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A TURN-UP DOWN UNDER: *McFARLANE* IN THE LIGHT OF *CATTANACH*

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Abstract

*The current position as to recovery of damages for the upkeep of a healthy child born as the result of a negligent sterilisation has been disturbed by the decision of the High Court of Australia in *Cattanach v Melchior*. The High Court rejected the recent ruling of the House of Lords in *McFarlane v Tayside Health Board* and decided in favour of recovery by a majority of 4:3. This paper reviews the antecedent litigation and analyses the conflicting opinions of the seven-judge bench in *Cattanach*. The likely effect on the common law within the Commonwealth is considered in anticipation of the imminent House of Lords decision in *Rees v Darlington Memorial Hospital NHS Trust*.*

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1. Introduction

The repercussions of *McFarlane v Tayside Health Board*¹ have reverberated through the courts of the United Kingdom for some five years and have already been reviewed by the present author.² The major issue in *McFarlane*, of course, lay in the question of whether or not compensation should be paid for the maintenance of a healthy child who was born as a result of negligent advice following a sterilisation operation. It is now common knowledge that the House of Lords unanimously decided in the negative, thereby overturning a similarly unanimous contrary decision reached in the Inner House of the Court of Session.³

It is equally well-known that, despite their decisive unanimity, the disparate reasoning behind their Lordships' individual decisions left *McFarlane* as a less than satisfactory precedent. Yet, insofar as it is possible to extract a single ratio from the case, it is clear that the precedent did not extend beyond the upkeep of a *healthy* child. The combined consequence was a rash of cases, each attempting, in its own way, to circumvent the *McFarlane*-imposed strictures. In this writer's opinion, the majority of these⁴ concerned cases of wrongful birth and, as such, were not directly relevant to the wrongful pregnancy model of *McFarlane*. They are, however, of major immediate interest in that, until the case of *Parkinson*,⁵ in which Hale LJ's clear preference for the approach of the Inner House to *McFarlane* shone through, no judges have shown any marked inclination to disturb the *basic* principle established in the House of Lords. Instead, a very steady tradition has evolved of allowing the costs *additional* to those of rearing a healthy child that result from the extra expenditure involved in the upkeep of a disabled minor.⁶

2. The Australian Response

In the midst of such orthodoxy in the United Kingdom, however, a quiet revolution was brewing in the Antipodes where the Queensland case of *Melchior v Cattana*⁷ was heard at first instance in August 2000. The facts in the case were, essentially, similar to those in *McFarlane*, the main difference being that the allegedly negligent post-sterilisation advice was given to the husband in the latter and to the wife in the former case. The ultimate argument in Mrs Melchior's case was, for procedural reasons, specifically confined to the question of compensation for the upkeep of a

¹ 2000 SC 1 (HL); [2000] AC 59.

² J K Mason, "Wrongful pregnancy, wrongful birth and wrongful terminology" (2002) 6 *Edin LR* 46.

³ *McFarlane v Tayside Health Board* 1998 SLT 307.

⁴ For a full list, see Mason, note 2 above and the later, seminal article by L C H Hoyano, "Misconceptions about wrongful conceptions" (2002) 65 *MLR* 883.

⁵ *Parkinson v St James' and Seacroft University Hospital NHS Trust* [2002] QB 266 – described by Hoyano, note 4 above, as beginning 'the process of subversion' of *McFarlane*.

⁶ In the later, and likely to be most important, case of *Rees v Darlington Memorial NHS Trust* [2003] QB 20 (CA), the extra costs were applied also in the case of a disabled parent. They could not, however, be applied when the parent was wholly disabled: *AD v East Kent Community NHS Trust* (2003) 70 *BMLR* 230 (CA) – a decision which raises considerable concerns in this writer's mind.

⁷ [2000] QSC 285.

healthy, uncovenanted child;⁸ accordingly, this note will be similarly limited. Holmes J had this to say on the subject at the trial stage:

[W]ere there a single, distinct line of reasoning to be discerned from either [McFarlane or CES⁹] I should follow it. However given the divergence of approach, I can see no alternative but to distil from those decisions the reasoning which appeals to me as sound.¹⁰

Holmes J then went on to say that she did not find ‘the public interest considerations identified in other cases so compelling that they dictate a conclusion against the recovery of economic loss by the plaintiffs’;¹¹ she was not prepared to undertake an analysis of the subjective vagaries of distributive justice;¹² she regarded the ‘fair, just and reasonable’ test¹³ as an unsatisfactorily imprecise approach to defining the presence and the extent of a duty of care; and she preferred the reasoning in the Australian case of *Perre v Apand Pty Ltd*¹⁴ to that in *McFarlane* (at para 61). As a result, she awarded the, albeit comparatively modest, sum of \$A 105,249 for the costs of raising the child.

The case was then appealed and the appeal was dismissed by a majority, but the report of the Supreme Court of Queensland, Appeals Division appears not to be available.¹⁵ The nub of the case, however, lies in the subsequent appeal to the High Court of Australia¹⁶ where, as has been indicated, the hearing was limited to the single issue: If, in consequence of medical negligence, a couple become the parents of an unintended child, can a court, in an award of damages, require the doctor to bear the cost of raising and maintaining the child?¹⁷

There is little doubt that, confronted with yet another analysis of *McFarlane*, one is haunted by a sense of déjà vu. There is, one feels, a limit to which the same set of similar arguments can be applied to the same set of similar circumstances. *Cattanach* is, however, an exceptional case. It is the first in which attribution of responsibility for the costs of rearing an uncovenanted, healthy child, who is born as a result of medical negligence, has been addressed by a panel of seven judges in the highest court of a

⁸ I have stolen this adjective from Kennedy J in *Richardson v LRC Products Ltd* (2000) 59 BMLR 185 at 195 in preference to using the pejorative and often inaccurate ‘unwanted’. For explanation, see Mason, note 2 above at note 77.

⁹ *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47 – a case in the NSW Court of Appeal that was widely quoted in *McFarlane*. Leave to appeal to the High Court was given in *CES* but the case was settled prior to the hearing.

¹⁰ See note 7 above at para 50.

¹¹ *Ibid* at para 55.

¹² *Ibid* at para 56.

¹³ *Caparo Industries plc v Dickman* [1990] 2 AC 605.

¹⁴ (1999) 73 ALJR 1190.

¹⁵ *Melchior v Cattanach* [2001] QCA 246. This is the citation quoted by the High Court of Australia. The Australasian Legal Information Institute website, however, reports only a procedural discussion under the heading. It is available online at http://www.courts.qld.gov.au/qjudgment/ca01_201.htm

¹⁶ *Cattanach v Melchior* [2003] HCA 38 (hereafter referred to as *Cattanach*). The subsequent paragraphing in the text refers to this citation unless otherwise indicated.

¹⁷ Per Gleeson CJ at para 1.

Commonwealth country. It is also important in that a panel of judges at the highest level has divided on the issue; it therefore provides an opportunity to analyse discordant views that have been formed as a result of precisely similar court hearings. Finally, it is not since the deliberations in the Inner House in *McFarlane* that we have read positive judicial support for the payment of compensation for the upkeep of an uncovenanted child. A relatively full analysis of *Cattanach* is, therefore, justified on several grounds.

2.1 *McFarlane revisited*

Even at the risk of wearisome repetition, it will be useful to précis the reasons given in the House of Lords for rejecting the McFarlanes' claim for restitution in respect of their daughter's maintenance,¹⁸ the anomaly being that, while all the Law Lords denied being impelled by public policy, it is, in many instances, almost impossible to evade the transparent policy motives underlying their stated reasons.

If one is to find a common thread among the five decisions, the most likely candidate is the reasonableness of saddling the negligent doctor (and/or NHS Trust) with the extensive – and, perhaps, limitless – costs of supporting a child for eighteen years. True, the basis for the finding of *unreasonableness* differed, but the theme is similar whether one is looking at the doctor's expectation of liability, at the threshold on which liability is set, at the proportionality between fault and claim or one is simply using the concept of reasonableness and fairness to set up a form of *Caparo*¹⁹ defence. Even Lord Steyn's appeal to distributive justice is, at base, an appeal to reasonableness.

The second line of argument, led predominantly by Lord Hope, can be categorised as that of the 'impossible assessment' – whether this be founded on the simple difficulty of financial planning for the future or on the more complex issue of comparing economic loss with emotional gain. The third line of reasoning was based on the concept of the 'blessing' of a child to the family.²⁰ Although only Lord Millett came close to accepting this as an absolute value, it was clearly in the minds of the remainder of the bench – modified or reduced, perhaps, to exhibiting an inherent distaste for placing *any* monetary value on a child.

There being no dissenting opinion, then, these were the bricks which the House of Lords offered the Australian High Court as possible foundations for their case.

3. *Cattanach v Melchior in the High Court*

The High Court²¹ was divided on the single issue with which it was confronted and, in the end, decided by a majority of 4:3 to dismiss Dr. Cattanach's appeal. Thus, the

¹⁸ J K Mason, "Unwanted pregnancy: A case of retroversion?" (2000) 4 *Edin LR* 191; Hoyano, note 4 above.

¹⁹ See note 13 above.

²⁰ A concept promoted by Jupp J in *Udale v Bloomsbury Area Health Authority* [1983] 2 All ER 522. See E Cameron-Perry, "Return of the burden of the 'blessing'" (1999) 149 *NLJ* 1887.

²¹ See note 16 above.

result was close run by any standards. We must, therefore, consider the conflicting arguments in some detail.

3.1 For allowing the appeal

To an extent, the arguments for allowing the appeal have been well rehearsed in *McFarlane* and, therefore, are of rather lesser interest in the present context than are those to the contrary. The opinions, however, convey a sense of underlying passion and it is this that the present author hopes to extract; essentially, *Cattanach* represents a well-matched contest between moral and legal principle.

3.1.1 Chief Justice Gleeson

Gleeson CJ's opinion, although probing several avenues, can, one feels, be summarised as adopting the 'public interest' route in support of the integrity of the family unit. He drew heavily on the social aspects of family life and on the obligations that are laid on parents both by statute and at common law which, he reiterated, have always attached fundamental importance to human life (at para 6). Possibly, his approach is most vividly expressed later in para 6:

[I]n this context, the concept of value is ethical not economic. It does not depend upon the benefits, tangible or intangible, that some children bestow upon their parents. ... In the eyes of the law the life of a troublesome child is as valuable as that of any other. ... The value of human life, which is universal and beyond measurement, is not to be confused with the joys of parenthood, which are distributed unevenly.

Even so, he made it clear that the ethical dimension could not foreclose the debate and stressed that the problem to be addressed was legal in nature. Consequently, he declined to categorise the case as one of personal injury; were that the case, he pointed out, the child's father could be dismissed as a 'faintly embarrassing irrelevancy' whereas, in fact, his role was one of the defining features of the claim insofar as it was presented as a joint claim by the parents (at para 9). The claim was, unarguably, one for pure economic loss. Indeed, the impression is left that at least a proportion of Gleeson CJ's antipathy to allowing the damages sought lay in the 'commercial' itemisation of the quantum of damages and the impossibility of defining or limiting these.²²

Gleeson CJ's cornerstone was, perhaps, laid in para 38 where he held that the case concerned the parent-child relationship and that to seek to assign an economic value to that relationship is neither reasonable nor possible. This, in turn, depended on his understanding that actionable damage, if there was any, arose because of the creation of a parental relationship rather than as a result of conception. In the writer's view, this places the claimants in something of a Catch 22 situation. It appears to be saying that they have been forced into a position that involves economic loss; at the same time, however, it is a loss which, short of putting the child up for adoption, they cannot legally avoid; from which it follows that they cannot claim compensation.²³ Be that as it may, the Chief Justice covered his tracks by concluding that 'the law

²² Thus following Lords Slynn and Hope in *McFarlane*.

²³ And see Hayne J at para 244.

should develop novel categories of negligence incrementally and by analogy with established categories'.²⁴ However, recognition of the present claim went beyond that and was unwarranted (at para 39).

3.1.2 Justice Hayne

Hayne J began by acknowledging what some would see as the inexorable consequential cascade of a failed sterilisation – conception and pregnancy, childbirth, the financial consequences of these and the financial consequences of having a further child to maintain and nurture. Each was a foreseeable consequence of its predecessor, all the way back to the negligent advice, and he concluded that the relevant question was not why the mother should be held to be entitled to recover for them but, rather, why she should *not* be so entitled (at para 192). Hayne J also accepted that the consequentialist analysis pointed logically to the existence of a *single* cause of action rather than one split into the effects of pregnancy and economic loss – a conclusion which had previously led to Lord Millett's expression of dissent to the mother's claim in *McFarlane*.²⁵

In his search for the answer to his question, Justice Hayne reviewed the standard explanations as aired in *McFarlane* and dismissed them, largely on the grounds that they miss the fundamental point in an action in tort or delict – that is, restitution of the status quo. In particular, he rejected the theory that to be the subject of litigation must be damaging to the resultant child; the true basis here was that the law should not permit commodification of a child (at para 261) – albeit that the term was not defined.²⁶

In the end, Hayne J broke ranks with the House of Lords and unequivocally based his decision on public policy.²⁷ A fair précis of his position is that the balance of benefit and disadvantage to be derived from motherhood cannot be assessed in monetary terms. Pragmatically, there is no crystal ball with which to see into the future. In principle, even if it could be so measured: 'the parent should not be permitted to attempt to demonstrate that the net worth of the consequences of being obliged to rear a healthy child is a financial detriment to him or her' (at para 247):

*If attention is to be paid to all of the consequences of the defendant's negligence, one of those consequences is that there is a new life in being That life is not an article of commerce and to it no market value can be given The common law should not permit recovery of damages for the ordinary costs of rearing a child.*²⁸

²⁴ Quoting Brennan J in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 481.

²⁵ Hayne J also protested at categorising such actions as 'wrongful conceptions' or 'wrongful births' when the negligence lay in a failure to give proper advice. The writer, however, sees the terms as usefully describing a form of general negligence in specific circumstances.

²⁶ 'Commodification' was used on several occasions – but there was no suggestion that the child would or could be used as a 'commodity'.

²⁷ And, in so doing, gave a careful review of the historic relationship between the courts and the common law – quoting, in particular, *Egerton v Brownlow* (1853) 4 HL Cas 1.

²⁸ At para 255. Interestingly, Hayne J would specifically allow the extra costs involved in the upbringing of a child with special needs (at paras 256 and 263) thus coming into line with *Parkinson*, note 5 above.

Hayne J's innovative solution to his fundamental question was radical and, to an extent, arbitrary. Rather than prolong the conflict between parental duty and the wrongful invasion of the parent's interests, he proposed the development of an inflexible rule in the common law – a rule which would preclude the parent from recovering damages in the circumstances envisaged:

*The parent would be denied treating the child as a commodity to be given a market value. The parent would be denied this because the law should not permit the commodification of the child.*²⁹

3.1.3 Justice Heydon

In this writer's view, Justice Heydon's opinion provides the most comprehensive survey of the 'no recovery' position. He begins with the practicalities to be faced in the future should the appeal be dismissed. These include allowing for the expense of the child's schooling,³⁰ the duration of the upbringing, the importance to be attached to the diminished quality of life to be enjoyed by the parents with a new child to look after, and the difficulties of moderating the damages as related to the economic standing of the parents – the common law of Australia not permitting capping.³¹ All of which looks very like the development of a 'floodgates' argument – 'it does indicate the nature of the litigation which will ensue if recovery is permitted'.³² The uncertainty as to how the money would be spent is also considered.³³

Heydon J's opinion then goes on to concentrate on the moral or public interest arguments that can be used to support a 'no recovery' rule and succinctly expresses the difficulties in making the case:

[I]t has been one thing to reach a conclusion after experiencing revulsion or feeling astonishment or observing a grotesque result. It has been another thing to formulate legal reasoning to support the conclusion reached (at para 317).

Does Justice Heydon succeed where others have failed? The answer must be – yes and no. His is a very long judgment³⁴ which is carefully argued and is underpinned by intense moral conviction. We can pick out some of the main headings and examine these, albeit briefly.

²⁹ At para 261. See also *Jaensch v Coffey* (1984) 155 CLR 549 per Deane J at 583 quoted by Heydon J at para 318.

³⁰ Quoting, inevitably, *Benarr v Kettering Health Authority* [1988] NLJR 179 and *Allen v Bloomsbury Health Authority* [1993] 1 All ER 651.

³¹ But see Kirby J at para 162, note 266. One is reminded of the comparison in the English cases involving disabled children: *Rand v East Dorset Health Authority* (2000) 56 BMLR 39 in which the parents' means were considered and *Hardman v Amin* (2000) 59 BMLR 58 in which they were specifically ignored.

³² Per Heydon J at para 311. Heydon J also criticised the Court of Appeal in *Cattanach* for taking insufficient account of this aspect (at para 322).

³³ A factor that drove the French courts to the unusual conclusion of allowing an action for wrongful life brought on behalf of a disabled neonate: *X c Mutuelle d'Assurance du Corps Sanitaire Francais et a* (2000) JCP 2293.

³⁴ It may be something of a commentary on the difficulties facing the supporters of 'no recovery' that their judgments occupied some 65 pages of transcript; the case for dismissing the appeal was made out in 46 pages.

It begins with an analysis of parental responsibility and, particularly, of the correlative responsibility of the courts towards children by virtue of the *parens patriae* jurisdiction which has ‘stimulated a long history of legislation intended to promote the welfare of children who are neglected or otherwise in peril’.³⁵ The situation is summed up: The law presumes that it is in the interests of children to be under the nurture and care of their parents’ (at para 331). On this basis, the reasoning of the majority in the Court of Appeal is to be found invalid for three reasons:

- i. It leads to an award of damages for a supposed loss in circumstances where what has happened is incapable of characterisation as a loss;
- ii. The award of damages would have the result, ‘entirely alien to the assumptions and goals of the legal system’, of encouraging parental misrepresentation of the parent-child relationship; and
- iii. It tends to generate litigation about children capable of causing the children distress and injury if they hear about it.

Criticism of Justice Heydon’s subsequent attack on these fronts must lie in the fact that, despite frequent appeals to legal principles embodied in both common and statutory family law,³⁶ these are often overshadowed by what can only be interpreted as emotive reasoning. This is not to decry the value and strength of such emotion – this writer and, one suspects, many readers, would agree with much of what is said. Moreover, if, as was suggested in the Court of Appeal, ‘community views’ as to the value of human life have been changed by the ready acceptance of contraception, sterilisation and abortion,³⁷ that is not to say that change *per se* is necessarily a good thing. Heydon J says (at para 353) that ‘a child is not an object for the gratification of its parents, like a pet or an antique car or a new dress’ – which is indisputable. The problem is simply that to say that ‘it is wrong to attempt to place a value on human life or a value on the expense of human life because human life is invaluable’ and that ‘the child itself is valuable ... because it is life’³⁸ (at para 354) does not answer the fundamental question – why should the Melchior *not* be compensated for the financial loss imposed upon them by the negligence of another?

This is, of course, not the sum of Justice Haydon’s case against recovery. He does, for example, make a specific issue of the potential damage to the child who has been the subject of litigation – an objection which, it seems to this writer, is better directed towards public adversarial proceedings in the family court. Nonetheless, the whole tenor of his opinion is epitomised in his conclusion which can bear quotation in full:

³⁵ At para 332. It is to be noted that, whereas the *parens patriae* jurisdiction subsists in Scotland, it is now not available in England. See G T Laurie, ‘*Parens patriae* in the medico-legal context: The vagaries of judicial activism’ (1999) 3 *Edin LR* 95. The point is, however, of little practical importance as the English courts retain their inherent jurisdiction: Children Act 1989, s.100.

³⁶ See, for example, the importance in Australia of the Child Support (Assessment) Act (1989) (Cth), ss. 3, 4, 24.

³⁷ At para 359 quoting McMurdo P and Davies JA *Cattanach v Melchior* [2001] QCA 246 at paras 51, 80-82, which I have been unable to access.

³⁸ I also see a conceptual difficulty for the Courts in this situation in that they must accept this premise but, at the same time, admit that the parents have a free and legal choice of recourse to abortion – at least in the United Kingdom.

*The various assumptions underlying the law relating to children and the duties on parents created by the law would be negated if parents could sue to recover the costs of rearing unplanned children. That possibility would tend to damage the natural love and mutual confidence which the law seeks to foster between parent and child. It would permit conduct inconsistent with a parental duty to treat the child with the utmost affection, with infinite tenderness, and with unstinting forgiveness in all circumstances because these goals are contradicted by legal proceedings based on the premise that the child's birth was a painful and a highly inconvenient mistake. It would permit conduct inconsistent with the duty to nurture children.*³⁹

And probably, at base, that sums up the case put by all three justices who were in favour of allowing the appeal.

3.2 For dismissing the appeal

The appellants in the case based their submission that there can be no award of damages for the cost of rearing a healthy child who was born by virtue of medical negligence primarily on the proposition that, as a matter of policy, the birth of a healthy baby is not a legal harm for which damages may be recovered. This policy, it was contended, reflects 'an underlying value of society in relation to the value of human life'.⁴⁰

Disagreement with this view could, therefore, be expressed in two ways. Either it could be postulated that the 'value' of human life and the cost of living a human life are distinct and the first of these propositions does not follow from the second. Or it could be argued that the rules of tort are established and there was no reason to displace them in the circumstances of this case.⁴¹ Both these approaches were adopted by the majority of 4 justices in the High Court phase of *Cattanach*.⁴²

3.2.1 Justices McHugh and Gummow

Justices McHugh and Gummow quickly raised their colours in stating:

Merely to repeat those propositions on which the appellants rely does not explain why the law should shield or immunise the appellants from what otherwise is a head of damages recoverable in negligence under general and unchallenged principles (at para 57).

The concept of immunity in tort law indicates protection against an action in respect of rights and duties for which the tortfeasor would be liable were it not that the circumstances are such that the public interest warrants his or her protection. But for

³⁹ At para 404.

⁴⁰ *Cattanach v Melchior* [2003] HCA 38 per McHugh and Gummow JJ at para 55.

⁴¹ For discussion of this aspect of *McFarlane*, see J Thomson, "Abandoning the law of delict?" (2000) *SLT* 43.

⁴² Since the House of Lords was unanimous in *McFarlane*, the only previous speeches on the subject in the higher Commonwealth courts which supported recovery are to be found in the appeal stage of *Cattanach* itself (note 37 above) and in the Inner House of the Court of Session in *McFarlane v Tayside Health Board* 1998 SC 389.

immunity to be considered, there must be a duty to breach and the justices, after lengthy discussion, concluded that this was not a case in which ‘immunity’ would be appropriate in respect of family relationships.

It is here that McHugh and Gummow JJ are at their most trenchant. What was wrongful in the case, they said, was not the birth of a third child to the Melchiors but the admitted negligence of Dr. Cattnach (at para 68) – the point that has been consistently argued by those who have found the decision in *McFarlane* unsatisfactory. They were emphatic that the damage suffered by the respondents was not the coming into being of the parent-child relationship:⁴³ ‘The relevant damage suffered by the Melchiors is the expenditure that they have incurred or will incur in the future, not the creation or existence of the parent-child relationship’ (at para 67) and this critical point was emphasised in para 68:

*The unplanned child is not the harm for which recompense is sought in this action; it is the burden of the legal and moral responsibilities which arise by reason of the birth of the child that is in contention.*⁴⁴

Moreover, the Justices refute the suggestion that the costs of rearing a child born as the result of negligence would constitute a novel head of damages:

*[W]hen a plaintiff asserts that, but for the defendant’s negligence, he or she would not have incurred a particular expense, questions of causation and reasonable foreseeability arise. Is the particular expense causally connected to the defendant’s negligence? If so, ought the defendant to have reasonably foreseen that an expense of that kind might be incurred?*⁴⁵

The answer to both questions in respect of the award in issue, they say, should be affirmative.

Having addressed the problem positively, McHugh and Gummow JJ considered the negative approach of refuting the ‘family unity’ argument that underlies so much of the opposition to recovery for maintenance. Allowing that ‘family values’, in the wide sense, represented an element of corporate welfare, they could, nevertheless, perceive no general recognition that persons on the position of the Melchiors should be denied the full remedies of Australian common law. It was, they said:

[A] beguiling but misleading simplicity to invoke the broad values which few would deny and then glide to the conclusion that they operate to shield the appellants from the full consequences in law of Dr Cattnach’s negligence (at para 77)

⁴³ *Vide*, Gleeson CJ at para 26.

⁴⁴ The Justices again disapprove the use of the term ‘wrongful birth’ in this context. The writer contends that this is a misnomer (Mason, note 2 above) and the criticism actually makes the distinction. The negligence of Dr Cattnach – i.e. the uncovenanted pregnancy – is wrongful, not the *birth* of the child.

⁴⁵ Quoting from *Nominal Defendant v Gardikiotis* (1996) 186 CLR 49 per McHugh J at 54.

And, although their argument here takes on the nature of some of the intuitive reasoning adopted by those of the opposing view, one must agree with them that the common law should not justify preclusion of recovery on the basis of speculation.⁴⁶

3.2.2 Justice Callinan

Justice Callinan certainly cheered this writer's spirits by drawing attention to what might be seen as a sophistic approach taken by many of those who have been called upon to adjudicate in cases of wrongful pregnancy. 'I cannot help observing,' he said, 'that the repeated disavowal in the cases of recourse to public policy is not always convincing' (at para 291) and he followed with:

In substance, almost all of the arguments that can be made against the awarding of damages for the costs of rearing a child consequent upon what [could be categorised]⁴⁷ as a wrongful pregnancy case do involve emotional and moral values and perceptions of what public policy is or should be (at para 292).

And, as we have already seen, neither the whole House in *McFarlane* nor the minority of the High Court in *Cattanach* are immune from criticism on one or both counts. Callinan J goes on to list succinctly the various arguments against awarding damages and, since most of these have been rehearsed in the minority opinions already described, there is no need for recapitulation. It is interesting, however, to note that he is not without sympathy for the emotional track – emotions, no matter how strong, must, however, be subservient to legal principle.⁴⁸

As a result, Callinan J found himself bound to confirm the findings of the Court of Appeal. There was nothing novel in the contention that the courts may be called upon to assess what is in reality unassessable with precision or has no true monetary equivalent. Nor was it novel for the court to look solely to financial consequences and to ignore emotional ones (at para 297). The reciprocal joy and affection of parenthood can have no financial equivalent to the costs of rearing a child. One is no substitute for the other.

Justice Callinan's opinion can be summed up in one extract which is so definitive as to require no further comment:

The applicants were negligent. The respondents as a result have incurred and will continue to incur significant expense. That expense would not have been incurred had the first applicant not given negligent advice. All the various touchstones for, and none of the relevant disqualifying conditions against, an award of damages for economic loss are present here (at para 299).

⁴⁶ At para 79. The reference here was specifically to speculation as to the effect on the resultant child but it is clear that it could be applied generally.

⁴⁷ Quoting Lax J in the Canadian case *Kealey v Berezowski* (1996) 136 DLR (4th) 708 at 723 as the authority. See also the Canadian academic B Dickens "Wrongful birth and life, wrongful death before birth, and wrongful law" in S A M McLean (ed) *Legal Issues in Human Reproduction* (1989), ch 4; Mason, note 2 above.

⁴⁸ At para 296. The quotation from *De Sales v Ingrilli* (2002) 193 ALR 130 per Callinan J at para 189 is particularly appropriate: "That a judge might find a task distasteful is not a reason for the judge not to do it".

3.2.3 Justice Kirby

I have left the opinion of Kirby J to the last, largely because it is written in such a concise way as almost to demand treatment as a ‘Summary and Conclusions’. Its language is also uncompromising; it has the hall-mark of ‘the last word on the subject’ – though, in passing, one doubts very much if that will be the case.

Justice Kirby epitomised the problem as that, there being no binding authority on which to depend, it had to be resolved by resort to the usual sources of the common law - the state of any legal authority that may be developed in the new circumstances, considerations of legal principle, and considerations of legal policy.

As to the first, Kirby J pointed to an interesting difference between the common law of Australia and that of the United Kingdom in relation to the current issue. *McFarlane*, he suggested, was decided, at least in major part on *Caparo* principles⁴⁹ - that the imposition of a duty of care depended, inter alia, on whether it was fair, just and reasonable to do so. *Caparo*, however, has not been followed in Australia;⁵⁰ accordingly, *McFarlane* provides no foundation of legal principle for guidance in *Cattanach* – and Kirby J went on to deplore how far from principle the later English decisions had drifted and to forewarn the Australian courts against following the same path.⁵¹ Judges, he said, should be willing to take responsibility for applying the established judicial controls over the expansion of tort liability but they have no authority to adopt arbitrary departures from basic doctrine:

Least of all may they do so, in our secular society, on the footing of their personal religious beliefs or ‘moral’ assessments concealed in an inarticulate premise dressed up, and described, as legal principle or legal policy (at para 137).

These are sharp words by any standards - I fancy one would not feel easy taking guard with Justice Kirby fielding in the slips!

Importantly, Kirby J set out a helpfully structured assessment of the various options – or, perhaps better, scenarios – with which the court may be confronted when considering claims for the costs of rearing an unplanned child.

Option 1 – the child is born healthy and no damages of any kind are awarded (an option which, in the current series, only Lord Millett, in *McFarlane* has adopted). This solution, in Kirby J’s view, could be traced back to religious or social views resting on specific attitudes to the dignity of the human person – or, in shorthand, to the assumption that the birth of a child is an inalienable blessing;⁵² to hold otherwise strikes at the foundations of family life and, hence, society. This, and several ancillary

⁴⁹ See note 13 above. This assessment is now generally accepted; see, for example, Brookes LJ in *Parkinson*, note 5 above.

⁵⁰ See, in particular, *Perre v Amand Pty Ltd* (1999) 198 CLR 180; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 194 ALR 337.

⁵¹ At para 128, quoting Hoyano, note 4 above. Although none of the cases are direct comparators with *McFarlane* aside from *Parkinson*, note 5 above and, now, *Rees*, note 6 above – a case which concerned the birth of a healthy child to a disabled mother and which is now under consideration by the House of Lords.

⁵² See Jupp J in the early English case of *Udale*, note 20 above at 531. But, even here, Jupp J actually adopted Option 2, below.

arguments, have been expressed in the minority opinions already described and were dealt with by Justice Kirby in summary fashion:

The notion that in every case, and for all purposes, the birth of a child is a 'blessing' represents a fiction which the law should not apply to a particular case without objective evidence that bears it out (at para 148).

Neither the invocation of Scripture nor the invention of a fictitious oracle on the Underground⁵³ ... authorises a court of law to depart from the ordinary principles governing the recovery of damages for the tort of negligence (at para 151).

In addition, compensation for the costs of upbringing may be difficult to calculate but it is a relatively straightforward calculation when compared with other judicial exercises and 'the experience of post-birth parental love would usually allay the hypothetical hurts attributed to hypersensitive children later learning that their birth was unexpected'. And, in concert with McHugh and Gummow JJ: 'To deny such recovery is to provide a zone of legal immunity to medical practitioners ... that is unprincipled and inconsistent with established legal doctrine' (at para 149).

Option 2 - limiting compensation to the immediate damage resulting from pregnancy and childbirth - is what can be seen as the *McFarlane* solution, and, again, Justice Kirby does not mince his words. Acting on his basic criticism that there was no unanimity in the House of Lords' speeches to mark out clearly the limits of what might be recovered, he said:

... [T]he diverse opinions illustrate what can happen when judges embark upon the "quicksands" of public policy, at least when doing so leads them away from basic legal principle (at para 158).

More specifically he pointed out, correctly, that severing the causal links between the various, and equally foreseeable, outcomes of pregnancy is incontestably arbitrary. Moreover: 'The propounded distinction between immediate and long-term costs of medical error is not drawn in other cases of medical negligence. It is arbitrary and unjust in this context' (at para 162). The former statement is certainly true; the latter epitomises the whole, lengthy debate.

Option 3 - recovery is available for the extra costs of maintaining a disabled neonate (the *Parkinson* solution) - would, now, seem to be the recognised United Kingdom policy within the appropriate scenario. Kirby J, however, again sees compensation for *extra* costs of rearing a disabled child as arbitrary and as reinforcing views about disability that are contrary to contemporary Australian values that are reinforced by the law.⁵⁴ He returns to Lord Steyn's commuter on the Underground and castigates those who would hold that, whereas it would 'stick in his or her gullet',⁵⁵ to allow recovery under Option 2, it would not do so in the case of a disabled child.

⁵³ An allusion to Lord Steyn's now legendary dispenser of distributive justice in *McFarlane*.

⁵⁴ At para 166. This aspect is also argued by Justices McHugh and Gummow at para 78.

⁵⁵ A phrase introduced by Longmore J in the trial stage of *Parkinson* (unreported). See *Parkinson*, note 5 above at para 95.

With the greatest respect, it seems that Justice Kirby goes off course here. Disapproval of a ‘stick in the gullet test’ on the basis that many judges are too old to appreciate the changing face of sexual mores⁵⁶ is, at base, disapproval of the *McFarlane* position as well as that of *Parkinson*. Once it is appreciated that the distinction has nothing to do with either family values or disability discrimination but is simply a matter of imposed costs, the ordinary man or woman - whether travelling by aircraft, train or omnibus - can approve the latter while disapproving the former case with equanimity. Certainly, as Justice Kirby says, later English judges have been forced into this ‘unhappy differentiation’ and certainly the logic of the position is suspect,⁵⁷ but most people would see this as being no more reprehensible than making the best of a bad job - always, of course, assuming that *McFarlane* is a bad job.⁵⁸

Option 4 offers the saving alternative of adhering to ordinary recovery principles but, at the same time, providing for the ‘off-set’ of the joys of parenthood. Vast quantities of print have been expended on this question, especially in the United States where the principle has been both accepted and rejected. Justice Kirby was once attracted to the option but has discarded it as being unjustifiable on general legal principles.⁵⁹

It will be remembered that it was also rejected in *McFarlane* but this was largely because of the difficulty, not only of comparing like with unlike, but also because of the difficulty of assessing the ‘benefits’ - a difficulty which led Hale LJ to the useful, if fictitious, concept of a ‘deemed equilibrium’ of cost and benefit in *Parkinson*.⁶⁰

Option 5 - compensation to include the foreseeable costs of child rearing, which could be described as the *Emeh* option⁶¹ or the *status quo ante McFarlane*. This, of course, was the option accepted by the majority in the Court of Appeal in *Cattanach* with which Kirby J agreed. Effectively, failure to do so would be an arbitrary departure from the principle of corrective justice. ‘Any such, denial is the business, if of anyone, of Parliament not the courts’ (at para 180). In a concession to the House of Lords, Justice Kirby acknowledged that concern to protect the economic viability of the National Health Service might help to explain its resort to ‘distributive justice’; such concerns could, however, find no place in Australian public policy.

4. Summary and Conclusions

So, there it is - an undoubted turn-up down under which may or may not have been expected. It cannot be denied that, from this writer’s point of view, it was hoped for,

⁵⁶ As he does at para 164. In passing, it is to be noted that Lord Hope, for example, is 65 years old, which scarcely qualifies him as a Victorian moralist.

⁵⁷ Principally on the grounds that you cannot calculate an ‘added’ expense without attaching a notional economic ‘value’ to the normal child.

⁵⁸ It is difficult to see how one can refute the reasoning of Lord Cameron in *Allan v Greater Glasgow Health Board* 1998 SLT 580 at 584.

⁵⁹ The principles are also extensively analysed by McHugh and Gummow JJ at para 90.

⁶⁰ See note 5 above at para 90. Some, of course, might regard this as a fiction too far. See, for example, Robert Walker LJ in *Rees*, note 6 above at para 35.

⁶¹ *Emeh v Kensington and Chelsea and Westminster Area Health Authority* [1985] QB 1012 (CA). A recent relevant contribution from the United States makes a strong plea for recognition of this option in that country: P Baugher, “Fundamental protection of a fundamental right: Recovery of child-rearing damages for wrongful pregnancy” (2000) 75 *Wash L Rev* 1205.

but one is left with a strange sense of a pyrrhic victory. The reason for this is difficult to identify but, possibly, lies in the fact that, for the first time,⁶² opposing arguments are juxtaposed in the same case report; the strength of the minority view - which, it could be said, is expressed more coherently and intensely than it was in the House of Lords in *McFarlane* - is, thereby, amplified.

4.1 The case against the minority view

Nevertheless, once one returns to an objective perspective, it remains clear that it is a view that is difficult, if not impossible, to sustain on legal principles as they now stand. The minority in *Cattanach* reach their conclusions in varying ways and this is a feature of all such decisions - and, in particular, of *McFarlane* where the variety of routes to the same end that were adopted has been a source of confusion ever since. And the more one looks at it, the more it becomes evident that this must be so, simply because there is no self-evident common law to support the case. It remains regrettably true that judicial attempts to impose common law based on public policy or interest can, at the end of the day, only be founded on the individual judge's interpretation of what *is* the public interest. Although it has been said repeatedly before, this is because, despite their underlying appreciation of the fact, the majority of the judges who have decided against recovery for the upbringing of an uncovenanted child has done so because it is seen as placing a value on a child - whereas the true issue is that of the *costs* of maintaining a child.

It is all very well to outline the civil and criminal law which governs family relationships but it is quite another to extrapolate this so as to create a moral Utopia in which families live. Statute law deals with specific situations. Thus, when the law states that the interests of a child will be paramount, it refers to those circumstances in which there is a conflict of interests - it does not place a value on a child and it does not say, or even imply, that the child is invaluable. Indeed, one wonders if those who oppose compensation for the results of a wrongful pregnancy are not arguing against themselves. In practice, one's interests are better served in an ambience of financial security than poverty; given, then, that the child's interests are paramount, any measure that will, in theory, improve that ambience is serving the letter as well as the spirit of family law.

Probably, we would all want to live in Utopia but it is unlikely to be a low-cost area. Those who oppose restitution are forcing a Utopian existence on uncommitted parents without, at the same time, appreciating that they may well not have a free choice - it may be, simply, that they cannot afford to live there. In short, they are expressing a moral paternalism without, themselves, having to undertake paternal responsibilities.⁶³ It is virtually impossible to see that recognition of these facts is, in any way, striking at the roots of family life; in fact, the scene is set for precisely the opposite result. What they are seeking is not that the affected family should accept their moral values but, rather, a greater degree of enforced acceptance not only of

⁶² Apart from the appeal stage of *Cattanach* which has not been considered here.

⁶³ Or, of course, maternal. I have expressed elsewhere (note 2 above) my appreciation of Hale LJ's analysis of parenthood in *Parkinson*, note 5 above at para 70. What she says about a disabled child is immediately transferable to the healthy child.

those values but of their economic consequences. And this is what is wrong with the decision in *McFarlane* and right in that in *Cattanach*.

4.2 The case for the majority

By contrast, the crisp and relatively uniform approach taken by the majority in *Cattanach* is extremely difficult to refute. All the ingredients and the consequences of the law of tort are present. The birth of a child is a foreseeable consequence of a negligent management of an operation designed to sterilise a patient and the consequent costs of maintaining that child are not only equally foreseeable but cannot be avoided by dint of statute law - and there is nothing novel in recompensing consequential damage. Moreover, it is impermissible to balance the benefits to one legal interest against the loss occasioned to a separate legal interest⁶⁴ - the problem of 'set-off' can, therefore, be avoided on principle.

The case made by Kirby J is particularly strong although, in places, one feels that it could have been phrased in more sympathetic terms. To dismiss a deeply considered opinion as relying on public policy 'with a passing nod towards the law's respect for the sanctity of life and occasional invocations of Scripture' smacks, once again, of legal sledging⁶⁵ which some umpires might regard as unfair. The opinion does, however, point us to two considerations that have not, as yet, been seriously addressed in this review.

First, we are reminded of the decision in *CES*⁶⁶ which we might regard as an Option 6 and which has not been reconsidered. Here, it was accepted 'as the highest common denominator of the majority' that expenses for the upkeep of an uncovenanted child were recoverable up to the time when the parents could have opted for its adoption. Justice Kirby dissented from this view which was scarcely discussed in *McFarlane*.⁶⁷ Although, perhaps, taking a minority stance, this writer feels that the option should not be foreclosed - legal principle as to limitation of damage notwithstanding. The importance of a woman's autonomy is, of course, agreed. Nonetheless, it is at least arguable that the exercise of that autonomy involves acceptance of the consequences of the exercise. This is no place to open the subject in depth but one can still wonder whether the *CES* decision may not be, in fact, the option which, all things considered, is the most fair, just and reasonable.

Which brings us to the second reminder which is that, despite Justice Kirby's earnest endeavours, *Caparo*⁶⁸ is currently rejected as a precedent in Australia. The importance of this is, of course, that as Justice Kirby points out at para 121,

⁶⁴ Per McHugh and Gummow JJ at para 90. This, however, depends on the assumption that the benefits arising from the birth of a child are not legally relevant to the head of damage that compensates for the cost of maintaining the child - and the authorities, particularly in the U.S.A., are by no means uniform on the point.

⁶⁵ At para 159. See also para 151.

⁶⁶ At para 113. See also note 8 above.

⁶⁷ Such discussion as there was concerned, mainly abortion and abortion was the issue raised in *Emeh*, note 61 above. The present writer sees a conceptual difference between abortion and adoption insofar as human life is preserved in the latter; the *moral* content of each choice is, therefore, of a different character.

⁶⁸ See note 13 above.

McFarlane and *Cattanach* have been decided on different principles. The two opposing decisions are, as a result, not incompatible and we do not have to paint a scenario in which two of the highest courts in the Commonwealth are at loggerheads.

Weir,⁶⁹ who believed the *McFarlane* decision to have been correct, said that, at the same time, we should not be surprised if the reasoning was uneasy:

[W]henever it enters the family home, the law of obligations – not just tort but contract and restitution as well – has a marked tendency to go pear-shaped.

Who, then, is to restore the symmetry of the homely apple? Many of us hoped for an answer in *Rees* when it reached the House of Lords⁷⁰ – but they were to be disappointed.⁷¹ Does the responsibility, then, rest with Parliament as was considered by Kirby J himself.⁷² An open vote in Parliament would be likely to be close and it is interesting to look at the help the members might derive from the courts. Considering all the judges who have been involved in *McFarlane* and its direct comparators, the Australian count is seven for recovery and four against. The UK equivalent is three in favour and six against although, if *Parkinson* were admitted to the pool, the figures would be even. *Rees*, which will be the subject of many analyses, unfortunately pays scant attention to *Cattanach* and appears to this author to do little more than confuse the issue. The end of the *McFarlane* saga may still lie in the distant future.

⁶⁹ T Weir, “The unwanted child” [2000] *CLJ* 238.

⁷⁰ The Court of Appeal decision in the case is fully discussed in Hoyano, note 4 above.

⁷¹ *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52. For a précis, see *The Times*, 21 October 2003.

⁷² At para 180.