‘Pouring Oil on Troubled Waters’: Enhancement of Autonomy in Reproductive Negligence

[150133106]

[May 2019]

DISSERTATION (LA3200)

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Acknowledgements

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Abstract

The purpose of this dissertation is to contribute to the debate on the importance of the reproductive choices and propose a novel strategy for ensuring its protection in the tort of negligence. In particular, this dissertation will focus on 'wrongful conception' claims and argue that in the light of the recent reform *in Montgomery v Lanarkshire Health Board*, the cases of the 'wrongful conception' such as *McFarlane* and *Rees* should be reconsidered. The reform shifted the approach from doctors' paternalism towards the autonomous decision-making by patients and this new nature of doctor-patient relationship is inconsistent with the existing framework for reproductive negligence claims. The dissertation will outline the tentative steps implemented by the Court towards recognising 'the loss of personal autonomy' as a stand-alone cause of action and the recent case law objections of this approach will be addressed. The dissertation will propose a new strategy, *'the loss of reproductive autonomy'*, which will operate as an umbrella for a variety of reproductive negligence claims and will help to recognise the experiences suffered by patients and parents in a substantive manner.

[10955 words]

TABLE OF CONTENTS

Table of Cases **5**

Introduction **6**

I. **Chapter 1: "The law"** **10**

Introduction **10**

1. A Timeline of 'Wrongful Conception' Cases 10

2. End of Peace and Uniformity **11**

McFarlane's case 11

Mrs. Parkinson's case 12

Ms. Rees's case 13

3. Summary of the UK Law **14**

4. Comparative Analysis **14**

Australia 14

USA 15

Canada 15

Singapore 16

5. The Summary of Reasons for Rejecting Upkeep Costs **16**

Conclusion **17**

II. Chapter 2: "Deficiencies of the current state of affairs" **19**

Introduction **19**

1. Is a Healthy Child Always a "Joy and Blessing?" **19**

2. Unhappy Differentiation **21**

3. Immunity Zone for NHS **22**

Conclusion **23**

III. Chapter 3: "Shift to Autonomous Choices" **25**

Introduction **25**

1. First Steps Towards Recognising Personal Autonomy **25**

2. Patients – "The Authors of Their Own Lives" **26**

Montgomery 26

Shaw v Kovac 28

ACB 29

Conclusion **30**

IV. Chapter 4: Reproductive Autonomy as a New Formula **31**

Introduction **31**

1. New Framework **31**

2. What is Autonomy? **33**

3. Why is it Important to Recognise Reproductive Autonomy? **36**

4. How Should it be Compensated? **37**

Conclusion **38**

V. Conclusion **39**

Bibliography **40**

Table of Cases

ACB v Thomson Medical Pte Ltd [2017] SGCA 20

Bennarr v Kettering [1988] 138 NLJ 179

Bolam v Friern Hospital Management Committee [1957] 2 All ER 118

Caparo Industries plc v Dickman [1990] 1 All ER 568

Cattanach v Melchior [2003] 5 LRC 1

Chester v Afshar [2004] UKHL 41

Custodio v Bauer [1962] 251 Cal App 2d 303

Doiron v Orr [1978] 86 DLR 719 (3d)

Emeh v Kensington and Chelsea and Westminster Area Health Authority [1984] 3 All ER 1044 (CA)

Goodwill v British Pregnancy Advisory Service [1996] 1 WLR 1397 (CA)

Henderson v Merrett Syndicates v Merrett Syndicates [1995] 2 AC 145

McFarlane v Tayside Health Board [2000] 1 SC (HL)

Montgomery v Lanarkshire Health Board v Lanarkshire Health Board [2015] 11 (UKSC)

Parkinson QB 266 v St James and Seacroft University Hospital NHS Trust [2001] 266 (QB)

Rees v Darlington Memorial Hospital [2003] UKHL 52 (HL)

Richardson v Mellish [1824] 2 Bing 229

Shaw v Kovac [2017] 1028 EWCA Civ

Smith v Erik S. Bush [1990] 1 AC 831

Thake v Maurice [1985] 2 WLR

Udale v Bloomsbury Area Health Authority [1983] 2 All ER 522

Witt v Yale-New Haven Hospital [2008] 977 A.2d 779 (Conn. Super)

Introduction

The point of no return caused by medical negligence often creates a 180-degree change in the lives of patients. This is even more so when the negligence involves reproduction. These patients now also become parents. In many of these situations, the patient specifically planned against parenthood, therefore deciding to undergo sterilisation or vasectomy, but it was negligently performed. The family settings are very diverse. While a mother of one healthy baby lives in modest conditions and is in need of financial support, another family is affluent, but their child was born disabled. Yet another neonate is healthy, but the mother suffers from disability which complicates the care for her child. Despite the fact that all these unplanned children are accepted and loved, their parents are entitled to bring a claim against a negligent doctor for 'wrongful conception'.[1]

There is no dispute that doctors are under a legal duty to provide professional care for their patients according to the well-established principles found in tort law. Rather, the issue arises as to whether a doctor has breached such duty of care and whether this breach caused a recognized medical harm to the patient. Normally, in order to prove medical negligence, it is necessary to demonstrate three essential requirements. Firstly, the health care professional owed a duty of care to the patient; secondly, there was a breach of that duty by failing to comply with the professional standard of care; and lastly, that that breach caused a legally recognisable medical harm. By satisfying these well-known elements of tort of negligence, patients are entitled to receive damages for suffering an injury. However, this is not fully the case in the field of 'wrongful conception' claims.

Duty. In such cases it is not disputable that the doctor owes a duty of care to the patient who undergoes the sterilisation or vasectomy procedure. However, the difficulty may arise in issue whether the doctor owes a duty of care to the patient's partner. Indeed, a doctor's duty of care will not extend to all future sexual partners of a patient undergoing sterilisation, but only to partners who are within the doctor's contemplation when the operation is performed[2]. In other words, the test of reasonable foreseeability can be applied in order to resolve the problem of the extension of the duty of care to a patient's partner.

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[1] A wrongful conception claim involves a patient who alleges that the doctor was negligent in performing a voluntary sterilisation, which was intended for the purpose of irreversible contraception. The patient believing that he or she can no longer conceive a child, dispenses with contraceptive measures and later as a result of the negligent procedure there is an unplanned child. Stephan Todd, 'Accidental Conception and Accident Compensation' (2012) 3 PN, 196.

[2] *Goodwill v British Pregnancy Advisory Service* [1996] 1 WLR 1397 (CA) 1404

Breach. The breach of duty of care will most often occur either when the doctor performed the negligent sterilisation or where the doctor provided negligent advice about the operation's success[3]. The majority of 'wrongful conception' cases combine these two breaches[4]. It is important to notice that there are a variety of methods whereby the sterilisation can be carried out and some of them possess a higher inherent risk of reversal. According to the Royal College of Obstetricians and Gynaecologists' guidelines, patients requesting sterilisation should be fully informed that tubal occlusion and vasectomies are subject to failure rates and that pregnancy may occur several years after the procedure[5]. Under the recent *Montgomery* judgement, doctors are obliged to disclose to patients even minor risks of treatment using "dialogue", without "bombarding patients with technical information"[6]. JK Mason informs that "wrongful pregnancy" occurs in 1 out of 2,500 cases in the case of men and 1 out of 600 in the case of women[7]. According to statistics, technical failures are more common in cases of tubal occlusion than in vasectomy cases[8]. In order to determine whether the doctor was negligent in performing the surgery, under the *Bolam* test, an expert witness would have to be involved to assess whether the doctor's standard of conduct met the requirements of the "professional man of ordinary skill"[9].

For the purposes of this dissertation, it is necessary to clearly distinguish from the scenario where the procedure was performed properly and the doctor provided the patient with the full information about any risks and alternative methods of surgery, but failure of sterilisation occurred anyway, due to the inherent risk of reversal. In such cases, the doctors cannot be liable, as there was no negligence and the patient was informed about the minor risk of reversion. Such cases should be distinguished from cases where the doctor admitted that the procedure was implemented negligently. This paper will focus on cases where the patients suffered from the negligent surgery, which led to substantial changes to their personal lives.

Causation. In respect of causation, it has been established that the pregnant women affected by negligent sterilisation procedures are not expected to resort to abortion or adoption[10]. The fact that a woman decided not to terminate her pregnancy and bring up the child does not amount to a *novus actus interveniens*[11]. *Mcfarlane* strongly rejected the notion that the failure to terminate or

[3] Stephan Todd, 'Accidental Conception and Accident Compensation' (2012) 3 PN, 196.
[4] *McFarlane v Tayside Health Board* [2000] SC (HL) 1
[5] Faculty of Sexual & Reproductive Health Care, 'Male and Female Sterilisation' (2014) FSRH 1.
[6] Elspeth Reid, 'Montgomery v Lanarkshire Health Board and the Rights of the Reasonable Patient' (2015) Edinburgh Law Review 361, 364.
[7] JK Mason, *The Troubled Pregnancy: Legal Wrongs and Rights of Reproduction* (Cambridge University Press 2007) 101.
[8] ibid.
[9] *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118
[10] *McFarlane v Tayside Health Board* [2000] 2 AC 59 (HL) [59], [74]
[11] ibid.

abort will result in a break of the chain of causation. Lord Steyn was unable to "conceive of any circumstances in which the decisions of the parents not to resort to even a lawful abortion could be questioned"'[12]. The termination of pregnancy, especially of a late one, is a profound moral and medical dilemma, which women have to face after a failed sterilisation, and as a result, the negligent doctors should anticipate that the women can reject it.[13] Therefore, it could be said that "but for" the negligence of the doctor, the patient would have never been placed in an undesirable position which she or he initially attempted to avoid, and hence compensation should be paid fully.

Harm. Yet, Courts around the world are divided on the question of whether the parents of an unexpected child should be compensated. This is a complex and controversial issue, as it combines intricate questions of morality, ethics, and strict application of law. In the UK, the Court presents various moral and practical reasons for refusing to award so called "*upkeep costs"* which are damages associated with raising a child. Parents of a healthy child are entitled to receive only a modest sum for suffering pain and discomfort during the pregnancy and birth, but not beyond.

It is worth noting that an action for wrongful conception cases can be brought both in contract and in tort.[14] However, in practice the court will only imply into the contract "the duty to exercise a reasonable case in performing the sterilisation", therefore the implied warranty that the sterilisation will be successfully achieved will never be provided.[15] Consequently, the resort to contract law will be of no help and generally "the cases brought in contract will be indistinguishable from negligence actions".[16]

The purpose of this thesis is to analyse whether in the era of choice, it is time to reconsider the current law on 'wrongful conception'. This dissertation will critically examine the current law established in *McFarlane* and *Rees* and evaluate whether the House of Lords cases should be reviewed in the light of the recent *Montgomery* reforms.

In 2015, in a fundamental case in the medical field, *Montgomery v Lanarkshire Health Board,* the Supreme Court firmly confirmed the patient's autonomy in a doctor-patient relationship[17]. The case shifted the approach from doctors' paternalism to patient-centered decision-making emphasizing a patient's wishes and choices. Given the fact that the court made tentative steps to recognize a patient's autonomy, this paper will argue that the cases of the 'wrongful conception' are inconsistent with this new trend and should be reconsidered focusing primarily on the interests of parents.

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[12] ibid [81].

[13] JK Mason, *The Troubled Pregnancy: Legal Wrongs and Rights of Reproduction* (Cambridge University Press 2007) 116

[14] *Henderson v Merrett Syndicates* [1995] 2 AC 145

[15] Emily Jackson, *Medical Law: Text, Cases and Materials (2nd edn,* Oxford University Press 2010) 727.

[16] ibid.

[17] *Montgomery v Lanarkshire Health Board* [2015] UKSC 11

Although the recent decisions of the United Kingdom Supreme Court (UKSC) and the Singapore Court rejected the claim that the "loss of autonomy" constitutes a stand-alone cause of action, this dissertation will argue that "the loss of *reproductive* autonomy" should be accepted as a new cause of action. This approach is envisaged to provide a solution not only for cases of 'wrongful conception', but also embracing cases of wider reproductive wrongs.

Some academic commentators argue that the "loss of autonomy" should not be used as a sword, because it will distort the existing control mechanisms of the tort of negligence[18]. Yet, this paper proposes a narrower approach, specifically tailored to the 'wrongful conception' cases. A claim for loss of reproductive autonomy is conceptually different from claiming damages for raising a child. This approach will allow the avoidance of judicial objections which bar the claim for upkeep costs. The focus is intended to be on the impact of a child on the lives of parents, rather than on the costs of their maintenance.

The structure of this dissertation is as follows: firstly, a timeline of development of the case law on 'wrongful conception' will be examined and the comparative analysis will be introduced. Secondly, the deficiencies of the current position will be outlined. Thirdly, the discussion on the shift towards the patient's autonomy will be laid out. Lastly, a novel strategy for dealing with reproductive negligence claims will be proposed.

[18] Craig Purshouse, 'Liability for Lost Autonomy in Negligence: Undermining the Coherence of Tort Law?' (2015) 22 Torts Law Journal 226, 228.

I. Chapter 1: "The law"

Introduction

This section explores the law in respect of 'wrongful conception' in the UK and other common law jurisdictions. First, the pre-*McFarlane* position will be briefly addressed. Then, the leading cases on 'wrongful conception' – *McFarlane v Tayside Health Board*, *Parkinson v St James and Seacroft University Hospital NHS Trust* and *Rees v Darlington Memorial Hospital* will be discussed. The chapter will introduce the underlying practical and policy reasons why the courts in the UK and other common law countries adopt a negative approach in awarding the maintenance costs of children.

1. A Timeline of 'Wrongful Conception' Cases

Almost forty years ago, in 1983, the Court faced the first case, *Udale v Bloombsurry AHA,* dealing with the issue of whether the child-rearing costs could be recovered where a woman after failed sterilization conceived a fifth child[19]. The Court rejected her claims for upkeep costs and since that time Justice Jupp's statement that the birth of a child is "a blessing and an occasion for rejoicing' has been widely cited.[20] Jupp J rejected the claim for the upkeep costs until a child reaches 18 years old determining that it was undesirable that the child should learn from the court's judgement that their birth had been a mistake[21]. Further, it was stated that such approach can lead doctors to encourage their patients to have an abortion in order to avoid litigations in tort of negligence[22]. In addition, the court was deterred from awarding upkeep costs by setting off the advantages of having a child against the financial burden, which parents have to face after the birth[23]. Despite the fact that the costs for maintenance of the child were not awarded, the court decided that the parents should be compensated for the loss of earnings during the pregnancy, for the 'disturbance of the family finances' and increased accommodation for the family[24].

Two years later, *Udale* was overruled in *Thake v Maurice,* where Peter Pain J famously stated that 'every child has a belly to be filled and a body to be clothed'[25]. The reasoning in *Thake* was followed in *Emeh v Kensington and Chelsea AHA*, where it was rejected that there is any

[19] [1983] 2 All ER 522
[20] *Udale v Bloomsbury Area Health Authority* [1983] 2 All ER [522], [531]
[21] ibid.
[22] ibid.
[23] ibid.
[24] ibid.
[25] [1985] 2 WLR [215], [230] (Peter Pain J)

public policy objection in recovery of the maintenance costs.[26]From the mid-1980's, the costs for the upbringing of the child were awarded and indeed, sometimes they were very high.[27]

It is important to note that the UK courts had no problem with awarding damages for the upkeep costs of the unplanned child for fourteen years before a dramatic sea-change happened in *McFarlane*.

2. End of Peace and Uniformity

McFarlane's case

In 1999, the House of Lords was faced with two claimants, Mr. and Mrs. McFarlane, who were assured by doctors that the husband's vasectomy was successfully implemented and he was no longer fertile[28]. Relying on the assurances of professionals, the couple dispensed with contraceptive methods, and consequently, Mrs. McFarlane became pregnant and gave birth to their fifth child. Although the Health Board argued that the process of conception, pregnancy and child-birth were natural, the House of Lords accepted that these circumstances can be considered as an actionable physical harm for the mother[29]. The House of Lords found that Mrs. McFarlane should be entitled to recover for the *pain* and *sufferings of pregnancy*, but damages *for upkeep of costs* of a *healthy child* were rejected[30]. It is important to notice that each of the five judges in denying the compensation, "spoke five different legal voices" and according to Mason none of these reasons "appear to be wholly satisfactory to a person who has no special training in law"[31]. Priaulx stated:

> to some degree, a legal education can rather blind us to what is going on in cases, given the tendency to see law through law, rather than to ask broader questions about whether the policy of the law is fair or sustainable outside the operation of legal rules.[32]

In *McFarlane*, Lord Slynn simply applied the *Caparo* test and considered that it was not "fair, just and reasonable" to impose a duty of care on a doctor and he should not be liable for the consequential responsibilities imposed on the parents[33]. Lord Hope supported Lord Slynn's

[26] [1984] 3 All ER [1044], [1050].

[27] In *Bennarr v Kettering* (1988) 138 NLJ 179, following a negligent sterilisation, damages were awarded to cover future private education.

[28] *McFarlane v Tayside Health Board* [2000] 2 AC 59 (HL)

[29] ibid, at [74].

[30] ibid, at [59].

[31] J K Mason, *The Troubled Pregnancy: Legal Wrongs and Rights of Reproduction* (Cambridge University Press 2007) 119.

[32] Nicolette Priaulx, *The Harm Paradox: Tort Law and the Unwanted Child in an Era of Choice* (Routledge, 2007) xiv.

[33] *McFarlane v Tayside Health Board* [2000] 2 AC (HL) [59], [82].

approach using the *Caparo* test[34]. He emphasized that in the absence of a threshold, the liability could be stretched almost indefinitely so as to impose on the doctor the costs for private education[35]. Lord Hope determined that the detriments would be offset by the benefits of having a resultant child[36]. He stated that while in the short term there is pleasure which a child gives in return for the love and care given by parents, in the longer term there is a mutual relationship of support and affection which will continue throughout the whole life[37]. Lord Clyde believed that the award of damages for upkeep costs was wholly disproportionate to the doctor's fault[38]. Lord Millet reiterated the argument stated in *Udale*, that the birth of a healthy child is a blessing and cannot be considered to be a detriment[39]. Lord Millet decided that the parents are entitled to conventional sum in an amount not exceeding five thousand pounds[40].

Mrs. McFarlane gave birth to a healthy child, however, the judges mentioned that a case with *a disabled neonate* may have a different outcome. Yet, their Lordships did not provide any instructions as to the potential approach in relation to a case which involved a disabled child. Three years after the *McFarlane* litigation, Mrs. Parkinson suffered from the negligent sterilisation and gave birth to a *disabled neonate*[41]. According to Mason, *Parkinson* could fall under the "McFarlane exception"[42].

Mrs. Parkinson's case

Angela Parkinson already had four children and did not plan to have the fifth one. Mrs. Parkinson had undergone an admitted negligent sterilisation. Ten months later, she conceived a child and was informed that there was a risk that the child may be disabled; however, she decided not to have an abortion. The child was born with a severe behavior disorder. The family financial resources were modest and the birth of the child meant that Mrs. Parkinson could not return to her paid employment. The pregnancy caused "an intolerable strain" on the Parkinson's marriage and the couple separated before the birth of the child. Mrs. Parkinson sought to recover upkeep costs for the unexpected child.

[34] ibid [97].
[35] ibid [91].
[36] ibid [97].
[37] ibid.
[38] ibid [106].
[39] ibid [60].
[40] ibid [114].
[41] *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] QB 266
[42] J K Mason, *The Troubled Pregnancy: Legal Wrongs and Rights of Reproduction* (Cambridge University Press 2007) 153.

Applying the *Caparo* test, the foreseeability and proximity were satisfied, and unlike *McFarlane,* it was "fair, just and reasonable" to award the damages for looking after the disabled child[43]. However, it should be noted that the damages were limited to the extra expenses associated with the child's disability. Brook LJ picturesquely opined that "considering the distributive justice, 'ordinary people' would approve the award of damages limited to the extra expenses for a disabled child, and would not approve expenses for a healthy child".[44]

There is a further case, *Rees,* which is of fundamental importance, as were this case to be successful at the appeal, it would force the House of Lords to review its controversial decision in *McFarlane*. The House of Lords had an opportunity to reconsider the underlying principle of *McFarlane*, but instead, their Lordships' solution was to find a compromise - the award of a fixed amount. Mason considers that *Rees*, "rather than exploring a lacuna in *McFarlane*, was seeking to impose a *new* exception"[45].

Ms. Rees's case

While Mrs. McFarlane, as a mother was healthy, Ms. Rees suffered from partial blindness. Being observed by the surgeon, she admitted that she would never want a child because of the difficulties she would have in caring for it, and she was also anxious about the impact of pregnancy and labour on her own health[46]. She sought sterilization, which was negligently implemented and gave birth to a *healthy* boy. Ms. Rees sued for the full amount of rearing costs. The Court of First Instance held that the principle in *McFarlane* is well-established and sufficiently tested, therefore Ms. Rees could not recover costs for the maintenance of her child[47]. In the Court of Appeal, considering the "special circumstances" of the mother, it was agreed to award the damages *limited to special expenses* emanating from the disability of the mother in the amount of fifteen thousand pounds[48]. Mason refers to Lady Hale who provided an analogy with the *Parkinson* case determining that:

> if disability in the child is likely to complicate the mother/child relationship in both physical and economic terms, disability in the mother is likely to do so to an equal or even greater extent.[49]

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[43] *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] QB [266], [266]
[44] ibid [283].
[45] J K Mason, *The Troubled Pregnancy: Legal Wrongs and Rights of Reproduction* (Cambridge University Press 2007) 163.
[46] *Rees v Darlington Memorial Hospital* [2003] UKHL 52 (HL)
[47] Ibid [309].
[48] Ibid.
[49] J K Mason, *The Troubled Pregnancy: Legal Wrongs and Rights of Reproduction* (Cambridge University Press 2007) 164.

3. Summary of the UK Law

Before moving to the comparison of the law on 'wrongful conception' with other common law jurisdiction it is necessary to summarise the position of the UK. Reviewing the UK cases on 'wrongful conception', it may seem that the field of "wrongful conception" is inconsistent and unstable. Peter Cane notes that "one understandable reaction to the wrongful conception cases would be that they show how unsuited courts are to dealing with complex, sensitive and controversial ethical and social issues"[50]. Purhouse stated that *McFarlane,* together with *Rees* and *Parkinson* left the English law on 'wrongful conception' in a 'mess'[51]. The current position is as follows:

1. The mother is entitled to modest damages for pain, suffering, and inconvenience of pregnancy and child birth[52].
2. The mother is not entitled to receive upkeep costs for raising a child[53].
3. If the child is disabled, the mother can receive the *additional costs* associated with the child's disability[54].
4. There is a fixed award in the amount of fifteen thousand pounds for recognition of wrong done[55].

There is no single approach adopted uniformly in the common law world in respect of wrongful conception. This can be evidenced by the judgements of Australian, Canadian, US, and Singaporean Courts.

4. Comparative Analysis

Australia

At the same time of the *McFarlane* case, a similar case was being litigated in the Australian High Court – *Cattanach v Melichior*.[56] The patient underwent a voluntary sterilisation at the age of 40. Four years later, Mrs. Melchior became pregnant and delivered a healthy child. Despite the case being difficult in physiological matters, the issue remained the same and it was whether a

[50] Peter Cane, 'Another Failed Sterilisation' (2004) 120 LQR 189, 193.

[51] Craig Purshouse, 'Autonomy, Affinity, and the Assessment of Damages: ACB v Thomson Medical Pte Ltd [2017] SGCA 20 and Shaw v Kovak [2017] EWCA Civ 1028' (2018) Medical Law Review 26 (4) 675, 677.

[52] *McFarlane v Tayside Health Board* [2000] 2 AC 59 (HL)

[53] ibid.

[54] *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] QB 266

[55] *Rees v Darlington Memorial Hospital* [2003] UKHL 52 (HL)

[56] [2003] 5 LRC 1

couple producing an unintended child can recover damages for medical negligence and require the doctor to bear the cost of raising and maintaining the child.

The High Court of Australia decided not to follow the approach prescribed by *McFarlane* by a majority 4 to 3 and awarded the damages for maintenance of the child. The main reason was that that there was no justification to "shield or immunize" the doctor who made a mistake and depart from the well-established principles of tort law.[57] Unlike the House of Lords in *McFarlane*, the Australian Court did not apply the *Caparo* test[58] and *McFarlane* did not provide any legal basis for the *Cattanach* approach. Kirby J said that the judges should be willing to take responsibility for applying the established judicial controls over the expansion of tort liability but they are not authorised to depart from the basic doctrine of torts[59].

The experience of Canada and the United States is contrary to Australian approach and will be mentioned briefly, as the law of these countries provides the same outcome as in the UK.

USA

The majority of the US courts reject the claims for the award of damages for maintenance of the child, mainly because of the argument that the burden can be offset by the advantages of having a healthy child, known as the "benefits rule".[60] As an example, the leading case is *Custodio v Bauer*, where maintenance costs were offset by benefits of having a child.[61]

The USA jurisprudence is of a minimal value as a model for the UK, because the US courts reject actions for wrongful conception cases. There were forty-two cases with the claims for upkeep costs, which were rejected by the US court and thirteen cases which were accepted, but the upkeep costs were not awarded, because of the "benefits" rule[62].

Canada

In the Canadian case *Doiron v Orr,* a twenty-two year old woman, after giving birth to three children, decided not to have children anymore due to financial hardship[63]. She subsequently had a fourth child and sought damages for upkeep costs. The claim for the cost of upbringing the

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[57] Ibid, at [57].

[58] *Caparo Industries plc v Dickman* [1990] 1 All ER 568; the three-stage *Caparo* test is whether the harm is reasonably foreseeable; whether there is a relationship of proximity; whether it is "fair, just and reasonable" to impose liability.

[59] *Cattanach v Melchior* [2003] 5 LRC 1, [136]

[60] J K Mason, *The Troubled Pregnancy: Legal Wrongs and Rights of Reproduction* (Cambridge University Press 2007) 107

[61] 251 Cal App 2d 303 (1962)

[62] J K Mason, *The Troubled Pregnancy: Legal Wrongs and Rights of Reproduction* (Cambridge University Press 2007) 107.

[63] (1978) 86 DLR (3d) 719

child was refused, as the Court determined that the birth of a child is beneficial and not detrimental and under the "benefits" rule any disadvantages can be offset by the benefits of having a child.

Singapore

The recent decision of the Court of Appeal of Singapore was named as possibly, one of the most difficult decisions to come before the court so far.[64] The Court offered a novel approach for tort law to deal with "troubled waters" of wrongful conception cases. It is important to notice that the facts of the case *ACB v Thomson Medical Pte Ltd* differed from all the above mentioned decisions. In this case, the claim arose due to a negligently performed IVF procedure, where a doctor fertilized the mother with the sperm of an unknown Indian donor, instead of her husband's sperm.[65] The couple noticed that the baby had a different skin tone and hair color from their own and the examination proved that the baby's DNA did not match with the father's.

The claim of the parents was not that they did not want a child, but due to the negligently performed IVF procedure, the problem was that they did not want *this particular child.*[66] The claimant sued the IVF company to recover damages for pecuniary and non-pecuniary losses, upkeep costs and provisional damages until the child reaches thirty-five for any adverse genetic condition the child might inherit from the biological father.[67] These claims included the payment for international education and reasonable lifestyle costs of an affluent family.[68]

In this case, the Court was against allowing the damages for upkeep costs, arguing that it would denigrate the parent-child relationships. Yet, considering unusual facts of the case the court, in order to avoid controversies of the claim for upkeep of costs, allowed damages recognizing a novel cause of action – "loss of genetic affinity".[69]

5. The Summary of Reasons for Rejecting Upkeep Costs

The overview of the above-mentioned cases indicates that the decisions on wrongful conception cases are reached mainly on public policy considerations.

In order to prevent the recovery of upkeep costs, the judges present moral factors that "a healthy child is a blessing and joy" and cannot be considered to be an injury. The judiciary

[64] Jordan English, Mohammud Jaamae Hafeez-Baig, 'ACB v Thomson Medical Ptd Ltd: Recovery of Upkeep Costs, Claims for Loss of Autonomy and Loss of Genetic Affinity: Fertile Ground for Development' (2018) 41 Melbourne University Law Review 1360, 1362.
[65] [2017] SGCA 20
[66] ibid (n 64).
[67] ibid (n 65) [11].
[68] ibid.
[69] ibid [149].

considers that it is undesirable for children when they grow up to discover that they were so unwanted that their parents were not willing to provide the upkeep costs. There is an argument that the parents should not be compensated for an event that other couples have been seeking unsuccessfully. Justice Heydon, in *Cattanach* stated that that it is wrong to attempt "to place a value on human life or a value on the expense of human life because human life is invaluable".[70]

The distributive justice is another argument against the recovery of upkeep costs. In *Rees*, Lord Bingham stated that awarding "a potentially large amount of damages for an unexpected child against NHS, which is in need of funding to meet pressing demands, would offend the community's sense of how public resources should be allocated"[71]. Also, it is argued that the cost for rearing a child is so speculative that it cannot form a basis for compensation. Lord Hope, in *McFarlane* determined that the compensation can be stretched almost indefinitely, so as to include private education, gifts, travel expenses and other amenities. Justice Hayne, in *Cattanach* stated that disadvantages arising from motherhood cannot be assessed in monetary terms and, even if it could be measured, 'the parent should not be permitted to attempt to demonstrate that the net worth of the consequences of being obliged to rear a healthy child is a financial detriment to him or her"[72]. Justice Heydon provides a similar argument to Lord Hope, stating that by allowing upkeep costs, the court would face difficulties in determining the fees for education, the duration of maintenance and moderating the economic status of parents.[73]

The third major argument against allowing the recovery of upbringing costs is that the detriments of having a child can be offset by non-pecuniary benefits. As it was seen, this approach is preferred by Canada and the United States. In *McFarlane*, the Court determined the existence of a child and the parental happiness derived from it, could not be ignored and the advantages outweigh any negative aspects of having an unplanned child. Lord Hope stated:

> There are benefits in this arrangement as well as costs. In the short term there is the pleasure which a child gives in return for the love and care which she receives during infancy. In the longer term there is the mutual relationship of support and affection which will continue well beyond the ending of the period of her childhood.[74]

Conclusion

Considering the above cases, it is clear that legal minds have not been able to agree upon a single framework which will provide a unified solution which could accommodate diverse situations. The Courts mainly deploy public policy considerations to avoid awarding substantial

[70] *Cattanach v Melchior* [2003] 5 LRC 1 (Australia), [353]
[71] [2004] 1 AC [309], [316]
[72] Ibid (n. 70) [247].
[73] Ibid [306] - [309].
[74] *McFarlane v Tayside Health Board* [2000] 2 AC [59], [84]

damages. Post-*McFarlane*, the Court had to invent exceptions for *Rees* and *Parkinson.* However, the English Court has not yet faced a claim like their counterparts in Singapore. This current "solution" is deficient in various aspects and its weaknesses should be explored next.

II. Chapter 2: "Deficiencies of the current state of affairs"

For every policy factor thrown onto the scales to deny liability another exists to redress the balance…[75]

Introduction

This section will explore the weaknesses of the approach adopted in *McFarlane* and *Rees.* In particular, it will address questions as to whether the child can be always considered to be a "joy and blessing" for those who sought irreversible surgery purporting to avoid exactly this event. Then, the paper will address its concern about drawing the lines between able-bodies and disabled children and parents. Lastly, it will consider whether the argument that patients should not be compensated at the expense of NHS is compelling.

1. Is a Healthy Child Always a "Joy and Blessing?"

In *McFarlane*, Lord Millet famously expressed that the compensation for upkeep costs cannot be provided, because children should not be considered to be a harm, as it is a "joy and blessing"[76]. However, the House of Lords' argument about "joy and blessing" was subsequently subject to criticism.[77]

In the Australian case *Cattanach,* Kirby LJ stated that the proposition that a child is a blessing and joy in every case "represents a fiction"[78]. This argument can be supported by the fact that since 1967 in the UK there were adopted Acts of Parliament devoted to family planning and abortion[79]. The fact that sterilisation is recognised indicates that some family settings do not contemplate to have a child.[80] Considering the wide-spread methods of contraception, the availability of abortion and adoption in the UK, it is evident that some families prefer not to have children and exercise their right to limit the family size. Even if society assumes that to have a

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[75] C R Symmons, 'Policy Factors in Actions for Wrongful Birth', (1987) 50 MLR 269, 305.
[76] [2000] 2 AC (HL) [59], [60].
[77] *Rand v East Dorset Health Authority* (2000) 56 BMLR 39; *Hardman v Amin* [2000] Lloyd's Rep Med 498; *Lee v Taunton & Somerset NHS Trust* [2001] 1 FLR 419.
[78] [2003] 5 LRC 1, [148].
[79] The Family Planning Act 1967; The Abortion Act 1967.
[80] *Thake v Maurice [1986]* 1 QB [644], [666] (Peter Pain J)

child is a happy and inevitable part of life, it is unlikely that nowadays 'London Underground commuters' would agree that parents who underwent negligent sterilisation are unharmed. The reason is that today "the inevitability of procreation has lost its contemporary significance"[81]. In *Thake v Maurice*, Peter Pain J stated that

> By 1975, family planning was generally practiced. Abortion had been legalized over a wide field. Vasectomy was one of the methods of family planning which was not only legal but was available under NHS. It seems to me to follow from this that it was generally recognized that the birth of a healthy baby is not always a blessing.[82]

Mason notices that a very large number of pregnancies are genuinely unwanted.[83] Priaulx argues that the assumption that parents suffered no harm is erroneous and it conveniently omits that the "blessing has been forced upon them".[84] The argument that parenthood is *always* beneficial is not consistent with the fact that many couples embark on a serious decision to undergo an irreversible procedure such as sterilisation. Given the fact that the patient underwent an invasive surgery, the prospect of having a baby will unlikely bring the joy expounded in *McFarlane*. Emily Jackson considers it is "odd for the law to insist that people should view their surgery as 'a blessing' and occasion for joy".[85] It is unclear why anyone would prefer sterilisation, if the benefits of parenthood always outweigh its disadvantages.

Priaulx considers that the reason for the decision in *McFarlane* was that the Court addressing such difficult issues as wrongful conception searched for *any rule* to deny the compensation[86]. The simplest way to avoid the award of compensation is to provide a moral argument that the child is an event for rejoicing. According to Priaulx pregnancy should not be conceptualized as a disease or an injury, however, it is important to emphasize that when it is unwanted it should be recognized as a harm[87].

Bernard Dickens comments that such celebration of children "denies the compatible social and legal reality that many conscientious, responsible couples do not want children either at all or at particular times".[88] Jordan English and Mohammud Baig argue that "there are many harsher

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[81] Nicolette Priaulx, 'Damages for Unwanted Child: Time to Rethink?' (2005) 73 Medico-Legal Journal 152, 153
[82] ibid (n 80).
[83] J K Mason, *The Troubled Pregnancy: Legal Wrongs and Rights of Reproduction* (Cambridge University Press 2007) 1.
[84] Nicolette Priaulx, *The Harm Paradox: Tort Law and the Unwanted Child in an Era of Choice* (Routledge, 2007) 6.
[85] Emily Jackson, *Medical Law: Text, Cases and Materials (2nd edn,* Oxford University Press 2010) 736
[86] ibid (n 84).
[87] ibid [44].
[88] Bernard Dickens, 'Wrongful Birth and Life, Wrongful Death Before Birth, and Wrongful Law' in Sheila Maclean (ed.) *Legal Issues in Human Reproduction* (Darthmouth: Aldershot).

truths that children will have to face while growing up rather than the knowledge that, at the time of conception they were not wanted".[89]

The argument of this dissertation is that all individuals are idiosyncratic, meaning that all have different views and preferences, which must be respected. Those who consider that unexpected pregnancy is not an injury merely do not bring claim to the Court, however those individuals who believe that the pregnancy followed by negligent sterilisation is an injury should be treated as such. The importance which the child has for potential parents depends on subjective preferences and a network of values. It should not be the role of courts to "trivialize those values by reference to abstract goods of children in society".[90]

2. Unhappy Differentiation

Peter Cane suggests that the real problem is that the Court in *McFarlane* could not foresee that such scenarios as *Rees* and *Parkinson* were coming.[91] The Court in *Parkinson* and *Rees* awarded a conventional sum in the amount, which extended to the special needs of a disabled child and parent. Singer S opined that in *Rees* the court created novel remedies in order to detract from obvious injustices.[92] The award was modest and significantly undercompensates the parents. It is admitted that the award is merely a "gloss" on *McFarlane*.[93] Keren-Paz considers that the idea that fifteen thousand pounds is a sufficient amount to compensate the patient for the intrusion in his or her life is, indeed, shocking.[94]

The weakness of this differentiation is that parents, in order to recover, at least additional costs, have to portray themselves or their children as disabled. This differentiation between award of damages for disabled children and healthy ones is not desirable. Although the description of health condition cannot be avoided, as it is a matter of obvious fact, the problem is that this differentiation in award of damages raises the question of whether a disabled child cannot be considered to be a so-called, "blessing". Priaulx describes the current law as a "mess" which invites one to consider a disabled child to be of "a less blessing in caring and financial terms"[95]. Furthermore, there can be circumstances like in the Singaporean case *ACB*, where the child was

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[89] Jordan English, Mohammud Jaamae Hafeez Baig, 'ACB v Thomson Medical Pte Ltd: Recovery of Upkeep Costs, Claims for Loss of Autonomy and Loss of Genetic Affinity: Fertile Ground for Development' (2018) 41 Melbourne University Law Review 1360, 1377.
[90] ibid (n 84).
[91] Peter Cane, 'Another Failed Sterilisation' (2004) 120 LQR 189, 190.
[92] J K Mason, *The Troubled Pregnancy: Legal Wrongs and Rights of Reproduction* (Cambridge University Press 2007) 414.
[93] *Rees v Darlington Memorial Hospital* [2004] 1 AC [309], [318]
[94] Tsachi Keren- Paz, 'Compensating Injury to Autonomy in English Negligence Law: Inconsistent Recognition' (2018) 26 Med Law Rev 585, 604.
[95] Nicolette Priaulx, 'Damages for Unwanted Child: Time to Rethink?' (2005) 73 Medico-Legal Journal 152, 156.

biologically unrelated to the father due to the negligence of the doctor.[96] Kumaralingam Amirthalingam argues that "awarding damages for loss of genetic affinity places the child under a similar or perhaps even darker cloud: he or she is not only unwanted because of cost, but unwanted because he or she is biologically unrelated".[97] The drawing of lines between able-bodied and disabled proposes a rather discriminatory approach than a "fair and just" exception. Additionally, the argument of the Court that parents could benefit from being maintained in the future by their unexpected child is watered down in cases of disabled children. It is not to devalue them; however, it is evident that offset calculation used by the court cannot apply easily in the cases of disabled children.

3. Immunity Zone for NHS

It is clear that were the Courts to award damages associated with child-rearing costs then these damage will, indeed, be substantial. *Benarr v Kettering* demonstrates that a child's maintenance can lead to a very high award.[98] The Court decided that it is not "fair, just and reasonable" to impose on doctors, whose fault was a "relatively minor lapse of judgement", such exorbitant amounts. Yet, Emily Jackson argues that the fact that the doctor's fault during the operation is not so grave should not deprive patients of their damages. She states:

> a minor and very common lapse of judgement while driving – such as momentarily taking one's eye off the road in order to admire the view – might have catastrophic consequences, and it would not be open to the driver to argue that the level of damages would be disproportionate to the degree of fault.[99]

On the other hand, there is a fear that in these cases, parents will be unjustly enriched by receiving, apart from happiness of having a child, the full amount of damages related to child rearing expenditures. It is argued that the parents will get "something for nothing".[100] However, Mason provides a good analogy of a boy who receives compensation for injury sustained in some negligently left pit and after recovery enjoys his life.[101] In this case nobody would argue that the boy does not deserve the compensation because he subsequently recovered.

Moreover, it can be argued that there is a high risk that by imposing the full amount of upkeep costs for an unexpected child solely on the parents, may trigger them to put a baby up for

[96] *ACB v Thomsan Medical Pte Ltd* [2017] SGCA 10
[97] Kumaralingam Amirthalingam, 'Reproductive Negligence: Unwanted Child or Unwanted Parenthood?' (2018) 134 LQR 15, 19.
[98] [1988] NLJR 179
[99] Emily Jackson, *Medical Law: Text, Cases and Materials (2nd edn,* Oxford University Press 2010) 736.
[100] J K Mason, *The Troubled Pregnancy: Legal Wrongs and Rights of Reproduction* (Cambridge University Press 2007) 123.
[101] ibid.

adoption or undergo an abortion. Considering that people are "restrained by innate adherence to the principle of the sanctity of human life" and always concerned with the "public consciousness", the award of compensation, which will not be a "mockery", but in fact some financial assistance could reduce the number of abortions and adoptions.

The Courts also argue that the upkeep costs should not be awarded, because it is complicated to count damages considering the different financial status of families. However, again it is scarcely a satisfying reason for not attempting to find a sum, which will be widely recognized as reasonably fair.

Although upkeep costs are largely rejected because it can lead to arbitrary awards, it should be noted that the Courts do consider the affluence of families in pure economic loss cases. This can be evidenced by the case *Smith v Erik S. Bush,* where the court compared different families' circumstances and decided that modest families will be more likely compensated.[102] Therefore, the argument that it is impossible to calculate damages because there are different families with different financial means is not so compelling given that other areas of the law clearly do make these distinctions when awarding damages.

Emily Jackson confirms that it is undoubtedly true that the Health Board has more pressing demands upon its budget than compensating Mrs. McFarlane's upkeep costs. However, she says, "it is not normally open to a court to deny a claimant damages because the defendant could deploy the money more usefully elsewhere".[103]

The aim of this dissertation is not to advocate for the award of arbitrary and substantial sums at the expense of the NHS and other public coffers, which are financially stretched, but to address the problem of undervaluing the "loss of reproductive autonomy" which is said to be so respected by Courts, but in reality fails to capture the real loss suffered by patients and families. The Court acknowledged the value of the patient's autonomy, however the amount provided for compensating its loss is "derisory" and does not reflect fully the respect for autonomy expounded in *Chester*, *Rees, and Montgomery*.

Conclusion

"Public policy" is "a very unruly horse, and once you get astride it, you never know where it will carry you".[104] The Court, in denying full compensation for parents provide a range of policy arguments some of which are considerably strong. However, these arguments subjected to

[102] [1990] 1 AC 831

[103] Emily Jackson, *Medical Law: Text, Cases and Materials (2nd edn,* Oxford University Press 2010) 737.

[104] *Richardson v Mellish* (1824), 2 Bing 229, 252 (Burrough J)

academic criticism are not compelling enough to send off parents, who suffered from negligence which will have long-lasting consequences, almost empty-handed.

III. Chapter 3: “Shift to Autonomous Choices”

Introduction

The notion of “loss of autonomy” is not a novel concept. Personal autonomy is acknowledged to be one of the key terms in not only medical law and ethics but all other facets of everyday life. This notion is not absent from the judgements and this chapter will start by considering the cases where the respect for personal autonomy was upheld. After that, the recent UKSC judgement *Montgomery* will be analysed and it will be suggested that this case offers something more than merely recognising the duty to disclose risks. In particular, there was a massive reform regarding the nature of the doctor-patient relationship. It will be argued that this judgement sits uneasily with the other wrongful conception cases. While in the recent *Montgomery* case, the patient’s rights and choices were fully recognised, in the context of ‘wrongful conception’ actions the value of autonomy is limited. After that, post-*Montgomery* cases will be analysed. In *ACB* and *Shaw v Kovac* the idea that ‘loss of autonomy’ should be recognised as a new form of actionable damage was rejected in Singapore and England, respectively[105]. The underlying reasons for rejection of the “loss of autonomy” in the tort of negligence will be analysed.

1. First Steps Towards Recognising Personal Autonomy

The first case illustrating that autonomy per se can be protected by courts was in *Rees,* where Lord Millet stated that

> the conventional award applies not for the birth of the child, but for the denial of an important aspect of their personal autonomy, viz the right to limit the size of their family. This is an important aspect of human dignity, which is increasingly being regarded as an important human right, which should be protected by law.[106]

Nominal fixed damages in the amount of fifteen thousand pounds, were awarded by the Court in order to recognise the wrong done to the parents.

The second case which mentioned interference with personal autonomy was *Chester v Afshar*, where a surgeon advised the patient to undergo a surgical procedure on her spine, but failed to warn her about the minor (1-2%) risk of serious neurological syndrome arising from the

[105] [2017] SGCA 20; [2017] EWCA Civ 1028

[106] *Rees v Darlington Memorial Hospital* [2004] 1 AC 309, 349

operation[107]. The patient suffered from severe spine damage and sued the doctor, claiming that if she knew about the risk, she would have postponed the surgery and would have sought advice on an alternative treatment. The Court found in favour of the patient determining that the doctor's breach of duty in failing to warn about all risks, caused the injury sustained by Chester[108]. The Court stressed that it is the central right of the patient to make an informed choice[109]. Lord Steyn referred to the importance of "due respect for autonomy and dignity of each patient"[110]. Referring to the concept of personal autonomy, Lord Steyn cited Professor Ronald Dworkin who explained that "the value of autonomy derives from the capacity to express one's own character – values, commitments, convictions, and critical as well as experimental interests"[111]. Lord Walker noted that for 20 years "the importance of personal autonomy has been more and more widely recognised".[112]

Finally, *Montgomery* is an important decision, which determines that the standard adopted in *Sidaway* is dead and there is a shift from medical paternalism to patient-centered approach[113]. Jonathan Montgomery states that the recent case represents a "radical departure from the previous orthodoxy and suggest to revisit many earlier cases"[114].

1. Patients – "The Authors of Their Own Lives"

Montgomery

The Court in *Montgomery* introduced a new test of informed consent[115]. The Supreme Court unanimously held that a doctor is under a duty to take reasonable care to ensure that the patient is aware of any *material* risks involved in any recommended treatment, and of any alternative variants. Lord Kerr and Lord Reed set out that the test for "materiality" stating that it is

> whether, in the circumstances of the particular case, a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor

[107] [2004] UKHL 41
[108] *Chester v Afshar* [2004] UKHL 41, [2005] 1 AC 134 [1]-[2]
[109] ibid [14].
[110] ibid [18].
[111] ibid.
[112] ibid [92].
[113] Jonathan Herring, 'Elbow Room for Best Practice? Montgomery, Patients' Values, and Balanced Decision-Making in Person-Centred Clinical Care' (2017) 25 Med Law Rev 528, 584.
[114] Jonathan Montgomery, 'Patient no Longer? What Next in Healthcare Law?' (2017) 70 Current Legal Problems 73
[115] [2015] UKSC 11.

> should reasonably be aware that the particular patient would be likely to attach significance to it.[116]

Lord Kerr and Lord Reed stated that the position adopted in *Sidaway* "ceased to reflect the reality and complexity of the way in which health services are provided".[117] Therefore, the approach shifted towards recognising patients "as persons holding the rights, rather than the passive recipients of the care".[118] The Court has suggested that "legal and social developments point away from a model of the relationship between the doctor and the patient based on medical paternalism".[119]

Lady Hale provides a significant perspective to examine the place in which the patient occupies in the law of negligence:

> it is now well recognised that the interest which the law of negligence protects is a person's interest in their own physical, psychiatric integrity, an important feature of which is autonomy, their freedom to decide what shall and shall not be done to their body.[120]

Montgomery offers a rather subjective test of materiality emphasising such terms as *'in patient's position'* and *'particular patient'*. This indicates that the focus shifted from the doctor's duty to the rights of the patient. Gemma Turton welcomes the increased subjectivity that arises from the positive steps which the doctor is reasonably expected to take to be aware of the particular patient's concerns. She considers that the starting point for the doctor is now to highlight the importance of protecting patient autonomy and adopting the patient's right.[121]

Although, *Montgomery* mainly concerns the informed consent, the understanding of what is required from doctors in practice is important, as it shows how far the patient's autonomy is stretched and indicates the underpinning of the judgement is the concept of autonomy.

Heywood argues that the doctor-patient relationship has changed since the court in *Montgomery* stated that the "doctor's duty of care takes its precise content from the needs, concerns and circumstances of the individual patient".[122]

Gemma Turton states that in the light of *Montgomery*, "the law can take a path of recognising the patient autonomy as the central concern and thus expect judicial development of

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[116] *Montgomery v Lanarkshire Health Board* [2015] UKSC 11 [87]
[117]ibid [75].
[118]ibid.
[119]ibid.
[120]ibid [108].
[121] Gemma Turton, 'Informed Consent to Medical Post-Montgomery: Causation and Coincidence' (2019) 27 Med Law Rev 108, 115.
[122] Rob Heywood, 'R.I.P. *Sidaway*: Patient – Oriented Disclosure – A Standard Worth Waiting For?' (2015) 23 Med Law Rev 455, 462.

the causation rules in a manner that gives even fuller protection of autonomy"[123]. She says that "shaping the content of the duty of care around the patient's autonomy has the forward-looking function of guiding doctors' behaviour"[124]. The standard of disclosure in *Montgomery* values the autonomy of the individual by allowing patients to make a "fulfilling choice".[125] However, it is noted that negligence traditionally has never provided protection for lost choices, as it mostly concerned more with physical harms.

It may appear that autonomy now is an ascending concept whereby the requirements of information disclosure lead towards an indirect recognition of the patient's autonomy. However, *Rees*, *Chester,* and *Montgomery* do not comprehensively protect autonomy itself. Its standalone recognition as a separate cause of action has been recently rejected by the Court of Appeal in *Shaw v Kovak* and Singapore Court in *ACB*.

Shaw v Kovac

In *Shaw v Kovac*, an 89-year old patient died following an operation. His daughter sued the doctor for failing to provide the patient and his family with the requisite information about the implications of the operation. She claimed that a wrongful interference with the deceased's personal autonomy constitutes a separate and free-standing cause of action. However, the Court rejected this claim stating that "such cause has never been pleaded and could not be raised now".[126] It was stated that there is no indication in jurisprudence to argue that there is a separate, free-standing "loss of autonomy" avenue. The Court decided that the "loss of autonomy" due to a lack of informed consent did not require any separate, free-standing head of damages considering that the general compensation could be obtained under *Chester v Ashfar* and *Montgomery*[127].

However, the main policy rejecting the award of damages for the "loss of autonomy" was the floodgate argument. Davis LJ questioned: "Would such awards by extension be available for other torts generally?"[128] Before addressing this issue, it is necessary to consider further the objections which were presented in the Singaporean case *ACB,* that failed to recognise the "loss of autonomy" as a separate cause of action. Purhouse considers that the arguments provided in the Singapore Court in *ACB* are more compelling than the "floodgate" argument in *Shaw v Kovac.*[129]

[123] ibid (n 120) 109.
[124] ibid, 129.
[125] [2017] EWCA Civ 1028
[126] *Shaw v Kovac* [2017] EWCA Civ 1028 [70]
[127] ibid.
[128] ibid.
[129] Craig Purshouse, 'Autonomy, Affinity, and the Assessment of Damages: ACB v Thomson Medical Pte Ltd [2017] SGCA 20 and Shaw v Kovak [2017] EWCA Civ 1028' (2018) Medical Law Review 26 (4) 675, 684.

ACB

The Singaporean case *ACB,* where the doctors mixed up the sperm of the parent was called as one of the most important negligence judgements of this decade[130]. The Court considered the idea of recognising the "loss of autonomy" as a separate cause of action. Yet, it decided not to adopt this path providing three main reasons. First, the Court rejected the "loss of autonomy", as it is "too nebulous and too contested notion to ground a claim"[131]. This notion is subject to theoretical disagreements, as it is a fundamental question of moral and political philosophy, and the Court is not a right place to decide such matters[132].

Second, the Court objected to recognise "the loss of autonomy" because this "notion does not comport with the concept of damage in the tort of negligence"[133]. Traditionally, for the damage to be actionable, claimants have to show that they are "at least minimally worse off". However, the Court determined that sometimes the interference with the personal autonomy makes an individual, in fact, better off[134]. For example, the requirement to wear a seatbelt or the providing of a blood transfusion to a Jehovah Witness objectively place individuals better off than the alternative.

Third, "the recognition of such a head of damage would undermine existing control mechanisms which keep recovery of the tort of negligence within sensible bounds"[135]. Purhouse agreed with this argument stating that:

> the recognition of the loss of autonomy as a new form of actionable damage in negligence will lead to much worse outcomes than sending the occasional sympathetic claimant home empty-handed: it has the potential to destroy whatever coherence remains of this tort[136].

Specifically, Purshouse considers that the recognition of the "loss of autonomy" would undermine the restrictions in pure economic loss and psychiatric harm[137]. He considers that it will lead to floodgate of claims, an overburdened court system, and disproportionate damages[138].

Considering these recent decisions, it seems that a standalone claim for "the loss of autonomy" is paralyzed for now. However, if the Court would recognize a separate cause of action,

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[130] ibid, 676.
[131] *ACB v Thomson Medical Pte Ltd* [2017] SGCA 20 [115]
[132] ibid [119].
[133] Ibid.
[134] Craig Purshouse, 'Autonomy, Affinity, and the Assessment of Damages: ACB v Thomson Medical Pte Ltd [2017] SGCA 20 and Shaw v Kovak [2017] EWCA Civ 1028' (2018) Medical Law Review 26 (4) 675, 686.
[135] ibid, 687.
[136] ibid, 676.
[137] Craig Purshouse, 'Liability for Lost Autonomy in Negligence: Undermining the Coherence of Tort Law?' (2015) 22 Torts Law Journal 226, 228.
[138] ibid, 247.

which would be defined more narrowly, it could help to resolve the cases involving reproductive wrongs without facing objections raised in *Shaw v Kovac* and *ACB*.

Conclusion

Although the Courts respect the fundamental right of "personal autonomy", it is clear from *Shaw v Kovac* and *ACB* that they are not willing to recognise it as a standalone cause of action, as there is a risk that it will destroy any coherence of the tort of negligence. It could be argued that there is no need in recognition of the "loss of autonomy" in its wide and general interpretation, however, it could be re-defined in order to address only reproductive injustices, not only limited to wrongful conception, but also cover wrongful fertilization and the lost right of procreation.

A greater discussion is required as to what is "reproductive autonomy" conception, why it is important to protect it and how it should be compensated.

IV. Chapter 4: Reproductive Autonomy as a New Formula

It is the capacity for 'enlargement of mind' that makes autonomous, impartial judgement possible.[139]

Introduction

In order for the law to be just, it should evolve progressively with the times and the Court should be pushed to depart from their previous decisions and recognise a new cause of action, such as the loss of *reproductive* autonomy. If the concept of autonomy is as valuable as their Lordships suggest, then it should be legally recognised and individuals whose reproductive plans were distorted should be compensated not in a "nominal" way. However, in order for a new head of damages to be recognised, the concept of autonomy needs to be clearly articulated.

Although there were tentative steps towards recognising the loss of autonomy, currently there is a lack of consensus as to the definition of autonomy, the boundaries and compensation. In the subsequent discussion a new formula to resolve reproductive wrongs will be introduced. Then, a preferable conception of autonomy, which should ground the regulation of reproductive wrongs will be discussed. Finally, the importance of its protection and how it should be compensated will be analysed.

1. New Framework

Why can the "loss of autonomy" not be defined more narrowly? The recognition of "the loss of *reproductive* autonomy" (instead of merely "loss of autonomy") as a separate cause of action could be specifically tailored to address the problems of reproductive wrongs. This approach will not lead to "floodgates", "over-inclusiveness" and distortion of "coherence" of the tort of negligence, as it was influentially argued by some respected academic commentators and judges.[140] It will cover only reproductive wrongs, embracing botched vasectomies and IVF mix-ups. Hence, it will not enter the area of psychiatric harm and pure economic loss.

[139] Jennifer Nedelsky, 'Embodied Diversity and the Challenges to Law', (1997) 42 McGhill Law Journal 91, 107.
[140] Craig Purshouse, 'Liability for Lost Autonomy in Negligence: Undermining the Coherence of Tort Law?' (2015) 22 Torts Law Journal 226; *ACB v Thomson Medical Pte Ltd* [2017] SGCA 20.

This novel avenue will assist courts in eliminating undesirable distinctions between able-bodied and disabled individuals. Priaulx suggests that "the English law can no longer justify differential outcomes based on concepts of health and disability, nor continue to displace the context of individual sexual and reproductive lives"[141]. This new right to "reproductive autonomy" would be conceptually different from claims for the costs for upbringing a child. Therefore, it should not face the same moral objections, which are reflected in *McFarlane*, *Rees* and *ACB,* in particular that the child is a detriment or that it will morally denigrate parent-child relationships. The focus will be more on the parents, the recognition of their values and choices which are currently defeated by the reproductive negligence.

This separate and a free-standing cause of action could assist the Court by allowing it to avoid from having to invent a new exception every time to *McFarlane*. For example, the Court does not provide any further guidelines as to how a case would be decided where both the mother and the child are disabled. Will the Court follow *Rees* in such case and award a fixed compensation in the amount of fifteen thousand pounds to recognise the wrong done? It will unlikely be viewed as a distributive justice and it would more appear as a distributive injustice.

Additionally, considering the complicated world of reproduction and the development of technology, today it is not uncommon for individuals to resort to clinics, laboratories and sperm banks to store their reproductive cells and tissues in order to be able to conceive a child later on. For example, in the US case *Witt v. Yale-New Haven Hospital*, a cancer patient learned that a side effect of chemotherapy is infertility[142]. She decided to remove a reproductive tissue in order to "freeze and store" it for conceiving later a genetically related baby. The reproductive tissue was negligently destroyed by the hospital and the patient was entitled to recover only for suffering emotional distress. This case illustrates that apart from failed sterilisation and failed fertilisation claims, there are scenarios where "the right to procreate" is deprived[143]. Such a disastrous mishap happened in the University Hospitals Fertility Clinic in Ohio, where the clinic negligently failed to preserve four thousand frozen eggs and embryos affecting more than one thousand potential parents[144]. Therefore, the "loss of *reproductive* autonomy" could operate as an umbrella for various claims of reproductive negligence such as in the example of *Witt* or the University Hospitals Fertility Clinic in Ohio.

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[141] Nicolette Priaulx, *The Harm Paradox: Tort Law and the Unwanted Child in an Era of Choice* (Routledge, 2007) 80

[142] 977 A.2d 779, 781-782 (Conn. Super. 2008).

[143] Dov Fox, 'Reproductive Negligence' (2017) 117 Columbia Law Review 149, 190.

[144] Kate Snow and others, 'University Hospital Fertility Clinic Says Human Error Caused Embryo, Egg Failure' (Today, 27 March 2018) https://www.today.com/health/university-hospitals-fertility-clinic-failure-caused-human-error-t125910 accessed 14 April 2019.

In order to make this new formula work, it is necessary to attempt to define generally what is autonomy and find its most suitable conception for protection of reproductive choices.

2. What is Autonomy?

Gerald Dworkin's classic list of definitions for autonomy include "autonomy as liberty or freedom to act; as dignity, as 'freedom of the will'; as independence; and as 'critical reflection'".[145] The list is not conclusive and expands to "self-mastery; choosing freely; choosing one's own moral position and accepting responsibility for one's choice".[146]

It is acknowledged that "there are many different conceptions of autonomy"[147]. However, for the purposes of this work it would be helpful to emphasise competing libertarian and communitarian views of autonomy. While libertarians see autonomy "simply as self-determination", communitarians consider that individual autonomy should be subject to the needs and interests of the community.[148]

The position of this dissertation is that in order to resolve the reproductive wrongs, it would be better to adopt the libertarian conception of autonomy, as the specific purpose of recognizing reproductive autonomy is to depart from the interests and the general opinion of the community. The liberal ideal is subject to criticism by feminists advocating "ethics of care" or relational approach, however, the attempts to undermine it, may lead to reinforcing the very stereotypes which this dissertation tries to eliminate.[149] Additionally, "the ethic of care" thesis will not be the most suitable approach in the context of reproductive wrongs, as this new cause of action would embrace not only women, but also autonomous choices of men.

Autonomy will be better protected representing liberal approach by emphasising the individual reasons for decision-making, rather "other-regarding".

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[145] Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge University Press 1988) 6

[146] Alasdair Maclean, "Autonomy", *Autonomy, Informed Consent and Medical Law: A Relational Challenge* (Cambridge University Press 2009) 10

[147] Ibid, 11

[148] Ibid.

[149] This dissertation acknowledges that the liberal approach is subject to criticism summarised by Nicolette Priaulx, *The Harm Paradox: Tort Law and the Unwanted Child in an Era of Choice* (Routledge, 2007) p. 164. Feminists argue that the liberal conception is not able "to deal with connection, in conceptualising humans as essentially 'discrete, bounded units, beings who come in ones, not twos". Robin West criticises the liberal approach for excluding aspects such as dependency, embodiment, emotionality, connection and care. West offers "connection thesis" by stating that women are actually connected to other human life. West's views are reflected in Carol Gilligan's proposition who argues that women exercise their moral responsibility through relationships, connection, selflessness and care. Nevertheless, while these approaches are very influential, they are not devoid of criticism. Joan Williams argues that the danger of such approaches is that it is "potentially destructive" and may reinforce "inherently loaded stereotypes" that women are a "weaker vessel".

John Stuart Mill, in his book *On Liberty* provided a liberal and individualistic conception of autonomy stating:

> The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right.[150]

The main restriction on autonomy according to J.S. Mill is the harm principle. The Court could argue that allowing patients to recover substantial damages for reproductive wrongs could harm a community by burdening its financial resources. However, Maclean states that the limitation of personal autonomy could be justified only in case if either "the specific interests of a sufficiently large number of individuals are harmed or when a 'common' interest is harmed". [151]For example, "public-health threats, such as risk of transmitting an infectious disease, may justify coercion".[152]

It is unlikely that the recognition of the loss of reproductive negligence could tremendously overburden society with high expenses, as the Court could adopt a middle path in awarding damages to avoid two extremes. Furthermore, Emily Jackson noted that the argument that the defendant could distribute money better to something else is not satisfying.[153] On the contrary, it would be in the public interest for the doctors to be deterred from negligence and strive for improving the quality of their work.

Glover states that once a person's choices have been restricted and no matter to what extent then their autonomy is overridden.[154] The whole purpose of autonomy is to recognise the choices of individuals, irrespective of whether they may seem rational or irrational. Every person should be allowed to decide what would be better for his or her own life without any restraints of society. Therefore, if somebody decides not to have children at all and undergoes sterilisation or decides to freeze biological material to conceive children later, these preferences should be accepted and respected. The references to "London Underground commuters" or general public opinion that children are always a "blessing" should not prevail over an individual's decision about how to plan her or his life. According to Glover, reliance on "moral belief", that was done in *McFarlane* and

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[150] John Stuart Mill, *On Liberty (*first published in 1859, Batoche Books 2001) 13.

[151] Alasdair Maclean, "Autonomy", *Autonomy, Informed Consent and Medical Law: A Relational Challenge* (Cambridge University Press 2009) 32.

[152] ibid.

[153] ibid (n 103).

[154] Jonathan Glover, *Causing Death and Saving Lives: The Moral Problems of Abortion, Infanticide, Suicide, Euthanasia, Capital Punishment, War and other Life-or-Death Choices* (Penguin Books 1990).

Rees, depends on concepts that are blurred and incoherent.[155] He states that "public policy and society force upon individuals, non-individualistic views" and "individualism is demeaned by forcing individuals to accept values of underground commuters".[156]

The concept of autonomy is criticized for being "nebulous", therefore courts are not appealed by the idea of recognising it as a separate head of damage.[157] However, the notions of "underground commuter", "distributive justice", "joy and blessing" as well as "fair, just and reasonable" which are widely used by courts equally do not provide clear guidelines, merely serving as labels rather than some practical instructions. Hoyano stated that

> Distributive justice has become yet another label, without pretending to intellectual rigour. Appeals to commuters on the Underground to decide duty of care issues allows the courts to avoid confronting the sharp edges of tort policy".[158]

Hoyano argues that 'the wrongful conception' cases showed that "distributive justice is an unruly horse as public policy for the courts to ride".[159] Therefore, an argument that it is wrong to use the autonomy concept by courts because it is conceptually uncertain should not prevent the court, at least, from attempting to define it.

Although in *ACB* it was stated that defining "autonomy" should not be the task of the court, Purshouse notes that there have been several cases where judges have adopted liberal, individualistic interpretation of autonomy.[160] For example, in *Re T*, Lord Donaldson adopted the definition of the loss of autonomy to determine whether an individual is entitled to reject life-saving treatment.[161]

The autonomy, at the very least, requires to respect the individual's choices and act according to their personal beliefs and values.[162] Emily Jackson states that autonomy is 'not just the right to pursue ends that one already has, but also to live in an environment which enables one to form one's own value system and to have it treated with respect'.[163]

Priaulx argues that there is a real need for the law to embrace a "fuller, richer and contextualised expression of autonomy".[164] The reproductive autonomy is more than just the

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[155] Jonathan Glover, *Causing Death and Saving Lives: The Moral Problems of Abortion, Infanticide, Suicide, Euthanasia, Capital Punishment, War and other Life-or-Death Choices* (Penguin Books 1990) 25
[156] Ibid, 30.
[157] *ACB v Thomson Medical Pte Ltd* [2017] SGCA 20 [
[158] Laura Hoyano, 'Misconceptions about Wrongful Conception' (2002) 65 Modern Law Review 883, 904
[159] Ibid, 906
[160] Ibid (n 134).
[161] [1993] Fam 95
[162] Nicolette Priaulx, *The Harm Paradox: Tort Law and the Unwanted Child in an Era of Choice* (Routledge, 2007) 9
[163] Ibid.
[164] Ibid, 80.

bodily integrity. Feminists strategies are aimed at broadening the notion of reproductive autonomy to embrace the emotional aspects of the unexpected pregnancy.[165]

3. Why is it Important to Recognise Reproductive Autonomy?

The current problem is that damage is perceived often in the form of some physical injury, scars and damage to property. However, distorted reproductive plans entail more than just physical pain and temporary injury. But, by no means, should it be considered less valuable.

Lady Hale in *Parkinson* picturesquely described the impact of pregnancy and the birth of a child on the mother's life. She correctly noticed that from the moment a woman conceives, profound physical changes happen in her body.[166] While for some women the birth of a child is a natural, non-dangerous process, others, unhappily, can suffer from obstacles and an uncomfortable time[167]. Lady Hale stated that a responsible woman will have to modify her pleasures in smoking and the amount of alcohol that she consumes.[168] A pregnant woman has to diet, she can no longer wear her favourite clothes and most likely she will not be able to return to her paid job immediately after giving birth[169]. Importantly, Lady Hale stated that there are not only physical changes, but also psychological[170]. In *Parkinson,* she mentioned an important factor which judges in *McFarlane* omitted – that "the invasion of the mother's personal autonomy does not stop once her body and mind have returned to their pre-pregnancy state". She said that "one's life is no longer just one's own but also some-one else's".[171]

An American poet, feminist and the mother of three sons, Adrienne Rich, in her book *Of Woman Born* included entries from her private journal describing her controversial feelings of being a mother.[172] She writes that "children grow up not in a smooth ascending curve, but jaggedly, their needs inconstant as weather".[173] Rich states that "the physical and psychic weight

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[165] Ibid, 43
[166] *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] QB 266 [64]
[167] Ibid.
[168] Ibid, 67.
[169] Ibid.
[170] Ibid, 65.
[171] Ibid, 66.
[172] *"My children cause me the most exquisite suffering of which I have any experience. It is the suffering of ambivalence: the murderous alternation between bitter resentment and raw-edged nerves, and blissful gratification and tenderness. Sometimes I seem to myself, in my feelings toward these tiny guiltless beings, a monster of selfishness and intolerance. Their voices wear away at my nerves, their constant needs, above all their need for simplicity and patience, fill me with despair at my own failures… There are times when I feel only death will free us from one another, when I envy the barren women who has the luxury of her regrets but lives a life of privacy and freedom".* Adrianne Rich, *Of Woman Born: Motherhood as Experience and Institution* (WW Norton & Company; Norton Pbk Ed Edition 1995) 21.
[173] Ibid, 38

of responsibility on the woman by children is by far the heaviest of social burdens" and she considers that it cannot be compared with slavery or forced labour because "the emotional bonds between a woman and her children make her vulnerable in ways which the forced labourer does not know".[174]

It is not to illustrate that having children is a mere boredom; indeed, children bring happiness and tenderness, but mainly, it is to demonstrate the variety of opinions and experiences which should be respected.

Equally, those patients and parents who planned to have children by resorting to IVF clinics and sperm banks and suffered from negligence which will undoubtedly have lifelong, adverse impact on their lives shall be entitled to protection for loss of their reproductive autonomy.

4. How Should it be Compensated?

The existing scheme of compensation known as "conventional award", established in *Rees* for recognizing loss of patient's autonomy is not adequate. As Priaulx states, it "is not only derisory in a financial sense", that many women are left to rely exclusively on their own financial resources in caring for the "products of negligence", but also throws doubt on "how extensive the law's commitment to reproductive autonomy is".[175] The patients should be entitled clearly to something what would be more than a standardized conventional award. Stephan Todd suggests that this can be resolved by focusing only on necessary expenses.[176] He states that either it might include expenses of childcare until the child reaches school age in order to allow a single parent to remain in employment, or the amount should be such as to allow the parents a period of time to reorder their lives and adjust to their new circumstances.[177] The amount should not be extravagant, but at the same time it cannot be nominal.

A compensation for intangible losses does not represent a great problem for the UK courts. The Court is willing to award damages in cases of the breach of confidence for the misuse of personal information[178], ensures compensation in cases of informed consent[179] and breach of fiduciary duties. Therefore, it should not pose an insurmountable burden to calculate damages for parents whose interests were negligently thwarted.

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[174] Ibid, 52
[175] Nicolette Priaulx, 'That's One Heck of an "Unruly horse"! Riding Roughshod Over Autonomy in Wrongful Conception' (2004) 12 Fem LS 317, 329
[176] Stephen Todd, 'Wrongful Conception, Wrongful Birth and Wrongful Life' (2005) 27 Sydney Law Review 525, 533
[177] Ibid, 536.
[178] *Campbell v MGN Ltd* [2004] UKHL 22
[179] *Chester v Afshar* [2004] UKHL 41, [2005] 1 AC 134; *Montgomery v Lanarkshire Health Board* [2015] UKSC 11

Conclusion

The distortion of reproductive plans has a long-lasting and complicated impact on parents which deserve corrective justice. Reproductive autonomy could be a unified solution for various reproductive negligence claims. Preferably, reproductive autonomy should be adopted in a liberal and individualistic sense.

V. Conclusion

Doctors negligently perform sterilisation and vasectomies assuring patients about sterility. Fertility clinics mix up the genetic material of one donor with another. The in vitro laboratories fail to preserve frozen eggs of thousands of patients, including those who are cancer survivors. The news headlines depicting such medical errors are not rare. However, the doctors and the NHS are still immunised from compensating affected patients and courts trivialise the reproductive negligence harms.

Therefore, this dissertation proposed to recognise a separate cause of action, the 'loss of reproductive autonomy' which could provide a better solution for patients and parents whose plans were unjustly frustrated. This path could help to eliminate unnecessary distinctions based on health and disability, offer a unified approach without the need to create new exceptions for new circumstances and substantively uphold the respect for the reproductive autonomy which is so needed in the era of choice. The law should be coherent and transparent, but the current scheme of reproductive torts for now falls below this standard, therefore to be so averse to changing this realm of the law is not favourable.

Indeed, the author acknowledges that this new proposition is not fully devoid of uncertainties. This approach raises some further need for discussion as to whether the father would be able to claim the loss of reproductive autonomy, if a woman decided to have an abortion without consulting him; further, whether such claim could be brought in a case where a woman secretly gave birth failing to inform the father and depriving him of the opportunity to look after the child and much more. These questions are beyond the scope of this paper and the author sincerely hopes to develop these themes in her future research. To date, it can be concluded that the recognition of the loss of reproductive autonomy will be a welcoming reform which will allow the law to move with the times and in the right direction.

Bibliography

Amirthalingam K, 'Reproductive Negligence: Unwanted Child or Unwanted Parenthood?' [2018] LQR 15
— —'Medical Negligence and Patient Autonomy - Bolam Rules in Singapore and Malaysia' [2015] SAcLJ 666

Cane P, 'Another Failed Sterilisation' [2004] LQR 189

Dworkin G, *The Theory and Practice of Autonomy* (Cambridge University Press, 1988)

English J, Hafeez-Baig, 'ACB v Thomson Medical Pte Ltd: Recovery of Upkeep Costs, Claims for Loss of Autonomy and Loss of Genetic Affinity: Fertile Ground for Development ' [2018] Melb U L Rev 1360

Faculty of Sexual & Reproductive Health Care, 'Male and Female Sterilisation' [2014] FSRH 1

Fox D, 'Reproductive Negligence' [2017] Colum L Rev 149

Glover J, *Causing Death and Saving Lives: The Moral Problems of Abortion, Infanticide, Suicide, Euthanasia, Capital Punishment, War and other Life-or-Death Choices* (Penguin Books, 1990)

Herring J, 'Elbow Room for Best Practice? Montgomery, Patients' Values, and Balanced

Decision-Making in Person-Centred Care' [2017] Med Law Rev 582

Heywood R, 'R.I.P. Sidaway: Patient – Oriented Disclosure – A Standard Worth Waiting For?' [2015] Med Law Rev 455

Hoyano L, 'Misconceptions about Wrongful Conception' [2002] MLR 883

Jackson E, *Medical Law: Text, Cases and Materials* (2edn, Oxford University Press 2010)

Keren-Paz T, 'Compensating Injury to Autonomy in English Negligence Law: Inconsistent Recognition' [2018] Med Law Rev 585

MacLean A, *Autonomy, Informed Consent and Medical Law: A Relational Challenge* (Cambridge University Press 2009)

Mason JK, *The Troubled Pregnancy: Legal Wrongs and Rights in Reproduction* (Cambridge University Press 2007)

Mill JS, *On Liberty* (first published in 1859, Batoche Books 2001)

Montgomery J, 'Patient No Longer? What Next in Healthcare Law?' [2017] CLP 73

Nedelsky J, 'Embodied Diversity and the Challenges to Law' [1997] McGhill LJ 91

Priaulx N, *The Harm Paradox: Tort Law and The Unwanted Child in an Era of Choice* (Routledge-Cavendish 2007)

— —'That's One Heck of an "Unruly Horse"! Riding Roughshod Over Autonomy in Wrongful Conception' [2004] FLS 317

Purshouse C, 'Autonomy, Affinity, and the Assessment of Damages: ACB v Thomson Medical Pte Ltd' [2018] Med Law Rev 675
— —'Liability for Lost Autonomy in Negligence: Undermining the Coherence of Tort Law' [2015] TLJ 226

Reid E, 'Montgomery v Lanarkshire Health Board and the Rights of the Reasonable Patient' [2015] Edin LR 360

Rich A, *Of Woman Born: Motherhood as Experience and Institution* (WW Norton & Company; Norton Pbk Ed Edition 1995)

Snow K and others, 'University Hospital Fertility Clinic Says Human Error Caused Embryo, Egg Failure' (Today 2018) <https://www.today.com/health/university-hospitals-fertility-clinic-failure-caused-human-error-t125910> accessed 14 April 2019

Symmons CR, 'Policy Factors in Actions for Wrongful Birth' [1987] MLR 269

Todd S, 'Accidental Conception and Accident Compensation' [2012] PN 196
— —'Wrongful Conception, Wrongful Birth and Wrongful Life ' [2005] Syd Law Rev 525

Turton G, 'Informed Consent to Medical Treatment Post-Montgomery: Causation and Coincidence' [2019] Med Law Rev 108