

OFFSETTING DAMAGES IN WRONGFUL CONCEPTION AND BIRTH CASES: A WAY THROUGH THE POST-MCFARLANE MIRE

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I. INTRODUCTION

You can offset apples against apples, and pears
against pears, but not apples against pears.

Lord Toulson, *Lee v Taunton & Somerset NHS*¹

The House of Lords refusal to award damages for the cost of raising children born as a result of negligence has rightly been subject to substantial criticism.² Much of this has focused on the handling of the economic loss aspects of such claims, and on the problematic moral arguments raised in support of this refusal.³ While these are legitimate criticisms, there is further problem with the approach of the courts to maintenance costs that has not been fully examined. In both *McFarlane v Tayside Health Board*,⁴ and later *Rees v Darlington Memorial Hospital NHS Trust*,⁵ some judges considered that in order to calculate the damages, benefits accruing to the claimants from the child's existence (however unintended) would have to be set-off against the losses claimed, that is, the costs of raising the child. To do so, would require the court to value the 'benefits' a child brings to their parents; a task as repugnant as it is impossible. Yet if such a set-off was untenable, the only alternative would be to conduct no set-off and award *all* of the costs claimed, affording parents all of the benefits of their child, free from all costs. This would either be disproportionate to the wrong done, or would afford them an unreasonable 'windfall'. Faced with this conundrum, the best approach, in the view of the House of Lords, was to refuse an award for maintenance altogether. The Court of Appeal in *ARB v IVF Hammersmith and R* agreed,⁶ confirming that this difficulty in offsetting damages was one of two features that was 'crucial' to the outcome in *McFarlane*,⁷ and that the same approach should now apply in contractual claims of this kind.

Remarkably, the serious flaws in the courts' approach to offsetting have scarcely been scrutinised in the literature, despite this approach being both doctrinally unsound and poorly justified.⁸ We argue that the way some judges undertook to balance 'benefits and burdens', by offsetting the non-pecuniary benefits of parenthood from the pecuniary costs of maintaining the child, does not accord with the general tortious and contractual principles governing compensation, which dictates that when calculating damages, heads of loss ought to be kept distinct, and benefits only offset against awards under the same head of loss.

The courts appeared to assume that awarding maintenance costs was impossible without engaging in the unpalatable exercise of valuing the benefits and burdens that a child brings. However we argue that if the distinction between claims for pecuniary and non-pecuniary losses is preserved, this

¹ [2001] 1 FLR 419, 429.

² See, e.g., L.C.H. Hoyano, 'Misconceptions about Wrongful Conception' (2002) 65 MLR 882; N. Priaulx, 'That's One Heck of an "Unruly Horse" Riding Roughshod over Autonomy in Wrongful Conception' (2004) 12 *Feminist Legal Studies* 317, but compare: S. Todd, 'Wrongful Conception, Wrongful Birth and Wrongful Life' (2005) 27 *SydLR* 525.

³ We agree with much of this, but do not rehearse these arguments again in here.

⁴ [2000] 2 AC 59.

⁵ [2004] 1 AC 309.

⁶ [2018] EWCA Civ 2803.

⁷ *Rees* (n 5) at [322] *per* Lord Steyn. See also *ARB* (n 6), [33] *per* Nicola Davies LJ.

⁸ Laura Hoyano has touched briefly on the offsetting argument in her overview of the decisions in this area: Hoyano, 'McFarlane v Tayside Health Board and Cattnach v Melchior' in J. Herring and J. Wall (eds), *Landmark Cases in Medical Law*, (Oxford: Hart, 2015). There has been more detailed treatment of this in other jurisdictions, some of which we reference in this piece.

calculus is necessary only to determine what, if any, award ought to be made for the parents *non-pecuniary* losses (namely their ‘lost amenity’). The perceived benefits of a child should not, in other words, affect any award made for maintenance costs, unless they are of a financial kind. A court may therefore accept the moral concerns raised in *McFarlane* which speak against attempt to ‘value’ a child by refusing any award for lost amenity, without allowing these concerns to taint the rest of the award.

II. THE CURRENT POSITION: NO COMPENSATION FOR MAINTENANCE COSTS

Wrongful *conception* claims mostly arise when a medical practitioner’s negligence leads a person to wrongly believe he or she is sterile and does not need to use contraception, resulting in a woman falling pregnant. Wrongful *birth* claims arise when, due to negligence, a pregnancy is continued when it would otherwise have been terminated. The law has for many years compensated women who make claims of either kind for the pain and suffering associated with pregnancy and birth,⁹ and for other related costs such as lost wages, maternity clothes and the layette.¹⁰ Until 2000, the courts had also awarded compensation for the maintenance costs of raising an unintended child. In *Emeh v Kensington and Chelsea and Westminster AHA*,¹¹ for example, the award included the costs of clothing, housing, educating and feeding the child to adulthood,¹² as well as lost earnings and child-minding expenses.¹³ Awards have even extended to the cost of private education.¹⁴

However, the position was reversed in 2000 by the House of Lords in *McFarlane*, which rendered such costs no longer recoverable.¹⁵ This approach was confirmed in two later decisions — *Parkinson v St James and Seacroft University Hospital NHS Trust*¹⁶ and *Rees*¹⁷— albeit with two modifications. Firstly, the *additional* cost of raising an unintended *disabled* child over and above the normal costs of raising a healthy child are recoverable,¹⁸ but the extra costs arising from the *parent’s* disability are not.¹⁹ Secondly, a ‘conventional award’, currently £15,000, will be made in such cases to reflect the infringement of autonomy resulting from such negligence.²⁰ The court provided numerous arguments in support of these changes, many of which have received substantial attention in the literature.²¹

⁹ *Walkin v South Manchester Health Authority* [1995] 1 WLR 1543 (Lord Auld); *McFarlane* (n 4) (Lord Steyn and Lord Clyde).

¹⁰ See *Udale v Bloomsbury Area Health Authority* [1983] 1 WLR 1098; *Thake v Maurice* [1986] QB 644; *Benarr v Ketting Health Authority* (1988) 138 NLJ 179; *Allen v Bloomsbury Health Authority* [1993] 1 All ER 651; *McFarlane* (n 4).

¹¹ *Emeh v Kensington and Chelsea and Westminster Area Health Authority* [1985] QB 1012, esp. at 1022, per Waller J.

¹² Confirmed by Brooke J in *Allen* (n 10).

¹³ This position was supported in *Crouchman v Burke* (1997) 40 BMLR 163; *Allan v Greater Glasgow Health Board* 1998 SLT 580.

¹⁴ *Benarr* (n 10).

¹⁵ *McFarlane* (n 4).

¹⁶ [2002] QB 266.

¹⁷ [2002] QB 266.

¹⁸ *Parkinson* (n19). This applies equally to wrongful birth cases: *Groom v Selby* [2001] EWCA Civ 1522.

¹⁹ *Rees* (n 5).

²⁰ *Rees* (n 5).

²¹ See e.g. C. Purshouse, ‘Liability for Lost Autonomy in Negligence: Undermining the Coherence of Tort Law?’ (2015) 22(3) *Torts Law Journal* 226; Prialux (n 2); Hoyano, ‘Misconceptions about Wrongful Conception’ (n 2); Todd (n 2).

Much of the reasoning in *McFarlane* concerned whether a doctor's duty in wrongful conception cases could extend to indemnifying parents for the financial costs associated with a negligently conceived child. In Lord Slynn's view, for example, while a doctor who agrees to sterilise a patient does assume a duty of care to prevent pregnancy, he or she does not assume responsibility for the financial costs of raising an unintended child that might result if that duty is not fulfilled.²² For Lord Steyn meanwhile, it could not be fair, just and reasonable to impose a duty of this kind, as there must be a just distribution of burdens among society, and it would not be right for parents to place the burden of the child's costs on hospitals.²³

Not all of their Lordships accepted the duty-based analysis, and one key policy concern, voiced most notably by Lord Millett, was that a healthy child ought to be regarded by the law as a blessing and not a harm.²⁴ In *Rees*, he was clear that the situation was best understood by reference to the head of damage rather than the duty of care: the maintenance costs were a particular head of damage—the cost of bringing up a healthy child—that the House in *McFarlane* had considered it morally repugnant to allow.²⁵ This position is one of the two 'features' of the reasoning in *McFarlane* that Lord Steyn identified four years later in *Rees* as 'crucial' to its outcome: that 'the law must take the birth of a healthy baby to be a blessing, not a detriment.'²⁶ The second feature was the offsetting argument that we will come to shortly. While there was some disagreement over the import of the different lines of reasoning advanced in *McFarlane*,²⁷ nothing in *Rees* casts doubt on the ratio. Lord Bingham and Lord Steyn both considered that even if some of them might disagree with the earlier ruling, it would be wrong to overturn it so soon after, merely because a differently constituted court might reach a different conclusion.²⁸

When this issue was revisited in *ARB*, albeit in the context of a contractual breach, these two 'features' were also picked up by both Jay J in the High Court and Nicola Davies LJ in the Court of Appeal. Nicola Davies LJ identified the 'legal policy' in *McFarlane* and *Rees* as resting on two fundamental objections to such claims: the moral unacceptability of conceptualising a child as a financial loss,²⁹ and the impossibility of accurately calculating the loss given problems with determining the appropriate set off.³⁰ Arguably, neither objection is quite so easily discerned in their Lordships speeches in *McFarlane*, but their acceptance in *Rees* and now *ARB* means it is clear that both the House of Lords and Court of Appeal have interpreted (or reinterpreted) the case in that way.

While our focus in this paper is on the second objection — the offsetting argument — for the purposes of our analysis we must briefly address the idea that it is unacceptable to treat a child as 'damage'. This has been widely and rightly criticized as a mistaken understanding of the claimant's

²² *McFarlane* (n 4), 76.

²³ *Ibid*, 82.

²⁴ *Ibid*, 112.

²⁵ *Rees* (n 5) at [108].

²⁶ *Rees* (n 5), 322.

²⁷ Lord Millett felt that an approach based on recoverable loss was preferable to a duty of care analysis because the pregnancy and birth were 'exactly what the defendants were employed to prevent' and so any consequential loss fell within the scope of their duty (*Rees* (n 5) at [104]–[106]), whereas Lord Steyn maintained that both analyses were 'equally valid' and the difference of method was 'not of great importance' (*Rees* (n 5) at [30]).

²⁸ *Rees* (n 5), [31], [32], [41] *per* Lord Steyn; [7] *per* Lord Bingham.

²⁹ N 4 above, at [33]

³⁰ *Ibid*.

loss.³¹ As Justice Michael Kirby observed in the Australian case of *CES v Superclinics (Australia)*, the child's existence is not the 'damage' in the action, rather the

birth of the child is simply the occasion by which the negligence of the respondents manifests itself in the economic injury to the parents. It is the economic damage which is the principal unwanted element.³²

Understood correctly, it is the *financial* impact occasioned by the birth of the child for which claimants seek redress when asking for maintenance costs, not compensation for the *existence* of the child *per se*.³³ In tort, this economic damage derives from the negligence, while in contract, it derives from the breach that prevents the claimants from obtaining an expected benefit from an agreement (namely, the avoidance of having a child that they did not intend).

Tort damages should, as Lord Blackburn said in *Livingstone v Rawyards Coal Co*, be 'that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong ...'.³⁴ In contract, damages protect the party's expectation interest, placing them in the position they would have been had the contract been performed.³⁵ Characterised in this way, it is clear that whether the claim arises in tort or contract, parents wanting an award for maintenance costs are seeking redress for the pecuniary losses caused by the wrong or breach — the financial burden that caring for a child brings — and the compensation is intended to return them to the financial position they would have been in but for that wrong or breach. They might *also* seek recovery for the non-pecuniary losses they may suffer, including the emotional distress of having a child thrust upon them, the time and inconvenience involved in looking after that child, and (for the mother), the pain and discomfort of pregnancy and childbirth. There may well be concerns about *how* and *whether* to make the non-pecuniary award (which we explore later), but this is entirely irrelevant in relation to the characterisation of their claim for their *pecuniary* losses.

III. THE OFFSETTING ARGUMENT AND WHY IT SHOULD BE REJECTED

Having set aside the first objection to such awards, we now turn to second objection: that the recovery of maintenance costs should be denied on the basis that it is impossible to accurately calculate the losses due to the offsetting problem. The argument, at least as presented in *Rees* and *ARB*, goes as follows. The unintended child brings with it considerable financial burdens, in the form of the cost of clothes, food and housing. These costs are real and calculable. The child is also a benefit, a beloved joy in the lives of these parents. These benefits are either accepted by the court as implicit,³⁶ or clearly evident on the facts. It is not, however, possible to value these benefits in pecuniary terms, hence it is impossible to compare them to the costs. This means no calculus can be made, and so it was felt to leave two choices: compensate for all those pecuniary losses (the full

³¹ See, for example: D. Fox, Reproductive Negligence, 117 *Columbia Law Review* 149, 151–57 (2017); R Scott, 'Reconsidering "Wrongful Life" in England after Thirty Years: Legislative Mistakes and Unjustifiable Anomalies' (2013) 72 *CLJ* 115; Hoyano (n 2); Todd (n 2).

³² *CES v Superclinics (Australia) Pty Ltd* (1995) 38 *NSWLR* 47, 75.

³³ M. Hogg, 'Damages for Pecuniary Loss in Cases of Wrongful Birth' (2010) 1(2) *Journal of European Tort Law* 156, 156; K. Amirthalangam, 'IVF baby and upbringing costs - a claim for wrongful parenthood' (2019) 35(2) *Professional Negligence* 112, 115.

³⁴ (1880) 5 *App.Cas.* 25, 39.

³⁵ *Robinson v Harman* (1848) 1 *Ex Rep* 850.

³⁶ *McFarlane* (n 4), 112.

maintenance costs) but do not reduce by the value of the incalculable benefits; or give no compensation at all.³⁷ The Lords opted for no award, the logic being that to do otherwise would be to *over-compensate*, because the parents would be able to enjoy the benefits of their unintended child for free.

This argument underpins the reasoning of their Lordships in *Rees* to varying degrees, but it had its origins in *McFarlane*, arguably in the speeches of Lord Hope, Lord Clyde and, to a lesser extent, of Lord Millett. Lord Clyde, for example, stated that to relieve the parents of the financial obligations of caring for the child would go beyond reasonable restitution for the wrong done as ‘the pursuers end up with an addition to their family... although unexpected, [now] welcome’ and may then ‘have the child maintained ... free of any cost’.³⁸ Lord Hope adopted a duty-based analysis in *McFarlane*, but he similarly argued that the birth of a child brought immense value to the parents. It would be ‘invidious’ to attempt to ‘offset the benefits which she brought against the costs of her upbringing’, yet if these benefits were left out of the account, it would not be fair, just and reasonable, since the ‘the pursuers would be paid far too much.’ As he explained, ‘they would be relieved of the cost of rearing the child [but] they would not be giving anything back to the wrongdoer for the benefits’.³⁹ Both their Lordships therefore thought that to make a full award for maintenance costs would, in effect, afford the parents an unacceptable windfall.

In *Rees*, Lord Steyn noted that ‘the emphasis [in *McFarlane*] was squarely on the *impossibility* of undertaking a process of weighing the advantages and disadvantages’; ‘in monetary terms it is impossible to calculate the benefits of avoiding a birth and having a healthy child’.⁴⁰ Likewise Lord Hope stated that ‘it was considered that a calculation aimed at achieving a fair result, taking everything into account, was impossible’,⁴¹ while Lord Millett described his own argument in that case as resting on the view that the benefits of a child are ‘incalculable or cannot be weighed at all’.⁴² In *ARB*, too, Mr Justice Jay summarised the ‘legal policy objections’ to allowing recovery of maintenance costs in *Rees* as including (*inter alia*) ‘the inherent difficulty, if not impossibility, of measuring the loss’, ‘the refusal to offset the benefits which will accrue from parenthood from any additional financial liabilities; [and] the feeling that it is morally unacceptable to attempt this exercise’.⁴³ In the Court of Appeal, Lady Justice Nicola Davies reasoned that ‘at the core of the legal policy which prevented recoverability of the identified loss in *Rees* and *McFarlane* was the impossibility of calculating the same loss given the benefits and burdens of bringing up a healthy child’.⁴⁴ This would, in her view, apply equally to claims in contract.⁴⁵

Before evaluating this argument, it is worth noting that while Lord Hope’s judgment perhaps comes the closest, none of the judgments in *McFarlane* state the offsetting point in quite the terms set out in *Rees* and *ARB*. In fact, Lord Millett’s judgment might be read as offering a variation on this point, whereby the costs are deemed to be *outweighed* by the benefits a child brings. In his view, placing a monetary value on the birth of a child would be ‘as difficult and unrealistic as it is distasteful’.⁴⁶

³⁷ The third alternative of arriving at some rough or arbitrary figure is arguably what the conventional award might be thought to do, were the sum not so derisory and had the courts not stressed that this was not the case.

³⁸ *McFarlane* (n 4), 105.

³⁹ *McFarlane* (n 4), 97.

⁴⁰ *Rees* (n 5) at [28].

⁴¹ *Rees* (n 5) at [59].

⁴² *Rees* (n 5) at [111].

⁴³ *ARB v IVF Hammersmith and R* [2017] EWHC 2438 (QB) at [319].

⁴⁴ *ARB* (n 6) at [33].

⁴⁵ *ARB* (n 6) at [33].

⁴⁶ *McFarlane* (n 4), quoting Lord McCluskey.

Moreover it would do nothing to resolve the problem, as either the courts would decide that the value of a child outweighed the cost of raising them, in which case this merely confirmed what most courts would have been willing to assume anyway, or it would ‘have accepted the unedifying proposition that the child is not worth the cost of looking after him.’⁴⁷ Consequently, the choice must be between ‘allowing no recovery on the basis that the benefits must be regarded as outweighing any loss, and allowing full recovery on the basis that the benefits, being incalculable and incommensurable, must be left out of account’.⁴⁸ Lord Millett concluded that no recovery ought to be permitted, for the law must take the birth of a healthy child to be a blessing, not a detriment.⁴⁹

In *Parkinson*, Lady Justice Hale interpreted the judgments in *McFarlane* as advocating a kind of ‘deemed equilibrium’: since it is impossible to calculate the benefits that a child brings so as to give a ‘proper discount’ for them, ‘the only sensible course is to assume that they balance one another out’.⁵⁰ This interpretation was forcefully dismissed by the House of Lords in *Rees*, with Lord Steyn emphasising that *McFarlane* focussed on the *impossibility* of undertaking a weighing process, not an assumption that they cancelled each other out.⁵¹ Lord Hope similarly dismissed the idea that ‘there was assumed to be an equal distribution on either side of benefits and disadvantages.’⁵² Rather, ‘no calculation of that kind was attempted or even contemplated’,⁵³ since such a calculation would be impossible. Lord Millett, too, clarified that this did not accurately capture his reasoning in *McFarlane*:

to say that something is incalculable or cannot be weighed at all is quite different from saying that it is deemed to weigh the same as something else. To say, as I did, that “society itself must regard the balance as beneficial” is quite different from saying that the balance must be treated as level.⁵⁴

Therefore, despite some ambiguity in *McFarlane*, the position is now clear that the benefits of having a child are not deemed to outweigh the costs, but rather such a weighing task would itself be impossible, and hence to avoid this problem, no award for maintenance costs should be made. We refer to this throughout as the ‘offsetting argument’.

1. Set-Off Only Like from Like

Despite the weight of authority in support of it, we respectfully argue that the offsetting argument is mistaken. There are two components of this argument, both of which we will address in this paper. First, the argument holds that the benefits of a child coming into a parent’s life are incalculable in monetary terms. Second, it considers it correct to reduce any award for the *pecuniary* losses suffered by the claimants by *the value of these benefits*. As they are incalculable, this is impossible and hence the impasse posited in *McFarlane*, *Rees* and *ARB* is reached.

⁴⁷ *McFarlane* (n 4), 111.

⁴⁸ *McFarlane* (n 4), 111.

⁴⁹ *McFarlane* (n 4), 114.

⁵⁰ *Parkinson* (n 16), [87].

⁵¹ *Rees* (n 5), [27].

⁵² *Rees* (n 5), [59].

⁵³ *Rees* (n 5), [59].

⁵⁴ *Rees* (n 5), [111]. In *ACB v Thomson Medical Pte Ltd*, the Singapore Court of Appeal also understood the English position this way, emphasising that the issue with offsetting was not about *difficulty* with assessing damages: “but, rather, about its impossibility”: *ACB v Thomson Medical Pte Ltd* [2017] SGCA 20; [2017] 3 WLUK 512 (CA (Sing)), [91].

The first component raises a legitimate concern: how could one render the joys and strains of parenthood in monetary terms, particularly when speculating about what a child *will* bring into the lives of his or her parents in the future? We will explore this later, however the crucial point here is that whether or not this is true simply does not matter, because these benefits are *non-pecuniary* in nature, and it is trite law that in calculating damages, only like may be set-off against like. The offsetting argument rests on the presumed need to set-off losses and benefits that are not of a similar kind, which is mistaken.

Strikingly, the erroneous nature of this approach to offsetting was pointed out by Lord McCluskey (in the Court of Session) and Lord Clyde in *McFarlane* itself, as well as in a critique of *McFarlane* in the Australian courts, prior to it being accepted in *Rees*.⁵⁵ Lord Clyde explicitly rejected the idea that any benefits that a child brings to their parents ought to be offset against the financial losses associated with raising them, explaining that:

in attempting to offset the benefit of parenthood against the costs of parenthood one is attempting to set off factors of quite a different character against each other and that does not ... accord, with principle. ... like requires to be offset against like. ... one would expect economic gain to be set off by economic loss. It may be that the benefit which a child represents to his or her parent is open to quantification, but there is no principle under which the law recognises such a set off.⁵⁶

To illustrate the point, Lord Clyde gave two examples. Firstly, he noted that a 'parent's claim for the death of a child is not offset by the saving in maintenance costs which the parent will enjoy'.⁵⁷ Secondly, he invoked the analogy of a mineworker:⁵⁸ it could not be right that his losses in being rendered unable to work by an accident would be offset against the pleasure he may get from the 'open air' above ground.⁵⁹ Not only was it not a principle recognised by law, but it would be 'difficult or even impracticable' to conduct such a set-off, given the uncertainty surrounding calculating a figure for the benefit the child constituted.⁶⁰ Moreover the effect would be that parents wishing to pursue a claim would have to prove that the child is 'more trouble than he or she is worth', which was patently undesirable as well as a mischaracterisation of their complaint.⁶¹ Therefore, any award for pecuniary losses should not be reduced to account for *non-pecuniary* benefits arising as a result of the child's birth. This was not, as some others suggested, because of the impossibility of quantifying the benefits of having a child, but because the benefits and costs are of such a fundamentally different kind that they simply should not, as a matter of principle, be weighed against one another.⁶²

⁵⁵ The decision in *McFarlane* was criticized in both the Supreme Court of Queensland (in *Melchior v Cattanach*) and the High Court of Australia (in *Cattanach v Melchior* [2003] HCA 38), discussed later.

⁵⁶ *McFarlane* (n 4), 103.

⁵⁷ *McFarlane* (n 4), 103.

⁵⁸ Used originally by Lord McCluskey in the Court of Session in *McFarlane v Tayside Heath Board* 1998 SLT 307, 316.

⁵⁹ *McFarlane* (n 4), 103.

⁶⁰ *McFarlane* (n 4), 103.

⁶¹ *McFarlane* (n 4), 103.

⁶² Lord Clyde still concluded that no award for maintenance costs should be made, but this was because if the benefits cannot be taken into account, the defenders would be liable for the full loss and the parents would essentially gain a windfall — a child they value but at no cost to themselves. This, he considered, would go beyond reasonable restitution for the wrong: *McFarlane* (n 4), 105. Moreover when determining what *would* constitute reasonable compensation, he thought it 'appropriate to have regard to the extent of the liability which the defenders could reasonably have thought they were undertaking', which, in this case, would not extend to the cost of maintaining the child. This seems close to Lord Slynn's reasoning that the doctor did not 'assume

Neither Lord cited any authority in support of their assertions about how damages ought to be calculated, but both considered this position self-evidently true.⁶³ Lord Toulson similarly regarded the position as so well-established as to need no authority when he explained the ‘central dilemma’ underlying the speeches in *McFarlane in Lee v Taunton & Somerset NHS*:

It being the object of the law of damages to place the injured party in the same position ... as they would have been in but for the breach of duty... credit must be given for benefits resulting from the breach. But in attempting to draw a balance sheet which shows a true and fair view of the injured party’s loss, credit items can only be taken into account which are commensurable with the debits claimed. You can offset apples against apples, and pears against pears, but not apples against pears.⁶⁴

In our view, Lord Toulson and others were right in their approach. While offsetting must be undertaken to ensure claimants are not compensated more than their net loss,⁶⁵ this does not mean that the benefits of the child should be set off against the financial award that might otherwise be made for the parent’s asserted pecuniary loss.

Dividing damages for person injury into pecuniary and non-pecuniary losses has been standard practice since 1970,⁶⁶ and it is common and accepted practice to set-off *pecuniary* collateral benefits against pecuniary losses to arrive at an accurate assessment of the financial loss suffered.⁶⁷ There are detailed rules governing such calculation.⁶⁸ However, any set-off must operate in line with the well-established position in *Parry v Cleaver* that benefits will be deducted only if they are of the same ‘intrinsic nature’ as the loss sought to be recovered.⁶⁹

It is clear from the limited authorities that pecuniary and non-pecuniary losses are *not* to be regarded as of the same intrinsic nature, and so the like-for-like principle applies such that *non-pecuniary* benefits are not to be set off against *pecuniary* losses.⁷⁰ For example, William Latimer-

responsibility’ for the costs of raising an unwanted child when he or she agreed to sterilise a patient. This argument is unconvincing: in sterilising a man or woman, the prevention of the creation of a child is *precisely* what is in mind, and the losses flowing from its failure must include as *consequential* (and therefore recoverable) loss, the cost of raising that child.

⁶³ They made various comments to this effect in the Court of Session, including that ‘No one would dream of suggesting...’ and ‘not of a kind our law has ever recognised’ in relation to offsetting: *McFarlane v Tayside Health Board* 1998 S.L.T. 307 (Court of Session (Inner House, Second Division)). See also Lord Cullen at 396C-D. Toulson J gives an interpretation of *McFarlane in Lee* (n 1), and the mineworker example at p. 429, agreeing with the lesson Lord Clyde draws from it.

⁶⁴ *Lee* (n 1).

⁶⁵ *British Transport Commission v Gourley* [1956] AC 185; *Hussain v New Taplow Paper Mills Ltd* [1988] AC 514, 527.

⁶⁶ A. Ogus, *The Law of Damages* (London, Butterworths, 1973), 221.

⁶⁷ See, eg, the following major sources which give substantial attention to this latter form of set-off, and little attention to the offset of non-pecuniary benefits against pecuniary losses: J. Edelman, S. Colton and J. Varuhas (eds), *McGregor on Damages* (London: Sweet & Maxwell, Thomson Reuters, 2018); A. Burrows, *Remedies for Tort and Breach of Contract*, 3rd edn, (Oxford: Oxford University Press, 2004); R. Lewis, *Deducting Benefits from Damages for Personal Injury* (Oxford: Oxford University Press, 1999).

⁶⁸ As in *Parry* itself, where the House of Lords held that an award for loss of earnings should not be reduced to account for a pension received as a result of the injury because they were not of the same intrinsic nature: *Parry* (n **Error! Bookmark not defined.**), 15. See also *Longden v British Coal Corp* [1998] AC 653, 663.

⁶⁹ *Parry v Cleaver* [1970] AC 1, 15.

⁷⁰ There is only limited authority on this question, but the lack of consideration of the issue indicates that this so widely accepted as to be axiomatic. Rather, the focus has been almost exclusively on whether particular *pecuniary* losses and *pecuniary* benefits are sufficiently similar. This culminated recently in the Supreme Court decision in *Globalia Business Travel S.A.U. of Spain v Fulton Shipping Inc of Panama* [2017] UKSC 43, which focusses on whether there is a causal nexus between the breach and the benefit. While the court held that there

Sayer's *Personal Injury Schedules: Calculating Damages*, declares the correct position in English law is that

a perceived benefit can only be set-off against a claim of the same type. Therefore, non-pecuniary advantage should not be used to restrict pecuniary loss'.⁷¹

This approach is seen in the cases, with Lord Scarman expressing doubts about the legitimacy of offsetting non-pecuniary gains against pecuniary losses *obiter* in *Lim Poh Choo v Camden and Islington*. In support of this, he noted a report by the Pearson Commission (below) that 'considers it wrong in principle to reduce the one by reason of the size of the other'.⁷² Latimer-Sayer also notes the refusal in *Arafa v Potter* to reduce an award for lost earnings to account for the claimant now experiencing the benefits of shorter working hours and more holidays of his new job after his injuries prevented him continuing his pre-accident occupation.⁷³ Moreover, in the Queen's Bench hearing of *Parry v Cleaver*, Lord Justice Winn commented that 'damages for pain, loss of mobility or enjoyment of life are different in kind from damages for monetary loss; the two are not to be set off'.⁷⁴

The Law Commission, in its various reviews of damages since the early 1970s has also made it clear that pecuniary and non-pecuniary losses should not be set-off against one another.⁷⁵ Writing in a slightly different context they were clear, for example, that the approach of some judges of 'adjusting' overall damages in order to address concerns about overlap between pecuniary and lost amenity awards was wrong,⁷⁶ and that 'a better result is achieved by treating the assessment of pecuniary and non-pecuniary loss as independent of each other'.⁷⁷ Following this approach, the award for pecuniary loss should be the full loss (accounting for recognised deductions), and the non-pecuniary loss should be separately calculated in accordance with the accepted scales. This was because

was no general principle preventing a benefit 'diminishing a loss of another kind', in this case, the 'different kinds' of loss were both of a financial kind (the capital value of a vessel and the loss recoverable for a charterer's breach of a time charter ([30])), falling under the same head of damage. This does not undermine the position on the relationship between non-pecuniary and pecuniary losses and benefits. Indeed in the High Court (with whom the Supreme Court agreed), Mr Justice Popplewell invoked in support the case of *Nadrepgh Ltd v Willmet & Co* [1978] 1 WLR 1537 quoting Mr Justice Whitford's assertion that any benefit should be taken into account if they 'relate sufficiently closely to a particular head of damage as to be appropriate to be set off against that head of damage.' ([2014] EWHC 1547 (Comm) at [39]; quoting from [1978] 1 WLR 1537 (p1543H)). He also made clear that this principle only applied if the benefit was capable of being 'measured in financial terms' ([39]).

⁷¹ W. Latimer-Sayer, *Personal Injury Schedules: Calculating Damages* 4th edition (London: Bloomsbury Professional, 2018) [A12].

⁷² *Lim Poh Choo v Camden and Islington* [1980] AC 174, 192. Referring to the Pearson Report: Report of the Royal Commission on Civil Liability and Compensation for Personal Injury (1978) Cmnd 7054-1.

⁷³ [1994] PIQR Q73. W Latimer-Sayer, *Personal Injury Schedules: Calculating Damages* 4th edition (London: Bloomsbury Professional, 2018) [A12].

⁷⁴ *Parry* (n69), 211.

⁷⁵ There is no discussion of this in in Law Commission, *Damages for Personal Injury: Non-Pecuniary Loss* (LC257, 1998).

⁷⁶ For example, Lord Denning considered there would be overlap where a person who could no longer work due to negligently-induced disease received an award for both lost amenity and lost future earnings. Having future earnings compensated would bring both financial and non-financial benefits, the latter in the form of relief at worry for the future. The amenity award should thus be reduced to account for this: *Smith and Others v Central Asbestos Co. Ltd. and Another* [1971] 3 W.L.R. 206, 218.

⁷⁷ Law Commission, *Report on Personal Injury Litigation: Assessment of Damages*, LC 56, 1973, London, HMSO; WP41.

damages for pecuniary and non-pecuniary loss are, in principle, to meet separate losses. Provided there is no duplication in practice between them, to reduce damages for non-pecuniary loss because of the level of damages for pecuniary loss must cause under-compensation.⁷⁸

The Pearson Committee agreed,⁷⁹ concluding that it would be wrong to reduce one award to account for the size of the other.

In fact, most of the scant authority on offsetting pecuniary and non-pecuniary losses and benefits involves the converse question of whether the *non-pecuniary losses* caused by a tort can be reduced by *pecuniary gains* that arise as a result, but the general principle of 'like versus like' holds. One example, noted in *McGregor on Damages*, is that the *Social Security (Recovery of Benefits) Act 1997* does not permit such benefits to be deducted from damages for non-pecuniary losses, only from awards for pecuniary loss.⁸⁰ To raise the issue of such collateral benefits in the context of non-pecuniary loss would, the authors assert, 'seem strange... for such benefits, which are of a pecuniary nature, must surely operate only to reduce pecuniary loss.'⁸¹ Harry Street takes a similar view, noting that

If a rich woman takes pity on the injured man and marries him, this gain would be ignored, not because it is collateral, but because it is not ... [of the same subject matter] with any head of damage.⁸²

There are a number of reasons why the law is right to require only like to be set-off against like when calculating damages, and why, therefore, the courts were wrong to deviate from it in *McFarlane*. One is simply that the two heads of award have very different functions. Pecuniary heads of damage compensate the claimant for the financial loss they have suffered, and because such monetary losses are calculable with a fair degree of accuracy, monetary compensation can be very effective in redressing these, so they are effective at returning the claimant to the *financial* position they were in before the tort or breach.

By contrast, the aim of non-pecuniary damages is very different. As *McGregor on Damages* explains, 'it is not possible... to fully compensate for a serious physical injury', all the law can do is try to place a monetary value on the harm to claimant has suffered.⁸³ Consequently, as Peter Cane and James Goudkamp observe, there is 'an air of unreality' about the calculation:

Something that cannot be measured in money is 'lost', and the compensation principle requires some monetary value to be placed on it. There appears to be no objective way of working out any relationship between the value of money – what it will buy – and damages awarded for pain, suffering and loss of amenities.⁸⁴

⁷⁸ Law Commission, *Damages for Personal Injury: Non-Pecuniary Loss* (LC257, 1998), [3.17].

⁷⁹ Report of the Royal Commission on Civil Liability and Compensation for Personal Injury (1978) Cmnd 7054-1, [759].

⁸⁰ Edelman et al, (n **Error! Bookmark not defined.**) 40-273. Although it might be argued that the Act's approach can be alternatively explained as those benefits not being intended to cover non-pecuniary losses, and hence of a different kind in another sense. We are grateful to Leo Boonzaier for this point.

⁸¹ Edelman et al, (n **Error! Bookmark not defined.**), 40-273 (our emphasis). Latimer-Sayer (n **Error! Bookmark not defined.**), Chapter J.

⁸² H. Street, *Principles of the Law of Damages* (London: Sweet & Maxwell, 1962), 114.

⁸³ *McGregor on Damages* (London: Sweet & Maxwell, Thomson Reuters, 2018), 40-059

⁸⁴ P. Cane & J. Goudkamp, 'Damages for Personal Injury and Death' in *Atiyah's Accidents, Compensation and the Law* (CUP, 2018), 150

Because non-pecuniary losses cannot be rendered in money terms, a money award cannot really be said to make good the loss and restore the claimant to their pre-tort or pre-breach position.⁸⁵ Rather, as Cane and Goudkamp observe:

The object of such compensation is to enable the injured person to obtain a substitute source of satisfaction or pleasure (where some 'amenity' has been lost), or alternatively to comfort the victim or provide him or her with solace for what has happened (as in the case of pain and suffering).⁸⁶

Consequently, much of the authority stresses the importance of ensuring 'fair, just and reasonable' compensation for the injuries sustained.⁸⁷ Given that the primary function of damages is restorative, and this can be achieved in relation to pecuniary losses, to reduce the award for that part of the loss to account for non-pecuniary benefits would necessarily mean the award no longer met this primary restorative function.

A second, related justification for keeping the calculation of each distinct is because that pecuniary awards can be calculated with considerable precision, accounting for both financial losses and gains, and arriving at totals that are fairly accurate. While perfect calculation is impossible, the requirement that each element of the losses and benefits is itemised and calculated individually before being tallied up, helps, as the Law Commission have noted, to ensure accuracy and fairness in the award.⁸⁸ By contrast, non-pecuniary awards are calculated differently and do not (and cannot) profess to be an accurate financial representation of loss. The precision of the pecuniary award is inherently undermined if some non-pecuniary calculation of a collateral benefit was then brought into it. This would necessarily mean that a precisely calculated sum is then reduced by an arbitrary amount, which would be perverse given the importance given to precise calculation via itemisation in the first place. This is readily apparent in the context of wrongful conception and birth cases, as while the cost of feeding, clothing and housing a child can be calculated with a high degree of accuracy, any attempt to place a monetary figure on the joys a child brings to their parents (off-set against the annoyance and disruption they cause) will necessarily be highly arbitrary.

Writing in another context, the Law Commission, spoke strongly against the idea that the overall award should be capable of arbitrary adjustment. It was, they argued, fairer to calculate each head independently and then combine them, with neither being amended to account for the other,⁸⁹ otherwise there was a risk of reducing the individuality of each calculation in some parts, and undermining attempts at consistency in others.

There are good reasons, then, to support the law's position of keeping heads of loss distinct, and so Lord Toulson was right to assert that the non-pecuniary benefits of having a child, should not be required to be offset against any award for the financial losses suffered by the parents. It might well be impossible to calculate the net non-pecuniary loss (as we discuss later), but that is irrelevant — it

⁸⁵ Zlatin Zlatev has made this point via an analysis of damages awards for non-pecuniary contractual interests, noting that in cases such as *Farley v Skinner* and *Watts v Morrow*, the monetary awards given for breach could not 'undo' the inconvenience and distress each suffered: Z. Zlatev, 'Quantification of damages for non-pecuniary losses deriving from breach of contract' (2020) 40 *Legal Studies* 548, 564.

⁸⁶ Cane & Goudkamp (n93), 394

⁸⁷ *Rowley v London and North Wester Ry Co* (1873) LR 8 Exch 221 and 231; *Lim Poh Choo v Camden Area Health* at 187 and *Heil v Rankin*.

⁸⁸ The Law Commission, *Report on Personal Injury Litigation --- Assessment of Damages*, LC 56, 1973, London, HMSO, [188].

⁸⁹ The Law Commission, *Report on Personal Injury Litigation --- Assessment of Damages*, LC 56, 1973, London, HMSO, [198]-[199].

should have had no bearing on the calculation of the *financial* burdens the unintended child brought.

Kathryn Vikingstad reaches a similar conclusion on cases in the United States where the same erroneous approach is taken,⁹⁰ commenting that given maintenance costs ‘are, quite clearly, injuries to the parents’ financial interests’ while the benefits parents derive from having a child are ‘emotional in nature’, ‘allowing these emotional benefits to offset, either partially or completely, the financial injury of having to raise a child is a patent violation of the same interest limitation’.⁹¹ This limitation, contained in the *Restatement (Second) of Torts*, requires that when calculating an award, ‘[d]amages resulting from an invasion of one interest are not diminished by showing that another interest has been benefited’.⁹² Similarly, Justice Bablitch noted in the Wisconsin Supreme Court that

the ‘same interest’ rule would require that the economic damages involved in raising the child be offset by corresponding economic benefits, and that emotional harms be offset by emotional benefits, and so on.⁹³

Precisely the same reasoning was applied in the High Court of Australia in *Cattanach v Melchior* when Justices McHugh and Gummow agreed with Lord Clyde that pecuniary and non-pecuniary heads of damage ought to be kept distinct, noting that:

the head of damages that is relevant in the present case is the financial damage that the parents will suffer as the result of their legal responsibility to raise the child. The benefits to be enjoyed as a result of having the child are not related to that head of damage.⁹⁴

It was therefore wrong to suggest that awarding damages for the cost of raising a child would require the court to off-set a ‘monetary value’ for the child against maintenance costs, as ‘it is impermissible in principle to balance the benefits to one legal interest against the loss occasioned to a separate legal interest’ when assessing damages.⁹⁵

⁹⁰ Kathryn Vikingstad’s research demonstrates that in 2007, out of forty-three states in the United States who had considered the issue, only three (Wisconsin, New Mexico, and Oregon) allowed parents to recover the full costs of raising a child. In these states, the so-called tort ‘benefit’ rule expressly contained within the Restatement (Second) of Torts (1979) (section 920) is often invoked by courts to deny or limit recovery in wrongful conception and birth cases by either requiring parents to offset maintenance costs by the ‘emotional benefits’ they will receive from the child. She cites numerous examples including: *Univ. of Ariz. Health Scis. Ctr. v. Superior Court*, 667 P.2d 1294, 1299 (Ariz. 1983); *Custodio v Bauer*, 251 Cal. App. 2d 303, 323 (Cal. Ct. App. 1967); *Jones v. Malinowski*, 473 A.2d 429, 435 (Md. 1984); *Burke v. Rivo*, 551 N.E.2d 1, 18 (Mass. 1990); *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169, 176 (Minn. 1977); see K. Vikingstad, ‘The Use and Abuse of the Tort Benefit Rule in Wrongful Parentage Cases’ (2007) 82(2) *Chicago-Kent Law Review* 1063-1106.

⁹¹ *Ibid*, 1099. See also: J. Kashi, ‘The Case of the Unwanted Blessing’ (1977) 31 *University of Miami Law Review* 1409, 1415; E. Posner and A. Porat, ‘Offsetting Benefits’ (Coase-Sandor Institute for Law & Economics Working Paper No. 675, 2014), 7.

⁹² Restatement (Second) of Torts (1979), s920, comment b.

⁹³ *Marciniak v Lundborg* 450 N.W.2d 243 (Wis. 1990), [8].

⁹⁴ *Cattanach v Melchior* [2003] HCA 38, [90]. In this case, Justice Michael Kirby condemned the approach in *McFarlane* as a departure from ‘the ordinary principles governing the recovery of damages for the tort of negligence’ from which ‘neither the invocation of scripture nor the invention of a fictitious oracle on the Underground ... authorises a court of law to depart’ [151].

⁹⁵ *Ibid*, [90]. McMurdo P and Davies JA make the same point in the Supreme Court of Queensland in *Melchior v Cattanach*, emphasising that to set off ‘the joys and pleasures of parenthood against the economic loss of raising the child to moderate or extinguish the loss’ fails to compare like with like, and is incorrect because the benefit is not of the same interest as the loss’: *Melchior v Cattanach* [2001] QCA 246 at [56] (McMurdo P) and [88], [108] (Davies JA).

Other jurisdictions have taken a similar view. The South African Supreme Court in *Administrator, Natal v Edouard* refused to allow ‘a pregnancy action subject to a set-off of the benefits of parenthood’, or to hold ‘that the benefits automatically cancel out the patrimonial loss involved in child-raising expenses’.⁹⁶ According to Van Heerden JA, while the monetary value of any tangible benefits that accrue as a result of a delict or breach of contract ‘must obviously be brought-into account’⁹⁷ there was no foundation in South African law for the suggestion that ‘benefits of a non-pecuniary nature must also be “subtracted” from patrimonial [i.e. pecuniary] loss’.⁹⁸ Quite the opposite: ‘a plaintiff claiming patrimonial loss is not called upon to adjust such loss with reference to non-pecuniary benefits arising from *inter alia* a breach of contract’.⁹⁹

The same is true in many civil law jurisdictions, with Germany, the Netherlands and Switzerland all permitting parents to recover maintenance costs, having expressly rejected the idea that non-pecuniary benefits ought to be set-off against the financial harms. The Swiss Bundesgericht was clear, for example, that:

a parent’s joy at the birth of their child cannot be included in the calculation of damages as a ‘mitigating factor’ or deducted from maintenance costs, particularly as joy, which is of immaterial worth, is immeasurable.¹⁰⁰

Similarly the Dutch Hoge Raad rejected the idea that the benefits of a child outweighed any financial losses, making clear that ‘intangible benefits should only be taken into account when determining any non-material damage’.¹⁰¹ As Barbara Steininger explains, this is also the position in Germany, where the Bundesgerichtshof has held that non-pecuniary advantages cannot be taken into account when assessing the parents’ pecuniary loss as these are ‘not comparable... a set-off is only possible between comparable goods, for instance between pecuniary advantages and pecuniary disadvantages.’¹⁰²

2. Deviating from Orthodoxy: Refusing Claimants a Windfall

It is clear, then, that the offsetting argument deployed in *McFarlane*, *Rees* and *ARB* to deny maintenance costs is doctrinally unsound under English law, as well as out of kilter with the approach taken elsewhere. The House of Lords demonstrably chose to deviate from this orthodox approach to the calculation of damages these cases. It did so because otherwise it would be required to make a full restorative pecuniary award, which they considered would give the parents a ‘windfall’, enabling them to enjoy all of the benefits of a child without the costs associated with them. The House of Lords regarded this as an unacceptable overcompensation, given the other policy concerns that shaped their views, such as the distributive justice argument, which we explore below.

⁹⁶ [1990] 3 SA 581 (Appellate Division).

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*, [21].

¹⁰⁰ BGE 132 III 359, 379.

¹⁰¹ 21. 2. 1997, NJ 1999 at 3.10.

¹⁰² B. Steininger, “Wrongful Birth and Wrongful Life: Basic Questions” (2010) 1 *JETL* 125, 137. See also BGHZ 76, 249 and BGHZ 76, 259.

In our view, conceptualising an award of maintenance costs as a ‘windfall’ not only misrepresents what has occurred in these cases, it obscures the very cause of it — a negligent failure to ensure the claimants achieved their goal of *avoiding* having a child. By framing the child as a benefit, the parents are cast as almost churlish in seeking compensation for the costs that attend the joy of a child coming into their lives. But this erases the fact that these claimants *explicitly* and responsibly sought to avoid this very outcome. To describe the relief of some of the financial burden of the child’s subsequent care as a ‘windfall’ entirely ignores that the parents had already weighed the benefits and burdens of having a child and concluded that, for them, the benefits a child might bring were not sufficient to relative to the burdens.

It is not hard to see why some claimants had come to this conclusion. In *Sciuriaga v Powell*, a negligently-performed abortion resulted in woman who had been crippled by polio and deserted by her child’s father being left to care on her own for a child she had not wanted.¹⁰³ In *Thake v Maurice*, a couple were already at ‘their wits’ end’ struggling to cope with the financial burden of five children on Mr Thake’s railway guard salary, when the failed added another child to family.¹⁰⁴ In *ARB*, it was very clear that the claimant had not wanted another child with *R*. To describe the claimants in such cases as having gained a ‘windfall’, by being offered some monetary compensations to help them with the financial costs of raising those unexpected children is a gross mischaracterisation of the realities of the situation they faced.

Even for those in less difficult circumstances, raising an unexpected child has serious implications. They may be forced to move house, quit their jobs, or change their schooling and childcare arrangements to accommodate the new addition, and will undoubtedly have to invest enormous time and effort into that child for the rest of their lives. An award for maintenance (which in *McFarlane* was calculated at £100,000) may relieve some of the financial burden (and so be restorative of one dimension of their loss), but they must still bear all the non-financial burdens of raising a child, for which money can never fully compensate. To the extent then, that these parents could be said to be ‘over-compensated’ by taking the joys of parenthood without the financial cost, this leaves out an important entry in the ‘ledger’ --- the pain, heartache, sleepless nights and stress of parenthood. It is false to say they have taken the benefits for free if maintenance costs are awarded --- those benefits come balanced by all the downsides any parent experiences. And as Nicolette Prialux has pointed out, the courts are unlikely to take this approach in other settings. Citing Bernard Dickens, she rightly observes that no court would entertain the argument that the father of a child did not have to pay child maintenance, on the basis that he had ‘conferred a priceless blessing’ on the child’s mother.¹⁰⁵

The fact that when faced with this unwanted outcome, the parents chose to love and care for this child rather than reject them by giving them up for adoption, does not mean the thwarting of their autonomy evaporates, nor that they cannot rejoice in the child while still lamenting that their lives took this turn. The courts would not, for example, deny a victim of negligently-caused paralysis an award for lost future earnings because they find fame and success as a Paralympian. Making the best of an unfortunate turn of events, or even finding unexpected happiness in it, in no way lessens the fact that they have suffered a wrong at the hands of another, with life-changing consequences.

¹⁰³ *Sciuriaga*

¹⁰⁴ [1985] 2 WLR 215.

¹⁰⁵ N. Prialux, ‘A Letter from the UK: Tort Law and Damages for the Unwanted Child’ (2008) 14 J. Legal Econ. 53, 59.

The language of ‘windfalls’ and ‘overcompensation’ thus illegitimately masks the fundamental nature of what has happened and why these people want compensation. It implies that the parents will, if awarded maintenance costs, benefit unfairly in some way; or to use Lord Hope’s language, the award would go beyond ‘reasonable restitution for the wrong done’.¹⁰⁶ While the language of restitution is inapt here,¹⁰⁷ it is notable that within the context of unjust enrichment, it is widely recognised that ‘the law’s general concern is with the benefit to the particular defendant, or so-called “subjective devaluation”’.¹⁰⁸ Benefits are only incontrovertibly benefits if they have been or can be realised in money; and a benefit which cannot be realised in monetary terms, and has not been ‘freely accepted’, would not be regarded as such. As Pollock CB put it in *Taylor v Laird*, ‘suppose I clean your property without your knowledge, have I then a claim on you for payment? How can you help it? One cleans another’s shoes; what can the other do but put them on?’.¹⁰⁹ It is unreasonable for the law to describe the position as a ‘windfall’ in one context, while denying it would amount to ‘enrichment’ in another.

Even if this argument against regarding a child as an incontrovertible benefit is not accepted, however, it does not follow from this that the court ought to deny the maintenance award. In both tort and contract, the purpose of damages is to place the claimant in the position he or she would have been had the wrong not occurred. However, achieving this with exactitude is not always possible, and the court will — as here — sometimes be left with a choice as between under- or over-compensating the claimant.

While courts are generally averse to over-compensating, they do so where there are good policy reasons to justify it, such as the encouragement of benevolence.¹¹⁰ Arguably, similar logic could apply here: parents who have stepped up to love and care for an unintended child should be encouraged and supported. This speaks in favour of tolerating such (alleged) ‘over-compensation’, particularly as it is clearly preferable to the alternative. After all, a child is unlikely to be harmed to learn that their parents have been compensated for the cost of their care, but by removing one aspect of the unintended parents’ discontent — the unwanted financial impact — the court may well reduce some of the strain on the relationship between parent and child, thus contributing to the child’s well-being. Providing financial support, may thus help parents to accept this unexpected burden, and to try to make the best of a challenging situation, providing a loving and financially stable home for the child.

If maintenance awards are seen as over-compensation, one concern (which underpins Lord Steyn’s judgment in *McFarlane*) is that, at least in tort cases, this is borne by the public purse. Peter Cane for example, has argued, ‘public money should not be wasted by over-compensating some personal injury victims.’¹¹¹ However, this argument is misconceived. As Jonathan Herring explains, this argument would apply to any claim against the NHS and does not demonstrate why these claims should be treated differently to any other negligence claim.¹¹² After all, the amount claimed for in

¹⁰⁶ *McFarlane* (n 4), 105.

¹⁰⁷ Restitutionary obligations arise in response to a benefit being conferred on the defendant or out of the defendant’s own wrong, which is not the situation here. We are grateful to Owen Lloyd for this point.

¹⁰⁸ *Cressman v Coys of Kensington (Sales) Ltd* [2004] EWCA Civ 47, [2004] 1 WLR 2775 at [28].

¹⁰⁹ (1856) 25 LJ Ex 329. We are grateful to Tatiana Cutts for drawing our attention to this argument.

¹¹⁰ It is for this reason that the courts do not offset benevolent gifts and charitable payments against pecuniary awards for personal injury: *Parry v Cleaver* [1970] AC 1; *Redpath v Belfast and County Down Railway* (1947) NI 167; *Hussain v New Taplow Paper Mill Ltd* [1988] AC 514. They have also refused to offset benefits where the claimant has paid for the benefit, such as individual insurance: *Parry*.

¹¹¹ P. Cane, *Atiyah’s Accidents Compensation And The Law* (5th ed 1993), 323.

¹¹² J. Herring, *Medical Law and Ethics*, 4th edn (Oxford University Press, 2012), 288.

these cases pales in comparison to many other serious instances of negligence: a recent instance of negligence during childbirth resulted in a £27 million settlement.¹¹³ This approach can only be justified if you accept, which we do not, that there is no harm involved in having an unintended child thrust upon you. Indeed this harm is recognised explicitly in the conventional award, which assumes that people have a legitimate right to control their reproduction, and ought to be compensated for the loss of this.

That is not to say that we cannot have sympathy for some of the concerns underpinning those cases. But the appropriate response to such concerns is not to characterise the award of maintenance costs as a ‘windfall’ and to deny any recovery on this basis. In the following section, we therefore turn to how the courts could and should instead deal with such cases in the future.

IV. A ROAD MAP FOR FUTURE CASES

In this section, we navigate a way through the legal mire created in *McFarlane* in a way that takes account of some of moral or policy concerns while also enabling parents to recover the financial costs of raising an unintended child. We demonstrate that even if the law wishes to consider a baby in some sense a good thing, this does not necessitate denying claimants any compensation for the costs its parents incur. Given that the different heads of damage ought to be kept distinct, any set-offs should be made only against those benefits which pertain to *that* head of damage, and so compensation can be awarded for maintenance costs without the court being placed in the invidious position of having to quantify the ‘benefits’ a child brings to their parents to balance them against the financial costs.

1. The Nature of the Parents Claim: Separating out the Losses

As we have seen, one reason the courts concluded as they did on maintenance costs is that they wrongly characterised the claimed loss as the existence of the child itself. Not only was this mistaken, it had the further problematic impact of obscuring the real nature of the claimants’ losses. It is essential that in future cases, courts clearly identify the numerous, distinct losses suffered by these claimants and consider how they might be captured within legally recognised heads of damages.

In part, it is the loss of their ability to make their own reproductive decisions freely. It is also the consequent change in their life circumstances, and the emotional and social impacts, which we argue fall within the law’s concept of ‘lost amenity’. There is the pain and suffering associated with the pregnancy and birth for the woman, which falls under the non-pecuniary loss of pain and suffering. And then there are the financial implications of the birth of the child, which are best understood as economic losses (in our view consequential), fitting under the heading of pecuniary losses. These losses or harms ought to be dealt with separately, with claims under the different heads of damage kept distinct. This is not only usual practice elsewhere in tort and contract, but will also enable courts to calculate an award that properly restores claimants’ financial losses, while capturing other aspects of their loss appropriately.

¹¹³ See Penningtons Manches Cooper, ‘£27 million settlement for cerebral palsy caused by birth injury at London hospital’ <<https://www.penningtonslaw.com/case-studies/27-million-settlement-for-cerebral-palsy-caused-by-birth-injury-at-london-hospital>>.

There are, in fact, many examples pre-*McFarlane* which are instructive of how the courts could approach this. In *Sciuriaga*, Mr Justice Tasker Watkins specifically rejected the defence that no damages could be recovered by reason of public policy, and awarded the claimant damages under four heads: loss of earnings to the date of trial; loss of future earning capacity (due to her caring responsibilities); impaired marriage prospects, and pain and distress (she did not claim for maintenance costs).¹¹⁴ In the Court of Appeal, Lord Justice Stephenson agreed to award damages for pain and suffering, but dealt with these as a separate head of loss to the other awards. A detailed balancing of the realities of her altered marriage prospects was conducted, but no account was taken of her happiness or otherwise at having a child *per se*. This approach was cited with approval in *Emeh*, with Lord Justice Purchas stating that he saw

no reason for the courts to introduce into the perfectly ordinary, straightforward rules of recovery of damages, whether they are damages flowing from a breach of contract or from tort, some qualification to reflect special social positions.¹¹⁵

We also see this approach clearly in the decision of the High Court in *Thake v Maurice*,¹¹⁶ concerning a vasectomy performed negligently and in breach of contract. As in *Sciuriaga*, Mr Justice Peter Pain kept the different heads of damage separate. He made an account of some non-pecuniary benefits which he offset against damages for lost amenity, but did not elide these with maintenance costs. Consequently, he would have awarded damages for distress and discomfort associated with learning of the pregnancy, the pregnancy itself and the birth, but felt that *under this head* the 'joy of the birth of a healthy child' would cancel out these detriments and so made no award. He did, however, make awards for lost earnings and maintenance costs until the child's seventeenth birthday, which he emphasised were 'fully recoverable'. On appeal, the majority felt the matter ought to be dealt with via tort instead.¹¹⁷ However, as in *Emeh* and *Sciuriaga*, the court dealt with the different aspects of the loss under separate heads, albeit the Court of Appeal felt the pain and suffering of pregnancy and birth ought to be recoverable.¹¹⁸

Such an approach is not limited to contractual claims, and in *Allen v Bloomsbury Health Authority* it was taken in a tortious claim following the negligent failure of a health authority to detect the claimant's pregnancy in time for her to have an abortion.¹¹⁹ Having decided that there was no public policy bar to recovery, Mr Justice Brooke followed Lord Justice Purchas's approach in *Emeh* and applied what he considered to be the ordinary rules of recovery.¹²⁰ In his view, the women in such cases 'should be entitled to recover damages for the two quite distinct foreseeable heads of loss':¹²¹ the 'personal injuries during the period leading up to the delivery of the child', and 'the economic loss involved in the expense of losing paid employment and the obligation of having to pay for the upkeep and care of an unwanted child'.¹²² The latter was a 'totally different type of claim', 'quite unassociated with her own physical injury'.¹²³ In accordance with the principles applied in *Thake* and *Emeh*, she was awarded damages for maintenance, lost earnings, pain, suffering and loss of amenity.

¹¹⁴ (1979) 123 SJ 406; (1980) 48 MLR 224.

¹¹⁵ *ibid*, 1056.

¹¹⁶ *Thake* (n 10).

¹¹⁷ The reasons are not relevant to our discussion, and so we do not go into them here.

¹¹⁸ *Thake* (n 10), 683. This will be considered in more detail later in section 1.3 Claiming Lost Amenity.

¹¹⁹ *Allen* (n 10). See also *Benarr* (n 10); *Salih v Enfield Health Authority* [1990] 1 WLR 333; *Gardiner v Mountfield and Lincolnshire Area Health Authority* [1990] 1 MLR 205; *Robinson v Salford Health Authority* [1992] 3 MedLR 270.

¹²⁰ *Allen* (n 10).

¹²¹ *Allen* (n 10), Q57.

¹²² *Allen* (n 10), Q57.

¹²³ *Allen* (n 10), Q57.

Within the latter, Mr Justice Brooke took account of the need to offset the joys and the troubles, but kept this calculus distinct from pain, suffering and financials.¹²⁴

The courts had then, prior to *McFarlane*, approached these claims by applying the ordinary approach to damages, keeping the heads of loss distinct, and offsetting the benefits a child brings only against other non-pecuniary harms, not the financial losses suffered. This enabled them to separate the question of whether a child was, as a matter of principle, something that the law must regard as valuable, from the financial burdens that they undoubtedly bring. Given the difficulty (and likely offense) involved in trying to quantify the parents' dissatisfaction with having a child, some judges, most notably in *Thake*, regarded the benefit of a child as cancelling out the other detriments and thus made no award for lost amenity. In doing so, they avoided any unpalatable declaration that the child was, on balance, more harm than good to its parents (which underpinned the first objection to awarding damages in *Rees* and *ARB*), while still allowing some financial support to the parents. In our view, this approach is correct, and in the section that follows, we consider how the courts *ought* to approach claims for maintenance costs. We then briefly consider set-off in the context of lost amenity claims.

2. Recovering Maintenance Costs

In any negligence claim, the claimant must prove the defendant's breach caused them to suffer some legally recognisable damage.¹²⁵ While pregnancy and childbirth were recognised as physical injuries in *McFarlane*,¹²⁶ the majority regarded maintenance costs as *pure* economic loss, and therefore not recoverable unless the doctor had assumed responsibility for those costs.¹²⁷ In our view, this understanding of the damage is wrong. We agree with Laura Hoyano's analysis that the pre-*McFarlane* decisions were correct in categorising it 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.¹²⁸

The woman's pregnancy should be seen as a personal injury, which flowed from the negligence, and caused her to produce the child. As the later costs of raising the child flow directly from the birth of that child, these economic losses are clearly *consequential* on the negligence, for the woman at least,¹²⁹ and ought therefore to be recoverable.¹³⁰ In calculating the pecuniary losses, the only similar

¹²⁴ *Allen* (n 10), Q56 at [3]–[4].

¹²⁵ This includes physical injury, property damage, consequential economic loss and, sometimes, pure economic or psychiatric injury.

¹²⁶ *McFarlane* (n 4).

¹²⁷ The High Court of Australia has voiced substantial criticism of the approach to loss in the *McFarlane* line of cases. In *Cattanach v Melchior* [2003] HCA 38, Justice Callinan commented that 'All the various touchstones for, and none of the relevant disqualifying conditions against, an award of damages for economic loss are present here'.

¹²⁸ LCH Hoyano, 'Misconceptions about Wrongful Conception' (2002) 65 MLR 882. [PAGE REF]

¹²⁹ The issue is more complex where the claimant is only the man involved in the conception (as in *ARB*) but in *McFarlane* (n 4), *Rees* (n 5) and *Parkinson* (n 16), this was not the case and hence this approach is fundamentally flawed. See, eg, M. Hogg, 'Damages for Pecuniary Loss in Cases of Wrongful Birth' (2010) 1(2) *Journal of European Tort Law* 156, 161; D. Nolan, 'Deconstructing the Duty of Care' (2013) 129 LQR 559, 572–3; J.K. Mason, 'Wrongful pregnancy, wrongful birth and wrongful terminology' (2002) 6(1) *Edinburgh Law Review* 46, 52. Slade LJ had also regarded cost of care as entirely foreseeable in *Emeh*: (1983) *The Times*, 3 January, QBD; [1985] QB 1012, 1025; as did Auld LJ took in *Walkin v South Manchester Health Authority* [1994] 1 WLR 1543, 1549.

¹³⁰ *Allen* (n 10); and also *Benarr* (n 10); *Salih* (n 119); and *Gardiner* (n 119). However even if one does not accept this analysis it is hard to see how a doctor agreeing to perform a sterilization (or advise one's success)

legal interest that might be offset is any economic gains the parents might make from the birth of the child.¹³¹ For example, almost all social security benefits are to be deducted on damages for pecuniary loss.¹³²

In contract, once the court has established that there has been a breach of an express or implied term of the contract (such as the clinic's failure on consent in *ARB*), they ought then to take the ordinary contractual approach of protecting the claimant's expectation interest. In relation to the *pecuniary* losses, this entails a straightforward calculation of what the financial loss would be, subject to rules on remoteness in *Hadley v Baxendale*.¹³³ As we have demonstrated, the two policy arguments made against doing so in *ARB* (the moral unacceptability of conceptualising a child as a financial loss, and the impossibility of accurately calculating the loss given problems with determining the appropriate set off¹³⁴) are both unconvincing and should not preclude an award.

Even if these policy concerns are considered compelling in the tort context, the courts resist overturning or restricting contracts on public policy grounds, and the heads of policy under which they may do so are highly restricted. While a contract which does not involve committing a legal wrong may be unenforceable if 'its tendency is to bring about a state of affairs of which the law disapproves on the grounds of public policy'.¹³⁵ Examples have included agreements in restraint of marriage, contracts promoting sexual immorality, or those interfering with the course of justice. Contracts for fertility, sterilisation or even abortion services are unlikely to fall within this category.

Certainly Peter Pain J explicitly dismissed the idea that policy ought to preclude the award of damages for breach of contract in *Thake*, citing Tasker Watkins J's statement in *Sciuriaga* that he could perceive 'no policy, public or other, why [the claimant] should not recover such damages as she can prove she has sustained by the surgeon's negligent failure or other breach of duty'.¹³⁶ While he acknowledged there was doubt as to 'whether the categories of public policy are now closed', he must, in his view, 'approach this matter with caution', as 'a judge of first instance should hesitate

cannot be said to have assumed responsibility for the costs of raising a child which results from breach, where those losses are an unavoidable (and hence foreseeable) consequence of precisely the event the claimants were trying to avoid by pursuing sterilization. Lady Justice Hale made exactly this point in *Parkinson* (n 16). While in *Goodwill v British Pregnancy Advisory Service* [1996] 1 WLR 1397, the court rejected a claim brought by the partner of a man who had not been advised properly of the risk of spontaneous reversal of a vasectomy, this case is distinguishable. The court considered it vital that that Ms Goodwill was not in a 'known or identifiable' category of partners when the vasectomy was performed; and that there was no 'temporal proximity' between the breach (April 1985), and the damage materializing (November 1989, when the child was born). Clearly, this reasoning would not apply where the victim of the negligence had herself become pregnant, nor in a case such as *McFarlane*, as where a married couple seek treatment together with the express aim of limiting their family size, the wife would have undoubtedly been within the 'known or identifiable' category of partners at the time of the vasectomy. *Goodwill* was also decided prior to the decisions in *White v Jones* [1995] 2 AC 207 (HL) and *Spring v Guardian Assurance plc and Others* [1995] 2 AC 296 (HL) which extended the *Hedley Byrne* principle to include third parties.

¹³¹ Lord Clyde raised this as a 'hypothetical possibility' in *McFarlane*: see [1991] 3 All ER 400 (CA).

¹³² Law Commission, *Damages Personal Injury Collateral Benefits Consultation* [2.71]

¹³³ (1854) 156 ER 145. In determining remoteness, the court will apply the two limbs in *Hadley v Baxendale*, dividing losses into those foreseeable by a reasonable person, and those that could have been foreseen with defendant's actual knowledge.

¹³⁴ *Ibid.*

¹³⁵ E. Peel, *Treitel: The Law of Contract* (14th edition Sweet & Maxwell 2015), 549, citing *McEllistrim's Case* [1919] AC 548, 571.

¹³⁶ (1980) 48 MLR 224, 228–229. He also asserted that 'generally public policy has interfered with a claim for damages for breach of contract only where but for the claimant's prior wrong, he would have suffered no damage from the defendant's breach of contract': [1985] 2 WLR 215.

long before attempting to ride this unruly horse in a new direction'.¹³⁷ While policy considerations might be relevant in some cases, 'to erect them into a rule of public policy applicable to all cases would work great injustice'.¹³⁸ 'Sentiment' must be put aside, with the judge focussing instead on the fact that 'the law relating to damages is concerned with reparation in money terms and this is what is needed for the maintenance of a baby'.¹³⁹ In our view, he was correct. As Susanna Rickard has said of the decision of the Court of Appeal in *ARB* the effect of transposing the policy arguments from tort was that, despite the claimant winning every 'legal point germane to his primary case', the court 'conferred upon the IVF clinic effective impunity from the normal consequences of their breach of contract'.¹⁴⁰

Importantly, allowing such claims does not necessarily entail opening the floodgates to substantial damages claims, burdening the NHS. Firstly, the normal rules of remoteness apply. This might, for example, have precluded recovery of at least some of the more egregious losses claimed for in *ARB*,¹⁴¹ as knowing that *ARB* was a wealthy individual, is unlikely in itself, to amount to the 'special knowledge' required by *Hadley v Baxendale*,¹⁴² that losses might include the cost of E's gap year, car, and attending university abroad.¹⁴³ In tort, remoteness could also restrict the amount of damages, albeit to a lesser extent, as the limit rests on foreseeability of the general type of loss.¹⁴⁴

Secondly, if such awards were deemed excessive, it would be open to Parliament to impose a tariff for maintenance costs, analogous to those seen in personal injury cases. This could be set by reference to the average cost of raising a child in the UK until the age of 21, for example, which in 2016 was calculated as being £231,000.¹⁴⁵ This would avoid fears of crushing awards, but it would also address another concern, that applying the ordinary measure of damage might mean that those from poorer backgrounds receive significantly lower awards than wealthy claimants, who might, for example, be more likely to privately educate their child.¹⁴⁶ A tariff approach also reflects a distinction that could be made between *necessary* costs associated with a child, which are foreseeable and reasonable, and *optional* costs, such as private schooling, which are incurred only as a matter of preference and capacity to afford them; and would avoid the courts having to decide whether a doctor could reasonably have foreseen such 'optional costs', based on perceptions about the patient's socio-economic status.

3. Claiming Non-Pecuniary Losses

Our aim in this paper has been to make the case for reinstating maintenance awards in wrongful conception and birth cases by demonstrating that the application of standard compensatory

¹³⁷ *Thake* (n 136), 230.

¹³⁸ *Thake* (n 136), 232.

¹³⁹ *Thake* (n 136), 230.

¹⁴⁰ S. Rickard (counsel in *ARB*), quoted in 'Time for 'wrongful birth' decisions to be reviewed', *New Law Journal* 13/10/2017, 5.

¹⁴¹ [2017] EWHC 2438 (QB), [325].

¹⁴² (1854) 156 ER 145.

¹⁴³ In *ARB*, Nicola Davies LJ accepted that the losses fell within 'the reasonable contemplation of the parties' (*Baxendale*) and so were recoverable (n7 at [35]). While this is a question of fact to be determined by the trial judge, arguably this concedes too much.

¹⁴⁴ *The Wagon Mound (no. 1)* [1968] AC 388; *Heron II* [1969] 1 AC 350

¹⁴⁵ J Bingham, 'Average cost of raising a child in UK £230,000', *The Telegraph*, 22 January 2015, <<https://www.telegraph.co.uk/news/uknews/11360819/Average-cost-of-raising-a-child-in-UK-230000.html>> (accessed 5th August 2020).

¹⁴⁶ See, eg, *Benarr* (n 10).

principles means the offsetting argument does not hold. However, a necessary corollary of this point is the question of how such offsetting should be done under the heads of non-pecuniary loss. Damages for pain and suffering are already recoverable in tort claims for wrongful conception and birth;¹⁴⁷ and are likely recoverable in contractual claims too, given previous cases permitting recovery for pain and suffering where a breach has caused personal injury.¹⁴⁸ These awards are not reduced by the benefits this pain brings.¹⁴⁹ As Lord Justice Kerr explained in the Court of Appeal in *Thake*, while the joy of having the child could be rightly set-off against the time, trouble and care she would need, the pain and suffering associated with the pregnancy and birth stood ‘on a separate footing’ and it would therefore be ‘wrong to apply this set off to this head of claim as well’.¹⁵⁰ In our view, this approach was correct: damages for pain and suffering ought to be dealt with separately, being of a different ‘kind’ of damage to lost enjoyment.

Much more controversial is whether parents ought to be able to claim compensation for loss of enjoyment or distress as a consequence of having an unintended child. An amenity award is certainly permissible in general terms. In tort, such an award is made, but cannot be claimed as a freestanding head of injury, and so any lost amenity in having a child must be consequent on the mother’s personal injury. In contract meanwhile, lost amenity awards are only made if one of two exceptions applies: either the breach has caused personal injury, physical inconvenience, or discomfort,¹⁵¹ or a significant object of the contract is for enjoyment or the alleviation of distress.¹⁵² In respect of the former, awards have been made for the inconvenience of having to walk four miles in the rain;¹⁵³ and for the inconvenience and mental stress from living in a house during repair,¹⁵⁴ and so pregnancy, childbirth and the consequent demands of a child would seem at least equivalent. Alternatively, it would be feasible to interpret some contracts in relation to fertility as aimed at alleviating distress, such as a contract for the performance of an abortion, or, as in *ARB*, where part of the contract secured control over his reproduction via a consent clause, which meant he could only father a child if he wished to do so.

If the parents do claim for lost amenity, the ‘losses’ to their enjoyment occasioned by the birth of a child ought to be set-off against any benefits they derive from having a child.¹⁵⁵ This leaves the court with two options. They can follow standard principles for non-pecuniary awards and decide on the facts of the case what compensation, on balance, would be ‘fair, just and reasonable’. Or, in a similar vein to *McFarlane*, they can hold that performing any such evaluation would be either impossible, or so deeply distasteful that as a matter of principle no damages should be awarded for lost amenity. Neither approach would undermine our argument that maintenance costs should be dealt with separately and considered recoverable.

¹⁴⁷ Even in *McFarlane*, all of their Lordships, except Lord Millett, agreed that Mrs McFarlane ought to be awarded damages for the pain and suffering of pregnancy and childbirth, with Lord Steyn noting that ‘there is nothing objectionable to allowing such a claim’, which is ‘supported by a great deal of authority worldwide.’: *McFarlane* (n 4), [84]; *Rees* (n 5); *Emeh* (n 11).

¹⁴⁸ See *Hobbs v The London and South Western Railway Co* (1875) LR 10 QB 111.

¹⁴⁹ *McFarlane* (n 4), 87.

¹⁵⁰ *Thake* (n 10), 683.

¹⁵¹ *Hobbs* (n148).

¹⁵² *Jarvis v Swan Tours* [1972] EWCA 8; *Farley v Skinner* [2001] UKHL 49.

¹⁵³ A railway company was required to compensate a family after dropping them at the wrong station: *Hobbs* (n148).

¹⁵⁴ *Watts v Morrow* [1991] 1 WLR 1421.

¹⁵⁵ As McHugh and Gummow JJ commented in *Cattanach v Melchior* [2003] HCA 38 at [90], ‘if the mother claimed damages for “loss of enjoyment of life” as the result of raising the child... it would be correct to set-off against the claim all the benefits derived from having the child’.

It may be that future courts come across situations in which an award for loss of enjoyment is thought appropriate to capture the complex ambivalence the claimants feel in relation to their children,¹⁵⁶ or to capture the wrong suffered in such cases.¹⁵⁷ For a court so minded, there is precedent in case law. In both *Rand*¹⁵⁸ and *McLelland*,¹⁵⁹ for example, the consequences for the parents of having disabled children were accounted for in the award, albeit that when calculating lost amenity awards, the English courts take a ‘diminution of value’ approach, which in tort places an objective value on the claimant’s loss, and does not seek to measure the claimant’s *subjective* experience of their situation and how they feel about it.¹⁶⁰

However accepting that a child inevitably involves a balance of benefits and burdens — as almost all parents would — is quite a different matter from attempting to quantify those benefits and burdens, and weigh them against one another to determine a fair and just evaluation of the resulting impact on amenity. In both *McFarlane* and *Rees*, the difficulties involved in making such a calculation were rightly stressed, and we have considerable sympathy for Lord Millett’s observation that placing a monetary value on the amenity loss caused by the birth of a child would be ‘as difficult and unrealistic as it is distasteful’;¹⁶¹ as some of the evidence given in *ARB* exemplifies. Conducting such a balancing exercise might also cause harm the child later if he or she learns their parents argued in court that their very existence had made their lives worse,¹⁶² and it may even be harmful to claimants themselves. As Sofia Yakren’s work shows, in making such claims, parents are put ‘in the excruciating position of having to emphasize the “hate” part of [their parental] ambivalence even in the face of an inviolable “love” for [their] child’.¹⁶³ It is notable that damages for lost amenity have not been claimed in any recent cases; and we would be sympathetic to a court wishing to preclude such claims in the future.

These arguments for refusing lost amenity claims translate less easily into contractual situations because through contractual undertakings, parties *do* assign value to certain outcomes, and the law, in upholding the bargain they have made, respects the subjective value they have placed on it. Far from the birth of a child being an ‘objective’ good which the law cannot rightly view as a ‘loss’, through contract, the law empowers them to say that a certain event is something they do not want, and to define the amount of the loss in the event that it materialises. Nowhere is this more clear than in contracts for enjoyment or the alleviation of distress, which as we have explained might capture some contracts relating to reproduction. In *Jarvis v Swan Tours Ltd* for example, Mr Jarvis was permitted to consider having an entire resort to himself in the Swiss mountains a ‘grave

¹⁵⁶ Sofia Yakren demonstrates from her empirical work on such claims that parents placed in this position do not, in fact, come to experience simple happiness at the blessing bestowed upon them, but a complex interaction between joy and sadness, love and hate: S. Yakren, “Wrongful Birth” Claims and the Paradox for Parenting a Child with a Disability’ (2018) 87 *Fordham Law Review* 583, 610.

¹⁵⁷ This would take account of the point made by Dov Fox that coming to love the child also does negate the possibility that the claimant’s life would have been better had the negligence been avoided, and so an award might be reasonable: D. Fox, *Birth Rights and Wrongs: How Medicine and Technology are Remaking Reproduction and the Law* (Oxford University Press, 2019), 116.

¹⁵⁸ *Rand & Rand v East Dorset Health Authority* [2001] PIQR Q1.

¹⁵⁹ *McLelland & McLelland v Greater Glasgow Health Board* [2001] SLT 446 at [8]-[12].

¹⁶⁰ This approach was taken in *Wise v Kaye* in relation to lost amenity damages awarded to a claimant who was permanently unconscious and therefore not cognisant of their situation: [1962] 1 QB 638. It was confirmed by the House of Lords in *West v Shephard*: [1964] AC 326. This means that damages may still fail to adequately capture the subjective impact of the negligence on the claimant in these cases.

¹⁶¹ *McFarlane* (n 4).

¹⁶² See, e.g. *Udale* (n 10) per Jupp J; P. Šustek and M. Šolc, ‘Court Decisions in Wrongful Birth Cases As Possible Discrimination Against the Child’ (2017) 18(1) *Espaço Jurídico Journal of Law* [EJL] 31.

¹⁶³ Yakren has explored how emotional distress damages could and should form part of the award for unintended conceptions and births: S. Yakren (n156).

disappointment’, because the law allows people to contract for non-pecuniary benefits and entitles them to compensation when their expectations are not met.¹⁶⁴

In *ARB*, the claimant contracted with the clinic to the effect that unless he gave his written consent, an embryo would not be implanted. In doing so, he defined what he would consider to be a detriment: namely, a loss of control over whether, and when, he had a child. In reliance on this, he chose not to have the embryos destroyed. It is therefore difficult to see why then, the law would not respect his subjective valuation of outcomes, just as they did in *Jarvis*. This point might be made even more strongly in relation to negligent sterilisation operations, where the very purpose of the contract is to secure a certain outcome, namely an inability to conceive. Where a breach causes the event to materialise that the claimant explicitly sought to avoid, it is difficult to see why this should not be regarded as a loss to them subjectively, yet owning a large country house, complete with ‘croquet lawn, tennis court, orchard, paddock and swimming pool,’ could be constructed thus in *Farley v Skinner*.¹⁶⁵ Indeed in *McFarlane*, Lord Slynn expressly raised the possibility that parties might use contract to protect their reproductive autonomy.¹⁶⁶ Even in *ARB*, the judges left open the possibility that the position may have been different if there had been a liquidated damages clause in the contract.¹⁶⁷

Notwithstanding this, courts have limited damages for lost amenity in past contractual cases. In *Sciuriaga v Powell*, Tasker Watkins J allowed only a ‘modest’ claim for lost amenity as the ‘very miserable time’ she had had was offset by ‘the happiness motherhood has obviously brought to the claimant’.¹⁶⁸ In *Thake*, the joys and trouble children bring were deemed to be ‘virtually impossible to assess in terms of money’ and it was ‘therefore right that in law should be treated as cancelling each other out’.¹⁶⁹ Should a future court wish to avoid the unseemly exercise of valuing a child’s impact, therefore, these cases might act as a framework, accommodating some of the moral concerns raised in *McFarlane* and *Rees* without allowing this to ‘taint’ the parents claim to maintenance costs.

V. CONCLUSION

In this paper, we have sought to demonstrate why neither of the two ‘core’ policy objections accepted in *Rees* and *ARB* can justify the current failure to compensate parents for the costs of raising a child born as a result of negligence. The view that damages should not be awarded because the joys of having a child cannot be weighed against the costs they entail is both doctrinally incoherent, and it wrongly characterises the nature of the harm in these cases as being the child itself, and not the financial burden they create for their parents.

These problems can be avoided by simply applying the standard principles of recovery. By keeping the different heads of losses distinct, and only off-setting the damages against benefits of a similar ‘kind’, the courts can capture the harms actually claimed in these cases by awarding damages for

¹⁶⁴ *Jarvis* (n152). See also *Farley* (n152).

¹⁶⁵ *Farley* (n152) at [2]. This is precisely the point Carol Sanger makes when she says that ‘disappointed plaintiffs ... are distressed that they didn’t get what they bargained and paid for—competent medical treatment—toward a reproductive goal. To veer back toward contracts, they wanted their expectations to be met...’: C. Sanger. ‘The Lop-sides Harms of Reproductive Negligence’ (2017) *Columbia Law Review Online* 29, 36-38.

¹⁶⁶ *McFarlane* (n 4), 76.

¹⁶⁷ *ARB* (n 6) at [36].

¹⁶⁸ [1979] 5 WLUK 154.

¹⁶⁹ *Thake* (n 10). Lady Justice Hale’s ‘deemed equilibrium’ theory in *Parkinson* might also be understood as a variant of this approach: *Parkinson* (n 16) at [90].

maintenance costs, without having to take a moral position on whether or not the birth of a child ought to be conceived as a damage or not. Any consideration of this latter question would only arise when considering whether the mother ought to be compensated for lost amenity and it is open for the court here to regard the 'joy of the birth of a healthy child' as cancelling out all other detriments to the mother's amenity, as they did in *Thake v Maurice*. Such an approach would more accurately reflect the nature of the parents' claim in these cases, and allow the financial burdens placed upon them to be removed without putting the courts in the invidious position of having to declare the birth of *any* child something to be lamented as a harm to allow compensation to be awarded.