Pouring Oil on Troubled Waters : Enhancement of Autonomy in Reproductive Negligence

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Abstract

The purpose of this dissertation is to contribute to the debate on the importance of the reproductive choices and propose a novel strategy for ensuring its protection in the tort of negligence. In

of the recent reform *in Montgomery v Lanarkshire Health Board*, the cases

such as *McFarlane* and *Rees* should be reconsidered. The reform shifted the approach

towards the autonomous decision-making by patients and this new nature of doctor-patient relationship is inconsistent with the existing framework for reproductive negligence claims. The dissertation will outline the tentative steps implemented by the Court towards recogni as a stand-alone cause of action and the recent case law objections of this approach will be addressed. The dissertation will propose a new strategy, *t* , which will operate as an umbrella for a variety of reproductive negligence claims and will help to recognise the experiences suffered by patients and parents in a substantive manner.

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Although the recent decisions of the United Kingdom Supreme Court (UKSC) and the Singapore Court rejected the claim that the constitutes a841.92 r 0 -3<0003>-90.0000

I. Chapter 1: “The law”

Introduction

This section explores the la

common law jurisdictions. First, the pre-*McFarlane* position will be briefly addressed. Then, the leading cases *McFarlane v Tayside Health Board*, *Parkinson v St James and Seacroft University Hospital NHS Trust* and *Rees v Darlington Memorial Hospital* will be discussed. The chapter will introduce the underlying practical and policy reasons why the courts in the UK and other common law countries adopt a negative approach in awarding the maintenance costs of children.

1. A Timeline of ‘Wrongful Conception’ Cases

Almost forty years ago, in 1983, the Court faced the first case, *Udale v Bloombsurry AHA*, dealing with the issue

public policy objection in recovery of the maintenance costs.[26]From the mid-1980 , the costs for the upbringing of the child were awarded and indeed, sometimes they were very high.[27]

It is important to note that the UK courts had no problem with awarding damages for the upkeep costs of the unplanned child for fourteen years before a dramatic sea-change happened in *McFarlane*.

2. End of Peace and Uniformity

McFarlane's case

In 1999, the House of Lords was faced with two claimants, Mr. and Mrs. McFarlane, who no longer fertile[28]. Relying on the assurances of professionals, the couple dispensed with contraceptive methods, and consequently, Mrs. McFarlane became pregnant and gave birth to their fifth child. Although the Health Board argued that the process of conception, pregnancy and child-birth were natural, the House of Lords accepted that these circumstances can be considered as an actionable physical harm for the mother[29]. The House of Lords found that Mrs. McFarlane should be entitled to recover for the *pain* and *sufferings of pregnancy*, but damages *for upkeep of costs* of a *healthy child* were rejected[30]. It is important to notice that each of the five judges in denying the compensation, spoke five different legal voices and according to Mason none of these reasons appear to be wholly satisfactory to a person who has no special training in law [31]. Priaulx stated:

> to some degree, a legal education can rather blind us to what is going on in cases, given the tendency to see law through law, rather than to ask broader questions about whether the policy of the law is fair or sustainable outside the operation of legal rules.[32]

In *McFarlane*, Lord Slynn simply applied the *Caparo* test and considered that it was not to impose a duty of care on a doctor and he should not be liable for the consequential responsibilities imposed on the parents[33]

approach using the *Caparo* test[34]. He emphasized that in the absence of a threshold, the liability could be stretched almost indefinitely so as to impose on the doctor the costs for private education[35]. Lord Hope determined that the detriments would be offset by the benefits of having a resultant child[36]. He stated that while in the short term there is pleasure which a child gives in return for the love and care given by parents, in the longer term there is a mutual relationship of support and affection which will continue throughout the whole life[37]. Lord Clyde believed that

s fault[38]. Lord Millet reiterated the argument stated in *Udale*, that the birth of a healthy child is a blessing and cannot be considered to be

3. Summary of the UK Law

law jurisdiction it is necessary to summarise the position of the UK. Reviewing the UK cases on is inconsistent and unstable. Peter Cane notes

couple producing an unintended child can recover damages for medical negligence and require the doctor to bear the cost of raising and maintaining the child.

The High Court of Australia decided not to follow the approach prescribed by *McFarlane* by a majority 4 to 3 and awarded the damages for maintenance of the child. The main reason was

depart from the well-established principles of tort law.[57] Unlike the House of Lords in *McFarlane*, the Australian Court did not apply the *Caparo* test[58] and *McFarlane* did not provide any legal basis for the *Cattanach* approach. Kirby J said that the judges should be willing to take responsibility for applying the established judicial controls over the expansion of tort liability but they are not authorised to depart from the basic doctrine of torts[59].

The experience of Canada and the United States is contrary to Australian approach and will be mentioned briefly, as the law of these countries provides the same outcome as in the UK.

USA

The majority of the US courts reject the claims for the award of damages for maintenance of the child, mainly because of the argument that the burden can be offset by the advantages of having a healthy chil [60] As an example, the leading case is *Custodio v Bauer*, where maintenance costs were offset by benefits of having a child.[61]

The USA jurisprudence is of a minimal value as a model for the UK, because the US courts reject actions for wrongful conception cases. There were forty-two cases with the claims for upkeep costs, which were rejected by the US court and thirteen cases which were accepted, but the [62].

Canada

In the Canadian case *Doiron v Orr*, a twenty-two year old woman, after giving birth to three children, decided not to have children anymore due to financial hardship[63]. She subsequently had a fourth child and sought damages for upkeep costs. The claim for the cost of upbringing the

child was refused, as the Court determined that the birth of a child is beneficial and not detrimental the benefits of having a child.

considers that it is undesirable for children when they grow up to discover that

damages. Post-*McFarlane*, the Court had to invent exceptions for *Rees* and *Parkinson.* However, the English Court has not yet faced a claim like their counterparts in Singapore. This current various aspects and its weaknesses should be explored next.

II. Chapter 2: “Deficiencies of the current state of affairs”

For every policy factor thrown onto the scales to deny liability another exists to redress the balance [75]

Introduction

This section will explore the weaknesses of the approach adopted in *McFarlane* and *Rees.* In particular, it will address questions as to whether the child can be always considered to be a sought irreversible surgery purporting to avoid exactly this event. Then, the paper will address its concern about drawing the lines between able-bodies and disabled children and parents. Lastly, it will consider whether the argument that patients should not be compensated at the expense of NHS is compelling.

1. Is a Healthy Child Always a “Joy and Blessing?”

In *McFarlane*, Lord Millet famously expressed that the compensation for upkeep costs cannot be provided, because children should not be considered to be a harm, as it is a [76]. subsequently subject to criticism.[77]

In the Australian case *Cattanach,* Kirby LJ stated that the proposition that a child is a blessing and joy in [78]. This argument can be supported by the fact that since 1967 in the UK there were adopted Acts of Parliament devoted to family planning and abortion[79]. The fact that sterilisation is recognised indicates that some family settings do not contemplate to have a child.[80] Considering the wide-spread methods of contraception, the availability of abortion and adoption in the UK, it is evident that some families prefer not to have children and exercise the

child is a happy and inevitable part of life, nderground unharmed. The [81]. In *Thake v Maurice*, Peter Pain J stated that

> By 1975, family planning was generally practiced. Abortion had been legalized over a wide field. Vasectomy was one of the methods of family planning which was not only legal but was available under NHS. It seems to me to follow from this that it was generally recognized that the birth of a healthy baby is not always a blessing.[82]

Mason notices that a very large number of pregnancies are genuinely unwanted.[83] Priaulx argues that the assumption that parents suffered no harm is erroneous and it conveniently omits has been

truths that children will have to face while growing up rather than the knowledge that, at the time of conception they were not wanted .[89]

The argument of this dissertation is that all individuals are idiosyncratic, meaning that all have different views and preferences, which must be respected. Those who consider that unexpected pregnancy is not an injury merely do not bring claim to the Court, however those individuals who believe that the pregnancy followed by negligent sterilisation is an injury should be treated as such. The importance which the child has for potential parents depends on subjective preferences and a network of values. It should not be the role

.[90]

2. Unhappy Differentiation

Peter Cane suggests that the real problem is that the Court in *McFarlane* could not foresee that such scenarios as *Rees* and *Parkinson* were coming.[91] The Court in *Parkinson* and *Rees* awarded a conventional sum in the amount, which extended to the special needs of a disabled child and parent. Singer S opined that in *Rees* the court created novel remedies in order to detract from obvious injustices.[92] The award was modest and significantly undercompensates the parents. It is

McFarlane.[93] Keren-Paz considers that the idea that fifteen thousand pounds is a sufficient amount to compensate the patient for the intrusion in his or her life is, indeed, shocking.[94]

The weakness of this differentiation is that parents, in order to recover, at least additional costs, have to portray themselves or their children as disabled. This differentiation between award of damages for disabled children and healthy ones is not desirable. Although the description of health condition cannot be avoided, as it is a matter of obvious fact, the problem is that this differentiation in award of damages raises the question of whether a disabled child cannot be considered to be a so-called, blessing

one to con [95].

Furthermore, there can be circumstances like in the Singaporean case *ACB*, where the child was

biologically unrelated to the father due to the negligence of the doctor.[96] Kumaralingam

similar or perhaps even darker cloud: he or she is not only unwanted because of cost, but unwanted

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III. Chapter 3: “Shift to Autonomous Choices”

Introduction

a novel concept. P

operation[107]

> should reasonably be aware that the particular patient would be likely to attach significance to it.[116]

Lord Kerr and Lord Reed stated that the position adopted in *Sidaway* to reflect the .[117] Therefore, the approach shifted towards recognising patients as persons holding the rights, rather than the .[118] The Court has point away from a model of the relationship between the doctor and the patient based on medical .[119]

Lady Hale provides a significant perspective to examine the place in which the patient occupies in the law of negligence:

> it is now well recognised that the interest which the law of negligence interest in their own physical, psychiatric integrity, an important feature of which is autonomy, their freedom to decide what shall and shall not be done to their body.[120]

Montgomery offers a rather subjective test of materiality emphasising such terms as *in position* and *particular patient* . This indicates that the focus the rights of the patient. Gemma Turton welcomes the increased subjectivity that arises from the concerns. She considers that the starting point for the doctor is now to highlight the importance of protecting patient autonomy and ado .[121]

Although, *Montgomery* mainly concerns the informed consent, the understanding of what is required from doctors in practice is important, as it shows stretched and indicates the underpinning of the judgement is the concept of autonomy.

Heywood argues that the doctor-patient relationship has changed since the court in *Montgomery* stated that the concerns and circumstances of the .[122]

Gemma Turton states that in the light of *Montgomery* recognising the patient autonomy as the central concern and thus expect judicial development of

the causation rules in a manner that gives even fuller p [123]. She says that -looking [124]. The standard of disclosure in *Montgomery* values the autonomy of the individual by allowing patients to make a .[125]

ACB

The Singaporean case *ACB,* where the doctors mixed up the sperm of the parent was called as one of the most important negligence judgements of this decade[130]. The Court considered the as a separate cause of action. Yet, it decided not to adopt this path providing three main reasons. First, the Court rejected , as it is nebulous and too contested notion [131]. This notion is subject to theoretical

which would be defined more narrowly, it could help to resolve the cases involving reproductive wrongs without facing objections raised in *Shaw v Kovac* and *ACB*.

Conclusion

Although the Courts respect the

This novel avenue will assist courts in eliminating undesirable distinctions between able-bodied and disabled individuals.

differential outcomes based on concepts of health and disability, nor continue to displace the [141]. This new righ

would be conceptually different from claims for the costs for upbringing a child. Therefore, it should not face the same moral objections, which are reflected in *McFarlane*, *Rees* and *ACB*, in particular that the child is a detriment or that it will morally denigrate parent-child relationships. The focus will be more on the parents, the recognition of their values and choices which are currently defeated by the reproductive negligence.

This separate and a free-standing cause of action could assist the Court by allowing it to

In order to make this new formula work, it is necessary to attempt to define generally what is autonomy and find its most suitable conception for protection of reproductive choices.

2. What is Autonomy?

Gerald Dworkin classic list of definitions for autonomy include autonomy as liberty or freedom to act; as ; as independence [145]

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John Stuart Mill, in his book *On Liberty*

Rees, depends on concepts that are blurred and incoherent.[155]

society force upon individuals, non- ed by

.[156]

The concept of autonomy is criticized for being nebulous

bodily integrity. Feminists strategies are aimed at broadening the notion of reproductive autonomy to embrace the emotional aspects of the unexpected pregnancy.[165]

3. Why is it Important to Recognise Reproductive Autonomy?

The current problem is that damage is perceived often in the form of some physical injury, scars and damage to property. However, distorted reproductive plans entail more than just physical pain and temporary injury. But, by no means, should it be considered less valuable.

Lady Hale in *Parkinson* picturesquely described the impact of pregnancy and the birth of

She correctly noticed that from the moment a woman conceives, profound physical changes happen in her body.[166] While for some women the birth of a child is a natural, non-dangerous process, others, unhappily, can suffer from obstacles and an uncomfortable time[167]. Lady Hale stated that a responsible woman will have to modify her pleasures in smoking and the amount of alcohol that she consumes.[168] A pregnant woman has to diet, she can no longer wear her favourite clothes and most likely she will not be able to return to her paid job immediately after giving birth[169]. Importantly, Lady Hale stated that there are not only physical c

of responsibility on the woman by children is by far the heaviest

considers that it cannot be compared with slavery or forced

between a woman and her children make her vulnerable in ways which the forced labourer does not know .[174]

It is not to illustrate that having children is a mere boredom; indeed, children bring happiness and tenderness, but mainly, it is to demonstrate the variety of opinions and experiences which should be respected.

Conclusion

The distortion of reproductive plans has a long-lasting and complicated impact on parents which deserve corrective justice. Reproductive autonomy could be a unified solution for various reproductive negligence claims. Preferably, reproductive autonomy should be adopted in a liberal and individualistic sense.

V. Conclusion

Doctors negligently perform sterilisation and vasectomies assuring patients about sterility. Fertility clinics mix up the genetic material of one donor with another. The in vitro laboratories fail to preserve frozen eggs of thousands of patients, including those who are cancer survivors. The news headlines depicting such medical errors are not rare. However, the doctors and the NHS are still immunised from compensating affected patients and courts trivialise the reproductive negligence harms.

Therefore, this dissertation proposed to recognise

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