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**Claims for Wrongful Pregnancy and Child Rearing
Expenses**

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Claims for Wrongful Pregnancy and Child Rearing Expenses

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ABSTRACT

A healthy child is so lovely a creature that I can well understand the reaction of one who asks: how could its birth possibly give rise to an action for damages? But every baby has a belly to be filled and a body to be clothed. The law relating to damages is concerned with reparation in money terms and this is what is needed for the maintenance of a baby.¹

Wrongful birth claims relate to the birth of a child as a consequence of medical negligence. There has been general acceptance by courts in various jurisdictions that costs relating to the pregnancy and birth may be recovered. However the more contentious issue is whether there is liability for the costs of rearing such a child. The English courts have held there is no such liability with respect to a healthy child, while in Australia, the Queensland Court of Appeal has taken the opposite view². In New Zealand the issue has yet to be decided. The Accident Compensation scheme has limited the development of the law relating to personal injury in general, but the High Court has found that the scheme does not prevent claims for wrongful birth. It is argued that the New Zealand courts should follow the Australian decisions, as the English approach is based on the views of ordinary people on this moral question as perceived by judges. This requires the individual judge's sense of the moral answer to a question to prevail, albeit in light of the judge's view of the opinions of ordinary people. It is argued that this is a subjective approach in that, in such a complex and emotionally difficult area of the law, there is unlikely to be uniformity of opinion among the public, or even among judges. As such, this is arguably a matter better resolved by legislation than by the courts.

¹ *Thake v Maurice* [1986] QB 644, 666F (Peter Pain J).

² *Melchior v Cattnach* [2001] Aust Torts Reps 81-591 (Qld SC), [2001] QCA 246 (26 June 2001, unreported BC 2001 03372)(Qld CA). However note that special leave to appeal has been granted by the High Court of Australia ((2002) 23(6) Leg Rep SL 1).

INTRODUCTION

This paper considers the various approaches that might be taken by the courts in New Zealand with respect to claims for wrongful birth. It considers the English decisions and contrasts them with judicial developments in Australia. It briefly outlines the decisions of the courts in other jurisdictions, such as the United States and Canada. The issue is whether the New Zealand courts should adopt the subjective approach of the judges in the House of Lords in *McFarlane v Tayside Health Board*³, or the arguably more principled approach of the Queensland Court of Appeal.⁴ There is discussion of the various arguments that have been suggested to justify decisions in this undeniably difficult area.

Wrongful birth actions arise when a claim is made, usually by parents, that medical negligence has caused them to bear the burden of an unwanted child. The negligence may be a consequence of poor technique, or it may be a result of a failure to supply appropriate information, or it may be both. These cases most commonly relate to a failed sterilisation operation leading to the birth of a child, or a failed termination of pregnancy, leading to the continuation of the pregnancy. In both these situations the medical negligence was a substantial cause of the birth of a child.

Alternatively, there may be failure to diagnose a pregnancy, so that the opportunity to seek a termination is lost. In this situation it cannot be claimed that the negligence directly caused the birth, as the woman would already be pregnant when she sought medical advice. Her claim is based on the premise that there has been a failure to provide information and that this failure deprived her of the opportunity to make a choice as to termination of the pregnancy. An essential aspect will be establishing that, had the pregnancy been diagnosed sufficiently early, she would have terminated it.

Cases relating to the failure to provide information involve either lack of knowledge of the possibility that sterilisation might fail, and so the patient does not have the opportunity to choose to use alternative contraception, or cases where there has been a failure to advise of risks to the child. The essential feature of such a claim is that the patient would have made different choices if the risks had been explained. In such a case the patient has no wish to have a child at all.

However in cases where a child is born with a disability and that disability was foreseeable, the child, whilst originally a wanted child, becomes a child from whom unwanted consequences and expenses will arise. The claim then relates to the additional burdens faced by the parents of a disabled child. The argument is that the medical practitioner should have foreseen the risk and should have advised the mother of it. As in cases relating to failure to diagnose a pregnancy, it must

³ [1999] 4 All ER 961.

⁴ *Melchior v Cattanaach* [2001] Aust Torts Reps 81-591 (Qld SC), [2001] QCA 246 (unreported 26 June 2001, BC 2001 03372) (Qld CA).

also be shown that had she been adequately advised, the mother would have obtained a termination of the pregnancy.⁵

Foreseeability is also relevant in determining the extent of the responsibility of the negligent doctor. If a sterilisation operation or termination is performed negligently, it is foreseeable that the woman will become or remain pregnant. The courts have, however, wrestled with the concept that the application of the principle of foreseeability should result in the doctor becoming liable for the costs of the child's entire upbringing. It has been suggested that imposing such liability can be seen as subjecting the doctor to 'a kind of medical paternity suit'.⁶

In cases where the child born after a failed sterilisation has disabilities that were not foreseeable during the course of the pregnancy, it might be argued that liability for the costs of the upbringing, including the additional costs arising from the disability are not just. The doctor might argue it was fate and not the quality of medical care that lead to the disabilities. However, damages in negligence are assessed on the nature of the consequences of the negligence rather than the degree of culpability as minor negligence can foreseeably have far-reaching consequences.

This paper will review the wide range of approaches taken by the courts to decide these admittedly difficult issues. Some cases have suggested a distinction between wrongful birth cases and failed sterilisation (or wrongful conception) cases. In wrongful birth cases, the opportunity that is lost to the parents is the opportunity to terminate a pregnancy, which would have been available if the impugned professional services had not been negligently performed.⁷ However, in *Groom v Selby*⁸ Hale LJ stated,⁹ 'the principles applicable in wrongful birth cases cannot sensibly be distinguished from the principles applicable in wrongful conception cases.'

NEW ZEALAND

Claims relating to failed sterilisation have been uncommon in New Zealand. As has been stated by Barker J, '[t]he law in New Zealand on damages for personal injury has rather stood still since the accident compensation scheme came into force'¹⁰. However, some such cases are now being presented before the Courts.¹¹ In *B v WDHB*,¹² the plaintiffs are seeking compensation for a fourth

⁵ Gerald Robertson et al, 'Legal Norms Relevant to the Practice of Human Genetics: A Background Paper' (1995) 3 *Health Law Journal* 187, Mark Strasser, 'Misconceptions and Wrongful Birth – a Call for Principled Jurisprudence' (1999) 31 *Arizona State Law Journal* 21, Brenda McGivern 'Tortious Liability for (selected) Genetic Harm: Exploring the Arguments' (2002) 10 *Torts Law Journal* 4.

⁶ *Becker v Schwartz* 413 NYS 2d 895, 907 (1978).

⁷ *Parkinson v St James and Seacroft University Hospital WHS Trust* [2001] EWCA 530 para 46.

⁸ [2001] EWCA (Civ 1522) (18 October 2001).

⁹ *Ibid* para 28.

¹⁰ *Bryan v Philips New Zealand Ltd* [1995] 1 NZLR 632, 640, relating to a claim of cancerphobia, resulting from exposure to asbestos.

¹¹ A New Plymouth woman is suing a doctor for \$50,000 for pain and suffering caused when she became pregnant after a failed sterilisation operation five years ago. 'Doctor sued over failed sterilisation' *New Zealand Herald* (Auckland), Thursday March 21 2002, 1.

child, which was conceived as a result of a failed vasectomy. They allege that the pregnancy was caused by a lack of informed consent, in that had they been advised that the vasectomy might fail they would not have consented to the operation. They do not claim that the operation was performed negligently. The case was an application by the defendants to have the claim struck out.

The first hurdle facing the plaintiffs in such a case in New Zealand is the Accident Compensation bar, which prevents claims for personal injury. The Accident Insurance Act 1998 contains a wider bar than was included in previous legislation, through the operation of ss 7(2) and 394(1), which say:

- s 7(2) This act also continues the existing restrictions on any such person seeking to obtain compensatory damages for the personal injury through any proceedings in a New Zealand court.
- s 394(1) No person may bring proceedings independently of this Act, whether under any rule of law or any enactment, in any court in New Zealand, for damages arising directly or indirectly out of –
 - (a) personal injury covered by this Act; or
 - (b) personal injury covered by the former Acts

Section 39(1) sets out the requirements for cover.

- s 39(1) Cover for personal injury suffered in New Zealand (except mental injury caused by certain criminal acts)
 - An insured has cover for a personal injury if –
 - (a) He or she suffers the personal injury in New Zealand on or after 1 July 1999; and
 - (b) The personal injury is any of the kinds of injuries described in section 29(1)(a), (b), or (c); and
 - (c) The personal injury is described in any of the paragraphs in subsection (2).

In *B v WDHB* the vasectomy occurred before 1 July 1999. However, the transitional provisions in the Act provide that, if the injury was suffered before 1 July 1999 and no claim has been lodged, then cover is to be determined under the current Act.¹³

Section 29 defines 'personal injury' as follows:

Personal injury means –

- (a) The death of an insured; or
- (b) Physical injuries suffered by an insured, including for example, a strain or a sprain; or
- (c) Mental injury suffered by an insured because of physical injuries suffered by the insured.

The key issue in the proceedings was whether the harm suffered by the plaintiffs amounted to 'physical injuries'. Section 39 provides for cover for personal injury caused by medical misadventure

¹² (Unreported, High Court, Wellington, Master Thomson 24 October 2001) CP No 4/01.

suffered by the insurer. The term “medical misadventure” is defined in the Act to include medical error and medical mishap. The definition of medical error extends to include a negligent failure to obtain informed consent.¹⁴ In a number of New Zealand decisions it has been concluded that pregnancy is not a personal injury by accident.¹⁵ The reasoning behind these decisions is that pregnancy can not be considered to be an injury, as it is a natural physiological function. In addition, there is no direct causal link between the pregnancy and the medical treatment received. The pregnancy was caused by intervening factors such as sexual intercourse.

The Master held that while the position of the father regarding physical injury was debatable, the mother was entitled to commence common law proceedings. This is because, while she is an insured person under the Accident Insurance Act 1998, she suffered no personal injury caused by medical misadventure as defined by s39 (2)(b), because she did not suffer ‘personal injury caused by medical misadventure suffered by the insured’. The insured is the father as it was he, not the mother, who received treatment. Section 36 provides as follows:

s 36 Medical error.

- (1) Medical error means the failure of a registered health professional to observe a standard of care and skill reasonably to be expected in the circumstances.
- (2) Such a failure includes a registered health professional's negligent failure to, for example,
 - (a) obtain informed consent to treatment from –
 - (i) The insured to whom the treatment is given; or
 - (ii) The insured's parent, legal guardian, or welfare guardian, as appropriate, if the insured does not have legal capacity; or...

Thus section 36(2)(a)(i) refers to the father not the mother, and as the mother was not covered by the Accident Insurance Act, she is able to sue at common law.

B v WDHB was reheard before Gendall J as an application to review the decision of the Master's refusal to strike out the proceedings.¹⁶ Gendall J agreed with the Master, stating that the wife did not suffer medical misadventure, as she was not a patient. Nor was she someone to whom any treatment was given. He doubted that conception, where it arose out of a natural process, could be described as a personal injury. With respect to the husband, he held that he did not suffer a personal injury. The husband neither conceived nor gave birth, and he did not suffer any personal injury by virtue of any surgery. The Judge agreed with the Master that, given the uncertain state of the law regarding damages for the birth of a child, it was inappropriate to strike the action out.

¹³ Section 423.

¹⁴ Sections 34 and 36.

¹⁵ *DK v ARCIC* [1995] NZAR 529, *Bell v ARCIC* (98/99), 13 March 1996, *Pritchard v ARCIC* (Decision No 104/96) 3 October 1996, *MT v ARCIC* (Decision No 91/96) 27 August 1996 and *MM v ARCIC* (Decision No 79/96) 27 August 1996.

¹⁶ *SGB v WDHB* (Unreported, High Court, Wellington CP 4/01, 15 February 2002, Gendall J.)

The case does not address the issue as to whether damages for the cost of raising a child will be allowed in New Zealand. The case will now proceed to a substantive hearing, assuming that it is not settled in the meantime. With respect to damages for raising the child, the question will be whether the New Zealand courts will adopt the reasoning of the House of Lords in *McFarlane v Tayside Health Board*,¹⁷ a decision which has led one commentator to state, 'I can think of few decisions that are – to their very core – as odious, unsound, and unsafe as this one'¹⁸.

THE ENGLISH APPROACH

Cases of this kind first came before the English Courts less than 20 years ago. Until *McFarlane v Tayside Health Board*,¹⁹ there was a trend in England and Scotland toward allowing damages, both for the pain and distress of an unplanned pregnancy and birth, and the cost of rearing the resulting child.

In *Udale v Bloomsbury Area Health Authority*²⁰ a woman's sterilisation failed, a healthy child was born and a second operation performed. Negligence was admitted and damages awarded, which included pain and suffering and loss of earnings during pregnancy, damages for disturbance to the family finances relating to the provision of a layette and increased accommodation for the family. However Jupp J, rejected a claim for the future costs of the child's upbringing on grounds of public policy. His reasons were, that it was undesirable that a child should learn that a court had declared its life to be a mistake, the difficulty of setting off the joy of having a child against the cost of rearing, and the risk that doctors might encourage abortion in order to avoid claims against them for medical negligence. However, *Udale* was contrary to the trend of English and Scottish cases prior to that point.

In *Thake v Maurice*²¹ a vasectomy was performed, the husband was advised that contraception was no longer necessary, but a child was born. In a claim brought in contract and tort, Peter Pain J refused to follow *Udale* and allowed such a claim. He found that there was no reason why public policy prevented the recovery of expenses arising from the birth of a healthy child. He awarded damages for the expenses of the birth and the mother's loss of wages, but refused damages for the pain and suffering of labour, stating that these were offset by the joy of the birth. He did award damages for the child's upkeep until its seventeenth birthday. He observed²² that social policy, which permitted abortion and sterilisation, implied that it was generally recognised that the birth of a healthy child was not always a blessing. The Court of Appeal²³ held that damages should be awarded for pain and suffering 'per the majority' in tort rather than contract. The joy of having the

¹⁷ Above n 3.

¹⁸ Dr J Ellis Cameron-Perry 'Return of the burden of the "blessing"' (1999) 149 *New Law Journal* 1887.

¹⁹ Above n 3.

²⁰ [1983] 1 WLR 1098, [1983] 2 All ER 522.

²¹ Above n 1.

²² [1986] QB 644, 666G.

child could be set off against the time, trouble and care in the upbringing of the child, but not against pre-natal pain and distress. For these, damages should be awarded.

In *Emeh v Kensington and Chelsea and Westminster Area Health Authority*²⁴ a sterilisation operation failed and the resultant child was born with congenital abnormalities. The court held that there was no rule of public policy that precluded recovery of damages for pain and suffering and for maintaining a child. The Court of Appeal followed Peter Pain J, in holding that the loss recoverable extended to any reasonably foreseeable loss directly caused by the unexpected pregnancy. Thus pregnancy was equated with personal injury, leading to consequential (as opposed to pure) economic loss, which includes upbringing costs.²⁵ Although this case related to a child with a disability, it was subsequently considered binding with respect to claims by parents for wrongful birth of a healthy child.

However *Emeh* predates the retreat from *Anns v Merton London Borough Council*²⁶ which resulted from the decision of *Murphy v Brentwood District Council*.²⁷ This has led to judicial scepticism about an overarching principle for the recovery of new categories of economic loss. In order to create liability in respect of economic loss there must be a closer link between the act and the damage than foreseeability provides. There should be a relationship of neighbourhood or proximity between the person said to owe the duty and the person to whom it is alleged the duty is owed. That relationship depends on whether it is fair, just and reasonable for the law to impose the duty. The doctor must have assumed responsibility for the economic interest of the claimant and the claimant must accordingly have relied upon this.²⁸ The duty of care of a doctor relating to the prevention of pregnancy may not necessarily include also avoiding the costs of rearing the child if the child is born and accepted into the family.

In *Allen v Bloomsbury Health Authority*²⁹ a sterilisation operation was carried out, with the physicians having negligently failed to diagnose the fact that the mother was already four weeks pregnant. Had she been made aware of her pregnancy at that time, she would have had it terminated. She claimed, inter alia, for the future maintenance of the resultant child who was healthy, except that she had a mild speech defect and mild dyslexia. In awarding costs and expenses to bring up the child until she was 18 years old, Brooke J stated that recoverable damages were justified under two distinct categories: one for personal injuries to the mother arising out of the failed procedure and the pregnancy itself; the other for the economic loss sustained by the family.³⁰ However, this division was disapproved of by the Court of Appeal in *Walkin v South*

²³ [1986] 1 All ER 497.

²⁴ [1985] QB 1012, [1985] 2 WLR 233, [1984] 3 All ER 1044.

²⁵ Angus Stewart, QC 'Damages for the Birth of a Child' (1995) 49 *Journal of the Law Society of Scotland* 298, 300.

²⁶ [1978] AC 728.

²⁷ [1991] 1 AC 398.

²⁸ Above n 25.

²⁹ [1993] 1 All ER 651.

³⁰ *Ibid* 658.

Manchester Health Authority,³¹ where it was held that the wrongful birth claim could only be justified as an action 'arising from the infliction of a personal injury'³². A claim for the economic loss caused by the birth of a child could not give rise to an independent cause of action. Neill LJ stated that 'the claim for financial loss cannot be separated from a claim for the physical injury'³³.

In *Allan v Greater Glasgow Health Board*³⁴ Lord Cameron of Lockbroom rejected the argument that public policy prevented a claim for the pain and distress of pregnancy and birth. He could see no reason why the cost of rearing should not, in principle, be provided for. He stated 'The question at the end of the day must be whether what is sought by way of reparation can be regarded as reasonable having in mind the particular circumstances of the particular case'³⁵.

However in *McFarlane v Tayside Health Board*,³⁶ the House of Lords reversed the trend outlined above, in deciding that damages could not be recovered for the costs of rearing a healthy child. There was a substantial divergence of approach by the respective judges, with no single distinct line of reasoning. Lord Slynn considered that the mother was entitled to general damages for the pain and discomfort of the pregnancy and birth, and special damages by way of medical expenses, clothes for her, and equipment needed on the birth of the baby. She would also have been entitled, had she claimed for it, to compensation for loss of earnings due to the pregnancy and birth. He saw no room for an argument that her decision not to have an abortion constituted a break in the chain of causation, or made the damage too remote. He considered the approach of offsetting the presumed benefit of the child against any damages too unwieldy. He awarded only those damages immediately associated with the pregnancy and birth. Lord Slynn did not accept the public policy argument that it was undesirable for children to learn that their birth was not wanted, by discovering that a damages claim had been made. Neither did he accept that such damages claims would lead to the medical profession encouraging late abortions. He did accept that the loss associated with the costs of raising the child was foreseeable, but he decided that the medical practitioner's duty of care could not, applying the 'fair, just and reasonable' limb of the test prescribed by Lord Bridge in *Caparo Industries PLC v Dickman*,³⁷ extend to responsibility to avoid the costs of rearing a child. It was, he said, a matter of inherent limitation of the liability of the doctor, rather than a public policy question.

Lord Steyn held that damages in that case should be limited to pain and suffering for the pregnancy and birth, and loss of income during pregnancy. He stated that the claim for the cost of bringing up the child was supportable from a corrective justice perspective. Corrective justice requires someone who has harmed another without justification to indemnify the other. Distributive justice requires a focus on the just distribution of burdens and losses among members of a society. He held that if a

³¹ [1995] 4 All ER 132.

³² Ibid 145.

³³ Ibid.

³⁴ 1998 SLT 580.

³⁵ Ibid 585 D-E.

³⁶ Above n 3.

distributive justice approach were taken, the instinctive response of the average person would be that the parents ought not to be compensated for having a healthy child; and the latter approach was, in his view, the real basis for denying such claims. Applying such a distributive justice approach, which, he maintained, did not involve reliance on public policy grounds, he decided that tort law did not permit recovery of the costs of upbringing in the case of a healthy child. As a secondary basis for his decision, he determined that the claim did not meet the *Caparo v Dickman*³⁸ requirement of being fair, just and reasonable.

Lord Hope of Craighead considered that recovery should be allowed for the pain and suffering involved in the pregnancy and the birth, and that there should be no set-off against such damages for the pleasure to be derived from the child. He considered that normal rules as to the remoteness of damage should apply, so that such claims did not necessarily terminate at the moment of birth. With respect to the question of how child-rearing costs should be treated, Lord Hope stated that he did not rely on policy grounds, which were matters for the legislature. He, like Lord Slynn, referred to the *Caparo v Dickman* test, but in a somewhat different way. He stated that the benefits of having a child ought to be brought to account, as to fail to do so was not fair, just or reasonable. However, since the value of the benefit could not be calculated (unlike the economic costs of rearing the child), it was impossible to say that the costs exceeded the benefits. They could not, therefore, be recovered.

Lord Clyde also stated that he did not rely on public policy arguments, because for every argument there was a counter-argument. Nor did he support the concept of set-off of the benefit of parenthood against the costs of child-rearing. His reasons were, in part, because it was inappropriate to seek to set off non-economic gain against economic loss and, in part, because the uncertainty of the benefit made the attempt at set-off impracticable. He stated that damages are intended to achieve restitution and based on this, he concluded that the mother was entitled to recover for the pain and suffering associated with the pregnancy and birth. However, he held that to relieve the parents of the financial obligations of rearing their child, while permitting them to continue enjoyment of it did not constitute a reasonable restitution. Nor was the expense of child rearing proportionate to the doctor's culpability. It was, therefore, appropriate to limit damage so as to provide a proper measure of restitution.

Lord Millett, while accepting that there was a strong, direct and foreseeable causal connection between the defendant's negligence and the costs of rearing the child, concluded that such costs were not recoverable. He recognised that, in individual cases, the birth of a baby might not constitute a benefit, but stated that it was necessary that society as a whole regard the event as beneficial. He held that the law should not allow parents to enjoy the advantages of parenthood while avoiding its disadvantages, as to do so would be 'subversive of the mores of society'³⁹. This

³⁷ [1990] 2 AC 605, 617-8.

³⁸ Ibid.

³⁹ Above n 3, 1006.

reasoning led him, unlike the rest of the Lords, to reject the claim for pain and suffering arising out of the pregnancy and delivery, which he characterised as part of the price of parenthood. However, the parents were entitled to general damages in a modest sum to reflect the loss of their freedom to limit the size of their family. In addition, if they had disposed of items bought for their other children on the strength of the negligent information given them, the cost of replacing those items would be recoverable.

McFarlane has subsequently been held to have settled the issue of liability for the responsibilities consequential on the birth of a healthy child imposed on or accepted by the parents. In *Greenfield v Irwin (a firm) and others*,⁴⁰ the mother attempted to claim for her loss of earnings following the birth, as she had given up work to look after the child. It was held *McFarlane* applied and the claimant could not recover economic loss arising from the existence of a healthy child as a result of an unwanted pregnancy.

In *Parkinson v St James and Seacroft University Hospital NHS Trust*,⁴¹ the child, who was conceived following a negligently performed laproscopic sterilisation, suffered from disabilities. Damages were awarded for the child's special needs and care relating to his disability, but this did not extend to the basic costs of his maintenance. Brook LJ treated this as a claim for pure economic loss and identified from the recent decisions of the House of Lords five different techniques that might be used in deciding whether to allow a claim for damages of this sort. He concluded that none of the five mitigated against allowing the claim in these circumstances. Hale LJ held this as a claim which on ordinary principles of law would be recoverable. There was a duty of care to prevent pregnancy, this duty had been broken and the whole of this damage was the foreseeable consequence of the breach of duty.

In *Groom v Selby*⁴² the claimant underwent a sterilisation operation. The consultant failed to carry out a pregnancy test before operating. Unknown to anyone, the claimant was about six days pregnant at that time. The child was born prematurely and contracted salmonella meningitis following birth, leading to disabilities, the extent of which would only become apparent as the child matured. The abnormality would not have been detected in the foetus if the pregnancy had been diagnosed in the usual way. The issue was whether the disabilities followed foreseeably from the unwanted conception, or whether the chain of causation had been broken by some new intervening cause during the pregnancy. It was held that, although the condition developed after birth, this did not mean she was a healthy child as contemplated in *McFarlane*. Brooke LJ felt that the principles of distributive justice as enunciated in *McFarlane* did not assist in this case, as lay people might well be divided in their opinions in such a case.

⁴⁰ [2001] 1 WLR 1292.

⁴¹ [2001] 3 All ER 97.

⁴² [2001] EWCA Civ. 1522.

Hale LJ commented that she would not regard the costs of bringing up a child, who was born as a result of the negligence of another, as 'pure' economic loss. She stated, '...rather, they are economic losses consequent upon the invasion of bodily integrity suffered by a woman who becomes or remains pregnant against her will'⁴³. She held that if a child is to be regarded as not healthy, the disability must be genetic, or arise from the processes of intrauterine development and birth.

The comments of Hale LJ in both *Parkinson* and *Groom v Selby*, indicate a movement from *McFarlane*. For her, a duty of care sufficient to impose liability existed because there had been an invasion of the mother's autonomy.⁴⁴ When the pregnancy has been wrongly caused,⁴⁵ she interpreted the Judges in *McFarlane* (apart from Lord Slynn) as being concerned with 'whether a particular type of damage is recoverable if the duty is broken'⁴⁶. She stated that the House of Lords had adopted a 'solution of deemed equilibrium' whereby the benefits and burdens of having a healthy child cancel each other out as a matter of law.⁴⁷ For a disabled child, the 'deemed equilibrium' accounts for the ordinary costs of raising the child but not the 'extra care and extra expenditure' a disabled child requires. She stated⁴⁸ '[t]his analysis treats a disabled child as having exactly the same worth as a non-disabled child. It affords him the same dignity and status. It simply acknowledges that he costs more.'

She repeated the notion of deemed equilibrium in *Rees v Darlington Memorial Hospital NHS Trust*.⁴⁹ In that case the mother was disabled, in that she was severely visually handicapped. Her vision was worsening and she sought a sterilisation as she believed she would be unable to care for a child. The operation was performed negligently and she gave birth to a healthy child. There was a low risk that the child might have inherited retinitis pigmentosa. Hale LJ emphasised that the principle detriment suffered by those who become parents against their will is the legal and factual responsibility to look after the child. She stated that 'just as the extra cost involved in discharging that responsibility towards a disabled child can be recovered, so too can the extra costs involved in a disabled parent discharging that responsibility towards a healthy child'⁵⁰.

Walker LJ agreed that the appeal should be allowed, based on there being nothing unfair, unjust, unreasonable, unacceptable or morally repugnant in permitting recovery of compensation for a limited range of expenses with a close connection to the mother's disability. He disagreed with the deemed equilibrium theory of Hale LJ, stating that his interpretation of *McFarlane* was that the judges rejected such an approach.⁵¹

⁴³ Ibid para 31.

⁴⁴ Ibid para 69.

⁴⁵ Ibid para 74.

⁴⁶ Ibid para 86.

⁴⁷ Ibid paras 87-90.

⁴⁸ Ibid para 90.

⁴⁹ [2002] EWCA Civ 88 (14 February 2002).

⁵⁰ Ibid para 23.

⁵¹ Ibid paras 35-38.

Waller LJ would have dismissed the appeal, on the grounds that any exception to the rule in *McFarlane*, with respect to a healthy child must be examined with great care, taking into account how the ordinary person would perceive the fairness of the exception. He gave as an example the situation of a woman with several children, who is not disabled, but whose physical and mental health and family circumstances may be so fragile that the birth of another child, even if healthy, would create a crisis in health terms for her. Waller LJ held that she is unable to recover damages for the care of the child. Consequently, on the basis of distributive justice, ordinary people would think it was not fair that a disabled person should recover when mothers who may in effect become disabled by ill health through having a healthy child would not.⁵²

This argument demonstrates the problem with *McFarlane*. The situation of the two mothers is comparable. However it might equally be argued that this is a good reason why both should be able to recover the expenses involved in raising the child.

AUSTRALIA

There has been substantially less Australian judicial consideration of the extent to which damages may be awarded for the birth of a child than in the United Kingdom or United States. In *Dahl v Purnell*,⁵³ Pratt DCJ allowed damages for pre-natal distress and the pain and suffering of the birth; the past and future costs of bringing up the child; out of pocket expenses in the form of amounts expended on maternity clothes and medical expenses, loss of consortium and an amount for the parents' voluntary services, past and future, in caring for the child. However, he reduced the last components by a quarter to reflect the intangible benefits of a healthy child. He held that public policy considerations did not prevent the plaintiff's claim. *Veivers v Connolly*⁵⁴ was a decision of the Supreme Court of Queensland, and related to the birth of a severely disabled child to a woman who had suffered rubella during pregnancy. Her claim was successful against her doctor, for failing to diagnose her rubella and for failing to warn her of the consequent risks to the foetus. In *CES v Superclinics (Australia) Pty Ltd*,⁵⁵ the New South Wales Court of Appeal held that the primary question was whether negligent advice resulting in the loss of opportunity to terminate the pregnancy could give rise to a claim for damages, plus the question of what damages could be recovered. Each of the three members of the Court of Appeal reached a different conclusion.

Kirby P stated that in the English and American cases there was consensus to the extent that damages for pain and discomfort associated with the birth, the costs involved in the birth and loss of earning capacity resulting directly from the pregnancy and its immediate aftermath were recoverable. He discounted the two public policy arguments against recovery for the economic costs of raising the child. The first argument is the idea that a healthy child (at least) is a 'blessing'

⁵² Ibid paras 53-55.

⁵³ (1993) 15 QLR 33.

⁵⁴ [1995] 2 Qd R 326.

and should not result in damages. The second argument is that a child whose birth had led to such damages would suffer distress as a consequence of the realisation that its conception and birth were unwanted. He considered that any difficulty in assessing damages should not mean such damages would not be awarded, as courts are frequently required to assess future economic and non-economic loss. He considered that the decision whether to set off the benefit of a healthy child against the amount of damages depended on the facts of the individual case, pointing out that it should not be assumed that the birth of a healthy child is always a blessing.

However, in order to achieve a majority approach, Kirby P agreed with Priestly JA's approach to damages, which disallowed damages from the point at which adoption could have occurred. Meagher JA dissented, stating that he considered it abhorrent that the birth of a healthy child could lead to an award of damages. He felt it might be damaging to the child to become aware that she was an unwanted child.

Until this point, the Australian cases were in accord with those of the United Kingdom, in which the preponderance of cases had allowed damages for loss of earnings and the costs of raising a child. In *Melchior v Cattnach*,⁵⁶ the Queensland Court of Appeal had to decide whether to follow *McFarlane*.

Melchior concerned a failed sterilisation operation, and the negligent failure of the patient's health care provider to warn the mother that pregnancy might occur. In the first instance,⁵⁷ Holmes J declined to follow the House of Lord's decision in *McFarlane*. She stated that although *McFarlane* was persuasive, the judgments did not produce a consistent line of reasoning against awarding damages with respect to a healthy child.⁵⁸ She proceeded to select from those judgments the reasoning that appealed to her as sound.

With respect to the public policy arguments, she found the 'blessing' argument, applied as a social imperative, entails a 'blunt intrusion of the individual decision-maker's value system into legal reasoning'⁵⁹. She stated that the context in which a child is born might profoundly affect the happiness to be derived from his or her existence. As such, the birth of a healthy child can not be stated to always be a blessing. She additionally found difficulty in distinguishing between a healthy and unhealthy child. She disapproved of the argument that it is deleterious for a child to know that it is unwanted. She took the pragmatic view that 'a child whose parents financial burden was ameliorated by an award would be in a considerably happier position than one whose parents were precluded by public policy from any relief'⁶⁰. Overall, she felt that the competing views in *McFarlane* were insufficiently compelling to dictate a conclusion against the recovery of economic loss. She

⁵⁵ (1995) 38 NSWLR 47.

⁵⁶ [2001] QCA 246 (26 June 2001 unreported BC 2001 03372)(Qld CA).

⁵⁷ *Melchior v Cattnach* [2001] Aust Torts Reps 81-591 (Qld SC).

⁵⁸ *Ibid* para 50.

⁵⁹ *Ibid* para 51.

⁶⁰ *Ibid* para 53.

was also unimpressed by Lord Steyn's distributive justice approach in *McFarlane*, because of its inherent subjectivity. She found that the failure to adopt out the child did not interrupt the chain of causation – it was a failure to intercept it. She felt that there was no guarantee that adoption would be less catastrophic in its consequences than the decision to keep the child.⁶¹ She was unimpressed by the 'fair, just and reasonable' test proposed by Lords Slynn and Hope in *McFarlane* stating,

Although one seeks, of course, to arrive at an imposition of liability which is fair, just and reasonable, to use that desired result as a test by which the initial questions – is there a duty and, if so, how far does it extend – can be answered, is an unsatisfactorily imprecise approach.⁶²

Holmes J declined to follow *McFarlane*, and made an award for special damages, past and future care, economic loss, the costs of raising the child and loss of consortium.

On appeal, McMurdo P and Davies JA agreed with the primary judge, concluding that child rearing costs should be awarded and dismissed the appeal with costs. Thomas JA disagreed. The judges unanimously agreed that the primary judge's findings as to negligence and causation should stand. McMurdo P found that the principles set out in the High Court relating to the recovery of pure economic loss⁶³ supported the award of child rearing costs. He rejected the benefit of parenthood argument, because in today's Australian society children are not regarded as an economic asset and are not universally regarded as a blessing. Additionally, the free choice of the parents to limit the number of their children was taken from them by the doctor's negligence. The damages were for the loss flowing from the conception of the child caused by the appellant's medical negligence and the additional financial burden that will be placed on the family, rather than for the wrongful birth or new life of the child. He noted that not every failed sterilisation will lead to damages, only those where negligence has caused the pregnancy. This will involve a relatively small and determinate class of claimants and the resulting damages will be limited to the moderate reasonable costs of child rearing.

Davies JA concurred, acknowledging that the birth of a child is not always a blessing. He found no policy factors that ought to preclude recovery of the cost of maintaining the child during the period of minority. He concluded that a set-off of the emotional benefits against the cost of raising the child should not be permitted, as to permit a contest about the benefits and burdens of a child would be morally offensive. Thomas JA dissented, stating that the benefits of a healthy child should be brought into account and he concluded that the 'limited damages rule' in force in most parts of the United States and also in the United Kingdom best fits the standards and expectations of Australian society.⁶⁴

⁶¹ Ibid para 57.

⁶² Ibid para 60.

⁶³ *Perre v Appand Pty Ltd* (1999) 198 CLR 189, 191.

⁶⁴ See the reasons for such a rule summarised at para 169.

An important feature of the majority decisions is the rejection of the concept that litigation would adversely impact on the child. They pointed to the fact that litigating that conception was unwanted did not indicate necessarily that the child was unwanted. This is supported by the fact that the loss claimed is pecuniary. They pointed out that the financial gains from successful litigation would be beneficial to the child's welfare.

The New South Wales Supreme Court in *Edwards v Blomeley*⁶⁵ reviewed the English cases. Studdert J stated that the High Court has not yet had occasion to consider whether the costs of rearing a child in a 'wrongful birth' case are recoverable as damages in a claim by the parents of the child. However he did conclude that this review 'indicates that in an action brought by the parents for 'wrongful birth', some damages are recoverable to compensate for the past costs and the ongoing costs of caring for a child born disabled'⁶⁶. He stated that the measure of damages is unsettled at the present time.

THE POSITION IN OTHER JURISDICTIONS

In Canada the matter does not appear to have been directly considered at appellate level. However, Lax J in the Ontario Court (General Division) in a carefully considered judgment held in a case of failed sterilisation, that child rearing costs were pure economic loss and were not generally compensable because the birth of the child was not an injury and brought the family many benefits. Further, the parents were not prevented from fulfilling their parental responsibilities and the relationship of mutual support and dependency which arose on the birth of the child was not compromised.⁶⁷

By contrast, in South Africa, a husband as administrator of his joint estate with his wife, brought an action for damages for breach of contract arising out of the performance of a failed sterilisation procedure on his wife. The Appellate Division of five judges allowed the claim for the financial cost of rearing the child, but limited it to cases where the sterilisation procedure was performed for socio-economic reasons.⁶⁸ This was contrasted with sterilisation solely in order to limit reproductive capacity.

In the United States, the issue is a state not a federal matter and different states have taken different approaches. As a broad generalisation it can be said that the majority of jurisdictions have taken an approach consistent with that of the House of Lords, disallowing claims for damages for the costs of rearing and educating children born after a negligent sterilisation procedure. The most

⁶⁵ [2002] NSWSC 460 (12 June 2002) per Studdert J. This case is one of three unsuccessful cases heard on 11 and 12 March 2002 relating to wrongful life, where the child is seeking damages in consequence of a failure to prevent the child from being born.

⁶⁶ Ibid.

⁶⁷ *Kealey v Berezowski* (1996) 136 DLR 4th 708,741.

⁶⁸ *Administrator, Natal v Edoward* (1990) (3) SA 581.

common reasons have been because of the public policy consideration that parents cannot be said to have been damaged by the birth of a healthy, normal child.⁶⁹ The following cases demonstrate the diversity of approach taken in the United States.

In a case of wrongful conception following a negligent and failed sterilisation, the United States Court of Appeals, District of Columbia Circuit, noted, without finally deciding the question, that, 'when a couple has chosen not to have children, or not to have any more children, the suggestion arises that for them, at least, the birth of a child would not be a net benefit. That is their choice and the courts are required to respect it'⁷⁰. In other instances, where a couple chooses sterilisation for therapeutic or eugenic reasons, the birth of a healthy child, though unplanned, would be a great benefit and a court may feel it is unjust to impose on a defendant doctor the costs of raising the child.⁷¹ 'Generally, however, the plaintiff's recovery will most accurately reflect the amount of injury incurred if it is limited to paying for those risks that the plaintiff specifically sought to avoid and that came to pass'⁷². Ms Hartke had undertaken the sterilisation procedure because she feared that serious complications from a pregnancy could lead to her death. Once those dangers passed, having a child was a positive experience. The birth of the child was not an injury and to award her child-rearing expenses would be a windfall, which should not be allowed.

In *Lovelace Medical Center v Mendez*,⁷³ the Supreme Court of New Mexico upheld the right of parents of a healthy baby conceived after a negligently performed sterilisation procedure to recover the reasonable costs of raising the baby to adulthood. For the public policy reasons of, 'the unseemly spectacle of the parents' attempting to prove how slight or non-existent was the psychological benefit they derive from their additional child in order to minimise the offset to their non-pecuniary interests', the court declined to set off an amount representing the emotional benefits from having an additional healthy child against the economic costs of rearing the child.

In *Sherlock v Stillwater Clinic*,⁷⁴ the Supreme Court of Minnesota considered a claim brought by Mr and Mrs Sherlock, who had seven children and wanted no more, for the reasonable costs of rearing a child born after a negligently performed sterilisation procedure. The court held, in a 3-2 decision, that public policy considerations cannot properly be used to deny the recovery of all damages proximately caused by a negligently performed sterilisation that was indistinguishable from ordinary medical negligence:

⁶⁹ See for example, *Terrell v Garcia*, 496 SW 2d 124 (Tex. Civ. App. 1973), *Rieck v Medical Protective Co of Fort Wayne Ind*, 64 Wis. 2d 514, 219 N.W. 2d, 242 (1974), *Cockrum v Baumgartner* 95 Ill. 2d 193, 447 N.E. 2d 385, 69 Ill. Dec. 168 (Ill. 1983), *McKernan v Aasheim*, 102 Wash. 2d 411, 687 P. 2d 850 (Wash 1984) and *Girdley v Coats* 825 S.W. 2d 295, 798 P. 2d 477 (1990).

⁷⁰ *Hartke v McKelway* 707 F2d, 1544 (1983), 1552.

⁷¹ *Ibid* 1554.

⁷² *Ibid* 1555.

⁷³ 805, P2d 603 (NM 1991).

⁷⁴ 260 NW 2d 169 (1977).

Where the purpose of the physician's actions is to prevent conception or birth, elementary justice requires that he be held legally responsible for the consequences which have in fact occurred. While other courts have referred to a negligent sterilisation case as a 'wrongful birth' action, we believe that this type of case is more properly denominated an action for 'wrongful conception', for it is at the point of conception that the injury claimed by the parents originates.⁷⁵

After considering the disadvantages and assessing their role as a mortal attempt to do justice in an imperfect world, the court, by majority, concluded that the reasonably foreseeable costs of rearing the child are a direct financial injury to the parents and should be allowed, subject to an offset for the value of the benefits conferred to them by the child. There should be strict judicial scrutiny of verdicts to prevent excessive awards.

In *Custodio v Bauer*,⁷⁶ the Californian Court of Appeal allowed the parents to claim damages under the Californian Civil Code for child raising expenses, where the child was conceived as a result of a failed sterilisation. In *Betancourt v Gaylor*,⁷⁷ the action was for damages for raising the child born after an allegedly negligently performed sterilisation. On a motion brought by the defendants to dismiss the action, Loftus JCC refused summary judgment, noting that 'any other loss or damage approximately resulting from the negligent sterilisation operation, including the costs, emotional upset and physical inconvenience of rearing a child, may be recovered at law'⁷⁸.

In *Burke v Rivo*,⁷⁹ the Supreme Judicial Court of Massachusetts, in a 4-3 decision, held that the parents of a child born after a failed sterilisation procedure could recover damages for the cost of rearing a normal, healthy, but (at least initially) unwanted child, if the reason for seeking sterilisation was founded on economic or financial considerations. The benefit, if any, the parents receive from having the child should be offset against the cost of rearing the child. There was no reason founded on sound public policy to immunise a physician from having to pay for a reasonably foreseeable consequence of his negligence, or from a natural and probable consequence of a breach of his guarantee, namely the parents' expenses of rearing the child to adulthood.

Similarly, in *Ochs v Borrell*,⁸⁰ the Supreme Court of Connecticut, in a unanimous decision, allowed the parents to claim the costs of raising a child with some orthopaedic disabilities born after a negligent sterilisation procedure performed upon the mother. The jury was entitled to award damages for child rearing expenses, reduced by the value of the benefits conferred on the parents by having and raising the child. The court concluded that this could be dealt with on a case by case basis.

⁷⁵ Ibid 174-175.

⁷⁶ 251 Cal App 2d 303, 59 Cal Rptr 463, 27 ALR 3d 884(1967)

⁷⁷ 136 N.J. Super. 69, 74, 344 A.2d 336 (1975).

⁷⁸ Ibid 340.

⁷⁹ 551 NE 2d 1 (Mass 1990).

⁸⁰ 187 Conn 253(1982).

DISABLED CHILD

McFarlane was confined to the wrongful birth of a healthy child. In England the right remains to recover damages for the extra costs of raising a disabled child. A disabled child may be born as a result of negligence in two different types of situations. The first is that the negligence could directly lead to the birth of a disabled child, where the purpose of the doctor/patient interaction is to avoid conception or birth. An example is the loss of opportunity to obtain an abortion, where a test for foetal abnormality is carried out negligently. The second possibility is where the negligence incidentally leads to the birth of a disabled child, such as where a sterilisation fails, and the resulting child is unexpectedly born with a disability.

It is necessary to determine the level of disability required before a child ceases to be a healthy child. In *Parkinson*,⁸¹ Hale LJ (with whom Brooke LJ agreed) attempted a definition. She stated that any disability must be caused by the defendant's negligence. The disability must arise from the processes of conception, pregnancy or birth. The cause of the disability must be 'genetic' or 'the foreseeable processes of intra-uterine development and birth'⁸². Otherwise the disability would not be sufficiently causally connected to the doctor's negligence so as to give rise to the claim.

Secondly, the disability must be 'significant'. It will not include 'minor defects or inconveniences such are the lot of many children who do not suffer from significant disabilities'⁸³. Thirdly, Hale LJ relied on the definition of a disabled child in s17(11) of the Children's Act 1989:

A child is disabled if he is blind, deaf or dumb or suffers from a mental disorder of any kind or is substantially and permanently handicapped by illness, injury or congenital deformity or such other disability as may be prescribed...

This concept of a 'healthy child' is an artificial notion. It is difficult to distinguish between the healthy and the unhealthy, and decide the level and type of disability necessary before the healthy child who is a blessing becomes a disabled child who is a burden. Holmes J, in *Melchior v Cattnach*,⁸⁴ stated that the drawing of such distinctions is unattractive. This issue led McMurdo P in the Queensland Court of Appeal to state⁸⁵

... it is offensive and wrong to suggest that children born with disabilities, even severe disabilities, cannot enrich the lives of their parents, family and the wider community in diverse ways. If the benefits argument is valid it must apply to all children whether born with disabilities or the respect to which all human life is entitled will be devalued.

⁸¹ Above n 41.

⁸² Above n 41, 92 and *Groom v Selby* above n 42, 32.

⁸³ Above n 41, 52.

⁸⁴ Above n 57.

⁸⁵ Above n 56.

Davies JA thought that to limit the damages for maintenance of a disabled child to the extra cost of maintaining such a child is both illogical and unfair.⁸⁶ In addition, there seems little reason to limit liability for the maintenance of a severely disabled child to damages for the period of childhood.⁸⁷ The responsibilities and burdens of the parents may well continue into the adult life of such a child, who may never be able to live independently.

PUBLIC POLICY ARGUMENTS

The principal argument against awarding damages for the upbringing of a child conceived as a consequence of medical negligence, is that the birth of a normal healthy child is a blessing and a benefit to both parents and society and so not a matter for compensation. In *McFarlane*,⁸⁸ Lord Millett held that the law must take the birth of a normal healthy baby to be a blessing, not a detriment. This view has been criticised as ‘Lord Millett borrowing a page or two from Sophocles, from Lord Gill and (it would seem) from some tenderer-than-thou book of soft core philosophy’⁸⁹.

Children are no longer universally regarded as a blessing. Indeed, it is doubtful whether they ever were. Children are not economic assets, they are financial liabilities for many years.⁹⁰ Society accepts that individuals may limit their fertility by way of contraception and sterilisation. In fact, many people would say that responsible human beings ought to manage their reproductive outcomes, with a view to promoting the overall financial and emotional stability of their family. As was stated by McMurdo P in *Melchior v Cattnach*,⁹¹ ‘It is self evident that it is in society’s interests to encourage the nurturing of children within families, but I do not see that this is achieved by refusing moderate and reasonable economic loss caused by professional negligence.’ He felt that the award of damages would benefit society by encouraging the raising of the child within the family unit.

The benefit argument sets off the joys and pleasures of parenthood against the economic loss of raising the child, so as to extinguish the loss. This approach involves attempts to establish the benefit and burden for each child. Such a calculation would require an argument that a particular child would be more of a burden than a benefit so as to avoid offsetting. In addition, the so-called ‘benefits’ of parenting were exactly what the plaintiffs sought to avoid by undergoing a sterilisation procedure, especially if it was undergone for socio-economic reasons. The benefits of parenting are

⁸⁶ Ibid 96.

⁸⁷ *Edwards v Blomeley* [2002] NSWSC 460 (12 June 2002) para 112, ‘It is not to be assumed that a claim available to parents of a disabled child must be limited to the period of the child’s minority.’

⁸⁸ Above n 3.

⁸⁹ Above n 18, 1887.

⁹⁰ See the discussion of the cost to women of child rearing in ‘The Staple Inn Reading: “The Value of Life and the Cost of Living- Damages for Wrongful Birth.”’ Rt Hon Lady Justice Hale DBE. www.actuaries.org.uk/library/staple_inn_read_2001.pdf.

⁹¹ Above n 56, 52.

not similar in kind to economic loss and so it is inappropriate to offset the two. General non-pecuniary damages should not be offset against general pecuniary damages.⁹²

A further public policy argument is that the child concerned may discover that it was unwanted and its upbringing paid for by another and that the child might be psychologically harmed by discovering it is an 'emotional bastard'. This argument ignores the reality that many people may be aware that their conception was unplanned. This does not necessarily result in an unloved child; rather it is the social and economic consequences of the birth that are the factors that are undesired. To limit the financial disadvantages to the family may indeed have the effect of ameliorating the effects of a child who might otherwise cause limitations, or even hardship, to the family.

In *Udale*,⁹³ Jupp J. was concerned that a mother who accepted and loved the child following its birth would get little or no damages because her love and care for her child and her joy, ultimately, at its birth would be set off against, and might cancel out the inconvenience and financial disadvantages which naturally accompany parenthood. In contrast, a woman who nurtured bitterness in her heart and refused to let her maternal instincts take over would be entitled to large damages. In short, virtue would go unrewarded and unnatural rejection of womanhood and motherhood would be generously compensated. This argument can be countered by stating that the financial costs of raising the child may well be the same for both mothers. No doubt many mothers in this situation will make the best of the situation and love their child, whilst still resenting the financial and emotional disadvantages they have suffered. The award of damages in this situation should not relate to judgments about the moral praiseworthiness of a particular mother. The mother who is less accepting is not necessarily a bad person, her attitude may be a reflection of the totality of her circumstances.

It is notable that in *McFarlane*, the judges maintained that public policy took no part in the search for a solution, it was based on legal policy.⁹⁴ Lord Hope of Craighead said that the question for the court was ultimately one of law, not of social policy.⁹⁵ Lord Steyn likened public policy arguments to 'quicksands'⁹⁶ and Lord Clyde recalled that public policy was long ago realised as 'a very unruly horse, and when once you get astride of it you never know where it will carry you'⁹⁷. Lord Millett said that limitations in the scope of legal liability arose from legal policy where what was in issue was the admission of a new head of damages, or the admission of a duty of care in a new situation. Legal policy in this sense was not the same as public policy, even though moral considerations may play a part in both.⁹⁸ Lord Clyde pointed out that a solution was unlikely to be derived in a setting in which each side could point to public policy issues with, for every argument, a reasonable counter-

⁹² Brenda McGivern 'Tortious liability for (selected) genetic harm: Exploring the arguments' 10 *Torts Law Journal* 4, 38.

⁹³ [1983] 1 WLR 1098, 1109D-F.

⁹⁴ See [1999] 4 All ER 961, 972, 978, 993-994, 1000, [2000] AC 59, 76, 83, 100, 108.

⁹⁵ [1999] 4 All ER 961, 988.

⁹⁶ *Ibid* 978.

⁹⁷ *Ibid* 994.

⁹⁸ *Ibid* 1000.

argument.⁹⁹ With respect, this is undoubtedly correct, although similar comment might be made about the distributive justice approach proposed by Lord Steyn.

THE POSITIVE MORALITY APPROACH

Lord Steyn proposed that the individual judge's sense of the 'moral answer to a question' should prevail; 'what may count in a situation of difficulty and uncertainty is not the subjective view of the judge but what he reasonably believes that the ordinary citizen would view as right'¹⁰⁰. Replacing the man on the Clapham omnibus with commuters on the London Underground, he formed the view that an overwhelming number of ordinary men and women would conclude that the parents of an unwanted but healthy child should not be able to sue the doctor or hospital for compensation for the cost of raising the child. If it were necessary he would also conclude that the claim does not satisfy the requirement of 'fair, just and reasonable'¹⁰¹. As was stated by Hale LJ in *Parkinson*¹⁰²

The traveller on the Underground 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 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 would be less emphatic and less unanimous.

A fundamental underlying precept in *McFarlane* is the belief in the preciousness of human life. However, as has been stated by Seymour,¹⁰³ such a perspective is increasingly likely to be rejected. He suggests that if a woman should be free to decide all matters relating to childbearing, then a woman should be free to control her fertility and can legitimately claim to have suffered harm if her exercise of that freedom has been thwarted by medical negligence.

Although the judges in *McFarlane* pay lip service to the rights of individuals to make choices to limit the sizes of their families, they fail to protect the exercise of such rights. One might doubt the frequency with which their Lordships travel on the London Underground and their familiarity with the opinions of such travellers, especially those with limited economic or emotional resources. They appear to find morally distasteful the concept that the community generally accepts that an individual may make a legitimate choice that the birth of a child will not be a blessing. It seems illogical and unfair to deny recovery of the costs of maintaining the child born as a consequence of a doctor's negligence.

⁹⁹ Ibid 993.

¹⁰⁰ Ibid 897.

¹⁰¹ Ibid 977-978.

¹⁰² Above n 41, 82.

¹⁰³ John Seymour, 'Actions for Wrongful Birth and Wrongful Life' *New Zealand Bioethics Journal* February 2001, 26,31.

GENDER ISSUES

Hale LJ has suggested that the issues relating to wrongful birth are questions that men and women may look at differently,¹⁰⁴ whilst accepting that there is just as much diversity of view among women as there is among men. In many of the decided cases, the judges have emphasised the pain and suffering of pregnancy and childbirth. In contrast, they give scant consideration to the profound and lasting changes to a woman's life resulting from pregnancy and childbirth. In reality, the latter effects are the more significant, as such effects last for the remainder of the woman's life. Hale LJ does not regard the upbringing of a child as pure economic loss, but rather loss that is consequent on the invasion of bodily integrity and loss of personal autonomy involved in an unwanted pregnancy. She regards the loss of autonomy as consisting principally in the resulting duty to care for the child, rather than simply to pay for its keep. She points to the physical changes consequent on pregnancy and birth, some of which are permanent. She also refers to psychological changes and also the severe curtailment of personal freedom during the pregnancy. She notes that giving birth is hard work, often painful and sometimes dangerous. The effects are long lasting. The personal obligations continue throughout the childhood involving work, loss of freedom and 24 hour responsibility. She states:

All of these consequences flow inexorably, albeit to different extents and in different ways according to the circumstances and characteristics of the people concerned, from the first: the invasion of bodily integrity and personal autonomy involved in every pregnancy. This is quite different from regarding them as consequential upon the pain, suffering and loss of amenity experienced in pregnancy and childbirth.¹⁰⁵

She points out that the law now recognises the claim of injured persons to be compensated for the costs of their care.¹⁰⁶ If the care is provided by a family member, the claim is made by the injured person, but the loss is that of the family member. The family member has not been wronged. In a wrongful birth case the care is provided by the person who has been wronged and the legal obligation to provide it is the direct and foreseeable consequence of that wrong. She infers that claims for the wrongful conception and birth of healthy children could well be analysed in this way, as the courts have been prepared to do in cases concerning disabled children.¹⁰⁷

Raising children is expensive, particularly for the parent who looks after the child, usually the mother. In New Zealand, in 1999, women's average hourly earnings were 81.2% of that of men. Women are twice as likely to work part-time than men are. 28.3% of all families in New Zealand are sole parent families, the majority headed by women. 91% of people receiving the Domestic

¹⁰⁴ Above n 90, 20.

¹⁰⁵ Ibid 25.

¹⁰⁶ Ibid 24.

¹⁰⁷ Ibid 24-25.

Purposes sole parent benefit are women.¹⁰⁸ It is clear that the gender earnings gap is largely caused by the responsibility for the care of children. As such, a child (or further child) may well not be a blessing to the individual mother. Additionally, it may not be a blessing to the community at large if they, through the payment of taxation, contribute to the maintenance of such a child.

CONTRACT

In *McFarlane* there are references to contract. Lord Slynn said that if a client wants to be able to recover the costs of raising a child, he or she must do so by an appropriate contract. Lord Steyn stated that the outcome would depend on the terms of the contract that was alleged to have been made. He added that since a contract for services is usually involved, the term concerned might be an obligation to take reasonable care. On the other hand, the terms may be expressed more stringently and may amount to a warranty of an outcome.¹⁰⁹

The Law Lords (apart from Lord Clyde) held it was not 'fair, just and reasonable' for the parents to recover the costs of rearing a healthy child. In other words, the defendant did not owe a duty of care to prevent this economic loss. In a claim in contract, the action is complete on breach of contract. The Court must then quantify the damages to be paid. As was stated by McMurdo P in *Melchior v Cattnach*,¹¹⁰ '... the answers to these questions are the same whether the claim is framed in tort or contract, provided of course in the latter case that the breach alleged is of an express or implied term to exercise reasonable care.' The Courts have usually sought to assimilate the legal results in contract and negligence actions in the medical context.

In an action in contract, a Court could conclude that the judgments in *McFarlane* are based on public policy and apply the same policy to a contract case. Although some of the judges denied they were deciding the case on the basis of public policy,¹¹¹ through the application of principles such as 'distributive justice', these bear a striking similarity to public policy arguments. The difficulty that arises is whether public policy is available to deny recovery in a contract case. The cases seem to relate public policy (or illegality) to the validity or enforceability of the contract itself.¹¹² In *McFarlane*, Lord Hope, in distinguishing *Administrator, Natal v Edouard*,¹¹³ stated that case depended on a strict interpretation of the rule as to the damages recoverable in contract, which has no part in the law relating to delictual liability for negligence.

¹⁰⁸ The statistics are from 'The Status of Women in New Zealand, 1998 CEDAW Report', and 'Briefing the Incoming Minister, 1999', Ministry of Women's Affairs. <http://www.mwa.govt.nz>

¹⁰⁹ Above n 3, 972.

¹¹⁰ Above n 56, 2.

¹¹¹ Above n 3, 972, 978, 993.

¹¹² M. Furmston (ed), *The Law of Contract* (1999), Chapter 5.

¹¹³ 1930 (3) SA 581.

The main obstacle to a successful case in contract may be in establishing a detriment to justify damages. If a child is taken to be a benefit, regardless of the actual effect on the particular parents, then the argument can be made that there is no loss and so no damages.

In *Thompson v Sheffield Fertility Clinic*,¹¹⁴ a woman underwent in vitro fertilisation. She had only agreed to the replacement of two embryos, but the clinic replaced three. In the event, she gave birth to healthy triplets. She sued in contract and tort for the cost of raising an additional child. On the preliminary question, it was held that as there had been a breach of contract, the issue was the terms of the contract. The Court did not consider whether damages would be available for the birth of the extra child and the matter was settled before the issue was decided.¹¹⁵ Whether she could have recovered the costs of raising the extra child would depend on the specific provisions of the contract. If the parties anticipated the breach and expressly dealt with who would pay for the financial consequences of the birth of the child, recovery would be likely. However such a contract is unlikely. Lord Steyn seemed to accept that liability in contract might arise where the terms of the contract amounted to a warranty of an outcome¹¹⁶ and so, in Lord Slynn's words, the doctor will have 'assume[d] responsibility for those economic losses'¹¹⁷. In *SGB v WDH*¹¹⁸ a further cause of action has been added pursuant to the Consumer Guarantees Act 1993, and so the issue of contract may yet fall to be decided in New Zealand.

WHO CAN SUE?

The issue is whether, if the negligent operation is performed on one parent, the other has the right to sue. The question is whether a duty of care is owed to that person. In *Goodwill v British Pregnancy Advisory Service*,¹¹⁹ a man had undergone a vasectomy operation arranged by the defendants. He was advised that the operation had been successful and he would not need to use contraception in the future. Three years after the operation, he commenced a sexual relationship with the plaintiff. Having been told of the permanency of the vasectomy, and being reassured by her doctor that the chances of pregnancy were remote, she did not use contraception. She became pregnant and gave birth to a daughter. The father was a married man, who was living with his wife and family. It was held that the defendants were not in a sufficient or any special relationship with the plaintiff, such as gives rise to a duty of care. At the time the advice was given to the father of the child, the defendants had no knowledge of the plaintiff, she was not an existing sexual partner of his, but was merely a potential future sexual partner. In order to succeed, the plaintiff would have to prove, inter alia, that the defendant knew, either actually or inferentially, that the advice communicated was likely to be acted on by the plaintiff. In addition, that this action was without

¹¹⁴ (Unreported, High Court of Justice, Queen's Bench Division: Hooper J, 6 March 2001) – referred to in (2001) 9 *Medical Law Review*, 170-173.

¹¹⁵ See 'Mother of IVF Triplets settles for £20,000' *Guardian*, 24 February 2001.

¹¹⁶ Above n 3, 972.

¹¹⁷ Ibid.

¹¹⁸ Above n 16.

independent inquiry, for a purpose whether particularly specified or generally described, which was made known either actually or inferentially to the defendant at the time when the advice was given, and that it had been so acted upon by the plaintiff to her detriment.

Consequently, the ability of a parent or other person with the responsibility to care for a child to make a claim will depend on proximity. The issue is the closeness of the relationship of the claimant to the doctor, such as being a known sexual partner of the patient. As was stated by Hale LJ in *Parkinson*,¹²⁰ 'my tentative view is, however, that if there is a sufficient relationship of proximity between the tortfeasor and the father, who not only has, but meets his parental responsibility to care for the child, then the father too should have a claim.'

CONCLUSION

The approach of the English courts towards claims for the recovery of the costs of rearing a child born as a result of medical negligence is to disallow such expenses as would arise as a consequence of the birth of a healthy child, but to permit damages for the additional expenses incurred in the care of a disabled child. The comments of Hale LJ indicate that the English judiciary does not universally accept this view.¹²¹ The Queensland Court of Appeal, in order to avoid such distinctions between a child who is healthy and one who is disabled has allowed damages for child rearing where the pregnancy was a consequence of medical negligence.

If the decision whether to allow such damages is to be based on subjective concepts, then it is preferable for Parliament to pass appropriate legislation, rather than the Courts deal out 'palm tree justice'¹²². Public policy considerations might suggest that to allow such claims would potentially increase the risks, and so the costs, of medical practice. Equally, arguments could be made that it is distasteful to require parents to demonstrate that their child is defective, and thus unwanted, in order to recover damages. A person who seeks medical advice in order to avoid or terminate pregnancy has done so because they do not want a child, irrespective of the health of that child.¹²³ The point is that such a child would be a detriment for financial, emotional, or social reasons, even if the family loved and accepted the child. The parents have lost the autonomy to make the decision to limit their fertility and have consequently suffered loss.

If it is accepted that New Zealand today is a liberal society where a plurality of values is accepted and protected,¹²⁴ then it is difficult to formulate a basis for a 'community view' that has some form of

¹¹⁹ [1996] 2 All ER 161.

¹²⁰ Above n 41, 93.

¹²¹ Above n 90.

¹²² *Szechter (otherwise Karsov) v Szechter* [1970] 3 All ER 905, 909.

¹²³ There are however, cases where the procedure was to avoid the birth of a child with a suspected defect and once the child is born healthy, it is a wanted child. In that case the parents have suffered no loss, if they wanted a healthy child, but not a disabled child.

¹²⁴ As in the Human Rights Act 1993.

special normative status. Such a view that provides a basis for a uniform public morality would enable the solution of issues by way of the positive morality approach. It is difficult to escape the notion that in *McFarlane* the views of the mythical commuter have, in reality, been substituted by the views of the judiciary, thus leading to a subjective decision- making process.

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