| **59 BMLR 58**, |

# [*Hardman v Amin 59 BMLR 58*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-FD4T-B4GB-00000-00&context=1522468)

QUEEN'S BENCH DIVISION

HENRIQUES J

24, 25 JULY, 25 SEPTEMBER 2000

*Adrian Whitfield QC* and *Christopher Hough* (instructed by *Irwin Mitchell*) for the claimant.

*Kieran Coonan QC* and *Christina Lambert* (instructed by *Hempsons*) for the defendant.

Henriques J.

This action arises from the 'wrongful birth' of a gravely disabled child. It raises difficulties to date unresolved by appellate courts. The judgment will deal only with the heads of damages, which are recoverable, and the bases of calculating such awards. Liability has been admitted.

Maureen Elizabeth Hardman claims damages against her general practitioner Dr Farhatr Amin. On 12 January 1996 a consultation took place at the claimant's home. Both parties were aware of the claimant's pregnancy. She was suffering a widespread florid rash over most of her body and a sore throat. The defendant inaccurately diagnosed tonsillitis and prescribed amoxycyllin, stating that the rash was a reaction to being pregnant.

It is conceded on the defendant's behalf that: (1) it was negligent of Dr Amin to fail to arrange seriological tests; (2) had seriological tests been performed a rubella infection would have been diagnosed; (3) had the rubella infection been diagnosed a competent medical practitioner would have counselled the claimant about the probable damage to the foetus and discussed with her the possibility of termination of pregnancy; (4) the claimant and her husband would have agreed to the termination of the pregnancy.

On 31 August 1996 the claimant gave birth to Daniel by means of an emergency caesarian section. He is severely disabled suffering personality, cognitive and

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behavioural changes and sensory deprivation. He has no effective hearing and is partially sighted. He requires and will continue to require constant care and supervision. He is very vocal, screaming at the top of his voice just about all the time. He is awake much of the night. He has no sense of danger and doors and gates all require locking. Daniel suffers and will continue to suffer delayed development. He will never work or live independently and will survive well into adult life.

The claimant is now aged 26 and worked continuously from leaving school at 16 up to Daniel's birth. Her employers were Butlins, Asda, Mion Electronics and SR Gant as a sewing machinist. It was her intention to return to SR Gant after maternity leave had finished. In June/July 1999 she tried to do a job working at a petrol station for 17 hours per week. Her mother looked after Daniel while she was at work but she found it very hard work and the claimant found it too tiring trying to work having been awake all night. In October 1999 she stopped working being unable to combine work with caring for Daniel.

During her pregnancy the claimant believed that she and her child were normal and healthy. It was only immediately after birth that a diagnosis of a heart murmur and rubella infection were made.

The claimant's husband, Stuart Hardman, is 35 years of age and works a 55–60 hour week as a long distance lorry driver. He is fully supportive of both the claimant and Daniel and spends much of his free time taking Daniel to appointments with specialists and therapists. It has always been the intention of the Hardmans to have two children and it remained their intention to have a second child at some future date. Daniel is a much loved child.

On 2 March 2000 it was ordered by consent that there be judgment for the claimant on the issues of breach of duty and causation and on 16 May 2000 it was ordered that the issue of what heads of damage are measurable and bases of calculation be determined as a preliminary issue.

Distinguished counsel have greatly assisted in formulating the relevant questions for my determination.

A. CAN THE CLAIMANT GET DAMAGES FOR THE SUFFERING AND INCONVENIENCE OF PREGNANCY AND CHILDBIRTH?

There is agreement between the parties that the claimant may recover under this head, albeit a modest sum. The defendant can properly assert that had the claimant undergone a termination, she would have become pregnant again on two further occasions and given birth to two healthy children. By reason of the defendant's negligence she has not undergone a further additional pregnancy and birth and has avoided a termination of pregnancy procedure. On the other hand, but for the negligence she would have avoided a caesarian section and, more significantly, she would have avoided the shock of realising that her child had been born seriously disabled.

By evaluating these competing factors 'the court will, if asked so to do, award damages' for the suffering and inconvenience of pregnancy and childbirth.

**B. CAN THE CLAIMANT GET SPECIAL DAMAGES FOR LOSS AND EXPENSE (INCLUDING LOSS OF EARNINGS) CONSEQUENT ON PREGNANCY AND CHILDBIRTH?**

The defendant's response is: 'Yes provided it is consequent upon any identified personal injury suffered by the claimant.'

Accordingly, it is necessary for me to determine whether this is an action for damages for personal injuries.

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[*Section 3*](https://advance.lexis.com/api/document?collection=legislation-uk&id=urn:contentItem:5W53-GW21-F900-G11B-00000-00&context=1522468) of the Law Reform (Personal Injuries) Act 1948 defines what is meant by personal injury:

'In this Act, the expression “personal injury” includes any disease and any impairment of a person's physical and mental condition, and the expression “injured” shall be construed accordingly.'

A determination of this issue is of further significance because Mr Coonan's proposition that this is not an action for personal injuries allows him to submit that [*s 2(4)*](https://advance.lexis.com/api/document?collection=legislation-uk&id=urn:contentItem:5W53-GW21-F900-G11J-00000-00&context=1522468) of the Law Reform (Personal Injuries) Act 1948 does not apply:

'In an action for damages for personal injuries (including any such action arising out of a contract) there shall be disregarded, in determining the reasonableness of any expenses, the possibility of avoiding those expenses or part of them by taking advantage of facilities available under the National Health Service Act 1977 …'

Mr Coonan accordingly claims that this is not an action for damages for personal injuries, therefore sub-s 2(4) does not apply and therefore the claimant must mitigate her loss by taking advantage of facilities under the National Health Service Act.

The point arose in *Walkin v South Manchester Health Authority* (1995) [*25 BMLR 108*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-JB7K-21P8-00000-00&context=1522468), [*[1995] 1 WLR 1543*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-DRV1-JNJT-B3WR-00000-00&context=1522468), which was a wrongful conception claim – that is a failed sterilisation operation. Auld LJ said ((1995) [*25 BMLR 108*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-JB7K-21P8-00000-00&context=1522468) at [*114*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-JB7K-21P8-00000-00&context=1522468), [*[1995] 1 WLR 1543*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-DRV1-JNJT-B3WR-00000-00&context=1522468) at [*1550*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-DRV1-JNJT-B3WR-00000-00&context=1522468)):

'it seems to me that the unwanted conception, whether as a result of negligent advice or negligent surgery, was a personal injury in the sense of an “impairment” in the illustrative definition in s 38(1) [of the Limitation Act 1980 which is in the same terms as the Personal Injury Act 1948].'

Indeed, there was a concession by Mr Wingate-Saul QC expressly approved by all three members of the court, the others being Roch and Neill LJJ, that conception followed by a normal pregnancy and the birth of a healthy child amounts to personal injuries within the meaning of [*s 38(1)*](https://advance.lexis.com/api/document?collection=legislation-uk&id=urn:contentItem:5W59-M221-DXHD-G0JD-00000-00&context=1522468) of the Limitation Act 1980.

Neill LJ stated ((1995) [*25 BMLR 108*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-JB7K-21P8-00000-00&context=1522468) at [*119*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-JB7K-21P8-00000-00&context=1522468), [*[1995] 1 WLR 1543*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-DRV1-JNJT-B3WR-00000-00&context=1522468) at [*1554*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-DRV1-JNJT-B3WR-00000-00&context=1522468)):

'I am persuaded … that the better view is to treat the “wrongful” conception as the moment of injury.'

In *McFarlane v Tayside Health Board* (1999) [*52 BMLR 1*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468), [*[2000] 2 AC 59*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468), also of course a wrongful conception case, Lord Steyn said ((1999) [*52 BMLR 1*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468) at [*18*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468), [*[2000] 2 AC 59*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468) at [*81*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468)):

'Counsel for the health authority argued as his primary submission that the whole claim should fail because the natural processes of conception and childbirth cannot in law amount to personal injury.'

He continued after a reference to other jurisdictions:

'every pregnancy involves substantial discomfort and pain. I would therefore reject the argument of the health authority on this point.'

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Lord Clyde said ((1999) [*52 BMLR 1*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468) at [*36*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468), [*[2000] 2 AC 59*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468) at [*101*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468)):

'That issue was put at rest in *Walkin v South Manchester Health Authority* (1995) [*25 BMLR 108*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-JB7K-21P8-00000-00&context=1522468), [*[1995] 1 WLR 1543*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-DRV1-JNJT-B3WR-00000-00&context=1522468), where, in relation to a claim by a mother following an unsuccessful sterilisation operation, the court held that there was only one cause of action and that cause of action was for damages consisting of or including damages in respect of personal injury …'

Then he said ((1999) [*52 BMLR 1*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468) at [*37*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468), [*[2000] 2 AC 59*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468) at [*102*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468)):

'natural as the mechanism may have been, the reality of the pain, discomfort and inconvenience of the experience cannot be ignored. It seems to me to be a clear example of pain and suffering such as could qualify as a potential head of damages.'

Lord Millett said ((1999) [*52 BMLR 1*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468) at [*42*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468), [*[2000] 2 AC 59*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468) at [*107*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468)):

'In the present case the injuria occurred when (and if) the defenders failed to take reasonable care to ensure that the information they gave was correct. The damnum occurred when Mrs McFarlane conceived. This was an invasion of her bodily integrity and threatened further damage both physical and financial.'

Of course, we are concerned in the instant case with a wrongful birth and not with a wrongful conception but this was a childbirth which, but for negligence, would have been avoided. It would be an anomaly for a wrongful conception claim to be an action for damages for personal injuries whilst a wrongful birth case was not. Indeed, both counsel essentially agree with that proposition. Mr Coonan submits that there may technically be a claim, and in other cases there will be, but on the present facts there is no identifiable special damage parasitical upon the wrongful birth which would not be incurred by any future notional birth which has in fact been avoided – in other words 'there would have been a loss of earnings in the future were there to have been another child in any event so that has to be set off subject to discounting'.

Accordingly, under this head I make the following findings: (1) This is an action for damages for personal injuries. (2) The continuation of a pregnancy which should not have been continued can amount to a personal injury and in the circumstances of this case does so. (3) The claimant can get special damages for loss and expense (including loss of earnings) consequent on pregnancy and childbirth subject to the evidence which may establish a notional set-off in relation to the loss and expense of a future pregnancy and childbirth. Such set-off is capable of reducing the claim under this head to nil.

**C. CAN THE CLAIMANT GET DAMAGES FOR THE PAST AND FUTURE COST OF PROVIDING FOR DANIEL'S SPECIAL NEEDS AND CARE RELATED TO HIS DISABILITY?**

The defendant's primary submission is that, following *McFarlane*, the claimant has no claim at all in respect of past or future pecuniary losses. The claim for pecuniary losses is a claim, which arises out of the existence and/or disability of Daniel. It is a claim for pure economic loss and is thus a separate and independent claim from the claim for general damages for personal injury

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and any loss of amenity consequent thereon. In *McFarlane* the House of Lords held that, in relation to a healthy child, no claim is maintainable by the parents for economic loss, whether in respect of care costs (eg for child minders), maintenance costs, or for loss of earnings suffered as a result of the birth. Both Lord Slynn and Lord Steyn expressly left open the question of whether a claimant could recover damages in respect of economic loss arising out of the need to rear a disabled child. The claimant contends for a distinction to be drawn between the rearing of a healthy child and a disabled child. The defendant contends that no distinction should be drawn as a matter of principle between a healthy child and a disabled child such as Daniel Hardman, who is accepted and integrated into the family and who is a source of joy. To do otherwise would be invidious and morally offensive and impractical.

Further, it is contended, no distinction can be drawn in terms of foreseeability. The birth of a congenitally disabled child was a foreseeable consequence of the defendant's negligence, just as the birth of a healthy child is a foreseeable consequence of a failed vasectomy or sterilisation procedure. Further, it is said that there was an insufficient relationship of proximity between the negligent act and the loss here complained of.

Since the claimant contends that the reasoning in *McFarlane* relates solely to cases of healthy children, it is necessary to consider the state of the law pre-*McFarlane*.

In the following cases the English and Scottish courts have allowed recovery in wrongful birth cases of such costs.

1. *Emeh v Kensington and Chelsea and Westminster Area Health Authority* [*[1984] 3 All ER 1044*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W4N-VKG1-K054-G4CF-00000-00&context=1522468), [*[1985] QB 1012*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-6D81-F873-B3RH-00000-00&context=1522468). At first instance Park J held that the plaintiff's failure to terminate her pregnancy was so unreasonable as to constitute novus actus interveniens. Allowing the appeal, Walker, Slade and Purchas LJJ held that it was not contrary to public policy to recover damages for the birth of a child and the plaintiff was entitled to recover damage for her financial loss caused by the negligent performance of the sterilisation operation.

2. *Salih v Enfield Health Authority* (1991) [*7 BMLR 1*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F2F4-G1RK-00000-00&context=1522468), [*[1991] 3 All ER 400*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W4N-W381-JP4G-64F4-00000-00&context=1522468). This was a case of a child born suffering from congenital rubella in circumstances very similar to the present case. It differed in that the parents decided to have no more children. Drake J at first instance made no reduction for any saving however both he and the Court of Appeal (Butler-Sloss, Mann LJJ and Sir Christopher Slade) were in no doubt that the costs of rearing a disabled child were recoverable. Butler-Sloss LJ said ((1991) [*7 BMLR 1*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F2F4-G1RK-00000-00&context=1522468) at [*5*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F2F4-G1RK-00000-00&context=1522468), [*[1991] 3 All ER 400*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W4N-W381-JP4G-64F4-00000-00&context=1522468) at [*404*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W4N-W381-JP4G-64F4-00000-00&context=1522468):

'The child was born as a direct result of the lack of advice which, if given, would have resulted in a termination of pregnancy. Once born the child requires to be maintained by someone during minority. The question is whether the saved expenditure arising from the decision not to have more children is properly to be taken into account in that quantification process. The general proposition in quantifying damages is to place the injured party … in as good a position as he would have been if the negligent act had not occurred, but in no better position.'

3. *Fish v Wilcox* (1993) [*13 BMLR 134*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-JB7K-220K-00000-00&context=1522468). Swinton Thomas J awarded £234,387 to the plaintiff, who brought a claim for her loss and damage as a result of the birth and as a result of having to look after a seriously handicapped child. The

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appeal before Nourse, Stuart-Smith and Mann LJJ concerned only the question of double recovery. It was never suggested that the mother's claim for looking after her daughter should be disallowed.

4. *Nunnerley v Warrington Health Authority* [2000] Lloyd's Rep Med 170 (Morrison J). The child was born with a genetic defect, which should have been detected at an early stage of pregnancy. Had it been so there would have been a termination. It was held that the claimants were entitled to claim damages for the cost of care, because the normal principles of compensation applied in a case such as this. The wrong committed was the birth of Todd and the costs consequent upon this included the cost of his continuing care.

5. *Taylor v Shropshire Health Authority* [2000] Lloyd's Rep Med 96 (Judge Nicholl). An unwanted pregnancy following a failed sterilisation. It was held that the mother was entitled to recover the reasonable cost of raising and caring for her severely disabled child subject to offsetting the values of the child's aid, comfort and sacristy during the parent's life expectancy.

6. *Rand v East Dorset Health Authority* (2000) [*56 BMLR 39*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2KB-00000-00&context=1522468) (Newman J). There was a negligent omission to screen for foetal abnormality resulting in the birth of a child suffering from Down's syndrome. The cost of maintenance of the child was recoverable, limited to the extent to which such loss related to the disability.

7. *Anderson v Forth Valley Health Board* (1997) [*44 BMLR 108*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F2F4-G1V7-00000-00&context=1522468) (Lord Nimmo-Smith, Court of Session (Outer House)). Parents of two sons born suffering from muscular dystrophy, who would have terminated the pregnancies if given proper advice, were able to recover the costs of maintaining and rearing their two disabled sons.

8. *McLelland v Greater Glasgow Health Board* 1999 SLT 543, 1998 SCLR 1081 (Lord McFadyen). The defendants negligently failed to diagnose a Down's syndrome pregnancy, which would otherwise have been terminated. The parents were entitled to recover damages in respect of the expenditure, which they had incurred and were likely to incur in the future on Gary's basic maintenance.

It can be seen from these several decisions that, prior to *McFarlane*, there was a general acceptance that a parent in these circumstances can get damages for the past and future costs of providing for a disabled child's needs and care related to his disability. Only one authority was cited in which a claim had failed, namely *R v Croydon Health Authority* (1997) [*40 BMLR 40*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F2F4-G1PX-00000-00&context=1522468) (Kennedy, Morritt, and Chadwick LJJ).

That case, however, is readily distinguishable from the present and turned upon the scope of radiologists' duty to regulate the size of an employee's family. Further, the child was born healthy and, as Kennedy LJ said ((1997) [*40 BMLR 40*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F2F4-G1PX-00000-00&context=1522468) at [*47*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F2F4-G1PX-00000-00&context=1522468)):

'when the mother wants both the pregnancy and the healthy child, there is simply no loss which can give rise to a claim for damages in respect of either the normal expenses and trauma of pregnancy or the costs of bringing up a child.'

The question must now be answered in the light of the decision in *McFarlane v Tayside Health Board* (1999) [*52 BMLR 1*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468), [*[2000] 2 AC 59*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468), bearing in mind that was a failed vasectomy case resulting in the birth of a healthy child. The House of Lords disallowed a claim for basic maintenance costs for a number of reasons.

Lord Slynn held ((1999) [*52 BMLR 1*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468) at [*13*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468), [*[2000] 2 AC 59*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468) at [*76*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468)) that such loss was economic. Foreseeability is not the only test. There must be a relationship

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of neighbourhood or proximity between parents and doctor: see *Caparo Industries plc v Dickman* [*[1990] 1 All ER 568*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W4N-VX91-JN6B-S03Y-00000-00&context=1522468), [*[1990] 2 AC 605*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KKX1-JKHB-64FF-00000-00&context=1522468). Is it fair just and reasonable for the law to impose the duty:

'As Mr Stewart QC says [in 'Damages for the Birth of a Child' (1995) 40 JLSS 298] the alternative test is to ask whether the doctor or the board has assumed responsibility for the economic interest of the claimant “with concomitant reliance by the claimant”.'

I will return to consider the *Caparo* test. Suffice it to say, for present purposes, Lord Slynn concluded that it would not be fair just and reasonable to impose liability.

Lord Steyn, applying the principles of distributive justice as reflected by the views of London Underground commuters, together with the requirement to be fair, just and reasonable, determined that the claim should be disallowed. He took into account that the claim was based on an assumption of responsibility by the doctor who gave negligent advice. He added ((1999) [*52 BMLR 1*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468) at [*20*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468), [*[2000] 2 AC 59*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468) at [*83*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468)):

'But in regard to the sustainability of a claim for the cost of bringing up the child it ought not to make any difference whether the claim is based on negligence simpliciter or on the extended *Hedley Byrne* principle.'

Lord Hope concluded that the claim for care costs was for economic loss. The costs can be calculated but the benefits which in fairness must be set against them cannot. It would not be fair just or reasonable to impose a duty to meet such costs.

Lord Clyde said ((1999) [*52 BMLR 1*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468) at [*40*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468), [*[2000] 2 AC 59*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468) at [*105*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468)–106):

'In the present case we are concerned critically with a claim for an economic loss following upon allegedly negligent advice … It seems to me that even if a sufficient causal connection exists, the cost of maintaining the child goes far beyond any liability which in the circumstances of the present case the defenders could reasonably have thought they were undertaking. Furthermore, reasonableness includes a consideration of the proportionality between the wrongdoing and the loss suffered thereby.'

He concluded that it would be unreasonable to relieve the parents of their financial obligation to the child, and the expense could be disproportionate to the culpability.

Lord Millett said ((1999) [*52 BMLR 1*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468) at [*43*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468), [*[2000] 2 AC 59*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468) at [*108*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468)–109):

'It is true that the claims in the present case are brought under the extended *Hedley Byrne* principle (see *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [*[1963] 2 All ER 575*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W4N-T2X1-JSRM-61YJ-00000-00&context=1522468), [*[1964] AC 465*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G4CY-00000-00&context=1522468)). But I agree with my noble and learned friend Lord Steyn that it should not matter whether the unwanted pregnancy arises from the negligent supply of incorrect information or from the negligent performance of the operation itself. It is also true that the claim for the costs of bringing

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up Catherine is a claim in respect of economic loss, and that the claims in delict for pure economic loss are with good reason more tightly controlled than claims in respect of physical loss. But I do not consider that the present question should depend on whether the economic loss is characterised as pure or consequential. The distinction is technical and artificial if not actually suspect in the circumstances of the present case, and is to my mind made irrelevant by the fact that Catherine's conception and birth are the very thing that the defenders' professional services were called upon to prevent. In principle any losses occasioned thereby are recoverable however they may be characterised.'

He concluded that the law must take the birth of a natural healthy child to be a blessing and not a detriment.

On behalf of the claimant, Mr Whitfield QC submits that in the circumstances of the present case, care costs attributable to disability should be awarded. He contends in accord with *McFarlane* that such a claim is one for 'economic loss'. The criteria for establishing such a duty have been defined by the House of Lords thus.

In *Hedley Byrne & Co Ltd v Heller and Partners Ltd* [*[1963] 2 All ER 575*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W4N-T2X1-JSRM-61YJ-00000-00&context=1522468), [*[1964] AC 465*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G4CY-00000-00&context=1522468) it was said that a duty of care arises when a party seeking information from another possessed of special skill trusts him to exercise due care, and the other knows that reliance is being placed on his skill or judgment.

In *Caparo Industries plc v Dickman* [*[1990] 1 All ER 568*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W4N-VX91-JN6B-S03Y-00000-00&context=1522468), [*[1990] 2 AC 605*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KKX1-JKHB-64FF-00000-00&context=1522468) Lord Bridge defined the criteria as foreseeability, proximity and fairness. Lord Roskill said ([*[1990] 1 All ER 568*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W4N-VX91-JN6B-S03Y-00000-00&context=1522468) at [*581*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W4N-VX91-JN6B-S03Y-00000-00&context=1522468)–582, [*[1990] 2 AC 605*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KKX1-JKHB-64FF-00000-00&context=1522468) at [*628*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KKX1-JKHB-64FF-00000-00&context=1522468)):

'it has now to be accepted that there is no simple formula or touchstone to which recourse can be had in order to provide in every case a ready answer to the questions whether, given certain facts, the law will or will not impose liability for negligence or, in cases where such liability can be shown to exist, determine the extent of that liability. Phrases such as “foreseeability”, “proximity”, “neighbourhood”, “just and reasonable”, “fairness”, “voluntary assumption of risk” or “voluntary assumption of responsibility” will be found used from time to time in the different cases. But, as your Lordships have said, such phrases are not precise definitions. At best they are but labels or phrases descriptive of the very different factual situations which can exist in particular cases and which must be carefully examined in each case before it can be pragmatically determined whether a duty of care exists and, if so, what is the scope and extent of that duty.'

In *Henderson v Merrett Syndicates Ltd* [*[1994] 3 All ER 506*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W4N-WD01-FFMK-M1RN-00000-00&context=1522468) at [*521*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W4N-WD01-FFMK-M1RN-00000-00&context=1522468), [*[1995] 2 AC 145*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KKV1-JGBH-B1XC-00000-00&context=1522468) at [*181*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KKV1-JGBH-B1XC-00000-00&context=1522468) Lord Goff said:

'if a person assumes responsibility for 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

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no need to embark upon any further inquiry whether is “fair just and reasonable” to impose liability for economic loss.'

Lord Goff's speech in *Henderson*, identifying assumption of responsibility as the key criticism of duty in relation to economic loss was endorsed by Lord Steyn in *Williams v Natural Life Health Foods Ltd* [*[1998] 2 All ER 577*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W4N-WKV1-JBM1-M3RK-00000-00&context=1522468), [*[1998] 1 WLR 830*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-DRK1-F5KY-B0F7-00000-00&context=1522468). He said that once a case was identified as falling within the assumption of responsibility principle enunciated in *Hedley Byrne* 'there is no need to embark on any further enquiry whether it is fair just and reasonable to impose liability for economic loss'. He answered academic criticism thus ([*[1998] 2 All ER 577*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W4N-WKV1-JBM1-M3RK-00000-00&context=1522468) at [*582*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W4N-WKV1-JBM1-M3RK-00000-00&context=1522468), [*[1998] 1 WLR 830*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-DRK1-F5KY-B0F7-00000-00&context=1522468) at [*835*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-DRK1-F5KY-B0F7-00000-00&context=1522468)):

'The touchstone of liability is not the state of mind of the defendant. An objective test means that the primary focus must be on things said or done by the defendant or on his behalf in dealings with the plaintiff.'

Mr Whitfield points out with some purpose to which I will return in due course that the assumption of responsibility referred to in the defendant's assumption of responsibility *for the task* not the assumption of legal liability per Lord Browne-Wilkinson in *White v Jones* [*[1995] 1 All ER 691*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W4N-WD01-F7ND-G2G9-00000-00&context=1522468) at [*716*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W4N-WD01-F7ND-G2G9-00000-00&context=1522468), [*[1995] 2 AC 207*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KKV1-JGBH-B1XD-00000-00&context=1522468) at [*273*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KKV1-JGBH-B1XD-00000-00&context=1522468):

'If the responsibility for the task is assumed by the defendant he thereby creates a special relationship between himself and the plaintiff in relation to which the law (not the defendant) attaches a duty to carry out carefully the task so assumed.'

The cases thus far cited on assumption of responsibility do not touch upon medical negligence but I am referred to *X and Y v Pal* (1991) 23 NSWLR 26, [1992] 3 Med LR 195 (Aus NSW CA), in which Clarke JA said:

'The fundamental elements underlying (the doctors) proximity relationship with his patient were assumption of responsibility and reliance. The doctor assumed the responsibility of exercising due care in the treatment of his patient and the patient relied upon him to administer the treatment with due care. Furthermore the doctor was working in an area which he could, if he were not careful, so damage his patient and the child that she was carrying that either that child or children later born to the patient must suffer damage.'

Accordingly, in the present case it is argued on behalf of the claimant that the defendant doctor owed a clear duty to the claimant to treat and advise appropriately and assumed responsibility for so doing and that the claimant clearly placed reliance upon her. At the time of the misdiagnosis, the doctor knew the claimant was pregnant. She was advising a patient with rubella and there was a high probability of severe foetal damage. There was a clear connection between the damage and the breach of duty to enable the court to say that the damage flowed from the breach. The doctor must have known the birth of a disabled child would impose upon the claimant a life of stress and expense. In the circumstances which the doctor should have detected, the claimant was entitled to a lawful termination under the Abortion Act 1967. Accordingly, the

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claimant submits that distributive justice and the man on the Underground would require the expense to fall not on the claimant or the rest of the family or the state but on the wrongdoer.

For the defendant, Mr Coonan QC submits that, following *McFarlane*, the claimant has no claim at all in respect of past or future pecuniary basis because: (1) The claim for pecuniary loss is a claim which arises out of the existence and/or disability of Daniel. It is a claim for pure economic loss and thus is a separate and independent claim from the claim for general damages for personal injury and any loss of amenity consequent thereon. (2) In *McFarlane* the House of Lords held that in relation to a healthy child no claim is maintainable by the parents for economic loss, whether in respect of care costs (eg child minders), maintenance costs or for loss of earnings suffered as a result of the birth.

The House of Lords specifically left open the question whether a claimant could recover damages in respect of economic loss arising out of the need to rear a disabled child (see Lord Steyn ((1999) [*52 BMLR 1*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468) at [*20*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468), [*[2000] 2 AC 59*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468) at [*84*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468)) and Lord Clyde ((1999) [*52 BMLR 1*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468) at [*34*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468), [*[2000] 2 AC 59*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468) at [*99*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468)).

Until the decision in *McFarlane*, a claim of this type had never been considered by the House of Lords and the courts had not been required to identify analytically the precise nature of the claim, which had been recognised as viable. Before *McFarlane*, the critical decision in England and Wales was *Emeh v Kensington and Chelsea and Westminster Health Authority* [*[1984] 3 All ER 1044*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W4N-VKG1-K054-G4CF-00000-00&context=1522468), [*[1985] QB 1012*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-6D81-F873-B3RH-00000-00&context=1522468). The law as it was then was summarised by Brooke J in *Allen v Bloomsbury Health Authority* (1992) [*13 BMLR 47*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F2F4-G1MG-00000-00&context=1522468), [*[1993] 1 All ER 651*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W4N-W371-DY33-B4X0-00000-00&context=1522468). In particular, it was understood that a claim by a parent for damages for economic loss in respect of the need to rear a healthy *or* a disabled child was maintainable. In terms of a claim for economic loss, no distinction was drawn between them.

In so far as the issue is to be resolved by having regard to the character and scope of the duty of care owed to the claimant, then the defendant admits that the birth of a congenitally disabled child was a foreseeable consequence of the defendants negligence, just as the birth of a healthy child is a foreseeable consequence of a failed vasectomy or sterilisation procedure. No distinction can be drawn for these purposes in terms of forseeability.

However, Mr Coonan submits, as he did in *Rand v East Dorset Health Authority* (2000) [*56 BMLR 39*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2KB-00000-00&context=1522468), that there was an insufficient relationship of proximity between the negligent act and the loss here complained of for the following reasons: (a) There is no essential distinction to be drawn between the case of a failure to perform a vasectomy (or sterilisation procedure) adequately and a failure to carry out a rubella test. In the former case, the duty of the defendant was to avoid conception at all in circumstances where the parents did not wish for a child at all, whereas in the latter case the duty of the defendant was limited to advising in circumstances when the claimant did not wish for a child. (b) The mere fact that Mrs Hardman was deprived of the opportunity of exercising a choice under the Abortion Act 1967 does not provide the necessary degree of proximity or alternatively any greater degree of proximity than arises in the case of a failed sterilisation procedure which is performed inadequately. (c) It cannot be said that the scope and character of the duty of care is any more extensive than in the case of a child born healthy merely because the child is born disabled. (d) The defendant cannot sensibly be said to have assumed responsibility for the foreseeable greater cost associated with a disabled child any more than the Tayside Health Board did in *McFarlane* in relation to the foreseeable lower costs associated with a healthy child merely because these costs are greater in the former case.

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Further in support of the defendant's case Mr Coonan submits: (1)That no distinction should be drawn as a matter of principle between a healthy child and a disabled child such as Daniel Hardman who is accepted and integrated into the family and who, on the evidence, is a source of joy. To do otherwise would be (a) invidious and morally offensive and (b) impractical. There is a fundamental difficulty in defining disability. (2) He submits that it would be inconsistent to allow recovery when the child herself has no claim. (3) He submits that there is no distinction to be drawn between the case of a healthy child or a disabled child in these circumstances whether the issue is to be resolved: (a) by determining whether it was fair, just and reasonable to impose liability for the loss claimed *(*see *Caparo Industries plc v Dickman* [*[1990] 1 All ER 568*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W4N-VX91-JN6B-S03Y-00000-00&context=1522468), [*[1990] 2 AC 605*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KKX1-JKHB-64FF-00000-00&context=1522468) and *McFarlane v Tayside Health Board* (1999) [*52 BMLR 1*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468) at [*11*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468)–13 and 30, [*[2000] 2 AC 59*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468) at [*74*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468)–76 and 95, per Lord Slynn and Lord Hope; or (b) by reference to considerations of distributive justice (see *McFarlane v Tayside Health Board* (1999) [*52 BMLR 1*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468) at [*19*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468), [*[2000] 2 AC 59*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468) at [*83*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468), per Lord Steyn); or (c) by determining whether the imposition of liability for economic loss would go beyond reasonable justification for the wrong done (see *McFarlane v Tayside Health Board* (1999) [*52 BMLR 1*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468) at [*40*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468), [*[2000] 2 AC 59*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468) at [*105*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468), per Lord Clyde).

**Conclusion**

1. Prior to *McFarlane*, the law allowed recovery in wrongful birth cases for the costs of rearing and maintenance.

2. *McFarlane* does not affect the law so far as it relates to the wrongful birth of disabled children. Lord Steyn ((1999) [*52 BMLR 1*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468) at [*20*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468), [*[2000] 2 AC 59*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468) at [*84*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468)) stated that he was not concerned with the case of an unwanted child born seriously disabled and Lord Clyde ((1999) [*52 BMLR 1*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468) at [*34*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468), [*[2000] 2 AC 59*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468) at [*99*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468)) made it expressly clear: 'It has to be noted in the present case we are dealing with a normal birth and a healthy child.' Lord Millett said ((1999) [*52 BMLR 1*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468) at [*47*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468), [*[2000] 2 AC 59*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468) at [*114*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468)): 'It is morally offensive to regard a normal, healthy baby as more trouble and expense than it is worth.' There is nothing in Lord Slynn's speech or in Lord Hope's speech to suggest that either intended to alter the law in relation to disabled children. Indeed, Lord Hope said ((1999) [*52 BMLR 1*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468) at [*33*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468), [*[2000] 2 AC 59*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468) at [*97*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468)) that his views were very similar to those which Lord Steyn has given in his judgment.

3. The claim for maintenance and upkeep of Daniel is a claim for pure economic loss ((1999) [*52 BMLR 1*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468) at [*12*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468), 16, 30, 40 and 43, [*[2000] 2 AC 59*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468) at [*75*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468), 79, 95, 105 and 109) per Lord Slynn, Lord Steyn, Lord Hope, Lord Clyde and Lord Millett.

4. I adopt the test in *Caparo Industries plc v Dickman*, namely that in economic loss cases liability is established if damage is foreseeable, there is a relationship of proximity, and it is just, fair and reasonable to make an award.

5. I find that the birth of a disabled child was a foreseeable consequence of the defendant's negligence. Indeed, this is conceded by Mr Coonan.

6. I find that there was a sufficient relationship of proximity between the negligent act, namely the failure to carry out a rubella test and the loss here complained of, namely, the birth of a severely disabled child. In assessing the defendant's proximity relationship with the claimant, I have had regard to Clarke JA's dicta in *X and Y v Pal* (1991) 23 NSWLR 26, [1992] 3 Med LR Rev 195. I find that the defendant owed a clear duty to the claimant to treat and advise appropriately, and assumed responsibility for so doing. I find that the claimant placed reliance upon the defendant.

***[\*72]***

7. I find that the claimant was entitled to a lawful termination of her pregnancy within the limitations imposed by the Abortion Act 1967. The existence and the purpose of that Act were sufficient to impose liability on the defendant for the consequences of omission.

8. At the time of the misdiagnosis the defendant knew that the claimant was pregnant.

9. Since the defendant was advising a patient with rubella, and since there is a high probability of severe foetal damage, I find there was a sufficient connection between the damage and the breach of duty to conclude that the damage flowed from the breach.

10. I am satisfied that the doctor must have known that the birth of a disabled child would condemn the claimant to significant stress and expense.

11. I have regard also to the principle of distributive justice as defined by Lord Steyn in *McFarlane* ((1999) [*52 BMLR 1*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468) at [*19*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468), [*[2000] 2 AC 59*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468) at [*82*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468)–83). If the commuters on the underground were asked whether the costs of bringing up Daniel (which are attributable to his disability) should fall on the claimant or the rest of the family, or the state, or the defendant, I am satisfied that the very substantial majority, having regard to the particular circumstances of this case, would say that the expense should fall on the wrongdoer.

12. Whilst acknowledging the integrity of Mr Coonan's analysis of the precise nature of the claim, the fact that Daniel was born severely disabled, whilst Catherine McFarlane was a healthy child, produces a different result, whether applying the *Caparo* criteria – fair, just and reasonable to make an award – or principles of distributive justice.

13. I consider the question posed by Lord Clyde ((1999) [*52 BMLR 1*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468) at [*40*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468), [*[2000] 2 AC 59*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468) at [*105*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468)), namely whether the imposition of liability for economic loss would go beyond reasonable restitution for the wrong done. Since the defendant knew that he was treating a pregnant patient who was suffering from rubella and since there was a high probability of severe foetal damage, I am satisfied that the imposition of liability for economic loss would *not* go beyond reasonable restitution for the wrong done.

14. I do not consider it to be either invidious or morally offensive or impractical to draw a distinction between Daniel Hardman and a healthy child for the purposes of determining the present question. The task is merely to quantify the additional cost to the parents caused by the disabilities.

15. I see no fundamental difficulty amounting to an insuperable difficulty in defining disability nor do I anticipate an unedifying growth of case law in which the courts would be asked to compare disabilities in order to value the worth of a disabled child's life to his parents.

16. I reject the argument that it would be inconsistent to allow recovery when the child himself has no claim. Since this is a claim by a parent who has herself suffered an economic loss, I can see no inconsistency.

For these reasons, I find that the claimant can get damages for the past and future cost of providing for Daniel's special needs and care related to his disability.

**D. CAN THE CLAIMANT GET DAMAGES FOR THE PAST AND FUTURE COST OF DANIEL'S BASIC MAINTENANCE?**

Mr Whitfield concedes that *McFarlane* represents the law of England but reserves the right to submit otherwise should this case go to the House of Lords.

***[\*73]***

If Daniel was not disabled, *McFarlane* would bar his claim. However, he is disabled and, but for the negligence, the claimant would not have spent any money bringing up a disabled child.

There are dicta of Lord McFadyen in *McLelland v Greater Glasgow Health Board* 1999 SLT 543, 1998 SCLR 1081, and Drake J at first instance in *Salih v Enfield Health Authority* [1990] 1 Med LR 333, which handsomely support this argument.

Notwithstanding *McFarlane*, I would in any event have been bound by the Court of Appeal's decision in *Salih*. Without expressing any view on the matter, as this was not argued before me, I fully appreciate Mr Whitworth's wish to canvass this proposition before their Lordships House.

**E. IS ANY AWARD UNDER C OR D 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?**

The defendant relies upon the reasoning of Newman J in *Rand v East Dorset Health Authority* ((2000) [*56 BMLR 39*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2KB-00000-00&context=1522468) and invites me to adopt that view of the law. He said this ((2000) [*56 BMLR 39*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2KB-00000-00&context=1522468) at [*58*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2KB-00000-00&context=1522468)):

'The claimants may only recover such losses as they have in fact sustained, or will probably sustain, in the future. 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 wealth 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 Coonan successfully advanced this argument before Newman J in January 2000.

Some three months earlier an identical argument by him was rejected by Judge Nicholl sitting as a High Court judge in *Taylor v Shropshire Health Authority* [2000] Lloyd's Rep Med 96 at 103. A similar argument was rejected by Lord Nimmo Smith in *Anderson v Forth Valley Health* Board (1997) [*44 BMLR 108*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F2F4-G1V7-00000-00&context=1522468) at [*139*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F2F4-G1V7-00000-00&context=1522468), when he said:

'In my view, the correct test in considering future care costs is whether what is proposed is reasonable, and, if so, whether the relative expense is likely to be incurred. I do not think that the existing resources of the pursuers should operate as a limiting factor any more in this case than in the case of a seriously injured pursuer who is likely to require to pay for the provision of care in the future.'

I note with interest that in a long line of cases including *Benarr v Kettering Health Authority* (1998) 138 NLJ 179; *Emeh v Kensington and Chelsea and*

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*Westminster Area Health Authority* [*[1984] 3 All ER 1044*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W4N-VKG1-K054-G4CF-00000-00&context=1522468), [*[1985] QB 1012*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-6D81-F873-B3RH-00000-00&context=1522468); *Salih v Enfield Health Authority* (1991) [*7 BMLR 1*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F2F4-G1RK-00000-00&context=1522468), [*[1991] 3 All ER 400*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W4N-W381-JP4G-64F4-00000-00&context=1522468); *Thake v Maurice* [*[1986] 1 All ER 497*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W4N-VRH1-JSJC-X0XF-00000-00&context=1522468), *[1986] QB 644*; *Udale v Bloomsbury Area Health Authority* [*[1983] 2 All ER 522*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W4N-VKG1-K054-G410-00000-00&context=1522468), [*[1983] 1 WLR 1098*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-DRC1-F2TK-2166-00000-00&context=1522468); and *Allen v Bloomsbury Health Authority* (1992) [*13 BMLR 47*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F2F4-G1MG-00000-00&context=1522468), [*[1993] 1 All ER 651*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W4N-W371-DY33-B4X0-00000-00&context=1522468), this present argument was never canvassed nor did it occur to a sequence of distinguished judges. True it is that cases such as *Emeh* proceeded on the basis that damages were for personal injuries and not for economic loss. Brooke J, however, in *Allen v Bloomsbury Health Authority* made it plain when he said ((1992) [*13 BMLR 47*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F2F4-G1MG-00000-00&context=1522468) at [*53*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F2F4-G1MG-00000-00&context=1522468), [*[1993] 1 All ER 651*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W4N-W371-DY33-B4X0-00000-00&context=1522468) at [*657*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W4N-W371-DY33-B4X0-00000-00&context=1522468)): 'She is also entitled to damages for economic loss quite unassociated with her own physical injury which falls into two main categories.'

I must ask therefore whether it must follow as a matter of law from the categorisation of the claim as a claim for pure economic loss that the claimant is limited by her means as opposed to the reasonable needs of her disabled child.

Such a scenario is deeply unattractive. The poorer the claimant, the less she will be able to spend on her disabled child. Indeed, it might deny the claim of the poorest parent unable to buy in any care or equipment.

In argument, Mr Whitfield pointed out that two impecunious mothers who had both read the judgment in *Rand* and with claims pending in court, may both go down the High Street and inform their respective bank mangers that they had a claim pending against the health authority: 'Can I borrow £100,000 please so that I can recover £100,000 in damages?' One manager may agree, whilst next door there is a refusal: lady A gets £100,000 damages and lady B gets nothing.

Such a state of affairs cannot prevail in a system of compensation intended to put a claimant in the position she would have been in but for the tort.

I find myself compelled to disagree with Newman J on this aspect of the law. I accept Mr Whitfield's argument that categorisation of a claim as one for economic loss identifies the criteria to be satisfied before a duty and its scope are established, but has nothing to do with the quantification of damages once a breach of duty is shown to have resulted in loss of a type which the defendant was under a duty to avoid.

Lord Hoffmann in *South Australia Asset Management Corp v York Montague Ltd* [*[1996] 3 All ER 365*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W4N-WD01-F7ND-G293-00000-00&context=1522468) at [*371*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W4N-WD01-F7ND-G293-00000-00&context=1522468), [*[1997] AC 191*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KKV1-JGBH-B2D6-00000-00&context=1522468) at [*213*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KKV1-JGBH-B2D6-00000-00&context=1522468) said:

'Normally the law limits liability to those consequences which are attributable to that which made the act wrongful. In the case of liability in negligence for providing inaccurate information, this would mean liability for the consequences of the information being inaccurate.'

Liability for the consequences of the fact in the present case must surely include a liability to pay for the care of Daniel attributable to his disability. Limiting damages to what the claimant can afford does not provide proper compensation for the consequences of the tort and the claimant will not, so far as possible, be restored to the position she would have been in but for the tort.

In my judgment the claimant should be placed in a position in which she can care for her disabled child's reasonable needs during the duration of their joint life span.

In support of his contentions Mr Coonan referred me to a decision of Hodgson J namely *Benarr v Kettering Health Authority* (1988) 138 NLJ 179. It

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was, said Mr Coonan, an illustration of the proposition that if you have the money to pay for something which a person in less well off circumstances would not, and if you can establish on the facts that you probably would spend that money, then you can recover it.

This was a failed vasectomy case giving rise to the birth of a healthy child, Catherine, the fourth in the family. The three elder children were all being privately educated by parents passionately committed to independent education. Hodgson J concluded that –

'Catherine would have been privately educated so long as financial disaster did not overtake the family, something which, having seen the plaintiff, I am quite sure is in the highest degree improbable.'

Having cited dicta of Peter Pain J in *Thake v Maurice* [*[1984] 2 All ER 513*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W4N-VKG1-K054-G40N-00000-00&context=1522468), Hodgson J ruled that:

'if the victim of a negligent vasectomy is a father who would in any event have privately educated his children, he is entitled to be compensated for what in the circumstances of that family could properly be called a necessary.'

This decision does not, in my judgment, support Mr Coonan's argument. It is but a further illustration of the court's obligation to restore a claimant to the position he would have been in but for the tort. As Mr Whitfield pointed out in argument, nobody could ever argue that if you were to cripple a man who was always too poor to be able to afford a crutch, therefore he is not going to get the cost of the crutch to help him get about after you have negligently injured him. It must follow that the cap argument (a claimant can only recover what he can spend) can only exist in relation to a claim for pure economic loss in the sense of a claim where financial loss is in no way dependent upon personal injury.

It is manifest from two of the speeches in *McFarlane* that their Lordships did not intend to penalise impecunious claimants in the manner contended for by Mr Coonan.

Lord Steyn said ((1999) [*52 BMLR 1*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468) at [*20*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468), [*[2000] 2 AC 59*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468) at [*82*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468)):

'But in regard to the substainability of a claim for the cost of bringing up the child it ought not to make any difference whether the claim is based on negligence simpliciter or on the extended *Hedley Byrne* principle.'

If a claim based on the extended *Hedley Byrne* principle was as disadvantageous to the claimant as Mr Coonan suggests it should be, there would of course be a significant difference.

Lord Millet said ((1999) [*52 BMLR 1*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468) at [*43*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468), [*[2000] 2 AC 59*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468) at [*109*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468)):

'I do not consider that the present question should depend on whether the economic loss is characterised as pure or consequential. The distinction is technical and artificial if not actually suspect in the circumstances of the present case, and is to my mind made irrelevant by the fact that Catherine's conception and birth are the very things that the defenders' professional services were called upon to prevent. In

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principle any losses occasioned thereby are recoverable however they may be characterised. Moreover the distinction has no moral content and while ostensibly relied upon by some of those who have rejected the claim it can in reality have played no part in their belief that it would be morally wrong to accede to it.'

I conclude that any award under C or D should not be 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.

**F. CAN THE MOTHER GET DAMAGES FOR HER PAST AND FUTURE CARE OF DANIEL UNDER HOUSECROFT V BURNETT OR BY WAY OF DAMAGES FOR LOSS OF AMENITY?**

At Mr Coonan's behest, and properly so, I begin by answering this question by adopting his helpful formulation thus: is the claimant entitled to an award of damages in respect of her past and future gratuitous *extra* personal care (whether or not discounted in accordance with *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 defendant submits that she is not so entitled for the reasons relied upon by Newman J in *Rand* (2000) [*56 BMLR 39*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2KB-00000-00&context=1522468) at [*61*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2KB-00000-00&context=1522468)):

'The principle established in *Donnelly v Joyce* [*[1973] 3 All ER 475*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W4N-TYM1-F4NT-X2PR-00000-00&context=1522468), [*[1974] QB 454*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-6D21-JW5H-X3J9-00000-00&context=1522468) and upheld by *Hunt v Severs* [*[1994] 2 All ER 385*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W4N-W381-JP4G-64HC-00000-00&context=1522468), [*[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. Katy has no claim. The Court of Appeal in *Donnelly v Joyce* [*[1973] 3 All ER 475*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W4N-TYM1-F4NT-X2PR-00000-00&context=1522468) at [*480*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W4N-TYM1-F4NT-X2PR-00000-00&context=1522468), [*[1974] QB 454*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-6D21-JW5H-X3J9-00000-00&context=1522468) at [*462*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-6D21-JW5H-X3J9-00000-00&context=1522468) and the House of Lords (in *Hunt v Severs* [*[1994] 2 All ER 385*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W4N-W381-JP4G-64HC-00000-00&context=1522468) at [*390*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W4N-W381-JP4G-64HC-00000-00&context=1522468), [*[1994] 2 AC 350*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G4BX-00000-00&context=1522468) at [*358*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G4BX-00000-00&context=1522468)) stated that in such a case the provider has no direct cause of action. In this instance the parents can only claim if they have suffered a loss and the loss has been incurred by reason of Katy's disabled condition.'

Mr Coonan puts the matter very simply. The claimant has suffered no loss; her claim can only be formulated as a claim for pure economic loss. Parental care is not parasitical upon any personal injury suffered by the claimant.

Mr Whitfield answers that proposition this way. If the mother is entitled to claim money she would spend on needs arising out of disability, for example paying carers, then it must follow, as night follows day, that if she saves the defendants money by providing the care herself, and therefore perhaps gets only 75% of the commercial cost of care, in accordance with normal practice, then that claim is good because there can be no logical distinction between a claim for the commercial cost of care and the value of care provided by a mother.

Indeed, Mr Coonan accepts that the claimant is entitled to claim for earnings which she has lost because she has had to give up work in order to care for Daniel. It is submitted that, by parity of reasoning, she ought to be able to claim for the value of that care which she provides, provided there is not an overlap between the two.

In an ordinary claim where a child claimant is injured and a mother gives up work and looks after the child, the damages would be measured either by the amount of earnings which she has lost, or if it is not very much earnings and she has put in a lot of hours by the amount of care she has provided there is not an overlap (see *Housecroft v Burnett* [*[1994] 2 All ER 385*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W4N-W381-JP4G-64HC-00000-00&context=1522468), [*[1994] 2 AC 350*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G4BX-00000-00&context=1522468)). It is said that these are simply two ways of quantifying the same head of damage.

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Is there, however, a distinction to be made because the claimant is not the child who is injured but rather the mother who is claiming the money so that she can look after the child?

In *Fish v Wilcox* (1993) [*13 BMLR 134*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-JB7K-220K-00000-00&context=1522468) at [*138*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-JB7K-220K-00000-00&context=1522468) Stuart-Smith LJ said:

'In my judgment, although … there is a distinction between the *Housecroft* case and the present inasmuch as the claims are made by different people, in the 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 task that the court has to perform in the two cases.'

In her commentary on the report, Margaret Puxon QC stated the effect of the decision in the manner which I am pleased to adopt:

'It seems therefore that in such a case while the court may not award damages so that a defendant may both recompense a parent for loss of earnings and also “pay” the parent a full “wage” for the work carried out, the court should award such a sum as will appropriately recompense the parent; this sum will either be based on earnings actually lost, or on the value put on the services rendered as assessed by the court, whichever be the higher. Presumably, this assessment is to be made on the *Housecroft v Burnett* principle; that is the commercial rate “scaled down”; this brings an element of vagueness, perhaps more respectfully referred to as discretion, which gives both judges and legal advisers some latitude in their judgments and negotiations.'

It is significant that awards on these lines were made in the *Salih* case and in the *Taylor* case, in which Mr Coonan appeared for the defendants. The submission there was that there should be damages, but that they should not be measured by *Housecroft v Burnett*, there should be a lump sum for the general position, loss of amenity, burden of caring etc. Judge Nicholl rejected that proposition.

In the *Rand* case, however, in which Mr Coonan also appeared for the defendant, Newman J decided that there should be such a lump sum award notwithstanding Mr Coonan's invitation (on this occasion) to the contrary. Under the head 'damages' for the additional mental, physical, and emotional stress and wear and tear in bringing up a Down's syndrome child over and above that involved in bringing up a healthy child, he awarded Mrs Rand £30,000 and Mr Rand £5,000.

Mr Coonan submits that the claimant can only recover such damages within a properly formulated claim for personal injury and, so far as Newman J relied upon Lord Millett in *McFarlane* that analysis does not represent the law.

Lord Millett had said ((1999) [*52 BMLR 1*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468) at [*48*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468), [*[2000] 2 AC 59*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468) at [*114*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468)):

'It does not, however follow that Mr and Mrs McFarlane should be sent away empty-handed. The rejection of their claim to measure their loss by the consequences of Catherine's conception and birth does not lead to the conclusion that they have suffered none. They have suffered both injury and loss. They have lost the freedom to limit the size of

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their family. They have been denied an important aspect of their personal autonomy. Their decision to have no more children is one the law should respect and protect. They are entitled to general damages to reflect the true nature of the wrong done to them. This should be a conventional sum which should be left to the trial judge to assess, but which I would not expect to exceed £5,000 in a straightforward case like the present.'

As Newman J pointed out, this was not an award for care but compensation for what the parents have lost by reason of having to provide care and attention.

In the present case Daniel screams all night and requires constant hands-on attention. This will involve the claimant in spending almost all her waking hours attending to his needs. Lord Bridge in *Hunt v Severs* [*[1994] 2 All ER 385*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W4N-W381-JP4G-64HC-00000-00&context=1522468) at [*394*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W4N-W381-JP4G-64HC-00000-00&context=1522468), [*[1994] 2 AC 350*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G4BX-00000-00&context=1522468) at [*363*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G4BX-00000-00&context=1522468) said: 'the underlying rationale of the English law … is to enable the voluntary carer to receive proper recompense for his or her services.'

*Conclusion*

I am abundantly satisfied that the only way in which the claimant can receive recompense for the time spent in her care of Daniel falls to be calculated on *Housecroft v Burnett* lines, as refined by *Fish v Wilcox*.

Provided there is evidence that the claimant has provided or will provide care, she is entitled to compensation. The measure of damages would be the 'commercial' costs less 25%.

Further, and alternatively, the claimant seeks damages for the loss of amenity consisting in the stress, anxiety and disruption of her life resulting from the obligation to bring up a disabled child.

It is accepted by the claimant that if proper compensation for continuing care by the complainant is provided then that will considerably moderate the claim for loss of amenity, because there will be compensation for that care which includes stress.

In *Allen v Bloomsbury Health Authority* (1992) [*13 BMLR 47*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F2F4-G1MG-00000-00&context=1522468) at [*54*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F2F4-G1MG-00000-00&context=1522468), [*[1993] 1 All ER 651*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W4N-W371-DY33-B4X0-00000-00&context=1522468) at [*657*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W4N-W371-DY33-B4X0-00000-00&context=1522468) Brooke J summarised the law as it then appeared to be:

'the law is willing to recognise a claim for general damages in respect of the foreseeable additional anxiety, stress and burden in bringing up a handicapped child, which is not treated as being extinguished by any countervailing benefit, although this head of damage is different in kind from the typical claim for anxiety and stress associated with and flowing from an injured plaintiff's own personal injuries.'

If I am wrong in relation to the measurability of the gratuitous care costs then a very substantial sum would be recoverable, so it is claimed under this limb.

Mr Coonan contends that such an award should not be made 'because and such extra wear and tear is a consequence of Daniel's disability and not a consequence of any personal injury suffered by the claimant. The claimant can only recover such damages within a properly formulated claim for personal injury'.

He submits that *Emeh* was wrongly decided on this point and that Brooke J in *Allen* relied upon the erroneous point decided in *Emeh*. Mr Coonan reminds me that *Emeh* was criticised in *McFarlane* and should no longer be regarded as good law.

***[\*79]***

As Newman J astutely observed in *Rand*, the Weekly Law Reports state that *Emeh* has been 'overruled', whilst the All England Reports used the word 'considered'.

Lord Steyn in *McFarlane* ((1999) [*52 BMLR 1*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468) at [*16*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468), [*[2000] 2 AC 59*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468) at [*79*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468)) spoke of unease amongst the judges at the *Emeh* decision and cited Ognall J's surprise (in *Jones v Berkshire Area Health Authority*) (2 July 1986, unreported)) that the law acknowledged entitlement in a mother to claim damages for the blessing of a healthy child. Lord Clyde also made reference to *Emeh* ((1999) [*52 BMLR 1*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468) at [*36*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468), [*[2000] 2 AC 59*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468) at [*101*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-JSXV-G462-00000-00&context=1522468)). Coincidentally, these were the two Law Lords who specifically reserved the point in relation to a child born with a disability. Accordingly, it must be that when *Emeh* is being criticised it is in relation to the claim for basic costs, not cost of disability, which did not arise.

Accordingly, I do not find *Emeh* as being overruled in so far as disabled children are concerned and I see no reason to depart from or disagree with the dicta of Brooke J in *Allen v Bloomsbury Health Authority*.

In support of Mr Whitfield's argument that it is perfectly proper to include a claim both for gratuitous care past and present provided by the mother and for the stress involved, I was referred to three authorities, none precisely on all fours with the present case, in which distinguished judges had made analogous awards. I need not here recite the facts of each but they are: *Kralj v McGrath and St Theresa's Hospital* [*[1986] 1 All ER 54*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W4N-VRH1-JSJC-X136-00000-00&context=1522468); *Bagley v North Herts Health Authority* (1986) NLJ 1014; *Grieve v Salford Health Authority* [1991] 2 Med LR 295.

In the latter case Rose J said this ([1991] 2 Med LR 295):

'The matters for which she is entitled to compensation are: loss of the child and of the satisfaction of bringing the pregnancy to a successful conclusion in the manner graphically described by Simon Brown J in *Bagley*. In addition the psychological damage she suffered without putting a label on it. My attention has been drawn to *Kralj v McGrath* a decision of Woolf J. So far as both cases are concerned there are circumstances similar to this case and, as always, help is derived from the figures awarded and by the judges' approach.'

To retreat to a position where claimants who sustain stress or psychological damage in circumstances such as this would not only be insensitive but would constitute a failure to compensate in manifestly meritorious circumstances.

Accordingly, I find that the claimant can get damages for her past and future care of Daniel either (a) calculated in accordance with *Housecroft v Burnett* or (b) 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.

**G. IS ANY AWARD UNDER C OR F LIMITED TO THE AMOUNT OF EXPENDITURE OR NEEDS BEFORE DANIEL REACHES THE AGE OF 18?**

It is agreed by both parties that the answer to this question is No.

*European Convention on Human Rights*

Throughout my deliberations I have had regard to art 8 entitlement to 'respect for his private and family life and his home'. That consideration has not been the determining factor in any one of the issues I have sought to resolve in this judgment.

***[\*80]***

I derive satisfaction, however, from the fact that the consequences of this judgment as it stands will be to permit the Hardmans, as a family unit independent of the state, to meet Daniel's needs. A failure to provide adequate compensation would have disrupted and prevented the family leading as 'normal' a life as possible (see *Marckz v Belgium* (1979) 2 EHRR 330). It would have deprived this family of its autonomy vesting all major decisions as to care in the state.

It may well be that the common law has reached a solution entirely compatible with art 8.

*An appeal*

Both counsel, with no hint of menace, agreed that whatever conclusion I were to reach permission to appeal was likely to be sought by the disappointed party. Having regard to Lord Steyn and Lord Clyde's reservation, this came as no surprise. I am told that *Taylor v Shropshire Health Authority* has been listed in the Court of Appeal early in 2001 and that Mr Whitfield and Mr Coonan are retained in that case. In granting permission to appeal to the defendant, I express the view that the present case could ideally be heard alongside *Taylor*. Both counsel concur in that view.

Judgment for the claimant.