

Medical Law

SUBMISSIONS FROM NON-EXISTENT CLAIMANTS: THE NON-IDENTITY PROBLEM AND THE LAW

C Foster, * T Hope, ** and J. McMillan ***

“Let the day perish wherein I was born, and the night in which it was said: There is a man child conceived.” Job 3:3

“...I could accuse me of such things that it were better my mother had not borne me...” Hamlet

Abstract: Some medical interventions (or indeed omissions) determine the identity of a person. Those interventions or omissions may themselves cause harm, for which a child subsequently sues. Even if they do not themselves cause harm they may result in the birth of a child who subsequently brings a claim for being allowed to exist in the state caused by the intervention. The obvious objection to a claim of either class is that in the absence of the medical intervention or omission of which the claimant complains, the claimant would never have existed at all. This objection arises from what philosophers have called the “non-identity problem”. This article examines the attitude that the English courts would be likely to have to such a claim. It concludes that the English law has so far failed to appreciate the significance of the non-identity problem, but will have to grapple with it soon.

Keywords: Non-identity; wrongful life; damage; fetus; Parfit; McKay

INTRODUCTION

The ‘non-identity problem’ is a conundrum more easily illustrated than described. Its central idea, at least when looked at through a legal prism, is

* Barrister, Outer Temple Chambers, London, UK.

** Professor of Medical Ethics, University of Oxford, UK

*** Senior Lecturer in Medical Ethics, Department of Philosophy, University of Hull, UK

that some acts or omissions can change the identity of a person, and that accordingly one has to look with particular philosophical care at any subsequent complaints about those acts or omissions which come from the person who has resulted from them.

The non-identity problem is a rather new philosophical 'discovery'. It has been much debated in the philosophical literature over the last 20 years¹. It has implications for how we should think about our moral duties towards future generations. It raises the possibility of 'non-person affecting harms' i.e. of harms which leave no one worse. With the advent of sophisticated techniques to assist reproduction and the ability to select embryos for implantation into the uterus on the basis of genetic characteristics, the non-identity problem is of considerable relevance to medicine. The implications of the non-identity problem for the ethics of reproductive technologies have been explored in depth by bioethicists². However, it does not seem that the implications of this problem have been so clearly thought through by lawyers. They will not be able to evade it for long. Cases involving the non-identity problem are bound to come before the courts soon. What position should the courts take on the philosophical issues that lie at the heart of this problem? In this paper we examine the legal implications of the non-identity problem. We argue that the issue behind the non-identity problem makes a crucial legal difference. This is in contrast with the position taken by many, although not by all, philosophers.

Identity-preserving and identity-altering interventions

At the heart of the non-identity problem lies a distinction between acts or decisions that are *identity-preserving* and those that are *identity-affecting*. We use medical examples to illustrate this distinction.

Most medical interventions are *identity-preserving*. When a patient takes an antibiotic to cure an infection the patient's state or condition is altered, one

1. D. Parfit, *Reasons and Persons* (Oxford University Press 1984); J. Woodward, 'The non-identity problem' (1990) 96 *Ethics*; M. Hanser, 'Harming future people' (1990) 19 *Philosophy and Public Affairs* 59; J. McMahan, 'Wrongful Life: Paradoxes in the Morality of Causing People to Exist' in J. Harris (ed.) *Bioethics* (Oxford University Press 2001).

2. J. Harris, 'The Welfare of the Child' (2000) 8 *Health Care Analysis*. T. Hope, J. McMillan. 'Ethical problems before conception' (2003) 361 *The Lancet*. J. Burley, J. Harris 'Human cloning and Child Welfare' (1999) 25 *The Journal of Medical Ethics*. D. Davis, 'Genetic dilemmas and the child's right to an open future' (1997) 27 *Hastings Center Report* 2.

hopes for the better, but the identity of the patient of course remains the same. The same is true of most other medical and surgical treatments – surgery for bowel cancer for example. Identity-preserving interventions are also part of antenatal care. Pregnant mothers are given folate supplements in order to decrease the chance that the fetus (and the child whom the fetus will become) will suffer from spina bifida. In this case the folate may change the state of the child that will be born (through preventing spina bifida) but it does not change the identity of that (future) child. If large amounts of alcohol are consumed by a woman when pregnant then there is an increased chance that the child will be born with some brain damage. In this case alcohol consumption may change the state of the child who is born but it does not change the identity of that child.

Contrast these situations with the following. Two couples (we will call them A and B) attend an assisted reproduction clinic. They have not conceived after several years of ‘trying’ for a baby. They can probably be helped to conceive using in-vitro fertilisation (IVF). Neither can afford to pay the costs but the clinic has a small amount of funding to assist those who cannot pay. Unfortunately the funding is sufficient to help one couple only. If the clinic staff choose couple A then baby a may be born; if the staff choose couple B then baby b may be born. Baby a and baby b would be different babies. The choice that the clinic staff makes will affect not only the state of the baby who may come to exist but also its identity. Choosing between these couples is an *identity-affecting* choice.

The non-identity problem: an outline

Derek Parfit was the first philosopher who discussed the non-identity problem in detail and who gave it its name. He illustrates the problem with an example of a fourteen year old girl who chooses to have a child. He imagines that this girl is still too young, and perhaps too immature, to give any child that she might conceive at her current age a good start in life. It would be better if she were to delay pregnancy for several years, until a time when she is more mature and more able to take on the responsibilities of parenthood. What would we mean here by saying that ‘it would be better if she were to delay pregnancy’? We are likely to mean two things: first, that it would be better for the girl herself not to take on this responsibility; and second that it would be better for her child if she were to delay pregnancy until she was in a position to give the child a better start in life. It is this latter meaning that is problematic; the view

that it would be better for her child if she delays pregnancy. Parfit writes:

*'If she had waited [i.e. delayed pregnancy], this particular child would never have existed. And, despite its bad start, his life is worth living ... If someone lives a life that is worth living, is this worse for this person than if he had never existed? Our answer must be No ... When we see this, do we change our mind about this decision? Do we cease to believe that it would have been better [for her child] if this girl had waited, so that she could give to her first child a better start in life? ... We cannot claim that this girl's decision was worse for her child. What is the objection to her decision? This question arises because, in different outcomes, different people would be born. I shall therefore call this the Non-identity problem.'*³

There has been much debate by legal theorists and the courts about claims for "wrongful life". These are claims brought by a child in which the child says: "My life is so miserable that it would have been better if I had never been born. Compensate me for the misery of my existence." Some of that debate is outlined below.

The non-identity problem is engaged in claims for wrongful life where there has been an identity-affecting intervention. In every wrongful life claim the court has to decide whether or not the person who has been brought into existence can sensibly claim that their very existence amounts to compensable harm. In every wrongful life claim and in every scenario that raises the non-identity problem it is hard to say that a person caused to exist in a harmed condition has been made worse off, because the alternative is non-existence. There is of course a difference between a straightforward wrongful life claim and a non-identity wrongful life claim. In the first, the non-existence that the claimant says would be preferable is mere nothingness. In the second the claimant may be saying that he would rather be somebody other than himself or he may in some other sense be un-wishing his present state. This distinction has troubled philosophers. It does not yet seem to have troubled the English courts.

The non-identity problem is brought into sharp focus by comparing the following two hypothetical cases⁴.

3. Parfit 1984 page 359

4. Hope and McMillan (2003), *op cit*

A. *Deafening an embryo*

A couple with a genetic condition causing deafness wish to have a child who is also deaf. This is so that the child is part of the “deaf community”. The woman becomes pregnant. Genetic testing shows that the fetus does not have the genetic condition causing deafness, and that it is likely to become a normal child. Suppose (hypothetically) that a drug is available that if taken by a pregnant woman, at a particular stage in pregnancy, will cause a normal fetus to become deaf. It has no other effect and is otherwise completely safe for both embryo and mother. The couple decide that the woman should take this drug in order to ensure that their child is born deaf. Note that this drug is an identity-preserving intervention; their child will be the same person if they decided against giving it the drug.

B. *Choosing a “deaf embryo”*

A couple with a genetic condition causing deafness request assistance with conception. Both the man and the woman are congenitally deaf. Some embryos are created (using IVF) and these are genetically tested (pre-implantation diagnosis) to see which have the “deafness gene”. Embryo A is a healthy normal embryo. Embryo B has the deafness gene but is otherwise healthy. The couple wish to have embryo B implanted because they want their child to be part of the “deaf community”. Note that this choice is identity-affecting.

If you consider that the embryo has the full moral status of a person - and that you consider it murder not to ensure both embryos are implanted - vary the example to involve selection of the egg rather than of the embryo.

Different philosophical positions taken on the non-identity problem

The moral question that the non-identity problem raises is whether there is any moral difference between the choices to be made in the two case examples described above. On the one hand the general outcome is similar in the two cases: a child is born deaf as a result of the parents’ decisions, whereas a child could have been born who is able to hear. On the other hand in the first case a fetus (or the child that the fetus will become) is harmed, whereas in the second case no specific individual is harmed as a result of the choice.

In broad terms, philosophers have taken one of three positions with regard to the moral importance of the non-identity problem.

A. *The no-difference position.* One intuitively plausible reaction to the “deafening an embryo” and “choosing a deaf embryo” cases is that it makes no difference whether the child with the defect would have otherwise existed without the defect or whether another child would have existed without the defect. In both cases we should evaluate the situation from a moral point of view in an identical way. On this view, what the parents have done in each case is, from the moral point of view, equally wrong. This is the position for which both Parfit and some of his critics argue⁵.

B. *The some difference position* The second position is that the non-identity issue makes some moral difference but that it is morally better to act so that any child conceived is not handicapped⁶.

C. *The enormous difference position* The third position is that the non-identity issue makes an enormous moral difference – to such an extent that if no individual has been harmed, as in the case of ‘choosing a deaf embryo’ then little or no wrong has been done (except in the extreme case where the child’s life will be so unpleasant that it would have been better not to have been born).

Those who take position A sometimes make use of a rather strange concept: that of ‘non-person affecting harm’. They accept the point, emphasized by critics of the no-difference position, that no person is harmed in situations that give rise to the non-identity problem, but they maintain that, nevertheless, harm has been done. They call this harm ‘non-person affecting harm’.

How would the courts view cases which raise this problem? The English law’s approach to various manifestations of the embryo-deafening example is discussed below.

5. Critics of Parfit often attempt to provide rival explanations for the wrongness of causing a person to exist in harmed condition. It’s not completely clear whether these authors think that their alternative explanation equalises cases like ‘deafening an embryo’ and ‘choosing a deaf embryo’ but given that they are arguing for a rival explanation of our intuitions in these cases it seems reasonable to suppose so. For example see Hanser (1990), and Woodward (1990).

6. This is the position hinted at in A. Buchanan, D. Brock, N. Daniels, D. Wikler. *From Chance to Choice: Genetics and Justice* (Cambridge University Press 2000)

Claims by congenitally disabled children: The English law

The general position: The Congenital Disabilities (Civil Liability) Act 1976

The 1976 Act provides that a child born alive with a personal injury can bring a claim in some circumstances⁷. To qualify, the disability must result from an occurrence which falls within s. 1(2), namely one which:

- “(a) affected either parent of the child in his or her ability to have a normal healthy child⁸;
- or
- (b) affected the mother during her pregnancy, or affected her or the child in the course of its birth, so that the child is born with disabilities *which would not otherwise have been present.*” (Authors’ emphasis).

Claims for “Wrongful life”

As noted above, these are claims brought by a child in which the child contends that it would have been better if it had never been born at all.

The Law Commission, in its Report on Injuries to Unborn Children⁹, intended to outlaw claims for wrongful life. The words in s. 1(2) which are highlighted above are intended to implement that view. That was how s. 1(2)(b) was interpreted in the main English case on the issue, *McKay v Essex AHA*¹⁰. Stephenson LJ said there that s. 1(2)(b) imported “*the assumption that but for the occurrence giving rise to a disabled birth, the child would have been born normal and healthy, not that it would not have been born at all.*”¹¹

McKay itself concerned a birth which occurred before the passing of the 1976 Act. The Court of Appeal therefore considered the common law position, and decided that the common law similarly prohibited a claim for wrongful life.

7. There may be a residual common law right for a child to sue in respect of injuries incurred before birth: see *Burton v Islington Health Authority: De Martell v Merton and Sutton Health Authority* [1992] 3 WLR 637. In practice, the common law is never invoked. It is inconceivable that the courts would find that the common law would give a different answer to the 1976 Act.

8. For example, an intervention that irradiated a parent's gonads, with the result that a child was born alive but genetically damaged.

9. Report No. 60: 1974, Cmnd 5709

10. [1982] QB 1166

11. At 1178

There were three main reasons for this:

(a) *Public policy considerations*

The sanctity of human life was a basic principle which informed all of the English law. To allow a claim like this would be to breach that principle.

(b) *The doctor owed no duty to the child to terminate its life*

Abortion was legal, but it did not follow from this that there was a duty to do a legal abortion. The existence of a duty was conditioned by the public policy considerations. There is another problem in imposing on the doctor a common law duty to do or advise a termination. At the time the duty was supposed to have been owed, the child was not, for these purposes, a legal person. How can one owe a duty to a non-entity?

(c) *Evaluation of the damage was impossible*

Each of the judges commented on this. One passage makes the point:

“The only loss for which those who have not injured the child can be held liable to compensate the child is the difference between its condition as a result of their allowing it to be born alive and injured and its condition if its embryonic life had been ended before its life in the world had begun. But how can a court evaluate that second condition and so measure the loss to the child? Even if a court were competent to decide between the conflicting views of theologians and philosophers and to assume an “after life” or non-existence as the basis for the comparison, how can a judge put a value on one or the other, compare either alternative with the injured child’s life in this world and determine that the child has lost anything, without the means of knowing what, if anything, it has gained?”¹²

A caveat: does the 1976 Act abolish a common law claim for wrongful life?

It has been suggested, more imaginatively than realistically, that if there was originally a common law right to claim for wrongful life, the 1976 Act does not abolish it¹³. The argument is a technical one and would be most unlikely to succeed in an English court.

12. Per Stephenson LJ at 1181,

13. See Fortin J.E.S. Is the 'Wrongful Life' action really dead? (1987) JSWL 306

Torts in the course of reproductive technology: A different situation?

Section 1A of the 1976 Act provides:

“.....in any case where:

(a) a child carried by a woman as the result of the placing in her of an embryo or of sperm and eggs or her artificial insemination is born disabled,

(b) the disability results from an act or omission in the course of the selection, or the keeping or use outside the body, of the embryo carried by her or of the gametes used to bring about the creation of the embryo, and

(c) a person is under this section answerable to the child in respect of the act or omission,

the child’s disabilities are to be disregarded as damage resulting from the wrongful act of that person and actionable accordingly at the suit of the child.”

This section is not well drafted, but it allows a claim by a child in respect of a disability attributable to a wrongful act or omission occurring during infertility treatment. There has been speculation about whether the words “in the course of the selection” in sub-section (b) effectively create a right of action for wrongful life where there has been something wrong in the selection¹⁴. But this is unlikely to be the proper meaning of the sub-section, for three main reasons. First, the more natural reading of the section suggests that it is aimed at torts committed during the course of the selection, rather than at the selection itself. Second, the legislative history of the section suggests this too. A cause of action as ethically tricky as wrongful life is unlikely to have slipped unnoticed into the statute book. Nobody suggested at the time that this sub-section was being debated that this would be its effect. Third, this construction has all the fundamental difficulties identified in *McKay*.

Actions for personal injury, falling short of full-blown wrongful life claims, fall foul of objections (a) and (c) in *McKay*.

14. This is argued by I. Kennedy and A. Grubb in *Medical Law, Text and Materials* Second Ed., (Butterworths) at 977. Others agree: see Mason J.K., , McCall Smith R.A. and Laurie G.T., *Law and Medical Ethics*, 6th Edition, (Butterworths, 2002) at paragraph 6.51, note 96

Arguments based on the European Convention on Human Rights (“ECHR”)

Article 2 of the ECHR gives a right to life. Article 3 prohibits inhuman and degrading treatment. Article 8 protects private and family life. All these Articles could theoretically be engaged in obvious ways in arguments about liability for congenital disability. For reasons which appear below, the details of these arguments are not considered here.

The non-identity problem and the law: some theoretical cases

In each of the examples that follow, only civil claims for damages are considered. In some of them there is potential criminal liability in English law. In some there may be public law remedies. In neither the criminal or the public law arena does the issue of compensation for mere existence or the *locus standi* of claimants who are un-wishing themselves necessarily arise in the same stark way as it does in the civil courts.

1. Case 1: Choosing a deaf embryo

1A: Deliberate iatrogenic damage

A deaf couple want a deaf child. They conceive a child naturally. They then get a doctor to prescribe them a drug which deafens the child in utero. The child is born, and sues its parents and the doctor for damages for its deafness.

This is legally trivial. The doctor is liable under s. 1(2)(b) of the 1976 Act¹⁵.

1B: Selection of a “deaf embryo”

A deaf couple, whose deafness is genetically determined, wish to conceive a deaf child. They seek pre-implantation genetic testing together with embryo selection. This involves in-vitro fertilisation techniques. Several eggs are extracted from the woman and fertilised with sperm from the man. Several embryos result. These embryos are genetically tested to see which ones have the genetic composition which will result in a deaf child, and which do not. At

15. The mother would not be liable under the 1976 Act. For policy reasons, based on the assumption that the liability of parents to their children for negligence during pregnancy would interfere with the parent-child relationship, the Act excludes such liability, except in the special case of injuries sustained in road traffic accidents. Because the fetus is not a legal person, only the Act can give it a right to damages: the common law will not help.

the couple's request a "deaf" embryo is implanted into the woman. In due course a deaf, but otherwise healthy baby is born.

The baby brings an action (for present purposes it does not matter against whom), claiming damages for its deafness.

The first legal observation to make is that this is not a straightforward "wrongful life" claim. The child is not saying that it would have been better not to exist, but rather that it would be better to exist without being deaf. The problem, of course, is that without the disability of which it complains, the child would never be able to complain at all: the child would not exist. The courts give compensation for damage. Damage implies a change from a previously undamaged state. The cornerstone of the law of tortious damages is that damages put the claimant, so far as money can do it, into the position that the claimant would have been in had the tort not occurred. Here, supposing that one can identify a tort, if the tort had not occurred the claimant would never have existed. As the claimant described to the court what the loss was, he would necessarily be un-wishing himself. It is accordingly impossible to identify any damage at all in the sense in which "damage" is conventionally understood by common lawyers¹⁶.

This is an extreme example of the application of the third of the reasons identified in *McKay* for rejecting claims for wrongful life – the impossibility of quantification. In *McKay*, the courts declined an invitation to evaluate financially the difference between existence and non-existence. It is likely that the claimant's slightly more sophisticated invitation in the case under consideration would, for essentially the same reason, be declined.

As long as the compensatory principle stands, there will be no identifiable loss, and that will be fatal to any claim¹⁷. In other words, the difference between non-identity situations and straightforward wrongful life claims – that in the

16. Feinberg and Parfit both agree with this conclusion, although Feinberg thinks that a child can be said to be wronged in the extreme case where its condition makes its life not worth living: see Feinberg J., *The Moral Limits of the Criminal Law*, Volume 1: Harm to Others (OUP 1984), at 102

17. The public policy reasons articulated in *McKay* point to the same result. The courts and the legislature have repeatedly and increasingly emphasised that impaired lives are not to be compared unfavourably with unimpaired ones: see, for example, *MacFarlane v Tayside Health Board* [2000] 2 AC 59; *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309; Disability Discrimination Act 1995

former, but not the latter, the same number of people will be caused to exist – whilst being of moral relevance, does not, on our analysis cut any legal ice.

For a related reason, any arguments by the child based on the ECHR are likely to fail. Pattinson puts it like this:

“... can conduct that is a necessary condition for the existence of a particular rights-holder (X), by itself, violate X’s rights? A negative answer must be given because being denied of the object of a right (ie of whatever the right is to) implies that one could have had that object. This can be presented in syllogistic form: (a) An individual cannot be a rights-holder (have rights) until it exists. (b) If an individual cannot exist in the absence of the relevant conduct, then the individual cannot be a rights-holder in the absence of the relevant conduct. (c) Thus, any conduct that is a necessary condition for the existence of an individual cannot, by itself, violate that individual’s rights. In short, for one’s rights to have been violated, one must have been denied of an alternative existence wherein one’s rights are fulfilled.”¹⁸

This can be put in a more legal way. A claim by the deaf child would be a claim under Article 2 and/or Article 3 and/or Article 8. But such claims could only be made if the most fundamental of all rights, the Article 2 right to life, had been violated. Dead men have no rights, other than the not hugely comforting right to have, in some circumstances, the manner of their deaths investigated. The same must go for non-existent men. All ECHR claims are analytically contingent on, and must therefore be subservient to, Article 2 right to life claims.

It has been suggested above that s.1A of the 1976 Act cannot apply to cases of *deliberate* embryo or gamete selection. If that suggestion is wrong, then of course s. 1A, side-stepping completely the non-identity problem, gives the child in this case a clear remedy. That is true for case 1B too.

The non-identity problem is theoretically relevant to the question of the legality in public law of any endorsement of this procedure by the Human Fertilisation and Embryology Authority (HFEA). The HFEA would be bound, before permitting the procedure, to consider the effect on the future child. But which future child? The Human Fertilisation and Embryology Act 1990 does not

18. Pattinson, Shaun, ‘Reproductive Cloning: Can cloning harm the clone?’ (2002) 10 *Medical Law Review*, at 304-305

help. Section 13(5) simply says “A woman shall not be provided with treatment services unless account has been taken of the welfare of any child who may be born as a result of the treatment...” No guidance is given as to how such account should be taken. It seems unlikely, given the wording, that the non-identity issue was considered when drafting the act.. The policy considerations in play here would seem to be identical to those which arise in a private law claim for damages. It would be anomalous if a child could not recover damages but at the same time could obtain censure of the organisation which allowed it to exist.

1C: Pre-fertilisation selection for deafness

Suppose that it is possible for eggs and/or sperm to be genetically tested before fertilisation. Such testing is used to select gametes carrying “deaf” genes, and a “deaf” embryo is duly created. No embryos are destroyed. A deaf child is born, and sues.

The situation here is slightly different to 1B. It is not the child itself which has been selected for its deafness. Instead, its component parts have been selected for their deaf attributes. But this, for the purposes of the law, is a distinction without a difference. The child would not have been in any position to bring a claim were it not made up of the component parts that it was in fact made up of, and if it was not made up of those component parts it would not exist at all.

The ECHR, for the reasons outlined above, would not help this claimant.

2. Case 2: Fetal damage from isotretinoin treatment

Isotretinoin is a very potent treatment for acne. If a woman becomes pregnant while taking isotretinoin there can be significant fetal damage. Assume that it would be negligent for a doctor to prescribe isotretinoin without also prescribing the oral contraceptive pill (OCP)¹⁹. Assume that a doctor has failed to prescribe the OCP, and that a child is born disabled as a result. The child sues the doctor.

This is different from 1B because the outcome (the disability) is unwanted. There was no positive selection of the disabled child. But the legally orthodox position is that this is a distinction with no legal consequences. If the OCP had

19. We make this assumption purely for the purposes of this legal analysis. We are not asserting that it is, or should be, negligent.

been prescribed, the claimant would never have existed. The orthodox question is: What damage has occurred to the claimant? The answer is clear: None. Any other answer requires gross biological naivety. It should make no difference that, if the OCP had been prescribed, an undamaged child would have been born at a later date, after the course of isotretinoin had been stopped. That undamaged child would be a different person from the claimant. One cannot rationally compensate disabled Child A by giving him damages representing the difference between him and non-disabled Child B if one knows as a matter of genetic fact that Child A and Child B are wholly different individuals. That would be as rational as giving Child B some money to compensate him for the damage which he might have suffered had he been exposed to isotretinoin.

But is it really as simple as this? Perhaps the final result should depend on how the negligence is characterised. If the negligence is really failure to prescribe the OCP, then any claim brought by the child would seem to fall finally at the hurdle of the non-identity problem. But if the negligence is prescription of isotretinoin to a woman who happens not to be taking the OCP, the claim is no different from case 1A: the child has simply been poisoned. This is a legally curious result. It would have the unsatisfactory effect of making the case turn on a pleading point (how is the negligence described?), and would allow the clinician to escape liability totally if he had been negligent in two ways (prescribing isotretinoin and failing to prescribe the OCP), but to be liable if he had been negligent in only one way (prescribing isotretinoin). These anomalies would no doubt compel the courts in the direction of the intuitive, orthodox solution – that the child has no claim.

The ECHR arguments should fail for the same reasons as before.

CONCLUSIONS

We have argued that the law currently adopts what we have described as the ‘enormous difference position’ with regard to non-identity cases. In identity-affecting cases the fact that a different person who was not, for example, deaf or disabled, could have been brought into existence counts for nothing. In identity-preserving cases, on the other hand, the fact that a fetus or child has been made worse off will generally be legally significant. So, the non-identity problem makes an enormous difference to the likely success of any legal action.

Many philosophers, however, disagree with the ‘enormous difference position’, and adopt either the ‘no-difference’ position or the ‘some difference’ position.

On their view it can be a significant wrong if a person is caused to exist with a disability when another person could have been brought into existence in a healthy condition. It does not follow from this view that the law should be changed so as to take account of the wrongness of causing people to exist in harmed conditions. It might be that that any such law would be impracticable. However, those who reject the 'enormous difference' position may believe that there is a case for saying that an identity-affecting intervention that leads to the existence of a significantly handicapped person is morally reprehensible and ought to be actionable in some way. Whether or not this view has merit, it seems to be soundly rejected by current English law. It has been rejected, however, without any apparent appreciation, let alone consideration, of the non-identity problem. Reproductive technology is proliferating and accelerating, and the courts will have to deal squarely with the non-identity problem before too long.