Conceptualising Harm in the Case of the ‘Unwanted’ Child

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I. Introduction

‘Harm’ is an ambiguous concept. Most types of human conduct are capable of affecting the interests of others either positively or negatively to some degree, although a customary understanding of harm is best characterised as the ‘setting back, or defeating of an interest.’ But whether actions for wrongful life, wrongful birth and wrongful conception can or ought to be formulated in such terms presents the courts with issues of legal and ethical complexity.

At the heart of the dilemma lies a tension between two constructions of ‘harm’. Is the experience of unsolicited parenthood or childhood disability ‘part of the normal vicissitudes of life’ for which one must bear the full consequences, or a harmful event that should be the subject matter of litigation capable of compensatory relief? A passing reference to the growth of family planning and rapid developments in diagnostic and genetic testing might be thought capable of providing a decisive answer as to whether these experiences are normal and inevitable. But the question: ‘can new life amount to damage?’ is not decided within a legal vacuum. Policy factors such as the morality of abortion, the value of life, the promotion of family stability, scarce healthcare resources and the consequences of attributing liability to the medical profession have deeply affected the nature and existence of case law. The primacy given to such policy factors inevitably affects the availability and scope of these unique actions.

An exploration of wrongful life, birth and conception reveals that quite different tensions arise in relation to these actions according to country-specific factors. The type of legal system, constitutional arrangements, extent and order of religious belief and the degree of technological advance, all constitute variables that may serve to underpin key differences in the treatment of comparable legal claims encountered in multiple-jurisdictions.
In presenting a synopsis of the current position in relation to these birth-related claims in France, Germany and the United Kingdom (UK) this paper will center its discussion on the specific tensions that have arisen within each jurisdiction. Although myriad issues fall outside the scope of this article, the specific point of analysis is located in identifying a ‘common conception of harm’ in relation to these actions. Whether ‘new life’ is considered injurious in the circumstances of a diagnostic error or the provision of faulty information is evidently a crucial issue for determination, but of equal importance is how that harm is characterised. In the absence of a uniform approach, this will provide the essential framework for analysing the differential treatment of ‘harm’.

2. Wrongful Life

“Whether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly left to the philosophers and theologians.”

By contrast to the relatively straightforward situation where prenatal harms directly injure a fetus, in the wrongful life suit the defendant is not accused of actually causing the disabled condition. Rather, he/she wrongfully allows a child to be born or conceived where there is a ‘certainty or unreasonable risk’ it will be impaired. Factual situations arising in such claims include clinicians negligently failing to advise parents prior to conception of risks that a child might inherit a genetic disability, during infertility treatment, the selection of a damaged embryo for implantation or during pregnancy counselling where a doctor fails to identify an impaired fetus. A particular feature of the wrongful life action is that the plaintiff is the child (or the child’s representative), who typically alleges that ‘but for’ the clinician’s negligent failure to inform his/her parents of the child’s condition, the parents would have terminated the pregnancy.

The interest that the plaintiff asserts in such an action has proved extremely controversial, notably an interest in not being born impaired. The courts have tended to interpret the plaintiff’s claim as one that suggests that no life is preferable to life with impairment. As an understatement, courts tend to be resistant to such claims. Three particular objections are commonly raised in rejecting the child’s claim. First, it is contrary to public policy for a doctor to owe a duty to the foetus to compel its destruction. Secondly, the child has not suffered any damage in law through being born. Thirdly, assessing damages is impossible, given that it requires the court to undertake