

Damages for the “Unwanted” Child: Time for a Rethink?

Dr Nicolette M Priaux

Lecturer, School of Law, Keele University

If a healthy child born as a result of clinical negligence is a “blessing” which should not resound in child maintenance damages, can one create an exception for the birth of a *disabled* child? If so, should the law then permit a further exception for the disabled *parent* of a healthy child? And, even if the healthy child is not the proper subject-matter of damages, is this the same as saying that those who actively sought to avoid parenthood suffer no loss at all? Over the last six years, such questions have arisen in the English courts following the House of Lords ruling in *McFarlane v Tayside Health Board*¹ in 1999 that parents of an unplanned but healthy child were no longer entitled to recover damages reflecting the costs of its maintenance. That *McFarlane* did not straightforwardly apply to cases where either the child or the parent is disabled, not only led to the lower courts creating a series of difficult exceptions,² but culminated in a second House of Lords ruling on this subject in the case of *Rees v Darlington Memorial Hospital NHS Trust* in late 2003.³ While various commentators reflecting on *Rees* have claimed that English law in relation to unplanned births is now something of a “mess”, as this note considers, the most problematic aspect of the law in this area has been the differential responses of the courts to cases involving “disability”. Questioning the legitimacy of such an approach and noting the need for a full resolution of the issue, the article goes on to examine the most significant and pressing question in this field for lawyers and clinicians alike: what is the future for wrongful birth and wrongful conception claims?

***McFarlane* and the “Healthy” Child**

“Instinctively, the traveller on the Underground would consider that the law of tort has no business to provide legal remedies consequent upon the birth of a healthy child, which all of us regard as a valuable and good thing.”⁴

The stories of parents bringing wrongful conception and birth suits against health authorities raise familiar scenarios – clinical mishaps in family planning techniques including negligently performed abortion and sterilisation, the provision of incorrect results following post-operative testing, and in case of wrongful birth, negligent failures in genetic counselling, whether actual diagnosis or information provision. Claiming that in the absence of such negligent treatment the “unwanted” child would not have been born,⁵ parents have typically sought damages under two heads; first, for the pain and suffering attendant on the “personal injury” of pregnancy and birth, and second for the costs of child maintenance. While for over a decade parents were able to seek both heads of damages from courts where clinical negligence resulted in the birth of a healthy or disabled child, in 1999, the House of Lords adjudication of *McFarlane* brought one dimension of this trend to a close. Here, the House was confronted by two claimants, Mr and Mrs McFarlane, who had been (incorrectly) assured by doctors that the husband was no longer fertile following his vasectomy operation. Having dispensed with contraceptive methods, Mrs McFarlane became pregnant and gave birth to their fifth child, Catherine. Mrs McFarlane claimed damages for the pain and suffering attendant upon pregnancy and birth, and both pursuers claimed for the costs of rearing their healthy child. Although not taking issue with the mother’s claim for pain and suffering (Lord Millett dissenting on this point), their Lordships utilised a wide variety of legal techniques in order to unanimously deny the more substantial claim for child maintenance in the case of a *healthy* child. And while the judgment is less than straightforward, since their Lordships spoke in five different voices, the general thrust of *McFarlane* was this: if parents had suffered any loss, then this was pure economic loss which was outweighed by the blessings of

a healthy child. Extra-judicially reflecting on the *McFarlane* decision, Hale LJ (as she was then) remarks:

“[A]t the heart of their reasoning was the feeling that to compensate for the financial costs of bringing up a healthy child is a step too far. All were concerned that a healthy child is generally regarded as a good thing rather than a bad thing.”⁶

Of course, “at the heart of their reasoning” is policy – and it is a policy decision which has been subject to a fair amount of criticism amongst medico-legal scholars in the field.⁷ Nor is it difficult to see why. Firstly, *McFarlane* constitutes a departure from established English law; as their Lordships recognised, under the normal principles of tort law the claim for child maintenance would succeed. Yet the justifications for that departure are quite opaque. Take, for instance, Lord Steyn’s appeal to the principles of “distributive justice” and the “Commuter on the Underground”, in determining the “just distribution of burdens and losses among members of a society”, and what the “ordinary citizen” would expect the law of tort to do in the case of a healthy child. Not only does the lack of an empirical foundation suggest that the answers yielded are entirely a matter of judicial speculation, but the process of deliberation raises serious questions as to *which* distributive outcomes “carry the most weight” or are “determinative”, or whether this is an instance of “the judge ... consciously applying an outcome or merely struggling to explain an intuition”.⁸ Secondly, and related to this, while the “health” of the child was central to all of their Lordships’ rejection of maintenance damages, even this unifying strand was undermined. While their Lordships rejected the US-style “set-off” argument, assessing that the benefits of having a healthy child were “incalculable” in monetary terms, Lord Hope considered that it would not be “fair, just or reasonable” to leave such benefits out of account, otherwise the parents would be unjustly enriched. Is this not obviously engaging in a set-off exercise? Similarly, in declaring this exercise as capable of producing “morally repugnant” results, Lord Millett also engaged in the same process, finding that *society* must take the blessing of a healthy baby to *outweigh* the disadvantages of parenthood. A rather odd conclusion one might think, having earlier described the benefits of such a healthy child as “incalculable and incommensurable”.

A fuller critique reveals that these criticisms are far from exhaustive; for in so many respects the *McFarlane* decision is unsatisfactory. But one of the most significant problems with the policy deployed in *McFarlane* is the failure to weigh up a series of *competing* policy considerations. As the “ordinary citizen” might well ask, if one decides to undergo invasive medical procedures to remove the prospect of parenting responsibilities, can the failure of that procedure be properly described as a “joy” or a “good thing”? Since the experience of parenthood in these cases is clearly different from the situation where parenthood is planned, what this overlooks is the fact that here a “blessing” has been forced upon the parents. Even if society does hold the assumption that a healthy child is a good thing, it seems unlikely that many would be so quick to assume that the parents are unharmed in this factual setting, since the inevitability of procreation has lost contemporary significance. Peter Pain J expressed the importance of this countervailing policy factor, stating:

“By 1975, family planning was generally practised. Abortion had been legalised over a wide field. Vasectomy was one of the methods of family planning which was not only legal but was available under the National Health Service. It seems to me to follow from this that it was generally recognised that the birth of a healthy baby is not always a blessing.”⁹

However, while *McFarlane* was clear in asserting that parents with an unplanned but healthy child have suffered no actionable loss, the future application of the “blessings” principle was not. As one might reasonably question, if it is assumed that a *healthy* child is a blessing, then how does one approach the unplanned birth of a disabled child? As the case law reveals, in the case of the disabled child, the “harm” parents have suffered has been treated very differently indeed. And although the point had not been raised in *McFarlane*, even Lord Steyn commented that the matter might need to be adjudicated differently.

Parkinson and the “Disabled” Child

Beyond Lord Steyn’s concession that the disabled child might require a different response, lower courts were presented with a difficult task in finding a convincing legal basis for distinguishing the case of the “disabled” child from *McFarlane*. In *Parkinson v St James*,¹⁰ the first wrongful conception case following *McFarlane*, the claimant sought recovery for the costs of maintaining her fifth but disabled child, Scott, who was conceived following a negligently performed sterilisation. Although accepted as not being attributable to the performance of the sterilisation procedure, the child’s condition, which consisted of severe psychological problems, meant that it was inappropriate to treat Scott as a “healthy” child. At first instance, Longmore J held on a preliminary issue that the claimant should recover for the costs of providing for her son’s special needs and care relating to his disability, but denied recovery of the basic costs of his maintenance. The defendants appealed against the first direction and the claimant appealed against the second. Dismissing the appeal and cross-appeal, the Court of Appeal distinguished *McFarlane* and held that the mother would be entitled to claim the additional costs as related to caring for and raising her disabled child. Delivering one of the main judgments, Brooke LJ justified the decision in the following terms: (1) the disabled child was a foreseeable consequence of the negligent sterilisation; (2) that there was no difficulty in accepting in principle that the surgeon should be deemed to have assumed responsibility for the foreseeable and disastrous economic consequences of his negligence; (3) that since the purpose of the operation was to prevent the claimant from conceiving further children, including those with congenital abnormalities, the duty of care was strictly related to that purpose; (4) that parents similarly situated had been able to recover damages prior to *McFarlane*, so this would not be a radical step into the unknown; (5) and since foreseeability and proximity were satisfied, an award of compensation limited to the additional costs of raising the disabled child would be “fair, just and reasonable”; or alternatively, one could call in aid the principles of distributive justice, of which Brooke LJ opined that:

“[O]rdinary people would consider it would be fair for the law to make an award in such a case, provided that it is limited to the extra expenses associated with bringing up a child with a significant disability.”¹¹

Not just “ordinary people” but also Sir Martin Nourse who felt content to simply state “I agree”, and Hale LJ, who though reaching the same conclusion did so on quite different principles. In distinguishing *McFarlane*, Hale LJ stressed that whilst the principles of distributive justice were concerned with fairness between different classes of claimant and defendant, so too were they concerned with different classes of claimant. In this respect, she emphasised that this could explain why Lord Steyn in *McFarlane* compared the parents of a healthy child with the unwillingly childless or the parents of a disabled child – they were so much better off.¹² Utilising the “solution of deemed equilibrium”, Hale LJ noted that since *McFarlane* concerned healthy children, where the costs of raising a child are equal to the benefits it confers upon its parents, the same could not be said where a child was disabled. In this respect, she commented that there was no need to take the *McFarlane* limitation any further, and since a disabled child needs extra care and expenditure, the additional costs attributable to the disability should be recovered.¹³

As has been noted by many, the judgments in *Parkinson* are extremely powerful – as Mason comments, the case, “in its own way, is as important as *McFarlane*”.¹⁴ Not only does the court illustrate a great sensitivity to the facts of the case, but the judgments express clear sympathy for the claimants. Who could not be moved by a story in which the narrator relays how the conception and birth of a child were “catastrophic events”, of a family living in “cramped accommodation”, a husband who must work extra overtime to make ends meet, a mother of four other children, who finding herself caring for an unwanted fifth but severely disabled child, must now give up all hope of returning to work, and the “intolerable strain” placed on a marriage which eventually breaks down? Yet sympathy does not provide a *legal*

justification – so how can the judgment be reconciled with *McFarlane*? Articulating this concern is Laura Hoyano, who comments:

“Surely it would be strained to assert that a surgeon in undertaking the procedure does not assume responsibility for the maintenance costs for a healthy child, but does assume responsibility for the statistically less likely possibility of an unhealthy child? *A fortiori* it is untenable to argue that extraordinary care costs are proportionate to the doctor’s fault when ordinary ones are deemed to be disproportionate. So it appears that parents of a handicapped child might be rescued only by the application of the offset formula to conclude that the child was a burden than a blessing, or by some formulation of distributive justice.”¹⁵

In the context of the wrongful conception claim, Hoyano’s observations are quite correct. It may be true that a disabled child “costs more” and has greater needs, but whether a doctor should be liable for that greater cost is another question entirely; surely the consequences would be more disproportionate? And while assumption of responsibility is unproblematic in the context of wrongful birth cases, where the very aim of the medical procedure is to avoid disability, the same cannot be said of wrongful conception where the whole purpose, akin to *McFarlane*, is to avoid the birth of *any* child. Indeed, by their Lordships (highly questionable) account in *McFarlane*, while a surgeon is under a duty to prevent pregnancy, he does not assume responsibility for the costs of child maintenance. Why then, should a surgeon assume responsibility for the maintenance costs of *any* negligently born child? Since the child’s disability in wrongful conception cases is not caused by the doctor, but the disability arises as a matter of chance, holding clinicians responsible for this less likely consequence seems entirely arbitrary. In truth, the only means of attempting to “legally” justify the *Parkinson* decision is through the remaining devices of “just, fair and reasonable” and “distributive justice”. Of the former, it goes little further than finding a possible chink in the *McFarlane* armour:

“it would not be fair, just and reasonable to award compensation which went further than the extra expenses associated with bringing up a child with a significant disability.”¹⁶

So, in other words, because *McFarlane* applied to healthy children, an exception can be made?

But, legally speaking, this is less than satisfactory; as Hoyano notes it is quite anomalous to determine a duty of care by reference to the *extent* rather than the *kind* of loss, “particularly where the rule is not calibrated to the impact of the loss on the particular family unit and its capacity to absorb it”.¹⁷ And on this basis there is nothing to separate the claimants in *McFarlane* from those in *Parkinson*. If the duty of care cannot extend to child maintenance costs in the former, it should not extend any further in the latter. Perhaps then, we can look to the principles of distributive justice where people in society “would consider that it would be fair for the law to make an award in such a case, provided that it is limited to the extra expenses associated with the child’s disability”.¹⁸ Or perhaps not, since it is here that we find Hoyano’s most scathing attack:

“Distributive justice has become yet another label, without pretending to intellectual rigour. ... Appeals to commuters on the Underground to decide duty of care issues allows the courts to avoid confronting the sharp edges of tort policy – deterrence, external scrutiny of professional standards of competence, cheapest cost avoidance of risk, insurability against loss, other modes of loss-spreading – and whether carving out *ad hoc* exceptions to well-established legal principles is a matter for parliamentary rather than judicial action.”¹⁹

Hoyano’s criticisms do not stand alone – and the principal reasons for this is that unless one articulates that a disabled child is *not* a blessing, it is simply impossible to find a convincing legal explanation for the exception created in *Parkinson*. However, given that *McFarlane* has proved a less than universally popular decision could it be that the Court of Appeal’s judgment in *Parkinson* is driven by a “tug of sympathy” for the claimants in this case coupled with not just a small measure of contempt for the House of Lords’ decision in *McFarlane*? As

Maclean has noted, the Court of Appeal (Hale LJ in particular) “was keen to minimise the scope and the impact of the House of Lords’ decision”.²⁰ And, after all, it is worth bearing in mind that but for *McFarlane*, it would neither have been necessary, nor perhaps possible to draw such lines between cases involving healthy and disabled children.

Yet, more recent developments have brought the reproductive torts to a nail-biting juncture. As if to provide a dramatic demonstration of the inherent problems of such line-drawing, the courts were presented with a further challenge – another factual variant of the wrongful conception case. Shortly after the adjudication of *Parkinson*, the Court of Appeal was called upon to determine the case of *Rees v Darlington Memorial Hospital*.²¹ And while the case concerned disability, it contained a crucial twist: for it was the parent, and not the child that suffered from a disability.

Rees and the Disabled Parent

The claimant, Karina Rees, suffered from a severe and progressive visual disability, retinis pigmentosa. Having already given up work because of her impaired vision, she requested a sterilisation because she considered that her eyesight would render her unable to care for a child, and was also anxious about the effect of labour and delivery upon her own health. The sterilisation operation was performed negligently, and the claimant later gave birth to a healthy son, Anthony. In bringing proceedings against the defendant hospital trust, the claimant sought damages for the full costs of bringing up the child. The judge at first instance ruled against the claimant on the determination of a preliminary issue and she appealed.

Of course, one might imagine that since the child in *Rees* was deemed “healthy”, the outcome must be clear. Since *McFarlane* ruled that parents of healthy children were not entitled to the costs of child maintenance, the same must be said of this case; no issue could arise around parental disability. However, in closely following their judgment in *Parkinson*, the majority of the Court of Appeal (Waller LJ dissenting) decided differently and permitted recovery of the additional financial costs of raising a child as were “uniquely referable” to the claimant’s disability. As Hale LJ rationalised, where the extra costs involved in discharging parental responsibility towards a disabled child are recoverable, “so too can the costs involved in a disabled parent discharging that responsibility towards a healthy child”.²² In delivering the leading judgment, Hale LJ endeavoured to provide a distinction between the abilities of the actors in *McFarlane* and *Rees* to illustrate that the former were able to discharge their parental responsibility. By contrast, a disabled parent requires help to discharge the most basic responsibility. Regarding *McFarlane* as precluding the recovery of ordinary maintenance damages, Hale LJ assessed that “we do not have to assume it goes further than that”; rather, additional damages would put the claimant “in the same position as her able-bodied fellows”.²³

But, if ordinary parents are denied recovery for the costs of maintaining a healthy child, why should the law treat a disabled mother differently? The fact that here, like the cases of disabled children, it will “cost more” for the disabled claimant mother to raise a healthy child is equally unsustainable on principles of law; this hardly provides a compelling legal reason to extend a doctor’s liability to these additional costs. Perhaps Karina Rees will incur greater hardship in raising her healthy child and find greater difficulty in adapting her life to care for a child she believed herself unable to parent. These aspects of her case coupled with a biological father playing no role in the child’s upbringing may certainly sway one’s sympathies in favour of recovery. But *McFarlane* takes no prisoners, this is pure economic loss, the birth of a healthy child is an incalculable blessing and an occasion for joy, and outweighs all the costs of parenthood.

Disability and Health: a False Dichotomy?

To a large degree, the case law so far demonstrates what could be described as a “mess”; while the healthy child is a blessing, its disabled counterpart is certainly less of a blessing in caring and financial terms, and the same can also be said by analogy of a disabled parent with

a healthy child. So while success (even if only limited) critically depends upon the presence of disability, the question at this stage must be whether such differential treatment is justified.

As a reading of either *Parkinson* or *Rees* soon illustrates, the judgments are simply replete with reasons as to why claims involving disability should form the exception to *McFarlane*. By comparison with the “normal” and “ordinary” experience of caring for a healthy child, the presence of disability is emphasised as “costing more”, requiring “extra care”, involving more time, and imposing greater levels of stress upon the family and so on. But the overall impression of these cases presents a further dimension; for what is expressed is not merely that disability raises an *additional* burden, but that the family experience of disability is completely different in nature and *kind* and therefore justifies differential treatment in the law of tort. Yet, by comparison with the cases involving healthy children (and parents), the reproductive outcomes in question do indeed sound more serious, since in many cases parents will have a greater and longer caring, financial and emotional burden. As the facts of the cases involving disabled children demonstrate, distinctions can be drawn.

Take for example the facts of *Rand v East Dorset*,²⁴ where the mother “assumed almost total responsibility for the care and upbringing” of her disabled child, to the exclusion of her husband “from all but very limited support and participation”, or those of *Hardman v Amin*,²⁵ where the mother’s caring burden involved “spending almost all her waking hours attending to [the disabled child’s needs]”; both provide biographies which, as Janet Read suggests, are quite typical of the “patterns of informal care provided by mothers and fathers of disabled children”.²⁶ And, as Hale LJ clearly recognised in her sensitive analysis in *Parkinson*, many of these cases do illustrate clear examples of where a disabled child raises a much more extensive burden, since s/he:

“needs extra care and expenditure. He is deemed on this analysis, to bring as much pleasure and as many advantages as does a normal healthy child. Frankly, in many cases, of which this may be one, this is much less likely. The additional stresses and strains can have seriously adverse effects upon the whole family, and not infrequently lead, as here, to the break up of the parents’ relationship and detriment to other children.”²⁷

If we now focus on the case of the healthy child, however, and assume the opposite, we will have made our first mistake, for we will have assumed that it is the fact of “disability” that adds the additional burden, which is absent in other cases. And it is that very fact that tends to blind us to the real context of these torts: these individuals do not want *this* child at all. So, when these individuals’ reproductive expectations fail, for whatever reason, quite simply, they all confront an additional financial, emotional and caring burden. A further dimension to these cases that we also tend to ignore is that the claimants in these cases are individuals, with distinct biographies, different social circumstances and varying abilities to care for an unplanned child. In the Court of Appeal in *Rees*, Waller LJ’s dissenting judgment elucidates the danger of forgetting this more context-based dimension:

“Assume the mother with four children who had no support from husband, mother or siblings, and then compare her with the person who is disabled but who has a husband, siblings and a mother all willing to help. I think ordinary people would feel uncomfortable about the thought that it was simply disability which made a difference.”²⁸

Parallels can be drawn. The hardship and need that arises from caring for an unplanned child need not derive from the fact of “disability” alone. Lone parenthood, coupled with a lack of social and familial support, typifies an analogous situation where individuals may honestly believe themselves to suffer exceptional hardship in caring for a healthy child, although to what extent will inevitably vary. So, in other words, if we can draw a distinction between the cases involving disability, and those involving health, the difference lies not in the “kind” of harm or burden that these individuals suffer, but rather it can only be one of degree. And this point cannot be emphasised enough: Hale LJ remarks that “the difference between a normal and a disabled child is primarily in the extra care that they need, although this may bring with it extra expenditure”, but as she also acknowledges, this is far from saying that caring for a

healthy child is a *harmless* experience. In a compelling essay she details at length the severe loss of autonomy involved in pregnancy, childbirth and parenthood. Clearly critical of *McFarlane* she comments that “parental responsibility is not simply or even primarily a financial responsibility”. Illustrating that the burden of child care, “in the greater majority of cases”, typically falls upon women, she emphasises that the burden of caring for *any* child is an extensive and enduring responsibility, since the “obligation to provide or make acceptable arrangements for the child’s care and supervision lasts for 24 hours a day, seven days a week, all year round, until the child becomes old enough to take care of himself”.²⁹

Yet, while Hale and Waller LJ’s analyses correctly emphasise that the distinction between “health” and “disability” as pivotal categories for recovery are less than sound, other problems emanate from assuming that disability requires differential treatment. While disability rights activists have argued that “disability” is at least partly a societal construction, where social barriers rather than physical attributes are largely causative of disability, the courts’ approach nevertheless embraces a purely medical model of disability. The difficulty with assuming that disability should make the difference is that it conflates “disability” with “incapacity” and fails to appreciate that “the disabled” are not a monolithic entity. Rather, individuals’ experiences of living with disability or caring for a disabled child are variable and the “ease” or “difficulty” in raising an unplanned child will depend on the context of their lives. Furthermore, this conflation only serves to perpetuate pathologising assumptions about the effects of parental disability on children and a child’s disability on its parents. But perhaps one can go further than this; as one US commentator has noted of the law’s exceptional treatment of individuals with disabilities:

“It cannot represent anything other than a value-judgment on behalf of society that the lives of [people with disabilities] are worth considerably less than those of a ‘normal’ person. This is particularly true when giving birth to a [disabled] child in itself merits legal compensation while the birth of a healthy child, in similar circumstances, does not.”³⁰

Courts must tread carefully here, for what this suggests is that the judicial approach to disability is not merely problematic for overlooking the parental burden that arises from the birth of *any* unplanned child, but that it is also arguable that the law is susceptible to the claim that it is sending out discriminatory messages about the value of individuals with impairments. So, given these acute difficulties, coupled with the confused picture of the reproductive torts, was this not a state of affairs that surely begged a return to the House of Lords for a full clarification, or perhaps a much hoped for quiet u-turn with “good grace and no loss of face”?³¹

Rees in the House of Lords³²

Expectations of either were soon to be disappointed. Following the Court of Appeal’s adjudication of *Rees v Darlington Memorial Hospital*, the defendant NHS Trust was granted an appeal to the House of Lords, although of interest, the respondent, Karina Rees, invited the House to review their previous decision of *McFarlane* under the *Practice Statement (Judicial Precedent)*.³³ Yet despite the bad press to which *McFarlane* had been subject, the now seven-strong House of Lords refused to depart from this decision, holding that it would be “wholly contrary to the practice of the House to disturb its unanimous decision in *McFarlane* given as recently as four years ago, even if a differently constituted committee were to conclude a different solution should have been adopted”.³⁴ In other words, even if their Lordships considered the previous ruling incorrect, the *McFarlane* decision would remain? Commentators in the field, such as Clare Dixon, have suggested that:

“[T]he main significance of *Rees* lies in the fact that the challenge to *McFarlane* failed; and the introduction of ... conventional damages for the loss of autonomy suffered as a result of unintended conception and birth.”³⁵

It is certainly true that the majority overturned the Court of Appeal’s ruling in *Rees*, substituting the additional maintenance award for that of “conventional” damages amounting

to £15,000, a fixed, if not meagre sum, that will now apply to all claimants in these cases. So, in one respect *Rees* provides some clarification – the healthy child, irrespective of parental disability, remains a blessing which cannot resonate in damages for child maintenance (albeit a blessing causative of £15,000 worth of loss of autonomy). On this limited issue, *McFarlane* stands. However, it would be incorrect to say that the challenge to *McFarlane* completely failed; in fact the “creation” of this “conventional award” is fairly radical. Although finding little favour with the minority, who regarded the creation of such an award as straying into the “forbidden territory” of Parliament,³⁶ or feared that what the majority considered a “modest sum” might well be seen as “derisory”, the conventional award nevertheless illustrates a significant departure from *McFarlane*. After all, since the disabled claimant in *Rees* gave birth to a healthy child as a result of a failed sterilisation, the clear ratio of *McFarlane* covered precisely this occurrence in rejecting child maintenance damages; so was there any need to introduce any conventional award? And indeed, if the minority considered the decision to be such a sound one, then why did Lords Steyn, Hope and Hutton consider that a disabled parent should form an exception to this rule and receive additional damages? It seems both the minority and majority responses provide some acknowledgement that with the benefit of foresight *McFarlane* would have been decided differently. And, the award, though not particularly “conventional”, might well be seen as a grumbling and most certainly derisory concession that parents in these cases do not always find the prospect of an unplanned child an unbridled joy. So given clarity on this point, the question remains, what is the future of the “unwanted” but disabled child?

An Uncertain Future: the “Disabled” Child

The dramatic retraction of liability in the actions for wrongful conception and birth since *McFarlane* suggests a fairly bleak future for those seeking damages for the costs of child maintenance. And *Rees* certainly confirms that expansionary tendencies are not on the agenda. While the House of Lords had an opportune moment for a complete rethink of the principles underpinning *McFarlane*, in line with scholarly criticism and indeed, a lower court backlash against that decision, Their Lordships’ response came in the form of a small compromise – the conventional award. So for parents who find themselves with an unplanned but “healthy” child that is as good as it is going to get. However, for parents of disabled children, the future is uncertain – for it is on this subject that we find *no* consensus.

What is particularly striking about *Rees* is the clear division in the House on nearly every point. Although the majority came down in favour of awarding Karina Rees the conventional award rather than additional damages, it was a far from convincing majority of 4:3. But more significantly, while *Rees* provided the House of Lords with an ideal opportunity to clarify the law across the entire field of wrongful conception and birth, we find little in the way of future guidance for lower courts seeking to adjudicate on cases involving the birth of a disabled child. Between the seven judges there is no indication as to whether the *Parkinson* decision was correct in creating an exception for a disabled child, or whether there, too, the conventional award should apply. Nor indeed, do we find much in the way of an indication whether the House would draw a distinction between cases of wrongful conception and wrongful birth. While all of their Lordships expressed an allegiance to the principles of *McFarlane*, which if correct must logically result in denying claims such as *Parkinson* (and *Rees*), some of their Lordships were less than comfortable with treating those cases as being on a par with *McFarlane* – on the factual merits of those cases, they sensed that justice demanded a different approach. Speaking of the disabled child, Lord Hope commented:

“But the scene changes if following upon a wrongful or unconvenanted pregnancy, the mother gives birth to a child who is seriously disabled and is likely to remain so throughout its childhood. Here too there is the inevitable mixture of costs and benefits, of blessings and detriments that cannot be separated. One cannot begin to disentangle the complex emotions of joy and sorrow and the intangible burdens and rewards that will result from having to assume responsibility for the child’s upbringing. But there is no getting away from the fact

that the parent of a seriously disabled child is likely to face extra costs in her endeavour to make the child's upbringing as normal as possible."³⁷

In line with earlier criticisms, this conclusion (which also attracted Lords Steyn and Hutton) is legally problematic. And as Lunney suggests, this approach cannot be reconciled with *McFarlane* since, "it is hard to see how this avoids doing what *McFarlane* says is prohibited – weighing up the burdens and benefits of a child, albeit disabled, and deciding that the child is more trouble than it was worth".³⁸ Lord Scott, on the other hand, whilst not endorsing *Parkinson*, considered that one might gainfully distinguish the case of a disabled child in a wrongful birth suit. There, unlike wrongful conception, the avoidance of the birth of a child with a disability was the *very* reason why parents sought medical treatment. Yet this is a point which is not only caught by Lunney's insight that this will surely offend *McFarlane*, but, more significantly, is caught by Lord Scott's own *dicta* when speaking of providing compensation for the wrongful conception of a disabled child:

"The striking of the balance between the burden of rearing the disabled child and the benefit to the parents of the child as a member of their family seems to me as invidious and impossible as in the case of the child born without any disability."³⁹

Although true that there is greater proximity in the wrongful birth case, this will not save a judgment in favour of compensation from appearing any less invidious or impossible. Matching the uncommitted response of Lord Scott in this respect is the judgment of Lord Millett. And perhaps his thoughts are the most surprising, given that he was, after all, the architect of the conventional award in *McFarlane* (despite it not having been taken up there) and was quick to apply this award to the situation of Karina Rees. Whilst one might imagine that he would extend this to *Parkinson* also, His Lordship was more ambivalent on the disabled child. Although wishing to keep the point open on *Parkinson*, Lord Millett nevertheless commented that:

"Told that a friend has given birth to a normal, healthy baby, we would express relief as well as joy. Told that she has given birth to a seriously disabled child, most of us would feel (though not express) sympathy for the parents. Our joy at the birth would not be unalloyed; it would be tinged with sorrow for the child's disability. Speaking for myself, I would not find it morally offensive to reflect this difference in an award of compensation."⁴⁰

So, taking stock at this point – Lords Steyn, Hutton and Hope would appear willing to award additional damages to parents of a disabled child irrespective of whether this was a wrongful birth or wrongful conception case; Lord Millett illustrates some sympathy to *Parkinson* and if sympathy translates into law, he would also allow additional damages in all cases of disabled children. By contrast, Lord Scott would deny damages in the wrongful conception case involving a disabled child, but would possibly regard wrongful birth cases in a different light. Even if one were to exclude Lord Scott's judgment, the prospect of a majority among a similarly constituted seven-panelled House⁴¹ willing to award additional damages in the case of a disabled child would seem fairly plausible.

Yet, on reflection, this is perhaps surprising. For of the different approaches, the one which offends *McFarlane* the least (although it might offend Parliament, and future claimants in these circumstances), is that of the conventional award and its standard application to *all* cases irrespective of disability, health, hardship and need. While sympathetic to the plight of the claimant in *Rees*, Lord Bingham clearly recognised that, following *McFarlane*, holding a doctor liable for a disability which he did not cause, but not for the birth which he/she did, was "arguably anomalous". On that basis he suggested the application of the conventional award, "without differentiation, to cases in which either the child or the parent is (or claims to be) disabled".⁴² In similar force, Lord Nicholls, clearly influenced by Waller LJ's concerns in the Court of Appeal over singling out disability for compensation, also considered that the preferable approach should be an award of a lump sum in all circumstances.

So, what is one to conclude at this juncture? The approach which seems to have mustered the most favour, that of awarding additional damages to parents of a disabled child, not only

lacks a sound legal foundation, but given my earlier criticisms, carries the deeply problematic message that a disabled child is less than a blessing, and that parental choices in reproduction only *matter*, or matter more if the child is born disabled. And this, I suggest, is a conclusion we should feel deeply uncomfortable about. But on the other hand what of the conventional award? Might we also hesitate before applying this across the board to all cases of wrongful conception and birth?

While some consider that “there is much to be said for the introduction of such a conventional award”,⁴³ the present author begs to differ. Although the award will be simple to administer, it is highly questionable what the award is for, and more particularly whether it is fair. It may be true that the award “makes no unjustly arbitrary distinction between the claimants”,⁴⁴ but this still begs the question as to how the assumption that *all* parents are *identically* situated, with the same impact on their lives through the birth of an unplanned child, illustrates respect for the notion of “individual autonomy”? Undoubtedly, the distinction between health and disability has been problematic, but that is not to say that on the factual merits of these cases there are no differences at all.

As we have seen, many of the cases involving disability *do* display a much greater caring, financial and emotional burden, but that one of the manifest problems with the *McFarlane* decision has been to assume that those who fall within the category of “health/normality” are blessed by the products of negligence. A close attention to context illustrates that the birth of an unplanned child is a serious issue for *all* parents, a loss that is suffered irrespective of health and disability. As has been stressed, if there is a difference in the burden that parents will suffer, this will never be one of kind, but one of extent, dependent upon individual circumstances. So, while the conventional award seems initially attractive, its flattening approach is, as Lunney comments, a risky strategy:

“It is risky because it may end up pleasing no one, except perhaps the NHS. Given the potential costs involved in raising a child, the parents of a healthy child may still feel hard done by. Disabled parents may feel aggrieved because the comparatively small award is unlikely to meet the additional costs incurred because of their disability. Those in favour of a full award in line with corrective justice principles may feel that the solution fails to do justice and those who believe *McFarlane* was a wholly just decision may feel that the judgment has been undermined.”⁴⁵

The conventional autonomy award may well find merit with some in drawing *no* distinctions between (differently situated) individuals, but it remains nevertheless, unjust and arbitrary. Moreover, given that the conventional award is said to recognise the reproductive autonomy of individuals and their “right to limit the size of their family”, which is after all, an “important aspect of human dignity”,⁴⁶ one might have some doubts as to how extensive the law’s commitment to reproductive autonomy really is. The conventional approach not only risks “pleasing no one”, but if applied across the board to include cases of disabled children will only further entrench the manifest unfairness that results from its application.

Of course, in the absence of a consensus in the House of Lords over the disabled child, the Court of Appeal’s determination of *Parkinson* still stands as good law. But for how long is quite questionable, since defendants may well consider that the House of Lords judgment in *Rees* provides an open invitation to appeal. Given this, it is hoped that their Lordships will take time to carefully review their previous approaches to the cases of wrongful conception and birth, for there are yet more reasons to do so.

Conclusion: Time for a Rethink?

The amount of judicial activity over the six years elapsing since *McFarlane* demonstrates the controversial and difficult (if not incoherent) nature of this decision. By contrast with Lord Millett’s reflection that “experience has now shown there to be unforeseen difficulties in application; nor that the decision is productive of injustice”,⁴⁷ as *Rees* and *Parkinson* at Court of Appeal level illustrate, the lower courts’ difficulties in applying *McFarlane* have been incurred precisely in efforts to avoid the obvious injustice it brings about. In a broader

context, however, *McFarlane* and subsequent cases illustrate a further concerning trend than perhaps Lord Millett or his colleagues might wish to acknowledge. Some have come to regard the case law in this field as illustrating “how far negligence law has come adrift of principle”,⁴⁸ whilst others consider the English position to provide a “preview, and a warning, against following the same course”.⁴⁹

In denying damages that would otherwise be recoverable under the conventional principles of tort law, their Lordships in *McFarlane* found the “answer” in more nebulous concepts of pure economic loss, benefits, blessings and let us not forget the trusty commuter, the oracle of distributive justice. But, as Kirby J’s recent ruminations in the Australian wrongful conception case of *Cattanach v Melchior* indicate (a case in which the majority of the High Court *permitted* the recovery of ordinary child maintenance damages), the *McFarlane* decision goes well beyond the merely unconventional, “it is arbitrary and unjust”.⁵⁰ In his view, not only is the Commuter a mask for “unreliable personal opinions” and the language of blessings and burdens illustrative of legal analysis overwhelmed with emotion, but significantly, Kirby J comments that the distinction between the immediate and long-term costs of medical error could be said to be discriminatory:

“[G]iven that it involves a denial of the application of ordinary compensatory principles in the particular given circumstances of childbirth and child-rearing, circumstances that biologically and socially pertain to the female experience and traditionally fall within the domain of women. If such a distinction is to be drawn, it is the responsibility of the legislature to provide it, not of the courts, obliged as they are to adhere to established legal principle.”⁵¹

Kirby J by no means sits alone in highlighting this gender dimension,⁵² or indeed in pointing to Parliament as the proper arbiter of the future of the reproductive torts.⁵³ In these two respects, the House of Lords has overstepped the mark. Given the already extensive burden of responsibility which women confront in matters of reproduction, it should be of great concern that the English law of tort has further privatised responsibility for the care of children brought about by negligence. Indeed, the language of blessings and benefits, hardly tempered by the derisory conventional award, merely communicates that negligence resulting in the birth of a child is a harmless event for which individuals, in particular women, must now be prepared to bear the costs. Nor is this concern ameliorated by reference to the principles of distributive justice and a National Health Service “always in need of funds to meet pressing demands”.⁵⁴

While their Lordships in *Rees* were more open about their reasons for denying compensation for child maintenance, notably the concern of providing large sums of damages to parents of healthy children against a publicly funded National Health Service, as Morris comments, “the law of negligence has not previously applied different rules as to levels of compensation according to whether defendants are part of the public as opposed to the private sector. If the laws of tort are to be reformed in this regard, it would be better not to do it by a side-swipe, albeit by the House of Lords.”⁵⁵ And, in the context of claims for clinical negligence, the various “solutions” adopted in both *McFarlane* and *Rees* are undoubtedly anomalous. Creating a partial immunity to the NHS against liability for wrongful conception and birth suits must now raise difficult questions of *all* clinical negligence claims, as to which are the most deserving of compensation and those which are not. If one considers that such judgments are better left for Parliament than the judiciary, then the reproductive torts now require a serious rethink.

Notes

1. *McFarlane v Tayside Health Board* [2000] 2 AC 59.
2. See Diana Brahams, “Editorial: Damages for ‘Unwanted’ Healthy Child Awarded to Physically Disabled Mother But Not to Mentally Handicapped Mother” (2003) 71(1) *Medico-Legal Journal* 1.
3. *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52.
4. [2000] 2 AC 59, 82 (*per* Lord Steyn).

5. In “wrongful conception” actions, parents seek damages from clinicians on the basis that they would not have conceived the child (healthy or disabled) but for the negligence. “Wrongful birth” claims generally only involve the birth of a disabled child. Typically the negligence at issue includes failures in genetic counselling or diagnosis, which leaves parents under the false impression that the child is healthy. The crux of the claim is that, but for the negligence, the parents would have elected to terminate the foetus under the Abortion Act 1967, s 1(1)(d). Note that wrongful life claims are different, though they arise out of the same circumstances as wrongful birth claims. In these suits, the action is instituted by the impaired child (or its representative) who claims that but for the negligence, his/her parents would have aborted the pregnancy. This latter action has been barred in English law since the case of *McKay v Essex AHA* [1982] 2 All ER 777 and is excluded under the Congenital Disabilities (Civil Liability) Act 1976, s 1(5).
6. Hale DBE, “The Value of Life and the Cost of Living – Damages for Wrongful Birth”, (2001) 7 *British Actuarial Journal* 755, 755.
7. See for example, Jackson, *Regulating Reproduction* (Oxford: Hart Publishing, 2001); Mason, “Unwanted Pregnancy: a Case of Retroversion?” (2000) 4 *Edin L Rev* 191; Maclean, “*McFarlane v Tayside Health Board*: a Wrongful Conception in the House of Lords” (2000) 3 *Web JCLI*.
8. Maclean, “Distributing the Burden of a Blessing” (2004) 3 *Journal of Obligations & Remedies* 23, 37.
9. *Thake v Maurice* [1985] 2 *WLR* 215, 230.
10. *Parkinson v St James’* [2001] 3 All ER 97.
11. [2001] 3 All ER 97, [40].
12. [2001] 3 All ER 97, [82].
13. [2001] 3 All ER 97, [90].
14. Mason, “Wrongful Pregnancy, Wrongful Birth and Wrongful Terminology”, (2002) 6 *Edin L Rev* 46, 64.
15. Hoyano, “Misconceptions about Wrongful Conception”, (2002) 65 *MLR* 883, 891.
16. [2001] 3 All ER 97, [51] (*per* Brooke LJ).
17. Hoyano, 897.
18. [2001] 3 All ER 97, [50].
19. Hoyano, 904.
20. Maclean, “Distributing the Burden of a Blessing”, (2004) 3 *Journal of Obligations & Remedies* 23, 23–24.
21. *Rees v Darlington Memorial Hospital NHS Trust* [2002] *EWCA Civ* 88.
22. [2002] *EWCA Civ* 88, [23].
23. [2002] *EWCA Civ* 88, [23].
24. (2000) *BMLR* 39. In the wrongful birth case of *Rand v East Dorset*, the mother gave birth to a child with Down’s Syndrome. The negligence consisted of the failure to inform the parents, following antenatal scanning, of the high risk of this reproductive outcome, thereby depriving the claimant of the opportunity to terminate her pregnancy under the terms of the Abortion Act 1967. Newman J, presented with the difficult task of determining this case shortly after *McFarlane*, held that parents could claim for the “additional” costs of child maintenance. Construing the claim as one for pure economic loss, Justice Newman considered that the Health Authority’s liability to compensate depended not upon the child’s disability, but upon the reasonable expenditure by the parents (i.e. what the parents could have afforded to pay) in connection with the disability.
25. [2000] *Lloyd’s Rep Med* 498. In this wrongful birth case which followed *Rand*, the doctor negligently failed to diagnose German measles whilst the mother was pregnant. The claimant gave birth to a severely disabled child. Illustrating clear disagreement with the approach of Newman J in *Rand*, Henriques J considered it “deeply unattractive” and legally incorrect that damages be assessed by reference to parental means, rather than the child’s needs. Henriques J distinguished *Rand* and held that claimants could recover damages for the past and future costs of raising the child, as were related to the child’s disability. For a detailed analysis of both *Rand* and *Hardman*, see Hoyano.
26. Read, *The Family and Society, Listening to Mothers* (Buckingham, OUP, 2000), 52.
27. [2001] 3 All ER 97, [90].
28. [2002] *EWCA Civ* 88, [53].
29. [2001] 3 All ER 97, [71].
30. Jackson, “Action for Wrongful Life, Wrongful Pregnancy and Wrongful Birth in the United States and England” (1995) 17 *Loyola of Los Angeles International & Comparative Law Journal* 553, 607.
31. Mason, 66.

32. [2000] 2 AC 59.
33. [1966] 1 WLR 1234.
34. [2000] 2 AC 59, [7].
35. Dixon, "An Unconventional Gloss on Unintended Children", (2004) 153 NLJ 1732, 1733.
36. [2000] 2 AC 59, [46] (*per* Lord Steyn).
37. [2000] 2 AC 59, [56].
38. Lunney, "A Right Old Mess: *Rees v Darlington Health Authority*" (2004) UNELJ 145, 150.
39. [2000] 2 AC 59, [145].
40. [2000] 2 AC 59, [112].
41. Note however, the recent retirement of the Right Honourable Lord Steyn.
42. [2000] 2 AC 59, [9].
43. Lunney, 153.
44. Maclean, 41.
45. Maclean, 41–42.
46. [2000] 2 AC 59, [123].
47. [2000] 2 AC 59, [103].
48. Hoyano, 900.
49. *Cattanach v Melchior* [2003] HCA 38 (Australia) (*per* Kirby J), [128].
50. [2003] HCA 38 (Australia), [162]. On facts which closely resemble those of *McFarlane* (except in *Cattanach*, the negligent post-operative advice was given to the wife following a sterilisation procedure), the High Court of Australia held by a 4:3 majority that child maintenance damages for the wrongful conception of a healthy child were recoverable, and rejected that any set-off should apply for the "benefits" flowing from a healthy child's birth. For an analysis of this judgment, see Vranken, "Damages for Wrongful Birth – the Australian Perspective" (2003) (November) *International Family Law Journal* 210.
51. [2003] HCA 38 (Australia), [162].
52. Priaulx, "Joy to the World! A Healthy Child is Born!" (2004) 13 SLS 5.
53. See Cane, "Another Failed Sterilisation" (2004) LQR 189.
54. [2003] UKHL 52, [6] (*per* Lord Bingham).
55. Morris, "Another fine mess... the Aftermath of *McFarlane* and the decision in *Rees v Darlington Memorial Hospital NHS Trust*" (2004) 20 *Professional Negligence* 2, 12.