body of literature, derived from Derek Parfit's "Non-Identity Problem", on the morality of wrongful life actions.[16] Likewise, "critical legal studies" or "social justice" perspectives have contributed to these debates.[17] Although I refer to some of this scholarship in places, I believe a doctrinal approach to these issues is timely in light of a number of recent developments.[18] Although the first inroad involving

[12] Best exemplified by W. Macaskill and S. Steel, "Suing for Damaged Existence", available at https://sandysteel.weebly.com/uploads/2/8/9/0/28904105/macaskill_steel_-_suing_for_damaged_existence__2011_.pdf (last accessed 18 August 2025). I am grateful to Sandy Steel for permitting me to cite from this paper.

[13] A key difference is that there is no equivalent section 1A of the 1976 Act in the Hong Kong scheme.

[14] *Kahn v Meadows* [2021] UKSC 21, [2022] A.C. 852.

[15] There may be good reasons why parents choose not to bring a wrongful birth action. See J. McCandless and K. Horsey, "Reproductive Harm, Social Justice and Tort Law: Rethinking 'Wrongful Birth' and 'Wrongful Life' Claims" in K. Horsey (ed.), *Diverse Voices in Tort Law* (Bristol 2024), 93.

[16] See D. Parfit, *Reasons and Persons* (Oxford 1984), ch. 16.

[17] See W.F. Hensel, "The Disabling Impact of Wrongful Birth and Wrongful Life Actions" (2005) 40 Harvard Civil Rights-Civil Liberties Law Review 141; McCandless and Horsey, "Reproductive Harm".

[18] For recent defences of this methodology, see J. Stapleton, *Three Essays on Torts* (Oxford 2021), ch. 1; Lord Burrows, "Judges and Academics, and the Endless Road to Unattainable Perfection" (2022) 55 Israel Law Review 50; D. Nolan, *Questions of Liability Essays on the Law of Tort* (Oxford 2023), 2; A. Bogg, "Doctrinal Method in Labour Law: Potential, Problems, Prospects" in A. Blackham and

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section 1A has been subject to scrutiny, notably by Rosamund Scott in this journal,[19] there has been very little scholarly examination of *Toombes* or *Lam Wing Hei*, despite them clarifying important aspects of this area of law.[20]

Finally, the label "wrongful life" is commonly charged with having "bizarre, even macabre, overtones".[21] Yet the term is widespread and the suggested alternatives usually inappropriately obscure the true nature of the claim. For example, Harvey Teff proposed replacing it with familiar legal categories, such as "negligently inflicted injury" or "absence of informed consent".[22] This can be regarded as the equivalent of attempting to side-step the intractable causation questions raised by the exposure to asbestos in *Fairchild v Glenhaven Funeral Services Ltd.* by declaring it to be a simple case of employers' liability.[23] In the absence of a better description, I will continue to refer to these claims as ones for wrongful life.

II. The Supposed Bar on Wrongful Life Claims under the 1976 Act

As was noted in the introduction, the Court of Appeal in *McKay* maintained that the Congenital Disabilities (Civil Liability) Act 1976 ruled out claims for wrongful life.[24] It is worth giving a precis of the legislation before examining whether this view is accurate.

The Act applies to all births after its passing (i.e. 22 July 1976)[25] and arose as a result of the thalidomide scandal where a sedative marketed as a safe cure for morning sickness in reality had teratogenic effects and was responsible for causing widespread birth defects.[26] As a result of the litigation challenges faced by children harmed by the drug, the Law Commission recommended putting civil liability for ante-natal injuries on

S. Cooney (eds.), *Research Methods in Labour Law: A Handbook* (Cheltenham 2024). Cf. G. Samuel, "What Is the Role of the Legal Academic?" (2022) 3 Amicus Curiae 305.

[19] Scott, "Reconsidering 'Wrongful Life'"; see also N. Gur, "Wrongful Life Claims and Negligent Selection of Gametes or Embryos in Infertility Treatments: A Quest for Coherence" (2014) 22 Journal of Law & Medicine 426.

[20] Jurists who have analysed *Toombes* include Bowden, "Unequal Treatment", 465–69; McCandless and Horsey, "Reproductive Harm", 97–99. Bowden's primary focus is not on wrongful life but another odd feature of the legislation: its treatment of parental immunity. McCandless and Horsey analyse wrongful life claims as part of a broader discussion of reproductive harms but only mention the 1976 Act in passing.

[21] H. Teff, "The Action for 'Wrongful Life' in England and the United States" (1985) 34 International and Comparative Law Quarterly 423, 425. See also *Harriton v Stephens* [2006] HCA 15, at [9]–[14] (Kirby J); *Florence v Benzaquen* 2021 ONCA 523, at [112]–[113] (Fairburn A.C.J.O.); J. Fortin, "Is the Action for 'Wrongful Life' Really Dead?" (1987) 8 Journal of Social Welfare & Family Law 306, 307; McCandless and Horsey, "Reproductive Harm", 85.

[22] Teff, "Action for Wrongful Life", 424.

[23] [2002] UKHL 22, [2003] 1 A.C. 32.

[24] The Act applies in England, Wales and Northern Ireland but not Scotland: Congenital Disabilities (Civil Liability) Act 1976, s. 6(2).

[25] Ibid., s. 4(5).

[26] See H. Teff and C. Munro, *Thalidomide: The Legal Aftermath* (London 1976); D. Body, "The Legacy of Thalidomide" [2018] Journal of Personal Injury Law 159.

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a statutory footing.[27] Section 1(1) states that if a child is born disabled as a result of an occurrence before its birth and a person (other than the child's mother) is answerable to the child in respect of the occurrence then "the child's disabilities are to be regarded as damage resulting from the wrongful act of that person and actionable accordingly at the suit of the child". There are, therefore, three key requirements to successfully claim: a child "born disabled"; an "occurrence"; and "answerability".

"Born" means "born alive (the moment of a child's birth being when it first has a life separate from its mother)"[28] and "disability" refers to "any deformity, disease or abnormality, including predisposition (whether or not susceptible of immediate prognosis) to physical or mental defect in the future".[29] An "occurrence", a key notion to which I will return, is defined in section 1(2) as one which:

> (a) affected either parent of the child in his or her ability to have a normal, healthy child; or
>
> (b) affected the mother during her pregnancy, or affected her or the child in the course of its birth, so that the child is born with disabilities which would not otherwise have been present.

A defendant will be "answerable" to the child if "he was liable in tort to the parent or would, if sued in due time, have been so", though "it is no answer that there could not have been such liability because the parent suffered no actionable injury, if there was a breach of legal duty which, accompanied by injury, would have given rise to the liability".[30]

In *McKay* Griffiths L.J. maintained that section 1 of the Act "achieves its objective"[31] in excluding wrongful life claims. Section 4(5) replaces the common law "whereby a person could be liable to a child in respect of disabilities with which it might be born" and section 1(2)(b) requires that an occurrence that affects the mother during pregnancy, or her or the child during the course of its birth, results in a situation in which a "child is born with disabilities which would not otherwise have been present". If a defendant is to be liable for an occurrence during pregnancy, the child must have been capable of being born without the disability. In other words, the disability must have been caused by the occurrence. Removing the negligent occurrence would not have enabled Mary McKay to have a life without disability as it would have eradicated her very existence. Accordingly, her claim was not permitted under the Act.

[27] Law Commission, *Report on Injuries to Unborn Children*, Cmnd 5709 (London 1974).
[28] Congenital Disabilities (Civil Liability) Act 1976, s. 4(2)(a).
[29] Ibid., s. 4(1).
[30] Ibid., s. 1(3). Without this caveat, it might be difficult for some children to claim where the alleged tort committed against the parent is negligence because that tort only gives rise to liability upon the infliction of damage.
[31] *McKay v Essex* [1982] Q.B. 1166, 1192 (Griffiths L.J.).

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III. The Scope and Gist of Wrongful Life Claims under the 1976 Act: Disabilities and Novel Forms of Damage

Despite the views expressed in *McKay*, a number of inventive arguments have contested the idea that the 1976 Act bars wrongful life claims.[32] Michael Jones has articulated the most promising of these. He maintains that the legislation does not remove the possibility of a wrongful life action as such claims are not in respect of *disabilities* "but rather a claim not to have been born at all, which theoretically could be brought by a healthy child".[33]

At least in some circumstances, this seems persuasive. Certain forms of damage in wrongful life claims, if accepted as actionable, would not be classed as "disabilities" and so fall outside of the Act. This can be illustrated by the Northern Irish case of *A and B v A Health and Social Services Trust*.[34] The claimants were twins born with a darker skin colour than their white parents as a result of the wrong sperm being used in the parents' IVF treatment. Their claim against the defendant failed on the ground that they had not suffered any damage: harm taking the form of one's skin colour could not form the gist of an action in negligence.[35] Nonetheless, Sally Sheldon identifies this as a claim for wrongful life because the children would not exist if the correct sperm had been used.[36] As the alleged damage would not be encompassed by the definition of disability in section 4(1), this type of case would fall outside of the Act and would be governed by the common law. Although the putative damage was not recognised, it illustrates the point that non-disability wrongful life claims fall outside of the Act.

Similarly, in the Illinois case of *Zepeda v Zepeda*,[37] a claim brought by a child for harm associated with being illegitimate was rejected as a wrongful life claim. Again, this type of damage was not actionable. But, if a similar case were brought in England, it would fall outside the Act as the alleged damage is not a disability. The controversial presentation of the damage in *A and B* and *Zepeda* no doubt doomed them to failure, but other novel forms of damage might more successfully ground a claim.

In *ACB v Thomson Medical Pte Ltd.* – a case not dissimilar to *A and B* involving the wrong sperm being used in fertility treatment, but brought by the mother – the Singapore Court of Appeal recognised "loss of genetic

[32] See Fortin, "Is the Action for 'Wrongful Life' Really Dead?", 307. For a rebuttal, see *Lam Wing Hei v Hospital Authority* [2018] HKCFI 1167, at [37] (Bharwaney J.).
[33] M. Jones, *Medical Negligence*, 6th ed. (London 2021), at [2-154].
[34] [2011] NICA 28, [2012] N.I. 77.
[35] Ibid., at [9] (Girvan L.J.).
[36] S. Sheldon, "Only Skin Deep? The Harm of Being Born a Different Colour to One's Parents" (2011) 19 Medical Law Review 657, 658; see also J. McCandless, "*A and B (by C, their mother and next friend) v A (Health and Social Services Trust*" in M. Enright, J. McCandless and A. O'Donoghue (eds.), *Northern/Irish Feminist Judgments: Judges' Troubles and the Gendered Politics of Identity* (Oxford 2017).
[37] 41 Ill. App. 2d 240, 190 N.E. 2d 849 (Ill. App. Ct. 1963).

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affinity" as a new form of damage.[38] Assuming that a child in England were to frame the damage in this way, the Act would not be engaged because a lack of genetic affinity with one's parent(s) is not a disability. This is not to say that such claims would succeed: the English courts may not follow Singapore's lead in recognising this damage.[39]

Additionally, a claim will fall outside the purview of the legislation if the claimant is not born with a *predisposition* towards a disability. This point is exemplified by a case that arose from the "spy cops" scandal, where undercover police officers infiltrated (mostly left-wing) political groups and began relationships with members.[40] In *TBS v Metropolitan Police Commissioner*,[41] the claimant's mother was a political activist and his father pretended to be one but was really an undercover police officer. The father later abandoned the claimant and lied about why. When the claimant discovered his father's identity and the actual reasons for the abandonment, he developed an adjustment disorder and a depressed mood. He brought claims in misfeasance in a public office and negligence against the defendant commissioner. If the defendant had not been a "spy cop" and seduced the claimant's mother, then she would not have become pregnant with the claimant and he would not exist at all. Nicol J. refused to strike out the claim and I will examine the reasoning later in this article, including the judge's denial that the claim was for wrongful life. For the point at hand, it is relevant that both parties agreed that the 1976 Act did not apply to these issues. No reason was given for this concession but it was probably correct. Although an adjustment disorder could be classed as a disability, the claimant was not born with it, nor is there any indication that he was born with a predisposition to a mental disability.

The above discussion indicates that *certain* wrongful life claims will fall outside the scope of the 1976 Act. However, it may be harder to maintain that *all* wrongful life claims can avoid the reach of the legislation by a clever reframing of the gist of the action. This is because Jones's argument that the damage is properly seen as "life" was specifically considered and rejected by the Court of First Instance of Hong Kong SAR in *Lam Wing Hei*. Justice Bharwaney held:

> The combined effect of clause 1 and in particular, clause 1(2)(b) thereof, and of clause 4(5) of the Bill was to bar any such cause of action for damages for wrongful life and wrongful suffering for children born after the passing of

[38] [2017] SGCA 20, [2018] Med. L.R. 55, at [135] (Andrew Phang J.A.).
[39] It might also be argued that if the correct gametes were used, a different child would exist and so the child, unlike the parents, has not lost any genetic affinity.
[40] P. Lewis and R. Evans, "Secrets and Lies: Untangling the UK's 'Spycops' Scandal", *The Guardian*, available at https://www.theguardian.com/uk-news/2020/oct/28/secrets-and-lies-untangling-the-uk-spy-cops-scandal (last accessed 15 September 2025).
[41] *TBS v Metropolitan Police Commissioner* [2017] EWHC 3094 (QB).

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> the Act. The Court of Appeal in *McKay v Essex Area Health Authority* did not misread the legislation.[42]

It may be that a middle ground can be found. A claim for wrongful life where the claimant seeks damages reflecting any disabilities might properly be regarded as one "in respect of disabilities", even if the claimant tries to side-step this and frame the claim as one for "life". The Act would govern such claims while those for genuinely novel forms of damage, unrelated to disability, could be regarded as falling outside its reach.

Although this is the best reading of the legislation, the Act potentially adopts a more restrictive attitude to disabilities, at least under section 1(2)(b), than it does more nebulous, novel forms of damage, which fall outside its scope. This is an odd feature of the legislation, given that physical well-being is usually regarded as one of the most important interests that tort law protects.[43]

This may be considered one example of the English law's haphazard treatment of wrongful life actions. But it is mainly of academic interest, given that the common law, after *McKay*, does not adopt a permissive approach to wrongful life actions (thus precluding most of the non-disability claims that fall outside of the Act).[44] Of far greater practical importance are the wrongful life actions that the Act explicitly creates. It is to these that I shall now turn.

IV. Infertility Treatment Claims

One important inroad into the apparent legislative bar on wrongful life claims arises by virtue of section 1A of the 1976 Act, which was added by section 44 of the Human Fertilisation and Embryology Act 1990. Section 1A extends section 1 of the 1976 to cover infertility treatments and states:

> In any case where –
>
> (a) a child carried by a woman as the result of the placing in her of an embryo or of sperm and eggs or her artificial insemination is born disabled,
>
> (b) the disability results from an act or omission in the course of the selection, or the keeping or use outside the body, of the embryo carried by her or of the gametes used to bring about the creation of the embryo, and
>
> (c) a person is under this section answerable to the child in respect of the act or omission,

[42] *Lam Wing Hei v Hospital Authority* [2018] HKCFI 1167, at [35].
[43] See J. Murphy, "Tort's Hierarchy of Protected Interests" [2022] 81 C.L.J. 356.
[44] An exception may be *TBS v Metropolitan Police Commissioner* [2017] EWHC 3094 (QB), discussed below.

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> the child's disabilities are to be regarded as damage resulting from the wrongful act of that person and actionable accordingly at the suit of the child.

Consider the embryologist faced with transferring Embryo A, which will result in a child with a disability, or Embryo B, which will result in a child born free from disability. If the embryologist negligently selects Embryo A instead of Embryo B then, according to section 1A, the disabled child will be able to claim for the disabilities. Yet Child A would not have had an existence without the disabilities. If Embryo B were selected instead, then a different, non-disabled person would be born. Section 1A therefore creates a wrongful life claim.

Convincing justifications for permitting this type of wrongful life claim have proven elusive.[45] If the mere fact that it involves assisted reproductive treatment ("ART") supported differential treatment, then its creation "could be perceived either as stigmatising, or privileging, the now relatively common use of ART".[46] In her illuminating review of the parliamentary debates that led to the introduction of section 1A, Rosamund Scott recognised that the creation of this wrongful life action was "simply portrayed as being analogous to a claim in respect of prenatal injury to the fetus".[47] However, such an analogy is inapt given that, where there is negligent *selection* of an embryo, "[t]hat particular child had *no other way of being born* than as a disabled one".[48] This indicates that the legislature not only created a wrongful life action but did so inadvertently. I will return to whether the distinction between this type of "conception" claim and those "pregnancy" claims that follow a similar fact pattern to *McKay* is justified after considering another type of wrongful life claim created by the statute.

V. Occurrences under Section 1(2)(A)

A. Toombes v Mitchell

The case of *Toombes v Mitchell*[49] indicates that the availability of wrongful life claims extends beyond section 1A: they are also permitted under section 1(2)(a) of the legislation. Evie Toombes was born with a congenital developmental defect from spinal cord tethering. She brought a claim under section 1(2)(a) alleging that the defendant doctor failed to advise her mother of the benefits of taking folic acid before conception. If properly advised, Evie's mother would have delayed conceiving for several weeks and taken folic acid during that time.

In a trial on the preliminary issues, Mrs. Justice Lambert held that an "occurrence" need not necessarily result in a change in the physiological

[45] For detailed rebuttal of some potential attempts to justify section 1A, see Gur, "Wrongful Life Claims".
[46] Scott, "Reconsidering 'Wrongful Life'", 120.
[47] Ibid.
[48] Ibid., emphasis in original.
[49] [2020] EWHC 3506 (QB).

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state of the parent.[50] The "ordinary linguistic meaning" of "occurrence" is "that something happened".[51] Relying on negligent advice and having an act of sexual intercourse when the mother was in a folic acid-deficient state was capable of being an occurrence.[52] Furthermore, section 1(2)(a) contained no prohibition on a claim brought by a child who, but for the wrongful act, would not have been born at all. Recall that it merely requires an occurrence to have "affected either parent of the child in his or her ability to have a normal, healthy child". By contrast, section 1(2)(b) requires an occurrence to have "affected the mother during her pregnancy, or affected her or the child in the course of its birth, *so that the child is born with disabilities which would not otherwise have been present*" (emphasis added). As the judge noted, "this rider was not added to subsection 1(2)(a) which deals with pre-conception occurrences, only to 1(2)(b)".[53] Section 1(2)(a) therefore "contains no express prohibition on claims brought by children who, but for the wrongful act, would never have been conceived".[54] Given this, all the elements of the cause of action under the Act were present and so the claim could proceed. It was later successful at trial.[55]

If the defendant had not been negligent, then Evie Toombes's mother would have waited several weeks to conceive. The delay in intercourse would entail a different sperm fertilising a different egg. As such, the claimant would not have had a non-disabled existence if her mother had waited to take sufficient folic acid before conception. Instead, a different child would be born. This is therefore a case of wrongful life: one that occurs before or at conception. Section 1(2)(a)'s definition of "occurrence" means that the Act "appears to recognise a form of legal interest in not being conceived"[56] – a fact recognised by an early commentator on the Act.[57]

B. The Reach of Section 1(2)(a)

It is worth noting that not all claims that fall under section 1(2)(a) are for wrongful life. For example, imagine that a defendant negligently ran over a woman and injured her pelvis.[58] Years later, this injury results in her child's skull being crushed during a vaginal delivery so that it is born with brain damage. This would be an occurrence that affected the

[50] Ibid., at [45].
[51] Ibid.
[52] Ibid., at [48].
[53] Ibid., at [27].
[54] Ibid., at [51].
[55] [2021] EWHC 3234 (QB).
[56] Jones, *Medical Negligence*, at [2-155].
[57] P.J. Pace, "Civil Liability for Pre-Natal Injuries" (1977) 40 M.L.R. 141, 153.
[58] See Law Commission, *Injuries to Unborn Children*, at [77]; A. Whitfield, "Common Law Duties to Unborn Children" (1993) 1 Medical Law Review 28, 48.

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mother's ability to have a normal healthy child and so an action could be brought under section 1(2)(a). It would not be a case of wrongful life, though. If the mother's pelvis had not been crushed, *this* child could have had a healthy existence. The occurrence has caused the child's *disability*. Such cases can be distinguished from the situation in *Toombes*.

Notable, too, is the fact that a claim cannot be brought under section 1(2)(a) if the parent would have had a disabled child no matter the circumstances of the intercourse. The occurrence must affect either parent's ability to have a healthy child. An example is given by Mrs. Justice Lambert:

> If, in reliance upon reassuring but negligent advice concerning their genetic status, parents had intercourse which led to the conception and birth of a child suffering from a genetic disability inherited from the parent then, even though but for the negligent advice that child would not have been conceived, that child would not have a lawful claim under the Act.[59]

This requirement, while sometimes being a legitimate causation requirement in *parental claims*, is harder to justify in claims by children. It is not obvious why a claimant stating "I should not be born, a different, non-disabled child should exist instead" should succeed but one arguing "I should not be born, a different, disabled child should exist instead" should fail. In any event, there is some ambiguity in the reach of Lambert J.'s example. Catherine Bowden has questioned whether it is "limited to the scenario in which any child of either parent would inherit the genetic condition as opposed to only children that they conceived together".[60] If the mother alone had received negligent genetic counselling then the requirements of section 1(2)(a) could be met as she "could have had a healthy child even if this would have been with another partner".[61] Her *ability* to have a healthy child will have been affected by the occurrence.

If Bowden's interpretation is accepted, the Act might cover the factual matrix of *Criminal Injuries Compensation Authority v First Tier Tribunal (Social Entitlement Chamber)*,[62] where a child, Y, was born with a genetic disorder as a result of the incestuous rape of his mother by her father. The Court of Appeal rejected a claim for compensation under the Criminal Injuries Compensation Scheme. Y, having not been conceived at the time of the rape, was not a "victim of crime"; the victim was Y's mother. Henderson L.J. recognised that this was a case of wrongful life:

[59] *Toombes v Mitchell* [2020] EWHC 3506 (QB), at [55]. In these circumstances, the defendant might also have a defence under section 1(4).
[60] Bowden, "Unequal Treatment", 469. For a discussion of civil liability for the genetic transmission of diseases, see C. Stanton, "Genetic Transmission of Disease: A Legal Harm?" (2016) 24 Health Care Analysis 228.
[61] Bowden, "Unequal Treatment", 469.
[62] [2017] EWCA Civ 139, [2017] 4 W.L.R. 60.

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> On analysis, his real complaint would have to be that he should never have been conceived at all. A complaint of that nature, however, is not a claim for personal injury, but a claim for wrongful existence, which as this court explained in *McKay v Essex Area Health Authority* is not one that the law can recognise, or for which compensation could be assessed.[63]

However, the fact pattern matches that posited by Bowden and so could conceivably lie under section 1(2)(a) of the 1976 Act. The mother might not have been able to avoid having a disabled child *with this father* but could have potentially avoided having *a* child with these genetic defects were it not for the defendant's wrong. She could have conceived a (different) child *sans* disabilities in an act of non-incestuous intercourse.

Regardless of whether the reach of section 1(2)(a) extends to cover cases where a parent would be capable of having a healthy child with a different partner, there is no denying that the interpretation of the 1976 Act in *Toombes* is a practically significant inroad into the apparent exclusion of wrongful life claims. In addition to pre-conception advice, it could cover situations where one parent passes on a sexually transmitted disease to the child, such as congenital syphilis; for if the parent had waited to conceive until after they had taken antibiotics, a different child would have been born.[64]

VI. Distinguishing "Conception" Cases from "Pregnancy" Cases

A. The Distinction

What both infertility treatment claims and actions under section 1(2)(a) have in common is that the defendant's wrong occurs before the pregnancy is established. As mentioned earlier, I will use the label "conception claims" to distinguish them from "pregnancy claims", which follow a similar pattern to *McKay*. Any distinction between claims under section 1(2)(a), which allows wrongful life conception claims, and 1(2)(b), which bars wrongful life pregnancy claims (or at least those in respect of disabilities) matches, and is supported by, the intention of the Law Commission in the report that led to the 1976 Act. My criticism here is targeted at the drafting of the 1976 Act rather than Mrs. Justice Lambert's reading of it in *Toombes*.

The Law Commission did not think that what I have called "conception claims" are "really cases of wrongful life":

> There is we think, a difference between a negligent failure to prevent the birth of an already conceived child and negligence which actually causes the intercourse which results in the conception. In the latter case, we think that the child should be able to claim damages and that they should be assessed

[63] Ibid., at [31].
[64] See Law Commission, *Injuries to Unborn Children*, at [88]; Bowden, "Unequal Treatment", 469.

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> by comparison with the child as he would have been had he not suffered from the disability.[65]

Alas, the Commissioners, while clear in their belief that the cases are different, did not bother to enlighten readers with their reasons for arriving at this conclusion. A clue, however, can be found elsewhere in the report. Discussing the bar on wrongful life pregnancy cases, it stated: "Such a cause of action, if it existed, would place an almost intolerable burden on medical advisors 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."[66]

It therefore appears that the 1976 Act was drafted in a manner to deny wrongful life "pregnancy" claims due to a fear that permitting them would pressure doctors into advising patients to have an abortion.[67] Is this rationale convincing?

B. Do Wrongful Life "Pregnancy Claims" Encourage Abortions in Dubious Circumstances?

The idea that wrongful life actions encourage doctors to recommend abortions has received a cool reception from some judges. In *McKay* Griffiths L.J. explicitly referred to, but remained unconvinced by, the Law Commission's fears. His view was that 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".[68]

The alleged negligent conduct in most wrongful life claims is not the failure to abort the child but rather, as Noam Gur reminds us, "to diagnose medical problems properly, to bring them to the parents' attention, and to inform them of the consequences and risks of possible medical treatments".[69] Wrongful life claims do not require medical professionals to urge an abortion but merely to give mothers the correct information about the health of the child.

An exception to this classification of the breach might be the facts of the British Columbia case of *Cherry v Borsman*[70] where an abortion was performed negligently – part of the placenta was removed but not the foetus – so that the child was born with disabilities. Notwithstanding the

[65] Law Commission, *Injuries to Unborn Children*, at [91].
[66] Ibid., at [89].
[67] This view was confirmed in *Toombes v Mitchell* [2020] EWHC 3506 (QB), at [52] (Lambert J.).
[68] *McKay v Essex* [1982] Q.B. 1166, 1192 (Griffiths L.J.).
[69] Gur, "Wrongful Life Claims", 431; see also *McKay v Essex* [1982] Q.B. 1166, 1192 (Griffiths L.J.); *Lam Wing Hei v Hospital Authority* [2018] HKCFI 1167, at [50] (Bharwaney J.).
[70] [1990] B.C.J. No. 2576, 1991 Can. L.I.I. 8297 (B.C.S.C).

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judge's denial that this was a wrongful life claim,[71] it can be regarded as one because, although the defendant did actually cause the disabilities, the alternative for the child was non-existence. But if such claims were permitted it would not pressure doctors to encourage abortions. Rather, the law would be endorsing the view that doctors performing abortions should do so with reasonable care.[72]

One might counter that there may be situations where, if wrongful life pregnancy cases were permitted, doctors may be tempted to push abortions on mothers. Consider the following:

> "A doctor misreads test results and so negligently fails to tell a pregnant woman that her child will be disabled. Discovering his mistake at a later date, and in order to avoid liability to the child, the doctor reveals the correct test results to his patient and encourages her to have an abortion."

Concerns generated by such hypotheticals are misplaced. In the above scenario, there would be no reason for the doctor to encourage an abortion. If, after revealing the mistake, the patient decided to keep the child, then the child's existence would be the result of that choice. There may, of course, be situations where she would have had a termination if informed early in the pregnancy but would not want to have a late abortion. But any incentive the doctor has to persuade the patient to have an abortion that she would otherwise forgo could be countered by reference to the fact that such conduct would probably constitute a breach of the doctor's duty of care, thus exposing him to further liability.[73] The argument is also over-inclusive: wrongful birth claims are currently permitted, notwithstanding any incentive a doctor may have to advise a patient to terminate her pregnancy.

Perhaps the problem is that permitting wrongful life pregnancy cases entails endorsing the view that an abortion can take place. But abortion is lawful in England, provided the requirements of the Abortion Act 1967 are satisfied. Not only that, but "serious handicap" is also listed as one of the grounds for a late abortion under the Act.[74] Abortion might provide a factual difference between the cases but it is not a legally significant reason for differentiating them.[75] It is also worth noting that "infertility claims" under section 1A of the Act endorse the view that the embryo that resulted in the child should have been destroyed so if the law's concern is the protection of unborn life, then this policy is not being applied consistently.

[71] Ibid., at [44]–[47] (Skipp J.).
[72] Ibid., at [42].
[73] For a discussion on the professional obligation to provide non-directive counselling: S. Sheldon, "The Decriminalisation of Abortion: An Argument for Modernisation" (2016) 36 O.J.L.S. 334, 354.
[74] Abortion Act 1967, s. 1(1)(d). Hong Kong also permits abortion on the grounds of "serious handicap", but only up to 24 weeks: Offences Against the Person Ordinance (Cap. 212), s. 47A.
[75] Whitfield, "Common Law Duties", 48.

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C. The Distinction in Other Common Law Jurisdictions

Other common law jurisdictions, unbound by a statutory framework akin to the 1976 Act, do not bifurcate conception and pregnancy cases. In *Waller v James*, the High Court of Australia heard a claim by a child born with disabilities after a doctor negligently failed to advise parents undergoing IVF that the father's condition ("AT3") was genetically transmissible.[76] Consider, too, the Ontario Court of Appeal case of *Florence v Benzaquen*.[77] It involved an action by disabled triplets whose mother had taken a fertility drug, Serophene, which increased the likelihood of conceiving multiple foetuses and the associated risks of premature births. Equally, the Court of Appeal of Manitoba decision in *Lacroix v Dominique* was brought by disabled children whose mother had conceived them while taking a drug to control her epilepsy.[78] Each case was judged to be for wrongful life and so all of them were rejected. If the parents in *Waller* were advised properly they would have attempted to ensure only embryos free from AT3 were transferred or used a donor sperm. If the mother in *Florence* had not taken the drug, she would not have had triplets. If the mother in *Lacroix* had been informed of the risks of her epilepsy medication, she would have likely chosen not to become pregnant. None of the claimants would have existed but for the negligence. However, if analogous cases were brought in England under the 1976 Act, they would probably succeed under section 1(2)(a). Of course, different approaches in other common law jurisdictions do not necessarily imply that the approach in English law is misguided. But the fact that the conception–pregnancy distinction is not implemented elsewhere indicates there may not be good reasons for upholding it.

D. Counterpoint

An awkward counterpoint to the idea that the common law does not make the distinction is the High Court of England and Wales's decision in *TBS v Metropolitan Police Commissioner*,[79] the facts of which were outlined earlier in this article. Recall that the claimant allegedly suffered damage after discovering that his father was an undercover police officer.

If the wrongful conduct was solely the ending of the relationship and abandoning the family home, then it would be fair to say that this caused his adjustment disorder and so it would not be a claim for wrongful life. But a key part of the claim was the seduction of the mother; without this, the claimant would not exist.[80] This could, therefore, be regarded as

[76] [2006] HCA 16.
[77] 2021 ONCA 523.
[78] 2001 MBCA 122.
[79] [2017] EWHC 3094 (QB).
[80] Ibid., at [36].

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a claim for wrongful life and bolster the view that wrongful life "conception" actions might sometimes be permitted at common law, with the result that such actions under the 1976 Act are rendered less incongruous.

Not too much weight should be placed on this counterexample, however. For one thing, the analysis in this strike-out application could have been more thoroughly developed. The judge did not consider this a wrongful life claim and distinguished *McKay* on unconvincing grounds, insisting "[TBS] is not aggrieved at having been born, but he does complain that the circumstances of his father mean that he has suffered the Adjustment Disorder".[81] Yet this does not get around the core problem with these claims: that the defendant's alleged wrong has caused the claimant to exist. More fundamentally, at no point was a distinction between "conception" and "pregnancy" claims articulated as a reason for distinguishing *TBS* and *McKay*. If, however, *TBS* is seen as allowing wrongful life "conception claims" at common law, then it merely indicates that the chaotic nature of English law's treatment of wrongful life claims goes beyond the legislative interventions identified earlier in this article.

In sum, it appears that the current law does not treat like cases alike. As Nicholas McBride rightly observes, private law "will not be able to maintain its legitimacy if it is perceived to treat its subjects in an arbitrary and unequal way".[82] It should not depend upon brute luck or arbitrarily favouring one class of people over another.[83] At present, and in the absence of another reason for distinguishing the wrongful life "conception" and "pregnancy" claims, the 1976 Act does not satisfy this requirement.

VII. The Options for Reform

A. A Negligence Action at Common Law

There is significant inconsistency in the way that English law handles wrongful life cases. If it is accepted that the distinction between pregnancy and conception claims is not justified it becomes necessary to examine the best response to this problem. Should wrongful life actions be expanded to include pregnancy claims or retracted to exclude conception claims? Or can another basis for delineating the claims be found? As stated earlier, a range of reasons were proffered in *McKay* for denying the claim. Of these, the most formidable now appears to be the difficulty claimants face in establishing that they have suffered any

[81] Ibid., at [40] (Nicol J.).
[82] N. McBride, *The Humanity of Private Law – Part I: Explanation* (Oxford 2019), 201.
[83] Ibid.

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actionable damage.[84] In what follows, I will examine whether, if the 1976 Act were repealed, a common law action would be consistent with negligence's damage requirement before briefly discussing potential legislative solutions. Although the focus is on the damage question, it will become apparent that there is a significant overlap between this issue and concerns about devaluing the lives of people with disabilities.

Damage is necessary to complete a negligence claim: it is the "gist of the action".[85] It has also been described as a "nebulous"[86] concept and "the object of surprisingly little analysis by academics working in common law countries".[87] On the conceptual question of what constitutes damage, there seem to be two main camps. One sees damage as, in the words of Lord Hoffmann in *Rothwell v Chemical & Insulating Co. Ltd.*, "an abstract concept of being worse off, physically or economically, so that compensation is an appropriate remedy".[88] For convenience, we might refer to this as the counterfactual account of damage: a claimant will suffer damage if they are made worse off.[89]

An alternative view of damage does not *necessarily* require a claimant to be worse off than they otherwise would be without the defendant's negligence. This rights-based account might regard a person as having suffered damage where there has been "interference with a right or interest recognised as capable of protection by law".[90] Call this the non-counterfactual account of damage.

Two powerful proposals have been advanced for reconciling wrongful life claims with negligence law's actionable damage requirement and they *broadly* align with these different accounts of damage. These are:

(1) A counterfactual view where wrongful life claimants will suffer damage when their disabilities are so severe that any good in life is outweighed by the burdens. In other words, when life is on-balance bad.
(2) A non-counterfactual damage where wrongful life claimants will suffer damage when placed in a position where they have disabilities (or potentially other hardships).

[84] See T. Weir, "Wrongful Life – Nipped in the Bud" [1982] 41 C.L.J. 225, 227; *Harriton v Stephens* [2006] HCA 15, at [160] (Hayne J.); *Lam Wing Hei v Hospital Authority* [2018] HKCFI 1167, at [51] (Bharwaney J.).

[85] *Sidaway v Board of Governors of the Bethlem Hospital and the Maudsley Hospital* [1985] A.C. 871, 883 (Lord Scarman) (H.L.).

[86] *ACB v Thomson Medical* [2017] SGCA 20, at [45] (Phang J.A.).

[87] D. Nolan, "Damage in the English Law of Negligence" (2013) 4 Journal of European Tort Law 259, 260; see also J. Stapleton, "The Gist of Negligence: Part 1 – Minimal Actionable Damage" (1988) 104 L.Q.R. 213, 213.

[88] [2007] UKHL 39, [2008] 1 A.C. 281, at [7].

[89] *Harriton v Stephens* [2006] HCA 15, at [168] (Hayne J.) and at [251] (Crennan J.).

[90] *Cattanach v Melchior* [2003] HCA 38, (2003) 215 C.L.R. 1, at [23] (Gleeson C.J.); see also Macaskill and Steel, "Suing for Damaged Existence"; D. Nolan, "Rights, Damage and Loss" (2017) 37 O.J.L.S. 255, 256; S. Steel, "Damages without Loss" (2023) 139 L.Q.R. 219, 230–31.

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In what follows, I will analyse these proposals before turning to consider possible legislative solutions.

B. The Counterfactual View of Damage

For wrongful life claimants, the counterfactual account of damage involves comparing existence with a disability and the state that the claimant would have been in but for the breach of duty, which is non-existence. Weighty judicial[91] and academic[92] opinion denies that a comparison between existence and non-existence can ever be made, but I will remain agnostic on that issue and assess the counterfactual account on different grounds. I am also going to presume that the idea, put forward by some philosophers, that life is *always* worse than non-existence is not one that the law would accept.[93]

A rich philosophical literature posits that while existence is usually preferable to non-existence, there are certain circumstances where this is not the case.[94] Although the comparison can be confounding, such a view would perhaps value non-existence as neutral.[95] An important articulation and defence of this position in the legal context comes from Rosamund Scott, who, building on these studies, contends that claimants could suffer damage if they are "born with a condition that is so severe that any goods in life are outweighed by the burdens".[96] Existence could constitute *damage* when non-existence is preferable to a life with disabilities.[97] Arguments along these lines have found a sympathetic audience with some judges. For example, when wrongful life reached the High Court of Australia in *Harriton v Stephens*, Kirby J. in his

[91] *McKay v Essex* [1982] Q.B. 1166, 1192–93 (Ackner L.J.); *Harriton v Stephens* [2006] HCA 15, at [206] (Callinan J.). Cf. *Harriton v Stephens* [2006] HCA 15, at [101] (Kirby J.).

[92] Macaskill and Steel, "Suing for Damaged Existence"; see also C.J.J.M. Stolker, "Wrongful Life and the Limits of Liability and Beyond" (1994) 43 International and Comparative Law Quarterly 521, 531–33; O.J. Herstein, "Why 'Nonexistent People' Do Not Have Zero Wellbeing but No Wellbeing at All" (2013) 30 Journal of Applied Philosophy 136. Cf. Weir, "Wrongful Life", 228; Teff, "Action for 'Wrongful Life'", 433; Ruda, "I Didn't Ask to be Born", 215; Scott, "Reconsidering 'Wrongful Life'", 131.

[93] D. Benatar, *Better Never to Have Been: The Harm of Coming Into Existence* (Oxford 2006), 14; see also S.V. Shiffrin, "Wrongful Life, Procreative Responsibility, and the Significance of Harm" (1999) 5 Legal Theory 117.

[94] J. Glover, *Causing Death and Saving Lives* (originally published in 1977, London 1990), 51–53; Parfit, *Reasons and Persons*, ch. 16; J. Feinberg, "Wrongful Life and the Counterfactual Element in Harming" (1986) 4 Social Philosophy & Policy 145, 158; J. Harris, "The Wrong of Wrongful Life" (1990) 17 Journal of Law and Society 90; A. Buchanan et al., *From Chance to Choice: Genetics and Justice* (Cambridge 2000), ch. 6.

[95] D. Stretton, "The Birth Torts: Damages for Wrongful Birth and Wrongful Life" (2005) 10 Deakin Law Review 319, 357.

[96] Scott, "Reconsidering 'Wrongful Life'", 118; see also D. Boonin, "How to Solve the Non-Identity Problem" (2008) 22 Public Affairs Quarterly 127, 135–39.

[97] See *Lam Wing Hei v Hospital Authority* [2018] HKCFI 1167, at [51] (Bharwaney J.).

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dissenting judgment was of the view that "it is arguable that a life of severe and unremitting suffering is worse than non-existence".[98]

Very few conditions would be severe enough to give rise to an action as they would have to render life of "sub-zero quality".[99] Tay–Sachs syndrome and Lesch–Nyhan syndrome are possible candidates.[100] This sets the bar very high and would mean many claimants in reported wrongful life decisions could not establish damage under this proposal (although it would still be possible for their parents to bring a claim for wrongful birth). For example, Evie Toombes's disabilities are not severe enough to render her life unworthwhile. A para horse rider, campaigner for hidden disabilities and author of a book: it is not hard to see why one judge described her as a "remarkable young woman".[101] This threshold for establishing damage would also exclude wrongful life actions by people with Down's syndrome, as most people with this disability report living very happy lives.[102]

It would not be incoherent for the law to adopt this position and declare that life can be damage when it is so bad that non-existence is preferable. Allowing wrongful life claims in these limited circumstances has many advantages over the current distinctions made by the 1976 Act, which, as we have seen, permits these actions in an arbitrary and haphazard manner. However, there are potential downsides to this approach.

Disabled children would have to go to court or have claims brought on their behalf, arguing that non-existence is preferable to their current position. The line between eligible and ineligible conditions might be difficult to draw[103] – something that proponents of this proposal do acknowledge.[104] It is not unimaginable that judges, when faced with a sympathetic claimant who would otherwise be left to rely on comparatively meagre state benefits, might be tempted to expand the range of conditions under which life would be considered "on-balance bad" to permit recovery.

If this happens, successful wrongful life claims may not be confined to only the most serious conditions and the law would declare a greater range of disabilities to be ones where non-existence or death is preferable to living with them. This could send an undesirable message to other people with those disabilities, many of whom may be leading fulfilling lives. Crennan J. in *Harriton* maintained that it is "odious and repugnant to devalue the life of a disabled person by suggesting that

[98] *Harriton v Stephens* [2006] HCA 15, at [105]; see also *McKay v Essex* [1982] Q.B. 1166, 1180, 1182 (Stephenson L.J.). Cf. *Lam Wing Hei v Hospital Authority* [2018] HKCFI 1167, at [51] (Bharwaney J.).
[99] Scott, "Reconsidering 'Wrongful Life'", 133.
[100] Ibid., at 131.
[101] *Toombes v Mitchell* [2021] EWHC 3234 (QB), at [3] (Coe H.H.J.).
[102] Scott, "Reconsidering 'Wrongful Life'", 133–35.
[103] Gur, "Wrongful Life Claims", 436.
[104] Scott, "Reconsidering 'Wrongful Life'", 135, 138.

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such a person would have been better off not to have been born into a life with disabilities".[105] Such views are not idiosyncratic, nor confined only to the judiciary. If the conditions encompassed by wrongful life claims are expanded beyond those where there is broad agreement that life is on-balance bad, it could result in the implementation of a forensic process that is, in the words of Stephen Todd, "demeaning to disabled people".[106]

C. Counterarguments

To this argument, one might respond that similar judgments are already made in analogous legal contexts.[107] Cases of withdrawal of treatment from severely disabled neonates under the *parens patriae* jurisdiction or the Children Act 1989 are sometimes marshalled in support of wrongful life claims.[108] There, the courts must determine whether continued medical treatment is lawful in the child's best interests, which are assessed from the assumed view of the patient.[109] The term "best interests" is used "in its widest sense to include every kind of consideration capable of bearing on the decision" and the court "must do the best it can to balance all of the conflicting considerations in a particular case with a view to determining where the final balance lies".[110] Although there is a presumption in favour of preserving life, it is not irrebuttable: it "may be outweighed if the pleasures and the quality of life are sufficiently small and the pain and suffering and other burdens are sufficiently great".[111] Does this not imply that the courts already recognise that continued life under certain conditions is on-balance bad? If the circumstances where wrongful life claims are allowed and treatment can be withdrawn from neonates align, why cannot judges maintain a strict standard when holding that life with certain disabilities is so bad that it constitutes damage?

This example bolsters the idea that there are situations in which the law holds that, from the child's perspective, existence can be harmful. Alas, it is not a perfect analogy for refuting the idea that judges would successfully confine recognising damage to only the most serious cases. Questions

[105] *Harriton v Stephens* [2006] HCA 15, at [258]; see also S. Todd, "Wrongful Conception, Wrongful Birth and Wrongful Life" (2005) 27 Sydney Law Review 525, 541.

[106] S. Todd, "Negligence by IVF Providers: Injury on Being Born?" (2025) 55 Journal of the Royal Society of New Zealand 207, 214; see also Hensel, "Disabling Impact", 174.

[107] Another context where inconsistency between wrongful life and other areas of law had been raised, but which I will not consider further here, is under the Human Fertilisation and Embryology Act 1990, s. 13(5), which provides that a woman should not be provided with treatment "unless account has been taken of the welfare of any child who may be born as a result of the treatment", on which see E. Jackson, "Conception and the Irrelevance of the Welfare Principle" (2002) 65 M.L.R. 176, 196–99.

[108] R. Lee, "To Be or Not to Be: Is that the Question? The Claim of Wrongful Life" in R. Lee and D. Morgan (eds.), *Birthrights: Law and Ethics at the Beginnings of Life* (London 1990), 186–87.

[109] *Portsmouth Hospitals NHS Trust v Wyatt* [2005] EWCA Civ 1181, [2005] 1 W.L.R. 3995, at [87] (Wall L.J.).

[110] *University Hospitals Plymouth NHS Trust v B (A Minor)* [2019] EWHC 1670 (Fam), at [14] (MacDonald J.).

[111] Ibid.

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regarding whether *life* is on-balance bad are *covert* in the withdrawal cases – the question is whether *continued treatment* is in the child's best interests – but *overt* in the damage question. Furthermore, as Gur states, "one of the main factors that impel judges to maintain a stringent severity requirement in withdrawal of treatment cases is the drastic implications of a decision to withdraw life-sustaining treatment, namely, bringing about the death of a child".[112] This factor is absent in wrongful life cases. As such, the fact that judges seem to have been reasonably successful in taking a restrictive approach in treatment withdrawal cases does not necessarily indicate that wrongful life claims will be similarly circumscribed.

It could be argued that the law already indicates that life with serious disabilities might be on-balance bad by recognising "serious handicap" as a basis for a late termination under section 1(1)(d) of the Abortion Act 1967. Placing to one side the significant criticisms that have been levelled at this provision,[113] it could be argued that in the most severe cases, where life will be on-balance bad, abortion could be said to be in the interests of the foetus.[114] Nevertheless, there are sufficient differences between this context and that of wrongful life to weaken the analogy.

The threshold of "serious handicap" is not necessarily as high as the "on-balance bad threshold".[115] Prescriptive guidance on what counts as a "serious handicap" is scarce.[116] Still, there is some evidence of abortions being performed under this ground on foetuses diagnosed with cleft palates or with Down's syndrome.[117] These are not conditions that render life on-balance bad and so termination for these mid-spectrum conditions is likely to be based on (supposed) parental interests rather than the interests of the child. The "serious handicap" ground does not, therefore, indicate whether the range of conditions grounding wrongful life cases could be tightly circumscribed, as neither doctors nor judges have confined them in this way (as the legislation does not, on the most

[112] Gur, "Wrongful Life Claims", 436, fn. 54.

[113] See S. McGuinness, "Law, Reproduction, and Disability: 'Fatally Handicapped'?" (2013) 21 Medical Law Review 213; S. Sheldon, "Beyond the Tramlines: Disability Discrimination, Reproductive Rights and Anachronistic Abortion Laws" (2024) 44 O.J.L.S. 104.

[114] For the literature on whether the "serious handicap" ground can be said to be for the benefit of the child, the parent(s) or for society, see S. Sheldon and S. Wilkinson, "Termination of Pregnancy for Reason of Foetal Disability: Are there Grounds for a Special Exception in Law?" (2001) 9 Medical Law Review 85, 88–93; R. Scott, "Interpreting the Disability Ground of the Abortion Act" [2005] 64 C.L.J. 388, 395–400.

[115] See *Crowter v Secretary of State for Health and Social Care* [2021] EWHC 2536, [2022] 1 W.L.R. 2513, at [17]–[24] (Singh L.J. and Lieven J.); Scott, "Interpreting the Disability Ground of the Abortion Act", 404. Similar things could be said of the welfare principle under the Human Fertilisation and Embryology Act 1990, s. 13(5): it does require the child's potential welfare to be negative. See Human Fertilisation and Embryology Authority, *Code of Practice*, 9th ed. (London 2023), ch. 8.

[116] See Royal College of Obstetricians and Gynaecologists, "Termination of Pregnancy for Foetal Abnormality in England, Scotland and Wales", report of a working party, available at https://www.rcog.org.uk/media/21lfvl0e/terminationpregnancyreport18may2010.pdf (last accessed 18 August 2025).

[117] *Jepson v The Chief Constable of West Mercia Police Constabulary* [2003] EWHC 3318 (QB).

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plausible reading, appear to require it). Acceptance of s 1(1)(d) of the Abortion Act 1967 or the withdrawal of treatment for severely ill neonates does not, therefore, provide a convincing case in favour of allowing claims for wrongful life.

D. A Risk Worth Taking?

One might contest Todd's claim regarding a demeaning forensic process by insisting that disabled claimants would rather receive compensation, particularly if it can improve their lives. Kirby J. in *Harriton* emphasised that awarding damages in wrongful life cases would provide disabled children with "practical empowerment", enable them to "lead a more dignified existence" and provide them "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".[118] Julie McCandless and Kirsty Horsey point out that in wrongful life claims any damages would be for the child's life rather than its upbringing during its minority and that such actions "can remove some stigma from a parent who prefers not to make a wrongful birth claim, worries that this somehow makes a statement that they did not want and did not love their child".[119] *Toombes* illustrates this. Her mother had not brought a claim for wrongful birth, but Evie Toombes was able to bring an action herself under the 1976 Act once she was an adult.[120]

Let us now imagine that judges successfully restrict wrongful life cases to only the most severe disabilities where there is general agreement that the child's life is overwhelmed with suffering. In such circumstances, interventions to keep the child alive are unlikely to be in its best interests and so will be unlawful.[121] Where life is on-balance bad, the child is unlikely ever to have capacity and its lifespan is *likely* to be short. Any action would be brought on the child's behalf by its parent(s).

Given this, some of the advantages of a wrongful life claim over a wrongful birth claim by parents are potentially diminished: children whose lives are on-balance bad may have few opportunities to participate in society, regardless of any monetary award. The advantages of a claim being brought in the child's name over a parental one might be minimal (though certainly not zero) when the child is unlikely to be aware of any action.

[118] *Harriton v Stephens* [2006] HCA 15, at [122]; see also D. Stretton, "Wrongful Life and the Logic of Non-Existence" (2006) 31 Melbourne University Law Review 972, 997.
[119] McCandless and Horsey, "Reproductive Harm", 92–93.
[120] *Toombes v Mitchell* [2020] EWHC 3506 (QB), at [39].
[121] Harris, "Wrong of Wrongful Life", 101.

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There are therefore benefits and risks to recognising wrongful life claims, even under the on-balance bad account of damage. Where the scales fall is a subject about which reasonable debate can ensue. Comments from a recent case, *Crowter v Secretary of State for Health and Social Care*,[122] challenging the lawfulness of section 1(1)(d) of the Abortion Act 1967 on the grounds that it expressed negative stereotypes about disabled people contrary to the European Convention on Human Rights, are apposite in these circumstances. Lord Justice Underhill maintained that whether the "serious handicap" ground was perceived as sending any negative message about the living disabled "depends on the perspective – itself no doubt reflecting the circumstances and values – of the particular individual".[123] The same can be said of wrongful life. Ultimately, it comes down to the problem of line-drawing and whether one believes this can be satisfactorily achieved in this context. While such difficulties are an omnipresent feature of the law,[124] and the counterfactual proposal is an enormous improvement on the current law's arbitrariness, the courts' reluctance to recognise damage in wrongful life cases is not unreasonable. Some of these concerns are, admittedly, speculative but, with respect, so too are the benefits that such litigation would bring and the idea that judges would tightly confine the list of eligible conditions.

E. The Non-Counterfactual View of Damage

A beguiling proposal for avoiding the potential difficulties with the counterfactual or comparative view of account has been put forward by William Macaskill and Sandy Steel. They claim that an alternative definition of damage can be utilised, which they label the "causal account": "If A causes B to be in a bad state, then A damages B."[125] From this, they argue that in wrongful life claims the defendant's negligence has caused the claimant to be in a "bad state" in violation of "the right not negligently to be caused physical non-comparative damage" or a "right not to be in a state of severe disability".[126] By removing the need to compare existence with non-existence, damage would be established in a case such as *Toombes* merely by the fact that the defendant's negligence caused the claimant to exist in a state where she had disabilities. It would be immaterial that this was the only way that she could exist. Nor would it matter if the claimant's life was worth living.

[122] [2022] EWCA Civ 1559.
[123] Ibid., at [72] (Underhill L.J.).
[124] For a discussion of the difficulties of line-drawing when recognising damage, see R. Bagshaw, "Children as Actionable Damage" (2004) 15 King's Law Journal 117, 125–26.
[125] Macaskill and Steel, "Suing for Damaged Existence".
[126] Ibid.

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While this would allow wrongful life claimants to leap the damage hurdle, it potentially raises other concerns. Macaskill and Steel's proposal contains a rider that claims would be for "severe" disabilities.[127] This would mean that wrongful life claims for trivial injuries would not be covered. Yet once the *de minimis* threshold is cleared, the seriousness of a claimant's harm is not normally relevant in establishing damage (though, of course, it will be crucial in assessing the amount of damages that might be awarded). A minor fracture is normally regarded as damage in negligence but might not be regarded as a *severe* disability. Macaskill and Steel's argument, recall, is different from arguing that life is damage when it is on-balance bad (where questions of seriousness would be determinative). If A accidentally dropped a rock on B's toe, fracturing it, then A will have caused B to suffer actionable damage under normal negligence principles. Why, then, would A placing B in a position where B has a fractured toe not be actionable under the non-counterfactual account? If this account does not cover minor injuries, it would be inconsistent with the normal principles for determining damage.[128] If it does include milder injuries then damage would be a very expansive concept.[129] It could come close to holding that the child has "a right to be born whole or not at all".[130] Accepting this reasoning, according to Stephenson L.J. in *McKay,* would:

> 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. These are the consequences of the necessary basic assumption that a child has a right to be born whole or not at all, not to be born unless it can be born perfect or "normal," whatever that may mean.[131]

Echoing these views, Ackner L.J. noted the "odd position" that embracing such arguments would entail a child born "with a very minor disability, such as a squint" being entitled to sue the doctor failing to advise an abortion.[132]

These remarks were deplored by Kirby J. in *Harriton*: "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

[127] Ibid.

[128] This was acknowledged by Kirby J. in *Harriton v Stephens* [2006] HCA 15, at [125]. In the wrongful conception case of *Parkinson v St. James and Seacroft University Hospital NHS Trust* [2002] Q.B. 266, [2001] 3 W.L.R. 376, at [52], Brooke L.J. held that a parental claim for the extra costs associated with raising a child with a *significant* disability, rather than minor impairments and inconveniences, could be recovered. However, given that the full costs of raising a child are not recoverable in wrongful conception cases, primarily because of the difficulties involved in off-setting the benefits and burdens, in parental claims the requirement for a significant disability can be seen as an application of the *de minimis* rule to ensure that the general rule is not undercut.

[129] Liability could potentially be reined in by other requirements of a negligence claim.

[130] *McKay v Essex* [1982] Q.B. 1166, 1181.

[131] Ibid.

[132] Ibid., at 1189.

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squint is absurd and insulting."[133] This appears to misunderstand the analogy that Ackner L.J. was making. *Pace* Kirby J., Ackner L.J. was not saying that catastrophic injuries are the same as a squint.[134] Far from it. Rather, if the damage is assessed non-counterfactually (as "life with disabilities" rather than "life with disabilities that render non-existence preferable to existence") then it would include minor disabilities too (above the *de minimis* threshold). There is nothing insulting about Ackner L.J.'s *dicta* and no conclusions about the seriousness of Alexia Harriton's disabilities can be drawn from it. From this, we might conclude that the non-counterfactual account of damage avoids some of the potential problems with the counterfactual account but only by creating equally significant ones.

F. Do Away with Damage?

While not fatal to the recognition of wrongful life claims, the above discussion reveals a tension between them and negligence's damage requirement. Legislation could remove some of these difficulties. A reformed statute could list the conditions deemed to make life on-balance bad, thus reducing the risks with the counterfactual approach or eliminate some of the problems with the non-counterfactual account by confining liability to "serious" disabilities (and perhaps providing some firm guidance as to what these encompass). Again, the desirability of this might depend on one's views of the correct balance between the risks and benefits of permitting such actions. Also, any statutory guidance might be challenging to draw in a way that covers children born with multiple disabilities, a combination of which might render suffering so bad that non-existence is preferable but, alone, would not lead to negative welfare.[135]

Proponents could bite the bullet and argue that such actions should simply be permitted and defendants should have to pay the costs of any disabilities even if they would have still been present but for the defendant's wrongdoing. There is some precedent for this. As detailed earlier, the Congenital Disabilities (Civil Liability) Act 1976 allows wrongful life "conception" claims. If the requirements for the statutory claim are met, then "the child's disabilities *are to be regarded* as damage resulting from the wrongful act of that person".[136] This legal fiction could be extended to *all* wrongful life claims. Children would

[133] [2006] HCA 15, at [124].
[134] Todd, "Wrongful Conception", 540.
[135] For similar reasons, there has been reluctance to provide a list in of conditions that could ground the disability ground of the Abortion Act 1967: House of Commons Science and Technology Committee, *Scientific Developments Relating to the Abortion Act 1967: Twelfth Report of Session 2006–07*, vol. 1 (London 2006), ch. 3.
[136] Congenital Disabilities Act 1976, s. 1(1), emphasis added.

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recover the cost of their disabilities even if they would not have existed without them.

These options avoid some of the potential pitfalls with defining damage in wrongful life claims that have been highlighted earlier. It is worth asking, though, whether, in developing such legislation, the tort system should treat wrongful life claimants in particular as a special case more deserving of tort compensation than other patients who have suffered devastating injuries after a medical accident but cannot establish that the defendant's breach caused their damage.[137] Imagine an Eddie Toombes, born with disabilities that were not the result of an occurrence by a tortfeasor. His claim would be a non-starter. One can endorse the idea that the needs of such children should be met – perhaps through alternative compensation schemes – without supporting the maintenance and expansion of tort actions for wrongful life. Consideration of the desirability of alternative compensation systems for birth injuries,[138] including wrongful life claimants,[139] is outside the scope of this article but may provide a better solution.

VIII. Conclusion

Margaret Brazier once described the Congenital Disabilities (Civil Liability) Act 1976 as doing "little for the reputation of Parliamentary draughtsman" due to its "complex and convoluted rules" proving to be a "nightmare to operate in practice".[140] If the arguments in this article are accepted, this appears, if anything, to be an understatement, at least so far as the legislation's treatment of wrongful life actions goes.

One might naturally expect legislation with "disabilities" in its title to have such a focus, but the fact that more novel and nebulous forms of damage fall outside of its scope leads to a potential inversion of tort law's hierarchy of protected interests:[141] claims for disabilities are curtailed by the Act in circumstances analogous to *McKay* but novel forms of damage are not subject to the statutory bar on wrongful life "pregnancy" claims.

Of far more practical importance and concern, given that the common law would probably prevent many of those novel claims, is the legislation's

[137] Indeed, it has been suggested that causation difficulties are the central problem with prenatal injury claims: M. Brazier, E. Cave and R. Heywood, *Medicine, Patients and the Law*, 7th ed. (Manchester 2023), at [13.10].

[138] House of Commons Health and Social Care Committee, *NHS Litigation Reform: Thirteenth Report of Session 2021–22* (London 2022), 5; see also S.D. Pattinson, "Wrongful Life Actions as a Means of Regulating Use of Genetic and Reproductive Technologies" (1999) 7 Health Law Journal 19, 27.

[139] Given the controversies surrounding the common law's treatment of other reproductive negligence claims, such as wrongful birth and wrongful conception claims, a case could be made for reform efforts being drawn broadly in this area to encompass claims by parents. This could avoid problems of double recovery and over-compensation.

[140] Brazier, "Parental Responsibilities", 265.

[141] Murphy, "Hierarchy".

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division between impermissible wrongful life "pregnancy" cases and "conception cases", the latter of which are allowed. Exacerbating such problems is the lack of a convincing justification for differential treatment. It is hard to escape the conclusion that the law is not treating like cases alike.

To respond to this inconsistency, the boundaries of the law could be redrawn. If the 1976 Act were repealed then a common law negligence claim would likely be fettered by that tort's damage requirement. The two strongest suggestions for framing damage in wrongful life claims were examined: one counterfactual and one non-counterfactual. While both accounts are an improvement on the 1976 Act's framework, they are not without potential downsides and so the common law's distaste for such claims cannot be lightly dismissed. Legislation could be introduced to allay some of these concerns, but, ultimately, whether the benefits of allowing these actions outweigh the downsides is a subject on which reasonable debate could be had (though, personally, I think the common law bar is justified).

Where there is much less room for dispute is on the undesirability of maintaining the status quo under the 1976 Act. There is no principled reason why Evie Toombes's claim should succeed, but Mary McKay's should fail. While one can admire the noble motives that led to its passing, the Congenital Disabilities (Civil Liability) Act 1976 has long outlived its usefulness.[142] Its upcoming 50th anniversary should be marked by its repeal or, at the very least, root and branch reform.

[142] Especially since the permissibility of claims for prenatal injuries have been confirmed at common law: *Burton v Islington* [1993] Q.B. 204.

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