

*Should Lost Autonomy be Recognised as
Actionable Damage in Medical
Negligence Cases?*

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Craig Purshouse

School of Law

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Abstract

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It has been suggested by some commentators that the ‘real’ damage (as opposed to that pleaded) in the cases of *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309 and *Chester v Afshar* [2005] 1 AC 134 was the claimant’s lost autonomy. Arguments have consequently been put forward that lost autonomy either already is or should be recognised as a new form of actionable damage in medical negligence cases. Given the value placed on respecting patient autonomy in medical law and bioethics, it might be thought that such a development should be welcomed.

But if lost autonomy is accepted as a new form of damage in negligence, it will not be confined to the two scenarios that were present in those cases and it may be inconsistent with other established negligence principles. This thesis considers whether lost autonomy ought to be recognised as a new form of damage in negligence and concludes that it should not.

A close textual analysis of *Rees* and *Chester* is undertaken in order to determine whether a ‘lost autonomy’ analysis actually provides the best explanation of those two cases. I then look at how the concepts of autonomy and harm should be understood to determine whether, ethically speaking, to interfere with someone’s autonomy is to cause them harm. The final part of the thesis considers important doctrinal tort law considerations that have been overlooked in the medical law literature. I argue that the nature of autonomy means that it cannot coherently be considered actionable damage within the tort of negligence and that recognising a duty of care to avoid interfering with people’s autonomy would be inconsistent with the restrictive approach the courts take to recovery for psychiatric injury and economic loss. My ultimate conclusion is that the benefits of allowing such claims do not outweigh the undermining of established principles that would ensue if lost autonomy were recognised as a form of actionable damage in negligence.

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The Author

Craig Purshouse graduated from the University of Sheffield in 2010 with a first class honours LL.B in Law, where he won the Sweet and Maxwell Law Prize. He completed his M.A. in Healthcare Ethics and Law (distinction grade, Lord Alliance Prize) at the University of Manchester in 2012 and stayed there for his doctoral research, which was funded by the Arts and Humanities Research Council. He is currently Lecturer in Law at the School of Law and Social Justice, University of Liverpool.

Publications

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Introduction

In *Wilsher v Essex Area Health Authority*¹ Lord Bridge said, ‘We should do society nothing but disservice if we made the forensic process still more unpredictable and hazardous by distorting the law to accommodate the exigencies of what may seem hard cases.’² Two hard medical negligence cases – *Rees v Darlington Memorial Hospital NHS Trust*³ and *Chester v Afshar*⁴ – are arguably difficult to square with the ordinary principles of tort liability. In the wrongful conception case of *Rees* the claimant received a £15,000 ‘conventional award’ despite the House of Lords confirming that the economic loss associated with raising a healthy child was irrecoverable.⁵ As such, there is uncertainty regarding what damage this award is compensating with suggestions – both in the judgments and in the academic literature – that the award was intended to vindicate the claimant’s rights.⁶ In *Chester v Afshar* the claimant was successful in the House of Lords (Lord Bingham and Lord Hoffmann dissenting) despite a strong argument that she could not demonstrate that the defendant’s breach of duty actually *caused* her injuries according to the normal rules of causation.⁷ It might be thought that these cases are distorting the law and, as a result, will make the forensic process more unpredictable and hazardous.⁸ Indeed, there is no shortage of academic and judicial opinion to that effect.⁹

However, some commentators have argued that a more coherent explanation of these cases – one that allows them to be reconciled with established principles – is that the real

¹ [1988] AC 1074.

² *Ibid* at 1092.

³ [2003] UKHL 52; [2004] 1 AC 309.

⁴ [2004] UKHL 41; [2005] 1 AC 134.

⁵ For the facts of these cases see below at 4.2.2 and 4.2.3.

⁶ See 4.2.2. below.

⁷ See 4.2.3. below.

⁸ *Wilsher v Essex Area Health Authority* [1988] AC 1074 at 1092 per Lord Bridge.

⁹ See ch 4.

damage suffered in both cases is the claimants' lost autonomy.¹⁰ Some go even further and maintain that lost autonomy already is, or should be, recognised as a (new) form of damage in negligence.¹¹ In this way, the accusation that *Rees* awards compensation without any loss being suffered and that *Chester* departs from conventional causation principles is refuted.¹²

Thus Witzleb and Carroll believe that it may emerge that *Rees* and *Chester* were tentative steps 'on the way to recognising interference with patient autonomy as a compensable loss in itself'¹³ and that '[w]hile such a bold move would not resolve all problematic issues, it would avoid the doctrinal difficulties exposed in the dissents in both decisions.'¹⁴

Priaulx maintains that '[t]he loss central to the wrongful conception case is one of reproductive autonomy'¹⁵ and that autonomy should be 'integrated as the organizing principle in wrongful conception cases.'¹⁶ She criticises *Rees* for not going far enough in recognising this new form of loss.¹⁷

Chico also argues that if autonomy is an important principle then an explicit legal recognition of it 'ought to take a form which reflects the importance of the interest.'¹⁸ She states:

It might be argued that a legal approach to protection of personal autonomy, which classes violation of the interest in autonomy as damage (in negligence), recognises the importance of the interest in a way which an approach which is

¹⁰ E.g. Sarah Green, *Causation in Negligence* (Oxford: Hart Publishing, 2015) ch 7.

¹¹ See ch 7.

¹² See ch 4.

¹³ Normann Witzleb and Robyn Carroll, 'The Role of Vindication in Torts Damages' (2009) 17 *Torts Law Review* 16, 41.

¹⁴ *Ibid.*

¹⁵ Nicolette Priaulx, 'Joy to the World! A (Healthy) Child is Born! Reconceptualising Harm in Wrongful Conception' (2004) 13 *Social and Legal Studies* 5, 16.

¹⁶ *Ibid.*, 22.

¹⁷ Nicolette Priaulx, *The Harm Paradox: Tort Law and the Unwanted Child in the Era of Choice* (London: Routledge, 2007) ch 3.

¹⁸ Victoria Chico, *Genomic Negligence: An Interest in Autonomy as the Basis for Novel Negligence Claims Generated by Genetic Technology* (London: Routledge, 2011) 35.

based on protecting the interest in autonomy without recognising that the interference has occasioned loss does not.¹⁹

The view that autonomy should be recognised as a new form of damage appears logical when one considers the value placed on respecting autonomy in medical law and ethics.²⁰ As Foster has stated, ‘Autonomy is held in high repute by lawyers. Judgements and professional codes are littered with respectful references to it. It is often presented as the principle that trumps all others.’²¹

If liability in negligence is, as Lord Atkin stated in *Donoghue v Stevenson*,²² ‘based upon a general public sentiment of moral wrongdoing for which the offender must pay’²³ then it might be considered to be beneficial for the law to hold that when a defendant commits the moral wrong of interfering with an individual’s autonomy they ought to be held liable in negligence.

Although the tort of negligence in England has not previously protected this interest,²⁴ there are ‘no particular institutional constraints placed on the courts when it comes to creating or developing novel rules of tort law.’²⁵ The categories of negligence are not closed and it is possible for new forms of actionable damage to be recognised.²⁶ After all, judges are required to keep the common law ‘abreast of current social conditions and expectations.’²⁷ As Lord Nicholls once said, ‘Continuing but limited development of the common law... is an integral

¹⁹ Ibid.

²⁰ See Margaret Brazier, ‘Do No Harm – Do Patients Have Responsibilities Too?’ (2006) 65 *Cambridge Law Journal* 397.

²¹ Charles Foster, ‘Autonomy in the Medico-Legal Courtroom: A Principle Fit for Purpose?’ (2014) 22 *Medical Law Review* 48, 48.

²² [1932] AC 562.

²³ Ibid. at 580.

²⁴ Jane Stapleton describes the idea as a ‘radical unorthodox position’ in ‘Occam’s Razor Reveals an Orthodox Basis for *Chester v Afshar*’ (2006) 122 *Law Quarterly Review* 426, 442.

²⁵ John Murphy, ‘Formularism and Tort Law’ (1999) 21 *Adelaide Law Review* 115, 199.

²⁶ *Donoghue v Stevenson* [1932] AC 562 at 619 per Lord Macmillan. See Donal Nolan, ‘New Forms of Damage in Negligence’ (2007) 70 *Modern Law Review* 59.

²⁷ *National Westminster Bank v Spectrum Plus* [2005] AC 680 at 697 per Lord Nicholls.

part of the constitutional function of the judiciary. Had the judges not discharged this responsibility the common law would be the same now as it was in the reign of King Henry II.²⁸

This is undeniable when one considers the fact, highlighted by Conaghan, that ‘our understanding of harm is a product of social relations and the meanings they generate.’²⁹ While pain or physical injury may be the most common social indicators of harm, ‘they are far from exhaustive or determinative. The notion of harm implies some element of *social recognition*; as such, it is fluid and contentious, shifting and changing over time.’³⁰ An example of this is the fact that a generation ago smacking children was considered to be acceptable physical discipline but now ‘the smacking parent is an abuser and the smacked child is abused.’³¹ Given that autonomy is an important moral value and the common law can adapt to reflect the fact that our social perceptions of harm can change over time, it might be thought reasonable that the tort of negligence should develop accordingly and protect against this new form of harm.

Yet this solution has not been fully considered in its wider context. Violation of autonomy might be A Bad Thing, morally speaking, and this analysis might provide a more coherent explanation for *Rees* and *Chester*. But if lost autonomy is accepted as a new form of damage in negligence then it will not be confined to the two scenarios that were present in those cases. Recognising lost autonomy as a form of damage in negligence might solve one problem by providing an elegant explanation of two hard cases but it may cause larger ones by being inconsistent with other established principles. Focusing on the law in England and Wales, this thesis will consider whether lost autonomy ought to be recognised as a new form of damage in negligence. By taking a broader view of the issues involved in this problem, it

²⁸ Ibid.

²⁹ Joanne Conaghan, ‘Law, Harm and Redress: A Feminist Perspective’ (2002) 22 *Legal Studies* 319, 322. C.f. Christian Witting, ‘Physical Damage in Negligence’ (2002) 61 *Cambridge Law Journal* 189.

³⁰ Ibid.

³¹ Ibid.

will be demonstrated that there a number of doctrinal difficulties with protecting this new interest in this branch of the law.

In the following three chapters I will, first, outline the philosophical and legal approach that underpins the thesis. I will then provide the ethical and legal background to the issues involved by conducting a review of the relevant literature relating to why autonomy is considered an important moral value and how this putative interest has been or could be protected by the law. I will then give an overview of the main chapters of this thesis, which will analyse whether lost autonomy should be recognised as a new form of actionable damage in English medical negligence cases.

Chapter 1: Philosophical and Legal

Approach

Janet Radcliffe Richards has said of those philosophers who head off in search of the Ultimate Moral Truth: ‘Most philosophers who set off for the stratosphere never return to earth to enlighten the people they have left behind, and the ones who do seem to disagree with each other, so they are not much help.’³²

Attempting the task of proving the perfect moral theory (or Ultimate Moral Truth) in this thesis would be a hopeless enterprise. Even if it was not the case that finer minds than mine have been grappling with such problems for centuries, doing so would mean that I would have no room left to deal with the actual question in this thesis. However, it would be impossible to discuss whether lost autonomy *should* be recognised as a form of damage in negligence without making any normative claims.³³ And in order to make normative claims that are not just based on intuition or prejudice one needs to rely on theory.³⁴ The philosophical and legal theory that I will be adopting in this thesis will be a utilitarian one as I believe it can provide a convincing framework for making ethical and legal decisions. It is not my intention, however, to *prove* that utilitarianism is a superior moral theory to the alternatives.³⁵ But in chapter 2, detailing the ethical and legal background to the problem this thesis is addressing, I rely on a number of utilitarian considerations in discussing the literature. For example, I argue that this theory provides us with reasons for why we should

³² Janet Radcliffe Richards, *The Ethics of Transplant: Why Careless Thought Costs Lives* (Oxford: Oxford University Press, 2012) 11.

³³ After all, there is a judicial belief that tort law is ‘simply formulated and declared morality’ – *Smith New Court Securities Ltd v Citibank* [1997] AC 254 at 280 per Lord Steyn. See also the comments of Peter Cane who has said ‘the law of tort can be viewed as a system of ethical rules and principles of personal responsibility for conduct’ *The Anatomy of Tort Law* (Oxford: Hart Publishing, 1997) 1.

³⁴ See Allan Beever, ‘Particularism and Prejudice in the Law of Tort’ (2003) 11 *Tort Law Review* 146.

³⁵ That said, I find R. M. Hare’s attempt to do so very convincing. See ‘Arguing About Rights’ (1984) 33 *Emory Law Journal* 631 and ‘Universal Prescriptivism’ in Peter Singer (Ed.), ‘A Companion to Ethics’ (Oxford: Blackwell, 1991) 456.

respect autonomy. Furthermore, as I will show in the section 1.2. of this chapter, there is evidence that judges take a broadly utilitarian methodology towards deciding tort cases and so this theory does not suffer from many of the problems associated with alternative private law theories.³⁶ It therefore makes sense in this chapter to give an overview of the moral theory of utilitarianism before discussing how this can potentially provide a persuasive account of tort law.

1.1. Ethical Approach

Utilitarianism is generally associated with the idea that the morally good outcome is the one that promotes the most happiness.³⁷ Nigel Simmonds has summed up a number of common features contained in the different versions of utilitarianism:

1. Utilitarianism is monistic, in that it proposes one supreme principle (the principle of utility) as governing all moral questions;
2. Utilitarianism is monistic in another respect also: its basic principle (the principle of utility) requires us to maximise a single goal, although the goal may be conceived differently in different versions of utilitarianism;
3. Utilitarianism is a version of consequentialism. Consequentialist theories claim that the moral rectitude of an action is a function of its expected consequences;
4. Utilitarianism is also individualistic, in the sense that it judges actions, laws and institutions by their impact upon the lives of individuals. Collective goals such as (for example) the creation of a flourishing sense of national identity or fraternity will be

³⁶ See Peter Cane, 'The Anatomy of Private Law Theory: A 25th Anniversary Essay' (2005) 25 *Oxford Journal of Legal Studies* 203 for an excellent overview of the main theoretical approaches to tort law.

³⁷ Nigel Simmonds, *Central Issues in Jurisprudence* 4th Edn. (London: Sweet and Maxwell, 2013).

accepted by the utilitarian as genuinely valuable only to the extent that they have positive consequences for the lives of individuals.³⁸

Despite having these aspects in common, there are number of different version of utilitarianism that can be adopted.³⁹ To give one example, for classical utilitarians such as Jeremy Bentham the goal to be maximised was the hedonistic one of promoting pleasure or happiness. He maintained that '[n]ature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do.'⁴⁰ However, the classical school disagreed about the *nature* of pleasure, with John Stuart Mill opting to separate 'higher pleasures' from 'lower' ones. Mill believed it better to be Socrates unsatisfied than a pig satisfied.⁴¹ Under Mill's utilitarian calculation going to the opera and reading Proust would presumably maximise utility more than spending all day drinking beer and watching reality TV shows. Bentham took a more egalitarian view that didn't distinguish between kinds of pleasures. He believed that: 'the game of push-pin is of equal value with the arts and sciences of music and poetry.'⁴² And this dispute relates only to the nature of pleasure. More recent theories see the satisfaction of *preferences* as the goal to be maximised.⁴³

The goal I will take utilitarianism to be maximising is the satisfaction of people's 'interests.'⁴⁴ The reason for this is that it does not suffer from the drawbacks in other utilitarian maximands. Unlike versions of utilitarianism seeking to maximise pleasure, it can recognise the fact that people can derive satisfaction from things that do not necessarily give

³⁸ Ibid., 18-19.

³⁹ See Dan Brock, 'Recent Works in Utilitarianism' (1973) 10 *American Philosophical Quarterly* 241.

⁴⁰ Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Oxford: Oxford University Press, 1907) 1.

⁴¹ John Stuart Mill, 'Utilitarianism' in John Gray (Ed.), *On Liberty and Other Essays* (Oxford: Oxford University Press, 1991) 138-139.

⁴² Jeremy Bentham, *The Rationale of Reward* (London: Robert Heward, 1830) 206.

⁴³ Peter Singer, *Practical Ethics* 3rd Edn. (Cambridge: Cambridge University Press, 2011) 14-15.

⁴⁴ See R. M. Hare, 'Wrongness and Harm' in *Essays on the Moral Concepts* (London: The Macmillan Press Ltd, 1972) 97.

them a pleasurable buzz; and unlike the preference-satisfaction utilitarianism it can account for the fact that people sometimes derive satisfaction from something in a way they do not presently recognise (though, admittedly, the ‘interests’ and ‘preferences’ account are very similar).⁴⁵ As a working definition of ‘interests’ the one used by Brazier is compelling. She described an interest as ‘a claim or want or desire of a human being or group of human beings which the human being or group of human beings seeks to satisfy, and of which, therefore, the ordering of human relations in civilised society must take account’⁴⁶

How, then, might the satisfaction of people’s interests be maximised? R.M. Hare’s two-level utilitarianism provides a convincing answer. This involves distinguishing between two levels of moral thinking. One, for use in a ‘cool hour’,⁴⁷ is called the critical level. At this stage a moral agent is permitted to consider all the details which would enable them to weigh up the course of action that would satisfy the most interests and thus have the best consequences.⁴⁸ The other, known as the intuitive level, is intended for normal use under conditions of ignorance of the future, stress and temptation, and in moral education and self-education.⁴⁹ At this level we should ‘stick to firm and simple principles which are most likely in general to lead to right action.’⁵⁰ The former of these two levels is used to select the principles to be adhered to in the latter.

If we were completely rational beings, had unlimited information and ‘superhuman powers of clear thinking’⁵¹ then we would be able to find out all of the facts and determine what would have the best consequences in each particular case.⁵² We would be able to use the

⁴⁵ Robert Goodin, *Utilitarianism as a Public Philosophy* (Cambridge: Cambridge University Press, 1995) 13.

⁴⁶ Margaret Brazier, *Street on Torts* 9th Edn. (London: Butterworths, 1993) 3. In the latest edition, Christian Witting describes them as ‘the kinds of natural and other goods and attributes that people need to lead satisfying lives, and which a civilised society ought to recognise as worthy of (some degree of) protection.’ *Street on Torts* 14th Edn. (Oxford: Oxford University Press 2015) 4.

⁴⁷ R. M. Hare, ‘Critical Study: Rawls’ *Theory of Justice* I’ (1973) 23 *The Philosophical Quarterly* 144, 153.

⁴⁸ *Ibid*

⁴⁹ *Ibid*

⁵⁰ *Ibid*

⁵¹ R. M. Hare, ‘How to Decide Moral Questions Rationally’ (1986) 18 *Critica* 63, 76.

⁵² *Ibid*

critical level all of the time. But since we are very far from being completely rational the best way of achieving the decisions a fully rational being *would* make is to cultivate dispositions which result in us making similar decisions to such a being.⁵³ Given that we are ‘always incompletely informed and always subject to other human failings’⁵⁴ by following general principles and intuitions we are more likely over the course of our lives to make the decisions that we ought to make than by doing a utilitarian calculation on every occasion.⁵⁵

This is because in order to maximise the utility that arises from my act, I have to know or, at the very least, be able reasonably to guess what others are likely to do. But as Goodin has stated, knowing that with any certainty is impossible in a world populated by act-utilitarian agents:

The best way to coordinate our actions with those of others, and thereby maximise the utility from each of our actions as individuals as well as from all our actions collectively, is to promulgate rules (themselves chosen with an eye to maximising utility, of course) and to adhere to them.⁵⁶

As such we should normally rely on general principles when making moral decisions but in exceptional circumstances – e.g. when two of our intuitive convictions conflict in a particular case so cannot both be acted on or ‘when we ask whether the intuitive principles which we have ourselves acquired through our upbringing are the ones which we ought to pass on to our children’⁵⁷ – it is permissible to depart from the intuitive level to the critical one and weigh up which action will produce the most utility. Such scenarios, though, are very much the exception.

⁵³ Ibid

⁵⁴ Ibid

⁵⁵ Ibid

⁵⁶ Goodin, *Utilitarianism as a Public Philosophy* 18.

⁵⁷ Hare, ‘Arguing About Rights’ 634.

Before considering how this ethical framework applies to the law of torts, I will first consider some counterarguments against utilitarianism as a moral theory. Anti-utilitarians have, in Goodin's words, been ingenious at 'concocting painfully cute counterexamples to embarrass utilitarians.'⁵⁸ However, these have 'depicted merely (often barely) possible worlds, more often than probable ones; they have been contrived, more often than commonplace.'⁵⁹

Indeed, Stevens attempts this method of refutation, believing that according to utilitarianism 'it would be acceptable to kill you for your valuable organs to further the greater good if it could be demonstrated that this did not undermine the impact of the general prohibition on murder, perhaps if it could be done in secret.'⁶⁰ Under a crude version of the theory it would appear so: deliberately killing one person for their organs would potentially save the lives of people in need of kidneys, a liver, a heart etc. and so, by saving more lives than the one sacrificed, would *prima facie* satisfy more interests.⁶¹

However, if one takes the nuanced two-level approach this is not necessarily the case. At the intuitive level, the response to this scenario is fairly simple: killing someone for their organs would be murder and therefore wrong.⁶² As Hare says, when discussing an example similar to that proposed by Stevens:

A utilitarian does not have to dissent from this verdict at the intuitive level. If he has been well brought up (and in particular if he has been brought up by a sound critical utilitarian thinker) he will have that intuition, and it is a very good thing, from the utilitarian point of view, that he will have it. For just think what would

⁵⁸ Goodin, *Utilitarianism as a Public Philosophy* 6. See H.L.A. Hart's example of a system where slavery could maximise utility in 'Utilitarianism and Natural Rights' (1979) 53 *Tulane Law Review* 664, 672. This has been refuted by Hare in 'What is Wrong with Slavery' (1979) 8 *Philosophy and Public Affairs* 103. See also Peter Singer 'The Right to be Rich or Poor' (1975) 22 *New York Review of Books* <<http://www.nybooks.com/articles/archives/1975/mar/06/the-right-to-be-rich-or-poor/>> for criticisms of this type of argument.

⁵⁹ Goodin, *Utilitarianism as a Public Philosophy* 6.

⁶⁰ Robert Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007) 332-333.

⁶¹ See John Harris, 'The Survival Lottery' (1975) 50 *Philosophy* 81.

⁶² R. M. Hare, *Moral Thinking: Its Levels, Method and Point* (Oxford: Oxford University Press, 1981) 132.

be the consequences of a moral education which contained no prohibition on murder!⁶³

So at the intuitive level it would be wrong to kill someone to use their organs. We certainly would not want a rule that allowed it or wish to encourage people to murder others. As Goodin has noted, in choosing general rules to govern a wide range of circumstances, we must respond to common circumstances and so ‘it is extraordinarily unlikely that the greatest happiness can ever be realised by systematically violating people’s rights, liberties or integrity.’⁶⁴ This is because ‘the rules that maximise utility over the long haul and over the broad range of applications are also rules that broadly conform to the deontologists’ demands.’⁶⁵

However, if we ascend to the critical level, our normal intuitions provide no solution to this problem. After all, they have been developed to equip us with the ordinary situations we face in everyday life rather than rigged examples constructed with the express purpose of making murder appear to be the act which has the best consequences. At the critical level it cannot just be *assumed* that murder has the best consequences in this scenario as this level requires us to weigh up all of the relevant considerations. Doctors aiming to murder someone for this purpose would have to be very sure that this action would satisfy the most interests as ‘if they get it wrong, the consequences will be pretty catastrophic.’⁶⁶ Whose organs are they taking? What if the prospective victim was a skilled doctor who could save many more lives by being kept alive? As Hare states,

Have [the doctors] absolute confidence in the discretion and support of all the nurses, porters, mortuarists, etc., who will know what has happened? Add to this

⁶³ Ibid

⁶⁴ Goodin, *Utilitarianism as a Public Philosophy* 69.

⁶⁵ Ibid

⁶⁶ Hare, *Moral Thinking* 133.

the extreme unlikelihood of there being no other way of saving these patients, if they can be saved at all, and it will be evident that your opponent is not going to get much help out of this example, once it is insisted that it has to be fleshed out and given verisimilitude.⁶⁷

The example that Stevens puts forward lacks content and does not, without more, show that murder would satisfy the most interests. Even if Stevens could provide an imagined example where murder would be the course of conduct with the best consequences – and this is doubtful – it is not likely to trouble anyone in the real world and does not refute utilitarianism as a basis for the rules we should have in place to stop people killing others.⁶⁸ As Hare states:

[U]ntil your opponent produces actual cases, you should not let yourself be troubled overmuch with fictional ones. If the actual cases are produced, you will probably find that the critical discussion of them will leave you and the audience at one, provided that the discussion is serious.⁶⁹

In order to appeal to ordinary intuitions as an argument, opponents of utilitarianism must produce cases which are similar to the sorts of situation that our ordinary intuitions have been designed to deal with. For if the cases they use fall outside this class – as in the fanciful examples often put forward – ‘then the fact that our common intuitions give a different verdict from utilitarianism has no bearing on the argument; our intuitions could well be wrong about such cases, and be none the worse for that, because they will never have to deal

⁶⁷ Ibid, 134.

⁶⁸ Incidentally, it is extraordinary that Stevens’ attack on utilitarianism concerns this fanciful example that is unlikely to ever occur in the real world when he fails to fully consider what rights we have or how the courts should handle a clash of rights, something of far more practical consequence (see John Murphy, ‘Rights, Reductionism and Tort Law’ (2008) 28 *Oxford Journal of Legal Studies* 393 and Dan Priel, ‘That Can’t be Rights’ (2011) 2 *Jurisprudence* 227). Given that Stevens believes the common law owes ‘less to Jeremy Bentham than it does to Jesus Christ’ (107) perhaps he should apply the advice given by the latter at the Sermon on the Mount and remove the beam from his own eye before commenting on the speck in other tort theories.

⁶⁹ Hare, *Moral Thinking* 135.

with them in practice.⁷⁰ In this respect, two-level utilitarianism is immune from many of the attacks commonly levelled at this philosophy.⁷¹

As stated above, following particular rules, principles or intuitions, such as avoiding lying, stealing or killing people, will maximise utility overall as there are benefits for society in each of us being known as rule-followers or acting on shared intuitions. This is so even if following the rule or intuition might not produce the most utility in that particular instance.⁷² However, unlike deontological ethical theories, this form of utilitarian has a further advantage. As Goodin states:

But when, just occasionally, following a rule would have truly grievous utility consequences, we would be perfectly well licensed to abandon the rule by the self-same logic that led us to adopt rules and generally follow them. Rule utilitarians can, thus, lie to Nazis about the Jews hidden in their attic, in a way that Kantian rule-followers might find hard.⁷³

Indeed, this is something that Stevens struggles with. He asks ‘If there is a murderer at your door wondering if his intended victim is inside your house, would it be wrong to lie?’⁷⁴ and answers this question by saying:

In order to reject the position that lying is always wrongful it is unnecessary to resort to appeals to the adverse consequences which would follow. An absolute

⁷⁰ Hare, ‘What is Wrong with Slavery’ 111.

⁷¹ To take another example. At one point Stevens says ‘If it could be shown that the existence and enforcement by law of a right not to be killed, with correlative duties not to do so, led to no fewer deaths and no change for the better in human behaviour, would this be a good argument in favour of its abolition? It would not. It is simply wrong to kill other people; it is not wrong because this leads to fewer deaths.’ (333). Leaving aside that his response is pure assertion rather any form of reasoned argument, the example is so outlandish that any intuitions it generates are not reliable in our world. There is a wealth of evidence that laws against killing reduce the level of violence in society (Steven Pinker, *The Better Angels of Our Nature* (London: Penguin Books, 2012) 71-97) so it is not possible that removing these would result in fewer deaths in our world. As such, any intuitions we might have about such a scenario are wholly unreliable. Our intuitions cannot help us with this rigged example. If it was found that our laws increased the number of people being killed then critical thinking might demonstrate that it is best to change them.

⁷² Goodin, *Utilitarianism as a Public Philosophy* 18.

⁷³ Ibid.

⁷⁴ Stevens, *Torts and Rights* 337.

prohibition on lying ignores the possibility that rights can conflict, a possibility familiar to lawyers.⁷⁵

He believes that the killer's interest in knowing the truth is not readily commensurable with his intended victim's interest in not being killed: 'Our rights are not absolute and the right not to be lied to is no exception. There are worse things in life than lies.'⁷⁶

Certainly, there are. However, Stevens' response is characteristic of the obfuscation that occurs when rights language is used to discuss moral issues. The victim in this scenario will have a right good against the killer that the latter not kill them. But let us presume that I have not made undertakings to protect the victim and that they are a stranger who has run into my house, do they have a right good against me that I protect them by lying? According to Stevens, the claim rights that we have good against the rest of the world are of a negative kind⁷⁷ and we cannot compel others to come to our assistance.⁷⁸ Given this, if we adopt Stevens' rights-based theory, how can it be said that I am under a duty to tell lies in order to save the victim in this scenario? The implication of his theory is that a stranger has no right good against me that I prevent someone from killing them. A much more coherent explanation can be provided by utilitarianism. Normally it is wrong to tell lies but this is an exceptional situation whereby the interests satisfied by lying (saving someone's life) easily outweigh those in telling the truth (satisfying the killer's interest in murdering someone). Other things being equal, the utilitarian would lie. Any rule that we should not lie is outweighed by the benefits of saving someone's life.

⁷⁵ Ibid. It is notable that Stevens does not provide a detailed explanation for how scenarios where there is a conflict of rights should be decided.

⁷⁶ Ibid.

⁷⁷ Ibid., 9

⁷⁸ Ibid.

This section has provided an overview of the moral theory that underpins this thesis and argued that utilitarianism can provide us with a compelling moral theory. In the next section I will discuss whether it is also capable of providing a convincing theory of tort law.

1.2. Legal Approach

Although '[n]o one could ever accuse tort law of being under-theorised'⁷⁹ it is undeniable that most of the major theories of tort law, such as corrective justice and rights-based theories fail to come close to matching the decided cases and often lead to unpalatable normative conclusions.⁸⁰ As a result, when I began this thesis I initially took a sceptical view of general tort theory as an academic enterprise and was inclined to adopt the view of Tony Weir that 'Tort is what is in the tort books, and the only thing holding it together is their binding.'⁸¹

However, I now believe that utilitarianism can provide a compelling explanation of this branch of the law.⁸² In many respects, the 'protected interests' approach adopted by the authors of *Street on Torts* could be characterised as a utilitarian theory of tort law, though it is never explicitly labelled as such.⁸³ In the latest edition, Christian Witting states that 'the

⁷⁹ Murphy, 'Rights, Reductionism and Tort Law' 393.

⁸⁰ For an overview of corrective justice theories of tort law see Ernest Weinrib, *The Idea of Private Law* (Oxford: Oxford University Press, 1995) 151 and Allan Beever, *Rediscovering the Law of Negligence* (Oxford: Hart Publishing, 2007). For a critique of corrective justice theories see Peter Cane, 'Corrective Justice and Correlativity in Private Law' (1996) 16 *Oxford Journal of Legal Studies* 471 and 'Distributive Justice and Tort Law' (2001) 4 *New Zealand Law Review* 401, Mark Lunney and Ken Oliphant, *Tort Law* 5th Edn. (Oxford: Oxford University Press, 2013) 21-22 and Dan Priel, 'Private Law: Commutative or Distributive?' (2014) 77 *Modern Law Review* 308. For a rights-based view of tort law see Stevens, *Torts and Rights*. And for criticisms see John Murphy, 'Rights, Reductionism and Tort Law', Dan Priel, 'Torts, Rights, and Right-Wing Ideology' (2011) 19 *Torts Law Journal* 1 and 'That Can't be Rights' and James Goudkamp and John Murphy, 'Tort Statutes and Tort Theories' (2015) 131 *Law Quarterly Review* 133.

⁸¹ Tony Weir, *An Introduction to Tort Law* 2nd Edn. (Oxford: Oxford University Press, 2006), ix.

⁸² Utilitarian reasoning has, of course, been implicit in the reasoning of many of those who have contributed to the current shape of tort law. E.g. Oliver Wendell Holmes, *The Common Law* (London: Belknap Press, 2009) ch 3 and 4. But an explicit defence has been notably absent from the literature. For instance, there is no mention of utilitarianism in Peter Cane's extensive survey of the field in his excellent article 'The Anatomy of Private Law Theory: A 25th Anniversary Essay' (2005) 25 *Oxford Journal of Legal Studies* 203.

⁸³ See also the approach of Peter Cane in *Anatomy of Tort Law* and 'Rights in Private Law' in Donal Nolan and Andrew Robertson (Eds.), *Rights and Private Law* (Oxford: Hart Publishing, 2012) 46.

reason why *persons* commence tort actions is because they have suffered an infringement of their interests – usually resulting in a loss of some kind.’⁸⁴ Given this, tort law:

[S]erves to determine which of the many human (and related) interests are so fundamental that the law should impose obligations upon all persons that are designed primarily to protect those interests and, secondarily, to provide a remedy when those interests are wrongfully violated by others.⁸⁵

Protecting people’s interests maintains order by preventing people from engaging in their own vendettas and allows citizens to interact knowing that certain minimum standards of conduct will be respected.⁸⁶ As Robertson has argued, by doing justice between individuals the law of negligence serves a broader community welfare purpose, which is ‘best understood as the maintenance of civil peace through the provision of civil recourse for particular interpersonal wrongs.’⁸⁷ This reflects what Viscount Simonds said in *The Wagon Mound*: ‘civilised order requires the observance of a minimum standard of behaviour.’⁸⁸ In other words, protecting people’s interests through the law of tort enables us to predict how other people will behave. If people are law abiding they will behave in a way that accords with minimum standards of conduct and this leads to good *consequences*.

This ‘interests’ approach is not inconsistent with the ‘historical fact that tort law has been largely cobbled together over several centuries by a great many different (and differently minded) judges in a sometimes *ad hoc* fashion.’⁸⁹ This is because different interests will be given different weight by different judges at different times in different

⁸⁴ Christian Witting, *Street on Torts* 14th Edn. (Oxford: Oxford University Press 2015) 4. See Glanville Williams, ‘The Aims of Tort Law’ (1951) 4 *Current Legal Problems* 137.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ Andrew Robertson, ‘On the Function of the Law of Negligence’ (2013) 33 *Oxford Journal of Legal Studies* 31, 32.

⁸⁸ *Overseas Tankship (UK) Ltd. Appellants; v Morts Dock & Engineering Co. Ltd. (the Wagon Mound)* [1961] AC 388 at 423.

⁸⁹ Murphy, ‘Rights, Reductionism and Tort Law’ 393.

contexts.⁹⁰ No two judges will have exactly the same views of the best method of satisfying people's interests, the extent to which a particular interest should be protected or how clashes between competing interests should be resolved but this does not detract from the fact that they were seeking to satisfy people's interests overall.

In this respect, and unlike other tort theories, utilitarianism can take account of the peculiar decisions that have sometimes occurred without the need to discard them as 'wrong' merely because they do not fit the theory.⁹¹ It also allows for the development of new interests and the removal of irrelevant ones. In short, it provides a theory that realistically explains the law but can also describe how it *ought* to be. After all, a judge may believe that their decision will lead to the best results but, being human, they may be mistaken.

The criticism that Murphy has levelled at corrective justice, law and economic, and rights-based theories, that '[t]he idea that [judges] were all somehow motivated by a desire to apply, modify or develop the law in a way that was consistent with some kind of overarching norm or principle seems highly implausible,⁹² does not apply to the utilitarian theory of tort law as it is credible that judges have been aiming for the best consequences and to protect people's interests. This is so even if they believe that being concerned with rights or corrective justice is the best way to achieve this.⁹³

However, there are limits to what the law can do and so even if judges *aim* for the best consequences, the principles of tort law might not necessarily seamlessly reflect those that a utilitarian philosopher would choose. As Bagshaw has argued

⁹⁰ See Priel, 'That Can't be Rights' 230.

⁹¹ See Beever, *Rediscovering the Law of Negligence*.

⁹² Murphy, 'Rights, Reductionism and Tort Law' 393.

⁹³ As Bentham stated: 'When a man attempts to combat the principle of utility, it is with reasons drawn, without his being aware of it, from that very principle itself. His arguments, if they prove any thing prove not that the principle is *wrong*, but that, according to the applications he supposes to be made of it, it is *misapplied*. Is it possible for a man to move the earth? Yes; but he must first find out another earth to stand upon.' *An Introduction to the Principles of Morals and Legislation* (Oxford: Oxford University Press, 1907) 4-5.

The fact that legal rules must be applied in practice limits the form that they can take. A legal rule which draws the line between liability and no liability will cause problems unless (1) evidence will be readily available to determine which side of the line a particular case falls, (2) the reliability of that evidence can be established, and (3) the cost of obtaining that evidence and testing its reliability is not too great.⁹⁴

Where these practical problems make it ‘unwise to treat a line which a moral philosopher would use to distinguish one part of a group of claimants from another as a legal borderline’⁹⁵ a judge may refuse all such claims, allow all such claims or create arbitrary lines. The refinements available to a philosopher may not be open to a judge attempting to craft broad rules that can be followed in practice. As Goodin states attempts to formulate general rules, ‘will, perhaps inevitably, give rise to comparisons of utility that are only rather rough and ready.’⁹⁶ Consequently, the law may not develop exactly in accord with what a rational utilitarian with all available information would choose but it will still be broadly utilitarian.

1.3. Application of Theoretical Approach - Duty of Care

Now that I have outlined a plausible account of utilitarianism, its potential as an explanatory tort theory can be assessed by chronicling how the duty of care principle has developed in negligence. This serves an important secondary purpose for my thesis. As it is under the duty heading that new forms of damage in negligence are often recognised or rejected, it is useful to describe the history of this area of law.⁹⁷

⁹⁴ Roderick Bagshaw, ‘Children as Actionable Damage’ (2004) 15 *King’s College Law Journal* 117, 125-126.

⁹⁵ *Ibid*, 126.

⁹⁶ Goodin, *Utilitarianism as a Public Philosophy* 21.

⁹⁷ E.g. *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465. Cf *Chester v Afshar* [2005] 1 AC 134.

For a long time English law recognised liability for careless behaviour in a number of separate situations ‘only where the case can be referred to some particular species [of negligence] which has been examined and classified.’⁹⁸ It was doubted that new categories of negligence could be recognised.⁹⁹ Certainty in the law was ensured by this approach: people could order their behaviour to make sure they were compliant with the law of torts by looking at the previously decided categories of cases. However, it was the equivalent of judges solely relying on the *intuitive level* of thinking in Hare’s two-level schema. If the categories of negligence are rigidly set in stone then people’s interests are unlikely to be maximised overall as it would mean that the law cannot meet the developing needs of society.¹⁰⁰ As Oliphant has noted, ‘It has long been recognised...that certainty may sometimes conflict with the overriding requirements of justice.’¹⁰¹ Under this approach, the courts were arguably failing to use the *critical level* to determine whether the established categories were the best ones to have or when exceptional cases arose before the courts. Although people’s interests were satisfied to some extent because the law, and thus other people’s conduct, was more or less predictable, this approach did not satisfy utility overall as there was no critical thinking in exceptional circumstances. These rules were not the best ones to have as they were too rigid to satisfy peoples’ interest. As Priel states, ‘The rule that a plaintiff loses if his last name starts with an earlier letter in the alphabet than the defendant’s is clearly easy to apply, but it is not a good one.’¹⁰²

The landmark decision of *Donoghue v Stevenson*¹⁰³ took a different approach. As well as creating a new category of negligence (liability of the manufacturer of goods to the

⁹⁸ *Donoghue v Stevenson* [1932] AC 562 at 580 per Lord Atkin.

⁹⁹ See *Winterbottom v Wright* (1842) 10 M&W 109.

¹⁰⁰ See *McLoughlin v O’Brian* [1983] 1 AC 410 at 430 per Lord Scarman for criticisms of a conservative judicial approach.

¹⁰¹ Ken Oliphant, ‘Against Certainty in Tort Law’ in Stephen Pitel, Jason Neyers and Erika Chamberlain (Eds.), *Tort Law: Challenging Orthodoxy* (Oxford: Hart Publishing, 2013) 2.

¹⁰² Dan Priel, ‘Land Use Priorities and the Law of Nuisance’ (2015) *Melbourne University Law Review* (forthcoming). Kindly sent by personal correspondence.

¹⁰³ [1932] AC 562.

consumer of a product when it causes damage to person or property), the case is notable for Lord Atkin's neighbour principle: 'You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.'¹⁰⁴ Was this an overarching legal principle that could be applied to all future cases involving damage caused by carelessness or 'just an ethical and aspirational statement of little or no legal force'?¹⁰⁵

Initially the courts took a restrictive interpretation.¹⁰⁶ But a different attitude emerged with the House of Lords case of *Home Office v Dorset Yacht Co*¹⁰⁷ when Lord Reid said: 'the time has come when we can and should say that [Lord Atkin's neighbour principle] ought to apply unless there is some justification or valid explanation for its exclusion.'¹⁰⁸ In *Anns v Merton LBC*¹⁰⁹ Lord Wilberforce confirmed:

...in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter – in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the

¹⁰⁴ Ibid. at 580

¹⁰⁵ Cane, *Anatomy of Tort Law* 7.

¹⁰⁶ See *Howard v Walker* [1947] KB 860, 863 per Lord Goddard.

¹⁰⁷ [1970] AC 1004.

¹⁰⁸ Ibid. at 1027.

¹⁰⁹ [1978] AC 728.

scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.¹¹⁰

This two-stage test appeared to do away with the need for claimants to demonstrate that their case accorded with previously decided cases and there was concern that that the courts were being too enthusiastic in their support of this rationalisation of the law.¹¹¹ Given that the first stage of *Anns*, if interpreted as merely requiring foreseeability of damage,¹¹² was easy to satisfy,¹¹³ the test arguably ‘put an enormous burden on defendants’¹¹⁴ as they then had to demonstrate the reasons why a duty should not be imposed – in effect reversing the burden of proof. Writing extra-judicially, Lord Oliver said of this approach, ‘It is, perhaps, not surprising that this had led to a spate of claims which have become more and more repugnant to common sense.’¹¹⁵ He believed it led to radical changes in the law at the expense of certainty.¹¹⁶

Although not all of the criticism levelled at the *Anns* test was well-founded,¹¹⁷ there were problems with this principle. If in every case that arrives before the courts judges are weighing the policy factors for and against liability then it is difficult to predict how they will be decided and thus what the law is.¹¹⁸ Although rigid adherence to closed categories of negligence liability does not lead to the promotion of overall utility, the Wilberforce method goes too far the other way. By disregarding previously decided cases, *Anns* removes the

¹¹⁰ At 751-752.

¹¹¹ See Lord Templeman’s criticisms of *Anns* in *CBS Songs Ltd v Amstrad Consumer Electricals Plc* [1988] AC 1013 at 1059.

¹¹² Cf *Leigh and Silavan Ltd. v Aliakmon Shipping Co. Ltd. (the Aliakmon)* [1986] AC 785 and *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1985] AC 210.

¹¹³ Mark Lunney and Ken Oliphant, *Tort Law* 5th Edn. (Oxford: Oxford University Press, 2013) 137.

¹¹⁴ Alan Rodger, ‘Some Reflections on *Junior Books*’ in Peter Birks (Ed.), *The Frontiers of Liability, Volume 2* (Oxford: Oxford University Press, 1994) 65.

¹¹⁵ Lord Oliver, ‘Judicial Legislation’ (1989) 2 *Leiden Journal of International Law* 3, 16.

¹¹⁶ *Ibid.*

¹¹⁷ See David Howarth, ‘Negligence after *Murphy*: Time to Re-think’ (1991) 50 *Cambridge Law Journal* 58.

¹¹⁸ For a discussion of some of the problems with abandoning a ‘pockets of case law approach’ see Christian Witting, ‘Duty of Care: An Analytic Approach’ (2005) 25 *Oxford Journal of Legal Studies* 33, 44.

intuitive level of judicial thinking for determining whether a duty of care should be owed in a given case. Instead, it relies solely on *critical thinking* in every situation. Judges, like all of us, have limited knowledge of the impact of their decisions and so critical thinking should be reserved for exceptional circumstances. Moreover, if this takes place with every new case then it leads to a lack of certainty in the law with a consequent reduction in utility: it becomes difficult to determine what the minimum standards of behaviour are that people should meet.¹¹⁹

Starting with Lord Keith's decision in *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd*,¹²⁰ the courts began to retreat from the *Anns* position and instead emphasised 'the inability of any single general principle to provide a practical test which can be applied to every situation to determine whether a duty of care is owed and, if so, what is its scope.'¹²¹ A new approach towards determining the duty of care emerged with the decision of *Caparo Industries plc v Dickman*. The courts no longer seek a general test or principle that is capable of deciding each case that comes before the courts. As Lord Oliver stated in *Caparo*, 'to search for any single formula which will serve as a general test of liability is to pursue a will-o'-the-wisp.'¹²² Instead, one must first look at previously decided cases to see whether such a duty has been held to exist in the past.¹²³ If it has, a duty of care will be more likely to be imposed. This is because

[T]he law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to

¹¹⁹ See *Scullion v Bank of Scotland plc (trading as Colleys)* [2011] 1 WLR 3212 at [70] per Lord Neuberger.

¹²⁰ [1985] AC 210.

¹²¹ *Caparo Industries plc v Dickman* [1990] 2 AC 605 at 617 per Lord Bridge.

¹²² *Ibid.* at 633 per Lord Oliver. See also Jonathan Morgan, 'The Rise and Fall of the General Duty of Care' (2006) 22 *Professional Negligence* 206 where he states 'the days of a general conception of duty identified by a simple 'test' are over' (206).

¹²³ *Ibid.* at 635 per Lord Oliver.

the existence, the scope and the limits of the varied duties of care which the law imposes.¹²⁴

Examples of established duties of care include that owed by a doctor towards his patient,¹²⁵ a manufacturer of goods to consumers to ensure the product is reasonably safe to use,¹²⁶ that owed by individuals not to directly cause personal injury to others,¹²⁷ and that owed by an ex-employer to take care in preparing references for former employees¹²⁸ – but there are many more.¹²⁹ Conversely, if a line of cases have previously been rejected a duty of care being owed in the defendant's circumstances then such authorities will be followed. This is the equivalent of the intuitive level of thinking.

However, a defendant may have carelessly caused a claimant damage in ways that have not previously been decided by the courts. As a result, there might be no established category of cases that help decide either way whether the defendant owes the claimant a duty of care. Alternatively, there may be factors that are similar to a line of cases imposing a duty of care on the defendant and other factors similar to a line of cases that state no duty of care is owed. Furthermore, a rule may no longer be socially relevant. The fact that a duty of care is more likely to be recognised when it can be developed 'incrementally and by analogy with established categories'¹³⁰ does not help in novel circumstances.¹³¹ In these situations, judges will rely on the three-stage *Caparo* method. This imposes a duty of care where (1) the

¹²⁴ Ibid. at 618 per Lord Bridge.

¹²⁵ *Barnett v Chelsea and Kensington Hospital Management Committee* [1969] 1 QB 428.

¹²⁶ *Donoghue v Stevenson* [1932] AC 562.

¹²⁷ *Perrett v Collins* [1999] PNLR 77.

¹²⁸ *Spring v Guardian Assurance Plc* [1995] 2 AC 296.

¹²⁹ See Nicholas McBride and Roderick Bagshaw, *Tort Law* 4th Edn. (Harlow: Pearson, 2012) 130-132 for examples of recognised duties of care.

¹³⁰ *Caparo Industries plc v Dickman* [1990] 2 AC 605 at 635 per Lord Oliver.

¹³¹ Jane Stapleton, 'Duty of Care Factors: A Selection from the Judicial Menus' in Peter Cane and Jane Stapleton (Eds), *The Law of Obligations: Essays in Celebration of John Fleming* (Oxford: Oxford University Press, 1998).

damage is reasonably foreseeable; (2) the defendant and claimant are in a relationship of sufficiently close proximity; and (3) where it is fair, just and reasonable to do so.¹³²

The first stage is normally easy for a claimant to satisfy.¹³³ As for the latter two stages, it is sometimes argued that they cannot provide a clear answer to the duty of care question. In *Caparo* itself, Lord Bridge said the three stages of this method are ‘not susceptible of any such precise definition as would be necessary to give them utility as practical tests’¹³⁴ and that they ‘amount in effect to little more than convenient labels.’¹³⁵

If appellate judges are describing these three stages as labels of limited utility how are lower courts to decide whether a duty of care is owed? With regards to proximity, it can be a useful concept for types of damage that could trigger indeterminate liability such as economic loss and psychiatric harm.¹³⁶ The third stage places emphasis upon weighing the factors for and against imposing liability.¹³⁷ As Morgan states, whether recognition of a duty of care would be fair just and reasonable is ‘simply shorthand for consideration of all relevant factors militating for and against liability, by the court.’¹³⁸ Indeed, Lord Browne-Wilkinson observed, in unequivocal utilitarian terms, in *Barrett v Enfield London Borough Council*:

In English law the decision as to whether it is fair, just and reasonable to impose a liability in negligence on a particular class of would-be defendants depends on weighing in the balance the total detriment to the public interest in all cases from holding such class liable in negligence as against the total loss to all would-be

¹³² *Caparo Industries plc v Dickman* [1990] 2 AC 605 at 618 per Lord Bridge.

¹³³ See Witting, *Street on Torts* 36-37.

¹³⁴ At 618. In the same case, see at 628 per Lord Roskill and at 633 per Lord Oliver. See also *Stovin v Wise* [1996] AC 923 at 932 per Lord Browne-Wilkinson for the expression similar sentiments.

¹³⁵ At 618. See Howarth, ‘Negligence After *Murphy*: Time to Re-Think’ 60 for a criticism of the concept of proximity and Witting, ‘Duty of Care: An Analytic Approach’ for a defence.

¹³⁶ See Morgan, ‘The Rise and Fall of the General Duty of Care’ 210.

¹³⁷ *Ibid.*, 223. See also Rodger, ‘Some Reflections on *Junior Books*’ and Stapleton, ‘Duty of Care Factors: A Selection from the Judicial Menus’ for further information regarding the ‘weighing of policy factors’ approach to duty of care.

¹³⁸ Jonathan Morgan, ‘The Rise and Fall of the General Duty of Care’ 211. See also *Phelps v Hillingdon LBC* [2001] 2 AC 619 at 671 per Lord Clyde.

plaintiffs if they are not to have a cause of action in respect of the loss they have individually suffered.¹³⁹

In novel circumstances the courts therefore take a pragmatic approach to determining whether a duty of care exists by concentrating on the circumstances of the case and weighing up the factors for and against imposing a duty of care. As Stanton argues, the higher courts are now resolving leading cases simply in terms of what it ‘deems to be the best result.’¹⁴⁰

This approach arguably gets the right balance between the intuitive and critical levels of utilitarian thinking. In the normal run of cases one looks to what has been decided previously and follows those decisions: this is the intuitive level and creates certainty. However, the modern approach recognises that in some circumstances this will not be appropriate. Where this is so, judges undertake some critical thinking – weighing up the reasons for and against imposing liability – to arrive at the result that satisfies the most interests.¹⁴¹ Negligence may be a fluid principle that can be ‘applied to the most diverse conditions and problems of human life’¹⁴² but ‘certainty of the law is of the utmost importance.’¹⁴³

The balancing of intuitive and critical thinking, if done properly, is likely to lead to the satisfaction of the most interests overall. This approach is consistent with what Lord Reid, writing extra-judicially, stated regarding the role of judges:

¹³⁹ *Barrett v Enfield London Borough Council* [2001] 2 AC 550 at 559 per Lord Browne-Wilkinson.

¹⁴⁰ Keith Stanton, ‘Professional Negligence: Duty of Care Methodology in the Twenty First Century’ (2006) 22 *Professional Negligence* 134, 136.

¹⁴¹ Alas, it should be acknowledged that judges have been doing this with varying levels of success. See the criticisms of Ken Oliphant, ‘Against Certainty in Tort Law’ in Stephen Pitel, Jason Neyers and Erika Chamberlain, *Tort Law: Challenging Orthodoxy* (Oxford: Hart Publishing, 2013).

¹⁴² *Bourhill v Young* [1943] AC 92 at 107 per Lord Wright.

¹⁴³ *Leigh and Silavan Ltd. v Aliakmon Shipping Co. Ltd. (the Aliakmon)* [1986] AC 785 at 816 per Lord Brandon. Cf Ken Oliphant’s distinguishing between desirable and undesirable forms of certainty: ‘Against Certainty in Tort Law’ in Stephen Pitel, Jason Neyers and Erika Chamberlain, *Tort Law: Challenging Orthodoxy* (Oxford: Hart Publishing, 2013). Oliphant states that certainty of what factors are to be taken into account in each case is desirable, but that additional certainty as to outcomes in each case is not.

Of course we must have a general doctrine of precedent-otherwise we can have no certainty. But we must find a middle way which prevents precedent from being our master. That would be necessary even if the law were to remain static: it is still more necessary if the law is to develop as the needs of the time require.¹⁴⁴

Utilitarianism therefore provides us with an explanation for why the law is as it is: judges have been aiming for the best result but they have different views as to the ideal balance between certainty and fairness. This principle is also capable of determining how tort cases *ought* to be decided in the future: judges should aim for the balance of certainty and fairness that satisfied the most interests overall and in the long run.

It should be noted that I had not fully articulated this thinking regarding tort theory until after I had completed my papers but there is evidence of these normative assumptions underlying them. For example, in my final paper (ch 7) I argue that recognising lost autonomy as an interest in negligence is inconsistent with established principles relating to actionable damage. It is implicit in this that I believe that the benefits of departing from these principles do not outweigh the uncertainty that would result. As a result, a rule recognising lost autonomy as a form of damage in negligence would not maximise utility overall.

¹⁴⁴ Lord Reid, 'The Judge as Law Maker' (1997) 63 Arbitration 180, 182.

Chapter 2: Ethical and Legal Background

Now that I have outlined the theoretical underpinnings of this thesis, in this section I will give an overview of the ethical and legal background to the issues that I will be investigating in my papers. To avoid repetition, I will not be including things that are considered in depth in the chapters of this thesis.¹ The first part of this chapter will discuss some of the philosophical issues relating to the concept of autonomy, such as what terminology I will be using, whether it is even possible for people to be autonomous and reasons why we should respect autonomy. The latter part of this chapter will then discuss the legal mechanisms that are either currently used to protect patient autonomy or could be potentially be adapted for such a purpose in the future. Doing this will identify any potential lacunas in the law that an interest in autonomy protected by the tort of negligence could potentially fill.

2.1. Autonomy or Liberty?

In chapter 5 I analyse how autonomy ought to be defined in medical negligence cases and conclude that it ought to reflect the ideas derived from the work of John Stuart Mill that it should reflect a person's current preferences. However, Coggon and Miola have argued that the notion of autonomy should not be conflated with that of liberty.² They maintain that autonomy relates to the concept of free will i.e. it solely concerns internal constraints, whereas liberty relates to the making decisions without the interference of a third party – in other words, it is only concerned with external constraints.³ This is probably historically accurate. Mill himself does not refer to 'autonomy' in *On Liberty* and actually says that the

¹ For example, the definition of autonomy that I will be using in this thesis is documented extensively in chapter 5.

² John Coggon and José Miola, 'Autonomy, Liberty and Medical Decision-Making' (2011) 70 *Cambridge Law Journal* 523.

³ *Ibid.*, 526.

subject of the essay ‘is not the so-called Liberty of the Will [what Kantian’s might call autonomy]...but Civil, or Social Liberty: the nature and limits of the power which can be legitimately exercised by society over the individual.’⁴ Coggon and Miola’s distinguishing of autonomy and liberty therefore has much going for it.

However, this separation of the two concepts will not be adopted here. This is because much of the current bioethical and legal discourse conflates the two.⁵ Judges frequently refer to ‘autonomy’ when they seek to protect people from the interference of third parties.⁶ As I will be focusing on how the courts react to situations where a person’s ability to make decisions have been interfered with by another, it is best to use the labels that the courts actually adopt. I will therefore use ‘autonomy’ to encompass liberty unless otherwise indicated.

2.2. Is Autonomy an Impossible Ideal?

All sorts of obstacles prevent people from being in control of their own lives. Some are external: if I lock you in your room then you do not have much control over whether you can go to, say, the Trafford Centre or not. Others are internal: if you have agoraphobia then you will also not have much choice over whether you can go to the Trafford Centre even if the room is unlocked. Less extreme examples than these can also be given: we are all subject to the laws of physics, for example, and therefore have little control over whether we can walk on the Sun or not. And this is without considering the fact that respecting one person’s

⁴ John Stuart Mill, ‘On Liberty’ in John Gray (Ed.), *On Liberty and Other Essays* (Oxford: Oxford University Press, 1991) 5.

⁵ See ch 5.4. below.

⁶ See *Chester v Afshar* [2005] 1 AC 134 at 146 per Lord Steyn and the examples in 5.4.2 below.

autonomous choices may conflict with showing similar respect to another person's.⁷ It is therefore difficult to disagree with Raz when he says:

Autonomy is possible only within a framework of constraints. The completely autonomous person is an impossibility. The ideal of the perfect existentialist with no fixed biological and social nature who creates himself as he goes along is an incoherent dream.⁸

Does the impossibility of being fully autonomous mean that an individual cannot have any interest in having their autonomy respected? Not necessarily. Just because something is an ideal does not mean that we should not attempt to reach that ideal as closely as possible. Raz states that instead we can talk about 'significant autonomy.'⁹ This is 'a matter of degree'¹⁰ and a person 'may be more or less autonomous.'¹¹ He states: '(Significantly) autonomous persons are those who can shape their life and determine its course...[and] are part creators of their own moral world.'¹² According to Raz, people will enjoy significant autonomy 'to the degree that their choices are not entirely dictated by an effort to secure their basic needs. Such persons develop relationships with other creatures, and commit themselves to projects, plans, and causes.'¹³

In this thesis, I will proceed on the basis that it is not only *perfectly* autonomous choices that should be respected. As John Harris states one 'will be autonomous simply to the

⁷ See Christian Witting, 'The House that Dr Beever Built: Corrective Justice, Principle and the Law of Negligence' (2008) 71 *Modern Law Review* 621, 628-629 and the conclusion of this thesis.

⁸ Joseph Raz, 'Liberalism, Autonomy, and the Politics of Neutral Concern' (1982) 7 *Midwest Studies in Philosophy* 89, 112. See also John Harris who states that 'there is no such thing as complete autonomy' and that '[f]ull autonomy and even fully autonomous individual choices are in a sense ideal notions, which we can at best only hope to approach more or less closely.' John Harris, *The Value of Life: An Introduction to Medical Ethics* (London: Routledge & Kegan Paul, 1985) 195.

⁹ Raz, 'Liberalism, Autonomy, and the Politics of Neutral Concern' 111. See also Harris, *The Value of Life* 200, where he discusses 'maximally autonomous' choices. He says an agent's decision will be maximally autonomous 'where they are as autonomous as they could reasonably be in all the circumstances.'

¹⁰ Raz, 'Liberalism, Autonomy, and the Politics of Neutral Concern' 111.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*, 112.

extent that one's decisions are one's own, unfettered by others and suffering as little from various defects as is possible.¹⁴ Thus while many decisions may contain (1) defects in control such as addictions or mental illness; (2) defects in reasoning such as parroting of the others, blind prejudice or invalid inferences from facts; (3) defects in information i.e. having incomplete facts; and (4) defects in stability i.e. where the agent is likely to change their mind,¹⁵ they are still capable of being autonomous provided that attempts have been made to reduce such deficiencies as far as possible.

2.3. Why Should we Respect Autonomy?

In order to decide whether the law of negligence should be adapted to safeguard patient autonomy, it has to be shown that autonomy is something that is actually worth protecting. After all, few would advocate radical changes in the law to promote something that is universally considered undesirable.¹⁶ In this section I will outline the most important reason why respecting autonomy is generally considered to be desirable: the utilitarian one that doing so leads to the satisfaction of people's interests.¹⁷

We all enjoy making our own decisions and few of us would consent to being wholly controlled by another. This fact that people wish to be the authors of their own lives was recognised by John Stuart Mill. As Holm has said that '[f]or Mill autonomy is not valuable in

¹⁴ Harris, *The Value of Life* 200.

¹⁵ *Ibid.*, 196.

¹⁶ For writers who have denigrated autonomy as a moral principle see Daniel Callahan, 'Autonomy: A Moral Good, Not a Moral Obsession' (1984) 14 *The Hastings Centre Report* 40 and Charles Foster, *Choosing Life, Choosing Death: The Tyranny of Autonomy in Medical Ethics and Law* (London: Hart Publishing, 2009).

¹⁷ There are, of course, other reasons. Perhaps the most prominent alternative is the Kantian view that people have a 'right' to certain things such as autonomy that can never be interfered with. A more recent reiteration of this school of thought came from Robert Nozick in (see *Anarchy, State, and Utopia* (Oxford: Blackwell Publisher, 1974), Preface, ix). For a devastating critique of Nozick's anti-utilitarianism see Peter Singer, 'The Right to be Rich or Poor' (6 March 1975) *New York Review of Books* 22. Available online at <<http://bit.ly/15tVith>> A more persuasive non-utilitarian defence of autonomy is put forward by Robert Young in his article 'The Value of Autonomy' (1982) 32 *The Philosophical Quarterly* 35. He believes that autonomy is 'intrinsically desirable or valuable because of its foundational place for moral personhood and self-esteem, without its exercise on particular occasions being act-evaluatively for the best, or even for the good' (at 43).

itself, but because it directly and indirectly leads to the production of utility.’¹⁸ This is evident in Mill’s writing when he said: ‘Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest.’¹⁹ Mill maintained that when society overrules an individual’s judgment it is on the basis of general presumptions that can often be ‘misapplied to individual cases.’²⁰ This indicates that respecting autonomy is important because, in the long run, we all benefit and are made happier when making our own choices. When others deny us the opportunity to make our own choices they are often wrong about what is best (especially in individual cases) and, consequently, reduce utility. Protecting autonomy from interference is therefore seen as desirable because it *usually* has good consequences.²¹

Ordinarily, there is little conflict between aiming for the best consequences and respecting autonomy. Glover has pointed out that there would be bad outcomes if it was known that a hospital overrode competent patient’s wishes or paternalistically killed people.²² The diminished trust in the medical profession would result in people avoiding their doctors and not receiving necessary treatment. It is therefore difficult to disagree with his statement that ‘a sophisticated utilitarian would normally in practice derive from his own view the same decisions that would be generated by the autonomy principle.’²³ The fact that the consent of patients can also lead to positive therapeutic benefits further supports the view that respecting autonomy can lead to better outcomes.²⁴ Although this is not always the case and there are plenty of situations where overriding patient autonomy could improve utility in individual

¹⁸ Søren Holm, ‘Autonomy’ in Ruth Chadwick (Ed.), *Encyclopaedia of Applied Ethics Volume 1* (San Diego: Academic Press, 1998) 269.

¹⁹ Mill, ‘On Liberty’ 17.

²⁰ *Ibid.*, 85.

²¹ See Craig Purshouse, ‘Review – *Against Autonomy: Justifying Coercive Paternalism* by Sarah Conly’ (2014) 89 *Philosophy* 367.

²² Jonathan Glover, *Causing Death and Saving Lives* (London: Penguin, 1977) 81.

²³ *Ibid.*, 78.

²⁴ Harvey Teff, ‘Consent to Medical Procedures: Paternalism, Self-Determination or Therapeutic Alliance?’ (1985) 110 *Law Quarterly Review* 432, 436.

cases, thwarting people's autonomous, self-regarding choices does not usually lead to the best outcomes overall and in the long run.

Linked to this explanation why we should respect autonomy is the idea that each person generally knows what is best for them. Ronald Dworkin calls this the 'evidentiary view'²⁵ of respecting autonomy. Interferences with other people's autonomous choices is counselled against due to the fact that we are often wrong when we think we know what is best for someone else.²⁶ This evidentiary view is what Mill considers to be the 'strongest of all the arguments against the interference of the public with purely personal conduct.'²⁷ He says 'when it does interfere, the odds are that it interferes wrongly, and in the wrong place.'²⁸

However, Dworkin believes that this reason is 'very far from compelling'²⁹ as autonomy 'requires us to allow someone to run his own life even when he behaves in a way that he himself would accept as not at all in his interests.'³⁰ At first sight this criticism might be thought persuasive. People often make mistakes about what is good for them. If a person is autonomously refusing life-saving treatment this does not mean that refusing life-saving treatment is good for their *health*: it self-evidently is not.

There appears to be confusion as to what is meant by 'interests' in such circumstances. It is true that, say, refusing life-saving treatment is not in a person's objective *medical* interests and this is likely to be the case whatever a person's subjective preferences are. Antibiotics are likely to remove an infection regardless of the patient's wishes.

However, an individual will be the only person who has full access to their own thoughts, preferences and beliefs: they will be the only one who *truly* knows their *overall* interests. They are therefore the best judge of what is good *for them* in a more holistic

²⁵ Ronald Dworkin, *Life's Dominion: An Argument about Abortion and Euthanasia* (London: HarperCollins, 1993) 223.

²⁶ *Ibid.*

²⁷ Mill, 'On Liberty' 92.

²⁸ *Ibid.*

²⁹ Dworkin, *Life's Dominion* 223.

³⁰ *Ibid.*

sense.³¹ A patient may not want to satisfy their interest in good health as much as, say, their interest in drinking a bottle of Jack Daniels every night. Such choices can still be autonomous. As Glover states, someone would have to be very optimistic of their own judgment in order to override the wishes of someone else.³² Accordingly, the evidentiary view of autonomy is a further persuasive reason for why people should respect patient autonomy. In fact, there has recently been judicial support for this view. In *Westminster City Council v Sykes*,³³ Eldergill DJ stated that ‘most individuals wish to determine and develop their own interests and course in life, and their happiness often depends on this.’³⁴

This thesis will therefore take the view that respecting autonomy is important as it (usually) leads to good consequences such as the satisfaction of people’s interests or the improvement of their welfare. People should not interfere with others’ decisions as doing so often leads to bad results. Accordingly, there are good moral reasons for protecting patient autonomy from interference and there shall be a *prima facie* presumption in my thesis that, as Glover states, ‘Other things being equal, people ought to have as much autonomy as possible.’³⁵

2.4. Battery

Now that I have considered why autonomy is important, the following sections will consider alternative legal mechanisms by which patient autonomy can be protected to determine whether it is necessary to develop the tort of negligence to safeguard this interest. One potential mechanism is the tort of battery. Vindication of an individual’s interest in bodily

³¹ For a discussion of this see Craig Purshouse, ‘Review: *Against Autonomy: Justifying Coercive Paternalism* by Sarah Conly’ (2014) 89 *Philosophy* 367.

³² Glover, *Causing Death and Saving Lives* 81.

³³ (2014) 17 CCL Rep 139.

³⁴ *Ibid.*

³⁵ Glover, *Causing Death and Saving Lives* 74.

autonomy is the primary function of this tort,³⁶ which along with assault and false imprisonment constitutes a group of torts known as trespass to the person.³⁷ Feng has suggested that '[t]respass, not negligence is the most appropriate vehicle to protect the patient's exclusive non-clinical right to self-determination.'³⁸

To be successful in an action in battery the claimant must demonstrate that the defendant intentionally³⁹ committed an act that directly⁴⁰ brought about unlawful bodily contact with the claimant.⁴¹ This tort is actionable per se, which means a claim can be brought without there being any proof of damage. As Lord Scott stated in *Ashley v Chief Constable of Sussex Police*,⁴² 'A claimant has no cause of action in negligence unless he has suffered injury or damage. By contrast, battery or trespass to the person is actionable without proof that the victim has suffered anything other than the infringement of his right to bodily integrity.'⁴³ The slightest touching of another will suffice.⁴⁴ Furthermore, the target of the intention in battery is simply the physical contact – there need not be an intention to cause injury or act unlawfully.⁴⁵ There is no longer a requirement that the touching be hostile⁴⁶ but conduct that falls 'within a general exception embracing all physical contact which is

³⁶ Margaret Brazier, 'Patient Autonomy and Consent to Treatment: The Role of the Law?' (1987) 7 *Legal Studies* 169, 178.

³⁷ For a general discussion about the appropriateness of battery as a mechanism of protecting patient autonomy see Tan Keng Feng, 'Failure of Medical Advice: Trespass or Negligence' (1987) 7 *Legal Studies* 149, Brazier, 'Patient Autonomy and Consent to Treatment: The Role of the Law?' and Emily Jackson, 'Informed Consent' to Medical Treatment and the Impotence of Tort' in Sheila McLean (Ed.), *First Do No Harm: Law, Ethics and Healthcare* (Aldershot: Ashgate Publishing, 2006).

³⁸ Feng, 'Failure of Medical Advice: Trespass or Negligence' 164.

³⁹ *Letang v Cooper* [1965] 1 QB 232.

⁴⁰ See *Reynolds v Clarke* (1725) 1 Stra 634 at 636 per Fortescue CJ. As McBride and Bagshaw state 'If A injects a poison into B's body that is a battery. If A puts poison in B's drink and B later drinks it, that is not a battery' see *Tort Law*, 4th Edn. (Harlow: Pearson Education Ltd., 2012) 39. It should be mentioned that this requirement is sometimes interpreted more liberally in criminal law cases – see *DPP v K* [1990] 1 WLR 1067.

⁴¹ *Collins v Wilcock* [1984] 1 WLR 1172 at 1177 per Goff LJ.

⁴² [2008] 1 AC 962.

⁴³ *Ibid.* at [60] per Lord Rodger.

⁴⁴ See *Cole v Turner* (1704) 6 Mod 149 per Holt CJ and *Collins v Wilcock* [1984] 1 WLR 1172 at 1177 per Goff LJ.

⁴⁵ See F.A. Trindade, 'Intentional Torts: Some Thoughts on Assault and Battery' (1982) 2 *Oxford Journal of Legal Studies* 211, 220 and Jenny Steele, *Tort Law: Text, Cases and Materials*, 3rd Edn. (Oxford: Oxford University Press, 2014) 33.

⁴⁶ *Collins v Wilcock* [1984] 1 WLR 1172 at 1177 per Goff LJ and *F v West Berkshire HA* [1990] 2 AC 1 at 72 per Lord Goff. C.f. *Wilson v Pringle* [1987] QB 237 at 252-253 per Croom-Johnson LJ.

generally acceptable in the ordinary conduct of daily life'⁴⁷ such as jostling at a busy underground station or tapping someone on the shoulder to get their attention is not actionable.

According to the above law, there are a number of situations where a medical professional's conduct, if considered unlawful, could constitute the tort of battery. If A performs surgery on B then this will involve an intentional act that directly brings about physical contact with B.

It is no defence to a claim in battery that the defendant is a medical professional, nor, given that hostility is no longer an element of the tort, is it relevant that the defendant has noble motives: such conduct need only go beyond what is generally accepted in ordinary life. Instead, in order to defeat a claim in battery the defendant can argue that the claimant consented to the touching.⁴⁸ Medical professionals must therefore obtain consent for any procedures which involve bodily contact with the patient. For this reason, the requirement of consent has been described by Ian Kennedy as 'one aspect of respect for autonomy.'⁴⁹

What then is needed for consent to be valid in order to avoid a trespass claim? As Jackson has noted, consent 'must be given voluntarily, by someone who has the capacity to consent and who understands what the treatment involves.'⁵⁰ For consent to be voluntary, the decision must be that of the individual and not the result of pressure or undue influence emanating from another.⁵¹ The requirements of capacity are detailed in the next section. In order for the patient to understand what the treatment involves, they must be given information about the treatment. As Chico states, 'Consent, and the autonomy that it protects,

⁴⁷ *Collins v Wilcock* [1984] 1 WLR 1172 at 1177 per Goff LJ.

⁴⁸ See *Re T* (adult: refusal of medical treatment) [1993] Fam 95 and *St George's Healthcare NHS Trust v S* [1999] Fam 26. It is debateable whether lack of consent is part of the definition of the trespass or whether consent is a defence and there is not much authority on this point. See Jenny Steele, *Tort Law: Text, Cases and Materials*, 3rd Edn. (Oxford: Oxford University Press, 2014) 53-54.

⁴⁹ Ian Kennedy, 'The Patient on the Clapham Omnibus' (1984) 47 *Modern Law Review* 454, 456.

⁵⁰ Emily Jackson, *Medical Law: Text, Cases and Materials*, 3rd Edn. (Oxford: Oxford University Press, 2013) 166.

⁵¹ *Re T* [1993] Fam 95 at 120 per Butler-Sloss LJ, *Centre for Reproductive Medicine v U* [2002] Lloyd's Rep Med 259.

is vitiated if that consent is ill informed. Thus knowledge of relevant information is a procedural requirement of autonomy.⁵² How much information needs be give? In *Chatterton v Gerson*,⁵³ Bristow J states that consent will be valid once ‘the patient is informed in broad terms of the nature of the procedure which is intended.’⁵⁴

Aside from cases where a patient with capacity has been treated in the face of a refusal of treatment,⁵⁵ the courts have been reluctant to find that there is a lack of consent in battery actions against medical professionals.⁵⁶ It is usually required that some fraud or misrepresentation has occurred⁵⁷ or that a different procedure to the one the claimant consented to is performed.⁵⁸ Given this high threshold, if the patient’s grievance is that they were not given enough information about a medical procedure, actions in trespass are rarely brought. If the patient is broadly aware of the procedure they are consenting to then their claim will usually fail. As a result, in its current form battery is a very blunt instrument for protecting patient autonomy as it is not difficult for medical professionals to demonstrate that they have provided enough information to gain a valid consent.

Might battery be a preferable route for protecting patient autonomy? One advantage of using battery instead of negligence is that it is actionable per se so it is ‘not necessary to establish that any physical harm has been caused by the doctor’s inadequate disclosure.’⁵⁹ It can therefore be used to indicate that a patient’s bodily integrity has been compromised even if they have not suffered any physical harm. Given that causation ‘represents an almost

⁵² Victoria Chico, ‘Requiring Genetic Knowledge: A Principled Case for Support’ (2015) *Legal Studies* (online advance access) doi: 10.1111/lest.12080.

⁵³ [1981] QB 432.

⁵⁴ At 443.

⁵⁵ See *St George's Healthcare NHS Trust v S* [1999] Fam 26 and *Re B (Consent to Treatment: Capacity)* [2002] 1 FLR 1090.

⁵⁶ See *R v Richardson* [1998] 43 BMLR 21.

⁵⁷ *R v Tabassum* [2000] 2 Cr App R 328 and *Appleton v Garrett* [1996] PIQR P1.

⁵⁸ See *Devi v West Midlands RHS* [1980] CLY 687 (D performed minor gynaecological surgery on C and discovered her womb had ruptured. D performed a sterilisation as the abdomen was already open and was found liable in battery). C.f. *Davis v Barking* [1993] 4 Med LR 85 (consent to a general anaesthetic was sufficient to cover consent to a local anaesthetic).

⁵⁹ Emily Jackson, ‘‘Informed Consent’ to Medical Treatment and the Impotence of Tort’ in Sheila McLean (Ed.), *First Do No Harm: Law, Ethics and Healthcare* (Aldershot: Ashgate Publishing, 2006), 275.

insuperable obstacle to most claimants' actions in negligence because of the need to prove that proper disclosure would have prompted the patient to reject the proposed course of treatment'⁶⁰ a battery action may protect a patient's autonomy better than one brought in negligence because 'it is the violation of the patient's right to make an informed choice which is being compensated, rather than the materialisation – through nobody's fault – of some remote risk.'⁶¹ A claim in battery leads to compensation simply for being treated without consent and may therefore more effectively protect an interest in autonomy than negligence can. The latter action is paradigmatically concerned with injuries caused by accidents.

In an influential article Brazier stated that the decision in *Sidaway v Board of Governors of the Bethlem Royal Hospital*⁶² (discussed below at section 2.10) meant that '[l]iability in trespass for failure to disclose risks appeared to have been stamped on.'⁶³ She stated that 'the historical function of trespass as a means of enforcing the individuals' right to autonomy, a person's right to choice, appears to be on the wane in England'⁶⁴ and that the courts, apart from in the area of police powers, regard the action with suspicion.⁶⁵ She said that bringing an action against a doctor in battery appears to place them on a par with the police officer who beats a suspect.⁶⁶

This was undoubtedly true at the time Brazier wrote her article. However, that was before *F v West Berkshire HA*⁶⁷ confirmed that hostility was not a requirement for this tort. As a result of this development, there is evidence in the case law that there is potentially less of a stigma attached to battery actions than there used to be. For example, in the *Ms B* case,⁶⁸

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² [1985] AC 871.

⁶³ Brazier, 'Patient Autonomy and Consent to Treatment: The Role of the Law?' 179.

⁶⁴ Ibid., 180.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ [1990] 2 AC 1.

⁶⁸ [2002] EWHC 429

Butler-Sloss P commended the doctors for their actions in not removing a ventilator from a competent patient against her wishes, even though this constituted a battery.⁶⁹

Despite this, a major problem with utilising battery actions in medical disclosure claims is that the tort of battery overlaps with the criminal law.⁷⁰ It is perfectly understandable to wish to throw, say, the reprehensible defendant in *Appleton v Garrett*,⁷¹ a dentist who deliberately misled patients into accepting unnecessary treatment, in gaol. But if a higher information threshold was adopted and doctors who failed to warn of small risks began to feel the wrath of the criminal law we might find such results less palatable.

Regardless of the desirability of using trespass actions to vindicate autonomy, the current requirements of battery are unlikely to assist many claimants where the interference with their autonomy is not physical in nature. As Brazier stated, battery ‘would be severely limited both as a means of enhancing autonomy and of promoting co-operative health care’⁷² as it requires physical contact. She states ‘It offers no remedy to the patient prescribed and accepting drugs without an adequate opportunity to assess the risks and benefits for himself.’⁷³

Accordingly, while the tort of battery performs a useful function in protecting patient autonomy there are a number of situations – such as those that occurred in *Rees* or *Chester* – where it provides no solution for the patient whose autonomy been interfered with. If a patient has been informed in broad terms of a procedure, the interference is not physical or the loss of autonomy is non-intentional then it will not assist them. Unless a radical alteration

⁶⁹ Ibid at [97].

⁷⁰ C.f. *R v Richardson* [1999] QB 444 at 450 per Otton LJ, who said that the defendant may still be liable in tort even though she was not criminally liable and *Ashley v Chief Constable of Sussex Police* [2008] 1 AC 962, where it was held that the requirements of self-defence differ in tort and crime.

⁷¹ [1996] PIQR 1.

⁷² Brazier, ‘Patient Autonomy and Consent to Treatment: The Role of the Law?’ 180.

⁷³ Ibid. See also Harvey Teff, ‘Consent to Medical Procedures: Paternalism, Self-Determination or Therapeutic Alliance?’ (1985) 110 *Law Quarterly Review* 432, 439 and Jackson, ‘“Informed Consent” to Medical Treatment and the Impotence of Tort’ 275.

of the requirements of battery is undertaken, there may be a need for the tort of negligence to be developed to further protect a patient's interest in having their autonomy respected.

2.5. Capacity

Even if we should respect people's autonomous decisions, not everyone can make them. It would be unacceptable to respect, say, a five year old's refusal to go to the dentist. Some patients – such as neonates – do not have the cognitive ability to make *any* decisions, never mind sufficiently autonomous ones. Does this mean we should just leave them alone instead of giving them medical treatment? No. Protecting autonomy is unlikely to be of much concern for such patients as they have no autonomy to protect. As Mill said: 'It is, perhaps, hardly necessary to say that this doctrine [of respecting autonomy] is meant to apply only to human beings in the maturity of their faculties.'⁷⁴

Whether or *when* a person is said to be capable of being autonomous is not the focus of my research. I am concerned with interferences with decisions that *are* autonomous. I will assume that someone is capable of making autonomous decisions if they have sufficient capacity.⁷⁵ This is the approach the law takes. As Arden LJ has recently stated, 'Capacity is an important issue because it determines whether an individual will in law have autonomy over decision-making in relation to himself and his affairs. If he does not have capacity, the law proceeds on the basis that he needs to be protected from harm.'⁷⁶

In English law someone will be deemed to have capacity if they fulfil the criteria of the Mental Capacity Act 2005 (MCA) or, if they are a child, the test for determining *Gillick*

⁷⁴ Mill, 'On Liberty' 14.

⁷⁵ It should be noted that I am referring to autonomous *choices* or *decisions* and not to autonomous *people*. A person who is severely mentally ill may still have capacity to make *some* choices for themselves and will be autonomous to the extent that they can make these choices

⁷⁶ *Bailey v Warren* [2006] EWCA Civ 51 at [105] per Arden LJ.

competence.⁷⁷ Section 1(2) of the MCA states that there is a presumption of capacity unless it is established otherwise and s 1(4) states that a person should not be treated as unable to make a decision merely because it is an unwise decision.⁷⁸ The MCA states that a patient will only be deemed to lack capacity if they are ‘unable to make a decision for [themselves] in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain’⁷⁹ and the test for determining whether a person is unable to make a decision for themselves is contained in s. 3, MCA 2005. This states that a patient will lack capacity if they cannot: (1) understand the information relevant to the decision; (2) retain that information; (3) use or weigh it; or (4) communicate their decision. Once a patient is considered to lack capacity, treatment is to be given in their best interests.⁸⁰

2.6. Intentional Interferences with Autonomy

Together with negligence and battery, another area of tort law may be capable of protecting a patient’s interest in having their autonomy respected.⁸¹ In *Wilkinson v Downton*,⁸² the defendant, as a practical joke, falsely told the claimant that her husband had been involved in a serious accident. As a result, the claimant suffered a nervous shock which rendered her ill. Wright J held that the defendant had ‘wilfully done an act calculated to cause physical harm

⁷⁷ *Gillick v West Norfolk and Wisbech AHA* [1986] AC 112. This thesis will not focus on the autonomy of children.

⁷⁸ This reflects the common law position. See *Re T* [1993] Fam 95 and *Re C (Adult: Refusal of Treatment)* [1994] 1 All ER 819.

⁷⁹ s. 2(1), MCA 2005.

⁸⁰ s. 1(5), MCA 2005. The checklist for determining what is in an individual’s best interests is contained in s. 4.

⁸¹ It is worth mentioning here that Peter Birks has argued that dignitary interests are already protected in English law through awards of aggravated damages – ‘Harassment and Hubris: The Right to an Equality of Respect’ (1997) 32 *Irish Jurist* 1. Although parasitic on another tort being committed (they are not available in negligence: see *Kralj v McGrath* [1986] 1 All ER 54), they protect injury to the claimant’s dignitary or pride when a defendant has acted in a spiteful, high-handed or insulting manner. Birks believes that as they protect a separate interest to the original tort (e.g. defamation protects an interest in reputation rather than pride), there is a distinct tort that should be recognised. However, the better view is put forward by Jonathan Morgan when he states, ‘it would take a very great step indeed for the courts to recognise a new and explosive tort, protecting the intangible idea of ‘self-respect.’ See ‘Privacy, Confidence and Horizontal Effect: “Hello” Trouble’ (2003) 62 *Cambridge Law Journal* 444, 461.

⁸² [1897] 2 QB 57.

to the plaintiff—that is to say, to infringe her legal right to personal safety, and has in fact thereby caused physical harm to her⁸³ and that this stated a good cause of action as there was no justification for the act.

The rule in *Wilkinson v Downton*, sometimes known as the tort of intentionally inflicting physical or mental harm, has ‘very rarely been applied successfully in England.’⁸⁴ However, it could potentially provide one route by which tort law could protect against interferences with patient autonomy, particularly when an action in battery could not succeed. For example, the authors of *Winfield and Jolowicz* maintain that the administration of a noxious drug to an unwitting victim could be one example where the rule may have a role (as noted above, as this involves no physical contact an action in battery would be inappropriate).⁸⁵ However, Harold Shipman aside, the doctor who intentionally prescribes harmful drugs to his patients is likely to be a rarity in medical practice.

This tort’s ability to protect patient autonomy depends upon how it is interpreted. Prior to the Protection from Harassment Act 1997, it was thought that the rule in *Wilkinson v Downton* could provide a solution to the social problems of harassment and stalking and allow individuals to receive compensation for distress alone.⁸⁶ Thus Conaghan has argued that ‘from the perspective of feminists seeking to explore tort law for a possible remedy to sexual harassment, *Wilkinson v Downton* presents possibilities particularly if the case could form the basis of a general cause of action for the intentional infliction of emotional

⁸³ At 58-59.

⁸⁴ Jenny Steele, *Tort Law: Text, Cases and Materials*, 3rd Edn. (Oxford: Oxford University Press, 2014) 78. C.f. *Janvier v Sweeney* [1919] 2 KB 316 – one case where it was successful.

⁸⁵ W.E. Peel and J. Goudkamp, *Winfield & Jolowicz on Tort*, 19th Edn. (London: Sweet & Maxwell, 2014) 71.

⁸⁶ See *Khorasandjian v Bush* [1993] QB 727. Distress alone is irrecoverable in negligence see *McLoughlin v O’Brian* [1983] 1 AC 410 at 431 per Lord Bridge. Although damages for such non-pecuniary losses are capable of being recoverable in personal injury cases as ‘pain and suffering’, an actionable injury must have been suffered (see *Taylor v Chuck (RV) (Transport)* (1963) 107 SJ 910 and *H West & Son Ltd v Shephard* [1964] AC 326). Similarly, non-pecuniary losses such as distress can sometimes be recovered in contract – see *Farley v Skinner (No 2)* [2001] UKHL 49.

distress.⁸⁷ Indeed, the case law at the time prior to the 1997 Act indicated that this area of the common law could protect against harassing conduct.⁸⁸ Given that harassing conduct ‘plainly infringes the personal autonomy of the victim, representing as it does and unwarrantable violation of the victim’s right to be left alone,’⁸⁹ it might be argued that by protecting claimants from harassing conduct or the infliction of distress this tort could help protect patient autonomy.

However, recent jurisprudence has prevented any extension of this tort in that direction. In *Wong v Parkside Health NHS Trust*⁹⁰ the Court of Appeal held that the tort is not committed where the harm complained of is alarm or distress which falls short of a recognised psychiatric illness.⁹¹

In *Wainwright v Home Office*⁹² Lord Hoffmann believed that in *Wilkinson Wright J* wanted to water down the concept of intention as much as possible and so devised a concept of imputed intention.⁹³ He stated that if ‘one is going to draw a principled distinction which justified abandoning the rule that damages for mere distress are not recoverable, imputed intention will not do.’⁹⁴ Accordingly, it must be shown that the defendant’s conduct was intentional, which may limit this tort’s usefulness in preventing the interferences with autonomy that occurred in *Rees* and *Chester*.

More recently, in *O v Rhodes*⁹⁵ the Supreme Court confirmed that the required mental element for the tort was an intention to cause physical harm or severe mental or emotional

⁸⁷ Joanne Conaghan, ‘Gendered Harms and the Law of Tort: Remediating (Sexual) Harassment’ (1996) 16 *Oxford Journal of Legal Studies* 407, 417. See also Jo Bridgeman and Michael Jones, ‘Harassing Conduct and Outrageous Acts: A Cause of Action for Intentionally Inflicted Mental Distress?’ (1994) 14 *Legal Studies* 180, 196.

⁸⁸ *Khorasandjian v Bush* [1993] QB 727.

⁸⁹ Lord Bingham, ‘Tort and Human Rights’ in Peter Cane and Jane Stapleton (Eds.), *The Law of Obligations: Essays in Celebration of John Fleming* (Oxford: Oxford University Press, 1998) 8.

⁹⁰ [2001] EWCA Civ 1721

⁹¹ At [11] per Hale LJ.

⁹² [2004] 2 AC 406.

⁹³ At [41].

⁹⁴ At [45].

⁹⁵ [2015] 2 WLR 1373.

distress: mere recklessness would not suffice. While such an intention could in an appropriate case be inferred from the evidence, it was not to be imputed as a matter of law.⁹⁶ It was held that this tort is sufficiently contained by the combination of (a) the conduct element requiring words or conduct directed at the claimant for which there is no justification or excuse, (b) the mental element requiring an intention to cause at least severe mental or emotional distress, and (c) the consequence element requiring physical harm or recognised psychiatric illness. Thus even though emotional distress is capable of being the target of the defendant's intention, physical or psychiatric harm must result.

In this respect, the rule in *Wilkinson v Downton* is more concerned with protecting an individual's physical or mental safety as opposed to their dignitary interests or preventing distressing or harassing conduct. Given these recent developments it is no longer the case, as Witting once argued that, the 'courts are moving to a position whereby they offer redress to those who are especially vulnerable to mental harms due to their relationship (or former relationship) with the defendant.'⁹⁷ If this tort cannot protect a claimant who has only suffered distress as a result of the defendant's actions then it will be unlikely to be capable of being extended to protect lost autonomy. Furthermore, most doctors will not intend to cause emotional distress to their patients and so it unlikely that it is a useful vehicle for protecting autonomy in the medical context. Though it should be noted that like trespass and negligence, it may be capable of indirectly protecting a patient's autonomy – in this case by protecting interests in physical and psychological safety.

⁹⁶ At [82] per Baroness Hale and Lord Toulson.

⁹⁷ Christian Witting, 'Torts Liability for Intended Mental Harm' (1998) 21 *UNSW Law Journal* 55, 76.

2.7. Human Rights

Returning to the tort of negligence, it could be argued that this area of law should recognise lost autonomy as a new form of damage in order to comply with England's obligations under the European Convention of Human Rights (ECHR).

Article 8 of the ECHR states that 'Everyone has the right to respect for his private and family life, his home and his correspondence.'⁹⁸ It is a qualified right and so should not be interfered with except such as is in accordance with the law and 'is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'⁹⁹

Although the article itself does not explicitly mention autonomy, human rights jurisprudence has confirmed that this provision protects the concept. Thus in *VC v Slovakia*¹⁰⁰ the European Court of Human Rights stated, that private life is 'a broad term, encompassing, inter alia, aspects of an individual's physical, psychological and social identity such as the right to personal autonomy and personal development'¹⁰¹ and in *Pretty v United Kingdom* held that 'the notion of personal autonomy is an important principle underlying the interpretation of [article 8's] guarantees.'¹⁰²

The Human Rights Act 1998 (HRA) now requires judges to take into account the text of the ECHR, judgments, decisions and opinions of the institutions¹⁰³ and interpret legislation in manner that is compatible with the Convention.¹⁰⁴ Section 6 of the Act requires public authorities to act in compliance with the ECHR. This allows individuals to bring actions against public bodies when their rights have been infringed. Accordingly, if an individual's

⁹⁸ Art 8(1), ECHR

⁹⁹ Art 8(2).

¹⁰⁰ (2014) 59 EHRR 29 (18968/07)

¹⁰¹ At [138].

¹⁰² *Pretty v UK* (2002) 35 EHRR 1 (2346/02) at [61].

¹⁰³ s. 2, HRA 1998.

¹⁰⁴ s. 3.

autonomy has been interfered with by a public body they may be able to bring an action against them under these provisions. This is one potential method by which patient autonomy could be protected.

However, the HRA also has important implications for the development of the tort of negligence. Given that the courts are public authorities, judges must also act in accordance with the Convention.¹⁰⁵ The implication of this could be that judges are required to develop the common law in a manner that is consistent with the Convention rights. If this is the case then it means that those rights will be enforceable against private bodies. This is because courts adjudicating disputes between private bodies would have to ensure the Convention rights were respected. In fact there are examples of this already taking place. One is the use of article 8 to develop the equitable action of breach of confidence to protect an interest in one's private information not being misused (even where there is no initial confidential relationship) through a new tort called misuse of private information.¹⁰⁶ This allowed the supermodel Naomi Campbell to claim damages from *The Mirror* newspaper (very much a private body) for publishing information about her treatment for drug addiction.¹⁰⁷ This was necessary to comply with the Convention.¹⁰⁸

The result of these developments might be that in order to comply with the HRA, judges will choose to develop the tort of negligence so that it protects an interest in autonomy. This, of course would depend on a number of issues – that negligent interferences with autonomy involve a breach of article 8(1); that they are not justified by article 8(2); and that the current tort of negligence is not already compliant with article 8 – that any claimant

¹⁰⁵ s. 6(3)(a).

¹⁰⁶ Although there have been debates as to whether this action should properly be called a tort, the Court of Appeal have recently held that it should be labelled as such for the purposes of service out of the jurisdiction or the purposes of service out of the jurisdiction under the Civil Procedure Rules. See *Vidal-Hall and others v Google Inc (Information Commissioner intervening)* [2015] EWCA Civ 311 at [51] per Lord Dyson MR and Sharp LJ.

¹⁰⁷ *Campbell v MGN Ltd.* [2004] 2 AC 457.

¹⁰⁸ See *Michael v Chief Constable of South Wales Police* [2015] 2 WLR 343 at [124] per Lord Toulson.

might struggle to demonstrate. Moreover, the courts have shied away from interpreting the Act in a way that would extend liability in negligence.¹⁰⁹ In the recent case of *Michael v Chief Constable of South Wales Police*,¹¹⁰ concerning the liability of the police in negligence for failing to prevent injuries caused by a third party, Lord Toulson stated that he did not see ‘a principled legal basis for introducing a wider duty in negligence than would arise either under orthodox common law principles or under the Convention.’¹¹¹ Provided a claimant’s right to autonomy can be protected through an action under the HRA, there would be no need for the tort of negligence (or indeed other branches of tort law) to develop in the same way in order to comply with the Convention.

Indeed, it is far from clear that developing the law in such a way would be a welcome development. Nolan argues that liability in negligence and under the HRA should develop independently of each other so that, for the most part, the substantive law of negligence should not be affected by human rights law.¹¹² He maintains that the argument for the convergence of negligence and human rights law is based on two false assumptions, ‘namely that negligence law and human rights law perform similar functions within our legal system and that the norms of human rights law are somehow more fundamental than the norms encapsulated in negligence law.’¹¹³ As Lord Toulson has stated, the two legal regimes have different purposes: ‘Whereas civil actions are designed essentially to compensate claimants for losses, Convention claims are intended to uphold minimum human rights standards and to vindicate those rights. The difference in purpose has led to different time limits and different approaches to damages and causation.’¹¹⁴ Instead, as Nolan argues, separate development of

¹⁰⁹ C.f. *Rabone v Pennine Care NHS Foundation Trust* [2012] 2 AC 72.

¹¹⁰ [2015] 2 WLR 343.

¹¹¹ *Ibid.* at [125].

¹¹² Donal Nolan, ‘Negligence and Human Rights Law: The Case for Separate Development’ (2013) 76 *Modern Law Review* 286, 287.

¹¹³ *Ibid.*

¹¹⁴ *Michael v Chief Constable of South Wales Police* [2015] 2 WLR 343 at 127. Even if one takes a right-based view of tort law there are still differences between the two regimes: the rights protected by the Convention are good against the State whereas tort focuses on the private rights we have against each other.

the two legal regimes is ‘necessary to preserve the coherence of negligence law, since attempts to harmonise it with the Convention legal order would weaken its structural underpinnings and cut across its core principles.’¹¹⁵ Accordingly, it is not obvious that the Human Rights Act requires the tort of negligence to protect an interest in autonomy.

2.8. Vindictory Damages

It could be argued that, rather than recognising lost autonomy as a new form of damage, the cases of *Rees* and *Chester* themselves are actually examples of the tort of negligence awarding vindictory damages in order to reflect that an important interest or right of the claimant’s has been infringed even where no conventional loss has been suffered.¹¹⁶

Several academics have interpreted the cases in this manner.¹¹⁷ For example, Varuhas sees *Rees* as an example of the courts displaying ‘vindictory impulses’¹¹⁸ whereby ‘the law is anxious to ensure that an interference with a basic interest does not go without remedy.’¹¹⁹ He states: ‘It is difficult to explain the conventional award as compensating for factual loss, particularly as it does not vary with the particular claimant.’¹²⁰ Witzleb and Carroll argue that *Rees* and *Chester* reflect the fact that the law of tort ‘now recognises patient autonomy as an interest that is deserving of legal protection even where, on application of conventional principles, its violation has not caused any loss.’¹²¹

¹¹⁵ Nolan, ‘Negligence and Human Rights Law: The Case for Separate Development’ 287.

¹¹⁶ Such damages were arguably awarded in a recent misuse of private information case. In *Gulati v MGN Ltd.* [2015] EWHC 1482. Mann J stated that there was no reason why the law should not ‘make an award to reflect infringements of the right itself, if the situation warrants it. The fact that the loss is not scientifically calculable is no more a bar to recovering damages for ‘loss of personal autonomy’ or damage to standing than it is to damages for distress’ [at 111].

¹¹⁷ See David Pearce and Roger Halson, ‘Damages for Breach of Contract: Compensation, Restitution and Vindication’ (2008) 28 *Oxford Journal of Legal Studies* 73, 84.

¹¹⁸ Jason Varuhas, ‘The Concept of “Vindication” in the Law of Torts: Rights, Interests and Damages’ (2014) 34 *Oxford Journal of Legal Studies* 253, 269.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ Normann Witzleb and Robyn Carroll, ‘The Role of Vindication in Torts Damages’ (2009) 17 *Torts Law Review* 16, 41.

Although in some respects all findings in favour of a claimant vindicate their interests or rights, here vindication means to ‘attest to, affirm and reinforce the importance and inherent value’¹²² of a particular right or interest. Vindictory damages are ‘damages which are best viewed as neither compensatory nor restitutionary, neither loss-based nor gain-based...[they] are rights-based damages.’¹²³ They are substantial (as opposed to nominal) damages and they have previously been awarded by the Privy Council to reflect the fact a claimant’s constitutional rights have been interfered with in Commonwealth countries.¹²⁴

McBride and Bagshaw see no problem with such damages being awarded in tort. They believe that ‘there may still be reasons why the courts should make an award to mark the fact that the claimant’s rights (the flipside of duties owed to her) have been breached’¹²⁵ and, without elaborating what such reasons might be, ask ‘If those reasons exist, why should the courts be prevented from responding to them simply because there is a mantra that “damage is the gist of the negligence”?’¹²⁶

Yet awarding such damages in tort was rejected by the Supreme Court in the false imprisonment case of *Regina (Lumba) v Secretary of State for the Home Department*.¹²⁷ Lord Dyson said that the vindicating of a person’s rights was already met by traditional common law remedies (in other words, there was no lacuna in the law requiring vindictory damages). He believed that ‘[u]ndesirable uncertainty would result’¹²⁸ if vindictory damages were introduced.¹²⁹

¹²² Varuhas, ‘The Concept of “Vindication” in the Law of Torts’ 258-259.

¹²³ Pearce and Halson, ‘Damages for Breach of Contract: Compensation, Restitution and Vindication’ 84.

¹²⁴ See *Attorney-General of Trinidad and Tobago v Ramanoop* [2006] 1 AC 328. See Jenny Steele, ‘Damages in Tort and Under the Human Rights Act: Remedial or Functional Separation’ (2008) 67 *Cambridge Law Journal* 606.

¹²⁵ Nicholas McBride and Roderick Bagshaw, *Tort Law*, 4th Edn. (Harlow: Pearson, 2012) 826.

¹²⁶ *Ibid.*

¹²⁷ [2012] 1 AC 245.

¹²⁸ *Ibid.* at 283 per Lord Dyson.

¹²⁹ *Ibid.* See also Andrew Burrows, ‘Damages and Rights’ in Donal Nolan and Andrew Robertson (Eds.), *Rights and Private Law* (Oxford: Hart Publishing, 2012) 307.

But regardless of whether such damages should be available in tort generally, or are appropriate for certain torts such as trespass to the person, it is a necessary condition of vindicatory damages being awarded that there is actually a right that needs vindicating. It is submitted that they should not be awarded in negligence cases because if damage has been suffered then they are superfluous – ordinary compensatory damages can be given – and if no actionable damage has been suffered then a person’s legal rights have not been interfered with in this tort. The tort of negligence is only complete and actionable when damage has occurred.

As Lord Oliver, writing extra-judicially, said, ‘The duty [of care in negligence] is not a duty to be careful but a duty not to cause injury by carelessness. You can drive a car down the street at 60 mph and you may be in grave trouble with the traffic police; but you will not be liable to anyone unless you cause damage.’¹³⁰ This is trite law.¹³¹ Even if we ignore, as McBride and Bagshaw do, the House of Lords authority that a duty of care cannot be owed in the abstract without damage having been suffered,¹³² they do not present a persuasive argument that damages – vindicatory or otherwise – can or should be awarded in negligence without proof of damage.

Robert Stevens also believes the award in *Rees* is better seen as vindicating the claimant’s rights rather than compensating a new form of loss. He says, ‘It would have been better to state that damages were awarded for the wrong itself, without any gloss.’¹³³ Although, as will become clear later in this thesis, I share Stevens’ scepticism regarding whether lost autonomy can be a form of loss,¹³⁴ he is wrong in his assertion that the rights-

¹³⁰ Lord Oliver, ‘Judicial Legislation’ (1989) 2 *Leiden Journal of International Law* 311. See also Donal Nolan, ‘Deconstructing the Duty of Care’ (2013) 129 *Law Quarterly Review* 559 and Dan Priel, ‘Tort Law for Cynics’ (2014) 77 *Modern Law Review* 703. C.f. Nicholas McBride, ‘Duties of Care – Do They Really Exist?’ (2004) 24 *Oxford Journal of Legal Studies* 417.

¹³¹ *Rothwell v Chemical & Insulating Co Ltd* [2008] 1 AC 281 at 288 per Lord Hoffmann. See ch 4 below.

¹³² *Caparo Industries plc v Dickman* [1990] 2 AC 605 at 627 per Lord Bridge.

¹³³ Robert Stevens ‘Rights and Other Things’ in Donal Nolan and Andrew Robertson (Eds.), *Rights and Private Law* (Oxford: Hart Publishing, 2012) 135.

¹³⁴ See ch 7.

based view of *Rees* provides a more coherent explanation for the conventional award. First, Stevens states, ‘If lost autonomy is a form of harm for which damages are recoverable, should it not always be recoverable? Puncturing the tyres of my bicycle reduces my autonomy as well.’¹³⁵ The meaning of this rhetorical flourish is unclear. Under orthodox principles a punctured tyre would be property damage and so recoverable: is Stevens arguing that the property damage should not be recoverable in such circumstances or that it should not be compensated with an *additional* award for lost autonomy? I would agree with the latter but it is not obviously Stevens’ meaning when one considers the fact that he neglects to explain what right has actually been violated in *Rees*. What might this right be? Given that he asserts ‘autonomy as such is not something which is protected directly by a right; rather it means liberty, the vast domain of freedom of choice I have where others have no rights against me’¹³⁶ it cannot be a right to autonomy. The personal injury and expenses associated with pregnancy was already compensated by damages and so the conventional award cannot be for the violation of those rights. And the costs associated with raising the child were held to be irrecoverable and so according to the majority of the House of Lords that loss was not capable of being a right that was violated. It therefore appears that there were no other rights that were violated in the case as no form of actionable damage had been suffered that went uncompensated. As explained above, there is no right that others not act carelessly if no actionable damage is suffered but, even if there was, this would contradict Stevens’ probable opposition to the person with a bicycle puncture receiving an additional award – if someone’s negligence punctures my tyres then they will have acted carelessly and so violated this putative right. If acting carelessly constituted a violation of a right then surely a conventional award should be given whenever this occurs (including those cases where tyres have been punctured). Without any explanation as to what right has been violated, Stevens’ opinions

¹³⁵ Ibid.

¹³⁶ Ibid.

regarding *Rees* remain just that. His assertions do not provide a convincing explanation of the case.

Regardless, there are good reasons why negligence requires damage to have occurred. As Donal Nolan has argued, claimants who want their rights to be vindicated without proof of damage in the law of tort should use the more appropriate vehicle of the trespass torts, not negligence (and even then traditional remedies such as declarations or nominal damages can adequately vindicate rights where no loss has been suffered).¹³⁷ Trespass to the person involves intentional, direct conduct of a particular nature – touching, imprisonment etc. – whereas negligence ‘applies paradigmatically to unintentional conduct, incorporates no requirement of directness, and encompasses a limitless variety of actions or omissions.’¹³⁸ Nolan argues that if this distinction were eroded so that negligence was actionable without proof of damage people’s freedom of action would be unduly limited. It is no great imposition on defendants in trespass cases to tell them to avoid intentionally and directly touching people. The same is not true if unintentional, indirect conduct were to attract liability without proof of damage.¹³⁹

Although I argue that lost autonomy should not be recognised as a form of actionable damage in negligence, perceiving the damages in *Rees* and *Chester* as compensating a new form of damage, namely, lost autonomy is a more coherent option than viewing the awards in those cases as vindicating rights even where no loss has been suffered. Turning negligence into a tort that is actionable per se would be a far more radical – not to mention undesirable – step than recognising a new head of loss.

¹³⁷ Donal Nolan, ‘New Forms of Damage in Negligence’ (2007) 70 *Modern Law Review* 59, 79. See also *Letang v Cooper* [1965] 1 QB 232.

¹³⁸ Nolan, *ibid.*

¹³⁹ See also *O v Rhodes* [2015] 2 WLR 1373 at [77]-[86].

2.9. Assumption of Responsibility

In chapter 7 I argue that the law should not recognise a general duty of care to avoid interfering with autonomy. In that chapter I presume that there are currently no established categories of negligence that recognise such a duty. Yet Stephen Perry has argued that claims for lost autonomy ought to be successful where there has been an assumption of responsibility by the defendant that has been relied upon by the claimant.¹⁴⁰

He believes that there are sound reasons for imposing liability when the claimant has detrimentally relied on an undertaking given by the defendant and this is so even where the claimant has not suffered any tangible loss.¹⁴¹ The loss in such cases ‘should be regarded as an interference with the plaintiff’s interest in his or her personal autonomy’¹⁴² as the claimants have lost ‘an opportunity to pursue a course of action that would have been preferable to the one actually taken.’¹⁴³ Perry maintains that cases such as *Hotson v East Berkshire Area HA*,¹⁴⁴ a loss of a chance claim (discussed in section 4.3.), are properly viewed as falling under the *Hedley Byrne* principle and is an example of cases ‘in which patients rely on explicit or implicit undertakings given by medical personnel.’¹⁴⁵ In such cases where there has been lost autonomy caused by relying on undertakings given by the defendant economic loss and a lost chance of avoiding an adverse physical consequence then ‘become relevant considerations in the valuation of this more abstractly conceived loss.’¹⁴⁶ If this is correct then it could mean that lost autonomy could be recognised as a form of actionable damage in negligence claims under the extended *Hedley Byrne* principle.¹⁴⁷

¹⁴⁰ For a description of the *Hedley Byrne*/ assumption of responsibility line of cases see section 4.2.1. below.

¹⁴¹ Stephen Perry, ‘Protected Interests and Undertakings in the Law of Negligence’ (1992) 42 *University of Toronto Law Journal* 247, 250.

¹⁴² *Ibid.*

¹⁴³ *Ibid.*, 290-291.

¹⁴⁴ [1987] AC 750.

¹⁴⁵ Perry, ‘Protected Interests and Undertakings in the Law of Negligence’ 250.

¹⁴⁶ *Ibid.*

¹⁴⁷ See section 4.2.1 below.

Many of my arguments in chapter 7 apply equally to this argument but a further difficulty with Perry's thesis is that if the relationship between the doctor and patient in *Hotson* is one where an assumption of responsibility exists, then presumably all doctors will assume responsibility for their patients in this sense even when they have made no representation to safeguard autonomy. After all, the defendant in that case made no explicit undertaking to protect Master Hotson's 'opportunity to pursue a course of action that would have been preferable to the one actually taken.'¹⁴⁸ Accordingly, it will be exceptionally easy for a patient to demonstrate that the defendant owes them a duty of care to avoid interfering with their autonomy. If this represents the law then *Rees* and *Chester* – not mention the other controversial cases discussed in chapter four such as *McFarlane v Tayside Health Board*¹⁴⁹ and *Gregg v Scott*¹⁵⁰ – would be uncontroversial cases: the claimants in each of these cases could effortlessly demonstrate that the defendant had assumed responsibility to avoid interfering with their autonomy. If there are good reasons for denying such claims then it is unlikely that the courts would allow claimants to undermine established principles limiting liability by reframing them in such a way.¹⁵¹ Nor is it obvious that a new form of damage such as lost autonomy is capable of being protected by such cases. As Lord Toulson stated in *Michael*, the 'assumption of responsibility' duty category 'should not be expanded artificially.'¹⁵² If Perry's argument were accepted it would be a subversion of the restrictions placed on recovery for intangible and incorporeal forms of loss in negligence and would constitute an expansion of an already problematic line of cases far beyond the incremental

¹⁴⁸ *Ibid.*, 290-291.

¹⁴⁹ [2000] 2 AC 59.

¹⁵⁰ [2005] 2 AC 176.

¹⁵¹ See ch 4 and ch 7.

¹⁵² *Michael v Chief Constable of South Wales Police* [2015] 2 WLR 343 at [100].

steps that the current approach in negligence requires.¹⁵³ It is unlikely to be accepted by even the most claimant-friendly of judges.

2.10. The Standard of Care – Information Disclosure

In the medical negligence context, the main way in which patient autonomy has been protected has been through developments in the standard of care owed by doctors in information (non-)disclosure cases. The doctor's duty of care includes giving the patient enough information so that they can make a decision whether to accept or reject treatment.¹⁵⁴ If a patient is not warned of the risks of injury involved a particular procedure and those risks eventuate and the patient suffers injury then it is arguable that by failing to warn the patient the doctor has caused their injury (assuming the patient would not have undergone the procedure if warned). A doctor who fails to give enough information to the patient in such circumstances may have caused the patient damage by breaching their duty of care.

In this way, the tort of negligence arguably protects patient autonomy *indirectly*. Autonomy *itself* is not the gist of the action – the patient must still have suffered a form of personal injury – however, their right of choice is protected to some extent. If the careless doctor fails to give the patient enough information so that they can make an informed choice, they will be liable if such negligence causes the patient injury. As Jones has stated, 'The underlying ethical principle of informed consent is that one should respect the patient's autonomy: the capacity to think, decide and act on one's own thoughts and decisions freely and independently.'¹⁵⁵

¹⁵³ Simon Whittaker, 'The Application of the "Broad Principle of *Hedley Byrne*" as Between Parties to a Contract' (1997) 17 *Legal Studies* 169, 190.

¹⁵⁴ *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] AC 871 at 893 per Lord Diplock.

¹⁵⁵ Michael Jones, 'Informed Consent and Other Fairy Stories' (1999) 7 *Medical Law Review* 103, 123.

So, when will a doctor have breached their duty of care in this context? The case of *Bolam v Friern Hospital Management Committee*¹⁵⁶ was a first instance decision regarding what standard of care a medical professional owed towards their patients. McNair J advised the jury that a doctor would not be considered negligent ‘if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art.’¹⁵⁷ Under this approach, a doctor will not have breached their duty of care merely because there is a body of opinion that would take a contrary view. If a doctor can find a responsible body of medical opinion that would support their decision not to inform a patient of a particular risk involved in treatment then they will have met the requisite standard of care. The law imposes a duty of care but the standard of care is a matter of medical judgment.¹⁵⁸

Bolam was a case concerned with negligent advice, diagnosis and treatment. In *Maynard v West Midlands Regional Health Authority*¹⁵⁹ the House of Lords confirmed that this was the correct method to be taken in establishing negligence in diagnosis and treatment.¹⁶⁰ However, the question of whether this approach should be taken in cases involving negligent advice was raised in *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital*.¹⁶¹ Although the outcome of the case was unanimous in the House of Lords – Mrs Sidaway’s claim failed – there were differences in approach regarding how breach should be determined in such cases.

Lord Diplock’s judgment ‘is widely considered to be the least supportive of the right to autonomy of patients.’¹⁶² He believed that the *Bolam* test laid down a principle of law that

¹⁵⁶ [1957] 1 WLR 582.

¹⁵⁷ *Ibid.* at 587.

¹⁵⁸ *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] AC 871 at 881 per Lord Scarman.

¹⁵⁹ [1984] 1 WLR 634.

¹⁶⁰ *Ibid.* at 639 per Lord Scarman.

¹⁶¹ [1985] 1 AC 871.

¹⁶² Jose Miola, ‘On the Materiality of Risk: Paper Tigers and Panaceas’ (2009) 17 *Medical Law Review* 76, 81.

is applicable to all aspects of the duty of care a doctor owes his patient including the duty to warn about the risks of a proposed treatment.¹⁶³ Volunteering unsought information is ‘as much an exercise of professional skill and judgment as any other part of the doctor’s comprehensive duty of care to the individual patient, and expert medical evidence on this matter should be treated in just the same way.’¹⁶⁴

In contrast, Lord Scarman’s judgment emphasised a patient’s right to make their own decisions.¹⁶⁵ He believed that ‘the courts should not allow medical opinion as to what is best for the patient to override the patient’s right to decide for himself whether he will submit to the treatment offered him.’¹⁶⁶ He held that doctors should warn their patients of ‘material risks’¹⁶⁷ involved in treatment and that ‘[t]he test of materiality is whether in the circumstances of the particular case the court is satisfied that a reasonable person in the patient’s position would be likely to attach significance to the risk.’¹⁶⁸ He added the caveat that even if a risk was material, a doctor would not be liable if ‘upon a reasonable assessment of his patient’s condition he takes the view that a warning would be detrimental to his patient’s health.’¹⁶⁹

Lord Bridge (with whom Lord Keith agreed) and Lord Templeman delivered judgments that fell somewhere between these two extremes. For example, although Lord Bridge believed that ‘a decision what degree of disclosure of risks is best calculated to assist a particular patient to make a rational choice as to whether or not to undergo a particular treatment must primarily be a matter of clinical judgment’¹⁷⁰ he was

¹⁶³ At 894-895. Although when a patient asks a specific question about risks it would be expected that the doctor would tell them what the patient wanted to know,

¹⁶⁴ *Ibid.* at 895.

¹⁶⁵ *Ibid.* at 882.

¹⁶⁶ At 882.

¹⁶⁷ At 889.

¹⁶⁸ *Ibid.*

¹⁶⁹ At 890.

¹⁷⁰ At 900.

of opinion that the judge might in certain circumstances come to the conclusion that disclosure of a particular risk was so obviously necessary to an informed choice on the part of the patient that no reasonably prudent medical man would fail to make it.¹⁷¹

Lord Templeman took a similar approach, stating ‘I do not subscribe to the theory that the patient is entitled to know everything nor to the theory that the doctor is entitled to decide everything.’¹⁷²

In this respect, although primarily a matter for medical judgment, these two speeches acknowledged that there would be some circumstances when a risk was so obvious that it should be disclosed even if a body of medical opinion would not have disclosed it. Given that three of their Lordships supported neither the patient-centred approach or a strict *Bolam* one, it would be thought that the *ratio* of the decision would reflect the judgments of Lord Templeman and Lord Bridge. As Lord Kerr and Lord Reed state in *Montgomery v Lanarkshire Health Board*,¹⁷³ it would be ‘wrong to regard *Sidaway* as an unqualified endorsement of the application of the *Bolam* test to the giving of advice about treatment. Only Lord Diplock adopted that position.’¹⁷⁴

This, alas, was not how the case was initially interpreted. In decisions such as *Blyth v Bloomsbury HA*¹⁷⁵ and *Gold v Haringey HA*¹⁷⁶ the Court of Appeal adopted Lord Diplock’s *Bolam* approach. However, a more nuanced patient-friendly approach later emerged in *Pearce v United Bristol Healthcare NHS Trust*,¹⁷⁷ where Lord Woolf MR stated that ‘if there is a significant risk which would affect the judgment of a reasonable patient, then in the

¹⁷¹ Ibid.

¹⁷² At 904.

¹⁷³ [2015] UKSC 11.

¹⁷⁴ Ibid. at [57].

¹⁷⁵ [1993] 4 Med LR 151.

¹⁷⁶ [1987] 3 WLR 649.

¹⁷⁷ [1999] PIQR P 53.

normal course it is the responsibility of a doctor to inform the patient of that significant risk.¹⁷⁸ This method still pays lip-service to the *Bolam* approach: the doctor will not be deemed negligent if they disclose the risks that is accepted as proper practice by a responsible body of medical men. However, under *Pearce* it was believed that a responsible doctor would disclose the significant risks that a reasonable patient would want to know. In practice, this brought the standard of care closer towards the reasonable patient test adopted by Lord Scarman and was the approach that had been adopted by the courts in England and Wales.¹⁷⁹

As Brazier and Miola state:

[W]hatever the outcome on the facts, the ‘reasonable’ doctor test received a body blow in *Pearce*. It survives only if the ‘reasonable doctor’ understands that he must offer the patient what the ‘reasonable patient’ would be likely to need to exercise his right to make informed decisions about his care.¹⁸⁰

This was been confirmed in subsequent cases. For example, although when *Chester v Afshar* reached the House of Lords the issue in question was not breach but causation, Lord Woolf’s approach was implicitly approved by their Lordships.¹⁸¹

Any doubts that the standard of care in informational disclosure in that of the reasonable patient have now been banished by the recent Supreme Court decision of *Montgomery v Lanarkshire Health Board*¹⁸² (see section 7.2.1. below for a discussion of this case). The Supreme Court unanimously held that a doctor is under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended

¹⁷⁸ At [21]

¹⁷⁹ See also *Birch v University College London Hospital NHS Foundation Trust* [2008] EWHC 2237, which accepted the reasoning of Lord Woolf MR and further held that doctors are under a duty to inform patients of alternative treatment options. C.f. the position in Scotland prior to *Montgomery*, however, which took a more *Bolam* centred approach. See *Montgomery v Lanarkshire Health Board* [2013] CSIH 3.

¹⁸⁰ Margaret Brazier and Jose Miola, ‘Bye-Bye *Bolam*: A Medical Litigation Revolution?’ (2000) 8 *Medical Law Review* 85, 110.

¹⁸¹ All agreed that the defendant had a duty to warn the claimant of a 1-2 per cent risk inherent in the operation and emphasised the importance of the patient’s right to autonomy.

¹⁸² [2015] UKSC 11.

treatment, and of any reasonable alternative or variant treatments. The leading judgment of Lord Kerr and Lord Reed maintained that the test of materiality is whether, in the circumstances of the particular case, ‘a reasonable person in the patient’s position would be likely to attach significance to the risk, or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it.’¹⁸³

This represents a much more patient-centred approach towards the doctor’s duty to warn patients of risks. The idea that the only exception to the *Bolam* approach was where a patient specifically asked questions about risks was rejected as drawing excessively fine distinctions and disregarding the social and psychological realities of the relationship between a patient and their doctor: ‘it is those who lack such knowledge, and who are in consequence unable to pose such questions and instead express their anxiety in more general terms, who are in the greatest need of information’¹⁸⁴

Lord Kerr and Lord Reed said that ‘the paradigm of the doctor-patient relationship implicit in the speeches in [*Sidaway*] has ceased to reflect the reality and complexity of the way in which healthcare services are provided.’¹⁸⁵ Patients are now ‘widely regarded as persons holding rights, rather than as the passive recipients of the care of the medical profession’¹⁸⁶ and as ‘as consumers exercising choices’¹⁸⁷ who have much greater access to information about risks, side-effects and treatment options. The law should no longer presume that they are uninformed or incapable of understanding medical matters.¹⁸⁸ As Lord Kerr and Lord Reed state, these social and legal developments ‘point away from a model of the relationship between the doctor and the patient based on medical paternalism.’¹⁸⁹

¹⁸³ Ibid, at [87].

¹⁸⁴ At [58].

¹⁸⁵ At [75].

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

¹⁸⁸ At [76].

¹⁸⁹ At [81].

This reasonable patient approach to the standard of care in information disclosure cases is not free from problems. As Brazier has pointed out, even though professional practice may be disputed, some hard evidence will be to hand whereas ‘ascertaining the nature and reactions of the mythical reasonable patient’¹⁹⁰ can be difficult (though as she points out – no more difficult than determining the actions of the reasonable person on the Clapham omnibus): ‘the different and idiosyncratic reactions of individuals to doctors, hospitals, illness and ultimately to the prospect of death do add unknown and unknowable factors to the equation.’¹⁹¹ However, it is undoubtedly less paternalistic than the reasonable doctor approach.

Although the decision arguably involves an extremely creative rewriting of *Sidaway* to paint the majority judgments as closer to the speech of Lord Scarman than that of Lord Diplock,¹⁹² in practice this approach is not greatly different from the post-*Pearce* position in England and Wales.¹⁹³ It is clear that the standard of care in medical negligence cases now unambiguously acknowledges that respect for patient autonomy entails giving them sufficient information to make an informed decision and what counts as sufficient is determined from the perspective of the reasonable patient. As a result, in some respects, an interest in autonomy is now protected indirectly in negligence cases.

However, as shown in chapter 7 of this thesis, this is very different from protecting an interest in autonomy *itself*. Even though autonomy is now recognised as an important value, a patient will not receive compensation merely because a medical professional has carelessly restricted their choices. Another form of actionable damage (personal injury this context)

¹⁹⁰ Brazier, ‘Patient Autonomy and Consent to Treatment: The Role of the Law?’ 188.

¹⁹¹ *Ibid.*

¹⁹² At [53]-[56]. For a more accurate interpretation of *Sidaway*, see that of Harvey Teff soon after the case was decided: ‘It is difficult to read *Sidaway* as representing more than a slight divergence from the *Bolam* test, especially given the general tenor of the speeches and the clear rejection of ‘informed consent’ ‘Consent to Medical Procedures: Paternalism, Self-Determination or Therapeutic Alliance?’ (1985) 110 *Law Quarterly Review* 432, 450.

¹⁹³ *Birch v University College London Hospital NHS Foundation Trust* [2008] EWHC 2237

must have occurred. As Jackson has noted, ‘tort law’s response to information disclosure is that it points to a significant gap in the law’s protection of patient autonomy.’¹⁹⁴ By having a standard of care that protects a patient’s right of choice and awarding damages where personal injury occurs as a result, medical negligence *indirectly* protects patient autonomy. Autonomy per se is still not the gist of the action in these cases.¹⁹⁵

Jackson questions whether it would be more appropriate ‘for the doctor to be liable for the interference with her patient’s ability to reach an informed choice...but not for the unfortunate but blameless medical mishap.’¹⁹⁶ This is because, ethically speaking at least, ‘the principal purpose of the requirement that doctors should give their patients adequate information is to protect the patient from making uninformed choices about their medical care, *not to prevent physical injury*’¹⁹⁷ and that if the purpose of giving patients information is to facilitate informed decision making then ‘any failure to disclose material information will have interfered with her ability to make an autonomous choice, regardless of whether she happens to have *also* suffered physical injury as a result.’¹⁹⁸

Accordingly, while the law on information disclosure goes some way towards indirectly protecting patient autonomy, by requiring personal injury to have occurred these cases do not comprehensively protect autonomy *itself*. Because of this requirement, Jackson believes that ‘a free-standing interest in the capacity to make an informed choice cannot be protected by the tort of negligence.’¹⁹⁹ The following chapters will discuss whether this is the case and whether such a change in the law to protect this putative interest would be desirable.

¹⁹⁴ Jackson, “‘Informed Consent’ to Medical Treatment and the Impotence of Tort’ 285.

¹⁹⁵ C.f. Baroness Hale’s judgment at [81] and my discussion of it in chapter 7.

¹⁹⁶ Jackson, “‘Informed Consent’ to Medical Treatment and the Impotence of Tort’ 284.

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.*

Chapter 3: Outline of Papers

Chapter 4 – Judicial Reasoning and the Concept of Damage:

Rethinking Medical Negligence Cases

Damage is the gist of the action in negligence but is often subsumed within other headings of this tort such as duty of care, quantum of damages and causation. This chapter examines three important decisions where new forms of damage have been implicitly recognised or rejected. In *McFarlane v Tayside Health Board*³⁴⁴ the costs associated with raising a healthy child were rejected by the House of Lords. This was confirmed by the decision of *Rees* but this case arguably recognised lost autonomy as a new form of actionable damage in negligence. Finally, in *Chester* lost autonomy was arguably implicitly recognised as a form of actionable harm by the House of Lords. This article suggests that the lack of separate scrutiny of the damage concept in such cases is leading to poor reasoning and questionable results that threaten to undermine the coherence of negligence. Methods of restoring clarity to this tort will then be addressed.

Although the main argument in this paper is that appellate judges in medical negligence cases are not fully considering the concept of damage and that this is leading to distortions in the law, this chapter serves two important purposes for this thesis. The first is that it considers the different explanations for *Rees* and *Chester* and whether those cases are best described as ones where the damage was actually lost autonomy. As stated earlier, the ‘conventional award’ in *Rees* may serve a rights-vindication purpose and *Chester* was not pleaded as a lost autonomy case. Secondly, given the inconsistencies between the compensation awarded in those two cases, this article gives some consideration as to how

³⁴⁴ 2 AC 59.

damages for lost autonomy might be quantified in the future *if* it were to be recognised as a new form of damage.

Chapter 5 – How Should Autonomy be Defined in Clinical Negligence Cases?

In order for the tort of negligence to recognise autonomy as interest in negligence, it is first necessary to determine how autonomy should be understood in this context. The purpose of this chapter is to shed light on this issue and arrive at a suitable definition of the concept.

The three main definitions of autonomy are Kantian ideal desire autonomy, best desire autonomy and current desire autonomy. After discussing these concepts, this article argues that current desire autonomy provides the most philosophically coherent definition as ideal desire and best desire autonomy are consistent with autonomy's polar-opposite paternalism.

This article also argues that, if autonomy is to be recognised as an interest in negligence at all, current desire autonomy is the account of autonomy that is most likely to be adopted. This is because it is the version of autonomy that is used by judges in criminal law, human rights law and related torts such as battery. Legal coherence therefore demands that this definition is adopted is also adopted in negligence cases.

Although the concept of autonomy is often discussed in medical law and ethical literature, it is necessary to consider how it should be defined in this context as different accounts of autonomy may be more amenable to recognition as an interest in negligence than others.

Chapter 6 – A Defence of the Counterfactual Account of Harm

In order to determine whether a particular course of conduct is ethically permissible it is important to have a concept of what it means to be harmed. The dominant theory of harm is the counterfactual account, most famously proposed by Joel Feinberg. This determines whether harm is caused by comparing what actually happened in a given situation with the ‘counterfactuals’ i.e. what would have occurred had the putatively harmful conduct not taken place. If a person’s interests are made worse off than they otherwise would have been then a person will be harmed.

This definition has recently faced challenges from bioethicists such as John Harris, Guy Kahane and Julian Savulescu who, believing it to be severely flawed, have proposed their own alternative theories of the concept. In this chapter I will demonstrate that the shortcomings Harris, Kahane and Savulescu believe are present in Feinberg’s theory are illusory and that it is their own accounts of harm that are fraught with logical errors. I maintain that the arguments presented to refute Feinberg’s theory not only fail to achieve this goal and can be accommodated within the counterfactual account but that they actually undermine the theories presented by their respective authors. The final conclusion will be that these challenges are misconceived and fail to displace the counterfactual theory.

The purpose of this paper is to give a detailed account of what it means to be harmed. This will enable me to determine whether interferences with autonomy cause harm and, consequently, whether such harms are a moral wrong that should be reflected in legal protection in the tort of negligence. Given the definition of harm that I have defended (that it is a setback to a person’s interests) and the account of autonomy that I have adopted (that an autonomous choice reflects a person’s current desires), it is apparent that ethically speaking in the majority of circumstances that interfering with someone’s autonomy will be to harm them as it will setback their interests (see the definition of interests in this paper).

Chapter 7 – Liability for Lost Autonomy in Negligence: Undermining the Coherence of Tort Law?

Despite lost autonomy being a form of harm ethically speaking, this article argues that protecting lost autonomy as an interest in negligence would be mistaken by demonstrating that doing so would be inconsistent with the current legal understanding as to what counts as actionable damage and when a duty of care should be imposed. It is argued that if autonomy is seen as reflecting an individual's current desires then interferences with this putative interest do not necessarily make people objectively worse off in ways that are more than minimal. Given the definition of autonomy adopted in this thesis means there is no coherent way to divide different 'types' of autonomy, perceiving autonomy per se to be a form of actionable damage in negligence is inconsistent with established principles. Furthermore, the law of negligence restricts recovery for certain types of harm such as mental injury and economic loss. Given that causing someone psychiatric harm or economic loss is to interfere with an individual's autonomy, it is argued that recognising lost autonomy as a form of damage would undermine the restrictions that the law has placed on recovery for these types of harm.

As a result, it is argued that protecting a notional interest in autonomy would be problematic because it is difficult for the tort of negligence to do so in a coherent way without distorting established and cogent legal principles.

Chapter 4: Judicial Reasoning and the Concept of Damage – Rethinking Medical Negligence Cases

4.1. Introduction

Whether infringement of patient autonomy per se or the costs of raising a healthy child born as a result of a failed sterilisation are now remediable in the tort of negligence is a key debate for medical lawyers. Yet these questions have broader doctrinal implications for the law of tort. Specifically, the way in which these new forms of damage are being rejected or recognised might be distorting the coherence of the tort of negligence.

It is ‘hornbook law’¹ that damage is the ‘gist of the action’² in negligence. To succeed in this tort a claimant must show that the defendant breached a duty of care that caused the claimant actionable *damage*.³ As Lord Wright emphasised in *Lochgelly Iron and Coal Company v McMullan*,⁴ negligence ‘connotes the complex concept of duty, breach, and damage thereby suffered by the person to whom the duty was owing.’⁵ All of these indicia are required.

And yet one may be forgiven for not realising the fundamental importance of damage given the way many judges approach their decisions. Although in *White v Chief Constable of*

¹ *Gregg v Scott* [2005] 1 AC 176 at 226 per Baroness Hale.

² *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] AC 871 at 883 per Lord Scarman.

³ See *Gregg v Scott* [2005] 1 AC 176 at 226 per Baroness Hale.

⁴ [1934] AC 1.

⁵ *Ibid.* at 25 per Lord Wright.

*South Yorkshire Police*⁶ Lord Steyn stated, ‘The contours of tort law are profoundly affected by distinctions between different kinds of damage,’⁷ this component has often been passed over by judges in favour of its more interesting cousins – duty of care and causation. As such, it is rarely subject to rigorous scrutiny by the courts.⁸ Issues of damage, when they are dealt with at all, are often subsumed within these other aspects of negligence.⁹ The fact that courts take such an approach was made explicit by Lord Denning MR in *Spartan Steel and Alloys Ltd v Martin & Co*¹⁰ when he stated ‘Sometimes I say: “There was no duty.” In others I say: “The damage was too remote.”’¹¹

This, I will argue, is leading to poor reasoning and questionable results that threaten to undermine the coherence of this tort. These difficulties are particularly apparent in medical negligence cases. It is in this arena that the consideration of new forms of damage in negligence has led to controversy and three such cases – namely, *McFarlane v Tayside Health Board*,¹² *Rees v Darlington Memorial Hospital NHS Trust*¹³ and *Chester v Afshar*¹⁴ – are particularly illustrative of the problems that occur when judges do not undertake a thorough examination of the concept of damage.

⁶ [1999] 2 AC 455.

⁷ At 492.

⁸ However, several academics have discussed the issue. See Jane Stapleton, ‘The Gist of Negligence: Part 1 Minimal Actionable Damage’ (1988) 104 *Law Quarterly Review* 21; Christian Witting, ‘Physical Damage in Negligence’ (2002) 61 *Cambridge Law Journal* 189; Donal Nolan, ‘New Forms of Damage in Negligence’ (2007) 70 *Modern Law Review* 59; Andrew Tettenborn, ‘What is Loss?’ in Jason Neyers, Erika Chamberlain and Stephen Pitel (Eds.), *Emerging Issues in Tort Law* (Oxford: Hart Publishing, 2007); Janet O’Sullivan, ‘The Meaning of ‘Damage’ in Pure Financial Loss Cases: Contract and Tort Collide’ (2012) 28 *Professional Negligence* 248; Donal Nolan, ‘Damage in the English Law of Negligence’ (2013) 4 *Journal of European Tort* 259.

⁹ See Nolan, ‘New Forms of Damage in Negligence’, 79; Simon Deakin, Angus Johnston and Basi Markesinis, *Markesinis and Deakin’s Tort Law* 7th Edn. (Oxford: Oxford University Press, 2013) 106; and Nolan, ‘Damage in the English Law of Negligence’ 264. This paper builds on their analysis and applies it to the medical negligence context.

¹⁰ [1973] 1 QB 27.

¹¹ *Ibid.* at 37.

¹² [2000] 2 AC 59.

¹³ [2004] 1 AC 309.

¹⁴ [2005] 1 AC 134.

These decisions have been, to put it mildly, controversial, having separately been described as ‘incoherent,’¹⁵ ‘push[ing] the law of tort into wholly uncharted waters’¹⁶ ‘making bad law’¹⁷ and ‘lacking consistency.’¹⁸ However, the basis on which these cases have been castigated in the past is different to the one that will be undertaken here. Rather than reassess the *outcomes* of these decisions, this article will criticise the *methods* that the judges used to arrive at their conclusions. Specifically, in each of these cases new forms of damage were allowed or barred in ways that distort other concepts within the tort of negligence. The majority in *McFarlane* subsumed the question of whether the costs associated with raising a healthy child should be recoverable under the heading of duty of care, rather than fully analysing whether any harm associated with raising an unwanted child was a new form of damage or merely pure economic loss. Similarly, *Rees* and *Chester* arguably hid the recognition of a new head of loss, that of interference with patient autonomy, within the law relating to quantification of damages in the former case and causation in the latter. Furthermore, the quantification of lost autonomy in *Rees* was arguably inconsistent with the approach taken in *Chester*. This, I argue, can be explained by their Lordships’ failure to fully focus on the concept of actionable damage in these cases.

In the first part of this paper *McFarlane*, *Rees* and *Chester* will be analysed and it will be argued that overlooking the concept of damage and absorbing it within questions of duty of care, the quantification of damages and causation is leading to problematic reasoning in important medical negligence cases. Methods of restoring conceptual clarity to this tort and reducing the likelihood of such doctrinal controversies arising in the future will then be suggested.

¹⁵ Nicolette Prialx, ‘That’s One Heck of an “Unruly Horse”! Riding Roughshod Over Autonomy in Wrongful Conception’ (2004) 12 *Feminist Legal Studies* 317, 322.

¹⁶ Charles Foster, ‘It Should Be, Therefore It Is’ (2004) 154 *New Law Journal* 1644, 1644.

¹⁷ Sarah Green, ‘Coherence of Medical Negligence Cases: A Game of Doctors and Purses’ (2006) 14 *Medical Law Review* 1, 21.

¹⁸ Victoria Chico, ‘Wrongful Conception: Policy, Inconsistency and the Conventional Award’ (2007) 8 *Medical Law International* 139, 150.

4.2. The Damage Cases

In a series of articles, Donal Nolan has highlighted that the concept of damage has largely been overlooked in the tort of negligence and so there are few principles to guide the courts when considering this issue.¹⁹ For present purposes it is important to note that the different types of damage reflect the interests that the tort of negligence protects. As Weir has stated, interests are ‘the positive aspects of kinds of damage.’²⁰ If, in negligence, you have an interest in something, violation of that interest will be a type of damage. Currently the interests protected in negligence are personal injury²¹ (including psychiatric harm),²² property damage²³ and, in very limited circumstances, pure economic loss.²⁴ The more important interests – physical injury and property damage – are protected more liberally²⁵ than those that the courts deem less important – psychiatric harm²⁶ and economic loss.²⁷

The interests that tort law protects change over time. Today a claimant would be unsuccessful in an action in tort against a defendant who had seduced their daughter or enticed their wife away.²⁸ New interests can be recognised and archaic ones swept away. The tort of negligence is no different in this regard: it is capable of protecting new interests by recognising new forms of damage.²⁹ As Lord Macmillan observed in *Donoghue v Stevenson*,³⁰ ‘[t]he categories of negligence are never closed’³¹ and the law must ‘adapt itself

¹⁹ See Nolan, ‘New Forms of Damage in Negligence’ and ‘Damage in the English Law of Negligence’.

²⁰ Tony Weir, ‘Liability for Syntax’ (1963) 21 *Cambridge Law Journal* 216, 218.

²¹ See *Perrett v Collins* [1999] PNLR 77.

²² See *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310.

²³ See *Spartan Steel and Marc Rich & Co v Bishop Rock Marine Co* [1996] AC 211.

²⁴ See *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

²⁵ See *Perrett v Collins* [1999] PNLR 77 at 87 per Lord Hobhouse.

²⁶ See *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455.

²⁷ See *Murphy v Brentwood District Council* [1991] 1 AC 398.

²⁸ See Anthony Dugdale, and Michael Jones (Eds.), *Clerk and Lindsell on Torts* 20th Edn. (London: Sweet and Maxwell, 2013) [1-131].

²⁹ See *Dulieu v White* [1901] 2 KB 669 (psychiatric harm), *Hedley Byrne* (economic loss) and, for more recent examples Nolan, ‘New Forms of Damage in Negligence’.

³⁰ [1932] AC 562.

³¹ At 619.

to the changing circumstances of life.³² With this in mind, this section will examine the three cases that illustrate the problems that occur when judges do not rigorously scrutinise the concept of damage.

4.2.1. *McFarlane v Tayside Health Board*

McFarlane v Tayside Health Board concerned a married couple, the McFarlanes, with four children. Deciding that this was enough, the husband had a vasectomy. The pursuers were informed that that the husband's sperm count was negative and that contraceptive measures were no longer necessary. After following this advice, Mrs McFarlane became pregnant and gave birth to a healthy child, Catherine, after a normal pregnancy. Mrs McFarlane claimed for the physical discomfort arising from her pregnancy, confinement and delivery (the mother's claim) and both parents claimed for the financial costs of bringing up the child (the parents' claim).

When the case reached the House of Lords, their Lordships allowed the mother's claim (Lord Millett dissenting)³³ and so Mrs McFarlane was entitled to general damages for the pain, suffering and inconvenience of pregnancy and childbirth and (Lord Clyde dissenting on this point) special damages for extra medical expenses, clothing and loss of earnings associated with this. However the House of Lords unanimously overruled previous cases that had permitted the costs associated with raising a healthy child to be recovered and dismissed the parents' claim.³⁴

³² At 619.

³³ He would have instead awarded the parents conventional sum of £5,000 representing the fact that they had been denied 'an important aspect of their personal autonomy': *McFarlane v Tayside Health Board* [2000] 2 AC 59 at 114.

³⁴ See *Emeh v Kensington and Chelsea and Westminster Area Health Authority* [1985] 1 QB 1012; *Thake v Maurice* [1985] 2 WLR 215 and *Allen v Bloomsbury Health Authority* [1992] PIQR Q50.

While the success of the mother's claim is not wholly uncontentious the focus in this section will be on the dismissal of the parents' claim.³⁵ Various reasons were given for preventing the McFarlanes from succeeding. It was thought that 'the law must take the birth of a normal, healthy baby to be a blessing, not a detriment,'³⁶ that principles of distributive justice would prevent recovery,³⁷ that the extent of the defendant's liability was disproportionate to the duties undertaken,³⁸ that the doctor's duty of care did not extend to the costs of raising Catherine,³⁹ that such costs can only be recovered in contract⁴⁰ and that while the costs of raising a healthy child could be calculated, the benefits could not.⁴¹

Such a diversity of views will come as a shock to few people. One only has to look at the recently proposed changes to child benefit policy in order to see that questions regarding who should pay the costs of raising children are apt to provoke heated debates.⁴² Dealing as it does with important issues relating to reproductive autonomy, the budgets of the NHS and the value society places on children, the result in *McFarlane* was always going to be controversial. While no one wants to see parents struggling to raise an unwanted child they cannot afford, allowing recovery for childrearing costs may result in the unappealing state of affairs of wealthy parents taking money from the NHS to pay for their unwanted child to attend, as was permitted in the pre-*McFarlane* case of *Allen v Bloomsbury HA*,⁴³ an

³⁵ Lord Millett (at 114) believed the mother's claim was inconsistent with the dismissal of the parents' claim and Christian Witting has argued that as pregnancy is a natural process it is not a deleterious physical change and so *McFarlane* represents a widening of the concept of personal injury ('Physical Damage in Negligence'). For the contrary view, see Joanne Conaghan, 'Tort Law and Feminist Critique' (2003) 56 *Current Legal Problems* 175, 190-191, Nolan, 'New Forms of Damage in Negligence' and the speech of Hale LJ (as she then was) in *Parkinson v St James and Seacroft University Hospital NHS Trust* [2002] QB 266.

³⁶ *McFarlane* at 113-114 per Lord Millett.

³⁷ At 82 per Lord Steyn.

³⁸ At 91 per Lord Hope and 106 per Lord Clyde.

³⁹ At 76 per Lord Slynn.

⁴⁰ At 76 per Lord Steyn.

⁴¹ At 97 per Lord Hope.

⁴² Nicholas Watt 'Nick Clegg attacks limit on child benefit as 'Chinese-style family policy'' *The Guardian* (London, 12 January 2014) <<http://gu.com/p/3yne8/tw>> Last Accessed 12 August 2014.

⁴³ [1992] PIQR Q50 at Q62 per Brooke J.

expensive private school. It is therefore unsurprising that the result has been subject to stinging academic commentary.⁴⁴

Yet the reasoning in the case can be criticised on grounds that have been overlooked in the existing literature. Whereas Lord Clyde and Lord Millett approached the decision from a damage perspective by declining to perceive the costs of raising a healthy child as a head of loss in negligence, the majority believed that the hospital did not owe a *duty of care* to the McFarlane's to avoid causing their loss. The latter approach, I will argue leads to confusion in this area of law as the way the majority subsumed the investigation of whether actionable damage had occurred within questions of duty of care distorted the latter concept.

Before elaborating why this is, it is necessary to briefly outline how judges determine whether a duty of care exists in a given situation. First, the courts will look at whether a duty has been imposed in such circumstances in the past. As Lord Oliver stated in *Caparo Industries plc v Dickman*,⁴⁵ 'the most that can be attempted is a broad categorisation of the decided cases according to the type of situation in which liability has been established in the past in order to found an argument by analogy.'⁴⁶ If there is a line of cases where a similar duty has been held to exist before then it is likely that a duty of care will be established.

However, if a novel case does not fit within an established line of cases, the courts will then utilise the three-fold method exemplified in *Caparo*. Under this, a duty of care may be imposed where (1) the harm to the claimant is foreseeable; (2) there is a relationship of sufficient 'proximity'⁴⁷ between the claimant and defendant; and (3) it is 'fair, just and

⁴⁴ See Niciolette Prialx *The Harm Paradox: Tort Law and the Unwanted Child in the Era of Choice* (London: Routledge-Cavendish, 2007); Elizabeth Adjin-Tettey 'Claims of Involuntary Parenthood: Why the Resistance?' in Jason Neyers, Erika Chamberlain and Stephen Pitel (Eds.), *Emerging Issues in Tort Law* (Oxford: Hart Publishing, 2007) 85; and Victoria Chico, 'Wrongful Conception' and *Genomic Negligence: An Interest in Autonomy as the Basis for Novel Negligence Claims Generated by Genetic Technology* (London: Routledge-Cavendish, 2011).

⁴⁵ [1990] 2 AC 605.

⁴⁶ At 635.

⁴⁷ At 618 per Lord Bridge.

reasonable⁴⁸ to do so. This approach of asking whether imposing liability is fair, just and reasonable is largely policy-based but, again, a duty of care is more likely to be recognised under this method where a similar duty has been recognised before and the law should develop ‘incrementally and by analogy with established categories.’⁴⁹

One established category of cases where a duty of care has previously been recognised emanates from the decision in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*⁵⁰ and applies to cases of pure economic loss where there has been an ‘assumption of responsibility’⁵¹ by the defendant. In this case the House of Lords held that a defendant could be under a duty of care for causing pure economic loss to a claimant where there is a ‘special relationship’⁵² between the claimant and defendant, and the defendant has ‘voluntarily accepted or undertaken’⁵³ responsibility for a statement made to the claimant. The advice or statement must be given in circumstances where the defendant ‘knew or ought to have known that the inquirer was relying on him’⁵⁴ and there must be reliance on the advice by the claimant that is reasonable in the circumstances.⁵⁵ This category of cases first developed where negligent misstatements had occurred but now extends to negligent services.⁵⁶

In *McFarlane* it was held that, due to the defendant’s statement that the father’s sperm count was negative and so contraceptive measures were unnecessary the claim fell within the scope of the ‘extended *Hedley Byrne* principle.’⁵⁷ This is quite correct. The damage the claimants suffered was the very type they had gone to see the defendant to prevent and the

⁴⁸ At 618 per Lord Bridge.

⁴⁹ At 635 per Lord Oliver. For a more recent authority supporting this approach see *Customs and Excise Commissioners v Barclays Bank plc* [2006] 1 AC 181. See also Jonathan Morgan ‘The Rise and Fall of the General Duty of Care’ (2006) 22 *Professional Negligence* 206.

⁵⁰ [1964] AC 465.

⁵¹ At 529 per Lord Devlin.

⁵² At 486 per Lord Reid.

⁵³ At 529 per Lord Devlin.

⁵⁴ At 486 per Lord Reid.

⁵⁵ At 486 Lord Reid.

⁵⁶ *Henderson v Merrett Syndicates* [1994] 2 AC 145 at 181 per Lord Goff.

⁵⁷ *McFarlane* at 77 per Lord Steyn.

doctor had made a misrepresentation to them. The doctor-patient relationship is a very close one and the defendant had advised the claimants about what contraceptive precautions they needed to take in future. It is hardly unreasonable for the claimants to rely on the advice of their doctor and they evidently did so, otherwise Catherine would not exist. It would be remarkable if there was not an assumption of responsibility on these facts.⁵⁸

The troubling aspect of this case relates, instead, to how the majority applied the extended *Hedley Byrne* principle. It is well established that it is *not* a requirement of the extended *Hedley Byrne* principle – though it is of course necessary if undertaking the three-stage *Caparo* enquiry – to ask whether imposing a duty of care is fair, just and reasonable.⁵⁹ As Lord Steyn stated in *Williams v Natural Life Health Foods*⁶⁰ – echoing Lord Goff’s comments in *Henderson v Merrett Syndicates*⁶¹ – ‘once a case is identified as falling within the extended *Hedley Byrne* principle, there is no need to embark on any further inquiry whether it is “fair, just and reasonable” to impose liability for economic loss.’⁶²

It is peculiar, then, to find the very same Lord Steyn pronouncing in *McFarlane* that ‘the claim *does not satisfy the requirement of being fair, just and reasonable*.’⁶³ This idea that recovery for the costs of raising a healthy child on the facts of *McFarlane* is unfair, unjust and unreasonable is also echoed by Lord Hope⁶⁴ and Lord Slynn⁶⁵ in the majority.⁶⁶

⁵⁸ This is especially so when one looks at the very broad approach the courts take to determining this. See *Smith v Eric S Bush* [1990] 1 AC 831; *Henderson*; *White v Jones* [1995] 2 AC 207 and *Spring v Guardian Assurance* [1995] 2 AC 296.

⁵⁹ *Caparo* at 618 per Lord Bridge.

⁶⁰ [1998] 1 WLR 830.

⁶¹ [1994] 2 AC 145 at 181.

⁶² *Williams* at 834.

⁶³ *McFarlane* at 83 (my emphasis).

⁶⁴ At 95.

⁶⁵ At 76.

⁶⁶ That said, the latter also believed that there had *not* been an assumption of responsibility for this type of damage. This avoids the trap of eliding the *Caparo* and *Hedley Byrne* categories of cases but is perhaps even more indefensible as one would struggle to find a more archetypal *Hedley Byrne* situation than the facts of *McFarlane*. As Hale LJ (as she then was) stated in *Parkinson v St James and Seacroft University Hospital NHS Trust* [2002] QB 266 at 289: ‘Given that the doctor clearly does assume some responsibility for preventing conception, it is difficult to understand why he assumes responsibility for some but not all of the clearly foreseeable, indeed highly probable, losses resulting.’

Of course it could be argued that *McFarlane* was a novel case and so the *Caparo* method should be utilised. However, if the loss associated with raising a healthy child is accurately classified as pure economic loss and *Hedley Byrne* is applicable – and Lord Steyn maintained that this was the case⁶⁷ – then it is simply not open for judges to deny a duty of care being imposed because doing so is not fair, just and reasonable without re-writing the current approach for establishing the duty of care in negligence. Once the majority held that there was an assumption of responsibility on these facts, then a duty of care should be imposed.

To do otherwise is not merely a narrow problem for one particular form of damage (pure economic loss) under the *Hedley Byrne* doctrine but is contrary to the modern approach to duty of care since *Caparo*. Once a case fits into a category where the existence of a duty of care has already been recognised, the more elusive criteria of whether imposing liability is fair, just and reasonable do not arise.⁶⁸ As Hobhouse LJ (as he then was) stated in *Perrett v Collins* (a personal injury case), ‘a defendant should not be allowed to seek to escape from liability by appealing to some vaguer concept of justice or fairness; the law cannot be re-made for every case.’⁶⁹ Importantly, this approach has been confirmed by more recent cases. In *Customs and Excise Commissioners v Barclays*⁷⁰ Lord Bingham described ‘assumption of responsibility as a sufficient but not a necessary condition of liability, a first test which, if answered positively, may obviate the need for further inquiry.’⁷¹

Accordingly, if questions of whether recovery is fair, just and reasonable are to be applied where there is an assumption of responsibility then several House of Lords cases will

⁶⁷ *McFarlane* at 77. However it could be argued that this loss is not *purely* economic but consequent upon personal injury (see Conaghan, ‘Tort Law and Feminist Critique’, 193). However, this does not affect my argument that the majority failed to fully consider the issue of actionable damage in this case.

⁶⁸ See *Perrett* at 86 per Hobhouse LJ.

⁶⁹ At 90-91.

⁷⁰ [2006] 1 AC 181.

⁷¹ At 190. See also Keith Stanton, ‘Professional Negligence: Duty of Care Methodology in the Twenty First Century’ (2006) 22 *Professional Negligence* 134, 136.

need to be set aside.⁷² Such cases, even if one maintains that they were wrongly decided, are far too well-entrenched to be under-scrutinised in the manner Lord Steyn treats them. By not refusing liability in *McFarlane* on the basis that a healthy child is not *actionable damage* and instead holding that there was no duty of care in such situations, the majority of the House of Lords had to amalgamate the *Caparo* and *Hedley Byrne* approaches to duty of care. Lord Steyn accepted this, stating ‘it ought not to make any difference whether the claim is based on negligence *simpliciter* or on the extended *Hedley Byrne* principle.’⁷³

Given that the *Hedley Byrne* line of cases do not ask whether recovery is fair, just and reasonable whereas such questions are the *raison d’etre* of the *Caparo* test, it is hard to believe that it makes no difference. It could, however, be argued that it would be a good thing for these two tests to be merged. One might prefer a single method of determining duty of care that weighs the policy reasons for and against imposing such a duty. If this sounds familiar it might be because it is a replica of the general approach for determining duty most famously represented by the *dicta* of Lord Wilberforce in *Anns v Merton LBC*.⁷⁴ The courts could hardly have been more emphatic in their rejection of it.⁷⁵ Accordingly, asking whether recovery is fair, just and reasonable when a case already fits under the *Hedley Byrne* line of cases cannot be seen merely as incremental development in the tort of negligence but is instead a radical step that is inconsistent with the retreat from *Anns*.

It should be acknowledged that the majority did consider whether there should be liability in wrongful conception cases in depth. But the way they did so resulted in departures from established principles that were wholly unnecessary. The same result could be obtained by holding that a healthy child is not a recoverable form of loss. No duty of care can exist if

⁷² In *Henderson* Lord Goff stated that the fact that *Hedley Byrne* does not require a determination of whether liability is fair, just and reasonable, was important to the outcome of the case so cases relying on this decision would no longer be good law (at 181).

⁷³ *McFarlane* at 83-84.

⁷⁴ [1978] AC 728 at 751-752.

⁷⁵ See *D & F Estates v Church Commissioners for England* [1989] AC 177, *Leigh and Silavan Ltd v Aliakmon Shipping Co Ltd* [1986] 1 AC 785, and *Murphy v Brentwood District Council* [1991] 1 AC 398.

no damage has been suffered.⁷⁶ For this reason, the better tactic of refusing the parents' claim in *McFarlane* is that of Lord Clyde and Lord Millett. Lord Clyde stated that the issue in the case was 'concerned with the extent of the losses which may properly be claimed in the circumstances of the case.'⁷⁷ In other words, the question is whether the claimants have suffered a form of actionable damage that is recognised by this tort and 'not one of the existence of a duty of care.'⁷⁸

Lord Clyde said that it would be unreasonable that the claimants 'should in effect be relieved of the financial obligations of caring for their child'⁷⁹ by being paid a large amount of damages because this would 'be going beyond what should constitute a reasonable restitution for the wrong done.'⁸⁰ This approach is echoed by Lord Millett who saw the issue as one of 'whether the particular heads of damage claimed, and in particular the costs of maintaining Catherine throughout her childhood, are recoverable in law.'⁸¹

By rejecting the *McFarlane*'s claim under the heading of 'damage' rather than that of 'duty of care' Lord Clyde and Lord Millett avoided the pitfalls that Lord Steyn fell into and were able to refuse liability without merging the *Caparo* and *Hedley Byrne* line of cases. While one could disagree – and many do⁸² – with the outcome of their judgments, it is a more coherent way of reaching it. In future, judges should determine what (and whether) damage has been suffered before addressing duty of care questions.

⁷⁶ See *Caparo* at 627 per Lord Bridge. It might be said that just because no damage has been suffered does not mean that the doctor does not have a duty to take care. However, this is a misunderstanding of the duty concept in negligence. As Dan Priel has argued negligence law does not treat violations of duties of care as behaviours that should be avoided but as behaviours for which one should pay damages when loss is caused by such violations – 'Tort Law for Cynics' (2014) 77 *Modern Law Review* 703, 708. Provided one does not cause damage then one can behave as carelessly as one likes according to this tort. C.f. Nicholas McBride, 'Duties of Care – Do They Really Exist?' (2004) 24 *Oxford Journal of Legal Studies* 417 for the contrary view.

⁷⁷ *McFarlane* at 102.

⁷⁸ At 99 per Lord Clyde.

⁷⁹ At 105.

⁸⁰ At 105.

⁸¹ At 108 per Lord Millett.

⁸² See Prialux 'Joy to the World!', Adjin-Tettey, 'Claims of Involuntary Parenthood' and Chico, 'Wrongful Conception', 154.

One problem raised by this approach, though, is that the costs of raising a healthy child could be seen not as a new form of (irrecoverable) damage but as merely a claim for pure economic loss. It might be said that as it is well-established that pure economic loss is a form of actionable damage in negligence (albeit one that is only recoverable in exceptionally limited circumstances)⁸³ if recovery is to be denied it has to be done under the duty heading. This arguably indicates that the flawed reasoning in *McFarlane* cannot be explained away on the basis that the majority did not refuse liability under the damage heading – this option was arguably not open to them.

Yet this is to take a very broad-brush analysis of the damage present in *McFarlane*. Economic loss may have occurred but applying this logic one could say that practically every case in negligence is one for pure economic loss – the claimants usually are asking for money, after all. As *Winfield and Jolowicz* states, ‘if a car is destroyed, that is ‘economic’ in the sense that the owner’s assets are thereby diminished, but in legal terms it is classified as damage to property and the owner is entitled to its value as damages.’⁸⁴ A healthy child does not comfortably fit within the currently established categories of personal injury, property damage or pure economic loss and so *McFarlane* should have been decided on the basis of whether a new form of actionable damage (a healthy child) should be recognised. It was open for the courts to either recognise this or not. Accordingly, denying recovery on the basis that no damage had been suffered was the preferable approach to take. The case is a prime example of the distortions in the law that occur when judges do not thoroughly examine the concept of damage in negligence and its relationship with the duty of care concept.

⁸³ See *Simaan Contracting Co v Pilkington Ltd.* [1988] 1 QB 758 and *Murphy v Brentwood District Council* [1991] 1 AC 398.

⁸⁴ W.V.H. Rogers *Winfield and Jolowicz on Tort* 18th Edn. (London: Sweet & Maxwell, 2010) 218.

4.2.2. *Rees v Darlington Memorial Hospital NHS Trust*

Problems caused by a failure to consider the concept of damage are also apparent in another wrongful conception case, *Rees v Darlington Memorial Hospital NHS Trust*.⁸⁵ Ms Rees was severely visually disabled. She feared that her poor sight would prevent her from being able to care for a child and so underwent a sterilisation, which was negligently performed by the defendant hospital. As a result Ms Rees gave birth to a healthy son and claimed for the costs associated with raising the child and, if this should be refused, the *extra costs* she would incur from raising a healthy child attributable to her disability.

The case followed *Parkinson v St James and Seacroft University Hospital NHS Trust*,⁸⁶ where, after being sterilised, a mother gave birth to a disabled child as a result of her doctor's negligence. The Court of Appeal held that the costs of raising a healthy child were irrecoverable but that the *extra costs* associated with raising a disabled child could be awarded (one takes the costs of raising a *disabled child* and subtracts the costs of raising a *healthy child* to arrive at the appropriate amount).⁸⁷ Similarly, the Court of Appeal in *Rees*,⁸⁸ following *Parkinson*, said that although the full costs of raising a healthy child were irrecoverable, the extra costs associated with raising a child due to the claimant's disability could be awarded (one takes the costs of a *disabled parent* raising a healthy child and subtracts the cost of an able-bodied parent raising a *healthy child*).⁸⁹

The House of Lords in *Rees*, sitting as a panel of seven, refused to utilise the *Practice Statement*⁹⁰ to reverse *McFarlane* and held that it was still good law. As with the mother in *McFarlane*, Ms Rees was entitled to damages relating to the pregnancy and birth. Their

⁸⁵ The discussion of this case here will be brief as some of the issues associated with it will take place in my analysis of *Chester* in the next section.

⁸⁶ [2002] QB 266.

⁸⁷ At 283 per Brooke LJ.

⁸⁸ *Rees v Darlington Memorial Hospital NHS Trust* [2003] QB 20 (Waller LJ dissenting).

⁸⁹ See Roderick Bagshaw, 'Children as Actionable Damage' (2004) 15 *Kings College Law Journal* 117, 118-119 for an interesting discussion of this issue.

⁹⁰ [1966] 1 WLR 1234.

Lordships, overruling the Court of Appeal, unanimously reaffirmed that the costs of raising a healthy child are irrecoverable and held (Lord Steyn, Lord Hutton and Lord Hope dissenting on this point) that the claimant was unable to recover the extra costs referable to her disability. The circumstances of the mother make no difference.⁹¹ Yet, the majority also held that since the claimant was a victim of a legal wrong which had denied her the opportunity to live her life in the way she had planned, she should receive a conventional award of £15,000. This was described as a ‘gloss’ on *McFarlane*.⁹²

Much of the criticism of this case is an echo of that levelled at *McFarlane* that the full costs of raising a child, healthy or otherwise, should be awarded.⁹³ These will not be reiterated here. A more fundamental difficulty with *Rees* is that by giving the claimant a conventional sum of £15,000 with little accompanying analysis of the justifications for, or wider implications of, such an award, the House of Lords have, yet again, side-lined the concept of damage in an important medical negligence case.

For it was uncertain whether their Lordships in *Rees* were disregarding the necessity for damage to be suffered *at all* – in effect making the tort of negligence actionable per se – or recognising a new form of damage (that of lost autonomy). The former view perceives the conventional sum as vindicating a claimant’s rights rather than compensating them for a head of loss.⁹⁴ There is evidence to support this in the judgments. Lord Bingham, for example,

⁹¹ The House of Lords did not overrule *Parkinson* and so the extra costs associated with raising a disabled child are still recoverable.

⁹² *Rees* at 319 per Lord Nicholls.

⁹³ See Priaulx, *The Harm Paradox* and Adjin-Tettey, ‘Claims of Involuntary Parenthood.’

⁹⁴ See David Pearce and Roger Halson, ‘Damages for Breach of Contract: Compensation, Restitution and Vindication’ (2008) 28 *Oxford Journal of Legal Studies* 73, 88 and Nicholas McBride and Roderick Bagshaw, *Tort Law* 4th Edn. (London: Pearson, 2012) 826. It could be argued that this interpretation of *Rees* is relatively uncontroversial when one considers the approach the courts take in mesothelioma cases (see *Sienkiewicz v Greif Ltd* [2011] 2 AC 229). In such circumstances it might be argued that the law allows a claimant to recover damages even though the defendant has not caused them damage. I would reject an analogy between these cases and *Rees*. Unlike the interpretation of *Rees* being considered, the claimants in the mesothelioma cases are actually suffering from a form of actionable damage – mesothelioma – and so such cases do not render the tort of negligence actionable per se. Instead they concern modified forms of causation when scientific uncertainty means we do not know who actually *caused* the damage.

states that the conventional award is ‘not be intended to be compensatory.’⁹⁵ Donal Nolan has put forward persuasive reasons why if *Rees* is interpreted in such a manner the decision is contrary to principle. He argues that claimants who want their rights to be vindicated without proof of damage in the law of tort should use the more appropriate vehicle of the trespass torts, not negligence.⁹⁶

Yet *Rees* can be construed in another way. Nolan maintains that the judgments are compensatory in character and that the conventional award was intended to compensate parents for their lost autonomy and that *Rees* recognises this as a new form of damage.⁹⁷ Support for this view can also be found in the judgments, with Lord Bingham justifying the conventional award on the basis that the mother had ‘been denied, through the negligence of another, the opportunity to live her life in the way that she wished and planned’⁹⁸ and Lord Scott stating that the award is to ‘*compensate* the respondent for being deprived of the benefit that she was entitled to expect.’⁹⁹

Despite this being the better interpretation, the fact that the conventional award could reasonably be interpreted as threatening to turn negligence into a tort that is actionable per se hardly inspires confidence in their Lordships reasoning and handling of the issue of actionable damage in this case. The recognition of this new head of loss was subject to insufficient analysis (as will become apparent in my discussion of *Chester* below).

Yet even if the conventional sum is not merely intended to vindicate rights without any actionable damage having being suffered, it has not been free from criticism. Singer, for example, believes that the creation of the award ‘raises deep questions about the acceptable

⁹⁵ *Rees* at 317 per Lord Bingham. See also Lord Millett’s comment (at 349) that the right to limit the size of one’s family is ‘regarded as an important human *right* which should be protected by law.’

⁹⁶ Nolan, ‘New Forms of Damage in Negligence’ 79.

⁹⁷ *Ibid.* See also Priaulx, *The Harm Paradox* and Chico, *Genomic Negligence*.

⁹⁸ At 317.

⁹⁹ At 356 (my emphasis).

limits of judicial intervention.¹⁰⁰ She argues that ‘There is no precedent enabling judges to pluck out a figure to constitute a lump sum to be awarded in cases of specific types of damage.’¹⁰¹

However, it is not the case that no such precedent exists, as the House of Lords decision in *Benham v Gambling*¹⁰² demonstrates. This decision concerned ‘loss of expectation of life,’ which, prior to its abolition by the enactment of section 1(1)(b) of the Administration of Justice Act 1982, was a head of loss in negligence. However the calculation of such awards proved troublesome. As Lord Pearce stated in *West v Shepherd*:¹⁰³ ‘the wide divergence of views as to the value of our leases of life...led to awards which varied very widely and unpredictably.’¹⁰⁴ To resolve this, in *Benham*, the House of Lords awarded a conventional sum of £200 as ‘fixing a reasonable figure to be paid by way of damages for the loss of a measure of prospective happiness’¹⁰⁵ in future claims for this type of damage. This was seen as ‘imposing order on chaos in that particular aspect of the law.’¹⁰⁶ This decision demonstrates that, whatever other criticisms may be levelled at *Rees*, a conventional sum is not unheard of in the law of damages.¹⁰⁷

If one looks at the circumstances where conventional sums have been awarded it is in situations where an assessment of the value the damage in each individual case by the courts would be inappropriate. It would be unseemly for the courts to hold that one person’s lost years are worth more than another’s or have grieving relatives cross-examined on the level of

¹⁰⁰ Samantha Singer, ‘Case Note: *Rees v Darlington Memorial Hospital NHS Trust*’ (2004) 26 *Journal of Social Welfare and Family Law* 403, 413.

¹⁰¹ *Ibid.*, 413.

¹⁰² [1941] AC 157.

¹⁰³ [1964] AC 326.

¹⁰⁴ At 367.

¹⁰⁵ *Benham v Gambling* [1941] AC 157 at 166 per Viscount Simon.

¹⁰⁶ *West & Son Ltd v Shepherd* [1964] AC 326 at 367 per Lord Pearce.

¹⁰⁷ The same statute that abolished loss of expectation of life as a head of loss (Administration of Justice Act 1982, s 3) inserted a provision into the Fatal Accidents Act 1976 permitting damages for bereavement for the spouse of the deceased or, if the deceased was a minor, the parents (Fatal Accidents Act 1976, s 1A). The severity of bereavement may vary from person-to-person but, regardless of this, £12,980 is awarded for successful bereavement claims under the Act. While this is statutory and not part of the tort of negligence, it demonstrates that conventional sums are also an established part of tort law damages.

bereavement they are suffering. The courts are keen to avoid scenarios where a premium is put on protestations of misery and a long face is the only safe passport to a large award.¹⁰⁸ Similarly, it is not difficult to imagine the chaos (not to mention undermining of *McFarlane*) that would ensue if people were expected to prove something as elusive as how much autonomy they have lost as a result of having a child. Indeed, autonomy is an indivisible concept. Once a person's self-regarding capacitous choices have been restricted (and no matter to what extent they have been) then their autonomy has been interfered with.¹⁰⁹ People have autonomy in virtue of being capable of making choices.¹¹⁰ If individuals have an interest in autonomy then it is inconsistent for the law to state that some people's autonomy is worth more than others. A conventional sum may thus be an appropriate response to this kind of damage. *Pace* Singer, if this aspect of *Rees* has its shortcomings, it is not because such awards are beyond the acceptable limits of judicial intervention or without precedent.

Furthermore Singer's contention that judges do not pluck figures out of the air to award lump sums in cases of specific types of damage does not survive much scrutiny. In personal injury cases the courts openly acknowledge that 'there is no pecuniary guideline which can point the way to a correct assessment'¹¹¹ and that all they can do is 'award sums which must be regarded as giving reasonable compensation'¹¹² and 'endeavour to secure some uniformity in the general method of approach.'¹¹³ They are concerned that awards for similar types of injury are consistently applied but as *Street on Torts* states 'Non-pecuniary damages differ from pecuniary damages in that there is not even any suggestion of a

¹⁰⁸ *West* at 369 per Lord Pearce.

¹⁰⁹ See Jonathan Glover, *Causing Death and Saving Lives* (London: Penguin, 1977) 74, John Harris, *The Value of Life: An Introduction to Medical Ethics* (London: Routledge & Kegan Paul, 1985), Søren Holm, 'Autonomy' in Ruth Chadwick (Ed.), *Encyclopaedia of Applied Ethics Volume 1* (San Diego: Academic Press, 1998) 267.

¹¹⁰ See Glover, *ibid.* See also sections 2.1-2.3 of this thesis.

¹¹¹ *Lim Poh Choo v Camden and Islington Area Health Authority* [1980] AC 174 at 189 per Lord Scarman.

¹¹² *West* at 346 per Lord Morris.

¹¹³ *Ibid.*

scientific method of deciding what sum should be awarded.¹¹⁴ To believe that courts do otherwise is to buy into the fiction that, say, the complete loss of sight in one eye is *objectively* worth between £35,200 and £39,150.¹¹⁵ If *Rees* is to be indicted on such a basis then the entire law relating to general damages can be equally condemned.

However, while the above criticisms of *Rees* may be unwarranted, the lack of analysis by the majority for introduction of this new head of loss means there is much force in Lord Hope's comment that 'The lack of any consistent or coherent *ratio* in support of the proposition [of introducing the conventional award] in the speeches of the majority is disturbing'¹¹⁶ and Lord Steyn's belief that examination of the issue was ' cursory and unaccompanied by research.'¹¹⁷ The categories of negligence might never be closed but it would be helpful if the courts actually explained why they were recognising a new form of damage and how it should apply and be compensated in future analogous cases. This is something the majority in *Rees* failed to do. The fact that the conventional sum could reasonably be seen as making the tort of negligence actionable per se provides a stark example of the potential pitfalls that occur when judges fail to provide a thorough analysis of the concept of damage in negligence cases. If a principled reading of *Rees* can be given, it is not due to the majority's judgments.

Assuming, however, that diminished autonomy *is* capable of being actionable damage in negligence,¹¹⁸ the problems with *Rees* do not end there. The approach of recognising lost autonomy as a form of actionable damage in *Rees* is possibly inconsistent with that taken in *Chester v Afshar* and this divergence stems from their Lordships overlooking the issue of

¹¹⁴ John Murphy and Christian Witting, *Street on Torts* 13th Edn. (Oxford: Oxford University Press, 2013) 718.

¹¹⁵ Judicial College, *Guidelines for the Assessment of General Damages in Personal Injury Cases* (Oxford: Oxford University Press, 2012) 15.

¹¹⁶ *Rees* at 335.

¹¹⁷ At 327.

¹¹⁸ See ch 7.

damage. I will discuss this aspect of the reasoning in *Rees* together with my analysis of *Chester*.

4.2.3. *Chester v Ashfar*

In *Chester v Afshar* the claimant, Miss Chester, suffered from back pain so visited the defendant consultant, Mr Afshar, who recommended surgery. He failed, however, to warn her about a small risk of cauda equina syndrome (paralysis) inherent in the operation. This risk would be present no matter how expertly the operation was performed and liable to occur at random. Based on his advice, Miss Chester underwent the procedure and, although the surgery itself was not carelessly performed, she suffered from the syndrome.

Miss Chester admitted that she could not say that she would *never* have undergone the operation even if she had been warned of the risks.¹¹⁹ Instead, she said that she would not have had it at the time that she did but would have instead wanted to discuss the matter with others and explore alternatives. She conceded that she may have chosen to have the surgery on a different day. As a result of this concession, it was arguable that she could not show that Mr Afshar's carelessness in failing to warn her of the risks had actually *caused* the syndrome because it might have occurred anyway.

The House of Lords found in Miss Chester's favour (Lord Bingham and Lord Hoffmann dissenting). They held that even though the claimant could not establish that the defendant had *caused* her back pain, a departure from conventional causation rules was justified due to the fact that her right to make her own decision about her treatment had been interfered with. This reasoning, I will argue, confuses several issues and such confusion is generated by the House of Lords not undertaking a clear assessment of the damage suffered

¹¹⁹ If she could have said this her claim would have been successful. See *Sidaway v Board of Governors of the Bethlem Royal Hospital* [1985] AC 871.

in this case. As a result, problems arise in the court's treatment of causation and quantification of loss.

Below I will explore two different interpretations of *Chester*. The first is that the real damage in the case was Miss Chester's diminished autonomy and the cauda equina syndrome merely went to the assessment of damages. On this approach, if autonomy is the damage, the decision in *Chester* is inconsistent with the outcome in *Rees*. It must be emphasised that the purpose of this article is not to consider whether autonomy *ought* to be a form of damage in negligence or analyse the various different conceptions of autonomy.¹²⁰

The second interpretation is that the cauda equina syndrome *itself* was the damage. While this understanding would be consistent with *Rees*, it is still beset with considerable problems due to the House of Lord's approach to causation. Either way, the case supports the thesis that the result of judges not explicitly analysing the concept of damage is poor reasoning and the distortion of legal principles.

Autonomy as damage

It is arguable that the real damage in *Chester* was the loss of autonomy that Miss Chester suffered. If we accept that autonomy involves making decisions for oneself and being the author of one's own life,¹²¹ by not being given sufficient information about the surgery the claimant was denied the opportunity to live her life as she wished.

There is evidence of this in the judgments. Lord Steyn laid emphasis on Miss Chester's 'right of autonomy and dignity,'¹²² saying it 'can and ought to be vindicated by a narrow and modest departure from traditional causation principles.'¹²³ He reiterated that '[i]n

¹²⁰ See Nolan, 'New Forms of Damage in Negligence' and 'Damage in the English Law of Negligence'; Chico, *Genomic Negligence*; Prialux, *The Harm Paradox*; and ch 5 and 7 of this thesis.

¹²¹ Holm, 'Autonomy'.

¹²² *Chester* at 146.

¹²³ *Ibid.*

modern law medical paternalism no longer rules.¹²⁴ Lord Walker¹²⁵ and Lord Hope agreed.¹²⁶ Indeed, even Lord Hoffmann (dissenting) believed that there might be a case – albeit one he rejected – for a ‘modest solatium’¹²⁷ being awarded for Miss Chester’s diminished autonomy. If these statements are not an overt recognition of autonomy as a form of damage in negligence, they are certainly strongly indicative that, as Devaney has noted, ‘the primary concern of the majority...was to ensure that patient autonomy is respected.’¹²⁸

Some writers go further.¹²⁹ For example, Amirthalingham argues that *Chester* recognises diminished autonomy as a form of damage in negligence.¹³⁰ He states: ‘In effect, the majority implicitly recognized the loss of the patient’s right as the gist of negligence; the physical injury, which turned on the patient’s response, merely went to the quantification of the loss.’¹³¹

If this is a correct interpretation of *Chester* then the reasoning in the case is problematic. It would mean that not only had their Lordships ignored *the* key case that possibly recognises autonomy as a form of damage – *Rees v Darlington* does not feature in any of the judgments – but that they had arrived at a result that is arguably inconsistent with it. For while Ms Rees’s damages for the interference with her autonomy were limited to a conventional sum of £15,000, Miss Chester was entitled to full recovery for the consequences of the interference with hers (the costs of the cauda equina syndrome). If, after all, the House of Lords has previously valued lost autonomy as being worth £15,000 and this is, as some writers maintain, the damage that Miss Chester has suffered then the compensation she was given far exceeds this amount. Although details are absent, one could speculate that Lord

¹²⁴ At 143.

¹²⁵ At 163.

¹²⁶ At 153-154.

¹²⁷ At 147.

¹²⁸ Sarah Devaney, ‘Autonomy Rules Ok’ (2005) 13 *Medical Law Review* 102, 107.

¹²⁹ See Pearce and Halson, ‘Damages for Breach of Contract’ 98 and Murphy and Witting, *Street on Torts*, 159.

¹³⁰ Kumaralingam Amirthalingham, ‘Causation and the Gist of Negligence’ (2005) 62 *Cambridge Law Journal* 64 (2005) 32 and ‘The Changing Face of the Gist of Negligence’ in Neyers *et al* (Eds.), *Emerging Issues in Tort Law*.

¹³¹ Amirthalingham, ‘Causation and the Gist of Negligence’, 34.

Hoffmann's modest solatium might have been more consistent with the decision in *Rees* as it would likely be a standard amount of damages for interferences with autonomy across the tort of negligence (not unlike the conventional award).¹³² As things stand, the House of Lords appear not to be treating like cases alike and this may mean that Miss Chester was overcompensated.

However, if it is accepted that the two results are inconsistent, it may be *Rees*, not *Chester*, that was incorrectly decided on this issue. Lord Hope in his dissenting judgment in *Rees* stated: 'The splitting up of a claim of damages into these two parts in order to allow recovery of one part and deny recovery of the other part is a novel concept and it seems to me...to be contrary to principle.'¹³³ By allowing Ms Rees to recover the general damages for her lost autonomy (the £15,000 conventional award) but not the special damages (presumably the costs of raising a healthy child) the House of Lords may have acted contrary to principle in *Rees* and in future cases it might be argued that the full costs of infringements with patient autonomy ought to be recoverable as they were in *Chester*. This is what Chico argues when she states:

If autonomy is of such significant value as the House of Lords suggested in *Rees* and *Chester*, then it follows that legal protection for autonomy should be comprehensive and consistent. Comprehensive protection would require legal recognition of the whole value of autonomy.¹³⁴

Yet *pace* Lord Hope's comment that the separating of general and special damages in *Rees* is contrary to principle, a strong argument can be made that it is no more unprincipled than allowing recovery for one type of damage that arises from a negligent act but not other heads of loss that arise from the same event. The courts have long done this. In *Spartan Steel and*

¹³² *Chester* at 147.

¹³³ *Rees* at 334.

¹³⁴ Chico, *Genomic Negligence*, 134.

Alloys Ltd v Martin & Co Ltd,¹³⁵ for example, the electricity was negligently cut off in a factory and a claim was made for damage to property and pure economic loss. It was held that one type of damage was recoverable (the property damage and the consequent losses associated with it) and another was not (the pure economic loss).

The losses consequent on Ms Rees's diminished autonomy (namely, the full costs of raising a child) were held to be irrecoverable for policy reasons. Awarding her a conventional award but not the consequent losses is scarcely different to the court's approach in *Spartan Steel* of awarding damages for property damage but none of the pure economic losses flowing from the same negligent act.¹³⁶ Policy reasons preclude awarding *all* the foreseeable damage in some cases.

Conversely, in Miss Chester's case there are no policy reasons preventing recovery for the consequences of her diminished autonomy (namely, the costs associated with cauda equina syndrome). Whereas the courts can hold that a healthy child is not actionable damage, they can scarcely say the same about paralysis. If anything, on this analysis, Miss Chester was *undercompensated*. If autonomy is the real damage in *Chester* then, following *Rees*, one could argue she should have received £15,000 for her diminished autonomy in addition to the costs consequent on it.

That said, if interferences with patient autonomy is accepted as a form of actionable damage it is far more likely that the courts would only award a conventional sum to those who can show that their autonomy has been interfered with. If the claimant is suing for violated autonomy and the consequent personal injury then it might be questioned why they have not brought an action where their personal injury is the gist of the action. There may be restrictions on a personal injury claim: the claimant might be able to show that their autonomy has been interfered with (and that they have suffered personal injury as a result)

¹³⁵ [1973] 1 QB 27.

¹³⁶ See also *Muirhead v Industrial Tank Specialities Ltd* [1986] QB 507.

but cannot show that the defendant has *caused* their personal injury. An example of this could be seen if we modified the facts in *Chester* so that Miss Chester would definitely have had the operation *at exactly the same time* even if Mr Afshar had informed her of the risks of cauda equina syndrome and the risks eventuated. In such circumstances she would be able to show that her autonomy has been interfered with (as she has been denied the ability to make her own choice) but not that he had caused her any injury (as but for his carelessness she would still have had the operation at the same time and suffered from the syndrome). Allowing consequent losses in such circumstances will either undermine the restrictions placed in personal injury actions or, if there are no restrictions because the claimant *can* show that the defendant caused their injury, be wholly superfluous because the claimant could bring a personal injury action anyway.

However, the above is speculation. It is not clear as to whether or when losses consequent upon a claimant's lost autonomy are recoverable and the judgments in *Rees* and *Chester* do not give a coherent picture as to how diminished autonomy is to be quantified. Until this is clarified, the consistency of the two decisions is unclear. While the quantification of lost autonomy is not an insurmountable hurdle, such inconsistencies provide further evidence of the uncertainties that arise when the courts do not properly consider the issue of damage in medical negligence cases. A greater discussion by judges as to what an interference with autonomy consists of would enable us to determine whether the two decisions can be reconciled with one another and how autonomy should be quantified. This may be a problem in future cases because the courts continue to perceive autonomy as something that either already is, or might be capable of being, recognised as a form of damage protected by the tort of negligence. For example, Baroness Hale stated in the recent Supreme Court decision of *Montgomery v Lanarkshire Health Board*,¹³⁷ 'It is now well

¹³⁷ [2015] UKSC 11

recognised that the interest which the law of negligence protects is a person's interest in their own physical and psychiatric integrity, an important feature of which is their autonomy, their freedom to decide what shall and shall not be done with their body.'¹³⁸ The poor reasoning regarding lost autonomy in *Chester* and *Rees* may therefore continue to cause doctrinal troubles for the tort of negligence.

The cauda equina syndrome as damage

Problems with quantification aside, one upside of the above categorisation of *Chester* is that if lost autonomy *is* the damage in *Chester* then the issue of causation is not a problem. Once it is accepted that Mr Afshar breached his duty of care and deprived Miss Chester of deciding when to have her operation, he diminished her autonomy. *But for* his actions her right to choose would not have been limited. Whatever the merits of this view though, the fact that Miss Chester's damages represented the full costs of her paralysis and not merely a conventional award might indicate that the gist of the action was her personal injury and that the issue in the case is 'essentially one of causation.'¹³⁹

Yet even on this alternative interpretation, the case still illuminates the confusion that occurs when judges fail to robustly assess the concept of actionable damage and subsume such concerns under other headings of the negligence inquiry.

The standard approach to factual causation is the 'but for' test.¹⁴⁰ Under this, the claimant is 'required to discharge the burden of showing that the breach of which he complains caused the damage for which he claims and to do so by showing that but for the breach he would not have suffered the damage.'¹⁴¹ If this cannot be established then, unless the claimant can demonstrate that their case fits into one of a limited number of exceptional

¹³⁸ At [108]

¹³⁹ *Chester* at 148 per Lord Hope.

¹⁴⁰ *Barnett v Chelsea and Kensington Hospital Management Committee* [2969] 1 QB 428.

¹⁴¹ *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32 at 44 Lord Bingham.

rules,¹⁴² causation has not been proven. If factual causation can be demonstrated, one will then look to whether the damage was too remote¹⁴³ or whether any intervening acts broke the chain of causation¹⁴⁴ and, if this is not the case, the claimant will have fulfilled the causation requirement of a negligence claim.

If we ask ‘But for Mr Afshar’s negligence would Miss Chester have suffered from paralysis?’ the answer is no. She would not have undergone the operation on the day that she did. She might, however, have undergone it at a different time. What would happen if she did undertake it at a different time? She would have had a 1-2 per cent chance of suffering from the injury. In other words, she would have had at least a 98 per cent chance of having a successful operation and not suffering any harm.¹⁴⁵ Stapleton correctly states that if it could be established that Miss Chester fell within the unfortunate 1-2 per cent then she would be unable to show that Mr Afshar’s negligence caused the syndrome.¹⁴⁶ It would mean she was always doomed to suffer from paralysis if she had the operation. However, the evidence does not specify this. All that can be gleaned from the statistics in *Chester* is that the syndrome was likely to strike at random in 1-2 per cent of such procedures.

One can dispute the utility of statistical evidence in such circumstances.¹⁴⁷ But what one cannot do, as O’Sullivan convincingly argues, is ‘use the powerful human instinct to misinterpret statistics with the benefit of hindsight to assist in resolving the *Chester*

¹⁴² Space constraints prevent a full description of these exceptions being undertaken here but several are described in Ariel Porat and Alex Stein, *Tort Liability Under Uncertainty* (Oxford: Oxford University Press, 2001). For a more recent exception see *Fairchild*.

¹⁴³ See *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co (The Wagon Mound No 1)* [1961] AC 388 and *Overseas Tankship (U.K.) Ltd v The Miller Steamship Co and Another (The Wagon Mound No 2)* [1967] 1 AC 617.

¹⁴⁴ See, e.g. *Knightley v Johns* [1982] 1 WLR 349.

¹⁴⁵ Jane Stapleton ‘Occam’s Razor Reveals an Orthodox Basis for *Chester v Afshar*’ (2006) 122 *Law Quarterly Review* 430. C.f. Tamsyn Clark and Donal Nolan, ‘A Critique of *Chester v Afshar*’ (2014) 34 *Oxford Journal of Legal Studies* 659, 670-673.

¹⁴⁶ Stapleton, ‘Occam’s Razor’, 430.

¹⁴⁷ *Gregg* at 186 per Lord Nicholls.

problem.’¹⁴⁸ Just because Miss Chester suffered the damage does not mean that she would have suffered it at another time. There was a 98-99 per cent chance that she would not.

Given this 98-99 per cent chance it is more likely than not that she would have avoided the damage.¹⁴⁹ Legal causation is even less of an issue: the damage was foreseeable because it was the very harm that Mr Afshar had a duty to warn Miss Chester about and no acts had broken the chain of causation. Conventional principles therefore indicate Miss Chester could establish that Mr Afshar’s breach of his duty of care had caused her cauda equina syndrome.

Indeed, Lord Hope came close to acknowledging that Miss Chester could succeed under traditional causation jurisprudence, describing the but for test as being ‘easily satisfied.’ However, like the rest of the majority in *Chester* he believed that Miss Chester could not establish her case according to ordinary principles and that a special exception was required because ‘[t]he risk was not increased, nor were the chances of avoiding it lessened, by what Mr Afshar failed to say about it.’¹⁵⁰ This was the basis on which the minority in *Chester* rejected her claim and this view has also gained academic support.¹⁵¹ The majority and minority merely differed as to whether causation was required in such circumstances or whether Miss Chester should not recover at all.

The question that needed to be addressed in *Chester* is whether it is a requirement of the causal inquiry in negligence for the defendant to have increased the risks that damage would occur. On the one hand, while cases such as *McGhee v National Coal Board*¹⁵² and

¹⁴⁸ Janet O’Sullivan, ‘Causation and Non-Disclosure of Medical Risks – Reflections on *Chester v Afshar*’ (2003) 19 *Professional Negligence* 370, 377.

¹⁴⁹ For a more detailed version of this argument see Stapleton, ‘Occam’s Razor’. C.f. Clark and Nolan, ‘A Critique of *Chester v Afshar*’, 670-673.

¹⁵⁰ *Chester* at 161 per Lord Hope.

¹⁵¹ See *Chester* at 141 per Lord Bingham and at 147 per Lord Hoffmann, Foster, ‘It Should Be, Therefore It Is’; Robert Stevens ‘An Opportunity to Reflect’ (2005) 121 *Law Quarterly Review* 189; Green, ‘A Game of Doctor’s and Purses’ and Clark and Nolan, ‘A Critique of *Chester v Afshar*’, 664-665.

¹⁵² [1973] 1 WLR 1.

*Fairchild v Glenhaven Funeral Services Ltd*¹⁵³ have created exceptions to the but for test by deeming an increase in risks *sufficient* for causation to be established in limited circumstances, it is unclear whether an increase in risks is *necessary* to establish causation. It could be said that once the ‘but for’ test is met and the questions of remoteness and intervening acts have been resolved then the defendant has caused the claimant’s damage. If this is true then Mr Afshar would have caused Miss Chester’s cauda equina syndrome under conventional principles.

However, this method would result in defendants being liable for damage that is merely coincidental.¹⁵⁴ As Green states: ‘whilst Mr Afshar was negligent, and Miss Chester damaged, the two were not connected in the way this axiom anticipates. The fact that both the negligence and the damage occurred within the same factual matrix was no more than coincidental.’¹⁵⁵ The difficult question that the House of Lords needed to address was whether conventional causation principles require a defendant to increase the risk of harm to the claimant in order to be held liable. If it does, then the decision is contrary to principle.

On any reading, the case illustrates the problems that occur when judges do not have a clear idea of what the damage being claimed is. Understandable confusion has arisen as to what the gist of the case actually was – the interference with autonomy or the cauda equina syndrome. This allows judges to take advantage of the ambiguities as to what damage has occurred in order to avoid a robust assessment of contentious issues in negligence.

After all, if the damage *was* Miss Chester’s diminished autonomy then their Lordships would have had to explain when this new head of damage would be recoverable outside of the wrongful conception cases and how it should be quantified. Such questions do not arise if

¹⁵³ [2003] 1 AC 32.

¹⁵⁴ See Clark and Nolan, ‘A Critique of *Chester v Afshar*’.

¹⁵⁵ Sarah Green ‘*Chester v Afshar*’ in Jonathan Herring and Jesse Wall (Eds.), *Landmark Cases in Medical Law* (Hart forthcoming), kindly sent by personal correspondence.

the damage is the cauda equina syndrome and so their Lordships were able to sidestep such discussions.

Likewise, if the damage is the cauda equina syndrome and the usual tests of causation are *not* fulfilled then the majority would have had to justify why protecting autonomy justifies a departure in these circumstances but not in others. Autonomy may be an important value but it surely does not mean that established rules can be trampled over (otherwise Ms Rees would have been able to recover for the full costs of raising a healthy child as her autonomy had been interfered with). Their Lordships were able to exploit the fact that causation would have not been an issue if the damage was lost autonomy to disregard the causation requirement on these facts or avoid a robust assessment of whether it should be the law that a defendant must increase the risk of harm under normal rules. This equivocation has its downsides, though, because it possibly blinded their Lordships to the fact that Mr Afshar had caused the cauda equina syndrome under conventional principles. The reasoning of this case, as a result, leaves much to be desired.

4.3. Restoring Clarity

Many of the problems with *McFarlane*, *Rees* and *Chester* stem, I have argued, from their Lordships' failure to fully address issues relating to the nature of the damage suffered in each case and whether such damage is actionable in negligence. Yet, it should be acknowledged that not all recent medical negligence cases take a cursory approach to the issue of damage. The decision in *Gregg v Scott*¹⁵⁶ concerning whether a loss of a chance of a more favourable outcome could be actionable damage thoroughly considered the issue and, as a result, is a much better reasoned case than those analysed above.

¹⁵⁶ [2005] 1 AC 176.

In *Gregg v Scott* the claimant, suffering from non-Hodgkin's lymphoma, alleged that had he been referred to hospital by the defendant GP at an earlier date there would have been a high likelihood of a cure. However, due to the defendant's carelessness, by the time treatment commenced his chances of recovery, defined as surviving for a period of ten years, had fallen below 50%.

At trial the judge held that the defendant's delay in diagnosis had reduced the claimant's chances of surviving for ten years from 42 per cent (if he had been treated properly) to 25 per cent. As it was *not* more likely than not that the claimant would have survived even if he had been treated properly, it could not be shown that the defendant had caused the claimant's injury. The claimant had failed to show that his outcome would have been materially different if he had been treated promptly.

He sued for damages representing his loss of a chance of survival for ten years but was unsuccessful in the House of Lords (Lord Nicholls and Lord Hope dissenting). The (bare) majority held that unlike in claims for economic loss, a claimant cannot sue for the reduction of a chance of a favourable outcome in personal injury claims.¹⁵⁷

For present purposes, the case is important as all of their Lordships took a thorough assessment of whether and, if so, what damage had been suffered. This is in contrast to the earlier decision of *Hotson v East Berkshire AHA*,¹⁵⁸ where the issue of whether a loss of a chance of a full recovery is a form of actionable damage was disguised behind issues of causation. In *Hotson* the claimant was a 13 year old who fell from a tree, injuring his hip. He was not treated correctly due to the negligence of the defendant and, as a result, developed avascular necrosis. There was a 75% chance that he would have suffered this injury anyway due to the fall and only a 25% chance that the defendant had caused this injury. The claimant

¹⁵⁷ On this issue, Helen Reece's excellent article 'Losses of Chances in the Law' (1996) 59 *Modern Law Review* 188 remains a persuasive justification of when lost chances can be compensated. More recently see Lord Neuberger, 'Loss of a Chance and Causation' (2008) 24 *Professional Negligence* 206.

¹⁵⁸ [1987] AC 750.

in *Hotson* could not therefore show that the injury was *caused* by the defendant under conventional causation principles: it was not the case, on the balance of probabilities, that *but for* the defendant's negligence the claimant would not have suffered the injury. Instead, Master Hotson claimed for the *loss of a chance* of a full recovery.

When the claimant lost in the House of Lords, their Lordships focused on what we already knew: that the defendant had not caused the *necrosis* under traditional causation principles. Although it is evident from the judgment that their Lordships did not consider loss of a chance as an actionable form of damage, the discussion of *whether it could be* actionable damage itself was cursory at best.¹⁵⁹ As Howarth has stated, the House of Lords 'finessed the whole question of lost chances by presenting the facts in a radically different way.'¹⁶⁰ By doing this, the courts disguised the issue of whether something – loss of a chance – is actionable damage behind the issue of causation.

Conversely, in *Gregg* Lady Hale stated 'it can never be enough to show that the defendant has been negligent. The question is still whether his negligence has caused actionable damage.'¹⁶¹ She then considered whether a lost chance of a favourable outcome should be classed as actionable harm in personal injury cases and answered in the negative. Lord Phillips and Lord Hoffman in the majority did the same.

The dissenting judges in *Gregg* also acknowledged the importance of the issue, albeit that they handled the issue less persuasively than the majority, with Lord Nicholls reiterating: 'Where the claim is based on negligence the facts to be proved include those constituting actionable damage as well as those giving rise to the existence of a duty of care and its breach.'¹⁶²

¹⁵⁹ At 783 per Lord Bridge and at 793 per Lord Ackner.

¹⁶⁰ David Howarth, 'Negligence After *Murphy*: Time to Re-Think' (1991) 50 *Cambridge Law Journal* 50 (1991) 58, 61.

¹⁶¹ *Gregg* at 231-232 per Baroness Hale.

¹⁶² At 181 per Lord Nicholls. See also at 201 per Lord Hope. However, it is arguable that Lord Hope finessed the issue of damage by conflating the claimant's physical injury (the enlarged tumour) with the lost chance.

This focus on damage is an improvement on that taken in the earlier-analysed cases and it is to be hoped that it will be followed in the future. It is true that focusing on damage is not always guaranteed to lead to sound decisions.¹⁶³ But at least it allows us to pinpoint why a particular decision is problematic. In cases such as *McFarlane*, *Chester* and *Rees*, where the damage suffered is ambiguous or subsumed within other issues, such confusions can be hard to unpick from other plausible criticisms of the *results* of the judges' reasoning. Any problems with such cases are then multiplied.

What methods, then, would preserve the coherence of this tort? First, the issue of damage should be analysed in more depth. Without clarity about what damage has been suffered it is impossible to resolve issues of causation, duty of care or what level of compensation should be awarded. These are all contingent on what type of damage has occurred. This may not seem a ground-breaking proposition but as the above assessment of *McFarlane*, *Chester* and *Rees* has shown, it needs emphasising. It is time to undertake a thorough assessment of this aspect of negligence, even if it may superficially appear obvious what the damage is (as it probably did in *McFarlane*, *Rees* and *Chester*).

Second, damage should be treated as a question of law. One of the problems with the under-analysis of damage is that the concept has traditionally been seen as a question of fact. As Lord Pearce stated in *Cartledge v Jopling & Sons Ltd*,¹⁶⁴ 'It is a question of fact in each case whether a man has suffered material damage.'¹⁶⁵ Intuitively, most people think they know damage when they see it: a negligently-caused broken leg is damage that deserves compensating, whereas accidentally-caused mild upset alone is not.¹⁶⁶ Judges are no different and, quite understandably, may not feel the need to waste time engaging in deep

¹⁶³ For example, Lord Hoffmann thoroughly considered the issue in *Barker v Corus UK Ltd* [2006] 2 AC 572 but his judgment is open to criticism. See James Lee, 'Fidelity in Interpretation: Lord Hoffmann and *The Adventure of the Empty House*' (2008) 28 *Legal Studies* 1. Damage was also considered by the dissenting judges in *Gregg* but in a less coherent way than the majority.

¹⁶⁴ [1963] AC 758.

¹⁶⁵ At 779 per Lord Pearce.

¹⁶⁶ See *McLoughlin v O'Brian* [1983] 1 AC 410 at 431 per Lord Bridge.

philosophical discussions as to whether paralysis or a severed limb should be seen as damage when the answer appears obvious in most cases.¹⁶⁷ A consequence of this is that such findings are rarely appealed and so seldom given sustained analysis by the higher courts. This does not present a problem in most day-to-day medical negligence cases but, as has been shown above, it can present difficulties in harder ones as it means there is a lack of guidance from the higher courts.

Seeing damage as purely a question of fact diminishes the clarity of the law. Whether a head of loss is recoverable in negligence is a separate issue to whether a particular claimant had suffered from that loss in a given case. The former is a legal question. This is the approach Lord Millett took in *McFarlane* when he said:

The admissibility of any head of damage is a question of law. If the law regards an event as beneficial, plaintiffs cannot make it a matter for compensation merely by saying that it is an event they did not want to happen.¹⁶⁸

While this statement may be inconsistent with the traditional view that damage is a question of fact,¹⁶⁹ it has much going for it (It will be remembered from my above discussion that Lord Millett's analysis of the issues in *McFarlane* was preferable to that taken by the majority). That the courts have been analysing issues of damage under the concepts of duty, causation and the quantification of compensation is indicative that they already *de facto* treat it as a question of law. It would be far better if such thinking was made explicit and judges unequivocally said whether a certain form of damage was actionable or not and struck out claims on this ground rather than artificially doing so under different headings.

¹⁶⁷ Though, of course, there are certain forms of damage where the courts do fully consider such topics. See *West & Son Ltd v Shepherd* [1964] AC 326.

¹⁶⁸ At 112.

¹⁶⁹ *Cartledge v Jopling & Sons Ltd* [1963] AC 758.

What approach, then, should judges take towards this question of law? On the one hand, it is important that there is certainty in the law.¹⁷⁰ This requires judges to abide by the doctrine of precedent and follow previous decisions. In order to maintain consistency in the law this would require judges to reject a claim for a form of damage that has previously been deemed non-actionable, such as mere grief or distress.¹⁷¹

On the other hand, it is equally important that the law be 'just and move with the times.'¹⁷² In order for the law to be fair, it may be necessary for judges to depart from previous decisions and recognise new forms of damage.

As Lord Reid stated, writing extra-judicially:

People want two inconsistent things; that the law shall be certain, and that it shall be just and move with the times. It is our business to keep both objectives in view. Rigid adherence to precedent will not do. And paying lip service to precedent while admitting fine distinctions gives us the worst of both worlds. On the other hand too much flexibility leads to intolerable uncertainty.¹⁷³

One solution to this would be to follow the approach judges take towards determining when a duty of care exists. This approach is essentially utilitarian as it involves weighing up the factors for and against imposing liability in order to arrive at the best result in novel cases.¹⁷⁴

As Lord Browne-Wilkinson stated in *Barrett v Enfield London Borough Council*:

In English law the decision as to whether it is fair, just and reasonable to impose a liability in negligence on a particular class of would-be defendants depends on

¹⁷⁰ C.f. Ken Oliphant, 'Against Certainty in Tort Law' in Jason Neyers, Erika Chamberlain and Stephen Pitel, (Eds.), *Tort Law: Challenging Orthodoxy* (London: Hart Publishing, 2013) 1

¹⁷¹ *McLoughlin v O'Brian* [1983] 1 AC 410 at 431 per Lord Bridge.

¹⁷² Lord Reid, 'The Judge as Law Maker' (1997) 63 *Arbitration* 180, 182.

¹⁷³ *Ibid.*, 183.

¹⁷⁴ See Jane Stapleton, 'Duty of Care Factors: A Selection from the Judicial Menus' in Peter Cane and Jane Stapleton (Eds.), *The Law of Obligations: Essays in Celebration of John Fleming* (Oxford: Oxford University Press, 1998) 59, Morgan, 'The General Duty of Care', 213 and Stanton, 'Professional Negligence', 136.

weighing in the balance the total detriment to the public interest in all cases from holding such class liable in negligence as against the total loss to all would-be plaintiffs if they are not to have a cause of action in respect of the loss they have individually suffered.¹⁷⁵

Under current duty of care methodology, value is placed on certainty in the law by developing the law according to previously decided categories of cases. This is because maintaining consistency in the law ultimately ensures a fair result by treating like cases alike. Departing from precedent requires special justification. However, in exceptional circumstances, it is permissible to overrule previous decisions if the benefit of doing so outweighs the utility of following prior cases. The same approach should be taken towards recognising new forms of actionable damage. First, the courts should follow previous decisions that have recognised or rejected the form of damage under consideration. If, however, following precedent would be manifestly unjust, the courts should then weigh up the factors for and against allowing the new form of damage to be actionable, while bearing in mind the benefits and costs of recognising it to future litigants. If the new form of damage is rejected then the claimant's case is lost. If it is recognised, only then should questions of duty, causation and quantification be addressed.

4.4. Conclusion

Lord Scarman described damage as the gist of the action in negligence.¹⁷⁶ Subsequent Law Lords appear to disagree. In important medical negligence cases such as *McFarlane*, *Rees*

¹⁷⁵ [2001] 2 AC 550 at 559. C.f. Robert Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007) 1-2.

¹⁷⁶ *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] AC 871 at 883.

and *Chester*, most appellate judges have treated it as an unimportant side-issue (if they have considered it at all) that can be subsumed within questions of duty, causation and the quantification of damages.

It might be thought that such distinctions are unimportant hair-splitting. After all, whether a case is dismissed because the damage is not actionable or under the headings of duty or causation makes little difference to a claimant: they still lose the case. Indeed, in *Rees* Lord Steyn believed that questions of whether the case should be approached as one of damage or duty is ‘what some overseas writers have impolitely called professors’ law.’¹⁷⁷ He believed that ‘the difference in method is not of great importance. In this case the two concepts yield the same results.’¹⁷⁸

It is to be hoped, however, that this article has demonstrated that a lack of clarity on such issues leads to a number of doctrinal problems. If the courts wish to enable patients to recover damages for interferences with their autonomy (as in *Rees* and *Chester*) or deny compensation for the birth of a healthy child (as in *McFarlane*) then they need to do this in a way that is coherent and consistent with established principles by explicitly analysing the issue of damage and treating it as a question of law. After all, hard cases may make bad law but poor reasoning is equally responsible.

¹⁷⁷ *Rees* at 323.

¹⁷⁸ *Ibid.*

Chapter 5: How Should Autonomy be Defined in Medical Negligence Cases?

5.1. Introduction

In modern law medical paternalism no longer rules.¹ Respect for patient autonomy is now a fundamental principle of both medical law and bioethics.² Guidance issued to healthcare professionals emphasises the importance of respecting this value.³ As a result of these developments there have been suggestions that the law of clinical negligence should be developed so as to recognise diminished autonomy as a form of actionable damage in this area of tort law.⁴ But in order for the tort of negligence to recognise this new interest, it is first necessary to determine how autonomy should be understood in this context. The purpose of this article is to shed light on this issue and arrive at a suitable definition of the concept.

Before proceeding, however, it is important to emphasise that there is scope for disagreement regarding whether autonomy ought to be given the prominence that it currently enjoys in the medico-legal literature. For example, there has been some criticism that that the

¹ *Chester v Afshar* [2005] 1 AC 134 at 143 per Lord Steyn.

² See John Harris, *The Value of Life: An Introduction to Medical Ethics* (London: Routledge & Kegan Paul, 1985), John Christman, 'Constructing the Inner Citadel: Recent Work on the Concept of Autonomy' (1988) 99 *Ethics* 109, Søren Holm, 'Autonomy' in Ruth Chadwick (Ed.), *Encyclopaedia of Applied Ethics Volume 1* (San Diego: Academic Press, 1998) and Tom Beauchamp and James Childress, *Principles of Biomedical Ethics* 7th Edn. (Oxford: Oxford University Press, 2013).

³ See General Medical Council, *Consent: Patients and Doctors Making Decisions Together* (London: GMC 2008).

⁴ See Kumaralingam Amirthalingham, 'Causation and the Gist of Negligence' (2005) 62 *Cambridge Law Journal* 64 (2005) 32, Donal Nolan, 'New Forms of Damage in Negligence' (2007) 70 *Modern Law Review* 79, Nicolette Priaulx, *The Harm Paradox: Tort Law and the Unwanted Child in the Era of Choice* (Abingdon: Routledge-Cavendish, 2007) 9, Victoria Chico, *Genomic Negligence: An Interest in Autonomy as the Basis for Novel Negligence Claims Generated by Genetic Technology* (Abingdon: Routledge-Cavendish, 2011) 134, Tamsyn Clark and Donal Nolan 'A Critique of *Chester v Afshar*' (2014) 34 *Oxford Journal of Legal Studies* 659.

focus on protecting autonomy has resulted in other ethical principles being overlooked.⁵ However, the correctness of this view and whether lost autonomy *should* be recognised as a form of damage in medical negligence claims is outside the scope of this article and, indeed, is the subject of a forthcoming paper by the author.

This article will begin by providing some background as to how lost autonomy has come to be seen as a potential new form of damage in negligence. The second part of this article will then outline the main conceptions of autonomy in moral philosophy. The proceeding sections will then discuss which version of autonomy is the most philosophically and legally coherent. The final conclusion will be that if English law is to recognise autonomy as an interest protected by the tort of negligence, it is the liberal conception (or ‘current desire’ version) that provides the most appropriate definition.

5.2. Autonomy as a Form of Damage in English Clinical Negligence Cases

Before discovering which definition of autonomy is preferable to adopt in claims for medical negligence, it is necessary to provide some background as to why it has been suggested that medical negligence adopt such a course. Traditionally, the tort of negligence has not perceived autonomy *per se* as a form of damage that should be compensated. Instead, it has protected autonomy indirectly by safeguarding interests in, among others things, bodily integrity and property.⁶ Despite this, in two important cases the damages awarded (and thus the damage suffered) cannot be reconciled with traditional principles and so it could be argued that the better interpretation of these decisions is that they compensate the respective claimants for their diminished autonomy.

⁵ See Margaret Brazier, ‘Do No Harm – Do Patients Have Responsibilities Too?’ (2006) 65 *Cambridge Law Journal* 397.

⁶ See *Perrett v Collins* [1999] PNLR 77 and *Marc Rich & Co v Bishop Rock Marine Co* [1996] AC 211.

In *Rees v Darlington Memorial NHS Trust*,⁷ the claimant, Ms Rees, was severely visually disabled. She feared that her poor sight would prevent her from being able to care for a child and so underwent a sterilisation, which was negligently performed by the defendant hospital. As a result she gave birth to a healthy son.

Her claim for the costs associated with raising the child and, if this should be refused, the extra costs she would incur from raising a healthy child attributable to her disability was unsuccessful in the House of Lords. The majority decided to follow an earlier decision, which held that the costs of raising a healthy child were irrecoverable.⁸ Yet they held that since the claimant was a victim of a legal wrong which had denied her the opportunity to live in the way she had planned, she should receive a ‘conventional award’ of £15,000. Lord Bingham justified this on the basis that the mother had ‘been denied, through the negligence of another, the opportunity to live her life in the way that she wished and planned.’⁹ This has been interpreted by some commentators as an attempt to compensate the Ms Rees for her lost autonomy. Nolan, for example, has stated that the case ‘amounts to recognition of diminished autonomy as a form of actionable damage.’¹⁰

The second case is *Chester v Afshar*.¹¹ The claimant, Miss Chester, suffered from back pain so visited the defendant consultant, Mr Afshar, who recommended surgery. In breach of his duty of care he failed to warn her about a small risk (1-2 per cent) of cauda equina syndrome (paralysis) inherent in the operation. This risk would be present no matter how expertly the operation was performed and liable to occur at random. Based on this (lack of) advice, Miss Chester underwent the procedure and, although the surgery itself was not carelessly performed, she suffered from the syndrome.

⁷ [2004] 1 AC 309.

⁸ *McFarlane v Tayside Health Board* [2000] 2 AC 59.

⁹ *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309 at 317 per Lord Bingham.

¹⁰ Nolan ‘New Forms of Damage in Negligence’, 80.

¹¹ [2005] 1 AC 134.

Miss Chester admitted that she could not say that she would never have undergone the operation even if she had been warned of the risks (if this had been the case she would have easily been able to show that Mr Afshar's carelessness in failing to warn her of the risks had caused her injury). Instead, she said that she would not have had the procedure at the time that she did but would have instead wanted to discuss the matter with others and explore alternatives. She conceded that she may have chosen to have the surgery on a different day in the future. As a result of this concession, it was arguable that she could not show that Mr Afshar's carelessness in failing to warn her of the risks had actually caused the syndrome because it might have occurred anyway: Mr Afshar's carelessness had not increased her risks of suffering from cauda equina syndrome.

The majority of the House of Lords, however, found in Miss Chester's favour. They held that even though the claimant could not establish that the defendant had *caused* her back pain under traditional rules, a departure from conventional causation principles was justified because her right to make her own decision about her treatment had been interfered with. Lord Steyn laid emphasis on Miss Chester's 'right of autonomy and dignity,'¹² saying it 'can and ought to be vindicated by a narrow and modest departure from traditional causation principles.'¹³ This indicates that, as Devaney has noted, 'the primary concern of the majority...was to ensure that patient autonomy is respected'¹⁴ and several academics have perceived the *real* damage (as opposed to that pleaded) in this case to be the interference with Miss Chester's autonomy.¹⁵ Green, for examples, describes it as a 'loss of autonomy case.'¹⁶

¹² Ibid. at 146

¹³ Ibid

¹⁴ Sarah Devaney 'Autonomy Rules Ok' (2005) 13 *Medical Law Review* 102, 107.

¹⁵ See Amirthalingham, 'Causation and the Gist of Negligence', David Pearce and Roger Halson, 'Damages for Breach of Contract: Compensation, Restitution and Vindication' (2008) 28 *Oxford Journal of Legal Studies* 73, John Murphy and Christian Witting, *Street on Torts* 13th Edn. (Oxford: Oxford University Press, 2013) 159. Clark and Nolan maintain that the damage pleaded was Miss Chester's personal injury but that a better solution would have been to compensate her for her lost autonomy ('A Critique of *Chester v Afshar*').

¹⁶ Sarah Green, *Causation in Negligence* (Oxford: Hart Publishing, 2015) ch 7.

Given that these cases are hard to reconcile with conventional negligence rules that a claimant must establish that the defendant owed them a duty of care and the breach of that duty caused them actionable damage,¹⁷ it is arguable that a more principled understanding of these decisions is to perceive them as compensating the claimants for their lost autonomy. As a result, there have been a number of suggestions that lost autonomy per se is now, or should be, recognised as a form of damage in negligence.¹⁸ Chico states that these decisions ‘demonstrate substantial congruity’¹⁹ as in both cases the House of Lords ‘was motivated to provide a remedy for the victim of medical negligence on the basis that there had been an interference with the patient’s autonomy.’²⁰ Although the above judgments are infused with recognition of the importance of autonomy, there is very little discussion of what is meant by the concept in the cases themselves. How, then, should autonomy be defined in medical negligence claims? The answer to this question will be the focus of the rest of this article.

5.3. What is Autonomy?

‘Autonomy’ literally means self-determination²¹ and a person will be autonomous if they can choose and act on their own decisions.²² Beyond this, there are divergences in opinion about what being autonomous might entail. Coggon has provided a useful taxonomy of the three main different conceptions of autonomy utilised in legal discussions. He describes these theories as: ideal desire autonomy; current desire autonomy; and best desire autonomy.²³ Each of these might demand different courses of action and so an understanding of this

¹⁷ *Gregg v Scott* [2005] 1 AC 176 at 226 per Baroness Hale.

¹⁸ See n 4 above.

¹⁹ Victoria Chico, ‘Wrongful Conception: Policy, Inconsistency and the Conventional Award’ (2007) 8 *Medical Law International* 139, 154.

²⁰ *Ibid*

²¹ Holm, ‘Autonomy’ 267.

²² Peter Singer, *Practical Ethics*. 3rd Edn. (Cambridge: Cambridge University Press, 2011) 84.

²³ John Coggon, ‘Varied and Principled Understandings of Autonomy in English Law: Justifiable Inconsistency or Blinkered Moralism?’ (2007) 15 *Health Care Analysis* 234, 240.

philosophical concept is required in order to fully determine how it will be recognised by the tort of negligence.

5.3.1. Ideal Desire Autonomy

Ideal desire autonomy is influenced by the work of Immanuel Kant.²⁴ It reflects what a person *should* want and, according to Coggon, this is measured ‘by reference to some purportedly universal or objective standard of values.’²⁵ He states that this theory:

...requires agents to consider their reason for acting, and only to pursue a course of action if it could be made a universal law. That is, if it could be a successful maxim for all agents to follow. Therefore, if a person chooses to act in a way that is incompatible with a universalisable theory, that person is not acting autonomously.²⁶

According to this definition, certain conduct may never be capable of being autonomous if it does not comply with Kantian values (i.e. if one cannot rationally will one’s actions to be a binding universal law that everyone should follow) or is otherwise objectively morally bad. For example, Kant maintained that his ethical system prohibited lying (even to save someone’s life) and suicide.²⁷ If he was correct about this then lying or committing suicide cannot be autonomous acts. This would be so even if someone wanted to do these things. This notion of autonomy is therefore not based on an individual’s actual preferences but on what they (supposedly) *should* want.

²⁴ Immanuel Kant, *Fundamental Principles of the Metaphysics of Morals* (tr: Thomas Abbott in Allen Wood (Ed.), *Basic Writings of Kant* (New York: The Modern Library, 2001) 143. See also Onora O’Neill, *Autonomy and Trust in Bioethics* (Cambridge: Cambridge University Press 2002).

²⁵ Coggon, ‘Varied and Principled Understandings of Autonomy’ 240.

²⁶ *Ibid.*, 240-241.

²⁷ Immanuel Kant, *Grounding for the Metaphysics of Morals* (Indianapolis: Hackett, 1993) 422.

5.3.2. Current Desire Autonomy

Current desire autonomy, on the other hand, reflects an individual's 'immediate inclinations.'²⁸ It does not require a high level of reflection and need not be consistent with the person's values or ultimate goals.²⁹ This conception of autonomy is influenced by the work of John Stuart Mill, who stated: 'The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.'³⁰ Mill did not require people's self-regarding actions to be consistent with any set of rules or long-term goals. Instead, people can do as they please – in other words, fulfil their current desires – provided they do not cause harm to others.

This account of autonomy has been advocated by Jonathan Glover, who stated 'I override your autonomy only where I take a decision on your behalf which goes against what you actually do want, not where the decision goes against what you would want if you were more knowledgeable or more intelligent.'³¹ A person's actions will be autonomous if, provided the person is competent to make the decision and it is free and informed, such choices reflect their desires.³²

5.3.3. Best Desire Autonomy

In contrast, best desire autonomy states that a decision will be autonomous if it reflects a person's overall desires given their values, even if it runs contrary to their immediate desire.³³

²⁸ Coggon, 'Varied and Principled Understandings of Autonomy' 240.

²⁹ Ibid

³⁰ John Stuart Mill, 'On Liberty' in John Gray (Ed.), *On Liberty and Other Essays* (Oxford: Oxford University Press, 1991) 14.

³¹ Jonathan Glover, *Causing Death and Saving Lives* (London: Penguin, 1977) 77.

³² See Mental Capacity Act 2005.

³³ Coggon, 'Varied and Principled Understandings of Autonomy' 240.

This theory of autonomy has been proposed by Harry Frankfurt³⁴ and Gerald Dworkin.³⁵ The latter stated: ‘Autonomy cannot be located on the level of first-order considerations, but in the second-order judgments we make concerning first-order considerations.’³⁶ An action will only be autonomous if a person’s first-order desires (their immediate wants) are endorsed by their second-order desires (their long-term goals or values).³⁷ An example of respecting this type of autonomy would be preventing someone from eating cake if their long-term goal is to lose weight because their desire to eat cake only reflects their current desire rather than their ‘best’ desire.

5.3.4. Relational Autonomy

Before contemplating which of these definitions of autonomy is most cogent, it is worth pausing to consider another version of autonomy that is known as relational autonomy.³⁸ This theory is critical of the above accounts as they fail to ‘recognise the inherently social nature of human beings.’³⁹ It maintains that there is a need to think of autonomy as a ‘characteristic of agents who are emotional, embodied, desiring, creative, and feeling, as well as rational creatures’⁴⁰ and recognise that agents are ‘psychically and internally differentiated and socially differentiated from others.’⁴¹

Relational autonomy was developed by feminist theorists and communitarians who believe that other definitions ‘would wrongly attribute autonomy to those whose restricted socialisation and oppressive life conditions pressure them into internalising oppressive values

³⁴ See Harry Frankfurt, ‘Freedom of the Will and the Concept of a Person’ (1971) 68 *Journal of Philosophy* 5.

³⁵ See Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge: Cambridge University Press, 1988).

³⁶ Gerald Dworkin, ‘Autonomy and Behaviour Control’ (1976) 6 *The Hastings Centre Report* 23, 25.

³⁷ *Ibid*

³⁸ This notion of autonomy underpins Priaulx’s work in *The Harm Paradox*.

³⁹ Jennifer Nedelsky, ‘Reconceiving Autonomy: Sources, Thoughts and Possibilities’ (1989) 1 *Yale Journal of Law and Feminism* 7, 8.

⁴⁰ Catriona Mackenzie and Natalie Stoljar (Eds.), *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (Oxford: Oxford University Press, 2000) 21.

⁴¹ *Ibid*.

and norms.⁴² Feminist critiques maintain that given that traditional accounts of autonomy do not recognise the ‘value of relations of dependency’⁴³ they are seen as ‘masculinist conceptions.’⁴⁴ Those who accept a relational account of autonomy would not perceive, for example, that a woman who had an internalised belief that her role was to be subservient to her husband was autonomous even if that is what she wished to do.

However, this paper will not be considering this version of autonomy separately from the accounts discussed above. This is because most nuanced accounts of autonomy do not deny that people are, for example, emotional, creative and reliant on other people. It is a simple statement of the obvious that they are. As Raz states: ‘Autonomy is possible only within a framework of constraints. The completely autonomous person is an impossibility. The ideal of the perfect existentialist with no fixed biological and social nature who creates himself as he goes along is an incoherent dream.’⁴⁵ As a result, the concerns of communitarians and feminists can be accommodated within Coggon’s tripartite classification. As an example, the feminist belief that a woman who has an internalised belief that her role was to be subservient to her husband is not autonomous could be reconciled with ideal desire autonomy by maintaining that women *should* desire to be treated as equals with men and not accept passive roles.

It is therefore difficult to disagree with Fineman’s conclusion that ‘Although we all operate within societal and cultural constraints, we can determine directions and decide to take one path rather than another.’⁴⁶ Given this, and despite the fact that relational critiques of

⁴² John Christman, ‘Autonomy in Moral and Political Philosophy’ in E.N. Zalta (Ed.) *The Stanford Encyclopaedia of Philosophy* (Spring 2011 Edition) <<http://plato.stanford.edu/archives/spr2011/entries/autonomy-moral/>>.

⁴³ Mackenzie and Stoljar, *Relational Autonomy* 8.

⁴⁴ *Ibid.*, 9.

⁴⁵ Joseph Raz, ‘Liberalism, Autonomy, and the Politics of Neutral Concern’ (1982) 7 *Midwest Studies in Philosophy* 89, 112.

⁴⁶ Martha Fineman, *The Autonomy Myth: A Theory of Dependency* (New York: The New Press, 2004) 304. See also Helen Reece, ‘Review Article – *The Autonomy Myth: A Theory of Dependency*’ (2008) 20 *Child and Family Law Quarterly* 109.

autonomy provide a valuable examination of the influence of social constraints on individuals, it will not be considered as a separate account in the following discussion.

5.4. Which Conception of Autonomy is Preferable in the Medical Negligence Context?

5.4.1. Philosophical Coherence

The three conceptions of autonomy mentioned above will often have the same outcome.⁴⁷ If a person was suffering from a disease and currently had a desire to be cured, it is consistent with their values to be cured, and there is an objective rule that it is good for them to be cured then their decision to be cured will be autonomous under all three theories.

However, the theories can conflict. Objective values, second-order desires, and current preferences do not necessarily coincide. An individual might desire to commit suicide at the moment but this may conflict with their long-term goals or with a set of Kantian rules. Which version of autonomy, then, should be favoured for the purposes of recognising an interest in autonomy in medical negligence claims? The rest of this section will explain why the current desire view of autonomy is the preferable definition to adopt

First, best desire and ideal desire autonomy contain a number of logical defects. With regards to best desire autonomy, it could be argued that if a person's first-order desires need to be endorsed in order to be autonomous then the same conditions should apply to a person's second order desires. This could lead to an infinite regress of endorsements, making it implausible that endorsement should be a prerequisite in order for a choice to be an autonomous one. After all, why not require that one's second-order desires are endorsed by

⁴⁷ See Coggon, 'Varied and Principled Understandings of Autonomy' 244.

one's third-order desires and so on?⁴⁸ As Watson has argued, 'Since second-order volitions are themselves simply desires, to add them to the context of conflict is just to increase the number of contenders; it is not to give a special place to any of those in contention.'⁴⁹

Additionally, it is unclear why second-order desires are any more authentic than first-order ones. As Thalberg has stated, best desire autonomy:

...assume[s] that when you ascend to the second level, you discover the real person and what she or he really wants...why grant that a second-order attitude must always be more genuinely his, more representative of what he genuinely wants, than those you run into at ground level? Perhaps his higher attitude is only a cowardly second thought which gnaws at him.⁵⁰

Similarly, there are problems with the theoretical basis of ideal desire autonomy. Being based on the work of Immanuel Kant, it suffers from the problems associated with his philosophy. According to most versions of the ideal desire version of autonomy one will be autonomous if one's decisions can be logically universalised. Yet, as Joshua Greene has pointed out, there are a number of actions that cannot be universalised under this theory: 'Take, for example, being fashionable. Universal fashionableness is self-undermining [If everyone is fashionable then no one is]. Nevertheless, we don't think that being fashionable is immoral.'⁵¹ Besides, given that Kant himself used his theory to argue that slavery was morally justified but that masturbation was not, it can be seen as nothing more than an *ex post facto* rationalisation for

⁴⁸ Irving Thalberg, 'Hierarchical Analyses of Unfree Action' (1978) 8 *Canadian Journal of Philosophy* 211, 219.

⁴⁹ Gary Watson, 'Free Agency' (1975) 72 *The Journal of Philosophy* 205, 218.

⁵⁰ Thalberg, 'Hierarchical Analyses of Unfree Action' 219-220.

⁵¹ Joshua Greene, *Moral Tribes: Emotion, Reason and the Gap Between Us and Them* (London: Atlantic Books, 2013) 332.

the gut feelings that he already held.⁵² It is doubtful that it provides a sound basis on which to determine whether an action is moral – let alone autonomous – or not.

Even if a non-Kantian version of ideal desire autonomy is adopted, this account of autonomy still raises a number of difficulties. As Christman, citing the work of Isaiah Berlin,⁵³ has argued, this version of autonomy would allow people ignore the actual wishes of others in order to do what their ‘rational’ selves should want.⁵⁴ Indeed, this is a fundamental logical problem with adopting ideal desire and best desire accounts of autonomy, as both theories would allow the interference of a person’s decisions in their best interests (to ensure they comply with an objective rule or to ensure they comply with their own thought-through values). In other words, these definitions of autonomy are indistinguishable from autonomy’s polar opposite, paternalism – the restriction of a person’s choices ‘allegedly in the recipients’ own best interests.’⁵⁵ Given this, ideal desire and best desire definitions of autonomy fail to provide convincing accounts of autonomy. It is illogical that a given action – say, preventing someone from committing suicide – can be described as both paternalistic and respectful of autonomy *at the same time*, as it can under those two interpretations. To define the overriding of a competent person’s choices as a way of respecting their wishes is an abuse of language. It is more cogent to describe actions enforcing best desire and ideal desire autonomy as paternalistic and consider the circumstances when (if ever) paternalism is justified. The current desire version of autonomy is therefore the most philosophically coherent understanding of the concept.

⁵² Ibid, 300.

⁵³ Isaiah Berlin, *Four Essays on Liberty* (Oxford: Oxford University Press, 1969).

⁵⁴ Christman, ‘Constructing the Inner Citadel’ 116.

⁵⁵ Hetta Häyry, ‘Paternalism’ in Ruth Chadwick (Ed.), *Encyclopaedia of Applied Ethics Volume 1* (San Diego: Academic Press, 1998) 449.

5.4.2. Legal Coherence

Whatever the philosophical shortcomings of the other accounts of autonomy, and even if the above analysis is erroneous, there is another reason why the tort of negligence should perceive autonomy as matching the current desire definition of the concept. Adopting a different account of autonomy would mean that different theories of autonomy would be used in different branches of the law, thus damaging its coherence. For it is the current desire version of autonomy is one that the courts presently use in a number of contexts. As McLean states, ‘Irrespective of those philosophical approaches which seek to make autonomy a richer concept, it is the decision-making aspect of autonomy that dominates in law.’⁵⁶

The evidence for this is overwhelming. In a case on the ‘right to die’ the European Court of Human Rights declared that:

...the ability to conduct one's life in a manner of one's own choosing may also include the opportunity to pursue activities perceived to be of a physically or *morally harmful* or dangerous nature for the individual concerned.⁵⁷

If morally harmful decisions are deemed to be autonomous, then this definition of autonomy cannot refer to ideal desire autonomy as that theory requires actions to be ‘moral’ in order to be autonomous.

Furthermore, in criminal law it has been held that injecting oneself with a syringe of heroin is an autonomous act that breaks the chain of causation for the offence of unlawful act manslaughter.⁵⁸ Lord Bingham stated that ‘informed adults of sound mind are treated as autonomous beings able to make their own decisions.’⁵⁹ Given that injecting oneself with heroin is contrary to most people’s higher-level desires and is not particularly morally

⁵⁶ Sheila McLean, *Autonomy, Consent and the Law* (Abingdon: Routledge-Cavendish, 2009) 19.

⁵⁷ *Pretty v United Kingdom* (2002) 35 EHRR 1 at [62] (my emphasis).

⁵⁸ *R v Kennedy (No 2)* [2008] 1 AC 269.

⁵⁹ *Ibid.* at 275 per Lord Bingham.

praiseworthy, this appears to be an implicit endorsement of the current desire version autonomy.

There is also evidence that the current desire version of autonomy is used in the tort of battery. In the influential case of *Re T (Adult: Refusal of Treatment)*⁶⁰ Lord Donaldson MR stated:

...the patient's right of choice exists whether the reasons for making that choice are rational, irrational, unknown or even non-existent. That his choice is contrary to what is to be expected of the vast majority of adults is only relevant if there are other reasons for doubting his capacity to decide.⁶¹

If a right to choose one's treatment exists even if the reasons for that choice are irrational or non-existent then this cannot possibly reflect ideal desire or best desire theories of autonomy as the former (usually) requires decisions to be rational and the latter requires the reasons for them to be consistent with one's long-term wishes or values (thereby requiring *some* reasons for them to be given). The view that a person is free to make unwise self-regarding choices provided they have capacity to do so is also reflected in section 1 of the Mental Capacity Act 2005.

Finally, there is the example of *Chester v Afshar* (discussed earlier). Mr Afshar's actions were arguably perfectly justified under a best desire or ideal desire version of autonomy as it would be irrational and not in Miss Chester's long-term interests to refuse such an operation when it carried such small risks. Yet it was accepted that he *did* interfere with her *autonomy* and so this is further evidence that the law uses the current desire version of autonomy rather than the ideal desire or best desire versions.

⁶⁰ [1993] Fam 95.

⁶¹ *Ibid.* at 112.

Now the fact that a particular definition of autonomy represents the status quo is not, in itself, enough to ensure that it should be maintained. After all, many things that once represented the status quo in law – for instance, the condoning of marital rape – are now considered reprehensible.⁶² The common law is ‘capable of evolving in the light of changing social, economic and cultural developments’⁶³ and so could theoretically evolve to reflect a different definition of autonomy. It may be that other branches of the law, such as the tort of battery, should be changed to reflect a more accurate interpretation of the concept. This would mean that it would be open for the tort of negligence to adopt the ideal desire or best desire theories.

Leaving aside the philosophical problems with those two accounts, such a utopian vision would require a radical re-writing of the entire law of tort. Even if a different definition of autonomy was more plausible it would be the triumph of hope over experience to believe that judges would countenance such a drastic transformation of the law in this area.⁶⁴ Furthermore, it would be inconsistent to accept different definitions of the same concept within different areas of the law (never mind within such closely related areas of the law as the tort of battery and the tort of negligence).

It is for this reason that it is hard to accept Chico’s argument in favour of the tort of negligence recognising an interest in autonomy. In her compelling book *Genomic Negligence* Chico argues that ‘English negligence law could be imbued with a specific recognition of the interest in autonomy as a means of recognising...novel genomic claims [i.e. novel tort claims arising as a result of advances in genetic technologies].’⁶⁵ Her theory rests on a concept of autonomy ‘imbued with substantive or value rationality and procedural rationality’⁶⁶ because

⁶² *R v R* [1992] 1 AC 599.

⁶³ *Ibid.* at 616 per Lord Keith.

⁶⁴ Since the cases of *Caparo v Dickman* [1990] 2 AC 605 and *Murphy v Brentwood District Council* [1991] 1 AC 398 the trend has been for the law in this area to develop incrementally.

⁶⁵ Chico, *Genomic Negligence* 29.

⁶⁶ *Ibid.*, 42.

‘it allows some objective evaluation of what autonomy consists in which makes legal recognition of the interest more likely.’⁶⁷ In other words, Chico adopts a theory approximate to the ideal desire definition of autonomy. What form might such ideal desires take? Chico states that the English negligence system already ‘holds an intrinsic notion of value’⁶⁸ that could pour content into this rationality-based version of autonomy, namely ‘the position of the ordinary or reasonable person’⁶⁹ could be used to determine what is rational in the same way that it is ‘used as a measure of reasonableness.’⁷⁰

However, while it is true that the idea of the reasonable person is well-developed in other aspects of negligence law and that this conception of autonomy might constrain the number of claims in negligence for this type of damage and thus be more acceptable to judges,⁷¹ it suffers from the same problems associated with ideal desire autonomy that have been outlined above. For example, no ordinary or reasonable person would refuse a blood transfusion because such procedures are ungodly. Doing so would be archetypal unreasonable behaviour. And yet respect for autonomy means we permit such unwise choices by allowing Jehovah’s Witnesses (and others) treated in such a manner to bring actions in trespass.⁷² Similarly, mentally competent pregnant women are entitled to refuse to undergo a caesarean section even when doing so will endanger their life and that of their unborn child.⁷³ If autonomy is based upon what the ordinary or reasonable person deems acceptable then such decisions would not be capable of being autonomous ones. Accepting that choices have to be approved by the ordinary person would result in different definitions of autonomy existing in the tort of battery and the tort of negligence (with the former perceiving a refusal of life-

⁶⁷ Ibid, 49.

⁶⁸ Ibid, 57.

⁶⁹ Ibid, 57

⁷⁰ Ibid, 57

⁷¹ The trend in negligence has been to limit number of claims to avoid ‘opening the floodgates.’ See *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310.

⁷² See *Re T (Adult: Refusal of Treatment)* [1993] Fam 95 at 112.

⁷³ See *St George’s NHS Healthcare Trust v S* [1998] 3 WLR 936.

saving blood transfusions and caesarean sections as autonomous behaviour but the latter not). This would undermine the coherence of the law.*

Nonetheless, it may be countered that judges take advantage of the equivocal nature of autonomy and utilise all three conceptions in their judgments.⁷⁴ Judges might *explicitly say* that there need not be any reasons given for a decision in trespass to the person cases, but they may, as Coggon has argued, *implicitly* require that such decisions be rational.⁷⁵ One example he cites is the case of *Ms T*⁷⁶ where the refusal of a blood transfusion by a patient was overruled because she lacked mental capacity. The reason for Ms T's refusal was that she believed her blood to be evil and this was held by the judge hearing the case to be an indication that she lacked capacity. Coggon believes that this case provides evidence that in some circumstances judges require a decision to be rational before they will allow a patient to exercise their autonomy. If this is correct it may mean that current desire autonomy is not the only correct legal definition of autonomy and that negligence law could adopt the best or ideal desire versions.

But this this argument is not beyond reproach. Even if we accept that judges use all three definitions of autonomy in different circumstances this certainly does not mean that all they are equally valid or representative of the law. Traditional common law reasoning states that the decisions of the higher courts are binding on those of lower courts.⁷⁷ Many authoritative judgments have confirmed that the law reflects the position stated above by

* It is worth mentioning that in a more recent article (published after this article was accepted for publication), Chico has written that 'Despite the vague nature of autonomy in English medical law, in essence there seems to be a commitment to a content-neutral interpretation of the concept.' I will take her view to be that as a matter of positive law, autonomy is content-neutral but that, normatively, she believes the law should adopt the ideal desire version for clinical negligence cases. Victoria Chico, 'Requiring Genetic Knowledge: A Principled Case for Support' (2015) *Legal Studies* (online advance access) doi: 10.1111/lest.12080.

⁷⁴ Coggon 'Varied and Principled Understandings of Autonomy' 235.

⁷⁵ *Ibid.*, 247. See also Chico, *Genomic Negligence* 47.

⁷⁶ *An NHS Trust v Ms T* [2004] EWHC 1279.

⁷⁷ See Lord Oliver, 'Judicial Legislation' (1989) 2 *Leiden Journal of International Law* 1, 3.

Lord Donaldson MR above.⁷⁸ If the occasional first instance decision departs from this by, say, requiring a decision to be rational, it is merely an example of judges misapplying the law. As such, this criticism does not refute the argument that current desire version of autonomy is the most representative of the legal status quo at present: cases contrary to this view are per incuriam and inconsistent with binding authorities. Given the common law's concern with consistency and that the current approach towards any expansion of liability in negligence is that developments should be incremental based upon previous decisions,⁷⁹ it is likely that if lost autonomy is accepted as a form of damage in negligence then it will be the current desire version of autonomy that will be utilised.

5.5. Conclusion

The purpose of this paper has been to determine how English tort law might define the concept of autonomy in medical negligence claims. It has been argued that if autonomy is to be recognised as a form of damage protected by negligence then it is the 'current desire' version of the concept that is most likely to be used as it does not suffer from the philosophical problems of other definitions and is the most consistent with the current jurisprudence in related areas of tort law. Whether such claims should be successful is an entirely separate question. However, it is hoped that having a sound definition of the concept of autonomy will make arriving at the answer to it somewhat easier.

⁷⁸ See *Sidaway v Board of Governors of the Bethlam Royal Hospital and the Maudsley* [1984] 2 WLR 778 at 904 per Lord Templeman and *Re MB* [1997] 2 FLR 426 at 432 per Butler-Sloss LJ.

⁷⁹ See n 64 above.

Chapter 6: A Defence of the Counterfactual

Account of Harm

6.1. Introduction

Harming individuals is generally considered to be A Bad Thing.¹ Given that many discussions in bioethics take as their starting point John Stuart Mill's influential maxim that '[t]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others',² whether something causes harm to other people is believed to determine the limits of acceptable conduct. What constitutes harm is also of enormous practical consequence as claims can only be brought in the tort of negligence, for example, if harm has occurred.³

Given this, it is important to have an understanding of what it means to be harmed. The dominant theory of harm has been the counterfactual account, most famously proposed by Joel Feinberg.⁴ This determines whether harm is caused by comparing what actually happened in a given situation with the 'counterfactuals' i.e. what would have occurred had the putatively harmful conduct not taken place. If a person's interests are worse off than they otherwise would have been then a person will be harmed.

Yet this definition has faced criticism from bioethicists who, believing it to be severely flawed, wish to replace it with their own theories of the concept. The first challenge

¹ See for example the fact that non-maleficence is one of the four principles of bioethics outlined in Tom Beauchamp and James Childress, *Principles of Biomedical Ethics* 7th Edn. (Oxford: Oxford University Press, 2013).

² John Stuart Mill, 'On Liberty' in John Gray (Ed.), *On Liberty and Other Essays* (Oxford: Oxford University Press, 1991) 14

³ See Stephen Perry, 'Protected Interests and Undertakings in the Law of Negligence' (1992) 42 *University of Toronto Law Journal* 247.

⁴ Joel Feinberg *Harm to Others (The Moral Limits of the Criminal Law Volume I)* (Oxford: Oxford University Press, 1984).

came from Professor John Harris. In several books and articles he has proposed an alternative theory based upon whether a person is placed in a harmed state.⁵ He states ‘Where B is in a condition that is harmed and A and/or C is responsible for B’s being in that condition then A and/or C have harmed B’.⁶ A harmed state, he says, will be one that a person has a rational preference not to be in.

The second opposition to the counterfactual account is more recent and comes from Dr Guy Kahane and Professor Julian Savulescu.⁷ They believe that Feinberg’s comparative theory of harm fails to explain the intuitive reactions people have towards different conditions. Kahane and Savulescu hold that there is an important distinction between things such as being severely intellectually impaired or dying in one’s twenties on the one hand, and things such as lacking an IQ of 160 or dying in one’s hundred and thirties. They maintain that people see the former as harms but the latter as not and that the counterfactual account struggles to accommodate this distinction because Feinberg’s theory perceives both scenarios as making an individual worse off and thus harmed. As a result, they propose that whether a condition is statistically normal will be a morally significant factor in determining whether a person is harmed or not: the former harmful conditions fall below what is statistically average whereas the latter non-harmful ones are not. Causing someone to be in a condition that is below what is statistically normal will be to cause them harm under this theory.

The purpose of this article is to defend the counterfactual account of harm from these two attacks. At first sight this might appear a rather esoteric debate. After all, blinding someone or causing them to contract Ebola is likely to cause harm under all three theories. However, these theories can lead to different answers to the question of what causing harm

⁵ For the most recent restatement of this theory of harm see Nicola Williams and John Harris, ‘What is the Harm in Harmful Conception? On Threshold Harms in Non-Identity Cases’ (2014) 35 *Theoretical Medicine and Bioethics* 337.

⁶ John Harris, *Clones, Genes and Immortality* (Oxford: Oxford University Press, 1998) 110.

⁷ Guy Kahane and Julian Savulescu, ‘The Concept of Harm and the Significance of Normality’ (2012) 29 *Journal of Applied Philosophy* 318.

entails. Since many arguments in applied ethics currently rely upon the counterfactual account of harm, any deviation from this understanding of the concept is likely to have a large impact on contemporary bioethical problems. For example, Derek Parfit's Non-Identity Problem utilises the counterfactual definition of harm and its conclusion appears to imply that, provided a child born will have a worthwhile life, bringing into existence an impaired individual does not cause that individual harm if that is the only condition they could have existed in.⁸ This would mean it does not cause harm to select a congenitally deaf embryo for implantation. The child born would not be worse off as being deaf is the only state they could exist in (if a non-deaf embryo was selected then a different individual would be result) and so they would not be harmed by such reproductive choices.⁹ In contrast, Harris's and Kahane and Savulescu's theories, being non-comparative, would be able to say that having a deaf child would cause harm to the child born as a result: the child might have a rational preference not to be in that state and deafness falls below what is statistically normal.¹⁰

In this article I will argue that the shortcomings Harris, Kahane and Savulescu believe are present in Feinberg's theory are illusory and that it is their own accounts of harm that are fraught with logical errors. The first part of this article will give an overview of Feinberg's theory. Harris's alternative account will then be addressed and I will explain why it is unconvincing. Next, Kahane and Savulescu's criticisms of the counterfactual account and their own theory of harm will be presented and rebutted. I will demonstrate that the arguments presented to refute Feinberg's theory not only fail to achieve this goal and can be accommodated within the counterfactual account but that they actually undermine the

⁸ Derek Parfit, *Reasons and Persons* (Oxford: Oxford University Press, 1984) 359.

⁹ Rebecca Bennett, 'When Intuition Is Not Enough. Why the Principle of Procreative Beneficence Must Work Harder to Justify its Eugenic Vision' (2013) 28 *Bioethics* 447.

¹⁰ It is worth mentioning that Harris, Kahane and Savulescu all support an obligation for parents to avoid selecting congenitally disabled children. See Julian Savulescu and Guy Kahane, 'The Moral Obligation to Create Children with the Best Chance of the Best Life' (2009) 23 *Bioethics* 274 and Harris, *Clones, Genes and Immortality* 110.

theories presented by their respective authors. The final conclusion will be that that these challenges are misconceived and fail to displace the counterfactual theory.¹¹

6.2. The Counterfactual Account of Harm

Feinberg held that a person is harmed if their interests are put in a worse condition than they otherwise would have been.¹² The theory is therefore counterfactual as it compares what actually happened with what otherwise would have been the case (the ‘counterfactuals’). Feinberg stated: ‘A harms B only if his wrongful act leaves B worse off than he would be otherwise in the normal course of events insofar as they were reasonably foreseeable in the circumstances’.¹³

Note that a person does not have to be made worse off than they were *before*. To illustrate this Feinberg uses the example of a Miss America contestant being detained the night before the competition – a competition she was certain to win. Although she is not worse off than before (she was not a competition winner *before* the putatively harmful detention), she is still harmed by such actions as she is worse off than she otherwise *would have been* (she would have been a Miss America competition winner had the detention not occurred).¹⁴

One might object that a problem with this account of harm is that of causal overdetermination. Feinberg asks us to imagine a businessman who takes a taxi to the airport. On the way the reckless driving of the taxi driver causes a collision. As a result, the businessman is severely injured, rushed to hospital and misses his plane. He is made worse off and consequently appears to be harmed by the actions of the taxi driver. But what if the

¹¹ This paper is not directly concerned with issues of what constitutes causation or causing harm entails. Though for an excellent recent discussion see Sarah Green, *Causation in Negligence* (Oxford: Hart Publishing, 2015).

¹² Feinberg, *Harm to Others* 105.

¹³ Joel Feinberg, ‘Wrongful Life and the Counterfactual Element in Harming’ (1986) 4 *Social Philosophy and Policy* 145, 153.

¹⁴ *Ibid.*, 149.

missed plane had crashed after take-off, killing all of the passengers? It would appear that the businessman would not be harmed – even though he is suffering from severe injuries – because, counterfactually, he is not worse off as he has not died horribly in a plane crash.¹⁵

However, this problem is not insurmountable. The businessman will still be harmed under the counterfactual account because, given we are not omniscient, we have to assign blame based on *reasonably foreseeable* events. The taxi driver has still caused harm because the overall benefits of avoiding death were not *foreseeable*. Whether an individual is harmed is therefore based upon socially-constructed expectations and whether the setting back of their interests was usual in the circumstances.¹⁶ Morality does not demand the impossible of people and so no account of harm will hold people responsible for events that could not be expected.¹⁷

What, then, are interests? Feinberg takes interests to be components of a person's well-being and believes this concept is useful because it acknowledges 'the complexity of a person's good [and] how it contains various components, some of which may be flourishing while others languish at a given time'.¹⁸ To use the above example, an individual's interest in not being severely injured would be setback if it they were in a car crash but their (more important) interest in being alive would be benefitted by missing the fatal plane.

Hare once stated that 'the notion of interests is tied in some way or other to the notion of desires and that of wanting'¹⁹ and that 'it would scarcely be intelligible to claim that a certain thing was in a man's interest, although he neither wanted it, nor ever wanted it, nor

¹⁵ Ibid., 151.

¹⁶ For example, if one lived in a society, Ruritania, where everyone was much more intelligent than the people of, say, Manchester then an averagely intelligent person in Manchester could be harmed by living in that condition in Ruritania, even if they would not be considered harmed with that condition in Manchester. See Tuija Takala, 'Gender, Disability and Personal Identity' in Kristjana Kristiansen, Simo Vehmas and Tom Shakespeare (Eds.), *Arguing about Disability: Philosophical Perspectives* (Abingdon: Routledge, 2008).

¹⁷ Feinberg, 'Wrongful Life' 149.

¹⁸ Joel Feinberg, 'Harm and Offense' in L.C. Becker and C.B. Becker (Eds.), *Encyclopaedia of Ethics Volume II* (London: Routledge, 2001) 652.

¹⁹ R. M. Hare, *Essays on the Moral Concepts* (London: The Macmillan Press Ltd., 1972) 97.

ever would want it'.²⁰ This will be the definition of interests used in this article (though others can legitimately be countenanced).

6.3. John Harris's Challenge

The first challenge to the counterfactual account of harm is presented by Harris.²¹ Harris believes that 'to be harmed is to be put in a condition that is harmful'²² and explains that to be in a harmed condition is 'to be born with any impairment that one could have a rational preference to be born without.'²³ To illustrate this Harris uses a thought experiment of 'the emergency-room test'.²⁴ If a patient was brought into hospital in a condition that could only be rectified there and then and the medical staff would be negligent if they failed to correct it then the patient will be in a harmed state according to Harris.²⁵ Therefore when someone is in a condition they have a rational preference not to be in and another is responsible for this state of affairs then the latter will have harmed the former.

Most of the time this theory will not cause any problems and results in the same conclusions as Feinberg's. If you cut off my arm then I will be harmed under Feinberg's theory as, other things being equal, I will be worse off. I will also be harmed under Harris's account as a surgeon would be negligent if they failed to repair the damage if they could and I have a rational preference to not have a missing arm.

²⁰ Ibid. 98.

²¹ Although his 'harmed state' account has been criticised before, these critiques have not centred on its failure to displace the account of harm given by Feinberg. See Robert Sparrow, 'Harris, Harmed States, and Sexed Bodies' (2011) 37 *Journal of Medical Ethics* 276 and Bennett, 'When Intuition is Not Enough'.

²² Harris, *Clones, Genes and Immortality* 109.

²³ Rebecca Bennett and John Harris, 'Are There Lives Not Worth Living? When is it Morally Wrong to Reproduce?' in Donna Dickenson (Ed.), *Ethical Issues in Maternal-Foetal Medicine* (Cambridge: Cambridge University Press, 2002) 325.

²⁴ John Harris, *Enhancing Evolution: The Ethical Case for Making People Better* (New Jersey: Princeton University Press, 2007) 91.

²⁵ Ibid.

6.3.1. A Puzzling Conclusion

However, Harris's account runs into a number of problems in harder cases. The first is that it is too expansive and so leads to conclusions Harris may well, or perhaps should, be unwilling to accept given his writings on other topics. Under Harris's definition of harm it will be impossible to avoid causing harm if one chooses to have children. This is because everybody has certain characteristics that they might rationally prefer not to have. One might rationally prefer to be taller, less susceptible to common colds, have better eyesight, not die of old age, look like Elizabeth Taylor or Paul Newman in their prime or be more intelligent. In fact, if you picked any random individual existing on the planet you would certainly be able to find something, even if it is only minor, that is wrong with them. Something that one might rationally prefer to be improved and that a doctor would be considered negligent for not rectifying in an unconscious patient if they could. The implication of Harris's account is therefore that we are all harmed by existence because we could always rationally prefer to be in a better condition than the one we currently are in. If existence is a harmed state this means that those who cause people to be in such a condition – namely their parents – have caused harm. As a result, having children will always cause harm.

It is not open to Harris to say that a doctor would not be negligent for failing to find a cure to the common cold or administer the elixir of life as none is currently available. His account does not depend upon this. He believes, for example, that a deaf child is harmed by being born in a disadvantaged condition 'even though it is not possible for that particular individual to avoid the condition in question'²⁶ and exist in any other state. According to Harris, therefore, a child susceptible to common colds will be harmed even if they could not exist in any other state as, unlike Feinberg's, his account does not rest upon counterfactual alternatives. Whereas Feinberg would say that a child is harmed by being susceptible to colds

²⁶ Harris, *Clones, Genes and Immortality* 109.

if they could have existed in a state where they would not be so susceptible, Harris's theory of harm would say they are harmed regardless of the alternatives.

What should we do then if all children are harmed by existence? The first solution is to say that one should not have *any* children. There are some philosophers who do think that we are all harmed by existence. David Benatar is one of them and he has given an interesting argument that '[b]eing brought into existence is not a benefit but always a harm'.²⁷ Indeed, it is perfectly possible that this is the case and that we should not have children at all as doing so causes harm. But whatever the merits of this conclusion, this get-out is not available to Harris. Why? Because he has previously rejected it. Harris has stated '[s]o long as it is not possible to produce a healthier, and probably happier, alternative child there are still good moral reasons to produce children so long as their lives are predictably well worth living'.²⁸

Leaving aside the fact that Harris does not convincingly explain why an individual being harmed is dependent on whether another healthier person is waiting in the wings to replace them, if Harris does not accept that it is wrong to have children even though they will be harmed then there must be no duty to avoid causing harm. This is because, as Brassington has said, it is blameworthy to fail to fulfil a duty.²⁹ As we cannot be blamed for not performing the impossible, we cannot have a duty to do the impossible. Accordingly, if parents are allowed to have children then bringing them to birth in a non-harmed state (in other words, performing a duty to avoid causing harm) would be impossible. The failure to fulfil this duty not to cause harm will therefore not be blameable so it will not be a duty at all. This is the second unpalatable conclusion of Harris's account: it potentially sees causing harm as being completely morally unproblematic.

²⁷ David Benatar, 'Why it is Better Never to Come into Existence' (1997) 34 *American Philosophy Quarterly* 345.

²⁸ Harris, *Enhancing Evolution* 94.

²⁹ Iain Brassington, 'Enhancing Evolution and *Enhancing Evolution*' (2010) 24 *Bioethics* 395, 399.

Regardless of whether these two conclusions – that we should never have children; or that there is no duty to avoid harming people – are acceptable or not, this demonstrates a major inconsistency with Harris’s account of harm that is not apparent in Feinberg’s. Under Feinberg’s conception of harm bringing a child into existence only causes them harm if the child has a life that is not worthwhile (i.e. if they are worse off by being alive and so better off dead) and that is the only state they could be in. Given these problems, it is difficult to see why Harris’s account of harm should displace Feinberg’s.

6.3.2. The ‘Blighty Wound’ Soldier

Why then might we be tempted to adopt Harris’s view? Harris believes that it explains situations where we supposedly harm another even though they benefit overall. An illustration he gives in support of this is that of the ‘Blighty wound’ soldier, where in the First World War soldiers would shoot themselves in the foot in order to be sent home to England.³⁰ Harris states that adopting the counterfactual account would deprive us of describing these soldiers as being harmed as they are better off overall, whereas under his account they are harmed – people rationally prefer not to have foot injuries – but not wronged. Harris believes the intuitive reaction people have that the soldier is harmed undermines Feinberg’s counterfactual account.

However, assuming that Harris is correct to state that the soldier is harmed, this may not pose a problem for Feinberg’s theory. The soldier has caused themselves a serious injury so *their interest in having a healthy foot* is set back quite radically. They are likely to be permanently disabled, have exposed themselves to a serious risk of gangrene, amputation, even death and, at the very least, will be court-martialled and punished if found out. Many

³⁰ Harris, *Clones, Genes and Immortality* 113-114.

back in 'Blighty' might view them as cowardly. We might therefore be tempted to agree with Harris that the soldier is harmed.

However, Harris does not provide enough detail in this thought experiment to refute Feinberg's theory. The soldier's interest in being sent home, avoiding the war and surviving may not have been advanced that dramatically as they have only avoided a *risk* of death. This risk may have been small if the war was close to ending. If they survived they would have returned to 'Blighty' a hero. But by causing themselves injuries to avoid something that probably would not have happened anyway the soldiers might not have benefitted overall. As a result, the soldier would be worse off overall and thus harmed under Feinberg's account. While we may have a *feeling* that the soldier is harmed, that intuition may be explained better by the counterfactual account rather than Harris's own theory. There is simply not enough information in the thought experiment to conclusively determine whether any intuition that the soldier is harmed is better explained by Harris's or Feinberg's theory. If Harris put more content into this thought experiment to demonstrate that the soldier *was* benefitted overall then our intuitions might be different. After all, we might intuit that a soldier who shot themselves in August 1914 may not be harmed overall by such actions whereas one who did so in early-November 1918 would be. As a result, this thought experiment does not refute the counterfactual account of harm as it is insufficiently detailed.

6.3.3. Can One be Harmed and Benefited at the Same Time?

But even if this is not the case it makes little sense to describe a person as harmed if they benefit overall, especially if the only way to obtain the benefit is to accept the detriments that go with it. If, for example, a life-saving operation leaves someone with a scar they are not harmed *overall* by having their life saved if it is a choice between that or leaving an unscarred corpse (though their *interest in not being scarred* may be harmed). This is so even though

people have a rational preference not to be scarred. Accordingly, it is difficult to see any advantage in adopting Harris's account over Feinberg's. If one suffers a minor disadvantage in an otherwise overwhelming benefit, Harris's account would render such conduct impermissible if we had a duty to avoid causing harm.

This problem is not apparent in the counterfactual theory as it is capable of seeing certain actions as setting back some interests but advancing others and is therefore more nuanced than Harris's alternative.³¹

6.4. Kahane and Savulescu's Challenge

We have seen that Harris's theory of harm is less convincing than the one put forward by Feinberg. Might Kahane and Savulescu fare any better? Kahane and Savulescu state that 'to be severely intellectually impaired, paraplegic, blind, or to die in one's 20s is to suffer, in different ways and degrees, from serious disadvantage and harm'.³² This list will be referred to as list (1) and it is hard to disagree with this point. Assuming blindness or dying young do not further an individual's interests the items on list (1) will normally be considered harms according to the counterfactual account of harm.

However, Kahane and Savulescu believe the counterfactual theory 'faces a serious problem'³³ when one considers list (2). On this list are things such as: 'to have less than an IQ of 160, to lack great artistic talent, or to live less than 130 years'.³⁴ They maintain that these conditions could make people worse off but yet no one would describe this list 'as instances

³¹ It may be the case, however, that Harris is equivocating with his use of the word 'harm'. In certain scenarios where Harris describes someone as not being *harmed*, he conceded that they may be *wronged* (see *Clones, Genes and Immortality* 116-117). However, he provides us with no convincing reasons for why his terminology should be used. Indeed, his definition of harm removes all negative connotations that most people usually associate with the concept.

³² Kahane and Savulescu, 'The Concept of Harm' 318.

³³ *Ibid.*, 319.

³⁴ *Ibid.*

of serious disadvantage, harm or misfortune'³⁵ and state, 'it seems absurd to describe these limitations (and the conditions that underlie them) as serious harms'.³⁶ Putting someone in such a state does not appear to be equivalent to causing them harm. Consequently, Kahane and Savulescu believe that there appears to be a normative distinction between lists (1) and (2) and the aim of their paper is to determine what this distinction might be.

Kahane and Savulescu's theory therefore rests on an intuitive distinction between list (1) and list (2). They critique several possible reasons for this before proposing that statistical normality provides the best explanation for this intuition. Accordingly, statistical normality, they believe, must be morally important in discovering whether someone is harmed. That is, as the conditions in list (1) fall below what is statistically normal putting someone in such a condition will cause them harm and as the items in list (2) are statistically normal they will not be harms. To avoid repetition I will outline their justifications for this in more detail when exploring the weaknesses of their argument in the following sections.

Under the counterfactual account of harm the things in list (2) could *theoretically* be harms. People might have an interest in having great artistic talent or living to be 130 years old, for example. Thwarting these interests would make a person worse off and so they would be harmed. However, we must remember that the counterfactual account requires, in order for an individual to be harmed, their interests to be setback in 'the normal course of events insofar as they were reasonably foreseeable in the circumstances'.³⁷ There is presently no course of conduct that could be performed that would mean a person with the conditions in list (2), things such as lacking great artistic talent or living to less than 130 years old, could have these interests furthered *in the normal course of events insofar as they were reasonably foreseeable in the circumstances*. It is not reasonable to expect anyone to administer a serum that will enable people to be as great a composer as Mozart if no such serum exists. To put

³⁵ Ibid.

³⁶ Ibid.

³⁷ Feinberg, 'Wrongful Life' 153.

someone in one of these conditions listed in (2) does not cause them harm unless there was a way that someone could, say, live that long or have such great artistic talent.

Given this, the ‘serious problems’ that Kahane and Savulescu believe the counterfactual account faces are not ones that it faces in our world at present. They are merely theoretical. And, being theoretical, any intuitions that are generated by such thought experiments are not ones that can be relied on in this world. It may be that if there was a world where it is foreseeable that people could live to be 130 years old and their lives were then cut short then people in that world would see such actions are harmful. Kahane and Savulescu appear, therefore, not to have fully grasped the nuances of the counterfactual account and this is not a promising start for their theory. Nonetheless, their arguments can be refuted in other ways and so I will ignore this flaw for the rest of this paper.

6.4.1. The Problematic First Premise

The first problem with Kahane and Savulescu’s argument comes from their acceptance that the intuitive distinction concerning lists (1) and (2) is morally relevant for determining whether someone is harmed. Even if one concedes that people *do* have an intuition that the items on list (1) are worse than those in list (2), Kahane and Savulescu provide us with no evidence whatsoever that this intuition is, as they claim, a ‘normative’³⁸ one.

The trouble with relying solely on intuitions is that they are often unreliable. If one person intuits that X is bad and another that X is permissible then relying solely on intuition does not tell us how we should proceed. The mere fact people intuit a difference between list (1) and list (2) therefore tells us nothing normative.

³⁸ Kahane and Savulescu, ‘The Concept of Harm’ 319.

Kahane and Savulescu emphasise the fact that this intuition is ‘widely held.’³⁹ But the idea that we should blindly follow the intuitions of the majority is unconvincing. For a start, a cursory look at history shows that the majority of people have held all sorts of questionable beliefs. At one point most people intuited that throwing ‘witches’ in ponds or owning slaves was perfectly acceptable behaviour.

Many people, for example, have an intuition that human cloning is wrong.⁴⁰ But in an article supporting human cloning Julian Savulescu himself wrote:

[T]he fact that people find something repulsive does not settle whether it is wrong. The achievement in applied ethics, if there is one, of the last 50 years has been to get people to rise above their gut feelings and examine the reasons for a practice.⁴¹

It is hard to disagree. How peculiar, then, that Savulescu and Kahane elevate their gut feelings concerning the items in (1) and (2) without fully considering whether this intuitive distinction is morally important.

After all, a non-moral explanation can be suggested for the intuitive distinction between the two lists: such intuitions could simply be a result of our evolved responses to such scenarios. Thousands of years ago our ancestors would have seen being severely intellectually impaired, paraplegic, blindness or dying in one’s twenties as undesirable because these conditions would all be things that would hinder their chances of reproducing. As these conditions would have prevented people passing on their genes, natural selection will have given us evolutionary reasons to avoid these conditions. Our evolved response to the things in list (1) is to have a gut-feeling that they are harms.

³⁹ Ibid. 320.

⁴⁰ B.A. Bates et al, ‘Warranted Concerns, Warranted Outlooks: A Focus Group Study of Public Understandings of Genetic Research’ (2005) 60 *Social Science and Medicine* 331, 333.

⁴¹ Julian Savulescu, ‘Should we Clone Human Beings? Cloning as a Source of Tissue for Transplantation’ (1999) 25 *Journal of Medical Ethics* 87, 93.

The same cannot be said of the items in list (2). To have an IQ of less than 160, to lack great artistic talent or to live less than 130 years were not only unnecessary for people to pass on their genes thousands of years ago, but they are not even required for it now. Natural selection will not have provided us with aversions to being in such circumstances as any alternative would not be available to our ancestors or particularly advantageous in enabling them to reproduce. Natural selection may have equipped us with intuitions that the items in list (1) are bad if we are to pass on our genes but those in list (2) are not bad for this purpose.

This distinction is not necessarily morally significant however. As Peter Singer has stated, ‘The direction of evolution neither follows nor has any necessary connection with, the path to moral progress’.⁴² Indeed, just because something is good at helping people pass on their genes does not mean that it is good morally.⁴³

If Kahane and Savulescu want to rely on this intuition to show that the concept of harm should be redefined then they need to present a reason why the fact people (might) maintain an intuitive distinction between list (1) and list (2) renders this distinction morally important. This is something they fail to do. Accordingly they do not provide enough evidence to convincingly conclude that it is the counterfactual concept of harm that should be changed rather than the, supposedly widely-held, intuition people have regarding their two lists. Without this, Kahane and Savulescu’s argument for the importance of statistical normality in determining whether someone is harmed rests on insecure foundations.

Kahane and Savulescu try to extricate themselves from these difficulties by stating: ‘Those who reject our premises will naturally find our argument of limited interest.’⁴⁴ However, this is not a sufficient get-out clause for them. The burden is on the person offering an argument to show that their premises are sound, otherwise their proposition is question-

⁴² Peter Singer, ‘Ethics and Intuitions’ (2009) 9 *The Journal of Ethics* 331, 342.

⁴³ Alternatively, we may simply be that we have been educated to see list (1) as harms whereas, given alternatives to the things in list (2) are not something any of us will have encountered growing up, we have not been taught to see the latter as harms.

⁴⁴ Kahane and Savulescu, ‘The Concept of Harm’ 320.

begging. Kahane and Savulescu have failed to do this with their first premise and so they cannot simply dismiss any rebuttals based on this and continue to argue that statistical normality is morally important. Given, therefore, that the initial premise of Kahane and Savulescu's theory is unconvincing, it is hard not to conclude that their account of harm is inferior to the counterfactual one.

6.4.2. Statistical Normality

Let us now be generous and presume that the intuition we have that list (1) is worse than list (2) is a normative one. Does this mean that statistical normality provides a satisfactory account of what it means to be harmed? In this section I will show that it does not and highlight that Kahane and Savulescu's theory of harm leads to results that are far more counterintuitive – something they place great importance on – than the counterfactual account of harm.

Imagine there is a disease that has swept the population of Ruritania. Eighty per cent of the population has it and it causes them chronic pain. It is easily curable. Twenty per cent of the population do not have the disease. In this scenario the disease that the eighty per cent suffer from is statistically normal. The mode, mean and median of people suffer from it. If what is statistically normal was to determine whether a person was harmed then people are not harmed by suffering from chronic pain even though it could be easily cured. Furthermore, if say, only forty per cent of the population had this disease then there would be nothing to prevent someone, under Kahane and Savulescu's account of harm, injecting as many people as possible with the disease in order to make the disease statistically normal and thus not a harm. Under this theory, causing someone to be in chronic pain would not cause them harm even if doing so brought no other benefits. Such problems do not, of course, arise under the

counterfactual account as we could describe these people as harmed because, by not being cured, they are worse off than they otherwise would be in the normal course of events.

If we are concerned with the interests of people there are good reasons to reject Kahane and Savulescu's account of harm. Provided you end up being above what is statistically normal it would sanction the reduction of your welfare even when this did not improve the welfare of others. Whacking, say, a modern-day Michaelangelo over the head so that he could no longer paint something as great as the Sistine Chapel would not be to cause him harm under Kahane and Saulescu's theory provided he could still paint better than the average person. This would be so even if no one else was benefitted by such spiteful actions.⁴⁵ The mere fact that list (1) sometimes correlates with what is statistical normal, whereas those in list (2) do not, is not a compelling reason for concluding that statistical normality is important in determining whether someone is harmed. In contrast, Feinberg's theory allows us to say that minor harms are still harms and avoids these logical pitfalls.

6.4.3. Diminishing Marginal Utility and the Intuitive Distinction

I have demonstrated that Kahane and Savulescu's argument rests on a flawed premise and that a concept of harm based on statistical normality leads to counterintuitive results. Despite this, some may be tempted to draw a distinction between the two lists that Kahane and Savulescu present. They may see being paralysed as worse than, say, lacking the ability to fly. I would not disagree. The former is worse than the latter. But the best explanation for this is not the one provided by Kahane and Savulescu. The counterfactual theory of harm may be

⁴⁵ Kahane and Savulescu's theory appears to support a world similar to that outlined in Kurt Vonnegut's dystopian satire 'Harrison Bergeron', which imagines a society where the Handicapper General enforces the state's equality laws by handicapping people to ensure that no one is allowed to be smarter, better-looking, or more physically able than anyone else. See Kurt Vonnegut, *Welcome to the Monkey House* (London: Vintage Books, 1994) 7.

able to *better* account for the idea that list (1) is *generally* worse than list (2) in most circumstances because of the fact of diminishing marginal utility.

If something exhibits diminishing marginal utility then, according to Greene and Baron, ‘the more of that good an individual has, the less valuable having more of it will be to that individual.’⁴⁶ This is because one tends to put off buying goods with less utility per pound until after one has bought more essential, basic goods.⁴⁷ Simmonds provides a good illustration of this. He states:

Expressed very simply, this theory entails that an additional £1 given to a millionaire will make a negligible contribution to his welfare, whereas £1 given to a very poor man might make a significant contribution to his welfare, enabling him, say, to buy a meal that he could not otherwise afford.⁴⁸

Greene and Baron performed a study which showed that the utility people place on a wide range of goods – including extended lifespan – is marginally declining.⁴⁹ If we must accept, as Kahane and Savulescu maintain, that any difference between list (1) and list (2) is a moral one this may explain why the items in list (1) are considered worse than those in (2).

The items in list (1), things such as blindness, paraplegia or having a short lifespan, are invariably things that if they were removed would bring much greater utility than the items in list (2), things such as lacking artistic talent or not having a really long lifespan. A person who has an IQ of 75 is more likely to get a greater benefit from having their IQ increased by 10 points than someone with an IQ of 150 would. The principle of diminishing marginal utility would see the things in list (1) as ones that generally setback interests more than list (2) and this is why people might have an intuitive reaction that list (1) is worse than

⁴⁶ Joshua Greene and Jonathan Baron, ‘Intuitions about Declining Marginal Utility’ (2001) 14 *Journal of Behavioural Decision Making* 243.

⁴⁷ *Ibid.*, 244.

⁴⁸ Nigel Simmonds, *Central Issues in Jurisprudence* 4th Edn. (London: Sweet and Maxwell, 2014) 30-31.

⁴⁹ Greene and Baron, ‘Intuitions about Declining Marginal Utility’ 248.

list (2). However, this does not mean that the items in list (2) are not harms *at all* or even, in particular circumstances, not serious harms.

Whether someone is harmed is context-specific. The fact that diminishing marginal utility provides an explanation for the intuitive distinction merely means that *generally* the items in list (2) do not make life go as bad as those in list (1) and so are *usually* minor harms. Statistical normality is therefore not the only cogent explanation for any intuitive distinction that people may have between Kahane and Savulescu's lists – the counterfactual account of harm provides a more plausible explanation of why list (1) might be perceived as making people worse off than list (2).

Kahane and Savulescu try to get around this by arguing that 'We can stipulate, for our purposes, that enjoyment of these conditions [in list (2)] would significantly increase wellbeing, and that they would do so to roughly the same extent that the conditions listed in list (1) decrease it.'⁵⁰ However, this stipulation is not open to them logically. In our world it is not possible that the conditions in list (2) are as equally bad or reduce welfare to the same extent as the items in list (1) and so any intuitions that are generated as a result of this are untrustworthy. Stipulating that not being as good a playwright as Shakespeare is the equivalent in terms of setbacks to welfare as being blind is the equivalent of stipulating that two plus two equals five, or that being tortured to death is equal to having ten pounds stolen off you: it is so difficult, if not impossible, for us to even comprehend such a thing that any intuitions generated are of dubious reliability in our present world. This 'stipulation' is therefore not a good enough escape route for Savulescu and Kahane and they cannot simply presume that list (1) and list (2) are equally serious.

It is unsurprising, though, that Kahane and Savulescu do not tackle this problem head-on and list examples of things that *do* equally setback welfare in our world. This is because if

⁵⁰ Kahane and Savulescu, 'The Concept of Harm' 321.

they actually used examples that *did* increase or decrease welfare to the same extent then our intuitions would probably indicate that both lists contain harms and their whole argument would be undermined. Accordingly, Kahane and Savulescu must provide examples in their lists that actually reduce welfare to the same extent if any intuitions regarding the two lists are to be useful.

Without doing this, they cannot rebut the idea that diminishing marginal utility indicates that list (1) and list (2) are unlikely to reduce an individual's welfare to the same extent. This means the items in list (1) will setback welfare to a greater extent than those in list (2) will and so can be perceived as more serious harms under to the counterfactual account. Kahane and Savulescu therefore do not show that the counterfactual account of harm is an inadequate theory.

6.5. Conclusion

It has been said that harm is ‘a subject of special moral concern because harm is presumptively bad to suffer and presumptively wrong to inflict.’⁵¹ It is therefore essential that we adopt a definition of the concept that is philosophically coherent. The counterfactual account of harm is capable of withstanding such scrutiny and this article has defended it from two challenges. It has been shown that the theories of harm proposed by Harris, Kahane and Savulescu are internally inconsistent and contain a number of flaws. Both the ‘harmed state’ and the ‘statistical normality’ accounts lead to conclusions that, even if their respective authors were willing to accept them, are unlikely to be satisfactory for anyone else. As a result, the attacks directed by Harris, Kahane and Savulescu towards the counterfactual theory are fail to hit their target. Instead, like the Blighty Wound Soldier they shoot themselves in the foot.

⁵¹ Gregory Keating, ‘When is Emotional Distress Harm?’ in Stephen Pitel, Jason Neyers and Erika Chamberlain (Eds.), *Tort Law: Challenging Orthodoxy* (London: Hart Publishing, 2013) 276.

Chapter 7: Liability for Lost Autonomy in Negligence: Undermining the Coherence of Tort Law?

7.1. Introduction

In *Reeves v Commissioner of Police of the Metropolis*,¹ Lord Hobhouse emphasised the significance of the ‘the fundamental principle of human autonomy’² when he stated:

Where a natural person is not under any disability, that person has a right to choose his own fate. He is constrained in so far as his choice may affect others, society or the body politic. But, so far as he himself alone is concerned, he is entitled to choose.³

Autonomy is valuable because it leads, Alexander McCall Smith argues, to the living of a good life.⁴ As Ronald Dworkin has stated, it ‘allows each of us to be responsible for shaping our lives according to our own coherent or incoherent – but in any case, distinctive – personality’⁵ and ‘to lead our own lives rather than be led along them.’⁶ By contrast, the

¹ [2000] 1 AC 360.

² *Ibid.*, at 394.

³ *Ibid.* This case was primarily concerned with causation and the volenti defence. Lord Hobhouse was the lone dissenter on those issues but, although his judgment in no way represents the ratio decidendi of the case, his discussion of autonomy succinctly sums up the current law.

⁴ Alexander McCall Smith, ‘Beyond Autonomy’ (1997) 14 *Journal of Contemporary Health Law and Policy* 23, 30.

⁵ Ronald Dworkin, *Life’s Dominion: An Argument about Abortion and Euthanasia* (London: Harper Collins, 1993) 224.

⁶ *Ibid.*, 224.

person for whom decisions are made by others leads a ‘drab’⁷ and ‘poorer life’⁸ that is ‘less worth living than the life of the autonomous agent.’⁹ This seems to be true on an intuitive level: few of us would wish for all of our decisions to be controlled by another individual.

In light of this, the latter part of the twentieth century heralded a diminishing acceptance of the medical paternalism of the past.¹⁰ Today, bioethical debates emphasise the utmost importance of respecting an individual’s autonomy¹¹ and there has been no shortage of medical law cases stressing the same point. To see how far we have come, one only needs to compare Lord Denning’s statement in *Hatcher v Black*¹² that doctors are justified in telling a therapeutic lie to their patients with the way the tort of battery has developed to enable mentally competent¹³ patients to refuse the amputation of gangrenous limbs,¹⁴ Jehovah’s Witnesses refuse life-saving blood transfusions¹⁵ and prospective mothers to refuse life-saving caesarean-sections even when the life of their unborn child is threatened by such choices.¹⁶ As Judge LJ stated in a case concerning the latter factual scenario,

Even when his or her own life depends on receiving medical treatment, an adult of sound mind is entitled to refuse it. This reflects the autonomy of each individual and the right of self-determination.¹⁷

⁷ McCall Smith, ‘Beyond Autonomy’ 30.

⁸ Ibid.

⁹ Ibid.

¹⁰ Brazier’s account of how the law developed to protect patient autonomy remains illuminating: ‘Patient Autonomy and Consent to Treatment: The Role of the Law?’ (1987) *Legal Studies* 169. See also Sheila McLean, *Autonomy, Consent and the Law* (Abingdon: Routledge-Cavendish, 2009) 6-40.

¹¹ See Tom Beauchamp and James Childress, *Principles of Biomedical Ethics* 7th Edn. (Oxford: Oxford University Press, 2013), Gerald Dworkin, ‘Autonomy and Behaviour Control’ (1976) 6 *Hastings Centre Report* 23, John Harris, *The Value of Life: An Introduction to Medical Ethics* (London: Routledge & Kegan Paul, 1985); Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge: Cambridge University Press, 1988), John Christman, ‘Constructing the Inner Citadel: Recent Work on the Concept of Autonomy’ (1988) 99 *Ethics* 109; Søren Holm, ‘Autonomy’ in Ruth Chadwick (Ed.), *Encyclopaedia of Applied Ethics* Vol 1 (San Diego: Academic Press, 1998).

¹² (1954) *The Times*, July 2nd.

¹³ The law on mental capacity is now contained in the Mental Capacity Act 2005.

¹⁴ *Re C (Adult: Refusal of treatment)* [1994] 1 WLR 290.

¹⁵ *Re T (Adult: Refusal of treatment)* [1993] Fam 95.

¹⁶ *Re MB (Adult: Medical treatment)* [1997] 2 FCR 541 at 553 per Butler-Sloss LJ and *St George’s Healthcare NHS Trust v S* [1998] 3 WLR 936.

¹⁷ *St George’s Healthcare NHS Trust v S* [1998] 3 WLR 936 at 950.

In fact, such is the focus on protecting patient autonomy that some academics have criticised the tendency to see it as ‘a trump card beating all the other principles.’¹⁸

Respect for autonomy is therefore a significant social and cultural (not to mention legal) development. Given that the common law is ‘capable of evolving in the light of changing social, economic and cultural developments’¹⁹ it is arguable that one particular area of the common law – the tort of negligence – might be adapted to recognise this. Recent appellate cases such as *Rees v Darlington Memorial Hospital NHS Trust*²⁰ and *Chester v Afshar*²¹ could be interpreted as paving the way towards an interest in autonomy being recognised by this tort and there is a significant body of academic opinion that suggests that such a course has much to recommend it.²² A first impression of such developments might be that they should be welcomed. After all, if autonomy is A Good Thing then it might be thought that the law of negligence should be changed to further protect it.²³ Indeed, concentrating solely on the doctor-patient relationship and the medical law context with its focus on preserving autonomy might lead one to such a conclusion.

But a wider doctrinal analysis shows that this is not the case. In this article it is argued that protecting an interest in autonomy through the tort of negligence would be an error as it is impossible to do so in a coherent way without distorting established and cogent legal principles. The first section of this article explains the current position of the law towards

¹⁸ Margaret Brazier, ‘Do No Harm – Do Patients Have Responsibilities Too?’ (2006) 65 *Cambridge Law Journal* 397, 400. See also McCall Smith, ‘Beyond Autonomy’, Onora O’Neill, *Autonomy and Trust in Bioethics* (Cambridge: Cambridge University Press, 2002) ix, Charles Foster, *Choosing Life, Choosing Death: The Tyranny of Autonomy in Medical Law and Ethics* (Oxford: Hart Publishing, 2009) and ‘Autonomy in the Medico-Legal Courtroom: A Principle Fit for Purpose?’ (2014) 22 *Medical Law Review* 48.

¹⁹ *R v R* [1992] 1 AC 599 at 616 per Lord Keith.

²⁰ [2004] 1 AC 309.

²¹ [2005] 1 AC 134.

²² See Roger Crisp, ‘Medical Negligence, Assault, Informed Consent, and Autonomy’ (1990) 17 *Journal of Law and Society* 77, Kumaralingam Amirthalingham, ‘Causation and the Gist of Negligence’ (2005) 64 *Cambridge Law Journal* 32, Donal Nolan, ‘New Forms of Damage in Negligence’ (2007) 70 *Modern Law Review* 59, 79, Nicolette Priaulx, *The Harm Paradox: Tort Law and the Unwanted Child in the Era of Choice* (Abingdon: Routledge-Cavendish, 2007) 9, Victoria Chico, *Genomic Negligence: An Interest in Autonomy as the Basis for Novel Negligence Claims Generated by Genetic Technology* (Abingdon: Routledge-Cavendish, 2011) 134, Tamysn Clark and Donal Nolan, ‘A Critique of *Chester v Afshar*’ (2014) 34 *Oxford Journal of Legal Studies* 659.

²³ How negligence currently protects autonomy will be discussed below.

protecting autonomy by giving a brief overview of the cases of *Rees* and *Chester* and outlines what protecting an interest in autonomy involves. The second part of this paper shows that the very nature of autonomy means its diminishment cannot be considered a form of actionable damage in negligence in a way that is consistent with established principles. However, even if lost autonomy *could* be recognised as actionable damage, it is argued that a duty of care to avoid causing this type of harm would undermine the restrictions that the law has placed on recovery for other types of damage. Specifically, this section of the article addresses the fact that, since the law has limited recovery in negligence for economic loss and psychiatric harm and given that lost autonomy encompasses these kinds of losses, a duty of care to avoid interfering with autonomy would be inconsistent with the current law.²⁴ It is concluded that while it is true that autonomy is an important value, the protection of this notional interest cannot and should not be achieved by adapting the tort of negligence to perceive autonomy *itself* as a form of damage that people have a duty of care to avoid causing. This is not to deprecate autonomy as a moral value, nor even to say that it should not be further protected by the law generally, but if such protection were achieved through the tort of negligence the damage to the coherence of the common law would outweigh any benefits received by individual claimants.

²⁴ Issues of breach of duty and causation do not necessarily pose any problems for the recognition of an interest in autonomy in negligence and so will also not be the focus of this article. Furthermore, given this paper argues that autonomy should not be an interest protected by negligence, the issue of quantification for lost autonomy will not be considered here.

7.2. Autonomy and Negligence: The Current Position

7.2.1. The Autonomy Cases²⁵

In English law the concept of autonomy is perceived as being content-neutral. In a case concerned with the tort of battery, Lord Donaldson MR stated:

...the patient's right of choice exists whether the reasons for making that choice are rational, irrational, unknown or even non-existent. That his choice is contrary to what is to be expected of the vast majority of adults is only relevant if there are other reasons for doubting his capacity to decide.²⁶

This is evidence that English law does not require an individual's choices to be sensible or rational in order to qualify as being autonomous.²⁷ This account of autonomy is heavily influenced by John Stuart Mill's statement in *On Liberty* that 'The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.'²⁸ Autonomy is therefore conceived as being equivalent to self-determination: the freedom to pursue one's conception of the good life, just as long as it does not impinge upon

²⁵ The purpose of this article is not to give an in-depth analysis of the different interpretations of, and extensive literature on, these two cases but rather to use them as a starting point for discussing whether autonomy could be an interest in negligence.

²⁶ *Re T (Adult: Refusal of Treatment)* [1993] Fam 95 at 112.

²⁷ Although there are accounts of autonomy that do not see the concept as being content neutral (see John Coggon, 'Varied and Principled Understandings of Autonomy in English Law: Justifiable Inconsistency or Blinkered Moralism?' (2007) 15 *Health Care Analysis* 235; Chico, *Genomic Negligence* 42 and Priaulx, *The Harm Paradox* 9) space constraints prevent a detailed explanation of why these accounts of autonomy are unpersuasive here. This paper proceeds on the basis that if the courts are likely to recognise an interest in autonomy in negligence they are more likely to use the liberal, content-neutral definition of autonomy that is used in other branches of the law. The law of tort would descend into incoherence if two closely related torts such as battery and negligence used different definitions of the same concept.

²⁸ John Stuart Mill, 'On Liberty' in John Gray (Ed.) *On Liberty and Other Essays* (Oxford: Oxford University Press, 1991) 14. C.f. John Coggon and Jose Miola's article 'Autonomy, Liberty and Medical Decision-Making' (2011) 70 *Cambridge Law Journal* 523 where they argue that there is confusion between the concept of autonomy and that of liberty and that Mill's work is concerned only with the latter. However, given that autonomy and liberty are used interchangeably in the case law and much of the academic literature, this need not concern us here. See also Clark and Nolan, above n 22, for a discussion of different conceptions of autonomy.

another's identical freedom.²⁹ If autonomy is to be recognised as an interest in negligence, it is likely that this account of the concept will be used to avoid inconsistency with the tort of battery and other related areas of the law where this definition has gained acceptance.³⁰

The first case illustrating that autonomy per se could be an interest protected by the tort of negligence was *Rees v Darlington Memorial Hospital NHS Trust*,³¹ where a visually disabled claimant underwent a sterilisation, which was negligently performed by the defendant hospital. As a result she gave birth to a healthy son and claimed for the costs associated with raising the child.³² Her claim was unsuccessful as the House of Lords followed its previous decision in *McFarlane v Tayside Health Board*,³³ which held that the damages associated with raising a healthy child were irrecoverable.

However, the majority of the House of Lords in *Rees* (Lord Bingham, Lord Nicholls, Lord Millett and Lord Scott) awarded the claimant a £15,000 conventional sum for having 'been denied, through the negligence of another, the opportunity to live her life in the way that she wished and planned'³⁴ (Lord Steyn, Lord Hutton and Lord Hope dissented on this point). As this award does not compensate the claimant for the costs associated with raising a healthy child, it has been interpreted as reflecting the claimant's diminished autonomy,³⁵ with Nolan, for example, stating that the case 'amounts to recognition of diminished autonomy as a form of actionable damage.'³⁶

²⁹ Kim Atkins, 'Autonomy and the Subjective Character of Experience' (2000) 17 *Journal of Applied Philosophy* 71, 74.

³⁰ See *Pretty v United Kingdom* (2002) 35 EHRR 1 [62] and *R v Kennedy (No 2)* [2008] 1 AC 269 at 275 per Lord Bingham for evidence that this version of autonomy is used in human rights jurisprudence and the criminal law respectively.

³¹ [2004] 1 AC 309.

³² She also claimed, should the claim for the full costs of raising the child be refused, for the *extra costs* she would incur from raising a healthy child attributable to her disability, but this claim was also refused.

³³ [2000] 2 AC 59.

³⁴ *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309 at 317 per Lord Bingham.

³⁵ See Chico, *Genomic Negligence* 126 and Priaulx, *The Harm Paradox* 74.

³⁶ Nolan, 'New Forms of Damage in Negligence' 80. C.f. Nicholas McBride and Roderick Bagshaw, *Tort Law*, 4th Edn. (Harlow: Pearson, 2012) 826 who view the conventional award as vindicating the claimant's rights rather than compensating her for lost autonomy.

The second case is *Chester v Afshar*.³⁷ The claimant, Miss Chester, suffered from back pain and visited the defendant consultant, Mr Afshar, who recommended surgery. He failed, however, to warn her about a small risk of cauda equina syndrome (paralysis) inherent in the operation. This risk would be present no matter how expertly the operation was performed and liable to occur at random. Based on his advice, Miss Chester underwent the procedure and, although the surgery itself was not carelessly performed, she suffered from the syndrome.

Miss Chester admitted that she could not say that she would *never* have undergone the operation even if she had been warned of the risks.³⁸ Instead, she said that she would not have had it at the time that she did but would have instead wanted to discuss the matter with others and explore alternatives. She conceded that she may have chosen to have the surgery on a different day. As a result of this concession, it was arguable that she could not show that Mr Afshar's carelessness in failing to warn her of the risks had actually *caused* the syndrome because it might have occurred anyway.

The House of Lords, however, found in Miss Chester's favour (Lord Bingham and Lord Hoffmann dissenting). They held that even though the claimant could not establish that the defendant had *caused* her paralysis,³⁹ a departure from conventional causation rules was justified because her right to make her own decision about her treatment had been interfered with. Lord Steyn laid emphasis on Miss Chester's 'right of autonomy and dignity,'⁴⁰ saying it 'can and ought to be vindicated by a narrow and modest departure from traditional causation principles.'⁴¹ He reiterated that '[i]n modern law medical paternalism no longer rules.'⁴²

³⁷ [2005] 1 AC 134.

³⁸ If she could have said this her claim would have been successful. See *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] AC 871.

³⁹ There is disagreement over whether this is an issue of factual causation or remoteness/scope of liability. See Clark and Nolan, 'A Critique of *Chester v Afshar*' 22.

⁴⁰ *Chester v Afshar* [2005] 1 AC 134 at 146.

⁴¹ *Ibid.*

⁴² *Ibid.*, at 143.

Indeed, even Lord Hoffmann (dissenting) believed that there might be a case – albeit one he rejected – for a ‘modest solatium’⁴³ being awarded for Miss Chester’s diminished autonomy. This *dicta* indicates that, as Devaney has noted, ‘the primary concern of the majority...was to ensure that patient autonomy is respected’⁴⁴ and several academics have perceived the *real* damage in this case to be the interference with Miss Chester’s autonomy.⁴⁵ Green, for examples, describes it as a ‘loss of autonomy case’.⁴⁶

Finally, in *Montgomery v Lanarkshire Health Board*,⁴⁷ the claimant was a pregnant diabetic woman of small stature. Because of this, there was a 9-10% risk of shoulder dystocia (the inability of the baby’s shoulders to pass through the pelvis) involved in a vaginal birth. This problem can usually be resolved by emergency procedures but there is a small risk that the child could be starved of oxygen and suffer serious harm. Unfortunately for Mrs Montgomery, the risks associated with shoulder dystocia eventuated and her child was born with severe disabilities as a result. The claimant submitted that she should have been warned of the risks of her undergoing a vaginal delivery and, if so warned, that she would have elected to undergo a caesarean section. As such, the injuries to her child would not have occurred. The defendant maintained that as the risks of serious injury were low, the consultant obstetrician was not under a duty to warn the patient of them.

The Supreme Court accepted the claimant’s arguments and unanimously held that a doctor is under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments. The leading judgment of Lord Kerr and Lord Reed maintained that test of

⁴³ *Ibid*, at 147.

⁴⁴ Sarah Devaney ‘Autonomy Rules Ok’ (2005) 13 *Medical Law Review* 102, 107.

⁴⁵ See Amirthalingham ‘Causation and the Gist of Negligence’, David Pearce and Roger Halson, ‘Damages for Breach of Contract: Compensation, Restitution and Vindication’ (2008) 28 *Oxford Journal of Legal Studies* 73, 98; John Murphy and Christian Witting, *Street on Torts* 13th Edn., (Oxford: Oxford University Press, 2013) 159. Clark and Nolan, maintain that the damage pleaded was Miss Chester’s personal injury but that a better solution would have been to compensate her for her lost autonomy – see ‘A Critique of *Chester v Afshar*’

⁴⁶ Sarah Green in the chapter ‘Lost Chances’ from her book *Causation in Negligence* (Oxford: Hart Publishing, 2015) kindly discussed by personal correspondence.

⁴⁷ [2015] UKSC 11.

materiality is whether, in the circumstances of the particular case, ‘a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it.’⁴⁸

This represents a much more patient-centred approach towards the doctor’s duty to warn patients of risks and the case emphasises the importance of respecting patient autonomy. The concurring judgment of Lady Hale arguably goes further. She stated: ‘It is now well recognised that the interest which the law of negligence protects is a person’s interest in their own physical and psychiatric integrity, an important feature of which is their autonomy, their freedom to decide what shall and shall not be done with their body.’⁴⁹ *Dicta* such as this might support the contention that autonomy per se either is or could be recognised as an interest protected by this tort.

7.2.2. Does the Tort of Negligence Already Protect an Interest in Autonomy?

The above cases have prompted some commentators to suggest that a duty of care to avoid interfering with an individual’s autonomy might be an appropriate solution to the problems raised by cases such as *Rees* and *Chester*.⁵⁰ However, it might be said that this adds little and that the tort of negligence already protects people’s autonomy.

If someone’s negligence causes a claimant to, say, suffer gastroenteritis so they cannot work or do the things they enjoy, then their ability to be the author of their own life is limited. Their autonomy will have been interfered with. The tort of negligence responds to this and requires a defendant to compensate a claimant for such interferences. By protecting an interest in not being physically injured, the tort of negligence *indirectly* protects people’s

⁴⁸ Ibid, at [87].

⁴⁹ Ibid, at [108].

⁵⁰ See Amirthalingham, Nolan, Chico, Clark and Nolan, above n 22.

autonomy. The same is true of the other interests that negligence protects. If your carelessness damages my bike then the way in which I choose to live my life will be affected if I have to start taking the bus every day. You will have to pay me compensation for this. This way of protecting autonomy perceives autonomy as being instrumentally valuable: one should not interfere with a person's autonomy because doing so can lead to undesirable consequences such as personal injury or property damage.

This is very different to what protecting an interest in autonomy per se involves. If autonomy itself is an interest in negligence, as *Chester* and *Rees* imply it could be in certain circumstances, then instead of damages being awarded for personal injury or property damage etc, they will be given for the diminished autonomy *itself*.⁵¹ Autonomy will be seen as *intrinsically* important rather than instrumentally valuable.⁵² This would reflect the intrinsic value of autonomy, as opposed to it being valuable for the sake of something else.⁵³ Instead of having to show that they are suffering from one of the currently recognised forms of damage, all a claimant would have to demonstrate is that their choices have been compromised. This is similar to the way in which the tort of battery operates, which sees interferences with physical autonomy (through unwanted touching) as intrinsically wrong. Being actionable per se, claims can be brought in that tort without further harm having being suffered. Accordingly, if autonomy per se is recognised as an interest in negligence, the way in which autonomy would be protected will be different from how it currently is.

⁵¹ Chico, for example, states that in *Rees* the House of Lords 'unwittingly recognised the intrinsic value of autonomy, but not the instrumental or whole value' (*Genomic Negligence* 128). Some academics have argued that the gist of the action in *Chester* was her diminished autonomy but that damages were awarded for the personal injury. See Murphy and Witting, *Street on Torts* 159. Whether diminished autonomy is compensated by awarding someone a conventional award (as in *Rees*) or all of the consequences of their lost autonomy (as in *Chester*) is not relevant to this article but will be addressed in future research.

⁵² Chico, *Genomic Negligence* 68.

⁵³ Jukka Varelius, 'The Value of Autonomy in Medical Ethics' (2006) 9 *Medicine, Health Care and Philosophy* 377 at 378.

7.3. Autonomy as an Interest in Negligence

Over half a century ago Street stated that '[t]he law of torts is concerned with those situations where the conduct of a party causes or threatens harm to the interests of other parties.'⁵⁴ Taking 'interests' to be claims or wants that human beings seek to satisfy,⁵⁵ most torts protect one particular interest. Nuisance protects the interest in the enjoyment of one's land, defamation protects the interest in one's reputation and so on. The tort of negligence is different. A defendant will be liable in this tort when they breach a duty of care owed to a claimant and that breach causes damage.⁵⁶ Given that there are different forms of damage in negligence, this tort protects several distinct interests. This is because, as Weir has stated, interests are 'the positive aspects of kinds of damage.'⁵⁷

The tort of negligence can also 'develop in adaptation to altering social conditions and standards'⁵⁸ and recognise new interests. As Lord Macmillan stated in *Donoghue v Stevenson*,⁵⁹ '[t]he categories of negligence are never closed.'⁶⁰ When, for example, society began to develop a greater understanding of psychiatric illnesses, this interest was protected by the recognition that people owe a duty to avoid causing others to suffer a 'nervous shock'.⁶¹

Whether autonomy should be recognised as an interest that should be protected by the tort of negligence turns of whether it can be seen as a form of actionable damage and, if so, whether a duty of care to avoid causing such damage can be imposed on defendants. I argue

⁵⁴ Harry Street, *The Law of Torts*, 2nd Edn. (London: Butterworths, 1959) 3.

⁵⁵ Margaret Brazier, *Street on Torts* 9th Edn. (London: Butterworths, 1993) 3.

⁵⁶ *Donoghue v Stevenson* [1932] AC 562 at 618-619 per Lord Macmillan.

⁵⁷ Tony Weir 'Liability for Syntax' (1963) 21 *Cambridge Law Journal* 216, 218.

⁵⁸ *Donoghue v Stevenson* [1932] AC 562 at 619.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ See the early nervous shock cases such as *Dulieu v White* [1901] 2 KB 669, where the injury actually sustained was physical, but it was recognised that such injuries could be caused psychologically. Admittedly, the introduction of this interest has not been wholeheartedly embraced as discussed in the section of this article on duty of care (below).

below that the current principles of negligence law indicate that neither of these are tenable propositions.

7.4. Diminished Autonomy as Actionable Damage

While damage is the gist of the action in negligence,⁶² it is the most overlooked aspect of this tort.⁶³ Beyond the currently recognised categories of actionable damage – personal injury,⁶⁴ psychiatric harm,⁶⁵ property damage⁶⁶ and economic loss⁶⁷ – there are few established principles determining when and whether a new form of damage will be recognised. As Nolan has stated:

the requirement of damage has generally been under-emphasised by common lawyers. Issues of damage are frequently repackaged as questions of duty of care or causation, important extensions of the categories of damage take place with little or no analysis or even acknowledgement of the fact, and textbooks fail to give the damage issue the separate treatment it deserves.⁶⁸

Certain principles, though, can be identified. One is that in order for damage to have been suffered a claimant must be worse off than they otherwise would have been had the defendant's carelessness not occurred. As Lord Hoffmann stated in *Rothwell v Chemical & Insulating Co Ltd*,⁶⁹ damage is 'an abstract concept of being worse off, physically or

⁶² *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] AC 871 at 883 per Lord Scarman.

⁶³ See Nolan, 'New Forms of Damage in negligence' and 'Damage in the English Law of Negligence' (2013) 4 *Journal of European Tort Law* 259, 264. See also Simon Deakin, Angus Johnston, and Basil Markesinis *Markesinis and Deakin's Tort Law*, 7th Edn. (Oxford: Oxford University Press, 2013) 106.

⁶⁴ See *Perrett v Collins* [1999] PNLR 77.

⁶⁵ See *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310.

⁶⁶ See *Marc Rich & Co v Bishop Rock Marine Co* [1996] AC 211.

⁶⁷ See *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

⁶⁸ Nolan, 'Damage in the English Law of Negligence' 264.

⁶⁹ [2008] 1 AC 281.

economically, so that compensation is an appropriate remedy⁷⁰ and it ‘does not mean simply a physical change, which is consistent with making one better...or with being neutral.’⁷¹

Nolan takes issue with this definition. He states that ‘not all forms of being worse off count as actionable damage.’⁷² This is certainly true with, for example, grief, distress and anxiety that fall short of psychiatric harm and that are not classed as actionable damage in their own right. These are considered ‘normal human emotion[s] for which no damages can be awarded.’⁷³ This is so despite them undoubtedly making a person worse off: one would much rather not be grieving, distressed or anxious. However, this criticism can be countered by the fact that being worse off is a necessary but not a sufficient condition for damage to have been suffered. One must be worse off but also must meet the standards of the maxim *de minimis non curat lex* – the law does not concern itself with trifles.⁷⁴ As the law deems ‘normal human emotions’ such as grief and anxiety to be minimal injuries compared to personal injury or psychiatric harm, they are irrecoverable. Whether the damage suffered is trifling is a question of degree. For example, in *Cartledge v Jopling & Sons Ltd*,⁷⁵ the claimant workmen contracted pneumoconiosis, a disease in which slowly accruing and progressive damage may be done to an individual’s lungs without their knowledge. The House of Lords held that it does not matter whether a claimant is aware of the damage or that medical science could not have discovered it at the stage that it occurred provided that it is more than minimal. The fact that disease would be visible on X-rays and that unusual exertion would cause the claimants to suffer meant that the damage was substantial.⁷⁶ In

⁷⁰ Ibid. at 289.

⁷¹ Ibid.

⁷² Nolan, ‘Damage in the English Law of Negligence’ 265.

⁷³ *Hicks v Chief Constable of South Yorkshire Police* [1992] PIQR 433 at 436 per Lord Bridge. Cf Rachael Mulheron, ‘Rewriting the Requirement for a ‘Recognised Psychiatric Injury’ in Negligence Claims’ (2012) 32 *Oxford Journal of Legal Studies* 77.

⁷⁴ See *Cartledge v Jopling & Sons Ltd* [1963] AC 758 at 779 per Lord Pearce.

⁷⁵ Ibid.

⁷⁶ Ibid.

contrast, in *Rothwell v Chemical & Insulating Co Ltd*,⁷⁷ the claimants were exposed to asbestos dust and developed pleural plaques, which meant they were susceptible to suffering an asbestos-related disease. Yet the House of Lords held that that since the plaques were symptomless and did not shorten life expectancy, their mere presence in the claimants' lungs did not constitute an injury capable of giving rise to a claim for damages in tort. Even though the claimants had suffered from anxiety as a result of developing these plaques, they could not recover in negligence. Accordingly, in order for actionable damage to have been suffered in negligence, the claimant must be made worse off and this worsening must be more than minimal.

However, Nolan might also disagree with this recasting of the components required for damage being suffered. He cites examples where one can be *better off* as a result of a defendant's negligence but still suffer from actionable damage.⁷⁸ One is of the skilful artist who paints over someone's painting unasked. Property damage has still been inflicted in such circumstances even if the individual could now receive more money for it.⁷⁹ Another example is this one:

...suppose I leave a bag of old clothes in my front garden ready to take them to the rubbish dump, but before I do so, the clothes are washed away in a flood caused by the defendant's negligence. Again, the fact that I no longer wanted the clothes and that the flood has saved me the trouble of taking them to the dump, would not prevent me from bringing a claim in negligence if I was so inclined.⁸⁰

Does this mean that one can be better off and still suffer actionable damage? Assuming that Nolan is correct that such claims would be successful, it does not follow that this means one

⁷⁷ [2008] 1 AC 281.

⁷⁸ Nolan, 'Damage in the English Law of Negligence' 265.

⁷⁹ *Ibid*, 277. See also *Jan de Nul (UK) Ltd v Axa Royal Belge SA* [2002] EWCA Civ 209 at [92] per Schiemann LJ.

⁸⁰ *Ibid*.

must not be worse off in order for damage to have been suffered. This can be explained by the fact that although one must be worse off to have suffered damage in negligence, whether one is worse off is assessed *objectively* rather than *subjectively*. The law will *deem* someone to be objectively worse off for having their clothing or picture ruined even if subjectively they are better off.⁸¹

As O’Sullivan has argued, the issue rarely arises in personal injury claims ‘because personal injury is universally, and thus objectively, regarded as detrimental.’⁸² However, she acknowledges that such claims may sometimes need to be placed in their proper *context*.⁸³ For example, the surgical removal of a claimant’s breast will count as damage if the breast was healthy, but not if the breast contained a cancerous tumour (and removal of the breast is an appropriate treatment).⁸⁴ Thus, the Jehovah’s Witness whose life is saved by an unwanted blood transfusion cannot sue in negligence for while they subjectively might not like what has happened to them, the law will not treat having one’s life saved as a type of harm in negligence.⁸⁵ This is not to say that such claimants would not have an action in another tort, such as battery, but given that battery is a tort that is actionable per se the fact that such cases do not require any damage to be suffered does not undermine O’Sullivan’s argument that damage in negligence is an objective concept.⁸⁶ O’Sullivan believes the fact that subjective detriment is insufficient to count as damage in tort represents the paradigm difference between this area of law and that of contract. She states ‘if you want to protect your

⁸¹ See *UBAF Ltd v European American Banking Corp* [1984] 2 All ER 226 and Janet O’Sullivan, ‘The Meaning of “Damage” in Pure Financial Loss Cases: Contract and Tort Collide’ (2012) 28 *Professional Negligence* 248. This is consistent with Nolan’s argument that damage is a socially constructed, factual concept as opposed to a factual one. See ‘Damage in the English Law of Negligence’ 267.

⁸² O’Sullivan, ‘The Meaning of “Damage” in Pure Financial Loss Cases: Contract and Tort Collide’ 260.

⁸³ See Christian Witting ‘Physical Damage in Negligence’ (2002) 61 *Cambridge Law Journal* 189, 203 and Nolan, ‘New Forms of Damage in Negligence’ 75

⁸⁴ O’Sullivan, *ibid*, cites *Dobbie v Medway Health Authority* [1994] 4 All ER 450 as an example of this. See also *Williamson v East London and City HA* [1998] Lloyd’s Rep Med 6. Note that if the cancer could be treated without removing the breast then removal of the breast would be considered damage.

⁸⁵ *Malette v Shulman* (1990) 67 DLR (4th) 321.

⁸⁶ Even if a procedure is in a patient’s best interests and they are better off as a result of it being performed, a battery is still committed if the patient does not consent. See *Devi v West Midlands AHA* [1980] 7 CL 44 where the defendant doctor, while performing minor gynaecological surgery, discovered that the claimant’s womb was ruptured. He had committed a battery by performing a sterilisation without obtaining her consent.

subjective expectations and preferences, the legal mechanism to use is *contract*. Tort will not do.⁸⁷

From the above, it is apparent that for actionable damage to be suffered in negligence a claimant must show that the defendant's conduct has made them objectively, and more than minimally, worse off than they otherwise would be. In light of this, it is highly doubtful that diminished autonomy could be seen as a form of damage in negligence because in many circumstances it will fail to meet these basic requirements.

For example, there are many scenarios where interferences with autonomy not only fail to make a person worse off than they otherwise would be but objectively improve their circumstances. The facts of *Chester v Afshar* can be adapted to illustrate this point. Imagine that Patient (P) is suffering from back pain and visits Doctor (D). The latter advises that surgery should take place but carelessly fails to tell P of a 2% risk of paralysis inherent in the surgery that is likely to occur at random. P might have delayed surgery had they known of this risk but, in ignorance of it, goes ahead. Unlike the facts in *Chester*, however, P's surgery is a success. Not only do they not suffer from paralysis, but their back pain is completely cured. In other words, D's interference with P's autonomy has made P *better off*. This illustrates the point made by Jackson in her article discussing the failure of tort law to protect patient autonomy:

If the purpose of giving patients information is to facilitate informed decision making, then any failure to disclose material information will have interfered with her ability to make an autonomous choice, regardless of whether she happens to have *also* suffered physical injury as a result.⁸⁸

⁸⁷ O'Sullivan, 'The Meaning of "Damage" in Pure Financial Loss Cases: Contract and Tort Collide' 258.

⁸⁸ Emily Jackson, "'Informed Consent" to Medical Treatment and the Impotence of Tort' in S McLean (Ed.), *First Do No Harm: Law, Ethics and Healthcare* (Aldershot: Ashgate, 2006) 274. See also Coggon, 'Varied and Principled Understandings of Autonomy in English Law' 238: 'In a case where a similar failure to inform occurred, but in which *no* physical harm resulted [as in *Chester*], it seems hard to believe that a court would allow damages for the harm done to the patient's autonomy.'

Though it could be argued that D has acted badly in such circumstances, it is hard to maintain that P has suffered any damage as P is not worse off. There will therefore be interferences with autonomy that do not fulfil the requirements to be actionable damage in negligence as they do not make a person worse off.

Nor is it difficult to imagine circumstances where an interference with autonomy will only have a minimal impact upon a person. Indeed, one's autonomy could be interfered with without one even noticing it. For example, you might have a desire not to be locked in your room. If someone secretly locked your door while you were watching television and unlocked it before the programme had finished your autonomy will have been interfered with without your knowledge. It may be morally questionable for a person to do this and they are likely to have committed the tort of false imprisonment.⁸⁹ But unlike negligence that tort is actionable per se: it does not require damage to be proven. The mere fact that a claimant can show they would have a successful action in a trespass tort does not mean that they can succeed in negligence as damage must be proven for the latter.⁹⁰ And it would certainly be stretching things to describe something this imperceptible as damage. Interferences with autonomy can therefore often have only minimal effects on people. If such minimal effects were inflicted carelessly it would be difficult for a claimant to maintain that they constitute actionable damage in negligence according to established principles.

Finally, autonomy is neutral as to what choices people make provided such choices do not cause harm. Whether someone's autonomy is interfered with is therefore dependent upon whether an individual had the desire in question. For example, an individual might have no desire whatsoever to have children (let us assume that this individual will not change their

⁸⁹ See *Meering v Grahame-White Aviation Company Ltd* [1920] 11 LT 44 at 53-54 per Atkin LJ and *Murray v Ministry of Defence* [1988] 1 WLR 692 at 701-703 per Lord Griffiths.

⁹⁰ See also Nolan's observation, 'New Forms of Damage in Negligence' 61 that what qualifies as actionable damage varies between the different torts.

mind about not wanting children). If someone prevented that individual from having a child then that person's desires have not been interfered with and so their autonomy has not been violated. This is not by any means to say that such conduct is acceptable nor that the individual in question has not suffered a *different* form of damage – merely that the reason such conduct is wrong and that the person is harmed is *not* due to their autonomy being interfered with. However, preventing a person who wishes to become a parent (or who might wish to become a parent in the future) from having a child will frustrate that individual's desires in a significant way and so will constitute an interference with their autonomy. In this regard, autonomy is an inherently subjective concept and is hard to reconcile with the traditional view in negligence of damage being objective.

There are therefore instances where interferences with autonomy do not meet the criteria of constituting actionable damage in negligence as they do not make people objectively and more than minimally worse off. It might be argued, however, that the above criticisms are unpersuasive. After all, minimal personal injuries are not recoverable in negligence but this does not mean more serious ones should be excluded. In this way, the law sees some injuries as recoverable and others as not. It might be argued that the law should see certain serious interferences with autonomy that objectively make a person worse off as actionable damage and other, more minor, interferences as irrecoverable. For example, if someone is forced to have a child that they do not want (as in *McFarlane* and *Rees*) or rendered infertile as a result of the negligence of another then their life will not go as planned in a significant way. Reproductive autonomy is therefore considered to be important by many people.⁹¹ By contrast, other preferences, such as that viewing pleasant sights as one goes about one's business, may be seen as of less fundamental significance.⁹² Distinguishing

⁹¹ I am grateful to the anonymous reviewer for this example.

⁹² In English law one cannot have an easement of prospect – in other words, there is no right to an unspoilt view. See *William Aldred's Case* (1610) 9 CoRep 57.

between different types of autonomy in this way may potentially pave the way for it to be considered an interest in negligence.⁹³

Although this counterargument is *prima facie* attractive, it is ultimately misconceived as it misrepresents what recovering for autonomy *per se* involves. The fact that a preponderance of people might see certain choices as more important than others is neither here nor there as far as the concept of autonomy is concerned. The vast majority of people would not choose to be tied up and have their genitals hit with a ruler as notoriously occurred in *R v Brown*.⁹⁴ However, if we are to protect people's ability to live their life in the manner of their choosing providing they do not infringe on the choices of others – in other words, protect their autonomy – then such preferences should be respected. One might think that respecting the choice not to reproduce is more important than that of having a nice view or engaging in sadomasochistic activities, but that may not be true of everyone. It may be legitimate for the law to protect an interest in not having one's reproductive preferences interfered with above other types of choices but doing this is not protecting an interest in autonomy *per se*. If one is to say that one kind of interference with autonomy is more serious or worthy of compensation than another type then one is no longer protecting an interest in autonomy *itself* but the other forms of harm that it leads to (in this example reproductive freedom). Put simply, this sees autonomy as instrumentally rather than intrinsically important. While there is nothing wrong with seeing autonomy as instrumentally important (as mentioned earlier, this is the position that negligence currently adopts) it is different from protecting an interest in autonomy *itself* (in the way that cases such as *Rees* and *Chester* arguably do).⁹⁵

⁹³ See Nolan's discussion of derivative forms of autonomy: 'New Forms of Damage in Negligence' 87.

⁹⁴ [1994] 1 AC 212.

⁹⁵ This is not to say that autonomy cannot be perceived as an important value underlying other interests protected by negligence but it does indicate that autonomy *itself* cannot be a form of damage in this tort.

Autonomy per se, unlike the other interests negligence protects, is an indivisible concept.⁹⁶ Once someone's autonomy has been interfered with it has been diminished. It is possible to say, for example, that one instance of property damage is worse than another (vase A could be in a worse state than vase B) but there is simply no non-arbitrary way of dividing up certain types of autonomy as more important than others without looking at the consequences of the damage to autonomy (rather than the lost autonomy *itself*). This is because the whole point of protecting autonomy is that it allows people to decide what is best for them and be the author of their own lives.⁹⁷ Respect for autonomy per se entails being neutral as to what the most important desires are provided acting on those desires does not cause harm to others. It is therefore contradictory to see autonomy per se as important but then say certain 'types' of autonomy are more important, worthy of respect or better than others. The principle of autonomy allows people to make decisions that are *irrational* and *bad* for *them*.

Those who want to defend autonomy per se as an interest that should be protected by the tort of negligence are then left with two choices. Either they should accept that *all* forms of interferences with autonomy can constitute actionable damage or that none can. There is no coherent way of dividing up some forms of autonomy as damage and others as not. Accepting all interferences with autonomy as a form of damage would involve seeing someone as suffering damage even when they are better off as result of an infringement with their autonomy or basing damage upon their subjective preferences and is a course unlikely to be accepted by the courts. As a result of these considerations, those who advocate recognition of autonomy as a form of damage in this tort will need to explain why the currently established principles of this branch of tort law ought to be swept aside to protect this putative interest.

⁹⁶ See Craig Purshouse, 'How Should Autonomy be Defined in Medical Negligence Cases?' (2015) *Clinical Ethics* (forthcoming).

⁹⁷ Dworkin, *Life's Dominion* 224.

It might be countered that the law of tort already protects an *aspect* of autonomy through the law of battery. The *form* of autonomy that this tort protects is that of bodily autonomy, the freedom from unwanted, unlawful touching. If battery is capable of protecting an aspect of autonomy it might be asked, why cannot the tort of negligence do the same and protect some forms of autonomy but not others?

This, however, is to ask the wrong question. It is not being denied that the tort of negligence can protect aspects of autonomy. Indeed, as stated above, the tort of negligence already does this by protecting interests in not being injured or having one's property damaged etc. But protecting autonomy in this way is not the same as protecting autonomy *per se*. Moreover, even if battery did protect an interest in autonomy *per se* this does not mean that negligence should do the same. As Lord Hoffmann stated in *Wainwright v Home Office*,⁹⁸ 'the policy considerations which limit the heads of recoverable damage in negligence do not apply equally to torts of intention.'⁹⁹

Another relevant consideration concerns tort law's protection of privacy. Although in England, unlike the United States of America, there is 'no over-arching, all embracing cause of action for "invasion of privacy"'"¹⁰⁰ the protection of various aspects of privacy is a fast emerging area of law.¹⁰¹ For example, the equitable action for breach of confidence has now developed into the tort of misuse of private information.¹⁰² As Lord Hoffmann states in *Campbell v MGN Ltd*:

Instead of the cause of action being based upon the duty of good faith applicable to confidential personal information and trade secrets alike, it focuses upon the protection of human autonomy and dignity – the right to control the dissemination

⁹⁸ [2004] 2 AC 406

⁹⁹ *Ibid.* at [44].

¹⁰⁰ *Campbell v MGN Ltd.* [2004] 2 AC 457 at 464 per Lord Nicholls.

¹⁰¹ *Ibid.*

¹⁰² As described by Lord Nicholls, *Ibid.* at 465.

of information about one's private life and the right to the esteem and respect of other people.¹⁰³

Given that privacy is often considered to be 'an aspect of human autonomy'¹⁰⁴ it might be argued that if English law is capable of protecting an interest in privacy, that it could also be capable of protecting an interest in autonomy. However, any analogy with tort law's protection of privacy does not support such an argument.

Privacy is concerned with an individual's interest in being left alone.¹⁰⁵ As Harris and Keywood have argued, there are many possible foundations for the right to privacy and although autonomy is one of them, others include dignity and physical and moral integrity.¹⁰⁶ It follows that privacy and autonomy are not necessarily synonymous and that there can be interferences with privacy that do not interfere with an individual's autonomy. For example, if I secretly installed a camera in your living room so that I could film you watching television I would interfere with your privacy. However, if you were unaware of the fact that you were being watched you would presumably go about your business in exactly the same way as you would if the camera was not there. The hidden camera would not necessarily interfere with your choices and your ability to live your life in the manner of your own choosing. It is therefore possible for one's privacy to be interfered with without having one's autonomy diminished.¹⁰⁷ Given that privacy and autonomy are not interchangeable concepts, it does not follow that just because the law of tort might be capable of recognising an interest in privacy that autonomy can be similarly protected by the tort of negligence.

¹⁰³ Ibid, at 473.

¹⁰⁴ Ibid, at 472.

¹⁰⁵ See Paul Roberts, 'Privacy, Autonomy and Criminal Justice Rights: Philosophical Preliminaries' in Peter Alldridge and Chrisje Brants (Eds.), *Personal Autonomy, the Private Sphere and the Criminal Law: A Comparative Study* (Oxford: Hart Publishing, 2001) 66-7.

¹⁰⁶ John Harris and Kirsty Keywood, 'Ignorance, Information and Autonomy' (2001) 22 *Theoretical Medicine and Bioethics* 416, 430.

¹⁰⁷ I am grateful to Joe Purshouse for this example.

Furthermore, even if autonomy *is* the foundation of privacy then the latter will necessarily be more specific and narrowly defined than the concept it is derived from. This may mean that an interest in privacy could be recognised by the law but an interest in autonomy cannot because the latter is too broad. This argument is put forward by Roberts in the context of criminal law. He sees the value of privacy as best understood as a component of personal autonomy but maintains that there cannot be a moral *right* to have one's autonomy respected. He states:

My interest in a life of boundless opportunity and fulfilment is not a good reason for placing other people under duties to become my skivvies and servants, or to strive endlessly to create the idiosyncratic public culture in which I would especially thrive and prosper. My interests are no warrant for subordinating other people's life projects to mine. Yet this is essentially what a right to autonomy would entail under prevailing conditions of scarcity, and absent the technological ingenuity to overcome such pragmatic constraints for the foreseeable future (which, admittedly, is not very far into the future, given the quickening pace of technological advances).¹⁰⁸

By contrast, an interest in being left alone is, he believes, sufficient grounds for placing individuals under duties not to molest or interfere with one another. He maintains that 'those duties are sufficiently undemanding to be universalised so that, for example, we all have a duty not to invade anybody else's physical integrity.'¹⁰⁹ Roberts is discussing moral rights and so this discussion should not be completely divorced from its context but an analogous point can be made regarding the interests that tort law should protect. It is arguable that an interest in privacy could be narrowly defined so as to warrant the protection of the law but

¹⁰⁸ Roberts, 'Privacy, Autonomy and Criminal Justice Rights' 66.

¹⁰⁹ Ibid, 66-7.

that autonomy is too broad a concept to form the gist of an action in negligence. In this respect, there is no inconsistency with the law of tort protecting an interest in privacy but not protecting an interest in autonomy: even if the latter concept is derived from the former they are concerned with different levels of generality.

In any case, the courts have declined to go as far as protecting an interest in privacy *per se* in tort law. As Lord Hoffmann stated in *Wainwright*:

There seems to me a great difference between identifying privacy as a value which underlies the existence of a rule of law (and may point the direction in which the law should develop) and privacy as a principle of law in itself. The English common law is familiar with the notion of underlying values...A famous example is *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534, in which freedom of speech was the underlying value which supported the decision to lay down the specific rule that a local authority could not sue for libel. But no one has suggested that freedom of speech is in itself a legal principle which is capable of sufficient definition to enable one to deduce specific rules to be applied in concrete cases. That is not the way the common law works.¹¹⁰

If the courts are unwilling to protect a general principle of ‘invasion of privacy’ then it is highly doubtful that they would protect a much more general principle of ‘invasion of autonomy’. The law does not protect privacy *per se*. Instead, it safeguards aspects of privacy such as not having private information misused. Other invasions do not always warrant the protection of the law. As Lord Nicholls stated in *Campbell*, ‘[a]n individual’s privacy can be invaded in ways not involving publication of information. Strip searches are an example.’¹¹¹ It may be possible that the law can protect aspects of autonomy but, as mentioned earlier, this

¹¹⁰ *Wainwright v Home Office* [2004] 2 AC 406 at [31] per Lord Hoffmann.

¹¹¹ *Campbell v MGN Ltd.* [2004] 2 AC 457 at 465. See also *Wainwright v Home Office* [2004] 2 AC 406.

is very different from protecting autonomy per se. It is therefore doubtful that any analogies with the law relating to privacy can support an argument that the tort of negligence should protect an interest in autonomy per se.

None of the above points, however, weakens the possibility of autonomy being a value that can point the direction in which the tort of negligence should develop¹¹² or from it being protected indirectly by the development of new interests. But an interest in autonomy per se is difficult to reconcile with established negligence principles.

7.5. A Duty of Care to Avoid Interfering with Autonomy

Negligence is not a tort that is actionable per se. If interferences with autonomy cannot be seen as a recognised form of damage, then any prospects of this tort protecting an interest in autonomy *itself* are dashed. However, even if the above analysis is incorrect and diminished autonomy *could* be a form of damage, there is a further obstacle that will prevent its acceptance as an interest protected by negligence. A claimant must show that a defendant owed them a duty of care to avoid interfering with their autonomy. This, I will argue, is something that they will be unable to do in a way that is consistent with established principles.

The question of whether there should be a duty of care to avoid interfering with people's autonomy itself has not previously come before the courts. It is a novel question and so would be decided under the three-stage *Caparo Industries plc v Dickman*¹¹³ method of weighing up the factors for and against imposing such a duty. The focus below will be on one particular factor that is fatal to the recognition of a duty of care to avoid interfering with autonomy and which overrides any countervailing factors in favour of recognising such a

¹¹² Indeed, *Montgomery v Lanarkshire Health Board* [2015] UKSC 11 shows that such an approach need not undermine established negligence principles.

¹¹³ [1990] 2 AC 605.

duty. This factor is that recognising such a duty would undermine the restrictions preventing a duty of care being recognised for other forms of damage, namely psychiatric harm and economic loss. Although the restrictions on recovery for psychiatric harm and economic loss in negligence are open to criticism,¹¹⁴ they are firmly entrenched and while they remain a part of English law a duty of care to avoid interfering with autonomy cannot be coherently recognised in a way that is consistent with them. As such, recognising a duty of care to avoid interfering with autonomy would compound the confusion within this area of law.

The duty of care element of negligence acts as a ‘control device’¹¹⁵ that places ‘some intelligible limits to keep the law of negligence within the bounds of common sense and practicality.’¹¹⁶ Nowhere is this more apparent than when the damage a claimant is complaining of is psychiatric harm or economic loss. While the tort of negligence protects several different interests, it does not see them as being of equal value. Tony Weir summed up the position well: ‘the better the interest invaded, the more readily does the law give compensation for the ensuing harm.’¹¹⁷

Given the differing importance of the relevant interests that negligence protects, whether a duty of care is owed is dependent upon the form of damage suffered by the claimant. The interests in being free from physical injury or in not having one’s property

¹¹⁴ See David Howarth, ‘Negligence After *Murphy*: Time to Re-Think’ (1991) 50 *Cambridge Law Journal* 58, Basil Markesinis and Simon Deakin, ‘The Random Element of their Lordships’ Infallible Judgment: An Economic and Comparative Analysis of the Tort of Negligence from *Anns* to *Murphy*’ (1992) *Modern Law Review* 619, Stephen Hedley, ‘Hillsborough: Morbid Musings of the Reasonable Chief Constable’ (1992) 51 *Cambridge Law Journal* 16, Nicholas Mullany and Peter Handford, *Tort Liability for Psychiatric Damage: The Law of ‘Nervous Shock’* (Sydney: Sweet and Maxwell, 1993), Nicholas Mullany, ‘Fear of the Future: Liability for Infliction of Psychiatric Disorder’ in Nicholas Mullany (Ed.), *Torts in the Nineties* (Sydney: LBC Information Series, 1997), Harvey Teff, ‘Liability for Negligently Inflicted Psychiatric Harm: Justifications and Boundaries’ (1998) 57 *Cambridge Law Journal* 91.

¹¹⁵ See Mark Lunney and Ken Oliphant, *Tort Law* 5th Edn. (Oxford: Oxford University Press, 2013) 121.

¹¹⁶ See *Caparo v Dickman* [1990] 2 AC 605 at 633 per Lord Oliver, *Customs and Excise Commissioners v Barclays Bank plc* [2006] 1 AC 181 at 192 per Lord Bingham and Jonathan Morgan, ‘The Rise and Fall of the General Duty of Care’ (2006) 22 *Professional Negligence* 206, 223. See also Alan Rodger, ‘Some Reflections on Junior Books’ in Peter Birks (Ed.), *The Frontiers of Liability*, Volume 2 (Oxford: Oxford University Press, 1994) and Jane Stapleton, ‘Duty of Care Factors: A Selection from the Judicial Menus’ in Peter Cane and Jane Stapleton (Eds.) *The Law of Obligations: Essays in Celebration of John Fleming* (Oxford: Oxford University Press, 1998) for further information regarding the ‘weighing of policy factors’ approach to duty of care. Cf Robert Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007) 1-2.

¹¹⁷ Tony Weir, *A Casebook on Tort*, 10th Edn. (London: Sweet & Maxwell, 2004) 6.

damaged are more comprehensively protected than those in not suffering from purely economic loss or psychiatric harm. As Lord Oliver stated in *Murphy v Brentwood DC*:¹¹⁸ ‘The infliction of physical injury to the person or property of another universally requires to be justified. The causing of economic loss does not.’¹¹⁹

It is trite tort law that unless a claimant can show that they are a ‘primary victim,’ in other words, that they were ‘involved, either mediately, or immediately, as a participant’¹²⁰ in an accident by being exposed to the danger of physical injury,¹²¹ then there a number of hurdles that must be jumped before a claim in negligence for psychiatric harm being successful.

Those who are not primary victims are classed as secondary victims. They are ‘no more than the passive and unwilling witness of injury caused to others.’¹²² In order to be successful in a negligence case a ‘secondary victim’ must show:

- (1) that they are suffering from a recognised psychiatric illness and ‘not merely grief, distress or any other normal emotion;’¹²³
- (2) that the injury would have been experienced by a person of ‘sufficient fortitude’¹²⁴ who, in the now rather archaic-sounding, words of Lord Porter in *Bourhill v Young*,¹²⁵

¹¹⁸ [1991] 1 AC 398.

¹¹⁹ Ibid at 487.

¹²⁰ *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 at 407 per Lord Oliver.

¹²¹ As Lord Lloyd stated in *Page v Smith* [1996] AC 155 at 190: ‘Once it is established that the defendant is under a duty of care to avoid causing personal injury to the plaintiff, it matters not whether the injury in fact sustained is physical, psychiatric or both.’ In other words, a claim for this type of injury can be successful provided physical injury was foreseeable even if psychiatric harm itself was not. Indeed, the courts have held that it is *only* those at a foreseeable risk of *physical* injury who can qualify as primary victims. See *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455 and *McFarlane v EE Caledonia* [1994] 2 All ER 1. However, whether this is a correct interpretation of the previous case law is debateable as it is more likely that Lord Lloyd in *Page* was seeking to liberalise the law on primary victims rather than narrow it. See Lord Goff’s dissenting speech in *White*.

¹²² *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 at 407 per Lord Oliver. For criticisms of the division between primary and secondary victims see Stephen Bailey and Donal Nolan, ‘The *Page v Smith* Saga: a Tale of Inauspicious Origins and Unintended Consequences’ (2010) 69 *Cambridge Law Journal* 495.

¹²³ *McLoughlin v O’Brian* [1983] 1 AC 410 at 431 per Lord Bridge. See also *Vernon v Bosley* [1997] 1 All ER 577 at 610 per Thorpe LJ.

¹²⁴ *Bourhill v Young* [1943] AC 92 at 117 per Lord Porter.

¹²⁵ [1943] AC 92.

‘possess[es] the customary phlegm.’¹²⁶ In other words, it must be foreseeable that a person would suffer from *psychiatric* injury in such circumstances rather than some type of (physical) injury more generally;

(3) that the harm must be caused by a ‘sudden and unexpected shock;’¹²⁷ and

(4) the claimant must also satisfy the criteria laid down in *Alcock v Chief Constable of South Yorkshire Police*¹²⁸ to demonstrate that their relationship with the defendant was sufficiently proximate. To do this, there must be (i) close ties of love and affection between the secondary victim and primary victim;¹²⁹ (ii) the claimant’s ‘proximity to the accident must be close both in time and space;’¹³⁰ and (iii) the shock must be a result of sight or hearing of the event itself or its immediate aftermath.¹³¹

Unless a secondary victim can meet these criteria then any negligence claim for psychiatric harm will be doomed to fail. However, if, say, someone suffers from PTSD as a result of witnessing a distant relative – or even stranger – being injured then it is not inconceivable that their autonomy will have been interfered with. Their desire not to suffer PTSD will have been violated, in addition to other desires such as, say, not having to take time off work. If a duty to avoid interfering with people’s autonomy was recognised such people could potentially reframe the gist of their claim as one for diminished autonomy and potentially recover damages. This would undermine the restrictions that the law has placed on recovery for psychiatric harm as it would mean that those who had suffered psychiatric harm but do not meet the threshold for a ‘secondary victim’ claim could still have a successful action in negligence and receive damages.

¹²⁶ Ibid, at 117.

¹²⁷ *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 at 412 per Lord Oliver.

¹²⁸ [1992] 1 AC 310.

¹²⁹ Ibid, at 403-404 per Lord Ackner.

¹³⁰ Ibid, at 404-405 per Lord Ackner.

¹³¹ Ibid.

Similar objections are raised when one considers the issue of pure economic loss. While recovery for negligently caused economic loss can succeed in limited circumstances,¹³² the law has imposed restrictions on recovery for this type of loss. For example, a claimant cannot recover in this tort when they suffer loss due to a defendant damaging the property of another person.¹³³ It is also the case that one cannot sue in negligence for economic loss caused by acquiring defective property.¹³⁴

The courts have therefore circumscribed recovery for pure economic loss. Yet if someone loses money because someone damages property belonging to another person or because they have acquired defective property then it is plausible that their autonomy has been infringed due to another's carelessness. As with psychiatric harm, an individual could side-step the restrictions the law places on recovery for economic loss by framing their claim in this way. After all, if I invest my life savings in property that turns out to be worthless then my ability to live my life as I choose is diminished. But if claims for diminished autonomy were permitted then the constraints on recovery for pure economic loss would be undermined.

As argued earlier, if one wants to protect an interest in autonomy per se there is no non-arbitrary way of dividing up different forms of autonomy. It cannot be argued that there should be a duty of care to protect certain forms of autonomy but not others. This would involve favouring one form of life plan over another and so would not be respecting autonomy itself. Autonomy, by its very nature, encompasses almost all other forms of damage and renders any restrictions for recovery of other types of harm obsolete: such constraints could be thwarted merely by reframing the claim as one for lost autonomy. This means that a duty of care to avoid interfering with autonomy itself cannot be reconciled with

¹³² See the line of cases following *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 such as *Smith v Eric S Bush* [1990] 1 AC 831, *Henderson v Merrett Syndicates* [1995] 2 AC 145, *White v Jones* [1995] 2 AC 207 and *Spring v Guardian Assurance* [1995] 2 AC 296.

¹³³ *Leigh & Sullivan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] AC 785.

¹³⁴ *Murphy v Brentwood District Council* [1991] 1 AC 398.

the boundaries that the law has placed on recovery of psychiatric harm and economic loss (to take merely two examples) because claimants would be able to receive compensation for such losses. This is a powerful factor against imposing a duty to avoid interfering with autonomy per se.

Furthermore, the policy reasons in favour of limiting the number of claims for pure economic loss and psychiatric harm are even more applicable to lost autonomy claims. One of the policies behind the control devices limiting claims for psychiatric harm is that there is a need to restrict the number of such claims. For example, in *McLoughlin v O'Brian*,¹³⁵ Lord Wilberforce stated that given psychiatric harm in its nature is capable of affecting a wide a range of people there is 'a real need for the law to place some limitation upon the extent of admissible claims.'¹³⁶ This justification is also present in *White v Chief Constable of South Yorkshire Police*,¹³⁷ another case arising out of the Hillsborough disaster, when Lord Steyn commented '[t]he abolition or a relaxation of the special rules governing the recovery of damages for psychiatric harm would greatly increase the class of persons who can recover damages in tort.'¹³⁸

Similar reasoning underpins the restrictions on claims for pure economic loss. *One* of the reasons given by Lord Denning MR in *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd*¹³⁹ for the refusal of the pure economic loss claim was that 'if claims for economic loss were permitted for this particular hazard, there would be no end of claims.'¹⁴⁰ This concern was reflected in the leading case of *Caparo*, where the House of Lords was

¹³⁵ [1983] 1 AC 410.

¹³⁶ *Ibid*, at 422.

¹³⁷ [1999] 2 AC 455.

¹³⁸ *Ibid*, at 494.

¹³⁹ [1973] QB 27.

¹⁴⁰ *Ibid*, at 38.

reluctant to expose defendants to ‘liability in an indeterminate amount, for an indeterminate time, to an indeterminate class.’¹⁴¹

There is therefore a wealth of evidence that recovery for psychiatric harm and pure economic loss is restricted on the basis that allowing it would lead to a large class of claims (sometimes known as opening the ‘floodgates’). This arguably has several negative consequences as it might impose ‘crushing financial liabilities upon defendants,’¹⁴² expose defendants to liability ‘out of all proportion to their degree of fault’¹⁴³ and overburden the court system.¹⁴⁴ Although there are many circumstances where the proposition that imposing a duty of care will open the floodgates is, as Hartshorne as argued, ‘difficult to factually support,’¹⁴⁵ he correctly states that there are certain contexts where its accuracy is self-evident such as if the *Alcock* claims were allowed.¹⁴⁶

This policy reason is even more applicable to claims for lost autonomy. Logically, whatever the number of people who can show that a defendant’s carelessness has diminished their bank balance or led them to suffer from a psychiatric illness will be, it will be smaller than the number who can show their autonomy has been interfered with. The latter will include people who are suffering from psychiatric harm or economic loss together with anyone else whose choices have been diminished. This factor points against imposing a duty of care to avoid interfering with autonomy.

It might be countered that such policy reasons are spurious and should be swept aside.¹⁴⁷ Instead of restricting claims for lost autonomy, this argument goes, we should

¹⁴¹ *Caparo v Dickman* [1990] 2 AC 605 at 621 per Lord Bridge (quoting Cardozo CJ in *Ultramares Corporation v Touche* (1931) 174 NE 441).

¹⁴² John Hartshorne, ‘Confusion, Contradiction and Chaos within the House of Lords Post *Caparo v Dickman*’ (2008) 16 *Tort Law Review* 8, 19.

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

¹⁴⁷ For criticisms of floodgates arguments see David Howarth, ‘Duty of Care’ in Ken Oliphant (Ed.), *The Law of Tort* (London: LexisNexis Butterworths, 2007).

liberalise the law on recovery for pure economic loss and psychiatric harm.¹⁴⁸ If these restrictions are unjustifiable then they should not prevent a duty of care to avoid interfering with autonomy being imposed.

Yet as valuable as protecting autonomy is, preserving the coherence of the tort of negligence is also important. Regardless of what one thinks of the rules limiting recovery for pure economic loss and psychiatric harm only the most optimistic of tort lawyers would consider the chances of them being swept aside as being anything other than remote. Rogers has stated that only parliament can undertake radical reform of the law on psychiatric harm¹⁴⁹ and, given the leading case on economic loss was decided by a panel of seven Law Lords and overruled a past House of Lords' decision, the same is probably true of the law relating to recovery of pure economic loss.¹⁵⁰ Allowing such claims could only occur if the tort of negligence was radically re-written from scratch – and such a scorched-earth approach is not open to judges.¹⁵¹ The law on pure economic loss and psychiatric harm is here to stay. Given that a duty of care to avoid interfering with autonomy is contrary to these established principles it cannot be recognised without radically altering the basic principles of the tort of negligence.¹⁵² Doing so would be a recipe for confusion and hard to reconcile with the incremental approach to judicial development of the common law.

¹⁴⁸ See Mullany and Handford, *Tort Liability for Psychiatric Damage* and Howarth, 'Negligence After *Murphy*'.

¹⁴⁹ W.V.H. Rogers, *Winfield and Jolowicz on Tort* 18th Edn. (London: Sweet and Maxwell, 2010) 297.

¹⁵⁰ *Murphy v Brentwood District Council* [1991] 1 AC 398.

¹⁵¹ Lord Oliver, 'Judicial Legislation' (1989) 2 *Leiden Journal of International Law* 3.

¹⁵² Nor are these the only two areas of law that might be undermined by the recognition of autonomy as an interest in negligence. Public authority omissions cases might be another aspect of the law where areas of non-actionability would be undermined by permitting lost autonomy claims. See *Van Colle v Chief Constable of Hertfordshire* [2009] 1 AC 225. It may also, for example, undermine causation requirements in personal injury cases as in many circumstances it might be easier for a claimant to show that a defendant has *caused* their autonomy to be diminished than show that the defendant has *caused* their personal injury. *Chester* is a prime example of this.

7.6. Conclusion

Nothing in this article should be seen as preventing an interest in autonomy being protected by a different branch of tort law. Developing the tort of battery¹⁵³ or modifying the rule in *Wilkinson v Downton*¹⁵⁴ might provide a more cogent way of doing this than adapting the law of negligence. Or perhaps, as Varuhas has argued, we ought to ‘directly and systematically protect [an interest in autonomy] through a standalone action, perhaps structured similarly to trespassory torts.’¹⁵⁵ Alternatively, the use of human rights law or a statutory scheme could protect such interests.¹⁵⁶ Such work, though, remains to be undertaken and is outside the scope of this article. Nor does anything in this article prevent the law of negligence continuing to perceive autonomy as instrumentally valuable and further protecting it indirectly by developing new interests. This would involve identifying the bad consequences of interfering with autonomy and then imposing duties of care on defendants to avoid causing such consequences. Regardless of whether such alternatives are tenable, though, to prevent the tort of negligence sliding into incoherence it would be better to reject this putative interest unless a clear argument can be provided as to how compensating lost autonomy *itself* is consistent with negligence principles.

What does this mean for *Chester* and *Rees*? Although there have been alternative interpretations of these cases,¹⁵⁷ if the damage in these cases is lost autonomy then they are impossible to reconcile with traditional tort law principles and should be overruled. This may

¹⁵³ This issue has previously been considered in Tan Keng Feng, ‘Failure of Medical Advice: Trespass or Negligence’ (1987) 7 *Legal Studies* 149 and Brazier, ‘Patient Autonomy and Consent to Treatment: The Role of the Law?’ However, developments in this area of the law mean that different conclusions may now be reached. See also Jackson, ‘“Informed Consent” to Medical Treatment and the Impotence of Tort’ and Clark and Nolan, ‘A Critique of *Chester v Afshar*’.

¹⁵⁴ [1897] 2 QB 57. Though c.f. *Wainwright v Home Office* [2004] 2 AC 406.

¹⁵⁵ Jason Varuhas, ‘The Concept of “Vindication” in the Law of Torts: Rights, Interests and Damages’ (2014) 34 *Oxford Journal of Legal Studies* 253, 270.

¹⁵⁶ See Clark and Nolan, ‘A Critique of *Chester v Afshar*’.

¹⁵⁷ See McBride and Bagshaw, *Tort Law* 826 for a rights-vindication interpretation of the conventional award in *Rees* and Jane Stapleton ‘Occam’s Razor Reveals an Orthodox Basis for *Chester v Afshar*’ (2006) 122 *Law Quarterly Review* 426 for an argument that *Chester* is an orthodox personal injury case.

appear harsh on the (deserving) claimants in these cases but one should remember that, as Murphy and Witting state in *Street on Torts*, ‘the law of negligence cannot be seen as the stairway to the Garden of Eden.’¹⁵⁸ However, so far these two cases have not intruded into other aspects of this area of law. While they should not be used as a method of incrementally developing an interest of autonomy in negligence, if they are not to be overruled then at the very least the courts should say ‘thus far and no further.’¹⁵⁹

It was stated earlier that tort law can adapt itself to changing circumstances to protect new interests. But this does not mean it is a blank slate that can be re-written at will. As John Murphy has stated, ‘[t]he common law needs to be able to develop in such a way that the solutions it provides to tomorrow’s problem cases sit consistently (or at least comfortably) with its own past.’¹⁶⁰ An interest in autonomy per se cannot do this. Taking autonomy to reflect the self-regarding choices of mentally competent adults, the underlying thesis of this article has been that the recognition of this potential interest would be inconsistent with the established rules regarding what constitutes actionable damage in negligence and difficult to reconcile with the restrictions on imposing duties of care on defendants to avoid causing pure economic loss or psychiatric harm. Autonomy may be a central moral value but so is maintaining the credibility and consistency of the common law. Judges and academics should hesitate before encouraging the driving of a steamroller over the latter in order to protect the former.

¹⁵⁸ Murphy and Witting, *Street on Torts* 74.

¹⁵⁹ As Lord Steyn stated in the context of psychiatric harm claims in *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455 at 500.

¹⁶⁰ John Murphy, ‘Formularism and Tort Law’ (1999) 21 *Adelaide Law Rev* 115, 125.

Conclusion

The problem that this thesis aimed to solve was whether lost autonomy ought to be recognised as new form of actionable damage in medical negligence claims. Here I will reiterate and draw together the arguments that I have made throughout this thesis in order to demonstrate why this question should be answered in the negative.

First, I considered what damage was actually compensated in *Chester* and *Rees*. It was argued that by avoiding a full consideration of the concept of damage in *Rees* and *Chester* the House of Lords created confusion in medical negligence cases that could have been avoided.⁸¹³ The conventional award in *Rees* is best seen as compensating for a new form of damage: that of lost autonomy; rather than as compensating the claimant in the absence of any loss being inflicted (e.g. because her ‘rights’ have been infringed).⁸¹⁴

The difficult question that the House of Lords needed to address in *Chester* was whether conventional causation principles require a defendant to *increase the risk* of harm to the claimant in order to be held liable. If answered negatively, the case could have been interpreted under conventional causation principles.⁸¹⁵ However, the poor reasoning in *Chester* meant that there was a lack of focus on what damage had been suffered and, by extension, what issues were at stake. It was found that if the case cannot be reconciled with conventional causation principles then a reasonable interpretation of the majority judgments is that the *real* damage was the interference with the claimant’s autonomy.⁸¹⁶

⁸¹³ See ch 4.

⁸¹⁴ See section 4.2.2.

⁸¹⁵ See section 4.2.3.

⁸¹⁶ *Ibid.*

Heywood has recently said that *Chester* was ‘Undoubtedly a breath of fresh air for claimant lawyers and anyone else concerned with patient rights’⁸¹⁷ but that ‘the judgment was not well received and continues to attract a steady stream of academic criticism from negligence purists.’⁸¹⁸ This, however, is to mischaracterise the criticisms of the decision. Being concerned with autonomy and patient rights does not compel one to the conclusion that the tort of negligence should award large sums of compensation, regardless of fault, whenever a patient has suffered an injury.⁸¹⁹ There may be a strong argument for abolishing the role of the tort of negligence in this area and instead installing a no-fault statutory compensation scheme for medical accidents,⁸²⁰ but as the law stands, if bringing a claim in negligence, it is necessary to show that the defendant’s breach of duty actually *caused* the claimant’s *injury*.

One does not have to a ‘purist’ to be concerned by the clumsy reasoning that took place in *Chester* and *Rees*. By departing from established rules in an arbitrary way, the House of Lords in these cases made the law unpredictable and did not treat like cases alike.⁸²¹ It may be good for Miss Chester to be awarded compensation in her circumstances but other patients who cannot establish causation, such as the claimant in *Gregg*, are unlikely to be satisfied with the explanation as to why her case justified a departure from normal principles but theirs do not.⁸²² A focus on patient rights would surely mean Mr Gregg ought to recover? Why was

⁸¹⁷ Rob Heywood, ‘RIP *Sidaway*: Patient-Oriented Disclosure – A Standard Worth Waiting For?’ (2015) 23 *Medical Law Review* 455, 456.

⁸¹⁸ *Ibid.*

⁸¹⁹ W.E. Peel and J. Goudkamp, *Winfield & Jolowicz*, 19th Edn. (London: Sweet and Maxwell, 2014) 2 and 29-31.

⁸²⁰ See Ken Oliphant, ‘Beyond Misadventure: Compensation for Medical Injuries in New Zealand’ (2007) 15 *Medical Law Review* 357, Mark Lunney and Ken Oliphant, *Tort Law* 5th Edn. (Oxford: Oxford University Press, 2013) ch 18 and Peter Cane, *Atiyah’s Accidents, Compensation and the Law* 8th Edn. (Cambridge: Cambridge University Press, 2013) ch 18.

⁸²¹ See section 4.4.

⁸²² See Sarah Green, ‘Coherence of Medical Negligence Cases: A Game of Doctors and Purses’ (2006) 14 *Medical Law Review* 1.

a purist view to causation taken in his case but not hers? After all, his choices had arguably been affected by the defendant's carelessness. He may have been capable of demonstrating that his autonomy had been interfered with too.⁸²³ The way that this potential new form of actionable damage has arguably been recognised is therefore open to criticism.

In this respect my first paper 'Judicial Reasoning and the Concept of Damage: Rethinking Medical Negligence Cases'⁸²⁴ has provided an original contribution to the literature on the important medical negligence cases of *McFarlane*, *Rees* and *Chester* by analysing them from a damage-focused perspective and providing a detailed consideration of whether 'lost autonomy' delivers the most cogent explanation of the actual damage suffered in *Rees* and *Chester*. Furthermore, the arguments I developed give a new perspective on this doctrinal issue by providing a framework for determining when how the concept of damage should be considered in the negligence enquiry and its relationship with other aspects of this tort.

Second, I considered the ethical question of whether to interfere with someone's autonomy is to cause them harm.⁸²⁵ It was argued that 'autonomy' is best defined as reflecting a person's current desires and 'harm' is best defined as setting back a person's interests so that they would be worse off than they otherwise would be in the normally foreseeable course of events.⁸²⁶ If an interest is defined as a claim or want or *desire* of a human being,⁸²⁷ then it follows that to interfere with a person's current desires will, in many circumstances, setback their interests and thus harm them. Accordingly, ethically speaking, interfering with someone's autonomy will often cause them harm.

⁸²³ Ibid.

⁸²⁴ (2015) *Medical Law International* (forthcoming).

⁸²⁵ See chs 5 and 6.

⁸²⁶ See section 5.4. and section 6.5.

⁸²⁷ See section 1.1.

Although there is no shortage of scholarship on the concept of autonomy, my paper ‘How Should Lost Autonomy be Defined in Medical Negligence Cases?’⁸²⁸ is an original contribution to the literature as it clarifies how autonomy should be specifically understood in the medical negligence context. Prior to my article there had been no specific defence of the use of the ‘current desire’ version of autonomy being the preferable account of autonomy to adopt in medical negligence cases. By drawing on overlooked philosophical arguments and the case law, I refuted arguments raised by other scholars as to why different versions of the concept should be favoured.

My article ‘A Defence of the Counterfactual Account of Harm’⁸²⁹ developed a defence of Feinberg’s theory of harm against recent attacks by bioethicists. In the literature, there had not been any detailed criticisms of Harris’ or Kahane and Savulescu’s alternative theories of harm and my article demonstrated that these alternatives rested on shaky philosophical foundations. This enabled me to defend Feinberg’s theory against many of the criticisms levelled at it and to demonstrate that it is a coherent and convincing account of what constitutes harm. Furthermore, given that much of Harris’s and Kahane and Savulescu’s other work rests upon their theories of harm being credible, it is hoped that this article will have an impact outside of the narrow question of what constitutes harm but will also lead to further debates for those who wish to challenge the work of these philosophers.

However, just because interfering with someone’s autonomy is to cause them harm *ethically* speaking does not necessarily mean that the tort of negligence should award them compensation.⁸³⁰ This thesis therefore considered whether, even if lost autonomy is a moral harm, recognising it as a form of actionable damage in negligence would be a welcome

⁸²⁸ (2015) *Clinical Ethics* (forthcoming).

⁸²⁹ (2015) *Bioethics* (forthcoming).

⁸³⁰ See ch 7.

doctrinal development. It was argued that the current law sees damage as being something that objectively and more than minimally makes a person worse off than they otherwise would be.⁸³¹ Given this, it is doubtful that lost autonomy could be properly recognised as a form of actionable damage because there are numerous circumstances where it fails to meet these requirements. In many situations interferences with autonomy not only fail to make a person worse off than they otherwise would be but objectively improve their circumstances; it will often only have a minimal impact on people; and it is inherently subjective (whether someone's autonomy is interfered with is dependent upon whether an individual had the desire in question).⁸³² There is no coherent way to separate certain 'more important' forms of autonomy from trivial ones.⁸³³ If one is to say that one kind of interference with autonomy is more serious or worthy of compensation than another type then one is no longer protecting an interest in autonomy *itself* but the other forms of harm that it leads to.⁸³⁴ Therefore, lost autonomy per se is incapable of being a form of actionable damage in negligence.

Additionally, it was found that it is impossible to reconcile a duty of care to avoid interfering with an individual's autonomy with the courts' restrictive approach to recovery for economic loss and psychiatric injury.⁸³⁵ If someone loses their life savings by acquiring defective property or cannot work because they have post-traumatic stress disorder as a result of witnessing a stranger being killed then the law of negligence provides them with no remedy.⁸³⁶ However, these are both examples where a defendant has interfered with an individual's autonomy. A duty of care to avoid interfering with autonomy would potentially

⁸³¹ See section 7.4.

⁸³² *Ibid.*

⁸³³ *Ibid.*

⁸³⁴ *Ibid.*

⁸³⁵ See section 7.5.

⁸³⁶ *Ibid.*

undermine these areas of law where no duty of care is imposed.⁸³⁷ Even if it is thought that these rules are unacceptable, reform of them should take place rather than allowing the law to slide towards incoherence by undermining them through the back door.⁸³⁸

The article where I developed these arguments, ‘Liability for Lost Autonomy in Negligence: Undermining the Coherence of Tort Law,’⁸³⁹ provides an original contribution to the literature. It consists of the first comprehensive account as to why lost autonomy is not capable of being a form of actionable damage in this branch of the law. It draws together the literature on what counts as actionable damage to provide a detailed analysis as to why lost autonomy is not capable of being actionable damage. Furthermore, it is the first piece of work to fully consider how recognising this form of actionable damage would be inconsistent with the law’s restrictive approach to the recovery of other forms of damage in negligence. In this respect, not only does this article provide an original contribution to the issue of whether lost autonomy should be recognised as actionable damage in negligence but the arguments in this article may also be applied to other potential new interests that the tort of negligence could recognise.

Even if my argument is incorrect and autonomy *should* be a new interest protected by the tort of negligence, it remains far from clear whether all consequential losses associated with an interference with autonomy should be recoverable (as arguably took place in *Chester*) or whether compensation should be limited to a conventional award (as took place in *Rees*).⁸⁴⁰ I speculated on various ways in which these two decisions could be reconciled on this issue. It may be that these cases are incompatible with one another and that Ms Rees was

⁸³⁷ Ibid.

⁸³⁸ Ibid.

⁸³⁹ (2015) 22 *Torts Law Journal* 226.

⁸⁴⁰ See section 4.2.3.

undercompensated by not receiving an award that reflected all of the consequential losses flowing from her lost autonomy (i.e. the costs of raising her child).⁸⁴¹ Alternatively, it could be argued that the decisions are coherent because the consequential losses associated with Ms Rees' lost autonomy were excluded for policy reasons that did not apply in Miss Chester's case.⁸⁴² If this is the case then it may be that Miss Chester should have been awarded an additional conventional award to reflect her lost autonomy as well as her consequential losses.⁸⁴³ However, the guidance and reasoning from the House of Lords in these cases is far from conclusive and I concluded that how lost autonomy might be quantified in future cases is far from clear.⁸⁴⁴ In this respect my first article, 'Judicial Reasoning and the Concept of Damage,' provides a further original contribution to the literature as there has not been a detailed consideration of how, assuming autonomy should be accepted as a protected interest in negligence, this new type of damage ought to be quantified in future cases.

As was stated at the start of this thesis, the aims of tort law are broadly utilitarian.⁸⁴⁵ Given the value placed on autonomy it might be thought that recognising this as a new interest in negligence would satisfy people's interests overall. This, however, is not the case. Although to a large extent the tort of negligence is concerned with arriving at results that are ethically acceptable, it does not follow that lost autonomy should be recognised as a new form of actionable damage in negligence. As Lord Steyn stated in *White*:

In an ideal world all those who have suffered as a result of the negligence ought to be compensated. But we do not live in Utopia: we live in a practical world where the tort system imposes limits to the classes of claims that rank for

⁸⁴¹ Ibid.

⁸⁴² Ibid.

⁸⁴³ Ibid.

⁸⁴⁴ Ibid.

⁸⁴⁵ See ch 1. In my future research I intend to defend a utilitarian theory of tort law more comprehensively.

consideration as well as to the heads of recoverable damages. This results, of course, in imperfect justice but it is by and large the best that the common law can do.⁸⁴⁶

In order to arrive at the best results that satisfy the most interests, the law needs cogent principles that can be easily applied.⁸⁴⁷ The law should not be too rigid in developing new rules that reflect societal changes, but there should be a preference for certainty.⁸⁴⁸ By awarding compensation to *Mses Chester and Rees*, the courts have departed from clear rules in an arbitrary way.⁸⁴⁹ As a result, the law now lacks certainty and is unprincipled.⁸⁵⁰

In an important paper, Tony Weir described how the common law has never been keen on compromise: ‘It has traditionally preferred the ‘all or nothing’ approach, ‘win or lose,’ with a win on points counting as a knock-out.’⁸⁵¹ It would not split the difference but would give judgment in total for one party or the other. Weir has described *Rees* as ‘a splendid example of the flight from ‘all-or-nothing’ in the common law’⁸⁵² and asks, ‘Does one need further proof that abandonment of the ‘all-or-nothing’ approach may well lead to arbitrary decisions?’⁸⁵³ It is hard to disagree with this assessment. The gloss in *Rees* ‘may end up pleasing no one...Those in favour of a full award in line with corrective justice principles may feel that the solution fails to do justice and those who believe *McFarlane* was a wholly

⁸⁴⁶ *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455 at 491 per Lord Steyn.

⁸⁴⁷ See section 1.3.

⁸⁴⁸ *Ibid.*

⁸⁴⁹ See section 4.3.

⁸⁵⁰ *Ibid.*

⁸⁵¹ Tony Weir, ‘All or Nothing?’ (2003-2004) 78 *Tulane Law Review* 511, 513. See also Robert Stevens, ‘Should Contributory Fault be Analogue or Digital?’ in Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith (Eds.), *Defences in Tort* (Oxford: Hart Publishing, 2015).

⁸⁵² Tony Weir, ‘All or Nothing?’ 551.

⁸⁵³ *Ibid.*, 552.

just decision may feel that the judgment has been undermined.⁸⁵⁴ Both *Chester* and *Rees* are examples where the courts have departed from coherent, relatively easy-to-apply principles in an attempt to award compensation to sympathetic claimants. But these departures took place in an illogical manner. As stated earlier, it would be no great stretch for *Chester* to have been decided under conventional principles. The decision in *Rees*, though, is unjustifiable. Given that lost autonomy cannot coherently be seen as a form of actionable damage, either *McFarlane* should have been overturned by utilising the *Practice Statement*⁸⁵⁵ and the claimant fully compensated or *McFarlane* should have been followed (and, whichever course was taken, the matter should then be left to Parliament). It would have been better to either allow or deny these claims altogether than attempt to justify them on the basis that the patient's autonomy was infringed – at least then the law would be certain and predictable.⁸⁵⁶ This is particularly so when there was a distinct lack of discussion as to how lost autonomy would be treated in other cases.

Instead, the courts should aim to satisfy the most interests possible by reflecting on what protected interests would do this.⁸⁵⁷ They should then create bright-line rules that are simple and easy to follow so that people can predict what the law will be and order their conduct accordingly.⁸⁵⁸ This will involve preventing doctors from carelessly causing certain forms of damage such as physical and mental injury. On the other hand, it will involve accepting that some things that setback people's preferences will not be recoverable: the law

⁸⁵⁴ Alasdair Maclean, 'An Alexandrian Approach to the Knotty Problem of Wrongful pregnancy: *Rees v Darlington Memorial Hospital NHS Trust* in the House of Lords' (2004) 3 *Web Journal of Current Legal Issues* <[http://http://webjcli.ncl.ac.uk/2004/issue3/maclean3.html](http://webjcli.ncl.ac.uk/2004/issue3/maclean3.html)>

⁸⁵⁵ [1966] 1 WLR 1234.

⁸⁵⁶ See Ken Oliphant's discussion of how the law of wrongful conception and, more specifically, the issue of whether damages for wrongful conception extend to the additional costs attributable to the disability of the unwanted child remains unresolved after *Rees*: 'Against Certainty in Tort Law' in Stephen Pitel, Jason Neyers and Erika Chamberlain (Eds.), *Tort Law: Challenging Orthodoxy* (Oxford: Hart Publishing, 2013) 14.

⁸⁵⁷ See ch 1 and section 7.6.

⁸⁵⁸ See section 1.1.

should only intervene in ‘those losses that are considered to go beyond what everybody is expected to tolerate within everyday life.’⁸⁵⁹ Autonomy *itself*, without more, is not such a loss.⁸⁶⁰

This does not mean new forms of damage that indirectly protect autonomy cannot be recognised but the implications of recognising them should be carefully considered.⁸⁶¹ The same applies to other attempts, outside of negligence, to fashion a remedy for lost autonomy. This thesis has been concerned with the tort of negligence and so should not be taken as an argument against protecting patient autonomy by other means – whether through other torts⁸⁶² or a statutory scheme⁸⁶³ – but any attempts to modify the law should bear in mind whether the benefit of protecting autonomy outweighs any detriment caused by departing from clear and well-established rules.

As Lord Neuberger MR (as he then was) said in *Scullion v Bank of Scotland plc (trading as Colleys)*:⁸⁶⁴

[A]s a matter of general principle, and the field of negligence is certainly no exception, the law must be developed in a principled and coherent way, and so as to be clear. The fact that a particular result may be perceived by many people to be fair in one case is a point which any sensible judge deciding that case will take into account. However, what appears to be a fair result in a particular case does not necessarily mean that the law as developed to achieve that result will satisfy

⁸⁵⁹ Gemma Turton, ‘Defining Damage in the House of Lords’ (2008) 71 *Modern Law Review* 1009, 1013.

⁸⁶⁰ See ch 7.

⁸⁶¹ E.g. ‘reproductive injury’ could be considered a new form of damage which would have clearer boundaries than autonomy per se. See Nicolette Priaux, ‘Rethinking Reproductive Injury’ (2009) 69 *Family Law* 1161.

⁸⁶² Considered in sections 2.4 and 2.6.

⁸⁶³ Margaret Brazier, ‘Patient Autonomy and Consent to Treatment: The Role of the Law?’ (1987) 7 *Legal Studies* 169.

⁸⁶⁴ [2011] 1 WLR 3212.

two even more important requirements of any judicial decision, namely legal clarity and coherence, and fair results in ensuing cases.⁸⁶⁵

⁸⁶⁵ Ibid at [70].

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Appendix

Copies of my published journal articles.

‘How Should Autonomy be Defined in Medical Negligence Cases’ (2015) *Clinical Ethics*

DOI: 10.1177/1477750915604104.

‘A Defence of the Counterfactual Account of Harm’ (2015) *Bioethics*

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‘Liability for Lost Autonomy in Negligence: Undermining the Coherence of Tort Law?’

(2015) 22 *Torts Law Journal* 226.



How should autonomy be defined in medical negligence cases?

Craig Purshouse

Abstract

In modern law medical paternalism no longer rules. Respect for patient autonomy is now a fundamental principle of both medical law and bioethics. As a result of these developments, and cases such as *Rees v Darlington Memorial NHS Trust* and *Chester v Afshar*, there have been suggestions that the law of clinical negligence should be developed so as to recognise diminished autonomy as a form of actionable damage in this area of tort law. Yet in order for the tort of negligence to recognise this new interest, it is first necessary to determine how autonomy should be understood in this context. The purpose of this article is to shed light on this issue and arrive at a suitable definition of the concept. After outlining the different theories of autonomy it is argued that the traditional liberal (current desire) definition is the most philosophically and legally coherent.

Keywords

Negligence, autonomy, medical law, tort

Introduction

In modern law medical paternalism no longer rules.¹ Respect for patient autonomy is now a fundamental principle of both medical law and bioethics.² Guidance issued to health care professionals emphasises the importance of respecting this value.³ As a result of these developments, there have been suggestions that the law of clinical negligence should be developed so as to recognise diminished autonomy as a form of actionable damage in this area of tort law.⁴ But in order for the tort of negligence to recognise this new interest, it is first necessary to determine how autonomy should be understood in this context. The purpose of this article is to shed light on this issue and arrive at a suitable definition of the concept.

Before proceeding, however, it is important to emphasise that there is scope for disagreement regarding whether autonomy ought to be given the prominence that it currently enjoys in the medico-legal literature. For example, there has been some criticism that that the focus on protecting autonomy has resulted in other ethical principles being overlooked.⁵ However, the correctness of this view and whether lost autonomy should be recognised as a form of damage in medical negligence claims is outside the scope of this article and, indeed, is the subject of a forthcoming paper by the author.

This article will begin by providing some background as to how lost autonomy has come to be seen as a potential new form of damage in negligence. The second part of this article will then outline the main conceptions of autonomy in moral philosophy. The proceeding sections will then discuss which version of autonomy is the most philosophically and legally coherent. The final conclusion will be that if English law is to recognise autonomy as an interest protected by the tort of negligence, it is the liberal conception (or 'current desire' version) that provides the most appropriate definition.

Autonomy as a form of damage in English clinical negligence cases

Before discovering which definition of autonomy is preferable to adopt in claims for medical negligence, it is necessary to provide some background as to why it has been suggested that medical negligence adopt

School of Law, University of Manchester, UK

Corresponding author:

Craig Purshouse, School of Law, University of Manchester, Williamson Building, Oxford Road, Manchester, M13 9PL, UK.

Email: craig.purshouse@manchester.ac.uk

such a course. Traditionally, the tort of negligence has not perceived autonomy per se as a form of damage that should be compensated. Instead, it has protected autonomy indirectly by safeguarding interests in, among others things, bodily integrity and property.⁶ Despite this, in two important cases the damages awarded (and thus the damage suffered) cannot be reconciled with traditional principles and so it could be argued that the better interpretation of these decisions is that they compensate the respective claimants for their diminished autonomy.

In *Rees v Darlington Memorial NHS Trust*⁷ the claimant, Ms Rees, was severely visually disabled. She feared that her poor sight would prevent her from being able to care for a child and so underwent a sterilisation, which was negligently performed by the defendant hospital. As a result she gave birth to a healthy son.

Her claim for the costs associated with raising the child and, if this should be refused, the extra costs she would incur from raising a healthy child attributable to her disability was unsuccessful in the House of Lords. The majority decided to follow an earlier decision, which held that the costs of raising a healthy child were irrecoverable.⁸ Yet they held that since the claimant was a victim of a legal wrong which had denied her the opportunity to live in the way she had planned, she should receive a 'conventional award' of £15,000. Lord Bingham justified this on the basis that the mother had 'been denied, through the negligence of another, the opportunity to live her life in the way that she wished and planned.'⁹ This has been interpreted by some commentators as an attempt to compensate the Ms Rees for her lost autonomy. Nolan, for example, has stated that the case 'amounts to recognition of diminished autonomy as a form of actionable damage.'¹⁰

The second case is *Chester v Afshar*.¹¹ The claimant, Miss Chester, suffered from back pain so visited the defendant consultant, Mr Afshar, who recommended surgery. In breach of his duty of care, he failed to warn her about a small risk (1–2%) of cauda equina syndrome (paralysis) inherent in the operation. This risk would be present no matter how expertly the operation was performed and liable to occur at random. Based on this (lack of) advice, Miss Chester underwent the procedure and, although the surgery itself was not carelessly performed, she suffered from the syndrome.

Miss Chester admitted that she could not say that she would never have undergone the operation even if she had been warned of the risks (if this had been the case she would have easily been able to show that Mr Afshar's carelessness in failing to warn her of the risks had caused her injury). Instead, she said that she would not have had the procedure at the time that she did but would have instead wanted to discuss the matter with others and explore alternatives.

She conceded that she may have chosen to have the surgery on a different day in the future. As a result of this concession, it was arguable that she could not show that Mr Afshar's carelessness in failing to warn her of the risks had actually caused the syndrome because it might have occurred anyway: Mr Afshar's carelessness had not increased her risks of suffering from cauda equina syndrome.

The majority of the House of Lords, however, found in Miss Chester's favour. They held that even though the claimant could not establish that the defendant had caused her back pain under traditional rules, a departure from conventional causation principles was justified because her right to make her own decision about her treatment had been interfered with. Lord Steyn laid emphasis on Miss Chester's 'right of autonomy and dignity',¹² saying it 'can and ought to be vindicated by a narrow and modest departure from traditional causation principles.'¹³ This indicates that, as Devaney has noted, 'the primary concern of the majority... was to ensure that patient autonomy is respected'¹⁴ and several academics have perceived the real damage (as opposed to that pleaded) in this case to be the interference with Miss Chester's autonomy.¹⁵ Green, for examples, describes it as a 'loss of autonomy case.'¹⁶

Given that these cases are hard to reconcile with conventional negligence rules that a claimant must establish that the defendant owed them a duty of care and the breach of that duty caused them actionable damage,¹⁷ it is arguable that a more principled understanding of these decisions is to perceive them as compensating the claimants for their lost autonomy. As a result, there have been a number of suggestions that lost autonomy per se is now, or should be, recognised as a form of damage in negligence.¹⁸ Chico states that these decisions 'demonstrate substantial congruity'¹⁹ as in both cases the House of Lords 'was motivated to provide a remedy for the victim of medical negligence on the basis that there had been an interference with the patient's autonomy.'²⁰ Although the above judgements are infused with recognition of the importance of autonomy, there is very little discussion of what is meant by the concept in the cases themselves. How, then, should autonomy be defined in medical negligence claims? The answer to this question will be the focus of the rest of this article.

What is autonomy?

'Autonomy' literally means self-determination²¹ and a person will be autonomous if they can choose and act on their own decisions.²² Beyond this, there are divergences in opinion about what being autonomous might entail. Coggon has provided a useful taxonomy of the

three main different conceptions of autonomy utilised in legal discussions. He describes these theories as: ideal desire autonomy; current desire autonomy; and best desire autonomy.²³ Each of these might demand different courses of action and so an understanding of this philosophical concept is required in order to fully determine how it will be recognised by the tort of negligence.

Ideal desire autonomy

Ideal desire autonomy is influenced by the work of Immanuel Kant.²⁴ It reflects what a person should want and, according to Coggon, this is measured 'by reference to some purportedly universal or objective standard of values.'²⁵ He states that this theory:

...requires agents to consider their reason for acting, and only to pursue a course of action if it could be made a universal law. That is, if it could be a successful maxim for all agents to follow. Therefore, if a person chooses to act in a way that is incompatible with a universalisable theory, that person is not acting autonomously.²⁶

According to this definition, certain conduct may never be capable of being autonomous if it does not comply with Kantian values (i.e. if one cannot rationally will one's actions to be a binding universal law that everyone should follow) or is otherwise objectively morally bad. For example, Kant maintained that his ethical system prohibited lying (even to save someone's life) and suicide.²⁷ If he was correct about this then lying or committing suicide cannot be autonomous acts. This would be so even if someone wanted to do these things. This notion of autonomy is therefore not based on an individual's actual preferences but on what they (supposedly) should want.

Current desire autonomy

Current desire autonomy, on the other hand, reflects an individual's 'immediate inclinations.'²⁸ It does not require a high level of reflection and need not be consistent with the person's values or ultimate goals.²⁹ This conception of autonomy is influenced by the work of John Stuart Mill, who stated: 'The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.'³⁰ Mill did not require people's self-regarding actions to be consistent with any set of rules or long-term goals. Instead, people can do as they please – in other words, fulfil their current desires – provided they do not cause harm to others.

This account of autonomy has been advocated by Jonathan Glover, who stated 'I override your autonomy only where I take a decision on your behalf which goes against what you actually do want, not where the decision goes against what you would want if you were more knowledgeable or more intelligent.'³¹ A person's actions will be autonomous if, provided the person is competent to make the decision and it is free and informed, such choices reflect their desires.³²

Best desire autonomy

In contrast, best desire autonomy states that a decision will be autonomous if it reflects a person's overall desires given their values, even if it runs contrary to their immediate desire.³³ This theory of autonomy has been proposed by Harry Frankfurt³⁴ and Gerald Dworkin.³⁵ The latter stated: 'Autonomy cannot be located on the level of first-order considerations, but in the second-order judgements we make concerning first-order considerations.'³⁶ An action will only be autonomous if a person's first-order desires (their immediate wants) are endorsed by their second-order desires (their long-term goals or values).³⁷ An example of respecting this type of autonomy would be preventing someone from eating cake if their long-term goal is to lose weight because their desire to eat cake only reflects their current desire rather than their 'best' desire.

Relational autonomy

Before contemplating which of these definitions of autonomy is most cogent, it is worth pausing to consider another version of autonomy that is known as relational autonomy.³⁸ This theory is critical of the above accounts as they fail to 'recognise the inherently social nature of human beings.'³⁹ It maintains that there is a need to think of autonomy as a 'characteristic of agents who are emotional, embodied, desiring, creative, and feeling, as well as rational creatures'⁴⁰ and recognise that agents are 'psychically and internally differentiated and socially differentiated from others.'⁴¹

Relational autonomy was developed by feminist theorists and communitarians who believe that other definitions 'would wrongly attribute autonomy to those whose restricted socialisation and oppressive life conditions pressure them into internalising oppressive values and norms.'⁴² Feminist critiques maintain that given that traditional accounts of autonomy do not recognise the 'value of relations of dependency'⁴³ they are seen as 'masculinist conceptions.'⁴⁴ Those who accept a relational account of autonomy would not perceive, for example, that a woman who had an internalised belief

that her role was to be subservient to her husband was autonomous even if that is what she wished to do.

However, this paper will not be considering this version of autonomy separately from the accounts discussed above. This is because most nuanced accounts of autonomy do not deny that people are, for example, emotional, creative and reliant on other people. It is a simple statement of the obvious that they are. As Raz states: 'Autonomy is possible only within a framework of constraints. The completely autonomous person is an impossibility. The ideal of the perfect existentialist with no fixed biological and social nature who creates himself as he goes along is an incoherent dream.'⁴⁵ As a result, the concerns of communitarians and feminists can be accommodated within Coggon's tripartite classification. As an example, the feminist belief that a woman who has an internalised belief that her role was to be subservient to her husband is not autonomous could be reconciled with ideal desire autonomy by maintaining that women should desire to be treated as equals with men and not accept passive roles.

It is therefore difficult to disagree with Fineman's conclusion that 'Although we all operate within societal and cultural constraints, we can determine directions and decide to take one path rather than another.'⁴⁶ Given this, and despite the fact that relational critiques of autonomy provide a valuable examination of the influence of social constraints on individuals, it will not be considered as a separate account in the following discussion.

Which conception of autonomy is preferable in the medical negligence context?

Philosophical coherence

The three conceptions of autonomy mentioned above will often have the same outcome.⁴⁷ If a person was suffering from a disease and currently had a desire to be cured, it is consistent with their values to be cured, and there is an objective rule that it is good for them to be cured then their decision to be cured will be autonomous under all three theories.

However, the theories can conflict. Objective values, second-order desires, and current preferences do not necessarily coincide. An individual might desire to commit suicide at the moment but this may conflict with their long-term goals or with a set of Kantian rules. Which version of autonomy, then, should be favoured for the purposes of recognising an interest in autonomy in medical negligence claims? The rest of this section will explain why the current desire view of autonomy is the preferable definition to adopt.

First, best desire and ideal desire autonomy contain a number of logical defects. With regards to best desire autonomy, it could be argued that if a person's first-order desires need to be endorsed in order to be autonomous then the same conditions should apply to a person's second order desires. This could lead to an infinite regress of endorsements, making it implausible that endorsement should be a prerequisite in order for a choice to be an autonomous one. After all, why not require that one's second-order desires are endorsed by one's third-order desires and so on?⁴⁸ As Watson has argued, 'Since second-order volitions are themselves simply desires, to add them to the context of conflict is just to increase the number of contenders; it is not to give a special place to any of those in contention.'⁴⁹

Additionally, it is unclear why second-order desires are any more authentic than first-order ones. As Thalberg has stated, best desire autonomy:

... assume[s] that when you ascend to the second level, you discover the real person and what she or he really wants... why grant that a second-order attitude must always be more genuinely his, more representative of what he genuinely wants, than those you run into at ground level? Perhaps his higher attitude is only a cowardly second thought which gnaws at him.⁵⁰

Similarly, there are problems with the theoretical basis of ideal desire autonomy. Being based on the work of Immanuel Kant, it suffers from the problems associated with his philosophy. According to most versions of the ideal desire version of autonomy one will be autonomous if one's decisions can be logically universalised. Yet, as Joshua Greene has pointed out, there are a number of actions that cannot be universalised under this theory: 'Take, for example, being fashionable. Universal fashionableness is self-undermining [If everyone is fashionable then no one is]. Nevertheless, we don't think that being fashionable is immoral.'⁵¹ Besides, given that Kant himself used his theory to argue that slavery was morally justified but that masturbation was not, it can be seen as nothing more than an ex post facto rationalisation for the gut feelings that he already held.⁵² It is doubtful that it provides a sound basis on which to determine whether an action is moral – let alone autonomous – or not.

Even if a non-Kantian version of ideal desire autonomy is adopted, this account of autonomy still raises a number of difficulties. As Christman, citing the work of Isaiah Berlin,⁵³ has argued, this version of autonomy would allow people ignore the actual wishes of others in order to do what their 'rational' selves should want.⁵⁴ Indeed, this is a fundamental logical problem with adopting ideal desire and best desire accounts of

autonomy, as both theories would allow the interference of a person's decisions in their best interests (to ensure they comply with an objective rule or to ensure they comply with their own thought-through values). In other words, these definitions of autonomy are indistinguishable from autonomy's polar opposite, paternalism – the restriction of a person's choices 'allegedly in the recipients' own best interests.'⁵⁵ Given this, ideal desire and best desire definitions of autonomy fail to provide convincing accounts of autonomy. It is illogical that a given action – say, preventing someone from committing suicide – can be described as both paternalistic and respectful of autonomy at the same time, as it can under those two interpretations. To define the overriding of a competent person's choices as a way of respecting their wishes is an abuse of language. It is more cogent to describe actions enforcing best desire and ideal desire autonomy as paternalistic and consider the circumstances when (if ever) paternalism is justified. The current desire version of autonomy is therefore the most philosophically coherent understanding of the concept.

Legal coherence

Whatever the philosophical shortcomings of the other accounts of autonomy, and even if the above analysis is erroneous, there is another reason why the tort of negligence should perceive autonomy as matching the current desire definition of the concept. Adopting a different account of autonomy would mean that different theories of autonomy would be used in different branches of the law, thus damaging its coherence. For it is the current desire version of autonomy is one that the courts presently use in a number of contexts. As McLean states, 'Irrespective of those philosophical approaches which seek to make autonomy a richer concept, it is the decision-making aspect of autonomy that dominates in law.'⁵⁶

The evidence for this is overwhelming. In a case on the 'right to die' the European Court of Human Rights declared that:

... the ability to conduct one's life in a manner of one's own choosing may also include the opportunity to pursue activities perceived to be of a physically or morally harmful or dangerous nature for the individual concerned.⁵⁷

If morally harmful decisions are deemed to be autonomous, then this definition of autonomy cannot refer to ideal desire autonomy as that theory requires actions to be 'moral' in order to be autonomous.

Furthermore, in criminal law it has been held that injecting oneself with a syringe of heroin is an

autonomous act that breaks the chain of causation for the offence of unlawful act manslaughter.⁵⁸ Lord Bingham stated that 'informed adults of sound mind are treated as autonomous beings able to make their own decisions.'⁵⁹ Given that injecting oneself with heroin is contrary to most people's higher-level desires and is not particularly morally praiseworthy, this appears to be an implicit endorsement of the current desire version autonomy.

There is also evidence that the current desire version of autonomy is used in the tort of battery. In the influential case of *Re T (Adult: Refusal of Treatment)*⁶⁰ Lord Donaldson MR stated:

... the patient's right of choice exists whether the reasons for making that choice are rational, irrational, unknown or even non-existent. That his choice is contrary to what is to be expected of the vast majority of adults is only relevant if there are other reasons for doubting his capacity to decide.⁶¹

If a right to choose one's treatment exists even if the reasons for that choice are irrational or non-existent then this cannot possibly reflect ideal desire or best desire theories of autonomy as the former (usually) requires decisions to be rational and the latter requires the reasons for them to be consistent with one's long-term wishes or values (thereby requiring some reasons for them to be given). The view that a person is free to make unwise self-regarding choices provided they have capacity to do so is also reflected in section 1 of the Mental Capacity Act 2005.

Finally, there is the example of *Chester v Afshar* (discussed earlier). Mr Afshar's actions were arguably perfectly justified under a best desire or ideal desire version of autonomy as it would be irrational and not in Miss Chester's long-term interests to refuse such an operation when it carried such small risks. Yet it was accepted that he did interfere with her autonomy and so this is further evidence that the law uses the current desire version of autonomy rather than the ideal desire or best desire versions.

Now the fact that a particular definition of autonomy represents the status quo is not, in itself, enough to ensure that it should be maintained. After all, many things that once represented the status quo in law – for instance, the condoning of marital rape – are now considered reprehensible.⁶² The common law is 'capable of evolving in the light of changing social, economic and cultural developments'⁶³ and so could theoretically evolve to reflect a different definition of autonomy. It may be that other branches of the law, such as the tort of battery, should be changed to reflect a more accurate interpretation of the concept. This would mean that it would be open for the tort

of negligence to adopt the ideal desire or best desire theories.

Leaving aside the philosophical problems with those two accounts, such a utopian vision would require a radical re-writing of the entire law of tort. Even if a different definition of autonomy was more plausible it would be the triumph of hope over experience to believe that judges would countenance such a drastic transformation of the law in this area.⁶⁴ Furthermore, it would be inconsistent to accept different definitions of the same concept within different areas of the law (never mind within such closely related areas of the law as the tort of battery and the tort of negligence).

It is for this reason that it is hard to accept Chico's argument in favour of the tort of negligence recognising an interest in autonomy. In her compelling book *Genomic Negligence* Chico argues that 'English negligence law could be imbued with a specific recognition of the interest in autonomy as a means of recognising... novel genomic claims [i.e. novel tort claims arising as a result of advances in genetic technologies].'⁶⁵ Her theory rests on a concept of autonomy 'imbued with substantive or value rationality and procedural rationality'⁶⁶ because 'it allows some objective evaluation of what autonomy consists in which makes legal recognition of the interest more likely.'⁶⁷ In other words, Chico adopts a theory approximate to the ideal desire definition of autonomy. What form might such ideal desires take? Chico states that the English negligence system already 'holds an intrinsic notion of value'⁶⁸ that could pour content into this rationality-based version of autonomy, namely 'the position of the ordinary or reasonable person'⁶⁹ could be used to determine what is rational in the same way that it is 'used as a measure of reasonableness.'⁷⁰

However, while it is true that the idea of the reasonable person is well-developed in other aspects of negligence law and that this conception of autonomy might constrain the number of claims in negligence for this type of damage and thus be more acceptable to judges,⁷¹ it suffers from the same problems associated with ideal desire autonomy that have been outlined above. For example, no ordinary or reasonable person would refuse a blood transfusion because such procedures are ungodly. Doing so would be archetypal unreasonable behaviour. And yet respect for autonomy means we permit such unwise choices by allowing Jehovah's Witnesses (and others) treated in such a manner to bring actions in trespass.⁷² Similarly, mentally competent pregnant women are entitled to refuse to undergo a caesarean section even when doing so will endanger their life and that of their unborn child.⁷³ If autonomy is based upon what the ordinary or reasonable person deems acceptable then such decisions would not be capable of being autonomous ones.

Accepting that choices have to be approved by the ordinary person would result in different definitions of autonomy existing in the tort of battery and the tort of negligence (with the former perceiving a refusal of life-saving blood transfusions and caesarean sections as autonomous behaviour but the latter not). This would undermine the coherence of the law.

Nonetheless, it may be countered that judges take advantage of the equivocal nature of autonomy and utilise all three conceptions in their judgements.⁷⁴ Judges might explicitly say that there need not be any reasons given for a decision in trespass to the person cases, but they may, as Coggon has argued, implicitly require that such decisions be rational.⁷⁵ One example he cites is the case of *Ms T*⁷⁶ where the refusal of a blood transfusion by a patient was overruled because she lacked mental capacity. The reason for *Ms T*'s refusal was that she believed her blood to be evil and this was held by the judge hearing the case to be an indication that she lacked capacity. Coggon believes that this case provides evidence that in some circumstances judges require a decision to be rational before they will allow a patient to exercise their autonomy. If this is correct it may mean that current desire autonomy is not the only correct legal definition of autonomy and that negligence law could adopt the best or ideal desire versions.

But this argument is not beyond reproach. Even if we accept that judges use all three definitions of autonomy in different circumstances this certainly does not mean that all they are equally valid or representative of the law. Traditional common law reasoning states that the decisions of the higher courts are binding on those of lower courts.⁷⁷ Many authoritative judgements have confirmed that the law reflects the position stated above by Lord Donaldson MR above.⁷⁸ If the occasional first instance decision departs from this by, say, requiring a decision to be rational, it is merely an example of judges misapplying the law. As such, this criticism does not refute the argument that current desire version of autonomy is the most representative of the legal status quo at present: cases contrary to this view are *per incuriam* and inconsistent with binding authorities. Given the common law's concern with consistency and that the current approach towards any expansion of liability in negligence is that developments should be incremental based upon previous decisions,⁷⁹ it is likely that if lost autonomy is accepted as a form of damage in negligence then it will be the current desire version of autonomy that will be utilised.

Conclusion

The purpose of this paper has been to determine how English tort law might define the concept of autonomy

in medical negligence claims. It has been argued that if autonomy is to be recognised as a form of damage protected by negligence then it is the ‘current desire’ version of the concept that is most likely to be used as it does not suffer from the philosophical problems of other definitions and is the most consistent with the current jurisprudence in related areas of tort law. Whether such claims should be successful is an entirely separate question. However, it is hoped that having a sound definition of the concept of autonomy will make arriving at the answer to it somewhat easier.

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A DEFENCE OF THE COUNTERFACTUAL ACCOUNT OF HARM

CRAIG PURSHOUSE

Keywords

harm,
counterfactual,
Joel Feinberg,
John Harris,
Julian Savulescu,
Guy Kahane

ABSTRACT

In order to determine whether a particular course of conduct is ethically permissible it is important to have a concept of what it means to be harmed. The dominant theory of harm is the counterfactual account, most famously proposed by Joel Feinberg. This determines whether harm is caused by comparing what actually happened in a given situation with the 'counterfactuals' i.e. what would have occurred had the putatively harmful conduct not taken place. If a person's interests are worse off than they otherwise would have been, then a person will be harmed. This definition has recently faced challenges from bioethicists such as John Harris, Guy Kahane and Julian Savulescu who, believing it to be severely flawed, have proposed their own alternative theories of the concept. In this article I will demonstrate that the shortcomings Harris, Kahane and Savulescu believe are present in Feinberg's theory are illusory and that it is their own accounts of harm that are fraught with logical errors. I maintain that the arguments presented to refute Feinberg's theory not only fail to achieve this goal and can be accommodated within the counterfactual account but that they actually undermine the theories presented by their respective authors. The final conclusion will be that these challenges are misconceived and fail to displace the counterfactual theory.

INTRODUCTION

Harming individuals is generally considered to be A Bad Thing.¹ Given that many discussions in bioethics take as their starting point John Stuart Mill's influential maxim that '[t]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others',² whether something causes harm to other people is believed to determine the limits of acceptable conduct. What constitutes harm is also of enormous practical consequence as claims can only be brought in

the tort of negligence, for example, if harm has occurred.³

Given this, it is important to have an understanding of what it means to be harmed. The dominant theory of harm has been the counterfactual account, most famously proposed by Joel Feinberg.⁴ This determines whether harm is caused by comparing what actually happened in a given situation with the 'counterfactuals' i.e. what would have occurred had the putatively harmful conduct not taken place. If a person's interests are worse off than they otherwise would have been then a person will be harmed.

Yet this definition has faced criticism from bioethicists who, believing it to be severely flawed, wish to replace it with their own theories of the concept. The first challenge

¹ See for example the fact that non-maleficence is one of the four principles of bioethics outlined in T.L. Beauchamp & J.F. Childress. *Principles of Biomedical Ethics*. 7th ed. Oxford: Oxford University Press; 2013.

² J.S. Mill. *On Liberty and Other Essays*. Oxford: Oxford University Press; 1991. 14.

³ See S. Perry. Protected Interests and Undertakings in the Law of Negligence. *Univ Tor Law J* 1992; 42: 247–317.

⁴ J. Feinberg. *Harm to Others (The Moral Limits of the Criminal Law Volume I)*. Oxford: Oxford University Press; 1984.

Address for correspondence: Craig Purshouse, University of Manchester – Centre for Social Ethics and Policy, School of Law Williamson Building, Oxford Road, Manchester M13 9PL, UK. Email: craig.purshouse@manchester.ac.uk

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came from Professor John Harris. In several books and articles he has proposed an alternative theory based upon whether a person is placed in a harmed state.⁵ He states 'Where B is in a condition that is harmed and A and/or C is responsible for B's being in that condition then A and/or C have harmed B'.⁶ A harmed state, he says, will be one that a person has a rational preference not to be in.

The second opposition to the counterfactual account is more recent and comes from Dr Guy Kahane and Professor Julian Savulescu.⁷ They believe that Feinberg's comparative theory of harm fails to explain the intuitive reactions people have towards different conditions. Kahane and Savulescu hold that there is an important distinction between things such as being severely intellectually impaired or dying in one's 20s on the one hand, and on the other things such as lacking an IQ of 160 or dying in one's 130s. They maintain that people see the former as harms but the latter as not and that the counterfactual account struggles to accommodate this distinction because Feinberg's theory perceives both scenarios as making an individual worse off and thus harmed. As a result, they propose that whether a condition is statistically normal will be a morally significant factor in determining whether a person is harmed or not: the former harmful conditions fall below what is statistically average whereas the latter non-harmful ones are not. Causing someone to be in a condition that is below what is statistically normal will be to cause them harm under this theory.

The purpose of this article is to defend the counterfactual account of harm from these two attacks. At first sight this might appear a rather esoteric debate. After all, blinding someone or causing them to contract Ebola is likely to cause harm under all three theories. However, these theories can lead to different answers to the question of what causing harm entails. Since many arguments in applied ethics currently rely upon the counterfactual account of harm, any deviation from this understanding of the concept is likely to have a large impact on contemporary bioethical problems. For example, Derek Parfit's Non-Identity Problem utilizes the counterfactual definition of harm and its conclusion appears to imply that, provided a child born will have a worthwhile life, bringing into existence an impaired individual does not cause that individual harm if that is the

only condition they could have existed in.⁸ This would mean it does not cause harm to select a congenitally deaf embryo for implantation. The child born would not be worse off as being deaf is the only state they could exist in (if a non-deaf embryo was selected then a different individual would be result) and so they would not be harmed by such reproductive choices.⁹ In contrast, Harris's and Kahane and Savulescu's theories, being non-comparative, would be able to say that having a deaf child would cause harm to the child born as a result: the child might have a rational preference not to be in that state and deafness falls below what is statistically normal.¹⁰

In this article I will argue that the shortcomings Harris, Kahane and Savulescu believe are present in Feinberg's theory are illusory and that it is their own accounts of harm that are fraught with logical errors. The first part of this article will give an overview of Feinberg's theory. Harris's alternative account will then be addressed and I will explain why it is unconvincing. Next, Kahane and Savulescu's criticisms of the counterfactual account and their own theory of harm will be presented and rebutted. I will demonstrate that the arguments presented to refute Feinberg's theory not only fail to achieve this goal and can be accommodated within the counterfactual account but that they actually undermine the theories presented by their respective authors. The final conclusion will be that that these challenges are misconceived and fail to displace the counterfactual theory.¹¹

THE COUNTERFACTUAL ACCOUNT OF HARM

Feinberg held that a person is harmed if their interests are put in a worse condition than they otherwise would have been.¹² The theory is therefore counterfactual as it compares what actually happened with what otherwise would have been the case (the 'counterfactuals'). Feinberg stated: 'A harms B only if his wrongful act leaves B worse off

⁵ For the most recent restatement of this theory of harm see N. Williams & J. Harris. What is the Harm in Harmful Conception? On Threshold Harms in Non-Identity Cases. *Theor Med Bioeth* 2014; 35: 337–351.

⁶ J. Harris. *Clones, Genes and Immortality*. Oxford: Oxford University Press; 1998. 110.

⁷ G. Kahane & J. Savulescu. The Concept of Harm and the Significance of Normality. *J Appl Philos* 2012; 29: 318.

⁸ D. Parfit. *Reasons and Persons*. Oxford: Oxford University Press; 1984. 359.

⁹ R. Bennett. When Intuition Is Not Enough. Why the Principle of Procreative Beneficence Must Work Harder to Justify its Eugenic Vision. *Bioethics* 2013; 28: 447–455.

¹⁰ It is worth mentioning that Harris, Kahane and Savulescu all support an obligation for parents to avoid selecting congenitally disabled children. See Savulescu J & Kahane G. The Moral Obligation to Create Children with the Best Chance of the Best Life. *Bioethics* 2009; 23: 274–290; Harris, *op. cit.* note 6.

¹¹ This article is not directly concerned with issues of what constitutes causation or causing harm entails. Though for an excellent recent discussion see S. Green, *Causation in Negligence*. Oxford: Hart Publishing; 2015.

¹² Feinberg, *op. cit.* note 4, p. 105.

than he would be otherwise in the normal course of events insofar as they were reasonably foreseeable in the circumstances'.¹³

Note that a person does not have to be made worse off than they were *before*. To illustrate this Feinberg uses the example of a Miss America contestant being detained the night before the competition – a competition she was certain to win. Although she is not worse off than before (she was not a competition winner *before* the putatively harmful detention), she is still harmed by such actions as she is worse off than she otherwise *would have been* (she would have been a Miss America competition winner had the detention not occurred).¹⁴

One might object that a problem with this account of harm is that of causal overdetermination. Feinberg asks us to imagine a businessman who takes a taxi to the airport. On the way the reckless driving of the taxi driver causes a collision. As a result, the businessman is severely injured, rushed to hospital and misses his plane. He is made worse off and consequently appears to be harmed by the actions of the taxi driver. But what if the missed plane had crashed after take-off, killing all of the passengers? It would appear that the businessman would not be harmed – even though he is suffering from severe injuries – because, counterfactually, he is not worse off as he has not died horribly in a plane crash.¹⁵

However, this problem is not insurmountable. The businessman will still be harmed under the counterfactual account because, given we are not omniscient, we have to assign blame based on *reasonably foreseeable* events. The taxi driver has still caused harm because the overall benefits of avoiding death were not *foreseeable*. Whether an individual is harmed is therefore based upon socially constructed expectations and whether the setting back of their interests was usual in the circumstances.¹⁶ Morality does not demand the impossible of people and so no account of harm will hold people responsible for events that could not be expected.¹⁷

What, then, are interests? Feinberg takes interests to be components of a person's well-being and believes this concept is useful because it acknowledges 'the complexity of a person's good [and] how it contains various components, some of which may be flourishing while others

languish at a given time'.¹⁸ To use the above example, an individual's interest in not being severely injured would be setback if it they were in a car crash but their (more important) interest in being alive would be benefitted by missing the fatal plane.

Hare once stated that 'the notion of interests is tied in some way or other to the notion of desires and that of wanting'¹⁹ and that 'it would scarcely be intelligible to claim that a certain thing was in a man's interest, although he neither wanted it, nor ever wanted it, nor ever would want it'.²⁰ This will be the definition of interests used in this article (though others can legitimately be countenanced).

JOHN HARRIS'S CHALLENGE

The first challenge to the counterfactual account of harm is presented by Harris.²¹ Harris believes that 'to be harmed is to be put in a condition that is harmful'²² and explains that to be in a harmed condition is 'to be born with any impairment that one could have a rational preference to be born without'.²³ To illustrate this Harris uses a thought experiment of 'the emergency-room test'.²⁴ If a patient was brought into hospital in a condition that could only be rectified there and then and the medical staff would be negligent if they failed to correct it then the patient will be in a harmed state according to Harris.²⁵ Therefore when someone is in a condition they have a rational preference not to be in and another is responsible for this state of affairs, then the latter will have harmed the former.

Most of the time this theory will not cause any problems and results in the same conclusions as Feinberg's. If you cut off my arm then I will be harmed under Feinberg's theory as, other things being equal, I will be worse off. I will also be harmed under Harris's account as

¹³ J. Feinberg. Wrongful Life and the Counterfactual Element in Harming. *Soc Philos Policy* 1986; 4: 153.

¹⁴ Ibid: 149.

¹⁵ Ibid. p. 151.

¹⁶ For example, if one lived in a society, Ruritania, where everyone was much more intelligent than the people of, say, Manchester then an averagely intelligent person in Manchester could be harmed by living in that condition in Ruritania, even if they would not be considered harmed with that condition in Manchester. See T. Takala. Gender, Disability and Personal Identity. In K. Kristiansen, S. Vehmas & T. Shakespeare, editors. *Arguing about Disability: Philosophical Perspectives*. Abingdon: Routledge; 2008. 124–133.

¹⁷ Feinberg, *op. cit.* note 13, p. 149.

¹⁸ J. Feinberg. Harm and Offense. In L.C. Becker & C.B. Becker, editors. *Encyclopaedia of Ethics Volume II*. London: Routledge; 2001. 652.

¹⁹ R.M. Hare. *Essays on the Moral Concepts*. London: The Macmillan Press Ltd.; 1972. 97.

²⁰ Ibid: 98.

²¹ Although his 'harmed state' account has been criticised before, these critiques have not centred on its failure to displace the account of harm given by Feinberg. See R. Sparrow. Harris, Harmed States, and Sexed Bodies. *J Med Ethics* 2011; 37: 276–279; Bennett, *op. cit.*, note 9.

²² Harris, *op. cit.* note 6, p. 109.

²³ R. Bennett & J. Harris. Are There Lives Not Worth Living? When is it Morally Wrong to Reproduce? In D. Dickenson, editor. *Ethical Issues in Maternal-Foetal Medicine*. Cambridge: Cambridge University Press; 2002. 325.

²⁴ J. Harris. *Enhancing Evolution: The Ethical Case for Making People Better*. New Jersey: Princeton University Press; 2007. 91.

²⁵ Ibid.

a surgeon would be negligent if they failed to repair the damage if they could and I have a rational preference to not have a missing arm.

A puzzling conclusion

Harris's account, however, runs into a number of problems in harder cases. The first is that it is too expansive and so leads to conclusions Harris may well, or perhaps should, be unwilling to accept given his writings on other topics. Under Harris's definition of harm, it will be impossible to avoid causing harm if one chooses to have children. This is because everybody has certain characteristics that they might rationally prefer not to have. One might rationally prefer to be taller, be less susceptible to common colds, have better eyesight, not die of old age, look like Elizabeth Taylor or Paul Newman in their prime or be more intelligent. In fact, if you picked any random individual existing on the planet you would certainly be able to find something, even if it is only minor, that is wrong with them. Something that one might rationally prefer to be improved and that a doctor would be considered negligent for not rectifying in an unconscious patient if they could. The implication of Harris's account is therefore that we are all harmed by existence because we could always rationally prefer to be in a better condition than the one we currently are in. If existence is a harmed state this means that those who cause people to be in such a condition – namely their parents – have caused harm. As a result, having children will always cause harm.

It is not open to Harris to say that a doctor would not be negligent for failing to find a cure to the common cold or administer the elixir of life as none is currently available. His account does not depend upon this. He believes, for example, that a deaf child is harmed by being born in a disadvantaged condition 'even though it is not possible for that particular individual to avoid the condition in question'²⁶ and exist in any other state. According to Harris, therefore, a child susceptible to common colds will be harmed even if they could not exist in any other state as, unlike Feinberg's, his account does not rest upon counterfactual alternatives. Whereas Feinberg would say that a child is harmed by being susceptible to colds if they could have existed in a state where they would not be so susceptible, Harris's theory of harm would say they are harmed regardless of the alternatives.

What should we do then if all children are harmed by existence? The first solution is to say that one should not have *any* children. There are some philosophers who do think that we are all harmed by existence. David Benatar is one of them and he has given an interesting argument that '[b]eing brought into existence is not a benefit but

always a harm'.²⁷ Indeed, it is perfectly possible that this is the case and that we should not have children at all as doing so causes harm. But whatever the merits of this conclusion, this get-out is not available to Harris. Why? Because he has previously rejected it. Harris has stated '[s]o long as it is not possible to produce a healthier, and probably happier, alternative child there are still good moral reasons to produce children so long as their lives are predictably well worth living'.²⁸

Leaving aside the fact that Harris does not convincingly explain why an individual being harmed is dependent on whether another healthier person is waiting in the wings to replace them, if Harris does not accept that it is wrong to have children even though they will be harmed then there must be no duty to avoid causing harm. This is because, as Brassington has said, it is blameworthy to fail to fulfil a duty.²⁹ As we cannot be blamed for not performing the impossible, we cannot have a duty to do the impossible. Accordingly, if parents are allowed to have children, then bringing them to birth in a non-harmed state (in other words, performing a duty to avoid causing harm) would be impossible. The failure to fulfil this duty not to cause harm will therefore not be blameable so it will not be a duty at all. This is the second unpalatable conclusion of Harris's account: it potentially sees causing harm as being completely morally unproblematic.

Regardless of whether these two conclusions – that we should never have children; or that there is no duty to avoid harming people – are acceptable or not, this demonstrates a major inconsistency with Harris's account of harm that is not apparent in Feinberg's. Under Feinberg's conception of harm bringing a child into existence only causes them harm if the child has a life that is not worthwhile (i.e. if they are worse off by being alive and so better off dead) and that is the only state they could be in. Given these problems, it is difficult to see why Harris's account of harm should displace Feinberg's.

The 'Blighty wound' soldier

Why then might we be tempted to adopt Harris's view? Harris believes that it explains situations where we supposedly harm another even though they benefit overall. An illustration he gives in support of this is that of the 'Blighty wound' soldier, where in the First World War soldiers would shoot themselves in the foot in order to be sent home to England.³⁰ Harris states that adopting the counterfactual account would deprive us of describing these soldiers as being harmed as they are better off

²⁷ D. Benatar. Why it is Better Never to Come into Existence. *Am Philos Q* 1997; 34: 345.

²⁸ Harris, *op. cit.* note 24, p. 94.

²⁹ I. Brassington. Enhancing Evolution and *Enhancing Evolution*. *Bioethics* 2010; 24: 399.

³⁰ Harris, *op. cit.* note 6, pp. 113–114.

²⁶ Harris, *op. cit.* note 6, p. 109.

overall, whereas under his account they are harmed – people rationally prefer not to have foot injuries – but not wronged. Harris believes the intuitive reaction people have that the soldier is harmed undermines Feinberg's counterfactual account.

However, assuming that Harris is correct to state that the soldier is harmed, this may not pose a problem for Feinberg's theory. The soldier has caused themselves a serious injury so *their interest in having a healthy foot* is set back quite radically. They are likely to be permanently disabled, have exposed themselves to a serious risk of gangrene, amputation, even death and, at the very least, will be court-martialled and punished if found out. Many back in 'Blighty' might view them as cowardly. We might therefore be tempted to agree with Harris that the soldier is harmed.

However, Harris does not provide enough detail in this thought experiment to refute Feinberg's theory. The soldier's interest in being sent home, avoiding the war and surviving may not have been advanced that dramatically as they have only avoided a *risk* of death. This risk may have been small if the war was close to ending. If they survived they would have returned to 'Blighty' a hero. But by causing themselves injuries to avoid something that probably would not have happened anyway the soldiers might not have benefitted overall. As a result, the soldier would be worse off overall and thus harmed under Feinberg's account. While we may have a *feeling* that the soldier is harmed, that intuition may be explained better by the counterfactual account rather than Harris's own theory. There is simply not enough information in the thought experiment to conclusively determine whether any intuition that the soldier is harmed is better explained by Harris's or Feinberg's theory. If Harris put more content into this thought experiment to demonstrate that the soldier *was* benefitted overall then our intuitions might be different. After all, we might intuit that a soldier who shot themselves in August 1914 may not be harmed overall by such actions whereas one who did so in early-November 1918 would be. As a result, this thought experiment does not refute the counterfactual account of harm as it is insufficiently detailed.

Can one be harmed and benefitted at the same time?

But even if this is not the case it makes little sense to describe a person as harmed if they benefit overall, especially if the only way to obtain the benefit is to accept the detriments that go with it. If, for example, a life-saving operation leaves someone with a scar they are not harmed *overall* by having their life saved if it is a choice between that or leaving an unscarred corpse (though their *interest in not being scarred* may be harmed). This is so even though people have a rational preference not to be

scarred. Accordingly, it is difficult to see any advantage in adopting Harris's account over Feinberg's. If one suffers a minor disadvantage in an otherwise overwhelming benefit, Harris's account would render such conduct impermissible if we had a duty to avoid causing harm.

This problem is not apparent in the counterfactual theory as it is capable of seeing certain actions as setting back some interests but advancing others and is therefore more nuanced than Harris's alternative.³¹

KAHANE AND SAVULESCU'S CHALLENGE

We have seen that Harris's theory of harm is less convincing than the one put forward by Feinberg. Might Kahane and Savulescu's fare any better? Kahane and Savulescu state that 'to be severely intellectually impaired, paraplegic, blind, or to die in one's 20s is to suffer, in different ways and degrees, from serious disadvantage and harm'.³² This list will be referred to as list (1) and it is hard to disagree with this point. Assuming blindness or dying young do not further an individual's interests the items on list (1) will normally be considered harms according to the counterfactual account of harm.

However, Kahane and Savulescu believe the counterfactual theory 'faces a serious problem'³³ when one considers list (2). On this list are things such as: 'to have less than an IQ of 160, to lack great artistic talent, or to live less than 130 years'.³⁴ They maintain that these conditions could make people worse off but yet no one would describe this list 'as instances of serious disadvantage, harm or misfortune'³⁵ and state, 'it seems absurd to describe these limitations (and the conditions that underlie them) as serious harms'.³⁶ Putting someone in such a state does not appear to be equivalent to causing them harm. Consequently, Kahane and Savulescu believe that there appears to be a normative distinction between lists (1) and (2) and the aim of their paper is to determine what this distinction might be.

Kahane and Savulescu's theory therefore rests on an intuitive distinction between list (1) and list (2). They critique several possible reasons for this before proposing that statistical normality provides the best explanation

³¹ It may be the case, however, that Harris is equivocating with his use of the word 'harm'. In certain scenarios where Harris describes someone as not being *harmed*, he conceded that they may be *wronged* (see *op. cit.* note 4, pp. 116–17). However, he provides us with no convincing reasons for why his terminology should be used. Indeed, his definition of harm removes all negative connotations that most people usually associate with the concept.

³² Kahane & Savulescu, *op. cit.* note 7, p. 318.

³³ *Ibid.* p. 319.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*

for this intuition. Accordingly, statistical normality, they believe, must be morally important in discovering whether someone is harmed. That is, as the conditions in list (1) fall below what is statistically normal putting someone in such a condition will cause them harm and as the items in list (2) are statistically normal they will not be harms. To avoid repetition I will outline their justifications for this in more detail when exploring the weaknesses of their argument in the following sections.

Under the counterfactual account of harm the things in list (2) could *theoretically* be harms. People might have an interest in having great artistic talent or living to be 130 years old, for example. Thwarting these interests would make a person worse off and so they would be harmed. However, we must remember that the counterfactual account requires, in order for an individual to be harmed, their interests to be set back in 'the normal course of events insofar as they were reasonably foreseeable in the circumstances'.³⁷ There is presently no course of conduct that could be performed that would mean a person with the conditions in list (2), things such as lacking great artistic talent or living to less than 130 years old, could have these interests furthered *in the normal course of events insofar as they were reasonably foreseeable in the circumstances*. It is not reasonable to expect anyone to administer a serum that will enable people to be as great a composer as Mozart if no such serum exists. To put someone in one of these conditions listed in (2) does not cause them harm unless there was a way that someone could, say, live that long or have such great artistic talent.

Given this, the 'serious problems' that Kahane and Savulescu believe the counterfactual account faces are not ones that it faces in our world at present. They are merely theoretical. And, being theoretical, any intuitions that are generated by such thought experiments are not ones that can be relied on in this world. It may be that if there was a world where it is foreseeable that people could live to be 130 years old and their lives were then cut short, then people in that world would see such actions as harmful. Kahane and Savulescu appear, therefore, not to have fully grasped the nuances of the counterfactual account and this is not a promising start for their theory. Nonetheless, their arguments can be refuted in other ways and so I will ignore this flaw for the rest of this article.

The problematic first premise

The first problem with Kahane and Savulescu's argument comes from their acceptance that the intuitive distinction concerning lists (1) and (2) is morally relevant for determining whether someone is harmed. Even if one concedes that people *do* have an intuition that the items on list (1)

are worse than those in list (2), Kahane and Savulescu provide us with no evidence whatsoever that this intuition is, as they claim, a 'normative'³⁸ one.

The trouble with relying solely on intuitions is that they are often unreliable. If one person intuits that X is bad and another that X is permissible then relying solely on intuition does not tell us how we should proceed. The mere fact people intuit a difference between list (1) and list (2) therefore tells us nothing normative.

Kahane and Savulescu emphasize the fact that this intuition is 'widely held'.³⁹ But the idea that we should blindly follow the intuitions of the majority is unconvincing. For a start, a cursory look at history shows that the majority of people have held all sorts of questionable beliefs. At one point most people intuited that throwing 'witches' in ponds or owning slaves was perfectly acceptable behaviour.

Many people, for example, have an intuition that human cloning is wrong.⁴⁰ But in an article supporting human cloning Julian Savulescu himself wrote:

[T]he fact that people find something repulsive does not settle whether it is wrong. The achievement in applied ethics, if there is one, of the last 50 years has been to get people to rise above their gut feelings and examine the reasons for a practice.⁴¹

It is hard to disagree. How peculiar, then, that Savulescu and Kahane elevate their gut feelings concerning the items in (1) and (2) without fully considering whether this intuitive distinction is morally important.

After all, a non-moral explanation can be suggested for the intuitive distinction between the two lists: such intuitions could simply be a result of our evolved responses to such scenarios. Thousands of years ago our ancestors would have seen being severely intellectually impaired, paraplegic, blindness or dying in one's 20s as undesirable because these conditions would all be things that would hinder their chances of reproducing. As these conditions would have prevented people passing on their genes, natural selection will have given us evolutionary reasons to avoid these conditions. Our evolved response to these things in list (1) is to have a gut-feeling that they are harms.

The same cannot be said of the items in list (2). To have an IQ of less than 160, to lack great artistic talent or to live less than 130 years were not only unnecessary for people to pass on their genes thousands of years ago, but they are not even required for it now. Natural selection

³⁸ Kahane & Savulescu, *op. cit.* note 7, p. 319.

³⁹ *Ibid.* p. 320.

⁴⁰ B.A. Bates et al. Warranted Concerns, Warranted Outlooks: A Focus Group Study of Public Understandings of Genetic Research. *Soc Sci Med* 2005; 60: 333.

⁴¹ J. Savulescu. Should we Clone Human Beings? Cloning as a Source of Tissue for Transplantation. *J Med Ethics* 1999; 25: 93.

³⁷ Feinberg. *op. cit.* note 13, p. 153.

will not have provided us with aversions to being in such circumstances as any alternative would not be available to our ancestors or particularly advantageous in enabling them to reproduce. Natural selection may have equipped us with intuitions that the items in list (1) are bad if we are to pass on our genes but those in list (2) are not bad for this purpose.

This distinction is not necessarily morally significant however. As Peter Singer has stated, ‘The direction of evolution neither follows nor has any necessary connection with, the path to moral progress.’⁴² Indeed, just because something is good at helping people pass on their genes does not mean that it is good morally.⁴³

If Kahane and Savulescu want to rely on this intuition to show that the concept of harm should be redefined, then they need to present a reason why the fact people (might) maintain an intuitive distinction between list (1) and list (2) renders this distinction morally important. This is something they fail to do. Accordingly they do not provide enough evidence to convincingly conclude that it is the counterfactual concept of harm that should be changed rather than the, supposedly widely-held, intuition people have regarding their two lists. Without this, Kahane and Savulescu’s argument for the importance of statistical normality in determining whether someone is harmed rests on insecure foundations.

Kahane and Savulescu try to extricate themselves from these difficulties by stating: ‘Those who reject our premises will naturally find our argument of limited interest.’⁴⁴ However, this is not a sufficient get-out clause for them. The burden is on the person offering an argument to show that their premises are sound, otherwise their proposition is question-begging. Kahane and Savulescu have failed to do this with their first premise and so they cannot simply dismiss any rebuttals based on this and continue to argue that statistical normality is morally important. Given, therefore, that the initial premise of Kahane and Savulescu’s theory is unconvincing, it is hard not to conclude that their account of harm is inferior to the counterfactual one.

Statistical normality

Let us now be generous and presume that the intuition we have that list (1) is worse than list (2) is a normative one. Does this mean that statistical normality provides a satisfactory account of what it means to be harmed? In this section I will show that it does not and highlight that Kahane and Savulescu’s theory of harm leads to results

that are far more counterintuitive – something they place great importance on – than the counterfactual account of harm.

Imagine there is a disease that has swept the population of Ruritania. Eighty per cent of the population has it and it causes them chronic pain. It is easily curable. Twenty per cent of the population do not have the disease. In this scenario the disease that the eighty per cent suffer from is statistically normal. The mode, mean and median of people suffer from it. If what is statistically normal was to determine whether a person was harmed then people are not harmed by suffering from chronic pain even though it could be easily cured. Furthermore, if say, only forty per cent of the population had this disease then there would be nothing to prevent someone, under Kahane and Savulescu’s account of harm, injecting as many people as possible with the disease in order to make the disease statistically normal and thus not a harm. Under this theory, causing someone to be in chronic pain would not cause them harm even if doing so brought no other benefits. Such problems do not, of course, arise under the counterfactual account as we could describe these people as harmed because, by not being cured, they are worse off than they otherwise would be in the normal course of events.

If we are concerned with the interests of people there are good reasons to reject Kahane and Savulescu’s account of harm. Provided you end up being above what is statistically normal it would sanction the reduction of your welfare even when this did not improve the welfare of others. Whacking, say, a modern-day Michaelangelo over the head so that he could no longer paint something as great as the Sistine Chapel would not be to cause him harm under Kahane and Savulescu’s theory provided he could still paint better than the average person. This would be so even if no one else was benefitted by such spiteful actions.⁴⁵ The mere fact that list (1) sometimes correlates with what is statistical normal, whereas those in list (2) do not, is not a compelling reason for concluding that statistical normality is important in determining whether someone is harmed. In contrast, Feinberg’s theory allows us to say that minor harms are still harms and avoids these logical pitfalls.

Diminishing marginal utility and the intuitive distinction

I have demonstrated that Kahane and Savulescu’s argument rests on a flawed premise and that a concept of

⁴² P. Singer. *Ethics and Intuitions*. *J Ethics* 2009; 9: 342.

⁴³ Alternatively, we may simply be that we have been educated to see list (1) as harms whereas, given alternatives to the things in list (2) are not something any of us will have encountered growing up, we have not been taught to see the latter as harms.

⁴⁴ Kahane & Savulescu, *op. cit.* note 7, p. 320.

⁴⁵ Kahane and Savulescu’s theory appears to support a world similar to that outlined in Kurt Vonnegut’s dystopian satire ‘Harrison Bergeron’, which imagines a society where the Handicapper General enforces the states’ equality laws by handicapping people to ensure that no one is allowed to be smarter, better-looking, or more physically able than anyone else. See K. Vonnegut. *Welcome to the Monkey House*. London: Vintage Books; 1994. 7.

harm based on statistical normality leads to counterintuitive results. Despite this, some may be tempted to draw a distinction between the two lists that Kahane and Savulescu present. They may see being paralysed as worse than, say, lacking the ability to fly. I would not disagree. The former is worse than the latter. But the best explanation for this is not the one provided by Kahane and Savulescu. The counterfactual theory of harm may be able to *better* account for the idea that list (1) is *generally* worse than list (2) in most circumstances because of the fact of diminishing marginal utility.

If something exhibits diminishing marginal utility then, according to Greene and Baron, 'the more of that good an individual has, the less valuable having more of it will be to that individual.'⁴⁶ This is because one tends to put off buying goods with less utility per pound until after one has bought more essential, basic goods.⁴⁷ Simmonds provides a good illustration of this. He states:

Expressed very simply, this theory entails that an additional £1 given to a millionaire will make a negligible contribution to his welfare, whereas £1 given to a very poor man might make a significant contribution to his welfare, enabling him, say, to buy a meal that he could not otherwise afford.⁴⁸

Greene and Baron performed a study which showed that the utility people place on a wide range of goods – including extended lifespan – is marginally declining.⁴⁹ If we must accept, as Kahane and Savulescu maintain, that any difference between list (1) and list (2) is a moral one this may explain why the items in list (1) are considered worse than those in (2).

The items in list (1), things such as blindness, paraplegia or having a short lifespan, are invariably things that if they were removed would bring much greater utility than the items in list (2), things such as lacking artistic talent or not having a really long lifespan. A person who has an IQ of 75 is more likely to get a greater benefit from having their IQ increased by 10 points than someone with an IQ of 150 would. The principle of diminishing marginal utility would see the things in list (1) as ones that generally setback interests more than list (2) and this is why people might have an intuitive reaction that list (1) is worse than list (2). However, this does not mean that the items in list (2) are not harms *at all* or even, in particular circumstances, not serious harms.

Whether someone is harmed is context-specific. The fact that diminishing marginal utility provides an explanation for the intuitive distinction merely means that

generally the items in list (2) do not make life go as bad as those in list (1) and so are *usually* minor harms. Statistical normality is therefore not the only cogent explanation for any intuitive distinction that people may have between Kahane and Savulescu's lists – the counterfactual account of harm provides a more plausible explanation of why list (1) might be perceived as making people worse off than list (2).

Kahane and Savulescu try to get around this by arguing that 'We can stipulate, for our purposes, that enjoyment of these conditions [in list (2)] would significantly increase wellbeing, and that they would do so to roughly the same extent that the conditions listed in list (1) decrease it.'⁵⁰ However, this stipulation is not open to them logically. In our world it is not possible that the conditions in list (2) are as equally bad or reduce welfare to the same extent as the items in list (1) and so any intuitions that are generated as a result of this are untrustworthy. Stipulating that not being as good a playwright as Shakespeare is the equivalent in terms of setbacks to welfare as being blind is the equivalent of stipulating that two plus two equals five, or that being tortured to death is equal to having ten pounds stolen from you: it is so difficult, if not impossible, for us to even comprehend such a thing that any intuitions generated are of dubious reliability in our present world. This 'stipulation' is therefore not a good enough escape route for Savulescu and Kahane and they cannot simply presume that list (1) and list (2) are equally serious.

It is unsurprising, though, that Kahane and Savulescu do not tackle this problem head-on and list examples of things that *do* equally setback welfare in our world. This is because if they actually used examples that *did* increase or decrease welfare to the same extent, then our intuitions would probably indicate that both lists contain harms and their whole argument would be undermined. Accordingly, Kahane and Savulescu must provide examples in their lists that actually reduce welfare to the same extent if any intuitions regarding the two lists are to be useful.

Without doing this, they cannot rebut the idea that diminishing marginal utility indicates that list (1) and list (2) are unlikely to reduce an individual's welfare to the same extent. This means the items in list (1) will setback welfare to a greater extent than those in list (2) will and so can be perceived as more serious harms under to the counterfactual account. Kahane and Savulescu therefore do not show that the counterfactual account of harm is an inadequate theory.

CONCLUSION

It has been said that harm is 'a subject of special moral concern because harm is presumptively bad to suffer and

⁵⁰ Kahane & Savulescu, *op. cit.* note 7, p. 321.

⁴⁶ J. Greene & J. Baron, 'Intuitions about Diminishing Marginal Utility', *J Behav Dec Making* 2001; 14: 243.

⁴⁷ *Ibid.*: 244.

⁴⁸ N.E. Simmonds, *Central Issues in Jurisprudence*, 4th ed. London: Sweet and Maxwell; 2013. 30–31.

⁴⁹ Greene & Baron, *op. cit.* note 46, p. 248.

presumptively wrong to inflict.⁵¹ It is therefore essential that we adopt a definition of the concept that is philosophically coherent. The counterfactual account of harm is capable of withstanding such scrutiny and this article has defended it from two challenges. It has been shown that the theories of harm proposed by Harris, Kahane and Savulescu are internally inconsistent and contain a number of flaws. Both the 'harmed state' and the 'statistical normality' accounts lead to conclusions that, even if their respective authors were willing to accept them, are unlikely to be satisfactory for anyone else. As a result, the

attacks directed by Harris, Kahane and Savulescu towards the counterfactual theory fail to hit their target. Instead, like the Blighty Wound Soldier they shoot themselves in the foot.

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Craig Purshouse is a doctoral candidate at the Centre for Social Ethics and Policy, School of Law, University of Manchester.

⁵¹ G. Keating. 2013. When is Emotional Distress Harm? In S. Patel, J. Neyers & E. Chamberlain, editors. *Tort Law: Challenging Orthodoxy*. London: Hart Publishing. 276.



Liability for lost autonomy in negligence: Undermining the coherence of tort law?

Craig Purshouse*

*Respect for individual autonomy is considered to be an important principle in bioethics and medical law. Appellate decisions such as **Rees v Darlington Memorial Hospital NHS Trust** and **Chester v Afshar** arguably indicate that lost autonomy could be a form of actionable damage in the tort of negligence and there has been a growing body of academic opinion that advocates the tort of negligence should protect an interest in autonomy. This article argues that such a course would be mistaken by demonstrating that recognition of this putative interest is inconsistent with current legal determinations and conceptual understandings as to what counts as actionable damage and when a duty of care should be imposed. As a result, it is argued that protecting a notional interest in autonomy would be problematic because it is difficult for the tort of negligence to do so in a coherent way without distorting established and cogent legal principles.*

Introduction

In *Reeves v Commissioner of Police of the Metropolis*,¹ Lord Hobhouse emphasised the significance of the ‘the fundamental principle of human autonomy’² when he stated:

Where a natural person is not under any disability, that person has a right to choose his own fate. He is constrained in so far as his choice may affect others, society or the body politic. But, so far as he himself alone is concerned, he is entitled to choose.³

Autonomy is valuable because it leads, Alexander McCall Smith argues, to the living of a good life.⁴ As Ronald Dworkin has stated, it ‘allows each of us to be responsible for shaping our lives according to our own coherent or incoherent — but in any case, distinctive — personality’⁵ and ‘to lead our own lives rather than be led along them.’⁶ By contrast, the person for whom

* LLB, MA, Doctoral Candidate, School of Law, University of Manchester. I am very grateful to Sarah Devaney, Donal Nolan, Rebecca Bennett, Jonathan Morgan, Joe Purshouse, Joachim Dietrich and an anonymous reviewer for helpful comments. All views and mistakes are my own. I would also like to thank the Arts and Humanities Research Council for funding this research.

1 [2000] 1 AC 360; [1999] 3 All ER 897; [1999] 3 WLR 363.

2 Ibid, at AC 394.

3 Ibid. This case was primarily concerned with causation and the volenti defence. Lord Hobhouse was the lone dissenter on those issues but, although his judgment in no way represents the ratio decidendi of the case, his discussion of autonomy succinctly sums up the current law.

4 A McCall Smith, ‘Beyond Autonomy’ (1997) 14 *J Contemp Health L and Pol’y* 23 at 30.

5 R Dworkin, *Life’s Dominion: An Argument about Abortion and Euthanasia*, Harper Collins, London, 1993, p 224.

6 Ibid, p 224.

decisions are made by others leads a ‘drab’⁷ and ‘poorer life’⁸ that is ‘less worth living than the life of the autonomous agent.’⁹ This seems to be true on an intuitive level: few of us would wish for all of our decisions to be controlled by another individual.

In light of this, the latter part of the twentieth century heralded a diminishing acceptance of the medical paternalism of the past.¹⁰ Today, bioethical debates emphasise the utmost importance of respecting an individual’s autonomy¹¹ and there has been no shortage of medical law cases stressing the same point. To see how far we have come, one only needs to compare Lord Denning’s statement in *Hatcher v Black*¹² that doctors are justified in telling a therapeutic lie to their patients with the way the tort of battery has developed to enable mentally competent¹³ patients to refuse the amputation of gangrenous limbs,¹⁴ Jehovah’s Witnesses refuse life-saving blood transfusions¹⁵ and prospective mothers to refuse life-saving caesarean-sections even when the life of their unborn child is threatened by such choices.¹⁶ As Judge LJ stated in a case concerning the latter factual scenario:

Even when his or her own life depends on receiving medical treatment, an adult of sound mind is entitled to refuse it. This reflects the autonomy of each individual and the right of self-determination.¹⁷

In fact, such is the focus on protecting patient autonomy that some academics have criticised the tendency to see it as ‘a trump card beating all the other principles’.¹⁸

Respect for autonomy is therefore a significant social and cultural (not to

7 McCall Smith, above n 4, at 30.

8 Ibid.

9 Ibid.

10 Brazier’s account of how the law developed to protect patient autonomy remains illuminating: M Brazier, ‘Patient autonomy and consent to treatment: The role of the law?’ (1987) *LS* 169. See also S McLean, *Autonomy, Consent and the Law*, Routledge-Cavendish, Abingdon, 2009, pp 6–40.

11 See T Beauchamp and J F Childress, *Principles of Biomedical Ethics*, 7th ed, Oxford University Press, Oxford, 2013; G Dworkin, ‘Autonomy and Behaviour Control’ (1976) 6 *Hastings Cent Rep* 23; J Harris, *The Value of Life: An Introduction to Medical Ethics*, Routledge & Kegan Paul, London, 1985; G Dworkin, *The Theory and Practice of Autonomy*, Cambridge University Press, Cambridge, 1988; J Christman, ‘Constructing the Inner Citadel: Recent Work on the Concept of Autonomy’ (1988) 99 *Ethics* 109; S Holm, ‘Autonomy’ in *Encyclopaedia of Applied Ethics*, R Chadwick (Ed), Vol 1, Academic Press, San Diego, 1998.

12 (1954) *The Times*, 2 July.

13 The law on mental capacity is now contained in the Mental Capacity Act 2005.

14 *Re C (Adult: Refusal of treatment)* [1994] 1 WLR 290; [1994] 1 All ER 819; [1994] 2 FCR 151.

15 *Re T (Adult: Refusal of treatment)* [1993] Fam 95; [1992] 4 All ER 649; [1992] 3 WLR 782.

16 *Re MB (Adult: Medical treatment)* [1997] 2 FCR 541 at 553 per Butler-Sloss LJ and *St George’s Healthcare NHS Trust v S* [1998] 3 WLR 936; [1998] 3 All ER 673; [1999] Fam 26; [1998] 2 Fam Law R 728.

17 *St George’s Healthcare NHS Trust v S* [1998] 3 WLR 936 at 950; [1998] 3 All ER 673; [1999] Fam 26; [1998] 2 Fam Law R 728.

18 M Brazier, ‘Do No Harm — Do Patients Have Responsibilities Too?’ (2006) 65 *CLJ* 397 at 400. See also McCall Smith, above n 4; O O’Neill, *Autonomy and Trust in Bioethics*, Cambridge University Press, Cambridge, 2002, p ix; C Foster, *Choosing Life, Choosing*

mention legal) development. Given that the common law is ‘capable of evolving in the light of changing social, economic and cultural developments’¹⁹ it is arguable that one particular area of the common law — the tort of negligence — might be adapted to recognise this. Recent appellate cases such as *Rees v Darlington Memorial Hospital NHS Trust*²⁰ and *Chester v Afshar*²¹ could be interpreted as paving the way towards an interest in autonomy being recognised by this tort and there is a significant body of academic opinion that suggests that such a course has much to recommend it.²² A first impression of such developments might be that they should be welcomed. After all, if autonomy is A Good Thing then it might be thought that the law of negligence should be changed to further protect it.²³ Indeed, concentrating solely on the doctor-patient relationship and the medical law context with its focus on preserving autonomy might lead one to such a conclusion.

But a wider doctrinal analysis shows that this is not the case. In this article it is argued that protecting an interest in autonomy through the tort of negligence would be an error as it is impossible to do so in a coherent way without distorting established and cogent legal principles. The first section of this article explains the current position of the law towards protecting autonomy by giving a brief overview of the cases of *Rees* and *Chester* and outlines what protecting an interest in autonomy involves. The second part of this article shows that the very nature of autonomy means its diminishment cannot be considered a form of actionable damage in negligence in a way that is consistent with established principles. However, even if lost autonomy *could* be recognised as actionable damage, it is argued that a duty of care to avoid causing this type of harm would undermine the restrictions that the law has placed on recovery for other types of damage. Specifically, this section of the article addresses the fact that, since the law has limited recovery in negligence for economic loss and psychiatric harm and given that lost autonomy encompasses these kinds of losses, a duty of care to avoid interfering with autonomy would be inconsistent with the current law.²⁴ It is concluded that while it is true that autonomy is an important value, the protection of this notional interest cannot and should not be achieved by

Death: The Tyranny of Autonomy in Medical Law and Ethics, Hart Publishing, Oxford, 2009 and ‘Autonomy in the medico-legal courtroom: A principle fit for purpose?’ (2014) 22 *Med L Rev* 48.

19 *R v R* [1992] 1 AC 599 at 616 per Lord Keith; [1991] 2 All ER 257; (1991) 155 JP 373; [1991] 2 WLR 1065.

20 [2004] 1 AC 309; [2003] 4 All ER 987; [2003] 3 WLR 1091; [2003] UKHL 52.

21 [2005] 1 AC 134; [2004] 4 All ER 587; [2004] 3 WLR 927; [2004] UKHL 41.

22 See R Crisp, ‘Medical Negligence, Assault, Informed Consent, and Autonomy’ (1990) 17 *J Law and Soc’y* 77; K Amirthalingham, ‘Causation and the Gist of Negligence’ (2005) 64 *CLJ* 32; D Nolan, ‘New Forms of Damage in Negligence’ (2007) 70 *MLR* 59 at 79; N Priaulx, *The Harm Paradox: Tort Law and the Unwanted Child in the Era of Choice*, Routledge-Cavendish, Abingdon, 2007, p 9; V Chico, *Genomic Negligence: An Interest in Autonomy as the Basis for Novel Negligence Claims Generated by Genetic Technology*, Routledge-Cavendish, Abingdon, 2011, p 134; T Clark and D Nolan, ‘A Critique of *Chester v Afshar*’ (2014) 34 *OJLS* 659.

23 How negligence currently protects autonomy will be discussed below.

24 Issues of breach of duty and causation do not necessarily pose any problems for the recognition of an interest in autonomy in negligence and so will also not be the focus of this

adapting the tort of negligence to perceive autonomy *itself* as a form of damage that people have a duty of care to avoid causing. This is not to deprecate autonomy as a moral value, nor even to say that it should not be further protected by the law generally, but if such protection were achieved through the tort of negligence the damage to the coherence of the common law would outweigh any benefits received by individual claimants.

Autonomy and negligence: The current position

The autonomy cases²⁵

In English law the concept of autonomy is perceived as being content-neutral. In a case concerned with the tort of battery, Lord Donaldson MR stated:

the patient's right of choice exists whether the reasons for making that choice are rational, irrational, unknown or even non-existent. That his choice is contrary to what is to be expected of the vast majority of adults is only relevant if there are other reasons for doubting his capacity to decide.²⁶

This is evidence that English law does not require an individual's choices to be sensible or rational in order to qualify as being autonomous.²⁷ This account of autonomy is heavily influenced by John Stuart Mill's statement in *On Liberty* that '[t]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.'²⁸ Autonomy is therefore conceived as being equivalent to self-determination: the freedom to pursue one's conception of the good life, just as long as it does

article. Furthermore, given this article argues that autonomy should not be an interest protected by negligence, the issue of quantification for lost autonomy will not be considered here.

²⁵ The purpose of this article is not to give an in-depth analysis of the different interpretations of, and extensive literature on, these two cases but rather to use them as a starting point for discussing whether autonomy could be an interest in negligence.

²⁶ *Re T (Adult: Refusal of Treatment)* [1993] Fam 95 at 112; [1992] 4 All ER 649; [1992] 3 WLR 782.

²⁷ Although there are accounts of autonomy that do not see the concept as being content neutral (see J Coggon, 'Varied and Principled Understandings of Autonomy in English Law: Justifiable Inconsistency or Blinkered Moralism?' (2007) 15 *Health Care Analysis* 235; Chico, above n 22, p 42 and Priaux, above n 22, p 9) space constraints prevent a detailed explanation of why these accounts of autonomy are unpersuasive here. This article proceeds on the basis that if the courts are likely to recognise an interest in autonomy in negligence they are more likely to use the liberal, content-neutral definition of autonomy that is used in other branches of the law. The law of tort would descend into incoherence if two closely related torts such as battery and negligence used different definitions of the same concept. I have defended the account of autonomy used in this paper elsewhere: C Purshouse, 'How Should Autonomy be Defined in Medical Negligence Cases?' (2015) *Clinical Ethics* (forthcoming).

²⁸ J S Mill, *On Liberty and Other Essays*, Oxford University Press, Oxford, 1991, p 14. Cf J Coggon and J Miola's article 'Autonomy, Liberty and Medical Decision-Making' (2011) 70 *CLJ* 523 where they argue that there is confusion between the concept of autonomy and that of liberty and that Mill's work is concerned only with the latter. However, given that autonomy and liberty are used interchangeably in the case law and much of the academic literature, this need not concern us here. See also Clark and Nolan, above n 22, for a discussion of different conceptions of autonomy.

not impinge upon another's identical freedom.²⁹ If autonomy is to be recognised as an interest in negligence, it is likely that this account of the concept will be used to avoid inconsistency with the tort of battery and other related areas of the law where this definition has gained acceptance.³⁰

The first case illustrating that autonomy per se could be an interest protected by the tort of negligence was *Rees v Darlington Memorial Hospital NHS Trust*,³¹ where a visually disabled claimant underwent a sterilisation, which was negligently performed by the defendant hospital. As a result she gave birth to a healthy son and claimed for the costs associated with raising the child.³² Her claim was unsuccessful as the House of Lords followed its previous decision in *McFarlane v Tayside Health Board*,³³ which held that the damages associated with raising a healthy child were irrecoverable.

However, the majority of the House of Lords in *Rees* (Lord Bingham, Lord Nicholls, Lord Millett and Lord Scott) awarded the claimant a £15,000 conventional sum for having 'been denied, through the negligence of another, the opportunity to live her life in the way that she wished and planned'³⁴ (Lord Steyn, Lord Hutton and Lord Hope dissented on this point). As this award does not compensate the claimant for the costs associated with raising a healthy child, it has been interpreted as reflecting the claimant's diminished autonomy,³⁵ with Nolan, for example, stating that the case 'amounts to recognition of diminished autonomy as a form of actionable damage.'³⁶

The second case is *Chester v Afshar*.³⁷ The claimant, Miss Chester, suffered from back pain and visited the defendant consultant, Mr Afshar, who recommended surgery. He failed, however, to warn her about a small risk of cauda equina syndrome (paralysis) inherent in the operation. This risk would be present no matter how expertly the operation was performed and liable to occur at random. Based on his advice, Miss Chester underwent the procedure and, although the surgery itself was not carelessly performed, she suffered from the syndrome.

Miss Chester admitted that she could not say that she would *never* have

29 K Atkins, 'Autonomy and the Subjective Character of Experience' (2000) 17 *J Appl Philos* 71 at 74.

30 See *Pretty v United Kingdom* (2002) 35 EHRR 1 [62] and *R v Kennedy (No 2)* [2008] 1 AC 269 at 275 per Lord Bingham; [2007] 4 All ER 1083; [2007] 3 WLR 612; [2007] UKHL 38 for evidence that this version of autonomy is used in human rights jurisprudence and the criminal law respectively.

31 [2004] 1 AC 309; [2003] 4 All ER 987; [2003] 3 WLR 1091; [2003] UKHL 52.

32 She also claimed, should the claim for the full costs of raising the child be refused, for the *extra costs* she would incur from raising a healthy child attributable to her disability, but this claim was also refused.

33 [2000] 2 AC 59; [1999] 4 All ER 961; [1999] 3 WLR 1301.

34 *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309 at 317 per Lord Bingham; [2003] 4 All ER 987; [2003] 3 WLR 1091; [2003] UKHL 52.

35 See Chico, above n 22, p 126 and Prialx, above n 22, p 74.

36 Nolan, above n 22 at 80. Cf N McBride and R Bagshaw, *Tort Law*, 4th ed, Pearson, Harlow, 2012, p 826 who view the conventional award as vindicating the claimant's rights rather than compensating her for lost autonomy.

37 [2005] 1 AC 134; [2004] 4 All ER 587; [2004] 3 WLR 927; [2004] UKHL 41.

undergone the operation even if she had been warned of the risks.³⁸ Instead, she said that she would not have had it at the time that she did but would have instead wanted to discuss the matter with others and explore alternatives. She conceded that she may have chosen to have the surgery on a different day. As a result of this concession, it was arguable that she could not show that Mr Afshar's carelessness in failing to warn her of the risks had actually *caused* the syndrome because it might have occurred anyway.

The House of Lords, however, found in Miss Chester's favour (Lord Bingham and Lord Hoffmann dissenting). They held that even though the claimant could not establish that the defendant had *caused* her paralysis,³⁹ a departure from conventional causation rules was justified because her right to make her own decision about her treatment had been interfered with. Lord Steyn laid emphasis on Miss Chester's 'right of autonomy and dignity',⁴⁰ saying it 'can and ought to be vindicated by a narrow and modest departure from traditional causation principles'.⁴¹ He reiterated that '[i]n modern law medical paternalism no longer rules'.⁴² Indeed, even Lord Hoffmann (dissenting) believed that there might be a case — albeit one he rejected — for a 'modest solatium'⁴³ being awarded for Miss Chester's diminished autonomy. This *dicta* indicates that, as Devaney has noted, 'the primary concern of the majority . . . was to ensure that patient autonomy is respected'⁴⁴ and several academics have perceived the *real* damage in this case to be the interference with Miss Chester's autonomy.⁴⁵ Green, for examples, describes it as a 'loss of autonomy case'.⁴⁶

Finally, in *Montgomery v Lanarkshire Health Board*,⁴⁷ the claimant was a pregnant diabetic woman of small stature. Because of this, there was a 9–10% risk of shoulder dystocia (the inability of the baby's shoulders to pass through the pelvis) involved in a vaginal birth. This problem can usually be resolved by emergency procedures but there is a small risk that the child could be starved of oxygen and suffer serious harm. Unfortunately for Mrs Montgomery, the risks associated with shoulder dystocia eventuated and her child was born with severe disabilities as a result. The claimant submitted that

38 If she could have said this her claim would have been successful. See *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] AC 871; [1985] 1 All ER 643; [1985] 2 WLR 480.

39 There is disagreement over whether this is an issue of factual causation or remoteness/scope of liability. See Clark and Nolan, above n 22.

40 *Chester v Afshar* [2005] 1 AC 134 at 146; [2004] 4 All ER 587; [2004] 3 WLR 927; [2004] UKHL 41.

41 *Ibid.*

42 *Ibid.*, at AC 143.

43 *Ibid.*, at AC 147.

44 S Devaney 'Autonomy Rules Ok' (2005) 13 *Med L Rev* 102 at 107.

45 See K Amirthalingham 'Causation and the Gist of Negligence' (2005) 64 *CLJ* 32; D Pearce and R Halson 'Damages for Breach of Contract: Compensation, Restitution and Vindication' (2008) 28 *OJLS* 73 at 98; J Murphy and C Witting, *Street on Torts*, 13th ed, Oxford University Press, Oxford, 2013, p 159. Clark and Nolan, above n 22, maintain that the damage pleaded was Miss Chester's personal injury but that a better solution would have been to compensate her for her lost autonomy.

46 S Green in the chapter 'Lost Chances' from book *Causation in Negligence*, Hart Publishing, Oxford, 2014, kindly discussed by personal correspondence.

47 [2015] UKSC 11.

she should have been warned of the risks of her undergoing a vaginal delivery and, if so warned, that she would have elected to undergo a caesarean section. As such, the injuries to her child would not have occurred. The defendant maintained that as the risks of serious injury were low, the consultant obstetrician was not under a duty to warn the patient of them.

The Supreme Court accepted the claimant's arguments and unanimously held that a doctor is under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments. The leading judgment of Lord Kerr and Lord Reed maintained that test of materiality is whether, in the circumstances of the particular case, 'a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it'.⁴⁸

This represents a much more patient-centred approach towards the doctor's duty to warn patients of risks and the case emphasises the importance of respecting patient autonomy. The concurring judgment of Lady Hale arguably goes further. She stated: 'It is now well recognised that the interest which the law of negligence protects is a person's interest in their own physical and psychiatric integrity, an important feature of which is their autonomy, their freedom to decide what shall and shall not be done with their body.'⁴⁹ *Dicta* such as this might support the contention that autonomy per se either is or could be recognised as an interest protected by this tort.

Does the tort of negligence already protect an interest in autonomy?

The above cases have prompted some commentators to suggest that a duty of care to avoid interfering with an individual's autonomy might be an appropriate solution to the problems raised by cases such as *Rees* and *Chester*.⁵⁰ However, it might be said that this adds little and that the tort of negligence already protects people's autonomy.

If someone's negligence causes a claimant to, say, suffer gastroenteritis so they cannot work or do the things they enjoy, then their ability to be the author of their own life is limited. Their autonomy will have been interfered with. The tort of negligence responds to this and requires a defendant to compensate a claimant for such interferences. By protecting an interest in not being physically injured, the tort of negligence *indirectly* protects people's autonomy. The same is true of the other interests that negligence protects. If your carelessness damages my bike then the way in which I choose to live my life will be affected if I have to start taking the bus every day. You will have to pay me compensation for this. This way of protecting autonomy perceives autonomy as being instrumentally valuable: one should not interfere with a person's autonomy because doing so can lead to undesirable consequences such as personal injury or property damage.

⁴⁸ *Ibid.*, at [87].

⁴⁹ *Ibid.*, at [108].

⁵⁰ See Amirthalingham, above n 22; Nolan, above n 22, at 79; Chico, above n 22, p 134 and Clark and Nolan, above n 22.

This is very different to what protecting an interest in autonomy per se involves. If autonomy itself is an interest in negligence, as *Chester* and *Rees* imply it could be in certain circumstances, then instead of damages being awarded for personal injury or property damage etc, they will be given for the diminished autonomy *itself*.⁵¹ Autonomy will be seen as *intrinsically* important rather than instrumentally valuable.⁵² This would reflect the intrinsic value of autonomy, as opposed to it being valuable for the sake of something else.⁵³ Instead of having to show that they are suffering from one of the currently recognised forms of damage, all a claimant would have to demonstrate is that their choices have been compromised. This is similar to the way in which the tort of battery operates, which sees interferences with physical autonomy (through unwanted touching) as intrinsically wrong. Being actionable per se, claims can be brought in that tort without further harm having being suffered. Accordingly, if autonomy per se is recognised as an interest in negligence, the way in which autonomy would be protected will be different from how it currently is.

Autonomy as an interest in negligence

Over half a century ago Street stated that '[t]he law of torts is concerned with those situations where the conduct of a party causes or threatens harm to the interests of other parties'.⁵⁴ Taking 'interests' to be claims or wants that human beings seek to satisfy,⁵⁵ most torts protect one particular interest. Nuisance protects the interest in the enjoyment of one's land, defamation protects the interest in one's reputation and so on. The tort of negligence is different. A defendant will be liable in this tort when they breach a duty of care owed to a claimant and that breach causes damage.⁵⁶ Given that there are different forms of damage in negligence, this tort protects several distinct interests. This is because, as Weir has stated, interests are 'the positive aspects of kinds of damage'.⁵⁷

The tort of negligence can also 'develop in adaptation to altering social conditions and standards'⁵⁸ and recognise new interests. As Lord Macmillan stated in *Donoghue v Stevenson*,⁵⁹ '[t]he categories of negligence are never closed'.⁶⁰ When, for example, society began to develop a greater

51 Chico, for example, states that in *Rees* the House of Lords 'unwittingly recognised the intrinsic value of autonomy, but not the instrumental or whole value' (above n 22, p 128). Some academics have argued that the gist of the action in *Chester* was her diminished autonomy but that damages were awarded for the personal injury. See Murphy and Witting, above n 45, p 159. Whether diminished autonomy is compensated by awarding someone a conventional award (as in *Rees*) or all of the consequences of their lost autonomy (as in *Chester*) is not relevant to this article but will be addressed in future research.

52 Chico, above n 22, p 68.

53 J Varelius, 'The Value of Autonomy in Medical Ethics' (2006) 9 *Medicine, Health Care and Philosophy* 377 at 378.

54 H Street, *The Law of Torts*, 2nd ed, Butterworths, London, 1959, p 3.

55 M Brazier, *Street on Torts*, 9th ed, Butterworths, London, 1993, p 3.

56 *Donoghue v Stevenson* [1932] AC 562 at 618–19 per Lord Macmillan.

57 T Weir 'Liability for Syntax' (1963) 21 *CLJ* 216 at 218.

58 *Donoghue v Stevenson* [1932] AC 562 at 619.

59 *Ibid.*

60 *Ibid.*

understanding of psychiatric illnesses, this interest was protected by the recognition that people owe a duty to avoid causing others to suffer a ‘nervous shock’.⁶¹

Whether autonomy should be recognised as an interest that should be protected by the tort of negligence turns of whether it can be seen as a form of actionable damage and, if so, whether a duty of care to avoid causing such damage can be imposed on defendants. I argue below that the current principles of negligence law indicate that neither of these are tenable propositions.

Diminished autonomy as actionable damage

While damage is the gist of the action in negligence,⁶² it is the most overlooked aspect of this tort.⁶³ Beyond the currently recognised categories of actionable damage — personal injury,⁶⁴ psychiatric harm,⁶⁵ property damage⁶⁶ and economic loss⁶⁷ — there are few established principles determining when and whether a new form of damage will be recognised. As Nolan has stated:

the requirement of damage has generally been under-emphasised by common lawyers. Issues of damage are frequently repackaged as questions of duty of care or causation, important extensions of the categories of damage take place with little or no analysis or even acknowledgement of the fact, and textbooks fail to give the damage issue the separate treatment it deserves.⁶⁸

Certain principles, though, can be identified. One is that in order for damage to have been suffered a claimant must be worse off than they otherwise would have been had the defendant’s carelessness not occurred. As Lord Hoffmann stated in *Rothwell v Chemical & Insulating Co Ltd*,⁶⁹ damage is ‘an abstract concept of being worse off, physically or economically, so that compensation is an appropriate remedy’⁷⁰ and it ‘does not mean simply a physical change, which is consistent with making one better . . . or with being neutral’.⁷¹

Nolan takes issue with this definition. He states that ‘not all forms of being

61 See the early nervous shock cases such as *Dulieu v White* [1901] 2 KB 669, where the injury actually sustained was physical, but it was recognised that such injuries could be caused psychologically. Admittedly, the introduction of this interest has not been wholeheartedly embraced as discussed in the section of this article on duty of care (below).

62 *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] AC 871 at 883 per Lord Scarman; [1985] 1 All ER 643; [1985] 2 WLR 480.

63 See Nolan, above n 22 and D Nolan, ‘Damage in the English Law of Negligence’ (2013) 4 *JETL* 259 at 264. See also S Deakin, A Johnston, and B Markesinis, *Markesinis and Deakin’s Tort Law*, 7th ed, Oxford University Press, Oxford, 2013, p 106.

64 See *Perrett v Collins* [1999] PNLR 77.

65 See *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310; [1991] 4 All ER 907; [1991] 3 WLR 1057.

66 See *Marc Rich & Co v Bishop Rock Marine Co* [1996] AC 211; [1995] 3 All ER 307; [1995] 3 WLR 227.

67 See *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465; [1963] 2 All ER 575; [1963] 3 WLR 101; [1963] 1 Lloyd’s Rep 485.

68 Nolan, above n 63, at 264.

69 [2008] 1 AC 281; [2007] 4 All ER 1047; [2007] 3 WLR 876.

70 *Ibid.*, at 289.

71 *Ibid.*

worse off count as actionable damage'.⁷² This is certainly true with, for example, grief, distress and anxiety that fall short of psychiatric harm and that are not classed as actionable damage in their own right. These are considered 'normal human emotion[s] for which no damages can be awarded'.⁷³ This is so despite them undoubtedly making a person worse off: one would much rather not be grieving, distressed or anxious. However, this criticism can be countered by the fact that being worse off is a necessary but not a sufficient condition for damage to have been suffered. One must be worse off but also must meet the standards of the maxim *de minimis non curat lex* — the law does not concern itself with trifles.⁷⁴ As the law deems 'normal human emotions' such as grief and anxiety to be minimal injuries compared to personal injury or psychiatric harm, they are irrecoverable. Whether the damage suffered is trifling is a question of degree. For example, in *Cartledge v Jopling & Sons Ltd*,⁷⁵ the claimant workmen contracted pneumoconiosis, a disease in which slowly accruing and progressive damage may be done to an individual's lungs without their knowledge. The House of Lords held that it does not matter whether a claimant is aware of the damage or that medical science could not have discovered it at the stage that it occurred provided that it is more than minimal. The fact that disease would be visible on X-rays and that unusual exertion would cause the claimants to suffer meant that the damage was substantial.⁷⁶ In contrast, in *Rothwell v Chemical & Insulating Co Ltd*,⁷⁷ the claimants were exposed to asbestos dust and developed pleural plaques, which meant they were susceptible to suffering an asbestos-related disease. Yet the House of Lords held that since the plaques were symptomless and did not shorten life expectancy, their mere presence in the claimants' lungs did not constitute an injury capable of giving rise to a claim for damages in tort. Even though the claimants had suffered from anxiety as a result of developing these plaques, they could not recover in negligence. Accordingly, in order for actionable damage to have been suffered in negligence, the claimant must be made worse off and this worsening must be more than minimal.

However, Nolan might also disagree with this recasting of the components required for damage being suffered. He cites examples where one can be *better off* as a result of a defendant's negligence but still suffer from actionable damage.⁷⁸ One is of the skilful artist who paints over someone's painting unasked. Property damage has still been inflicted in such circumstances even if the individual could now receive more money for it.⁷⁹ Another example is this one:

⁷² Nolan, above n 63 at 265.

⁷³ *Hicks v Chief Constable of South Yorkshire Police* [1992] PIQR 433 at 436 per Lord Bridge. Cf R Mulheron 'Rewriting the Requirement for a 'Recognised Psychiatric Injury' in Negligence Claims' (2012) 32 *OJLS* 77.

⁷⁴ See *Cartledge v Jopling & Sons Ltd* [1963] AC 758 at 779 per Lord Pearce.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ [2008] 1 AC 281; [2007] 4 All ER 1047; [2007] 3 WLR 876.

⁷⁸ Nolan, above n 63 at 265.

⁷⁹ *Ibid.*, at 277. See also *Jan de Nul (UK) Ltd v Axa Royal Belge SA* [2002] EWCA Civ 209; [2002] 1 All ER (Comm) 767; [2002] 1 Lloyd's Rep 583 at [92] per Lord Justice Schiemann.

suppose I leave a bag of old clothes in my front garden ready to take them to the rubbish dump, but before I do so, the clothes are washed away in a flood caused by the defendant's negligence. Again, the fact that I no longer wanted the clothes and that the flood has saved me the trouble of taking them to the dump, would not prevent me from bringing a claim in negligence if I was so inclined.⁸⁰

Does this mean that one can be better off and still suffer actionable damage? Assuming that Nolan is correct that such claims would be successful, it does not follow that this means one must not be worse off in order for damage to have been suffered. This can be explained by the fact that although one must be worse off to have suffered damage in negligence, whether one is worse off is assessed *objectively* rather than *subjectively*. The law will *deem* someone to be objectively worse off for having their clothing or picture ruined even if subjectively they are better off.⁸¹

As O'Sullivan has argued, the issue rarely arises in personal injury claims 'because personal injury is universally, and thus objectively, regarded as detrimental'.⁸² However, she acknowledges that such claims may sometimes need to be placed in their proper *context*.⁸³ For example, the surgical removal of a claimant's breast will count as damage if the breast was healthy, but not if the breast contained a cancerous tumour (and removal of the breast is an appropriate treatment).⁸⁴ Thus, the Jehovah's Witness whose life is saved by an unwanted blood transfusion cannot sue in negligence for while they subjectively might not like what has happened to them, the law will not treat having one's life saved as a type of harm in negligence.⁸⁵ This is not to say that such claimants would not have an action in another tort, such as battery, but given that battery is a tort that is actionable *per se* the fact that such cases do not require any damage to be suffered does not undermine O'Sullivan's argument that damage in negligence is an objective concept.⁸⁶ O'Sullivan believes the fact that subjective detriment is insufficient to count as damage in tort represents the paradigm difference between this area of law and that of contract. She states 'if you want to protect your subjective expectations and preferences, the legal mechanism to use is *contract*. Tort will not do.'⁸⁷

⁸⁰ *Ibid.*

⁸¹ See *UBAF Ltd v European American Banking Corp* [1984] 2 All ER 226; [1984] QB 713; [1984] 2 WLR 508 and J O'Sullivan, 'The Meaning of "Damage" in Pure Financial Loss Cases: Contract and Tort Collide' (2012) 28 *PN* 248. This is consistent with Nolan's argument that damage is a socially constructed, factual concept as opposed to a factual one. See above n 63, at 267.

⁸² O'Sullivan, above n 81, at 260.

⁸³ See C Witting, 'Physical Damage in Negligence' (2002) 61 *CLJ* 189 at 203 and Nolan, above n 22, at 75.

⁸⁴ O'Sullivan, above n 81, cites *Dobbie v Medway Health Authority* [1994] 4 All ER 450; [1994] 1 WLR 1234 as an example of this. See also *Williamson v East London and City HA* [1998] Lloyd's Rep Med 6. Note that if the cancer could be treated without removing the breast then removal of the breast would be considered damage.

⁸⁵ *Malette v Shulman* (1990) 67 DLR (4th) 321.

⁸⁶ Even if a procedure is in a patient's best interests and they are better off as a result of it being performed, a battery is still committed if the patient does not consent. See *Devi v West Midlands AHA* [1980] 7 CL 44 where the defendant doctor, while performing minor gynaecological surgery, discovered that the claimant's womb was ruptured. He had committed a battery by performing a sterilisation without obtaining her consent.

⁸⁷ O'Sullivan, above n 81, at 258.

From the above, it is apparent that for actionable damage to be suffered in negligence a claimant must show that the defendant's conduct has made them objectively, and more than minimally, worse off than they otherwise would be. In light of this, it is highly doubtful that diminished autonomy could be seen as a form of damage in negligence because in many circumstances it will fail to meet these basic requirements.

For example, there are many scenarios where interferences with autonomy not only fail to make a person worse off than they otherwise would be but objectively improve their circumstances. The facts of *Chester v Afshar* can be adapted to illustrate this point. Imagine that Patient (P) is suffering from back pain and visits Doctor (D). The latter advises that surgery should take place but carelessly fails to tell P of a 2% risk of paralysis inherent in the surgery that is likely to occur at random. P might have delayed surgery had they known of this risk but, in ignorance of it, goes ahead. Unlike the facts in *Chester*, however, P's surgery is a success. Not only do they not suffer from paralysis, but their back pain is completely cured. In other words, D's interference with P's autonomy has made P *better off*. This illustrates the point made by Jackson in her article discussing the failure of tort law to protect patient autonomy:

If the purpose of giving patients information is to facilitate informed decision making, then any failure to disclose material information will have interfered with her ability to make an autonomous choice, regardless of whether she happens to have *also* suffered physical injury as a result.⁸⁸

Though it could be argued that D has acted badly in such circumstances, it is hard to maintain that P has suffered any damage as P is not worse off. There will therefore be interferences with autonomy that do not fulfil the requirements to be actionable damage in negligence as they do not make a person worse off.

Nor is it difficult to imagine circumstances where an interference with autonomy will only have a minimal impact upon a person. Indeed, one's autonomy could be interfered with without one even noticing it. For example, you might have a desire not to be locked in your room. If someone secretly locked your door while you were watching television and unlocked it before the programme had finished your autonomy will have been interfered with without your knowledge. It may be morally questionable for a person to do this and they are likely to have committed the tort of false imprisonment.⁸⁹ But unlike negligence that tort is actionable per se: it does not require damage to be proven. The mere fact that a claimant can show they would have a successful action in a trespass tort does not mean that they can succeed in

⁸⁸ E Jackson, "'Informed Consent' to Medical Treatment and the Impotence of Tort" in S McLean (Ed), *First Do No Harm: Law, Ethics and Healthcare*, Ashgate, Aldershot, 2006, p 274. See also Coggon, above n 27, at 238: 'In a case where a similar failure to inform occurred, but in which *no* physical harm resulted [as in *Chester*], it seems hard to believe that a court would allow damages for the harm done to the patient's autonomy.'

⁸⁹ See *Meering v Grahame-White Aviation Company Ltd* [1920] 11 LT 44 at 53–4 per Atkin LJ and *Murray v Ministry of Defence* [1988] 1 WLR 692 at 701–3 per Lord Griffiths; [1988] 2 All ER 521.

negligence as damage must be proven for the latter.⁹⁰ And it would certainly be stretching things to describe something this imperceptible as damage. Interferences with autonomy can therefore often have only minimal effects on people. If such minimal effects were inflicted carelessly it would be difficult for a claimant to maintain that they constitute actionable damage in negligence according to established principles.

Finally, autonomy is neutral as to what choices people make provided such choices do not cause harm. Whether someone's autonomy is interfered with is therefore dependent upon whether an individual had the desire in question. For example, an individual might have no desire whatsoever to have children (let us assume that this individual will not change their mind about not wanting children). If someone prevented that individual from having a child then that person's desires have not been interfered with and so their autonomy has not been violated. This is not by any means to say that such conduct is acceptable nor that the individual in question has not suffered a *different* form of damage — merely that the reason such conduct is wrong and that the person is harmed is *not* due to their autonomy being interfered with. However, preventing a person who wishes to become a parent (or who might wish to become a parent in the future) from having a child will frustrate that individual's desires in a significant way and so will constitute an interference with their autonomy. In this regard, autonomy is an inherently subjective concept and is hard to reconcile with the traditional view in negligence of damage being objective.

There are therefore instances where interferences with autonomy do not meet the criteria of constituting actionable damage in negligence as they do not make people objectively and more than minimally worse off. It might be argued, however, that the above criticisms are unpersuasive. After all, minimal personal injuries are not recoverable in negligence but this does not mean more serious ones should be excluded. In this way, the law sees some injuries as recoverable and others as not. It might be argued that the law should see certain serious interferences with autonomy that objectively make a person worse off as actionable damage and other, more minor, interferences as irrecoverable. For example, if someone is forced to have a child that they do not want (as in *McFarlane* and *Rees*) or rendered infertile as a result of the negligence of another then their life will not go as planned in a significant way. Reproductive autonomy is therefore considered to be important by many people.⁹¹ By contrast, other preferences, such as that to view pleasant sights as one goes about one's business, may be seen as of less fundamental significance.⁹² Distinguishing between different types of autonomy in this way may potentially pave the way for it to be considered an interest in negligence.⁹³

Although this counterargument is *prima facie* attractive, it is ultimately misconceived as it misrepresents what recovering for autonomy *per se*

90 See also Nolan's observation above n 22, at 61 that what qualifies as actionable damage varies between the different torts.

91 I am grateful to the anonymous reviewer for this example.

92 In English law one cannot have an easement of prospect — in other words, there is no right to an unspoilt view. See *William Aldred's Case* (1610) 9 CoRep 57b

93 See Nolan's discussion of derivative forms of autonomy: n 22, at 87.

involves. The fact that a preponderance of people might see certain choices as more important than others is neither here nor there as far as the concept of autonomy is concerned. The vast majority of people would not choose to be tied up and have their genitals hit with a ruler as notoriously occurred in *R v Brown*.⁹⁴ However, if we are to protect people's ability to live their life in the manner of their choosing providing they do not infringe on the choices of others — in other words, protect their autonomy — then such preferences should be respected. One might think that respecting the choice not to reproduce is more important than that of having a nice view or engaging in sadomasochistic activities, but that is not true of everyone. It may be legitimate for the law to protect an interest in not having one's reproductive preferences interfered with above other types of choices but doing this is not protecting an interest in autonomy per se. If one is to say that one kind of interference with autonomy is more serious or worthy of compensation than another type then one is no longer protecting an interest in autonomy *itself* but the other forms of harm that it leads to (in this example reproductive freedom). Put simply, this sees autonomy as instrumentally rather than intrinsically important. While there is nothing wrong with seeing autonomy as instrumentally important (as mentioned earlier, this is the position that negligence currently adopts) it is different from protecting an interest in autonomy *itself* (in the way that cases such as *Rees* and *Chester* arguably do).⁹⁵

Autonomy per se, unlike the other interests negligence protects, is an indivisible concept.⁹⁶ Once someone's autonomy has been interfered with it has been diminished. It is possible to say, for example, that one instance of property damage is worse than another (vase A could be in a worse state than vase B) but there is simply no non-arbitrary way of dividing up certain types of autonomy as more important than others without looking at the consequences of the damage to autonomy (rather than the lost autonomy *itself*). This is because the whole point of protecting autonomy is that it allows people to decide what is best for them and be the author of their own lives.⁹⁷ Respect for autonomy per se entails being neutral as to what the most important desires are provided acting on those desires does not cause harm to others. It is therefore contradictory to see autonomy per se as important but then say certain 'types' of autonomy are more important, worthy of respect or better than others. The principle of autonomy allows people to make decisions that are *irrational* and *bad* for *them*.

Those who want to defend autonomy per se as an interest that should be protected by the tort of negligence are then left with two choices. Either they should accept that *all* forms of interferences with autonomy can constitute actionable damage or that none can. There is no coherent way of dividing up some forms of autonomy as damage and others as not. Accepting all

94 [1994] 1 AC 212.

95 This is not to say that autonomy cannot be perceived as an important value underlying other interests protected by negligence but it does indicate that autonomy *itself* cannot be a form of damage in this tort.

96 See C Purshouse, 'How Should Autonomy be Defined in Medical Negligence Cases?' (2015) *Clinical Ethics* (forthcoming).

97 Dworkin, above n 5, p 224.

interferences with autonomy as a form of damage would involve seeing someone as suffering damage even when they are better off as result of an infringement with their autonomy or basing damage upon their subjective preferences and is a course unlikely to be accepted by the courts. As a result of these considerations, those who advocate recognition of autonomy as a form of damage in this tort will need to explain why the currently established principles of this branch of tort law ought to be swept aside to protect this putative interest.

It might be countered that the law of tort already protects an aspect of autonomy through the law of battery. The *form* of autonomy that this tort protects is that of bodily autonomy, the freedom from unwanted, unlawful touching. If battery is capable of protecting an aspect of autonomy it might be asked, why cannot the tort of negligence do the same and protect some forms of autonomy but not others?

This, however, is to ask the wrong question. It is not being denied that the tort of negligence can protect aspects of autonomy. Indeed, as stated above, the tort of negligence already does this by protecting interests in not being injured or having one's property damaged etc. But protecting autonomy in this way is not the same as protecting autonomy per se. Moreover, even if battery did protect an interest in autonomy per se this does not mean that negligence should do the same. As Lord Hoffmann stated in *Wainwright v Home Office*,⁹⁸ 'the policy considerations which limit the heads of recoverable damage in negligence do not apply equally to torts of intention'.⁹⁹

Another relevant consideration concerns tort law's protection of privacy. Although in England, unlike the United States of America, there is 'no over-arching, all embracing cause of action for "invasion of privacy"'¹⁰⁰ the protection of various aspects of privacy is a fast emerging area of law.¹⁰¹ For example, the equitable action for breach of confidence has now developed into the tort of misuse of private information.¹⁰² As Lord Hoffmann states in *Campbell v MGN Ltd*:

Instead of the cause of action being based upon the duty of good faith applicable to confidential personal information and trade secrets alike, it focuses upon the protection of human autonomy and dignity — the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people.¹⁰³

Given that privacy is often considered to be 'an aspect of human autonomy'¹⁰⁴ it might be argued that if English law is capable of protecting an interest in privacy, that it could also be capable of protecting an interest in autonomy. However, any analogy with tort law's protection of privacy does not support such an argument.

⁹⁸ [2004] 2 AC 406; [2003] 4 All ER 969; [2003] 3 WLR 1137; [2003] UKHL 53.

⁹⁹ *Ibid.*, at [44].

¹⁰⁰ *Campbell v MGN Ltd* [2004] 2 AC 457 at 464 per Lord Nicholls; (2004) 62 IPR 231; [2004] 2 All ER 995; [2004] 2 WLR 1232.

¹⁰¹ *Ibid.*

¹⁰² As described by Lord Nicholls, *ibid.*, at AC 465.

¹⁰³ *Ibid.*, at AC 473.

¹⁰⁴ *Ibid.*, at AC 472.

Privacy is concerned with an individual's interest in being left alone.¹⁰⁵ As Harris and Keywood have argued, there are many possible foundations for the right to privacy and although autonomy is one of them, others include dignity and physical and moral integrity.¹⁰⁶ It follows that privacy and autonomy are not necessarily synonymous and that there can be interferences with privacy that do not interfere with an individual's autonomy. For example, if I secretly installed a camera in your living room so that I could film you watching television I would interfere with your privacy. However, if you were unaware of the fact that you were being watched you would presumably go about your business in exactly the same way as you would if the camera was not there. The hidden camera would not necessarily interfere with your choices and your ability to live your life in the manner of your own choosing. It is therefore possible for one's privacy to be interfered with without having one's autonomy diminished.¹⁰⁷ Given that privacy and autonomy are not interchangeable concepts, it does not follow that just because the law of tort might be capable of recognising an interest in privacy that autonomy can be similarly protected by the tort of negligence.

Furthermore, even if autonomy *is* the foundation of privacy then the latter will necessarily be more specific and narrowly defined than the concept it is derived from. This may mean that an interest in privacy could be recognised by the law but an interest in autonomy cannot because the latter is too broad. This argument is put forward by Roberts in the context of criminal law. He sees the value of privacy as best understood as a component of personal autonomy but maintains that there cannot be a moral right to have one's autonomy respected. He states:

My interest in a life of boundless opportunity and fulfilment is not a good reason for placing other people under duties to become my skivvies and servants, or to strive endlessly to create the idiosyncratic public culture in which I would especially thrive and prosper. My interests are no warrant for subordinating other people's life projects to mine. Yet this is essentially what a right to autonomy would entail under prevailing conditions of scarcity, and absent the technological ingenuity to overcome such pragmatic constraints for the foreseeable future (which, admittedly, is not very far into the future, given the quickening pace of technological advances).¹⁰⁸

By contrast, an interest in being left alone is, he believes, sufficient grounds for placing individuals under duties not to molest or interfere with one another. He maintains that 'those duties are sufficient undemanding to be universalised so that, for example, we all have a duty not to invade anybody else's physical integrity'.¹⁰⁹ Roberts is discussing moral rights and so this discussion should not be completely divorced from its context but an analogous point can be made regarding the interests that tort law should protect. It is arguable that an interest in privacy could be sufficiently narrowly

105 See P Roberts, 'Privacy, Autonomy and Criminal Justice Rights: Philosophical Preliminaries' in P Alldrige and C Brants (Eds), *Personal Autonomy, The Private Sphere and the Criminal Law: A Comparative Study*, Hart Publishing, Oxford, 2001, pp 66–7.

106 J Harris and K Keywood, 'Ignorance, Information and Autonomy' (2001) 22 *Theoretical Medicine* 416 at 430.

107 I am grateful to Joe Purshouse for this example.

108 Roberts, above n 105, p 66.

109 *Ibid*, pp 66–7.

defined so as to warrant the protection of the law but that autonomy is too broad a concept to form the gist of an action in negligence. In this respect, there is no inconsistency with the law of tort protecting an interest in privacy but not protecting an interest in autonomy: even if the latter concept is derived from the former they are concerned with different levels of generality.

In any case, the courts have declined to go as far as protecting an interest in privacy per se in tort law. As Lord Hoffmann stated in *Wainwright*:

There seems to me a great difference between identifying privacy as a value which underlies the existence of a rule of law (and may point the direction in which the law should develop) and privacy as a principle of law in itself. The English common law is familiar with the notion of underlying values . . . A famous example is *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534, in which freedom of speech was the underlying value which supported the decision to lay down the specific rule that a local authority could not sue for libel. But no one has suggested that freedom of speech is in itself a legal principle which is capable of sufficient definition to enable one to deduce specific rules to be applied in concrete cases. That is not the way the common law works.¹¹⁰

If the courts are unwilling to protect a general principle of ‘invasion of privacy’ then it is highly doubtful that they would protect a much more general principle of ‘invasion of autonomy’. The law does not protect privacy per se. Instead, it safeguards aspects of privacy such as not having private information misused. Other invasions do not always warrant the protection of the law. As Lord Nicholls stated in *Campbell*, ‘[a]n individual’s privacy can be invaded in ways not involving publication of information. Strip searches are an example.’¹¹¹ It may be possible that the law can protect aspects of autonomy but, as mentioned earlier, this is very different from protecting autonomy per se. It is therefore doubtful that any analogies with the law relating to privacy can support an argument that the tort of negligence should protect an interest in autonomy per se.

None of the above points, however, weakens the possibility of autonomy being a value that can point the direction in which the tort of negligence should develop¹¹² or from it being protected indirectly by the development of new interests. But an interest in autonomy per se is difficult to reconcile with established negligence principles.

A duty of care to avoid interfering with autonomy

Negligence is not a tort that is actionable per se. If interferences with autonomy cannot be seen as a recognised form of damage, then any prospects of this tort protecting an interest in autonomy *itself* are dashed. However, even if the above analysis is incorrect and diminished autonomy *could* be a form of damage, there is a further obstacle that will prevent its acceptance as an

110 *Wainwright v Home Office* [2004] 2 AC 406; [2003] 4 All ER 969; [2003] 3 WLR 1137; [2003] UKHL 53 at [31] per Lord Hoffmann.

111 *Campbell v MGN Ltd* [2004] 2 AC 457 at 465; (2004) 62 IPR 231; [2004] 2 All ER 995; [2004] 2 WLR 1232. See also *Wainwright v Home Office* [2004] 2 AC 406; [2003] 4 All ER 969; [2003] 3 WLR 1137; [2003] UKHL 53.

112 Indeed, *Montgomery v Lanarkshire Health Board* [2015] UKSC 11 shows that such an approach need not undermine established negligence principles.

interest protected by negligence. A claimant must show that a defendant owed them a duty of care to avoid interfering with their autonomy. This, I will argue, is something that they will be unable to do in a way that is consistent with established principles.

The question of whether there should be a duty of care to avoid interfering with people's autonomy itself has not previously come before the courts. It is a novel question and so would be decided under the three-stage *Caparo Industries plc v Dickman*¹¹³ method of weighing up the factors for and against imposing such a duty. The focus below will be on one particular factor that is fatal to the recognition of a duty of care to avoid interfering with autonomy and which overrides any countervailing factors in favour of recognising such a duty. This factor is that recognising such a duty would undermine the restrictions preventing a duty of care being recognised for other forms of damage, namely psychiatric harm and economic loss. Although the restrictions on recovery for psychiatric harm and economic loss in negligence are open to criticism,¹¹⁴ they are firmly entrenched and while they remain a part of English law a duty of care to avoid interfering with autonomy cannot be coherently recognised in a way that is consistent with them. As such, recognising a duty of care to avoid interfering with autonomy would compound the confusion within this area of law.

The duty of care element of negligence acts as a 'control device' that places 'some intelligible limits to keep the law of negligence within the bounds of common sense and practicality'.¹¹⁵ Nowhere is this more apparent than when the damage a claimant is complaining of is psychiatric harm or economic loss. While the tort of negligence protects several different interests, it does not see them as being of equal value. Tony Weir summed up the position well: 'the better the interest invaded, the more readily does the law give compensation for the ensuing harm.'¹¹⁶

Given the differing importance of the relevant interests that negligence protects, whether a duty of care is owed is dependent upon the form of damage

113 [1990] 2 AC 605; (1990) 1 ACSR 636; [1990] 1 All ER 568; [1990] 2 WLR 358.

114 See D Howarth, 'Negligence After *Murphy*: Time to Re-Think' (1991) 50 *CLJ* 58; B S Markesinis and S Deakin, 'The Random Element of their Lordships' Infallible Judgment: An Economic and Comparative Analysis of the Tort of Negligence from *Anns* to *Murphy*' (1992) *MLR* 619; S Hedley, 'Hillsborough: Morbid Musings of the Reasonable Chief Constable' (1992) 51 *CLJ* 16; N Mullany and P Handford, *Tort Liability for Psychiatric Damage: The Law of 'Nervous Shock'*, Sweet and Maxwell, Sydney, 1993; N Mullany, 'Fear of the Future: Liability for Infliction of Psychiatric Disorder' in N Mullany (Ed), *Torts in the Nineties*, LBC Information Series, Sydney, 1997; H Teff, 'Liability for Negligently Inflicted Psychiatric Harm: Justifications and Boundaries' (1998) 57 *CLJ* 91.

115 See *Caparo v Dickman* [1990] 2 AC 605 at 633 per Lord Oliver; (1990) 1 ACSR 636; [1990] 1 All ER 568; [1990] 2 WLR 358; *Customs and Excise Commissioners v Barclays Bank plc* [2006] 1 AC 181 at 192 per Lord Bingham; J Morgan, 'The Rise and Fall of the General Duty of Care' (2006) 22 *PN* 206 at 223. See also A Rodger, 'Some Reflections on Junior Books' in P Birks (Ed), *The Frontiers of Liability*, Vol 2, Oxford University Press, Oxford, 1994 and J Stapleton, 'Duty of Care Factors: A Selection from the Judicial Menus' in *The Law of Obligations: Essays in Celebration of John Fleming*, P Cane and J Stapleton (Eds), Oxford University Press, Oxford, 2002 for further information regarding the 'weighing of policy factors' approach to duty of care. Cf R Stevens, *Torts and Rights*, Oxford University Press, Oxford, 2007, pp 1–2.

116 T Weir, *A Casebook on Tort*, 10th ed, Sweet & Maxwell, London, 2004, p 6.

suffered by the claimant. The interests in being free from physical injury or in not having one's property damaged are more comprehensively protected than those in not suffering from purely economic loss or psychiatric harm. As Lord Oliver stated in *Murphy v Brentwood DC*:¹¹⁷ 'The infliction of physical injury to the person or property of another universally requires to be justified. The causing of economic loss does not.'¹¹⁸

It is trite tort law that unless a claimant can show that they are a 'primary victim,' in other words, that they were 'involved, either mediately, or immediately, as a participant'¹¹⁹ in an accident by being exposed to the danger of physical injury,¹²⁰ then there a number of hurdles that must be jumped before a claim in negligence for psychiatric harm being successful.

Those who are not primary victims are classed as secondary victims. They are 'no more than the passive and unwilling witness of injury caused to others'.¹²¹ In order to be successful in a negligence case a 'secondary victim' must show:

- (1) that they are suffering from a recognised psychiatric illness and 'not merely grief, distress or any other normal emotion';¹²²
- (2) that the injury would have been experienced by a person of 'sufficient fortitude'¹²³ who, in the now rather archaic-sounding, words of Lord Porter in *Bourhill v Young*,¹²⁴ 'possess[es] the customary phlegm'.¹²⁵ In other words, it must be foreseeable that a person would suffer from *psychiatric* injury in such circumstances rather than some type of (physical) injury more generally;

117 [1991] 1 AC 398; [1990] 2 All ER 908; [1990] 3 WLR 414; [1990] 2 Lloyd's Rep 467.

118 Ibid, at AC 487.

119 *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 at 407 per Lord Oliver; [1991] 4 All ER 907; [1991] 3 WLR 1057.

120 As Lord Lloyd stated in *Page v Smith* [1996] AC 155 at 190; [1995] 2 All ER 736; [1995] 2 WLR 644: 'Once it is established that the defendant is under a duty of care to avoid causing personal injury to the plaintiff, it matters not whether the injury in fact sustained is physical, psychiatric or both.' In other words, a claim for this type of injury can be successful provided physical injury was foreseeable even if psychiatric harm itself was not. Indeed, the courts have held that it is only those at a foreseeable risk of *physical* injury who can qualify as primary victims. See *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455; [1999] 1 All ER 1; [1998] 3 WLR 1509 and *McFarlane v EE Caledonia* [1994] 2 All ER 1; [1994] 1 Lloyd's Rep 16. However, whether this is a correct interpretation of the previous case law is debateable as it is more likely that Lord Lloyd in *Page* was seeking to liberalise the law on primary victims rather than narrow it. See Lord Goff's dissenting speech in *White*.

121 *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 at 407 per Lord Oliver; [1991] 4 All ER 907; [1991] 3 WLR 1057. For criticisms of the division between primary and secondary victims see S Bailey and D Nolan, 'The *Page v Smith* Saga: a Tale of Inauspicious Origins and Unintended Consequences' (2010) 69 *CLJ* 495.

122 *McLoughlin v O'Brian* [1983] 1 AC 410 at 431 per Lord Bridge; [1982] 2 All ER 298; [1982] 2 WLR 982. See also *Vernon v Bosley* [1997] 1 All ER 577 at 610 per Thorpe LJ; (1996) 35 BMLR 135; [1997] Fam Law 476.

123 *Bourhill v Young* [1943] AC 92 at 117 per Lord Porter.

124 [1943] AC 92.

125 Ibid, at 117.

- (3) that the harm must be caused by a ‘sudden and unexpected shock’;¹²⁶ and
- (4) the claimant must also satisfy the criteria laid down in *Alcock v Chief Constable of South Yorkshire Police*¹²⁷ to demonstrate that their relationship with the defendant was sufficiently proximate. To do this, there must be (i) close ties of love and affection between the secondary victim and primary victim;¹²⁸ (ii) the claimant’s ‘proximity to the accident must be close both in time and space’;¹²⁹ and (iii) the shock must be a result of sight or hearing of the event itself or its immediate aftermath.¹³⁰

Unless a secondary victim can meet these criteria then any negligence claim for psychiatric harm will be doomed to fail. However, if, say, someone suffers from PTSD as a result of witnessing a distant relative — or even stranger — being injured then it is not inconceivable that their autonomy will have been interfered with. Their desire not to suffer PTSD will have been violated, in addition to other desires such as, say, not having to take time off work. If a duty to avoid interfering with people’s autonomy was recognised such people could potentially reframe the gist of their claim as one for diminished autonomy and potentially recover damages. This would undermine the restrictions that the law has placed on recovery for psychiatric harm as it would mean that those who had suffered psychiatric harm but do not meet the threshold for a ‘secondary victim’ claim could still have a successful action in negligence and receive damages.

Similar objections are raised when one considers the issue of pure economic loss. While recovery for negligently caused economic loss can succeed in limited circumstances,¹³¹ the law has imposed restrictions on recovery for this type of loss. For example, a claimant cannot recover in this tort when they suffer loss due to a defendant damaging the property of another person.¹³² It is also the case that one cannot sue in negligence for economic loss caused by acquiring defective property.¹³³

The courts have therefore circumscribed recovery for pure economic loss. Yet if someone loses money because someone damages property belonging to another person or because they have acquired defective property then it is plausible that their autonomy has been infringed due to another’s carelessness.

126 *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 at 412 per Lord Oliver; [1991] 4 All ER 907; [1991] 3 WLR 1057.

127 [1992] 1 AC 310; [1991] 4 All ER 907; [1991] 3 WLR 1057.

128 *Ibid.*, at AC 403–4 per Lord Ackner.

129 *Ibid.*, at AC 404–5 per Lord Ackner.

130 *Ibid.*

131 See the line of cases following *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465; [1963] 2 All ER 575; [1963] 3 WLR 101; [1963] 1 Lloyd’s Rep 485 such as *Smith v Eric S Bush* [1990] 1 AC 831; [1989] 2 All ER 514; [1989] 2 WLR 790; *Henderson v Merrett Syndicates* [1995] 2 AC 145; [1994] 3 All ER 506; [1994] 3 WLR 761; [1994] 2 Lloyd’s Rep 468; *White v Jones* [1995] 2 AC 207; [1995] 1 All ER 691; [1995] 2 WLR 187 and *Spring v Guardian Assurance* [1995] 2 AC 296; [1994] 3 All ER 129; [1994] 3 WLR 354.

132 *Leigh & Sullivan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] AC 785; [1986] 2 All ER 145; [1986] 2 WLR 902.

133 *Murphy v Brentwood District Council* [1991] 1 AC 398; [1990] 2 All ER 908; [1990] 3 WLR 414; [1990] 2 Lloyd’s Rep 467.

As with psychiatric harm, an individual could side-step the restrictions the law places on recovery for economic loss by framing their claim in this way. After all, if I invest my life savings in property that turns out to be worthless then my ability to live my life as I choose is diminished. But if claims for diminished autonomy were permitted then the constraints on recovery for pure economic loss would be undermined.

As argued earlier, if one wants to protect an interest in autonomy per se there is no non-arbitrary way of dividing up different forms of autonomy. It cannot be argued that there should be a duty of care to protect certain forms of autonomy but not others. This would involve favouring one form of life plan over another and so would not be respecting autonomy itself. Autonomy, by its very nature, encompasses almost all other forms of damage and renders any restrictions for recovery of other types of harm obsolete: such constraints could be thwarted merely by reframing the claim as one for lost autonomy. This means that a duty of care to avoid interfering with autonomy itself cannot be reconciled with the boundaries that the law has placed on recovery of psychiatric harm and economic loss (to take merely two examples) because claimants would be able to receive compensation for such losses. This is a powerful factor against imposing a duty to avoid interfering with autonomy per se.

Furthermore, the policy reasons in favour of limiting the number of claims for pure economic loss and psychiatric harm are even more applicable to lost autonomy claims. One of the policies behind the control devices limiting claims for psychiatric harm is that there is a need to restrict the number of such claims. For example, in *McLoughlin v O'Brian*,¹³⁴ Lord Wilberforce stated that given psychiatric harm in its nature is capable of affecting a wide a range of people there is 'a real need for the law to place some limitation upon the extent of admissible claims'.¹³⁵ This justification is also present in *White v Chief Constable of South Yorkshire Police*,¹³⁶ another case arising out of the Hillsborough disaster, when Lord Steyn commented '[t]he abolition or a relaxation of the special rules governing the recovery of damages for psychiatric harm would greatly increase the class of persons who can recover damages in tort'.¹³⁷

Similar reasoning underpins the restrictions on claims for pure economic loss. One of the reasons given by Lord Denning MR in *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd*¹³⁸ for the refusal of the pure economic loss claim was that 'if claims for economic loss were permitted for this particular hazard, there would be no end of claims'.¹³⁹ This concern was reflected in the leading case of *Caparo*, where the House of Lords was reluctant to expose defendants to 'liability in an indeterminate amount, for an

134 [1983] 1 AC 410; [1982] 2 All ER 298; [1982] 2 WLR 982.

135 Ibid, at AC 422.

136 [1999] 2 AC 455; [1999] 1 All ER 1; [1998] 3 WLR 1509.

137 Ibid, at AC 494.

138 [1973] QB 27; [1972] 3 All ER 557; [1972] 3 WLR 502.

139 Ibid, at QB 38.

indeterminate time, to an indeterminate class'.¹⁴⁰

There is therefore a wealth of evidence that recovery for psychiatric harm and pure economic loss is restricted on the basis that allowing it would lead to a large class of claims (sometimes known as opening the 'floodgates'). This arguably has several negative consequences as it might impose 'crushing financial liabilities upon defendants',¹⁴¹ expose defendants to liability 'out of all proportion to their degree of fault'¹⁴² and overburden the court system.¹⁴³ Although there are many circumstances where the proposition that imposing a duty of care will open the floodgates is, as Hartshorne as argued, 'difficult to factually support',¹⁴⁴ he correctly states that there are certain contexts where its accuracy is self-evident such as if the *Alcock* claims were allowed.¹⁴⁵

This policy reason is even more applicable to claims for lost autonomy. Logically, whatever the number of people who can show that a defendant's carelessness has diminished their bank balance or led them to suffer from a psychiatric illness will be, it will be smaller than the number who can show their autonomy has been interfered with. The latter will include people who are suffering from psychiatric harm or economic loss together with anyone else whose choices have been diminished. This factor points against imposing a duty of care to avoid interfering with autonomy.

It might be countered that such policy reasons are spurious and should be swept aside.¹⁴⁶ Instead of restricting claims for lost autonomy, this argument goes, we should liberalise the law on recovery for pure economic loss and psychiatric harm.¹⁴⁷ If these restrictions are unjustifiable then they should not prevent a duty of care to avoid interfering with autonomy being imposed.

Yet as valuable as protecting autonomy is, preserving the coherence of the tort of negligence is also important. Regardless of what one thinks of the rules limiting recovery for pure economic loss and psychiatric harm only the most optimistic of tort lawyers would consider the chances of them being swept aside as being anything other than remote. Rogers has stated that only parliament can undertake radical reform of the law on psychiatric harm¹⁴⁸ and, given the leading case on economic loss was decided by a panel of seven Law Lords and overruled a past House of Lords' decision, the same is probably true of the law relating to recovery of pure economic loss.¹⁴⁹ Allowing such claims could only occur if the tort of negligence was radically re-written from scratch

140 *Caparo v Dickman* [1990] 2 AC 605 at 621 per Lord Bridge; (1990) 1 ACSR 636; [1990] 1 All ER 568; [1990] 2 WLR 358 (quoting Cardozo CJ in *Ultramares Corporation v Touche* (1931) 174 NE 441).

141 J Hartshorne, 'Confusion, Contradiction and Chaos within the House of Lords Post *Caparo v Dickman*' (2008) 16 *Tort L Rev* 8 at 19.

142 *Ibid.*

143 *Ibid.*

144 *Ibid.*

145 *Ibid.*

146 For criticisms of floodgates arguments see D Howarth, 'Duty of Care' in K Oliphant, (Ed), *The Law of Tort*, LexisNexis Butterworths, London, 2007.

147 See Mullany and Handford, above n 114 and Howarth, above n 114.

148 W V H Rogers, *Winfield and Jolowicz on Tort*, 18th ed, Sweet and Maxwell, London, 2010, p 297.

149 *Murphy v Brentwood District Council* [1991] 1 AC 398; [1990] 2 All ER 908; [1990] 3 WLR 414; [1990] 2 Lloyd's Rep 467.

— and such a scorched-earth approach is not open to judges.¹⁵⁰ The law on pure economic loss and psychiatric harm is here to stay. Given that a duty of care to avoid interfering with autonomy is contrary to these established principles it cannot be recognised without radically altering the basic principles of the tort of negligence.¹⁵¹ Doing so would be a recipe for confusion and hard to reconcile with the incremental approach to judicial development of the common law.

Conclusion

Nothing in this article should be seen as preventing an interest in autonomy being protected by a different branch of tort law. Developing the tort of battery¹⁵² or modifying the rule in *Wilkinson v Downton*¹⁵³ might provide a more cogent way of doing this than adapting the law of negligence. Or perhaps, as Varuhas has argued, we ought to ‘directly and systematically protect [an interest in autonomy] through a standalone action, perhaps structured similarly to trespassory torts’.¹⁵⁴ Alternatively, the use of human rights law or a statutory scheme could protect such interests.¹⁵⁵ Such work, though, remains to be undertaken and is outside the scope of this article. Nor does anything in this article prevent the law of negligence continuing to perceive autonomy as instrumentally valuable and further protecting it indirectly by developing new interests. This would involve identifying the bad consequences of interfering with autonomy and then imposing duties of care on defendants to avoid causing such consequences. Regardless of whether such alternatives are tenable, though, to prevent the tort of negligence sliding into incoherence it would be better to reject this putative interest unless a clear argument can be provided as to how compensating lost autonomy *itself* is consistent with negligence principles.

What does this mean for *Chester* and *Rees*? Although there have been alternative interpretations of these cases,¹⁵⁶ if the damage in these cases is lost autonomy then they are impossible to reconcile with traditional tort law principles and should be overruled. This may appear harsh on the (deserving)

150 The Rt Hon The Lord Oliver Aylmerton, ‘Judicial Legislation’ (1989) 2 *Leiden Journal of International Law* 3.

151 Nor are these the only two areas of law that might be undermined by the recognition of autonomy as an interest in negligence. Public authority omissions cases might be another aspect of the law where areas of non-actionability would be undermined by permitting lost autonomy claims. See *Van Colle v Chief Constable of Hertfordshire* [2009] 1 AC 225; [2008] 3 All ER 977; [2008] 3 WLR 593. It may also, for example, undermine causation requirements in personal injury cases as in many circumstances it might be easier for a claimant to show that a defendant has *caused* their autonomy to be diminished than show that the defendant has *caused* their personal injury. *Chester* is a prime example of this.

152 This issue has previously been considered in T K Feng, ‘Failure of Medical Advice: Trespass or Negligence’ (1987) 7 *LS* 149 and Brazier, above n 10. However, developments in this area of the law mean that different conclusions may now be reached. See also Jackson, above n 88 and Clark and Nolan, above n 22.

153 [1897] 2 QB 57. Though cf *Wainwright v Home Office* [2004] 2 AC 406; [2003] 4 All ER 969; [2003] 3 WLR 1137; [2003] UKHL 53.

154 J Varuhas, ‘The Concept of “Vindication” in the Law of Torts: Rights, Interests and Damages’ (2014) 34 *OJLS* 253 at 270.

155 See Clark and Nolan, above n 22.

156 See McBride and Bagshaw, above n 36, p 826 for a rights-vindication interpretation of the

claimants in these cases but one should remember that, as Murphy and Witting state in *Street on Torts*, ‘the law of negligence cannot be seen as the stairway to the Garden of Eden’.¹⁵⁷ However, so far these two cases have not intruded into other aspects of this area of law. While they should not be used as a method of incrementally developing an interest of autonomy in negligence, if they are not to be overruled then at the very least the courts should say ‘thus far and no further’.¹⁵⁸

It was stated earlier that tort law can adapt itself to changing circumstances to protect new interests. But this does not mean it is a blank slate that can be re-written at will. As John Murphy has stated, ‘[t]he common law needs to be able to develop in such a way that the solutions it provides to tomorrow’s problem cases sit consistently (or at least comfortably) with its own past’.¹⁵⁹ An interest in autonomy per se cannot do this. Taking autonomy to reflect the self-regarding choices of mentally competent adults, the underlying thesis of this article has been that the recognition of this potential interest would be inconsistent with the established rules regarding what constitutes actionable damage in negligence and difficult to reconcile with the restrictions on imposing duties of care on defendants to avoid causing pure economic loss or psychiatric harm. Autonomy may be a central moral value but so is maintaining the credibility and consistency of the common law. Judges and academics should hesitate before encouraging the driving of a steamroller over the latter in order to protect the former.

conventional award in *Rees* and J Stapleton ‘Occam’s Razor Reveals an Orthodox Basis for *Chester v Afshar*’ (2006) 122 *LQR* 426 for an argument that *Chester* is an orthodox personal injury case.

157 Murphy and Witting, above n 45, p 74.

158 As Lord Steyn stated in the context of psychiatric harm claims in *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455 at 500; [1999] 1 All ER 1; [1998] 3 WLR 1509.

159 J Murphy, ‘Formularism and Tort Law’ (1999) 21 *Adel L Rev* 115 at 125.