
WRONGFUL BIRTH

The Dubious Joys of Parenthood

By

Christopher Melton QC

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Three Cases

The purpose of this talk is to analyse a line of three cases, two decided by the House of Lords and one by the Court of Appeal. The most recent was decided by the House of Lords last autumn. The cases have settled some issues that needed resolving. However, they have done so in a way that raises other questions and which makes it difficult to predict how those questions might be resolved. Their importance extends beyond the area of law immediately concerned because they show, in a way that it is submitted is extremely worrying, the preparedness of their Lordships to arrogate to themselves important decisions on controversial issues of morality and public policy.

The cases will be familiar to many of you. They are:-

McFarlane v Tayside Health Board [2000] 2 AC 59

(claim for wrongful conception by healthy mother of healthy child – HL failed)

Parkinson v St James & Seacroft University Hospital NHS Trust [2002] QB 266

(claim for wrongful conception by healthy mother of disabled child – CA allowed)

Rees v Darlington Memorial Hospital NHS Trust [2003] WLR 1091

(claim for wrongful conception by disabled mother of healthy child - HL failed)

Wrongful Conception and Wrongful Birth.

It might be helpful to acknowledge the distinction made by some writers between wrongful conception and wrongful birth. The distinction is not legally important but it serves to categorise a number of the many factual variants that present themselves. It will be submitted that in an area where the number of factual situations is so potentially multifold, the need for adherence to legal principles is paramount.

Wrongful conception results typically from failed male or female sterilisation procedures, poor counselling in connection with the likely consequences or results of such procedures or poor counselling about the risk of a disabled child being born as the result of an undiagnosed or unexplained genetic condition suffered by one parent. They can involve transactions only involving the father in which only the mother may be the Claimant. This would occur in the case of the failed male sterilisation, which resulted in the pregnancy of a woman whom the man did not know at the time of sterilisation and in which the man played no role in the child's upbringing.

Wrongful birth cases are those in which conception was wanted or did not result from the fault of any party but where the negligent act resulted in the birth of a child when a termination of pregnancy was wanted or would have been wanted had appropriate information been given. Typically, these are cases of failed or delayed diagnosis of pregnancy, failed termination of pregnancy, failed diagnosis or poor counselling concerning the risk that continuing with the pregnancy will result in the birth of a badly disabled child.

Before the Year 2000, the Law was Relatively Settled.

In Udale v Bloomsbury Area Health Authority, [1983] 1 WLR 1098, Jupp J had been persuaded by David Latham QC, as he then was, that public policy should prevent the recovery by parents

of the costs of raising a healthy child following a failed sterilisation. Lord Justice Latham, as he now is, made no apology for that attempt in his 2003 Annual Lecture to the Personal Injuries Bar Association. Given that the argument he presented as Counsel in that case has now been approved by nine of Their Lordships in the House of Lords, it is perhaps not surprising that he did not apologise for it. It was, however, as he conceded, dismantled by Peter Pain J in Thake v Morris [1986] QB 644.

Udale was overturned by the Court of Appeal in Emeh v Kensington & Chelsea Health Authority [1985] QB 1012. The Court of Appeal held in that case that since sterilisation was lawful, there could be no good policy reason to deny the claim. The principle of the case applied to healthy children as it applied to disabled children, although the child in that case happened to be disabled.

That decision was followed by more than ten years of stability. There was a little queasiness concerning issues such as limitation, (see Walkin v South Manchester HA [1995] 1 WLR 1543 and the sensitivity of seeking on behalf of a Claimant substantial sums by way, for example, of re-imburement for private education.

McFarlane v Tayside Health Board [2000] 2 AC 59

Mr & Mrs McFarlane had 4 children. Understandably, they decided that that was enough for them and they took the responsible decision to seek medical intervention. Mr McFarlane underwent a sterilisation and after tests were carried out to confirm the success of the procedure, the McFarlanes were negligently informed that Mr McFarlane was infertile. Mrs Farlane went on to conceive their fifth child, Catherine. Catherine enjoyed good health and although her parents

had never wanted a fifth child, Catherine was welcomed into the family with all the warmth as if the pregnancy had been planned and wanted.

Mr & Mrs McFarlane claimed in the Scottish Courts the financial costs of Catherine's upbringing. They sought no general damages connected with the wear and tear or damage to their emotional or social life connected with her birth. What they sought was the financial cost of her upbringing.

With this case, the rot set in. The McFarlanes' claim was dismissed at first instance – the English Court of Appeal decisions did not bind the Scottish Courts - allowed on appeal, but then came before the House of Lords who said that no claim could be made.

Their Lordships allowed the appeal unanimously. Lord Millett, Lord Steyn and Lord Hope of Craighead were all also to feature in the case of Rees. Lord Slynn and Lord Clyde did not.

Lord Justice Brooke was to identify in *Parkinson* five mechanisms by which the House of Lords in *McFarlane* could have decided whether the law should recognise the existence of a legally enforceable duty of care, the breach of which might lead to an award of compensation of this kind;

- Had the surgeon assumed responsibility for the services rendered?
- What was the purpose of the operation?
- Were there comparable established categories of negligence or was this a step too far?
- The 'fair, just and reasonable' test of *Caparo*
- Resort to distributive justice, as per the Hillsborough cases

As he said, however, even the contents of this list were not exhaustive of the approaches used

On Normal Legal Principles, the Claim would have Succeeded

On normal principles, Their Lordships accepted that the McFarlanes' claim should succeed. As Lord Millett said:-

"Catherine's conception and birth are the very things that the Defendant's professional services were called upon to prevent. In principle, any losses occasioned thereby are recoverable, however they may be characterised."

As Lord Hutton was later to say in Rees v Darlington:

"It is clear that in McFarlane the House recognised that on normal principles of tort law the claim for bringing up the child would succeed."

What Justified this Departure from Normal Principles?

Lord Millett

Lord Millett was similarly articulate in conveying the ideas of others which they might not be able themselves to articulate. He said:

"Limitations on the scope of legal liability arise from legal policy, which is to say 'our more or less inadequately expressed ideas of what justice demands'. Legal policy in this sense is not the same as public policy, even though moral considerations may play a part in both. The Court is engaged in a search for justice and this demands that the dispute must be resolved in a way which is fair and reasonable and accords with ordinary notions of what is fit and proper."

Lord Millett went on to say that:

"It is morally offensive to regard a normal, healthy baby as more trouble and expense than it was worth."

He suggested that there should be a 'conventional award' of £5,000 to compensate the parents for the legal wrong for which they were, as a result of his ruling, to go uncompensated. None of the other judges made the suggestion, which was, as we shall see, to loom large in *Rees*.

Lord Steyn

According to Lord Steyn, distributive justice demanded that the claim should be disallowed. On the basis that most commuters on the underground would – he asserted – reject the claim, Lord Steyn asked himself why they would do so. The answer was

“An inarticulate response as to what is and what is not morally acceptable ... it is my firm conviction that where courts of law have denied a remedy, the real reasons have been grounds of distributive justice.”

And later ‘ ... *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 regard as right* ... ’

He went on to say that if it were necessary for him to do so, he would deny the claim as being neither “*fair, just or reasonable*”.

Lord Slynn

According to Lord Slynn, it would not be fair, just and reasonable to impose a duty of care. Caparo Industries PLC v Dickman [1990] 2 AC 605. Alternatively, ‘ ... *the doctor does not assume responsibility for those economic losses ... if a client wants to be able to recover such costs, he or she must do so by an appropriate contract ...* ’

Lord Hope

The approach taken by Lord Hope was similar to that taken by Lord Slynn.

Lord Clyde

According to Lord Clyde, if an award were to be made, it would not constitute reasonable restitution as it would not take into account the benefit to the parents of having a loving and healthy child.

Parkinson v St James & Seacroft University Hospital NHS Trust [2002] QB 266

Mr and Mrs Parkinson had decided that four children was enough for them and so Mrs Parkinson underwent a sterilisation procedure. It is important to emphasise that the decision was not taken because of any concern that the child might be born with a disability. The sterilisation

was done negligently. When it was realised that Mrs Parkinson was pregnant, the consequences were, in the words of Brooke LJ, catastrophic. The family lived in a two bedroomed house and to make ends meet Mr Parkinson had been working very long hours of overtime in a foundry. Mrs Parkinson had intended to return to work to finance their move into larger accommodation. When she became pregnant, these plans were thwarted; the marriage came under intolerable strain and Mr Parkinson left the matrimonial home. Things only got worse when Scott was born and when it was realised over the first years of his life that he was disabled.

There are excellent judgments in *Parkinson* delivered by Lady Justice Hale, as she then was and Brooke LJ. The bottom line for Hale LJ was that the opinions of their Lordships in *McFarlane* had to be translated into a theory of deemed equilibrium; a theory that was, however, firmly to be squashed by all her brother judges in *Rees*.

“At the heart of it all is the feeling that to compensate for the financial costs of bringing up a healthy child is a step too far. A child brings benefits as well as costs; it is impossible accurately to calculate those benefits so as to give a proper discount; the only sensible course is to assume that they balance one another out... ..”

Hale LJ went on to allow the claim for the extra costs referable to the disability and to say that the analysis she had made did not suggest in any way that Scott was worth less than the healthy child. In fact, it afforded him:

“... the same dignity and status ... it simply acknowledges that he costs more.”

Brooke LJ found that to allow the claim was fair, so long as the costs were limited to the extra costs referable to the child's disability and Sir Martin Nourse agreed with both judgments.

The philosophical problem created, however, is that if the reasoning underlying *McFarlane* was the impossibility of the weighing the value of the child against the likely cost of its upbringing, is

this exercise possible when the child is disabled? The practical legal problem is that the theory of deemed equilibrium was to be well and truly scotched in *Rees*.

Rees v Darlington Memorial Hospital NHS Trust [2003] WLR 1091

Miss Karina Rees is a single woman with a severe visual disability. She was apprehensive about pregnancy and childbirth, particularly because of her progressive visual condition. She wanted a sterilisation and told the surgeon her reasons why. The sterilisation failed because of the surgeon's negligence and in April 1997 Miss Rees gave birth to a healthy son. Because of her disability, she now plays only a restricted role in her child's upbringing. His father plays no role and so she depends on others, such as friends and family. She sought damages reflecting all the costs of the child's upbringing or, as an alternative, those extra costs that she would reasonably incur over and above those that would reasonably be incurred by a mother without her disability.

First Instance

Mr Stuart Brown QC, sitting as a Deputy High Court Judge, ruled on a preliminary issue in May 2001 that Ms Rees was not entitled to any of the upbringing costs.

Rees in the Court of Appeal

When Ms Rees' case came before the Court of Appeal, similar reasoning was applied as had been applied in *Parkinson*; the leading judgment was given by Lady Justice Hale and again she spoke of the deemed equilibrium. In applying the theory to Ms Rees' case, Lady Justice Hale said that the Claimant:

“is not being over-compensated by being given recompense for the extra costs of child care occasioned by her disability. She is being put in the same position as her able-bodied fellows.”

Robert Walker LJ found that there was:

“nothing unfair about allowing recovery”

In a powerful dissenting judgment, however, Waller LJ did not see how the claim could logically be allowed. The child was not disabled and although it might be said to be 'fair' to Miss Rees to allow her to recover, if she were to recover it would be unfair on the mother who, for example, might actually become disabled by the burden of bringing up a fifth child. [c.f. Mrs Parkinson] To allow one but not the other to recover would contravene the principles of distributive justice

which, as you know, first saw light of day in *Frost v Chief Constable of South Yorkshire Police* [1999] 2 AC 455.

Moreover, as we shall see, compensation would be awarded by reference to the mother's disability (which had not been caused by any breach of duty) and no recovery was obtained in respect of the upbringing of the child (which had been made necessary by the breach of duty).

Rees in the Lords

Their Lordships delivered their opinions on 16 October 2003. They heard not only the Defendant's appeal against the Court of Appeal decision but also the Claimant's cross appeal, which argued that McFarlane had been wrongfully decided. The cross appeal was given short shrift. Their Lordships said that McFarlane had been correctly decided and that a departure from a previous decision of the House of Lords could only be justified where there had been a fundamental change of circumstances, such as had obtained in *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443. A majority said Miss Rees claim should fail and introduced for such cases in an entirely unconventional way, a 'conventional' of £15,000.

Their Lordships were Lord Bingham of Cornhill, Lord Nicholls of Birkenhead, Lord Steyn, Lord Hope of Craighead, Lord Hutton, Lord Millett and Lord Scott of Foscote. As I have already

said, Lords Steyn, Hope and Millett had sat on *McFarlane*. Those in the majority gave the following opinions.

The Majority

Lord Bingham

*I do not propose to undertake the gruesome task of discussing the judgments in *McFarlane*.*

Lord Bingham accepted that the orthodox application of principle that provides a compensatory remedy for a proven violation of a legal right would have led to recovery in *McFarlane*. He said that all of the judges in *McFarlane* had reached their opinions for reasons of legal policy.

Invoking the moral theory of distributive justice, and the requirements of being just, fair and reasonable, culled from case law, are in context simply routes to establishing the legal policy.

The policy considerations underpinning the judgments of the House were, as I read them, an unwillingness to regard a child (even if unwanted) as a financial liability and nothing else, a recognition that the rewards which parenthood (even if involuntary) may or may not bring cannot be quantified and a sense that to award potentially very large sums of damages against a NHS always in need of funds to meet pressing demands would rightly offend the community's sense of how public resources should be allocated.

As Lord Bingham saw it, Kirby J *'was surely right'* when he said in *Melchior v Cattnach*, which will be considered briefly below, that *'concern to protect the viability of the NHS at a time of multiple demands on it might indeed help to explain the invocation in ... *McFarlane* ... of the notion of 'distributive justice'*.

In making these observations without disapproval, it very much seems that Lord Bingham thought that the policy imperative of not impoverishing the NHS came first, with the legal justifications of that policy coming second.

Lord Bingham disallowed the claim, doubted that the position should be any different in the case of a disabled child and supported Lord Millett's suggestion of a conventional award to compensate the mother for being denied, through the negligence of another, *'the opportunity to live her life in the way that she wished and planned.'*

Lord Millett

According to Lord Millett, the theory of 'deemed equilibrium' cannot be extracted from any of the speeches: it is entirely inconsistent with them. The benefits and burdens were not in balance but not capable of being weighed against one another.

To allow the claim would be an illegitimate gloss on McFarlane. Since McFarlane decided that even reasonably incurred costs cannot be recovered where the child is healthy, logic would not allow a claim for the disabled parent;

"to the extent that her disability has any effect it only increases the amount of costs which she reasonably incurs in bringing up the child. It is, with respect, no answer to say that the disabled parent has no choice in the matter ... The ... healthy parent may have no choice A single mother with no Disability Allowance may have no choice but to go out to work... . A woman who, like the old woman who lived in a shoe ... may have no choice but to employ someone to look after them ... A family which has already resorted to private health care and private education cannot realistically chose to do less for their latest child.. By contrast, a disabled mother ... may have family to ... look after the child."

Thus, Lord Millett echoed the strong dissenting judgment of Waller LJ in the Court of Appeal.

Lord Millett went on:

"Whatever we may say to the contrary, an award of the extra costs is an award of damages for the disability (which was neither caused nor contributed to by the tortfeasor)"

"The birth of the child is the Defendant's responsibility but does not sound in damages and the mother's disability is not the responsibility of the Defendant at all."

"In my opinion, the principle mandates the rejection of the parents' claim, but in this case principle also marches with justice. The decision of the majority of the Court of Appeal is destructive of the concept of distributive justice. It renders the law incoherent and is bound to lead to artificial and indefensible distinctions being drawn of the Court's struggle to draw a line between costs which are recoverable and those which are not."

The difficulty is that so much emphasis was placed on *McFarlane* on the fact that parents and child were healthy. One has to ask whether it was not excessive reliance on legal policy in *McFarlane* and reliance on concepts such as 'moral repugnance' that led to this state of affairs. According to Lord Millett, the decisions of Brooke and Hale LJ 'render the law incoherent' and are 'destructive of the concept of distributive justice.'

Lord Millett left open whether Parkinson was correctly decided. Confirming what had been his view in *McFarlane*, Lord Millett said that a conventional sum was appropriate to compensate the family:

"for the denial of the right to limit the size of their family ... a modest award would ... adequately compensate for the ... injury to the patient's autonomy ... Moreover it would ... not attract the distaste or moral repugnance which was the decisive factor in McFarlane..."

Distaste - moral repugnance! If claims in the case of disabled children and parents are now said to be indistinguishable logically from the claim in the case of the healthy child and parents, are they too to be characterised as morally repugnant?

Why is the conventional award needed? The only reason why the patient's autonomy is going uncompensated without this award is because it has been taken away from the patient.

Lord Scott of Foscote

Allowed the Defendant's appeal because '... *a balance sheet of detriment and benefit cannot be drawn up...*'

Suggested that *Parkinson* is wrongly decided, because '*where the parents have no particular reason to fear that if a child is born to them it will suffer from a disability, I do not think there is any sufficient basis for treating the expenses occasioned by the disability as falling outside the principles underlying McFarlane.*' The position might be different where the parents do have such a reason.

He agreed that a conventional award of £15,000 should be made.

Lord Nicholls

Agreed with the majority, that a conventional award of £15,000 should be made and that this should apply whether the child or parent was disabled. Doubts, therefore, *Parkinson*.

The Minority

Lord Steyn

In commenting on *McFarlane* in *Rees*, Lord Steyn said:

"Some Law Lords thought that an absence of a duty of care was the correct analysis and others thought it was a matter of irrecoverability of a head of loss. In my opinion, the former view is entirely orthodox ... on the other hand the latter is an equally valid explanation ... One is perhaps in the area of conceptualist thinking - what some writers have impolitely called 'Professors' Law'. Provided that one is clear about the foundation and reach of the legal policy involved, the difference in method is not of great importance. In this case, the two concepts yield the same results."

But in a five judge court, the 'foundation and reach of the policy may not be clear'.

According to Lord Steyn, there ran throughout the speeches in McFarlane a strong emphasis on the birth of a healthy child. Therefore, he agreed with the decision in Parkinson, although not everything said in it (by Lady Justice Hale) because:

“Where the child is seriously disabled... .. normal principles of corrective justice permit recovery of compensation for the costs of providing for the child’s needs and care relating to his disability but not for his maintenance.”

Those disagreeing with *Parkinson* and they would also ask whether the balancing exercise is more clear say that it is worth asking what is corrective about it, because the child was never going to be born able and all that is being corrected is the problem flowing from the disability. And they would also ask whether the balancing more clear or less invidious to perform in the case of a disabled child than in the case of another child?

Lord Steyn firmly rejected the idea of a conventional award.

Lord Hutton

Lord Hutton agreed with Lord Steyn about McFarlane. Moreover, he said that Ms Rees should recover the extra upbringing costs attributable to her disability, not as an exception to McFarlane but on normal principles to which McFarlane itself was an exception. There should be no conventional award.

Lord Hope

Lord Hope adopted Lord Steyn’s “*masterly analysis*” of the decision in McFarlane. The costs fell outside the ambit of the duty of care, according to Lord Hope. In McFarlane, for Lord Hope, the problem had been the insuperable difficulty of calculation, a difficulty that arose because of

the impossibility of placing a value on the benefit - the advantages and disadvantages were inseparable. To talk of 'deemed equilibrium' reads too much into the decision in McFarlane.

What was meant was that any calculation was impossible. Where both parents and child are healthy there is a symmetry and that is disturbed when one or other is disabled. The parent of a disabled child will face extra costs and make the child's upbringing as normal as possible. It would be fair, just and reasonable to allow the extra costs in the case of serious disability and he dismissed the appeal.

Lord Hope was extremely unhappy about the award of a conventional award;

- The suggested 'right to chose to limit the size of their family' is not a right at all but a freedom
- We have conventional awards in personal injury cases to compensate for pain and suffering because the damage suffered is incapable of being assessed arithmetically; but financial loss does not present the same problem;
- Such deemed compensation for the general damage suffered cannot justify the refusal of the special damage claim
- If Lord Bingham says it is neither compensatory nor punitive what is its basis, which must be entirely novel?
- *'the lack of any consistent or coherent ratio in support of the proposition in the speeches of the minority is disturbing.'*
- The award was an afterthought, based on little study or research and should have been left to Parliament.

Conclusion

Fair, Just, Reasonable, Proper – Distributive Justice

These words have the potential to cloak the resort by judges in controversial cases to their perception of what is morally right or socially for the best in a given situation. They may be necessary when the straightforward application of legal principles is not up to the job. They may be useful tools where the organic development of the common law needs it. They are not, however, to be resorted to just because the application of such principles would result in findings that some judges find 'morally offensive.' It is extremely disturbing when legal principles are jettisoned in favour of what are perceived by judges to be the clear morals of the day. Judges are appointed on the basis of their ability to analyse factual situations and because of their ability to apply the law to those situations. They are not selected because of their grasp of the mores of the day, nor are they accountable to the public if their perception of those mores is seen to be wrong.

If it was fear for the NHS that caused the decision in *McFarlane*, was any research undertaken to assess how many cases of negligent sterilisation there are annually. If there are few, is the policy imperative the one that should prevail? If there are many, is it at all a sensible approach to render the doctor unaccountable for all the losses that flow, except by the creation of a new and arbitrary 'conventional award'? Would it not be better to try to curtail the number of negligent episodes of negligent advice or treatment?

People in the position of the *McFarlanes* are not saying that their children are more trouble and expense than they are worth. What they were saying is that it undoubtedly costs more to have them than it would have cost not to. All the emotional benefits and burdens are separate and have to be regarded as such. They should have been recompensed for their financial losses but not for the emotional or other less tangible losses.

The Upshot

The position now is that;

- an entirely novel concept of the judge made 'conventional award' has been introduced; the scope of its application to other cases will be interesting; what about the creation of such awards in other cases, such as the Hillsborough police officers, where a recognised breach of duty goes uncompensated?
- there is going to have to be a further hearing in the House of Lords to decide what should happen in the *Parkinson* situation. All that is predictable about the outcome of the latter is that Lady Hale will be on one side of the fence and Lord Millett (is still sitting) on the other.
- As for claims brought in contract, watch this space!

Australia

The High Court in Australia in the case of Cattanach v Melchior [2003] HCA 38 found by a bare majority that in a failed sterilisation case where everyone was healthy, the parents *should* be able to recover the costs of bringing up the child. The issue was then left to the Queensland Parliament. The Parliament did debate it and a Bill has now gone to a second reading precluding such claims. However, the Queensland Parliament decided that the parents should be allowed to recover loss of earnings in cases where they decide to stay at home to look after the child and lose earnings as a result. Controversial issues such as these are rightly best left to the legislature and not to the judges.

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