‘Public policy’ has acquired a bad name in English tort law, but the reasons for its tumble from grace remain obscure. Lord Morris in *Dorset Yacht* gave us the Delphic admonition that the court should not shrink from being arbiter of whether it is fair and reasonable that a duty of care arise, and that ‘policy need not be invoked where reasons and good sense will at once point the way’¹ – but did not explain why sense and logic must be distinguished from policy factors, and why the latter do not encompass fairness and reasonableness. When the ‘policy considerations’ step of Lord Wilberforce’s two-stage test in *Anns*² was supplanted by ‘fairness, justice and reasonableness’ in *Caparo*’s three-stage test for duty of care,³ it was unclear how, if at all, this was intended to change the substance of what the court must consider in novel cases, or whether the revolution was confined to shifting the persuasive burden respecting policy considerations from the defendant to the claimant, by inference converting the court from an expansive to a conservative way of thinking about negligence law. While the factors selected for consideration under the third stage of the *Caparo* test have tended to weigh heavily against creating a duty of care, recently the countervailing policy that wrongs should be remedied – corrective justice – has regained prominence⁴ (which begs the question as to what constitutes a wrong). Perhaps aware of the flaccidity of ‘fairness, justice and reasonableness’ in explaining to parties why a duty of care has been withheld or imposed in their cases, the Law Lords have continued to cast about for more satisfactory labels. ‘Assumption of responsibility’, once subjected to scathing judicial criticism as being ‘neither helpful nor realistic’ as a test of liability,⁵ is now regarded as a virtually indispensable phrase in novel negligence decisions, at least where the harm is characterised as economic.⁶ The latest label in vogue is Aristotle’s ‘distributive justice’,⁷ usually deployed in counterpoint to ‘corrective justice’ which is generally assumed to be the default rationale underpinning tort law.

¹ *Home Office v Dorset Yacht Co Ltd* [1970] 1 AC 1004, 1038–1039.
³ *Caparo Industries plc v Dickman* [1990] 2 AC 605, 617–618.
⁵ *Smith v Eric S. Bush* [1988] 1 AC 831, 862 per Lord Griffiths, a criticism echoed by Lord Roskill in *Caparo* n 3 above, 375.
⁶ Assumption of responsibility was tentatively resuscitated by Lord Goff in *Spring v Guardian Assurance* [1995] 2 AC 296 and *Henderson et al. v Merrett Syndicates Ltd.* [1994] 3 WLR 761 and was decisive in *White v Jones* [1995] 2 AC 207, assuring its rehabilitation.
In McFarlane v Tayside Health Board\(^8\) the House of Lords had recourse to all of these labels in holding that the parents of a healthy child born following a negligently performed sterilisation procedure could not recover damages from a health authority for the cost of bringing up that child. The Lords reversed 15 years of consistent English appellate authority\(^9\) which had applied the conventional professional negligence template to find liability for maintenance costs, the claim being categorised as a consequential economic loss directly flowing from the failed sterilisation which was not only objectively foreseeable but directly contemplated by the parents and the surgeon.\(^{10}\) The Law Lords’ attempt to create a sharp-edged legal rule for ‘wrongful conception’ cases, however they might arise, without articulating a clearly defined supporting principle has fomented rather than forestalled further litigation. The lack of consensus in McFarlane has fostered confusion amongst trial judges and encouraged the Court of Appeal to create untenable distinctions, pivoting unsteadily on the health of the unwanted child and the reluctant parent respectively. I will analyse the disparate lines of reasoning taken in McFarlane and will use the subsequent cases to explore some of the implications of the collapse of legal principle which McFarlane, at least to this point, represents.

Fact variation #1: the healthy child of healthy parents

In McFarlane, the four Law Lords who concurred in the result were clearly concerned not to confer tort immunity on surgeons carelessly performing sterilisation procedures, which would create an unacceptable anomaly in

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\(^9\) Emeh v Kensington and Chelsea and Westminster Area Health Authority [1985] QB 1012 disapproving of Udale v Bloomsbury Area Health Authority [1983] 1 WLR 1098 (QB) holding the contrary; Thake v Maurice [1986] QB 644 (CA, leave to appeal to HL denied). See also the Scottish cases of Allan v Greater Glasgow Health Board 1998 SLT 580; Anderson v Forth Valley Health Board, 1998 SLT 588. Although the McFarlane appeal emanated from Scotland, the Law Lords were agreed that English and Scottish law should be the same: ‘[i]t would be strange, even absurd, if they were not’ (n 8 above, 68 per Lord Slynn; see also 78 per Lord Steyn). Some English courts had expressed misgivings about this position, but nonetheless applied Emeh and Thake: Jones v Berkshire Area Health Authority (unreported, 2 July 1986 per Ognall J; Gold v Haringey Health Authority [1988] QB 481, 484g per Lloyd LJ; Allen v Bloomsbury Health Authority [1993] 1 All ER 651, 662d–f per Brooke LJ.

\(^10\) ‘Wrongful conception’ cases arise most commonly from failed sterilisation procedures but also occasionally from incorrect diagnoses that the parents did not carry a defective gene (as in R.H. v Hunter [1996] OJ No. 2065 (Ont. Gen. Div.) – muscular dystrophy). They are more straightforward than so-called ‘wrongful birth’ cases, where the claimants decided to have a child, but would have terminated the pregnancy had they known that the foetus was suffering from an abnormality (as in Rand v East Dorset Health Authority (2000) 56 BMLR 39, [2001] Lloyd’s Rep Med 181; Hardman v Amin [(2000) Lloyd’s Rep Med 498, 59 BMLR 58 [cited hereafter from BMLR]; Lee v Taunton & Somerset NHS Trust [2001] 1 FLR 419]. In ‘wrongful conception’ cases, the parents did not wish to have any child, so the maintenance costs satisfy the ‘but for’ causation test whereas in ‘wrongful birth’ cases the claimants would have borne the usual costs of bringing up a child in any event. The rare cases of failed abortions (as in Scuriaga v Powell (1979) 123 SJ 406, appeal dismissed by CA (unreported, 24 July 1980, Transcript No. 597 of 1980), or an incorrect diagnosis that the mother was not pregnant (as in Groom v Selby [2001] All ER (D) 250, 64 BMLR 47 (CA) [cited hereafter from BMLR]; Greenfield v Irwin [2001] 1 WLR 1292, [2001] 1 FLR 899 [cited hereafter from FLR]) are in a third category which might be dubbed ‘wrongful continuation of pregnancy’; the medical negligence did not cause the pregnancy, but such cases can be assimilated for these purposes with ‘wrongful conception’ in that the patient did not want to have a child.
professional negligence. The NHS’ strategy had been to argue that conception, pregnancy and delivery are natural processes, and so cannot be characterised as harmful; hence any and all claims arising from the unwanted conception must be pure economic loss. The health authority thus hoped to exploit the instinctive aversion of negligence law to economic losses not causally related to physical damage. The majority rejected this line of reasoning, finding that the unwanted events constituted actionable physical harm to the mother; Lord Steyn most clearly equated the physical events with personal injury. Lord Millett, partially dissenting, considered that every normal healthy child is a blessing and a benefit in the eyes of law; therefore her birth cannot be converted to a detriment by her parents through a process of ‘subjective devaluation’. He would have given a conventional award of £5,000 for denial of the parents’ personal autonomy to choose to limit the size of their family, but no other award.

The conclusion that the mother had suffered an actionable physical wrong which warranted more than nominal damages was the only clear area of consensus in the majority. Lords Slynn, Steyn and Hope regarded the mother’s prenatal medical expenses and loss of income as consequential economic loss flowing from the physical injury, and hence recoverable, but Lord Clyde apparently did not. Any claim for postnatal loss of income was rejected in principle by Lord Clyde, and by inference by Lords Slynn and Steyn, but was accepted by Lord Hope if the foregone income was a direct result of the effects of the pregnancy itself, subject to the remoteness limiting rules. Lord Slynn accepted a claim for the layette for the newborn, but Lords Hope and Clyde did not, while Lord Steyn did not even discuss that head of damage.

All five Law Lords wanted to deny the claim for the cost of rearing the child, but they had singular difficulty in articulating why without falling into the quagmire (as they evidently saw it) of appeals to moral considerations. They may have felt unease about the allocation of the NHS’ limited resources to the mundane needs of a growing child. Lord Steyn was alone in acknowledging that there necessarily was a moral dimension to this result. The difficulty was finding a device which would permit the desired conclusion to follow.

The route taken by Lords Slynn, Steyn and Hope was to winch the maintenance claim from personal injury into the autonomous territory of pure economic loss –

11 Avoiding such immunity has also worried some American courts: Johnston v Elkins 736 P.2d 935, 939 (Kan. 1987); CS v Nielson 767 P.2d 504, 508 (Utah 1988).
12 n 8 above, per Lord Slynn, 74; Lord Hope, 86; Lord Clyde, 102; Lord Steyn, 81.
13 Lord Millett admitted that ‘in truth [the birth] is a mixed blessing’, with inseparable advantages and disadvantages (n 8 above, 114).
14 ibid 112. This is a rather peculiar transplantation of the concept from unjust enrichment by the receipt of unwanted services.
15 ibid 114. Lord Millett, somewhat oddly, would have accepted a claim if the parents had disposed of baby equipment in reliance upon the misrepresentation that the sterilisation was successful, as this loss would flow as a direct and foreseeable consequence of that information being wrong – notwithstanding that all the financial claims had the same causal nexus with the erroneous advice.
16 ibid 74, 76 per Lord Slynn, 84 per Lord Steyn, 87 per Lord Hope.
17 This seems to follow by inference from Lord Clyde’s rejection of any other consequential financial loss (ibid, 106).
18 ibid per Lord Clyde, 106.
19 This seems to follow from their rejection of any postnatal economic loss: ibid, 75–76 per Lord Slynn, 83–84 per Lord Steyn.
20 ibid 89.
21 ibid 76.
22 ibid 97 per Lord Hope, 106 per Lord Clyde.
23 ibid 97.
notwithstanding that they all had characterised the financial costs of the pregnancy and birth as economic loss consequential on the mother’s personal injury, and hence recoverable. There was no attempt to offer a cogent conceptual reason for the cut-off.\textsuperscript{24} It is difficult to see why there is not an equally strong nexus between the physical harm and the need to feed and clothe the resulting child. Lord Clyde and Lord Millett expressly declined to engage in the categorisation exercise, Lord Millett describing the distinction as being ‘technical and artificial if not actually suspect’ in such cases, and ‘having no moral content’\textsuperscript{25}.

Three means of deporting the maintenance costs to pure economic loss territory presented themselves. The case was pleaded as falling within ‘the extended Hedley Byrne principle’, which invited the conclusion that \textit{ipso facto} such claims must be characterised as pure economic loss. This was possible in \textit{McFarlane} because of the fortuitous\textsuperscript{26} circumstance that the surgeon had written to the husband to tell him, incorrectly, that he was sterile.\textsuperscript{27} However, \textit{Hedley Byrne} has recently been applied to claims of psychiatric and physical injury\textsuperscript{28}, even where no words were spoken at all. Having raised the point, however, Lord Steyn eventually concluded that he did not think it mattered whether the claim was characterised as coming under \textit{Hedley Byrne} or in negligence \textit{simpliciter}, as regardless the claim had to be treated as being one of economic loss for a species of negligently performed services\textsuperscript{29} – thereby conflating ‘pure’ and consequential economic loss. Lord Millett rejected any distinction between negligent words and acts in this context.\textsuperscript{30}

The second device, adopted by Lord Hope, was to hive off the child rearing claim from the mother to the father, to break the nexus between the physical implications of pregnancy and childbirth, and the costs of rearing the child.\textsuperscript{31} This obviously has limited utility where the mother is a single parent or is in paid employment; even if she is not, it is the family unit which has foregone enjoyment of the money used to support the unwanted child.

The third technique was to slice up the professional relationship into several duties of care, requiring that a distinct duty of care be adjudicated in respect of each head of damage.\textsuperscript{32} The argument here, first accepted in \textit{Caparo} in the context of pure economic loss,\textsuperscript{33} is that the existence of \textit{any} duty of care is determined by the nature of the specific damage which actually results, rather than from the type

\begin{footnotesize}
\begin{enumerate}
\item It is difficult to see why there is not an equally strong nexus between the physical harm and the need to feed and clothe the resulting child. Lord Clyde and Lord Millett expressly declined to engage in the categorisation exercise, Lord Millett describing the distinction as being ‘technical and artificial if not actually suspect’ in such cases, and ‘having no moral content’.
\item Lord Steyn merely said that ‘realistically’ maintenance costs are pure economic loss (\textit{ibid} 79).
\item \textit{ibid} 101–102 per Lord Clyde, 109 per Lord Millet.
\item An undesired birth can result from a range of negligent words (advice following the surgery not to use contraception; failure to advise of the possibility of spontaneous reversal of a vasectomy; advice about a hereditary genetic condition following which the claimants decide to have a child) or negligent actions (a failed sterilisation, a botched abortion, an incorrect diagnosis that the mother was not pregnant or that a foetus was not suffering from any abnormality).
\item \textit{Hedley Byrne} has recently been applied to claims of psychiatric and physical injury, even where no words were spoken at all.
\item Lord Clydes rejected this: ‘once the obligation to make reparation for some loss is predicated, it seems to me difficult to analyse the claim for maintenance of the child as a particular, and so separate, obligation’ (\textit{ibid} 102). Lord Millet preferred to consider the issue as whether the particular ‘novel’ head of damage was ‘recoverable in law’, without explaining where this fits into the conventional negligence template (\textit{ibid} 108).
\item \textit{Murphy v Brentwood} [1991] 1 AC 398 is an example of slicing apart duties to the same injured party (a builder owes a duty to a subsequent purchaser of defective premises to compensate him for personal injury but not for the cost of preventative repairs).
\end{enumerate}
\end{footnotesize}
of possible damage predictable when the potential tortfeasor embarked on his risk-creating activity. The cost of rearing the child could thus be severed from the mother’s personal injury. There was no attempt to explain why or how a case of failed sterilisation is different from other cases of negligently performed surgery where a separate duty of care analysis is not required for future financial losses, such as loss of income.\(^{34}\) Lord Clyde had doubts about this technique, expressly eschewing any duty of care analysis in favour of characterising the issue as the existence and extent of the loss.\(^{35}\)

The categorisation stratagem permitted Lord Slynn, Steyn and Hope to conclude that the claim failed to clear the particularly high barriers designed to intercept pure economic loss claims. However each of them found a different basis upon which to deny that a duty of care existed to protect the patients’ economic interest in restricting the size of their family.

Lord Slynn resorted to ‘assumption of responsibility’: while the doctor undertakes a duty to prevent pregnancy, he or she does not assume responsibility for the expense of rearing the child; ‘if a client wants to be able to recover such costs he or she must do so by an appropriate contract.’\(^{36}\) This exposes the inescapable vacuity of ‘assumption of responsibility’ as a duty of care test, notwithstanding Lord Browne-Wilkinson’s valiant attempt to break its circularity by defining it as assuming responsibility for the task itself rather than assuming legal liability.\(^{37}\) Can it realistically be said that a surgeon in undertaking to sterilise a patient assumes responsibility for the pain and suffering of any pregnancy and delivery, the mother’s prenatal loss of income and the layette, but not for the food put in the child’s mouth? Lord Slynn himself felt obliged to concede that this is illogical.\(^{38}\)

Lord Hope preferred the more malleable ‘fairness, justice and reasonableness’ final hurdle of the \textit{Caparo} test, holding that a duty of care for maintenance costs was barred on two grounds. First, the potential quantum of liability would be disproportionate to the duties undertaken and the extent of the negligence ‘in performance of a voluntary and comparatively minor operation’ taken for the proper purpose of allowing couples to have unprotected intercourse.\(^{39}\) However, it is anomalous in negligence law to determine the existence of a duty of care by the proportionality of the resulting liability to the degree of fault. As Lord Millett pointed out, ‘it is a commonplace that the harm caused by a botched operation may be out of all proportion to the seriousness of the operation or the condition of the patient which it was designed to alleviate’,\(^{40}\) but that does not normally preclude recovery under the principle of corrective justice. The extent of that liability is largely unpredictable for the most common negligent acts.

The second impediment to a duty of care for Lord Hope was the impossibility of calculating the quantum of liability because it could not be established that the child’s maintenance costs exceeded the benefits of having the child in the family; therefore the economic loss must \textit{ipso facto} fall outside the ambit of the duty of

\(^{34}\) eg \textit{Lim Poh Choo v Camden \& Islington AHA [1980]} AC 174.

\(^{35}\) n 8 above, 91, 101–102 \textit{per} Lord Clyde.

\(^{36}\) \textit{ibid} 76.

\(^{37}\) White \textit{v Jones [1995]} 2 AC 207, 273. Lord Steyn’s explanation of ‘assumption of responsibility’ as focusing objectively on what the defendant said or did in dealing with the claimant is arguably of even less assistance \textit{[Williams v Natural Health Foods Ltd [1998]} I WLR 830, 835].

\(^{38}\) n 8 above, 74.

\(^{39}\) \textit{ibid} 91.

\(^{40}\) \textit{ibid} 91.
care. However, it is a tenet of tort law that impossibility of precise calculation and a degree of speculation must not deter courts from awarding damages for nonpecuniary, and indeed pecuniary, loss for personal injury. Lord Clyde demolished Lord Hope’s benefit/burden conundrum, noting that it is contrary to principle to set off factors of a quite different character against one another; a parent’s claim for bereavement following a child’s death is not offset by the saving in maintenance costs which the parent will gain. Lord Steyn also rejected set-off as ‘the correct legal analysis of the position’, although, rather perplexingly, he thought the factor was relevant ‘in an assessment of the justice of the parents’ claim’.

Lord Millett’s reasoning on this point is also less than pellucid; he rejected the set-off exercise because it must ‘either be superfluous or produce the very result which is said to be morally repugnant’, but went on to hold that the law is driven to regard the benefits of a healthy child as necessarily outweighing the costs – even though the parents had done that same cost-benefit calculation for themselves, as they were entitled to do, and had come to the opposite conclusion. Surely an irrebuttable presumption that benefits outweigh burdens is the product of a set-off exercise, even if it is conducted from the perspective of society rather than of the parents. As for Lord Slynn, he discussed the conflicting American and Australian authorities on the set-off argument, but did not make it part of his own reasoning which, as stated earlier, invoked ‘assumption of responsibility’ as the talisman of duty of care.

Lord Clyde for his part accepted the disproportionality of liability to culpability argument of Lord Hope, albeit in relation to the existence and extent of the loss for which ‘reasonable restitution’ was required, rather than to the existence of a duty of care. Lord Clyde suggested that the claim was for ‘a loss near the limits of the causal chain’, but held that a sufficient causal connection could be made out. However, His Lordship regarded the maintenance costs as going ‘far beyond any liability which . . . the defendants could reasonably have thought they were undertaking’. Since the caselaw had consistently held for 15 years that maintenance costs were compensable, this point must either refer to foreseeability of the loss, which all the other Law Lords had viewed as incontestable by the defendant, or revert to the ‘assumption of responsibility’ reasoning of Lord Slynn.

Lord Steyn with refreshing candour rejected all of the grounds advocated by his colleagues: ‘to explain decisions denying a remedy for the cost of bringing up an unwanted child by saying that there is no loss, no foreseeable loss, no causative link or no ground for reasonable restitution is to resort to unrealistic and formalistic propositions which mask the real reasons for the decisions. And judges ought to strive to give the real reasons for their decision.’ For Lord Steyn, the honest answer lay in distributive justice, explained as follows:

It requires a focus on the just distribution of burdens and losses among members of a society. If the matter is approached in this way, it may become relevant to ask commuters on the

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41 ibid 97.
42 ibid 102–103.
43 ibid 81–82.
44 ibid 111.
46 n 8 above, 104.
47 ibid 105.
48 ibid 75 per Lord Slynn, 82 per Lord Steyn, 95 per Lord Hope, 113 per Lord Millett.
49 n 11 above at 82.
Underground the following question: ‘Should the parents of an unwanted but healthy child be able to sue the doctor or hospital for compensation equivalent to the cost of bringing up the child for the years of his or her minority, i.e. until about 18 years?’ My Lords, I am firmly of the view that an overwhelming number of ordinary men and women would answer the question with an emphatic ‘No.’ And the reason for such a response would be an inarticulate premise as to what is morally acceptable and what is not. . . . [T]hey will have in mind that many couples cannot have children and others have the sorrow and burden of looking after a disabled child. The realisation that compensation for financial loss in respect of the upbringing of a child would necessarily have to discriminate between rich and poor would, surely appear unseemly to them. It would also worry them that parents may be put in a position of arguing in court that the unwanted child, which they accepted and care for, is more trouble than it is worth. Instinctively, the traveller on the Underground would consider that the law of tort has no business to provide legal remedies consequent upon the birth of a healthy child, which all of us regard as a valuable and good thing.

It is my firm conviction 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. That is of course, a moral theory. It may be objected that the House must act like a court of law and not like a court of morals. That would only be partly right. The court must apply positive law. But judges’ sense of the moral answer to a question, or the justice of the case, has been one of the great shaping forces of the common law. What may count in a situation of difficulty and uncertainty is not the subjective view of the judge but what he reasonably believes that the ordinary citizen would regard as right. 50

It appears that, for Lord Steyn, distributive justice does not have independent, principled, explanatory content, but rather is a tool – a hypothetical opinion poll – which bases its results not on reason but on ‘instinct’, expressed as ‘an inarticulate premise as to what is morally acceptable and what is not’. Lord Steyn’s aspiration to coherence of exposition was undermined by his conclusion that ‘if it were necessary to do so, I would say that the claim does not satisfy the requirement of being fair, just and reasonable’, 51 making it unclear where and how distributive justice intersects with the negligence liability template. Lord Hope also discussed distributive justice, but without reaching any conclusion regarding its bearing on the case, reverting to the current orthodoxy of ‘fairness, justice and reasonableness’. 52

Remarkably, all of the Law Lords resolutely denied applying any concept of public or social policy. 53 Lord Clyde trotted out the well-worn dictum that public policy is ‘a very unruly horse, and once you get astride of it you never know where it will carry you’. 54 Lord Steyn contended that distributive justice allowed him to avoid the ‘quicksands’ of public policy, 55 without explaining the difference. Lord Millett claimed that in the court’s search for justice, ‘legal policy [in considering a novel head of damages] is not the same as public policy, even though moral considerations may play a part in both’, 56 without further elucidation. Lord Hope described the question for the court as ‘ultimately one of law, not of social policy’. 57

50 ibid 82.
51 n 8 above, 83.
52 ibid 96–97.
53 ibid 95 per Lord Hope, 100 per Lord Clyde, 83 per Lord Steyn, 108 per Lord Millett, 76 per Lord Slynn.
54 n 8 above, 100, quoting Richardson v Mellish (1824) 2 Bing 229, 252, [1824–34] All ER Rep. 258, 266, per Burrough J.
55 n 8 above, 83.
56 ibid 108.
57 ibid 95.
Lord Hope concluded that if the law is unsatisfactory the remedy lies in the hands of the legislature.\textsuperscript{58} None of the Law Lords referred to the counter-proposition formulated by Lord Scarman, on which the Court of Appeal had relied in \textit{Emeh},\textsuperscript{59} that while policy considerations must be weighed by the courts:

\begin{quote}
[T]he objective of the judges is the formulation of principle. And, if principle inexorably requires a decision which entails a degree of policy risk, the court’s function is to adjudicate according to principle, leaving policy curtailment to the judgment of Parliament … If principle leads to results which are thought to be socially unacceptable, Parliament can legislate to draw a line or map out a new path.\textsuperscript{60}
\end{quote}

Given that the House of Lords in 1999 was reversing a line of consistent cases built up over 15 years, surely it is plausible to infer that Parliament had seen no need to change that judge-made law.

Lord Nicholls of Birkenhead recently noted in \textit{Fairchild v Glenhaven Funeral Services Ltd} that:

\begin{quote}
To be acceptable the law must be coherent. It must be principled. The basis on which one case, or one type of case, is distinguished from another should be transparent and capable of identification. When a decision departs from principles normally applied, the basis for doing so must be rational and justifiable if the decision is to avoid the reproach that hard cases make bad law.\textsuperscript{61}
\end{quote}

Unfortunately, \textit{McFarlane} fell well short of this standard, leaving an unresolved conundrum for the lower courts to interpret. What is the \textit{ratio decidendi} of \textit{McFarlane}? Only three Law Lords expressly concluded there was no duty of care, each using a different route: no assumption of responsibility (Lord Slynn); not ‘fair, just and reasonable’ because liability would be disproportionate to fault (Lord Hope); and not ‘fair, just and reasonable’ because of distributive justice (Lord Steyn, \textit{obiter}). Lord Hope’s offset of benefits and burdens seems to fit more readily into a ‘no loss’ than a ‘no duty’ analysis. Lord Clyde expressly formulated the question as not relating to a separate duty of care, but rather as to whether there was any loss (which one would think was a ‘cause-in-fact’ issue), but then concluded the liability was unforeseeable (which surely is a ‘cause-in-law’ remoteness issue), and hence beyond the reach of ‘reasonable restitution’. Lord Millett’s reasoning ultimately seems also to rest on a denial that there was any loss.

Even if one concludes that this tally produced a \textit{ratio} of no duty of care owed in respect of maintenance costs, some important questions lurked:

(1) What if there had been no negligent advice to the parents (so as to set up a claim under \textit{Hedley Byrne}), but merely negligently performed surgery? It is likely that the same result would follow, although the artificiality of severing the child-rearing costs claim from the personal injury would be emphasised.

(2) What is the relevance of the motivation of the patient, and whether that information is communicated to the surgeon before the operation? Lords Hope\textsuperscript{62} and Clyde\textsuperscript{63} seemed to concede that this could be relevant, but Lord

\textsuperscript{58} \textit{ibid} \textsuperscript{95}.
\textsuperscript{59} n 9 above, 1055–1056 \textit{per} Purchas LJ, 1050–1051 \textit{per} Waller LJ, 1053–1054 \textit{per} Slade LJ, expressly adopting the public policy analysis of Peter Pain J in \textit{Thake v Maurice} n 9 above.
\textsuperscript{60} \textit{McLoughlin v O’Brien} [1983] 1 AC 410, 430.
\textsuperscript{61} \textit{Fairchild v Glenhaven Funeral Services Ltd} [2002] UKHL 22, [2002] 3 All ER 305, 336 at para 36.
\textsuperscript{62} n 8 above, 94, quoting \textit{Kealey v Berezowski} (1996) 136 DLR (4th) 708, 739–740 (Ont HC), which stated that the reasons for sterilisation will be relevant to whether the child’s birth was ‘a genuine injury or a “blessed event”’.
\textsuperscript{63} \textit{ibid} 99, noting that there were ‘no special features in the knowledge or expectation of the parties which might possibly be of significance’.
Millett said it would not be, because there would be evidential difficulties arising from mixed motives, and he thought it unlikely that the surgical team would know because it would be ‘impertinent of them to enquire’; he did not think that liability should turn on what was said to the doctor.  

(3) What relevance did Catherine McFarlane’s health and normality have for the ratio? The description of this unwanted child as healthy appeared no fewer than 55 times in Their Lordships’ opinions. Lord Steyn suggested that there ‘may be force’ to the health authority’s proffered concession that the rule might have to be different for a seriously disabled child, but expressly reserved the point for another day. Lord Clyde also queried, without answering, whether there might be a distinction in cases of ‘wrongful conception where the child is healthy and where the child is ‘imperfect’. The disabled child’s maintenance costs would still be pure economic loss, under the analysis of Lords Slynn, Steyn and Hope. Surely it would be strained to assert that a surgeon in undertaking the procedure does not assume responsibility for the maintenance costs for a healthy child should he be negligent, but does assume responsibility for the statistically less likely possibility of an unhealthy child.  

A fortiori it is untenable to argue that extraordinary care costs are proportionate to the doctor’s fault when ordinary ones are deemed to be disproportionate. So it appears that the parents of a handicapped child might be rescued only by application of the offset formula to conclude that the child was a burden rather than a blessing, or by some formulation of distributive justice.

(4) Would it make any difference if the patient had obtained private medical care? Lord Steyn expressly restricted his reasoning to claims framed in delict, and queried the correctness of the assumption in some cases that it is immaterial whether the actions were brought in contract or in negligence (or, presumably, concurrently). He suggested that liability would turn on the terms of the contractual obligation, and whether there was a warranty of an outcome. Lord Slynn implied that the contract would have to provide specifically for recovery of the child-rearing expenses, whereas Lord Clyde thought that there might – or might not – be a practical difference between the two formulations of the claims for damages. Since by this stage of the analysis breach of the tort duty to exercise reasonable care must have been proved, it is difficult to see how a contract could stipulate an even lower standard of professional competence; there is no need for a contractual warranty of infertility to establish breach. It is submitted that the contract cause of action should produce different results from the tort claim in McFarlane: the latter turned on whether there was any legal relationship between the parties in relation to the financial losses, whereas in a contract to terminate fertility it would be impossible not to conclude that the cost of supporting an unwanted child falls within the reasonable contemplation of the parties as being likely to be incurred by the patient in the event that sterility was not achieved, since it

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64 ibid 110.
65 ibid 99.
66 ibid 99.
67 At least assuming that the procedure was not carried out to avoid a known genetic defect.
68 n 8 above, 76–77.
69 ibid 76.
70 ibid 99.
71 As had been required by the Court of Appeal in dealing with the contract claim in Thake v Maurice, n 9 above.

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was that very result which the contract was intended to avoid. All of the Law Lords except Lord Hope considered the maintenance costs were reasonably foreseeable. Furthermore, there would be little room to manoeuvre distributive justice into the contract equation, since the freedom of the parties to contract rather than amorphous public policy should govern. Only if McFarlane means that a healthy child is deemed not to be a loss (which begs the question of the purpose of the contract for sterilisation) should the same result apply in contract as in tort.

If the House of Lords aimed to establish a bright line rule immunising the NHS from unwanted child maintenance claims, their expectations were misconceived. Since November 1999 when McFarlane was decided, the English courts have had to deal with at least nine cases in which the interpretation and application of McFarlane was at issue. The confusion generated by the divergent lines of reasoning adopted by the five Law Lords has permitted trial judges and the Court of Appeal elbow room to undercut McFarlane, a case with which it would seem they are clearly unhappy. The reasoning in these cases shows how far negligence law has come adrift of principle.

Fact variation #2: the healthy parent of a disabled child in a ‘wrongful birth’ case

The first judge compelled to grapple with the implications of McFarlane was Newman J in Rand v East Dorset Health Authority, which involved a ‘wrongful birth’ claim: flawed antenatal screening failed to detect that a foetus had Down’s Syndrome, and so the parents were denied the opportunity to terminate what had been a desired pregnancy. There was an unexplained six-year delay after the NHS had admitted liability before the quantum issues came to trial in January 2000. The NHS Litigation Authority relied upon the fortuitous intervention of McFarlane, decided just a few weeks earlier, to argue that maintenance costs were no longer recoverable, while the claimants relied upon obiter dicta in McFarlane to seek to disapply it to a disabled child.

Newman J canvassed all of the speeches in McFarlane, and concluded that (1) it was unclear how Lord Slynn would apply his ‘assumption of responsibility’ test to

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72 Therefore the first limb of Hadley v Baxendale (1854) 9 Exch. 341 must be satisfied, and in most cases also the second.
73 See Scuriaga v Powell n 10 above per Watkins J and Thake v Maurice per Peter Pain J (n 9 above, 666), holding that there is no authority holding that public policy will not permit damages to be awarded for breach of a contract to perform a legal act for proper reward.
74 The issue was scheduled to be argued in Thompson v Sheffield Fertility Clinic where three embryos rather than two were implanted in the claimant’s womb in IVF treatment at a private fertility clinic, resulting in the birth of triplets (Case No. SE 906 942, unreported judgment of Hooper J finding liability for breach of contract delivered 24 November 2000), but the parties settled for £20,000; the claimants had sought £100,000 for maintenance costs for the unwanted third child (The Guardian, 24 February 2001).
75 Rand v East Dorset Health Authority n 10 above; Hardman v Amin n 10 above; Lee v Taunton & Somerset NHS Trust n 10 above; Groom v Selby n 10 above; Greenfield v Irwin n 10 above, N v Warrington Health Authority (unreported, CA, 9 March 2000); Parkinson v St James and Seacroft University Hospital NHS Trust [2002] QB 266, [2001] 3 All ER 97, [2001] 3 WLR 376, [2001] 2 FLR 401 (CA) (cited hereafter from QB); Rees v Darlington Memorial Hospital NHS Trust; [2002] 2 WLR 1483, [2002] 2 All ER 177 (CA) (cited hereafter from All ER), leave to appeal granted by HL 22 July 2002; AD v East Kent Community NHS Trust (unreported, QB, 23 May 2002).
76 n 10 above.
a disabled child; (2) Lord Steyn’s hypothetical Underground commuter would be unlikely to think that the Health Authority was responsible for the full costs of supporting a disabled child where the pregnancy was desired and the handicap was not caused by medical negligence, but it would not be morally repugnant to focus compensation on the consequences of the disability itself; (3) Lord Hope’s ‘incalculable benefits’ point might not apply to costs flowing from the disability because these would not be incalculable; (4) Lord Clyde’s restitutionary approach ‘poses difficulties where but for the negligence there would have been no birth’, but in a ‘wrongful birth’ case the court had to ‘examine closely the nature of the choice made by the parents when deciding to lawfully terminate a pregnancy carrying the risk of the child being born disabled’; and (5) it was possible to contemplate a handicap so serious that Lord Millett’s advantages of parenthood would be ‘difficult to discern’, raising the question as to the point at which human life might have to be accorded no value.  

This gave rise to a threshold issue of fact as to what degree of disability warranted an exemption from McFarlane. Expert evidence showed that the child was at the highest level of ability and intelligence amongst Down’s Syndrome children, attended a mainstream state school and was fully integrated into family life. After evaluating the child’s handicaps, Newman J concluded that she nonetheless qualified as a ‘blessing’, because if it been possible to inform the claimants of the precise extent of the foetus’s disabilities they might have chosen to continue with the pregnancy.  

Newman J took pains to emphasise that ‘wrongful birth’ cases were different from ‘wrongful conception’ cases, because in the former the parents were committed to having a child prior to the negligent act; this affected not only general damages but also what economic loss might justly be imposed on the defendant. In the circumstances, the birth of a congenitally handicapped child could not constitute an injury to the parents, and therefore the claims for the cost of maintenance must be characterised as pure economic loss. Lord Clyde’s ‘unforeseeable loss’ argument could not apply to a ‘wrongful birth’ case (presumably because antenatal screening is directed to detecting foetal defects). For the same reason it could be said that the Health Authority had assumed responsibility for the economic losses should the screening procedure be performed negligently, depriving the parents of their rights under the Abortion Act 1967 to terminate the pregnancy on medical grounds. It is submitted that the foreseeability point has considerable force in this context, but an analogous assumption of responsibility argument could be made with equal persuasiveness in relation to a sterilisation procedure carried out because the patient could not afford a child.

For these reasons, Newman J held that the parents had a legally maintainable claim based upon the extended Hedley Byrne principle for the financial consequences flowing from the child’s disability, rather than from the fact of her existence. This included loss of profits (£42,730) due to the sale of the family business to enable the mother to act as primary carer. There was also an award, rather singular in a ‘wrongful birth’ case, for the mother’s pain and suffering, not

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77 ibid 43–47.
78 ibid 47, 52.
79 ibid 54.
80 ibid 57.
81 ibid 41–42, 59–60.
only for the distress of discovering the newborn was disabled, but also for delivering a third child whom she elected to conceive to prove to herself that she could have a normal child\(^\text{82}\) (the foreseeability of which one would think was contestable).

Although the case raised difficult problems as to the scope of *McFarlane* and its applicability to ‘wrongful birth’ cases, the NHS Litigation Authority decided not to appeal, and the case was settled. There followed two more ‘wrongful birth’ cases in which the trial judges, after extended analysis of the speeches in *McFarlane*, followed Newman J’s lead in concluding that the House of Lords had not precluded compensation for child-rearing costs related directly to the disability.

In *Hardman v Amin*, involving a child born with a grave disability following failure to diagnose rubella in his pregnant mother, Henriques J ruled that *McFarlane* did not affect the law so far as it related to the ‘wrongful birth’ of disabled children.\(^\text{83}\) He accepted the claimant’s argument that if the commuters on the Underground were asked whether the costs of bringing up the child attributable to his disability should fall on the claimant or the rest of the family, or on the State or the defendant, the very substantial majority would say that the expense should fall on the wrongdoer.\(^\text{84}\)

*Lee v Taunton and Somerset NHS Trust* concerned a failure to diagnose spina bifida in antenatal screening; unusually, prior to the pregnancy the parents had anticipated some degree of disability due to epilepsy medication which they both took, so the high-resolution ultrasound scan was performed to ensure there was not a grave foetal defect. Toulson J held that there was no reason in justice or common sense to confine the duty of the health authority to the personal discomfort of the continued pregnancy, when the fear of having a severely disabled child was uppermost in their minds. After italicising the many references in the speeches in *McFarlane* celebrating the joys of a healthy child, Toulson J concluded that the Law Lords had cut the ‘Gordian knot’ of the benefit/burden offset by two radical approaches: either the law deemed the child to be a blessing, therefore no loss had suffered (attributed to Lords Steyn, Millett and Hope); or there would be an inherent imbalance in relieving the parents of the financial obligations of caring for a healthy child, so the claim was inadmissible (attributed to Lords Slynn and Clyde). Therefore, *McFarlane* could not block the claim in *Lee*, because if the matter were put to an opinion poll among passengers on the Underground, a majority would not think that the birth of a disabled child must be deemed to be a blessing, in all circumstances and regardless of the extent of the child’s disabilities; nor would they regard the responsibility of caring for such a child as so enriching that it would be unjust for a parent to recover the cost from a negligent doctor on whose skill that parent had properly relied to prevent the situation.\(^\text{85}\) The Abortion Act 1967 demonstrated that Parliament considered it to be in the public good that the mother should be able to choose to have a termination to avoid a serious handicapped baby; it would be impossible to reconcile this right with a stance by the courts that it was a blessing that the mother was not able to exercise that right. This statutory right also answered the objection that it was deeply offensive for the courts to have to draw a line between normality/blessing and disability/burden.\(^\text{86}\)

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\(^{82}\) ibid 43, 67.

\(^{83}\) *Hardman v Amin* n 10 above, 71.

\(^{84}\) ibid 72.

\(^{85}\) *Lee v Taunton and Somerset NHS Trust* n 10 above, 430.

\(^{86}\) ibid 430–431.
The post-McFarlane ‘wrongful birth’ cases also exposed significant divergences of opinion as to how to quantify the parents’ claim. One twist to the claim for maintenance costs arising from the disability arises because the claim is set up as one of pure economic loss to the parents qua victims of the tort, and not as a loss to the child. Therefore, is the measure the parents’ loss, which by definition could not exceed their means, or is it the child’s needs? Newman J in Rand reasoned that the disability care costs must be determined by how much the parents could afford to spend on the child, much as a personal injury claimant’s claim for loss of earnings would be governed by her pre-accident income.87 However, Henriques J in Hardman held that it was ‘deeply unattractive’ that the poorer the claimant, the less she would be able to spend on her disabled child88 and declined to so limit the award. Toulson J in Lee agreed with Hardman on this point, because the child’s needs were inextricably entwined with the mother’s needs as his carer, and those needs existed regardless of her means; it would be invidious if two mothers in the same situation with the same needs differed in their ability to recover the cost of meeting those needs because one possessed independent means while the other did not.89 It is submitted that since the need for extraordinary care needs due to the disability is the factor claimed as distinguishing McFarlane, this must be right.

However, Toulson J did accept a defence argument (not advanced in Rand or Hardman) that because the cost of care was not consequential upon personal injury to the mother, regard should be had to the services available to the child from the NHS and the local authority.90

Toulson J also took a different view from Rand as to whether McFarlane required that the ordinary maintenance costs for a normal child be deducted. Since the baby was ‘incapable of being born other than severely disabled’, ‘to try to separate the consequences of George’s existence and George’s disabled existence is metaphysically impossible and practically unreal’; therefore, since George was not deemed a blessing, the mother should recover the full costs of maintenance, unless she would have sought to conceive again following the hypothetical termination, and so have incurred the costs of bringing up a healthy child in any event.91

Henriques J in Hardman held that continuation of a pregnancy which should have been terminated constituted a personal injury to the mother, and therefore her own foregone income following from her pregnancy and childbirth was recoverable as consequential economic loss.92 Both Henriques J and Newman J rejected the defence argument that McFarlane had barred nonpecuniary damages for the burden and stress of bringing up a handicapped child, Henriques J expressly stating that McFarlane had not actually overruled Emeh so far as such children were concerned.93

Thus in all of the cases of ‘wrongful birth’ where the parents sued for loss of their legal right to terminate a pregnancy due to foetal abnormalities, the trial courts have adhered to the pre-McFarlane authorities holding the Health Authority responsible for maintenance costs; however, Rand and Hardman acknowledged the

87 Rand v East Dorset Health Authority, n 10 above, 58.
88 Hardman v Amin, n 10 above, 73–76.
89 Lee v Taunton and Somerset NHS Trust n 10 above, 432–433.
90 Therefore the Law Reform (Personal Injuries) Act 1948, s 2(4), as amended by the Social Security (Recovery and Benefits) Act 1997, did not apply [ibid 431].
91 ibid 431–432.
92 Hardman v Amin, n 10 above, 64.
93 Rand v East Dorset Health Authority, n 10 above; ibid 68–69; 78–79.
impact of *McFarlane* by allowing claims only for costs related to special needs, whereas *Lee* considered that the entire maintenance costs were claimable, subject only to a causation test as to whether the parents would have incurred ordinary upbringing costs anyway, by conceiving again after the hypothetical termination.

**Fact variation #3: the healthy parent of a disabled child in a ‘wrongful conception’ case**

While Newman J emphasised in *Rand* the differing considerations applying to ‘wrongful birth’ and ‘wrongful conception’ cases, and this also strongly influenced the courts in *Lee* and *Hardman*, the distinction vanished for practical purposes when the Court of Appeal came to consider *McFarlane* in *Parkinson v St James and Seacroft University Hospital NHS Trust*.94 The Court of Appeal disapproved *McFarlane* to all cases involving extraordinary costs associated with disabled children even where the sterilisation was not intended to avoid a feared congenital disability.

The case involved a child with a still undiagnosed behavioural disorder born following a sterilisation procedure chosen by the parents because they felt that the family unit could not cope with the stresses of a fifth child in their cramped accommodation (a prediction which sadly was validated when the father left three months before the baby was born). During the pregnancy the mother was advised by a consultant that the child might be born with a disability (for which the health authority was not responsible), but she chose not to have the pregnancy terminated.

Brooke LJ traced the ever-more complicated evolution of duty of care tests since 1977, with apparent nostalgia for the ‘simple’ days of the *Anns* test. The ‘bold development of principle’ had been ‘called off’ in *Alcock*,95 and the advent of distributive justice (and Lord Steyn’s passenger on the Underground) in *Frost v Chief Constable of the South Yorkshire Police*96 represented ‘a practical attempt, under [unspecifed] adverse conditions, to preserve the general perception of law as a system of rules which was fair between one citizen and another’.97 Brooke LJ noted that there were at least five different legitimate techniques which the Law Lords could have used in *McFarlane*: assumption of responsibility; the purpose of the services; the incremental approach; the three-stage *Caparo* test; and distributive justice nor (with ill-concealed exasperation) was this an exhaustive list of the approaches taken, as the five members of the House of Lords ‘spoke with five different voices’.98 After listing the points on which there was agreement (or at least no dissentient voice),99 Brooke LJ could discover a majority only on the duty of care issue, gleaning from *dicta* of Lords Slynn, Steyn and Hope an implicit ‘congruence’ of distributive justice with the ‘fair, just and reasonable’ test.100 The solutions of each Law Lord did not give any clear indication of their views on the answer for a disabled child.101 Brooke LJ therefore considered himself at liberty to

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94 ibid 75 above.
96 [1999] 2 AC 455.
97 ibid 75 above, 274 at para 20.
98 ibid 276 at para 26, 277 at para 30.
99 ibid 277–278 at para 30–32.
100 ibid 279–280 at para 38–40.
proceed from first principles, and constructed the following reasoning:102 (i) the
birth of a child with congenital abnormalities was a foreseeable consequence of the
surgeon’s careless failure to clip a fallopian tube effectively;103 (ii) only the couple
concerned might be affected by this negligence; (iii) there is no difficulty in
principle in accepting the proposition that the surgeon should be deemed to have
assumed responsibility for the foreseeable and disastrous economic consequences
of performing his services negligently; (iv) the purpose of the operation was to
prevent Mrs Parkinson from conceiving any more children, including children with
congenital abnormalities, and the surgeon’s duty of care is strictly related to the
proper fulfilment of that purpose; (v) parents were entitled to recover damages in
these circumstances for 15 years between the decisions in Emeh and McFarlane so
that this is not a radical step forward into the unknown; (vi) an award of
compensation which is limited to the ‘often staggering and quite debilitating’104
special upbringing costs associated with rearing a child with a serious disability
would be fair, just and reasonable; and (vii) if principles of distributive justice are
called in aid, ordinary people would consider that it would be fair for the law to
make an award in such a case, provided that it is limited to the extra expenses
associated with the child’s disability.

For the reasons stated earlier, the assumption of responsibility step in this chain
of reasoning is stretched beyond logic. Only step (vi) can push the case of a
disabled child outside the ambit of McFarlane, but that is merely to state a
conclusion rather than an explanation. Even within the confines of Caparo and
Murphy, it is anomalous to fashion a duty of care by reference to the degree rather
than the type of loss – particularly where the rule is not calibrated to the impact of
the loss on the particular family unit, and its capacity to absorb it.

In a tour de force, Hale LJ wrote an extended essay on the physical,
psychological, practical and legal implications of pregnancy, childbirth and
motherhood for a woman’s personal autonomy, possibly a deliberate ‘reality
check’ to the panegyrics to parenthood in which all of the (male) Law Lords
indulged in McFarlane. If uninhibited by McFarlane, Her Ladyship would have
characterised the costs of bringing up a child not as ‘pure’ economic loss but rather
as economic loss consequent on the incursion on the woman’s autonomy by
becoming or remaining pregnant against her will, implying that she would have
concluded such costs to be recoverable.105 She ventured the opinion that the result
of McFarlane could be that some women had no other sensible option than
abortion, even though all five Law Lords considered it unreasonable to expect
women to mitigate their loss in this way.106 She then dismantled the reasoning in
McFarlane, pointing out that in ‘wrongful conception’ cases, unlike in personal
injury cases, the carer is the tort victim.107 All of the maintenance costs are part and
parcel of the caring responsibility which flows as a direct consequence of the
invasion of the woman’s rights, being the conception following from the negligent
medical care.108 In riposte to Lord Slynn, Hale LJ found it difficult to understand

102 ibid 282–283 at para 50.
103 Citing evidence in Emeh v Kensington and Chelsea and Westminster Area Health Authority n 9
above, 1019, that congenital abnormalities arise in between one in 200 and one in 400 live births.
105 A point Hale LJ reiterated forcefully in Groom v Selby n 10 above at 55 at para 31 as another reason
to confine McFarlane to the costs of bringing up a healthy child.
106 n 75 above, 286 at para 66.
107 ibid 287 at para 71.
why a doctor assumed responsibility for some but not all of the clearly foreseeable and indeed highly probable losses resulting from his failure to prevent conception.\textsuperscript{109} As for distributive justice, Her Ladyship tartly observed:

The traveller on the Underground is not here being invoked as a hypothetical reasonable man but as a moral arbiter. We all know that London commuters are not a representative sample of public opinion. We also know that the answer will crucially depend upon the question asked and the amount of relevant information and argument given to help answer it. The fact that so many eminent judges all over the world have wrestled with this problem and reached different conclusions might suggest that the considered response would be less emphatic and less unanimous.\textsuperscript{110}

Hale LJ concurred with Longmore J at first instance that only Lord Slynn had unequivocally based his decision on the extent of the duty of care and in a way which led inexorably to the conclusion that there should be no recovery for the cost of bringing up any child, whether healthy or disabled; the other speeches at least left the matter open.\textsuperscript{111}

Her Ladyship adroitly exploited this clear lack of consensus to construct her own ratio decidendi for McFarlane, contracting its ambit. She found a firm handhold in ‘deemed equilibrium’ – although, crucially, she did not identify a clear majority in favour of this solution. She noted that the notion smacked of the commodification of the child as an asset of the parents, and an equally rational response might be to attribute a conventional sum to the benefit to be gained from having the child within the family,\textsuperscript{112} presumably clearing away for an award for the ordinary and extraordinary maintenance costs net of this sum. Nevertheless, Hale LJ thought the solution attractive because it deems a disabled child to have the same worth, dignity and status and to bring the same benefits to the family\textsuperscript{113} as a normal child, but acknowledges that he costs more, and provides a solution to the problem of degree of qualifying disability. Distributive justice could be called in aid of this conclusion, as it is concerned not only between different classes of claimant and defendant but also between different classes of potential claimant,\textsuperscript{114} opening the pathway to classifying disabled children differently. Hale LJ considered that the claim for Scott Parkinson would not ‘stick in the gullet’ of the commuters on the Underground, whatever they might think of the claim for Catherine McFarlane.\textsuperscript{115}

Thus Brooke LJ and Hale LJ traced quite different routes to the same result – yet Sir Martin Nourse was content to state ‘I agree’.\textsuperscript{116} The result is yet another decision in this fraught area without a clear ratio.\textsuperscript{117}

Fact variation #4: the partially disabled parent of a healthy child

The process of subversion begun by Parkinson was completed in Rees v Darlington Memorial Hospital NHS Trust,\textsuperscript{118} where a healthy child was born to

\begin{thebibliography}{118}
\bibitem{109} ibid 289 at para 80.
\bibitem{110} ibid 290 at para 82.
\bibitem{111} ibid 292 at para 86.
\bibitem{112} ibid 293 at para 89.
\bibitem{113} Whilst noting that ‘frankly in many cases . . . this is much less likely’: ibid 293 at para 89.
\bibitem{114} ibid 290 at para 82.
\bibitem{115} ibid 295 at para 95.
\bibitem{116} ibid 295 at para 97.
\bibitem{117} The Court of Appeal refused permission to appeal the House of Lords, and the NHS Litigation Authority decided not to take the case further.
\bibitem{118} n 75 above.
\end{thebibliography}
one disabled parent. The single mother was severely visually handicapped. This was a predominant, but not the sole, reason that she sought sterilisation; apart from worries about the difficulty of looking after a child, she never had desired children, and feared labour and delivery. After the tubal ligation failed, she conceived and gave birth to a healthy baby. At the time of trial, she was being assisted by parents and friends to cope with caring for her toddler, and her counsel was ‘somewhat coy’ in identifying any extra child care costs attributable to her disability.119

The trial judge, Stuart Brown QC, had noted that if the claimant could recover in this scenario, the general rule in McFarlane was ‘fast dissipating’.120 He reluctantly concluded that in the post-McFarlane world her claim was unsustainable; every patient had a pressing reason for not wanting a child, but the claimant’s losses were precisely the same kind as would be suffered by many mothers, so the analogy with a handicapped child was less than complete.121

A split Court of Appeal allowed the appeal. Significantly, the majority of Robert Walker LJ and Hale LJ disagreed fundamentally on the route to the result, and in particular on whether ‘deemed equilibrium’ provided the key to McFarlane. Robert Walker LJ considered that the benefit/burden offset did not form the basis of any of the five opinions in McFarlane. He preferred to ascribe the decisions in McFarlane and Parkinson to the courts’ ‘moral intuition’ which dictated different results.122 There was nothing ‘unfair, unjust, and unreasonable, unacceptable or morally repugnant’ in permitting recovery of compensation for specific proved expenses having a very close connection with the mother’s severe visual impairment, given that the law increasingly recognises that disabled persons require special consideration.123 He emphasised that the fact that the claimant’s disability had been explained to the surgeon as the reason for her decision to be sterilised was relevant to his assumption of responsibility, disagreeing with Lord Millett that motivation is immaterial.124

Hale LJ defended and applied her self-described ‘metaphor’ of deemed equilibrium.125 The fulcrum point for Hale LJ’s distinction of McFarlane appears in the following passages, which are worth quoting at length:126

It is probably safe to assume that the ordinary person would be more sympathetic to the hard-pressed single parent than to the high-flying career woman. But they differ from one another only in their financial circumstances and the law does not usually regard this as relevant. There is, however, a crucial difference between them and a seriously disabled parent. These able-bodied parents are both of them able to look after and bring up their child. No doubt they would both benefit from a nanny or other help in doing so. But they do not need it in order to be able to discharge the basic parental responsibility of looking after the child properly and safely, performing those myriad essential but mundane tasks such as feeding, bathing, clothing, training, supervising, playing with, reading to and taking to school which every child needs. They do not need it in order to avoid the risk that the child may have to be taken away to be looked after by the local social services authority or others, to the detriment of the child as well as the parent. That is the distinction between an able-bodied parent and a disabled parent who needs help if she is to be able to discharge the most

120 ibid at para 17.
121 ibid at para 21–22.
122 n 75 above, 186–187 at para 33, 35.
123 ibid 188 at para 37, 41, citing the Disability Discrimination Act 1995 as an important landmark.
124 ibid 187 at para 34.
125 ibid 181 at para 10.
126 ibid 184–185.
ordinary tasks involved in the parental responsibility which has been placed upon her as a result of the defendant’s negligence.

Hence I would conclude that, just as the extra costs involved in discharging that responsibility towards a disabled child can be recovered, so too can the extra costs involved in a disabled parent discharging that responsibility towards a healthy child. Of course we can assume that such a parent benefits, and benefits greatly, from having a child she never thought she would have. We can and must assume that those benefits negative the claim for the ordinary costs of looking after and bringing him up. But we do not have to assume that it goes further than that. She is not being over-compensated by being given recompense for the extra costs of child care occasioned by her disability. She is being put in the same position as her able-bodied fellows.

In real life it is impossible to separate the doctor’s assumption of responsibility for preventing pregnancy from the assumption of responsibility for preventing parenthood and the parental responsibility it brings. The two go hand in hand just as pregnancy and childbirth go hand in hand. The law has limited the doctor’s responsibility because of the incalculable benefit the child must be presumed to bring. But if that incalculable benefit is put at risk by the very fact which led the parent to ask for the sterilisation, there is nothing unfair, unjust or unreasonable in holding that the surgeon assumes a more extensive responsibility for the consequences, at least where he knew of the disability and that this was the reason why she wished to avoid having a child. [Emphasis added]

Therefore, for Hale LJ it is the fact that the disabled parent ‘necessarily’ will have greater difficulty in discharging her child care responsibilities which justifies removing her case from the ambit of the McFarlane principle.

It must first be noted that there was no evidence before the Court that the child of a disabled parent is at greater risk of being taken into care, yet Hale LJ emphasised this three times, in the highlighted passages.127 Her Ladyship apparently assumed that such families are left to struggle in a vacuum, ignoring the statutory obligation placed upon local authorities by the Children Act 1989 to safeguard and promote the welfare of children who are in need, by providing a range and level of appropriate services to support and preserve the family unit so as to reduce the the need for care or supervision orders.128 The practical support provided by central government programmes for the disabled and by disability-specific charities is also overlooked.

Furthermore, by identifying disability with incapacity, the route to recovery mapped out in Rees fosters a culture of helplessness and victimhood. Henceforth in order to win exemption from the McFarlane rule, the parents of healthy children born following a failed sterilisation procedure must depict themselves as inadequate parents due to a pre-conception disability, incapable of carrying out ‘the most ordinary tasks’ to ensure the child is looked after ‘properly and safely’.129 Yet the Royal National Institute for the Blind is currently running a high-profile advertising campaign demonstrating the competence of visually impaired parents, to counter the specific discriminatory and patronising notions embedded in the reasoning of the majority.130 Hale LJ proceeds from the premise that the visually

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128 Children Act 1989 s 17; Sch 2, paras 7 and 8. A child is taken to be ‘in need’ if he or she is unlikely to achieve or maintain a reasonable standard of health or development without the provision of services by a local authority, or if he or she is disabled [s 17(10)].
129 n 75 above, 184 at para 22.
130 ‘Claire hasn’t seen her son in six years. It doesn’t make her a bad mother. Claire reads her son his bedtime story. She takes him to school. She is everything you would expect of a doting Mum. She is also blind – one of around 2 million people in the UK with serious sight problems. RNIB’s pioneering work is dedicated to help people like Claire and her family. Not just with braille, Talking Books and computer training but with imaginative and practical solutions to everyday challenges.’ [Advertisement in, inter alia, Homes & Gardens, July 2002, p. 98]. A parallel advertisement depicts a blind, competent father.
impaired cannot develop coping mechanisms and must rely upon third parties to supply their children’s care needs. This version of distributive justice therefore may not only perpetuate but deepen the stigmatisation of the disabled.

Courts must tread delicately here. Barriers to true equality of opportunity for the disabled are just as objectionable when they are brought about through benign paternalism as through deliberate action or neglect. The Supreme Court of Canada has stressed that the thrust of human rights legislation is to combat false assumptions about the effects of disabilities on an individual’s capacities based upon stereotypes which are themselves the product of bias and historical prejudice; ‘all too often, persons with disabilities are assumed to be unable to accomplish certain tasks based on the experience of able-bodied individuals’. The difficult task of human rights legislation is to eliminate such assumptions and to break down the barriers that stand in the way of equality for all, whilst at the same time avoiding reverse stereotyping which ignores an individual’s disability and forces him or her to sink or swim within the mainstream environment. To avoid unlawful discriminatory treatment, the focus must be on the true personal characteristics of an individual which may or may not create actual functional limitations, with a view to accommodating them, but without an assumption of incapacity. True, Hale LJ held that only the additional child maintenance costs attributable to the parent’s disability are recoverable, to bring that parent to a par with able-bodied parents. However, whilst initially appealing, ultimately this is a facile distinction because the wholesale exception for disabled parents assumes that reliance upon paid third parties for child care is necessary.

From this vantage point we can consider the issue of causation which lurks unrecognised behind the reasoning of the majority. Hale LJ makes pre-tort disability a relevant distinguishing characteristic to circumvent McFarlane, without considering whether, but for the disability, the need for childcare support might have arisen anyway. Most single and working parents require assistance. The point is that the need for childcare arises because the child exists, and the child would not exist but for the physician’s negligence. This chain of reasoning, under McFarlane, cannot yield a recoverable claim. So does it make any difference that the reluctant parent cannot provide the child care herself, due to her own pre-conception disability? The ‘thin skull rule’ cannot assist the claimant, because if the baseline harm (the need to care for the child) is not actionable under McFarlane, then logically the fact that the parent may have greater difficulty in coping with that harm due to her disability cannot convert it into a recoverable loss.

In a vigorous dissent, Waller LJ deftly manoeuvred distributive justice into a counter-attack on the viability of the distinction drawn by his colleagues, warning:

Once the court begins to disallow recovery, although normal principles would allow recovery, and once the court starts to consider the making of exceptions to that decision, – we are, as I see it, truly in the area of distributive justice as identified in Frost v Chief

132 British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights) [1999] 3 S.C.R. 868, at para 2 per McLachlin J (as she then was).
134 ibid, Québec (Commission des droits de la personne et des droits de la jeunesse) v Montréal (City); Québec (Commission des droits de la personne et des droits de la jeunesse) v Boisbriand (City) [2000] 1 SCR 665 per L’Heureux-Dubé J, at para 39, at para 48.
135 n 75 above, 185 at para 23.
**Constable of South Yorkshire** [citations omitted]. The costs of recovering the expenses of looking after a healthy child born through the negligence of a surgeon, are costs which the court has said should not be recovered, and if that is the boundary that a court has set, it is important that the court does not make exceptions to that rule, which would seem to be unjust to the persons unable to recover as a result of that rule.\(^{136}\)

Waller LJ considered that the appropriate body of opinion to consult was not the commuter on the London Underground, but the parents struggling to cope with healthy children born as a consequence of medical negligence.\(^{137}\) He used the rhetorical device of adding successive layers of disadvantage to the hypothetical comparator parent ensnared by McFarlane – burdened with an unwanted fifth child who has triggered a disabling breakdown in her health, impoverished and without support from husband, mother or siblings – and suggested that ‘ordinary people would feel uncomfortable about the thought that it was simply the disability which made a difference’, regardless of the parent’s degree of disability and the financial and practical support given her.\(^{138}\) If the disabled mother found that, contrary to her expectations, she could cope with assistance from others, she might find her child was of incalculable benefit.\(^{139}\) Like Robert Walker LJ, Waller LJ could not find any basis for the ‘deemed equilibrium’ theory in McFarlane.\(^{140}\)

So once again we have an appellate judgment without a clear *ratio* to guide the lower courts. ‘Deemed equilibrium’ as a legitimate, much less a binding, mechanism to distinguish cases is now even more contentious. It is unclear whether even Robert Walker LJ would consider the communication of the mother’s motivation to the surgeon as forming part of the *ratio* of his opinion, but without it, his decision rests openly upon ‘intuitive feeling’, and he does not attempt to distance the Court from this moral judgment by attributing it to passengers on the Underground.\(^{141}\) Hale LJ’s vision of distributive justice is inadvertently patronising and demeaning to disabled persons. Given the sharp disagreement amongst the three members of the Court, it is perhaps surprising that they denied permission to appeal to the House of Lords.

### Fact variation #5: the totally disabled parent of a healthy child

The final variation on ‘wrongful conception’ is brought to us by *AD v East Kent Community NHS Trust*, decided on May 23, 2002.\(^{142}\) The claimant became pregnant whilst she was an inpatient in a mixed psychiatric ward, after being ‘sectioned’ under the Mental Health Act 1983. She had suffered brain damage at the age of five, and it was not in issue that she was completely incapable of raising her healthy daughter on her own. The child had been in the care of her grandmother...

\(^{136}\) *ibid* 189 at para 45.

\(^{137}\) Much as the House of Lords considered the views of families of victims of the Hillsborough disaster who were denied recovery for psychiatric injury [*Frost v CC of South Yorkshire Police* n 96, 492 per Lord Steyn and 510–511 per Lord Hoffmann]; although this comparison was expressed as hypothetical, the families’ reaction when the Court of Appeal had awarded damages to junior police officers was widely publicised.

\(^{138}\) n 75 above, 190–191 at para 53–54.

\(^{139}\) Indeed, as counsel for the health authority had argued, the child might eventually be able to assist the parent with coping with the disability, readjusting the offset into a positive balance in favour of the benefits of parenthood.

\(^{140}\) n 75 above, 190, at para 50.

\(^{141}\) *ibid* 186, at para 33.

\(^{142}\) n 75.
since birth, under a residence order granted under the Children Act 1989. The claimant alleged that the hospital, knowing that she could behave promiscuously, had failed to ensure her physical and mental well-being as a mental patient by placing her in a mixed ward with inadequate supervision. A preliminary trial of an issue was directed as to her claim for the total costs of substitute grandparental care. Cooke J declined to carve out a new exception to McFarlane, on the basis that the claimant, as the alleged tort victim, had suffered no economic loss in respect of the upbringing of the child at all. Her total disability meant that she had no need for child care support services, and he declined to apply Hunt v Severs by analogy to create a fund for the actual carer, who enjoyed McFarlane’s ‘incalculable benefits’ brought by her granddaughter. Having identified a principle on which to ground his decision, Cooke J made a penetrating attack by way of obiter dicta on Parkinson and Rees.\(^{143}\) Noting that, whatever legal language was used, McFarlane was based on legal policy formed by a moral view, he considered that the ‘deemed equilibrium’ theory is not justified by McFarlane, nor does it appear to be the law, at least in so far as parental disturbance of that equilibrium is concerned, since it had been disapproved of by two of the Lord Justices in Rees. As a point of principle, ‘disturbed equilibrium’ necessarily means that the worth of the disabled child is valued against the cost of his upbringing, and found to be more trouble and expense then he was worth, an exercise which violates McFarlane. The ‘wrongful birth’ and ‘wrongful conception’ cases alike raise the same essential question as to the comparative value to be placed on human lives, whatever the moral framework chosen, and this notion, in the view of Cooke J, the law must eschew.

So where are we left following Parkinson and Rees?

1. There is no longer a substantive distinction between ‘wrongful conception’ and ‘wrongful birth’ cases.\(^{144}\) Both types of case have produced a child who would not have existed but for the medical negligence. However, there should be two significant differences. First, in ‘wrongful birth’ cases, a child was desired, and so the parents would have incurred ordinary upbringing costs had they terminated the pregnancy and conceived another healthy child. Conversely, failure to detect a foetal abnormality made the likelihood of a handicapped baby specifically foreseeable, whereas this will not be the case in a ‘wrongful conception’ case (apart from statistical probability in the general population) unless the sterilisation had taken place to avoid hereditary genetic defects. Therefore, there is a logical basis to awarding only special-needs costs in ‘wrongful birth’ cases distinct from any which could apply to wrongful conception cases.

2. In ‘wrongful conception’ cases (unlike ‘wrongful birth’ cases where the Abortion Act 1967 defines the lost right and so provides the abnormality threshold) English courts are driven to make invidious distinctions between healthy and disabled parents and children, as Rand and Lee illustrate. What kind of disability is relevant? How much abnormality is required to cross the threshold? What if only one parent has a disability? The factual questions cannot be dismissed on the basis that only the costs related to the disability are recoverable, because it would seem from Rees that third party care costs which

\(^{143}\) ibid at para 38–42. Cooke J granted leave to appeal to the Court of Appeal.

\(^{144}\) Greenfield v Irwin n 10 above, 904–907, at para 18–28, applying McFarlane to a healthy child in an undiagnosed pregnancy case; Groom v Selby n 10 above, 54, applying Parkinson to a disabled child born after a failed sterilisation attempted when the patient was already pregnant.
a particular parent would have incurred in any event had she been healthy may become recoverable merely because she is classified as disabled.

(3) It does not matter whether the possibility of a congenital defect was foreseeable or not in a particular case by the health professional at the time of rendering the medical services.

(4) Parental disability will count only if it predated the conception. A child’s disability will count only if it arose from a genetic defect or foreseeable events during pregnancy or birth, but not thereafter. 145

(5) Notwithstanding *dicta* in *Rees*, logically the motivation of the parents in seeking sterilisation is irrelevant. If Ms Rees’ motivation does form part of the *ratio decidendi*, then some motivations must be considered more valid than others, which raises another issue of discrimination. A further complication is whether that motivation must be communicated to the doctor in order to extend his or her assumption of responsibility to the patient.

(6) The legal status of claims of patients who can afford private healthcare and so can sue in contract remains unclear. The argument advanced here is that it would distort the essence of the medical services contract to hold that maintenance costs are not recoverable, unless, contrary to what most courts regard as reality, they are considered not to be a legally recognisable loss at all, as Lord Millett suggested in *McFarlane*. Not only would this be highly artificial where the parents responsibly opted for sterilisation for financial reasons, but this would introduce yet another layer of discrimination. Given the cherished status of the NHS in British society, it can be predicted with some confidence that Toulson J’s observation in *Lee* that ‘it should not make any difference in any civilised system of law’ whether a claimant received medical services as an NHS patient or as a private patient would be endorsed by the commuters on the Underground. 146 Until the contract issue is decided, however patients seeking sterilisation services would be wise to ‘go private’.

Conclusion

In each of *McFarlane*, *Parkinson* and *Rees*, the courts deployed terminology ultimately empty of content to justify the desired result, without clearly delineating the path to it. Distributive justice has become yet another label, without pretending to intellectual rigour. The transmogrification of the man on the Clapham omnibus is not limited to a change of public transport, as he is no longer just a convenient measure for the standard of care expected of non-experts, but also the gatekeeper for negligence law itself. Even in the era of civil jury trials for this tort, we did not expect jurors to perform this task. Appeals to commuters on the Underground to decide duty of care issues allow the courts to avoid confronting the sharp edges of tort policy – deterrence, external scrutiny of professional standards of competence, cheapest cost avoidance of the risk, insurability against loss, other modes of loss-spreading – and whether carving out *ad hoc* exceptions to well-established legal principles is a matter for parliamentary rather than judicial action. Ultimately, it is Parliament, and not the courts, who are accountable to the commuters on the Underground. Lord Lloyd’s prophecy in *Marc Rich* that the law of negligence risks

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145 *per* Hale LJ in *Parkinson*, n 75 above, 293–294 at para 92, excluding (unspecified) events treated as *novus actus interveniens*.

146 n 10 above, 423.
disintegrating into a series of isolated decisions without any coherent principles at all, with the retreat from \textit{Anns} turning into a rout,\footnote{Marc Rich & Co. \textit{v} Bishop Rock Marine [1996] AC 211, 230.} is fast becoming reality. The waste of resources, both of the courts and the litigants appearing before them, in trying to divine the meaning of precedents set in this fashion is illustrated all too graphically by the post-\textit{McFarlane} cases.

As Carnwath J (as he then was) has said extra-judicially, the courts do not have the tools to administer distributive justice; they must deal with individual cases, and there is no common coinage between the language of rights and wrongs and the language of costs and benefits.\footnote{‘The Liability of Public Authorities in Tort – Corrective and Distributive Justice’, paper presented at the British Institute of International and Comparative Law (2001) (in his capacity as Chairman of the Law Commission), 9, quoting Richard Epstein, ‘Causation and Corrective Justice: a reply’ (1979) 8 J Legal Stud 477, 503.} How much time is there between stops on the London Underground, to allow those passengers to assimilate the evidence, weigh up all the factors, and look down the track to future implications of their decision – as is the duty of the judiciary? Not only might London commuters not represent public opinion in the country as a whole, but they might not produce a clear majority, particularly in a complex case. With the utmost respect to Lord Steyn, it is not satisfactory for tort law to be based upon an ‘inarticulate premise as to what is morally acceptable and what is not’.\footnote{n 8 above, 1318F.} As Sedley LJ has trenchantly noted, albeit in a different context,

The public conscience, an elusive thing, as often as not turns out to be an echo chamber inhabited by journalists and public moralists. . . . [To] expect the judiciary to modify its decisions as to what the law and justice require because of what it fears the media would make of them is to ask for the surrender of judicial independence. The ‘fair, just and reasonable’ test is now the established judicial control on ground-breaking in tort. If the law were ever to revert to an exogenous test, it should be one which gauges the response of people who actually know what the court’s reasoning is; and no court which has confidence in its own reasoning should be worried about that.\footnote{Vellino \textit{v} Chief Constable of Greater Manchester [2002] 3 All ER 78, 91, at para 60 (considering the ‘public conscience’ test for the defence of illegality).}

Distributive justice would seem to be the archetype of such an exogenous test, with as hollow an echo: it permits the judiciary to abdicate its responsibility to identify and explain intellectually rigorous and coherent principles as the basis for decisions, in favour of an empirically untested appeal to public opinion, yielding unpredictable results which invite reversal at each level of appeal, depending on each judge’s subjective and avowedly instinctive notions of what justice requires. Thus distributive justice is no more illuminating – and arguably less – than the public policy which the Law Lords were so anxious to eschew. In 1993 Jenny Steele argued that current decision-making techniques in the law of negligence had come to represent a ‘partnership between exhausted principle and obscure pragmatism’, and called for a fuller consideration of the real motivating factors behind decision-making, liberating it from the fear of novel reasons.\footnote{Jenny Steele, ‘Scepticism and the Law of Negligence’ [1993] CLJ 437, 466–467.} Unfortunately distributive justice has proved to be just as empty a label as ‘proximity’: not only does it not tell us how to make decisions, but it fails to explain or justify those decisions. A principled approach can enhance the flexibility which gives the common law its vitality, if the courts directly confront policy factors, both intrinsic and extrinsic to the relationship of the particular parties.\footnote{See Cooper \textit{v} Hobart [2001] SCC 79, at para 30.}
and generate reasoned decisions supported by empirical evidence,\textsuperscript{153} rather than relinquishing that formidable task to the passenger on the London Underground.

The ‘wrongful conception’ cases demonstrate that distributive justice can be just as unruly a horse as public policy for the courts to ride. The London Underground is not the BBC’s 

\textit{Moral Maze}. Since we are apparently stuck on the Circle Line, however, we can only hope that the House of Lords, having now granted leave to appeal in \textit{Rees}, will clarify what they really meant in \textit{McFarlane}.

\textsuperscript{153} As Carnwath J (as he then was) called for in “Liability of Public Authority in Tort – Corrective and Distributive Justice” n 148, 9.