Case note

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THAT'S ONE HECK OF AN "UNRULY HORSE"!
RIDING ROUGHSHOD OVER AUTONOMY
IN WRONGFUL CONCEPTION


ABSTRACT. The case of *Rees v. Darlington Memorial Hospital N.H.S. Trust* arises from a lower court backlash against the a prior decision of the British House of Lords in *McFarlane v. Tayside Health Board*. *McFarlane* holding that healthy children brought about by negligence in family planning procedures are blessings, and parents should therefore be denied the costs of child maintenance. But, would the House agree with the Court of Appeal in *Rees* that the factual variation in that case of a disabled parent with a healthy child should form an exception? In tracing the appeal of *Rees* to the House of Lords, this note explores their Lordships' refusal in principle to depart from *McFarlane*, as well as the invocation of an autonomy-based approach to address the harm of unsolicited parenthood. In reflecting on the extent to which the wrongful conception action can be said to reinforce the value of reproductive autonomy, this note argues, nevertheless, that *Rees* illustrates in another way a significant departure from *McFarlane*, but that this is still a turn in the wrong direction. Far from resonating with women’s diverse experiences of reproduction, the law of negligence continues to illustrate little respect for reproductive choice. Therefore, this note calls for a deeper understanding of autonomy, one that recognises and embraces the diversity of individuals’ reproductive lives.

KEY WORDS: child maintenance damages, conventional award, disability, harm, health, reproductive autonomy, wrongful conception

INTRODUCTION

Instinctively, the traveller on the Underground would consider that the law of tort has no business to provide legal remedies consequent upon the birth of a healthy child, which all of us regard as a valuable and good thing.\(^1\)

\(^1\) “Public policy” as Burrough J. commented in *Richardson v. Mellish* (1824) 2 Bing. 229, 252, is “a very unruly horse, and once you get astride it you never know where it will carry you”.

\(^2\) *McFarlane v. Tayside Health Board* [2000] 2 A.C. 59, at 82, per Lord Steyn.

The stories of parents bringing wrongful conception suits against health authorities render familiar scenarios – clinical mishaps ranging from negligently performed abortions and sterilisation, to the provision of incorrect results following post-operative testing. Claiming that in the absence of such negligent treatment the ‘unwanted’ child would not have been born, parents have typically sought damages under two heads: first, for the pain and suffering attendant on pregnancy and childbirth, and second, for the costs of child maintenance. While English law has traditionally permitted both damages’ claims, the question of whether parents should be entitled to receive the costs of child-rearing has nevertheless, proved highly controversial. The initial reaction was outright rejection. Jupp J. in *Udale v. Bloomsbury* denied child maintenance damages on the grounds of public policy, observing *inter alia*, that the birth of a child “is a blessing and an occasion for rejoicing”.\(^3\) And even during the suit’s heyday, various judges articulated their expressions of surprise that English law should permit such recovery.\(^4\) Nevertheless, the more pragmatic line that, “...every baby has a belly to be filled and a body to be clothed”\(^5\) was seemingly legally calcified by the Court of Appeal in *Emeh v. Kensington, Chelsea and Westminster Area Health Authority*.\(^6\) As Mary Donnelly noted at that time, “in the unlikely event of the House of Lords overruling any of these decisions, the policy debate in England appears to be concluded” (Donnelly 1997, p. 16). But the gates of policy were about to be reopened once again in the case of *McFarlane v. Tayside Health Board*.\(^7\)

The House of Lords’ decision in *McFarlane* marked a return to the denial of child maintenance damages in the case of the healthy child. In their Lordships’ view, if parents had suffered harm, then this was pure economic loss which was far outweighed by the considerable joys parents acquired as a result of the blessed healthy child they took deliberate measures to avoid. In denying damages their Lordships spoke in five different legal voices, unified only by one “unruly horse” that dominated the whole proceedings. And, whatever one chooses to

\(^3\) *Udale v. Bloomsbury Area Health Authority* [1983] 2 All E.R. 522, at 531.

\(^4\) *Jones v. Berkshire Area Health Authority* (unreported, 2 July 1986); *Gold v. Haringey Health Authority* [1988] Q.B. 481; *Allen v. Bloomsbury Health Authority* [1993] 1 All E.R. 651.

\(^5\) *Thake v. Maurice* [1985] 2 W.L.R. 215, at 230, *per* Peter Pain J.

\(^6\) *Emeh v. Kensington, Chelsea and Westminster Area Health Authority* [1985] Q.B. 1012.

\(^7\) *Supra* n. 2.