



Neutral Citation Number: [2020] EWHC 3506 (QB)

Case No: QB-2019-001503

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 21 December 2020

**Before:**

**Mrs Justice Lambert DBE**

-----

**Between:**

**Evie Toombes**  
**(a protected party who sues by her mother and**  
**litigation friend, Caroline Toombes)**

**Claimant**

**- and -**

**Dr Philip Mitchell**  
**(sued in his own right and as a partner in, and on**  
**behalf of all the partners in the Hawthorn**  
**Medical Practice)**

**Defendant**

-----

**Ms Susan Rodway QC (instructed by Moore Barlow) for the Claimant**  
**Mr Christopher Johnston QC (instructed by Clyde & Co) for the Defendant**

Hearing dates: 9 and 10 November 2020

-----

## **JUDGMENT**

**Approved by the court for handing down**

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 1030 on Monday, 21 December 2020.

## Mrs Justice Lambert:

### Introduction

1. The Claimant was born on 19 November 2001. She has a congenital developmental defect causing spinal cord tethering. Her mobility is very limited and she suffers from urinary and bowel incontinence. She alleges that the cause of her physical disability is her mother's failure to take folic acid before her conception which was, in turn, due to the Defendant's negligent advice. She brings this claim through her mother and litigation friend in respect of her own "*wrongful conception and birth*" alleging that, but for the negligence of the Defendant, she would never have been conceived, and that "*her damage and disability are due to this*".
2. The action comes before me on a trial of the preliminary issue. The Defence makes clear that the allegations made in the Particulars of Claim are comprehensively disputed. This dispute remains. However, for the purpose of this trial of the preliminary issue, a set of facts which puts the Claimant's case at its highest has been agreed. The issue for me is whether, on the basis of those facts, the claim discloses a lawful cause of action.
3. The facts which have been agreed include that, but for the breach of duty, the Claimant would not have been conceived. The Defendant therefore submits that this is a claim in which the injury alleged is not the Claimant's disability but the fact of her existence. It is the Defendant's case that the action is one of "wrongful life", a term coined in the United States and adopted by the Law Commission in its Report on Injuries to Unborn Children (Law Com. No. 60) of August 1974 ("the Report"). As such, the claim is expressly excluded by the provisions of the Congenital Disabilities (Civil Liability) Act 1976 ("the Act") which gave effect to the recommendations of the Law Commission. Relying upon the judgment of the Court of Appeal in *McKay v Essex Area Health Authority* [1982] 2 All ER 771, the Defendant also submits that the claim would not have been recognised at common law, even before the introduction of the Act in July 1976. In *McKay* the Court struck out the claim brought by a child, born with significant disabilities consequential upon her mother's infection with rubella during the pregnancy, who alleged that, but for the breach of duty, the pregnancy would have been terminated. The Court observed that, after the coming into force of the Act on July 22 1976 "*there can be no question of such a cause of action arising in respect of births*" and that "*this case therefore raises no point of general public importance*". Both under the Act and at common law, the Defendant therefore submits that the agreed facts do not disclose a lawful cause of action.
4. The Claimant submits that the claim is not a claim for "wrongful life" and that to apply this label to the action is to misunderstand what the Law Commission intended to convey by the term; that whilst actions for "wrongful life" in the strict sense of the term were excluded under the Act, this claim is not such a claim. The claim is one which falls squarely within the scope of subsection 1(2)(a) of the Act which permits recovery by children born disabled as a consequence of negligence affecting a parent in his or her ability to have a healthy child. The Claimant submits that, on a proper reading of the Act, the Report and the judgments of the Court of Appeal in *McKay*, the label of "wrongful life" is restricted to tortious acts or omissions following conception but for which the pregnancy would have been terminated. As Ms Susan Rodway QC for the Claimant put it

in argument before me, “wrongful life” cases are “abortion cases” as distinct from cases in which it is alleged that, but for the negligence, the child would not have been conceived.

5. The focus of this preliminary issue trial is the proper interpretation of section 1 of the Act. The Report is relied upon by both parties as an external aid to construction, the Act having been passed exactly in accordance with the draft Bill annexed to the Report. The parties also place reliance upon the judgments in *McKay* in support of their competing definitions of claims for “wrongful life” and to the extent that the judgments interpret the relevant provisions of the Act.
6. The Claimant was represented by Ms Rodway and the Defendant by Mr Christopher Johnston QC. I am grateful to them both for their submissions.

#### The Agreed Facts

7. I set out below the salient agreed facts relevant to the preliminary issue trial.
  - a. The Claimant was conceived in early 2001. Before conception, the Claimant’s mother attended an appointment with the Defendant, her general practitioner, to discuss family planning. This appointment took place on 27 February 2001.
  - b. At the time, it was standard practice for GPs to advise prospective mothers of the potential benefits of taking sufficient folic acid before conception and during the first trimester. It was understood that an adequate intake may potentially reduce the risk of a baby being born with neural tube defects.
  - c. The Defendant advised the Claimant’s mother that taking folic acid was optional and that it was for her to decide whether to take the supplement. The Defendant did not warn the Claimant’s mother of any association between folic acid intake and the prevention of spina bifida. He did not prescribe her folic acid supplements. In so doing, the Defendant acted in breach of duty to the Claimant’s mother.
  - d. Shortly after the consultation and in reliance upon the Defendant’s advice, the Claimant was conceived. The Claimant was born on 19 November 2001. The Claimant was diagnosed with a lipomyelomeningocele (LMM), an occult form of neural tube defect leading to permanent disability.
  - e. For the purposes of this preliminary issues trial, it is accepted that:
    - i. The Defendant’s failure to advise the Claimant’s mother that she should take folic acid supplement, and to prescribe the supplement, was a breach of the duty of care (owed to the Claimant’s mother);
    - ii. But for that breach of duty, the Claimant’s mother would have delayed attempting to conceive for a number of weeks whilst she increased her intake of folic acid and achieved the therapeutic level of the folic acid in her bloodstream which she would then have maintained during the first 12 weeks of the pregnancy;

- iii. The Claimant was, in fact, conceived shortly after the consultation and during the time which, but for the breach, the Claimant's mother would have been increasing her intake of folic acid and avoiding conception. It follows that, but for the breach, the Claimant would not have been conceived and born at all. This reflects the Claimant's case on causation which is that: "*she was wrongly conceived and born and that her damage and disability is due to this. Her claim is that her mother would not have conceived her, that her mother would have attempted conception at a later point in time and hence that a sibling, not the Claimant, would have been conceived and born*"; and
  - iv. The sibling would have been "*a genetically different person*" who would not have suffered from a neural tube defect.
- f. In fact, the Claimant has a younger sibling, who was born without congenital defects.

### The Pleadings

8. The Particulars of Claim set out the facts alleged, the allegations of breach of duty and the Claimant's case on causation. Given the facts which have been agreed for present purposes, it is not necessary for me to repeat those sections of the claim. The legal basis for the action, whether the claim is brought at common law or under the Act and, if under the Act, how the Claimant articulates her claim is not set out in the Particulars of Claim. The objections made by the Defendant were not anticipated in the Particulars of Claim nor, having been raised in the Defence, were they addressed in a Reply. As to the damages sought, although only a preliminary schedule was served with the pleadings, it is apparent that it is the additional costs associated with the disability that are claimed, not the full costs of uninjured and injured living expenses.
9. So far as relevant to the issue before me, the Defence sets out the basis upon which it is alleged that the claim discloses no cause of action. It is asserted that the claim is one for wrongful life and is not actionable under the Act, as interpreted by the Court of Appeal in *McKay*; that the Defendant cannot owe the Claimant a duty of care to prevent her coming into existence; and that even if Parliament were to amend the Act to permit a wrongful life claim and to give the legislation retrospective effect to apply to the claim, this would not be a claim in which damages would be recoverable. The Claimant contends that she would and should not have been born and her claim for damages invites a comparison between the condition she is in now, and her non-existence, which is an impossible task upon which the Court cannot embark.
10. The parties also agreed a set of "Issues of Law" for the purpose of this preliminary issue trial. The questions overlap but question 2 encapsulates the point.

#### 2. Cause of Action

- a) Is the correct legal character of the Claimant's cause of action one in respect of wrongful life (as the Defendant contends) or an action for damages for the injuries caused to the Claimant in utero by reason of the Defendant's breach of duty (as contended by the Claimant)?

- b) Is it repugnant to the law to find that the Claimant has a cause of action in circumstances where the correct advice would have resulted in the conception of a different individual?
- c) If yes, can current legal principles be widened in order to enable the Claimant to pursue an action in her own right for damages for injuries suffered by reason of the Defendant's breach of duty?

11. Curiously, one of the questions posed suggests that the Claimant's case is that her injuries were caused when she was in utero. I simply record that, before me, the Claimant's case was that this is a claim which under the Act falls within subsection 1(2)(a).

### The Act

12. The Act came into force in July 1976. As stated in the preamble, it is "*an Act to make provision as to civil liability in the case of children born disabled in consequence of some person's fault*". The Act was prospective in effect only (hence the Court of Appeal's consideration of the common law position in *McKay*) and applied to all births occurring after it came into force, replacing the common law.

13. The key provisions which concern me are:

#### ***"4. Interpretation and other supplementary provisions.***

...

- (5) *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; but in section 1(3) of this Act the expression "liable in tort" does not include any reference to liability by virtue of this Act, or to liability by virtue of any such law."*

Section 1 provides:

#### ***"1. Civil liability to child born disabled.***

- (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 –*
  - (a) *affected either parent of the child in his or her ability to have a normal, healthy child; or*
  - (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.*

- (3) *Subject to the following subsections, a person here referred to as the defendant is answerable to the child if he was liable in tort to the parent and would, if sued in time, have been so: and it is no answer that there could not have been such liability because the parent suffered no actionable injury, if there was a breach of legal duty which, accompanied by injury, would have given rise to the liability.*
- (4) *In the case of an occurrence preceding the time of conception, the defendant is not answerable to the child if at that time either or both of the parents knew the risk of their child being born disabled (that is to say, the particular risk created by the occurrence); but should it be the child's father who is the defendant, this subsection does not apply if he knew of the risk and the mother did not*
- (5) *The defendant is not answerable to the child, for anything he did or omitted to do when responsible in a professional capacity for treating or advising the parent, if he took reasonable care having due regard to then received professional opinion applicable to the particular class of case; but this does not mean that he is answerable only because he departed from received opinion.”*

#### Law Commission Report No. 60

14. The Act gave effect to the recommendations of the Law Commission in the Report presented in August 1974. The impetus for the consultation process was the thalidomide tragedy and the litigation in its wake. The Terms of Reference were limited to liability for pre-natal injury, the focus being on tort upon proof of fault, or on strict liability within the field of tort law. The Commissioners recognised that the topic raised matters of considerable social importance and difficulty, and the consultation process was commensurately wide-ranging; it included a large number of members of the medical profession from different disciplines, various women's associations, the insurance industry and the clergy. When providing its advice to the Lord Chancellor in the form of the Report, the Law Commission also provided a draft Bill and Explanatory Notes. Parliament enacted the material part of the Act in exactly the same language as the draft Bill.

#### *General Principles for Liability*

15. The first problem facing the Commissioners arose from the status of, or non-existence of, the claimant at the time of the negligence. A claimant in such a case has “*no legal existence at the time of injury, nor any existence separate to its mother*”. Alternatively, an event or occurrence resulting from a negligent act or omission could cause pre-natal injury even though at the time of the negligence the injured person had not been conceived. The Commissioners recommended that, in spite of the difficulty, and so far as possible, claims for pre-natal injury should be “*equated with ordinary claims for damages for personal injury inflicted after birth*” and that, as a general rule, whenever there was liability at common law to a parent for an act or omission causing pre-natal injury the child should be entitled to recover damages.

16. The Commissioners addressed the problem by determining that liability for pre-natal injury sustained by the child should be derived from the duty owed to the parent, requiring only that the child should be born alive, with the cause of action thus crystallising at birth. This is reflected in subsection 1(3) of the Act. As the Explanatory Notes to the Bill state: “*the liability of the defendant is a derivative one, in that the combined effect of subsections (1) to (3) is to make liability to the child dependent on a pre-existent liability to one or other of the parents in respect of the matters giving rise to the disabled birth*”.
17. The Commissioners addressed a series of technical difficulties produced by the derivative basis for liability for pre-natal injury. I do not need to cover here all of those difficulties and how they were resolved. For present purposes it is sufficient to note that the Commissioners recognised that, applying traditional principles of tort law, no cause of action could arise until damage had been inflicted. This raised the problem that the negligent act or omission might leave the mother herself with no actionable injury. The Commissioners noted that the mother might be physically unaffected by the act or omission relied upon; noting the effect of thalidomide on the pregnant mother, she might even have benefited from the act or omission. In these circumstances, the mother would not be able to sustain a cause of action in her own right.
18. The draft Bill resolved the problem in subsection 1(3): “... *it is no answer that there could not have been such liability because the parent suffered no actionable injury, if there was a breach of legal duty which, accompanied by injury, would have given rise to the liability*”. As the Explanatory Notes state at paragraph 8(ii): “*the child’s right of action is not prejudiced by the inability of the mother to sue, - as for example whether she immediately pre-deceased the child, or can claim no actionable damage (because the occurrence in question was not one which caused any injury to her)*”. I return to this provision later when I consider Mr Johnston’s submission on the meaning of “occurrence” in subsection 1(2).

#### *Pre-Natal Injury Caused by Events Occurring Before Conception*

19. At Section E of the Report at [75] to [78] the Commissioners considered liability in respect of “*Pre-natal Injury Caused by Events Occurring Before Conception*”. The issue identified was the difficult question of whether an occurrence happening before conception and causing pre-natal injury should, in any circumstances, ground liability.
20. At [77] of the Report the Commissioners set out examples of what were referred to as “fact situations” where “*something happening to a child’s parents before its conception can lead to its being born with disabilities*”. The examples reflect the state of medical scientific knowledge in 1974. They include: physical injury to a mother’s pelvis causing injury to a child subsequently conceived and born; radiation of reproductive organs; congenital syphilis caused by contaminated blood transfusion given negligently to the mother before conception; and the use of the contraceptive pill being both ineffective and damaging to the foetus. The Commissioners remarked that there were, no doubt, a number of other fact situations where pre-natal injury could be caused by an event happening before conception.
21. The Commissioners concluded that, subject to one exception, a child born disabled due to tortious injury inflicted upon its parent before conception should have a remedy. The exception was parental knowledge at the time of the conception of the existence of a risk

that a child born of the intercourse would be disabled: such knowledge would break the chain of causation linking the tortious act or omission and the injury. Subject to this exception however, the Act confers a remedy upon a child born disabled as a result of a tortious occurrence which affected the mother before conception by subsection 1(1) read together with subsection 1(2)(a).

#### *Actions for “Wrongful Life”*

22. At Section H of the Report, the Commissioners considered “actions for wrongful life.” The question is posed in the following way: “*whether a child should have a right of action when the allegation essentially is that it has suffered harm from being born and the real complaint is that it would have been better not to have been born at all*”. In connection with advice provided to a woman during pregnancy, the Commissioners noted that “*here the negligence did not cause the disability; it caused the birth, but no act or omission of the advisor could have brought about the birth of a normal child*”.
23. The Commissioners concluded that an action for wrongful life “*in the strict sense of the term*” should not be permitted. A number of obstacles to such a claim were identified. In order to justify such a claim, it would be necessary to conclude that the child would have been better off had he or she never existed. Second, given that the claim is based upon the premise that the claimant would, but for the breach of duty to the mother, have not existed, any damages award would involve a comparison between non-existence and the claimant in a disabled state. Further, the Commissioners noted the real and intolerable burden that such a cause of action might place upon doctors to advise abortions in doubtful cases through fear of an action for damages.
24. Although the Commissioners considered that actions for wrongful life in the strict sense should not be permitted, they drew a distinction between such actions and other cases which in their view were not “*really cases of wrongful life*”. The Report offers two examples of such cases, both variants upon the facts of the American case of *Williams v State of New York* [1966] 18 N Y 2d 481, when as a result of hospital negligence a female patient had conceived as a result of rape. In *Williams*, the child sued the hospital for damages for the stigma of illegitimacy and the action was dismissed, in part, on the ground that illegitimacy was not an injury. However, the Commissioners considered that “*if the rapist had been syphilitic, a more sympathetic basis for a claim might have been advanced*”. The second example was similar, arising from an intentional wrong by a man suffering from syphilis who had intercourse with a woman without telling her that he was infected.
25. The Commissioners recorded that these examples of claims brought by children disabled by the effect of syphilis transmitted by the father on intercourse were not wrongful life claims. In respect of such a claimant, the Commissioners observed at [88]:

*“It is not for being born that [the child] seeks a remedy but for compensation for the disability resulting from the sexual intercourse. If that sexual intercourse and consequent disability can be shown to have resulted from the fault of another, then we do not think that the child should be without a remedy.”*

Later in its conclusions on the topic of wrongful life at [91] the Commissioners continued:

*“... in our examples based on the American case cited, we have come to the conclusion that the child should have a remedy. As we have said, we do not think that these are really cases of wrongful life. There is we think a difference between a negligent failure to prevent the birth of an already conceived child and negligence which actually causes the intercourse which results in the conception. In the latter case we think that the child should be able to claim damages and that they should be assessed by comparison with the child as he would have been had he not suffered from the disability.”*

26. The distinction being drawn by the Law Commission between those wrongful life cases coming within the strict sense of the term and those fact situations derived from *Williams* is relevant to the preliminary issue in this case which falls for my determination. I deal with the point below. I pause to note at this stage only that, in the examples based upon *Williams*, as in the case before me, neither claimant would, but for the negligence or the assault, have been conceived in the first place and yet the Commissioners considered that such claims were not cases of wrongful life but claims for damages for personal injury and that there should be recovery by the child limited to the additional losses flowing from the disability.
27. I conclude this summary by noting the terms of the draft Bill which was subsequently enacted. Subsection 1(2)(b) concerns occurrences which affected the mother during the pregnancy. This subsection carries the rider: *“so that the child is born with disabilities which would not otherwise have been present”*. This rider was explained in the Explanatory Note as follows: *“the clause gives the child no right of action for “wrongful life” (see paragraphs 89 and 90 of the report). 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 born normal and healthy (not that it would not have been born at all)”*. Again, I pause to note that this rider was not added to subsection 1(2)(a) which deals with pre-conception occurrences, only to 1(2)(b) which deals with occurrences affecting the mother during the course of the pregnancy.

#### *McKay v Essex Area Health Authority*

28. *McKay* was decided after the coming into effect of the Act but, as the claimant's birth predated the Act, the Court was concerned with the earlier common law position. The facts are straightforward. The infant claimant had been born disabled as a result of an infection of rubella suffered by her mother during the course of her pregnancy. The child brought a claim on the basis that, but for negligence in managing the pregnancy, the mother would have been informed of the risk that her pregnancy would be affected by rubella and would have terminated the pregnancy. In such circumstances the child would not have suffered *“entry into life”* with debilitating injuries. As the claimant's injuries had not resulted from the doctor's negligence but from the untreated rubella, the child's claim was analysed as one for negligently allowing her to be born alive in an injured condition. Upon an application to strike out the claim on the ground that it disclosed no cause of action (under RSC Ord. 18, r.19) the issue came before the Court of Appeal. The Court allowed an appeal from the order of Lawson J who had concluded that the claim was lawful.

29. The Court found that there were two main obstacles to the claim. The first was a policy objection to permitting a claim which was inconsistent with the concept of the sanctity of human life. The second focussed upon the impossibility of evaluating damages.
30. The Court concluded that the claim was one for wrongful life. The right which had been infringed was the right not to be born deformed or disabled which, in the context of the claim, was a right to have been aborted. As it was put by Stephenson LJ: “*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*” and “*the only result for which they were responsible was her being born*”. The Court refused to impose upon the medical profession a duty to take away life: “*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*”. Ackner LJ noted that there could be no common law duty of care to a person, without specific legislation, to terminate its existence and that to create a duty to cause the death of a foetus would offend against the sanctity of human life.
31. The Court also considered that it could not evaluate non-existence for the purpose of awarding damages for life or for the denial of non-existence. The injuries were caused by the rubella and not the doctor, and the child’s complaint was that she was allowed to be born at all. Thus the compensation would have to be based upon 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. The Court could not begin to evaluate non-existence as there was no comparison available and no damage could be established which a court would recognise. For Griffiths LJ this was the most compelling reason to reject the cause of action. As he recorded, the assessment of damages produced an intolerable and insoluble problem; no measure of damages could be formulated and so the Court should not entertain the claim.
32. All three members of the Court concluded that, had the claim fallen to be considered under subsection 1(2)(b) of the Act, then that provision had given effect to the recommendations of the Law Commission that there should be no cause of action for wrongful life. Subsection 1(2)(b) had been so worded as 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. The objective of the Law Commission that the child should have no right of action for wrongful life had therefore been achieved by the Act following which there could be no question of such a cause of action arising in respect of births after July 22 1976.

#### The Parties’ Submissions

33. Ms Rodway made three main points. Her central focus was the decision in *McKay*. She accepted that *McKay* had been correctly decided and that a claim brought by a child asserting that, but for the negligence, her mother would have been offered and accepted a termination of pregnancy is not a valid claim. She accepts that such a claim is properly described as an action for wrongful life. However, she submits that the label “wrongful life” is limited to claims which include the allegation that, but for the negligence, the

pregnancy should have been terminated or, to use her phrase, “abortion cases”. She analysed the judgments in order to demonstrate her point. She drew my attention to the various references of the Court to the burden which would be placed upon members of the medical profession to advise abortions through fear of litigation and the references by the Court that the duty to advise abortion and to kill the claimant was contrary to the sanctity of human life.

34. She submits that this narrow definition of wrongful life is supported by Report. When considering wrongful life, the Report concerns itself solely with occurrences during pregnancy. One of the objections was that a cause of action would place an almost “*intolerable burden on medical advisors 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*”. She also drew my attention to those sections of the Report which distinguish between wrongful life claims and those which do not fall within the strict definition.
35. Ms Rodway submits that, by contrast, this claim is not a claim for wrongful life. It falls within subsection 1(2)(a). Her submissions did not descend to a close analysis of the Act, however she submitted that the occurrence in the present claim was the negligent advice given by the Defendant to the Claimant’s mother.
36. Finally, Ms Rodway submitted that in the event that I did not accept her restricted definition of wrongful life actions, then I should conclude that it would be unlikely that *McKay* would be decided in a similar way now. Times have moved on and popular attitudes towards abortion have changed. There is not the same repugnance towards abortion as prevailed in 1982. As she put it in her written opening, “*so much time has passed since the judgment in McKay that there must be a commensurate re-evaluation of the issues under the modern prism*”. When viewed by reference to contemporary standards to deny this claimant a cause of action would be “*repugnant to the currently evolved moral and social responsibility*”. In support of this point she drew my attention to the amendment of the Act adding section 1A which permits recovery of damages by a claimant who has suffered a disability resulting from an act or omission in the course of the selection, or the keeping or use outside the body, of the embryo carried by the mother for the purposes of infertility treatment. This amendment, she submitted, reflected a change in approach to claims such as that brought by the Claimant.
37. I set out the headline points of Mr Johnston’s submissions only at this stage and deal with them more fully below. He submits that although this is not a case in which it is alleged that the Claimant would have been aborted, nonetheless, but for the negligence, the Claimant would never have been conceived. The Claimant could never have been born in any other way. The Defendant did not cause her disability and this Claimant could only ever have existed in her current and disabled state. The fact that but for the negligence a genetically different sibling would have been conceived after folic acid supplements had been given is irrelevant. This claim therefore raises the same policy and legal objections as those which vexed the Court in *McKay*. The claim also raises difficulties with the quantification of damages as it involves the existential imponderable of the value of non-existence. The Claimant here makes no attempt to address the problem which lies at the heart of the assessment of damages which is what offset should be allowed for what would have occurred in the “but for” situation.

38. In support of his analysis Mr Johnston relies upon the case of *Criminal Injuries Compensation Authority v First-tier Tribunal (Social Entitlement Chamber)* [2017] EWCA Civ 139 (“*CICA v FTT*”). The claim was brought by a disabled child (“Y”) who was the product of an incestuous rape of his mother (“M”) by his maternal grandfather. It was accepted that Y’s disabilities were a consequence of consanguinity. He claimed compensation under the 2008 Criminal Injuries Compensation Scheme as a “victim of crime”. The Court found that he had not been conceived at the time of the crime of violence (the rape) and, construing the statutory scheme in accordance with normal principles, only M could be a victim of crime as defined. The Court further noted however that given that Y had not been conceived at the time of the crime, damages would be impossible to assess and that such compensation would go beyond that which the Scheme was intended to cover. Mr Johnston drew my attention to the observations of Henderson LJ in which the real claim was stated to be a claim for wrongful existence and not personal injury, and that the law did not recognise such a claim.

### Discussion

39. I start by clearing the decks of one issue. It was common ground between the parties that, on the agreed facts as presented for the purpose of the preliminary issue trial, the Claimant’s mother would have had a valid claim for damages for wrongful birth, see *Parkinson v Seacroft and St James University Hospital NHS Trust* [2001] EWCA Civ 530. The claim would have encompassed the reasonable costs associated with the Claimant’s disability together with a modest award for pain and suffering associated with the pregnancy and childbirth. The central difference between the mother’s claim for wrongful birth and the Claimant’s claim is that the mother’s claim would be limited to her life expectation, rather than the Claimant’s life expectation. Ms Rodway told me that no claim was brought because, for reasons which I understand, the Claimant’s mother had not wished to bring a claim in her own right. I appreciate this. But in any event, whether such a claim would have been available, why it was not brought and whether it could yet be brought, does not seem to me to be of any relevance to the issue which concerns me. I therefore put the point to one side.

40. I turn therefore to the arguments before me. Although Ms Rodway’s focus was upon the judgments in *McKay*, my starting point is the Act. The issue for me, as I see it, is its proper interpretation. *McKay* remains relevant for the purpose of understanding the meaning of an action for wrongful life and, to the extent that it is relevant, to the consideration given to subsection 1(2)(b).

41. I agree with Mr Johnston that a cause of action under section 1 of the Act involves three components: a “wrongful act”, an occurrence as defined in subsections 1(2)(a) or (b) and a child born disabled. The occurrence must result in a child born with disabilities. In this case, on the agreed facts, if the Claimant has a lawful claim under the Act, it is one which must fall within subsection 1(2)(a) and based upon a pre-conception occurrence. Mr Johnston identifies two problems for the Claimant. The first is the narrow one: he submits that in this case there was no “occurrence”. The second, that there is no causal relationship between the Claimant’s injury and the wrongful act because, but for that wrongful act, the Claimant would never have been conceived.

42. Although there is an overlap, it is helpful to consider the objections separately.

(a) *Occurrence*

43. Mr Johnston submits that, given its ordinary and natural meaning, occurrence means that there was an event or “something happened” and that, in the context of this claim, it means that something must have happened which affected the Claimant’s mother in her ability to have a healthy child. In support of this interpretation, Mr Johnston drew my attention to the Report at [33] where the Commissioners referred to “... *the fact that an event or occurrence (resulting from a negligent act or omission) can cause pre-natal injury even though it happens before the injured person’s conception.*”. The terms “event” and “occurrence” are used interchangeably. The same terms “event” and “occurrence” appear to be used synonymously in [76] which concerns pre-conception claims.

44. On the agreed facts, however, Mr Johnston submits that nothing happened. There was no change in the Claimant’s mother’s state and so no occurrence which affected the Claimant’s mother’s ability to have a healthy child as required by subsection 1(2)(a). This is the nub of the claim which the Defendant faces. The Claimant’s mother did not take folic acid and so there was no alteration in her physical state.

45. I accept that the word occurrence means that something happened. This is to give the word its ordinary linguistic meaning. However the Act does not require that the occurrence involve a change or alteration in the mother’s physiological state. At [46] of the Report, the Commissioners noted that one of the technical difficulties with claims derived from a duty owed to the mother is that a tortious act may not result in any actionable injury to the mother and that “*an act or omission may cause physical injury to the child but leave the mother physically unaffected...*”, hence the provision at subsection 1(3) that there is no need for the mother to have an actionable injury for a lawful claim by the child for pre-natal injury. To the extent therefore that Mr Johnston submits that an occurrence must be referring to some physical change in the mother’s condition before conception, this was considered by the Commissioners only to be excluded as a pre-requisite for liability. It is not necessary for the mother to prove an actionable injury: something may have altered her physical state but equally she may have been physically unaffected.

46. There is however an alternative and more fundamental objection to Mr Johnston’s case that in this case there was no occurrence. The problem for Mr Johnston is that, depending upon its circumstances, the act of sexual intercourse itself can be a relevant occurrence. In the examples given at [88] of the Report (both variations on the facts of *Williams*), the occurrence is the intercourse with a person affected by a sexually transmitted disease. In those cases it is possible that, biologically, the infection was transmitted from father to mother and then from mother to child on conception (although this is not examined in the Report) but it would be artificial to suggest that mother’s infection was the “occurrence” when the infection and the conception were both aspects of the same event, the intercourse. Nor is there anything in the Report or Explanatory Notes which suggests that intercourse can only amount to an occurrence when it includes a sexually transmitted disease as the cause of the child’s disabilities.

47. Both of the examples given are, to the modern eye, rather archaic but they illustrate the simple point being made by the Commissioners that the circumstances of the intercourse

may amount to an occurrence. This is consistent with the general view expressed in the Report that liability for pre-natal injuries should where possible be equated with ordinary claims for damages for personal injuries and that the principles governing liability should be as for personal injuries inflicted after birth. It is also and importantly consistent with the remarks of the Commissioners at [91] that, where negligence actually causes the intercourse which results in the conception of a disabled child, there should be recovery.

48. With this in mind, I see no reason why, on the agreed facts before me, the Claimant's mother's reliance upon the negligent advice which she was given, that is, having sexual intercourse without the protective benefit of folic acid supplementation is not a relevant occurrence. I find that it was. This deals squarely with Mr Johnston's argument that, on the agreed facts, nothing happened and so there was no occurrence. Something did happen and that something was intercourse when the mother was in a folic acid deficient state. This is sufficient to dispose of Mr Johnston's argument on this point.

*(b) Is this a wrongful life claim in the "strict sense"?*

49. I turn then to Mr Johnston's further submission. It was advanced in a variety of different ways but boils down to the point that, but for the breach of duty, the Claimant would not have been conceived at all. In this case, the Claimant never had a chance of being born other than disabled. Hence his categorisation of the action as one for wrongful life. As such, the claim raises all the same social policy issues and difficulties of quantification that arise in the post-conception cases which are referred to in the Report and endorsed in *McKay*.

50. Although superficially attractive, Mr Johnston's submission does not withstand close scrutiny. I make the following observations.

51. The Act draws a distinction between pre-conception occurrences and occurrences which affected the mother during the course of her pregnancy. There is a rider to subsection 1(2)(b) "*so that a child is born with disabilities which would not otherwise have been present*" which is, according to the Explanatory Note, "... so worded as 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)". That rider has not been added to subsection 1(2)(a) which contains no express prohibition on claims brought by children who, but for the wrongful act, would never have been conceived.

52. The rider was not included in subsection 1(2)(a) and deliberately so. The Commissioners made clear at [88] and [91] of the Report that there was a difference between claims based upon pre-conception occurrences and those which involved occurrences during pregnancy. A negligent failure to prevent the birth of an already conceived child engages a range of social and moral policy issues, not least the imposition upon the medical profession of a duty to advise abortion in possibly dubious circumstances. However, claims based upon a wrongful act before conception which leads to the intercourse and conception raise no such difficulties.

53. The legislation was drafted to make this distinction and to permit certain actions arising from pre-conception occurrences even though, but for the wrongful act, the conception

would have not taken place. On a plain reading of subsection 1(1) in conjunction with subsection 1(2)(a), all that a claimant must prove to come within the Act is a wrongful act or omission leading to an occurrence (as defined) which results in a child who is born with disabilities. Unlike in a post-conception case, there is no need for the claimant to prove that, but for the wrongful act, he or she would still have been born. It is sufficient that the claimant was, in fact, born with a disability resulting from the occurrence.

54. Mr Johnston is therefore correct in submitting that, but for the wrongful act, Evie Toombes would (adapting the words in the Report at [89]) never have had a chance of being born other than in her disabled condition, but this fact does not bar the claim. The sentence in the Report upon which he relies must be seen in the wider context, in particular [88] and [91] which refer to claims that are not wrongful life claims in the strict sense. Neither of the child claimants disabled by syphilis in the examples drawn from the American case would, but for the wrongful act, have been conceived. But the Commissioners deemed that such claims were for the disability, not the fact of the child's existence.
55. The need for a causal link between the circumstances of the sexual intercourse and the disability must still be established in a pre-conception occurrence claim. In the examples given in the Report there was nothing which prevented either mother from giving birth to a healthy normal child. What caused the disability in each case was the sexual health of the father. But if the mother would not have been able to have a healthy child whatever the circumstances of the intercourse, then the Act does not permit recovery. The chain of causation between the wrongful act and a relevant occurrence resulting in a disabled child would not be complete. To illustrate the point I take a more modern example than those offered in the Report. If, in reliance upon reassuring but negligent advice concerning their genetic status, parents had intercourse which led to the conception and birth of a child suffering from a genetic disability inherited from the parent then, even though but for the negligent advice that child would not have been conceived, that child would not have a lawful claim under the Act. There would be no circumstances affecting the intercourse in which a healthy child could have been conceived and no causal connection between the occurrence and the disability. The mother (and father) may well have a claim for wrongful birth, but the child would not have a claim in his or her own right for damages for disability. In contrast, Evie Toombes' disability resulted from the circumstances of her conception which took place in her mother's folic acid deficient state.
56. I find that, on the basis of the agreed facts in this claim, the requisite elements in section 1 of the Act are established. All three elements required under the Act are present: a wrongful act (negligent advice) leading to an occurrence (sexual intercourse in a folic acid deficient state) which resulted in a child born with disabilities due to that deficiency of folic acid. Further, the Act resolves any difficulty in quantification of damages by providing that such a claim is one for personal injury arising from the child's disability to be assessed in accordance with conventional principles.
57. This interpretation is not inconsistent with the two decisions of the Court of Appeal of *McKay* and *CICA v FTT* as Mr Johnston submits. I find I need only deal with the cases briefly, notwithstanding their centrality in the submissions advanced before me. The Court in *McKay* was dealing with a claim which, had it been brought under the Act, would have engaged subsection 1(2)(b) and would have been excluded by the rider to that provision. The observations of the Court echo the concerns of the Commissioners which ultimately

led them to reject such a claim at [89] and [90] of the Report. Although I do not necessarily accept Ms Rodway's point that true wrongful life claims are restricted to what she describes as "abortion cases", this is a semantic distinction without significance in the context of this claim. The fact is that the Court in *McKay* was not addressing the issue which arises in this case which concerns a pre-conception occurrence.

58. Nor having considered *CICA v FTT* am I persuaded that my analysis above is wrong. That claim did not concern the Act, but a different statutory scheme, the Criminal Injuries Compensation Scheme 2008. The ratio of the decision was that, on a conventional interpretation of that scheme, M was a victim of a crime of violence and Y was not. The Act was not scrutinised and it does not appear that the Court was taken to the Report and draft Bill with Explanatory Notes which have featured so heavily in my consideration of the issue before me. Any comments made by the Court in that case must therefore be approached in this context.
59. I therefore find that the Claimant in this case has a lawful claim for damages for personal injury arising from her disability. This deals with the issues raised for my consideration in the "issues of law" for my preliminary determination.

### Conclusion

60. On the trial of the preliminary issue, there will be judgment for the Claimant.