SONDERDRUCK AUS:

Law, Legal Culture and Politics in the Twenty First Century

EDITED BY
Guenther Doeker-Mach
and Klaus A. Ziegert

Franz Steiner Verlag Stuttgart 2004

Corrective Justice and the Paradox of Future Individuals

CHTISTOPHER BIRCH

1. Introduction

It has become increasingly common for legal scholars to seek to found or justify the contemporary common law rules of tort upon principles of corrective justice.[1]. The concern for corrective justice carries with it the need to show how some people are morally responsible to make reparation for their past wrongs. One method for exploring the relationship between contemporary tort law and theories of corrective justice is to explore the tripartite relationship between the legal rules elaborated and applied by common law courts, our moral intuitions about the right outcome on the facts of those cases, and the way those cases should be dealt with by a systematic moral theory which seeks to explain the concept of corrective justice in a consistent way. John Rawls' description of such inquiry as the quest for a reflective equilibrium is apt, but a survey of the literature quickly reveals that the equilibrium is sought in different places depending upon whether a writer is more concerned with an explanation of legal doctrine on the one hand, or a consistent moral theory on the other.

The concern of this article is decidedly on the side of a search for a consistent and intelligible moral theory of corrective justice rather than a reconstruction of the contemporary law of tort. It is for this reason that explanations of judicial decisions that lay outside the realm of a theory of corrective justice are largely ignored. No doubt those that have analysed law from the perspective of economic theory would have explanations for the intricate legal rules governing damage where issues of causation are at stake and would have solutions to offer for some of the paradoxes treated in this analysis. This article however is part of the ongoing enterprise of seeking to investigate tort law from the perspective of corrective justice.

A further reason for concentrating attention on the analysis of tort law from the perspective of justice theory has been the close interaction between legal developments initiated by courts and the demands for justice made at the political and social level. It would substantially underestimate the significance of the

[1] For exponents of the view see Jules Coleman, Risks and Wrongs, Cambridge University Press, Cambridge, 1992 and Ernest Weinrib, Right and Advantage in Private law,(1989) 10 Cardozo.LRev, 1283. For a summary of some of the scholarship see Philosophical Foundations of Tort Law, ed David G Owen; Clarendon Press, Oxford, 1995. For an Australia perspective, particularly with regard to judicial pronouncements see K Mason; Fault, Causation and Responsibility: Is Tort Law Just An Instrument of Corrective Justice? (2000) 19 Australian Bar Review p.201

common law legal system to think that it always trails political and social developments. Alice Tay has pointed out the extent to which the common law courts have produced new and dynamic conceptions of justice which have led social and moral demands.[2]

In Australia the courts have led social and political change on issues concerning justice for Aborigines through their findings on native title. The High Court of Australia has however also been criticised for not being sufficiently radical in its approach to claims for reparation for past wrongs when it declined to grant a remedy to those Aboriginal plaintiffs seeking compensation for separation from their parents.[3] Courts have also proven unwilling to push the limits of tort law to permit compensation in the so-called "Wrongful Life" cases, however, courts have already shown themselves prepared to travel a long way in advance of much contemporary social and political thought in the so-called wrongful conception actions.[4]

Although it may be nearing the end of an important cycle of development, tort law has undoubtedly been a major instrument for elaborating claims for justice. Indeed, it will be argued that the legal concept of corrective justice, carrying with it the notion that wrongdoers make reparation for injury has to some degree supplanted political concepts of redistributive justice in several contemporary debates about the appropriate way of dealing with those whose plight is a result of past wrongs.

Some contemporary moral philosophers have identified a serious paradox concerning responsibility for past wrongs, at least in regard to wrongs committed at some considerable time in the past. This paradox was ironically first identified in regard to duties towards future generations.[5] The most detailed treatment of the problem has been by Derek Parfit who has referred to it as "the non-identity problem".

Tort lawyers have also been familiar with a number of paradoxes which afflict attempts to apportion responsibility for past wrongs. These have generally been identified as puzzles in showing a causal link between the damage caused to a victim and the conduct of a tortfeasor. The paradoxes usually arise in regard to so called causal over-determination, where several sufficient causes appear to cause the same harm.[6] It will be argued in this article that a generalized version of this problem afflicts all attempts to correct past wrongs through compensation to victims. The problem arises from the rules used to assess a victim's entitlement to damages. It will be further argued that this in turn circumscribes the extent to

[2] AES Tay, *The Sense of Justice in the Common Law* in Justice, edited by E Kamenka and AES Tay, Edward Arnold, London, 1979, p.79 at 92.

[3] In *Kruger v The Commonwealth* (1997) 190 CLR 1.

[4] *Cattanach v Melchoir* (2003) 199 ALR 131 E Weybury & C Witting, *Wrongful Conception Actions in Australia,* (1995) TLJ 53

[5] See Gregory S Kavka, *The Paradox of Future Individuals* (982) Vol 11, Philosophy and Public Affairs, p.93

[6] For a recent description of the problem and its conventional treatment by legal scholars see T Honore, *Responsibility and Fault* Hart Publishing, Oxford, 1999, p. 107ff.

which civil liability can usefully be used to correct for old wrongs. Finally, it will be argued that these problems are a reason why some social harms are best dealt with by forward looking principles of distributive justice rather than by historically oriented concepts of corrective justice.

2. Damages in Tort, Wrongful Life, and the Non Identity Problem

A number of recent claims for compensation for so-called wrongful life suffer the very conceptual difficulty identified by Derek Parfit and described as the non-identity problem. Several such cases were recently dealt with by Studdart J in the New South Wales Supreme Court.[7] In each case the plaintiff alleged that he or she was born with serious disabilities. In each case they complained that it was not their parent's intention to have caused them to be born, and but for negligent conduct by their parent's doctors they would not have been conceived in two of the three cases, and in the third that the pregnancy would have been aborted. The damages were said to flow from the plaintiffs' disabilities, and included costs that would not be incurred by another person not suffering such disabilities.

One of the plaintiffs legal representatives claimed it would be illogical if parents could be compensated for the losses that flow from the birth of a child where contraception had failed through medical negligence (so-called wrongful birth or wrongful conception) but the child born of such conception could not claim damages where it was born with disabilities.

In the general law of negligence if someone is negligently injured so as to require medical attention, and loses time from work, the monies awarded in compensation are usually said to be for the purpose of placing the victim back in the position he or she would have been in but for the accident. This, the so-called 'indemnity principle', underlies the award of special damages[8]. It is easy to understand how but for an accident a plaintiff would not have incurred medical costs or costs associated with lost income from time off work. The damage is measured by a counterfactual assumption that, but for the accident, the plaintiff would have continued leading a normal life which would not have involved attending doctors to have injuries treated, and would have permitted attending his or her usual place of work to earn income.

The law of tort gets into difficulties in those cases where it can be shown that but for the accident the plaintiff would not in fact have continued to lead his or her regular existence. Thus, if injuries are inflicted upon a plaintiff by the negligent conduct of defendant A, but the plaintiff would have otherwise been injured by the negligent conduct of defendant B, then complex questions of causation arise.

[7] *Edwards v Blomeley; Harriton v Stephens; Waller v James*. Studdart J Supreme Court of New South Wales, 12 June 2002

[8] See *Haynes v Bendall* (1991) 172 CLR 60 at 63 and *Kars v Kars* (1996) 187 CLR 354, John G Fleming, *The Law of Torts*, 9th Edition, LBC, Sydney, 1998, p.259

Apart from the sort of double causation problems just described the hypothetical or counterfactual assumption that we can measure damages by assuming the plaintiff's life would have continued in its normal fashion, but for the accident, and looking at the difference in costs between normal life and post accident life, appears at least workable.

Even compensation for intangible losses such as the impairment of the amenity of life, and pain and suffering, do not appear to raise obvious philosophical problems other than how one values this diminution in the enjoyment of life's existence. Indeed, some theories advanced by economic analysts suggest that there are at least notional ways that one might properly value loss of enjoyment of life.

Apart from the principle that damages are intended to place an injured party in the position he or she would be in but for the loss, damages are also affected by the principle of mitigation, the claimant has a duty to mitigate damage to the extent reasonably possible[9]. Thus a plaintiff, who lost his or her job because of the amount of time off work due to the accident, could not continue to claim for economic loss afterwards, if upon full recovery, he or she had been offered a job in all respects as good as his or her previous one, and without reasonable cause had rejected the offer. The principle of mitigation can thus be relied upon to, in effect, cause a plaintiff to bring to account certain benefits. In the example just used, if a plaintiff had lost a job as a result of an accident, and some time later acquired a new job, he or she cannot continue to claim for the loss of wages from the first job after the date of the second job without making an allowance for the fresh income.

The wrongful life cases appear puzzling because they are not easily capable of being fitted to the concepts just set out. What is complained of in the wrongful life cases is not that the medical practitioner negligently caused the plaintiff to be born with a disability, rather than to be born without the disability, but that the medical practitioner's negligence caused the plaintiff to be born as opposed to not born. The matter of which the plaintiff complains, being born with a disability, is an inevitable consequence of the medical practitioner negligently allowing the plaintiff to be born at all.

Had the medical practitioner conducted him or herself without any negligence, then all other things being the same, the consequence would be that the plaintiff would not exist. Given the alternatives of negligent or non-negligent conduct the only two outcomes appear to be the plaintiff does not exist, or the plaintiff exists, but exists with a disability.

If one assumes that existence with a disability would from the plaintiff's point of view be more desirable then non-existence, then from the plaintiff's point of view the negligent conduct of the doctor has conferred upon him or her an unwitting benefit, and if forced to choose, they would have to concede that all things considered, it is better that the doctor was negligent than not negligent.

[9] John G Fleming ibid p.285ff

Under the modern law of negligence in Australia, damages are said to be the gist of the action[10] and in the absence of damage a plaintiff has no entitlement to a verdict. There must be countless instances every day in which people behave negligently and either cause no harm or only confer benefits. Lawyers would have little trouble in advising in those instances that the negligence was not actionable.

The wrongful life cases brought in the New South Wales Supreme Court were all unsuccessful, as indeed have been most such cases brought in other jurisdictions. Studdart J in *Harriton* and *Edwards* has recorded the many other decisions on this issue from both common law and civil law jurisdictions. The difficulty of seeking to determine how existence with a disability can be compared with, or treated as worse than non-existence, is one of the principal reasons given in the many wrongful life cases for their dismissal.

Are wrongful life cases of the sort just described merely further instances where the negligence has caused no damage? Before offering any tentative conclusions on this issue it is worth considering another apparently unrelated type of litigation.

In May 2002 a Federal class action law suit was commenced in the United States against the corporations CSX, Aetna and Fleet Boston alleging that they had profited from the slave trade in the period before its abolition in the nineteenth century.[11] A committee chaired by Professor Charles Ogletree is reviewing possible defendants for a wide ranging reparations law suit. Potential defendants apparently include Brown, Yale and Harvard Universities.[12] Indeed, the issue of reparations is now at the forefront of debates in the United States regarding justice for black Americans.[13]

The website maintained by Human Rights Watch[14] states that Human Rights Watch traditionally advocates reparations as part of the remedy for any serious human rights abuse. The statement goes on to assert that the organization believes the descendants of a victim of human rights abuse should also be able to pursue claims of reparation. It is recognised, says that the statement, that there are practical limits to how long or through how many generations such claims should survive. Nevertheless, the statement says that in deciding whether to address relatively old wrongs the claim for reparations would be based not just on the past abuse itself but on its contemporary effects and whether people can reasonably claim that today they personally suffer the effects of past human rights violations through continuing economic or social deprivation.

[10] *Cattanach v Melchoir* op cit p.137 per Gleeson CJ

[11] *CityLimitsMonthly*,July/August2002,report at htttp://www.citylimits.org/content/articles/articleView.cfm?articlenumber=844

[12] See Peak News, 13 volume 110, 8 April 2002 at http://www.peek.sfu.ca/the-peak/2002_1/issue13/ne-repar.html)

[13] See D Horowitz, *Uncivil Wars*, Encounter Books, 2001, R Winbush; *Should America Pay? Slavery & and the Raging Debate on Reparations*, Amistad Press, 2003

[14] http://www.hrw.org/campaigns/race/reparations.htm

The demand for reparations has been advocated in many places outside the United States, and the United Nations World Conference Against Racism, racial discrimination, xenophobia and related intolerance held in Durban in South Africa in 2001 was controversial in part because of the reluctance of several western nations to answer the demand for reparations over their participation in the slave trade. Ultimately the issue was struck from the agenda of the conference.

Some may consider the demand for reparations for modern black Americans, because of the enslavement of their ancestors, or for other groups in the world whose ancestors have in modern times suffered serious human rights abuses, are wholly analogous with class actions brought by European Jews against German companies who misappropriated property or who used those individuals as slave labour during the 1930's and 1940's. To some the new reparations claims merely represent the ultimate extension of a civil law of wrongs, in which class actions now move from damages for those injured by dangerous products or drugs to the correction of historical wrongs. However, there are important distinctions between conventional tort claims and some of the demands now being made.

Several moral philosophers have pointed to a serious conceptual problem in the path of anyone seeking compensation for old historical wrongs.[15] Let us assume a contemporary American company was in business 150 years ago and employed slaves on properties it owned, made substantial profits from their labour, and that even today it can be shown that it would not enjoy its current net worth but for the benefit of those profits. The wrong however, was committed against those individual slaves that worked on its properties prior to the abolition of slavery in the United States in 1865. Because of the all pervading nature of the master/slave relationship there can be no doubt that if those individuals in pre 1865 America had not been enslaved they would have led wholly different lives. They may not even have led those lives in America but in a country in which they had been enslaved. Even assuming they were indigenous American slaves, each and every day of their life would have been entirely different. It is not unreasonable to assume that as a free people their lives would have been better, and that they could easily demonstrate that they suffered serious loss as a result of being enslaved.

However, if we assume counterfactually that they had not been enslaved and led a life of freedom we must assume those changes would have been all pervading, affecting the people they met, worked with and socialised with, and the relationships that they formed. Each individual's biography would have been completely different and that would no doubt have included the people they met, married and had children with. In a serious irony, the children of those slaves owe their existence to the fact that their parents were slaves.

The logic of this argument does not require a particularly substantial alteration in a person's life. We know from modern genetics that each person is the result of their parents DNA combining in a new unique form. The possibility of

[15] Jeremy Waldron, *Superseding Historic Injustice* (1992) 103 Ethics, 4

any two people (other than twins who share the same characteristics and in this regard are clones) having the same genetic structure is remote. Each person is the unique product of a particular conception. If instead of conceiving you at the moment she did your mother had conceived a day later as a result of an entirely different sexual act (taking an old fashioned view of reproduction) it would not be you born a day later, it would be a different person[16].

. . . We are of course not just our genotype. But the biography which also adds to our sense of personal identity is equally susceptible to these shifts in time. The genetically different child that your mother might have conceived the day after she in fact conceived you would have lived a life different from yours in a million different big and small ways.

Applying these principles to the current litigants in the United States, it follows that however wicked and evil the institution of slavery might have been all those currently alive who are descended from slaves owe their existence to the institution of slavery. If their ancestors who were alive prior to 1865 had not been enslaved, then the history of the United States would have gone so differently that none of the people the present claimants represent would exist. Of course, if slavery never existed at all the entire history of the last 500 or 600 years would have been so dramatically altered that the people alive in 1865 would not have existed either. But that does nothing to assist the argument for the current plaintiffs.

It should now be clear from this discussion that the difficulties that afflict any attempt to correct wrongs which extend over more than one generation suffer similar problems to the wrongful life cases. At least if the wrong is one that might be called an 'existence inducing act'.[17] What is also worth noting is that the argument relied upon in reply to the wrongful life cases – that the tortious act complained of gave the plaintiff existence, and therefore cannot give rise to a compensable claim – carries other implications that many would not wish to embrace.

The complex moral implications of the non-identity problem are further highlighted by another recently reported matter concerning a couple, both of whom are deaf and who used IVF technology to produce a child where one of the donor parents had been deliberately chosen to increase the likelihood that the baby would be deaf. The baby born as a result of this process was deaf.[18] The parents apparently adopted this course because they believed that they would have a better and more meaningful relationship with a child, which like them, was deaf. They did not view deafness as a disability, but rather, as an alternative form of existence.

[16] See Gregory S Kavka ibid and D Parfit, *Reasons and Persons*, Clarendon, Oxford, 1984, p.351 Parfit offers a detailed and persuasive argument that if any particular person had not been conceived when he or she was in fact conceived, it is in fact true that he or she never would have existed.

[17] Melinda A Roberts, A *Present Duties and Future Persons; Why Are Existence Inducing Acts Wrong?* (1995) 14 Law and Philosophy, p.297

[18] Sydney Morning Herald, 17 April 2002

The American couple who arranged to have the deaf child have come close to enacting in life the thought experiment devised by Parfit to illustrate the non-identity problem. The issue may be raised in this fashion. Is anybody worse off by the fact that the couple arranged for their child to be born deaf (assuming deafness is seen as a disability, rather than alternative type of life)? The child is not worse off because this particular child was only born because the parents (birth parents, not biological parents) sought an egg or sperm donor who carried the genes for deafness. Had they sought to have a child with hearing they would have sought a different donor and the result would have been a different child. Precisely as in the wrongful life cases, presuming that the deaf child prefers existence with impaired hearing to the possibility of having never existed, the deaf child is not worse off as a result of the parents action but presumably glad they took the course they did. The parents will I imagine make no complaint since it was their choice to have a child that was deaf and we may assume that any additional general social costs because of the extra time and effort in educating the child will be borne by the parents who have in any event freely elected to bear this burden. On all of the assumptions just made, nobody is worse off as a result of the conduct of the parent. Is there therefore no moral basis for criticizing their conduct?

Parfit argues persuasively that it is not a good moral principle simply to inquire if anyone is actually worse off. If that be the basis upon which we test the rightness or wrongness of conduct, many strange and anomalous results would occur. If we engaged in an extravagant and prolific use of the world's resources which seriously depleted them and made the lives of future generations much worse than an environmentally responsible policy, then we would be able to argue on the person affecting principle that we had done nothing wrong. Those people in the future might have lives seriously affected by our conduct, but our conduct would have set in motion a causal chain that undoubtedly affected the identity of the future generations, and even though their lives were worse off because of our conduct, had we behaved responsibly, history would have gone so differently that they would not have existed at all. Parfit rejects the conclusion that it would therefore be morally acceptable to engage in a policy of environmental depletion. In backing our intuition that such a policy would be wrong, Parfit rejects the moral theory that we test the correctness of conduct simply by asking whether anybody is in fact worse of as a result of the policy.

Parfit also argues that we continue to be right in criticising morally iniquitous past acts even if they were part of the necessary causal chain that brought us into existence. One might query Parfit's suggestion that we are not nevertheless bound to consider our existence morally bad or rationally to regret it, but perhaps to have some moral regret is a fulsome answer to the ambivalence one must now feel about one's existence when recognising how many past wrongs and injustices were necessary steps in bringing it about.

However, Parfit's concern is not that of the law of torts or of corrective justice. We may be able to satisfy ourselves that the person affecting principle cannot be applied to show that old wrongs are in some fashion okay. Even if

present descendants of American slaves owe their existence to the institution of slavery it does not mean that the institution of slavery was morally right or morally justified, and the doctors who were negligent in the wrongful life cases might still be criticised for their failure to exercise care. Nevertheless, the point of tort law or corrective justice is not merely to identify those who have acted wrongly, but to identify those who deserve compensation as a consequence.

3. Compensation and Counterfactual Causation

The non-identity problem in its various formulations poses a serious obstacle to any coherent account of why someone deserves to be compensated where the wrong complained of was a necessary condition of their existence. But the difficulties just discussed go further and afflict not only cases where the wrong is tied up with the existence of the plaintiff. To understand the difficulty a further aspect of tort compensation should be considered. The principles of tort compensation were explained at the beginning of the article as resting on the maxim that damages seek to put the plaintiff back into the position he or she would be in but for the accident, as best money can. This is a hallowed formulation, but not entirely accurate. Expressed in that fashion it suggests that tort damages seek to measure the global affects of the wrong, and subject to limitations imposed by rules about remoteness of damage, to compensate for all of those effects. Further, bringing the principle of mitigation to bear might suggest that the formula for damages involves a grossing up of all the costs and all the gains and payment to the plaintiff of his or her net loss. I shall refer to this as the welfare principle, the principle that compensation should reflect the net change in a plaintiff's welfare caused by the defendant's conduct.[19]

The legal rules governing the award of damages for civil wrongs in Australia and other common law jurisdictions do not permit the welfare principle unlimited application. Some further examples illustrate ways in which it is limited. Imagine once again someone is physically injured by a defendant's negligent conduct. The plaintiff will be entitled to some compensation for the physical pain and suffering endured as a result of the negligently caused accident. He or she will also be entitled to compensation for lost earnings that might flow from the accident. Assume however in this instance that the plaintiff during his or her period of hospitalisation meets someone who offers them a splendid business opportunity. The plaintiff takes up the offer and goes on to become fabulously rich. At the time of the trial the plaintiff may already have reached a situation in life where he or she looks back on the accident as a blessing. The whole of the benefits that have flowed as a result of the effect of the accident on their life outweigh the costs, including the pain and suffering. The plaintiff would gladly go through such pain and suffering again for such benefits.

[19] This terminology is not original, see B Chapman; *Wrongdoing, Welfare & Damages: Recovery for Non-Pecuniary Loss in Corrective Justice* in Philosophical Foundations of Tort Law, edited by D Owen, Clarendon, Oxford, 1995, p.409.

In the example just given the plaintiff is not nevertheless precluded from receiving some compensation. While the benefits from the business venture might have to be credited against any claim for loss of earnings, a plaintiff is not obliged to gross up the whole of the benefits and the whole of the costs. The plaintiff does not have to bring to account against the claim for damages for pain and suffering, the happiness and pleasure that flowed serendipitously from meeting his new friend and business associate in hospital.[20]

Modern principles of tort compensation are restrictive in the types of loss or harm that they treat as compensable. Thus, in a case of personal injury one may recover compensation for consequent diminution in the enjoyment of life and mental suffering. In the absence of physical injury or some psychopathological condition consequent upon a wrong one does not usually receive compensation for mental frustration, unhappiness or general loss of amenity of life.[21]

Not only do the modern principles of tort law restrict the types of harm or loss that are compensable, the principles of compensation do not permit one to net off all of the losses and all of the gains. Thus, in the example used above, of a plaintiff who while in hospital acquired a business opportunity which leads to substantial income, that income might have to be brought to account in mitigation of any damages claimed for economic loss. However, although the effect of the accident might have brought about a net improvement in the overall position of the plaintiff in life, the plaintiff is not obliged to bring that to account against the pain and suffering that flowed from the physical injury.

The principles of compensation under the modern law of torts treat individuals as holders of bundles of interest. We receive compensation for the impairment of those interests. We have an interest in enjoying bodily integrity and health. Physical injury impairs that interest and for that we are entitled to compensation. We have a recognised interest in the preservation and the use of our property and being able to use our mental and physical faculties to earn income. What can be compensated if either of these interests is harmed? The law does not recognise an interest in having one's life generally go well, fulfilling one's potential, or being generally in a state of happiness or contentment. Lack of these things may some times enter into the calculation of a compensable loss but they are not generally forms of harm which can be compensated when standing alone.

It is thus inaccurate to say of damages for a civil wrong, that they seek to put a plaintiff in the position he or she was in prior to the accident so far as money can. It could perhaps more accurately be said that they seek to compensate for

[20]Op.cit page 372 gives the following example "Suppose that I drive carelessly, and in the resulting crash cause you to lose a leg. One year later, war breaks out and; if you had not lost this leg, you would have been conscripted and killed. My careless driving therefore saved your life. But I am still morally to blame." And Parfit might have added, obliged to compensate you for the loss of your leg. However, in a court case on these facts one would not know that the accident had in fact saved the plaintiff's life. Fleming refers to the hypothetical of the passenger who missed the Titanic because of the negligent cab driver. (Fleming, op p.225). E Weinrib uses the example of the negligently caused accident which prevents the injured driver catching the plane that crashes. See E Weinrib, op cit 1283.

[21] Fleming op at p.40

harm to those interests recognised by the law as compensable by restoring one in regard to those interests to one's pre-accident position. It is thus entirely possible that when the damages are added to the total effects of the accident one may be substantially better off than before the accident or substantially worse off.

There is thus a closer analogy between the principles governing damages for loss or injury to property and loss or injury to a person than might often be recognised. In torts such as conversion, detinue, trespass to goods or negligent damage to goods or property, the value of the goods, or if the destruction not be total, the diminution in value, provides a starting point in the estimation of damages. Although consequential economic loss claims related to the loss of the use of a chattel are allowed and possibly even damages for loss of the use of an object which is not a profit earning object,[22] there is no principle at common law that deprives a plaintiff of damages representing the value of a chattel because the act of destruction set in chain a sequence of events which led to the receipt by the plaintiff of benefits in excess of the value of the chattel. The interest in one's property is treated as compensable per se, without the need for any inquiry into whether the loss of the chattel led to a general diminution in the welfare of the plaintiff.[23]

All of these issues were highlighted in the decision of the High Court of Australia in *Cattanach v Melchior*[24]. The appellant was a doctor who had negligently performed a sterilisation operation upon a woman who later fell pregnant. The claim was brought by the mother and father for damages for the negligently caused conception and birth. Consistent with earlier authority there was no dispute that the mother was entitled to compensation for the physical pain and inconvenience of bearing the child and giving birth and for medical costs associated with the confinement and birth. The trial judge had awarded damages in addition for the cost of rearing the child during its minority. The child was healthy and the costs associated with rearing it would not involve any unusual amounts. It was argued for Dr Cattanach (and accepted by several judges in a minority) that the cost of rearing the child ought not to be allowed as damages since a healthy child would bring benefits to its parents. These would be spread throughout the parents' life, they would be intangible and difficult to quantify and it would be arbitrary to treat the parents as having suffered a compensable loss by looking to the costs of rearing the child without bringing to account the countervailing benefits of having a child.

The majority in rejecting this contention maintained that the common law does not permit the offsetting of a benefit unless the benefit be in regard to the

[22] JG Fleming, *The Law of Torts*, 9th Edition, Law Book 1998, page 283–285

[23] Hunter J found that there was no general principle of betterment applicable to the calculation of damages when equipment was harmed by a malfunctioning fire suppression system. The plaintiff did not have to bring to account the benefits obtained by replacement of old with new after the total loss. See *Optus Networks Pty Limited v Leighton Contractors Pty Limited* [2002] NSWSC 327 (NSW Sup Court, Hunter J 24 April 2002). See also the discussion on a betterment in *MacGregor on Damages*, 16th Edition, London, Sweet & Maxwell, 1997, p.17

[24] (2003) 199 ALR 131

same interest as the loss. Where one of two interests is harmed and the other benefited, one may not set off against the loss the benefit obtained in regard to the other. A similar principle is stated in the restatement (2nd) of torts issued in 1997 in the United Stated and discussed in *Cattanach.*

Of course, to say that the benefits and burdens of separate interests will not be aggregated is in part to replace one mystery with another, for it still leaves vague the notion of what counts as a separate issue. Indeed, in *Cattanach* while the three judges in the minority clearly considered that the costs of rearing a child, and the benefits obtained from having a child, were in the same interest and might be aggregated, four judges forming the majority considered them to be separate interests that were not be aggregated. No clear or sharp test for deciding what counts as "the same interest" is provided by the decisions. Like many distinctions that do not appear to have a clear analytical basis, the suspicion lingers that the content is spelled out by decisions of the courts ultimately motivated by general policy reasons as to what will or will not represent an acceptable loss to be compensated.

Thus although reliance is often placed upon the welfare principle, and indeed it remains one of the principal reasons for rejecting claims in so-called wrongful life cases, the principle is not applied in a general and consistent fashion, rather, its operation is strictly confined, and damages will frequently be allowed where there is a specific and identifiable loss despite no general diminution in the welfare of the plaintiff, or in circumstances where there has been a net increase in the welfare of the plaintiff.

Is there a principled basis for confining the welfare principle, or is there no underlying moral theory that could form part of a theory of corrective justice which would justify the apparent anomalies just described?

4. Damages: Reparation for harm to interests, or diminished welfare

Corrective justice theories generally take one of two approaches in explaining the nature of damages. For Ernest Weinrib damages are a valuation of the infringement of the plaintiff's right,[25] and not a global calculus of debts and credits occasioned by the behaviour. Weinrib is of course correct, that merely because a defendant disadvantages or diminishes a plaintiff's welfare, does not entitle the plaintiff to take action. If someone sets up a business which although lawfully conducted, causes financial harm to its competitor, no right of the competitor is infringed, and the competitor has no action to recover its loss. On the other hand, if I wrongfully damage a piece of your property then usually I must compensate you for the diminution in value. If I smash your car, I owe you a new car. However, it provides little explanation of the rules of tort to attach the term 'right' to compensable interests. It might be said that I have a right not to have my income earning capacity damaged by your unlawful conduct, but that I do not

[25] E Weinrib op cit p.1284

have a right to have my life generally go well rather than badly, and my interest in that matter is not commensurable with any interest in my income so improvements in my general life are not to be netted off against damages for loss income. Certainly, there may be at least partial incommensurability between certain types of harm (lost income on the one hand, pain and suffering on the other) but Weinrib does not seek to defend his view on the basis that it is concerned with the nature or type of measurement that might be involved. The concept of interests which are not to be netted off relied upon by the High Court in *Melchoir* and the earlier decisions referred to in the majority's judgment appears to rest upon some ontological distinction between the nature of the interests, which the decided cases leave in some obscurity. Before seeking any resolution of the issue it is worth examining the conceptual difficulties faced by any attempt to appeal to the welfare principle as the underpinning for a concept of corrective justice.

The welfare principle suggests at least prima facie a way of identifying damages. If by my wrongful conduct I have left you worse off in a net fashion then, whatever the reason that might justify my obligation to compensate you, it is at least an attractive starting point that the amount by which I must compensate you is the amount by which I have left you worse off. However, if by this we intend to refer to a victim's total net welfare then the principle will not be workable.

The welfare principle must obviously be constrained by the impracticality of determining the total net effect upon a plaintiff of a defendant's wrongful conduct. The consequences on a person's life of any substantial act may continue throughout his or her whole life. There is a practical impossibility in ever knowing exactly what the life of the plaintiff might have been like but for the wrong committed against him or her. If damages are assessed at a trial held in reasonable proximity to the time at which the wrong was committed, one must either ignore future events or make calculations based on guesses or estimates of what is likely to happen in the future. Even in regard to relatively predictable matters such as a person's likely future income, there are notorious difficulties, known to lawyers in making appropriate estimates. These difficulties are compounded the further one seeks to apply a general over arching welfare principle.

Two things might be said in reply to these objections. The first is that it is reasonable to restrict the welfare principle to those effects of the wrongful conduct reasonably proximate in time to the wrong committed. This restriction might be defended on a similar basis to that used to defend rules governing remoteness of damage or scope of the risk. The wrongdoer should be liable for the foreseeable consequences of his or her conduct. They cannot be held liable for the wholly unknowable consequences throughout the plaintiff's future life. The difficulty with this rationale is that the whole reason a defendant is made to account for damage is because it is considered that they have done the plaintiff wrong. If one ignores effects, simply because they are too hard to measure, then the conclusion that there has been net harm to the plaintiff may well be a result of our arbitrary decision about which effects will be counted. While a defendant who has harmed a plaintiff might have an obligation to make compensation, it is

far less clear why a defendant who has not harmed a plaintiff on the basis of the global welfare principle should nevertheless be obliged to compensate for some harms simply because we have excluded consideration of countervailing benefits.

A more sophisticated defence of a limited welfare principle would build on the last point. It could be argued that there is nothing arbitrary about excluding effects that are not reasonably proximate to the wrong. It may be that we can judge from our general experience that when someone suffers personal injury, such for example as a broken leg, the probabilities are that his or her life will go less well than if he or she had not suffered the injury. Thus, although for some individuals the remote future effects of the injury may bring about substantial net benefits (eg, the plaintiff who gets the valuable business tip recuperating in hospital, or the plaintiff who is prevented from boarding the plane that crashes) the probabilities are that the plaintiff's life will generally continue without major or profound effects from the event but with the usual and predictable diminution in enjoyment of life and ability to earn income. It could even be argued that the sorts of events appealed to in demonstrating that the wrong may cause benefit, are merely fortuitous. If these are distributed randomly over the population of both the injured and uninjured, people will get their proportionate share but the population of victims will suffer disproportionately the harms visited by wrongful conduct.

The probability argument just described may provide a defence for a constrained welfare principle. Importantly, it takes the welfare principle as the starting point in determining the defendant's obligation in regard to compensation. The restriction on what factors will usually be taken into account is not because the notion of general welfare is not the appropriate way of compensating a plaintiff but because of the practical impediments to calculating the net welfare for a particular individual. The restrictions operate so as to exclude random factors and ensure that the typical plaintiff is compensated for the typical losses. Although in practice this means that some, if not most, plaintiffs may receive more or less than would be dictated by the welfare principle if it were capable of precise calculation, applying it in the constrained fashion just described does the best that can be achieved.

Although it is possible that a constrained welfare principle defended by some form of the probability argument just outlined could provide a workable principle of compensation it cannot be the rationale which underlies the existing common law rules. Although some empirical research has been done to see whether the damages obtained by those negligently injured is in the long term adequate compensation for their needs, the reasoning of courts does not suggest that the calculation of damages or the determination of which harms and which benefits will be included is based upon some actuarial estimate of likely future overall welfare.

Most importantly, as already pointed out, the common law rules regarding compensation for civil wrongs simply do not gross up all the losses and all the benefits. An economic windfall that comes to an injured plaintiff may reduce the damages awarded for future economic loss, but does not diminish the damages

awarded for pain and suffering or for medical expenses. The principles governing common law damages categorise the types of loss and compartmentalise them.

Furthermore, if the principles of compensation at common law were governed by judgments about the likely effect on net welfare of the defendant's conduct it would suggest that where at the date of the trial something can be known with great precision, then it should override the usual actuarial default judgment. Sometimes this principle applies but other times not. Someone who crashes into my car and damages it as I drive to work will not avoid compensating me by pointing out that my car was destined to be seriously damaged in any event some time later.[26] On the other hand, a claim for lost earning capacity might well be diminished if at the date of the trial it could be shown that I was destined to be dismissed some time later if I had not already been injured.[27]

It is far from clear that our general intuitions about wrongdoing track the welfare principle even in one of its limited or constrained versions. If somebody steals or destroys one of my valued belongings, we would consider their conduct in that regard to be wrongful, whether or not it triggered some chain of cause and effect which conferred upon me benefits of greater value than the object lost. Nor would most people consider the perpetrator in this example excused from making reparation for the object stolen or destroyed simply because of the countervailing benefits that I had fortuitously obtained. Our judgments in this regard cannot depend simply upon the general tendency of destroying or stealing goods. We do not condemn the perpetrator simply because the usual tendency of such conduct is to cause net loss. Even if it be known that the act caused me to receive a net benefit most of us would intuitively judge the conduct to have been wrongful and believed that the perpetrator should make reparation.

What appears to underlie out intuitions is perhaps an ontological distinction. Damage to property, or to our bodies, entitles us automatically to compensation for the diminution of value. Were this not the case our rights in our possessions and bodies would be defeasible. I could violate your rights in your property or your body with impunity provided I conferred sufficient other benefits upon you to leave you with net advantages. In those circumstances you would have no right of action. It might be worth my while to do that if I could obtain a higher value from your property or your body than you could. From the point of view of economic analysis rejecting the total net welfare principle might favour inefficiency, but from the perspective of justice there is no reason why rights to possessions and bodily integrity should not be given priority over efficiency.

On the other hand consequential losses, particularly consequential economic losses are more typically treated in accordance with some constrained version of

[26] *Performance Cars Limited v Abraham* [1962] 1 QB 33

[27] *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638. Similar hypotheticals have been discussed by several scholars not necessarily arriving at the same conclusions. See Ernest J Winerib, *Right and Advantage in Private Law* 10 *Cardozo Law Review* p.1283 (1989) and the discussion of B Chapman, Wrongdoing, Welfare, and Damages: Recovery for Non Pecuniary Loss and Corrective Justice in Philosophical Foundations of Tort Law edited by DJ Owen, Clarendon, Oxford, (1985) p. 409.

the welfare principle. The netting of losses and benefits appears more appropriate when one is not concerned with the direct invasion of one's property or bodily integrity. On the other hand, the epistemological issues described above are at least a partial reason for constraining the welfare principle Further reasons to do with preventing indeterminate liabilities, are often enunciated by courts and may be additional justifications, although ones that lie outside the ambit of this discussion.

5. The limits of corrective justice

Contemporary theorists of corrective justice have been far from unanimous in explaining the moral reasons which oblige a wrongdoer to make reparation. Indeed, there has been much exploration within contemporary corrective justice theory as to whether the reparation need necessarily come from the wrongdoer or whether a victim may be compensated from a pool contributed to by the community of wrongdoers or even collected from the society at large on a no fault principle.

All corrective justice theories however are ultimately concerned with explaining how and why reparation should be made to someone who has been harmed. The concept of harm or damage is crucial. Plainly, we can advocate the redistribution of money within a society for reasons unrelated to corrective justice. Most obviously members of a community who are very poor might be said to deserve a reallocation in their favour. This of course would not usually be justified by concepts of corrective justice but by some theory of redistributive justice. John Rawls' theory of justice as fairness advocates a form of constrained egalitarianism. A consequence of adopting Rawls' position, firmly pointed out by Robert Nozick, is that Rawls' theory calls for a particular pattern of distribution within the society which satisfies his principle of fairness and to the extent that the actual distribution continues to diverge from the end state pattern as a result of people's dealings and transactions, the institutions of the society will have to function in such fashion as to continue to restore that end state pattern which reflects a fair distribution.

It is one of the most distinctive characteristics of a Rawlsian concept of justice, emphasised by Nozick, that it is essentially ahistorical. Citizens in a Rawlsian state do not generally deserve any particular distribution, and certainly they do not deserve any particular distribution in consequence of their past conduct.

A Rawlsian state might still adopt a body of tort law. It might be found that the rules of tort law satisfy the difference principle, and that compensating those wrongfully harmed is ultimately of benefit to the least well off members of the society. However, tort law is likely to play a subsidiary role in a society with strong redistributive institutions. Those institutions might well take care of many of the matters that would otherwise be dealt with through compensatory orders. In a society where everyone obtains free medical care to the extent of their need,

there will not be compensatory orders for costs of medical care of accident victims.

Despite the theoretical interest in Rawls' concept of justice, the focus of political debate and social demand in liberal democracies in the last three decades has seen a rapid retreat from redistributive mechanisms. One of the most marked features of the last 30 years has been the abandonment of even moderate democratic socialist programs. Alice Tay and Eugene Kamenka emphasised in several of their key writings the processes by which social demands sometimes become embodied in new laws converting those demands into strict legal rights and interests, and by analogous or opposite processes matters traditionally dealt with by way of legal rights become instead regulated by bureaucratic –administrative regulatory bodies.[28]

What however has proven of interest since Tay and Kamenka wrote on these issues at the end of the 70's and beginning of the 80's, and noted the rise of bureaucratic-administrative solutions at the expense of classical legal solutions, has been the sudden resurgence of attempts to solve social problems by extending legal concepts rather than political concepts. For example, one might characterise the demands for justice for Aboriginal Australians on the one hand or black Americans on the other, during the 1960's and 1970's as characterised by concern with issues of distributive justice. While there was a consciousness of the past, the programs that were advocated were not put as demands for reparations, except perhaps in a metaphorical sense. By contrast the 1990's have witnessed the emergence of native title litigation, and other claims for reparation.

The last two decades have seen further claims made around the world on behalf of groups concerned with reparation for past wrongs, in some cases old wrongs, and such demands have been couched in the terms of corrective justice even if not actually brought as legal suits. The demise of socialist ideology in the liberal democracies in the last 20 years may well have contributed to an interest on the part of those seeking justice for disadvantaged members of society to look for solutions in development of the law rather than the advocacy of direct redistribution brought about by political action.

The difficulties associated with the claims in the so called wrongful life cases, the broader difficulties associated with any existence inducing act, and the problems of accounting for losses and benefits in application of the indemnity principle in general tort damages, are all reflections of the more fundamental principle that a claim for legal damages, or a moral demand for corrective justice, both require in some fashion, that the claimant establish that he or she has suffered a harm, or more precisely some wrong has been done which has caused them a loss.

Plainly, tort law could develop in new directions which sever it from the conceptual framework requiring individual claimants to establish losses caused

[28] Tay; AES and E Kamenka, *Law, Lawyers & Law Making in Australia* in *Law Making in Australia*, Edward Arnold, Melbourne, 1980, p.35. and AES Tay and E Kamenka, *Social Traditions, Legal Traditions* in Law and Social Control edited by E Kamenka and AES Tay, Arnold Edward, Melbourne, 1980 page 25.

by wrongful conduct. Tort law could develop in such a fashion that it becomes a vehicle for distributive justice. However, while such developments are possible, such radically different laws would require a different justification. If and to the extent that tort law is seen to do some kind of corrective justice then it is necessary that claimants establish that a wrong has caused them a loss.

This article has sought to show that the concepts of a wrongfully caused loss to a claimant become conceptually unworkable once divorced from the notion of harm to the body or property of the claimant and consequential losses computed by reference to some constrained version of the welfare principle. Beyond this traditional, and perhaps narrow scope, there appear to be serious obstacles that prevent it being shown how a claimant has suffered a loss because of a wrong.

That corrective justice, and its legal analogue, the law of civil wrongs, are limited in the fashion described does not mean that those whose human rights were infringed in an indirect fashion long ago, or who are descendants of earlier generations of victims may not have important claims to make. Corrective justice is not the whole of justice. Those claims however may more aptly be made in the presently unfashionable language of distributive justice.