Neutral Citation Number: [2017] EWHC 2990 (QB)

Case No: HQ14C03621
TLQ16/0079

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/11/2017

Before :

MRS JUSTICE YIP

- -

Between :

MS OMODELE MEADOWS **Claimant**

- and -

DR HAFSHAH KHAN **Defendant**

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- -

Mr Philip Havers QC and Mr Eliot Woolf (instructed by **McMillan Williams Solicitors**) for the **Claimant**
Mr Neil Davy (instructed by **Berrymans Lace Mawer LLP**) for the **Defendant**

Hearing dates: 17th - 18th October 2017

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Judgment Approved

Mrs Justice Yip :

1. This is a claim by Omodele Meadows for the additional costs of raising her son, Adejuwon, who suffers from both haemophilia and autism. It is admitted that, but for the defendant's negligence, Adejuwon would not have been born because his mother would have discovered during her pregnancy that he was afflicted by haemophilia and so would have undergone a termination. It is agreed that she can recover the additional costs associated with that condition. What is in dispute is whether she can also recover the additional costs associated with Adejuwon's autism. The defendant's position is that such costs are outside the scope of her liability because the service she was providing was only in relation to the risk of haemophilia. In such circumstances, responsibility for the wholly unrelated risk of autism is not to be transferred from the mother to the doctor. The claimant maintains that she is entitled to damages for the continuation of the pregnancy and its consequences, including all the additional disability related costs, on the basis of well-established principles in wrongful birth claims.

2. Put simply, the legal issue I must decide is this: Can a mother who consults a doctor with a view to avoiding the birth of a child with a particular disability (rather than to avoid the birth of any child) recover damages for the additional costs associated with an unrelated disability?

3. All other issues have been resolved by agreement. I commend the parties and their representatives for the sensible approach taken. As a result, I did not have to hear any oral evidence and the legal submissions could be considered against an agreed factual background.

4. Judgment had already been entered for damages to be assessed. The parties had discussed and agreed quantum subject to my determination of the outstanding legal issue. If I find that the claimant is entitled to the additional costs associated with both conditions, I am invited to enter judgment in the sum of £9,000,000. If the claimant is to be compensated only on the basis of the additional costs relating to Adejuwon's autism, the judgment sum would be £1,400,000. (Both figures include interest and an interim payment.)

The facts

5. In light of the approach taken by the parties, I am able to express the relevant facts briefly and dispassionately. In doing so, I recognise that this case involves highly emotive matters. It cannot be easy for any mother to contend bluntly that her child should not have been born. Although I did not hear evidence from Ms Meadows, her love for her son shone through from her written statements. She had specifically sought to avoid bringing a child with haemophilia into the world, knowing the suffering that the condition causes. The fact that she says clearly that she would have terminated her pregnancy had she known the baby would have haemophilia is not the same at all as saying that Adejuwon is now an unwanted child. On the contrary, it appears that he is much loved and well cared for. The burden of caring for him though is much greater than the burden of caring for a 'normal', healthy child and extends far beyond the purely financial cost. Although this is a claim for her loss, I do not doubt that the claimant's primary motive in bringing this claim is to provide a better life for her son.

6. Equally, I recognise it cannot be easy for a doctor to admit liability on the basis of a consultation to give blood results which she herself had not ordered and probably, in the course of a busy day. Concerns about the rising cost of clinical negligence claims and the impact on general practitioners' indemnity insurance have been widely reported. Holding the balance between these competing concerns is not easy and simply highlights the need for rigorous application of the legal principles, putting sympathy aside.

Core facts

7. At the outset of the trial, I provided a summary of the facts as I understood them to be having read the papers. Counsel helpfully reviewed my summary and suggested some minor amendments and additions so that the following can be seen as an accurate summary of the core facts.

    i) The claimant is now aged 40 and is the mother of Adejuwon Akinbade-Lawahl who was born on 10th September 2011 and so is now aged 6.

    ii) In January 2006, the claimant's nephew was born and was subsequently diagnosed as having haemophilia.

iii) The claimant wished to avoid having a child with that condition and so consulted a general practitioner, Dr Athukorala, in August 2006 with a view to establishing whether she was a carrier of the haemophilia gene.

iv) Blood tests were arranged. However, such tests were those to establish whether a patient had haemophilia and could not confirm whether or not the claimant was a carrier. In order to obtain that information, the claimant would have had to be referred to a haematologist for genetic testing.

v) On 25th August 2006, the claimant saw the defendant, another general practitioner at the same practice, to obtain and discuss the results of the blood tests.

vi) The claimant was told that the results were normal. As a result of the advice she received at that consultation and the previous consultation, she was led to believe that any child she had would not have haemophilia.

vii) In December 2010, the claimant became pregnant with Adejuwon. Shortly after his birth in September 2011 he was diagnosed as having haemophilia.

viii) The claimant was referred for genetic testing which confirmed that she was indeed a carrier of the gene for haemophilia.

ix) Had the claimant been referred for genetic testing in 2006, she would have known she was a carrier before she became pregnant. In those circumstances, she would have undergone foetal testing for haemophilia.

x) Such testing would have revealed that the foetus was affected. In such circumstances, the claimant would have chosen to terminate her pregnancy and Adejuwon would not have been born.

xi) Adejuwon's haemophilia is severe. He has been unresponsive to conventional factor VIII replacement therapy. His joints have been affected by repeated bleeds. He has to endure unpleasant treatment and must be constantly watched as minor injury will lead to further bleeding.

xii) In December 2015, Adejuwon was diagnosed as also suffering from autism. The fact that Adejuwon has haemophilia did not cause his autism or make it more likely that he would have autism.

xiii) Management of Adejuwon's haemophilia has been made more complicated by his autism. Even at the age of six, there is a gap between his understanding of his haemophilia and those of children of the same age. He does not understand the benefit of the treatment he requires and so his distress is heightened. He will not report to his parents when he has a bleed. This gap in understanding is likely to grow as he ages. He is unlikely to be able to learn and retain information, to administer his own medication or to manage his own treatment plan.

xiv) New therapies for treatment of haemophilia may mean that his prognosis in respect of haemophilia is significantly improved.

xv) In itself, his autism is likely to prevent him living independently or being in paid employment in the future.

Wrongful birth claims

8. This claim falls into a category conventionally described as 'wrongful birth'. This covers cases where, but for the defendant's wrong, the birth in question would not have occurred. There was some discussion in the course of argument about whether any distinction is to be drawn between a 'wrongful birth' case and a 'wrongful conception' case. In my judgment, it is perfectly clear, both as a matter of principle and having regard to the authorities, that no such distinction should be drawn.

9. 'Wrongful conception' occurs where a parent would have avoided pregnancy altogether but for the negligence. The classic example is a failed sterilisation. If the resulting pregnancy is not aborted (naturally or by termination) a 'wrongful birth' will result. 'Wrongful birth' may alternatively arise because negligent advice or treatment has denied the mother the opportunity to terminate a pregnancy that she would not have continued had she been properly advised or treated. It was suggested in the claimant's skeleton argument that *"the timing of the negligence in a 'wrongful birth' claim inevitably differs from that applicable to a 'wrongful conception' claim"*. That is not necessarily so. Here, the negligence occurred prior to conception. Had the claimant been properly advised that she was a carrier of the haemophilia gene, she would still have become pregnant so in her case it was the continuation of the pregnancy and the birth that was wrongful rather than the conception. The reason she wanted to discover whether she was a carrier was to allow for foetal testing and the termination of an afflicted pregnancy. A woman with religious, moral or other objections to any termination might have sought the same advice at the same stage but with a view to avoiding conception if she found she was a carrier. I cannot see that any sensible distinction can be drawn on the basis of whether it is the conception or the birth that is described as wrongful.

10. This has been confirmed by the Court of Appeal. In *Groom v Selby* [2002] PIQR P18, Hale LJ said:

> "The principles applicable in wrongful birth cases cannot sensibly be distinguished from the principles applicable in wrongful conception cases."

11. The starting point in reviewing the modern authorities on wrongful birth is *McFarlane v Tayside Health Board* [2000] 2 AC 59. That was a failed sterilisation case. The parents had four children and had decided they wanted no more. Having been told that the husband had been rendered sterile, a fifth child was conceived and born. The House of Lords, by a majority, allowed the mother to recover for the loss and damage associated with the pregnancy but rejected the parents' claim for the costs of raising the child who was a normal, healthy child. This was a significant milestone as previously there had been a trend in the English and Scottish cases towards allowing damages for the cost of raising the child. The decision left open the possibility of claiming for the costs of raising a disabled child born as a result of a defendant's negligence.

12. As noted in subsequent cases, the five members of the House of Lords adopted different approaches to the case. For the purpose of this claim, Counsel did not consider it necessary to focus in detail upon the reasoning set out in the various speeches in *McFarlane*. What is clear is that all their Lordships regarded the claim for the cost of raising a child as a claim for economic loss in respect of which the normal principles of breach of duty and 'but for' causation would not provide the final answer.

13. The first reported case following *McFarlane* to which I was referred was the decision of Henriques J in *Hardman v Amin* [2001] P.N.L.R. 11, in which it was said :

> "*McFarlane* does not affect the law so far as it relates to the wrongful birth of disabled children."

14. That was perhaps a more straightforward case. The child was born severely disabled following a general practitioner's failure to diagnose rubella during pregnancy. The disability was caused directly by the rubella virus. The recoverability of the extra costs associated with that disability is consistent with the defendant's approach to allowing for the recovery of the costs associated with Adejuwon's haemophilia.

15. The claimant places particular reliance upon two Court of Appeal decisions: *Parkinson v St James and Seacroft University Hospital NHS Trust* [2002] QB 266 and *Groom v Selby* [2002] PIQR P18. It is contended by the claimant that these decisions dispose of the issues in this case.

16. In *Parkinson*, the Court noted that, for varying reasons, the House of Lords in *McFarlane* unanimously held that the costs of raising a healthy child could not be recovered. Hale LJ suggested [87]:

> "At the heart of it all is the feeling that to compensate for the financial costs of bringing up a healthy child is a step too far."

17. In *Parkinson* and *Groom*, the Court of Appeal held that, while parents could not recover for the costs of raising a healthy child, each claimant was entitled to recover the additional costs involved in raising a disabled child.

18. In each case, there was no direct link between the negligence and the disability (as there had been in *Hardman*). Mrs Parkinson became pregnant following a failed sterilisation. Her son was born with severe disabilities. Mrs Groom would have undergone an early termination of her pregnancy but for her general practitioner's negligence. By the time the pregnancy was detected she considered it too late to have a termination. The child was born prematurely and succumbed to salmonella meningitis contracted during childbirth. Although she appeared healthy at first, she became unwell some weeks later and suffered damage to her brain which caused lasting disability.

19. In *Parkinson*, Hale LJ concluded [92] that the mother was entitled to recover for:

> "any disability arising from genetic causes or foreseeable events during pregnancy (such as rubella, spina bifida, or oxygen deprivation during pregnancy or childbirth) up until the child is born alive, and which are not novus actus interveniens."

20. The child's meningitis was described by Hale LJ in *Groom* as "bad luck" but she allowed for recovery of the costs relating to the disability which flowed from it on the basis that it arose "from the process of her birth during which she was exposed to the bacterium in question."

21. In *Parkinson*, Brooke LJ identified a "battery of tests" which could be relied on in deciding whether the law should recognise the existence of a legally enforceable duty of care, the breach of which would sound in damages. Both Counsel referred me to his analysis at paragraph 50 in that judgment and to the similar exercise conducted in *Groom* at paragraph 24.

22. There is no difficulty in this case in relation to proximity and foreseeability. It was conceded by Mr Davy that, although not diagnosed until much later, Adejuwon's autism was a congenital condition and a natural and foreseeable consequence of his birth. There was no argument that there had been a new intervening act or that it resulted from anything other than a natural chain of events from conception. Mr Davy accepted that standard 'but for' causation was made out. Neither party was suggesting that the case involved an incremental approach. On the contrary, each side said that the answer lay in applying established principles to the particular facts.

23. The tests upon which the parties disagreed were the assumption of responsibility; the scope of the duty of care and the extent to which it would be fair, just and reasonable to hold the defendant liable for the costs related to Adejuwon's autism.

24. In *Parkinson*, Hale LJ described the decision in *McFarlane* as representing a limitation on the damages which would ordinarily be recoverable on normal principles [90]. What she meant by 'normal principles' can be seen at paragraph 74:

> "Of course, most pregnancies are not caused wrongfully. But this case proceeds on the basis that this one was. The whole object of the service offered to the claimant by the defendants was to prevent her becoming pregnant again. They had a duty to perform that service with reasonable care. They did not do so. She became pregnant as a result. On normal principles of tortious liability, once it was established that the pregnancy had been wrongfully caused, compensation would be payable for all those consequences, whether physical or financial, which are capable of sounding in damages."

25. Brooke L.J. took a similar starting point in *Groom* at paragraph 17:

> "Since [the defendant's] breach of duty caused the claimant's pregnancy to continue, when it would otherwise have been terminated, and since Mr Coghlan conceded that the chain of events that took place in this case was foreseeable even if it was extremely rare, then if this was a straightforward personal injuries claim the way would ordinarily be open for the claimant to recover damages for negligence."

26. The purpose of the service offered by the defendant in this case was not to prevent the claimant having any child but rather, ultimately, to prevent her having a child with haemophilia. She wished to establish whether she was a carrier. If the service had been performed properly, she would have discovered that she was. She would then have taken steps to ensure that she did not continue with a pregnancy that was going to lead to the birth of a child with haemophilia. In that way, the birth of Adejuwon would have been avoided. Just as in *Groom*, it can be said that the defendant's breach of duty caused the claimant's pregnancy to continue when it would otherwise have been terminated.

27. In *Groom*, Brooke LJ said that there was no difficulty in principle in accepting the proposition that the doctor should be deemed to have assumed responsibility for the foreseeable and disastrous consequences of performing her services negligently. The doctor knew that the claimant had been sterilised and wanted no more children (let alone children with serious handicaps) and the duty of care included the purpose of ensuring that if the claimant was pregnant again she should be informed of that to allow her to prevent the birth of another child if she wished. He also found an award of compensation limited to the special upbringing associated with rearing a child with serious disability would be fair, just and reasonable. Hale LJ said [31]:

> "It is fair, just and reasonable that a doctor who has undertaken the task of protecting a patient from unwanted pregnancy should bear the additional costs if that pregnancy results in a disabled child."

28. *Rees v Darlington Memorial Hospitals NHS Trust* [2003] UKHL 52; [2004] 1 AC 309 was another failed sterilisation case, the difference being that the child was healthy but the mother had a pre-existing disability. She sought to avoid pregnancy because she felt that her disability would impair her parenting ability. The Court of Appeal found by a majority that the mother was entitled to claim those additional costs of rearing her child that related to her disability. The House of Lords (again by a majority) overturned this decision, holding that the decision in *McFarlane* that a parent could not recover for the cost of raising a normal, healthy child was not affected by the mother's disability. It is to be noted that this was despite the fact that the very purpose of the mother seeking sterilisation was to avoid the difficulty her disability would cause in raising a child.

29. Some of the speeches in *Rees* cast doubt on the Court of Appeal's reasoning in *Parkinson* and *Groom*. A number of their Lordships doubted whether damages for

raising a disabled child were recoverable. Nevertheless, *Parkinson* and *Groom* remain binding on me and Mr Davy did not seek to argue that the principle that damages could be recovered for the additional costs of a disabled child should be revisited in light of *Rees*.

30. Mr Havers relied upon a passage in the judgment of Lord Scott in *Rees* at paragraph 145:

> "a distinction may need to be drawn between a case where the avoidance of the birth of a child with a disability is the very reason why the parent or parents sought the medical treatment or services to avoid conception that, in the event, were negligently provided and a case where the medical treatment or services were sought simply to avoid conception."

He contended that this supported the claimant's case as it suggested that the principle of allowing recovery for a disabled child is even stronger in a case in which the very purpose of the investigation or procedure was to protect against the birth of a child with a disability. With respect, I do not think this passage does help the claimant's case. It must be seen in the context of a speech that was casting doubt on whether *Parkinson* was correctly decided. It is clear Lord Scott had in mind the situation where the parent was seeking to avoid a particular disability and consulted the doctor in relation to that risk. That applies here in the case of the disability relating to the haemophilia but does not help when considering whether liability should attach in relation to the consequences of the autism.

The *SAAMCO* principle

31. The defendant relies upon *South Australia Asset Management Corporation v York Montague* [1997] AC 191, a decision of the House of Lords concerning negligent valuation of property before the property crash of the early 1990's. The case contains statements of general principle in relation to whether losses can be considered to be within the scope of a professional adviser's duty. Earlier authorities cite this case under the title used in the Court of Appeal: *Banque Bruxelles Lambert S.A. v Eagle Star Insurance Co. Ltd*. More recently, it has become known by the shorthand *"SAAMCO"*.

32. In *SAAMCO*, the House of Lords was required to consider the extent of the liability of a valuer who provided a lender with a negligent overvaluation of property offered as security for a loan. The facts of the three cases before the House had two common features. First, the lender would not have provided the loan had the true value of the property been known. Second, a fall in the property market after the date of the valuation greatly increased the loss which the lender eventually suffered. The House of Lords decided that the measure of damages was the loss attributable to the inaccuracy of the information, namely the difference between the security the lender in fact had and that he would have had if the information had been accurate. The valuer was not responsible for all the consequences of proceeding with a loan which the lender would not have made had the true valuation been known.

33. At page 211, Lord Hoffman said:

> "Before one can consider the principle on which one should calculate the damages to which a plaintiff is entitled as compensation for loss, it is necessary to decide for what kind of loss he is entitled to compensation."

He went on at page 212 to quote Lord Bridge of Harwich in *Caparao Industries Plc. V Dickman* [1990] 2 A.C. 605 at 627:

> "It is never sufficient to ask simply whether A owes B a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harmless."

He said the real question was "the kind of loss in respect of which the duty was owed."

34. In simple terms, Mr Davy says that the loss referable to Adejuwon's autism was not the kind of loss in respect of which the defendant's duty was owed. Applying the *SAAMCO* principle, he says, leads to the conclusion that the defendant's liability is limited to the consequences of the haemophilia as that was the particular condition about which she was consulted.

35. Looking at the principles underlying the extent to which the valuers should be held liable in *SAAMCO*, Lord Hoffman said (at page 212H):

> "There is no reason in principle why the law should not penalise wrongful conduct by shifting on to the wrongdoer the whole risk of consequences which would not have happened but for the wrongful act."

But he went on to say that this is not the "normal rule". At page 213C he continued:

> "Rules which make the wrongdoer liable for all the consequences of his wrongful conduct are exceptional and need to be justified by some special policy. Normally the law limits liability to those consequences which are attributable to that which made the act wrongful. In the case of liability for providing inaccurate information, this would mean liability for the consequences of the information being inaccurate.
>
> I can illustrate the difference between the ordinary principle and that adopted by the Court of Appeal by an example. A mountaineer about to undertake a difficult climb is concerned about the fitness of his knee. He goes to a doctor who negligently makes a superficial examination and pronounces the knee fit. The climber goes on the expedition, which he would not have undertaken if the doctor had told him the true state of his knee. He suffers an injury which is an entirely foreseeable consequence of mountaineering but has nothing to do with his knee.

> On the Court of Appeal's principle, the doctor is responsible for the injury suffered by the mountaineer because it is damage which would not have occurred if he had been given correct information about his knee. He would not have gone on the expedition and would have suffered no injury. On what I have suggested is the more usual principle, the doctor is not liable. The injury has not been caused by the doctor's bad advice because it would have occurred even if the advice had been correct."

36. Lord Hoffman said there would be something wrong with a principle which produced the result that the doctor was liable in that scenario. He suggested it:

> "offends common sense because it makes the doctor responsible for consequences which, though in general terms foreseeable, do not appear to have a sufficient causal connection with the subject matter of the duty. The doctor was asked for information on only one of the considerations which might affect the safety of the mountaineer on the expedition. There seems no reason of policy which requires that the negligence of the doctor should require the transfer to him of all the foreseeable risks of the expedition."

37. In the same way, Mr Davy says all the foreseeable risks of the pregnancy cannot be transferred to the doctor who has provided a service in relation only to one specific risk, the risk of haemophilia.

38. The Court of Appeal had regard to *SAAMCO* in *Parkinson*. Citing it as *Banque Bruxelles Lambert SA v Eagle Star Insurance Co. Ltd.,* Brooke L.J. said [18]:

> "it may be necessary on some occasions for a court to ask itself for what purpose a service was rendered, because the inquiry may stake out the limits of the duty of care owed by the person performing the service"

The purpose of the 'service' (sterilisation operation) in *Parkinson* was to prevent Mrs Parkinson becoming pregnant again and therefore to prevent her having any more children, including children with congenital abnormalities.

39. In *Groom* Hale LJ said [29]:

> "Here the negligence consists in allowing the pregnancy to continue when the claimant did not wish to be pregnant at all."

Having said that for her part she did not regard the costs of bringing up a child born as the result of another's negligence as "pure" economic loss, she said that *McFarlane* was to be limited to the costs of bringing up a healthy child.

> "Whether one regards that as a scope of duty question or a scope of damages question matters little."

40. In *Chester v Afshar* [2005] 1 AC 309, the House of Lords considered the application of the *SAAMCO* principle in a different context in a clinical negligence claim. There, the claimant suffered serious neurological injury which was a recognised risk of the spinal surgery she underwent. The surgeon had negligently failed to warn her of the risk. The trial judge found that the claimant would not have undergone the operation when she did, had she been appropriately warned. He did not find that she would never have undergone the procedure. The risk of which she should have been warned was not created by the failure to warn. Lord Hope of Craighead said this [81]:

> "It was already there, as an inevitable risk of the operative procedure itself however skilfully and carefully it was carried out. The risk was not increased, nor were the chances of avoiding it lessened, by what Mr Afshar failed to say about it."

41. In this case, it is agreed that the risk of autism was a risk that existed with every pregnancy. The risk was not increased, nor were the chances of avoiding it lessened, by the failure to properly manage the risk of the claimant having a child with haemophilia.

42. In *Chester v Afshar*, both Lord Hope and Lord Walker emphasised that the issue of causation could not be properly addressed without a clear understanding of the scope of the defendant's duty. The majority considered that where a surgeon failed to warn of the very risk that materialised the patient should have a remedy in damages. Lord Walker distinguished injury that was merely coincidental. An example was [94]:

> "if a taxi-driver drives too fast and the cab is hit by a falling tree, injuring the passenger, that is pure coincidence. The driver might equally have avoided the tree by driving too fast, and the passenger might have been injured if the driver was observing the speed limit."

43. Miss Chester's case could not be put in that category, instead:

> "Bare "but for" causation is powerfully reinforced by the fact that the misfortune which befell the claimant was the very misfortune which was the focus of the surgeon's duty to warn."

44. There has been some criticism of *SAAMCO*. In an article in the Law Quarterly Review (L.Q.R 2005, 121 (Oct)), Lord Hoffman accepted that saying that the restriction flowed from the scope of the duty of care may be inappropriate. Clarifying what was meant, he said:

> "There is a close link between the nature of the duty and the extent of liability for breach of that duty."

He went on:

> "In the valuer's case, liability was confined to the consequences of the client having too little security because the valuer had not been asked to advise on whether the client should lend. The valuation was to be only one factor which the client would take into account in making his own decision about whether to lend."

45. In *Hughes-Holland v BPE Solicitors and another* [2017] UKSC 21; [2017] 2 WLR 1029, Lord Sumption JSC highlighted the distinction drawn by Lord Hoffman in *SAAMCO* between "advice" cases and "information" cases but acknowledged that such distinction could be confusing. In a case falling within the "information" category a professional adviser would contribute a limited part of the material on which the client will rely in deciding whether to enter a particular transaction but the process of identifying and assessing the other risks would remain with the client. In such circumstances, the adviser is only liable for the financial consequences of the information being wrong and not for all the financial consequences of the claimant entering into the transaction so far as these are greater. The defendant does not become the underwriter of the entire transaction by virtue of having assumed a duty of care in relation to just one element of the decision.

46. The defendant relies upon this, saying that her duty extended to providing information in respect of just one disability and that it would not be right to say that she assumed responsibility to protect from all the consequences of the claimant's decision to proceed with the pregnancy.

The parties' respective positions

47. The parties' positions can in the end be summarised briefly, I hope without doing any injustice to the careful and thorough way Counsel presented their submissions.

48. The claimant, through Mr Havers, says that once it is established (as it has been) that, but for the defendant's negligence, this pregnancy would not have continued, the defendant is liable for all the consequences of the pregnancy, save those that cannot be recovered as a matter of law. The cost of raising a healthy child is not recoverable because the law precludes that as a matter of policy. However, that does not apply to the cost of raising a disabled child. It has been determined in *Parkinson* and *Groom* that the 'kind of loss' that may be recovered in wrongful birth cases extends to cover disabilities arising from the normal incidents of conception, intra-uterine development and birth. Here it is accepted that Adejuwon's autism was congenital, although diagnosed later. The condition was no less foreseeable than the learning disability in *Parkinson* or the meningitis acquired at delivery in *Groom*.

49. The claimant further contends that the purpose of the duty in *Groom* and in this case was the same, namely to enable the mother to take steps to terminate an unwanted

pregnancy. Mr Havers argues that no rational distinction may be drawn between a woman who did not want any pregnancy and one who did not want a particular pregnancy. It is no less fair, just and reasonable to impose responsibility for all the disability-related consequences in this case than in *Parkinson* or *Groom*.

50. By contrast, Mr Davy contends on behalf of the defendant that there is a material distinction between the situation where a parent seeks to avoid the risk of a specific disability and one where the parent seeks to avoid or terminate any pregnancy. When a parent has sought to avoid having any child, there can be no question of that parent being willing to accept the normal risks that may lead to having a disabled child. However, a parent who is seeking to protect against a particular disability is otherwise quite happy to run the usual risks associated with any pregnancy. It is not fair, just and reasonable to transfer those risks from parent to doctor. The loss flowing from the autism did not fall within the kind of loss which the defendant had a duty to prevent.

51. The defendant seeks to distinguish different types of wrongful birth cases and says that the application of the *SAAMCO* principle to the different categories will lead to a different outcome. Mr Davy highlights that other wrongful birth claims have involved either failing to detect a particular disability about which the doctor was consulted or failing to prevent pregnancy altogether. He argues that this case is different. This is the first reported case in which a different disability has arisen when a doctor has been consulted about a particular risk. Application of the relevant principles lead to a rejection of the claim for the losses associated with the child's autism.

Discussion

52. I accept that, if looked at from the perspective of the risks that the parent was willing to run, there is a distinction between a case in which a parent does not want to have any child and one where a parent does not want to have a child with a particular disability. However, I am not persuaded that this is the appropriate starting point.

53. As a matter of simple 'but for' causation, Adejuwon would not have been born but for the defendant's negligence. The claimant therefore would not have had a child with the combined problems of haemophilia and autism. Had she known she was a carrier, she would have undergone foetal testing and would then have terminated this particular pregnancy. The other risks associated with that pregnancy would no longer have existed.

54. It is right that the claimant would have gone on to have another pregnancy at another time and involving, necessarily, a different combination of genes. Although any pregnancy would have carried the same risk of autism, on the balance of probabilities, the subsequent pregnancy would not have been affected by autism.

55. It seems to me that those circumstances produce a much closer analogy to *Chester v Afshar* than to the mountaineer's knee in *SAAMCO*. Just as with the risk inherent in the surgery in *Chester v Afshar*, the risk of autism was an inevitable risk of any pregnancy, but it cannot be said that it would probably have materialised in another pregnancy. In the case of the hypothetical mountaineer in *SAAMCO*, it can be said that if the advice about his knee had been right he would have gone on to climb the

same mountain and would have had the same accident. The risk that materialised (an avalanche) had nothing to do with his knee. Here though the risk that materialised had everything to do with the continuation of this pregnancy. The autism arose out of this pregnancy which would have been terminated but for the defendant's negligence.

56. I agree with Mr Havers when he says that it is inapt to ask, as the defendant does, what losses would have occurred if the information had been correct. The pregnancy is indivisible. It cannot be said that, if the advice had been accurate, the claimant would have had a child with autism but not with haemophilia. Unlike the mountain and the avalanche which existed quite independently of the condition of the mountaineer's knee, Adujowon was the product of a particular pregnancy which only continued to exist as a result of the negligent advice.

57. I accept that a key part of the rationale in *Chester v Afshar* was that the misfortune which befell the claimant was the very misfortune which was the focus of the surgeon's duty to warn. By contrast, the misfortune which was the focus of the duty here was haemophilia not autism. However, the focus of the defendant's duty, or the purpose of the service to put it another way, was to provide the claimant with the necessary information so as to allow her to terminate any pregnancy afflicted by haemophilia, as this pregnancy was. In the circumstances, the continuation of this pregnancy was as unwanted as that in *Groom*.

58. Once it is established that, had the mother been properly advised she would not have wanted to continue with her pregnancy, should it matter why she would have wanted a termination? Why logically should there be a distinction between the parent who did not want any pregnancy and one who did not want this particular pregnancy? In each case, the effect of the doctor's negligence was to remove the mother's opportunity to terminate a pregnancy that she would not have wanted to continue. To draw a distinction on the basis of considering the underlying reason why a mother would have wanted to terminate her pregnancy seems unattractive, arbitrary and unfair.

59. Mr Davy having conceded that there were no issues in relation to foreseeability and proximity and neither side contending that the case involved an incremental approach, the issues which remained live, having regard to the battery of tests identified in *Parkinson* and *Groom*, were:

    i) Whether the autism was a consequence falling within the responsibility the defendant had assumed;

    ii) The purpose of the service provided by the defendant and the scope of the duty that arose from that;

    iii) Whether it was fair, just and reasonable to impose liability for the costs associated with Adejuwon's autism;

    iv) Principles of distributive justice.

60. Mr Davy correctly identified an overlap between issues of duty, causation and loss and went on to analyse the issue of the scope of the duty as part of the key techniques to identify the circumstances in which the law should recognise the existence of a

legally enforceable duty, the breach of which might lead to an award of damages. However, he also drew attention to the authorities that treated the "scope of duty" as being more properly a causation limit.

61. The thrust of the defendant's argument (summarised at paragraph 38 of the skeleton argument) was that the additional losses associated with Adejuwon's autism fall outside the scope of the duty owed to the claimant.

62. I do not accept that is so. As I have already said, the focus of the defendant's duty and the very purpose of the service the claimant sought was to provide her with the necessary information to allow her to terminate any pregnancy afflicted by haemophilia. The birth of Adejuwon resulted from a pregnancy which was afflicted by haemophilia. His autism was bad luck, in the same way that the meningitis in *Groom* was bad luck. Equally, each condition was the natural consequence of a pregnancy that would not have continued if the doctor's duty had been performed correctly. The scope of the duty in this case extended to preventing the birth of Adejuwon and all the consequences that brought.

63. For the same reasons, I reject the submission that the losses flowing from Adejuwon's autism fell outside the defendant's assumption of responsibility. It is true that the defendant did not assume any particular responsibility in relation to autism but neither did the doctor in *Parkinson* assume a particular responsibility for learning difficulties or the doctor in *Groom* for meningitis. In all cases, the doctor did assume a responsibility which, if properly fulfilled, would have avoided the birth of the child in question.

64. I was told initially that the defendant had accepted that the costs and losses associated with the continuation of the pregnancy itself were recoverable. It seemed to me that this was perhaps inconsistent with the defendant's position on the autism-related losses. Applying the defendant's argument that, had the advice been correct, the claimant would have proceeded with the pregnancy, running the usual risks of pregnancy, would seem to exclude recovery of damages for the pregnancy itself as much as it excludes recovery for the autism-related losses. When this issue was explored, Mr Davy moved back from his initial acceptance that the pregnancy-related losses were recoverable. Alternatively, he said that the explanation for those losses being recoverable when the autism-related costs were not may lie in the fact that damages for the pregnancy are not damages for pure economic loss but rather are in the nature of personal injury damages to which different principles apply.

65. I accept, of course, that the defendant is not bound by any concession made during negotiations to agree a sensible valuation on the defendant's case. The sum agreed was a round sum. The pregnancy-related costs will have been a modest part of the overall total and may not have attracted much consideration. I do not hold anything agreed in negotiations against the defendant. Nevertheless, I do consider that the initial view that these damages were recoverable was right and was consistent with the principle that the claimant was entitled to recover for all the natural consequences of her pregnancy continuing since it would not have done so absent the negligence.

66. Asking whether it was fair, just and reasonable to impose a duty in respect of the autism costs and considering principles of distributive justice may give rise to difficult

questions as to where to draw any line. As Lord Steyn said in *McFarlane*, principles of distributive justice:

> "require a focus on the just distribution of burdens and losses among members of a society"

67. In my view, this is an area where opinions may differ. The distribution of burdens and losses between innocent patients and NHS doctors is generally a controversial topic. The sensitivities of this case perhaps give rise to even more ground for debate. However, I do not accept the defendant's suggestion that imposing liability here would mean that doctors would be under increased pressure to advise in relation to all potential consequences of pregnancy and birth when advising on one particular risk. Nor do I think the defendant's reference to the need for other professionals to purchase cover for coincidental loss is relevant. The rising cost of professional indemnity for general practitioners is a matter of legitimate public concern. However, allowing recovery of the autism costs in this case will not open the floodgates to numerous other claims. The circumstances of this case, with the coexistence of two disabilities, will be rare.

68. The courts have already determined that damages may be recovered for the costs of raising a disabled child born as a result of a doctor's negligence even though there is no direct link between the negligence and the disability. In my judgment, it would not be fair, just and reasonable to draw a distinction between the mother in this case who would have wanted to terminate this pregnancy and the mother who would have wanted to terminate any pregnancy. I do not consider that any principle of distributive justice requires a distinction to be drawn on that basis. I do not see that the claimant should be in a worse position simply because she would have been happy to have another pregnancy and to run the risks associated with that.

69. When testing the limits of liability, I asked Mr Havers what the position would have been if the claimant had been opposed to termination of pregnancy and so would have chosen not to become pregnant knowing she was a carrier. Could she then have recovered for all losses relating to the pregnancy and to an unrelated disability even if the child was not afflicted by haemophilia? Mr Havers suggested that would be the case. While that result would follow as a matter of simple 'but for' causation, I do not think many people would consider the recovery of damages to be just in those circumstances. However, with respect, I do not think Mr Havers was right about this. The birth of a disabled child who did not have haemophilia would have had nothing to do with the defendant's negligence. Such a case could truly be said to be analogous to the mountaineer's knee in *SAAMCO*. The crucial factor that the disabled child resulted from a pregnancy afflicted by the very condition about which the doctor was consulted would have been missing. In reality, I doubt very much that the claimant would have even contemplated bringing proceedings in those circumstances.

70. However, Mr Havers' contention on this issue together with Mr Davy's wavering position on the pregnancy damages does perhaps illustrate the difficulty in drawing a clear line between what is and what is not recoverable. Issues of causation in tort cases frequently raise difficult issues and inconsistencies do exist within the law. I am firmly of the view that this case should be decided by applying the relevant

principles consistently with the way in which the Court of Appeal has applied them in other wrongful birth cases. I consider it unattractive to introduce further inconsistency by distinguishing different types of wrongful birth cases and applying different principles to the recovery of damages for the upbringing of a disabled child.

Conclusion

71. The Court of Appeal has decided in *Parkinson* and *Groom* that recovery for the costs associated with a disability not directly linked to the negligence is fair where the disabled child would not have been born but for the negligence and where the disability arises out of the normal incidents of conception, intra-uterine development and birth. I can see no good reason to distinguish this case as a matter of principle or policy.

72. It follows that I consider that the costs related to Adejuwon's autism may properly be recovered by the claimant from the defendant. Damages will be assessed in the sum of £9,000,000 in accordance with the agreement on quantum reached between the parties.