



OUTER HOUSE, COURT OF SESSION

[2026] CSOH 55

A138/23

OPINION OF LORD BRAID

In the cause

(FIRST) PO AND (SECOND) OO

Pursuers

against

LOTHIAN HEALTH BOARD

Defender

**Pursuers: Mackenzie KC, Swanney; Slater & Gordon Scotland Ltd  
Defender: Reid KC, Jardine; NHS Central Legal Office**

11 June 2026

**Introduction - the issues**

[1] This is a “wrongful birth” case in which the pursuers contend that their fourth child (“A”) of whom they are respectively the mother and father and who has Down’s syndrome, would not have been born but for the admitted negligence of the defenders. That a duty of care is owed to the mother in such cases is well-established, and significant interim damages have already been paid to the first pursuer, but two issues arise for decision at this stage: (i) did the defenders also owe a duty of care to the second pursuer, as the father of the child (the first issue); and (ii) are damages to be assessed by reference to child A’s needs, or to the pursuers’ resources (the second issue)?

[2] The case, which is proceeding under chapter 42A of the Court of Session Rules, called before me for a debate so that the court might resolve those issues at this stage. A substantial joint minute of admissions was entered into and both parties invite the court simply to decide the first issue on the agreed facts. As regards the second issue, a decision on it will inform the evidence to be led at the proof in relation to quantum of damages.

### **Background**

[3] By way of background, and to put what follows into a financial context, the pursuers value their joint claim for care costs, past and future, at over £18 million, in addition to which they claim costs of over £1 million for a personal injury trust. As already alluded to, the defenders have paid the first pursuer interim damages of £216,528, which they contend is the full value of her claim. The second pursuer's claim is valued by him at just over £250,000, comprising, in the main, £75,000 for solatium, just under £110,000 for past and future wage loss, plus sundry other heads of claim. The defenders' primary position is that his entire claim is irrelevant, no duty of care having been owed to him, but on a without prejudice basis they value his claim, if he has one, at just over £55,000.

### **The first issue**

#### *Agreed facts (per the joint minute)*

[4] Child A was born on 9 May 2020, at the Royal Infirmary of Edinburgh, and on the following day he was diagnosed with Down's syndrome.

[5] The first pursuer's booking appointment took place on 5 December 2019, at the Leith Community Treatment Centre (LCTC). That appointment was with community midwife Wendy Rolland. The first pursuer's pregnancy was calculated to be at 9+6 weeks.

[6] At that booking appointment, Midwife Rolland provided the first pursuer with information in respect of screening tests during pregnancy, including screening for Down's syndrome. The first pursuer told Midwife Rolland that she consented to, and was keen for, all the fetal abnormality screening tests which were available. She explained that she and the second pursuer did not want to have another child who was disabled, as they would find it difficult to cope, already having three children, one of whom is disabled.

[7] The first pursuer was offered and accepted a first trimester ultrasound scan (USS). This screening (often referred to as the "combined test") only takes place when the woman is between approximately 10 weeks and 14 weeks gestation, and one purpose of it is to assess the risk of the baby having Down's syndrome. To that end, it includes a blood test.

[8] The first and second pursuer attended together for the combined test on 31 December 2019. They were seen by a radiographer. At that appointment, the first pursuer's pregnancy was calculated to be 14+3 weeks, rather than 13+5 weeks. This placed her in her second trimester. Accordingly, she was outwith the window in which the combined test could be done. She was advised that she would have to undergo a blood test to screen for Down's syndrome instead. That maternal blood test, known as the quadruple (or QUAD) test, was the second trimester fetal abnormality screening, which screened only for Down's syndrome. Its purpose is to assess the risk of the baby having Down's syndrome. To that end, it includes a blood test.

[9] The first pursuer was unable to undergo the QUAD test on 31 December 2019 as it was a public holiday. An appointment was arranged for her to attend for the test on 6 January 2020, but she did not attend that appointment (no criticism is made of that non-attendance). She next attended an antenatal appointment on 24 January 2020 at 17+6 weeks, at the LCTC with Midwife Hannah Webster. At that appointment, the fact

that the first pursuer had not had the QUAD test was not identified, and she was not given that test.

[10] Had the QUAD test been done at the appointment on 24 January 2020, it would likely have shown that the foetus had a chromosomal abnormality. An amniocentesis test would have been offered in response to such a result. That test would have been positive for a chromosomal abnormality.

[11] The first pursuer attended for her routine mid-pregnancy anomaly USS on 5 February 2020, at 19+4 weeks. The scan did not screen for Down's syndrome. The overall findings were reported as normal. No gross abnormality was detected.

[12] The first pursuer attended an antenatal appointment with Midwife Webster at the LCTC on 5 March 2020 (23+5 weeks). At that appointment, the fundal height (FH) was measured. It was 33cm, which is large. The first pursuer was referred to the hospital for an USS, which took place on 6 March 2020 at 23+6 weeks. It identified polyhydramnios (excess amniotic fluid). A plan was made for a repeat USS at 28 weeks.

[13] The repeat USS took place on 6 April 2020 at 28+2 weeks. Polyhydramnios was again identified. Professor Sarah Stock, consultant in fetal medicine, was asked to review the scan. A "double bubble", suggestive of duodenal atresia, was present. It was not recognised as such. A plan was made for further imaging and consultation with a fetal surgeon.

[14] A "double bubble" refers to a scan which shows two anechoic foci, one larger than the other, in the upper abdomen of the foetus. Such a finding is consistent with duodenal atresia (in which the first part of the bowel, the duodenum, is blocked). Duodenal atresia has a significantly increased association with Down's syndrome. Approximately 30% of foetus' with a "double bubble" have Down's syndrome.

[15] Had the “double bubble” been identified, an amniocentesis test would have been offered in response to such a result. That test would have been positive for a chromosomal abnormality.

[16] The first pursuer had a further USS on 8 April 2020, at 28+4 weeks. The scan was undertaken and reported by Dr Jane Walker, radiologist. Mr McHoney, fetal medicine surgeon, was also present. The scan confirmed the presence of a “double bubble”, the same abnormality that had been present during the previous scans.

[17] The first pursuer underwent another USS on 25 April 2020. Child A was measuring above the 97<sup>th</sup> centile. The scan was undertaken by Joanne Dampler, radiographer. The same abnormality that had been present during the previous scans, namely a “double bubble”, was present.

[18] In failing to identify on 24 January 2020 that the blood test scheduled for 6 January 2020 had not been done and thereby failing to arrange for that test to be done, the duty of care owed to the first pursuer was not fulfilled.

[19] In failing to identify a “double bubble” on the scan of 6 April 2020, the duty of care owed to the first pursuer was not fulfilled.

[20] All of the midwives, radiographers and other medical professionals referred to were employed by the defenders. The defenders are vicariously liable for the acts and omissions of its employees during the course of their employment. The defenders’ employees who examined, scanned or otherwise assessed the first pursuer during her pregnancy were acting in the course of their employment.

[21] Finally, although it is not formally admitted that the first pursuer would have elected to terminate the pregnancy had she known that child A would be born with Down’s syndrome, the defenders accept that she would have done so.

### *Averments of injury*

[22] In Article 8 of condescendence, the pursuers aver that they have both suffered loss, injury and damage through the defenders' breach of duty. They offer to prove that they both suffered from psychological injury as a result of child A suffering from Down's syndrome. They both suffered initial shock and distress upon discovering that child A had been diagnosed with Down's syndrome. They have suffered the physical, mental, and emotional distress of caring for child A. They suffer from the stress, wear, and tear of raising a child with Down's syndrome. They suffer from low mood, anxiety, fatigue and distress at caring for another child with complex/special needs, in addition to their other three children. They are often emotional, angry and irritable. The second pursuer has suffered from suicidal ideation and has been diagnosed as suffering from a major depressive disorder.

### *Submissions*

#### *Introduction*

[23] The pursuers' case evolved during the course of the debate. They describe the service which was provided by the defenders as including: (i) advising about the availability of screening tests for potential fetal abnormalities; (ii) providing information about those tests; (iii) conducting the tests; (iv) reporting the results of the tests accurately; and (v) giving advice about the risks of continuing with a pregnancy if the results were indicative of a fetal abnormality. No issue is taken by the defenders with that description

of the service. In terms of the pursuers' note of argument, the purpose of that service was said to be:

*“inter alia to allow the parents of the unborn child to make an informed decision about whether they wish to continue with the pregnancy if a fetal abnormality is discovered. That is so because the parents of said unborn child both have responsibility for the care of said child and will bear the emotional and financial burden of doing so. The persons to whom the medical practitioners provide their services in respect of fetal abnormality screening and advice are both of the parents of the unborn child.”*

Thus, the pursuers' position entering the debate was that the service was provided to both parents (albeit the tests themselves could only ever have been conducted on the first pursuer).

[24] In anticipation of that argument, and in response to it, senior counsel for the defenders submitted that none of the services listed could be provided to anyone other than the mother of a child: she was the patient; whether to proceed with a pregnancy was her decision and hers alone. For all the changes that pregnancy brought to a mother, it did not qualify her rights as a patient. He went on to imagine various factual scenarios, and the difficulties which could arise were the duties owed to the father as well as to the mother. What would the situation be, he asked, if the mother asked the midwife not to tell the father the results of the screening test: how was the midwife to reconcile her duty of confidentiality to the mother with her duty to the father? What if a father, suspected to be abusive, told the midwife that “we” have decided to have an abortion? What about the devoted but absent father, working overseas in (say) a combat zone: how was the midwife to fulfil her duty to him in those circumstances?

[25] By the time he came to make his submissions, senior counsel for the pursuers had subtly refined his case, so that rather than argue that the services were provided to both parents as had been anticipated, he now argued, founding upon the Australian case *BT v*

*Oei* [1999] NSW SC 1082, that the defenders were able to fulfil their duty of care to the second pursuer by giving proper advice to the first pursuer. He expressly disavowed any argument that there was a duty on the midwives or clinicians to tell, or advise, the second pursuer anything. The pursuers accepted that only the first pursuer was the defenders' patient and that it was she, and only she, who had to decide whether to terminate the pregnancy or not. Accordingly, the various dilemmas or difficulties foreseen by senior counsel for the defenders were nothing to the point: they simply did not arise.

[26] The first issue therefore reduces to the question whether the defenders owed a duty to the second pursuer to take reasonable care in providing, to the first pursuer, the services listed as (i) to (v) in para [23] above. Among other things, this involves consideration of whether the second pursuer is a primary victim (as he claims) or a secondary victim (as the defenders argue). Against this background, I now turn to the parties' competing submissions as to the law.

#### *Submissions for the defenders*

[27] Senior counsel for the defenders submitted that on any view the second pursuer was a secondary victim, his claim being contingent on a duty being owed to the first pursuer, and her decision whether to continue with the pregnancy or not. If (contrary to the facts of this case) the mother would not have had a termination even in the event of a positive test, the father could not have a claim. In that sense, the second pursuer was claiming compensation for harm brought about indirectly by injury caused to another person: *cf Paul and Another v Royal Wolverhampton NHS Trust* [2024] UKSC 1, paragraph 51. That case established that a clinician owed a duty of care only to their patient, not to any of the patient's relatives. The duty of care owed by a clinician to their patient was based upon

an assumption of responsibility: *Paul*, paragraph 132. Although, at paragraph 133, the Supreme Court had acknowledged, under reference to, among other cases, *BT v Oei*, above, that there were circumstances in which the duty of care owed by a medical practitioner may extend beyond the health of their patient to include other people, at paragraph 134 the court elected to express no view on the difficult questions raised by such cases, other than to observe that in relation to infectious disease, doctors are considered to have a responsibility to protect public health which is wider than their duty to protect the health of their patient. The facts in that case were very different from those here, and the court should be wary about placing any reliance on it.

[28] It was true that in *Parkinson v St James and Seacroft University Hospital NHS Trust* [2002] QB 266 at paragraph 93, Hale LJ (as she then was) countenanced the possibility of a duty to a father who meets his parental responsibilities to care for a child. However, those remarks were *obiter* and as the Court of Appeal recognised in *Whitehead v Hibbert Pownall and Newton* [2009] 1 WLR 549 at paragraph 51, the question of whether a duty of care was owed to a father in a wrongful birth case was “beset by important difficulties”, the court going on to say that such a claim would be viable, if at all, only as a secondary claim and that mixed questions of policy and causation would arise. Although in *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309, the court had appeared to draw no distinction between the parents of a child, that case had been brought by the mother alone.

[29] Turning to Scottish authority, in *Anderson v Forth Valley Health Board* 1998 SLT 588, a case involving allegedly negligent genetic counselling, Lord Nimmo Smith held that there was no reason why a duty of care should not be owed to the father as much as to the mother: page 604, at I to J. To the extent that Lord Nimmo Smith appeared to be influenced by the fact that the pursuers were at all material times a married couple, and that the

decision whether to have an abortion would have been a joint one, the case should be seen as redolent of its time and should now be regarded as having been wrongly decided. In *McLelland v Greater Glasgow Health Board* 2001 SLT 446 the facts were similar to those of the present case, in that the mother and father of a child born with Down's syndrome sued a health board in respect of admitted negligence in not carrying out tests which would have confirmed the presence of Down's syndrome. Although the defenders conceded that a duty was owed to the father, that concession had been wrongly made. Lord Prosser observed that at times, the submissions made on behalf of the defenders were hard to reconcile with the concession (para [7]).

[30] In summary, to find that a duty was owed to the second pursuer would be contrary to principle. The problem was not solved by holding that the duty would be fulfilled by the provision of proper advice to the first pursuer. That simply passed an obligation of some sort on to the mother, and that approach too was beset by difficulties.

#### *Submissions for the pursuers*

[31] In support of his submission that the second pursuer was a primary, not a secondary, victim, to whom a duty of care was owed, senior counsel for the pursuers relied upon *Anderson, McLelland, Parkinson and Rees*, all above, the last-named of which drew no distinction between a mother and father re an award for interference with the parents' autonomy; and *McDonald v Sydney South West Area Health Service* 2005 NSWSC 924 (a wrongful conception case) in which a duty was held to be owed to the father of the child,

reference being made in that case to *Harvey v PD* (2004) 59 NSWLR 639 in which it had been noted that:

“[T]he very purpose of the joint consultation was not merely to carry out the relevant tests...[t]hey had clearly signalled, by coming as a couple, that they were seeking joint and not separate advice.”

The court in *McDonald* took into account that the treating doctor knew that if he did not perform a sterilisation procedure properly, both his patient and her partner may suffer the financial detriment of having to raise an additional child and that, as an existing partner of the patient, the relationship between the partner and the doctor was so close or special that a duty of care arose. In *Less and Carter v Hussein* [2012] EWHC 3513 (QB), the *obiter* view was expressed by Judge Cotter QC that the father was not a primary victim, but that case could be distinguished on its facts as the father was not present at the relevant appointment. As regards the nature of the duty which was owed, reliance was placed on *BT v Oei*, above, in which the claim arose from the failure of a doctor to diagnose a patient’s HIV illness and to counsel him to undergo an HIV antibody test. The patient infected his partner with HIV. The issue in the case was whether the doctor owed a duty of care to the patient’s sexual partner. The court held (at paragraph 95) that there was such a duty, which was discharged by the doctor providing his patient with appropriate and adequate advice. That was the self-same duty owed to the second pursuer in this case.

[32] Whether a duty of care was owed was a fact-sensitive question. A duty arose in this case even though the second pursuer was not the patient, both because there was an assumption of responsibility, and because of the proximity of his relationship to the defenders: he was married to the first pursuer (which was neither averred nor agreed in the joint minute, but accepted by the defenders to be the case); child A was the “product” of both pursuers, having been conceived by both of them and being “made up” of both their

genetic material; the second pursuer attended the appointment on 31 December 2019; the defenders' employees were advised that the couple did not want another child with a disability; and the second pursuer would have rights and responsibilities, both physical and financial, for the care of any child.

### *Decision on the first issue*

#### *Introduction*

[33] Usually where the existence of a duty of care is in dispute, the court is being asked to incrementally expand the law by holding that a duty of care exists in a factual scenario where none has previously been found to exist. It is rare that the court is invited to hold that no duty of care exists in circumstances where courts in several jurisdictions have either held a duty to exist, or at least taken as a given, whether by concession or otherwise, that a duty of care was owed. And yet, that is the position here: the defender invites the court not to follow Scottish authority (*Anderson*, where Lord Nimmo Smith held that a duty of care could be owed to the father in a wrongful birth case); to treat the concession in *McLelland* (where the facts were on all fours with those here), that a duty was owed to the father, as having been wrongly made; to distinguish cases from other jurisdictions where a duty was found to exist, such as *BT v Oei*; and to disregard *obiter dicta* (in some instances, weighty: Hale LJ, in *Parkinson*) to the effect that a duty of care is, or at least may be, owed to the father in a wrongful birth case.

[34] That all said, it is true that, in at least some of the authorities relied on by the pursuer, the questions of why a duty should arise, and if so the content of that duty, were not analysed in any great detail, if at all; and there has been at least some judicial push-back against the notion that such a duty exists. As the judge in *Macdonald* pointed out at

paragraph 57, in the earlier case of *Cattanach v Melchior* (2003) 215 CLR 1 the exact duty of care the doctor owed to the patient's husband or the issue as to why he owed that duty were not explored in argument, the court having observed that it was not self-evident why there was a duty to offer the husband advice (which, of course, is not the duty now argued for here). I accept that care should perhaps be taken in placing reliance on cases such as *BT v Oei*, where the sexual health of someone other than the patient receiving advice, was at stake. However, it does not follow that the duty which is now argued for by the second pursuer cannot have been owed to him.

*Is the second pursuer a primary or secondary victim?*

[35] This is the first issue to resolve, since if the second pursuer is a secondary victim as the defenders maintain, his claim will be precluded by *Paul*, above, in which it was held by the Supreme Court that medical practitioners do not owe a duty of care to members of a patient's close family to protect them against the risk of personal injury caused by witnessing the patient's suffering or death as a result of negligence, such persons being secondary victims. No issue is taken with the description of a secondary victim at paragraph 51 in *Paul*, that it is someone who claims compensation for harm brought about indirectly by injury caused to another.

[36] Senior counsel for the defenders submitted that the second pursuer fell within that description because he would have had no claim if the first pursuer would not have elected to have an abortion in the event of a positive test; and that since his claim was in that sense dependent on what she would have done, the harm to him must have been brought about indirectly. However, that is to conflate causation with injury. The second pursuer did not suffer harm as a result of the injury suffered by the first pursuer, or the harm done to her.

The injury complained of by the first pursuer is not that she continued with her pregnancy for a period of some 3 or 4 months, resulting in additional pain which she would not otherwise have suffered; it is that she suffered psychological injury as a result of child A suffering from Down's syndrome. That comprised the initial shock and distress of discovering that he had been diagnosed with that syndrome, as well as the stress, wear and tear of raising him thereafter, all as described in para [23] above. That is precisely the same injury as was sustained by the second pursuer, for the same reasons. His injury was in no sense caused by witnessing his wife's distress, or by the trauma caused to her, but by the trauma simultaneously caused to him. The facts in this case are not analogous to a situation, where, say, the first pursuer had died in childbirth through the negligence of the defenders, when the second pursuer would indeed have been a secondary victim.

[37] Finally, Lord Prosser, in *McLelland*, had no difficulty in seeing the father in that case as a primary, not secondary victim: see para [41] below.

[38] For these reasons, I find that the second pursuer is a primary, not a secondary, victim. *Paul* does not preclude his claim. It simply does not apply.

*Was a duty of care owed to the second pursuer as a primary victim?*

[39] It remains necessary to consider whether the defenders owed the second pursuer a duty of care. The starting point is *Anderson*. There, the pursuers had two sons, both born with muscular dystrophy. The alleged negligence was a failure to refer them for genetic counselling, the pursuers' case being that had that been done, the first pursuer (the mother) would have been advised that she was a carrier of muscular dystrophy, and "they" would have elected for a termination. Lord Nimmo Smith rehearsed the competing submissions,

and citation of authority, in considerable detail. His conclusion on the question of breach is at page 604:

“I take as my starting point the well-established principles derived from Lord Atkin's discussion in *Donoghue v Stevenson* as to the circumstances which give rise to a duty of care. It is not in dispute that a duty of care may be owed to their patients by persons such as the present defenders in the provision of medical services. Although it is only averred that the first pursuer was a patient of the respective defenders, until the stage when the second pursuer's vasectomy came to be discussed and performed, I have no difficulty in accepting the idea that a duty of care was owed as much to him as to her by the defenders in the provision of the services referred to on record. They were at all material times a married couple, each of whom would be directly affected by the provision of, or the failure to provide, services relating to pregnancy, childbirth, abortion and contraception. Obviously the first pursuer would be the one who directly underwent such processes, apart from the second pursuer's vasectomy. But at least to the extent that it could reasonably be expected that the second pursuer would be involved to a significant degree, both physically and financially, in the care and upbringing of any child, I can see no reason why in the provision of services, particularly those associated with the taking of decisions between abortion and childbirth, the defenders should not be regarded as having owed a duty of care as much to the second pursuer as to the first. According to the pursuers' averments, enough information was provided to the defenders at various times to have led, if reasonable care had been exercised by them, to the provision of genetic counselling, which in turn would have resulted in the abortion of each of the two foetuses rather than the birth of the two boys. ... I can see no reason why the course of action desiderated by the pursuers, which according to them would have resulted in the abortion of two foetuses, should not be regarded as having as its purpose *inter alia* the prevention of events harmful to the pursuers which were or ought to have been within the contemplation of the defenders and which, if they had exercised reasonable care, would not have happened.”

[40] As can be seen from that passage, *Anderson* can be distinguished on its facts inasmuch as the father in that case had undergone a vasectomy which he averred he would not otherwise have done had he been aware that his sons suffered from a life-threatening condition - whereas in the present case, the second pursuer has not in any sense altered his position in reliance on his belief that the child would not be disabled - but that factor does not appear to have been uppermost in Lord Nimmo Smith's reasoning, which was rather based upon the fact that it could reasonably be expected that the father would have had a significant involvement, physical and financial, in the upbringing of the children; and that

the birth of the children was an event which harmed both pursuers. It is not clear whether the duty was said to be fulfilled by the giving of proper advice to the mother, as the duty is formulated here; or whether it was averred to be a duty to give such advice to both parents.

[41] In *McLelland*, the only other Scottish case in which the issue has arisen, Lord Prosser said, at paragraph 9:

“As the Lord Ordinary says, both pursuers relied on the defenders’ staff, to exercise reasonable care to provide them with the information, as well as providing the first pursuer with treatment, necessary to secure them against the eventuality of the birth of a child affected by Down’s syndrome. I would agree with the Lord Ordinary, that it was reasonably foreseeable to the staff concerned, that if they failed in their duty of care to both pursuers, the very event which they sought to guard themselves against was liable to occur, and that if it did so occur, the harmful effects, on both pursuers, would include both severe shock and distress on discovery that the child was affected by the syndrome, and also, in the longer term, increased stress and wear and tear in bringing up and caring for the child. Whether or not the law allows damages for these consequences, I am in no doubt that they are direct consequences, for Mr McLelland, of the breach of a duty owed to him. Decisions as to ‘secondary’ victims are not, in my opinion, in point.”

Although in that case it had been conceded that the defenders owed a duty to the *parents* (emphasis added) to advise them of the existence of Down’s syndrome at the appropriate stages of pregnancy, it is clear from that passage that Lord Prosser considered the concession to have been properly made. Expressing what he said slightly differently, the scope of the defenders’ duty extended to take reasonable care so as to prevent both parents from suffering the consequences of having to care for a child with Down’s syndrome.

[42] The defenders argue that, societally, things have moved on since those cases were decided. One of the core planks of their argument is that the decision whether to have a termination or not can only be that of the mother. Senior counsel for the defenders set much store by Hale LJ’s remarks in *Parkinson* where she stressed a woman’s rights to bodily integrity and to physical autonomy, and emphasised the differences between a man and woman, stating at paragraph 93, that “this is not a debate in which the differences between

the sexes can be ignored” and that “[t]he primary invasion of bodily and integrity and autonomy is suffered by the mother.” However, those remarks were in the context of a claim by the mother alone in respect of an allegedly negligent sterilisation procedure, for the costs of raising a severely handicapped child, where the issue was whether she was entitled to damages at all; and must be read with that in mind. Hale LJ went on to say, later in that paragraph:

“Of the two types of harm, one can only be suffered by her. The other in my view is properly conceptualised as the obligation to care for and bring up the child. That too is, in the great majority of cases, primarily born by her. However, there are cases where it is shared, more or less equally, or where the primary carer is the father. My tentative view is, however, that, if there is a sufficient relationship of proximity between the tortfeasor and the father who not only has but meets his parental responsibility to care for the child, then the father too should have a claim. However, the issue does not arise in this case, and so it is unnecessary to express a concluded view.”

[43] Senior counsel for the defenders complained that there were conceptual and practical difficulties in applying any test which involved asking whether after the child’s birth the father would meet his parental rights and responsibilities (assuming he had them) which could not be known during pregnancy. That may well be so, but is not a reason for holding that no duty exists to the father who is in a stable family relationship with the mother, and where the parents appear to have come to a joint decision that whereas they intend to raise a healthy child, they do not wish to raise a disabled one, which is the present case. The reason why the biological father who neither has parental rights and responsibilities nor is involved in the child’s upbringing does not have a claim is likely not to be because no duty was owed to him, but because he will have suffered no loss.

[44] Nor can I agree with the submission by senior counsel for the defenders that to hold that a duty is owed to the father in some way involves a qualification of the mother’s rights as a patient, or a denial of her right to absolute autonomy in respect of the decision whether

to have a termination or not. It is true that she has that autonomy, but to focus purely on that obscures the fact that the decision as to whether to conceive a child in the first place is (generally) a joint one; that the child, once born, is as much the father's as the mother's; and that the father, as much as the mother, is likely to be equally affected by any disability from which the child may suffer, which may well have a profound impact on the quality of both of their lives, emotionally and financially. It in no way detracts from the mother's ultimate right to change her mind to say that parents of an unborn child may well, and in practice often do (as much in 2026 as in 1998, when *Anderson* was decided), take a joint decision as to whether they wish to bring up a disabled child. The pursuers' case is that they *had* taken such a decision, which was known to the defenders. That is implicit in the first pursuer having told the midwife at her booking appointment that she and the second pursuer already had one disabled child and did not want another. Her wish to undergo fetal testing was so that the pursuers - not just the first pursuer - could avoid that very eventuality. It is reasonable to hold that, from that moment, the defenders accepted responsibility, not simply to the first pursuer, but to both pursuers, to take reasonable care to undertake fetal testing of the first pursuer, and to report the results accurately to her, since they were aware that both pursuers were reliant on them so doing in order to guard against the possibility of their having to raise a second disabled child. Implicit in that was that the first pursuer would have an abortion should the tests show that her baby suffered from Down's syndrome.

The necessary proximity between the second pursuer and the defenders arises from his relationship to the first pursuer (married, as it happens although I do not consider that to be an essential element if the parties are otherwise in a stable co-habiting relationship) and their intention to raise their child together, rather than from the happenstance that he has parental rights and responsibilities (as most fathers do), or that he attended one of the appointments.

[45] I do not see that this involves any qualification of the rights of the first pursuer as a patient, or that any conceptual or practical difficulties arise as senior counsel for the defenders maintained. It is unnecessary to find that the duty extended beyond that to take reasonable care in one single aspect of the first pursuer's care which was known directly to impinge upon the second pursuer. In that respect, the case is not wholly dissimilar to *BT v Oei*. That the first pursuer might in theory have changed her mind about having a termination is neither here nor there in the circumstances of the present case, because the defenders accept that but for the negligent failure to carry out the test, the first pursuer *would* have terminated her pregnancy. Had she changed her mind, as she would have been entitled to do, the second pursuer would have had no claim, not because no duty was owed to him but because he would then have failed to establish causation. Equally, it is nothing to the point to ask what the position might have been if the pursuer had not conveyed information imparted to her by the defenders, to the second pursuer: that is not this case.

[46] For these reasons, I conclude that the law remains as set out in *Anderson* and *McLelland*, and that it is in line with authority and *dicta* from other jurisdictions. I find that, in the circumstances of this case, the defenders did owe a duty to the second pursuer to take reasonable care in their provision of the service of fetal testing. Accordingly, the second pursuer is entitled to an award of damages, and the pursuers are entitled to proceed with their joint claim.

## **The second issue**

### ***Introduction***

[47] It is not disputed that the first pursuer (and since I have held that he does have a relevant claim, the second pursuer) are entitled to a "conventional" sum by way of damages,

to compensate them for loss of autonomy, any suffering (in the case of the first pursuer) during the continued pregnancy and child birth and the frustration of not being safeguarded from the risk they sought to guard against: *McFarlane v Tayside Health Board* 2000 SC(HL) 1 (in respect of a healthy child); *Rees v Darlington Memorial Hospital NHS Trust*, above (in respect of a disabled child). Nor is it disputed that the pursuers are entitled to the additional costs of raising a child with Down's syndrome (in comparison with the costs of raising a healthy child): *Parkinson*, above; doubted in *Rees* but confirmed as correct by the Supreme Court in *Meadows v Khan* [2022] AC 852. Where the controversy arises is in relation to the approach to quantifying those costs.

[48] The pursuers aver that the additional costs of bringing up and caring for child A over his lifetime, arising from his Down's syndrome, include:

"...past and future maintenance and care costs, services, treatment, therapies, aids and equipment and other items of miscellaneous expenditure, including additional accommodation costs, additional transport costs and additional holiday costs. The measure of loss in relation to said additional costs is calculated by reference to the reasonable needs of [child A], and not by the means or resources of the pursuers. In addition, the costs of a financial and welfare guardian for [child A] will be incurred. The costs of establishing and administering a personal injury trust for [child A] will be incurred."

[49] The dispute between the parties is focused in the defenders' averments in response:

"To the extent that a claim is advanced for care costs, treatments, therapies, aids and equipment and other items of expenditure (including accommodation, transport and holiday costs), such loss is measured by reference to the resources available to (or which would reasonably have been available to) the first pursuer. Costs which the first pursuer could not (or would not) incur are not a loss."

As will have been observed from para [3] above, resolution of this issue will have a material bearing on the amount of damages which the pursuers are able to recover.

## ***Submissions***

### *Submissions for the defenders*

[50] Senior counsel for the defenders submitted that the starting point was to keep in mind that the claim is by child A's parents, not by child A. The correct approach was to award damages to put the pursuers in the position they would have been in had the negligence not occurred, which is that child A would not have been born; loss must be measured not by the needs of the child but by the costs incurred by the parents, and it would be contrary to principle to award damages to reflect costs that the pursuers had not incurred and would never incur: *Livingstone v Rawyards Coal Co* (1880) 5 App Case 25, as recognised in the context of clinical negligence in *Nunnerley v Warrington Health Authority* [2000] Lloyd's Rep Med 170. See, too, the discussion in *Meadows v Khan*, above, at paragraphs 58 to 66. Although losses were not limited to childhood but could continue past the age of 18, the temporal limit was the life expectancy of the parent. However, there had been a divergence of approach in first instance cases. In *Anderson*, Lord Nimmo Smith had rejected an argument that the existing resources of the pursuers should operate as a limiting factor, stating (at page 606) that there was no more reason to adopt that approach than in the case of a seriously injured person who was likely to require to pay for the provision of care in the future; and holding that the correct test was whether what was proposed was reasonable and whether the relative expense was likely to be incurred. A similar approach had been taken in England in *Hardmin v Amin* [2000] Lloyd's Rep Med 498; *Lee v Taunton and Somerset NHS Trust* [2001] 1 FLR 419; and *Roberts v Bro Taf Health Authority* [2002] Lloyds Rep Med 182. However, no proper analysis of the law was undertaken in any of those cases, which were inconsistent with principle and wrongly decided: none of them squared up to the fact that the court would simply be delivering a claim by the child

through the vehicle of the parents. Assessing damages without reference to the resources of the parents turned the claim, in substance, into one by the child, despite such a claim not being recognised: *McKay v Essex Area Health Authority* [1982] QB 1166. The correct approach had been taken by Newman J in *Rand v East Dorset Health Authority* [2000] Lloyds Med Rep 181, in which damages were awarded by reference to the resources of the parents. Although that would result in a poor claimant getting less than a richer counterpart, that was often the case in personal injuries actions, the example given by Newman J being that of the managing director and his chauffeur being injured in the same accident, suffering identical injuries, but their differing claims for loss of earnings resulting in markedly different awards. In assessing the pursuers' resources, the damages paid to them could not be taken into account, because they would not have had those damages in the counterfactual world in which the child had not been born. It was misleading to categorise the defenders' approach as imposing a cap on a higher level of loss [although it was referred to as such in *Hardman*]; rather, the exercise was to ascertain the correct measure of loss.

#### *Submissions for the pursuers*

[51] Senior counsel for the pursuers submitted that a wrongful life case was one raised by or on behalf of a child who argued that they should not have been born, in other words, that there was a duty on the defender to have terminated their existence while they were a foetus. By contrast, in this case, the pursuers sought to recover the losses which *they* had suffered due to the admitted negligence of the defenders. That was quantified by reference to the needs of the child. The pursuers sought the additional costs of caring for a child with disabilities as reasonable damages to put them in the position they would have been in but for the negligence: that did not convert a wrongful birth case into a wrongful life case. But

for the wrong done to them, the pursuers would not have had a disabled child and would not have required to incur the additional responsibility and additional costs of caring for a disabled child: *Anderson*; *McLelland*, Lord Prosser at paragraph 31; *Nunnerley*, above. In none of those cases was there any reference to capping based upon the parents' resources, nor was there any such suggestion in *Meadows v Khan* or in *Parkinson*. The reasoning in *Hardman*, *Lee* and *Roberts* should be preferred to that of Newman J in *Rand*.

The chauffeur/managing director analogy was not a good one, because both were restored to the position they would have been in but for the accident, whereas the poor parent still had to look after the disabled child yet on the defenders' suggested approach would not be able to recover the costs of so doing. The factual premise of the defenders' suggested approach was in any event self-defeating because the pursuers could use the significant sums paid to them in damages, in whole or in part, to fund care. It was contrary to principle to cap the pursuers' claim by reference to their resources.

## ***Decision on issue 2***

### *Introduction*

[52] The parties agree that a principled approach should be taken to the assessment of the pursuers' loss, which is that, so far as money can achieve, they should be restored to the position they would have been in but for the negligent failures of the defenders:

*Livingstone v Rawyards Coal Co* and *Nunnerley v Warrington Health Authority* above.

Thereafter, they diverge as to the principles which should be applied in achieving that goal.

*Case law*

[53] The first case in which the issue was considered was *Anderson*. Lord Nimmo Smith's approach was straightforward, and favours the pursuers:

"In my view, the correct test in considering future care costs is whether what is proposed is reasonable, and, if so, whether the relative expense is likely to be incurred. I do not think that the existing resources of the pursuers should operate as a limiting factor any more in this case than in the case of a seriously injured pursuer who is likely to require to pay for the provision of care in the future. Nor do I think that care costs should be limited by reference to the pursuers' obligation to aliment their children or by the cessation of that obligation if and when each of them attains the age of majority. The claim for care costs arises, as I see it, from the natural bond between parent and child, an aspect of which is the parents' desire to care for the child. Subject to questions of the reasonableness of the consequent expenditure, which must depend on the circumstances, I can see no reason at this stage to suppose that it was not within the parties' contemplation that if the children were born suffering from disabilities the natural response of the pursuers would be to make reasonable provision for their care throughout the children's lives."

[54] The weight of English authority also favours the pursuers' approach. The sole voice in support of the defender's argument is that of Newman J in *Rand*, who held that the resources of the parents did operate as a limiting factor to the damages which could be recovered, stating at page 194:

"The claimants may only recover such losses as they have in fact sustained, or will probably sustain, in the future. Their own means, as opposed to Katy's needs, are determinative of this issue. In my judgment this must follow as a matter of law from the categorisation of the claim as a claim for pure economic loss. I recognise that this will inevitably give rise to wealthy parents being in a position to obtain higher awards than parents of poor or modest means but this is a regular and accepted consequence in claims for damages. A managing director and his chauffeur may suffer identical injuries in the same collision and a claim for their loss of earnings will give rise to markedly different awards. It is to be remembered that whatever the wealth of the parents may be the court can only make an award in respect of claims which it considers reasonable both in character and amount."

[55] The opposing view was best expressed by Henriques J in *Hardman* at page 507:

"I must ask ... whether it must follow as a matter of law from the categorisation of the claim as a claim for pure economic loss that the claimant is limited by her means as opposed to the reasonable needs of her disabled child.

Such a scenario is deeply unattractive. The poorer the claimant the less she will be able to spend on her disabled child. Indeed it might deny the claim of the poorest parent unable to buy in any care or equipment.

In argument, Mr Whitfield pointed out that two impecunious mothers who had both read the judgment in *Rand* and with claims pending in court may both go down the high street and inform their respective bank managers that they had a claim pending against the Health Authority. 'Can I borrow £100,000 please so that I can recover £100,000 in damages'. One manager may agree whilst next door there is a refusal. Lady A gets £100,000 damages and Lady B gets nothing.

Such a state of affairs cannot prevail in a system of compensation intended to put a claimant in the position she would have been but for the tort.

I find myself compelled to disagree with Newman J on this aspect of the law. I accept Mr Whitfield's argument that categorisation of a claim as one for economic loss identifies the criteria to be satisfied before a duty and its scope are established, but has nothing to do with the quantification of damages once a breach of duty is shown to have resulted in loss of a type which the defendant was under a duty to avoid."

[56] In *Lee*, Turner J preferred Henrique J's approach to that of Newman J, noting at page 433 that the child's needs were inextricably intertwined with those of the mother, since she bore the burden of attempting to cater for his needs, going on to state:

"I do not see why the quantification of [the mother's] loss under this head should be affected by her means. Her need exists, whether she has the means to meet it or not. It is quantifiable. It was caused by the defendants' negligence. In principle she should therefore be entitled to recover the cost of it. It would be invidious if two mothers in Mrs Lee's situation, each having the same needs, differed in their ability to recover the cost of meeting those needs, because one possessed independent means and the other did not."

[57] Turner J was of a similar view in *Roberts*, concluding at paragraph 15 that it would be inconsistent with the rationale of *Parkinson*, that the needs of the family in connection with the extra expenditure occasioned by having to care for a disabled child should be rationed by the economic circumstances in which the family found itself.

[58] The approach in *Hardman*, *Lee* and *Roberts* has received some academic approval: Jones, *Medical Negligence*, 6<sup>th</sup> Edition, paragraph 12-155. Underpinning the rationale of the

majority is the notion that in a just compensation system, it is unconscionable that the rich should be entitled to recover more than the poor, when both have to meet the same needs.

### *Analysis*

[59] The starting point in any claim for damages is to compare the position in which the pursuers now find themselves, with their position as it would have been had the defenders discharged the duties incumbent on them: the so-called counterfactual. The position in which the pursuers find themselves is that of having the responsibility, for the rest of their lives, of caring for and meeting the needs of child A throughout his childhood, and beyond. The counterfactual is that child A would not have been born, and the pursuers would not have had that responsibility but in all probability (I was told) would have gone on to have a healthy child (which is one justification for limiting their claim to the *additional* costs of caring for a child with a disability). While it is necessary to keep in mind at all times that the claim is one by the pursuers as the parents of child A for the loss *they* have suffered rather than one by or on behalf of child A himself, it does not follow, as the defenders' argument assumes, that there can be no overlap, even a significant overlap, between the needs of child A and the needs of the pursuers in caring for him. As Turner J observed in *Lee*, above, the two are inextricably intertwined. It is therefore a *non-sequitur* to say that because the pursuers' claim (necessarily) reflects child A's needs, it must be ill-founded as in substance a wrongful life claim which the law does not allow. One leg of the defenders' opposition to the pursuers' approach therefore falls away.

[60] There was also some debate as to whether, on the defenders' proposed approach of limiting the pursuers' claim to items of expenditure within their resources, account could or could not be taken of the significant damages payable to them in respect of their other heads

of claim. Senior counsel for the defenders submitted that they must be left out of account, because in the counterfactual, such damages would not have been paid. That is true, but in the counterfactual nor would the pursuers have had a disabled child to care for. It is in the real world that damages have been, or will be, paid to the pursuers, and in the real world that the pursuers must care for and meet the needs of child A. If as a matter of fact the pursuers were to use part of their damages, say, to purchase an expensive, but necessary, item of equipment for child A, why should the cost of that equipment not form part of their claim, simply because in the counterfactual world of no damages and no expensive equipment, the pursuers would have been unable to afford same? This perhaps goes to illustrate the unsatisfactory and to some extent illogical consequences if the defenders' argument were correct. It also illustrates that the defenders' approach, despite their senior counsel's protestations to the contrary, does indeed involve capping the pursuers' damages, since the pursuers would not be entitled to recover expenditure which they had in fact incurred. As others have observed, that is a deeply unattractive outcome.

[61] Next, the defenders rely upon the much-cited poor chauffeur/rich managing director example, given by Newman J, in support of their submission that it is frequently the case that the damages paid to wealthy individuals are higher than those paid to those less well financially endowed. The example presumes that both suffer identical injuries in the same car accident but that the loss of earnings element of the award to the managing director is significantly higher than the sum paid to the chauffeur. That may indeed be so, but that is because the wage loss sustained by the former is greater than the wage loss sustained by the latter; both are in fact treated in the same way in the sense that both are restored to the position in which they would have been but for the accident. There is no sense in which their resources are relevant in assessing their respective damages. It is not the law that

the managing director would be entitled to recover (say) the cost of round-the-clock care (should the injuries be catastrophic) and the chauffeur would not, simply because in the counterfactual world of no accident, only the former could have afforded that. Another leg of the defenders' argument therefore falls away.

[62] Nor does it assist the defenders to point out, as senior counsel did, that had the defenders' advice not been negligent - for example, if the test had been carried out and returned a false negative - the pursuers would have been dependent on their own resources in caring for child A. That can be said of any personal injuries claim based upon fault. Returning to the chauffeur example, it is nothing to the point that only the managing director would have been able to pay for his own care had the accident not been caused by the fault of another driver.

[63] Drawing all of this together, and reverting to the starting point of comparing the pursuer's actual position with their counterfactual one, in order to put them in the position in which they would have been but for the negligence, they ought to be entitled to recover the reasonable costs of meeting child A's additional needs, that is, those caused by his Down's syndrome. That is consistent with the scope of the duty on the defenders, the defenders' practitioners having been aware that the pursuers wished to avoid having a child with additional needs. None of the defenders' arguments, nor established principles, justify assessing the pursuers' claim by reference to their means. In simple terms, the reasoning of Lord Nimmo Smith in *Anderson* holds good: the approach is to ask whether any particular head of claim is reasonable, and whether it is likely to be incurred. That might rule out certain claimed expenditure as either being unreasonable, or as being unlikely to be incurred; by way of hypothetical example, if the pursuers had no intention of sending child A to an expensive fee-paying school then they would not be entitled to recover that head of

expenditure, however reasonable it might otherwise be. However, that is different from holding that it is irrecoverable because the pursuers do not have the resources to pay for it.

[64] It follows that the defenders' averments set out at para [50] above are irrelevant and fall to be excluded from probation; and the pursuers are entitled to go to proof on their corresponding averments. However a word of caution. Although the needs of the pursuers, and those of child A might overlap to a significant extent, it does not follow that they are identical in all respects. Accordingly, it does not necessarily follow from the foregoing that the pursuers are entitled to claim for expenditure likely to be incurred beyond their death; in a similar vein, nor am I currently persuaded that they will be entitled to recover the costs of establishing a personal injury trust, which, on the face of it, would be to treat the claim as if it were a claim by, or on behalf of, child A, which it is not. However, those are questions for another day.

### **Disposal**

[65] I will sustain the pursuers' second and fifth pleas-in-law (which are, respectively, that the second defender is entitled to reparation from the defenders, and that the defenders' averments regarding resources are irrelevant). I will reserve all questions of expenses. Thereafter, I will appoint the case to call at a further case management hearing so that future procedure might now be regulated.