

**AN IVF BABY AND A CATASTROPHIC ERROR—ACTIONS
FOR WRONGFUL CONCEPTION AND WRONGFUL
BIRTH REVISITED IN SINGAPORE**

*ACB v Thomson Medical Pte Ltd*¹

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I. INTRODUCTION

The parents of a child who is born as a result of medical negligence may bring an action to seek compensation from the relevant medical authorities for the cost of raising the child. The action, known generically as ‘wrongful birth’, most commonly arises either when a child is born following a failure to identify foetal abnormalities which would have led to termination of the pregnancy, or when a child is conceived and born following a failed sterilisation procedure (when the more specific term ‘wrongful conception’ is often employed). Although, in the United Kingdom (UK), the Court of Appeal in *Emeh v Kensington and Chelsea and Westminster Area Health Authority*² allowed a claim to be brought for the cost of raising a healthy child, the combined effect of the subsequent decisions of the House of Lords in *McFarlane v Tayside Health Board*³ and *Rees v Darlington Memorial Hospital NHS Trust*⁴—as well as the post-*McFarlane*, pre-*Rees* decision of the Court of Appeal in *Parkinson v St James and Seacroft University Hospital NHS Trust*⁵—has been to restrict claims to the particular costs associated with raising a child

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¹ [2015] 2 SLR 218 (HC) [*ACB*].

² [1985] 1 QB 1012 (CA).

³ [2000] 2 AC 59 (HL) [*McFarlane*]. *McFarlane* involved a claim for damages for wrongful conception brought by the parents of a healthy baby girl who was conceived and born after the husband was wrongly and negligently informed following a vasectomy that he and his wife no longer needed to use contraceptives. The House of Lords held that no duty of care was owed with respect to the cost of raising a healthy child.

⁴ [2004] 1 AC 309 (HL) [*Rees*]. In *Rees*, a claim for wrongful conception was brought by the mother of a healthy baby who was conceived and born following a negligently performed sterilisation procedure. The mother, who was severely visually handicapped, had sought to be sterilised primarily because of her disability. The House of Lords held that no duty was owed where it was the parent, rather than the child, who suffered from a disability.

⁵ [2002] QB 266 (CA) [*Parkinson*]. In *Parkinson*, which somewhat unusually involved elements of both wrongful conception and wrongful birth, a child was born with behavioural problems attributable to an

born with disabilities. And in Australia, the significance of the decision in *Cattanach v Melchior*,⁶ in which the High Court decided by a narrow margin to allow a claim in relation to a healthy child, has since been eroded by legislation which, in a number of jurisdictions, confines compensation to the special costs of raising a disabled one.⁷

Until recently, the only case in Singapore to have involved a claim for wrongful birth was *JU v See Tho Kai Yin*,⁸ in which the claimant sued her doctor for the cost of raising a congenitally disabled child whom she argued she would have aborted had she been informed of his condition. Although the action failed on its facts, the High Court in *JU* appeared tacitly to recognise that a duty of care can be owed for the cost of raising a child born with abnormalities.⁹ Now, in *ACB*, the High Court has been called on to consider an action in a very different type of case—one in which the claimant sought to recover the cost of raising a healthy baby born following a negligently performed IVF procedure in which she was implanted with an egg which had been fertilised not with her husband's sperm but with that of a third party donor. The decision is notable for the thoughtful judgment of Choo Han Teck J which, for the first time in this jurisdiction, canvasses the legal and ethical issues surrounding claims for wrongful birth.

II. THE FACTS AND THE DECISION OF CHOO J

The claimant in *ACB* was a Singaporean woman of Chinese descent married to a German of Caucasian descent. Having had difficulty starting a family, the claimant and her husband underwent a successful IVF procedure in 2007, as a result of which they had a son. In 2009, they went to the defendants for further IVF treatment, and in 2010 the claimant gave birth to a daughter (referred to in the judgment as 'Baby P'). Baby P's skin tone, hair colour and blood type were inconsistent with those of the claimant, her husband and their son, and genetic tests subsequently established that the claimant had mistakenly been implanted with an egg which had been fertilised by the sperm of a third party of Indian descent.

unidentifiable condition following a failed sterilisation procedure. The Court of Appeal allowed the claim to the extent that the cost of raising a disabled child exceeded that of raising a healthy one.

⁶ (2003) 215 CLR 1 (HCA) [*Cattanach*].

⁷ In addition to general legislation limiting tort claims in all Australian jurisdictions, specific provisions introduced to restrict wrongful birth claims to the special costs of maintaining a disabled child include *Civil Liability Act 2002* (NSW), ss 70, 71 and *Civil Liability Act 1936* (SA), s 67. Both provide that no damages may be awarded for the ordinary costs of raising a healthy child, while allowing for claims relating to the additional costs of raising a child born with disabilities. See also *Civil Liability Act 2003* (Qld), ss 49A and 49B(2), under which a court may not award damages for the costs ordinarily associated with raising a child born following a failed sterilisation procedure or a failed contraceptive procedure or contraceptive advice.

⁸ [2005] 4 SLR(R) 96 (HC) [*JU*].

⁹ Although in *JU*, *ibid*, the judge, Lai Siu Chiu J, did not specifically refer to the claimant's action as one for wrongful birth, the fact that she glossed over the duty issue, instead deciding the case purely on the basis that there was no breach of duty by the defendant doctor, suggests implicit acceptance of the basis for the claim. This conclusion is strengthened by the fact that Lai J overtly rejected the wrongful life claim brought on behalf of the child.

In June 2012, the claimant initiated actions in tort for the expenses which would be involved in raising Baby P.¹⁰ The actions were brought against four defendants—the hospital, its fertility clinic, a senior embryologist employed by the clinic (against whom a claim was also brought in contract) and the clinic’s chief embryologist. The claimant also brought an action for provisional damages for any genetic condition which Baby P might develop as a result of the donor’s genes. Both the upkeep claim and the provisional damages claim were struck out by Assistant Registrar David Lee on the ground that they were contrary to public policy. The claimant appealed against the striking out of the upkeep claim, and in hearing the appeal on this point, Choo J ruled in February 2014 that an application to strike out was inappropriate in a case such as this, where the claim for damages was connected with the question of liability.¹¹ In reaching this conclusion, however, his Honour cast doubt on the likelihood of the claimant’s action succeeding, primarily because the claim was one for pure economic loss for the cost of raising Baby P in circumstances where she and her husband had always intended to assume the expenses associated with having another child.¹² The claimant subsequently deleted the provisional damages claim from her statement of claim, and in August 2014 an interlocutory judgment with respect to the upkeep claim was entered against the defendants, who then took out a summons to have tried as a preliminary issue the question of whether the claim was sustainable as a matter of law.¹³ It was on this issue that Choo J delivered the judgment under discussion.

In seeking to establish the claimant’s case, her counsel made a number of arguments. These included assertions that failure to identify the mistake in implanting the claimant with an egg fertilised by the wrong sperm had deprived her of the opportunity to have an abortion; that to deny the claim would deprive the claimant of a remedy and confer immunity on the defendants; that the High Court of Australia in *Cattanach* had allowed a claim for the costs of raising a healthy child; and that the pertinence of the House of Lords’ decision in *McFarlane* was, *inter alia*, limited by its characterisation of the claim as one for pure economic loss and by the subsequent recognition in *Parkinson* of a claim for the additional cost of raising a disabled child, which made it difficult to suggest that all claims of this nature were fundamentally unsustainable.¹⁴ Counsel for the defendants, on the other hand, argued that *McFarlane*, which underscored judicial discomfort in allowing claims for the upkeep of a healthy child, was an appropriate precedent, while *Cattanach*, which had been

¹⁰ The claim involved the cost of pre-schooling in Beijing, schooling at the German International School in Beijing and tertiary education in Germany, as well as necessities such as food and clothing until Baby P became financially self-reliant, medical and travel expenses, expenses associated with any hobbies Baby P might pursue, and the cost of employing an additional maid until she started school.

¹¹ *ACB v Thomson Medical Pte Ltd* [2014] 2 SLR 990 (HC) [*ACB (striking out application)*].

¹² In this respect, Choo J observed, *ibid* at para 12, that while there was little doubt that a duty of care would be established, even under what he described as the “redacted” test for duty under *Spandek Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 (CA) [the *Spandek* test], Baby P was not a loss arising from a breach of that duty.

¹³ Although counsel for the claimant argued that the question should not be determined as a preliminary issue, Choo J rejected this argument: *ACB*, *supra* note 1 at para 9.

¹⁴ *Ibid* at para 10. Counsel for the claimant also argued s 70(1) of the *Women’s Charter* (Cap 353, 2009 Rev Ed Sing) as a basis for imposing a financial obligation on the defendants. However, Choo J ruled that the only person who could have been compelled to make a payment under the relevant section was the donor, against whom it was very unlikely such an order would be made.

overturned by legislation in a number of Australian states,¹⁵ applied with reluctance in others,¹⁶ and questioned by courts elsewhere,¹⁷ was not.¹⁸

Choo J found in favour of the defendants in both tort and—with respect to the action against the senior embryologist—contract.¹⁹ While acknowledging that the claimant would be entitled to damages under established heads such as pain and suffering,²⁰ he held that her action for the cost of raising Baby P must fail on two main grounds. The first was that the court could not entertain the claimant's argument that she had been deprived of the opportunity to undergo an abortion. Given her failure to refer in her affidavit to the lost possibility to terminate the pregnancy, this appeared to Choo J to be something of an afterthought,²¹ but he considered that, even if she might genuinely have considered an abortion had she known of the mistake, the proposition that this should give rise to a claim was unsupported by precedent. Indeed, as Lord Clyde had observed in *McFarlane*, to assess a case on the basis that a claimant had lost the opportunity to have an abortion would go “beyond what should constitute a reasonable restitution for the wrong done”.²²

The second ground on which Choo J held that the action must fail was that, rather than basing the claim on a failed attempt to be sterilised in order to prevent conception (as in both *McFarlane* and *Cattanach*), the claimant in this case had undergone IVF treatment because she actually wanted to have a child. In this respect, Choo J observed:

[T]here is a crucial difference between those cases and the present application before me: in the present case, Baby P was not an unwanted birth in the sense that [her] mother did not want to have a baby at all. [She] just wanted a baby conceived with her husband's sperm. This is an important distinction. It cannot be said that [she] and her husband were not contemplating having to expend money to bring up a child. On the contrary, the reason they engaged the defendants was so that they could have a child.²³

¹⁵ See *supra* note 7.

¹⁶ In this respect, counsel for the defendant referred to the decision of the Supreme Court of the Australian Capital Territory in *G and M v Sydney Robert Armellin* [2008] ACTSC 68.

¹⁷ In this respect, counsel for the defendant referred to the decision in *Rees*, *supra* note 4, and to the decisions from Ireland and Canada in *Byrne v Ryan* [2009] 4 IR 542 (HC) and *Bevilacqua v Altenkirk* [2004] BCSC 945.

¹⁸ *ACB*, *supra* note 1 at para 11. Both counsel also made submissions with respect to the remoteness or otherwise of the contract claim.

¹⁹ *Ibid* at para 17. Choo J gave no specific reasons for the failure of the contract claim. Presumably, he considered that the same policy considerations which underlay his decision in tort also applied to the action in contract.

²⁰ *Ibid*. Although the precise scope of the claim for pain and suffering in *ACB* is not clear, it is the case that in *McFarlane*, *supra* note 3, all their Lordships other than Lord Millett acknowledged that a claim would be available for the pain and suffering associated with pregnancy and childbirth. Moreover, while some commentators have argued that pregnancy and childbirth do not amount to physical damage, others have concluded that they are certainly regarded as physical damage by a woman who undergoes them when she does not wish to do so. See *eg*, Christian Witting, “Physical Damage in Negligence” (2002) 61(1) Cambridge LJ 189 at 193; Donal Nolan, “New Forms of Damage in Negligence” (2007) 70(1) Mod L Rev 59 at 74, 75.

²¹ *ACB*, *supra* note 1 at para 14.

²² *McFarlane*, *supra* note 3 at 105, quoted by Choo J in *ACB*, *supra* note 1 at para 14.

²³ *Ibid* at para 15.

Choo J ended his judgment by noting that the contentious nature of wrongful birth claims and the divergence of views expressed made this an area in which legislative intervention might be appropriate.²⁴ While the necessity for legislation was not a matter on which he had a definite view, he *was* firmly of the opinion that there were “coherent policy considerations against finding liability for upkeep”.²⁵ Referring to the view of Lord Millett in *McFarlane* that “[t]here is something distasteful, if not morally offensive, in treating the birth of a normal, healthy child as a matter for compensation”²⁶ and to that of Hale LJ (as she then was) in *Parkinson* that “[n]o one wants a situation in which a parent who thoroughly dislikes her child...but does her duty, is at an advantage compared with the parent who falls in love with her child”,²⁷ Choo J concluded:

Were the [mother] to succeed in her upkeep claim...every cent spent in the upbringing of Baby P [would] remind her that it was money from...compensation for a mistake. Baby P should not ever have to grow up thinking that her very existence was a mistake. A parent is obliged to maintain his infant child. It does not matter whether the child is his or her natural child, or an adopted child. When a parent has accepted his role in respect of that child, the obligation is his (and his spouse's). He cannot be a parent and have someone else pay to bring up the child.²⁸

III. DISCUSSION

At first blush, the judgment of Choo J in *ACB* appears to be a comparatively straightforward decision which is consistent with the general trend against allowing claims for the costs incurred in raising a healthy child.²⁹ Since such claims invariably involve the argument that the child should not have been conceived in the first place, they are usually described as actions for ‘wrongful conception’. In this sense, *ACB* is also a wrongful conception case, based as it is on the assertion that the claimant ought never to have been implanted with an egg fertilised by the donor’s sperm. While Choo J quite legitimately favoured the umbrella term ‘wrongful birth’,³⁰ the facts of *ACB* are certainly closer to the *McFarlane* and *Cattanach* line of wrongful conception authorities than to the line of wrongful birth cases in which it is argued that a child whose conception was planned ought subsequently to have been aborted due to congenital or other abnormalities.

However, as Choo J observed, *ACB* differs in key respects from the paradigm scenario in which compensation is sought for the cost of raising a healthy child. In the standard case, the action is brought by parents who have sought to avoid having a child by undergoing a sterilisation procedure which it later transpires was unsuccessful. In *ACB*, on the other hand, the claimant and her husband sought to be made fertile and actively wished to have a child. The corollary of this was that,

²⁴ *Ibid* at para 16.

²⁵ *Ibid*.

²⁶ *McFarlane*, *supra* note 3 at 111, quoted by Choo J in *ACB*, *supra* note 1 at para 16.

²⁷ *Parkinson*, *supra* note 5 at para 87, quoted by Choo J in *ACB*, *supra* note 1 at para 16.

²⁸ *Ibid*.

²⁹ See *supra* notes 3-7 and accompanying text.

³⁰ *ACB*, *supra* note 1 at paras 15, 16.

unlike the parents in *McFarlane*, *Cattanach* and other typical wrongful conception cases, they *were* willing to assume the financial consequences of bearing a child. Choo J noted this distinction, which he regarded as weakening the claimant's case.

There is, though, a persuasive argument that the factual differences between *ACB* and the paradigm cases actually strengthen the claim. In a normal situation, a child born after a failed sterilisation will be the biological product of both parents. Once the shock of having conceived the unplanned child has worn off (as it will probably have done before the child is even born), the parents will have a normal addition to their family. However, in *ACB*, where the biological father is from a different ethnic group and the child is therefore physically unlike the rest of the family, there will be a constant reminder of the mistake which was made. In this respect, the fact that Baby P's mother and her husband would have been perfectly willing to have borne the costs associated with raising the child they planned to have is surely beside the point. They neither planned nor wished to have a child who was not theirs as a couple—one who, following a negligent combination of egg and sperm in the laboratory, was wrongly implanted into the mother.³¹ This wrong, which in its violation of the claimant's bodily integrity resembled a trespass to her person,³² was arguably far more egregious than that suffered by the parents of a child who is born following an unsuccessful sterilisation, where the negligence in question has merely failed to prevent the occurrence of a natural biological process.

Choo J's closing observation that, for policy reasons, it would be wrong to treat the birth of a normal, healthy child as a matter for compensation is also in keeping with the widely articulated view that every healthy child is a blessing, and that it would be "subversive of the mores of society for parents to enjoy the advantages of parenthood while transferring to others the responsibilities which it entails".³³ However, general observations about the good fortune of bearing a healthy child do not address the specific factors at play in *ACB*. When, for example, in *McFarlane* Lord Steyn—the only judge openly to acknowledge the moral aspects of the case³⁴—concluded that if a commuter on the London Underground were asked whether the parents of a healthy child ought to be compensated for the costs of raising it the overwhelming response would be that they should not,³⁵ he had in mind the paradigm situation where the child is the naturally conceived biological offspring of its parents. It is

³¹ In this respect, Choo J's conclusion, *ibid* at para 16, that a parent must maintain his infant child, whether natural or adopted, also fails to take account of the particular facts of *ACB*, where Baby P is neither the natural child of her father nor adopted, and where her father has no option but to raise her even though she is not his biological child.

³² There is no suggestion that an action for trespass to the person (in the form of battery) was considered in this case, and it would have been possible only if the claimant had been able to show that her consent to the implantation procedure was not real. While it is normally true that once one has consented to the broad nature of medical treatment, no action in battery is available (see *eg*, *Chatterton v Gerson* [1981] QB 432), it *could* have been argued in this case that since the claimant would never have agreed to be implanted with an embryo which had not been fertilised by her husband's sperm, her consent to the relevant procedure was *not*, in fact, real.

³³ *McFarlane*, *supra* note 3 at 114. See, however, the judgment of Kirby J in *Cattanach*, *supra* note 6 at para 148, who suggests that it is a fiction to assume that every healthy child is a blessing.

³⁴ In *McFarlane*, *supra* note 3 at 82, his Lordship observed: "It may be objected that the House must act like a court of law and not like a court of morals. That would only be partly right. The court must apply positive law. But judges' sense of the moral answer to a question, or the justice of the case, has been one of the great shaping forces of the common law."

³⁵ *Ibid.*

by no means certain that a hypothetical commuter, whether in London or Singapore, would take the same view of the very different circumstances in *ACB*, where the child, although healthy, was definitely not (at least in a familial sense) ‘normal’.³⁶ Moreover, as Choo J himself observed during the initial hearing to determine whether or not the upkeep claim should be struck out, the considerations of distributive justice which led Lord Steyn³⁷ and his fellow Law Lords in *McFarlane* to conclude that no action should be available for the cost of raising a healthy child are “generally not appropriate when one is discussing the specific entitlements of an individual in law”.³⁸

Choo J’s conclusion that no child should grow up thinking that its very existence was a mistake is also one with which, on the surface, it is hard to take issue, certainly if the consequence is to make the child feel unloved or resentful. However, as Kirby J observed in *Cattanach*, the compensation sought in an action for wrongful conception is *not* for the child’s very existence,³⁹ but rather for the cost of raising it.⁴⁰ And while it *might* be true that, in the absence of litigation, a child in a normal wrongful conception case need not discover the circumstances which led to its existence, such a scenario is highly unlikely in the case of Baby P, who will grow up knowing that she looks different from the rest of her family for reasons which will one day have to be explained to her. The visible physical consequences of the mistake which led to her conception and birth are thus more likely to influence her sense of identity and belonging than is knowledge of any compensation to fund her upbringing. Indeed, while there is no reason to doubt that Baby P’s parents will have a loving and dutiful relationship with her, their being left with no remedy (aside from damages for the claimant’s pain and suffering) is surely more likely to impede than encourage the development of a close bond.

The particular circumstances which bring *ACB* outside the normal wrongful conception scenario mean that—even assuming one accepts the view that claims with respect to healthy children should not normally be allowed⁴¹—there is a sustainable argument that the case could have been treated *sui generis*, and that the preliminary issue could have been resolved in the claimant’s favour. If this had been the outcome, it would then have been a question of how to proceed.

Had the House of Lords in *McFarlane* not objected to the recognition of a duty of care with respect to the cost of raising a healthy child, the relevant claim could have been treated as one for pure economic loss arising from professional negligence—a

³⁶ In this respect, one could also question Choo J’s assessment that it would have been inappropriate for him to have taken account of the claimant’s argument that she might have chosen to abort the foetus had she known of the mistake, given the comparatively tolerant attitude to abortions in Singapore under the *Termination of Pregnancy Act* (Cap 324, 1985 Rev Ed Sing).

³⁷ See *eg*, Lord Steyn’s statement in *McFarlane*, *supra* note 3 at 83: “Relying on principles of distributive justice I am persuaded that our tort law does not permit parents of a healthy unwanted child to claim the costs of bringing up the child from a health authority or a doctor.”

³⁸ *ACB (striking out application)*, *supra* note 11 at para 7.

³⁹ Claims premised on the argument that the child should never have been born, brought on behalf of the child itself and known as actions for ‘wrongful life’, are rejected on public policy grounds in almost all jurisdictions. See *eg*, *JU*, *supra* note 11; *McKay v Essex Area Health Authority* [1982] QB 1166 (CA); *Harriton v Stephens* (2006) 226 ALR 391 (HCA).

⁴⁰ *Cattanach*, *supra* note 6 at para 148.

⁴¹ As the majority judgments in *Cattanach*, *ibid*, demonstrate, this is not a universally held view.

category of action which, by the time *McFarlane* fell to be decided, was already well-established in the UK.⁴² Since a duty of care with respect to professional negligence is also recognised under the *Spandek* test in Singapore,⁴³ there would, in theory, be no obstacle to allowing a claim of this nature. And while, in practice, a court might balk at the idea of awarding compensation for expensive lifestyle choices made by a child's parents—including in Baby P's case, the cost of private health care and private education overseas from primary to tertiary level⁴⁴—it would be within the court's power to award a more modest sum. An appropriate figure might, for example, be determined by reference to the average cost of feeding, clothing and providing healthcare and education to a child in Singapore up to the age of majority.

Another option would be to award the claimant a sum to mark the loss of autonomy which she and her husband suffered in having Baby P. In *Rees*,⁴⁵ the House of Lords drew on a suggestion made by Lord Millett in *McFarlane*,⁴⁶ and held that a conventional award of £15,000 should be paid in all wrongful conception cases to mark the disruption faced by parents when called on to raise an unplanned child. Lord Bingham, who suggested that the award would not be compensatory, considered that it would afford “some measure of recognition of the wrong done”⁴⁷ in depriving a parent or parents of the right to live as planned, while Lord Millett (having proposed the idea in *McFarlane*) saw it as “a modest award” which would “adequately compensate for the...injury to the parents' autonomy” in not being able to limit the size of their family.⁴⁸ While leaving unresolved the question of whether the award would be essentially compensatory or vindicatory in nature,⁴⁹ the decision in *Rees* to award a conventional sum did at least offer a compromise between awarding damages for the full cost of raising a child and awarding no damages at all.

A court in Singapore could choose to emulate this practice by introducing an award for loss of autonomy. As in the UK, this award could be applicable to all actions involving the unplanned birth of a healthy child due to medical negligence—although there would be nothing to prevent a court here from opting for a more generous sum than that awarded in the UK, where the financial constraints on the NHS militate for a conservative figure. It would also be possible for a court to make a more specific (and probably higher) award to take account of the exceptional loss of autonomy faced by the claimant on the particular facts of *ACB*. For although in *ACB*—unlike

⁴² See eg, *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 (HL), which extended to situations of professional responsibility the duty owed under *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL) with respect to pure economic loss which resulted from negligent misstatements.

⁴³ See eg, *Anwar Patrick Adrian v Ng Chong & Hue LLC* [2014] 3 SLR 761 (CA).

⁴⁴ See *supra* note 10.

⁴⁵ *Supra* note 4.

⁴⁶ *McFarlane*, *supra* note 3 at 114.

⁴⁷ *Rees*, *supra* note 4 at para 8. His Lordship considered that the award would also be available “without differentiation” to cases in which either the child or the parent was disabled. (See also *Cattanach*, *supra* note 6 at para 66, in which McHugh and Gummow JJ similarly referred to the need to recognise the disruption to parents' interests in not being able to plan their families.)

⁴⁸ *Ibid* at paras 123-125.

⁴⁹ For an analysis of this point, see Nolan, *supra* note 20 at 79, 80, where he concludes that notwithstanding the rights-based terminology in a number of the judgments in *Rees*, *supra* note 4, the conventional award does not vindicate rights through a trespass-like analysis, but rather “amounts to recognition of diminished autonomy as a form of actionable damage”. For this reason, Nolan suggests that Lord Bingham's reference to the award not being compensatory could simply be taken to mean that it does not relate to precisely quantifiable damage.

most wrongful conception cases—the claimant and her husband *did* actually plan to have another child, and so did not theoretically suffer loss of autonomy in terms of limiting the size of their family, they did *not* plan to have Baby P, whose existence will have a profound effect on their family life.

IV. CONCLUSION

Choo J's judgment in *ACB* is carefully considered and well-reasoned, and his conclusion reflects the more widely held view that it is not appropriate to allow a claim for the costs incurred in raising a normal, healthy child. There are, however, sufficient unusual aspects to the case for it to be distinguished from the paradigm wrongful conception cases, and for this reason it could have been treated as falling outside their sphere. Had the claim been successful, the extraordinary nature of its facts would have negated any risk of undermining the general philosophy that parents should ordinarily be responsible for raising their biological or adopted children, and the rarity of the action would have ensured that there was no danger of a flood of litigation. And while, if the claim *had* succeeded, the compensation sought for raising Baby P might have been considered unduly high, it would have been open to the court to have awarded a lower sum for her maintenance. Alternatively, the court could have recognised the loss of autonomy suffered by the claimant and her family as constituting the basis for an award. As it was, the decision left the claimant, who by any measure had been the victim of an appalling error, with no remedy other than for established heads of damage such as pain and suffering—an outcome which most non-lawyers would doubtless find rather surprising.

Postscript:

After this issue of the journal went to print, the judgment of Choo Han Teck J was appealed to the Court of Appeal. The decision of the Court is pending.