McKay v Essex Area Health Authority

**[1982] QB 1166**, | [*[1982] 2 All ER 771*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W4N-VKG1-K0BB-S28F-00000-00&context=1522468), | [*[1982] 2 WLR 890*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-DRS1-JT42-S2GP-00000-00&context=1522468), 126 Sol Jo 261

# [*McKAY AND ANOTHER v. ESSEX AREA HEALTH AUTHORITY AND ANOTHER [1978 M. No. 2947] [1982] Q.B. 1166*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-6D51-JNJT-B2K0-00000-00&context=1522468)

[COURT OF APPEAL]

Stephenson, Ackner and Griffiths L.JJ.

1982 Jan. 20, 21, 25; Feb. 19

APPEAL from Lawson J.

By writ, dated August 7, 1978, and a statement of claim, as amended the first plaintiff, Mary McKay, a minor who was born disabled (suing by her uncle and next friend, Michael William Davis) and the second plaintiff, Jacinta McKay, her mother, claimed damages for negligence against the first defendant, Essex Area Health Authority, and the second defendant, Dr. Gower-Davies, a medical practitioner. By the statement of claim, the first plaintiff claimed, inter alia, that by reason of the negligence of the defendants she had suffered "entry into a life in which her injuries are highly debilitating, and distress, loss and damage." Master Bickford Smith made an order striking out that claim. On appeal, Lawson J. set aside the master's order. The defendants appealed on the ground that the judge was wrong in law to hold that the facts, in relation to that claim pleaded in the statement of claim, disclosed a reasonable cause of action on the part of the first plaintiff against the defendants.

By a respondents' notice the plaintiffs contended that the judge's

***[\*1169]***

decision should be affirmed on the additional ground that the matter was not proper to be decided under R.S.C., Ord. 18, r. 19 because (a) it was not a plain and obvious case; (b) the rule was not intended to take the place of demurrer; and (c) serious and prolonged investigation into areas of law were involved.

The facts are stated in the judgments.

**Michael Hutchison Q.C.** and **Terence Coghlan** for the first defendant. Although the claim for "wrongful life" is superficially a claim in respect of the deformities with which the child was born, the real complaint involved is that the child was allowed to be born, for she could not be born without those deformities. Such a claim is not cognisable at law, in that the plaintiff has not suffered damage known to the law.

Since the child's disablement was caused by the rubella and not the defendants' negligence, the defendants are not liable for it.

It would be contrary to public policy to recognise a claim which violates the sanctity of human life and leads to actions by children against their mothers for not undergoing abortions to prevent their birth.

In the eyes of the law, a disabled life is better than no life. Therefore, there is no duty owed to a foetus to terminate its existence.

Death, as opposed to a disabled life, cannot be evaluated. An action for which compensation cannot be awarded cannot be regarded as reasonable.

The Law Commission Report on Injuries to Unborn Children (1974) (Law Com. No. 60) (Cmnd. 5709) endorsed the view that there is no right of action for wrongful life: see clause I of Appendix 1 to the Report. That view has received legislative force in [*section 1*](https://advance.lexis.com/api/document?collection=legislation-uk&id=urn:contentItem:5W53-GW21-F016-S38D-00000-00&context=1522468) of the Congenital Disabilities (Civil Liability) Act 1976.

In *In re B. (A Minor) (Wardship: Medical Treatment)* [1981] 1 W.L.R. 1421, the only English authority of any relevance to the present case, the court, when faced with a contention that an operation to preserve the life of a child should not be performed because it would be kinder to let the child die, had no hesitation in deciding that the operation should take place despite the known grave disabilities of the child.

Even if there is a substantial risk that the child may be born with a defect, there is still the possibility that it may be born whole, and so it is inconceivable that the law will recognise a duty to terminate its life. [Reference was made to *Gleitman v. Cosgrove* (1967) 227 A. 2d 689; *Becker v. Schwartz* (1978) 413 N.Y.S. 2d 895; *Park v. Chessin* (1977) 400 N.Y.S. 2d 110; *Berman v. Allan* (1979) 404 A. 2d 8; *Speck v. Finegold* (1979) Pa. Super., 408 A. 2d 496; *Curlender v. Bio-Science Laboratories* (1980) App., 165 Cal.Rptr. 477; *Phillips v. United States of America* (1980) 508 F.Supp. 537, 540, 541, 543 and *Turpin v. Sortini* (1981) App., 174 Cal.Rptr. 128.]

**Roderick Adams** for the second defendant. The argument for the first defendant is adopted.

There can be no claim for wrongful life in respect of births occurring after the passing of the Congenital Disabilities (Civil Liability) Act 1976: see section 4 (5) of the Act. This appeal, therefore, will have no effect on the future course of the law.

***[\*1170]***

**John Wilmers Q.C.** and **James Harris** for the plaintiffs. The court's jurisdiction to strike out a claim, under R.S.C., Ord. 18, r. 19, is discretionary. It should be exercised only in plain and obvious cases. The procedure under the rule was not intended to take the place of demurrer and, therefore, it is inappropriate to strike out a claim which is substantial, involves a long and serious investigation into areas of the law, or requires consideration by the House of Lords, since such a claim cannot be termed frivolous and vexatious. [Reference was made to *Attorney-General of the Duchy of Lancaster v. London and North Western Railway Co*. [1892] 3 Ch. 274, 276; *Hubbuck & Sons Ltd. v. Wilkinson, Heywood & Clark Ltd*. [*[1899] 1 Q.B. 86*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-6D91-FGY5-M4HN-00000-00&context=1522468), 91; *Dyson v. Attorney-General* [*[1911] 1 K.B. 410*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-6D51-FJDY-X3SJ-00000-00&context=1522468), 418; *Drummond-Jackson v. British Medical Association* [1970] 1 W.L.R. 688, 695, 699; *Rondel v. Worsley* [*[1969] 1 A.C. 191*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM21-JCRC-B3X7-00000-00&context=1522468), 234; *Wiseman v. Borneman* [*[1971] A.C. 297*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-FFMK-M21V-00000-00&context=1522468) and *Schmidt v. Secretary of State for Home Affairs* [*[1969] 2 Ch. 149*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-3VP1-JGHR-M0NX-00000-00&context=1522468), 171.]

A point on which there is a conflict of judicial opinion but no judicial decision in this country cannot be plain and obvious. It cannot, therefore, be said that in refusing to strike out the claim, the judge plainly exercised his discretion wrongly and so his decision ought to be interfered with. As all the claims in this action involve the same allegations, the application to strike out is misconceived since its only effect is to delay the action and increase the costs.

Apart from giving a mother the right to prevent the birth of her child, the Abortion Act 1967, by section 1 (1) (*b*), regards the termination of pregnancy in some circumstances to be beneficial to the child concerned. The concept that all life, however appalling, is better than no life has not survived the Act. *In re B. (A Minor) (Wardship: Medical Treatment)* [1981] 1 W.L.R. 1421 contemplates a situation where life must not be allowed to continue. Whether that situation exists must be tested by evidence at a trial, and the procedure to strike out must not be used in such cases.

As the child's damage, namely wrongful life, is the consequence of the defendants' breach of duty, the child is entitled to recover damages against the defendants. "Damage" means a consequence which flows from a breach of duty which society and the law should concur in treating as something which the plaintiff ought not to suffer and for which he should be compensated.

The difficulty of assessing the damages is no bar to the action, as demonstrated by loss of expectation of life: see *Rose v. Ford* [*[1937] A.C. 826*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM21-JG59-21F4-00000-00&context=1522468); *Benham v. Gambling* [*[1941] A.C. 157*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KKV1-JGBH-B28F-00000-00&context=1522468); *The Mediana* [*[1900] A.C. 113*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KKX1-JKHB-64FJ-00000-00&context=1522468) and *Chaplin v. Hicks* [*[1911] 2 K.B. 786*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-6D61-K0BB-S0J5-00000-00&context=1522468). To deal with the fact that the origin of the claim was the rubella infection, the court can allow the defendants a discount on the amount of damages.

The American courts have rejected the claim for wrongful life because there is no equivalent of the Abortion Act 1967 in the relevant jurisdictions. [Reference was made to *Gleitman v. Cosgrove*, 227 A. 2d 689, 691, 694, 703; *Becker v. Schwartz*, 413 N.Y.S. 2d 895, 900; *Berman v. Allan*, 404 A. 2d 8 and *Park v. Chessin*, 400 N.Y.S. 2d 110.]

**Hutchison Q.C.** in reply. R.S.C., Ord. 18, r. 19 applies to any point of law which, despite its initial difficulty, can be shown to have a plain

***[\*1171]***

answer. The novelty of a claim is the very reason for striking it out: see *Rondel v. Worsley* [*[1969] 1 A.C. 191*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM21-JCRC-B3X7-00000-00&context=1522468). No regard is to be had to the importance of a claim when considering whether it should be struck out. The only question is whether or not, as pleaded it discloses an arguable cause of action.

*Cur. adv. vult.*

February 19. The following judgments were read.

STEPHENSON L.J. There is before the court a claim by an infant daughter (suing by her uncle and next friend) and by her mother, against a health authority and against a doctor. On February 17, 1981, Master Bickford Smith struck out part of the first plaintiff's claim, but on June 18, 1981, Lawson J. allowed her appeal and allowed all her claim to proceed, but gave leave to appeal. This court is asked by both defendants to restore the master's order.

In this case we are unanimously of the opinion that the infant plaintiff's claim for what has been called "wrongful life" discloses no reasonable cause of action. We were all clearly of that opinion at the conclusion of the argument, and we reserved judgment in order to put into writing our reasons for allowing the appeal. In the course of doing so Griffiths L.J. has come to the conclusion that, though the claims disclosed no reasonable cause of action, the judge was nevertheless right in exercising his discretion not to strike them out and that on that ground the appeal should be dismissed. I have not felt able to agree with him on that point and shall give my reasons for disagreeing with him and for allowing the appeal.

The claims arise from the fact that the child was born disabled by rubella (German measles), which infected the mother in the early months of her pregnancy. That misfortune is alleged to have been the fault of the defendants; of the authority in one respect and of the doctor in two respects.

The statement of claim has been slightly amended at the suggestion of the judge. For the purpose of these interlocutory proceedings its allegations must be assumed to be true. It reads:

"1. The first plaintiff is a little girl born in 1975 and the second plaintiff is her mother.

"2. The first defendant operated a laboratory which, inter alia, tested samples of body fluids in order to discover whether the donor of the fluid sample was suffering from rubella (German measles). At all material times the second plaintiff was the patient of the second defendant.

"2A. The first defendant and the second defendant owed to the first plaintiff and to the second plaintiff a duty of care.

"3. The first and second plaintiffs will contend that rubella is an infection which is capable of giving rise to severe and irreversible damage to unborn children in the womb if it infects the mother of such an unborn child in the first four months of pregnancy. The risk of such damage is very substantial if the infection occurs in the first month and while the risk declines thereafter it is significant even

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in the fourth month. The progress of rubella in the mother and unborn child may be arrested by the injection of globulins into the mother but this cannot reverse or ameliorate damage already done by rubella to the unborn child. Once damage has actually occurred to the unborn child it is irreversible and the only method of preventing that child and its family or guardian from being burdened with those injuries in life is to abort the unborn child as provided by the Abortion Act 1967.

"4. The plaintiffs will contend that the first and second defendants knew or should have known of the matters set out in the preceding paragraph.

"5. On or about February 1975 the second plaintiff by her husband conceived the first plaintiff.

"6. On or about April 1975 the second plaintiff attended the surgery of the second defendant and told him that she was pregnant and that she thought she had been in contact with rubella. The second defendant took a blood sample from her with a view to its being tested for infection with rubella.

"7. That blood sample or the results of any tests which may have been performed upon it were mislaid by the first and second defendants. The second plaintiff again provided a blood sample for tests.

"8. In due course the second plaintiff was informed by the second defendant that she and her unborn child had not been infected with rubella during the pregnancy and that she need not consider an abortion of it.

"9. The second plaintiff would at all times have been willing to undergo an abortion of the unborn child within her if she had been informed that it had been infected with rubella and that there was a significant risk that it had suffered damage.

"10. In reliance upon the advice of the second defendant the second plaintiff did not request an abortion but continued with her pregnancy. On or about August 15 the first plaintiff was born (prematurely, for a reason unconnected with the matters complained of herein).

"11. The first plaintiff had been infected with rubella whilst still in her mother's womb and as a result of such infection she suffered injuries while still in the womb.

"Particulars of injuries of the first plaintiff

"The first plaintiff has suffered serious damage to her neural tissues and full particulars of the first plaintiff's current medical condition will be served in due course upon the defendants when it has been possible to make a reasonably full assessment.

"12. The above injuries, or the extent of them, were a result of the negligence of the second defendant.

"Particulars of negligence of the second defendant under this paragraph

"The second defendant was negligent in that he failed to guard

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against or to treat the suspected infection with rubella by an injection of globulins into the second plaintiff which he knew or ought to have known would combat the disease and reduce the likelihood of further damage. The plaintiffs will aver that this should have been done when the second plaintiff first complained of contact with rubella but without resiling in any way from that contention the plaintiffs aver that the opportunity should not have been missed to administer such an injection at any later stage.

"13. As a result of the negligence of the second defendant the first and second plaintiffs have been burdened with the injuries of the first plaintiff in that the second defendant failed to advise the second plaintiff of the desirability of an abortion of the first plaintiff.

"Particulars of negligence of the second defendant under this paragraph

"The second defendant was negligent in that he (a) failed to appreciate or to pass on to the first defendant some or all of the information provided by the second plaintiff; (b) failed to elicit all relevant information from the second plaintiff; (c) failed to require all appropriate tests to be performed upon the test sample provided by the second plaintiff; (d) caused or permitted a test sample or the results of any tests that may have been performed thereon to become mislaid; (e) took only two blood samples from the second plaintiff (one of those having been mislaid); (f) confused the blood sample provided by the second plaintiff or the results of any testing that may have been done thereon with some other blood sample, sample, test results or piece of paper; (g) failed to interpret such results of tests that may have been passed to him correctly, or at all; (h) failed to advise the second plaintiff of the infection with rubella and of the risk that if the first plaintiff were born into the world she would suffer from serious and irreversible injuries; (i) failed to inform the second plaintiff of the advisability of an abortion.

"14. As a result of the negligence of the first defendant the first and second plaintiffs have been burdened with the injuries of the first plaintiff in that the first defendant acted negligently in respect of the testing of blood samples for rubella whereby the second plaintiff was misled as to the advisability of an abortion.

"Particulars of negligence of the first defendant under this paragraph

"The first defendant was negligent in that it (i) failed to perform all the tests that may have been required by the second defendant upon the blood sample of the second plaintiff, or to perform any of those tests; (ii) failed to appreciate properly or at all any instructions or additional information that the second defendant may have provided in connection with the proposed testing; (iii) in so far as there was a duty upon them so to do, failed to perform all appropriate tests or to require all relevant information whether requested or supplied by the second defendant or not; (iv) failed to conduct any

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testing that may have been performed with due care; (v) in so far as there was a duty upon them so to do, failed to interpret the results of any testing that may have been performed, correctly or at all (vi) failed to inform the second defendant properly or at all of the results of any testing that may have been performed; (vii) lost one of the blood samples provided by the second plaintiff or the results of any tests that may have been performed upon it; (viii) confused the blood sample provided by the second plaintiff with another sample or confused the results of any testing that may have been performed on that blood sample with the results of other tests or other pieces of information.

"15. In the circumstances, the defendants are in breach of the duties referred to in paragraph 2A hereof.

"16. By reason of the foregoing, the first plaintiff has suffered: (a) under paragraph 12 hereof, personal injuries, distress, loss and damage; (b) under paragraphs 13 and 14 hereof, entry into a life in which her injuries are highly debilitating, and distress loss and damage.

"17. By reason of the foregoing, the second plaintiff has been burdened with a child with serious congenital disabilities and has suffered distress loss and damage.

"Particulars of expenditure of the second plaintiff upon the first plaintiff

"Cost of feeding and clothing the first plaintiff - £10 each week, and continuing.

"Cost of medical treatment and care, and any other expenses which would not have been required had the first plaintiff been born without deformities. (Full particulars of these will be delivered as and when known).

"18. And the plaintiffs claim damages, and interest pursuant to statute."

So each plaintiff alleges that the authority's laboratory was negligent, in respect of testing the mother's blood samples, with the result that she was misled as to the advisability of an abortion and the child has entered life handicapped by highly debilitating injuries and the mother has been burdened with a child with serious congenital disabilities (paragraphs 14 and 16 (b)); and each plaintiff alleges that the doctor was negligent (1) in failing to treat the mother and notice the likelihood of further damage to the child in her womb; and (2) in failing to advise the mother of the desirability of an abortion, with the same results to mother and child (paragraphs 13 and 16 (b)). But the child also alleges that the doctor's negligence in failing to treat her caused her injuries (paragraphs 12 and 16 (a)).

What the master did, and we are asked to do, is to strike out the whole of the child's claim (under paragraphs 14 and 16 (b)) against the authority, and the second part of her claim (under paragraphs 13 and 16 (b)) against the doctor, leaving only the first part of her claim (under paragraphs 12 and 16 (a)) against the doctor and the whole of the mother's claim against

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both. So paragraphs 14 and 16 (b) would be struck out, and paragraph 13 would be amended to read: "As a result of the negligence of the second defendant the second plaintiff has been burdened with the injuries of the first plaintiff …"

The mother then has a cause of action against both defendants for in effect being deprived of the opportunity of choosing to abort the damaged child. The child has a cause of action for injury to her in her mother's womb before birth. What we have to decide is whether the child has also a cause of action for being allowed to enter life damaged - what has been called "wrongful life" - or whether that is not "a reasonable cause of action" and should therefore be struck out now.

It is trite law that the court can only exercise its discretion to strike out a claim, under R.S.C., Ord. 18, r. 19 and its inherent jurisdiction. in plain and obvious cases, and this court will not interfere with the judge's exercise of the court's discretion in a matter in which he has a discretion unless it is plainly wrong.

Lawson J., in the approved note that we have of his judgment, thought that the child's cause of action against the authority and her second cause of action against the doctor was "a highly reasonable and arguable cause of action." He rejected the two basic points made by the defendants in support of the master's order and held (1) that they owed a duty to the child and (2) that the child's real complaint was not that "she was born at all" - "wrongful entry into life" - but that she was "born with deformities." As to (1), neither Mr. Hutchison for the authority nor Mr. Adams for the doctor has disputed in this court that it is at least arguable that a foetus has rights which the courts will recognise by imposing a duty on others not to injure it before birth: the child's remaining claim against the doctor is a reasonable cause of action. But as to (2), they submit that the judge went wrong and though the child would have brought no claim if she had been born without deformities, the claims which the judge has allowed are, on examination, claims that the defendants caused or allowed her to be born at all in breach of their duty to prevent her being born and, properly understood, are claims for wrongful entry into life and therefore disclose no arguable or reasonable cause of action.

Mr. Wilmers has submitted on behalf of the child, with the aid of a respondents' notice, that this is not a plain and obvious case, but the case, which the child is to be prevented from making if her claims are struck out, is a substantial case involving serious and prolonged investigation into areas of law; as such it cannot be termed frivolous or vexatious and if it cannot, it cannot be struck out as disclosing no reasonable cause of action: the rule is not intended to take the place of demurrer.

He supports that submission by citation from some of the well known authorities collected in *The Supreme Court Practice* (1982), notes to Ord. 18, r. 19, beginning with *Attorney-General of the Duchy of Lancaster v. London and North Western Railway Co*. [*[1892] 3 Ch. 274*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-3VV1-JCJ5-20RM-00000-00&context=1522468), and ending with *Drummond-Jackson v. British Medical Association* [1970] 1 W.L.R. 688. When I extend his line of authorities by beginning a little earlier with the speeches in the House of Lords in *Metropolitan Bank Ltd. v. Pooley* [*(1885) 10 App.Cas. 210*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G42F-00000-00&context=1522468), and ending a little later with the judgments

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in this court in *Riches v. Director of Public Prosecutions* [1973] 1 W.L.R. 1019, I cannot accept his submission in its entirety. Though the two sets of grounds now distinguished in paragraphs (*a*) and (*b*) of Ord. 18, r. 19 (1) overlap and throw light on, and perhaps give colour to, each other, they are not the same now any more than they were the same under the old 1883 rule, Ord. 25, r. 4 of the *Rules of the Supreme Court* (1883). Paragraph (*a*), reproducing the first part of the old rule, does indeed retain the character of demurrer, subject to one qualification, as rule 19 (2) demonstrates by making evidence inadmissible, and it is the later paragraphs, (*b*) included, expanding the latter part of the old rule by incorporating the old Ord. 19, r. 27 of the *Rules of the Supreme Court* (1883), which go beyond demurrer and allow affidavit evidence in support. I am content to follow the judge and decide this appeal on the basis, favourable to Mr. Wilmers, that it is paragraph (*a*) and the question whether the statement of claim discloses a reasonable cause of action in the two disputed respects with which alone the defendants' summons to strike out is concerned.

The defendants have to show that the case is "obviously unsustainable": *Attorney-General of the Duchy of Lancaster v. London and North Western Railway Co*. [*[1892] 3 Ch. 274*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-3VV1-JCJ5-20RM-00000-00&context=1522468), 277, *per* Lindley L.J.; "obviously and almost incontestably bad": *Dyson v. Attorney-General* [1911] 1 K.B. 410, 419, *per* Fletcher Moulton L.J.; "unarguable": *Nagle v. Feilden* [*[1966] 2 Q.B. 633*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-6D81-FG12-62S4-00000-00&context=1522468), 651, *per* Salmon L.J.; "one which cannot succeed": p. 648, *per* Danckwerts L.J.; "quite unsustainable": *Schmidt v. Secretary of State for Home Affairs* [*[1969] 2 Ch. 149*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-3VP1-JGHR-M0NX-00000-00&context=1522468), 171 *per* Lord Denning M.R.; "hopeless": *Riches v. Director of Public Prosecutions* [1973] 1 W.L.R. 1019, 1027, *per* Lawton L.J. This is all summed up in a sentence from the judgment of Lord Pearson in *Drummond-Jackson v. British Medical Association* [1970] 1 W.L.R. 688, 696, which Lawson J. followed in this case: "the order for striking out should only be made if it becomes plain and obvious that the claim or defence cannot succeed …" But it need not become plain "so that any master or judge can say *at once*" - (my italics) - "that the statement of claim as it stands is insufficient …": *Hubbuck & Sons Ltd. v. Wilkinson, Heywood & Clark Ltd*. [*[1899] 1 Q.B. 86*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-6D91-FGY5-M4HN-00000-00&context=1522468), 91, *per* Sir Nathaniel Lindley M.R. Though this court held d in *Dyson v. Attorney-General* [*[1911] 1 K.B. 410*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-6D51-FJDY-X3SJ-00000-00&context=1522468) that the court's power to strike out a statement of claim disclosing no reasonable cause of action was never intended to apply to an action involving a serious investigation of ancient law and questions of general importance, and in that respect to take the place of the old demurrer on which such questions could be fully argued and decided (see [*[1911] 1 K.B. 410*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-6D51-FJDY-X3SJ-00000-00&context=1522468), 414, *per* Cozens-Hardy M.R., and p. 418 *per* Fletcher Moulton L.J.), it can become plain and obvious to a master or a judge that a claim cannot succeed after "a relatively long and elaborate" hearing: *Drummond-Jackson v. British Medical Association* [1970] 1 W.L.R. 688, 696B *per* Lord Pearson; and *per* Sir Gordon Willmer, at p. 700:

"The question whether a point is plain and obvious does not depend upon the length of time it takes to argue. Rather the question is

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whether, when the point has been argued, it has become plain and obvious that there can be but one result."

Here the court is considering not "ancient law" but a novel cause of action, for or against which there is no authority in any reported case in the courts of the United Kingdom or the Commonwealth. It is tempting to say that the question whether it exists is so difficult and so important that it should be argued out at a trial and on appeal up to the House of Lords. But it may become just as plain and obvious, after argument on the defendants' application to strike it out, that the novel cause of action is unarguable or unsustainable or has no chance of succeeding. I think that the judge recognised this when he said it was not wrong of the defendants to try to strike out these claims.

Mr. Hutchison for the authority - and Mr. Adams for the doctor adopts all his submissions - has suggested that the power of the judge (and the master) to strike out a claim as disclosing no reasonable cause of action may not be a discretionary power and that this court's power to set aside the judge's order does not therefore depend on the courts being satisfied that he was plainly wrong. But I understood him to be content that we should deal with the judge's order on the assumption that he made it in the exercise of a discretionary power.

In my judgment the power is a discretionary power. The word "may" in Ord. 18, r. 19 (1) does not mean "must." But a defendant has a prima facie right to be relieved of having to meet a claim which discloses no reasonable cause of action, and if he can succeed in showing that a claim must fail, he ought not to be denied that relief simply because he still has to meet other claims by the plaintiff, unless there are strong reasons for allowing the bad claim to go to trial.

On this point I have anxiously considered the divergent opinions expressed by Ackner L.J. and Griffiths L.J. in the judgments which they are about to deliver and I have had the advantage of reading in draft. I think that the right decision must be in favour of the course which on balance does the better justice. I would accept Lord Pearson's opinion in *Drummond-Jackson v. British Medical Association* [1970] 1 W.L.R. 688, 696 that a relatively long and elaborate hearing is an unusual procedural method only to be adopted "in special cases where it is seen to be advantageous." And I feel the force of the considerations which lead Griffiths L.J. to his conclusion that the use of this procedure gives the defendants no significant advantage and inflicts disadvantages on the plaintiffs. But I conclude that this is such a special case, for the reasons given by Ackner L.J., and that the weighty matters to which he refers tip the balance in favour of this procedure, although it has not been as short and summary as I hope most such cases will continue to be.

Thus the only remaining question is: has the child a reasonable cause of action in the claims the master struck out or was the judge right in regarding them as arguable?

I have come, at the end of two days' argument, to the same answer as I felt inclined to give the question before I heard argument, namely that plainly and obviously the claims disclose no reasonable cause of action. The general importance of that decision is much restricted by the

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Congenital Disabilities (Civil Liability) Act 1976, and in particular section 4 (5) to which Mr. Adams called our attention. That enactment has the effect explained by Ackner L.J. of depriving any child born after its passing on July 22, 1976, of this cause of action. Section 1 (2) (b) repeats the same clause of the draft bill annexed as an appendix to the Law Commission Report on Injuries to Unborn Children (1974) (Law Com. No. 60) (Cmnd. 5709), and was intended to give the child no right of action for "wrongful life" and to import the assumption that but for the occurrence giving rise to a disabled birth, the child would have been born normal and healthy, not that it would not have been born at all: see pp. 46 and 47 of the report. I reject Mr. Wilmers's submission that it did not carry out that intention, which, in my judgment, the language of the paragraph plainly expresses. But the Act went further than the draft bill in replacing, by section 4 (5), "any law in force before its passing, whereby a person could be liable to a child in respect of disabilities with which it might be born;…"

The importance of this cause of action to this child is somewhat reduced by the existence of her other claim and the mother's claims, which, if successful, will give her some compensation in money or in care. However, this is the first occasion on which the courts of this country or the Commonwealth have had to consider this cause of action, and I shall give my reasons for holding that it should be struck out.

If, as is conceded, any duty is owed to an unborn child, the authority's hospital laboratory and the doctor looking after the mother during her pregnancy undoubtedly owed the child a duty not to injure it, and if she had been injured as a result of lack of reasonable care and skill on their part after birth, she could have sued them, as she is suing the doctor, for damages to compensate her for the injury they had caused her in the womb. Compare the thalidomide cases, where it was assumed that such an action might lie: e.g., *Distillers Co. (Biochemicals) Ltd. v. Thompson* [*[1971] A.C. 458*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-FFMK-M221-00000-00&context=1522468). But this child has not been injured by either defendant, but by the rubella which has infected the mother without fault on anybody's part. Her right not to be injured before birth by the carelessness of others has not been infringed by either defendant, any more than it would have been if she had been disabled by disease after birth. Neither defendant has broken any duty to take reasonable care not to injure her. The only right on which she can rely as having been infringed is a right not to be born deformed or disabled, which means, for a child deformed or disabled before birth by nature or disease, a right to be aborted or killed; or, if that last plain word is thought dangerously emotive, deprived of the opportunity to live after being delivered from the body of her mother. The only duty which either defendant can owe to the unborn child infected with disabling rubella is a duty to abort or kill her or deprive her of that opportunity.

It is said that the duty does not go as far as that, but only as far as a duty to give the mother an opportunity to choose her abortion and death. That is true as far as it goes. The doctor's alleged negligence is in misleading the mother as to the advisability of an abortion, failing to inform or advise her of its advisability or desirability; the laboratory's alleged negligence is not so pleaded in terms but the negligence pleaded against

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them in failing to make or interpret the tests of the mother's blood samples or to inform the doctor of their results must, like the doctor's negligence, be a breach of their duty to give the doctor an opportunity to advise the mother of the risks in continuing to let the foetus live in the womb and be born alive. But the complaint of the child, as of the mother, against the authority, as against the doctor, is that their negligence burdened her (and her mother) with her injuries. That is another way of saying that the defendants' breaches of their duties resulted, not just in the child's being born but in her being born injured or, as the judge put it, with deformities. But as the injuries or deformities were not the result of any act or omission of the defendants, the only result for which they were responsible was her being born. For that they were responsible because if they had exercised due care the mother would have known that the child might be born injured or deformed, and the plaintiffs' pleaded case is that, if the mother had known that, she would have been willing to undergo an abortion, which must mean she would have undergone one or she could not claim that the defendants were responsible for burdening her with an injured child. If she would not have undergone an abortion had she known the risk of the child being born injured, any negligence on the defendants' part could not give either plaintiff a cause of action in respect of the child being born injured.

I am accordingly of opinion that though the judge was right in saying that the child's complaint is that she was born with deformities, without which she would have suffered no damage and have no complaint, her claim against the defendants is a claim that they were negligent in allowing her, injured as she was in the womb, to be born at all, a claim for "wrongful entry into life" or "wrongful life."

This analysis leads inexorably on to the question: how can there be a duty to take away life? How indeed can it be lawful? It is still the law that it is unlawful to take away the life of a born child or of any living person after birth. But the Abortion Act 1967 has given mothers a right to terminate the lives of their unborn children and made it lawful for doctors to help to abort them.

That statute (on which Mr. Wilmers relies) permits abortion in specified cases of risks to the mother and the child. I need not read those provisions which are enacted in the mother's interests, but there is one provision relevant to the interests of the child. Section 1 (1) provides:

"Subject to the provisions of this section, a person shall not be G guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith - … (*b*) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped."

That paragraph may have been passed in the interests of the mother, the family and the general public, but I would prefer to believe that its main purpose, if not its sole purpose, was to benefit the unborn child; and if and in so far as that was the intention of the legislature, the legislature

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did make a notable inroad on the sanctity of human life by recognising that it would be better for a child, born to suffer from such abnormalities as to be seriously handicapped, not to have been born at all. That inroad, however, seems to stop short of a child capable of being born alive, because the sanctity of the life of a viable foetus is preserved by the enactment of section 5 (1) that "Nothing in this Act shall affect the provisions of the Infant Life (Preservation) Act 1929 (protecting the life of the viable foetus)."

Another notable feature of the Act is that it does not directly impose any duty on a medical practitioner or anyone else to terminate a pregnancy, though it relieves conscientious objectors of a duty to participate in any treatment authorised by the Act in all cases with one exception: see section 4 of the Act. It is, however, conceded in this case that a medical practitioner is under a duty to the mother to advise her of her right under the Act to have her pregnancy terminated in cases such as the present. There was, on the pleaded facts of this case, a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped. And from what we have been told without objection of her present mental and physical condition, that risk has become tragically actual.

There is no doubt that this child could legally have been deprived of life by the mother's undergoing an abortion with the doctor's advice and help. So the law recognises a difference between the life of a foetus and the life of those who have been born. But because a doctor can lawfully by statute do to a foetus what he cannot lawfully do to a person who has been born, it does not follow that he is under a legal obligation to a foetus to do it and terminate its life, or that the foetus has a legal right to die.

Like this court when it had to consider the interests of a child born with Down's syndrome in *In re B. (A Minor) (Wardship: Medical Treatment)* [1981] 1 W.L.R. 1421, I would not answer until it is necessary to do so the question whether the life of a child could be so certainly "awful" and "intolerable" that it would be in its best interests to end it and it might be considered that it had a right to be put to death. But that is not this case. We have no exact information about the extent of this child's serious and highly debilitating congenital injuries - the judge was told that she was partly blind and deaf - but it is not and could not be suggested that the quality of her life is such that she is certainly better dead, or would herself wish that she had not been born or should now die.

I am therefore compelled to hold that neither defendant was under any duty to the child to give the child's mother an opportunity to terminate the child's life. That duty may be owed to the mother, but it cannot be owed to the child.

To impose such a duty towards the child would, in my opinion, make a further inroad on the sanctity of human life which would be contrary to public policy. It would mean regarding the life of a handicapped child as not only less valuable than the life of a normal child, but so much less valuable that it was not worth preserving, and it would even mean that a doctor would be obliged to pay damages to a child infected with rubella

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before birth who was in fact born with some mercifully trivial abnormality. These are the consequences of the necessary basic assumption that a child has a right to be born whole or not at all, not to be born unless it can be born perfect or "normal," whatever that may mean.

Added to that objection must be the opening of the courts to claims by children born handicapped against their mothers for not having an abortion. For the reasons given by the Royal Commission on Civil Liability and Compensation for Personal Injury (1978) (Cmnd. 7054-1), cited by Ackner L.J., that is, to my mind, a graver objection than the extra burden on doctors already open to actions for negligent treatment of a foetus, which weighed with the Law Commission.

Finally, there is the nature of the injury and damage which the court is being asked to ascertain and evaluate.

The only duty of care which courts of law can recognise and enforce are duties owed to those who can be compensated for loss by those who owe the duties, in most cases, including cases of personal injury, by money damages which will as far as possible put the injured party in the condition in which he or she was before being injured. The only way in which a child injured in the womb can be compensated in damages is by measuring what it has lost, which is the difference between the value of its life as a whole and healthy normal child and the value of its life as an injured child. But to make those who have not injured the child pay for that difference is to treat them as if they have injured the child, when all they have done is not having taken steps to prevent its being born injured by another cause.

The only loss for which those who have not injured the child can be held liable to compensate the child is the difference between its condition as a result of their allowing it to be born alive and injured and its condition if its embryonic life had been ended before its life in the world had begun. But how can a court of law evaluate that second condition and so measure the loss to the child? Even if a court were competent to decide between the conflicting views of theologians and philosophers and to assume an " after life" or non-existence as the basis for the comparison, how can a judge put a value on the one or the other, compare either alternative with the injured child's life in this world and determine that the child has lost anything, without the means of knowing what, if anything, it has gained?

Judges have to pluck figures from the air in putting many imponderables into pounds and pence. Loss of expectation of life, for instance, has been held so difficult that the courts have been driven to fix for it a constant and arbitrary figure. Mr. Wilmers referred us to what judges have said on that topic in *Rose v. Ford* [*[1937] A.C. 826*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM21-JG59-21F4-00000-00&context=1522468) and *Benham v. Gambling* [1941] A.C. 157. But in measuring the loss caused by shortened life, courts are dealing with a thing, human life, of which they have some experience; here the court is being asked to deal with the consequences of death for the dead, a thing of which it has none. And the statements of judges on the necessity for juries to assess damages and their ability to do so in cases of extreme difficulty do not touch the problem presented by the assessment of the claims we are considering. To measure loss of expectation

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of death would require a value judgment where a crucial factor lies altogether outside the range of human knowledge and could only be achieved, if at all, by resorting to the personal beliefs of the judge who has the misfortune to attempt the task. If difficulty in assessing damages is a bad reason for refusing the task, impossibility of assessing them is a good one. A court must have a starting point for giving damages for a breach of duty. The only means of giving a starting point to a court asked to hold that there is the duty on a doctor or a hospital which this child alleges, is to require the court to measure injured life against uninjured life, and that is to treat the doctor and the hospital as responsible not for the child's birth but for her injuries. That is what in effect Mr. Wilmers suggests that the court should do, tempering the injustice to the defendants by some unspecified discount. This seems almost as desperate an expedient as an American judge's suggestion that the measure of damages should be the "diminished childhood" resulting from the substantial diminution of the parents' capacity to give the child special care: see the dissenting judgment of Handler J. in *Berman v. Allan* (1979) 404 A. 2d 8, 15, 19, 21. If there is no measure of damage which is not unjustified and indeed unjust, courts of law cannot entertain claims by a child affected with pre-natal damage against those who fail to provide its mother with the opportunity to end its damaged life, however careless and unskilful they may have been and however liable they may be to the mother for that negligent failure.

If a court had to decide whether it were better to enter into life maimed or halt than not to enter it at all, it would, I think, be bound to say it was better in all cases of mental and physical disability, except possibly those extreme cases already mentioned, of which perhaps the recent case of *Croke v. Wiseman* [1982] 1 W.L.R. 71 is an example, but certainly not excepting such a case as the present. However that may be, it is not for the courts to take such a decision by weighing life against death or to take cognisance of a claim like this child's. I would regard it on principle as disclosing no reasonable cause of action and would accordingly prefer the master's decision to the judge's.

I am happy to find support for this view of the matter in the Law Commission Report on injuries to Unborn Children (1974) (Law Com. No. 60) (Cmnd. 5709) and the Congenital Disabilities (Civil Liability) Act 1976, to which I have already referred, and in the strong current of American authority, to which we have been referred. Direct decisions of courts in the United States of America on the same topic are of no more than persuasive authority but contain valuable material and with one exception would rule out the infant plaintiff's claims in our case.

The first of the American cases is a decision of the Supreme Court of New Jersey in 1967: *Gleitman v. Cosgrove* (1967) 227 A. 2d 689. It was preceded by an article by G. Tedeschi, "On Tort Liability for 'Wrongful Life'" in the Israel Law Review, vol. 1, no. 4, p. 513 (October 1966). That article treated of earlier cases mainly concerned with illegitimate children and of the acts of parents in producing a child likely to be diseased, but concentrated on the impossibility of comparing the two alternatives of non-existence and existence with the disease. *Gleitman's case* has been

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followed in New Jersey and in other jurisdictions of the United States of America, all but one finally approving the decision on this point that the child has no claim for wrongful life against medical advisers for incompetent advice about the risks of being born severely disabled.

The facts in *Gleitman's case* are very like the facts of this case: the infant plaintiff was born handicapped as a result of the mother's German measles during pregnancy; Dr. Cosgrove and another doctor, who was also a defendant, had advised the mother (though they denied it) that the disease would have no effect on her unborn child. The doctor agreed that, if the mother had told him of the disease, his duty as a physician required him to inform her of the possibility of birth defects. The boy sued the doctors for his birth defects, the mother for the effects on her emotional state caused by her son's condition, the father for the costs incurred in caring for him. The trial judge dismissed the boy's complaint at the close of the plaintiffs' case, the parents' complaint after all the evidence was heard. The Supreme Court, by a majority, affirmed the judge's decision. Proctor J., delivering the judgment of the court, held, at p. 692, that the boy's complaint was not actionable because the conduct complained of, even if true, did not give rise to damages cognisable at law. Weintraub C.J., assenting on this point, stated, at p. 711, that the boy's complaint involved saying that he would have been better off not to have been born at all: "Man, who knows nothing of death or nothingness, cannot possibly know whether that is so."

Between 1977 and 1981 are to be found other reported decisions on claims by handicapped children and their parents against medical men and hospital authorities. In the earliest of them the Appeals Court of New York upheld motions to dismiss complaints by children suffering from Down's syndrome (mongolism) and polycystic kidney disease: *Becker v. Schwartz* (1978) 413 N.Y.S. 2d 895 and *Park v. Chessin* (1977) 400 N.Y.S. 2d 110. In *Becker's case*, 413 N.Y.S. 2d 895, 900 Jasen J. regarded the complaints as failing to state "legally cognizable causes of action," and Fuchsberg J., at p. 903, as "not justiciable."

These and later cases are helpfully reviewed by Blatt J. in dismissing another mongol child's claim for wrongful life in a South Carolina District Court: *Phillips v. United States of America* (1980) 508 F.Supp. 537, where he points out that the decision of the Court of Appeal in California in *Curlender v. Bio-Science Laboratories* (1980) App., 165 Cal.Rptr. 477, is the only case recognising such a cause of action.

I have not found in the judgment of Jefferson P.J. in the *Curlender case* any answer to the reasoned objections to this cause of action which are to be found in *Gleitman's case*, 227 A. 2d 689, and those cases which have followed it. Indeed, Mr. Wilmers said he could not rely on Jefferson P.J.'s reasoning in *Curlender's case*, App., 165 Cal.Rptr. 477, and it seems that the courts of California may now be coming into line with the rest: see *Turpin v. Sortini* (1981) App., 174 Cal.Rptr. 128, of which we have only a summary in *West's General Digest*, 5th series, vol. 32.

Judicial opinion expressed in the American decisions can, I think, be summarised in the following propositions. (1) Though what gives rise to the cause of action is not just life but life with defects. the real cause

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of action is negligence in causing life. (2) Negligent advice or failure to advise is the proximate cause of the child's life (though not of its defects). (3) A child has no right to be born as a whole, functional being (without defects). (4) It is contrary to public policy, which is to preserve human life, to give a child a right not to be born except as a whole, functional being, and to impose on another a corresponding duty to prevent a child being born except without defects, that is, a duty to cause the death of an unborn child with defects. (5) It is impossible to measure the damages for being born with defects because it is impossible to compare the life of a child born with defects and non-existence as a human being. (6) Accordingly, by being born with defects a child has suffered no injury cognizable by law and if it is to have a claim for being so born, the law must be reformed by legislation.

The current of opinion has run in favour of the fourth consideration and against the fifth consideration even to the point of dismissing it altogether. Authority for that, and for the considerations which I have formulated, is to be found in particular in the judgment of the Supreme Court of New Jersey given by Pashman J. in *Berman v. Allan* (1979) 404 A. 2d 8, 11-13; in the judgments of Cercone P.J. and Spaeth J. in *Speck v. Finegold* (1979) Pa. Super., 408 A. 2d 496, 508, 512; and in the judgment of Blatt J. in *Phillips v. United States of America*, 508 F.Supp. 537, 542-543.

There are indications, to which Mr. Wilmers called our attention, that some of the judges' opinions on the sanctity of human life were influenced by the illegality of abortion in some states; but those indications do not, in my opinion, play a decisive part in their decisions or weaken their persuasive force in considering the right answer to the same question in a jurisdiction where abortion has some statutory sanction.

I do not think it matters whether the injury is not an injury recognised by the law or the damages are not damages which the law can award. Whichever way it is put, the objection means that the cause of action is not cognisable or justiciable or "reasonable," and I can draw no distinction between the first two terms and the third as it is rather artificially used in Ord. 18, r. 19.

The defendants must be assumed to have been careless. The child suffers from serious disabilities. If the defendants had not been careless, the child would not be suffering now because it would not be alive. Why should the defendants not pay the child for its suffering? The answer lies in the implications and consequences of holding that they should. If public policy favoured the introduction of this novel cause of action, I would not let the strict application of logic or the absence of precedent defeat it. But as it would be, in my judgment, against public policy for the courts to entertain claims like those which are the subject of this appeal, I would for this reason, and for the other reasons which I have given, allow the appeal, set aside the judge's order and restore the master's order.

ACKNER L.J. Mary McKay was born on August 15, 1975, and is therefore 6½ years old. Whilst in her mother's womb she was infected with rubella (German measles) and as a result she is partly blind and deaf

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and is apparently disabled in other respects, the details of which have not been provided to us. She alleges in her statement of claim that Dr. Gower-Davies, the second defendant, owed her a duty of care when she was in utero. She claims that he was negligent in that he failed to treat the rubella infection, after being told that it was suspected by her mother, the second plaintiff. She contends that this can be arrested by the injection of globulins into the mother, which although it cannot reverse or ameliorate damage already done to the unborn child, it can reduce the likelihood of further damage.

It has not been contested that if the facts set out above are established, Mary has an arguable cause of action against the doctor. In fact, without it being in terms conceded, it was assumed that on those facts she would indeed recover damages.

Mrs. McKay is also claiming against the doctor on a similar basis. Further, she alleges that within two months of the conception of the child she told the doctor she thought she had been in contact with rubella. He therefore took a blood sample from her with a view to its being tested for infection. He negligently mislaid this sample and the further sample provided by her; alternatively he failed to interpret the results of such tests that may have been carried out by the first defendant, the Essex Area Health Authority. In the result, the doctor informed Mrs. McKay that she and her unborn child had not been affected by rubella during the pregnancy and that she need not consider an abortion. Mrs. McKay claims that if she had been properly advised by the doctor she would have decided to undergo an abortion and thus Mary would never have been born. She therefore claims damages on the basis that she has been "burdened with a child with serious congenital disabilities," and accordingly claims cost of medical treatment and care and any other expense which would not have been required had the child been born without deformities. She makes a similar claim against the health authority for its alleged negligence in failing to perform the appropriate tests on any samples provided to it by the doctor, of failing to inform the doctor properly or at all of the results of the tests, and in losing or confusing the blood samples.

Again, there was no suggestion that if Mrs. McKay established the facts referred to above she would nevertheless fail to recover damages. However, in addition to the claims referred to above, Mary seeks to add an additional claim against the doctor. Quite apart from his alleged failure to arrest the progress of the rubella infection by a process of injections, she claims that the duty of care which the doctor owed her when she was in utero involved advising her mother of the desirability of an abortion, which advice, as previously stated, the mother alleges she would have accepted. She accordingly claims that she has suffered damage by "entry into a life in which her injuries are highly debilitating, and distress loss and damage." She makes a similar claim, mutatis mutandis, against the health authority by reason of its alleged negligence in relation to its handling and testing of the samples and its failure to advise the doctor of the results of any such tests as it may have performed.

On February 17, 1981, Master Bickford Smith struck out Mary's

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additional claim against the doctor and the similar claim against the health authority on the basis that they disclosed no reasonable cause of action. On June 18, 1981, his decision was reversed by Lawson J., who, while accepting that it was a proper case in which to apply under Ord. 18, r.19 to strike out these claims, held that the child had "a highly reasonable and arguable cause of action."

In a respondents' notice Mr. Wilmers took the point that the application to strike out was misconceived because a serious and prolonged investigation into an area of law was involved and accordingly it could not be said that it was plain and obvious that the case was unarguable. I think it is convenient to take this point first.

I respectfully agree with the observation of Sir Gordon Willmer in *Drummond-Jackson v. British Medical Association* [1970] 1 W.L.R. 688, 700, where he said:

"The question whether a point is plain and obvious does not depend upon the length of time it takes to argue. Rather the question is whether, when the point has been argued, it has become plain and obvious that there can be but one result."

Moreover, when one considers the following matters, the judge's view that this was a proper case under the rules to make such an application, appears to me to be wholly justified.

1. The child's additional claim is in essence a claim based upon the negligent failure of the doctor and the health authority to prevent her birth. But for their negligent conduct her mother would have obtained an abortion and this would have terminated her pre-natal existence. This is a wholly novel claim, supported by no English authority.
2. The only courts which have considered such a claim are American courts. With one exception they have all denied the existence of such a cause of action. The respondents do not seek to justify the reasoning in that one exceptional decision. No prolonged legal argument was therefore available.
3. The Congenital Disabilities (Civil Liability) Act 1976 received the Royal Assent on July 22, 1976. Section 1, which deals with civil liability to a child born disabled, was in the terms of clause 1 of a draft annexed to the Law Commission Report on Injuries to Unborn Children (1974) (Law Com. No. 60) (Cmnd. 5709). It provides:

" (1) If a child is born disabled as the result of such an occurrence before its birth as is mentioned in subsection (2) below, and a person (other than the child's own mother) is under this section answerable to the child in respect of the occurrence, the child's disabilities are to be regarded as damage resulting from the wrongful act of that person and actionable accordingly at the suit of the child. (2) An occurrence to which this section applies is one which - … (*b*) affected the mother during her pregnancy, or affected her or the child in the course of its birth, so that the child is born with disabilities which would not otherwise have been present."

Subsection (2) (*b*) is so worded as to import the assumption that, but for the occurrence giving rise to a disabled birth, the child would have been

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born normal and healthy - not that it would not have been born at all. Thus, the object of the Law Commission that the child should have no right of action for "wrongful life" is achieved. In paragraph 89 of the Report the Law Commission stated that they were clear in their opinion that no cause of action should lie:

"Such a cause of action, if it existed, would place an almost intolerable burden on medical advisers in their socially and morally exacting role. The danger that doctors would be under subconscious pressures to advise abortions in doubtful cases through fear of an action for damages is, we think, a real one."

This view was adopted by the Royal Commission on Civil Liability and Compensation for Personal Injury (1978) (Cmnd. 7054-1), paragraph 1485.

1. Section 4 (5) of the Act provides:

"This Act applies in respect of births after (but not before) its passing, and in respect of any such birth it replaces any law in force before its passing, whereby a person could be liable to a child in respect of disabilities with which it might be born;…"

Thus, there can be no question of such a cause of action arising in respect of births after July 22, 1976. This case therefore raises no point of general public importance. It can, for all practical purposes, be considered as a "one-off" case.

The complaint that the application to strike out inevitably involves delay in the trial of those claims which are accepted as being arguable, is of no real moment in this case. We have been told that it is not yet possible properly to assess the child's injuries and it appears to be common ground that liability cannot conveniently be tried separately. Although the determination of the question whether the child's additional claims are plainly unarguable will, if decided in favour of the doctor and the health authority, not dispose of the action, it will clearly simplify it and probably add to the prospects of its settlement. Although the interlocutory application and appeals have involved expense, if the application is successful it will reduce the expense of the trial Moreover, in my judgment, a defendant, and likewise a plaintiff, is prima facie entitled to have pruned out of a statement of claim, equally a defence, such deadwood as he can clearly identify, so that the parties, and indeed the court, may more readily focus on the live issues.

**Reasonable cause of action**

I now turn to consider whether the child's additional claim discloses any reasonable cause of action.

1. *The duty*. I can consider this in relation to the claim against the doctor, since what can be said in relation to the claim made against him applies, mutatis mutandis, to the claim against the health authority.

The duty alleged is the duty to take care in relation to the unborn child. Hence the first claim for failing to treat the suspected rubella by injection, so as to reduce the likelihood of further damage. Thus, the self same duty is relied upon for pre-natal injuries as would be relied upon post-natally, if there was a failure to give proper treatment after the

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child had been born. The embryo or foetus is in a comparable position to the child and adult which it may ultimately become. However, in stark contrast to the plea that the doctor should have advanced the prospect of a healthy birth of the child, the additional plea, which is still based upon the same duty of care to the unborn child, relies upon a negligent failure to prevent its birth. The basis of this additional claim is that had the doctor properly discharged his obligation of care *towards the unborn child*, he would have advised the mother "of the desirability of an abortion," (paragraph 13), which advice the mother would have accepted (paragraph 9). Accordingly, the foetus's existence in utero would have been terminated. Thus, the duty of care is said to involve a duty *to the foetus*, albeit indirectly by advice to the mother, to cause its death.

I cannot accept that the common law duty of care to a person can involve, without specific legislation to achieve this end, the legal obligation to that person, whether or not in utero, to terminate his existence. Such a proposition runs wholly contrary to the concept of the sanctity of human life.

Mr. Wilmers contends that where it can be established that a child's disabilities are so severe that it can be properly stated that she would be better off dead, the duty of care involves the duty to terminate its life. He seeks to support this position by reference to *In re B. (A Minor) (Wardship: Medical Treatment)* [1981] 1 W.L.R. 1421. As Griffiths L.J. has pointed out, this was an urgent application made to the Court of Appeal in vacation and the two judgments were extempore. I am quite satisfied that Templeman L.J. was saying no more than that, conceding for the purpose of argument that where the life of a child is so bound to be full of pain and suffering that it could be contended that the court could, in the exercise of its wardship jurisdiction, refuse to sanction an operation to prolong the child's life, the case before it clearly was not such a case. I do not consider that *In re B*. provides any support to Mr. Wilmers's contention.

Mr. Wilmers was constrained to concede that if his submission was correct, then a child born with a very minor disability, such as a squint, would be entitled to sue the doctor for not advising an abortion, which advice would have been accepted, given that the risk (which fortunately did not eventuate) was of serious disabilities due to some infection which the doctor should have diagnosed. This would indeed be an odd position. Moreover, he accepted that if the duty of care to the foetus involved a duty on the doctor, albeit indirectly, to prevent its birth, the child would have a cause of action against its mother, who had unreasonably refused to have an abortion. Apart from the complicated religious and philosophical points that such an action would raise, the social implications in the potential disruption of family life and bitterness which it would cause between parent and child led the Royal Commission on Civil Liability and Compensation for Personal Injury (1978) (Cmnd. 7054-1) to conclude that such a right of action would be against public policy: see paragraph 1465.

Of course, the doctor, in accordance with his duty of care *to the mother*, owes her a duty to advise her of the rubella infection and its

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potentially serious and irreversible effects and on the advisability of an abortion, such an operation having in such circumstances been legalised by the Abortion Act 1967. This is, however, nihil ad rem.

1. *The in jury and the damages*. The disabilities were caused by the rubella and not by the doctor (I ignore whether their extent could have been reduced through injections, because that is the subject of the child's first claim). What then are her injuries, which the doctor's negligence has caused? The answer must be that there are none in any accepted sense. Her complaint is that she was allowed to be born at all, given the existence of her pre-natal injuries. How then are her damages to be assessed? Not by awarding compensation for her pain, suffering and loss of amenities attributable to the disabilities, since these were already in existence before the doctor was consulted. She cannot say that, but for his negligence, she would have been born without her disabilities. What the doctor is blamed for is causing or permitting her to be born at all. Thus, the compensation must be based on a comparison between the value of non-existence (the doctor's alleged negligence having deprived her of this) and the value of her existence in a disabled state.

But how can a court begin to evaluate non-existence, "the undiscovered country from whose bourn no traveller returns?" No comparison is possible and therefore no damage can be established which a court could recognise. This goes to the root of the whole cause of action.

Mr. Wilmers has provided no answer to the damage problem. His suggestion that you assess the compensation on the basis that the doctor had caused the disabilities and then you make some discount on a basis which he could not particularise because the doctor did not cause the disabilities, does not, in my judgment, advance the matter, except to tend to confirm the impossibility of making such an assessment.

For the above reasons, which are reflected in one or more of the American decisions to which Stephenson L.J. has referred, I conclude that the child's additional claims against the doctor and the health authority are clearly unsustainable and therefore have no chance of success. Accordingly I would allow the appeal and restore the order of Master Bickford Smith.

GRIFFITHS L.J. In this action the plaintiffs, for the first time in our courts, seek to bring a claim for what the Americans call "wrongful life." The defendants say that there is no such cause of action, and seek to strike it out of the plaintiffs' pleading pursuant to Ord. 18, r. 19. If they succeed it will not put an end to the action because the statement of claim makes other claims which it is conceded disclose at least arguable causes of action. The plaintiffs resist the defendants' application on the ground that the claim for "wrongful life" raises at least an arguable cause of action and the discretion to strike out should only be exercised in plain and obvious cases which can be decided without serious and prolonged investigation of the law, and this, say the plaintiffs, is not such a case. Furthermore, the plaintiffs rely strongly upon the fact that even if this cause of action is struck out, it will not put an end to the action and

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say that this is a factor which should weigh heavily in the balance against exercising the discretion to strike out.

After two days of argument I have come to the firm conclusion that our law cannot recognise a claim for "wrongful life"; nevertheless I should not have been prepared to interfere with the judge's discretion to refuse to strike out the claim as disclosing no reasonable cause of action. By deciding this question as a preliminary point, the trial of the action, which involves investigation of facts occurring as long ago as 1975, has inevitably been substantially delayed, which is highly undesirable, and it may be delayed further if this case goes to the House of Lords. I do not accept the argument that the plaintiffs brought that result upon themselves by putting forward an unsustainable claim. Although at the end of the day this court has unanimously decided that there is no claim for "wrongful life," Lawson J. (without of course having heard the full argument) thought the matter highly arguable, and it was in my view manifestly reasonable to put the claim forward on behalf of this grievously disabled child. I cannot see that deciding this issue at this stage brings any real advantage to the defendants. It was suggested that it might make settlement easier if the parties knew that the child had no claim against the hospital. This is pure speculation. We have no idea if the hospital has any thought of settlement, and if it really wanted to settle I do not believe the possibility that the child might have a claim as well as the mother, would present any real obstacle to a settlement. Obviously any lawyer acting for the child would make a very heavy discount against the risk that the court would refuse to allow a claim for "wrongful life."

The older authorities cited by Mr. Wilmers, *Attorney-General of the Duchy of Lancaster v. London and North Western Railway Co*. [*[1892] 3 Ch. 274*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-3VV1-JCJ5-20RM-00000-00&context=1522468); *Hubbuck & Sons Ltd. v. Wilkinson, Heywood & Clark Ltd*. [*[1899] 1 Q.B. 86*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-6D91-FGY5-M4HN-00000-00&context=1522468) and *Dyson v. Attorney-General* [*[1911] 1 K.B. 410*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-6D51-FJDY-X3SJ-00000-00&context=1522468). show that if this application to strike out had been made at the time when those authorities were decided, the court would have unhesitatingly refused it on the ground that it involved a serious investigation into a question of law quite unsuited to be decided by a judge sitting in chambers. But times change, and the pressure on the courts caused by the advent of legal aid, union support for many plaintiffs, and insurers acting for many defendants, is vastly greater than at the turn of the century. The courts must and do adapt their procedures to cope with these new pressures. Today many matters are decided in chambers which involve substantial legal argument, where it is of advantage to the litigants. Sometimes I think it is carried too far, particularly where applications for judgment under Order 14 lead to special appointments and hearings lasting several days and the consideration of a mass of documentary evidence. Judges should generally resist the temptation to embark upon such an inquiry and let the matter proceed to trial.

Today, in an appropriate case, the mere fact that a substantial and not frivolous argument can be presented to support a novel cause of action is not of itself sufficient to require a judge to exercise his discretion in favour of refusing to strike out, and in an appropriate case if at the end of the argument the judge comes to the conclusion that it is plain and

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obvious that the claim cannot succeed he should strike it out: see *Drummond-Jackson v. British Medical Association* [1970] 1 W.L.R. 688.

It was, however, stressed by Lord Pearson in that case that although there was a discretion to hold a long and elaborate hearing to determine the point in special cases where it could be seen to be advantageous, there should be no change in the general practice of only striking out where the answer was so plain and obvious that it could be determined at a short and summary hearing: see p. 696A-C.

If on an application to strike out as disclosing no cause of action a judge realises that he cannot brush aside the argument, and can only decide the question after a prolonged and serious legal argument, he should refuse to embark upon that argument and should dismiss the application unless there is a real benefit to the parties in determining the point at that stage. For example, where striking out the cause of action will put an end to the litigation a judge may well be disposed to embark on a substantial hearing because of the possibility of finally disposing of the action. But even in such a case the judge must be on his guard that the facts as they emerge at the trial may not make it easier to resolve the legal question. In this case I can see no significant advantage in deciding whether the child has a cause of action for wrongful life against the hospital or the doctor at this stage of the litigation, and I can see positive disadvantages in doing so because it delays the trial and increases costs. Therefore, in my opinion, this claim should not have been struck out under Ord. 18, r. 19, and the question should have been left to be resolved at the trial of the action.

I realise of course the temptation of saying: well, this point has now been argued before a master, a High Court judge, and very ably before the Court of Appeal, and it really would be ridiculous to send it back to be argued all over again before another High Court judge and then before another division of the Court of Appeal; especially when it is a one-off point because claims for "wrongful life" in all cases subsequent to the Congenital Disabilities (Civil Liability) Act 1976 are excluded by the wording of section 1 (2) (b) of that Act. Despite the force of these considerations, I would resist the temptation because I think to allow this appeal is to fly in the face of established practice and may set an unfortunate precedent. For these reasons I would have dismissed this appeal. As, however, I am in the minority and as the point has been fully argued I must state my opinion upon whether or not our common law recognises a claim for "wrongful life."

The child's claim for "wrongful life" is put against the hospital by the following steps: (1) the hospital when analysing the mother's blood owed a duty of care to the foetus in her womb. This point is conceded by the hospital for the purposes of this appeal. (2) The hospital discharges that duty of care by correctly advising whether the analysis shows that the mother has been infected. (3) In breach of that duty the hospital negligently advised that the analysis showed that the mother was not infected. (4) That breach of duty caused the birth of the child because if the hospital had correctly advised that the mother was infected, she would have decided to have an abortion. (5) As a result of being born the child has to bear the

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afflictions of deafness, partial blindness and some degree of mental retardation, which society and the law should concur in treating as something that should not have happened to the child and for which she should be compensated by the negligent hospital.

It can thus be seen that the child's allegation is that but for the negligence of the hospital she would not have been born; it is as a result of its wrong that she has been born; hence the term "wrongful life." The claim is put in a similar manner against the doctor.

Whether the law should give a remedy in such circumstances has been considered by the Law Commission. They concluded that there should be no liability for wrongful life and deliberately drafted section 1 of the Congenital Disabilities (Civil Liability) Bill to exclude any such liability. Parliament accepted that advice and enacted the material part of the Congenital Disabilities (Civil Liability) Act 1976 in precisely the same language as the Law Commission's Bill. I am unable to accept Mr. Wilmers's submission that the language of section 1 does not exclude the action for wrongful life; I have no doubt that it achieves its objective.

We have been referred to seven decisions of courts in the United States of America; all save one of those courts have denied a remedy for wrongful life. The remedy has been denied upon a variety of different grounds. The Law Commission were of the opinion that it would impose an intolerable burden on the medical profession because of a subconscious pressure to advise abortions in doubtful cases for fear of actions for damages. I do not myself find this a convincing reason for denying the action if it would otherwise lie. The decision whether or not to have an abortion must always be the mother's; the duty of the medical profession can be no more than to advise her of her right to have an abortion and of the pros and cons of doing so. If there is a risk that the child will be born deformed, that risk must be explained to the mother, but it surely cannot be asserted that the doctor owes a duty to the foetus to urge its destruction. Provided the doctor gives a balanced explanation of the risks involved in continuing the pregnancy, including the risk of injury to the foetus, he cannot be expected to do more, and need have no fear of an action being brought against him.

To my mind, the most compelling reason to reject this cause of action is the intolerable and insoluble problem it would create in the assessment of damage. The basis of damages for personal injury is the comparison between the state of the plaintiff before he was injured and his condition after he was injured. This is often a hard enough task in all conscience and it has an element of artificiality about it, for who can say that there is any sensible correlation between pain and money? Nevertheless, the courts have been able to produce a broad tariff that appears at the moment to be acceptable to society as doing rough justice. But the whole exercise, difficult as it is, is anchored in the first place to the condition of the plaintiff before the injury which the court can comprehend and evaluate. In a claim for wrongful life how does the court begin to make an assessment? The plaintiff does not say, "But for your negligence I would have been born uninjured." The plaintiff says, "But for your negligence I would never have been born." The court then has to compare the state

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of the plaintiff with non-existence, of which the court can know nothing; this I regard as an impossible task. Mr. Wilmers suggested that the court should assess the damages on the assumption that the plaintiff's injury had been caused by the hospital, and then discount the damages because it had not been so caused. But he was quite unable - and I do not blame him - to suggest any principle upon which the discount should be calculated.

Again, suppose by some happy chance the child is born with only a slight deformity, can it bring an action upon the basis that it would have been killed in the womb if the mother had been told of the risk of greater deformity? Such a claim seems utterly offensive; there should be rejoicing that the hospital's mistake bestowed the gift of life upon the child. If such claims are rejected, upon what basis could a claim be brought for a more serious injury? Only, it would seem, on the basis that the state of the child is such that it were better dead than alive. But knowing nothing of death, who is to answer this question, and what two minds will approach the answer by the same route? I regard the question as wholly outside the competence of judicial determination.

I would reject this novel cause of action because I see no way of determining which plaintiffs can claim; that is, how gravely deformed must the child be before a claim will lie; and secondly because of the impossibility of assessing the damage it has suffered.

The common law does not have the tools to fashion a remedy in these cases. If society feels that such cases are deserving of compensation, some entirely novel and arbitrary measure of damage is called for which, I agree with Jasen J. in *Becker v. Schwartz*, 413 N.Y.S. 2d 895, would be better introduced by legislation than by judges striving to solve the insoluble.

Appeal allowed.

Judge's order set aside and master's order restored.

Order for payment by plaintiffs of defendants' costs before judge and Court of Appeal; The Law Society to have 10 weeks to object.

Legal aid taxation of plaintiffs' costs.

Leave to appeal refused.

Solicitors: Legal Adviser, North East Thames Regional Health Authority; Hempsons; Steggles Palmer.

***B. O. A.***