THE PROTECTION OF PERSONAL INTERESTS

Evolving Forms of Damage in Negligence

This article considers the extent to which courts in various jurisdictions have, in recent years, widened the scope of recoverable damage in negligence actions involving the invasion of personal interests. Thus, for example, awards with respect to unwanted pregnancies in wrongful conception situations straddle the line between physical injury and mere inconvenience or temporary discomfort, and conventional awards for the disruption to parents' lives in such situations also fall outside what would once have been defined as recognisable damage. In other medical negligence scenarios, too, compensation is now awarded in circumstances where the lack of definable damage would, in the past, have prevented successful claims, and in the separate field of negligently imposed detention there are also suggestions that deprivation of liberty may be redefined as inherently recoverable loss. This more liberal approach to damage – which is still in its infancy and has yet to be adopted in the majority of personal interest situations – appears to be based on an (often implicit) acknowledgment that the need to limit the scope of recognisable harm is trumped by the desirability of vindicating personal rights and the undesirability of creating hollow duties.

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I. Introduction

1 The tort of negligence of course requires proof of damage – and indeed damage is often referred to as the "gist" of negligence.[1] The definition of damage has, however, traditionally been closely circumscribed, and although the categories of recoverable harm have

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1 See, *eg*, Jane Stapleton, "The Gist of Negligence, Part 1: Minimum Actionable Damage" (1988) 104 LQR 213 and Kumaralingam Amirthalingam, "The Changing Face of the Gist of Negligence" in *Emerging Issues in Tort Law* (Jason W Neyers, Erika Chamberlain & Stephen G A Pitel eds) (Oxford and Portland, Oregon: Hart Publishing, 2007) at p 467.

expanded beyond the paradigm physical injury to embrace damage which is both purely economic and psychiatric in nature, it is widely accepted that to allow claims for more ephemeral forms of injury would have a detrimentally expansionary effect. In order to keep within reasonable bounds the number of claims which may be initiated, more nebulous (and endemic) responses to a defendant's conduct are excluded from the definition of actionable harm.

2 In recent years, though, courts in a number of jurisdictions have recognised certain personal interests as deserving of protection in negligence even when their violation results in consequences which fall outside the conventionally acknowledged parameters of damage. This article will discuss the newly protected interests and the forms of harm to which their recognition has arguably given rise. In so doing, it will consider the policy factors which underlie the more flexible approach to damage, and in particular two major considerations which have proved influential in the cases under review – the rights-based analysis under which it is argued that tort law should offer a cause of action for wrongs suffered as well as for tangible damage sustained;[2] and the related argument that when personal interests are enshrined as legal rights the resulting duties must not be hollow, and that their violation must therefore be capable of vindication through monetary compensation. It will also consider situations in which this expansionary approach can be seen as indicating an augmented role for the tort of negligence – taking it beyond the field of compensation and even deterrence to fulfil a more regulatory function.[3]

3 It is worth noting at the outset that since there is no formal definition of what does – or perhaps more importantly what does *not* – constitute recoverable damage for the purposes of negligence, there is nothing to dictate that interests which appear to fall outside the traditional categories of physical, mental and economic harm may not

2 For discussion of the rights-based approach, see, *eg*, Robert Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007); Donal Nolan & Andrew Robertson, "Rights and Private Law" in *Rights and Private Law* (Donal Nolan & Andrew Robertson eds) (Oxford: Hart Publishing, 2011) ch 1; and Nicholas J McBride, "Rights as the Basis of Tort Law" in *Rights and Private Law* (Donal Nolan & Andrew Robertson eds) (Oxford: Hart Publishing, 2011) ch 12. For a rights-based approach focusing specifically on negligence, see too Allan Beever, *Rediscovering the Law of Negligence* (Oxford: Hart Publishing, 2007).

3 One of the earliest proponents of a more extensive role for tort law was Allen M Linden, whose article "Tort Law as Ombudsman" (1973) 51 Can Bar Rev 155 suggested that tort law could be extremely influential in more ways than simply providing compensation for aggrieved individuals. For a later analysis by the same author, see Allen M Linden, "Torts Tomorrow – Empowering the Injured" in *Torts Tomorrow: A Tribute to John Fleming* (Nicholas J Mullany & Allen M Linden eds) (Sydney: LBC Information Services, 1998) at p 321.

enjoy protection. The real question, to which there is as yet no clear answer, is whether the protection of such interests should be equated with recognition of "new" forms of damage, or whether it should instead simply be regarded as an extension of the existing categories of recognised harm.[4] In examining the circumstances in which evolving forms of damage appear to be gaining recognition – as well as those in which a more traditional approach to damage continues to be favoured – the article will consider this question. It will also consider the prospect for further relaxations to the notion of damage in the coming decades.

II. A more flexible approach to damage

A. Pregnancy and childbirth following medical negligence

4 Claims for pregnancy and childbirth following medical negligence are nowadays available only in limited circumstances. In the UK, the result of the decisions in *McFarlane v Tayside Health Board*[5] ("*McFarlane*") and *Rees v Darlington Memorial Hospital NHS Trust*[6] ("*Rees*") has been to allow wrongful birth[7] claims for the special costs of raising a child born with disabilities,[8] while refusing wrongful

4 For an influential discussion of this area, see Donal Nolan, "New Forms of Damage in Negligence" (2007) 70(1) MLR 59. One of the "new" areas which Nolan discusses (at 80–86) is the negligent provision of education. This arguably raises the question of whether the right to a proper education actually amounts to recognition of a new interest based on societal rights and expectations, or whether it is really just an aspect of damage to economic interests.

5 [2000] 2 AC 59. The claim related to the birth of a healthy child after the claimants were wrongly advised that the husband's vasectomy had rendered him infertile. Although in refusing the claim their Lordships specifically sought to distance themselves from issues of public policy, their judgments were – not surprisingly, given the nature of the question before them – in fact laden with policy considerations. Lord Millett, for example, based his judgment (at 114) on the premise that every healthy child is a blessing, and Lord Steyn (at 82–83) considered that if a commuter on the London Underground were asked whether the parents of a healthy child should be compensated for the cost of raising it, the overwhelming response would be that they should not. Considerations of distributive justice also implicitly underlay most of their Lordships' judgments – in particular the question of whether such awards would be the most appropriate use of the already overstretched resources of the National Health Service.

6 [2004] 1 AC 309; [2003] UKHL 52. The action was brought by a visually handicapped mother who gave birth to a healthy baby following an unsuccessful sterilisation. By a bare majority of four to three, their Lordships applied the reasoning in *McFarlane v Tayside Health Board* [2000] 2 AC 59 to refuse the claim.

7 Although an umbrella term, wrongful birth is most commonly used as a specific label in relation to the birth of a child whose conception was planned, but who suffers from a congenital or other disability which its parents argue would have led them to abort it had they been advised of its condition.

8 See, *eg*, the decision of the English Court of Appeal in *Parkinson v St James and Seacroft University Hospital NHS Trust* [2002] QB 266; [2001] EWCA 530.

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conception[9] claims for the costs associated with raising a healthy child – a position which appears to have been endorsed in Singapore in the cases of *JU v See Tho Kai Yin*[10] and, more recently, *ACB v Thomson Medical Pte Ltd*.[11] And although in *Cattanach v Melchior*[12] ("*Cattanach*") the High Court of Australia narrowly allowed a wrongful conception action for the cost of raising a healthy child, the impact of the decision was subsequently eroded both by general legislation in all Australian jurisdictions to limit tort claims[13] and by specific provisions restricting claims to the particular costs of raising disabled children in actions for wrongful birth.[14]

5 The policy considerations in this area of the law raise a plethora of moral and ethical issues, the resolution of which arguably extends beyond the proper judicial function. For this reason, it has even been suggested that determination of the law in this area might more appropriately be placed in the hands of the Legislature.[15] Nevertheless – whatever one's view of the legitimacy of refusing claims for the cost of

Although some of their Lordships in *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309; [2003] UKHL 52 questioned the validity of wrongful birth claims even in the case of a child born with disabilities, the decision has not been overruled.

9 Actions for wrongful conception most commonly arise as a result of a failed sterilisation procedure, following which an unplanned child is conceived and born.

10 [2005] 4 SLR(R) 96. Lai Siu Chiu J in the High Court implicitly recognised the validity of claims for wrongful birth where a child was born with disabilities.

11 [2015] 2 SLR 218. In *ACB v Thomson Medical Pte Ltd* [2015] 2 SLR 218, which involved somewhat unusual facts, Choo Han Teck J held that a claim by the mother of a healthy child who was born following in-vitro fertilisation treatment in which the claimant was negligently implanted with an embryo which had been fertilised not with her husband's sperm, but with that of a stranger, could not succeed. In reaching this conclusion, Choo J observed (at [15]) that there were "cogent policy considerations" against allowing claims for the cost of raising healthy children. Echoing Lord Millett's statement in *McFarlane v Tayside Health Board* [2000] 2 AC 59 at 111 that "[t]here is something distasteful, if not morally offensive, in treating the birth of a normal, healthy child as a matter for compensation", his Honour also opined (at [16]) that no child wishes to grow up thinking his birth was a mistake, something which would be implied were someone else to be made to pay for its upbringing. The claimant has since appealed against Choo J's judgment, and the decision of the Court of Appeal is pending.

12 (2003) 199 ALR 131; [2003] HCA 38.

13 See, *eg*, the Civil Law (Wrongs) Act 2002 (ACT); Civil Liability Act 2002 (NSW); and Civil Liability Act 2003 (Qld).

14 See, *eg*, ss 70 and 71 of the New South Wales Civil Liability Act 2002.

15 See, *eg*, Choo Han Teck J in *ACB v Thomson Medical Pte Ltd* [2015] 2 SLR 218 at [16]. Even assuming such cases can be seen as falling within the judicial function, it can be argued that some controls should be in place – *eg*, to prevent the inclusion of religious considerations on the grounds of pluralism.

raising a healthy child – the courts in the UK, and, it seems, Singapore,[16] *do* allow a woman who gives birth to a healthy child as a result of medical negligence to bring a claim for the pain, discomfort and inconvenience arising from the pregnancy and birth. While their Lordships in *McFarlane* rejected claims for wrongful conception where healthy babies were concerned, the majority nevertheless awarded damages to compensate for the experience of unwanted pregnancy and childbirth. Notably only Lord Steyn, dismissing an argument to the contrary, specifically treated pregnancy and childbirth as personal injury,[17] but although his fellow judges did not regard these conditions as falling within the orthodox definition of damage, they were nevertheless willing either to equate them with damage or to sidestep the distinction. Thus, Lord Hope described the claim as "analogous" to a claim for personal injury,[18] and Lord Slynn declared it unnecessary to consider the claim "in terms of 'harm' or 'injury' in [the] ordinary sense of the words".[19] On this basis, damages were awarded for the pain, suffering, and inconvenience of pregnancy and childbirth.

6 In the wake of *McFarlane*, the question of whether pregnancy and childbirth amount to physical damage has been the subject of academic debate. On the one hand, it has been observed that these are natural processes for which a woman's body is designed. Indeed, they are processes which most women hope to experience at some stage. They do not, in themselves, amount to an illness, nor do they normally result in permanent physiological changes to a woman's body. This being so, it is argued that the gravamen of the argument in actions for pregnancy and childbirth is that "there should be recovery for pain, suffering and inconvenience suffered *simpliciter* … unattached to any deleterious physical change".[20] On the other hand, it has also been observed that, to a woman who has sought to avoid having a child, the changes to her body and the pain, suffering and inconvenience associated with pregnancy and childbirth will certainly be perceived as physical damage, and so should be viewed as such. In this respect, it is argued that although a definition of damage which depends on the person to whom it is being applied may be novel, this need not prove an insuperable obstacle to its recognition.[21]

16 In *ACB v Thomson Medical Pte Ltd* [2015] 2 SLR 218, while holding that the claim for damages to pay for the child's upbringing failed, Choo Han Teck J accepted (at [17]) that the mother would be entitled to compensation for pain and suffering.

17 *McFarlane v Tayside Health Board* [2000] 2 AC 59 at 81.

18 *McFarlane v Tayside Health Board* [2000] 2 AC 59 at 86.

19 *McFarlane v Tayside Health Board* [2000] 2 AC 59 at 74.

20 See, *eg*, Christian Witting, "Physical Damage in Negligence" (2002) 61(1) Camb LJ 189 at 193.

21 See, *eg*, Donal Nolan, "New Forms of Damage in Negligence" (2007) 70(1) MLR 59. Nolan argues (at 74–75): "What matters is not what some (or even most) women think, but what the claimant herself thinks: after all, the question is not whether

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7 Whichever of these two approaches one favours, the award of damages for the pain and suffering associated with pregnancy and childbirth is exceptional, since either it regards pain and suffering as actionable without the need to attach them to recognisable damage, or, uniquely, it treats these natural and transient conditions as themselves constituting such damage. Arguably, though, a third approach, based on a rights-based analysis, might offer a better way to deal with situations of this kind. Under such an approach, the relevant damage could be categorised as the diminished autonomy suffered by a woman as a result of the intrusive changes to her body during pregnancy and childbirth. If – as is considered below in relation to conventional damages for an unplanned addition to one's family[22] – one accepts the argument that diminished autonomy is nowadays capable of being regarded as a form of damage in its own right, such an approach would offer a more holistic means of satisfying the requirement that damage be established in actions for negligence, while overcoming the difficulties associated with the (at best questionable) notion that pregnancy and childbirth really are forms of physical harm.

B. Conventional damages for an unplanned addition to one's family

8 The only judge in *McFarlane* not to agree that damages should be awarded to compensate for the mother's pain and discomfort during pregnancy and childbirth was Lord Millett, who held that "normal pregnancy and delivery were … an inescapable precondition of [the baby's] birth" and were thus simply "the price of parenthood".[23] However, notwithstanding his Lordship's conservative approach in this respect, he would have made a conventional award to acknowledge the loss of autonomy suffered by both parents in being unable to choose the size of their family.[24] Although not adopted in *McFarlane*, this proposal was favoured by the House of Lords in *Rees*, where, in addition to damages for the pain and suffering associated with pregnancy and childbirth, the court made a conventional award of £15,000 to reflect the claimant's diminished autonomy.[25]

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pregnancy is damage *in general*, but whether it is damage *to this woman*" [emphasis in original].

22 See paras 8–11 below.

23 *McFarlane v Tayside Health Board* [2000] 2 AC 59 at 114.

24 *McFarlane v Tayside Health Board* [2000] 2 AC 59 at 114.

25 *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309; [2003] UKHL 52. Strong reservations were, however, expressed by Lords Hope (at [70]–[77]) and Steyn (at [40]–[46]), both of whom pointed to the lack of precedents in this respect, and to the fact that, while conventional damages were justified in personal injury cases (where it was not possible to attribute a precise value to the loss of an eye or a limb), the same was not true of claims for economic

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9 As an award potentially applicable to both parents, the conventional sum does not derive from the mother's claim for pain and suffering, but is a separate award to mark the parents' loss of the ability to lead the life which they would otherwise have chosen. In *Cattanach*, McHugh and Gummow JJ spoke in terms of disruption to parents' interests in planning their families.[26] In *Rees*, Lord Bingham similarly suggested that the conventional sum, which he did *not* treat as compensatory, was designed to afford "some measure of recognition of the wrong done" in denying the mother's right (the claimant in that case being a single parent) "to live her life in the way that she wished and planned",[27] while Lord Millett – who was one of three judges to sit in both *Rees* and *McFarlane*[28] – described it as "a modest award [which] would … adequately compensate for the … injury to the parents' autonomy" in being deprived of "the right to limit the size of their family".[29]

10 It has been argued that, notwithstanding the extensive use of rights-based terminology in *Rees*, the conventional sum should not be interpreted as vindicating rights through a trespass-like analysis without reference to damage, since:[30]

> … [while t]he boundaries of actionable damage may be extended if this is thought necessary to give adequate protection to a particular interest (such as personal autonomy) … the requirement of damage cannot simply be done away with altogether.

It is certainly true that in *Rees* Lords Bingham[31] and Millett[32] both spoke in terms of "loss" and "injury", and even Lord Bingham's reference to the award not being compensatory can be interpreted as meaning that it does not relate to damage of a precisely quantifiable pecuniary nature. On this basis, rather than ignoring the need for damage, the

loss, where the actual damage could be calculated accurately in monetary terms. Their Lordships concluded that, in a case such as this, where the economic claim for the cost of raising the child had been rejected, there was no reason to make a conventional award.

26 *Cattanach v Melchior* (2003) 199 ALR 131; [2003] HCA 38 at [66].

27 *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309; [2003] UKHL 52 at [8].

28 The others were Lords Steyn and Hope, both of whom considered that the facts of *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309; [2003] UKHL 52 fell outside the *McFarlane* principle, and would therefore have allowed the wrongful birth claim by the disabled mother in that case.

29 *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309; [2003] UKHL 52 at [123]–[125].

30 Donal Nolan, "New Forms of Damage in Negligence" (2007) 70(1) MLR 59 at 79.

31 *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309; [2003] UKHL 52 at [8].

32 *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309; [2003] UKHL 52 at [125].

conventional award can be seen as amounting to "recognition of diminished autonomy as a form of actionable damage"[33] in its own right.

11 It is, however, the case that the overwhelming focus in *Rees* was on the wrong for which a remedy must be available rather than on the damage sustained. Indeed, in this respect the award for diminished autonomy in that case arguably went beyond a purely rights-based analysis to fulfil a regulatory function. This it did by holding negligent medical professionals accountable in circumstances where the more significant claim against them (for wrongful conception) was prohibited for reasons of public policy.[34] Seen from this perspective, the decision in *Rees* to introduce the somewhat arbitrary conventional award actually transcended the question of whether diminished autonomy amounted to damage, since its primary purpose was to ameliorate the harsh – yet apparently unchallengeable – conclusion in *McFarlane* that no claim may arise from the birth of a healthy child.

C. Non-disclosure of medical risks

12 In all jurisdictions, a doctor owes a duty to disclose to his patient a risk inherent in surgery about which the patient has specifically asked, and following the recent decision of the Supreme Court in *Montgomery v Lanarkshire Health Board*[35] ("*Montgomery*"), the UK has joined Australia and Canada in holding that a doctor also owes a duty to disclose other risks to which a reasonable person in the patient's position would attach significance.[36] In the absence of such disclosure,

33 Donal Nolan, "New Forms of Damage in Negligence" (2007) 70(1) MLR 59 at 79–80.

34 See discussion at paras 4–5 above. In terms of the regulatory function of the tort of negligence with respect to the medical profession, see Allen M Linden, "Tort Law as Ombudsman" (1973) 51 Can Bar Rev 155 at 161. As long ago as the 1970s, Linden suggested the role tort law could play in this respect.

35 [2015] 2 WLR 768.

36 The decision in *Montgomery v Lanarkshire Health Board* [2015] 2 WLR 768 ("*Montgomery*") drew heavily on the dissenting judgment of Lord Scarman in *Sidaway v Bethlem Royal Hospital* [1985] AC 871 ("*Sidaway*"), where his Lordship favoured the doctrine of informed consent and use of the "prudent patient" test, which require a doctor to disclose any risk of which a prudent patient would wish to be informed. Prior to *Montgomery*, the law on the disclosure of medical risks in the UK was, at least in theory, governed by *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 and the majority decision in *Sidaway*, under which the question of whether a doctor ought to have disclosed a risk is to be determined by what a responsible body of the doctor's peers would have done. Under this approach – which was adopted by the Singapore Court of Appeal in *Dr Khoo James v Gunapathy d/o Muniandy* [2002] 1 SLR(R) 1024 – a patient's claim will fail as long as at least some other responsible doctors would not have disclosed the relevant risk. However, in Canada, under *Reibl v Hughes* [1980] 2 SCR 880, and Australia, under *Rogers v Whitaker* (1992) 175 CLR 479, the legitimacy of a doctor's failure to disclose a risk has for some time been determined by versions of

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the doctor will be liable, should a risk be realised, in circumstances where the patient would have refused the surgery had he been aware of the risk. In such a case, the causal link between the doctor's negligence and the patient's damage is easily made out.

13 On the other hand, where a patient acknowledges that, even if he had been made aware of the relevant risk, he would probably have undergone the surgery anyway, the causal link between the negligence and the damage is, at best, tenuous. Nevertheless, the highest courts in Australia and the UK have held doctors who failed to inform patients of risks inherent in surgery responsible for the damage which their patients suffered when the risks were realised, even though the patients admitted that, had they known of the risks, they might still have undergone the procedures, albeit under different circumstances. In both *Chappel v Hart*[37] ("*Chappel*") and *Chester v Afshar*[38] ("*Chester*") – the latter notably laying the foundation for the decision of the Supreme Court in *Montgomery* – the High Court of Australia and the House of Lords used the notion of patient autonomy to relax the rules of causation to vindicate what would otherwise be the hollow right to decide when and how to undergo surgery.[39]

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the prudent patient test – and it is this approach which is now also reflected in the UK under *Montgomery*. (A similar approach is taken in Malaysia, under the decision of the Federal Court in *Foo Fio Na v Dr Soo Fook Mu* [2007] 1 MLJ 593). Notably (as discussed at paras 13–15 below), even before *Montgomery* there had been a paradigm shift in the philosophy of the UK courts, resulting in a move towards greater recognition of patient autonomy – although this philosophical change was not, and has not yet been, reflected in decisions of the Singapore courts, which continue to adopt a faithful application of the responsible doctor approach. In *Chua Thong Jiang Andrew v Yue Wai Mun* [2015] SGHC 119, the first post-*Montgomery* decision to be reported in Singapore, the High Court left open the question of whether Singapore should move towards a *Montgomery*-type approach. While it is thus possible that, when presented with an appropriate opportunity, the courts might adopt a more patient-friendly stance, Singapore's position with respect to the non-disclosure of medical risks is currently somewhat isolated (see para 16 below).

37 (1998) 195 CLR 232.

38 [2005] 1 AC 134.

39 *Chappel v Hart* (1998) 195 CLR 232 and *Chester v Afshar* [2005] 1 AC 134 were decided in the wake of the seminal industrial-disease decision of the House of Lords in *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32 ("*Fairchild*"). In *Fairchild*, their Lordships varied the rules of causation to allow claimants who had contracted mesothelioma from negligent exposure to asbestos fibres in the workplace to recover compensation from any or all of their previous employers, notwithstanding the impossibility of proving in whose employment they had been when the disease was triggered. There are obvious similarities between *Fairchild* situations and those in which a doctor fails to disclose a medical risk which would not necessarily have prevented the patient from undergoing the relevant surgery, since in both an artificial causal link is made between the defendant's negligence and the claimant's damage. However, only the medical non-disclosure cases raise issues associated with the recognition of non-traditional damage. In such cases the

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14 Of the two decisions, *Chappel*[40] is arguably the less radical, since there the claimant argued that, if warned of the relevant risk, she would have postponed the surgery and taken steps to secure the most experienced surgeon in the field to perform it. Although there were some differences of opinion in the High Court of Australia as to whether engaging a doctor with greater experience would have reduced the risk, at least two of the majority judges concluded that it would.[41] By contrast, in *Chester*[42] the claimant's case was based only on the assertion that, had she been informed of the risk, she would have taken longer to think about the surgery, with the result that she might have had the same procedure, performed by the same surgeon, but at a later date. The

damage actually caused by a doctor's negligent failure to disclose a relevant risk is not the patient's physical injury (which is attributable to the realisation of an inherent risk during competently performed surgery) but rather the patient's loss of autonomy in being deprived of the opportunity to make an informed decision. The physical injury for which compensation is awarded in such cases is, therefore, effectively a mask for that lost autonomy. *Fairchild* situations, on the other hand, do not raise comparable issues, since in such cases the only damage sustained is the mesothelioma, and this *is* caused by the negligence in question (it is just not apparent *whose* negligence). For these reasons, while this article treats the medical non-disclosure cases as relevant in terms of evolving forms of damage, it does not treat *Fairchild* situations in the same way.

40 In *Chappel v Hart* (1998) 195 CLR 232, Chappel, who was an Ear Nose and Throat surgeon, advised Hart that she required surgery to remove a pharyngeal pouch. This was a progressive condition which would have required surgery at some stage. Chappel, however, failed to warn Hart that the surgery carried an inherent risk that her oesophagus might be perforated, possibly leading to infection and damage to her voice. The risk was realised, and she suffered damage to her laryngeal nerves, paralysis to her right vocal cord and voice loss.

41 See *Chappel v Hart* (1998) 195 CLR 232 ("*Chappel*") at [17]–[19] and [97]–[98], *per* Gaudron and Kirby JJ. The other majority judge, Gummow J, referred (at [67]) to Chappel's own acknowledgment that the random chance of injury would probably not have eventuated if the surgery had been performed at a different time. For the minority, McHugh and Hayne JJ (at [38]–[41], [129] and [146]), took the view that, since the risk was a random one, it would have been the same whenever the surgery had been performed. For further analysis of the judgments in *Chappel*, see Tony Honoré, "Medical Non-Disclosure, Causation and Risk: *Chappel v Hart*" (1999) 7 TLJ 1. While observing (at 4) that to "cause something is to intervene so as to alter the existing or expected course of events. Hence to expose someone to a risk to which that person is exposed anyhow is not to cause anything", Honoré nevertheless concludes (at 8) that the majority's decision in *Chappel* was correct on policy grounds, since "Dr Chappel violated Mrs Hart's right to choose for herself, even if he did not increase the risk to her". For discussion of this view, together with other aspects of the decisions in both *Chappel* and *Chester v Afshar* [2005] 1 AC 134, see also Laura Khoury, "*Chester v Afshar*: Stepping Further away from Causation?" [2005] Sing JLS 246.

42 In *Chester v Afshar* [2005] 1 AC 134, Chester had for several years suffered from back problems. She resisted the idea of surgery, but was eventually persuaded by Afshar, a neurological expert, to have three intravertebral discs removed through a surgical procedure. Afshar failed to warn her of a 1–2% risk of *cauda equina* syndrome. This risk was realised, causing her to be partly paralysed.

minority judges[43] in the House of Lords distinguished *Chappel*, concluding that, since there was no evidence that the risk to the claimant would have been minimised merely by delaying her surgery, the claim must fail. However, the majority – in judgments which were openly policy-driven – held that a patient's right to be informed of risks inherent in surgery must be vindicated, even if this required a slightly unconventional approach to causation. Employing persuasive (if somewhat contrived) reasoning to overcome the statistically constant risk associated with the relevant surgical procedure,[44] Lord Steyn, for example, observed that:[45]

> … [the patient's] right of autonomy and dignity can and ought to be vindicated by a narrow and modest departure from traditional causation principles.
>
> … This result is in accord with one of the most basic aspirations of the law, namely to right wrongs … [thus] reflect[ing] the reasonable aspirations of the public in contemporary society.

And Lord Hope stated:[46]

> … the law which imposed the duty to warn on the doctor has at its heart the right of the patient to make an informed choice as to whether and if so when and by whom to be operated on. …
>
> … The function of the law is to enable rights to be vindicated and to provide remedies when duties have been breached. Unless this is done the duty is a hollow one, stripped of all practical force and devoid of all content. It will have lost its ability to protect the patient and thus fulfil the only purpose which brought it into existence. …

15 Decisions such as *Chappel* and, to an even greater degree, *Chester* – the underlying philosophy of which so heavily influenced the Supreme Court in *Montgomery* – indicate a general move towards

43 See *Chester v Afshar* [2005] 1 AC 134 at [6], *per* Lord Bingham, and [28]–[31], *per* Lord Hoffmann.

44 See, *eg*, *Chester v Afshar* [2005] 1 AC 134 at [11] and [19], *per* Lord Steyn, who, while acknowledging that the 1–2% statistical risk inherent in the surgery was a constant, nevertheless argued that this showed how improbable it was that the risk would actually have been realised at a future date. His Lordship based this argument on the premise that, but for the doctor's negligent failure to warn the claimant, the damage would not have occurred when it did, and that the small statistical risk meant it was therefore unlikely that the damage would have materialised on a subsequent occasion.

45 *Chester v Afshar* [2005] 1 AC 134 at [24]–[25]. Lord Hope, while acknowledging that, since the statistical risk was likely to occur at random, it would have been the same regardless of when the surgery had been performed, nevertheless concluded (at [62]) that the damage was within the scope of the doctor's duty to warn. Lord Walker agreed (at [101]) that the patient should have a remedy, even if this required the court to extend the existing principles of causation.

46 *Chester v Afshar* [2005] 1 AC 134 at [86]–[87].

greater recognition of patient autonomy and, in particular, a patient's right to control the circumstances in which he undergoes surgery. They even serve an arguably regulatory function in encouraging the medical profession to be more open in its approach to the disclosure of risks inherent in medical treatment.[47]

16 That the notion of patient autonomy does not, however, enjoy universal judicial support in cases of this kind is apparent in the (pre-*Montgomery*) decision of the High Court of Singapore in *Tong Seok May Joanne v Yau Hok Mun Gordon*,[48] in which Andrew Ang J observed that the ordinary principles of tort law militate against vindication of "the plaintiff's right of autonomy when there has been no provable damage caused".[49] In addition, unlike the award of the conventional sum in wrongful conception cases, in which the parents' diminished autonomy is arguably regarded as a form of damage and is certainly compensable in its own right, the medical non-disclosure of risk decisions stop short of treating invasion of a patient's right to autonomy as the gist of the action, instead adopting an approach which artificially connects the doctor's negligence with the patient's physical harm. In view of the fact that, as Lords Steyn and Hope indicated, the real purpose of the decision in *Chester* was to hold the doctor accountable for the wrong done in failing to disclose sufficient information to his patient, the House of Lords would arguably have done better – and would certainly have set a more transparent and workable precedent – had it taken a similar approach to that in *Rees* and actually awarded compensation for the claimant's diminished autonomy, rather than varying the rules of causation to associate the negligence with the damage which resulted from the surgery.[50]

17 An alternative, and superficially attractive, approach might have been for the courts in *Chappel* and *Chester* to have regarded the undisclosed risk as the relevant harm. However, the fundamental problem with such an approach would have been that the risks associated with surgery in cases of this kind are inherent, and not attributable to the defendants' negligence. Moreover, even in situations where an increased risk of harm *is* attributable to the negligence of a defendant, the question of whether risk can ever constitute actionable

47 In this respect, see Allen M Linden, "Tort Law as Ombudsman" (1973) 51 Can Bar Rev 155.

48 [2012] 2 SLR 18.

49 *Tong Seok May Joanne v Yau Hok Mun Gordon* [2012] 2 SLR 18 at [172].

50 A claim for diminished autonomy might, of course, be smaller than one for physical damage. However, a court would not be constrained in this respect by the same policy considerations which led the House of Lords in *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309; [2003] UKHL 52 to settle on a modest conventional award in cases of unplanned pregnancy and birth.

damage in its own right is a vexed one – as can be seen from the unanimous decision of the House of Lords in *Rothwell v Chemical & Insulating Co Ltd*[51] to reject claims for anxiety associated with the increased risk of contracting an industrial disease through negligent exposure to toxins in the workplace.[52] And while some academics have suggested the possibility of recognising risk as damage,[53] others consider that it would simply not be tenable.[54]

D. Negligently inflicted detention

18 A person who is directly deprived of his liberty without consent or lawful justification may bring an action in trespass for false imprisonment. Since trespass is actionable *per se*, it is not necessary for the purposes of the action to determine whether deprivation of liberty constitutes recoverable damage. However, following the decision of the English Court of Appeal in *Letang v Cooper*[55] ("*Letang*") in the mid-1960s, it has been widely accepted – although notably not yet in either

51 [2007] UKHL 39; [2007] 3 WLR 876.

52 In *Rothwell v Chemical & Insulating Co Ltd* [2007] UKHL 39; [2007] 3 WLR 876 the claimants had been exposed to asbestos at work. As a result, they had developed pleural plaques on their lungs, which indicated an increased risk of developing an asbestos-related disease. They brought actions for the anxiety which the knowledge of this increased risk caused. The House of Lords held that, since the pleural plaques were asymptomatic, either they did not amount to injury at all, or any injury which they did cause was *de minimis* and therefore irrecoverable. Lord Hoffmann (at [12]) considered that neither the risk of, nor anxiety about, future injury would be recoverable unless attached to already actionable damage, and Lord Rodger (at [91]) regarded the plaques as nothing more than a "hook" on which to hang a claim for independently irrecoverable damage which they did not cause. (See also paras 23–25 below for discussion of the related area of loss of chance.)

53 See, *eg*, Claire Finkelstein, "Is Risk a Harm?" (2003) 151 U Penn L Rev 153 at 998. Finkelstein argues that:

> … there is support for the notions of risk harm and chance benefit both in our ordinary views regarding risk and chance as well as in law. If these notions … prove compelling, there is no reason in principle why courts should refuse to make compensation awards based on exposure to risk alone.

54 See, *eg*, Stephen R Perry, "Risk, Harm and Responsibility" in *Philosophical Foundations of Tort Law* (David G Owen ed) (Oxford: Clarendon Press, 1995) at p 345. Perry argues that although "[t]he … thesis that risk is harm in itself is most plausibly explicated in terms of [an] objective conception of risk", nevertheless "even under this favourable interpretation that thesis must … be rejected".

55 [1965] 1 QB 232. In *Letang v Cooper* [1965] 1 QB 232, Lord Denning MR (with whom Danckwerts LJ concurred) stated (at 239):

> If one man intentionally applies force directly to another, the plaintiff has a cause of action in … trespass to the person … If he does not inflict injury intentionally, but only unintentionally, the plaintiff has no cause of action today in trespass. His only cause of action is in negligence …

Although technically *obiter*, Lord Denning's judgment was widely followed.

Australia[56] or Canada[57] – that trespass must nowadays be committed intentionally.[58] As a result, in jurisdictions which apply *Letang*, the only action available to a claimant who is unintentionally deprived of his liberty is in negligence, which of course requires him to establish recognisable damage. And even in those jurisdictions where *Letang* has *not* been followed, negligence may be the only available action where (as is often the case) detention is imposed indirectly.[59] So in such

56 In Australia, the action for negligent trespass remains available under the decision of the High Court of Australia in *Williams v Milotin* (1957) 97 CLR 465, which has been followed in preference to *Letang v Cooper* [1965] 1 QB 232 in several cases, including *Shaw v Hacksaw* [1983] 2 VR 153 and *Platt v Nutt* (1988) 12 NSWLR 231. With particular reference to negligent false imprisonment, see Carolyn Sapideen & Prue Vines, *Fleming's The Law of Torts* (Pyrmount, NSW: Lawbook Co, 10th Ed, 2011), in which the authors observe at p 40: "[I]f there can still be a negligent trespass (a view that remains possible at least in Australia), presumably there can also be negligent false imprisonment, actionable without proof of loss."

57 In Canada, negligent trespass also continues to be recognised. Moreover, under the decision of the Supreme Court of Canada in *Cook v Lewis* [1951] SCR 830; [1951] 1 DLR 1, the defendant bears the burden of disproving fault. For specific discussion of the position with respect to false imprisonment, see Lews N Klar, *Tort Law* (Toronto: Carswell, 4th Ed, 2008) at p 65. Klar concludes:

> There is no reason to suspect that Canadian tort law, which continues to recognize that a trespass can be committed either negligently or intentionally, would treat false imprisonment any differently from assault or battery.

However, in discussing negligent battery, he also argues (at p 58) that Canadian law ought to recognise that there are no policy reasons to justify the distinction between negligence and negligent trespass, and that the distinction should therefore be discarded.

58 The need for trespass to be committed intentionally was confirmed by the English Court of Appeal in *Wilson v Pringle* [1987] QB 237 ("*Wilson*"). (In *Wilson*, it was also suggested that the relevant intention must be hostile. However, in *In re F* [1990] 2 AC 1 the House of Lords subsequently rejected the hostility requirement.) For the position elsewhere, see, *eg*, *Dehn v Attorney-General* [1988] 2 NZLR 564 (HC), in which at first instance it was held in New Zealand that intention was an essential element in an action for battery (although the issue was not considered on appeal: [1989] 1 NZLR 320 (CA)), and *Amutha Valli d/o Krishnan v Titular Superior of the Redemptorist Fathers in Singapore* [2009] 2 SLR(R) 1091, in which the need for intention appears implicitly to have been accepted by the High Court of Singapore. For the Singapore position on false imprisonment, see also Andrew Harding & Tan Keng Feng, "Negligent False Imprisonment – A Problem in the Law of Trespass" (1980) 20 MLR 29, in which the authors state that:

> To succeed in false imprisonment the plaintiff, according to the latest view, must show that the defendant intentionally and directly imprisoned him without lawful authority.

In this respect they refer to the decision in *Letang v Cooper* [1965] 1 QB 232. They argue, however, that the law would be better served if an action for negligent false imprisonment were to be available.

59 Donal Nolan, "New Forms of Damage in Negligence" (2007) 70(1) MLR 59 at 68–70 argues that, although the action for negligent trespass – and thus negligent false imprisonment – could, in theory, be revived in those jurisdictions where it was abandoned in the wake of *Letang v Cooper* [1965] 1 QB 232, such a revival would be of limited practical use, since the application of negligent false

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situations it is crucial to determine whether deprivation of liberty amounts to recoverable damage.

19 Although the traditional approach has generally been to assume that only the consequences of wrongful detention – such as physical or psychiatric injury – and not the detention itself[60] are actionable, a number of UK authorities from the last couple of decades suggest a possible change of attitude. In *Welsh v Chief Constable of the Merseyside Police*,[61] for example, where the claimant brought an action in negligence for two days which he spent in custody as a result of a mistake by the Crown Prosecution Service, Tudor Evans J refused to hold that the claim should be struck out as giving rise to no duty of care. In deciding the issue, he made no reference to the fact that the only damage under the claim was the detention itself.[62] This approach was confirmed in *W v Home Office*,[63] where the Court of Appeal, while finding on a preliminary issue that no duty was owed to an asylum seeker whose period of detention was negligently prolonged by the immigration authorities, nevertheless indicated that detention *could* constitute

imprisonment would be confined to the class of cases in which there was a direct link between the defendant's conduct and the claimant's detention. This would exclude a wide range of situations, including those in which a person has been wrongly detained as a result of negligent administrative procedures.

60 See, *eg*, Francis Trindade, "The Modern Tort of False Imprisonment" in *Torts in the Nineties* (Nicholas J Mullany ed) (Sydney: LBC Information Services, 1997) at pp 253–255. Note, however, that in some old actions brought on the case for detention following negligent certification of lunacy there was liability for the detention itself: see, *eg*, *De Freville v Dill* (1927) 96 LJKB 1056. Note, too, that in some other cases the notion that detention could constitute damage appears to have been accepted, although the actions failed on other grounds: see, *eg*, *Thompson v Schmidt* [1892] 56 JP 212 and *Everett v Griffiths* [1920] 3 KB 163. For further discussion of these cases, see Donal Nolan, "New Forms of Damage in Negligence" (2007) 70(1) MLR 59 at 64.

61 [1993] 1 All ER 692.

62 See too *Elguzouli-Daf v Commissioner of Police of the Metropolis* [1995] QB 335 ("*Elguzouli-Daf*"). In *Elguzouli-Daf*, the Court of Appeal accepted that, for reasons of public policy, no duty of care was owed to a number of claimants who, in separate actions, argued that their pretrial detention had been prolonged due to the negligent failure to discontinue their prosecutions. However, both Steyn and, to a lesser extent, Morritt LJJ appeared to approve the outcome of *Welsh v Chief Constable of the Merseyside Police* [1993] 1 All ER 692 without questioning whether unwarranted detention could be actionable. In addition, see *Clarke v Crew* (1999) 149 NLJ 899, where the Court of Appeal upheld an award of compensation to a claimant for a day and a half's imprisonment due to a police officer's negligence. Although Simon Browne LJ did not specifically consider whether wrongful detention constituted damage, he observed that it seriously affected the well-being of the detainee. For further discussion of these cases, see Donal Nolan, "New Forms of Damage in Negligence" (2007) 70(1) MLR 59 at 64.

63 [1997] Imm AR 302.

actionable damage in its own right.[64] And in *McLoughlin v Jones*,[65] where the claimant brought an action against his solicitor whose negligence he argued had led to his wrongful conviction and imprisonment, Hale LJ (as she then was) in the Court of Appeal indicated that she considered loss of liberty to be a serious harm which was "just as much an interference in bodily integrity as is loss of a limb".[66]

20 While suggesting that detention may constitute a recognised form of damage for the purposes of negligence, these cases offer little discussion either of the way in which damage is defined or of the relationship between negligence and trespass in protecting the right to bodily integrity. Of greater assistance in this respect is the more recent decision of the House of Lords in *Ashley v Chief Constable of Sussex Police*[67] ("*Ashley*"). Although in *Ashley* – which concerned the fatal shooting of an unarmed man by a policeman in an authorised raid on his home – the relevant action was for assault and battery,[68] the case is pertinent because their Lordships specifically considered the distinct functions of negligence and trespass. By a majority of three to two,[69] they held that, while an action in trespass will be available to vindicate a person's right to bodily integrity regardless of whether harm is suffered, negligence comes into play purely to compensate for damage sustained.[70] In this respect, while Lord Rodger suggested that the invasion of rights did *not* amount to damage, and that its vindication must therefore be confined to trespass,[71] Lord Scott took a less

64 Lord Woolf MR referred when reaching this conclusion to decisions such as *Welsh v Chief Constable of the Merseyside Police* [1993] 1 All ER 692 and *Elguzouli-Daf v Commissioner of Police of the Metropolis* [1995] QB 335.

65 [2001] EWCA Civ 1743; [2002] QB 1312.

66 *McLoughlin v Jones* [2001] EWCA Civ 1743; [2002] QB 1312 ("*McLoughlin*") at [57]. Note, however, that the question of whether detention amounted to damage in its own right was not, strictly speaking, an issue in *McLoughlin*, where the claim related to psychiatric illness which the claimant suffered as a result of his experience.

67 [2008] UKHL 25; [2008] 1 AC 962.

68 The claimants brought actions for assault and battery, false imprisonment, negligence and misfeasance in public office. In the trial court, the Chief Constable accepted liability in negligence for the consequences of the shooting (although not for the shooting itself), and also admitted the false imprisonment claim. Judgment was given for the claimants and damages were awarded with respect to both claims. The remaining claims were dismissed both by the trial judge and in the Court of Appeal.

69 Lords Scott, Bingham and Rodger. Lords Carswell and Neuberger dissented.

70 On this basis, they concluded that the claimants, who were the son and the father of the deceased, must be allowed to pursue a vindicatory action for assault and battery with respect to the shooting, even though they had already been awarded damages for negligence and false imprisonment.

71 *Ashley v Chief Constable of Sussex Police* [2008] UKHL 25; [2008] 1 AC 962 at [60]:

> 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

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categorical attitude, referring to the rights-based analysis in *Chester* and to Lord Hope's observation in that case that the law must offer adequate remedies to vindicate rights which would otherwise be hollow.[72] In addition, Lords Scott and Rodger both acknowledged that, in appropriate cases, compensatory damages for actual damage sustained (whether in negligence or trespass) could also serve a vindicatory function.[73]

21 A number of academics have supported the view that detention should be recognised as recoverable damage, primarily on the ground that there is nothing in principle which militates against it.[74] One commentator has even observed that "[l]oss of personal liberty is almost as grave a deprivation as loss of life itself".[75] While this analogy is perhaps overstated – particularly in cases of minor, short-lived detentions, or situations where the claimant is unaware until after the event that he has been detained[76] – it is certainly true that the fundamental right not to be deprived of one's freedom is at least as deserving of protection as other aspects of a person's autonomy. Indeed, as the UK cases indicate, negligently inflicted detentions frequently involve egregious infringements by defendants who have control and custody over particularly vulnerable claimants. There is thus an

proof that the victim has suffered anything other than the infringement of his right to bodily integrity: the law vindicates that right by awarding nominal damages.

72 *Ashley v Chief Constable of Sussex Police* [2008] UKHL 25; [2008] 1 AC 962 at [22], referring to *Chester v Afshar* [2005] 1 AC 134. See also para 14 above.

73 *Ashley v Chief Constable of Sussex Police* [2008] UKHL 25; [2008] 1 AC 962 ("*Ashley*") at [22] and [60]. *Ashley* itself was not such a case, given that the trial court had rejected the claim for assault and battery when awarding compensatory damages.

74 See, *eg*, Lews N Klar, *Tort Law* (Toronto: Carswell, 4th Ed, 2008) and Maurice A Millner, *Negligence in Modern Law* (London: Butterworths, 1967). For a more equivocal analysis, see W V H Rogers, *Winfield & Jolowicz on Tort* (London: Sweet & Maxwell, 17th Ed, 2006) at p 123. Rogers suggests that while many might think the victim of negligently inflicted imprisonment should be entitled to some redress "he has not obviously suffered what amounts to 'damage' for the purposes of the law of negligence – though it is arguable that one could include within that concept the loss of liberty for a substantial time".

75 Peter G Heffey, "Negligent Infliction of Imprisonment: Actionable '*Per Se*' or '*Cum Damno*'?" (1983) 14 MULR 53 at 61.

76 See, *eg*, W V H Rogers, *Winfield & Jolowicz on Tort* (London: Sweet & Maxwell, 17th Ed, 2006). See also Donal Nolan, "New Forms of Damage in Negligence" (2007) 70(1) MLR 59 at 66–67. While agreeing that there is much to be said for using negligence as the vehicle for claims arising from negligently inflicted detention, Nolan also concludes that there are some problems associated with treating deprivation of liberty as damage in its own right in cases where the period of detention is extremely brief or where the claimant is unaware of his detention. He observes that although, in such scenarios, nominal damages could be awarded in an action for trespass, the same would not be true for an action founded, as negligence is, on proof of damage.

argument that the wrong done in such cases is even more serious than that in the medical negligence cases where damages are awarded (whether directly or indirectly) for diminishing a claimant's autonomy. For this reason, a duty should be owed not to deprive a person of his or her liberty, and in order to avoid this duty being hollow its breach should result in compensation which reflects the gravity of the wrong.

III. Thus far and no further?

22 Damage is now recognised as compensable in a number of circumstances where once it would not have been. It would, however, be premature to see these circumstances as presaging an unambiguous trend. Indeed, in the majority of what might be described as "rights-based" claims, damage continues to be defined in a narrow and exclusionary manner. Thus, for example, actions with respect to emotional harm which is not consequential on physical damage fail on the basis that the various human emotions are too prevalent to be compensable, with the result that even extreme grief,[77] terror at the prospect of imminent death[78] and anxiety that one will develop a life-threatening condition due to the risk created by negligent exposure to a toxic substance[79] fall outside the realm of compensable harm. Moreover, other actions, such as claims for wrongful life, where it is argued that a child's existence is so blighted that it ought never to have been born, are rejected out of hand on moral and ethical grounds.[80]

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77 See, *eg*, *Man Mohan Singh s/o Jothirambal Singh v Zurich Insurance (Singapore) Pte Ltd* [2008] 3 SLR(R) 735, where the parents of two teenage boys killed in a road accident caused by the defendant's negligence were unable to succeed in their claim for profound and debilitating grief not amounting to psychiatric injury.

78 See, *eg*, *Hicks v Chief Constable of South Yorkshire* [1992] 2 All ER 65, in which the parents of two teenage girls killed in the Hillsborough football stadium disaster brought a claim against the police for damages in respect of the fear and terror the girls must have suffered in the minutes before they died. In the House of Lords, Lord Bridge observed (at 69):

> It is perfectly clear that fear by itself, of whatever degree, is a normal human emotion for which no damages can be awarded. Those trapped in the crush at Hillsborough who were fortunate enough to escape without injury have no claim in respect of the distress they suffered in what must have been a truly terrifying experience. It follows that fear of impending death felt by the victim of a fatal injury before that injury is inflicted cannot by itself give rise to a cause of action …

79 See *Rothwell v Chemical & Insulating Co Ltd* [2007] UKHL 39; [2007] 3 WLR 876.

80 See, *eg*, *JU v See Tho Kai Yin* [2005] 4 SLR(R) 96 where Lai Siu Chiu J in the High Court of Singapore observed (at [96]): "At common law, a disabled child has no cause of action for [wrongful life] … Such claims would be contrary to public policy as a violation of the sanctity of life." In a similar vein, see the judgment of Hayne J in the High Court of Australia in *Harriton v Stephens* (2006) 226 ALR 391. Hayne J opined (at [171]) that the only way to conclude that a disabled or abnormal claimant had suffered damage would be through a comparison of his

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23 Perhaps even more significantly, in *Gregg v Scott*[81] ("*Gregg*") the House of Lords also rejected the argument that medical negligence which deprives a patient of a less than 51% chance of recovery from an illness or injury should give rise to a cause of action. At first blush, this might appear to be somewhat surprising, given the openly rights-oriented decision in *Chester*, which was decided just a short while before *Gregg*. However, the refusal to take a similarly patient-friendly approach in medical loss of chance cases stems from fear that the fabric of civil law actions would be irreparably undermined by a relaxation of the balance of probabilities requirement. For this reason, their Lordships in *Gregg* (albeit by a bare majority) followed their own earlier decision in *Hotson v East Berkshire Area Health Authority*[82] and held that an action for the loss of a chance due to medical negligence can succeed only where that negligence has, on the balance of probabilities, deprived the claimant of a better than 50% chance of recovery.

24 Although in *Gregg*, Lord Nicholls, one of the two minority judges, echoed the sentiments of Lord Hope in *Chester*[83] when he described as hollow the duty owed by a doctor to his patient in a situation where the patient does not have a better than even chance of recovery in the first place,[84] the majority took the view that claims for mere loss of chance cannot be allowed. Observing that damage is the gist of the action in negligence,[85] Baroness Hale concluded that to allow claims based not on damage itself, but on a reduced opportunity to avoid damage, would result in a "heads you lose everything, tails I win something"[86] situation for claimants. While acknowledging that cases

"past, present and expected physical and intellectual state and capacities" with those of a person who did not suffer from those disabilities or abnormalities. He went on to conclude (at [172]) that this could not be done, given that the claimant in a wrongful life action "cannot ever have had and could never have had a life free from the disabilities". Other judges, such as Ackner LJ in *McKay v Essex Area Health Authority* [1982] QB 1166 at 1189 have focused on the fact that wrongful life claims are premised on the assertion that the claimant should never have been born at all, thus raising the question of how a court can "begin to evaluate non-existence, the undiscovered country from which no traveller returns".

81 [2005] UKHL 2; [2005] 2 WLR 268. The claimant, who suffered from non-Hodgkin's lymphoma, would have had a 42% chance of disease-free survival for ten years had his condition been diagnosed when he first consulted his doctor. However, as a result of the doctor's negligent failure to diagnose the condition in a timely manner, the prospect of survival for ten years was reduced to 25% by the time the claimant commenced treatment some nine months later.

82 [1987] AC 750.

83 See para 14 above.

84 *Gregg v Scott* [2005] UKHL 2; [2005] 2 WLR 268 at [3]–[4].

85 *Gregg v Scott* [2005] UKHL 2; [2005] 2 WLR 268 at [193].

86 *Gregg v Scott* [2005] UKHL 2; [2005] 2 WLR 268 at [224].

such as *Chester*[87] had modified well-settled principles of causation and damage, her Ladyship distinguished such authorities on the basis that they dealt with particular problems which could be addressed without altering the general principles governing damages in the majority of personal injury claims – something which would not be true of actions for loss of chance. And although Lord Phillips conceded the possibility of awarding damages "proportionate to the increase in the chance of an adverse outcome"[88] in situations where a patient had actually suffered physical damage, he considered that it would not be a satisfactory exercise to award damages for the reduced prospect of a cure when the long-term result of the treatment was still uncertain.[89] In the wake of *Gregg*, the High Court of Australia has also rejected claims for loss of chance in medical negligence situations in the case of *Tabet v Gett*,[90] and the Canadian courts adopt a similar approach.[91]

25 The refusal to recognise loss of chance as amounting to recognisable damage does not, however, apply across the board. Courts in several jurisdictions have allowed actions by claimants who have been deprived by defendants of the opportunity to gain an economic benefit based on the hypothetical action of a third party,[92] and in the post-*Gregg* decision of the English Court of Appeal in *Wright v Cambridge Medical Group*[93] ("*Wright*") – which concerned the hypothetical act of a third party in the context of medical negligence[94] – Lord Neuberger MR indicated that the reasoning in *Gregg* did "not conclusively shut out"[95]

87 Both Baroness Hale and Lord Hoffmann (another of the majority judges) also referred to *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32, the first of the cases in which the House of Lords modified the rules on causation.

88 *Gregg v Scott* [2005] UKHL 2; [2005] 2 WLR 268 at [190].

89 *Gregg v Scott* [2005] UKHL 2; [2005] 2 WLR 268 at [190]. One of the factors which complicated the determination of the issue was that by the time the appeal came before the House of Lords, the claimant had almost reached the ten-year survival mark.

90 [2010] HCA 12; (2010) 240 CLR 537.

91 See, *eg*, *Laferrière v Lawson* [1991] 1 SCR 541, as applied in *Lévesque v Hudon* 2013 QCCA 920.

92 See, *eg*, the decision of the English Court of Appeal in *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602, and, albeit in a contractual context, the decision of the Singapore Court of Appeal in *Asia Hotel Investments Ltd v Starwood Asia Pacific Management Pte Ltd* [2005] 1 SLR(R) 661.

93 [2011] EWCA Civ 669.

94 In *Wright v Cambridge Medical Group* [2011] EWCA Civ 669, an action was brought on behalf of a child claimant who suffered injury to her hip and leg following a delay by the defendant medical practice in referring her to a hospital, where subsequent delays to her treatment caused her permanent damage. For reasons which were not discussed in the case, no action was brought against the hospital.

95 *Wright v Cambridge Medical Group* [2011] EWCA Civ 669 ("*Wright*") at [84]. Elias LJ and Dame Janet Smith also considered *Gregg v Scott* [2005] UKHL 2;

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the possibility of a loss of chance approach in such circumstances.[96] Although his Lordship ultimately held that for reasons of "certainty and consistency"[97] it would not be right to distinguish *Gregg* and treat *Wright* as a loss of chance case,[98] he nevertheless suggested that the Supreme Court might wish to reconsider whether it was appropriate to treat all medical loss of chance cases in the same way.[99] Following the decision in *Wright*, it has been proposed that in cases which turn on a breach of the medical duty to refer, the gist of negligence should be the lost chance which results from the breach.[100]

IV. Conclusion

26 A more liberal approach to the definition of what constitutes recoverable damage – particularly in the area of medical negligence – has been adopted in a range of circumstances. However, it is difficult to discern from the various circumstances any distinct philosophy or consistent pattern. It is, for example, by no means universally agreed that pregnancy and childbirth (even if unplanned and unwanted) actually amount to physical damage, yet they give rise to an award of damages nonetheless. And while the related – though independent – award of a conventional sum for an unplanned addition to one's family appears to recognise loss of autonomy as a form of recoverable damage in its own right, the same is not true of *Chester*-type non-disclosure of medical risk cases, where the courts avoid the issue by notionally compensating not for the loss of autonomy itself, but for the non-negligently inflicted physical damage. In addition, although in the rather different scenario of negligently inflicted detention the courts appear

[2005] 2 WLR 268 to be theoretically distinguishable on the basis that the facts of *Wright* involved the hypothetical action of a third party.

96 See, *eg*, the judgment of Lord Hoffmann in *Gregg v Scott* [2005] UKHL 2; [2005] 2 WLR 268 at [72]–[90]. While not endorsing the prospect of claims involving the hypothetical acts of third parties in medical negligence cases, his Lordship did not definitively exclude the possibility.

97 *Wright v Cambridge Medical Group* [2011] EWCA Civ 669 at [84].

98 Lord Neuberger instead based his decision on the ground that the defendant's negligence in failing to make a timely referral was a causative factor in the claimant's damage, and that it was not open to the defendant to argue that the hospital's negligence had broken the chain of causation: *Wright v Cambridge Medical Group* [2011] EWCA Civ 669 at [36]–[46]. Dame Janet Smith (at [131]) similarly decided the case on the basis that "the [defendant's] delay … severely curtailed the window of opportunity for the hospital team to diagnose and treat [the claimant] appropriately". However, Elias LJ, in the minority, took the view (at [97]) that "since the claimant would still have been in the same position … even had the doctor referred her [earlier] … the causal link between negligence and damage does not exist".

99 *Wright v Cambridge Medical Group* [2011] EWCA Civ 669 at [84].

100 See Kumaralingam Amirthalingam, "Causation and the Medical Duty to Refer" (2012) 128 LQR 208 at 211.

willing in principle to accept deprivation of liberty as actionable, there has been little discussion of the precise basis for such a claim or the way in which the definition of damage might be framed. Moreover, the number of situations in which the courts maintain their refusal to widen the characterisation of recoverable damage is evidence of the inappropriateness of a one-size-fits-all analysis.

27 Yet while the search for common characteristics in these evolving categories may not be particularly fruitful, a number of discernible themes can be identified. The first, and most prevalent, is an increasingly rights-based approach to negligence – a phenomenon which is particularly apparent in the recognition of rights associated with personal autonomy. The second, associated, theme is the desirability of ensuring that, once a right is recognised, it is not hollow but gives rise to a remedy which reflects the seriousness of the wrong which has been done. Finally, some cases suggest the possibility – albeit as yet largely unarticulated – that the tort of negligence may be assuming a regulatory role.

28 At present, however, the more expansive approach to damage is still at a developmental stage, with the result that the reasoning process employed by the courts is often somewhat oblique. Indeed, while the recognition of a more rights-based approach permeates just about all the cases, the only situation in which the invasion of a right appears, in itself, to be regarded as recognisable damage is that where a conventional sum is awarded for loss of autonomy through the addition of an unplanned child to one's family – and even then the discussion of damage is, at best, somewhat ambiguous.[101] In none of the other cases is the infringement of rights actually treated as constituting recoverable harm.[102] In the majority of situations, the courts find ways to bring the infringed right within the existing framework of damage, even though this requires them to skirt around the true basis for the decision. This they do either by reasoning creatively, and, as in *Chester*, drawing an artificial connection between the infringed right and the claimant's physical injury, or by glossing over details which might be expected to render the particular damage irrecoverable, as in the pain and suffering during childbirth cases and the negligently inflicted detention cases, where an assumption appears simply to be drawn that the consequence of the defendant's act either amounts to, or can be equated with, recognisable harm.[103]

101 See discussion at paras 8–11 above.

102 Although conversely, where recognisable damage *can* be established, a claimant may also be entitled to a separate action in trespass to vindicate an infringed right. See discussion at para 20 above.

103 See discussion at paras 4–7 and 18–21 above.

29 While, therefore, the increasing number of situations in which the courts now allude to the vindication of rights and the protection of autonomy points to an underlying basis for recovery which would once have been considered too nebulous to be entertained, it is too early to predict a future in which the infringement of rights will enjoy the status of a distinct and independent form of damage. The coming decades will doubtless reveal whether the more open-minded approach to damage which is apparent in the situations discussed in this article translates to a substantially expanded definition of damage, or whether it merely leads to greater innovation in the interpretation of the existing one.