Selecting a Disabled Embryo Can Constitute Grievous Bodily Harm

Lisa Cherkassky
LLB, PGCE(PCE), LLM, PGC(HEP), Senior Lecturer in Medical Law, University of Derby

Abstract

The Human Fertilisation and Embryology Act 1990 (as amended) in the UK allows parents to select a disabled embryo for implantation as part of fertility treatment services. There was widespread condemnation of a couple in the United States who intentionally conceived two deaf children, and there is evidence to suggest that requests for dwarfism are on the rise. This article suggests that it is an offence against the person to give birth to an intentionally disabled child, and that this is a unique criminal act that can be distinguished from a wrongful life action (rejected in UK law by *McKay v Essex Area Health Authority* [1982] Q.B. 1166). The components of s.18 of the Offences Against the Person Act 1861 will be explored to prove that should an intentionally disabled child ever come forward, a prosecution may be possible under the criminal law.

Introduction

Preimplantation Genetic Diagnosis (PGD) has been used in fertility treatment to test for genetic disorders such as cystic fibrosis, Tay Sachs disease, Fanconi Anemia and sickle cell anemia in preimplanted embryos since the first live birth in 1990.[1] The Human Fertilisation and Embryology Act 1990 (as amended) (the "1990 Act") allows parents, under s.13(9) and Sch.2, para.1ZA(1)(b), to screen for disabilities and select a disabled embryo for implantation in the hope that their child is born disabled.

A person who is intentionally deprived of his sight, hearing or mobility without lawful excuse would suffer a non-fatal offence under the Offences Against the Person Act 1861 (the "1861 Act"). It is submitted in this article that a child born with intentional disabilities caused during fertility treatment should be able to argue that he has too. This unique offence reads like a civil action for wrongful life (as rejected in UK law by the High Court in *McKay v Essex Area Health Authority*[2]) in that the child is seeking legal recognition for a disability he was born with, but it will be shown that if a mother manifests the disability in her child through her own actions, with the intention to do so, she satisfies the components of s.18 of the 1861 Act, regardless of the fact that it was done out of love.

The Human Fertilisation and Embryology Act 1990

The power to screen embryos created during fertility treatment for a disability is found in Sch.2 to the recently amended 1990 Act:

> 1ZA (1): A licence ... cannot authorise the testing of an embryo, except for one or more of the following purposes—
>
> (a) establishing whether the embryo has a gene, chromosome or mitochondrion abnormality that may affect its capacity to result in a live birth,
>
> (b) in a case where there is a particular risk that the embryo may have a gene, chromosome or mitochondrion abnormality, establishing whether it has that abnormality or any other gene, chromosome or mitochondrion abnormality,
>
> ...
>
> (2) A licence cannot authorise the testing of embryos for the purpose mentioned in sub-paragraph (1)(b) unless the Authority is satisfied—
>
> (a) in relation to the abnormality of which there is a particular risk, and
>
> (b) in relation to any other abnormality for which testing is to be authorised under sub-paragraph (1)(b),
>
> that there is a significant risk that a person with the abnormality will have or develop a serious physical or mental disability, a serious illness or any other serious medical condition.[3]

A healthy couple is unlikely to create embryos with a "particular risk" of an abnormality, so testing may only be available to them under Sch.2, para.1ZA(1)(a). A disabled couple (or a carrier couple) could have their embryos tested under both para.1ZA(1)(a) and (b): they are free to test for grave abnormalities under para.1ZA(1)(a) and they are also likely to produce embryos with a "particular risk" of an abnormality under para.1ZA(1)(b). This is supported by para.1ZA(2), which states that there must be a "significant risk" that the embryo will have or develop the disability, illness or condition in question. The embryo, once screened, is then "in a suitable condition to be placed in a woman" under Sch.2, para.1(1)(d) of the 1990 Act (as amended). It was decided in *R. (Quintavalle) v Human Fertilisation and Embryology Authority (and Secretary of State for Health)*[4] that "suitable" is subjective according to the desires of the mother (per Lord Hoffmann):

> "[I]f the concept of suitability in sub-paragraph (d) of 1(1) is broad enough to include suitability for the purposes of the particular mother, it seems to me clear enough that the activity of determining the genetic characteristics of the embryo by way of PGD or HLA typing would be "in the course of" providing the mother with IVF services and that

> the authority would be entitled to take the view that it was necessary or desirable for the purpose of providing such services."[5]

In the majority of cases, it is assumed that the powers under para.1ZA(1)(b) are used by couples to *eliminate* disabled embryos from fertility treatment, but in the rare event that a disabled/carrier couple wish to locate a particular disability for *implantation* (this would constitute the subjective reading of "suitability" under *Quintavalle*), the 1990 Act allows a disabled embryo to be implanted as long as it is not favoured:

> **Section 13: Conditions of licences for treatment**
> ...
> (9) Persons or embryos that are known to have a gene, chromosome or mitochondrion abnormality involving a significant risk that a person with the abnormality will have or develop—
> (a) a serious physical or mental disability,
> (b) a serious illness, or
> (c) any other serious medical condition,
> must not be preferred to those that are not known to have such an abnormality.

The consequence of s.13(9) and *Quintavalle* is that a disabled couple can select an embryo with a significant risk of a serious physical or mental disability, illness or condition for implantation as long as a healthy embryo is selected alongside it. The Human Fertilisation and Embryology Authority (the "HFE Authority") has provided a viability benchmark in its Code of Practice:

> "Paragraph 10.18: An example of an embryo not suitable for transfer in [s.13(9)] is one that has no realistic prospect of resulting in a live birth."[6]

It appears that a couple can select a disabled embryo for implantation with any disorder, defect or disability *as long as it is capable of being born alive*, effectively lowering the threshold of "disorder, defect or disability" under s.13(9) to anything short of death.

A clinical ethics committee will have to approve implantation after conversations with the couple (para.10.17) but the circumstances of the couple—rather than the seriousness of the defect, disorder or disability—will be considered before screening is offered (paras 10.5 and 10.6). The HFE Authority was contacted under the Freedom of Information Act 2000 as part of this research to release statistical information about how many couples select defective and disabled embryos for implantation. The response was: "the HFE Authority does not hold the information requested as we only collect information on when an embryo is not transferred due to a positive genetic test."[7] It is not known if a couple in the United Kingdom has implanted a disabled embryo under the 1990 Act, and, sadly, the child himself (should he exist) may never learn that his disability was intentional.

The Welfare of the Disabled Embryo

To offer protection to the prospective disabled child, the 1990 Act contains a welfare provision for prospective parents seeking treatment services Section 13(5) provides:

> 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 (including the need of that child for supportive parenting), and of any other child who may be affected by the birth.

Section 13(5) is designed to identify serious threats to welfare before the embryo is created and an intentionally inflicted disability would surely count as a threat, but the provision has been shown to be unworkable. In the 16 appeal cases between 1998 and 2014 that mention s.13(5), none of them focus solely on the welfare provision or question the harm to the potential child.[8] A House of Commons Science and Technology Committee even called the provision "unusable".[9] There is also an issue with interpretation: is the welfare provision to be viewed through the eyes of the disabled parents (subjectively), or viewed through the eyes of the reasonable man (objectively)?[10] A third barrier preventing a straightforward use of s.13(5) is its role in the courts: it is not clear who would bring the action on behalf of the embryo, and the judge, should a case ever make it to court, could be interpreted by disability support groups as labelling disabled families as having depreciated welfare if he ruled that the selection of a disabled embryo did not support the welfare of the child.

The 1990 Act, therefore, allows for the selection of a disabled embryo for implantation during the course of fertility services (s.13(9)) if it is suitable to the mother (*Quintavalle*), with no tangible welfare provision to protect it. Reproductive autonomy is used by writers to defend the actions of couples who seek to create a disabled child, but it is submitted that the law should never be complicit in the creation of disabled children.[11]

However, in the event that a disabled child has already been born under the 1990 Act and he comes to realise in his older years that his parents *ensured* his disability, has he suffered an offence against the person under the criminal law? It is submitted that he has, and that such a criminal action can be distinguished from the civil action of wrongful life.

A Real Life Case Study

A prophesised legal action is easier to envisage when a case study is found in life. Candace (Candy) McCullough and Sharon Duchesneau—a deaf lesbian couple from Maryland in the United States—provoked a very strong reaction when they intentionally sought a deaf sperm donor for use in artificial insemination in 2002.[12] Gauvin, their resulting son, was born mostly deaf and deprived of his hearing aid. He had an older sister, Johanne, aged five, who was also born from the same sperm donor and is completely deaf. In their interview, the couple justified their decision by referring to their own subjective desires:

> "(Sharon): It would be nice to have a deaf child who is the same as us ... I think that would be a wonderful experience ... you know, if we can have that chance, why not take it? ... a hearing baby would be a blessing. A deaf baby would be a special blessing."
>
> "(Candy): Some people look at it like 'oh my gosh, you shouldn't have a child who has a disability'. But you know, black people have harder lives. Why shouldn't people be able to go ahead and pick a black donor if that's what they want? They should have that option. They can feel related to that culture, still bonded with that culture."

There was widespread condemnation of the couple. Peter Garrett, research director for LIFE, described it as "unethical".[13] Ken Connor, president of the U.S. Family Research Council, said it was "incredibly selfish".[14] The public outcry was also strong, referring to the decision as "monstrous and cruel" and "misguided".[15]

It is understandable that Candy and Sharon would want deaf children if they are deaf themselves: the family unit would be very close, they may enjoy being part of a special culture where sign language is viewed as a unique and sophisticated form of communication, and the children may feel less isolated if they are in a deaf family. However, disabled parents who create disabled children can be accused of not seeing the bigger picture. The special world that they try to manufacture by selecting a disabled embryo only lasts for a few dependant years until the child grows up. There is no mention by Candy and Sharon of the best interests of their child, who is his own person with his own undetermined future, separate from the couple's own experiences. It was not for them to carve his direction in life.

Deafness is not the only disability sought by couples. A couple who seek dwarfism, for example, also bestow a myriad of medical problems on their child, including delayed or slow growth, joint pain, abnormal bone alignment, compressed nerves, degenerative joint disease, slower development of motor skills, excess fluid on the brain, cleft palate, club foot, bowed legs, curvature of the spine, ear infections, and crowded teeth. There is strong evidence to suggest that requests for PGD to select dwarfism are on the rise: one report has stated that at least one fertility clinic in the United States had complied with a request to select dwarfism because the trait ran in the family.[16] A second report also confirmed that in off-the-record conversations with endocrinologists, patients with dwarfism were "strong-arming" physicians into agreement by threatening to go to another clinic, refuse PGD, become pregnant, test for dwarfism and abort any foetus not carrying the gene.[17] There are 285 licensed genetic disorders to screen for in the United Kingdom, and according to official statistics, 18 clinics provided PGD in 2012, resulting in 523 IVF treatment cycles with a live birth rate of 28.2 per cent (although we don't know how many of these cycles resulted in the positive selection of a disabled embryo).[18]

It is clear that, regardless of the loving motives of the parents, a child who is born disabled at the behest of his parents is deprived of his chance to an open future at the very least.[19] The "open future" theory gathered momentum in the United States, where a personal interest in bodily integrity was recognised in the old common law:

> "... no right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."[20]

It is generally accepted that if a disability is inflicted upon a person after birth, it constitutes an offence against the person under the 1861 Act. A child should have this same right, irrespective of when the actus reus took place, or the method of infliction.

The Criminal Law

There are three relevant criminal offences applicable to the intentional infliction of a disability upon a person: an assault occasioning actual bodily harm under s.47; maliciously inflicting grievous bodily harm under s.20; or grievous bodily harm with intent under s.18 of the 1861 Act.[21] There has recently been a handful of cases of young women blinded by male family members in violent domestic incidents and the defendants were convicted of causing grievous bodily harm with intent under s.18 of the 1861 Act.[22] The intentional infliction of blindness clearly attracts the most serious charge (the maximum penalty under s.18 is life imprisonment).[23] Where the disability (i.e. blindness) is already inherent in the embryo, it is suggested that the actus reus occurs through the acts of selection, implantation, pregnancy and birth during the fertility treatment process, as opposed to a single act of violence. This is an uncertain approach, but grievous bodily harm can be caused "by any means whatsoever" under s.18, and the end result in both cases is the same: an intentional disabling of a person.

The relevant definition in s.18 is as follows:

> Whosoever shall unlawfully and maliciously by any means whatsoever wound or cause any grievous bodily harm to any person with intent to do some grievous bodily harm to any person ... shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for life.

This definition will now be applied to a mother who positively selects, implants, carries and births a disabled embryo via fertility treatment under s.13(9) of the 1990 Act (as amended) with the intention of giving birth to a permanently disabled child.

(i) Actus reus

The actus reus of s.18 is highlighted below:

> Whosoever shall *unlawfully* and maliciously *by any means whatsoever wound or cause any grievous bodily harm to any person* with intent to do some grievous bodily harm to any person ... shall be guilty of felony ...

The actus reus of the mother occurs in several stages over a long period of time: the mother *selects* a disabled embryo, the disabled embryo is *implanted* into her body, she *carries* the disabled child to term, and then *gives birth* to a disabled child where the manifestation of the disability is complete.[24] The wording of s.18 states that the actus reus must be "unlawful" and, at first glance, the actions of the mother appear to be supported by s.13(9) of the 1990 Act, which allows for the selection of a disabled embryo as long as it is "not preferred". However, it is no defence to say that the creation of a disabled child is lawful because the selection of its embryo is lawful—s.13(9) does not cover the implantation of a disabled child, the carriage of a disabled child, or the birth of a disabled child. Whilst it is true that these elements are not explicitly unlawful acts, it has not yet been established that a mother can *lawfully* implant, carry and birth an *intentionally* disabled child. There is also no lawful defence for causing the disability to manifest into life, such as mistake, self-defence or intoxication. The whole transaction forms the actus reus, and it constitutes the causing of harm "by any means whatsoever" under s.18.

"Grievous bodily harm" is given its ordinary, natural meaning. It is no longer necessary for the harm to "seriously interfere with health or comfort".[25] It is not even necessary for the jury to look for "really serious harm"[26] or "life threatening" harm,[27] as long as they assess the injuries objectively.[28] Many of the 287 licensed defects, disorders and disabilities listed by the HFE Authority could constitute serious harm to an objective standard, including deafness, dwarfism, cystic fibrosis, down's syndrome, epilepsy and muscular dystrophy. It is highly likely that a jury would view these disabilities as "serious harm".[29] In conclusion, the mother has unlawfully (speculatively), by the means of implantation, carriage and birth, caused grievous bodily harm to a person under s.18 of the 1861 Act.

(ii) Mens rea

The mens rea of s.18 is highlighted below:

> Whosoever shall unlawfully and *maliciously* by any means whatsoever wound or cause any grievous bodily harm to any person *with intent to do some grievous bodily harm to any person* ... shall be guilty of felony ...

The mens rea of s.18 is a specific intention to do some grievous bodily harm, adopted from the law of murder.[30] There is no doubt that the mother, through her actions of selection, implantation, pregnancy and birth, intended to bring to life a disabled child. Alternatively, the mother must see the disability as a virtually certain consequence of her actions.[31] This is also easily satisfied.

(iii) Coincidence and causation

It should not matter that the actus reus and the mens rea occurred before the birth of the child, or that the harm manifested at the moment of birth. *Attorney-General's Reference (No.3 of 1994)*[32] confirms that an actus reus and a mens rea during pregnancy (a stabbing) can be combined with a manifestation of that harm at birth to form a criminal offence (manslaughter). It should also not matter that the actus reus takes the form of fertility treatment before birth as opposed to an act of violence after birth.

The disability is inherent in the embryo before it is selected so writers have suggested that the mother does not *cause* the disability; she simply gives that particular embryo the opportunity to live its best life.[33] This distinction is untenable because the mother, in selecting, implanting, carrying and birthing the disabled child, causes the disability to flourish into life with specific intention. To put it in crude causal terms, but for the actions of the mother, the disability would not have manifested into life. US case law (a civil case) has hinted that a causal connection would support the child's case:

> "A child has a legal right to begin life with a sound mind and body. If the wrongful conduct of another interferes with that right, and it can be established by competent proof that there is a causal connection between the wrongful interference and the harm suffered by the child when born, damages for such harm should be recoverable by the child."[34]

It should also not matter that the cause of the disability is stretched out over several acts (selection, implantation, carriage and birth) as long as they combine to be the operating cause of the resulting harm.[35]

On the topic of causation, it is a good idea at this point to distinguish a mother who positively selects a disabled embryo for implantation from a mother who discovers a disability during pregnancy and decides to keep the child. There is no criminal liability in the latter scenario because the mother did not select and implant the disability with intention. It occurred without her knowledge. She is a bystander in the condition of her child.

In summary, there is no bar in place to prevent the Crown Prosecution Service from bringing a charge of grievous bodily harm with intent against a mother who gives birth to a child that she *ensured* was disabled: the acts of selection, implantation, pregnancy and birth manifest the disability into life by any means whatsoever to satisfy the actus reus of s.18, and the mother specifically intended for her child to be disabled when she engaged in the acts above, forming the mens rea of s.18. This must not be confused with a wrongful life action in civil law, where a child seeks compensation for being born disabled.

It is not a Wrongful Life Action

There is opposition to the idea that a child can seek legal recognition for being born disabled. A "wrongful life" action, as it is known, is not actionable in civil law. A selection of writers submit that because the disability was inherent in the embryo before selection, there was no healthy alternative except not to be born. This is the crux of a wrongful life action—the mere birth of the child would have to constitute "harm" for the action to succeed—and the courts in the UK have denied that birth is a harm to be compensated. The leading case is *McKay v Essex Area Health Authority*.[36] Ackner L.J. confirmed that the courts could not compensate for existence:

> "… 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."[37]

It is widely accepted, therefore, that there is no duty in law to ensure that a person does not exist (or to be more specific, there is no duty to perform an abortion because the foetus is disabled).[38] The US courts have come to the same conclusion.[39] However, a wrongful life action is *not* applicable to positively selected disabled embryos. The disabled child, if his disability resulted from being a positively selected disabled embryo, is not arguing that it would be better not to be born (i.e. a civil duty to abort); he is arguing that his disabilities were intentionally manifested at the hands of his mother (i.e. a criminal offence against the person). The civil courts will not be compensating his birth; instead, the criminal courts will be punishing for intentional blindness, deafness or dwarfism (and may turn a weary eye to the HFE Authority, who had a legal duty to protect his welfare under s.13(5) of the 1990 Act but instead was complicit in his harm). This is a unique criminal offence, but the 1861 Act has changed with the times to accommodate omissions,[40] psychological grievous bodily harm[41] and biological HIV transmission.[42] It can include harmful fertility treatment too.

Conclusion

The intentional disabling of a child after birth reads like a heinous criminal offence, yet couples can, under s.13(9) and Sch.2, para.1ZA(1)(b) of the 1990 Act, and as a result of *Quintavalle*, screen for disabilities and select a disabled embryo for implantation in the hope that their child is born disabled. A person who is inflicted with the same harm would suffer an offence against his person under the 1861 Act, and this article has shown that a child born with intentional disabilities should be able to argue that he has too. The mother satisfies the actus reus of s.18 when she selects, implants, carries and births a disabled child, and she satisfies the mens rea of s.18 when she intends for the disability to manifest (only the selection is supported by law under s.13(9)). Causation is a cloudy issue, with some writers submitting that the disability is already inherent in the embryo, but it is argued that the disability manifests into life as a direct result of the actions of the mother. To put it another way, there is no difference between *ensuring* a disability in a prospective child and *causing* disability in an existing child. It is accepted that in the latter case, there was an act of violence that can be distinguished from the more benign acts of selection, implantation, pregnancy and birth, but the fact that the former child has never experienced an "able" body should not preclude his parents from criminal charges. The disability is manifested with intention "by any means whatsoever", as per s.18.

The 1990 Act is constructed in such a way as to allow for disabled children to be deliberately born. The screening technology was not developed to be abused in this way and it casts an unethical shadow over the HFE Authority. It would be in the best interests of the child to amend s.13(9) to state that any disabled embryos must not be selected for implantation. We do not know if such children exist in the UK or how old they are, and they may never find out that their disability was intentional, but if they do come of age and discover the truth, they deserve to be recognised as being intentionally deprived of their basic faculties just like any other person who suffers an offence against his person resulting in a permanent disability.

[1] The sex of two sets of twin girls was used to determine their predisposition to genetic diseases. The successful project was published in: A.H. Handyside et al, "Birth of a Normal Girl After In Vitro Fertilisation and Preimplantation Diagnosis Testing for Cystic Fibrosis" (1992) 327(13) New. Eng. J.M. 905.

[2] [1982] Q.B. 1166

[3] The screening process is delicate and costly: an embryo is created *in vitro,* one or two cells are removed a few days after fertilisation, and then tested for a genetic or hereditary disorder or disease. The embryo is not altered by this procedure.

[4] [2005] 2 A.C. 561.

[5] [2005] 2 A.C. 561 at para.24.

[6] HFE Authority, *Code of Practice*, 8th edn (April 2015).

[7] The request was sent on Monday, June 23, 2014 and responded to on Thursday, June 26, 2014 by Neil McComb, Register Information Officer, HFE Authority, Finsbury Tower, 103–105 Bunhill Row, London, EC1Y 8HF.

[8] This is probably because, after birth, s.1 of the Children Act 1989 would come into play, making the position of s.13(5) of the 1990 Act rather ambiguous. For further criticism of s.13(5), see: E. Jackson, "Conception and the Irrelevance of the Welfare Principle" (2002) 65 M.L.R. 176.

[9] House of Commons, Science and Technology Committee, *Human Reproductive Technologies and the Law*, Fifth Report of Session 2004–05, Vol.1 (March 14, 2005), para.93, available at: *http://www.publications.parliament.uk/pa/cm200405/cmselect/cmsctech/cmsctech.htm* [last accessed May 8, 2015].

[10] There is research to suggest that disabled people view their disability more favourably than people who have not experienced it and that PGD to eliminate disability is derogatory to disabled people: M. Saxton, "Parenting Screening and Discriminatory Attitudes About Disability" (1988) 13(1–2) Wom. & Heal. 217–224; J.S. Freeman, "Arguing Along the Slippery Slope of Human Embryo Research" (1996) 21 J. Med. Phil. 61–81; A. Middleton et al, "Attitudes of Deaf Adults Toward Genetic Testing for Hereditary Deafness" (1998) 63 Am. J. Hum. Gen. 1175–1180; N. Levy, "Deafness, Culture, and Choice" (2002) 28 J.M.E. 284–285; R. Scott, "Choosing Between Possible Lives: Legal and Ethical Issues in Preimplantation Genetic Diagnosis" (2006) 26(1) O.J.L.S. 153; C. Gavaghan, "Right Problem, Wrong Solution: A Pro-Choice Response to 'Expressivist' Concerns about Preimplantation Genetic Diagnosis" (2007) 16 C.Q.H.E. 20–34; S. Michie and T. Marteau, "The Choice to Have a Disabled Child" (1999) 65 Am. J. Hum. Gen. 1204–1207; and F.K. Boardman, "The Expressivist Objection to Prenatal Testing: The Experiences of Families Living With Genetic Disease" (2014) Soc. Sc. Med. 18–25.

[11] See K.W. Anstey, "Are Attempts to Have Impaired Children Justifiable?" (2002) 28 J.M.E. 286–288; R. Scott, "Prenatal Testing, Reproductive Autonomy, and Disability Interests" (2005) 14 C.Q.H.E. 65–82; J. Daar, "ART and the Search for Perfectionism: on Selecting Gender, Genes and Gametes" (2005) 9 J. Gen. Rac. Just. 241; and H. Draper, "Beware! Preimplantation Genetic Diagnosis May Solve Some Old Problems but It Also Raises New Ones" (1999) 25 J.M.E. 114–120 for three fictional scenarios in which couples may want disabled children, and how they may be trying to serve the best interests of the disabled child.

[12] Liza Mundy, "A World of Their Own", *Washington Post*, March 31, 2002, W22.

[13] BBC News, April 8, 2002, available at: *http://news.bbc.co.uk/1/hi/health/1916462.stm* [last accessed April 21, 2015].

[14] M. Pyeatt, "Deaf Lesbians Criticised for Efforts to Create a Deaf Child", CNS News, July 7, 2002, available at: *http://dev.cnsnews.com/news/article/deaf-lesbians-criticized-efforts-create-deaf-child* [last accessed April 21, 2015].

[15] J. Sproston, Letter to the Editor, "Like Mother, Like Child", *Washington Post*, June 9, 2002, W2.

[16] In conversations with endocrinologists at an American Society for Reproductive Medicine: K. Smolensky, "Creating Children with Disabilities: Parental Tort Liability for Preimplantation Genetic Interventions" (2008) 60 Hast. L.J. 299 at 300, fn.3.

[17] Not wanting to cause an unnecessary abortion (which would be against the Hippocratic Oath), and realising that the end result would be the same without his assistance, the physician agreed to perform PGD to select a child with dwarfism: C. Moutou et al, "Preimplantation Genetic Diagnosis for Achondroplasia: Genetics and Gynaecological Limits and Difficulties" (2003) 18 Hum. Rep. 509.

[18] As of April 20, 2015. The official statistics can be found in: HFE Authority, *Fertility Treatment in 2012: Trends and Figures*, pp.18–19, available at: *http://www.hfea.gov.uk/104.html* [last accessed April 21, 2015].

[19] A theory first presented by Joel Feinberg, supporting the idea that every child is born with "anticipatory autonomy rights" and parents, as mere guardians of the child, have a responsibility to protect these fundamental rights until adulthood: J. Feinberg, "The Child's Right to an Open Future" in W. Aiken and H. LaFollette (eds), *Whose Child? Children's Rights Parental Authority and State Power* (Totowa: Littlefield, 1980).

[20] *Union Pac. R.R. Co v Botsford* (1891) 141 US 250 at 251. The courts have since recognised that children have a "legal right to begin life with a sound mind and body": *Stallman v Youngquist* (1988) 531 N.E.2d 355 (Illinois Supreme Court) at 360.

[21] Wounding under ss.20 or 18 would not be relevant to a child born with an intentional disability because the continuity of the skin is not broken: *Moriarty v Brooks* (1834) 6 C. & P. 684.

[22] Victims include Jageer Mirgind in June 2014; Tina Nash in May 2012 (*R. v Jenkin* [2013] 2 Cr. App. R. (S.) 15); and Kelly Winter in July 2010. A basic internet search will reveal the facts and decisions in all three cases.

[23] The Crown Prosecution Service's Charging Standard recommends that permanent disability or permanent loss of sensory function is charged under s.20, but the specific intention of the mother to manifest the disability in her child and the identical actus reus make s.18 a preferable option: *http://www.cps.gov.uk/legal/l_to_o/offences_against_the_person/#a15* [last accessed April 21, 2015].

[24] It is acceptable for an actus reus to occur during one long transaction: *R. v Thabo Meli* [1954] 1 All E.R. 373, followed in *R. v Moore and Dorn* [1975] Crim. L.R. 229.

[25] *R. v Smith* [1961] A.C. 290, followed in *R. v Metharam* [1961] 3 All E.R. 200.

[26] *R. v Janua* [1999] 1 Cr. App. R. 91.

[27] *R. v Bollom* [2004] 2 Cr. App. R. 50.

[28] *R. v Brown* [1998] Crim. L.R. 484.

[29] The jury may take the age of the victim into consideration to accurately measure the effect of the harm: *R. v Bollom* [2004] 2 Cr. App. R. 50.

[30] *R. v Bryson* [1985] Crim. L.R. 669.

[31] See *Nedrick* [1986] 3 All E.R. 1 and *Woollin* [1998] UKHL 28.

[32] [1997] 3 W.L.R. 421.

[33] See J. Savulescu, "Deaf Lesbians, 'Designer Disability' and the Future of Medicine" (2002) 325 B.M.J. 771; M. Hayry, "There is a Difference Between Selecting a Deaf Embryo and Deafening a Hearing Child" (2004) 30 J.M.E. 510–512.

[34] *Smith v Brennan* 157 A.2d 497 (N.J. 1960) at 503.

[35] *R. v Smith* [1959] 2 Q.B. 35.

[36] [1982] Q.B. 1166.

[37] [1982] Q.B. 1166 at 1189. See also Stephenson L.J. at 1181, and Griffiths L.J. at 1192: "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."

[38] See T. Weir, "Wrongful Life—Nipped in the Bud" (1982) 41 Camb. L.J. 225; H. Teff, "The Action for 'Wrongful Life' in England and the United States" (1985) 34 I.C.L.Q. 423.

[39] *Gleitman v Cosgrove*, 227 A.2d 689 (N.J. 1967). In a more recent case in the US, parents of a child born with cystic fibrosis following PGD sued the embryologists for failing to detect the condition. The claim was "loss of consortium", meaning that they had lost companionship, but the court interpreted the case as "wrongful birth" and rejected it because the harm was too speculative: *Doolan v IVF Am., Inc*, 2000 Mass. Super. LEXIS 581. For further information, see S. Baruch, "Pre-Implantation Genetic Diagnosis and Parental Preferences: Beyond Deadly Disease" (2008) 8 Houst. J. Heal. L. Pol. 245.

[40] *Santana-Bermudez v DPP* [2003] Crim. L.R. 471 (s.47).

[41] *R. v Ireland* [1997] 4 All E.R. 225 (s.20, if it is "serious").

[42] *R. v Dica* [2004] EWCA Crim 1103 (s.20, without consent).