Harriton v Stephens: 
The Principle and Policy of Non-Existence

VERITY DOYLE *

Abstract

This case note considers the controversial case of Harriton v Stephens, in which the High Court of Australia held (6:1) that an action for wrongful life is not available in Australia. The note takes a critical perspective on the determinative issues, focusing on the construction of the duty of care issue in Crennan J’s leading judgment. The note concludes that the approach taken by her Honour – that legally cognisable damage is a precondition to a duty of care – unnecessarily conflates the two issues in a manner which leads to the erroneous rejection of wrongful life as a cause of action in Australia.

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1. Introduction

Debates relating to reproductive rights usually focus on a woman’s right to bodily autonomy. In *Harriton v Stephens*,¹ the High Court considered reproductive rights from the perspective of an unborn child. The court was called upon to decide whether a child born with severe congenital defects, who would have been aborted but for medical negligence, has a right of action against the medical practitioner, a cause of action which has become known as an action for wrongful life.² The High Court held (6:1) that no such cause of action is available in Australia.³

This note has three substantive parts. First, it will outline the facts and relevant procedural history. Second, it will briefly summarise the judgments given. The third part of the note will evaluate the position reached by the court in relation to the two determinative issues: duty of care and damage. It will be argued that in her Honour’s leading judgment, Crennan J constructed a technical argument in support of her rejection of the wrongful life action, which was based on a questionable conflation of the duty and damage elements of a negligence action, and the assertion that it is impossible for a court to make a comparison between life and non-existence. It will be argued that, as a matter of strict legal principle, wrongful life actions should be allowed and that although there are compelling policy reasons for rejecting wrongful life actions, if the court had applied legal principle to the dispute, the outcome, or at least the majority's reasoning, may well have been different.

2. The Facts and Procedural History

On 19 March 1981, Alexia Harriton was born with severe congenital defects as a result of being infected with rubella in utero. Her disabilities include blindness, deafness, mental retardation and spasticity. She requires 24 hour care.

Alexia Harriton’s mother (Mrs Harriton) had attended a GP, Dr M Stephens (the defendant’s father) during the first trimester of her pregnancy with a fever and a rash. She said she was concerned her recent rash was rubella and she was given a blood test. When she returned, she saw Dr P R Stephens (the defendant) who confirmed she was pregnant and advised her illness was not rubella and that her unborn child was not at an abnormal risk of congenital defects. This diagnosis and the advice based upon it were incorrect.

By her tutor, Alexia Harriton brought an action in the Supreme Court of New South Wales against Dr Stephens for his negligent misdiagnosis of her mother. Her case was based on the assertion that, had her mother been correctly diagnosed with rubella, she would have obtained a lawful termination of the pregnancy. As a result, Alexia Harriton would never have been born and would not have endured

¹ (2006) 226 CLR 52 ("Harriton"). The case was heard and decided with the case of Waller v James; Waller v Hoolahan (2006) 226 CLR 136.
² Kirby J's opines that this is a very unfortunate labelling of the action: Ibid 59.
³ Ibid.
pain, suffering, or sustained economic loss and incurred medical costs. The limitation period on any claim Mrs Harriton may have had against Dr Stephens had expired.

An agreed statement of facts was prepared for the Supreme Court. The questions put to the court were:

(a) If the defendant failed to exercise reasonable care in his management of the plaintiff’s mother and, but for the failure the plaintiff’s mother would have obtained a lawful termination of the pregnancy, and as a consequence the plaintiff would not have been born, does the plaintiff have a cause of action against the defendant?

(b) If so, what categories of damages are available?

In the Supreme Court, Studdert J found that there was no cause of action on the ground that the duty owed to Alexia Harriton was one not to injure her, and that Dr Stephens had not breached that duty. He also noted public policy concerns militating against such a cause of action and discussed the impossibility of assessing compensatory damages. Alexia Harriton appealed Studdert J’s decision to the New South Wales Court of Appeal where it was dismissed by a majority. Spigelman CJ found there was no duty owed with respect to the loss suffered by the appellant, noting that the duty asserted did not reflect community values. Ipp JA dismissed the appeal on the ground that the compensatory principle could not be applied because it was impossible to compare life with non-existence, and that there were no compelling policy reasons for refashioning the compensatory principle in a manner that Alexia Harriton’s claim would satisfy. Mason P (in dissent) found the duty owed to Mrs Harriton extended to Alexia Harriton and that there was no conceptual difference between the critical event that might have enabled Alexia Harriton’s parents to sue for wrongful birth and that which gave rise to Alexia Harriton’s claim.

3. Judgments Given

Four judgments were delivered in the High Court. The leading judgment was written by Crennan J (with whom Gleeson CJ, Gummow and Heydon JJ agreed), dismissing the appeal. Hayne J and Callinan J delivered separate judgments, also dismissing the appeal. Kirby J dissented.

Crennan J’s judgment turned on a finding that Alexia Harriton’s ‘life with disabilities’ did not constitute legally cognisable damage because it was impossible to make a comparison between life and non-existence. Her Honour found that it was impossible to formulate a duty of care in respect of damage which is not cognisable. After making this finding, which essentially resolved the case, her Honour went on to consider a number of policy and practical considerations including the value of

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4 Ibid 114 (Crennan J).
5 Harriton [2002] NSWSC 461, [21].
6 Ibid 71.
8 Ibid 737-8, 744-8.
9 Ibid 718.
life,\textsuperscript{10} the compensatory principle,\textsuperscript{11} corrective justice,\textsuperscript{12} and the potential for a child to sue their mother for a failure to abort.\textsuperscript{13}

The only issue considered substantively by Hayne J was that of damage. He focused on the compensatory principle, emphasising that the ‘enquiry cannot be made in the abstract’\textsuperscript{14} and found that, because Alexia Harriton could never have had any life other than that which she has, a comparison would be required between life and non-existence. His Honour relied on the reasons of Crennan J to show that such a comparison was impossible, but expressly refused to consider the consequences of this finding for the existence of a duty of care.\textsuperscript{15} His Honour also considered whether there were justifications in law or policy for extending the damage concept and concluded that there was no basis for departing from the established rule.\textsuperscript{16} In particular, his Honour identified inherent problems with causation in wrongful life cases.\textsuperscript{17}

Callinan J noted a number of legal and policy concerns ‘arguing in both directions’,\textsuperscript{18} including the potential to encourage the practice of defensive medicine through counselling abortion, the rationale for making a doctor responsible for the costs of raising a disabled child, the potential for actions against parents and the role of the court in determining issues the subject of ‘diverse theological and philosophical opinion’.\textsuperscript{19} However, his Honour decided the case ‘on logic’, stating that the appeal must be dismissed because ‘it is not logically possible for any person to be heard to say “I should not be here at all”, because a non-being can say nothing at all.’\textsuperscript{20}

Kirby J, in dissent, held that on ‘ordinary principles of negligence law’\textsuperscript{21} Alexia Harriton’s case could be established. He found that the duty fell into the established category of that which a health care provider owes to an unborn child, and that a comparison between life and non-existence, while difficult, was not impossible. His Honour rebutted the policy reasons raised by Crennan J militating against recovery, and outlined a number of factors in favour of recovery, particularly that denial of wrongful life actions erects an immunity around health care providers.\textsuperscript{22}

\textsuperscript{10} Harriton (2006) 226 CLR 52, 128.
\textsuperscript{11} Ibid 130.
\textsuperscript{12} Ibid 132.
\textsuperscript{13} Ibid 125.
\textsuperscript{14} Ibid 104.
\textsuperscript{15} Ibid 102.
\textsuperscript{16} Ibid 107.
\textsuperscript{17} Ibid.
\textsuperscript{18} Ibid 112.
\textsuperscript{19} Ibid 113.
\textsuperscript{20} Ibid.
\textsuperscript{21} Ibid 100.
\textsuperscript{22} Ibid.
4. The Determinative Issues

4.1 Duty of Care

(a) Approaches espoused in Harriton

Only two judges considered the issue of duty: Kirby J and Crennan J (Gleeson CJ, Gummow and Heydon JJ agreeing). The approaches taken by Kirby J and Crennan J demonstrate different conceptions of the scope of the duty enquiry. It will be argued that Crennan J’s conception of duty, which considers it dependent on a legally cognisable damage, erroneously conflates the two concepts in a manner which is counterintuitive, and has the result of excluding recovery for all categories of damage claimed.

Crennan J makes establishment of a legally cognisable damage a precondition to finding a duty of care. Her Honour acknowledges that a general practitioner owes a duty to a pregnant patient to advise of complications, and that the same practitioner owes a duty to an unborn foetus, but states that ‘those duties are not determinative of the specific question here, namely whether the particular damage claimed in this case by the child engages a duty of care’. Her Honour goes on to state the duty which must be proven as ‘a duty upon Dr P R Stephens to diagnose rubella and then advise Mrs Harriton that the only way to prevent a very high risk of bearing a child with rubella would be to terminate the pregnancy.’ Crennan J finds there is no cognisable damage and that ‘a duty cannot be stated in respect of damage which cannot be proved’.

By contrast, Kirby J views the duty issue as relatively straightforward. He formulates the duty at a general level of abstraction, stating that ‘an established duty category exists ... health care providers owe a duty to an unborn child to take reasonable care to avoid conduct which might foreseeably cause pre-natal injury’. His Honour goes on to opine that, while none of the elements stand alone, issues of breach, causation, remoteness and assessment of damages are not matters relevant to duty of care.

Hayne J appears to support a median approach. His Honour is not in favour of a strict adherence to the traditional and strictly element-based approach, and has even suggested that in some cases it may be useful for the action to be turned on its head. However, his Honour still supports the elements being addressed separately, stating in Harriton that question of damage ‘is separate and distinct from questions of duty or causation’.

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23 Hayne J expressly refused to consider what implications his finding that there was no legally cognisable damage had on the duty issue: Ibid 102. Callinan J did not discuss the duty issue: Ibid.
26 Ibid 127
27 Ibid 74.
31 (2006) 226 CLR 52, 102
(b) Construction of the duty of care

The differing constructions of the duty question reflect a more fundamental point of uncertainty in the law of negligence: the extent to which the elements of negligence should inform each other, and in particular, whether a different approach needs to be adopted in cases which claim for novel or controversial damage. The views at either end of the spectrum can be characterised as the element based view and the holistic view. The element based view holds that each element of the action of negligence should be considered in isolation from the others, and that the enquiry narrows as it progresses. This view has traditionally found support in the courts and is in line with the approach adopted by Kirby J.

The holistic view argues that the elements of negligence cannot be viewed in isolation and that the action should be viewed as a whole, each element informing the other, and in particular, that damage, as the ‘gist of the action’ should inform each element. This view was first clearly espoused in Australia by Brennan J, 32 and is endorsed by Crennan J and those who adopt her judgment in Harriton. In the argument made by Crennan J, her Honour emphasises that damage is the gist of the action of negligence 33 and relies on the obiter dictum of Brennan J in Sutherland Shire Council that ‘[a] postulated duty of care must be stated in reference to the kind of damage that a plaintiff has suffered’.34

The holistic approach requires further consideration. Two questions must be asked: first, what is the merit of the holistic approach, and is there a sound reason to apply it in all cases; second, if not, is there a justification for adopting the holistic approach in cases involving novel or controversial damage?

It is submitted the holistic approach suffers significant theoretical and empirical problems. If followed to its logical conclusion, employing the holistic approach in answering the duty question has the consequence that no duty arises until after the damage occurs. While it is certainly true that ‘no cause of action accrues until damage has occurred’,35 this does not mean duties do not exist before the cause of action occurs. For example, an occupier of land owes a duty of care to entrants to ensure there are no dangerous hazards on their property.36 This duty lies dormant, and the cause of action accrues when someone wanders onto the property, falls into an unmarked 10 metre deep hole in the ground, and suffers injury. Upon Crennan J’s construction, the duty would not arise until the person had suffered the injury. This suggestion puts the cart before the horse and essentially involves finding a duty retrospectively. This is counterintuitive, as if the existence of a duty is


36 See for example: Stevens v Bodribb Sawmilling Co Pty Ltd (1986) 160 CLR 16; TNT Australia Ltd v Christie [2003] NSWCA 47.
contingent upon damage, it would be impossible for the potential tortfeasor to fulfil (that is, not breach) their duty by, for example, putting up signs or fencing to warn of the hole.

Crennan J’s insistence on legally cognisable damage has some semblance of court’s traditional concern with not recognising duties ‘in the air’.[37] However, this concern can be managed by tying the duty down by reference to a particular relationship, rather than by reference to damage occurring. The traditional approach, espoused by Atkin LJ in Donoghue v Stevenson,[38] views a duty of care as arising out of some relationship between the two parties, rather than by reference to a specific act or damage.[39]

Kirby J gives three reasons for formulating the duty at a general level of abstraction rather than adopting a holistic approach:

1) The duty concept is already overworked and unduly complicated;
2) Particularising the duty of care to too great a level of specificity carries with it the risk of eliding questions of law and fact; and
3) Making specific inquiries at the duty stage subverts the traditional structure of the cause of action in negligence, which is designed to pose increasingly specific question as each successive element falls for decision.[40]

It is submitted that the holistic approach is counterintuitive, inconsistent with traditional authority and would complicate the negligence enquiry. For these reasons, it is submitted that it would be undesirable to apply the holistic approach to all negligence actions.

Notwithstanding the difficulties with the holistic approach outlined above, it is instructive to consider whether there is justification for looking at the action as a whole in cases which claim for novel or controversial damage. There are two possible justifications for adopting such an approach: first, that the question simply cannot be resolved without looking at the action as a whole; and second, that the logic of the law should not be applied to reach an outcome which the community would be morally uncomfortable. Each justification will be evaluated in turn.

In respect of the first argument, it is submitted that it is unnecessary and unhelpful to subvert the normal enquiry simply because a novel or controversial type of damage is claimed. The traditional approach provides for resolution of the duty issue. As Kirby J notes, there is an established duty category; the duty of a health provider not to injure an unborn child; a duty which crystallizes on birth.[41] The question then becomes whether this duty extends to Alexia Harriton’s situation, where Dr Stephens did not cause her mother to become infected with rubella, but where his negligent

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[38] [1932] AC 562.
[39] Ibid 579.
[40] 75-6, referring to his own judgment in Neindorf v Junkovic (2005) 80 ALJR 341 at 352-4.
conduct deprived her of the opportunity to take steps to prevent Alexia Harriton’s current condition. There is significant authority on the principle that a doctor need not cause an injury to be liable for failing to cure or ameliorate its effects.\(^4\) Indeed in the United Kingdom wrongful life case of *McKay v Essex Area Health Authority*,\(^4\) it was conceded by the defendant that a duty of care was owed.\(^4\) Therefore, when the damage issue is dealt with – as it is submitted it should be – as discreet from duty and traditional principles, the appropriate conclusion is that Dr Stephens owed Alexia Harriton a duty to take reasonable care.

The second argument for adopting this approach is one which looks to the result of the enquiry. Indeed, considering legally cognisable damage a prerequisite to a duty of care only arises as a question where novel or controversial damage is claimed: there is no debate that a broken arm is legally cognisable damage, therefore compounding of the elements of the action may be of little practical consequence.

In this case, a finding of negligence requires not only a finding that a child with Alexia Harriton’s disabilities would be better off if they had never been born, but also requires the court to attribute a monetary value to their life. This is a finding with which, as Spigelman CJ noted in the Court of Appeal,\(^4\) many people in the community would feel uncomfortable. The moral discomfort with a court adopting this position is not quelled by Kirby J’s statement that ‘law suits are not about love or family but about money’.\(^4\) Therefore, it may be argued that where the application of strict logic and legal principle results in an outcome inconsistent with values generally held in society, it is an example of the tyranny of legal logic which Holmes and other legal theorists have warned against.\(^4\) It could be argued that this can be avoided if the action is considered as a whole.

However, it is submitted that this argument merely involves putting a legal veneer over what is essentially a policy consideration. Crennan J is careful to emphasise that ‘the practical forensic difficulty is independent of arguments about the value (or sanctity) of human life and any repugnance evoked by the appellant’s argument that her life with disabilities is actionable’.\(^4\) However, to decide to apply this approach in a case essentially requires a predetermination that a claimed damage is novel or controversial, and it is submitted such a predetermination diverts attention from the proper resolution of the matter in accordance with established principles of tort law.


\(^4\) It was also suggested by Hayne J that it may be possible to assume a duty [1982] QB 1166, 1178 (Stephenson LJ).

\(^4\) Ibid.


\(^4\) *Holmes*, *The Common Law* (1881), 1.

Therefore, it is submitted that the holistic approach adopted by Crennan J erroneously conflates the elements of the negligence action in a manner which is neither necessary for resolution of the action, not justified on an outcome oriented approach. Rather, the subversion of the duty enquiry simply dresses policy concerns up in legal clothing. It is submitted that it is dangerous to disguise policy in this manner, and that adoption of this approach is undesirable. Further, the element based approach adopted by Kirby J is more conducive to resolution of the cause of action.

This is not merely a theoretical consideration. Crennan J’s conflation of the damage and duty concepts has potential consequences for the outcome of this case, particularly if the only problem with damage is one of quantification. While the general damages claimed by Alexia Harriton were for ‘life with disabilities’, she also claimed special damages for past and future medical costs, and damages for economic loss in lost earnings. Her Honour’s finding that there is no duty of care obviously defeats the cause of action in its totality, and precludes recovery for any kind of damage. While a finding that there was damage as the gist of the action is a precondition to recovery, if (as it is argued it should be below) damage were established but there is still a perceived problem quantifying or applying a monetary value to life, special damages could still be recovered as they have been in some American courts.

4.2 Damage and the Impossible Comparison

The question of whether Alexia Harriton’s life with disabilities could constitute legal damage was the determinative issue in Crennan J and Hayne J’s majority judgments. The inability to logically prove damage also seems to form the basis of Callinan J’s decision. Although the issues of ‘damage’ and ‘damages’ are discreet, many of the same arguments apply to both and so the issues will be dealt with in turn. This gives rise to three questions: must a comparison between life and non-existence be made?; if so, is such a comparison possible?; and finally, if so, should the courts conduct such a comparison or should they decline to do so because of the sensitive nature of the subject matter? It will be argued that the comparison is necessary, that legal principle leads to the conclusion that the comparison is possible, and that courts should therefore make the comparison and leave any ‘corrections’ deemed necessary because of the subject matter to the legislature.

(a) Is a comparison between life and non-existence necessary?

Negligent conduct is not actionable unless it causes damage or injury. Therefore in this case it was necessary for Alexia Harriton to show, in accordance with the compensatory principle, that she was in some way worse off as a result of Dr Stephens’ misdiagnosis. It was agreed by both parties that the compensatory principle applies in this case.

Generally, the compensatory principle does not mean a plaintiff must prove that their life as a whole is worse than it would have been if the negligent conduct did not occur; it will be sufficient to show

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49 Ibid 53.
52 Flemming above n 35, 216.
pain, suffering, or loss of the amenities of life.\textsuperscript{53} However, Alexia Harriton’s principal claim was for a
\textit{life with disabilities}. While some commentators have suggested it would have been possible for her
to sue for \textit{disabilities} alone,\textsuperscript{54} this was not the case pled.

Upon Crennan J’s construction, whether damage was sustained depends upon a comparison
between the plaintiff’s situation after the tort, and what the situation would be, but for the negligent
act. Because the basis of Alexia Harriton’s claim was that her mother would have aborted her, Alexia
Harriton therefore needed to prove that she would have been better off if she had never been born.
That this is the appellant’s burden of proof seems to be a point of agreement in all judgments.\textsuperscript{55}

\textbf{(b) Is a comparison between life and non-existence possible?}

The majority of the court concludes that no cause of action can exist because there is no legally
cognisable damage. Crennan J focuses on the impossibility of comparing a life with disabilities with
non-existence on a slightly different basis to that of Callinan J. Her Honour argues that: ‘there is no
present field of human learning or discourse, including philosophy and theology, which would allow a
person experiential access to non-existence... it cannot be determined in what sense Alexia
Harriton’s life with disabilities represents a loss, deprivation or detriment compared with non-
existence.\textsuperscript{56} Her Honour was careful to emphasise that ‘the practical forensic difficulty’ is not related
to any policy concerns about the value of life.\textsuperscript{57}

Hayne J emphasised that the ‘enquiry cannot be made in the abstract’\textsuperscript{58} and stated that the grievous
injury of a life with disabilities can only be considered an injury if compared to some alternate state
of being. Because Alexia Harriton could never have lived without disabilities, a comparison with a
‘normal’ person does not establish damage, and a comparison with non-existence is impossible. He
concludes that ‘because the appellant cannot ever have and could never have had a life free from the
disabilities she has that the particular individual comparison required by the law’s conception of
“damage” cannot be made... she cannot show she has suffered damage.’\textsuperscript{59}

Although Callinan J does not expressly refer to the compensatory principle in his reasons, his decision
‘on logic’ appears to be a statement that because there is no available comparator, Alexia Harriton
cannot be said to have suffered damage.

Two observations may be made about the majority’s judgment, one based on common sense and
another on legal principle.

\textsuperscript{53} Harriton (2006) 226 CLR 52, 84, Kirby J. See also: Dean Stretton, ‘The Birth Torts: Damages for Wrongful Birth and


\textsuperscript{55} Harriton (2006) 226 CLR 52, 82 (Kirby J), 103 (Hayne J), 130 (Crennan J). Callinan J does not discuss the compensatory
principle.

\textsuperscript{56} Ibid 126.

\textsuperscript{57} Ibid 127.

\textsuperscript{58} Ibid 104.

\textsuperscript{59} Ibid 105.
First, Crennan J’s reasoning is based on the fallacy that a judge must be able to personally experience an injury, or at least to hear expert evidence from a medical practitioner about the injury, in order to award damages in respect of that injury. As Stretton notes, this must amount to either a claim that one cannot experience their own non-existence, or that one cannot imagine what non-existence is like ‘from the inside’.60 The fact that a judge has not personally experienced an injury does not mean he or she cannot make a comparison and recognise the injury constitutes a damage. In relation to the second, Stretton notes that one need not be able to imagine what something is like (‘from the inside’) in order to compare it with something else, and gives the example of unconsciousness.61 Perhaps an even more apt example is that of profound disability; no medical expert has ever experienced such profound disabilities as those suffered by Alexia Harriton. Notwithstanding this fact, had Alexia Harriton’s injuries been sustained by a positive negligent act, such as mishandling during her birth, a court would have no issue awarding damages in respect of them.

Second, to suggest that courts are absolutely unable to countenance non-existence is, as Kirby J notes, undermined by the fact that ‘for some time, the courts have been comparing existence with non-existence in other legal settings.’62 His Honour notes a number of situations, including in cases involving withdrawal of treatment from newborns and the elderly,63 and the English case of Re A,64 in which the English Court of Appeal ordered that conjoined twins be severed, even though one would die. Courts in Canada have also allowed a plaintiff to recover for battery where a lifesaving treatment is carried out without their consent.65 These cases demonstrate that courts have implicitly weighed life against non-existence in a number of contexts. However, none of these decisions was made in the context of a negligence claim, and caution is therefore required in determining what weight they should carry.

For Crennan and Hayne JJ, the conclusion that there was no legally cognisable damage because the required comparison is impossible, also answers the question of whether quantification of damages is possible. In the reasons of Crennan J, this forms part of the obiter dictum, her Honour having already concluded that there was no duty of care. Her Honour concludes that the compensatory principle applies and states that it, like duty of care, ‘depends for its utility and execution on proof of the actual damage suffered.’66 Hayne J does not comment further on the specific assessment of damage point.

Kirby J is critical of the argument that damages are unquantifiable as a reason for dismissing the appeal. He notes that assessment of damages is always an exercise in approximation and that courts

60 Stetton above n 54, 986.
61 Ibid 987.
64 [2001] 2 WLR 480.
65 Ibid.
have assigned values to ‘intangible injuries and nebulous losses’. 67 Finally, he notes that difficulties with approximation should not defeat a claim where there is otherwise a cause of action. 68 Callinan J, while not expressly considering damages, seems to empathise with at least the last argument made by Kirby J, stating that ‘[a] court should not shrink ... from making the best approximations that they can well understanding that perfection or precision in any assessment of general damages ... is impossible.’ 69

With respect, it is submitted that Crennan J’s argument neither stands up to the criticism of Kirby and Callinan JJ, nor aligns with normal principles about assessment of damages. Moreover, even if quantification of damage is an issue in assessing general damages, the quantification of the special damages claimed is straightforward and as Kirby J notes, the impossible comparison argument ‘falls away completely’ in this respect. 70

(c) Should damage be assessed or quantified?
A comparison between life and non-existence is not impossible. Indeed, Kirby J conducted such a comparison, concluding it was ‘arguable that a life of severe and unremitting suffering is worse than non-existence.’ 71 A number of commentators have performed similar exercises. 72 However, simply because the comparison is possible may not mean the courts should engage in the comparison.

While courts have balanced life against non-existence in the past, as noted above, none of the cases referred to in support of the possibility of such a comparison occurred in a tort context. This is significant in two respects. First, in tort, damage is ‘the gist of the action’ and to find liability requires a finding that life itself, healthy or disabled, is a legal injury. Further, while the cases dealt with the comparison, none of them involved attributing a monetary figure to human existence. These differences bring into focus a number of policy concerns.

Notwithstanding the fact that none of the majority judgments rely expressly on policy considerations, strong opinions are expressed, especially in the judgment of Crennan J. In relation to the ‘value of life’, Crennan J opines that ‘it is odious and repugnant to devalue the life of a disabled person by suggesting that such a person would have been better off not to have been born’. 73 Her Honour emphasised that Alexia Harriton’s disabilities were not the extent of her humanity and that despite her disabilities, her life may be rewarding. Crennan J also noted problems which would arise in determining which plaintiffs were disabled enough to be considered better off dead. Her Honour finally discussed ‘pervasive inconsistencies’ which would exist between allowing wrongful life actions

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68 Ibid 79.
69 Ibid 111.
71 Ibid 85.
and statutes protecting equal treatment for disabled people.  

Crennan J seemingly returns to this argument in her concluding sentence, stating that ‘[l]ife with disabilities, like life, is not actionable’. By contrast, Kirby J argues that while sanctity of human life is an important legal principle, it is not absolute and that to state a wrongful life action offends the principle is symptomatic of a misunderstanding of the character of the action.

Concerns are also raised and argued for both sides in relation to the potential for children to sue their parents, the potential for a successful wrongful life action to increase practice of defensive medicine in the counselling of abortion, and issues relating to raising the standard of medical practice.

Given the arguments made above in favour of courts strictly applying legal principle to reach an outcome, it may appear that the logical conclusion is that courts should ignore these policy considerations. However, it may also be argued that the complex moral questions involved in resolving this case mean that courts should decline to recognise the action and leave it to the legislature. Indeed, Callinan J opines that ‘[a] case of this kind is so different from any other, and goes so much to the heart of diverse theological and philosophical opinion, that the courts should leave it to the legislators to state the law to govern it.’ This argument holds some weight, given that the actual exercise of comparing life with non-existence is likely to turn on judges’ personal religious, moral and philosophical views.

However, as Kirby J notes, ‘courts are continually concerned with such line drawing’. Courts are called upon to make the best decision they can, and it is inevitable that personal views will influence the conclusions reached. In Cattanach v Melchior, the court expressly left policy concerns to one side and determined to resolve the matter by reference to legal principle. The fact is that courts cannot simply decline to decide a matter before them and leave its resolution to the legislature. In fact, to reject a cause of action where application of legal principle would point to liability is tantamount to a decision based on policy alone. It is submitted that courts should, as they did in Cattanach, recognise the action and allow the legislature to introduce legislation if the result offends public morality.

5. Conclusion

Crennan J’s leading judgment in Harriton v Stephens, relied on a technical legal analysis to reject Alexia Harriton’s claim. It is submitted that Crennan J’s conflation of the duty and damage elements

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74 Ibid 129-130.
75 Ibid 135.
76 Ibid 125 (Crennan J), 91 (Kirby J).
77 Ibid 112 (Callinan J).
78 Ibid 113 (Callinan J), 100 (Kirby J).
79 Ibid 113.
82 Indeed, after the decision in Cattanach, several Parliaments in Australia enacted legislation prohibiting claims for wrongful birth: see for example Civil Liability Act 2003 (Qld).
of negligence was erroneous and that the finding that the law could not contemplate the differences between life and non-existence was not based in legal principle. Undoubtedly, the decision was a difficult one, involving consideration of concepts which are usually the subject of philosophical or theological rather than legal enquiries. Nonetheless, it is submitted that in such circumstances, it is the court’s role to resolve the case on legal principle alone, even if the outcome is unpalatable. Therefore, it is submitted that the better view in Harriton is that taken by Kirby J, following a strict application of legal principle and compensating Alexia Harriton for her life with disabilities.