Products Liability and the Fertility Industry: Overcoming Some Problems in “Wrongful Life”

Francis Sohn†

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Introduction

The first pregnancy created from frozen human sperm occurred in 1953,1 and the first commercial sperm bank in the United States opened in Minnesota in 1970.2 Later that decade, the first pregnancy produced in

† Candidate for J.D., Cornell Law School, 2011; B.A., The University of Chicago, 2008. I would like to thank Professor James A. Henderson, Jr., for introducing me to the law of torts and helping me learn to love it. I would also like to thank my editors Barbara Bispham and John Errico, as well as James Nault and Leah Patrick and the rest of the ILJ for their hard work. Final and most important thanks go to my family and friends, who encouraged me to seek publication.

1. Mark S. Frankel, Cryobanking of Human Sperm, 1 J. MED. ETHICS 36, 36 (1975).

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vitro that resulted in a healthy birth occurred in England. These were the seeds of the modern fertility industry. Today, that industry is “highly commercialized,” and operating on a “free market basis,” so much so that sperm is even being sold over the Internet. There is some regulation of the fertility industry, but fertility clinics tend to be for-profit entities, despite the fact that they are often attached to non-profit hospitals. Indeed, one commentator has stated that the wider fertility industry is “undeniably a business,” and, troublingly, “one of the very few industries [in the United States] to operate with virtually no rules.”

The general legal policy in the United States is to protect the identity of the anonymous sperm donor. In England, however, the Human Fertility and Embryology Authority eliminated donor anonymity in 2005, allowing a child conceived through sperm from an anonymous donor to find out the donor’s identity. As a result, England has seen a decrease in sperm donors at home and an increase in “fertility tourists” who go abroad for donor treatment, while the United States has seen its sperm export market grow. As donor anonymity shrinks across the European Union, and other restrictions are not loosened, England and the international community may become increasingly dependent on U.S. commercial sperm exports.

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5. Id. at 78.
10. Id. at xvii.
11. KINDREGAN & MCBRIEN, supra note 4, at 45.
As for-profit commercial entities operating with large profit margins, one might reasonably expect fertility clinics and other industry players to be held responsible under the normal standards of products liability law for the harm caused by defective sperm that they sell. It was not until early 2009, however, that Donovan v. Idant Laboratories, the first case bearing directly on the issue, was decided. In Donovan, the mother of a child born with a genetic defect inherited from allegedly improperly screened donor sperm brought suit against the commercial entity that supplied the sperm. Though the court dismissed the mother's claims as time-barred, it allowed the daughter's claim to proceed under a theory of products liability. After a rehearing, however, the court dismissed the daughter's claim as well, stating that “the injuries alleged in plaintiff's strict liability and warranty claims [were] essentially claims for wrongful life.”

Today, the tort of wrongful life—the action of a child to recover for genetic defects resulting from negligent genetic counseling—is only recognized in a small number of American jurisdictions, and England is generally thought to have abrogated it by statute. A representative court

18. See The Baby Business, supra note 9, at 38 (noting that one sperm bank operates with an eighty-percent profit margin).
19. Id. at 39 (noting that sperm is sold at a 2,000-percent markup from obtainment costs).
20. The Restatement (Third) of Torts: Products Liability, however, contains a blanket exemption for human blood and tissue. Restatement (Third) of Torts: Products Liability § 19(c) (1998). Judge O'Neil states that semen “is considered a human tissue,” and is therefore within any such laws exempting human tissue. Donovan v. Idant Labs., 625 F. Supp. 2d 256, 271 (E.D. Pa. 2009). Many courts have found that embryos and zygotes are at least human tissue, if not something more. See, e.g., Davis v. Davis, 842 S.W.2d 588, 596–597 (Tenn. 1992). The author’s research, however, has revealed no other cases holding that semen or sperm qualifies as human tissue. Furthermore, several commentators state that the policy behind the passage of “blood shield” laws, which enact the Restatement's human blood and tissue exclusion, would not likely be applied to sperm. See, e.g., Megan D. McIntyre, The Potential for Products Liability Actions When Artificial Insemination by an Anonymous Donor Produces Children with Genetic Defects, 98 Dick. L. Rev. 519, 530 (1994).
22. Id. at 271.
23. Id. at 273. The legal commentariat was not silent after the initial decision in Donovan. One commentator spoke of the “floodgates” being opened to litigation. Norra MacReady, Sperm is Subject to Product Liability Laws in the US, 10 Lancet Oncology 451, 451 (2009). Several others took note of the first-impression nature of the case. See, e.g., Mark Hansen, Bad Seed, 95 A.B.A. J., July 1, 2009, at 13; Rebecca Porter, Sperm can be a Defective Product, Federal Judge Rules, 45 Trial 62, at 62 (2009).
24. Donovan, 625 F. Supp. 2d at 276. The decision was upheld on appeal. See D.D. v. Idant Labs., 374 F. App'x. 319, 324 (3d Cir. 2010).
opinion states the objections to wrongful life as follows:

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 to be left to the philosophers and the theologians. Surely the law can assert no competence to resolve the issue, particularly in view of the very nearly uniform high value which the law and mankind has placed on human life, rather than its absence. Not only is there to be found no predicate at common law or in statutory enactment for judicial recognition of the birth of a defective child as an injury to the child; the implications of any such proposition are staggering. Would claims be honored, assuming the breach of an identifiable duty, for less than a perfect birth? And by what standard or by whom would perfection be defined?  

Recovery for the related parental action of “wrongful birth” is allowed, but is often limited to the “extraordinary” costs of raising the disabled child.  

Both the United States and England, however, have robust products liability regimes. This Note suggests that where the fertility industry and the ill-starred tort of wrongful life collide, the law of products liability can provide a meaningful and judicially acceptable alternative means of recovery for children born disabled as a result of the negligence of a genetic counselor. That is, where a child conceived using commercially-derived defective sperm is born disabled, this Note proposes that the law of products liability can provide an important measure of relief to that child by giving courts that are unwilling to deal with the thorny philosophical and religious questions associated with wrongful life a sound logical basis for granting recovery.  

Part I of this Note introduces the background law of products liability in the United States and England. Part II discusses the background of wrongful life and why courts have largely rejected it; it also discusses wrongful birth and the trend present in its jurisprudence to allow recovery of all costs related to childrearing. It will argue that recovery in wrongful birth is correct, and that the limitations on recovery in wrongful life are incorrect, and that this difference in treatment is an illogical and unjust result. Part III argues that the general principles of products liability law can provide a coherent and acceptable wrongful life action that overcomes such problems, thus presenting a way to bring wrongful life and wrongful birth recoveries into accord; it also assesses the likelihood that such a system will be implemented in both countries.  


28. For the United States, see, e.g., Siemieniec v. Lutheran Gen. Hosp., 512 N.E.2d 691, 706 (Ill. 1987) (noting that some states also allow the parents of the disabled individual similar expenses extending into the adult life of the disabled individual). For England, see Parkinson v. St. James and Seacroft University Hospital NHS Trust, [2002] Q.B. 266, 283 (EWCA (Civ)). America’s wrongful birth jurisprudence, however, is trending towards allowing recovery of all childrearing costs, including those for which parents remain legally liable after the disabled child reaches majority.
29. See infra Part I.
I. Products Liability in the United States and England

This section will introduce the background law of products liability in the United States and England. It will also provide relevant history of the development and commercialization of the fertility industry.

A. Products Liability in the United States

The liability of commercial distributors for defective products originally sounded solely in the law of negligence and contract. At common law, only those parties in privity with a commercial distributor could sue the distributor for harm caused by a defective product; the English courts originally stated this rule in Winterbottom v. Wright in the mid-nineteenth century, and the American courts quickly adopted it. The logic the Winterbottom court offers for this rule is as follows:

[It] is a general rule, that wherever a wrong arises merely out of the breach of a contract . . . , whether the form in which the action is conceived be ex contractu or ex delicto, the party who made the contract alone can sue. If the rule were otherwise, and privity of contract were not requisite, there would be no limit to such actions.

Although the rule in Winterbottom became generally accepted, the American courts began to modify it almost as soon as they adopted it. In 1852, a New York state court permitted a suit without privity because the product in question—a poison mislabeled and sold as a beneficial drug—“put human life in imminent danger.” The end of the privity rule came in 1916 with the famous case of MacPherson v. Buick Motor Co. In that case, Judge Benjamin Cardozo eloquently explained why a lack of privity was no longer a bar to recovery:

If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made . . . [and] there is added knowledge that the thing will be used by persons other than the purchaser . . . without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully . . . . We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law.

Once the privity barrier fell, American courts began to allow the use of res ipsa inferences to establish negligence from the occurrence of an accident if the plaintiff could show that the accident would not normally occur without negligence. This allowance overcame problems of proof in product

32. HENDERSON & TWERSKI, supra note 30, at 7.
34. Thomas v. Winchester, 6 N.Y. 397, 409 (1832).
36. Id. at 1053.
defect cases. The California Supreme Court’s decision in Escola v. Coca Cola Bottling Co. is representative of this development, and scholarship from the mid-twentieth century generally establishes the prevalence of the use of res ipsa inferences in products liability cases sounding in negligence. Escola is also notable for Justice Traynor’s concurring opinion, which presaged the social arguments used in the eventual move to strict liability. Justice Traynor supported the idea of strict or “absolute liability” for a manufacturer when a product that is “placed on the market, [known] to be used without inspection, proves to have a defect that causes injury to human beings.” For Justice Traynor, as society evolved, it was important that “[t]he manufacturer’s obligation to the consumer [should] keep pace” with that evolution.

The penultimate case in the move to strict liability for harm caused by product defects is Henningsen v. Bloomfield Motors, Inc. Arising under a predecessor to the Uniform Commercial Code, the claim in Henningsen was based on the implied warranty of merchantability of an automobile; the jury found after trial that Chrysler, the defendant manufacturer, had violated that warranty. On appeal, Chrysler asserted that it was not liable to Henningsen on the implied warranty of merchantability because, as an incident to the contract, it was only liable to the party with which it had contracted—namely, not Henningsen. The court rejected this argument as based on outmoded concepts inconsistent with modern marketing and sales practices, and held that fault and contractual privity need not be established in order for the plaintiff to recover against the manufacturer on an implied warranty of merchantability. In effect, the court in Henningsen denied Chrysler the right to determine the full scope of its liability for a defective product, and took that determination, at least in part, to be a matter to be decided by positive public law, and not by private contract.

General strict liability for the harm caused by a defective product was finally established by the Supreme Court of California in Greenman v. Yuba Power Products, Inc. In that case, the plaintiff’s wife bought him a woodworking power tool; while he was using it for its intended function, the tool malfunctioned and caused him serious injury. Stating that the traditional rules of privity and warranty, both of which sounded in contract, “were developed to meet the needs of commercial transactions [and thus] cannot properly be invoked to govern the manufacturer’s liability to those injured by [its] defective products” because the reasons for holding the

40. Id. at 443.
42. Id. at 73.
43. Id. at 80.
44. Id. at 84.
46. Id. at 898.
manufacturer liable in the second case were different. Justice Traynor announced as a rule what had been simmering up through MacPherson, Escola, and Henningsen; he wrote that “[a] manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.”

The American Law Institute (ALI) adopted the rule in Greenman when it issued the Restatement (Second) of Torts in 1965. Section 402A of that Restatement creates strict liability for harm caused by a defective product “not dependent upon either contract or negligence” in a party “engaged in the business of selling” a defective product that is “unreasonably dangerous to the user or consumer or to his property.” Under § 402A, this liability exists regardless of the care taken in the preparation and sale of the unreasonably dangerous product.

Courts following § 402A have recognized three broad categories of product defect: manufacturing, design, and warning. Manufacturing defects are those that arise when a specific unit departs from the product’s intended design making that specific unit unreasonably dangerous; strict liability applies to harm caused by these defects. Design defects are present when a product’s design is unreasonably dangerous; strict liability also applies to harm flowing from these defects. Warning defects exist when the warnings accompanying a product are insufficient to prevent reasonably foreseeable harm; unlike liability for manufacturing and design defects, liability for warning defects—also discussed under the “failure to warn” heading—is assessed under a standard substantially identical to traditional negligence. Nonetheless, the ALI reporters made it clear that a product without any physical defects—whether manufacture or design—

47. Id. at 901.
48. Id. at 900.
49. Restatement (Second) of Torts § 402A cmt. b (1965).
50. Restatement (Second) of Torts § 402A 1(a) (1965).
52. Restatement (Second) of Torts § 402A 2(a) (1965).
53. For a recent example of this reasoning, see Swanstrom v. Teledyne Cont’l Motors, Inc., No. 1080269, 2009 Ala. LEXIS 274, at *3 (Ala. Nov. 20, 2009). There has been argument since the founding era of § 402A that design defects were not to be judged under a strict liability standard. Dean Prosser, the ALI reporter for the Restatement (Second), wrote that “[t]here are . . . particular areas in which the liability of the manufacturer, even though it may occasionally be called strict, appears to rest primarily upon a departure from proper standards of care, so that the tort is essentially a matter of negligence . . . . One of these involves the design of the product, which includes plan, structure, choice of materials and specifications.” William L. Prosser, Handbook of the Law of Torts 644–45 (4th ed. 1971). Furthermore, § 398 of the Restatement (Second) gives a negligence/reasonable conduct standard for design defects. Restatement (Second) of Torts § 398 (1965).
54. See Ex parte Chevron Chem. Co., 720 So. 2d 922, 928 (Ala. 1998) (collecting cases). See also Anderson v. Owens-Corning Fiberglass Corp., 810 P.2d 549, 558 (Cal. 1991) (“[T]he strict liability doctrine has incorporated some well-settled rules from the law of negligence . . . . It may also be true that the ‘warning defect’ theory is ‘rooted in negligence’ to a greater extent . . . . The ‘warning defect’ relates to a failure extraneous to the product itself. Thus, while a manufacturing or design defect can be evaluated with-
could still be in a “defective condition” if it were sold without a warning necessary to make it safe for a reasonably foreseeable, particular use.\(^{55}\)

A common and understandable theme in the jurisprudence of courts following § 402A is that the focus of a products liability inquiry should be on the product itself, and not on the conduct of the manufacturer or commercial distributor. As one representative court put it:

Strict products liability for design defect thus differs from a cause of action for a negligently designed product in that the plaintiff is not required to prove that the manufacturer acted unreasonably in designing the product. The focus shifts from the conduct of the manufacturer to whether the product, as designed, was not reasonably safe.\(^{56}\)

This view, however, obscures the important fact that a product is not designed \textit{ex nihilo}. A product is always designed \textit{by someone}, and thus to hold that the focus is not on the conduct of the manufacturer, but on the design of the product, is to make a circular argument. Professor Henderson strongly supports this view and writes that “[i]n the areas involving generic product risks, common law liability of manufacturers has always been, and always will be, based on fault.”\(^{57}\) In the comments to the Restatement (Third) of Torts: Products Liability, Professors Henderson and Twerski write further that:

Assessment of a product design in most instances requires a comparison between an alternative design and the product design that caused the injury, undertaken from the viewpoint of a reasonable person. That approach is also used in administering the traditional reasonableness standard in negligence.\(^{58}\)

The Supreme Court of Iowa gives a judicial pronouncement in favor of this view as well, stating that courts purporting to use strict liability “slip back into the type of analyses virtually identical to those employed in negligence cases . . . Inevitably the conduct of the defendant in a [design defect] case becomes the issue.”\(^{59}\)

The Restatement (Third) of Torts: Products Liability embodies this approach to strict liability.\(^{60}\) Section 2 of that Restatement retains the same three categories of product defect as developed in the caselaw following the Restatement (Second); however, where it retains true strict liability for harm arising from manufacturing defects, it retains the core reasonable-out reference to the conduct of the manufacturer . . . the giving of a warning cannot.”\(^{(}\text{em}}phasis in original).\(^{(}\)

\(^{55}\) \textit{RESTATEMENT (SECOND) OF TORTS }§ 402A cmt. h (1965).


\(^{59}\) Olson v. Prosoco, Inc., 522 N.W.2d 284, 289 (Iowa 1994).

\(^{60}\) The Restatement (Third) does allow for liability for harm caused by generic products defects without a reasonableness analysis when product failure occurs in such a way that would not occur without defect, and when the failure was not solely caused by other factors. \textit{RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY }§ 3 (1998). This picks up on the traditional doctrine of \textit{res ipsa loquitur}. \textit{See id. cmt. a} (1998).
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ness standard of negligence for liability for harm arising from design and warning defects, without applying the negligence label to it.\footnote{61} In this respect, the Restatement (Third) reflects the reality that while “[e]very American jurisdiction purports to hold manufacturers strictly liable for harm caused by their defective products,”\footnote{62} a clear majority of jurisdictions actually employs the risk-utility/reasonableness standard contained in the Restatement (Third) for generic product risks, \footnote{63} with the only true strict liability for the harm caused by defective products arising from a manufacturing defect.\footnote{64}

B. Products Liability in England

Whereas liability for harm caused by defective products in the United States is generally handled solely within tort, a person injured by a defective product might bring a claim in England in tort, in contract, or under independent statutory grounds.\footnote{65}

A products liability claim brought as a tort would sound in negligence. The classic statement of products liability in negligence comes from the case of \emph{Donoghue v. Stevenson}: 

\begin{quote}
 \footnotesize
 [A] manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer’s life or property, owes a duty to the consumer to take that reasonable care.\footnote{66}
\end{quote}

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  \item \footnote{61} \emph{RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY} § 2(b)–(c) (1998).
  \item \footnote{62} Henderson, \textit{supra} note 57, at 384.
  \item \footnote{64} The Restatement (Third) is, of course, not without its critics. Amongst other things, debate rages around what the original intent of § 402A of the Restatement (Second) was, and whether the Restatement (Third) has betrayed that intent. At least one commentator finds that it has not. See Michael D. Green, \textit{The Unappreciated Congruity of the Second and Third Torts Restatements on Design Defects}, 74 BROOK. L. REV. 807, 838 (2009). Further discussions of the often highly charged debate between the opponents and supporters of the Restatement (Third) are beyond the concerns of this Note. Professor Henderson succinctly explains why the principle of negligence continues to dominate tort jurisprudence, including products liability. First, judges have a strong ethical intuition to tie liability to wrongful conduct, something that true strict liability does not do. Henderson, \textit{supra} note 57, at 388–89. Second, true or “broad-based” strict liability would generate disputes over broad social policy that are essentially “unadjudicable” and better suited to legislative than judicial determination. \textit{Id.} at 393–97. Finally, the risks that product manufacturers would be forced to bear would be uninsurable due to problems of adverse selection and moral hazard, which would in turn destroy the financial integrity of an insurance scheme needed to sustain a broad-based strict liability system. \textit{Id.} at 397–400.
  \item \footnote{65} Interestingly, some English commentators believe that “[t]he term ‘products liability’ is an American invention” and that “[i]t does not describe a distinct category of law in the United Kingdom.” Harvey Teff, \textit{Products Liability}, in \textit{PRINCIPLES OF MEDICAL LAW} 747, 747 n.1 (Ian Kennedy & Andrew Grubb eds., 1998).
  \item \footnote{66} [1932] A.C. 562 (H.L.) 569 (appeal taken from Scot.) (U.K.).
\end{itemize}
Products liability claims sounding in negligence claims are thus treated largely the same as any other tort sounding in negligence, and there is no independent need to qualify the source of the harm as a product. The inference of res ipsa loquitur is explicitly recognized for manufacturing defects, and there is no reason to believe it would not apply to design defects as well. Liability may also attach if warnings are not intelligible or commensurate with the risks posed by a product, although the learned intermediary rule applies. As in the United States, liability in tort attaches to all members of the commercial chain of distribution, and not only to the manufacturer.

Unlike in the United States, the law of contract remains an independent ground for a products liability claim. Contracts for the sale of a product may give rise to liability under the implied terms imputed to such contracts through the Sale of Goods Act of 1979, and products delivered through a contract for services may similarly give rise to liability under the Supply of Goods and Services Act of 1982. Under these Acts, it is an implied term in the contract that a product is of satisfactory quality and fit for its particular purpose, and when it is not, the seller will face strict liability for harm stemming from the breach of the implied contractual terms. However, unlike American courts, English courts follow the contractual doctrine of privity in products liability cases. Coupled with the reluctance of English courts to find independent collateral contracts between manufacturers and end users, this means that contractually-based products liability claims are of limited utility to such users harmed by defective products.

The 1985 EC Directive on products liability was intended to harmonize the law of products liability across the member states of the European Union, and to introduce “liability without fault”—that is, strict liability. The Directive required member states to pass legislation implementing it within three years, and England did so with the Consumer Protection Act of 1987. Nonetheless, the common law of products liability sounding in

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67. Teff, supra note 65, at 759 (collecting cases).
68. Id. at 760–61.
69. Id. at 761–62.
70. Id. at 763.
71. Id. at 766.
72. Id. at 758.
73. Id. at 752–53.
74. Id. at 752.
75. Id. at 751–52.
76. Teff, supra note 65, at 754.
78. Id.
negligence remains viable.\textsuperscript{80} The European Court of Justice is satisfied that the Act complied with the Directive;\textsuperscript{81} as such, the relevant body of law to look to is English, not European. The most in-depth interpretation of the Act to date is the opinion of Judge Burton in A v. National Blood Authority.\textsuperscript{82} Drawing from a variety of comparative law sources in an opinion spanning over 100 pages, Judge Burton held that a consumer expectations standard was the proper test for defectiveness, writing that:

Whether it is appropriate to define the one infected bag of blood in 100 as a manufacturing defect, or as an inevitable result of a chosen design process which cannot guarantee uniformity of product, the issue is still the same, namely whether the safety was provided which the public was entitled to expect in respect of that product.\textsuperscript{83}

Instead of using the American manufacturing defect and design defect labels, Burton introduced his own terms of “standard products” and “non-standard products.”\textsuperscript{84} Whereas standard products were to be judged against other standard products on the market when conducting a consumer-expectations defectiveness analysis, non-standard products would be judged against the standard product from which they deviate.\textsuperscript{85} Thus, Burton held that an infected bag of blood was a non-standard product,\textsuperscript{86} whereas a non-infected bag of blood would be a standard product. For Burton, then, it does not matter if a non-standard product is defective in design or manufacture, but rather that some harm stems from its dangerous quality.\textsuperscript{87}

As one commentator put it, the consumer expectation standard taken up by Burton could be construed to mean that “[t]he fact a product does not provide the standard of safety legitimately expected should not merely be evidence of possible defectiveness, but should be considered as being a defect in its own right.”\textsuperscript{88} Finding that this definition was “very philosophical,”\textsuperscript{89} Burton required some harmful characteristic, even in the non-standard product, before liability would attach.

To the American observer, it is difficult to understand what the import of Burton’s opinion in A v. National Blood Authority actually is. Though Burton believed that his standard would result in strict liability in all prod-

\begin{thebibliography}{99}
\bibitem{id} \textit{Id.} \S 39.
\bibitem{id} \textit{Id.} \S 36.
\bibitem{id} \textit{Id.} \S 41.
\bibitem{id} \textit{Id.} \S 65.
\bibitem{id} \textit{Id.} \S 66.
\end{thebibliography}
ucts liability cases, it appears that the standard/non-standard distinction merely replaces the manufacturing/design distinction, while possibly expanding the meaning of manufacturing defect. Indeed, two leading English commentators state that the “distinction between standard and non-standard products raises many of the same issues” as the distinction between design defects and manufacturing defects.\textsuperscript{90} Whatever the correct understanding of Burton’s opinion may be, it was not influential in three recent English decisions, all of which continued to apply a negligence-style standard to design defects.\textsuperscript{91} Professor Howells seems to acknowledge that a reasonableness standard akin to negligence will continue to reign for design defects,\textsuperscript{92} and Professor Stapleton bluntly states that the Directive, and hence the Act, did not create a true strict liability system for design defects.\textsuperscript{93} Professor Teff’s prediction that questions of design and warning defect “will continue to revolve around issues of relative safety, reasonable care, and foreseeability, thereby perpetuating the kind of balancing act characteristic of negligence and of American ‘strict’ product liability regimes alike,” has come to pass.\textsuperscript{94}

II. What Are the Torts of Wrongful Life and Wrongful Birth?

“Living in misery sucks marginally less than dying in it.” - Dr. House.\textsuperscript{95}

“Anyone who is among the living has hope– even a live dog is better off than a dead lion!”\textsuperscript{96}

With its depiction in an eponymous episode of the popular TV series “Law and Order: Criminal Intent,” the tort of wrongful life has undeniably arrived in the public consciousness.\textsuperscript{97} However, while the tort has found acceptance in a small number of states, it is generally disallowed in both the United States and England.\textsuperscript{98} Indeed, nine states have affirmatively barred wrongful life claims by statute.\textsuperscript{99} This section will explore the definitions of wrongful life and wrongful birth that American courts have developed and highlight relevant differences in the English tort system, with references to relevant legal commentary. This section will end by arguing that the treatment by both the courts and commentators of the torts is logically and morally inconsistent.

\textsuperscript{90} Fairgrieve & Howells, supra note 80, at 967.
\textsuperscript{91} Id. at 968.
\textsuperscript{92} Howells, supra note 88, at 151.
\textsuperscript{94} Teff, supra note 65, at 779–80.
\textsuperscript{95} \textit{House, M.D.: House Divided} (FOX television broadcast Apr. 29, 2009).
\textsuperscript{96} Ecclesiastes 9:4.
\textsuperscript{97} \textit{Law & Order: Criminal Intent: Wrongful Life} (NBC television broadcast Mar. 26, 2006).
\textsuperscript{98} See supra notes 25–28.
A. What is Wrongful Life, and What Are its Problems?

Wrongful life does not have a single definition throughout the United States. Indeed, one commentator notes that terminological confusion was the source of much of the consternation with the tort in its formative years.\(^{100}\) Generally, however, it can be defined as an action instituted by parents on behalf of a child born with congenital defects that went undetected due to the negligence of another.\(^{101}\) Claims typically arise today for defects that could have been detected by genetic screening procedures while the fetus was still **in utero**,\(^{102}\) but negligent (or non-existent) preconception genetic testing may also serve as the factual predicate.\(^{103}\)

The harm alleged in wrongful life actions is that the child’s birth forced it to endure “the lifetime of suffering inflicted on [it by its] condition.”\(^{104}\) This harm is alleged to be caused—both proximately and in fact—by the incomplete or inadequate information provided to the parents due to the flawed genetic screening, which in turn makes it impossible for the parents to make an informed decision on whether or not to continue the pregnancy.\(^{105}\)

It is important to note that wrongful life does not encompass so-called prenatal torts, which involve claims for direct physical harm to a fetus **in utero** by the act or omission of another.\(^{106}\) At common law, the early rule was that “the unborn child was part of the mother at the time of the injury” and thus, any injury to the fetus would be compensable only in a suit by the mother.\(^{107}\) A legal trend began in the 1960s to recognize these torts,\(^{108}\) and by the early 1970s, every jurisdiction that addressed the issue of injury to a viable fetus **in utero** had allowed the action.\(^{109}\) William Prosser, a leading torts treatise writer, states that the early common law rule suffered a “spectacular[ly] abrupt reversal” unprecedented in the “whole history of the law of torts.”\(^{110}\) Another commentator flatly states that American courts “universally hold that no one is to be denied compensation for injury merely because the harm was inflicted before that person’s birth.”\(^{111}\)

The concept of independent prenatal torts, however, makes it clear that a duty not to injure the fetus exists in both the mother and the

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103. Rogers, supra note 100, at 716.
104. Id.
105. Id. at 719.
106. See Willis, 607 S.E.2d at 67.
109. Rogers, supra note 100, at 731.
child.\textsuperscript{112} It follows logically, then, that in wrongful life cases, the duty to inform the mother of potential genetic or congenital defects lies with both affected parties—the mother, who must make decisions about continuing with her pregnancy based on the information, and the fetus, who must be represented through the agency of its parents.\textsuperscript{113} This argument of pass-through liability to the fetus in wrongful life cases is made by both American\textsuperscript{114} and British commentators.\textsuperscript{115}

Some wrongful life cases hold that even if someone breaches a duty of care by failing to operate according to professional medical standards, said failing is neither the cause-in-fact nor proximate cause of the genetic defect in the child, as the child would have had the genetic defect regardless of the actions of the genetic counselor.\textsuperscript{116} As it was described above, however, wrongful life, as courts understand it today, does not allege that the breach of the duty of care causes the genetic defect.\textsuperscript{117} Instead, the “gravamen of [wrongful life] is that the physician’s negligence precluded any parental decision to abort the fetus.”\textsuperscript{118} The duty in wrongful life is an informational one;\textsuperscript{119} the physician must provide accurate genetic counseling in keeping with professional standards of care,\textsuperscript{120} or face liability for the consequences proximately caused by such failure.

Although some courts will no doubt continue to hold to the flawed causation analysis described above,\textsuperscript{121} it is readily apparent that even American jurisdictions that do not recognize wrongful life agree that it does not pose theoretical problems on proximate cause or duty grounds.\textsuperscript{122} Courts typically analogize wrongful life claims to standard

\begin{itemize}
\item \textsuperscript{112} Thomas Keasler Foutz, Note, “Wrongful Life”: The Right Not to be Born, 54 Tul. L. Rev. 480, 490-91 (1979).
\item \textsuperscript{114} Id.
\item \textsuperscript{115} IAN KENNEDY & ANDREW GRUBB, MEDICAL LAW: TEXT WITH MATERIALS 936 (2d ed. 1994).
\item \textsuperscript{116} See, e.g., Gleitman v. Cosgrove, 227 A.2d 689, 692 (N.J. 1967) (stating that “the defendants could [not] have done [anything that] would have decreased the likelihood that the infant would be born with defects. The conduct of defendants was not the cause of infant plaintiff’s condition.”) (emphasis added).
\item \textsuperscript{117} See supra note 105 and accompanying text.
\item \textsuperscript{118} Phillips v. United States, 508 F. Supp. 537, 542 (D.S.C. 1980).
\item \textsuperscript{119} Jackson, supra note 113, at 554.
\item \textsuperscript{120} Inasmuch as it is an informational tort, wrongful life is perhaps better characterized as a form of negligent misrepresentation. The Restatement (Second) of Torts § 552 explicitly recognizes a cause of action in this vein for negligently supplying false information in a professional transaction when the person who reasonably relies on said information suffers pecuniary loss. While § 552(2)(b) implies that this cause of action extends only so far as the provider of the information intends it to influence the other party in the transaction, such an intention in the case of genetic counseling is beyond dispute.
\item \textsuperscript{121} For example, Missouri, which has abrogated wrongful life by statute, still holds that there are insurmountable problems of proximate cause in such cases. See Wilson v. Kuenzi, 751 S.W.2d 741, 745 (Mo. 1988).
\item \textsuperscript{122} See, e.g., Becker v. Schwartz, 386 N.E.2d 807, 811-12 (N.Y. 1978).
\end{itemize}
malpractice claims;\textsuperscript{123} as such, wrongful life should present no unique problems of duty or breach. It should be even less difficult for courts to find that a duty has been breached if they consider wrongful life as existing under the aegis of the broader tort of negligent misrepresentation.\textsuperscript{124}

Beyond the negative arguments that causation is not a problem—that is, because courts have generally not found it to be a problem—there is at least one positive reason why courts should find causation in wrongful life cases, where the duty described above is breached. This is based on the analogy of wrongful life cases to certain wrongful death survival actions. The argument is based on the facts of \textit{Williams v. Bay Hospital, Inc}.\textsuperscript{125} In \textit{Williams}, the decedent died of lung cancer that went undetected due to the negligence of a physician in reading an x-ray.\textsuperscript{126} It was stipulated that the cancer was not caused by this negligence and would not have been curable if timely detected. Nevertheless, the physician was held responsible for the additional pain and suffering that the decedent had to bear in the interstitial period between negligent non-diagnosis and death.\textsuperscript{127} The commentator with whom this analogy originates forcefully argues that:

No logical distinction exists between the survival actions discussed above and cases for wrongful life. The physician’s negligence did not cause the disease in either case, nor would competent medical treatment have been able to avert the illness. Rather, the negligent act caused the suffering in wrongful life cases, and increased the suffering in survival actions.\textsuperscript{128}

As such, in order to state a claim for wrongful life, the plaintiff should simply need to allege that the parents would have terminated the pregnancy had they been properly informed of the risk of birth defects. The measure of damages, like that in \textit{Williams}, should accordingly be made against the increased pain and suffering the child suffered that it otherwise would not have, had it been born without defect, with a possible limitation of recovery to those defects that cause more than \textit{de minimis} suffering.

As presented above, one would rightfully believe the clear way for wrongful life claims to reach a jury on the questions of harm and damages would be according to the well-worn torts analytical paradigm of duty-breach-causation-harm.\textsuperscript{129} By force of logic, such an assumption would be quite correct. The courts, however, have struggled with the issues of harm and damages, and this Note will now present those struggles.

\begin{footnotes}
\item[123.] For example, California, which explicitly acknowledges wrongful life, considers wrongful life actions under the broader umbrella of medical malpractice. See Bonta v. Friedman, 111 Cal. Rptr. 2d 194, 196 (Cal. Ct. App. 2001).
\item[124.] See supra note 120 (discussing the argument that wrongful life can be classified under negligent misrepresentation as defined in the Restatement (Second) of Torts).
\item[125.] 471 So. 2d 626 (Fla. 1985).
\item[126.] \textit{Id.} at 628 (reversal of summary judgment for the defense).
\item[127.] \textit{Id.} at 630.
\item[128.] Jackson, supra note 113, at 562.
\item[129.] Willis v. Wu, 607 S.E.2d 63, 69-70 (S.C. 2004). Note that the duty, implicit in the text above, is to perform genetic screening and provide counseling based thereupon in a manner consistent with professional standards of care.
\end{footnotes}
On the issue of harm, it is a common refrain of courts in American jurisdictions that do not recognize wrongful life that there is no legally cognizable harm.\textsuperscript{130} This is based on the idea that courts cannot say that being born, even if with severe defects, is better than not being born at all.\textsuperscript{131} The core of this objection is that the courts are institutionally disadvantaged in the philosophical endeavor of weighing life against non-life. First, taken at face value, this objection is meritless, as it is clear that the courts deal with life and non-life issues on a regular basis. The existence of the death penalty comes to mind with courts deciding regularly whether or not to grant stays and appeals of sentences; the direct outcome of such decisions being the life or non-life of the appellant. Second, when the courts deal with abortion statutes, they make decisions that affect not only the life of the fetus directly, but also the life of the mother indirectly. Third, while federal court decisions do not support a right to die or to physician-assisted suicide,\textsuperscript{132} they do support the common law right of adults of sound mind to refuse life-saving medical treatment.\textsuperscript{133} Fourth, the courts clearly deal with the value or cost of life balanced against non-life in the wrongful birth situation. Above all, the objection cannot be that the courts are institutionally unable to decide questions with deep philosophical questions—if that were the case, judicial review for constitutionality would grind to a near-halt. In sum, though “it is the part of wisdom not to attempt, by any general statement, to cover every possible phase of [a given] subject,”\textsuperscript{134} the courts of this country do not seem to be deterred from attacking difficult questions solely by dint of the need to, in some form, balance life and non-life.

The issue of damages is more complex. The basic remedy in a torts action sounding in negligence is a compensatory one—the injured plaintiff is to be put in the same position as the plaintiff would have occupied but for the defendant’s negligence.\textsuperscript{135} In the wrongful life context, American courts typically understand this as requiring them to weigh the value of an impaired life against non-life.\textsuperscript{136} American courts have generally declined to acknowledge that a common law action for wrongful life can lie based on the protest that this balancing is too difficult, and that the power to perform it should not be exercised absent a positive grant by the relevant legislative power.\textsuperscript{137}

The merits of this argument will be discussed anon; a problem with its general logic must first be discussed. The logic of the court in Becker v. Schwartz is representative of this flaw and can be summarized as follows:

\textsuperscript{131} Becker, 386 N.E.2d at 812.
\textsuperscript{135} Becker, 386 N.E.2d at 812.
\textsuperscript{136} Id. See also Dumer v. St. Michael’s Hosp., 233 N.W.2d 372, 375-76 (1975).
\textsuperscript{137} Becker, 386 N.E.2d at 812.
we recognize that a duty to provide genetic counseling consistent with a professional standard of care may be owed to a fetus \textit{in utero}; we recognize, too, that that duty has been breached in wrongful life cases; however, because it is difficult to assess damages stemming from a challenging question of harm, we will state that plaintiff claims in wrongful life cases “should be dismissed for failure to state legally cognizable causes of action.”\textsuperscript{138} The Supreme Court of Ohio makes this objection even more bluntly, stating that “because wrongful life claims force courts to weigh the value of being versus nonbeing, courts have been reluctant to recognize this cause of action.”\textsuperscript{139}

As one commentator puts it, a denial of a cause of action on such grounds demonstrably “puts the cart before the horse and allows the difficulties of assessment to determine the existence of a right of action.”\textsuperscript{140} Such a denial violates the basic principle of torts in that determining whether a cause of action sounding in negligence will lie rests only on the finding that harm is proximately caused by a breach of duty; properly understood, difficulty in assessing damages should not enter into the logic of the court at the pleading stage.\textsuperscript{141} Therefore, it is clear that the difficulty-in-damage-assessment is a red herring, to which the courts have unfortunately fallen prey.

Assuming away the obvious procedural difficulty above, and operating on the assumption that difficulty in establishing damages can be a dispositive factor in deciding whether or not a plaintiff has stated a valid tort claim, it is not at all clear wrongful life claims should be denied on such grounds. It is clear that juries make factual determinations of harm and put damages in dollars to those harms in almost every tort case involving the defense of comparative fault. For example, how would a jury determine comparative fault in a head-on collision case, where Driver A is intoxicated to a level approaching alcohol poisoning, and Driver B is simultaneously texting and using a speaker phone, to his own great distraction? Are both drivers equally at fault? Is Driver A 45% at fault, and Driver B 55%? Or is the proper ratio 40% to 60%, or 10% to 90%, or something different yet? In this situation, it would almost certainly be an abuse of discretion for the judge to take the case from the jury based on her doubt in the ability of the jury to make a difficult partition of fault and damages.

While this hypothetical does not directly mirror the problem asserted in wrongful life situations, it indicates that difficulties of measuring damages are in other cases not considered valid grounds to refuse to recognize a cause of action as a matter of law. The logic in denying wrongful life claims on difficulty of assessment grounds, then, simply does not hold up under closer scrutiny. Indeed, assigning dollar amounts to damages lies at the core of the jury function in the tort system, and to say that wrongful life

\textsuperscript{138.} Id.
\textsuperscript{139.} Hester v. Dwivedi, 733 N.E.2d 1161, 1164 (Ohio 2000).
\textsuperscript{141.} 22 Am. Jur. 2d Damages § 627 (2010).
should be barred as a matter of law on the grounds that it is too difficult to put a value on the harm it alleges belies the reality that juries deal with difficult questions and difficult damage calculations on a regular basis. The protest that wrongful life is somehow uniquely or especially “too hard” for courts to deal with thus appears to be nothing more than a measure of stubborn unwillingness to deal with wrongful life, to the detriment of those who would be done justice should wrongful life be recognized.

B. Conclusion of this Sub-Section

This section demonstrates that wrongful life damages can be established by standard negligence principles from the basis of legally cognizable harm in the form of the child’s pain and suffering, and that such pain and suffering can properly be said to have been caused by the negligence of a genetic counselor. Viewed in this light, the approach to wrongful life in the American courts, as represented by the Becker and Gleitman decisions, is simply incorrect—the difficult task of measuring damages for the harm of pain and suffering caused by a defendant’s negligence sits squarely within the American tort system.142 The extremely narrow view of the

142. It is, of course, no argument that it is difficult to assign dollar amounts to harm resulting from pain and suffering. The words of the New Jersey Supreme Court are difficult to improve upon and deserve to be quoted at length:

For hundreds of years, the measure of damages for pain and suffering following in the wake of a personal injury has been ‘fair and reasonable compensation.’ This general standard was adopted because of universal acknowledgment that a more specific or definitive one is impossible. There is and there can be no fixed basis, table, standard, or mathematical rule which will serve as an accurate index and guide to the establishment of damage awards for personal injuries. And it is equally plain that there is no measure by which the amount of pain and suffering endured by a particular human can be calculated . . . . The varieties and degrees of pain are almost infinite. Individuals differ greatly in susceptibility to pain and in capacity to withstand it. And the impossibility of recognizing or of isolating fixed levels or plateaus of suffering must be conceded.

It is just as futile to undertake to attach a price tag to each level or plateau which could be said to have a reasonable basis in scientific or economic fact. Any effort to do so must become lost in emotion, fancy and speculation.

As a consequence, the law has declared the standard for measuring damages for personal injuries to be reasonable compensation and has entrusted the administration of this criterion to the impartial conscience and judgment of jurors who may be expected to act reasonably, intelligently and in harmony with the evidence.

Botta v. Brunner, 26 N.J. 82, 92–94 (1958) (internal citations omitted). Furthermore, examples abound where difficulty in measurement do not bar damages as a matter of law. Indeed, one of the primary justifications for punitive damages is that they should be allowed precisely because other damages were difficult to measure on the cutting edge of the law, or disfavored for some other reason. See Mary Jane Morrison, Getting a Rule Right and Writing a Wrong Rule: The IRS Demands a Return on all Punitive Damages, 17 CONN. L. REV 39, 69 (1984) (note 112 and accompanying text). While “punitive damages are generally available for willful or intentional violations of a common law or statutory duty [in order] to punish and deter the wrongdoer rather than to compensate the aggrieved party,” Snapp v. Unlimited Concepts, Inc., 208 F.3d 928, 934 (11th Cir. 2000), the measure that is appropriate to “punish and deter” is certainly not an easily amenable determination, and yet, the determination is made frequently without objection that it is too difficult.
function of damages in tort present in these decisions, namely, to restore the tort victim to her pre-tort condition.\footnote{143} ignores the fact that:

[T]ort law jurisprudence is moving toward a more abstract system of compensation via cost-spreading based on social policy concerns where innocent persons are harmed and need help, and away from denying recovery based on a technical application of elements required to state a cause of action at common law.\footnote{144}

It is apparent, then, that in order to come into line with this trend in tort law jurisprudence and do substantial justice to the victims of wrongful life, American courts must adjust their approach to wrongful life claims. At the very least, one may hope that those jurisdictions recognizing wrongful life claims will move towards a full recovery of child-rearing costs, as appears to be the trend in wrongful birth cases.\footnote{145} One may hope that the source of this trend—shifting social and judicial attitudes on the benefits of parenthood and childrearing once thought near divine—may eventually lead to a broad reformulation of American wrongful life jurisprudence and bring it in line with the general law of negligence. Such a transformation would sit squarely against the weight of precedent in this country, though, making it unlikely to occur in the foreseeable future. A new approach is needed if reform is to be had; Part III of this Note will discuss one such possibility.

C. What is Wrongful Birth, and What Are its Problems?

Whereas wrongful life is the action instituted by a parent on behalf of a child born with congenital defects due to the negligence of another in performing genetic testing and giving appropriate counseling based thereupon,\footnote{146} wrongful birth is the action instituted by parents on their own behalf, based on the same set of facts, for their own costs in raising the disabled child—depending on the jurisdiction, either all costs, or only extraordinary costs\footnote{147}—and the parents’ own emotional distress damages.\footnote{148} Also in contrast to wrongful life, wrongful birth is met with nearly universal acceptance in American courts.\footnote{149} After the Gleitman court initially rejected it, wrongful birth has been accepted by every court that has come upon the issue since.\footnote{150}

Although similar problems of causation and harm arise in the wrong-
ful birth situation, the most difficult problem with wrongful birth is that of determining damages. In cases of wrongful pregnancy—where the negligence of another causes an unintended pregnancy resulting in the birth of a healthy child—the measure of damages is typically restricted to pregnancy-related costs, including relevant pain and suffering. In cases of wrongful birth—where the negligence of another causes the birth of a disabled, unintended child—two choices emerge, as alluded to above. In some wrongful birth cases, only extraordinary child-rearing costs caused by the child’s disability were recoverable. While this “extraordinary costs rule” includes recovery of costs in those situations where the parent remains legally responsible for the care of the child after the child has reached adulthood, it is not without its critics. The Seventh Circuit in Robak v. United States asserts that the majority of cases follow an opposite rule, namely the “fundamental tenet of tort law that a negligent tortfeasor is liable for all damages that are the proximate result of his negligence,” which “must include the costs of raising a normal child.”

Proponents of the extraordinary costs rule offer two justifications. The first is based on the principle of avoidable consequences and the twin familiar cants of the sanctity of life and family. According to the principle of avoidable consequences, parents would either have to abort a child, violating the sanctity of life, or give the child up for adoption, violating the sanctity of family. In jurisdictions following this logic, the extraordinary costs rule is applied to avoid these undesirable results and to avoid giving “windfalls” to the parents while still awarding them something. Second, American proponents of the extraordinary costs rule state that the value of parenthood “make[s] it impossible for [the] court to measure [the] damages in being the mother and father of a defective child.” Or, as another court put it:

Every child’s smile, every bond of love and affection, every reason for parental pride in a child’s achievements, every contribution by the child to the welfare and well-being of the family and parents, is to remain with the mother and father. For the most part, these are intangible benefits, but they are nonetheless real. On the other hand, every financial cost or detriment—including the cost of food, clothing and education, would be shifted to the physician . . . . We hold that such result would be wholly out of proportion to the culpability.

151. The issues of causation and harm are resolved in a similar manner to those of wrongful life and do not require extensive discussion here. For a brief summary of the reasoning doing away with problems of cause and harm, see Dickens, supra note 150, at 84–85.
152. Dickens, supra note 150, at 87.
154. Id. at 350.
156. Id. at 479.
158. Id.
In other words, the immeasurable benefits of parenthood are to be weighed against the distinctly bounded costs thereof, and courts following this logic find that balance to be in favor of the parents of the disabled child only to the extent that extraordinary costs exist. This is supposed to follow from the basic tort principle that the benefits of a tort must be compared to its harms when determining recovery.\textsuperscript{161}

The problems with this approach are readily apparent. To the first argument, the words of the Michigan Court of Appeals are instructive:

The defendant does not have the right to insist that the victim of his negligence have the emotional and mental makeup of a woman who is willing to abort or place a child for adoption. If the negligence of a tortfeasor results in conception of a child by a woman whose emotional and mental makeup is inconsistent with aborting or placing the child for adoption, then, under the principle that the tortfeasor takes the injured party as he finds him, the tortfeasor cannot complain that the damages that will be assessed against him are greater than those that would be determined if he had negligently caused the conception of a child by a woman who was willing to abort or place the child for adoption.\textsuperscript{162}

Instead of being protective of life and family, then, the compromise reached by the extraordinary costs rule operates primarily to shield tortfeasors from the liability for which they should be liable based on the fact that parents choose to respect life and family by continuing the pregnancy and keeping the child. The extraordinary costs rule appears to be little more than a judge’s exercise of the “excessive license to indulge their personal intuitions and idiosyncratic fantasies” granted him by the common law system,\textsuperscript{163} with grossly intolerable results that demean and debase life and family in the name of fairness and limiting liability.

Under closer scrutiny, the bare reference to the benefit principle cannot be grounds for denying recovery of all child-rearing costs in wrongful birth. It has been a settled principle of equity since nearly the founding of the American republic that “[n]o one has the right to compel another to have his property improved in a particular manner; it is as illegal to force him to receive a benefit as to submit to an injury,”\textsuperscript{164}—that is, a tortfeasor may not determine for the tort victim that his negligence conferred a benefit. Equally clear is the rule that “where the benefit is not caused by the wrongful act itself, the defendant cannot claim a reduction of damages on account of it.”\textsuperscript{165}

With these two rules in mind, the benefit principle alone does not indicate that recovery should be restricted to extraordinary child-rearing

\textsuperscript{160} Rieck v. Med. Protective Co., 219 N.W.2d 242, 244–45 (Wis. 1974).
\textsuperscript{161} 22 Am. Jur. 2d Damages § 383 (2010).
\textsuperscript{163} Dickens, supra note 150, at 87.
\textsuperscript{164} Merritt v. Parker, 1 N.J.L. 460, 466 (N.J. 1795).
\textsuperscript{165} Northwest Oil Co. v. Haslett Warehouse Co., 123 P.2d 985, 988 (Or. 1942) (internal quotations omitted).
costs. First, in both England and the United States, it is clear that even a healthy child is no longer considered to be the unmitigated blessing that doctrinaire courts consider it to be.166 An important question arises from this observation: is the disabled child a benefit in a legally cognizable sense? Though the moral answer is clear to most, the legally significant answer is not, and must necessarily differ from case to case. Even if being the parent of a disabled child is considered a legally cognizable benefit, one must further ask what it is that those joys should offset. Do they cancel out the mental worries of child-rearing only, or do they go beyond and cancel out the economic costs of child-rearing as well? Again, the answer is not self-evident from mere reference to the benefit principle, although courts denying recovery of all child-rearing costs have intimated that it is.167

D. Conclusion of this Sub-Section

Although wrongful birth is generally recognized, many courts continue to deny recovery of all child-rearing costs on the basis of public policy. The policy expressed in those decisions, however, is mired in dated social thinking. Nonetheless, the trend appears to be towards allowing recovery of all child-rearing costs, and inasmuch as judicial attitudes continue to evolve in the direction of general societal attitudes qualifying the once near-sacred benefit of parenthood, it can be expected that the current majority opinion allowing recovery of such costs will continue to expand.

E. Similarities and Differences in English Law Wrongful Life

McKay v. Essex Area Health Authority168 is the keystone of English law on wrongful life. The McKay court rejected wrongful life, both at common law and under statute, and "was influenced to a large degree by [its] consideration of American case law."169 It should not be surprising, then, that the English law of wrongful life substantially reflects the results the American bench reached.

166. For an American perspective, see Troppi, 187 N.W.2d at 517 ("To say that for reasons of public policy contraceptive failure can result in no damage as a matter of law ignores the fact that tens of millions of persons use contraceptives daily to avoid the very result which the defendant would have us say is always a benefit, never a detriment. Those tens of millions of persons, by their conduct, express the sense of the community."). For an English perspective, see Thake v. Morris, (1985) 2 W.L.R. 215, 230-32 (Q.B.) (Eng.) ("In approaching this problem I firmly put sentiment on one side. A healthy baby is so lovely a creature that I can well understand the reaction of one who asks: how could its birth possibly give rise to an action for damages? But every baby has a belly to be filled and a body to be clothed. The law relating to damages is concerned with reparation in money terms and this is what is needed for the maintenance of a baby . . . . I do not accept that it is part of our culture that the birth of a healthy child is always a blessing. It may have been the assumption in the past. I feel quite satisfied that it is not the assumption today.").
167. See supra note 160 and accompanying text.
169. Fortin, supra note 140, at 310.
Agreeing with the logic of the Becker court, Lord Justice Griffiths found the harm-damages nexus of issues to be the most troublesome. He wrote that:

The basis of damages for personal injury is the comparison between the state of the plaintiff before he was injured and his condition after he was injured . . . . The court then has to compare the state of the plaintiff with non-existence, of which the court can know nothing; this I regard as an impossible task.170

Accordingly, he stated that any remedy for wrongful life actions “would be better introduced by legislation than by judges striving to solve the insoluble.”171 The rules of law in McKay and Gleitman—which represent the majority position of American jurisdictions on wrongful life—are so close that one commentator calls them “identical.”172

More interesting than the McKay court’s common law reasoning, however, is its statutory argument. All three Lords Justice agreed that the Congenital Disabilities (Civil Liability) Act of 1976 (1976 Act)173 barred wrongful life claims in England. Lord Justice Griffiths states that “claims for wrongful life in all cases subsequent [to the Act] are excluded by the wording [thereof].”174 Lord Justice Ackner states that “there can be no question”175 that the Act bars claims of wrongful life after its passage, and Lord Justice Stephenson agrees with Lord Justice Ackner’s assessment.176 Despite this unanimity, however, it is not clear that the McKay court was correct—or complete—in its treatment of the statute. English commentators note at least four grounds for possible disagreement, and each will be addressed in turn.

The first argument is that because Section 4(5) of the 1976 Act refers to liability to a child “in respect of disabilities,”177 the Act cannot be applied to bar wrongful life cases.178 This is so, argues the commentator who originates this argument, because the duty in wrongful life is properly viewed as one to “advise on the unborn child’s potential quality of life” and not “in respect of disabilities.”179 As another commentator points out, however, such a chary interpretation of the phrase “in respect of” as it occurs in English law is not borne out in the cases, and is unlikely to be adopted in this one.180

171. Id.
175. Id. at 1187.
176. Id. at 1178. Indeed, Stephenson is “happy” to so find. Id. at 1182.
178. Fortin, supra note 140, at 312.
179. Id. This characterization of the duty is consistent with the common law view of wrongful life argued for in this Note.
The second argument is that the McKay decision does not reach Section 1(2)(a) of the 1976 Act. That section creates liability for occurrences that affect the “ability [of a parent] to have a normal, healthy child.” Accordingly, it is argued that a breach of the duty to provide genetic counseling consistent with a professional standard of care that leads to the birth of a disabled child denies parents the opportunity to have a “normal, healthy child,” and thus, under Section 1(1) of the 1976 Act, allows the child to sue.

Inasmuch as the statutory arguments made from the text of the 1976 Act depend on constructions of ambiguous words, it is perhaps unlikely that the English courts will accept them in light of McKay’s unequivocal rejection of wrongful life claims. A third statutory argument, however, seems beyond reproach. It stems from the amendments made to the 1976 Act by the Human Fertilisation and Embryology Act of 1990. This amendment states that:

In any case where a child carried by a woman as the result of [any of several fertility treatments] is born disabled, [and] the disability results from an act or omission in the course of the selection . . . of the embryo carried by her or of the gametes used to bring about the creation of the embryo, and a person is under this section answerable to the child in respect of the act or omission, the child’s disabilities are to be regarded as damage resulting from the wrongful act of that person and actionable accordingly at the suit of the child.

A person is liable to the child under Section 1A as quoted above if the person would have been liable to either or both parents in tort. Given that the English courts recognize tort liability for wrongful birth, the 1990 amendments to the 1976 Act “clearly recognized a wrongful life claim.” Indeed, two leading English commentators state that the 1990 amendments show “that the policy of the law [has] shifted from that stated in McKay.”

Finally, the McKay court was heavily influenced in its analysis of the 1976 Act by the view of the Law Commission expressed in its “Report on Injuries to Unborn Children.” Lord Justice Ackner cites the following passage from that report as definitively rejecting wrongful life:

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182. 1976 Act § 1(1).
183. Kennedy & Grubb, supra note 115, at 977. This argument depends, of course, on the degree to which “opportunity” can be read into “ability.” See id.
185. 1990 Act, § 44 1A(a)-(c) (emphasis added).
186. 1990 Act, § 44 1A(2).
187. See Jackson, supra note 26, at 371.
188. Kennedy & Grubb, supra note 115, at 977
189. Id.
190. The McKay court referred to the Law Commission report ten times in an opinion spanning less than thirty pages, each time with approval.
Such a cause of action, if it existed, would place an almost intolerable burden on medical advisers in their socially and morally exacting role. The danger that doctors would be under subconscious pressures to advise abortions in doubtful cases through fear of an action for damages is, we think, a real one.\footnote{191. McKay v. Essex Area Health Auth., (1982) 1 Q.B. 1166, 1187.}

And, as Lord Justice Griffiths points out, it was the Law Commission that drafted the 1976 Act.\footnote{192. \textit{Id.} at 1192.} If, however, the McKay court had looked at the debates of Parliament surrounding the 1976 Act, their conclusion that it forbade wrongful life claims would almost certainly be different.

The general, century-old\footnote{193. See Pepper v. Hart, (1992) A.C. 593, 609 (H.L.) (appeal taken from Eng.).} interpretive heuristic in English courts is to refuse to look at Parliamentary debates in order to divine the meaning of an Act of Parliament.\footnote{194. See \textit{id.} at 630–32 (collecting cases).} However, in 1992, a decision by the House of Lords modified the rule. Speaking for a four-to-one majority, Lord Justice Browne-Wilkinson stated that “[c]lear and unambiguous statements made by Ministers in Parliament are as much the background to the enactment of legislation as white papers and Parliamentary reports.”\footnote{195. \textit{Id.} at 635.}

The debates in Parliament around the 1976 Act make it clear that while Parliament adopted the language of the Law Commission draft bill, it did not intend that the Act should bar wrongful life claims. While one Member of Parliament stated that with respect to wrongful life, “the Bill is neutral,”\footnote{196. 904 PARL. DEB., H.C. (5th ser.) (1975) 1593.} there are clear indications that the Act was not intended to ban anything, but rather to serve as “a stepping stone along the way to clarifying this dark corner of the law.”\footnote{197. 904 PARL. DEB., H.C. (5th ser.) (1975) 1609.}

Alfred Morris, the Undersecretary of State for Health and Social Security at the time, stated that the Act would “serve the important purpose of ensuring that a disabled child whose disability results from the wrongful act of another will not be impeded in claiming damages by any doubt or obscurity in the law.”\footnote{198. 904 PARL. DEB., H.C. (5th ser.) (1975) 1599.} Peter Archer, then Solicitor General, stated that the Act was “modest [and] of limited application.”\footnote{199. 904 PARL. DEB., H.C. (5th ser.) (1975) 1648.} Another Member of Parliament was careful to note that the Act was not intended to limit tort actions available at common law.\footnote{200. 904 PARL. DEB., H.C. (5th ser.) (1975) 1607.} Leo Abse, another Member of Parliament better known for his legislative work in support of gay rights, clearly believed that the Act would allow for a wrongful life claim, stating that “it could happen that a sperm bank negligently controlled could ultimately lead to a disabled child who would have no remedy against those who, for commercial reasons, were in control of such a sperm bank,” and that the Act would give that child a remedy in the same way that the child would
have a remedy for any other prenatal tort.201

F. Conclusion of this Sub-Section

Following the reasoning of their American counterparts, the English courts hold that there is no common law cause of action for wrongful life. Beyond this, they also state that wrongful life is statutorily prohibited. This sub-section has argued that the 1976 Act properly understood in light of the intent of Parliament did not prohibit wrongful life, and that later amendments to the Act indicate a shift in policy to allow wrongful life by statute. While these arguments have yet to be tested in court, it is not unreasonable to believe that they indicate a sea change in English statutory views on wrongful life, and that wrongful life may indeed now be viable by statute, regardless of its status at English common law.

G. Wrongful Birth

Wrongful birth is recognized in England and its existence as such is non-controversial.202 The standard of recovery appears to be that reasonable child-rearing costs will be awarded.203 As in the United States, however, debate exists over the proper way to balance the joys and stresses of parenting a disabled child. As one leading commentator states, it is simply “not easy to predict how the [English] courts will approach the concept of offsetting the value of the child’s aid, comfort and society against rearing costs.”204

H. Conclusion of this Section

The United States and England, then, though they have important differences, both follow the same general logic in denying wrongful life claims. The United States recognizes wrongful birth and there is a marked trend in the country towards allowing recovery for all related expenses, but it is difficult to determine whether England will follow this trend. While many commentators have argued that allowing parents to recover while denying the affected child the right to recover is illogical and therefore untenable,205 Professor Eduard Picker of the University of Tübingen puts the objection in clear terms that deserve to be quoted at length:

Without exception, all concepts that treat the life of the child as concurrently absolute and sacrosanct, on the one hand, and relative and disposable, on the other, are logically and legally untenable. Such concepts are even more untenable when unequal treatment leads to the monstrous consequence that the absolute value of human existence is claimed only in rela-

201. 904 PARL. DEB., H.C. (5th ser.) (1975) 1615.
202. See Jackson, supra note 26, at 371.
204. Whitfield, supra note 180, at 705.
tion to a directly affected child, while its relativity is asserted in favor of indirectly affected parents. In other words, it is contradictory, to the point of being intolerable, to rate suffering in relation to the agonizing life of another in a different manner from and as superior to the suffering of the affected party him or herself—namely, the owner of the life falls victim to its sacrosanctity, while external third parties become the beneficiaries of its presumed disposability.206

With the jurisprudence of wrongful life and wrongful birth confused to the point of being incorrect and reaching morally intolerable results, the need for rethinking and reform is real. The remainder of this Note will present a novel suggestion for reform based on the law of products liability and assess the likelihood that the United States and England will adopt said reform, both on its own grounds and in light of the more moderate reforms suggested above.

III. Rethinking Wrongful Life: A Products Liability Approach

This Note has argued that the current jurisprudence of wrongful life and wrongful birth is logically incoherent. It has suggested that recovery of all childrearing costs be allowed in wrongful birth, and shown that this is the trend in the United States; such a reform would be compatible with changing social mores in England and would fit within the current standard of reasonable costs as well. This Note has also suggested that there are logical inconsistencies in both the American and English jurisprudence of wrongful life, and that such claims are on all fours with the time-tested principles of the law of negligence; it has also argued that there are strong statutory grounds in England to allow wrongful life claims. In spite of these observations, it is clear in the American context that the jurisprudence of wrongful life is going nowhere fast; the weight of precedent is simply too great, and the emotional and ethical pull of the subject too strong for the American courts to correct themselves and do justice to children born disabled due to the negligence of another. Likewise, it is unlikely that English courts will follow through on the apparent promise of a statutory wrongful life claim, given the weight of precedent in that country against wrongful life and its close similarities with American thought on the subject.

This Note will now present a meaningful alternative that may break the current impasse: a theory of recovery based on products liability. Such an approach would allow a substantial number of wrongful life claims to succeed without having to address the thorny moral questions that arise when addressing such claims under the standard law of negligence. This section will address three primary questions: first, can sperm be classified as a product? Second, in what sense could sperm be labeled defective? Third, how would labeling sperm as a defective product give an alternative justification for harm and damages to the law of negligence? Finally, it will

address the likelihood that a products liability reform to wrongful life will be adopted in the United States and England.

A. Is Sperm a Product?

In the United States, a decedent is said to have “an interest, in the nature of ownership, to the extent that he had decisionmaking authority as to the use of his sperm for reproduction.” 207 It has been argued that instead of this quasi-property status, sperm should be treated as any other property for legal purposes. 208 Another commentator suggests that legislatures should abandon the intent-based standard and create a new property right in sperm to deal with “recent medical advances [and] powerful market forces.” 209 Inasmuch as problems with the intent-based standard are grounded in concerns that sperm will be distributed in a manner inconsistent with the intent of the male source and thus violate his reproductive rights, 210 such problems likely do not exist in the case of donated sperm, where it is clear that the intent of the paid donor is to allow the fertility clinic to sell his sperm.

Blood is clearly considered a product in England. 211 Since the supply of sperm is similarly commercial in nature and as socially accepted as the supply of blood, sperm should be considered a product under English law as well. 212

In the United States, the supply of blood was originally considered a service under Perlmutter v. Beth David Hospital. 213 The Supreme Court of Illinois reached a different conclusion in 1970 after the Restatement (Second) of Torts was released, 214 leading to the enactment of blood shield laws, which remove blood from the realm of products altogether. 215 The policy concerns for removing blood from the realm of products by statute—namely to protect the emergency supply of blood—do not apply to the fertility industry, as fertility treatments are not emergency treatments and the supply of sperm is solely for elective procedures, not life-saving ones. Thus, it is unlikely that even the broadest blood shield laws will protect fertility clinics that supply sperm from a products liability claim. 216

212. Teff, supra note 65, at 757.
215. See McIntyre, supra note 20, at 529.
216. See id. at 530.
B. What is Defective Sperm?

As was discussed above in Part I.A of this Note, sperm can be defective in warning if a fertility clinic fails properly to warn the patient of the dangers associated with the use of donated sperm, including the risk of genetically inherited diseases—the type of harm that would usually be alleged in wrongful life. Inasmuch as sperm can be said to have a design, it would be that it contains no genes that would give rise to a known genetic disease for which DNA testing or other detection is available. In this sense, though a fertility clinic likely would not be liable for genetic diseases present in the genetic material of sperm generally—that is, it would not be liable for design defects in sperm since it is not the designer thereof—it is clearly the commercial supplier of sperm and thus would be liable for genetic defects in sperm above the universal, unavoidable portions of genetic disease. That is, every gene not present in all sperm that leads inexorably to a genetic disease could properly be termed a manufacturing defect.

C. What Difference Does it Make?

When a product is used in the delivery of a service, the person delivering the service is not liable for the harm stemming from a defect in that product. This is because the service provider is typically held not to be in the commercial chain of distribution. For example, in Magrine v. Krasnica, a doctor was held not to be subject to a products liability claim when a needle he was using broke off in a patient’s mouth. A fertility clinic in its role as a medical service provider, then, would only be liable for the harm stemming from its own negligent provision of service. This would amount to a standard wrongful life claim sounding in the common law of negligence, and for all the reasons noted above, such a claim would likely fail.

However, unlike the example of the doctor and the broken needle given above, a fertility clinic is both a service provider and a product supplier. Thus, while it might not be held liable for negligent provision of a medical service due to concerns over wrongful life, it should be held liable for any harm arising from a defect in sperm it supplied in its independent role as product supplier. Furthermore, because true strict liability attaches to the harm stemming from a product with a manufacturing defect, and because sperm bearing genetic sources of congenital defect and disease can be said to have manufacturing defects, claims brought by children born with such defects and diseases would be fully compensated without showing fault on the part of the fertility clinic.

Still, in order to have this kind of recovery, causation must still be shown. Unlike the admittedly difficult logical steps needed to show causation in the negligence-type wrongful life case examined above, causation in

217. 227 A.2d 539, 543 (Hudson County Ct. 1967).
218. It should be noted that in the case of a fertility clinic not supplying its own gametic material, the clinic’s supplier could still be held liable according to the arguments in this section.
a products liability-based wrongful life would be as simple as showing that
the faulty gene was in fact present in the sperm and showing by appropri-
ate science that said faulty gene does in fact give rise to a congenital defect
or disease. It might still be argued that no recovery ought to be awarded
unless and until symptoms stemming from the faulty gene became mani-
fest—that is, unless and until some harm actually occurred.

This “no symptoms, no recovery” logic prevails in federal asbestos
exposure cases, where no damages are recoverable until some physical
manifestation of symptoms is present. When one looks deeper into the
asbestos cases, however, a roadmap of how damages might nonetheless be
awarded in a products liability wrongful life case emerges. The primary
worry in asbestos exposure cases is, of course, lung cancer. However, the
Supreme Court has held that a lesser chronic disease known as asbestosis,
also caused by asbestos exposure, is a sufficient harm to claim mental
upset damages and any asbestosis-related treatment costs. The
Supreme Court of West Virginia has held that significant exposure to a
dangerous substance leading to an increased risk of a disease developing is
sufficient harm to award damages for costs associated with monitoring for
that disease. Indeed, Jane Stapleton, one of the foremost English com-
mentators on torts generally, has written that “the setting in motion of the
bodily processes—the latent condition—which over time was certain (in ret-
rospect) to produce later palpable and then disabling symptoms” would be
sufficient injury to claim full recovery in negligence; that would be true
all the more in strict liability. Thus, inasmuch as the presence of a faulty
gene is harm that would necessitate monitoring for possible development
of disease at a later date, some recovery could be had based on the pres-
ence of the gene alone, with full recovery being awarded if the feared dis-
ease in fact materialized.

Finally, a single products liability approach to harm caused by geneti-
cally defective gametes can bring coherence to wrongful birth and wrongful
life jurisprudence. It would do so by ending the intolerable situation noted
by Professor Picker—that parents can bring a wrongful birth suit and be
awarded all childrearing costs, while disabled children can recover nothing.
It would do so by giving an alternative basis for recovery in both wrongful
birth and wrongful life, one grounded in liability for harm caused by a
defective product used in fertility treatments, namely, donated gametes.

Rather than balancing life and non-life, as in wrongful life, or the joys
of parenthood against its stresses, as in wrongful birth, a products liability
theory of recovery would encourage the fertility industry to invest opti-

(applying federal statutory law).
223. It is an important limitation that the gametic material be donated. Parents
would have difficulty suing under a products liability theory if their own gametes were
used, as they would be the ultimate manufacturer of the gametic material in that
situation.
mally in taking care that the gametic material used in fertility treatments, and thus make such treatments as safe as can be made through the tort system. Whereas courts are loathe to weigh the difficult balances just mentioned—although this Note has argued that they can and do in other circumstances—a products liability reform to this area of law would allow tort courts to assume a role they are used to. That is, it would allow them to focus on the traditional aspect of tort law that is the ex post regulation of social behavior, and allow them to give a substantial measure of justice to an important group, namely to those actually harmed by defective products, while also sending important signals to fertility clinics to encourage them to take appropriate levels of care.  

D. How Likely is Reform?

Although some commentators argue that predicting the evolution of rules of law is akin to gazing into a cloudy crystal ball, 225 I hope that the discussion in this Note so far has cast away some of the legal cumulus and enabled something closer to forecast than prophecy.

Because the American law of products liability, through true strict liability for manufacturing defects, seeks to require product manufacturers and commercial distributors to bear the costs of harm stemming from products, and because a genetically impaired gamete improperly screened can be considered defective in manufacture, it would seem that the case for allowing what would otherwise be called a wrongful life claim is straightforward. The Donovan court declined the opportunity to make this reform in part because it viewed the damages in a products liability action and traditional wrongful life action as serving the same purpose, one of “plac[ing] plaintiff in the position which she would have occupied had the product not been distributed.” 226

While this is certainly one function of tort, such a statement oversimplifies tort by overlooking its ex post regulatory function mentioned above. As Professor Henderson explains, this regulatory function of a strict liability system for harm caused by manufacturing defects is four-fold: it encourages investment in safer products; it discourages consumption of defective products; it reduces transaction costs involved in litigating claims; and finally, it spreads the dislocation costs of large harms across a risk pool. 227

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225. Symposium, Conflict of Laws Roundtable: The Value of Principled Preferences, 49 Tex. L. Rev. 229, 230 (1971) (quoting Oliver Wendell Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 461 (1897)). There have, of course, been more scientific efforts at prediction. See generally Miriam A. Cherry & Robert L. Rogers, Tiresias and the Justices: Using Information Markets to Predict Supreme Court Decision, 100 Nw. U. L. Rev. 1141 (2006). Such discussions are beyond the scope of this Note.
as well, as harm caused by such defects is neither tacitly nor expressly assumed by the product user.\(^\text{228}\) Thus, inasmuch as the claim of a child born disabled alleges strict products liability for a manufacturing defect in the gametic material from which that child was born, there exist at least five functions for tort to serve beyond that of placing the plaintiff in the position she would have occupied but for the tort occurring. If future advocates can bring these functions to the attention of the courts, it is not unreasonable to hope that the products liability reform will be adopted, and that justice will be done to the important subset of victims of traditional wrongful life suits that can establish a products liability claim.

In England, changes to the 1976 Act make it likely that a claim that would traditionally be labeled as wrongful life will succeed on statutory grounds, though this theory has yet to be tested. In addition to this argument, Section 6(3) of the 1987 Act provides that harm caused to a child by a product supplied to her parents is considered harm to her for purposes of her own claim under the 1976 Act.\(^\text{229}\) This provision provides a conceptual link between wrongful life—which the 1976 Act is properly said not to have banned\(^\text{230}\)—and products liability, thus giving English judges solid grounding to use the same reasoning suggested immediately above to American courts and allow wrongful life claims that are substantially based on a products liability theory of recovery to rise and fall on their own merits.

**Conclusion**

The difficulties that exist in the jurisprudence of wrongful life arise from deeply held beliefs in the sanctity of life; the difficulties in wrongful birth stem from a desire to uphold the value of and the importance of parenthood. It is clear that some of these difficulties are the result of an unfortunate nomenclature. As the Supreme Judicial Court of Massachusetts stated, “[t]hese labels are not instructive. Any ‘wrongfulness’ lies not in the life, the birth, the conception, or the pregnancy, but in the negligence of the physician.”\(^\text{231}\)

A products liability approach to wrongful life moves the focus of the courts away from the difficult moral and social questions with which they are typically asked to deal when hearing such claims in their traditional forms. In doing so, whether the gametic material is defective in manufacture or warning, this approach would allow courts to apply familiar tort standards—strict liability and negligence, respectively—and move beyond current stagnant precedent and allow tort to function properly, both in its victim-compensating and deterrent roles. A products liability approach thus ends the hypocrisy of treating a life as “absolute and sacrosanct” and hence non-compensable in an action by the one living it, while treating it as

\(^{228}\) *Id.* at 939.

\(^{229}\) CPA, *supra* note 79, § 6(3).

\(^{230}\) *See supra* notes 197–201 and accompanying text.

\(^{231}\) *Viccaro v. Milunsky*, 551 N.E.2d 8, 9 n.3 (Mass. 1990).
“relative and disposable”\textsuperscript{232} in an action brought by those not living it.

\footnote{232. See Picker, \textit{supra} note 206.}