Judgments - Rees (Respondent) v Darlington Memorial Hospital NHS Trust (Appellants)

HOUSE OF LORDS

SESSION 2002-03
[2003] UKHL 52
on appeal from: EWCA Civ 88

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Rees (Respondent)

v.

Darlington Memorial Hospital NHS Trust (Appellants)

ON

THURSDAY 16 OCTOBER 2003

The Appellate Committee comprised:

Lord Bingham of Cornhill

Lord Nicholls of Birkenhead

Lord Steyn

Lord Hope of Craighead

Lord Hutton

Lord Millett

Lord Scott of Foscote

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LORD BINGHAM OF CORNHILL

My Lords,

1. In *McFarlane v Tayside Health Board* [2000] 2 AC 59 a husband and wife, themselves healthy and normal, sought to recover as damages the cost of bringing up a healthy and normal child born to the wife, following allegedly negligent advice on the effect of a vasectomy performed on the husband. Differing from the Inner House of the Court of Session (1998 SLT 307), the House unanimously rejected this claim. A factual variant of that case reached the Court of Appeal in *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530, [2002] QB 266: the mother, who had undergone a negligently performed sterilisation operation, conceived and bore a child who was born with severe disabilities. Following *McFarlane,* the Court of Appeal held that the mother could not recover the whole cost of bringing up the child; but it held that she could recover the additional costs she would incur so far as they would be attributable to the child's disabilities. There was no appeal from that decision. The present case raises a further factual variant of *McFarlane.* The claimant in these proceedings (Ms Rees) suffers a severe and progressive visual disability, such that she felt unable to discharge the ordinary duties of a mother, and for that reason wished to be sterilised. She made her wishes known to a

consultant employed by the appellant NHS Trust, who carried out a sterilisation operation but did so negligently, and the claimant conceived and bore a son. The child is normal and healthy but the claimant's disability remains. She claimed as damages the cost of rearing the child. The Court of Appeal (Robert Walker and Hale LJJ, Waller LJ dissenting) held that she was entitled to recover the additional costs she would incur so far as they would be attributable to her disability: [2002] EWCA Civ 88, [2003] QB 20. The appellant NHS Trust now challenges that decision as inconsistent with *McFarlane.* The claimant seeks to uphold the decision, but also claims the whole cost of bringing up the child, inviting the House to reconsider its decision in *McFarlane.*

2. Since the argument in this appeal the High Court of Australia has given judgment in *Cattanach v Melchior* [2003] HCA 38. That case arose from negligent advice following an incompletely performed sterilisation operation and one of the issues (the only issue litigated in the High Court) was whether the parents could recover as damages the cost of rearing the child, both parents and child being normal and healthy. The trial judge upheld that claim and her decision was affirmed by a majority of the Court of Appeal of the Supreme Court of Queensland ([2001] QCA 246) and by a bare majority of the High Court. I have found the judgments of the High Court of particular value since, although most of the arguments deployed are not novel (as they could scarcely be, given the volume of litigation on this subject in many different countries), the division of opinion among the members of the court gives the competing arguments a notable sharpness and clarity.

3. It is convenient to begin by considering *McFarlane.* In that case there were, as it seems to me, broadly three solutions which the House could have adopted to the problem then before it. (I can, for present purposes, omit two of the solutions which Kirby J listed in paragraph 138 of his judgment in *Melchior* but gratefully adopt his formulation of the remaining three, while altering their order). They were:

> (1) That full damages against the tortfeasor for the cost of rearing the child may be allowed, subject to the ordinary limitations of reasonable foreseeability and remoteness, with no discount for joys, benefits and support, leaving restrictions upon such recovery to such limitations as may be enacted by a Parliament with authority to do so.
>
> (2) That damages may be recovered in full for the reasonable costs of rearing an unplanned child to the age when that child might be expected to be economically self-reliant, whether the child is "healthy" or "disabled" or "impaired" but with a deduction from the amount of such damages for the joy and benefits received, and the potential economic support derived, from the child.
>
> (3) That no damages may be recovered where the child is born healthy and without disability or impairment.

4. An orthodox application of familiar and conventional principles of the law of

tort would, I think, have pointed towards acceptance of the first of these solutions. The surgeon whose allegedly negligent advice gave rise to the action was exercising his professional skill for the benefit of the McFarlanes who relied on it. The foreseeable result of negligent advice would be the birth of a child, the very thing they wished to avoid. No one can be unaware that bringing up a child has a financial cost. All members of the House accepted that the surgeon owed *a* duty of care to the McFarlanes, and the foreseeable result was that which occurred. Thus the proven violation of a legal right would lead to a compensatory remedy. I do not find it surprising that this solution has been supported by the line of English authority which preceded *McFarlane* (*Emeh v Kensington and Chelsea and Westminster Area Health Authority* [1985] QB 1012, *Thake v Maurice* [1986] QB 644, *Benarr v Kettering Health Authority* [1988] 138 NLJ 179), by the Inner House in *McFarlane* itself (1998 SLT 307), by decisions of the Hoge Raad in the Netherlands and the Bundesverfassungsgericht in Germany (see Keuleneer, Androulidakis-Dimitriadis and Pozzo, *European Review of Private Law* 2:241-256, 1999) and now by a majority of the High Court of Australia. Faithful adherence to the precepts articulated by Lord Scarman in *McLoughlin v O'Brian* [1983] 1 AC 410, 429-430 would have pointed towards adoption of this first solution.

5. The second solution has been adopted in 6 state courts in the United States (see La Croix and Martin, "*Damages in Wrongful Pregnancy Tort Actions"*, in Ireland and Ward, *Assessing Damages in Injuries and Deaths of Minor Children* (2002) 93, 97-98, quoted by Callinan J in his judgment in *Melchior*, paragraph 287). But this solution did not commend itself to any member of the House in *McFarlane* or any member of the High Court in *Melchior*, it was not supported by counsel in the present appeal and the objections to it are in my opinion insuperable. While it would be possible to assess with some show of plausibility the likely discounted cost of rearing a child until the age when the child might reasonably be expected to become self-supporting, any attempt to quantify in money terms the value of the joys and benefits which the parents might receive from the unintended child, or any economic benefit they might derive from it, would, made when the child is no more than an infant, be an exercise in pure speculation to which no court of law should lend itself. I need say no more of this possible solution.

6. The five members of the House who gave judgment in *McFarlane* adopted different approaches and gave different reasons for adopting the third solution listed in paragraph (3) above. But it seems to me clear that all of them were moved to adopt it for reasons of policy (legal, not public, policy). This is not a criticism. As Lord Denning MR said in *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373, 397:

> "This case is entirely novel. Never before has a claim been made against a council or its surveyor for negligence in passing a house. The case itself can be brought within the words of Lord Atkin in *Donoghue v Stevenson:* but it is a question whether we should apply them here. In *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, Lord Reid said, at p 1023, that the words of Lord Atkin expressed a

> principle which ought to apply in general 'unless there is some justification or valid explanation for its exclusion.' So did Lord Pearson at p 1054. But Lord Diplock spoke differently. He said it was a guide but not a principle of universal application (p 1060). It seems to me that it is a question of policy which we, as judges, have to decide. The time has come when, in cases of new import, we should decide them according to the reason of the thing.
>
> In previous times, when faced with a new problem, the judges have not openly asked themselves the question: what is the best policy for the law to adopt? But the question has always been there in the background. It has been concealed behind such questions as: Was the defendant under any duty to the plaintiff? Was the relationship between them sufficiently proximate? Was the injury direct or indirect? Was it foreseeable, or not? Was it too remote? And so forth.
>
> Nowadays we direct ourselves to considerations of policy. In *Rondel v Worsley* [1969] 1 AC 191, we thought that if advocates were liable to be sued for negligence they would be hampered in carrying out their duties. In *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, we thought that the Home Office ought to pay for damage done by escaping Borstal boys, if the staff was negligent, but we confined it to damage done in the immediate vicinity. In *SCM (United Kingdom) Ltd v W J Whittall & Son Ltd* [1971] 1 QB 337, some of us thought that economic loss ought not to be put on one pair of shoulders, but spread among all the sufferers. In *Launchbury v Morgans* [1971] 2 QB 245, we thought that as the owner of the family car was insured she should bear the loss. In short, we look at the relationship of the parties: and then say, as matter of policy, on whom the loss should fall."

The policy considerations underpinning the judgments of the House were, as I read them, an unwillingness to regard a child (even if unwanted) as a financial liability and nothing else, a recognition that the rewards which parenthood (even if involuntary) may or may not bring cannot be quantified and a sense that to award potentially very large sums of damages to the parents of a normal and healthy child against a National Health Service always in need of funds to meet pressing demands would rightly offend the community's sense of how public resources should be allocated. Kirby J was surely right to suggest (in paragraph 178 of his judgment in *Melchior)* that:

> "Concern to protect the viability of the National Health Service at a time of multiple demands upon it might indeed help to explain the invocation in the House of Lords in *McFarlane* of the notion of 'distributive justice'".

It is indeed hard to think that, if the House had adopted the first solution discussed above, its decision would have long survived the first award to well-to-do parents of the estimated cost of providing private education, presents, clothing and foreign holidays for an unwanted child (even if at no

more expensive a level than the parents had provided for earlier, wanted, children) against a National Health Service found to be responsible, by its negligence, for the birth of the child. In favouring the third solution, holding the damages claimed to be irrecoverable, the House allied itself with the great majority of state courts in the United States and relied on arguments now strongly supported by the dissenting judgments of Gleeson CJ, Hayne and Heydon JJ in *Melchior.*

7. I am of the clear opinion, for reasons more fully given by my noble and learned friends, that it would be wholly contrary to the practice of the House to disturb its unanimous decision in *McFarlane* given as recently as 4 years ago, even if a differently constituted committee were to conclude that a different solution should have been adopted. 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. I am not in any event persuaded that the arguments which the House rejected in 1999 should now be accepted, or that the policy considerations which (as I think) drove the decision have lost their potency. Subject to one gloss, therefore, which I regard as important, I would affirm and adhere to the decision in *McFarlane.*

8. My concern is this. Even accepting that an unwanted child cannot be regarded as a financial liability and nothing else and that any attempt to weigh the costs of bringing up a child against the intangible rewards of parenthood is unacceptably speculative, the fact remains that the parent of a child born following a negligently performed vasectomy or sterilisation, or negligent advice on the effect of such a procedure, is the victim of a legal wrong. The members of the House who gave judgment in *McFarlane* recognised this by holding, in each case, that some award should be made to Mrs McFarlane (although Lord Millett based this on a ground which differed from that of the other members and he would have made a joint award to Mr and Mrs McFarlane). I can accept and support a rule of legal policy which precludes recovery of the full cost of bringing up a child in the situation postulated, but I question the fairness of a rule which denies the victim of a legal wrong any recompense at all beyond an award immediately related to the unwanted pregnancy and birth. The spectre of well-to-do parents plundering the National Health Service should not blind one to other realities: that of the single mother with young children, struggling to make ends meet and counting the days until her children are of an age to enable her to work more hours and so enable the family to live a less straitened existence; the mother whose burning ambition is to put domestic chores so far as possible behind her and embark on a new career or resume an old one. Examples can be multiplied. To speak of losing the freedom to limit the size of one's family is to mask the real loss suffered in a situation of this kind. This is that a parent, particularly (even today) the mother, has been denied, through the negligence of another, the opportunity to live her life in the way that she wished and planned. I do not think that an award immediately relating to the unwanted pregnancy and birth gives adequate recognition of or does justice to that loss. I would accordingly support the suggestion favoured by Lord Millett in *McFarlane* (at p 114) that in all cases such as

these there be a conventional award to mark the injury and loss, although I would favour a greater figure than the £5,000 he suggested (I have in mind a conventional figure of £15,000) and I would add this to the award for the pregnancy and birth. This solution is in my opinion consistent with the ruling and rationale of *McFarlane.* The conventional award would not be, and would not be intended to be, compensatory. It would not be the product of calculation. But it would not be a nominal, let alone a derisory, award. It would afford some measure of recognition of the wrong done. And it would afford a more ample measure of justice than the pure *McFarlane* rule.

9. I would for my part apply this rule also, without differentiation, to cases in which either the child or the parent is (or claims to be) disabled:

   (1) While I have every sympathy with the Court of Appeal's view that Mrs Parkinson should be compensated, it is arguably anomalous that the defendant's liability should be related to a disability which the doctor's negligence did not cause and not to the birth which it did.

   (2) The rule favoured by the Court of Appeal majority in the present case inevitably gives rise to anomalies such as those highlighted by Waller LJ in paragraphs 53-54 of his dissenting judgment.

   (3) It is undesirable that parents, in order to recover compensation, should be encouraged to portray either their children or themselves as disabled. There is force in the points made by Kirby J in paragraphs 163-166 of his judgment in *Melchior*.

   (4) In a state such as ours, which seeks to make public provision for the consequences of disability, the quantification of additional costs attributable to disability, whether of the parent or the child, is a task of acute difficulty. This is highlighted by the inability of the claimant in this appeal to give any realistic indication of the additional costs she seeks to recover.

10. I would accordingly allow the appeal, set aside the orders of the Court of Appeal and of the Deputy Judge, and order that judgment be entered for the claimant for £15,000. I would invite the parties to make written submissions on costs within 14 days.

    LORD NICHOLLS OF BIRKENHEAD

    My Lords,

11. In this appeal, as in the recent case of *McFarlane v Tayside Health Board* [2000] 2 AC 59, your Lordships' House has to make a decision concerning the development of the law in a field which is highly controversial and, therefore, exceedingly difficult. What should be the policy of the law on the award of damages when an unwanted pregnancy occurs, and an unintended child is born, following professionally negligent medical procedures or advice? Should the doctor or the hospital be required to pay the cost of

bringing up the child to an age when he will be self-supporting?

12. The parent's claim in this type of case can be stated simply. The negligent doctor committed a legal wrong towards the parent, and the precise event the parent sought to avoid then happened: the birth of a child. On ordinary legal principles the foreseeable adverse financial consequences of a legal wrong may expect to be borne by him who committed the wrong. Here the cost of bringing up the child was foreseeable and, indeed, may have been one of the very reasons why the parent sought to avoid pregnancy.

13. This argument is forceful. But it is important to keep in mind that the law's evaluation of the damages recoverable for a legal wrong is not an automatic, mechanical exercise. Recoverability of damages is always bounded by considerations of fairness and reasonableness: see *Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19; [2002] 2 AC 883, 1090 - 1091, paras 69-70. So the answers to the questions I have stated calls for an assessment of what is fair and reasonable in cases of this nature.

14. Judges of course do not have, and do not claim to have, any special insight into what contemporary society regards as fair and reasonable, although their legal expertise enables them to promote a desirable degree of consistency from one case or type of case to the next, and to avoid other pitfalls. But, however controversial and difficult the subject matter, judges are required to decide the cases brought before the courts. Where necessary, therefore, they must form a view on what are the requirements of fairness and reasonableness in a novel type of case.

15. In *McFarlane v Tayside Health Board* [2000] 2 AC 59, your Lordships' House held unanimously that a negligent doctor is not required to meet the cost of bringing up a healthy child born in these circumstances. The language, and to some extent the legal reasoning, employed by each of their Lordships differed. But, however expressed, the underlying perception of all their Lordships was that fairness and reasonableness do not require that the damages payable by a negligent doctor should extend so far. The approach usually adopted in measuring recoverable financial loss is not appropriate when the subject of the legal wrong is the birth of an unintended healthy child and the head of claim is the cost of the whole of the child's upbringing.

16. I have heard nothing in the submissions advanced on the present appeal to persuade me that this decision by the House was wrong and ought to be revisited. On the contrary, that the negligent doctor or, in most cases, the National Health Service should pay all the costs of bringing up the child seems to me a disproportionate response to the doctor's wrong. It would accord ill with the values society attaches to human life and to parenthood. The birth of a child should not be treated as comparable to a parent suffering a personal injury, with the cost of rearing the child being treated as special damages akin to the financially adverse consequences flowing from the onset of a chronic medical condition.

17. But this is not to say it is fair and reasonable there should be no award at all except in respect of stress and trauma and costs associated with the pregnancy and the birth itself. An award of some amount should be made to recognise that in respect of birth of the child the parent has suffered a legal wrong, a legal wrong having a far-reaching effect on the lives of the parent and any family she may already have. The amount of such an award will inevitably have an arbitrary character. I do not dissent from the sum of £15,000 suggested by my noble and learned friend Lord Bingham of Cornhill in this regard. To this limited extent I agree that your Lordships' House should add a gloss to the decision in *McFarlane v Tayside Health Board* [2000] 2 AC 59.

18. Once it is decided that damages do not include the cost of bringing up a healthy child, anomalies such as those noted by Waller LJ in the Court of Appeal in the present case become inescapable if an exception is made when either the child or the mother is disabled. The personal circumstances where this problem arises will vary so widely that what is fair and reasonable in one set of family circumstances, including the financial means of the family, may not seem so in another. But awards of damages of this nature cannot sensibly be made by courts on a discretionary or means-tested basis. The preferable approach is an award of a lump sum of modest amount in all circumstances.

19. For these reasons, and also the reasons given by Lord Bingham of Cornhill, I would allow this appeal, and set aside the orders of the Court of Appeal and of Stuart Brown QC sitting as a deputy High Court judge. In response to the preliminary issue I would declare that the claimant is not entitled to recover any of the costs of bringing up the child Anthony, but she is entitled to payment of £15,000.

LORD STEYN

My Lords,

I. A Disabled Mother and a Failed Sterilisation.

20. Ms Karina Rees is now 31 years of age. She suffers from a genetic condition known as retinitis pigmentosa. Since the age of two she has been blind in one eye and has limited vision (6/36) in the other. She is severely visually handicapped.

21. In 1995 Ms Rees consulted her general medical practitioner with a view to undergoing a sterilisation procedure. The GP referred her to a consultant gynaecologist at the Darlington Memorial Hospital. The referral letter to the consultant explained that:

    (a) Ms Rees was registered partially sighted;

    (b) her vision had deteriorated over the last few years and she had recently given up work;

(c) she had great difficulty in finding a suitable method of contraception and at times had requested the morning after pill;

(d) she was single and had been advised that the sterilisation would be irreversible but she was adamant that she did not want and would never want children;

(e) she felt that her eyesight would prevent her from looking after children properly;

(f) she was anxious about health matters and scared at the thought of labour and delivery.

When Ms Rees saw the consultant, she told him that she did not want to have children. She told him that her very poor eyesight would make it very difficult for her to look after a baby.

22. On 18 July 1995 the consultant performed the sterilisation operation. He did not adequately occlude the fallopian tubes. Ms Rees was unaware that the sterilisation operation had failed.

23. In July 1996 Ms Rees became pregnant. On 28 April 1997 she gave birth to a son, Anthony. His father has no desire to be involved with him. There is a risk that Anthony has inherited retinitis pigmentosa but it is low. Anthony is a healthy and normal child. Very little is known about the impact of Ms Rees' disability on the way in which she cares for Anthony. The Court of Appeal was, however, told that she is bringing up Anthony herself with the help of her mother and other relatives who live nearby. The Court of Appeal was also told that Ms Rees does not cook because she feels it to be too dangerous but that she does try to dress the child.

II. The Proceedings Below.

24. On 21 September 1999 Ms Rees issued proceedings in the Darlington County Court claiming damages for negligence arising out of the failure of the sterilisation operation. By her amended particulars of claim she claimed the cost of bringing up Anthony to his majority which costs would include expenses that would be common to the upbringing of Anthony by a mother who was healthy and expenses that would be incurred by her as a result of her visual handicap. By its defence the NHS Hospital Trust admitted that the sterilisation operation was performed negligently but it denied liability for any part of the cost of bringing up Anthony. The case was transferred to the High Court. On 1 May 2001 Mr Stuart Brown QC, sitting as a deputy judge of the High Court, heard a preliminary issue. The purpose of the preliminary issue was to determine whether Ms Rees was in principle entitled to recover any part of the cost of bringing up Anthony in the light of the decision of the House of Lords in *McFarlane v Tayside Health Board* [2000] 2 AC 59. In *McFarlane* this House had decided that parents of a healthy child, born after negligent sterilisation advice, could not recover in tort the cost of bringing up the child. At the same time the House held that a modest solatium in respect

of the pain and suffering associated with pregnancy and childbirth may be awarded. On 16 May 2001, the judge held that Ms Rees was not entitled to recover any part of the costs of bringing up Anthony.

25. When the matter came before the Court of Appeal it had before it not only the decision of the House in *McFarlane* but also the subsequent decision of the Court of Appeal in *Parkinson v St James and Seacroft University Hospital NHS Trust* [2002] QB 266 where it was held that in a failed sterilisation case the extra costs of discharging parental responsibility towards *a disabled child* is unaffected by *McFarlane* and can in principle be recovered. There was no appeal against this decision. On 14 February 2002 by a majority the Court of Appeal (Hale and Robert Walker LJJ, with Waller LJ dissenting) allowed the appeal of the claimant and held that *a disabled parent* is entitled to recover those "extra" costs involved in discharging his or her responsibility to bring up a healthy child which are attributable to and incurred as a result of the fact of the parent's disability: *Rees v Darlington Memorial Hospital NHS Trust* [2003] QB 20. Unfortunately, there was no information before the Court of Appeal as how, if at all, it is more costly for the claimant to look after Anthony than it would be for a mother who does not have her disability.

III. The Issues Before the House.

26. The agreed issue before the House reads as follows:

> "In the light of the decision of the House of Lords in *McFarlane v Tayside Health Board* [2000] 2 AC 59, where a person who suffers from a physical disability undergoes a negligently performed sterilisation operation, conceives, gives birth to a healthy child and, as a consequence of the birth of the child incurs:
>
> > (a) costs of bringing up the healthy child which would be incurred by a healthy parent; and
> >
> > (b) additional costs of bringing up the healthy child which would not be incurred by a healthy parent and which are incurred because of the particular parent's physical disability;
> >
> > which of those costs of bringing up the healthy child (if any) may be recovered by the parent in an action in negligence brought against the person responsible for the performance of the sterilisation."

Despite this formulation of the issue, the case for the claimant at the hearing before the House appeared to be restricted to seeking to recover the extra cost involved in discharging her responsibility for bringing up a healthy child which are incurred as a result of her disability. The House has the same meagre information before it as the Court of Appeal had. There is in particular no information before the House as to how, if at all, it is more costly for the claimant to look after Anthony than it would be for a mother

who does not have the disability. In what has been a complex case this has proved to be a difficulty.

27. It is necessary to explain the framework of the appeal in more detail. First it was submitted on behalf of the claimant that the House wrongly decided *McFarlane*. If this challenge succeeds, it is common ground that the claimant is entitled to succeed and the appeal of the NHS Trust Hospital must be dismissed. If it fails, other issues arise. The second issue, relevant by analogy and not direct application, is whether the decision in *Parkinson,* which laid down that the case of a disabled child falls outside the scope of the principle laid down in *McFarlane,* was correct. The answer to this question has some bearing on the ultimate decision in the instant case. The third question is then whether the majority in the Court of Appeal in the present case correctly held that the decision in *McFarlane* does not preclude recovery by a disabled parent of a healthy child of the extra cost of caring for the child.

IV. The Challenge To The Decision in McFarlane.

28. I do not propose to undertake the gruesome task of discussing the judgments in *McFarlane.* But it is necessary to explain briefly what was decided in *McFarlane.* It was held that the cost of parents caring for a healthy and normal child, born as a result of negligent sterilisation advice, was not recoverable in tort. There was undoubtedly divergence between the reasoning in the speeches. Subject to Lord Millett's view that a modest conventional sum - he mentioned £5,000 (at 114) - could be awarded there was unanimity on the outcome of the principal claim for the cost of bringing up the child. There is a clear ratio. Moreover, despite differences in reasoning, two features were crucial. First, in monetary terms it is impossible to calculate the benefits of avoiding a birth and having a healthy child. In *Parkinson* [2002] QB 266 Hale LJ sought to rationalise the decision in *McFarlane* by saying that it depended on a deemed equilibrium theory: 292-293, paras 87-91. That is not a correct interpretation of *McFarlane.* Instead the emphasis was squarely on the impossibility of undertaking a process of weighing the advantages and disadvantages. The second feature was explained by Lord Millett as follows (113 H - 114 A):

> "In my opinion the law must take the birth of a normal, healthy baby to be a blessing, not a detriment. In truth it is a mixed blessing. It brings joy and sorrow, blessing and responsibility. The advantages and the disadvantages are inseparable. Individuals may choose to regard the balance as unfavourable and take steps to forgo the pleasures as well as the responsibilities of parenthood. They are entitled to decide for themselves where their own interests lie. *But society itself must regard the balance as beneficial. It would be repugnant to its own sense of values to do otherwise. It is morally offensive to regard a normal, healthy baby as more trouble and expense than it is worth.*" (Emphasis added.)

These I believe to be themes which led the Law Lords sitting in the case to reject the claim for the cost of bringing up the healthy child: see Lord Slynn

of Hadley, at 75C and 76C; my judgment, at 83D-E; Lord Hope of Craighead, at 97C-D; Lord Clyde, at 103 B-D; Lord Millett, at 111C-D.

29. That brings me to the question what the foundation of this reasoning was. For my part the answer is clear. The House did not rest its decision on public policy in a conventional sense: Lord Slynn of Hadley, at 76D; my judgment, at 83D-E; Lord Hope of Craighead, at 95A; Lord Clyde, at 100A-C; and Lord Millett, at 108A-C. Instead the Law Lords relied on legal policy. In considering this question the House was bound, in the circumstances of the case, to consider what in their view the ordinary citizen would regard as morally acceptable. Invoking the moral theory of distributive justice, and the requirements of being just, fair and reasonable, culled from case law, are in context simply routes to establishing the legal policy.

30. Now I turn to the question whether this conclusion was reached on the basis that there was absence of a duty of care in respect of the cost of bringing up a healthy and normal child or whether the decision was made on the basis that this head of loss is not recoverable. This question arises because there was undoubtedly a duty of care to the extent that the mother was allowed to recover for pain and suffering associated with the pregnancy and childbirth. Some Law Lords thought that an absence of a duty of care was the correct analysis and others thought it was a matter of irrecoverability of a head of loss. In my opinion the former view is entirely orthodox: see Lord Hope of Craighead, 95E-96D: see also Lord Slynn of Hadley, at 76B-C; and my judgment, at 83D - E. On the other hand, the latter is an equally valid explanation: Lord Clyde, at 105E-F; and Lord Millett, at 113H-114B. One is perhaps in the area of conceptualistic thinking - what some overseas writers have impolitely called professors' law. Provided that one is clear about the foundation and reach of the legal policy involved, the difference in method is not of great importance. In this case the two concepts yield the same results.

31. It is now necessary to consider how an invitation to depart from a decision of the House should be approached. *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234, which announced that such a course was possible, was in no sense an open sesame for a differently constituted committee to prefer their views to those of the committee which determined the decision unanimously or by a majority. That would be a licence not appropriate to final decision-making by a supreme court. In *R v Knuller (Publishing, Printing and Promotions) Ltd* [1973] AC 435 Lord Reid considered the point. He observed (at 455):

> "It was decided by this House in *Shaw v Director of Public Prosecutions* [1962] AC 220 that conspiracy to corrupt public morals is a crime known to the law of England. So if the appellants are to succeed on this count, either this House must reverse that decision or there must be sufficient grounds for distinguishing this case. The appellants' main argument is that we should reconsider that decision; alternatively they submit that it can and should be distinguished.
>
> I dissented in *Shaw's* case. On reconsideration I still think that the

> decision was wrong and I see no reason to alter anything which I said in my speech. But it does not follow that I should now support a motion to reconsider the decision. I have said more than once in recent cases that our change of practice in no longer regarding previous decisions of this House as absolutely binding does not mean that whenever we think that a previous decision was wrong we should reverse it. In the general interest of certainty in the law we must be sure that there is some very good reason before we so act . . . I think that however wrong or anomalous the decision may be it must stand and apply to cases reasonably analogous unless or until it is altered by Parliament."

This led the House to refuse to depart from a decision given eleven years earlier even if it had been wrong. In *Fitzleet Estates Ltd v Cherry* [1977] 1 WLR 1345 the House returned to the point. There was an invitation to the House to depart from a majority decision (by 3:2) in a previous case decided eleven years before. Lord Wilberforce observed (with the express agreement of Lord Salmon and Lord Keith) (1349):

> "There is therefore nothing left to the appellant but to contend - as he frankly does - that the 1965 decision is wrong. This contention means, when interpreted, that three or more of your Lordships ought to take the view which appealed then to the minority.
>
> My Lords, in my firm opinion, the Practice Statement of 1966 was never intended to allow and should not be considered to allow such a course. Nothing could be more undesirable, in fact, than to permit litigants, after a decision has been given by this House with all appearance of finality, to return to this House in the hope that a differently constituted committee might be persuaded to take the view, which its predecessors rejected. True that the earlier decision was by majority: I say nothing as to its correctness or as to the validity of the reasoning by which it was supported. That there were two eminently possible views is shown by the support for each by at any rate, two members of the House. But doubtful issues have to be resolved and the law knows no better way of resolving them than by the considered majority opinion of the ultimate tribunal. It requires much more than doubts as to the correctness of such opinion to justify departing from it."

Viscount Dilhorne and Lord Edmund-Davies gave speeches along the same lines. None of this detracts from the power of the House to depart from a previous decision where there are cogent reasons to do so. Without trying to be exhaustive, I would mention that a fundamental change in circumstances such as was before the House in *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443, or experience showing that a decision of the House results in unforeseen serious injustice, may permit such a departure.

32. The issue in *McFarlane* was a profoundly controversial one. Ultimately, there was a choice to be made between eminently reasonable competing

arguments. The House carefully examined the earlier domestic case law. The House embarked on an extensive review of the comparative jurisprudence. It is not suggested that this examination did not reveal the range of feasible solutions. The subsequent decision in *Cattanach v Melchior* [2003] HCA 38 (16 July 2003) where by a 4:3 majority the High Court of Australia decided in favour of recovery merely underlines the controversiality of the problem and the range of views on the subject. In *McFarlane* the House examined the applicable principles and relevant analogies in great depth. It is not argued that the House overlooked any arguments of substance. Rather counsel for the claimant invites the House to say that the Law Lords in *McFarlane* made the wrong choice. For my part it would be entirely wrong for the House, differently constituted today, to depart from *McFarlane* even if some Law Lords had been persuaded that they would have decided the case differently.

33. Having listened to the argument of counsel for the claimant that *McFarlane* was wrongly decided - an argument somewhat less detailed and rigorous than was before the House in *McFarlane* - I have to say I am satisfied that the House came to the correct conclusion four years ago. The comparative review before the House showed that, although the subject is controversial and that the solutions vary, the decision in *McFarlane* is probably that followed in a majority of jurisdictions. There has been academic criticism of *McFarlane.* There is disagreement among writers about the correctness of the outcome: see, for example, Tony Weir, *A Casebook on Tort*, 9th ed (2000), p 131; Joe Thomson, "Abandoning the Law of Delict? *McFarlane v Tayside Health Board* in the Lords" 2000 SLT 43; Laura C H Hoyano, "Misconceptions about Wrongful Conception" (2002) 65 MLR 883. Accepting that the subject is a highly controversial one, the decision of the House, rooted as it was in morality, justice and legal policy, represented the least bad choice. For my part the decision in *McFarlane* was a sound one.

V. Parkinson: A Disabled Child.

34. Throughout the speeches in *McFarlane* runs the strong emphasis on the birth of a healthy and normal child. The opinions show that the House was fully alive to the different considerations which arise if the child is seriously disabled. But the case then before the House did not require a decision on such a case.

35. When the issue involving a disabled child came before the Court of Appeal in *Parkinson* the ruling was unanimous that such a case is not affected by *McFarlane.* While not wishing to endorse everything said in the detailed judgments of Brooke and Hale LJJ, I agree with the decision. The legal policy on which *McFarlane* was based is critically dependent on the birth of a healthy and normal child. That policy does not apply where the child is seriously disabled physically and/or mentally. In such cases normal principles of corrective justice permit recovery of compensation for the costs of providing for the child's needs and care relating to his disability but not for the basic costs of his maintenance.

VI. Rees: The Disabled Mother.

36. The position of a disabled mother who gives birth to a healthy and normal child was not considered in *McFarlane.* And to the best of my knowledge the Law Lords did not have it in mind at all. What the House would have said if in *McFarlane* the claim was by a seriously disabled mother, who had told the surgeon that due to her incapacities she would be unable to look after a child, is a matter of speculation. But the House must now grapple with this difficult case.

37. Unlike the position of the disabled child, it is not possible to regard the disabled mother of a healthy and normal child as unaffected by the principle in *McFarlane.* On the contrary, an award of damages in the present case is only possible if an exception is created. That this is so becomes even clearer if one considers the grounds of legal policy which underpin *McFarlane* as I have explained them.

38. In a powerful dissenting judgment in *Rees*, Waller LJ explained why he regarded such an exception as unacceptable I set out the core of his reasoning. He observed, at pp 34 -35, paras 52-55:

> "52 Where the court is concerned with the birth of a healthy child, it seems to me that before contemplating the making of an exception to the general rule established by *McFarlane's* case one must examine with even greater care (if that is possible) whether any exception is justified, because (as I have stressed) the House of Lords were concerned with the award of damages in relation to the birth of a healthy child. In that context one must take into consideration how such an exception would be perceived by others who, as already stated, would have recovered damages on normal principles but will not recover because of the *McFarlane* decision, or, perhaps more accurately, one must take into account how the ordinary person would perceive the fairness of the exception.
>
> 53 Let me address some examples, I hope not too extreme. If one takes the facts to be that a woman already has four children and wishes not to have a fifth; and if one assumes that having the fifth will create a crisis in health terms, unless help in caring for the child was available. She cannot recover the costs of caring for the child which might alleviate the crisis, as I understand *McFarlane's* case. I would have thought that her need to avoid a breakdown in her health was no different from the need of someone already with a disability, and indeed her need might be greater depending on the degree of disability. Does she, or ordinary people, look favourably on the law not allowing her to recover but allowing someone who is disabled to recover?
>
> 54 If one were to add that the lady with four children was poor, but the lady with a disability was rich - what then? It would simply emphasise the perception that the rule was not operating fairly. One

> can add to the example by making comparisons between possible family circumstances of the different mothers. Assume the mother with four children had no support from husband, mother or siblings, and then compare her with the person who is disabled, but who has a husband, siblings and a mother all willing to help. I think ordinary people would feel uncomfortable about the thought that it was simply the disability which made a difference.
>
> 55 If a disabled person has a healthy child, and finds that she can, contrary to her anxieties, cope with that child with the help of family and others, I would have thought that in Lord Hope's words the benefits of having that child would be incalculable. It is the fact that such benefits of having that healthy child are incalculable which it seems to me leads to the result that the court simply should not give damages for the birth of that child. It is because the court is simply not prepared to go into a calculation which involves weighing one aspect against the other which in my view should bring about the conclusion that it is not fair, just, and reasonable that a disabled person should recover when other mothers in as great a need cannot. On the basis of distributive justice I believe that ordinary people would think that 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."

The examples given by Waller LJ in paras 53 and 54 are telling. I would accept that there is an element of arbitrariness involved in holding that only the disabled mother of a healthy and normal child can claim damages. Since it is of prime importance that the law must avoid arbitrariness this creates a serious difficulty.

39. On the other hand, there is great force in the observations of Robert Walker LJ. He held, at p 32, para 41:

> "But these difficulties should not in my view deter this court from allowing the possibility of recovery (which is all it is, on the preliminary issue) in circumstances which, as I see it, are not covered by *McFarlane's* case and are a legitimate extension of *Parkinson's* case [2002] QB 266. Disabled persons are a category of the public whom the law increasingly recognises as requiring special consideration (the Disability Discrimination Act 1995 is an important landmark) and the developing law as to disability should (as Hale LJ explained in *Parkinson's* case, at p 293, para 91) avoid the sort of definitional problems which Lord Hoffmann referred to in *Frost v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, 510B."

How is this tension between cogent arguments pulling in opposite directions to be resolved? In jurisprudential and positive law terms this is a truly hard case. It is unrealistic to say that there is only one right answer. But a decision must be made, and that decision must represent the best available choice and hopefully a decision defensible as delivering justice. For reasons which are

apparent from this opinion it is logically not straightforward to treat the present case as simply an extension of *Parkinson.* On the other hand, I consider (like Hale and Walker LJJ) that 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 operation. I am persuaded that the injustice of denying to such a seriously disabled mother the limited remedy of the extra costs caused by her disability outweighs the considerations emphasised by Waller LJ.

VII. A conventional award

40. Lord Bingham has explained why he favours a conventional award of £15,000 in the present case. His opinion makes clear that to this extent he would depart from *McFarlane* in the case of a healthy and normal child. He has further observed that he would apply this rule, without differentiation, to cases in which either the child or the parent is (or claims to be) disabled. This involves overruling the majority of the Court of Appeal in the present case. It also involves overruling the Court of Appeal decision in *Parkinson* against which there was no appeal. The other opinions in the present case speak for themselves.

41. As Lord Bingham has said the suggestion was first made by Lord Millett in *McFarlane* (at p 114). It is true that none of the members of the majority in *McFarlane* discussed the point. It was, of course, not an issue at all in *McFarlane*. But it would be wrong to assume that the majority did not consider it. Like Lord Hope I considered it but found it unacceptable. And without doubt that was also the position of Lord Slynn and Lord Clyde. The proposal for a conventional award therefore runs counter to the views of the majority in *McFarlane*. Now the idea appeals to a narrow majority of a differently constituted Appellate Committee. This does not mean that the point cannot be re-examined but it certainly suggests that the matter should be examined with great care and due observance of the usual procedures.

42. In *Parkinson* the idea of a conventional award was not raised at all. It could, of course, have been raised as an alternative. The reason was no doubt that after *McFarlane* it was thought that this avenue was no longer open.

43. In the present case the idea of a conventional award was not raised at first instance or in the Court of Appeal. For my part it is a great disadvantage for the House to consider such a point without the benefit of the views of the Court of Appeal. And the disadvantage cannot be removed by calling the new rule a "gloss". It is a radical and most important development which should only be embarked on after rigorous examination of competing arguments.

44. It is clear from the agreed statement of facts and issues, as well as the printed case of the parties, that the idea of a conventional award was not an issue in the present case until the oral hearing. It is true that questions along these lines were put in oral argument but the examination of the issue was

cursory and unaccompanied by research.

45. No United Kingdom authority is cited for the proposition that judges have the power to create a remedy of awarding a conventional sum in cases such as the present. There is none. It is also noteworthy that in none of the decisions from many foreign jurisdictions, with varying results, is there any support for such a solution. This underlines the heterodox nature of the solution adopted.

46. Like Lord Hope I regard the idea of a conventional award in the present case as contrary to principle. It is a novel procedure for judges to create such a remedy. There are limits to permissible creativity for judges. In my view the majority have strayed into forbidden territory. It is also a backdoor evasion of the legal policy enunciated in *McFarlane*. If such a rule is to be created it must be done by Parliament. The fact is, however, that it would be a hugely controversial legislative measure. It may well be that the Law Commissions and Parliament ought in any event, to consider the impact of the creation of a power to make a conventional award in the cases under consideration for the coherence of the tort system.

47. I cannot support the proposal for creating such a new rule.

VIII. The Conclusion and Disposal.

48. While I am troubled by the wholly unparticularised nature of the claim I would allow the claim of Ms Rees to be pursued. For avoidance of doubt I add that the cases mentioned by Waller LJ, at pp 34 - 35, paras 53 and 54 of his judgment are on the wrong side of the line drawn in *McFarlane* and I would not extend the exception to such cases.

49. I would dismiss the appeal of the NHS Hospital Trust.

LORD HOPE OF CRAIGHEAD

My Lords,

50. My noble and learned friend Lord Steyn has summarised the facts of this case, and I gratefully adopt his account of them. I cannot improve upon his masterly analysis of the decision of this House in *McFarlane v Tayside Health Board* [2000] 2 AC 59 that the costs of rearing a normal and healthy child were not recoverable. I also agree with him, for all the reasons that he has given, that it would be wrong for the House now to depart from *McFarlane* even if some of your Lordships had been persuaded that they would have decided the case differently.

51. When I was giving my reasons for the decision in *McFarlane* I said that the value which was to be attached to the benefits which would have to be set off against the costs of rearing the child were incalculable: [2002] 2 AC 59, 97. I did not base my decision on a belief that it was morally repugnant to award damages for the birth of a healthy child. As Gleeson CJ observed in

Cattanach v Melchior [2003] HCA 38 (18 July 2003), para 6, the fundamental value which is attached to human life is an ethical, not an economic, concept and the problem which had to be addressed was legal, not theological. It was the insuperable problem of calculation that was the critical point in the decision so far as I was concerned. If, as I believe, it is impossible to measure the benefits, it must follow that no value can properly be arrived at for the balance that would need to be struck between the costs and the benefits to arrive at a figure which could be awarded as damages. The conclusion which I drew was that, for this reason, these costs must be held to fall outside the ambit of the duty of care which was owed to the pursuers by the persons who carried out the procedures in the hospital and the laboratory.

52. In expressing myself in that way I was adopting the approach to economic loss which was indicated by Lord Oliver of Aylmerton in *Caparo Industries plc v Dickman* [1990] 2 AC 605, 651 and in *Murphy v Brentwood District Council* [1991] 1 AC 398, 486 - 487. I share the view which Gleeson CJ expressed in *Cattanach v Melchior*, para 30, that the claim was one for the recovery of pure economic loss arising out of a relationship, liability for which has to be justified by showing that there was a duty of care to protect the claimants from that kind of harm. It has been suggested that it would be more accurate to say simply that it was for a head of loss which was not recoverable. There may indeed be other ways of expressing the point. I continue to think that Lord Oliver's formulation of the principle is acceptable in this context. But, as Lord Steyn has explained, the decision was at its heart founded in legal policy. This means that we are dealing with an area of the law where the responsibility for making choices about its development lies with the judges.

53. The question which has been raised in this case is whether *McFarlane* can be distinguished because the claimant is a seriously disabled person. The facts are different, of course, because the parents in that case were both free from disability, as was the child who had been born as a result of the Board's negligence. But the ratio of that decision needs to be examined as well, in order to discover whether this difference in the facts allows the conclusion to be drawn that in her case the extra costs of rearing a normal, healthy child which are due to her disability are recoverable.

The disabled child

54. It has already been held in *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530; [2002] QB 266 that the case of a seriously disabled child can be distinguished and that, although the ordinary costs of rearing the child are not recoverable, the decision in *McFarlane* does not preclude recovery of the extra costs which are attributable to the child's disability. This point did not require to be examined in *McFarlane*. The Lord Ordinary, Lord Gill, emphasised at the outset of his opinion that the debate in that case was conducted on the basis that the child was a normal, healthy child: 1997 SLT 211, 212F. The position was unchanged when the case reached your Lordships' House, as can be seen

from all the speeches.

55. I agree with the Court of Appeal that the question whether the extra costs of raising a seriously disabled child are recoverable raises a separate issue. In principle, these costs constitute an extra and distinct burden on the parent who has suffered damage as result of the tortfeasor's negligence. The task of identifying and setting off against each other all the many and various costs and benefits, both tangible and intangible, of raising a normal, healthy child throughout its childhood is an impossible one. As my noble and learned friend Lord Millett said in *McFarlane*, the advantages and disadvantages are inseparable.

56. But the scene changes if, following upon a wrongful or uncovenanted pregnancy (as to the use of these expressions, see J K Mason, *Wrongful Pregnancy, Wrongful Birth and Wrongful Terminology*, (2002) 6 Edin LR 46, at pp 47 and 65, note 77), the mother gives birth to a child who is seriously disabled and is likely to remain so throughout its childhood. Here too there is the inevitable mixture of costs and benefits, of blessings and detriments, that cannot be separated. One cannot begin to disentangle the complex emotions of joy and sorrow and the intangible burdens and rewards that will result from having to assume responsibility for the child's upbringing. 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.

57. A disabled child is likely to need extra care, and the provision of this care is likely to mean extra expenditure. As Professor Mason has observed in his helpful contribution to the debate on this subject, 6 Edin LR 46, at pp 58 and 64, love in the context of disability has to be backed by corresponding supportive resources. These resources cost money. The more disabled the child is, the more difficult it is to fulfil these obligations. I consider that, as a matter of legal policy, the Court of Appeal were right to hold that in principle these extra costs are recoverable. In *Cattanach v Melchior*, para 166, Kirby J said that to award these extra costs would reinforce views about disability and attitudes towards parents and children with physical or mental impairments that were contrary to contemporary Australian values reinforced by the law. The law in this country is just as alert to the need to eliminate discrimination on the ground of disability. But I do not, for my part, see any conflict between the policy which the law in that area has adopted and awarding damages for the extra costs that have to be incurred to enable a disabled child who has special needs to lead as normal a life as possible.

The disabled mother

58. Now we are faced with the difficult question whether the extra costs which will be incurred by a seriously disabled parent in rearing a normal, healthy child are recoverable. The issue did not arise in *McFarlane*. But I think that it can be taken to have been the unspoken assumption at all levels in that case that the child-rearing costs which the parents were seeking to recover were the costs which normal, healthy parents would incur when they were

providing for their child's upbringing.

59. It has to be made clear that *McFarlane* was not decided on the basis that, if the child too was a normal and healthy one, there was a deemed equilibrium, as Hale LJ in *Parkinson* suggested: [2002] QB 266, 292-293, paras 87-91. By this metaphor she meant that the benefits brought by the child were deemed sufficient to negative the claim for the costs of its upbringing: [2003] QB 20, 25, para 10. This suggests that there was assumed to be an equal distribution on either side of benefits and disadvantages. With respect, however, that reads too much into the decision. No calculation of that kind was attempted or even contemplated. It was considered that a calculation aimed at achieving a fair result, taking everything into account, was impossible.

60. Nevertheless it is true to say that, if one assumes that the child and the parent are normal and healthy when one is contemplating the advantages and disadvantages that will flow from the child's birth, an element of symmetry is inherent in the exercise. The symmetry lies in the assumption that the parent and the child are both normal and healthy. It is disturbed if one is driven to assume that either the parent or the child is affected by a serious disability. Once one accepts, as I would do, that the extra costs of rearing a seriously disabled child are recoverable it may thought that to deny the recovery of extra costs by the seriously disabled parent would be to introduce a distinction between these two cases which was arbitrary and unreasonable.

61. But the risks of a decision which is arbitrary and unreasonable are not all one way. It may indeed be difficult, as Lord Millett points out, to isolate the extra costs which are due to the parent's disability from the financial benefits which, over time, will result from bringing up the child within the disabled person's family. How, it may be asked, can these extra costs be identified if the benefits and disadvantages of rearing a normal and healthy child are incalculable? It has also been suggested that it is difficult to justify making an exception in favour of the seriously disabled parent when others such as the exhausted and depressed mother who already has more children than she can cope with cannot recover the extra costs of rearing which are attributable to her special circumstances. These were the points which troubled Waller LJ in the Court of Appeal. It led him, in a careful and helpful opinion, to dissent from the decision that in principle these extra costs were recoverable: [2003] QB 20, 34 - 35, paras 52-55.

62. It seems to me that the first of these difficulties raises a question of fact rather than a question of principle. Great care must be taken to avoid passing on to the tortfeasor costs which are attributable simply to the fact of the parent's disability. It is the extra out-of-pocket expenses which the seriously disabled parent has to incur when she is confronted by the ordinary tasks of child-rearing after making due allowance for any anticipated financial benefits, and those costs only, that are in issue here. Her situation has to be compared with that of the normal, healthy parent. One can say, as in the case of a seriously disabled child, that a seriously disabled parent who has special needs is likely to require help if her child is to have a normal upbringing and

that this is likely to lead to extra expenditure. Here again I do not see any conflict between the policy which the law has adopted about discrimination on the ground of disability and awarding damages for the extra costs that have to be incurred to enable a parent who has special needs to provide her child with as normal a life ass possible. I agree with Robert Walker LJ that the care that may be needed in sorting out what costs are and are not so attributable should not deter us from allowing the possibility of recovery, which is all that is being asked for by way of a preliminary issue at this stage: [2003] QB 20, 32, para 41.

63. The second point, however, is more troublesome and I confess that I have not found it easy to find a clear answer to it. I agree with Lord Millett that as a general rule the parent's motive for not wanting any, or any more, children is irrelevant. On balance however I have come to the view that the fact that the child's parent is a seriously disabled person does provide a ground for distinguishing *McFarlane* and that it would be fair, just and reasonable to hold that such extra costs as can be attributed to the disability are within the scope of the tortfeasor's duty of care and are recoverable.

64. It is suggested that to make an exception in favour of the seriously disabled parent would undermine the basis of the decision in *McFarlane* to such an extent that it would open the door to claims for extra child-rearing costs by disadvantaged parents generally. The question then is, are there sound reasons for making an exception only in the case of serious disability?

65. Disadvantages which are the result of the parent's choice of life-style prior to the unwanted conception can be said, without hesitation, to fall into an entirely different category. So too, although this is a harder case, are disadvantages that flow from circumstances beyond the parent's control such as social deprivation, racial discrimination or family breakdown. The decision in *McFarlane* applies across the board, to every healthy and normal parent, in whatever social or family condition they may find themselves. The seriously disabled parent is in a different category. It is the inescapable fact of her disability which marks the case of the seriously disabled parent out from these cases. The fact that this category too must be applied across the board, irrespective of the social or family situation in which the parent finds herself, indicates the fundamental nature of the characteristic that gives rise to it. Her social or family circumstances may, of course, affect the amount of the costs that can be considered to be recoverable. But it is the inescapable fact that the seriously disabled parent cannot, however hard she tries, do all the things that a normal, healthy parent can do when carrying out the ordinary tasks involved in a child's upbringing that place this parent's case into distinct category.

66. I would also take into account this further factor. In the Court of Appeal Robert Walker LJ referred to the developing law as to disability: [2003] QB 20, 32, para 41. He suggested that this should help to overcome the problems in defining what is and what is not a disability. I would prefer to regard the developing law on this subject as a guide to the general direction the common law should take when it is considering what it should do in cases of

serious disability as a matter of legal policy.

67. There has been a good deal of activity in the field of employment law and in the law relating to discrimination generally. Discrimination in the employment field on grounds of disability presents unique challenges to legislators, as Mummery LJ pointed out in *Clark v Novacold Ltd* [1999] ICR 951, 954 E - G. Section 1(1) of the Disability Discrimination Act 1995 provides that a person has a disability for the purposes of that Act if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities. But this is subject to various qualifications and exceptions in Schedule 1. Guidance under section 3 of that Act has been issued by the Secretary of State and there is also a Code of Practice. The decision of the Employment Appeal Tribunal in *Goodwin v Patent Office* [1999] ICR 302 illustrates the complex exercise that may have to be undertaken when the statutory definition is applied to the facts with the assistance of this additional material. Further legislation will be needed to give effect by 2 December 2006 to that part of Council Directive 2000/78/EC (OJ, L303/16, 2 December 2000) which, in laying down a general framework for equal treatment in employment and occupation, deals with discrimination on grounds of age and disability: see the second paragraph of article 18.

68. It is the main thrust of this legislation rather than the detailed definitions that I would look to for guidance. The respect and value which the law places on every life extends to everybody irrespective of whether they are born with or without disabilities. But, as the legislation shows, the law also faces up to the fact of disability and to the risk of discrimination and disadvantage that it gives rise to. Its aim is to provide civil rights for disabled people whose impairment affects their ability to carry out normal day-to-day activities. By allowing the seriously disabled parent to recover the extra costs of child-rearing which are due to her disability the law will be doing its best to enable her to perform this task on equal terms with those who are not affected by her impairment.

69. What then does one mean, in this context, when one refers to serious disability? I would prefer to rely on the flexibility of the common law. Each case must be taken on its own facts. The temptation to find a handicap where there is none must be resisted. I have referred to the parent in whose favour the exception exists as "seriously disabled". The word "serious" is important. The normal incidents of an otherwise healthy life must be held to be covered by the *McFarlane* principle. As for the word "disability", I would take the requirement of need as the guiding principle. Is the mental or physical characteristic which distinguishes the case from that of the 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? In the present case the genetic condition from which the claimant suffers suggests that, when the facts are examined, the answer to this question will be in the affirmative.

A conventional sum?

70. I should like to add that I have not overlooked Lord Millett's suggestion that the proper outcome in all these cases would be to award the parents a modest conventional sum for the denial of their right to limit the size of their family - or, as he now puts it, to compensate them for the injury to their autonomy. I was not attracted by this suggestion when he made it in *McFarlane*, and I have to confess, with respect, that I am not attracted by it in this case either. I agree with Gleeson CJ's observation in *Cattanach v Melchior*, para 23 that it would be more accurate to say that parents have the freedom to choose, and therefore to limit, the size of their family. To describe this freedom as a right - or, as Lord Millett now suggests, as the loss of an opportunity which is the proper subject of compensation by way of damages - seems to me beg many questions which are not answered in his analysis. But that is not the only reason for the difficulty which I have in accepting this suggestion.

71. The award of a conventional sum is familiar in the field of damages for personal injury. Conventional sums are awarded as general damages for typical injuries such as the loss of a limb or an eye or for the bereavement that results from the loss of a child or parent in the case of a fatal accident. This is the means by which the court arrives, as best it can, at a figure for the damage suffered which is incapable of being calculated arithmetically: Kemp and Kemp, *The Quantum of Damages*, vol 1, para 1-003. The sum which it awards has been described by Lord Denning MR in *Ward v James* [1966] 1 QB 273, 303 as "basically a conventional figure derived from experience and from awards in comparable cases": see also *Wright v British Railways Board* [1983] 2 AC 773, 777D per Lord Diplock. The award is conventional in the sense that there is no pecuniary guideline which can point the way to a correct assessment: *Lim Poh Choo v Camden and Islington Area Health Authority* [1980] AC 174, 189G-H per Lord Scarman. But financial loss does not present the same problem. It is capable of assessment in money. So it has never been the practice to resort to a conventional sum as a means of compensating the claimant for that part of the loss that falls under the head of special damages.

72. To take just one example, the distinction between these two heads of loss has been recognised by section 1 of the Damages (Scotland) Act 1976, as amended by section 1 of the Damages (Scotland) Act 1993, which defines the rights of relatives of a deceased person in Scots law. The relatives' claims for loss of support and funeral expenses are dealt with in section 1(3). Members of the deceased's immediate family may then be awarded under section 1(4), without prejudice to any claim under section 1(3), such sum as the court thinks just by way of compensation for distress and anxiety, grief and sorrow and the loss of such non-patrimonial benefit as the relative might have been expected to derive from the deceased's society and guidance if the deceased had not died. This is the equivalent of an award of damages for bereavement under section 1A of the Fatal Accidents Act 1976, which was inserted by section 3(1) of the Administration of Justice Act 1982, except that the amount of the award is left to the court and not fixed, as it is in England and Wales, by statutory instrument.

73. The award of a conventional sum to parents for the loss of the right, or the

opportunity, to limit the size of their family would perform a similar function to the award of a conventional sum under section 1(4). It would deal with that part of the parents' claim that fell into the category of general damages. But it would not deal - nor, as Lord Millett has explained, would it be designed to deal - with that part of the claim resulting from the loss of the right that fell into the category of special damages. The splitting up of a claim of damages into these two parts in order to allow recovery of one part and deny recovery of the other part is a novel concept and it seems to me, with respect, to be contrary to principle. If damages are to be awarded at all, the aim must be to put the injured parties into the same position as far as money will allow as if they had not sustained the wrong for which they are being compensated: *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39 per Lord Blackburn. That rule would be broken if we were to assume that the loss of the right to limit one's family was capable of being compensated for by an award of damages and then to say that the parents' award was to be restricted by law to a conventional sum to compensate them only for their general damages. It would also be broken if we were to say - contrary to my assumption - that the conventional sum was intended to give them something for their financial loss also. It would deny them the opportunity of attempting to establish the true value of that part of their claim according to the compensatory principle.

74. Lord Bingham seeks to escape from this problem by asserting that the conventional award which he favours would not be, and would not be intended to be, compensatory. It would not be the product of calculation nor would it be nominal, but would afford some measure of recognition of the wrong done. This approach seems to me to depart from the principle which has always guided the common law in its approach to the assessment of damages. He does not suggest that the award is intended to be punitive. If it is not, and the case is not one for an award that is purely nominal, what basis can there be for it other than the compensatory principle? Both Lord Millett and Lord Scott use language which suggests that they are seeking to arrive at a figure which would compensate the parents for being deprived of the loss of opportunity or of the benefits which they were entitled to expect. Lord Nicholls does not use the same language, but his brief treatment of the issue leaves me in doubt as to the basis for it. The lack of any consistent or coherent ratio in support of the proposition in the speeches of the majority is disturbing. It underlines Lord Steyn's point that the examination of the issue at the oral hearing was cursory and unaccompanied by research. Like him, I cannot agree with the description of the new rule by Lord Bingham and Lord Nicholls as a "gloss" on the decision in *McFarlane*.

75. Then there is the problem of arriving at an appropriate figure for a conventional sum which was not at risk of being seen by the parents as derisory. The figure which Lord Millett suggested in *McFarlane* seems to me to invite that criticism. I doubt whether the larger figure that is now being suggested removes this difficulty. We are in uncharted waters, as there are no previous awards for the loss of this right to which we can look in order to discover the parameters. But it would be wrong to ignore the current level of awards in actions of damages for personal injury. To take just one recent

example, the Inner House of the Court of Session has held, having regard to the recent level of jury awards for bereavement (jury awards are still competent in Scotland in actions of damages for personal injuries: Court of Session Act 1988, section 11(a)), that the parents of an adult son who was killed in a flying accident should be awarded £20,000 each under section 1(4) of the Damages (Scotland) Act 1976 for their bereavement: *Shaher v British Aerospace Flying College Ltd*, 2003 SLT 791. How is one to measure the loss of the right to limit the size of one's family against an award of that kind, bearing in mind the far-reaching and long-lasting effect that the birth of the uncovenanted child will have on the life of the parent? It seems to me that a much closer examination of the general level of awards in these and other similar cases would be needed before one could come up with a figure that one could even begin to regard as appropriate. In my respectful opinion it would not be right for your Lordships, without guidance from judges sitting at first instance, to attempt to carry out that exercise.

76. Lord Bingham has given, as one of his reasons for applying the new rule without differentiation to cases whether either the child or the parent is, or claims to be, disabled the acute difficulty of the task of quantifying the additional costs attributable to disability. As I have already said, I agree with Robert Walker LJ that care would be needed in sorting out what costs are and are not so attributable. But to describe the task as one of acute difficulty seems to me to be an overstatement. Lord Bingham then says that the difficulty is highlighted by the inability of the respondent to give any realistic indication of the additional costs she seeks to recover. But I think that this may be quite unfair to the respondent, as all that was being asked for at this stage was an answer to the preliminary issue whether the recovery of costs was a possibility. We have no means of knowing whether the additional costs in her case can or cannot readily be identified, as this question was not explored at first instance or in the Court of Appeal nor was it focused as an issue in this appeal.

77. I am left with the uneasy feeling that the figure which is to be established by the new rule will in many cases, and especially in this one, fall well short of what would be needed to satisfy Lord Millett's aim, which Lord Scott adopts, of compensating the parents for the wrong that has been done to them. The issue is, as Lord Steyn says, hugely controversial and I agree with him that its creation - which would surely then have been the product of much more study and research than has been given to its creation in this case by the majority - ought to have been left, preferably with the benefit of a report by the Law Commissions, to Parliament.

Conclusion

78. I would allow the respondent's claim to proceed. I would dismiss the appeal.

LORD HUTTON

My Lords,

79. The claimant, Ms Karina Rees, is a young woman in her early thirties who suffers from the genetic condition of retinitis pigmentosa. Since the age of two she has been blind in one eye and has limited vision in the other eye; she is severely visually handicapped. In recent years her vision had deteriorated and she had given up work. She felt that her eyesight would bar her from properly looking after a child and she was anxious about health matters and frightened by the thought of labour and delivery. She had great difficulty in finding a suitable method of contraception and she came to a very definite decision that she did not want and would never want to give birth to a child. She was referred by her general practitioner to a consultant gynaecologist at Darlington Memorial Hospital and when she saw the consultant she told him of her visual handicap and of the concerns and fears which had led her to the decision that she would never want to give birth to a child. With this knowledge of her concerns and of her decision the consultant performed a sterilisation operation on the claimant on 18 July 1995. The appellant hospital trust admits that the operation was performed negligently and that the right fallopian tube was not adequately occluded. In July 1996 the claimant's son Anthony was conceived and he was born on 28 April 1997. His father had no desire to be involved with him and the claimant is a single mother who is bringing up Anthony alone. It is accepted for the purposes of this appeal that Anthony is a healthy child.

80. In September 1999 the claimant commenced proceedings against the hospital trust claiming damages for negligence in respect of the sterilisation operation and she sought to recover the costs of bringing up Anthony to his majority. The costs which she claimed included the costs which would be incurred by a mother who was not disabled in the bringing up of a child and she also claimed the extra costs that would be incurred by her as a result of her severe visual disability.

81. At the trial of a preliminary issue Mr Stuart Brown QC, sitting as a deputy judge of the High Court, held that he was bound by the decision of this House in *McFarlane v Tayside Health Board* [2000] 2 AC 59 to hold that the claimant was not entitled to recover damages for any of the costs of bringing up her son. On appeal the Court of Appeal (Robert Walker and Hale LJJ, Waller LJ dissenting) held that the claimant was entitled to damages to compensate her for the extra costs incurred by her in bringing up her son attributable to her disability, and the hospital trust now appeals to the House against that decision.

McFarlane v Tayside Health Board

82. In *McFarlane* a married couple with four children decided that they did not want any more children and that the husband should undergo a vasectomy. A vasectomy operation was performed by a surgeon employed by the defendant health board and five months later the surgeon informed the husband that his sperm counts were negative and that contraceptive measures were no longer necessary. The parents acted on that advice and subsequently the wife became pregnant and after a normal pregnancy and labour gave birth to a healthy child whom the parents loved and cared for as an integral

part of their family. Both parents were also in good health. Both parents sued the health board for negligence, the mother claiming damages for the physical discomfort suffered by her in her pregnancy, confinement and delivery and both parents also sued for the financial costs of caring for and bringing up the child. The Outer House of the Court of Session dismissed the pursuers' action on the ground that a normal pregnancy and labour could not constitute personal injuries for which damages were recoverable and that the benefits of parenthood transcended any financial loss incurred by the parents in looking after and bringing up their child. The Second Division of the Inner House of the Court of Session reversed that decision and held that the wife was entitled, if negligence were established, to damages for the physical effects of pregnancy and childbirth. The Second Division further held that in accordance with the conventional principles of delict law the parents would be entitled to recover the costs of bringing up the child and that there were no public policy grounds to disentitle the parents from recovering such costs.

83. The House decided, Lord Millett dissenting, that the wife was entitled to general damages for the pain suffering and inconvenience of pregnancy and childbirth and, Lord Clyde dissenting, to special damages for extra medical expenses, clothing and loss of earnings associated with the pregnancy and birth. The House further held that the parents were not entitled to recover damages for the costs of bringing up the child. Each member of the Appellate Committee delivered a speech and there was some degree of difference in the reasons given for the decision. Lord Slynn of Hadley (at p 76B-D) and Lord Hope of Craighead (at p 97D-E) held that it would not be fair, just or reasonable to impose a duty of care on the employees of the health board giving rise to liability for the cost of bringing up the child. Lord Steyn (at p 83D-E) held in reliance on principles of distributive justice that the tort law of Scotland and England does not permit parents of a healthy unwanted child to claim the costs of bringing up the child from a health authority or a doctor. He further observed that if it were necessary to do so, he would say that the claim did not satisfy the requirement of being fair, just and reasonable. Lord Clyde held (at p 105B-F) that to award damages for the cost of bringing up the child would not constitute reasonable restitution as it would not take into account the benefit to the parents of having a loved and healthy child. Lord Millett stated (at p 108C) that the court is engaged in a search for justice, and that this demands that the dispute be resolved in a way which is fair and reasonable and accords with ordinary notions of what is fit and proper, and he held (at p 114B) that society itself must regard the balance of advantages and disadvantages in having a normal, healthy baby as beneficial. It would be repugnant to its own sense of values to do otherwise, and it is morally offensive to regard a normal, healthy baby as more trouble and expense than it was worth.

84. In holding that it would not be fair, just or reasonable to impose a duty of care giving rise to liability for the cost of bringing up the child, Lord Slynn and Lord Hope were applying the principle stated by Lord Oliver of Aylmerton in *Caparo Industries plc v Dickman* [1990] 2 AC 605, 633B that before imposing a duty of care the law requires "that the attachment of liability for harm which has occurred be 'just and reasonable'", and the

related principle stated by Lord Hoffmann in *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191, 211H that the plaintiff must show "that the duty was owed to him and that it was a duty in respect of the kind of loss which he has suffered."

85. Both *Caparo* and *Banque Bruxelles* were cases where no physical harm caused by the alleged breach of duty intervened between it and the financial loss which had been suffered, and in *Banque Bruxelles* Lord Hoffmann stated at 213C: "Normally the law limits liability to those consequences which are attributable to that which made the act wrongful", and it would appear to be clear that the costs of bringing up the child were, in accordance with conventional principles, attributable to the wrongdoing of the hospital staff. I think it was for this reason that Lord Clyde stated at [2000] 2 AC 59, 102 A and D:

> "the issue raised in the appeal is not properly one of the existence or non-existence of a duty of care …. The present case is concerned with the extent of the losses which may properly be claimed in the circumstances of the case, rather than with the existence or non-existence of a liability to make reparation."
>
> However, as my noble and learned friend Lord Steyn observes in his speech, this is a point in the area of conceptualist thinking. What is important is that the two concepts, the one stated by Lord Slynn and Lord Hope, the other by Lord Clyde, yield the same result, and in my opinion the fundamental principle underlying the speeches in *McFarlane* is that it would not be fair, just or reasonable to award damages for the cost of bringing up a healthy child.

The issues on this appeal

86. Two principal issues arise on this appeal. The first issue is whether the House should depart from the decision in *McFarlane*. Mr de Wilde QC, for the respondent, submits that the House is entitled to depart from the decision pursuant to *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234 and that the House should do so because the decision was contrary to well-established principles of tort law. My Lords, I reject that submission. I consider that the decision was right. Even if I considered that the decision was erroneous, I would be of opinion for the reasons given by the House in *Fitzleet Estates Ltd v Cherry* [1977] 1 WLR 1345 that the House should not depart from the decision.

87. The second issue is, if the decision in *McFarlane* stands as good law, does it require a court to hold, as did the deputy High Court judge, that damages cannot be recovered in the present case where the single mother, unlike the mother in *McFarlane*, is seriously disabled. This is the issue which I now turn to consider, but before doing so I think it is relevant to make a further observation. I think it is clear, as stated by Hale LJ in *Parkinson v St James and Seacroft University Hospital NHS Trust* [2002] QB 266, 288D and Waller LJ in the Court of Appeal in the present case [2003] QB 20, 33B that

in *McFarlane* the House recognised that on normal principles of tort law the claim for the cost of bringing up the child would succeed. Lord Millett stated, at p 107B:

> "The defenders do not deny that they are responsible for having supplied the information in question, that Mr and Mrs McFarlane were entitled to rely on it, that it was incorrect, and that they were under a duty to take reasonable care to ensure that it was correct. Nor do they deny that, if they failed to do so, then they would normally be liable for all the foreseeable consequences of its being wrong: see *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191, 214, per Lord Hoffmann."

And, at p 109C:

> "Catherine's conception and birth are the very things that the defenders' professional services were called upon to prevent. In principle any losses occasioned thereby are recoverable however they may be characterised."

See also Lord Slynn, at p 70H and Lord Hope, at p 90B.

The decision of the Court of Appeal in Parkinson

88. In deciding the second issue a further point which has to be considered is whether *Parkinson* was correctly decided. In that case the sterilisation operation was negligently carried out and the claimant later conceived and gave birth to a child who was born with severe disabilities. Longmore J held that the claimant was entitled to recover damages for the costs of providing for her child's special needs relating to his disabilities but not for the basic costs of his maintenance, and this decision was upheld by the Court of Appeal.

89. In his judgment Brooke LJ based his decision that the appeal of the health trust should be dismissed on the ground that it was fair, just and reasonable to award the claimant compensation for the extra expenses associated with bringing up a child with significant disabilities. At p 282G, he cited the judgment of the Supreme Court of Florida in *Fassoulas v Ramey* (1984) 450 So 2d 822 that:

> "There is no valid policy argument against parents being recompensed for these costs of extraordinary care in raising a deformed child to majority. We hold these special upbringing costs associated with a deformed child to be recoverable."

He then stated:

> "Unless we are bound by authority to the contrary, I find this argument persuasive."

And, at p 283C he stated:

> "an award of compensation which is limited to the special upbringing costs associated with rearing a child with a serious disability would be fair, just and reasonable; (vii) if principles of distributive justice are called in aid, I believe that ordinary people would consider that it would be fair for the law to make an award in such a case, provided that it is limited to the extra expenses associated with the child's disability."

90. In her judgment Hale LJ gave consideration to the right to physical autonomy at p 284 and discussed conception, pregnancy and childbirth as an invasion of bodily integrity at p 285. Having discussed the judgment in *McFarlane* she stated at p 292E:

> "At the heart of it all is the feeling that to compensate for the financial costs of bringing up a healthy child is a step too far. A child brings benefits as well as costs; it is impossible accurately to calculate those benefits so as to give a proper discount; the only sensible course is to assume that they balance one another out."

And, at p 293C:

> "The solution of deemed equilibrium also has its attractions and is in any event binding upon us. Indeed, it provides the answer to many of the questions arising in this case. The true analysis is that this is a limitation on the damages which would otherwise be recoverable on normal principles. There is therefore no reason or need to take that limitation any further than it was taken in *McFarlane's* case. 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, of which this may be one, this is much less likely. The additional stresses and strains can have seriously adverse effects upon the whole family, and not infrequently lead, as here, to the break-up of 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."

At the end of her judgment she stated, at p 295A:

> "94 …The difference between a normal and a disabled child is primarily in the extra care that they need, although this may bring with it extra expenditure. It is right, therefore, that the parent who bears those *extra* burdens should have a claim.

> 95 Longmore J considered that such a claim would not 'stick in the gullet'. I agree. Whatever the commuter on the Underground might think of the claim for Catherine McFarlane, it might reasonably be thought that he or she would not consider it unfair, unjust or disproportionate that the person who had undertaken to prevent conception, pregnancy and birth and negligently failed to do so were held responsible for the extra costs of caring for and bringing up a disabled child.
>
> 96 For those reasons, as well as those given by Brooke LJ, I would dismiss this appeal."

Sir Martin Nourse agreed with both judgments.

91. In my opinion the decision of the Court of Appeal in *Parkinson* was right. In *McFarlane* the House confined its considerations to the case of the birth of a healthy child and expressed no opinion in relation to the birth of a child with disabilities. In that case the House considered that it was not fair, just or reasonable to award damages for the costs of bringing up a healthy child. But in my opinion it is fair, just and reasonable to award damages for the extra costs of bringing up a disabled child and I am in agreement with the observation of Robert Walker LJ in relation to *Parkinson* in his judgment in the present case, [2003] QB 20, 30G:

> "There is not the same intuitive feeling that it would be exorbitant compensation to award damages for financial burdens which are the direct consequence of the disability of a child who was born disabled after a failed sterilisation, and which would not be incurred in consequence of the birth of a normal, healthy child."

The decision of the Court of Appeal in this case

92. In the instant case Robert Walker LJ stated the basis of his decision as follows, at p 32B:

> "I would base my decision on there being nothing unfair, unjust, unreasonable, unacceptable or morally repugnant in permitting recovery of compensation for a limited range of expenses which (when specified and proved) will be found to have a very close connection with the mother's severe visual impairment, and nothing to do with the blessings which the birth of her healthy son may have brought her."

He further stated, at p 32G that the circumstances of Karina Rees's case are not covered by *McFarlane's* case, that an award to her would be a legitimate extension of the decision in *Parkinson*, and that disabled persons are a category of the public whom the law increasingly recognises as requiring special consideration.

93. Hale LJ also held that the appeal of Karina Rees should be allowed. At pp

27H - 28A, she stated that all the discussion in the judgments in *McFarlane* was on the basis that the child was healthy and the costs were those of bringing up a healthy child. In her opinion it did no violence to the reasoning in *McFarlane* to conclude in *Parkinson* that the extra costs of bringing up a disabled child altered the justice of the case. In *McFarlane* in terms of the actual care required by the child, the parents were as well able to provide such care as any other parents and the House had not considered the position of a parent in a different position. Earlier in her judgment, at p 25 E she had referred to the concept of deemed equilibrium upon which she had relied in her judgment in *Parkinson* and she stated, at pp 28G -29A:

> "Hence I would conclude 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. Of course we can assume that such a parent benefits, and benefits greatly, from having a child she never thought she would have. We can and must assume that those benefits negative the claim for the ordinary costs of looking after and bringing him up. But we do not have to assume that it goes further than that. She is not being overcompensated by being given recompense for the extra costs of child care occasioned by her disability. She is being put in the same position as her able-bodied fellows."

94. However both Robert Walker LJ, at p 31D and Waller LJ, at p 34D questioned the validity of the concept of deemed equilibrium on the ground that, as expressed by Waller LJ, in *McFarlane* the members of the House did not think in terms of an equilibrium with precise quantities on either side of the balance. In my respectful opinion this non-acceptance of the concept was justified for the reason stated by Waller LJ.

95. Waller LJ dissented from the opinion of the majority of the court that Karina Rees should recover the extra costs of bringing up her child on the ground that such a ruling would constitute an exception to the general rule established by *McFarlane*, and that such an exception would not be fair and reasonable when the difficulties of a mother who was not disabled but who faced other severe difficulties and problems was compared with the difficulties of Karina Rees. He gave as an example a woman who already had four children and wished not to have a fifth, and for whom the birth of a fifth child would create a crisis in health terms unless help in caring for the child was available. The Lord Justice concluded his judgment by stating, at p 35D:

> "It is because the court is simply not prepared to go into a calculation which involves weighing one aspect against the other which in my view should bring about the conclusion that it is not fair, just, and reasonable that a disabled person should recover when other mothers in as great a need cannot. On the basis of distributive justice I believe that ordinary people would think that 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."

Conclusion

96. The difficulties posited by Waller LJ place in sharp focus the problem which arises on this appeal, but I find myself in respectful agreement with the opinion of Robert Walker LJ, at p 32G that these difficulties should not deter the courts from deciding that a disabled mother is entitled to recover compensation for the extra costs of bringing up her child.

97. My reasons for so holding, which have been foreshadowed in the views which I have already expressed, can be stated shortly. As I have said, I consider that the decision in *McFarlane* was grounded on the principle that it is not just, fair or reasonable to award damages to healthy parents for the costs of bringing up a healthy baby; the House did not consider the position where the mother was disabled. In my opinion where the mother is disabled it is not unjust, unfair or unreasonable to award damages for the extra costs of bringing up the child. In considering whether damages should be awarded there is, in my view, a clear distinction between a disabled mother and a mother in normal health. It is right, in my opinion, to recognise and give effect to this distinction in laying down a principle to guide courts of first instance notwithstanding that a mother who is not disabled may face the serious difficulties described by Waller LJ. The fact that hard cases can be pointed to very close to the line which divides recovery from non-recovery does not invalidate the principle itself.

98. Secondly, there are two ways of stating the decision of the Court of Appeal in this case. It can either be said that the decision creates an exception to the principle established by *McFarlane*, or it can be said that *McFarlane* created an exception, in the case of the birth of a healthy baby to healthy parents, to the principle that where there is a breach of duty causing physical harm, all the damages directly flowing from that breach of duty can be recovered. As I have stated, I think that the members of the House recognised that under the general principles applicable to the recovery of damages for negligent breach of duty the *McFarlane* parents would have been entitled to recover damages. Therefore, whilst to some extent the matter is one of terminology, I would hold that *McFarlane* created an exception to the general principles, that that exception does not apply to a disabled child or to a disabled mother, and that accordingly the *McFarlane* decision does not bar the mother from recovering in this case.

99. Accordingly, for the reasons which I have given, I would dismiss this appeal.

LORD MILLETT

My Lords,

100. In *McFarlane v Tayside Health* Board [2000] 2 AC 59 your Lordships were called upon to consider for the first time the extent to which damages are recoverable for the birth of an unintended child following a

wrongful pregnancy. By this is meant a pregnancy which is consequent upon a failed sterilisation, whether it has been performed negligently or the parents have been negligently informed that it has been successful. The House held that the parents could not recover the costs of bringing up a normal, healthy child. In *Parkinson v St James and Seacroft University Hospital NHS Trust* [2002] QB 266 the Court of Appeal held that the additional costs of bringing up a disabled child were recoverable. The question in the present case is whether the additional costs of bringing up a normal, healthy child which are attributable to the fact that one of the parents is disabled are similarly recoverable.

101. Your Lordships are therefore asked to decide whether the present case is a legitimate extension of *Parkinson* or is governed by the overriding principle established in *McFarlane*. The respondent sought to avoid this question by inviting the House to depart from its decision in *McFarlane*.

102. The principles which guide the House in deciding whether to depart from a previous decision of its own are well established and have been repeatedly stated: see *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234; *R v Knuller (Publishing, Printing and Promotions) Ltd* [1973] AC 435, 455 per Lord Reid; and *Fitzleet Estates Ltd v Cherry* [1977] 1 WLR 1345, 1349 per Lord Wilberforce. As Lord Wilberforce said in the last-mentioned case:

> "It requires much more than doubts as to the correctness of [the previous decision] to justify departing from it."

103. The established criteria are nowhere near satisfied in the present case. I would not depart from the unanimous decision of the House in *McFarlane* even if, after further reflection, I thought that it was wrong. But I am not persuaded that it was. I have heard nothing in the arguments presented to us which was not considered in *McFarlane*. All aspects of the question and the reasoning of the final appellate courts in numerous jurisdictions (which were seldom unanimous) were exhaustively canvassed. Experience has not shown there to be unforeseen difficulties in application; nor has it shown that the decision is productive of injustice. It has not been universally welcomed by academic writers; nor has it been universally condemned. The most that can be said is that the decision was controversial; and that was evident from the most casual reading of the comparative case law. If further evidence were needed, it is provided by the recent decision of the High Court of Australia in *Cattanach v Melchior* [2003] HCA 38, which was reached by a majority of four to three. *Quot judices tot sententiae*. Despite the diversity of opinion, the judgments cover familiar ground and contribute no new insight.

104. *McFarlane* was a case of negligent sterilisation advice. It decided that the costs of bringing up a normal, healthy child are not recoverable. Negligence was not admitted - that issue remained to be tried - but the appeal was brought on the pleadings and negligence had to be assumed. The defenders conceded that they were responsible for having given the advice in question and that they were under a duty to take reasonable care to ensure

that it was correct. They acknowledged that they would normally be liable for all the foreseeable consequences of its being wrong. They accepted that Mrs McFarlane's pregnancy and the child's birth were the direct and foreseeable consequences of the advice being wrong. Causation was not in issue. On conventional legal reasoning Mr and Mrs McFarlane would be entitled to recover damages which represented the full extent of the financial and other losses consequent upon Mrs McFarlane's pregnancy and the birth of their child, including the costs of bringing her up.

105. The House nevertheless unanimously held that the costs of bringing up the child were not recoverable. In their speeches the individual members of the Appellate Committee all based this conclusion on legal policy, though they expressed themselves in different terms. My noble and learned friend Lord Steyn spoke of distributive justice; he asked himself what would be morally acceptable to the ordinary person. Others spoke of what was "fair, just and reasonable" - which expresses the same idea. I spoke openly of legal policy. At p 108, I said:

> "The admission of a novel head of damages is not solely a question of principle. Limitations on the scope of legal liability arise from legal policy, which is to say 'our more or less inadequately expressed ideas of what justice demands' (see *Prosser and Keeton on Torts*, 5th ed (1984), p 264). This is the case whether the question concerns 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 is not the same as public policy, even though moral considerations may play a part in both. The court is engaged in a search for justice, and this demands that the dispute be resolved in a way which is fair and reasonable and accords with ordinary notions of what is fit and proper. It is also concerned to maintain the coherence of the law and the avoidance of inappropriate distinctions if injustice is to be avoided in other cases."

Others too made it clear that this was not the same as public policy in the traditional sense of that expression. It would not have been contrary to public policy to award damages to the pursuers in *McFarlane* any more than it would be contrary to public policy to award damages for breach of contract beyond the limits imposed by the rule in *Hadley v Baxendale* (1854) 9 Exch 341. But in both cases the denial of damages rests upon policy considerations.

106. Another and more technical difference of approach is detectable in the speeches. Lord Clyde and I considered that the question was directed to the admission of a new head of loss. Others considered that the question was whether the loss claimed was within the scope of the duty of care. In my opinion this is merely a difference of exposition. In some cases it is more illuminating to approach the question from one end; in other cases from the other. In *Caparo Industries plc v Dickman* [1990] 2 AC 605 Lord Bridge of Harwich said, at p 627:

> "It is never sufficient to ask simply whether A owes B a duty of care.

> It is always necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harmless. 'The question is always whether the defendant was under a duty to avoid or prevent that damage, but the actual nature of the damage suffered is relevant to the existence and extent of any duty to avoid or prevent it:' see *Sutherland Shire Council v Heyman*, 60 ALR 1, 48, per Brennan J."

In *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191 Lord Hoffmann said, at p 211:

> "A duty of care such as the valuer owes does not however exist in the abstract. A plaintiff who sues for breach of a duty imposed by the law (whether in contract or tort or under statute) must do more than prove that the defendant has failed to comply. He must show that the duty was owed to him and that it was a duty in respect of the kind of loss which he has suffered."

107. Each of those cases raised an issue of causation. In neither case was it a factual issue, for there was no doubt that the loss was sustained as a direct result of the negligent information which the defendant had supplied. But the law does not hold a person liable for all the foreseeable consequences of his actions. So the question in each case was one of responsibility: was the defendant legally responsible for the loss which his negligence had caused? There was nothing unusual, however, in the nature of the loss; indeed it was commonplace - financial loss arising from a bad investment. The difficulty arose from the causal relationship between the defendant's negligence and the loss sustained by the plaintiff. The solution lay in recognising that a person is only liable for loss which falls within the scope of his duty of care.

108. The problem in a case of wrongful pregnancy is not the same. There is no difficulty about causation, whether as a matter of fact or of legal responsibility. The pregnancy and birth of a child are the very things which the defendants are employed to prevent. It is impossible to say that consequential loss falls outside the scope of their duty of care. They are accordingly liable for the normal and foreseeable heads of loss, such as the mother's pain and suffering (and where appropriate loss of earnings) due to the confinement and delivery. The novelty of the claim in *McFarlane* lay in one particular head of damage - the cost of bringing up a healthy child. The House considered it to be morally repugnant to award damages for the birth of a healthy child. It makes for easier exposition to identify the issue by reference to the head of damage rather than the duty of care. It also has the added advantage that identifying the *ratio* of *McFarlane* in this way may make it simpler to find the answer to the question raised by the present case.

109. In a lecture to the Personal Injury Bar Association's Annual Conference in 2003 Sir Roger Toulson, Chairman of the Law Commission, described the ratio of *McFarlane* as follows:

> "Although at a detailed level there are therefore significant

differences between the judgments, at a broader level two features dominate them. These are, first, the incalculability in monetary terms of the benefits to the parents of the birth of a healthy child; and, secondly, a sense that for the parents to recover the costs of bringing up a healthy child ran counter to the values which they held and which they believed that society at large could be expected to hold."

110. I agree with this analysis, which accurately represents my own reasoning and, I believe, that of other members of the Committee. I said, at pp 113- 114:

> "In my opinion the law must take the birth of a normal, healthy baby to be a blessing, not a detriment. In truth it is a mixed blessing. It brings joy and sorrow, blessing and responsibility. The advantages and the disadvantages are inseparable. Individuals may choose to regard the balance as unfavourable and take steps to forgo the pleasures as well as the responsibilities of parenthood. They are entitled to decide for themselves where their own interests lie. *But society itself must regard the balance as beneficial. It would be repugnant to its own sense of values to do otherwise. It is morally offensive to regard a normal, healthy baby as more trouble and expense than it is worth.*"(Emphasis added).

111. In subsequent cases Hale LJ has developed the idea that the decision in *McFarlane* rested on a theory of "deemed equilibrium". With respect, such a theory cannot be extracted from any of the speeches; on the contrary, it is entirely inconsistent with them. To say that something is incalculable or cannot be weighed at all is quite different from saying that it is deemed to weigh the same as something else. To say, as I did, that

> "society itself must regard the balance as beneficial"

is quite different from saying that the balance must be treated as level.

112. *McFarlane* decides that the costs of bringing up a normal, healthy child must be taken to be outweighed by the incalculable blessings which such a child brings to his or her parents and do not sound in damages. *Parkinson* decides that the additional costs of bringing up a disabled child are recoverable in damages. It may be that strict logic demands a different answer. A disabled child is not "worth" less than a healthy one. The blessings of his or her birth are no less incalculable. Society must equally "regard the balance as beneficial". But the law does not develop by strict logic; and most people would instinctively feel that there was a difference, even if they had difficulty in articulating it. Told that a friend has given birth to a normal, healthy baby, we would express relief as well as joy. Told that she had given birth to a seriously disabled child, most of us would feel (though not express) sympathy for the parents. Our joy at the birth would not be unalloyed; it would be tinged with sorrow for the child's disability. Speaking for myself, I would not find it morally offensive to reflect this difference in an award of compensation. But it is not necessary for the

disposal of the present appeal to reach any conclusion whether *Parkinson* was rightly decided, and I would wish to keep the point open. It would in any case be necessary to limit the compensation to the *additional* costs attributable to the child's disability; and this may prove difficult to achieve without introducing nice distinctions and unacceptable refinements of a kind which tend to bring the law into disrepute. For the reasons I gave in my speech in *McFarlane* I would not for my part wish to distinguish between the various motives which the parties might have for desiring to avoid a pregnancy.

113. However that may be, the decision of the Court of Appeal in the present case is not a legitimate extension of *Parkinson*, but an illegitimate gloss on *McFarlane*. The conventional approach to damages would allow the costs of bringing up a healthy child, but only so far as they were reasonable. Costs which are incurred unreasonably are not recoverable. So what *McFarlane* decides is that the costs of bringing up a healthy child, even though reasonably incurred, are not recoverable.

114. Such costs are infinitely variable. They will differ as between one family and another. They will vary, not only according to the needs of the individual child, but according to the circumstances of the parents and other members of the family. They may be greater in the case of a single parent, and less where there are grandparents or siblings to fetch and carry and help with the care of the child. They may be greater where the mother chooses or has to go out to work and so must employ a child minder or home help. They may be very great if the mother is a highly paid professional woman or works at a job which takes her frequently away from home; or if the family is accustomed to private health care or education. All these factors, which are referable to the personal circumstances of the child's family and not to those of the child, go to increase the costs which are reasonably incurred in bringing up the child. But *McFarlane* teaches that none of these costs are recoverable in the case of a healthy child, however reasonably they may be incurred. In principle, the same must be true of the disabled parent. To the extent that her disability has any effect, it increases the amount of the costs which she reasonably incurs in bringing up the child, costs which are nevertheless not recoverable.

115. It is, with respect, no answer to say that the disabled parent has no choice in the matter; and that if a mother's disability makes it impossible for her to look after the child, she must perforce employ someone to do it for her. The normal, healthy parent may also have no real choice in the matter. A single mother with no disability allowance may have no choice but to go out to work. A mother who, like the old woman who lived in a shoe, has "so many children she doesn't know what to do" may have no choice but to employ someone to look after them. A family which has already resorted to private health care and private education for the existing children cannot realistically choose to do less for their latest child. By contrast, a disabled mother may have a husband, parents and other members of the family to give support and look after the child. There is no relevant difference between costs which are "necessary" and those which are "reasonable", even if it were

practicable to attempt to draw it; but it cannot be drawn on the line which distinguishes the disabled parent from the normal, healthy one.

116. There is another consideration. A child who is born disabled is disabled throughout his or her childhood. Likewise a disabled parent is disabled throughout his or her child's childhood. But there is a significant difference. The factors which make it appropriate to award compensation for the birth of a disabled child are present throughout; those which appear to make it appropriate to award damages for the birth of a healthy child to a disabled parent gradually disappear to be overtaken by the advantages. Once the child is able to go to school alone and be of some help around the house, his or her presence will to a greater or lesser extent help to alleviate the disadvantages of the parent's disability. And once the child has grown to adulthood, he or she can provide immeasurable help to an ageing and disabled parent.

117. It is a mistake to assume that, because the costs attributable to the disability are "extras" whether the disabled party is the child or the parent, there is any symmetry. It is true that *McFarlane* was concerned with a normal, healthy baby born to normal, healthy parents, though this group includes parents who for one reason or another could ill afford to have to look after another child. We expressly confined our decision to the case of a healthy child because we recognised that the case of a disabled child might be distinguishable. But, speaking for myself, I made no assumptions about the health or other characteristics of the parents. I considered their circumstances to be irrelevant. It was enough that they did not want or could not properly look after another child. I expressly said that their motives for not wanting another child were irrelevant. I still regard this to be the case.

118. Disability is a misfortune, and it is the mark of a civilised society that it should provide financial assistance to the disabled. The United Kingdom discharges this responsibility by payment of disability allowance. But this is the responsibility of the state and is properly funded by general taxation. It is not the responsibility of the private citizen whose conduct has neither caused nor contributed to the disability. *McFarlane* teaches that the costs of bringing up a healthy child by an unimpaired parent do not sound in damages. Whatever we may say to the contrary, an award of the "extra" costs which are attributable to the fact that the parent is disabled is an award of damages for the disability.

119. It is accepted that care must be taken not to award damages for the parent's disability. An immediate difficulty is that the costs which are attributable to the parent's disability cannot be disentangled from those which are attributable to the birth of the child. If the parent is unable through disability to look after her healthy child, she must employ someone to do so. How are those costs to be characterised? They must be due at least in part to the birth of the child, and in part to the parent's disability. It is impossible to separate the two elements. They are not different components of the cost, but a single cost with composite causes.

120. But even if they could be separately identified it would not help, for in principle no part of the costs is recoverable. This is what marks the difference between the present case and *Parkinson.* Where it is the child who is disabled the costs are attributable either to the birth of the child or to the fact that the child is disabled. The former are not recoverable; the latter are. Where it is the mother who is disabled they are attributable either to the birth of the child or to the fact that the mother is disabled. There is no third possibility. To the extent that they are due to the birth of the child *McFarlane* precludes recovery and to the extent that they are not due to the birth of the child, the causal link with the wrong is broken and the defendants are not liable for them in any case. The fact that the mother is disabled aggravates the financial consequences of the birth of a healthy child, and the birth of a healthy child aggravates the financial consequences of the mother's disability. The former is the defendants' responsibility but does not sound in damages and the latter is not the responsibility of the defendants at all.

121. In my opinion, principle mandates the rejection of the parent's claim. But in this case principle also marches with justice. The decision of the majority of the Court of Appeal is destructive of the concept of distributive justice. It renders the law incoherent and is bound to lead to artificial and indefensible distinctions being drawn as the courts struggle to draw a principled line between costs which are recoverable and those which are not. In his powerful dissenting judgment Waller LJ drew attention to the absurdities which would result from drawing the line in entirely the wrong place. He said, at [2003] QB 20, 34 - 35:

> "53 Let me address some examples, I hope not too extreme. If one takes the facts to be that a woman already has four children and wishes not to have a fifth; and if one assumes that having the fifth will create a crisis in health terms, unless help in caring for the child was available. She cannot recover the costs of caring for the child which might alleviate the crisis, as I understand *McFarlane's* case. I would have thought that her need to avoid a breakdown in her health was no different from the need of someone already with a disability, and indeed her need might be greater depending on the degree of disability. Does she, or ordinary people, look favourably on the law not allowing her to recover but allowing someone who is disabled to recover?
>
> "54 If one were to add that the lady with four children was poor, but the lady with a disability was rich—what then? It would simply emphasise the perception that the rule was not operating fairly. One can add to the example by making comparisons between possible family circumstances of the different mothers. Assume the mother with four children had no support from husband, mother or siblings, and then compare her with the person who is disabled, but who has a husband, siblings and a mother all willing to help. I think ordinary people would feel uncomfortable about the thought that it was simply the disability which made a difference."

122. I can see no answer to these criticisms. In my opinion, principle, common justice and the coherence of the law alike demand that the line be drawn between those costs which are referable to the characteristics of the child and those which are referable to the characteristics of the parent. I agree with Waller LJ that ordinary people would think it unfair that a disabled person should recover the costs of looking after a healthy child when a person not suffering from disability who through no fault of her own was no better able to look after such a child could not. I can identify no legal principle by which such a distinction could be defended.

123. I still regard the proper outcome in all these cases is to award the parents a modest conventional sum by way of general damages, not for the birth of the child, but for the denial of an important aspect of their personal autonomy, viz the right to limit the size of their family. This is an important aspect of human dignity, which is increasingly being regarded as an important human right which should be protected by law. The loss of this right is not an abstract or theoretical one. As my noble and learned friend Lord Bingham of Cornhill has pointed out, the parents have lost the opportunity to live their lives in the way that they wished and planned to do. The loss of this opportunity, whether characterised as a right or a freedom, is a proper subject for compensation by way of damages.

124. I made this suggestion in *McFarlane*, but it was not taken up by any one else. As I see it, it was neither accepted nor rejected, and I do not think it right to say that the point was decided. The majority did not consider it at all, at least expressly, perhaps because it was wrongly thought to be an alternative to the award of damages for the mother's pain and suffering. It was not, for I would have awarded it to both parents. In my opinion the point is still open for consideration without the need to depart from the decision in *McFarlane.*

125. The award of a modest sum would not, of course, go far towards the costs of bringing up a child. It would not reflect the financial consequences of the birth of a normal, healthy child; but it would not be meant to. They are not the proper subject of compensation for the reasons stated in *McFarlane.* A modest award would, however, adequately compensate for the very different injury to the parents' autonomy; moreover it would be available without proof of financial loss, and so would not attract the distaste or moral repugnance which was the decisive factor in *McFarlane.* In that case I suggested that the award should not exceed £5,000 in a straightforward case. On reflection, I am persuaded that the figure should be a purely conventional one which should not be susceptible of increase or decrease by reference to the circumstances of the particular case. I agree with the figure of £15,000 which Lord Bingham has suggested.

126. I would allow the appeal and substitute an award of £15,000 as a conventional sum.

LORD SCOTT OF FOSCOTE

My Lords,

127. In this appeal your Lordships have been invited to re-consider the decision of the House in *McFarlane v Tayside Health Board* [2000] 2 AC 59 and, second, to consider whether the principle established by that decision is determinative of the issue arising in the present case. It is, therefore, necessary to try to identify the principle underlying *McFarlane*.

128. The *McFarlane* case was one in which a married couple decided that they did not want any more children. So the husband, Mr McFarlane, underwent a vasectomy, or so he thought. After the operation had been carried out, Mr McFarlane submitted sperm samples for examination by the surgeon who had carried out the operation. The surgeon advised Mr and Mrs McFarlane that the samples showed the vasectomy had been successful and that they no longer needed to take contraceptive measures. This advice was acted on by Mr and Mrs McFarlane but unfortunately was wrong. Six months or so later Mrs McFarlane became pregnant and subsequently gave birth to a healthy baby who, although originally unwanted, became a much loved member of the McFarlane family. Mr and Mrs McFarlane sued for damages in negligence. It may be that the vasectomy had been negligently carried out but they based their claim on the surgeon's negligent representation that Mr McFarlane's sperm counts were negative. This negligent advice was, indeed, the only basis on which Mrs McFarlane could have based an action. The McFarlanes claimed damages for Mrs McFarlane's pain, suffering and distress attributable to the unwanted pregnancy and the trauma of childbirth and also for the costs they would incur in raising the child to adulthood. Nothing, for present purposes, turns on the former damages claim. The House held, unanimously that the McFarlanes were not entitled to the latter.

129. It is helpful, to me at least, to start with a review of the general principles that apply to damages. The basic rule of damages, whether in contract or in tort, was expressed by Lord Blackburn in *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25. He said, at p 39, that damages should be

> "…. that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."

130. In applying this principle there is often, however, a difference depending on whether the claim is a contractual one or a claim in tort. In general, where a claim is based on a breach of contract, the claimant is entitled to the benefit of the contract and entitled, therefore, to be placed in the position, so far as money can do so, in which he would have been if the contractual obligation had been properly performed. But where the claim is in tort, there being no contract to the benefit of which the claimant is entitled, the claimant is entitled to be placed in the position in which he would have been if the tortious act, the wrong, had not been committed. The

difference in approach is often important in cases where the claim is based on negligent advice or negligent misrepresentation. If the defendant was under a contractual obligation to give competent advice, the claimant is entitled to be put in the position he would have been in if competent advice had been given. But if the defendant owes no contractual obligation to the claimant and the case is brought in tort, the claimant must be put in the position he would have been in if no advice had been given at all.

131. I have mentioned this difference in approach to claims in contract and claims in tort in order to clear it out of the way. For it has, in my opinion, no relevance at all in cases based on professional advice or services given by professionals. There are two reasons for this. First, if a professional, whether a doctor, a lawyer or any other professional, provides professional advice or services to a client on a non-contractual basis, the professional owes to the client a professional duty of care in doing so. In the case, for example, of a doctor working in the National Health Service and advising or treating an NHS patient, the advice or services are provided by the doctor pursuant to his contractual arrangements with the NHS, not pursuant to any contract with the patient. But the intention and purpose of those arrangements is that the doctor's services be made available to NHS patients. That being so, the extent of the duty of care owed to each NHS patient and the extent of the doctor's liability, and his NHS employer's vicarious liability, if the doctor is in breach of that duty, cannot in my opinion be any different from the extent of the duty and of the liability for any breach of duty that would apply in the case of a private patient with whom the doctor had a contractual relationship. The NHS patient is entitled to the benefit of the contractual duty owed by the doctor pursuant to his contract with his NHS employers. (c/f *White v Jones* [1995] 2 AC 207 where the disappointed beneficiaries, suing in tort, were placed by way of damages in the position they would have been in if the negligent solicitor had properly discharged his duty to his client, the testator).

132. Alternatively, applying the traditional approach to tortious damages, it can be said that if, in a case like *McFarlane*, no representation at all had been made by the surgeon about Mr McFarlane's post-vasectomy fertility, the McFarlanes would not have assumed that contraceptive measures were unnecessary, would have taken suitable precautions and would have been in exactly the same position as they would have been in if a correct representation about his fertility had been made. Similarly, in a case like the present one, if a sterilisation operation had not been carried out on the respondent by the negligent doctor, the respondent would either have continued to take contraceptive measures or she would have had a sterilisation operation carried out by some other doctor. In either case her baby would, on a balance of probabilities, not have been conceived.

133. Accordingly, as it seems to me, the answer to the *McFarlane* case, to the present case and to each of the other like cases to which your Lordships have been referred does not depend on whether the claim is a contractual or a tortious one. The same result must be reached whether the claimant was a private patient or an NHS patient. In every case the claimant, having

established negligence, is entitled, as a matter of general principle, to be placed in the same position he or she would have been in if the professional advice or services had been competently provided. So in every case this general principle of damages would require the claimant to be placed in the position he or she would have been in if the baby had not been born.

134. It is at this point that, as it seems to me, the application of general principle becomes difficult. It becomes difficult because the consequence of the negligence is the birth of a human being and because assessments about the value or the burden of a particular human life are impossible. These difficulties have to be grappled with, and I will come back to them, but before doing so I want to consider how the damages issue would look if analogous professional negligence had occurred in a context that did not involve these difficulties. Suppose the owner of a two year old colt decided to have the colt gelded and engaged a veterinary surgeon (a vet) to carry out the operation. The vet operates on the colt and advises the owner that the operation has been successful. In the belief that that is so the owner allows the gelding, as he believes the colt to have become, to graze in a paddock with some mares. But the operation has been negligently performed, the colt succeeds in getting one of the mares in foal, the condition of the mare is not discovered until it is too late to do anything about it and in due time the mare gives birth to a healthy foal. The mare is not damaged by the experience but the owner sues the vet for damages. Negligence is not in issue. For what damages would the vet be liable? An account of detriment and benefit would need to be drawn up. Veterinary costs occasioned by the mare's unwanted pregnancy and the birth of the foal would be recoverable. But what else? Special circumstances might, subject to remoteness rules, justify special claims; but leave special claims aside. What about the costs of rearing the foal to maturity? The proposition that the defendant vet would be liable for such costs seems absurd. It is instructive to ask oneself why that is so. It is absurd, in my opinion, because the owner of the foal does not have to keep it. Its unexpected and originally unwanted arrival would present him with a number of choices. He could have the foal destroyed as soon as it was born. But this would be an unlikely choice for the foal would be likely to have some value and it would cost very little to leave it with its dam until it could be weaned. Or the owner could decide to keep the foal until it could be weaned and then to sell it. Or he could decide to keep it until, as a yearling or a two year old, it had reached a little more maturity and then sell it. Or he could try and add value to it by breaking it in, schooling it and then selling it. Or he could keep it for his own use. Each of these choices, bar the first, would have involved the owner in some expense in rearing the foal. But the expense would be the result of his choice to keep the foal. Moreover, the expense of rearing the foal would have to be set against the value of the foal. The owner could not claim as damages reimbursement of the expenses without bringing into account the benefit.

135. The inability of the owner of the unwanted foal to claim from the negligent vet the cost of rearing the foal seems to me to raise no particular difficulty or issue of principle. The difficulty produced by cases like *McFarlane* and the present case is because the originally unwanted progeny

is a human being, not an animal, and because, for very deeply ingrained cultural and, for some, religious reasons, human life, whether that of babies, children, adults in the prime of life or the aged and whether normal or associated with disability, is regarded by society generally and by the law as uniquely precious and as incapable of valuation in monetary terms. And the relationship between the originally unwanted but, once born, loved and cherished baby and his or her parents and siblings cannot be put into any monetary scale of benefit and detriment.

136. Nonetheless it must be recognised that the parents' costs and expenses in looking after and providing for the originally unwanted baby until his or her maturity do result from the decision of the parent or parents to keep the child. If the parents decided, for example, to place the child with an adoption society with a view to adoption, they would not incur those costs and expenses. Nor would they incur them if, for whatever reason, the mother had had her unwanted pregnancy terminated. Most parents, I am sure, would not regard their decision to keep and rear their baby as representing a choice. It would seem to them inevitable that this is what they would have to do. The owner of the unwanted foal, they would say, has a true choice. There is no reason why he should keep the foal and if he decides to do so he must accept the adverse as well as the beneficial consequences of doing so. But the choice, if that is the right word, facing the parents of the originally unwanted baby is not comparable. For a mix of cultural, moral and religious reasons the parents of every baby are expected to accept a responsibility for the baby and its well being that has no parallel in the case of the unwanted foal. The law, indeed, reinforces these reasons with its own expectations of and duties imposed on parents in relation to the children born to them. It is, in my opinion, reasonable for parents who have produced an originally unwanted baby to say that they regard themselves as having had no choice but to keep the child as a member of their family and raise him or her to the best of their ability.

137. But this conclusion does not itself answer the question: why should the negligent doctor be liable for the economic consequences of the parents' decision to keep and rear the child, reasonable, praiseworthy and socially valuable though that decision no doubt was? As to causation, the doctor's negligence was undoubtedly a *causa sine qua non* of the costs in question and was a reasonably foreseeable consequence of the pregnancy notwithstanding that it resulted from an independent decision of the parents to keep the child. And the pregnancy was the outcome the avoidance of which had been the reason for seeking the doctor's services. These considerations suggest that the answer to the question should favour the claimant.

138. But there are two further considerations which seem to me to be of importance and, in the end, determinative. First, there is no escaping that it is a feature of these cases that the expenses sought to be recovered from the negligent doctor have been, or will be, necessarily accepted by the parents of the child as the price to be paid for having the child as a member of their family. It has not been asserted by any parent in any of the cases to which

your Lordships have been referred that the price was not worth paying. The value to the parents and the other family members of having the child as a member is not capable of valuation, either at a particular snapshot of chosen time or over the period until the child reaches maturity. Is it right to charge the defendant with the costs and expenses of providing the parents with something of unique value but incapable of valuation? The account of detriment and benefit, into which would go the costs of rearing the child on one side and, at least, the child benefit allowance on the other, would be incomplete without anything to represent the value of what was being acquired by the expenditure. The impossibility of drawing up a balance fair to both sides seems to me a strong argument why no balance should be drawn up at all. And, finally, the placing of a money value on the net detriment to the child's parents of having to rear the child would, it seems to me, be inconsistent with the status of the child as a valued and loved member of the family. I regard these considerations as having a weight that requires a departure from the conclusion to which the normal application of tortious damages rules would lead.

139. In *McFarlane* somewhat different reasons were given by different members of the Appellate Committee for concluding that the parents could not claim damages for the cost of rearing their healthy and much loved baby. I am not in disagreement with the reasons they expressed and have reached the same conclusion. In my opinion, however, it is important to recognise that the conclusion is not that which the normal application of established tortious damages principles would lead to. It is an exception based upon a recognition of the unique nature of human life, a uniqueness that our culture and society recognise and that the law, too, should recognise. It seems to me to be an acceptable irony that the conclusion is the same conclusion as that which would have been reached in the case of the unwanted foal, but reached by an entirely different route.

140. If I am right in concluding that the unanimous decision in *McFarlane* was correct and that the decision was not reached by applying normal principles of damages but by constructing an exception to those principles based upon a recognition of the uniqueness of every human being and, therefore, of every baby whether wanted or unwanted, the question then arises whether the present case falls within that exception.

141. The only relevant factual difference between *McFarlane* and the present case is that in the present case the mother is blind. Her blindness was the reason why she wanted a sterilisation operation to be performed on her. She doubted her ability to look after her baby if she were to bear one. But, due to the doctor's negligence, she did bear one and, on the footing that *McFarlane* bars her recovery as damages of the ordinary expenses of looking after her child, she seeks damages to reimburse herself for the extra costs she will incur on account of her blindness.

142. My Lords, in my opinion the mother's visual disability does not take the case out of the exception to normal principle established by *McFarlane*. Her baby, too, is a healthy and much loved baby. She has not said, and

would not say, that her baby's presence in her household is not a joy and a delight. But it has caused her to incur expenses and will, no doubt, continue for some years to do so. However, all the features of *McFarlane* that justify creating an exception from normal principle are present, too, in this case. The mother need not have kept her baby but decided to do so. I do not imagine that she ever felt that she had a real choice. There is no doubt that her baby adds value to her life and that the value is not capable of assessment in monetary terms. A balance sheet of detriment and benefit caused by the doctor's negligence cannot be drawn up.

143. The majority in the Court of Appeal treated this case as justifying, on account of the mother's blindness, an exception to *McFarlane*. An exception to an exception is apt to produce messy jurisprudence and for all the reasons so cogently expressed by Waller LJ in his dissenting judgment in the Court of Appeal, the creation of an exception in the present case would lead to further exceptions. The exception that *McFarlane* constitutes is based on a recognition of the uniqueness of a human being. The principle on which *McFarlane* is based cannot be limited to the particular circumstances peculiar to that particular case and I do not think the mother's disability in the present case can justify a departure from the basis on which *McFarlane* was decided. I suspect that underlying the majority decision in the Court of Appeal lies the thought that *McFarlane* was wrong and a desire to limit its effect as much as possible. In my opinion, however, *McFarlane* was correctly decided and the basis of the decision should be applied in the present case.

144. I should mention *Parkinson v St James and Seacroft University Hospital NHS Trust* [2002] QB 266. In *Parkinson* a sterilisation operation on the claimant was negligently performed. As a result the claimant conceived when she thought, and hoped, she was unable to do so. She declined to have her pregnancy terminated although warned that the child might be born with a disability. The child was born with severe disabilities. The claimant claimed damages for negligence. The Court of Appeal, following *McFarlane* up to a point, held that she was entitled to recover damages for the costs of providing for her child's special needs relating to his disabilities but was not entitled to recover the basic costs of his ordinary maintenance.

145. The question how the *McFarlane* principle should be applied to a case in which the mother is healthy but the child is born with a disability is not one which needs to be resolved on this appeal. In my opinion, however, a distinction may need to be drawn between a case where the avoidance of the birth of a child with a disability is the very reason why the parent or parents sought the medical treatment or services to avoid conception that, in the event, were negligently provided and a case where the medical treatment or services were sought simply to avoid conception. *Parkinson* was a case in the latter category. In such a case, where the parents have had no particular reason to fear that if a child is born to them it will suffer from a disability, I do not think there is any sufficient basis for treating the expenses occasioned by the disability as falling outside the principles underlying *McFarlane*. The striking of the balance between the burden of rearing the disabled child and

the benefit to the parents of the child as a member of their family seems to me as invidious and impossible as in the case of the child born without any disability.

146. Moreover, the immediate cause of the extra expenses is the child's disability, not the doctor's negligence. In *Emeh v Kensington and Chelsea and Westminster Area Health Authority* [1985] QB 1012 evidence was given to the effect that the chance of a baby being born with a congenital abnormality was between one in 200 and one in 400 (see Waller LJ at p 1019). Waller LJ's reference to this statistic was cited by Brooke LJ in *Parkinson* in support of his conclusion that the birth of a child with abnormalities was a reasonably foreseeable consequence of the negligent failure to carry out a sterilisation operation successfully.

147. My Lords, I have some doubts about this conclusion. The possibility that a child may be born with a congenital abnormality is plainly present to some degree in the case of every pregnancy. But is that a sufficient reason for holding the negligent doctor liable for the extra costs, attributable to the abnormality, of rearing the child? In my opinion it is not. Foreseeability of a one in 200 to 400 chance does not seem to me, by itself, enough to make it reasonable to impose on the negligent doctor liability for these costs. It might be otherwise in a case where there had been particular reason to fear that if a child were conceived and born it might suffer from some inherited disability. And, particularly, it might be otherwise in a case where the very purpose of the sterilisation operation had been to protect against that fear. But on the facts of *Parkinson* I do not think the Court of Appeal's conclusion was consistent with *McFarlane*.

148. For the reasons I have given I would allow this appeal. But, like my noble and learned friends Lord Bingham of Cornhill and Lord Millett, I am not sure that the recovery by the respondent of nothing for the frustration of her expectation that her sterilisation operation would safeguard her against conception satisfies justice. She was owed a duty of care in the carrying out of the operation. She was entitled to the benefit of the doctor's contractual obligation to his NHS employers to carry out the operation with due care. It is open to the court to put a monetary value on the expected benefit of which she was, by the doctor's negligence, deprived (c/f *Farley v Skinner* [2002] 2 AC 732). I would respectfully agree with Lord Bingham's suggestion that she be awarded £15,000. So I, too, while allowing the appeal, would substitute an award of £15,000 as a conventional sum to compensate the respondent for being deprived of the benefit that she was entitled to expect.