

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

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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

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

2. Hollace S.W. Swanson, *Donor Anonymity in Artificial Insemination: Is it Still Necessary?*, 27 COLUM. J.L. & SOC. PROBS. 151, 152 (1993).

vitro that resulted in a healthy birth occurred in England.³ These were the seeds of the modern fertility industry. Today, that industry is “highly commercialized,”⁴ and operating on a “free market basis,”⁵ so much so that sperm is even being sold over the Internet.⁶ There is some regulation of the fertility industry,⁷ but fertility clinics tend to be for-profit entities, despite the fact that they are often attached to non-profit hospitals.⁸ Indeed, one commentator has stated that the wider fertility industry is “undeniably a business,”⁹ and, troublingly, “one of the very few industries [in the United States] to operate with virtually no rules.”¹⁰

The general legal policy in the United States is to protect the identity of the anonymous sperm donor.¹¹ 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.¹² 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,¹³ while the United States has seen its sperm export market grow.¹⁴ As donor anonymity shrinks across the European Union,¹⁵ and other restrictions are not loosened,¹⁶ England and the international community may become increasingly dependent on U.S. commercial sperm exports.¹⁷

3. Debora Spar & Anna M. Harrington, *Building a Better Baby Business*, 10 MINN. J. L. SCI. & TECH 41, 41 (2009).

4. CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER’S GUIDE TO EMERGING LAW AND SCIENCE 79 (2006).

5. *Id.* at 78.

6. See Karen Springen & David Noonan, *Sperm Banks Go Online*, NEWSWEEK, Apr. 21, 2003, at 37.

7. The Federal Fertility Clinic Success Rate and Certification Act of 1992 established reporting requirements on a nationwide level. 42 U.S.C. § 263 a-1-a-7 (2000). There is also independent state-level regulation. KINDREGAN & MCBRIEN, *supra* note 4, at 81.

8. Kimberly D. Krawiec, *Altruism and Intermediation in the Market for Babies*, 66 WASH. & LEE L. REV. 203, 213-14 (2009).

9. DEBORA L. SPAR, THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION 3 (2006) [hereinafter THE BABY BUSINESS].

10. *Id.* at xviii.

11. KINDREGAN & MCBRIEN, *supra* note 4, at 45.

12. *Sperm Donors to Lose Anonymity*, BBC News, Jan. 21, 2004, <http://news.bbc.co.uk/2/hi/health/3414141.stm>.

13. Mark Henderson, *Childless Couples Denied as Anonymity Loss Scares Egg and Sperm Donors*, TIMES ONLINE, June 26, 2008, <http://www.timesonline.co.uk/tol/news/science/article4215440.ece>.

14. Krawiec, *supra* note 8, at 218.

15. *Buying Babies, Bit by Bit: Assisted Conception*, THE ECONOMIST, Dec. 23, 2006, http://www.economist.com/node/8345513?story_id=8345513 [hereinafter Buying Babies].

16. Posting of Daniel Hamermesh to Freakonomics Blog, <http://freakonomics.blogs.nytimes.com/2008/11/17/the-sperm-supply-problem/> (Nov. 17, 2008, 10:36 AM).

17. The other major source of commercial sperm is Denmark, which maintains donor anonymity. Kimberly D. Krawiec, *Sunny Samaritans and Egomaniacs: Price-Fixing in the Gamete Market*, 72 LAW & CONTEMP. PROBS. 59, 88 n.161 (2009). Denmark, however, cannot export sperm to countries where anonymous donation is illegal. *Buying Babies*, *supra* note 15, at 1.

As for-profit commercial entities operating with large profit margins,¹⁸ supported in large part by selling sperm at remarkable markups,¹⁹ 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.²⁰ It was not until early 2009, however, that *Donovan v. Idant Laboratories*, the first case bearing directly on the issue, was decided.²¹ 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.²² 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.²³ 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."²⁴

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,²⁵ and England is generally thought to have abrogated it by statute.²⁶ 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).

21. *Donovan*, 625 F. Supp. 2d 256.

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).

25. California, New Jersey, and Washington recognize a cause of action in wrongful life. See *Turpin v. Sortini*, 643 P.2d 954, 965–66 (Cal. 1982); *Procanik v. Cillo*, 478 A.2d 755, 757 (N.J. 1984); *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483, 495 (Wash. 1983).

26. Congenital Disabilities (Civil Liability) Act, 1976, c. 28 (Eng.), § 2(b) is generally considered to prevent a wrongful life claim in England. Harvey Teff, *The Action for "Wrongful Life" in England and the United States*, 34 INT'L & COMP. L.Q. 423, 426 n. 23 (1985). See also *McKay v. Essex Area Health Auth.*, (1982) 1 Q.B. 1166, 1177–78. It has been argued, however, that the McKay court misinterpreted the law. See, e.g., Anthony

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?²⁷

Recovery for the related parental action of “wrongful birth” is allowed, but is often limited to the “extraordinary” costs of raising the disabled child.²⁸

Both the United States and England, however, have robust products liability regimes.²⁹ 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.

Jackson, *Wrongful Life and Wrongful Birth: The English Conception*, 17 J. LEGAL MED. 349, 366 (1996). This argument is addressed in Part II, *infra*.

27. Becker v. Schwartz, 386 N.E.2d 807, 812 (N.Y. 1978).

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.³⁰ 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*³¹ in the mid-nineteenth century, and the American courts quickly adopted it.³² The logic the *Winterbottom* court offers for this rule is as follows:

[I]t 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.³³

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.”³⁴ The end of the privity rule came in 1916 with the famous case of *MacPherson v. Buick Motor Co.*³⁵ 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.³⁶

Once the privity barrier fell, American courts began to allow the use of *res ipsa loquitur* 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

30. JAMES A. HENDERSON & AARON D. TWERSKI, *PRODUCTS LIABILITY: PROBLEMS AND PROCESS* 6 (6th ed. 2008).

31. *Winterbottom v. Wright*, (1842) 152 Eng. Rep. 402 (Ex.).

32. HENDERSON & TWERSKI, *supra* note 30, at 7.

33. *Winterbottom*, (1842) 152 Eng. Rep. at 404 (internal quotations omitted).

34. *Thomas v. Winchester*, 6 N.Y. 397, 409 (1852).

35. *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916).

36. *Id.* at 1053.

defect cases. The California Supreme Court's decision in *Escola v. Coca Cola Bottling Co.* is representative of this development,³⁷ 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.³⁸ *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."³⁹ For Justice Traynor, as society evolved, it was important that "[t]he manufacturer's obligation to the consumer [should] keep pace" with that evolution.⁴⁰

The penultimate case in the move to strict liability for harm caused by product defects is *Henningsen v. Bloomfield Motors, Inc.*⁴¹ 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.⁴² 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.⁴³ 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.⁴⁴ 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.*⁴⁵ In that case, the plaintiff's wife bought him a wood-working power tool; while he was using it for its intended function, the tool malfunctioned and caused him serious injury.⁴⁶ 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

37. *Escola v. Coca Cola Bottling Co. of Fresno*, 150 P.2d 436 (Cal. 1944).

38. See generally Page Keeton, *Products Liability—Proof of the Manufacturer's Negligence*, 49 VA. L. REV. 675 (1963).

39. *Escola*, 150 P.2d at 440.

40. *Id.* at 443.

41. *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960).

42. *Id.* at 73.

43. *Id.* at 80.

44. *Id.* at 84.

45. *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963).

46. *Id.* at 898.

manufacturer liable in the second case were different.⁴⁷ 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.”⁴⁸

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”⁴⁹ in a party “engaged in the business of selling”⁵⁰ a defective product that is “unreasonably dangerous to the user or consumer or to his property.”⁵¹ Under § 402A, this liability exists regardless of the care taken in the preparation and sale of the unreasonably dangerous product.⁵²

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.⁵³ 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.⁵⁴ 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).

51. RESTATEMENT (SECOND) OF TORTS § 402A 1 (1965).

52. RESTATEMENT (SECOND) OF TORTS § 402A 2(a) (1965).

53. For a recent example of this reasoning, see *Swanson 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 *ex nihilo*. A product is always designed 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.”) (emphasis in original).

55. RESTATEMENT (SECOND) OF TORTS § 402A cmt. h (1965).

56. Voss v. Black & Decker Mfg. Co., 450 N.E.2d 204, 207 (N.Y. 1983).

57. James A. Henderson, Jr., *Why Negligence Dominates Tort*, 50 UCLA L. REV. 377, 384 (2002).

58. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. d (1998).

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. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 3 (1998). This picks up on the traditional doctrine of *res ipsa loquitur*. See *id.* cmt. a (1998).

ness standard of negligence for liability for harm arising from design and warning defects, without applying the negligence label to it.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,”⁶² a clear majority of jurisdictions actually employs the risk-utility/reasonableness standard contained in the Restatement (Third) for generic product risks,⁶³ with the only true strict liability for the harm caused by defective products arising from a manufacturing defect.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.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 *Donoghue v. Stevenson*:

[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.⁶⁶

61. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b)-(c) (1998).

62. Henderson, *supra* note 57, at 384.

63. Aaron D. Twerski & James A. Henderson, Jr., *Manufacturers' Liability for Defective Product Designs: The Triumph of Risk-Utility*, 74 BROOK. L. REV. 1061, 1069 (2009).

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, *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, *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. *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. *Id.* at 397-400.

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, *Products Liability*, in PRINCIPLES OF MEDICAL LAW 747, 747 n.1 (Ian Kennedy & Andrew Grubb eds., 1998).

66. [1932] A.C. 562 (H.L.) 569 (appeal taken from Scot.) (U.K.).

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.⁶⁷ Furthermore, a manufacturer's compliance with common practice or statute will not necessarily protect it from liability.⁶⁸ 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.⁶⁹ Liability may also attach if warnings are not intelligible or commensurate with the risks posed by a product,⁷⁰ although the learned intermediary rule applies.⁷¹ As in the United States, liability in tort attaches to all members of the commercial chain of distribution, and not only to the manufacturer.⁷²

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 1982.⁷³ 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.⁷⁴ However, unlike American courts, English courts follow the contractual doctrine of privity in products liability cases.⁷⁵ Coupled with the reluctance of English courts to find independent collateral contracts between manufacturers and end users,⁷⁶ 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.⁷⁷ The Directive required member states to pass legislation implementing it within three years,⁷⁸ and England did so with the Consumer Protection Act of 1987.⁷⁹ Nonetheless, the common law of products liability sounding in

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.

77. Council Directive 85/374, 1985 O.J. (L 210) 29, 29 (EEC).

78. *Id.*

79. Consumer Protection Act, 1987, c. 43, § 1 (Eng.) [hereinafter CPA].

negligence remains viable.⁸⁰

The European Court of Justice is satisfied that the Act complied with the Directive;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*.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.⁸³

Instead of using the American manufacturing defect and design defect labels, Burton introduced his own terms of “standard products” and “non-standard products.”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.⁸⁵ Thus, Burton held that an infected bag of blood was a non-standard product,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.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.”⁸⁸ Finding that this definition was “very philosophical,”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-

80. Duncan Fairgrieve & Geraint Howells, *Rethinking Product Liability: A Missing Element in the European Commission’s Third Review of the European Product Liability Directive*, 70 MOD. L. REV. 962, 965 (2007).

81. Case C-300/95, E.C. Commission v. U.K., 1997 E.C.R. I-2649, 3 C.M.L.R. 923, 940-41 (1997).

82. *A v. National Blood Authority*, (2001) 3 Eng. Rep. 289 (Q.B.).

83. *Id.* ¶ 39.

84. *Id.* ¶ 36.

85. *Id.* ¶ 41.

86. *Id.* ¶ 65.

87. *Id.* ¶¶ 36 and 66.

88. Geraint Howells, *Defect in English Law: Lessons for the Harmonisation of European Product Liability*, in *PRODUCT LIABILITY IN COMPARATIVE PERSPECTIVE* 138, 152 (Duncan Fairgrieve ed., 2005).

89. *A v. National Blood Authority*, (2001) 3 Eng. Rep. 289 (Q.B.) ¶ 65.

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.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.⁹¹ Professor Howells seems to acknowledge that a reasonableness standard akin to negligence will continue to reign for design defects,⁹² and Professor Stapleton bluntly states that the Directive, and hence the Act, did not create a true strict liability system for design defects.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.⁹⁴

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

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

“Anyone who is among the living has hope—even a live dog is better off than a dead lion!”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.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.⁹⁸ Indeed, nine states have affirmatively barred wrongful life claims by statute.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.

90. Fairgrieve & Howells, *supra* note 80, at 967.

91. *Id.* at 968.

92. Howells, *supra* note 88, at 151.

93. Jane Stapleton, *Bugs in Anglo-American Products Liability*, in *PRODUCT LIABILITY IN COMPARATIVE PERSPECTIVE* 295, 329 n.159 (Duncan Fairgrieve ed., 2005).

94. Teff, *supra* note 65, at 779–80.

95. *House, M.D.: House Divided* (FOX television broadcast Apr. 29, 2009).

96. *Ecclesiastes* 9:4.

97. *Law & Order: Criminal Intent: Wrongful Life* (NBC television broadcast Mar. 26, 2006).

98. See *supra* notes 25–28.

99. Michelle McEntire, *Compensating Post-Conception Prenatal Medical Malpractice While Respecting Life: A Recommendation to North Carolina Legislators*, 29 CAMPBELL L. REV. 761, 770 n.66 (2007) (collecting statutes from Idaho, Indiana, Michigan, Minnesota, Missouri, North Dakota, Pennsylvania, South Dakota, and Utah).

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

100. Thomas D. Rogers III, *Wrongful Life and Wrongful Birth: Medical Malpractice in Genetic Counseling and Prenatal Testing*, 33 S.C. L. Rev. 713, 715 (1982).

101. See, e.g., James G. v. Caserta, 332 S.E.2d 872, 879 (W. Va. 1985).

102. See, e.g., Ermoian v. Desert Hosp., 61 Cal. Rptr. 3d 754, 761 (Cal. Ct. App. 2007); see also Willis v. Wu, 607 S.E.2d 63, 67 (S.C. 2004).

103. Rogers, *supra* note 100, at 716.

104. *Id.*

105. *Id.* at 719.

106. See Willis, 607 S.E.2d at 67.

107. See, e.g., Dietrich v. Inhabitants of Northampton, 138 Mass. 14, 17 (1884).

108. See Seattle-First Nat'l Bank v. Rankin, 367 P.2d 835, 838 (Wash. 1962).

109. Rogers, *supra* note 100, at 731.

110. PROSSER, *supra* note 53, at 336.

111. DAN B. DOBBS, THE LAW OF TORTS § 288 (2000).

child.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.¹¹³ This argument of pass-through liability to the fetus in wrongful life cases is made by both American¹¹⁴ and British commentators.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.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.¹¹⁷ Instead, the “gravamen of [wrongful life] is that the physician’s negligence precluded any parental decision to abort the fetus.”¹¹⁸ The duty in wrongful life is an informational one;¹¹⁹ the physician must provide accurate genetic counseling in keeping with professional standards of care,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,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.¹²² Courts typically analogize wrongful life claims to standard

112. Thomas Keasler Foutz, Note, “*Wrongful Life*”: *The Right Not to be Born*, 54 TUL. L. REV. 480, 490-91 (1979).

113. Anthony Jackson, *Action for Wrongful Life, Wrongful Pregnancy, and Wrongful Birth in the United States and England*, 17 LOY. L.A. INT’L & COMP. L. J. 535, 555 (1995).

114. *Id.*

115. IAN KENNEDY & ANDREW GRUBB, MEDICAL LAW: TEXT WITH MATERIALS 936 (2d ed. 1994).

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).

117. See *supra* note 105 and accompanying text.

118. *Phillips v. United States*, 508 F. Supp. 537, 542 (D.S.C. 1980).

119. Jackson, *supra* note 113, at 554.

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.

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).

122. See, e.g., *Becker v. Schwartz*, 386 N.E.2d 807, 811-12 (N.Y. 1978).

malpractice claims;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.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 *Williams v. Bay Hospital, Inc.*¹²⁵ In *Williams*, the decedent died of lung cancer that went undetected due to the negligence of a physician in reading an x-ray.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.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.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 *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 *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.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.

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).

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).

125. 471 So. 2d 626 (Fla. 1985).

126. *Id.* at 628 (reversal of summary judgment for the defense).

127. *Id.* at 630.

128. Jackson, *supra* note 113, at 562.

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.

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.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.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,¹³² they do support the common law right of adults of sound mind to refuse life-saving medical treatment.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,”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.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.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.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:

130. See, e.g., *Foote v. Albany Med. Ctr. Hosp.*, No. 4725-05, 2008 WL 2310948, at *3 (N.Y. Sup. Ct. June 5, 2008) (finding no harm beyond the extraordinary costs of raising a disabled child) (citing *Becker v. Schwartz*, 386 N.E.2d 807, 813 (N.Y. 1978)).

131. *Becker*, 386 N.E.2d at 812.

132. See *Washington v. Glucksberg*, 521 U.S. 702, 734–36 (1997).

133. See *Cruzan v. Dir., Mo. Dep’t. of Health*, 497 U.S. 261, 278 (1990).

134. *Twin City Nat’l Bank of New Brighton v. Nebecker*, 167 U.S. 196, 202 (1897).

135. *Becker*, 386 N.E.2d at 812.

136. *Id.* See also *Dumer v. St. Michael’s Hosp.*, 233 N.W.2d 372, 375–76 (1975).

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 *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.”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.”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.”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.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

138. *Id.*

139. *Hester v. Dwivedi*, 733 N.E.2d 1161, 1164 (Ohio 2000).

140. Jane E.S. Fortin, *Is the “Wrongful Life” Action Really Dead?*, 9 J. SOC. WELFARE L. 306, 310 (1987).

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,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.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.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,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 costs¹⁴⁷—and the parents’ own emotional distress damages.¹⁴⁸ Also in contrast to wrongful life, wrongful birth is met with nearly universal acceptance in American courts.¹⁴⁹ After the *Gleitman* court initially rejected it, wrongful birth has been accepted by every court that has come upon the issue since.¹⁵⁰

Although similar problems of causation and harm arise in the wrong-

143. This view finds some support in the Restatement (Second) of Torts § 901.

144. Deanna A. Pollard, *Wrongful Analysis in Wrongful Life Jurisprudence*, 55 ALA. L. REV. 327, 341–42 (2004).

145. See conclusion of wrongful birth sub-section, *infra* Part II D.

146. *See supra* Part II A.

147. See *Robak v. United States*, 658 F.2d 471, 479 (7th Cir. 1981) (collecting cases).

148. See, e.g., *Berman v. Allan*, 404 A.2d 8, 16–17 (N.J. 1979).

149. See Julie F. Kowitz, Note, *Not Your Garden Variety Tort Reform: Statutes Barring Claims for Wrongful Life and Wrongful Birth are Unconstitutional Under the Purpose Prong of Planned Parenthood v. Casey*, 61 BROOK L. REV. 235, 255 (1995) (collecting cases).

150. Bernard Dickens, *Wrongful Birth and Life, Wrongful Death Before Birth, and Wrongful Law*, in *LEGAL ISSUES IN HUMAN REPRODUCTION* 80, 86 (Sheila A.M. McLean ed. 1989).

ful birth situation,¹⁵¹ 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.¹⁵² 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.¹⁵³ 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,¹⁵⁴ 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,”¹⁵⁵ which “must include the costs of raising a normal child.”¹⁵⁶

Proponents of the extraordinary costs rule offer two justifications. The first is based on the principle of avoidable consequences and the twin familiar canons 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.¹⁵⁷ 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.¹⁵⁸ 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.”¹⁵⁹ 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—what the complaint terms “hard money damages”—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.

153. See, e.g., *Smith v. Cote*, 513 A.2d 341, 349–50 (1986).

154. *Id.* at 350.

155. 658 F.2d 471, 478–79 (7th Cir. 1981) (emphasis in original).

156. *Id.* at 479.

157. See *Smith*, 513 A.2d at 349–50.

158. *Id.*

159. *Gleitman v. Cosgrove*, 227 A.2d 689, 693 (N.J. 1967).

involved.¹⁶⁰

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.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.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,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,"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."¹⁶⁵

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

160. *Rieck v. Med. Protective Co.*, 219 N.W.2d 242, 244-45 (Wis. 1974).

161. 22 AM. JUR. 2d *Damages* § 383 (2010).

162. *Troppi v. Scarf*, 187 N.W.2d 511, 520 (Mich. Ct. App. 1971).

163. Dickens, *supra* note 150, at 87.

164. *Merritt v. Parker*, 1 N.J.L. 460, 466 (N.J. 1795).

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 Authority*¹⁶⁸ 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.

168. (1982) 1 Q.B. 1166.

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

170. *McKay*, (1982) 1 Q.B. at 1192–93.

171. *Id.*

172. Jackson, *supra* note 113, at 565.

173. Congenital Disabilities (Civil Liability) Act, 1976, c. 28 (Eng.) [hereinafter 1976 Act].

174. *McKay*, (1982) 1 Q.B. at 1191.

175. *Id.* at 1187.

176. *Id.* at 1178. Indeed, Stephenson is “happy” to so find. *Id.* at 1182.

177. 1976 Act, § 4(5).

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.

180. Adrian Whitfield, *Actions Arising from Birth*, in PRINCIPLES OF MEDICAL LAW 650, 684–85 (Ian Kennedy & Andrew Grubb eds. 1998).

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.”¹⁸¹ 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,¹⁸² allows the child to sue.¹⁸³

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 1990.¹⁸⁴ 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.¹⁸⁵

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.¹⁸⁶ Given that the English courts recognize tort liability for wrongful birth,¹⁸⁷ the 1990 amendments to the 1976 Act “clearly recognized a wrongful life claim.”¹⁸⁸ Indeed, two leading English commentators state that the 1990 amendments show “that the policy of the law [has] shifted from that stated in *McKay*.¹⁸⁹

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.”¹⁹⁰ Lord Justice Ackner cites the following passage from that report as definitively rejecting wrongful life:

181. 1976 Act § 1(2)(a).

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.*

184. Human Fertilisation and Embryology Act, 1990, c. 37 (Eng.) [hereinafter 1990 Act].

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.¹⁹¹

And, as Lord Justice Griffiths points out, it was the Law Commission that drafted the 1976 Act.¹⁹² 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-old¹⁹³ interpretive heuristic in English courts is to refuse to look at Parliamentary debates in order to divine the meaning of an Act of Parliament.¹⁹⁴ 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.”¹⁹⁵

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,”¹⁹⁶ 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.”¹⁹⁷

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.”¹⁹⁸ Peter Archer, then Solicitor General, stated that the Act was “modest [and] of limited application.”¹⁹⁹ Another Member of Parliament was careful to note that the Act was not intended to limit tort actions available at common law.²⁰⁰ 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

191. *McKay v. Essex Area Health Auth.*, (1982) 1 Q.B. 1166, 1187.

192. *Id.* at 1192.

193. See *Pepper v. Hart*, (1992) A.C. 593, 609 (H.L.) (appeal taken from Eng.).

194. See *id.* at 630–32 (collecting cases).

195. *Id.* at 635.

196. 904 PARL. DEB., H.C. (5th ser.) (1975) 1593.

197. 904 PARL. DEB., H.C. (5th ser.) (1975) 1609.

198. 904 PARL. DEB., H.C. (5th ser.) (1975) 1599.

199. 904 PARL. DEB., H.C. (5th ser.) (1975) 1648.

200. 904 PARL. DEB., H.C. (5th ser.) (1975) 1607.

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.

203. See Emeh v. Kensington and Chelsea and Westminster AHA, [1985] Q.B. 1012, 1028 (quoting Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 170-71 (Minn. 1977)).

204. Whitfield, *supra* note 180, at 705.

205. See, e.g., Paul H. Mitrovich, *Ohio Wrongful Pregnancy, Wrongful Birth, and Wrongful Life Law Needs to be Revisited to Obtain a More Equitable Result and Consistency of Law*, 33 OHIO N.U. L. REV. 623, 637 (2007).

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

206. Eduard Picker, “*Wrongful Life*”—Legal and Ethical Controversies in Western Society of Today, 13 TEL AVIV U. STUD. L. 75, 92 (1997).

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

207. Estate of Kievernagel, 83 Cal. Rptr. 3d 311, 317–18 (Cal. Ct. App. 2008) (quoting *Hecht v. Super. Ct.*, 20 Cal. Rptr. 2d 275, 283 (Cal. Ct. App. 1993)).

208. David A. Rameden, *Frozen Semen as Property in Hecht v. Superior Court: One Step Forward, Two Steps Backward*, 62 UMKC L. REV 377, 395 (1993).

209. Charles M. Jordan Jr. & Casey J. Price, *First Moore, then Hecht: Isn’t it Time we Recognize a Property Interest in Tissues, Cells, and Gametes?*, 37 REAL PROP. PROB. & TR. J. 151, 190 (2002).

210. See Ernest Waintraub, *Are Sperm Cells a Form of Property? A Biological Inquiry into the Legal Status of the Sperm Cell*, 11 QUINNIPAC HEALTH L. J. 1, 13–15 (2007).

211. See generally *A v. National Blood Authority*, (2001) 3 Eng. Rep. 289 (Q.B.) (liability of defendant for blood as a product).

212. Teff, *supra* note 65, at 757.

213. 123 N.E.2d 792, 796 (N.Y. 1954).

214. See *Cunningham v. MacNeal Mem’l Hosp.*, 266 N.E.2d 897, 904 (Ill. 1970).

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.²¹⁷ 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.²¹⁸ 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 appropriate 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 manifest—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.²¹⁹ 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.²²⁰ 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.²²¹ Indeed, Jane Stapleton, one of the foremost English commentators on torts generally, has written that “the setting in motion of the bodily processes—the latent condition—which over time was certain (in retrospect) to produce later palpable and then disabling symptoms” would be sufficient injury to claim full recovery in negligence;²²² 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 presence of the gene alone, with full recovery being awarded if the feared disease in fact materialized.

Finally, a single products liability approach to harm caused by genetically 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.²²³

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-

219. See, e.g., Metro-North Commuter R.R. Co. v. Buckley, 521 U.S. 424, 426 (1997) (applying federal statutory law).

220. See Norfolk & Western Ry. Co. v. Ayers, 538 U.S. 135, 141 (2003).

221. See Bower v. Westinghouse Elec. Corp., 522 S.E.2d 424, 433-34 (W. Va. 1999).

222. Jane Stapleton, *The Gist of Negligence: Part One*, 104 L.Q. REV. 213, 216 (1988).

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.²²⁴

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 Ideas of basic fairness support strict liability for manufacturing defects

224. See W. Kip Viscusi, *Toward a Diminished Role for Tort Liability: Social Insurance, Government Regulation, and Contemporary Risks to Health and Safety*, 6 YALE J. ON REG. 65, 82 (1989).

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.

226. *Donovan v. Idant Labs.*, 625 F. Supp. 2d 256, 275 (E.D. Pa. 2009).

227. James A. Henderson, Jr., *Coping with the Time Dimension in Products Liability*, 69 CAL. L. REV. 919, 931–32 (1981).

as well, as harm caused by such defects is neither tacitly nor expressly assumed by the product user.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.²²⁹ This provision provides a conceptual link between wrongful life—which the 1976 Act is properly said *not* to have banned²³⁰—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.”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”²³² in an action brought by those not living it.

232. See Picker, *supra* note 206.

