Neutral Citation Number: [2018] EWCA Civ 2803

Case No: A2/2017/3052

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
MR JUSTICE JAY
[2017] EWHC 2438 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/12/2018

Before:

LADY JUSTICE KING DBE
LORD JUSTICE DAVID RICHARDS
and
LADY JUSTICE NICOLA DAVIES DBE

- -

Between:

ARB	**Appellant**
- and -	
IVF HAMMERSMITH	**Respondent**
- and -	
R	**Third Party**

- -
- -

David Halpern QC, Michael Mylonas QC and Susanna Rickard (instructed by **Hughes Paddison**) for the **Appellant**
Jeremy Hyam QC and Suzanne Lambert (instructed by **Hempsons**) for the **Respondent**
Michael Powers QC and Mark McDonald (instructed by **Axiom Stone Solicitors**) for the **Third Party**

Hearing dates: 30-31 October 2018

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Approved Judgment

Lady Justice Nicola Davies DBE:

1. This is an appeal from the decision of Jay J in respect of ARB's claim for breach of contract against the respondent IVF clinic. In November 2010, the clinic thawed and implanted an embryo containing ARB's gametes into R, from whom ARB had by that date separated. The clinic failed to obtain ARB's written or informed consent to the procedure. It proceeded on the basis of a signature on the relevant form which the judge found had been forged by R.

2. The embryo was one of several created from ARB's and R's gametes during previous IVF treatment at the clinic. That earlier treatment resulted in the birth of their son. As a result of the clinic's breach of contract in thawing and implanting the embryo without consent, R gave birth to a daughter, E, who is now the sibling of ARB's son; there is a Family Court order confirming parental responsibility and shared residence in respect of both children. ARB seeks damages for the pecuniary losses relating to E's upbringing (past and future) incurred as a result of the clinic's breach of contract.

3. ARB succeeded on all aspects of his primary case against the clinic for breach of contract. However, the judge held that ARB could not recover damages for the cost of E's upbringing for reasons of policy.

4. The judge identified the crux of the matter as being whether the legal policy enunciated by the House of Lords in *McFarlane v Tayside Health Board* [2000] 2 AC 59 and *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309 and applicable to tortious claims founded on reasonable care obligations should apply equally to contractual claims founded on strict obligations in circumstances where the parties have not sought to quantify or liquidate the damages payable in the event of breach. He found that the same legal policy applied to thwart ARB's claim. At [319] he stated:

> "Looking again at Rees, the legal policy objections may be characterised as follows: the inherent difficulty, if not impossibility, of measuring the loss; the unwillingness to regard the child as a financial liability; the refusal to offset the benefits which will accrue from parenthood from any additional financial liabilities; the feeling that it is morally unacceptable to attempt this exercise; and the notion that it is not fair, just and reasonable to allow this sort of claim. These objections overlap, and may be expressed in different ways, with different emphasis. Most of them are apt to apply where the contractual obligation is strict. The last of these objections is expressly tied to considerations which traditionally have only operated in the tortious sphere, and it is to be noted that Lord Bingham also expressly referred to burdens on the NHS. However, the secondary obligation to pay damages arises by implication of the common law, and in my view the result should be the same even if one were notionally to strip away the tort-specific objections. Furthermore, I have difficulty with the notion that a private patient could succeed whereas an NHS patient could not."

5. Permission to appeal to the Court of Appeal in respect of the policy bar was granted by the judge.

Facts

6. In 2008 the appellant, ARB, and the third party, R, attended the respondent's clinic for the purpose of investigating and subsequently undergoing fertility treatment. They entered into a contract for the provision of fertility services. As a result an embryo was placed into R and she subsequently gave birth to a healthy boy. As part of that treatment, all of which was provided on the NHS, a number of embryos made with ARB and R's gametes were frozen to await the possibility that they would decide to undergo further treatment. Storage of embryos can only be done lawfully if both the male and female providing their gametes have given their written consent. That consent was contained in a document, "Agreement for Cryopreservation of Embryos" ("the Agreement"), which was signed by R and ARB on 24 June 2008. The Agreement commenced with the identification of R and ARB, setting out their addresses and contact details, and thereafter stated:

> "[We] Understand that:
>
> 1. a) We must both give written consent before any embryos are thawed and replaced…
>
> 2. In the event of divorce or separation:
>
> - The IVF unit will only thaw and replace embryos if both partners give written consent at the time of embryo replacement. The partners should also be those which are named in this document…
>
> 5. Contract conditions:
>
> a) We review the storage contract annually. It is the responsibility of the couple once a year to confirm that you wish storage of embryos to continue. Failure to keep in contact with the unit or failure to pay the annual storage fee will result in the disposal of your embryos 3 months after the annual review date has lapsed or on expiry of your consent form (whichever is first). It is also your responsibility to inform the senior embryologist if you change your address or if there is any change in personal circumstances.
>
> b) It is your joint responsibility to pay the annual fee to cover storage of your embryos and administration.
>
> c) Consent to store embryos is required by both partners. If either partner does not agree then the embryos have to be thawed and allowed to perish.
>
> 6. Declaration: We have been given sufficient time to consider the contents of this document, and have been given the opportunity to have counselling if required or to take legal advice before signing below…"

7. Following the birth of their first child in the autumn of 2008, relations between ARB and R deteriorated. On 13 February 2008 ARB signed a form "Consent to the Use of Sperm and Storage of Embryos in Own Treatment or Research". The form, prescribed by the Human Fertilisation and Embryology Authority ("HFEA") is known as the "MT1 form", R also signed a "WT1 form" in similar terms to the MT1. In MT1 ARB expressly consented to the use of his sperm in his partner's treatment for creating embryos in vitro and the use of those embryos in his partner's treatment. The form stated that ARB "can change or withdraw your consent at any time except when your sperm, or embryos created with your sperm, have already been used."

8. On 5 March 2008 ARB and R consulted the clinic's director, Mr Geoffrey Trew, Consultant in Reproductive Medicine and Surgery. Mr Trew's notes include the fact that following R's first treatment cycle at the clinic five embryos were frozen. At the consultation Mr Trew recommended that R undergo various investigations. In the event that the tests were normal the plan was to proceed to a frozen embryo replacement cycle ("FERC") with a blastocyst transfer (a blastocyst is an embryo at day five of its development). On 8 March 2010 Mr Trew wrote to R's consultant stating that "she would like another baby".

9. Following their consultation ARB paid a fee of £750 and the parties were given a number of documents, described by ARB as "a package of papers". They comprised: counselling information leaflet; consent to the thawing of embryos; FERC patient guide; patient and partner questionnaire; self-funded patient treatment price list.

10. On 30 April 2010 R attended the clinic alone and was seen by Mr Trew following completion of the investigations. He informed her that she could proceed to a first cycle with all five of the available embryos being thawed. On 14 May 2010 R attended the clinic alone for a FERC coordination appointment when she was seen by a nurse. The notes record that the patient was unsure about thawing all of the embryos for blastocyst, she would decide prior to embryo transfer. It notes that the Consent to Thaw form was given, R was instructed to speak to the embryologist before signing the form and to indicate the number of embryos which "they are happy to thaw initially". She was instructed to return the signed form on the day of the suppressed scan which was the next stage in the process.

11. The clinic had a written protocol/Standard Operating Procedure ("SOP") for the FERC clinic which included the following:

> "FERC clinic is a nurse-led clinic, it may be possible for an embryologist to be in attendance.… If no embryologist is available for clinic, ask them to advise how many embryos should be thawed initially. …
>
> 1.2. The Consultation
>
> …
>
> - Allow the embryologist to explain about the embryos, if they are present

- Explain the consent to thaw form – if both partners are present and they are happy to sign it – witness the form

…

- If both partners do not attend clinic, give the consent form and emphasise the importance of returning it at the first scan appointment.

…"

12. In 2014, three years after the event which led to the birth of E, the SOP was revised to include the following:

"The Consultation

…

- Allow the embryologist to explain about the embryos, if they are present. Explain the Consent to Thaw Form – if both partners are present and they are happy to sign it – witness the form and scan it on IDEAS – Patients need to bring some forms of ID – i.e. Passport or Driving License

…

- If both partners do not attend clinic, give/email the consent form and emphasize the importance of returning it at the first scan appoint – Both patients need to sign Consent to Thaw Form in presence of a Nurse and their ID checked against their Passport or Driving license

…

Obtaining and Checking Consent forms

- It is important that both partners need to be present during coordination

- Both partners need to bring their valid ID (passport, driving license)

- The nurse taking consent needs to check that both signatures in the FERC consent match the ones in the valid ID and the ones in the previous consent forms (if available on IDEAS).

- If it all matches, the nurse taking consent signs the consent form as a witness (member of staff) and document that signatures has been checked against the valid ID (specify which ID) and the previous consent forms

- Ask the patient/s to also write the same signature as with the previous consent forms if different from the valid ID, and document any remarks

- The completed consent form is scanned into the patient's file in IDEAS, the original will be kept in the folder found in the operational office and be discarded after 6 months

If in case the male partner is not present during the coordination appointment (even with his signature)

- check females signature and sign as witness with a note that male is not present during coordination and advised patient that male partner is required to attend the clinic and complete the consent form prior to the first scan appointment

- male partner to bring a valid ID to the unit when completing the consent form

- scan the consent form into IDEAS

- original copy to be kept at FERC consent folder in the nurses office and to be given to patients on Day of Embryo Transfer

2.3.2 Procedure when the male partner attends the unit to complete the consent forms

Any nurse or embryologist can assist male partner in completing the consent form:

- print out the scanned consent form from IDEAS, read remarks

- ask the male partner to sign the consent form and make sure it matches the one in the valid ID and the previous consent forms (if available on IDEAS)

- Ask the patient to also write the same signature as with the previous consent forms if different from the valid ID, and document any remarks

- countersign as witness

- scan the consent form into IDEAS

2.3.3 Circumstances that male partner is not available

For any circumstances that the male partner will not be available by any means such as out of the country, disability or others,

> discuss the issue with the consultant and senior Embryologist and document the decision on IDEAS."

13. In July 2010 R and ARB separated. In August 2010 a letter from the clinic arrived at ARB's home, which he took to R's home. It contained a form "Frozen Embryo Bank Record Update and Agreement Renewal". R completed the form giving her address and signed it on 7 September 2010. The judge found that R had in fact signed the form on 5 September 2010. In signing the form the parties gave the following declaration:

> "I understand that [the clinic] will renew the storage of our embryos for a further year, the next review will be June 2011.
>
> It is our responsibility to keep the senior embryologist informed of any change of address and circumstances. We understand that if we do not keep in contact, our embryos will be disposed of three months after the date stated above, unless I have contacted the senior embryologist at [the clinic] and organised continued storage."

Neither party informed the clinic of their separation.

14. The patient and partner questionnaire required signature by both partners in three separate places. In respect of R it is signed as of 13 September 2010. ARB's signature is in three places and is dated 14 September 2010. ARB's evidence, accepted by the judge, was that he signed it undated on 5 March 2010. All the information on the form including the dates against ARB's signatures was completed by R.

15. On 19 October 2010 R attended the clinic alone for her first suppressed scan. She did not return the Consent to Thaw form. It was subsequently provided by her. R signed that form, which bears the date 20 October 2010. The signature which purports to be that of ARB is adjacent to "male partner" on the form. The form contains the following:

> "[R] and [ARB] consent to the thawing of our embryos that were frozen following infertility treatment. We also understand that …
>
> - The decision of the number of embryos to thaw will be made after discussion with ourselves and a member of the IVF team. This will be renewed on the day of the thaw by an embryologist and is dependent on the survival of the embryos. …
>
> 'Discussed with Ben Lavender 1 good embryo to be thawed and placed if it survives. If not 4 remaining eggs to be thawed and observed.' [In manuscript]
>
> - We understand that we are being treated as a couple and that the male partner will be the legal father of any resulting child."

This form was not signed as required by a "member of centre".

16. On 29 October 2010 R attended the clinic for her pre-transfer appointment. On 2 November 2010 one embryo was thawed and transferred. E was born in 2011.

17. On 25 November 2012 ARB signed a form withdrawing his consent to the use and storage of any embryos fertilised by his sperm.

Judge's findings of fact

18. The judge described ARB as an honest witness who did his best to give accurate and reliable evidence. He found that R had lied in her evidence as to: R signing the Consent to Thaw form; ARB's agreement to such a procedure; his alleged attendance with Mr Trew on 30 April 2010. The judge found that R forged ARB's signature on the Consent to Thaw form on or about 20 October 2010. She did so by tracing over a pencil outline of ARB's signature in biro.

19. The purpose of the 5 March 2010 consultation with Mr Trew was to discuss the use of frozen embryos to make R pregnant. R desperately wanted another child, ARB was "very lukewarm but went along with it". Mr Trew gave general information about the FERC procedures but did not discuss important details such as the number of embryos to be thawed. Following the consultation ARB and R were given the bundle of documents identified at paragraph 9 above. ARB did not read the documents, they were retained by R. He signed the patient and partner questionnaire on 5 March 2010, it being his understanding that it was required by the clinic in relation to the tests R would undergo. He did not date the questionnaire nor did he fill in any details relevant to him.

20. ARB was unaware of R's FERC coordination appointment on 14 May 2010. However, the clinic was proceeding on the basis that ARB and R were being treated together. The judge found that in the discussion on or about 5 September 2010 between ARB and R, identified in paragraph 12 above, ARB told R not to do anything without his permission. ARB signed the renewal form without reading it carefully because he did not think it was particularly significant and his main concern was to preserve his contact arrangements in relation to D. At [209] of his judgment the judge stated:

> "Thus, I conclude that ARB did not sign the Consent to Thaw form on 20th October 2010 or at all. His signature was forged by R. I further conclude that he did not in fact give his informed consent to the procedure because he was not given all the necessary information which would have enabled him to provide his consent, he was not willing to have a child with R in September and October 2010, and he would not have signed the Consent to Thaw form had R asked him to do so. I am completely satisfied that ARB had not in fact been given sufficient information by R in relation to the number of embryos to be implanted and their stage of development. I am also completely satisfied that ARB had no intention of having another child with R after May 2010. In October 2010 R well knew that, which explains why she resorted to desperate, dishonest measures."

Regulatory Framework

21. Human Fertilisation and Embryology Act 1990 (as amended):

> "12. General Conditions
>
> (1) The following shall be conditions of every licence granted under this Act—
>
> …
>
> (c) except in relation to the use of gametes in the course of providing basic partner treatment services, that the provisions of Schedule 3 to this Act shall be complied with…
>
> …
>
> Schedule 3 – Consents to use or storage of gametes, embryos or human admixed embryos etc
>
> 1. Consent
>
> (1) A consent under this Schedule, and any notice under paragraph 4 varying or withdrawing a consent under this Schedule, must be in writing and, subject to sub-paragraph (2), must be signed by the person giving it.
>
> …
>
> (3) In this Schedule 'effective consent' means a consent under this Schedule which has not been withdrawn.
>
> …
>
> 3. Procedure for giving consent
>
> (1) Before a person gives consent under this Schedule—
>
> (a) he must be given a suitable opportunity to receive proper counselling about the implications of taking the proposed steps, and
>
> (b) he must be provided with such relevant information as is proper.
>
> (2) Before a person gives consent under this Schedule he must be informed of the effect of paragraph 4 and, if relevant, paragraph 4A below.
>
> 4. Variation and withdrawal of consent
>
> (1) The terms of any consent under this Schedule may from time to time be varied, and the consent may be withdrawn, by

> notice given by the person who gave the consent to the person keeping the gametes, human cells, embryo or human admixed embryo to which the consent is relevant.
>
> ...
>
> 5. Use of gametes for treatment of others
>
> (1) A person's gametes must not be used for the purposes of treatment services or non-medical fertility services unless there is an effective consent by that person to their being so used and they are used in accordance with the terms of the consent.
>
> (2) A person's gametes must not be received for use for those purposes unless there is an effective consent by that person to their being so used.
>
> …
>
> 8. Storage of gametes and embryos
>
> (1) A person's gametes must not be kept in storage unless there is an effective consent by that person to their storage and they are stored in accordance with the consent."

22. There is nothing in the 1990 Act which indicates that any breach of its provisions gives rise to any civil liability.

HFEA Code of Practice Eighth Edition

23. The eighth edition was in force between April 2010 and April 2011. It contains the following:

> "Guidance Note 4
>
> Licence Conditions
>
> T58. Prior to giving consent gamete providers must be provided with information about: (a) the nature of the treatment, (b) its consequences and risks, (c) any analytical tests, if they are to be performed, (d) the recording and protection of personal data and confidentiality, (e) the right to withdraw or vary their consent, and (f) the availability of counselling.
>
> T59. The information referred to in licence condition T58 must be given by trained personnel in a manner and using terms that are easily understood by the gamete provider.
>
> …
>
> Guidance Note 5

Licence conditions

T57. Gametes or embryos must not be used in the provision of treatment services … unless effective consent is in place from each gamete provider in accordance with Schedule 3 …

…

The law requires the centre to obtain written informed consent from a person before it performs the following procedures: … (e) using embryos created with their gametes for their own treatment, treatment of a partner or treatment of others.

…

5.1 The centre should obtain written informed consent from a person before it carries out the following procedures: (a) using their gametes for their own treatment or their partner's treatment.

…

5.3 The centre should establish and use documented procedures to ensure that no activity involving the handling or processing of gametes or embryos is carried out without the appropriate consent having been given.

Interpretation of mandatory requirements

The law requires that before a person consents to the procedures outline in box 5A, they should be given:

> (a) enough information to enable them to understand the nature, purpose and implications of their treatment or donation,
>
> (b) a suitable opportunity to receive proper counselling about the implications of the steps which they are considering taking, and
>
> (c) information about the procedure for varying or withdrawing any consent given, and about the implications of doing so.
>
> …

5.6 The centre should give anyone seeking treatment or considering donation or storage enough time to reflect on their decisions before obtaining their consent. The centre should give them an opportunity to ask questions and receive further information, advice and guidance.

…

> 5.9 The centre should ensure that anyone giving consent declare that:
>
> (a) they were given enough information to enable them to understand the nature, purpose and implications of the treatment or donation,
>
> (b) they were given a suitable opportunity to receive proper counselling about the implications of the proposed procedures,
>
> (c) they were given enough information about the procedure for varying or withdrawing consent, and
>
> (d) the information they have been given in writing is correct and complete.
>
> 5.10 Treatment centres should take all reasonable steps to verify the identity of anyone accepted for treatment, including partners who may not visit the centre during treatment. If a patient's identity is in doubt, the centre should verify their identity, including examining photographic evidence such as a passport or a photocard driving licence. The centre should record this evidence in the patient's medical records.
>
> 5.11 To avoid the possibility of misrepresentation or mistake, the centre should check the identities of the patients (and their partners, if applicable) against identifying information in the medical records. This should be done at each consultation, examination, treatment or donation."

24. Department of Health Guidance:

> "1. For consent to be valid, it must be given voluntarily by an appropriately informed person who has the capacity to consent to the intervention in question … Acquiescence where the person does not know what the intervention entails is not 'consent'.
>
> …
>
> 10. To be valid, consent must be given voluntarily and freely, without pressure or undue influence being exerted on the person either to accept or refuse treatment. …
>
> …
>
> 13. To give valid consent, the person needs to understand the nature and purpose of the procedure. Any misrepresentation of these elements will invalidate consent. …

> …
>
> 18. In considering what information to provide, the health practitioner should try to ensure that the person is able to make an informed judgment on whether to give or withhold consent.
> …
>
> 32. The validity of consent does not depend on the form on which it is given. Written consent merely serves as evidence of consent: if the elements of voluntariness, appropriate information and capacity have not been satisfied, a signature on a form will not make the consent valid.
>
> 33. Although completion of a consent form is in most cases not a legal requirement (exceptions include certain requirements of the Mental Health Act 1983 and of the HFEA 1990 as amended) the use of forms is good practice where an intervention such as surgery is undertaken."

Appellant's Ground of Appeal 1

25. The appellant's primary submission is that the judge wrongly found the claim to be barred on grounds of legal policy. Three points are made:

    i) The IVF clinic was found by Jay J to have committed a breach of contract by thawing and implanting the embryos. The legal policy developed in cases of tort resulting from wrongful conception/birth, which prevents recovery of loss arising from the birth of a healthy child, does not apply in cases of contract. In assessing any loss, it is not for the court to take any account of any benefit arising from the birth and upbringing of the child but simply to apply the rule in *Hadley v Baxendale* (1854) 9 Exch 341 to the financial loss resulting from the breach in contract;

    ii) The court must consider the nature of this contract and the breach. It can only occur if the female wishes to have a child and the male does not want to have a child using his gametes. The loss which would result, namely the birth of a child, would satisfy both limbs of *Hadley v Baxendale*;

    iii) As a general rule of contract, if a particular type of loss falls within either limb of *Hadley v Baxendale* and a claimant in fact regards the birth as a loss and not something which brings any benefit, the claimant is entitled to claim such a loss. Mr Halpern QC accepted that such an approach would entail an assessment of the claimant's loss based not on an objective assessment by the court but on the claimant's own subjective assessment.

26. The respondent contends that the judge correctly recognised that the question to be addressed was whether the legal policy bar in *McFarlane* and *Rees* applied to a contractual claim founded on a strict obligation. He correctly held that in this case, whether the claim is in tort or contract, the measure of damages is the same; the test for remoteness does not turn on any distinction pertaining to the nature of the underlying obligation and there is no material difference for the purposes of this legal policy

between contractual claims founded on reasonable care obligations and on strict obligations. In summary, there was relevant equivalence or congruence of outcome with a hypothetical claim in tort.

27. The appellant accepts, as he must, that whether or not the authorities of *McFarlane* and *Rees* were correctly decided is not a question for this court.

28. In *McFarlane*, a tortious claim, a husband and wife sought to recover as damages the cost of bringing up a healthy, normal child born to the wife following negligent advice in respect of the effect of a vasectomy performed upon her husband. Damages were awarded for the mother's pain and suffering, for the costs associated with the birth but not for the cost of the upbringing of a healthy child. It was accepted that the mother's pregnancy and the birth of her child were the direct and foreseeable consequences of the negligent advice. The language and reasoning of their Lordships differed but, as was stated by Lord Steyn in *Rees* at [28], there is a clear ratio:

> "…two features were crucial. First in monetary terms it is impossible to calculate the benefit of avoiding a birth and having a healthy child … the emphasis was squarely on the impossibility of undertaking a process of weighing the advantages and disadvantages. The second feature was explained by Lord Millett as follows:
>
> > 'In my opinion the law must take the birth of a normal, healthy baby to be a blessing, not a detriment. In truth it is a mixed blessing. It brings joy and sorrow, blessing and responsibility. The advantages and the disadvantages are inseparable. Individuals may choose to regard the balance as unfavourable and take steps to forgo the pleasures as well as the responsibilities of parenthood. They are entitled to decide for themselves where their own interests lie. But society itself must regard the balance as beneficial. It would be repugnant to its own sense of values to do otherwise. It is morally offensive to regard a normal, healthy B baby as more trouble and expense than it is worth.'"

29. In *McFarlane*, Lord Millett, having noted that *damnum* and *injuria* had both been proved and that causation and mitigation were not in issue, stated at 108B-C:

> "The admission of a novel head of damages is not solely a question of principle. Limitations on the scope of legal liability arise from legal policy, which is to say 'our more or less inadequately expressed ideas of what justice demands' …. This is the case whether the question concerns the admission of a new head of damages or the admission of a duty of care in a new situation. Legal policy in this sense is not the same as public policy, even though moral considerations may play a part in both. The court is engaged in a search for justice, and this demands that the dispute be resolved in a way which is fair and reasonable and accords with ordinary notions of what is fit and proper. It is also concerned to maintain the coherence of the law

> and the avoidance of inappropriate distinctions if injustice is to be avoided in other cases."

30. Their Lordships were agreed that the reasons for rejecting the claim were based on legal policy, with reference to "distributive justice" and to "what is fair, just and reasonable".

31. In *Rees*, the claimant, who suffered a severe visual handicap, underwent sterilisation as she was concerned that she would be unable to care for a child. The procedure was negligently performed by the defendant, the claimant became pregnant and gave birth to a healthy baby. The claim was in negligence, it included damages for the cost of the upbringing of the child. The House of Lords, by a majority of 4:3, dismissed the claim, holding that the claimant's own disability was not a reason for distinguishing the claim from *McFarlane*.

32. Lord Bingham at [6], Lord Steyn (dissenting, but not on this point) at [29] and Lord Hope (dissenting, but not on this point) at [51-52] agreed that the decision in *McFarlane* was based on legal, not public, policy. Discussion upon the issue of legal policy included the following:

i) Lord Hope, referring to his judgment in *McFarlane* stated at [51G-H]:

> "It was the insuperable problem of calculation that was the critical point in the decision so far as I was concerned. If, as I believe, it is impossible to measure the benefits to arrive at a figure which could be awarded as damages. The conclusion which I drew was that, for this reason, these costs must be held to fall outside the ambit of the duty of care which was owed to the pursuers by the persons who carried out the procedures in the hospital and the laboratory."

ii) Lord Nicholls at [15] and Lord Hutton (dissenting) at [86, 87, 97] also based their respective conclusions on what was fair, just and reasonable (i.e. legal, not public, policy).

iii) At [108] Lord Millett stated:

> "There is no difficulty about causation, whether as a matter of fact or of legal responsibility. The pregnancy and birth of a child are the very things which the defendants are employed to prevent. It is impossible to say that consequential loss falls outside the scope of their duty of care. They are accordingly liable for the normal and foreseeable heads of loss, such as the mother's pain and suffering (and where appropriate loss of earnings) due to the confinement and delivery. The novelty of the claim in *McFarlane* lay in one particular head of damage – the cost of bringing up a healthy child."

> At [109] he cited with approval the words of the late Sir Roger Toulson (as he then was) as follows:

> "In a lecture to the Personal Injury Bar Association's Annual Conference in 2003 Sir Roger Toulson, Chairman of the Law Commission, described the ratio of *McFarlane* as follows:
>
> 'Although at a detailed level there are therefore significant differences between the judgments, at a broader level two features dominate them. These are, first, the incalculability in monetary terms of the benefits to the parents of the birth of a healthy child; and, secondly, a sense that for the parents to recover the costs of bringing up a healthy child ran counter to the values which they held and which they believed that society at large could be expected to hold.'"

iv) Lord Scott at [130] to [133] drew attention to the general distinction between damages in tort and contract, but said that there was no difference in the case of professional negligence where the duty was the same duty to take reasonable care, whether arising in tort or in contract:

> "Accordingly, as it seems to me, the answer to the *McFarlane* case, to the present case and to each of the other like cases to which your Lordships have been referred does not depend on whether the claim is a contractual or a tortious one. The same result must be reached whether the claimant was a private patient or an NHS patient. In every case the claimant, having established negligence, is entitled, as a matter of general principle, to be placed in the same position he or she would have been in if the professional advice or services had been competently provided. So in every case this general principle of damages would require the claimant to be placed in the position he or she would have been in if the baby had not been born."

Discussion

33. In *Rees* and *McFarlane* it was accepted that the loss sustained, namely the cost of the upbringing of a healthy child, was on the facts of each case directly caused by the negligence of the defendant and reasonably foreseeable. In this case it is not disputed that the loss claimed, namely the costs of the upbringing of E, would be in the reasonable contemplation of the parties in the event of a breach of the contract. At the core of the legal policy which prevented recoverability of the identified loss in *Rees* and *McFarlane* was the impossibility of calculating the same loss given the benefits and burdens of bringing up a healthy child. If it is impossible for a court to calculate the value to be attributed to the benefit of a child, so as to set off such value against the financial cost of the child's upbringing as a matter of legal policy in tort, how is the task possible for a court if such loss results from a breach of contract? Added to this is the sense, reflected in the judgments in *Rees* and *McFarlane*, that it is morally unacceptable to regard a child as a financial liability.

34. At [317-318] Jay J, in determining that the same legal policy as pertains in tort applies to thwart ARB's claim, stated:

> "317. The crux of the matter remains whether the legal policy enunciated by the House of Lords in Rees, and undoubtedly applicable to contractual claims founded on reasonable care obligations in the light of the principle of relevant equivalence or congruence which I have identified, should – for reasons of principle, logic and policy – apply equally to contractual claims founded on strict obligations in circumstances where the parties have not sought to quantify or liquidate the damages payable in the event of breach. This last aspect is crucial because the current focus is on the secondary obligation to pay damages arising under the common law.
>
> 318. In my judgment, the same legal policy applies to thwart ARB's claim. The measure of damages is the same; the test for remoteness does not turn on any distinction pertaining to the nature of the underlying obligation; and, most particularly, there is no material difference for the purposes of this legal policy between contractual duties of these two types…"

I agree with the analysis. It is of note that Lord Scott in *Rees* stated that as to the general principle of damages, which require a claimant to be placed in the position he or she would have been in had the baby not been born, recovery does not depend upon whether a claim is a contractual one or a tortious one.

35. This is a contractual claim for a particular kind of pure economic loss, namely the upbringing of a healthy child. It is accepted that the tests of causation and foreseeability are met which would, applying the principles in *Hadley v Baxendale*, allow such loss to be within the reasonable contemplation of the parties. It is to be observed that *Hadley v Baxendale* is itself an example of the application of legal policy in a contract.

36. The breach of contract arises in the absence of a liquidated damages clause in the contract. The obligation to pay damages which results is a secondary obligation arising by implication of the common law. There is nothing in this contract which modifies the approach of the common law which must include legal policy. It follows that there is no legal basis upon which to differ in terms of the recovery of the claimed loss as between contract and tort.

37. Mr Halpern QC, on behalf of the appellant, sought to distinguish the facts of this case upon the basis that ARB had paid for the services which he received pursuant to the contract and thus could sue on the same, unlike the person who obtained the services on the NHS and brought a claim in tort. Taken through to its conclusion, such an argument would permit a person who has the means to pay for such private services to sue in contract and, if the appellant's submission were to succeed, recover damages for such loss, whereas the individual who does not have the means to pay for private treatment would have to bring a claim in tort, which would be irrecoverable following *Rees* and *McFarlane*. The fundamental unfairness resulting from such a factual position serves to underpin the reasoning behind the legal policy and the need for the same in contract and tort.

38. Mr Halpern QC considered it necessary to invoke the concept of an unwanted child. Whatever the circumstances of E's birth, her father has accepted his share of

responsibility for her upbringing, he wishes to treat her in the same way as his other children. As the judge noted at [320] ARB, like Ms Rees, suffered a legal wrong. The judge found that the fact that ARB feels conflicted and Ms Rees probably does not is not an important distinction. He was correct so to find.

39. The appellant has accepted legal policy has a part to play in contract as well as tort. For the reasons given, the legal policy which prevented recoverability of the cost of the upbringing of a healthy child in the tortious claims in *Rees* and *McFarlane* applies to ARB's claim for breach of contract. This first Ground of Appeal fails.

Clause 1(a) of the Agreement (paragraph 6 above)

40. In the Respondent's Notice, two grounds are raised for the purpose of this appeal. In the first, the respondent contends that the appellant's claim should be dismissed on the additional ground that clause 1(a) of the Agreement properly construed was not a strict obligation but one of reasonable care.

41. The judge concluded at [262]:

    i) The clinic owed an implied obligation to exercise reasonable care in relation to complying with its obligations under the 1990 Act, HFEA Guidance and its licence conditions, at the time consent was being sought for the thawing and replacement of the embryo;

    ii) The clinic owed an express obligation to ARB not to thaw and replace an embryo if he did not give his written consent;

    iii) This obligation is strict.

42. The judge found that the clinic was in breach of the terms of its licence and the 1990 Act as a result of the implantation of an embryo into R without ARB's consent. No valid MT1 was in place for the use of this embryo. It was an express term of the Agreement that ARB's written informed consent would be obtained before any embryos were thawed.

43. In considering the proper construction of the Agreement, the applicable principles are those set out by the Supreme Court in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173 and the earlier authorities there cited.

44. After setting out the names, personal and contact details of ARB and R, the Agreement states:

> "Understand that:-
>
> 1. (a) We must both give written consent before any embryos are thawed and replaced."

The words "understand that" govern the six clauses in the Agreement. The arrangement is between ARB and R of the one part, and the clinic of the other. It is bilateral: the clinic provides services in consideration of payment. The Agreement is the only document which records that arrangement, other documents signed by the parties being

consents given pursuant to the Agreement. It follows that the word "understand" signifies acceptance by ARB and R of the standard terms offered by the clinic.

45. The natural meaning of clause 1(a) is that no embryo will be thawed or replaced without the written consent of both ARB and R. The judge held that this clause had two consequences: firstly, that the clinic was under a duty not to thaw or replace an embryo without the written consent of both ARB and R and secondly that neither of them would be entitled to object if the clinic refused to thaw or implant an embryo without the written consent of both of them. I agree with the judge's analysis. The wording of clause 1(a) is drafted as an absolute restriction on the thawing or implanting of an embryo without the consent of both parties. While read on its own, clause 1(a) does not in terms impose an obligation on the clinic, it clearly does so when read in the context of the whole document.

46. The respondent submits that the meaning of clause 1(a) is cut down by clause 2 which specifies that the written consent of both partners is required for the thawing or implanting of an embryo in the event of the parties being divorced or separated. By implication, written consent of both is required only in such an event and thus clause 1(a) must be read as not imposing any duty on the clinic in any other circumstances. I do not agree. Clause 2 expands upon clause 1(a) in order to include the events of divorce or separation. I regard clause 2 as reinforcing the meaning of clause 1(a), namely to obtain written consents and thereafter extending the requirement to include a specific situation.

47. The respondent contends that clause 1(a) should be read as limited to a duty to take reasonable care because, as a general rule, professionals do not usually undertake obligations involving strict liability.

48. In *Platform Funding Limited v Bank of Scotland plc (formerly Halifax plc)* [2008] EWCA Civ 930 the Court of Appeal held that a valuer, in addition to the usual duty of reasonable care, had also expressly warranted to the lender who instructed him that he would achieve a result, namely the valuation of a particular property. The borrower deceived the valuer into valuing the wrong property. The court held the valuer liable without proof of negligence. At [19] Moore-Bick LJ stated:

> "In principle, therefore, although there is every reason to assume, in the absence of a term to the contrary, that a professional person has undertaken no more than to use reasonable skill and care in relation to matters calling for the exercise of his professional skill and expertise, there would seem to be no good reason why one should make a similar assumption in relation to other aspects of his instructions. As to those, one would expect to construe the terms of engagement in each case to ascertain the precise nature of the obligations undertaken, without making any prior assumption that they are qualified or unqualified…"

Rix LJ, having reviewed previous authorities in respect of the obligation of a professional person to exercise his professional skill, said of those authorities at [48]:

> "…They all turn on their own particular facts. They nevertheless allow the following conclusions: (1) that the default obligation

> is one limited to the taking and exercise of reasonable care; (2) that it requires special facts or clear language to impose an obligation stricter than that of reasonable care; (3) that a professional man will not readily be supposed to undertake to achieve a guaranteed result; and (4) that if he is undertaking with care that which he was retained or instructed to do, he will not readily be found to have nevertheless warranted to be responsible for a misfortune caused by the fraud of another. It follows from the jurisprudence and from these conclusions to be derived from them, however, that it is not possible to support a blanket approach whereby, even in the absence of an express warranty, a professional's responsibility is nevertheless always limited to the taking of reasonable care."

49. Adopting the approach identified in *Platform Funding Limited*, the wording of clause 1(a) imposes an absolute restriction on the thawing or implanting of an embryo without consent. There is nothing in its wording which limits the clinic's obligation to a duty of reasonable care. There is no ambiguity in the clause.

50. The fundamental flaw on this point in the respondent's argument is that the duty not to act without the written consent of ARB and R is a straightforward process which requires the physical obtaining of the written document. It is not a process which is dependent on medical or scientific skill. It does not require account to be taken of medical or scientific uncertainty which, in the context of a process which requires this, is a significant factor in the rationale underpinning the more limited duty to take reasonable care. Contrast clause 1(a)'s process with the process of thawing and implanting an embryo which does require skill and care, the exercise of which cannot guarantee success. This is expressly recognised in clauses 1(e) and (f) of the Agreement which make clear that the clinic's liability is limited if the embryos are damaged or destroyed whilst being stored or thawed or if the child is damaged as a result of having been frozen or thawed.

51. Even allowing for the fact that written consent is in all likelihood to be interpreted as meaning written informed consent, as all consent in medicine must be informed, clause 1(a) required no more than the obtaining of the written document. The process of providing the relevant information to the patient was clearly envisaged to take place at an earlier stage of the proceedings, i.e. the 30 April 2010 meeting with Mr Trew, the FERC appointment on 14 May 2010, and the noted conversation with Ben Lavender the embryologist. I agree with the judge that if this form is signed there is deemed to be informed consent, the presumption being that there was prior discussion between both parties. If written consent is not given then neither is written informed consent.

52. The purpose of clause 1(a) is to ensure that written consent is given. The purpose of the Agreement is to give effect to the statutory obligations under the 1990 Act. The 1990 Act has as its cornerstone the need for consent. Schedule 3 paragraph 6(3) provides that:

> "An embryo the creation of which was brought about in vitro must not be used for any purpose unless there is an effective consent by each relevant person ..."

Schedule 3 paragraph 8(2) provides that:

> "An embryo the creation of which was brought about in vitro must not be kept in storage unless there is an effective consent, by each relevant person in relation to the embryo, to the storage of the embryo and the embryo is stored in accordance with those consents."

Schedule 3 paragraph 1(3) provides:

> "In this Schedule 'effective consent' means a consent under this Schedule which has not been withdrawn."

53. The need for the obtaining of written consent is the more acute in an area of medicine where it is acknowledged that individuals will embark upon these procedures desperate for conception and the birth of a child. There was evidence before Jay J that in other clinics providing this service, proven or suspected ID fraud has been found. It is an illustration of the desperation of those seeking the procedure and the length to which they will go in order to obtain the same, as has been demonstrated on the facts of this case. In my judgment the risk of fraud or forgery in this particular area of medicine is yet another reason underpinning the purpose of clause 1(a) – the strict imperative to obtain documented proof of written consent.

54. For the reasons given, I am in agreement with Jay J. The obligation of the clinic identified in clause 1(a) is strict. The respondent's ground is not upheld.

Appellant's Ground of Appeal 2

55. The appellant contends that by reason of the judge's findings that the defendant clinic's process for ensuring consent was "illogical" the judge erred in holding that the defendant clinic was not in breach of any duty to take reasonable care to obtain ARB's written and informed consent. The fact that other clinics had similar processes was not relevant where these processes did not withstand logical analysis: *Bolitho v City & Hackney Health Authority* [1998] AC 232 applies.

56. Permission to appeal upon this ground was granted by Jackson LJ. It is accepted by the appellant that in the event that the appeal fails upon Ground 1, Ground 2 does not strictly require determination. The court has chosen to address Ground 2 because of the fundamental importance of the issue of obtaining consent as a part of the respondent clinic's process.

57. At [276] the judge accepted that consent is "absolutely central" to the 1990 Act and to concurrent common law obligations. He stated that there must be consent at all stages of the procedure including the final stage. He applied what he described as the standard *Bolam/Bolitho* test to the standard of care and concluded that the clinic was not in breach of any duty to take reasonable care in obtaining ARB's written consent. He did so for the following reasons:

> "279. First, Ms Suthers accepted that the clinic's SOP for telephone or postal co-ordination, or something similar, was practised in a number of IVF clinics at the time (at one point, she

> went further and agreed that it was common practice); that the presumption that a couple being treated together would share information, whether commonplace or not, was one which some clinics would make; that it was not uncommon for the male partner not to attend the co-ordination appointment or the final appointment before implantation; and that some clinics operate a practice whereby the Consent to Thaw form, as a 'provisional consent', is in place at or before the time of the first suppress scan appointment, with the final decision being made on the day of implantation (when it would be common only for the female partner to be present) as to the number of embryos to be thawed.
>
> 280. Secondly, clause 5.10 of HFEA's Code of Practice states that clinics should take all reasonable care to verify identity, 'including partners who may not visit the centre during treatment'.
>
> 281. Thirdly, on the facts of this case the clinic was entitled to believe that the Patient and Partner questionnaire was completed by ARB on the date the document bore.
>
> 282. Fourthly, on the facts of this case R was continuing to represent, or at least give the impression, that she was communicating with her partner ARB, who was being treated together with her in pursuit of a common objective."

However, having so found, the judge at [283] identified three matters which caused him concern; (i) that ARB and R were being treated together as patients at all material times before they separated. He then stated:

> "My second concern is that the clinic's SOPs operative at the material time made clear that if both partners were present, their signatures should be witnessed, but if one partner was not present, this need not happen. This is illogical. Thirdly, a strict application of the clinic's former SOPs could have permitted what occurred in this case without ARB having attended any relevant clinic appointment. This is troubling…"

58. It is the appellant's contention that the illogicality of the SOP went further than that described by the judge. If both partners attended the FERC appointment, the clinic's employee confirmed the understanding of each of them to the consequences of the procedure and then witnessed their consents and each of their signatures. Where one of their partners failed to attend the SOP permitted the employee to delegate the responsibility for obtaining consent to the attending partner. It provided for no witnessing of the non-attending partner's signature, still less any effective check that the consent had been validly obtained from the non-attending partner. The result was that in precisely those circumstances where forgery was most likely, the safeguards for obtaining written consent were significantly reduced. Having found the SOP to be illogical, Mr Mylonas QC states that the judge should have found that it failed the second limb of *Bolitho* as it was neither reasonable nor responsible.

59. Consent is a cornerstone of the 1990 Act. A procedure which permits delegation for the obtaining of consent to a person who is not employed by the clinic and, critically, could have her/his own reasons for providing consent which was not true consent is not only illogical, it makes a mockery of a process, the purpose of which is to obtain valid written consent. The fact that other clinics may have used such a process, and the court was informed that the HFEA were aware of the same, raises serious questions as to the duties of those clinics and the HFEA which are not for this court to determine or comment upon. The illogicality of this process represented an abrogation by the clinic of its duty to obtain consent. In *Montgomery v Lanarkshire Health Board* [2015] UKSC 11 the Supreme Court identified the requirements of consent which makes these failings the more stark. The identified practice of this clinic was neither reasonable nor responsible. This second ground of appeal is made out.

Respondent's second ground

60. In the Respondent's Notice a second ground was raised, namely remoteness of damages. It states that the judge should additionally have held that the substantial damages claimed in this case for the upbringing of a healthy child, E, were too remote and not recoverable under the contract, in any event, because they were not within the reasonable contemplation of the parties and/or not a kind of loss for which the defendant assumed responsibility and/or unquantifiable, unpredictable, uncontrollable and disproportionate, so as to be contrary to market understanding amongst fertility clinics at the time.

61. In the final part of his judgment the judge stated that in the event that the judgment is overturned on appeal he would be required to assess damages in due course. He made a ruling following a limited discussion which stated that "all I am holding is that the law relating to remoteness of damage does not provide an in principle objection to ARB's claim. Its separate ingredients will, if necessary, require closer examination." By reason of the findings of this court, no such examination by the judge is required. Further, given the limited nature of the judge's findings the respondent's second ground does not require determination by this court.

Conclusion

62. For the reasons given in this judgment, I would dismiss the appeal.

Lord Justice David Richards:

63. I agree.

Lady Justice King DBE:

64. I also agree.