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Citation for final published version:

Priault, Nicky 2017. Reproducing the properties of harms that matter: the normative life of the damage concept in negligence. *Journal of Medical Law and Ethics* 2017 (1 Apri) , 1.

Publishers page: <http://www.uitgeverijparis.nl/reader/199700/100131...>

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Forthcoming, *Journal of Medical Law and Ethics*, 2017

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# Reproducing the Properties of Harms that Matter: The Normative Life of the Damage Concept in Negligence

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## ABSTRACT

The overarching theme of this work is the extent to which the damage concept within the law of negligence reflects our human and social experience of personal harm and injury – and critically, the extent to which the current grammar of negligence law permits it to. My claim is that if the concept of damage is a *normative* one – one itself imbued with ideals of social justice and equality, directed towards treating like cases alike – then the law of negligence will treat the human experiences that accompany different forms of putative damage as stuff central to the damage enquiry. As I seek to argue here, that notion that the damage concept is a normative one, open to new situations in which it can be shown that individuals are left ‘appreciably worse off’, is the stuff of legal myth. Centralising the reproductive tort cases which have proved dominant in the theorisation of harm I illustrate how traditional understandings of damage as physical hurts and mediated through ‘common sense’ understandings of loss have rendered irrelevant the psycho-social and practical factors which prove crucial to an enquiry in assessing *whether* individuals are left appreciably worse off. The thrust of the argument is that because the very grammar of the damage concept fails to engage with individuals’ biographies – the “stuff” that gives meaning to the harms they have sustained – it impacts hard not only on the ‘damage’ question as to *whether* particular harms *should* be embraced within negligence on normative grounds but on the extent to which negligence itself can be said to have normative traction capable of delivering results that are fair, capable of producing horizontal justice and treating like cases alike.

# Reproducing the Properties of Harms that Matter: The Normative Life of the Damage Concept in Negligence

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Inescapably the state must sort out from the frenetic bustle of the world what amounts to a compensable or remediable injury and what does not.<sup>1</sup>

How much worse off must one be? An action for compensation should not be set in motion on account of a trivial injury. *De minimis non curat lex*. But whether an injury is sufficiently serious to found a claim for compensation or too trivial to justify a remedy is a question of degree. Because people do not often go to the trouble of bringing actions to recover damages for trivial injuries, the question of how trivial is too trivial has seldom arisen directly.<sup>2</sup>

Law's conventional approach to regulating bodily interventions has been to consider the body as an *object* of analysis rather than as a *category* of analysis. In our view, legal analysis could offer a richer understanding of law's engagement with bodies and bodily materials if it adopted a thicker conception of embodiment.<sup>3</sup>

## Introduction

The overarching theme of this work is the extent to which the damage concept within the law of negligence reflects our human and social experience of personal harm and injury – and critically, the extent to which the current grammar of negligence law permits it to. My claim is that if the concept of damage is a *normative* one – one itself imbued with ideals of social justice and equality, directed towards treating like cases alike – then the law of negligence will treat the human experiences that accompany different forms of putative damage as stuff central to the damage enquiry. Of course, it is well known that the tort of negligence does not (and cannot) offer universal coverage in responding to harm; not all harms considered *harmful* in the social world translate into legal damage. This is the by-product of a system that inevitably must make choices and must possess boundaries to be a system. In itself, the drawing of lines is not destructive to the conception of damage being regarded as a normative

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<sup>1</sup> JK Lieberman 'The Relativity of Injury', *Philosophy and Public Affairs* 7 (1977) 60-73, 63.

<sup>2</sup> *Rothwell v Chemical and Insulating Company Limited and others; Johnston v NEI International Combustion Limited; Topping v Benchtown Limited; Grieves v F T Everard & Sons and others* [2007] UKHL 39, para. 8 (*per* Lord Hoffman); hereafter '*Rothwell*'.

<sup>3</sup> R Fletcher, M Fox & J McCandless 'Legal Embodiment: Analysing The Body of Healthcare Law' (2008) 16 *Medical Law Review* 321-345, 321.

one,<sup>4</sup> even if on view of an isolated case, one might believe the result produced to be unfair or arbitrary. Rather, in evaluating whether the damage concept is normatively charged, my focus is less on the drawing of lines, but on the substance that guides where those lines are and should be drawn. Centralising a range of cases which have proved interesting to the courts by virtue of the inherent nature of the harm, this paper explores the quality of the account given as to where the boundaries of the damage concept are drawn. Analysis of ‘the account’ consists of two intersecting elements. First, close attention is paid to the kinds of markers that the courts deploy which give sense to what ‘damage’ means – for example, seriousness of injury might be one such reason for accommodating some harms but not others; the second element concerns the framing of particular harms in this process. As I seek to highlight in this article, this latter aspect of the enquiry proves critical in evaluating the normative scope of the damage concept. Putative markers such as seriousness, or indeed, being left ‘appreciably worse off’ can quickly lose their normative potential depending on what aspects of a claimant’s harm and experience the law ‘sees’ or is capable of seeing.

In exploring the normativity of the damage concept, my interest is less on those kinds of harms that law now recognises but treats restrictively, notably claims involving purely psychological damage,<sup>5</sup> but on a number of broader situations arising under English law which have triggered some extended debate in the courts around the question as to whether an actionable legal harm, notably “damage”, has been sustained. These cases, which for want of a better term are referred to here as ‘damage hybrids’, have the look and flavour of a conventional personal injury but resonate in a kind of harm that fails to fit orthodox categories. Because of their hybrid nature, courts have struggled to typify the damage sustained. As will be seen, the kinds of harms falling within this contentious category arguably reflect aspects of the difficult historical trajectory that the psychological damage cases have travelled in order to be accommodated within negligence, and for unremarkably similar reasons: the situations focused on here possess a strong psycho-social character rather than squarely fitting what negligence is said to demand in order to establish the existence of damage to persons, notably, *physical bodily* harm.

The question of whether damage has been sustained at all is clearly a fundamental one, not only because this is an essential prerequisite for an actionable claim in negligence, but because that question also demands a court to assess what, for the purposes of negligence liability, *should* or *should not* count as cognisable harm. This

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<sup>4</sup> It may be that an action fails for other reasons, such as the absence of other critical ingredients that mark out the boundaries of responsibility. In social life while it may seem evident that a very serious harm has been sustained, some claims may fail for a range of other, and quite valid reasons including the absence of a responsible party to blame, or because the causal link between the breach and the outcome harm cannot be established on the balance of probabilities. However, what is of interest here, are those kinds of personal harms which struggle to gain attention in negligence by virtue of the inherent nature of the harm itself.

<sup>5</sup> This category of action has attracted a voluminous literature; for a recent and fascinating exploration of the subject, see H Teff *Causing Psychiatric and Emotional Harm: Reshaping the Boundaries of Legal Liability* (Oxford: Hart Publishing 2009).

is, of course, a normative question – and it is the normative capacity of this central concept that I come to question here. This is a novel, but critical enquiry. While a growing body of legal scholarship creatively deploys the concept of harm as a hermeneutic in a range of ways, for exploring the position of typically neglected subjects before the law (for example, women and ethnic minorities),<sup>6</sup> the potential impact of technological and clinical innovation which raises fresh opportunities but new risks of harms being caused in novel ways,<sup>7</sup> or indeed, the impact of human rights on negligence in mobilising constitutionalised forms of harm<sup>8</sup> – all areas which demonstrate the uncertain and often difficult boundaries of the concept of damage in practice - what is missing from this field of inquiry is a critique which speaks in more general terms about the concept of damage, its nature and life within the tort of negligence.

The absence of that kind of over-arching critique may well reflect how discussion around the damage concept remains relatively new legal territory in common law jurisdictions.<sup>9</sup> That is so for scholarship, as well as the courts.<sup>10</sup> Indeed, it would seem to be a fairly recent matter that the concept of damage has been added to the panoply of practitioner strategies for mounting new and innovative legal challenges. From a position where scholars felt able to assert that the question of what amounts to ‘damage’ seemed ‘self-evident’ or a matter of ‘common-sense’,<sup>11</sup> a variety of social, technological and clinical norms are serving to generate fresh questions about what it means to be harmed. In turn, these push hard at the boundaries of what counts as ‘damage’ in law. This new genus of claims that seek to ease (or ‘stretch’) the damage concept away from the ‘obvious’ prove central to the current paper. These cases provide an important opportunity for us to become more thoughtful about damage as a concept and the way that it defines the scope and boundaries of negligence itself. In cases where ‘damage’ has proved central, courts have been forced to reveal some of their analytical cards, at least in defining what constitutes ‘actionable damage’. What we see is a stubborn preference for interpreting damage and personal injury as narrowly meaning harms sustained physically and bodily, with continued suspicion surrounding harms falling short of that – despite these often looking every bit as ‘concrete’ and ‘serious’ at the point of commission, and just as corrosive (perhaps more so in many instances) of life in their consequences. An analysis of the

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<sup>6</sup> See for example, J Conaghan, ‘Law, Harm and Redress: A Feminist Perspective’ (2002) *Legal Studies*, 22, 319-339; M Chamallas & J Wriggins *The Measure of Injury: Race, Gender and Tort Law* (New York: New York University Press 2010); R Graycar & J Morgan, J *The Hidden Gender of Law* (Sydney: Federation Press 2002); D Scott ‘Injurers without Remedies: Body Polluted: Questions of Scale, Gender and Remedy’ (2010) *Loyola of Los Angeles Law Review* 121-156.

<sup>7</sup> V Chico, *Genomic Negligence: An Interest in Autonomy as the Basis for Novel Negligence Claims Generated by Genetic Technology* (Routledge Cavendish 2011).

<sup>8</sup> D Nolan ‘New Forms of Damage in Negligence’. (2007) *Modern Law Review*, 70(1), 59-88.

<sup>9</sup> M Chamallas, ‘Theorizing Damage through Reproductive Torts’, (2015) *JOTWELL* <http://torts.jotwell.com/theorizing-damage-through-reproductive-torts/>.

<sup>10</sup> See the dicta of Lord Hoffman at para 8, above note 2.

<sup>11</sup> PS Atiyah *The Damages Lottery* (Oxford: Hart Publishing 1997); see also David Nolan’s (above n 8) discussion which touches upon the question around the analytical attention to the damage concept.

assumptions informing such deliberations can tell us much about the extent that law connects with our social experience of being human, about the defensibility of the lines drawn in establishing what counts as damage and injury, and ultimately, it can also tell us about the limits of the law.

How the courts have interpreted concepts of damage and injury in assessing which kinds of harms may or may not be admitted is undoubtedly problematic, particularly when viewed with the benefit of exploring the social and psychological experience of injury. But the significance of what that means for the tort of negligence as a fair and principled arbiter of what *ought* to count as damage, is the particular focus. As I seek to argue here, that notion that the damage concept is a normative one, open to new situations in which it can be shown that individuals are left ‘appreciably worse off’, is the stuff of legal myth. My legal lab for analysis consists of a range of cases, in particular the expanding category of the reproductive torts which has proved dominant in the theorisation of harm as played out through case law and debated in scholarly and practitioner communities. Through these cases, what I seek to illustrate is how traditional understandings of damage as consisting of essentially physical hurts, mediated through ‘common sense’ understandings of loss have rendered irrelevant the psycho-social and practical factors which prove utterly crucial to an enquiry in assessing *whether* individuals are left appreciably worse off. The thrust of the argument is that because the very grammar of the damage concept fails to engage with individuals’ biographies – that is the very “stuff” that gives meaning to the harms they have sustained – it impacts hard not only on the ‘damage’ question as to *whether* particular harms *should* be embraced within negligence on normative grounds but on the extent to which negligence itself can be said to have normative traction capable of delivering results that are fair, capable of producing horizontal justice and treating like cases alike.

## What Counts as Damage

Unlike the torts of trespass or libel which are actionable *per se*, in the law of negligence, ‘damage’ holds a central role and is said to form the ‘gist of the action’.<sup>12</sup> A claimant not only needs to establish a duty of care, a breach of that duty, and that the breach has caused the damage complained of – she must also show that the *type* of harm she has suffered is one that is accepted by the law as ‘actionable’. While the concept of ‘damage’ is poorly defined in negligence, the suffering of a ‘plain and obvious physical injury’ presents no problem.<sup>13</sup> Therefore, gastroenteritis suffered through swallowing parts of a snail in a bottle of ginger beer or cancer suffered through exposure to asbestos in the workplace, will most certainly constitute physical harms for the purposes of negligence.<sup>14</sup> Yet beyond these so-called ‘obvious’ items,

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<sup>12</sup> J Stapleton, ‘The Gist of Negligence’ (1988) *The Law Quarterly Review*, 104, 213-38, 213.

<sup>13</sup> PS Atiyah *The Damages Lottery* (Oxford: Hart Publishing 1997), 94.

<sup>14</sup> C Witting ‘Physical Damage in Negligence’ (2002) *Cambridge Law Journal*. 61(1), 189-208.

what constitutes an actionable injury becomes more complex. Defined under section 38(1) of the Limitation Act 1980, ‘personal injuries’ include ‘any disease and any impairment of a person’s physical *or mental condition*’ (my emphasis). Conceivably, while that definition of personal injury could support an expansive accommodation of mental harms, in practice the kind of injuries that trigger actionable claims in negligence reveals a less liberal reading. It is well known, for example, that emotional harm, which falls short of psychiatric illness (such as mere anxiety, inconvenience or discomfort) is never actionable, while a medically verified psychiatric illness is only actionable under limited circumstances. It is important to note however, that providing damage has been established (notably, of the physical sort), that negligence has no problem in addressing intangible harms, such as psychological or emotional harms as items of consequential loss for the purposes of damages. The distinction though muddy at times, is that ‘damage’ concerns liability and is a crucial anchor for an actionable claim, whereas items of consequential loss are only relevant for the assessment of damages, once liability has been established. With one exception in the field of human harms, notably the restrictive category of purely psychological damage cases which are only cognisable (and for which a duty is owed only) under highly circumscribed conditions, consequential loss cannot frame the damage itself. Arguably, given that for those limited purposes psychological damage is treated as a form of personal injury this rather blurs the distinction between what are supposed to be separate analytical categories (‘damage’ and ‘consequential loss’), as well as confusing the issue as to whether damage is genuinely the narrow category that courts present it as being. Notwithstanding this anomaly, which according to Abraham constitutes a rare exception to the legal requirement for physical harm<sup>15</sup> the courts have been more explicit in demarcating between these analytical categories in defining the limits of the concept of damage in *Rothwell v Chemical and Insulating Co Ltd*.<sup>16</sup>

In *Rothwell*, the appellants had been negligently exposed to asbestos at work and developed asymptomatic pleural plaques. While pleural plaques indicated the presence of asbestos fibres in the lungs and pleura which could cause other life-threatening diseases (e.g. asbestosis or mesothelioma), these constituted future risks which might never materialise. Central to the appellants’ case sat two key arguments; the first was that the pleural plaques should be treated in and of themselves as actionable harm; the second argument proposed a novel form of actionable damage based on aggregation theory – actionable damage it was argued, consisted of the combination of the asymptomatic pleural plaques, the risk of future injury as well as anxiety at the prospect of future injury. In response to the first argument, although physical changes had occurred, notably pleural plaques, it had been found that these had no perceptible deleterious effect on the health or capability of the men. In light of this, Lord Hoffman rejected asymptomatic pleural plaques as actionable damage, commenting that,

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<sup>15</sup> KS Abraham ‘The Trouble With Negligence’ (2001) *Vanderbilt Law Review*, 54, 1187-1223.

<sup>16</sup> *Rothwell* (note 2).

Damage in this sense is an abstract concept of being worse off, physically or economically, so that compensation is an appropriate remedy. It does not mean simply a change in physical condition, which is consistent with making one better, as in the case of a successful operation, or with being neutral, having no perceptible effect upon one's health or capacity.<sup>17</sup>

The argument that these physical changes should be regarded as a personal injury, as actionable damage in and of themselves, was by far, the most promising.<sup>18</sup> For these men's claims, it probably constituted *the* critical hook for any subsequent recovery of what would otherwise be deemed, consequential effects. Nevertheless, insofar as the court considered these physical changes in themselves non-actionable, it was perhaps unsurprising that their Lordships went on to reject the remaining arguments based on aggregated theory. In light of an established position in English law that neither the risk of injury or apprehension of that risk happening is actionable, the aggregated theory simply amounted to an attempt to repackage different non-actionable ingredients (the pleural plaques, risk of future injury and anxiety about risk of future injury) to create a new cause of action where none individually could lie. In similar force, their Lordships also unanimously rejected the further claim brought on a separate appeal<sup>19</sup> to the effect that psychiatric injury resulting from anxiety in contemplation of the risks flowing from pleural plaques should be deemed actionable.

Central to our current analysis however, is what constitutes 'damage' and what kinds of human harms are drawn within the judicial frame in establishing its boundaries. Importantly, not only is no reference made to emotional harm as a form of damage – indeed, it is explicitly rejected in the face of somewhat creative attempts of lawyers to 'tie' emotional harms with 'physical changes' to push existing boundaries. Emotional harms remain, as *Rothwell* illustrates, a form of consequential loss for which one must *first* establish prior physical damage. Other than the narrowly circumscribed situations where claimants can demonstrate that a duty of care exists to protect them from purely psychological harm, anything short of that, claimants must demonstrate the prior existence of a physical injury 'hook' for emotional harms to be recoverable.<sup>20</sup> The line between physical and emotional harms, however, is not always easy to discern. As Conaghan and Mansell comment, 'physical injury is often accompanied by emotional distress while psychiatric harm is regularly exhibited through an array of physical symptoms (such as vomiting, insomnia, weight loss and

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<sup>17</sup> *Ibid*, para. 16, para. 7.

<sup>18</sup> Note also that in the context of the pleural plaques litigation that while *Rothwell* determined that asymptomatic pleural plaques did not constitute an actionable personal injury, and this certainly also applied to Scotland and Northern Ireland, both the Scottish Parliament and Northern Ireland Assembly have subsequently legislated to reverse it. Following *AXA General Insurance Ltd & Ors v Lord Advocate & Ors* [2011] U.K.S.C. 46, which upheld the right of the Scottish Parliament to reverse *Rothman* in Scotland, the question of whether asymptomatic pleural plaques constitute a personal injury/actionable damage, is now jurisdiction specific

<sup>19</sup> *Grieves* (note 2).

<sup>20</sup> Stapleton, *The Gist* (note 12).

other ‘stress related’ illnesses).<sup>21</sup> While medicine and science illustrate the ‘close and symbiotic relationship between mental and physical health’, the distinction between these categories nevertheless remains ‘deeply embedded in the doctrinal substance of negligence law’.<sup>22</sup> Nor is it always clear whether actionable damage has been suffered in cases which hold an evident physical and bodily dimension. In *Rothwell* the House of Lords determined that asymptomatic pleural plaques caused by negligent exposure to asbestos were insufficient to constitute actionable damage in negligence. Undoubtedly, the impact of exposure to asbestos had had *some* physical impact, but not sufficient to constitute actionable damage. Clarifying that the question was not whether plaques were an ‘injury’ or a ‘disease’ as the judge at first instance had thought, Lord Hoffman noted that the damage enquiry entails asking “Is he appreciably worse off on account of having plaques?” Given that the plaques have no effect on the health or capabilities of the men, he concluded that ‘they have not caused damage’.<sup>23</sup>

These are not straightforward distinctions being drawn. The resulting dialogue acts to mask a process which entails a significant amount of discretion in determining whether these injuries, if indeed they were injuries,<sup>24</sup> made the claimants ‘appreciably worse off’. This is a far more arbitrary exercise than it might at first appear, given that much of what can be said to be deleterious about a physical state, is psychological and subjective. Pain, for example while having physiological dimensions has psychosomatic ones too; it is also a ‘social and cultural phenomenon’.<sup>25</sup> As such, that the physical and non-physical dimensions are so thoroughly intertwined, seeking out an ‘objective’ measure of what is an inherently deleterious physical state and what is not, seems doomed from the outset. As Lord Hope in *Rothwell* recognised, other than being able to say that the law will not entertain claims for damages ‘where the physical effects of injury are no more than negligible’, policy does not ‘provide clear guidance as to where the line is to be drawn between effects which are and are not negligible’.<sup>26</sup> Nevertheless, one quickly gets the sense that their Lordships are incredibly unsure about where the distinction between harmful physical states and unharmed ones lie with the result that the deployment of language is (understandably) less than artful as they attempt to manover themselves through a semantic minefield of closely related terms. The attempt to separate out *legal* concepts of ‘injury’ and ‘damage’ from their

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<sup>21</sup> J Conaghan and W Mansell *The Wrongs of Tort* (London: Pluto Press 1999), 35.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Rothwell* (note 2), para. 19. For more detailed analysis of this case, see A Gore ‘What is Actionable Injury? The Demise of the Pleural Plaques Litigation’ (2008) *Journal of Personal Injury Law*, 8(1), 1-15; G Turton ‘Defining Damage in the House of Lords’ (2008) *Modern Law Review*, 71(6), 987-1014.

<sup>24</sup> At points the judgment makes for quite painful reading. As Gore (note 23) comments, it is not clear whether the court, and in particular Lord Hoffman, is suggesting that pleural plaques constitute a non-actionable injury, or whether he is saying that they are not an injury at all, or whether ‘he is sidestepping the dichotomy’. All that is clear is that they do not, *in and of themselves*, when asymptomatic, constitute an actionable injury.

<sup>25</sup> M Winance, ‘Pain, Disability and Rehabilitation Practices: A Phenomenological Perspective’ (2006) 28 *Disability and Rehabilitation* 1109-1118, 1110.

<sup>26</sup> *Rothwell* (note 2), para. 47.

social meaning most evidently proved too challenging for the court, in light of judges speaking of the same phenomena as not constituting an injury, constituting a *harmless* injury, potentially constituting an injury, or indeed, damage as something which admits of degrees, ‘real damage’ as distinct from damage that is purely minimal.<sup>27</sup> While the thrust of it would seem to be that the physical condition needs to be inherently harmful, rather than trivial, this broader conceptual muddle coupled with the court’s rejection that damage needed to hinge upon establishing the presence of a clinically verifiable injury or disease,<sup>28</sup> leaves one with the distinct feeling that the judges are just making things up as they go along.

That a clinically verifiable disease or injury is not a prerequisite for the damage enquiry undoubtedly works to the favour of that category of claimant who becomes unexpectedly pregnant as a result of failures in family procedures which were designed to prevent that very result. The so-called ‘wrongful conception’ suit illustrates the interpretive scope of the ‘physical damage’ requirement, as well as some tensions around whether a pregnancy, though socially regarded as being a ‘natural’ and frequently desired state (but also frequently undesired), can be conceptualised as harmful. In *McFarlane v Tayside Health Board*,<sup>29</sup> for instance, the appellants had invited the House of Lords to find that the processes of conception, pregnancy and birth were natural events, and could not be deemed a personal injury. Though accepting that an unwanted pregnancy could constitute a personal injury given that this was the very event the claimant sought medical assistance to avoid, the House’s discussion as to how pregnancy is actually injurious, and how this accords with conventional understandings of damage, led to a strained and unconvincing set of judicial responses. Lord Steyn for example, commented that it was unnecessary to consider:

[T]he events of an unwanted conception and birth in terms of ‘harm’ or ‘injury’ in its ordinary sense of the words. They were unwanted and known... to be unwanted events. The object of the [procedure] was to prevent them from happening.<sup>30</sup>

Lord Hope, by contrast, considered that the mother’s claim could be described in ‘simple terms’ as one ‘for the loss, injury and damages which she has suffered as a result of a harmful event’ although noted that it ‘may seem odd to describe the conception as harmful’.<sup>31</sup> His Lordship commented that in normal circumstances this would not be the case as the ‘physical consequences to the woman of pregnancy and

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<sup>27</sup> *Rothwell* (note 2), para. 39 (*per* Lord Hope).

<sup>28</sup> Though note Lord Scott’s rather contradictory dicta which places quite some emphasis on the absence of disease in this case.

<sup>29</sup> In *McFarlane v Tayside Health Board* [2000] 2 AC 59, the House of Lords determined that while claimants bringing negligence suits involving the wrongful conception of healthy children could claim damages for the pain and suffering attendant upon pregnancy and birth, that the law would no longer provide compensation relating to the (often substantial) maintenance costs of such (healthy) children.

<sup>30</sup> *Ibid*, 74.

<sup>31</sup> *Ibid*, 86.

childbirth are, of course, natural processes'; however, in these circumstances, 'it was the very thing which she had been told would not happen to her'.<sup>32</sup> Refusing to take account of any possible 'relief and joy' after childbirth, Lord Hope observed that 'pregnancy and childbirth involve changes to the body which may cause, in varying degrees, discomfort, inconvenience, distress and pain'. The fact that these consequences flowed naturally from the 'negligently-caused conception' would not remove them from the proper scope of an award of damage. Also rejecting the 'natural not injurious' proposition, Lord Steyn remarked that 'the negligence of the surgeon caused the physical consequences of pain and suffering associated with pregnancy and childbirth. And every pregnancy involves substantial discomfort'.<sup>33</sup> In similar vein, Lord Clyde suggested that natural as the mechanism may have been, 'the reality of the pain, discomfort and the inconvenience of the experience cannot be ignored. It seems to me to be a clear example of pain and suffering such as could qualify as a potential head of damages'.<sup>34</sup> Even Lord Millett, having commented that conception and childbirth were the 'price of parenthood' thereby dissenting from awarding damages under this head, found no difficulty in conceptualising pregnancy in these circumstances as a harm: 'This was an invasion of her bodily integrity and threatened further damage both physical and financial.' In his view, the injury and loss was one of personal autonomy and the decision to 'have no more children is one the law should respect and protect'.<sup>35</sup> A striking feature of the dicta arising in *McFarlane* is that despite their Lordships' firm acceptance of an unwanted pregnancy as actionable damage, we are presented with a variety of models of personal injury rather than a unitary vision as to what that injury precisely consists of. Is the damage based on the mental attitude of the claimant, the physical experience, or something else? The typification of damage in *McFarlane* forwards three distinctive models of conceptualising personal injury. Though it is clear in all these accounts that deleteriousness is necessary to satisfy the 'damage' criteria, it remains unclear for the purposes of thinking beyond this case to other kinds of harm, whether a claimant must always manifest a physical, bodily harm and the criteria by which this is actually judged.

Notwithstanding these legal wrangles, the presence of a physical, bodily harm remains the gold standard of 'damage' in negligence. At the level of common sense, the preference for physical bodily harm seems incredibly persuasive. Few of us, it is to be imagined, would regard the impairment or loss of a previously well-functioning limb as a good thing. The preservation of our bodily integrity seems to be a fundamental interest indeed. In the ordering of our human needs and interests, Abraham Maslow and Joel Feinberg are united in thinking that such physical invasions would be seen as deleterious for reducing an individual down to the very lowest level of being: a merely physiological state. The attainment of a stable identity

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<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*, 81.

<sup>34</sup> *Ibid.*, 102.

<sup>35</sup> *Ibid.*, 114.

or ‘homeostasis’, a constant and normal physiological state permits the individual to transcend ones physical self, ‘one’s own skin and body and bloodstream... so that they become intrinsic to the Self itself’.<sup>36</sup> And for such theorists, the satisfaction of one’s basic physiological needs is critical for the individual to pursue other social goals; so the significance of such an invasion of bodily integrity is that the frustration of or thwarting of physiological needs prevents the individual from pursuing other goals, as until gratified, they will ‘dominated the organism’.<sup>37</sup> No doubt, for the ‘organism’ to be solely occupied with physiological matters must be a rather bad thing indeed; and Feinberg sees the matter in such terms also; for him the blocking or damaging of one’s physiological needs features as the most serious of invasions, the person in question who sustains that damage would be ‘very seriously harmed indeed’.<sup>38</sup> At intuitive level, we simply know this to be true; being able to take one’s body more or less for granted (quite irrespective of what one’s existing physical state is), rather than being conscious of, and consumed by one’s physicality all the time, is what is best captured by bodily integrity. It is a sense of self, a stable platform for pursuing one’s plans, than an actual descriptor of our physicality.

On this account, that the damage concept accommodates physical bodily harms might seem thoroughly unproblematic. But the difficulty here is that it is not simply an accommodation, but a relatively exclusive preference for harms of the physical bodily kind. The significance of this is that the damage concept acts as a critical gateway to the bringing of an actionable claim, and irrespective of the magnitude and extent of the losses that one might suffer, should those flow from the kinds of harms which fail to ‘fit’ the damage category, those losses will simply lie where they fell. As Turton comments,

As a system of corrective justice, the tort of negligence operates to correct wrongful losses. This clearly necessitates a loss caused by wrongdoing, but also leaves scope for the law only to intervene in those losses that are considered to go beyond what everybody is expected to tolerate within everyday life’.<sup>39</sup>

It is at this point, the boundary between actionability and non-actionability, where the operation of the damage concept becomes objectionable. It is an exclusive and excluding category that acts as the *gatekeeper* for financial reparation. It privileges and ‘sees’ particular kinds of harm which feel intuitive and through privileging them, excludes others. As such, while there is no problem in saying that generally a duty of care will be owed for a more than negligible physical injury which results from a positive act of a defendant, in relation to psycho-social harms such a thing cannot be said. In light of this we should treat with special caution the seemingly normative assertions of the courts that actionable damage encompasses harms which are ‘serious’, leave claimants ‘appreciably worse off’, given that a whole catalogue of

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<sup>36</sup> A Maslow *The Farther Reaches of Human Nature* (Penguin Books 1971), 259.

<sup>37</sup> J Feinberg *Harm to Others*. (Oxford: Oxford University Press 1987), 6.

<sup>38</sup> *Ibid*, 37.

<sup>39</sup> Turton, (note 23), 2013.

ways that one can suffer serious harm or be left appreciably worse off are excluded. The kind of harm matters, and insofar as the law has general anxieties about the character of psycho-social harms and holding defendants liable for these, no matter how serious or disabling the harm that results and how careless the defendant, claimants will struggle to gain reparation for their loss. While there are established instances where purely psychological harm is treated as damage,<sup>40</sup> the courts restrict the liability situations via the concept of duty. As such, if psychological harm is a kind of damage, it is tenaciously guarded and ring-fenced. Though conceptually capable of embracing a broader understanding of what ‘damage’ means, far beyond physical bodily trauma, the law of negligence eyes with suspicion harms which manifest themselves not as bodily abnormalities, but as psycho-social tragedies.

Before moving on, given that my claim is that a whole repertoire of human experiences relevant for a normatively charged concept of damage are treated as irrelevant, it is important to flesh out what is meant by psycho-social harm and to show its potency for ‘anchoring’ damage. It is much broader than emotional harm in the sense of upset, grief or even a clinically verified psychological disorder. Rather, what it captures a range of things which, like breaking one’s leg whilst skiing or developing a terminal illness, are experiences we would wish to avoid for they are so disruptive of life as to completely destabilise it. From the loss of a loved one, caring for a sick and elderly relative, the labour of caring for a child that one did not want, living in fear in a crime-ridden area, having too much work to do so that one’s social and personal life is compromised, to not having enough money to pay the bills – all of these are experiences which in a strict sense, fail to be bodily or physical, though each of them are mediated through us as persons possessing bodies. Such events and experiences are, of course, very often experienced as the vicissitudes of life. But whilst they endure they can prove to be psychologically and socially corrosive in their impact. They all relate to our emotional being in the world, and our connections and relationships with others, with our responsibilities and moral sense of responsibility to others. They have a physical and emotional dimension insofar as they can result in declines in physical and mental health, but often imperceptibly and gradually; they often require entail hard work, both physically and emotionally in supporting others. Many of these can be regarded as chosen situations, but morally and structurally they will feel unavoidable and unauthored. All of these kinds of experiences are part of the package of life, but for as long as they endure they keep us standing in the same spot. They can disable us. It is in this important sense that *these* experiences fail to differ from the experience of a physical injury in terms of the meaning of our lives and interference with the things we most value. If one considers the effects of dealing with

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<sup>40</sup> See for example the purely psychological damage claims, formerly known as ‘nervous shock’, ranging from the recognition of primary victims in cases such as *Page v Smith* [1995] UKHL 7 (House of Lords 1995); [1996] A.C. 155 (House of Lords 1996), through to the more restrictive category of secondary victims as demonstrated in *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 A.C. 310 (House of Lords 1992). For discussion around the historical development of these claims, and analysis, see further K Horsey and E Rackley, *Tort Law* (Oxford: OUP 2013) and H Teff *Causing Psychiatric and Emotional Harm: Reshaping the Boundaries of Legal Liability* (Oxford: Hart Publishing 2009).

a broken leg, the significance of that physical injury lies in its psycho-social effects; one suffers pain, has to reorganise how to get around, cannot engage in sports or walks, and must endure the hassle of scans and eventually getting a cast removed – many aspects of one’s daily life simply need to be rethought and the kinds of simple everyday events we could normally take for granted, become the stuff of rethinking and re-evaluation. With this in mind, we start to see how the assumption that physical harms are different in nature from other kinds of harms looks rather artificial indeed. What is *harmful* about a physical harm is situated not in the momentary fracture of a physical structure, but in its human effects. On this analysis at least, if we think about the precise way that any of these events might interfere with our lives, our goals and aspirations, there seems to be no theoretical basis for calling one set of experiences ‘life’ and another ‘injury’ (or indeed, following *Rothwell*, ‘harmful injuries’ rather than ‘injuries that are harmless’<sup>41</sup>). It is the strength of that demarcation and the disconnection between the two that is at issue here.

### **Hybrid Injuries and Failed Reproductive Wishes**

The question as to what aspects of our humanity the law manages to capture and the extent to which it reflects our experience of injury, is the normative hermeneutic suggested here. If one reads through any personal injury case, one will be struck by the highly specified way that injury is represented. Law’s narrative of humanity, if taken as something that represents *persons* offers a mightily simplified and stripped down biography of the events around the commissioning, sustaining and consequences of an injury. Victims really don’t look remarkably human at the end of a case. So too, for that matter, do defendants become faceless individuals (though given that much of tort law is handled by insurers, this is probably much closer to the truth). Much of what it means to be human is filtered out and squeezed through analytical categories so that the people central to negligence cases seem like quickly drawn caricatures of human beings. Of course, to some extent this is unavoidable; socially and individually we are complex. Given that those closest to us can be surprised at the twists and turns in our personalities, we can hardly expect the law to capture what it means to be ‘us’ at this level. However, insofar as negligence law relates to the regulation of real human beings, in the setting of duties, standards and the provision of a response for negligently inflicted injury, it is quite reasonable to suppose that determinations as to what amounts to a compensable injury and what does not, would be informed by reference to the social experience of injury. Indeed, an evaluation of the ‘effects’ (beyond ‘physical’ effects) goes to the heart of the question as to whether a putative harm is seen as sufficiently injurious, or indeed, whether a claimant has been left ‘appreciably worse off’ for it to be embraced within the concept of damage.

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<sup>41</sup> *Rothwell* (note 2), para. 47 (*per* Lord Hope.)

As a means of thinking this through, the focus for this query is upon a relatively new type of injury situation, which I have referred to elsewhere as the “Hybrid Injury”.<sup>42</sup> The central feature of the hybrid injury is that the nature of the harm, which holds psycho-social and practical dimensions, sits somewhere in between two strong and recognised forms of damage in negligence law: firstly, the conventional personal injury case which involves physical bodily harm, and secondly, that of the purely psychological damage via ‘nervous shock’ situation, in particular, where a primary victim sustains psychiatric trauma as a result of narrowly escaping physical injury.<sup>43</sup> If the purely-psychological-harm-via-shock cases served to constitute the first significant assault on the boundaries of the damage concept – in the sense of at least easing it away from rigid ideas of the necessity of bodily harm, then these hybrid cases may be seen as the second assault. They are excellent candidates for this because of their strong familial resemblance to the conventional personal injury case, in all but the harm actually sustained. As such, with these hair-splitting cases courts have been forced to be more explicit about why it is that the harms sustained constitute damage or not. What becomes apparent is the extent of the law’s hostility to and ignorance about harm of a psycho-social nature, as well as the striking absence of a sufficient conceptual justification for existing legal boundaries. In terms of claims brought to date, these include situations which Teff refers to as ‘psychological detriment’ cases, or those which Horsey and Rackley refer to as claims for ‘messed up lives’<sup>44</sup>, notably cases in the setting of education and social care which involve alleged failures on the part of educational psychologists,<sup>45</sup> teachers or social workers in the identification of conditions, amelioration of learning difficulties or exercise of appropriate care decisions.<sup>46</sup> Here, however, my focus is firmly upon reproductive cases which qualify as hybrid injury cases given that these have proved quite special in challenging the damage concept, and particularly revealing as to the problematic distinctions between actionability and non-actionability in English law.

### ***The Joys of Parenthood***

If the House of Lords’ conceptualisation of the injury of pregnancy, labour and childbirth in *McFarlane*<sup>47</sup> was problematic, this lay in the representation of these events as being episodic and isolated. This had very particular repercussions in the context of the broader claim, where the pursuers<sup>48</sup> sought damages not only for the

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<sup>42</sup> N Priaulx ‘Endgame: On Negligence and Reparation for Harm’. In Erika Rackley and Janet Richardson (eds), *Feminist Perspectives on Tort Law* (Routledge: Cavendish, 2012). Note that in while the current piece questions the evaluative scope of ‘actionable damage’ in assessing the extent to which the law of negligence encompasses our human experience of personal harm and injury and whether it can, the *Endgame* piece is limited to exploring whether negligence *should* do so when taking into account broader concerns around the operation of torts.

<sup>43</sup> For example, see *Page* (note 40).

<sup>44</sup> Horsey and Rackley (note 40), 163.

<sup>45</sup> See *Phelps v London Borough of Hillingdon* [2001] 2 A.C. 619.

<sup>46</sup> See further, Teff (note 40), 122-4.

<sup>47</sup> *McFarlane* (note 29).

<sup>48</sup> The case started in the Scottish legal system and ‘pursuer’ is the equivalent of ‘plaintiff’ or ‘claimant’.

pain, suffering and lost amenity attendant upon pregnancy and childbirth, but for the maintenance costs of raising the resulting healthy child. While allowing damages for the former, the House of Lords unanimously denied the child maintenance claim though deploying a variety of techniques in reaching this conclusion. Lords Hope and Slynn typified the harm sustained as purely economic loss. In severing the child maintenance claim from the duty of the doctor to prevent pregnancy no justification was provided as to why a doctor should be liable for the economic loss flowing from pregnancy and childbirth, but not its repercussions. Although a distinction which Lord Millett found artificial ‘if not suspect’ given that these events were the very things the defendants ‘were called upon to prevent’,<sup>49</sup> his view that pregnancy, childbirth and the raising of the child were ‘the price of parenthood’,<sup>50</sup> appears equally suspect. Nevertheless, this conclusion led him to reject such awards, and offer as compensation a small award of £5,000 to reflect their loss of freedom to limit their family size. Notwithstanding all of these approaches, in what has become the most quoted passage of *McFarlane*, Lord Steyn captures the sentiments which resonate throughout each judgment. Concluding that recognising such a claim would be contrary to the moral ethos of society, he argued:

Instinctively, the traveller on the Underground would consider that the law of tort has no business to provide legal remedies consequent upon the birth of a healthy child, which all of us regard as a valuable and good thing.<sup>51</sup>

The *McFarlane* decision certainly invites a far broader critique than can be provided here,<sup>52</sup> for so many aspects of this judgment remain questionable. From the typification of the consequences of a failed medical procedure sought to remove the prospect of parenting responsibilities as a ‘joy’ or a ‘good thing’, the fact that women will be particularly affected by decision-making in this area given that the burden of care continues to fall more often than not, upon women, to the messy and contradictory application of legal ‘principle’ so that one wonders what legal principle remains - there is little to commend the judgment. However, what concerns us here is the way that law engages with our humanity; and in this respect, the artificial split between the events of pregnancy, childbirth and the events which have been typified not as capable of amounting to damage but rather, purely economic harm, or a ‘good thing’, is the issue. Quite critically, such a divorce between these ‘events’ is only possible by virtue of an understanding of reproductivity and reproductive labour that fails to connect with our human experience. And in line with the running thesis of this piece, the problematic priority afforded to *physical harm* as the gold standard of ‘damage’ is what sustains that failure to connect with the experience of injury.

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<sup>49</sup> *McFarlane* (note 29), 109.

<sup>50</sup> *Ibid*, 114.

<sup>51</sup> *Ibid*, 82.

<sup>52</sup> See further, N Prialx ‘Joy to the World! A (Healthy) Child is Born! Reconceptualizing Harm in Wrongful Conception’ (2004) *Social and Legal Studies*, 13(1), 5-26; N Prialx *The Harm Paradox: Tort Law and the Unwanted Child in an Era of Choice*. Aldershot: Routledge-Cavendish 2007).

The manner by which pregnancy, labour and childbirth were typified, as we saw earlier, presented the harm as an invasion of the fundamental right to bodily integrity – a depiction which Hale LJ (as she was then) later criticised for offering an account of those events without any ‘detail about what is entailed’.<sup>53</sup> Significantly, while these accounts of injury are premised upon the traditional tort framework which prioritises *physical bodily harms*, in treating bodily boundaries as something to be protected from outside invasion, how do these fail to capture the experience and impact of an unwanted pregnancy? Is not a pregnancy significant for being more than a physical and biological event? While the House of Lords rejected child maintenance damages, thereby severing the harm at the point of birth, does this not posit the harm as peculiarly *episodic* and *fleeting*, rather than what must be perceived in these cases as an *enduring* responsibility?

Female personhood in pregnancy cannot be understood by reference to the merely biological and physical, as these ‘processes are always mediated by the cultural meanings of pregnancy, by the woman’s personal and social context, and by the way she constitutes herself in response to these factors through the decisions she makes’.<sup>54</sup> Although rooted in biology, the significance of pregnancy – whether experienced as a wanted or unwanted state – cannot be appreciated by focusing on the physical manifestation of pregnancy. Rather, the significance of *being* pregnant is inextricably intertwined with the considerable responsibility and enduring consequences which pregnancy heralds. For a woman, her expectations of life, her stability, her security, her hopes for the future have been irrevocably changed by virtue of that physical state. Furthermore, an unwanted pregnancy can seriously disrupt important aspects of a woman’s life, including family relationships, work, education, and finances, which may result in enduring demands and burdens on her life.<sup>55</sup> Significantly none of these are corporeal harms. Only when we acknowledge both the physical *and* psycho-social aspects, can we begin to address the extent of the harm of an unwanted pregnancy. And this will never be a merely physical event that ceases at childbirth. For many women, this may be viewed as an enduring, continuing source of responsibility and connection – a process that has a beginning, but no end.

Insofar as these wrongful conception cases provide a stark illustration of the operational problems inherent in the traditional personal injury framework, this has not gone unnoticed at judicial level. Ruminating on the *McFarlane* decision, Hale LJ argued that the birth of a child was an inseparable consequence of the harm of unwanted pregnancy, so that it ‘is not possible, therefore, to draw a clean line at the birth’.<sup>56</sup> Noting (in detail) that while pregnancy is more significant than a merely ‘physical’ event, but involves a ‘severe curtailment of freedom’, she comments that,

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<sup>53</sup> *Parkinson v St James' and Seacroft University Hospital NHS Trust* [2002] Q.B. 266 (Court of Appeal 2002), 285.

<sup>54</sup> C MacKenzie ‘Abortion and Embodiment’. (1992) *Australian Journal of Philosophy*, 70, 136-155, 141.

<sup>55</sup> S Orr, & C Miller, C. ‘Unintended Pregnancy and the Psychosocial Well-Being of Pregnant Women’ (1997) *Women's Health Issues*, 7, 38-46

<sup>56</sup> *Parkinson* (note 53), 287.

Parental responsibility is not simply or even primarily a financial responsibility. The primary responsibility is to care for the child. The labour does not stop when the child is born. Bringing up children is hard work. The obligation to provide or make acceptable and safe arrangements for the child's care and supervision lasts for 24 hours a day, 7 days a week, all year round, until the child becomes old enough to take care of himself. That is why the 'mother gap' exists: mothers have to tailor their work outside the home to cater for their caring responsibilities within the home. Only those who can earn more than it will cost to buy some of those services from others suffer a much smaller gap. But the cost is still there.<sup>57</sup>

For Hale LJ, all of these consequences flow 'inexorably, albeit to different extents and in different ways according to the circumstances and characteristics of the people concerned, from the first: the invasion of bodily integrity and personal autonomy involved in every pregnancy'.<sup>58</sup> Conscious of the manner by which this offers a very different typification of the harm involved in wrongful conception cases, Hale LJ comments that rather than the harm being located in the economic consequences of paying for the child's keep, it is instead located in the care and labour entailed in raising the child. While their Lordships had rejected the view that these harms were consequential upon the injury in pregnancy and childbirth, Hale LJ nevertheless views this as an impoverished way of typifying the harms involved; instead, the loss is best expressed as a loss of autonomy, for being an experience which permeates every aspect of an individual's life.

At the time, the present author regarded Hale LJ's analysis as a 'conceptual metamorphosis',<sup>59</sup> not only in the context of these wrongful conception cases, but in offering a deeper and more meaningful approach to how the concept of damage and the notion of personal injury might be addressed and conceptualised in negligence. Of special importance here is the rejection by Hale LJ of the traditional damage paradigm so deeply embedded in negligence. The traditional conception of damage dislocates the very meaning of what is *injurious* about injury for only having meaning in its purely physical manifestation so that our focus is skewed, necessitating the search for scars, biological evidence of injury, for traces of physical damage which no (rational) person would invite, wish for or consent to. From this perspective, it is quite easy to see that the very conceptual difficulties that commentators and judges in this field have experienced rests upon the fact that neither pregnancy or parenthood are easy to describe in these terms, and no doubt most people would be shocked to hear that a pregnancy let alone a child were in any way analogous to a fractured skull. Yet, when those experienced are unwanted and enforced, they can be every bit as harmful (and potentially more so), enduring, and corrosive of one's autonomy as any physical harm.

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<sup>57</sup> B Hale 'The Value of Life and the Cost of Living - Damages for Wrongful Birth' (2001) Retrieved June 9, 2011, from The Actuarial Profession: <http://www.actuaries.org.uk/research-and-resources/documents/value-life-and-cost-living-damages-wrongful-birth>, 24.

<sup>58</sup> *Ibid*, 25.

<sup>59</sup> Prialx *The Harm Paradox* (above 52), 43.

## *The Properties of Lost Sperm*

While *McFarlane* received a fair amount of critical commentary, some might offer the view that their Lordships later rescued themselves in the case of *Rees v Darlington Memorial Hospital NHS Trust*<sup>60</sup> in their management of a claim involving a disabled claimant who wrongfully conceived a healthy child. In that case, their Lordships were invited to review *McFarlane*. Though stubbornly loyal to the central premise of *McFarlane*, notably that parents should not receive compensation for healthy children (these continuing to be good things rather than bad things) by a majority the House determined that Lord Millett's idea of a conventional sum in *McFarlane* was a 'gloss' worth deploying here. Creating a 'conventional award' to reflect the lost autonomy involved in wrongful conception, that loss regarded as consisting of the deprivation of living the kind of life one had wanted to lead, the House of Lords sent Karina Rees away with what will be a fixed sum in all such cases, of £15,000. Certainly, this is *something* and something is undoubtedly better than nothing. But it does not rescue their Lordships from their problematic reasoning in *McFarlane* given that the recognition of lost autonomy is really largely rhetorical. In ordinary cases where damage is recognised, damages would be based on a corrective measure of full reparation, rather than this symbolic fixed sum which fails to enquire into how claimants are affected and what losses *they* as individual claimants actually sustain. As such, the award continues to constitute an exception to the ordinary principles of negligence, fails to engage with the nature of the harm sustained in such cases, and continues to reaffirm that non-physical harms are far less harmful than physical ones and less deserving of a response. On this basis, though there is something radical about the Conventional Award in the sense of it appearing to accommodate a broader kind of damage than merely physical harms, as it applies to the wrongful conception case, it is far from radical at all: it is less of a remedy than a consolation prize for claimants whose losses have not been afforded the benefit of proper scrutiny or redress.

Despite these concerns about the wrongful conception case, there was still the chance that this approach might yet prove to be significant given that it did signal a quite astonishing departure from conventional ways of conceptualising damage. Though lost autonomy panned out to be a half-hearted measure potentially designed to placate claimants who would still be left holding the baby largely uncompensated, perhaps later cases would more fully reveal the promise of the approach. In this respect, a strong contender for such an analytical approach was the case of *Yearworth and others v North Bristol NHS Trust*<sup>61</sup> in which the claimants had banked semen samples which were later negligently destroyed.<sup>62</sup> The claimants, all cancer patients, brought claims against the NHS Trust for the mental distress and/or psychiatric injury they had

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<sup>60</sup> *Rees v Darlington Memorial Hospital NHS Trust* [2003] U.K.H.L. 52 (House of Lords 2003).

<sup>61</sup> *Yearworth and others v North Bristol NHS Trust* [2009] E.W.C.A. Civ 37 (Court of Appeal 2009).

<sup>62</sup> Note that for the purposes of the actions brought the sperm samples were treated as having perished irretrievably.

suffered upon learning of the negligent destruction of the samples, or the lost opportunity to father children having failed to regain their fertility following treatment.

That the facts of the case seemed to resonate so strongly with the kind of harm suffered by claimants in the wrongful conception case, in the sense of the disruption to their idealised private and family lives, this might well have offered a superb opportunity to apply the idea of loss of autonomy to a different, though closely analogous situation. Yet, in the structuring of the claim by the claimants' legal representatives, and the responses offered at first instance and in the Court of Appeal, there is no mention of *Rees* or the Conventional Award; something made all the more surprising given the analytical struggles that lawyers and the judiciary alike had in assessing what kind of damage, if any, had actually occurred. At first instance the trial judge accepted the arguments of the NHS Trust, who though admitting being in breach of duty, denied liability arguing that the men were not entitled to damages because loss of sperm neither constituted a 'personal injury' nor indeed, damage to their 'property'. The Court of Appeal also rejected that the damage to and loss of the sperm samples constituted a 'personal injury'. However in its broader resolution of the case, the Court departed from the first instance analysis. On the issue of property, the Court found that for the purposes of their claims in tort, the men had ownership of the sperm; furthermore, having asked the parties to make fresh submissions on whether the appellants might have a distinct cause of action under the (somewhat archaic) law of bailment, the Court also held that there was a bailment of the sperm by the men to the Trust. Subject to the factual issues being resolved before the County Court, the Trust was liable to them under bailment as well as tort, and the appellants were in law deemed capable of recovering damages for psychiatric injury and/or mental distress in bailment.

*Yearworth* constitutes an illuminating example of the narrower reading afforded to the personal injury concept in English law. Viewed through a restrictive reading of damage where 'physical' bodily harm is necessary, the ejaculated sperm would leave the men's bodies in their previous – and unharmed state – a neutral outcome (it would be the treatment for cancer that risked rendering the men infertile), so in what way could the loss sustained be describable as physical bodily harm? Clearly, Mr Townsend, Counsel for the Appellants in *Yearworth*, faced an uphill battle in attempting to demonstrate that the relevant loss (narrowly advanced as the destroyed sperm itself), constituted a 'personal injury'. Conscious of the apparent need to present the 'injury' as *physical* and *bodily* in nature in line with conventional understandings of the 'damage' in English law, he forwarded a veritable battery of arguments which sought to elide the theoretical differences between a physical *bodily* injury and physical damage to bodily materials *after removal from the body*. In attempting to encourage the judiciary to embrace a more 'elastic' definition of injury so as to encompass this event, Mr Townsend's argument proceeded as thus: (a) the sperm had been inside the men; (b) damage to it while there, for example as a result

of radiation of the scrotum, would have constituted a personal injury; (c) why should the men's ejaculation of it make any difference? (d) unlike products of the body which are removed from it with a view to their being abandoned – such as cut hair, clipped nails, excised tissue and amputated limbs – the sperm was ejaculated with a view to its being kept; (e) unlike other parts of the body which are removed even with a view to being kept (e.g. such as hair for a memento) the ultimate intended function of the stored sperm was identical to its function when formerly inside the body, namely to fertilise a human egg; and (f) the sperm retained a significant property; despite being frozen, it remained in essence biologically active with the result that it retained a living nexus with the men whose bodies had generated it.<sup>63</sup>

Unable to cite direct authority to support his proposition, Counsel relied upon alternative authorities which illustrated a more fluid approach to the question of what constituted a 'personal injury'. His main authorities for such an approach were derived from *Walkin v South Manchester Health Authority*<sup>64</sup> and a German Federal Court of Justice decision.<sup>65</sup> In *Walkin*, a wrongful conception case, the Court of Appeal had accepted that an unwanted pregnancy brought about by clinical negligence in family planning techniques could constitute a personal injury and fell within the definition of section 38(1) of the Limitation Act 1980.<sup>66</sup> However, perhaps more germane to the instant case, was the decision of the Bundesgerichtshof, decided on similar facts to *Yearworth* in which the Court had treated negligently destroyed sperm as if it were a personal injury. On view of such authorities, the Court of Appeal gave Counsel's argument short-shrift. Noting that while a broader approach to personal injury had indeed been adopted in *Walkin*, pregnancy was nevertheless a *physical* event within the woman's body, thereby the analogy far from aided Counsel's argument. In relation to the specific legal context under which the German Court had laboured at the time of giving judgment, their options for permitting recovery, by contrast with English law, were severely limited. The only means by which the man could have recovered for the damage he had sustained was by classifying the injury as personal.<sup>67</sup> Disposing of the personal injury element, Lord Judge CJ commented that,

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<sup>63</sup> *Yearworth* (note 61), para. 19.

<sup>64</sup> *Walkin v. South Manchester Health Authority* [1995] 1 W.L.R. 1543.

<sup>65</sup> Bundesgerichtshof (Sixth Civil Senate), BGHZ 124, 52 (Bundesgerichtshof, Federal Court of Justice November 9, 1993).

<sup>66</sup> For further analysis of this case, see N Prialux 'Beyond stork delivery: From injury to autonomy in reconceptualising 'harm' in wrongful pregnancy' (2006) 38 *Studies in Law, Politics & Society* 105-149

<sup>67</sup> As the Federal Court of Justice noted, the concept of physical injury, as expressed in §§ 823(1), 847(1) Bürgerliches Gesetzbuch (BGB), is capable of expressing a wide meaning (to which they gave effect departing from a narrower conception to which the Appeal Court had conformed): 'It considers the right to one's own body as a legally formulated section of the general right of personality. It also interprets as "physical injury" - expressly mentioned in § 823 I BGB and treated separately from "impairment to health" - every unjustified intrusion of bodily integrity, unless the owner of the right has given his consent (references). It is not the physical matter as such that is protected by § 823 I BGB but rather a person's entire area of existence and self-determination, which is materially manifested in the body (references). The provisions of § 823 I BGB protect the body as the basis of human personality' (para [2], Bundesgerichtshof (Sixth Civil Senate), 1993).

[I]t would be a fiction to hold that damage to a substance generated by a person's body, inflicted after its removal for storage purposes, constituted a bodily or "personal injury" to him.<sup>68</sup>

A contrary conclusion, the Court considered, could be productive of counter-intuitive results, for example, in cases where the sperm was negligently destroyed after the men regained their fertility, or where the time limit for preservation of sperm had been met resulting in the intentional destruction of the samples as demanded by law. Yet ironically, despite holding it to be a 'fiction' to hold that lost sperm could be capable of counting as a bodily or personal injury, the Court proceeded to question, and at length, whether sperm stored for these purposes could be capable of ownership. Conducting a lengthy review of authorities in English law which illustrated great reluctance to confer a property or ownership label upon the human body or its parts, an analysis of other jurisdictions where courts had debated property in the body, and ignoring the warnings of Counsel for the Respondents who was clearly more cognisant of the reasons shaping prior judicial restraint, the Court of Appeal determined that for the purposes of their claims in tort, the men had ownership of the sperm.

In so many ways, while the pages of the *Yearworth* judgment are exciting for their conclusions around property in the body, the judgment is more interesting and revealing for what the Court of Appeal *failed* to explore. In the former instance that scholars should come to see the most sensational aspect of the case as being the conferring of a property label onto human bodily materials is probably unsurprising. Not only has the subject been hotly contested in academic circles across decades, but English law itself has rarely created exceptions to a general rule that has denied property conceptualisations of the human body or its parts. One might think then, that the question as to whether applying the property label in the present case was really appropriate might be best addressed by Parliament.<sup>69</sup> Yet, the entire judgment was utterly overwhelmed by doctrinal and philosophical questions around the nature of property and the narrow issue of the susceptibility of sperm to ownership. The evident keenness of the Court of Appeal to give some 'physical' hook via property by which to ground a possible claim however drove them to *entirely* neglect a question which is not, following our analysis of cases like *McFarlane* or *Rees*, simply a matter of 'common sense': how and in what way had these men been made 'appreciably worse off'? This is the most interesting aspect of the case and it proves the most important in our enquiry around the extent to which the concept of damage is normatively charged. While the Court of Appeal located a somewhat controversial physical hook

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<sup>68</sup> *Yearworth* (note 61), para. 23.

<sup>69</sup> For further analysis of *Yearworth*, and broader references to literature, see further N Priaux, 'Managing Novel Reproductive Injuries in the Law of Tort: The Curious Case of Destroyed Sperm' (2010) *European Journal of Health Law*, 10(1), 81-95.

by which to found a private law claim, what we never learn are the reasons as to why that step *should* be taken.

At this stage of our analysis, it is hoped that the reader will be struck by the curious manner by which the Courts have interpreted the harms suffered by these parties. While *Yearworth* takes quite a different route by which to conceptualise the damage that the men suffer through destroyed sperm, the precise vehicle for this closely resembles a personal injury approach insofar as it *also* collapses into a *physical* paradigm as ‘the’ means of assessing actionability. The damage in this sense consists not of the deleterious *effects* but of the destruction of the (property) sperm. Insofar as some might regard *Yearworth* to be a significant case for challenging traditional conceptions of men’s bodies ‘as sexed bodies rather than as reproductive bodies’<sup>70</sup> thereby championing men’s reproductive rights, such a conclusion would be somewhat premature. The global picture suggests a hollow victory from this perspective. If we consider more holistically the range of cases assessed here, from *McFarlane* to *Yearworth*, we see little consistency or coherence in the analysis offered by the courts as to why damage is recognised in some cases, and not in others. Instead, forms of harm are magically transformed, albeit awkwardly, into personal injury (allowing pain and suffering attendant on pregnancy and birth) or purely economic loss (denying child maintenance costs of healthy but wrongfully conceived child), whilst others are transformed into property damage (to mobilise a claim for destroyed sperm in bailment). These actionability transformations permit the courts to get to the conclusion they seek to reach, but fail to justify *why*. This latter step, however, proves critical. The enquiry as to ‘why’ some matters *become* or do not become forms of actionable damage would need to be central if the concept of damage possessed a normative underbelly. And why a normatively charged concept of damage matters proves so crucial is by virtue of providing the judiciary with the methods and social imagination to drive a principled, fair and like-for-like incremental development of negligence.

This is quite critical insofar as it is far from obvious why lost sperm *should* count as damage, and yet the care and labour of an unwanted child, should not. We can, of course, attempt to locate an overarching principle that binds them together, but this will not take us very far. It might, for example, be argued that the harm of an unwanted child is not universal to all. Given that some people welcome the prospect of a healthy child, negligence should hesitate before accommodating context-dependent harms. Yet such an analysis also squarely applies to lost sperm; to put it as delicately as one can, it might be supposed that a great many men willingly suffer the loss of sperm quite routinely rather than experience this as harmful. We may have suspicions as to why the courts are better disposed to some cases than others - for example the potential financial magnitude of claims - but this does not invoke the analytical category of ‘damage’ (or even negligence). Rather, unarticulated judicial preferences as to which

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<sup>70</sup> M Thomson ‘Masculinity, Reproductivity and the Law’. In S. Holm, & J. Gunning, *Ethics, Law & Society* pp. 135-147 (Aldershot: Ashgate Publishing 2007), 138.

kinds of harms are harmful and which are not, would then be doing the work. As a normative category, the question of why the tort of negligence should encompass some kinds of harm is simply missing, or is skewed by virtue of what the damage enquiry currently demands that we look for as the central feature of all negligence cases: physical loss. And herein lies what is a far deeper problem: as a normative category, the damage concept will always be an impoverished means of addressing the very query which the House of Lords in *Rothwell* suggested was so central to establishing the presence of damage: notably whether the claimant had been made ‘appreciably worse off’. For that, the physical and bodily dimensions of injury will never be able to tell us much about loss, harm, deleteriousness or indeed, deservingness. Rather, if we care about affording redress for serious instances of loss, then as the next section seeks to illustrate, this can only be adjudged by reference to what the damage enquiry so ably manages to miss: our embodied human experience of injury.

### **On Being Human: Psycho-Social Aspects of Male Infertility**

For some, the construction of the claimants’ harm in *Yearworth* as property, rather than personal injury, or indeed a broader conception of damage, will be completely unproblematic. Property, it might be argued, like any other legal category, is nothing but a practical analytical label - one shouldn’t read too much significance into it. For others, labels are not legally innocuous or morally neutral but highly symbolic for potentially expressing different values about humanity. On this view, the label is far more than a practical legal device to mobilise some claim or another – it has the capacity to shift the way we *see* humanity in the future. While some regard ideas of property or ownership when applied to bodies or body parts with trepidation for commoditising aspects of human life,<sup>71</sup> others would welcome this conceptual shift for offering potentially stronger rights by which to protect the human body.<sup>72</sup> Yet, for the present author, the main issue with this label, akin to personal injury, is not on what it symbolises, but what it actually does. What both property and personal injury concepts share in common is an unshakeably strong focus on corporeal harm as *the* trigger for actionability. On all accounts, this is a perilously reductionist account of harm. Insofar as both labels treat psycho-social dimensions of harm as largely irrelevant, courts will always be constrained in their ability to properly engage in normative questions around whether a particular harm *ought* to count as damage. In other words, issues that are arguably critical for a principled and normative evaluation of damage – indeed, negligence itself – are missing.

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<sup>71</sup> H Widdows Towards Commodification? A Response to the Court of Appeal Judgment on Compensation for Lost Sperm (2009, March 2) Retrieved June 14, 2011, from Bionews: [http://www.bionews.org.uk/page\\_38056.asp](http://www.bionews.org.uk/page_38056.asp).

<sup>72</sup> K Mason & G Laurie ‘Consent or Property? Dealing with the Body and its Parts in the Shadow of Bristol and Alder Hey’ (2001) *Modern Law Review*, 64(5), 353-377.

A full reading of the County Court and Court of Appeal management of the *Yearworth* case reveals that the question as to whether damage was suffered was addressed as a purely legal analytic exercise. The only question was how destroyed sperm samples could fit existing categories of damage by which to ground a claim for damages for subsequent loss. The ‘why’ question, however was missing; despite being a novel kind of damage, neither court felt it necessary to enquire whether and in what way these claimants had suffered an event that left them “appreciably worse off”.<sup>73</sup> What we learn about any given claimant is the alleged suffering of a ‘severe adverse reaction to the news that, unless he was to recover his natural fertility, his chance of becoming a father, represented by the storage of his sperm, had been lost’.<sup>74</sup> Moreover, the court noted some of the features of the case which served to weaken it, one of which was that some of the men had since regained their fertility – or had sub-optimal fertility to start off with – factors which rendered a set of claims that were likely to be relatively modest in damages. Yet across the judgments, no consideration was given as to why or whether negligence (or for that matter, bailment) *should* seek to recognise and protect (or not) the kinds of interests which the circumstances of this case revealed. Rather, akin to the analysis of harm in *McFarlane* of which Hale LJ later complained, we get the conclusion, but without any ‘detail about what is entailed’.<sup>75</sup>

Yet this complaint, notably of the absence of ‘detail about what is entailed’, extends far beyond the examples set in the context of reproductivity. This problem manifests itself at every level in the context of determinations of what counts as damage. The foundational nature of the concept of damage and its significance in the context of negligence should surely invite forward-thinking shifts in judicial thought that rises above the specifics of a case so that incrementalism is directed by normative principle.<sup>76</sup> Yet what is apparent from cases where ‘damage’ has proved central, the specifics of the case prove dominant and have overwhelmed principled analysis. However, the example of reproductive harm provides a focused illustration as to how that problem operates, and the result: notably, a serious miscasting of how entire categories of person *are* and how harm is *really* experienced. While men’s experiences of reproduction ‘have tended to be seen in law as somewhat distant and vicarious, mediated by and through the agency of the woman who stands as a ‘gate-keeper’ to their involvement’,<sup>77</sup> *Yearworth* does nothing to challenge such a conception. The construction of the harm in *Yearworth* as consisting of destroyed property, rather than significant for what that symbolises for those men, skews the

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<sup>73</sup> *Rothwell* (above, 2), para. 19.

<sup>74</sup> *Ibid*, para. 9.

<sup>75</sup> Parkinson (note 53), 285.

<sup>76</sup> This argument can be aligned with comments by other commentators to the effect that in the context of the wrongful conception cases how the courts have been ‘stumbling from case to case’ and come ‘adrift of principle’; see respectively, P Cane ‘Another Failed Sterilisation’ (2004) 120 *Law Quarterly Review* 189; L Hoyano ‘Misconceptions about Wrongful Conception’ (2002) *Modern Law Review* 65: 883.

<sup>77</sup> S Sheldon & R Collier *Fragmented Fatherhood* (Oxford: Hart Publishing 2008), 8.

harm in significant ways. Rather than focusing on the gravity (or indeed, triviality) of the harm suffered, in the sense of what these sperm samples had signified for these men in the context of their biographical lives, the focus on property limits our understanding of loss as essentially residing in property relations, had and lost.

An analysis of the manner by which the law represents men's relationship to reproduction and fatherhood readily illustrates how men are conceptualised as peripheral, if not shadowy characters in the whole matter. Though cases involving wrongful conception invite an obvious critique in terms of the way that women are represented as essentially maternal, and naturally unharmed by the prospect of (unwanted) motherhood, the characterisation of men is equally pernicious. Remarking on the belief that a child is a blessing in such cases and the problematic representation of women's labour, Susan Atkins and Brenda Hoggett suggest that this provides:

[A]n excellent illustration of how easy it is for the law to perceive the financial loss to the father who has to provide for an unplanned child, but not to the mother, who has to bring [the child] up... The law is not used to conceptualizing the services of a wife and mother as labour which is worthy of hire.<sup>78</sup>

But nor is the law accustomed to conceptualising the harms that men sustain as extending beyond loss to the wallet or property. Indeed, insofar as stereotypical views of what it is to be a woman, have harmed women, the same can be said for men.<sup>79</sup> Social understandings of men's relationship to reproduction as essentially 'indirect, involving supporting mothers in financial, emotion or other ways', comment Sheldon and Collier, 'have been entrenched in a range of legal provisions'.<sup>80</sup> While law's understanding of masculinity reflects a view of the past where men's lives are interesting 'in their more public dimensions thereby ignoring the private and personal elements',<sup>81</sup> in the context of reproductivity, it remains the case that even academic literature on men's experiences of parenthood, reproductivity and inability to parent is sparse.<sup>82</sup> From the provision of reproductive and maternal services to reproduction research, reproduction remains centred on women as if 'it were central to all women's lives'. Despite male problems constituting the sole or contributing factor to infertility

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<sup>78</sup> S Atkins and B Hoggett *Women and the Law* (Oxford: Blackwell, 1984), 90.

<sup>79</sup> M Alexandre, 'Eradicating the Badge of inferiority associated with caregiving Men: Masculinity, Vulnerability and the global Employment context'. In N Priaulx and A Wrigley, pp 91-110, *Ethics, Law & Society* (Farnham, Ashgate, 2013).

<sup>80</sup> Sheldon and Collier (note 77), 38.

<sup>81</sup> E Dermot *Intimate Fatherhood: A Sociological Analysis* (London: Routledge 2008), 64.

<sup>82</sup> BD Peterson, C Newton, K Rosen & G Skaggs 'The Relationship Between Coping and Depression in Men and Women Referred for In Vitro Fertilization' (2006) *Fertility and Sterility*, 85(3), 802-804; AV Bell, 'Overcoming (and Maintaining) Reproductive Difference: Similarities in Gendered Experience of Infertility' (2015) 38 *Qualitative Sociology*, 439-458; RE Webb and JC Daniluk 'The End of the Line: Infertile Men's Experiences of Being Unable to Produce a Child' (1999) 2 *Men and Masculinities* 6-25; L Culley, N Hudson, and M Lohan 'Where are all the men? The marginalization of men in social scientific research on infertility' (2013) 27 *Reproductive BioMedicine Online* 225-235.

in a substantial proportion of couples,<sup>83</sup> and shifting social expectations in respect of men's emotional involvement in family and fathering practices,<sup>84</sup> the continued conflation of reproduction with femininity, places men in a marginal position as 'largely invisible actors', 'bystanders'<sup>85</sup> and more provocatively, the 'second sex'. As Throsby and Gill note, cultural associations of reproduction 'with women and the focus of reproductive technological intervention of the female body add to the invisibility of the male experience of that engagement'.<sup>86</sup>

Moreover, while research endeavours have moved on from the position that 'children are seen as a woman's business and events from conception onward her concern',<sup>87</sup> studies designed to elicit a greater understanding of men's experience, have been constrained by broader factors. For example, while finding that for both men and women the inability to conceive a child constituted a major life crisis, resulting in feelings of 'grief, anger, guilt, envy, profound loss and depression', Throsby and Gill also found that the continued (false) correlation between infertility and impotence tended to encourage secrecy amongst men, or a tendency to present infertility as *her* physiological problem, not his. In their study designed to explore how men understand and engage with IVF, Throsby and Gill found that,

[F]or men, the inability to conceive with their partner also produces an additional and gender-specific set of difficulties associated with a perceived threat to their masculinity... [I]t is a consequence of a strong popular association between male fertility, potency and masculinity. In finding themselves unable to make their partners pregnant (for whatever reason), men felt that their sense of themselves as men was called into question.<sup>88</sup>

A striking feature of the research around masculinity, reproductivity, and infertility, is that while men's feelings about the inability to conceive corresponds to a large degree with how women conceptualise that loss, the manner by which women and men *exhibit* and *respond* to that loss differs in marked ways. Recent research highlights that although infertility constitutes a major life event for both men and women, men are less likely to 'express emotional distress'.<sup>89</sup> This latter aspect, in particular, has posed a variety of challenges in respect of efforts to gain insights into the impact of infertility upon men. Not only are there considerable logistical and methodological challenges in including (and recruiting) men in infertility research<sup>90</sup>

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<sup>83</sup> Culley *et al* (note 82) 226.

<sup>84</sup> L Hinton and T Miller 'Mapping men's anticipation and experiences in the reproductive realm: (in)fertility journeys' (2013) 27 *Reproductive BioMedicine Online* 244-252.

<sup>85</sup> *Ibid*, 248.

<sup>86</sup> K Throsby and R Gill 'It's Different For Men: Masculinity and IVF' (2004) *Men and Masculinities*, 6(4), 330-348, 331.

<sup>87</sup> MC Mason *Male Infertility - Men Talking* (London: Routledge 1993), 3.

<sup>88</sup> Throsby and Gill (note 86), 336.

<sup>89</sup> W Marsiglio, M Lohan and L Culley 'Framing Men's Experience in the Procreative Realm' (2013) *Journal of Family Issues* 1-26, 14.

<sup>90</sup> Culley *et al* (note 82).

but also interpretative challenges in identifying men's psycho-social experiences. The operation of (out-dated) gender stereotyping in empirical research around male infertility looms hard here, raising significant questions over past claims to the effect that women suffer more adverse reactions to infertility than men.<sup>91</sup> As Webb and Daniluk note, while there is a significant body of research and clinical literature which maps the considerable psychosocial distress of women in relation to the inability to conceive, this has led 'many clinicians to suggest that fatherhood is a less significant role in the lives of men, and as such, men are less invested in the outcome of infertility investigations and treatments'.<sup>92</sup> While 'distress' is recognised by sociologists as a social construct, tied to social norms, personal and social expectations as well as cultural understandings so that distress manifests itself in different forms and different cultural settings, the danger to which researchers are now alert is that research has been more sensitised to the (well-investigated) ways that *women* experience and express distress.<sup>93</sup>

Despite the historical neglect of men in reproduction research,<sup>94</sup> a growing body of scholarship exploring the particular ways that men respond to the experience of infertility, and what this symbolises, leaves us in no doubt that the lost prospect of fatherhood constitutes a profound loss for many. Earlier critical engagements with the emotional and psychological aspects of male infertility, such as Mary-Claire Mason's *Male Infertility – Men Talking* have proved powerful for debunking ideas of men's ambivalence to their reproductive futures. Offering often touching first hand accounts from men, her pathbreaking study illustrates that for all of her subjects male infertility was regarded as a problem even if their experiences 'varied enormously',

I found out I was producing no sperm in 1987. For the first few days I think I was numb, going through the motions, going to work and somehow getting through the day. I worried about a future without children and felt anxious about what my wife would feel about my infertility. I was frightened of growing old without children, and then I started to think that [donor insemination] might be forced on me. The next stage was going through wild swings of emotion. One minute I would be very positive thinking my infertility was a challenge I would overcome, then I would slump into depression. It was very important that nobody found out, I couldn't have coped with that.<sup>95</sup>

Assessing what what is 'lost' through infertility proves to be complex. The desire for children is rarely clearly articulated or attended by concrete reasons. For many, fatherhood constitutes an 'inevitable and logical step' for men, 'a normal thing to

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<sup>91</sup> T Wischmann 'Your count is zero' - Counselling the infertile man' (2013) 16 *Human Fertility* 35-39.

<sup>92</sup> Webb and Daniluk (note 82) 8.

<sup>93</sup> Culley *et al* (note 82).

<sup>94</sup> Wischmann (note 91).

<sup>95</sup> Mason (note 87), 81, 'Interview with 'Matthew'.

do’,<sup>96</sup> ‘natural’, ‘taken-for-granted’,<sup>97</sup> ‘the most important thing in life’ or ‘essential to a full and complete life’.<sup>98</sup> For many, the *possibility* of being able to father in the future seems important. Men’s responses to a diagnosis of infertility, as Mason had found depended on a ‘huge list of factors’ such as type of diagnosis and past personal history, so that men saw the problem ‘differently, reacted to and coped with it in diverse ways’.<sup>99</sup> While men, like women, experience non-transitional events such as infertility differently, for some it thrusts them into ‘a personal and existential crisis’, challenging ‘basic assumptions regarding justice, fairness and the meaning of life’.<sup>100</sup> While many men approach adulthood with the expectation of eventually becoming a parent, the news of infertility can be identified as multi-faceted in terms of ‘the loss of fertility, the loss of genetic continuity, the loss of a life dream, the loss of masculinity, the loss of control, and the loss of meaning in life’.<sup>101</sup> While fertility may be an assumption for men, the news of infertility can be experienced as a ‘bomb-shell’; unlike women, men do not have continual reminders of their reproductive potential or indeed warning signs as to problems through menstruation and changes in one’s cycle.<sup>102</sup> Moreover, infertility is often experienced in a relational context, whether referring to a future possible partner, or a current one. For men in partnerships, the news of their fertility can foster feelings of inadequacy, betrayal and isolation. While men might manage their sense of loss in ways their partners could not understand or identify with, infertility could become the source of interpersonal conflict, with ‘misunderstandings, resentment and dissatisfaction’.<sup>103</sup> Over time, some men experience a ‘powerful sense of threat and foreboding’ where infertility threatens the ‘very essence of all that he had held as secure’,

The men had mapped out their lives, and now everything had changed. They had no clear sense of how to construct a future and no idea of what the future might hold. In particular they feared that they might lose not only the biological children they had hoped for but the woman they loved and hoped to have children with. These feelings were sometimes debilitating and left the man unable to make decisions about alternative parenting options such as adoption or donor insemination. As one participant stated, “I can’t believe some of the things I said... I was to the point where I was almost encouraging [my wife] to have an affair and don’t tell me about it” to avoid having to make a decision.<sup>104</sup>

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<sup>96</sup> D Lupton & L Barclay *Constructing Fatherhood*. (London: Sage Publications 1997), 119.

<sup>97</sup> D Owens ‘The Desire to Father: Reproductive Ideologies and Involuntary Childless Men’. In L. McKee, & M. O’Brien, *The Father Figure* (London: Taylor & Francis 1982), 76.

<sup>98</sup> *Ibid*, 79.

<sup>99</sup> Mason (note 87), 194.

<sup>100</sup> Webb and Daniluk (note 82) 7.

<sup>101</sup> *Ibid*, 14.

<sup>102</sup> Mason (note 87), 84.

<sup>103</sup> F M Andrews & J L Halman, J. L. ‘Infertility and Subjective Well-being: The Mediating Roles of Self-Esteem - Internal Control and Interpersonal Conflict’. (1992) *Journal of Marriage and the Family*, 54, 408-417, 409.

<sup>104</sup> Webb and Daniluk (note 82) 17.

The consequences of infertility then, situate themselves heavily at psycho-social and relational level and can permeate every area of one's life. As Mason explains one reason for this ripple effect may be that the goal 'of parenthood is linked to other ones such as being a worthwhile member of society. Failure to become a father may mean the other goals seem unattainable and the person starts to feel worthless'.<sup>105</sup> From an individual's self-perception, their relations with others including their partner, performance at work and levels of psychological health, the impact of infertility and an individual's ability to cope with or move beyond infertility are variable, highly dependent on personality, context and personal biography.

The foregoing, while crudely drawing out aspects of a developing research domain around men's experience of infertility, illustrates how the vehicle of property deployed in *Yearworth* renders an impoverished representation of the nature of the harm sustained by individuals whose hopes for fatherhood had been frustrated. In some respects, one could venture that the circumstances of *Yearworth* suggest a more pronounced loss for those whose fertility did not return, in light of the active steps taken (and typically encouraged by NHS providers in those diagnosed and treated for cancer<sup>106</sup>) to preserve the possibility of genetic fatherhood. What should be painfully clear, is that the significance of these experiences is diminished when conceptualised as an abstract idea of property had and lost, of physical hurts or pains. Rather, the only means of understanding the meaning of destroyed sperm in *Yearworth* is in the destruction of an open horizon which made these men's lives make sense. This gives social meaning, and an explanation as to why courts might treat these experiences as ones which leave the men 'appreciably worse off', rather than sustaining harms that are trivial or momentary at the point that property sperm is destroyed. True it is that for some of the *Yearworth* claimants their fertility returned, however, a property damage analysis poorly equips the courts to evaluate how to treat these claims as distinct from those where men are rendered infertile. The effects as part of the broader biography of harms that have been sustained gives flesh to damage. At the heart of the problem lies the concept of damage, whether expressed as personal injury or property, which simply renders irrelevant the psycho-social and practical factors which seem so crucial to an enquiry in assessing whether individuals are left appreciably worse off. It is this enquiry which provides the critical normative marker for establishing whether the tipping point for harms that *should* make the legal cut (whether 'seriousness' or being left 'appreciably worse off') has been demonstrated.

At this stage, some readers may be sceptical; though it may be true that these psycho-social aspects of harm are suffered, and that valuably fleshes out questions of damage, what difference does such an enquiry *really* make? After all, was it not the case that the Court of Appeal was practically falling over itself to accommodate the harms

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105 Mason (note 87), 100.

106 A Chapple, M Salinas, S Ziebland, A McPherson and A Macfarlane, 'Fertility Issues: The Perceptions and Experiences of Young Men Recently Diagnosed and Treated for Cancer' (2007) 40 *Journal of Adolescent Health* 69–75.

suffered here within the concept of damage? This would be a fair comment. Given the narrow remit of the notion of ‘personal injury’, the adoption of a property rationale in *Yearworth* to claimants who were not physically harmed *per se*, is perhaps understandable. The Court of Appeal was evidently keen to afford some recognition of the wrong done and the outcome harm that resulted. Even Heather Widdows, who harboured grave concerns about the implications of assigning a property label to human reproductive materials and the appropriateness of compensation in such instances, conceded that, given the men’s distress, and the *obvious wrong* committed, compensation at least recognises that, ‘[an] injustice has occurred’ and that ‘as the only form of recognition, this is better than none’.<sup>107</sup> Some might argue that as a matter of common sense, these men seem *obviously* harmed. On that basis, the kind of enquiry we have just conducted in exploring some of the psycho-social aspects as to *how* and in what way these men may have suffered harm as a means of determining ‘real damage’ might seem superfluous or excessive given that the court nevertheless arrived at the ‘right’ result.

However, what needs emphasising here is just how haphazard and arbitrary ideas of ‘obviousness of injury’ and locating the ‘right result’ can be in the tort of negligence. Had the Court of Appeal denied this claim, akin to the County Court, this would have been equally unsurprising. If we think back to our exploration of the response of the courts to whether asymptomatic plural plaques constitute actionable damage (or indeed ‘injury’), the progression of the *Rothwell* litigation highlights the production of very different judicial responses; so too, in the wider UK sphere, do we now see contrasting approaches to the question as to whether pleural plaques constitute damage or not. Ideas of obviousness or ‘common sense’ then, do not take us far. So too, can the same be said by reference to the courts’ approach to the question of whether the harm of raising and maintaining an unwanted but healthy children should be deemed actionable. What is obvious to one person, or indeed, to one commuter on the underground, may not be to another. For those who know what is involved in the care of a child, the prospect of caring for an unwanted child after a failed sterilisation may be regarded as ‘obviously’ harmful; for others who believe that parenthood merely entails writing cheques, the harm suffered may be far less evident.

Yet, if we rise above the particularities of these cases and endeavour to explore the potential commonalities between them, this invites a different critique. If we care about horizontal equity between victims, in the sense of treating like cases alike, there is no reason for distinguishing between cases like *McFarlane* or *Yearworth*. Though the particular circumstances and impacts will differ in the sense of reproductive labour being thrust upon a claimant versus hopes for a genetically-related child being swept away from another, these cases are closely bound together in the messing up of one’s life plans in often profound ways. They both manifest essentially the same kind of harm, notably the frustration of reproductive plans that made these claimants’ lives, make sense. This should be the principle gateway for evaluating *how* and in *what ways*

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<sup>107</sup> Widdows (note 71).

one's life plans have been disrupted. The significance of the freedom to make plans concerning reproduction lies in its instrumental relationship with a far broader series of interests which form the architecture of our lives and it is against that, which an evaluation of damage needs to be judged. In this sense then, the potentially corrosive effects on *any* individual's life through the thwarting of reproductive plans, should make it impossible to suggest that decisions to reproduce are *more* or *less* important than 'decisions to avoid reproduction'.<sup>108</sup> Yet, the overall picture presented is that the law is willing to protect the interests of those who wish to have children over those who take steps to avoid that outcome; a conclusion which seemed so obvious to the House of Lords in *McFarlane* in declaring the pursuers to have been blessed by parental responsibility, rather than harmed by it, despite taking invasive steps to avoid that very blessing. Either way, the point to be made here is that while neither 'obviousness' or 'common sense' will be able to safely guide us to the 'right result', they nevertheless play a large role in determinations of what is, what is not damage.

The foregoing illustrates how the harm entailed in the frustration of reproductive plans is so poorly captured by the analytical concepts that negligence possesses for addressing issues of actionability and compensation for injury. One never gets the sense as to why destroyed sperm, or an unwanted child, *is really* harmful – the enquiry never extends beyond the assumption that these events were simply undesired. There is no evaluation attending the concept of damage to measure even crudely whether these harms are trivial, deleterious, or perhaps catastrophic to the claimants. In this respect the damage enquiry and the courts' mode of analysis is painfully divorced from and disinterested in, social reality. The critical characteristics that serve to transform bodies into *persons*, those aspects of "us", that prove so central to the meaning of who we are and our capacity to value life: our subjectivity, emotionality, relationality, personality, capacity to love/care and the possession of aspirations and wishes – are treated as quite irrelevant aspects of humanity in determining when and whether damage has been sustained capable of *triggering* an actionable claim.<sup>109</sup> So too are red flag factors critical to issues of fairness before the law, around gender and equality, missed resulting in a damage concept that reflects and perpetuates outdated

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<sup>108</sup> In a slightly different context, the author has discussed this point in much greater detail elsewhere, see further N Prialx 'Rethinking Progenitive Conflict: Why Reproductive Autonomy Matters' (2008) *Medical Law Review*, 16, 169-200.

<sup>109</sup> True it is that when we look to the question of *losses* which flow from the damage – notably, *consequential loss* (that is once 'actionable damage' has been established) that this is surely premised upon a wider conception of humanity, an embodied person that suffers psycho-social *effects*. Indeed at that stage of the enquiry, the focus is not for the injury itself, but for the *effects* of that injury (*Baker v Willoughby* [1969] U.K.H.L. 8). However, the point being made here is that these psycho-social "effects", are not actionable in themselves, nor evaluated as relevant to questions around damage, without proof of damage in the first place. The attempt here is not to attempt a repackaging of effects (e.g. akin to the "lost chance" claims which may be seen as a sophisticated strategy to repackage 'effects' as a form of damage in circumstances where claimants cannot demonstrate a causal link between the breach and physical damage (see for example, *Gregg v Scott* [2005] U.K.H.L. 2) but rather to question why so much of our collective human experience is positioned as 'effects' – or 'after-thoughts' that only come to matter when a 'physical' anchor is present. It is in this respect, that the attempt to keep "damage" and the "effects" proves pernicious, as demonstrated in the cases under examination in the present piece.

stereotypes of men and women's roles in reproduction and family rather than challenging them. It is in this sense that by virtue of all that the concept of damage misses, that it proves to be *damaging*. The most significant aspects of what it means to be human, for the greater part, are relegated to "legal junk" for the purposes of locating damage. Why this should be seen as problematic goes far beyond aspirations for the law to reflect 'who we are' in a strictly presentational sense; rather, it strikes at the heart of a far more pressing issue: analytical inclusiveness.

## **Conclusion: Psycho-Social Harm at the Edge of Time**

Irrespective of whatever ideals and aspirations we hold the tort of negligence up to, its particular method of achieving what it achieves, is incrementalism. Case by case, a whole host of distinctive scenarios have come before the courts so as to foster the growth of the tort of negligence into the super-size tort it is today. During the passage of its life course, one can of course spot points where its boundaries have been guarded vigorously with different ends or fears in sight, nevertheless the overall trend is one of growth resulting in a tort that speaks to broad range of liability situations which a century ago would have been unthinkable. Nevertheless, while incrementalism constitutes an inherent part of the negligence enterprise, there is good reason for questioning the techniques and indeed the normative 'vision' that guide the growth of new liability situations (or indeed, the opposite). 'Growth' in and of itself cannot be taken as 'the' good; nor for that matter can maintaining the status quo so as to ruthlessly preserve existing boundaries at all costs, be seen as an intrinsic good. Rather there is a fair expectation that the tort of negligence is connected to the facilitation of broader social goals, responsive to the social settings to which negligence has purchase and that these considerations help in no small measure to steer the path of the law. It is with these very concerns in mind that this article has centralised the concept of damage. The aim has been to explore the extent to which that connection is evident, and the extent to which one can say that the boundaries of what constitutes actionable harm are being drawn by reference to any higher principle at all.

In so many respects, that socio-legal connection proves critical for the life of negligence and it proves especially germane in the context of our discussion around damage. In the context of the broader theorising around the concept of harm, weighty arguments have been presented to highlight how often the pockets of resistance to extending the tort of negligence, for instance in the case of harms that women sustain as women, have offended core ideals of fairness before the law and indeed the aspiration to treat like cases are treated alike. But so too, is there an argument in respect of the relevance of negligence which underpins the need for a concept of damage that remains open and fluid. Insofar as what is considered harmful in our 'everyday' lives refreshes with new generations, agitated by changing social, technological and indeed, clinical norms, by developments in what is possible and knowable, and in different spheres expected in our professional and social realms, in similar force the concept of damage needs to remain somewhat fluid to retain its purchase. Yet these two ideas, of the fairness of negligence and its relevance as an at

least partial tool of governance, both depend on a very specific kind of careful incrementalism which this article has argued, seems incredibly lacking. As I have sought to highlight, at least on the basis of these second generation ‘hybrid damage’ cases, the concept of damage is currently masquerading as a normative category. In part this is by virtue of its centralisation of corporeal harm, and its neglect of the psycho-social aspects of injury; it is the latter which not only makes conceptions of ‘damage’ meaningful and worthwhile, but tells us what kinds of experiences prove to leave us ‘appreciably worse off’ or are the most ‘serious’. It is in this sense that some account needs to be made of ‘the ways in which we value the living physical body as it enables our being in the world and our interactions with others’.<sup>110</sup> The point is this: it is that “stuff”, the embodied vision of ourselves that often proves to be so irrelevant to the current analytical enquiry in negligence law, which is utterly critical in adjudging from a socio-normative perspective, whether serious harm has occurred and whether the law *should* seek to vigorously protect the interests that harm has frustrated.

As we have seen in the context of the above cases, it is clear that the law deeply misrepresents the experience of reproductivity, reproductive labour and the emotional and *practical* experience of having one’s expectations frustrated. Contrary to the story that law tells and the picture it presents, an enquiry into these dimensions tells us that these are not trifling or harmless injuries. The consequences of one’s reproductive expectations had and lost can have a corrosive impact upon victims and the consequences and experience of frustrated reproductive plans look every bit as harmful and disruptive (and often, perhaps more so) as the suffering of many strictly physical injuries, whether whiplash or other short-lived bodily harms, that negligence regards as unproblematic.<sup>111</sup> Arguably then, to *not* include these other kinds of harm which fail to fit a strictly physical paradigm seems to send out pernicious and unsupportable messages about what harms we should be willing to privately tolerate for being simply the ‘vicissitudes of life’ rather than serious harms warranting negligence’s attention and a remedy.

Such an argument is strongly supported by reference to equity and fairness before the law.<sup>112</sup> For example, too often the harms that women sustain as women, have fallen into the ‘vicissitudes’ category as is demonstrated by the slow recognition of mental disturbance as a legally cognisable harm, or indeed, more recently, as explored above, through the scaling back of meaningful compensation for parents of unwanted children born as a result of negligence in family planning procedures. That tort fails to ‘see’ many of the injuries that women sustain as *women* - of reproductivity, pregnancy, childbirth and the emotional and life capital lost through caring for a child that one had planned *not* to have - is deeply embedded within the analytical categories

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<sup>110</sup> Fletcher, Fox and McCandless (note 3), 321.

<sup>111</sup> Priaux (note 42).

<sup>112</sup> Although note that a broader exploration of equity and fairness might well point in a different direction; see further Priaux (note 42).

that control liability. These categories are not objective but require ‘substantive choices to be made about which claimed injuries it will remedy.’<sup>113</sup> As such, because categories such as damage reflect a choice as to which aspects of human social life should be treated as injurious, we need to be watchful as to *which*, and more particularly, *whose* social experiences it picks up. As Joanne Conaghan comments,

[I]njury has a social as well as an individual dimension: people suffer harm not just because they are individuals but also because they are part of a particular class, group, race or gender. Moreover, their membership of that particular class, group, race or gender can significantly shape the nature and degree of the harm they sustain. The problem with law then is its failure to recognize that social dimension. Consequently, and in the context of gendered harms, it fails to offer proper redress.<sup>114</sup>

In this respect then, we see that when important aspects of our biographical experience are missed, law lacks insight into the specific ways that injury and harm occur, as well as the conditions which generate them. Under such circumstances, tort will proceed as if the experiences which harm and injure us are simply part of the normal (rather than injured) life course. For example, it is only since the late 1970s that sexual harassment has been transformed from behaviour widely regarded as a ‘harmless’ part of normal human engagement to behaviour constituting sex discrimination, deserving of a legal response.<sup>115</sup> And it is important here to recognise how these analytical categories can march on for decades whilst failing to speak to the experiences of classes and populations of people to whom it officially purports to apply to. In the context of emotional harms, as Martha Chamallas and Jennifer Wriggins argue, while the traditional justification was that the law was directed at protecting material interests and physical harm, leaving emotions and relationships beyond legal protection, this ‘basic demarcation line had important gender implications for compensation’,

[L]osses typically suffered by men were often associated with the more highly-valued physical realm, whilst losses typically suffered by women were relegated to the lower-valued realm of the emotional or relational.<sup>116</sup>

Of course, that this privileging of physical harm over emotional harm ‘persists to this day’<sup>117</sup> has been central to this paper. And what I hope to have shown is that a concern for negligence law to reflect important aspects of our humanity is more than a wish for inclusive symbolism. The question of biographical inclusiveness has serious repercussions in relation to which injuries, and indeed very often, *whose* injuries are addressed by tort. While a vast body of feminist literature has noted the manner by

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<sup>113</sup> Lieberman (note 1), 63.

<sup>114</sup> J Conaghan, J ‘Gendered Harms and the Law of Tort: Remediating (Sexual) Harassment’. (1996) *Oxford Journal of Legal Studies* (1996), 16, 407-431, 408.

<sup>115</sup> Conaghan, *Law, Harm and Redress* (note 6).

<sup>116</sup> Chamallas and Wriggins (note 6) 37-8.

<sup>117</sup> *Ibid*, 38.

which law has excluded those experiences and risks which either exclusively, or more frequently pertain to the biographical experience of being a woman,<sup>118</sup> the present analysis has also sought to illustrate is that it is not only for women that the privileging of the physical over the emotional has been problematic. The absence of an emotional and social dialogue within negligence has also rendered a fictitious and problematic portrayal of losses and harms sustained by men too. Rather than being conceptualised as emotional creatures whose reproductive materials signify lost and frustrated futures, the beings of *Yearworth* are ‘sperm owners’, whose psychological response constitutes an afterthought – it is limited to and triggered as a result of carelessly destroyed property. An exploration of the psycho-social aspects of injury and loss clearly reveals some fundamental problems that underpin the assumptions around what can and should count as actionable harm. Certainly the Court of Appeal’s assessment of the *Yearworth* case is impoverished in ascertaining the nature and the quality of the injury (but we can sceptically note that while the normative questions around *why* this should count as damage are missing, it did, nevertheless allow the claims to proceed), just as the same kind of enquiry in relation to the psycho-social and practical aspects of caring for a wrongfully conceived child makes it incredibly hard to conclude that claimants’ are unharmed or are better off than those who sustain a ‘physical’ injury. Given the repercussions for wrongful conception claimants, on their lives, freedom and broader interests, we may well find that the psycho-social and practical dimensions of their injuries places them generally in a worse position than those whose injuries consist of physical hurts.<sup>119</sup>

What path then, would the author advocate that the law of negligence and the judiciary as its gatekeepers, follow? This is a somewhat harder question and I hope that the reader will forgive what appears to be some ambivalence on this point. The urge to compel the law of negligence to embrace a wider ambit of harms under its cloak, tugs hard here. Modifying the concepts of injury and damage so that they are *more* in line with the lived experience of human injury would go a long way toward making the damage enquiry more normatively meaningful, and indeed, more coherent, inclusive and morally robust to meet new challenges and a changing social landscape. Moreover, accommodating these broader harms would seem to entail rather minor revisions to existing law, for as Christian Witting has already noted in relation to cases of wrongful conception, the kind of damage featured there is, ‘so closely analogous to orthodox kind of damage that one would be splitting hairs to attempt to draw a line between them’.<sup>120</sup> Such expansionism undoubtedly provides a legitimate response given that it is motivated by a genuine desire to address some of the serious shortfalls in the operation of the negligence ideal in its management of human harm; indeed, it is an approach that this author has advocated in the past.<sup>121</sup> Nevertheless, the process

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<sup>118</sup> See further, Conaghan (note 6); J Bridgeman & S Millns *Feminist Perspectives on Law, Law's Engagement with the Female Body* (London: Sweet & Maxwell 1998); R West *Caring for Justice* (New York: New York University Press 1997); Graycar and Morgan (note 6).

<sup>119</sup> Prialx (note 42).

<sup>120</sup> Witting (note 14), 203.

<sup>121</sup> Prialx (note 52).

of incrementally revising negligence to reflect our humanity in the ways in which we experience injury, whether on the grounds of equality, justice, or coherence, while a common strategy for smoothing out disparities *within* the law of negligence, is one approach – and it is one driven by legal egalitarian ends. But perhaps viewed through a slightly wider lens, a different response is possible. It may be that incrementalism plays into a habit of offering a short-lived and impoverished kind of gain for society when we consider quite practical aspects of how the law of negligence operates on the broader social landscape. Indeed regarded in this way, a more detailed investigation into some of the foundational assumptions of the concept of damage and in particular the ‘physical’ gold standard that underpins it might well bring more closely into view the reparative limits of negligence in attaining the kinds of solutions we had hoped for.<sup>122</sup>

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<sup>122</sup> *Ibid.*