| **56 BMLR 39**, | (2000) Times, 10 May, | [*[2000] All ER (D) 252*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-V2R1-DY89-M38R-00000-00&context=1522468)

# [*Rand v East Dorset Health Authority 56 BMLR 39*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2KB-00000-00&context=1522468)

QUEEN'S BENCH DIVISION

NEWMAN J

25 FEBRUARY 2000

*Harold Burnett QC* and *Richard Ough* (instructed by *Humphries Kirk*, Swanage) for the claimants.

*Kieran Coonan QC* and *Christina Lambert* (instructed by *Beachcroft Wansboroughs*, Sheffield) for the defendant health authority.

NEWMAN J.

***[\*41]***

In this action, Sally Margaret Rand and her husband, Peter Frederick Rand, claim damages against the East Dorset Health Authority. On 6 June 1988 Mrs Rand gave birth to a daughter, Katy, who was born with Down's syndrome and she suffers to a degree from the handicaps and disabilities normally associated with that condition.

Since 1983 Mr and Mrs Rand had been the owners and proprietors of a rest home. It had a capacity for and was licensed for eight residents. Mrs Rand, a qualified state registered nurse, was able to provide the nursing services required in the rest home, as well as to perform domestic duties. Mr Rand fulfilled the role of general overseer, administrator and maintenance man, which involved him in gardening and shopping. They employed at least two domestic staff. Their first child, Christopher, was born on 5 July 1985.

In January 1988 doctors wrongfully omitted to inform the claimants of the results of a scan carried out in the course of the routine provision of medical care and management of Mrs Rand's pregnancy. The scan disclosed the likelihood that she would give birth to a Down's syndrome baby. It has been accepted that the negligent omission deprived the claimants of the opportunity to terminate the pregnancy. Further, that had they been told of the likelihood that Mrs Rand would give birth to a Down's syndrome baby, she would have had an abortion.

The claim by the parents is believed to be the first to come to trial since the judgment of the House of Lords 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), [*[1999] 3 WLR 1301*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-DR91-F2TK-2095-00000-00&context=1522468), and every aspect of the claim has fallen for consideration in the light of that decision. Proceedings were commenced in May 1991. There followed an admission of liabilities and judgment was entered with damages to be assessed on 26 August 1994. There have been two interim payments totalling £120,000. There then followed a number of years' delay until the case commenced before me in January 2000. There has been no explanation for the inordinate delay. A principal consequence has been that the House of Lords has delivered judgment in the case of *McFarlane*. The heads of damage comprising the claim for damages, which I must now assess, reflect the law prior to the judgment of the House of Lords. The heads of damage can be classified as follows:

1. General damages for both claimants.

2. Claims for Kate. Such claims include:

(a) Maintenance of Katy from birth up to age 25 years. It is a claim for the full cost of maintenance and upkeep of Katy. The age of 25 years is taken as the stop date because it is estimated that when she reaches that age she will move to a residential home.

(b) The education of Katy to the age of 18 years. The claimants desire Katy to receive private education. At the moment she is in mainstream state education.

(c) between up to age 25 years (at different times by parents, grandparents and professionals) and from the age of 25 years her care in the residential institution.

(d) Costs of aids and appliances from birth throughout her life.

(e) Cost of therapies from birth throughout her life.

3. Claims for the parents' financial losses. These include:

(a) Loss of profits of the residential home. It is the claimants' case that the birth of Katy, a disabled child, forced them to sell the residential home

***[\*42]***

which was their business and their home. Since that date Mrs Rand has spent her time in providing full-time care for Katy. Mr Rand, despite efforts to obtain employment, has been unemployed for 11 years. He will be 65 years old in 2008. Continuing future loss of profits are claimed to that date.

(b) The value of their accommodation. There is a claim comprising the value of the accommodation they had in the rest home.

(c) Extra council tax. By reason of having to purchase their own home they contend they have to pay extra council tax.

(d) Capital gains tax. There is a claim for capital gains tax which, on the sale of the rest home, they were bound to pay, which it is said would not have been paid had they remained at the rest home or rolled over the proceeds of sale of the rest home into any other rest home that they purchased. On retirement they would have had retirement relief against the capital gains tax.

The claimants' estimate of the claim as set out in the schedule of damages amounts to a sum of the order of £800,000.

Both counsel agree that in the light of the judgment in the case of *McFarlane*, each and every head of damage claimed by the claimants falls for review and consideration. Had Katy been born a healthy, normal child, the position would be straightforward. It is apparent that, in the course of argument before their Lordships' House, consideration was given to the question whether the same approach would be appropriate in the case of a child born seriously disabled. Lord Steyn observed ((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), [*[1999] 3 WLR 1301*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-DR91-F2TK-2095-00000-00&context=1522468) at [*1320*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-DR91-F2TK-2095-00000-00&context=1522468)):

'Secondly, counsel for the health authority was inclined to concede that in the case of an unwanted child, who was born seriously disabled, the rule may have to be different. There may be force in this concession but it does not arise in the present appeal and it ought to await decision where the focus is on such cases.'

There is an issue as to whether Katy should be described as 'seriously disabled'. The defendant submits that she suffers from a mild learning disability and developmental delay. The claimants submit she is seriously disabled and will always require a considerable degree of care and assistance. There is no dispute that she is regarded as one of the most able and intelligent children among those who suffer from Down's syndrome. She has, for example, to date attended a mainstream state school. She has been fully integrated into normal family life and leads a full and active life. I shall need to revert to the detailed argument in due course.

I propose to identify factors in the claim under consideration which set the context for the review which I must undertake: (1) The parents wanted to have a second child. In the sense often used in the cases, Katy is not an 'unwanted child'. (2) Owing to the negligence of the defendant, Katy was at no time in the course of the pregnancy, 'unwanted', nor was her birth 'unwanted'. Nevertheless, the claimants did not want to have a disabled child, and in view of the admitted negligence the birth can appropriately be described as 'wrongful'. (3) Since birth Katy has been loved, wanted and cared for in the family. She has been 'a blessing'. But that is not to say that her disability has not caused the parents distress and emotional turmoil. (4) The admitted negligence did not cause

***[\*43]***

the disability. (5) Katy has no claim for the life which the defendant's negligence has occasioned, notwithstanding that the quality of her life is affected by her disability. (6) A claim based upon a lost opportunity to terminate a pregnancy by reason of the risk the child would suffer from 'abnormalities' must be shown to fall within [*s 1(1)(a)-(d)*](https://advance.lexis.com/api/document?collection=legislation-uk&id=urn:contentItem:5W53-GW41-F8SS-6313-00000-00&context=1522468) of the Abortion Act 1967, as amended by the Human Fertilisation and Embryology Act 1990. Subsection 1(d) provides that it shall be lawful to terminate where: '… 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.'

**GENERAL DAMAGES FOR MR AND MRS RAND**

It is not disputed as a matter of principle, in my judgment correctly, that Mrs Rand can maintain a claim for pain and suffering flowing from the negligent act. In this case the evidence would not support a claim for the pain and suffering and discomfort involved in giving birth to Katy, for Katy was a wanted child. The claim is based upon the contention that, but for Katy being disabled, the claimants would not have had a third child, namely Robert, who was born on 16 July 1992. Mrs Rand stated in evidence, which I unhesitatingly accept, that she had a third child in order to prove to herself and others that she could have a normal child. The defendant submits that such sum as would be proper to award in respect of the extra pain, suffering and discomfort of a pregnancy must be offset by the avoidance of an amniocentesis and termination of pregnancy which the proper discharge of the defendant's duty of care would have imposed upon Mrs Rand. This head of damage calls for no further comment at this stage, but I shall return to assess damages in due course. Mr Rand has no claim under this head, namely pain and suffering. I shall have to consider whether he is entitled to general damages on any other basis.

**THE CLAIMS FOR KATY**

Mr Burnett QC seeks to restrict the impact of the decision in the House of Lords in *McFarlane* to the birth of a healthy child. He submits that the principles established and followed prior to the judgment should be followed. In particular that the case of *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) governs the position. He submits that the House of Lords did not decide that in a case of a claim for damages for negligence resulting in the unwanted birth of a disabled child that a court was now bound to hold that claims for the maintenance and care of the child were to be regarded as claims for economic loss. Further, if such claims were regarded as claims for economic loss, he disputed that any principle could be extracted from the judgment which rendered a claim for economic loss sustained by the parents unsustainable. In this case there is a claim for loss of profits, and other financial consequences are claimed as damages. Having regard to these arguments, I must attempt to analyse the speeches in the House of Lords, to extract the underlying reasoning, and having done so, assess the impact they have on the facts of this case.

**LORD SLYNN**

Lord Slynn concluded ((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), [*[1999] 3 WLR 1301*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-DR91-F2TK-2095-00000-00&context=1522468) at [*1312*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-DR91-F2TK-2095-00000-00&context=1522468)):

'The real question raised here is more fundamental. It is to be remembered on this part of the case that your Lordships are concerned

***[\*44]***

only with liability for economic loss. It is not enough to say that the loss is foreseeable as I have accepted it is foreseeable. Indeed if foreseeability is the only test there is no reason why a claim should necessarily stop at the date when a statutory duty to maintain a child comes to an end. There is a wider issue to consider. I agree with Mr Stewart QC (in the article to which I have referred) that the question is not simply one of the quantification of damages, it is one of liability, of the extent of the duty of care which is owed to the husband and wife.'

His Lordship considered the question to be whether the doctor or the board had assumed responsibility for the economic interest of the claimant 'with concomitant reliance by the claimant'. Having considered it he concluded ((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), [*[1999] 3 WLR 1301*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-DR91-F2TK-2095-00000-00&context=1522468) at [*1312*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-DR91-F2TK-2095-00000-00&context=1522468)):

'… it is not fair, just or reasonable to impose on the doctor or his employer liability for the consequential responsibilities, imposed on or accepted by the parents to bring up a child.'

This conclusion of fundamental principle was reached in a case where the negligent act comprised the giving of wrong advice which led to the parents taking no contraceptive measures ('wrongful conception'). In the instant case the negligent act comprised omitting to advise the Rands, which led to the parents taking no steps to terminate the pregnancy ('wrongful birth'). The distinction may give rise to different considerations in connection with a mother's claim for pain and suffering arising from the birth of the child, but counsel did not argue for a distinction to be drawn in connection with the claim for the cost of upbringing.

It is not clear whether Lord Slynn would have come to a different conclusion if the negligent act or omission had occasioned the birth of a disabled child. But if it is correct to draw a distinction between the character of the responsibility assumed for preventing the birth of a healthy child and that of a disabled child, Lord Slynn's test could well produce a different answer.

**LORD STEYN**

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 [*13*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468), [*[1999] 3 WLR 1301*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-DR91-F2TK-2095-00000-00&context=1522468) at [*1313*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-DR91-F2TK-2095-00000-00&context=1522468)) treated the claim as being –

'brought under the extended *Hedley Byrne* principle … that is, it is based on an assumption of responsibility by the doctor who gave the negligent advice.'

He expressly considered *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), which did involve an 'unwanted' child born with congenital disabilities. Lord Steyn accepted the analysis made by Mr Stewart QC of the judgment in *Emeh* that the court had equated '… pregnancy with personal injury giving rise to *consequential* (as opposed to *pure*) economic loss which includes upbringing costs' (see Angus Stewart QC 'Damages for the Birth of a Child' (1995) 40 JLSS 298 at 300). Lord Steyn concluded that the claim of each parent in *McFarlane* has to be regarded as 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 [*16*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468), [*[1999] 3 WLR 1301*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-DR91-F2TK-2095-00000-00&context=1522468) at [*1316*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-DR91-F2TK-2095-00000-00&context=1522468)).

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Having surveyed available comparative jurisprudence, he concluded that:

'… where courts of law have denied a remedy for the cost of bringing up an unwanted child the real reasons have been grounds of distributive justice' ((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), [*[1999] 3 WLR 1301*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-DR91-F2TK-2095-00000-00&context=1522468) at [*1318*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-DR91-F2TK-2095-00000-00&context=1522468)).

Applying principles of distributive justice exemplified by certain cases, he concluded ((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)–20, [*[1999] 3 WLR 1301*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-DR91-F2TK-2095-00000-00&context=1522468) at [*1319*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-DR91-F2TK-2095-00000-00&context=1522468)):

'I am persuaded that our tort law does not permit parents of a healthy unwanted child to claim the costs of bringing up the child from a health authority or a doctor. If it were necessary to do so, I would say that the claim does not satisfy the requirement of being fair, just and reasonable.'

It is plain from the speech of Lord Steyn that the considerations of distributive justice were addressed by reference to the 'healthy child'. For example, the hypothetical question addressed to Underground commuters was: 'Should the parents of an unwanted but healthy child be able to sue …?' But the argument for coherence and rationality which he accepted was prompted by the following observation in Trindade and Cane *The Law of Torts in Australia* (2nd edn, 1993) p 434:

'… it might seem inconsistent to allow a claim by the parents while that of the child, whether healthy or disabled, is rejected. Surely the parents' claim is equally repugnant to ideas of the sanctity and value of human life and rights, like that of the child, on a comparison between a situation where a human being exists and one where it does not.'

This in turn led to Lord Steyn's response to the concession made by counsel for the health board that, in the case of an unwanted child who was born seriously disabled, the rule may have to be different: 'There may be force in this concession but it does not arise in the present appeal and it ought to await decision where the focus is on such cases' ((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), [*[1999] 3 WLR 1301*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-DR91-F2TK-2095-00000-00&context=1522468) at [*1320*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-DR91-F2TK-2095-00000-00&context=1522468)) In my judgment a claim for the full cost of maintenance of a disabled child necessarily gives rise to the same 'repugnance', because it requires 'a comparison between a situation where a human being exists and one where it does not'. Contrary to Lord Steyn's suggestion for the focus on such a case, it avoids focusing on the disability. In my judgment, a claim focused on the consequences of a disability does not give rise to the same repugnance, for it requires a comparison between a normal, healthy child and a disabled child.

**LORD HOPE**

Lord Hope categorised the claim for the financial consequences of caring for, feeding and clothing and maintaining the child as a 'claim for economic loss'. He regarded the costs of rearing to be a reasonable foreseeable consequence of the negligence, but having regard to the benefits to be derived from rearing a child and because the value to be attached to them was incalculable he concluded that ((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 [*32*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468), [*[1999] 3 WLR 1301*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-DR91-F2TK-2095-00000-00&context=1522468) at [*1332*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-DR91-F2TK-2095-00000-00&context=1522468)):

***[\*46]***

'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 meeting their obligations to the child during her childhood are not recoverable as damages … This is economic loss of a kind which must be held to fall outside the ambit of the duty of care which was owed.'

In my judgment the above reasoning does not assist the claimants in their pursuit of the full costs of maintenance, care and rearing for a disabled child, but it contains pointers which could support the alternative approach that such costs, so far as they are consequent upon the disability, are recoverable as a head of economic loss because such a calculation does not require assessing the incalculable.

**LORD CLYDE**

Lord Clyde recognised ((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), [*[1999] 3 WLR 1301*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-DR91-F2TK-2095-00000-00&context=1522468) at [*1334*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-DR91-F2TK-2095-00000-00&context=1522468)), but without comment, 'a distinction in cases of wrongful conception between those where the child is healthy and those where the child is unhealthy, or disabled or otherwise imperfect …'

He, unlike Lord Slynn, considered the only issue to be 'one about the existence and extent of the loss … sustained'. He hesitated in adopting an approach derived from principles applicable to economic loss.

Having reviewed the argument and the cases, Lord Clyde concluded by reference to Lord Blackburn's words in *Livingston 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) at [*39*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KKX1-JKHB-64J8-00000-00&context=1522468) that an award of damages which enable the parents to maintain their child free of charge whilst in their custody did not 'seem to accord with the idea of restitution or with an award of damages which does justice between both parties' ((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 [*39*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468)–40, [*[1999] 3 WLR 1301*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-DR91-F2TK-2095-00000-00&context=1522468) at [*1339*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-DR91-F2TK-2095-00000-00&context=1522468)).

He concluded ((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), [*[1999] 3 WLR 1301*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-DR91-F2TK-2095-00000-00&context=1522468) at [*1340*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-DR91-F2TK-2095-00000-00&context=1522468)) that restitution as claimed was not reasonable:

'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.'

In my judgment the application of a restitutionary approach poses difficulties where, but for the negligence, there would have been no birth. But in a wrongful birth case the answer may lie in a close examination of the nature of the choice made by parents when deciding to lawfully terminate a pregnancy carrying the risk of the child being born disabled.

**LORD MILLETT**

Lord Millet considered that the outcome should not depend upon the categorisation of the claim as either pure or consequential economic loss. Nor that the answer lay with the remedy being disproportionate to the wrong. He rejected the materiality of the parents' wishes or motive. He supposed a case where there existed a serious risk that the unwanted pregnancy might lead to the birth of a defective child and where the parents were opposed to abortion. He continued ((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 [*44*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468), [*[1999] 3 WLR 1301*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-DR91-F2TK-2095-00000-00&context=1522468) at [*1344*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-DR91-F2TK-2095-00000-00&context=1522468)):

***[\*47]***

'Suppose further that, to their great joy and relief, childbirth was uneventful and the baby was entirely normal. It would seem absurd to allow a claim for the costs of bringing up a child in these circumstances.'

Having reviewed the cases and the argument he concluded ((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)–48, [*[1999] 3 WLR 1301*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-DR91-F2TK-2095-00000-00&context=1522468) at [*1347*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-DR91-F2TK-2095-00000-00&context=1522468)): (1) that the birth of a baby is a blessing. 'It brings joy and sorrow, blessing and responsibility. The advantages and the disadvantages are inseparable'; (2) that the two are inseparable and that the advantages cannot be enjoyed without the disadvantages. '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.'

It is plain that a failure to terminate a pregnancy, where there is a substantial risk that the child could be born seriously handicapped, might occasion the birth of a child so seriously disabled that the advantages to which Lord Millett refers would be difficult to discern. Such a case would throw up in acute form the moral issue as to the point at which human life might have to be accorded no value. It does not arise in this case. Happily, Katy, although disabled, is a 'blessing'. But there is an issue about the degree of her disablement and it is an appropriate point in the judgment for me to make my findings.

**KATY'S PAST, PRESENT AND LIKELY FUTURE CONDITION**

At birth (6 June 1988) she was tiny and poorly. When five weeks old she was not thriving. In common with Down's syndrome babies she required heart surgery. Prior to the major surgery which was carried out in February 1989, Mr and Mrs Rand had reason to doubt how long she would survive. The surgery was a complete success and Katy was transformed by it. The early months had put enormous strain on both Mr and Mrs Rand but the result of the surgery was that Katy had a normal life expectancy and there was a need for care and attention to be given to her future development. Mrs Rand has devoted her time to Katy with outstanding results.

Janet Carr, a clinical psychologist, assessed Katy at the age of 4 years 6 months. She records her as '… an attractive slim little girl …' who amply demonstrated '… the typical strong mindedness of people with Down's Syndrome'. Her assessment was based on a cohort examined and studied by her. Katy's score was '… equivalent to those of the highest scorers in the whole cohort. This suggest that Katy is one of the most able children with Down's Syndrome'. At the date she concluded as to the future:

'Where everyday life skills are concerned Katy is likely to be a very competent young woman with Down's Syndrome, to be capable of living with some degree of independence, and even of being employed at a simple level and being paid a wage. She is however very unlikely ever to be able to live entirely independently; to marry, or to bring up children. She will need care and supervision for the rest of her life.'

In an assessment dated 2 March 1998, Janet Carr reported that she was confident that Katy's intellectual ability would match the average of those of her cohort now aged 21 years. Her reading was rated '… as extremely good …' As to Katy's skills:

'Katy feeds herself independently though she may need help with cutting difficult foods. She baths and dries herself but is supervised in

***[\*48]***

tooth-cleaning. She is able to dress herself entirely except for the top button of her shirt and for doing up laces and her tie. She manages the toilet entirely by herself, is clean and dry by day (and has been since about 5–6 years old) and at night. In all this she rates in the top half to one third of the 11 year-old cohort, and rather better than that where bathing is concerned. Her sleep is somewhat more problematical. She goes to bed at 7.30 pm and always wakes at 5.30 am, even if he goes to bed later in the evening. On 3/7 nights she sleeps through to 5.30 but at other times she wakes at about 1 am, goes to her mother, and is then taken back to her bed where she settles. When she wakes in the morning she will usually go downstairs and find things to do, but because it is quite unpredictable what this might be Mrs Rand usually gets up and goes downstairs with her. For example, Katy may decide to do some cooking, turning on the gas; again, on one occasion when she went downstairs on her own there had been a power cut and there was no electricity, so Katy, in a spirit of independent helpfulness, found every candle in the house, and matches, and lit all the candles. Although it was explained to her that this had not been a good idea it is not possible to predict what other ideas she may have, so Mrs Rand often has quite interrupted and curtailed sleep. Katy likes shopping, and, as another example of her independence, insists on buying things on her own: Mrs Rand has to go outside the shop while Katy is making her purchases. She does not know the value of coins, though she knows some coins are of higher value than others. Katy can tell the time to the hour and half hour, and while I was there also told a quarter hour correctly.'

Asked to describe Katy's personality, Mrs Rand said she was 'highly strung, nosy, stubborn, a tremendous show-off' (all this said in tones of the greatest affection). The stubbornness can show itself at any time but particularly where her personal appearance is concerned: everything about her, clothes, hair, tie, must be just right and she will not leave it until it is to her satisfaction: 'When she says “No” it's a struggle.' Mrs Rand has developed strategies to deal with this but Mr Rand finds it more difficult. Katy still needs a good deal of supervision, both in the home and outside. She does not fully understand danger, such as that from traffic, and when she goes swimming will swim out of her depth. She can be left in the house alone for not more than a few minutes and is not allowed out of the garden, although Mrs Rand hopes this will become possible when Robert, now aged six, is old enough to go out with her. These restrictions were in place for about half the 11-year cohort, with the most able children allowed more freedom.

So Katy, with her very good intellectual powers, still requires more supervision than did most of the children of her level of ability. This may well be due, at least in part, to her independence and adventurousness, qualities which are less often seen in children with Down's syndrome, which, while wholly admirable in themselves, may put her at risk of getting into situations she may not be able to manage entirely safely. This results in those caring for her having to be more vigilant and diplomatic in allowing her sufficient scope for her developmental needs while ensuring she is not exposed to unacceptable risks.

In the annual review to 9 October 1998 from Swanage Middle School, a somewhat different picture emerges:

***[\*49]***

'*Independence in School*:

(1) *Work*: Katy can now work for periods unaided on appropriate tasks – with supervision at hand. However, in some ways her independence needs curbing, in that she needs to be encouraged to work co-operatively with her AWA and fellow pupils, so that she may continue to make progress.

(2) *Social Situations*: Katy can cope with most social situations She is able to travel independently to and from school on the bus, choose and pay for her lunch in the canteen, and move around school to different classes for different lessons with different teachers. These are all situations she has never had to deal with before, and she is coping well.'

On a review dated 5 November 1998 based upon an account from Mrs Rand the following is reported:

'I am delighted with the way Katy has settled at Swanage Middle School, from my point of view there have been no problems. She is happy and enjoying all aspects of her new school life and has adapted to a change in routine well. Katy travels to and from school on the bus and has coped with this well. She appears to be working hard in all subjects and knows [who] teaches her for each subject. She also knows the names of all the children in her class.

When she gets home from school Katy is eager to tell me about her day which I find thrilling as she has always found this very hard. She is keen to do her homework thought she does need me to sit with her while she does it, especially the written work. Katy's reading has improved dramatically and she is always keen to read. On the occasions I have seen her at work in the classroom I am aware of the necessity for as much one to one AWA help as possible to keep her on target and to maintain the wonderful progress she has made. One of Katy's main problems is still her speech and communication skills; though much improved, I feel more help could be given in this are [sic] via the speech therapist.

Katy continues with all her out of school activities and participates well in all of them. These include ball jazz, swimming, brownies, badminton and Sunday school. She also spends a lot of time on the computer at home and produces some good work. Perhaps it could be made possible for her to have one at school.'

Dr Russell, the consultant psychiatrist called by the claimants, reported in January 1993 and has not seen Katy since that date. His summing up of the prognosis, which is not disputed, points out that although Katy 'stands a good chance of enjoying a high quality of life until middle age', she will be exposed to health risks which do not affect those with Down's syndrome, for example, she has an above average risk of contracting leukaemia.

He concluded his report as follows:

'In addition to the normal expenditure on food, board and lodging that would be incurred by a normal person she will during the course of her life have additional requirements for therapy, education, respite care and the costs of care and supported accommodation.'

***[\*50]***

In my judgment Katy is seriously disabled, but the quality of her life, her ability, her personality and her potential have incalculable value. Mr and Mrs Rand have undergone emotional and physical strain by reason of Katy's disability but it has had positive consequences as well. Mrs Rand states:

'I do approximately 25 hours a fortnight voluntary work with the local toddler group, Sunday School, Youth Club and Music Group. All four groups are linked with the local Church. I actually started the Youth Club with my own children in mind as there were very few facilities available to them. All my three children are involved in the Sunday School, Youth Club and Music Group and Katy was also involved in the toddlers group. I receive state allowances for caring for Katy and whilst I appreciate I am entitled to them I also wish to help other people in return. When Katy was younger I sat in on a number of special needs groups and I have learnt skills by watching and listening to other professionals but also from the hands on experience I have had in bringing up Katy. I wish to share those skills and I enjoy my time with the toddler group as I am around children. Any child can come to that group but there is also, remarkably, a lot of special needs children. The reason for having so many special needs children attend is partly because parents are aware of my own personal situation but also because they know I am a trained nurse. I feel I have something to give back to the community for the skills I have learnt.'

I have deliberately limited the extent of my citation from the case of *McFarlane*. No summary survey I could prepare would do justice to the argument, counter argument and discussion which the speeches contain and the reading of them in their entirety will be the task of anyone having to consider this judgment.

**THE ARGUMENT**

Mr Burnett submitted that there was no reason why all the claims for Katy should not succeed. He submitted that the reasoning in *McFarlane* had no application where the child born as a result of a wrongful birth was born seriously disabled. He relied upon seven cases, each concerning the birth of a disabled child: *Salih v Eastfield 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 E R 400; *Fish v Wilcox and Gwent Health Authority* (1993) [*13 BMLR 134*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-JB7K-220K-00000-00&context=1522468); *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); *McLelland v Greater Glasgow Health Board* (1998) Times, 14 October; *Nunnerley v Warrington Health Authority* (1999) Times, 26 November; *Taylor v Shropshire Health Authority* [1998] Lloyd's Rep Med 395.

In each of these he submitted the ordinary principles of damages had been applied so as to allow claims in the same legal category as the claims now advanced for Katy. In *Salih*, the trial judge awarded damages for the 'basic cost' of maintaining a child who had been born with congenital rubella syndrome, where the parents had been deprived of the opportunity of terminating the pregnancy because the defendant negligently failed to diagnose and warn of the danger of rubella affecting their child. The award was reversed on appeal but on grounds which, by reason of the particular facts of the case, have a limited bearing on the present argument.

The rubella particularly affected the hearing and sight of the child. The effect would be permanent and would seriously affect his ability and development.

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That said, he was a very intelligent boy, eager to learn and able to do so despite very severe handicaps. Each parent had been caused much distress by their son's severe handicap. The health authority contested a claim for the cost of maintaining Ali but the argument was based on the facts of the case. The authority submitted that, but for the birth of Ali, who was born handicapped, the parents would have had two more children. Therefore, a direct result of Ali's birth had been to save the ordinary cost of bringing up a normal child. Thus only the additional costs due to Ali's condition were recoverable. In rejecting it, Drake J stated:

'In my judgment this argument is flawed. Had the defendants not been negligent, the plaintiffs would have willingly incurred the cost of maintaining a normal child. It was a cost they wanted to incur. But due to the negligence, they are now incurring the cost of bringing up a severely handicapped child, and they never wanted, and do not want, a handicapped child. The fact that, as loving and compassionate parents, they have love for Ali and will do everything possible to help him does not alter the fundamental fact that they did not want a handicapped child; and the cost of maintaining him is, therefore, something they never wanted. Put in a different way, the cost of bringing up a normal child would be entirely offset by the fact that the plaintiffs would be paying for something they wanted. As it is, they are paying for something they did not want. In my judgment the plaintiffs are entitled to recover the basic cost of maintaining Ali. Figures were produced showing that the additional basic costs of providing for a family of two adults and three children compared with that of two adults and two children has remained constant for several years at £1,050 a year. This figure is not disputed by the defendants and no-one has taken any point that at some time in the not-too-distance future the daughter Ece, who is now 15, may leave home, so that the comparison would then be between two adults and one child and two adults and two children. It has been held (see *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)) that there are no grounds of public policy to prevent an award for the upkeep of an unwanted child.'

Mr Burnett invites me to adopt the distinction made by Drake J and apply it to the claim by the Rands. I am unable to give effect to the reasoning. Drake J's considerations were concerned to deal with the argument that the direct result of Ali's birth had been to save the plaintiffs the ordinary cost of bringing up a normal child because the parents had decided after Ali's birth to have no more children. He was comparing the cost of bringing up a normal child with the cost of bringing up a severely handicapped child but, with respect, I believe he went too far. It led him to attribute no value to a handicapped life, where the facts established the contrary. Thus he concluded: '… they never wanted, and do not want, a handicapped child', adding ((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 [*4*](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 [*403*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W4N-W381-JP4G-64F4-00000-00&context=1522468)):

'The fact that, as loving and compassionate parents, they have love for Ali and will do everything possible to help him does not alter the fundamental fact that they did not want a handicapped child; and the cost of maintaining him is, therefore, something they never wanted.'

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I cannot accept the legitimacy of the breadth of the finding, either as a general proposition or on the facts, as I find them, in this case. In my judgment it is not what the parents had wanted which determines the result. If disability is a factor which influences the legal conclusion under review, then it is the actual disability of the child which is relevant and not what the parents feared and would have taken steps to avoid. Parents properly advised of the risk their child may be born disabled will not always, perhaps seldom will, be provided with a firm detailed prognosis of the degree of disablement from which the child might suffer. A decision to terminate in such instances cannot be safely regarded as a decision not to have a child with the disabilities, which the child, if allowed to be born, will have. It is generally based, preventative action against uncertain risks which, as Lord Millett postulated 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 [*44*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468), [*[1999] 3 WLR 1301*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-DR91-F2TK-2095-00000-00&context=1522468) at [*1344*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-DR91-F2TK-2095-00000-00&context=1522468)) on some occasions, if no action is taken, happily might lead to the birth of a healthy child. I would certainly not conclude on the evidence before me that, had it been possible to inform the Rands of the precise extent of Katy's disabilities, they would have decided to terminate the pregnancy. The weight which Drake J attached to the parents' 'want' to avoid having a handicapped child is borne out by his approach to the response of the parents after Ali was born. Unless the finding 'they … do not want a handicapped child' is to be detached from the findings as to quality of life enjoyed by Ali and how much love and care they had shown to Ali, it cannot stand. Further, as a matter of principle it attributes no value to a handicapped life.

Again, on the facts of this case I am certain that the Rands 'do want' Katy. They do want to spend money on her and, within their limits, have done so. I have no doubt that, had they been better off, they would have spent more. They want to spend more, but the issue for me to determine is whether they can obtain compensation to do so. It is to be noted that the direction of the argument in *Salih* apparently deflected attention away from the authority's suggested conclusion, which was that the costs attributable to the disabilities could be recovered.

Finally, as to *Salih*, the judge's reliance on *Emeh* cannot, in my judgment, stand after the judgment in *McFarlane*. I reach this conclusion regardless as to whether the case should be regarded as 'overruled' as the Weekly Law Reports state, or 'considered' as the All England Reports suggest.

**FISH V WILCOX**

In *Fish v Wilcox and Gwent Health Authority* (9 April 1992, unreported) Mrs Fish claimed that those in charge of her antenatal care had failed to consider, test and warn her that she was carrying a congenitally deformed foetus. Cally, the child, was born suffering from spina bifida and considerably disabled. Swinton Thomas J stated:

'The joy of having the child does not cancel out the time and trouble and expense involved in the upbringing of a damaged child. The joy of having the child if there is such joy, must be taken into account in diminution of the amount award. For obvious reasons, that is not an easy task. In some cases, where a child is very badly damaged, it might be said that the child brought little or no joy. That is not this case. It was readily and rightly conceded by Mrs Fish and Mr Roddick, on her behalf, that Cally brings considerable joy to her. That was self-evident on the video recording which I saw. Cally is a loving child. I suggested in the course of submissions by Counsel for both parties that the easiest way of dealing with this problem was to make an assessment of the difference

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between the cost and time and trouble expended on a normal child and cost, time and trouble expended on the damaged child. However, I was blown off that course by the efforts of both Counsel who told me, no doubt on the basis of the Court of Appeal decisions, that that was not the right course or approach. Accordingly, I must make an assessment of damages recoverable by the mother in respect of the care and expense which has been expended on Cally between the date of her birth and the date of trial, making due allowance for the joy which Cally has brought to her. That joy is certainly reduced by reason of the fact that Cally is a damaged child and the anxiety and difficulties in her upbringing which that damage has caused.'

I regard the judgment of Swinton Thomas J as a prescient guide to the proper approach. He correctly saw a way of avoiding the calculation of the incalculable benefit of a child, but was 'blown off course'. It is not a case which assists the claimants in their full cost of care and maintenance claims for Katy.

**EMEH**

*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) proceeded upon a legal analysis of 'injury' which must now be regarded as erroneous. It does not provide the claimants with a sound legal basis for their claims for Katy.

**ANDERSON**

*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), 1998 SLT 588 was a claim by parents against the hospital board for negligence in failing to advise them that their two sons would be likely to be born suffering from muscular dystrophy. As a result, they were deprived of the opportunity to terminate. The case is much in point and contains a detailed survey of the issues and arguments which I have to determine. It was tried by Lord Nimmo Smith after Lord Gill's judgment in *McFarlane* but before that case was heard on appeal by the Second Division of the Inner House of the Court of Session.

Lord Nimmo Smith refused to dismiss the pursuers' claim. He held that: (1) it was a 'wrongful birth' case and that such cases gave rise to broadly similar considerations as 'wrongful conception' cases; (2) following well-established principles derived from *Donoghue v Stevenson* [*[1932] AC 562*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T2W-KM11-FFMK-M1XB-00000-00&context=1522468), [*[1932] All ER Rep 1*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-WC51-FBN1-243F-00000-00&context=1522468), the defenders owed the pursuers a duty of care in the provision of services relating to the taking of decisions by them in connection with abortion and childbirth; (3) the legislative purpose of the Abortion Act 1967 was to provide an opportunity to prevent the birth of a severely handicapped child, and that the birth of a severely handicapped child was to be regarded as a harmful event; (4) the consequences to the parents of the birth of a handicapped child were not to be regarded as 'pure economic loss', the pursuers were to be treated as having suffered personal injuries in the conventional sense; (5) even if the consequences were to be regarded as pure economic loss the tests in law could be regarded as satisfied; (6) there was no reason in principle why from the range of options in a claim for an award of damages, parents should be excluded from asserting that by reason of the birth they had suffered adverse consequences and that the 'value' of the child did not outweigh those consequences; (7) there was support for his approach in the case of *Emeh*; (8) as to the assessment of damages, the pursuers having disclaimed any intention of claiming for more than the additional costs associated with the

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children's disabilities, the cost of the provision of care by them and by persons employed by them was recoverable. Future care, so long as it was reasonable, was recovered and the 'resource of the pursuers should' not 'operate as a limiting factor'. Further, that future care should not be limited to the age of legal obligation to support their children ((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), 1998 SLT 588 at 606):

'The claim for care costs arises, as I see it, from the natural bond between parent and child, an aspect of which is the parents' desire to care for the child … I can see no reason at this stage to suppose that it was not within the parties' contemplation that if the children were born suffering from disabilities the natural response of the pursuers would be to make reasonable provision for their care throughout the children's lives.'

As to each of the numbered points above: (1) I have difficulty in accepting the breadth of the proposition. The parents' commitment to having a child prior to the negligent act, in my judgment, affects general damages and what may be just or reasonable to impose on the defendant by way of liability for economic loss. (2) (3) and (4) I do not consider as a matter of fact or law that the birth of a congenitally handicapped child amounts to injury to the parents. It is an event which will give rise to distress and suffering by the parents and can therefore harm them but it is not 'a harmful event' comprising an injury to them. In my judgment, the availability to parents, under the Abortion Act 1967, of a choice not to have a seriously disabled child, cannot render a birth occasioned either by choice or by negligence an injury. Nevertheless, I do regard the legal right accorded to parents by the 1967 Act as relevant to the ambit of the duty of care assumed by those having responsibility in connection with childbirth. In my judgment, a claim for damages relating to the cost of maintenance and care of a handicapped child is a claim for 'pure economic loss'. For the purposes of categorising the claim, I can see no reason for drawing a distinction between the healthy and the disabled child. (5) and (6) I am not persuaded that, if the underground commuter was asked the question whether it was fair and just that, where parents intended to have a child, but the child was born disabled, such disablement being through no fault of the health authority, the whole of the costs of maintenance and rearing should be borne by the health authority, the answer would be 'Yes'. In my judgment, the submission by counsel for defenders in *Anderson* that 'there was always a benefit provided by a child's life' is correct, and legal effect should be given to it. In any event, on the facts of the case I have to decide, it would be outrageous to conclude that the value of Katy did not outweigh the adverse consequences attendant upon her birth and life. Again, it has to be said that the Rands did not attempt to argue for such a conclusion, nor did Mr Burnett's submissions give a hint of such a contention. In my judgment, in a claim for compensation an approach requiring the task of evaluation according to the benefits and deficits of any human life, even where severe disablement is present, is not appropriate. Nor, as I shall attempt to explain, is it necessary so as to achieve a just result. (7) For the reasons I have already given the case of *Emeh* can no longer be regarded as a reliable source of support. (8) I shall revert to these points when assessing damages upon the alternative basis for recovery but it may be convenient to foreshadow where, with respect to Lord Nimmo Smith, I feel bound to depart from his approach. Because he

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concluded that the parents had suffered harm by reason of the disabilities suffered by their children, the resources of the parents did not operate as a limiting factor. In my judgment they do operate as a limiting factor.

**MCLELLAND**

The basic facts in *McLelland v Greater Glasgow Health Board* [*1999 SC 305*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W36-1801-JNCK-24KY-00000-00&context=1522468), 1999 SLT 543 are the same as in the instant case. The opinion of Lord Macfadyen was delivered and a section of the argument by counsel was heard, after the judgment of the Inner House in *McFarlane*. That decision narrowed the scope of the argument.

The detailed facts included the existence of an apprehension on the part of the mother that, owing to family history, she might give birth to a Down's syndrome child. As a result, he concluded in connection with the claim for solatium ([*1999 SC 305*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W36-1801-JNCK-24KY-00000-00&context=1522468) at [*313*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W36-1801-JNCK-24KY-00000-00&context=1522468), 1999 SLT 543 at 549):

'It seems to me to be clear that it was reasonably foreseeable to the staff concerned that if they failed in their duty of care the very event which the pursuers sought to guard themselves against was liable to occur, and that if it did occur the harmful effects on both pursuers would include (a) severe shock and distress on discovery that the child was affected by Down's Syndrome and (b) in the longer term increased stress and wear and tear in bringing up and caring for the child. If damages were not recoverable in respect of these harmful effects, the law would in my opinion be failing to achieve its recognised aim of putting the parties who have suffered as a result of a wrong as nearly as can be achieved by money compensation in the position in which they would have been if the wrong had not been committed (*Livingstone v Rawyards Coal Co Ltd* (7 R (HL) 1) *per* Lord Blackburn at p 7).'

Lord Macfadyen held that: (1) The basic cost of maintenance of Gary (the child) and the additional care required because of his disability were recoverable. (2) He preferred the reasoning of Drake J in *Salih* to that of the Court of Appeal (Butler Sloss LJ) which held Drake J to have been in error in not taking account of the saving to the parents in not having any more children. Lord Macfadyen concluded ([*1999 SC 305*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W36-1801-JNCK-24KY-00000-00&context=1522468) at [*318*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W36-1801-JNCK-24KY-00000-00&context=1522468), 1999 SLT 543 at 552):

'I do not adopt Drake J's formulation ((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 [*4*](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 p [*403*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W4N-W381-JP4G-64F4-00000-00&context=1522468)g) that the cost of bringing up a normal child would be entirely “offset” by the fact that the parents would be paying for something that they wanted. I do, however, prefer the result he reached to that reached by the Court of Appeal. The cost of bringing up a healthy child would have been incurred willingly by the pursuers. It would have been the cost of doing something they wished to do. The cost of bringing up Gary is something which has been forced on them by the defenders' negligence. It would in my view be wrong to deny the pursuers recovery of the latter forced unwanted expense on the ground that but for the negligence they would probably have spent a similar amount of money in willingly incurring the former expense.'

He declined to follow *Salih*. (3) Among other issues on damages, that the cost of Gary's basic maintenance after he reaches the age of 18 years was not

***[\*56]***

recoverable since the state was likely to bear the burden, but allowed a claim for extra maintenance costs arising from Gary's special needs as he was not satisfied the state would provide them. (4) Among other issues on damages, that the additional care of the parents required because of Gary's handicap was approximately reflected in an award of general damages for solatium and not in an award by reference to a commercial basis by a third party. (5) Among other issues on damages, that the parents '… if they were able and it was necessary to do so … . wish to make provision for Gary to be in supported accommodation once they were not longer able to look after him at home', and as a result awarded compensation under this head.

As to (1) and (2), for the reasons already given, I am unable to treat as relevant to the consideration of the position after the birth what the parents may have considered as an unwanted expense prior to the birth. As to (3) (4) and (5), I shall revert to them later.

**NUNNERLEY**

In *Nunnerley v Warrington Health Authority* [2000] Lloyd's Rep Med 170, the only issue before the court, determined as a preliminary issue, was whether the parents could recover compensation for the cost of care, which on the balance of probabilities they were foreseeably likely to give him after he had reached the age of 18 years. Maintenance was not included. The judgment of Morison J was delivered one month before judgment in *McFarlane* was delivered by the House of Lords. He held (at 172) that: (1) 'The claimants are entitled to be put into the position they should have been in but for the wrong done to them. The wrong done in this case was, however inelegant this expression may seem, the birth of Todd. The losses consequent upon Todd's birth include the cost of care'. (2) A contrary conclusion was not required by reason of the claim being the parents' and not the child's, the absence of injury to either claimant, the absence of legal responsibility after the age of 19, and the entitlement of an adult disabled person to statutory allowances (some means tested and some not).

As to (1), the judge did not have the benefit of the House of Lords' deliberations and conclusions. With respect, I am bound to say that I cannot see how the restitutionary principle supports the conclusion, for there would have been no child. To apply it ignores the life of the child. But the judgment, understandably, does not consider the prior question, which, in my judgment, arises, namely whether (a) the duty of care extended to saving the claimant from the consequences of birth or only the consequences of the birth of a disabled child; and whether (b) the claim was a claim for pure economic loss.

**TAYLOR**

Mr Coonan QC appeared for the defendant, as he does before me. Judge Nicholls rejected his submissions to the effect that the mother should be compensated for her past and future care by a lump sum forming part of the claim for general damages. He also rejected the full breadth of the submission that future care was to be set at the level the mother could afford and not by reference to the child's reasonable needs. He accepted the submission was correct in the case of 'items purchased and other expenses incurred to the date of trial'. At the date of the judgment, argument had concluded but their Lordships had not delivered their opinions in *McFarlane*.

I propose to return, as necessary, to the case when considering the heads of damage. I do not derive much assistance from it on the fundamental principles underlying the claims advanced for Katy.

***[\*57]***

**SUBMISSIONS ON BEHALF OF THE DEFENDANT**

Mr Coonan QC submitted that although the question was left open in *McFarlane*, seemingly for 'seriously disabled children', Katy was not seriously disabled. Further, that for the reasons given in *McFarlane*, a claim in respect of economic loss, in a wrongful birth case, cannot be maintained. I have already held that Katy is seriously disabled.

He invited me to give full effect to the doubts expressed 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 [*38*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W34-PYR1-F016-S2D8-00000-00&context=1522468)–39, 40, [*[1999] 3 WLR 1301*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-DR91-F2TK-2095-00000-00&context=1522468) at [*1338*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-DR91-F2TK-2095-00000-00&context=1522468), 1340) and hold the heads of loss as not reasonably foreseeable. In this regard, the distinction between a wrongful conception case (*McFarlane*) and a wrongful birth case is material. It eliminates two stages of Lord Clyde's considerations. In my judgment the heads of loss are reasonably foreseeable.

I hope I do justice to his full submissions by summarising them, on this part of the case, as follows.

1. No distinction can be drawn between a healthy child and Katy for to attempt to do so involves assessing the incalculable joy and benefit she has brought to the family.

I agree with this submission and have already observed that, in my judgment, it presents difficulties for the claim for the full cost of maintenance of Katy. That said, however, it does not support the rejection of any claim for the cost of maintaining Katy, for a claim limited to the cost connected with her disability does not involve an invidious and morally offensive valuation. Further, the argument does not touch the claim for loss of profits advanced by the claimants.

2. It is not fair, just and reasonable to impose liability for the loss claimed in connection with the claims for Katy, because the defendant cannot be said to have assumed responsibility for the economic loss any more than the defendant in *McFarlane*. There was no duty to prevent conception. The mere fact that Katy was born disabled cannot extend the ambit of the duty of care beyond that recognised in *McFarlane*.

I am bound to say that my views on this argument have varied, but after full consideration, I reject it. I have concluded that there is a difference between the choice available to parents to limit their family on the grounds of size alone, and the choice available by virtue of the Abortion Act 1967 to terminate a pregnancy on medical grounds. The existence of the Act is sufficient to introduce into the relationship between the health authority responsible for a pregnancy and the parents, a duty to take reasonable steps to ensure the parents can exercise their choice under the Act. The lawful and proper operation of the Abortion Act anticipates and requires the opinions of medical experts to be available and is firmly placed in the area of medical expertise. Although the scan of Mrs Rand was not deliberately carried out to detect whether she was carrying a disabled foetus, in my judgment, the existence of the Abortion Act, and the potentiality for it serving a purpose relevant to Mr and Mrs Rand's rights under the Act, are sufficient to impose liability for financial consequences flowing from the failure to draw the relevant risk of disability to their attention. For these reasons I reject the argument that there was an insufficient relationship of proximity between the negligence and the loss complained of. The defendant was under a duty of care to save the claimants from the consequences of the birth of a disabled child. The quantification of any damage must be carried out in accordance with established principles.

3. I do not accept, as Mr Coonan submitted, that there is an inconsistency in allowing recovery for the parents (subject to the proper limits to which the

***[\*58]***

parents' action must be limited) where there is no recovery for the child. The claim has to be treated for all purposes as the parents' claim. I shall have to revert to this when dealing with quantum.

4. I reject the suggested undesirable consequence that a child might perceive a recovery in damages as being based on a contention that he or she should have been aborted. When old enough to do so, he or she will recognise that what was lost by its parents was an opportunity which Parliament had decided should be available to them. The express purpose of the statute can hardly be regarded as an offensive legal basis for compensation.

**CONCLUSIONS**

Although my conclusions on the matter of principle raised in the light of *McFarlane* will be readily apparent from the judgment so far, they are: (1) The claim for the full cost of the maintenance and upkeep of Katy is not maintainable in law. (2) Mrs Rand has a legally maintainable claim for general damages for pain and suffering. (3) The claimants have a legally maintainable claim based upon the extended principle of *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) for financial consequences flowing from the admitted negligence of the defendant, limited to the consequences flowing from Katy's disability. (4) The claim advanced for the cost of maintenance and the cost of care for Katy is a claim for pure economic loss, as is the claim advanced for loss of profits.

**ASSESSMENT OF DAMAGES**

I shall deal with general damages for pain and suffering after I have dealt with each and every other head of damage.

I accept the following general propositions in connection with the heads of damage as advanced by Mr Coonan QC.

1. The claimants may only recover damages in respect of such economic loss which is proved to arise from Katy's disability, rather than from the face of her existence.

2. 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.

3. The claim for economic loss does not terminate, as a matter of law, upon Katy reaching her 18th birthday.

**SCHEDULE OF LOSS**

Past costs of maintaining Katy

These costs have been calculated by reference to the rate of the National Foster Care Association. The total amount claimed, £31,319, is admitted as a sum, but

***[\*59]***

it does not reflect the extra costs associated with Katy's disability. It must follow that, in the light of my conclusions, it is irrecoverable. I have already found that, had Katy not been born disabled, the claimants would not have had another child. For that reason, I have concluded that Mrs Rand can recover general damages for an extra pregnancy but no claim can arise, nor is it made, for the cost of maintaining their third child, Robert, who is normal and healthy. The claim as presented is no more than the Rands would have incurred had Katy been healthy and not disabled.

It follows there is no recovery under this head.

*Past loss of profit from rest home*

Mr Rand had been employed in hospital administration until 1983, when he and his wife set up a residential rest home, registered for nine residents. At the time of Katy's birth, Mr and Mrs Rand were in business together running the rest home. They state that they were forced to sell it in February 1990 as a result of the demands made upon Mrs Rand's time through having to care for a disabled child. Although Mr Rand could continue to help run the home, Mrs Rand, a state registered nurse, provided help which they could not afford to obtain by employing a replacement. Since the sale, Mrs Rand has cared full-time for Katy and Mr Rand, despite efforts to obtain employment, has been unemployed. He would have retired when 65 years of age, namely in 2008. Based upon the accounts, the amount claimed to January 2000 totals £82,481. The sum is agreed as a figure. The claim for the next eight years is at a rate of £37,453 per annum.

*Mrs Rand*

Mrs Rand has assumed almost total responsibility for the care and upbringing of Katy. She has done so to the exclusion of Mr Rand from all but very limited support and participation. They live together with the family but the marriage has suffered. I have no doubt that the quality of life which Katy enjoys, her successful integration into the family, her brothers' loving acceptance of her, her successful integration into mainstream school, her zeal and happy enthusiasm for life despite her disability, and her potential for development, are to a large degree the result of the care and attention provided by Mrs Rand, being the product of her deep commitment and love, and especially strong maternal instincts. Although I believe other mothers could, without giving rise to criticism, have taken a different view of how much time they should devote to their disabled child, I am satisfied that Mrs Rand's decision to withdraw from providing help in the rest home business was a natural and reasonable response to the birth of Katy. Had Katy not been disabled, she would not have withdrawn her services from the business. Although there is some evidence that other factors could have influenced the decision to sell the home, I am satisfied on the balance of probabilities that the cause for the decision was the inability of Mrs Rand to work, owing to Katy's disability. By parity of reasoning, I reject the contention that Mrs Rand has acted unreasonably in not obtaining employment. The earliest suggested date is March 1997, when Robert went to school at the age of five. I see the force of the contention, viewed as a practical suggestion, that she could have used Mr Rand's unemployment as a source of support which would have enabled her to return to work. Had she done so by reason of her qualifications she would have earned as much as, or more than, the rate used for calculating the loss of profits. Again, many in her position might have done so. But the consequence of Katy's disability on this family has been to leave

***[\*60]***

Mr Rand almost out of account for caring purposes. He showed no confidence in his ability to cope as a result. I do not feel justified in concluding that these factors are the consequence of unreasonable conduct. They are the particular consequences that have arisen in the process adopted by this family to provide the best possible life for their disabled child.

*Mr Rand*

In my judgment, the defendant's contention that Mr Rand has failed to mitigate their loss is made out. By 1994 Katy had been at full-time school since September 1993. Robert was nearly two years old. Mr Rand had been out of work for four years Although he made many job applications, he focused on too high a level of employment in a limited sphere. Loss of profits are claimed from 1994 at approximately £7,000 per annum. I am satisfied that, had he chosen to do so, he could have taken more lowly employment and that he would have obtained employment, earning at least £7,000 and perhaps more. The contrary was argued to the extent that suspicion was cast on the appropriateness of the specific suggestion that he could have become a mini cab driver, and it was pointed out that a recent survey had shown that only 50% of men between the ages of 55 and 65 were in employment at all, and that as a result it was not reasonable in all the circumstances to expect Mr Rand to look for employment of the kind suggested. In my judgment, it is a valid example of the type of employment he could have taken. It is not sufficient to say that he was suitable for a particular level of responsibility by way of employment and that he could continue to hold out for such employment at the expense of the defendant. It is to be noted that, in August 1994, judgment was entered in this case. The receipt of benefit, including receipt by Mr Rand of income support, amounted to a figure not far short of the loss of profit claimed. In my judgment, Mr Rand wrongly allowed the position to continue, and could have earned, admittedly in lower grade employment, the amount now claimed from the defendant. The loss of profit to March 1994 is £42,730 and I award this sum. No claim has been advanced for Mrs Rand's inability to work as a state registered nurse outside the rest home business.

For completeness I should add that I regard the claim for loss of profits as a reflection of the particular consequences which Katy's disability had upon the earning power of both Mr and Mrs Rand. It is foreseeable that the demands involved in caring for a disabled child will affect a parent's ability to work. In many cases a father's employment will not be affected by the birth of a disabled child, but such cases do not touch the principle at play, namely that a claim for the foreseeable financial consequences to parents of the birth of a disabled child is maintainable.

*Past capital gains tax*

The figure of £28,008 is agreed as a figure. The basis for the claim is that, but for having to sell the rest home and come out of the business, any liability for capital gains tax would have been deferred until 2008. In my judgment, unlike the loss of opportunity to earn a living, which had a causal connection to Katy's disability and was foreseeable, this head of economic loss should not be regarded as recoverable. It is not every financial consequence, howsoever caused, which can be recovered. The liability to such tax arose from a number of factors far removed from the negligence of the defendant and to the duty of care owed to the claimants. The uncertainty of the factual basis for the claim, predicated as it is on the business continuing to the year 2008, is a further reason for rejecting it.

***[\*61]***

*Past council tax*

The claimants appear to have made a profit.

*Past care costs*

This claim is made by reference to the care provided by the maternal grandparents of Katy. It is categorised as respite care. The claim gives rise to an issue of principle, and if legitimate in law, a number of factual issues. It has been valued at £16,310.

*The issue of principle*

The claimants have not suffered any loss in connection with the “care” provided by Katy's maternal grandparents. No sum has been paid to the grandparents, nor is there any evidence that the claimants have assumed a legal obligation to pay the grandparents.

The principle established by *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. As to whether the care has been provided by reason of Katy's disabled condition, the evidence is unsatisfactory. I have no doubt that by reason of Katy's condition there has existed a need for Mrs Rand to obtain some respite from her caring responsibilities. With Katy at full-time school she has enjoyed respite. She has developed her voluntary activities. However, as to the care and attention shown to Katy by the grandparents, the evidence shows that is not significantly greater than the care and attention they have devoted to her brothers. Nor is it clear that they would not have shown the care and love to Katy in any event. The claim has emerged through the assistance provided to the claimants by the expert, Marion Banks. She formulated the claim without a clear regard to the legal principles at issue. It was not put forward on a clear 'extra over' basis. In my judgment, putting aside the insuperable question of principle, it owes its presence in the case more to Marion Banks than to the facts.

*An alternative basis for a claim*

By way of final submission in reply, Mr Burnett submitted that Mr and Mrs Rand could be considered as having a claim for past care. The steps in the argument were as follows. Mr and Mrs Rand had not claimed for past care because they had claimed for loss of profits. They could not have both. I have awarded loss of profits up to 1994. After that date Mr Rand was in a position to earn as much as, or more than, the loss of profits claimed and thus Mr Rand was (and is) providing care for Katy at no financial cost to the family.

*Past accommodation costs*

The factual basis for this claim is that when the claimants were carrying on the rent home business, the business also provided them with a house. Accountants have valued the benefit. The figures, as figures, are agreed, but the process of reasoning leading to the figures is disputed. More fundamentally, the claim is said to be too remote.

***[\*62]***

I have difficulty in following the logic of the claim. The claimants enjoyed the benefit of living in the rest home. They also owned a flat nearby which had been purchased by them as a 'bolt hole', namely their home away from the business. The capital value or interest which their accommodation in the rest home represented was held by them through their ownership of the rest home. Their investment in the rest home also served to provide them with a home. When they sold the rest home they did not lose their capital, they realised it, and purchased another home.

In my judgment, the advantage enjoyed by the claimants and their family in living for the greater part of their time at the place of their business did give rise to incidental benefits which can be treated as part of the profits they enjoyed from the business. They comprised the incidental advantages in the cost of heating, lighting and electricity, and the cost of the provision of food. I have considered whether the absence of figures or calculations on this precludes me from calculating them. On balance, I believe fairness requires some broad approach calculated by an annual amount to March 1994. I award four years at £1,500 per annum. The claim must fall with the cessation of the loss of profits claim. I should add, in case it be thought I have overlooked it, that the addition of £1,500 each year to the loss of profits claim does not affect my conclusion that, by March 1994, Mr Rand could have obtained employment paying him as much as, or more than, the total lost profits including the above £1,500.

*Past costs of aids and appliances*

Agreed at £775.

*Future costs*

1. *The future cost of maintaining Katy to the age of 18 years*

This claim quantified at £21,570 (which is agreed as a figure) is not calculated by reference to the consequences of Katy's disability. It fails for the reasons already given in connection with the claim for the past costs of maintaining her.

2. *Cost of private education of Katy*

The claim is for the period from date of trial to the age of 18 years. Katy is now 111/2 years old and is due to move on to senior mainstream school when she is 13 years old. It has been submitted that it is not clear on the evidence whether it will be Wareham Upper or Purbeck Upper. The latter has a special needs department, whereas the former has not. Further, Mrs Rand expressed reservations about the character of the special needs department at Purbeck, which in her view was likely to lean towards educational needs rather than 'life skills', which Katy particularly requires. As a result, Mrs Rand has concluded that there is a likely future need for Katy to be educated privately. Further, it was not settled that Katy would be able to go to, or remain in, mainstream education at a senior level, and a placement at a special needs school would be inappropriate. There was some evidence that Downs syndrome children fall behind as they grow older. The Rands have not approached any private school and the availability in the private sector of better special needs has been assumed rather than established by evidence.

The above recitation of the claim is more than sufficient to disclose some contentious factual issues, as well as to demonstrate the existence of an objection in principle to it being legally maintainable.

However compelling Katy's needs for private education are or will be, it is not her needs which determine the validity of the claim. Mr and Mrs Rand, not

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having resources sufficient to enable them to finance private education, nor a reasonable prospect, without recovery from the defendant, of being able to finance private education, will suffer no loss. Katy has a right to be provided with education to meet her special needs because the education authority have a duty to provide for them.

For completeness, I should say that had I concluded that the claim was maintainable, I would nevertheless have rejected it on the facts.

1. Although one can never be certain, the present indications are that Katy will go on to mainstream senior education. There is a reasonable opportunity for her to go to Purbeck. She already enjoys individual support at school during many hours of the week (AWA) and there is no reason to believe it will not continue. The local education authority has a duty under the Education Act 1996 to review annually the provision of special education for individual children on whom a Statement of Special Educational Needs is maintained.

2. The reports on Katy are encouraging, although they bear out the need for continuing 'one to one' AWA help.

3. Although Mrs Rand does not wish Katy to go to a special school (should present indications fail to continue), there is no evidence that a special school would be inappropriate.

*Costs of future care to the age of 18 years*

|  |  |  |  |
| --- | --- | --- | --- |
|  |  |  |  |
|  | The claim is quantified at £45,726, made up as follows: |  |  |
|  |  | £ |  |
|  | Annual occupational therapy assessments | 813 |  |
|  | Occupational therapy | 13,550 |  |
|  | Transport costs to therapy sessions | 11,978 |  |
|  | Respite care to 18 years | 14,778 |  |
|  | Additional holiday cost to age 18 | 4,607 |  |
|  |  | 45,726 |  |
|  |  |  |  |

*The suggested legal basis for the claim*

Mr Burnett relied upon the opinion of 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), 1998 SLT 580. In that case the pursuers had limited their claim to additional costs associated with the children's disabilities. Mr Burnett submitted that, if I was unable to take the view that there was injury to the parents, and therefore held the claim to be a claim for pure economic loss, then the concept of care costs being based upon 'the natural bond between parent and child' was available to provide legal support for the parents' claim. He submitted that, like Lord Nimmo Smith, I should hold that the resources of the parents should not operate to limit recovery. I am unable to accept the argument.

On further reading of Lord Nimmo Smith's opinion it seems to me that the concept of the 'natural bond' led him to conclude that reasonable provision for care throughout the children's lives was foreseeable. He was not treating it as a discrete principle capable of supporting the claim. It is not easy to see how the concept of the 'natural bond between parent and child', as opposed to his conclusion that the parents had suffered injury, could support his conclusion that the parents' resources did not operate as a limit. Although he concluded that the tests required in law to be satisfied for the pursuit of a pure economic loss claim had been satisfied, he did not treat the claim as such. Had he done so, I do not see how he could have concluded that, where no loss is established, there can be a recovery. Although it

***[\*64]***

was canvassed in argument that the strength and purpose of the natural bond, if left unfulfilled, could equate to a loss, I am not so persuaded.

If I am wrong in the above conclusion then there are other hurdles for the claimants.

The claim is derived from the report of Marion Banks. As Mr Burnett pointed out, there is an overlap with the claim for private education, but since I have rejected that claim I must revisit the topic. I am satisfied that Katy needs help in developing skills 'required to cope in the community, such as community knowledge, use of transport and communication facilities, shopping, interpersonal skills, friendships, responsibilities and relationships'. For convenience these have been labelled 'life skills' and the heading 'occupational therapy' is apt to confuse. The costs are calculated by reference to fees charged in private practice. They are agreed as figures at £813 and £13,550. Transport costs are challenged because they are on the basis of 35 pence a mile (£11,978), whereas they should be for running costs only. I agree, if recoverable, the claim has to be reduced under that head to £6,000.

*Will the costs and expenditure be provided by the local education authority?*

Dr Russell agreed that the local education authority was responsible for the 'life skills' needs of Katy by virtue of the Children Act 1988 (Pt III). Janet Carr, a clinical psychologist called for the claimants, with a special expertise in assessing the needs and abilities of those with Down's syndrome, agreed that it was for the local education authority to determine Katy's needs. The area of uncertainty thrown up by the evidence was whether the help would be provided. It was agreed it would if the system worked properly. I have heard no evidence which leads me to conclude that the help which Katy requires will not be provided. On the balance of probabilities, it will be. Thus, even if maintainable in law, in my judgment it would not be reasonable for the defendant to have to bear the cost. I reject the argument that I should conclude otherwise because it merely transfers responsibility to the state. The state's responsibility exists by virtue of statute, not by my conclusion in this judgment.

*Respite care to the age of 18*

This claim is calculated by reference to the cost of outside carers on the assumption that the grandparents can no longer provide the care they have provided to date. Mr Burnett had to recognise that *McLelland*, upon which he relied in other respects, could not help him in this regard. He submitted that it represented the law of Scotland and not England. In my judgment the law of England and Scotland do not differ in this regard. The common law rule in Scotland established by the case of *Robertson v Turnbull* [*1982 SC (HL) 1*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5W36-0JW1-JGPY-X20V-00000-00&context=1522468), 1982 SLT 96 is that the defendants and relatives of an injured party have no right of action in respect of loss which they have suffered. [*Section 8*](https://advance.lexis.com/api/document?collection=legislation-uk&id=urn:contentItem:5W53-GW51-JJD0-G30F-00000-00&context=1522468) of the Administration of Justice Act 1982 alleviated that position in Scotland but the combined effect of the provision and the common law in Scotland does not differ from the position which prevails in England. As Lord Bridge stated 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): 'Thus, in both England and Scotland the law now ensures that an injured plaintiff may recover the reasonable value of gratuitous services …' By holding that the plaintiff who recovers damages holds them on trust for the voluntary carer, the law in Scotland and England was brought into line.

Mr Burnett did not advance a specific argument that I should adopt the approach of Lord MacFadyen and reflect the additional care in the claim for general damages, but I shall deal with the issue later under that heading.

***[\*65]***

*If the care is not provided by commercial carers can there be recovery by the parents as voluntary carers?*

There has been no satisfactory calculation of the extra care required in consequence of Katy's disability. But if there had been what would be the position in law?

It is obvious that a disabled child will require more care than a normal healthy child and the question arises as to whether, in the absence of any expenditure on it or the capability to pay for it in the future, the parents, or one of them, can recover compensation for that care. In my judgment it must follow that the claim being an economic loss claim there can be no recovery. I recognise that the position illustrates with some poignancy the difference between the position of wealthy parents and those of modest means. I shall consider the point again under the claim for general damages.

*Additional holiday costs*

In my judgment this claim is made out. By reason of Katy's disability there is a need for extra care whilst she is on holiday. Additionally, extra cost and expense are likely to be incurred. The claim is at £850 per annum and it is reasonable to predict that the Rands will be able to afford these costs. I award £4,607.

*Costs of aids and equipment to age 18 years*

*Shoes*: Katy 'scuffs' her shoes and thus wears out shoes at a rate which causes extra expenses to the Rands. The claim is costed at £210 per annum. The multiplier to age 18 (61/2) years is six. The claim under this head is agreed at £1,260.

*Home computer*: There is a computer at home for use of all three children. Mrs Rand expressed the wish to have one for Katy's own use to promote her education and social development. Mr Coonan submitted that the evidence did not support the conclusion there was a need. Further, that the children are likely to have required separate computers in any event.

In my judgment the evidence establishes that a separate computer for Katy is a reasonable necessity. Her need for a computer stems from the particular benefits she will enjoy from its use because of her disability. The Rands are, or are likely to be, in a position to purchase a computer from their own resources, albeit at the sacrifice of something else. I can see no reason why the defendant should not recompense them for a loss which I am satisfied they are likely to incur in the future since the particular need arises out of Katy's disability. The cost of purchasing a computer and software is estimated by the accountants to be about £1,600. I award that figure. There is a claim for future costs of a computer to which I shall return.

*Cost of therapies to age 18 years*

The following are claimed:

|  |  |  |  |
| --- | --- | --- | --- |
|  |  |  |  |
|  |  | £ |  |
|  | Speech therapy to age 18 | 4021 |  |
|  | Physiotherapy to age 18 | 183 |  |
|  | Recreational therapy to age 18 | 1140 |  |
|  |  | 5344 |  |
|  |  |  |  |

***[\*66]***

*Speech therapy*

To date the Rands have not paid for speech therapy, even though Mrs Rand expressed dissatisfaction with the availability to date of such therapy from the state (one might add, even though large interim payments have been received). I have to conclude that Katy has not needed it to date. The claim is based upon speech therapy for two years. In my judgment it has not, and will not, in the time envisaged by the claim, be necessary.

*Physiotherapy*

A small claim of £183. In my judgment the claim is not refuted by the fact that Katy gets plenty of exercise. It is well within the parents' resources and is reasonable and necessary by reason of her disability.

*Recreational therapy*

This is riding for the disabled which Katy has been doing at a cost to her parents. Riding is particularly beneficial to someone like Katy, for it enables her to compete on a 'more level playing field' than she can in other sports. The claim is calculated at £4,752, being the cost for the next 50 years. It has to be remembered that this is not Katy's claim but her parents'. I do not believe I am justified in concluding that they will make lifelong provisions for Katy to enjoy horse riding. The annual cost is put at £240. Doing the best I can, I propose to apply a multiplier of 10, a total of £2,400. This assessment is thus a future cost going beyond the age of 18.

*Claims from the present date to 2008*

1. *Cost of profits from the rest home*

No award arises. The claim is at £7,453 per annum.

2. *Value of accommodation*

No award arises.

3. *Council Tax to 2008*

This is too remote. If wrong, the figure of £1,146 falls to be reduced by the saving to trial of £865.

*Cost of maintaining Katy from 18 to 25 years of age (or some later date)*

The cost is placed at £30,174, calculated by reference to the National Foster Care Association. For the reasons already given it is not maintainable, for it is advanced not by reference to costs arising from her disability but for the total cost of her maintenance. That apart, from the age of 18 years I accept that Katy will be in receipt (in her own right) of income support, disability living allowance and severe disablement allowance. These benefits are likely to exceed the NFCA figure. There is no evidence that the claimants will have any reasonable need to top up these benefits so as to provide more maintenance.

*Cost of future care from 18–25 years of age*

It is assumed that Katy will be at home. The cost is calculated by reference to a full-time carer's costs and valued at £105,437. The care will be provided by Mrs Rand with minimal help from Mr Rand.

There is undisputed evidence that Katy will require extra care by reason of her disability, even though she is expected to have developed a measure of independence. I take the view that there is a real possibility she will be able to work, at least to a certain extent, but the lack of available employment prevents

***[\*67]***

the conclusion being a likelihood that she will. If it were to be maintainable as a claim by the parents for economic loss, the defendant suggests it should be evaluated at an extra four hours a day. It translates as: 4 x 4.98 x 7 x 52 = £7,250 per annum. Computed as a financial loss, the figure is reasonable. It would fall to be reduced by a *Housecroft* deduction (see *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)) by 25% to £5,500. Taking a multiplier of 6.32 for the period produces a figure of £34,760. It is not recoverable as financial loss, but I leave over whether the claim can be reflected in an award of general damages.

*Respite care*

A claim is advanced in the sum of £18,192. It is presumed to be based upon care provided by a professional carer. Having regard to the measure of independence which Katy will enjoy, I can see no factual basis for it. In any event it is not maintainable in law.

*Additional holiday costs*

Agreed at £4,864 and, in my judgment, recoverable for the reasons already given.

*Accommodation in the community from the age of 25 years*

A claim is made for £341,874. It ignores any state provision by way of accommodation or payment of costs. Mr and Mrs Rand desire Katy to be accommodated in an institution such as the Home Farm Trust. It assumes Mrs Rand will 'let go'. It assumes Katy will want to leave home. But Dr Carr stated that two thirds of her cohort were still living at home at the age of 35.

The claim fails as a claim for economic loss by the claimants. In any event, the evidence establishes that the overall cost of accommodation and support services will be met by the local authority.

*Aids and equipment from age 18 for life*

*Shoes*: This claim should be allowed for the years to age 24 (£210 x 6.32). When she reaches 25 she will be less likely to need her parents' assistance in this regard.

*Computer*: Again, I see no basis for the claim until the age of 25. I place, as the defendant suggests, a sum of £3,000 on the cost the parents would be reasonably able to provide.

*Recreational therapy*: I have already awarded a figure.

**GENERAL DAMAGES**

Damages for an additional pregnancy and birth

The claimants suggest £18,000. The defendant contends that an appropriate award is between £2,000 and £3,000.

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) Brooke J considered that an award under this head should be small but the facts pointed to a limited recovery. It is to be remembered that Mrs Rand decided to have a third child because of Katy's disabled condition, and her desire to prove to herself and others that she could have a normal healthy child. I regard that as an adverse unusual circumstance to accompany a pregnancy, which must have also adversely affected the circumstances of the birth of Robert. I accept that the figure has to be offset by the fact that by reason of the negligence she was saved from the surgical procedures connected with a termination.

***[\*68]***

It is accepted that Mrs Rand can recover for the distress at discovering Katy was born suffering from Down's syndrome, but correctly, it being pointed out that had she been properly informed she would have suffered from being told of the risk.

There are no guidelines for an award of this nature and the value of the offsetting which the court is required to effect. I have derived some assistance from the cases of *McLelland* and *Taylor v Shropshire Health Authority* [1998] Lloyd's Rep Med 395. In my judgment, there is a marked difference between being told in the process of proper care and management that you may be carrying a disabled baby, and discovering at the birth of your child that it is disabled. I feel bound to pay some special regard to the shock and distress which must be occasioned when the expectation of joy at the birth of a normal child is cruelly disappointed. It is an indication of the depth of her disappointment, bordering on shame, that Mrs Rand decided to have another child to prove that she could do so. She stated in answer to a question from the court:

'I had a third child because having very traumatically had Katy I felt I needed to have another normal baby – I felt that I had let everyone down … I wanted to prove that I could have another healthy baby. Secondly, I felt that it was unfair to Christopher not to have a normal brother and sister.'

Had she been told of the result of the scan with the proper skill with which doctors can inform a patient, and had a termination, she would not have suffered as she did.

In my judgment, a proper award for general damages for the additional pregnancy and birth and for the shock and pain associated with the birth of Katy is £15,000.

*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*

Mr Coonan submitted that there is a jurisprudential difficulty in making an award under this head, which can conveniently be described as a claim for loss of amenity, because the loss of amenity is consequential upon the condition of Katy and not upon 'the personal injury' for which he accepted Mrs Rand could recover. The point is an important one and is not without complication. It could be argued that it represents an attempt to claim for the cost of care consequent upon Katy's disability, when no claim based on financial loss can be made out on the evidence and thus constitutes an attempt to obtain indirectly what cannot be obtained directly.

In my judgment if it is correct to define the duty of care which the defendant owes to the claimants as a duty to save them harmless from the consequences of having a disabled child, and it can be shown that a breach has given rise to burdens other than purely financial burdens, the application of the law should lean towards some compensation being obtainable. 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 expressed the principle thus:

'(5) … the law is willing to recognise a claim for general damages in respect of the foreseeable additional anxiety, stress and burden

***[\*69]***

involved in bringing up a handicapped child, which is not treated as being extinguished by any countervailing benefit, although this head of damages is different in kind from the typical claim … flowing from an injured plaintiff's own personal injuries.'

Brooke J relied upon *Emeh* ([*[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) at [*1051*](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 [*1022*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-6D81-F873-B3RH-00000-00&context=1522468), per Walker LJ) and I see no reason to conclude that *McFarlane* precluded the application of this principle to an award of general damages.

It is not correct to describe the burdens as being consequential upon the condition of Katy, for whose condition the defendant is not responsible. But the relevant consideration is whether the burdens are consequential upon a breach of the duty of care. The defendant is not liable for the disability but liable for having failed to protect the claimants from the consequences of the disability. The burdens are consequential upon the failure of the defendant to take reasonable steps to protect the claimants from having to suffer the burdens. It is obvious that the birth of a disabled child will dramatically affect the quality of life of both parents and it is to be inferred that a reason why they would have terminated the pregnancy was to avoid such a loss of amenity in their lives. As the law stands, they cannot recover for any distress which causes no injury, but the loss of amenity caused by being required to expend time caring for a disabled child is a real and physical consequence. I have no doubt that it has sometimes led to exhaustion. In my judgment, the law can recognise a claim for a continuing loss of amenity where a breach of duty has caused physical consequences giving rise to the loss of amenity. The flexibility of the law is well illustrated by Lord Millett, who, despite his rejection of the claim as formulated in *McFarlane*, stated ((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), [*[1999] 3 WLR 1301*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-DR91-F2TK-2095-00000-00&context=1522468) at [*1348*](https://advance.lexis.com/api/document?collection=cases-uk&id=urn:contentItem:5T46-DR91-F2TK-2095-00000-00&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 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.'

I gratefully adopt the analysis which can be applied to the claim by the Rands. An award by way of general damages can reflect the true nature of the wrong done to the Rands, who have been deeply affected in their private lives by having to devote more time to the care and upbringing of Katy than the care and upbringing of a healthy child would have involved. The assessment should not be made by reference to commercial costs or hourly rates. It is not an award for care but compensation for what the parents have lost by reason of having to provide the care and attention. It is not an award for financial loss under the guise of general damages. In this case the figure of £5,000 is, in my judgment, much too low, but it serves as a useful starting point arising as it does in a case of a healthy child. Where disability exists there is a continuing claim. Mr and

***[\*70]***

Mrs Rand intend to look after Katy at home until she is 25 years old. In my judgment, the commitment is more likely to be longer. Although Katy's independence will increase the need for supervision will remain. Her teenage years may give rise to particular needs and supervision. No offsetting of benefits is required, for it is an award focused on the consequences of the disability. Mrs Rand has assumed, and will continue to have, almost total responsibility. In my judgment the appropriate figure for Mrs Rand is an award of £30,000. Mr Rand should receive £5,000.

**SUMMARY**

|  |  |  |  |
| --- | --- | --- | --- |
|  |  |  |  |
|  |  | £ |  |
|  | Loss of profits | 42,730 |  |
|  | Loss of benefit of accommodation | 6,000 |  |
|  | Past Aids and Appliances | 775 |  |
|  | Additional Holiday Costs | 4,607 |  |
|  | Cost of Aids and Equipment to age 18 (Shoes) | 1,260 |  |
|  | (Computer) | 1,600 |  |
|  | Physiotherapy | 183 |  |
|  | Recreational Therapy | 2,400 |  |
|  | Future Additional Holiday Costs | 4,864 |  |
|  | Shoes | 1,327 |  |
|  | Computer | 3,000 |  |
|  | General Damages Mrs Rand | 45,000 |  |
|  | Mr Rand | 5,000 |  |
|  |  | £118,746 |  |
|  |  |  |  |

I propose to leave over for further argument the issues of:

(1) the deduction of benefits; (2) recoupment and (3) interest.

Counsel are invited to add to their existing submissions and I shall set a date for a further hearing.

I should like to record my gratitude to both counsel for their help in this case.