Wrongful Birth and Wrongful Conception – The Rights of the Father

Introduction

The law on recovery for damages in wrongful birth and wrongful conception cases has been settled for some time; since the cases of McFarlane v Tayside Board of Health [2000] 2 AC 59, Parkinson v St James and Seacroft University Hospital NHS Trust [2001] EWCA Civ 530 and Rees v Darlington Memorial Hospital NHS Trust [2002] EWCA Civ 88 there has been little, if any, disruption to the status quo. It is clear however that there do remain some unanswered questions regarding the limits of recovery in this area; one such query arose in the more recent case of Whitehead v Searle [2008] EWCA Civ 285, where the rights of a father in these actions was considered.

The Established Case Law

The progression of the three key authorities in respect of wrongful birth and wrongful life actions was as follows:

1. McFarlane: The Claimants decided they did not want any more children and so the husband underwent a vasectomy. Unfortunately following negligent advice as to the success of the operation the couple became parents to a healthy child. The House of Lords held that, although damages for the pain and suffering of pregnancy and childbirth could be awarded, the costs of rearing the child were irrecoverable.

2. Parkinson: This case presented a factual variation to McFarlane, where a child had been conceived and born due to negligent sterilisation but was not healthy as in McFarlane and instead was born with disabilities (such disabilities were not connected to the negligence). The Court of Appeal reiterated that the costs of rearing a healthy child must fail but here allowed recovery of the extra costs associated with rearing a child with disabilities.

3. Rees: The House of Lords was once again presented with a factual variation on the preceding cases, where here the Claimant was a disabled woman who had elected to have a sterilisation operation because of the difficulties her disability would cause her in raising children. The sterilisation was performed negligently and resulted in the birth of a healthy child. The House of Lords determined that Rees was more in line with McFarlane than Parkinson and so the costs of rearing the child were irrecoverable, though a lump sum ‘conventional award’ was permitted to reflect the legal wrong suffered by the Claimant.

There have been a few cases decided since then, but none which have rocked the boat in terms of the established law. Interesting questions did however arise in the case of Whitehead v Searle, discussed further below.

Whitehead v Searle

Whitehead involved a professional negligence action, brought by the ex-partner of a deceased mother (primarily on behalf of her estate but also in his personal capacity) who had been bringing a wrongful birth claim for maintenance costs. The ex-partner was also the father of the child who was the subject of the wrongful birth claim. In the mother’s original action she was likely to have been successful in her claim for some maintenance costs since her child had been born with a disability and so the case was subject to the exception established in Parkinson; the allegation was that clinicians had failed to diagnose spina bifida in the foetus during the mother’s pregnancy and so frustrated the mother’s choice to therefore undergo a termination. The Solicitors who had been acting on behalf of the mother had not concluded the matter before she died, and consequently the right to recover the additional maintenance costs had died with her (since it was accepted that the measure of her claim for damages could not extend to any loss or expense incurred after death); had...
The matter been concluded before she had died then the losses would have extended to cover the additional maintenance costs into the future. The action against the mother’s Solicitors was for those lost recoverable costs.

The decision at first instance was that the Defendant firm was liable for the costs for the benefit of the mother’s estate. The father’s claim in his personal capacity was dismissed on the basis that the legal representatives of the mother did not owe the father a duty of care. The basis of that decision was that the father himself had no claim against the health authority. The Judge was prepared to accept that a "husband or co-habitee father may have a claim for damages ... any such claim would have to be subject to the proviso that it is linked to that of the mother of the child." He then clarified that to be linked to a mother’s claim it must have been reasonably foreseeable that a breach of duty to the mother would result in losses to the father as well; as the father in Whitehead had been somewhat absent (not living with the mother and making only occasional contributions to the upbringing of the child) the Judge was not satisfied that the father met that hurdle.

On appeal the first instance decision was overturned. In respect of the claim on behalf of the estate the Court of Appeal found that to award damages to the estate would present an unconnected windfall, and would therefore go further than what the law would normally allot the father in his representative capacity. In assessing the father’s claim in his personal capacity the Court of Appeal, like the Judge at first instance, addressed the extent to which the father had a claim in his own right against the health authority. Counsel for the Defendant Solicitors firm argued that there is no established cause of action for a father in a wrongful birth / conception claim. Laws LJ was of the view that such a claim would be "viable, if at all, only as a secondary claim" and that it would face important difficulties (including policy considerations). Rix LJ was more optimistic about the right of a father to bring such a claim, stating it to be a "potentially difficult but realistically arguable claim" though this view did not take him as far as a dissent. Ultimately the potential existence of such a claim was found not to be enough to establish a duty of care owed directly to the father by the Defendant Solicitors firm, and so the professional negligence claim by the father in his personal capacity also failed. What is interesting about Whitehead however, are the comments made in relation to the rights of a father to bring a wrongful birth / conception claim more generally; both judgments suggesting that although there might be a right on behalf of fathers to bring a claim this was by no means an established right and the extent of such a right was uncertain in any event (such that even if a cause of action did exist it may still be parasitic on the mother’s own claim).

A Father’s Rights

The maintenance costs in Whitehead did not simply disappear on the death of the mother, they remain and must be met by someone. The only way the losses can be recovered, in the absence of a mother to bring the claim, is either under an action for wrongful life made by the child itself or a claim brought by the person left with the burden of caring for the child (and thereby incurring those costs) in place of the mother. It has long been established that an action for wrongful life will not succeed (see McKay v Essex AHA [1982] 2 QB 1166) and the decision in Whitehead shows that it is far from settled law that an action brought by anyone other than the mother for maintenance costs would be successful, notwithstanding the fact that those losses have only been incurred as a result of negligence.

The Court in Whitehead appeared reticent to accept that fathers may well have the right to bring a claim for maintenance costs. That the Court was not willing to readily accept this concept sits slightly at odds with previous wrongful birth / conception claims where losses have been sought by both parents. The leading case of McFarlane itself involved a claim made by both parents in respect of maintenance costs; although that claim was of course denied the focus was certainly not on refusing to allow the father to claim, but rather on the recoverability of such costs generally. In McLelland v Greater Glasgow Health Board [2001] S.L.T 446, a case which very closely followed McFarlane, the Defendant accepted that a duty of care was owed to the father as well as the mother and it was admitted that, as the child had been born with Down’s syndrome, the maintenance costs associated with the disability were recoverable by both. The same was evident in the cases of Salih v Enfield [1991] 3 All ER 400 and Rand v East Dorset Health Authority [2000] Lloyd’s Rep. Med. 181 where both parents made claims which succeeded.

In Anderson v Forth Valley Health Board [1998] S.L.T. 588 the Court went further, making an express statement that a duty of care was owed to the father as much to the mother since it was clear that both he and his wife would be affected by the pregnancy and its consequences. The Court in Anderson was however keen to show that such a principle had limits, stating that the duty would only arise where it could be reasonably expected that the husband would be involved in the upbringing of the child to a significant degree. As part of her judgment in Parkinson Hale L.J. also made obiter remarks as to the rights of a father in such claims; she was of the “tentative view … that if there is a sufficient relationship of proximity between the tortfeasor and the father who not only has but meets his parental responsibility to care for the child” then the father would be able to bring a claim in his own right.

What is clear from Whitehead is that there still considerable debate to be had regarding the rights of a father to claim for maintenance costs in wrongful birth / conception actions. Laws LJ was certainly of the view that the law in this respect was still developing and that the matter ought to be authoritatively concluded in a case calling for its decision; he did not consider Whitehead to be such a case. Whitehead was of course a professional negligence case as opposed to a stand-alone claim by the father in a wrongful birth / conception action, and so different considerations applied to the determination of liability. Nevertheless, the judgments of Laws LJ and Rix LJ make express comment on the rights of a father in wrongful birth / conception claims, and the matter is very much left open.

Conclusion

The case of Whitehead v Searle raises interesting questions about the limits of recovery in wrongful birth / conception cases. Recovery in such cases is already confined to allow only those additional maintenance costs incurred as a result of a child born with a disability, alongside the Rees conventional award. What is less clear are the limits of recovery if the father of a child were to bring a claim for those maintenance costs in his own right, something which Whitehead casts doubt over. It is likely that those circumstances where a father would find himself in such a position will be rare (though as Rix LJ points out in Whitehead one can easily envisage a scenario where a mother dies in childbirth and therefore only the father can make such a claim). It does however appear that the law has been left open as to what would happen in such circumstances. In a controversial area of law which has remained unchanged for some years it may well be time that the matter came before a senior court again.

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