OPINION OF LORD OSBORNE

in the Petition of

JOHN MILLAR, curator *bonis* to Lesley Anne Pascoe (A.P.)

Petitioner:

for

Judicial Review of a Decision of

THE CRIMINAL INJURIES COMPENSATION BOARD

Respondents:

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13 November 1996

In this petition for judicial review of a decision of the respondents, the petitioner, a solicitor, is the curator *bonis* to Lesley Anne Pascoe, conform to Deliverance of the Sheriff of South Strathclyde, Dumfries and Galloway at Dumfries, dated 16 February 1995, a certified copy of which is 5/1 of process. The ward of the petitioner was born on 19 January 1973 to Winifred Hawkins Bell, as appears from the extract birth certificate, 5/2 of process.

The respondents are the Criminal Injuries Compensation Board, which was constituted under and in terms of a Scheme, established on 1 August 1964, by the Crown in exercise of the Royal Prerogative. The respondents are enjoined to proceed under and in terms of that Scheme, as amended from time to time. The Scheme which

is relevant to the present petition is the Revised 1979 Scheme, which applies only to incidents occurring before 1 October 1979. A copy of this Scheme is 5/4 of process.

It is convenient for me at this stage to make reference to certain paragraphs of the Revised 1969 Scheme, which are of relevance to the issues which have arisen in this case. This I now do.

> "2. The Board will be provided with money through a Grant-in-Aid out of which payments will be made to applicants for compensation where the Board are satisfied, in accordance with the principles set out below, that compensation is justified. Their net expenditure will fall on the Votes of the Home Office and the Scottish Home and Health Department. ...
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> 5. The Board will entertain applications for *ex gratia* payment of compensation in any case where the applicant, or in the case of an application by a spouse or dependant ... the deceased, sustained in Great Britain, ... on or after 1 August 1964 personal injury directly attributable to a crime of violence .... .
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> 6. Compensation will not be payable unless the Board are satisfied - (a) that the injury was one for which compensation of not less than £250 would be awarded; and (b) that the circumstances of the injury have been the subject of criminal proceedings, or were reported to the police without delay; and (c) that the applicant has given the Board all reasonable assistance, particularly in relation to any medical reports that they may require. Provided that the Board at their discretion may waive the requirement in (b) above.
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> 7. Where the victim who suffered injuries and the offender who inflicted them were living together at the time as members of the same family no

compensation will be payable. For the purposes of this paragraph where a man and woman were living together as man and wife they will be treated as if they were married to one another. ...

9. ... The Board will consider applications for compensation arising out of rape and sexual assaults, both in respect of pain, suffering and shock and in respect of loss of earnings due to pregnancy resulting from rape and, where the victim is ineligible for a maternity grant under the National Insurance Scheme, in respect of the expenses of child birth. Compensation will not be payable for the maintenance of any child born as a result of a sexual offence.

10. Subject to what is said in the following paragraphs, compensation will be assessed on the basis of common law damages and will take the form of a lump sum payment, rather than a periodical pension. More than one payment, may, however, sometimes be made - for example, where only a provisional medical assessment can be given in the first instance."

The circumstances which have given rise to the present petition are as follows. The ward's mother, Winifred Bell, is the daughter of one Thomas Graham Bell. The ward was conceived and born as a result of an act of incestuous sexual intercourse between Thomas Graham Bell and Winifred Bell. It is averred by the petitioner, but denied by the respondents, that the conception and birth was a result of an act of rape. At the time of the conception, in or about April 1972, Winifred Bell was aged 15 years. On 13 November 1991 Thomas Graham Bell was convicted in the High Court of Justiciary in Edinburgh and sentenced to eight years imprisonment for, *inter alia*, offences constituted by acts of incestuous sexual intercourse. In this connection, I refer to the Extract Sentence, etc. 5/5 of process.

It is not disputed that the ward was born with, and will suffer permanently from, severe mental handicap. She was born with congenital characteristics not present in a normal child, which were genetic and arose directly from the consanguinity of her parents. These congenital characteristics included profound mental handicap, deafness, microcephaly and various physical abnormalities. In consequence of this situation, on 4 December 1991, Winifred Bell made an application to the respondents on behalf of the ward for compensation upon the basis that the ward's severe mental handicap was directly attributable to crimes of violence perpetrated by Thomas Graham Bell. A copy of the application is 5/6 of process. By a letter dated 17 February 1992, 5/7 of process, the respondents rejected this application on the ground that they were not satisfied that the ward was suffering from personal injuries which were directly attributable to a crime of violence, as required by paragraph 5 of the 1969 Scheme. The material part of that letter is in the following terms:

> "However the Board can only award compensation for injuries which are within the Scheme. Under paragraph 4(a) (sic) of the Scheme those are injuries which are directly attributable to a crime of violence. In this case, the Board are not satisfied that the applicant is suffering from such injuries and therefore I regret that there can be no award under this Scheme."

Following upon the receipt of this decision, an application was made on behalf of the ward for an oral hearing, a procedure made available to dissatisfied claimants in terms of the 1969 Scheme. In consequence, an oral hearing before the respondents took place in Glasgow on 2 December 1993. At that hearing, Winifred Bell gave evidence as to the circumstances in which the crimes of violence were committed. In addition,

the respondents had before them (1) reports of D.N.A. tests confirming that the ward was undoubtedly the daughter of Winifred Bell and Thomas Graham Bell, and (2) a medical report dated 5 May 1992, compiled by a Dr Douglas Wilcox of the Department of Medical Genetics at Glasgow University, which concluded that the profound handicaps suffered by the ward were the result of the consanguinity between her parents. A copy of that report is 5/8 of process.

Following upon the oral hearing, the respondents issued an undated written decision, which bears the serial number 91/56342/HA. That decision was in the following terms:

> "We accept that the applicant was born with congenital characteristics not present in a normal child. These include profound mental handicap; deafness; microcephaly; and various abnormal physical characteristics. We accept that the congenital characteristics are genetic and arise directly from the consanguinity of the parents. By their nature they were an inherent part of the conception.
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> We have considered and accept as sound the reasoning in the cases of *Hamilton v Fife Health Board 1993 S.L.T. 624*, and the cases of *Burton and de Martell* respectively reported at *[1992] 3 All E.R. 833*. We of course are concerned under the Scheme with the test of whether the applicant sustained personal injuries directly attributable to a crime of violence. We accept that 'personal injuries' is a term which can properly be applied to injuries occurring before birth and do not regard the precise stage at which the injuries occurred as relevant to our decision.

However, we consider that congenital deficiencies cannot properly be held to be injuries within the meaning of the Scheme. Congenital characteristics may properly be described as defects by reference to the norm but cannot properly be regarded as injuries sustained. They are inherent in the applicant. At no point did she have the potential of existence without them. There is nothing about the crime of violence which has caused her to exist in a state less perfect than she would otherwise have done.

Had we considered that her present deficiencies could properly be held to be 'injuries' for the purposes of the Scheme, we would have had to consider whether they were directly attributable to the crime of violence. Clearly her birth was directly attributable to what can be taken in this context as an act of rape. The 'injuries' as distinct from the birth were not attributable to the rape but to the genetic make up of the parents. The element of violence was not a direct cause of the child being born with a profound handicap as opposed to being born 'normal'. We have, of course, considered the test in *Ince* but conclude that if she did sustain injury, the injury was not directly attributable to the violence.

We also had to consider whether any award could have been made having regard to the provisions of paragraph 7 of the Scheme extant at the time of the acts in issue. We were satisfied on the evidence that at the time of conception and of birth the mother was living in family with the offender. That was not disputed in relation to the birth. She gave evidence of a decision to leave home and go to live with her grandparents when she left school the day before her sixteenth birthday. There was confused evidence that she had wished to

leave before that and had gone to stay at her grandparents for several days at a time fairly regularly. Her father had always come to collect her and take her home. Although her solicitor led her in an attempt to show that this was against her will we did not accept her as reliable on this point. Plainly the applicant was incapable of existence independent of the mother and we conclude therefore, that all (*sic*) the relevant periods she must be taken as living in family and that the claim is excluded by the Scheme as it stood at the time. (We had regard *to R. v C.I.C.B. ex parte P. 1993*)."

The petitioner seeks two remedies in the present petition: (1) reduction of the aforementioned decision of the respondents; and (2) an order from the Court requiring that the respondents reconsider the ward's application for compensation. The grounds upon which these remedies are sought are set forth in some detail in paragraphs 9, 10 and 11 of the petition, which I need not reproduce here. The respondents' answers to these grounds are to be found in paragraphs 9, 10 and 11 of their Answers, which again I need not reproduce here.

When the petition came before me at a First Hearing, junior counsel for the petitioner indicated that there were three main issues: (1) the definition of "injury"; there was a question whether congenital defects could properly be regarded as "injuries"; (2) causation; the question arose of whether the "injuries" were attributable to the crime of violence, or not; and (3) the issue of bar; the question was whether the victim and the offender were "living together at the time as members of the same family". Counsel for the petitioner next proceeded to make reference to the important documentation relating to the case, to which I have already referred. It was pointed out that in 5/7 of process, the respondents' initial decision, reference had been made to

the wrong Scheme. However, it was not considered that that error was of importance in the present context. It was also indicated that the crime involved here had been committed between 1 April 1972 and 1 January 1974. The ward had been born on 19 January 1973. In relation to the report by Dr Douglas Wilcox, dated 5 May 1992, 5/8 of process, it was indicated that its contents and conclusions were accepted by the respondents. By way of explanation of the terms of the written decision of the respondents, it was indicated that the cases of *Hamilton*, *Burton* and *de Martell* mentioned in the second paragraph of the decision were cases which showed that a foetus, injured prior to birth, might make a delictual or tortious claim. It would become apparent that the petitioner took serious issue with the contents of the third paragraph of the respondents' written decision. It was pointed out that, whatever might appear elsewhere, the respondents accepted that there had been a crime of violence, namely rape, as appeared from the fourth paragraph of the written decision.

Counsel for the petitioner indicated that it would be necessary for the Court to construe the terms of the Revised 1969 Scheme and, in particular, paragraph 5 thereof, which dealt with the scope of the Scheme. No particular point arose from the terms of paragraph 9; the mother of the ward had herself made a claim for compensation, which had been satisfied.

Turning to the issue of "personal injury", counsel for the petitioner made reference to a report by the Scottish Law Commission, No. 30, relating to Liability for Antenatal Injury. In that Report it was recognised, at paragraph 22, that extremely difficult problems arose where a child was born with disabilities attributable to genetic defects or some other inherited condition. In that paragraph and in Conclusion 7 of the Report, it was considered that such questions were best left to the

Courts to decide on the basis of existing principles of law. Thus, it could be said that what might be described as genetic injury was considered to be a possible basis for a claim for reparation. It was clear that the respondents accepted that the impairment of the condition of an unborn child might be categorised as personal injury, as appeared from the second paragraph of their decision. The petitioner's submission was that, where there had been an act resulting in congenital deficiency, the child concerned could be said to have suffered personal injury. That was because personal injury occurred when a person experienced suffering, in association with the commission of a legal wrong.

Having thus outlined the basic position taken up by the petitioner, junior counsel indicated that there were seven areas for consideration: (1) the ordinary meaning of the word "injury"; (2) the Institutional use of the word; (3) the word "injury" in American cases; (4) the line of authority relating to "wrongful life"; (5) the "wrongful life" cases, where a remedy in reparation had been given; (6) the effect of causation on the argument; and (7) the cases on "pre-conception" tort.

Turning to the matter of the ordinary meaning of the word "injury", reference was made to the Oxford English Dictionary, in which three meanings were given: (1) wrongful action or treatment; violation or infringement of another's rights; suffering or mischief wilfully and unjustly inflicted. (2) intentionally hurtful or offensive speech or words; reviling, insult, calumny; a taunt, an affront. (3) (a) hurt or loss caused to or sustained by a person or thing; harm, detriment, damage. (b) a bodily wound or sore. It was submitted that there were two elements involved in an injury, the occurrence of some wrongful act and suffering caused by it. It was clear

from the dictionary definitions given that the word injury was very wide in scope; the respondents had however taken the narrowest of views concerning it.

When one came to look at the use of the word "injury" in the Institutional Writers, it became apparent that the definition focused on the wrongful act. In this connection, reference was made to Stair's Institutions, I.9.2,3 and 4. In Walker, Delict, Second Edition, at page 31 *et seq.*, there was an examination of the Roman law origins of delictual liability in Scotland. It was evident from that treatment that the Roman law principles, upon which Scots law was founded, were broad enough to encompass the concept of personal injury for which the petitioner was contending in this case.

Turning to more recent authorities in Scots law, *Black v Duncan 1924 S.C. 738* was instructive. In that case it was decided that a husband might recover damages from a rapist for the rape of his wife; implicit in that decision was a broad concept of injury. A similarly broad concept of injury was apparent from *A v C 1919 35 Sh. Ct. Rep. 166.*

Counsel for the petitioner next proceeded to deal with the third area for consideration, the concept of "injury" in American cases. In *Zepeda v Zepeda 190 N.E. 2d 849*, the Court was concerned with the plight of an adulterine bastard. At pages 856 to 858, the word "injury" was applied to one who had been born and remained illegitimate. On that kind of approach, the word injury could be used in relation to the plight of the ward here.

In *Curlender v Bio-Science Laboratories App., 165 Cal. Rptr. 477*, the Court was concerned with a claim on behalf of a child who was born with Tay-Sachs Disease, seeking recovery on the theory of alleged "wrongful-life". The Court

considered that the birth of the plaintiff with a genetic defect was regarded as an injury cognisable at law. Once again, the kind of handicaps from which the ward here suffered were recognised as injury; a claim for reparation was allowed.

Counsel for the petitioner continued her submissions by dealing with the fourth area for consideration, the line of authority relating to "wrongful life". It had to be recognised that, while in certain cases, such as *Curlender v Bio-Science Laboratories*, a claim had been allowed for "wrongful life", there were others in which reparation claimed on that basis had been refused. The grounds of refusal tended to have been public policy considerations, in association with the difficulty of quantifying loss.

In *McKay and Another v Essex Area Health Authority and Another [1982] 1 Q.B. 1166* the Court had been concerned with an infant plaintiff, who had been born disabled as a result of an infection of rubella suffered by her mother, while the child was in her womb. It was alleged that, but for the negligence of the defendants, the mother would have had an abortion, to terminate the life of the child. The child claimed damages for having suffered entry into a life in which her injuries were highly debilitating, and distress, loss and damage. The Court of Appeal held that, since the child's complaint was that she was born with deformities caused by the rubella while she was in her mother's womb, the basis of the claim was that the defendants were negligent in allowing the child to be born alive. It was also held that the child's claim was contrary to public policy as being a violation of the sanctity of human life and a claim which could not be recognised and enforced, because the Court could not evaluate non-existence for the purpose of awarding damages for the denial of it. Particular reference was made to pages 1178, 1179, 1182, 1188 and 1189.

While the Court held that there was no legal duty to abort a foetus, the judgments contained a recognition of injury in the context of the case. In the present action, the Court was not concerned with the method of assessment of compensation.

Counsel for the petitioner next referred to _Berman and Others v Allan and Another_ *404 A. 2d8*. In that case the Court held that an infant, who was born afflicted with Down's Syndrome, a genetic defect commonly referred to as mongolism, did not suffer any damage cognisable at law by being brought into existence; thus doctors could not be held liable in a medical malpractice action founded upon "wrongful life". Despite the nature of this decision, the petitioner argued that there was a basis for compensation in the present case which did not involve saying that the child should never have existed. What was involved here was an "injury" in a proper sense of the word. In the case cited, there was a dissenting judgment of Handler, J., which focused upon the concept of "injury" in relation to the child concerned.

Counsel for the petitioner next referred to _Alquijay v St. Lukes-Roosevelt Hospital Center_ *483 N.Y.S. 2d 994*. In that case, once again, the Court rejected a claim brought on behalf an infant with Down's Syndrome, on the view that it was in fact a claim for wrongful life, which was not legally cognisable. A similar view was taken in _Azzolino and Others v Dingfelder_ *337 S.E. 2d 528*. That case also was concerned with a Down's Syndrome child. The view taken was that life, even with severe defects, could not be "injury" in the legal sense for the purposes of recovery in a "wrongful life" action. It was submitted on the petitioner's behalf that this approach was wrong; there was a contrary line of authority.

Williams v The State of New York *223 N.E. 2d 343*, it was accepted, also created difficulty for the petitioner. It involved a claim at the instance of an infant

who was born out of wedlock to a mentally deficient mother as a result of a sexual assault on her while she was confined as a patient in a State mental institution. The Court indicated that the impossibility of entertaining the suit came, not so much from difficulty in measuring the damages, as from the absence from legal concepts of any such idea as a wrong caused by permitting a woman to be violated and to bear an out-of-wedlock infant. *Cowe v Forum Group, Inc.* *575 N.E. 2d 630* was a somewhat similar case. In it the Court decided that there was no cause of action stated by an infant plaintiff, to the extent that the plaintiff sought damages for the negligence of a nursing home in failing to protect his mother from rape, thereby causing his birth to parents incapable of care and support.

Counsel for the petitioner next turned to the fifth area for consideration, that of "wrongful life" cases, where a remedy in reparation had been given. The first such case was *Harbeson and Others v Parke-Davis, Inc., Wash., 656P. 2d 483*. The case was concerned with Foetal Hydantoin Syndrome, attributable to the use of the drug Dilantin during pregnancy. The Court held that a child might maintain an action for "wrongful life" in order to recover extraordinary expenses to be incurred during the child's lifetime, as a result of the child's congenital defect. However, general damages for "wrongful life" were not admissible.

Counsel for the petitioner next referred to *Turpin v Sortini and Others Sup., 182 Cal. Rptr. 337*. Once again, while it was held that general damages could not be recovered on behalf of a child in respect of hereditary deafness, the child could recover special damages for extraordinary expenses necessary to treat the hereditary ailment. Reliance was placed particularly on pages 341 to 349. It was submitted that this decision showed that the Court had recognised a congenital defect as an "injury".

Reliance was also placed upon *Procanik v Cillo and Others 478 A. 2d 755 (N.J. 1984)*. In this case an infant plaintiff sought damages for birth defects and impaired childhood in consequence of congenital rubella syndrome resulting from the mother's German measles in the first trimester of pregnancy. The right of the child to recover extraordinary medical expenses was recognised.

Summarising the American cases, so far as that was possible, counsel for the petitioner submitted that they were by no means all adverse to the petitioner's submissions. While it was plain that the American Courts were reluctant to address the issue of existence, as compared with non-existence, they had, in some cases, considered that it was possible to look at "wrongful life" and to award special damages related thereto. The premise of such consideration was that there had been an "injury" inflicted.

Counsel for the petitioner next turned to deal with the sixth area for consideration, the effect of causation on the argument. She recognised that it was difficult to assess an "injury", where the act which caused the suffering also caused life to be created. However, there was a failure in logic in the respondents' position; it was submitted that an act could properly be seen as causing "injury" and giving life at the same time. A number of illustrations could be afforded of such a situation. Firstly, a motorist might knock down a starving pedestrian; the injured person would be taken to hospital and there given nourishment, which would save his life. Secondly, an obstetrician might misapply forceps during delivery causing damage to the head of the baby. Thirdly a gynaecologist might, through negligence, cause damage to a foetus. In all of these situations injury would be inflicted at the same

time as life was conferred. So, it was essential to the petitioner's argument to say that "injury" could be inflicted upon something that previously did not exist.

Counsel for the petitioner then proceeded to deal with the seventh area of consideration, the cases on "pre-conception" tort. In relation to this area, it was submitted that there could be "injury", involving suffering, caused by actions prior to conception. An example of such a case was *Jorgensen v Meade Johnson Laboratories Inc., 483F. 2d 237 (1973)*. In this case a father of deceased and living Mongoloid children brought an action claiming that the Mongoloid condition of the children resulted from the mother's taking birth control pills manufactured by the defendants. It was held that the complaint stated a recognised cause of action. While it was recognised that the allegations in the case involved pre and post-conception harm, the Court did not exclude pre-conception harm from consideration. In relation to that it used the word "injured". Reverting for a moment to *Zepeda v Zepeda*, at page 853, it was there recognised that a defendant could be held accountable, even if his wrongful act was completed before the plaintiff was conceived. There could be a "conditional prospective liability in tort to one not yet in being", as appeared from page 853. Reverting again to *Turpin v Sortini*, it was plain that the Court recognised that there was no difficulty concerning pre-birth, or pre-conception tort.

Counsel for the petitioner next referred to *Renslow v Mennonite Hospital and Others 367 N.E. 2d 1250*. In that case the Court held that an infant could maintain an action against a hospital and physician for any injuries sustained as a result of a negligent blood transfusion into the mother, even though the transfusion occurred several years prior to the infant's conception. Counsel for the petitioner then referred to *Bergstreser v Mitchell and Others 577 F. 2d 22 (1978)*. Once again, the Court

recognised the actionability of a pre-conception tort. In _Graham and Another v Keuchel and Others_ *847 P. 2d 342 (Okl. 1993)* again it was held that physicians could be found liable for the wrongful death of a newborn infant, even though the acts of alleged negligence took place before that infant was conceived.

While the views expressed in these cases were clear and favoured the recognition of pre-conception tort, it was accepted that there were other American cases to a contrary effect, which were listed in the respondents' answers at page 3(c). It was submitted that the cases there relied upon were not consistent with the weight of American authority.

Turning to the situation in the United Kingdom, it was indicated that the Law Commission had considered the problem of a pre-conception torts or wrongs. The ultimate result had been the passage through Parliament of the _Congenital Disabilities (Civil Liability) Act 1976_, cap. 28. Section 1 of that Act created civil liability to a child born "disabled" in certain circumstances there defined. Section 4(1) of the Act defined a "child being born disabled or with disabilities" as "being born with any deformity, disease or abnormality, including predisposition (whether or not susceptible of immediate prognosis) to physical or mental defect in the future". This Act did not extend to Scotland. The Scottish position had been discussed in the Scottish Law Commission's report, already referred to. The conclusions reached by the Commission, set forth at page 16 thereof, were to the effect that the Scottish Courts, by applying existing principles of law, would admit the right of a child who been born alive to recover damages for antenatal injuries which it had sustained by reason of the wrongful act of another; liability would be incurred whether the

defender's act occurred before or after conception. Accordingly, it had been concluded that legislation similar to the Act of 1976 was unnecessary in Scotland.

Summarising her position in relation to her first argument, to the effect that congenital defects could be regarded as "injuries", I was invited to discount arguments based upon tort, delict and reparation, in so far as they were based upon the difficulty of assessment of loss and on public policy. The Court ought to revert to the basic concepts of *inuria* and *damnum*. It was plain that the respondents had taken too narrow a view of the situation in this, their first consideration of the matters here involved.

Turning to her second main argument, on the issue of causation, the respondents' decision on the matter was to be seen in the fourth paragraph on page 1 of their decision document, 5/3 of process. The position taken up was that, while the birth of the child was directly attributable to what could be taken in the context as an act of rape, any "injuries" were not attributable to the rape, but rather to the genetic make-up of the parents. Thus the element of violence was not a direct cause of the child being born with profound handicap, as opposed to being born normal. This position was maintained by the respondents in their Answers in paragraph 10.

In approaching this matter the Court had to consider what was the violence; who was the victim; and what was the operative cause of the injury. In so doing it had to bear in mind that, in order to satisfy the terms of the Revised 1969 Scheme, it was necessary for it to be established that "personal injury" was "directly attributable to a crime of violence". It was submitted that that had been or could be demonstrated in the present case. The respondents' decision revealed a misconception. In this case, there had been one event, an incestuous rape, which amounted to two crimes. A

pregnancy was not an inevitable consequence of rape, yet compensation was available, whether there was a pregnancy or not, in respect of that crime, as appeared from condition 9 of the Scheme. The respondents' Answers were unsatisfactory, since, in paragraph 10, there was no attempt to address these matters. In any event, viewed more generally, the respondents' position was wrong. In that connection reference was made to *Regina v Criminal Injuries Compensation Board ex parte Schofield [1971] 1 W.L.R. 926*. It was plain from the judgment of Lord Parker, C.J., that the construction of the Scheme was not to be approached as if it was a statute. A broad and common sense approach ought to be followed when considering the words "directly attributable".

Reliance was also placed upon *Brown v Minister of Pensions 1946 S.L.T. 371*. The question in that case was whether injury was or was not attributable to war service; there was an onus on the minister to establish that it was not. In relation to the application of such language, Lord Cooper said at page 373 that,

> "while the search was for causation, it was not for causation in the metaphysical or scientific sense, but in the wider and more liberal sense in which the matter would be understood by the man in the street applying common-sense standards"

A similar approach had been taken in *Regina v Criminal Injuries Compensation Board ex parte Ince [1973] 1. W.L.R. 1334 at pages 1341 and 1344*. In this connection reference was also made to *Stapley v Gypsum Mines Limited [1953] A.C. 663, at page 681*. Following this approach to causation, it was irrelevant that the act which caused the child to come into existence was also that which had caused it to suffer.

Counsel for the petitioner next turned to what might be described as the bar argument. The respondents' position was based upon the terms of paragraph 7 of the Revised 1969 Scheme. In particular, attention had to be focused on the words "... living together at the time as members of the same family ...". The petitioner's submission was simply that, since the victim, the child, had no independent life at the time of the crime, it could not be said to have been living with the offender as a member of the same family, regardless of whether the mother was so doing. The respondents' decision was set forth in the fifth paragraph of the decision document. This aspect of the matter was also dealt with in paragraph 11 on page 4 of their Answers. That paragraph contained the fallacy that, in some way, the child's right was derivative from the mother. That view was wrong; anyway, that particular point had not been raised in the respondents' decision document and accordingly could be ignored. Certain points were made in paragraph 11(a) of their Answers by the respondents. In this area, it appeared that the respondents were relying upon certain concepts of the law of delict. It was submitted that these were irrelevant in the context of the application of the Revised 1969 Scheme. It had been made plain in *Regina v Criminal Injuries Compensation Board ex parte Staten [1972] 1 All E.R. 1034* that the phrase "living together ... as members of the same family" in paragraph 7 of the Scheme should be given its ordinary, natural meaning, and should not be made to conform with other legal concepts. Furthermore, the words "at the time" in paragraph 7 had to refer to the time of the "crime of violence" referred to in paragraph 5 thereof. Since, at that stage, the child was incapable of independent life, paragraph 7 could not operate.

In the whole circumstances, the Court should sustain the plea-in-law for the petitioner, quash the decision of the respondents and require them to reconsider the petitioner's application in the light of correct principles of law.

Junior counsel for the respondents submitted that they had not erred in law in any way. On the three main issues in the case the respondents made the following submissions:

(1) While it was accepted that the child concerned had certain grievous disabilities, they could not be regarded as "personal injuries"; (2) *Esto* they could be so regarded, they could not be seen as "directly attributable" to the crime of rape; and (3) In any event, under paragraph 7 of the Revised 1969 Scheme, any claim which the child might have was precluded.

Counsel for the respondents began her submissions by focusing attention on the child herself. It was obvious from the medical material which was available to the respondents that the child's conception and her handicaps were indivisible. The act which caused the child to come into being also produced her disabilities. Furthermore, there was nothing about the crime which had caused the child to exist in the disabled state, although, in the absence of the act concerned, the child would not have been born at all. The truth was that the child's disabilities were due to consanguinity between her parents and to nothing else. Those disabilities were an inexorable consequence of the conception and birth. Looked at in this way, it was plain on a common sense basis that the child's handicaps were not "personal injuries".

Counsel for the respondents next proceeded to consider the meaning of the words "personal injury" in the context of the Revised 1969 Scheme. It was plain from the form of the Scheme, which provided compensation for "personal injury" caused in

a particular way, that "personal injury" in that sense involved an interference with the integrity of the human body or mind, as a result of which the victim was altered. It involved a change of some kind, as a result of which the person concerned was impaired. The mere experience of suffering in itself was not enough to constitute "personal injury". In compensating an injured party for their injury, the aim was to repair the damage suffered by the injured person, or, at least, to return him, so far as possible, to an earlier position, enjoyed before the injury. Thus the victim must have had something to lose, prior to the injury. In the present case the child concerned had never had a pre-existing intact state, which had been diminished by injury. This child had had no existence in any real sense, prior to conception. It followed that it was impossible to describe the disabilities which she possessed as "injury".

Examination of the treatment of reparation by Stair at I.9. 2 and 3 made it clear that what was involved in the concept of reparation was, by the best available means the restoration of a pre-existing condition enjoyed before injury was inflicted. Damage was seen as a diminishing of someone or the taking away of something from a person, which of right they had. These concepts were hostile to the petitioner's contentions. The true nature of "injury" for which compensation could be awarded was made clear by Lord Blackburn in *Livingstone v Rawyards Coal Company (1880) 7 R.(H.L.) 1, at page 7.* Compensation involved the restoration of a pre-existing condition. That approach was supported by what was said in *Wallace v Kennedy 1908 S.L.T. 485, at page 486.* That case was concerned with the nature of "physical injury", which was said to involve the disturbance of normal health in some way. Mere mental pain or anguish was not enough to constitute injury.

The distinction between injury and an emotional reaction in the context of the law of reparation was highlighted in *Simpson v Imperial Chemical Industries Limited 1983 S.L.T. 601*. For the former damages could be awarded, but for the latter they could not. At page 605 it was said that, for recovery, there had to be "a visible and provable illness or physical effect. Mere distress of mind, grief or suffering is not enough."

At this point in her submissions, junior counsel for the respondents drew my attention to the *Human Fertilisation and Embryology Act 1990*, cap. 37. In the Current Law Statutes, the Act appeared in association with a detailed note on the biological terms used in the Act itself. This explanation contained a helpful explanation of the process of conception. It made clear that the genetic make up of the child depended upon the characteristics of the female egg and the male sperm. It was apparent from this that genetic defects would exist from the moment of conception. This meant that, in this case, the child had not been altered in any way, or rendered less whole that she might otherwise have been, by any wrongful act. The reality was that she could not have existed, given her parentage, save in her present state. It followed from that state of affairs that no "injury" had occurred, according to the ordinary meaning of the word. The child's existence and present condition could not be separated. She could not be entitled to compensation only for what might be described as a defective existence. That meant that compensation could not be given for, among other reasons, the reason that, in terms of paragraph 10 of the Revised 1969 Scheme, compensation had to be assessed on the basis of common law damages. No damages could be awarded to the child under the provisions of the common law in respect of her defective existence. While it could not be denied that her handicaps

would give rise to distress, it was clear from the authorities already cited that distress alone or other forms of suffering, in the absence of injury, could not form the basis of an award. The idea of "injury" as an alteration to a pre-existing state had been the basis for the refusal of many Courts in the United States in America to award damages for "wrongful life".

By way of an introduction to consideration of American authorities, it had to be realised that each State had its own legal system, legislature and Courts. There was a great variety of legal concepts in use and many conflicts between the decisions of Courts in different States. Furthermore, it was evident from a reading of the American reports that the approach of the judiciary involved less inhibition in relation to judicial legislation than was customary in the United Kingdom. In addition, it was plain that the use of language in American decisions appeared to be rather looser than was found in British cases; legal concepts in use in America, in some cases, differed materially from those to which British Courts were accustomed. For all these reasons, it was necessary to approach the American decisions with caution.

Counsel for the respondents then proceeded to review a number of American decisions. These included *Zepeda v Zepeda*. Reference was also made to *Williams v The State of New York 276 N.Y.S. 2d 885*. This was a decision of the highest Court of New York State. The infant concerned, conceived in circumstances somewhat similar to those of the present case, was found to have no right to recover. What was said at page 888 was particularly persuasive. Keating, J. considered that the principal basis for refusal of a remedy was the difficulty that the very act which caused the plaintiff's birth was the same one responsible for whatever damage she had suffered or would suffer. Damages in tort cases were awarded on the basis of a comparison between the

position the plaintiff would have been in, had the defendant not committed the acts causing injury, and the position in which the plaintiff presently found herself. That exercise could not be undertaken in a case such as that involved.

Reliance was placed also upon Becker and Others v Schwartz and Others and Park and Others v Chessin and Others *413 N.Y.S. 2d 895*. These cases were concerned with an alleged failure to advise relating to the availability of an amniocentesis test to discover the existence of Down's Syndrome. The claims were in effect for "wrongful life". They were rejected by the New York Court of Appeals. The Court indicated that there was no precedent for the recognition of a fundamental right of a child to be born as a whole, functional human being.

This particular case had been followed in a number of others including Berman v Allan, Alquijay v St Lukes-Roosevelt Hospital Center and Azzolino v Dingfelder. The effect of these cases could be summarised in this way. The law did not recognise any right on the part of a child to be born perfect, or not to be born at all. There was no duty on anyone to prevent a birth of a child which possessed defects. Being born under one set of circumstances, or to one set of parents, rather than another was not a cognisable wrong. Life with or without a handicap was considered to be more precious than non-life. In any "wrongful life" claim there was a logical impossibility involved in the assessment of damages, because it would require a comparison of life with some handicap and non-existence, which a Court of law could not make. Claims for special damages in cases of "wrongful life" were not recognised. Finally, it had been considered that, on account of the vast legal and social implications of the recognition of a claim for "wrongful life", the matter was properly one for legislation, rather than judicial decision. It was evident from these

cases that there was no "injury" in any proper sense of the word in "wrongful life" situations. All this was consistent with Stair's approach that injury involved a diminution of something, or the taking away of something previously enjoyed.

Counsel for the respondents went on to refer to *Curlender v Bio-Science Laboratories*.. This was a case in which a minor child, born with Tay-Sachs Disease, brought a personal injury action against medical testing laboratories, seeking recovery on the theory of alleged "wrongful life". It had been decided that the plaintiff was not entitled to damages as if she had been born without defects and would have a normal life expectancy but, rather, damages were to be fashioned based on her shortened lifespan. Although the judgment in this case recognised that claims for wrongful life had been almost universally barred, nevertheless damages were to be allowed for the pain and suffering to be endured during a limited lifespan. It was submitted that this decision was wrong. It had, in effect, been overturned in the subsequent case of *Turpin v Sortini*. It was not followed in *Procanik v Cillo and Others* and had been criticised in *McKay and Others v Essex Area Health Authority, at page 1183.*

At this stage of her argument, counsel for the respondents interposed a Scottish case, which had come to her attention, *Moffat v The Secretary of State for Scotland 1995 S.L.T. 729.* In it, the Court expressed the opinion that damages could have been awarded in the case, if liability had been established, for injury to health sustained by the pursuer during the course of a lengthy prison riot. However it was obvious from that case that the pursuer had suffered from a variety of physical symptoms, apart from discomfort.

Counsel for the respondents then reverted to her consideration of the American cases. In *Turpin v Sortini*, it was recognised that a child suffering from hereditary

deafness was entitled to recover special damages for extraordinary expenses necessary to treat the hereditary ailment, but could not recover general damages. The case did not assist the petitioner; the use of the word "injury" to describe the plaintiff's condition was inappropriate. At other parts of the judgment, it seemed to be said that no "injury" had been suffered. Consideration of the judgment seemed to suggest that the claim for special damages had been allowed on grounds of public policy rather than law. There was no logic to support the Court's decision. So far as *Procanik v Cillo* was concerned, the decision in relation to general damages was correct, but when the Court dealt with special damages it was plain that they were motivated by considerations of policy rather than logic or law, as appeared from page 762. This weakness in the majority decision was highlighted in the dissenting opinion of Schreiber, J. So far as *Harbeson v Parke-Daves Inc.* was concerned, it was submitted that the decision was wrong, in so far as special damages for wrongful life were allowed. This case had not been followed in later cases.

Cowe v Forum Group, Inc., was an important American case supporting the respondents' position. At page 635 it was affirmed that "life, even life with severe defects, cannot be an injury in the legal sense." This case demonstrated a clear rejection of wrongful life claims. In it, the cases relied upon by the petitioner were not followed. It was the most recent American pronouncement on the subject.

Counsel for the respondents next considered *McKay and Another v Essex Area Health Authority and Another*, in which the Court of Appeal, adopting the approach in *Becker v Schwartz*, held that the child's claim was contrary to public policy in respect that it amounted to a claim for wrongful life. The matter could be approached in a number of different ways, but one of those involved the suggestion that no injury

cognisable by the law had been suffered in such cases, as appeared from page 1184. This case was particularly important in the present context, since paragraph 10 of the Revised 1969 Scheme provided that "... compensation will be assessed on the basis of common law damages ...". If the common law declined to award damages in the situation with which we were dealing, it followed that compensation could not be awarded in terms of paragraph 10. That amounted to an argument relating to the meaning of the term "personal injury"; it also constituted a separate reason why the respondents' decision was correct.

Looking at the matter in a more general way, the basic difficulty which the petitioner faced was that there was no possibility of a pre and post-injury comparison in the present circumstances. The child's defects were inherent in her genetic make up. In any event, one of the difficulties of accepting the existence of a right to be born normal was that it was virtually impossible to define the limits of normality. People who might be described as "normal" were, in reality, very varied. Characteristics which might be seen as defects by one person could be seen as assets by another.

Further, it was clear that "suffering" alone was not recognised by the law as a basis for a right to damages. In this connection reference was made to *Page v Smith [1996] 1 A.C. 155*, particularly to the speeches of Lord Jauncey of Tullichettle at page 171 and Lord Lloyd of Berwick at page 190. Before "suffering" could be recognised as a basis for a right to damages, it had to be shown that it was consequent upon personal injury.

Counsel for the respondents next proceeded to consider in detail the significance of paragraph 10 of the Revised 1969 Scheme. In relation to paragraph 10 of that Scheme, she submitted that the Court could have regard to it, even though it

had not been referred to specifically in the respondents' decision. That submission was supported by Glasgow District Council v The Secretary of State for Scotland *1980 S.C. 150*. That case showed that the decision of an administrative body, in that case the Secretary of State for Scotland, being correct in law did not require to be quashed, although the reasoning by which it was reached was, in part, erroneous. In that connection, reliance was placed on Ahmed v The Secretary of State for the Home Department *[1994] Imm. A.R. 457* and Andrew v Glasgow District Council *20 January 1995; Lord Clyde; unreported.*

Junior counsel for the respondents went on to consider the so-called "pre-conception tort" cases. Jorgensen v Meade Johnson Laboratories Inc. was distinguishable because, although it involved pre and post-conception injury, there was no concern on the part of the Court as to the nature of that injury. The children involved had had the opportunity to be born normal, in the absence of damage to the mother's chromosomes. Further, in Renslow v Mennonite Hospital, the position was that, but for the negligent act, the mother concerned could have had a healthy child. Bergstreser v Mitchell and Others had not been followed in other cases. In any event, there had been a potential for the child to have been born intact. In Albala v City of New York and Others *N.Y., 429 N.E. 2d 786*, no remedy was afforded for a pre-conception tort upon the mother. In Enright v Eli Lilly & Company and Others *568 N.Y.S. 2d 550 (Ct. App. 1991)* Albala was followed. In Grover and Others v Eli Lilly & Company and Others *591 N.E. 2d 696 (Ohio 1992)* the issue was treated as one of product liability. The manufacturer's liability did not extend to persons who had never been exposed to the drug, either directly or *in utero*.

The *Congenital Disabilities (Civil Liability) Act 1976* had, as its purpose, the clarification of English law. It had no application in Scotland, where it was thought that such clarification was unnecessary. An examination of the Act of 1976 showed that, for liability to exist, there had to be "an occurrence" and "disabilities" which would not otherwise have been present. That meant that the child concerned must have been capable of normal life, but for the occurrence. The scope and purpose of the Act of 1976 was explained by Ackner, L.J. in *McKay and others v Essex Area Health Authority*, at pages 1186 to 1187. The object of the Law Commission had been that a child should have no right of action for "wrongful life".

Counsel for the respondents next turned to the interpretation of the Revised 1969 Scheme itself. She submitted that that Scheme was not a statute and that it should not be treated as such. However, the words used in it should be given their ordinary and plain meanings. The policy involved in its application was primarily the responsibility of the respondents. Accordingly, the Court should hesitate to interfere with the respondents' interpretation of a Scheme which was couched in broad terms. In that connection reference was made to *Regina v Criminal Injuries Compensation Board ex parte Schofield, at pages 929 and 931*. If one followed that approach in this case and applied the ordinary meaning of the language used, in particular of the words "physical injury", it could not be said that the respondents were plainly wrong and had misconstrued the Scheme. Paragraph 2 of the Scheme made it clear that compensation would be paid where the "Board are satisfied, in accordance with the principles set out below, that compensation is justified." Thus the primary responsibility for the interpretation for the Scheme belonged to the respondents. A similar approach to the interpretation of the Scheme was advocated in *Regina v*

Criminal Injuries Compensation Board ex parte Staten at page 1036. There had to be no artificiality in the construction process. In this connection reference was also made to *Regina v Criminal Injuries Compensation Board ex parte Webb [1987] 1 Q.B. 74, at page 78*. A similar approach to the interpretation of the Scheme was taken in *Gray v Criminal Injuries Compensation Board 1993 S.L.T. 28*, by Lord Weir at page 30. The result of following the foregoing approach should be that the expression "personal injury" ought to be given an ordinary meaning, not a strained interpretation, such as that contended for for the petitioner.

In relation to paragraph 7 of the Revised 1969 Scheme, it was submitted that the child could not be a person, or a victim, until she existed on birth. Thus she would be capable of being a victim only once born; at the time of birth, she became a person and lived in family with the offender. The words "at the time" in paragraph 7 meant at the moment when she suffered injury, that is to say, in this instance, when she was born and began to suffer. Support for this view was to be found in *Hamilton v Fife Health Board 1993 S.L.T. 624 at pages 632 and 633*. On the assumption that the idea of "injury" was to be extended to the unborn foetus, in order to enable paragraph 7 to be meaningfully considered in this context, it was submitted that the foetus was "living together at the time as (a member) of the same family" with the offender.

Finally, it was submitted that, in this instance, the "personal injury" was not "directly attributable to a crime of violence". If a woman was raped and became pregnant, there was a recognition in terms of the Scheme that the pregnancy was part of the injury suffered. That was apparent from paragraph 9. However, the position of the child was different. The child did not exist at the time of the rape. It came into being as a result of it. Pregnancy commenced a few days later. The resulting child

would be born nine months later. Only then did it begin to suffer. Thus the "injuries" involved here could not be said to be directly attributable to a crime of violence, because the child did not exist at the time of the crime. The Scheme was said to have been introduced for the purpose of furnishing compensation to victims of crimes of violence. Because the child did not exist at the time of the crime of violence, it could not be a victim of it. It was plain from the terms of paragraph 6(b) of the Scheme and from the terms of the application form, 5/6 of process, that the respondents must have been satisfied that rape had been timeously reported. Looking at the terms of the Scheme overall and at paragraph 6 in particular, it was clear that this child could not be seen as a victim of a crime of violence; alternatively, the problem faced by the child was not an "injury" in terms of the Scheme. The earliest starting point for the child's "injuries" was not the rape itself, but the subsequent conception, or even the birth. For injuries to be directly attributable to a crime of violence under the Scheme they had to have been inflicted on the person concerned in the course of the commission of the crime, or to be the *sequellae* of such injuries inflicted upon that person in the course of the crime.

In the whole circumstances, the Court should sustain both of the respondents' pleas-in-law and refuse the prayer of the petition. The petitioner's plea-in-law should be repelled.

Senior counsel for the petitioner indicated that he adopted junior counsel's submissions. He said that the petitioner's basic complaint was that the respondents had precluded themselves from considering what injury had been suffered by the child in question and how that child should be compensated therefor. The respondents had misdirected themselves by virtue of errors of law in the application of the Scheme; in

particular, they had misconstrued paragraphs 5 and 7 of the Scheme. It was indicated that the petitioner accepted the *dictum* of Bridge, J. in *Regina v Criminal Injuries Compensation Board ex parte Schofield, at page 931*, to the effect that the respondents were custodians of their own policy. However, they were not arbiters as to the meaning of the Scheme under which they operated. Ultimately, as was plain, the respondents were amenable to judicial review.

The first substantial issue which arose was whether the child had sustained "personal injury" at all. In relation to that, the problem that the petitioner had to overcome was to meet the argument that a person could not be said to have been injured unless there had been some deleterious alteration in a pre-existing state. It was submitted that there was no difficulty relating to the words "sustained" and "personal" in paragraph 5, as appeared from the Opinions of Lord McCluskey at page 631 and Lord Caplan at page 630 in *Hamilton v Fife Health Board*. The problem arose over the word "injury". The petitioner's submission was, quite simply, that on a proper view, if one contemplated the condition of the child, it could be said that she had sustained "personal injury". Of course, if the petitioner's submission was wrong on that point, the case failed. What was challenged by the petitioner was the notion that there had to be an alteration of a pre-existing condition before it could be said that "injury" had occurred.

Some assistance might be got from a consideration of the word *inuria* in Scots law. Lawyers would say that a "wrong" was an "injury". If a wrong has been done, it would be said that an "injury" had been sustained. It was not necessary to look at a pre-existing state. The "alteration in state" argument had been supported by reference to *Livingstone v Rawyards Coal Company* and *Wallace v Kennedy*. However, those

cases were not inconsistent with the petitioner's position. It was submitted that suffering might be a sufficient basis for an award of damages. In this connection reference was made to *Barclay v Chief Constable, Northern Constabulary 1986 S.L.T. 562* where it was held that the expression "personal injuries" in section 17 of the *Prescription and Limitation (Scotland) Act 1973* extended to injury to feelings. Further, in *Fleming v Strathclyde Regional Council 1992 S.L.T. 161*, a similarly broad view of "personal injuries" was taken.

Counsel for the petitioner indicated his reliance upon certain of the American authorities put before the Court, where impairment was seen as equivalent to injury. In relation to the pre-conception tort cases, it was submitted that, if a legal system recognised pre-conception tort, that system did not have the difficulty which the respondents had encountered. Pre-conception torts were recognised in England. While the 1976 Act did not refer to "injury", it used equivalent language. Under that Act what might be described as "defects" in a human being might have to be assessed for purposes of awarding damages.

The effect of the common law on the situation had to be considered because of paragraph 10 of the Scheme. The approach taken by Lord Clyde in *Andrew v Glasgow District Council* was accepted. An element of the decision in *McKay and Another v Essex Area Health Authority*, where it was held that damages could not be awarded for wrongful life, was that it was considered that there could be no duty to destroy life. In this connection reference was made to pages 1181, 1184 and 1188. Issues of that kind did not arise here. The respondents had no need to be concerned with duties to destroy life or anything equivalent to that. If comparison between life in a particular state and non-existence was necessary, it was nowhere indicated that a

tribunal could not enter upon that particular task. Indeed in recent times Courts had done just that in cases where authority had been granted for the termination of life. In that connection reference was made to *Law Hospital N.H.S. Trust v The Lord Advocate and Others, 22 March 1996; (unreported)* and *Airedale N.H.S. Trust v Bland [1993] A.C. 789.*

Care had to be exercised in considering the American cases in relation to what was meant by "injury". In *Williams v The State of New York*, *Ecker v Schwartz, Alquijay v St Lukes-Roosevelt Hospital Center* and *Cowe v Forum Group Inc.*, the word "injury" had been used as equivalent to a legal wrong. In *Burman v Allan, Azzolino v Dingfelder* and *Turpin v Sortini*, the word "injury" had been used in a sense equivalent to damage. It was plain that the word "injury" was capable of a wide range of meanings. On the second and third main issues, senior counsel was content to adopt the submissions already made by junior counsel.

Senior counsel for the respondents recalled that the respondents had refused to award compensation on three grounds. There was in fact a fourth justification for withholding compensation, which arose from the terms of paragraph 10 of the Scheme. It provided that compensation had to be assessed on the basis of common law damages. It was perfectly clear that, in a context such as the present one, damages were not available at common law, as appeared from the decision in *McKay and Another v Essex Area Health Authority and Another*. Having regard to that state of affairs, it followed that compensation could not be assessed and awarded. In that connection senior counsel simply relied on the submissions made by junior counsel.

He sought to emphasise in his submissions the first ground upon which the respondents had rejected the application, namely the absence of "injury". The

fundamental problem for the petitioner was that the wrongful act which must have caused any "injury" also caused conception and therefore brought the child into existence. The consequence was the problem of identifying anything that could have been caused to be injured, in the ordinary sense of the word.

Some reference had been made to Institutional writers. Great care should be exercised in understanding what they said. In particular, the present case was concerned with "personal injury", the expression used in paragraph 5 of the Scheme, not with the technical Latin word *iniuria*, which was used by those writers. It was accepted that "injury" was one of the meanings of the word *iniuria* but it was not the position that they were interchangeable words. The word *iniuria* connoted a legal wrong, in the sense in which that was normally defined.

The fact was that, in ordinary language, the concept of "injury" necessarily involved the deleterious alteration of a pre-existing condition. In accordance with that concept, the so-called thalidomide child was not injured, but disabled. Examination of the writings of Stair, which had been relied upon by the petitioner, indicated that in Scots law the word possessed a similar sense. Furthermore, the authorities most recently relied upon by counsel for the petitioner, *Barclay v The Chief Constable, Northern Constabulary* and *Fleming v Strathclyde Regional Council* both involved consideration of that concept of "injury". In each case, there had been a pre-existing condition which had been changed for the worse. In the present application, the child sought compensation for the trauma of being who she was. That was not "injury". The concept of "injury" advanced by the respondents was reflected in the law of reparation in Scotland, as appeared from the quotation from Stair and from the case of *Livingstone v Rawyards Coal Company*. The difference between the present case, the

American cases and McKay and Another v Essex Area Health Authority and Another on the one hand and any other personal injury case on the other was this. In a conventional personal injury case, non-wrongful conduct would result in the continuation of a person in an unimpaired state. In this case and the other cases mentioned, non-wrongful conduct would result in the non-existence of the person in question. In the conventional personal injury case, the injury was defined by the difference between the unimpaired condition and the impaired condition. In such a case, damages could be awarded to repair the difference, so far as money could. In the latter kind of case, the option was between non-existence and an impaired existence. The impaired existence simply could not sensibly be described as an "injury" because nothing had been impaired. There were two reasons for that contention: firstly, there was nothing in existence to be harmed before the wrongful act; secondly, if being brought into existence could be seen as a "harm", that harm could not be evaluated as a detriment. If such an evaluation could not be undertaken, it was illogical and anomalous to contemplate the award of what might be described as consequential loss related to that harm, as had been done in certain of the American cases cited.

Reliance had been placed by the petitioner upon Airedale N.H.S. Trust v Bland, a case which had its origin in the Hillsborough disaster. The subject of that litigation was a person who was in a persistent vegetative state. All brain function, thought processes and consciousness had been terminated. Only the heart and lungs of the victim continued to operate. In order to keep that person alive, feeding and excretory functions had to be managed. This treatment had been initiated in the hope that the patient would recover. However, latterly it had been recognised that recovery

would not occur. The determination of the issue in the case did not involve an assessment of the value of life, as opposed to non-existence, as suggested on behalf of the petitioner. The approach to the problem was that it was said that the treatment being given to the victim was of an invasive nature, applied without the patient's consent. Such treatment was justified only where it could be said that it was necessary in the interests of the patient. So long as there was a possibility of recovery, there was such justification. Once there was not, it could no longer be said that it was in the best interests of the patient to continue the treatment and thus to maintain him or her in the state concerned. The Court was careful to say that it was not authorising the determination of life by doctors; nor was it saying that to end the patient's life was in the patient's best interests. The issue was seen as a question of treatment. In this connection reference was made to pages 886 to 898 of the report. At page 894 it was said, in particular, that disabled life could not be said to be less valuable than life in the absence of disability. The same approach as that involved in that case was taken in the recent Scottish decision of _Law Hospital Trust v The Lord Advocate and Others_. Accordingly, these two cases did not afford to the petitioner the support for his case contended for. In these cases the Court made no attempt to evaluate life in comparison with non-existence.

One way in which the petitioner had attempted to resolve these problems was to define "suffering" as "injury", comparing the condition of the child here involved with what was described as normal life. The difference between the child's actual state and so-called normal life being regarded as "injury". The most fundamental objection to that approach was that it divorced "injury" from any comparison of a

former and a subsequent state. The difficulty was that here the former state was unreal. The forceps delivery example was a false analogy.

A further serious difficulty for the petitioner's argument was that there was a serious problem in defining what was normal in human terms. There was no answer to the question of what degree of deviation from the supposed normal pattern of human existence was to be regarded as an "injury". In any event, to attempt to define normality in human beings was an objectionable and unsustainable exercise. It involved the undertaking of distasteful and morally objectionable comparison exercises. There were no useable criteria. The impossibility of defining normality was recognised in *McKay v Essex Area Health Authority*, at page 1193.

Senior counsel for the respondents submitted that the authorities were of some assistance in identifying the problems involved. The American cases were the only ones which had been found relating to wrongs alleged to have occurred in conception. Counsel for the respondents then proceeded to summarise his position in relation to the American cases. *Zepeda v Zepeda* and *Williams v The State of New York* were early cases which formed the background to more modern decisions. However, in those cases claims based upon alleged disadvantages in the circumstances of conception were rejected. *Becker v Schwartz* was the leading American case. It suggested that, where claims were made on behalf of infants for "wrongful life", there was no legally cognisable injury. That case had been followed widely in the United States of America, save in three States. The decision in *Becker v Schwartz* had been followed in a number of other cases, including *Burman v Allan*, *Alquijay v St Lukes-Roosevelt Hospital Center* and *Azzolino v Dingfelder*. These particular cases differed from the present case on their facts, since they were concerned with failure to have an

abortion, rather than wrongful conception. However, they raised the same problem as existed here, namely the attempted comparison of life and non-existence. In *Turpin v Sortini*, at pages 346 to 347, it was indicated very clearly that the possession of an hereditary ailment could not properly be described as "injury". It was simply impossible to make a reasoned award of damages upon such a basis. In *Cowe v Forum Group, Inc.*, at pages 634 to 635, the Court declined to recognise the possession of congenital disorder as "injury". It had to be recognised however that certain States allowed the recovery of special expenses in such cases, as had happened in *Turpin v Sortini*, *Harbeson v Parke-Davis Inc.* And *Procanik v Cillo*. Such decisions were based on considerations of expediency. The illogicallity of so doing had been recognised, as, for example, in *Procanik v Cillo* at page 762. That particular kind of approach had not generally been followed, as appeared from *Alquijay v St Lukes-Roosevelt Hospital Center*, *Azzolino v Dingfelder* and *Cowe v Forum Group Inc.*.

Senior counsel for the respondents next turned to deal with the so-called pre-conception torts. In such cases, a wrongful act had affected a mother's reproductive system, so as to damage an otherwise healthy foetus, or create a damaged one. Examples of such cases were *Jorgensen v Meade Johnson Laboratories Inc.*, *Renslow v Mennonite Hospital* and *Bergstreser v Mitchell and Others*. *Jorgensen v Meade* had not been universally followed. In *Albala v New York City*, *Enright v Eli Lilly & Company* and *Grover v Eli Lilly & Company*, different views were taken. It had been contended on behalf of the petitioner that *Jorgensen v Meade Johnson Laboratories Inc.* was important, because the defects to the child were inherent in its conception. However, that case was distinguishable from the present one, in respect that the

defects, though inherent in the child, were not always inevitable. The mother's chromosomal structure had been altered by a drug prior to conception. Thus the possibility had existed before the wrongful act of the parents having a healthy child. That contrasted with the present case where it was throughout inevitable that the child involved would be as that child was.

Senior counsel for the respondents next made reference to the English experience. In *McKay and Another v Essex Area Health Authority and Another*, it was plainly recognised that the defects concerned could not be categorised as an "injury". It was impossible to assess damages in such a case, since there was nothing with which to compare the damaged state. In any event, even if there was some way of resolving that problem, the question of what degree of disability could be said to constitute an "injury" arose. There was simply no answer to that question. On the whole issue of whether the child had sustained "personal injury" within the meaning of paragraph 5 of the Scheme, the respondents' decision was correct. On the second and third grounds of refusal stated by the respondents, the submissions already made by junior counsel for the respondents were relied upon.

In this case, which arises out of the plight of Lesley Anne Pascoe, for whom one must have the greatest sympathy, I have been favoured with very wide ranging submissions, including a wealth of citation of authorities from the United States of America. In these circumstances, it is of great importance that I should endeavour to focus with precision the issues which I have to decide. It appears to me that there was unanimity as regards what the main issues were. In the first place, the question arose of whether the grievous condition of Lesley Anne Pascoe could properly be regarded as "personal injury", within the meaning of paragraph 5 of the Revised 1969 Scheme,

under which, at the material time, the respondents operated. In the second place, the question was whether, assuming that the first issue was answered in the affirmative, that "personal injury" was "directly attributable to a crime of violence". In the third place, assuming that the first two questions were answered in the affirmative, the issue arose of whether the claim for compensation was barred by the terms of paragraph 7 of the Scheme, on the view that "the victim who suffered injuries and the offender who inflicted them were living together at the time as members of the same family", within the meaning of that paragraph. It is to these issues that I now turn.

It is plain that the first issue which I have to decide is one of the interpretation of the words "personal injury", which appear in paragraph 5 of the Scheme, in the context in which they appear. That being so, it is necessary to consider the several authorities which were cited relating to the approach which should be adopted to the interpretation of the respondents' Scheme. In _Regina v Criminal Injuries Compensation Board ex parte Schofield_, although Bridge, J. dissented, I have understood that his observations relating to the proper approach to the interpretation of the respondents' Schemes have enjoyed acceptance and approval. At page 931 he said:

> "... one must bear in mind that the Scheme, as the document is entitled which enshrines the rules for the Board's conduct, is not recognisable as any kind of legislative document with which the Court is familiar. It is not expressed in the kind of language one expects from a parliamentary draftsman whether of statutes or statutory instruments. It bears all the hallmarks of a document which lays down the broad guidelines of policy."

He then stated:

"that in the operation of the Scheme, in the day to day consideration of applications, inevitably, within the broad guidelines laid down by the Scheme itself, the Board's decisions are constantly shaping the policy more precisely, and if the executive, who are wholly responsible for the form of the Scheme and can change it any day in the week by a written answer to a parliamentary question, do not think the Board is shaping the policy in the right way, then a suitable amendment of the Scheme can be made without any of the difficulties which accompany amendments to legislation properly so called. It is against that background that I approach the problem of construction ... and against that background it seems to me that it would be wrong for this Court to intervene and say that the Board have misconstrued the Scheme unless it is very clear that that is the only tenable view."

In _Regina v Criminal Injuries Compensation Board ex parte Staten_, Lord Widgery, C.J. said in relation to the Scheme: "I think the Court should look at these words and give them their ordinary sensible meaning." In _Regina v Criminal Injuries Compensation Board ex parte Webb_, a similar approach was taken by Lawton L.J.. He said:

"The Scheme is not a statutory one. The Government has made funds available for the payment of compensation without being under a statutory duty to do so. It follows, in my judgement, that the Court should not construe the Scheme as if it were a statute but as a public announcement of what the Government was willing to do. The entails the Court deciding what would be a reasonable and literate man's understanding of the circumstances in which

he could under the Scheme be paid compensation for personal injury caused by a crime of violence."

Finally, in *Gray v Criminal Injuries Compensation Board*, Lord Weir accepted that the approach described above to the interpretation of the Scheme was correct. It is this common sense and non-technical approach to the interpretation of the Scheme which I endeavour to adopt.

There is no doubt that the meanings of the word "injury" contained the Oxford English Dictionary, to which reference was made, are wide. Indeed, the first meaning found there may be capable of embracing the concept of "injury" advanced by the petitioner, although I consider that even that definition presupposes the existence of a victim. However, dictionary definitions can be only a part of the picture.

During the course of the argument reliance was placed upon certain passages in Stair, I. 9.2 and 3.. This Title is concerned with reparation. It is there said: "In reference to man is the obligation of repairing his damage, putting him in as good a condition as he was in before the injury." Also: "Damage is called *damnum, a demendo*, because it diminisheth or taketh away something from another, which of right he had." It appears to me that these passages, particularly the first, indicate that there was involved in the concept of injury, in the context of the early law of reparation, the idea of a pre-existing victim, who was diminished by an injury. The law was concerned with "putting him in as good a condition as he was in before the injury". That particular approach was the one expressed Lord Blackburn in *Livingstone v Rawyards Coal Company*, at page 7:

"... where any injuries are to be compensated by damages, in settling the sum of money to be given for reparation or damages, you should as nearly as

> possible get at the sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."

In *Wallace v Kennedy*, Lord Johnston was considering the significance of nervous shock in the law of reparation. He considered that:

> "To found a claim of damages for personal injury there must be physical injury of some kind. It may equally be produced by nervous shock producing bodily illness. ... mere mental pain or emotion will not ground an action."

I take from this the unexpressed premise that, in the view of Lord Johnston, there must have been a victim before there could be an injury. Further, mere distress or emotion will not ground an action. The same approach on that latter aspect of the matter was taken in *Simpson v Imperial Chemical Industries Limited*.

While these pronouncements upon the insufficiency of mental anguish or distress tend to undermine the petitioner's argument, to the effect that suffering in itself could properly be seen as constituting "injury", it appears to me that they have limited value here. The child involved in this case no doubt may experience mental anguish in relation to her plight. However, that plight is the result of gross physical abnormalities, which are not comparable with the kind of problems which existed in *Wallace v Kennedy* and *Simpson v Imperial Chemical Industries Limited*. Thus I consider that the basic issue between the parties in this case, relating to "personal injury", must be resolved by reference to other considerations.

Reliance was placed on *Black v Duncan* by the petitioner. I do not think that that case is of any significance in the context here. While the claim concerned was

novel, it is quite clear from the context that there could be said to have been a pre-existing victim of the offence concerned, namely the husband, who had previously enjoyed an undefiled marriage bed. For similar reasons, I do not consider that the case of *A. v C.* is of any assistance.

The petitioner also relied upon *Barclay v The Chief Constable, Northern Constabulary*. In that case, the Court was concerned with the interpretation of the expression "personal injuries" in section 17 of the *Prescription and Limitation (Scotland) Act 1973*. It was held that that expression extended to injury to feelings, such as might be experienced by a person who had been defamed. It appears to me that that case does not advance the position of the petitioner in relation to the issue which I am considering, since, in the case of a person whose feelings have been injured by a defamation, prior to the infliction of the wrong concerned, there would have existed a person who had not been injured in that way. In other words, there would have been a pre-existing victim. The observations which I have just made in relation to *Barclay v The Chief Constable, Northern Constabulary*, appear to me to be equally applicable to *Fleming v Strathclyde Regional Council*, also relied upon by the petitioner.

During the course of the argument before me, both parties cited a large number of American cases. I do not think that it is either practicable or necessary for me to consider all of these individually. It appears to me that a number of general points must be made in relation to these cases. In the first place within the United States of America, as I understand it, there are as many jurisdictions as there are States. It is quite apparent from consideration of the cases cited that, from time to time, on particular topics, differences of view emerge in different jurisdictions. This

phenomenon makes it somewhat difficult to reach a conclusion as to what might he thought to be "American law", if such a term is meaningful. In the second place, it is quite obvious from reading some, at least, of the American cases cited that the approach of certain American Courts to the judicial process is very different from that which is followed in our Courts. It is plain that, in some cases, Judges, who may hold their offices as a consequence of election, take it upon themselves to ground their decisions patently upon their own view of expediency and public policy. Their actings in some cases appear to approximate more to explicit judicial legislation rather than to the application of an existing body of law to the facts before them. In the third place, the cases cited were, of course, not directly concerned with the particular issue which I am now considering. They were, almost exclusively, cases in which civil claims were made, grounded upon negligence or product liability. Accordingly, in my view, it is necessary to approach such cases recognising what they are. With these considerations in mind, I now pass to consider certain of the American cases cited. In doing so, I have two objects in mind, firstly to see if it can be said that the weight of American cases points in any particular relevant direction, in relation to the issue I am considering and, secondly, to see whether those cases are of specific assistance in relation to the elucidation of the concept of "personal injury".

It was represented to me that *Becker and Others v Schwartz and Others* could be described as the leading American case, having regard to the Court in which it was decided, the Court of Appeals of New York. In that case parents brought actions against physicians alleging causes of action for "wrongful life". The Court of Appeals held that the complaints, filed on behalf of abnormal infants who required extraordinary care and treatment, alleging "wrongful life", based upon the defendant

physicians' alleged negligence in failing to inform the parents accurately of the risks involved in pregnancy, resulting in the parent's decision to conceive or not to terminate pregnancy, did not state legally cognisable causes of action. The infants did not suffer any legally cognisable injury because a child did not have a fundamental right to be born as a whole, functional human being, and damages which might be recoverable on behalf of such infants were not ascertainable. In this case, at page 900, Judge Jasen said:

> "However, there are two flaws in plaintiffs' claims on behalf of their infants for wrongful life. The first, in a sense the more fundamental, is that it does not appear that the infants suffered any legally cognisable injury. (Cf. *Williams v State of New York*.) There is no precedent for recognition at the Appellate Division of the 'fundamental right of a child to be born as a whole, functional human being' ... whether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and the theologians. Surely the law can assert no competence to resolve the issue, particularly in view of the very nearly uniform high value which the law and mankind has placed on human life, rather than its absence. Not only is there to be found no predicate at common law or in statutory enactment for judicial recognition of the birth of a defective child as an injury to the child; the implications of such proposition are staggering. Would claims be honoured, assuming the breach of an identifiable duty, for less than a perfect birth? And by what standard or by whom would perfection be defined?

There is also a second flaw. The remedy afforded an injured party in negligence is designed to place that party in the position he would have occupied but for the negligence of the defendant. Thus, the damages recoverable on behalf of an infant for wrongful life are limited to that which is necessary to restore the infant to the position he or she would have occupied were it not for the failure of the defendant to render advice to the infant's parents in a non-negligent manner. The theoretical hurdle to an assertion of damages on behalf of an infant accruing from a defendant's negligence in such a case becomes at once apparent. The very allegations of the complaint state that had the defendant not been negligent, the infant's parents would have chosen not to conceive, or having conceived, to have terminated rather than to have carried the pregnancy to term, thereby depriving the infant plaintiff of his or her very existence. Simply put, a cause of action brought on behalf of an infant seeking recovery for wrongful life demands a calculation of damages dependent upon the comparison between the Hobson's choice of life in an impaired state and non-existence. This comparison the law is not equipped to make."

At page 903 Judge Fuchsberg, concurring said:

"I agree with the majority opinion in so far as it dismisses the 'wrongful life' causes of action brought on behalf of each of the two infants. However I would not posit that disposition on a professed inability to calculate the extent and amount of the damages.

My own reason is a more fundamental one. There can be no tort 'except in the case of some individual whose interests have suffered' and in cases such as

these there is no way of showing that the 'interests' of the infants have suffered at all.

My point will become more concrete if we contrast the basis for the parents' own causes of action here with that of their children."

Judge Fuchsberg then went on to consider the claims made directly by certain parents. At a later stage, dealing with the claims on behalf of the infants he said:

"It is undisputed that the defendants neither created nor added to the children's abnormalities; the claim is simply that, but for their failure to act in accordance with accepted medical standards, the children would not have been born. Who then can say, as it was essential to the parents' causes of action that they say for themselves, that, had it been possible to make the risk known to the children-to-be in their cellular of foetal state or, let us say, in the mind's eye of their future parents that the children too would have preferred that they not be born at all?

To ordinary mortals the answer to the question obviously is 'no one'. Certainly the answer does not lie in the exercise by the children if their mental conditions permit, of subjective judgments long after their births. Therefore, whatever be the metaphysical or philosophical answer - speculative, perhaps debatable, but hardly resolvable - and however desirable it may be for society to otherwise treat these problems with sensitivity, I am compelled to conclude that the matter is just not justiciable."

Judge Wachtler, dissenting in part, concurred with the majority in relation to wrongful life. At page 905 he said:

"But the problems extend beyond causation. There is also the question as to what right the doctor violated and to whom the right belongs. The infant essentially claims that she had a right not to be born when birth would necessarily mean a life of hardship. The majority notes that the damages for violation of such right would be impossible to asses. But on an even more fundamental level this cause of action must fail because the Courts have long refused to recognise that such a right exists. (*Williams v The State of New York*.) ... and of course whether the infant was wrongfully conceived, as in *Williams*, or could have been legally aborted, as in the case now before us, is of no practical significance. In either event there is no right not to be born, even into a life of hardship, and thus no right cognisable at law which the defendant can be said to have violated."

In view of the significance attached to the case of *Williams v The State of New York* in the judgments from which I have just quoted, I consider it appropriate to say something about that case. In it an infant, who was born out of wedlock to a mentally deficient mother as a result of a sexual assault on the mother while she was confined as a patient in a State mental institution, filed a claim against the State which had negligently failed to prevent the assault. The New York Court of Appeals held that the infant had no right to recover. Looking at the judgments in *Williams*, it is apparent that the similarity between that case and the present one gives them particular interest. At page 888 Judge Keating said:

"What troubles me about this case is what one commentator has described as the 'logico-legal' difficulty of permitting recovery when the very act which

caused the plaintiff's birth was the same one responsible for whatever damage she has suffered or will suffer.

Damages are awarded in tort cases on the basis of a comparison between the position the plaintiff would have been in, had the defendant not committed the acts causing injury, and the position in which the plaintiff presently finds herself. The damages sought by the plaintiff in the case at Bar involve a determination as to whether non-existence or non-life is preferable to life as an illegitimate with all the hardship attendant thereon. It is impossible to make that choice. ...

Since it is impossible to determine the damage for which the State is responsible or for that matter to determine whether the defendant caused her any injury at all, I do not see how this action can be maintained."

In *Berman v Allan*, similar views were expressed by Supreme Court of New Jersey in relation to an infant who had been born afflicted with Down's Syndrome. Medical malpractice was alleged. The Court held that the infant had not suffered any damage cognisable at law by being brought into existence. The opinion of the majority of the Court, delivered by Judge Pashman contained this passage:

"We recognise that as a Mongoloid child, Sharon's abilities will be more circumscribed than those of normal, healthy children and that she, unlike them, will experience a great deal of physical and emotional pain and anguish. We sympathise with her plight. We cannot, however, say that she would have been better off had she never been brought into the world. Notwithstanding her affliction with Down's Syndrome, Sharon, by virtue of her birth, will be able to love and be loved and to experience happiness and pleasure - emotions

which are truly the essence of life and which are far more valuable than the suffering she may endure. To rule otherwise would require us to disavow the basic assumption upon which our society is based. This we cannot do."

The same approach was taken in the case of *Alquijay v St Lukes-Roosevelt Hospital Center*, also a decision of the Court of Appeals of New York, as it was also in *Azzolino v Dingfelder*, a decision of the Supreme Court of North Carolina. This latter case is of interest in the present context on account of the language used in the judgment of Justice Mitchell. He was dealing with an infant afflicted by Down's Syndrome and considering the possibility that the pregnancy might have been terminated following upon amniocentesis. At page 532 he said:

> "In applying traditional tort concepts to Michael's claim then, there remains the question of whether he has suffered any legally cognisable injury. In order to hold that Michael has been 'injured' in a legal sense the Court of Appeals felt compelled to say that it was 'unwilling, and indeed unable to say as a matter of law that life even with the most severe and debilitating of impairments is always preferable to non-existence'. We take a view contrary to the Court of Appeals. Therefore, we conclude that life, even life with severe defects, cannot be an injury in the legal sense. ... Although not determinative of our holding, we note that the overwhelming majority of jurisdictions which have been called upon to consider the issue have rejected claims for relief for wrongful life by children born afflicted with defects. ... We hold that such claims for relief are not cognisable law in this jurisdiction."

The case of *Turpin v Sortini*, a decision of the Supreme Court of California, which was concerned with the case of a deaf child who sought damages for the

defendants' failure to advise its parents of the possibility of hereditary deafness, thus depriving them of the opportunity to choose not to conceive the child, contains in the judgment certain passages which appear to me to be particularly apt in the circumstances of this case. In addition, the distinction is drawn between what might be described as ordinary pre-natal injury and cases where what is involved is an inevitable genetic defect. In relation to that matter, at page 344, Justice Caus said:

> "In an ordinary pre-natal injury case, if the defendant had not been negligent, the child would have been born healthy; thus, as in a typical personal injury case, the defendant in such a case has interfered with the child's basic right to be free from physical injury caused by the negligence of others. In this case by contrast, the obvious tragic fact is that the plaintiff never had a chance 'to be born as a whole, functional human being without total deafness'; if the defendants had performed their jobs properly, she would not have been born with hearing intact, but - according to the complaint - would not have been at all."

In relation to the earlier point, at page 346, he said:

> "... we believe that the out-of-State decisions are on sounder grounds in holding that - with respect to the child's claim for pain and suffering or other general damages - recovery should be denied because (1) it is simply impossible to determine in any rational or reasoned fashion whether the plaintiff has in fact suffered an injury in being born impaired rather than not being born; and (2) even if it were possible to overcome the first hurdle, it would be impossible to assess general damages in any fair, non-speculative manner. ... As one Judge explained: 'When a jury considers the claim of a

once-healthy plaintiff that a defendant's negligence harmed him - for example by breaking his arm - the jury's ability to say that the plaintiff has been 'injured' is manifest, for the value of a healthy existence over an impaired existence is within the experience or imagination of most people. The value of non-existence - its very nature - however is not'".

The last American case with which I intend to deal in detail is *Cowe v Forum Group, Inc.*, decision of the Supreme Court of Indiana. It happens to be the most recent American case available to me on the subject matter concerned, the decision being dated 25 July 1991. It was concerned with a child born to a mentally retarded mother in the total custodial care of a nursing home. The claim was one for, among other things, wrongful life. The Court held that (1) damages for wrongful life were not cognisable under Indiana law; (2) no cause of action was stated by the plaintiff to the extent that the plaintiff sought damages for the nursing home's negligence in failing to protect his mother from rape thereby causing his birth to parents incapable of care and support. In delivering the judgment of the Court Justice Dickson said at page 634:

"An overwhelming majority of other jurisdictions considering the issue have rejected claims for wrongful life for children born with congenital disorders. ... There are two inter-related grounds upon which the denial of recovery usually rests. The first is a general conceptual unwillingness to recognise any cognisable damages for a child born with a genetic impairment as opposed to not being born at all. ... Judicial recognition of the defective child's birth as an injury to the child would raise profound questions. ... The second basis for rejecting wrongful life claims is the impossibility of calculating compensatory

damages to restore a birth defective child to the position he would have occupied were it not for the defendant's negligence. Because children with genetic disorders are impaired from the moment of conception, it is impossible for them to have a fundamental right to be born as whole individuals. Hence the only alternative to their suffering, and the standard against which their compensation must be determined, is non-existence."

The Justice then went on to consider the approach followed in certain other Courts and continued at page 635:

> "However, we believe that such considerations of public policy are better suited to legislative than judicial determination. Persuaded that the generally prevailing view is better reasoned and more consistent with established principles of tort law, we can conclude that 'life' even life with severe defects, cannot be an injury in the legal sense' (*Azzolini*). Damages for wrongful life are not cognisable under Indiana law."

A large number of other American cases than those from which I have quoted were cited. I have given consideration to these cases. Doing the best that I can in relation to reported decisions from a series of foreign jurisdictions, the conclusion which I have reached is that the weight of American authority is to the effect that, in the law of negligence in America, wrongful life claims are not admissible. Essentially there appear to be two reasons for this: (1) the conceptual problem of regarding a genetic defect as an injury; and (2) the impossibility of the assessment of damages on any rational basis.

I should say, in addition, that much authority was cited to me on the subject of pre-conception torts. It does not appear to me that that authority advances

consideration of the issues in this case significantly. It is plain that, in certain circumstances, the law may recognise a pre-conception tort. Where avoidable damage has been done to a subsequent foetus or child, no doubt a remedy may be appropriate. However, the difficulty arises where the defect which is the subject of the claim or complaint is of genetic origin and unavoidable, having regard to the identity of the parents. It appears to me that that distinction was not fully recognised in the submissions made on behalf of the petitioner in relation to those cases.

I propose now to consider the sole United Kingdom case, in which the issues which concern me were examined, McKay and Another v Essex Area Health Authority and Another. In this case, the infant plaintiff was born disabled as a result of an infection of rubella suffered by her mother, the second plaintiff, while the child was in her womb. The plaintiffs alleged that, but for the negligence of the defendants, a Health Authority and a doctor, the mother would have had an abortion, under the Abortion Act 1967, to terminate the life of the child. The child claimed damages on the ground of the doctor's failure to treat the rubella, and against both defendants for her having "suffered entry into a life in which her injuries are highly debilitating, and distress, loss and damage". The Court of Appeal held that, since the child's complaint was that she was born with deformities caused by the rubella while she was in her mother's womb, the basis of the claim was that the defendants were negligent in allowing the child to be born alive; that although it was lawful for a doctor to advise and help a mother to have an abortion under the Abortion Act 1967, the doctor was under no legal obligation to the foetus to terminate its life; that the child's claim was contrary to public policy as being a violation of the sanctity of human life and a claim which could not be recognised and enforced because the Court could not evaluate

non-existence for the purpose of awarding damages for the denial of it and, therefore, the claim disclosed no reasonable cause of action. In a wide ranging judgment Stephenson, L.J. drew attention to the fact that the Court was dealing with a "wrongful life" claim. Thereafter he identified the impossibility of assessing damages in such a case. Thereafter he undertook a review of certain of the cases decided in the United States of America, including some of those to which I have referred. At page 1183 he summarised his view as to judicial opinion expressed in the American decisions in a series of propositions. These were:

> "(1) Though what gives rise to the cause of action is not just life but life with defects, the real cause 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 cognisable by law and if it is to have a claim for being so born, the law must be reformed by legislation."

Thereafter his Lordship went on to consider the different lines of reasoning which had commended themselves in the United States and, in particular, the fourth and fifth considerations which he mentioned in the above quotation. Thereafter he went on:

> "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' ...".

Ackner, L.J., at page 1189, deals with the issue of injury. There he said:

> "The disabilities were caused by the rubella and not by the doctor .... 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."

Griffiths, L.J. at page 1192 emphasised the difficulty in relation to the assessment of damage. There he said:

> "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 damage 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."

At page 1193 he goes on to consider the significance of the level of deformity. He concluded:

> "... 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 the cause of the impossibility of assessing the damages 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_, would be better introduced by legislation than by Judges striving to solve the insoluble."

Before expressing my conclusions upon the issue with which I am currently concerned, it is appropriate that I should mention two further cases, namely *Airedale N.H.S. Trust v Bland* and *Law Hospital N.H.S. Trust v The Lord Advocate and Others*. These cases are concerned with persons in a persistent vegetative state. They were founded upon by the petitioner in an attempt to provide an answer to the problem described by Griffiths L.J. in *McKay and Another v Essex Area Health Authority and Another* as "insoluble". The argument was, as I understood it, that Courts in the *Airedale N.H.S. Trust* and *Law Hospital N.H.S. Trust* cases had already embarked upon the assessment of the value of life and death in relation to persons in a persistent vegetative state and had felt able to reach conclusions on a comparison. I regard that argument as based upon a misapprehension of what was decided in the two cases mentioned. In both of those cases, the issues before the Court were issues relating to medical treatment, to which the patient had not consented, and its justification. In *Airedale N.H.S. Trust v Bland* the House of Lords held that the object of medical treatment and care was to benefit the patient, but since a large body of informed and responsible medical opinion was of the view that existence in the persistent vegetative state was not of benefit to the patient, the principle of the sanctity of life, which was not absolute, was not violated by ceasing to give medical treatment and care involving invasive manipulation of the patient's body, to which he had not consented and which conferred no benefit upon him. In my view therefore, these decisions do not have the effect contended for them by the petitioner.

In the light of the whole of the foregoing authorities and considerations, which I have mentioned, I have reached the conclusion that the respondents in this case did not err in law when they concluded in their written decision that "congenital

deficiencies cannot properly be held to be injuries within the meaning of the Scheme". In my opinion, the reasoning contained in the third paragraph of the respondents' written decision, 5/3 of process, is not open to criticism. It appears to me that the concept of injury, in the context of a situation in which compensation for it must be assessed, presupposes a pre-injury state which is capable of assessment and comparison with the post-injury state. It is obvious from the circumstances of this case that the child concerned never had, nor could have, any existence save in a defective state. Accordingly, in my opinion, it is inevitable that her plight, grievous though it may be, cannot be seen as "personal injury", within the meaning of paragraph 5 of the Revised 1969 Scheme.

I am confirmed in the view which I have formed by a consideration of the arguments which were addressed to me in relation to paragraph 10 of the Revised 1969 Scheme, to which I believe I am entitled to have regard, although that paragraph was not relied upon in the respondents' decision, and that for the reasons advanced on their behalf before me. It is there provided that " ... compensation will be assessed on the basis of common law damages ...". It is quite evident that from the decisions which I have reviewed and in particular *McKay and Another v Essex Area Health Authority and Another* that such an assessment, in this case, would be impossible. The common law, in my opinion with logical justification, has set its face against the possibility of making an assessment of damages in a case such as this. Indeed that impossibility has figured prominently in the reasoning in many of the American cases, to which I have I have referred, and also in the case of *McKay and Another*. It appears to me that that state of affairs is one which I can properly take into account in interpreting the expression "personal injury" where it occurs in paragraph 5 of the

Scheme. If, on the basis of one interpretation of that expression, the process enjoined by paragraph 10 is impossible, but, on another interpretation of that expression it is possible, it appears to me that the latter interpretation should be adopted, in order to achieve internal consistency. In this case that interpretation would involve the exclusion of the condition of the child from the category of "personal injury".

While what I have concluded above is determinative of the petition, I shall now deal briefly with the second main issue which was ventilated in the course of the argument before me, namely the matter of causation. In approaching this issue, I do not think that it is disputed that the Court ought to adopt the common sense approach to causation referred to in a number of decisions, including *Regina v Criminal Injuries Compensation Board ex parte Schofield*, *Brown and Others v Minister of War Pensions*, *Regina v Criminal Injuries Compensation Board ex parte Ince*, and *Stapley v Gypsum Mines Limited*. The message which emerges from these cases is that causation is not to be examined in any metaphysical or scientific sense, but in the wider and more liberal sense in which the matter would be understood by the man in the street applying common sense standards. The matter was put thus by Lord Reid in *Stapley v Gypsum Mines Limited* at page 681:

> "If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a Court of law this question must be decided as a properly instructed and reasonable jury would decide it. A jury would not have profited by a direction 'couched in the language of logicians, and expounding theories of causation with or without the aid of Latin maxims'. ... The question must be determined by applying common sense to the facts of each particular case."

Bearing these principles in mind, I have come to the conclusion that the respondents have not followed Lord Reid's injunction. In the fourth paragraph of the written decision, 5/3 of process they say:

> "Clearly her birth was directly attributable to what can be taken in this context as an act of rape. The 'injuries' as distinct from the birth were not attributable to the rape but to the genetic make up of the parents. The element of violence was not a direct cause of the child being born with profound handicap as opposed to being born normal."

In my view, in this passage, the respondents draw a distinction between the birth of the child, which they accept was directly attributable to an act of rape and the "injuries". It appears to me that a jury or the ordinary man would not draw such a distinction. I consider that they would accept that the birth of the child and its disabilities were both directly attributable to the same criminal act, namely the acknowledged act of rape. However, in the light of the conclusion which I have reached in relation to the first issue argument before me, the fact that I have reached this conclusion has no practical consequence in the present proceedings.

Finally I have to consider the third main issue which was argued before me, namely whether, in the circumstances of this case the terms of paragraph 7 of the Revised 1969 Scheme would constitute a bar to the petitioner's claim. Paragraph 7 of the Scheme contains these words:

> "Where the victim who suffered injuries and the offender who inflicted them were living together at the time as members of the same family no compensation will be payable."

In connection with the present issue, the question arises of what is meant by the words "at the time". It appears to me perfectly plain that this is intended to be a reference to the single moment of time when an offender inflicted and a victim suffered "personal injury directly attributable to a crime of violence ...". Endeavouring to relate that interpretation of the paragraph to the circumstances here, the words "at the time" must relate, in my opinion, to the time of the rape and incestuous intercourse, the only time when any act by the offender occurred. It appears to me to be equally plain that, if there is a "victim who suffered injuries", which of course I have held there is not, that victim must have been the foetus which became the child. The question therefore must be whether it can be said that the foetus and the offender "were living together at the time as members of the same family". In my opinion it plainly cannot be said that that was the case, since I do not consider that it can be meaningfully said that a foetus can live with anyone as a "member of ... (a) family". It appears to me clear that this paragraph is intended to relate to persons in life independent from their mothers. In these circumstances I consider that the conclusion reached in the fifth paragraph of the written decision of the respondents, 5/3 of process was plainly wrong. At the end of that paragraph the respondents say this:

> "Plainly the applicant was incapable of existence independent of the mother and we conclude therefore, that (at) all the relevant periods she must be taken as living in family and that the claim is excluded by the Scheme as it stood at the time."

In my opinion that view is fallacious. I am at a loss to understand how a foetus can be taken to be living in family with anyone, since a foetus is not a person in

any accepted sense of the word. I am fortified in the view which I have formed on this point by what was said by Lord Caplan in *Hamilton v Fife Health Board* at page 633. However, despite the conclusion which I have reached on this matter, in view of the opinion which I have formed in relation to the first issue argued before me, that conclusion has no practical consequence.

In the whole circumstances, the decision which I have reached is that the petitioner has failed to demonstrate that he is entitled to the remedy sought. My conclusion is that his ward's grievous problems lie outwith the scope of the Revised 1969 Scheme and that the respondents acted correctly in refusing the remedy sought. Accordingly I shall repel the plea-in-law for the petitioner, sustain plea-in-law 2 for the respondents and grant decree of absolvitor.

OPINION OF LORD OSBORNE

in the Petition of

JOHN MILLAR, curator *bonis* to Lesley Anne Pascoe (A.P.)

Petitioner:

for

Judicial Review of a Decision of

THE CRIMINAL INJURIES COMPENSATION BOARD

Respondents:

Act: Brodie Q.C., Scott
Brodies W.S.

Alt: Reed Q.C., Caldwell
R. Brodie

13 November 1996