trial and sentencing procedure in cases involving child defendants. More widely, it is significant for the treatment of all children in criminal trials because it recognises the difficulty children can have in understanding and participating in adult-focused adversarial court proceedings.

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THE UNWANTED CHILD

WHEN the news came forth from Downing Street last November that a fourth child was to be born to the premier and his wife, joy spread throughout the land. Gloom and despondency, by contrast, reigned in the McFarlane household when it transpired that Mrs. McFarlane was pregnant yet again, for in order to ensure that there would be no fifth child the couple had come to a decision: rather than rely on the physics of the condom or the chemistry of the pill the husband, like 9,000 other Scotsmen every year, was to resort to the surgery of vasectomy. So he did, and the health authority reported that the operation had been successful, but vital nature had counteracted medical art ... and Catherine was born. She was in perfect health. Mrs. McFarlane claimed £10,000 for the pain of pregnancy and childbirth and both parents claimed £100,000 for the cost of keeping Catherine. They thereby joined the long line of those who, relying on the Court of Appeal's judgment in *Emeh* v. *Kensington and Chelsea and Westminster A.H.A.* [1985] Q.B. 1012, sought to throw on to the medical profession the cost of bringing up the child they had engendered and conceived, healthy though it was and in the event welcome—except for the expense.

For the fourteen years since *Emeh* the National Health Service, short of resources for curing the sick, has been disbursing large sums of money for the maintenance of children who have nothing wrong with them. To give but a single example out of very many: in 1993 the Lambeth Health Authority had to pay Mrs. Cort no less than £140,679 ("James might not have been planned, but I wouldn't give him up for the world"). The House of Lords has now put an end to that (*McFarlane* v. *Tayside Health Board* [1999] 3 W.L.R. 1301), but *Emeh* was not formally overruled, and so deserves a moment's notice.

In *Emeh* the child was not healthy, but handicapped. The principal defence, correctly dismissed, was that the mother should have had an abortion and was therefore solely responsible for the birth. The second line of defence was that the defendant was liable

only for the extra expense attributable to the child's being handicapped, in as much as it was contrary to public policy to allow parents to claim for the cost of bringing up a healthy child. This defence was also dismissed, rather cursorily. But does a decision that a claim for the cost of a healthy child is not barred by *public policy* entail the rejection *sub silentio* of all other grounds, not argued in the case, on which it might be barred? And are observations about a healthy child in a case involving a handicapped child not obiter dicta, since, as we shall see, the cases are clearly distinguishable and ought to be distinguished? In these circumstances one wonders why in *Thake* v. *Maurice* [1986] Q.B. 644 (where again the issue was collateral, the principal question being whether the doctor had guaranteed the success of the sterilisation operation (No)) the Court of Appeal was so eager to be bound by *Emeh*, and why the House of Lords refused leave to appeal. After all, *Emeh* was an unreserved decision, that is, one in which their Lordships took no time to reflect on a holding which would clearly prove a major drain on public funds.

Fortunately the Senators of the College of Justice are not bound by the Court of Appeal and Scots litigants need no leave to appeal to the House of Lords, so Lord Gill was able to dismiss the McFarlanes' claim as irrelevant and the defender could appeal from the reversal of his decision by the Inner House. The rule now laid down by the House of Lords is perfectly clear: the parents of a *healthy* child cannot claim the *cost of maintenance* from a person in *negligent* breach of his duty to take care to prevent that birth, although (Lord Millett dissenting) the mother can claim for the pain and suffering involved in the unwanted pregnancy and childbirth. The technical problem is how to distinguish these two claims, since both alleged harms are manifestly attributable to the same negligence—morning sickness and the cost of Pampers being equally part of the price to be paid for having a child.

The distinction cannot be drawn in terms of *fault*, if negligence is assumed, as here, nor in terms of *causation*, since both are equally foreseeable consequences of the negligence (it being agreed that neither the failure to have an abortion nor the decision not to put the child up for adoption could possibly constitute a *novus actus interveniens* or an unreasonable failure to mitigate the damage). Can one say that there was no *harm*? Not easily, since "There is another mouth to feed". Can one say that there is no *net* harm, that is, can one set off against the economic expense the emotional benefits of parenthood and say that the cost of feeding is offset by the ensuing smile and gurgle? Not really, since the cost of the former is calculable and the value of the latter is not. So what

about the *kind of damage*? In three of the speeches the financial nature of the cost of maintenance is emphasised, with the indication that there was perhaps no undertaking of responsibility for such expense (as opposed to the pain of pregnancy), and that it was not "fair, just and reasonable" to impose liability for it.

Though prepared to accept these reasons, Lord Steyn preferred a bolder approach eschewing "formalistic propositions". One can sympathise with this, since none of the grounds for rejecting the claim was *in itself* conclusive, especially as (though this was not mentioned) Lord Goff in *Henderson* had said that "fair, just and reasonable" has no place in *Hedley Byrne* cases, and in *Hedley Byrne* itself Lord Devlin had said that a doctor's duty extends as much to the patient's wealth as to his health. For Lord Steyn, the true reason for rejecting the claim for the cost of rearing is distributive justice, militating in this case against corrective justice: it could not be right—and he was sure that people on the London Underground would agree with him—to give people money for a baby they didn't want when so many people want one so badly that they go to great expense (or even Romania) to have one. Distributive justice had admittedly been invoked in the latest *Hillsborough* case as indicating that it was invidious to compensate shocked policemen while denying compensation to shocked relatives, but there the question was of discriminating between two groups who sought compensation for an admitted harm not, as here, of allowing one group to claim compensation for what another group would not think a harm at all.

We must therefore revert to the notion of "harm". Our law's reluctance to treat "harm" as a legal rather than a factual concept has had sorry consequences. In the 1930s dead people, recently enfranchised by the 1934 Act, began to claim damages just for being killed. The courts agreed that being killed was a harm: if life was good, being deprived of it must be bad and *therefore* an actionable harm. Life being held good, the next question was "How good is it?" Ask a silly question, and you get the answer "Not very"—£200, said the House of Lords, recognising that you must take the rough with the smooth. Nowadays one can no longer claim for being killed. This is by statute. Statutes don't give reasons. But there must be one. What is it? Surely it is that being killed is not in itself a harm at all, and the courts themselves should have so held.

It is true that in *McFarlane* Lord Millett stated that "The contention that the birth of a normal healthy baby 'is not a harm' is not an accurate formulation of the issue", but he proceeded to say that "the birth of a healthy and normal baby is a harm only

because his parents... choose to regard it as such", that "plaintiffs are not normally allowed, by a process of subjective devaluation, to make a detriment out of a benefit" and that "it is morally offensive to regard a normal, healthy baby as more trouble and expense than it is worth". Is this not to say that in law there is no harm or no net harm?

But if the rule is clear enough, as this rule is, does it matter much if the reasons are doctrinally unconvincing? It does, rather, for the next case to come up will involve a child not healthy but handicapped—a situation which the House in *McFarlane* explicitly refused to consider. We must not do an *Emeh* in reverse and hold that the present dismissal of the claim for the healthy child entails the subsequent rejection of the claim where the unwanted child is handicapped, a distinction which cannot but turn on the condition of the child and relate to the "harm or not?" question. After all, while one must not say that the handicapped child is "more trouble and expense than it is worth"—words which may come back to haunt us—the birth of a handicapped child is surely a matter for condolence whereas that of a healthy child is (despite the expense) a reason for congratulation and a Hallmark card. It is perhaps significant that in countering the side-effects of *Emeh* the House did not overrule the decision itself.

The problem of the unwanted healthy child has been raised in many jurisdictions, as the speeches in *McFarlane* note. Nowhere has it proved unproblematic or uncontroversial. In Germany, after an unseemly quarrel not only between the civil courts and the Constitutional Court, but also between the two senates of the Constitutional Court, parents can generally sue for their financial loss (the claim being in contract). In France, by contrast, the birth of a healthy child is said not to be a compensable harm at all, but (contrary to the position here—*McKay* [1982] Q.B. 1166—and elsewhere) the handicapped child itself has been held entitled to sue for being born rather than aborted. Such diversity must be anathema to Brussels.

The result in *McFarlane* is quite right, and we should not be surprised if the reasoning is uneasy: whenever it enters the family home the law of obligations—not just tort, but contract and restitution as well—has a marked tendency to go pear-shaped.

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