Wrongful Conception and Birth

The Loss of Reproductive Freedom and Medical Irresponsibility

KERRY PETERSEN*

> *Damages cases are not about love. They are principally about recoverable costs.*
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> Kirby A-CJ, *CES v Superclinics*[1]

1. *Introduction*

The term "reproductive freedom" is as broad as it is long and has its roots in the 19th century when the early feminist movement fought hard to help women limit the size of their families through contraception. The slogan "women have a right to control over their own bodies" encapsulates the "Women's Liberation Movement" of the 1960s–70s when the demand for safe, legal and accessible abortion, surgical sterilisation and effective contraception became incorporated into the feminists' agenda. The issue of contraception is no longer contentious and an important concern for contemporary feminists is that women should have the right to say no, as well as yes, to having children. Today, women seek a real choice over their reproductive lives, and reproductive freedom in the broadest sense, this is a significant issue in the contemporary debate. As Susan Sherwin says:

> Reproductive freedom for women requires that they have control over their sexuality, protection against coerced sterilisation (or iatrogenic sterilisation caused by prescribed contraceptives) and access to the social and economic support necessary to care for any children which they care to bear. It requires that women be free to define their roles in society according to their concerns and needs as women.[2]

Rapid advances in genetic knowledge and prenatal testing can also enhance reproductive freedom and expand the concept of informed parenting. As McLean observes:

> The logical outcome of new genetic knowledge is the institution of screening programmes, and there are very good reasons why this may be of great benefit. For the individual who may be at risk of having a genetically damaged child, the knowledge that this is so permits an informed choice about whether or not to parent.[3]

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* Senior Research Fellow, School of Law, University of Glasgow. I would like to thank Sarah Eliston, Sheila McLean and Regina Graycar for their assistance with this article.

1 (1995) 38 NSWLR 47 at 74.

2 Sherwin, S, *No Longer Patient* (1992) at 133–4.

3 McLean, S, "Mapping the Human Genome — Friend or Foe" (1994) *Soc Sci Med* 1221 at 1223.

Already, preconception and prenatal screening programs have reduced the number of infants born with a disability.[4] However, it is also important to ensure that a woman's reproductive choice is not restricted by these technological developments. Not everyone insists on a "designer" child and it must never be assumed that a pregnant woman who finds she is carrying a damaged embryo or foetus wants to discontinue the pregnancy. A United States study, for example, found that of the 395 parents of children with Cystic Fibrosis (CF) surveyed, the majority supported abortion for severe intellectual disability, genetic disorders and other illnesses; but a minority of parents with CF children (20 per cent) would abort a CF foetus. The authors concluded that most parents in the sample do not regard selective abortion for CF as an acceptable reproductive option, although they believe this option should be available to others; and that affected families may not welcome public health efforts to provide prenatal testing for CF.[5]

These advances in preconception and prenatal testing also increase the potential for inaccurate test results, incorrect diagnoses and other forms of human and mechanical error. Undoubtedly this will lead to further litigation in contract and tort, adding to the evolving body of law in the wrongful conception and birth cases, that is, unless or until new legislative frameworks are established.[6]

A. Preconception Tests

Since the late 1980s, tests have been developed which can predict if either of the potential parents are carriers of disorders such as Tay Sachs, Huntington's Chorea, muscular dystrophy, Fragile X syndrome or Hurler's disease. Rogers and Craig claim that by the end of the 20th century, screening will be available for even more disorders, such as inherited breast cancer and lung cancer, leukaemia, some forms of Alzheimer's disease and predisposition to emphysema.[7] Tests can also predict the possibility of foetal abnormality where there has been exposure to radiation, or where there is a pre-existing condition such as Rhesus incompatibility. As well, pre-implantation diagnostic techniques in fertilisation treatment are becoming more sophisticated.

B. Prenatal Tests

Early in the pregnancy, tests can identify high risk pregnancies and check for conditions such as rubella, chromosomal problems and various foetal disorders. Later on, ultrasonography and amniocentesis are used to detect conditions such as spina bifida and Down's syndrome. These latter tests are performed routinely when the pregnant woman is over 35 years and where there is a history of family disorder.

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4 It is reported that "in 1982, 1,016 [newly born] infants had spina bifida, missing brain parts or other abnormalities of the central nervous system. Ten years later the figure had dropped by 75% as a result of screening." Rogers, L and Craig, O, "The Hardest Choice" *The Sunday Times* 16th June 1996 at 20.

5 Wertz, D C, et al, "Attitudes Towards Abortion Among Parents of Children with Cystic Fibrosis" (1991) *Am J of Public Health* 992 at 995.

6 Annas, G J, *Standard of Care* (1993) at 163.

7 Above n4.

Referring to one of the most controversial features of screening in the United Kingdom, McLean observes that "in some areas no screening will be offered unless the prospective parents agree that they will not rule out a termination should the results of the test indicate genetic handicap".[8] It is most important that a woman's wish to proceed with a pregnancy even if the potential child will be seriously handicapped should be respected. It is therefore critical to establish reproduction freedom as the philosophical foundation of law and policy as we move into this new era of technocratic reproductive medicine.

C. *Wrongful Conception and Birth Claims*

At the outset it is important to emphasise the distinction between a claim for a prenatal injury and claims for wrongful conception and birth. There may be an action for prenatal injury when the plaintiff alleges that the injury was caused by the defendant's negligence. By contrast, the plaintiff in a wrongful conception or birth case is claiming damages for having lost the opportunity not to conceive or the opportunity not to have to decide whether to continue or discontinue a pregnancy. It goes without saying that words about human reproduction preceded by the adjective "wrongful" are bound to be off-putting and confusing. Moreover, there is little consistency in the literature on the labelling of the actions. One approach is to adopt the Kennedy and Grubb solution. These writers use the labels wrongful conception and wrongful birth as "convenient devices" acknowledging that they are "terms of art" each of which describes a group of particular situations calling for the application of common law principles.[9] For convenience, I shall discuss the legal developments within the framework of this terminology.

i. Wrongful Conception: The Negligent Non-prevention of Pregnancy

This action may arise when a plaintiff seeks damages for unwanted or wrongful conception. It is alleged that the woman would not have conceived but for the negligent breach of duty owed by the defendant. Most commonly these claims arise where the negligence concerns contraceptive advice or treatment.

ii. Wrongful Birth: The Negligent Non-termination of Pregnancy

This action may arise where a plaintiff seeks damages for the birth of an unwanted child. The essence of the claim is that the foetus was allowed to be born because of the defendant's negligence. The negligent breach of duty may take place during preconception and prenatal counselling or where there has been a mishandled abortion or misdiagnosis of pregnancy.

2. *The Role of Law*

Before discussing the cases, I shall make two observations about the wrongful conception and birth cases and the context in which they take place. The first is that this is a developing area of law which illustrates the common law at

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8 McLean, above n3 at 1224.

9 Kennedy, I and Grubb, A, *Medical Law: Text with Materials* (2nd edn, 1994) at 927; see also Dickens, B, "Wrongful Birth and Life, Wrongful Death before Birth, and Wrongful Law" in McLean, S, *Legal Issues in Human Reproduction* (1989).

work. Even though the first English wrongful conception case, *Scuriaga v Powell*[10] ("*Scuriaga*") was decided more than a decade ago, some judges continue to demonstrate antipathy to these claims by denying compensation on policy grounds when the unwanted child is healthy. The antipathy is based on the so-called "blessing" argument where the harm or loss is pleaded as the birth of the child. In *Udale v Bloomsbury AHA*,[11] ("*Udale*") for example, Jupp J adopted an absolutist sanctity of life approach when refusing to award damages for the upkeep of a healthy child. He stated that the law must assume that children are a blessing. Commenting on this decision Reichman says:

> The main premise underlying the decision in *Udale* would appear to be that there has been no damage, because the birth of a healthy child is necessarily a blessed event, and is therefore a cause for celebration and not compensation. According to this view, to award damages in such a situation would be to equate the birth of a child with an injury to its parents, and thereby impliedly degrade the possession of human life. This would be inconsistent with the fundamental concept held by society that life is inherently valuable.[12]

Although Jupp J's approach has generally been abandoned by the English courts[13] it was resurrected in 1995 in *CES v Superclinics*[14] in the New South Wales Court of Appeal ("*Superclinics (CA)*") where it received express approval in the dissenting judgment of Meagher JA.[15]

The second observation is linked to the first and concerns the social context. It is after all one of the functions of the common law to permit the law to grow and develop in accordance with customs, mores and social change. Judges in the English cases are obliged to incorporate into their reasoning the fact that legal abortions are available as long as the requirements of the *Abortion Act* 1967 (UK) as amended by the *Human Fertilisation and Embryology Act* 1990 (UK) are met. This statute permits therapeutic abortion when two registered medical practitioners form the bona fide opinion that a pregnancy should be terminated for one of the following reasons:

a) The pregnancy has not exceeded its 24th week and the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family (s1(1)(a)).

b) The termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman (s1(1)(b)).

c) The continuance of pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated (s1(1)(c)).

d) There is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped (s1(1)(d)).

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10 (1979) 123 Sol L J 406.

11 [1983] 2 All ER 522.

12 Reichman, A C, "Damages in Tort for Wrongful Conception: Who Bears the Cost of Raising the Child?" (1985) 10 *Syd LR* 568 at 574.

13 See *Thake v Maurice* [1984] 2 All ER 513 ("*Thake No 1*"); *Emeh v Kensington* [1984] 3 All ER 1044 ("*Emeh*") and *Allen v Bloomsbury HA* [1993] 1 All ER 651 ("*Allen*").

14 Above n1.

15 Id at 86–7.

In relation to the first two grounds, social factors may be taken into account if they are considered relevant. Under section 2 of the Act, medical practitioners may consider the pregnant woman's actual or reasonably foreseeable environment when determining whether the continuance of the pregnancy would cause serious risk or injury to health. Furthermore, if a termination is immediately necessary to save the life of the woman, or to prevent grave permanent injury to the physical or mental health of the woman two medical opinions need not be obtained. Doctors must act in good faith at all times and comply with a range of recording requirements.

In Australia, the legal status of abortion is more complex. Abortion comes under the jurisdiction of the States. In South Australia and the Northern Territory abortion reform statutes modelled on the English statute have been passed.[16] The law in other Australian States is based on the judicial interpretation of the criminal statutes in the two key cases *R v Davidson*[17] (*"Davidson"*) and *R v Wald*[18] (*"Wald"*).

In *Davidson*, it was held that an abortion will be lawful unless the jury would be entitled to believe beyond reasonable doubt that the accused did not honestly believe on reasonable grounds that the abortion was performed because it was necessary to preserve a woman from serious danger to her life or her physical or mental health, and that the act was proportionate to the dangers it was seeking to prevent. In *Wald*, Levine J expanded the reasons justifying abortion to include economic and social factors. This objective/subjective test places a heavy evidentiary burden on the Crown and prosecutions have been very rare. Nevertheless, although abortion is a contentious subject in Australia, legal state subsidised abortions have been available from Australian hospitals and "free standing" clinics since the *Davidson* and *Wald* rulings.[19] In practice abortion is a common medical procedure. This social context is relevant to the wrongful conception and birth cases where the plaintiffs are alleging that they were denied the opportunity to terminate a pregnancy and that this could have been prevented but for the defendant's negligence. However, the uncertainty surrounding the legal status of abortion was raised in the unreported New South Wales Supreme Court decision *CES v Superclinics*[20] (*"Superclinics (SC)"*). The trial judge, Newman J, denied the plaintiff compensation for a wrongful conception action on the ground that she had merely lost the opportunity to perform an illegal act. I will discuss the facts in this case in more detail later. The Court of Appeal in *Superclinics (CA)* overruled Newman J's interpretation of the law. In his judgment, Kirby A-CJ (as he then was)[21] observed that abortion practice is a reality which cannot be ignored.

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16 *Criminal Law Consolidation Act* 1935 (SA) s82A; *Criminal Code* 1983 (NT) ss172, 173.

17 [1969] VR 667.

18 (1971) 3 DCR (NSW) 25.

19 Graycar, R and Morgan, J, *The Hidden Gender of Law* (1990) at 198–220; for discussion on practice in the UK see, Mason, J K and McCall Smith, R A, *Law and Medical Ethics* (2nd edn, 1994) at 100–2.

20 Unreported, Newman J, Supreme Court of NSW, 18 April 1994 (*"Superclinics (SC)"*). For a critical discussion of the Supreme Court and Court of Appeal decisions see: Graycar, R and Morgan, J, "'Unnatural rejection of womanhood and motherhood': Pregnancy, Damages and the Law. A note on *CES v Superclinics (Aust) Pty Ltd*" (1996) 18 *Syd LR* 323.

21 In 1995 the Honourable Justice Kirby was elevated to the High Court of Australia.

Referring to the incidence of abortion practice and medical accountability Kirby A-CJ pointed out that:

> [t]o interpret that law without reference to such reality in a claim for civil damages where serious breaches of duty have been accepted to have occurred is, in my view, quite unrealistic. Effectively, it shifts the burden of the respondents' proved breaches of duty of care in this case from them to a patient who came to their "Superclinic" and received careless treatment. It sanctions without civil redress serious acts and defaults which have resulted in very substantial losses to the appellants. This cannot be, and is not, the law.[22]

As I have already noted, one of the major problems for plaintiffs in these cases is the resistance of judges to awarding full compensation for child rearing expenses where the unwanted child is healthy. In part, this stems from the way in which the actions are pleaded. For example, if (as is generally the case) the loss of opportunity to have an abortion is pleaded as the cause of action and the birth of the child as the harm, it must be established on the balance of probabilities that if the woman had been given the chance she would have secured a lawful termination. As Kirby A-CJ says in *Superclinics (CA)*, "it was the deprivation of this opportunity which was caused by the respondents' [or defendant's] negligence, which in turn caused the damage".[23] Treating the loss of opportunity to have an abortion as the cause of action has led courts to adopt two approaches which impinge upon a woman's reproductive choice. First, courts can and have considered whether it is ever reasonable for a woman to refuse an abortion on the basis that a failure to have an abortion may break the chain of causation and constitute a failure to mitigate damages. Second, the defendant can argue that in the circumstances a hypothetical abortion would have been unlawful and that a court cannot condone an unlawful act. As part of this analysis I shall consider an alternative approach whereby the loss of opportunity either to exercise reproductive choice or not to be placed in a reproductive dilemma is itself treated as the damage.

3. *Negligence Claims*

As in other negligence claims, the plaintiff must prove the usual tortious elements: breach of duty, causation and harm. In *Allen*, Brooke J refers to a guiding principle underlying case law in this area. He states:

> If a doctor fails to act towards his patient with the standard of care reasonably to be expected of him, and as a foreseeable result of the doctor's breach of duty of care a child is born whose potential for life would have been lawfully terminated but for the doctor's negligence, the law entitles the mother to recover damages for the foreseeable loss and damages she suffers in consequence of the doctor's negligence.[24]

Although there is a dearth of Australian authority in the area, the increase in preconception and postconception screening is likely to result in more litigation. The lack of clarity surrounding abortion laws has provoked legal and

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22 Above n1 at 70.
23 Id at 56.
24 Above n13 at 657.

public interest in the *Superclinics* case. Much of the interest concerns the effect of actions in tort on the criminal regulation of abortion.

4. *Breach of Duty*

In a number of cases negligence has been admitted. When it has not, it must be proved that the defendant owed the plaintiff a duty of care and that it was breached.[25] As Mason and McCall Smith point out, the health professional owes the client a duty of care and if this is breached "the client may argue that she has been deprived of the opportunity to terminate the pregnancy and is now burdened with an unwanted or handicapped child".[26]

Establishing liability has been difficult in sterilisation cases where the defendant doctor has failed to warn the patient about the possible risk of failure or has failed to warn the patient to take the precaution of using another means of contraception. In the failed sterilisation case *Thake (No1)*,[27] the plaintiffs had five children and lived in straightened circumstances.[28] The husband had a vasectomy operation in October 1975 and against very high odds natural recanalisation occurred and the wife delivered a healthy child in 1978. The Court of Appeal held that failure of the doctor to give his usual warning that there was a slight risk of recanalisation constituted a breach of duty because the warning would have alerted the wife to the possible risk that she may become pregnant.[29] The outcome of the case may have been different if expert medical evidence had been given to the court. For example, when a similar set of circumstances arose in *Gold v Haringey Health Authority*[30] ("*Gold*"), Lloyd LJ was influenced in his decision by the medical evidence that:

> the doctors were unanimous in their view that though they themselves would have warned of the risk of failure, nevertheless a substantial body of responsible doctors would not have given any such warning in 1979.[31]

In line with Bolam v Friern Hospital Management Committee[32] ("*Bolam*"), where it was held that established and accepted medical practice was the test for medical negligence, Lloyd LJ found that the failure to give a warning did not amount to negligence because a substantial body of responsible doctors would not have warned a patient about the risk of recanalisation.[33] In

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25 For a feminist approach to the standard of care in tort law, see: Bender, L, "A Lawyer's Primer on Feminist Theory and Tort" (1988) 38 *J Leg Education* 3.

26 Mason and McCall Smith, above n19 at 1003.

27 Above n13.

28 Ibid. The court held in this case that the defendants owed a duty of care to both the husband and the wife because they both received medical counselling/advice about the vasectomy and both of them signed consent forms. But in the recent case *Goodwill v BPAS* [1996] 7 Med LR 129 ("*Goodwill*"), where the plaintiff became pregnant by a married man who had undergone a vasectomy three years before they met, the Court of Appeal held that although the duty of care may be extended to a man's wife in certain circumstances, it could not be expected to extend to all the man's future sexual partners.

29 [1986] 1 All ER 497 ("*Thake (No 2)*").

30 [1987] 2 All ER 888.

31 Id at 891.

32 [1957] 1 WLR 582; see also, *Sidaway v Bethlem Royal Hospital Governors* [1985] 1 All ER 643 ("*Sidaway*").

33 *Gold*, above n30 at 891–6.

the early Australian sterilisation case *F v R*,[34] the female plaintiff became pregnant after a competently performed tubal ligation. The medical practitioner failed to warn her about the possibility of failure. The plaintiffs claimed that the doctor had breached her duty of care by failing to advise of the risk of failure and was liable in negligence. The trial judge, Mohr J, found for the plaintiff parents and ruled that the failure to give the plaintiff a warning was a breach of the duty of care. However, the Supreme Court of South Australia found that the non-disclosure did not amount to negligence because the risk of failure was statistically small and the doctor, acting in what she considered to be in the best interests of her patient, followed the non-disclosure practice adopted by most medical practitioners in that area of medicine. The court expressly rejected the *Bolam* test and took the view that the standard of reasonable care is to be determined by the court not just by reference to medical practice. Moreover, although the court made it clear that the appeal may have gone the other way if the plaintiff had directly asked the doctor about the possibility of a subsequent pregnancy, the problem of the patient knowing which question to ask was not addressed.

A similar set of facts arose in the Victorian case *Petrunic v Barnes*[35] ("*Petrunic*"). Tadgell J decided that he did not have to decide whether or not to apply the *Bolam* test because the plaintiffs failed to make their case. He found that a doctor did not have a duty to warn the plaintiffs about possible risks of failure or advise them about birth control alternatives because he took the view that the plaintiff in this case would have gone ahead with the tubal ligation regardless. He based his judgment entirely on the breach of duty issue and refrained from considering causation questions.

In the medical negligence case *Rogers v Whitaker*[36] ("*Rogers*"), the High Court of Australia decided that the standard of care to be exercised by a doctor is not to be determined solely or even primarily by evidence of medical practice supported by a responsible body of medical opinion. The Court held that it is the role of a court to adjudicate on the question of the appropriate standard of care in particular circumstances and that evidence of medical practice should be treated as a useful guide for the courts. It was also held that a doctor has a duty of care to warn a patient of material risks, particularly the risks that a reasonable doctor would disclose, or risks which the doctor could reasonably be expected to know would be significant for that patient. This ruling emphasises the context of the professional relationship and for this reason Weybury and Witting suggest,

> [it] should [be] easier for Australian plaintiffs in wrongful conception actions to prove a breach of duty where a doctor has failed to warn of the failure rate of a sterilisation procedure.

They add:

> it is clearly arguable that a doctor who is confronted with a woman in difficult financial circumstances, who has had a large number of children and expresses a strong desire to avoid further pregnancy, should reasonably be

34 [1982] 29 SASR 437; [1983] 33 SASR 189.
35 (1988) Aust. Torts Rep 80-147.
36 (1992) 175 CLR 479.

> aware that she would be likely to attach significance to the risk of failure of a proposed sterilisation procedure.[37]

The ruling in *Rogers* may make it easier to establish a breach of duty where people deliberately seek genetic testing/counselling or prenatal testing/counselling because of their family history, where they already have an afflicted child, or where people seek testing/counselling because of other concerns which could lead to foetal abnormality *and* the doctor is informed and understands the reasons for their concern.

5. *Causation*

The question of causation in these actions has raised some difficult issues about reproductive freedom because the loss of opportunity to terminate the pregnancy is generally pleaded as the cause of action. The plaintiff must establish on the balance of probabilities that if she had received adequate information she could have and would have taken steps to avoid the conception or birth of the unwanted child. The trial decision in *Superclinics (SC)*[38] and Meagher J's judgment in *Superclinics (CA)*[39] illustrate that a plaintiff's case may fail if, according to this test, a lawful abortion could not have been secured. The uncertain nature of abortion law has given the judges the opportunity to deny relief according to their interpretation of the lawfulness of a hypothetical abortion. Otherwise, developments affecting causation issues in the Australian cases are not noteworthy. However, a matter which has raised some difficulties in the English courts is whether or not a woman's refusal to have an abortion constitutes a break in the chain of causation. In *Scuriaga*,[40] a doctor failed to remove the foetus when performing a lawful abortion. He offered to perform another abortion when the woman realised she was still pregnant but she refused because it was so late in the pregnancy. The plaintiff gave birth to a healthy child by caesarian section. Watkins J held that her refusal to have a second abortion was not a break in the chain of causation and the sole and effective cause of the continuation of the pregnancy was the doctor's breach of contract.[41]

However, in *Emeh*[42] the trial judge had found that Mrs Emeh's refusal to consider an abortion was a failure to mitigate damages and was so unreasonable that it eclipsed the defendants' original negligence. In this case the pregnancy was diagnosed at 17–20 weeks advanced after Mrs Emeh had undergone a negligently performed sterilisation procedure. When Mrs Emeh discovered her pregnancy she actually thought she was 26 weeks advanced and refused to have an abortion because she did not want any more operations and because she believed that an abortion could be life threatening. The unwanted child was born with a congenital abnormality.

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37 Weybury, D and Witting, C, "Wrongful Conception Actions in Australia" (1995) 1 *Torts LJ* 53 at 63.
38 Above n20.
39 Above n1.
40 Above n10.
41 Ibid.
42 Above n13.

The Court of Appeal reversed the decision holding that her refusal to terminate the pregnancy did not break the chain of causation and was not a failure to mitigate the damage. The defendant's negligence had put the plaintiff in the position of having to face a dilemma which she had attempted to avoid by having herself sterilised. Slade LJ addressed the question when (if ever) it is unreasonable for a woman in these circumstances to refuse an abortion. He said:

> Save in the most exceptional circumstances, I cannot think it right that the court should ever declare it unreasonable for a women to decline to have an abortion, in a case where there is no evidence that there were any medical or psychiatric grounds for terminating the particular pregnancy. And no such evidence has been drawn to our attention relating to this particular pregnancy of the plaintiff in the present case.[43]

It is not entirely clear what Slade LJ is saying here. Is he saying that if a woman declines to have an abortion for personal, religious or moral reasons it would be rarely right for a court to declare this behaviour unreasonable? He did not regard Mrs Emeh's refusal to have an abortion as being exceptional enough to be classified as unreasonable. But what circumstances does he envisage warranting a court to decide that a refusal to have an abortion was unreasonable? Waller and Purchas LJJ also declined to find Mrs Emeh's refusal to have an abortion unreasonable, but they both came to that conclusion on the basis that the pregnancy was well advanced. Although the Court of Appeal ultimately recognised Mrs Emeh's claim to reproductive freedom the door has been left open.[44]

6. *Harm or Loss*

A plaintiff may sue for the foreseeable loss and damages suffered as a result of the negligent deprivation of reproductive choice. In *Emeh*,[45] Waller LJ took the view that if a woman becomes pregnant it is reasonably foreseeable that she will have a baby — even a baby with a disorder — and in addition, it is reasonably foreseeable that a woman in this situation may want to keep the child. Nevertheless, there is some reluctance to defining the birth of a child, particularly a healthy child, as a harm. Stewart asks how "can the birth of a healthy child be viewed as a harm"?[46] From a feminist point of view this is not at all problematic, because in effect the negligence has led to reproductive coercion. The woman has been forced to give birth to a child and all that that entails in terms of personal freedom, bodily inviolability and financial responsibility. In *Superclinics (CA)* Kirby A-CJ supports this view when he says:

> The damage incurred is that damage, mental, physical and economic, associated with having to carry a child to term and give it birth when such a pregnancy was unexpected and unwanted. It is simply incorrect in fact to state that if there were no serious impact on the mother's health on the birth, there was no damage at all.[47]

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43 Id at 1053.

44 In *Goodwill*, Peter Gibson LJ found it was reasonable to expect a woman to have an abortion at 14 weeks gestation: above n28 at 133.

45 Above n13.

46 Stewart, A, (1995) "Damages for the Birth of a Child" 40 *J L Soc Scotland* 298 at 301.

Moreover, in *Allen* Brooke J identified two heads of loss. The first is "a claim for damages for personal injuries during the period leading up to the delivery of the child".[48] He compared this claim to a negligence claim for personal injury. The second is the claim for "economic loss involved in the expense of losing paid employment and the obligation of having to pay for the upkeep and care of an unwanted child".[49] He viewed this latter claim as different "although it may in turn be associated with a different type of claim for damages for the loss of amenity associated with bringing up a handicapped child".[50] This approach is supported by Kennedy and Grubb, who point out that the nature of the harm or loss is central to a proper analytical understanding of the cause of action. They suggest that "Brooke J's analysis that the essence of the claim for the cost of rearing the child and for any lost income of the parents is one of economic loss seems right".[51] Nevertheless, it is likely that there will always be some contention when the birth of a child is pleaded as the harm or loss.

7. *Abortion*

Obviously, the legal status of abortion is bound to play a critical role in wrongful conception and birth cases because the courts will not award compensation for the loss of opportunity to perform an illegal act.

A. England

The specific grounds for abortion under the *Abortion Act* 1967 (UK) (as amended) have been discussed earlier. The decision in *Rance v Mid-Downs Health Authority*[52] (*"Rance"*) illustrates that although therapeutic abortion is permitted, non-therapeutic abortion remains a prima facie criminal act. In this case, Mrs Rance had a child born with spina bifida. The hospital staff had failed to discover the foetal abnormality when conducting prenatal screening. However, the wrongful birth claim failed because the foetus would have been "capable of being born alive" under the *Infant Life (Preservation) Act* 1929 (Eng & Wales) when the hypothetical abortion (or hypothetical offence of child destruction) would have taken place.[53]

If the *Rance* case had come before the English courts after the *Abortion Act* 1967 (UK) was amended by the *Human Fertilisation and Embryology Act* 1990 (UK) the decision may have been different because section 1(1)(d) of the amended Act removes gestational restrictions "where there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped". Nevertheless, it is still possible that a defence under the *Abortion Act* 1967 (UK) (as amended) will not apply. In practice, the legislation tends to be interpreted liberally — particularly in the case of early abortions. However, if the terms of the amended legislation

47 Above n1 at 72.
48 Above n13 at 658.
49 Ibid.
50 Ibid.
51 Kennedy and Grubb, above n9 at 987.
52 [1991] 1 All ER 801.
53 Ibid.

are not fully satisfied the *Infant Life (Preservation) Act* 1929 (Eng & Wales) and section 58 of the *Offences Against the Person Act* 1861 (Eng & Wales) may still apply.[54] Legal discussion on the offence of child destruction and unlawful abortion usually takes place in the context of a criminal prosecution where the accused is a medical practitioner, and where a "good faith" defence may be available. Assessing the lawfulness of abortion in a wrongful conception or birth claim is, however, more analogous to a court being asked to grant a declaration about a hypothetical question. For example, a court could view a hypothetical abortion as illegal in a wrongful birth case if the child is born with a slight handicap or disadvantage but is not *seriously* handicapped and the woman was relying on section 1(1)(d) of the Act because she did not discover the foetal abnormality until after the 24th week. Additionally, in a wrongful conception case, if the woman plaintiff claimed that she would have relied on section 1(1)(a) of the *Abortion Act* 1967 (UK) (as amended) which permits abortion up to the 24th week "where the continuance of the pregnancy would involve risk greater than if the pregnancy were terminated or injury to the pregnant woman's physical or mental health or any existing children of her family", the defendant could argue that the grounds did not exist and the hypothetical abortion in the circumstances would have been unlawful.

B. Australia

Unlike the position in England, there are strong grounds for arguing that abortion is not prima facie an offence in the common law jurisdictions of Australia, following *Davidson*[55] and *Wald*.[56] However, the uncertainty of the law, as highlighted in the New South Wales Supreme Court trial decision *Superclinics (SC)*, potentially gives Australian judges more latitude than their English counterparts to find a hypothetical abortion unlawful. In the wrongful birth case *Veivers v Connolly*[57] ("*Veivers*") de Jersey J chose a creative solution to the problem of deciding whether or not the plaintiff could have obtained a lawful abortion. In this case the child was born severely disabled after the mother had contracted rubella early in the pregnancy. The court found that the medical practitioner was negligent in failing to diagnose the condition and that a correct diagnosis would have led to a recommendation for termination. The court also found that the plaintiff would have sought a termination if she had been given a correct diagnosis. Nevertheless, because of the possibility (albeit remote) that such a termination would have been an offence, instead of attempting to anticipate how a jury would decide the question, de Jersey J reduced the damages by 5 per cent reflecting his assessment of the degree of risk that the termination would have been unlawful.[58] This

54 See Morgan, D and Lee, R G, *Human Fertilisation & Embryology Act 1990* (1991) at 55.

55 Above n17.

56 Above n18.

57 [1995] 2 Qd R 326.

58 De Jersey J incorrectly assumed that it was necessary for two medical practitioners to provide what he described as the "requisite certificate" and to obtain the consent of the hospital medical superintendent. In *R v Bayliss* (1989) 9 Qld Lawyer Reps 8, McGuire J found that the *Davidson* and *Wald* cases applied to the Queensland law of abortion. Neither of these cases requires more than one medical opinion to justify a lawful abortion. It may be medical practice to obtain two opinions but it is not the law.

method overcomes some of the problems faced by the plaintiff in the *Superclinics* decisions.

In *Superclinics (SC)*,[59] the woman plaintiff, a single student, went to the defendant's clinic shortly after missing her period because she was concerned about being pregnant and did not want to have a child. She was subjected to an extraordinary procession of misdiagnoses and was not told she was pregnant until she was 19.5 weeks advanced. At this point she was advised it was too late to have a termination and in due course gave birth to a healthy but unwanted child. At the trial, Newman J found that there had been a breach of duty by the defendants and also found that the plaintiff at all times from the date when she first missed her period wanted an abortion if she were diagnosed as pregnant. However, he denied the claim for damages on the ground that she had merely lost the opportunity to perform an illegal act. He drew an analogy between a woman seeking an abortion in these circumstances and an unsuccessful bank robber claiming damages against another party who unintentionally obstructed the robbery, even though this was a civil action for negligence not a criminal trial.[60]

As I have already noted, Newman J was overruled by the Court of Appeal (Kirby A-CJ, Priestley JA and Meagher JA dissenting).[61] Kirby A-CJ found that Newman J had incorrectly applied the tests in *Davidson* and *Wald* by failing to recognise the true nature of the evidentiary burden and explicitly states that the law does not impose a strict liability test.[62] He held that Newman J erred in his assumption about the role of the jury in a criminal trial[63] and ruled that the correct question should have been framed as follows: could the defendant by evidence and inference establish that a jury would be entitled to conclude beyond reasonable doubt that a hypothetical medical practitioner could not have held an honest and reasonable belief that a woman's mental and physical health would be sufficiently affected by the pregnancy to justify termination?[64] He also interpreted the mental health indication as including her state of mind after the birth of the child as well as during the pregnancy.[65] Kirby A-CJ concluded that the New South Wales *Crimes Act* 1900 does not presume that an abortion is an unlawful act. He says:

> The crime alleged is not expressed in terms that the act of procuring the abortion shall be unlawful unless the accused can show an honest and reasonable belief that it was necessary and proportionate, given the mental and physical health of the pregnant woman. The onus is upon those who assert the unlawfulness to negative the belief.[66]

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59 Above nn1, 20.

60 Ibid. In *R v Arthur*, 6 November 1981 *The Times*, at 1, the reverse took place. Dr Arthur was charged with the murder (later reduced to manslaughter) of a baby born with apparently uncomplicated Down's syndrome. During the criminal trial, the court accepted evidence of standard medical practice concerning the care of neonate babies even though this evidence had no technical relevance to the criminal charge. Dr Arthur was acquitted on the application of the civil test and medical practitioners continue to be unsure about their legal liability when treating severely disabled infants.

61 Above n1.

62 Id at 61.

63 Ibid.

64 Ibid.

65 Id at 60, 65.

66 Id at 61.

In any case, the woman plaintiff in *Superclinics* could not have been guilty of a crime because there was no evidence that she intended to have an unlawful abortion.[67] Accordingly, she would not have had the requisite *mens rea* to perform an unlawful act. Not surprisingly, Kirby A-CJ found the analogy of a bank robber unsatisfactory and preferred the approach adopted by de Jersey J in *Veiver's* case.[68]

Priestley JA agreed that a termination would not necessarily have been unlawful in the absence of a relevant court ruling.[69] However, Meagher JA (in dissent) agreed with the trial judge, finding that a medical practitioner could not have honestly believed on reasonable grounds that a hypothetical abortion would have been lawful in these circumstances.[70]

The New South Wales Court of Appeal upheld *Davidson* and *Wald*, but the divergent judicial approaches mean that the law is still uncertain, and as Priestley JA notes, it is also extremely unpredictable.[71] Moreover, in view of Kirby A-CJ's seniority on the Court of Appeal when the case was heard, and his intellectually rigorous judgment, it can be argued that there is no presumption that an abortion is unlawful in jurisdictions following the *Davidson* and *Wald* rulings. Future common law developments will be up to the courts.

Finally, in Australian jurisdictions where child destruction statutes apply, English cases may be persuasive but they are not binding. However, the defence of child destruction could be raised in a wrongful conception or birth action where a foetus is deemed to be capable of being born alive.[72]

8. *Damages and Public Policy*

Even where the courts have acknowledged the existence of a cause of action,[73] or where liability has been admitted, judges can use the shield of public policy to restrict or deny a plaintiff's claim. The legal question concerning reparation is whether or not public policy reasons are relevant to the claim. This decision is left to judicial discretion. The following sample of English and Australian cases briefly illustrate how judges have exercised this discretion when assessing the damages.

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67 Id at 66–8.
68 Id at 68.
69 Id at 83.
70 Id at 85–6.
71 Special Leave to the High Court (No S140/95, 15 April 1996) was granted to the defendant doctors and the medical clinic. However, the two parties settled on 10 October 1996: see "Church prays for abortion ruling to go higher" *SMH* 10 October 1996.
72 See Petersen, K, *Abortion Regimes* (1993) at 116–7, 187–91.
73 Symmons notes that "[b]oth the United Kingdom and American cases seem to indicate that the choice of action is immaterial to the recoverability of damages, insofar as the policy considerations which apply to tort also apply to contract". Symmons, C R, "Policy Factors in Actions for Wrongful Birth" (1987) 50 *Modern LR* 269 at 271. See also, *Emeh*, above n13 at 1056 per Purchas LJ.

A. *English Cases*

In *Scuriaga,*[74] the first wrongful conception case, the court was not invited and did not consider public policy questions. Watkins J specifically said that he could see no policy reasons for denying damages and the plaintiff was compensated for loss of earnings (including future earnings), diminished marriage prospects, plus pain and suffering. No claim was made for the upkeep of the healthy child. However, in *Udale,*[75] where the plaintiff had a healthy child after a negligent sterilisation and liability was not at issue, Jupp J found there were policy objections to awarding damages for a healthy child's upkeep. As I have already noted, he relied on the absolutist sanctity of life/blessing argument which assumes that the birth of a child is always a good thing. He said:

> Our society ... is founded on the basic unit of the family and assumes that children are the natural and desirable consequence of marriage and that the child's subsistence is a benefit alike to the child, the parents, the family and to society as a whole. In short the law must assume that children are a blessing.[76]

Jupp J also considered that social implications were involved, that a child should not be legally branded as a mistake; that offsetting the joys of parenthood against the cost of upkeep would permit virtue to go unrewarded; and finally that doctors would be under pressure to perform late abortions to avoid liability.[77]

Later cases recognised that it is not always in the interests of public policy to treat the birth of a child as a blessing. However, damages for pain and suffering experienced during pregnancy and birth can be set-off against the benefit of not having an abortion. Two categories of economic loss have been recognised: the cost of the child's upkeep and the loss of earnings. Nevertheless, although the courts recognise that medical negligence is the basis of the claim for general damages, that is the physical cost the mother pays in rearing her child, this claim is generally set off against the benefit of the joys of parenting a healthy child on grounds of public policy.[78] There is no obvious legal principle supporting the set-off for a healthy child and there seems to be no valid reason for awarding damages for a breach of contract or tort and then excluding foreseeable costs to reflect a perceived social position. However, this set-off will not necessarily apply where the child is disabled because "the forseeable additional anxiety, stress and burden involved in bringing up a handicapped child ... is not treated as being extinguished by any counterveiling benefit".[79] This distinction seems to be based on sentiment not legal principle and the set-off approach is another version of the blessing argument. By refraining from setting-off costs for disabled children the courts are implicitly stating that they do not bring as much joy to the family as healthy children.

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74 Above n10.
75 Above n11.
76 Id at 529.
77 Ibid.
78 See *Emeh, Thake (No 1)*, above n13; *Thake (No 2)*, above n29; and *Allen*, above n13.
79 *Allen* per Brooke J, id at 657.

B. *Australian Cases*

Using policy considerations to bar plaintiffs from recovering damages is an approach which has not been adopted with enthusiasm by Australian courts. In *Veiver's* case, where the court found that the doctor was negligent, they were not even considered. In *Dahl v Purnell*[80] the husband had undergone a competently performed vasectomy but his sperm count did not decline to zero. One of the defendant doctor's employees negligently told the plaintiff wife over the telephone that the sperm count was "okay". Acting on this advice the couple stopped using contraception and a healthy child was subsequently born. The plaintiffs sued for damages and included a claim for the upkeep of the child. Pratt J did not accept the notion that public policy would bar the plaintiff from recovering damages for the birth of a healthy child. He also took the view that Jupp J's "blessing" approach to children was "positively anachronistic".[81] He said, "the reality for Queenslanders is that their children will have to be educated well into their 20s if they are to take a comfortable place in the society of the 21st century".[82] Pratt J awarded damages according to the normal principles, but set off the claim for "services, physical care and upbringing, past and future" against the benefits of having a healthy child.

In *Superclinics (CA)* Kirby A-CJ found there was "little consistency in the cases ... either as to whether a 'set-off' rule should be applicable in the circumstances, or, if it is applied, against what component of the damage it should be measured".[83] As I have already noted, he had no difficulty finding that a mother can suffer damage on the birth of a healthy child. Kirby A-CJ expressly rejected the "blessing" argument and following the logic of that position found that public policy was not a bar to full recovery. However, Meagher JA echoed Jupp J's views on the blessing argument even though he upheld the trial judge's ruling that the hypothetical abortion would have been an illegal act.[84] Moreover, in spite of the negligence of the defendant medical practitioner, and the public interest in high medical standards, Meagher JA chose not to make any comment about their negligent behaviour.[85]

Both Meagher JA and Priestley JA favoured the view that as part of the plaintiff's obligation to mitigate her losses the possibility of adoption should be a relevant consideration. Priestley JA concluded that the breach of duty did not cause the plaintiff any monetary damage associated with child rearing and would only award costs up to the time when the child could have been adopted out.[86] As well, he would only award reparation for the anguish suffered by the mother in choosing to keep the child or have her adopted. He considered that the rearing costs flowing from that choice were not relevantly caused by the breach of duty and said, "it was this choice which was the cause, in my opinion, of the subsequent cost of rearing the child".[87] It has to

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80 (1992) 15 Qld Lawyer Reps 33.
81 Id at 35.
82 Id at 36.
83 Above n1 at 76–7.
84 Id at 85–7.
85 Ibid.
86 Id at 84.
87 Id at 85.

be said that this approach completely ignores societal views on adoption — the incidence of which has declined considerably over the last two decades.[88]

There is no coherent matrix of principles governing policy in the wrongful birth and conception cases and in view of this incoherence it is worthwhile to make some general observations about judicial reference to public policy.

C. *The Role of Public Policy in Adjudication*

Judges have a great deal of subjective latitude when determining public policy considerations. In the early 1980s, Lord Scarman warned about the danger of confusing public policy with the legislative function and he preferred that principles should generally override policy questions. He said:

> The distinguishing feature of the common law is this judicial development and formulation of principle. Policy considerations will have to be weighed; but the objective of the judges is the formulation of principle. And, if the principle inexorably requires a decision which entails a degree of public risk, the court's function is to adjudicate according to principle, leaving policy curtailments to the judgment of Parliament. Here lies the role of the two law-making institutions in our constitution. By concentrating on principle the judges can keep the common law alive, flexible and consistent, and can keep the legal system clear of policy problems which neither they, nor the forensic process which it is their duty to operate, are equipped to resolve. If principle leads to results which are thought to be socially unacceptable, Parliament can legislate to draw a line or map out a new path.[89]

Lord Scarman recognises the need for the common law to adapt to social change through the application of legal principles. However, not all judges follow this lead. Some judges seem to believe that even in pluralistic societies such as Britain and Australia, there is a bottom line consensus in the community on moral values which gives them the authority to stray from principles. The Australian philosopher, Max Charlesworth, disputes this belief in common values. He says:

> In a liberal society, where a pluralism of values is not only tolerated but actively encouraged, there is no such thing as "the community" view which has some kind of special normative status and which provides a basis for a public morality or for that nebulous entity which judges are fond of calling "public policy".[90]

The division in society over abortion is a good illustration of this argument. I would suggest that the majority of judicial voices airing their idiosyncratic interpretations of public policy and so-called common values are actually airing the values of these male judges who represent a small proportion of society. How do they gauge the common values?

Aspirations to judicial neutrality are certainly not served well by importing emotion and personal views to the bench.[91] An example of this is the following

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88 See Graycar and Morgan, above n19 at 340.

89 *McLoughlin v O'Brian* [1982] 2 All ER 298 at 310.

90 Charlesworth, M, *Bioethics in a Liberal Society* (1993) at 27.

91 See Tricker, C, "Sex, Lies and Legal Debate: Abortion Law in Australia. Note on *CES v Superclinics*" (1995) 17 *Syd LR* 446 at 449.

statement made by Ognall J, which reflects personal views about motherhood and infertility rather than an expression of principle. He said:

> I pause only to observe that, speaking purely personally, it remains a matter of surprise to me that the law acknowledges an entitlement in a mother to claim damages for the blessing of a healthy child. Certain it is that those who are afflicted with a handicapped child or who long desperately to have a child at all and are denied that good fortune would regard an award for this sort of contingency with a measure of astonishment. But there it is: that is the law.[92]

Do these personal views on maternity have any place in cases which are essentially about medical negligence? In a contextual and moral sense it is untenable to assert that an unwanted child should always be regarded as a blessing. As Peter Pain J recognised in *Thake (No 1)*, state policy (and this applies equally to Australia) provides freedom of choice over procreation through family planning programs and the availability of state subsidised abortion.[93] Furthermore, it is not obvious that placing an economic value on the cost of a child's upkeep offends the sanctity of life principle. On the contrary, a parent in these circumstances may wish to exercise reproductive choice for financial reasons and an award of damages could help the parents cope with the unexpected and unplanned arrival of the child, particularly a disabled child. As Kirby A-CJ says in *Superclinics (CA)*:

> in a case such as the present, [the parents] assessed the situation. They concluded that the child would, in fact, be a greater burden than a desired "blessing". This conclusion was manifested by the steps taken, or the desires expressed, to secure a termination of the pregnancy at a time when this could have been safely done.[94]

There is no legal principle which can possibly support the contention that parents should be denied recovery of damages because an initially unwanted child may learn later in life that it was a mistake. Many families have survived happily with "mistakes" and most offspring would be delighted to know that they were the source of financial assistance for their parents. Similarly, there is no legal principle which gives any force or validity to a concern that medical practitioners will be under pressure to perform late abortions to avoid liability. An abortion performed without the free and informed consent of the woman would be unlawful. There may be cases where public policy arguments are appropriate but in this volatile area of law many of the public policy reasons are moral questions or even conjecture.

9. *Conclusions*

The wrongful conception and birth cases raise a number of questions about reproductive freedom for the following reasons. First, as we have seen in *Rance* and *Superclinics (SC)*, the spectre of the hypothetical unlawful abortion or the hypothetical offence of child destruction being raised as a defence continues

92 Ognall J in *Jones v Berkshire AHA* (unreported) quoted by Lloyd LJ in *Gold*, above n30 at at 890.

93 Above n13 at 526.

94 Above n1 at 74.

to remain a possibility. As the trial decision *Superclinics (SC)* clearly demonstrates this is a particularly difficult problem for plaintiffs in Australian jurisdictions, where the early criminal abortion statutes have been modified by common law and where the distinction between a lawful and an unlawful abortion is not always clear. Although the *Abortion Act* 1967 (UK) (as amended) sets out specific defences for medical practitioners acting in good faith, English plaintiffs are not totally immune from the possibility of the defence being raised while abortion remains prima facie a criminal offence. Moreover, denying a claimant damages because of a hypothetical offence misconstrues the nature of the professional relationship. The duty of care which the health professional owes to a patient exists independently of any alleged criminal act. A doctor is obliged to provide a pregnant woman with the same standard of care as other patients. The law does not permit a health professional to misdiagnose a pregnancy negligently or carelessly provide false information about a genetic test or prenatal test with impunity. After all, the underlying rationale for these actions is to impose accountability on health professionals.

Second, defining the birth of the unwanted child as the harm suggests that the dispute is between the parent and the unwanted child, rather than between the parents and the negligent health professional. Judges' reluctance to declare a child to be unwanted has resulted in a distinction being drawn between the damages awarded for a healthy child and a disabled child. This distinction implies that a disabled child is not only unwanted but brings less joy to the parents. A far more logical and humane approach would be to discard the set-off policy.

Third, by treating the loss of opportunity as the cause of action rather than the damage, the plaintiff is required to demonstrate according to a civil standard, that she would have had an abortion. The only other option the law has is to use an objective "reasonable" test and this is inappropriate. It is clear that a woman has no obligation to mitigate her loss by having an abortion. However, Slade LJ's dicta in *Emeh*[95] suggests that a woman should be able to refuse an abortion, save in exceptional circumstances. Without further explanation of these exceptional circumstances, this pronouncement is puzzling. The issue of refusing an abortion has yet to be tested in the Australian courts.

The underlying issue is how a parent can be compensated for the loss of opportunity not to be placed in a reproductive dilemma. One approach is to plead the loss of opportunity as the damage, on the basis that it is this opportunity which has intrinsic value. In *Superclinics (CA)* Kirby A-CJ says that if the action were pleaded this way the woman would still have to establish "that loss or damage had been sustained by the deprivation of the opportunity"[96] but he goes on to say "[this] would be done by simply demonstrating that the opportunity which was lost by the [health professional's] negligence was of *some* value, but not negligible value"[97] to the woman. It follows that a plaintiff in these circumstances would perhaps not have to "prove that she could successfully have obtained a (lawful) abortion on the balance of probabilities".[98] Kirby A-CJ observes that "the damages would ... [be] limited to

95 Above n13 at 1053.
96 Above n1 at 57.
97 Ibid.
98 Ibid.

those for the loss of opportunity as such" and adds that "proof would [be] required only that there would have been a 'not negligible' possibility of her having a lawful abortion".[99] This is a much more acceptable test and overcomes problems about the plaintiff having to mitigate loss. Moreover, the tortfeasor must accept the victim as found and if, when the woman becomes aware of the dilemma, she finds that she cannot abort her foetus, this should not bar her from recovering damages.

Where a woman conceives because of medical negligence the harm is the loss of opportunity not to conceive. And as the English courts have accepted, the foreseeable consequence of conception is the birth of a child — healthy or disabled. This covers the "warning" sterilisation cases, negligent misprescription of contraception pills, negligent preconception testing and counselling. The loss of opportunity is the loss of choice not to be pregnant. Where a woman remains pregnant after a botched abortion and does not realise she is still pregnant until later in the pregnancy when an abortion is either dangerous to her health or otherwise unacceptable to her, she has also lost the opportunity not to be pregnant. When the woman has intentionally become pregnant and has a prenatal test it cannot be assumed that she would necessarily abort the foetus if given the chance.[100] But if a negligent diagnosis deprives her of the opportunity to make the choice, the loss of choice is the harm. Furthermore, the "not negligible" test referred to by Kirby A-CJ could provide a woman with more flexibility than current standard of proof requirement.

Once the cause of action is defined as the loss of opportunity, most of the policy objections would become irrelevant, because the loss or harm is not the birth of a child. It is also worth stating these cases are dealing with the negligent behaviour of health professionals — people in whom we as a society have to place an enormous amount of trust. This seems to be overlooked when public policy is being discussed! In a society which values human rights, personal freedom and personal inviolability, a very high economic value ought to be placed on the loss of opportunity to exercise reproductive freedom.

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99 Ibid.

100 See Katz Rothman, B, *The Tentative Pregnancy* (3rd edn, 1994).