CASE notes

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Unplanned births, unplanned costs: who pays the price?

On the 25 November 1999 the House of Lords ruled unanimously in *Macfarlane and Another v Tayside Health Board (Scotland)* that parents who produce a healthy child after a failed sterilisation or vasectomy may not claim compensation for the child's upbringing. While English courts were hitherto at liberty to award damages in excess of $160,000, compensation may now be drastically curtailed. Yet, whether the impact of this decision will traverse the Pacific Ocean and take root upon Australian shores remains to be seen - indeed, potent moral and social arguments weigh heavy on both sides of the spectrum.

Facts

The facts upon which the *Macfarlane* decision was based are clear. Mr McFarlane underwent a vasectomy operation on 16 October 1989. In reliance on a letter dated 23 March 1990, confirming that his sperm count was negative, he and his wife resumed intercourse without contraceptive measures. Mrs McFarlane subsequently fell pregnant with their fifth child, Catherine. They sought damages for the pain and inconvenience and loss of earnings resultant upon the unplanned pregnancy, as well as the costs associated with rearing the child.

The Lord Ordinary dismissed the action on two grounds: normal pregnancies and childbirth are natural processes which cannot be regarded as personal injuries; and the birth of a healthy baby is not a harm but a blessing. The case was subsequently considered on appeal by the House of Lords.

House of Lords Decision:

The House of Lords held unanimously that the plaintiffs may not receive compensation for costs associated with rearing the child. Rather a majority favoured the 'limited damages' approach: compensation would only be granted for pain and inconvenience, and loss of earnings associated with the unplanned pregnancy. The court left open the question of whether parents may be entitled to the cost of bringing up a handicapped child.

The various rationales upon which the judgments were based are heavily redolent of value-laden policy considerations. Lord Slyn, Lord Steyn and Lord Hope gave separate, yet largely concurring judgments. They rejected the plaintiff's claim for child-rearing costs, confining compensation to the mother's claim for solatium and any financial losses attributable to the pregnancy. While conceding that costs associated with rearing the child would have been reasonably foreseeable, their Lords specified that mere foreseeebility is not sufficient in cases of pure economic loss; "there must be a relationship of proximity and the attachment of liability for the harm must be 'fair, just and reasonable'." Their lords reasoned that discounting benefits associated with the child's birth would run contrary to notions of fairness and justice; and since benefits are inherently unquantifiable, costs are not recoverable as damages. In this connection, Lord Steyn also drew upon notions of distributive justice to lend weight to his argument. Indeed, the fact that compensation would necessarily warrant discrimination between rich and poor, and imply that a child is "more trouble than it's worth", would not cohere with views of the ordinary person.

In contrast, Lord Clyde upheld the claim for pain and inconvenience, yet dismissed the claim for loss of wages. Nevertheless, he too rejected the claim for child-rearing expenses, contending that they are 'wholly disproportionate to the doctor's culpability", and hence fail to accord with principles of restitution. Lord Millet rejected claims for both pain and inconvenience and for child-rearing costs, fervently asserting that "the birth of a normal, healthy child is a blessing not a detriment". He did, however, approve general damages to reflect the nature of the wrong.

The Position in Australia:

The position in Australia may appear, at first glance, to cohere substantially with the recent *Macfarlane* decision. Indeed, in *C.E.S. v Superclinics (Australia) Pty. Ltd.* (1995) 38 N.S.W.L.R. 47, a majority of the NSW Court of Appeal held that the plaintiff had, through the doctor's negligent failure to diagnose her pregnancy, lost the opportunity to have an abortion. Priestly J.A. and Kirby J permitted a limited recovery for pain and suffering associated with the "wrongful birth", but not for child-rearing expenses. In a dissenting opinion, however, Meagher J asserted that public policy was an absolute bar to the award of damages in "wrongful birth" cases, as it is inherently too difficult to assess damages on an acceptable basis.

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On a closer analysis of Kirby J's judgment, however, a different perspective emerges. Kirby J - now a member of the newly-constituted High Court - explicitly indicated that damages should in some cases be awarded for child-rearing expenses. In support of his view, Kirby J provided a number of powerful arguments which may incline one to query the reasoning upon which the judgments in *Macfarlane* were based. In rejecting the assertion that damages would be "so speculative as to defy calculation", he asserted that "judges and juries are required every day to make assessments of future economic and non-economic loss incurred as a result of another's negligence. They do so upon such amorphous considerations as 'loss of enjoyment of life'."

He further argued that Courts "should not embrace the fiction that an unwanted but healthy child must always be considered a blessing. Parents themselves have already...assessed the situation. They concluded that the child would, in fact, be a greater burden than a desired 'blessing'. This conclusion was manifested by the steps taken, or the desires expressed, to secure a termination of the pregnancy at a time when this could have been safely done. The widespread use of contraceptive measures is itself an indication of a general social disagreement with the theory that every potential child must necessarily be considered an unalloyed blessing." In light of Kirby J's findings then, it is not obvious that the current Australian High Court would necessarily follow blindly the *Macfarlane* decision. The High Court may well be more lenient to potential plaintiffs.

Certainly, the recent HC decision in *Perre v Apand Pty Ltd* (1999) ATR 81-516 may also influence a judgment in respect of pure economic loss flowing from an unwanted pregnancy. In that case the High Court, in separate judgments, highlighted a number of factors to be considered in determining whether there exists a relationship of proximity. The court considered, inter alia: (1) the knowledge of the defendant at the time of the act; (2) whether the defendant had control over the activity; (3) the vulnerability of the plaintiff; (4) whether the imposition of a duty would result in indeterminate liability; (5) whether a duty would impose a burden on commercial autonomy; and (6) whether there was gross negligence on the part of the defendant. While the impact of this judgment remains to be seen, it appears that it may not discount entirely the possibility of a claim for child-rearing costs in the context of unwanted pregnancies. A court is likely to engage in a balancing of policy factors, the results of which will depend on the intricacies of the specific case. Thus, while the current Australian position remains substantially unclear, it may be too presumptuous to assert that the recent Macfarlane decision represents "good" law in Australia. In fact, with the advent of the European Union, the Macfarlane decision itself may yet be required to undergo a final assessment at the hands of the European Court of Justice. PL