THE VALUE OF LIFE AND THE COST OF LIVING -

DAMAGES FOR WRONGFUL BIRTH

We all know that bringing up children is an expensive business. It is expensive to both parents, but it is most expensive to the parent who looks after the child, usually the mother. The figures are staggering.

There is already a substantial gender earnings gap. In 1999, the Cabinet Office Women's Unit commissioned research into the difference in lifetime earnings between men and women of equivalent educational attainments.¹ This is most noticeable for mid-skill women with GCSEs, almost as noticeable for low skill women with no qualifications, and least noticeable for highskill women with degrees. Over her lifetime, Mrs Mid-skill will earn £241,000 less than an equivalent man, representing 37% of her lifetime earnings. Mrs Low-skill will earn £197,000 less, also representing 37% of her lifetime earnings. Mrs High-skill will earn £143,000 less than her male counterpart, but this will only be around 12% of her lifetime earnings.

On top of this, women who have children experience a further mother gap: that is, a difference in lifetime earnings between them and their childless sisters. This is most marked for Mrs Low-

¹ See Cabinet Office Briefing, *Women's incomes over the lifetime*, 2000; full report, edited by Dr Katherine Rake, HMSO.
skill, who will lose a further £285,000 over her lifetime if she has two children, ending up with less than half her husband's lifetime earnings; but Mrs Mid-skill will lose a further £140,000; and Mrs High-skill will lose only a further £19,000. But this study did not take into account the costs of child care: these are likely to be very high for Mrs High-skill whose higher earnings make it worth her while: if they were deducted the gap between her and her husband would be greater.

Mostly, however, parents these days want to have a child or willingly take the risk. The mother gap is falling. One reason for this is the change in women's working patterns - far more are returning to work quite soon after having children. But another is that women are deliberately having their children later in life: the mean age at childbirth in England and Wales rose from 26.2 in 1971 to 29 in 1999\(^2\). This has a cumulative effect upon their later working patterns. So parents who expect to bear the main burden of responsibility for child care are increasingly seeking to control the number and timing of their children and have very strong economic reasons for doing so. These are on top of all other reasons - personal or health-related - which might lead one to do so.

So it is one thing to choose whether or not to make the sacrifice involved. It is quite another thing to have it thrust upon you. What if a woman is wrongfully saddled with responsibility for a child she does not want to have? Does she, or the father, have any redress?

Wrongful conception and wrongful birth

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\(^2\) Social Trends No 31, 2001, p 50.
I am not here concerned with rape: if the father can be identified he may be made liable to maintain the child. Otherwise it can happen in two basic ways. First, the mother or father may have undergone an ineffective sterilisation: hence the mother conceives when she never meant to do so. These are known as 'wrongful conception' cases. A variant of this is where the parents are given negligent genetic advice, as a result of which they conceive a child whom they never meant to conceive.3 Second, the doctors may have wrongfully failed to detect a pregnancy, or to screen for birth defects, thus depriving the mother of the opportunity of having the abortion which she would have had if she had known in time. These are known as 'wrongful birth' cases.

The child's claims

The parents' claims must be distinguished from any claim the child may have. The child's situation is quite different. A child who is born disabled when he would otherwise have been born healthy may be entitled to claim damages under the Congenital Disabilities (Civil Liability) Act 1976. He can only do so if the disability was caused by wrongful conduct towards his mother during pregnancy or towards either parent before conception or by the selection, keeping or use of the embryo or gametes employed in IVF, GIFT or donor insemination treatment.4 The principle is the same as that which allows anyone who has been caused personal injuries by someone else's negligence or other wrongful conduct to claim damages for those injuries. The only difference is that liability towards the child depends upon a breach of duty towards one or other of the parents.

4 1976 Act, ss 1(1) and (2) and 1A(1).
The main reason for this approach was to ensure that the mother could not be liable to the child for the damage which she might have caused him, for example by smoking or taking drugs during pregnancy. The Law Commission thought that this would be undesirable and damaging to the mother-child relationship. They were much impressed with the view of the Bar Council that 'logic and principle ought to yield to social acceptability and natural sentiment'. It would add to the stress of an already stressful relationship, lead to unseemly allegations that she had been negligent in not following the most recent recommended ante-natal regime, any damages payable would only reduce the money available to support the family, and it could be used as a weapon between parents in dispute. This last point was very strongly urged by the then President of the Family Division, Sir George Baker. As we shall see, this concern for the mother-child relationship has also featured in the parents' claims. The problem did not arise, however, if she did the damage when driving a car knowing that she was pregnant, because then she would be covered by insurance and these supposedly damaging effects would not arise.

However, it is different if the child is born disabled when otherwise he would never have been born at all: for example, where he has a congenital disability such as Down's syndrome which is not detected during pregnancy, or where his mother contracts German measles and is given negligent advice about it. If it had been detected or she had been properly advised, she would have had an abortion and he would never have been born. These are known as 'wrongful life' cases. In McKay v Essex Area Health Authority, it was decided that, in English law, the child

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5 See Law Com No 60, Report on Injuries to Unborn Children, 1974, paras 53 to 64.

6 1976 Act, s 2.
does not have a claim at all.\textsuperscript{7}

The technical reason was the way in which liability under the 1976 Act is framed - that is, on the basis that the child was born with disabilities which he would not otherwise have had\textsuperscript{8} - and on the exclusion of any other liability towards a child born with disabilities.\textsuperscript{9} The underlying reason is the principle of equal respect for all life and a reluctance to speculate about the quality of any life to the person living it. How can anyone say that they should never have been born? How can the court say that someone would be better off dead? How the court assess their damages when they could only ever have been born disabled? The purpose of damages is to compensate for loss: but what have you lost when your real complaint is that you should not have been allowed to live? Not all legal systems take the same view on this although most do.

\textbf{The parents' claims}

But what about the parents? They have been landed with a child whom they would not otherwise have had. In \textit{McKay}, while the child's claim for 'wrongful life' was struck out, the mother's claim for 'distress, loss and damage', including maintenance, medical treatment and care and other additional expenses caused by the disability was not. The courts were soon grappling with the problem.

I find it mildly interesting that the trial courts which first considered the public policy issues

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\item \textsuperscript{7} [1982] 1 QB 1166, CA.
\item \textsuperscript{8} See s 1(2)(b).
\item \textsuperscript{9} See s 4(5).
\end{itemize}
involved in wrongful conception claims reached different conclusions according to whether it was the mother's or the father's sterilisation which had failed. In *Udale v Bloomsbury Area Health Authority*,\(^\text{10}\) decided on 17 February 1983, Jupp J rejected a claim for the costs of maintenance and enlargement of the family home brought by a mother after her sterilisation operation had failed. He was most impressed with the following arguments:

'(1) It is undesirable that any child should learn that a court has publicly declared his life or birth to be a mistake - a disaster even - and that he or she is unwanted or rejected. Such pronouncements would disrupt families and weaken the structure of society. (2) A plaintiff such as Mrs Udale would get little or no damages because her love and care for her child and her joy, ultimately, at his birth, would be set off against and might cancel out the inconvenience and financial disadvantages which naturally accompany parenthood. By contrast, a plaintiff who nurtures bitterness in her heart and refuses to let her maternal instincts take over would be entitled to large damages. In short, virtue would go unrewarded; unnatural rejection of womanhood and motherhood would be generously compensated. . . . (3) Medical men would be under subconscious pressure to encourage abortions in order to avoid claims for medical negligence which would arise if the child were allowed to be born. (4) It has been the assumption of our culture from time immemorial that a child coming into the world, even if, as some say, "the world is a vale of tears", is a blessing and an occasion for rejoicing."\(^\text{11}\)


\(^{11}\) See p 1109D-F.
On the other hand, in *Thake v Maurice,*\(^{12}\) decided on 26 March 1984, Peter Pain J granted a claim for maintenance costs and loss of earnings brought by both parents after the father's vasectomy had failed (and they had not been given an adequate warning that it might do so); interestingly the parents did not make any claim for the time and trouble in bringing up the child, because they accepted that these would be cancelled out by the joy of having her. This, like an earlier case of *Scuriaga v Powell,*\(^{13}\) where there was no claim for upbringing costs, was a claim for breach of contract, not the tort of negligence. But the judge considered and rejected the public policy arguments which had persuaded Jupp J.

As to (1), he did not think that awarding damages would make the child feel rejected: 'She is surrounded by a happy, albeit somewhat poverty stricken, family life. It is this that must make her feel wanted and not rejected. She may learn in years to come that her conception was unwanted. But there is nothing exceptional about this. What matters to a child is how it is received when it enters life.'\(^{14}\) As to (2), to adopt the policy favoured by Jupp J would mean that virtue would go unrewarded: the joy these parents had in the child was largely of their own making in the way they had met their difficulties: the birth of a healthy child should be set off only against their disappointment and the labour pains. On (3), the decision on abortion is made by the parent and doctors who are usually quite independent of the doctor performing the sterilisation. And for (4), the state's support for family planning, and even abortion, meant that it was generally recognised that the birth of a healthy child was not always a blessing. 'The policy


\(^{14}\) See p 667C.
of the state, as I see it, is to provide the widest freedom of choice. It makes available to the public the means of planning their families or planning to have no families. If plans go awry, it provides for the possibility of abortion. But there is no pressure on couples either to have children or not to have children or to have only a limited number of children.\textsuperscript{15}

Earlier he had said, 'In approaching this problem, I firmly put sentiment on one side. 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.'\textsuperscript{16}

The Court of Appeal resolved the disagreement in \textit{Emeh v Kensington and Chelsea and Westminster Area Health Authority},\textsuperscript{17} decided on 24 July 1984. This was another claim brought by a mother after a failed sterilisation. All three judges simply said that they preferred the arguments of Peter Pain J in \textit{Thake} to those of Jupp J in \textit{Udale}. The main issue in the case was whether the mother's failure to have an abortion broke the chain of causation and they were unanimous in holding that it did not: the negligent doctor, having put her in this dilemma, had no right to expect her to solve it in this way.

An interesting feature of this case was that the child was seriously disabled, but this was not the

\textsuperscript{15} See pp 666H to 667A.

\textsuperscript{16} See p 666F.

\textsuperscript{17} [1985] QB 1012, [1984] 3 All ER 1044.
basis of the court's decision. The closest they came to referring to it was when Purchas LJ accepted that ordinarily there would be 'an appropriate diminution' in damages for 'the value of the child's aid, comfort and society during the parents' life expectancy'\textsuperscript{18} but that this did not arise in this case.

The matter was therefore regarded as settled by the time that Thake itself reached the Court of Appeal on 11 December 1985. For more than 15 years the courts put these principles into effect, not only where there was a contractual claim but also in tort. It is not surprising that the courts held that there was a claim in tort. The doctor obviously owed a duty to the person being sterilised to perform that operation with reasonable care and to advise them properly of the consequences. The whole purpose of the service they had undertaken to perform was to prevent pregnancy. The entirely foreseeable result of a breach of that duty of care was an unwanted pregnancy. From that, all kinds of damage foreseeably flowed. So why should the negligent doctor not have to pay for it?

Yet during those fifteen years, there were many who felt instinctively uneasy about awarding the parents damages for having a normal healthy child to bring up. One of those who confessed his unease was Brooke J (as he then was) in Allen v Bloomsbury Health Authority [1993] 1 All ER 651, where he clearly distinguished between the claim for personal injury damages and the claim for economic loss. This was a case where the doctors performing a sterilisation failed to realise that the mother was pregnant. When she found out it was too late to have an abortion. The resulting child had a devastating effect upon the life of the mother, a divorced single parent.

\textsuperscript{18} Quoting from Sherlock v Stillwater Clinic (1977) 260 NW 2d 169, pp 170-171.
with two other children to support. Brooke J awarded her nearly £30,000 loss of earnings until the child reached 11, child minding costs from 11 to 14 of nearly £3000, and maintenance costs of £27,000 odd until she was 18.  

He also pointed out that the maintenance costs would depend upon the family involved:

'. . . defendants are liable to pay for all such expenses as may reasonably be incurred for the education of upkeep for the unplanned child, having regard to the circumstances of the case and, in particular, to his condition in life and his reasonable requirements at the time the expenditure is incurred.'

So the claims in respect of children in modest circumstances - an HGV driver, railwayman or young unmarried mother - tended to be based upon income support (supplementary benefit) rates. But in Benarr v Kettering Health Authority, where the family were in affluent circumstances and sent all their children to private schools, the award was just over £60,000, and included just under £20,000 for private education.

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19 This was in addition to special damages - ie financial loss already suffered, but we do not know how - of more than £25,000.

20 At p 662a.

21 See Udale v Bloomsbury Area Health Authority [1983] 1 WLR 1098, 2 All ER 522 (husband an HGV driver); Thake v Maurice [1986] QB 644, [1984] 2 All ER 513 (husband a railwayman); Gardiner v Mountfield (1989) 5 BMLR 1 (young and almost certainly unmarried mother); see also Emeh v Kensington and Chelsea and Westminster Area Health Authority [1985] QB 1012, [1984] 3 All ER 1044, where the multiplicand was £507 pa, nothing is known of the parents' financial circumstances but the child was also severely disabled and thus entitled to extra welfare benefits; and Salih v Enfield Health Authority [1991] 3 All ER 400, where the multiplicand of £1050 pa was agreed, the husband owned a clothing factory but nothing is known about his income.

Mrs Allen also got damages (£2500) for the pain, suffering and loss of amenity involved in the pregnancy, offset by the benefit of not having to go through the abortion she would otherwise have had. She did not get damages for all the additional wear and tear and tiredness caused by having to look after the child, because (as had been accepted in *Thake*) this was offset by the benefits of having and bringing up a healthy child.

**After McFarlane**

There matters stayed until the Scottish case of *McFarlane v Tayside Health Board*\(^{23}\) reached the House of Lords. But in the meantime, the House of Lords had also been reconsidering the whole scope of the law of negligence in what Professor Jane Stapleton has called 'non-traditional claims'. By a traditional claim, she has in mind one 'in which the careless positive act of a private defendant resulted in physical injury to the plaintiff', such as a running down action or the snail in the ginger beer bottle. Non-traditional claims range from pure nervous shock or pure economic loss to a diverse range of physical injury claims of affirmative duties, often brought against deep-pocketed public authorities. Under the pressure of these, she says, the view has developed that 'the negligence principle is one that requires tight and effective doctrinal control, and that society simply cannot and should not require the tort system to provide monetary compensation for every harm resulting from carelessness, not even every physical harm'.\(^{24}\)

*McFarlane* was a claim brought by the mother and father in respect of the birth of a healthy

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\(^{23}\) [2000] 2 AC 59.

child following a vasectomy after which they had been wrongly advised that they need not use contraception. Unlike the trial judge, the House were prepared to regard an unwanted but normal pregnancy as damage. The majority distinguished between two types of loss: (1) the pain, suffering and loss of amenity suffered by the mother during pregnancy and childbirth, and the immediate financial losses associated with that: all the earlier English cases had recognised this head of damage, even when they had been more doubtful about the costs of upbringing; and (2) what they saw as the pure financial loss involved in the costs of bringing up the child until reaching independence. The father's claim was purely financial. The mother's claim was of both types. She could have the first but neither of them could have the second.

Why did they do so? Only Lord Slynn unequivocally based his decision on the lack of a duty of care. The others accepted the existence of some duty, but considered whether this particular type of damage was recoverable if the duty was broken. Lord Steyn, Lord Hope and Lord Clyde appear to have regarded the child rearing costs as pure economic loss and not consequential upon the wrongful conception. They expressed themselves differently, but at the heart of their reasoning was the feeling that to compensate for the financial costs of bringing up a healthy child is a step too far. All were concerned that a healthy child is generally regarded as a good thing rather than a bad thing. But it is impossible accurately to calculate the benefits so as to give a proper discount. Would one want a parent who thoroughly dislikes her child and the predicament in which she has been placed, but does her duty, to be at an advantage compared with a parent who falls in love with her child at birth and willingly reconciles herself to her fate? Would one want a parent who disparages her child to be at an advantage compared with one who sees the best in him?
The obvious solution, as Lord McCluskey had said in the Inner House of the Court of Session,\textsuperscript{25} and Lord Millett agreed, is either to ignore the benefits altogether or to assume that they cancel out the upbringing claim. Effectively the House of Lords did the latter. In doing so they went further than the earlier cases. These had also assumed some benefit from having a healthy child but had set that off against the extra time and trouble spent in bringing up the child, rather than against the costs of his maintenance. That too is interesting: it seems to assume that the one - usually the mother - who gets the trouble also gets the fun whereas the father gets only the expense.

There are of course many, and not only feminists, who would challenge the assumption that there is any sort of equilibrium between the costs of bringing up a child and the benefits they bring. They would argue that the true costs to the primary carer of bringing up a child are so enormous that they easily outstrip any benefits. As Lord McCluskey also said,

\begin{quote}
'\textbf{The "principle" that the value of a child should be held to outweigh all the financial outlay incurred bringing up a child might well appeal to those who can afford to make such outlay without any, or any undue, financial hardship. But even in our civilisation, there are some for whom an unwanted and unplanned pregnancy is a financial disaster and may bring an end to a chosen way of life with financial and personal losses.}'\textsuperscript{26}
\end{quote}

\textsuperscript{25} 1998 SLT 307 at p 317F.

\textsuperscript{26} At p 317B.
Some would dispute the very notion of a child bringing benefit to the parents, smacking of the commodification of the child, regarding him as a species of property in a way now rejected by family law. Indeed counsel for the Health Board went so far as to argue before the Inner House that expenditure on a child was 'spent on nourishing an asset'.\(^{27}\) It is, as Lord Millet pointed out, society which is bound to regard its new member as an asset, whatever the views and experience of the parents. If so, an equally rational response might be to attribute a conventional sum as the benefit to be assumed to be gained from the pleasure of a child's company, the pride in his achievements, the hope of support in old age, and the passing on of one's genes. This is a solution sometimes adopted by the law when faced with a rationally necessary but factually impossible task.

On the other hand, the House of Lords reflected a view which is probably widely held. It is certainly widely held elsewhere in the common law world. According to a helpful paper by Steven Free,\(^ {28}\) most courts in the United States have rejected claims for the costs of raising a healthy child in 'wrongful conception' cases,\(^ {29}\) and there is a similar decision in Canada, Kealey v Berezowski;\(^ {30}\) but there are some US decisions which have allowed it;\(^ {31}\) the South African

\(^{27}\) 1998 SLT 307, at p 310A.

\(^{28}\) Prepared on behalf of the claimant in Parkinson v St James and Seacroft University Hospital NHS Trust [2001] 3 All ER 97.

\(^{29}\) There is a review in Johnson v University Hospitals of Cleveland 540 NE 2d 1370 (1989); see also Jackson v Bumgardner 347 SE 2d 743 (Supreme Court of South Carolina); Cochrane v Baumgartner 95 Ill 2d 193, 447 NE 2d 385; Szekeres v Robinson 102 Nev 93, 715 P 2d 1076 (Supreme Court of Nevada, 1986).

\(^{30}\) (1996) 136 DLR (4th) 708 (Ontario Court, General Division).

\(^{31}\) Lovelace Medical Centre v Mendez 111 NM 336, 805 P 2d 603 (Supreme Court of New Mexico, 1991); Marciñak v Lundborg 153 Wis 2d 59, 450 NW 2d 243 (1990); Zehr v Haugen 318 Or 647, 871 P 2d 1006 (Supreme Court of Oregon, 1994); Burke v Rivo 406 Mass 764, 551 NE 2d 1 (1990).
case law supports it;\textsuperscript{32} and so did Kirby A-CJ in \textit{CES v Superclinics (Australia) Pty.} \textsuperscript{33} It seems to be allowed in Germany (although there is a difference of view between the Bundesgerichtshof and the Bundesverfassungsgericht) but not in France.

The law is now settled in the United Kingdom. \textit{McFarlane} has recently been applied by the Court of Appeal in \textit{Greenfield v Irwin (A Firm) and others}.\textsuperscript{34} This was a wrongful birth rather than a wrongful conception case but unlike most of those cases the child was healthy. There had been a negligent failure to discover that the mother was pregnant before prescribing her a course of contraceptive injections (very like the facts in \textit{Allen}). The Court held that the case could not be distinguished from \textit{McFarlane}.

The House of Lords did not, however, deal with the position in relation to a disabled child. Lord Steyn expressly acknowledged that here the considerations might be different. Indeed, when asking himself what the 'person on the underground' would think of the McFarlanes' claim, he suggested that 'they will have in mind that many couples cannot have children and others have the sorrow and burden of looking after a disabled child.'\textsuperscript{35} The others were clearly thinking only in terms of a healthy child. Two different sorts of case have come before the courts since \textit{McFarlane}.

\textsuperscript{32} \textit{Administrator, Natal v Edouard} 1990 (3) SA 581; \textit{Mukheiber v Raath & Another} 52 BMLR 49 (Supreme Court of Appeal, South Africa, 1999.

\textsuperscript{33} (1995) 38 NSWLR 47: although in order to achieve a majority result which the lower court could apply in assessing the damages, he agreed with Priestley JA that they should be limited to the point when the unwanted child could have been adopted.

\textsuperscript{34} [2001] 1 FLR 899.

\textsuperscript{35} At p 82C.
In the first category are 'wrongful birth cases', in which there was a failure properly to screen for genetic or other defects arising during pregnancy. In such cases there is a direct link between the negligence and the disability. There are now three cases at first instance which decide that the parents can claim the extra costs of having such a disabled child. These cases reveal an interesting difference of view as to whether the costs of a child are properly conceptualised as the costs of maintenance or the costs of care or a combination of the two.

In *Hardman v Amin,*36 the facts were virtually identical to those in *McKay.* The doctor negligently failed to diagnose german measles when the mother was pregnant and her child was born severely disabled. Henriques J decided that the mother could still make a claim for the past and future costs of providing for the child's special needs and the care related to his disability, that is for the extra burdens involved, including both out of pocket expenditure and the cost of the extra care gratuitously provided by the mother. The claimant accepted that *McFarlane* now precluded a claim for the past and future cost of the child's basic maintenance.

Toulson J reached a similar conclusion in *Lee v Taunton & Somerset NHS Trust.*37 Here the mother took drugs for epilepsy, was counselled before conception about the risks and advised to have a high resolution scan to detect tubal neural defect, but the scanner negligently failed to detect spina bifida. Toulson J took the provisional view (on an application for an interim

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37 [2001] 1 FLR 419.
payment) that if this child's birth was not a deemed blessing, there would have been no barrier to recovering the full costs of his maintenance, except for that if she had terminated this pregnancy but continued her attempts to have another child she would have incurred the costs of a healthy child in any event.

In the earlier case of *Rand v East Dorset Health Authority*, 38 a child was born with Down's syndrome after a negligent failure to inform the parents that the results of the scan revealed a high risk of this. Newman J held that there was a claim for the extra costs of maintenance. But he also held that as it was a claim for pure economic loss, the quantum depended upon what the parents could have afforded to pay rather than upon the child's needs. Hence they could not recover the cost of care provided gratuitously by family members or for private education or extra accommodation. Henriques J and Toulson J disagreed: putting the parents in the position in which they would have been had the negligence not taken place meant that they should recover for the child's reasonable needs rather than what they could have afforded to pay.

There is a good deal of support elsewhere in the common law world for recovering at least the extra costs of raising a disabled child in these 'wrongful birth' cases. There is a large number of cases to that effect in the United States 39 and *Veivers v Connelly* 40 in Australia. The French also

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39 *Shroeder v Perkel* 87 NJ 68-9, 432 A 2d 834 (Supreme Court of New Jersey, 1981); *Greco v United States* 111 Nev 405, 893 P 2d 345 (Supreme Court of Nevada, 1995); *Phillips v United States* 575 F Supp 1309 (US District Court, District South Carolina, 1983); *Keel v Banach* 624 SO 2d 1022 (Supreme Court of Alabama, 1993); *Siemenic v Lutheran General Hospital* 117 Ill 2d 230, 512 2d 691 (Supreme Court of Illinois, 1987); *Arche v United States* 247 Kan 276, 798 P 2d 477 (Supreme Court of Kansas, 1990); *Blake v Cruz* 108 Idaho 253, 698 P 2d 315 (Supreme Court of Idaho, 1984); *Smith v Cote* 128 NH 231, 513 A 2d 341 (1986); *Moore v Lucas* 405 SO 2d 1022 (1981); *Robak v United States* 658 F 2d 471 (7th Circuit Court of Appeal, 1981); *Lininge v Eisenbaum* 764 P 2d 1202 (Supreme Court of Colorado again).
allow recovery in this case. There do not seem to be any cases against it.

The second sort of case is a wrongful conception where the child born as a result of the failed sterilisation is not 'healthy' but in some way disabled. In this case, there is no direct link between the negligence and the disability, except of course for the link between the negligence and the birth. Does the logic of McFarlane mean that there should be no damages for this child either? Or does it mean, following Toulson J in Lee that he should not be deemed a blessing at all and so the full cost of his upbringing can be recovered? Or does it mean that, similarly to Hardman and Rand, the extra costs caused by his disability can be recovered?

This question came before the Court of Appeal in Parkinson v St James and Seacroft University Hospital NHS Trust. The parents lived in modest circumstances. They already had four children and the mother was planning to return to full time work as they needed less of her time. A sterilisation operation was negligently performed with the result that she became pregnant with her fifth child. For the sake of the preliminary issue it was assumed that he was significantly disabled. There was evidence that he was placing an enormous strain on the family, the parents' marriage had broken up and the lives of the other two children still at home were also affected.

The comparative law is more divided on this intermediate dilemma. There are some United States cases which allow damages for the extraordinary costs of a disabled child in wrongful

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40 [1995] 2 Qd R 326 (Supreme Court of Queensland).

41 [2001] 3 All ER 97.
conception claims: but in one case there was negligent genetic advice, which is in many ways more like the wrongful birth cases, where there is negligent post conception screening; and in another case the whole object of the vasectomy was to avoid having another genetically disabled child; this has been cited with approval in a later case. But there are others which do not. In at least two of these this was because the negligent sterilisation did not fall within the American concept of 'proximate cause' for the disability. The question does not seem to have been decided in Canada or Australia.

The Court of Appeal in Parkinson held that the mother could claim the extra costs of bringing up a disabled child. We did so for somewhat different reasons. Brooke LJ treated this as a claim for pure economic loss and identified from the recent decisions of the House of Lords five different techniques which might be used in deciding whether or not to recognise a claim for damages of this sort. He concluded that none of these militated against allowing the claim in these circumstances.

I took the view, as had the Inner House of the Court of Session in McFarlane, that this was a claim which on ordinary principles of the law would be recoverable: there was a duty of care to

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43 Fassoulas v Ramey 450 So 2d 822 (Florida Supreme Court 1984).
44 Emerson v Magendatz 629 a 2d 409 (Rhode Island, 1997); there was also an earlier case of Stribling v de Quevedo (Superior Court of Pennsylvania, 1980).
45 Williams v University of Chicago Hospitals 179 Ill 2d 80, 688 NE 2d 130 (Supreme Court of Illinois, 1997); Pitre v Opelousas General Hospital et al 530 SO 2d 1151 (Supreme Court of Louisiana); Williams v Van Biber (Missouri Court of Appeals); Simmerer v Dabbas (Supreme Court of Ohio).
46 Garrison v Foy 486 NE 2d 5 (Court of Appeals of Indiana); LaPoint v Shirley 409 F Supp 118 (United States District Court applying Texas law).
prevent pregnancy, this duty had been broken, and the whole of this damage was the foreseeable consequence of that breach of duty. However, the House of Lords had decided that the maintenance costs of a healthy child could not be recovered. The rationale for this must be that the benefit of having such a child is deemed to cancel out the costs. I called this a 'deemed equilibrium'. If so, there is no need to limit the claim by more than this. I said this:

'This caters for the ordinary costs of the ordinary child. A disabled child needs extra care and extra expenditure. He is deemed, on this analysis, to bring as much pleasure and as many advantages as does a normal healthy child. Frankly, in many cases this is much less likely. The additional stresses and strains can have seriously adverse effects upon the whole family, and not infrequently lead to the break up the parents' relationship and detriment to the other children. But we all know of cases where the whole family has been enriched by the presence of a disabled member and would not have things any other way. 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.'

Who is 'right'?

In this difficult field there are of course no absolutely 'right' answers. The fact that so many legal minds have wrestled with the problems but come to different conclusions is testimony to that. I do wonder whether it is a question which men and women may look at rather differently. My normal stance is that, while of course we should have more women judges, that is not because it will make a difference to how cases are decided. We are all lawyers first, trained in the
particular ways of legal thinking, and our loyalty is to the law. We have all taken an oath to 'do right by all manner of people according to the laws and usages of this realm without fear or favour affection or ill will'. We are all different, of course, in our characters, experiences, values and preferences. There is just as much diversity of view among women as there is among men. Women would never have got anywhere without the help and support of men who were able to empathise with their situation and do something about it. Many women who have got somewhere have just as much difficulty as some men in empathising with the situation of their less fortunate sisters.

And yet, and yet . . . The one thing which inevitably distinguishes women from men is the experience of conception, pregnancy and childbirth. My perception of these issues may differ from that of others in two inter-related ways. First, left to myself, I would not regard the upbringing of a child as pure economic loss, but loss which is consequential upon the invasion of bodily integrity and loss of personal autonomy involved in an unwanted pregnancy. Lord Slynn, Lord Hope and Lord Millett clearly recognised that unwanted pregnancy is such an invasion. Lord Millett was also suspicious of the emphasis upon the distinction between economic and other kinds of loss. But because of the countervailing benefit, he would have allowed none of the claim, except for a small conventional sum to mark that invasion. Secondly, I would regard that loss of autonomy as consisting principally in the resulting duty to care for the child, rather than simply to pay for his keep.

The point about pregnancy and childbirth is that it brings about profound and lasting changes in a woman's life. Those changes last for much longer than the pregnancy, birth and immediate
aftermath. Whatever the outcome, happy or sad, a woman never gets over it. The are, of course, many men who never get over becoming a father, but the consequences may be rather different.

Pregnancy brings major physical changes. These always carry a risk to life and health greater than the non-pregnant state. These vary according to the age, state of health, and other characteristics of the woman, and of the unborn child. For some women, pregnancy is very dangerous, while for others it is not. It also brings psychological changes. Again these vary from woman to woman. Some can amount to a recognised psychiatric disorder, while others may be regarded as a good thing. For most women they include the development of deep feelings for the growing child, feelings which may be reciprocated by the child even before he is born.

There is also a severe curtailment of personal freedom. Literally, one's life is no longer one's own. A responsible pregnant woman foregoes or moderates the pleasures of alcohol and tobacco. She changes her diet. She submits to regular and intrusive medical examinations and tests. She takes certain sorts of exercise but not others. She can no longer wear her favourite clothes. She is unlikely to be able to continue in paid employment throughout the pregnancy or to return to it immediately thereafter. For some women, therefore, pregnancy is generally a pleasurable experience, for others it is generally an uncomfortable time, for many it varies as it goes along.

She cannot simply rid herself of the responsibility. The availability of legal abortion depends upon the opinions of others. Even if favourable opinions can easily be found by those who know how, there is still a profound moral dilemma and potential psychological harm if that route is
taken. Late abortion brings with it particular problems, and these are more likely to arise in failed sterilisation cases where the woman does not expect to become pregnant. The House of Lords was unanimous (as had been the Court of Appeal in *Emeh*) that it was not reasonable to expect any woman to mitigate her loss by having an abortion.47

Giving birth is hard work, often painful and sometimes dangerous. It brings the pregnancy to an end but it takes some time for the body to return to its pre-pregnancy state, if it ever does, especially if the child is breast fed. There are well-known psychiatric illnesses associated with child-birth and the baby blues are very common. The law recognises that a woman may not recover her pre-pregnancy psychological health for at least six weeks.48

The invasion of the mother's personal autonomy does not stop once her body and mind have returned to their pre-pregnancy state. The mother who gives birth is always the legal mother of the child, irrespective of whether or not she is the genetic parent.49 The mother always and automatically has parental responsibility for the child.50 She will be criminally liable for abandoning or neglecting him.51 She cannot legally surrender or transfer her responsibility, although she can arrange for others meet it for her.52 If she acts responsibly there will be no

47 Lord Slynn at p 74E-F, Lord Steyn at p 81E, Lord Hope at p 97B-C, Lord Clyde at p 105E, Lord Millett at p 113B.

48 Adoption Act 1976, s 16(4); see also the Infanticide Act 1938.

49 Human Fertilisation and Embryology Act 1990, s 27(1).

50 Children Act 1989, s 2(1) and (2)(a).

51 Children and Young Persons Act 1933, ss 1(1),(2)(a), 17(1)(a).

52 Children Act 1989, s 2(9).
criminal liability, but short of adoption she cannot divest herself of the responsibility. Adoption is subject to many of the same problems as is abortion. Once again, the House of Lords (unlike Priestley JA in CES) did not consider it reasonable for a wrongdoer to expect a parent to take this course.

Parental responsibility is not simply or even primarily a financial responsibility.\(^5^3\) The primary responsibility is to care for the child. The labour does not stop when the child is born. Bringing up children is hard work. The obligation to provide or make acceptable and safe arrangements for the child's care and supervision lasts for 24 hours a day, 7 days a week, all year round, until the child becomes old enough to take care of himself. That is why the 'mother gap' exists: mothers have to tailor their work outside the home to cater for their caring responsibilities within the home. Only those who can earn more than it will cost to buy some of those services from others suffer a much smaller gap. But the cost is still there.

The law now recognises the claim of an injured person to be compensated for the costs of caring for him. When the care is provided by a family member, the claim is made by the injured person but the loss is the family member's.\(^5^4\) The family member has not been wronged. Here, however, the care is provided by the very person who has been wronged, and the legal obligation to provide it is the direct and foreseeable consequence of that wrong. Claims for wrongful conception and birth of healthy children have not previously been analysed in this way: in

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\(^5^3\) Children Act 1989, s 3(1).

McFarlane v Tayside Health Board,\textsuperscript{55} no claim was made 'in respect of any care or trouble undergone by the pursuers in the course of bringing up the child'.

Yet in cases concerning disabled children, the courts have been prepared to do this. In Fish v Wilcox,\textsuperscript{56} the only question was whether the mother could have both the value of her services in caring for her severely disabled child and her loss of earnings: this would have been double recovery, so she could not do so: whether she should claim costs of care or loss of earnings will therefore depend upon her earning power. In both Hardman v Amin and Lee v Taunton & Somerset NHS Trust, the court was prepared to allow the extra care costs caused by the child's disability. In my view, the out of pocket expenses on food, clothing, housing, schooling etc are not independent of the caring responsibility but part and parcel of it. That obligation arises just as much for a healthy child as for a disabled one, although its content may be different and it will not last as long.

That is why it is not possible to draw a clean line at the birth. 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.\textsuperscript{57} Some of them may also be suffered by the father, if he takes a significant role in

\begin{footnotes}
\item[55] 1998 SLT 307, at p 309.
\item[56] [1994] 5 Med LR 230.
\item[57] Cf the Lord Justice Clerk in McFarlane, 1998 SLT 307, at p 311E.
\end{footnotes}
looking after the child.

However, the present state of the law is that one cannot claim either the care or the maintenance costs of a healthy child but one can claim the extra costs of both types for a disabled child.

The next question which has arisen is what if the mother herself is disabled? In Rees v Darlington Memorial Hospital NHS Trust, the mother asked for a sterilisation because she was blind and did not believe that she could look after a child properly. The sterilisation was negligently performed and she gave birth to a healthy child, whom she is now bringing up, but it is a struggle for her. The case will be coming before the Court of Appeal later this year. Is it one in which the decision in McFarlane must be followed, as the trial judge held? Or is it one in which the extra burden upon the disabled mother of having to care for the child can be recognised? What would the 'person on the underground' say? I wish I knew!

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58 High Court, 16 May 2001.