Damages and the Unwanted Child

by

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INTRODUCTION

During the last decade the number and theories of birth-related legal claims have increased. This increase can be partially attributed to the availability of medical information and genetic and prenatal testing.[1] Prenatal diagnosis through amniocentesis and related procedures has become more common. Contraceptive and sterilisation techniques have become more available, more widely used,[2] and with exceptions which give rise to the causes of action discussed in this paper, generally more efficient.

The three main causes of action in this area are "wrongful life", "wrongful birth" and "pre-natal torts". They are related, although different considerations apply to each. Perhaps the most important distinctions between these causes of action are the identity of the plaintiff and the nature of the damage alleged.[3] For reasons of space, only the first two of these will be discussed.[4]

It might also be noted that pre-natal torts are neither novel nor conceptually difficult in terms of traditional tort analysis. In these torts, the wronged plaintiff stands before the court claiming that he or she has suffered an injury because the tortfeasor breached a duty of care. The

[1] Schmidt, "Wrongful Life" 250 *JAMA* (1983) 2209.

[2] Trlin and Perry, "*Manawatu Family Growth Study*" Govt Printer, Wellington (1981).

[3] Somerville, "Joinder of Issue at the Frontiers of Biomedicine, a review essay of 'Genetics, Ethics and the Law" by G P Smith 6 *UNSWLJ* (1983) 103.

[4] For a discussion of pre-natal torts see Smith, *Genetics, Ethics and the Law,* Associated Faculty Press, NY (1981); H H Clark, "Wrongful conception: a new kind of medical malpractice?" (1972) 12 Fam LQ 259.

only novel aspect of the plaintiff's case, *en ventre sa mere*, was plaintiff's lack of standing to issue a writ when the injury occurred. In contrast however, "wrongful life" and "wrongful birth" torts raise unique moral and philosophical questions, and necessitate a new departure in the concept of "damage". Pre-natal torts refers to tort liability for pre-natal injury and is a topic worthy of separate examination.[5]

Wrongful life causes of action are now statute-barred in the United Kingdom,[5] but remain an open question in other common law jurisdictions, including New Zealand. Wrongful birth actions have already appeared in New Zealand notwithstanding the existence of the Accident Compensation Act 1982. Indeed, it will be shown that this Act does not bar a cause of action, but rather structures the nature of the damages.

WRONGFUL LIFE

The tort of wrongful life has been used to describe a variety of situations that are legally and factually dissimilar. It is therefore useful to define precisely what is meant by the term, and to restrict discussion within those boundaries. Wrongful life may be defined as "an action for damages brought by the plaintiff child on the premise that were it not for the negligence of the defendant, the child would not have been born, or would not have been born in an impaired state".[6]

The newness of this cause of action should not be a deterrent to its consideration. As Lord Reid noted in *Home Office* v *Dorset Yacht Co Ltd*,[7] there has been a steady trend toward regarding the law of negligence as depending on principle, so that when a new point emerges, one should ask not whether it is covered by authority, but whether recognised principles apply to it. The relevant elements to be proven in an action for wrongful life are:

(a) the existence of the duty of care owed by the defendant to the plaintiff;
(b) a breach of that duty;
(c) causality between the action of the defendant and the injury suffered by the plaintiff; and
(d) damage.

These various elements will be considered in the context of the discussion which follows:

(i) *The North American Experience*

In the United States, wrongful life litigation generally arose out of situations in which children were born out of wedlock,[8] or else subject to birth defects.[9] As a rule, the Courts had been reluctant to break new

[5] Congenital Disabilities (Civil Liability) Act 1976.
[6] P Hersch, "Tort liability for wrongful life" (1983) 6 *UNSWLJ*, 133.
[7] [1970] AC 1004, 1026-7.
[8] *Zapeda* v *Zapeda* 190 NE 2d 849 (1963).
[9] *Gleitman* v *Cosgrove* 227A 2d 689 (1967); *Stewart* v *Long Island College Hospital* 313 NYS 2d 502 (1970); *Demer* v *St Michaels Hospital* 223 NW 2d 372 (1975).

ground and award damages to these children, preferring to let the legislature determine the applicable public policy considerations.[10]

An early exception to this consensus occurred in the New York Appellate Division judgment of *Park* v *Chessin.*[11] In this case, the parents, who had already produced a child fatally afflicted with polycystic kidney disease, were told by the defendant obstetricians that the disorder was not hereditary and that the chances of subsequent children having this disease were practically nil. As a result of this advice the couple had another baby which also suffered from the disease.

In allowing the claim of the child for injuries and pain and suffering to stand, the Court acknowledged its departure from the prevalent view:

> [C]ases are not decided in a vacuum; rather, decisional law must keep pace with expanding technological, economic and social change. Inherent in the abolition of the statutory ban on abortion . . . is a public policy consideration which gives potential parents the right, within certain statutory and case law limitations, not to have a child. The right extends to instances in which it can be determined with reasonable medical certainty that the child would be born deformed. The breach of this right may also be said to be tortious to the fundamental right of a child to be born as a whole, functional human being.[12]

The Court appears to recognise here that parents have a right to be informed of the probability that their child will be born deformed. By failing to inform them adequately, that right is breached. The duty which is owed to the parents therefore inures derivatively to the child.[13]

In *Curlender* v *Bio-Science Laboratories*[14] the child plaintiff was born with Tay-Sachs disease and a life expectancy of only four years. Her parents had asked for screening prior to starting a family and the test results were negative. On the assumption that the tests were carried out negligently, the Californian Court of Appeal held that the infant was entitled to pursue her case, for a duty was owed. The Court disregarded the argument that the laboratory could not have protected the child from the disease other than by 'bringing about' her non-existence. The amount of damages was restricted by limiting recovery to the four years of actual life.

The Court might be construed here as giving tacit approval to the proposition that being born can constitute a greater harm to an individual than not being born; they have accepted a 'quality of life' principle and acknowledge that that principle might conflict with a 'sanctity of life' principle. As Somerville points out[15] this conflict occurs because respect for the former principle, in contrast to respect for the latter,

[10] *Zapeda* v *Zapeda op cit* is generally cited as the leading authority for this view.
[11] (1977) 400 NYS 2d 110.
[12] *Ibid*, 114.
[13] See Hersch *supra*, note 6.
[14] 165 Cal Rptr 477 (1980).
[15] "Joinder of issue at the frontiers of medicine" (1983) 6 *UNSWLJ* 103.

entails the recognition that life may be of such poor quality that it constitutes a damage.

In *Turpin* v *Sortini*[16] the California Supreme Court addressed the question of whether a young girl suffering from hereditary deafness could bring an action against the physician who negligently failed to advise her parents of the possibility that she would be born deaf. The parents claimed that they had conceived their second child in reliance on the defendant's diagnosis that their first child was free of hereditary hearing defects. Their second child was the plaintiff in the wrongful life action.[17]

The plaintiff sought both general and special damages. The appeal for general damages was based upon the alleged injury suffered by the child in being born impaired, while the special damages were sought to offset the extraordinary expenses that the child would incur for specialized education, training and equipment.[18] The Court noted that the action was analogous to a normal malpractice action, in which traditional common law tort principles permit recovery for any damage that is the proximate result of the defendant's alleged negligence.[19]

The defendants argued that the plaintiff had not suffered any legally cognizable injury as a proximate result of their negligence. Had they performed their job properly they claimed, it would not have prevented the plaintiff being born with unimpaired hearing; rather the plaintiff would not have been born at all. The injury complained of then was the plaintiff's very existence, which according to public policy was not an injury the courts could recognise.[24]

This argument was rejected by the Court. It was held that although society places the highest value on the sanctity of human life, it cannot be established as a matter of law that impaired life is preferable to non-life in all circumstances.

General damages, which are meant to restore the injured plaintiff to the position he would have been in had no wrong been committed, was rejected by the Court. They denied recovery because of the difficulty of determining whether the plaintiff had in fact suffered an injury in being born impaired rather than not being born at all.[21]

The Court did however, uphold the plaintiff's claim for special damages, allowing recovery of expenses which would not have been incurred had it not been for the defendant's negligence. The Court found special damages to be readily ascertainable and awardable without confronting the question of the value of impaired existence over non-existence.[22]

[16] (1982) 182 Cal Rptr 337.
[17] There were other causes of action, but it was the wrongful life issue that was addressed by the Supreme Court.
[18] *Ibid*, 339.
[19] *Ibid*, 342.
[20] *Ibid*, 343.
[21] *Ibid*, 346.
[22] *Ibid*, 349.

Lest it be thought that such results are only a Californian phenomenon, the Washington Supreme Court in *Harbeson* v *Parke-Davis Inc*,[23] also recognised a wrongful life action brought by an impaired child. The claim was analysed within the traditional framework of duty, breach, proximate cause, and injury. All four elements having been established, special damages relating to the cost of the handicap were awarded. As in *Turpin*, the Washington Court held that it is impossible to measure the value of impaired life as compared to non-existence; an award of general damages was therefore precluded.[24]

A few years earlier in Canada, the Quebec Superior Court in *Cataford* v *Moreau*[25] considered the wrongful life claim of a child born as a result of the failed sterilisation of his mother.[26] This decision can be distinguished from the United States cases in that the child was born into a marital union[27] and was "normal" in every possible way. The Court rejected out of hand the possibility of a child suing for damages resulting from his own birth:

> The birth of a healthy child does not constitute, for this child, damage, and still less damage compensable in money. It is clearly impossible to compare the situation of the infant after his birth with the situation in which he would have been in if he were not born. Merely to state the problem shows its illogicality; by what perversion of the spirit may one arrive at qualifying as damage the inestimable gift of life?[28]

The Court did leave open the possibility however, that an action involving a child born with some abnormality, and thus more in line with the American cases, might suceed.

(ii) *United Kingdom*

The issue of the rights of infants to recover damages for a breach of duty owed to them while still in the uterus has received much attention.

In 1974 the Law Commission reported that:

> The development of medical and social services has led to more and more women seeking advice during pregnancy. This . . . is bound to lead to greater risks to medical advisers failing to tender the correct advice or to prescribe and give the correct treatment.[29]

The Commission could clearly see growing pressure on the medical profession arising from a new lode of civil litigation. They argued that no action for wrongful life should be allowed; the principal objection being the necessity of finding that a damaged child would have been better off had he or she never existed.[30] Nor would it be easy they said,

[23] 656 p 2d 483 (1983).
[24] *Ibid*, 496.
[25] (1978) 114 DLR (3d) 585.
[26] There was a separate claim from the parents for the wrongful birth of the child, and this will be considered below in the heading dealing with such causes of action.
[27] *Cf Zapeta* v *Zapeta op cit*.
[28] *Cataford* v *Moreau supra*, 596.
[29] Law Commission *Report on Injuries to Unborn Children* No 60 HMSO 1974 Cmnd 5709.
[30] *Ibid*, 34.

to assess damages on any logical basis for it would be difficult to establish a norm with which the plaintiff in his disabled state could be compared.[31]

The Law Commission's Report was followed by the enactment in 1976 of the Congenital Disabilities (Civil Liability) Act. Under the Act, anyone responsible for an occurrence affecting the parent of a child causing that child to be born disabled will be liable in tort to the child, provided he or she would have previously been liable to the parent.[32] Hence a duty is now owed to the fetus, but only when an analogous duty is owed to the parent.

The factual origin of the claim may derive from several possibilities arising in modern obstetric care. Injury to the fetus in the uterus through drugs (such as an epidural anaesthetic) or surgery are sources of harm but easily fit into legal conceptions of proximity and damage. The provisions of the Congenital Disabilities Act fit into that conceptual framework. But the situation is less clear cut when the essence of the plaintiff's claim is not "disabilities which would not otherwise have been present,"[33] but rather the very existence of the plaintiff.

The question of whether common law principles could be applied to this and related issues had its first English analysis in *McKay* v *Essex Area Health Authority*.[34]

Mary McKay was born disabled by rubella, which had infected her mother in the early months of pregnancy. It was alleged in the statement of claim that the Essex Area Health Authority's laboratory was negligent in its testing of the mother's blood samples, with the result that the mother was misled as to the advisability of an abortion. In consequence, the child was born severely handicapped. The doctor responsible was also alleged to have been negligent in failing to treat the mother and to notice the likelihood of further damage to the child in the uterus and in failing to advise the mother that an abortion was desirable. Finally, it was claimed that the doctor's alleged negligence in failing to treat caused the injuries with which the child was born.[35]

In the Court of Appeal Stephenson LJ said that if, as was conceded, any duty was owed to the unborn child, the hospital laboratory and the doctor treating the pregnant mother certainly owed the child a duty not to injure it. If the child had been injured before birth as a result of lack of reasonable skill and care on their part she could have sued them, as indeed she was suing the doctor, for damages to compensate her for the injury caused in the uterus.[36]

But the claims in dispute alleged that the child had been injured not

[31] *Ibid.* As we have seen however, the US Courts have accepted that arm of the argument with respect to *general* damages, but retained a right of recovery with respect to *special* damages.

[32] s1(2)(b) and s4(5).

[33] The test established under the Act.

[34] [1982] 2 All ER 771.

[35] *Ibid*, 774–776.

[36] *Ibid*, 779.

by either defendant, but by the rubella which through nobody's fault had infected the mother. Hence the child's right not to be injured before birth by the carelessness of others had not been culpably infringed. The only right which had been infringed was a right not to be born disabled or deformed. In the case of a child disabled or deformed before birth by nature or disease this could only mean a right to be aborted or killed or deprived of the opportunity to live after being delivered from the mother's body.[37]

The claim against the defendants was that they were negligent in allowing the child to be born at all. But this presupposed a duty to take away life; and there could not be such a duty. Though a doctor could in certain circumstances do to a fetus what he could not lawfully do to a person in being,[38] it did not follow that he was under a legal obligation to the fetus to terminate its life or that the fetus had a legally cognizable right to die.[39]

To impose such a duty, Stephenson LJ continued, would be to make a further inroad into the sanctity of human life, which would be contrary to public policy and which would require in effect the life of a handicapped child to be regarded not only as of less value than that of a normal child but so much less valuable as not to be worth preserving.[40] Finally, he concluded, damage to the child could not be ascertained and evaluated.[41] This case established for the time being at least that there is no cause of action for wrongful life in England.

It was not in dispute in *McKay* that at least three of the elements necessary to a successful tort action were present. First, the doctor in losing the blood sample and/or misreading the laboratory report was indisputably negligent. Secondly, causation was established; it was accepted that had Mrs McKay been told the truth she would have had an abortion; her failure to make the decision to terminate the pregnancy was a direct result of the defendant's negligence. Thirdly, the association between rubella in early pregnancy and subsequent deformed birth is sufficiently well established to fall within a test of reasonable forseeability.[42]

If negligence, causation and forseeability are established, then the claim may be dismissed on the grounds of an absence of duty, an absence of damage, or contrary to public policy.[43] All three arguments are to be found in the three judgments given in the Court of Appeal. The claim that no duty exists is perhaps the least contentious. It was conceded that a duty was owed to the mother to tell the truth about the rubella infection and thus give her the opportunity to elect termination

[37] *Ibid.*
[38] For example, under the provisions of the Abortion Act 1967.
[39] *McKay* v *Essex AHA supra*, note 34.
[40] *Ibid*, 781.
[41] Citing the decision of the New York Court of Appeal in *Williams* v *State of New York* 18 NY wd 481 (1966).
[42] *Overseas Tankship (UK) Ltd* v *Miller Steamship Co Pty* [1967] 1 AC 617.
[43] T Weir "Wrongful life nipped in the bud". [1982] *CLJ* 225.

of the pregnancy. On the other hand it might be argued that if it is conceded that a duty exists to one person which results in the termination of the life of the fetus, then it is arguably inconsistent to suggest that no such duty exists to the fetus when the result would be exactly the same.

The public policy argument is also flawed, not least because of its conceptual weakness. It more often than not calls for a value judgment on the part of the judge which may or may not be either empirically based or shared with the populace at large whose interest it purports to represent.[44] This is evident in Stephenson LJ's appeal to the 'sanctity of life'. Changing social attitudes generally, and the virtual elective nature of abortion under the English legislation[45] in particular, undermines the force of this principle.

The suggestion of the Law Commission[46] that allowing a wrongful life cause of action would place intolerable pressures on doctors to recommend abortions in borderline cases was specifically rejected by the Court in *McKay*. As Griffiths LJ pointed out, it is not suggested in a wrongful life action that the doctor should have advised an abortion:

> . . . provided the doctor gives a balanced explanation of the risks involved in continuing the pregnancy including the risk of injury to the fetus, he cannot be expected to do more, and need have no fear of an action being brought against him.[52]

What is inherent in this debate, although never addressed by the Court in *McKay*, is the recognition of a "quality of life" principle which may be in conflict with a "sanctity of life" principle. This issue is far from resolved, not least because of the difficulty in defining the proper limits within which the quality of life principle should be applied.[48]

The final policy issue to be noted is that the wrongful life suit touches upon intimate family matters by permitting the wrongfully born child to sue its parents in respect of its birth. Hersche suggests that public policy would not permit such a development,[49] but such a view is by no means unanimous.

In 1981 the California Legislature following the decision in *Curlender* v *Bio-Science Laboratories*[50] amended its statutes to preclude an action by the child against its mother.

Similarly, the Congenital Disabilities (Civil Liability) Act 1976 grants immunity from suit to the mother,[51] except with respect to injury caused to the child by the mother driving a motor vehicle,[52] but allows a suit by

[44] *Shaw* v *DPP* [1962] AC 220.
[45] Abortion Act 1967 (UK).
[46] *Supra*, note 33 at para 89.
[47] *McKay* v *Essex AHA supra*, note 34 at 790.
[48] Somerville *supra*, note 3 at 113.
[49] *Supra*, note 6 at 141. See also *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* 1978 Cmnd 7054 at para 1460, 1462.
[50] (1980) 165 Cal Rptr 477. *Supra*, note 14.
[51] s1(1).
[52] s2.

the child against the father. In fact, the father has less immunity from suit by the child than any other person. Section 1(4) provides:

> In the case of an occurrence preceding the time of conception, the defendant is not answerable to the child if at that time either or both of the parents knew the risk of their child being born disabled (that is to say, the particular risk created by the occurrence); but should it be the child's father who is the defendant, this subsection does not apply if he knew of the risk and the mother did not.

The Royal Commission on Civil Liability for Personal Injury[53] reviewed this section of the Act and the objection that permitting a cause of action might risk grave damage to family relations. They recommended by a majority that the child should not have a right of action against *either* parent for ante-natal injury.[54] This recommendation has not however, been accepted by the Legislature.

The final test to apply is whether or not there has been any damage. Weir argues that this is the best ground on which to reject the McKay child's claim.[55] But Weir adopts a rather narrow view of damage maintaining that the child would not have been *better off* had the defendants done their duty; she would not have existed at all and accepts by implication that one cannot 'be damaged', no matter how bad the disabilities, if the alternative is to have no existence.

The Court of Appeal did not address this issue. Instead, they preferred to say that the damage was not capable of measurement. Weir is, with respect, quite right to point out the inconsistency in this approach. The Courts have for many years been quantifying damages for loss of expectation of life.[56]

It has already been noted that a further flaw in the Court's reasoning was their failure to follow the American example of distinguishing between general and special damages, the latter being a quantification, however imperfectly, of the additional cost associated with raising a severely handicapped child. Perhaps the most serious objection to Weir's analysis however, is that it requires the notion of "damage" to be narrowly construed as analogous to disability; and views life as a state against which no other could be an improvement. It is surely more fruitful to contemplate the possibility that indeed, death may be better than life.[57]

The final point is that the significance of the *McKay* decision may lie in its implied support for a claim of wrongful birth.[58] The judgments in *McKay* imply that the mother would succeed had her allegations of fact been established. As the leading judgement of Stephenson LJ put it:

> The importance of this cause of action to the child is somewhat reduced by the

[53] *Supra*, note 49.
[54] *Ibid*, para 1471.
[55] *Supra*, note 43 at 227.
[56] *Ibid*, at 228. See also: Law Commission Working Paper No 47, *Injuries to Unbor. Children* (1973).
[57] *ie* to allow notions of "quality of life" to receive judicial recognition.
[58] *ie* an action brought by the parents of the child. This is discussed below.

existence of . . . the mother's [claim] which, if successful, will give the child some compensation in money or in care.[59]

WRONGFUL BIRTH

In wrongful birth actions, the parent of the child is the plaintiff; the child itself constitutes the damage to the parent and the amount of this damage must be quantified.[60] An alternative to this 'birth as damage' approach is that the birth of the child is a 'damaging event' which gives rise to loss to the parent. The damage can take various forms, including economic loss to the parent for having to support the child, loss of opportunity to work because of needing to care for the child, or emotional injury to the parent due to his or her life-style or feelings being adversely affected by the birth of the child.[61]

This second option may be described as the 'birth as the occasion of damage' approach. Such an approach poses a number of difficulties. Not the least of these is the reluctance of the law to award compensation for damage when that damage is not directly connected with physical injury to the person. This difficulty is avoided if one adopts the 'birth as damage' approach, and treats the birth of the child as a form of physical injury to the parent which thus constitutes damage.[62]

When the problem is posed in this way, it is easier to set the legal test for estabishing liability. Were it not for the defendant's negligence the child would not have been born. The legal test can therefore be: whether the birth of the child was a reasonably forseeable consequence of the defendant's breach of duty.

In the cases to be discussed below the tendency has been to accept the first elements of the tests for liability: a duty of care was owed, there was a breach of that duty, and the birth was a reasonably forseeable consequence of that breach. The difficulty arises on the question of damage. It is here that the courts may be seen to be moving, albeit with occasional reluctance, to accepting the position that the birth of a healthy child may be a "damage" to the parent.[63] The question then revolves around whether or not the damage continues beyond the birth, or whether the birth 'cures' the damage.

The division between pre and post-birth owes more to presumptions about the value of a child than it does to strict logic.[64] Where the birth

[59] *McKay* v *Essex AHA supra*, note 34 at 779.

[60] Somerville *supra*, note 3 at 110.

[61] *Ibid*, 110.

[62] See for example the approach of the Supreme Court of Minnesota in *Sherlock* v *Stillwater Clinic* 260 NW 2d 169 (1977) where the Court declared (at 174–175) that the allowance of damages is "wholly consistent with the elementary principle of compensatory damages which seeks to place injured plaintiffs in the position they would have been in had no injury occurred."

[63] Less philosophical difficulty is found in reaching a conclusion of "birth as damage" when the child is itself damaged in some way. Thus the parents of the unfortunate Mary McKay will probably have less difficulty in obtaining substantial recompense than might otherwise have been the case.

[64] See footnotes 78–83 below and accompanying text.

'cures' the damage, the birth of a normal, albeit unwanted, child is perceived as amounting to a benefit which negates any damage that would otherwise accrue as the child grew and consumed parental resources. Such an application of commercial principles rests somewhat uneasily in the law of tort. The following cases will illustrate that point more vividly.

In *Sciuriaga* v *Powell*[65] the defendant doctor agreed to terminate the plaintiff's pregnancy by means of a legal abortion. An operation was duly carried out which failed to terminate the pregnancy. The plaintiff refused a second operation which involved some risk to her health. She was told that the first operation had failed because she had a 'structural defect'. In fact it had failed because the surgeon had botched the operation. He had then seized upon a "speculative and dangerous" explanation for his failure. The Judge found that he had acted negligently and in breach of his duty. There were no public policy reasons to exclude the plaintiff from recovering damages. Indeed, Watkins J noted that 12 Halsbury's Law (4th ed) para 1133 states: "a plaintiff may recover, or fail to recover, damages in a novel situation by reason of the view of public or social policy taken by the courts." He then went on to consider whether public policy should eliminate Miss Sciuriaga's cause of action, and concluded that:

> During a study of various cases in which the notion that public policy shall cause the court to abstain from redressing a wrong by an award of damages, I have not found an instance of a court declaring that public policy demands that damages shall not be awarded for a breach of contract, the contract being to perform a legal act for proper reward. Abortion is legal in circumstances which Parliament has prescribed. . . . I perceive no policy, public or other, why she should not recover such damages as she can prove she has sustained by the surgeon's negligent failure or other breach of duty. . . .[66]

The damages were then set at £7000 for loss of earnings, £7500 for future loss of earnings, £3500 for diminution of her marriage prospects, and £750 for pain and suffering, including anxiety, distress and other mental suffering.

On appeal,[67] which was confined to the question of quantum, the Court of Appeal reduced the damages by £4250. The principles upon which Watkins J had decided the case in the lower court were not challenged. Unfortunately, as Miss Sciuriaga did not claim damages for the cost of raising the child, this question was left open.

However some lead on this matter was given in the Court of Appea judgement of Waller LJ:

> [O]nce a woman has given birth to a healthy child with no harm to her, and the fears o

[65] QBD 18 May 1979, Unreported. See: [1979] 123 SJ 406. This was an action for breach of contract, not for negligence. The judge expressly stated however that there was no public policy reason to preclude the plaintiff recovering damages in tort. For a general discussion of the evolution away from a contract/tort dichotomy see Holyoake, "Tort and Contract after Junior Books" (1983) 99 LQR 591.

[66] From the transcript.

[67] Unreported. Court of Appeal. 24 July 1980 (1980/597) Waller J.

the doctor had been shown to be unfounded, I would not regard it as unarguable that thereafter no more damage would arise.[68]

Two other issues arose in this case, although neither were discussed at length by the trial Judge. They are linked by the general issue of the duty to mitigate one's loss. The first issue was whether or not Miss Sciuriaga should have accepted the offer of a second abortion. Watkins J concluded that the plaintiff had remained willing to submit to an abortion up until the fourteenth week of pregnancy. No adverse inference was drawn from the refusal to have the pregnancy terminated at twenty-two weeks. As the issue was not discussed at length, it is not possible to infer whether or not a refusal at an earlier, and less hazardous, stage of the pregnancy would have influenced the Judge's conclusion. It seems unlikely that a refusal to terminate the pregnancy could be held against the plaintiff and with respect that is the proper conclusion to reach.[69]

The second and related issue was the plaintiff's decision not to offer the child for adoption, but to raise it herself. Had the issue of damages to cover the cost of raising the child been argued, this would have assumed greater importance. In the instant case this was relevant to the claim for loss of earnings and impairment of marriage prospects.

The argument has been canvassed a number of times before the American courts and rejected in every case.[70] The general principle is that the plaintiff must have taken reasonable steps to mitigate damage.[71] To hold the threat of a reduction of damages over the head of the plaintiff if she failed to place the child for adoption clearly constitutes unreasonable pressure.

The American case *Robak* v *US*[72] was decided prior to *McKay*[73] and on almost identical facts. The mother had contracted rubella during the pregnancy and the physician failed to advise her of the risks of the child being born deformed as a result.[74] Had the mother been informed she would have terminated the pregnancy.

The Court awarded damages to the parents for the wrongful birth of their severely deformed child. The Court expressly refused to set off the costs of rearing a normal child against the damages awarded to the parents for rearing the damaged child. A causation based analysis which employed a 'birth as damage' approach was used to explain this result: but for the negligence of the defendant, the child would not have

[68] *Ibid*, 21.

[69] But *Emeh* v *Kensington & Chelsea AHA* infra note 84.

[70] *Troppi* v *Scarf* (Mich) 187 NW 2d 511 (1972); *Martineau* v *Nelson* 247 NW 2d 409 (1976); *Sherlock* v *Stillwater Clinic* 260 NW 2d 169 (1977); *Ziemba* v *Sternberg* 357 NYS 2d 265 (1974).

[71] See generally, *Salmond on the Law of Torts* (1973), ed Heuston and Chambers (18th ed 1981); Fleming, *The Law of Torts* (6th ed 1983).

[72] 658 F 2d 471 (1981).

[73] *Supra*, note 34.

[74] Under the doctrine of *Roe* v *Wade* 410 US 113 (1973) the plaintiff would have had the

been born at all, rather than would not have been born damaged.[75] As a consequence of this mode of analysis, the parents' damage consisted of the birth of the child and was quantified as the full cost of rearing it and not just the additional costs incurred because she was damaged.[76]

By contrast, the South Australian Supreme Court in *F* v *R*[77] expressly found that the care of the child was not a matter "which sounds in damages". In that case the female plaintiff was subject to a properly performed but unsuccessful tubal ligation. She had not been informed of the unavoidable risk of the sterilisation failing. The Court awarded her $10,000 for the pain and suffering of both the "wrongful pregnancy" which involved a caesarian section for delivery of the child, and a second sterilisation operation.

The reluctance of the Australian Court to award damages to cover the cost of child-rearing stemmed from the judicial belief that the birth of a healthy, albeit unplanned, child, confers a blessing which overrides the economic loss involved.

This attitude is epitomised in the majority judgement in *Terrell* v *Garcia*:[78]

> The satisfaction, joy, and companionship which normal parents have in rearing a child make such economic loss worthwhile. These intangible benefits, while impossible to value in dollars and cents, are undoubtedly the things that make life worthwhile. Who can place a price tag on a child's smile or the parental pride in a child's achievement? . . . Rather than attempt to value these intangible benefits, our Courts have simply determined that public sentiment recognises that these benefits to the parents outweigh their economic loss.[79]

The flaw lies in that which "our Courts have simply determined". For there is of course no empirical evidence to support the proposition that parents have made any such determination. If anything the evidence tends to point in the opposite direction.[80] This comment illustrates the tendency of some of the judiciary to arbitrarily determine what constitutes the public's view.

As was noted above,[81] in *Cataford* v *Moreau*[82] where $1000 was awarded for the cost of raising a child, some measure of compromise is possible. The measure in that case was an extremely modest one, bearing no resemblance to the actual cost of rearing a child.[83] It will suffice to note at this point however, that the principle of costs for childrearing was by 1981 accepted in at least three common law jurisdictions; Canada, the United States and England.

option of terminating the pregnancy.

[75] Somerville *supra*, note 3 at 111.

[76] *Supra*, note 75 at 478–9.

[77] 5 May 1982.

[78] 496 SW 2d 124 (1973).

[79] *Ibid*, 128.

[80] Espenshade, "The value and cost of children" (1977) 32(1) *Population Bulletin*.

[81] See *supra*, notes 25–28 and accompanying text.

[82] *Supra*, note 25.

[83] Espenshade *supra*, note 8.

The leading authority on wrongful birth at the present time is *Emeh* v *Kensington and Chelsea and Westminister AHA*[84] Here the plaintiff was a married woman aged 37 with three children. In May 1976 her current pregnancy was terminated and a laparoscopic sterilisation was negligently carried out. In late January 1977 she discovered she was 17 weeks pregnant. On 3rd July 1977 she gave birth to a child with congenital abnormalities, which were the product of chance and no fault of the defendant Area Health Authority (AHA). At trial, the dispute was over causation and the quantum of damages.

The case gave a fresh airing to the argument which had failed in *Sciuriaga* v *Powell.*[85] Here it succeeded. Counsel for the Authority argued that the plaintiff broke the chain of causation by failing to obtain an abortion. In other words, she should have mitigated her loss by ending the pregnancy and avoiding the expense of bearing and bringing up the child. The Judge at first instance, Park J, held that although in *Sciuriaga's* case Mr Justice Watkins had been right to hold that there had been no break in the chain of causation, in this case the facts were different. The continuation of the pregnancy and the birth were not caused by the defendant's original negligence but by the plaintiff's *novus actus interveniens* in failing to take steps to minimise her damage.

The Judge distinguished *Sciuriaga* on the following grounds:

(i) The plaintiff had earlier undergone an abortion. This was presumed to imply a lack of objection to abortion *per se.*

(ii) She did not consider an abortion again because she was afraid to put herself in the hands of the doctors again, and this was her only reason.

(iii) The Judge found she was an unreliable and sometimes untruthful witness and he was therefore unable to accept that she was afraid of having an abortion.

The Judge went on to say:

> . . . her own unacceptable reasons for not seeking an abortion have convinced me that, in truth, she elected to allow the pregnancy to continue because she wanted to bear another child, and from that time onwards her pregnancy was not unwanted.[86]

Mrs Emeh's damages were accordingly cut off at the date she "unreasonably" refused to have an abortion. She was awarded £1500 for the sickness and distress of four months pregnancy and for the second sterilisation which she later underwent because of the failure of the first.[87]

It is submitted that this was an extraordinary decision, which in the words of one commentator,[88] looks at first sight to be an illustration of male chauvinist insensitivity. One view is that a plaintiff who rejects

[84] *The Times* 3 March (1983) (High Court); [1984] 3 All ER 1044 (CA).
[85] *Supra*, note 65.
[86] *Supra*, note 84.
[87] The case went to the Court of Appeal [1984] 3 All ER 1044. The Court of Appeal decision is discussed below.
[88] Lewis, "Damages for wrongful birth" (1983) *Law Society Gazette* 1045.

surgery, as happened in the recent case of *Selvanayagam* v *University of West Indies*,[89] has to show that he or she has acted reasonably. Failure to do so is a breach of the principle that a plaintiff is under a duty to mitigate damage. In Mrs Emeh's case this was apparently the principle that was accepted, because she had willingly chosen to terminate an earlier pregnancy, and her reasons for not doing so this time were unconvincing.

The alternative view, with which the present writer respectfully concurs, is that it is unacceptable to find "unreasonable" a decision not to terminate a pregnancy. The adoption of this view has two principal merits. First, it is entirely consistent with the sanctity of life principle the Courts have long been at pains to uphold.[90] Secondly, the evolution of the law of abortion has been toward ensuring that the decision to terminate is freely taken by the woman in consultation with her physician.[91] To pose the question in terms of abort or suffer the consequences is, with respect, a negation of that choice.

A rather different approach was adopted in *Udale* v *Bloomsbury Area Health Authority*.[92] Here the plaintiff, the mother of four children, underwent a sterilisation operation which was carried out by doctors employed by the defendant health authority. The operation was not successful and she subsequently became pregnant. After giving birth to a normal baby the mother brought an action in negligence against the health authority claiming damages for:

> (i) pain and discomfort including anxiety and distress caused by the unsuccessful operation;
>
> (ii) loss of earnings during pregnancy, birth and the early rearing of the child;
>
> (iii) the cost of enlarging the family home to accommodate the new baby; and
>
> (iv) the cost of the child's upbringing until the age of 16.[93]

The health authority admitted liability but disputed the amount of damages. In particular, they argued that as a matter of public policy, damages should not be awarded for a healthy, normal and loved child, and that it would be invidious to weigh the benefit of a child against the cost of bringing it up.[94]

Jupp J reviewed the cases of *Emeh, Sciuriaga* and *McKay*, but found them of limited assistance. He did accept however, that public policy factors precluded recovery of the last three levels of damage. The public policy considerations which particularly impressed were as follows:

[89] [1983] 1 All ER 824.

[90] See *supra*, notes 38–41 and accompanying text.

[91] O'Neill, "Old Principles, New Issues: the law of abortion in New Zealand" University of Waikato (Mimeo) (1984).

[92] [1983] 2 All ER 522.

[93] These were the disputed levels of damage. A number of others, including shock and anxiety from the unwanted pregnancy, the taking of unnecessary drugs, and re-sterilisation, were not disputed. *Ibid*, 522.

[94] *Ibid*, 529. Interestingly, counsel for the defendant distinguished between damages for a normal child, and what might be claimed if the child was handicapped or deformed.

(i) It is highly undesirable that any child should learn that a Court has publicly declared his life or birth to be a mistake. . . . Such pronouncements would disrupt families and weaken the structure of society;
(ii) The mother would in any event get little or no damages because her love and joy and care for the child would cancel out the inconvenience and financial disadvantages which had occurred. Nor could it be right that an unloving parent would recover more than a loving one. In short, virtue would go unrewarded.
(iii) Medical men would be under subconscious pressure to encourage abortions in order to avoid claims for medical negligence which would arise if the child were allowed to be born,[95] and
(iv) It has been the assumption of our culture from time immemorial that a child coming into the world is a blessing and an occasion for rejoicing.[96]

The Judge went on to conclude that the rejection of these heads of damage was not absolute. This he did first, by refusing to accept that the plaintiff's damages ceased at the birth,[97] and secondly, by increasing the award of damages for pain, suffering, inconvenience, anxiety and the like to compensate for the additional costs associated with the birth.[98]

While the factors which the Judge took into account are all of great importance, it is doubtful that they should preclude recovery of damages to meet the cost of bringing up the child and extending the house.

Further, it seems probable that the Udale child will learn that he was, at least initially, unwanted, simply by virtue of the fact that the action was brought. Similarly there is doubt about the logic of confusing the economics of rearing the child with the mother's feelings for the child. Whether those feelings are of love or resentment are irrelevant to the objective issue of cost; the former will not be reduced by a greater portion of the latter.[99]

Thirdly, the "subconscious pressure on medical men to encourage abortions" is an important factor in a case like Mrs McKay's, where a non-aborted child complains of being allowed to live, but surely has less application where the act complained of is a negligent failure to sterilise. The *Udale* case is apparently not being taken to appeal by either party, but it was reviewed by the Court of Appeal in Mrs Emeh's case.[100]

[95] A point lifted directly from the Law Commission's 1974 *Report on Injuries to Unborn Children* No. 60 Cmnd 5709.
[96] *Supra*, note 94 at 531.
[97] *Cf* the earlier cases *eg F* v *R* where it was held that the birth of the child 'cured' the damage.
[98] *Udale* v *Bloomsbury AHA* at 531-2.
[99] As Brahams points out, "Damages for unplanned babies — a trend to be discouraged" (1983) 133 *New Law Journal* 643, 645, if all babies are legal blessings, then why the need for the Abortion Act, the pill, sterilisation, and Family Planning organizations?
[100] *Infra*.

Although the Emeh child had abnormalities and the Judge in *Udale*'s case said specifically that his decision was not intended to deal with the abnormal child there is a common thread. In the former case the child's abnormalities were the product of chance and not a matter for which the defendant could be held responsible. In the latter case a normal child was born as the result of the defendant's negligence. There is therefore no reason why the cases should be treated differently because one child was normal and the other not: both exist because of negligence by the defendant.

The next relevant English decision, *Thake* v *Maurice*[101] was, like *Sciuriaga*,[102] an action in contract and also represents an advance in the tort law of wrongful birth. Here a husband and wife sued a surgeon for damages for breach of contract to perform a vasectomy operation. The operation was performed successfully and completely, but through no fault of the surgeon spontaneous recanalisation occurred and the female plaintiff conceived her sixth child.

The surgeon had not warned the plaintiffs that there was a small risk of the operation reversing itself, although that was the surgeon's usual practice. He had however made it clear that the operation was irreversible, although there is no logical relationship between surgical irreversibility and the potential for failure through recanalisation. The Judge held that while the surgeon had not intended to guarantee the husband's sterility, on a true construction of both the oral and the written terms of the contract, in the absence of the warning which the surgeon usually gave as to the natural reversal, the surgeon had contracted to make the husband irreversibly sterile.[103]

As the operation had failed in its objective, the surgeon was liable in damages. The Judge, Peter Pain J, went on to hold that there is no general rule of public policy that damages could not be awarded in respect of the birth of a healthy child.[104]

This case is significant for a number of reasons, perhaps the most notable for our purposes being the willingness of Peter Pain J to reject the reasoning of Jupp J in *Udale* as to the limits of public policy in the calculation of damages. In particular, he was critical of the view that the joys of motherhood can be objectively equated with the costs of supporting an unplanned baby throughout its dependent years.[105]

An opportunity to review these conflicting lines of authority was provided when Mrs Emeh's case went to the Court of Appeal.[106] The leading judgment was given by Lord Justice Waller. The trial judge had

[101] [1984] 2 All ER 513. A contractual relationship was possible because they were private patients.

[102] *Supra*, note 65.

[103] *Supra*, note 101 at 519–520.

[104] *Ibid.*

[105] There are notable parallels therefore with *Sciuriaga's* case, as well as the North American authorities cited earlier.

[106] *Emeh* v *Kensington and Chelsea and Westminister AHA Supra*, note 84.

considered *Sciuriaga* v *Powell*[107] where it was determined that there had been no break in the chain of causation, but on very similar facts in *Emeh* rejected the plaintiff's case because of her "unreasonableness" in failing to minimise the damage by undergoing an abortion.

The Court of Appeal applied the reasoning of Lord Reid in *McKew* v *Holland and Hannen and Cubitts (Scotland) Ltd*[108] concerning the chain of causation:

> But I think it right to say a word about the argument that the fact that the appellant made to jump when he felt himself falling is conclusive against him. When his leg gave way the appellant was in a very difficult situation. He had to decide what to do in a fraction of a second. He may have come to a wrong decision; he probably did. But if the chain of causation had not been broken before this by his putting himself in a position where he might be confronted with an emergency, I do not think that he would have put himself out of court by acting wrongly in the emergency unless his action was so utterly unreasonable that even on the spur of the moment no ordinary men would have been so foolish as to do as he did.[109]

The test of unreasonable conduct in Lord Reid's view was therefore very high. In *Emeh's* case the trial judge set the standard too low. In this he was influenced by two factors in particular. First, he had considered Mrs Emeh's evidence to be untruthful. The Court of Appeal, in reviewing the evidence, concluded that there was genuine confusion regarding the material dates, and Mrs Emeh had in fact been telling the truth.[110]

Secondly, the trial judge had failed to appreciate the significance in terms of comparative risk of an abortion performed at eight weeks duration of pregnancy, and one performed at twenty or more weeks.[111] Waller LJ therefore concluded that the deduction made by the trial judge because of Mrs Emeh's failure to minimise the damage by having an abortion was unwarranted. Slade LJ went even further. Save in the most exceptional circumstances, he said:

> I cannot think it right that the court should ever declare it unreasonable for a woman to decline to have an abortion.[112]

On the questions of remoteness and forseeability, Waller LJ considered that as the woman was pregnant, it was certainly forseeable that she would have a baby. More to the point, as the proportion of all births that contain congenital abnormalities is between 1:200 and 1:400 births, the risk is clearly one that is 'forseeable' in the law of negligence.[113]

The final question was whether the award of damages should be constrained by reason of public policy considerations. In *Sciuriaga* v

[107] *Supra*, note 65.
[108] [1969] 3 All ER 1621.
[109] *Ibid*, 1624.
[110] *Supra*, note 106 at 1049.
[111] *Ibid*, 1048.
[112] *Supra*, note 106 at 1053.
[113] *Ibid*, 1049.

Powell[114], as already noted, Watkins J had rejected an objection to the award of damages on this ground.

In *Udale* v *Bloomsbury Area Health Authority* Jupp J[115] came to the opposite conclusion, finding policy objections to the award of damages in relation to the upkeep of a child. The Court of Appeal[116] preferred *Sciuriaga* to *Udale*. In disapproving the *Udale* decision, the Court cited the opinion of Lord Scarman in *McLoughlin* v *O'Brien*[117] that:

> 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 principle inexorably requires a decision which entails a degree of policy risk, the court's function is to adjudicate according to principle, leaving policy curtailment to the judgment of Parliament.[118]

In the absence of any rule to the contrary therefore, the Court of Appeal allowed Mrs Emeh to recover in full for the financial damage sustained by her as the result of the surgeon's negligence. It was irrelevant whether the child was born healthy or abnormal.[119]

It may now be taken as current law that a woman may recover damages, including the cost of raising a child, where:

(a) the defendant is in breach of a contract to perform an operation for sterilisation: *Thake* v *Maurice*,[120] or;

(b) is negligent in the performance of that operation: *Sciuriaga* v *Powell*; *Thake* v *Maurice*; *Emeh* v *Kensington AHA*.

(c) The normality or otherwise of the child does not affect the principle of damages being awarded, but an abnormal child would be relevant to the question of quantum: *Emeh* v *Kensington AHA*.

THE NEW ZEALAND SITUATION

Common law actions for damages for personal injury were abolished in New Zealand by s5(1) of the Accident Compensation Act 1972. This was preserved by s27(1) of the new 1982 Act which came into force on 1 April 1983. For a claimant to be recompensed under the Act for her child's wrongful birth it is therefore necessary to prove that the birth constitutes a "personal injury by accident" within the meaning of the Act. Section 2 of the Act defines "personal injury by accident" as including "medical misadventure" and it is to that phrase that one must first turn.[121] The central issue is, as Hughes points out, whether pregnancy and childbirth fall within the definition of personal injury by accident where the pregnancy occurs after a surgical operation aimed at

[114] *Supra*, note 65.
[115] [1983] 2 All ER 522;
[116] *Supra*, note 106 at 1050–51.
[117] [1983] 1 AC 410.
[118] *Ibid*, 430.
[119] *Supra*, note 106 at 1051, 1052, 1054, *per* Slade LJ, 1056 *per* Purchas LJ.
[120] [1984] 2 All ER 513.
[121] This is not the place for a detailed analysis of that phrase. See Bray, "Medica Misadventure and Accident Compensation" (1976) VUW Law Library (Mimeo).

preventing conception.[122] A small number of recent cases have considered this point.

In *Tietjens* v *Rutherford*[123] the plaintiff underwent a tubal diathermy sterilisation operation. She subsequently became pregnant and gave birth to a healthy child. A claim for damages was made alleging negligence on the part of the defendant surgeon. The Court, after considering the definition of personal injury by accident in s2 of the Act, and various precedents,[124] held that the misapplication of the diathermy procedure was a "personal injury by accident". Accordingly the action was statute barred.

The second head of the claim was that the surgeon had failed to do a number of things, including adequately identifying the structure of the left fallopian tube; that is, the defendants alleged acts were of omission rather than commission. Damages were sought for the costs of rearing the child and for compensation for physical and mental stress occasioned by the birth of the child which did not necessarily arise out of any personal injury by accident.[125]

The case went on appeal to the Court of Appeal where it is reported as *L* v *M.*[126] The Court decided the case by a majority on the rather narrow ground that whether or not the plaintiff had cover under the Act was a matter to be determined by the Corporation.[127]

Cooke J was the only judge to consider the substantive issues. He said:

> In the ordinary sense the conception and the consequent childbirth can be said to have been caused by accident — namely the failure of the operation. But I do not think that either the conception or the childbirth could be described as a personal injury to the mother.[128]

After describing how the pregnancy arose from a ligament, rather than a fallopian tube being operated on, Cooke J went on to conclude that:

> In my opinion it would not be ordinary or natural to say that the damages claimed for the cost of providing for the child until he is independent arise, either directly or indirectly, out of the injury to the ligament.[129]

Since the circumstances giving rise to the action occurred, Parliament amended s2 of the Act in 1974 to include "medical misadventure" within the definition of personal injury by accident. Cooke J was inclined to the view that should similar circumstances arise in the future, the new definition would suffice to bring s5(1) into play and thereby bar

[122] Hughes, "Accident Compensation and Childbirth" [1981] NZLJ 79.
[123] Noted in [1978] *Recent Law* 137.
[124] *G* v *Auckland Hospital Board* [1976] 1 NZLR 638; *Jones* v *Secretary of State* [1972] AC 944.
[125] *Supra*, note 123.
[126] [1979] 2 NZLR 519.
[127] *Ibid*, 523.
[128] *Ibid*, 529.
[129] *Ibid*, 530. (s135A, now s27(a).

any claim for personal injury. He detected support for this view in the decision of the Accident Compensation Appeal Authority in *Re Mrs McR.*[130] On the crucial question of whether other types of damages were recoverable — for example mental anguish, the cost of childbirth and childrearing, loss of wages etc, — he had only this to say:

> I do not think the Act bars the present action so far as it relates to alleged economic damages. Whether, apart altogether from the Act, damages are recoverable at common law in such circumstances has not been argued.[131]

This case is therefore authority for the view that common law actions for damages are not necessarily linked to personal injury by accident (including since 1974 medical misadventure) and that it only requires an appropriate case for the matter to be substantively argued.[132]

The case of *Re Mrs McR* referred to earlier[133] also involved a pregnancy and birth following a failed sterilisation operation. The distinguishing feature was that the failure of the operation was attributed to a mechanical defect in the instrument used in the operation. The Accident Compensation Commission determined that Mrs M did not have cover in respect of the Act and the way was therefore open to her to commence a common law action against the Auckland Hospital Board for negligence. On appeal to the Accident Compensation Appeal Authority[134] Judge Blair reversed the Commission. They in turn appealed to the High Court where the case is reported as *Accident Compensation Commission* v *Auckland Hospital Board.*[135]

In *Mrs McR*'s case the birth had resulted in severe emotional and financial stress being placed upon the plaintiff and her family. She had been obliged to cease part-time employment and to obtain a larger more expensive home. There were other non-earning types of losses.[136] Speight J said that these losses would be recoverable under Part IVA of the Act.[137]

The question which he had to decide was whether or not:

> . . . the failure of the operation on Mrs M is merely due to it falling within an accepted failure rate or whether it has been attributable to operational negligence or difficulties of an unexpected and undesigned variety. *If it was the first of these, then in my view it is not medical misadventure.* If it is the second of these then it is medical misadventure.[138] (emphasis added)

As the facts of the case led Speight J to conclude that it was a

[130] (1978) 1 NZAR 567.
[131] *L* v *M supra*, at 530 *per* Cooke J.
[132] Which did not happen here as the appeal dealt only with the interlocutory matter of whether the plaintiffs must first have the question of possible cover under the Accident Compensation Act determined by the Commission.
[133] *Supra*, note 130.
[134] *Ibid.*
[135] [1980] 2 NZLR 748.
[136] *Ibid*, 749–50.
[137] *Ibid*, 750. The provisions as to general compensation are now covered by Part VI of the 1982 Act, especially ss79, 80.
[138] *Ibid*, 753.

mechanical fault and separate from the "normal anticipated failure rate"[139] Mrs M was therefore covered by the statute and entitled to compensation.

The interlocutory matters having thus been settled, the matter was referred back to the Accident Compensation Corporation for a determination as to the amount payable as compensation for medical misadventure. The Corporation paid compensation under s120 (lump sum), s113 (loss of earning capacity), and s121(1) for the expenses associated with baby clothing and accessories and maternity wear. The total amounted to $5,350.[140] A further claim had been made under s121(1) for expenses relating to clothing and maintenance of the child for the period since birth, which by 1982 was already five years. The plaintiff claimed that these latter items were 'necessarily and directly resulting' from the injury. These claims were disallowed by the Corporation and the plaintiff appealed to the Accident Compensation Appeal Authority. The case resurfaced, this time as *Re Z.*[141]

The decision of Judge Blair hinged upon an interpretation of s121(1)[142] which provides in part that the Corporation may pay to a claimant "compensation of such amount as it thinks fit for actual and reasonable expenses and proved losses necessarily and directly resulting from the injury." This section had been the subject of judicial consideration in *Accident Compensation Commission* v *Nelson.*[143] The Court in that case emphasized that s120(1) imposed a "stern test" which was said to be "a more stringent test than has ever prevailed as to remoteness of damage at common law in either tort or contract."[144] Great stress was laid on the significance of the conjunctive use of the words "necessarily and directly resulting."[145]

In *Re Z*[146] Judge Blair appears to have relied upon the Hearing Officer's interpretation of that case to find that while the pregnancy and birth were direct results of the medical misadventure, and as such compensatable, there was not an "intimate causal relation" between the medical error and the cost of raising the child.

There are a number of problems with this interpretation. The first is that Blair J appears to have inferred from the Hearing Officer's decision that *Nelson* did not support the proposition that proved losses subsequent to the injury are compensatable. In fact the Chief Justice came to precisely the opposite conclusion and allowed Mr Nelson recovery of compensation for loss of goodwill that resulted from his injury preventing him from carrying on his business. Davison CJ so held not-

[139] *Ibid.*
[140] $2,500, $2,325 and $525 respectively.
[141] *Re Z* [1982] NZACR 279.
[142] This section is reproduced as s80(1) in essentially identical format in the 1982 Act.
[143] [1979] 2 NZLR 464 CA.
[144] *Ibid* at 467 Cooke J.
[145] *Ibid.*
[146] *Supra*, note 141 at 281.

withstanding the fact that the wording of s121(1) required him to look beyond the *Wagon Mound*[147] test forseeability to stricter tests of causation. In this he found assistance from *Corporation of Raleigh* v *Williams*[148] in determining that "necessarily resulting" meant a high degree of probability. On the question of directness, the Chief Justice adopted the test applied by Scrutton LJ in *In re Polemis*[149] that it is a test of "so long as the damage is directly traceable to the . . . act and not due to the operation of independent causes."

The second major problem in Blair J's finding is the application of the *Polemis* test to the facts of *Re Z*. It is submitted that if conception can be accepted as injury then the damages which accrue are those which necessarily flow from such injury. Once a pregnancy is underway it follows logically that there will be a birth and a continuing life. Expenses associated with that life are necessarily a consequence of the conception and birth. To phrase it in the terms used earlier in this paper, "but for" the conception there would be no birth and no continuing expense.

One suspects that the real reason for the learned Judge's finding is one of policy. This conclusion is reinforced by Blair J's finding that "In any such case as the present a line must be drawn somewhere"[150] and again by Blair J's approving reference to *McLoughlin* v *O'Brien* where Griffin LJ said that:

> . . . any system of law must set some bounds to the consequences for which a wrongdoer must make reparation . . . in any state of society it is ultimately a question of policy to decide the limits of liability.[151]

The present writer respectfully agrees with Griffin LJ. The point of contention arises over the position at which the dividing line must be drawn. It is submitted that the appropriate test is that applied in *Speck* v *Finegold*:

> But for the defendant's breach of duty to properly treat . . . the plaintiff parents, they would not have been required to undergo the expenditure alleged.[152]

This was cited with approval by the Appeal Court in *Robak* v *United States* which added "[t]hese expenditures must include the costs of raising a normal child."[153]

Policy reasons were also prominent in *XY* v *Accident Compensation Corporation*,[154] possibly the last case to be decided under s121(1) of the 1972 Act. The fact situation in *XY* was on all fours[155] with that of *Re Z* and the latter case had heavily influenced Willis DCJ, acting in the

[147] [1967] 1 AC 617.
[148] [1893] AC 540.
[149] [1921] 3 KB 560.
[150] *Re Z supra*, note 141 at 281.
[151] [1981] 1 All ER 809, 827.
[152] 408 A 2d 496, 508 (1979).
[153] 658 F 2d 471, 479 (1981). See also notes 101-105 and accompanying text.
[154] [1984] NZACR 777.
[155] *Ibid per* Jeffries J at 779.

capacity of an Appeal Authority. *XY* subsequently went on appeal to the High Court, and given the similarity of the fact situations, the decision of Jeffries J in *XY* may also be taken as a comment on the earlier case of *Re Z*. Mrs XY sought $18,603 expenses incurred in bringing up the child.

It was common ground between the parties that the exceptions contained in s121(1)(a)-(e) had no application.[156] The central issue therefore turned on whether the injury (conception, pregnancy and birth) continued beyond birth. Jeffries J thought that "to name regeneration of the species . . . an injury . . . is to introduce novel and very fundamental changes to accepted human thinking."[157]

This view, with respect, appears to owe more to the interpolation of the Judge's values than it does to rigorous legal reasoning. Whether the costs of raising the child are "expenses" and "losses" in terms of the statute is not clarified by the Judge's analogy of adoptive parents who "willingly and eagerly perform the task of raising the biological children of others . . . bearing exactly the same financial obligations as any parent."[158] Such an analogy ignores the crucial distinction in this case: adoptive parents "willingly and eagerly" seek to raise a child; Mrs XY had been sterilised precisely (she had thought) to be spared more of that function.

The further policy point worth noting is that the court did "not regard either abortion or adoption as avoidable consequences the appellant might have taken to lessen, or make unnecessary, the requirement to pay compensation."[159] A similar view was adopted by Blair J in *Re Z*[160] and it now seems to be settled law in New Zealand and the United States,[161] that failure to abort or adopt out the child does not constitute a failure to mitigate the damage. This must now also be taken to be the case in England.[162]

The final point to note is that twice in his judgment Jeffries J referred specifically to "maintenance of a *healthy* child"[163] and "with the birth of a *healthy* child there has been a return to normalcy."[164] This

[156] Compensation not being:
(a) Damage to property; or
(b) The loss of an opportunity to make a profit; or
(c) Any loss arising from inability to perform a business contract; or
(d) Any loss that has not for the time being actually occurred, whether or not the actual amount thereof is ascertainable before it occurs; or
(e) Expenses in or towards payment of which compensation is otherwise payable under this Act.

[157] *XY* v *ACC supra*, note 154 at 781.

[158] *Ibid.*

[159] *Ibid*, at 778.

[160] *Supra*, note 141 at 281.

[161] See *Robak* v *US supra*, note 72.

[162] In particular *Sciuriaga* v *Powell*, *Udale* v *Bloomsbury AHA supra*, *Thake* v *Maurice supra*, all took that view, and they are confirmed by the Court of Appeal in *Emeh* v *Kensington AHA supra*.

[163] *XY* v *ACC supra*, note 154 at 781.

[164] *Ibid*, at 781.

arguably at least leaves open the possibility that the Court may adopt a modified stance to the question of damages if the resulting child is abnormal in some way, as was the outcome in a number of United States cases,[165] and the previously discussed *McKay* and *Emeh* cases in the United Kingdom. We shall have to wait for a suitable opportunity before it can be argued.

The 1982 Accident Compensation Act sought to cast its net more widely than did s121(1) under the old 1972 Act. Whereas previously there had been only four classes of exception to the compensation otherwise payable under s121(1)[166] the new section (now s80) listed eight categories of exception. The new s80(1)(a) by extending the definition of 'property' to include intangible values (eg goodwill) was probably designed to prevent a recurrence of the decision in *Nelson*.[167]

Of the remaining sub-sections s80(1)(f) is most directly relevant to the payment of expenses involved in rearing a child. The sub-section provides that compensation is payable for losses other than:

> . . . any loss that has not for the time being actually occurred, whether or not the amount thereof is ascertainable before it occurs.

Future child rearing costs by definition cannot have yet "occurred", and the amount payable is ascertainable only in an abstract sense. Even if it were ascertainable, for example in the manner used to calculate the value of future estates as in the Matrimonial Property Act or the Estate and Gift Duties Act, it would be to no avail in terms of the apparent effect of the wording of this sub-section. A definitive interpretation would have to await a Court decision, which because of the recency of the Act's passage, has not yet had an opportunity to eventuate.

CONCLUSION

A claim for damages for the unwanted child is an emerging area of tort and contract law. Of the two categories, wrongful life and wrongful birth, the former has as yet received no support outside the United States. Elsewhere, where such an action is not statute barred, as in the United Kingdom, most jurisdictions have declined to acknowledge liability, primarily on grounds of public policy.

Wrongful birth actions appear to have a more promising future. A rapidly increasing number of cases throughout the common law world have awarded damages for such areas as loss of income, pain and suffering, and direct expenses associated with the birth of the child itself (eg hospital, layette etc). The primary division is this case appears to be between those that award damages to cover the continuing costs of child rearing and those that do not.

[165] *Robak* v *US supra* (rubella); *Berman* v *Allen* 404 A 2d 8 (1979) (mongolism); *Park* v *Chessin supra* (polycystic kidney disease); *Speck* v *Finegold supra* (congenital neurofibromatosis).

[166] *Supra*, note 156.

[167] Law Society submission to Select Committee on Accident Compensation Bill, 1982. See also "Notes on Seminar on Accident Compensation Act 1982". Auckland District Law Society 6.20 (1984).

In New Zealand the situation is complicated by the existence of the Accident Compensation Act 1982. The situation currently appears to be as follows:

(1) There is no statute bar to wrongful life actions, but public policy considerations are, it is submitted, likely to prevail to prevent the successful bringing of such an action.

(2) If there has been negligence, for example, an incompetently performed sterilisation, or a failure to advise a pregnant woman that her fetus is deformed and thereby giving her the option of an abortion, then the mother may proceed in a common law action for damages. The line of recent cases suggest that such an action has an excellent chance of success providing the normal tests relating to negligence, duty of care, forseeability, and damage, can actually be established.[168]

Alternatively, in the absence of negligence and where the pregnancy is a result of a medical misadventure or accident, then cover is provided in terms of the Accident Compensation Act 1982. The attempt has been made however, to restrict compensation under the Act to damages accruing up to the moment of birth,[169] or to expenses actually incurred but not those reasonably forseeable in the future.[170] In the light of the English Court of Appeal's decision in *Emeh's* case, a future New Zealand court may reappraise its views in this area. Until such time as that happens however, it appears that yet again, the Accident Compensation Act has restricted rights and remedies previously enjoyed under the common law, without adequate compensation from the statute which purported to substitute for the common law.

[68] See *Emeh* v *Kensington AHA supra*, note 84, at 1049 — 50 *per* Waller LJ for discussion of what amounts to a fairly liberal interpretation of the forseeability test, very much to the plaintiff's advantage, and contrast that to the views of Jeffries J in *XY* v *ACC supra*, note 154.

[69] *XY* v *ACC supra*, where the birth "cures" the injury, *per* Jeffries J.

[70] S80(1)(f).