A RIGHT OLD MESS

REES V DARLINGTON HEALTH AUTHORITY [2003] 3 WLR 1091

Mark Lunney*

Few areas of the law of negligence have excited as much recent comment as the liability of medical practitioners for negligence that results in the birth of an unplanned child. The spate of literature has been sparked by a number of recent cases, particularly in the United Kingdom, dealing with this issue. In *McFarlane v Tayside Health Board*[1] a unanimous House of Lords held that the negligence of a medical practitioner that resulted in an unwanted pregnancy and subsequent birth did not give rise to a claim for damages with respect to the costs of raising the now extant child. This controversial decision led the Court of Appeal in England to distinguish *McFarlane* where the child was born with a disability so that a claim would lie for the extra costs — those over and above the normal expenses of raising a healthy child — associated with the child's disability.[2] A further extension was made by a differently constituted Court of Appeal in *Rees v Darlington Health Authority*[3] where the claim was for the extra expenses incurred by a disabled parent who had to care for a child born as a result of the negligence of the medical practitioner. In the meantime, the High Court of Australia reached a different conclusion to the House of Lords in *McFarlane* by holding that the reasonable costs of rearing an unplanned child were recoverable in an action against the negligent medical practitioner.[4] Given this diversity the decision of the House of Lords in *Rees v Darlington Health Authority*[5]

---

* Associate Professor of Law, School of Law, University of New England

1 [2000] 2 AC 59.

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

3 [2003] QB 20.

4 *Cattanach v Melchior* (2003) 77 ALJR 1312.

5 [2003] 3 WLR 1091.

was much awaited. However, although the decision is of great interest, it is suggested that it leaves many questions unanswered. Whatever one's views of the High Court of Australia's ruling in *Cattanach v Melchior*,[6] it is preferable to the fine distinctions that now govern this area of the law of negligence in England and Wales.

In *Rees* the claimant had a severe visual handicap and as a result was concerned that she would not be able to care for any children she might otherwise have had. Accordingly, she underwent a sterilisation operation at the defendant's hospital. The operation was performed negligently with the result that the claimant became pregnant by a partner who wished to have no involvement with the child's upbringing. She brought proceedings against the hospital claiming the costs of raising the child. Two months after she began the action the House of Lords delivered judgment in *McFarlane* and at first instance the trial judge relied on *McFarlane* to reject the claim. In the appeal to the Court of Appeal the claimant, relying on *Parkinson v St James & Seacroft University Hospital NHS Trust*,[7] successfully argued that she could claim the additional costs of raising the child attributable to the disability. By a majority of 4–3 (Lords Bingham, Nicholls, Millett & Scott; Lords Steyn, Hope and Hutton dissenting) their Lordships allowed the appeal.

The first question considered by the House of Lords, at the request of the claimant, was whether the decision of *McFarlane* should be departed from (hence a panel of seven Law Lords rather than five). In this respect their Lordships were unanimous in holding that the decision in *McFarlane* should remain the law. This was so not just because it was thought that the decision in *McFarlane* was correct but also because the conditions for reconsideration of an earlier decision of the House of Lords had not been met. This aspect of the decision must surely be correct. *McFarlane* was delivered only four years earlier. It was a unanimous decision made after full argument. In matters where minds might legitimately differ as to the correct legal approach decisions of the highest appellate court should not be subject to change as a result of different personnel on the court. This is

---

6 (2003) 77 ALJR 1312.

7 [2002] QB 266.

particularly so for the House of Lords where not all members sit on every appeal. As Lord Bingham explained: 'It would reflect no credit on the administration of the law if a line of English authority were to be disapproved in 1999 and reinstated in 2003 with no reason for the change beyond a change in the balance of judicial opinion'.[8]

Whilst this ruling precluded the claimant from recovering the entire costs of raising the child, it did not answer the question whether the additional child-rearing costs related to the disability of the claimant could be recovered. This required their Lordships to consider the basis for the decision in *McFarlane*. In *Parkinson* Hale LJ argued that the rationale for the decision in *McFarlane* was that the birth of a healthy but unwanted child resulted in a 'deemed equilibrium' — the costs of raising the child must be taken as being equal to the benefits conferred on the parents in having the child.[9] This did not apply where the child was disabled and, accordingly, the additional rearing costs attributable to the disability could be recovered. This explanation of *McFarlane* was rejected by their Lordships. There was no deemed equilibrium because the value of the child to its parents was incapable of quantification. As Lord Steyn noted, the emphasis in *McFarlane* was on the 'impossibility of undertaking a process of weighing the advantages and disadvantages.'[10] However, their Lordships divided over whether *McFarlane* extended to situations beyond that where a healthy child was born to healthy parents. The majority decided that the decision did preclude an award of damages in a case like *Rees*, and in principle Lords Steyn and Hope, in dissent, agreed that *McFarlane* should apply unless an exception was created. This was because the prime difficulty in allowing the claim in *McFarlane* related to the birth of a healthy child. According to the majority, these difficulties applied irrespective of whether the mother was disabled. Conversely, the minority thought that, in the words of Lord Steyn, 'the law should give special consideration to the serious disability of a mother who had wanted to avoid having a child by undergoing a sterilisation

---

8 [2003] 3 WLR 1091, 1096–97.
9 [2002] QB 266, 292.
10 [2003] 3 WLR 1091, 1102.

operation."[11] This would be recognised by allowing the mother to claim the additional costs of raising the child attributable to the disability of the parent.

As Lord Steyn noted, it would be unrealistic to say that there was one "right" answer in a case such as *Rees*.[12] However, it is suggested that, given the decision in *McFarlane*, the majority of the House of Lords reached the preferable result. First, as noted by Waller LJ in the Court of Appeal,[13] it is difficult to differentiate between physical disabilities and disabilities attributable to the economic or social condition of the parents, but it seems clear that the minority would have restricted recovery to disabilities of the former category. Why should the parent who is at risk of a nervous breakdown as a result of the birth of the child, perhaps because of the additional financial burden, be denied recovery (because the disability did not exist at the date of the birth) when an already disabled parent can recover? Even if this distinction is accepted, it is not clear what level of disability will allow the parent to recover. Lord Hope thought that only "serious" disabilities would qualify, with "disability" being a "mental or physical characteristic which distinguishes the case from that of a normal, healthy parent of such a kind that extra costs will need to be incurred if the child is to receive a normal and proper upbringing."[14] The difficulties with this definition simply spring from the page. It requires the setting up to two notional ideals — the normal healthy parent, and the normal and proper upbringing. It is far from clear whether either of these ideals have a grounding in reality. Secondly, to be a serious disability must the "mental" characteristic be equivalent to a recognised psychiatric illness, and, if not, what level of mental disability will be sufficient? It is easy enough to envisage situations where, if means allow it, a severely stressed mother might wish to employ a nanny or send the child to a crèche, but how is one to judge whether this is an extra cost that *needs* to be incurred as a result of the disability? This illustration also highlights a difficulty noted by the majority:

---

11 [2003] 3 WLR 1091, 1107.
12 Ibid.
13 [2003] QB 20, 34–5.
14 [2003] 3 WLR 1091, 1113.

how would damages be assessed in such a case?[15] No particulars of damage were pleaded in *Rees*, a point noted by members of both the majority and minority. This is not surprising. It would require the claimant to identify the costs associated with the upbringing of a normal healthy child by normal healthy parents — terms incapable of any meaningful definition — and then to identify the costs actually incurred by the disabled parent in raising the child. It is unclear in the minority speeches whether the actual additional costs could be claimed or only the reasonable additional costs, although in any event the claimant will have a duty to mitigate the loss. This process raises more questions than can be addressed here, but one example will suffice. Suppose the disabled parent already has children and uses state-funded child care to assist in the rearing of the children. Could the disabled parent claim the cost of private child care in respect of the costs associated with rearing the unplanned child? If so, would the same apply if the additional child care was provided privately but gratuitously by a family member? Of course, it is always possible to argue that the perceived difficulty of applying a rule of law should not prevent its recognition, but there comes a point where the difficulty of applying the rule suggests that the rule itself should be reconsidered. Perhaps the majority approach is unfair but it is workable, and the law of negligence is much in need of workable rules.

A couple of other points discussed in *Rees* deserve attention. Although its correctness was not at issue in *Rees*, all of their Lordships discussed the decision of the Court of Appeal in *Parkinson* allowing recovery to the parent of the additional costs, over and above those of raising a healthy child, associated with raising a disabled child. All three members of the minority thought that these costs should be recoverable, and Lords Bingham, Nicholls and Scott thought otherwise as such a result was inconsistent with *McFarlane*. However, whilst expressly leaving open the correctness of *Parkinson*, Lord Millett suggested that such a claim might be consistent with *McFarlane*.[16] It hardly needs to be said that this division of

---

[15] See for example [2003] 3 WLR 1091, 1098 (Lord Bingham); 1128 (Lord Millett).

[16] [2003] 3 WLR 1091, 1126.

opinion leaves *Parkinson* in a precarious position, and it is submitted that it too should be reversed if the *McFarlane* justification is correct. It must also be as impossible to weigh up the benefits and burdens of having a disabled child as a healthy one. This reasoning, however, did not appeal to Lord Hope, who argued: "But there is no getting away from the fact that the parent of a seriously disabled child is likely to face extra costs in her endeavour to make the child's upbringing as normal as possible."[17] With respect, it is hard to see how this avoids doing what *McFarlane* says is prohibited — weighing up the burdens and benefits of a child, albeit disabled, and deciding that the child is more trouble than it was worth.[18] The other members of the House who supported *Parkinson*, Lords Steyn and Hutton, did so on the basis that *McFarlane* was an exception to the general principles of corrective justice that required a tortfeasor to provide compensation for all harm resulting from the tort that was not too remote. Unfortunately, the principle upon which the exception was based appears to apply to the situation in *Parkinson*. It is true that their Lordships in *McFarlane* did not consider the position of the disabled child, although it is more difficult to discern from the speeches that their Lordships were, as Lord Steyn claimed in *Rees*, "fully alive to the different considerations which arise if the child is seriously disabled."[19] However that may be, it is submitted that the decision of the majority is consistent with the reasoning by which *McFarlane* was decided. In addition, both Lords Bingham and Scott thought that it would be somewhat odd to allow recovery for the disability (which the medical practitioner's negligence did not cause) but not for the birth (which it did).[20] However, Lord Scott indicated that the position might be different if the very purpose of the sterilisation was to prevent the possibility of the birth of a disabled child. It must be admitted that such a result is

---

17 [2003] 3 WLR 1091, 1110.

18 Seymour, '*Cattanach v Melchior*: legal principles and public policy' (2003) 11 *TLJ* 208, 217.

19 [2003] 3 WLR 1091, 1105.

20 [2003] 3 WLR 1091, 1097 (Lord Bingham), 1135–6 (Lord Scott).

instinctively attractive,[21] but equally it is hard to see how allowing recovery in this case is any more consistent with the rationale of *McFarlane* than in any other case where the child is born disabled.[22] In most if not all cases where a sterilisation has been carried out the very purpose of the procedure is to prevent the birth of an unplanned child, but it was accepted in *McFarlane* (and iterated by Lord Millett in *Rees*[23]) that the motives of the parents for not wanting another child were irrelevant. Once the child is born the impossibility of comparing burdens and benefits arises and recovery is precluded.[24] The approach of Lord Scott, which seems to suggest that liability for rearing costs arises due to some kind of assumption of responsibility by the medical practitioner, fails to recognise the overriding policy considerations that led to the unanimous decision of the House of Lords in *McFarlane*. Of course, it would be possible to create an exception to *McFarlane* but it is hardly desirable to explain a decision by reference to a set of reasons and then immediately set about undermining those reasons. This is not to say that reliance on an assumption of responsibility by the patient is irrelevant; it may ground the recovery of other heads of damage (such as pain and suffering associated with the pregnancy and loss of earnings of the mother during pregnancy).[25]

Lest it be thought that the decision of the majority in *Rees* was somewhat conservative, one final point must be noted. In what was described by Lord Bingham as a 'gloss' on *McFarlane*[26] the majority held that in cases where the negligence of a medical practitioner had resulted in the birth of an unplanned child, the mother was entitled to an award of £15000 as general damages to

---

21 See also Hoyano, "Misconceptions about Wrongful Conception" (2002) 65 *MLR* 883 who makes a strong argument as to why this case should be treated differently.

22 Seymour, above n 18.

23 [2003] 3 WLR 1091, 1128.

24 See the judgment of Cooke J in *AD v East Kent Community NHS Trust*, unreported, QBD, 24 May 2002.

25 This might also explain the decision in *BT v Oei* [1999] NSWSC 1082 holding a doctor liable to the sexual partner of his patient when the doctor failed to recommend a HIV test with the result that the partner contracted the virus from the patient.

26 [2000] 3 WLR 1091, 1097.

compensate for the loss of the opportunity to live her life in the way that she wished or planned. This was in addition to the award for pain and suffering and loss of earnings during the pregnancy. Two issues arise for discussion. First, to whom is the award to be made? In *Rees* only one parent was a party to the action so the award was made solely to her. However, it is not clear whether the award is one awarded to the parents (jointly) where they are parties to the action or only to the mother. The idea for such an award comes from Lord Millett's speech in *McFarlane* where he suggested that an award of general damages of £5000 should be made to both parents.[27] It is much less clear what their Lordships thought in *Rees*. It is submitted that the answer lies in determining whether the duty of the medical practitioner is owed to the parents individually or as a couple. On the facts of *Rees* it seems clear that the duty was owed only to the child's mother as in the circumstances the father wished to take no part in the upbringing of the child. In this situation it is perhaps not surprising that some of their Lordships used 'she' and 'her' when referring to the loss of a parent's autonomy.[28] In general it is submitted that a medical practitioner owes no duty of care with respect to the loss of autonomy of a future sexual partner of a person on whom the medical practitioner carries out a sterilisation or vasectomy procedure.[29] However, it seems likely that a duty is, or at least may be, owed to the current sexual partner of the party undergoing the procedure, at least where the procedure has been carried out as a result of a joint decision of the parties to avoid the possibility of the woman becoming pregnant, on the basis that the practitioner assumed responsibility to both parties. It must be admitted that this gives rise to nice distinctions; for example, it would deprive a woman

---

27 [2000] 2 AC 59, 114.

28 [2003] 3 WLR 1091, 1097 (Lord Bingham), 1136 (Lord Scott).

29 In *Goodwill v British Pregnancy Advisory Service* [1996] 1 WLR 1397 the English Court of Appeal refused to allow a claim for rearing costs made by a woman who had become pregnant by a partner who had, prior to the relationship, had a vasectomy and whose surgeon had negligently failed to warn of the possibility of "spontaneous reversal". The case was decided before the *McFarlane* decision (so was not based on the unavailability of this head of damages) and it is submitted that the reasoning in the case would also apply to prevent a claim for damages for loss of autonomy in similar circumstances.

in a stable but subsequent sexual relationship with a man who had previously undergone a negligently performed vasectomy a claim for a share of the £15000 for loss of autonomy if she became pregnant in reliance on her partner's infertility. It also recognises that a father may have a claim in respect to loss of autonomy in respect of the birth of an unplanned child when the mother may not. However, it is submitted that this is preferable to extending the duty of the medical practitioner merely on the basis that the subsequent sexual partner was foreseeable and might suffer a loss of autonomy if the practitioner is negligent. This should be so irrespective of whether the subsequent sexual partner might have a claim against the practitioner (i.e. a women claiming for the pain and suffering and loss of income associated with the pregnancy).[30] Even if all this is accepted, many questions remain. The birth of child creates rights and obligations on both parents. For example, assume that the duty is owed to both sexual partners. It may be that, as in *Rees* the father of the child wishes to play no role in the child's upbringing. However, he may in future be required to contribute to the costs of doing so, and this will to some extent impinge on his autonomy. Would the possibility of him having to make such a contribution be sufficient to allow him to claim?

The second point to make about this new award of general damages relates to the first. Their Lordships received no written submissions on the introduction of a conventional award of this nature as the point was first raised in the oral hearing. For Lords Steyn and Hope, the introduction of such a novel head of damages should only have been considered after full argument.[31] Given that, in any event, they both went on to dismiss such an award as contrary to principle and suitable for introduction only by the legislature it is not entirely clear why they saw the absence of full argument as decisive but the general point remains valid. It is submitted that there is much to be said for the introduction of such a conventional award. The loss of autonomy is an intangible loss hence the categorisation of the award as general damages. If the law does not allow the economic

---

[30] This question did not arise for decision in *Goodwill*. Such damages were allowed in *McFarlane* where a duty was owed to the mother as the patient. Whether this would apply to the *Goodwill* situation remains to be seen.

[31] [2003] 3 WLR 1091, 1108 (Lord Steyn), 1115–6 (Lord Hope).

consequences of the loss of autonomy to be compensated by awarding rearing costs of the child for the reasons explained in *McFarlane*, it does not follow that those same reasons should bar all components of the claim. Lord Hope thought that this 'splitting of damages' was impermissible[32] but there are well established parallels in other areas of tort law. A victim of negligence may sue for the pain and suffering associated with an injury caused by the negligence of another but may not recover for loss of earnings as a burglar whilst recovering from the injury.[33] In both cases, but for very different reasons, the law would allow recovery for general damages but limit the award of special damages. Such a course would be exceptional but in areas where public policy plays such a large role judges should not be averse to being creative.[34] That said, Lords Hope and Steyn are surely correct to say the introduction of this award is more than a 'gloss'. Some of the difficulties with the award have been discussed above. No doubt full argument would have elucidated more. Superior appellate courts should be slow to make such changes as a 'gloss'.

At one level it is easy to sympathise with the plight of superior courts when dealing with such controversial issues as were at stake in *Rees*. It is perhaps not surprising then, at least in England and Wales, that the law of negligence in relation to unplanned births appears something of a mess. This is an area where value judgments must be made, and greater clarity is unlikely to be found in appeals to judges to apply 'ordinary legal principles'.[35] Sympathy, however, can only go so far in excusing inconsistency and confusion. As Cane astutely notes, the real problem with *McFarlane* is that it failed to see *Parkinson* or *Rees* coming.[36] Whatever one thinks of the majority decision of the High Court of Australia in *Cattanach v Melchior*, the result has been to provide at common law a relatively clear and workable

---

32 [2003] 3 WLR 1091, 1114.

33 *Burns v Edman* [1970] 2 QB 541. See also *Hunter v Butler* [1996] RTR 396; *Hewison v Meridian Shipping PTE* [2002] EWCA Civ 1821. For an Australian example see *Meadows v Ferguson* [1961] VR 594.

34 See Cane, 'Another Failed Sterilisation' (2004) 120 *LQR* 189.

35 See Cane, 'The Doctor, the Stork and the Court: A Modern Morality Play' (2004) 120 *LQR* 23; see n 34.

36 (2004) 120 *LQR* 189.

rule.[37] The recent cases from England and Wales, of which *Rees* is the latest, demonstrate that this is a virtue not to be underestimated.

---

[37] Unfortunately, statute has somewhat muddied the water. In December 2003 the New South Wales Parliament introduced an amendment to the *Civil Liability Act 2002* (NSW), introducing Part 11. Section 71 of that Act now limits the damages recoverable in respect of the wrongful birth of a child by excluding rearing costs. However, the section allows for the common law development of an action for the additional rearing costs associated with a disabled child – the 'Parkinson' approach (s 71(2)). One other state (Queensland) precludes any claim arising out of a failed sterilisation or contraception procedure, or the failure to give proper contraceptive advice, for 'costs ordinarily associated with rearing or maintaining a child.' (*Civil Liability Act 2003* (Qld) Part 5, ss 49A & 49B, inserted by the *Justice and Other Amendment Act 2003* s 41, commenced 8 December 2003). It is unclear whether the additional costs associated with raising a disabled child are excluded as falling within the 'ordinary costs' of raising a child.