

CLAIMS FOR WRONGFUL PREGNANCY AND DAMAGES FOR THE UPBRINGING OF THE CHILD

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

I INTRODUCTION

Wrongful birth actions arise when a claim is made, usually by parents, that medical negligence has caused them to bear the burden of an unplanned child. Different factual circumstances may lead to such a claim. The negligence may be a consequence of poor technique during an operation, or a failure to supply appropriate information, or both.²

Wrongful birth cases create many difficult issues. First, foreseeability is relevant to determine the extent of the responsibility of the negligent doctor. If a sterilisation operation or termination is performed negligently, it is foreseeable that the woman will become or remain pregnant.³ The courts have, however, struggled with the concept that the application of foreseeability should result in the doctor becoming liable for the costs of the child's entire upbringing, rather than limiting liability to the pain and inconvenience of the unwanted pregnancy and birth. It has been suggested that imposing such liability can be seen as subjecting the doctor to 'a kind of medical paternity suit'.⁴

In cases where the child is born after a failed sterilisation and has disabilities that were not foreseeable during the course of the pregnancy, it might be argued that liability for the costs of the upbringing, particularly the additional costs arising from the disability, are not just. The doctor might argue it was fate and

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1 *Thake v Maurice* [1984] 2 All ER 513, 526.

2 *Edwards v Blomeley* [2002] NSWSC 460 (Unreported, Studdert J, 12 June 2002).

3 *McFarlane v Tayside Heath Board* [2000] 2 AC 59. 'It was plainly foreseeable that if the operation did not succeed, or recanalisation of the vas took place, but the husband was told that contraceptive measures were not necessary, the wife might become pregnant': at 74 (Lord Slynn).

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

not the quality of medical care that led to the disabilities. However, damages in negligence are assessed on the basis of the consequences of the negligence, rather than the degree of culpability, since minor negligence can have far-reaching consequences. In every birth there is a statistical risk that the child will be born with disabilities, therefore, disability is foreseeable.⁵

Some cases suggest that there is a distinction between wrongful birth cases and wrongful conception cases.⁶ Wrongful conception refers to a pregnancy resulting from the defendant's negligence. Wrongful birth cases relate to the birth and consequential expenses of raising the child. In the latter, the parents have lost the opportunity to terminate a pregnancy. This opportunity would have been available if the impugned professional services had not been negligently performed.⁷ Despite this distinction, in *Groom v Selby*⁸ ('*Groom*') Hale LJ stated that 'the principles applicable in wrongful birth cases cannot sensibly be distinguished from the principles applicable in wrongful conception cases'.⁹

This paper considers the various approaches that have been taken by the courts in New Zealand in claims for wrongful birth. It considers the English decisions on the same topic and contrasts them with judicial developments in Australia. A brief outline of the decisions of courts in other jurisdictions, such as the United States and Canada, is also given.

In New Zealand courts, the law relating to personal injury has been slow to develop since the commencement of the Accident Compensation Scheme¹⁰ ('Scheme'). However, dissatisfaction with the levels of compensation from the Scheme has led to increased attempts to obtain compensation by way of litigation. The courts are now being called upon to consider the issue of damages for the birth of a child.

One approach is that of the House of Lords in *McFarlane v Tayside Health Board* ('*McFarlane*').¹¹ This approach denies compensation for the upbringing of a healthy child on the grounds that such a child is viewed by society as a blessing. The alternative, or the arguably more principled approach, is that of the High Court of Australia in *Cattanach v Melchior*¹² ('*Melchior*') which affirmed

5 *Emeh v Kensington and Chelsea and Westminster Area Health Authority* [1985] 1 QB 1012, 1019:

In my view it is trite to say that if a woman becomes pregnant, it is certainly foreseeable that she will have a baby, but in my judgment, having regard to the fact that in a proportion of all births – between one in two hundred and one in four hundred were the figures given at the trial – congenital abnormalities might arise, makes the risk clearly one that is foreseeable, as the law of negligence understands it (Waller J).

6 In the United States, for example, wrongful conception relates to those cases which result from a negligent sterilisation or advice that leads to an unwanted pregnancy. Wrongful birth is used to describe those cases where a child is born subsequent to a negligent abortion. See Angus Stewart, 'Damages for the Birth of a Child' (1995) 40 *Journal of the Law Society of Scotland* 298, 298.

7 *Parkinson v St James and Seacroft University Hospital NHS Trust* [2002] QB 266, [46].

8 [2001] EWCA Civ 1522 (Unreported, Brooker LJ, Hale LJ and Steele J, 18 October 2001).

9 *Ibid* [28].

10 See below Part II(A).

11 [2000] 2 AC 59.

12 [2003] HCA (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 16 July 2003).

the decision by the Queensland Court of Appeal in *Melchior v Cattanach*,¹³ acknowledging that even a healthy child can be a financial burden, for which the parents might claim compensation.

This paper will review the varied approaches taken by the courts to decide these issues and consider the views expressed by various commentators. It will focus on the remedial, rather than substantive, aspects of such claims, particularly whether damages should be available to compensate for the birth of a disabled child, but not a healthy child.

II NEW ZEALAND

A Accident Compensation

Since 1974, New Zealand has had a comprehensive no fault Accident Compensation Scheme for those who suffer personal injury. All personal injury victims are covered by the *Injury Prevention, Rehabilitation and Compensation Act 2001* (NZ) ('IPRCA').¹⁴ Therefore, a person injured in a motor vehicle accident or at work is compensated in the same way as a person injured at home.¹⁵ In the space of 30 years the Scheme has undergone five major statutory transformations.¹⁶

When first introduced, New Zealand's Accident Compensation Scheme was intended to be a solution to the injustices created by the vagaries of common law personal injury litigation.¹⁷ When dealing with such claims the common law mechanism was:

- haphazard, in that it failed to compensate significant numbers of accident victims;
- expensive;
- subject to substantial delays; and
- not conducive to rehabilitation.

The primary purpose of the Scheme was to ensure that people who were physically injured received 'a real measure of monetary compensation for their losses'.¹⁸

It is doubtful whether the statutes, from 1972 and 1982, ever provided substantial compensation with respect to the lump sum payments available. The

13 [2001] QCA 246 (Unreported, McMurdo P, Davies and Thomas JJA, 26 June 2001).

14 See Brooker's Statutes of New Zealand, *Brooker's Accident Compensation in New Zealand*, vols 1-2, 0864720998.

15 A person injured at work receives compensation for the first week, whereas compensation for non-work injuries starts after the first week. See *Injury Prevention, Rehabilitation and Compensation Act (2001)* (NZ) ss 97-9 and Schedule 1(32).

16 These are, the *Accident Compensation Act 1972* (NZ), the *Accident Compensation Act 1982* (NZ), the *Accident Rehabilitation and Compensation Insurance Act 1992* (NZ), the *Accident Insurance Act 1998* (NZ) and *Injury Prevention Rehabilitation and Compensation Act 2001* (NZ).

17 New Zealand, Royal Commission to Inquire into and Report Upon Workers' Compensation, *Woodhouse Report* (1967).

18 *Ibid* [484].

1972 regime¹⁹ provided a maximum lump sum of \$7000 for permanent loss or impairment of bodily function. It provided a maximum payment of \$10 000 for pain and suffering, loss of enjoyment of life and disfigurement. The maximum damages available were \$17 000. In 1982 the maximum lump sum payment was increased to a combined maximum of \$27 000.²⁰

The *Accident Rehabilitation and Compensation Act 1992* (NZ) was introduced because of concerns about the increasing costs of lump sum compensation for permanent disability and the judicial expansion of personal injury by accident. The lump sum compensation was abolished, a move criticised as a fundamental breach of the social contract that underlay the original scheme.²¹ Under the *IPRCA*, the ban on civil claims for damages was retained.²² Since then a variety of approaches have been used in an attempt to bypass the scheme utilising the common law.²³

To be compensated under the *IPRCA* an injured person must show:

- (a) that they suffered personal injury;²⁴ and
- (b) that this is covered²⁵ under the *IPRCA*.

If an injured person is covered under the *IPRCA* then they cannot resort to the New Zealand courts for damages for the injury. This is because ss 317 and 318 of the *IPRCA* bar 'proceedings ... for damages arising directly or indirectly out of a personal injury covered by this Act'.²⁶ Few problems arise with motor vehicle and work accidents under the *IPRCA*, because the vast majority of such cases involve some form of forceful contact resulting in physical injuries caused by the accident.²⁷

Unlike some other overseas jurisdictions, there is no need for the injured person to prove negligence and sue for damages. Nor is there a need for the injured person to show that the injury happened through the use of a motor vehicle or at work. Instead, an injured person comes under the general accident compensation scheme if they have a personal injury that is covered under the *IPRCA*. In addition, the *IPRCA* does not result in the lengthy and expensive delays of civil litigation for damages.

1 *Upsurge in Damages Claims*

Although obtaining compensation for most injuries poses little difficulty, and the bar on damages claims remains, there has been a striking upsurge in damages

19 *Accident Compensation Act 1972* (NZ) ss119–20.

20 *Accident Compensation Act 1982* (NZ) ss 78–9.

21 Rodney Harrison, *Matters of Life and Death: the Accident Rehabilitation and Compensation Insurance Act 1992 and Common Law Claims for Personal Injury* Legal Research Foundation (University of Auckland) 1993.

22 *Injury Prevention, Rehabilitation and Compensation Act 2001* (NZ) s 394.

23 For example, attempts have been made to extend the role of exemplary damages, commence litigation for nervous shock and extend the scope of claims based on negligence, breaches of fiduciary duty and breaches of the *New Zealand Bill of Rights Act 1990* (NZ).

24 *Injury Prevention, Rehabilitation and Compensation Act 2001* (NZ) s 26.

25 *Injury Prevention, Rehabilitation and Compensation Act 2001* (NZ) s 8.

26 *Injury Prevention, Rehabilitation and Compensation Act 2001* (NZ) s 317.

27 *Injury Prevention, Rehabilitation and Compensation Act 2001* (NZ) ss 20, 26.

claims being filed for mental trauma and exemplary damages in personal injury cases. This upsurge has primarily been for cases of sexual abuse, medical negligence, and work related injuries, there have also been some as a result of motor vehicle accidents. There are three main reasons for this upsurge in damages claims:

- *Mental trauma* is not included in the definition of personal injury under the *IPRCA*, except in cases where mental injuries are suffered because of physical injuries²⁸ and where mental injury arises from sex crimes.²⁹ Thus, damages for mental trauma can be claimed in court.
- *Exemplary damages* claims are allowed in cases of negligent and intentional conduct.³⁰
- *Lump sum compensation* was reintroduced by the *IPRCA*.³¹ However, the amounts available are low.³²

B Failed Sterilisation Claims

Claims relating to failed sterilisation are rare in New Zealand, therefore '[t]he law in New Zealand on damages for personal injury has rather stood still since the accident compensation scheme came into force'.³³ However, cases are now coming before the courts because the parents in these situations, facing the expenses of raising a child, have no access to accident compensation because they have not suffered a personal injury as defined by the legislation.³⁴

In *SGB v WDHB*,³⁵ the plaintiffs sought compensation for the birth of their fourth child, that was conceived as a result of a failed vasectomy. They alleged that the pregnancy was caused by a lack of informed consent, that is, if they had

28 *Injury Prevention, Rehabilitation and Compensation Act 2001* (NZ) s 26. Cases filed include: *W v Health South Canterbury* (High Court, Timaru, CP 2/95, 1995) – \$1.5 million compensatory damages sought for mental trauma from the switching of newborn babies by a hospital, settled on confidential terms; *W v Counties Manukau Health Ltd* (High Court, Auckland, CP 583/94, Barker J, 13 April 1995) – \$200 000 exemplary damages sought against the hospital for sexual abuse of two children by a paedophile inadequately supervised on release from a mental hospital; *B v Residual Health Unit* (High Court, Wellington, AP 289/96, Gallen J and Neazor J, 28 July 1997) – \$1 million compensatory damages claimed by parents for mental trauma and \$400 000 exemplary damages for brain damage caused to an infant in hospital.

29 *Injury Prevention, Rehabilitation and Compensation Act 2001* (NZ) s 21. Cases filed include: *W v Attorney-General* (High Court, Wellington, CP 42/97, Smellie J, 3 October 2002) – claim for compensatory and exemplary damages for child abuse while in foster care.

30 *Injury Prevention, Rehabilitation and Compensation Act 2001* (NZ) s 319. Cases filed include: *Jackson v Burcher* (High Court, Hamilton, CP56/94 Master Faire, 19 September 1997) – claim for \$1.5 million exemplary damages for medical negligence and alleged cover-up of radioactive damage as the result of a scan; *A v Bottrill* [2002] 3 WLR 1406 – claim for exemplary damages for medical negligence.

31 *Injury Prevention, Rehabilitation and Compensation Act 2001* (NZ) s 54.

32 *Injury Prevention, Rehabilitation and Compensation Act 2001* (NZ) s 380. Schedule 1, ss 54–8, Injury Prevention, Rehabilitation and Compensation (lump sum and independence allowance) Regulations 2002 SR2002/22 set the amounts of lump sum payments available, such as: 10 per cent disability = \$2500; 20 per cent = \$6459; 40 per cent = \$19 920.

33 *Bryan v Philips New Zealand Ltd* [1995] 1 NZLR 632, 640 (Barker J).

34 See, eg, 'Doctor sued over failed sterilisation', *New Zealand Herald* (Auckland), 21 March 2002, 1. In the case discussed in this article, a New Plymouth woman is suing a doctor for \$50 000 for pain and suffering caused when she became pregnant after a failed sterilisation operation five years before.

35 (Unreported, High Court of New Zealand, Master Thomson, 24 October 2001).

been advised that the vasectomy might fail they would not have consented to the operation. They did not claim that the operation was performed negligently. The case was an application by the defendants to have the claim struck out.³⁶

The first hurdle facing the plaintiffs is the accident compensation bar, which prevents claims for personal injury.³⁷ The *Accident Insurance Act 1998* (NZ) ('*AIA*')³⁸ contained a higher bar than previous legislation through the operation of s 7(2) which stated:

This act also continues the existing restrictions on any such person seeking to obtain compensatory damages for the personal injury through any proceedings in a New Zealand court.

And, s 394(1), which stated:

No person may bring proceedings independently of this Act, whether under any rule of law or any enactment, in any court in New Zealand, for damages arising directly or indirectly out of –

Personal injury covered by this Act; or

Personal injury covered by the former Acts.

The requirements for cover are set out in s 39(1):

Cover for personal injury suffered in New Zealand (except mental injury caused by certain criminal acts)

An insured has cover for a personal injury if –

- (a) He or she suffers the personal injury in New Zealand on or after 1 July 1999; and
- (b) The personal injury is any of the kinds of injuries described in section 29(1)(a), (b), or (c); and
- (c) The personal injury is described in any of the paragraphs in subsection (2).

The vasectomy occurred before 1 July 1999. However, the transitional provisions in the Act provided that if the injury was suffered before 1 July 1999 and no claim had been lodged, then cover was to be determined under s 423 of the *AIA*.

'Personal injury' was defined in s 29 of the *AIA*:

Personal injury means –

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

36 The case has not yet reached a substantive hearing.

37 *Injury Prevention, Rehabilitation and Compensation Act 2001* (NZ) s 317.

38 The *Accident Insurance Act 1998* (NZ) has since been repealed and replaced by the *Injury Prevention Rehabilitation and Compensation Act 2001* (NZ). However, the bar from 1998 continues and the discussion in *SGB v WDHB* remains relevant.

The key issue in the proceedings was whether the harm suffered by the plaintiffs amounted to physical injuries. Section 39(1) of the *AIA* provided for cover for personal injury caused by medical misadventure suffered by the insurer. The term ‘medical misadventure’ was defined in the *IPRCA* to include medical error and medical mishap.³⁹ The definition of medical error extended to include a negligent failure to obtain informed consent.⁴⁰

In a number of New Zealand court decisions it has been concluded that pregnancy is not a personal injury caused by accident.⁴¹ The reasoning behind these decisions is that pregnancy cannot be considered an injury because it is a natural physiological function. In addition, there is no direct causal link between the pregnancy and the medical treatment received. The pregnancy was caused by intervening factors such as sexual intercourse.

In *SGB v WDHB*, Master Thomson held that while the position of the father regarding physical injury was debatable, the mother was entitled to commence common law proceedings. This is because, while she was an injured person under the *AIA*, she suffered no personal injury caused by medical misadventure because she did not suffer ‘personal injury caused by medical misadventure suffered by the insured’.⁴² The insured is the father and s 36 of the *AIA* stated:

(1) Medical error means the failure of a registered health professional to observe a standard of care and skill reasonably to be expected in the circumstances.

(2) Such a failure includes a registered health professional’s negligent failure to, for example, –

obtain informed consent to treatment from –

(i) The insured to whom the treatment is given; or

(ii) The insured’s parent, legal guardian, or welfare guardian, as appropriate, if the insured does not have legal capacity ...⁴³

Thus, s 36(2)(a)(i) referred to the father, not the mother. Therefore, since the mother was not covered by the *AIA*, she was able to sue at common law.

SGB v WDHB was reheard before Gendall J as an application to review Master Thomson’s decision refusing to strike out the proceedings.⁴⁴ Gendall J agreed with Master Thomson, stating that the wife did not suffer medical misadventure because she was neither a patient nor did she receive any treatment. He doubted that conception, where it arose out of a natural process, could be described as a personal injury within the meaning of the *IPRCA*.

39 *Injury Prevention, Rehabilitation and Compensation Act 2001* (NZ) s 32.

40 *Injury Prevention, Rehabilitation and Compensation Act 2001* (NZ) ss 34, 36.

41 See, eg, *DK v ARCIC* [1995] NZAR 529, *Bell v ARCIC* (Unreported, District Court of Wellington, Middleton J, 22 April 1999; *Pritchard v ARCIC* (Unreported, District Court of Wellington, Lovell-Smith J, 3 October 1996; *MT v ARCIC* (Unreported, District Court of Rotorua, Middleton J, 25 September, 1996; *Harrild v Director of Proceedings* [2002] NZAR 513.

42 *Accident Insurance Act 1998* (NZ) s 39(2)(b).

43 *Accident Insurance Act 1998* (NZ) s 36.

44 *SGB v WDHB* [2002] NZAR 413 (Unreported, Gendall J, 15 February 2002).

Regarding the husband, Gendall J held that he did not suffer a personal injury. The husband neither conceived nor gave birth, and he did not suffer any personal injury by virtue of any surgery. He agreed with Master Thomson that, given the uncertain state of the law regarding damages for the birth of a child, it was inappropriate to strike the action out.

If the case was to proceed to trial the issue would be whether the parents of a healthy child, born as a result of either a negligently performed sterilisation operation, negligent advice, or a negligent omission to advise about the consequences of the sterilisation operation⁴⁵ should be entitled to recover from the negligent doctor the costs of reasonable maintenance of the child.

The issue of wrongful birth has also been the subject of litigation in the United Kingdom, the United States and, to a lesser extent, in Australia. In New Zealand, since the hurdle of the accident compensation barrier has been overcome, it is possible that more wrongful birth cases will arise. However, the New Zealand courts have not yet addressed the issue of whether damages for the cost of raising a child will be allowed. Will the courts will adopt the reasoning of the House of Lords in *McFarlane* or, the approach of the High Court of Australia in *Cattanach v Melchior*?⁴⁶ A response to this question may be seen in one commentator's statements about *McFarlane*: 'I can think of few decisions that are – to their very core – as odious, unsound, and unsafe as this one'.⁴⁷ The argument advanced in this paper is that the reasoning in *Cattanach v Melchior* should be adopted in New Zealand because the singular moral view adopted in *McFarlane* is insufficient to justify the limited damages decision which restricts damages to the pregnancy and birth.

III THE ENGLISH APPROACH

Wrongful birth cases first came before the English Courts less than 20 years ago. Prior to *McFarlane*,⁴⁸ there was a trend in England and Scotland toward allowing damages, both for the pain and distress of an unplanned pregnancy and birth, and for the cost of rearing the child. However, *McFarlane* reversed this trend and held that damages could not be recovered for the upbringing of a healthy child.

A Cases Prior to *McFarlane*

In *Udale v Bloomsbury Area Health Authority*⁴⁹ ('*Udale*'), a woman's sterilisation failed, a healthy child was born and a second operation performed. Negligence was admitted and damages were awarded. These included damages

45 *Chester v Afshar* [2002] 3 All ER 552.

46 [2003] HCA (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 16 July 2003).

47 J Ellis Cameron-Perry, 'Return of the Burden of the "Blessing"' (1999) 149 *New Law Journal* 1887.

48 *McFarlane v Tayside Health Board* [2000] 2 AC 59.

49 [1983] 2 All ER 522.

for pain and suffering, loss of earnings during pregnancy, disturbance to the family finances relating to the provision of a layette and increased accommodation for the family. However, Jupp J rejected a claim for the future costs of the child's upbringing on grounds of public policy. One of his reasons for this was that it was undesirable that a child should learn that a court had declared its life to be a mistake.⁵⁰ Additional reasons were the difficulty of offsetting the joy of having a child against the cost of rearing it, and that the risk involved might lead to doctor's encouraging abortion in order to avoid claims against them for medical negligence.⁵¹

In *Thake v Maurice*,⁵² a vasectomy was performed and the husband was advised that contraception was no longer necessary. However, a child was born. In a claim brought in contract and tort, Peter Pain J refused to follow *Udale* and allowed the claim. He found that there was no reason why public policy prevented the recovery of expenses arising from the birth of a healthy child.⁵³ He awarded damages for the expenses of the birth and the mother's loss of wages. However, he refused damages for the pain and suffering of labour, stating that this were offset by the joy of the birth.⁵⁴ He also awarded damages for the child's upkeep until its 17th birthday.

Justice Peter Pain observed that social policy, which permitted abortion and sterilisation, implied that it was generally recognised that the birth of a healthy child was not always a blessing.⁵⁵ A majority in the Court of Appeal held that damages should be awarded for pain and suffering in tort rather than contract.⁵⁶ The joy of having the child could be off-set against the time, trouble and care in the upbringing of the child, but not against pre-natal pain and distress. For the latter damages should be awarded.

In *Emeh v Kensington and Chelsea and Westminster Area Health Authority*⁵⁷ ('*Emeh*') a sterilisation operation failed and the resultant child was born with congenital abnormalities. The Court of Appeal held that there was no rule of public policy that precluded recovery of damages for pain and suffering and for maintaining a child. It followed Peter Pain J in holding that the loss recoverable extended to any reasonably foreseeable loss directly caused by the unexpected pregnancy. Thus pregnancy was equated with personal injury, leading to consequential, not pure, economic loss, which includes the costs of upbringing.⁵⁸ Although this case related to a child with a disability, it was subsequently considered binding with respect to claims by parents for wrongful birth of a healthy child.

50 Ibid 531.

51 Ibid.

52 [1984] 2 All ER 513.

53 Ibid 668.

54 Ibid 667.

55 Ibid 666.

56 *Thake v Maurice* (CA) [1984] 2 All ER 513.

57 [1985] 1 QB 1012.

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

However, *Emeh* predates the retreat from *Anns v Merton London Borough Council*⁵⁹ which resulted from the decision of *Murphy v Brentwood District Council*.⁶⁰ This led to judicial scepticism about an overarching principle for the recovery of new categories of economic loss.

In *Allen v Bloomsbury Health Authority*,⁶¹ a sterilisation operation was carried out and the physicians negligently failed to diagnose that the mother was already four weeks pregnant. It was argued that had she been made aware of her pregnancy at that time, she would have terminated it. She claimed damages, inter alia, for the future maintenance of the resultant child who was healthy except that she had a mild speech defect and mild dyslexia. Justice Brooke awarded damages for the costs and expenses of rearing the child until she was 18 years old. He stated that recoverable damages were justified under two distinct categories. First, under a category of personal injuries to the mother arising from the failed procedure and the pregnancy itself. Secondly, for the economic loss sustained by the family.⁶²

This decision was disapproved of by the Court of Appeal in *Walkin v South Manchester Health Authority*,⁶³ where it was held that a wrongful birth claim could only be justified as an action ‘arising from the infliction of a personal injury’.⁶⁴ A claim for the economic loss caused by the birth of a child could not give rise to an independent cause of action because ‘the claim for financial loss cannot be separated from a claim for the physical injury’.⁶⁵

In *Allan v Greater Glasgow Health Board*⁶⁶ Lord Cameron rejected the argument that public policy prevented a claim for the pain and distress of pregnancy and birth. He could see no reason why the cost of rearing should not, in principle, be provided for. ‘The question at the end of the day must be whether what is sought by way of reparation can be regarded as reasonable having in mind the particular circumstances of the particular case.’⁶⁷

The law seemed settled in deciding that a doctor is in a relationship of proximity with a patient, who relies on the doctor to give advice and provide treatment with appropriate care. A doctor was liable for the foreseeable financial consequences of an unwanted pregnancy that resulted from the doctor’s negligence.

B The *McFarlane* Reasoning

The certainty of the law relating to wrongful birth was temporary, as it was challenged in *McFarlane*. After reviewing the existing case law about wrongful birth, Lord Slynn concluded: ‘It seems to me from this ... that the law is still

59 [1978] AC 728.

60 [1991] 1 AC 398.

61 [1993] 1 All ER 651.

62 *Ibid* 658.

63 [1995] 4 All ER 132.

64 *Ibid* 145.

65 *Ibid*.

66 (1993) 17 BMLR 135.

67 *Ibid* 585 [D]–[E].

developing and that there is no universal and clear approach'.⁶⁸ Their Lordships considered four possible approaches to wrongful pregnancy cases:

- no recovery for either wrongful conception or birth;
- recovery for both wrongful conception and wrongful birth;
- full recovery for wrongful conception but recovery for the wrongful birth off-set against the benefits of having a healthy child – the benefits rule; and
- recovery only allowed for wrongful conception, but no recovery for wrongful birth – the limited damages rule.

The plaintiffs in *McFarlane* were a married couple with four children. They decided to move to a bigger house and the wife returned to work to meet their increased financial commitments. They decided to have no further children and to ensure this the husband had a vasectomy. After the operation he was told that his sperm count was negative and that he no longer needed to take contraceptive precautions. The plaintiffs followed this advice and the wife became pregnant.

At first instance Lord Gill dismissed the claims.⁶⁹ He decided that pregnancy and childbirth did not constitute a personal injury and that 'the privilege of being a parent is immeasurable in monetary terms [and] that the benefits of parenthood transcend any patrimonial loss'.⁷⁰ His decision was reversed on appeal. The Inner House held that the benefits of parenthood could not outweigh the damage caused by the unwanted pregnancy.⁷¹ The defendants appealed.

In the appeal the House of Lords reversed the trend in the earlier cases. The judges decided that damages could not be recovered for the costs of rearing a healthy child. They only allowed the claim for solatium.⁷² The majority argued that because the pregnancy and birth were precisely the unwanted events that the vasectomy was supposed to prevent, the wife could recover for the pain, discomfort and inconvenience of the pregnancy and any other expenses that arose directly as a result of the pregnancy. There were substantial differences in the approaches taken by the judges. Consequently, there was no single line of reasoning.

Lord Slynn decided that the mother was entitled to general damages for the pain and discomfort of the pregnancy and birth. He also concluded that she was entitled to special damages for her medical expenses, clothes and equipment needed on the birth of the baby. Further, if she had claimed for it, she would also have been entitled to compensation for her loss of earnings due to the pregnancy and birth.

Lord Slynn's decision was based on two tests. The first was whether there was a relationship of proximity between the parents and the doctor. This depended on whether it is fair, just and reasonable for the law to impose the duty.⁷³ The second

68 *McFarlane* [2002] 2 AC 59, 73.

69 *McFarlane v Tayside Health Board* [1997] SLT 211 (Unreported, Lord Gill, 20 September 1996).

70 *Ibid* 216.

71 *McFarlane v Tayside Health Board* [1998] SLT 307 (Unreported, Lord Cullen, Lord McCluskey and Lord Allanbridge, 9 January 1998) 308.

72 This was the wrongful birth claim.

73 *McFarlane* [2000] 2 AC 59, 75–6.

test was whether the doctor or the Health Board had assumed responsibility for the economic losses of the parents, accompanied by the parents' reliance on them.⁷⁴ By utilising this test, Lord Slynn applied a variation of the 'fair, just and reasonable' limb of the test of reasonable foreseeability, prescribed by Lord Bridge in *Caparo Industries Plc v Dickman* ('*Caparo*').⁷⁵

In this case, Lord Bridge identified that test as a prerequisite to the imposition of duty in addition to the proximity test.⁷⁶ Earlier House of Lords decisions indicated that the essential issue was not whether a defendant has accepted responsibility for economic loss but whether responsibility had been accepted for the provision of professional services.⁷⁷

Lord Slynn accepted that the loss associated with the costs of raising the child was foreseeable.⁷⁸ However, he decided that the medical practitioner's duty of care could not extend to responsibility to avoid the costs of rearing a child.⁷⁹

Lord Steyn held that the damages should be limited to pain and suffering for the pregnancy and birth and loss of income during pregnancy. He stated that the claim for the cost of rearing the child was supported from the perspective of corrective justice.⁸⁰ However, if a distributive justice approach were taken, the natural response of the reasonable person would be that the parents should not be compensated for having a healthy child. The latter approach was, in his view, the real basis for denying such claims.⁸¹ Applying the distributive justice approach, which he maintained did not involve reliance on public policy grounds, he decided that tort law did not permit recovery of the costs of upbringing in the case of a healthy child. As a secondary basis for his decision, he determined that the claim did not meet the *Caparo* requirement of being 'fair, just and reasonable'.⁸²

Lord Hope decided that recovery should be allowed for the pain and suffering involved in the pregnancy and the birth, and that this should not off-set against the pleasure derived from the child. He considered that rules of the remoteness of the damage should apply. This would mean that such claims did not necessarily terminate at the moment of birth. Regarding the question of child rearing costs, Lord Hope stated that he did not rely on policy grounds because they were matters for the legislature.⁸³

Like Lord Slynn he referred to the *Caparo* test but he applied it in a different way. He stated that the benefits of having a child should be considered because a failure to do this was not 'fair, just or reasonable'.⁸⁴ However, since unlike the economic costs of rearing the child the value of the benefit could not be

74 Ibid.

75 [1990] 2 AC 605, 617–18.

76 Ibid.

77 *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830, 834.

78 *McFarlane* [2000] 2 AC 59, 76.

79 Ibid 79.

80 Ibid 81–2.

81 Ibid 83.

82 Ibid.

83 Ibid 95.

84 Ibid 97.

calculated, it was impossible to say that the costs exceeded the benefits. Therefore, these costs could not be recovered.⁸⁵

Lord Clyde stated that the issue was not merely the existence of the duty of care or of its breach, but the existence and extent of the loss sustained as a result of the breach. In deciding what damages were reasonable, he considered that 'the cost of maintaining the child goes far beyond any liability which in the circumstances of the present case the defendants could reasonably have thought they were undertaking'.⁸⁶

He also decided that reasonableness included consideration of the proportionality between the wrongdoing and the loss.⁸⁷ As the costs of upbringing could be large, especially if they included expenses like private education, it would be difficult to accept any reasonable relationship between the negligence and the award. Therefore, no relationship should be made. The expense of child rearing was also not proportionate to the doctor's culpability. It was appropriate to limit damage to provide a proper measure of restitution. On this basis, he concluded that the mother was entitled to recover for the pain and suffering associated with the pregnancy and birth. However, he held that relieving the parents of the financial burden of rearing their child, while permitting them to continue its enjoyment, did not constitute a reasonable restitution.⁸⁸

He did not support the concept of off-setting of the benefit of parenthood against the costs of child rearing. His reasons included that it was inappropriate to try and off-set non-economic gain against economic loss, and that the uncertainty of the benefit made any attempt to off-set the different types of gains impracticable.⁸⁹

Lord Millett, while accepting that there was a strong, direct and foreseeable causal connection between the defendant's negligence and the costs of rearing the child, concluded that such costs were not recoverable.⁹⁰ He recognised that, in individual cases, the birth of a baby might not constitute a benefit, but stated that it was necessary that society as a whole regard the event as beneficial.⁹¹ He held that the law should not allow parents to enjoy the advantages of parenthood while avoiding its disadvantages, because to do would be 'subversive of the mores of society'.⁹²

This reasoning led him, unlike the rest of the Court, to reject the claim for pain and suffering arising out of the pregnancy and delivery. He characterised this as part of the 'price of parenthood'.⁹³ However, the parents were entitled to general damages of a modest sum to reflect the loss of their freedom to limit the size of their family. In addition, if they had disposed of items bought for their other

85 Ibid.

86 Ibid 106.

87 Ibid.

88 Ibid.

89 Ibid 102-3.

90 Ibid 113.

91 Ibid 114.

92 Ibid.

93 Ibid.

children on the strength of the negligent information given to them, the cost of replacing those items would be recoverable.

There are six underlying reasons for the decision that the parents should bear the full cost of child maintenance:

- child maintenance is pure economic loss;
- compensating the parents for the cost of rearing their child would amount to unjust enrichment;
- the moral intuition of the judges supported the concept of distributive justice;
- the potential scale of the damages;
- the incoherence of allowing claims for wrongful birth but not wrongful life; and
- judicial disquiet with the concept of damages for child maintenance.

C Subsequent to *McFarlane*

1 *Healthy Child*

In England, *McFarlane* has subsequently been held to have settled the issue of liability for wrongful birth cases resulting in the birth of a healthy child. In *Greenfield v Irwin*,⁹⁴ a mother attempted to claim for her loss of earnings following the birth of a child because she had given up work to look after the child. It was held that *McFarlane* applied and the claimant could not recover economic loss arising from the existence of a healthy child as a result of an unwanted pregnancy.

2 *Disabled Child*

McFarlane concerned a healthy child and their Lordships specifically declined to consider whether the decision would be different for a disabled child. Subsequently, in *Parkinson v St James and Seacroft University Hospital NHS Trust* ('*Parkinson*'),⁹⁵ a child, conceived following a negligently performed laproscopic sterilisation, was born disabled. Damages were awarded for the child's special needs and care relating to the disability, but this did not extend to the basic costs of maintenance.

Lord Justice Brooke treated this as a claim for pure economic loss. It was 'fair, just and reasonable'⁹⁶ to allow recovery of the extra costs related to the disability on the grounds of corrective justice. This was because the extra medical and educational expenses could be substantial. They could also be allowed on the grounds of distributive justice, because ordinary people would think such an award was fair.⁹⁷

Lady Justice Hale held that this was a claim which, on ordinary principles of law, would be recoverable. There was a duty of care to prevent pregnancy, this duty had been broken and the whole of this damage was the foreseeable

94 [2001] EWCA Civ 113 (Unreported, Buxton LJ, May LJ and Laws LJ, 24 January 2001).

95 [2002] QB 266.

96 *Caparo* [1990] 2 AC 605, 617–18.

97 *Parkinson* [2002] QB 266, [50].

consequence of the breach of duty.⁹⁸ However, even though the child was disabled, it still provided pleasures and advantages which could be off-set against the costs of its basic care.⁹⁹ She therefore allowed recovery only for the costs attributable to the disability.

In *Groom*¹⁰⁰ the claimant underwent a sterilisation operation. The medical consultant failed to carry out a pregnancy test before operating. Unknown to anyone, the claimant was approximately six days pregnant at that time. The child was born prematurely and contracted salmonella meningitis following its birth. The cause of this was exposure during birth to bacteria to which it was more vulnerable because it was premature. The meningitis led to disabilities, the extent of which would only become apparent as the child matured. The abnormality would not have been detected in the foetus if the pregnancy had been diagnosed in the usual way. The issue was whether the disabilities were a foreseeable consequence of the unwanted conception, or whether the chain of causation had been broken by some new intervening act during the pregnancy.

It was held that, although the condition developed after birth, this did not mean that the baby was a healthy child as contemplated in *McFarlane*. It was concluded that premature birth was a foreseeable consequence of pregnancy and that the baby's condition was a recognised complication from premature birth. Lord Justice Brooke felt that the principles of distributive justice, as enunciated in *McFarlane*, did not assist in this case, as reasonable people may be divided in their opinions in such a case.¹⁰¹

Lady Justice Hale commented that she could not regard the costs of bringing up a child, who was born as a result of the negligence of another, as pure economic loss. She stated: 'Rather, they are economic losses consequent upon the invasion of bodily integrity suffered by a woman who becomes or remains pregnant against her will'.¹⁰² This indicates that the issue is one of causation or remoteness.

The comments of Hale LJ in both *Parkinson* and *Groom* indicate a movement away from *McFarlane*, even though both are about disabled children. According to Hale LJ, a duty of care sufficient to impose liability existed in *Parkinson* because there had been an invasion of the mother's autonomy.¹⁰³ Regarding situations where the pregnancy had been wrongly caused,¹⁰⁴ she interpreted the majority judgments in *McFarlane* as being concerned with 'whether a particular type of damage is recoverable if the duty [of care] is broken'.¹⁰⁵ She stated that the House of Lords had adopted a 'solution of deemed equilibrium',¹⁰⁶ whereby the benefits and burdens of having a healthy child cancel each other out as a

98 Ibid [75].

99 Ibid [90].

100 [2001] EWCA Civ 1522 (Unreported, Brooke LJ, Hale LJ and Steele J, 18 October 2001).

101 Ibid [23].

102 Ibid [31].

103 *Parkinson* [2002] QB 266 [69].

104 Ibid [74].

105 Ibid [86].

106 Ibid [90].

matter of law.¹⁰⁷ For a disabled child, the ‘deemed equilibrium’¹⁰⁸ accounts for the ordinary costs of raising the child, but not the ‘extra care and extra expenditure’¹⁰⁹ that such a child requires. She stated: ‘This analysis treats a disabled child as having exactly the same worth as a non-disabled child. It affords him the same dignity and status. It simply acknowledges that he costs more’.¹¹⁰

One problem lies in determining the level of disability required before a child ceases to be a healthy child. In *Parkinson* and *Groom*, Hale LJ (with whom Brooke LJ agreed) attempted to prescribe how to ascertain this level. First, she stated that any disability must be caused by the defendant’s negligence in the processes of conception, pregnancy or birth. The cause of the disability must be ‘genetic or arise from the processes of intra-uterine development and birth’.¹¹¹ Otherwise, there would not be a sufficient causal connection between the disability and the doctor’s negligence, to give rise to the claim. Secondly, the disability must be ‘significant’.¹¹² It cannot include ‘minor defects or inconveniences such as are the lot of many children who do not suffer from significant disabilities’.¹¹³ Thirdly, Hale LJ relied on the definition of a disabled child in s 17(11) of the *Children Act 1989* (UK):

[A] child is disabled if he is blind, deaf or dumb or suffers from mental disorder of any kind or is substantially and permanently handicapped by illness, injury or congenital deformity or such other disability as may be prescribed ...¹¹⁴

This analysis sets the level of disability that allows a case to become one about a disabled child. However, the issue is ultimately whether the child has extra needs that result in extra expense to the parents. The claim is dependent on any reasonable extra expenditure because it is quite possible that some disabilities will not involve additional costs.

The approach in *McFarlane* suggests that a disabled child could never offer any joy or benefit to the family. This issue led McMurdo P in *Melchior v Cattanach* to state:

[I]t is offensive and wrong to suggest that children born with disabilities, even severe disabilities, cannot enrich the lives of their parents, family and the wider community in diverse ways. If the benefits argument is valid it must apply to all children whether born with disabilities or the respect to which all human life is entitled will be devalued.¹¹⁵

In the same case Davies JA thought that to limit the damages, for maintenance of a disabled child to the extra cost of maintaining that child, is both ‘illogical ...

107 Ibid [87]–[90]. Cf *Rees v Darlington Memorial Hospital NHS Trust* [2002] EWCA Civ 88 (Unreported, Waller LJ, Walker LJ and Hale LJ, 14 February 2002) [35], [38], [50] (Walker LJ and Waller LJ).

108 *Parkinson* [2002] QB 266 [90].

109 Ibid [90].

110 Ibid.

111 *Groom* EWCA Civ 1522 (Unreported, Brooker LJ, Hale LJ and Steele J, 18 October 2001) [32]. See also *Parkinson* [2002] QB 266 [92].

112 *Parkinson* [2002] QB 266 [51]–[2].

113 Ibid [52].

114 *Children Act 1989* (UK). See *Parkinson* [2002] QB 266 [91].

115 [2001] QCA 246 (Unreported, McMurdo P, Davies JA and Thomas JA, 26 June 2001) [29].

[and] unfair'.¹¹⁶ In addition, there seems to be, little reason to limit liability for the maintenance of a severely disabled child to damages for the period of childhood.¹¹⁷ The responsibilities and burdens of the parents may continue into the adult life of the child, who may never be able to live independently.

It has been argued by Kimberley Wilcoxon¹¹⁸ that it is impossible for anyone to know, a few years into the child's life, how the disabilities will subsequently affect the child. She also expresses concern that a wrongful life claim at least sends a message that extends to all disabled people: your differences make your life not worth living. Anthony Jackson¹¹⁹ argues that the necessary implication of granting higher awards to the parents of those born with disabilities is that disabled people will be valued less than healthy ones.

It would seem no easier to predict child rearing costs for a disabled child than for a healthy child. Disabled children may also be of incomparable worth to their parents. Therefore, if the emotional benefits of having an unwanted healthy child outweigh the costs of rearing that child as a matter of law, notwithstanding the facts of the case, it is difficult to explain why the same analysis is not appropriate in the case of a disabled child.¹²⁰ All children are a financial burden to their parents. The extent of their burden is likely to be affected by matters such as, the income of the family and the number of children supported by that income, rather than the sole consideration of whether or not the child is disabled.

3 *Disabled Parent*

Lady Justice Hale repeated the notion of 'deemed equilibrium'¹²¹ in *Rees v Darlington Memorial Hospital NHS Trust*.¹²² In that case a mother was severely visually handicapped. Her vision was worsening and she sought sterilisation because she believed she would be unable to care for a child. The operation was performed negligently and she gave birth to a healthy child. There was a low risk that the child might have inherited retinitis pigmentosa – the cause of the mother's visual handicap.

Lady Justice Hale held that the principle of deemed equilibrium, relied upon in *McFarlane*, operated to exclude the costs of raising a healthy child, but did not exclude recovery of the extra costs incurred by a disabled mother in order to provide for the needs of her child.¹²³ She emphasised that the principal detriment suffered by those who become parents against their will is the legal and factual

116 Ibid [96].

117 *Edwards v Blomeley* [2002] NSWSC 460 (Unreported, Studdert J, 12 June 2002). 'It is not to be assumed that a claim available to parents of a disabled child must be limited to the period of the child's minority': at [112].

118 Kimberley Wilcoxon, 'Statutory Remedies for Judicial Torts: The Need for Wrongful Birth Legislation' (2001) 69 *University of Cincinnati Law Review* 1023.

119 Anthony Jackson, 'Wrongful Life and Wrongful Birth' (1996) 17 *The Journal of Legal Medicine* 349–81.

120 Mark Strasser, 'Misconceptions and Wrongful Births: A Call for a Principled Jurisprudence' (1999) 31 *Arizona State Law Journal* 161, 194.

121 *Rees v Darlington Memorial Hospital NHS Trust* [2002] EWCA Civ 88 (Unreported, Waller LJ, Walker LJ and Hale LJ, 14 February 2002) [10].

122 Ibid.

123 Ibid [10].

responsibility to look after the child. She stated that ‘just as the extra costs involved in discharging that responsibility towards a disabled child can be recovered, so too can the extra costs involved in a disabled parent discharging that responsibility towards a healthy child’.¹²⁴

Lord Justice Walker agreed that the appeal should be allowed, based ‘on there being nothing unfair, unjust, unreasonable, unacceptable or morally repugnant in permitting recovery of compensation for a limited range of expenses ... [with] a close connection to the mother’s [disability]’.¹²⁵ He stated that ‘disabled persons are a [special] category of the public whom the law increasingly recognises as needing special consideration’.¹²⁶ He questioned the deemed equilibrium theory of Hale LJ, stating that his interpretation of *McFarlane* was that the judges rejected such an approach.¹²⁷

Lord Justice Waller would have dismissed the appeal on the grounds that any exception to the rule in *McFarlane* with respect to a healthy child must be examined with great care, taking into account how the ordinary person would perceive the fairness of the exception.¹²⁸ As an example he discussed the situation of a woman with several children who is not disabled, but whose physical and mental health and family circumstances may be so fragile that the birth of another child, even if healthy, would create a health crisis for her. That mother would be unable to recover damages for the care of the child.¹²⁹ Consequently, ‘on the basis of distributive justice ... ordinary people would think it was not fair that a disabled person should recover when mothers who may in effect become disabled by ill health through having a healthy child would not’.¹³⁰

This argument demonstrates the problem with *McFarlane*. The situation of the two mothers is comparable. It could equally be argued that there is a good reason why both should be able to recover the extra expenses involved in raising a child, rather than denying damages in both cases.

IV AUSTRALIA

A sharp contrast to the English position has been provided by the Australian courts, even though there has been substantially less Australian judicial consideration of the circumstances where damages may be awarded for the birth of a child. The Australian position has been reinforced by the High Court’s recent decision to dismiss the appeal in *Melchior*,¹³¹ thus allowing damages to be awarded for the costs of rearing a healthy child.

124 Ibid [23].

125 Ibid [37].

126 Ibid [41].

127 Ibid [35]–[8].

128 Ibid [52].

129 Ibid [53]–[4].

130 Ibid [55].

131 [2003] HCA (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 16 July 2003).

Prior to this decision, in *Dahl v Purnell*,¹³² Pratt DCJ allowed damages for: pre-natal distress and the pain and suffering of the birth; the past and future costs of bringing up the child; out of pocket expenses in the form of amounts expended on maternity clothes and medical expenses; loss of consortium and an amount for the parents' voluntary services, past and future, in caring for the child. However, he reduced the last components by one quarter to reflect the intangible benefits of a healthy child.¹³³ Deputy Chief Justice Pratt, also held that public policy considerations did not prevent the plaintiff's claim.¹³⁴

*Veivers v Connolly*¹³⁵ related to the birth of a severely disabled child to a woman who had suffered rubella during pregnancy. Her claim was successful against her doctor for failing to diagnose her rubella and for failing to warn her of the consequent risks to the foetus.

In *CES v Superclinics (Australia) Pty Ltd*,¹³⁶ the New South Wales Court of Appeal held that the primary question was whether negligent advice resulting in the loss of opportunity to terminate the pregnancy could give rise to a claim for damages. There was also a question of what damages could be recovered. Each of the three members of the Court of Appeal reached different conclusions.

Acting Chief Justice Kirby stated that in the English and American cases there was consensus to the extent that damages for pain and discomfort associated with the birth, the costs involved in the birth and loss of earning capacity resulting directly from the pregnancy and its immediate aftermath were recoverable. He discounted the public policy arguments against recovery for the economic costs of raising the child. He considered that any difficulty in assessing damages should not mean such damages would not be awarded because courts are frequently required to assess future economic and non-economic loss. He decided that the decision whether to off-set the benefit of a healthy child against the amount of damages depended on the facts of the individual case. He pointed out that it should not be assumed that the birth of a healthy child is always a blessing.¹³⁷

However, in order to achieve a majority approach, Kirby ACJ agreed with Justice Priestly's approach to damages, which disallowed damages from the point at which adoption could occur.¹³⁸ Justice Meagher dissented stating that he considered it abhorrent that the birth of a healthy child could lead to an award of damages. He felt it might be damaging to the child to become aware that she was an unwanted child.¹³⁹

Until this point, the Australian cases were in accord with those of the United Kingdom, where a number of cases had allowed damages for loss of earnings and the costs of raising a child. Before the High Court decision in *Melchior*, the

132 (1993) 15 Qld Lawyer Rep 33.

133 *Melchior* [2001] QCA 246 (Unreported, McMurdo P, Davies JA and Thomas JA, 26 June 2001) [37] discussing *Dahl v Purnell*.

134 *Ibid* [37].

135 [1995] 2 Qd R 326.

136 (1995) 38 NSWLR 47.

137 *Ibid* 73.

138 *Ibid* 79.

139 *Ibid* 86-7.

Queensland Court of Appeal had to decide whether to follow *McFarlane* in *Melchior v Cattanach*.¹⁴⁰ This case concerned a failed sterilisation operation and the negligent failure of the patient's health care provider to warn the mother that pregnancy might occur. At first instance¹⁴¹ Holmes J had declined to follow *McFarlane*. She stated that although *McFarlane* was persuasive, the judgments did not produce a consistent line of reasoning against awarding damages with respect to a healthy child.¹⁴²

With respect to the public policy arguments, Holmes J found the 'blessing' argument '[a]ppplied as a social imperative ... entails a blunt intrusion of the individual decision-maker's value system into legal reasoning'.¹⁴³ She stated that 'the context in which a child is born might profoundly affect the happiness to be derived from his or her existence'.¹⁴⁴ As such, the birth of a healthy child cannot always be a blessing. Further, it was difficult to distinguish between a healthy and unhealthy child. She disapproved of the argument that it is harmful for a child to know that it was unwanted. Instead, she took the pragmatic view that 'a child whose parents' financial burden was ameliorated by an award would be in a considerably happier position than one whose parents were precluded by public policy from any relief'.¹⁴⁵

Overall, she felt that the competing views in *McFarlane* were insufficiently compelling to dictate a conclusion against the recovery of economic loss.¹⁴⁶ She was also unimpressed by Lord Steyn's distributive justice approach in *McFarlane* because of its inherent subjectivity.¹⁴⁷ She found that the failure to adopt out the child did not interrupt the chain of causation – it was a failure to intercept it. There was no guarantee that adoption would be less catastrophic in its consequences than the decision to keep the child.¹⁴⁸

Regarding the 'fair, just and reasonable'¹⁴⁹ test proposed by Lords Slynn and Hope in *McFarlane*, Holmes J states:

Although one seeks, of course, to arrive at an imposition of liability which is fair, just and reasonable, to use that desired result as a test by which the initial questions – is there a duty and, if so, how far does it extend – can be answered, is an unsatisfactorily imprecise approach.¹⁵⁰

Justice Holmes made an award for special damages, past and future care, economic loss, the costs of raising the child and loss of consortium.

On appeal,¹⁵¹ McMurdo P and Davies JA agreed with Holmes J, concluding that child rearing costs should be awarded. Justice Thomas disagreed although

140 [2001] QCA 246 (Unreported, McMurdo P, Davies JA and Thomas JA, 26 June 2001).

141 *Melchior v Cattanach* [2001] Aust Torts Reports ¶81-591.

142 *Ibid* 66,629.

143 *Ibid*.

144 *Ibid*.

145 *Ibid*.

146 *Ibid* 66,630.

147 *Ibid*.

148 *Ibid*.

149 *Ibid*.

150 *Ibid* 66,630–66,631.

151 *Melchior v Cattanach* [2001] QCA 246 (Unreported, McMurdo P, Davies JA and Thomas JA, 26 June 2001).

the judges unanimously agreed that the primary judge's findings as to negligence and causation should stand.

President McMurdo found that the principles set out by the High Court relating to the recovery of pure economic loss¹⁵² supported the award of child rearing costs.¹⁵³ He rejected the argument about the benefits of parenthood because in today's society children are not regarded as an economic asset and are not universally regarded as a blessing.¹⁵⁴ Additionally, the free choice of the parents to limit their number of children was taken from them by the doctor's negligence.¹⁵⁵

Damages were awarded for the loss flowing from the conception of the child caused by the appellant's medical negligence and the additional financial burden that would be placed on the family, rather than for the wrongful birth or for the new life of the child. He noted that not every failed sterilisation will lead to damages and that it was only possible in cases where negligence had caused the pregnancy. This would involve a relatively small and determinate class of claimants and the resulting damages would be limited to the moderate reasonable costs of child rearing.¹⁵⁶

Justice Davies concurred, acknowledging that the birth of a child is not always a blessing. He found no policy factors that ought to preclude the recovery of the cost of maintaining the child during its childhood.¹⁵⁷ He concluded that an off-set of the emotional benefits against the cost of raising the child should not be permitted. To permit such a contest, about the benefits and burdens of a child, would be 'morally offensive'.¹⁵⁸

Justice Thomas dissented, stating that the benefits of a healthy child should be brought into account. He concluded that the 'limited damages rule',¹⁵⁹ in force in most parts of the United States and also in the United Kingdom, best fit the standards and expectations of Australian society.¹⁶⁰

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

In *Edwards v Blomeley*¹⁶¹ the New South Wales Supreme Court reviewed the English cases. Justice Studdert stated that at that time the High Court had not yet had occasion to consider whether the costs of rearing a child in a 'wrongful birth'

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

153 *Melchior v Cattanach* [2001] QCA 246 (Unreported, McMurdo P, Davies JA and Thomas JA, 26 June 2001) [37]–[44].

154 *Ibid* [51].

155 *Ibid* [49].

156 *Ibid* [61].

157 *Ibid* [99].

158 *Ibid* [89].

159 *Ibid* [169].

160 *Ibid*.

161 [2002] NSWSC 460 (Unreported, Studdert J, 12 June 2002).

case were recoverable as damages in a claim by the parents of the child.¹⁶² This has since changed. However, he did conclude that the cases discussed indicated ‘that in an action brought by the parents for ‘wrongful birth’, some damages are recoverable to compensate for the past costs and the ongoing costs of caring for a child born disabled’.¹⁶³ He stated that the measure of damages is ‘unsettled at the present time’.¹⁶⁴ This case was one of three wrongful life cases in which children brought claims seeking damages as a result of a failure to prevent them from being born.¹⁶⁵

A The High Court in *Melchior*

In 2003 the High Court of Australia had the opportunity to consider whether to allow damages for the costs of rearing an unplanned child. The majority in *Melchior* dismissed the appeal and allowed the damages award.

Justices McHugh and Gummow dismissed the appeal. They stated that the appellants’ submission was based on the proposition that the birth of a healthy child is not a legal harm for which damages could be recovered.¹⁶⁶ They held that the unplanned child was not the harm for which recompense was sought, rather, the financial losses resulting from the birth was the harm. The wrongful action was the negligence of Dr Cattnach. They answered in the affirmative two questions:

- (1) Is the particular expense causally connected to the defendant’s negligence?
- (2) If so, ought the defendant to have reasonably foreseen that an expense of that kind might be incurred?¹⁶⁷

Whilst accepting that the values respecting the importance of human life, the stability of the family unit and the nurture of infant children are an essential aspect of the welfare of the community, they could perceive no general recognition that such values denied the award of damages for rearing a child. This was an area of the law that had matured into a coherent body of legal doctrine. They stated that to differentiate between healthy and disabled children in this context would be to discriminate by reference to a distinction irrelevant to the object sought to be achieved, which was the award of compensatory damages to the parents. Justice Kirby concurred with this view stating that Australian law should not go down the path of distinguishing between healthy and disabled children, for it leads away from established legal principle.

Justices McHugh and Gummow held that the common law should not justify preclusion of recovery on speculation as to possible psychological harm to the child. They would not allow any off-set of the benefits gained from the child

162 Ibid 105.

163 Ibid.

164 Ibid.

165 See also *Harriton v Stephens* [2002] NSWSC 461 (Unreported, Studdert J, 12 June 2002); *Waller v James* [2002] NSWSC 462 (Unreported, Studdert J, 12 June 2002).

166 *Melchior* [2003] HCA (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 16 July 2003) [54].

167 Ibid [65]–[66].

because the interests of the parents in controlling the size of their family have a different character or quality to the affection they would give and hope to receive from the child. In assessing damages it is not permissible in principle to balance the benefits to one legal interest against the loss occasioned to a separate legal interest. Justice Kirby agreed that such set off was inappropriate because emotional benefits and burdens cannot be measured at the beginning of life and are different in quality from the costs involved in rearing a child.

Justice Kirby also dismissed the appeal. He held that to the extent that *McFarlane* rests on a *Caparo* analysis it is inapplicable to the common law of Australia where the High Court has rejected the *Caparo* three-stage approach. He stated that the deference to the man on the London underground referred to by Lord Steyn in *McFarlane* is an unconvincing fiction. Instead of employing such fictions judges should be willing to take responsibility for applying the established judicial controls over the expansion of tort liability. He was not convinced by arguments that the calculation of the value of considerations such as joy and love is not possible or that the child might be emotionally harmed by such litigation. He stated that the argument that the birth of every child is a blessing is a fiction that should not apply to a particular case without objective evidence to support it. He stated that this is not a case of pure economic loss as the mother at least had suffered physical events involving her person. In considering distributive justice, he stated that the burden of losses normally falls on the person whose negligence has caused the losses and that to deny recovery in the context of childbirth is potentially discriminatory towards women. If such a distinction is to be drawn it should be done by way of legislation.

Justice Callinan dismissed the appeal stating that almost all of the arguments against awarding damages involve emotional and moral values, and perceptions of what public policy is or should be.¹⁶⁸ He did not accept that doctors and hospital authorities should enjoy a new form of immunity in the absence of strong reasons for its creation. He stated that no identifiable universal principle of public policy denied the award of damages for the rearing of the child and that arguments of distributive justice are unimpressive. Judges must do equal justice between the rich and the poor.¹⁶⁹ In any event, such arguments lead to the conclusion that the doctor or the health authority, having the larger pocket, should pay.

Chief Justice Gleeson allowed the appeal stating that the claim was one for recovery of pure economic loss arising out of a relationship.¹⁷⁰ He measured the case against the policy reasons for the law's reluctance to impose liability for economic loss. He considered that the liability sought to be imposed is indeterminate and it is difficult to relate it coherently to other rules of common law and statute. It is based on an imprecise concept of financial harm that is incapable of rational or fair assessment. It involves regarding a socially fundamental human relationship in purely financial terms. He stated that the

168 Ibid [292].

169 Ibid [301].

170 Ibid [30].

accepted approach in Australia is that the law should develop negligence incrementally and by analogy with established categories. He held that the present claim went beyond that and was unwarranted.¹⁷¹

Justice Hayne also allowed the appeal based primarily on arguments of public policy. He did not accept that a healthy child is always a blessing. He stated that the existence of a child will usually include non-financial benefits and will not be confined to economic detriment. Parents should not be permitted to demonstrate that the net worth of rearing a healthy child is a financial detriment because of the possibility of inflicting harm on the child by denying the benefits of the relationship.¹⁷²

Justice Heydon allowed the appeal emphasising the deleterious affect that such litigation would have on the child. He stated that human life has unique value and cannot be categorised as a loss. It is wrong to place a value on the expense of human life because human life is invaluable and incapable of effective or useful valuation.¹⁷³ He felt that resultant cases would encourage parental misrepresentation of the parent-child relationship and create an odious spectacle. Such litigation might cause children distress and injury. He stated that the various assumptions underlying the law relating to children and duties on parents created by the law would be negated if parents could recover the costs of child rearing. This would tend to damage the natural love and mutual confidence, which the law seeks to foster between parent and child.¹⁷⁴ He favoured the view that there was not a duty of care at all, because allowing such a duty would cause the tort of negligence to impair the legal principles and provisions that require parents to act in the best interests of their children. As such, he favoured the view that in the interest of protecting the child from the knowledge it was unwanted, the mother should not be able to recover for her pain and suffering, lost income and expenses at birth. Equally, the father should not be able to recover for loss of consortium.¹⁷⁵

The diversity of approaches in the arguments demonstrates the complexity of the issue of whether damages should be awarded for the rearing of a healthy child. In particular, it indicates that policy arguments lead inevitably to counter arguments. The minority appear to feel instinctively uneasy about such awards and fear the potential for large awards of damages. However, so long as patients are fully informed about the potential for failure of sterilisation operations in order to remove the potential for cases based on lack of informed consent, it is likely that only a relatively small number of negligence cases will arise.

171 Ibid [39].

172 Ibid [259].

173 Ibid [347], [356].

174 Ibid [371].

175 Ibid [411] – [412].

V OTHER JURISDICTIONS

The issue of damages for raising a healthy child has been considered in other jurisdictions with varying outcomes. The dominant view has been that such damages should not be awarded because of the judicial disquiet over the concept that parents can claim that a healthy child is a loss.

In Canada the matter does not appear to have been directly considered at appellate level. However, Lax J held in a case of failed sterilisation in the General Division of the Ontario Court, that child rearing costs were pure economic loss and were not generally compensable because the birth of the child was not an injury. Instead, it brought the family many benefits. Further, the parents were not prevented from fulfilling their parental responsibilities and the relationship of mutual support and dependency which arose on the birth of the child was not compromised.¹⁷⁶

By contrast, in South Africa a husband as administrator of his joint estate with his wife brought an action for damages for breach of contract arising out of the performance of a failed sterilisation procedure on his wife. 'The Appellate Division of five judges allowed the claim for the financial cost of rearing the child, but limited it to cases where the sterilisation procedure was performed for socio-economic reasons.'¹⁷⁷

In the United States, wrongful birth is a matter for State courts and the approach between States varies. The majority of jurisdictions have taken an approach consistent with that of the House of Lords, disallowing claims for damages for the costs of rearing and educating children born after a negligent sterilisation procedure. The most common reasons have been because of the public policy consideration that parents cannot be said to have been damaged by the birth of a healthy, normal child.¹⁷⁸

VI PUBLIC POLICY ARGUMENTS

There have been a number of reasons advanced to justify the reluctance to award damages for the raising of a healthy child. These reasons tend to involve value judgments about the position of children in society and invoke subjective concepts, such as distributive justice. This may be of little practical relevance to parents who are in difficult financial or emotional situations. Arguments include the blessing argument, emotional harm arguments, policy considerations and distributive justice. These will be considered in order to determine whether they

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

177 *Melchior v Cattanach* [2001] QCA 246 (Unreported, McMurdo P, Davies JA and Thomas JA, 26 June 2001) [16] discussing *Administrator, Natal v Edouard* [1990] (3) SALR 581.

178 *Melchior Cattanach* [2001] QCA 246 (Unreported, McMurdo P, Davies JA and Thomas JA, 26 June 2001). See also *Terrell v Garcia*, 496 SW 2d, 124 (Tex Civ App, 1973); *Rieck v Medical Protective Co of Fort Wayne Ind*, 219 NW 2d, 242 (Wis, 1974); *Cockrum v Baumgartner*, 95 Ill 2d 193; 447 N E 2d 385 (Ill, 1983), *McKerna v Aasheim*, 447 NE 2d, 385 (Ill, 1983) and *Girdley v Coats*, 687, P 2d 850 (Wash, 1984).

form a sufficiently compelling basis for the denial of compensation for the upbringing of a healthy child in New Zealand.

A The 'Blessing' Argument

The main argument in *McFarlane* against awarding damages for the upbringing of a child conceived as a consequence of medical negligence is that the birth of a normal healthy child is a blessing and a benefit to both parents and society. Therefore, it is not a matter for compensation. This approach has been criticised and described as 'Lord Millett borrowing a page or two from Sophocles, from Lord Gill and (it would seem) from some tenderer-than-thou book of soft core philosophy'.¹⁷⁹

Children are no longer universally regarded as a blessing. Indeed, it is doubtful whether they ever were. Children are not merely economic assets, but they are financial liabilities for many years.¹⁸⁰ Society accepts that individuals may limit their fertility by way of contraception and sterilisation. In fact, many people would say that responsible human beings ought to manage their reproductive outcomes, with a view to promoting the overall financial and emotional stability of their family. President McMurdo in *Melchior v Cattanaach* felt that the award of damages would 'benefit society by encouraging the raising of the child within the family unit'.¹⁸¹

A fundamental underlying principle in *McFarlane* is the belief in the preciousness of all human life. However, as stated by Seymour,¹⁸² this perspective is increasingly likely to be rejected. He suggests that if a woman should be free to decide all matters relating to childbearing, it follows that a woman should be free to control her fertility. Therefore, she can legitimately claim to have suffered harm if her exercise of that freedom has been thwarted by medical negligence.¹⁸³

The existence of a child, whether healthy or suffering from some level of disability, will from time to time bring both joy and despair to most parents. To enable parents to have the financial means to raise a child, without disadvantage to the rest of the family or causing the initially unwanted child to bear the burden of having caused hardship to the family, would not seem to be a denial of the blessing. It merely allows the blessing to be enjoyed and the child to be given the greatest advantages possible. This does not deny that a child is a benefit to society, but suggests that parents, who have been denied the freedom to limit the size of their family through the negligence of another, should receive at least some reasonable, objectively assessed, financial compensation for the resultant expenses.

179 Cameron-Perry, above n 47, 1887.

180 See Lady Justice Hale *The Staple Inn Reading: The Value of Life and the Cost of Living – Damages for Wrongful Birth* (2001) <http://www.actuaries.org.uk/files/pdf/library/staple_inn_read_2001.pdf> at 5 June 2003.

181 [2001] QCA 246 (Unreported, McMurdo P, Davies JA and Thomas JA, 26 June 2001) [52].

182 John Seymour, 'Actions for Wrongful Birth and Wrongful Life' (2001) 2(1) *New Zealand Bioethics Journal* 26.

183 *Ibid* 31.

B The Benefit–Burden Off-Set

The benefit argument sets off the joys and pleasures of parenthood against the economic loss of raising the child, and this extinguishes the loss. Thus, in all cases, the burden and benefits of having a healthy child cancel each other out as a matter of law.¹⁸⁴

This balancing of benefits and burdens has the disadvantage of disregarding the reality of the situation of a particular family. Alternatively, an attempt may be made to assess the benefits and burdens in light of the individual circumstances in each case. This approach involves an attempt to establish the benefit and burden of each child. Such a calculation would require argument that a particular child would be more of a burden than a benefit. It has been argued that this off-set violates public policy, because a court cannot place a price tag on the beneficial value of a child to its parents.¹⁸⁵

Some commentators have regarded the benefits and burdens approach as a sensible or enlightened solution.¹⁸⁶ Alvarez states that ‘jurisdictions following the off-set benefits rule recognize that there are situations where parents, despite the benefits they might receive from the birth of a child, are simply unable to provide for another child, either financially or emotionally, or both’.¹⁸⁷ She states that the recognition of the existence of an injury is not inconsistent with public policy because ‘parental pleasures do not eradicate the economic reality’.¹⁸⁸ It is also argued that the advantage of this approach is that it allows sufficient flexibility to tailor the award of damages to the circumstances of each case, rather than subscribing to a strict recovery rule for all cases.¹⁸⁹ Alvarez suggests that an important component in applying the offset benefits rule is the motive of the parents for seeking sterilisation.¹⁹⁰ If the motive was financial then the losses are clear. However, if the motive was to avoid the danger of a genetic defect, then the birth of a healthy child is a benefit and the parents have suffered no loss.

Lord Clyde’s arguments in *McFarlane* about the impossibility of off-setting benefits and burdens fail to consider that the detrimental side of child rearing is not purely economic as it involves, inter alia, loss of time, sleep and freedom. Similarly, the benefits are also varied. An attempt to off-set such aspects involves the evaluation of both parental distress and children’s worth. A court might be

184 See, eg, *Parkinson* [2002] QB 266.

185 See *Johnson v University Hospital*, 540 NE 2d 1370, 1373–4, 1378 (Ohio, 1989) at 14 (Douglas J citing *Beardsley v Wierdsma*, 650 P 2d 288, 293 (Wyo, 1982)):

If the concept of benefit or offset were applied to actions for wrongful pregnancy ... benefits could be greater than damages, in which event someone could argue that the parents would owe something to the tortfeasors ... [A] child should not be viewed as a piece of property.

186 See, eg, Christopher D Jerram, ‘Child Rearing Expenses as Compensable Damage in Wrongful Conception Case: *Burke v Rivo* 24 *Creighton Law Review* 1643, 1665.

187 Iraida J Alvarez, ‘A Critique of the Motivational Analysis in Wrongful Conception Cases’ (2000) 41 (3) *Boston College Law Review* 585, 601.

188 *Ochs v Borrelli*, 445 A 2d 883, 885 (Conn, 1982).

189 Alvarez, above n 188, 602.

190 *Ibid* 603.

better to arrive at a figure that represents fair compensation for the parents' losses.

The benefits of parenting are exactly what the plaintiffs seek to avoid by undergoing a sterilisation procedure, especially if it is undergone for socio-economic reasons.¹⁹¹ The benefits of parenting are not similar in kind to economic loss, because the detrimental side of child rearing is not purely economic, and so it is inappropriate to offset the two. General non-pecuniary damages should not be offset against general pecuniary damages.¹⁹²

C Emotional Harm Arguments

An additional public policy argument is that the child concerned may discover that it was unwanted and that its upbringing was paid for by another. The child might be psychologically harmed by discovering it is an 'emotional bastard'.¹⁹³ This argument ignores the reality that many people may be aware that their conception was unplanned. This does not necessarily result in an unloved child. Rather, it is the social and economic consequences of the birth that are the factors that are undesired. Limiting the financial burdens of the family may lead to an amelioration of the effects upon the children, who might otherwise be aware that their existence is the cause of limitations, or even hardship, to their families.¹⁹⁴

The approach in *Melchior v Cattanach*, in stating that an unwanted conception does not necessarily result in the child being unwanted, is correct. Such cases do not infer that the child is rejected by its family, just that there is a claim for pecuniary losses resulting from the existence of the child, but these do not necessarily equate to emotional harm to the child.

D Legal Policy

It is notable that in *McFarlane* the judges maintained that public policy took no part in the search for a solution. The decision was based on legal policy.¹⁹⁵ Lord Hope, said that the question for the court was ultimately one of law, not of social policy.¹⁹⁶ Lord Steyn, likened public policy arguments to 'quicksand'.¹⁹⁷ Lord Clyde recalled that public policy was long ago realised as 'a very unruly horse, and when once you get astride of it you never know where it will carry you'.¹⁹⁸ Lord Millett said that limitations, in the scope of legal liability, arose from legal policy where the issue was the admission of a new head of damages or the admission of a duty of care in a new situation. Legal policy in this sense was

191 David Kerrane, 'Parenting: Damages for Wrongful Pregnancy' (2000) 11 *Journal of Contemporary Legal Issues* 467.

192 Brenda McGivern, 'Tortious Liability for (Selected) Genetic Harm: Exploring the Arguments' (2002) 10 *Torts Law Journal* 41, 38.

193 *Melchior* [2001] QCA 246 (Unreported, McMurdo P, Davies JA and Thomas JA, 26 June 2001) [59].

194 *Ibid* [97].

195 See *McFarlane* [2000] AC 59, 76, 83, 100, 108.

196 *Ibid* 95.

197 *Ibid* 83.

198 *Ibid* 100.

not the same as public policy, even though moral considerations may play a part in both.¹⁹⁹

Lord Clyde, also pointed out that a solution was unlikely to be derived in a setting in which each side could point to public policy issues as reasonable counter-argument for each argument.²⁰⁰ This is undoubtedly correct, although similar comment might be made about the distributive justice approach proposed by Lord Steyn.

In *Melchior* the Judges of the Queensland Supreme Court²⁰¹ the Court of Appeal²⁰² and the High Court of Australia²⁰³ were prepared to consider openly the policy factors. Clearly, policy was the basis of the English decisions prior to *McFarlane*.²⁰⁴ It is perhaps unfortunate that in *McFarlane* their Lordships chose to express their moral view while denying the policy aspects.

E Distributive Justice

The emphasis in *McFarlane* on distributive justice requires judges to invoke their subjective moral views, while cloaking them as the moral majority. Lord Steyn noted that ‘tort law is a mosaic in which the principles of corrective justice and distributive justice are interwoven’.²⁰⁵ Corrective justice requires somebody who has harmed another without justification to indemnify the other. Distributive justice relates to the just distribution of burdens and losses among members of a society. The judges labelled the cost of raising the child as pure economic loss. They applied corrective justice principles to the physical damage of pregnancy and distributive justice principles to the pure economic loss of raising the resultant child.

In basing their judgments on distributive justice their Lordships continued a line of argument used by Lord Steyn in *Frost v Chief Constable of South Yorkshire Police*²⁰⁶ to prevent police officers involved in the Hillsborough disaster from recovering for psychiatric damage when the victims’ families had been unable to succeed in a claim. Lord Steyn proposed that the individual judge’s sense of the ‘moral answer to a question’ should prevail: ‘what may count in a situation of difficulty and uncertainty is not the subjective view of the judge but what he reasonably believes that the ordinary citizen would view as right’.²⁰⁷ Lord Steyn formed the view that an overwhelming number of ordinary

199 Ibid 108.

200 Ibid 99.

201 *Melchior v Cattanaach* [2001] Aust Torts Reports ¶81-591.

202 *Melchior v Cattanaach* [2001] QCA 246 (Unreported, McMurdo P, Davies JA and Thomas JA, 26 June 2001).

203 *Melchior* [2003] HCA (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 16 July 2003).

204 See, eg, *Gold v Haringey* [1988] 1 QB 481. ‘At one time there was a conflict of decisions at first instance as to whether it was against public policy to allow a plaintiff to recover damages for the birth of a healthy child. But that conflict has been resolved, so far as this court is concerned by the unanimous decision of this court in *Emeh ...*’: at 484 (Lloyd LJ).

205 *McFarlane* [2000] 2 AC 59, 165.

206 [1998] QB 254.

207 Ibid 897.

men and women would conclude that the parents of an unwanted but healthy child should not be able to sue the doctor or hospital for compensation for the cost of raising the child.²⁰⁸

In *Udale*,²⁰⁹ Jupp J was concerned that a mother who accepted and loved a child following its birth would receive little or no damages. This is because her love and care for her child and her joy from its birth would be off-set against, and might cancel out, the inconvenience and financial disadvantages which naturally accompany parenthood. In contrast, a woman who nurtured bitterness in her heart and refused to let her maternal instincts take over would be entitled to large damages. In short, virtue would go unrewarded and unnatural rejection of womanhood and motherhood would be generously compensated.

This argument can be countered by stating that the financial costs of raising the child may be the same for both mothers. No doubt many mothers in this situation would make the best of the situation and love their child, whilst still resenting the financial and emotional disadvantages suffered. The award of damages in this situation should not relate to judgments about the moral praiseworthiness of a particular mother. The mother who is less accepting is not necessarily a bad person. Her attitude may just be a reflection of the totality of her circumstances.

Although the judges in *McFarlane* acknowledge the rights of individuals to make choices to limit the size of their family, they fail to protect this right. They appear to find morally distasteful a concept that the community generally accepts: that individuals may make a legitimate choice that the birth of a child will not be a blessing to them.

Tort law does involve an amalgam of corrective and distributive justice. Their Lordships in *McFarlane* did not consider which party was best able to meet the loss or insure against it. In most cases this will not be the parents. *McFarlane* is less about distributing burdens and benefits in society than it is about denying entitlement to compensation for financial loss of a group of reluctant parents who sue professional advisors. This is despite the fact that the law permits claimants to sue professional advisors in other circumstances.

VII GENDER ISSUES

Wrongful birth is an issue affecting women more than men. Women become pregnant and give birth, and in many cases assume the majority of the burdens of raising the resultant child. In New Zealand, almost one in three children are raised by a sole parent, most commonly the mother. Gender equality is highly dependent on the ability of women to control their fertility. The distributive justice approach in *McFarlane* suggests that it is fair to allow the burden resulting from a doctor's negligence to fall upon the woman. This is based on views about the worthiness of motherhood.

208 Ibid 977–8.

209 [1983] 2 All ER 522, 531.

Lady Justice Hale has suggested that the issues arising in this paper are questions that men and women may look at differently.²¹⁰ She accepts that there is as much diversity of view among women as there is among men. In many of the decided cases, the judges have emphasised the pain and suffering of pregnancy and childbirth. In contrast, they give scant consideration to the profound and lasting changes to a woman's life consequent on pregnancy and childbirth. In reality, the latter effects are the more significant because they last for the remainder of the woman's life.

Lady Justice Hale does not regard the upbringing of a child as pure economic loss, but rather as loss that is consequent on the invasion of bodily integrity and loss of personal autonomy involved in an unwanted pregnancy.²¹¹ In her opinion, the loss of autonomy suffered by a woman consists principally of the resulting duty to care for the child, rather than simply to pay for its keep.²¹² She points to the physical changes consequent on pregnancy and birth, some of which are permanent.²¹³ She also refers to psychological changes and also the severe curtailment of personal freedom during the pregnancy.²¹⁴ She notes that giving birth is hard, often painful and sometimes dangerous work.²¹⁵ Its effects are long lasting because the personal obligations continue throughout childhood and involve work, loss of freedom and 24 hour responsibility.²¹⁶ She states:

All of these consequences flow inexorably, albeit to different extents and in different ways according to the circumstances and characteristics of the people concerned, from the first: the invasion of bodily integrity and personal autonomy involved in every pregnancy. This is quite different from regarding them as consequential upon the pain, suffering and loss of amenity experienced in pregnancy and childbirth.²¹⁷

She points out that the law now recognises the claim of injured persons to be compensated for the costs of their care.²¹⁸ If the care is provided by a family member, the claim is made by the injured person, even though the loss is that of the family member. The family member has not been wronged.

In a wrongful birth case, the care is provided by the person who has been wronged and the legal obligation to provide it is the direct and foreseeable consequence of that wrong. She infers that claims for the wrongful conception and birth of healthy children could be analysed in this way, because the courts have been prepared to do this in cases concerning disabled children.²¹⁹

Raising children is expensive, particularly for the parent looking after the child, usually the mother. In New Zealand, in 1999, women's average hourly

210 Lady Justice Hale *The Staple Inn Reading: The Value of Life and the Cost of Living – Damages for Wrongful Birth* (2001) <http://www.actuaries.org.uk/files/pdf/library/staple_inn_read_2001.pdf> at 5 June 2003, 20.

211 *Ibid* 21.

212 *Ibid*.

213 *Ibid* 22.

214 *Ibid*.

215 *Ibid* 23.

216 *Ibid* 24.

217 *Ibid* 25.

218 *Ibid* 24.

219 *Ibid* 24–5.

earnings were 81.2 per cent of that of men.²²⁰ Women were twice as likely to work part-time as men were.²²¹ Of all families, 28.3 per cent were single parent families, the majority headed by women.²²² Further, 91 per cent of people receiving the Domestic Purposes Sole Parent Benefit were women.²²³

It is clear that the gender earnings gap is largely caused by the responsibility for the care of children. As such, a child may not be a blessing to the individual mother. Additionally, it may not be a blessing to the community at large if they, through the payment of taxation, need to contribute to the maintenance of such a child. Therefore, there may be valid policy arguments that the negligent party should bear a reasonable portion of the damages, rather than leaving them to be borne by the mother with contribution by the state, if she is receiving welfare benefits.

VIII WHO CAN SUE?

If the negligent operation is performed on one parent, it must be determined whether the other parent has the right to sue. The question is whether a duty of care is owed to that person. In *Goodwill v British Pregnancy Advisory Service* ('*Goodwill*'),²²⁴ a man had undergone a vasectomy arranged by the defendant service. He was advised that the operation had been successful and that he would not need to use contraception in the future. Three years after the operation he commenced a sexual relationship with the plaintiff. She was told of the permanency of the vasectomy and was reassured by her doctor that the chances of pregnancy were remote. Thus she did not use contraception. However, she became pregnant and gave birth to a daughter. The father was a married man, who was living with his wife and family.

It was held that the defendants were not in a sufficiently proximate or special relationship with the plaintiff to give rise to a duty of care on their part. At the time the advice was given to the father of the child, the defendants had no knowledge of the plaintiff. She was not an existing sexual partner of his, but was to be a future sexual partner of his.

In order to succeed, the plaintiff needed to prove, inter alia, that the defendant knew, either actually or inferentially, that the advice communicated was likely to be acted on by the plaintiff. The plaintiff also needed to prove reliance on the advice without independent inquiry. The purpose of advice must be either particularly specified or generally described, and made known either actually or

220 *The Status of Women in New Zealand 1998: The Combined Third and Fourth Reports on New Zealand's Progress on Implementing the Convention on the Elimination of All Forms of Discrimination Against Women* February (1998) Ministry of Women's Affairs <<http://www.mwa.govt.nz/women/status/index.html>> at 5 June 2003; *Briefing the Incoming Minister* (1999) Ministry of Women's Affairs <<http://www.brazentraining.co.nz/text/pnzfacts.htm>> at 9 June 2003.

221 Ibid.

222 Ibid.

223 Ibid.

224 [1996] 2 All ER 161.

inferentially to the defendant at the time when the advice was given. Additionally, the advice must be shown to have been so acted upon by the plaintiff to her detriment.

Consequently, the ability of a parent or other person, with the responsibility to care for a child, to make a claim will depend on their proximity to the defendant. The issue in *Goodwill* was whether the claimant, a sexual partner of the defendant, was in a sufficiently close relationship with the defendant. As was stated by Hale LJ in *Parkinson*, 'My tentative view is, however, that if there is a sufficient relationship of proximity between the tortfeasor and the father who not only has but meets his parental responsibility to care for the child, then the father too should have a claim'.²²⁵

IX CONCLUSION

The approach of the English courts towards claims for the recovery of the costs of rearing a healthy child born as a result of medical negligence is to allow damages for the pregnancy and birth of a child but disallow expenses that would arise as a consequence of the birth. Damages are allowed for the additional expenses incurred for the care of a disabled child, or for the care of a healthy child by a disabled mother. Lady Justice Hale has stated her concerns about the reasoning behind this approach in *Parkinson* and *Groom*.

The High Court of Australia has avoided distinctions between a child who is healthy and one who is disabled allowing damages for child rearing where the pregnancy was a consequence of medical negligence.²²⁶

Wrongful birth cases involve complex and emotionally difficult situations. To allow recovery from negligent medical practitioners only if the child has a disability requires parents to demonstrate that their child is defective and thus unwanted. Although the extra costs of caring for a child with a disability should be taken into account in the calculation of damages, this does not necessarily justify the denial of compensation to parents of a healthy child. Arguments involving the joys and sorrows of parenthood should be avoided because these can just as easily justify the denial of damages as the award of them.

The emphasis in *McFarlane* on the assumed responses of ordinary people and the references to 'fair, just and reasonable' suggest that fairness and remoteness were criteria for disallowing damages. If the decision whether to allow these type of damages is based on subjective concepts such as distributive justice, then this paper argues that it is preferable for Parliament to pass appropriate legislation,²²⁷ rather than allowing the Courts to deal out 'palm tree justice'.²²⁸

225 [2002] QB 266 [93].

226 *Melchior* [2003] HCA (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 16 July 2003).

227 *McFarlane* [2000] 2 AC 59, 95. 'The question for the court is ultimately one of law, not of social policy. If the law is unsatisfactory, the remedy lies in the hands of the legislature': at 95 (Lord Hope).

228 *Szechter v Szechter* [1970] 3 All ER 905, 909:

Public policy considerations might suggest that to allow such claims would potentially increase the risks and costs of medical practice. However, the few cases to date suggests that the risk would not be extensive, as only a limited number of unwanted pregnancies are a consequence of medical negligence.

A person who seeks medical advice in order to avoid or terminate pregnancy has done so because they have chosen not to have a child, irrespective of the health of that child.²²⁹ Any child can be a financial, emotional, or social burden, even if the family love and accept the child. The parents have lost the autonomy to make the decision to limit their family and have consequently suffered loss. The best interests of the child will, in most cases, be advanced if the parent or parents have sufficient resources to raise the child in the family without incurring financial hardship.

This paper concludes that the policy arguments in *McFarlane* are not sufficiently convincing to deny compensation to parents of a child born as a consequence of medical negligence. The birth of a child is more likely to be experienced as a blessing by the parents if their child is able to receive an upbringing that makes them develop into a citizen who is a benefit to society. This can occur if the parents are able to receive reasonable compensation for the losses resulting from medical negligence.

The approach of the Queensland Court of Appeal and of the majority decisions in *Melchoir* avoids subjective considerations such as the individual judge's moral sensibilities, and treat the healthy child and the disabled child similarly. Consequently, this paper suggests such an approach should be adopted by the courts in New Zealand, should the issue of damages for the expenses of rearing a child arise.

If there is a substantial area of hardship which the existing law does not reach, the remedy nowadays lies in the hands of Parliament, which has at its service the advice of the executive as to all foreseeable repercussions of the decision (an advantage denied to courts of law); and if even the most sagaciously framed general rule is still liable to throw up, exceptionally, some cases of hardship, it is open to Parliament, should it be so advised, to establish a court of equity to deal with such cases on their merits. But it is not open to a court of law to deal out what is sometimes called 'palm-tree justice': at 909 (Simon P).

229 There are however, cases where the procedure was to avoid the birth of a child with a suspected defect and once the child is born healthy, it is a wanted child. In that case the parents have suffered no loss, as they wanted a healthy child, but not a disabled child. John Seymour, 'Actions for Wrongful Birth and Wrongful Life' (2001) *New Zealand Bioethics Journal* 26, 32–3.