

# **You Should Never Look a Gift Horse in the Mouth: One-Size-Fits-All Compensation in Wrongful Conception**

## **Introduction**

This article reconsiders the, now nine year old, House of Lords' decision in *Rees v. Darlington Memorial Hospital NHS Trust*<sup>1</sup>, which was, to say the least, a novel claim that found resolution in a previously unheard of approach. It was novel because of the solution which was adopted by the House of Lords to resolve the issue of compensating for Wrongful Conception.<sup>2</sup> Ms Rees presented the courts with a set of factual circumstances that had not been envisaged in the development of the law in this country or any other, it was the first case which concerned the health of the parent rather than the child. This article will begin by giving a brief explanation of *Rees* and the prior decisions which led to the adoption of such a novel and, it is submitted, highly unconventional approach. It will show that, despite an unwillingness to reconsider it, the *McFarlane* decision no longer stands as the highest authority in this area; *Rees* is, at least, on a par with it. In the main body the article will then go on to critically consider the adoption of the conventional award, and the justifications given for and against it, and the use of Lord Scott's professional negligence analogy. In so doing, some wider criticisms of the judiciary's approach to these cases will be made in context.

## **Wrongful Conception**

Essentially, wrongful conception is a claim of clinical negligence; so the claimant must prove that there was a *Duty of Care* which was *breached* and this *caused* the 'harm'. It is the *harm* involved which leads us to give these claims a distinct nomenclature of 'wrongful conception'. A claim of wrongful conception arises where a patient has sought sterilisation as a means to avoid the use of contraceptives and to avoid the birth of an (at least originally) unwanted child. As a result of negligence on the part of the medical practitioner in either the performance of the procedure itself or in the provision of post-operative advice this has proved ineffective, the mother has subsequently become pregnant. The essence of the claim is that, because of the medical practitioner's negligence, the claimants have, contrary to their wishes and intentions, been burdened with the unwanted process of pregnancy and parental responsibilities, the very consequences that medical intervention was sought to avoid. The damage is essentially split in to two elements. In the first, the 'Mother's claim', the damage claimed for arises as a result of the pregnancy and birth itself, for example the pain and suffering and loss of amenity. In the second, the damage claimed for is the financial burden of rearing the child up until the age of majority. It is this second claim which has proved particularly controversial.

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<sup>1</sup> [2003] UKHL 52, [2004] 1 AC 309.

<sup>2</sup> These actions have also been called "Wrongful Pregnancy"; "Wrongful Conception" is preferred as a more accurate statement of the wrong which is suffered in these claims. It should also be noted that this claim is fundamentally different from the other legally viable 'Reproductive Tort'; Wrongful Birth. Whilst in the present case the negligence causes the sterilisation procedure to fail; in Wrongful Birth the claim is that the negligent pre-natal counselling meant that there was not an opportunity to abort the previously *wanted* pregnancy.

As medicine advances, especially in the realms of procreation, it is understandable that so do common attitudes concerning sex, contraception, abortion, marriage, divorce and our autonomy more widely. It is hardly surprising that in modern society '[s]ex is no longer inevitably tied to procreation'.<sup>3</sup> As one eminent Australian judge has noted, courts must be aware of the fact of, 'non-married, serial and older sexual relationships, widespread use of contraception, same-sex relationships with and without children, procedures for 'artificial' conception and widespread parental election to postpone or avoid children'.<sup>4</sup> The courts' ability to recognise these claims in the UK has been as a result of the law of tort's ability to develop, as society does, and widen the definition of 'harm' to encompass pregnancy and childbirth.<sup>5</sup>

### The Facts

Ms Rees was diagnosed at the age of two with 'Retinitis Pigmentosa', a genetic condition which caused her blindness in one eye and only partial sight in the other. In 1995, at the age of 23, she was referred, at her request, by her GP to a consultant gynaecologist at Darlington Memorial Hospital to be sterilised. In the referral letter eight points were noted. It was explained that Ms Rees was (1) registered partially sighted, (2) her vision had deteriorated over recent years, (3) she had recently given up work, (4) she had struggled to find a suitable method of contraception - at times requesting the morning after pill - but (5) was adamant that she did not nor ever would want children, (6) felt her eyesight would impede her ability to look after a child, (7) was anxious about her health and (8) scared by the prospect of labour and childbirth. She was aware that the procedure was irreversible but remained adamant at the consultation that she did not wish to have children. On 18 July 1995, the procedure was performed; however, the consultant negligently failed to occlude the fallopian tubes. Ms Rees was unaware that the procedure had failed. A year later she became pregnant and on 28 April 1997 gave birth to her son, Anthony. His father had no desire to be involved in his upbringing. She raised him herself with assistance from her mother and other relatives. Whilst there was a low risk that Anthony may have inherited his mother's condition he otherwise was a healthy and normal child.

On 21 September 1999, Ms Rees issued proceedings in the County Court claiming the costs of bringing Anthony up to the age of majority which would be incurred by a healthy parent as well as those *additional* costs she would incur by reason of her disability<sup>6</sup>. At this time *Emeh v. Kensington*,

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<sup>3</sup> Nicolette Priaux, "Rethinking Progenitive Conflict: Why Reproductive Autonomy Matters?" (2008) 16 *Medical Law Review* 169-200, 169.

<sup>4</sup> *Cattanach v. Melchior* [2003] HCA 38 (Aus), [164] (Kirby J).

<sup>5</sup> This is not to say that acceptance of the action has been straightforward; *Udale v. Bloomsbury Area Health Authority* [1983] 2 All ER 522. See also: *Macfarlane v. Tayside Health Board* (1997) SLT 211 (OH), 214 (Lord Gill), 'In my view, a pregnancy occurring in the circumstances of this case cannot be equated with a personal injury. Pregnancy and labour are natural processes resulting in a happy outcome...' cf: *Thake v. Maurice* [1985] 2 WLR 215 (HC), 230: 'By 1975, family planning was generally practised. Abortion had been legalised over a wide field. Vasectomy was one of the methods of family planning which was not only legal but available under the National Health Service. It seems to me to follow from this that it was generally recognised that the birth of a healthy baby is not always a blessing'.

<sup>6</sup> It is worth noting that at the hearings there was no evidence submitted on behalf of Ms Rees that she would suffer any greater financial loss or the extent to which might be incurred. See: Clare Dixon, "An Unconventional Gloss on Unintended Children" (2003) 153 *New Law Journal* 1732: 'Perhaps her additional costs will prove to be like the snail in a certain ginger [beer] bottle: extremely important - but was it ever there?'

*Chelsea and Westminster Area Health Authority*<sup>7</sup> was the highest authority in wrongful conception. The Court of Appeal had ruled that the recovery of damages for the costs of raising the *uncovenanted* child<sup>8</sup> were available and there were no grounds of principle or policy which prevented this. Shortly after proceedings were issued, in November 1999, the House of Lords, in *McFarlane v. Tayside Health Board*<sup>9</sup>, took a different view by holding that the post-birth losses were not recoverable. It is, for the purpose of this article, sufficient to accept the ratio of *McFarlane* as it was described by the court in *Rees*.<sup>10</sup> First, it is impossible in monetary terms to accurately calculate the respective benefits of avoiding the birth and having a healthy child.<sup>11</sup> Second, 'society itself must regard the balance as beneficial... it is morally offensive to regard a normal, healthy baby as more trouble and expense than it is worth'.<sup>12</sup> The House had therefore decided that the costs for rearing the child were unavailable in cases where the child was born healthy – leaving open the question of whether costs, at least those additional costs, could be recovered in cases where the child was born with a disability. The Court of Appeal then heard *Parkinson v. St James and Seacroft University Hospital NHS Trust*<sup>13</sup> in April 2001. It held that a parent was able to recover those costs which were above and beyond the normal costs of raising a healthy child incurred as a result of the child's disability.

On 1 May 2001, the High Court heard a preliminary issue to determine whether, in light of *McFarlane*, any part of the costs of bringing up Anthony, a healthy child, were available on account of Ms Rees' disability<sup>14</sup>. Stuart Brown QC found that he was bound by the House of Lords decision and subsequently Ms Rees could not recover any of the costs for raising Anthony. The matter then came before the Court of Appeal, in which Hale LJ succinctly recognised that the issue was, 'does the House of Lords' decision in *McFarlane* mean that none of the costs of bringing up a healthy child can ever be claimed whatever the circumstances or can it be distinguished in the particular circumstances of this case?'<sup>15</sup> By a majority,<sup>16</sup> the court held that the disabled parent was able to recover those *extra* costs, which were attributable to and incurred as a result of her disability, involved in discharging her parental responsibility to the child.

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<sup>7</sup> [1985] QB 1012 (CA).

<sup>8</sup> The term "Uncovenanted Child" is preferred to "Unwanted Child" by the author for the same reasons given by Kenyon Mason & Graeme Laurie, *Mason and McCall Smith's Law and Medical Ethics* 8<sup>th</sup> Ed (OUP, 2011) 338. For legal use of the term, see: *Richardson v. LRC Products Ltd* (2001) 59 BMLR 185, 195 (Kennedy J).

<sup>9</sup> [2000] 2 AC 59 (HL).

<sup>10</sup> It should be noted that this is because of the lack of space and strict relevance; there is still plenty to be said about *McFarlane* (n 8) and whether this is the true ratio or not is up for debate. It is worth noting that this "ratio" was not explicitly referred to during the course of the judgment in that case. I would prefer to recognise that each member of the House took a different means to reaching their respective conclusions and there are numerous factors which their Lordships considered – the undertone of the majority, however, may be expressed as rejecting the post-birth losses as *pure economic loss* which failed the *Caparo v. Dickman* [1990] 2 AC 605 *fair, just and reasonable* test. The House was also particularly apprehensive of the magnitude of the awards on the financially stretched NHS – recognised by Lord Bingham (*Rees* (HL) (n 1), [6]) – it is clear that the House thought the damages were disproportionate to the fault.

<sup>11</sup> *Rees* (HL) (n 1), Lord Steyn, [28]; Lord Millett, [108]-[109]

<sup>12</sup> *McFarlane* (n 9), Lord Millett, 113-4.

<sup>13</sup> [2001] EWCA Civ 530, [2001] 3 WLR 376.

<sup>14</sup> *Rees v. Darlington Memorial Hospital NHS Trust* (unreported, 1 May 2001).

<sup>15</sup> *Rees v. Darlington Memorial Hospital NHS Trust* [2002] EWCA Civ 88, [2003] QB 20, [5].

<sup>16</sup> Walker and Hale LJ; Waller LJ dissenting.

## The House of Lords

The Trust appealed the decision and the House of Lords, by a bare majority, allowed the appeal but in so doing attached an important caveat. Ms Rees had invited the House to reconsider *McFarlane*, in light of widespread criticism, but the panel of seven unanimously declined; finding that 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 legal opinion'.<sup>17</sup> By a majority of 4:3, the House held that *Rees* could not be distinguished from *McFarlane* and so the additional costs could not be recovered - the mother's disability did not alter this. The majority instead suggested that the real harm which was suffered in these cases was the 'denial of an important aspect of...personal autonomy, viz the right to limit the size of their family'.<sup>18</sup> This, it was said, justified the 'gloss' of £15,000 by way of general damages as a non-derisory, non-compensatory, non-nominal, "conventional" award which would recognise the infringement to the parents' autonomy.<sup>19</sup> Lord Bingham preferred that the conventional award be available in addition to the mother's claim; presumably replacing the rearing costs that were no longer available. Pinning his award to the loss of autonomy, his Lordship noted:

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.<sup>20</sup>

Recognising that *McFarlane* is an exception to the normal rules of tort law, the majority criticised an approach of carving out exceptions to the exception. The House acknowledged two reasons for not awarding *full* compensation: (1) the birth of a healthy child is a *blessing* and it would be contrary to public morality to deem it to be compensable loss, and (2) though the parents did suffer the detriment of additional costs they also experienced the benefit of raising the child. The award of a modest, 'conventional' sum did not compensate the parents fully, which would be unjust enrichment, but did go some way to recognising the wrongdoing done to them.

The minority found that the award was a novel procedure for judges that risked 'straying into forbidden territory'<sup>21</sup> so was a matter for Parliament and instead preferred to allow for the additional costs to be recovered.<sup>22</sup> The award was not supported by any authority within the UK or elsewhere and had not been raised in any of the earlier cases.<sup>23</sup> It was therefore a 'backdoor

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<sup>17</sup> *Rees* (HL) (n 1), [7] (Lord Bingham).

<sup>18</sup> *ibid* [123] (Lord Millett).

<sup>19</sup> *ibid* [8] (Lord Bingham).

<sup>20</sup> *ibid*

<sup>21</sup> *ibid* [46] (Lord Steyn).

<sup>22</sup> *ibid* [41]-[47] (Lord Steyn); [73]-[77] (Lord Hope).

<sup>23</sup> With the exception of Lord Millett in *McFarlane* (n 9) who proposed a similar award but in rather different circumstances and values - he had proposed an award of £5,000 instead of both the mother's claim (the pre-birth losses; such as pain and suffering, loss of amenity etc.) and the costs of rearing the child - though he did in *Rees* (HL) (n 1) [124] that he would have awarded it to both parents and that he had been persuaded that, on reflection, it should be 'a purely conventional one which should not be susceptible of increase or decrease by reference to the circumstances of the particular case' and so he agreed with Lord Bingham's figure of £15,000 ([125]).

evasion<sup>24</sup> of the legal policy enunciated in *Mcfarlane*.<sup>25</sup> It was more appropriate, and intra vires of the court's discretion, to recognise an exception to the "rule" based on the special requirements of the parent.

### Comment

What this sequence of cases shows is that if the Law Lords...are to take their law making function seriously... they must, at least, be prepared to contemplate the possibility that it may be dangerous to consider individual cases too much in isolation... Stumbling from one set of facts to the next is, as *Rees* shows, a formula for confusion and instability...<sup>26</sup>

This case raises a number of issues of its own but also goes somewhat toward resolving others that, due to the myopic approach of the House in *Mcfarlane*, had been left open. The purpose of this comment is to deal with two aspects of the judgment which are, firstly, important in their own right and, secondly, will open the door for investigation of some of the wider issues surrounding this case and the common law more generally in this area. To this end, it will first look at the nature of the 'Conventional Award' and some of the implications surrounding the support given for that award by the majority and the criticism which it received by the minority. It will then look more closely at the judgment of Lord Scott and the comparisons his Lordship draws with another, 'analogous', case of professional negligence.

#### *A Very (Un)Conventional Award*

In the four years between *Mcfarlane* and *Rees* there were seventeen individual judgments<sup>27</sup> across four key cases in which there were a myriad of views and approaches proposed exemplifying the difficulty of these cases and the challenge, 'if not incoherence'<sup>28</sup>, that *Mcfarlane* poses. It is worth, at this point, briefly reciting what happened in *Mcfarlane*. Mr and Mrs Mcfarlane had been assured of the husband's sterility after his vasectomy procedure; on this advice they dispensed with contraceptive methods and the wife became pregnant with their fifth child. Mrs Mcfarlane claimed damages for the harm suffered through pregnancy and birth and both husband and wife claimed the costs of rearing the healthy child until maturity. The majority of the House accepted the wife's claim with relative ease as constituting actionable physical harm. There was complete agreement in the House that the costs of rearing the child were not recoverable, though there were a number of techniques adopted in reaching this conclusion; these differing approaches mean that *Mcfarlane* is not a straightforward judgment. It is enough here, again, to accept that it was based on the two reasons given in *Rees* as the ratio of the judgment<sup>29</sup> – which were clearly policy reasons. Baroness Hale has claimed, 'At the heart of their reasoning was the feeling that to compensate for the

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<sup>24</sup> *Rees* (HL) (n 1), [46] (Lord Steyn).

<sup>25</sup> In *Mcfarlane* (n 9) it was only Lord Millett that spoke of 'legal policy' the others had shied away from the policy debate and denied its relevance; however, in *Rees* (n 1) Lord Bingham [6]; Lord Steyn [29]; Lord Hope [52]; and Lord Millett [105] all explicitly found that *Mcfarlane* had been based on legal policy.

<sup>26</sup> Peter Cane, "Another Failed Sterilisation" (2004) 120 *Law Quarterly Review* 189-93, 190-1.

<sup>27</sup> I feel justified in disregarding the judgment of Sir Martin Nourse in *Parkinson* (n 13) [97] in which he was content to simply say 'I agree'.

<sup>28</sup> Nicolette Priaux, *The Harm Paradox: Tort Law and the Unwanted Child in an Era of Choice* (Routledge-Cavendish, 2007), 71.

<sup>29</sup> These were: (1) the impossibility of balancing the respective benefits and burdens; and (2) the fact that society must hold the balance to be beneficially.

financial costs of bringing up a healthy child is a step too far'.<sup>30</sup> The problem with this is that no matter how one puts it, it seems disingenuous to the parents to assert that the unsought child is a 'blessing' which justifies the departure from the well-established tortious principles. It may seem a step too far for those who hold children in that regard. However, to those parents who, for whatever reason, opt to forego the possibility of procreating, compensating for negligence causing that outcome seems no less reasonable than to compensate for some other physical injury caused by clinical negligence.

It is hardly surprising that in the face of this confusion that there were attempts by the lower courts to subvert the harshness of *Mcfarlane* and a growing wave of academic criticism<sup>31</sup>. The law, having 'found the 'answer' in more nebulous concepts of benefits, blessings, and of course, our trusty commuter, the oracle of distributive justice',<sup>32</sup> was accused of coming 'adrift from principle'<sup>33</sup> and served as a warning for commonwealth jurisdictions 'against following the same course'.<sup>34</sup> Whilst it was hoped that in *Rees* the House might make a swift U-turn it was not to be<sup>35</sup>. The House was unanimous that a previous decision, given only four years earlier, could not be overruled simply because a differently constituted court concluded that a different approach should be taken – this was not the effect of the 1966 Practice Statement. One may well wonder whether this is precisely what this was the effect which was the intention to achieve. Surely, if the conclusion that a different approach should be taken is based on the fact that the original decision was causing an injustice this will justify overruling it? Given that the majority's reasoning behind the conventional award, as we shall see, was based on the conclusion that to award nothing for a legal wrong suffered was unjust, was this alone not enough for the court to justify, at least, revisiting the previous decision? The direct challenge to *Mcfarlane* had seemingly failed. The challenge to *Mcfarlane* 'pure'<sup>36</sup>, however, did not.

A 'gloss' was added by a bare majority of the seven strong House to ease the harshness of *Mcfarlane* 'pure'; the 'conventional' award of £15,000 would go someway towards making up for the unavailability of the maintenance costs. Thus the child remains a blessing such that, at least in the eyes of society, s/he cannot be the basis of an award of damages; albeit a blessing whose imposition on the parents is enough to base an award of £15,000. It is clear that *Mcfarlane* 'pure' no longer

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<sup>30</sup> Baroness Hale, "The Value of Life and the Cost of Living – Damages for Wrongful Birth" (2001) 7 *British Actuarial Journal* 747-63, 755.

<sup>31</sup> See: J Thomson, "Abandoning the law of delict?" (2000) *Scots Law Times* 43; Hoyano (n 32); Cane (n 22); Cameron-Perry (n 57); Booth (n 57); Prialx (2007) (n 28); Mason (2007) (n 40). See also, for support of the pre-*Mcfarlane* position: Alastair Mullis, "Wrongful Conception Unravelling" (1993) 1 *Medical Law Review* 320-335. For US support, see; Patricia Baugher, "Fundamental Protection of a Fundamental Right: Full Recovery of Child-Rearing Damages for Wrongful Pregnancy" (2000) 75 *Washington Law Review* 1205-1236.

<sup>32</sup> Prialx (2007) (n 28), 72. See: *Mcfarlane* (n 9), 82 (Lord Steyn) for reference to the 'oracle of distributive justice'.

<sup>33</sup> Laura Hoyano, "Misconceptions about Wrongful Conception" (2002) 65 *Modern Law Review* 883-906, 900.

<sup>34</sup> *Cattanach* (n 4) [128] (Kirby J).

<sup>35</sup> Kenyon Mason, "Wrongful Pregnancy, Wrongful Birth and Wrongful Termination" (2002) 6 *Edinburgh Law Review* 46-66, 66: "Most importantly, it shows the way by which a future panel of the House of Lords – possibly one by now including a female member – could retreat from *Mcfarlane* with good grace and no loss of face." See also: Prialx (2007) (n 28), 72.

<sup>36</sup> This term is used to refer to the *Mcfarlane* rule in its unaltered form; essentially the legal position pre-*Rees*.

stands. Ironically, nor would it have stood had the balance been shifted in favour of the minority approach. A shift from compensation being unavailable to the conventional award is a fairly large move, especially given that the parents were so unharmed by their blessing. Whilst the factual variant, the parent's disability, was unforeseen before *Rees*, the case covers essentially the same ground as *McFarlane* - it concerns a claim in which the uncovenanted child is *healthy*. Despite their emphasis on *McFarlane* being sound, the minority still took the view that those extra costs ought to be available, in spite of accepting the arbitrariness of allowing an award on this basis when other parents in equal or greater need financial, physically or mentally will be unable to recover. In a Canadian case shortly after *Rees*, Groberman J said:

It appears to me that the decision to award "conventional damages" is a substantial retreat from the approach taken in *McFarlane*... I see these variations as recognition that the Limited Damages approach, whatever its merits, does not succeed in adequately compensating parents in wrongful... [conception] actions.<sup>37</sup>

Perhaps the House was influenced to make the concessions by the claimants in the case before them. In *McFarlane*, the claimants were a married couple with a 'happy' family of five healthy children and the new addition was a much-loved, cherished member of that family. In *Rees*, meanwhile, the mother before them was a severely visually disabled woman, unable to work, adamant she did not want *any* children and fearful of what would happen if she did, sterilised at the age of 23 and with child at the age of 25, the father of whom played no part in his life. It hardly seems surprising that Ms Rees tugged at the House's sympathy while the McFarlanes did not.

Turning now to the conventional award itself, it is striking just how unconventional it really is. It had found favour with Lord Millett in *McFarlane* but even there the award was far removed from that which was proposed in *Rees*, even if one accepts that his Lordship had intended it to be available to both parents<sup>38</sup>, that award would have consisted of £5,000 and would have been awarded instead of both the pre-birth injury and the maintenance costs. At that time, however, Lord Millett's proposed solution received little attention from his colleagues in the House. By the time *Rees* was heard, there had been a shift in the judicial mindset; the abhorrence that parents were claiming for the birth of a child, who was, invariably, a blessing and, whether the parents accepted it or not, society was sure that it always would be a blessing, had mellowed. The inclination that justice was not being done was clear to see when Lord Nicholls stated, 'an award of some amount should be made to recognise that...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'.<sup>39</sup> Surely the fact that a legal wrong has been suffered, especially one having such a far-reaching effect, is a suitable reason to follow the normal

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<sup>37</sup> *Bevilacqua v. Altenkirk*, 2004 BCSC 945 (Can (SC)), 63 (Groberman J). In this case, the mother was awarded the sum of \$30,000 (£11,939 – at 24 February 2004) for both the pre-birth and the post-birth aspects of her claim whilst the father was also awarded the sum of \$20,000 (£7,959– at 24 February 2004) which was admittedly for the non-pecuniary losses associated with rearing the child. Back dated currency figures acquired using <<http://finance.yahoo.com/currency-converter>>, accessed 24 May 2012.

<sup>38</sup> *Rees* (HL) (n 1), [124] (Lord Millett). Interestingly if this had been Lord Millett's intention originally, one may well ask where exactly the fairness would be in awarding the sum twice when the parental unit are still together and only once when they are separated; simply, the McFarlanes would have been award £10,000; whilst Ms Rees would only have received £5,000, surely the latter would have a far greater need for the larger sum given that she was raising the child alone, though admittedly with assistance, and struggling to cope with her own disability.

<sup>39</sup> *Rees* (HL) (n 1), [17] (Lord Nicholls).

principles of tort law? If the 'limited damages approach' was not doing justice, the House ought to have paid more attention to why this was.

The award itself, as noted, had nothing to do with the financial burden of raising the child but instead was pinned to the loss of autonomy which the parent(s) suffered.<sup>40</sup> Unfortunately, as Mason notes, 'it is hard to find a commentator who does not, at this point, start to scratch his or her head'.<sup>41</sup> Lord Bingham's award in *Rees*, after all, applies in the situation which was covered by *Mcfarlane*, the birth of a healthy child, and applies quite differently from that covered by Lord Millett's suggestion. It is difficult to see how the suggestion that 'the point is still open for consideration without the need to depart from the decision in *Mcfarlane*'<sup>42</sup> can be sustained unless one is to admit that its basis is the result of 'a change in the balance of judicial opinion'<sup>43</sup> which was the unanimous reason given by the House for not reconsidering *Mcfarlane*. Nor could one easily deny the suggestion that 'quite simply, *Mcfarlane* no longer stands as good law in light of *Rees*'.<sup>44</sup> The most that can be said for *Mcfarlane* is that it is on a par with *Rees*. If *Mcfarlane* truly remains good law, then the oracle of distributive justice may well ask how the legal policy enunciated in 1999 had made way to the admission that there was a wrong which deserved compensating for in 2003. If the answer is that either the judicial mindset had soften or there was a feeling that justice was not being done - each of which could be described by the obdurate statement; "a change in the balance of judicial opinion" - surely the solution would have been to reconsider the previous judgment. If it was wrong it ought to be righted sooner rather than later.

It is now necessary to consider on what each of their Lordships based the conventional award. As noted, Lord Bingham in his mind considered that though the award would recognise the harm that had been suffered, pinning it to the loss of autonomy to the mother, rather than the parents<sup>45</sup>, it would not be the 'product of calculation' nor would it be 'a nominal, let alone a derisory award'.<sup>46</sup> Lord Bingham's favour for such an approach is not altogether all that surprising considering that one year earlier<sup>47</sup> his Lordship had expressed his support for the following extra-judicial comment by McLachlin J:

Tort law is about compensating those who are wrongfully injured. But even more fundamentally, it is about recognising and righting wrongful conduct by one person or a group of persons that harms others. If tort law becomes incapable of recognising important

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<sup>40</sup> *ibid* [8] (Lord Bingham).

<sup>41</sup> Kenyon Mason, *The Troubled Pregnancy: Legal Wrongs and Rights in Reproduction* (CUP, 2007), 176.

<sup>42</sup> *Rees* (HL) (n 1), [124] (Lord Millett).

<sup>43</sup> Cane (n 26), 190.

<sup>44</sup> Nicolette Priaux, "That's One Heck of an 'Unruly Horse'! Riding Roughshod over Autonomy in Wrongful Conception" (2004) 12 *Feminist Legal Studies* 317-31, 327.

<sup>45</sup> An interesting point here is that in cases, such as *Mcfarlane*, where it is the father who is sterilised, it is the mother who would recover the award for the infringement to *her* autonomy. One might wonder how it is exactly that the father's autonomy is left unaffected. This point will, unfortunately, have to be left for another time given the lack of space.

<sup>46</sup> *Rees* (HL) (n 1), [8] (Lord Bingham).

<sup>47</sup> *Fairchild v. Glenhaven Funeral Services Ltd and others* [2002] UKHL 22, [11] (Lord Bingham).



wrongs, and hence incapable of righting them, victims will be left with a sense of grievance and the public will be left with a feeling that justice is not what it should be.<sup>48</sup>

Similarly, Lord Nicholls recognised that the birth of a child should not be comparable to a personal injury.<sup>49</sup> The award recognised the legal wrong that had been suffered<sup>50</sup> and served to avoid means-testing the finances of a family; instead allowing a modest lump sum to be given in every case.<sup>51</sup> Lord Millett, meanwhile, reminded us that his opinion was still:

[T]o award the parents a modest conventional sum...not for the birth of the child, but for the denial of an important aspect of their autonomy, viz the right to limit the size of their family...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... [T]he 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.<sup>52</sup>

Finally, Lord Scott considered that the award was to put a monetary value on the frustration of her expectation that sterility would be achieved and, as she was owed a duty of care, to be deprived of that expectation by reason of the doctor's negligence was an appropriate basis for such an award.<sup>53</sup>

With this varying opinion as to what was the legal wrong that needed righting, it is hardly surprising that Lord Hope was concerned by 'the lack of any consistent or coherent ratio in support of the proposition'<sup>54</sup>. Perhaps more surprising, though, is Mason's perception of the award as 'a form of conscience money or as a charity designed to offset the sense of injustice'<sup>55</sup> arising from *McFarlane*. Given the lack of a strong unifying ratio in *McFarlane*, where the Law Lords had struggled to explain why the maintenance costs were unavailable without appealing to spurious and nebulous concepts to do so, was it shocking, or surprising, or even unapprehended, that an attempt to subvert the harshness of that decision would be, to say the least, unclear? This is not to say the majority were correct in doing so. Rather it is to say that, at the very least, there was a consensus amongst the majority that there was a need for compensation because a *legal* wrong had been suffered; rather than the masked appeals to *public* policy used to subvert the claimant's legal rights in *McFarlane*. However, as Pedain argues, there remain reasons to be concerned:

If the event which has these consequences is, in law, beneficial, what then is the justification for giving general damages where special damages have been refused?... [I]f it is not compensatory, it is even less clear on what legal basis it can be awarded at all. And is it not bound to make some members of the public, whose moral sensitivities their Lordships were so concerned about in *McFarlane*, uncomfortable to learn that you get £10,000 under the

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<sup>48</sup> McLaughlin J, "Negligence Law - Proving the Connection", in ed Mullany and Linden *Torts Tomorrow, A Tribute to John Fleming* (LBC Information Services, 1998), at 16.

<sup>49</sup> *ibid* [16] (Lord Nicholls).

<sup>50</sup> *ibid* [17] (Lord Nicholls).

<sup>51</sup> *ibid* [18] (Lord Nicholls).

<sup>52</sup> *ibid* [123] (Lord Millett). For an explanation of the difference between 'right' and 'freedom', see: Wesley Hohfeld, *Fundamental Legal Conceptions* 3rd Ed (Yale University Press, 1964), 36-50.

<sup>53</sup> See: *Rees* (HL) (n 1), [148] (Lord Scott). Seemingly leaning closer to the approach which would allow for full compensation; as we shall see later however, the full judgment of his Lordship precludes this.

<sup>54</sup> *ibid* [74] (Lord Hope).

<sup>55</sup> Mason (2007) (n 40), 178.

Fatal Accidents Act 1976 for losing a child through another's negligence, and £15,000 at common law for having one?<sup>56</sup>

What then, were the arguments of the minority against such an award? Lord Steyn was perhaps the most fervent in his criticism of the award, describing it a 'backdoor evasion' on the *McFarlane* rule<sup>57</sup> having already questioned the existence of there being *any* authority to support it and suggesting that the creation of an award of this type was solely within the *vires* of Parliament<sup>58</sup> – ironic, given the criticism levelled towards the *McFarlane* decision for exceeding the ambit of viable judicial considerations of 'policy'.<sup>59</sup> As Mason argues:

However one likes to look at it, in the end, the *McFarlane* decision removes this right [to compensation under the orthodox application of the law of tort] on the grounds of legal policy. Any conflict between a legal right and legal policy is normally settled at the stage of recognition of that right. In *McFarlane*, it is being resolved at the stage of quantification of compensation for breach of a right – which is a new departure... They were, thus, on the horns of a self-made dilemma – and this must be the anomaly that the House was anxious to set aside.<sup>60</sup>

### *(Un)Conventional Justice*

Whilst the *Rees* 'gloss' undoubtedly produces a far more benevolent end than did *McFarlane* 'pure', to what extent can it be said that applying a flat rate award to all cases be said to achieve the justice it sets out to? Cases in which claimants will surely be situated in a range of circumstances, where the injury suffered is at the very least 'variable', and where it remains unclear whether we are compensating or simply recognising a wrongdoing. The award may be pleasing to a National Health Service, which is 'always in need of funds to meet pressing demands'<sup>61</sup>, given that the need to negotiate over the intricacies of projected expenses is removed in favour of a one-size-fits-all award which can be handed out fairly swiftly without any great fear of additional litigation costs *if* settlement cannot be reached<sup>62</sup>. Simple to administer though it may be, can it really be said to be fair?<sup>63</sup> Whilst it has been suggested that the 'beauty of such an award is that it makes no unjustly arbitrary distinction between the claimants, all of whom will receive the same award'<sup>64</sup>, it is difficult to comprehend quite how an award, pinned to the interference with an *individual* claimant's autonomy, which deems all victims to be identically situated actually respects *their* autonomy.<sup>65</sup> If

<sup>56</sup> Antje Pedain, "Unconventional Justice in the House of Lords" (2004) 63(1) *CLJ* 19-21, 20-1.

<sup>57</sup> *Rees* (HL) (n 1), [46] (Lord Steyn).

<sup>58</sup> *ibid* [45] (Lord Steyn).

<sup>59</sup> See: Priaulx (2007) (n 28); Mason (2007) (n 33); J Ellis Cameron-Perry, "Return of the Burden of the 'Blessing'" (1999) 149 *New Law Journal* 1887; Penny Booth, "A Child is a Blessing – Heavily in Disguise, Right?" (2001) 151 *New Law Journal* 1738. cf Tony Weir, "The Unwanted Child" (2000) 59(2) *CLJ* 238-41.

<sup>60</sup> Mason (n 40), 179.

<sup>61</sup> *Rees* (HL) (n 1), [6] (Lord Bingham).

<sup>62</sup> On the point, see: Alasdair Maclean, "An Alexandrian Approach to the Knotty Problem of Wrongful Pregnancy: *Rees v. Darlington Memorial Hospital NHS Trust* in the House of Lords" (2004) 3 *Web JCLI* - <<http://webjcli.ncl.ac.uk/2004/issue3/maclean3.html>>, accessed 18 May 2012.

<sup>63</sup> Nicolette Priaulx "Damages for the 'Unwanted' Child: Time for a Rethink?" (2005) 73 *Medico-Legal Journal* 152-163, 161.

<sup>64</sup> *ibid*

<sup>65</sup> See: Priaulx (2005) (n 62), 162: 'Moreover, given that the conventional award is said to recognise the reproductive autonomy of individuals and their 'right to limit the size of their family', which is after all, an 'important aspect of human dignity', one might have some doubts as to how extensive the law's commitment

the award is said to reflect something as intensely personal and individual as autonomy, surely the correct approach would be to emphasise the dignity and respect of that person and not simply 'pay mere lip service to the value of autonomy'.<sup>66</sup> As Prialux argues:

If the law is truly to respect individual autonomy, then it must be recognised that a 'self' is always implicated in that concept – whether the harm is founded in disability, or indeed located in isolation, poverty and hardship – the experience of unsolicited parenthood will be different in each situation, based on differential experience, lives and aspirations.<sup>67</sup>

The courts should apprehend the fact that their decision to forego compensation applies in claims 'in the particular given circumstances of childbirth and child-rearing, circumstances that biologically and socially pertain to the female experience and traditionally fall within the domain of women'.<sup>68</sup> Their decision to treat the loss of all women's reproductive autonomy as equally felt does nothing to soften the discriminatory message. Is it, however, all that surprising that members of the Judiciary, even in the highest appellate court, 'from the skewed masculine viewpoint of a father whose almost exclusive role lies in economic provision'<sup>69</sup>, failed to properly comprehend a loss that is suffered inevitably mostly by the mother. Having advocated a view which suggests that a child is or ought to always be thought as, on balance, a benefit, the courts have left open the question of how this sits with other policies which are accepted by law. Unfortunately, it does not sit well. How can the promotion of the idea of family planning be reconciled with the view that, despite the disappointment of the initial failure, the uncovenanted child is a benefit? If the duty of parenthood is such a benefit, why as a society do we recognise the *need* to allow persons to divest themselves of that duty? If the courts are to show respect for the unavoidably different situations women and men find themselves in in relation to reproduction, they ought to begin by recognising that the obligation involves more than merely financially caring for and subsequently benefitting from the child's existence. This is, after all, an obligation which attaches automatically to the mother and centres, not around financial support but, around caring for the child. The conventional award treats the mother's loss of autonomy as a one-off incident where her expectations are frustrated or opportunities lost which over time will give way to joy and love. Such a view is insidious for the House to take. It overlooks the perennial loss of personal freedom which is suffered by the mother; she is forced to change her lifestyle, submitted to the hands of doctors, unable to rid herself of responsibility without the approval of others, psychologically imbalanced, legally responsible after birth and obliged to care for and supervise the child until it is able to take care of itself, and much more. In the face of this all, how can it be said that a flat-rate award labelled as recognising (rather than protecting) her autonomy is adequate compensation?

The reasoning behind creating the conventional award is clear; *Mcfarlane* 'pure' – and the limited damages approach – was causing an injustice by completely foregoing compensation where a legal wrong had been suffered. The court's attempts to subvert this harshness by allowing *additional* costs where there was a disability, in either parent or child, were creating indistinct and arbitrary lines

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to reproductive autonomy really is. The conventional approach not only risks 'pleasing no one', but if applied across the board...will only further entrench the manifest unfairness that results from its application'.

<sup>66</sup> Prialux (2007) (n 28), 78

<sup>67</sup> *ibid*

<sup>68</sup> *Cattanach* (n 4), [162] (Kirby J).

<sup>69</sup> Alasdair Maclean, "*Mcfarlane v Tayside Health Board: A Wrongful Conception in the House of Lords?*" (2000) 3 *Web JCLI*, <<http://webjcli.ncl.ac.uk/2000/issue3/maclean3.html>>, accessed 28 May 2012.

which may have satisfied justice in the individual case but would have sacrificed formal justice in doing so. The true basis, or lack thereof, of the award is, however, concerning, as is its strict application as a 'one-size-fits-all' measure of the loss of reproductive autonomy where sterilisation procedures fail due to the negligence of the performing doctor. In any event, some four years after the House in *McFarlane* had left open the issue of the claim where the child is disabled, it has once again been left unanswered – it seems likely, though, that that avenue has also been closed. Perhaps most worryingly, nine years on there has not been a single wrongful conception case reported; the implication seemingly being that any dwindling incentive which potential claimants had, which would have allowed some of these unresolved issues resolution, has now been extinguished completely. The 'beauty' of the administrative ease of the award could have removed the wrongful conception claim from the judicial ambit for the foreseeable future at the very least.

### *Never Look a Gift Horse in the Mouth*

It is now necessary to consider the rather exceptional judgment of Lord Scott that highlights, very aptly, how these cases have a tendency to confuse and conjure emotive reactions even behind the mask of what appears to be essentially 'law speak'. It is hardly surprising that these cases tend to provoke such strong reactions from both commentators and judges alike; Lord Scott's attempt to resolve the claim in simple terms demonstrates that even the most straightforward analysis can quickly become muddled.

Lord Scott began his judgment by recognising that, whether a claim was brought in tort or in contract, the general principle of damages required that the claimant be returned to the position she would have been in had the negligence not occurred or, more accurately, had the baby not been born. This was however, he recognised, rather astutely, complicated by the fact that the case involves the birth of a human being.

To avoid this, Lord Scott proposed to approach the issue of damages by way of analogy, considering how professional negligence would look in a context that did not involve these difficulties. This new starting point concerned the negligent performance by a vet of a gelding procedure on a two year old colt; the result being that the colt succeeds in getting a mare in foal whose condition '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'.<sup>70</sup> Though, the mare (rather fortunately) is undamaged by these events, the owner sues the vet for damages. Lord Scott admitted, with ease, that the veterinary costs associated with the unwanted pregnancy and birth would be recoverable<sup>71</sup> but, leaving special claims aside, found it less straightforward to accept the cost of rearing the foal to majority:

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

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<sup>70</sup> *Rees* (HL) (n 1), [134] (Lord Scott).

<sup>71</sup> *ibid*

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.<sup>72</sup>

So, essentially, the owner can either have the foal destroyed immediately or sell it at some later date? The prior being unlikely because it has some tradable value. This tradable value could be used to offset the expense of rearing it to the point of sale. Already, one may well ask whether this analogy is really a close one, given that the child has no (legally) tradable value. After all, while the mare, the gelding and the foal are all mere property, both mother (and father) and child are autonomous human beings. The colt had no determination over whether it was gelded, nor does the mare have determination over what happens to the foal; the only agent capable of determining an outcome in the analogy is the owner of the horses. They are simple possessions of the owner.

There being no difficulty or issue of principle in finding that the owner was unable to claim the rearing costs led Lord Scott to this rather straightforward assessment of the analogous case; he then returned to his astute observation that cases such as *Rees* and *Mcfarlane* are complicated by the fact that human life 'is regarded by society generally and by the law as uniquely precious'<sup>73</sup> and fortunately recognising that the child is 'incapable of value in monetary terms'.<sup>74</sup> This meant that the balance between benefit and detriment could not be struck. Or, perhaps, meant that the child could not be sold. Nevertheless the expense of raising the uncovenanted child must 'result from the decision of the parent(s)...to keep the child'.<sup>75</sup> Despite the rather obvious difference in the two claims, after all 'the originally unwanted progeny is a human being, not an animal'<sup>76</sup>, there were comparisons, since '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 the unwanted pregnancy terminated'.<sup>77</sup> Nor would they have if it was possible to have the child destroyed at birth, as it was for the owner of the foal.<sup>78</sup>

One might have been forgiven at this point for wondering whether Lord Scott was preparing to reconsider the mitigation ethic which had seemingly been put to rest long ago.<sup>79</sup> After all, Hale LJ had recently made a point that whilst mitigation had been rejected so too had the child maintenance costs, meaning that 'the result of their Lordships' decision could well be that some will have no other

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<sup>72</sup> *ibid*

<sup>73</sup> *ibid* [135] (Lord Scott).

<sup>74</sup> *ibid*

<sup>75</sup> *ibid* [136] (Lord Scott).

<sup>76</sup> *ibid* [135] (Lord Scott).

<sup>77</sup> *ibid* [136] (Lord Scott).

<sup>78</sup> See, for discussion of the argument in favour of so doing: Alberto Guibilini & Francesca Minerva, "After-Birth Abortion: Why Should the Baby Live?" (2012) *J Med Ethics (Online)* <<http://jme.bmj.com/content/early/2012/04/12/medethics-2011-100411.full.pdf+html>> accessed 1 June 2012. It should be noted that this article has proved to be very controversial since its publication.

<sup>79</sup> The issue had been dealt with in *Emeh* (n 7), 1024 (Slade LJ): 'Save in the most exceptional circumstances, I cannot think it right that the court should ever declare it unreasonable for a woman to decline to have an abortion in a case where there is no evidence that there were any medical or psychiatric grounds for terminating that particular pregnancy'.

This was later confirmed by Lord Steyn in *Mcfarlane* (n 9), 81.

sensible option (than to have the pregnancy terminated)'.<sup>80</sup> Lord Scott was led to consider the question of 'choice' that was presented. Recognising that whilst most parents would not think of their decision 'as representing a choice'<sup>81</sup>, realising that the owner of the foal exercises 'a true choice'<sup>82</sup>, and for a mix of cultural, moral and religious reasons they are expected to accept responsibility and ensure the well-being of their offspring, which the law reinforces with its own expectations and duties, it may be that there is 'no parallel in the case of the unwanted foal'.<sup>83</sup> So the parents have 'decided' to keep the uncovenanted child, but they have not 'chosen' to keep it? Or, at least, if they have 'chosen', it was not a 'true choice'? Despite accepting that the negligence was the *causa sine qua non* of the costs and a reasonably foreseeable consequence, this, however, according to Lord Scott, did nothing to answer the question of the economic consequences. Given that the avoidance of pregnancy was the outcome for which the parents sought the doctor's services;<sup>84</sup> one may well be inclined to ask: what then of the choice which Ms Rees, and the parents in other cases, *did* make, the choice to permanently forego their fertility?

As the question as to compensation was still unanswered, his Lordship set out to find the determinative considerations, which, fortunately, did not involve comparisons with horses that would help to resolve the issue. First, Lord Scott considered that there was no escaping the fact that the expenses which had been sought for recovery from the negligent doctor had been accepted by the parents as a 'price to be paid'<sup>85</sup> for having the child. As the parents had never suggested that 'the price was not worth paying', was it right to charge the defendant with the costs of providing the parents with something that was of unique value and yet invaluable?<sup>86</sup> As Prialx has noted, 'Was it ever suggested by claimants that the 'price was not worth paying?'<sup>87</sup> Surely the fact that, as his Lordship had already noted, the parents might have thought they had no choice about whether to keep the child means that it was in reality a price which *had to be* paid. As it was been noted in a US case:

The parents made a decision not to have a child. It was precisely to avoid that "benefit" that the parents went to the physician in the first place. Any "benefits" that were conferred upon them as a result of having a new child in their lives were not asked for and were sought to be avoided. With respect to emotional benefits, potential parents in this situation are presumably well aware of the emotional benefits that might accrue to them as the result of a new child in their lives. When parents make the decision to forego this opportunity for emotional enrichment, it hardly seems equitable to not only force this benefit upon them but to tell them they must pay for it as well by offsetting it against their proven emotional damages. With respect to economic benefits, the same argument prevails.<sup>88</sup>

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<sup>80</sup> *Parkinson* (n 13), [66] (Hale LJ).

<sup>81</sup> *Rees* (HL) (n 1), [136] (Lord Scott).

<sup>82</sup> *ibid*

<sup>83</sup> *ibid*

<sup>84</sup> *ibid* [137] (Lord Scott).

<sup>85</sup> *ibid* [138] (Lord Scott).

<sup>86</sup> *ibid*

<sup>87</sup> Prialx (2007) (n 28), 107.

<sup>88</sup> *Marciniak v. Lundborg*, 1990 153 Wis 2d 59, 450 NW 2d 243 (Wisc SC), Wis 73-4, NW 2d 249. An American wrongful conception case.

Nonetheless, his Lordship was convinced that ‘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’.<sup>89</sup> One might well wonder where the fairness in this practice is for the claimant. After all, it is clear that there is *a* loss, a loss for which a monetary value can be placed, what is unclear is the benefit. Generally speaking, the difficulty in determining a precise figure for the damages award does not justify awarding the victim nothing.<sup>90</sup> The court ought to strive to find an appropriate figure to compensate for the wrongdoing.<sup>91</sup> The argument may have been more convincing here, if as the House argued in *McFarlane*, Lord Scott had shown apprehension to the possibility that there could be *no* loss. The possibility, however remote, that there the claimant has not suffered loss surely cannot justify ignoring her assertion that she would have been better off but for the birth of the child, especially in cases such as *Rees* and *Parkinson* where the claim is not only for the ‘normal’ costs but also those incurred over and above due to the disability of either the parent or the child.

Yet these determinative considerations led Lord Scott to conclude that a departure from the normal rules of tort was justified; the exception being based on the ‘unique nature of human life, a uniqueness that our culture and society recognise and that the law, too, should recognise’.<sup>92</sup> So unique, in fact, that it was ‘an acceptable irony’ that the conclusion is the same as the case of the unwanted foal but which had been reached by an entirely different route.<sup>93</sup> How different really were the routes? Both essentially came down to recognising that whilst there was a loss suffered by rearing the new addition this was surpassed by the ‘value’ of that addition. The beneficial value meant that a claim for the burden was ‘absurd’. The irony seems to be that, for Lord Scott, the foal and the child are essentially the same; it is only their type of ‘value’ which is different.

Lord Scott, though, was not finished, as noted, and went on to consider that the ‘frustration of her expectation that her sterilisation operation would safeguard her against conception satisfies justice’<sup>94</sup> and as a result of this frustration she ought to be awarded the conventional award of £15,000. So, the human life so unique and precious that it precludes an award, ironically the same outcome as in the case of a gelded colt, but the ‘frustration’ of having the child is enough for an award of £15,000? Would the ‘frustration’ felt by the owner of the foal justify a conventional award? Or is that negated by the tradable value of the foal? If so, is this not simply stating that a child’s commercial value is £15,000?

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<sup>89</sup> *Rees* (HL) (n 1), [138] (Lord Scott).

<sup>90</sup> Allan Beever, *Rediscovering the Law of Negligence* (Hart Publishing, 2009), 398.

<sup>91</sup> The principle of compensating in tortious cases has long since been settled but was provided aptly in the oft quoted passage in *Livingstone v. Rawyards Coal Company* (1880) 5 App Cas 25, 39 (Lord Blackburn): ‘[W]here any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at 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’.

<sup>92</sup> *ibid* [139] (Lord Scott).

<sup>93</sup> *ibid*

<sup>94</sup> *ibid* [148] (Lord Scott).

*A Horse! A Horse! My Kingdom for... Choice!*

It may well be asked whether 'the mother...is intended to be the equivalent of the unharmed mare or the choice-bearing and therefore unharmed owner'.<sup>95</sup> Whichever character Lord Scott had in mind for the mother in his analogous scenario, if his Lordship did at all, it is clear that he was far less ambivalent toward the notion of choice than his predecessors had been. Choice, obviously, is a central element in these claims, and the lack of express consideration of it is somewhat disconcerting. It is, after all, hardly surprising that one commentator has noted, 'It would be foolish to ignore the fact that many people who see no ethical objection whatever to sterilization (which is, after all, no more than a form of contraception) might have the strongest possible objections to abortion of a healthy foetus'.<sup>96</sup> For if there is a 'true choice' experienced by the claimants, the courts then should, rightly, be able to assess the idea of mitigation. If, however, there is no choice and parents are forced by their moral, religious, societal, or even circumstantial convictions, the exception to the normal rules of tortious recovery seems far more unjust. The failure to pay due attention to the notion of choice in these claims is understandable considering that it would require consideration over the alternatives - abortion and adoption. Given that assessing mitigation would involve deciding whether the decision not to abort the foetus was *unreasonable*, is it astounding that the courts preferred not to explicitly decide on the matter? This, however, is uncomfortable ground to stand on; if it was negligence that placed the claimants in the position of having 'no choice' how can it be said that they are responsible for the financial implications of being placed in that position? Nonetheless, the courts' attitude appears to be that the decision to keep the child is reasonable *because* the child is a blessing. Equally, the decision to terminate the pregnancy will be reasonable if it is chosen. No matter how one puts it, a decision is made reasonable by the fact that it was chosen, whether or not this was a 'true choice', and it is ostensibly for this reason that claimants are responsible for the financial implications.

The court's swift backhand to the notion of parent's mitigating their losses is hardly surprising. The lower courts, which is essentially where the issue would be raised in the majority of cases, are hardly equipped to deal with the moral, philosophical, religious and, indeed, legal implications of challenging the parents reasoning, or even simply asking them to justify it, let alone deal with what would constitute an 'unreasonable' decision not to procure an abortion. Indeed, few have been more vehement in their rejection of the mitigation ethic than Gaudron J, 'That would be about the cruellest and most inhumane submission I have heard put in this Court since I have been here. I must say, it took my breath away when I read the judgments below suggesting that that was a proper form of mitigation'.<sup>97</sup> If we are to take stock of these objections to challenging the decision not to mitigate, and of course realise the political implications *were* the courts to begin challenging such 'decisions'<sup>98</sup>, we must surely begin to lean, as Lord Scott appeared to, toward there being, at least a

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<sup>95</sup> Prialx (2007) (n 28), 107-8.

<sup>96</sup> W.V. Horton Rogers, "Legal Implications of Ineffective Sterilisation" (1985) *Legal Studies* 296-313, at 302.

<sup>97</sup> *Nafte v. CES* (11 Sept 1996), S91/1996, per Gaudron J.

<sup>98</sup> Though the courts have on one occasion willingly rejected a mother's claim based on a failure to mitigate, it was on rather 'safer' grounds – *Sabri-Tabrizi v. Lothian Health Board* (1997) 43 BMLR 190 (Scots (OH)). In this case the mother became pregnant shortly after a failed sterilisation procedure and had the pregnancy terminated. Shortly thereafter, she became pregnant again, this time birthing a stillborn child. The knowledge of her fertility, in respect of the second pregnancy, meant that her conduct was unreasonable in subjecting herself to the risk of pregnancy. Anthony Grubb, "Failure of Sterilisation - Damages for 'Wrongful



possibility, that the 'choice' made and experienced by the parent(s) may not only be a difficult one, but be seen as being no choice at all. It is implausible to say that all will experience the same 'choice' and a myriad of factors will influence this.

For some abortion is a viable option, for others it is not. For some adoption will make a victim of the child, for others adoption is in the best interests of the child. For some it is selfless to have the child adopted, for others it is selfless to keep it.<sup>99</sup> A balance must be struck between the financial burdens of raising the child and estimating the personal bereavement that will be felt after having an abortion or giving up the child for adoption. A balance which, without experience of raising a child, as was the case for Ms Rees may be extremely difficult for the claimant to begin to attempt, let alone actually weigh. This is not to forget the altruistic reasons, the influence of other parties and various other reasons all factoring in to what is, essentially, a decision which the mother must make. Furthermore, it is unlikely that the motivation of the claimant is going to be minimising their losses. Instead, their concern is likely to be doing what they believe is 'right' not only for themselves personally but others who are affected by their choice and, ultimately, the child.

#### *Unique, Precious and Entirely Capable of Valuation*

For Lord Scott, as noted, this was still not determinative of the issue; even if the parents did not have a 'true choice', in the sense that as a result of the rejection of mitigation it is possible to think of there being no decision to be made, the only outcome available was to keep and rear the child, this did not provide an answer as to *why* the parents should be compensated. It was instead the fact that the child is a unique and precious human life which precludes the award of compensation. The fact that there would be a financial burden associated with the duties owed to that unique and precious human being did not alter that, regardless of whether the doctor's services had been sought for the sole purpose of avoiding that child. What, however, does this miss:

It is undeniable that some might regard a healthy child as a joy, but...[if] one decides to undergo invasive medical procedures to remove the prospect of parenting responsibilities, can the failure of that procedure be properly described as a 'joy' or 'good thing'...even when that 'joy' is thrust upon them?<sup>100</sup>

The child may well be unique, precious and incapable of valuation; that does not mean it does not carry a cost.

At this point it is necessary to return to Lord Scott's analogy. For his Lordship the fundamental difference between *Rees* and his analogy was that the child was of 'unique value but incapable of valuation'<sup>101</sup>, but there was a far more important difference which though alluded to, in his recognition that Anthony Rees was a human, not an animal, had never been expressly mentioned.

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Conception" (1985) 44 *CLJ* 30-2, 31, has also suggested that a failure to have the pregnancy terminated with the sole intention being to recover damages might also constitute a failure to mitigate - though, this seems less likely to occur today than when Grubb was writing his article.

<sup>99</sup> See: Katherine Bartlett, "Re-Expressed Parenthood" (1988) 98 *Yale Law Journal* 295-340, at 323: 'She may conclude that although she longs to keep her child, the child would be better off with an adoptive family. In these circumstances, her decision to place her child for adoption is an act of self-sacrifice for the welfare of the child.'

<sup>100</sup> Priaulx (2007) (n 28), 4.

<sup>101</sup> *Rees* (HL) (n 1), [138] (Lord Scott).

The point here is that, whilst the foal, and equally the mare, are living they are not afforded the same respect as the child; they are no more than chattels in the eyes of the law. The life, admittedly, allowed his Lordship the chance to construct a myriad of avenues available to the owner with all but one involving the owner choosing to incur the financial responsibility of rearing the foal. They can, as seen, be reduced to just two. Either the owner can destroy his new chattel or he can sell it at a later date, the profit of so doing negating the cost of its upkeep until that time. If, for example, my negligence were to cause you to acquire a priceless painting, you cannot claim that I have caused you loss - you can either rid yourself of it or you can sell it for your own gain. This is not, of course, an option which is available to the parents in wrongful conception cases; for all the talk of the value of children in our society, they have no value in the commercial sense. They are not tradable. The essence of the claim is 'every baby has a belly to be filled and a body to be clothed'<sup>102</sup>; it says nothing of metaphysical worth or the sanctity of life or the objectification or commodification of human beings and children; the claim is that the child is the cause of loss to the parent(s).

With this in mind, the analogy becomes far less convincing, dubious as it already was, in fact it may be said that Lord Scott's analogy closer resembles the proverb by which this section is titled. The logic of his judgment and those in *McFarlane* seems to be that the parents might have felt they had little or no real choice, but they did have a choice and they exercised it<sup>103</sup>, and by exercising that choice in that way the parent(s) were not only unharmed but benefitted from having the child; as such, they would be advised never to look a gift horse in the mouth. Or, were some of the earlier inferences to be taken further, it may be found that the need to inspect its mouth is gone; a universal value now exists. Each and every child is unique, precious and entirely capable of valuation and that value is £15,000.

## Conclusion

This article has considered two crucial aspects of the judgment of the House of Lords in *Rees*. It has also given a brief explanation of the case law which led to the adoption of such a novel and, it is submitted, highly unconventional approach. Despite the House's clear unwillingness to reconsider *McFarlane*, in light of the damaging onslaught from commentators and attempts to subvert the harshness of its application by lower courts, it is clear that, at least, in its bare form *McFarlane* no longer stands as the highest authority in this area. At a minimum, it can be said that *Rees* is on a par. Although there was hope at the time that *Rees* could have been the first case in an ongoing line of cases which would make inroads into *McFarlane* as unwavering binding authority, hindsight has shown us that *Rees* has removed some of the incentive for claimants to have their case heard thus negating this as a potential outcome.

The conventional award, therefore, might have done more damage than good. Though undoubtedly claimants are, financially at least, better off than before, the invariable one-size-fits-all nature of the award leads to questions as to how an approach which treats all victims as having suffered an identical misfortune can truly be said to respect individual reproductive autonomy. It is surely not the case that the only interference with a woman's autonomy occurs when she is frustrated to discover that her expectations have not come to fruition. Even if this is the only interference

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<sup>102</sup> *Thake v. Maurice* [1986] QB 644, 666 (Peter Pain J).

<sup>103</sup> *Rees* (HL) (n 1), [142] (Lord Scott).

suffered, is £15,000 an appropriate sum of compensation considering only £10,000 is available to those parents that lose a child? In *Rees*, the House was again eager to emphasise that the birth of a child is always a 'blessing', or in the eye of society it is, though this was less explicit than in *Mcfarlane*. Nonetheless, whilst at least recognising that the parents in these cases are not completely unharmed, there remains an implicit feeling that the House believed parents have not truly been injured by the consequences of the doctor's negligence.<sup>104</sup> The problem with this attitude is that it essentially treats the parent's decision to be sterilised as simply *wrong* and its failure has prevented the parent from making a mistake. The implication being that, therefore, *all* decisions surrounding family planning which prevent or postpone one from having children, or decisions to have one's progeny adopted, are irrational mistakes. As Beever argues, 'It is contemptuous of these people to insist that their judgments are simply wrong, because one happens to regard children otherwise'<sup>105</sup>. Surely this is an attitude that, in modern society, is neither true nor that we wish to adopt.

Whilst it is perhaps too much to say that this attitude lives on to quite the extent it did in the wake of *Mcfarlane* its presence cannot be denied. The judiciary from its skewed masculine viewpoint has demonstrated its inability to comprehend the mother's loss - though this 'conventional wisdom' might tell us that 'women are interested in sex for procreation'<sup>106</sup> the reality is that this is no longer true, especially in these cases. Most worryingly, they have demonstrated little consideration of the extent to which the mother's autonomy is violated; deeming it merely a single incident of frustrated expectation occurring equally in all incidents of wrongful conception. In any other circumstance, a victim of wrongdoing would not be expected to pay for the benefit of the product of another's wrongdoing; this is especially so had that victim taken active steps to prevent that eventuality from happening. Why then are these cases any different? The answer, it is submitted, is simple; the courts simply do not understand how parents (particularly mothers) have suffered or will continue to suffer by what is, in their eyes, a joyous event. It is for that reason that the House's judgement, and Lord Scott's in particular, leaves the impression that the claimants are being lambasted for claiming 'injury' and attempting to put a value on their unique and precious gift. That said they are aware that a wrong has been suffered and it is for this reason that the conventional award came into existence. It is, in this author's opinion, time for Parliament to step in and resolve an area of law that is contentious due not only to the failure to produce justice but also because of the lack of respect it has for our reproductive choices.

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<sup>104</sup> On this point, Pedain (n 55), 19-20 argues: 'They did so (blocked the claim in *Mcfarlane*) for reasons of a "legal policy" which, stripped of all linguistic embroidery, boils down to protecting the NHS – vicariously liable for most doctors' negligent blunders – from expensive claims when "nothing worse happened than the birth of a healthy if unwanted child"'.  
<sup>105</sup> Beever (n 91), 391.

<sup>106</sup> Sally Sheldon, "ReConceiving Masculinity: Imagining Men's Reproductive Bodies in Law" (1999) 26 *Journal of Law and Society* 129-49, 130.