

This paper was written many moons ago in 2011 for the *KCL Moral Values and Private Law Conference I*. I suspect neither of us would sign up to everything here now (though that there is a distinction in tort law between suffering damage and being worse off than would otherwise have been still seems correct). I have posted it here as I (Steel) make reference to it elsewhere.

Suing for Damaged Existence

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Introduction

It is possible to be born in such a way that a necessary condition of one's existence is another's negligence. Sometimes, this negligently caused existence is one of severe disability. In what have been termed cases of *wrongful life*, courts have had to decide whether such negligence is actionable. Jurisdictions disagree. The disagreement is partly a result of different resolutions to the tension which such cases generate. On the one hand, there are seemingly powerful doctrinal and theoretical arguments against the idea that sense can be made of an individual being *harmed* or *damaged* by being brought into existence. On the other hand, even given these arguments, the moral intuition remains that a severely disabled child whose existence was a result of another's negligence has been wronged by that person.¹

In this paper we attempt to resolve this tension and show that there are both philosophical and legal grounds for thinking that there ought to be a tort of wrongful life in English law.

In section 1, after setting out more precisely what a wrongful life claim is, we distinguish among several reasons why wrongful life claims have been rejected by the courts, and focus on the most powerful one: what we call the *counterfactual non-existence* argument. We contend that this argument is flawed. In section 1.i, we show why the argument is not flawed for the reason asserted by most commentators, namely that it is in fact intelligible to ask whether an individual is better existing than never having existed. In section 1.ii we show how it is possible to wrong someone without making them *worse off*. In section 1.iii, we establish that it is possible to commit certain torts without making the victim of the tort worse

¹ D. Velleman, 'Persons in Prospect', *Philosophy & Public Affairs* 36, 221, 276 (2008): "A child to whom we give a lesser initial provision will have been wronged by our lack of due concern for human life in creating him"

off. We then suggest in section 1.iv that it would be desirable to expand the scope of torts actionable without proof that the victim is worse off to the tort of negligence. Finally, in section 1.v, we show that some claimants in wrongful life cases ought to fall within this expanded tort of negligence.

Section 2 of the paper is directed to a remedial question: if we should say that a tort has been committed against the wrongful life victim, is she entitled to any compensation in respect of it? It seems to be an assumption of courts in these cases that in order to access a remedy of more than nominal damages, the victim must show that she is worse off than if the tort had never happened. We argue that this is not true in cases where the damage caused is constitutive of a right's infringement and that this holds for the right infringed in wrongful life cases.

1. Grounding a tort of wrongful life

A wrongful life claim² is a claim for damages, brought by a (severely) disabled child, generally against a medical professional,³ alleging that the latter's negligent failure to advise the child's mother of the risk, or presence of disability, has caused his or her existence in a (severely) disabled state.⁴ In cases of this type, the child alleges not that he or she would have been born without disability had the professional not been negligent (the disability being unavoidable), but rather that he or she *would not have existed at all*, because his or her mother would have had an abortion if properly advised.

These claims have been rejected at common law⁵ in England and are now likely barred by statute.⁶ By and large, they have been unsuccessful elsewhere too.⁷ Many reasons have been adduced by courts and commentators supporting their failure. Four common reasons are (i) that recognition of a claim devalues disabled life in so far as it is essential to such a claim that

² Courts in common law and civil law jurisdictions have had to consider these claims. For recent comparative overviews, see: Grubb, Laing, McHale (eds.) *Principles of Medical Law* (OUP: 2010), pp. 284-295; Ruda, *'I Didn't Ask to be Born': Wrongful Life from a Comparative Perspective* (2010) 2 *Journal of European Tort Law* 204; Steininger, *Wrongful Birth and Wrongful Life: Basic Questions* (2010) 2 *Journal of European Tort Law* 125

³ Other defendants are conceivable: for example, the child's mother, or an infected third party who rapes the child's mother.

⁴ The first suits seem to have been brought in respect of the stigma of bastardy: *Zepeda v Zepeda* (1963) 190 NE 2d 849 (Illinois).

⁵ *McKay v Essex Area Health Authority* [1982] QB 1166 (CA)

⁶ Congenital Disabilities (Civil Liability) Act 1976, s.1(1), s.1.(2)(b) and s.(4)(5). But it is certainly arguable that a wrongful life claim (contrary to the policy behind the Act) could slip through via s.1(2)(a) or s.1A, on which see Kennedy and Grubb, *Medical Law* (Butterworths, 2000), 1552

⁷ See Ruda pp.205-207 (above, n.1) for a comprehensive overview. The most recent rejection in the Common law is a decision (by 6-1 majority) of the High Court of Australia: *Harriton v Stephens* [2006] HCA 15. Some notable exceptions: California, New Jersey, Washington have allowed claims for the child's vast medical expenses; Israel (life can be worse than non-existence); France before *la loi anti-Perruche*.

severely disabled life is not worth living; (ii) that the sanctity of life or some other reason requires one to take the view that life is always a benefit;⁸ (iii) that if claims against doctors are accepted, then it will be difficult to resist a claim against the child's parents;⁹ (iv) that the defendant is not a cause of the child's disability. This paper has some implications for the first claim and second claim though it takes no stand upon the third (hence it may not justify actions against parents). It will become clear in section 1.v that the fourth is irrelevant: on the *but for* test of causation,¹⁰ the doctor is a cause of the child's existence in a severely disabled state, which as we suggest in section 1.iv is the damage which forms the basis of the claim.

Rather, we focus on the most powerful¹¹ argument made against there being a tort of wrongful life, which we call the *argument from counterfactual nonexistence*. In *McKay v. Essex Area Health Authority*, for example, it was stated: 'The court ... 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'.¹² Similarly, in the American case of *Gleitman v. Cosgrove*, for example, the court claimed: "[t]he infant plaintiff would have us measure the difference between his life with defects against the utter void of non-existence, but it is impossible to make such a determination."¹³

The argument is as follows:

- 1) In order to ground an action in the tort of negligence, the claimant must show damage.
- 2) Showing damage requires the assessment of the counterfactual of what would have happened absent the defendant's wrongful conduct.
- 3) Such an assessment, in wrongful life cases, requires the court to ask whether the claimant would have been better off not existing than existing in a severely disabled state.
- 4) Such an assessment is impossible.
- 5) Therefore, the tort of negligence cannot be established in wrongful life cases.

We suggest, in section 1.ii, that the problem with this argument is that (2) is false. Much philosophical and legal discussion, however, has centred around premise (4). In the following section, we show why premise (4) is justified.

1.i The non-comparability of life with non-existence

⁸ See e.g.: *Berman v Allan* 404 A. 2d.8, 12-13 (N.J., 1979)

⁹ See e.g.: *Harriton*, 226 CLR 52, at paras. 205, 250 (Callinan J concurring).

¹⁰ Accepted by all European legal systems: Winiger, Koch, Koziol, Zimmermann (eds.), *Essential Cases on Natural Causation*, Digest of European Tort Law Vol. 1 (2007, Springer).

¹¹ See, e.g. S. Todd, 'Wrongful Conception, Wrongful Birth, and Wrongful Life', 27 *Sydney Law Review* 525, 541 (2005) describing it as the "core objection".

¹² *McKay v. Essex Health Authority*, above n.4; see also

¹³ *Gleitman v. Cosgrove*, 49 N.J. 22, 277 A.2d 689 (1967).

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Many philosophers and legal commentators have given arguments that entail that premise (4) should be rejected.¹⁴ It has been argued that the necessary comparison between life and non-existence *can* be made. It is intelligible, so it is claimed, to say that a person can be better off not-existing than existing. If this is so, then wrongful life cases would not pose any significant new theoretical issue. The court could assess whether the claimant is better or worse off than she would have been had she not existed. If she is better off living, then she has been benefited, and no compensation should be awarded. If she would have been better off never having existed, then she has been made worse off by being brought into existence, and compensation should be awarded.

In this section we argue in favour of the courts' claim that the comparison between life and non-existence is unintelligible. In order for the comparison to be intelligible, it must make sense to attribute a certain level of wellbeing to a non-existent person: there must be a fact about how well-off a person is if they don't exist. We argue that it is a mistake to attribute wellbeing levels to a non-existent people.

The issue has been a matter of debate in the philosophical literature. The central metaphysical problem with attributing wellbeing levels to nonexistent people is the obvious one: nonexistent entities cannot have any properties, and therefore cannot have the property of having a wellbeing level.¹⁵ Let us call this the 'no subject' problem.

Despite this problem, some philosophers have argued that non-existent people can have a wellbeing level. For example, Nils Holtug argues as follows:

Suppose that a person exists but that no positive or negative values befall her. Since no positive or negative values befall her, her life has zero value. Likewise, no positive or negative values befall a person who does not exist. For the same reason, then, we may assign zero value to her non-existence.¹⁶

A person in a lifelong coma, for example, might be an example of someone who has no positive or negative values befall her. Because of this, we might say that this person has had a neutral life: one that is neither good nor bad overall. Similarly, Holtug thinks, because non-existence involves the complete absence of goods or bads, a person's wellbeing is neutral if she doesn't exist.

¹⁴ For example: D. Benatar, 'The Wrong of Wrongful Life' (2000), *American Philosophical Quarterly* 180; J. Feinberg 'Wrongful life and the counterfactual element in harming' (1986) *Social Philosophy and Policy* 158-9; F. Feldman (1991), 'Some puzzles about the evil of death' 50 *The Philosophical Review* 210; N. Holtug, 'On the value of coming into existence' (2001) 5 *The Journal of Ethics* 361-384; M. Roberts, 'Can It Ever Be Better Never To Have Existed At All? Person-Based Consequentialism and A New Repugnant Conclusion' (2003) 20 *Journal of Applied Philosophy* 159.

¹⁵ This argument is made, for example, by: J. Broome, *Weighing Lives* (OUP, Oxford 2004) 66-7; K. Bykvist, 'The benefits of coming into existence' (2007) 135 *Philosophical Studies*.

¹⁶ Holtug (n 14) 381.

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However, this argument is not sound. Consider the following analogous argument: What it is for a business to break even is for it to lack any profits, and to lack any losses. The King of France's business, because it is non-existent, lacks any profits, and lacks any losses. Therefore, the King of France's business broke even.

What Holtug and others have confused is the difference between having a neutral, or zero amount of, a property, and lacking that property altogether. Numbers have no weight; but that does not mean that they have weight of 0 Newtons. Rather, they lack the property of 'weight' altogether. Similarly, it's not true that Gordon Brown, were he not to exist, would have a height of 0m; rather, he would have no height (and no other properties) at all.

Aside from the metaphysical issues, there are powerful moral arguments against the view that non-existent people have wellbeing levels. First, this view cannot accommodate certain sorts of value. It is at least somewhat plausible that one factor in what makes one's life go well is one's average wellbeing over all those times at which one is alive. For non-existent people, there is no time at which they are alive. So their average wellbeing is undefined; if so, then the overall goodness of their lives are undefined; and, if so, then they do not have wellbeing levels at worlds in which they do not exist. So, if one wants to claim that persons at wellbeing levels at worlds in which they do not exist, one must make an ad hoc denial of the idea that one's average wellbeing is a contributing factors to one's overall lifetime wellbeing.

Second, if persons have a neutral wellbeing level at worlds in which they do not exist, then any action, such as contraception, which deliberately prevents persons from coming into existence, is a harmful action. In using contraception, one deliberately acts such that a person has a lower level of wellbeing than they would otherwise have had (assuming that they would live a worthwhile life, had they been born). One therefore harms that person.¹⁷ Moreover, this harm is severe, because the loss the possible person suffers is great: the harm is greater, for example, than the harm of killing a young child, because more years of expected happy life are lost.

That an action is harmful is normally a strong moral reason to refrain from performing that action, when there are available, less harmful, actions. So, on the account we are attacking, there is strong moral reason not to use contraception, because one always has the option not to use contraception. This strong moral reason derives from the harm that a possibly existent person suffers. This is an absurd consequence of the view.

The defender of the intelligibility of the comparison cannot respond to this argument by claiming that harms to merely possible people have no moral force. If so, then, aside from appearing ad hoc, the account is robbed of its point. If the life non-existence comparison is not of moral relevance when applied to the issue of contraception, it should not be of moral relevance in wrongful life cases either, and so the central argument, that certain people are made worse-off, in a morally relevant sense, by being brought into existence, cannot be made out.

¹⁷ Holtug (n 14) 375 is explicit about this consequence.

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Given that there are strong arguments against the view that the life / non-existence comparison can be made, we should wonder why the argument could be made to the contrary. A partial explanation is lack of clarity on the distinction between having a neutral welfare level, and having no welfare level at all, as discussed above. A further explanation is that two different comparisons have been conflated: it has been assumed that, if the harm of *death* is intelligible, then the harm of never having been born must also be intelligible.

However, the idea that death is a harm does not suffer from the same problems as those described above. There is no ‘no subject’ problem: when we compare how well a person’s life went with how well that person’s life would have gone had she died at a later date, we do not need a comparison between life and non-existence. Rather, we can compare two whole lives: we compare the value of the person’s life, given that she died when she did, with what the value of her life would have been, had she died at a later date.¹⁸ And there are no bizarre normative consequences of this view.

The two problems have a structural similarity, however. It is commonly understood that there are three ‘levels’ of value: (i) value for a person at a time; (ii) value for a person; and (iii) value *simpliciter*.¹⁹ Death is can a harm at the second ‘level’ of value: death can harm for someone even though there is no time at which it harms them, because it makes a person’s life overall go worse. Similarly, the bringing into existence of lives full of pain and suffering can make the world worse *simpliciter* even though there is no-one whom is made worse-off. A possible explanation for the confusion over the issue of life / non-life comparability is that we naturally confuse the idea that bringing into existence a child with a terrible life makes the world worse with the different idea that it makes *the child’s* life go worse.

In this section, we have argued that the relevant life / non-life comparison is unintelligible. If there is a tort of wrongful life, then the argument must be made out in a different way. We will now explain why the *counterfactual non-existence* argument can be rejected, by rejecting premise (2), that damage requires a counterfactual comparison.

1.ii. Wronging without making worse off: some philosophical foundations

‘Harm’ or ‘damage’ is often understood to have a univocal meaning, cashed out in comparative terms, as follows:

The Comparative Account of Damage: If A acts such that B is worse off than B would otherwise have been, then A damages B²⁰.

¹⁸ See, e.g. Feldman (n 14) and Broome (n 15) for discussion of this idea.

¹⁹ Broome (n 15) 63-6.

²⁰ Eloquently supported in B. Bradley, ‘Analyzing Harm’ (unpublished paper)

In this paper, we do not claim that the *Comparative Account* of damage is *incorrect*. It does flesh out one sense in which one person can damage another. However, we do claim that it is a mistake to think that the *Comparative Account* fleshes out the *only* sense in which one person can damage another. Our claim is that there is *another* important sense of ‘damage’.²¹ We define this as follows:

The Causal Account of Damage: If A causes B to be in a bad state, then A damages B.

On this account, it does not matter what would have happened had A not acted as she did. What matter is what *actually happened*: what events A caused to occur. The key normative implication of this view is that, because causing bad states is a type of damage, the fact that a certain action would cause someone to be in a bad state provides a moral reason against performing that action. This account does not need a precise definition of what counts as a ‘bad state’ in order to be functional – the idea of a bad state can be fleshed out with reference to paradigm examples, such as physical pain, emotional suffering, severe disability, and disease²².

In typical cases of damage, the *Comparative Account* and the *Causal Account* give the same verdict. For example, if A punches B, A usually both causes B to be in a bad state (the state of pain), and also makes B worse off than she would otherwise have been (because B would not have suffered this pain had she not been punched). This can make it difficult to distinguish the two accounts. But there are examples that seem to motivate decisively the idea that the *Causal Account* also provides a sense in which one person can damage another.

Consider the following example:

Torture

Torturer is torturing Victim. He would have done so for the rest of the day, but then Eager interrupts and asks to take over. Eager starts torturing Victim but, being inexperienced, does so less viciously than Torturer would have done, and so Victim is in less pain than she would have been.

²¹ Similar suggestions have been made by E. Harman ‘Can we harm and benefit in creating?’ (2004) 18 *Philosophical Perspectives* 89-113 and S. Shiffrin ‘Wrongful life, procreative responsibility, and the significance of harm’ (1999) 5 *Legal Theory* 117-148. See also S. Perry, ‘Harm, History, and Counterfactuals’ 40 *San Diego Law Review* (2003)

²² See JJ Thomson, ‘Still More on the Metaphysics of Harm’ 82 *Philosophy and Phenomenological Research* 436, 438 (2011)

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On its own, the *Comparative Account* cannot make sense of this case. According to the *Comparative Account*, Eager *benefits* Victim by torturing her; and Eager would have damaged Victim had he *not* tortured Victim. This is the wrong result. In *Torture*, it seems clear that Eager damages Victim by torturing Victim, and that this damage constitutes a reason against the action, available to Eager, of torturing Victim. The reason why Eager damages Victim is because Eager causes Victim pain. The *Causal Account* gets the right result.

As the *Torture* example shows, ‘causal’ damage generates weighty reasons against action. We regard these actions as sufficient to ground a right against being damaged, where ‘damage’ is understood in the causal sense. This makes intuitive sense of the cases above. Moreover, understanding the duty not to damage others in terms of rights helps to resolve a puzzle that the causal account of damage generates.

The *Causal Account* requires one, sometimes, not to undertake courses of action that make victims better off (in the comparative sense): in these cases, this means that the victim of the damage will not regret that the perpetrator acted in the way that she did; the victim would not have wanted the alternative to happen. This might seem puzzling: surely morality is about protecting the victim’s wishes; if the victim does not desire that the perpetrator did not act as she did, how could the perpetrator’s act be wrong? Fleshing out the duty not to damage in terms of rights helps to explain this puzzle.

Rights partly constitute a person’s special, inviolable, moral standing. They ground special normative relationships: paradigmatically, they ground restrictions on action such that one may not perform a certain action, even if it is for the greater good of others.²³ An extension of this idea is that there are certain things that one may not do to someone, even though it is for the greater benefit of the person concerned. This idea is not perverse; rather, it is necessary in order to fully respect the inviolability of an individual’s rights. This can be seen in the following case, a variant of which is suggested by Elizabeth Harman.²⁴

Rape

Soldier meets Victim. Soldier knows that if he repeatedly rapes Victim, she will conceive, and have a child that she would not otherwise have had. He knows that the benefit to her of having the child will be so great that it will outweigh the pain and humiliation of having been raped (a fact that she would later acknowledge).

It seems clear that it is not permissible for Soldier to rape Victim, even if he did so with the intention of benefitting her, in full knowledge that his action would benefit her. Victim has a

²³ See, e.g. R. Dworkin (1984) ‘Rights as Trumps’, in Waldron, J., (ed.) *Theories of Rights*, Oxford University Press.

²⁴ Harman (n 21) 99.

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right against damage, which may not be violated. The beneficial consequences are not sufficient to outweigh that prohibition.

The above examples give grounds, therefore, for thinking that both the *Comparative* sense of ‘damage’ and the *Causal* sense of ‘damage’ are morally relevant, and ground reasons against action. Persons have rights against damage, in this sense; violation of that right is morally wrong.

1.iii. Torts actionable without proof of comparative damage

The law agrees that it is possible to wrong someone without making them worse off. In this section, we illustrate how the law’s recognition of this fact brings us close to the structure of a wrongful life case, laying the foundation for our argument that the law ought to recognise the possibility not merely of *wronging* someone though not making them worse off, but also of *wronging them by damaging them*, though not making them worse off.

The most obvious legal instance of the wrongs without comparative damage are torts actionable *per se* - for example, torts involving a trespass to someone’s person: assault, battery and false imprisonment. In each of these, the claimant’s cause of action is established (the tort is “actionable”) without proof of damage (hence “per se”).²⁵ Whether C is worse off is therefore irrelevant, so far as the existence of a cause of action is concerned.

That a cause of action exists in torts actionable *per se* without C showing that C is worse off, also seems to hold true in the case where D actually makes C better off than C otherwise would have been. This emerges quite clearly from the reasoning (though not raised directly by the facts themselves) of some Justices in the recent case of *Walumba Lumba v Secretary of State for the Home Department*.²⁶ The appellants had been detained pursuant to powers granted to the Secretary of State under the Immigration Act 1971. The decision whether to detain them was deliberately taken, in breach of a public law duty, by reference to a secret policy which conflicted with the Secretary of State’s published policy concerning the circumstances in which powers to detain immigrants would be exercised. It was clear, however, that even had the Secretary of State complied with his public law duties, and thus the published policy been applied to the appellants, they would have been imprisoned in any

²⁵ For recent application of this “hornbook law”, as Lady Hale put it, see *Lumba v Secretary of State for the Home Department* [2011] UKSC 12; *Kambadzi v Secretary of State for the Home Department* [2011] UKSC 23

²⁶ [2011] UKSC 12

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case: they were no worse off. This made no difference to liability, which depended simply upon the *fact* of imprisonment, and not, additionally, upon any sort of counterfactual.²⁷ If liability depends simply upon the *fact* of imprisonment, however, it is difficult to see how making someone *better off* (requiring a counterfactual) would avoid liability.

Finally, consider a hypothetical case which is structurally similar to the wrongful life case: D unintentionally confers a (substantial) benefit²⁸ upon C through wrongful conduct.

Kiss X and Y, strangers, are standing at the bus stop. X gives Y a kiss. This startles Y and knocks him out of the way of an oncoming negligently driven bus which, *wholly unbeknownst to X*, was approaching from behind them.

Just like in *Walumba Lumba*, the tort – here, battery - is committed by the *fact* of direct non-consensual application of force²⁹; what happens later has no bearing on whether the cause of action exists. X legally wrongs Y: the kiss constitutes the tort of trespass: the direct non-consensual intentional interference with a person's body.

This analysis of *Kiss* seems clearly correct but some further arguments may be offered. One is that no available defence obtains. Intentional infliction of force upon a non-consenting person can avoid being trespassory only if a valid defence obtains. The only at all plausible defence obtaining here would be *necessity*. The boundaries of this defence are unclear. An example would be where D performs a surgical operation involving an incision on C, unconscious, in order to save C's life, where C's life was in imminent danger. Other things being equal, the non-consensual infliction of force upon C may be justified where D acts in order to save C's life from imminent peril. But it has never been suggested that D may take advantage of this defence where he does not act *in order to* save C's life. Indeed without those good intentions, it would seem clear that D would not only be subject to an action in trespass, but also to criminal sanction.³⁰

A second consideration in favour of the analysis of *Kiss* is the law's treatment of the following, different, type of case. Suppose C, a resolute Jehovah's Witness, currently of sound mind, will die in one hour if untreated with a blood transfusion. C informs the doctor firmly that under no circumstances is C to be given the transfusion. Nonetheless, once C falls unconscious, D performs the life-saving transfusion. After regaining consciousness, C is

²⁷ *Ibid per* Lady Hale; Lord Dyson; Lord Kerr

²⁸ This is not to say that the wrongful life victim is *better off* existing than not; that is just as incoherent as their being worse off. It is only to say that causing someone to exist can confer *goods* upon them.

²⁹ For a similar analysis that the simple application of force is a (in their terminology *prima facie*) wrong: see M. Dempsey, J. Herring, 'Why Sexual Penetration Requires Justification', 27 *Oxford Journal of Legal Studies* 467, 473: "The use of physical force on another person is a *prima facie* wrong".

³⁰ Pursuant, for example, to the Offences Against the Person Act 1861, s.20. Of course, the criminality of the conduct does not necessarily lead to its also being tortious.

saddened but nonetheless goes on to live a fairly happy life. It is clear that a trespass is committed against C, even if C is no worse off.³¹

A third consideration in favour of the analysis of *Kiss* is more general in nature. It points to the perceived rationale of trespass to the person.³² Tony Weir writes of the tort's function being: "to protect and vindicate the basic rights of the citizen against deliberate, even well-meaning, invasion, whether or not any damage is caused."³³ The idea, then, is that it is possible to violate someone's right to corporeal integrity without 'damaging' them. In other words, since the claim is founded upon the violation of a right, whether the claimant is worse off is of much less significance. We have given plausibility to that idea above.

1.iv Wronging without making worse off: the tort of negligence

Clearly, the wrongful life claimant is not the victim of a trespass: she can hardly claim to have had direct force applied to her person by the defendant. Any claim would have to be in negligence.³⁴ Yet, as we have already noted, it would seem that "a claim in tort based on negligence is incomplete without proof of damage. Damage in this sense is an abstract concept of being worse off, physically or economically."³⁵

In fact, it is possible to have a cause of action in negligence without showing that one is worse off. This occurs in cases of causal overdetermination.³⁶ In *Bailey v Ministry of Defence*³⁷ the claimant aspirated her vomit, causing cardiac arrest and a serious brain injury. She had been negligently allowed by the defendant to become particularly weakened after a non-negligently performed operation. The question was whether the amount of weakness added to her condition by the defendant's negligence made any difference to whether she suffered a brain injury. In other words, was the negligence a but for cause of the brain injury? It was impossible to say. However, the claimant had shown a *material contribution* of the defendant's negligence to the injury: though it was not a *necessary* condition of the injury, it was, arguably, a necessary element of a set of conditions *sufficient* for the injury.³⁸ Whatever

³¹ See S Michalowski, "Trial and Error at the End of Life: No Harm Done?" 28 *Oxford Journal of Legal Studies* 257 (2008)

³² However, Weir erroneously thinks this rights-base to be a peculiar function of trespassory torts, as opposed to all, or most, torts.

³³ T. Weir, *Tort Law* (Oxford, 2006) p.134

³⁴ Though this is denied by R. Perry, "It's a Wonderful Life" 93 *Cornell Law Review* 329 (2008) where it is argued that a contractual claim for misrepresentation should form the cause of action.

³⁵ *Rothwell v Chemical and Insulating Co.* [2008] 1 AC 281 *per* Lord Hoffmann

³⁶ See also, A. Beever, *Rediscovering the Law of Negligence* (Oxford, Hart 2007) 433

³⁷ [2008] EWCA Civ 883

³⁸ Here we draw on the Necessary Element of a Sufficient Set analysis of causation developed in R.W. Wright, 'Causation in Tort Law' (1985) *California Law Review* 1735. This will no doubt infuriate some. For a recent philosophical defence of it: M. Strevens, 'Mackie Remixed', in J.K. Campbell, M. O'Rourke (eds) *Causation and Explanation* (MIT Press, 2007)

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the correct causal analysis, the point is that the claimant had a cause of action in negligence without demonstrating that she was any worse off as a result of the defendant's negligence.³⁹

Another example is *Jobling v Associated Dairies*⁴⁰ where C had been negligently injured by D employer in 1973. Later C, before trial in 1976, independently succumbed to a debilitating spinal disease. C was no worse off as the losses would have occurred in any event. It would be odd to say that C had a cause of action in 1973 but later lost it sometime before 1976. We *know* in 1973 that the claimant was *wronged* without questioning whether the losses would have occurred anyway.

The best explanation⁴¹ of this phenomenon is that individuals have rights against physical damage in our causal sense. In moral terms, it is surely uncontroversial to suggest that one has a right not to be subjected to physical injury – a bad state - by another's negligence. The reason for viewing this as a *right* is either that our interest in being free from severe suffering is sufficiently serious as to justify the imposition of a duty upon others not negligently to cause it⁴² or that negligently causing another severe suffering is inconsistent with sufficient respect for them as a person.⁴³ In either case, as we say above, the qualification as a *right* indicates that breaching the duty correlative with the right requires special justification, above and beyond merely conferring greater good to that person or others.

Following Professors Beever⁴⁴ and Stevens,⁴⁵ we accept that English law vindicates this moral right in conferring a legal power to demand damages for breaches of duties of care not to cause physical damage: the legal right not negligently to be caused physical damage to one's person reflects the moral right not negligently to be caused physical damage to one's person. This interpretive claim (that the law here claims to reflect morality) gains plausibility from a number of considerations: the normative language of rights and duties used in judicial decisions;⁴⁶ the probable historical origins of the duty of care concept in English law in the writings of seventeenth century natural lawyers;⁴⁷ and the ability of rights-based considerations to explain the irrecoverability of certain forms of loss.⁴⁸

It should be possible for a cause of action to arise for the infringement of the right not to be negligently caused physical damage to one's person, when D in fact causes C to suffer

³⁹ Further examples can be found in J. Stapleton, 'Choosing What We Mean By Causation in The Law' (2008)

⁴⁰ Discussed further below.

⁴¹ Another would be to say that one has a right not to be unreasonably risked damage and that violation of that right gives rise to a cause of action. McBride, for example, takes the view that the rights protected by the tort of negligence are rights not to be unreasonably risked damage. N. McBride, 'Duties of Care, Do They Really Exist?' 2004 *Oxford Journal of Legal Studies* at

⁴² J. Raz, *The Morality of Freedom* (Oxford: Clarendon, 1986).

⁴³ J. Feinberg 'The nature and value of rights' (1970) 4 *Journal of Value Inquiry*

⁴⁴ A. Beever, *op cit*.

⁴⁵ R. Stevens, *Torts and Rights* (Oxford, 2007), 329 *et seq*.

⁴⁶ See, for example, *Chester v Afshar* [2005] 1 AC 134, at [87] *per* Lord Hope: "the function of the law is to enable rights to be vindicated".

⁴⁷ D. Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford, 1999) at X; D. Ibbetson, 'Natural Law and Common Law' (2001) 5 *Edin LR* 4

⁴⁸ N. Jansen, 'Duties and Rights in Negligence: A Comparative and Historical Perspective on the European Law of Extracontractual Liability' (2004) 24 *Oxford Journal of Legal Studies* 443, 444

physical damage, without then asking whether C is worse off. In other words, a cause of action should arise where D negligently causes C to be in the bad state of physical damage.⁴⁹ The main argument for this is that it is correct to say that at the point at which C is negligently subjected to physical damage, C's right has been infringed or, the same thing, that C is the victim of a wrong.⁵⁰ Thus, if C is negligently run over by D with the result that C's leg is broken, C is the victim of a wrong. If, as things turn out in the well-worn hypothetical, C suffers a broken leg, but is thereby saved a trip on a doomed aircraft flight, C remains *wronged*, if not (possibly) *worse off*.

A secondary argument is that recognition of a cause of action simply upon violation of the right not to be negligently placed in the bad state of physical damage is supported by an analogy with trespass to the person. If, as argued above, C has a cause of action in trespass to the person without showing that he is worse off, why not also in negligence? This question has especial force if we allow, as we should,⁵¹ the possibility of negligent trespass to the person. Furthermore it is unclear why victims of negligent causation of a physical damage who are no worse off are less deserving of the potential expressive function of the law of torts – of the ability of having it publicly declared that the defendant is a wrongdoer by virtue of having a cause of action – than victims of trespasses.

1.v. Wronging without making worse off: wrongful life

In the preceding discussion, we saw that there can be wrongs which do not make anyone worse off, and that this phenomenon, already recognised by the trespass torts, ought to be recognised in the tort of negligence. We now show how this analysis would work in wrongful life cases.

First, it is clear that the doctor's negligence causes the claimant to be in a bad state. The disability in question, which involves not only physical impairment but also physical and emotional pain, clearly qualifies as a bad state. It is equally clear that the doctor's negligence qualifies as a cause: were it not for the doctor's negligence, the disability and suffering would not exist; this qualifies the doctor's negligence as a cause on the *but-for* test of causation.

Second, the bad state is protected by the existence of a right. We could say that the causation of the bad state – the severe disability - ought to be protected by the right not negligently to

⁴⁹ The analysis is akin to that of J. Stapleton in "Cause-in-Fact and the Scope of Liability for Consequences" (2003) 119 *Law Quarterly Review* 388, where she distinguishes between causation of injury, and actionable damage. The claim here is that at the point at which *injury* is suffered, a right has been violated and there ought to be a cause of action. See also M. Stiggebout, 'The case of 'losses in any event': a question of duty, cause or damages' (2010) 30 *Legal Studies* 558, 564

⁵⁰ For a similar, but flawed argument, see Beever, *Rediscovering the Law of Negligence*, 433

⁵¹ McBride and Bagshaw, *Tort Law* (3rd ed., 2008) at

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be caused physical non-comparative damage. However, if it is too distorting to consider the child's disability as a physical damage within or by analogy to categories of physical damage currently recognised,⁵² then it would seem uncontroversial to say that there *ought* to be a right, protected by the law of tort, not negligently to be caused to be in a state of severe disability.⁵³ The doctor's negligence, which violates one or both of these rights, constitutes a wrong.

One objection needs to be met here.⁵⁴ First, it may be puzzling how the doctor's wrong could constitute a rights violation: the claimant did not exist when the doctor negligently acted; and non-existent persons cannot have rights. There was no existing person to suffer the rights violation, so no-one could have had their rights violated. This seems to be the basis of Professor Beever's rejection of wrongful life claims:

“Only those who are born alive possess rights. Accordingly, just as there is no right not to be aborted, there can be no right to be aborted. Therefore the birth of the claimant was not a violation of its rights.”⁵⁵

This objection suffers from a confusion about when the violation of a right occurs. Normally, the *act* of violating a right occurs at the same time that the violation is *suffered*: if A punches B, for example, A's act occurs at the same time as B suffers the rights violation. This means that, in paradigmatic cases, it is unclear whether a rights violation occurs when the *act* occurs or when the *suffering* of the violation occurs. The above objection assumes that the rights violation occurs when the act occurs. But other examples show that this is mistaken: the rights violation occurs when the violation is suffered. Consider the following example. If A leaves a bear trap on his land, which, ten years later, B walks into, suffering grievous injury, it is clear that the violation occurs at the time that B suffers the injury. Indeed, if B is only five years old, then B was not a rights-bearer at the time of A's action; the above objection would also provide an objection to the claim that, in this example, B's rights have been violated.

What is of moral relevance is whether the victim is a rights-bearer *at the time the violation is suffered*, not whether the victim is a rights-bearer when the perpetrator's act takes place. Wrongful life cases do not provide any interesting new issue in this regard.

2. The Remedial Consequences of a Tort of Wrongful Life

⁵² On how the courts have stretched the concept of physical injury: D. Nolan, *New Forms of Damage in Negligence* (2007) 70 MLR 59

⁵³ See also B. Steinbock, 'Wrongful Life and Procreative Decisions' in M.A. Roberts, D.T. Wasserman (eds.) *Harming Future Persons* 155 (2009, Springer).

⁵⁴ The objection was suggested to us in conversation by Professor Ibbetson.

⁵⁵ A. Beever, *op cit.* 386. Cf. R. Stevens, *Torts and Rights*, 75, 186

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So far the discussion has been directed towards showing that English law ought explicitly to extend the scope of torts actionable without demonstration that C is worse off to negligence in the way outlined and that this expansion should therefore include the case of wrongful life.

This part describes the current position on whether C must show that she is worse off in order to be entitled to more than nominal compensation in respect of a personal injury caused by D. The discussion will show that it is not clear as a matter of authority that C's damages for pain and suffering or loss of amenity will always be reduced or unavailable if C is no worse off. A possible rationalisation of the cases giving rise to this uncertainty is either the principle that where the damage caused is constitutive of the right-infringement, and damages are substitutive of that right-infringement, any benefit conferred by the infringement will generally be disregarded in the award of damages. It is submitted that this principle can support the award of substantial compensation in respect of the non-pecuniary loss of a wrongful life victim.

*No worse off: the current law*⁵⁶

What might be described as the standard position is as follows. In order to recover substantial damages as a result of a wrong which results in non-comparative damage,⁵⁷ C must show that she has suffered a loss and demonstrating loss requires C to show that she is worse off as a result of the wrong (the general rule), unless the loss would have occurred anyway due to an independent tortious event⁵⁸ (the exception).

The leading case on the supposed general rule is *Jobling v Associated Dairies*.⁵⁹ C was involved in an accident caused by his employer's negligence in 1973 which led to persistent back pain. In 1976, before the trial, it was found that C suffered from a disease (spondyloitic myelopathy) which was independent of the accident and prevented C from working entirely. C would have been unable to work from 1976 even had D not behaved negligently. The House of Lords reduced C's damages in respect of *lost earnings* to reflect the fact that after 1976 D would not have been at work anyway. In respect of the lost earnings, C was not worse off.

The result in *Jobling* may be contrasted with the earlier House of Lords' decision in *Baker v Willoughby*.⁶⁰ C's left leg was injured by D's negligence in a car accident: this caused stiffness and thereby loss of amenity. Shortly before the trial, C's left leg was shot in an

⁵⁶ For one view of the cathedral, see Stiggelbout, *Losses in any event*, Legal Studies (2010) 558.

⁵⁷ This is only intended as an explanation of a supposed necessary condition of substantial damages, not a sufficient one.

⁵⁸ E.g. *Clerk & Lindsell on Torts*, 2-100 (2010, 20th ed).

⁵⁹ [1982] AC 794

⁶⁰ [1970] AC 467

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armed robbery at work.⁶¹ As a result of the second accident, C had to have the leg amputated. Again, in *Baker*, C would have lost his earnings anyway through the effect of the robber's shot on his leg. This time, the trial judge's general award of £1200 was not reduced at all. D's argument that the amputation of the leg had somehow "obliterated" or "superseded" the effects of the car accident (how could a non-existent leg *still* cause loss of amenity?) was not accepted. Lord Reid thought that the amputation joined the effects of the car accident as "concurrent" causes of the loss of amenity.⁶²

Textbooks tend to discuss these cases in chapters on causation.⁶³ The but-for test of causation seems to get the 'right' result in respect of the lost earnings in *Jobling* yet the 'wrong' result in *Baker* where C is thought to merit recovery even after the point at which the losses would have happened anyway. If *Jobling* and *Baker* are both correct, this seems to imply that the but-for test is inadequate or that it is being misapplied.

Most people will allow that the first event (the tort) in both cases caused a physical injury, even if that physical injury would have happened at a later time.⁶⁴ Most people are also happy to say in respect of the *losses*, that though the second event *would have caused* some or all of them to happen anyway, it *did* not as they had already been caused by the first event.⁶⁵ If that is right, then the causal questions have been settled and the question becomes: Why is the fact that (some of) the loss would have happened anyway relevant in *Jobling* but not in *Baker* so as to relieve the defendant of liability for losses which he has historically caused? This is most plausibly an issue of damages, since in both cases a wrong has been established and causal questions have been settled.⁶⁶

An Interpretation

It would be tempting to argue here that the cases are in fact irreconcilable. The argument would be that *Baker* is correct and it shows that C does not have to show that he or she is worse off: though some of the losses (the lost earnings) would have happened anyway, this is to be disregarded. In some respects, this would be a normatively appealing suggestion. D has wrongfully caused damage and loss. The fact that the loss would have happened anyway is nothing for which D ought to be able to claim credit. If the law of tort disregarded this

⁶¹ Arguably the accident and the armed robbery were not independent events: the accident was a but for cause of the armed robbery (since without the accident, C would not have been working at this particular place at that time). But the point seems not to have been taken.

⁶² *Baker*, at

⁶³ McBride and Bagshaw, *Tort Law*, (3rd ed., 2008) 550-551; J. Murphy (ed.), *Street on Torts* (Oxford, 2007) 159; Deakin, Johnston and Markesinis (eds.) *Tort Law* (Oxford, 2008) 246

⁶⁴ This leads some down the road to the NESS test of causation. See Wright (1985) *op cit.*. It seems to be a crucial supposition of all the philosophical literature on causation that an account of causation is to be measured against how it deals with cases of overdetermination. The but-for test cannot deal with these.

⁶⁵ The House of Lords seems to have had difficulty with this proposition in *Gray v Thames Trains* [2009] UKHL 33

⁶⁶ In agreement with: Stiggelbout, *op cit.*; Stapleton *op cit.* above.

fortuitous subsequent event, it would cut a mid-position between fully endorsing “moral luck” and (attempting) fully to eliminate moral luck.⁶⁷ A full elimination of luck would require the jettisoning of the idea that the defendant cause any damage at all: negligence or other wrongful conduct would generate liability in itself.⁶⁸ But if this were the case, there would be no normative reason to allow a particular C to sue a particular D *for compensation*. However, the law could allow that C has been the victim of a compensable wrong at the point at which D has caused both damage and loss.

We do not here argue for this position, and also not, therefore, that *Jobling* is wrongly decided. Rather, it seems possible to suggest that in respect of certain forms of loss, the fact that these losses would have happened anyway *is* relevant, but in respect of others, it is not. In *Jobling*, for example, the employer remained liable for C’s loss of amenity despite the fact that this loss would have occurred anyway.⁶⁹ This also happens in cases of failed sterilisation. In *Rees v Darlington Memorial Hospital NHS Trust*⁷⁰ the claimant suffered a number of losses: the pain and suffering of an unwanted pregnancy; the financial costs of raising an unwanted child; and the loss of the opportunity to live her life in the way she wanted. The financial costs were held to be off-set by the joyful benefits of raising a child. The pain and suffering and the loss of autonomy were still recoverable, despite the “incalculable” benefits a child brings. Similarly, where a patient with capacity refuses treatment and a doctor continues to treat, the doctor is still liable to pay substantial damages even if he or she makes the patient objectively better off.⁷¹

Professor Stevens has suggested an explanation of this phenomenon. Let us call it the *no off-set principle*:

“Gains consequential upon the infringement of a right may offset consequential losses but they cannot offset damages as a substitute for the right infringed which are not awarded in order to compensate for loss.”⁷²

The best interpretation of the first part of this claim - the thesis that damages can be a “substitute” for the right infringed is to say that damages act as so as to value the right’s *infringement*.⁷³ It is unclear, however, which awards of damages Professor Stevens considers to be substitutive of a right’s infringement and therefore ‘immune’ to set off by consequential gains. On the one hand, he considers that the failure to appeal the award of loss of amenity in

⁶⁷ On moral luck and tort law generally, see JCP Goldberg and B Zipursky, ‘Tort Law and Moral Luck’, (2007) 92 *Cornell Law Review*

⁶⁸ As argued by C. Schroeder, *Causation, Compensation and Moral Responsibility* in D. Owen (ed) *Philosophical Foundations of Tort Law*, (Oxford, 1995) 347

⁶⁹ This point was not appealed to the House of Lords.

⁷⁰ [2004] 1 AC 309

⁷¹ *B v An NHS Hospital Trust* [2002] EWHC 429 (Fam). Para [99] makes clear that the damages were more than nominal.

⁷² Stevens, 74.

⁷³ See J. Edelman, ‘The Meaning of Loss and Enrichment’ in Chambers, Mitchell, and Penner (eds.), *Philosophical Foundations of the Law of Unjust Enrichment* (2009, Hart), 219

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Jobling was correct because loss of amenity damages are substitutive of the right infringement.⁷⁴ On the other hand, it seems that pain and suffering damages are not, for him, substitutive of the right.⁷⁵

Yet if we exclude pain and suffering damages from the *no set off principle*, then we struggle to explain the result in *Rees* on the question of pain and suffering and loss of autonomy; and so, also, any award of damages for distress in continued treatment where the treatment is highly beneficial objectively. We suggest a more plausible principle might be as follows. There exist certain types of non-comparative damage to persons (like pain, severe disability) which provide strong reasons against action. There are special normative reasons not to inflict a severe disability upon persons. These reasons are sufficient to generate the conclusion that we have a right against the negligent infliction of such damage. As such when D negligently inflicts this damage, the damage *constitutes* the right infringement. It is difficult, if not impossible, to off-set damage which is constitutive of the right's infringement.

This principle generates morally appealing results which are not inconsistent with the law as we find it.⁷⁶ Thus where D negligently causes C to become paralysed but fortuitously this saves C from another (non-tortious) paralysing event, D cannot rely upon the fact that the loss of amenity would have happened anyway to deny C's claim for loss of amenity damages in respect of paralysis. C's pecuniary losses, however, can be set off: the fact of these pecuniary losses does not in itself provide sufficient normative reason to say that C's rights have been infringed. Consequently, those losses are not constitutive of the right infringement and can therefore be set off.

Damages for Wrongful Life

In some cases a doctor has negligently caused a child to exist with Tay-Sachs Disease (TSD). TSD is a fatal genetic disorder which causes progressive destruction of the nervous system. The child normally suffers deafness, blindness, recurring seizures, mental disability and gradually total physical incapacity. By age four, the child's nervous system will generally be damaged so badly that death will ensue before age five.⁷⁷

Damages in such a case would be assessed by reference to the child's pain and suffering and inability to pursue certain valuable activities. Awards similar to those set out in the *Guidelines for the Assessment of General Damages in Personal Injury Cases*⁷⁸ would be appropriate. The exercise, like all awards for pain and suffering,⁷⁹ will be inexact. On our

⁷⁴ Stevens, 74-75

⁷⁵ Stevens, 76

⁷⁶ Admittedly, English law does not grant a free-standing right against negligent infliction of severe pain not mediated by a physical injury: *Hicks v South Yorkshire Police* [1992] 2 All ER 65. This is normatively anomalous.

⁷⁷ Genome.gov

⁷⁸ 9th ed., 2008

⁷⁹ For a useful attempt to make the process more rational, see V. Kaparanou, L. Visscher, 'Towards a Better Assessment of Pain and Suffering Damages' (2010) 1 *Journal of European Tort Law* 48

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account, however, the claimant's rights have been infringed and so there is strong reason to face these difficulties.

Conclusion

We have argued that there ought to be a tort of wrongful life in English which sounds in more than nominal damages. We showed first that one route to this conclusion is blocked by the impossibility of comparing life with never having existed. This prevents claimants from showing that they are *worse off* existing than never having existed. We then argued, however, that there could be moral and legal wrongs which do not require such a demonstration. Specifically, one can have a right not to be placed in certain bad states, the negligent causation of which constitutes a wrong. We then showed that the claimant in wrongful life is the victim of such a wrong. Finally, we argued that such wrongs could entitle victims to substantial compensation.