

Compensation for failed sterilization

Umo I Esen

Two recent Court of Appeal decisions have modified the hitherto settled rules governing the compensation payable following failed and negligently performed sterilization. Compensation is now possible other than for the pain and suffering of the pregnancy where the child or mother is disabled.

Failed sterilization remains an important cause of litigation in the UK, and guidelines from the Royal College of Obstetricians and Gynaecologists (1999) have been put forward to try and minimize this problem, by looking at issues around the major causes leading to litigation. These include not recognizing an ongoing pregnancy at the time of sterilization as well as the patient not receiving adequate information before the operation to be able to make an informed decision. Injury to the patient at the time of operation and failure of the operation to prevent pregnancy as a result of faulty technique, equipment or a spontaneous reversal of the sterilization procedure are also important causes of litigation following failed sterilization (Filshie, 1999).

McFARLANE V TAYSIDE HEALTH MANAGEMENT BOARD

McFarlane v Tayside Health Management Board [1999] had provided general guidance in the compensation of patients in respect of pregnancy and children born following failed sterilization. The facts of the case were that Mr and Mrs McFarlane, who had four children, decided their family was complete and that they did not want any more children. Mr McFarlane then had a vasectomy performed uneventfully in 1989. Post-vasectomy semen analysis was carried out on two occasions and Mr McFarlane then received a letter confirming the success of the operation, in which case contraception could be dispensed with. However, in late 1991 Mrs McFarlane became pregnant, delivering a baby girl in 1992. Mr and Mrs McFarlane then brought legal action against the health authority.

The House of Lords in *McFarlane v Tayside Health Management Board* [1999] ruled that the costs of bringing up a healthy child born as a result of failed sterilization could not be recov-

ered and that the advantages of parenthood equalled the costs of bringing up a healthy child. The only recoverable costs were those for pain and suffering of the mother carrying an unwanted child and any other expenses arising as a direct result of the pregnancy.

This was a landmark decision in that it abolished the then prevailing state of affairs which allowed the recovery of the maintenance costs of a child resulting from a failed and negligently performed sterilization irrespective of whether the child was normal or not.

Before *McFarlane v Tayside Health Management Board* [1999], in *Emeh v Kensington & Chelsea and Westminster Area Health Authority* [1984], where a child was born with congenital malformations following failed sterilization, recovery for maintenance was allowed. Also in *Thake v Maurice* [1986], where a healthy child was born following a failed vasectomy, maintenance costs were also awarded. *Benarr v Kettering Health Authority* [1988] was another case in which maintenance costs, including the cost of private education of the healthy child, were payable following a failed sterilization.

RECENT DECISIONS

McFarlane, however, did not address the issue of compensation where the child resulting from a failed and negligently performed sterilization procedure was disabled.

Two more recent cases have looked at this issue. In *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] a woman with four children became pregnant following a sterilization procedure. There were concerns that the baby may be disabled, but she chose not to take up the option of a termination of pregnancy.

The baby was born in 1995 and was found to be disabled. The Court of Appeal held that there

Mr Umo I Esen is Consultant Obstetrician and Gynaecologist in the Department of Obstetrics and Gynaecology, South Tyneside Healthcare Trust, South Shields NE34 0PL

was no reason to preclude the compensation of the mother for the additional costs of bringing up a child with significant disability, and that such recovery was fair, just and reasonable. The disability of the child was held to have disturbed the equilibrium established in *McFarlane*, making compensation for upkeep of the child payable.

In the most recent case of *Rees v Darlington Memorial Hospital NHS Trust* (2002) the claimant, who was significantly visually impaired as a result of suffering from retinitis pigmentosa, sought to be sterilized as she would find it particularly difficult to care for a child given her condition. The operation was performed in 1995, however, she became pregnant and delivered a baby boy in 1997. Legal proceedings were commenced, with the claimant seeking the full costs for the upbringing of her son.

KEY POINTS

- Failed sterilization is an important cause of clinical negligence litigation.
- Compensation other than for pain and suffering is possible where the child or mother is disabled.
- Compensation to reflect the additional cost of caring for a disabled child or a disabled mother caring for a healthy child, is now payable in addition to compensation for pain and suffering arising directly from the pregnancy.
- It is possible to minimize the risk of failure of sterilization by using proper techniques and by strict adherence to the published guidelines.

The Court of Appeal held that she was entitled to the extra costs that would arise in the care of her child as a result of her disability, making a distinction between able-bodied parents and a disabled parent.

CONCLUSION

These latest cases have modified *McFarlane*, allowing compensation following failed sterilization for the maintenance of disabled children and also where the mother is disabled. It would appear that it may well be possible stretch this concept further, to perhaps situations where the disability affects other members of the family, whether the child is normal or no. Would maintenance costs be payable if the father, another sibling or the grandmother was disabled? It is not unlikely that in light of the decisions in *Parkinson* and *Rees* we will increasingly see attempts by claimants to further stretch and extend the boundaries beyond *McFarlane*. **HM**

Conflict of interest: none.

Benarr v Kettering Health Authority [1988] NLJ 179
Emeh v Kensington & Chelsea and Westminster Area Health Authority [1984] 3 All ER 1104
Filshie GM (1999) Risk management: sterilisation. *The Obstetrician and Gynaecologist* 1(1): 26–32
McFarlane v Tayside Health Management Board [1999] 4 All ER 961
Parkinson v St James and Seacroft University Hospital NHS Trust [2001] 3 WLR 376
Rees v Darlington Memorial Hospital NHS Trust (2002) *The Times* 20 February
Royal College of Obstetricians and Gynaecologists (1999) *Male and Female Sterilisation Evidence-based clinical guidelines. No 4*. RCOG Press, London
Thake v Maurice [1986] QB 644