This is a repository copy of Judicial reasoning and the concept of damage: Rethinking medical negligence cases.

White Rose Research Online URL for this paper: http://eprints.whiterose.ac.uk/136160/

Version: Accepted Version

Article:

https://doi.org/10.1177/0968533215619468

© 2015, The Author(s). This is an author produced version of a paper published in Medical Law International. Reprinted by permission of SAGE Publications.

Reuse
Items deposited in White Rose Research Online are protected by copyright, with all rights reserved unless indicated otherwise. They may be downloaded and/or printed for private study, or other acts as permitted by national copyright laws. The publisher or other rights holders may allow further reproduction and re-use of the full text version. This is indicated by the licence information on the White Rose Research Online record for the item.

Takedown
If you consider content in White Rose Research Online to be in breach of UK law, please notify us by emailing eprints@whiterose.ac.uk including the URL of the record and the reason for the withdrawal request.
Judicial Reasoning and the Concept of Damage: Rethinking Medical Negligence Cases

CRAIG PURSHOUSE*

Abstract – 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 article examines three important decisions where new forms of damage, such as the costs of raising a healthy child or loss of autonomy, have been implicitly recognized or rejected – McFarlane v Tayside Health Board, Rees v Darlington and Chester v Afshar – and 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 the tort of negligence. Methods of restoring clarity to this tort are then addressed.

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

* School of Law and Social Justice, University of Liverpool. I am very grateful to Professor Margaret Brazier, Dr Sarah Devaney and Professor John Murphy for helpful feedback on an earlier version of this article. All views and mistakes remain my own. This article has been published online before print in Medical Law International (2015) 10.1177/0968533215619468. Please cite that version.

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.
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 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

---

5 Ibid. at 25 per Lord Wright.
6 [1999] 2 AC 455.
7 At 492.
10 [1973] 1 QB 27.
11 Ibid. at 37.
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.

These decisions have been, to put it mildly, controversial, having separately been described as ‘incoherent,’\(^{15}\) ‘push[ing] the law of tort into wholly unchartered 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

\(^{13}\) [2004] 1 AC 309.
\(^{14}\) [2005] 1 AC 134.
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.

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 injury\(^{21}\) (including psychiatric harm),\(^{22}\) property damage\(^{23}\) and, in very limited circumstances, pure economic loss.\(^{24}\) The more important interests – physical injury and property damage – are protected more liberally\(^{25}\) than those that the courts deem less important – psychiatric harm\(^{26}\) 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

\(^{19}\) See Nolan, ‘New Forms of Damage in Negligence’ and ‘Damage in the English Law of Negligence’.


\(^{21}\) See Perrett v Collins [1999] PNLR 77.


\(^{25}\) 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].
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 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.

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 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

---

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’.
31 At 619.
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.
permitted the costs associated with raising a healthy child to be recovered and dismissed the parents’ claim.\(^{34}\)

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 contract\(^ {40}\) 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


\(^{35}\) 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.

permitted in the pre-McFarlane case of Allen v Bloomsbury HA, an expensive private school. It is therefore unsurprising that the result has been subject to stinging academic commentary.

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, ‘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.’ 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’ between the claimant and defendant; and (3) it is ‘fair, just and

---

43 [1992] PIQR Q50 at Q62 per Brooke J.
45 [1990] 2 AC 605.
46 At 635.
47 At 618 per Lord Bridge.
reasonable’ 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.’

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 and applies to cases of pure economic loss where there has been an ‘assumption of responsibility’ 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’ between the claimant and defendant, and the defendant has ‘voluntarily accepted or undertaken’ 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’ and there must be reliance on the advice by the claimant that is reasonable in the circumstances. This category of cases first developed where negligent misstatements had occurred but now extends to negligent services.

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.’ 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.
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.
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.\textsuperscript{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.\textsuperscript{59} As Lord Steyn stated in Williams v Natural Life Health Foods\textsuperscript{60} – echoing Lord Goff’s comments in Henderson v Merrett Syndicates\textsuperscript{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.’\textsuperscript{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.’\textsuperscript{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 Hope\textsuperscript{64} and Lord Slynn\textsuperscript{65} in the majority.\textsuperscript{66}

\textsuperscript{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.
\textsuperscript{59} Caparo at 618 per Lord Bridge.
\textsuperscript{60} [1998] 1 WLR 830.
\textsuperscript{61} [1994] 2 AC 145 at 181.
\textsuperscript{62} Williams at 834.
\textsuperscript{63} McFarlane at 83 (my emphasis).
\textsuperscript{64} At 95.
\textsuperscript{65} At 76.
\textsuperscript{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 case\textsuperscript{67} – 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.\textsuperscript{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.’\textsuperscript{69} Importantly, this approach has been confirmed by more recent cases. In Customs and Excise Commissioners v Barclays\textsuperscript{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.’\textsuperscript{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

\begin{footnotesize}
\begin{enumerate}
\item 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.
\item See Perrett at 86 per Hobhouse LJ.
\item At 90-91.
\item [2006] 1 AC 181.
\item At 190. See also Keith Stanton, ‘Professional Negligence: Duty of Care Methodology in the Twenty First Century’ (2006) 22 Professional Negligence 134, 136.
\end{enumerate}
\end{footnotesize}
need to be set aside.\textsuperscript{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.’\textsuperscript{73}

Given that the Hedley Byrne line of cases do not ask whether recovery is fair, just and reasonable whereas such questions are the \textit{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 \textit{Anns v Merton LBC}.\textsuperscript{74} The courts could hardly have been more emphatic in their rejection of it.\textsuperscript{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

\textsuperscript{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).

\textsuperscript{73} McFarlane at 83-84.

\textsuperscript{74} [1978] AC 728 at 751-752.

by holding that a healthy child is not a recoverable form of loss. No duty of care can exist if no
damage has been suffered. 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.’ 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.’

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’ by being paid a large amount of
damages because this would ‘be going beyond what should constitute a reasonable restitution
for the wrong done.’ This approach is echoed by Lord Millet 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.’

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 do – with the outcome of their judgments, it is a more coherent

---

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
77 McFarlane at 102.
78 At 99 per Lord Clyde.
79 At 105.
80 At 105.
81 At 108 per Lord Millett.
82 See Priaulx ‘Joy to the World!’, Adjin-Tettey, ‘Claims of Involuntary Parenthood’ and Chico, ‘Wrongful
Conception’, 154.
way of reaching it. In future, judges should determine what (and whether) damage has been suffered before addressing duty of care questions.

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.

---

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.\textsuperscript{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,\textsuperscript{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).\textsuperscript{87} Similarly, the Court of Appeal in Rees,\textsuperscript{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).\textsuperscript{89}

The House of Lords in Rees, sitting as a panel of seven, refused to utilise the Practice Statement\textsuperscript{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

\textsuperscript{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.
\textsuperscript{86} [2002] QB 266.
\textsuperscript{87} At 283 per Brooke LJ.
\textsuperscript{88} Rees v Darlington Memorial Hospital NHS Trust [2003] QB 20 (Waller LJ dissenting).
\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{94} There is evidence to support this in the judgments. Lord Bingham, for example, states

\begin{itemize}
\item \textsuperscript{91} The House of Lords did not overrule Parkinson and so the extra costs associated with raising a disabled child are still recoverable.
\item \textsuperscript{92} Rees at 319 per Lord Nicholls.
\item \textsuperscript{93} See Priaux, The Harm Paradox and Adjin-Tettay, ‘Claims of Involuntary Parenthood.’
\item \textsuperscript{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 4\textsuperscript{th} 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.
\end{itemize}
that the conventional award is ‘not be intended to be compensatory.’ 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.

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. 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’ and Lord Scott stating that the award is to ‘compensate the respondent for being deprived of the benefit that she was entitled to expect.’

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 Gambling¹⁰² 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

---

¹⁰¹ Ibid., 413.
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.
are worth more than another’s or have grieving relatives cross-examined on the level of 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 if 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 scientific method of deciding

---

108 West at 369 per Lord Pearce.
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.
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 damage. I will discuss this aspect of the reasoning in Rees together with my analysis of Chester.

¹¹⁶ Rees at 335.
¹¹⁷ At 327.
¹¹⁸ See ch 7.
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. 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 in this case. As a result, problems arise in the court’s treatment of causation and quantification of loss.

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.
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 modern law medical paternalism no longer rules.’124 Lord Walker125 and Lord Hope agreed.126 Indeed, even

---

120 See Nolan, ‘New Forms of Damage in Negligence’ and ‘Damage in the English Law of Negligence’; Chico, Genomic Negligence; Priaulx, The Harm Paradox; and ch 5 and 7 of this thesis.
121 Holm, ‘Autonomy’.
122 Chester at 146.
123 Ibid.
124 At 143.
125 At 163.
126 At 153-154.
Lord Hoffmann (dissenting) believed that there might be a case – albeit one he rejected – for a ‘modest solatium’ 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.’

Some writers go further. For example, Amirthalingham argues that Chester recognises diminished autonomy as a form of damage in negligence. 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.’

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 Hoffmann’s modest solatium might have been more consistent with the decision in Rees as it would likely be a standard amount of

---

127 At 147.
129 See Pearce and Halson, ‘Damages for Breach of Contract’ 98 and Murphy and Witting, Street on Torts, 159.
131 Amirthalingham, ‘Causation and the Gist of Negligence’, 34.
damages for interferences with autonomy across the tort of negligence (not unlike the conventional award). 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.’ 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.

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 Alloys Ltd v Martin & Co Ltd, 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

---

132 Chester at 147.
133 Rees at 334.
134 Chico, Genomic Negligence, 134.
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) 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

\(^{136}\) See also Muirhead v Industrial Tank Specialities Ltd [1986] QB 507.
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 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

137 [2015] UKSC 11
be done with their body.’ 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.’

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. 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.’ If this cannot be established then, unless the claimant can demonstrate that their case fits into one of a limited number of exceptional rules, causation has not been proven. If factual causation can be demonstrated, one will then look to

---

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.
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.
whether the damage was too remote or whether any intervening acts broke the chain of causation 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. 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. 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. 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 problem.’ 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.

144 See, e.g. Knightley v Johns [1982] 1 WLR 349.
146 Stapleton, ‘Occam’s Razor’, 430.
147 Gregg at 186 per Lord Nicholls.
Given this 98-99 per cent chance it is more likely than not that she would have avoided the damage. 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.’ This was the basis on which the minority in Chester rejected her claim and this view has also gained academic support. 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. One the one hand, while cases such as McGhee v National Coal Board and Fairchild v Glenhaven Funeral Services Ltd 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.

150 Chester at 161 per Lord Hope.
then the defendant has caused the claimant’s damage. If this is true then Mr Afshar would have
caued 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 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

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.
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.

**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.

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

---

\(^{156}\) [2005] 1 AC 176.
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 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 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.’ \(^{162}\)

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

\(^{159}\) At 783 per Lord Bridge and at 793 per Lord Ackner.

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.

\(^{163}\) 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.
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 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.

165 At 779 per Lord Pearce.
166 See McLoughlin v O’Brian [1983] 1 AC 410 at 431 per Lord Bridge.
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.
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.\(^\text{168}\)

While this statement may be inconsistent with the traditional view that damage is a question of fact,\(^\text{169}\) 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.

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.\(^\text{170}\) 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.\(^\text{171}\)

---

\(^\text{168}\) At 112.
\(^\text{169}\) Cartledge v Jopling & Sons Ltd [1963] AC 758.
On the other hand, it is equally important that the law be ‘just and move with the

times.’\textsuperscript{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.\textsuperscript{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.\textsuperscript{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
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.\textsuperscript{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

\textsuperscript{172} Lord Reid, ‘The Judge as Law Maker’ (1997) 63 Arbitration 180, 182.
\textsuperscript{173} Ibid., 183.
\textsuperscript{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
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.

**CONCLUSION**

Lord Scarman described damage as the gist of the action in negligence.\(^\text{176}\) Subsequent Law Lords appear to disagree. In important medical negligence cases such as McFarlane, Rees 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.’\(^\text{177}\) He believed
that ‘the difference in method is not of great importance. In this case the two concepts yield
the same results.’\(^\text{178}\)

\(^{176}\) Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital [1985] AC 871 at 883.
\(^{177}\) Rees at 323.
\(^{178}\) Ibid.
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.