

A Womb with a *Mother* in View: Reflections on Conflicting Analyses of Wrongful Birth (A Response to Professor Chris Bruce)

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Introduction

In a recent paper, Bruce (2008) commences by stating, *inter alia*, that “Nicolette Prialux, using legal reasoning argued that the British courts’ ruling in these cases have been inconsistent and unsupportable. This paper takes the contrary view, arguing that the court’s behaviour can be explained using economic reasoning.”² Insofar as Bruce’s fascinating paper raises a much broader range of issues of interest to me, it is *this* passage which captures my particular attention. In light of my earlier contribution to the *Journal of Legal Economics* (hereafter, “JLE”),³ which provides a lengthy critique of the recent developments in the wrongful conception/birth case law in the UK, in this note, here I seek to offer some thoughts in *starting* to address the following interrelated questions:

- (1) Why is it that Professor Bruce and I should find ourselves so profoundly in disagreement as to the British courts’ management of these wrongful birth cases? What lies at the heart of this disagreement?
- (2) Should there really be a ‘disagreement’ at all, if, as is it commonly claimed, that economists employ the ‘positive scientific’ approach to investigate the rationale underlying the development of the common law?
- (3) Why do I find an economic analysis of the wrongful birth cases unconvincing? How *could* it convince me?

It is important that I clarify at this stage that the discussion that follows is written not as a general attack upon economics or economic analyses of the law,⁴ or indeed for that matter, upon the extremely interesting paper that Chris Bruce has offered. Rather, my response is posed largely as a query. My hope is that the combination of Bruce’s paper and my own will encourage others to share a fruitful dialogue about the field of economics, as well as its relationship to other approaches to the study and understanding of the law.

Legal Reasoning (& the View from ‘Somewhere Else’)

First things first: one of the assumptions underpinning Bruce’s paper is that I take issue with the British courts’ rulings in the actions for wrongful conception and birth based on ‘legal

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² See Bruce’s draft paper available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1160440.

³ Prialux (2008).

⁴ See however the work of Terence Dougherty (2005) for a good overview of the various criticisms to which the Law and Economics school has been subject.

reasoning'. In *part*, this is true. Certainly a significant portion of my prior contribution to JLE was spent exploring fairly doctrinal concerns, that is evaluating the 'law' (intended here to mean in its very narrowest sense the strict application of the elements of the tort of negligence in establishing liability, notably: duty, breach and causation of damage) more or less as a technical matter, in order to assess whether on this ground, the overall reasoning of the courts could be said to be both consistent and convincing. My view, based on this narrow doctrinal concern was that the (legal) reasoning deployed by the appellate courts in the wrongful birth saga running from *McFarlane v Tayside Health Board*⁵ to the House of Lords' final holding in *Rees v Darlington Memorial Hospital*⁶ was inconsistent, at points, contradictory, and on the whole, deeply unconvincing.⁷ This is a fairly unremarkable conclusion, and I am by no means alone in holding this view.⁸

However, that was only the first part of my analysis, and it was not the *most* critical part of it. That the deployment of the 'legal rules' proved to be both inconsistent and unconvincing was not, *per se*, **the** problem for me; 'legal reasoning' fails to provide a sufficient explanation as to why it is that I believe the overall outcomes in these cases to be *unsupportable* (just as it is nigh impossible to explain the courts' conclusions reached in these cases purely by reference to legal principle). This is a critical point.

Rather, the notion that the approach of the courts *is* unsupportable is grounded in what one could call the "View from Somewhere Else" (rather than the pure application of legal rules) – that is, some other principles, concerns, biases and values are coming into play, and have influenced my view that the decision-making of the courts in these cases cannot be supported. To make this clearer, let's place this in context. It is entirely plausible that one can find the technical application of the legal rules to be both inconsistent and unsound, but nevertheless *still* support the overall conclusion. One might put the wrong ingredients into a bowl, or perhaps the right ones but in the wrong order, and still end up with a jolly nice cake agreeable to one's palate. And the same can be said in particular instances of the law - one can support the overall policy conclusions reached even if one is critical of the manner by which the courts have arrived at them.⁹

Yet, as one can see clearly in the context of these wrongful birth cases, 'policy' refers to the question as to what direction the law *ought* to take – e.g. the normative question as to whether the repercussions of parenting an unwanted but healthy child *should* form the

⁵ [2000] 2 A.C. 59.

⁶ [2003] U.K.H.L. 52.

⁷ If one is looking for solid legal reasoning which *strictly* applies the various tenets of *McFarlane*, the most coherent/consistent legal response would be to deny *all* parents (whether healthy or disabled) of wrongfully *conceived* children (whether healthy or disabled) access to both child maintenance damages *and* the so-called 'conventional award'. For fuller details as to why I hold the view that the law in this area is inconsistent, contradictory and unconvincing, based on 'legal reasoning', see my previous contribution to this journal, Prialux (2008).

⁸ See in particular, Peter Cane (2004) and Laura Hoyano (2002). Cane (2004: 190-1) argues that the case law in this field demonstrates a certain about of stumbling from one set of facts to the next and that this creates (and has created) 'a formula for confusion and instability in the law'. Hoyano's view (2002:900) is in tune with this, and in her beautiful and thorough critique of the development of the case law in this field she argues that the case law in this field illustrates 'how far negligence law has come adrift of principle'. See also the critiques of Morris (2004); Lunney (2004); Jackson (2001).

⁹ For example see the work of Tony Weir (2000); though he is critical of the legal reasoning in *McFarlane*, he nevertheless applauds the policy conclusions reached.

subject-matter of damages. But the point is this: the particular policy direction that the law takes on this matter is a *choice, a judgment* – it is not a purely technical concern which automatically springs from the internal logic of the law/legal rules/legal reasoning. Such a view is made apparent from a reading of *McFarlane* (in which their Lordships spoke in ‘five different voices’, deploying different legal mechanisms and moral justifications by which to deny parents of unwanted but healthy children damages for child maintenance) and subsequent cases, and indeed, as Lady Justice Hale (as she was then – now Baroness Hale) recognised, the reasoning of the judges in *McFarlane* was explicitly shaped by reference to broader considerations/policy concerns:

[A]t the heart of their reasoning was the feeling that to compensate for the financial costs of bringing up a healthy child is a step too far. All were concerned that a healthy child is generally regarded as a good thing rather than a bad thing (Hale, 2001: 755).

So, just as ‘legal reasoning’ fails to fully explicate the basis of their Lordships’ judgment in *McFarlane*, it will also fail to explain the basis for the view that the courts’ management of these wrongful birth cases is worthy of support or not; to form the view that parents should or should not receive damages for the unwanted but healthy child (or indeed, the unwanted but disabled child for that matter) – is a choice, a judgment – based on a “View from Somewhere Else”, rather than a conclusion that can be formed via scientific observation of phenomena, or as arising naturally from the application of strict legal rules.

That legal reasoning may not point in *any* clear direction in cases such as these, and that we must seek to identify what extra-legal principles, values and biases are shaping the law as a means of understanding its development, is made clear once one examines the *dicta* of the individual judges in the House of Lords in *McFarlane* and in *Rees* (as well as the conflicts/divisions between those judges), and of the different ‘solution’ arrived at in relation to these cases by Lady Justice Hale in *Parkinson*. Moreover, this should be unsurprising – the very conceptual machinery used by the courts in fashioning their different ‘solutions’ to these cases (e.g. in relation to the question of whether a duty of care is owed, ‘fair, just and reasonable’) is inherently vague, open to differential interpretation and capable of masking policy considerations. Indeed, the concepts critical to establishing liability - of duty, breach and causation of damage - are not merely self-evident, objective and neutral categories that guide the judge in his ‘fact-finding mission’ towards an *objective* resolution. Rather these concepts overlap and intersect; they are variable, interchangeable, policy-laden smokescreens, ‘open to judicial manipulation’ (Conaghan and Mansell, 1999). So, as these instances make clear, ‘legal reasoning’ cannot be a value-free, objective or ‘scientific’ enterprise – even Lord Steyn himself noted in *McFarlane* that the ‘judges’ sense of the *moral* answer to a question... has been one of the great shaping forces of the common law’ (p. 82 [my emphasis]). And indeed as a reading of *McFarlane* makes clear, what is at work in the development of the wrongful birth case law is not strict legal doctrine, but exceptions to doctrine – in other words, what underpins the various outcomes of all of these decisions is policy.¹⁰

¹⁰ Though this dichotomy between law and policy is to a large degree superficial, and relates to somewhat long-running jurisprudential debates, the reason for drawing the distinction here is to clarify that while the law is self-referential, it is *also* shaped by reference to other perspectives (e.g. including

Therefore, we must dig a little deeper, beyond the letter of the law, in order to establish whether the concerns that have shaped the courts' determination of these cases (e.g. the judges' sense of the moral answer to the question as to whether parents of unwanted, wrongfully born children should be entitled to compensation on ordinary principles of tort law) are sound, justifiable and *supportable*.

Clashing Views? Normative versus Positive Analysis

So, beyond legal reasoning then; in this regard, it is relevant to note that in analysing the (inconsistent) reasoning, the overall outcome (including the matter of what compensation is awarded and on what basis), and the question as to how the developments within this field cohere with the objectives of the law of tort generally (i.e. how tort law does tort law), I approach all of these issues from an explicitly *feminist perspective*. In my original contribution to JLE, perhaps I did not make that plain enough. Either way, this must surely constitute the right starting point for understanding why Chris Bruce and I would arrive at different conclusions regarding the courts' management of the wrongful birth cases: we are not really disagreeing about the handling of these wrongful birth cases – rather, what we are disagreeing about is *the lens through* which one should examine these actions in the first place. That lens – whether one deploys an economic lens, a 'feminist' lens, or any other, will determine and limit the kinds of questions we ask and *don't ask*, the aspects of the cases that we care about or don't, alongside shaping the nature of the conclusions we can and do reach. Each lens exposes its own methodological bias, holds different objectives and quite simply, embraces different ways of 'knowing'.

In this sense, insofar as Chris Bruce and I appear to arrive at different conclusions in relation to these wrongful birth cases – what we are dealing with here is a much more fundamental sort of disagreement.¹¹ While economists claim to be engaged in the practice of 'positive science', the "what is" project ('positive science does not concern itself with value judgments, or what should be'), feminists by contrast are self-consciously engaged in a normative project – we have a vision of the kind of world that we think women *ought* to, need to and deserve to inhabit. As one might imagine, the difference between the "what is" and the "what ought to be" approaches to these actions is likely to provide *the* explanation for our difference of views as to whether or not the solution of the courts to the dilemma of the wrongfully born child is 'supportable'. I shall return to briefly explore this clash of normative versus positive analysis shortly insofar as I have some reservations as to whether an economic analysis of tort can truly present itself as a positivist methodology – and this is particularly so on my reading of Bruce's assertions on the point of wrongful birth case law; but before turning to this I would first like to briefly outline a few points as to my approach to these cases, for this exposes very quickly, why Chris Bruce and I might *never* find ourselves in agreement.

A Brief Overview of a Feminist Approach to Wrongful Birth Claims

economic principles). In this sense, 'strict law' is intended to mean the body of existing legal rules/doctrine, whilst legal policy is intended to refer to the variety of directions that the law *could* take.

¹¹ And one to which much feminist energy has been spent; see for example the collection of essays in a collection edited by Martha Albertson Fineman and Terence Dougherty (2005).

As the most fleeting glance of the now numerous comments and articles exploring the case of the 'unwanted child' reveal, claimants in the UK instituting such actions can expect to receive a significantly lower compensation package than would have been available prior to 1999. In this sense, I suggest in JLE, as elsewhere (Priaux, 2006) that these actions are 'in decline'. Departing from the principles of conventional justice, the courts have determined that parents complaining of the unwanted repercussions following a negligently born child should no longer be entitled to full compensation.¹² Prior to *McFarlane*, the full compensation principle applied to what is, in effect, quite simply an action for clinical negligence. Although the post-*McFarlane* developments have been causative of celebratory cheers from some scholarly corners, I take a very different stance. From a feminist perspective, one that is rooted in protecting and promoting women's reproductive freedom, the demise of these actions was (and is) viewed as a cause for great concern. While not discounting the importance of men's contribution to child-rearing, it is nevertheless women who experience the biological processes of reproduction, and despite shifting (rather than shifted) attitudes towards women's role in public life, it remains the case that the responsibility of caretaking for children and others in society falls, more often than not, upon women.

For these reasons, my exploration of these cases centralises its concern with the reproductive experiences of women and their lives before the law of tort. Changes in legal policy as to the injuries and harms the law is willing to acknowledge and protect when relating to matters of reproduction cannot be properly viewed or understood without specific reference to women – this is not an area of law that warrants a gender-neutral stance. Why should this be so you ask? Well, there are very practical reasons most obviously concerning the existing responsibility that women currently undertake for dependency work. Not only does this impose very clear financial limitations upon life, but can hinder a woman's aspirations for career, or education, among other opportunities open to men and childless women. While this imbalance is not something that can be generally tackled through the law of tort, it is a different matter when those responsibilities are thrust upon women by negligence. In this context, it is therefore of critical importance that the law of tort handles constructively, rather than reflects, the unequal nature of society. However, alongside this, the law of tort also holds significant symbolic power in three interlined ways. First, these actions hold the potential to *reinforce* that the negligent failure to protect women's reproductive choices constitutes a *real harm*, with significant and enduring repercussions upon their lives. The law can articulate that the harms that women suffer, as women, *really matter*. Second, the reproductive torts could *enhance* women's reproductive freedom by enforcing higher standards of medical care – liability for the frustration of women's choices sends out a strong signal that the medical profession should take greater care in their facilitation. Third, the law also plays an important role in reflecting the reality and diversity of women's lives. Although 'choice' is a term inclined to mislead, in bespeaking an array of unlimited choices that is rarely there, it is nevertheless important to *take seriously* a woman's choice to avoid, or indeed, delay, parenthood to pursue other avenues, which she regards as more fulfilling in her life. The law does play an essential role in articulating that these interests are ones worthy of protection and the importance of reproductive autonomy in the

¹² See Priaux (2008); note that the House of Lords in *McFarlane* determined that parents of a wrongfully born but healthy child should no longer be entitled to receive child maintenance damage (by far the most significant item of damages in a claim for wrongful conception).

diverse lives of women (and of course men) as a means of leading a fulfilling and chosen life.

In light of these points, my mission, if you will, was to assess the demise of the reproductive torts – to root out why it should be that the courts have assessed these actions as deserving ‘special treatment’. And it is important to note that although the actions for wrongful conception and wrongful birth have been given *special labels*, they are no different in essence to any other case of medical negligence. But they have been singled out for special treatment.

Yet in my evaluation of these actions, I did not seek to ask whether the courts’ behaviour was in line with economic thought, nor did I seek to query what an ‘efficiency-seeking court would rule’ in these cases (Bruce, 2008) – these were not my concerns. Instead I asked: to what extent had the above considerations, as to the specific impact that failed reproductive plans had on women, been taken (or not) into account in shaping the law’s response that no longer should women harmed through negligence resulting in pregnancy, childbirth and the responsibilities of parenthood become the recipients of full compensation? What assumptions have informed legal principle that these kinds of injuries should be assessed as *less* deserving, less worthy of recognition than other kinds of injuries sustained in the clinical arena? Are these harms so different in nature from other kinds of injuries? How does the law understand those harms specifically sustained by women? As my work in this field has considered, the explanations offered by the courts (and indeed others commenting on this development in the reproductive torts) left many questions begging as to *why* the injuries sustained in these actions have been singled out and largely transformed from compensable harm into the mere vicissitudes of life.

This fleeting insight into my approach readily reveals that my analytical concerns will dramatically depart from those of an economist studying this breed of clinical negligence. The matters which concern me, it would seem, are simply not relevant or of interest to a mainstream economist. I am explicitly engaged in the ‘how things ought to be’ question – however, to some degree, I rather think the economist is too, despite his assertions to the contrary. And it is perhaps for that very reason that I find an economic analysis of the wrongful birth litigation unconvincing. Given that I hope for a rejoinder, let me expand on this *a little*.

Economic Analysis of the Courts’ Behaviour: *Explaining it, condoning it, or reflecting it?*

“...the court’s behaviour can be explained using economic reasoning” (Bruce, 2008)

“By analyzing merely “the way things are,” without foregrounding a concern for “the way things perhaps ought to be,” or for what initial allocations of wealth and/or power are secured by the way things are, Law and Economics provides a very powerful justification for maintenance of the current status quo. In such respects, it seems likely that rather than being a mere application

of a logical scientific method to the law, Law and Economics could be seen as part of a normative approach to the law and to politics” (Dougherty, 2005: 6).

“What this sequence of cases shows is that if the Law Lords... are to take their law-making function seriously... they must, at least, be prepared to contemplate the possibility that it may be dangerous to consider individual cases too much in isolation and on their precise facts. ... Stumbling from one set of facts to the next is, as *Rees* shows, a formula for confusion and instability in the law” (Cane, 2004: 190-1).

These quotes foreground a few of my concerns with the economist's continued retention of the claims that he/she is engaged in positive science, that positive science does not concern itself with value judgments, or *what should be* and that this forms the basis of economic theory's ability to predict what will be (see Bruce, 2008). Insofar as I cannot seek to be comprehensive here (for this was supposed to be a 'brief' response to Bruce's paper), I shall outline a number of concerns (and indeed queries) on this point.

It is fully accepted that in our endeavours to understand “what is”, that we must *all* simplify or abstract from observations of the real world – the real world is indeed so complex that humans cannot be expected to understand it fully.¹³ Indeed, even in the narrower context of the common law, the same is true. As is clear from Cane's quote above, for those of us who endeavour to understand the development of the common law, and in particular, these wrongful birth cases, we are all trying to make sense of chaos. In these cases, the UK judiciary has quite literally, 'stumbled' from one set of facts to the next. In *McFarlane* the House of Lords did not anticipate the unusual factual twist of *Rees* – they just didn't see it coming - and they paid scant attention to how, if at all, they might resolve the case of the disabled child.¹⁴ And this, as I suggested in my earlier contribution to JLE, has spawned very particular problems in terms of the legal reasoning that flows from these cases.

However, our respective disciplines provide us with tools for attempting to make some sense of this chaos. Chris Bruce, for example, claims that the courts' behaviour can be explained using economic reasoning, whilst I claim, that an analysis which centralises *gender* also has explanatory force. From my analysis, the overall results of the courts' management of these cases, as discerned from the reasoning deployed by the judiciary, is premised upon very particular (and false) constructions of women, and that it is this fundamental misrepresentation of women's sexual and reproductive lives which provides one (albeit, pretty convincing) explanation for the decline in compensation that will be made available to parents of children wrongfully conceived as a result of medical misadventure. No doubt insights from psychology, sociology, philosophy, evolutionary biology and so on could provide us with alternative accounts – however, as things stand, the explanation offered by Chris Bruce and myself arguably constitute competing theories as to 'what is', and to some extent, 'what will be'.

However, while there are significant differences between our approaches, the real point of departure between us, and what I see as being the single chief weakness of economic

¹³ Those simplifications and abstractions inevitably mean that for each of us, the explanation for 'what is', is but one possible explanation amongst many.

¹⁴ A question which is still in need of resolution – see Priaulx (2008).

method, is the refusal to concede (or perhaps a failure to realise) that when one seeks to understand the world through an economic lens, one is to some degree (perhaps a large degree, but this is moot) engaged in the question of 'what should be'. Economics is not a value-neutral enterprise.¹⁵ For example, the primary concern for 'efficiency' it might be claimed, is positivist – that is, merely descriptive of the development of the common law. However, on the other hand, the question can be begged of Law and Economics as to whether, 'efficiency' is the *aim*, the thing to be 'promoted', the 'ideal' (in which case, the approach is decidedly normative) - or whether it is claimed that 'efficiency' merely constitutes the expected and rational/normal behaviour of individuals, entities, and indeed, courts (in which case, economics holds a closer relationship with psychology) and thereby provides a useful model for predicting behaviour. And from my 'outsider' perspective, there would seem to be a great deal of slippage between the two. As Dougherty argues, "...it is bedevilling to try to grasp the difference between what is labelled positive and what is clearly normative in much of Law and Economics literature. Most of its positive arguments in fact are based on fundamental assumptions that clearly involve normative choices and political judgments (Dougherty, 2005: 4).

This query keenly arises in relation to the paper offered by Chris Bruce – for even in his introduction it would not appear that his analysis of these wrongful birth cases is *neutral*. Insofar as Bruce points out that I regard the management of these cases by the British Courts to be *unsupportable*, he claims to take a contrary view – so, am I to assume from this that he *supports* the conclusion of the British courts on the basis that their approach is in line with economic reasoning? This demonstrates, I think, some slippage between positive and normative analysis. The answer I would expect from someone like Chris Bruce (and I am happy for him to qualify this for me), is not that he *supports* the overall outcomes of the cases, nor that he takes issue with what I say – but rather, that the Courts' behaviour is merely in line with economic principle, more or less in line with testable hypothesis which flow from economic principle. If 'efficiency' is not an ideal, a goal – in the normative sense – it should not matter one jot whether the result I suggest (which may well be seen by an economist to be *inefficient*) – is actually the overall result that the courts do reach. To an economist who is engaged in the work of positive science, this would merely be an observation – and no doubt an interesting one, for the courts' behaviour then would be an aberration, a deviation from established economic principles.

So, in this sense, and I am happy to stand corrected, all that can be said by the economist on this matter, is that that is *how things are*. Based on the notion that economics is merely designed to explain how things are (and based on those observations, how things will be), one cannot I think, go much further than this. Economics would not, it seems, provide much room for finding *disagreement* with my view that the overall result of the wrongful birth cases is unsupportable, or just plain wrong. For the economist, to go further than that is surely to prefer an alternative solution, perhaps one based on economic principle. And if that view is not based on economic principle, it nevertheless still enters the terrain of normative analysis – but is informed by a "View from Somewhere Else" (whether this is one's gut feeling, own moral sense of the answer/how things should be, etc.).

¹⁵ See for example the interesting critique of Robert Nelson (2001).

So, this really outlines some of the *initial* questions that I have of the discipline of Law and Economics as applied to these wrongful birth cases - whether the ability to explain the courts' behaviour via economic reasoning in fact amounts to a defence and justification (i.e. condoning) the outcomes of these cases. For in the absence of an explicit assertion to the contrary, the analysis provided by Bruce would seem to suggest that the courts' approach is supportable, *because* it would appear to sit in accordance with economic principles. And importantly, if one does provide *support for* the British Courts' behaviour, I suggest that it is nigh impossible to claim that one is not concerned with value judgments, or the question of *what should be*. One is making a choice, forming a judgment as to *what should be*; the values that guide the economist then, of 'efficiency-seeking' behaviour is an explicitly normative judgment. The economist is applying his own view as to what is socially desirable (i.e. efficiency), his own vision of social justice, and ignoring other ways of understanding the rationale underlying the development of the common law and so on.

If this is so, then in my mind, *much* more in the way of a defence is required as to why efficiency *ought* to be the goal. It takes little imagination to consider how promoting 'efficiency as *the* goal' could deliver an impoverished form of 'justice', given that this will ignore (and tolerate), among other things, existing inequalities, vulnerability and hardship, and exercise of power in society. Indeed, as a case in point, though Bruce's analysis suggests that the wrongful birth cases are in line with economic principles, and he would presumably not seek to advocate a 'different solution', given my analysis which highlights precisely these aspects of wrongful birth case law and finds them so terribly problematic, my response is *very* different.¹⁶

It is worthwhile noting that none of this should be taken as an attack upon Law and Economics – instead, what I am outlining here (albeit, in non-exhaustive fashion) are aspects of a Law and Economics approach to the wrongful birth case law that I find to be troubling, in part unconvincing, *but* ultimately, fascinating. Indeed, had I not been so fixated upon the initial claims made in Bruce's paper, I would have spent the greater part of this paper engaging with points that I found to be both promising and useful. However, for the time being, I wish to get these preliminary points out of the way. So, as a means of teasing out a further address from Chris Bruce, one which will better allow me to understand the contribution that Law and Economics can make to my understanding of the development of the common law, I conclude this response with a number of concrete enquiries.

Conclusion (Questions for Chris Bruce)

What I seek to do here is to expose a series of my concerns in the form of posing a number of quite specific questions of the economic analysis of wrongful birth case law. Insofar as Chris Bruce's paper seeks to *specifically* address the wrongful birth case law, I would wish to see how the general thesis could be defended on the basis of the following queries:-

In the section of his paper dealing with 'testable hypotheses', Bruce notes that his prior analysis predicts that:

¹⁶ For details as to the solution I would recommend, see my conclusion in my earlier piece in JLE, Prialx, 2008.

If both the parents are *not* disabled and (a) the unplanned child is not disabled, the court will award either no damages or only conventional damages' whilst if the 'unplanned child is disabled, the courts will award damages equal to those that would have been awarded if the child had not been disabled *plus* the incremental costs associated with raising a disabled child.

My interest here is in how this position has been reached – that is the view that courts will award either no damages, or only conventional damages - on economic principles. Based on my reading of his analysis, the notion that courts are likely to award either *no* damages or *only conventional damages* in such an instance, would seem to be based upon an explicit value-judgment, or at least the analysis would seem to have been engineered in such a way as to reflect (rather than predict) the courts' view that the birth of an unwanted but healthy child is, in itself, a fairly minor harm (which should therefore not command much in the way of compensation).

Let me break this down to three individual points for comment:-

1. In the case of parents with an unwanted but healthy child, why would one factor in the probability of having a disabled child into the equation? Insofar as parents in these cases wished to avoid the birth of *any* child, I do not think it appropriate to measure the harm that they have suffered (and indeed to vary the compensation that should be awarded as a result) on the basis of a comparison between the small risk of having a child with a disability, and having a healthy child. Such an analysis, it would seem, merely starts from the position that the birth of a disabled child is a harmful occurrence best avoided, and that parents with a healthy child (albeit one that they didn't want) are extremely *fortunate* for having escaped that *kind of child* and having been blessed with a better, healthy one. In other words, how does one arrive at the conclusion *objectively* that the birth of a healthy child in such instances should command only a small amount of damages? Such an issue, it seems to me must necessarily be separated from the issue of wrongfully born disabled children.
2. Following on from the above, there would seem to be a fair amount of speculation in arriving at this conclusion, which does not seem to be the product of a "positive scientific" approach. Bruce argues that while the average parent of an unwanted child must have suffered a net loss, this does not mean that such a parent must suffer a net loss when the unwanted child is not disabled. He suggests that, 'it is *possible* that even though the parents of unwanted children expected to obtain lower net benefits from their children than did the parents of wanted children, they may still have expected to obtain positive net benefits from a healthy, but unwanted child.' It seems to me that the inclusion of the words 'possible' and 'may' is just as speculative and arbitrary as the view espoused in *McFarlane*, that the birth of a healthy child is a joy and a blessing, and not, on the whole, a harm. In other words, the analysis seems to be *derived* from the court's approach, and *not predictive* of the outcome.

3. Prior to *McFarlane*, the position of the courts was to award damages on the basis of *full compensation*. Naturally this approach would still, in relevant cases, have drawn a distinction between unwanted but healthy children and unwanted but disabled children. However, the difference between the *post-McFarlane* approach and the *pre-McFarlane* approach is that in the latter, the repercussions of parenting an unwanted but healthy child were assumed to be the appropriate subject-matter of full compensation, including the costs of raising the child to majority. Was this position, which was held for thirteen years, *not* in line with economic principle? In other words, what on the basis of economic theory justifies this shift in compensation policy to a position where such parents will not receive child maintenance damages (but will receive a fixed conventional award)?

And finally – it is useful to raise one further general point which explores these cases in the broader context of tort law as a whole. This, for me, is particularly critical. As we are more than aware, the principle of full compensation no longer applies to these specific actions (which have received ‘special treatment’). Given how tort law does tort law, and the overarching objectives of tort law, my own interest is in what it is precisely that justifies the ‘special treatment’, and whether an economist might form a view (or indeed, whether it could be predicted) as to whether the kind of solutions the courts have arrived at in the wrongful birth case, should have broader application. If ‘efficiency-seeking’ behaviour on the part of the courts formed the explanation for this, then might we not expect to see the court depart from orthodox rules of tort law across the board in clinical negligence, and elsewhere?

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