When speaking of damages in Tort law Salmond & Heuston state “[i]t is often discussed whether the governing principle is that of restitutio in integrum, or whether the defendant is only obliged to give the plaintiff fair compensation”. It would seem that in most situations where damages are assessed the courts consider fair compensation to be a monetary sum, based on actuarial evidence, which would amount to restitutio in integrum. Thus, in practice, the distinction between the principles is often blurred. However, some specific situations call for a deeper examination of the concept of fair compensation. A recent example is Byrne v Ryan\(^2\) where the Irish High Court was faced with determining what would constitute fair compensation for the negligent performance of a sterilisation operation. The case raised some interesting issues such as the role of public policy in determining the extent of recoverability and how such public policy is formed. The questions of how harm is defined and what exactly could be termed a recoverable loss were also raised.

In Byrne v Ryan, a mother gave birth to two children following a sterilisation operation. She sought damages inter alia for the cost of repeating the sterilisation procedure and the defendants did not contest this aspect of the matter. Interestingly, once negligence had been established, the defendants chose to concede damages for pain and suffering on the part of the mother during the two pregnancies. However, the central point in dispute was the mother’s claim for the financial cost of rearing the two children. Under the principle of restitutio in integrum one would expect the cost of rearing the children to be recoverable as being a foreseeable loss from the tortfeasor’s negligence.\(^3\) As Hale L.J. noted in Parkinson v St James and Seacroft University Hospital NHS Trust: “[g]iven that the doctor clearly does assume some responsibility for preventing conception, it is difficult to understand why he assumes responsibility for some but not all of the clearly foreseeable, indeed highly probable, losses resulting.”\(^4\)

The fact that the mother had a second child after the failed procedure might indicate an element of contributory negligence on the parents’ part.

\(^*\) The author would like to acknowledge the help and guidance of Eoin Quill, University of Limerick, in preparing this paper.

However, Kelly J. found that during the first pregnancy the mother was under the impression that she had been pregnant at the time of the sterilisation. Therefore, after the birth of the first child the mother still believed the sterilisation procedure had been effective but too late to prevent that child from being conceived. It was only after the birth of the second child that the mother came to be aware of the possibility that the first child had also been conceived after the procedure had taken place. Perhaps the most telling fact in relation to this aspect of the case was that the defendants did not plead contributory negligence on the part of the plaintiff and, consequently, Kelly J. did not have to consider the matter in detail.

With liability for negligence established, the question for the High Court was whether providing the mother with the financial cost of rearing the children amounted to fair compensation or not. In a relatively brief judgment Kelly J., having evaluated decisions from other jurisdictions, held that the cost of rearing the children was not recoverable. A review of the arguments for and against restitutio in integrum that were advanced in other jurisdictions helps to throw light on the judgment in Byrne v Ryan.5

THE ARGUMENTS FOR FAIR COMPENSATION

Many jurisdictions such as Canada6 and the majority of the states in the US7 consider fair compensation not to include the cost of child rearing. However, for the present purposes the decision that best displays the arguments for limiting compensation is that of the House of Lords in McFarlane v Tayside Health Board.8 In this case a child was born to a couple after the father had undergone a vasectomy. The conception and subsequent birth of the child resulted from the negligence of the surgeon who carried out the vasectomy. Accordingly, the couple sought compensation for the pain and suffering of the mother during the pregnancy and the costs of rearing their unexpected daughter until she was eighteen years of age.

Lords Slynn of Hadley, Steyn, Hope of Craighead and Clyde formed the majority, holding that damages were only recoverable for the mother’s pain and suffering during the pregnancy. They agreed that an undesired

5. It is worth noting that prior to deciding the extent of recoverable damages Kelly J. extensively reviewed the issue of the hospital being held vicariously liable for the negligence of the consultant and imposed liability on the hospital for any want of care on the part of the consultant. See above fn.2, p.48.


pregnancy and its attendant physical discomfort constituted harm. In the words of Lord Hope of Craighead “[t]he fact is that pregnancy and childbirth involve changes to the body which may cause, in varying degrees, discomfort, inconvenience, distress and pain.” Lord Millet dissented, contending that the discomforts of pregnancy could not constitute harm in the traditional sense as they were balanced by the joys of becoming a parent being what he described as “the price of parenthood.”

It would seem from the speeches that in reaching their conclusions the Lords were heavily influenced by philosophical ideals of the virtue of human life and whether it would be morally acceptable to classify the birth of a child in the circumstances outlined as being a harm or loss.

Lord Millett gave perhaps the clearest example of this approach in relation to defining harm when he stated “[t]here is something distasteful, if not morally offensive, in treating the birth of a normal, healthy child as a matter for compensation”. In his opinion the birth of a healthy child, regardless of the desires of the parents, is always a blessing and so the core of the issue was whether this was counterbalanced by the financial loss incurred by the parents. He found “[i]t is morally offensive to regard a normal, healthy baby as more trouble and expense than it is worth.” Interestingly, although he found that neither the mother’s pain and suffering nor the cost of rearing the child was recoverable, he was unwilling to see the parents “sent away empty handed”. Thus he felt that a modest sum in the form of general damages was appropriate.

Lord Millett had willing allies in Lord Clyde and Lord Hope who, although viewing the matter from a different perspective, formed the opinion that awarding the costs of rearing the child would result in a disproportionate gain for the parents. Lord Clyde found that awarding damages only for the discomforts of pregnancy and childbirth represented “…the proper measure of restitution in the circumstances of the present case”. Lord Hope echoed this approach by holding that the financial losses of parenthood must be offset against its emotional benefits “[o]therwise the pursuers would be paid far too much”. He emphasised this conclusion by noting that the emotional benefits were incalculable and so, determining a net loss was impossible and consequently, the costs were not recoverable on grounds of indeterminacy.

Lord Steyn approached the matter from the perspective of what he termed as “distributive justice”, which, he felt, required an appropriate distribution

14. Lord Clyde preferred to use the term “reasonable restitution” whereas Lord Hope focussed on the plaintiff “not giving anything back to the wrongdoer for the benefits” ([2000] 2 A.C. 59 at 97).
of burdens amongst society. In his opinion this concept of justice could be
divined by considering the view of an average member of society. He said
“[i]t may become relevant to ask of the 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?” Lord Steyn felt that an average person would abhor
the idea and consider the parents of the healthy child the most appropriate to
bear the cost of rearing the child. On these grounds the costs of child rearing
were not recoverable.

Lords Slynn of Hadley and Hope of Craighead took the view that the
matter involved the question of pure economic loss. Thus, their approach
was to use the test laid down in Caparo Industries plc v Dickman, in
particular the “fair, just and reasonable” limb of the test. Lord Slynn asked
was it fair, just and reasonable to impose a duty on the doctor in relation to
the economic interest of the patient? Ultimately he held that it was not, as
the doctor would not have undertaken to protect the economic interests of the
patient nor would the claimant have relied on the doctor to do so. Therefore
he held “[i]f a client wants to be able to recover such costs he or she must
do so by an appropriate contract”. Lord Hope was of the same opinion in
holding “[t]he 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.”

While the decision as to the costs of child rearing was unanimous the
conflicting reasons that were relied upon, ultimately serve to undermine each
other; furthermore each of the varied grounds are themselves problematic
for reasons that will be discussed anon.

THE ARGUMENTS IN FAVOUR OF RESTITUTIO IN INTEGRUM

The leading arguments in favour of restitutio in integrum are found in the
Australian High Court case of Cattanach v Melchior. This case dealt with
the same problem that faced Kelly J. in the Irish High Court. In a joint
application the mother and the father claimed the cost of rearing the child
from the doctor that had negligently advised the mother after her sterilisation.
Following an extensive review of the jurisprudence in Australia and other
jurisdictions the court held by a four to three majority that damages should
include the costs of rearing the unexpected child.

The majority, McHugh, Gummow, Kirby and Callinan J.J. approached
the matter from the principle in Overseas Tankship (UK) Ltd v Morts Dock

17. [2000] 2 A.C. 59 at 82.
& Engineering Co Ltd (The Wagon Mound), that a defendant will be liable for the reasonably foreseeable consequences of his negligence. Taking this approach meant that in the opinion of the majority restitutio in integrum should be the starting point from which to examine the matter. Thus, their essential questions were twofold. First, is the cost of rearing the child causally connected to the doctor’s negligence? Second, was it a reasonably foreseeable expense? Answering both the questions in the affirmative meant that the cost would be recoverable unless “strong reason” suggested otherwise. Clearly, if there were to be a strong reason, it would be determined by what McHugh and Gummow JJ. described as “the policy of the law”. It is interesting to note that this approach suggests a different way of contemplating the problem to that preferred by the House of Lords. Where the House of Lords was prepared to use policy as a means of limiting the imposition of a duty, the Australian High Court see the role of policy as relating to a determination on remoteness. It is submitted that the effect of this difference is not to be underestimated.

Each of the majority dealt with the issue of policy in slightly different ways. In McHugh and Gummow JJ.’s opinion this policy could be ascertained by asking two deceptively simple questions. First, is the protection of the family unit and its associated values an essential aspect of society? If so, then is there a “general recognition in the community that those values demand that there must be no award of damages”. In their judgment McHugh and Gummow JJ. held the policy of the law would be opposed to limiting the damages available. It is interesting to note that in their opinion the policy of the law could be determined by the judicial awareness of a “general recognition in the community.”

Kirby J. considered this method of divining policy to be most unreliable and merely constituted another example of judges applying personal opinions that were “formed in the far-off days of judicial youth, thirty or more years earlier, when social facts were significantly different”. He preferred not to expound a theory of how the correct policy should be divined. Instead he felt that the grounds used in the dissenting judgments and in other jurisdictions for the application of a policy limiting damages were flawed and held “[n]either the invocation of Scripture nor the invention of a fictitious oracle on the Underground (not even its Australian equivalent) authorises a court of law to depart from the ordinary principles governing the recovery of damages for the tort of negligence.” As such anything less than sound legal principle was not sufficient to warrant limiting the application of The Wagon Mound principle and in the absence of such the cost of child rearing must be recoverable.

Callinan J. approached the issue of policy from a different viewpoint.

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23. [2003] 215 C.L.R. 1 at 73.
Rather than second-guess the thoughts of the “oracle on the underground” he examined the pragmatic effects of limiting damages. One of these effects would be that the extent of a doctor’s liability would be curtailed solely on the grounds of policy. Callinan J. stated that this “would be tantamount to the conferral of a new form of immunity upon doctors and hospital authorities”. In noting the “increasing judicial aversion to the enjoyment of special privilege or advantage in litigation”, he felt that the policy of the law should forbid the creation of new immunities unless the public interest required such immunity. In the current case Callinan J. felt that the public interest of “corrective justice” was best served by the tortfeasor compensating the victim in full for all foreseeable damages.

The majority also addressed themselves to the suggestion that the financial cost of rearing the child could be offset against the benefits of having a child. Essentially they found that in order to offset a benefit against a loss, both the benefit and the loss would have to be of the “same interest”. In this situation the loss that the parents were claiming was financial and the benefit would be emotional. Kirby J. stated that “emotional and other benefits and burdens resulting from such a birth… are different in quality from the costs incurred in child-raising”. Callinan J. was of the view that “[t]he reciprocal joy and affection of parenthood can have no financial equivalence to the costs of rearing him. One is no substitute for the other”. Thus, the idea of offsetting the benefit of the child’s society against the financial burden of rearing the child was not sustainable.

In a reflection of the House of Lords position, the majority of the court was in agreement on the eventual decision reached but differed as to the reasoning behind their conclusions. However it is to be noted that the differences in approach are not as marked as those of the House of Lords.

THE IRISH DECISION

On reviewing the English case law and noting the similarity between the House of Lords’ position and other jurisdictions, Kelly J. observed that “the question which I have to ask is one of principle or, if one prefers, policy.” He felt that as a novel type of case the matter could not be definitively decided on the basis of existing legal principles. In divining the policy to be applied Kelly J. was heavily influenced by the persuasive arguments of the House of Lords in the McFarlane case. In particular, he alluded to the concept of distributive justice, as propounded by Lord Steyn, and the concept that a healthy child cannot be described as harm, as advanced by Lord Millett. In agreeing with the policy underlying the McFarlane decision, Kelly J. held

that a policy of non-recoverability should apply in Ireland. Interestingly, he also held that the policy of not awarding damages for the costs of rearing the child would complement the Constitutional protection guaranteed to the family, in that an award of damages in these circumstances would undermine the dignity that the Constitution affords to the family and human life. It is submitted that the awarding of damages would have little or no effect on the emotional relationship between parent and child on which the family unit is based. The suggestion that an award of damages may upset the child in later life and induce a destructive feeling of being unwanted can be matched by the consideration that if anything would make the child feel unwanted it would be learning that his or her parents had taken drastic but unsuccessful measures to prevent conception. Moreover, the fact that damages were awarded to the mother for pain and suffering associated with an unwanted pregnancy significantly dilutes the force of that argument. If an award of damages for the cost of rearing the child would have a negative emotional impact so too would an award for the pain and suffering: in short, it is submitted that legal policy must insist that either no award of damages be made or that damages be recovered under all heads. That said, Kelly J. has defined Irish policy to be that general damages may be awarded for the pain and suffering involved in the pregnancy as well as the medical expenses incurred both during the pregnancy and repeating the failed sterilisation procedure, but not for the cost of rearing the child.

CONCLUSIONS

It would seem that the arguments in favour of limiting compensation can be listed under four headings.

The first is that this is a case of pure economic loss or not. If it is, then the Caparo test for limiting the extent of the duty owed applies. However, the use of this test is problematic as Fordham notes: “[w]here legal principle is concerned, the boundaries between the various elements of negligence tend to be quite blurred.”32 If the ratio of Caparo is that in situations of pure economic loss a duty will be imposed only where special circumstances suggest it is fair, just or reasonable to do so, the corollary is that a duty would not be imposed in circumstances where to do so would be unfair or unjust. But what if the duty is already established and not contested? What, if any, is the role of the Caparo test? The orthodox view is that the role of the Caparo test is to limit the extent of the defendant’s liability. However, under traditional principles the extent of liability is a remoteness issue, not a duty issue. It is submitted, that using the Caparo test in relation to remoteness blurs the important, but often overlooked, distinction between imposing a duty and imposing liability. The fact that this confusion has occurred in other

situations does not justify its use in this type of case.\textsuperscript{33}

Nevertheless, if the distinction between duty and liability is disregarded, the question then becomes what is fair, just and reasonable? In general, much emphasis is placed on what the court feels is the opinion of the ordinary person in the street. It is submitted that this method of divining policy is fraught with danger and while it contributes to the fluidity of policy, it is ultimately influenced by the subjective views of the judiciary involved. Symmons emphasises the unpredictability of “such judicial ‘Gallup polling’ of the sentiments of society [that] is bound to be both speculative and subjective in many instances.”\textsuperscript{34}

It is submitted that this is not a case of pure economic loss. While the head of damages for the mother is rather straightforward in that her personal losses are consequential to the personal injury she suffered as a result of the pregnancy, can we point to a recognisable harm that the parents jointly suffered? A possible category may be the concept of a breach of their autonomy in deciding the size of their family or, put another way, an interference with their right to marital privacy. Whether this is a constitutional issue\textsuperscript{35} or an issue capable of being covered by the law of negligence\textsuperscript{36} is irrelevant for the present purposes. The important point is that this interference is regarded as a specific harm capable of being compensated by an award of damages. The natural and probable consequence of interfering with this right is the birth of more children and the attendant financial cost of rearing these additional children, which would suggest that the financial loss in rearing the additional children is consequential to the interference with the parents’ autonomy and not pure economic loss, as we currently understand it.

The second consideration for limiting damages is found in Lord Steyn’s invocation of the concept of distributive justice. It is to be noted that the use of the phrase “distributive justice” is somewhat misleading in this case. Distributive justice tends to convey a notion of spreading the burden over a large section of the community, usually through the vehicle of insurance cover, whereas here the concept is used to allocate the burden between two sets of individuals. It is better to view this approach as involving a fair allocation of the burden as distinct from a distribution of the burden. It is submitted that to impose such a burden on the parents is not only the antithesis of distributive justice because it moves the burden away from the doctor who may be able to spread the cost through the vehicle of insurance cover, but is also to the detriment of corrective justice as it undermines one of the primary functions of Tort law, which is to hold wrongdoers accountable.

\textsuperscript{33} See White v Chief Constable of the South Yorkshire Police [1999] 1 All E.R. 1 for use of this approach in relation to recoverability for negligently caused psychological harm.

\textsuperscript{34} C R Symmons, “Policy Factors in Actions for Wrongful Birth” (1987) 50 Mod L Rev 269 at 280.


for their actions. In general, one would expect responsibility to lie with the wrongdoer and not the victim.

The third argument is that the birth of a healthy child is not a harm that merits an award of damages. Nolan\textsuperscript{37} suggests that whether the birth of a child is considered harm must depend on the circumstances in which the child is born. This determination must be made from the viewpoint of the woman involved. If a pregnancy is not desired to the point that active steps are taken to prevent it, then any ensuing pregnancy must be defined as harm. Lord McCluskey in the Second Division of the Court of Session stated “[i]t is sufficient to say that a woman who becomes pregnant despite her deliberate choice not to become pregnant suffers damnum and loss in the form of significant consequences for her physical condition, being consequences which she did not desire.”\textsuperscript{38} Thus, the key to the concept of harm in this type of case is that what some may see as a blessing to others is a loss. As such there can be no blanket rule defining whether pregnancy is harm or not.

Fourth, it is contended that the benefits of parenthood must be off-set against the financial loss and as these benefits are incalculable it is equally impossible to measure the net loss. In relation to the offsetting of benefits, it can be argued that the benefits of having a healthy child can be offset against the interference with the parents’ autonomy and as such may cancel out an award of general damages for the interference. This offsetting may be allowable on the basis that the loss of autonomy is an emotional loss that can be considered in the same vein as the emotional benefit of having a healthy child. However, to consider offsetting the emotional benefits of having a child against the financial losses incurred in rearing the child is to compare apples with oranges. As noted above, an emotional benefit should not be used to cancel out a loss of a different interest.

Turning to the arguments for restitutio in integrum perhaps the most persuasive is the approach taken by Callinan J. in the \textit{Cattanach} case, namely that to limit recoverability is in effect to create immunity for doctors for certain aspects of their work. This creation of a new example of immunity would seem to be directly at odds with the current trends in tort law.\textsuperscript{39} It would seem that the other arguments in favour of restitutio in integrum are heavily based on criticisms of the rationale used by the courts that have limited damages.

While it may seem repulsive to think that a family who love their child can force a doctor to pay for the financial cost of rearing that child, from a legal point of view this option is far more acceptable than not providing any damages where a wrong has been committed. The current approach involves an unprincipled compromise and, as Lord Millett noted, “[t]he only difference between the two heads of damage claimed is temporal”.\textsuperscript{40} In

\textsuperscript{39} See in particular Hall & Co. v Simons [2000] 3 All E.R 250.
\textsuperscript{40} [2000] 2 A.C. 59 p.114. The author would like to point out that Lord Millett used this logic to find that no damages were recoverable, whereas the author would suggest
this light it is submitted that the true definition of fair compensation for the losses incurred as a result of a negligently performed sterilisation procedure can only be restitutio in integrum.

that this logic also applies to the converse proposition.

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