Recovering damages in wrongful life cases

Suzanne Farg gives guidance on pursuing clinical negligence claims for ‘wrongful conception’ and ‘wrongful birth’

The essential characteristics of reproductive and antenatal medical treatment are such that negligence in these areas will often have further reaching implications for the patient and his or her family, than negligence in other areas of medicine.

Particular examples are the cases where a child is born in circumstances in which the parents would not have chosen to conceive (wrongful conception) or would have terminated the pregnancy (wrongful birth), had appropriate medical care been provided.

These cases have arisen in various circumstances including:

- pregnancy following failed sterilisation and vasectomy procedures;
- pregnancy following failure to provide appropriate information regarding contraception (including contraception required following a sterilisation procedure);
- pregnancy following a failure to counsel parents regarding the risk of transmitting a genetic disorder;
- birth of a child following a failure to diagnose pregnancy or to provide appropriate information regarding termination of pregnancy;
- birth of a child following the failure to identify a fetal anomaly which, if diagnosed, would have led to a decision to terminate the pregnancy.

In the above situations, it has been necessary for the courts to consider: who can be compensated and for what?

The usual position where a child has been injured as a consequence of negligent medical treatment provided to their mother during pregnancy, is that the child may bring a claim on their own behalf for the injuries which they have sustained (pursuant to the Congenital Disabilities (Civil Liability) Act 1976). In contrast, however, wrongful conception and wrongful birth cases are not claims for injury to the child but, instead, are based on the premise that the child should not have been born. It has been held that the child themselves cannot bring a claim for losses arising in consequence of their own existence, even if they are born suffering severe disability (a so called ‘wrongful life’ claim, see McKay v Essex AHA [1982]); however, the child’s parents may be able to pursue their own claim.

In order to establish their claim, the parents must not only prove that the medical care was negligently provided but also that the birth of the child would have been avoided, if they had received an appropriate standard of treatment. In cases of this type, the medical evidence which establishes what information should have been available to the parents, and the factual evidence of the parents regarding the decisions that they would have made, are vital elements required to prove causation.

For example, a wrongful birth claim for the failure to diagnose fetal anomaly during pregnancy, would require evidence from the parents that they would have chosen to terminate the pregnancy, had they been appropriately advised about the anomaly.

The recent case of Less v Hussain [2012] is an example of a wrongful
conception claim in which the claimants failed to prove causation. The claim was brought by a couple who sought advice from the defendant, a consultant gynaecologist, regarding the risks of becoming pregnant, in the context of the woman’s history of obstetric problems. The couple subsequently became pregnant but the baby was stillborn. It was held that there had been a breach of duty by the defendant in failing to advise the couple of the need to come in for a second appointment. However, it was found that, even if the appointment had taken place, the advice which the couple would have received regarding the potential risks of pregnancy would not have deterred them from becoming pregnant. (The judge commented that, if the claim had been established, it would have been reasonable for the mother to recover for losses associated with the child’s death.)

When pursuing a claim for wrongful conception or wrongful birth it is also necessary to consider the restrictions which the court has placed upon the losses for which the parents may recover.

An unwanted pregnancy, or the continuation of a pregnancy which would otherwise have been terminated, has been held to constitute a personal injury to the mother for which she may receive compensation both in general damages and in special damages which relate directly to the pregnancy and birth (including her loss of earnings during pregnancy).

In addition, in Rees v Darlington Memorial Hospital NHS Trust [2003] the House of Lords established a ‘conventional award’ (usually in the sum of £15,000) in respect of the loss of the parents’ ability to control the size of their family. This sum was specified to be separate from the damages received by the mother for undergoing the pregnancy and was not intended to be compensatory but instead to be a measure of recognition of the wrong done.

Previously, the costs of upbringing for the child (usually the largest element of the claim) could also be recovered. However, following the House of Lords decision in McFarlane v Tayside NHS Trust [2000], general maintenance costs for the child’s upbringing are no longer recoverable. McFarlane was a claim for the costs of bringing up a healthy child conceived following a vasectomy procedure. Their Lordships concluded that these upbringing costs could not be recovered; however, the judgments specifically referred to the birth of a healthy child and left open the possibility that a different position would be taken if the child was born with a disability.

The extent of this rule was tested in subsequent cases in which a healthy child was born to a disabled mother. In Rees (which followed the cases of McFarlane and Parkinson v St James and Seacroft University Hospital NHS Trust [2001]) a woman suffering from severe, progressive visual impairment had undergone a sterilisation procedure, due to the difficulties her condition would impose on her ability to fulfil ‘the ordinary duties of a mother’. As a consequence of the defendant’s negligence, the sterilisation procedure failed and she gave birth to a healthy child. The claimant argued that the difficulties caused by her own disability in caring for the child, mirrored a situation in which a disabled child had been born to a non-disabled mother. However, the House of Lords found that the general rule in McFarlane applied and the claimant was unable
In assessing damages, it has been necessary for the courts to consider what can be recovered by the parents as part of the costs of their child’s disability.