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Review

Wrongful birth: Clinical settings and legal implications

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SUMMARY

'Wrongful birth' is a term used in the English legal system when describing negligence claims for compensation brought against hospitals where it is argued on behalf of parents bringing the claim that with appropriate treatment their child should not have been born. This paper considers the basis for such claims and the difference between claims brought where there is a healthy child compared to one where the child is born with a disability. Claims arising from failed sterilisations are reviewed as well as those due to an alleged failure to detect fetal anomalies on routine ultrasound scanning. In regard to the latter we review the findings of a major report looking at such claims in England, and we consider practical learning and risk management points that can help to reduce the chances of litigation.

1. Introduction

The concept of 'wrongful birth' is is now well-established in English law. The term describes claims for clinical negligence where an opportunity has been lost to parents to terminate a pregnancy when this option would have been available if the impugned professional services had not been negligently performed. Claims of this nature often relate to undetected fetal abnormalities. However, there is also a tranche of cases relating to failed sterilisation resulting in the birth of a child. When the baby is born healthy, the parent in receipt of the substandard treatment (to whom, on the current law in England, the legal duty of care is owed) has only limited recompense, but when the baby is disabled, the increased costs of bringing up that child as a result of its disabilities are recoverable.

2. Limits of claim: healthy babies/'wrongful life'

It is important to note from the outset that, in England and Wales, there is only a limited legal right to compensation when a healthy baby is born whose birth would not have taken place had reasonable treatment or advice been provided to its parents. The starting point for such claims is the 1999 case of McFarlane and another v Tayside Health Board [1999] All ER (D) 1325, which involved an unwanted (but healthy) child who was born as a result of substandard performance of a vasectomy. The child (the parents' fifth) was born in May 1992, after the father had been informed that his sperm count was nil and that he and his wife no longer needed to take contraceptive precautions.

It was decided in that case by the House of Lords that the parents could not recover the cost of their child's upbringing from the doctor who had performed the vasectomy. This decision was not, however, without its immediate critics, and the House of Lords was invited to reconsider the issue in the 2003 case of Rees v Darlington Memorial Hospital National Health Service (NHS) Trust [2003] UKHL 52. In that case, a mother with very poor eyesight as a result of retinitis pigmentosa, who had been blind in one eye and with only limited vision in the other since the age of two years, had sought sterilisation given her concerns that her sight problems would make it difficult to care properly for her child. However, her right fallopian tube was not adequately occluded, and her son was conceived in July 1996 and born in April 1997. By a majority of 4:3 on a seven-judge panel, the Court decided to stand behind the decision in McFarlane and not allow damages associated with the cost of bringing up a healthy child. The reason appeared to be the unique value of human life and the impossibility of calculating the benefits associated with the existence of a healthy child.

Since Rees, therefore, the position with regard to babies who were unwanted but who do not suffer from a recognised disability is that the Court will award compensation to a mother for the pain, incapacity, and distress of the pregnancy and birth in itself. It will also award a nominal sum [1] to mark the legal wrong involved in her being deprived of the freedom to control whether she has children, and if so, how many; but it will not go beyond this. It is

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noteworthy that the case of Rees involved a healthy child born to a severely visually disabled mother, and as such, the relatively hard line which was taken in not awarding the inevitably higher costs which she (as compared to a healthy mother) would have had to bear in raising her child has in turn prompted some academic criticism; however, it remains the law at the time of writing.

It should also be noted that, on the current law, no claim is available to a child for what has been called 'wrongful life', i.e. where its only complaint against the healthcare provider is that they have allowed it, in the absence of any negligent treatment or advice given to its parents, to be born in an injured condition [2]. This is not, however, the case in all jurisdictions, as considered below.

3. Babies born with congenital abnormalities

There is a proportion of legal claims against the NHS in which it is argued that a disabled child would not have been born had the healthcare provided to its parents been to a reasonable standard, and it is these cases – which can be extremely costly – which this paper aims to consider in more detail. The alleged negligence in such cases did not cause the baby's injuries but instead deprived the parents of the opportunity to terminate the pregnancy or afforded them a disabled baby when they had no wish for any child because they had undergone sterilisation. One leading Law Lord said that '… it should not matter whether the unwanted pregnancy arises from the negligent supply of information or from the negligent performance of the operation itself' [3].

The main foundation of such claims can be found in the case of Parkinson v St James & Seacroft University Hospital NHS Trust [2001] EWCA 530, in which a mother had undergone a sterilisation operation that had failed, leading her to give birth to a child who suffered from learning and behavioural difficulties. The Court in that case found that the decision in McFarlane did not preclude recovery of the extra costs to the parents that were attributable to their child's disability (i.e. beyond the usual costs of raising a child). In a similar vein, the 2000 case of Rand v East Dorset Health Authority [2000] Lloyd's Rep Med 181 involved parents who were not informed about the result of a scan indicating that the mother was likely to give birth to a baby suffering from Down syndrome. They were not informed of her right to an abortion, and the Court held that they could claim for the 'additional' costs of child maintenance. Whereas the subsequent case of Rees did cast some doubt on the decision in Parkinson, it has not been overturned.

4. Critical voices and judicial dissent

Although McFarlane, Rees, and Parkinson remain good law, there have been dissenting voices from both the academic and judicial ranks. Lord Bingham, in Rees, opined that:

> While I have every sympathy with the Court of Appeal's view that Mrs Parkinson should be compensated, it is arguably anomalous that the defendants' liability should be related to a disability [either on the part of the child or its mother] which the doctors' negligence did not cause and not to the birth which it did.

However, Lord Bingham also noted that due to giving birth when she had not sought to do so, 'the mother has been denied … the opportunity to live her life in the way that she wished and planned'.

It was suggested by Lord Scott, also in Rees, that a distinction might be drawn between a case where the avoidance of a child with a disability is the very reason why the parents sought treatment (e.g. claims associated with fetal anomaly scanning) and the case where medical treatment (e.g. sterilisation) is sought merely to avoid having to use contraception. His suggestion was that damages should be available only in the former situation. However, there has been no case law on the subject to date. Similarly, there is an argument that Parkinson ought strictly to apply only to cases of failed sterilisation or vasectomy, i.e. in which the treatment complained of had been sought for the very purpose of preventing childbirth. Again, though, the point has not been successfully pursued.

The position, therefore, remains that a successful claimant in a wrongful birth case can claim the additional costs of their child's upbringing if the child has a disability. It is arguable that these costs can only be recovered in respect of the period until the child turns 18 years, but in practice, allowance often has to be made if the child will in fact require significant care beyond that age.

5. Other jurisdictions

Whereas this paper addresses the position in English law, it is of note that the right to claim for wrongful birth is broadly recognised across many other jurisdictions; it is perhaps not surprising, though – touching as it does on such thorny moral issues as abortion and the definition of disability – that the standpoint taken in England and Wales is not reflected worldwide. In the USA, for instance, whereas the issue is dealt with on a state level without complete cross-border consistency, most jurisdictions simply do not allow claims for the costs of raising a healthy child. Some states, such as Idaho, Kentucky, and Pennsylvania specifically prohibit any wrongful birth claims. California, on the other hand, permits claims to be framed in terms of wrongful life [4].

Another different approach was suggested by the finding of the High Court in Queensland, Australia, in the 2003 case of Cattanach v Melchior [2003] HCA 38 (16 July 2003), that a negligent doctor was liable for the costs of bringing up an unplanned child even when that child was healthy; however, this swiftly found itself the subject of legislative reform by way of amendments to the state's Civil Liability Act 2003, which now stipulates that a Court 'cannot award damages for economic loss arising out of the costs ordinarily associated with rearing or maintaining a child' in cases of either failed contraception or failed sterilisation [5].

6. Case studies

In practice, many of the cases of wrongful birth which are faced by healthcare providers arising from alleged negligent treatment in the NHS relate to fetal anomaly ultrasound scanning. We have identified three such cases drawn from our own experience, illustrating some of the issues in this area.

6.1. Case study 1

Claimant S underwent ultrasound scanning at 21 and 24 weeks' gestation. These scans showed a lemon-shaped head with scalloping of the frontal bones, as well as indications of a small cerebellum and small head. It was alleged (and admitted) that this should have prompted tertiary referral for a detailed anomaly scan under the defendant hospital Trust's ultrasound scanning protocol. However, no such referral was made. Had the patient been referred, a spinal lesion would have been detected, and termination of pregnancy would have been discussed. In the event, the child was born with spina bifida, for the management of which the hospital will be required to bear the costs. Assessment of the value of this case is ongoing as at the date of this paper.