**[2001] 1 FLR 419**, [2001] Fam Law 103, | [*[2000] All ER (D) 2460*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-V251-JJK6-S2N6-00000-00&context=1522468)

# [*LEE v TAUNTON AND SOMERSET NHS TRUST [2001] 1 FLR 419*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5VNN-8F21-JN14-G2V0-00000-00&context=1522468)

Queen's Bench Division

Toulson J

1 November 2000

**Damages — Birth of child — Failure to diagnose foetal disability — Opportunity to terminate pregnancy lost**

*Adrian Palmer QC for the first claimant (Mrs Lee)*

*Jeremy Stuart-Smith QC for the defendants*

*The second claimant (Mr Lee) did not appear and was not represented.*

1 November 2000

TOULSON J:

*Introduction*

This is an application by Mrs Lee for an interim payment. Civil Procedure Rules 1998, Part 25, r 25.7 provides that the court may make such an order only if it is satisfied that, if the claim went to trial, the claimant would obtain judgment for a substantial sum of money (other than costs) against the respondent to the application; and that the court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment.

In this case the claimant has obtained judgment by consent for damages to be assessed and has already received an interim payment of £120,000. She now seeks a further interim payment of £100,000. The question is whether she can properly satisfy the court that the amount presently sought is no more than a reasonable proportion of the likely final award.

*The facts*

Mr and Mrs Lee were married in 1994. They both had histories of epilepsy, which made it necessary for them to take anti-convulsive medication. Soon after the marriage Mrs Lee consulted her general practitioner because she wanted to start a family. He referred her to a clinical genetic nurse at Musgrove Park Hospital in Taunton, which is run by the defendant trust. On 8 August 1994 the nurse, Mrs Heather Skirton, saw Mr and Mrs Lee and discussed with them the risks, including particularly the risk of foetal abnormality resulting from the sodium valproate medication being taken by Mrs Lee. Mrs Skirton made a note that whilst they were not really concerned about a child having minor features of valproate syndrome or anything

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operable such as a cleft lip, they would wish to terminate a foetus with NTD (neural tube defect); and she advised Mrs Lee that in pregnancy she should undergo a high-resolution foetal abnormality ultrasound scan. This would be done at 18–29 weeks' gestation.

In due course Mrs Lee became pregnant, and her pregnancy was confirmed by her general practitioner on 28 April 1995. Shortly afterwards he referred her to a consultant gynaecologist and obstetrician at Musgrove Park Hospital for consultant care during her pregnancy. At the consultant's request, on 4 August 1995 Mrs Lee underwent a high-resolution ultrasound scan which was specifically designed to detect any abnormality of the foetus, including any neural tube defect such as spina bifida. Mrs Lee was then at 18 weeks' gestation.

The images were examined by a radiologist employed by the defendants. He reported no abnormality. It is accepted that he was negligent. In fact, the scan revealed specific abnormalities diagnostic of spina bifida, which he ought to have detected and reported. If Mrs Lee had been told the true position, she would have had her pregnancy terminated. But she proceeded to term and gave birth to a son, George, by Caesarean section on 4 December 1995.

George was born with a large open spina bifida lesion with bi-lateral club feet and hydrocephalus. The lesion was closed surgically, but an assessment at 6 months showed that he was considerably handicapped due to a major spinal defect, hydrocephalus, a neurogenic bladder, rectal prolapse and lower limb deformity.

George has been the subject of reports by a consultant paediatric neurologist, Dr Gwylyn Hosking. The most recent is dated 24 August 2000. It presents a very bleak picture, as appears from the following extracts:

'During this last two years this boy has had a large number of seizures and several admissions to hospital, two to intensive care …

George is a profoundly handicapped little boy. There has been little in the way of cognitive development and I agree with others that have suggested his development has been no greater than a infant of one year of age. I think it is rather less. There is also some self stimulatory behaviour which is worrying and may itself account for the maternal impression that in some ways George has deteriorated. This is of particular concern and demands that there is a need to have an extremely active intervention programme here on an indefinite basis to try and ameliorate or prevent this.

George is about to be admitted into a school for children with special needs but during the school vacation while he was seen by me both his Opportunity Nursery provision has ceased as have the Portage Programme. He has been left with minimal professional service support apart from his respite care …

This is a boy with complex needs. He has needs in terms of very poor cognitive function in order to try and overcome self stimulatory behaviour and enable him to interact with his environment and learn. He will I believe need highly specialised educational input throughout all of his childhood and adolescent years and will require the support of services for adults with profound learning difficulties …

This boy has a major physical disability which is permanent. He has

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already had the trauma of twelve surgical adventures and more are scheduled. It is not for me to comment on the wisdom or the vision of these interventions but I certainly cannot see that there is any prospect that this boy will ever walk with any appliance which exists at present …

The original spinal lesion that this boy has, has given rise to not only profound motor paralysis below the legs but also a paralysis of the bowel and bladder.

There is already severe limitation in providing care for this boy in the environment in which he and his mother live. The bathroom is far too small and it is quite right that there will need to be a hoist in order for this boy to be appropriately bathed, which in his case is more important than for many others. This will be impossible within the existing bathroom for which there seems no prospect of an extension …

While this boy does have what seems to be good hand function he has profound cognitive imbalance. It is impossible to prognosticate exactly as to this boy's life expectancy but I would have to express the view at this stage that I would be very surprised if George managed to survive much past the age of twenty years. The constellation of problems that he has are such that his continued existence over a significant period of time is likely to be very precarious.'

(The reference to George living with his mother is explained by the fact that earlier this year Mr and Mrs Lee separated and Mr Lee now has another partner.)

The basis for the interim application is that money is urgently needed to improve upon the 'minimal professional service support' referred to by Dr Hosking and to enable Mrs Lee to move to a house with a bathroom capable of meeting George's needs.

*Merits of the case*

On the facts as summarised, I am strongly sympathetic to the application.

As Mrs Lee and the defendants both knew, the object of the scan was to discover if there was any detectable sign of serious foetal abnormality so that Mrs Lee should be able to exercise the choice allowed to her in law under the Abortion Act 1967 to have a termination of her pregnancy if such were the case. The result of the radiologist's negligence was to deprive her of the opportunity to exercise that choice and thereby avoid the physical, emotional and economic burdens which she now bears by reason of her legal responsibilities and her maternal sense of duty towards her grossly disabled child.

Since it is the object of the law of damages to put the injured party, so far as money can, in a position equivalent to that which she would have been in but for the breach of duty (*Livingstone v Rawyards Coal Co* [*(1880) 5 App Cas 25*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KKX1-JKHB-64J8-00000-00&context=1522468)), in this case one would expect that to include the cost of making reasonable provisions for George's needs, for whom the burden of caring falls on Mrs Lee.

It is true that economic loss, unless consequent on personal injury or damage to property for which the sufferer has a right to sue, is normally regarded for the purposes of the law of negligence as an accident of life which must lie where it falls, regardless of the fact that some other human being has been the instrument of the misfortune. This is because it is

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considered that it would be too great an interference for the state, through the courts, to seek to regulate economic welfare and redistribute economic losses by the law of negligence. Every day countless people suffer economic loss of one kind or another through acts or omissions of others, and to seek to apportion blame and redistribute such losses would involve massively cumbersome and expensive legal machinery.

However, the courts have departed from that general approach in certain cases where such a special relationship exists between the injured party and the party who has caused the injury that to allow recovery would not be open to the same general objection and to refuse recovery would seem a denial of justice. The special relationship principle was established in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [*[1964] AC 465*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G4CY-00000-00&context=1522468) and more recently re-examined in *Henderson and Others v Merrett Syndicates Ltd and Others*; *Hallam-Eames and Others v Merrett Syndicates Ltd and Others*; *Hughes and Others v Merrett Syndicates Ltd and Others*; *Feltrim Underwriting Agencies Ltd and Others v Arbuthnott and Others*; *Gooda Walker Ltd (In Liquidation) and Others v Deeny and Others* [*[1995] 2 AC 145*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KKV1-JGBH-B1XC-00000-00&context=1522468), in particular by Lord Goff of Chieveley at 178–131. Various phrases have been used to express the nature of the principle and the circumstances in which it applies. It has been said that it applies where there is a relationship equivalent to contract, that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract. It has been said that it applies where a person possessed of a special skill undertakes to apply that skill for the assistance of another person who relies upon such skill.

Lord Goff of Chieveley set out what he regarded as the key passages from *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [*[1964] AC 465*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G4CY-00000-00&context=1522468) in his speech in *Henderson and Others v Merrett Syndicates Ltd and Others*; *Hallam-Eames and Others v Merrett Syndicates Ltd and Others*; *Hughes and Others v Merrett Syndicates Ltd and Others*; *Feltrim Underwriting Agencies Ltd and Others v Arbuthnott and Others*; *Gooda Walker Ltd (In Liquidation) and Others v Deeny and Others* [*[1995] 2 AC 145*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KKV1-JGBH-B1XC-00000-00&context=1522468) and, at 181, added his explanation why there is no problem in cases of this kind about liability for pure economic loss:

'… the concept provides its own explanation why there is no problem in cases of this kind about liability for pure economic loss; for if a person assumes responsibility to another in respect of certain services, there is no reason why he should not be liable in damages for that other in respect of economic loss which flows from the negligent performance of those services. It follows that, once the case is identified as falling within the *Hedley Byrne* principle, there should be no need to embark upon any further inquiry whether it is “fair, just and reasonable” to impose liability for economic loss …'

In the present case the relationship between Mrs Lee and the defendants was equivalent to contract. It should not make any difference in a civilised system of law whether Mrs Lee underwent the scan as an NHS patient or a private patient. The radiologist possessed a special skill. He undertook to report on what the scan revealed and, by necessary implication, to exercise a proper degree of professional skill in so doing. The defendants knew that

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Mrs Lee would depend on the professional advice she was given over the critically important question whether her pregnancy should continue or be terminated. They knew that Mrs Lee had already stated she would wish to have a termination if the foetus suffered from a neural tube defect, as to which she was dependent on receiving proper information and advice from the defendants.

The present case therefore appears to me to fall squarely within the 'special relationship' principle.

What is the argument to the contrary? Mr Stuart-Smith QC founded his sensitively and skilfully presented argument on the decision of the House of Lords in *McFarlane and Another v Tayside Health Board* [*[2000] 2 AC 59*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468). The defendants' case is that, in the light of *McFarlane*, the only damages which Mrs Lee is entitled to claim are damages for the extra pain which she suffered during the last 4 months of her pregnancy and the extra shock and distress of discovering that George suffered from spina bifida, as compared with the pain and shock which she would have suffered if she had discovered the condition of her unborn child in August 1995 and then undergone a termination of the pregnancy. That case, Mr Stuart-Smith submitted, is at least sufficiently arguable to prevent the court from being satisfied at this stage that Mrs Lee will obtain a significantly greater award of damages than the amount which has already been paid to her.

*McFarlane and Another v Tayside Health Board* [*[2000] 2 AC 59*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468)

Mrs McFarlane became pregnant after her husband had undergone a vasectomy and (as it was alleged) had been negligently misinformed that he was now sterile. She gave birth to a healthy child. The House of Lords held that, if there was negligence, she was entitled to general damages for the pain, suffering and inconvenience of the pregnancy and childbirth, and to special damages for extra medical expenses, clothing and loss of earnings associated with the pregnancy and delivery, but not for the cost of caring for the child.

There are therefore two obvious factual distinctions between *McFarlane* and the present case. Firstly, *McFarlane* did not result from negligent advice intended to be acted upon by the mother in making a decision whether to have her pregnancy terminated. Secondly, Mr and Mrs McFarlane's child was healthy. Lord Steyn stated, at 84, that 'counsel for the Health Board was inclined to concede that in the case of an unwanted child who was born seriously disabled the rule may have to be different', but there was no argument about that issue and no consideration was given to it in the judgments beyond noting the fact that it did not arise for decision.

Counsel on both sides were agreed that it was not possible to extract a single ratio decidendi from the case, but they otherwise disagreed in their analyses of it and its impact, if any, on the present case.

Mr Palmer QC submitted that the claim for care failed in *McFarlane* because of the impossibility and offensiveness of attempting to balance the benefits of a healthy child against the burdens of a healthy child, and that it was this factor which led the House of Lords to hold that a duty of care did not extend to cover the economic losses arising from the wrongful birth of a healthy child; but that this had no relevance in the case of a parent seeking compensation for the additional consequences of disability.

Mr Stuart-Smith submitted that there is no essential distinction to be

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drawn between cases of a failure properly to perform a vasectomy (or properly to report on its results) and of a failure properly to report on the results of an ultrasound scan; that the scale and character of the duty in either case should not be affected by whether the child is particularly at risk of being born disabled; that it is not sensible to say that the defendant trust in this case assumed responsibility for the large costs associated with the care of a disabled child, when the Tayside Board was held not to have assumed responsibility for the smaller costs of maintaining a healthy child; that it is invidious to weigh in the balance the relative benefits and burdens not only of a healthy child, but of any child; and that it would be neither just nor sensible to try to draw an arbitrary line between a 'healthy' child and a 'disabled' child, when disability is a matter of infinitely variable degree. For all of those reasons he submitted that no proper distinction is to be drawn between this case and *McFarlane*.

The greater part of the argument was spent in examining the speeches in *McFarlane*, and I am grateful to both counsel for the way in which they did so.

Lord Slynn of Hadley, at 75–76, analysed the question as one of the extent of the duty of care which was owed to Mr and Mrs McFarlane. He observed that in order to create liability in respect of economic loss, there may have to be a closer link between the act and the damage than mere foreseeability. He cited *Caparo Industries plc v Dickman and Others* [*[1990] 2 AC 605*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KKX1-JKHB-64FF-00000-00&context=1522468) for the proposition that there should be a relationship of 'neighbourhood' or 'proximity' between a person said to owe the duty and the person to whom it is said to be owed, and that this depended on whether it was fair, just and reasonable for the law to impose the duty.

He recognised that the doctor undertook a duty of care in regard to the prevention of pregnancy, but he said that it did not follow that the duty included avoiding the costs of rearing the child if born and accepted into the family. He concluded that it was not fair, just or reasonable to impose on the doctor liability for the consequential responsibilities, imposed on or accepted by the parents to bring up a child, and that the doctor did not assume responsibility for those economic losses.

In stating that conclusion Lord Slynn of Hadley did not explicitly identify his reasons, and counsel suggested in argument that the conclusion was essentially intuitive. That may be so, but, whether it is so or not, I do not find anything in his judgment which leads me to believe that he would have reached the same decision in this case. If, as is not disputed, the defendants owed some duty to Mrs Lee in informing her about the results of the scan, I see no reason in justice or common sense for confining it to a duty in relation to the avoidance of her undergoing the personal discomfort of a further 4 months of pregnancy, when that would have been the matter of least concern in the minds of herself and the doctors responsible for her pregnancy; uppermost would have been all the potential problems involved in caring for the needs of a severely disabled child.

Lord Steyn began at 79 by identifying the issues and examining the authorities, among which he highlighted the following observation of Ognall J in *Jones v Berkshire Area Health Authority* (unreported) 2 July 1986:

'I pause only to observe that, speaking purely personally, it remains a matter of surprise to me that the law acknowledges an entitlement in a

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mother to claim damages for the *blessing of a healthy child*. Certain it is that those who are afflicted with a handicapped child or who long desperately to have a child at all and are denied *that good fortune*, would regard an award for this sort of contingency with a measure of astonishment. But there it is: that is the law.' (emphasis added)

Having eliminated various grounds on which he would not decide against the parents' claim for compensation for financial loss arising from their child's birth, Lord Steyn contrasted the perspectives of 'corrective justice' and 'distributive justice'. The former required somebody who had harmed another without justification to indemnify the other, and on that approach the parents were entitled to succeed in their claim for the cost of bringing up the child. The latter required a focus on the just distribution of burdens and losses among members of a society. Lord Steyn continued at 82:

'If the matter is approached in this way, it may become relevant to ask commuters on the Underground the following question: “Should the parents of an unwanted but healthy child be able to sue the doctor or hospital for compensation equivalent to the cost of bringing up the child for the years of his or her minority, i.e. until about eighteen years?” My Lords, I am firmly of the view that an overwhelming number of ordinary men and women would answer the question with an emphatic “No”. And the reason for such a response would be an inarticulate premise as to what is morally acceptable and what is not. Like Ognall J. in *Jones v Berkshire Area Health Authority*, 2 July 1986, they will have in mind that many couples cannot have children and others have *the sorrow and burden of looking after a disabled child*. The realisation that compensation for financial loss in respect of the upbringing of a child would necessarily have to discriminate between rich and poor would surely appear unseemly to them. It would also worry them that parents may be put in a position of arguing in court that the unwanted child, which they accepted and care for, is more trouble than it is worth. Instinctively, the traveller on the Underground would consider that the law of tort has no business to provide legal remedies consequent upon the *birth of a healthy child, which all of us regard as a valuable and good thing*.' (emphasis added)

After setting out the two approaches, Lord Steyn observed that tort law is a mosaic in which the principles of corrective justice and distributive justice are interwoven, and that in uncertain and difficult cases a choice had sometimes to be made between the two approaches. He concluded at 83:

'In my view it is legitimate in the present case to take into account considerations of distributive justice … Relying on principles of distributive justice I am persuaded that our tort law does not permit parents of a healthy unwanted child to claim the cost of bringing up the child from a health authority or a doctor.'

It is, I think, an oversimplification to read Lord Steyn as suggesting that 'corrective' and 'distributive' concepts are rivals. The whole of the law of tort is about the redistribution of loss from the shoulders of a person who has sustained it onto the shoulders of another. It is only one means by which the

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state may redistribute loss. Although there are instances of strict liability in tort, they are relatively rare. Normally, losses will only be redistributed under the law of tort where they can be seen to have been caused by some fault on the part of the defendant which merits correction.

Oliver Wendell Holmes set out the reasons with characteristic clarity in *The Common Law* (Boston University, Lowell Institute, Lectures, 1880, published 1881) (Dover Publications, 1991), Lecture III on torts:

'The state might conceivably make itself a mutual insurance company against accidents, and distribute the burdens of its citizens' mishaps among all its members. There might be a pension for paralytics, and state aid for those who suffered in person or estate from tempest or wild beasts. As between individuals it might adopt the mutual insurance principle pro tanto, and divide damages when both were in fault, as in the rusticum judicium of the admiralty, or it might throw all loss upon the actor irrespective of fault. The state does none of these things, however, and the prevailing view is that its cumbrous and expensive machinery ought not to be set in motion unless some clear benefit is to be derived from disturbing the status quo. State interference is an evil, where it cannot be shown to be a good. Universal insurance, if desired, can be better and more cheaply accomplished by private enterprise. The undertaking to redistribute losses simply on the ground that they resulted from the defendant's act would not only be open to these objections, but … to the still graver one of offending the sense of justice. Unless my act is of a nature to threaten others, unless under the circumstances a prudent man would have foreseen the possibility of harm, it is no more justifiable to make me indemnify my neighbour against the consequences, than to make me do the same thing if I had fallen upon him in a fit, or to compel me to insure him against lightning.'

But even where there is fault, redistribution may be considered impracticable, undesirable or unjust on various grounds: hence the mosaic pattern of the law of tort to which Lord Steyn referred. I will come back to the particular factor which seems to me to have been critical in the conclusion that redistribution of the parents' losses in *McFarlane* was wrong.

Lord Hope of Craighead observed that Mr and Mrs McFarlane were bringing up their child within the family, and that there were benefits in the arrangement as well as costs. In the short term there was the pleasure which the child gave in return for his parents' love and care, and in the longer term there was the mutual relationship of support and affection which would continue well beyond the end of her childhood. He concluded at 97:

'In my opinion it would not be fair, just or reasonable, in any assessment of the loss caused by the birth of the child, to leave these benefits out of account. Otherwise the pursuers would be paid far too much. They would be relieved of the cost of rearing the child. They would not be giving anything back to the wrongdoer for the benefits. But the value which is attached to these benefits is incalculable. The costs can be calculated but the benefits, which in fairness must be set against them, cannot. The logical conclusion, as a matter of law, is that the costs to the pursuers of

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meeting their obligations to the child during her childhood are not recoverable as damages. It cannot be established that, overall and in the long run, these costs will exceed the value of the benefits. This is economic loss of a kind which must be held to fall outside the ambit of the duty of care which was owed to the pursuers by the persons who carried out the procedures in the hospital and the laboratory.'

Lord Hope of Craighead added the comment that he believed that his reasons were very similar to those given by Lord Steyn.

Lord Clyde observed, at 103, that, when it came to the claim for maintenance costs, to attempt to offset the benefits of parenthood against the costs of parenthood was to attempt to set off factors of quite a different character against each other, and that this was wrong in principle; for, in the context of compensation, like requires to be offset against like.

He went on to say, at 105–106, that for the pursuers therefore to end up with an addition to their family, originally unintended but now welcome, and to be enabled to have the child maintained while in their custody free of any costs, did not seem to accord with the idea of restitution or with an award of damages which did justice between both parties. Furthermore, in considering the reasonableness of such a result, the proportionality between the wrongdoing and the loss was relevant; and he considered that for the parents to be able to recover the expenses of child rearing would be disproportionate to the doctor's culpability.

Lord Millett did not consider that the solution to the question lay in a process of categorisation, whether of the nature of the wrong or of the loss; nor was he persuaded by the argument that the remedy was disproportionate to the wrong. He then set out, at 110, what he saw as the two principal grounds advanced for denying recovery of child-rearing costs:

'First, it is said that the birth of a healthy baby is not a harm but a blessing. It is “a priceless joy” and “a cause for celebration;” it is “not a matter of compensation.” Secondly, it is said that the costs of bringing up the child are not the result of his birth, but of the parents' deliberate decision to keep the child and not to have an abortion or to place the child for adoption.'

As to the first argument, Lord Millett said, at 111, that he agreed with the view of all the judges below that the choice was between allowing no recovery (on the basis that the benefits must be regarded as outweighing any loss) and allowing full recovery (on the basis that the benefits must be left out of account as incalculable and incommensurable).

Lord Millett then considered the arguments for and against the contention that the birth of a healthy baby is a blessing and not a matter for compensation.

As to the second argument, Lord Millett rejected the proposition that Mr and Mrs McFarlane's decision to keep their baby should be regarded as breaking the chain of causation, but he went on to state, at 113, that he accepted the thrust of both the main arguments in favour of dismissing the claim for maintenance costs. At first sight this may seem a little confusing, but, as I read his reasons, he treated the two arguments as intertwined, in that he regarded the birth of a healthy baby as a blessing and he considered that a

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party who in fact accepts a blessing cannot complain about the associated burden. He expressed the matter as follows:

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

This does not answer the question whether the benefits should be taken into account and the claim dismissed or left out of account and full recovery allowed. But the answer is to be found in the fact that the advantages and disadvantages of parenthood are inextricably bound together. This is part of the human condition. Nature herself does not permit the parents to enjoy the advantages and dispense with the disadvantages. In other contexts the law adopts the same principle. It insists that he who takes the benefit must take the burden. In the mundane transactions of commercial life, the common law does not allow a man to keep goods delivered to him and refuse to pay for them on the ground that he did not order them. It would be far more subversive of the mores of society for parents to enjoy the advantages of parenthood while transferring to others the responsibilities which it entails.' (emphasis added)

Underlying the speeches in *McFarlane* was a central dilemma. It being the object of the law of damages to place the injured party in the same position (so far as money can) as they would have been in but for the breach of duty, it is axiomatic that credit must be given for benefits resulting from the breach. But in attempting to draw a balance sheet which shows a true and fair view of the injured party's loss, credit items can only be taken into account which are commensurable with the debits claimed. You can offset apples against apples, and pears against pears, but not apples against pears.

Lord Clyde, at 103, gave the example of a mineworker rendered unfit for work underground. If he claims damages for loss of earnings, the defendant cannot seek to offset 'the pleasure and benefit which he may enjoy in the air of a public park'. One might add that his general enjoyment of his leisure time would be a relevant factor in the assessment of any general damages for loss of amenities consequent upon his physical injuries; but for the purposes of the law of damages, it is irrelevant that a claimant who can establish a particular head of loss has also gained a non-commensurable benefit.

In *McFarlane* the majority of the House of Lords applied that rule in permitting Mrs McFarlane's claim for general damages for the pain and discomfort of pregnancy and childbirth, and for special damages for the extra medical expenses, clothing and loss of earnings associated with them. But their Lordships considered it strikingly unfair that the parents should be entitled to recover the financial costs of maintaining a healthy child, without performing the legally and factually impossible task of giving credit for the

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non-pecuniary benefits. Faced with that Gordian knot, they cut it. They did so by more radical or less radical means. The more radical was to hold positively as a matter of law that the birth of a healthy child is a deemed blessing (with the consequences that it cannot form a subject for compensation and that there cannot be an inquiry on the facts of a particular case whether it is a blessing or not). The less radical was to conclude that the potential imbalance in allowing such a claim to be advanced was such that it was not reasonable to permit it.

The holding that the birth of a healthy child is a deemed blessing appears most explicitly in the speeches of Lord Steyn at 82 and Lord Millett at 113–114, but Lord Hope of Craighead considered that his own reasoning was very similar to that of Lord Steyn. It was, I think, precisely because Lord Steyn regarded the birth of a healthy child as 'a valuable and good thing' (in contrast with the 'sorrow and burden of looking after a disabled child'), that he considered that Mr and Mrs McFarlane's financial loss should not be redistributed, even if proved to have been caused by the fault of the health authority.

Lord Slynn of Hadley and Lord Clyde did not go so far as to say that the birth of a healthy child is a deemed blessing, but the tenor of their judgments was to regard it as unjust that the parents should be relieved of the financial obligations of caring for a healthy child whom they had accepted into their family, because of the inherent imbalance in allowing such a claim.

Both approaches have in common that the nurture of a healthy child is considered to be so potentially enriching to the parents that, having accepted the responsibility, they cannot claim the financial cost from the doctor who placed them in the originally unwanted situation.

If this reading of *McFarlane* is correct, the case presents no obstacle to the present claim. I do not believe that it would be right for the law to deem the birth of a disabled child to be a blessing, in all circumstances and regardless of the extent of the child's disabilities; or to regard the responsibility for the care of such a child as so enriching in the ordinary nature of things that it would be unjust for a parent to recover the cost from a negligent doctor on whose skill that parent had properly relied to prevent the situation.

If the matter were put to an opinion poll among passengers on the Underground, I would be surprised if a majority would support such a view. More importantly, Parliament has provided by s 1(1)(d) of the Abortion Act 1967 (as amended by the Human Fertilisation and Embryology Act 1990) that a pregnancy may be terminated if two registered medical practitioners are of the opinion formed in good faith that 'there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped'. Parliament must therefore have considered it to be in the public good that a mother should be able to choose to have a termination in those circumstances. I cannot reconcile that provision with the argument that public mores nevertheless require the courts to regard it as a blessing that Mrs Lee was not able to exercise her right under the Act, when the purpose of the statutory provision (and of the scan) was to enable her to avoid the unhappy and burdensome situation in which she now finds herself.

The same point seems also to me to provide the answer to Mr Stuart-Smith's argument that disabilities can vary infinitely in degree, and that it

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would be deeply offensive for the courts to be put in a position of having to draw a line between children who are sufficiently normal to be deemed a blessing and others who are not. I do not see the court being put into such a position in the present type of case. If a scan showed, or should have showed, evidence of such abnormality that the mother would have been entitled under s 1(1)(d) of the Act to have her pregnancy terminated, and if she would have exercised that right, but was deprived of the opportunity to do so as a result of clinical negligence, those facts should provide a sufficient foundation for her claim.

Before *McFarlane* it was accepted law that if a child was born with abnormalities which ought to have been detected at a time when the mother would have had an abortion, a claim would lie for the mother's loss and damage as a result of having to look after a seriously handicapped child: *Fish v Wilcox* [1994] 5 Med LR 230. Since *McFarlane* there have been two similar cases at first instance in which the courts have rejected the central argument advanced by the defendant health authority in the present case that the claimant's right to recover damages was limited in the same way as in *McFarlane*: *Rand v East Dorset Health Authority* [2000] Lloyds Rep Med 181 (a decision of Newman J) and *Hardman v Amin* (unreported) 25 September 2000 (a decision of Henriques J). As is plain from what I have already said, I agree with their rejection of the argument.

In *Hardman v Amin* (unreported) 25 September 2000 Henriques J set out various questions formulated by counsel and his answers to them. Counsel were agreed that in this case the same questions arise but not all of them were disputed for the purposes of the present application. I will set out those requiring comment.

*Can the claimant get damages for the past and future cost of providing for George's special needs and care related to his disability?*

I agree with Newman J and Henriques J that the answer to this question is yes. I have already set out why I consider that Mrs Lee is entitled to look to the defendant for the cost of alleviating and discharging the burden of caring for George by paying the costs of his reasonable needs; and why I consider that this conclusion is not inconsistent with *McFarlane*.

Mr Stuart-Smith argued that in calculating any such loss regard should be had to the services available to George from the NHS and from the local authority, because, although the action is in part a claim for personal injuries suffered by Mrs Lee, the costs of caring for George are not in truth damages for personal injuries suffered by her, so that s 2(4) of the Law Reform (Personal Injuries) Act 1948, as amended by the Social Security (Recovery of Benefits) Act 1997 does not apply to this part of the claim. I did not hear full argument on this point, but my provisional view is that Mr Stuart-Smith is right. However, it is not necessary to decide the point for present purposes, because the reason for the present application is that Mrs Lee and George are not presently receiving adequate help and support (as is described in further detail in Dr Hosking's recent report).

*Can the claimant get damages for the past and future cost of George's basic maintenance?*

A claim for the full cost of George's maintenance is made in the action, but no claim for the cost of George's basic maintenance is made for the

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purposes of this application. In *Rand v East Dorset Health Authority* [2000] Lloyds Rep Med 181 Newman J accepted the health authority's argument that the claimant could only recover damages in respect of such economic loss which was proved to arise from the child's disability, rather than from the fact of her existence. I have not heard full argument, but at present I see the matter in a different way, although the end result on the facts of this case may be the same. George was incapable of being born other than severely disabled. That being so, to try to separate the consequences of George's existence and George's disabled existence is metaphysically impossible and practically unreal. If George's birth was not a deemed blessing, I cannot see a barrier to Mrs Lee recovering the full costs of his maintenance, except for the important fact that she was wanting to bear a healthy child. If, following a termination of her pregnancy with George, she had continued with her attempts and had been successful, she would have incurred the costs of bringing up a healthy child in any event. I mention these matters because they may need further investigation at the final assessment of damages.

*Is any award for the costs of care limited to the amount which the claimant would be able to contribute to such costs in the absence of an award of damages to meet them?*

Newman J held in *Rand v East Dorset Health Authority* [2000] Lloyds Rep Med 181 that the answer is yes. He said at 194:

'The claimants may only recover such losses as they have in fact sustained. Their own means, as opposed to Katy's needs, are determinative of this issue. In my judgment this must follow as a matter of law from the categorisation of the claim as a claim for pure economic loss. I recognise that this will inevitably give rise to wealthy parents being in a position to obtain higher awards than parents of poor or modest means but this is a regular and accepted consequence in claims for damages. A managing director and his chauffeur may suffer identical injuries in the same collision and a claim for their loss of earnings will give rise to markedly different awards. It is to be remembered that whatever the worth of the parents may be the court can only make an award in respect of claims which it considers reasonable both in character and amount.'

Mr Stuart-Smith supported this reasoning. He submitted that it was crucial to remember that the claim being considered is Mrs Lee's claim and not George's claim. If George were able to bring a claim, his loss would be defined by his needs: *Donnelly v Joyce* [*[1974] 1 QB 454*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-6D91-JB7K-20VY-00000-00&context=1522468), 462. But since Mrs Lee's claim is for economic loss, her loss cannot exceed her means, since her means determine the extent to which she will be able to carry expenditure.

Henriques J in *Hardman v Amin* (unreported) 25 September 2000 disagreed with Newman J on this issue. He held that categorisation of the claim as one for economic loss identified the criteria to be satisfied before a duty and its scope were established, but had nothing to do with the quantification of damages once a breach of duty was shown to have resulted in loss of a type which the defendant was under a duty to avoid. He further held that the defendant's liability included a liability to pay for the care of

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the child attributable to its disability, and that limiting the damages to what the claimant could afford would not provide proper compensation for the consequences of the tort, since the claimant would not be restored, so far as money could achieve it, to the position she would have been in but for the tort.

I agree with Henriques J on this issue. I accept Mr Stuart-Smith's argument that, if George were able to bring a claim, his loss would be defined by his needs. But those needs are inextricably intertwined with Mrs Lee's needs, since she bears the burden of attempting to cater for his needs. I do not accept that her loss is defined by her means rather than by her reasonable needs.

Take the position as it is described in Dr Hosking's report. Mrs Lee has primary responsibility for George's care. She has minimal professional service support apart from respite care. George has complex needs. In order to be able to care for George properly, and to alleviate the burden on herself, she needs additional help. I do not see why the quantification of her loss under this head should be affected by her means. Her need exists, whether she has the means to meet it or not. It is quantifiable. It was caused by the defendants' negligence. In principle she should therefore be entitled to recover the cost of it. It would be invidious if two mothers in Mrs Lee's situation, each having the same needs, differed in their ability to recover the cost of meeting those needs, because one possessed independent means and the other did not.

*Can Mrs Lee get damages for her past and future care of George under Housecroft v Burnett* [*[1986] 1 All ER 332*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W4N-VRH1-JSJC-X17C-00000-00&context=1522468) *or by way of damages for loss of amenity?*

I would answer yes, for once it is recognised that by reason of the defendants' negligence Mrs Lee incurred the burden of looking after a severely disabled child, which she would not otherwise have incurred, she ought to be entitled to reasonable compensation for her time spent in doing so.

It is true that in *Housecroft v Burnett* [*[1986] 1 All ER 332*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W4N-VRH1-JSJC-X17C-00000-00&context=1522468) the court was concerned with assessing the value of nursing services provided by a member of the family to an injured claimant. This is not such a case, for George is not a claimant. Mr Stuart-Smith relied on this distinction and on the judgment of Newman J in *Rand v East Dorset Health Authority* [2000] Lloyds Rep Med 181, 195, where he said:

'The principle established in *Donnelly v Joyce* [*[1974] 1 Q.B. 454*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-6D91-JB7K-20VY-00000-00&context=1522468) and upheld in *Hunt v Severs* [*[1994] 2 AC 350*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G4BX-00000-00&context=1522468) that a plaintiff can recover for the value of nursing services provided by a member of the family cannot assist the claimants, for this is not a claim by the injured person.'

However, if I am right that Mrs Lee is entitled to be compensated for the injury done to her in causing her to incur the burden of caring for a severely disabled child, *Housecroft v Burnett* [*[1986] 1 All ER 332*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W4N-VRH1-JSJC-X17C-00000-00&context=1522468) merely provides a means of assessing the appropriate amount of compensation.

In *Fish v Wilcox* [1994] 5 Med LR 230, 232, Stuart-Smith LJ made exactly this point when he said:

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'In my judgment, although there is a distinction between the *Housecroft* case and the present in as much as the claims are made by different people, in one case by the child who needs the care, and in the other case by the mother who provides it, there is no essential distinction between the tasks that the court has to perform in the two cases.'

Henriques J cited this passage in *Hardman v Amin* (unreported) 25 September 2000 and concluded:

'Accordingly I find that the claimant can get damages for her past and future care of Daniel either calculated in accordance with *Housecroft v Burnett* or by way of damages for loss of amenity consisting in the stress anxiety and disruption of her life resulting from the obligation to bring up a disabled child.'

I agree with this approach.

*Conclusion*

It was not disputed that, if I concluded as I have on the questions of principle that arise in this case, it would follow that the claimant would be entitled to substantial damages, of which the sum presently claimed would be no more than a reasonable proportion.

I do not accept the submission that because the defendant's contentions on the issues of principle are arguable, I should not be satisfied for present purposes that the claimant will succeed in recovering substantial damages. The fact remains that in all the cited cases, before and after *McFarlane*, of birth of a disabled child after alleged negligence in failing to detect foetal abnormalities which would have led to a termination of the pregnancy, the courts have recognised the claimant's right to claim damages for the cost of meeting the child's special needs. With counsel's help, which I gratefully acknowledge, I have considered whether the decision in *McFarlane* should lead to a different conclusion in this type of case, and I do not believe so.

Accordingly I am satisfied that in law Mrs Lee has a substantial claim. On the question of discretion, in view of Dr Hosking's report I am satisfied that it is right to order a further interim payment of £100,000 so that steps can be taken as intended to improve George's care without further delay.

Interim payment of £100,000 to be made.

*Solicitors:*

*Lyons Davidson for the first claimant (Mrs Lee)*

*Hempsons for the defendants*

*The second claimant (Mr Lee) did not appear and was not represented.*

***PHILIPPA JOHNSON Barrister***