CLAIMING IN CONTRACT FOR WRONGFUL CONCEPTION

The English courts' position on compensation for the costs of raising "unwanted" children has remained static for 15 years, despite being widely criticised. *ARB v IVF Hammersmith and R* [2018] EWCA Civ 2803; [2019] 2 W.L.R. 1094 provided a welcome opportunity to review this controversial area of law. However, rather than using the contractual dimension of that case to strike out from the law's approach to negligence claims, the Court of Appeal transposed it uncritically into contract law, affirming that whether a wrongful conception claim is brought in negligence or for breach of contract, the costs of raising the child are not recoverable. Regrettably, the Supreme Court refused permission to appeal, since it raised no point of law that demanded consideration at present. However it did not deny that the points of law raised were arguable or of general public importance.

In 2008, the claimant (ARB) and his partner (R) underwent fertility treatment at the defendant clinic, IVF Hammersmith, resulting in the birth of their first child. As part thereof, both parties consented to the freezing of further embryos, and signed agreements annually to store them. On 5 March 2010, the couple returned to the clinic for advice on further treatment. R then returned for further appointments without ARB in April, May and October 2010, at some point being given a "Consent to Thawing of Embryos" form requiring the signature of both parties. Unbeknown to the clinic, during this time, the relationship broke down and by July 2010 the couple had separated. Some time later, R returned the form, dated 20 October 2010 and purportedly signed by both herself and ARB. Accordingly, an embryo was implanted in R's womb, resulting in the birth of a second child, E. On the evidence, Jay J. [2017] EWHC 2438 (QB); [2018] 2 W.L.R. 1223 found that the signature had been forged, and that ARB would not have consented to the thawing and use of frozen embryos. Accordingly, ARB argued that the clinic had breached an express or implied term of its contract that it would secure his signed written consent to the thawing and implantation of embryos. Alternatively, it had breached an express or implied term to take reasonable care in obtaining such consent. He sought seven-figure damages for the costs of her upbringing, including "private education, a gap year, university abroad, [and] a generous wedding" (see at [325]). The clinic sued R for the tort of deceit, seeking an indemnity under CPR Pt 20.

Both Jay J. and the Court of Appeal approached the situation first as a matter of contractual interpretation. The crucial document was the "Agreement for Cryopreservation of Embryos" which ARB and R had signed before undergoing their original fertility treatment. Clause 1(a) stated that ARB and R "understand" that they "must both give written consent before any

embryos are thawed and replaced". Jay J. held that this imposed a strict duty on the clinic not to thaw or replace an embryo without written consent of both parties, and further that neither party would be entitled to object if the clinic refused to thaw or implant an embryo without the other's written consent ([2018] 2 W.L.R. 1223 at [262]). The Court of Appeal approved this analysis. It followed that, as ARB's signature had been forged, it did not represent valid written consent, and so the clinic had breached its contractual obligation.

Both courts rejected the clinic's argument that the term created no more than a duty to take reasonable care to obtain consent. Jay J. dismissed the argument, based on *Thake v Maurice* [1986] Q.B. 644; [1986] 1 All E.R. 497, that courts rarely construe clauses of this kind as amounting to guarantees, since professionals do not usually undertake obligations involving strict liability. In that case, the success of a vasectomy could not be the subject of a binding contractual promise because the outcome was necessarily affected by the "vagaries of science", as any reasonable person would have understood. Obtaining written consent, however, is a promise not contingent on other factors, and a reasonable person would understand such a clause to mean that written consent would, in fact, be obtained. The Court of Appeal concurred: there is no general rule that professionals' obligations are always limited to taking reasonable care, rather their interpretation will depend on the particular facts. This approach is clearly correct. The courts should be slow to "read down" an apparently strict contractual requirement for both parents to consent to implantation of an embryo, given the very serious risk—a lifetime of unwilling parenthood—against which the term aims to protect.

Given these findings, the question of whether there was also a duty to take reasonable care to secure written consent was not essential to the outcome of the case. Nonetheless, Jay J. found that the clinic did owe an implied obligation to comply with its licence conditions and/or the terms of the Human Embryology and Fertilisation Act 1990 (as amended) ([2018] 2 W.L.R. 1223 at [238] and [266]), which required reasonable care in obtaining written consent (at [246] and [162]). The Court of Appeal agreed, though it diverged on the question of whether or not IVF Hammersmith had breached this duty. Jay J. held that it was not in breach: many other clinics operated similar policies, it was not uncommon for male partners not to attend appointments, and the clinic was entitled to believe the forms had been filled in accurately. This was subject to one concern: that the policy was "illogical" in providing that "if both partners were present, their signatures should be witnessed, but if one partner was not present, this need not happen" even if the partner had not attended *any* clinic appointments ([2018] 2 W.L.R. 1223 at [283]). In the Court of Appeal, the appellants argued that, if the

clinic's policy was "illogical", it could not withstand logical analysis in the way demanded by *Bolitho v City and Hackney Health Authority* [1998] A.C. 232; [1997] 4 All E.R. 771. The clinic was effectively delegating the responsibility for obtaining the signature to the attending partner, with the result that "in precisely those circumstances where forgery was most likely, the safeguards for obtaining written consent were significantly reduced" ([2019] 2 W.L.R. 1094 at [58] per Nicola Davies L.J.). Therefore, the clinic's practice "was neither reasonable nor responsible" (at [59]). Given the profound implications of thrusting parenthood on someone without their consent, it is right, in our view, to impose the high standard of care envisaged, particularly in light of *Montgomery v Lanarkshire Health Board* [2015] UKSC 11; [2015] 1 A.C. 1430.

ARB therefore had a cause of action against IVF Hammersmith. The final issue was whether the policy objections raised against tortious claims for wrongful conception might apply also to:

> "contractual claims founded on strict obligations in circumstances where the parties have not sought to quantify or liquidate the damages payable in the event of breach" ([2018] 2 W.L.R. 1223 at [317]).

Jay J. (at [293]) found the reasoning and conclusions of the judges in *McFarlane v Tayside Health Board* [2000] 2 A.C. 59; [1999] 4 All E.R. 961 to be tied specifically to the tort of negligence, since the majority there were concerned with whether it was fair and just to impose a duty of care on a doctor, a concern irrelevant where a strict obligation derives from an express contractual term. While the ratio in *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52; [2004] 1 A.C. 309 was also limited to tort claims, he nonetheless felt that the legal policy underpinning it could apply to a contractual claim if there was "equivalence or congruence" between it and a hypothetical tort claim (at [305]). In this case, both courts agreed that the measure of damages should mirror that available in tort. Absent a liquidated damages clause, the clinic's obligation was "a secondary obligation arising by implication of the common law" (see [2019] 2 W.L.R. 1094 at [36]), and that common law included the legal policy that applied in *McFarlane* and *Rees* to prevent the recoverability of damages, due to (see [2018] 2 W.L.R. 1223 at [319]):

(i) the moral discomfort at regarding a child as a financial liability;
(ii) the impossibility of calculating that financial liability given the benefits and burdens of bringing up a healthy child;

(iii) the refusal to offset the benefits that accrue from parenthood against additional financial liabilities (and moral concerns about the unacceptability of doing so); and

(iv) that it is not fair, just and reasonable to allow this sort of claim.

Both considered that most of these objections applied to strict contractual obligations as much as in tort, notwithstanding the fact that the majority of judgments in *McFarlane* concerned whether it would be "fair, just and reasonable" to impose a duty of care on doctors in respect of the parents' economic loss, which ought to be irrelevant where, as in *ARB*, the duty is not being imposed on the parties by law, but is a strict and express term of a contract voluntarily agreed between them. Some judgments are particularly difficult to apply to *ARB*. For example, Lord Steyn in *McFarlane* opposed liability on the grounds of distributive justice: it was not fair, just and reasonable for NHS funds to pay for the costs of raising a healthy child. Clearly this is not in and of itself persuasive where, as here, the defendant is a private clinic.

More broadly, this approach assumes that tort and contract are normatively so similar that legal policy can simply be transposed across. The very purpose of contracts is to let the parties allocate risk and assign a value to performance. The legal policy identified is based partly on the view that the birth of a child cannot be considered detrimental in law, with Lord Millett stating in *McFarlane* that:

> "if the law regards an event as beneficial, plaintiffs cannot make it a matter for compensation merely by saying that it is an event they did not want to happen" ([2000] 2 A.C. 59 at 112).

Yet this is precisely what contract law permits parties to do—agree the value of outcomes, albeit within legal limits, including public policy concerns. The courts will refuse to enforce, for example, where a liquidated damages clause amounts to a penalty, or where a contract promotes an immoral purpose, but these limits are considered exceptional, with the dominant principle being *pacta sunt servanda*—contracts should be enforced. The contract empowered ARB to regard it as wrong if IVF Hammersmith implanted one of his embryos without his written consent. Lord Slynn even contemplated using contract in this way in *McFarlane*, noting that "if a client wants to be able to recover such costs he or she must do so by an appropriate contract" (at 76). There is nothing to suggest that he meant here only contracts containing a liquidated damages clause. ARB was free to include one, defining the loss in the

event of breach. As this would not fall under any of the established public policy grounds speaking against enforcement, it would be difficult to justify setting it aside.

While the damages sought in this case were extortionate, this could have been moderated by the ordinary remoteness rules encapsulated in *Hadley v Baxendale* (1854) 9 Ex. 341; 156 E.R. 145. Despite Nicola Davies L.J. conceding that "the tests of causation and foreseeability [were] met" and so the losses were "within the reasonable contemplation of the parties" ([2019] 2 W.L.R. 1094 at [35]), arguably the cost of a gap year, a car, and a generous wedding, may all be challenged as being a different "type" of loss from "necessaries" such as food and clothing. Clinics are also free to impose limits on the damages payable in the event of breach.

The Court of Appeal also took the view that it would be fundamentally unfair if NHS patients (who can claim only in tort) could not recover damages in such situations, but those who had contracted for IVF services could. But where someone opts to pay for a service, giving something up in order to gain certain benefits under a contract, it is hard to see why they should be denied a remedy in the event that the other party fails to fulfil their undertaking. It is entirely justifiable to treat parties who have contracted differently, because they bargained to secure themselves rights which another has not. This is even more clearly so if a liquidated damages clause has been included. Therefore, even if the legal policy were apt for tort, it is not for contract.

Even were this not the case, Lord Millett's pronouncement in *McFarlane* that the birth of a child should not be considered detrimental by the law misconceives what the damage in actions of this kind is. As Kirby J. rightly pointed in *CES v Superclinics* (1995) 38 N.S.W.L.R. 47 at [75] (decided prior to *McFarlane*):

> "[I]t was not the child as revealed which was unwanted. Nor is the child's existence the *damage* in the action. 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."

Even ARB, who manifestly did not want a child with his former partner, claimed only for the financial losses sustained and not for any "lost amenity" due to her birth—a distinct head of loss which is, as discussed below, dealt with separately in contract law. That he, and other similarly positioned claimants, may come to love their child does not alter the fact that they did not choose to incur the financial implications of having a child. Further, even if one accepts Lord Millett's point that having a child is an objectively good thing, whether intended

or not, the chances of a happy outcome for parents and child will be increased by removing a source of stress—the financial burden—that might otherwise exacerbate an already difficult situation. It should also not be forgotten, though it is often downplayed in the cases, that the claimants are in this position and incurring this loss, in consequence of someone else's wrong: in *ARB*, consent procedures that were manifestly unsatisfactory.

The second point underpinning the legal policy is that, even if we can countenance that a child is a detriment financially, children bring such benefits that it is impossible to disentangle these from the detriments they bring. As Lord Millett put it in *McFarlane*, "the advantages and disadvantages of parenthood are inextricably bound together", and so just as "[n]ature herself does not permit parents to enjoy the advantages and dispense with the disadvantages", nor must the law ([2000] 2 A.C. 59 at 114). This is hard to sustain in light of *Parkinson v St James and Seacroft University Hospital NHS Trust* [2002] Q.B. 266; [2001] 3 All E.R. 97, in which the Court of Appeal demonstrably regarded themselves as able to "disentangle" the benefits of a disabled child from the costs involved in raising one.

Some of the *McFarlane* and *Rees* judgments include a variation of this point, approved in *ARB*, that even if a wrongfully-conceived child is in some sense a harm, any compensation for that harm would have to be reduced by the amount of benefit the parents derive from his or her birth. The account would, as Lord Scott explained in *Rees*, be "incomplete without anything to represent the value of what was being acquired by the expenditure" ([2004] 1 A.C. 309 at [138]). Yet as Lord Clyde asserted in *McFarlane*, the law does not conduct such set-off calculations in other contexts, remarking ([2000] 2 A.C. 59 at 103) that

> "the loss sustained by a mineworker who is rendered no longer fit for work underground [is not] offset by the pleasure and benefit he may enjoy in the open air of a public park."

Lord McCluskey and Lord Cullen took similar views in the Scottish Court of Session in *McFarlane*, as did Lord Toulson in *Lee v Taunton & Somerset NHS* [2001] 1 F.L.R. 419. While the other judges in both *McFarlane* and *Rees* did not share Lord Clyde's perspective, no authority was cited for either of the two positions. Some detailed exploration of Lord Clyde's view by the Supreme Court would therefore be welcome: of whether such a set-off should be undertaken, and if so, how the courts should undertake it. Even if Lord Clyde is wrong, it is not legitimate simply to assume that the benefits are so great or so incommensurable as to outweigh the detriments and to conclude that no compensation can be made.

This is especially so given that, in previous contractual claims for wrongful conception (none of them referred to in *ARB*), including *Thake v Maurice* [1986] Q.B. 644 and *Sciuriaga v Powell* (1979) 123 S.J. 406, the courts have, when determining quantum, kept different heads of damage (pecuniary and non-pecuniary) distinct. They have not, so to speak, subtracted apples from pears, by reducing pecuniary damages by the value of any non-pecuniary damages. Instead, they have balanced out the damages under each head of loss, with non-pecuniary losses–pain, suffering and lost amenity–dealt with separately. The House of Lords in *McFarlane* and in *Rees* should similarly have kept these heads of damage distinct (as they generally are in questions of damages in contract and tort) rather than eliding them, with any offsetting of the non-pecuniary joys brought by children coming under the head of loss of amenity. In reality, the parents in *McFarlane, Rees* and *ARB* were not claiming for lost amenity (only the *pecuniary* losses suffered), so this would have been unnecessary. However doing so would have had the added benefit of more accurately reflecting the claimants actual complaint—the financial burden, not the existence of the child per se—and avoided the need even to consider the offensive conclusion that an award for financial losses entailed regarding the child as more trouble that he or she was worth. The decision in *ARB* and the Supreme Court's refusal to hear an appeal are disappointing. The Court of Appeal had an opportunity to re-evaluate this area of law, but, rather than critically appraising the poorly-justified decisions in *McFarlane* and *Rees*, it extended them, unquestioned, into contract, without sensitivity to the normative differences between contract and tort.

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