Articles

Saviour siblings: the role of the welfare principle within the law of assisted reproductive technology in England and Wales (Part 2)

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A saviour sibling is a child who is born to provide an organ or cell transplant to a sibling who is affected by a (usually) life-threatening disease. These children can be conceived naturally, but sometimes parents will choose to use certain forms of reproductive technology in order to conceive a child (known as 'the resulting child') who can help or even cure the ill sibling ('the existing child'). The law and the language surrounding this area are complicated and technical, but the area focussed on in both parts of my article is that of assisted reproductive technology, known as 'ART'. In part 1 (January issue of *Family Law* at [2021] Fam Law 81) I examined the harm and potential risks of ART, as well as the welfare of the resulting child. Continuing with this examination, I turn to the paramountcy principle.

Is the paramountcy principle compatible?

A major criticism of the application of the paramountcy principle, which can also be applied when employing welfare arguments in the area of reproductive regulation, is the fact that it leaves too much discretion to judges. It is impossible for a judge or, for example the Human Fertilisation and Embryology Authority, to ever have enough information to be able to make a rational choice; since making a choice of this nature would involve balancing all potential outcomes against each other and this would, particularly in the case of *potential* children, simply be too great an exercise. On a more philosophical level, it also involves placing the creation of human life in the hands of an arbitrary regulator, in this case, the clinic offering the treatment, which would lead to existential and social criticism about individuals 'playing God'. These existential arguments are significant, since the regulation of reproduction will inevitably raise questions about the value the law places on human life, hence why it is important to examine the issues and objections surrounding that regulation. Furthermore, there are questions as to whether the same welfare exercises can be applied for *existing* children as for *potential* children, since it appears that this is what s 13(5) attempts to do in regulating welfare in the sphere of the Human Fertilisation and Embryology Act 1990 ('the 1990 Act').

Cohen suggests that an argument for greater regulation on reproductive legislation is particularly attractive because 'it justifies interference for the sake of preventing harm to society's most vulnerable, children'[1]. In other words, those who wish to protect the resulting child from being exploited would argue for greater regulation based on best

1 Cohen, Glenn, *Regulating Reproduction*, (2011) 96 Minn. L R 423, pg. 433

interests or welfare reasoning. This is a classic example, Cohen continues, of the application of John Stuart Mill's harm principle. This argument makes sense at a superficial level: we are happy to limit the rights of access to this technology to protect a vulnerable group within society, and when it comes to the welfare principle, this reasoning is entirely sound. It makes sense to consider the interests of the child as paramount when it comes to decisions about their future and welfare. From all potential viewpoints: parents, courts and society as a whole, this principle is very attractive and is a strong reason to interfere with the rights of others. Furthermore, this is a traditional approach throughout English family law, which does treat the rights and welfare of the child as paramount when it comes to any decision made about them.

However, as Cohen goes on to say, when we transpose these arguments into the law on regulating reproduction, we are taking an established and accepted principle of existing family law and trying to fit it into the law of reproduction[2], which regulates the *creation* of families, not *existing* families. Cohen suggests:

> '. . . the analogy goes: protecting the best interests of existing children is to the constitutional protections against interference in child rearing and legal parenthood . . . as protecting the best interests of resulting children is to the constitutional protections against interference in reproductive decisions'[3].

What Cohen is saying here is that both areas, namely the regulation of the family and the regulation of reproduction are protected spheres, but the justifications and reasons for protecting them are not the same because they control separate behaviours and decisions. As we have seen above, when it comes to welfare dialogue in family law, we look at all the competing interests and relevant rights and then come to the conclusion that best protects the welfare of the given child.

However, it would be a falsehood in the case of potential saviour siblings to say that there are competing interests – the interests of a *potential* child surely cannot have the same weight as those of an *existing*, living, breathing child. As Cohen points out, we are happy to use welfare reasoning to justify interventionism when it comes to *existing* interests, but it is an entirely different question to use these justifications in the case of *potential* interests[4]. On any logical extension of legal best interests' reasoning, existing interests would always trump potential ones, therefore saviour siblings should always be created for the benefit of the existing child and there would be no need for regulation. This analysis would justify and legitimise the UK approach, which is a clear prioritisation of the interests of the existing child, allowing for any potential harm to the resulting child. Therefore, for those who argue for stricter regulation, that regulation must be justified by moving away from the traditional welfare approach employed for existing children.

A further problem with even employing welfare reasoning at all when discussing *potential* interests of the resulting child is that of the *Non-Identity Problem*. In questions of reproductive law, we are considering the interests of a child who has not yet been born. Therefore, it could be argued that it would be impossible to do harm to a child by bringing it into existence, since the only alternative is not to bring it into existence at all. Essentially, the Non-Identity Problem suggests that life is always better than non-life and, given the option, everyone would choose to be born than to not be born. On this logic, we cannot use best interests of the resulting child or welfare arguments to justify intervening into the *creation* of children, and we can dispel welfare reasoning by asking 'will this child be *harmed* by being born?', as surely the answer will be no[5].

2 Cohen, Glenn, *Regulating Reproduction* (2011) 96 Minn. L R 423, pg. 435
3 *ibid* pg. 435
4 Cohen, Glenn, *Regulating Reproduction* (2011) 96 Minn. L R 423, pg. 437
5 Parfitt, Derek, *Reasons and Persons* (1984)

The options regarding use of ART to create children are these: allow it, or don't. The child is born, or it is not. Therefore, in order to justify even *considering* welfare in the selection of saviour siblings, one would have to conclude that there might be a situation where the potential damage to the resulting child might be so great that the child would have preferred not to have been born at all, that is, that it will sometimes be in the best interests of the child *not to be born*. As we can see above, the evidence of the impact of donation on sibling donors is generally negative. However, is it so negative as to suggest that the approach which maximises their welfare would be that these children should never have been born? This, ostensibly, is the Non-Identity Problem – life is always better than non-life, therefore we cannot justify regulation of the use of this reproductive technology on 'best interests' principles alone, because it would always be better to create than to not. Therefore, the fact that the 1990 Act includes a welfare provision at all is either (i) superficial, in the sense that the welfare assessment will never conclude that the saviour shouldn't be born due to welfare concerns, so operates merely as an appraisal of welfare before the inevitable birth of the child or (ii) a direct rejection of the Non-Identity Problem, in that there may be cases where the welfare assessment identifies such serious harm that the child is never created, running contrary to the idea that all life is better than non-life.

In order to unpack the relevance of the Non-Identity Problem to the 1990 Act framework, it would be useful to look at other areas of UK law and determine judicial opinion on whether or not 'being born' is generally considered a good thing in English law. A good analogy can be drawn here with the tortious cases involving the 'wrongful birth' tort[6], that is, where the negligence of doctors in performing vasectomies led families to have children they could not cope with. The 'harm' that they sued the doctors for was, technically, the birth of the child. As Dr Priaulx puts it, the parents claimed that 'in absence of such negligent treatment the "unwanted" child would not have been born'[7]. This was the essence of the case in *McFarlane v Tayside Health Board*[8], where the parents' claim for damages for maintenance to help in bringing up the child was rejected by the court. The court did allow Mrs McFarlane damages for her pain and suffering during the actual act of having the child, but they refused damages reflecting the life of the child, since any loss they had suffered would be 'outweighed by the blessings of a healthy child'[9]. This is an interesting policy decision since, under the normal rules of tort law, the couple should have been able to claim for the loss suffered and all of the judges' arguments against allowing them to claim were rooted in policy rather than law. In fact, Lord Steyn alluded to simple social values, suggesting that:

> 'Instinctively, the traveller on the Underground would consider that the law of tort has no business to provide legal remedies consequent upon the birth of a healthy child, which all of us regard as a good and valuable thing'[10]

This reasoning in a Court of Appeal judgment does seem to suggest that Lord Steyn was struggling to fit his own intuitive sense of what was 'right' into an acceptable legal form. Priaulx explains that 'in so many respects, the decision in *McFarlane* is unsatisfactory'[11] not least because it does not align with so many other areas of reproductive law. For example, as Peter Paine J pointed out in *Thake v Maurice*:

> 'By 1975 family planning was generally practised. Abortion had been legalised over a wide field. Vasectomy was one of the methods of family planning that was not only legal but was available under the National Health Service. It seems to

6 *McFarlane v Tayside Health Board* [2000] 2 AC 59; *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52
7 Priaulx, N, *Damages for the Unwanted Child: Time for a rethink?* (2005) MLJ 73 4, pg.5
8 [2000] 2 AC 59
9 Priaulx, N, *Damages for the Unwanted Child: Time for a rethink?* (2005) MLJ 73 4, pg.5
10 [2000] 2 AC 59, 82 *per* Lord Steyn
11 Priaulx, N, *Damages for the Unwanted Child: Time for a rethink?* (2005) MLJ 73 4, pg.7

> me to follow from this that it was generally recognised that the birth of a healthy baby is not always a blessing'[12]

Despite this case having come 15 years before the judgment in *McFarlane*, the point still very much stands. The liberal stance on reproduction seen in England and Wales has continued to expand into the 21st century, thus the ideas declared in *McFarlane* about a child always being a societal blessing appear outdated. The decision in *McFarlane* is widely criticised, and Priaulx asks the poignant question regarding the judges' decision that the birth of a healthy baby is always a good thing: 'if one decides to undergo invasive medical procedures to remove the prospect of parenting responsibilities, can the failure of that procedure properly be described as a "joy"?'[13].

The laws on the 'wrongful birth' tort in the UK can safely be described as a mess and based on little more than the sympathies of the individual judges. However, they do give us an insight into how English law views the Non-Identity problem, that is, *McFarlane* tells us that it is always preferable to be born than not to be born. The birth of a healthy baby is always viewed, by English law, as a joy and a blessing. The decision in *McFarlane* was challenged in the *Rees v Darlington Memorial Hospital NHS Trust* appeal under the *Practice Statement (Judicial Precedent)*[14]. Despite the criticism, the seven-judge panel in the House of Lords reaffirmed the decision in *McFarlane*, but did suggest it came down to the inclinations of the judges, refusing to change it even 'if a differently constituted committee were to conclude a different solution should have been adopted'[15].

We can further examine the courts' approach to the Non-Identity Problem in a slightly different context with the case of *McKay v Essex AHA*[16]. This case held that there can be no claim in law which allows a child born with deformities to claim damages for negligence against doctors in allowing it to be born. One of the claimants in this case, unlike *McFarlane*, was the child herself (along with her mother) who was born disabled as a result of an infection of German measles that her mother contracted while the claimant was in the womb. The basis of the claim was that, but for the negligence of the doctor (joint defendant with the Health Authority), the mother would have had an abortion to terminate the pregnancy on discovery of the effect of the infection on the child[17]. The negligence alleged was namely in (i) failing to treat the infection and notice further likelihood of damage to the child in the womb, and (ii) failing to advise the mother of the desirability of an abortion, given the effect of the infection on the foetus. The child claimed against both defendants for her having suffered 'entry into a life in which her injuries are highly debilitating, and distress, loss and damage'[18], essentially, that their negligence allowed her to be born at all. On appeal by the defendants, the court held:

> 'I cannot accept that the common law duty of care to a person can involve, without specific legislation to achieve this end, the legal obligation to that person, whether or not in utero, to terminate his existence. Such a proposition runs wholly contrary to the concept of the sanctity of human life.'[19]

The court further held that to allow such an action would imply an assumption that a child is to be born whole (without disabilities) or not at all, which seemed to influence their decision:

> 'To impose such a duty toward the child would, in my opinion, make a further

12 *Thake v Maurice* [1985] 2 WLR 215, 230
13 Priaulx, N, *Damages for the Unwanted Child: Time for a rethink?* (2005) MLJ 73 4, pg.7
14 [1966] 1 WLR 1234
15 [2000] 2 AC 59
16 [1982] QB 1166
17 *ibid* pg.1166
18 *ibid*.
19 *ibid* pg. 1188

> inroad on the sanctity of human life which would be contrary to public policy. It would mean regarding the life of a handicapped child as not only less valuable than the life of a normal child, but so much less valuable that it was not worth preserving . . .these are the consequences of the necessary basic assumption that a child has a right to be born whole or not at all'[20]

This is interesting as it qualifies the decision in *McFarlane* one step further by saying that we cannot grant a disabled child the right not to be born, since this would devalue the life of children born with disabilities and imply that it is only desirable to be born 'whole'. Therefore, both healthy children and children born with deformities or disabilities should be valued by society and considered generally a good thing. It was not acceptable, in the court's opinion, to suggest that there are circumstances where a child should not have been born. The court also struggled in *McKay* with the idea of balancing existence against non-existence, with Ackner LJ asking 'how can a court begin to evaluate non-existence, the undiscovered country from whose bourn no traveller returns?. . . no comparison is possible'[21] which emphasised the English judges discomfort with even attempting to assess life vs non-life. This evaluation between life and non-life is exactly what s 13(5) of the 1990 Act demands of clinicians who take account of the resulting's child welfare and is therefore, according to the ruling in *McKay*, impossible.

It is therefore difficult to reconcile the line of these cases with the welfare considerations in s 13 of the 1990 Act. These cases suggest that English judges and courts agree with the Non-Identity problem in the sense that the courts view life as always preferable to non-life. Even if the saviour sibling who was born as a result of use of PGD had congenital disabilities, it follows from the line in *McKay* that this would not preclude a court from considering that the child should have been born anyway, simply on the strength of the 'sanctity of life' argument. If one includes the benefit to the existing sibling in the balance, it would only serve to further tip the scales in favour of always allowing the child to be born. Looking at the cases above, we can conclude that the welfare provision included in the 1990 Act must be superficial, since it would go against the line of authority in *McFarlane* and *McKay* to say that it would ever be appropriate for a saviour sibling not to be born as a result of welfare considerations. The welfare provision of s 13 of the 1990 Act therefore clearly operates merely as an appraisal of welfare before the saviour is born than as any real safeguard of that child's interests. In turn, this may suggest that English law is in agreement with the stance of Cohen that welfare considerations in reproductive law are problematic, because there simply is no way to do an accurate appraisal of the welfare when the only outcomes are birth or non-birth. This is a major criticism of the application of the welfare principle as a justification for stricter regulation in the law on saviour siblings, since even if there were concerns about the potential impact on the resulting child, the only way to counteract these risks would be to not produce the child at all, invoking the Non-Identity Problem. This analysis further legitimises the English approach of a presumption in favour of creating saviour siblings, although the welfare proviso contained in s 13 seems superficial and out of place in the law of reproduction.

One should ask therefore whether the welfare provision in the 1990 Act should be retained, given its mostly symbolic status and lack of practical effect. The Human Fertilisation and Embryology Authority conducted a review into the welfare of the child in 2005[22], where they decided there should be a general presumption in favour of treatment, but that treatment should be refused:

20 *ibid*, pg.1180–1181
21 *ibid* pg.1189
22 Human Fertilisation and Embryology Authority (HFEA), *Tomorrow's Children: A Consultation on guidance to licensed fertility Clinics on taking in account the welfare of children to be born of assisted conception treatment*, (Jan 2005)

'if the treatment centre concludes:

(i) That it would not be in the interests of any resulting child; or
(ii) That it would not be in the interests of any other child; or
(iii) That it is unable to obtain sufficient information and advice upon which to base a proper assessment; or
(iv) That, having regard to all the circumstances, it is inappropriate to offer such treatment'[23]

This clearly shows that the Human Fertilisation and Embryology Authority are keen to retain a provision for the welfare assessment of the resulting child when it comes to ART. However, as has been emphasised above, this welfare language falls flat once we establish that if the treatment is refused due to welfare concerns of the child, then no child is created at all and this is not, according to English courts, a satisfactory alternative. Many would question the purpose of a welfare provision within the law of reproduction at all, since it seems impossible to be able to conduct any sort of substantive assessment. Jackson goes so far as to suggest that 'extending the "welfare principle" to decisions taken prior to a child's conception is shown to be unjust, meaningless and inconsistent with existing legal principle'[24]. This not only refers to the problems outlined above regarding the Non-Identity Problem, but there is a strong argument that the welfare principle is inconsistent, as it only applies when parents need to employ the use of ART and not to parents who create children naturally. This potentially leads to discrimination against infertile, single or same-sex parents. Jackson also argues that the principle is overly paternalistic:

'for the vast majority of people, deciding whether or not to conceive is not susceptible to legal control. People who conceive through heterosexual sexual intercourse do so without any external scrutiny of the merit or otherwise of their decision. Monitoring these exceptionally personal choices in order to identify ill-judged or improper conception decisions would be unreservedly condemned as an unacceptably intrusive abuse of state power'[25]

Jackson makes the point that by insisting on the application of the welfare principle in the reproductive sphere, we are facilitating a legal qualitative assessment of the merits of some parents over others. It would be unfair, she argues, to 'take advantage of their biological incapacity'[26] and use it as an opportunity to assess the wisdom of their choice to become parents. For any parents who do not require access to this treatment, the welfare of the child they may create is completely irrelevant to their capacity to conceive, therefore, even making welfare a relevant consideration in assisted reproduction is, *prima facie*, discriminatory. Jackson proposes that these problems could also lead to concerns from a human rights perspective, given the protection of the Art 12[27] right to found a family, Art 8[28] right to respect for private and family life[29] and Art 14[30] protection from discrimination. Under s.3 of the Human Rights Act 1998, UK legislation must, as far as is possible, be interpreted in way that is compatible with the rights enshrined in the European Convention. Jackson highlights that in the decision of *X and Y v The Netherlands*[31] the European Court held that the purpose of Art 8 was 'essentially that of protecting the individual against arbitrary interference by public authorities'[32]. Therefore, Jackson asks:

23 *ibid* pg.32
24 Emily Jackson, 'Conception and the Irrelevance of the Welfare Principle' (2002) 65 *Modern Law Review* 176
25 *ibid* pg.177
26 *ibid* pg.178
27 European Convention on Human Rights, incorporated into English law by the Human Rights Act 1998
28 *ibid*
29 Emily Jackson, 'Conception and the Irrelevance of the Welfare Principle' (2002) 65 *Modern Law Review* 176, pg.200
30 European Convention on Human Rights, incorporated into English law by the Human Rights Act 1998
31 (1985) 8 EHRR 235
32 *ibid* 239–240, para 23

> 'Could our interest in making certain intimate decisions free from public scrutiny . . .be protected by Article 8? In theory, yes . . .[It could be] argued . . .that section 13(5) treats an important aspect of infertile individuals' private lives, namely their decision to attempt to conceive a child, without the respect afforded to fertile individuals' reproductive decisions'[33]

However, there are several reasons, noted by Jackson, why this argument would not necessarily succeed in English courts. Firstly, although Art 8 is not subject to the same qualifications as those contained in Art 12, English courts have traditionally treated them as having an equivalent effect. This was seen in the case of *R (Mellor) v Secretary of State for the Home Department*[34], where English courts rejected an absolute right to procreate in consideration of a prisoner's request for artificial insemination facilities. The claimant argued that his inability to have access to reproductive technology (AI) in prison was a direct violation of his Art 12 right to found a family. This argument could be analogous to a case where, for example, infertile parents or parents wishing to create a saviour sibling argue that restricting their access to PGD and ART through the inclusion of a welfare principle violates their Art 12 rights.

There were four separate strands to the reasoning of the court in *Mellor*, one of which was a consideration of the welfare of the resulting child. The court held, 'it is thus the aim of the policy to limit the grant of AI facilities to those who can reasonably be expected to be released into a stable family setting, and to play a parental role in bringing up any child conceived by AI'[35]. This is a clear indication that the courts view the welfare of the resulting child as a legitimate limitation on the protections of Art 12. Lord Phillips was particularly concerned about the impact of a single-parent upbringing, going so far as to say 'I consider it legitimate, and indeed desirable, that the State should consider the implications of children being brought up in those circumstances [single parent families] when deciding whether or not to have a general policy of facilitating the artificial insemination of the wives of prisoners'[36]. This again highlights the seriousness of the manner in which the courts take their responsibility to welfare in suggesting that single-parent families, of which there were nearly 3 million in the UK in 2019[37], are undesirable for the welfare of the child. We can see from the above analysis that this concern about pre-conception welfare is misplaced and certainly, being born into a single-parent family would not be the 'serious harm' envisaged by s 13(5), but this judgment somewhat halts the advancement of a human rights argument in overturning the welfare provisions in the 1990 Act. Jackson observes that 'the current and likely interpretation of the Human Rights Act 1998 inevitably reflects dominant assumptions about the universal relevance of the welfare principle', which implies that any future challenges may be futile until the welfare principle is properly critiqued in English law.

There are further problems with the welfare principle in its very foundations. The justifications for the welfare principle where it normally applies in the sphere of family law and in the Children Act 1989, are that it protects a vulnerable percentage of the population. The child's welfare is paramount because children are otherwise the 'innocent victims of their parents' decisions'[38] and thus need to be protected by a third party who is guaranteed to take full consideration of their interests. However, these justifications cannot apply if the child is yet

33 Emily Jackson, 'Conception and the Irrelevance of the Welfare Principle' (2002) 65 *Modern Law Review* 176, pg.200
34 [2001] 3 WLR 533
35 *ibid* pg. 535
36 *ibid* pg.552
37 Office of National Statistics https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2019
38 *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 1 FLR 2170

to be created. A welfare assessment of any interests of the resulting child would involve hypothesis, or evaluation of a hypothetical existence. Andrew Dutney contrasts the application of the welfare principle in the family law context, where the child is in existence and therefore able to hold interests, and that where the child has no identity and no conceivable interests[39]. He concludes it would be a falsehood to attribute interests to a potential child and would change the nature of identity if we are to consider the welfare of those not yet conceived[40]. For example, it would run contrary to the liberal abortion laws in the UK if we attribute valuable interests to pre-conceived children, or think it appropriate to conduct pre-conception welfare analyses. Furthermore, the guidance the Human Fertilisation and Embryology Authority gives for the application of the welfare principle include 'the importance of a stable and supportive environment for any and all children who are part of an existing or prospective family group'[41]. This seems to suggest that the welfare considerations to be considered before the conception of a saviour sibling make up a fairly low threshold, for example, an unstable family life. In other words, an unstable family life would be enough to prevent the conception of the child. However, in practice the legal presumption in favour of treatment applies in the absence of 'a risk of serious harm'[42], which is a much higher threshold than the welfare considerations suggest. Where do the considerations of a supportive family fit into an assessment of the risk of serious harm? In this respect, the application of welfare of the resulting child in ART assessments seems confused and misplaced. It seems to be a confused application of various aspects of the welfare principle cherry picked from case law and statute without a definitive structure or test. This can also be seen in Para 1ZA itself, where the 1990 Act limits saviour sibling selection to those where the existing sibling is suffering from a 'serious medical condition'[43]. Here, the 1990 Act is focusing not on the harm to the child to be born, but on the benefit to the recipient, which further skews the application of the welfare principle, since the existing sibling's condition is unlikely to influence the quantitative harm to the resulting child.

Conclusions about the role of the welfare principle within English legislation

There are alternative approaches to the English position or to a total abandonment of reproductive welfare altogether. Taylor-Sands advocates a relational approach to welfare in the context of ART. According to this approach, welfare is considered, but considered outside the traditional parameters of child law. She suggests that the interests of any child created using ART or PGD should be equally weighted with the interests of intimate family members[44], particularly in the context of saviour siblings, since the process of selection and creation is 'by its very nature a shared enterprise . . .the role of the child to be born is integral to the survival of the existing sibling and the welfare of the family as a whole'[45]. Taylor-Sands believes there is a role for welfare of the child in reproductive matters, but that the individual interests of the child to be born should be considered alongside the collective interests of preserving the family unit and saving the existing child. In the specific context of saviour siblings therefore, Taylor-Sands emphasises that the

39 Andrew Dutney, 'Hope Takes Risks: Making sense of the interests of ART offspring' (WA Seminar 'Assisted Reproduction: Considering the Interests of the Child, 2000), 31–32

40 *ibid*

41 Human Fertilisation and Embryology Authority (HFEA), *Tomorrow's Children: A Consultation on guidance to licensed fertility Clinics on taking in account the welfare of children to be born of assisted conception treatment*, (Jan 2005) pg. 28

42 HFEA, *Tomorrow's Children: Report of the Policy Review of Welfare of the Child Assessments in Licensed Assisted Conception Clinics* (Jan 2005), 1

43 Human Fertilisation and Embryology Act 1990 Schedule 2, Para 1ZA

44 Taylor Sands, M, *Saviour Siblings: A relational approach to the welfare of the child in selective reproduction*, (2013) Routledge, pg. 77

45 *ibid* pg.77

'collective interests of the family should not override the individual interests of its members'[46] and there is still a role for welfare considerations in order to prevent 'exploitation, abuse or neglect'[47] of the resulting child. However, 'family decisions are rarely based solely on the individual interests of one particular child'[48] and therefore, a relational model reflecting the decision-making process of a family who was not using ART, is, for Taylor-Sands, the most appropriate approach.

This appears to be an attractive proposal, since it allows for a more holistic assessment of the needs of all parties involved in the creation of a saviour sibling. However, this approach does not tackle the demands of the Non-Identity Problem as well as an approach which removes welfare from the equation altogether. However, removing any concerns of welfare has potential adverse implications for society as a whole, since it may allow children to become commodities or facilitate the practice of eugenics. These issues are the reason that regulation in this area is so difficult, since there are so many competing interests. It would appear that English legislation is fairly robust in terms of preventing the commodification argument, since the legislation is clear on the appropriate cases for the use of PGD. Furthermore, the presumption in favour of creating saviour siblings is attractive for those who seek to use this technology for a greater social benefit; it is clear that a ban on the use of this technology would fail to serve the interests of anyone except potentially created children, and even these concerns are based on shaky grounds (see Packman's study above). Therefore, the regulation contained in the 1990 Act does appear to strike a balance between (i) the best use of the technology, and (ii) an appropriate regulation to address ethical concerns. A major criticism of the English approach would have to be its inclusion of a vague welfare consideration, which does not stand up to analysis. Whether Parliament or the judiciary will give further guidance on the role of welfare within pre-conception regulation remains to be seen. For now, an inclusion of some element of welfare seems policy-led, rather than legally sound; it allows clinics an option to prevent access to this technology if it appears appropriate to do so. To cloak these concerns in the language of welfare may be misguided however and therefore clearer guidelines on the role of the clinics in policing the use of this technology is certainly required.

46 Taylor Sands, M, *Saviour Siblings: A relational approach to the welfare of the child in selective reproduction*, (2013) Routledge pg.91
47 *ibid* pg.91
48 *ibid* pg.122