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BLESSING OR BURDEN? RECENT DEVELOPMENTS IN ACTIONS FOR WRONGFUL CONCEPTION AND WRONGFUL BIRTH IN THE U.K. AND AUSTRALIA

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Several cases involving claims for wrongful conception or wrongful birth have come before the English and Australian courts in recent years. The decisions in these cases have not been consistent and the law has been left in a state of some uncertainty. This article discusses the cases and considers the direction which the law in this area might be expected to take in future.

I. INTRODUCTION

In a case which came before the Singapore courts recently, a child suffering from Down's syndrome was named as co-plaintiff in an action brought by his mother against the obstetrician who allegedly failed to diagnose the child's condition in time for him to be aborted.[1] The child's action, based on the financial hardship and pain which he had endured as a result of being born, appeared to fly in the face of established law. For it is accepted in just about every jurisdiction that no action is available in tort to a person who seeks to argue that he should have been spared a life which is so compromised that it lacks any value. On the occasions when an action of this nature has been attempted, the courts have balked at the notion that a legal remedy should be available to the claimant, and for reasons of public policy they have thus far refused to recognize a duty to prevent life in such circumstances.[2]

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1 See "Down's boy, two, sues doc over suffering" *The Straits Times* (29 September 2004), which reported that a woman by the name of Katharine Soh Lea Chin was suing her obstetrician, Dr See Tho Kai Yin, and his practice on behalf of both herself and her two year old child for the doctor's failure to advise her to undergo pre-natal testing and for his failure to diagnose the fact that the child was suffering from Down's syndrome. At the time of completing this article, the court had not delivered its judgment.

2 See, *e.g.*, the decision of the English Court of Appeal in *McKay v. Essex Area Health Authority* [1982] Q.B. 1166 [*McKay*]. The judgment of Ackner L.J. (at 1172) illustrates concern about the "danger that doctors would be under subconscious pressures to advise abortions in doubtful cases." *McKay* was also decided on the basis that the *Congenital Disabilities (Civil Liability) Act 1976* precluded claims of this nature. In 2002, the Supreme Court of New South Wales similarly refused claims for wrongful life in the three cases of *Edwards v. Blomeley*; *Harriton v. Stephens*; *Waller v. James* [2002] N.S.W.S.C. 460 at 461, 462. For commentary on Studdert J.'s judgment in that court and on wrongful life claims in general, see P. Watson, "Wrongful Life Actions in Australia" (2002) 26 Melbourne U.L. Rev. 736. On appeal by two of the claimants, in *Harriton (by her tutor) v. Stephens; Waller (by his tutor) v. James and Another; Waller (by his tutor) v. Hoolahan* [2004] N.S.W.C.A. 93, the New South Wales Court of Appeal upheld by a 2:1 majority the finding that the actions (framed as claims for 'wrongful suffering') must fail, although the two members of the majority (Spigelman C.J. and Ipp J.A.) were not uniform in

On the other hand, the mother's claim seeking compensation for, *inter alia*, the costs of raising her disabled child, was based on somewhat firmer foundations. For actions brought against medical authorities by the parents of children born with disabilities—and, indeed, the parents of healthy but unplanned children born following unsuccessful sterilisation procedures—have succeeded in a number of situations and jurisdictions since the decision of the English Court of Appeal in *Emeh v. Kensington & Chelsea & Westminster Area Health Authority*.[3] The distinction drawn between the two types of claim is that while one (the child's claim for 'wrongful life')[4] would require a court to determine the worth—or lack thereof—of a human existence, the other (the parents' claim for 'wrongful conception' or 'wrongful birth')[5] merely requires it to make a financial assessment of the costs associated with child-rearing.

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their reasons for denying the appeals. It is worth noting, however, that Mason P. would have allowed the appeals.

3 [1985] Q.B. 1012 [*Emeh*]. In *Emeh*, the English Court of Appeal stated that public policy would not prevent an award of damages for the costs of raising a disabled child. In so doing, it rejected the position of the High Court in *Udale v. Bloomsbury Area Health Authority* [1983] 2 All E.R. 522, which had held that the birth of any child, whether healthy or disabled, should be regarded as a blessing. Following *Emeh*, claims brought in various circumstances for the costs of raising healthy children were allowed in cases such as *Thake v. Maurice* [1986] 1 Q.B. 644 (which, although an action in contract, dealt with the same policy issues as those in similar tort claims), *Benarr and another v. Kettering Health Authority* (1988) N.L.J. 179, *Allen v. Bloomsbury Health Authority* [1993] 1 All E.R. 651 and *Crouchman v. Burke* (1997) 40 B.M.L.R. 163. 270. In Australia a claim for the costs associated with raising a child who was born disabled following a doctor's failure to diagnose that the mother was suffering from rubella succeeded in *Veivers v. Connolly* (1995) 2 Qd. R. 326. Until the recent decision by the High Court in *Cattanach v. Melchior* (*infra* note 11), there was doubt about the position in Australia with respect to claims involving healthy children. The only relevant case was *C.E.S. v. Superclinics (Aust) Pty Ltd* (1995) 38 N.S.W.L.R. 47, in which the Supreme Court of New South Wales held that the mother of a healthy child who chose not to have the child adopted could not obtain from the clinic which had failed to diagnose her pregnancy damages for the costs of raising the child. However, since the case was settled before the final appeal was completed, the law in this area was regarded as unclear. For criticism of the decision, see Graycar and Morgan, "Unnatural Rejection of Womanhood and Motherhood: Pregnancy, Damages and the Law" (1996) 18 Sydney L. Rev. 323.

4 It should be noted that in the United States, claims for 'wrongful life' originally related to situations where a healthy but illegitimate child sued his father for the stigma of his illegitimacy. Most were unsuccessful for similar policy reasons to those later articulated in *McKay*. See, *e.g.*, *Zepada v. Zepada*, 190 N.E. 2d 849 (1963). For discussion of this area, see Harvey Teff, "The Action for 'Wrongful Life' in England and the United States" (1985) 34 I.C.L.Q. 423 and C.R. Symmons, "Policy Factors in Actions for Wrongful Birth" (1987) 50 M.L.R. 269.

5 Although the term 'wrongful birth' is commonly used to refer to actions by parents who are seeking to recover the costs associated with bringing up their children, the specific situations to which the term relates vary depending on the jurisdiction in which it is used. In the Australian courts, it tends to be used to describe all claims in which a parent or parents sue for the costs of raising a child, whether the child is healthy or disabled. In the English courts, 'wrongful birth' is normally confined to claims relating to a disabled child, where the basis of the claim is a failure to recommend termination of a pregnancy which was originally desired but which would have ceased to be so had the parents been aware of their unborn child's condition. In other cases, where the claim relates to a healthy (or even a disabled) child born to healthy parents following a failed sterilization (or vasectomy) procedure, or to a healthy child born to a disabled person whose fertility has not been controlled, the term 'wrongful conception' is generally used, since in these cases no pregnancy was desired in the first place. (In the less common category of actions where a pregnancy has not been diagnosed or an abortion has failed, the expression which is usually adopted is 'wrongful continuation of pregnancy'). For further discussion of the terminology used by the English courts in the various categories, see, *e.g.*, Laura C.H. Hoyano, "Misconceptions about Wrongful Conception" (2002) 65 M.L.R. 883 at 884, n. 10.

The distinction has, however, always had its detractors,[6] and decisions involving claims for the cost of raising children in wrongful conception and wrongful birth situations have gone both ways.[7] The willingness of the English courts to allow claims for the cost of raising children—at least where those children are born without disabilities to able-bodied parents—ceased just before the millennium with the House of Lords' decision in *McFarlane and Another v. Tayside Health Board*.[8] In the wake of *McFarlane*, there was uncertainty about the direction which the law might take in other jurisdictions, and questions were raised about the position in England should the courts in future be faced with claims involving parents or children suffering from disabilities. Those questions were answered to an extent when, in 2002, following a number of first instance decisions involving children born with disabilities,[9] the English Court of Appeal decided in *Parkinson v. St James and Seacroft University Hospital NHS Trust*[10] that a mother could recover damages for the proportion of the costs which she would incur in raising her child which was attributable purely to the child's disabilities. Then in 2003 two more cases came before the highest courts—the first in Australia and the second in England. In the first case, *Cattanach v. Melchior*,[11] the Australian High Court narrowly decided to allow a claim for damages by the parents of a healthy child. However, in the second, *Rees v. Darlington Memorial Hospital NHS Trust*,[12] the House of Lords, after considering *McFarlane*, *Parkinson* and *Melchior*, reaffirmed the views expressed in *McFarlane*—and arguably went even further in holding that the disabled parent of a healthy child should receive no compensation for the cost of rearing that child.

This article will examine the judicial approaches taken in these cases, and will seek to determine whether any consistency can be discerned in this morally cloudy area of the law.

II. The Cases

A. *McFarlane*

McFarlane (an appeal from the Scottish Inner House of the Court of Session) offered the House of Lords its first opportunity to consider the question of whether damages

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6 See Harvey Teff, *supra* note 4. Teff refers (at 427, n. 27) to cases from both the United States and the Commonwealth in which dissenting judges have for decades voiced concerns about the implications of awarding damages in such circumstances, particularly in actions involving disabled children. Among the cases cited are *Doiron v. Orr* (1978) 86 D.L.R. (3d) 719, *Gildiner v. Thomas Jefferson University Hospital* 451 F. Supp. 692 (1978) and *Dumer v. St. Michael's Hospital* 69 Wis. 2d 766 (1975).

7 While claims have succeeded in jurisdictions such as South Africa (see *Mukheiber v. Raath* 1999 (3) S.A. 1065), they have failed in other jurisdictions (see, *e.g.*, the Canadian case of *Kealey v. Berezowski* (1996) D.L.R. (4^{th}) 708).

8 [2000] 2 A.C. 59 [*McFarlane*].

9 *Rand v. East Dorset Health Authority* (2000) 56 B.M.L.R. 39 [*Rand*], *Hardman v. Amin* (2001) 59 B.M.L.R. 58 [*Hardman*], and *Lee v. Taunton & Somerset N.H.S. Trust* [2001] 1 F.L.R. 419 [*Lee*]. For further discussion of these cases, see *infra* text at note 29 *et seq*.

10 [2001] E.W.C.A. 530, [2002] Q.B. 266 [*Parkinson*, cited to Q.B.].

11 [2003] H.C.A. 38, (2003) 199 A.L.R. 131 [*Melchior*, cited by paragraph number to A.L.R.].

12 [2003] U.K.H.L. 52, [2003] 3 W.L.R. 1091 [*Rees*, cited to W.L.R.].

should be awarded for the cost of raising a child who had been born as a result of an act of medical negligence. The case involved a claim for damages for wrongful conception brought by the parents of a healthy baby girl. The child was conceived and born after the husband had wrongly and negligently been informed, following a vasectomy, that he was now sterile and that he and his wife need no longer use contraceptives. The question before the House was therefore whether the doctor responsible for giving the negligent advice—and, more significantly, his employers, the local health authority—should be held liable for the costs associated with the child's upbringing.

When *McFarlane* was decided, the prevailing English law—as represented by *Emeh* and the cases which had followed it[13]—recognized liability by a medical authority for the cost of raising a child, whether healthy or disabled, in circumstances where the authority was responsible for wrongly preventing the conception and/or birth of the child in question. This position was, moreover, generally regarded as being consistent with the category of claims for pure economic loss arising from professional negligence which had come to be recognized following the House of Lords' application of the principle established in *Hedley Byrne & Co. Ltd. v Heller & Partners*[14] in *Henderson v. Merrett Syndicates Limited*.[15] Yet in *McFarlane* all five members of the court—for reasons which, it must be said, were neither fully canvassed nor entirely consistent—held that claims for the cost of raising a healthy child should cease to be allowed.

In spite of the obvious moral and ethical connotations of the case, their Lordships sought to distance themselves from issues of public policy[16]—although their judgments indicate the impossibility in practice of separating the law from social considerations in a case of this kind. Lord Millett based his judgment on the premise that a healthy child, whether planned or not, should always be treated as a blessing, and that it would be "subversive of the mores of society for parents to enjoy the advantages of parenthood while transferring to others the responsibilities which it entails."[17] Lord Hope considered that, since the benefits of having a healthy child were incalculable, it could not be said that the financial obligations involved in raising such a child outweighed the benefits of parenthood, and so it would not be fair, just or reasonable to relieve the parents of these obligations.[18] Lord Clyde (who preferred an analysis based on extent of loss rather than duty of care) referred to "the expense of child rearing [being] wholly disproportionate to the doctor's culpability,"[19] and Lord Slynn, taking a similar view albeit from a duty angle, stated that "[t]he doctor

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13 See *supra* note 3.

14 [1964] A.C. 465 [*Hedley Byrne*].

15 [1995] 2 A.C. 145 [*Henderson*].

16 Lord Slynn, *supra* note 8, at 76 stated that his conclusion was "not the result … of the application of public policy"; Lord Steyn at 83 referred to avoiding the "quicksands" of public policy; Lord Hope at 95 reasoned that the matter was "ultimately one of law, not of social policy", Lord Clyde at 100 (quoting Burrough J. in *Richardson v. Mellish* (1824) 2 Bing. 229 at 252) described policy as "a very unruly horse, and once you get astride of it you never know where it will carry you"; and Lord Millett at 108 asserted that legal policy was not the same as public policy "even though moral considerations may play a part in both".

17 *Ibid.* at 114. See his Lordship's comment that: "It is morally offensive to regard a normal, healthy baby as more trouble and expense than it is worth."

18 *Ibid.* at 97.

19 *Ibid.* at 106.

undertakes a duty of care in regard to the prevention of pregnancy: it does not follow that the duty includes also avoiding the costs of rearing the child if born and accepted into the family."[20]

Lord Steyn was the only judge openly to recognize the moral aspect of the case.[21] He drew on the perceived views of the general public (in the form of commuters on the London Underground) in concluding that, if such ordinary men and women were to be asked "Should the parents of an unwanted but healthy child be able to sue the doctor or hospital for compensation equivalent to the cost of bringing up the child for the years of his or her minority?":

> I am firmly of the view that an overwhelming number … would answer the question with an emphatic "No." And the reason for such a response would be an inarticulate premise as to what is morally acceptable and what is not … The realisation that compensation for financial loss in respect of the upbringing of a child would necessarily have to discriminate between rich and poor would, surely, appear unseemly to them. It would also worry them that parents may be put in a position of arguing in court that the unwanted child, which they accepted and care for, is more trouble than it is worth. Instinctively, the traveller on the Underground would consider that the law of tort has no business to provide legal remedies consequent on the birth of a healthy child, which all of us regard as a good thing.[22]

Even Lord Steyn, though, asserted that his judgment was based ultimately on considerations of distributive justice rather than on pure considerations of morality.[23]

The unanimous finding that there could be no liability for the child's upbringing did not lead their Lordships to conclude that the health authority should be entirely immune from liability. All five judges agreed that some claim should be available with respect to the unplanned pregnancy, although there was limited agreement as to exactly what this claim should cover. All except Lord Millett were willing to treat the mother's condition as physical injury,[24] and thus to award damages for the pain, suffering and inconvenience of pregnancy and childbirth.[25] Lord Millett was not willing to award anything to the mother for the pain and suffering associated with the pregnancy and birth, although he would have been prepared to make a conventional award of £5,000 to recognise the parents' loss of autonomy in choosing to limit the size of their family.[26] The majority—again with the exception of Lord Millett, and

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[20] *Ibid.* at 76.

[21] See, *e.g.*, his Lordship's observation, *ibid.* at 82-83: "It may be objected that the House must act like a court of law and not like a court of morals. That would only be partly right. The court must apply positive law. But judges' sense of the moral answer to a question, or the justice of the case, has been one of the great shaping forces of the common law".

[22] *Ibid*.

[23] *Ibid*. Several commentators, together with judges in subsequent cases, have since commented on the probability that underlying the notion of distributive justice in *McFarlane* was an unwillingness on the part of their Lordships to stretch the financially troubled National Health Service still further by encouraging awards of this kind. See, *e.g.*, the observations of Kirby J. in *Melchior*, *supra* note 11, and Lord Bingham of Cornhill in *Rees*, *supra* note 12, as well as the views expressed by Michael Jones in "Bringing Up Baby" 9 Tort L. Rev. 14 at 19.

[24] This was particularly clear in the judgment of Lord Steyn, *supra* note 8 at 81.

[25] *Ibid.* at 76, 84, 87 and 105.

[26] *Ibid.* at 114. Since none of the other judges accepted this proposal, no such award was made.

apparently Lord Clyde—considered that the mother should also recover for loss of earnings during pregnancy,[27] and Lord Hope (and possibly Lord Slynn) would even have been prepared to extend this to her loss of earnings for an undetermined period following the baby's birth.[28] But these were comparatively minor concessions in a decision which effectively eradicated the possibility of suing in negligence for the cost of raising a healthy child.

B. *Parkinson and Its Precursors*

In the immediate aftermath of *McFarlane*, three wrongful birth claims came before the lower courts.

In the first case, *Rand*,[29] antenatal screening had failed to detect that a foetus had Down's Syndrome. Had the parents been aware of this, they would have had the opportunity to terminate the pregnancy, and having been denied this opportunity, they claimed compensation for expenses associated with the child's disabilities. The judge, Newman J., concluded that wrongful birth cases (where the pregnancy was initially desired, but would have ceased to have been so had the parents been made aware of the disabled condition of the foetus) were different from wrongful conception cases like *McFarlane* (where the pregnancy itself—although resulting in the birth of a healthy child—was undesired) and should thus be treated differently. One difference was that since the parents in a wrongful birth case intended to have a child, they could not claim that the birth itself was damage, and so their only claim was for economic loss.[30] However, the arguments which had prevailed for refusing to allow a claim for economic loss in *McFarlane* were not applicable in a wrongful birth case, where the incalculable benefits of bearing a healthy child were not relevant, and where the hypothetical commuter on the London Underground would be unlikely to consider it morally repugnant to focus on compensation for the consequences of disability. It was foreseeable that if the relevant health authority failed properly to screen mothers, thus depriving parents of their rights under the Abortion Act 1967, those parents would suffer damage, and that damage should be recoverable under the extended *Hedley Byrne* principle.[31] Newman J. awarded compensation to cover the economic consequences flowing from the child's disability.

The case was settled before appeal, but a similar issue then arose in *Hardman*.[32] In this case, Henriques J., faced with a claim brought by a mother who gave birth to a child with severe disabilities after doctors failed to diagnose that she had contracted rubella while she was pregnant, held that *McFarlane* did not affect the law concerning children born with disabilities and awarded damages for the costs associated with the child's condition. *Hardman* was followed by *Lee*,[33] in which antenatal screening

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27 *Ibid.* at 76, 84, 89, 106 and 114.

28 *Ibid.* at 97 and 76.

29 *Rand*, *supra* note 9.

30 *Ibid.* at 43 and 67. However, Newman J. did award damages for the mother's pain and suffering on discovering that her newborn baby was disabled. Perhaps rather surprisingly, he also awarded damages for the delivery of a subsequent child whom the mother bore to prove to herself that she could have a healthy baby.

31 *Ibid.* at 43-47 and 59-60.

32 *Hardman*, *supra* note 9.

33 *Lee*, *supra* note 9.

had failed to diagnose that a foetus was suffering from spina bifida, and the child in question had therefore been born with severe congenital abnormalities. The parents had specifically sought the screening since they feared foetal disability as a result of medication which they were both taking. Toulson J., deciding the case, was of the view that the two main lines of reasoning to be drawn from *McFarlane* were that either the birth of a child was a blessing, for which no compensation should be given, or that doctors should not be made to compensate parents for the disproportionately large expense of raising a child whose very existence would be enriching (the first approach being attributed to Lords Millett, Steyn and Hope and the second to Lords Slynn and Clyde). Neither line of reasoning could apply in the case of a child born with disabilities. Toulson J. therefore awarded damages for the cost of raising the child.[34]

It was against this background that the Court of Appeal reached its decision in *Parkinson*. The case was an unusual one since it concerned a child born with behavioural problems attributable to an unidentifiable condition following a failed sterilisation procedure. The mother had been informed during her pregnancy that the child might be disabled, but she had chosen not to have an abortion. *Parkinson* therefore straddled the divide between actions for wrongful conception and actions for wrongful birth, involving as it did a claim for the cost of raising a disabled child who had been conceived following a failed medical procedure. The Court of Appeal decided that the mother could recover damages for the costs associated with her child's condition, even though her sterilisation had *not* been carried out specifically for the purpose of preventing the birth of a disabled child, thus effectively sidelining *McFarlane* in claims for the cost of raising a child born with disabilities.

In her judgment, Hale L.J. embarked on an extensive examination of the wide-reaching implications of pregnancy, childbirth and motherhood, and traced the limitations which all three conditions placed on a woman's autonomy. Had she not been constrained by the binding decision in *McFarlane*, she would have treated the cost of raising a child not as purely economic loss but rather as a consequential loss flowing from invasion of that autonomy by a doctor who failed to control a woman's fertility. She discerned little consensus in their Lordships' reasoning in *McFarlane*, and observed that the unintended effect of the decision might well be to encourage abortions among women who had sought to be sterilized for economic reasons and who would now have no means of obtaining financial assistance in raising their unplanned children.[35] She also questioned Lord Steyn's arguments about distributive justice and commuters on the Underground on the basis that:

> The traveller is not here being invoked as a hypothetical reasonable man but as a moral arbiter. We all know that London commuters are not a representative

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[34] *Lee*, *ibid.* at 430. Although Newman, Henriques and Toulson JJ. all agreed in their respective decisions that the parents could succeed in their claims, they disagreed on the issue of assessing damages. Newman J. in *Rand* (*supra* note 9 at 58) took the view that the parents' losses should be assessed on the basis of their personal circumstances, while Henriques J. in *Hardman* (*ibid.* at 73-75) and Toulson J. in *Lee* (*ibid.* at 431-433) considered that it would be unpalatable to award less to a poorer parent. And although Newman J. considered *McFarlane* to mean that the costs of raising a healthy child must be deducted from the damages awarded, Toulson J. (*ibid* at 433) considered such an exercise to be artificial and impracticable. For further discussion of the decisions in *Rand*, *Hardman* and *Lee*, see Hoyano, *supra* note 5 at 892-896.

[35] *Supra* note 10 at 286-287.

> sample of public opinion. We also know that the answer will crucially depend upon the question asked and the amount of relevant information and argument given to help answer it. The fact that so many eminent judges all over the world have wrestled with this problem and reached different conclusions might suggest that the considered response might be less emphatic and less unanimous.[36]

However, Hale L.J. considered that even if one *were* to assume that the Underground commuters would object to allowing a claim for the cost of raising a healthy child, this objection would not be likely to extend to a disabled one. Drawing on some of the judgments in *McFarlane* to frame the notion of "deemed equilibrium" (under which the benefits associated with raising a healthy child would be deemed to balance out the costs, thus negativing the claim), her Ladyship concluded that although this concept carried the danger of commodifying children—an objection subsequently relied on heavily by the minority in *Melchior*[37]—it crucially allowed a disabled child to be regarded as having the same worth and as offering the same benefits as a healthy child, but to be classified differently when it came to compensation because he cost more. This she felt would be regarded as unobjectionable by Lord Steyn's Underground commuters.[38]

Brooke L.J. also discerned few common features in the judgments in *McFarlane* (concluding that their Lordships "spoke with five different voices")[39] and was of the view that, whatever its findings with respect to healthy children, the decision gave no clear indication of the position to be adopted in cases concerning those born with disabilities. He therefore considered himself free to reason from first principles. Most of these principles (such as the fact that it was foreseeable that a child might be conceived if a surgeon were to carry out a sterilisation procedure negligently, and that the category of claimants in such cases would be limited to the parents of the unwanted child in question)[40] would have been equally applicable to healthy children and were clearly based on what his Lordship saw as the quite reasonable position under which such claims had been allowed prior to *McFarlane*. However, the key finding—and the one which was confined to situations involving disabled children—was that it was fair, just and reasonable to award damages to cover the special ("often staggering and quite debilitating")[41] costs involved in bringing up a child with serious disabilities. In terms of distributive justice, he considered that most people would find such an award acceptable as long as that award were to be confined to the additional expenses associated with the child's condition. Sir Martin Nourse agreed that damages should be awarded.[42] The Court of Appeal refused leave to appeal to the House of Lords and the defendant, the National Health Service (N.H.S.), did not pursue the matter.

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36 *Ibid.* at 295.
37 See *infra* text at notes 60 *et seq*.
38 See *supra* note 10 at 295.
39 *Ibid.* at 276-277.
40 *Ibid.* at 282-283.
41 *Ibid.* at 280, quoting from *Fassoulas v. Ramey* 450 So 2d 822 (1984, Florida Sup. Ct.). For further analysis of Brooke L.J.'s judgment, see Hoyano, *supra* note 5 at 896-897.
42 *Supra* note 10 at 295.

C. *Melchior*

Into this picture came the decision of the Australian High Court in *Melchior*. The case concerned a couple who conceived their third child after the mother, Mrs Melchior, had undergone a tubal ligation. While carrying out the procedure, the defendant doctor, Dr Cattanach, had failed to clip her right fallopian tube, since he wrongly believed it had been removed. He did not, therefore, warn her after the procedure that she might still be fertile. She subsequently became pregnant and gave birth to a healthy child. Following the birth of this child, the parents sued the defendant in contract and tort for the cost of raising the child. The contract claim was not pursued, but at trial the defendant was found liable in negligence for failing to inform the mother of the possibility that the procedure might not succeed due to the presence of her functioning right tube.[43] An appeal by the defendant to the Queensland Court of Appeal failed,[44] and the defendant then appealed to the High Court.

The only question before the High Court was whether the Court of Appeal had been wrong to hold that the parents were entitled to damages for the reasonable costs of maintaining their child, since the issues of duty, breach, causation and remoteness, together with liability for the mother's pecuniary and non-pecuniary losses arising from her pregnancy, were all agreed in the claimants' favour. By a majority of four to three the court held that the Court of Appeal had been correct in upholding the trial judge's decision to award damages for the costs of raising the child.[45]

The three very detailed majority judgments (only McHugh and Gummow J.J. produced a joint judgment) contained a number of common threads, as did the three similarly full minority ones. The majority, having accepted the existence of the elements of a negligence claim, found it comparatively straightforward to conclude that compensation was thus required under normal tort principles. The minority, on the other hand, based their decision primarily on policy objections to the claim.

Of the majority judges, Kirby J., normally a willing advocate of the open consideration of policy issues, regretted the demise in Australia of the *Caparo* test,[46] the absence of which he feared would lead to a less transparent approach to such matters. Without *Caparo* to assist him, he based his judgment on what he described as "ordinary principles of tort liability."[47] In his opinion, the case was not confined by the parameters of pure economic loss, since it involved damages for the economic consequences of a physical event. Moreover, to deny a claim of this nature would "provide a zone of legal immunity to medical practitioners engaged in sterilisation procedures that is unprincipled and inconsistent with established legal doctrine."[48]

Kirby J. recognised that five alternative outcomes were possible. The first (conforming with the views of Lord Millett in *McFarlane*) would be to hold that every

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43 *Melchior v. Cattanach* [2001] Aust. Torts Reps. 81.

44 *Cattanach v. Melchior* [2001] Q.C.A. 246; BC200103372 (McMurdo P. and Davies J.A.; Thomas J.A. dissenting).

45 For discussion of the High Court's decision in *Melchior*, see, *e.g.*, John Seymour, "*Cattanach v. Melchior*: Legal Principles and Legal Policy" (2003) 11 Torts Law Journal at 208 and Peter Cane, "The Doctor, the Stork and the Court: a Modern Morality Play" (2004) 120 Law. Q. Rev. at 23.

46 *Supra* note 11, at paras. 121-122. The reference is of course to the three-part test of foreseeability, proximity and "just and reasonabless" formulated in *Caparo Industries v. Dickman* [1990] 2 A.C. 605.

47 *Supra* note 11 at para. 177.

48 *Ibid.* at para. 149.

child should be regarded as a "blessing," and thus to refuse to recognise any claim in negligence in these circumstances, whether the child in question was healthy or disabled.[49] This alternative Kirby J. rejected both on the basis that it was a fiction to assume that every child indeed constituted a blessing, and on the basis that the claim was, anyway, not a claim with respect to the child's very existence but rather a claim for the costs involved in raising it.[50]

The second alternative (in line with the decision in *McFarlane*) would be to accept the validity of a claim in negligence in these circumstances, but to confine it to the immediate physical and economic consequences of pregnancy and delivery. The third would be to extend damages to the cost of maintaining a child, but only if the child (as in *Parkinson*) and/or its parent or parents[51] suffered from a disability. Both outcomes Kirby J. regarded as "arbitrary" and "unjust" or "unacceptable."[52]

The fourth alternative—and one which Kirby J. admitted to having initially found attractive—would be to extend damages to cover the costs of maintaining any child, whether healthy or disabled, but with a reduction to reflect the joys and benefits of parenthood. On consideration, however, his Honour was of the opinion that, as a matter of legal principle, there was no justification for taking account of such benefits, which had "nothing to do with the legal wrong for whose foreseeable consequences the tortfeasor must restore the parents."[53] He therefore concluded that the fifth alternative—that of extending damages to the cost of raising any child with no reduction to take account of the benefits of child-rearing—was the correct one. In the case at hand, this alternative would "entitle the victims of the appellants' wrong to recover from the appellants all aspects of their harm that are reasonably foreseeable and not too remote."[54]

Like Kirby J., McHugh and Gummow JJ. considered that not every birth could be regarded as a blessing and that, anyway, a claim for the cost of raising a child must be separated from the emotional issues involved:

> The unplanned child is not the harm for which recompense is sought in this action; it is the burden of the legal and moral responsibilities which arise by reason of the birth that is in contention. The expression "wrongful birth" … is misleading and directs attention away from the appropriate frame of legal discourse. What is wrongful in this case was not the birth of a third child to Mr. and Mrs. Melchior but the negligence of Dr. Cattanach.[55]

Neither were their Honours impressed by the possibility (which they considered to be "speculative" at best)[56] that an award of damages now might later harm the child when he learned that his conception had been undesired and that his birth had

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49 See *supra* note 8 at 112, and *supra* note 17.

50 *Supra* note 11 at para. 148.

51 At the time the judgments in *Melchior* were handed down, the decision of the English Court of Appeal in *Rees* allowed claims for maintenance by a disabled parent. However, the decision of the House of Lords in that case was awaited, and the House subsequently reversed the Court of Appeal's position. See discussion *infra*, text at note 75 *et seq*.

52 *Supra* note 11, at paras. 162 and 166.

53 *Ibid.* at para. 175.

54 *Ibid.* at para. 179.

55 *Ibid.* at para. 68.

56 *Ibid.* at para. 79.

given rise to a claim for compensation. Moreover, there was no argument to justify reduction of damages to take account of the pleasures of child-rearing, since "[t]he benefits received from the birth of a child are not legally relevant to the head of damage that compensates for the cost of maintaining the child."[57]

Callinan J. while acknowledging that he found it "personally distasteful to be required to assess damages of the kind claimed"[58] nevertheless considered the decision to be a relatively simple one to reach:

> The appellants were negligent. The respondents as a result have incurred and will continue to incur considerable expense. That expense would not have been incurred had the first appellant not given negligent professional advice. All of the various touchstones for, and none of the relevant disqualifying conditions against, an award of damages for economic loss are present here.[59]

The minority judges were (not surprisingly) more impressed by the reasoning in *McFarlane*, and in particular by the views of the most cautious of the judges in that case, Lord Millett. Approving Lord Millett's analysis, Hayne J. held that public policy militated against an inquiry into the monetary worth of the child,[60] an inquiry which would encourage parents to argue that the burdens of child-rearing outweighed the benefits, and which would lead them to treat "the child as a commodity to be given a market value."[61] He would therefore have restricted any claim in circumstances such as these to "those matters which affect the parent alone".[62]

Heydon J., too, relied heavily on public policy in his judgment, and shared the view that it would be wrong to allow the 'commodification' of the child:

> A child is not an object for the gratification of parents, like a pet or an antique car or a new dress. Nor is it a proprietary advantage which has accompanying burdens needing to be met if the advantage is to be fully secured …[63]

His judgment was, however, also concerned with the practical consequences of allowing claims of this kind. He asked how the appropriate level of compensation could be assessed and wondered what would (or should) happen in claims by families with high expectations about private schooling up to the age of 18—and possibly beyond, or in situations where an additional child might make the family wish to move to a bigger house or to extend their existing one.[64] Moreover, in comparison with personal injury litigation, where there were a number of moral and legal safeguards against exaggerating the damage for which a claim was being made, his Honour worried that claimants would be more likely to overstate the expenses associated with bringing up a child:

> … [A] new order of litigation would arise if the law permitted plaintiffs to sue in respect of the apprehended cost of future events relating to the ordinary needs and

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57 *Ibid.* at para. 90.
58 *Ibid.* at para. 296.
59 *Ibid.* at para. 299.
60 *Ibid.* at paras. 257-258.
61 *Ibid.* at para. 261.
62 *Ibid.* at para. 262. Hayne J. referred in this respect to "the pain and suffering of pregnancy and childbirth, and those costs of the failed procedure that have been thrown away."
63 *Ibid.* at para. 353.
64 *Ibid.* at paras. 306 to 12 and paras. 338 to 346.

> weaknesses of their children. The restraints on plaintiffs exaggerating the needs and weaknesses of their children are likely to be much more attenuated than the restraints against plaintiffs exaggerating their own needs and weaknesses.[65]

Gleeson C.J. expressed similar concerns about the means of assessing such claims ("If the cost of birthday and Christmas presents is to be included, why not … the expense associated with a wedding? If the cost of schooling is included, why not … the cost of tertiary education?").[66] His concerns in this respect were influenced—much as the judgments of Lords Clyde and Slynn had been in *McFarlane*—by the view that it would not be reasonable to hold a doctor liable for such expenses, since this would go beyond the "reasonable restitution"[67] required by tort law. His Honour concluded that the claim involved:

> … treating, as actionable damage, and as a matter to be regarded in exclusively financial terms, the creation of a human relationship that is socially fundamental. The accepted approach in this country is that "the law should develop novel categories of negligence incrementally and by analogy with established categories." The recognition of the present claim goes beyond that, and is unwarranted.[68]

D. *Rees*

Some of their Honours in *Melchior* referred to the recent decision of the English Court of Appeal in *Rees*, and to the fact that the case had been appealed to the House of Lords, but that their Lordships' decision was still awaited.[69] Some three months later that decision was delivered.

Rees involved a healthy baby born, following a negligently performed sterilisation procedure, to a mother who was severely visually handicapped. She had sought to be sterilised primarily, although not exclusively, because of her disability. Her action against the relevant medical authorities was for the additional costs which she would incur in raising her child due to her condition. The trial judge, Stuart Brown Q.C., held (somewhat reluctantly) that the decision in *McFarlane* precluded the claim, since the mother's losses—in employing extra help or calling on friends and family to assist—would be the same as those of many other mothers and were not of the same nature as those in the case of a handicapped child.[70]

On appeal to the Court of Appeal, two of the three judges—Hale and Robert Walker L.JJ.—reversed this finding, although their reasons for doing so were rather different. Hale L.J., adopting her own analysis in *Parkinson*, drew on the concept of "deemed equilibrium" which she had favoured in that case. In her opinion, *McFarlane* was distinguishable from the present case because, unlike a healthy parent, a disabled parent could not raise a child unaided and must necessarily draw on the assistance of others.[71] Robert Walker L.J., on the other hand, did not find any grounds

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65 *Ibid.* at para. 339.
66 *Ibid.* at para. 32.
67 *Ibid.* at para. 36.
68 *Ibid.* at para. 39 (quoting Brennan J. in *Sutherland Shire Council v. Heyman* (1985) 157 C.L.R. 424 at 481).
69 See, *e.g.*, *ibid.* at para. 163, for reference by Kirby J. to the Court of Appeal's decision in *Rees*.
70 The trial judgment, delivered on 9 March 2001, was unreported.
71 [2003] Q.B. 20 at 28.

for the "deemed equilibrium" view in the judgments in *McFarlane*, and preferred to draw on what he saw as the "moral intuition"[72] of the courts in both that case and *Parkinson*. The claimant's disability (which had been known to the surgeon and had been accepted by him as the main reason for her requiring sterilisation) meant that it was fair, just and reasonable to hold that he had assumed a responsibility to her. Given the increasing recognition of the need to treat disabled persons with special consideration, there was nothing morally repugnant about awarding damages for expenses which she would incur due to her visual impairment.[73] Waller L.J. dissented. In a powerfully worded judgment, he expressed his discomfort with the notion that the mother's disability alone should enable her to claim when healthy parents (however desperate their circumstances) were not able to do so. He also considered that, once the claimant adjusted to life with the child, she might actually find her son's presence to be beneficial.[74]

In the House of Lords, a bench of seven Law Lords was asked to consider two issues. The first was whether *McFarlane* should be overruled, and the second was whether, if *McFarlane* remained good law, it would preclude recovery for the costs incurred by a disabled parent in raising a healthy child. All seven judges agreed that *McFarlane* had been correctly decided and should not be overruled. By a bare majority the court reversed the decision of the Court of Appeal and held that the costs of raising the child were irrecoverable.

The majority—Lord Bingham of Cornhill, Lord Nicholls of Birkenhead, Lord Millett and Lord Scott of Foscoe—held that no damages should be awarded to cover the costs of bringing up the child which flowed from the mother's disability (although, as established by *McFarlane*, the mother could recover for the pain and suffering associated with pregnancy and birth). They did, however, hold—in a decision which drew on the views of Lord Millett in *McFarlane*—that she should receive a conventional award, set at £15,000, to reflect the wrong which she had suffered in being denied the opportunity to live as she had planned.

Lord Bingham, who discussed at length both *McFarlane* and *Melchior* (and in particular Kirby J.'s formulation of the possible outcomes in a case of this kind),[75] acknowledged that an orthodox application of tort principles would have allowed recovery in *McFarlane* under the rules governing liability for negligent misstatements.[76] Their Lordships in *McFarlane* had adopted different approaches when

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72 *Ibid.* at 30

73 *Ibid.* at 32.

74 *Ibid.* at 35. In the case of *A.D. v. East Kent Community N.H.S. Trust* [2002] F.C.R. 658, [2002] E.W.H.C. 2256, which was decided after the Court of Appeal reached its decision in *Rees*, Cooke J. refused to award damages to the totally disabled mother of a healthy child. The mother's disability rendered her incapable of looking after the child (who was cared for by its grandmother). In his *obiter dicta*, Cooke J. criticised the Court of Appeal decisions in *Parkinson* and *Rees*, both of which he considered violated the principles underlying *McFarlane*. For further discussion of Cooke J.'s judgment, see Hoyano, *supra* note 5 at 902-903. Cooke J.'s decision was affirmed by the Court of Appeal, [2003] 3 All E.R. 1167, [2002] E.W.C.A. Civ. 1872, on the basis that there were no 'additional' or 'extra' costs arising from the mother's disability, since the costs borne by the child's grandmother were merely those which a healthy mother would have incurred.

75 See discussion *supra* at note 49 *et seq*.

76 *Supra* note 12 at 1094. Interestingly, neither Lord Bingham nor the other members of the House when deciding *Rees* discussed the fact that whereas the claim in *McFarlane* had related to the giving of negligent advice, the claim in *Rees* related to negligent performance of the surgery. Given the restrictive attitude

refusing to apply the orthodox principles, but all had refused to do so "for reasons of policy (legal, not, public policy),"[77] which Lord Bingham considered to be completely justified, and which he now applied in *Rees*.[78] However, his Lordship felt that some payment should be made to recognise the fact that the mother had lost the right to choose to remain childless, and he concluded:

> I would … support the suggestion favoured by Lord Millett in *McFarlane* … that in all cases such as these there would be a conventional award to mark the injury and loss … (I have in mind a conventional figure of £15,000) and I would add this to the award for pregnancy and birth. This solution is in my opinion consistent with the ruling and rationale in *McFarlane*. The conventional award would not be, and would not be intended to be, compensatory. It would not be the product of calculation. But it would not be a nominal, let alone a derisory, award. It would afford some measure of recognition of the wrong done. And it would afford a more ample measure of justice than the pure *McFarlane* rule.
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> I would for my part apply this rule also, without differentiation, to cases in which either the child or the parent is (or claims to be) disabled.[79]

Lord Nicholls took the view that while "on ordinary principles the foreseeable adverse financial consequences of a legal wrong may expect to be borne by him who committed the wrong", it was nevertheless crucial to bear in mind that "[r]ecoverability of damages is always bounded by considerations of fairness and reasonableness."[80] Based on such considerations, and in particular on the idea that it would be "a disproportionate response to the doctor's wrong"[81] to hold the National Health Service liable for the costs of bringing up the child, he agreed that the decision in *McFarlane* should stand. He further agreed with the award of £15,000 to recognise the wrong which the mother had suffered. While recognising the essentially arbitrary nature of the sum decided upon, he preferred this to the alternative of means-testing.

Lord Millett, who in *McFarlane* had firmly opposed the notion of compensating parents for the costs of raising healthy children, unsurprisingly saw no reason to make an exception where the parents of such children were themselves disabled. He believed that although the individual judgments in *McFarlane* had involved differences of approach, they had been based on the underlying idea expressed in his own judgment that "[i]t is morally offensive to regard a normal, healthy baby as more trouble and expense than it is worth."[82] In this respect, he was openly critical of

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of the English courts to claims for economic loss caused by negligent acts, one might have expected this point to have been taken. However, the courts in general seem nowadays to consider this distinction to be of little significance where negligence by professionals is at issue, given that the 'professional skill' category (flowing from the decision in *Henderson*, *supra* note 15) allows the imposition of a duty of care whether the negligence complained of takes the form of an act or a statement. This probably explains their Lordships' failure to note the distinction. For further discussion, see *infra* text at note 103 *et seq*.

77 *Supra* note 12 at 1095.

78 These included their Lordships' unwillingness to regard a healthy child as a financial burden and nothing else, and their unwillingness make a financially pressed National Health Service accountable for the costs of raising such a child. For further discussion of the latter point, see *supra* note 23 and *infra* notes 110 and 114.

79 *Supra* note 12 at 1097.

80 *Ibid*. at 1098.

81 *Ibid.* at 1099. In making this point, his Lordship echoed the opinion of Lord Clyde in *McFarlane*, although taken from a duty, rather than an extent of loss, perspective. See *supra* note 19.

82 *Supra* note 12 at 1126.

Hale L.J.'s analysis both in *Parkinson* and in the Court of Appeal in this case that the decision in *McFarlane* had rested on a theory of "deemed equilibrium"[83]—"such a theory cannot be extracted from the speeches; on the contrary, it is entirely inconsistent with them."[84] His Lordship considered that the question of whether *Parkinson* had been correctly decided was not relevant to this case and should be left open, although he did recognise that the costs associated with raising a disabled child could be treated differently from those associated with raising a healthy one, and expressed the view that he would not "find it morally offensive to reflect this difference in an award of compensation."[85] However, he saw no justification for extending this principle to disabled parents, and drew heavily on the dissenting judgment of Waller L.J. in the Court of Appeal to stress the arbitrariness of awarding damages to a disabled parent when no able-bodied parent, however dire the circumstances, would be able to recover, and to make the point that the birth of a healthy child to a disabled parent might in fact prove to be an advantage as the child grew up and became able to assist the parent.[86]

With respect to the conventional award which he alone had favoured in *McFarlane*, but which was now being approved by the majority in this case, Lord Millett observed that such an award "would not, of course go far towards the costs of bringing up a child … but it would not be meant to … a modest award would, however, adequately compensate for the very different injury to the parents' autonomy."[87]

The last of the majority judges, Lord Scott, agreed that general principles would require the claimant "to be placed in the same position he or she would have been in if the professional advice or services had been competently provided" but concluded that simply applying such general principles was difficult in cases of this kind "because the consequence of the negligence is the birth of a human being and because assessments about the value or burden of a particular human life are impossible."[88] *McFarlane*, rightly in his Lordship's view, had established an exception to general principles which recognised the uniqueness of such claims. This case differed from *McFarlane* only because the mother was blind, which his Lordship did not consider sufficient to take it outside the ambit of that decision ("a balance sheet of detriment and benefit … cannot be drawn up").[89] Although not critical to this case, Lord Scott questioned the decision to award damages in the case of a disabled child in *Parkinson*, since the parents in that case had asked for the relevant sterilisation to be performed simply to avoid conception in general, rather than to avoid the conception of a disabled child. Only in the latter category would his Lordship have been willing to make an exception to *McFarlane*.[90] He agreed that in this case a conventional sum of £15,000 should be awarded.[91]

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83 See *supra* text at notes 37 and 71.

84 *Supra* note 12 at 1126. Lord Millett was not alone in criticising the "deemed equilibrium" analysis. See, *e.g.*, the judgments of two of the minority judges, Lords Hope and Hutton, at 1110 and 1121.

85 *Ibid*.

86 *Ibid.* at 1127. (For the judgment of Waller L.J. in the Court of Appeal, see *supra*, note 74.)

87 *Ibid*. at 1130.

88 *Ibid*. at 1132.

89 *Ibid*. at 1135.

90 *Ibid.* at 1136.

91 *Ibid*.

The three dissenting judges—two of whom (Lord Steyn and Lord Hope) had decided *McFarlane*—considered that this case fell outside the *McFarlane* principle. Lord Steyn and Lord Hope were, moreover, extremely critical of the legal basis for the conventional award favoured by their majority colleagues.

Lord Steyn was of the view that their Lordships in *McFarlane* had not addressed their minds to the issue of a disabled mother giving birth to a healthy child, which meant that the matter now had to be considered for the first time. Although impressed by the dissenting opinion of Waller L.J. in the Court of Appeal, in which his Lordship had stressed the arbitrariness of making awards to disabled parents when even the most needy healthy ones had no claim, Lord Steyn was more persuaded by the views of Robert Walker L.J. who, while recognising the danger of arbitrary lines being drawn, had nevertheless held that recovery should not be denied to a deserving category of claimants.[92] Lord Steyn concluded:

> It is unrealistic to say that there is only one right answer. But a decision must be made, and that decision must represent the best available choice and hopefully a decision defensible as delivering justice … it is logically not straightforward to treat the present case simply as an extension of *Parkinson*. On the other hand, I consider (like Hale and Robert Walker L.J.J.) that the law should give special consideration to the serious disability of a mother who had wanted to avoid having a child by undergoing a sterilisation operation. I am persuaded that the injustice of denying to such a seriously disabled mother the limited remedy of the extra costs caused by her disability outweighs the considerations emphasised by Waller L.J.[93]

In his judgment, Lord Hope took issue with Lord Millett's view that the judges in *McFarlane* had basically shared his view that it was morally offensive to treat a healthy child as more trouble than it was worth ("I did not base my decision on a belief that it was morally repugnant to award damages for the birth of a healthy child … the fundamental value which is attached to human life is an ethical, not an economic, concept, and the problem … [is] legal, not theological ").[94] Lord Hope regarded the real problem in cases of this kind to be the calculating the additional costs which a disabled parent would incur. Like Lord Steyn, he was impressed by the views of Waller L.J. in the Court of Appeal, and he accepted that there might be considerable difficulties in determining the extent to which a mother's disability increased the cost of raising her child. However, also like Lord Steyn, Lord Hope ultimately preferred the reasoning of Robert Walker L.J., and held that these difficulties should not deter a court from considering the possibility of recovery. While accepting Lord Millett's point that a parent's reason for not wanting any (or more) children is normally irrelevant, his Lordship concluded:

> On balance … I have come to the view that the fact that the child's parent is seriously disabled does provide a ground for distinguishing *McFarlane* and that it would be fair, just and reasonable to hold that such extra costs as can be attributed to the disability are within the scope of the tortfeasor's duty of care and are recoverable …

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92 See *supra* notes 72 and 73.
93 *Supra* note 12 at 1107.
94 *Ibid*. at 1108.

> … I have referred to the parent in whose favour the exception exists as "seriously disabled". The word "serious" is important. The normal incidents of an otherwise healthy life must be held to be covered by the *McFarlane* principle …[95]

Lord Hutton shared the view that difficulties of determination and assessment of damages should not lead to denial of a rule allowing recovery. He considered that, as an exception to the normal rules, *McFarlane* should not apply to either a disabled child or a disabled mother.[96]

The reservations of Lord Hope and Lord Steyn about the conventional award of £15,000 were very strongly worded. Lord Hope pointed out that although conventional awards are common in the field of personal injury, where it is impossible to place an accurate financial value on the loss of a limb or an eye, no such problem of assessment exists in cases involving financial loss. To make a conventional award in such circumstances would not only be novel, it would effectively mean the division of damages into two parts—general and special—with the intention of allowing the first while rejecting the second. This would be contrary to the compensatory function of tort law.[97] Although Lord Bingham had appeared to acknowledge that the award would not be compensatory, the other majority judges had not done so, which left considerable doubt as to the basis for the award.[98] Lord Steyn was similarly concerned. He observed that, if applied in the way suggested by Lord Bingham (the only judge specifically to state that the award would apply to all cases without differentiation), it would require a departure from *McFarlane* and a reversal of the position in *Parkinson*,[99] and, like Lord Hope, he objected to the fact that, having been rejected by the majority in *McFarlane*, the concept of a conventional award was now being mooted at a late stage in this appeal without having had the benefit of being considered in either of the courts below. Lord Steyn (expressing views shared by Lord Hope)[100] observed:

> … it is a great disadvantage for the House to consider such a point without the benefit of the views of the Court of Appeal. And the disadvantage cannot be removed by calling the new rule a "gloss". It is a radical and most important development which should only be embarked on after rigorous examination of competing arguments … No United Kingdom authority is cited for the proposition that judges have the power to create a remedy of awarding a conventional sum in cases such as the present. There is none … Like Lord Hope I regard the idea of a conventional award in the present case as contrary to principle … In my view the majority have strayed into forbidden territory … If such a rule is to be created it must be done by Parliament. The fact is, however, that it would be a hugely controversial legislative measure.[101]

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95 *Ibid*. at 1111 and 1113.
96 *Ibid*. at 1123.
97 *Ibid*. at 1114.
98 *Ibid*.
99 *Ibid*. at 1107.
100 *Ibid*. at 1115-1116.
101 *Ibid*. at 1107-1108.

III. Discussion

The law in this area has never been jurisdictionally consistent, but the present position is less settled—and more confused—than at any time since *Emeh* was decided almost twenty years ago. Although the lack of judicial consensus is perhaps not particularly surprising, given the fact that, as Lord Steyn observed in *Rees*, there is no "right answer" to the questions which the courts face in cases of this kind,[102] it is unfortunate that decisions in recent years have done little to focus or clarify the position.

One noteworthy feature of wrongful conception and wrongful birth cases in both England and Australia is the acceptance by the courts that the claims satisfy the requirements for recovery under the general principles of tort law, and that only if an exception to these general principles is recognised will the claims fail. This is noteworthy because, in spite of the fact—at least in wrongful conception cases—that the mother's claim for damages for pregnancy and childbirth stems from her physical condition and its economic consequences, most judges treat the claim for the costs of maintaining the child whom she bears as an action for pure economic loss.[103] Pure economic loss is, of course, an area of damage which normally poses considerable problems for claimants in negligence actions; and although several of the cases (like *McFarlane* and *Melchior*) have involved the more readily compensable category of economic loss caused by negligent misstatements,[104] others (like *Rees*) have involved claims for economic loss caused by negligent acts, an area in which the English courts, in particular, operate an almost blanket prohibition against recovery. Yet even the English courts have generally eschewed this line of reasoning,[105] largely because of

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[102] See *supra* note 93.

[103] In *McFarlane*, for example, Lords Hope, Slynn and Steyn all treated the claim for the costs of raising the child as a purely economic one, even though they had already recognised the costs of pregnancy and childbirth as being consequential on the mother's personal injury. (See, *e.g.*, the comments of Lord Steyn, *supra* note 8 at 79, that "Realistically, despite the pregnancy and child birth, the … claim is … for economic loss".) For criticism and comments on this approach, see Hoyano, *supra* note 5 at 886. However, not all judges consider the claims to involve pure economic loss. In *Melchior*, for example, Kirby J. observed: "The parents [are] entitled to recover damages for the economic consequences of the established physical event caused by the negligence without having to satisfy the special tests adopted by the common law for so-called 'pure' economic loss …" (see *supra* note 11 and *supra* text at note 48), while in *Parkinson*, Hale L.J. took the view that the damages associated with raising a child as consequential on the invasion of the mother's bodily autonomy (see *supra* note 10 at 286-287). And in *McFarlane*, Lord Millett considered that it did not make a difference whether the loss was pure or consequential, because such a distinction was "technical and artificial if not actually suspect in the circumstances of the present case" and because it had "no moral content". See *supra* note 8 at 112. For a comment on Lord Millett's views, see Jones, *supra* note 23 at 15, who observes: "if all technical and artificial distinctions in the law of torts could be rejected on the basis that they lacked moral content, the legal landscape would look rather different."

[104] In fact, in *McFarlane* at least two of the judges (Lord Steyn and Lord Millett) held that it would make no difference if the economic loss were to be occasioned by a statement or an act. See *supra* note 8 at 84 and 112.

[105] For example, in *McFarlane*, although Lords Hope, Slynn and Steyn all treated the claim as purely economic (see *supra* note 103) and alluded to the difficulties associated with such a claim (see, *e.g.*, Lord Steyn, who stated, *supra* note 8 at 79, that "[t]he development of a new ground of liability … for the recovery of economic loss must be justified by cogent reasons"), they ultimately decided the case on other grounds. See *supra* notes 18, 20 and 21.

the notion of "professional responsibility,"[106] under which a claimant may succeed against a professional who has negligently caused him harm, regardless of whether the negligence takes the form of an act or a statement and of whether it causes physical damage or economic loss. As a result, the class of damage in wrongful conception and wrongful birth claims is treated as fundamentally allowable, with the legitimacy of the claims being questioned (by those who do question their legitimacy) not because—or at least not primarily because—the claims relate to economic loss, but because they involve difficult questions of moral, ethical and distributive justice.

And it is these difficult questions which are responsible for the uncertainties and inconsistencies to be found in the law as it presently stands. For while most judges (with some refreshing exceptions, particularly in the Australian High Court)[107] seek to distance themselves from the idea that their judgments are based on matters of public or social policy, in practice these are the concerns which are at the very heart of their decisions. To describe—as Lord Bingham did in *Rees*—the decision in *McFarlane* as being based on "legal, not public policy,"[108] is to create a distinction so fine that it is almost meaningless.[109]

That is not to say that had there been more openness about public policy considerations in *McFarlane* the case would have been decided any differently. Whether a judge acknowledges that a decision is being reached for reasons of policy, or whether he rationalises it in terms of "justice and reasonableness," or according to principles of causation or extent of loss, the outcome is likely to be the same, because his instinctive view of what is right will be the same whatever label he uses to communicate that view. However, if their Lordships in *McFarlane* had been willing to reach a consensus on the underlying reasons for their decision (even if this consensus had been nothing more than the open acknowledgment of a desire to protect the already under-funded and over-stretched National Health Service from further calls on its resources)[110] there would have been a far greater chance of that decision offering a concise and clearly-stated precedent, which in turn might have led to its concise and clearly-stated application in subsequent cases. Instead, we have witnessed a number of disparate views being expressed at length in a number of cases, culminating in the decisions in *Parkinson* and *Rees*. Indeed, it is largely because of the difficulty in drawing a single ratio from the five judgments in *McFarlane* (beyond the fact that the costs of raising a healthy child are not recoverable), that judges in cases like *Parkinson* and now *Rees* have become embroiled in such a complicated process of

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[106] This notion had its starting point in the concept of 'assumption of responsibility' in *Hedley Byrne*,*supra* note 14, as subsequently extended and refined by their Lordships some thirty years later in *Henderson*, *supra* note 15.

[107] In *Melchior*, *supra* note 11, Callinan J stated at para. 291: "I cannot help observing that repeated disavowal in the cases of recourse to public policy is not always convincing" and Hayne J. opined, at para. 226, that there are times when "judges in a common law system must make choices about the way in which the common law is to develop."

[108] See *supra* note 77.

[109] See, too, Cane, *supra* note 45, who observes at 23-24 that in *Melchior* "each of the justices ultimately had to make a judgment-call based on a personal, value-laden assessment of the relative weight of the competing arguments". Cane then quotes Richard Ackland, who, in "Putting labels on court rulings that don't suit" *Sydney Morning Herald* (25 July 2003), wrote: "… judicial reasoning frequently involve[s] coating personal values in what law is to hand to lend support. To suggest that is not activism or adventurism is really too much of a con to swallow."

[110] See *supra* note 23. For criticism of such reasoning, see *infra* note 114.

reasoning and distinguishing.[111] This writer considers the decision in *McFarlane* to have been unjustifiably rigid in its refusal to award damages for the costs of raising children born as a result of medical negligence,[112] and is therefore to some extent grateful that the decision did not close the door to recovery in all such cases. But it must be said that the law in this area has not been well-served by the lack of a clear and coherently articulated principle in *McFarlane*.

Nor can the Australian High Court really be said to have contributed to the search for clarity in this area. The decision in *Melchior* is extremely long, and the six separate judgments make few concessions to the need for a clear statement of law. Moreover, although the decision allows for recovery even in the case of a healthy child, the narrow margin by which it was decided suggests that the future for this area of law might not be as secure as the outcome would otherwise indicate. At least one state has already reversed the decision by legislation,[113] and even if it survives in other states, the endorsement of *McFarlane* in *Rees* and the decision not to follow the path set by *Melchior* suggest that we are unlikely to see the English courts liberalising their stance during the next few years.

Rees is an important precedent. Not only is it the most recent case in this area, it is also a case decided by seven Law Lords. It is, however, open to criticism on several grounds. One is the acceptance by all seven judges that the decision in *McFarlane* was correct. Although not entirely surprising given *McFarlane's* relative newness, added to the fact that three of their Lordships (Lords Millett, Slynn and Hope) were common to both cases, the refusal to reconsider the blanket prohibition of claims for the costs of raising healthy children was still regrettable. Another ground for criticism is the reasoning which led the majority to leap from endorsement of *McFarlane* to the conclusion that, since no able-bodied parents could claim expenses associated with raising a healthy child, it would be wrong to allow any disabled parent to claim. As the minority in *Rees* demonstrated, this was by no means the obvious or automatic conclusion to be drawn from an application of *McFarlane*. Claims by disabled parents for the costs of raising healthy children will never be so numerous as to pose a danger of floodgates, and to take the view that it is effectively better to be unfair to all parents of healthy children rather than to make a concession for those who face special problems in raising such children involves a questionable application of logic. Moreover, underlying sympathy for the defendant and for its

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[111] See Hoyano, *supra* note 5 at 884 and 892 for further discussion of the failure of their Lordships to "establish a bright line" in *McFarlane*.

[112] For further criticism of *McFarlane*, see, *e.g.*, Jones, *supra* note 23 at 16, who observes that their Lordships treated the views of the parents in not wishing to have more children as "completely irrelevant … despite the fact that sterilisation is an accepted and commonly performed surgical procedure … and abortion is lawful when the criteria laid down in the *Abortion Act 1967* (U.K.) are satisfied. In other words, 'society' has already made the judgment that it is legitimate for individuals to make choices about parenthood."

[113] See Part 5 of Queensland's *Civil Liability Act 2003* relating to damages claimable for the costs of raising a child born after failed contraceptive advice or treatment or failed sterilisation advice or procedures. Section 49A(1) provides for situations where "following a procedure to effect the sterilisation of an individual, the individual gives birth to, or fathers, a child because of the breach of duty of a person in advising about, or performing, the procedure". Under section 49A(2), a court "cannot award damages for economic loss arising out of the costs ordinarily associated with rearing or maintaining a child."

precarious financial position ought not to form the basis for a refusal to allow actions by persons whom the defendant has harmed.[114]

Another doubtful aspect of *Rees* is the majority's decision to make a conventional award in circumstances where the damage claimed was capable of being assessed in financial terms. Not only was the decision to make a conventional award in such circumstances unprecedented, but the taking of this radical step was also, as Lords Hope and Steyn observed,[115] made without full debate or detailed consideration of the consequences. Their dissent was couched in such critical terms that it seems unlikely that this will be the end of the story where this aspect of the decision is concerned. However, if the conventional award *does* find acceptance it might well, as Lord Steyn warned,[116] effectively spell a reversal of *Parkinson*, under which the additional costs associated with raising a disabled child are recoverable. For although Lord Scott was the only one of their Lordships in *Rees* directly to suggest that he opposed the decision in *Parkinson*,[117] Lord Bingham, who gave the leading judgment with respect to the conventional award, indicated that the award should in future apply to all cases of wrongful conception or wrongful birth, whether the child or the parent be healthy or disabled.[118]

IV. Conclusion

When their Lordships decided *McFarlane* in 1999, they sought to draw a line under the law in this area. Instead, their decision spawned a number of conflicting and incompatible decisions and led to strong disagreement among the judiciary in terms of both legal principle and damage assessment.

In England, the decision in *McFarlane* has been confirmed and extended in *Rees*, with the result that no damages—apart from a conventional award—are available to the parents (whether able-bodied or not) of any healthy but unwanted child. While the decision of the Court of Appeal in *Parkinson* still appears to allow claims for the extra costs involved in raising a disabled child, it is unclear how this will be affected by the conventional award introduced in *Rees*. In Australia, the High Court in *Melchior* has allowed a claim for the cost of raising a healthy child, but by the barest of

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[114] See Jones, *supra* note 23 at 19, who concludes his article on *McFarlane* by observing: "*Hedley Byrne* principles would not be distorted in this way to the advantage of any other profession … patients suing their doctors are frequently cast in the role, not of the victim of medical error, but as predators on the funds that would otherwise be employed to treat other (and almost by definition, since they are not suing the N.H.S., more deserving) patients. In that sense, compensating the victims is always an exercise in 'distributive justice' or at least in setting priorities in the use of resources. But all defendants have got better things to do with their money than hand it over to plaintiffs. That, however, tells us nothing about whether they should be required to pay for the consequences of their carelessness."

[115] See *supra* text at note 97 *et seq*.

[116] See *supra* note 99.

[117] His Lordship's objection to *Parkinson* was based on the fact that in that case the sterilisation had not been carried out specifically to prevent the birth of a disabled child. See *supra* text at note 90.

[118] See *supra* note 79. Of course, even if *Parkinson* survives *Rees*, the law in this area will be far from ideal. See Hoyano, *supra* note 5 at 891, who points out the illogicality of distinguishing between healthy and disabled children born following a failed sterilisation procedure: "Surely it would be strained to assert that a surgeon in undertaking the procedure does not assume responsibility for the maintenance costs of a healthy child should he be negligent, but does assume responsibility for the statistically less likely possibility of an unhealthy child."

majorities and in the face of fierce opposition which now seems to be leading to legislative reversal. This is not an area of law which brims with certainty or inspires confidence.

Unlikely as it is that the English courts will have either the opportunity or the inclination to reconsider the current position in the near future, that is nevertheless what this writer would wish to see. All judges when faced with wrongful conception or wrongful birth cases agree that basic principles of tort law favour the claimants. Only by a process of convoluted and subjective reasoning do some of them then manage to take the cases outside these basic principles. The law would be better served by a more straightforward approach. If a state-financed defendant is insufficiently funded to compensate a claimant, then that is something which the state should address. Sympathy for the fact that the defendant is economically stretched does not justify a situation in which victims of negligence are left without any meaningful remedy. Nor is there any basis for refusing claims simply because conventional wisdom considers a child to a blessing. A blessing can also be a financial burden—and if that burden has been created by the negligence of a defendant, then it is one which tort law should require him to shoulder.