

The Right Approach to Wrongful Conception

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1. INTRODUCTION

A case of ‘wrongful conception’ was defined in *McFarlane v Tayside Health Board*² as ‘an action by parents of an unwanted child for damage resulting to them from the birth of the child’.³ Lord Steyn here suggested that ‘instinctively, the traveller on the Underground would consider that the law of tort has no business to provide legal remedies consequent upon the birth of a healthy child, which all of us regard as a valuable and good thing’.⁴ However, the majority of the Australian judges sitting in the High Court of Australia, in the case of *Cattanach v Melchior*,⁵ were certainly no travellers on the Underground. *Cattanach* decided—contrary to the decision in *McFarlane*—that the parents of a child born as a result of a doctor’s negligence are entitled to recover damages for the costs of raising the child until adulthood. The purpose of this essay is twofold. First, the various analyses on actionable damage and public policy from these two cases will be outlined and then explored in greater depth. I will argue that these two cases, *McFarlane* and *Cattanach*, were not decided on sound bases, whether on grounds of public policy or legal principle. Ultimately, I suggest that instead of viewing wrongful conception as a tort of negligence, the ‘right approach’ is to view wrongful conception as a nominate tort, akin to the trespassory torts, which are actionable *per se*.

II. UNDERSTANDING MCFARLANE AND ‘WRONGFUL CONCEPTION’

Mr and Mrs McFarlane had four children in 1989. They purchased a bigger house and needed a larger mortgage. To meet the growing financial needs of the family, Mrs McFarlane decided to return to work. The couple decided that Mr McFarlane would undergo a vasectomy, because they did not want any more children. On 16 October 1989, a consultant surgeon performed the operation on Mr McFarlane at a hospital operated by Tayside Health Board. The operation was successful. A consultant surgeon later wrote to Mr McFarlane on 23 March 1990, informing him that ‘[his] sperm counts are now negative and [he] may dispense with contraceptive precautions’. The couple relied on this advice. However, in September 1991, Mrs McFarlane became pregnant and gave birth to a healthy daughter, Catherine, on 6 May 1992.

The legal proceedings started in Scotland. The couple sued Tayside Health Board in delict and the claim can be split into two parts. First, Mrs McFarlane claimed £10,000 for the pain, suffering

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² [2000] 2 AC 59 (HL).

³ *ibid* 76 (Lord Steyn). ‘Wrongful conception’ is different from ‘wrongful life’. A ‘wrongful life’ claim is made by a child for damage to himself arising from the very fact of his birth. This type of claim involves the child arguing that he should never have been born. The English courts have rejected ‘wrongful life’ claims because they violate the sanctity of human life: *McKay v Essex Area Health Authority* [1982] 2 All ER 771 (CA). This essay focuses exclusively on ‘wrongful conception’. Further, it focuses on a healthy mother wrongfully conceiving a healthy baby.

⁴ *McFarlane* (n 2) 82.

⁵ [2003] HCA 38. This decision, however, has been qualified in some States. Queensland, for example, through the *Justice and Other Legislation Amendment Act 2003*, inserted sections 49A and 49B into the *Civil Liability Act 2003*, disallowing claims for ‘costs ordinarily associated with rearing or maintaining a child’ (s 49A(2)). However, the legal principles expounded in *Cattanach* are still relevant to our present purposes.

and distress resulting from the unwanted pregnancy. Second, the couple claimed a sum of £100,000 for the cost of bringing up Catherine. At first instance, the Lord Ordinary, Lord Gill, dismissed the action with regard to both heads of claim. The thrust of Lord Gill's judgment was that 'the privilege of being a parent is immeasurable in monetary terms (...) the benefits of parenthood transcend any patrimonial loss'.⁶ However, the Inner House allowed a reclaiming motion and reversed Lord Gill's order, holding that both heads of claim are recoverable on conventional principles of delict.⁷ On appeal, the House of Lords unanimously held that the maintenance costs for a healthy child were not recoverable. On the issue of Mrs McFarlane's pain, suffering and distress arising from the unwanted pregnancy, the House of Lords, by a 4:1 majority, held that the claim was recoverable.

Cattanach, a similar case heard by the High Court of Australia,⁸ revolved mainly around the same issues. Mr and Mrs Melchior, satisfied with the size of their family, decided to stop having more children. When Mrs Melchior first consulted Dr Cattanach, she told him that her right ovary and fallopian tube had been removed. Dr Cattanach then went on to perform a tubal ligation on Mrs Melchior, attaching a clip only to Mrs Melchior's left fallopian tube. Eventually, Mrs Melchior discovered that she was pregnant and gave birth to her son, Jordan. It transpired that her right fallopian tube had not been removed. The trial judge found that Dr Cattanach was negligent because he had too readily accepted Mrs Melchior's assertion, without any further investigation. The High Court of Australia, by a 4:3 majority, held that the couple could recover damages for the potential maintenance costs of Jordan.

The House of Lords and the High Court of Australia had to grapple with two major issues, *inter alia*, in *McFarlane* and *Cattanach* respectively, in order to determine the damages that the couples were entitled to. First, what is the actionable damage in such cases? Second, what exactly was the scope of the duty of care that the surgeons owed to the couples? To determine the exact scope of the duty of care, most of the judges sitting in both cases resorted to policy arguments. Their Lordships' and their Honours' answers to these two questions will now be subject to closer examination.

III. VARYING CONCEPTIONS OF ACTIONABLE DAMAGE

It is necessary to be clear about what the actionable damage is and about what is 'consequential' on it. As we shall observe, the damages that the claimants are entitled to turn on a construction of actionable damage. If the maintenance costs can be considered as consequent on physical injury, then the economic loss will be allowed. However, if the maintenance costs are considered pure economic loss, it will not be recoverable unless it falls into an exceptional category.⁹ This position is evinced in the case of *Spartan Steel & Alloys v Martin & Co*,¹⁰ where the Court of Appeal held that economic loss 'consequent' on physical damage is recoverable but economic loss 'independent' of the physical damage is not.¹¹

⁶ *McFarlane v Tayside Health Board* (1997) SLT 211 (SC (OH)), 216.

⁷ *McFarlane v Tayside Health Board* (1998) SCLR 126 (Court of Session, Inner House (Second Division)).

⁸ The High Court of Australia is the highest appellate court in Australia.

⁹ Pure economic loss is not generally recoverable in the English and Australian law of negligence. One exception is *Hedley Byrne v Heller* [1964] AC 465 (HL) type of liability for negligent misstatements. Another exception is a *Junior Books v Veitchi* [1983] 1 AC 520 (HL) scenario, where the high degree of proximity between the parties was said to make the relationship 'akin to contract'.

¹⁰ [1973] QB 27 (CA).

¹¹ *ibid* 39 (Lord Denning).

The High Court of Australia and the House of Lords offered varying interpretations of actionable damage. However, all except one of these interpretations should be rejected because they are logically untenable.

One view advanced is that, while the mother has suffered personal injury, the maintenance costs are not consequential on it. The maintenance cost is thus categorised as pure economic loss and, therefore, unrecoverable. Two arguments were presented in *McFarlane* to achieve this very end.

The first was presented by Lord Hope. His Lordship attributed the claim for maintenance cost to the father, and concluded that 'this is a claim for economic loss' because Mr. McFarlane 'does not claim that he suffered physical or mental injury'.¹² By this analysis, the maintenance costs would no longer be consequential on the physical injury of the mother. It follows that the claim is one of pure economic loss. However, the artificiality of this analysis is plain. As Hoyano rightly pointed out, this analysis 'obviously has limited utility where the mother is a single parent or is in paid employment'.¹³

The second was to divide the duty of care, owed by the doctor to the patient, into several parts. Lord Slynn held that 'the doctor undertakes a duty of care in regard to the prevention of pregnancy: it does not follow that the duty includes also avoiding the costs of rearing the child if born and accepted into the family'.¹⁴ Whilst His Lordship would grant compensation for the 'physical effects of the pregnancy', the doctor 'does not assume responsibility for those economic losses'.¹⁵ The maintenance costs, it follows, would be detached from physical injury to the mother. This line of reasoning was not well-received in *Cattanach*. Most of the judges in *Cattanach* thought that if there was physical injury inflicted on the mother by the doctor's negligence, it follows that the maintenance costs were 'consequential'. Moreover, Hoyano also points out that 'there was no attempt in *McFarlane* to explain why or how a case of failed sterilisation is different from other cases of negligently performed surgery where a separate duty of care analysis is not required for future financial losses, such as loss of income'.¹⁶

Another view was suggested by Gleeson CJ in his dissenting judgment in *Cattanach*. His Honour thought that if the Melchioris had suffered damage 'it is because of the creation of that relationship and the responsibilities it entails'.¹⁷ His Honour asserted that the relationship between parent and child 'is the immediate cause of the anticipated expenditure which the respondents seek to recover by way of damages'.¹⁸ The corollary is that the court was dealing with 'a claim for recovery of pure economic loss arising out of a relationship' rather than 'a claim for financial loss consequential upon personal injury to a plaintiff, or damage to a plaintiff's property'.¹⁹ This therefore meant that the claim for maintenance costs was unrecoverable. Gleeson CJ's argument was persuasively criticised by two of the judges in the majority, McHugh and Gummow JJ. Their Honours suggested that Gleeson CJ's argument examined the case from the 'wrong perspective'.²⁰ Their Honours thought that the actionable damage is the 'expenditure that they have incurred or will incur in the future, not the creation or existence of the parent-child relationship'.²¹

¹² *McFarlane* (n 2) 89.

¹³ Laura Hoyano, 'Misconceptions about Wrongful Conception' (2002) 65 MLR 883, 886.

¹⁴ *McFarlane* (n 2) 76.

¹⁵ *ibid.*

¹⁶ Hoyano (n 13) 887.

¹⁷ *Cattanach* (n 5) [26].

¹⁸ *ibid.*

¹⁹ *ibid* [30].

²⁰ *ibid* [67].

²¹ *ibid.*

It is submitted that Gleeson CJ's argument, though creative, should ultimately be rejected. First, Gleeson CJ's analysis smacks of artificiality. How can the law deny that such a relationship arises as a consequence of pregnancy? Gleeson CJ, in his judgment, failed to offer a convincing argument on why and how we can deny the link between the process of pregnancy and the relationship that follows inexorably as a corollary. Second, if Gleeson CJ's argument were adopted in the English courts, it would introduce uncertainty into an area which was hitherto thought clear. It is foreseeable that if Gleeson CJ's approach were to be adopted, courts in the future might imply such relationships between the different parties in order to convert a putative consequential economic loss to pure economic loss based on the courts' intuition.

The most plausible view, advanced by majority in *Cattanach*, is that maintenance costs for the child flowed naturally from the claim for the pain and suffering of pregnancy and was not, thus, a claim for pure economic loss. The maintenance costs of raising the child would therefore be recoverable, on a straightforward application of legal principle. McHugh and Gummow JJ, for example, held that the damage is the 'burden of the legal and moral responsibilities which arise by reason of the birth of the child that is in contention'.²² This perspective was also echoed by Kirby and Hayne JJ (although the latter eventually dissented on the basis of public policy). Kirby J was unwavering in his tone when he suggested that because Mrs. Melchior suffered physical injury, 'she would be entitled to recover on normal principles without disqualification'²³ the maintenance costs of rearing the child.

Even though this analysis is the most principled amongst all the others—since it adheres to the conventional understanding of consequential and pure economic loss—there is something distasteful about it. This approach necessarily leads us to conclude that the birth of the child is the actionable damage. Lord Millett agreed with Lord McCluskey that assigning a monetary value to the child's existence is 'as difficult and unrealistic as it is distasteful'.²⁴ His Lordship very perceptively points out that 'the exercise must either be superfluous or produce the very result which is said to be morally repugnant. If the monetary value of the child is assessed at a sum in excess of the costs of maintaining him, the exercise merely serves to confirm what most courts have been willing to assume without it. On the other hand, if the court assesses the monetary value of the child at a sum less than the costs of maintaining him, it will have accepted the unedifying proposition that the child is not worth the cost of looking after him'.²⁵

IV. POLICY: CONTROLLING OR LOOSING THE REINS OF THE UNRULY HORSE?

Public policy was once likened by Burroughs J to 'a very unruly horse and when you get astride it you never know where it will carry you. It may lead you from the sound law'.²⁶ However, this view stands in stark contrast to Lord Denning's opinion in *Enderby Town FC v Football Association*.²⁷ Lord Denning disagreed and suggested that 'with a good man in the saddle, the unruly horse can be kept in control'.²⁸ With respect to Lord Denning, it will be argued here that, in this area of law, Burroughs J was right; the unruly horse has led the courts into the wilderness of inconclusive arguments. In *McFarlane*, most of the judges sought to rely on public policy arguments in order to justify non-recoverability of the maintenance costs. These arguments will be explored in greater depth in the section below.

²² *Cattanach* (n 5) [68].

²³ *ibid* [149].

²⁴ *McFarlane* (n 2) 111.

²⁵ *ibid*.

²⁶ *Richardson v Mellish* (1824) 2 Bing 229, 252.

²⁷ [1971] Ch 591 (CA).

²⁸ *ibid* 606.

One such policy argument can be labelled as ‘moral argument’. This argument focuses mainly on the sanctity of life and the impact on the growth of the child should he or she find out that he or she was unwanted by the parents. Lord Millett in *McFarlane* put the point across very strongly in arguing that the law should regard the birth of a normal, healthy baby to be ‘a blessing, not a detriment’.²⁹ Lord Millett argued that though in truth, the birth of a child is a ‘mixed blessing’—since parenthood comes with its ups and downs—the ‘society itself must regard the balance as beneficial’.³⁰ *Pace* Lord Millett, though, this argument does not take us very far. Kirby J pointed out in *Cattanach* that this argument ‘represents a fiction which the law should not apply to a particular case without objective evidence that bears it out’.³¹ The notion of ‘blessing’ is an amorphous one. It conceals a whole series of important questions: by whose standard should this ‘blessing’ be measured? How can the intangible blessings be properly measured? It is intrusive for the law to make value judgments like these. By answering these questions, the law will inevitably foist its understanding of ‘blessing’ on the parents – when they plainly do not consider parenthood to be a blessing – and this fails to respect the couples’ reproductive choices and autonomy.

Second, distributive justice has also been offered as a public policy argument. Lord Steyn in *McFarlane* invoked this in highlighting that the matter ‘requires a focus on the just distribution of burdens and losses among members of a society’. His Lordship mentioned that if the question—whether maintenance costs in wrongful conception should be recoverable—were to be asked to commuters on the Underground, ‘an overwhelming number of ordinary men and women would answer the question with an emphatic ‘No.’ And the reason for such a response would be an inarticulate premise as to what is morally acceptable and what is not’.³²

It is interesting to note that Lord Steyn has been a vocal proponent of resorting to moral considerations in the law. In *Smith New Court Securities v Citibank N.A.*,³³ Lord Steyn said: ‘I make no apology for referring to moral considerations. The law and morality are inextricably interwoven. To a large extent the law is simply formulated and declared morality’.³⁴ However, this policy argument has been subjected to trenchant criticism from the judiciary and academic commentators alike. Hoyano argued that distributive justice ‘permits the judiciary to abdicate its responsibility to identify and explain intellectually rigorous and coherent principles as the basis for decisions, in favour of an empirically untested appeal to public opinion, yielding unpredictable results which invite reversal at each level of appeal, depending on each judge’s subjective and avowedly instinctive notions of what justice requires’.³⁵ This has also been echoed in the High Court of Singapore. Choo Han Teck J, in *ACB v Thomson Medical Pte Ltd*,³⁶ remarked that ‘if public policy is a quicksand, philosophies of distributive justice are sinkholes’.³⁷ McHugh and Gummow JJ also cited Hale LJ’s criticism of Lord Steyn’s judgment with approval.³⁸ Hale LJ, in *Parkinson v St James and Seacroft University Hospital*,³⁹ highlighted that ‘the fact that so many eminent judges all over the world have wrestled with this problem and reached different conclusions might suggest that the considered response would be less emphatic and less unanimous’.⁴⁰

²⁹ *McFarlane* (n 2) 114.

³⁰ *ibid*.

³¹ *Cattanach* (n 5) [148].

³² *McFarlane* (n 2) 82.

³³ [1997] AC 254 (HL).

³⁴ *ibid* 280.

³⁵ Hoyano (n 13) 905.

³⁶ [2014] SGHC 36.

³⁷ *ACB* (n 36) [8].

³⁸ *Cattanach* (n 5) [82].

³⁹ [2002] QB 266 (CA).

⁴⁰ *ibid* [82].

The problems with this policy argument are immediately apparent: it is a bald assertion on his Lordship's part, which requires empirical validation. In fact, the decision in *Cattanach* serves as a good counterpoint to Lord Steyn's assertion, *viz.* that 'an overwhelming number of ordinary men and women' would not grant child-rearing costs as compensation. But even if this could be empirically proven, it would not follow that the judges should apply the majority view through the law. Stevens pointed out that 'if our rights are to be overridden whenever there is a consensus opinion that they are not deserving of respect, we do not have rights worthy of the name. The law is not, and should not be, determined by the judge's best guess of majority public opinion'.⁴¹ Finally, there are many competing conceptions of distributive justice in the sea of literature.⁴² Lord Steyn's version of distributive justice is merely one of a spectrum. This gives rise to a crucial and unresolvable question: why should his Lordship's account be adopted over the many others?

Last, the courts in England have also justified the decision of *McFarlane*—albeit an *ex post facto* rationalisation—on the grounds of protecting the funds of the National Health Service ('NHS'). Lord Bingham in *Rees v Darlington Memorial Hospital NHS Trust*⁴³ suggested that one of the policy considerations underlying the decision in *McFarlane* was 'a sense that to award potentially very large sums of damages to the parents of a normal and healthy child against a National Health Service always in need of funds to meet pressing demands would rightly offend the community's sense of how public resources should be allocated'.⁴⁴ His Lordship also emphatically supported Kirby J's suggestion in *Cattanach*, where His Honour pointed out that 'concern to protect the viability of the National Health Service at a time of multiple demands upon it might indeed help to explain the invocation in the House of Lords in *McFarlane* of the notion of "distributive justice"'.⁴⁵ This was also reiterated by Lord Nicholls in *Rees*, where his Lordship pointed out that to argue that the 'National Health Service should pay all the costs of bringing up the child' seems like 'a disproportionate response to the doctor's wrong'.⁴⁶

However, this policy argument does not appear to be of much succour. First, this argument raises another question: why should the cost rightly fall on the claimant rather than the NHS? If the answer lies in the quantum of damages, the courts will face an uphill task trying to draw a bright line between when to compensate and when not to. Second, based on empirical research into allocation of public health resources, it has been suggested that 'decisions are made on the basis of clinical and cost effectiveness at the expense of ethical inquiry into what is acceptable'.⁴⁷ *Ex hypothesi*, Chico argues that negligence claims must be judged on their cost effectiveness rather than merit, and there is no *a priori* reason why negligence victims should be disentitled to a claim in damages.⁴⁸ Additionally, Chico perceptively highlights the incoherence in this argument, with regard to the court's disregard to the extension of negligence liability against NHS in other areas. She points out, for instance, that the decision of *Chester v Afshar*⁴⁹ does not chime with this policy argument when applied in the *McFarlane* context. The House of Lords allowed a novel claim, in *Chester*, by relaxing traditional causation rules. She rightly questions 'if the NHS can afford *Chester* why can it not afford *McFarlane*?'⁵⁰

⁴¹ Robert Stevens, *Torts and Rights* (OUP 2007) 311.

⁴² Peter Cane, 'Distributive Justice and Tort Law' (2001) N.Z.L.Rev. 401, 405.

⁴³ [2003] UKHL 52.

⁴⁴ *ibid* [6].

⁴⁵ *Cattanach* (n 5) [178].

⁴⁶ *Rees* (n 43) [16].

⁴⁷ Victoria Chico, 'Wrongful Conception: Policy, Inconsistency and the Conventional Award' (2007) MLI 8(2) 139, 146.

⁴⁸ *ibid.*

⁴⁹ [2004] UKHL 41.

⁵⁰ Chico (n 47) 149.

By examining some of the policy arguments offered by the courts, it is hoped that the problems of resorting to policy, in this area of the law, are thoroughly exposed. Far from arriving at a reasoned answer, the courts have been led into the wilderness by this unruly horse.

By the end of these two sections, it appears as though we have hit somewhat of a dead end. If we cannot decide the case on conventional negligence principles, are we then to wave our white flags, sink back in our seats and resign to our fate?

V. A FRESH START

A fresh start is needed. In this section, I argue that the tort of wrongful conception should be seen as an actionable tort *per se*, similar to the trespassory torts, rather than as a part of the tort of negligence. First, I intend to explore the reasons why the torts of trespass are actionable *per se*. Next, I will explore the advantages and disadvantages of reconceptualising wrongful conception as a discrete tort on its own, and then conclude that only by reshaping wrongful conception as an actionable tort *per se* can we achieve greater analytical clarity in this area of law.

Why are some torts, especially the trespassory ones, actionable *per se*? What does it mean for a tort to be actionable *per se*? As Nolan and Davies explain ‘some torts are actionable only if harm is caused, others are actionable without proof of damage’ (*per se*). The distinction is an accident of history but can be rationalised. Torts actionable without proof of damage are either torts where damage can be presumed, or they are torts whose function is to protect particular rights from any invasion, whether or not damage has resulted. Nominal damages may be given to signify that a right has been invaded although no harm has been done.’⁵¹

Why is it advantageous to view wrongful conception as an actionable tort *per se*, rather than a tort of negligence?

First, it can be argued that, by doing so, the law escapes the preceding discussion on actionable damage and public policy. The problems with seeing wrongful conception as a tort of negligence are plentiful. First, we have to conclude that the maintenance costs of bringing up the child are consequential economic losses, by ordinary legal principles. By that line of reasoning, we have to conclude that the birth of the child is an actionable damage. This is a conclusion which the judges in *McFarlane* tried to escape from, by magically holding that the maintenance costs are pure economic loss, without any clear explanation. Further, it has been pointed out that the policy arguments applied are weak and inconclusive. Instead of helping us come to a conclusion on whether there is a duty of care these policy arguments pull us further away from it by further complicating matters. These problems of viewing wrongful conception as a tort of negligence are serious – they are serious enough to warrant a rethink of the classification of wrongful conception.

⁵¹ Donal Nolan and John Davies, ‘Torts and Equitable Wrongs’ in Andrew Burrows (eds), *English Private Law* (OUP 2013).

Second, if we view wrongful conception as an actionable tort *per se*, we redirect the focus back on the rights of the mother, rather than on the fault of the doctor. This has been the emphasis of Lord Bingham and Lord Millett in *Rees* and it is a sensible approach. Lord Millett, for instance, suggested that the modest conventional sum awarded in *Rees* was for ‘the denial of an important aspect of their personal autonomy, *viz.* the right to limit the size of their family’.⁵² Lord Bingham, in the same case, spoke of the legal wrong as depriving the mother of ‘the opportunity to live her life in the way that she wished and planned’.⁵³ If we transform wrongful conception into a nominate tort, into an actionable tort *per se*, the gist of the action consists in the wrong, in infringing the claimant’s freedom to live her life in the way that she had so planned. This is a wrong that is serious enough to garner protection from any potential invasion, regardless of whether legally recognisable actionable damage arises.

Third, by doing so, the conventional sum⁵⁴ can be justified on the basis of the nominal sum. If wrongful conception is seen as a tort of negligence, it is difficult to justify the conventional sum, as Lords Steyn, Hope and Hutton held as the minority in *Rees*. The minority opposed this conventional sum for a few reasons. Lord Steyn objected because it is ‘forbidden territory’ that the judges should not enter into and that ‘there are limits to permissible creativity for judges’.⁵⁵ Additionally, his Lordship also pointed out that the sum is ‘a backdoor evasion of the legal policy enunciated in *McFarlane*’.⁵⁶

Lord Hope sustained a vigorous critique of the majority’s judgment. First, his Lordship held that the compensatory principle would be broken if ‘the conventional sum was intended to give [the parents] something for their financial loss’ because ‘it would deny them the opportunity of attempting to establish the true value of that part of their claim according to the compensatory principle’.⁵⁷ Second, his Lordship pointed out the lack of ‘any consistent or coherent ratio’ for the conventional sum. His Lordship pointed out that Lord Bingham’s claim, *viz.* that the conventional sum is not compensatory in nature, and that it deviates from the normal approach to the assessment of damages. Additionally, Lord Hope questions: if the sum is not based on compensation, ‘what basis can there be for it?’⁵⁸ Last, his Lordship points out that the sum might be deemed as ‘derisory’ by the parents.

Lord Hope points out that the courts are in ‘uncharted waters’ and questions ‘how is one to measure the loss of the right to limit the size of one’s family against an award of that kind, bearing in mind the far-reaching and long-lasting effect that the birth of the uncovenanted child will have on the life of the parent?’⁵⁹ The onslaught, executed elegantly by the minority on the conventional sum, is valid. But, it is only valid if the conventional sum is thought of as compensatory, since compensatory damages are usually awarded to claimants who successfully establish negligence on the part of the defendants. However, if wrongful conception were instead seen as a tort which is actionable *per se*, very much like the tort of trespass, it follows that the court can grant nominal damages due to the wrong committed by the defendant on the claimant. The court need not ‘compensate’ for any loss or damage; it only needs to give a sum to signify that a right has been infringed. The conventional sum approach favoured by the majority in *Rees* can therefore be justified under the actionable tort *per se* approach.

⁵² *Rees* (n 43) [123].

⁵³ *ibid* [8].

⁵⁴ The majority in *Rees*, by the slight margin of 4-3, decided to put a ‘gloss’ (as termed by Lords Bingham and Nicholls) on the *McFarlane* judgment by granting a conventional sum of £15,000 to the mother (or the couple jointly) in cases of wrongful conception.

⁵⁵ *Rees* (n 43) [46].

⁵⁶ *ibid*.

⁵⁷ *ibid* [73].

⁵⁸ *ibid* [74].

⁵⁹ *ibid* [75].

VI. SUMMARY: THE ROAD NOT TAKEN

Robert Frost, in a poignant poem, wrote ‘Two roads diverged in a wood, and I – I took the one less travelled by, And that has made all the difference’. The law of torts has been, in recent decades, sauntering along the path that the tort of negligence paved. One can see the beguiling appeal in doing so; after all, the tort of negligence, with its duty of care test, comes closest to unifying all the other torts and transforming the English Law of Torts to the English Law of Tort. Yet as appealing as this may be, when it comes to wrongful conception, the path less travelled—by reconceptualising wrongful conception as an actionable tort *per se*—is the ‘right’ approach. It will restore intellectual clarity back to a confused and muddled area of law. It will signify a protection of the mother’s autonomy by focusing on it more directly, rather than placing the doctor’s negligence in the limelight. It will, additionally, avoid the quagmire on actionable damage and public policy that the tort of negligence engenders. If the law of torts chooses to walk down this path, foreign though it may be, it will make all the difference.