

ANALYSIS OF COMMON LAW JUDGMENTS IN REGARDS OF “WRONGFUL BIRTH” CASES

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ABSTRACT: This article gives a detailed report about the changes in tort law concerning “Wrongful Birth” cases established by the House of Lords. With their first decision concerning the vexed issue of “Wrongful Birth”, the House of Lords in *McFarlane v Tayside Health Board* in 1999 took into account the high moral and social complexity of the issue and abandoned ordinary tort law principles for these cases. Nevertheless, the House of Lords failed to deliver a clear and sound precedent with *McFarlane*. Due to the complicated nature of the matter, the judgment consists of five different approaches to justify the decision. The article observes the impact of this incoherent precedent on subsequent decisions. It raises the question of whether matters of such a high social and moral impact actually can be handled satisfactorily by the judiciary, or whether these matters would be better left to the legislature.

I INTRODUCTION

This paper examines the development of the common law in the area of “wrongful birth”¹ claims. These are claims of parents who argue that but for the negligence of, for example a genetic counsellor advising on a diagnostic test or a surgeon carrying out a vasectomy or a sterilisation procedure, no child would have been conceived and born, and thus no child to rear and support financially.² “Wrongful birth” or “unplanned pregnancy” cases have appeared in many different combinations: be it the birth of a healthy child or a disabled child from healthy or disabled parents. The cause could be a negligently performed sterilisation or vasectomy, negligently performed termination of a pregnancy, or negligent advice about the risk of failure of sterilisation or vasectomy, ad so on. All these cases pose the same question: should the law allow recovery of damages in the case of the birth of an unplanned child resulting from negligent medical treatment or advice?³ This question is not only a juridical problem but also a moral and social one. On the one hand, the general public regards the birth of a healthy child as a “blessing” and not an event that should be compensated.⁴ On the other hand there is the parents’ right to determine the size of their family. Furthermore, the economic reality that raising a child is expensive has to be taken into account.⁵

The different common law jurisdictions have a broad range of competing approaches to the issue.⁶ Some deny any award of damages; others point out the compensating benefit arising from parenthood, which from their point of view outweighs the costs of bringing up the child.

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¹ A distinction has to be made between “wrongful birth” and “wrongful life” cases, the latter dealing with the claims of disabled children for damages arising for them out of the fact of their birth.

² Anne Morris and Severin Saintier “To be or not to be: Is that the question? Wrongful life and misconceptions” (2003) 11 Med LR 167.

³ Eleanor J. Russell “Is parenthood an ‘unblemished blessing’ in every case” (1998) 25 SLTA 191, 191

⁴ Penny Booth “A child is a blessing – heavily in disguise, right?” (2001) NLJ 151, 1738.

⁵ Russell, supra n 3.

⁶ Michael A Jones “Bringing up baby” (2001) 9 (1) Tort Law Review 14.

They only grant the mother recovery for the consequences of the pregnancy and birth.⁷ Finally there is the option of full recovery. Based on the application of ordinary tort law principles, this was the approach favoured by the English courts for over ten years.⁸

This position was changed significantly by the decision of the House of Lords in *McFarlane v Tayside Health Board*⁹ in 1999, which held that, where a healthy child is born due to negligence, the costs of raising the child are not recoverable.¹⁰ *McFarlane* was the first decision of the “wrongful birth” cases to come before the House of Lords and the decision established new principles for these cases by abandoning the ordinary principles of tort law on which the lower courts had earlier relied. Interestingly, although the Lords unanimously agreed that no recovery was possible, they all came to this conclusion by different approaches. The fact that all five Law Lords delivered speeches makes it difficult to determine the actual reasoning of the House of Lords - further proof of the complexity of the issue.¹¹

There have subsequently been two other decisions which show how far the *McFarlane* decision and its principles actually reach. In *Parkinson v St. James Seacroft University Hospital NHS Trust*,¹² which was decided about two years after *McFarlane*, a disabled child was born after a failed sterilisation of the mother. She was permitted recovery for the extra costs of maintaining a disabled child by the Court of Appeal. In *Rees v Darlington Memorial Hospital NHS Trust*¹³ the House of Lords ruled in a four to three majority decision that neither the extra costs related to the disability of the mother nor the general costs for raising the healthy child should be reimbursed. Instead a so-called “conventional award” of £15,000 was granted. It was not meant to be compensatory, but was described by the majority as recognition of the legal wrong done to the plaintiff. Thus, it was criticized by scholars and the minority of the House of Lords because it created a new head of damages while not clarifying a decisional approach to the difficult social issues arising in “wrongful birth” cases. Moreover, it raised important questions about judicial reasoning, the role of a final appeal court and which tasks may better be left to Parliament as the legislative power.¹⁴

The purpose of this paper is to analyse *McFarlane* and the principles used in the decision by the House of Lords. Part II deals with the decision and the reasoning of the five speeches of their Lordships in *McFarlane*. Part III examines how the Court of Appeal dealt with *McFarlane* in the subsequent *Parkinson* case. Part IV analyses how the “*McFarlane* principles” were used by the House of Lords in *Rees*. Part V then gives a summary of what can be concluded from these authorities.

II *McFarlane v Tayside Health Board* [1999] 3 WLR 1301 (HL)

A. *The jurisprudence prior to McFarlane*

Prior to *McFarlane v Tayside Health Board* the judicial approach to “wrongful birth” cases seemed to be fixed for over 14 years. Damages were awarded whether negligence led to the

⁷ Jones, supra n 6, 14–15.

⁸ Joanna Manning “Health Care Law Part 1. Common Law Developments” (2004) 1 NZLR 181, 181-182.

⁹ *McFarlane v Tayside Health Board* (HL) [2000] 2 AC 59 (“*McFarlane*”).

¹⁰ Adrian Palmer “Failed sterilization cases after *McFarlane v Tayside Health Board*” (2000) JPIL 1, 51, 51.

¹¹ Charles Foster “Wrongful birth: new right from the north” (2000) SJ 144 (2), 38, 38.

¹² *Parkinson v. St. James and Seacroft University Hospital NHS Trust* [2002] QB 266 (“*Parkinson*”).

¹³ *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309 (“*Rees*”).

¹⁴ Peter Cane “Another failed sterilisation” (2004) LQR 120, 189.

birth of a healthy child, as decided by the Court of Appeal in *Thake v Maurice*,¹⁵ or the birth of a disabled child, as decided by the Court of Appeal in *Emeh v Kensington and Chelsea and Westminster Area Health Authority*.¹⁶ As such, prior to *McFarlane*, litigation in “wrongful birth” cases was based on the ordinary tort law principle of liability in negligence, leading to compensation for all physical and financial consequences of the pregnancy, once it was established that the pregnancy had been wrongfully caused.¹⁷ The recovery permitted in some cases even included costs for private education.¹⁸ Presumably the chance of substantial awards was one reason for the rising number of claims made in this area, most of them at the expense of the limited resources of the National Health Service (NHS).¹⁹

B. The McFarlane Case

In *McFarlane* the father of the “wrongfully born” child, Mr George McFarlane, underwent a vasectomy operation with the agreement of his wife. The McFarlanes already had four children and did not wish to have any more. They considered their family complete. Some months after the vasectomy, Mr McFarlane was negligently advised that contraceptive precautions were no longer necessary. Mr and Mrs McFarlane relied on this advice and Mrs McFarlane became pregnant. She gave birth to a healthy child whom the parents welcomed, loved and accepted as an integral part of their family.

The McFarlanes sued the health board responsible for the negligent advice. They made a claim for damages for the financial costs of raising the child. The mother claimed damages for the physical discomfort caused by pregnancy and birth. Both claims were rejected at first instance by the Lord Ordinary (Lord Gill) of the Outer House,²⁰ who decided not to follow the English line of authorities permitting recovery.²¹ He denied the mother’s claim, arguing that pregnancy does not match the definition of physical injury. Rather it is a “natural process resulting in a happy outcome. [...] the natural sequelae of conception and that is an event that in this case can hardly be considered as a physical injury *per se*”.²² The claim concerning the financial consequences of the child’s birth was rejected, as the benefits of parenthood transcended the financial loss suffered by the McFarlanes and so the couple would not be in an overall position of loss.²³ This decision was reversed by the Court of Appeal,²⁴ based on the reasoning found in earlier English decisions.²⁵ Relying on *conventional negligence*

¹⁵ *Thake v Maurice* CA [1986] QB 644.

¹⁶ *Emeh v Kensington and Chelsea and Westminster Area Health Authority* [1985] 1 QB 1012.

¹⁷ Richard Meeran “Clinical negligence – Failed sterilisation – Disabled unwanted child – Wrongful birth” (2001) JPIL 3, 313.

¹⁸ See, eg, the High Court’s decision in *Allen v Bloomsbury Health Authority* [1993] 1 All ER 651.

¹⁹ Palmer, supra n 10, 5.

²⁰ *McFarlane v Tayside Health Board* (Outer House) [1997] SLT 211.

²¹ Margaret Bickford-Smith “Failed Sterilisation resulting in the birth of a disabled child: the issues” (2001) JPI L 4, 404, 406. The Courts of first instance in Scotland, England and Wales belong to three different hierarchies, so that decisions from the other hierarchy are not binding for them. By contrast, the apex of the hierarchy of Scottish Civil Courts is the House of Lords, as well as for the civil courts of England and Wales. This raises the question of whether a House of Lords decision on Appeal from one jurisdiction binds courts of the other jurisdictions and itself as the apex of the hierarchy of these other jurisdictions. In *McFarlane* their Lordships left no doubts concerning this question - that the decision was also binding on English and Welsh Courts - as two of the Law Lords expressly stated so; see Lord Slynn in *McFarlane*, supra n 9, 68; Lord Steyn, supra n 9, 77, 78.

²² *McFarlane* (CA), supra n 20, 214.

²³ Russell, supra n 3, 193.

²⁴ *McFarlane v Tayside Health Board* (IH (2 Div) [1998] SLT 307.

²⁵ Bickford-Smith, supra n 21.

principles the court did not see any grounds on which the *prima facie* liability of the health board could be denied.²⁶ The Inner House held that Mrs McFarlane was entitled to damages for the physical consequences of pregnancy and birth, provided that negligence was proven. The parents' claim for patrimonial loss was also approved. The court held that unplanned conception is an infringement of the parent's right to family planning and thus was a foreseeable *damnum* for which the defendants are liable under the law of negligence. This includes the reimbursement for the costs of raising the unplanned child.²⁷

C. McFarlane at the House of Lords

The decision of the House of Lords in *McFarlane* can be analysed in terms of the mother's claim and the claim for childrearing costs.

In respect of the mother's claim, the House of Lords dismissed the appeal (Lord Millett dissenting). The House ruled that, as the negligent advice to her husband was the cause of Mrs McFarlane's conception, she was entitled to general damages for the pains associated with pregnancy and childbirth, as well as special damages for the accompanying extra medical expenses, loss of earnings and clothing.²⁸

The appeal in respect of the parents claim for recovery for the child-rearing costs on the other hand was allowed. Though this was a unanimous decision the arguments brought by the five Law Lords varied greatly.

1. *The different arguments of the Lords concerning the claim for childrearing costs*

As their Lordships all reached the same conclusion, but did so by five rather different speeches, the respective argument of each Law Lord will be presented and examined.

(a) *Lord Slynn: It has to be "fair, just or reasonable" to impose a liability.*

Lord Slynn of Hadley presented the arguments brought by the Lord Ordinary as well as the arguments brought on appeal by the Scottish Courts of Session. He also referred to earlier cases in England and Scotland. Furthermore he gave summaries of non-binding precedent cases from the United States, the Commonwealth and other European States. With this summary he merely intended to illustrate the enormous variety of possibilities to approach the problem as the matter of "wrongful birth" has not been at the House of Lords before.²⁹

His main argument rejecting the claim was that the link between the negligent act and the damage should be a closer one than the mere foreseeability. Furthermore he based his decision on the "fair, just and reasonable" test established in *Caparo Industries Plc. v Dickman*.³⁰ The *Caparo* test held that liability should not just depend upon foreseeability but should also

²⁶ See Lord Steyn in *McFarlane*, supra n 9, 78.

²⁷ *McFarlane*, supra n 24.

²⁸ *McFarlane*, supra n 9, 59-60. The paper will focus on the claim for childrearing costs and how the different judgments deal with that, as the mother's claim is not as controversially discussed as the claim for childrearing costs.

²⁹ *Ibid*, 73.

³⁰ *Caparo Industries Plc. v Dickman* (HL) [1990] 2 AC 605 ("*Caparo*").

depend on the question as to whether it is “fair, just or reasonable” for the law to impose a duty of care.³¹ He then concluded that³²

it is not fair, just or reasonable to impose on the doctor or his employer liability for the consequential responsibilities, imposed on or accepted by the parents to bring up a child. The doctor does not assume responsibility for those economic losses.

Lord Slynn also emphasised that his decision was not a result of “public policy” but “comes from the inherent limitation of liability relied on”.³³

(b) *Lord Steyn: The principle of distributive justice*

Lord Steyn also gave a summary of related cases from lower courts and other jurisdictions. He concluded that in cases where full compensation for the financial consequences of the birth of a healthy child is granted, “it may be that the major theme in such cases that one is simply dealing with an ordinary tort case in which there are no factors negating liability in delict.”³⁴ In cases where such a reward was not allowed, he assumed the holding to be based on considerations of corrective justice.³⁵ But he also pointed out that in the majority of the compared jurisdictions the claims for compensation of the costs of upbringing an unwanted child were rejected and the main reasons therefore were policy considerations.³⁶

Lord Steyn also denied the McFarlanes’ appeal but approached the case from the vantage point of distributive justice. As he puts it:³⁷

It requires a focus on the just distribution of burdens and losses between members of a society. If the matter is approached in this way, it may become relevant to ask commuters on the Underground the following question: “Should the parents of an unwanted but healthy child be able to sue the doctor or hospital for compensation equivalent to the cost of bringing up the child (...)?” My Lords, I am firmly of the view that an overwhelming number of ordinary men and women would answer the question with an emphatic “No”.

Lord Steyn furthermore admitted that distributive justice itself could be seen as a moral theory and critics might argue that the House of Lords should be a court of law and not a court of morals. His answer to this allegation was:³⁸

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

³¹ *McFarlane*, supra n 9, 76-77.

³² *Ibid*, 76.

³³ *Ibid*.

³⁴ *Ibid*, 81.

³⁵ Corrective justice requires somebody who has harmed another without justification to indemnify the other. On this approach the parents’ claim for the cost of bringing up Catherine must succeed; see Lord Steyn, *ibid*. 82.

³⁶ *Ibid*, 81.

³⁷ *Ibid*, 82.

³⁸ *Ibid*.

He further referred to his own and Lord Hoffman's judgment in the case of *Frost v Chief Constable of South Yorkshire Police*³⁹ as an example illustrating the relevance of moral dimension in the development of the law. This case dealt with the compensation claims for psychiatric loss suffered in relation to the Hillsborough disaster. They reasoned, with Lord Hoffman expressly invoking considerations of distributive justice, that it would be morally unacceptable to reject the claim of the victims' relatives but grant compensation for psychiatric loss suffered by police officers who were on duty at the Hillsborough disaster, as was done in *Alcock v Chief Constable of South Yorkshire Police*.⁴⁰

Lord Steyn also emphasised that his distributive justice approach was not based on the grounds of public policy:⁴¹

On the contrary, I would avoid those quicksands. Relying on principles of distributive justice I am persuaded that our tort law does not permit parents of a healthy unwanted child to claim the costs of bringing up the child from a health authority or a doctor. If it were necessary to do so I would say that the claim does not satisfy the requirement of being fair, just or reasonable.

Furthermore Lord Steyn in his speech also mentioned explicitly that *McFarlane* could not be applied to the special case of the unwanted child born with serious disabilities.⁴²

(c) *Lord Hope of Craighead: Costs do not exceed the value of the healthy child*

Lord Hope also gave a summary of the different approaches to the issue. He also referred to the "fair, just and reasonable" test which should be applied in relation to the link between the negligence and the loss.⁴³

There must be a relationship of proximity between the negligence and the loss which is said to have been caused by it and the attachment of liability for the harm must be fair, just and reasonable. The mere fact that it was reasonably foreseeable that the pursuers would have to pay for the costs of rearing their child does not mean that they have incurred a loss of the kind which is recoverable.

Furthermore he referred to the considerations of distributive justice favoured by Lord Hoffman in *Frost*⁴⁴ but also admitted that this principle by its nature is general and imprecise.⁴⁵ He preferred the final hurdle of the *Caparo* test of "fairness, justice and reasonableness".⁴⁶ From his point of view it would not be fair, just or reasonable to relieve the parents from the costs of rearing the child because the birth of the child did not only present a financial loss. There were also unweighable benefits of parenthood that were not exceeded by the economic loss. He claimed that this loss is "economic loss which must be held to fall outside the ambit of the duty of care which was owed to the pursuers by the persons who carried out the procedures in the hospital and the laboratory."⁴⁷ Like the other Law Lords,

³⁹ *Frost v. Chief Constable of South Yorkshire Police* [1999] 2 AC 455 ("Frost").

⁴⁰ *Alcock v Chief Constable of South Yorkshire Police*[1992] 1 AC 31.

⁴¹ *McFarlane*, supra n 9, 83.

⁴² *Ibid.*

⁴³ Lord Hope in *McFarlane*, supra n 9, 95.

⁴⁴ *Frost*, supra n 39.

⁴⁵ *McFarlane*, supra n 9, 96.

⁴⁶ Laura CH Hoyano "Misconceptions about Wrongful Conception" (2002) MLR 65, 883, 887.

⁴⁷ *McFarlane*, supra n 9, 96.

Lord Hope was eager to stress that his decision was not led by public policy considerations. He saw the problem the court had to solve as “ultimately one of law, not of social policy”.⁴⁸

(d) *Lord Clyde: Damages would exceed what could be regarded as reasonable restitution*

Lord Clyde presented some of the various approaches from the range of case law available. Furthermore he also denied that his judgment was led by public policy considerations and strongly protested against approaching this case on public policy considerations:⁴⁹

And to affirm more positively that public policy requires that the claim should succeed seems to me to be coming very close to an encroachment on the responsibilities which attach to the legislature and not to the courts. The judicial function may extend beyond the interpretation of the law to the problem of applying the law to novel circumstances. But in doing so the court should have regard to existing principles.

Lord Clyde further admitted that the relationship between the plaintiffs and the defenders was sufficiently close to construct a duty of care, but put into question whether the McFarlanes had sustained any loss that the law should recognise. In this regard he rejected the approach of offsetting the costs of childrearing against the benefits of parenthood, as uncertain, difficult and impracticable. He supported the idea of “restitution with an award of damages that does justice between both parties”.⁵⁰ Restitution has to be reasonable, which was not so in this case.⁵¹

Even if a sufficient causal connection exists the cost of maintaining the child goes far beyond any liability which in the circumstances of the present case the defenders could reasonably have thought they were undertaking. Furthermore reasonableness includes a consideration of the proportionality between the wrongdoing and the loss suffered thereby.

In his opinion the restitution of all childrearing costs was wholly unproportional to the actual loss suffered.

(e) *Lord Millett: A normal healthy child as a blessing.*

Lord Millett was the only one of the five Law Lords partially dissenting. He also found his way to deny childrearing costs but he neither argued in favour of the *Caparo* test of “Fairness, Justice and Reasonableness” nor did he further the argument of distributive justice. He focused on the balance between the benefits and losses attached to the birth of a healthy child.

Lord Millett presented different decisions from other jurisdictions, which either favoured the benefit rule “that the costs of providing for a child must be offset by the benefits supplied by its very existence”⁵² or argued against the theory that a “healthy baby is a blessing and not a matter for compensation”.⁵³ He referred to Kirby A-CJ’s decision in the Court of Appeal of

⁴⁸ Ibid, 95.

⁴⁹ Ibid, 100. Lord Clyde moreover cited Burrough J. in *Richardson v Mellish* referring to public policy as “a very unruly horse, and when once you get astride it you never know where it will carry you”.

⁵⁰ Ibid, 105.

⁵¹ Ibid.

⁵² See *ibid*, 110, 111; Lord Millett quoting from *Public Health Trust v Brown* (1980) 388 So 2d 1084, 1085-1086.

⁵³ *Ibid*, 111.

the Supreme Court of New South Wales in *C.E.S. v Superclinics (Australia) Pty. Ltd.*,⁵⁴ where he emphasised that the court must make a distinction between the birth of the child and the financial consequences of the birth and that “the economic damage (...) is the principal unwanted element, rather than the birth or existence of the child”.⁵⁵

Lord Millett thus decided neither in favour nor against the established “benefits” rule in its “classical” meaning. He admitted that the birth of a child is not a blessing but also not a detriment but a mixed blessing and insofar created his own view of a “benefit-rule”.⁵⁶

He concluded.⁵⁷

In my opinion the law must take the birth of a normal, healthy baby to be a blessing, not a detriment. In truth it is a mixed blessing. It brings joy and sorrow, blessing and responsibility. The advantages and the disadvantages are inseparable. Individuals may choose to regard the balance as unfavourable (...). But society itself must regard the balance as beneficial. It would be repugnant to its own sense of values to do otherwise. It is morally offensive to regard a normal, healthy child as more trouble and expense than it is worth.

He claimed that there is the simple principle of law that whoever takes the benefit has to take a burden; thus the McFarlanes had to take the costs for the upbringing of the unwanted child, as this burden is inextricably bound together with the joy and benefits of having a child.⁵⁸ Applying this string of argumentation consistently, he also saw the pregnancy and its physical consequences as the price for the joy of parenthood.

Accordingly he dissented from the other judgments by also rejecting the mother’s claim.⁵⁹ But in contrast to his “dear and noble friends” he did not want to send away the parents empty handed. He suggested that the McFarlanes be entitled to general damages to recognize the legal wrong done to them.⁶⁰

2. Critical thoughts

The five speeches in the House of Lords decision in *McFarlane* consisted of a jumbled variety of approaches. The following issues, however, could be identified as arguments all Law Lords agreed on.⁶¹

- (1) All Law Lords denied that public policy was of importance to them in finding a solution.
- (2) The refusal to have an abortion or adoption was not considered a ground on which the parents’ claim could be rejected.
- (3) The so-called benefits rule, under which the benefits of parenthood would be set off against the costs for maintaining the child, was not relied upon by any of the Law Lords.⁶²

⁵⁴ *C.E.S. v Superclinics (Australia) Pty. Ltd.*, 38 [1995] NSWLR 47, 75.

⁵⁵ *Ibid.*

⁵⁶ *McFarlane*, supra n 9, 113-114.

⁵⁷ See Lord Millett, supra n 9, 113-114.

⁵⁸ *Ibid.*, 114.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.* This mere suggestion of an award of a conventional sum has been renewed in *Rees*. There exists strong criticism against that creation of a new head of damages. See supra I.C.3(c).

⁶¹ The task to distil this judgment has been undertaken by the Court of Appeal in *Parkinson* before deciding whether to apply or distinguish *McFarlane*. Lord Brooke identified the arguments in agreement with the other members of the court; see Lord Brooke in *Parkinson*, supra n 12, 277.

- (4) There was a unanimous view that the birth of a child is the foreseeable consequence of a negligently performed vasectomy.
- (5) Moreover they all agreed that the parents' claim was one of economic loss.

In my opinion this list of issues demonstrates how little certainty *McFarlane* provides on the subject of “wrongful birth” cases. The first issue is neither the settlement of a question of law nor fact but a simple statement of doubtful validity. It merely affirms that their Lordships at least had one thing in common - a negative sentiment towards public policy. They emphasised that they were led by legal policy, which was not the same as public policy.⁶³ Nevertheless, it seems that this distinction is only one of words, as all judges had difficulty in articulating a well-grounded explanation as to why they wanted to deny the claim for childrearing costs; an explanation which would show that they were not led by public policy or moral considerations.⁶⁴ Especially if one considers the test of what is “fair, just and reasonable”, it is hard to believe that public policy was not the basis of their decision.⁶⁵ One reason why they were so eager to label the policy considerations leading them as “legal” instead of “public” could be that admitting public policy considerations as the foundation would also allow invocation of other public policy considerations which might lead to exactly the contrary conclusion.⁶⁶ Another reason could be that an acknowledgement of public policy considerations would raise doubt that this matter is really one for the courts. It could be argued that questions of public policy would better be left to Parliament. Matters of legal policy seem far more likely to be accepted as matters for the courts.

At first glance the four remaining issues appear to be helpful; clearing up doubts about certain facts and thus focusing on the actual juridical and moral question of whether an exception to the ordinary tort law rules should be established in the “wrongful” birth cases. Though this question has been answered with a clear “Yes”, *McFarlane* lacks coherent underlying principles that can provide a guiding authority for all “wrongful birth” cases.⁶⁷

Considering all the different approaches of distributive justice, the *Caparo* test of fairness, justice and reasonableness, the proportionality test of Lord Clyde or Lord Millett's consideration of the value a healthy child has to society in general, the *McFarlane* decision seems to be a compromise rather than the product of sound legal reasoning.⁶⁸ Therefore *McFarlane* was succeeded by several different cases which could not merely apply the “*McFarlane* principles” but instead had to deal with the interpretation and application of the ruling.⁶⁹

It appears that *McFarlane* deliberately left open the question of where all these approaches might lead in the case of a birth of a disabled child.⁷⁰ Keeping in mind that most of the arguments in *McFarlane* were attached to the concept that a healthy child is a benefit or blessing to the parents - or at least to society - there automatically arises the question of

⁶² The benefit rule has been adopted in other jurisdictions as well as by the Lord Ordinary at first instance in *McFarlane*. Hence it has been discussed in the House of Lords but did not find approval. See especially the speech of Lord Millett in *McFarlane*, supra n 9.

⁶³ See Lord Millett in *McFarlane*, supra n 9, 108.

⁶⁴ Hoyano, supra n 46, 885.

⁶⁵ Morris and Santier, supra n 2, 182.

⁶⁶ Ibid.

⁶⁷ Jones, supra n 6, 14.

⁶⁸ Joe Thomas “Abandoning the law of delict? *McFarlane v Tayside Health Board* in the Lords” (2000) SLT 43.

⁶⁹ Hoyano, supra n 46, fn. 75 at 892. Due to limited space this paper will only concentrate on the two most important cases *Parkinson* and *Rees*.

⁷⁰ Palmer, supra n 10, 53.

whether the child would be regarded the same way if born with disabilities. What stage of disability is so grave that the “balance” tips and the child must be considered a burden and not a blessing such that recovery must be allowed?⁷¹ *McFarlane* did not seem to offer a clear line of principles or legal tools to determine if damages can be claimed in these cases.

III *Parkinson v St. James and Seacroft University Hospital NHS Trust* [2001] 3 WLR 376 (CA)

The case of *Parkinson v St. James and Seacroft University Hospital NHS Trust*, which went before the Court of Appeal in 2001, was quite similar to the initial family situation in *McFarlane* decided by the House of Lords in 1999.⁷² However in contrast to *McFarlane* the unwanted child was born with disabilities. Given that slightly different situation that the facts in *Parkinson* were similar to *McFarlane* except with a disabled baby,⁷³ it is of interest to see how the *McFarlane* principles were considered in this slightly different situation.

A. *The Parkinson Case*

In *Parkinson* the mother, Mrs Parkinson, underwent a sterilisation after she and her husband decided not to have any more children. The sterilisation was carried out negligently and Mrs Parkinson became pregnant several months after the surgery. She gave birth to a child with severe disabilities. As described by Brooke LJ the conception and birth of the child were “catastrophic events in her life”. Furthermore the marriage broke up and Mr Parkinson left his wife with five children, including the severely disabled baby. Mrs Parkinson sued the St James and Seacroft University Hospital NHS Trust and claimed damages for personal injuries and consequential loss in regard of wrongful conception and the birth of the disabled child.

At first instance Longmore J ruled that she was entitled to recover damages for the costs of child rearing related to the disability of the baby but not for the basic costs of maintenance. This judgment was affirmed by the Court of Appeal.

B. *How were the reasonings of McFarlane considered?*

The reasoning of the Court of Appeal in *Parkinson* can be found in the judgements of Brooke LJ and Hale LJ. Though taking quite different routes of argumentation, both Justices came to the same conclusion: that Mrs Parkinson should be awarded damages for the extra child raising costs related to the disability of the unwanted child.⁷⁴

1. *The judgment of Brooke LJ*

In his speech Brooke LJ undertook the difficult task of analysing the House of Lords judgment in *McFarlane*. He noted the difficulty of the task in that the House of Lords “spoke with five different voices”.⁷⁵ Nonetheless Brooke LJ was able to identify the issues on which all Law Lords agreed as well as certain issues on which one or more members of the House expressed an opinion without any of the other Law Lords dissenting.⁷⁶ Furthermore Brooke LJ pointed out that there were at least five different approaches used in *McFarlane* to decide

⁷¹ Ibid, 53; Thomas, supra n 68, 45.

⁷² Bickford-Smith, supra n 21, 406.

⁷³ J K Mason “Wrongful Pregnancy, Wrongful Birth and Wrongful Terminology” (2002) Edin LR 6, 46.

⁷⁴ Hoyano, supra n 46, 898.

⁷⁵ *Parkinson*, supra n 12, 277.

⁷⁶ Ibid, 277-278. See 278 for the list of the issues agreed on.

whether the law should recognise the existence of a legally enforceable duty of care, leading to an award of damages.⁷⁷ In his opinion these tests were not exclusive but were supportive,⁷⁸ so that “if the facts are properly analysed and the policy considerations correctly evaluated the several approaches will yield the same result”.⁷⁹ This idea also found its support in the reasoning of *McFarlane*, where Lord Steyn and Lord Hope appear to have equated the principle of distributive justice to the *Caparo* three-fold proximity test of fairness, justice and reasonableness.⁸⁰

Brooke LJ concluded from his analysis of *McFarlane* that the matter of a disabled child was left open.⁸¹

Because Lord Slynn’s treatment of the solution is so brief it is not clear whether he would have arrived at the same answers if the child had been seriously disabled at birth. (...) Lord Steyn expressly said that there might be force in the concession made by counsel for the health board to the effect that the rule might have to be different in the case of an unwanted child who was born seriously disabled.

Thus, with the matter left open he applied step by step these different approaches established in *McFarlane* for the case of a healthy child to the case of a disabled child.⁸²

Firstly the birth of a disabled child was a foreseeable consequence of the failure to close a fallopian tube. It was a limited but foreseeable group of people who could be affected, thus the negligent surgeon should be deemed to have assumed responsibility for the foreseeable consequences of his negligent performance.⁸³ In regard to the second approach he concluded that “the purpose of the operation was to prevent Mrs Parkinson from conceiving any more children, including children with congenital abnormalities, and the surgeon’s duty of care is strictly related to the proper fulfilment of that purpose”.⁸⁴ Furthermore he looked back at the line of authorities prior to *McFarlane* under which recovery in the case of a disabled child has been possible. Referring to these cases, he explained that a judgment in favour of Mrs Parkinson would neither be “a step into the unknown” nor “taking the law forward one step further by analogy”.⁸⁵ Also the fourth approach, the “*Caparo* test”, did not bring any difficulties for Brooke LJ. He assumed that it would be fair, just or reasonable to award damages for the special upbringing costs related to a disabled child. Finally he also turned to the principle of distributive justice. He simply believed “that ordinary people would consider it would be fair for the law to make an award in such a case, provided that it is limited to the extra expenses associated with the child’s disability”.⁸⁶ Thus Brooke LJ concluded that there

⁷⁷ Due to limited space, this is only the list of the tests applied: 1. Assumption of responsibility 2. Purpose for the service rendered 3. The incremental approach 4. *Caparo* test with emphasis on the third step of fairness, justice and reasonableness 5. The principle of distributive justice compared to corrective justice. For more details, see *Parkinson*, supra n 12, 276, para 26.

⁷⁸ Robin Oppenheim “The “mosaic” of tort law: the duty of care in question” (2003) J.P.I. Law Sep., 151, 153.

⁷⁹ Brooke LJ in *Parkinson*, citing from Sir Brian Neill in *Bank and Credit and Commerce International (Overseas) Ltd v Price Waterhouse (No2)* [1998] PNLR 564, 568.

⁸⁰ Meeran, supra n 17, 316.

⁸¹ Brooke LJ in *Parkinson*, supra n 12, 279.

⁸² Due to limited space, this is a brief summary of the step by step reasoning of Brooke LJ; for detail see *Parkinson*, supra n 12, 282-283, para 50.

⁸³ Referring to the first approach, see fn. 77.

⁸⁴ *Parkinson*, supra n 12, 282-283, para 50.

⁸⁵ *Ibid.* This argument refers to the incremental approach. In his view an analogy is not even necessary, as cases already have been decided in this way.

⁸⁶ *Ibid.*

was no conflict between his course of action, which had been demanded by logic and justice, and the reasonings in *McFarlane*.⁸⁷

Examining all five approaches and how Brooke LJ applied these in the *Parkinson* case, there might be justice and logic regarding them detached from their application in *McFarlane*.⁸⁸ But regarding the application in *Parkinson* in the context of the reasoning in *McFarlane*, it might well be a decision of justice but not of logic.⁸⁹

A comparison between the two judgments that considers the “assumption of responsibility” approach shows that *McFarlane* has only been superficially examined and used as an authority. It does not seem logical that the assumption of responsibility for the maintenance costs of a healthy child have been denied, but in the case of the less likely birth of an unhealthy child it was concluded that one can *deem* the surgeon to *have assumed* such responsibility for the extra costs related to disability in the case of a negligent performance.⁹⁰

The approach of the *Caparo* test seems to be an approach which is not within the ambit of *McFarlane* but independently based on the fact that negligence led to the birth of a disabled rather than a healthy child. But even this approach seems to be more result-oriented than actually founded on the fairness, justice and reasonableness test. It is somewhat awkward to determine a duty of care by regarding more the degree rather than the type of loss to decide whether an award of damages would be fair, just and reasonable.⁹¹

Furthermore it has to be pointed out critically that Brooke LJ cited cases, in which the different “*McFarlane* approaches” are labelled “policy considerations”,⁹² but did not give any opinion on the question of whether these approaches were approaches of public policy. He merely cited from *McFarlane* where the judges denied public policy considerations and distinguished between legal and public policy.⁹³

Nonetheless the judgment of Brooke LJ did not appear to undermine any of the reasoning in *McFarlane*. He avoided any contradiction among the judgments by only applying the “tools” given by the different approaches in *McFarlane*, but did not take into account to which conclusions these rather flexible approaches actually led the different judges in *McFarlane*.⁹⁴ An application of the approaches that followed more closely the method of argumentation used in *McFarlane*, might have produced a similar judgment. This would have been a more consequential solution, as the significant difference between the two cases lay in the dimension of the consequential loss and not in the negligent action.

⁸⁷ *Parkinson*, supra n 12, 283, para 51.

⁸⁸ Mason, supra n 73, 63.

⁸⁹ Hoyano, supra n 46, 897.

⁹⁰ Oppenheim, supra n 78, 157; Hoyano, supra n 46, 891.

⁹¹ Hoyano, supra n 46, 897.

⁹² See Brooke LJ in *Parkinson*, citing from Sir Brian Neill in *Bank and Credit and Commerce International (Overseas) Ltd v Price Waterhouse (No2)* [1998] PNLR 564, 568, supra n 79.

⁹³ *Parkinson*, supra n 12, 27, para 30,

⁹⁴ As with the Judges in *McFarlane*, he did not apply the “pure” benefit and burden test. Concerning the set of facts here, it would bring along with it even more problems. In this case, it would not only be difficult to determine whether one has to take the parents’ or society’s point of view to determine if a child has to be regarded as a blessing. One also would have to take into consideration that it would be discriminating to judge the case of a disabled child differently, who, sadly but true, in reality is regarded differently - at least by society.

All of this is the result of the diffuse and varied reasoning in *McFarlane*, which did not give any guidance on the question of how to classify disabled children.⁹⁵

2. The judgment of Hale LJ

Hale LJ used another approach to distinguish the facts in *Parkinson* from the *McFarlane* case. She first investigated to what extent the reasoning in *McFarlane* also dealt with the matter of a disabled child. Hale LJ identified that only the speech of Lord Slynn could be assumed not to differentiate between a healthy and a disabled child when he concluded that there should be no recovery for bringing up the wrongfully conceived child. The other Law Lords at least left the matter open.⁹⁶ Thus she did not consider herself bound by *McFarlane*. As such, she did not even apply the *McFarlane* approaches but used the lack of consensus to construct her own *ratio decidendi* from *McFarlane*.⁹⁷ She favoured the construct of a *deemed equilibrium*.⁹⁸

Indeed it [the solution of a deemed equilibrium] provides the answer to many of the questions arising in this case. The true analysis is that this is a limitation on the damages which would otherwise be recoverable on normal principles. There is therefore no reason or need to take that limitation any further than it was taken in *McFarlane*. This caters for the ordinary costs of an ordinary child. A disabled child needs extra care and extra expenditure. (...). This analysis treats a disabled child as having exactly the same worth as a non-disabled child. It affords him the same dignity and status. It simply acknowledges that he costs more.

Nonetheless Hale LJ referred to distributive justice as a tool, which could be called in aid to her solution of a *deemed equilibrium*. Distributive justice however needs to be regarded not only a measurement for justice between the parties involved but also among different classes of potential claimants.⁹⁹ She reasoned:¹⁰⁰

Whatever the commuter on the Underground might think of the claim for Catherine McFarlane, it might reasonably be thought that he or she would not consider it unfair, unjust or disproportionate that the person who had undertaken to prevent conception, pregnancy and birth and negligently failed to do so were held responsible for the extra costs of caring for and bringing up a disabled child.

Furthermore Hale LJ In her speech focused on the right of bodily integrity. She pointed out that in *McFarlane* all their Lordships recognised that to cause a woman to become pregnant and bear a child against her will is an invasion of that fundamental right to bodily integrity.¹⁰¹ This invasion does not only cause pain, suffering and loss of amenity but also financial damage.¹⁰² In support of this conclusion she provided a detailed description of what physical, psychological, practical and legal changes pregnancy, childbirth and motherhood have for a woman.¹⁰³

⁹⁵ Hoyano, supra n 46, 898.

⁹⁶ Ibid, 292, para 86.

⁹⁷ Hoyano, supra n 46, 898.

⁹⁸ Hale LJ in *Parkinson*, supra n 12, 293, para 90.

⁹⁹ Hoyano, supra n 46, 898.

¹⁰⁰ Hale LJ in *Parkinson*, supra n 12, 295, para 95.

¹⁰¹ Hale LJ in *Parkinson*, supra n 12, 284, para 58.

¹⁰² Hoyano, supra n 46, 897.

¹⁰³ See *Parkinson*, supra n 12, 285 pp, para 64 – 73.

Moreover she diverged from *McFarlane* by not understanding the costs of bringing up a child as pure economic loss but rather as a financial loss consequent on the incursion to the woman's autonomy by wrongful conception:¹⁰⁴

It is not possible, therefore, to draw a clear line at the birth. All of these consequences flow inexorably, albeit to different extents and in different ways according to the circumstances and characteristics of the people concerned, from the first: the invasion of bodily integrity and personal autonomy involved in every pregnancy.

In contrast to Brooke LJ, Hale LJ's analysis, which created a new approach to the issue, undermined the ruling of the House of Lord in *McFarlane*.¹⁰⁵ At the same time, she also used the opportunity of not being bound by the House of Lords to criticise the different rulings in *McFarlane*.

In particular Lord Slynn's approach of "assumed responsibility",¹⁰⁶ as well as Lord Steyn's invocation of the technique of distributive justice did not find her approval:¹⁰⁷

The traveller on the London underground is not here being invoked as a hypothetical reasonable man but as a moral arbiter. We all know that London commuters are not a representative sample of public opinion. (...). The fact that so many eminent judges all over the world have wrestled with this problem and reached different conclusions might suggest that the considered response would be less emphatic and less unanimous.

The reasoning of Hale LJ thus seems to be of more significance than Brooke LJ's speech. She did not step back from *McFarlane* but also did not really apply the "*McFarlane* approaches". She found her own way of argumentation to achieve the desired result to compensate Parkinson for the extra costs. Nonetheless her speech included criticism of *McFarlane*. Considering her remarks on the right of bodily integrity and the that costs of bringing up an unwanted child are also an economic loss consequent on this invasion, this seems to imply that Hale LJ would have concluded such costs recoverable in any case, irrespective of the child's health.¹⁰⁸ However, she did not explicitly say so. Her criticism of the initial *McFarlane* decision can only be read indirectly so that there is no overt clash between the two judgments.

Finally, Hale LJ's judgment is the only woman's opinion on these matters to date. Describing in detail the effects of pregnancy, birth and motherhood she opened the way to look at wrongful pregnancy cases from a completely new perspective.¹⁰⁹ But in turning to the *deemed equilibrium* she avoided a real contradiction within *McFarlane* and merely left her remarks as *obiter* and a very firm lead for future courts.¹¹⁰

3. Critical thoughts

In *Parkinson* the Court of Appeal decided the case of wrongful conception and birth of a disabled child. As a basic principle of the common law the Court of Appeal is bound by the

¹⁰⁴ Hale LJ in *Parkinson*, supra n 12, 287, para 73.

¹⁰⁵ Mason, supra n 73, 63.

¹⁰⁶ See Hale LJ in *Parkinson*, supra n 12, 289, para 80.

¹⁰⁷ Ibid, 290, para 82.

¹⁰⁸ Hoyano, supra n 46, 897.

¹⁰⁹ Mason, supra n 73, 64.

¹¹⁰ Mason, supra n 73, 65.

decisions of the House of Lords. Thus it was important for the Court of Appeal to first analyse the scope of the prior decision of the House of Lords to know if and how far it was bound by *McFarlane*.

Parkinson and *McFarlane* both are “wrongful birth” cases, but differed on the fact that the *McFarlane* baby was healthy and the *Parkinson* baby was disabled. Thus the Court of Appeal first had to identify whether the scope of the *McFarlane* judgment also encompassed the case of a disabled child. Both judges came to the conclusion that *McFarlane* left this fact scenario open and thus there was a gap in the law in “wrongful birth” cases. The two speeches of Brooke LJ and Hale LJ argued the cases of wrongful conception and birth of a disabled child from two very different angles, but came to the same result.¹¹¹ In regards to this “repertory” of argumentation one can even assume that the judgment in *Parkinson* has filled the void left in *McFarlane* in relation to the “wrongful birth” of a disabled child.¹¹²

On the other hand, the fact that the unanimous reasoning was achieved by such different means of argumentation and the third judge of the Court of Appeal, Sir Martin Nourse, did not even reveal his line of reasoning but simply stated “I agree” shows once more the difficulty of equipping decisions on this controversial subject with a clear *ratio*.¹¹³ As in *McFarlane* this decision seems to be more driven by the aim to achieve a result which matches the idea of what morally can be considered as fair and just,¹¹⁴ rather than an attempt to either use or establish legal principles.

Nonetheless, at least the recognition by the Court of Appeal that *McFarlane* did not cover the whole range of “wrongful birth” cases, might allow future courts to avoid being bound and limited by *McFarlane* and enable them to establish different principles without actually contradicting *McFarlane*. Furthermore Hale LJ’s critical view of *McFarlane* gives opponents to the *McFarlane* judgment hope that the *Parkinson* decision has opened up a means for the House of Lords to step back from its decision in *McFarlane*.¹¹⁵

IV *Rees v Darlington Memorial Hospital NHS Trust* [2003] 3 WLR 1091 (HL)

Only four years after *McFarlane* the House of Lords had the opportunity to reconsider its holding in relation to wrongful conception cases. *Rees v Darlington Memorial Hospital NHS Trust* again dealt with the issue of a wrongful conception but differed slightly from *McFarlane* in that it was not the child but the mother who had a disability.

A. The Rees Case

In *Rees* the claimant, Karina Rees, was a severely visually handicapped woman who due to her disability feared being unable to handle children. She underwent a sterilisation operation which was negligently performed. Subsequently she became pregnant and gave birth to a healthy baby. In the lower court it was held that the claimant was not entitled to any damages in regard to the costs of rearing the child. On appeal the Court of Appeal held in a majority decision that recovery should be allowed for the additional costs of child rearing provided the

¹¹¹ Hoyano, *supra* n 46, 898.

¹¹² Mason, *supra* n 73, 64.

¹¹³ Hoyano, *supra* n 46, 898.

¹¹⁴ In his speech in *Rees v Darlington Memorial Hospital NHS Trust*, Walker LJ appropriately ascribed the decision in *McFarlane* and *Parkinson* as “moral intuition” which dictated different results. See *Rees v Darlington Memorial Hospital NHS Trust* [2002] QB 20, 30-31, para, 33 and 35.

¹¹⁵ Mason, *supra* n 73, 65, 66.

costs are related to the disability where a handicapped parent brings up the child. The House of Lords reversed. By a four to three majority it decided that no recovery for child rearing costs should be allowed. Instead a conventional award of 15.000 £ was granted as a measure of recognition of the legal wrong done to the victim.

B. The different reasonings

The “wrongful birth” and “wrongful pregnancy” cases are, as a matter of fact, very controversial. Thus the case of *Rees* raises once more difficult social issues. With its decision of a 4/3 majority, however, it also raises important questions about judicial reasoning and the role of a final appeal court.¹¹⁶

1. The majority decision

The majority of the House of Lords, namely Lord Bingham of Cornhill, Lord Nicholls of Birkenhead, Lord Millett¹¹⁷ and Lord Scott of Foscote, decided against allowing Karina Rees any recovery for the normal costs of rearing her healthy baby as well as recovery for extra childrearing costs related to her disability.

(a) Overruling *McFarlane*?

In doing so this decision was a lost opportunity to overrule the earlier House of Lords decision in *McFarlane*.¹¹⁸ Lord Bingham gave the following explanation for the categorical refusal to overrule *McFarlane*:¹¹⁹

It would be wholly contrary to the practice of the House to disturb its unanimous decision in *McFarlane* given as recently as four years ago, even if a differently constituted committee were to conclude that a different solution should have been adopted. It would reflect no credit on the administration of the law if a line of English authorities were to be disapproved in 1999 and reinstated in 2003 with no reason for the change beyond a change in the balance of judicial opinion. I am not in any event persuaded that the arguments which the House rejected in 1999 should now be accepted, or that the policy considerations which (as I think) drove the decision have lost their potency.

The majority judges discerned as the *ratio* of *McFarlane* that it was not possible to weigh the benefits of the birth of a healthy child against the benefit of not having a child.¹²⁰ According to Lord Nicholls’s speech the language and the legal reasonings of the Lords in *McFarlane* might have differed in some way:¹²¹

but, however expressed, the underlying perception of all their Lordships was that fairness and reasonableness do not require that the damages payable by a negligent doctor should extend so far. The approach usually adopted in measuring recoverable financial loss is not appropriate when the subject of the legal wrong is the birth of an unintended healthy child and the head of claims is the cost of the whole of the child’s upbringing.

¹¹⁶ Cane, supra n 14, 189.

¹¹⁷ Lord Millett was the only one of the majority judges who also was a member of the House of Lords in the earlier *McFarlane* case, already in that case invoking the remedy to grant the claimant a conventional award. Furthermore the minority judges Lord Hope and Lord Steyn formed part of the House of Lords in *McFarlane*. Only Lord Hutton has not been part of the Court.

¹¹⁸ Also the minority decided against overruling *McFarlane*, see infra, 0.

¹¹⁹ Lord Bingham in *Rees*, supra n 13, 316, para 7.

¹²⁰ Mark Mildred “Personal Injury – Clinical Negligence – Failed Sterilisation” (2004) JPIL 1 C 19. C 20.

¹²¹ See Lord Nicholls in *Rees*, supra n 13, 318, para 15.

The case of a healthy child born to a disabled mother fell under these principles. The notion that the circumstances in *Rees* were vastly different in that the mother of the healthy child was disabled, were cast aside as the majority concurred with the dissenting judgment of Waller LJ in the Court of Appeal.¹²² Lord Millett agreed by saying that:¹²³

In my opinion, principle, common justice and the coherence of the law alike demand that the line be drawn between those costs which are referable to the characteristics of the child and those which are referable to the characteristics of the parent. (...) ordinary people would think it unfair that a disabled person should recover the costs of looking after a healthy child when a person not suffering from disability who through no fault of her own was no better able to look after such a child could not.

(b) *How was Parkinson considered?*

Besides upholding *McFarlane*, the Court of Appeal's judgement in *Parkinson* was criticised by the majority judges.¹²⁴ For Lord Bingham it "is arguably anomalous that the defendant's liability should be related to a disability which the doctor's negligence did not cause and not to the birth which it did".¹²⁵ He not only argued against a recovery of the extra costs related to the mother's disability, but also equated *Parkinson* and *Rees*. He saw the disability of the child in *Parkinson* as not any closer related to the birth of the unwanted baby than the disability of the mother in *Rees*. Both disabilities were not caused by the negligence of the doctor. It was the doctor in *Parkinson* only who had caused a child to be conceived.

Lord Nicholls indirectly criticised *Parkinson* when he predicted that "anomalies (...) become inescapable" if it is decided that damages do not include the cost of bringing up a healthy child, but exceptions are made "when either the child or the mother is disabled".¹²⁶ He further explained that "[t]he personal circumstances where this problem arises will vary so widely that what is fair and reasonable in one set of family circumstances, including the financial means of the family, may not seem so in another".¹²⁷ As such, *Parkinson* was an improper exception to the *McFarlane* rule. Lord Scott was of the opinion that *Parkinson* was wrong on its facts.¹²⁸ He argued that a distinction has to be made between the cases where a sterilisation has been performed to avoid the birth of a disabled child and cases when this was not a particular intention of the parents.¹²⁹

Parkinson was a case in the latter category. In such a case, where the parents have had no particular reason to fear that if a child is born to them it will suffer from a disability, I do not think there is any

¹²² See Waller LJ in *Rees v Darlington Memorial Hospital NHS Trust* [2003] QB 20 (CA), 35, para 55. He created the hypothetical example of a disabled mother who has a very good financial and family background opposed to a still healthy mother who is at risk of getting ill due to the stress the extra child puts on her, as she has no such supportive background. He argued that it would be unjust to put this disabled mother in a better position than the healthy mother.

¹²³ See Lord Millett in *Rees*, supra n 13, 349, para 122.

¹²⁴ Court of Appeal judgments are only binding to lower courts. But as the Court of Appeal comprises 3 judges not only the arguments of the majority are important, but also sometimes a dissenting judgment in the Court of Appeal becomes the argument of the majority of a succeeding House of Lords decision which sets a precedent.

¹²⁵ See Lord Bingham in *Rees*, supra n 13, 317, para 9.

¹²⁶ Lord Nicholls in *Rees*, supra n 13, 319, para 17. In *Parkinson* only the case of a disabled child has been discussed. The case of a disabled parent has not been taken in consideration. But with his criticism Lord Nicholls not only denies exceptions from the *McFarlane* rule for the *Rees*, but also in the *Parkinson* set of facts.

¹²⁷ *Ibid.*

¹²⁸ Cane, supra n 14, 190.

¹²⁹ See Lord Scott in *Rees*, supra n 13, 355, para 145.

sufficient basis for treating the expenses occasioned by the disability as falling outside the principles underlying *McFarlane*. The striking of the balance between the burden of rearing the disabled child and the benefit to the parents of the child as a member of the family seems to me as invidious and impossible as in the case of a child born without any disability.

Lord Millett, on the other hand, simply declined to comment on the correctness of the *Parkinson* decision. He pointed out that “it is not necessary for the disposal of the present appeal to reach any conclusion whether *Parkinson* was rightly decided” and that he “would wish to keep the point open”.¹³⁰

(c) *Rees* giving a “gloss” to *McFarlane* – Creation of a new head of damages

Though the majority decided to follow the earlier House of Lords decision in *McFarlane* it is likely that the decision in *McFarlane* did not have the full consent of the Law Lords in *Rees*. They favoured the suggestion of Lord Millett in the *McFarlane* case of awarding the claimant a conventional sum.¹³¹ For them it did not seem to be “fair and reasonable” that “there should be no award at all”.¹³² For Lord Nicholls it was important that “an award of some amount should be made to recognise that in respect of the child the parent has suffered a legal wrong, a legal wrong having a far-reaching effect on the lives of the parent and any family she may already have.”¹³³ Lord Bingham emphasised that this new head of damages would not be contradictory to the *McFarlane* rule. It did not allow restitution for child rearing costs but provided a “gloss”¹³⁴ to this rule.¹³⁵

This solution is in my opinion consistent with the ruling and rationale of *McFarlane*. The conventional award would be, and would not be intended to be, compensatory. It would not be the product of calculation. But it would not be a nominal, let alone a derisory, award. It would afford some measure of recognition of the wrong done. And it would afford a more ample measure of justice than the pure *McFarlane* rule.

The majority furthermore was of the opinion that this conventional award should be the solution for all wrongful conception cases, irrespective of any disability of either the mother or the baby.¹³⁶ For these Law Lords the crucial point, on which they based the legitimated this head of damages, was not the birth of the child, the accompanying circumstances or succeeding costs, but the injury and the loss of the freedom to limit the size of one’s family.¹³⁷

¹³⁰ Lord Millett in *Rees*, supra n 13, 346, para 112.

¹³¹ See supra, I.C.1(e).

¹³² Lord Nicholls in *Rees*, supra n 13, 319, para 17.

¹³³ Ibid.

¹³⁴ Ibid. Lord Nicholls is calling this award a “gloss” to the decision in *McFarlane*.

¹³⁵ Lord Bingham in *Rees*, supra n 13, 317, para 8.

¹³⁶ Antje Pedain “Unconventional justice in the House of Lords” (2004) CLJ 63 (1), 19, 20. See for example *Rees*, supra n 13, 317, para 9, Lord Bingham stating that he would “apply this rule also, without differentiation, to cases in which either the child or the parent is (or claims to be) disabled.”

¹³⁷ See for example Lord Millett in *Rees*, supra n 13, 350, para 125; Mildred, supra n 120, C 21; Pedain, supra n 136, 20. This approach resembles the approach of Hale LJ in *Parkinson* who saw an infringement of the woman’s right of bodily integrity by the unwanted pregnancy, but differs in so far as it comprises not only the pregnant mother and her physical and psychological changes due to pregnancy, but also the father of the child and the right of both parents as the unit of the family which “plans and organizes” the family.

2. The minority view

As the decision in *Rees* was a 4 to 3 majority, it is well worth examining the arguments of the minority and how the minority judges disposed of the preceding judgments in *McFarlane* and *Parkinson*. The fact that two of the dissenting judges were part of the House of Lords¹³⁸ at the time of its unanimous decision in *McFarlane*, the precedent for the wrongful birth cases, is of particular significance.

(a) Overruling *McFarlane* or taking *Rees* outside the *McFarlane* doctrine?

Like the majority, all of the minority judges upheld the decision in *McFarlane*. Lord Steyn referred to the *1966 Practice Statement*,¹³⁹ which allowed recourse from a prior decision of the House of Lords, but also stressed that the Practice Statement “was in no sense an open sesame for a differently constituted committee to prefer their views to those of the committee which determined the decision unanimously or by majority”.¹⁴⁰ He was of the opinion that a decision in which a differently constituted House of Lords substitutes its own view for the earlier decision would render the court inappropriate for fulfilling the task of “final decision-making by a supreme court”.¹⁴¹ Furthermore he pointed out that considering the complexity of the subject, *McFarlane* has been “the least bad choice” and hence a sound decision.¹⁴²

With their positive view of *McFarlane*, the minority had to find a different means in order to avoid clashing with that case. Lord Hope argued that the grave disability of the claimant takes the case outside the *McFarlane* doctrine so that it would be justifiable to establish a special case.¹⁴³ He was of the opinion that the unspoken assumption in *McFarlane* was “that the child-rearing costs which the parents were seeking to recover were the costs which normal, healthy parents would incur when they were providing for their child’s upbringing”.¹⁴⁴ Concerning the argument that an exception for seriously disabled parents would undermine the *McFarlane* principles and therefore open the door to claims for extra child-rearing costs by disadvantaged parents in general,¹⁴⁵ he presented the following counter argument:¹⁴⁶

The decision in *McFarlane* applies across the board, to every healthy and normal parent, in whatever social or family condition they may find themselves. The seriously disabled parent is a different category. It is the inescapable fact of her disability which marks the case of the seriously disabled parent out from these cases.

Lord Hutton “escaped” from *McFarlane* a different way. From his point of view the non-applicability of *McFarlane* to *Rees* would not be another exception from the “*McFarlane* principles”. He argued that the “*McFarlane* principles” themselves are only an exception to the general rule, which needs to be confined very narrowly.¹⁴⁷ Thus he concluded that “the

¹³⁸ Lord Hope and Lord Steyn.

¹³⁹ Practice Statement (Judicial Precedent) [1966] 1 WLR 1234.

¹⁴⁰ Lord Steyn in *Rees*, supra n 13, 323, para 31.

¹⁴¹ Ibid.

¹⁴² Ibid, 324, para 33.

¹⁴³ Mildred, supra n 120, C 21.

¹⁴⁴ Lord Hope in *Rees*, supra n 13, 330, para 58.

¹⁴⁵ This is the argument of Waller LJ in his dissenting judgment in the Court of Appeal in *Rees*, which influenced the majority’s decision.

¹⁴⁶ Lord Hope in *Rees*, supra n 13, 332, para 65.

¹⁴⁷ Mildred, supra n 120, C 21.

exception does not apply to a disabled child or to a disabled mother, and that accordingly the *McFarlane* decision does not bar the mother from recovering in this case”.¹⁴⁸

(b) *Criticism of the majority’s solution of a conventional award*

As the minority was in favour of awarding Karina Rees damages for the extra expenses relating to her disability, they did not need to create a conventional award. Accordingly they heavily criticised the conventional award concept. Lord Steyn claimed that the majority with this creation had to some extent departed from *McFarlane* and did not only add mere “gloss”.¹⁴⁹

As Lord Bingham has said the suggestion was first made by Lord Millett in *McFarlane*. It is true that none of the members of the majority on *McFarlane* discussed the point. It was, of course, not an issue at all in *McFarlane*. But it would be wrong to assume that the majority did not consider it. Like Lord Hope I considered it but found it unacceptable. And without doubt that was also the position of Lord Slynn and Lord Clyde. The proposal for a conventional award therefore runs counter to the views of the majority in *McFarlane*.

He further exclaimed that this new rule “is a radical and most important development which should only be embarked on after rigorous examination of competing arguments”.¹⁵⁰ He was of the opinion that “the majority have strayed into forbidden territory” and that “[i]t is also a backdoor evasion of the legal policy enunciated in *McFarlane*. If such a rule is created it must be done by parliament.”¹⁵¹ Also Lord Hope agreed with Lord Steyn that the award at least should have been “the product of much more study and research than has been given to its creation in this case by the majority” and also better left to Parliament, that it would be “preferable with the benefit of a report by the Law Commission.”¹⁵²

3. *Critical thoughts*

Looking at *Rees*, the problems with the *McFarlane* decision become even more obvious. These problems not only concern the question of whether the *McFarlane* decision was just, but also whether the approaches used in the case were coherent and stable.

The divergent lines of reasoning of the Law Lords in *McFarlane* have caused much confusion. It has left trial judges as well as Court of Appeal judges with “elbow room” to undercut the decision.¹⁵³ Therefore it is not surprising that the *Rees* judges had difficulty deciding whether the facts in the case were a variation of the *McFarlane* decision or whether the case of a disabled parent giving birth to a healthy child required an entirely different approach. The majority assumed that *McFarlane* was also applicable to the case of a disabled parent. On the contrary the minority judges did not see the *McFarlane* decision as binding in *Rees*. For them the disabled mother fell outside of the exception to ordinary tort law rules established by *McFarlane*.

¹⁴⁸ Lord Hutton in *Rees*, supra n 13, 342, para 98.

¹⁴⁹ Lord Steyn in *Rees*, supra n 13, 327, para 40, 41.

¹⁵⁰ Ibid, para 43.

¹⁵¹ Ibid, para 46.

¹⁵² Lord Hope in *Rees*, supra n 13, 335, para 78.

¹⁵³ Hoyano, supra n 46, 892.

Considering this difficulty in actually defining the ambit of *McFarlane*, it seems quite apparent that the Law Lords in *McFarlane* did not see cases like *Rees* or *Parkinson* coming.¹⁵⁴ The difficulties the House of Lords had applying the ambiguous reasoning of *McFarlane* to the facts in *Rees* is a problem of their own making.¹⁵⁵

All of the Law Lords agreed that overruling *McFarlane* was out of the question but did not feel comfortable with applying the established rules to the new but only slightly different set of facts. But both of the approaches they chose for achieving a different and in their opinion more just result, as opposed to the plain application of the “*McFarlane* principles”, are problematic.

The minority’s approach of taking the facts out of the ambit of the *McFarlane* exception and arguing - as Lord Hope did - that “where the mother is disabled it is not unjust, unfair or unreasonable to award damages for the extra costs of bringing up the child”¹⁵⁶ is not satisfying.¹⁵⁷ A guideline as to how to determine what is “fair just or reasonable”, beyond the speeches in *McFarlane*, has not yet been given.

The majority’s approach in my opinion seems to be even more problematic than the *McFarlane* decision to which it was adding a “gloss”. First, of all, it seems questionable to be calling this new head of damages “a gloss”. Considering the opinion of the majority that *Rees* falls into the ambit of *McFarlane*, this new head of damages is a departure from *McFarlane*. Though the majority argued that it is only “a measure of the recognition of the wrong done” and not “compensatory”,¹⁵⁸ it nevertheless contradicts *McFarlane*. While the legal wrong done to Karina Rees has been recognized, did not the McFarlanes suffer a similar “wrong”?

Maybe the *Rees* majority was led by the impression that their *McFarlane*-based initial approach would be unjust. As a result they may have made an attempt to “square the circle” by granting this award.¹⁵⁹ But, as pointed out by the minority, it is doubtful whether the judges are competent to create such a new head of damages without adequate “study and research”.¹⁶⁰ As the majority’s reason for establishing this award was to recognize the loss of the freedom to limit the size of one’s family, they set a precedent for all “wrongful birth” cases whether the parents or the children are disabled or not.¹⁶¹

As this area of law involves a great deal of ethical and social complexity, it might be more appropriate to regulate the issue by legislation.¹⁶²

V CRITICAL SUMMARY OF THE DEVELOPMENT FROM *McFarlane* TO *Rees*

McFarlane has been the turning point in the development of the “wrongful birth” cases. Before *McFarlane* these cases basically fell under the ordinary rules and principles of tort

¹⁵⁴ Cane, supra n 14, 190.

¹⁵⁵ Pedain, supra n136, 19.

¹⁵⁶ Lord Hope in *Rees*, supra n 13, 342, para 97.

¹⁵⁷ Cane, supra n 14, 191.

¹⁵⁸ Lord Bingham, supra n 13, 317, para 8.

¹⁵⁹ Mildred, supra n 120, C 21.

¹⁶⁰ See Lord Hope in *Rees*, supra n 13, para 77.

¹⁶¹ Pedain, supra n 136, 20.

¹⁶² Cane, supra n 14, 191.

law.¹⁶³ Recovery for the costs of child raising were awarded. Though the Law Lords in *McFarlane* cited a lot of different reasons, such as the “fair, just and reasonable” test or distributive justice, it is quite obvious that they were, against all their protestations that they were not, led by policy considerations.¹⁶⁴ The vast majority of health care in the United Kingdom is provided via the National Health Service (NHS).¹⁶⁵ Thus it seemed reasonable or even necessary to protect the limited resources of the NHS, and by this the taxpayers, from being burdened with the financial costs of claims concerning the upbringing of an unplanned, but not necessarily unwanted, healthy baby.¹⁶⁶

However, the lack of consensus and different approaches taken by the individual justices (Lords) make the *McFarlane* decision difficult to apply.¹⁶⁷ The principle of distributive justice in particular, particularly that favoured by Lord Steyn, did not even attempt to identify an independent, principled, explanatory content for this construct.¹⁶⁸ Rather he used it as a tool to achieve the desired conclusion, by setting up a hypothetical opinion poll, asking the “reasonable man”, the commuter on the Underground, to discover what is morally acceptable and what is not.¹⁶⁹ As this opinion poll was only a hypothetical one and Lord Steyn the only one deciding what the outcome would have been,¹⁷⁰ it is rather doubtful if this way of reaching a conclusion actually is of any use to establish a new principle – one which is meant to have precedent value for subsequent disputes. The same is true for the regularly chosen argument that a certain outcome “would not be fair, just and reasonable”. No real measure of how to determine what is fair, just or reasonable has been provided.

Consequently, *McFarlane* has not only fostered confusion amongst trial judges but also encouraged the Court of Appeal to create untenable distinctions, focusing unsteadily on the health of the unwanted child and the reluctant parent respectively.¹⁷¹ *Parkinson* is a good example of the dilemma created by *McFarlane*. The Court of Appeal judges found two different ways of arguing and furthering their desired decision that the extra costs of rearing a disabled child should be recoverable. This decision thereby is entirely inconsistent. It included hidden criticism of *McFarlane* and the development of other legal tests criteria by Hale LJ. But it also included an approval of the *McFarlane* principles by Brooke LJ, using the principles to come to the same conclusion as Hale LJ. What can be concluded from this case is not only that *Parkinson* itself is missing a clear *ratio* but also that *McFarlane* provoked this somewhat incoherent decision.

The most recent decision of the House of Lord in *Rees* is the third part of the *McFarlane*, *Parkinson* triad.¹⁷² This judgment, as a four to three majority, is further proof of the difficulty courts have in finding solutions in this complex area of law, not only in the United Kingdom but in all different jurisdictions.¹⁷³ In this case the problem has been the same as in

¹⁶³ Pedain, supra n 136, 19.

¹⁶⁴ Muiris Lyons “Personal Injury – Clinical Negligence – Failed Sterilisation – Unwanted Birth – Disabled Mother” (2002) JPIL 2, 212, 213; Hoyano, supra n 46, 905.

¹⁶⁵ Jones, supra n 6, 19.

¹⁶⁶ Thomson, supra n 68, 45.

¹⁶⁷ Hoyano, supra n 46, 883.

¹⁶⁸ Jones, supra n 6, 19.

¹⁶⁹ Hoyano, supra n 46, 889; *ibid.*

¹⁷⁰ Jones, supra n 6, 18.

¹⁷¹ Hoyano, supra n 46, 883.

¹⁷² Mildred, supra n 120, C 20.

¹⁷³ For example in the High Court of Australia’s decision in July 2003 of *Cattanach v Melchior* (2003) 199 ALR 131 (HCA) the decision also has been made by a bare majority vote of four to three and seven different

McFarlane. Frankly, the Law Lords all knew what they wanted to decide but had problems in finding a justification. This task has not been made simpler by the fact that a precedent in this area of law already existed. Compared to the *Parkinson* case and its set of facts, it was not easy to avoid the confusing *ratio* of the *McFarlane* judgment in *Rees*.

In *Rees*, as well as in *McFarlane*, the child was healthy and the parents had their reasons not to want the child. The majority felt reluctant to overrule a recent decision for which underlying policy considerations had not changed.¹⁷⁴ Thus they did not use the “good old justification” of “distributive justice” or the *Caparo* test to distinguish *Rees* from the *McFarlane* case. Instead they introduced something totally new to the law of negligence: the award of a conventional sum, which was labelled not to be compensation (and contrary to *McFarlane*) but the recognition of a legal wrong without any compensatory meaning.¹⁷⁵

This certainly is the most obvious case of judicial law making in the *McFarlane* triad and it raises questions about how far the duty, or rather the competence, of the ultimate common law judicial body should actually extend. Is it a matter of judicial action to create exceptions to well-established legal principles or should this better be left to Parliament?¹⁷⁶

On the one hand it can be argued that it is precisely the function of the appeal courts, or at least final appellate courts, to not only interpret the existing legal rules and principles and supporting policies, but to establish or rather recognize new principles.¹⁷⁷ If these courts would only be allowed to apply the well-established rules and tools of interpretation, the common law would cease to develop. This would be contrary to the historic dynamism that is one of the most significant factors of the common law system, giving it its justification and strength.¹⁷⁸ To deny final appeal courts the ability to establish new principles would make it impossible for the common law to be flexible and to adapt to changes in social and moral practice.¹⁷⁹

On the other hand it can be argued that, at least in areas of ethical and social complexity such as the “wrongful birth” cases, legislative instead of judicial law making would be more appropriate.¹⁸⁰ An Act of Parliament would achieve clarity and prevent the courts from stumbling from one set of facts to the next, which is a formula for confusion and legal instability.¹⁸¹ Already the Court of Appeal judges in *McFarlane*, who decided not to turn their back on the general tort law principles, and thus approved the appeal against the decision of the Lord Ordinary, were anxious to distinguish their role from the role of Parliament: The role of the Parliament is to decide what the law should be. The role of a judge is to decide what the law is.¹⁸² Lord Cullen did not see public policy, which can be equated with the no more illuminating principle of distributive justice used in *McFarlane*,¹⁸³ as a foundation for a retreat

judgments. In contrast to *Rees* and *McFarlane* in this case the High Court decided that the child rearing costs related to the birth of a healthy but unplanned child were recoverable.

¹⁷⁴ Mildred, supra n 120, C 20-21.

¹⁷⁵ See the speech of Lord Bingham, supra at n. 135.

¹⁷⁶ Hoyano, supra n 46, 904. So far there exists no Act of Parliament in the United Kingdom regulating the matter of wrongful birth cases. Also in Germany it has been left to the courts to place the “wrongful birth cases” by interpretation and application of the existing legal rules.

¹⁷⁷ Cane, supra n 14, 193.

¹⁷⁸ Ibid.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid, 191.

¹⁸¹ Ibid.

¹⁸² Russell, supra n 3, 197.

¹⁸³ Hoyano, supra n 46, 905.

from the valid general principles. He quoted the following passage from Lord Scarman in *McLoughlin v O'Brian*¹⁸⁴ as a support of this view:¹⁸⁵

The distinguishing feature of the common law is the judicial development and formation of principle. Policy consideration will have to be weighed: but the objective of the judges is the formulation of principle. And, if principle inexorably requires a decision which entails a degree of policy risk, the court's function is to adjudicate according to principle, leaving policy curtailment to the judgment of Parliament (...). If principle leads to results which are thought to be socially unacceptable, Parliament can legislate to draw a line or map out a new path.

This is especially so having in mind the process of achieving distributive justice by, of course only hypothetically, asking the commuter on the London underground. It seems to be unjust to leave this problem of social and moral justice to the courts when it is generally Parliament which is accountable to the commuters on the Underground.¹⁸⁶ If the decisions in one area of law based on legal principles are socially undesirable, it would be better to leave the issue to Parliament.

But bearing in mind how slowly the legislative law making process can be and how rapid social changes may emerge, it is understandable that courts sometimes have no choice but to confront an issue, irrespective of whether the issue is complex, sensitive or socially and morally controversial.¹⁸⁷

Nonetheless it would be desirable that in such cases the courts put some more emphasis on a more collegial style of judgment-writing than occurred in the *McFarlane* triad; to achieve at least an agreed majority position on the main points of a case. It would help to establish new principles rather than only resolving the particular dispute. It would lessen the potential that future courts would be confused about the law.¹⁸⁸

VI CONCLUSION

The examination of the three different judgments in this paper reveals that it is rather difficult for the judiciary to deal with areas of law plagued by social and ethical controversy and fulfil the task of establishing a clear and coherent *ratio*.

The *McFarlane* case marked a significant change in the area of the “wrongful birth” cases. It abandoned general tort law principles for the sake of public opinion and the purse of the National Health System. The major problem with this decision has not been its specific outcome but the vast number of different approaches, which have rendered *McFarlane* a very confusing precedent.

The main approaches of distributive justice and the “fairness, justice and reasonable” test in particular have turned out to be of little assistance to both the lower courts and subsequent decisions in the House of Lords. They fail to explain or justify the ultimate decision. The approach of distributive justice has to be criticised especially for leaving the question of

¹⁸⁴ See *McLoughlin v O'Brian* [1983] 1 AC 410, 430.

¹⁸⁵ Lord Cullen in *McFarlane v Tayside Health Board* (Outer House), supra n 20, 312.

¹⁸⁶ Hoyano, supra n 46, 904.

¹⁸⁷ Cane, supra n 14, 193.

¹⁸⁸ *Ibid*, 190.

justice exclusively to the hypothetically questioned commuter on the underground, “the ordinary man”, instead of at least being somehow supported by empirical evidence.¹⁸⁹

The Law Lords in *McFarlane* also have to be criticised for being too focused only on the set of facts presented in their case. They did not sufficiently consider all of the different possibilities of “wrongful birth” cases and how the *McFarlane* “principles” might subsequently influence them. *Parkinson* is proof of the shortsightedness of *McFarlane*. The same is true for *Rees*, which, though argued differently by the Law Lords, is an attempt to retreat from what has been regarded as just and fair in *McFarlane*.

The introduction of the conventional sum as a new head of damages tried to maintain consistency with *McFarlane* but was also intended to give to the claimant what by the time of the *Rees* decision has been regarded as justice.

All in all, given the complexity of the matter, it is not surprising that the jurisdiction has struggled with providing consistent, stable and sound legal reasonings. Thus, there arises the question of whether it really should be the task of appeal and final appeal courts to act in areas of moral, social and political importance. It seems that Parliament and its mechanisms are far better suited to consider all of the different arguments and factors that actually reflect society’s view of justice.

It is true that this would sacrifice one of the most distinctive features of the common law: flexibility. But in my opinion it seems to be inevitable in areas of conflicting positions. If confusion is to be prevented and a clear and predictable line of reasoning that reflects the opinion of the commuter on the underground, who coincidentally also happens to be the person electing the representatives, is to be established, I do not see any alternative other than leaving these matters to Parliament.

¹⁸⁹ Hoyano, *supra* n 46, 905-906.