Damages for Wrongful Conception: Moving Away from Policy Considerations?

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In *McFarlane and Another v Tayside Health Board*[1] the House of Lords addressed for the first time the issue of damages in a wrongful conception case. The decision provides a strong indication that in such cases, damages will be awarded for the pain and suffering associated with childbirth, but not for the costs of maintaining the child until adulthood. In so doing, they arrived at the same decision that a number of courts — relying on the concept that the birth of a healthy child cannot be characterised as a 'harm' — have arrived at. However, the majority declined to make policy considerations the basis for their decision, and relied instead upon principles of recovery for economic loss and distributive justice.

I. The facts and the decisions at first and second instance

In October 1989 the first plaintiff, Mr McFarlane, underwent a vasectomy operation. The plaintiffs had four children and had decided, for reasons that are not disclosed in the judgment, not to have any more. In March 1990 a letter from the consultant surgeon informed Mr McFarlane that his sperm counts were negative, and the couple resumed intercourse without contraceptive measures. In September of the following year Mrs McFarlane became pregnant and gave birth to a normal, healthy child (Catherine) in May 1992. The plaintiffs sued the defendants in negligence in relation to the compilations of the seminal analysis record and in advising the first plaintiff that he no longer needed to use contraception.[2] Mrs McFarlane claimed £10 000 for pain and distress resulting from the pregnancy and the couple claimed £100 000 as the costs of maintaining Catherine until adulthood.

The judge at first instance, Lord Gill, rejected both claims on the basis that a normal pregnancy and labour do not constitute harm in respect of which damages are recoverable and that the benefits of having a child outweighed any costs to the parents in raising that child. The Appeal Court reversed the decision on both grounds. They held that pregnancy and childbirth were events in respect of which damages could be awarded and that there was no requirement that the benefits of having a child be off-set against the costs. Furthermore, they held that considerations of public policy did not preclude the plaintiffs from recovering maintenance costs for Catherine. The defendants appealed.

II. The issues

The claim in *McFarlane* was a claim for wrongful conception, that is a claim made by a parent or parents for the negligent non-prevention of pregnancy. This type of action is to be distinguished from an action for wrongful birth — a claim by a parent or parents for a negligent non-termination, and from an action for wrongful life — a claim made by a disabled child for negligent non-prevention or non-termination of pregnancy.[3] However, the issues that arise in each type of action are similar and are relevant to cases that arise under a different type of action.

These issues have been addressed in a substantial number of cases in the UK, the US

1 [2000] 2 AC 59.
2 Note 1 at 98.
3 The distinction is explained in Stewart A, 'Damages for the Birth of a Child: Emotional Bastards — Or What?' (1995) JLSS 298 at 298.

and other jurisdictions.[4] Most United States courts have awarded damages in respect of pregnancy and childbirth, but many have denied recovery of maintenance costs.[5] English courts, on the other hand, have exhibited a trend of allowing full recovery in wrongful conception/birth cases.[6] The only superior court decision on point in Australia until recently was *CES v Superclinics*.[7] In that case, the plaintiff was denied recovery for the costs of raising the child to adulthood, although Kirby P would have preferred to have awarded full damages. In *Melchior v Cattanach*,[8] a judgment recently handed down by the Queensland Court of Appeal, full damages were awarded. That case is discussed below.

Policy considerations have played an important role in these decisions. These considerations are many and various but can be summarised as follows.[9] One proposition is that an action to recover damages for the birth of a healthy child is contrary to the moral ethos of society because the birth of a child is an occasion for celebration. In the same vein is the argument that parents do not suffer 'damage' as a result of the birth of a healthy child, or that even if they do, they can mitigate this damage by terminating the pregnancy or offering the baby for adoption. It has also been argued that the difficulty of calculating damages of this nature, especially with respect to off-setting the benefits of raising a child against the economic disadvantages, precludes recovery. Yet another consideration is the fact that recovery of this kind may place an excessive burden on the medical profession and prompt doctors to encourage patients to seek an abortion in cases where the pregnancy is a result of negligence. The final factor relates to the detriment that may result to the welfare of a child who learns that he or she was 'unwanted'.

III. The decision of the House of Lords

The House of Lords partly overturned the decision of the Court of Appeals and found that the parents were not entitled to the costs of raising Catherine. By majority (Lord Millett dissenting) the House of Lords dismissed the appeal in relation to the damages for pregnancy and childbirth.

1. Damages for pregnancy and childbirth

Lord Slynn held that it was not necessary to show harm or injury in order to recover damages,[10] and that Mrs McFarlane was entitled to medical expenses, maternity clothes and baby equipment. Lords Steyn,[11] Hope[12] and Clyde[13] held that childbirth and pregnancy could amount to injury and that damages for this were recoverable, although Lord Clyde denied recovery in respect of the layette and Mrs McFarlane's loss of income. Lord Millett,[14] in dissent, held that damages were not recoverable on the basis that the birth of a child must be regarded as beneficial by law. He did, however, award general damages in the amount of £5000 and found that the costs of replacing equipment may be recoverable if the parents had disposed of their old equipment in reliance on the success of the vasectomy procedure.

4 An overview of the cases is given by Lord Slynn of Hadley; 69–73.
5 Seymour J, *Childbirth and the Law*, 2000, United States, Oxford University Press, 122–123.
6 The distinction is explained in Stewart A, 'Damages for the Birth of a Child: Emotional Bastards — Or What?' (1995) JLSS 298 at 300.
7 (1995) 38 NSWLR 47.
8 [2001] QCA Unreported, 26 June.
9 The summary is taken from Symmons CR, 'Policy Factors in Actions for Wrongful Birth' (1987) *The Modern Law Review*, 50(3), 269.
10 [2000] 2 AC 59 at 74.
11 Note 10 at 84.
12 Note 10 at 87.
13 Note 10 at 106.
14 Note 10 at 114.

2. Damages for maintenance of the child

The most significant aspect of the judgment is the determination that damages could not be recovered for the costs of raising Catherine until adulthood. Their Lordships were unanimous in this finding, although their reasoning varied.

The majority (Lords Slynn, Steyn and Hope) based their decision on principles relating to recovery for economic loss. Lord Slynn explained that the issue was not simply one of quantification of damages, but of the extent of the duty of care owed by the surgeon to the plaintiffs.[15] As well as foreseeability, a relation of proximity was required, which could only be imposed where it is 'fair, just and reasonable' for such a duty to be imposed at law.[16] He further held that it was not fair, just and reasonable to impose liability on the doctor for the responsibilities of raising a child.[17] Lord Hope decided on largely the same terms.[18] Lord Steyn utilised similar reasoning, but framed his discussion in terms of 'distributive justice'.[19] His approach involved an assessment of the just distribution of burdens and losses among members of society. This assessment was undertaken by means of asking commuters on the Underground: 'Should the parents of an unwanted but healthy child be able to sue the doctor or hospital for compensation equivalent to the cost of bringing up the child for the years of his or her minority, i.e. until about 18 years?'[20] In Lord Steyn's opinion, the overwhelming majority would answer in the negative. If necessary Lord Steyn would also say that the claim would not satisfy the requirement of being fair, just and reasonable.[21] The plaintiffs therefore could not obtain damages for the costs of raising their child.

Lord Clyde's decision was based on the idea of restitution. He held that for the plaintiffs to be awarded the costs of maintenance for a child who had become a loved and welcome addition to their family did not accord with the idea of doing justice between the parties.[22]

The judgment of Lord Millett differed considerably from those of his fellow Lords. He did not consider that the decision should depend on the characterisation of the loss as economic or consequential.[23] He held that the claim in respect of maintenance was not recoverable because, while the birth of a child brings mixed blessings, society must regard the balance as beneficial — to do otherwise would be morally offensive.[24] His Lordship cited *Public Health Trust v Brown*,[25] where the court stated:

> a parent cannot be said to have been damaged by the birth and rearing of a normal, healthy child. . .[I]t is a matter of universally-shared emotion and sentiment that the intangible but all-important, incalculable but invaluable 'benefits' of parenthood far outweigh any of the mere monetary burdens involved. . .[26]

3. Rejection of public policy factors?

Lords Slynn,[27] Steyn[28] and Clyde[29] all emphasised that their decisions did not depend on issues of public policy. Lord Clyde pointed out that policy considerations in support of

15 Note 10 at 76.
16 Note 10 at 77.
17 Note 10 at 77.
18 Note 10 at 96–97.
19 Note 10 at 82.
20 Note 10 at 82.
21 Note 10 at 83.
22 Note 10 at 105.
23 Note 10 at 109.
24 Note 10 at 114.
25 (1980) 388 So.2D 1084, 1085–6.
26 Cited at [2000] 2 AC 59 at 110–111.
27 [2000] 2 AC 59 at 76.
28 Note 27 at 83.
29 Note 27 at 100.

one party were usually balanced by a countervailing argument in support of the other party, and that such considerations were therefore not sufficiently solid ground to provide a basis for decision-making.[30]

However, despite the open rejection of policy considerations as a basis for judgment, an undercurrent of policy issues runs throughout the judgment. Lord Millett openly based his decision on public policy, stating that there is '. . . something distasteful, if not morally offensive' in treating the birth of a normal child as a 'harm'. Lord Steyn, in the context of a discussion of distributive justice, stated that:

> 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.[31]

The House of Lords considered the possibility that the assessment of damages would differ from case to case in accordance with the financial circumstances of the plaintiff parents. Their Lordships considered that this was unreasonable because in some cases, the expenses of child-rearing would be disproportionate to the doctor's culpability.[32]

Their Lordships also considered and rejected a number of policy considerations. The argument was not advanced by the defendants that the plaintiffs could have mitigated their loss by terminating the pregnancy or by offering the baby for adoption, nor that their failure to do so broke the chain of causation. Nevertheless the possibility of such an argument was addressed by each member of the court, and unanimously rejected.[33] Lord Steyn opined that that the law must respect parents' decisions on family planning, which are closely tied to basic freedoms and rights of autonomy.[34]

Lord Slynn[35] rejected the argument that an extension of liability to damages for maintenance would result in medical practitioners encouraging potential litigants to have abortions. In his opinion, the ethical standards of doctors and the availability of medical insurance provided sufficient protection against such a possibility. He also found unpersuasive the argument that damages should be denied on the grounds that a child may be psychologically affected by learning that her or his birth was unwanted. He pointed to the fact that unplanned conception is not uncommon and that babies born as a result of 'unwanted' pregnancies frequently become accepted and integrated into families.[36] While the decision in *McFarlane* was ostensibly made on the basis of principles concerning economic loss, it is clear that notions of public policy were carefully considered by their Lordships, albeit that some considerations were ultimately rejected.

4. Rejection of the 'Benefits Rule'

The decision in *McFarlane* represents a rejection of the 'benefits rule' which has been applied in a number of other cases on point. Basically, the rule allows damages to be awarded for the maintenance of a child until he or she reaches majority, but requires set-off of an amount intended to represent the benefits derived from the love and companionship of a child.[37] Lord Slynn rejected this approach on the grounds that it was too difficult to assess the benefits provided by a child. He stated:[38]

> 'Of course there should be joy at the birth of a healthy child, at the baby's smile and the teenager's enthusiasms but how can these be put in money terms and trimmed to allow for sleepless nights

30 Note 27 at 100.
31 Note 27 at 82.
32 Note 27: Lord Clyde at 106; Lord Hope at 91.
33 Note 27: Lord Slynn at 74; Lord Steyn at 81; Lord Hope at 97; Lord Clyde at 104; Lord Millett at 113.
34 Note 27 at 81.
35 Note 27 at 75.
36 Note 27 at 75.
37 This approach was applied by the District Court of Queensland in *Dahl v Purnell*, 24 September 1992.
38 [2000] 2 AC 59 at 75.

and teenage disobedience? If the valuation is made early how can it be known whether the baby will grow up strong or weak, clever or stupid, successful or a failure both personally and careerwise, honest or a crook?'

Lord Hope[39] was of the opinion that considerations of fairness, justness and reasonableness required benefits to be taken into account, but that it was impossible to calculate such benefits. Lord Clyde[40] considered that the difficulty of assessing damages should not be a bar to recovery. He also stated that only the economic benefits of having a child should be off-set against the financial costs of maintaining that child. Ultimately, he rejected the benefits rule on the grounds that to require a parent to demonstrate that their child was 'more trouble than he or she is worth' was undesirable. Similar reasoning was advanced by Lord Steyn.[41] Lord Millett[42] also unequivocally rejected the benefits rule, finding that the choice was between no recovery on the basis that benefits outweigh any loss and full recovery on the basis that benefits must not be considered, as they are immeasurable.

IV. Significance of *McFarlane* in Australia

No case involving a claim for costs of raising a child in a wrongful birth case has yet come before the High Court of Australia. *CES v Superclinics*[43] was settled before reaching the High Court.[44] The most recent case on point is the decision of the Queensland Court of Appeal in *Melchior v Cattanach*.[45] In that case a couple successfully sued a doctor who performed a sterilisation operation on Mrs Melchior. The doctor failed to inform her that he had been unable to confirm that her right fallopian tube had been removed during adolescence; that if it was still in existence there was an increased chance she could become pregnant; and that a procedure was available to confirm that the tube had been removed. The Court of Appeal unanimously decided that the plaintiffs were entitled to damages for the costs of raising the child when Mrs Melchior subsequently became pregnant.

Like the House of Lords, the Queensland Court of Appeal considered that this was a case in which damages were claimed for pure economic loss. However, their analysis of economic recovery lead a majority of the court (Thomas J dissenting) to award damages for the cost of raising the child until adulthood. McMurdo P supported the findings of the primary judge that the principles for recovery in economic loss cases established in *Perre v Apand*[46] supported the plaintiffs' claim for recovery. She pointed to factors such as the control by Dr Cattanach, the reliance of the Melchiors, their vulnerability, and the fact that a finding of liability resulted in a small and determinate class of people. Davies JA relied on similar factors to reach the same conclusion.[47]

It is submitted that *Melchior* represents a rejection of the notion that the birth of a healthy child is always a blessing for which parents should receive no compensation. The House of Lords in *McFarlane* denied the parents' claim under the guise of restricting liability for economic loss, however the judgment indicates a strong influence of policy. The Court of Appeal in *Melchior* did not consider that principles of economic loss were a bar to recovery in an unwanted conception action. It remains to be seen which approach will be followed by the High Court.

39 Note 38 at 97.
40 Note 38 at 103.
41 Note 38 at 82.
42 Note 38 at 111.
43 (1995) 38 NSWLR 47.
44 [2001] QCA Unreported, 26 June at 7.
45 Note 44.
46 (1999) 198 CLR 180.
47 [2000] 2 AC 59 at 21.