Wrongful Conceptions of 'Harm'

Rethinking Unsolicited Parenthood in an Era of Choice

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Abstract

Wrongful conception and birth suits hold a troubled past and future. As a response to rapid advancement and increased choice in reproduction, these actions have introduced to the courts the legally and ethically problematic question, "can parenthood ever constitute an injury?" At the heart of the dilemma lies the manner by which law and society conceptualise 'harm'. Is this part of the normal vicissitudes of life, or a harmful event? But this question is not decided within a legal vacuum; public policy factors have deeply influenced the nature and existence of case law. In conducting a contextual examination of these actions, this thesis examines from a feminist perspective how concepts of harm and autonomy are judicially characterised within negligence law, and explores the tensions emerging from conflicting constructs.

Considering the controversial question of whether parents should receive compensation for the birth of a child, this thesis also pursues neglected questions arising from these actions. Can one ever describe the 'natural' biological process of pregnancy as 'damage' to a woman? Should a woman be *required* to minimise the losses entailed with rearing a child by abortion or adoption? In revealing the limited degree to which law values women's reproductive autonomy, these questions have become crucial in understanding the decline of these reproductive torts. But this thesis goes further, and argues that law is very consciously playing on traditional stereotypes of maternity to justify the imposition of responsibility for reproductive risks onto women. In seeking to disrupt the invocation of the law's liberal framework of the autonomy ideal underpinning these actions, this thesis embraces the notion of 'complex personhood' and calls for an understanding of reproductive harm that resonates a deeper and relational understanding of reproductive choice and responsibility.

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Introduction: Unsolicited Parenthood in an "Era of Choice"

> 'I am going to tell you a story,' said Mma Ramotswe to the Government Man. 'This story begins when there was a family with three sons. The father was very pleased that his first born was a son and he gave him everything he wanted. The mother of this boy was also pleased that she had borne a boy for her husband, and she also made a fuss of this boy. Then another boy was born, and it was very sad for them when they realised that this boy had something wrong with his head. The mother heard what people were saying behind her back, that the reason why the boy was like that was that she had been with another man while she was pregnant. This was not true, of course, but all those wicked words cut and cut at her and she was ashamed to be seen out. But that boy was happy; he liked to be with cattle and to count them, although he could not count very well...'[1]

The increasing medicalisation of women's sexual and reproductive health remains a controversial issue in feminist scholarship. The natural functioning of women's bodies, menstruation, pregnancy, childbirth, and menopause, while not experienced as 'illnesses' have nevertheless been redefined as medical problems and subsumed within the jurisdiction of medicine as necessitating surveillance and intervention.[2] The growth of reproductive technology and genetic knowledge means

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[1] Alexander McCall Smith, *Morality for Beautiful Girls* (London: Abacus, 2001), 216-217.

[2] Susan Nott and Anne Morris, 'All in the Mind: Feminism and Health Care', in Anne Morris and Susan Nott (eds) *Well women, the gendered nature of health care provision* (Aldershot: Ashgate, 2002).

that women's reproductive lives will remain under clinical scrutiny. Seemingly beneficial technologies present women with serious dilemmas; for example, prenatal testing offers few answers where serious genetic disorders are detected in a foetus owing to shortfalls between 'diagnosis' and 'cure'. Similarly, techniques of visualisation in monitoring foetal health are shifting perceptions of pregnancy, posing the risk of constructing 'personhood from 'natural' facts'.[3] Noting developments in the United States where pregnant women have been held criminally accountable for harms to their unborn children, Sally Sheldon suggests the danger here is that such knowledge may be imported into law.[4] While in English law, maternal duties are not reflected so conspicuously, they nevertheless exist. Pregnant women refusing clinically indicated treatment have found their own views judicially discredited as 'irrational, selfish or mad'.[5] And apparent shifts in legal thinking, most notably that a pregnant woman holds the right to decline any medical intervention for the sake of foetal health, nevertheless resonate against societal expectations that 'mothers must, if they are mentally normal, love their children, nurture and protect them.'[6] Therefore, the law is deeply implicated in the increasing medical control over women's lives, not only through exercising paternalistic controls over women and deference to medical opinion,

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[3] Ingrid Zechmeister, 'Foetal Images: The Power of Visual Technology in Antenatal Care and the Implications for Women's Reproductive Freedom (2001) 9 *Health Care Analysis* 387, 393.

[4] Sally Sheldon, *Beyond Control: Medical Power and Abortion Law* (London: Pluto, 1997).

[5] Such representations of women emerge from earlier case law on enforced caesareans; see for example, *Re MB (An Adult: Medical Treatment)* [1997] 2 FLR 426 (CA) and *Norfolk and Norwich Trust v W* [1996] 2 FLR 613 (Johnson J).

[6] Jane Weaver, 'Court-ordered Caesarean Sections' in Andrew Bainham, Shelley Day-Scholater and Martin Richards (eds.), *Body Lore and Laws* (Oxford: Hart Publishing, 2002), 239.

but in also permitting medicine to colonise important areas of women's reproductive lives – for example, fertility and abortion.

While such rapid advancement in the area of reproductive medicine has had obvious impacts on women's reproductive autonomy, other perceptible effects are evident. Heightened expectations in the promises of medical science have not only led to an expansion of the ethical obligations of medicine, but also legal duties under the law of negligence. As such, the actions for wrongful conception and wrongful birth[7] can be viewed as the products of 'medical progress' and increased 'choice' in the field of reproduction. While relatively new to the United Kingdom courts, these actions clearly demonstrate the law of tort's ability to embrace a widening ambit of harms under its cloak. Bringing fresh promises for claimants whose reproductive decisions are destroyed through negligent treatment, it has also required the courts to address difficult ethical and legal questions.

At the heart of the dilemma lies a tension between two constructions of 'harm'. Is unsolicited parenthood 'part of the normal vicissitudes of life',[8] or a '*harmful*' event that should be the subject matter of litigation, sounding in damages? Reference to changing reproductive norms might be thought capable of providing a decisive answer. The

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[7] In 'wrongful conception' actions, parents seek damages on the basis that they would not have *conceived* the child (healthy or disabled) but for the negligence. 'Wrongful birth' claims however, generally involve the birth of a disabled child. Here parents claim that the pregnancy would not have been *continued* but for the negligence, which deprived them of the 'right' to abortion. In 'wrongful life' claims, by contrast, the action is taken by the 'impaired' child (or his/her representative) claiming that but for the negligence, his/her parents would have aborted the pregnancy. This latter action has been barred since the case of *McKay v Essex Area Health Authority* [1982] 2 All ER 777 (CA) and is excluded under section 1(5) of the Congenital Disabilities (Civil Liability) Act 1976 (see further chapter two).

[8] Basil S Markesinis, *Always on the Same Path* (Oxford: Hart, 2001), 81.

promotion of family planning services in the United Kingdom has given rise to different familial forms, postponement of parenthood and childless women,[9] indicating that traditional domestic activities such as child-rearing are no longer seen as 'central unifying roles'.[10] Therefore, normal expectations of life may include the decision to limit family size, abstain from parenthood altogether or avoid parenthood when the conditions are not 'right', for example where there is a risk that if born, the child would suffer from disability. But these expressions of reproductive choice frequently depend on the medical profession. When such expectations are defeated through negligence, however, individuals must confront a different life plan, one that arguably holds inescapable parenting obligations, including financial, social and psychological implications.[11]

Affording legal recognition of this type of harm has not been straightforward. The actions for wrongful conception and birth do not sit easily within the paradigm of the conventional negligence claim, clearly involving more than the 'run-of-the-mill features to be found in

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[9] Alice Belcher, 'The Not-Mother Puzzle' (2000) 9 *Social & Legal Studies* 539.

[10] Lynda Clarke and Ceridwen Roberts, 'Policy and rhetoric: The growing interest in fathers and grandparents in Britain' in Alan Carling, Simon Duncan and Rosalind Edwards (eds.) *Analysing Families, Morality and Rationality in Policy and Practice* (London: Routledge, 2002), 165.

[11] Some regard the availability of abortion or adoption services as militating against this view. But this oversimplifies the experience of unwanted pregnancy. Firstly, a woman might opt for sterilisation precisely to avoid decisions of this nature. Secondly, as Sally Sheldon argues, such decisions are not made within a vacuum; women confront a series of institutional, social and economic barriers that impinge on their choices (Sally Sheldon, 'Unwilling Fathers and Abortion: Terminating Men's Child Support Obligations?' (2003) 66 MLR 175). See further chapter four where these issues are examined in detail.

other areas of medical negligence.'[12] Claiming that under some circumstances 'a new life amounts to damage in the law of tort'[13] ultimately requires the courts to recognise a new wrong. And perhaps for these reasons the courts have struggled to reconcile its position within the law of tort. Nor is the related question 'can parenthood constitute an injury?' decided within a legal vacuum. Policy factors such as the value of life, the promotion of family stability and the consequences of attributing liability to the medical profession have deeply affected the nature and existence of case law.

As the most fleeting glances of case commentaries on wrongful conception and birth reveals, these are actions in decline; tort law has finally closed its gate on the "ordinary" damages awards which claimants traditionally received for the costs of raising their negligently born child. Although causative of celebratory cheers from some scholarly corners, this thesis takes a very different stance. From a feminist perspective, one rooted in protecting and promoting women's reproductive freedom and 'choice', the demise of these actions must be seen as a cause for great concern. As this thesis considers, the reproductive torts hold considerable symbolic power in three interlinked ways. Firstly, these actions hold the potential to *reinforce* that the negligent failure to protect women's reproductive choices constitutes a real harm, with significant and enduring repercussions upon their lives. In this important respect, the law can articulate that the harms that women suffer, as women, really matter. Secondly, the reproductive torts could actually *enhance* women's reproductive freedom and control over their sexual lives. Since tort law holds a significant role in deterring negligent behaviour, liability for the

[12] C.R. Symmons, 'Policy Factors in Actions for Wrongful Birth' (1987) 50 MLR 269, 298.

[13] Mary Donnelly, 'The Injury of Parenthood: The Tort of Wrongful Conception' (1997) 48 *Northern Ireland Legal Quarterly* 10, 10.

frustration of women's choices sends out a strong signal that the medical profession must take greater care in their facilitation. Thirdly, the law might also be said to play an important role in *reflecting* the reality and diversity of women's lives. Although "choice" is inclined to mislead, in bespeaking an array of unlimited choices that is rarely there, it still remains a truism that many women are choosing to avoid, or at least delay parenthood to pursue other avenues they regard as more fulfilling in their lives. Therefore, the law could play an essential role in articulating the centrality and importance of reproductive autonomy in the diverse lives of women (and men) as a means of leading a fulfilling and chosen life.

But, the law of tort has done none of these things. The demise of the actions of wrongful birth and conception rests upon the invocation of a very different symbolism – and it is one that is deeply pernicious. In navigating through the different elements of these reproductive torts, the controversial parental claim for 'ordinary' child maintenance damages in wrongful conception and birth and the 'additional' damages awards claimed by parents of disabled children, this thesis seeks to highlight that the courts are less concerned with reproductive "choice", and more concerned with reproductive "responsibility". That is not to say that the courts are unconcerned with "choice", they are - but in deeply gendered ways that defeat, deny, and exclude the existence of "harm" through unsolicited parenthood. The manner by which the courts achieve this destabilising of choice is more fully revealed by analysing in depth a number of questions which have so far been either neglected, or given short-shrift in this discrete area of negligence law. For example, can one ever describe the 'natural' biological process of pregnancy as constituting a harmful event, as 'actionable damage'? Does the harm lie in the fact that it is an unwanted state, an invasion of one's physical bodily boundaries or something else? Or, should a woman ever be *required* to minimise her losses entailed with rearing an

'unwanted' child by 'choosing' an abortion, or by later placing the child up for adoption? Does 'keeping' the child indicate that its existence is very much wanted? As this thesis argues, in revealing the limited degree to which the law respects women's reproductive autonomy, these questions have become absolutely crucial in understanding the decline of these reproductive torts and suggesting possibilities for reform.

The thrust of the argument, developed through the thesis is that the courts must seek to find a balanced approach between public policy concerns and reproductive autonomy in the adjudication of unsolicited parenthood claims. However, essential to this argument is outlining precisely *what* reproductive autonomy encapsulates, since it is a value highly susceptible to differential interpretation; and significantly, it is one that the law of negligence presently adopts. In embracing a feminist theoretical framework within the broader context of reproduction, this thesis examines the gendered content of the liberal reproductive autonomy ideal and traces its invocation within the law of tort. Arguing that the law is consciously playing on *both* liberal visions of personhood and relational stereotypes of maternity to justify the imposition of 'responsibility' for reproductive risks onto women, final chapters therefore seek an alternative framework by which to disrupt the link between choice and responsibility. Theorising within the space between liberal and relational understandings of autonomy, this thesis adopts the concept of 'complex personhood' as a means of articulating a strategy to overcome law's gendered conception of legal personhood. Such a strategy, while tentative, is forwarded as offering the possibility of a conceptualisation of harm that resonates a deeper and relational understanding of reproductive choice and responsibility. And importantly, it is one that also offers the potential to *incorporate* women's diverse experiences of pregnancy, childbirth and motherhood within the law of tort.

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Unravelling Harm I: Joy to the World! A (Healthy) Child is Born![1]

> Alice looked round her in great surprise. "Why, I do believe we've been under this tree the whole time! Everything's just as it was!"
> "Of course it is," said the Queen. "What would you have it?"
> "Well, in *our* country," said Alice, still panting a little, "you'd generally get to somewhere else – if you ran very fast for a long time as we've been doing."
> "A slow sort of country!" said the Queen. "Now, *here*, you see, it takes all the running *you* can do, to keep in the same place. If you want to get somewhere else, you must run at least twice as fast as that!"[2]

INTRODUCTION: REOPENING THE GATES OF POLICY

The stories of parents bringing wrongful conception actions against health authorities render familiar allegations - clinical mishaps ranging from negligently performed abortions and sterilisation, failure to diagnose pregnancy, to the provision of incorrect test results following post-operative testing. Claiming that in the absence of such negligent

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[1] This chapter constitutes an extended version of an existing publication (Nicolette Priaulx 'Joy to the World! A (Healthy) Child is Born! Reconceptualizing 'Harm' in Wrongful Conception' (2004) 13 *Social & Legal Studies* 5) and was presented in extended format earlier this year ('Joy to the World! A (Healthy) Child is Born! Reconsidering Unconventional Tortious Justice' (Chicago, The Law and Society Association 2004 Annual Meeting, 2004).

[2] Lewis Carroll *Alice's Adventures in Wonderland and Through the Looking-Glass* (London: Penguin Books, 1998), 143.

treatment the child would not have been born, parents have typically sought to claim damages for the pain and suffering of the physical events of pregnancy and childbirth and for the costs of child rearing. While English law has traditionally permitted both claims, the question of whether parents should be entitled to the costs of childrearing has proved controversial. The initial reaction to such a claim was outright rejection. In *Udale v Bloomsbury Area Health Authority,* Jupp J denied damages under this head on the grounds of public policy, observing *inter alia,* that the birth of a child 'is a blessing and an occasion for rejoicing.'[3] Although not repudiating the 'child as a blessing', *Udale* was soon overruled by *Thake v Maurice.*[4] In allowing damages for childrearing, Peter Pain J preferred to address the issue in economic terms: '...every baby has a belly to be filled and a body to be clothed.'[5] And this more pragmatic line of reasoning was followed by the Court of Appeal in *Emeh v Kensington, Chelsea and Westminster Area Health Authority.*[6] Despite expressions of 'surprise' that English law should permit such recovery in *Jones v Berkshire Area Health Authority,*[7] *Gold v Haringey Health Authority*[8] and *Allen v Bloomsbury*,[9] it seemed that *Emeh* had settled the matter. As Mary Donnelly noted, 'in the unlikely event of the House of Lords overruling any of these decisions, the policy debate in England appears to be concluded.'[10] But the gates of

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[3] *Udale v Bloomsbury AHA* [1983] 2 All ER 522, at 531.

[4] *Thake v Maurice* [1985] 2 WLR 215 (Peter Pain J).

[5] *Thake,* above n 4 at 230.

[6] *Emeh v Kensington, Chelsea and Westminster Area Health Authority* [1985] QB 1012 (CA).

[7] *Jones v Berkshire Area Health Authority*, unreported, 2 July 1986 (Ognall J).

[8] *Gold v Haringey Health Authority* [1988] QB 481 (CA).

[9] *Allen v Bloomsbury* [1983] 1 All ER 651 (Brooke J).

[10] Mary Donnelly, 'The Injury of Parenthood: The Tort of Wrongful Conception' (1997) 48 *Northern Ireland Legal Quarterly* 10, 16.

policy were about to reopen in the case of *McFarlane v Tayside Health Board.*[11]

In 1999 the House of Lords were faced with two claimants, Mr and Mrs McFarlane, who had been assured by doctors that the husband was no longer fertile following his vasectomy operation. Having dispensed with contraceptive methods, Mrs McFarlane became pregnant and gave birth to their fifth child, Catherine. Mrs McFarlane claimed damages for the pain and inconvenience of pregnancy and birth, and both pursuers claimed for the costs of rearing their healthy child. Despite the Health Board's contention that the processes of conception, pregnancy and childbirth were natural events, thereby pure economic loss, the majority of the House (Lord Millett dissenting) found relatively little difficulty in construing such events as actionable physical harm to the mother.[12] Therefore, while reaching little agreement as to the extent of damages, their Lordships found that Mrs McFarlane should be entitled to recover for the pain and inconvenience of the pregnancy and for those expenses arising as a result of the pregnancy. However, in relation to damages for the cost of raising a healthy child, all their Lordships were in agreement - this part of the claim should be denied - although they employed a variety of techniques in reaching this conclusion. Lords Slynn and Hope typified this part of the claim as pure economic loss. In severing the child maintenance claim from the duty of the doctor to prevent pregnancy, no justification was provided

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

[12] Their Lordships were – with the exception of Lord Millett – quite certain that pregnancy and childbirth in wrongful conception suits should constitute actionable *physical* harm; however, this is *not* to say that the characterisation of harm is unproblematic. Indeed, each of their Lordships subscribing to the view that pregnancy is actionable damage, present quite different views as to what the harm consists of. This aspect of the action for wrongful conception is explored in chapter three.

as to why a doctor should be liable for the economic loss consequential on the personal injury of pregnancy and childbirth, yet not the maintenance of the child. One would seem to flow inexorably from the other – well recognised by Lord Millett, who rejected that the question should turn on whether economic loss was *pure* or *consequential:*

> The distinction being artificial if not suspect in the circumstances of the present case, and is to my mind made irrelevant by the fact that... conception and birth are the very things that the defendant's... were called upon to prevent.[13]

To hold a doctor liable for such economic losses, Lord Slynn considered, would not be 'just, fair and reasonable' reasoning that while the doctor is under a duty to prevent pregnancy he does not assume responsibility for the costs of child maintenance. Lords Hope and Clyde noting that this was a minor procedure suggested that the loss suffered was disproportionate to the wrongdoing. Lord Millett rejected this line of reasoning, noting that it is commonplace that 'the harm caused by a botched operation may be out of all proportion to the seriousness of the operation.'[14] Lord Clyde, while categorising the loss as purely economic, rejected recovery on the basis that an award enabling parents to maintain their 'welcome' child free of cost would not accord with the idea of restitution. And, although their Lordships had already rejected a 'set-off' argument, the benefits of having a child being incalculable in monetary terms, Lord Hope reiterated that it would not be 'fair, just or reasonable' to leave such benefits out of account, otherwise the parents would be unjustly enriched. Is this not obviously engaging in a set-off exercise?

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[13] *McFarlane,* above n 11, at 109.

[14] *McFarlane,* above n 11, at 109.

Similarly, in declaring the set-off exercise as capable of producing 'morally repugnant' results, Lord Millett also engaged in the same process, finding that *society* must take the blessing of a healthy baby to outweigh the disadvantages of parenthood. A rather odd conclusion one might think, having earlier described the benefits as 'incalculable and incommensurable.'[15] On this reasoning, parents could not make it a matter for compensation because 'it is an event they did not want to happen' - they cannot 'make a detriment out of a benefit.'[16] Such reasoning, Lord Millett found, led to the rejection of both claims. Pregnancy and delivery were the inescapable preconditions of the child's birth, and raising the child was an inevitable consequence, 'the price of parenthood'; unaltered by the fact that 'it is paid by the mother alone.'[17] Instead he suggested a conventional award of £5,000 to reflect their loss of freedom to limit their family size.

While both Lords Millett and Steyn sought to reject the 'formalistic techniques' of duty, foreseeability, causation and reasonable restitution employed by the remainder of the House, Lord Steyn suggested that this process of categorisation acted to 'mask the real reasons for the decisions.'[18] Noting that on the normal principles of corrective justice, such a claim would succeed, Lord Steyn preferred to regard the case 'from the vantage point of distributive justice.'[19] Echoing sentiments expressed in each judgment in *McFarlane*, he concluded that it would be contrary to the moral ethos of society to compensate parents for the birth of a healthy child:

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[15] *McFarlane,* above n 11, at 111.

[16] *McFarlane,* above n 11, at 113.

[17] *McFarlane,* above n 11, at 114.

[18] *McFarlane,* above n 11, at 82.

[19] *McFarlane,* above n 11, at 82.

> It may become relevant to ask commuters on the Underground... "Should the parents of an unwanted but healthy child be able to sue the doctor or hospital for compensation equivalent to the cost of bringing up the child for the years of his or her minority, i.e. until about 18 years?" My Lords, I am firmly of the view that an overwhelming number of ordinary men and women would answer the question with an emphatic "No" ...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.[20]

Lord Steyn readily admitted that the principles of distributive justice were grounded on moral theory. Alert to the fact that some may object to the House acting as a court of morals, rather than of law, he noted that the 'judges' sense of the moral answer to a question... has been one of the great shaping forces of the common law.'[21] Denying that such conclusions were the 'subjective view of the judge' he noted that these views were ascertainable by what the judge reasonably believes that the ordinary citizen would regard as right. The differing approach of the judges has not provided a straightforward judgment, or one that is defensible on the ordinary rules of tort. But irrespective of the various legal techniques employed, the issue central to *McFarlane* is policy. As Lady Justice Hale asserts:

> [A]t the heart of their reasoning was the feeling that to compensate for the financial costs of bringing up a healthy child is a step too far. All were concerned that a healthy child is generally regarded as a good thing rather than a bad thing.[22]

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[20] *McFarlane,* above n 11, at 82.

[21] *McFarlane,* above n 11, at 82.

[22] The Right Honourable Lady Justice Hale DBE, 'The Value of Life and the Cost of Living – Damages for Wrongful Birth', The Staple Inn Reading (2001) 7 *British Actuarial Journal* 747, 755.

It is undeniable that *some* might regard a healthy child as a joy, but what does this perspective miss? If one decides to undergo invasive medical procedures to remove the prospect of parenting responsibilities, can the failure of that procedure be properly described as a 'joy' or 'good thing'? Herein lies the notion that the parents have, as a matter of law, suffered no harm from a child's birth even when that 'joy' is thrust upon them.

With a continuing focus on the highly influential *McFarlane* judgment, and a critical assessment of the later case of *Rees v Darlington Memorial Hospital*,[23] this chapter adopts the concept of 'gendered harm' in examining judicial exchanges as to whether unsolicited parenthood involving the birth of a healthy child constitutes a compensable harm or not. In considering developments initiated by *Rees* at Court of Appeal level - most notably the carving out of an exception for disabled parents - and the divided response of the House of Lords on appeal, the dimensions of a harm construct reliant upon a nexus between disability and (in)capacity will be explored. Whether differential treatment is justifiable, forms one of this chapter's central themes. But the central argument, which sets out the analytical framework and tenor for the rest of this thesis, is that the courts must fully embrace the value of reproductive autonomy in their adjudication of these reproductive torts. However, this is no simple task. Having previously advocated elsewhere that the objective must therefore be to provide a 'fresh theoretical perspective to the construction of harm... based on autonomy as the central organising principle,'[24] recent judicial

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[23] *Rees v Darlington Memorial Hospital* [2002] EWCA Civ. 88; [2002] 1 FLR 799 (CA); *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52; [2004] 1 FLR 234 (HL)

[24] Priaulx, above n 1, 7.

conversations reveal that this line of analysis itself is susceptible to broad interpretation.[25] Therefore, this chapter examines the recent legal invocation of autonomy-based arguments in the action of wrongful conception, and questions whether this value currently plays any meaningful role in recognising the harms flowing from the frustration, denial or destruction of reproductive choices.

CHARACTERISING 'HARM' IN WRONGFUL CONCEPTION

The concept of 'harm', though seemingly self-evident is thoroughly ambiguous. In defining our understanding of 'harm', we might initially allude to broken bones or other types of obvious injuries; injury in this sense clearly constitutes 'harm'. Nevertheless, the further we stray from the corporeal paradigm, the more difficult it becomes to refer to 'injury'.[26] For example, a stolen wallet; we would hardly refer to the owner as being 'injured', but we could conceptualise this through a customary understanding of harm, notably the 'setting back, or defeating of an interest'.[27] On this view, 'harm' is a broader notion than 'injury'.

Nevertheless, individual notions of harm can both overlap and be quite distinct to legal conceptions of harm. As Joanne Conaghan and Wade Mansell point out, 'While some kinds of harms are easily assimilated within the traditional corpus of law, others do not lend themselves so easily to tortious characterisation.'[28] Considering the doctrinal limitations of tort and the construction of harm it is worth considering

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[25] *Rees*, above n 23 (HL).

[26] Joel Feinburg, *Harm to Others* (Oxford: Oxford University Press, 1984).

[27] Feinburg, above n 26, 33.

[28] Joanne Conaghan and Wade Mansell, *The Wrongs of Tort* (London: Pluto, 1999), 161.

what interests, and, more particularly, *whose* interests, tort law serves. In this respect, Conaghan argues that tort law, 'while quick to defend and protect interests traditionally valued by men, is slow to respond to the concerns which typically involve women, for example, sexual harassment or sexual abuse'.[29] It is only since the late 1970's that sexual harassment has transformed from behaviour widely regarded as a 'harm*less*' part of normal human engagement to behaviour constituting sex discrimination, deserving of a legal response.[30]

In examining the array of harms that women predominantly suffer, feminist scholars have utilised the concept of 'gendered harm' in rendering visible the harms that women suffer, as women.[31] Therefore, in the context of wrongful conception, it should be relevant that the experience of pregnancy and childbirth is not universal; and that, as actual mother and carer of an unintended child, women will be most affected by decision-making in this area of tort law. Seen in this light, the principles of distributive justice, directed towards the 'just distribution of burdens and losses among members of a society',[32] certainly falls under suspicion; the 'losers' will always be women. Therefore, one must question why 'harm' in wrongful conception does not translate into cognisable legal 'harm', where significant policy considerations militate against such a finding.

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[29] Joanne Conaghan, 'Tort Law and the Feminist Critique of Reason' in Anne Bottomley (ed) *Feminist Perspectives on the Foundational Subjects of Law* (London: Cavendish, 1996), 48.

[30] Joanne Conaghan, 'Law, harm and redress: a feminist perspective' (2002) 22 *Legal Studies* 319.

[31] Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (Sydney: Federation Press, 2002).

[32] *McFarlane,* above n 11, at 165 (*per* Lord Steyn).

In *McFarlane,* 'harm' is legally constructed in two principal ways. Firstly, a healthy child is a blessing and its existence cannot be injurious. Secondly, the 'harm' claimed in wrongful conception is wholly economic and therefore damages are not available.[33] Yet, Lord Millett recognised that the contention that the birth of a healthy child 'is not a harm', was not 'an accurate formulation of the issue', but that it would only constitute a harm if its parents chose to regard it as such.[34] It can be a harm, but not at law? Alternatively, claimants are wrong to assert a child constitutes a harm because society regards a child as a blessing? Akin to Lord Millett's view that 'society must regard the balance as beneficial',[35] Lord Steyn was equally certain that the commuter on the underground would consider those in society *unable to have* children and find it morally unacceptable to compensate parents for rearing a non-disabled child in these circumstances. Of course, the commuter is nothing more than a fictitious character of the legal imagination used as a doctrinal obstacle to recovery – but to pernicious effect. He carries with him the 'sting of societal condemnation'[36] and has only served to limit a fundamental right and exclusion from protection. This commuter, J.K. Mason suggests, is a 'tough person,

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[33] While the law of negligence adopts a restrictive approach towards claims of 'pure economic loss', such recovery is less problematic in the case of the 'economic torts', for example, deceit, passing off, conspiracy, injurious falsehood or wrongful interference with contractual relations. Furthermore, recovery of this type is typical in contract where the majority of claims exclusively concern economic losses.

[34] *McFarlane,* above n 11 at 112.

[35] *McFarlane,* above n 11 at 114.

[36] David D Meyer, 'The Paradox of Family Privacy', (2000) 53 *Vanderbilt Law Review* 527, 565.

inured to the slings and arrows of outrageous conditions'.[37] He speculates that the traveller on the Strathay Scottish Omnibuses would provide a different view: "these people find themselves in a position which they sought to avoid".[38]

The assumption that the parents have suffered no 'harm' through the blessing of a child is erroneous and conveniently overlooks the fact that here a 'blessing' has been forced upon them. The experience of parenthood in wrongful conception is clearly different from the situation where parenthood has been planned. The fundamental distinction is that in the former, medical negligence led to the birth of a child. Even if society does hold the assumption that a healthy child is a good thing, it seems unlikely that many commuters would be quick to assume that the parents have suffered no harm in this factual setting. Children may well be valued, but the inevitability of procreation has lost contemporary significance to many in society. Peter Pain J expressed the importance of this countervailing policy factor, stating:

> By 1975, family planning was generally practised. Abortion had been legalised over a wide field. Vasectomy was one of the methods of family planning which was not only legal but was available under the National Health Service. It seems to me to follow from this that it was generally recognised that the birth of a healthy baby is not always a blessing.[39]

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[37] J.K. Mason, 'Unwanted Pregnancy: A Case of Retroversion?' (2000) 4 *Edinburgh Law Review* 191, 205.

[38] Mason, above n 37, 205.

[39] *Thake,* above n 4 at 230.

As C.R. Symmons remarks, judicial "Gallup polling" of society's sentiments will be 'both speculative and subjective'.[40] Public policy considerations can point in either direction, from the unqualified goods of children on one hand, to the value of family planning on the other; either can constitute the will of the people.[41] Therefore, the question of whether a child is a blessing loses its validity in answering the question of damages because 'for every "policy" factor... thrown onto the scales to *deny* liability' another exists to 'redress the balance'.[42]

The principle criticised here is not the assumption that a child is a blessing, but rather that this fact can only be determined by those who have gone to great lengths to put an end to their reproductive capacity.[43] In making this decision, an intricate network of values and subjective preferences will determine what importance a child will hold in their lives;[44] it should not be the role of the court to trivialise those values by reference to the abstract goods of children in society. Following invasive surgery to avoid a child, it should be obvious that the prospect of a baby will not herald the sense of joy expounded in *McFarlane*. It is a source of concern that their Lordships thought to utilise such a line of reasoning in denying damages to the McFarlane's. One possibility is that the courts have searched for *any rule* that will deny recovery in

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[40] C.R. Symmons, 'Policy Factors in Actions for Wrongful Birth' (1987) 50 MLR 269, 280.

[41] Of interest, their Lordships firmly rejected that they were stepping into the 'quicksands' of public policy. Considering the House reversed case law spanning some fifteen years, could this be indicative that this was an issue best left for legislators, who do enter such 'quicksands,' than judges?

[42] Symmons, above n 40, 305.

[43] Emily Jackson, 'Conception and the Irrelevance of the Welfare Principle' (2002) 65 MLR 176.

[44] Jackson, above n 43.

these cases, simply because the wrongful conception claim requires judges to address difficult questions.[45] The clearest method of escape is to provide a basic moral framework that assumes that the birth of a child is a blessing and is an occasion for joy as a matter of law to its parents. Nevertheless, the moral foundation is unstable.

Pervasive throughout *McFarlane* are notions of 'sanctity of life'. Lord Steyn suggested that his decision to deny recovery was 'reinforced by coherence', explicitly relying on English law's rejection of wrongful life claims.[46] However, as Jennifer Mee contends 'wrongful conception is a cause of action based on the negligent invasion of an individual's interest in *preventing* conception, it does not raise the abortion issue or implicate "sanctity of life" concerns'.[47] If Lord Steyn has approached this question on the basis of moral theory, then as Alisdair Maclean suggests, the substance of the moral answer is both questionable and unconvincing.[48] In this vein, Bernard Dickens suggests that such

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[45] Shelley A Ryan, 'Wrongful Birth: False Representations of Women's Reproductive Lives' (1994) 78 *Minnesota Law Review* 857.

[46] *McFarlane,* above n 11 at 83.

[47] Jennifer Mee, 'Wrongful Conception: The Emergence of a Full Recovery Rule' (1992) 70 *Washington University Law Quarterly* 887, 899.

[48] Alisdair Maclean, 'McFarlane v Tayside Health Board: A Wrongful Conception in the House of Lords?' (2000) 3 *Web Journal of Current Legal Issues.* An interesting aspect of the decision in *McFarlane*, which is not explored within this thesis, is the appeal to religious beliefs. While the values espoused in *McFarlane* are analysed here as holding a fully secular foundation, it is notable that the common references to the birth of a child as a 'joy' and a 'blessing' originate from earlier decisions in which appeal is made specifically to religious values. For example, in *Udale*, Jupp J commented: "One is inevitably reminded of the Gospel (John 16:21): 'A woman when she is in travail hath sorrow, because her hour is come: but as soon as she is delivered of the child, she remembereth no more the anguish, for joy that a man is born into the world.'"

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.'[49] He transposes the false logic of the 'moral answer' noting that no court would entertain the argument from a putative father that he should not be required to provide financial support for a child on the grounds that he has conferred a priceless blessing on the mother.[50] So, in alternative contexts, the courts rigidly take the view that the joys of parenthood fail to outweigh the costs, yet in wrongful conception, claimants are not permitted 'by a process of subjective devaluation, to make a detriment out of a benefit'.[51] What kind of moral theory produces the astonishing, if not absurd conclusion that parenthood is 'objectively' more joyous, beneficial and welcome precisely when it is unwanted?[52]

Regina Graycar notes that 'perhaps we can learn something from the "stories judges tell" if we think about the epistemological content of each of them. What are judges telling us about the things they know about the world?'[53] In earlier case law, the representations of women were most visible. In *Udale,* Jupp J. referred to the claimant in the

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[49] Bernard Dickens, 'Wrongful Birth and Life, Wrongful Death Before Birth, and Wrongful Law' in Sheila A.M. McLean (ed.) *Legal Issues in Human Reproduction* (Dartmouth: Aldershot, 1990), 87.

[50] Dickens, above n 49. Although it is true that courts may not entertain such arguments presently, the liability of *all* genetic fathers to pay child support under English law is coming under pressure from Men's Advocates'; see further chapter four.

[51] *McFarlane,* above n 11, at 112 (*per* Lord Millett).

[52] Although the analogy is perhaps distasteful, this privileging of 'objective' views over the subjective views of rape victims (where 'no' means 'yes') comes to mind, and dramatically illustrates the sinister nature of such a legal approach.

[53] Regina Graycar, 'The Gender of Judgments: Some Reflections on "Bias"' (1998) 32 *The University of British Columbia Law Review* 1, 32.

following terms: 'She is not only an experienced mother but, so far as I am able to judge, a good mother, who has all the proper maternal instincts'.[54] However, in relation to the childrearing claim in *McFarlane* rarely does one see *any* reference to the mother or her *role* as mother; but she *is* very much there. Perhaps the question here is: 'what are judges *not* telling us?' For example, should it be significant that their Lordships repeatedly referred to the fact that Catherine was 'loved', 'accepted' and 'welcomed'? Or, that their Lordships thought it 'absurd to distinguish between the claims of the father and mother'?[55] Might it also be relevant to our enquiry that the court focused on the benefits and financial costs of parenthood alone? It seems that only Lord Millett recognised that the burden of raising the child was 'paid by the mother alone'.[56] The concern which preoccupied the House is well demonstrated by Anthony Jackson who suggests that: 'every burden, such as the financial cost of the child's life, his feeding, clothing and education would shift firmly onto the medical profession'.[57] Significantly, Alisdair Maclean comments that this raises doubts about their conclusions on fairness in having only considered one dimension of the moral argument:

> Perhaps from the skewed masculine viewpoint of a father whose almost exclusive role lies in, economic provision, they have failed to take into account the considerable non-pecuniary detriments that come with parenthood.[58]

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[54] *Udale,* above n 3 at 526.

[55] *McFarlane,* above n 11 at 79 (*per* Lord Steyn).

[56] *McFarlane,* above n 11 at 114.

[57] Anthony Jackson, 'Actions for Wrongful Life, Wrongful Pregnancy and Wrongful Birth in the United States and England' (1995) 57 *Loyola of Los Angeles International and Comparative Law Journal* 535, 598.

[58] Maclean, above n 48.

Or indeed, those that come with motherhood. Here judicial techniques denying recovery through set-off exercises, unjust enrichment or 'distributive justice' all proceed from the assumption that the 'blessing of a healthy child' outweighs the cost of raising the child; an argument that will leave either the burden of caring or the financial losses unaccounted for. Remarking on the belief that a child is a blessing, 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.[59]

Therefore, in comparing non-pecuniary benefits with pecuniary disbenefits, this approach reflects a narrow definition of harm, failing to recognise that not all the burdens will be financial. And, having characterised unwanted conception as actionable physical harm, reasoning which has been employed in a consistent line of authority before *McFarlane* in permitting the recovery of child maintenance costs, can maintenance costs be correctly characterised as a 'pure economic loss'? If pregnancy is a personal injury, then surely the economic loss suffered by the mother is immediately consequential on that injury? It seems that their Lordships have inadvertently recognised that wrongful conception is a harm, but have just declined to provide the complete remedy.

The *McFarlane* ruling may be clear in asserting that parents with an unplanned healthy child have suffered no compensable loss, but the future application of this rule to alternative situations is far from clear.

Should the rule be different in relation to the unwanted but disabled child? Lord Steyn considered that while there maybe 'force in this concession', it was not relevant to the present appeal and his Lordship therefore declined to rule on the point.[60] Does the category of 'parent' mean *all* parents, irrespective of their particular circumstances? Or might there be similar force in allowing a concession where the parent, rather than the child, is disabled? And how might the courts approach the situation where both parent and child are disabled?[61]

The problematic nature of the *McFarlane* legacy is particularly highlighted by the controversial case of *Rees v Darlington Memorial Hospital.*[62] Prior to its adjudication in the House of Lords, the Court of Appeal, deciding on the preliminary issue, determined that a mother suffering from severe visual disabilities could recover not only damages for pain and suffering of the unplanned pregnancy and labour, but also the additional costs of bringing up a healthy child until majority. If the harm is purely economic and a healthy child is a blessing, it is highly questionable following *McFarlane* how the Court of Appeal could possibly allow such recovery. As the dissenting judgment of Waller LJ leaves no doubt, the Court of Appeal has exceeded the boundaries set by the House of Lords.

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[59] Susan Atkins and Brenda Hoggett, *Women and the Law* (Oxford: Blackwell, 1984), 90.

[60] *McFarlane,* above n 11, at 84 (see chapter two).

[61] The latter situation, of a parent-child disabled dyad, has not yet arisen, although there are hints of such a possibility in the case of *Rees* (above n 23). Central to this case was the mother's disability, the genetic condition called *retinis pigmentosa* which rendered her very nearly blind. In this respect, though treated for the purposes of the case as 'healthy', there was a small probability of the claimant's child inheriting the disability.

[62] *Rees*, above n 23.

However, even before *Rees*, the Court of Appeal had already sought to limit the application of *McFarlane* in the context of wrongful conception claims. In *Parkinson v St James' and Seacroft University Hospital NHS Trust,*[63] the Court of Appeal ruled that the recovery of the extraordinary costs associated with maintaining a disabled child born as a result of a failed sterilisation would be fair, just and reasonable. Emphasising that a disabled child should be afforded the same dignity and status as a healthy child, Hale LJ contended that the differential repercussions in emotional, financial and caring terms justified a departure from *McFarlane.*

This process of demarcating between health and disability not only formed the foundation of *Parkinson*, but that of *Rees*. As Hale LJ rationalises in *Rees*, where the extra costs involved in discharging parental responsibility towards a disabled child are recoverable, 'so too can the costs involved in a disabled parent discharging that responsibility towards a healthy child'.[64] In delivering the leading judgment, Hale LJ endeavoured to provide a distinction between the abilities of the actors in *McFarlane* and *Rees* to illustrate that the former were able to discharge their parental responsibility. By contrast a disabled parent not only requires help to discharge the most basic parental responsibility, but would be at 'risk' that the child may have to be removed from her care by social services. Therefore, Hale LJ found that the 'deemed equilibrium' between costs and benefits, seemingly stable in the *McFarlane*-type case, would not exclude recovery here; the equilibrium had been 'tilted in the direction of extra cost needing

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[63] *Parkinson v St James' & Seacroft University Hospital NHS Trust* [2001] 3 All ER 97 (CA).

[64] *Rees,* above n 23, at paragraph [23].

compensation'.[65] But this must beg the question: if ordinary parents are denied recovery for the costs of maintaining a healthy child, why should the law treat a disabled mother differentially? The fact that it will 'cost more' for the disabled claimant mother to raise a healthy child hardly provides a compelling legal reason to extend a doctor's liability to these additional costs. Nevertheless, the underlying point is clear. In addressing the question of whether harm has been suffered and to what extent that harm impairs an individual's life can only be answered by reference to the interests the parent(s) sought to protect. But analytically, this approach is impossible to reconcile with the judgment of *McFarlane*. Quite simply, *Rees* breaks with precedent, further illustrating the inherent flaws of the assumption that parents suffer no harm. Perhaps Karina Rees will incur greater hardship in raising her healthy child, and find greater difficulty in adapting her life to care for a child she believed herself unable to parent. These aspects of her case coupled with a biological father playing no role in the child's upbringing may certainly sway one's sympathies in favour of recovery. But the legal construction of 'harm' from *McFarlane* takes no prisoners, this is pure economic loss, the birth of a healthy child is a blessing and an occasion for joy, and outweighs all the financial costs of parenthood.

RECONCEPTUALISING HARM: A PROFITABLE EXERCISE?

Characterising the 'harm' in wrongful conception as purely economic loss is deeply problematic. On this account, the creation of the parent-child dyad is conceived of as a relationship rendering purely financial obligations - and financial repercussions should parenthood be brought about negligently. Nevertheless, as will be clear at this stage, the

[65] B Mahendra, 'Left Holding the Baby – Act III' (2002) 152 NLJ 409.

relationship is not conceptualised as wholly fiscal. Indeed, when assessing the benefits emerging from parenthood their Lordships turn to consider purely non-financial considerations;[66] yet, how many of us quantify or calculate the profits or joys of parenthood? Since this aspect of parenthood is hardly amenable to financial calculation, what then, of the losses which also fail to translate readily into the language of dollars or pounds. And what might these consist of? In order to locate a truer balance between benefit and detriment we need to consider the fuller impact of unsolicited parenthood; therefore the question becomes, what language might allow us to capture this 'invisible' dimension of unsolicited parenthood within the corpus of tort law?

In endeavouring to locate a balanced approach, the principle of autonomy most obviously arises as an interest capable of being defeated through unsolicited parenthood. Legally characterised in other areas of medical law as a fundamental principle,[67] its relevance to the wrongful conception action is clear. While autonomy is not a 'univocal concept',[68] in the context of respect for reproductive choice, it holds a specific meaning. At a minimum this requires respect for an individual's right to make choices, and to take actions based upon their

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[66] Indeed, had this been the case, the court would have struggled to defend its claim that the economic benefits of parenting outweigh the economic detriments. As Anthony Giddens comments, 'Having a child is no longer an economic benefit and the family is no longer an economic unit'. See further, Anthony Giddens, 'Runaway World: the Reith Lectures Revisited: Family' (1999-2000 Director's Lectures, London School of Economics, 1999).

[67] See *St. George's Healthcare NHS Trust v S* [1998] 3 WLR 936 (CA), and more recently, *Ms B v An NHS Hospital Trust* [2002] EWHC 429.

[68] Tom L. Beauchamp and James F. Childress, *Principles of Biomedical Ethics* (Oxford: Oxford University Press, 1994).

personal values and beliefs. Emily Jackson's 'enthusiasm for autonomy as an organising principle'[69] is justified upon the conviction that a broader and richer understanding of reproductive autonomy may be normatively desirable. She suggests 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'.[70] Social norms may shape the character of our choices, but it is nonetheless important to recognise the exceptional value of being the author of our actions, particularly in an area as personal as reproduction. Similarly, the acknowledgement of this value has 'served to discredit paternalism... reflected in the legal regime by which medical treatment is regulated.'[71] The value of autonomy within medical law therefore encapsulates the notion that the right to physical integrity and the ability to make voluntary decisions must be respected.[72]

While this liberal conception of autonomy may present some answers within medical contexts, Robin Mackenzie notes that it is impossible to reconcile with the everyday realities of women's lives in pregnancy and motherhood.[73] Susan Sherwin contends that the model of personhood under the liberal autonomy ideal constructs a false ideology that decisions are isolated from their social environment, when in fact 'so

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[69] Emily Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Oxford: Hart Publishing, 2001), 2.

[70] Jackson, above n 69, 6.

[71] J.K Mason and R.A. McCall Smith, *Law and Medical Ethics* (London: Butterworths, 1999), 8.

[72] Derek Morgan, *Issues in Medical Law and Ethics* (London: Cavendish, 2001).

[73] Robin Mackenzie, 'From Sanctity to Screening: Genetic Disabilities, Risk and Rhetorical Strategies in Wrongful Birth and Wrongful Conception Cases' (1999) 7 *Feminist Legal Studies* 175.

much of our experience is devoted to building or maintaining personal relationships and communities'.[74] Nor does this liberal ideal permit room to question differences among people, or the effects that 'oppression... has on a person's ability to exercise autonomy'.[75] By contrast, a relational view of autonomy squarely addresses these issues. In the healthcare context, relational autonomy questions not only the social and political contexts of decision-making, but also the options available to women – and those who control those options.[76] Therefore in the context of reproduction, relational autonomy highlights the increasing medicalisation of women's lives, their social positioning within the familial unit,[77] and the resulting impact on their 'choices'.

Clearly this approach holds considerable weight in the context of wrongful conception and birth suits. From this perspective, various factors already highlighted illustrate the political and social contexts of these decisions: the increasing control of women's reproductive lives and the expectation that women will *naturally* take on the burden of rearing children. Not only do these factors serve to limit respect for women's reproductive choices and autonomy but they must also be implicated in decisions that fail to regard unsolicited parenthood as a harmful experience. Therefore, the assumption that the parental interest invaded by the defendant's negligence is wholly economic should be approached with scepticism. From a relational approach, it should be

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[74] Susan Sherwin, 'A Relational Approach in the Politics of Health' in Susan Sherwin *et al.*, *The Politics of Women's Health, Exploring Agency and Autonomy* (Philadelphia: Temple University Press, 1998), 34.

[75] Sherwin, above n 74, 35.

[76] Sherwin, above n 74.

[77] Susan Dodds, 'Choice and Control in Feminist Bioethics' in Catriona Mackenzie and Natalie Stoljar (eds) *Relational Autonomy, Feminist Perspectives on Autonomy, Agency, and the Social Self* (Oxford: Oxford University Press, 2000)

questioned why other interests, such as planning the size/timing of the family, potential harm to other family members, and the significant disruption of one's future plans are not assessed as deserving of protection. Quite simply, a child is not a trouble-free consumer product, thereby comparable to 'unordered goods' or the 'mundane transactions of commercial life',[78] which can be returned or sold on the market. In the realm of family life, parenthood demands an active response to a relationship of dependency that holds considerable and enduring responsibilities for those concerned. Therefore, other losses are consequent upon the birth of an unplanned child. Amy Bernstein observes that whereas pregnancy and childbirth occur during defined episodes, motherhood is "chronic";[79] it spans throughout the woman's lifetime and evolves as mother and child age. So, from a female perspective the loss of autonomy endures past childbirth; motherhood involves more than just biological capacity. And for men who embrace caring responsibilities, this "chronic" experience will be almost identical. If parenthood is chronic, what of those who have chosen to reject that very state?

Parenthood involves considerable responsibility and will not always carry positive connotations, but the courts assume that these responsibilities are outweighed by the joy that non-disabled children naturally bring. In this context, restricting injury within the economic sphere results in a narrow view of what constitutes harm. It is not

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[78] *McFarlane,* above n 11, at 114 (*per* Lord Millett): 'In the mundane transactions of commercial life, the common law does not allow a man to keep goods delivered to him and refuse to pay for them on the ground that he did not order them. It would be far more subversive of the mores of society for parents to enjoy the advantages of parenthood while transferring to others the responsibilities which it entails.'

[79] Amy B. Bernstein, 'Motherhood, Health Status and Health Care' (2001) 11 *Women's Health Issues* 173, 173.

doubted that economic motivations will influence reproductive decision-making; this possibility is fully embraced. But financial concerns may not have been the primary motive and therefore any assessment of harm needs to take into account a series of intangible, non-pecuniary and relational harms. Refusal to acknowledge the fuller range of interests that individuals seek to protect both excludes and misrepresents the reality of their motivation.

The loss central to the wrongful conception case is one of reproductive autonomy. This does not mean that individuals become in some way 'less' autonomous, but rather, approaching the losses from this perspective allows us to consider the impact on individuals when their 'autonomous' choices are destroyed or set back. In this respect, in choosing to avoid parenthood, the failure of that decision will impact on individuals in myriad ways and to differing degrees. The individual's power to decide whether or not to become a parent has been irrevocably lost, and inevitably faces a profound change of lifestyle and loss of autonomy. If we accept that individuals should have the right to choose the type of life they find subjectively meaningful, providing it causes no harm to others' interests, then the individual is best placed to determine their reproductive choices. The belief in autonomous control over whether and when to reproduce, Laura Purdy contends is the linchpin of women's equality in the context of reproduction.[80] Depriving individuals of such control interferes with their capacity to live in accordance with their own beliefs, and in some

[80] Laura M. Purdy, 'What Feminism Can Do for Bioethics' (2001) 9 *Health Care Analysis* 117.

cases such failures to respect reproductive autonomy 'may even involve infringing their bodily integrity.'[81]

The courts have traditionally failed to view unsolicited parenthood in this manner. One must therefore question the courts' adherence to the principle of autonomy and consider to what extent conflicting principles are at play. Few would find difficulty in accepting Derek Morgan's proposition that there are areas of medical law 'where the goal comes closer to the enforcement of moral notions,'[82] and the wrongful conception action demonstrates exactly this tension between law and ethics. Other moral notions have been accepted into the ambit of the courts' decisional framework, such as the role of the family, the value of life and societal expectations of women. These have been used in isolation to facilitate an outcome-based mechanism that misrepresents the harm experienced through unsolicited parenthood. Denying legal recognition of the consequent harm communicates negative signals to plaintiffs about the value of their lives, autonomy and the nature of the harm following wrongful conception.

Of course, in theory, this alternative construction of harm sounds pretty convincing – approaching the loss in non-moneterizable terms seems capable of capturing the dimensions of unsolicited parenthood so clearly overlooked by the analytical approach of *McFarlane.* But in practice, in the concrete world of the judiciary, how does one acknowledge such a loss of autonomy? Does one merely create a new head of damages as recognition of such a loss in all wrongful conception cases and give it a notional value in damages? After all, is

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[81] Jackson, above n 69, 7. Such instances, as Emily Jackson explains, are illustrated by those cases where the courts have authorised 'non-consensual surgical intervention in childbirth'.

[82] Morgan, above n 72, 53.

it not the case that all parents in these cases suffer such a loss? While some might well welcome such a development, and regard it as curative of the problematic *McFarlane* legacy, it is argued that this scheme of 'compensation' should be deeply resisted. Indeed, how does the assumption that *all* parents in these cases are identically situated, with the same impact on their lives through the birth of an unplanned child illustrate respect for the notion of individual autonomy? Having stressed elsewhere that the law should 'now acclimatise its treatment of such individuals and place greater emphasis on care, dignity and respect, providing a force that promotes a more expressive characterisation of autonomy',[83] what is being advocated here is something more than a mere 'autonomy award'.

Convenient though such an 'autonomy award' might be, what is meant by autonomy in this context is a commitment to recognising the diverse situations of individuals, the varying degrees that individuals may be harmed through the failure of their reproductive choices. In other words, a relational approach entails responding to what the harm of unsolicited parenthood consists of, in individual circumstances. However, a failure to approach harm from this perspective has obvious repercussions – since what we are left with is the purely objective realm. In the absence of a context-based perspective then, we can either make the assumption that all individuals are identically situated or, perhaps to our greater peril, assume that the creation of strict categories will indicate which individuals are more deserving of compensation than others. And why such approaches should be problematic is no better illustrated than in the case of *Rees*.

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[83] Priaulx, above n 1, 17 [later emphasis]

CREATING *APPEAL*ING DICHOTOMIES? THE NEXUS BETWEEN DISABILITY AND INCAPACITY

> Too often disabled people, because of their impairments, are viewed as incapable of sex and love, as incapable of independent living, as incapable of parenting and enjoying family life.[84]

Two distinct approaches to the nature of harm have been adopted in the wrongful conception action, as illustrated by *McFarlane* at the highest appellate level and *Rees* in the Court of Appeal. Combined, these judgments meant that the parental healthy/disabled dichotomy would be crucial to the question of recovery. Since the House of Lords' decision in *Rees* however, in which their Lordships overturned the Court of Appeal's ruling, this is no longer the case. Nevertheless, it is fruitful at this juncture to ask whether such differential treatment is justifiable on the strength of the Court of Appeal's analysis. Not only does this judgment provide a cautionary tale to their Lordships before following suit in singling out 'disability' for 'special treatment', but quite significantly, it may well have provoked a partial reconsideration of the rigid approach adopted in *McFarlane*.

Unquestionably, the most prominent and far-reaching judgment in the Court of Appeal is provided by Lady Justice Hale. In clearly advocating 'special treatment', Hale LJ's analysis of Karina Rees depicts a woman whose autonomy is severely diminished through disability; a woman who struggles to raise her child because of her disability. In the context of *Rees,* this may be unproblematic for some; however, Hale LJ went much further, providing a wholesale distinction between the able-bodied parent and disabled parent in carving out an

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[84] Tom Shakespeare, Kath Gillespie-Sells and Dominic Davies, *The Sexual Politics of Disability* (London: Cassell, 1996), 209.

exception to *McFarlane*. Obvious problems stem from this approach, but of concern here, *Rees* formulates a tight nexus between disability and incapacity, giving rise to tensions in assessing what might constitute 'diminished autonomy' in identifying and assessing relevant harms. Is it possible to draw a bright line between the able-bodied parent and the disabled parent? Should we assume that the former is better able to perform their parenting obligations?

Disabled women are not a monolithic entity. Women's experiences in living with physical, sensory or developmental disabilities are variable, as will be their abilities to care for children.[85] Conflating disability with incapacity only serves to perpetuate pathologising assumptions about the effects of parental disability on children[86] and maintains the myth that disabled people are incapable parents whose 'children are consequently in danger'.[87] While certainly not the intended consequence of the Court of Appeal, the *Rees* conceptualisation of 'harm' nevertheless serves to legally reinforce stereotypical and discriminatory attitudes towards those with disabilities:

> The public generally regards blind girls and women as unlikely candidates for motherhood. First of all we are often perceived as asexual, uninterested in dating, and unattractive to potential partners. Second, we are considered helpless, incompetent, and unable to care for a neighbor's children for a few hours; we certainly can't be responsible for a growing life for eighteen years. Relentlessly bombarded with these

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[85] Virginia Kallianes and Phyllis Rubenfeld, 'Disabled Women and Reproductive Rights' (1997) 12 *Disability & Society* 203.

[86] Megan Kirshbaum and Rhoda Olkin, 'Parents with Physical, Systemic or Visual Disabilities' (2002) 20 *Sexuality and Disability* 65.

[87] Shakespeare, Gillespie-Sells and Davies, above n 84, 111.

> negative assumptions, it is hard for us, as blind women, to believe that motherhood is truly among our options.[88]

As disability rights advocates have argued, while the medical establishment has been 'one of the loci of control over women's bodies and reproduction', this is exacerbated for disabled women: 'the attitudes of the medical profession towards disabled women as child bearers have often been based on myth rather than fact. Physicians often counsel disabled women not to have children.'[89] Despite significant changes in the law, Kirsty Keywood highlights the continued judicial reliance on a 'crude, medicalised construction' of disability that typifies adult women with learning disabilities as asexual and vulnerable.[90] This 'double standard', where the expectations of women's traditional reproductive role are reversed, assumes vulnerability and incapacity, yet ignores contextual factors, such as poverty or a lack of social or familial support which may have a strong bearing on individual autonomy. In Waller LJ's dissenting judgment in *Rees*, these were factors that he took great care to emphasise. He suggested that one should consider very carefully how such an exception will be perceived - not by the Commuter - but by those who

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[88] Deborah Kent, 'Beyond Expectations: Being Blind and Becoming a Mother' (2002) 20 *Sexuality and Disability* 81, 82.

[89] Kallianes and Rubenfeld, above n 85, 208. Such examples of counselling by professionals however, overlook other sources of coercion and pressure imposed, for example by *both* professionals *and family* members, on those with intellectual disabilities to use birth control, undergo sterilisation or even to terminate pregnancies against their wishes. See further David McConnell and Gwynnyth Llewellyn, 'Stereotypes, parents with intellectual disability and child protection' (2002) 24 *Journal of Social Welfare and Family Law* 297, 303.

[90] Kirsty Keywood, '"I'd Rather Keep Him Chaste" Retelling the Story of Sterilisation, Learning Disability and (Non)Sexed Embodiment' (2001) 9 *Feminist Legal Studies* 185.

would have successfully claimed damages prior to *McFarlane*. Considering the fine line between suffering a disability and experiencing hardship in raising children without support he stated:

> Assume the mother with four children who had no support from husband, mother or siblings, and then compare her with the person who is disabled, but who has a husband, siblings and a mother all willing to help. I think ordinary people would feel uncomfortable about the thought that it was simply disability which made a difference.[91]

Parallels can be drawn. The diminished ability to care for a child need not derive from disability alone. Lone parenthood coupled with a lack of social and familial support typifies an analogous situation where individuals may honestly believe themselves to be diminished in their ability to care for a child, although to what extent will inevitably vary. Of course, this is *not* to argue that those suffering from disabilities should also be denied damages; but quite simply, that disability in itself, is not an 'adequate indicator of parenting capacity'.[92] All too quickly do we forget the success stories of those who have overcome obstacles to parenthood, despite their disability; those who build or operate from essential networks in preparing them, and supporting them throughout parenthood. As Deborah Kent powerfully reflects on her own situation, 'blindness was not an obstacle to motherhood',[93] and she stresses the common feature that links all parents' lives: 'for the most part we rely on the same inner and outer resources that help *all* parents survive. We need the support of family and friends.'[94] And beyond

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[91] *Rees,* above n 23, at paragraph [53].

[92] McConnell and Llewellyn, above n 89. Therefore, Hale LJ's assumption that children of disabled parents are at greater 'risk' of being removed by social services must also be seen as overly simplistic.

[93] Kent, above n 88, 84.

[94] Kent, above n 88, 88.

this, it is arguable that viewing 'disability' as the signifier for special treatment – that is, as *the* problem – also risks overlooking the operation of other factors such as race, gender, sexuality, poverty and class, which may not only influence individual experiences,[95] but create barriers to effective parenting, quite irrespective of disability. Therefore, rather than drawing such 'bright lines', a more compelling argument is that courts should examine the individual circumstances of all parents.

Following *McFarlane* however, this option was clearly not open to the Court of Appeal. Therefore, while the judgment is undoubtedly problematic, once one takes account of the very real constraints within which the Court of Appeal operated - the choice between allowing an exception based on disability or not - the ruling must surely constitute an understandable attack on the rigid approach adopted in *McFarlane.* But does *Rees* clearly restrict claims on the basis of disability? If, as Tony Weir observes, the cases of wrongful birth involving disabled children present a danger of inferior courts illustrating their 'antipathy to the *McFarlane* decision by finding a handicap where really there is none',[96] then might the Court of Appeal's decision in *Rees* potentially create an equal danger?

In essence this is not the case, since Hale and Robert Walker LJJ sought to restrict recovery to those cases where the claimant suffers a pre-tort disability which is known by the doctor as forming the reason why the claimant sought to limit her family. Therefore, not only does this leave no room for the sympathetic exercise of discretion for claimants who do

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[95] Nasa Begum, 'Disabled Women and the Feminist Agenda' (1992) 40 *Feminist Review* 70, 70.

[96] Tony Weir, 'The Unwanted Child' (2002) 6 *Cambridge Law Review* 244, 248.

not strictly fall on the 'right' side of the disability/able-bodied dichotomy, but further restricts recovery for those who do. As Andrew Grubb comments, such a limit is 'entirely arbitrary', since it is 'inconsistent with the principle that the recovery should be based upon the loss being reasonably foreseeable'.[97] Indeed, while courts have regarded the 'unlikely' consequence of a disabled child being born as a result of a failed sterilisation as reasonably foreseeable, Grubb questions, surely 'so could an accident leading to physical disability?'[98] Nevertheless, despite such criticisms, what is abundantly clear of the Court of Appeal's conceptualisation of harm in *Rees* is that disability makes all the difference.

TORT LAW: (RE)CONSTRUCTIVE OR RECEPTIVE?

The dangers of the approach by the Court of Appeal in *Rees* are quite clear. The reconstructive nature of tort law means that individuals will need to mould their injuries to fit tight doctrinal categories to gain adequate redress to illustrate that they have suffered harm.[99] Both able-bodied and disabled women are the losers here. Laura Hoyano maintains that:

> The route to recovery mapped out in *Rees* fosters a culture of helplessness and victimhood. Henceforth in order to win exemption from the *McFarlane* rule, the parents of healthy children... must depict themselves as inadequate parents due to a pre-conception disability, incapable of carrying out 'the most ordinary tasks.'[100]

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[97] Andrew Grubb, 'Failed Sterilisation: Damages for the Birth of a Healthy Child: *Rees v Darlington Memorial Hospital N.H.S. Trust*' (2002) 10 *Med L Rev* 206, 209.

[98] Grubb, above n 97, 209.

[99] Nancy Levit, 'Ethereal Torts' (1992) 61 *George Washington Law Review* 136.

[100] Laura C.H. Hoyano, 'Misconceptions about Wrongful Conception' (2002) 65 MLR 883, 900.

It has already been emphasised that the 'harm' in wrongful conception is to be assessed via the concept of reproductive autonomy – a serious issue for all women - a parental harm that is suffered irrespective of whether we are dealing with able-bodied or disabled parents. Importantly, recognising that harm has been suffered in these circumstances does not necessarily mean the generous provision of damages. A point upon which the courts have struggled is the distinction between 'harm' and 'quantum.' A principal fear is that admitting the occurrence of harm will necessarily lead to alarmingly high awards being paid out by an already resource-starved National Health Service, to say, wealthy parents claiming the cost of their child's private education.[101] Therefore, the obvious focal point for judicial evaluation is the object of damages in wrongful conception cases.

Various approaches arise in relation to the reproductive torts of wrongful conception and birth - for example, that the courts allow recovery on the basis of what the parents could reasonably afford to spend on their child. By contrast, the alternative approach suggested by Emily Jackson is to limit awards to those costs 'reasonably incurred as a result of the child's life'.[102] And such a view would seem to closely correlate with that of Hale LJ in *Rees* who suggested that the object of damages in these cases is to 'compensate for those things which… will be *needed* if both mother and child are to enjoy the benefits of living together as a family'.[103] Indeed, as Grubb comments, since the parents' loss flows from the legal (or factual) obligation to support the child: an obligation which would be to meet its reasonable needs', the 'needs-

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[101] See for example the case of *Benarr v Kettering HA* (1988) 138 NLJ 179 (Hodgson J) in which child maintenance damages incorporated such costs.

[102] Emily Jackson, above n 69, 34.

[103] *Rees*, above n 23, at paragraph [25] [my emphasis].

based' approach is correct.[104] Beyond this, however, the 'needs-based' approach holds other analytic attributes which merit its application more generally: in particular, its powerful response to the parent-child dyad, as well as its strategic potential in reconceptualising the 'harm' entailed in unsolicited parenthood.

Hale LJ implicitly adopts a relational approach which fosters caring and interdependence, devoted to the building and development of personal relationships.[105] Based on this view, when addressing the question of damages it would be entirely fair for the court to consider the situation of both child and parent; the child's needs are inextricably linked to the situation of the parent. This perspective not only provides direct recognition that the relationship created is one of child-to-parent

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[104] Grubb, above n 97, 209. Andrew Grubb also suggests that it is correct for other reasons: 'it focuses on the child's situation which it would be unjust to prejudice solely on the basis of the financial background of its parents' and that the alternative approach ('reasonably afford' measure) 'does not make practical common sense'. As he notes in line with Henriques J in *Hardman v Amin* [2000] Lloyd's Rep Med 498, 'a sensible parent would simply pop off to the bank manager and borrow money to increase their ability to pay for the child's reasonable needs which they could not otherwise afford. The money would then be recoverable from the defendant.' More simply put, parents taking advantage of the 'reasonably afford' measure would seek to increase their wealth *superficially* and seek to claim this back from the defendant.

[105] It is, of course, tempting at this stage to suggest that a female adjudication of reproductive matters might make a difference. If it does, then it should clearly be of concern that there remains a poor representation of women in the judiciary (see Erika Rackley, 'Representations of the (woman) judge: Hercules, the little mermaid, and the vain and naked Emperor' (2002) 22 *Legal Studies* 602) Given this, one might be 'sceptical as to [the judiciary's] ability to bring a plurality of perspectives to bear upon them' particularly in matters of reproduction 'which are often asserted by women' (Susan Millns, 'The Human Rights Act 1998 and Reproductive Rights' (2001) 54 *Parliamentary Affairs* 475, 481). See also Hale, above n 22, 761. This theme is examined in greater depth in chapter three.

dependency, but crucially, that the real significance of such dependency is that it invokes nurturing obligations, not simply financial ones. Similarly, if the object of damages is based on need, it will steer the courts away from making invidious comparisons between the disabled and able-bodied which embody dangerous assumptions as to relative worth and capabilities of individuals in society. An approach receptive to need would also recognise that the capacity to perform parental duties rests not on the body alone, but that material and relational factors also have a strong bearing. And this approach may provide a key to understanding the crucial differences emerging between that of *McFarlane* and case law involving disabled children and parents.[106] Factually these cases may involve both greater loss of autonomy and additional strains in raising children, but the loss of autonomy and diminished ability to care cannot be assumed on the basis of disability alone. Circumstantially, the harm experienced by 'healthy' individuals may be just as considerable.

Unquestionably, a needs-based assessment has many attractions – most notably the adoption of a relational approach that circumvents *McFarlane.* However, it should be emphasised that as an inevitable consequence of the *McFarlane* ruling, this broader conceptualisation of 'need' still fails to take account of the loss of autonomy incurred through the ordinary burden of caring for a child. Parental responsibility, Lady Justice Hale rightly suggests 'is not simply, or even

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[106] *Groom v Selby* [2001] EWCA Civ. 1522 (CA); *Rand v East Dorset HA* (2000) 56 BMLR 39 (Newman J); *Hardman v Amin* [2000] Lloyd's Rep Med 498 (Henriques J); *Lee v Taunton & Somerset NHS Trust* [2001] 1 FLR 419 (Toulson J); and *AD v East Kent Community NHS Trust* [2002] EWHC 1890 (Cooke J); [2002] EWCA Civ 1872 (CA). See further chapter two.

primarily a financial responsibility',[107] yet the outcome of cases such as *Rees* far from supports this conclusion - 'harm' is referenced solely by the additional costs related to disability and not the caring burden *simpliciter* that arises in all parental obligations.[108] Simply put, 'need' merely provides a financial *status quo* with able-bodied parents.[109] Nevertheless, by virtue of *McFarlane*, this is the present state of the law: 'one cannot claim either the care or maintenance costs of a healthy child'.[110] Therefore, while such dichotomous treatment of those who can claim and those who cannot, is certainly problematic, the question remains, if the law is to take account of such non-pecuniary harms, on what alternative basis can this be assessed?

THE MANY FACES OF AUTONOMY

> Terms such as autonomy... have no independent meaning or definition and can be understood in conflicting and incompatible ways. These concepts often become battle cries for diverse political movements. Their amorphous, overarching, and imprecise nature means that they can

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[107] Hale, above n 22, 762.

[108] That the ambit of cognisable harm excludes consideration of the hands-on provision of care is furthered supported by the recent case of *AD v East Kent Community NHS Trust,* above n 106. Here the claimant, unable to raise the child herself, claimed the substitute cost of care provided by the child's grandmother. At first instance Cooke J refused recovery, holding that that the claimant and her mother gained "all the joys and benefits free of expense" (*AD* at paragraph [27]) and the grandmother was "bringing up the child herself in substitution for the claimant" (*AD* at paragraph [34]) rather than providing caring *services* to the claimant. Such conclusions were upheld on appeal. See further Nicolette Priaulx, 'Parental Disability and Wrongful Conception' (2003) 33 *Family Law* 117; and see further chapter five.

[109] A situation which Hale LJ clearly recognised: 'She is being put in the same position as her able-bodied fellows.' *Rees,* above n 23, at paragraph [23].

[110] Hale, above n 22, 763.

> be used simultaneously by those holding disparate positions *in regard to any proposal.*[111]

The concept of autonomy was explicitly cited as legally relevant to the circumstances of *Rees.* There is much to suggest that addressing 'harm' from this perspective will more effectively unravel losses incurred through unsolicited parenthood. In many ways *Rees* is advancing the cause of damages for loss of autonomy; in doubting her ability to perform parenting responsibilities towards a child, the claimant sought not to conceive on account of her disability. Already forced to give up employment by virtue of the progressive nature of her disability, caring for a child would only exacerbate the limitations upon her life. Indeed, the courts' recognition that she required help that an able-bodied mother might not, implicitly emphasises that point. But would the House of Lords respond to the plight of Karina Rees in this way? On the *McFarlane* construction of harm, an appeal to the House of Lords seemed sure to fail: 'It would be repugnant to [society's] own sense of values to do otherwise... than take the birth of a normal healthy baby as a blessing, not a detriment'.[112] These were the words of Lord Millett - but could he provide the sole voice of dissent? In *McFarlane,* Lord Millett conceptualised harm differently to the rest of the House, choosing instead to award a 'conventional' sum to compensate for the loss of autonomy and freedom to limit the family size:

> They have suffered both injury and loss. They have lost the freedom to limit the size of their family. They have been denied an important aspect of their personal autonomy. Their decision to have no more children is one the law should respect and protect.[113]

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[111] Martha Albertson Fineman, *The Autonomy Myth, A Theory of Dependency* (London: The New Press, 2004), 25-26 [my emphasis].

[112] *McFarlane,* above n 11 at 114 (*per* Lord Millett).

[113] *McFarlane,* above n 11 at 114 (*per* Lord Millett).

In *McFarlane* he noted that the pursuers had not claimed that they had sustained loss by the impairment of their ability to discharge existing liabilities but only claimed loss by sustaining an additional financial burden. Transposing the logic of his judgment from *McFarlane*, he may well be persuaded that the loss incurred here is greater, forming the foundation of a judgment if faced with a disabled mother and a healthy child. This line of analysis certainly provides a conceptually clear and flexible route that would allow the courts to increase an award to encompass recognition of the potentially greater loss of autonomy incurred through unsolicited parenthood. Nor does this line of reasoning stand in isolation; Lord Millett's determination of the harm incurred in wrongful conception cases is much complimented by the powerful analysis of Lady Justice Hale, who writing extra-judicially states:

> First, left to myself, I would not regard the upbringing of a child as pure economic loss, but loss which is consequential upon invasion of bodily integrity and loss of personal autonomy involved in unwanted pregnancy... Secondly, I would regard that loss of autonomy as consisting principally in the resulting duty to care for the child, rather than simply paying for his keep.[114]

Embracing the concept of personal autonomy as central to this action, significant endeavours have been made by Lord Millett and Lady Justice Hale to apply these principles as a means of resolving the difficult ethical and legal issues arising in wrongful conception cases. Although the flavour of each judgment is quite different, it is arguable that such commitment to autonomy retains its potential in continuing to offer the most coherent legal framework in addressing the nature of harm in the wrongful conception case. But, perhaps a moment of

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[114] Hale, above n 22, 761.

'congratulatory' hesitation is required here – do both these judges really illustrate a 'commitment to autonomy'? The word 'autonomy' is certainly present in both judgments, but the flavour of each is completely different.

Located in *Rees* at the Court of Appeal level is a tacit recognition that a child is not an unqualified good. This perspective, expressed through Hale LJ's analysis, enquires into the plaintiff's motivation in wishing to exercise their reproductive autonomy. The approach shifts the focus from the 'child as blessing' to the real cause of injury, the negligent procedure, and provides a different construction of harm that accepts that the significant repercussions that actors will suffer are neither natural nor inevitable. Nor is this merely an abstract or fleeting account of harm; her Ladyship's account so clearly contextualises the harm as one that is individually suffered, as claimant specific. Therefore in *Rees*, we learn of the claimant's situation and the real constraints on her ability to parent a child as a result of her disability. But the very heart of Hale LJ's judgment is perhaps captured more fully when she adds of the parent-child relationship, '*we can only imagine* the sort of difficulties facing them both'.[115] Indeed, it is this precisely this imaginative and contextual dimension that so clearly separates Hale LJ's analytical approach from that of Lord Millett's highly distanced, abstract and gender-neutral approach.[116]

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[115] *Rees*, above n 23, at paragraph [3] [my emphasis].

[116] Indeed, Lord Millett's judgment is typified by the use of 'they', with very few exceptions (his Lordship's attention shifts to the mother when disregarding her personal claim). Even discussing matters that women might regard as personal to them, such as abortion decision-making, we never learn that this might hold a female specific dimension.

For his Lordship, the loss is not located within the parent-child dyad. And, if the mother's claim for pain and injury attendant on pregnancy and childbirth is in any way different to the claim for child maintenance, this is merely 'temporal';[117] a conclusion that led Lord Millett to reject both these claims.[118] Instead, the award of autonomy serves as (token) recognition that the parents 'have suffered both injury and loss,'[119] although the judgment will certainly leave many wondering what that loss - beyond the failure of a choice to materialise - precisely consists of. In stark contrast, Hale LJ by reference to her earlier judgment in *Parkinson* locates the harm of wrongful conception firmly within a gender-specific context:

> The primary invasion of bodily integrity and autonomy is suffered by the mother... Of the two types of harm, one can only be suffered by her. The other in my view is properly conceptualised as the obligation to care for and bring up the child. That too is, in the great majority of cases, primarily born by her.[120]

Nor does her Ladyship's analysis end there – in an extended essay, she describes in great detail the possible repercussions of pregnancy, childbirth, and motherhood on individuals, recognising that the impact on individuals will be experienced 'to different extents and in different ways according to the circumstances and characteristics of the people concerned.'[121] Yet, nowhere in Lord Millett's judgment do we learn of the context, the manner by which unsolicited parenthood has impacted on these claimant's lives, their daily realities, or in what way their

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[117] *McFarlane,* above n 11, at 114.

[118] Lord Millett was the only member of the House to reject the mother's claim for pain and suffering attendant on pregnancy and childbirth.

[119] *McFarlane,* above n 11, at 114.

[120] *Parkinson,* above n 63, at paragraph [94].

[121] *Parkinson*, above n 63, at paragraph [73].

futures have changed irrevocably by the relationship of dependency they now must respond to; nor indeed, does his Lordship stretch to consider such possibilities in the imaginative domain. Instead, Lord Millett's measure of the loss of autonomy appears to be motivated by a desire not to appear too churlish by sending the claimants away 'empty handed':

> They are entitled to general damages to reflect the true nature of the wrong done to them. This should be a conventional sum which should be left to the trial judge to assess, but which I would not expect to exceed £5,000 in a straightforward case like the present.[122]

The disparity between these two approaches, of course, illustrates how 'autonomy' can be interpreted in such radically different ways. However, in the present context, this holds a much greater significance; in searching for an expressive characterisation of autonomy that captures the fuller extent of the losses suffered by parents in wrongful conception, the question of which approach the law embodies becomes absolutely crucial. If the law is to provide a convincing account of harm experienced in unsolicited parenthood, then clearly it must encompass an understanding inclusive of women's perspectives of pregnancy, childbirth and parenting and a framework that assesses the specific interests the parent(s) sought to protect and the impact on their lives as parents. The 'loss of autonomy' in unsolicited parenthood is much more extensive than just the failure of a 'choice'.

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[122] *McFarlane,* above n 11, at 114. As Whitfield questions: '[I]f compensation is to be awarded for interference with autonomy, why should it be 'conventional' rather than reflecting the true effect of that interference on the lives of the parents?' See further Adrian Whitfield, 'The fallout from *McFarlane*' (2002) 18 *Professional Negligence* 234, 238.

THE CASE OF JUDICIAL PRIDE: ADMINISTERING (UN)CONVENTIONAL (IN)JUSTICE?

> Leadership is required from the House of Lords in re-assessing the framework of the law in order to respond to the nature of the harm *actually* suffered in these cases. The differing response of the law to other matters involving bodily integrity simply makes no sense... Of fundamental importance is the foundation upon which damages are recovered or claims dismissed [...] Rather than engaging in a series of philosophical questions concerning the goods of children in society, the courts will be able to address more concrete questions of what the harmful repercussions of a failed life-plan involve. This is not to say that the principle of autonomy will become the 'White Knight' of the wrongful conception action – this is wholly dependant on how the courts choose to implement such an organizing principle in practice...[123]

The amount of judicial activity over the four years' elapsing since *McFarlane* demonstrates the controversial and difficult, if not incoherent nature of this decision. Although it is true that *McFarlane* has 'not been universally welcomed by academic writers; nor has it been universally condemned',[124] it is more difficult to agree with Lord Millett's further reflection that, 'experience has not shown there to be unforeseen difficulties in application; nor that the decision is productive of injustice'.[125] Yet, had their Lordships foreseen the numerous challenges to their own position on the 'unwanted child',[126] as well as

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[123] Priaulx, above n 1, 22-23.

[124] *Rees* (HL), above n 23, at paragraph [103] (*per* Lord Millett).

[125] *Rees* (HL), above n 23, at paragraph [103] (*per* Lord Millett).

[126] *Rand v East Dorset Health Authority* (2000) 56 BMLR 39; *Hardman v Amin* [2000] Lloyd's Rep Med 498; *N v Warrington Health Authority* (unreported, 9 March 2000) (CA); *Lee v Taunton & Somerset NHS Trust* [2001] 1 FLR 419; *Groom v Selby* [2001] EWCA Civ. 1522 (CA); *Greenfield v Irwin* [2001] 1 WLR 1292; *Parkinson,*

the lower courts falling helplessly into invidious positions so as to carve out exceptions wherever possible, perhaps *McFarlane* might have been decided differently. This is, of course speculation. But bearing this in mind, if we reflect more carefully on cases like *Parkinson* and *Rees*, experience illustrates that the lower courts' difficulties in applying *McFarlane* have been incurred precisely so as to avoid the obvious injustice it brings about. In a broader context however, *McFarlane* and subsequent cases illustrate a more concerning trend than perhaps Lord Millett or his colleagues might wish to acknowledge. Some have come to regard the case law in this field as illustrating 'how far negligence law has come adrift of principle',[127] whilst others regard the English position as providing 'a preview, and a warning, against following the same course.'[128]

And adrift of principle it is; the issue their Lordships in *McFarlane* took great care to avoid raising explicitly was how their treatment of wrongful conception formed an isolated example of denying damages in the context of clinical negligence suits. In other words, having found that the birth of an unwanted child and its 'subsequent existence were the direct and foreseeable result of the defenders' negligence',[129] their Lordships 'blocked a claim for damages which would have been recoverable under ordinary tort principles.'[130] In straying from the ordinary rules of corrective justice, a principle which 'requires [that]

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above n 63 (CA); *Rees,* above n 23 (CA) ; *AD v East Kent Community NHS Trust* [2002] EWCA Civ. 1872 (CA).

[127] Hoyano, above n 100, 903.

[128] *Cattanach v Melchior* [2003] HCA 38 (16 July 2003), at paragraph [128] (*per* Kirby J).

[129] *McFarlane,* above n 11, at 107 (*per* Lord Millett).

[130] Antje Pedain, 'Unconventional Justice in the House of Lords' (2004) 63 *Cambridge Law Journal* 19, 19.

somebody who has harmed another without justification... indemnify the other,'[131] their Lordships found the 'answer' in the more nebulous concepts of distributive justice, pure economic loss, benefits, blessings – and let us not forget the trusty commuter on the London Underground. But, from the perspective of clinical negligence claims generally, the Commuter is suspiciously missing from analysis; albeit, perhaps a quite unsurprising absence, since such claims are dealt with on the ordinary principles of tort law. As Kirby J's recent ruminations in the Australian case of *Cattanach v Melchior*[132] might suggest, when considered in this context, *McFarlane* goes well beyond the merely unconventional: 'It is arbitrary and unjust'.[133] In his opinion, not only is the Commuter a mask for 'unreliable personal opinions',[134] and the language of blessings, the family, and love illustrative of legal analysis overwhelmed 'with emotion',[135] but significantly, Kirby J suggests that

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[131] *McFarlane,* above n 11, at 82 (*per* Lord Steyn).

[132] *Cattanach,* above n 128. In *Cattanach,* the High Court of Australia, by a majority of 4:3, allowed the claimant recovery of damages in full for the cost of rearing their unwanted child, with no discounts for joys, benefits or support (Gleeson CJ, Hayne J and Heydon J dissenting). Nevertheless, since this ruling, the Hon R J Welford MP introduced the Justice and Other Legislation Amendment Bill 2003 (Qld) with the intention of reversing the effect of *Cattanach*, so that damages in such suits will be restricted in the future. See further, Nicolee Dixon, 'The Costs of Raising a Child: Cattanach v Melchior and the Justice and Other Legislation Amendment Bill 2003 (Qld) (QPL September 2003) RBR 2003/24. See also, Reg Graycar, 'A loved baby can't cancel out a clear case of negligence' (2003) *on line opinion*, 25 July 2003, www.onlineoptions.com.au/view.asp?article=573.

[133] *Cattanach,* above n 128, at paragraph [162] (*per* Kirby J).

[134] *Cattanach,* above n 128, at paragraph [135]; Kirby J states: 'Sometimes, to avoid the appearance of unreliable personal opinions, judges have attempted to objectify the foundation for their judgements. Lord Steyn did this in *McFarlane* by his appeal to the supposed opinion of the passenger in the London Underground.

[135] *Cattanach,* above n 128, at paragraph [151].

the distinction between the immediate and long-term costs of medical error 'could be said to be discriminatory':[136]

> [G]iven that it involves a denial of the application of ordinary compensatory principles in the particular given circumstances of childbirth and child-rearing, circumstances that biologically and socially pertain to the female experience and traditionally fall within the domain of women. If such a distinction is to be drawn, it is the responsibility of the legislature to provide it, not of the courts, obliged as they are to adhere to established legal principle.[137]

As a critical and detailed attack upon their Lordships adjudication of the wrongful conception claim, *Cattanach* can be viewed as providing the final contemporary words on *McFarlane* and a rather timely warning - the House of Lords was set to review their previous decision in the appeal of *Rees* from the Court of Appeal. Confronted by a seven strong House of Lords,[138] the respondent in *Rees* invited the House to reconsider its position in *McFarlane* and to depart from that decision under the *Practice Statement (Judicial Precedent).*[139] Was this an audacious and brave invitation to the highest appellate court of the land, or one that provided the perfect opportunity for their Lordships to undertake a quiet u-turn with 'good grace and no loss of face'?[140] Those inclined to gambling might well be inclined to favour failure on

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[136] *Cattanach,* above n 128, at paragraph [162].

[137] *Cattanach,* above n 128, at paragraph [162].

[138] Including three Law Lords providing judgment in *McFarlane* (Lords Hope, Millett and Steyn).

[139] *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234.

[140] Writing prior to the Court of Appeal's adjudication of *Rees*, J.K. Mason suggested that the reasoning employed in *Parkinson* showed the way by which the House of Lords 'could retreat from *McFarlane* with good grace and with no loss of face.' See further J.K. Mason, 'Wrongful Pregnancy, Wrongful Birth and Wrongful Terminology' (2002) 6 *The Edinburgh Law Review* 46, 66.

this account, since taking such a turn in policy inevitably involves the House admitting that their previous decision was erroneous in some way; or in more euphemistic terms that, 'a decision of the House results in unforeseen serious injustice'.[141] And, if the gambling man wishes to increase his odds, Lord Steyn's comments provide him with greater security, having taken care to point out, that in the past, there were those [hardly rare] occasions when the House had refused to depart 'from a decision... even if it had been wrong'.[142] But even so, his Lordship asserted, 'none of this detracts from the power of the House to depart from a previous decision where there are cogent reasons to do so.'[143] Unsurprisingly, the court was unanimous in holding that it would be, 'wholly contrary to the practice of the House to disturb its unanimous decision in *McFarlane* given as recently as 4 years ago, even if a differently constituted committee were to conclude that a different solution should have been adopted.'[144] In other words, even if their Lordships considered the previous ruling incorrect, or causative of an injustice, the *McFarlane* legacy would remain; or would it?

Authors such as Clare Dixon, for example, suggest that, 'the main significance of *Rees* lies in the fact that the challenge to *McFarlane failed*; and the *introduction* of... conventional damages for the *loss of autonomy* suffered as a result of unintended conception and childbirth.'[145] But if one approaches this more carefully, does it not

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[141] *Rees* (HL), above n 23, at paragraph [31].

[142] *Rees* (HL), above n 23, at paragraph [31].

[143] *Rees* (HL), above n 23, at paragraph [31].

[144] *Rees* (HL), above n 23, at paragraph [7] (*per* Lord Bingham).

[145] Clare Dixon, 'An unconventional gloss on unintended children' (2004) 153 NLJ 1732, 1733 [my emphasis]. See also Richard Kidner, *Casebook on Torts (8th edition)* (Oxford: Oxford University Press, 2004), 193-194; Kidner also reads *Rees* (HL) as accepting the '*McFarlane* principle'.

appear quite peculiar to use the words 'failed' and 'introduction of' in the context of *Rees*? After all, Karina Rees gave birth to a healthy child as a result of a failed sterilisation; the clear *ratio* of *McFarlane* covered precisely this occurrence so as to reject child maintenance damages – was there any need to introduce an additional award of damages? And if Lord Steyn really considered the decision in *McFarlane* to be such 'a sound one',[146] then why, in common with his fellow dissenters, did his Lordship consider that a disabled parent with a healthy child should form the exception to this rule? Does the creation of either a conventional award or an exception for a disabled parent with a healthy child indicate that their Lordships are truly abiding by their rule in *McFarlane?*

So, just *how* conventional is this award, and what does 'conventional' in this sense mean – traditional, conservative, or typical? The notion of 'conventional' damages is certainly none of these things; but the word 'unadventurous' does come to mind. If it is traditional, such a tradition holds a very recent history, merely tracing back as far as Lord Millett's prior decision in *McFarlane* in which he suggested the modest sum of £5,000 'to reflect the true nature of the wrong suffered' by the claimants; the wrong consisting of a loss of autonomy.[147] As his Lordships reflected in *Rees*, such a suggestion 'was not taken up by anyone else'[148] in the *McFarlane* court, yet in *Rees* such a notion greatly attracted Lords Bingham, Nicholls and Scott. Lord Bingham, for example, considered the conventional award 'consistent with the ruling and rationale of *McFarlane*';[149] that is, despite no other member

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[146] *Rees* (HL), above n 23, at paragraph [33].

[147] *McFarlane,* above n 11 at 114.

[148] *Rees* (HL), above n 23, at paragraph [124].

[149] *Rees* (HL), above n 23, at paragraph [8].

of the *McFarlane* court having 'taken up' such a suggestion. Furthermore, his Lordship considered that such an award would not be, nor would be intended to be, compensatory. Nor, Lord Bingham added would it be the product of calculation – a point that the architect of the conventional award emphasised, since it 'should not be susceptible of increase or decrease by reference to the circumstances of the particular case.'[150] Indeed, for Lord Bingham a conventional award, neither nominal, nor derisory, of £15,000 would afford some measure of recognition of the wrong done, and such a 'gloss' would provide a 'more ample measure of justice than the pure *McFarlane* rule.'[151] This conventional award would provide the ultimate solution, since:

> The spectre of well-to-do parents plundering the National Health Service should not blind one to other realities: that of the single mother with young children, struggling to make ends meet and counting the days until her children are of an age to enable her to work more hours and so enable the family to live in a less straightened existence; the mother whose burning ambition is to put domestic chores so far as possible behind her and embark on a new career or resume an old one... To speak of losing the freedom to limit the size of one's family is to mask the real loss suffered in a situation of this kind. That is that a parent, particularly (even today) the mother, has been denied through the negligence of another, the opportunity to live her life in the way that she wished and planned.[152]

While Lord Nicholls considered that the amount of some award should be made to recognise the far-reaching effect that the birth of a child will have upon its parents, his Lordship conceded that the amount would 'inevitably have an arbitrary character'.[153] But less arbitrary, according

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[150] *Rees* (HL), above n 23, at paragraph [125].

[151] *Rees* (HL), above n 23, at paragraph [8].

[152] *Rees* (HL), above n 23, at paragraph [8].

[153] *Rees* (HL), above n 23, at paragraph [17].

to Lord Millett, than drawing lines between the disabled parent and the healthy parent, the very exercise that their Lordships Steyn, Hope and Hutton indulged in. The creation of such boundaries, Lord Millett maintained, would be 'destructive of the concept of distributive justice' as well as rendering 'the law incoherent' if not leading 'to artificial and indefensible distinctions being drawn as the courts struggle to draw a principled line between costs which are recoverable and those which are not.'[154] In such cases, his Lordship considered, such damages would effectively mean that the courts provided an award 'for the disability.'[155]

Problematic though such boundaries might be, could not Lord Millett's conventional but stable award equally create 'artificial and indefensible distinctions'? After all is it not the case, on the terms of Lords Millett and Bingham that well-to-do parents plundering the NHS will receive exactly the same amount – that is, £15,000 – as the disabled and single parent who struggles to make ends meet? Even if drawing demarcations on the basis of disability is deeply problematic,[156] should

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[154] *Rees* (HL), above n 23, at paragraph [121].

[155] *Rees* (HL), above n 23, at paragraph [118].

[156] It should also be noted here that Lord Millett nevertheless, is satisfied in drawing remarkably similar boundaries between disabled and healthy *children*; this seems to be based largely on the 'assumption' that while the disabled child will remain disabled throughout their life (and presumably utterly helpless) that by contrast, the healthy child of a disabled parent will go to school alone and be of help to the parent in later life (see Lord Millett at paragraph [116]). On this basis, might not Lord Millett be *as* guilty as those he criticises in making invidious assumptions on the basis of disability, or indeed the benefits that children bring to their parents? This aspect of *Rees* however was deeply disputed between their Lordships, and no formal conclusion was reached as to whether the previous decision of *Parkinson* was correct or not. See further chapter two.

no distinction be drawn between these two cases on their factual merits? Lord Millett's answer here is particularly selective:

> It is, with respect, no answer to say that the disabled parent has no choice in the matter; and that if a mother's disability makes it impossible for her to look after the child, she must perforce employ someone to do it for her. The normal, healthy parent may also have no real choice in the matter. A single mother with no disability allowance may have no choice but to go out to work. ...By contrast, a disabled mother may have a husband, parents and other members of the family to give support and look after the child.[157]

Indeed, in Lord Millett's somewhat idealistic vision of reality and 'choice', all mothers, whether poverty stricken like the 'old woman who lived in the shoe', or those living from state benefits can afford to 'employ' another to care for their child(ren).[158] On his analysis, there is no reason to distinguish between differentially situated individuals, since the commonality that links them is 'choice' - any hardship incurred after birth can be freely transferred whether through financial or familial means – all individuals are post-birth rendered identical. And herein lies the problem with this so-called conventional award that embraces 'distributive justice'; despite his Lordships protestations that the 'loss of this right is not an abstract or theoretical one', in practice Lord Millett's vision of autonomy is purely restricted to the moment of the failure of the prospective parent's initial choice (a point at which, presumably Lord Millett would also argue that all individuals are exactly situated). The award applies:

> [N]ot for the birth of the child, but for the denial of an important aspect of their personal autonomy, viz, the right to limit their family. This is an

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[157] *Rees* (HL), above n 23, at paragraph [115].

[158] *Rees* (HL), above n 23, at paragraph [115].

> important aspect of human dignity, which is increasingly being regarded as an important human right which should be protected by law. ...The parents have lost the opportunity to live their lives in the way that they wished and planned to do. The loss of this opportunity, whether characterised as a right or freedom, is a proper subject by way of damages.[159]

At face value, this sounds rather impressive; but how else, one must ask, is the loss of autonomy to be properly measured, other than relating it to the impact upon the individual situations of those caring for their unsolicited child? If the 'harm' resulting from unsolicited parenthood is based upon the creation of a relationship between parent and child, and the enduring dependency that this entails, how can autonomy hold any meaning in the context of wrongful conception without reference to that relationship? This is clearly not an aspect of 'autonomy' that Lord Millett had in mind. Indeed, it would seem that Lord Millett's vision of autonomy extends no further than the moment that one's choices have been frustrated and denied – and it is an approach that still draws the line at birth.

Considering the approach of Lords Millett, Bingham, Nicholls and Scott, one perhaps feels greater sympathy for those in the House who did choose to differentiate the situation of a disabled parent from that of the able-bodied parent. For them, the 'harm' exists not merely in the mind – a moment of frustrated choice, but in the assumed hardship of actively parenting a child. Although Lord Hope perhaps articulates the same stereotypical views as those enunciated in the Court of Appeal's adjudication of *Rees*,[160] Lord Steyn by contrast, carefully weighed up

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[159] *Rees* (HL), above n 23, at paragraph [123].

[160] *Rees* (CA), above n 23, at paragraph [65]: 'But it is the inescapable fact that the seriously disabled parent cannot, however hard she tries, do all the things that a normal, healthy parent can do when carrying out the ordinary tasks involved in a

the differential positions of both Waller LJ and Robert Walker LJ in the Court of Appeal's determination of *Rees*: the former critical of drawing boundaries, whilst Robert Walker LJ considered that the law treated disabled persons as a category of the public 'whom the law increasingly recognises as requiring special consideration.'[161] In this respect, Lord Steyn questioned, 'How is this tension between cogent arguments pulling in opposite directions to be resolved? In jurisprudential terms this is truly a hard case'.[162] Conceding that there was no right answer, his Lordship was persuaded that the 'injustice of denying to such a seriously disabled mother the limited remedy of the extra costs caused by her disability outweighs the considerations emphasised by Waller LJ.'[163] But of the 'conventional award', Lords Steyn and Hope were both positively militant; regarding this as contrary to principle, Lord Steyn considered that those advocating such a remedy had strayed into the 'forbidden territory' of Parliament. Lord Hope however, suggested that if damages were to be awarded at all, 'the aim must be to put the injured parties into the same position as far as money will allow as if they had not sustained the wrong for which they are being compensated.'[164] In his Lordship's view, referring to such an award, as Lord Bingham did, as non-compensatory, still departed from legal principle which guided the common law. Otherwise, what alternative basis could there be for such an award? With regard to the increased figure of £15,000, Lord Hope doubted whether such an amount would

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child's upbringing that place this parent's case into a distinct category.' It might well be that Lord Hope's caveat of 'seriously disabled' saves him here.

[161] *Rees* (CA), above n 23, at paragraph [41].

[162] *Rees* (HL), above n 23, at paragraph [39].

[163] *Rees* (HL), above n 23, at paragraph [39].

[164] *Rees* (HL), above n 23, at paragraph [73].

remove the danger of an award being regarded as derisory, and was left with the feeling that:

> [T]he figure which is to be established by the new rule, will in many cases, and especially in this one, fall well short of what would be needed to satisfy Lord Millett's aim, which Lord Scott adopts, of compensating parents for the wrong that has been done to them.[165]

What becomes clear at this stage is that neither the majority or minority approaches are capable of achieving the aim that their Lordships hoped for: adherence to the *McFarlane* legacy. Quite simply, *McFarlane* no longer stands as good law in the light of their Lordships' determination of *Rees*. If healthy children constitute a benefit serving to outweigh all of the detriments of parenthood, how then can such a conventional award be justified without over-compensating parents? Furthermore, if *McFarlane* determined that the healthy child could not, as a matter of law, be the subject matter of damages, then why should a disabled parent recover in such circumstances? Surely, the child is as much of a blessing and joy in such a situation? Both approaches - whether an exception based on disability allowing the claimant to recover the additional costs relating to maintaining a child as related to her disability, or the majority approach, of the conventional award - constitute significant inroads into the *McFarlane* judgment. Nevertheless, while these illustrate very forcefully that their Lordships have changed course, it is certainly not a turn in the right direction.

The approaches of the minority and majority in the House of Lords could not be further apart. Lord Steyn and his fellow dissenters mark out disability, or by the account of Lord Hope 'serious disability', as providing the bright line between recovery and non-recovery. By

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[165] *Rees* (HL), above n 23, at paragraph [77].

contrast, Lord Millett and his proponents consider that justice will be served by making *no* concessions to individual circumstances. Rather, paying lip service to the principle of autonomy seems to resolve all the difficulties inherent in examining the individual, and sometimes messy, circumstances of claimants. And lip service it is. If a commitment to reproductive autonomy requires at a minimum, 'respect for an individual's right to make choices,'[166] then how do we respond to an approach that constructs the compensable loss as a single moment of frustrated choice, that is, the point at which one realises that one's reproductive choices have been denied? As is apparent from the judgments of both Lords Millett and Scott, after this moment, 'choice' is only legally relevant so as to deny further compensation since, 'The mother need not have kept her baby but decided to do so';[167] and that remains the case even where the actors do not regard themselves as holding a 'real choice.' And it is here that we find the parallel between *McFarlane* and the varying positions illustrated in *Rees* – such perspectives of 'harm' are based on assumption, not fact, concrete reality, or the individual circumstances of each case – quite simply, the 'individual' is absent. Therefore while the amounts awarded in such cases might well be regarded as derisory, then their Lordships 'respect for autonomy' must be seen in a similar light. If the law is truly to respect individual autonomy, then it must be recognised that in addition to the relational context, a 'self' is always implicated in that concept – whether the harm is founded in disability, or indeed located in isolation

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[166] See earlier, at 27.

[167] *Rees,* above n 23, at paragraph [142] (per Lord Scott); and in the context of transferring the caring burden and the lack of a subjectively meaningful 'real choice', see Lord Millett at paragraph [115]. Nor are these isolated examples – Lord Millett in *McFarlane* is also deeply attracted by the notion of choice in relation to keeping the child as a reason for denying damages. See further, chapter four.

and hardship – the experience of unsolicited parenthood will be different in each individual situation, based on differential experience, lives, aspirations, and personalities. If 'autonomy' is ever to play a meaningful role in wrongful conception in locating the harm of unsolicited parenthood, then the law must display a commitment to recognising and embracing the diversity of individuals.

CONCLUSION

In the context of wrongful life suits, Mackenzie has noted that, 'the judiciary seem to prefer medical paternalism over patient autonomy, male dominance over reproductive choice and a legal forum for the resolution of medical ethics issues'.[168] These comments have equal application here. Concepts of 'duty' or 'distributive justice' have themselves served to 'mask the real reasons' for decisions, which it has been suggested, are imbued with pernicious assumptions about roles women are expected to adopt within society. While these concepts have been used to limit the legal responsibility of practitioners towards women, they could have been as easily formulated to extend the duty of the medical profession to take greater care in facilitating the reproductive choices of their patients. The current approach suggests that negligence resulting in the birth of a healthy child is an inevitable part of life and not a harm, for which individuals, in particular women, must now be prepared to bear the costs. In a society that promotes the goods of family planning, such medical immunity communicates dangerous signals. Significantly, such judicial paternalism serves to demean the choices of women and denies the individual control over her life and moral destiny. If individuals in society are to be regarded as holding the right to bodily integrity and freedom to determine what

[168] Mackenzie, above n 73, 181.

sort of life they wish to have, then it is now time to re-evaluate the wrongful conception action.

The principle of autonomy has been put forward as a mechanism that provides both a proper assessment of the harm in wrongful conception and respect for the autonomous reproductive choices of individuals in society. It is undeniable that unsolicited parenthood in these circumstances constitutes a harmful event, which is not to be restricted to parents suffering 'disablement'. This chapter argues that those who lie outside of this corporeal paradigm are also harmed, although the degree of their loss will clearly differ in its nature and extent. Autonomy should be integrated as the organising principle in wrongful conception cases; but essentially, in so doing, the law must re-orientate the meaning and depth of autonomy in order to provide a rational account by candidly addressing the interests at stake and entering into discourse about the weight to be attached to those interests. This does not necessitate that the courts dispense with value judgments, but it is essential that these reflect social norms. Nor will such an approach be permissive of invidious awards or threaten to open the 'floodgates'. Respecting individual autonomy will not result in every plaintiff making a claim for wrongful conception becoming the effective recipient of the full costs of raising their healthy children.

Quantification of damages could be limited if based on a relational approach that recognises the extent to which individuals are harmed will differ and expressed in variable ways. The differing response of the law to other matters involving bodily integrity simply makes no sense – wrongful conception is as intimately tied to legal issues of consent, bodily inviolability, medical standards of care, as are other areas of medical negligence. Of fundamental importance is the foundation upon which damages are recovered or claims dismissed; if

based on this theoretical perspective, the law will be respecting the decisional ability of individuals to make their own life plans. If those plans are defeated, then the law should provide acknowledgement that the violation of those interests represents not only a frustrated 'choice', but a life event which holds significant and enduring repercussions. In better reflecting the social reality of their situation, the law would provide valuable recognition that the tortfeasors in these cases have afflicted real harm on the plaintiffs, rather than conferring a priceless blessing upon them. Instead of engaging in a series of philosophical questions concerning the goods of children in society, the courts will be able to address more concrete questions of what the harmful repercussions of a failed life-plan involve. The law should now seek to engender an approach that recognises that for men and women, the loss of autonomy involved in childrearing can be both a social and legal wrong and not just a normal part of life. A firm commitment to the principle of autonomy offers such a possibility.

But, of course, it is only a *possibility*. Rather than being the 'White Knight' of the wrongful conception action – foregoing analysis has illustrated that 'autonomy' is a rather 'elusive' value, subject to different interpretations as to its quality, extent and invocation. And, considering the broader context of these reproductive torts, this must certainly provide food for thought – what does a 'firm' commitment to reproductive autonomy in tort law actually entail - is it an all or nothing matter? Since reproductive autonomy is not 'an absolute right admitting of no exceptions or qualifications',[169] perhaps one might argue that the law should recognise autonomy only when it is most 'seriously' invoked; that tort law must and will impose limits, since some choices are more important than others? Although this chapter

[169] Emily Jackson, above n 69, 320.

has firmly concluded that the courts' adjudication of cases involving healthy children demonstrates no such commitment to the principle of reproductive autonomy, what then should be made of the wrongful birth and conception cases involving disabled children where there has been a greater measure of success? In examining whether some choices more 'seriously' invoke autonomy interests than others, the following chapter limits itself to asking one specific question: does a recognition that parents have suffered 'harm' in the case of a disabled child mean that tort law might be recognising a 'limited form' of parental autonomy?

2

Unravelling Harm II: Additional Burdens & (Re)producing Imperfect Exceptions?

> The inspector took another sweet and pushed the bag to me.
>
> '"...and each foot shall have five toes,"' he quoted. 'You remember that?'
>
> 'Yes,' I admitted, unhappily.
>
> 'Well, every part of the definition is as important as any other; and if a child doesn't come within it, then it isn't human, and that means it doesn't have a soul. It is not in the image of God, it is an imitation, and in the imitations there is always some mistake. Only God produces perfection, so although deviations may look like us in many ways, they cannot be really human. They are something quite different.'[1]

THE READER FOR AUTONOMY: THE DILEMMA

In the wake of the genetic revolution, definitions of parenthood, kinship, reproduction and risk have been thrown into a state of flux. Prenatal and pre-implantation genetic diagnostic techniques offer 'new alternatives for action in fields which up to now were beyond human influence,'[2] and significantly, expansion in reproductive choice. In the era of the 'gene', prospective parenthood no longer turns on quantitative questions alone ("how *many* children?"). As reprogenetics increases our ability to detect an ever greater range of 'harmful' genetic conditions from which a potential child might suffer, parents

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[1] John Wyndham, *The Chrysalids* (London: Penguin Books, 1955), 55.

[2] Elisabeth Hildt, 'Autonomy and freedom of choice in prenatal diagnosis' (2002) 5 *Medicine, Health Care and Philosophy* 65, 69.

increasingly confront the issue of qualitative choice ("what *kind* of child?").[3] But the question of what kind of children to have is, as Buchanan *et al* comment, 'one of the most controversial components of reproductive freedom'.[4] Disagreements exist here as to the justification for, and interests implicated in utilising reprogenetic and abortion practices to avoid the 'risk' of a disabled child. Seen by some as driven by cost-benefit analyses to avoid the state or individuals bearing the costs of disability,[5] and as 'confirming a general public hostility towards those with impairments',[6] reprogenetics are thus viewed as inherently discriminatory. An alternative perspective suggests that the avoidance of conception or termination of pregnancy, actually benefits the prospective child under circumstances where it would otherwise live with intolerable pain and suffering as a result of severe disability.[7] Others, by contrast, support a 'parental choice' model, holding that the desire to have a child healthy and free from disability is 'natural'; nor is this position regarded as being incompatible with 'the generally accepted notion that an individual already born with that condition should receive appropriate respect with full civil and human rights.'[8]

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[3] The term "reprogenetics" refers to the application of genetic knowledges and techniques, such as prenatal diagnosis or pre-implantation genetic diagnosis, within the reproductive realm.

[4] Allen Buchanan, Dan W Brock, Norman Daniels and Daniel Wikler, *From Chance to Choice, Genetics & Justice* (Cambridge: Cambridge University Press, 2000), 210.

[5] Ruth Bailey, 'Prenatal Testing and the Prevention of Impairment: A Woman's Right to Choose?' in Jenny Morris (Ed) *Encounters with Strangers, Feminism and Disability* (London: The Women's Press, 1996), 161-163.

[6] Colin Barnes, Geof Mercer and Tom Shakespeare, *Exploring Disability, A Sociological Introduction* (Cambridge: Polity Press, 2003), 222.

[7] For further discussion around this point, see Sally Sheldon and Steve Wilkinson, 'Termination of Pregnancy for Reason of Foetal Disability: Are There Grounds For A Special Exception In Law?' (2001) 9 *Med L Rev* 85, 88-93.

[8] Ruth Deech, 'Family Law and Genetics', (1998) 61 MLR 697, 713.

But 'natural' as that desire might be, Ruth Deech highlights that the fear still remains that 'modern genetics will create a society in which people are intolerant of anything less than perfection and in which the family becomes the focus of ensuring that that perfection is created in a new generation.'[9] While reprogenetics raise a much wider series of concerns and criticisms, what becomes immediately apparent from a cursory examination is the magnitude of the challenge for regulators and society in determining 'how much we leave to genetic chance and individual choice'.[10] And ultimately, it might well be that the answer to this fundamentally depends on establishing what and whose purpose these technologies serve.[11]

Disagreements over whose interests are, or should be vindicated in utilising reprogenetic technologies, inevitably impact hard on the question of who is *harmed* in law when such reproductive expectations are not met. And the actions of wrongful conception and birth, vis-à-vis wrongful life claims illustrate exactly this tension: are parents harmed as a result of giving birth to a severely disabled and unwanted child, or is it the child itself that is harmed? Not many would be willing to suggest that a life full of suffering and intolerable pain is not a 'harm*ful*' state; yet, whether that child has been 'harm*ed*' through being brought into existence where impairment was inevitable is generally regarded as legally and philosophically problematic. By contrast, identifying relevant 'harm' might seem clearer in both wrongful conception and birth claims where, as a result of negligence, 'one or both parents reluctantly sacrifice their life to nurse their severely

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[9] Deech, above n 8, 714.

[10] Roger Brownsword, 'Regulating Human Genetics: New Dilemmas For A New Millennium' (2003) 12 *Med L Rev* 14, 14.

[11] Barbara Katz Rothman, *The Tentative Pregnancy, Prenatal Diagnosis and the Future of Motherhood* (London: Pandora Press, 1988), 3.

disabled child.'[12] Here, the financial, emotional and caring repercussions are by no means inevitable; quite simply, the failure of such parents' reproductive choices makes them worse off. And significantly, in the case of the unwanted disabled child, this is a sentiment which the tort of negligence shares; at least to the limited extent that extraordinary maintenance damages are permitted by reference to the child's disability.

But reflecting on the analysis advanced in chapter one, there is no doubt that the wrongful conception of a healthy child can be analysed in a remarkably similar way.[13] Indeed, is it not fair to conclude that all parents in such circumstances will suffer harmful consequences? On this view, an additional parenting burden arises as the direct result of *any* child being negligently brought into the world; therefore, if any distinction might be drawn, it will certainly not be one as to the *kind* of harm, but rather one of *extent*. Yet, as we have seen the courts have largely rejected wrongful conception claims involving the healthy child, since its birth is not regarded as harmful to its parents as a matter of law. Therefore, one must question, why are damages permitted in actions for wrongful birth and conception cases where the unwanted child is disabled – what is it that makes the difference?

Certainly wrongful *birth* cases are different, in so far as the parents' failed reproductive expectations can be clearly referenced to section 1(1)(d) of the Abortion Act 1967,[14] which legalises termination where

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[12] Julian Savulescu, 'Is there a "right not to be born"? Reproductive decision-making, options and the right to information' (2002) 28 JME 66.

[13] See chapter one's analysis of *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52; [2004] 1 FLR 234 (HL).

[14] Section 1(1)(d) of the 1967 Act (as amended by the Human Fertilisation and Embryology Act 1990) states that a person shall not be guilty of an offence when a pregnancy is terminated by a registered medical practitioner if two registered medical

there is a substantial risk that if born, the child would suffer from such physical or mental abnormalities as to be seriously handicapped. In such cases, the parents *wanted* a child, but a healthy one. Typically the negligence at issue includes failures in genetic counselling, whether actual diagnosis or information provision, leaving parents under the false impression that the intended child was healthy. The crux of such claims is that, but for the negligence, the parents would have elected to terminate the affected foetus under the Act. By contrast, however, wrongful *conception* cases involving the birth of a disabled child do not turn directly upon such provisions. In such cases, parents sought to avoid the birth of a child entirely, and the disablement of their unwanted offspring will have been a matter of coincidence rather than intentional avoidance.[15] Thus viewed, from a motivational stance alone, these parents are in no different a position to the pursuers in *McFarlane.*[16]

But arguably, even where lost abortion rights are not at issue, alluding to the Act's underlying legal policy might nevertheless strengthen claims. Here we might point to the singling out of the 'seriously handicapped' child, rather than *any* child, as a ground for termination. This distinction coupled with the absence of a gestatory time-limit under s.1(1)(d) might well indicate that, unlike the potential birth of a healthy child, the law regards disability as a 'harmful' reproductive risk outcome best avoided 'wherever possible.'[17]

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practitioners are of the opinion formed in good faith that 'there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped'.

[15] Certainly there is the possibility of these two scenarios colliding (wrongful conception and birth), although as Mason remarks 'the combination must, however, be rare'; Mason, below n 63, 49.

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

[17] Bailey, above n 5, 159.

Courts must tread carefully here; if it is simply 'disability' that makes the difference, then arguably the law risks articulating the notion that 'the lives of the handicapped are worth considerably less than those of a "normal" person.'[18] And following *McFarlane*, the temptation to draw such a distinction might well be great, since concepts of 'health' and 'benefits' were absolutely central to the rejection of the pursuers' claim for child maintenance damages. Nevertheless, it is possible that such difficulties could be avoided by analysing such claims from a parental perspective, in vindicating the principle of reproductive autonomy; or could it be the case that this already forms the foundational perspective underlying wrongful birth and conception suits where the child is disabled?

Although recognising that the Abortion Act 1967 was never premised on the basis of enhancing or protecting women's autonomy, Rosamund Scott has recently advanced that English law might be seen 'as at least *partly* concerned with reproductive autonomy, backed up by corresponding wrongful birth liability.'[19] Elsewhere in her contribution she remarks that the thrust of s.1(1)(d) of the Abortion Act is 'to protect parents from certain reproductive experiences should they so wish', and suggests that since a lawful abortion becomes an option under certain conditions, 'to this extent, a *limited form* of parental autonomy is in issue.'[20]

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[18] Anthony Jackson, 'Actions for Wrongful Life, Wrongful Pregnancy and Wrongful Birth in the United States and England', (1995) 17 *Loyola of Los Angeles International & Comparative Law Journal* 535, 607.

[19] Rosamund Scott, 'Prenatal Screening, Autonomy and Reasons: The Relationship Between the Law of Abortion and Wrongful Birth' (2003) 11 *Med L Rev* 265, 325 [my emphasis].

[20] Scott, above n 19, 275 [my emphasis].

This is a truly intriguing claim. What does it mean to be 'partly' concerned with, or to raise a 'limited form' of reproductive autonomy? Does this mean that reproductive autonomy is worthier of respect in some circumstances, but not in others? Is this what we mean by respect for reproductive autonomy? And how relevant is it that Scott's hypothesis is solely based on the action for wrongful birth in which s.1(1)(d) of the Act is directly raised? Certainly the existence of this provision necessarily implicates a parental interest in terminating a disabled foetus, and indeed, raises a convenient basis for recognising compensable interests at the same time. In this regard, Scott is undoubtedly correct in pointing to a close symmetry or 'indirect correspondence' between the Abortion Act and wrongful *birth* cases.[21] But, this clearly fails to answer the question as to the interests vindicated in wrongful *conception* claims involving disabled children, since here there is no such correspondence with the Abortion Act; quite simply, parents do not claim here that they lost the opportunity to terminate.[22]

Alternatively, we might ask whether the law's recognition of a parent's right to litigate on the basis of a negligently born disabled child in both wrongful conception and birth suits is equivalent to protecting reproductive autonomy.[23] Yet perhaps this question is counter-intuitive, in so far as it still fails to answer why parents should have

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[21] Scott, above n 19, 285.

[22] Indeed, arguably it might well be seen by some as militating against recovery, since in these actions parents have not been deprived of the opportunity to terminate under the Abortion Act 1967; therefore there might be scope for arguing that parents should mitigate their losses.

[23] Rosamund Scott raises a similar question in context of s.1(1)(d) of the Abortion Act 1967: 'is the concern to protect parents the same as a concern to protect their autonomy?' (Scott, above n 19, 275).

their autonomy recognised in such circumstances, but not where the child is healthy.

The assertion that the law is 'partly' concerned with reproductive autonomy provides the quest upon which this chapter embarks. In analysing this claim, it is argued that a better picture as to the nature and extent of respect for reproductive autonomy emerges from a less selective approach than that exhibited by Scott. Therefore, a sustained analysis of the distinctions drawn between actions for wrongful conception *and* birth, as well as the dichotomous treatment of claims involving healthy and disabled children become crucial in examining whether, and to what extent autonomy interests are raised in these actions. As a result, much of this chapter is dedicated to a detailed examination of case law, leaving conclusions as to the presence of autonomy, whether partial, complete or perhaps absent, to the end. But, what must be stressed here as holding much greater importance in 'reading for autonomy' is that we actively engage with the jurisprudence of the courts in these cases.[24] Pointing to the existence of wrongful birth litigation and s.1(1)(d) of the 1967 Act seems a rather thin basis for concluding that 'autonomy' interests are raised. Indeed, caution must be taken not to 'read in autonomy' where it fails to exist;

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[24] The expression 'Reading for Autonomy' is inspired by Samuel Pillsbury's 'Reader for Emotion' devised as a new analytic method by which to assess, *inter alia*, how a judge's emotions might influence his formal reasoning. In the present context, such a method is key in assessing where autonomy is invoked as a merely normative concept, absent of 'analysis or explanation', or whether the judge's treatment of autonomy exhibits a deeper concern with the context of parents' situations in these cases. Therefore, in the sense that the present author is looking for a particular judicial engagement with 'autonomy', there is possibly little to separate the 'emotion reader' and the 'autonomy reader. For discussion on the former, see Samuel H Pillsbury, 'Harlan, Holmes and the Passions of Justice', in Susan A Bandes (Ed) *The Passions of Law* (London: New York University Press, 2001).

we can get it wrong.[25] Therefore, an examination of *how* the courts conceptualise parental harm in the case of a disabled child - as well as a recognition of the obvious constraints imposed upon the courts following *McFarlane* – may well provide a greater indication as to whether autonomy arises as a central value. Is the harm conceptualised as transitory, or as an enduring harm, and significantly what does that harm consist of?

As this chapter highlights, there is much to indicate that courts appear to be invoking relevant autonomy interests in cases involving disabled children. This, coupled with a striking sensitivity to the gender dynamics of care-taking suggests that such jurisprudence offers significant potential in applying to all cases of wrongful birth and conception - irrespective of the relative health of the child. Yet, while there is much to recommend this approach, such jurisprudence is significantly undermined, akin to *Rees* at Court of Appeal level, by drawing invidious distinctions between health and disability, as well as displaying terminological and conceptual confusion between actions for wrongful conception and birth. But, by no means are these problems insurmountable; in line with previous analysis, this chapter argues that assessing claims from the perspective of parental harm offers a clear method of avoiding many of the difficulties that bedevil the courts.

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[25] Of course, this depends upon what we mean by 'reproductive autonomy'. As chapter one sought to illustrate, 'autonomy' is a concept susceptible to conflicting interpretations.

THE PRE-*MCFARLANE* DAYS: A SNAPSHOT FROM MEDICAL AUTONOMY TO FINANCIAL FICTIONS

> The problem with *Bolam* is that it inhibited the courts exercising a restraining influence. The courts must recognise that theirs is essentially a regulatory role and that they should not interfere unless interference is justified. But when interference is justified they must not be deterred from doing so by any principle such as the fact that what has been done is in accord with a practice approved of by a respectable body of medical opinion. It is all a question of getting the balance right and this is what I hope the courts have now established.[26]

If the courts' *excessive* deference to the medical profession is a matter of medico-legal history, then as His Right Honourable Lord Woolf suggests we need not look too far into the archives.[27] At a time when McNair J's test of 'any responsible group of doctors knows best'[28] was at its height, and shortly before the enactment of the Human Fertilisation and Embryology Act 1990, Brooke J was called upon to determine the wrongful birth case of *Rance v Mid-Downs Health Authority*.[29] Here, it was alleged that the defendants had been negligent in failing to diagnose that the claimant's foetus of twenty-six weeks suffered from spina bifida, thereby depriving the claimant mother of the opportunity to terminate her pregnancy under s.1(1)(b) of the Abortion

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[26] The Right Honourable The Lord Woolf, 'Are The Courts Excessively Deferential To The Medical Profession?' (2001) 9 *Med L Rev* 1, 15-16.

[27] TRH, The Lord Woolf, above n 26, 1.

[28] TRH, The Lord Woolf, above n 26, 5; Lord Woolf refers here, of course, to the infamous 'Bolam Test', derived from *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 in which McNair J laid out (at 587) what was to become the test for the standard of care in negligence: a doctor would not be 'guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art…'

[29] *Rance and Another v Mid-Downs Health Authority and Another* [1991] 1 QB 587; [1991] 1 All ER 801.

Act 1967.[30] In response, the defendants denied negligence, and contended that at the material time the child was capable of being born alive so that such termination would have been unlawful under s.1 of the Infant Life (Preservation) Act 1929.[31] While the 1929 Act created a presumption that a foetus of twenty-eight weeks gestation was capable of being born alive,[32] this could be rebutted by evidence that a foetus *over* that period was not so capable; or, quite crucially for Mrs Rance, that an *earlier* gestatory period should apply. Despite having accepted that there were obstetricians available who would have been willing to perform a termination at that late stage,[33] Brooke J was satisfied on the balance of probabilities that the child was capable of being born alive at the pertinent time and that an abortion would have been unlawful. Accordingly, the claim that the plaintiff had lost the opportunity to terminate failed, and in any event it had not been proved that the defendants had been negligent.

As a reflection on the law as it stood, this case is truly fascinating. The prospects of bringing a successful wrongful birth claim at that juncture were not merely limited, but very possibly nonexistent, since it was not merely the 1929 Act at work here. As an outstanding example of the primacy of medical autonomy, we need look no further than Brooke J's

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[30] Note that the twenty-six week gestatory period was the earliest point at which diagnosis was possible.

[31] Section 1(1) of the 1929 Act provides that '...any person who, with intent to destroy the life of a child capable of being born alive, by any wilful act cause a child to die before it has an existence independent of its mother, shall be guilty of [an offence]... Provided that no person shall be found guilty of an offence under this section unless it is proved that the act which caused the death of the child was not in good faith for the purpose of preserving the life of its mother.

[32] Section 1(2) of the 1929 Act.

[33] *Rance,* above n 29 at 607.

later *dicta* which revealed just how extensively he was willing to bow to medical opinion:

> [E]ven if I had reached a different conclusion on the law, on the facts of this most unusual situation I would certainly not be disposed to make findings of professional negligence against responsible medical men who based their practices on a reasonable belief, shared by very many of their colleagues, about the relevant law, even if that belief turned out to be wrong when the law was authoritatively determined in the courts.

In this astounding passage, what Brooke J is saying is that even had abortion been lawful at the requisite time, there would still be no finding of negligence providing that a responsible body of medical opinion was under the misconception that it was not so permissible. In light of the subsequent enactment of the Human Fertilisation and Embryology Act 1990, which disengaged the Abortion Act 1967 from the 1929 Act and permitted abortion on grounds of disability up to term,[34] this led some to quite justifiably question: 'does a future Mrs Rance still lose her action?'[35] In this respect, *Rance* fortunately *is* of purely historical interest in reflecting abortion legislation, as well as the excesses of deference to medical opinion as they operated in these cases in a pre-HFEA 1990 era. But as later successful cases provide testimony, there is one main ingredient of *Rance* that has stood the test of time: the noted 'correspondence' between wrongful birth cases and the Abortion Act 1967.[36] And this correspondence has continued through the subsequent liberalisation of abortion legislation as reflected under s.1(1)(d). Therefore, a woman's ability to terminate a pregnancy up to term under that section is fully recognised in such cases, while

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[34] See above, s.1(1)(d) of the 1967 Act.

[35] Maureen Mulholland, 'Rance: the shape of litigation to come?' (1990) *Professional Negligence* 102, 106.

[36] Scott, above n 19.

quite gladly, a corresponding provision for clinical misapprehension under McNair J's legacy is not.[37]

As will be remembered, for over a decade prior to *McFarlane* the English courts permitted claims for pain and suffering and costs of child rearing in wrongful conception claims. Indeed, *Emeh v Kensington,*[38] a case involving the birth of a disabled child, set the trend for permitting full damages on the normal principles of compensation in cases of both wrongfully born disabled and *healthy* children.[39] And even those riled at that latter prospect, implicitly drew the line exactly there; as Ognall J in *Jones v Berkshire Area Health Authority* commented:

> Speaking purely personally, it remains a matter of surprise to me that the law acknowledges an entitlement in a mother to claim damages for the blessing of a healthy child. *Certain it is that those who are afflicted with a handicapped child* or who long to have a child at all and are

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[37] Note however, that if the terms of the Abortion Act 1967 are not met, then the 1929 Act and section 58 of the Offences Against the Person Act 1861 could still apply. Therefore, in the wrongful birth context, it could be claimed that such a hypothetical abortion would have been unlawful if the child's disability was trivial. See further, Kerry Petersen, 'Wrongful Conception and Birth: The Loss of Reproductive Freedom and Medical Irresponsibility' (1996) 18 *Sydney Law Review* 503; and Scott, above n 19.

[38] *Emeh v Kensington, Chelsea and Westminster Health Authority* [1985] QB 1012;

[39] *Salih v Enfield Health Authority* (1991) 7 BMLR 1; [1991] 3 All ER 400; *Fish v Wilcox* (1993) 13 BMLR 134; *Nunnerly v Warrington Health Authority* [2000] Lloyd's Rep Med 170; *Taylor v Shropshire Health Authority* [2000] Lloyd's Rep Med 96. And in the Scottish courts: *Anderson v Forth Valley Health Board* (1997) 44 BMLR 108 and *McLelland v Greater Glasgow Health Board* 1999 SLT 543, 1998 SCLR 1081 (for a detailed commentary on these two latter cases, see Robin Mackenzie, 'From Sanctity to Screening: Genetic Disabilities, Risk and Rhetorical Strategies in Wrongful Birth and Wrongful Conception Cases' (1999) 7 *Feminist Legal Studies* 175).

> denied that good fortune would regard an award for this sort of contingency with astonishment.[40]

So, if questions arose as to recovery in cases where liability was made out, these turned on the issue of quantum, rather than whether to allow damages at all.[41] Of particular interest in this respect, is the wrongful birth case of *Salih v Enfield Health Authority* which arose from a failure of the health authority to diagnose and warn the mother of the danger that the child she was carrying might be affected by rubella syndrome, with the result that she was unable to have the pregnancy terminated.[42] While there was no question as to whether the additional costs of rearing a disabled child were recoverable, the issue debated at both first instance and in the Court of Appeal was whether the claimant was entitled to the ordinary costs of raising the child. Since claimants in these cases wanted a healthy child, logically one can assume that they were willing to bear its ordinary costs. But what should a court make of this, in light of the birth of a disabled child, coupled with an abandonment of plans to have further children? Put in simple terms, the crux of the defendant's claim here was that the birth of the disabled child *saved* the plaintiffs the ordinary costs of bringing up a normal child.

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[40] *Jones v Berkshire Area Health Authority* (unreported, 2 July 1986) [my emphasis].

[41] See the unsuccessful wrongful birth case of *R v Croydon Health Authority* (1997) 40 MBLR 40 which turned on the scope of duty owed by a radiologist to a woman required to undergo a pre-employment medical examination. The negligence in question consisted of the failure to diagnose primary pulmonary hypertension, a condition which can reduce life-expectancy particularly if the sufferer becomes pregnant. In this case the claimant did become pregnant, giving birth to a healthy child. In addition to general damages, the claimant sought damages for maintaining her child. The court rejected the latter reasoning that the obligations assumed by the radiologist did not extend to the claimant's private life.

[42] *Salih*, above n 39.

At first sight, this sounds ridiculous; the notion of being "saved" expense through having a child that one never wanted must surely border on the fictional. Making no deduction for any such saving, Drake J at first instance was clearly of this view, stating:

> In my judgment this argument is flawed. Had the defendants not been negligent, the plaintiffs would have willingly incurred the cost of maintaining a normal child. It was a cost they wanted to incur. But due to negligence, they are now incurring the costs of bringing up a severely handicapped child, and they never wanted, and do not want, a handicapped child.[43]

The Court of Appeal, however, concluded differently. In an evocative speech detailing the significant and unwanted repercussions of a severely physically disabled child upon the parents, the family as a whole, and in particular, the wife 'who has had the major care of the child', Butler-Sloss LJ conceded that the issue was 'difficult to evaluate entirely unemotionally'.[44] In this regard, the analysis is unquestionably striking in its recognition of distinct gender roles within the family home. Nevertheless, perhaps against her better judgment, Butler-Sloss LJ considered it necessary to 'strip away the emotion from this case and look at the issue in terms of money for heads of damages that can properly be awarded'; and the result of which was a denial of ordinary damages.

There is no doubt that Butler-Sloss LJ was correct as to the motivational distinction between the wrongful birth case, and wrongful conception cases in which parents had firmly resolved not to have any further children. But what is open to debate, is the assessment of damages resulting from the conclusion that, 'the parents' complaint

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[43] *Salih*, above n 39 (LexisNexis Transcript).

[44] *Salih,* above n 39.

relates not to the birth, but rather to the special burdens which the abnormality imposes.'[45] Certainly the tortious measure of damages is to place the injured party, as far as money can do it, in as good a position as they would have been had the negligent act not occurred. But one must ask, what is that position? No child being born through the opportunity to terminate, or a healthy child which Mrs Salih's later terminated foetus indicated that she would possibly have had? On this rare occasion, it is possible to agree with Anthony Jackson that whether another child would have been born 'was, and should have remained, a matter for them, and not a concern of either the defendants or the court.'[46]

Conceptualising additional damages as restorative of the *status quo* must surely provide a compelling argument that, contrary to Butler-Sloss LJ's position, this is the *very* place for emotion. An emotional perspective reveals not only the remote nature of the claim that a future healthy child might otherwise have been born, but more particularly, that it is nigh impossible to carve out an ordinary burden from an extraordinary burden in such a case, in the same way that one might conceptualise providing damages for say, loss of profits, defective goods or traditional personal injury claims. In each of those scenarios damages are assessed by reference to a formerly 'intact' state. In wrongful birth claims by contrast, a *whole being* has been brought into existence; not a being where one part of its existence is wanted, whilst the defective element is not. In short, the notion of an 'additional' burden as it operates here, is a complete financial fiction and deeply misrepresents the nature of the wrong. Might it not be fair to conclude in this limited respect at least, that the reality of these claimants' lives is

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[45] John Seymour, *Childbirth &The Law* (Oxford: Oxford University Press, 2001), 93.

[46] Jackson, A, above n 18, 588.

that they are no differently placed to parents of a disabled child who wanted no children at all?

SHALL I COMPARE THEE TO A HEALTHY CHILD? THE WRONGS OF WRONGFUL BIRTH

> [W]hile one must not say that the handicapped child is "more trouble and expense than it is worth" – words which may come back to haunt us – the birth of a handicapped child is surely a matter for condolence whereas that of a healthy child is (despite the expense) a reason for congratulation and a Hallmark card.[47]

According to Barry Schwartz, everything suffers from comparison. Rather than measuring human experience as either 'good' or 'bad' in absolute terms, 'comparisons are the only meaningful benchmark'.[48] In many contexts this proves generally unproblematic; the benchmark or norm, by which one evaluates the last book read or restaurant dinner, is pretty innocuous and unlikely to have far reaching consequences. But as history testifies, physiological, sexual, gender, ethnic or religious benchmarking has served to exclude and oppress those who fail to fit within the privileged, 'normal' blueprint that comparison so often gives rise to. Of course, these are not self-evident or objective 'norms'; as Georges Canguilhem comments in the context of physiology, the concept of norm 'cannot be reduced to an objective concept determinable by scientific methods. Strictly speaking then, there is no biological science of the normal.'[49] Yet despite the apparent ease by

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[47] Tony Weir, 'The Unwanted Child', (2000) *The Cambridge Law Journal* 238, 241.

[48] Barry Schwartz, *The Paradox of Choice* (New York: HarperCollins Publishers Inc, 2004), 181.

[49] Georges Canguilhem, *The Normal and the Pathological* (New York: Zone Books, 1991), 228.

which the 'normal' elides with the 'natural', such norms arise neither 'naturally' nor 'innocently':

> A norm is in effect the possibility of a reference only when it has been established or chosen as the expression of a preference and as the instrument of a will to substitute a satisfying state of affairs for a disappointing one. Every preference for a possible order is accompanied, most often *implicitly,* by the aversion for the opposite possible order. That which diverges from the preferable in a given area of evaluation is not the indifferent but the repulsive or more exactly, the repulsed, the detestable.[50]

Among the most susceptible to exclusion from the 'elusive' physiological model of normality are disabled people. Portrayed as 'tragic victims of some unfortunate accident or disease, as people who do not function normally',[51] as 'objects of pity, and burdens to society',[52] coupled with the relentless march of genetic science towards the eradication of disease and impairment,[53] it is hard to disagree that disability 'seems to be all about real bodies that are physically, sensory or intellectually different in *undesirable* ways.'[54] The centrality of the medical model, of course, is deeply problematic, and has long been jettisoned by disabled activists towards a social model which highlights that it is social barriers, the constructed environment and societal

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[50] Canguilhem, above n 49, 240.

[51] Nicholas Watson, 'Enabling Identity: Disability, Self and Citizenship' in Tom Shakespeare (Ed) *The Disability Reader* (London: Continuum, 1998), 147.

[52] Cassandra Phillips, 'Re-imagining the (Dis)Abled Body' (2001) 22 *Journal of Medical Humanities* 195, 195.

[53] Carol Thomas, 'The 'Disabled' Body' in Mary Evans and Ellie Lee (Eds) *Real Bodies, A Sociological Introduction* (New York: Palgrave, 2002), 64 [my emphasis].

[54] Thomas, above n 53, 64.

attitudes, that disable those with impairments.[55] While many reject that disability can be conceived of as purely social phenomena, it is beyond question that social practices and arrangements play a significant disabling role.[56] Yet, despite such contemporary shifts, a notable feature of the law of tort is its unyielding reliance upon the medical model in which 'disability is centrally viewed as a personal tragedy and loss within the body'.[57] By reference to the normal 'market, exchange value of intact, attractive bodies',[58] tort law compensates the victim 'because she is deemed to have lost what she has *owned* whether it be an arm, a leg or the potential to work.'[59] Compensation then, in this limited sense, seeks to restore the unlawfully 'harmed' body and its relationship to the world, as far as money can, to the *status quo.*

That the 'body' is construed as the site of loss is significant here. The typification of the healthy body as tragically *lost* as a point of comparison holds far less resonance in cases of wrongful conception or birth suits involving disabled children, where 'but for' the negligence parents would have avoided the birth of 'that' child entirely. Therefore, by contrast with prenatal injury claims where 'but for' the negligence, the child would have been born healthy,[60] if there is any suitable

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[55] Colin Barnes, 'The Social Model of Disability: A Sociological Phenomenon Ignored by Sociologists?' in Tom Shakespeare (Ed), *The Disability Reader* (London: Continuum, 1998).

[56] See for example, John Harris, 'Is There a Coherent Social Conception of Disability?' (2000) 26 JME 95; Sheldon and Wilkinson, above n 7.

[57] Phillips, above n 52, 195.

[58] Alan Hyde, *Bodies of Law* (Chichester: Princeton University Press, 1997), 63.

[59] Joanne Conaghan and Wade Mansell, *The Wrongs of Tort.* (London: Pluto Press, 1999), 80.

[60] Such claims fall under the Congenital Disabilities (Civil Liability) Act 1976; section 1(5) states that the defendant will only be liable to the child if liable to the parent in respect of the act causing the injury.

'bodily' comparator in wrongful conception and birth cases it is between the child's disabled existence and *no* existence. While this point is addressed later on in this chapter, what becomes clear at this stage is that the harm of childhood 'disability' takes on a purely *relational* dimension. This is, however, far from saying that the loss is not referable to the existence of disability; it is, but only insofar as disability impacts upon *others*. Therefore, if the birth of an impaired child is to be seen as a harmful or 'tragic' event it is because it 'changes significantly the lives of other family members.'[61] Yet, recognition of this relational dimension *as* 'harm' has constituted a significant challenge for the courts. With an eye over its shoulder to the spectre of eugenics, the judiciary has been naturally cautious to avoid signalling that disabled children should be afforded less dignity and status than their healthy counterparts; but if the birth of a healthy child is seen to herald such great joy, how does one avoid articulating this?

In truth, it is not difficult to locate the source of the problem; case law and legal principle become hideously confusing following *McFarlane*. In the absence of a clear *ratio*, what courts were left to grapple with were five different voices, the rejection of ordinary maintenance costs in the case of a healthy child, justified variously on the basis of the scope of duty, the healthy child as a blessing and its 'incalculable' benefits, the infamous Commuter, but significantly, the concession that a different rule might apply to the disabled child. As a non-exhaustive list of largely ambiguous principles, how on earth could the lower courts make sense of where to go when confronted with parental claims of wrongful birth in the case of a disabled child? And, since *McFarlane* did not clarify the issue, what distinction, if any, should be drawn between the actions of wrongful birth and conception in this instance?

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[61] Barnes *et al*, above n 6, 222.

According to J.K. Mason, the distinction between wrongful conception and birth should be seen as critical for two reasons. Firstly, he suggests that although the Health Trust will be involved in both, the individual defendant may well differ. So in wrongful conception, while actions are generally brought against the negligent surgeon, in wrongful birth claims the 'manager of the pregnancy, or even the laboratory technician'[62] are the more likely recipients of a writ. The second distinction, which we have already noted, is the parent's motivation in each action: wanting no children, and wanting a healthy child. Mason regards this as being of much greater jurisprudential importance, since he suggests that,

> [I]t is at least arguable that an action for personal injury cannot survive within the context of one for wrongful birth – and this is irrespective of whether one visualises the injury as an invasion of bodily integrity or in terms of the pain and suffering associated with pregnancy, for both have been willingly accepted.[63]

While there is some force in this assertion, courts have seen the matter quite differently. Henriques J in *Hardman v Amin* considered such damages justifiable on the basis that 'it would be an anomaly for a wrongful conception claim to be an action for damages for personal injuries whilst a wrongful birth case was not,' and accordingly conceptualised the personal injury as 'the continuation of a pregnancy which should not have been continued'.[64] By contrast, Newman J in *Rand v East Dorset* conceptualised this on the basis of the 'shock and distress which must be occasioned when the expectation of joy at the

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[62] J. K. Mason, 'Unwanted Pregnancy: A Case of Retroversion?' (2000) 4 *Edinburgh Law Review* 191, 197.

[63] J.K. Mason, 'Wrongful Pregnancy, Wrongful Birth and Wrongful Terminology' (2002) 6 *The Edinburgh Law Review* 46, 50.

[64] *Hardman v Amin* [2000] Lloyd's Rep 498 (LexisNexis Transcript).

birth of a normal child is cruelly disappointed', as well as the claimant becoming pregnant once again to rid herself of the 'shame' and 'disappointment' of giving birth to a disabled child.[65] Who then, is right? Arguably, Mason's thesis which relies upon the woman's lack of "consciousness" as to harm is quite correct on tortious principles as to pain and suffering.[66] And in the absence of a claimant suffering genuine psychiatric injury, Newman J's approach would surely not apply.[67] However, an award *can* be made for loss of amenity even where the claimant is permanently unconscious and cannot appreciate his or her condition:

> The fact of unconsciousness is therefore relevant in respect of and will eliminate those heads or elements of damage which can only exist by being felt or thought or experienced. The fact of unconsciousness does not, however, eliminate the actualities of the deprivations of the ordinary experiences and amenities of life which may be the inevitable result of some physical injury.[68]

There is little difficulty in conceptualising pregnancy arising from wrongful birth in terms of a loss of amenity; indeed we might reflect it is all the more serious than the lost enjoyment from a swimming pool a few inches shallower?[69] However, perhaps this merely forwards what

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[65] *Rand v East Dorset Health Authority* (2000) 56 BMLR 39 (LexisNexis Transcript).

[66] No claim for pain and suffering is permitted where the claimant is permanently unconscious or incapable of subjectively experiencing pain (*Wise v Kaye* [1962] 1 QB 638).

[67] *Hinz v Berry* [1970] 2 QB 40; see also *Kerby v Redbridge Health Authority* [1994] PIQR Q1 in which the court rejected awarding damages for the claimant's 'dashed hopes' of giving birth to a healthy child.

[68] *H West & Son Ltd v Shephard* [1964] AC 326 at 341 (*per* Lord Morris).

[69] See the contract case of *Ruxley Electronics and Constructions Limited v Forsyth* [1995] WLR 118 which involved a breach of a contract to build a pool to a specified depth although resulting in no diminution of value; the claimant was refused the cost of reinstatement, but was awarded a sum for loss of amenity.

damages might be available and *not* the point at which personal injury is sustained from which these damages flow? In this regard, what it particularly troubling is that Mason appears to regard 'personal injury' as a fixed entity, and utilises the subjective notion of 'willingness' (or a more appropriate term which he avoids, "consent") as pivotal to its existence. In many contexts, this mentalist attitude would be capable of throwing up some truly worrisome results. But even if this mind-over-matter projection of personal injury is seen as important, might not Mason's account be seen as lacking in overlooking the question of the objective reality of consent and what the actor thought they were consenting to?[70]

Whether a woman's 'willingness' might be seen as relevant following *McFarlane,* is rather a moot point. But, if one is searching for the general thrust of what a 'personal injury is', in the context of wrongful conception it would seem to centre on the loss of amenity resulting from a wrongful pregnancy: 'pregnancy and childbirth involve changes to the body which may cause, in varying degrees, discomfort, inconvenience, distress and pain'.[71] If the loss of amenity is construed *as* the injury in question, then surely consent to that state must be relevant? In this respect, it is certainly arguable that at the point where

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[70] Indeed, since the negligence in question is based upon negligent misrepresentation, this really poses a series of interesting questions. Is one 'harmed' by the fact of not knowing (i.e. the loss of opportunity to make an informed decision), at the point that one learns that one has been misled, or is one harmed by the material *consequences* flowing from that deception? While this is not discussed here for reasons of space, it is a matter of intrigue to consider these different dimensions in relation to the criminal law: intercourse by deception (*R v Williams* [1923] 1 KB 340), or the reckless transmission of HIV where the risk of transmission is unknown to the 'victim' (see *R v Dica* [2004] EWCA Civ 1103 and case commentary of Matthew Weait, 'Dica: knowledge, consent and the transmission of HIV' (2004) 154 NLJ 826).

[71] *McFarlane,* above n 16, 102.

a termination could have been performed, the woman's consent becomes invalid. Therefore the injury of pregnancy could be seen as the loss of amenity (or autonomy) entailed in a wrongfully continuing pregnancy.[72] And this might provide a means of explaining *why* the lower courts have felt themselves able to provide damages both for the pregnancy and birth experience of the mother in wrongful birth claims. Nevertheless, since the subject of 'pregnancy as injury' is taken up in much greater detail in the following chapter, in the context of the current discussion it will suffice to note that the distinction between wrongful birth and conception on these grounds is better conceived of as an issue of timing, than one of 'willingness' or consciousness. Perhaps then, we can take Mason's assertion that 'none the less, harm derives from the realisation and continued knowledge that she has given birth to a disabled child' as a grumbling, partial concession on this point.[73]

While the courts have encountered little difficulty on the issue of amenity claims for pregnancy, the determination of maintenance damages for the disabled child following *McFarlane* has proved more problematic. And the unenviable task of determining the first wrongful birth claim following *McFarlane*, fell to Newman J who, clearly evidencing masochistic tendencies, deemed that 'every aspect of the

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[72] There would seem to be some support for this view. As Whitfield suggests, this part of the claim is 'perhaps not unlike a claim for breach of a contract to provide peace of mind and freedom from distress.' Furthermore, Whitfield also points to Purchas LJ's suggestion in *Hayes v Dodd* [1990] 2 All ER 815, that the contract rule of loss of amenity damages should also apply in tort See further, Adrian Whitfield, 'The fallout from *McFarlane*' (2002) 18 *Professional Negligence* 234, 245.

[73] Mason, above n 63, 55.

claim has fallen for consideration in the light of that decision.'[74] To justify departure from *McFarlane,* of course, Newman J incurred his first dilemma: the need to distinguish between the healthy and disabled child, but without attributing less value to the latter. Describing the wrongfully born disabled child as a 'blessing', Newman J commented that that was not to say however, 'that her disability has not caused the parents distress and emotional turmoil'. Since regarding the healthy child as a detriment and the subject-matter of compensation was, according to Lord Millett in *McFarlane*, 'repugnant',[75] Newman J considered that the same must be said of ordinary damages for the disabled child since it would require a 'comparison between a situation where a human being exists and one where it does not'. Instead, he adjudged that focusing on the consequences of disability avoided such existential difficulties, since then the comparison was 'between a healthy and disabled child'.

Remaining resolute that a disabled child was a "blessing", Newman J noted, however, that the advantages which Lord Millett contemplated (although never articulated) of the healthy child in *McFarlane* would be 'difficult to discern' in the present case. So it is not a blessing, less of a blessing or perhaps the disabled child comes not with the 'trailing clouds of glory' that the healthy child so clearly does?[76] And while highly critical of approaches comparing the cost of raising the normal child with the severely disabled child as going "too far" and attributing 'no value to handicapped life', quite astonishingly, the judge determined that damages would be assessed by reference to the

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[74] *Rand,* above n 65 (LexisNexis Transcript); this case arose from a negligent omission to screen for foetal abnormality resulting in the birth of a child suffering from Down's syndrome.

[75] *McFarlane,* above n 16, 114.

[76] *McFarlane*, above n 16, at 114 (*per* Lord Millett).

'financial consequences as related to consequences flowing from Katy's disability'. But, if the child is a blessing, though one rendering difficult to discern advantages, how else does one assess additional maintenance damages without reference to the costs entailed with an ordinary child? Perhaps as an attempt to evade this question Newman J suggested that since the claim must be treated for all purposes as the parents' claim, it should be their means and *not* the child's needs that determine damages. So, for all purposes it is entirely better to ensure that impecunious claimants receive minimal awards? Yet another intriguing conclusion that fails to tally with his earlier statement that the result was not to be determined by 'what the parents wanted' but 'the actual disability of the child'.

If one is unclear as to the basis of this decision, and indeed the broader question as whose interests are vindicated here, this is entirely justified. Although clear that the parents' 'legal right' under Abortion Act 1967 was relevant to the ambit of the duty of care, Newman J was adamant that the Act could not render a birth occasioned either by choice or by negligence an injury. Rather, 'it is the actual disability of the child which is relevant and not what the parents feared and would have taken steps to avoid'. But, since the child has not been injured, does this really make sense? Furthermore, clearly eager to further distance the decision from *McFarlane,* Newman J considered that quantitative choices to limit family size were entirely different to those premised under the 1967 Act, since the latter imposed a *duty* to ensure that parents could exercise their choices. Does this mean that only qualitative choices matter, or that only those referenced to the 1967 Act are sufficient to create liability? In the context of wrongful birth claims, one must wonder whether a distinction can be drawn between the two.

In numerous respects, Newman J's judgment is deeply problematic; as Mason observes, approaching wrongful birth claims through *McFarlane* leads to the 'almost inevitable conclusion' that full child maintenance costs should be disallowed.[77] Considering that *McFarlane* only ruled out maintenance costs in relation to the 'healthy' child, surely a stronger case could be forwarded for full damages in this situation? And although Newman J's concern was to avoid the 'no blessings' argument by only considering additional damages, nor is it apparent that he achieved this quite commendable aim. But, that is not to say that there is no merit in *Rand*; there is. In the course of Justice Newman's judgment we learn of the enormous strain placed upon the claimants, and significantly, of the particularity of Mrs Rand's situation as primary carer:

> She assumed almost total responsibility for the care and upbringing of Katy. She has done so to the exclusion of Mr Rand from all but very limited support and participation. ...Although I believe other mothers could, without giving rise to criticism, have taken a different view of how much time they should devote to their disabled child, I am satisfied that Mrs Rand's decision to withdraw from providing help in the rest home was a natural and reasonable response to Katy. ...But the consequence of Katy's disability on this family has been to leave Mr Rand almost out of account for caring purposes. He showed no confidence in his ability to cope as a result.[78]

In a judgment quite critical of Mr Rand – his failure to gain work through focusing on too high a level of employment in a limited sphere, coupled with his lack of ability to cope - a story unfolds, that Janet Read suggests, is quite typical of 'the patterns of informal care provided

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[77] Mason, above n 63, 59.

[78] *Rand,* above n 65 (LexisNexis Transcript).

by mothers and fathers of disabled children'.[79] In the context of the two-parent household, Read explains that it is mothers who hold primary responsibility for the care of disabled children; nor does the fact that 'fathers are more likely than mothers to undertake paid employment outside the home' provide explanation for this.[80] Even when (like Mr Rand) the father is unemployed, or located within the family home for other reasons, the burden of responsibility remains subject to unequal distribution. And it is here we find the most positive aspect of *Rand.* Conceptualising the parents' reason for wishing to terminate the pregnancy as being based on the desire to avoid a 'loss of amenity' in their lives, Newman J also granted general damages apportioned by reference to the differential role in caretaking. Having awarded £5,000 to Mr Rand, the higher sum of £25,000 was granted to Mrs Rand on the basis that she had assumed, and would continue to have, almost total responsibility. And we might reflect with surprise, if not some admiration for Newman J's creativity, that the award was explicitly based on Lord Millett's 'conventional sum' *dicta* in *McFarlane.*

What then, can we conclude at this early stage? Certainly the Abortion Act 1967 seems important in so far as it creates the requisite relationship between the tortfeasor and claimant upon which the latter might litigate. But it most certainly does not mark out the nature of the harm suffered. If, however, we focus on the consequences of a failed choice as marking out a deeper concern with a respect for autonomy, then this is to be found in Newman J's careful analysis of the differential gender roles played within the family home as reflected in 'loss of amenity' damages. Indeed, had Newman J assessed *additional*

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[79] Janet Read, *Disability, The Family and Society, Listening to Mothers* (Buckingham: Open University Press, 2000), 52.

[80] Read, above n 79, 52.

maintenance damages from the same parental perspective, he might well have avoided the need to conclude that while the disabled child was a 'blessing', it was one holding less advantages than the blessing of a healthy child; a problem better avoided by Henriques J in the wrongful birth case of *Hardman v Amin*.[81]

Firmly taking the view that *McFarlane* did not concern the wrongful birth of disabled children, Henriques J considered it neither invidious nor morally offensive to draw a distinction between the disabled child and the healthy child. Instead, the task was merely to quantify the additional costs *to the parents* caused by the disabilities. The fact that the child here was disabled, whilst in *McFarlane* the child was healthy, produced a different result whether expressed in *Caparo* terms of 'just, fair and reasonable'[82] or on the principles of distributive justice. Finding it both 'deeply unattractive', and legally incorrect that damages should be assessed by reference to the parents means, Henriques J distinguished *Rand* and held that liability to pay for the care of the child must be calculated by reference to the disability. Having analysed the claimant's significant caring burden, which involved 'spending almost all her waking hours attending to his needs', the judge determined that the claimant could recover damages for her past and future care of the child, whether justified through stretching the principles of *Housecroft*

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[81] *Hardman*, above n 64 (LexisNexis Transcript). This case concerned the failure of the defendant to diagnose that the claimant was suffering from rubella during her pregnancy, thereby depriving her of the opportunity to terminate pregnancy. The child, Daniel, while likely to survive well into adulthood, required constant care and would never be able to live or work independently.

[82] *Caparo Industries plc v Dickman* [1990] 1 All ER 568; for the application of the third "stage" ('just, fair and reasonable') of this test in determining the duty of care in wrongful conception, see discussion of *McFarlane* in chapter one.

v Burnett,[83] or by way of damages for the 'loss of amenity' consisting in the 'stress, anxiety and disruption of her life resulting from the obligation to bring up the child.' But, an issue not raised by the claimant in this case, was the ordinary costs of raising the child. And for all his careful analysis, we might find slightly problematic Henriques J's statement that he would, in that event have been bound by *Salih.*[84] By contrast, Toulson J in *Lee v Taunton* was less impressed by the *Salih* rationale, stating:

> George was incapable of being born other than severely disabled. That being so, to try to separate the consequences of George's existence and George's disabled existence is metaphysically impossible and practically unreal. If George's birth was not a deemed blessing, I cannot see a barrier to Mrs Lee recovering the full costs of his maintenance, *except for the important fact that she was wanting to bear a healthy child.*[85]

Does this, as some suggest, *really* illustrate 'sympathy to full recovery'?[86] Despite the judge's evident criticisms, this 'important fact' exception sounds suspiciously *Salih*-like. While keen (unlike his predecessors) to declare that it would *not* be right for the law to deem the 'birth of a child to be a blessing', nor caring for such a child as so 'enriching', this position would seem to suggest that at least part of that responsibility is enriching in the sense that the claimant was initially

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[83] *Housecroft v Burnett* [1986] 1 All ER 332; this constitutes an unusual application of *Housecroft* since it normally applies to *third parties* who, having no direct claim themselves, bear either part of the claimant's injury, either through payment or nursing assistance. The difference here, of course, is that the child for which the claimant cares, has not been injured, and the court here, as in the earlier case of *Fish v Wilcox* (above n 39), are allowing the third party to claim directly.

[84] *Salih*, above n 39.

[85] *Lee v Taunton and Somerset NHS Trust* [2001] Fam Law 103; [2001] FLR 419 (LexisNexis Transcript) [my emphasis].

[86] Mason, above n 63, 58.

willing to assume it. Separating the child's existence might well seem 'metaphysically impossible', but carving up the claimant's responsibilities to the child is equally so, since it implies that part of the child's existence is 'wanted'. The better view must surely be that the child's existence and the parental responsibility are inextricably intertwined.[87] Sophistry aside, however, Toulson J more sensibly avoided the problems which befell earlier courts. Pointing to s.1(1)(d) of the 1967 Act as being irreconcilable with a position that a deprivation of that 'right' be deemed a blessing, the judge went on to remark that, the 'purpose of [that] statutory provision (and of the scan) was to enable her to avoid the unhappy and burdensome situation in which she now finds herself.'

While Toulson J's analysis of the Parliamentary intention behind the 1967 Act departs markedly from the approaches demonstrated so far, it is clear that the Abortion Act 1967 is of some significance in all these cases. It is relevant as to the ambit of the duty of care, imposing a duty on health professionals to take reasonable steps to ensure that parents can exercise their choices under the Act, and constitutes the foundation upon which to impose liability on defendants for the consequences of their omissions. Nor have judges found difficulty in distancing themselves from *McFarlane* in terms of proximity as between the negligent act and the birth of a disabled child. The very reason the claimant sought out the services of the defendant was to avoid that result. What has proved more problematic to the courts, however, is the question of quantification and how to justify a differential response from *McFarlane* insofar as disabled children raise different considerations. Responses, which range from 'blessings', to 'no blessings', illustrate a general confusion as to whether it is right to say

[87] A fact also recognised by the judge in the context of providing for the disabled child's needs.

either of those things, as well as a few teething problems in relation to whether the child's disability, or the parental responsibility should guide the assessment of damages. But, in particular, the issue of ordinary maintenance damages has truly confounded the courts. Despite a seemingly partial concession that full damages might be available, this too is undermined by an implicit reference to 'savings'. While this line is perhaps best seen as an extension of Mason's 'willingness' theorem, it is worth considering what the appropriate extent of damages should be in the wrongful conception claim, since it would be quite impossible to advance the notions of 'savings' - claimants in such cases want *no* child at all. Or following Newman J's articulated preference for qualitative choices over quantitative ones, perhaps the question should be, is there any sustainable future for the wrongful conception claim at all?

THE IMAGINED JURY: THINKING LEGALLY OR CONCEPTUALISTICALLY?

If one is moved by the circumstances of the families in wrongful birth cases, then it will be difficult to avoid the tug of sympathy in those wrongful conception cases where parents similarly find themselves caring for a disabled child. Might we be moved by a story in which the narrator relays how the conception and birth of such a child were 'catastrophic events', of a family living in 'cramped accommodation', a husband working 'extra overtime' to make ends meet, a mother of four other children, who, finding herself caring for an unwanted fifth but severely disabled child, must now give up all hope of returning to work, and the 'intolerable strain' placed on a marriage which eventually breaks down? A failed quantitative choice this may well have been, but could we, on these familial facts of *Parkinson v St James' and Seacroft*

University Hospital, draw lines between the wrongful birth and conception case?[88]

From the facts as presented above, it is imagined that few would struggle on this point; but more specifically, neither did the Court of Appeal. Since *Parkinson* concerned a failed sterilisation resulting in the birth of a disabled child, and followed a line of wrongful birth cases, Brooke LJ possibly felt that it was incumbent upon him to note that the distinction between the two was that the latter turned on the lost opportunity to terminate a pregnancy.[89] What the significance of this might have been was left mysteriously hanging at the mere observation that 'the policy issues in "wrongful birth" cases are different'.[90] Nevertheless, Brooke LJ later elucidated in the case of *Groom v Selby* that all he had in mind was that 'the issues relating to causation, and to what is fair, just and reasonable in such circumstances' were very much more straightforward in wrongful *birth* cases.[91]

In navigating his way through *McFarlane*, a case holding clear resonance with *Parkinson*,[92] Brooke LJ found that the birth of a disabled child was a foreseeable consequence of the negligent sterilisation; that there was no difficulty in accepting in principle that the surgeon should be deemed to have assumed responsibility for the foreseeable and disastrous economic consequences of his negligence; that since the purpose of the operation was to prevent the claimant from conceiving further children, including those with congenital

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[88] *Parkinson v St James' Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530; [2001] 3 WLR 376.

[89] *Parkinson*, above n 88, at paragraph [46].

[90] *Parkinson,* above n 88, at paragraph [48].

[91] *Groom v Selby* [2001] EWCA Civ 1522 at paragraph [19].

[92] With the exception of the disabled child, the factual scenarios of both cases are analogous.

abnormalities, the duty of care was strictly related to that purpose; that parents similarly situated had been able to recover damages between the *Emeh* and *McFarlane* years, so this was not a radical step into the unknown; and that since foreseeability and proximity were satisfied, an award of compensation limited to the additional costs of raising the disabled child would be 'fair, just and reasonable'; or alternatively one could call in aid the principles of distributive justice, of which Brooke LJ opined that,

> [O]rdinary people would consider it would be fair for the law to make an award in such a case, provided that it is limited to the extra expenses associated with bringing up a child with a significant disability.[93]

Not just 'ordinary people', but also Sir Martin Nourse who felt content to simply state 'I agree',[94] and a judge now quite familiar to us, Lady Justice Hale, who though reaching the same conclusion did so on quite different principles. In differentiating the nature of the *Parkinson* claim from that of *McFarlane,* Hale LJ stressed that whilst the principles of distributive justice were concerned with fairness between different classes of claimant and defendant, so too were they concerned with different classes of claimant. In this respect, she emphasised that this could explain why Lord Steyn in *McFarlane* compared the parents of a healthy child, with the unwillingly childless or the parents of a disabled child; they were so much better off.[95] Utilising the 'solution of deemed equilibrium', later invoked her judgment in *Rees v Darlington*,[96] Hale LJ noted that since *McFarlane* concerned healthy children, there was no need to take that limitation any further, since a disabled child:

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[93] *Parkinson,* above n 88, at paragraph [40].

[94] *Parkinson,* above n 88, at paragraph [97].

[95] *Parkinson,* above n 88, at paragraph [82].

[96] *Rees v Darlington Memorial Hospital* [2002] EWCA Civ. 88; [2002] 1 FLR 799 (CA) (see chapter one).

> [N]eeds extra care and extra expenditure. He is deemed on this analysis, to bring as much pleasure and as many advantages as does a normal healthy child. Frankly, in many cases, of which this may be one, this is much less likely. The additional stresses and strains can have seriously adverse effects upon the whole family, and not infrequently lead, as here, to the break up [of] the parents' relationship and detriment to the other children.[97]

Since 'deemed equilibrium' is doublespeak for 'set-off', Mason notes that the decisiveness of the concept is open to challenge.[98] And challenged it was. Not only did Robert Walker and Waller LJJ later reject such a theory in *Rees*, noting that their Lordships in *McFarlane* had explicitly ruled out such an exercise,[99] but on the appeal of *Rees* to the House of Lords, so did Lord Hutton, who also articulated his non-acceptance of the theory.[100] Nevertheless, such trenchant rejections aside, there is no denying that raising a disabled child brings additional costs and requires extra care;[101] but is this the same as conceptualising the child *as* a burden? If we reflect on studies which reveal how consistently mothers speak of their disabled children with 'love, pride and appreciation' and their relationships as both 'rewarding and enriching',[102] it is abundantly clear that the daily realities of raising a child must be seen as being entirely separate to that child's intrinsic worth – and of significance, this is a point which forcefully emerges from Hale LJ's judgment:

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[97] *Parkinson,* above n 88, at paragraph [90].

[98] Mason, above n 63, 64.

[99] *Rees* (CA), above n 96, at paragraph [50] (*per* Waller LJ); paragraph [34] (*per* Robert Walker LJ).

[100] *Rees* (HL), above n 13, at paragraph [94].

[101] Read, above n 79, 56.

[102] Read, above n 79, 60.

> But we all know of cases where the whole family has been enriched by the presence of a disabled member and would not have things any other way. This analysis treats a disabled child as having exactly the same worth as a non-disabled child. It affords him the same *dignity* and status. It simply acknowledges that he costs more.[103]

Although 'human dignity' is central to bioethics in promoting a respect for the 'intrinsic value of human life',[104] it has led a more peripheral existence in English law.[105] While the concept of dignity clearly holds resonance, as Hazel Biggs argues, at the end of life, so too must it be seen as holding considerable currency in the present context. As a brief reflection of the courts' wrangles over 'blessings', 'advantages' and 'benefits' reveals, the central concern has been on how to preserve the dignity of the disabled child whilst simultaneously conceding that its existence has very real and practical repercussions for its parents. And, in avoiding the linguistic pitfalls of *McFarlane*, towards a dignity-based analysis, there is little question that Hale LJ achieves precisely that.[106] As a means of conceptualising the parent-child dyad, this analytical perspective contributes a great deal to the field of wrongful conception and birth; and on reflection, the same must be said of the *Parkinson* decision itself. As we have seen, Hale LJ's characteristically sensitive analysis focuses not only on 'dignity', but also on 'autonomy', a concept central to her characterisation of the gender-based harm(s) arising as a

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[103] *Parkinson,* above n 88, at paragraph [90] [my emphasis].

[104] Hazel Biggs, *Euthanasia, Death with Dignity and the Law* (Oxford: Hart Publishing, 2001), 149.

[105] Biggs goes onto explain that 'dignity' has been invoked in end of life decisions in the UK, and is a concept 'gaining currency through the language of human rights in other jurisdictions.' For a detailed discussion on the concept of 'dignity' see Biggs, above n 104.

[106] For further celebration of Hale LJ's analysis in this respect, see Roger Brownsword, 'Genomic Torts: An Interest in Human Dignity as the Basis for Genomic Torts' (2003) 42 *Washburn Law Journal* 413, 430-431.

result of failed reproductive expectations.[107] And, if there were any doubts as to the more practical questions of the extent and timing of disability in order to institute a claim, so too are these questions pursued.[108] Indeed, we might be left, like Mason with the inescapable impression that *Parkinson* is a most significant case which,

> [I]n its own way, is as important as was McFarlane, despite the fact that it was decided in a lower court. [...] In the light of the very powerful arguments expressed, it is *almost impossible to believe that the rule awarding special damages in such circumstances* will ever be disturbed.[109]

Almost impossible, is not however, completely impossible; and one must wonder what reservations Mason had in mind. But, less shy of articulating her concerns is Laura Hoyano, who remarking on the limits of *McFarlane* judgment commented:

> Surely it would be strained to assert that a surgeon in undertaking the procedure does not assume responsibility for the maintenance costs for a healthy child, but does assume responsibility for the statistically less likely possibility of an unhealthy child? *A fortiori* it is untenable to argue that extraordinary care costs are proportionate to the doctor's fault when ordinary ones are deemed to be disproportionate. So it appears that the parents of a handicapped child might be rescued only

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[107] See chapters one and three.

[108] As to the severity of the disability, at paragraph [91] of *Parkinson* (above n 88) Hale LJ relies on the definition of disability under Part III of the Children Act 1989, of which section 17(11) states that 'a child is disabled if he is blind, deaf or dumb or suffers from mental disorder of any kind or is substantially and permanently handicapped by illness, injury or congenital deformity or such other disability as may be prescribed.' In relation to when disability must arise to found a claim, at paragraph [92] Hale LJ comments that 'any disability arising from genetic causes or foreseeable events during pregnancy up until the child is born alive and which are not *novus actus interveniens,* will suffice...'

[109] Mason, above n 63, 64 [my emphasis].

> by the application of the offset formula to conclude that the child was a burden than a blessing, or by some formulation of distributive justice.[110]

In the context of wrongful conception claims, Hoyano's observations are quite correct. It may be true that a disabled child "costs more" as Hale LJ asserts, but whether a doctor should be liable for that greater cost is another question entirely. Surely the consequences would be *more* disproportionate? And while assumption of responsibility is unproblematic in the context of wrongful birth where the whole aim is to avoid disability,[111] the same cannot be said of wrongful conception, leaving obvious problems as to both proximity and foreseeability of the damage. In the latter, the whole purpose was to avoid the birth of *any* child. And although it might be a 'natural' desire of parents to avoid the birth of a disabled child, this still leaves the question as to why the more foreseeable consequence of a healthy child is denied. As the passage which Brooke LJ relied upon reveals, these differential results cannot be sustained on the basis of foreseeability:

> In my view it is trite to say that if a woman becomes pregnant *it is certainly foreseeable that she will have a baby,* but in my judgment having regard to the fact that in a proportion of all births – between one in 200 and one in 400 were the figures given at trial – congenital abnormalities might make the risk clearly one that is foreseeable, as the law of negligence understands it.[112]

Despite the obvious flaw in Brooke LJ's rationalisation here, more remarkable was the centrality of 'foreseeability' to the later case of

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[110] Laura C H Hoyano, 'Misconceptions About Wrongful Conception' (2002) 65 MLR 883, 891.

[111] Whitfield, above n 72, 239.

[112] *Parkinson*, above n 88 at paragraph [15] citing Waller LJ in *Emeh* (above n 38 at 1019) [my emphasis].

Groom v Selby.[113] Here Mr Justice Steele, Hale and Brooke LJJ held doctors responsible for the *even* less statistically likely consequence of a wrongfully conceived child becoming disabled several weeks after its initially healthy birth through exposure to a bacterium during the normal processes of birth.[114] Although an unfortunate infection that we would otherwise understand as 'bad luck', or in legal terms an intervening cause, the thrust of this case must be that no longer need one prove a link between disablement and negligence. As Whitfield tritely remarks of *Groom*, 'the language of 'new intervening cause' seems to be in the process of being replaced by the concept of 'responsibility'.[115] And it is a conclusion made all the more sustainable once we consider the broad invocation of the more nebulous concepts of 'just, fair and reasonable' and 'distributive justice' in these cases.

In *Parkinson*, these concepts provide the only remaining legal means by which to explain how the court created an exception for the disabled child in the wrongful conception case. But *do* these concepts really provide an explanation, or do they, as Hoyano suggests, merely state the conclusion?[116] If we look for the main justification for awarding additional damages, it goes little further than finding a possible chink in the *McFarlane* armour: 'it would not be fair, just and reasonable to award compensation which went further than the extra expenses associated with bringing up a child with a significant disability'.[117] So, in other words, because *McFarlane* applied to healthy children, with a

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[113] *Groom v Selby* [2001] EWCA Civ 1522.

[114] *Groom*, above n 113, at paragraph [24].

[115] Whitfield, above n 72, 242.

[116] Hoyano, above n 110, 897.

[117] *Parkinson,* above n 88, at paragraph [51] (*per* Brooke LJ).

reserved view on the disabled child,[118] an exception can be made. And for further validation Brooke LJ called in 'aid' the principles of distributive justice – or rather the people of the Underground - noting his belief that they 'would consider that it would be fair for the law to make an award in such a case, provided that it is limited to the extra expenses associated with the child's disability.'[119]

But legally speaking, this is less than satisfactory; as Hoyano notes it is quite anomalous to determine a duty of care by reference to the *extent* rather than the *kind* of loss, 'particularly where the rule is not calibrated to the impact of the loss on the particular family unit, and its capacity to absorb it';[120] rather the question is whether 'the duty of care is owed to *that person.*'[121] And on this basis, there is nothing to separate the *McFarlane* claimants from the *Parkinson's.* Like all good recipes, the ingredients of the duty of care, "foreseeability", "proximity", "just and reasonable", have meaningful and interrelated roles to play, but in determining whether a duty of care exists, as Lord Roskill explains:

> At best they are but labels or phrases of the very different factual situations which can exist in particular cases, and which must be carefully examined in each case before it can be pragmatically determined whether a duty of care exists and, if so, what is the scope and extent of that duty.[122]

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[118] Lord Steyn (at 84) provides the strongest concession that the disabled child might be different; whilst Lords Clyde and Millett (at 99 and 114 respectively) very clearly confine the boundaries of their decision to the healthy child (*McFarlane,* above n 16).

[119] *Parkinson,* above n 88, at paragraph [50].

[120] Hoyano, above n 110, 897.

[121] Andrew Grubb, 'Failed Sterilisation: Damages for the Birth of a Disabled Child' (2002) 65 MLR 78, 82.

[122] *Caparo Industries plc v Dickman* [1990] 1 All ER 568 at 581-582.

So one might surmise that if the duty of care extends no further than pregnancy and childbirth in *McFarlane,* nor should it extend any further in *Parkinson*? Yet in the absence of a 'careful examination' to explain why that is not the case, perhaps we can look to the principles of distributive justice for justification? Or perhaps not; since here we find Hoyano's most scathing attack and it is one worth citing at length:

> Distributive justice has become yet another label, without pretending to intellectual rigour. The transmogrification of the man on the Clapham omnibus is not limited to a change of public transport, as he is no longer just a convenient measure for the standard of care expected of non-experts, but also the gatekeeper for negligence law itself. ...Appeals to commuters on the Underground to decide duty of care issues allows the courts to avoid confronting the sharp edges of tort policy – deterrence, external scrutiny of professional standards of competence, cheapest cost avoidance of risk, insurability against loss, other modes of loss-spreading – and whether carving out *ad hoc* exceptions to well-established legal principles is a matter for parliamentary rather than judicial action.[123]

All in all, it is simply not possible to find a convincing legal explanation (or indeed to create one) for the exception created in *Parkinson*; in the absence of legal justification, it would seem to stand merely as an attribution of responsibility *per se.* It not only fails to explain how the differences between wrongful birth and conception cases might hold significance following *McFarlane,* but more particularly why full damages could not be provided in *Parkinson*, if the disabled child really does raise such different considerations. But it is not difficult to guess why those explanations are missing. Consider first Brooke LJ's 'all that I had in mind' in relation to the distinction between wrongful birth and conception. Did he come to later realise that drawing legal distinctions between the two would militate against any recovery in the latter? And

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[123] Hoyano, above n 110, 904.

of damages, might awarding additional costs have been an attempt to keep the decision secure? Indeed, had the Court of Appeal awarded ordinary damages here, not only would this have been out of kilter with wrongful birth claims, but also wrongful conception claims involving healthy children. But thirdly, and more speculatively, could it be that the Court of Appeal's judgment reflects a 'tug of sympathy' for the claimants in this case, with not a small measure of contempt for *McFarlane*? It is worth bearing in mind, that 'but for' *McFarlane,* it would neither be necessary, nor perhaps possible to draw such tight lines between the wrongful birth and conception case, nor indeed on the grounds of health or disability – a fact of which the Court of Appeal was acutely aware.

Of course, the critical response that *Parkinson* has received in relation to absent legal justification, as well the eroded distinction between wrongful birth and conception is all fashioned on the basis that it is both possible and sensible to talk about these decisions by reference to legal doctrine. And it would not be incongruous to suggest that the resort to *strict* legal doctrine might well be driven by a sense of injustice that results from such a relaxation of the rules that would otherwise be celebrated in other contexts.[124] Certainly the normal application of legal rules would turn out differential results; this is beyond question.

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[124] See for example, *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22. The claimants in question, having worked for successive companies where they were exposed to asbestos dust and fibres, developed mesothelioma; however it was impossible to prove, on a balance of probabilities that the 'guilty' fibres were the result of any *particular* defendant's breach of duty; a classic 'but for' dilemma. For this reason these claims failed in the Court of Appeal. The House of Lords however, permitted an evidential leap to bypass this causation problem; the driving force of their reasons for doing so is well elucidated by Lord Nicholls statement at paragraph [36], that: 'Any other outcome would be deeply offensive to instinctive notions of what justice requires and fairness demands.'

However, considering that those rules were largely suspended by *McFarlane* upon no principled basis, attempting to find legal coherence in later decisions where really there is none, would seem a rather futile exercise. And to illustrate an unwitting acceptance of this, we must return once more to the House of Lords adjudication of *Rees,* in which we find Lord Steyn's intriguing clarification of the *McFarlane* decision:

> The House did not rest its decision on public policy in a conventional sense... Instead the Law Lords relied on legal policy. In considering this question the House was bound, in the circumstances of the case, to consider what in their view the ordinary citizen would regard as morally acceptable. Invoking the moral theory of distributive justice, and the requirements of being just, fair and reasonable, culled from case law, are in context simply routes to establishing the legal policy.[125]

One might, as a lawyer, be surprised to learn that the system of precedent has been so radically overhauled. Rather than referring to legal principle to determine appellate decisions, we must now look to an "imagined jury" and contemplate not merely what they might think a particular case outcome should be, but more specifically, what the law should be. And if there were any doubts as to the distinction between public and legal policy, it must surely be that legal policy is the stuff of the courts as determined by this 'imagined jury', whilst public policy is determined by Parliament? On this basis, can there be any doubts over the correctness of the *Parkinson* decision?

Perhaps not, since as Lord Steyn remarked, whether one construes *McFarlane* as denying recovery on the basis of a duty of care or as an irrecoverable head of damages, both constitute 'equally valid' explanations; and in any event the legal policy underpinning these

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[125] *Rees* (HL), above n 13 at paragraph [29].

alternative routes relate only to the 'healthy' child.[126] So, if *McFarlane* rules out ordinary maintenance costs for the healthy child, does this mean that these *can* be recovered for the disabled child? With specific reference to *Parkinson*, Lord Steyn commented:

> While not wishing to endorse everything said in the detailed judgments... I agree with the decision. ...In such cases normal principles of corrective justice permit recovery of compensation for the costs of providing for the child's needs and care relating to his disability but not for the basic costs of his maintenance.[127]

What are we to make of this? Why are the principles of distributive justice suspended in favour of corrective justice in the case of a disabled child? And more crucially, has corrective justice been applied here at all? Having argued in *McFarlane* that on the principles of corrective justice the parent's claim for the ordinary costs of raising a healthy child would have succeeded,[128] would it not seem a matter of Steynian logic that the application of these principles to the disabled child must result in full costs? In the absence of a full explanation, those bringing *any* tortious claim will surely tremble at the prospect as to which principle might be randomly invoked. Indeed, Lord Steyn's inability, some four years' later, to explain either the precise basis of the *McFarlane* decision, or its exact application to the case of the disabled child, is quite concerning. Justifying the decision as being validly based on either a duty of care, or as a head of irrecoverable principles, cannot be explained away by either: 'in this case the two concepts yield the same result' or, 'one is perhaps in the area of conceptualistic thinking'.[129] If there is conceptual thinking at work, it is at best ill-conceived, defies

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[126] *Rees* (HL), above n 13 at paragraph [30].

[127] *Rees* (HL), above n 13 at paragraph [35].

[128] *McFarlane*, above n 16, at 82.

[129] *Rees* (HL), above n 13 at paragraph [30].

legal principle, and does little to mask the ad-hoc nature of these decisions.

Nevertheless, in the absence of coherence, there was still the hope that the seven-man court of *Rees* might provide at least *certainty* as to what damages should apply in future cases involving disabled children, as well as providing a conclusion to the debate as to whether wrongful birth and conception claims should be distinguished. But, on the latter issue, only two members of the court expressed a clear opinion. Lord Millett, in keeping with his previous judgment in *McFarlane* could see no reason for distinguishing between individual's motives for avoiding pregnancy. By contrast, in Lord Scott's view, such a distinction did need to be drawn between those cases where avoidance of disability was the *very* reason why parents sought medical services, and those, like *Parkinson* where medical treatment was sought to avoid the conception of a child. In the latter case where parents had 'no reason to fear' the birth of a disabled child, Lord Scott suggested that the principles of *McFarlane* should apply.[130] And key to this motivational distinction was an obvious distain for Lord Brooke's stretched notion of 'foreseeability' in *Parkinson*. But surely this is taking the principles of *McFarlane* too far. Indeed, on Lord Steyn's reading, *Parkinson* most clearly escapes *McFarlane,* since this case did not concern the healthy child, and of course, the imagined jury fully approved of limited recovery for that very reason.

On the issue of damages however, we find an even greater variance of opinion. Lords Bingham and Nicholls would apply the conventional award of £15,000 without differentiation to all cases, irrespective of health or disability. By contrast, Lords Hope and Hutton concurred with Lord Steyn's view that additional costs should be allowed in the case of

[130] *Rees* (HL), above n 13, at paragraph [145].

the disabled child; and it would seem that Lord Scott would also allow such limited recovery, but only in the wrongful birth case. Lord Millett, however, chose to keep the matter of damages open, although he illustrated some willingness to see the disabled child as raising different considerations to that of the healthy child:

> Told that a friend has given birth to a normal, healthy baby, we would express relief as well as joy. Told that she has given birth to a seriously disabled child, most of us would feel (though not express) sympathy for the parents. Our joy at birth would not be unalloyed; it would be tinged with sorrow for the child's disability. Speaking for myself, I would not find it morally offensive to reflect this difference in an award of compensation. ...It would in any case be necessary to limit the compensation to the *additional* costs attributable to the child's disability; and this may prove difficult to achieve without introducing nice distinctions and unacceptable refinements of a kind which tend to bring the law into dispute.[131]

Arguably that latter danger has already been largely realised. While lower courts might find guidance in this judgment as to when they should send a Hallmark card to the parents of negligently born unwanted children, there is no indication as to whether a conventional award of £15,000 should apply to all cases, irrespective of health or disability, or whether additional damages should apply in the latter case. However, since Lord Scott's view that only wrongful birth cases might receive additional damages stands alone, it would seem likely that the motivational distinction will no longer apply. Yet, if we are tempted, like our critics of *Parkinson,* to assess this on legal principle it is beyond question that such a distinction must apply.

So, for the time being *Parkinson*, as protectorate of the wrongful conception case involving the disabled child, survives the scrutiny of the

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[131] *Rees* (HL), above n 13, at paragraph [112].

House. And what has saved it, is confusion, incoherence and internal divisions of the Court. In no respect, can we identify a convincing majority over the disabled child. Whilst Lord Millett was wary of drawing 'unacceptable refinements', those falling into the pro-*Parkinson* camp quickly drew a distinction between recognising the parental costs of meeting the needs of disabled children, and the inherent status of the child - a view no doubt prompted by the *dicta* of Hale LJ in the Court of Appeal. Of the conventional award, as we have seen, the House was also utterly divided; and in relation to what the very basis of *McFarlane* might have been, we similarly find no coherent response. But in one main and already documented respect we might well identify a majority *rationale* – and this turns on "lacking": a lack of expressed sympathy for the claimant; a lack of context as to the daily realities of caring for, rather than financing, an unwanted disabled child, and quite significantly, a lack of 'mother' who all too often is masked by the term 'parent'. In short, what *Rees* demonstrates in all these respects, is a lack of respect for reproductive autonomy.

ON TAKING 'LIFE' SERIOUSLY: WHY PARENTAL HARM?

To repeat well-covered ground, *McFarlane* deemed that the healthy child was a blessing and to conceptualise it as 'the injury' in these cases was not merely repugnant, but offended the principle of sanctity of life – all life is precious. Yet, as John Seymour comments, to invoke such a belief in the preciousness of human life, makes it impossible to draw distinctions between the healthy and disabled child.[132] So, if the healthy child raises sanctity of life considerations, leading to the view that damages are incalculable and awarding them repugnant, then surely the same must be said of the disabled child? In agreement with Mason, the rather unfortunate logic of *McFarlane* must be 'that damages should be

[132] Seymour, above n 45, 76.

denied in either case.'[133] Therefore, despite the rejection of Hale LJ's 'deemed equilibrium', there is little doubt that the courts are most obviously engaged in set-off – how else can damages be justified? And the same set-off must apply in denying damages in the case of a healthy child; a conclusion inadvertently confirmed by Lord Millett:

> To say that something is incalculable or cannot be weighed at all is quite different from saying that it is deemed to weigh the same as something else. [...] *McFarlane* decides that the costs of bringing up a normal, healthy child must be taken to be *outweighed* by the incalculable blessings...[134]

While the rationale might be contradictory, the lower courts quite understandably interpreted this to mean that only additional damages might be carved out as an exception to *McFarlane*. But, as previous analysis illustrates, in justifying this exception, the courts articulated mixed messages as to whether a disabled child was a blessing, a lesser blessing or a burden. And this is a point worth revisiting, for the inevitable consequence of these mixed messages is an equally confused statement about *who* is harmed in these cases. Or perhaps this is the *very* reason for the confusion? Take for instance, Newman J's comment that assessing ordinary damages would entail a 'comparison between a situation where a human being exists and one where it does not'.[135] One might be forgiven for suggesting that the same comparison applies in assessing additional damages also – but isn't that the whole point? Since in wrongful conception cases parents wished to avoid childbirth entirely, and in wrongful birth, the parents wished to terminate an affected foetus, 'but for' the negligence these children would not exist. If one is disinclined to accept the fundamental nature of this claim on

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[133] Mason, above n 62, 204.

[134] *Rees* (HL), above n 13, at paragraphs [111-112] [Emphasis Added].

[135] *Rand*, above n 65.

'sanctity of life' grounds, then one might show equal resistance to laws that permit parental choice over abortion or the withdrawal of treatment for disabled neonates,[136] since all these decisions require a third party judgment over whether non-existence is better than existence. Preserving the "sanctity of life" is clearly important, but unless one is willing to deny parental choice in matters of reproduction, one must also accept that the principle is never absolute.

Yet such confusion had simple beginnings; questions over 'who is harmed?' only truly calcified as a central concern following Lord Steyn's fleeting comparison with the outlawed wrongful life claim.[137] Of course, it is possible to draw some parallels here, since wrongful life suits arise out of the same circumstances as wrongful birth claims; but that is as far as the parallel extends. By contrast with the parental claim in wrongful birth, in wrongful life suits it is the child, or his representative that alleges 'but for' the clinician's negligent failure to inform his parents of the child's condition, the parents would have terminated the pregnancy. The interest that the claimant asserts here has proved extremely controversial, notably an interest in not being born impaired. Nevertheless, since termination of pregnancy would have resulted in *no* existence, courts have tended to object to such claims on several grounds.[138] Firstly, it is contrary to public policy for a doctor to owe a duty to a foetus to compel its destruction; secondly, the child has

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[136] See for example, *Re B (A Minor) (Wardship: Medical Treatment)* [1981] 1 WLR 1421; *Re T (Wardship: Medical Treatment)* [1997] 1 WLR 242.

[137] *McFarlane,* above n 16, at 83.

[138] However, the Cour de Cassation, France's highest court permitted such a claim to succeed in the case of *Perruche,* Cass. Ass. Plén., 17.11.00, JCP G2000, II-10438; see further Morris and Saintier, below n 143; A Duget, 'Wrongful life: the recent French Cour de Cassation decisions' (2002) 9 *European Journal of Health Law* 139. And for discussion of the legislative backlash, see Tony Weir, 'The Unwanted Child' (2002) 6 *Edinburgh Law Review* 248.

not suffered any damage in law through being born; and finally, assessing damages is impossible given that it requires the court to undertake a comparison between disabled existence and that of non-existence. The problem, of course, is not the claim itself, but rather the identity of the individual making that claim. In rejecting the wrongful life claim entirely as a matter of English law,[139] Stephenson LJ in *McKay v Essex* stated:

> To impose such a duty towards the child would, in my opinion, make a further inroad on the sanctity of human life which would be contrary to public policy. It would mean regarding the life of a handicapped child as not only less valuable than the life of a normal child, but so much less valuable that it was not worth preserving.[140]

Despite the outlawing of this action, wrongful life continues to generate an extensive amount of scholarly interest - perhaps unsurprising when one considers the philosophical dimension to these claims.[141] While such arguments are beyond the scope of this thesis, it is relevant to mention that there is support for the view that the existential problems

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[139] The exclusion of claims was shortly after confirmed by section 1(5) of the Congenital Disabilities (Civil Liability) Act 1976 which states: 'The defendant is not answerable to the child for anything that he did or omitted to do when responsible in a professional capacity for treating or advising the parent.'

[140] *McKay v Essex Area Health Authority* [1982] 2 All ER 777, at 781.

[141] As a sample of the extensive literature see further: Joel Feinberg, 'Wrongful Conception and the Right Not to Be Harmed' (1985) 8 *Harvard Journal of Law & Public Policy* 57; Joel Feinberg, *Harm to Others* (Oxford: Oxford University Press, 1984); Bonnie Steinbock, 'The Logical Case for 'Wrongful Life'' (1986) 16 *Hastings Center Report* 15; John Harris, *Clones, Genes and Immortality* (Oxford: Oxford University Press, 1998); C Sureau and F Shenfield, 'The fetus as a patient: wrongful life, wrongful death' in C Sureau and F Shenfield (Eds) *Ethical Dilemmas in Reproduction* (London: Parthenon Publishing, 2002).

which have led to the demise of wrongful life can be avoided,[142] but of greater interest here, is the argument that wrongful life claims should be favoured over those of wrongful birth.

In arguing for recognition of wrongful life claims, Anne Morris and Severine Saintier comment that wrongful birth claims are both 'unjust and demeaning' since they treat the child - a 'legal parasite' - as a 'burden to his parents'.[143] One might imagine that Hale LJ demonstrated how easily such conclusions could be avoided, having recognised that, 'the action is not about the resultant child but is simply a matter of the costs of the resultant child';[144] yet Morris and Saintier conveniently avoid Hale LJ's contribution in *Parkinson,* and more surprisingly comment that:

> Without denying the 'burden' on the parent, 'what is the difference between helping the parents financially to support the consequences of the child's handicap and compensating the child to help the parents cope with the material consequences of having a disabled child?'[145]

Perhaps one can turn the claim around, since their arguments hardly provide a convincing basis upon which to jettison the wrongful birth

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[142] See for example, Patricia Beaumont, 'Wrongful Life and Wrongful Birth' in Sheila McLean (Ed) *Contemporary Issues in Law, Medicine and Ethics* (Dartmouth: Aldershot, 1996); Ian Kennedy and Andrew Grubb, *Medical Law* (London: Butterworths, 2000).

[143] Anne Morris and Severine Saintier, 'To Be Or Not To Be: Is That The Question? Wrongful Life And Misconceptions' (2003) 11 *Med L Rev* 167, 192; for a remarkably similar claim see Anthony Jackson where he argues that, 'At worst, those who bring an action for wrongful birth are implying that a handicapped child's life is worthless to such an extent that giving birth to the child constitutes a sufficiently significant injury that it should be legally compensable' (above n 18, 609).

[144] Mason, above n 62, 203.

[145] Morris and Saintier, above n 143, 191-192 (citing M Gobert, 'La cour de cassation méritait-elle le pilori?' (2000) *Petite Affiches* 7).

claim. Nor indeed, do these provide much in the way of support for the wrongful life claim; if there is no difference between the compensatory power of both suits, and one cannot deny the 'burden' on the parent, then why should the parent not be permitted to recover on behalf of the child – and more specifically, for their own distinct losses?

To deny wrongful birth claims on the basis that the child is deemed a "burden" is, in no uncertain terms, myopic. It not only deeply misrepresents the parental-child relationship, but also overlooks the question as to who is *really* making these claims. To regard the wrongful life suit as conceptualising the child in any better light, or as any less legally parasitic is to ignore the reality of wrongful life claims; as Patrick Kelley astutely notes, 'the decision to sue for wrongful life ordinarily is not made by the plaintiff [child], but by the parents charged with [the] plaintiff's care and education.'[146] Therefore, those advocating the rise of wrongful life and downfall of the wrongful birth claim might well be providing a more sustainable argument that *neither* action should be recognised at law.

But, they are, perhaps unwittingly saying something more than that. Claims that wrongful life suits are to be preferred to wrongful birth actions overlook the most significant aspects of these cases, and this cannot be overemphasised; it was the parents' choice to refrain from procreation, it was their choice that was frustrated by medical negligence, it was the mother who carried and gave birth to that child, and it will be the parents who will continue to bear the financial and caring repercussions of that severely disabled child's life. So, who is harmed? To overlook this dimension, not only denies a parental interest

[146] Patrick J Kelley, 'Wrongful Life, Wrongful Birth and Justice in Tort Law' (1979) *Washington University Law Quarterly* 919, 942.

in making reproductive choices, but more significantly, might well be the equivalent of saying that parents are not harmed at all.

ON INVOKING AUTONOMY "SERIOUSLY"

After an exhausting discussion of the most prominent cases in the field of wrongful birth and conception, it is time to start considering how we might make sense of 'confusion'. Among the many questions we might ask, this chapter only asks the following: what do these cases say about the importance of reproductive autonomy? As will be remembered, this chapter commenced with Rosamund Scott's claim that English law might be seen as 'at least partly concerned with reproductive autonomy, backed up by corresponding wrongful birth liability'.[147] And quite central to this claim was the existence of section 1(1)(d) of the Abortion Act 1967. In light of the expansion of negligence liability, there is little doubt that the status of s.1(1)(d) has been strengthened through a willingness of the judiciary to read that provision as creating a duty to take reasonable steps to ensure that women could exercise their choices to avoid giving birth to a disabled child. And since the 1967 Act itself is neither creative of such a duty, nor premised on autonomy, the wrongful birth action post-*Rance* can be seen as increasing the scope of medical responsibility and reinforcing parental choice in the reprogenetic realm.[148] On the same account, however, the provisions of the Act also

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[147] Scott, above n 19, 325.

[148] In the sense that it reinforces the clinician's duty to provide parents with information as to the health of their foetus, as well as providing parents with the opportunity to terminate a pregnancy where grounds for abortion under that section arise. The *extent* of a clinician's duty to offer testing however raises a different issue, and of course, this is a matter to which the 1967 Act is silent. Obvious risk factors such as the claimant's age, or medical history may well indicate the greater risk of giving birth to a disabled child, and provide clear instances where a duty of care exists to provide counselling and testing (*Enright v Kwun and Blackpool Victoria Hospital*

potentially *limit* the scope of parental choice and prospects of successful litigation for wrongful birth. Since s.1(1)(d) of the Act only permits abortion on the grounds that there is a 'serious risk of substantial handicap', Scott rightly notes that 'the corresponding wrongful birth duty is unlikely to support the lost opportunity to abort for reasons of trivial impairment.'[149] Such a consideration is likely to defeat a claim on grounds of causation, since the question is not merely whether the claimant *would* have terminated a pregnancy had she known of foetal disability, but whether she *could* have lawfully accessed an abortion.[150] Therefore, in this respect, the 1967 Act is critical to determining liability.

Yet, insofar as the wrongful birth litigation greatly strengthens women's choices under s.1(1)(d) of the Abortion Act, and demands higher clinical standards in the reprogenetic field, it is certainly possible to agree with Scott, that such litigation has the *practical* effect of enhancing patient autonomy. Nevertheless, whether that was the main driving force of wrongful birth litigation, is open to question. What would also appear to be a concern for the courts is whether it is fair to privatise those costs

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NHS Trust [2003] EWHC 1000). In the absence of a clear 'risk' category, whether a failure to offer testing is negligent will depend upon the standard of care relating to clinical practice (see *Sidaway v Board of Governors of the Bethlem Royal Hospital* [1985] 1 AC 871).

[149] Scott, above n 19, 304. And for the same reason, this would also likely rule out the possibility of a woman falling within the gestatory limits of section 1(1)(a) of the Act succeeding in such a suit. *Parkinson* (above n 88) clarifies that for parents to institute a claim, the child must be 'substantially and permanently handicapped' (see above, 67).

[150] For an interesting critique of the causation requirement in wrongful birth claims, see Shelley A Ryan, 'Wrongful Birth: False Representations of Women's Reproductive Lives' (1994) 78 *Minnesota Law Review* 857.

within the familial unit, or in case of less wealthy claimants, to direct these to the state:

> If the commuters on the underground were asked whether the costs of bringing up [the disabled child] should fall on the claimant or the rest of the family, *or the state*, or the defendant, I am satisfied that the very substantial majority... would say that the expense should fall on the wrongdoer.[151]

This is not to say that s.1(1)(d) of the 1967 Act coupled with wrongful birth litigation is unconcerned with women's reproductive choice; but more simply, that it would be wrong to overlook the possibility that the success of those suits could also be seen as instrumental to satisfying alternative concerns. However, those suspicious of the widespread practice of genetic testing would probably assert this in much stronger terms:

> To demonstrate the effectiveness of prenatal diagnosis, cost benefit analyses were undertaken by health economists, to confirm that resources invested in screening would be offset by savings or 'benefits.' A major item of 'benefit' in these was a calculation of the savings to the state of the cost of supporting a disabled child. ...Such analyses implied or perhaps illustrated that the state's interest in prenatal testing is not in women making any choice, but in making a choice to have an abortion...[152]

It is not argued here that wrongful birth actions are to be seen as part of a eugenic conspiracy, or that women are the handmaidens of political policy; far from it. Yet, reprogenetics, abortion and wrongful birth claims did not arise within a vacuum. Political debates have certainly highlighted that disability (and its avoidance through genetic screening and abortion) gives rise to economic considerations for both the

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[151] *Hardman,* above n 64 (*per* Henriques J).

[152] Bailey, above n 5, 161.

individual and the state.[153] Therefore, it is arguable that wrongful birth claims might sit within a nexus of concerns, including desires to encourage effective clinical practice in the reprogenetic field; in this sense then, these actions may be seen as a regulatory mechanism with the ultimate aim of avoiding the costs of disability being passed on to the individual or society.[154]

So, might this confluence of interests explain what Scott means by English law being partly concerned with reproductive autonomy? Indeed, Scott herself appreciates that there is a 'delicate balance of interests at stake in this context - parental, fetal, those of people with disabilities, medical and societal' and suggests that, 'arguably, the strongest of these is parental'.[155] Whilst this position might well be sustainable, Scott's claim would seem to pivot around quite different concerns:

> As far as a potentially disabled fetus is concerned... since wrongful birth duties will be limited to duties to advise of serious disabilities (and however these are judged, they will surely not include the very trivial), reproductive autonomy will only be protected by means of the wrongful birth action in situations in which it might be seriously invoked.[156]

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[153] Bailey, above n 5, 162.

[154] For a critique on the possible regulatory function of wrongful life claims, see Shaun D Pattinson, 'Wrongful Life Actions as a Means of Regulating Use of Genetic and Reproductive Technologies' (1999) 7 *Health Law Journal* 19; other authors hint at this by emphasising tort law's deterrent value; see Christine Intromasso, 'Reproductive Self-Determination in the Third Circuit: The Statutory Proscription of Wrongful Birth and Wrongful Life Claims as an Unconstitutional Violation of Planned Parenthood v Casey's Undue Burden Standard' (2003) 24 *Women's Rights Law Reporter* 101.

[155] Scott, above n 19.

[156] Scott, above n 19, 322.

Is this an argument about reproductive autonomy at all? Or is this a discussion as to the extent that tort law compensates for the failure of reproductive choices as constrained by the Abortion Act? Alternatively, could Scott be arguing that where the right to litigate exists, as tempered by the terms of the 1967 Act, this marks out when tort law does or does not protect reproductive autonomy? Since her detailed study considers the severity of disability required for abortion under the 1967 Act, its correspondence with wrongful birth, the extent of the duty tort law imposes on clinicians to facilitate patient choice, and the strengthening of such rights and duties through wrongful birth, it is difficult to identify where Scott's concern with the 'limited' form of autonomy lies. And since Scott avoids the 'highly complex' issues of damages in the wrongful birth case,[157] we can safely assume that it is unrelated to the 'limited' compensation that such cases attract. Therefore, Scott's concern would seem to be situated in examining when parents might be entitled to bring a wrongful birth claim, and the intersection of this suit with the Abortion Act 1967. In these important respects, Scott's numerous observations unquestionably contribute to a *much* greater understanding of this field.

But the result of limiting the context to wrongful birth is that conclusions as to the invocation of reproductive autonomy are necessarily left hanging. Since the claims of wrongful birth and wrongful conception are so deeply interlinked, an understanding as to their development cannot be fully understood in isolation. And for the same reason, neither can one produce a realistic picture of the extent to which tort law protects and respects decisions to avoid parenthood without a consideration of both these claims. But, these criticisms aside, the nature of Scott's claim in the wider context of wrongful birth and

[157] Scott, above n 19, 314 (fn 201).

conception actions proves most intriguing; so, is it possible to be 'partly' concerned with reproductive autonomy?

If we take reproductive autonomy as meaning a respect for an individual's choices within the reproductive realm, what picture arises when considering the varying outcomes of wrongful birth and conception suits?[158] Can we distinguish between parental choices arising in these suits? We could first attempt to explain this through the nature of the initial choice exercised. Since s.1(1)(d) of the 1967 Act can be understood as invoking parental interests as to *serious* rather than *trivial* qualitative choices,[159] we might claim that the limits of tort law's recognition of reproductive autonomy is partial in the sense that it is regulated by the constraints of the 1967 Act.[160] But how do we explain the parallel results achieved in the wrongful conception claim where the child is disabled, and the rejection of claims involving healthy children? Of this Scott comments:

> [T]he shift in the wrongful conception cases toward the idea that the birth of a healthy child can never be an injury sounding in economic loss might be taken as some indication of the likely offence to public policy of *compensating for the missed opportunity to abort for trivial aspects of a fetus's condition*. Indeed, it was important to Hale LJ in (the *wrongful birth* case of) *Parkinson* that the disabled child could meaningfully be distinguished from the non-disabled child.[161]

With respect, this is patently wrong. Wrongful conception suits (of which *Parkinson* is an example), unlike wrongful birth suits, do not

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[158] Having already examined that the differential results are inexplicable by reference to the requirements of negligence liability, this dimension will not therefore be repeated here.

[159] See Sheldon and Wilkinson, above n 7.

[160] This would appear to be the thrust of Scott's argument; above n 19.

[161] Scott, above n 19, 305 [my emphasis].

involve a lost opportunity to abort. Rather the negligence in question includes failed sterilisation, vasectomy or the provision of incorrect information concerning fertility following such procedures, all of which result in conception, pregnancy and birth. Therefore, if abortion could arise within wrongful conception cases at all, its role would be limited to considering whether defendants should be responsible for damages relating to the birth of a child which claimants could have avoided (or mitigated) through exercising their 'rights' under the Act.[162] In other words, the presence of the 1967 Act holds the potential to operate against such claims, rather than vindicate parental choice.

Alternatively, could it be that *qualitative* choices are more important than *quantitative* ones? There are, of course, two dimensions to this question, but let us focus firstly on the initial exercise of that choice. As was considered at the beginning of this chapter, the terms of the 1967 Act certainly illustrate a hierarchy where qualitative choices are given greater force than quantitative ones - the absence of a gestatory time-limit under s.1(1)(d) constituting a key indicator. Whether the hierarchy is justifiable however, is doubted, since such dichotomous treatment is deeply contended between pro-choice, pro-life and disability activists. Nevertheless, the middle ground might be that 'we should not regard aborting an 'able-bodied foetus as morally different from aborting an 'impaired' foetus and that the law's treatment of the two should be the same.'[163] Although such a view fails to reflect public opinion, or the

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[162] It has been widely accepted that the mitigation requirement no longer applies to cases of wrongful conception following their Lordships explicit rejection of this doctrine in *McFarlane* (above n 16). This position, however, is disputed in chapter four.

[163] Sheldon and Wilkinson discuss here the 'rare' consensus emerging between what would, on other grounds represent quite polarised positions on abortion (above n 7, 85).

reality of abortions performed in this country,[164] from the perspective of reproductive autonomy, it is impossible to draw any such tight distinctions between the qualitative and quantitative where the crux of both choices is to avoid a continuation of pregnancy. In plain terms, since *no* woman should be forced to continue an unwanted pregnancy, the 'type' of child that might otherwise ensue is completely irrelevant. Furthermore, such a distinction also fails abysmally in its power to explain why parallel results are achieved in wrongful birth claims and wrongful conception claims resulting in the birth of a disabled child, since in the latter, the choice exercised was *quantitative*, not qualitative.

Therefore, if we cannot draw lines between the kinds of choice on the grounds of autonomy, could it be that such hierarchies are sustainable on the basis of their differential repercussions? Or more simply put, in the context of wrongful birth and conception claims does having a disabled child impose an *additional* burden? As we have seen, the courts' analysis of wrongful birth and conception claims have conceptualised the birth of a disabled child as imposing a caring and financial burden *over and above* that which a healthy child might entail. And this is beyond dispute; caring for a severely disabled child not only imposes an 'enduring and long-term' commitment, frequently making 'demands that go a long way beyond what is usually required of parents of non-disabled children', but the caring work is often 'more exacting and more complex than with other children.'[165] Drawing our attention to the social and material circumstances of many mothers of disabled children, as well as the social isolation involved in such care, Read stresses that,

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[164] Sheldon and Wilkinson, above n 7, 86; as the authors note, while public opinion would appear to find termination on the grounds of disability more acceptable, the number of abortions performed under s.1(1)(d) are far outstripped by those under s.1(1)(a) of the 1967 Act.

[165] Read, above n 79, 54.

> [I]t is hardly surprising that there can be an impact on the physical and psychological health of those bearing the brunt. Mothers of disabled children have been found to experience higher levels of stress than others in the general population and... lone mothers are particularly at risk. Most families keep going, but... the equilibrium that they manage to create is often fragile and can be upset by unforeseen crisis.[166]

As a means of understanding the differential outcomes of wrongful conception and birth cases, this perspective of 'greater' harm is quite useful. If 'disability' raises different considerations, then this must lie in the 'additional' caring and financial burden. And this position certainly provides a basis for justifying the award of 'additional' maintenance damages to the parents of disabled children, even though legally this has proved problematic in wrongful conception cases post-*McFarlane.* Perhaps then, we might agree with Scott that while reproductive autonomy matters, 'reasons do as well, thereby implying that reproductive autonomy matters most when *seriously* invoked.'[167] So, in this respect, English law's concern with reproductive autonomy is partial in limiting its coverage to serious choices, since:

> Morally speaking, given that parents are entitled to choose whether to reproduce, arguably they should also be able to choose to avoid reproduction under certain conditions, for instance, because of what caring for a severely disabled child may entail.[168]

But, what does it mean to 'seriously' invoke reproductive autonomy? Do not all "choices" to avoid reproduction matter, or deserve being taken seriously? And more specifically how do we adjudge *which*

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[166] Read, above n 79, 67.

[167] Scott, above n 19, 325.

[168] Scott, above n 19, 300-301.

choices are more important or 'serious' than others?[169] If this question is to be answered by the consequences as Scott's statement appears to suggest, then it enters into very dangerous territory – since what it does not answer is, who is the judge and what are those conditions?

Arguably, it is positions such as this which have seriously compromised women's reproductive autonomy, for all too quickly can the assumption of 'seriousness' be turned so as to limit, override and control sexual bodies. Nor does it take long to summon up examples within the field of reproduction where women's ability to control their bodies have been, and continue to be subjected to 'conditions'. The sterilisation of intellectually disabled and enforced caesarean sections,[170] both provide largely historical examples where coercive medical practices were judicially authorised on the basis of preventing some ulterior harm. Yet, there is no doubt that at that time, judges considered that the risk of a viable foetus's death, or of the world being 'swamped with incompetents',[171] gave rise to "serious" enough conditions so as to *override* autonomy interests. Or in a modern context, we could point to the hierarchical treatment of the infertile under section 13(5) of the Human Fertilisation and Embryology Act 1990. 'The need of that [future] child for a father' under the 1990 Act certainly imposes a condition which will operate to the disadvantage of single and lesbian

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[169] Such a point raises the related issue of Reverend Joanna Jepson's recent legal challenge to a late termination for foetal abnormality. Jepson wanted a judicial review of the West Mercia Constabulary's decision not to prosecute two doctors who performed an abortion on a foetus of over 24 weeks gestation for cleft palate. Jepson's challenge clearly illustrates the sentiment that such abortions are performed on trivial grounds, and are therefore unlawful. See further, *Jepson v West Mercia CC* (Permission for Judicial Review 1 December 2003; hearing on 24-26 May 2004 postponed pending renewed investigation).

[170] For example, *Re MB (An Adult: Medical Treatment)* [1997] 2 FLR 426.

[171] *Buck v Bell* 274 US 200 (1927) at 207 (*per* Mr Justice Oliver Wendell Holmes).

women. No doubt there also, legislators thought that the need for a father figure invoked 'serious' enough concerns to justify the provision's enactment and render women's autonomy conditional.[172] And of course, the most obvious example in the context of our discussion must be abortion legislation; not only does the 1967 Act make a woman's access to abortion subject to opinion of others, but conditional upon satisfying grounds which will determine whether her request is trivial and undeserving, or a serious and therefore, *deserving* one.[173]

For these reasons, it is quite impossible to agree with Scott that the prospect of caring for a disabled child means that a woman's autonomy interests have been more 'seriously' invoked than a woman who confronts the prospect of unwillingly caring for a healthy child. Both confront 'additional' burdens and restrictions upon their lives that they took deliberate measures to avoid, and therefore both deserve full recognition of their reproductive autonomy. Yet, as we have seen the judiciary in such cases has made exactly these types of value-judgments as to who is harmed and who is not, and which autonomous choices should or should not count. And there is no doubt these value-judgments are similarly based upon the misguided notion that some choices in this context are more important than others. Therefore, as an overall picture as to the values arising within the case law, it is difficult, if not impossible to suggest that tort law is 'partly' concerned with, or recognises a 'limited form' of reproductive autonomy. Rather, the general message is that only the parents of severely disabled children are harmed, that only choices with a qualitative dimension matter and that the medical profession must be prepared to take responsibility for failed

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[172] See further Emily Jackson, 'Conception and the Irrelevance of the Welfare Principle' (2002) 65 MLR 176.

[173] See further Sally Sheldon, *Beyond Control: Medical Power and Abortion Law* (London: Pluto, 1997).

reproductive choices where that qualitative – but not quantitative – dimension exists.

Therefore, what we are left with is a fairly grim picture as to the existence of reproductive autonomy in these cases; and, of course, its absence from the bigger picture of wrongful conception and birth might well suggest the invocation of alternative values which are playing a fairly major role in determining these differential outcomes.[174] Yet, in truth, bigger pictures can be misleading; all they tell us is what is happening on the surface, and not *why* those outcomes have come about. And in this respect, while both this chapter and the last have been clearly critical of the outcome position in such cases, neither has ignored the reason why the courts have found themselves embroiled in confusion, in blessings, and in unsustainable, if not invidious positions. If we are to look for the cause, then of course, we look to the long reach of *McFarlane*; and it is this case that has left lower courts making the best of a bad situation, struggling to carve out exceptions in areas where perhaps none really existed.

Yet, in their doing so, whilst we have found problems, we also find great promise. We discover a widespread judicial recognition in the lower courts of the contextual dimension in wrongful conception and birth cases which so rarely arises in the case of the healthy child: that the allocation of the extensive burdens and costs of reproduction are typically gendered and therefore, that in the case of a disabled child, 'parent' so often means mother. And quite strikingly, the acknowledgment of this dimension to the mother-child dyad is also met by a judicial willingness to give value to the caring services of the mother and recognise her as *directly wronged* through the birth of an

[174] For example, reproductive *responsibility,* stereotypes of 'good' and 'bad' mothers or reproducers; see chapter five.

unwanted child.[175] As a way forward in conceptualising wrongful birth and conception, such jurisprudence is valuable if not absolutely essential, since the analytical method is clearly of equal application to *any* child. Nevertheless, whilst we are left to speculate how the healthy child might generally be received by the lower courts if left to their own devices, no such speculation is required of (the now) Lady Hale. And here it seems most apt to leave the final words to Mason, who remarking upon her Ladyship's various arguments, states:

> [A]lone amongst the various analyses, it can be applied almost verbatim to the wrongful pregnancy terminating in a normal child. The basic obligations of parenthood are the same irrespective of the health status of the child. The simple fact is that, the more disabled is the child, the more difficult it is to fulfil those obligations – and the more costly it is to contain that fulfilment within tolerable bounds.[176]

CONCLUSION: THE LIMITS OF TORT

As an analysis of the actions for wrongful birth and conception reveals, it is simply not possible to explicate the differential outcomes on the grounds that tort law protects a *limited* form of parental autonomy. Because the nature and exercise of such reproductive choices are virtually indistinguishable, such an argument stretches the meaning of autonomy beyond any sensible limits, and for reasons expressed earlier, could act to the detriment of women's reproductive freedom in the longer term. Nevertheless, such an assertion might be gainfully employed elsewhere.

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[175] The Right Honourable Lady Justice Hale, 'The Value of Life and the Cost of Living – Damages for Wrongful Birth', The Staple Inn Reading (2001) 7 *British Actuarial Journal* 747.

[176] Mason, above n 63, 64.

By contrast with the question of child maintenance costs, the mother's claim for damages attendant upon the personal injury of pregnancy reveals an exact parity of success between the two suits. And despite the 'willingness' theory which Mason sees as militating against the recognition of such damages in wrongful birth, the courts have nevertheless routinely awarded damages in both wrongful conception *and* births suits. Whether an attitudinal distinction might be drawn has not duly concerned the judiciary, at least where this limited head of damages arises. In this sense then, the willingness of the courts to permit damages under this head, might well evidence a limited concern with women's autonomy. But, as the following chapter considers in the context of wrongful conception, the claim that a pregnancy might constitute damage has not been trouble-free; and the construction of a process, generally understood as being both 'natural' and 'wanted', as an injury has certainly led to a confused articulation as to how a woman is harmed through wrongful pregnancy. Therefore, while we might describe the law's concern with women's reproductive autonomy as limited, we can be more certain in saying the same of its vocabulary.

Before leaving the subject of disability in order to consider the issues briefly furnished above, it is worth noting a further dimension to autonomy and tort law within a broader context: their limited currency in the outside world as a means of resolving social problems. While as lawyers and ethicists we are left debating the goods and evils of technological progress and increasing choice within the reprogenetic field, what is often overshadowed is the issue of how best to care for the growing community of disabled individuals already existing in society:

> The idea that disability is a medical problem affecting a small proportion of the population is no longer sustainable. In the 1980s government figures suggested that there were 6.5 million disabled people in Britain. A more recent study concludes that four out of every

> ten adult women and men have a long term illness or disability. [...] Moreover, the combination of an ageing population and new medical interventions which prolong life will ensure that the number of disabled people will increase substantially over the next few years.[177]

In the wider context of disability then, a chapter discussing *legal* recourse must necessarily be viewed as offering an extremely limited contribution. Discussions over the limits of reproductive autonomy and parental choice really hold fairly short-shrift in the real world. While these resonate firmly within the legal domain, they clearly hold little relevance to those who already face the reality of being cared *by*, or caring *for* other family members. And although we might be forgiven for believing that an increased political willingness to make provision for disabled individuals in society translates into greater choice and better services, as Read comments, such an assumption is largely misguided. Instead, the reality is that 'services remain patchy and underfunded and as a consequence, children and their families are often predominantly reliant on their own personal coping resources and strategies for much of what they need.'[178]

So in the absence of an appropriate social response, can we turn to the private law? In most cases, this is extremely unlikely. Amongst the apocalyptic talk of the UK becoming immersed in a 'blame culture' where virtually any 'adverse experience is readily blamed on someone else's negligence'[179] lies the stark truth that law is simply *not* prepared to pay up for the vicissitudes of life. Most disability and disease is '*not* caused by genetic abnormalities detectable *in utero*, but instead from poverty, accidents, war, exposure to environmental toxins or from a complex interaction between an individual's genotype and their

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[177] Barnes, above n 55, 65.

[178] Read, above n 79, 8.

[179] Frank Furedi, *Culture of Fear* (London: Continuum, 2003), 11.

environment'.[180] So, when we speak of the partial successes of parents in these cases (and of course, not all succeed), regrettably we are talking of a rather privileged few who can point directly to wrongdoing. And while tort law has recently come to embrace the language of 'distributive justice', as a description of what private law *does*, this is highly inaccurate. There are limits to both private law's way of seeing and way of distributing; tort law will not, for the vast majority of those disabled in society provide any response. Therefore, unless and until we are willing to overhaul the law of negligence in favour of a system which seeks to achieve the broader aim of social justice, for the moment as the term 'private law' might well imply, compensation will remain exactly that: a *private* matter for the privileged few.

[180] Emily Jackson, *Regulating Reproduction, Law, Technology and Autonomy* (Oxford: Hart Publishing, 2001), 100.

3

Unravelling Harm III: Pregnant Bodies, Minds and Lives

> She pondered. "Androids can't bear children," she said, then. "Is that a loss?"
>
> He finished undressing her. Exposed her pale, cold loins.
>
> "Is it a loss?" Rachel repeated. "I don't really know; I have no way to tell. How does it feel to have a child? How does it feel to be born, for that matter? We're not born; we don't grow up; instead of dying from illness or old age we wear out like ants. Ants again; that's what we are. Not you; I mean me. Chitinous reflex-machines who aren't really alive."[1]

INTRODUCTION

Pregnancy is woman's work.[2] It is the one experience that 'inevitably differentiates women from men' and thus forms a 'crucial part of our identity which we cannot ignore, even supposing we would wish to do so.'[3] The fact that *most* women hold the *capacity* to bear children, Morris and Nott reflect has had adverse consequences for the treatment of women in society.[4] The dominant ideology of reproduction positions

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[1] Phillip K. Dick, *Do Androids Dream of Electric Sheep?* (London: Millennium,1968), 165.

[2] Julien S Murphy, 'Is Pregnancy Necessary? Feminist Concerns About Ectogenesis' (1989) 4 *Hypatia* 3.

[3] Susan Atkins and Brenda Hoggett, *Women and the Law* (Oxford: Blackwell, 1984), 83.

[4] Anne Morris and Susan Nott, 'The Law's Engagement with Pregnancy' in Jo Bridgeman and Susan Millns (eds) *Law and Body Politics, Regulating the Female Body* (Aldershot: Dartmouth, 1995).

and defines women in terms of their *potential* mothering role[5] and thereby exercises a regulatory role over *all* women's lives. Nor has the increasing incidence of infertility and deliberate childlessness displaced this view. Childless life is not perceived as being a 'viable or appealing choice' and 'women who purposefully do not have children are not taken on their own terms, but are measured by the idealized standard of motherhood.'[6] Whilst pro-natalist norms hold a powerful influence on the way that women are viewed, *non*-pregnant women are nevertheless assumed to have the capacity to make valid self-determining choices about their lives and destinies, in a way that the *pregnant* women rarely are. The pregnant woman's body is no longer her own, it labours now for another – she is not one person 'but two – mother and foetus – and society may expect, even demand that her freedom is curtailed in the interests of the foetus.'[7] Under an ideology whereby 'the foetus is something to be protected from its mother',[8] the rational and sane mother must willingly accept treatment by medical professionals, for 'no normal mother-to-be' would persist with a course that would cause serious harm to her foetus. As a result, pregnant women are confronted with a law that speaks 'loudly of care and protection of children, and less loudly but perhaps more profoundly, of control of women.'[9]

It is in this context that this chapter explores wrongful pregnancy in the tort of negligence. This becomes important when considering that the law has been more involved in conceptualising women as a harm to foetal health, than as harmed through the experience of pregnancy

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[5] Carolyn Morell, 'Saying No: Women's Experiences with Reproductive Refusal' (2000) 10 *Feminism & Psychology* 313.

[6] Morell, above n 5, 314.

[7] Morris and Nott, above n 4, 54-55.

[8] Alison Diduck, 'Legislating Ideologies of Motherhood' (1993) 2 *Social & Legal Studies* 461, 471.

[9] Diduck, above n 8, 465.

itself. Therefore, while society values motherhood for its product, a healthy child, and is one which construes motherhood as naturally involving sacrifice, the law rarely speaks the language of the care and protection of the rights, health and integrity of pregnant women. But in confronting the action of wrongful pregnancy, this is the language demanded of it. Does wrongful pregnancy constitute a personal injury or merely a harm*less* biological function that cannot constitute "damage" or "harm"? The significance of this question lies at the heart of the tort of negligence.

A number of torts, such as trespass or libel, are actionable *per se* – without evidence of damage.[10] The absence of damage is not germane to such actions since tort law operates here to 'vindicate private rights and not necessarily to compensate the victim.'[11] By contrast, in the law of negligence, "damage" holds a central role and is said to form the 'gist of the action'.[12] Therefore, a claimant will not only need to establish a duty of care, a breach of that duty, and that the breach 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'. This proves unproblematic in the case of the 'straightforward results of many physical acts of negligence.'[13] Beyond the broken bones and personal injuries obvious to the human eye, it is well recognised that

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[10] In the context of trespass to the person, the US case of *Mohr v Williams* (1905) 104 NW 12 is illustrative. Here the plaintiff consented to an operation upon her right ear. During the operation, the surgeon discovered that the left ear, rather than the right, required surgery. Despite a successful operation on the plaintiff's left ear, the court held the surgeon liable for battery, having acted outside the ambit of consent provided.

[11] Basil Markesinis and Simon Deakin, *Tort Law* (Oxford: Oxford University Press, 4th ed, 1999), 18.

[12] Jane Stapleton, 'The Gist of Negligence' (1988) 104 *Law Quarterly Review* 213, 213.

[13] P. S. Atiyah, *The Damages Lottery* (Oxford: Hart Publishing, 1997), 52.

'damage can be recovered for any physical harm'.[14] Therefore, gastroenteritis suffered through swallowing parts of a snail in a bottle of ginger beer,[15] cancer or lung diseases suffered through exposure to asbestos in the workplace, will most certainly constitute physical harms for the purposes of negligence. The question is, in what way might an unwanted pregnancy – a normal, biological function, although *unwanted*, be conceptualised as actionable physical damage?

It is undeniable that there are salient differences between an unwanted pregnancy and broken bones, but what do they consist of? What is a 'personal injury', and importantly, *who* defines it? Does it matter for these purposes that while some pregnancies are unwanted, others are not? Or in determining this issue should we merely be content with the weaker view that pregnancy should be treated as *analogous* to a personal injury, so as to avoid the difficult arguments that pregnancy gives rise to?[16] And indeed, if wrongful pregnancy does constitute "damage" what rights/interests are being implicated and how do such conceptualisations of harm intersect or conflict with alternative representations of the processes of pregnancy and childbirth? As Nott and Morris highlight, understanding how the law engages with pregnancy and constructs the 'Pregnant Woman' demands 'more than a consideration of single issues.'[17]

There is a growing body of literature relating to wrongful conception, however remarkably little addresses the mother's claim for pain and

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[14] Atiyah, above n 13, 53.

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

[16] Alastair Mullis, 'Wrongful Conception Unravelled' (1993) 1 *Med L Rev* 320.

[17] Morris and Nott, above n 4, 55.

suffering consequent upon the *injury* of pregnancy.[18] In fact, this element of the claim is more often than not dismissed as either unproblematic or uncontroversial. Possibly the main reason for the "pregnancy-as-damage question" being speedily dismissed is simply because it has not *yet* suffered rejection by English law. Undergraduate texts on medical law often reflect this unproblematic status: 'so far as we know, such damages have never been denied in any jurisdiction'.[19] Or could it be because this question is considered to be less philosophically *interesting* than the contention that the birth of a 'healthy' child causes harm?

It is true that the child maintenance claim raises a series of difficult legal and ethical considerations, and constitutes the more substantial compensation claim made by parents. Nevertheless, what this chapter hopes to illustrate is firstly, that the mere fact the 'pregnancy-as-damage' question has not attracted a similar level of analytical enquiry by the courts or academics, by no means denotes ready acceptance of its status as "damage". Secondly, the issue of 'pregnancy-as-damage' I argue, is by far the *more* interesting question.

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[18] Much literature seeks to address the question of child maintenance costs. For example Jeff L Milsteen, 'Recovery of Childrearing Expenses in Wrongful Birth Cases: A Motivational Analysis' (1983) 32 *Emory Law Journal* 1167.

[19] J.K. Mason, R.A. McCall Smith and G.T. Laurie, *Law and Medical Ethics* (London: Butterworths LexisNexis, 2002), 116. However, as chapter two illustrated, the question of 'pregnancy as damage' in wrongful 'birth' actions, and more particularly, the courts' wholesale acceptance of this claim, has received quite critical coverage by J.K. Mason on the grounds of a woman's "willingness" to enter into pregnancy. See further Mason, 'Wrongful Pregnancy, Wrongful Birth and Wrongful Terminology' (2002) 6 *The Edinburgh Law Review* 46.

NATURAL BORN REPRODUCERS?

> The body has been made so problematic for women that it has often seemed easier to shrug it off and travel as a disembodied spirit.[20]

Through discourse, both law and medicine construct bodies. Bodies that are deviant, diseased, injured, autonomous, inviolable, private, violated, the medico-legal metaphors that give rise to bodies that are constituted as property or machine - all constitute discursive social constructions of the body. The body in Western culture is traditionally conceptualised 'as something apart from the true self (whether conceived as soul, mind, spirit, will, creativity, freedom) and as undermining the best efforts of that self.'[21] Rúdólfsdóttir explains that the dominant idea is that the 'truly liberated and disciplined self cultivates rational thought, the instrument of the self, on the basis of its freedom from the impulses of the body'.[22] In law, this mind/body dualism finds its expression in dominant liberal conceptions of individual autonomy, the notion of the rational, self-determining, and self-owning individual. This notion of the person as property, or as 'self-proprietor', Naffine suggests, has become 'a convenient way of highlighting the freedoms enjoyed by the modern individual... which serves to accentuate the fullness of the rights enjoyed by persons in relation to themselves and to others.'[23] In healthcare law, this paradigm of autonomy holds a pivotal role. The giving of valid consent provides

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[20] Annadís Rúdólfsdóttir, 'I Am Not a Patient, and I Am Not a Child': The Institutionalization and Experience of Pregnancy' (2000) 10 *Feminism & Psychology* 337, 338 (citing A Rich, *Of Woman Born: Motherhood as Experience and* Institution (New York: Norton, 1976, 40).

[21] Susan Bordo, *Unbearable Weight* (Berkeley, CA: University of California Press, 1993), 5.

[22] Rúdólfsdóttir, above n 20, 338.

[23] Ngaire Naffine, 'The Legal Structure of Self-Ownership: Or the Self-Possessed Man and the Woman Possessed' (1998) 25 *Journal of Law and Society* 193, 194.

the authority for medical procedures, and therefore underpins this Lockean notion of self-governance where the *competent* individual is free to do with his body whatever he chooses, providing he does not cause harm to others. This notion of self-ownership however, Naffine suggests, implies that the property-owner is something separate to the body:

> [T]he 'important thing for self-ownership is that the subject 'I' – the person as mind – should retain control of its object body; no one else should exercise this self-possession or self-control. The divided self must operate in this manner if personhood is to be retained.[24]

Therefore, under such conceptions of liberal autonomy, the 'true subject self', is the rational mind, which takes control of and governs the 'object' body and therefore self-ownership translates into body ownership – and demands 'self-control and the ability to repel the encroachments of others'.[25] Such constructions of the body as property can also be seen to underpin the provision of compensatory damages for personal injury. As Alan Hyde comments, the law recognises a market value for intact and attractive bodies, and hypothesises the body 'as property "had" and "lost"',[26] even though neither lost attractiveness or pain-free existence are open to market value quantification.[27] Therefore, notions of bodily autonomy and bodily privacy all imply bodily boundaries, and an internal division of the person – 'the owner

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[24] Naffine, above n 23, 202.

[25] Naffine, above n 23, 202.

[26] In the context of damages for pain and suffering A. I. Ogus (which Alan Hyde, below n 27 cites) suggests: 'Each part of the body has an objective "value", independently of the use or enjoyment to be derived from it. The integrity of the body becomes something sacrosanct. The pleasures of the body are relegated to a status of minor importance.' (A.I. Ogus, 'Damages for Lost Amenities: For A Foot, A Feeling or a Function?' (1972) MLR 35 1, 10).

[27] Alan Hyde, *Bodies of Law* (Chichester: Princeton University Press, 1997), 62.

and the owned'.[28] While legal analysis has proceeded in conceptualising man's rights to civic freedom through distinguishing the mind from the body, this Cartesian dualism has also been highly influential in scientific disciplines where the body is reconstituted under the medical gaze as machine. Here the mind is reduced to a spirit or ghost that directs the disconnected body – the machine, representing the mindless body. The patient under this reconstruction is reduced to nothing more than *a body*, a passive medical object, rather than an experiencing subject. The body is observed and understood though its machine-like functionality – 'it works or fails to work'.[29] The medical body is a biological organism, 'entirely discoverable and convertible to information', and rendering a set of facts about physical status and functionality.[30]

As 'heirs of Cartesianism',[31] both the legal and medical constructions provide an impoverished view of personhood. The machine body is reduced to mere physical existence, while the property body, neglects the significance of the human body, as if this 'autonomous subject is not possessing a body', but is 'an instrument through which the subject is interacting with the world'.[32] Whether or not we think it makes sense to construct bodies in these ways, both representations are productive of cold and inhuman bodies that fail to account for the variety of way in which we *experience* our lives through bodies as human beings. One is either a body or a thinking and choosing agent, but never 'a feeling and

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[28] Naffine, above n 23, 201.

[29] Martyn Evans, 'The 'Medical Body' As Philosophy's Arena' (2001) 22 *Theoretical Medicine* 17, 20.

[30] Evans, above n 29.

[31] Elizabeth Grosz, *Volatile Bodies, Toward a Corporeal Feminism* (Bloomington, IN: Indiana University Press, 1994), 8.

[32] Editorial, 'Health care and the human body' (1998) 1 *Medicine, Health Care and Philosophy* 103, 104.

being agent'.[33] But it is not just this impoverished view that opens up Cartesian methodology to criticism – these ways of seeing are highly gendered. Such dualism is characterised by (and productive of) sex difference: the male body, free from the burdens of pregnancy and menstruation, while women are constructed as being essentially *bodily* beings, 'unable to transcend [their] corporeality.'[34] Femininity is tied to corporeality, and associated with the non-rational: emotion, passion, care and partiality while 'reason and masculinity are co-defined in opposition to the body'.[35] This opposition between reason and the body, Claire Colebrook comments, 'not only harbours a hierarchy, it constitutes an axiology through which the very categories of thought are produced as sexed.'[36] And this sexing in Western culture has been posited as a 'necessary consequence of an irreducible biological difference.'[37]

That men are to mind/reason as women are to body/emotion, holds deep philosophical foundations. The radical distinction between 'material' or physical pregnancy and 'spiritual' pregnancy, with primacy given to the latter[38] is illustrated by Socrates' comparison of his art of 'giving birth to thought', with that of midwifery:

> My art of midwifery is in general like theirs; the only difference is that my patients are men, not women, and my concern is not with the body but with the soul that is in travail of birth. And the highest point of my

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[33] Shelley Budgeon, 'Identity as an Embodied Event' (2003) 9 *Body & Society* 35, 37.

[34] Kirsty Keywood, 'More than a Woman? Embodiment and Sexual Difference in Medical Law' (2000) 8 *Feminist Legal Studies* 319, 325.

[35] Claire Colebrook, 'Incorporeality: The Ghostly Body of Metaphysics' (2000) 6 *Body & Society* 25, 28.

[36] Colebrook, above n 35, 34.

[37] Keywood, above n 34, 322.

[38] Amy Mullin, 'Pregnant bodies, pregnant minds' (2002) 3 *Feminist Theory* 27.

> art is the power to prove by every test whether the offspring of a young man's thought is a false phantom or instinct with life and truth.[39]

Spiritual pregnancy is strongly associated with man, for it is only those 'who are physically incapable of giving birth who can become spiritually pregnant';[40] physical pregnancy in Nietzsche's view would exhaust a woman of all her psychic energy, removing her ability to become intellectually creative. But, such creativity, according to Nietzche, comes at a price; since when a woman has scholarly inclinations, 'there is usually something wrong with her sexuality.'[41] While this would appear to suggest that both women and men *can* become spiritually pregnant - women will only achieve this by virtue of malady. As Amy Mullin suggests, the use of philosophical metaphor drawn from women's experiences of pregnancy and childbirth not only acts to deny any spiritual or philosophical significance to the physical pregnancy, but reinforces that it is a process 'valuable or interesting only for its result, the physical or spiritual child'.[42]

This view of pregnancy as a merely physical event resonates in modern medical practice, in which we see two body constructs emerging – the pregnant body as passive and as pathological. In the first, Hyde explains that if a woman's body is a machine with different parts, only her reproductive organs are the active agents; women would merely be 'the passive instruments of nature's purposes, their agency appearing only as they *interfered* with the purposes nature intended for their

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[39] Plato, 'The Theaetetus' in E Hamilton and H Cairns (eds) *Collected Dialogues* (Princeton, NJ: Princeton University Press, 1961), 855.

[40] Mullin, above n 38, 29.

[41] Friedrich Nietzsche, *Beyond Good and Evil* (London: Penguin, RJ Hollindate trans, 1990), 101.

[42] Mullin, above n 38, 30.

bodies.'[43] This passive body can be clearly illustrated by ultrasound scanning, which as Mullin comments diminishes 'the importance of a woman's bodily knowledge during pregnancy, and also... increase the sense of the foetus as an independent agent that just happens to be temporarily contained within a pregnant woman's body.'[44] Within this construal, the body is a passive machine, the physician a technician and pregnancy is merely 'a solely physical event in which a woman's participation is limited to patiently waiting for (and not harming) the foetus within her.'[45] While this construction of pregnancy positions the body as passive, the second typification renders the pregnant body as a site of risk and pathology – by contrast with the healthy (male) body which is posited as unchanging, the female body falls outside this criterion of health. Because such 'natural life processes are... perceived as deviant where they differ from men's,'[46] pregnancy is therefore rendered abnormal, pathological and problematic - a disease in need of medical treatment and control.[47]

The connecting of women more closely to their bodies than men, through a biological specificity, Elizabeth Grosz comments, has served to restrict women's 'social and economic roles to (pseudo) biological terms' and confined women to the biological role of reproduction.[48] Furthermore, this biological account of women as *essentially* corporeal has been problematic in terms of justifying women's legal subjectivity

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[43] Hyde, above n 27, 38 (citing Reva Siegel, 'Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection' (1992) 44 *Stanford Law Review* 261, 291-292).

[44] Mullin, above n 38, 36.

[45] Mullin, above n 38, 37.

[46] Laura Purdy, 'Medicalization, Medical Necessity and Feminist Medicine' (2001) 15 *Bioethics* 248, 251.

[47] Rúdólfsdóttir, above n 20, 339.

[48] Grosz, above n 31, 14.

and agency. As Nicola Lacey notes, only 'subjects with normal bodies can claim full legal privileges, including on occasion, the privilege of corporeal invisibility. In other words, having a 'normal' body allows a subject to fit the culturally privileged model of the rational choosing individual.'[49] Therefore, while women have been conceptualised through biological accounts as surrendered to the flesh through reproduction, and their bodies differentiated to men, women would be deemed under this mind/body split, to be 'insufficiently individuated to own themselves'[50] and therefore excluded from the framework of self-ownership – the domain of rationality. Indeed, from a historical perspective, women's essentially sexual and reproductive identity has permitted possessory rights to be exercised *over* women. Ngaire Naffine notes how a woman within marital relations became an 'object of sexual property, a physical being over which the husband exercised exclusive rights of use and possession.'[51] At one time, a man could not be charged with the rape of his wife - however if his 'cold-blooded' wife denied him of pleasant intercourse, and children, husbands would be received sympathetically by the divorce courts.[52] Furthermore, the law of consortium, which provided remedies for the loss of affection and companionship was never premised as a female right, but was a husband's cause of action. Similarly, in the medical domain Susan Atkins and Brenda Hoggett comment, there was not only the belief that a husband could prevent his wife from being sterilised or provided with contraception, but that when she had conceived that he was entitled to choose between her life and the child's.[53]

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[49] Nicola Lacey, *Unspeakable Subjects, Feminist Essays in Legal and Social Theory* (Oxford: Hart Publishing, 1998), 107.

[50] Naffine, above n 23, 204.

[51] Naffine, above n 23, 208.

[52] Susan Atkins and Brenda Hoggett, *Women and the Law* (Oxford: Blackwell, 1984), 84.

[53] Atkins and Hoggett, above n 52, 85.

These are, of course, historic accounts. The action for loss of consortium was abolished in 1952, and despite the continuing centrality of sex in marriage,[54] a husband can now be charged with rape of his wife.[55] And the ability of a man to determine what happened to his wife's body in matters of reproduction was put firmly to an end in *Paton v British Pregnancy Advisory Service Trustees,* the judge commenting that:

> [N]o court would ever grant an injunction to stop sterilization or vasectomy any more than it would use the old decree of restitution of conjugal rights to compel matrimonial intercourse.[56]

Although no longer the property of their husbands, what of a woman's self-ownership? These ways of constructing 'femininity' have traditionally influenced the regulation of women's bodies where, 'female sexuality and women's powers of reproduction are the defining (cultural) characteristics of women, and, at the same time, these very functions render women vulnerable, in need of protection or special treatment.'[57] Female bodies are different, and it is this bodily difference in the capacity to procreate that has posed a particular dilemma for law. Men do not become pregnant, but many women do. Arguably, this is why matters of equality and self-determination become peculiarly messy when the law is required to deal with pregnant bodies. Are pregnant bodies comparable to *men's* sick bodies? Pregnancy is not comparable to an 'illness' as such, but for years this was exactly how the law approached pregnancy for the purposes of granting maternity rights.[58] While the experience of pregnancy is

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[54] See further, Ngaire Naffine, 'The Legal Structure of Self-Ownership: Or the Self-Possessed Man and the Woman Possessed' (1998) 25 *Journal of Law and Society* 193.

[55] *R v R* [1991] 4 All ER 481; [1991] 3 WLR 767 (HL).

[56] *Paton v British Pregnancy Advisory Service Trustees* [1979] 1 QB 276.

[57] Grosz, above n 31.

[58] Morris and Nott, above n 4.

hardly a new phenomenon to women, the law has traditionally struggled to find the language to conceptualise it. For instance, what language is appropriate for decisions to terminate a pregnancy or refusals of invasive treatment where this may place a healthy foetus at risk? How for example can the classic expression of self-determination that 'Every human being of adult years and sound mind has a right to determine what shall be done with *his* own body',[59] apply to pregnant bodies which are 'Not-One-But-Not-Two'?[60] As we have seen with abortion, rather than this being conceptualised as a matter of self-determination, a woman's exercise of her decisional ability to end a pregnancy, the Abortion Act 1967 explicitly *avoids* according substantive rights to women, but rather divests decisional powers to the medical profession. The conceptual basis of the 1967 Act, Sally Sheldon comments perpetuates the view that the decision to abort in itself is not an acceptable one for a woman to make. Rather, it stands as 'the exception to the norm of maternity' and only those women who have *good* reasons - the wrong type of foetus, existing obligations to children, poor social and living conditions - will be permitted to terminate a pregnancy.[61] Abortion then, is not a matter of self-ownership and self-determination, but is one that concerns the regulation and control of women. Here, we find that the rhetoric of body ownership has threatened, rather than facilitated women's rights to control their bodies, where such arguments have been 'deployed, through the use of medical knowledges... to facilitate the construction of the foetus as a

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[59] *Schloendorff v Society of New York Hospital* 105 NE 92 (NY, 1914).

[60] Isabel Karpin, 'Legislating the Female Body: Reproductive Technology and the Reconstructed Woman' (1992) 3 *Columbia Journal of Gender and Law* 325, 329.

[61] Sally Sheldon, *Beyond Control, Medical Power and Abortion Law* (London: Pluto, 1997), 42.

separate, rights-holding 'being'.'[62] The foetus is positioned as a patient in its own right, the medical profession as its protector. Autonomy in this context 'continues to be defined in terms of a separate self, in need of protection from the (m)Other, now constructed as both a potential treat to the innocent and a perversion of the natural.'[63] Moreover, this medical model of foetal separation and abstraction from the woman's body has highly influenced the law. When a pregnant woman and her foetus are injured, is the foetus part of the mother like 'her arm or her leg', or 'a separate organism from the mother'?[64] As Carl Stychin comments, the application of the liberal ideal of autonomy to the foetus has had the consequence of constructing the female body as a passive object 'which must be controlled and regulated to protect the autonomy of the foetus'[65] rather than situating the woman as an autonomous self.

From a feminist perspective then, it is biological difference that has formed the source of oppression, rendering women as connected, dependent and subordinate to men. While this has served to undermine women's involvement in the public sphere, it has also affected their capacity to act autonomously in relation to matters of reproduction. Of course, there has been a conceptual shift in the law's engagement with women, and in the reproductive field, most significantly in relation to the courts' articulation of women's claims to autonomy in enforced caesarean cases. Despite this, however, the law still defers considerable power to doctors, regarding access to both abortion and infertility services, and the extent of power that doctors hold quite generally in the management of childbirth holds serious practical implications for

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[62] Carl F Stychin, 'Body Talk: Rethinking Autonomy, Commodification and the Embodied Legal Self' in S. Sheldon and M Thomson (eds) *Feminist Perspectives On Health Care Law* (London: Cavendish, 1998), 223.

[63] Stychin, above n 62, 224.

[64] Attorney-*General's Ref No 3 of 1994* [1996] QB 581 at 593.

[65] Stychin, above n 62, 224.

women's autonomy in reproduction. While competent women hold the right to self-determination, doctors still hold control over the determination of incapacity, which is often accepted by judges as an 'uncontestable question of fact.'[66] This coupled with the 'prevailing assumption... that every right-minded pregnant woman will eagerly comply with her doctor's requests for cooperation'[67] means that there are more subtle ways of undermining a woman's self-determination in practice. As Emily Jackson maintains, there is a need for the law to spell out more clearly 'when a patient will be judged incapable of making her own decision', and the 'circumstances in which a caesarean section will be deemed to be in her best interests'.[68]

So where does this leave us? In practical terms, reproduction remains a matter of medical control, and the law has certainly been permissive of this. However, a more optimistic reflection upon reproduction as a significant part of health care provision, would posit that in legal terms, medical law is in a state of "conceptual metamorphosis". By no means is this a fresh observation, Derek Morgan having provided a detailed and insightful view of the "metamorphosis" of medical law in a multi-faceted sense.[69] My interest in this notion is particularly focused on the central stance now afforded to considerations of patient autonomy in the courts' deliberations in the health care forum - and the action for wrongful pregnancy, I suggest, forms part of this "conceptual metamorphosis", in more ways than one.

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[66] Emily Jackson, *Regulating Reproduction, Law, Technology and Autonomy* (Oxford: Hart Publishing, 2001), 139.

[67] Jackson, above n 66, 135.

[68] Jackson, above n 66, 136.

[69] Derek Morgan, *Issues in Medical Law and Ethics* (London: Cavendish Publishing, 2001), 13-36.

The law's acceptance of the mother's claim in the action for wrongful conception, and its recognition that an unwanted pregnancy can be a real harm, invites a different perspective in relation to the debate on women's autonomy in reproduction – and an altogether more promising one. Such claims have been met by a greater judicial willingness to construe pregnancy under some circumstances as harmful to the woman, rather than a state that gives rise to a conflict between foetus and mother. And significantly, the case law here signals a willingness to characterise women as *subjects*, rather than the passive *objects* of legal and medical control.

This is *not* to say that the characterisation of the harm offered by the courts is free of problems; as previous chapters have argued, there remains an obvious tension in the way that the courts have recently construed the child maintenance claim.[70] However, this specific head of damages opens up a space in which to consider how pregnancy impacts upon women's lives and identity, as well as a standpoint from which to challenge the notion that pregnancy is merely a corporeal and episodic event. Furthermore, this action provides an alternative place to question how the law of tort approaches those harms *unique* to women, the extent to which the law expresses concepts of reproductive harm, responsibility and autonomy resonant with women's experiences and importantly, to offer possible strategies for their articulation in the law.

UNWANTED PREGNANCY AS A PERSONAL INJURY?

Babies do not arrive as the result of a painless and uneventful stork delivery. Recognition of this fact in the wrongful conception action is

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[70] *McFarlane v Tayside Health Board* [2000] 2 AC 59; *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52; [2004] 1 AC 309. See further chapters one and two.

found in the first head of damages for the pain and suffering and loss of amenity attendant upon pregnancy.[71] For pregnancy and childbirth to attract such damages, these may only be awarded if they are treated as forms of personal injury.[72] In *Allen v Bloomsbury Health Authority*[73] Brooke J was willing to conceptualise pregnancy and childbirth in this way, when considering the claim of a mother who was negligently deprived of the opportunity to have a pregnancy terminated. He awarded damages for:

> ...the discomfort and pain associated with the continuation of her pregnancy and the delivery of her child [as] a claim for damages for personal injuries... *comparable to*, though *different from*, a claim for damages for personal injuries resulting from the infliction of a traumatic injury.[74]

Just how might pregnancy and childbirth be 'comparable to, though different from', other injuries? Brooke J failed to expand on this point. Failing to commit one way or the other merely leaves unwanted pregnancy as a 'sort of injury.' In the absence of a 'conclusive judicial definition',[75] authors grappling with this question have been inclined to refer to the definition of personal injury under section 38(1) of the Limitation Act 1980: 'any disease or any impairment of a person's physical or mental condition'. Indeed, this broad definition certainly permits scope for suggesting that wrongful pregnancy can constitute a personal injury. W.V. Horton Rogers submits that it should not be

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[71] Damages for pain and suffering attendant upon pregnancy have been routinely accepted in both contract and tort: *Scuriaga v Powell* (1979) 123 SJ 406; *Udale v Bloomsbury Area Health Authority* [1983] 1 WLR 1098; *Thake v Maurice* [1986] QB 644; *Allen v Bloomsbury Health Authority* [1993] 1 All ER 65 (although Brooke J off set the advantage of not undergoing a termination of the pregnancy).

[72] *McLouglin v O'Brien* [1983] AC 410.

[73] *Allen v Bloomsbury Health Authority* [1993] 1 All ER 651.

[74] *Allen,* above n 73, at 657-658 [my emphasis].

[75] Mullis, above n 16.

difficult to regard pregnancy as an impairment of a woman's condition since it involves 'an element of danger, certain discomfort and possibly severe disruption of the woman's employment and pattern of life'.[76]

This 'pregnancy as impairment' perspective resonates with the Court of Appeal's holding in *Walkin v South Manchester Health Authority*[77] in which a more detailed consideration of the issue was offered. At what point could it be said that an injury was sustained? Here the court considered three possible periods: the failure of the sterilisation, conception and birth. The failure of the attempt to sterilise, Auld LJ considered was not itself a personal injury: 'It did her no harm; it left her as before.'[78] Rejecting the birth as the injury, albeit with no justification as to why this could not be the originating point, Neill LJ was 'persuaded... that the better view is to treat the "wrongful" conception as the moment of injury.'[79] Despite this, Neill LJ was not entirely satisfied with the conclusion, noting that in most cases the cause of action arises at the time of the negligent act. This is doubtful, bearing in mind that in *all* personal injury cases time only starts to run from the date of the injury or from the date of the knowledge of such injury.[80] Nor did Neill LJ consider that this might well be inappropriate in the context of a wrongful conception suit, since knowledge of the failed sterilisation, 'may not occur until some weeks later, especially where the plaintiff does not realise that there is a possibility that she may be

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[76] W.V. Horton Rogers, 'Legal Implications of Ineffective Sterilization' (1985) *Legal Studies* 296, 310.

[77] *Walkin v South Manchester Health Authority* [1995] 1 WLR 1543; [1995] 4 All ER 132.

[78] *Walkin,* above n 77, at 1550.

[79] *Walkin,* above n 77, at 1554.

[80] Section 14 of the Limitation Act 1980.

pregnant'.[81] Taking conception as the moment of injury, and expressly relying on section 38(1) of the Limitation Act 1980, Auld LJ considered that an unwanted conception, whether as a result of negligent advice or surgery, would constitute a personal injury in the sense of 'impairment.' He added that the 'resultant physical change in her body resulting from conception was an unwanted condition which she had sought to avoid by undergoing the sterilisation operation.'[82] As this had been accepted by both parties Roch LJ conceded the point, although not without expressing his reservations:

> I have some difficulty in perceiving a normal conception, pregnancy and the birth of a healthy child as 'any disease or any impairment of a person's physical or mental condition' in cases where *the only reasons for the pregnancy and subsequent birth being unwanted are financial.*[83]

A somewhat unlikely state of affairs, considering that Mrs Walkin had taken deliberate steps to avoid conception, pregnancy *and* birth – all of which hold more than merely financial repercussions.[84] This does, however, raise an interesting point. The identification of conception as the point of injury, Whitfield suggests, 'depends upon whether or not the mother wanted to conceive', adding that 'this presents the conceptual difficulty of the plaintiff's right to damages being dependent

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[81] Case Comment, '*Walkin v South Manchester HA* [1995] 4 All ER 132' (1995) *Journal of Personal Injury Litigation* 236, 238.

[82] *Walkin,* above n 77, at 1550 [my emphasis].

[83] *Walkin,* above n 77, at 1553.

[84] Note, however, that Mrs Walkin did not make a claim for the pain and suffering attendant upon personal injury, but framed her (second) writ as a claim for the economic losses in raising a healthy unwanted child. Her reason for doing so was to avoid the three-year limitation period serving to statute-bar her claim. On this basis the Court of Appeal held that her claim for the economic losses could not be separated from that of the personal injury. Nevertheless, the absence of a personal injury claim under these circumstances cannot, in my view, lead to the conclusion that the loss she has suffered is *purely* financial.

not upon the defendant's acts but upon the plaintiff's *attitude* to the defendant's act.'[85] And, unlike J.K. Mason, Whitfield is not only directing this attitudinal point to the wrongful birth claim where a 'healthy' child was a *wanted* outcome.[86] One of the practical difficulties Whitfield considers to emerge from this conceptualisation of injury is that of the woman who does not wish to be pregnant at the time of conception, but later changes her mind, when she finds out that she is pregnant.[87] Surely, as in the majority of cases, this woman would not then bring a claim? Questioning the attitudes of those who do bring claims is to trivialise the importance of the decision to undergo sterilisation, and moreover, seems to suggest that any woman who wavers in her view towards pregnancy is more likely than not, to fall down in favour of *wanting* it. If indeed conception following a failed sterilisation is an injury, then it should be treated *as an injury*.[88] The court would be unlikely to question in any other context a claimant's state of mind towards *his* injury caused by negligence, to determine if indeed it *really is an injury*. The *Walkin* definition of injury however, has other implications. The Court of Appeal having ruled out the failed sterilisation itself as the point of injury, on the basis that 'it left her as before', must also eliminate any possibility of a man claiming personal

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[85] Adrian Whitfield, 'Actions Arising from Birth' in Ian Kennedy and Andrew Grubb (eds), *Principles of Medical Law* (Oxford: Oxford University Press, 1998), 690.

[86] Mason, above n 19 (see also chapter two).

[87] If indeed, the courts are to undertake these types of enquiries as to the 'attitude' of the woman involved, then the problems that Whitfield raises in relation to 'conception-as-injury' would not be eliminated through considering later points of the reproductive process as the injury in any event.

[88] There is, however, one exception to this. Roch LJ in *Walkin* raised the example of a man having a vasectomy, who enters into a relationship with a woman, who is unaware of the sterilisation operation. She is desirous of having a child and becomes pregnant by that man because the operation has not been properly performed and then looks to that man for maintenance of the child who is subsequently born. Clearly, in such a situation, the claimant would be the man.

injury where his fertility remains following a vasectomy. Is it sensible to speak of an ineffective vasectomy in terms of personal injury? Most think not.[89] Professor Rogers suggests that as a failed vasectomy merely maintains the status quo, that is maintains the normal condition, a 'state of fertility, albeit undesired' cannot constitute actionable damage.[90] Therefore, unless the claimant can illustrate that he has suffered mental disturbance - nothing short of psychiatric harm - his claim will be one of economic loss through raising an unwanted child, therefore parasitic to the mother's claim.[91] Therefore, in this alternative situation, the woman will need to establish that her partner's doctor owed her a duty of care to prevent physical injury. In a continuing relationship where the partner's doctor knows of her existence, this should be straightforward,[92] since it would be readily foreseeable that if a vasectomy fails the woman will become pregnant as a result of sexual intercourse. Where this is not the case, a doctor will not owe a duty to every woman that a man impregnates. In *Goodwill v British Pregnancy Advisory Service,*[93] Ms Goodwill claimed damages for the costs associated with pregnancy, as a result of her (illicit) partner's vasectomy having spontaneously reversed. Her partner, Mr Mackinlay, however, had undergone the vasectomy procedure three years *prior* to his sexual relationship with Ms Goodwill. The Court of Appeal struck out the claim as "vexatious", holding that at the time her partner was told that he could dispense with contraception the claimant was:

> ...merely like any other woman in the world, a potential future sexual partner of his, that is to say a member of an *indeterminately large class*

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[89] Whitfield, above n 85; Jackson, E, above n 66, 29; Mullis, above n 16.

[90] Rogers, above n 76, 310.

[91] However, as illustrated in chapter one claims involving healthy children and parents are ruled out following both *McFarlane* and *Rees* (above n 70).

[92] See for example, *McFarlane,* above n 70; *Thake v Maurice* [1986] QB 644.

[93] *Goodwill v British Pregnancy Advisory Service* [1996] 1 WLR 1397.

> *of females* who might have sexual relations with Mr MacKinlay during his lifetime.[94]

Therefore, providing that a duty is owed, the personal injury suffered through a wrongful conception is one that is sustained by the woman who conceives, carries and gives birth to the child – and this is so, whether conception results from a failed sterilisation or vasectomy. As Mason comments, 'the fact that the claim can be a real one is demonstrated by the acceptance of the mother's claim in *McFarlane*'.[95] Indeed, the House of Lords unquestionably accepted that the mother had suffered an actionable physical wrong – although the judgment is littered with varying accounts as to how this natural, biological process could be conceptualised - as "injury", "harm", "damage" or "invasion of bodily integrity". Lord Slynn, for example, commented that it was unnecessary to consider:

> ...the 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 vasectomy was to prevent them happening.[96]

Not a harm or injury in the ordinary sense of the words – therefore in an *extraordinary* sense? This appears dangerously close to expressing the view that because pregnancy and birth are merely elements of the natural process of reproduction, they are therefore not self-evidently injuries. 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

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[94] *Goodwill,* above n 93, at 1405 (*per* Peter Gibson LJ) [my emphasis]. See further, Michael Davies, 'Reliance on medical advice by third parties: the limits of *Goodwill*' (1996) 12 *Professional Negligence* 54.

[95] Mason, above n 19, 48.

[96] *McFarlane,* above n 70, at 74.

noting that it 'may seem odd to describe the conception as harmful.'[97] His Lordship noted that in *normal* circumstances this would not be the case, as the 'physical consequences to the woman of pregnancy and 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'.[98] Refusing to take account of any possible 'relief and joy' following childbirth, Lord Hope observed that 'pregnancy and childbirth involve changes to the body which may cause, in varying degrees, discomfort, inconvenience, distress and pain.'[99] 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. Underpinning this point, Lord Hope raised examples from the field of personal injury where the natural consequences of an initial injury, such as the development of arthritic changes, are taken into account.[100] An alternative analogy might have been suitable here, since these particular natural consequences emerge *after* the (unnatural) infliction of an injury - but the point is clear. What might constitute natural processes in the course of ordinary life (for example, illness and eventual death) do not remain 'natural' and thereby harmless events, if negligently *inflicted* upon an individual.[101] 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

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[97] *McFarlane,* above n 70, at 86.

[98] *McFarlane,* above n 70, at 86.

[99] *McFarlane,* above n 70, at 87.

[100] *McFarlane,* above n 70, at 87.

[101] To furnish this point further, while illness and death may be natural under ordinary circumstances, the manner and timing of their occurrence renders such events as injuries, as opposed to natural events. A similar analogy can be drawn with infertility as natural/ injurious.

involves substantial discomfort'.[102] In similar vein, Lord Clyde suggested that natural as the mechanism may have been, 'the reality of the pain, discomfort and 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.'[103] 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.'[104] 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'.[105]

Could these characterisations leave lower courts in any doubt that an unwanted pregnancy constitutes anything other than an actionable physical harm? In *Greenfield v Irwin,*[106] a case following *McFarlane*, the claimant was treated with a course of contraceptives. She alleged that the defendants negligently failed to diagnose that she was pregnant at the time, with a *healthy* child that she did not want; as such that their negligence deprived her of the opportunity to have the pregnancy terminated. Having given up work to look after the child, she brought a claim for lost earnings. The main factual difference between *McFarlane* and *Greenfield* was that in the former, the negligence led to the

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[102] *McFarlane,* above n 70, at 81.

[103] *McFarlane,* above n 70, at 102.

[104] *McFarlane,* above n 70, at 102.

[105] *McFarlane,* above n 70, at 114.

[106] *Greenfield v Irwin* [2001] EWCA Civ 113 – note that the point of injury here turns not on conception, but continuation of the pregnancy. Therefore, the claimant argues that negligence deprived her of the opportunity to terminate under the Abortion Act 1967. For these reasons, J.K. Mason categorises *Greenfield* as a wrongful birth claim despite the factual difference that the child at issue was healthy (Mason, above n 19).

wrongful conception, whilst in *Greenfield*, the negligence consisted of a failure to diagnose pregnancy depriving the claimant of the opportunity to terminate. Providing the leading judgment in the Court of Appeal, Buxton LJ stated:

> I am unable to accept that the damage suffered here was "physical" in any way that makes a relevant distinction between this case and *McFarlane*. It may or may not be right... that what happened here is to be characterised as an interference with the plaintiff's body, even thought it was a failure to interrupt a physical process already in operation rather than the initiation of a process. But there is no difference between this case and *McFarlane* which, in my judgment, makes any distinction that is relevant in law between the two cases.[107]

This can be interpreted in two different ways. In isolation this might appear to reject that an unwanted pregnancy is a type of physical harm at all. In attempting to demonstrate how difficult the courts have found it to conceptualise pregnancy as an injury, Christian Witting comments of Buxton LJ's statement that, 'His Lordship appears to have assumed that the House of Lords in *McFarlane* had found that the claimant suffered *no* physical injury.'[108] Indeed, others have also interpreted Buxton LJ as 'initially' rejecting that the primary injury is the mother's condition of being pregnant.[109]

Such interpretations, however, are misconceived.[110] Once one examines the context of this judgment, and the arguments raised by counsel in

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[107] *Greenfield,* above n 106, at paragraph [13].

[108] Christian Witting, 'Physical Damage in Negligence' (2002) 6 *Cambridge Law Journal* 189, 195.

[109] Oliver Radley-Gardener, 'Wrongful Birth Revisited' (2002) 118 *The Law Quarterly Review* 11, 13.

[110] Furthermore, it should be noted that Buxton LJ *did* recognise the basis of the House of Lords decision in allowing the claim of pain and suffering attendant on pregnancy, when he said: '[W]hat was described for the purposes of identification as the mother's claim, which was a claim for discomfort from the pregnancy and the

Greenfield, Buxton LJ's response does *not* reject that pregnancy is a personal injury, but merely indicates that there is no 'relevant' difference between this case and *McFarlane* to justify deviation *from McFarlane.*

To make this clearer, in *Greenfield*, counsel for the claimant argued that the personal injury Mrs Greenfield suffered was no different to those cases where injuries, diseases or other conditions were not properly diagnosed and treated – notably as the result of a negligent act. A good example of this is where the defendant fails to detect the early symptoms of a treatable cancer.[111] By contrast, in *McFarlane* the negligence consisted of a *misstatement*, notably that the plaintiff's vasectomy operation had been successful and that the couple could now dispense with contraception. Where the distinction lies, is that the first is a negligent act (negligence *simpliciter*), while the latter consists of negligent words.[112] The significance being that the common law tended

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injury and stress of the act of giving birth. A ruling that she could recover in that respect was upheld in the House of Lords.' (*Greenfield,* above n 106, at paragraph [7]). Also, May LJ reflecting on the determination of the claim for loss of earnings due to pregnancy and birth in *McFarlane,* stated: "That might readily have been characterised as a claim for damages consequential on, or parasitical to, a personal injury claim, the personal injury being that associated with the pregnancy and birth itself."

[111] A hospital casualty department can be responsible for making an incorrect diagnosis and sending a patient away without treatment (*Barnett v Chelsea & Kensington Hospital Management Committee* [1969] 1 QB 428); or indeed failures to detect abnormalities in cervical screening (*Penney v East Kent HA* [2000] Lloyd's Rep Med 41 (CA)).

[112] An unwanted birth can result from negligent words (advice that contraception is not necessary following surgery; failure to advise of the possibility of spontaneous reversal of vasectomy; advice about a hereditary condition on the basis of which the claimants decide to have a child) or negligent actions (a failed sterilisation or abortion; incorrect diagnosis that the woman was not pregnancy or that a foetus did not suffer from an abnormality).

to take a cautious approach in imposing loss caused by statements, on the basis that *words* are more likely, than *deeds*, to give rise to only financial loss, than physical harm. That this seems to be the driving force of Buxton LJ's concerns is further reinforced:

> The attraction of the analysis [to counsel] was to seek to argue that there was a strong, indeed stark, distinction in the law of negligence between the rules applying to a case that can be characterised as one of advice or causing of economic loss; and to a case that can be characterised as one of physical damage. That, however, is not now the law.[113]

Perhaps the most interesting aspect of *Greenfield* is that this claim actually went as far the Court of Appeal, since in *McFarlane*, Lord Steyn ruled out such a distinction in these actions:

> [I]n regard to the sustainability of a claim for the cost of bringing up the child it ought not to make any difference whether the claim is based on negligence *simpliciter* or on the extended *Hedley Bryne* principle... the latter is simply the rationalisation adopted by the common law to provide a remedy for the recovery of economic loss for a species of negligently performed services[114]

This is, as Hoyano suggests, 'conflating 'pure' and consequential economic loss'.[115] On this basis, it appears that plaintiff's counsel in *Greenfield* had hoped to encourage the Court of Appeal to distinguish between consequential and pure economic loss, so that the loss of earnings claim would be regarded as economic loss consequential on personal injury. Therefore, contrary to Witting's interpretation, the Court of Appeal on this reading was not casting any doubt as to whether pregnancy was a physical injury. Indeed, this issue did not seem to

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[113] *Greenfield,* above n 106, at paragraph [14].

[114] *McFarlane,* above n 70, at 83-84.

[115] Laura Hoyano, 'Misconceptions about Wrongful Conception' (2003) 65 MLR 883, 886.

unduly preoccupy the court at all, nor ought it to have.[116] Rather, the Court was more concerned as to whether a distinction could be drawn between *McFarlane* and *Greenfield* as to the *manner* by which the injury was caused and was simply rejecting counsel's argument that this should be conceptualised as a single cause of action in respect of personal injury. Indeed, if any question arose concerning pregnancy as an injury, this centred on the fact that *Greenfield* concerned a 'failure to interrupt a physical process already in operation rather than the initiation of a process'.[117] Certainly the *Walkin* definition of injury, which posits the precise point of injury at the point of conception – a view also echoed in *McFarlane* 'the harmful event was the child's conception'[118] - must fail to apply in this situation. Nevertheless, in *McFarlane*, their Lordships' review of the case law relating to such claims appears to provide, at least, tacit approval that the continuation of an unwanted pregnancy owing to negligence would entitle such a claim to succeed.[119] No doubt, this view underpinned the reasoning of the Court of Appeal in *Greenfield* that such damages should be recovered.

There can be little question that for the purposes of the law, an unwanted pregnancy brought about by negligence is a harm that will resound in damages. This is the case, whether justified by reference to 'impairment' under the Limitation Act 1980, the 'unwanted' nature of the condition, the frustrated purpose of sterilisation or vasectomy, the invasion of a woman's bodily integrity, and the pain and suffering that these events entail. For some, however, these accounts are deeply

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[116] *Per* May LJ at paragraph [43]: "There may be a claim for what may be characterised as a personal injury, but that claim does not extend to the loss of earnings' claim with which this court is concerned."

[117] *Greenfield,* above n 106, at paragraph [13] (*per* Buxton LJ).

[118] *McFarlane,* above n 70, at 86 (*per* Lord Hope).

[119] For example, *Allen v Bloomsbury Health Authority* [1993] 1 All ER 651; *Scuriaga v Powell* (1979) 123 SJ 406.

problematic. The language of "harm", "injury" or "invasion of bodily integrity" used in such cases, it is suggested, merely indicates that these are types of harms that, in an *orthodox* legal sense, cannot be said to be harm at all. Here sits the contention that the law is being 'stretched' to give effect to a 'social conception of harm'.

THE GROWTH OF TORT & THE *STRETCHING* OF HARM?

The law, it is said, is being stretched 'in half a dozen different directions'.[120] Concepts of fault, causation, harm – the 'very concept of negligence' - have been stretched, out of all recognition in the 'favour of injured accident victims.'[121] Whether owing to sympathetic judges,[122] greedy lawyers (who might be seen as the ultimate beneficiaries of 'law stretching'), or the product of living in a "blame culture", the result is that 'the whole system is shot through with absurdity and unreality.'[123] Or so Atiyah maintains, lamenting that 'at one time damages for injury, especially for personal injury, were almost entirely confined to cases where the victim suffered a plain and obvious physical injury'.[124] Whether one should regard the recognition of merely 'plain and obvious' physical injuries as constituting the *good old days* of tort law, is to be doubted – but no doubt it was a great deal simpler.

Over the decades, the legislative and common law development of tort, in general, has been nothing short of astonishing. In the legislative realm, numerous pockets of liability have opened up. One can now take a claim for harassment, even where no immediate violence is

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[120] Atiyah, above n 13, 32.

[121] Atiyah, above n 13, 32.

[122] Atiyah, above n 13, 37.

[123] Atiyah, above n 13, 94.

[124] Atiyah, above n 13, 52.

threatened,[125] a claim against a tortfeasor who specifically excludes such liability,[126] or indeed a claim where one is partly at fault for his injuries[127] – not even the grave will shield a dead tortfeasor from liability.[128] This is to name just a few of the legislative developments,[129] but of the most significant has been the enactment of the Human Rights Act 1998, which allows claims to proceed against public authorities for the invasion of, or failure to protect against invasion, the rights under the European Convention on Human Rights. Whilst such legislative hyperactivity might be partly explained by the refusal of judges to modify a rule 'even though it had become unacceptable',[130] as Weir comments, the common law has been far from complacent:

> In 1789 [the courts] held that a liar was answerable for the harm caused by his deceit although he obtained nothing by his false pretences. In 1862 they held it tortious knowingly to persuade a person to break his contract with the plaintiff. In 1866 they held the occupier of premises liable for failing to make them reasonably safe for people who came there on business. In 1891 they allowed injured workmen to sue for breaches of safety legislation. In 1897 they held it tortious to play a nasty practical joke which made the victim ill. In recent years the courts have increasingly held defendants liable for failing to protect people against third parties, or even themselves...[131]

And the list of instances where the courts have opened up liability continues to grow, not only through recognising new types of harm, for

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[125] The Protection From Harassment Act 1997.

[126] The Unfair Contract Terms Act 1977.

[127] The Law Reform (Contributory Negligence) Act 1945.

[128] The Law Reform (Misc. Prov.) Act 1934.

[129] For a brief, but interesting account of the historical development of tort law, see further Tony Weir, *Tort Law* (Oxford: Oxford University Press, 2001).

[130] Weir, above n 129, 3.

[131] Weir, above n 129, 3-4.

example, pure economic loss[132] or purely psychiatric damage,[133] but the variety of *ways* that such harms, whether physical, psychological or economic, might be inflicted.[134] Therefore, for those who have been harmed, this snapshot of the development of torts might well appear an entirely *positive* and promising one – after all, is it not the case that the law of torts is increasingly willing to extend its protection? Or rather, should we, like Weir, regard this development in more *negative* terms: 'it is undeniable that the progressive socialization of harm diminishes the responsibility, indeed the autonomy, of the individual.'[135] Whether one is inclined to view the growth of tort law in either positive or negative terms much depends on one's perspective and, of course, the questions one asks. As Conaghan comments, 'from a feminist perspective, it is difficult to see how the autonomy of women is diminished by developments which facilitate legal redress in the contexts of acts of sexual violence and abuse, raising a question as to *whose* autonomy Weir perceives to be threatened.'[136] This is a valuable point. Some might, for example, cast a suspicious eye on this rather generalised talk of growth and stretching when considering those areas where the law is *not* in favour of expanding liability, but rather retracting it.[137]

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[132] *Hedley Bryne & Co. v Heller & Partners Limited* [1964] AC 465.

[133] *Dulieu v White* [1901] 2 QB 669.

[134] See for example, *Phelps v London Borough of Hillingdon* [2001] 2 AC 619, where the House of Lords held that the failure to ameliorate the effects of dyslexia can be harm, albeit leaving open the question of whether this would constitute a personal injury or an economic loss claim.

[135] Weir, above n 129, 6.

[136] Joanne Conaghan, 'Tort Law and Feminist Critique' (2003) 56 *Current Legal Problems* 175, 186.

[137] For example, the barring of child maintenance claims in the wrongful conception action (see chapter one).

It is undeniable that the increased recognition of different harms must also bring with it the burden of increased responsibilities. Therefore, the individual in this context - the teacher, doctor, employer or policeman - will need to be extra vigilant to prevent the occurrence of harms that, at one time, would not have been regarded as harmful at all. In this sense, therefore, Weir's point seems to simply posit that, the greater the responsibility to avoid causing harm, the greater the impairment of *that* responsible agent's ability to move freely in society. Furedi neatly encapsulates this view:

> The most negative consequence of compensation culture is not the amount of money paid out in frivolous cases. It is the extension of formalised liability into areas that were hitherto considered to be the domain of personal responsibility [which] contributes towards relieving the burden of responsibility from the individual by reinterpreting misfortune as by definition the responsibility of others.[138]

But there are two faces of autonomy. It is one thing to deny burdening individuals with responsibility under the concept of distributive justice where harms are spread equally, but quite a *different* matter where those harms are spread 'unequally and if some persons or classes of persons bear them to a considerably greater degree than others.'[139] Such liberal conceptions of autonomy, responsibility, harm and risk, then merely become a mask for substantive and procedural inequality. Therefore, whether the growth of tort law and the transfer of responsibility are considered as autonomy *enhancing* or *diminishing,* must certainly depend on what values are at stake, *whose* interests are at stake, and whether these are considered in society as worthy of protection.

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[138] Frank Furedi, 'Courting Mistrust: The Hidden Growth of a Culture of Litigation in Britain' (London: *Centre for Policy Studies*, 1999), 36.

[139] Jeffrie G Murphy, 'Some ruminations on women, violence, and the criminal law' in J.L. Coleman and A. Buchanan, *In Harm's Way, Essays in Honor of Joel Feinberg* (Cambridge: Cambridge University Press, 1994), 210.

So if the law is being stretched, in what areas and in what way is it being stretched? A number of commentators have pointed to the wrongful conception suit as constituting a piece of 'English folly', in awarding damages for the unexpected physical consequences of medical procedures, 'even where they cannot be said to be injuries at all'.[140] The *McFarlane* ruling has therefore been openly welcomed on the basis that:

> [T]he proper answer to the question whether reluctant parents of a healthy unwanted child can claim the cost of bringing it up is to say that to have a healthy child cannot be counted as 'damage', even though parenthood involves considerable expense.[141]

In this context, if "damage", as Weir complains, 'is the proper object of compensation, it is surprising how little attention courts and lawyers have paid to the concept'[142] – a quite extraordinary remark, since Weir devotes merely 301 words to the task of defining the concept. He suggests, that, 'In the normal case, damage consists of having fewer good things to enjoy or more bad ones to put up with than one would otherwise have had.'[143] If the courts apply this definition, can it be any surprise if the concept of harm is being stretched? Others, however, have undertaken a more detailed consideration of the concepts of "harm" and "damage" within the tort of negligence,[144] and of particular

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[140] Atiyah, above n 13, 54.

[141] Weir, above n 129, 186.

[142] Weir, above n 129, 186.

[143] Weir, above n 129, 186.

[144] Jane Stapleton, 'The Gist of Negligence' (1988) 104 *The Law Quarterly Review* 213; Jane Stapleton, 'Cause-In-Fact and the Scope of Liability for Consequences' (2003) 119 *The Law Quarterly Review* 388; Simon Deakin and Basil Markesinis, 'The Random Element of their Lordships' Infallible Judgment: An Economic and Comparative Analysis of the Tort of Negligence from *Anns* to *Murphy*' (1992) 55 MLR 619; Conaghan, above n 136; Joanne Conaghan, 'Gendered Harm and the Law of Tort' (1996) 16 *Oxford Journal of Legal Studies* 407; Joanne Conaghan, 'Tort

interest here, Christian Witting has done so within the context of the wrongful conception action. Questioning whether an unwanted pregnancy can constitute *physical damage*, and much echoing Atiyah's sentiment that 'giving birth is hardly a physical injury',[145] Witting claims that: 'We find that what constitutes physical damage for one purpose in the law of negligence might not constitute physical damage for another purpose.'[146] His thesis is *not*, however, that pregnancy and childbirth should not be treated as actionable damage, conceding that the reasoning employed by their Lordships in *McFarlane* was the 'product of an inherent logic'.[147] Rather, his claim is that the alleged injuries to the mother 'are not describable as deleterious physical changes',[148] and therefore do not constitute physical injuries 'in the orthodox sense', but those of a 'socially constructed kind.'[149] Considering the claim for pain and suffering in *McFarlane*, Witting comments:

> [T]he mother's conception was an entirely natural event that her physiological constitution was designed to induce and to accommodate... The development of her baby restricted her movements and resulted in physical confinement towards the end of the pregnancy. This was undoubted interference with the mother's autonomy. But the fact remains that the mother's physiological integrity was not compromised. Her organs continued to function in the way that "nature intended" and her body returned after delivery to its pre-conception state. It is difficult, as such, to describe the changes that took place within the claimant's body as *deleterious changes* or as having impaired their functioning.

Litigation in the Context of Intra-Family Abuse' (1998) 61 MLR 132; Conaghan, 'Law, harm and redress: a feminist perspective' (2003) 22 *Legal Studies* 319.

[145] Atiyah, above n 13, 54.

[146] Witting, above n 108, 190.

[147] Witting, above n 108, 194.

[148] Witting, above n 108, 192.

[149] Witting, above n 108, 194.

Equating an unwanted pregnancy with injury because of its *unwanted nature* or the risks of something going wrong, Witting rejects as fallacious, on the basis that threatened injury is not actual injury, as negligence does 'not compensate for risks arising in the air'.[150] Similarly, while one might imagine that the bodily changes involved in a pregnancy could easily satisfy notions of impairment or deleteriousness, for Witting, this is simply not enough. Juxtaposing the woman who is desirous of children against the woman who is not, he comments that, 'the fact that minds could differ over the question'[151] indicates that no physical injury has been suffered in the *orthodox sense*. Therefore, on what basis then did the House of Lords in *McFarlane* permit recovery if no physical damage has been suffered? Witting suggests that their Lordships clearly took:

> [S]ocial views into account in determining the answer to the question whether the law *should* treat the kind of claim in question *as if* it were a claim for physical injury or damage. The question they answered was a normative one, dependent upon social perceptions, not a positive one, dependent upon the proof of deleterious changes in the body of the claimant.[152]

Significantly, Witting creates a story of judges at a complete loss in conceptualising this manifestation of injury in orthodox legal terms, to the extent that they are forced to resort to the ordinary bystander test - a social conception of harm – in order to justify recovery. That their Lordships could not properly found the claim on the basis of orthodox physical damage, he suggests, also left the Court of Appeal in *Greenfield* confirming an award upon this 'wider notion of physical injury',[153] since there was great doubt as to what *McFarlane* had

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[150] Witting, above n 108, 193.

[151] Witting, above n 108, 194.

[152] Witting, above n 108, 194.

[153] Witting, above n 108, 196.

determined on this issue. Earlier analysis certainly illustrates that Witting's view of *Greenfield* is misconceived. This, coupled with a judicious editing of their Lordships' opinions in *McFarlane* might demonstrate that the 'judicial uncertainty' thesis is unfounded,[154] but perhaps more significantly, that Witting's views on this subject are informed by a series of gendered assumptions. After all, is it possible to reach any other conclusion when considering his view that, 'most women are only too glad to avail themselves of the opportunity to conceive and to give birth to children at some stage during their reproductive lives'?[155]

Despite significant evidence to the contrary,[156] and the fact that women are 'increasingly asking themselves whether they actually want to be

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[154] The earlier analysis of Witting's claim in relation to *Greenfield* illustrates the danger of taking arguments out of context. It is also interesting to note that in relation to *McFarlane*, he engages in a similar enterprise in developing this picture of judicial uncertainty. Using solipsism to avoid the end of the sentences where we find a more expressive characterisation of injury (for example in relation to Lord Hope). Or choosing one passage over another, for the same purpose. For example, Lord Steyn very closely equiparates pregnancy with personal injury, however the passage that Witting selects focuses on Lord Steyn's use of the ordinary bystander test, no doubt to evidence his notion of 'social construction of damage'. Nevertheless, Lord Steyn's invocation of the bystander test, while pivotal to the *rejection* of the child maintenance claim, holds a peripheral role in relation to the mother's claim.

[155] Witting, above n 108, 192-193.

[156] This is contentious for several reasons. Firstly, most women, is not *all* women. Certainly, it is true that the numbers of women who *choose* childlessness, or remain childless because of infertility remain in the minority, but it is a growing one. Belcher illustrates that of women born in the 1940's, around 10 per cent did not have children. Furthermore, official governmental forecasts suggest that of those born in the 1960's, at least 20 per cent will not have children and of those born in the 1970's, nearly one-quarter will not have children; see further, Alice Belcher, 'The Not-Mother Puzzle' (2000) 9 *Social & Legal Studies* 539. Secondly, it should be questioned what 'readily avail' means – does it mean choosing, planning, intending, wanting or desiring children? Possibly Witting would not draw such distinctions. Irrespective of the label

mothers',[157] the main thrust of Witting's argument is founded upon this premise.

Moreover, his presentation of unwanted pregnancy as 'natural' and therefore not 'deleterious' or an 'impairment', sustains a view that would only retain its cogency in a physical world completely untouched by human intervention – one where life is lived as fate. As a product of the technological revolution, mankind can now intervene to prevent the *natural* occurrence or *natural* progression of diseases that would otherwise have been undetectable. Would we be as calmly accepting of the view that the negligent failure to detect the early signs of cancer really did no harm, since it is "natural" for humans to become diseased and to eventually die? And, when transposed into the field of reproduction, can it really make sense to refer to anything as 'natural' in a biotechnological world that facilitates artificial means of reproduction such as *in vitro* fertilisation and gamete intra-fallopian transfer? Surely these are instances where both 'nature and tradition release their hold'?[158]

Much related to this, is the apparently pre-social conception of 'orthodox physical damage', which Witting presents as existing separately from any social conceptions of harm. Against this idea of

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that we attribute to his claim, as Purdy notes, pregnancy often results, not out of *desire* for motherhood, but rather through the non-use of contraception or because of the unavailability of abortion services (Laura Purdy, 'Babystrike!' in H. Lindeman Nelson (ed) *Feminism and Families* (New York: Routledge, 1997)). While the former tends to be conceptualised as careless or irresponsible, as Lee and Jackson point out, the perception of 'the reliability of contraception is fundamentally flawed' (Ellie Lee and Emily Jackson, 'The Pregnant Body' in Mary Evans and Ellie Lee (eds), *Real Bodies, A Sociological Introduction* (Hampshire: Palgrave, 2002), 128).

[157] J Bartlett, *Will you be Mother? Women who Choose to Say No* (London: Virago, 1994) as cited in Belcher, above n 156, 543.

[158] Anthony Giddens, 'Risk and Responsibility' (1999) 62 MLR 1, 5.

law as an autonomous and self-referential system, the stronger view must be that, the legal and the social are inextricably intertwined. Peter Fitzpatrick for example, underpins this point, commenting that society 'depends every bit as much on law for its identity as law depends on society', and that the two co-exist in a relational or constitutive 'theory of mutual determination'.[159] Similarly, Conaghan questions how, in the absence of 'social values or attention to context, notions of nature or deleteriousness are to be determined.'[160] Indeed, this portrayal of 'physical damage' as an immutable, fixed category becomes highly contentious when we consider that, 'of all the conceptual elements of the tort of negligence... *damage*, is by far the least developed'[161] and that the concept is 'relative, dependent on the circumstances of the occasion.'[162] Even if the law determines concepts of "damage" by reference to the Commuter on the underground, does this really implicate a *new* conception of harm, when historically 'the common law has been strongly associated with the concept of community... giving institutional expression to strongly consensual views of the community'?[163] And on those occasions where a decision 'may require the extension or adaptation of a principle or in some cases the creation of new law to meet the justice of the case',[164] and the recognition of

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[159] Peter Fitzpatrick, 'Distant Relations: The New Constructionism In Critical And Socio-Legal Studies' in P.A.Thomas (ed) *Socio-Legal Studies* (Dartmouth: Aldershot, 1997), 148-149.

[160] Conaghan, above n 136, 191.

[161] Markesinis and Deakin, above n 11, 77.

[162] John G. Fleming, *The Law of Torts* (Sydney: Law Book Co., 9th edition, 1992), 216. Interestingly this is something which even Witting seems to concede when he writes 'What the law will regard the physical changes as sufficient, "depends on the evidence and the circumstances"' (Witting, above n 108, 191).

[163] Richard Mullender, 'Tort, Human Rights, and Common Law Culture' (2003) 23 *Oxford Journal of Legal Studies* 301, 312.

[164] *Per* Lord Scarman in *McLoughlin v O'Brian* [1983] 2 All ER 298 (HL).

different harms, is this always explicable through a social conception of harm? However, of greater importance, can we be confident that law has even identified an authentic 'social conception of harm', when the judge's articulation on any given issue, is one that the *judge* '*reasonably believes* that the ordinary citizen would regard as right'?[165] At best, judges grounding their decisions on an 'empirical community'[166] are simply second-guessing.[167] After all, would a society that 'demands that parents should have the ability to limit the size of their families',[168] be so quick to assume that while an unwanted pregnancy *was* harm, maintaining a child for 18 years *was not*?[169]

But, more contentious still, is Witting's conceptualisation of unwanted pregnancy as a harmless, non-injurious event - in *orthodox* terms. As Conaghan suggests, the injury is located 'in a woman's *perception* of her state in a way which divorces that perception from her 'naturally' pregnant (and thereby harm-less) body, which Witting manages to present the injury as non-physical in origin'.[170] The 'unwantedness' of the pregnancy is rendered completely separate to the experience of the pregnancy itself and in so doing displaces the 'embodied and affective aspects' of an unwanted pregnancy.[171] Elsewhere the law reflects this

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[165] *McFarlane,* above n 70, at 82 (*per* Lord Steyn) [my emphasis].

[166] Mullender, above n 163, 313.

[167] Therefore, on this basis it could suggested that Witting has merely dressed up the labels of 'public policy' or 'legal policy' to masquerade as a 'social conception of harm'? For example, Lord Reid in *Parry v Cleaver* ([1970] AC 1) alludes to the ordinary bystander, "It would be revolting to the ordinary man's sense of justice, and *therefore contrary to public policy*..." (at 14 [my emphasis]).

[168] Witting, above n 108, 194.

[169] As Quick suggests, 'such references to reasonable public attitudes are a convenient but poor disguise for judicial policy-making'; Oliver Quick, 'Damages for Wrongful Conception' (2002) *Tort Law Review* 5, 7.

[170] Conaghan, above n 136, 191.

[171] Lacey, above n 49, 114.

Cartesian tradition of a dualism between mind and body, and the privileging of the mind over body.

Take, for example, the criminal law of rape with the notion of consent at its heart. As Nicola Lacey comments in this context, where the law locates the harm as a 'particularly mentalist, incorporeal one' this serves to 'block the articulation of the inextricable integration of mental and corporeal experience' and deny 'any expression of the corporeal dimension of this violation of choice.'[172] In this respect, the law of rape might form an analogous wrong, since many would argue that the injury of an unwanted pregnancy lies precisely in the absence of consent.[173] While this is resonant of a weaker and particularly 'mentalist construction of the wrong',[174] even this perspective is disarmed by Witting who constructs the woman's perception as too unreliable (irrational) to constitute an injury. Her autonomy is denied once placed within a framework of varying attitudes towards the desirability or otherwise of pregnancy – quite simply, if this is an injury, it is one which most women invite – how on earth can this constitute '*orthodox* physical harm'?[175]

So, what is this orthodox physical damage? While Witting concedes that unwanted pregnancy is 'so closely *analogous* to orthodox kinds of

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[172] Lacey, above n 49, 112.

[173] See for example, Eileen McDonagh, *Breaking the Abortion Deadlock: From Choice to Consent* (New York: Oxford University Press, 1996) who argues that the injury of wrongful pregnancy is analogous to the law of rape, or indeed kidnapping, since these are wrongs based on the absence of consent. Similarly, Alistair Mullis places considerable emphasis on whether a pregnancy is desired or not, and suggests that as 'a consequence, pregnancy may be a personal injury in some cases but not in others' (above n 16, 325)

[174] Lacey, above n 49, 112.

[175] Witting, above n 108, 203

damage that one would be splitting hairs to attempt to draw a line between them',[176] others are less generous in their view:

> Doctors would be puzzled by this talk of injury. This appears to have been a normal pregnancy, a physiological process no different in substance to a filling and emptying of the bladder or bowel. No doctor would equate a normal pregnancy followed by the birth of a healthy child with any kind of injury.[177]

Until we can answer this question, surely it must be impossible to confidently assert that an unwanted pregnancy is, or is not a personal injury? But this is far from straightforward. Any attempts to provide a definition by reference to the Limitation Act 1980 of 'any disease and impairment of a person's physical or mental condition',[178] merely throws up more questions – what is disease or impairment? That the search for such definitions have 'occupied so many good minds for so long with so much continuing contention', Nesse suggests, perhaps illustrates that the question of what 'disease' is, might either be 'miscast or unanswerable.'[179] Of course, to some, this might seem surprising, perhaps even intuitively wrong – we *know* what disease is, what impairment is - the body is not functioning properly, it deviates from the norm. Then what is the norm? How do we decide what concepts of normality are, in the absence of complete knowledge about the body?

What constitutes disease or normality is an entirely slippery matter. In the context of mental illness, Ian Kennedy demonstrates this point,

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[176] Witting, above n 108, 203.

[177] B Mahendra, 'Thrown to Woolf' (1995) 145 NLJ 1375.

[178] Express reliance on section 38(1) of the Limitation Act 1980 typifies the traditional approach in defining wrongful pregnancy as an injury. For judicial applications of the Limitation Act 1980 in relation to wrongful pregnancy, see *Walkin* (above n 77); and for academic applications, see Rogers (above n 76).

[179] Randolph M Nesse, 'On the difficulty of defining disease: A Darwinian perspective' (2001) 4 *Medicine, Health Care and Philosophy* 37, 37.

noting how homosexuality transformed overnight from an illness to a *not*-illness in 1974 following a vote of the American Psychiatric Association. As he suggests, it is not the *objective facts* that changed, since homosexuality remains as much a part of social life after 1974 as it was prior to that date.[180] What *has* changed however 'is how the particular doctors *choose* to judge it.'[181] The significance of this is clear. Rather than being immediately ascertainable as a matter of scientific exactitude, what we know as disease, illness and impairment are 'themselves fabrications of powerful discourses, rather than discoveries of 'truths' about the body and its interaction with the social world.'[182] Therefore, what constitutes a personal injury is not 'some static objectively identifiable fact',[183] but instead must be viewed as a concept that varies and changes in its meaning and application.

The circularity of arguments which rely on the false premise of 'most women do, some women don't' in relation to the experience of unwanted pregnancy, coupled with a confident reliance upon some self-evident notion of 'personal injury' must be seen to undermine most, if not all, of Witting's claims. Rather than blindly accepting the view that concepts of "damage" and "personal injury" are self-evident, objective and gender-neutral categories, we come to engage with the question of *what harm is* when we examine their distribution, recognition and quantification. For example, why does lost attractiveness in the case of women generate considerably higher awards than for men?[184] Or in the

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[180] Ian Kennedy, *The Unmasking of Medicine* (London: George Allen & Unwin, 1981).

[181] Kennedy, above n 180, 2.

[182] Ellen Annandale, *The Sociology of Health and Medicine: A Critical Introduction* (Cambridge: Polity, 2001), 35.

[183] Kennedy, above n 180, 4.

[184] See further, Judicial Studies Board Guidelines 2000, in Peter Barrie, *Compensation for Personal Injuries* (Oxford: Oxford University Press, 2002), 313.

context of female harms, why does the law provide generous damages for injuries causing *infertility*, yet only modest awards for wrongful pregnancy? And tellingly, could it be significant that Witting rejects that wrongful pregnancy is a personal injury, while judicial consensus holds that it is? The 'fact that minds could differ over the question'[185] might well indicate that what *physical injury is*, is most certainly not set in stone.

Despite such criticisms, Witting's characterisation of unwanted pregnancy as an injury sustained to the (differing) mind rather than the (unharmed, pregnant) body sets the stage for a further mode of enquiry. There are obvious differences between the outcomes of the courts and Witting's deliberations, but just how different are they in substance? As earlier analysis illustrates, Western metaphysical thought has been pervasive, and continues to reflect the law's mechanistic treatment of bodies in personal injury. Furthermore, dualistic thought continues to resonate with liberal conceptions of autonomy and body-ownership. Bearing in mind the gendered history of dualistic thought, and its tendency to exclude women's perspectives, it must be essential to question to what extent this informs the conceptualisation of harm in wrongful pregnancy. Therefore, the questions that we must ask at this stage are, *how* is wrongful pregnancy constructed and by reference to what values? And, importantly, what aspects of the experience of unwanted pregnancy are encapsulated (or excluded) through the personal injury framework?

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[185] Witting, above n 108, 194.

CHARACTERISING HARM : JUST ALL TOO CARTESIAN?

> The law of torts values physical security and property more highly than emotional security and human relationships. This apparently gender-neutral hierarchy of values has privileged men, as the traditional owners and managers of property, and has burdened women, to whom the emotional work of maintaining human relationships has commonly been assigned. The law has often failed to compensate women for recurring harms – serious though they may be in the lives of women – for which there is no precise masculine analogue.[186]

It is beyond question that the courts' acceptance of unwanted pregnancy as a recognised head of damages constitutes an important step in the field of reproductive law. Conceptually, this constitutes a significant shift away from viewing women as irrevocably tied to their reproductive functions, and indeed, the *legal* recognition that "harm" has occurred is a key societal signifier, since perceptions of harm 'are closely linked to law'.[187] From early case law that exhibits judicial expressions of doubt, if not considerable discomfort, in describing unwanted pregnancy as a 'harm' later case law such as *McFarlane*, provides a much stronger account. Contrary to the view that pregnancy is natural, therefore non-injurious, the law provides that, 'this is an area of family life in which freedom of choice may properly be exercised' and will respect 'the right of men and women to take steps to limit the size of their family.'[188]

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[186] Martha Chamallas and Linda K Kerber, 'Women, Mothers, and the Law of Fright: A History' (1989-1990) 88 *Michigan Law Review* 814, 814.

[187] Joanne Conaghan, 'Law, harm and redress: a feminist perspective' (2002) 22 *Legal Studies* 319, 322.

[188] *McFarlane,* above n 70, at 86 (*per* Lord Hope).

But - *there is a but.* A striking feature of *McFarlane* is that despite their Lordships firm acceptance of unwanted pregnancy as actionable physical damage, we are presented with three possible models of personal injury rather than a unitary vision as to what the injury precisely involves. Moreover, each way of seeing the pregnant body perpetuates a dualistic view of the experience of unwanted pregnancy. Lord Slynn for example, proceeded from a 'mentalist' perspective of injury, grounding his decision on a consent-based framework where the events that happened were simply "unwanted" and known to be unwanted.[189] Similarly, Lord Hope embraced this framework, but shifted his analysis of the injury as holding a strong physical dimension, detailing that the bodily changes might cause 'discomfort, inconvenience, distress and pain.'[190] For Lord Steyn, the injury is situated precisely in these physical consequences of pregnancy commenting that every pregnancy involves 'substantial discomfort'.[191] Certainly, pregnancy holds a strong physical dimension – as McDonagh comments 'pregnancy is a massive, ongoing set of processes, caused by a fertilized ovum, which keeps a woman's body physically operating and changing every second, minute, hour, day, week, and month for nine months.'[192] While the physical changes to a woman's body are unquestionably a strong element of the harmful experience of unwanted pregnancy, the inherent weakness of this approach is that it fails to recognise that pregnancy is 'rarely, if ever, experienced by women as [holding] solely bodily significance.'[193] By contrast, however, a much stronger thesis was put forward by Lord Millett who conceptualised the

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[189] *McFarlane,* above n 70, at 74.

[190] *McFarlane,* above n 70, at 87.

[191] *McFarlane,* above n 70, at 81.

[192] McDonagh, above n 173, 71.

[193] Mullin, above n 38, 33.

injury as consisting of the invasion of a woman's bodily integrity, and the threat of future physical and financial risk.[194]

So, is the injury physical, or mental, in the sense that the event was unwanted, an invasion of bodily boundaries, or does it consist of something else? Broadly speaking, each judgment presents the harm as an invasion of the fundamental right to bodily integrity, although each is expressed differently, without any 'detail about what is entailed'.[195] Significantly, while these accounts of injury are premised upon the traditional tort framework, in treating the body as something to be controlled by the mind, and the bodily boundaries to be protected from outside invasion, how do these fail to capture the experience and impact of an unwanted pregnancy? Is not a pregnancy something more than just a physical and biological event? And indeed, in severing the harm at the point of birth, does this not posit the harm as peculiarly *episodic*, rather than what must be perceived as an *enduring* responsibility? Might it be significant that these ways of describing the harm could be as easily deployed to describe an injury that a man might sustain? Is there not some sense that the uniquely female experiences of pregnancy and childbirth have been 'squeezed through a masculine interpretative sieve'[196] in order to provide legal recognition of this harm?

In daily life, Robin West suggests, women sustain physical, emotional, psychic and political harms that have little or no counterpart in the lives of men. Unwanted pregnancy, whether brought about by negligence or not, is itself a harm, and the aspect of this experience which holds no correlate in men's lives is that a woman finds herself in 'an

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[194] *McFarlane,* above n 70, at 107.

[195] *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 560 at paragraph [63] (*per* Hale LJ).

[196] Jo Bridgeman and Susan Millns, *Feminist Perspectives on Law, Law's Engagement with the Female Body* (London: Sweet & Maxwell, 1998), 390.

involuntarily nurturant position'.[197] When the pregnancy is wanted West maintains that this constitutes an uncomplicated act of altruism. However, when the pregnancy is *involuntary and unwanted*, the pregnant woman is undertaking nurturant work against her will, the consequence of which is that a woman's:

> [M]oral, relational life is thus as fully invaded as is her physical body. She nurtures, but without the preceding act of will and commitment that would engage her moral, choosing self. She becomes a nurturant but *unchoosing* creature – a little more like the spreading chestnut tree that gives without choosing to give, and a little less like an autonomous individual whose selfhood is strengthened rather than threatened by altruistic acts.[198]

West's emphasis on the relational and psychic dimension is one that the various accounts of the harm of unwanted pregnancy as physical, merely unwanted, or an invasion of bodily boundaries fail, *by themselves*, to capture. That this dimension is so often overlooked, West suggests, is perhaps because it is so deeply gendered.[199] While both men and women will be *causally* responsible for pregnancy, a woman's bodily connection with the foetus means that she also holds an inescapable 'decisional responsibility' – a responsibility that men can 'choose not to assume' or acknowledge by virtue of their bodily *alienation* from the consequences of their actions.[200] Furthermore, conceptualising the pregnant woman as involuntarily undertaking a nurturant position in relation to the foetus directly challenges liberal conceptions of 'possessive individualism, in which a free, self-

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[197] Robin West, *Caring For Justice* (London: New York University Press, 1997), 105.

[198] West, above n 197, 105.

[199] West, above n 197, 106.

[200] Catriona MacKenzie, 'Abortion and Embodiment' (1992) 70 *Australian Journal of Philosophy* 136, 141.

determining and self-responsible identity is constituted as property'.[201] Instead, the nurturant self is the 'self that does not choose' and 'does not engage her will with her actions' in which selfhood is further undermined.[202] Also highlighting the psychic and bodily connections between the fetus and the woman in the context of abortion, Catriona MacKenzie comments:

> To think that the question of autonomy... is just a question about preserving the integrity of one's body boundaries, and to see the f[o]etus merely as an occupant of the woman's uterus, is thus to divorce women's bodies from their subjectivities. Ironically, it comes close to regarding women's bodies as simply f[o]etal containers...[203]

Female personhood in pregnancy cannot be understood by reference to the merely biological, 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.'[204] From a relational perspective, a woman's expectations of her life, her stability, security, her hopes for the future have been irrevocably changed and it will be the woman alone who holds the responsibility for determining whether she will commit or not to the 'existence of such a future person'.[205] 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

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[201] C. Lury, *Prosthetic Culture: Photography, Memory and Identity* (London: Routledge, 1998), 1.

[202] West, above n 197, 106.

[203] Mackenzie, above n 200, 150.

[204] Mackenzie, above n 200, 141.

[205] Mackenzie, above n 200, 147.

burdens upon her life.[206] Significantly, none of these are corporeal harms. Acknowledgement of only the physical impact perpetuates a medical model of pregnancy, which as Ashe observes, 'informs legal discourse as well as medical theory and practice', and emphasises 'the separability of the pregnant woman and the fetus' defining 'the female reproductive process in terms of discontinuity rather than continuity.'[207]

Only when we acknowledge both the physical and *emotional feelings* of the mother and her connection with the foetus, can we begin to address important parts of a woman's subjectivity and 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. As Bergun and Bendfeld comment, by engaging with the "feeling body" of the pregnant mother, 'another scene unfolds before us that allows us to acknowledge the primacy and full subjectivity of the mother, the potential of the fetus, and the environment within which the relation must survive and flourish.'[208] How does this "feeling body" impact upon dominant conceptions of harm and autonomy? And if the body in this area of tort law is too Cartesian, thereby jettisoning the affective, relational and emotional dimensions of an unwanted pregnancy, what strategies might be employed to challenge this? As a starting point, because pregnancy is an experience shared by most women, and is a uniquely female experience,

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[206] Suzanne T Orr and C Arden Miller, 'Unintended Pregnancy and the Psychosocial Well-Being of Pregnant Women' (1997) 7 *Women's Health Issues* 38.

[207] Marie Ashe, 'Law-Language of Maternity: Discourse Holding Nature in Contempt' (1988) 22 *New England Law Review* 521, 539.

[208] Vangie Bergum and Mary Anne Bendfeld, 'Shifts of Attention: The Experience of Pregnancy in Dualist and Nondualist Cultures' in Rosemarie Tong (ed) *Globalizing Feminist Ethics, Crosscultural Perspectives* (Oxford: Westview, 2001), 90

then it will be important for the law to conceptualise notions of harm, autonomy and responsibility by reference to women's perspectives.

The concept of autonomy, as I have already argued, is central to matters of reproduction and clearly must be fully embraced within any conceptualisation of the harm in wrongful pregnancy. But the tension here is that the liberal discourse of autonomy positions the harm of unwanted pregnancy in a way that many women might not readily accept. The language of lived subjectivity, of embodied existence is denied, reducing bodies to property, and injuries to merely physical pains. This is not to say that the law doesn't recognise harms which are non-physical, non-pecuniary, intimate and relational – but that these are often devalued and diminished.[209] So, is there room for emotions, intimacy and affect within the language of autonomy? And in the context of wrongful pregnancy, by highlighting this as a unique experience, is there not an inherent danger in reconstructing harm in order to embrace emotional and relational losses? This strategy could well act to position women as being in need of special treatment, as weaker and emotional (in opposition to reason), thereby serving to merely perpetuate dualistic thought rather than challenge it. But, as Nedelsky's work illustrates in the context of judicial decision-making, emotion is an essential part of reasoning – rather than a binary opposition between mind and body, reason and emotion, the partnership between reason and emotion requires 'a responsiveness to the reasoner's body states'.[210]

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[209] In the context of the criminal law, see further, Matthew Weait, 'Taking the blame: criminal law, social responsibility and the sexual transmission of HIV' (2001) 23 *Journal of Social Welfare and Family Law* 441; Nicola Lacey, above n 171.

[210] Jennifer Nedelsky, 'Embodied Diversity and the Challenges to Law' (1997) 42 *McGill Law Journal* 91, 102.

The significance of this in the context of our discussion is that it acts to challenge dualistic thought, and importantly to particularise autonomous decision-making as connected to affect and the body. Therefore, rather than rejecting the significance of the body, as a number of feminists writers have, in challenging metaphysical thought,[211] Nedelsky reconstructs the concepts of autonomy and rights so as to encompass it. Nedelsky fully embraces the centrality of autonomy to feminism, but illustrates that *liberal* conceptions of autonomy are simply illusory in denying the self that is psychically and relationally connected and constituted by relationships with others. In this sense, the capacity to self-govern can only develop in the context of intimate and social relations with others – it is not isolation that is necessary for the development and experience of autonomy, but relationships.[212] In reconceiving autonomy then, the task 'is to think of autonomy in terms of the forms of human interactions in which it will develop and flourish.'[213]

This re-envisioning of autonomy is essential to the characterisation of harm in unwanted pregnancy. It emphasises an embodied, feeling, relationally connected human being – those aspects central to the

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[211] Such an approach is typified by the work of feminist post-structuralists such as Judith Butler, who have argued that the body that we experience is constantly mediated by constructs, associations and images. The body figured by such work becomes merely a passive surface upon which culture overlays a disciplinary system of meanings. The difficulty that many have with such an approach is that this acts to deny the body as a lived entity, as a physical reality and thereby subordinates the body, and relies on the very dualistic model it sought to challenge. For an example of this see Judith Butler, *Gender Trouble, Feminism and the Subversion of Identity* (London: Routledge, 1999); *Bodies That Matter, On the Discursive Limits of "Sex"* (London: Routledge, 1993).

[212] Jennifer Nedelsky, 'Reconceiving Autonomy: Sources, Thoughts and Possibilities' (1989) 1 *Yale Journal of Law and Feminism* 7, 12.

[213] Nedelsky, above n 212, 21.

pursuit and attainment of autonomy. On this view then, our conceptualisation of harm in unwanted pregnancy shifts well beyond the merely physiological aspects of reproduction, and considers the relational and social impacts that result from disrupted relationships, the involuntariness of a woman's nurturant position, her fears and anxieties for the future, the significant moral and decisional responsibilities that she finds herself holding which endure well past childbirth and develop as mother and child age. Reproductive autonomy then takes on a richer meaning – it is more than merely bodily autonomy, the right to control our bodily boundaries – the definition of personal integrity takes on a broader characterisation to integrate a feminist conceptualisation of harm.

A CONCEPTUAL METAMORPHOSIS OR AN AFFECTIVE JUDGMENT OF "HARM"?

Having spoken of a "conceptual metamorphosis" much earlier on, perhaps some will wonder at what point it is suggested that this shift took place in the context of the wrongful pregnancy action. Is it not the case that the harm in these actions is too corporeal, and that feminist strategies are required to broaden concepts of autonomy, responsibility so as to integrate the relational and emotional aspects of unwanted pregnancy? Indeed, has it not been demonstrated that there is a real tension between the traditional personal injury framework and its application to harms that women suffer as women? And furthermore, have we not travelled light years away from a concept of personal injury describable in terms of 'any disease or impairment of a person's physical or mental condition'[214] by emphasising the harm as one which holds a relational, emotional and affective dimension?

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[214] Section 38(1) of the Limitation Act 1980.

At the heart of these problems, is that pregnancy ever came to be defined as a personal injury; this language is utterly constraining and forces the most inappropriate parallel between pregnancy and other injuries. From this perspective, it is quite easy to see that the very conceptual difficulties that commentators in this field have continually confronted rests upon the fact that pregnancy *is* hard to describe in precisely these terms – it is a natural biological function – and no doubt most women would be bewildered to hear that pregnancy, even unwanted, was in any way analogous to a personal injury. As we have seen in relation to the medicalisation of reproduction, women's natural processes of menstruation, pregnancy and menopause have come to be defined in terms of malady, as well as the defining of abortion in primarily medical terms. And indeed in the employment context, the courts for many years drew parallels between pregnancy and illness so as to justify maternity rights.

What is problematic about typifying pregnancy in such terms is not *only* that each model forces a particular view of the experience of pregnancy and draws such parallels with injuries and illnesses – my central concern is that these representations are *harmful*. Whether under the veil of 'equal treatment' or to justify the control and regulation of women, these ways of seeing act to exclude or misrepresent important aspects of women's experiences. Pregnancy should *not* be conceptualised as a disease, an injury, or a sickness,[215] but when it is an unwanted state it certainly *must* be recognised as a 'harm'. What

[215] Betty Friedan puts forward a similar view in the context of maternity rights, commenting: 'I think the time has come to acknowledge that women are different from men, and that there has to be a concept of equality that takes into account that women are the ones who have the babies. We shouldn't be stuck with always using a male model, trying to twist pregnancy into something that's like a hernia.' Quoted in Zillah R Eisenstein, *The Female Body and the Law* (London: University of California Press, 1988), 105.

forcibly emerges from this, is that defining pregnancy in these ways completely misses the point, or more emphatically, loses sight of 'the central political battle'[216] – notably, women gaining control over their moral, relational and social lives, of which this richer conception of reproductive autonomy is a key aspect.

But, this gives rise to a dilemma. If unwanted pregnancy brought about by negligence is *not* a personal injury, then does this automatically declassify the wrongful pregnancy suit as falling within the concept of "damage"? As has been argued, however, "damage" is not a self-evident and fixed notion; on this basis, then, might it be possible to claim that the broader conception of reproductive autonomy is a value capable of being set back, and therefore constituting 'damage' itself? In *McFarlane* there certainly seems to be an increasing willingness to typify loss along such lines, albeit based on the much weaker notion of *bodily* autonomy. However, more recently, there have been strong indications of a fresh judicial approach to the question of "what is the loss of unwanted pregnancy?"

As we have already seen from the case of *Parkinson v St James'*,[217] Hale LJ heavily criticised the approach taken by their Lordships in *McFarlane* in relation to the childrearing claim. Arguing that this was an inseparable consequence of the harm of unwanted pregnancy she commented that, 'it is not possible, therefore, to draw a clean line at the birth.'[218] In the same judgment, and with equal force, Hale LJ notes an utter lack of surprise at their Lordships failure to detail what might be involved in conception, pregnancy and childbirth. Commenting on the

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[216] Laura Purdy, 'Medicalization, Medical Necessity, and Feminist Medicine' (2001) 15 *Bioethics* 248, 256.

[217] *Parkinson v St James' and Seacroft University Hospital NHS Trust* [2001] 3 All ER 97 (see chapters one and two).

[218] *Parkinson,* above n 217, at paragraph [73].

'profound physical changes'[219] that a woman experiences from the very point of conception, and the accompanying risks attendant upon pregnancy, Hale LJ emphasises that along with these go psychological changes. Noting that for some these changes may be seen as beneficial, while for others these might amount to a recognised psychiatric disorder, 'many are somewhere in between'.[220] By contrast to the marked 'foetal absence' in *McFarlane*, Hale LJ directly links these psychological changes to the existence of the child, where many women will develop, 'deep feelings for the new life as it grows within one, feelings which there is now evidence to suggest begin to be reciprocated by the growing child even before he is born.'[221] And while there are physical and psychological consequences, these are accompanied by a 'severe curtailment of personal autonomy',[222] where:

> Literally, one's life is no longer just one's own but also someone else's. One cannot simply rid oneself of that responsibility. The availability of legal abortion depends upon the opinion of others. Even if favourable opinions can readily be found by those who know how, there is still a profound moral dilemma and potential psychological harm if that route is taken. Late abortion brings with it particular problems, and these are more likely to arise in failed sterilisation cases where the woman does not expect to become pregnant.[223]

Many aspects of this judgment are notable. The framework that Hale LJ adopts is resonant of a broader conceptualisation of harm, in encompassing the physical, emotional and relational harms resulting from an unwanted pregnancy. Moreover, it constitutes a significant departure from previous accounts where the foetus is peculiarly absent -

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[219] *Parkinson,* above n 217, at paragraph [64].

[220] *Parkinson,* above n 217, at paragraph [65].

[221] *Parkinson,* above n 217, at paragraph [65].

[222] *Parkinson,* above n 217, at paragraph [66].

[223] *Parkinson,* above n 217, at paragraph [66].

this framework, by contrast, emphasises that a pregnancy, whether wanted or not, cannot be understood without emphasising the very connectedness of the maternal/foetal bond. It is from this relationship that a woman's moral responsibilities and sense of connected identity emerge. As a result we are provided with an embodied - and implicitly feminist - perspective of pregnancy, and it is one that is made all the more powerful by holding relevance not only to the experience of *wrongful* pregnancy, but in a non-legal context, to *any* pregnancy. It also provides an account of "damage" firmly based on the loss of reproductive autonomy, rather than one based on a personal injury framework. In forwarding her view that child maintenance costs are part and parcel of this harm, Hale LJ explicitly rejects an account based on personal injury:

> 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. This is quite different from regarding them as consequential upon the pain, suffering and loss of amenity experienced in pregnancy and childbirth. [224]

That this approach holds practical merits for the law is an understatement. Arguably, this constitutes what might be regarded as a "conceptual metamorphosis", not only in the way that an unwanted pregnancy is viewed but also in the sense that it would seem to offer a stronger legal framework for (re)considering women's roles in reproduction generally. Therefore, while this may well be the case, there still remains the question as to whether such a perspective is likely to be embraced in the future: for there is one further notable (and unsurprising) aspect of this implicitly feminist framework – it is provided by a woman.

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[224] *Parkinson,* above n 217, at paragraph [73].

As Hale LJ questions extra-judicially, might *her* perspectives on conception, pregnancy and childbirth, be informed differently to that of a man?[225] A point hinted at by Mason who comments that Hale LJ's judgment in *Parkinson* is of,

> [S]pecial significance not only because it comes from *a woman who has had and has brought up a child* – even the latter experience being one that must be rare among men of more than middle age – but more so because it is the *only* woman's opinion on the subject.[226]

It is at this point that we enter into murky waters. Few will have missed the fact that the most vitriolic attacks upon the wrongful pregnancy suit have been waged by *male* commentators and judges who have either expressed deep reservations in holding - or wholesale rejection – that wrongful pregnancy can be conceptualised as harm. When considering this, perhaps a more sceptical stance might hold that the awarding of damages for unwanted pregnancy is merely to avoid claimants being 'sent away empty handed'.[227] Indeed, as Conaghan ponders, 'because few judges ever envisage themselves as pregnant let alone bring the actual experience to bear on their deliberations, their stance – in common perhaps with many tort commentators – is generally one of distance from perhaps even aversion to the whole messy business.'[228] Maybe this goes too far, but the point of interest that arises here is whether the *experience* (or potential to) of conception and pregnancy could make a difference. As Hale LJ comments, it is this experiential facet of such processes that distinguishes men from women, and she concedes (as is evident from her judgments in *Parkinson, Groom* and

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[225] The Right Honourable Lady Justice Hale, DBE, 'The Value of Life and the Cost of Living – Damages for Wrongful Birth' (2001) 7 *British Actuarial Journal* 747, 760.

[226] Mason, above n 19, 64 [my emphasis].

[227] *McFarlane,* above n 70, at 114 (*per* Lord Millett).

[228] Conaghan, above n 136, 190.

Rees) that her 'perception of these issues may differ'.[229] While Hale LJ leaves this question open-ended, the significance of this is abundantly clear.

If experience or even the *potential* to experience, makes a difference then in the context of a predominantly male judiciary, the fact that some harms are unique to women will surely have a bearing on the delivery of judgments.[230] Some suggest that the integration of 'emotionally-laden' personal experience might well prove an asset in judicial decision-making.[231] If emotional and affective responses are generated through personal experience, and form an essential role in our ability to choose from an array of possible actions, then clearly experience must constitute an essential component. In this vein, Nedelsky queries, 'if past experience is crucial (if not conclusive) what happens to those who appear before a judge who has a very different background?'[232] Indeed, in the context of a wrongful pregnancy suit, should the judicial panel be composed primarily of those who have some experience to bear upon the dispute? And how significant is it that such a representative panel would be heavily composed of women? Or, if we pursue the notion of

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[229] Hale, above n 225, 761 (*Groom v Selby* [2001] EWCA Civ. 1522; *Parkinson,* above n 217; *Rees,* above n 70).

[230] This enquiry is however slightly different to saying that men and women tend to approach and understand moral obligations differently, as feminist theorists such as Carol Gilligan claimed. She suggested that in the context of relationships women and men tend to approach and understand moral obligations differently; where women tend to privilege relationships and their connection to others, while men, by contrast, value individual autonomy and separation. (Carol Gilligan, *In A Different Voice: Psychological Theory and Women's Development* (Cambridge, Massachusetts: Harvard University Press, 1982). Here, however the claim is that experience might inform judicial decision-making and have a bearing on impartial judgment.

[231] See for instance Jennifer Nedelsky application of the work of Antonio Damasio, above n 210.

[232] Nedelsky, above n 210, 107.

truly impartial judgment, based upon 'a presumed unity of selves stripped of their affective, experiential and bodily differences',[233] must we automatically disqualify those very individuals on the pretext of bias? The latter option might, suggests Nedelsky, run the risk of selecting individuals who are 'blind to the problem'.[234]

No easy answers are generated in relation to the wrongful conception suit. Some might offer the view that an increased representation of women with the experience of conception, pregnancy and birth, while desirable, might have little impact where 'certain forms of utterance are privileged by law in the construction of what is authoritative, and, by corollary, what (or who) lacks credibility'.[235] But our problem here is perhaps less acute. It is not that the male component of the judiciary is denying that harm has occurred – that is clearly not the case. The possibility being explored here is to what extent a feminist conception of harm might be introduced and fully embraced into tort law, in the face of judges that "just don't get it."[236] And perhaps this is where Hale LJ's enriched perspective might make a difference. If the dominant characterisation of harm in the wrongful pregnancy case is one typified by judges that are 'locked into one perspective, whether through fear, anger or ignorance',[237] then Hale LJ offers a broader perspective for the judiciary to take into account. Nedelsky has suggested that:

> What makes it possible for us to genuinely judge, to move beyond our idiosyncrasies and preferences, is our capacity to achieve an "enlargement of mind". We do this by taking different perspectives into account. This is the path out of the blindness of our subjective private

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[233] Nedelsky, above n 210, 110.

[234] Nedelsky, above n 210, 110.

[235] Regina Graycar, 'The Gender of Judgments: Some Reflections on "Bias"' (1998) 32 *The University of British Columbia Law Review* 1, 10.

[236] Nedelsky, above n 210, 106.

[237] Nedelsky, above n 210, 107.

> conditions. The more views we are able to take into account, the less likely we are to be locked into one perspective, whether through fear, anger or ignorance. It is the capacity for "enlargement of mind" that makes autonomous, impartial judgment possible.[238]

Therefore on this view, Hale LJ's contribution is not important by virtue of it having been delivered *by a woman,* nor indeed because it might be the consequence of 'affective judgment'. Rather, the significance here must be that she has offered a different perspective for the judicial forum to take into account, a dialogue that embraces a diversity of experiential perspectives – an opportunity to start to "get it". And consequently, for those who lack first-hand knowledge of the experiences of conception, pregnancy and childbirth, such an experiential deficit may not matter, if met by a willingness to integrate the voices of women.

CONCLUSION

At first sight, the question of "Is wrongful pregnancy a harm?" might seem a rather rhetorical, pointless, question to pose. However, as this chapter demonstrated, the way that the courts and commentators have come to characterise that harm has been deeply problematic; some having even come to question whether this can be construed as harm at all. What constitutes "harm", whether through the lens of 'personal injury' or 'damage', however, is far from self-evident, or based on a set of observable facts. Rather what we find is that it is a judgement, a choice, imbued with, and the product of, 'social, political and moral values'.[239]

Having briefly considered from a historical perspective the manner by which women's bodies have come to be regulated and objectified by

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[238] Nedelsky, above n 210, 107.

[239] Kennedy, above n 180, 7.

virtue of their biological difference, a notable aspect of the wrongful pregnancy action is the extent to which Cartesian dualism still retains its influence in both law and medicine. The constructs emerging as a result, define harm as a predominantly bodily experience, and present a disembodied view of (female) personhood and legal subjectivity, thus serving to misrepresent women's experiences of conception, pregnancy and childbirth. This chapter therefore demonstrates that a wider jurisprudential view of harm that encompasses women's perspectives of reproduction is needed.

No doubt, for some, this might be viewed as a further example of "harm stretching", or an attempt to reinterpret misfortune in a way that 'diminishes the responsibility, indeed, the autonomy of individuals'.[240] However, in the context of wrongful pregnancy this is far from the case. Not only does the foregoing analysis illustrate the inherent inadequacies of liberal conceptions of 'individual' autonomy, it also challenges the narrow conception of responsibility underpinning it. Pregnancy, whether wanted or not, is impossible to understand through an ideology that promotes individuation, discontinuity and separation. Indeed this process only becomes understandable by highlighting the *connected* nature of the relationship between a mother and her foetus. It is however, essential that connectivity does not become a tool for paternalism, since as West observes this 'is not something to celebrate; it is that very connection that hurts us.'[241] The unique moral and decisional burden that women carry through pregnancy must be viewed as imposing broader responsibilities that cannot be shifted, nor easily ended for many. Unwanted conception marks the point of a continuing source of responsibility and an enduring invasion of personal autonomy

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[240] Weir, above n 129, 6.

[241] Robin West, 'Jurisprudence and Gender' in K Bartlett and R Kennedy (eds) *Feminist Legal Theory: Readings in Law and Gender* (Oxford: Westview, 1991), 214.

– the emotional and relational harms do not stop at the point of childbirth.

Whether a broader conceptualisation of reproductive autonomy might offer potential in acting as the dominant value in the reproductive torts has been questioned both here, and in preceding chapters. Indeed, some have remarked in the past that 'there is little to suggest that a feminist construction of connection and continuity would be accepted in the courtroom'.[242] By considering the framework adopted by Hale LJ however, there are clear signs that a feminist perspective of reproduction is beginning to find its place within judicial decision-making.[243] Not only does this offer a framework powerful in its ability to describe varying accounts of pregnancy, articulating deep respect for the personhood of the mother, and her lived subjectivity in pregnancy, but provides a more convincing account of the harms involved in wrongful pregnancy. This perspective not only offers a way forward in assessing harm(s) in wrongful conception, but also presents a valuable opportunity to re-evaluate dominant conceptions of autonomy in the field of reproduction quite generally. Yet in considering whether this really constitutes a conceptual metamorphosis, one important question remains: will the remainder of the judiciary (and indeed the legislature) embrace such a perspective when the opportunity presents itself?

On this account, perhaps less optimism can be afforded. Since the *prevailing* conception of reproductive harm in these suits is *far* from embodied and relational, it is perhaps inevitable that there will be little, if any recognition that a woman's decisional burden is intimately

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[242] Katherine de Gama, 'Posthumous Pregnancies: Some Thoughts on 'Life' and Death' in S Sheldon and M Thomson (eds) *Feminist Perspectives on Health Care Law* (London: Cavendish, 1998), 277.

[243] Given *Lady* Hale's recent escalation to the House of Lords, it is a perspective that will now bear on the highest English appellate decisions.

connected to the *very* aspects of pregnancy that the dominant vision *excludes*. As the following two chapters consider, the exclusion of this 'moral' domain has culminated in a very different understanding of reproductive autonomy and it is one where the focus is less on the "loss" of autonomy, but rather its *exercise*. While the law may recognise that pregnancy is both *harmful* and *unwanted*, the same perspective is certainly not adopted in relation to its consequences; herein lies the claim that a woman's failure to terminate a pregnancy indicates that the consequences were *very much wanted*.

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Reviving the Avoidable Consequences Rule: A *Reasonable* & *Healthy* Case of Catch-22?

> There was only one catch and that was Catch-22, which specified that a concern for one's own safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions. Orr would be crazy to fly more missions and sane if he didn't, but if he was sane he had to fly them. If he flew them he was crazy and didn't have to; but if he didn't want to he was sane and had to. Yossarian was moved very deeply by the absolute simplicity of this clause of Catch-22 and let out a respectful whistle.
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> "That's some catch, that Catch-22," he observed.
> "It's the best there is," Doc Daneeka agreed.[1]

INTRODUCTION: AVOIDING HEALTHY CHILDREN

Childbirth is no longer the *inevitable* consequence of pregnancy. Natural miscarriage aside, the availability of legal abortion means that for many women, the 'natural' consequences of sexual intercourse can be avoided.[2] While women's 'self-identity and social role have been defined historically by their procreative capacities',[3] it is difficult to

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[1] Joseph Heller, *Catch 22* (London: Corgi Books, 1961), 54.

[2] It is appreciated that this statement is grossly over-simplified and holds numerous caveats. These will be examined in the course of this chapter.

[3] M A Ryan, 'The argument for unlimited procreative liberty: A feminist critique' (1990) 20 *Hastings Center Report* 6 (LexisNexis transcript).

overstate the significance of this development. Gaining the freedom to decide whether or not to bear and nurture children through the wider availability of contraception and access to legal abortion has been, and remain high on the feminist political agenda. The supply of abortion services, as Leslie Bender comments, is 'one part of women gaining control of their reproductive lives, an essential prerequisite to women freeing themselves from male dominance.'[4] Not only is this central in securing a right to reproductive autonomy, but ultimately, an identity untied to *reproduction*. However, given the importance of abortion to gaining such freedom, there is little doubt that the legislative provisions governing this area come as a large disappointment to many.

In numerous respects, the delivery of such treatment under the Abortion Act 1967 is highly restricted; as noted previously, the thrust of the Act was not premised upon conferring a right of reproductive autonomy, but rather in placing decisional responsibility into the hands of the medical profession. Although this remains the case, it is undeniable that abortion has become more freely available as medical discretion has been exercised more liberally. And the provisions of the Act are certainly open to liberal interpretation. Considering that pregnancy and childbirth are *always* more dangerous than abortion, section 1(1)(a) is easily satisfied providing the woman's pregnancy sits within the gestatory time limits.[5] Furthermore, it may be argued that this provision of the Act

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[4] Leslie Bender, 'Teaching Feminist Perspectives on Health Care Ethics and Law: A Review Essay' (1993) 61 *University of Cincinnati Law Review* 1251, 1263.

[5] Section 1(1)(a) of the 1967 Act provides one of the grounds under which a lawful termination may be performed. This applies where two doctors have formed the opinion, in good faith that, 'the pregnancy has not exceeded its 24th week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family'.

coupled with the social ground under s.1(2), which permits account to be taken of the 'woman's actual or reasonably foreseeable environment', renders lawful the termination of *every* pregnancy within the prescribed time limits.[6] As J. K. Mason suggests of abortion 'it is difficult to see how one could be refused in the circumstances.'[7] Therefore it is perhaps unsurprising that in practice, as Sally Sheldon comments, 'there is a widespread assumption that the 1967 Act seems to have provided reasonable access to abortion services performed in safe conditions for most women.'[8] And some, even in judicial quarters, would go much further than this; as Lord Denning MR remarked of the Abortion Act 1967:

> It legalised abortion if it was done so as to avoid risk to the mother's health, physical or mental. This has been interpreted by some medical practitioners so loosely that abortion has become *obtainable virtually on demand*. Whenever a woman has an unplanned pregnancy, there are doctors who will say it involves a risk to her mental health.[9]

Whether the Act provides 'reasonable access' or 'abortion on demand' will be examined later; but taken at face value, the ability of women to avoid the consequences of pregnancy must surely raise serious questions in the context of wrongful conception. Here, it will be remembered that wrongful conception suits are premised on the basis that the very

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[6] As Emily Jackson argues however, 'there is no right to abortion even if the grounds in the Act are plainly satisfied' and she points to further obstacles to women accessing abortion services; these aspects will be examined later (Emily Jackson, below n 230, 470).

[7] J. K. Mason, 'Wrongful Pregnancy, Wrongful Birth and Wrongful Terminology' (2002) 6 *The Edinburgh Law Review* 44, 49.

[8] Sally Sheldon, 'The Abortion Act 1967: A Critical Perspective' in Ellie Lee (Ed) *Abortion Law and Politics Today* (London: Macmillan Press Ltd, 1998), 46.

[9] *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] A.C. 800 [my emphasis].

consequence of wrongful conception – the child – was unwanted. If one reduces such claims down to their 'bare essentials', argues Anthony Jackson, 'one sees that the parents are doing nothing more than appearing in court and proclaiming that the birth of their child was worse than not having it at all.'[10] Therefore, is it not fair to ask, as Mason does, 'why, in fact, do failed sterilisations ever come to a live birth when there are often multiple reasons for a legal termination of pregnancy which are accepted in the Abortion Act 1967?'[11] Might a failure to terminate a pregnancy indicate that the child was in fact, very much "wanted"?

Of course, there will be obvious exceptions to this – a specific feature of wrongful conception cases is that claimants do not expect to become pregnant,[12] and therefore the possibility remains *in some cases* at least, that late discovery of pregnancy might preclude lawful abortion. But by no means does this exhaust the issue of the 'unwanted child'. In such circumstances then, might it not be reasonable to suggest that parents who complain of the burden of an unwanted child could have been spared 'considerable "distress", legal expenses, and anxiety if they placed their child in a more loving home'?[13] Such an argument holds that even in the absence of abortion as a means of avoiding the 'unwanted' consequences of conception, we should not take at face

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[10] Anthony Jackson, 'Action for Wrongful Life, Wrongful Pregnancy and Wrongful Birth in the United States and England' (1995) 17 *Loyola of Los Angeles International & Comparative Law Journal* 535, 602.

[11] J.K. Mason, *Medico-Legal Aspects of Reproduction and Parenthood* (Dartmouth: Ashgate, 2nd ed, 1998).

[12] The Right Honourable Lady Justice Hale, 'The Value of Life and the Cost of Living – Damages for Wrongful Birth', The Staple Inn Reading (2001) 7 *British Actuarial Journal* 747.

[13] Anthony Jackson, above n 10, 602.

value that the birth of a healthy child left parents in a *worse* position. If the child was *really* unwanted, the parents could have placed the child up for adoption.[14] Indeed, how can the child *ever* be conceptualised as "unwanted" when the overwhelming majority of parents in these suits not only *choose* to keep their child, but declare it to be 'loved, loving and fully integrated into the family'?[15] Setting aside the peculiarity of parents *unwittingly* undermining their own claims, the 'bare essentials' approach certainly generates some fairly convincing no-win arguments. On this view, the outcome is quite simply always 'wanted' - a sort of Catch-22. By powerfully illustrating the contradictory nature of parents' claims in wrongful conception, such arguments not only raise *general* questions as to the credibility and conduct of claimants - they also raise very particular legal questions.

In negligence, such arguments translate readily into the mitigation doctrine. Placing a *positive* 'duty' on the claimant to act *reasonably* to minimise their losses following the defendant's breach, the doctrine entails that a failure to act will result in a denial of recovery of damages in respect of any 'unmitigated' losses. Therefore, the mitigation doctrine relates to *quantum* of damages, rather than ultimate *liability* of the defendant.[16] This distinction is important; although mitigation speaks the language of 'duty', this is misleading, since the claimant commits no wrong by failing to minimise his or her losses. Rather the underlying theory of mitigation is that following a breach, the claimant 'is not

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[14] Anthony Jackson, above n 10.

[15] *McFarlane v Tayside Health Board* [2000] 2 AC 59, at 74 (*per* Lord Slynn)

[16] Note that the claimant's unreasonable conduct may also be construed under legal causation as constituting an intervening cause of his or her losses – therefore the same issue can affect ultimate liability. This will be examined later.

entitled to sit back, do nothing, and sue for damages'[17] or 'indulge in his own whims or fancies at the expense of the defendant'.[18] In other words, the central thrust of this doctrine is the 'desirability of avoiding waste... a loss which could have been avoided by reasonable action.'[19] So, in the context of employment, a claimant who loses their job through injury, but remains capable of working, some action is required on their part. Looking for alternative employment would be reasonable under the circumstances.[20] While the mitigation doctrine has ease of application in employment and contractual contexts, it also arises in relation to personal injury cases and medical treatment. Thus, the injured claimant should seek medical treatment that will *improve* his or her condition. However, since the court must keep in mind that the defendant's breach *forced* the claimant to mitigate, the claimant would not generally be expected to submit themselves to procedures that hold substantial risk of further injury or uncertain outcomes. Therefore, although the question asked in this context is whether 'the plaintiff acted reasonably in refusing surgery', what is deemed "reasonable" depends on the circumstances, including the medical advice received.[21]

Such examples, however, are superficially straightforward; as Geoffrey Samuel comments what may amount to 'unreasonable behaviour is not

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[17] John Cooke and David Oughton, *The Common Law of Obligations* (London: Butterworths, 3rd ed, 2000), 305. As one case put it, the claimant 'is fully entitled to be as extravagant as he pleases, but not at the expense of the defendant' (*Darbishire v Warran* [1963] 1 WLR 1067, at 1075).

[18] W V H Rogers, *Winfield and Jolowicz on Tort* (London: Sweet & Maxwell, 16th ed, 2002), 762

[19] J Beatson, *Anson's Law of Contract* (Oxford: Oxford University Press, 28th Edition, 2002), 615.

[20] If this employment pays less however, then he may recover from the defendant the difference between his previous earnings and present earnings.

always an easy or uncontroversial matter.'[22] And in the context of wrongful conception this is certainly true, for mitigation raises highly controversial questions. Can we truly speak of an 'improvement' in the claimant's condition when contemplating a duty to mitigate by terminating a pregnancy; or conclude that claimants realise a 'positive benefit'[23] when surrendering a child for adoption? Do these constitute 'reasonable' steps? And might we feel uncomfortable in describing the claimant as indulging in 'whims or fancies' by virtue of their 'choice' to keep their child? Indeed, can it ever be right for the law to conceptualise such *inaction* as a 'choice' at all, or does it make a difference that this choice has been thrust upon the claimants? Such questions will crucially depend upon the legal construction of "choice" and the "chooser", as well as the context in which that "choice" is framed. Nevertheless, in the context of mitigation, what also forcibly emerges from these initial questions is the notion of reproductive responsibility. As will become apparent, the mitigation doctrine is not simply about making choices, but taking *responsibility* for those *choices* – the two concepts are inextricably intertwined.

The marriage of these concepts in law is hardly a surprise; it is an age-old relationship that provides the language that law knows best: that of the celebrated and much venerated notion of individual autonomy. Under this liberal vision of autonomy, the concept of 'choice' is quite impossible to divorce from questions of responsibility. In making a decision, the 'self becomes an agent, an autonomous and responsible

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[21] *Selvanayagam v University of the West Indies* [1983] 1 All ER 824, at 827.

[22] Geoffrey Samuel, *Law of Obligations and Legal Remedies* (London: Cavendish, 2nd Edition, 2001), 236. See also Tony Weir, *A Casebook on Tort* (London: Sweet & Maxwell, 9th Edition, 2000), 658.

[23] Cooke and Oughton, above n 17, 306.

subject'.[24] This ideal legal actor, as Ngaire Naffine comments is 'the rational and therefore responsible human legal agent or subject: the classic contractor, the individual who is held *personally accountable* for his civil and criminal actions.'[25] While the notion of responsibility has certainly not escaped feminist scrutiny,[26] it is a notable feature of discussions of autonomy as they arise in medical ethics and elsewhere that "choice" continues to take centre-stage. This concept is central to our consideration of who counts as an autonomous agent, since by making a choice, 'one controls the shape of one's life, and thereby realizes autonomy.'[27] Therefore, considering that women confront many choices in their lives that serve to differentiate them from men,[28] and indeed the historical exclusion of women from the realm of legal personhood as responsible and choosing agents, it must be essential that we continue to interrogate the gender dynamics of 'choice'. But, one must wonder, is it just the concept of choice that bothers us? Of course, there are very good reasons for feeling uneasy about 'choice' particularly in the context of the increasing technological control over reproduction. Indeed, can it be any wonder that so many feminist scholars wrangle

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[24] Costas Douzinas and Shaun McVeigh, 'The Tragic Body: The Inscription of Autonomy in Medical Ethics and Law', in Shaun McVeigh and Sally Wheeler (Eds) *Law, Health & Medical Regulation* (Hants: Dartmouth Publishing, 1992), 3.

[25] Ngaire Naffine, 'Who are Law's Persons? From Cheshire Cats to Responsible Subjects' (2003) 66 MLR 346, 362 [my emphasis].

[26] Paul Benson, 'Feeling Crazy, Self-Worth and the Social Character of Responsibility' in Catriona Mackenzie and Natalie Stoljar (Eds) *Relational Autonomy, Feminist Perspectives on Autonomy, Agency and the Social Self* (Oxford: Oxford University Press, 2000), 73. See also Helen Reece, *Divorcing Responsibly* (Oxford: Hart, 2003).

[27] Alexander McCall Smith, 'Beyond Autonomy' (1997) 14 *Journal of Contemporary Health Law & Policy* 23, 24.

[28] Joan C Williams, 'Deconstructing Gender' (1988-1989) 87 *Michigan Law Review* 797, 831.

with the notion of choice when, in a number of reproductive situations, women are presented with remarkably *little* 'choice'? This surely raises serious questions as to whether legal and societal *perceptions* of women's reproductive choices 'remain an aspiration rather than a reality'.[29] But there is perhaps another contributing factor for our disquiet - and it is much related to concerns about 'choice' under the autonomy ideal – notably, the increasing *responsibility* of women for reproductive choices.

It is within this broader context that the next two chapters explore the mitigation ethic. The present chapter seeks to demonstrate why a close analysis of the mitigation ethic has now become so necessary for feminist legal scholarship. By examining the revival of this ethic in law, this chapter explores the invocation of the concepts of choice and responsibility as they arise within the field of reproduction generally, and their conceptual intersection with the law. Taking up the concerns surrounding the mitigation ethic, the next chapter by contrast, is resolution orientated. By conducting a deeper examination of the invocation of, and meaning attributed to the concepts of choice and responsibility in law, the main objective will be to articulate theoretical possibilities in overcoming the mitigation ethic. Nevertheless, as will become apparent, these two chapters hold broader aims.

In continuing to subject the action for wrongful conception to scrutiny it becomes particularly important at this juncture to note the crucial links to preceding chapters. Questions problematized previously - the gendered characterisation of harm, the increasing medicalization of women's lives, the dominance of the liberal autonomy ideal and the

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[29] Sally Sheldon, 'Unwilling Fathers and Abortion: Terminating Men's Child Support Obligations?' (2003) 66 MLR 175, 183.

disembodied construction of female subjectivity arising under it; as well as the uncertain, rather than self-evident, nature of legal doctrine – all retain central relevance to the subject matter that lies ahead. And significantly, in forming the penultimate stage of our harm unravelling process, these interlinked chapters seek to illustrate how all these threads of analysis intersect. As it shall be argued, it seems nigh impossible to arrive at any *convincing* conclusions as to *why* the courts, for the greater part, have rejected wrongful conception suits involving healthy children (or the "ordinary" burden), *without* considering the culmination of these factors. Furthermore, in seeking to make conceptual connections, so too do these chapters aim to draw together and develop the strategic elements of the thesis suggested so far.

Having provided tentative conclusions as to alternative ways of conceiving harm, autonomy and female subjectivity that better resonate with women's experiences in reproduction, the main objective of the following chapter is to provide a fuller account of these – and one that might withstand criticisms to which this thesis is presently open. Therefore in endeavouring to achieve both the conceptual and strategic connections suggested above, we return to a figure that has featured prominently within this thesis so far – the pregnant subject. In doing so, these chapters will consider in greater detail a dimension of her subjectivity only touched upon previously – her decisional responsibility. As will become apparent, it is this very dimension of the female legal subject that lies at the heart of the mitigation doctrine.

RAISING DEAD QUESTIONS OR MAKING CONNECTIONS?

It might well seem that interrogating the mitigation doctrine in wrongful conception suits[30] is yet another pointless exercise which merely runs over well-trodden ground.[31] After all, the overwhelming majority of commentators assert that the courts in the United Kingdom, have, with few exceptions, been fairly consistent in rejecting the mitigation doctrine in both wrongful conception and birth actions.[32] Indeed, prior to *McFarlane v Tayside Health Board*, it is difficult to disagree.[33] Even in *McFarlane itself*, the House of Lords emphatically rejected that they would *ever* indulge such arguments had they been advanced by the defendants.[34] The rejection of child maintenance damages therefore, must necessarily be explicable through the operation of alternative legal routes. Therefore, one might ask, what else is there to say aside from

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[30] Note that the mitigation doctrine cannot apply to wrongful birth claims, since there the action turns on the 'lost' opportunity to terminate a pregnancy.

[31] See chapter three which queried the so-called 'unproblematic' status of whether an unwanted pregnancy constituted actionable damage.

[32] Although many of these authors discuss the possibility that the mitigation doctrine might be used in the future given 'exceptional circumstances' following the *dicta* of Slade LJ in *Emeh v Chelsea and Westminster AHA* [1984] 3 All ER. See for example, Michael Davies, *Textbook on Medical Law* (London: Blackstone Press, 2001), 185; J.K. Mason, 'Unwanted Pregnancy: A Case of Retroversion?' (2000) 4 *Edinburgh Law Review* 191, 199; Regina Graycar and Jenny Morgan, '"Unnatural rejection of womanhood and motherhood": Pregnancy, Damage and the Law, A note on *CES v Superclinics (Aust) Pty*' (1996) 18 *The Sydney Law Review* 323; Hale, above, n 12, 762;

[33] *McFarlane*, above n 15. As chapter two illustrated, the courts had provided child maintenance damages for nearly thirteen years until the House of Lords' ruling in *McFarlane*. In that time, there are few examples of such damages being rejected, let alone reduced through mitigation doctrine.

[34] *McFarlane,* above n 15.

commenting on various aspects of the death of, or the prospective future rival of the mitigation doctrine in wrongful conception in the UK? Nor does one find much assistance from looking further afield. In the United States, commentary reflects a similar trend: in many jurisdictions the mitigation doctrine for the greater part is dead in these actions.[35] Therefore confronting this unified front, it is perhaps unsurprising that the few commentators who very *tentatively* suggest to the contrary find themselves subject to criticism.[36] On such accounts, it is implied that one must have either drawn inappropriate parallels, or one is guilty of misunderstanding very basic doctrinal distinctions in the law.[37] While there are noticeable infelicities in these tentative approaches, one of the aims of this chapter is to recover this unconventional line of thought, and provide much greater detail, and one hopes, force to the argument that mitigation is certainly well and alive.

But the real significance of this argument lies not in the *existence* of mitigation in this action, but in its *explanatory* power. Rather than posing a series of hypothetical questions in relation to a largely rejected

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[35] John Seymour, *Childbirth and the Law* (Oxford: Oxford University Press, 2000); Jeff L Milsteen, 'Comment: Recovery of Childrearing Expenses in Wrongful Birth Cases: A Motivational Analysis' (1983) 32 *Emory Law Journal* 1167; Fred Norton, 'Assisted Reproduction and the Frustration of Genetic Affinity: Interest, Injury, and Damages' (1999) 74 *New York University Law Review* 793, 836: 'In wrongful pregnancy actions, no court has ever required mitigation of damages'.

[36] There are two commentators who seem to suggest that mitigation arguments are more widely expressed in the US courts than is commonly taken to be the case; nevertheless, the 'tentative' nature of their comments means that we find only the most fleeting of mentions; these are discussed later. See David J Mark, below n 171, fn 89; Norman M Block, below n 109, 1115.

[37] Gerald B Robertson, 'Civil Liability Arising from "Wrongful Birth" Following an Unsuccessful Sterilization Operation' (1978-1989) 4 *American Journal of Law and Medicine* 131, 154.

legal device, what this chapter seeks to illustrate is just how extensively mitigation is applied in wrongful conception actions involving *healthy* children than it might appear at first sight. Rather than playing a secondary role, as mitigation often does in negligence actions vis-à-vis contractual claims,[38] it is argued that the mitigation argument has become absolutely *central* where healthy children are born as a result of wrongful conception. It is central to the question as to why the courts shift financial responsibility for child maintenance costs from the tortfeasor to the claimant and, as this chapter argues, provides an explanatory force as to the retraction of liability in this discrete field. Why the situation *might* be different in the case of the wrongfully conceived *disabled* child is explored fully in chapter five; although, it will suffice to note that one cannot completely discount the operation of mitigation argument there either.

However, in raising mitigation as being 'central' is not to completely divorce the operation of other factors. Possible factors that might account for such retraction in the absence of a definitive explanation could include more traditional concerns, such as deference to the medical profession,[39] or fears of defensive medicine as a result of opening up the floodgates to an already strained publicly funded health service. Or an alternative explanation might conjecture that this is merely part of a general trend in retracting 'non-traditional' claims in negligence law.[40] But no longer need we second-guess; faced with

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[38] As John Cooke and David Oughton note, mitigation is 'primarily, although not exclusively, a contract device' (above n 17)

[39] Sally Sheldon, *Beyond Control, Medical Power and Abortion Law* (London: Pluto, 1997).

[40] Jane Stapleton, 'Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences' (2001) 54 *Vanderbilt Law Review* 941, 942. As examined in Chapter

critical accounts following their decision in *McFarlane*,[41] the House of Lords recently indulged themselves in a remarkable display of honesty as to where their concerns lay:

> [T]o award potentially very large sums of damages to the parents of a normal and healthy child against a National Health Service always in need of funds to meet pressing demands would rightly offend the community's sense of how public resources should be allocated.[42]

Such factors may well culminate so as to provide a *compelling* explanation, but do they yield a convincing or complete one? In the absence of a complete NHS immunity against *all* professional negligence claims, or a practice of shielding impecunious defendants from large damages award, only the 'healthy child' remains as a plausible concern. But since tort law is generally unaccustomed to pointing out the alternative emotional fortunes cast upon claimants as a result of negligently caused economic losses,[43] notions of 'health' and 'normality' similarly fail to provide answers that *by themselves* withstand logical analysis. Therefore this chapter constitutes the search for a fuller explanation. As it shall be seen, a closer examination of the mitigation doctrine and its conception(s) of female subjectivity in an "era of choice" yield some *very* convincing answers.

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three there has been a growth of non-traditional claims, well demonstrated by the case of *Phelps v London Borough of Hillingdon* [2001] 2 AC 619.

[41] See for example, Emily Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Oxford: Hart, 2001); and the High Court of Australia in *Cattanach v Melchior* [2003] HCA 38.

[42] *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52; [2003] 3 WLR 1091, at paragraph [6] (*per* Lord Bingham) (HL).

[43] That is, outside of wrongful conception claims.

THE MITIGATION ETHIC: LEGAL PERCEPTIONS OF RESPONSIBILITY

Under the tort of negligence, our central actor is the tortfeasor. Through the claimant's attempts to establish liability, via the doctrines of duty, breach, and causation of damage, our focus is drawn to the defendant: *their* situation, alleged wrongdoing and conduct. But rarely does our focus remain there; it shifts. In many such actions, questions will arise in relation to the *claimant's* conduct and responsibility for the damage they suffer. And in negligence, such questions straightforwardly translate into two established doctrines: mitigation and causation.[44] Although the doctrinal scope of causation is broader than that of mitigation[45] - the latter sometimes referred to as a type of "claimant's

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[44] In tort law, causation is separated into 'factual' and 'legal' causation. Before legal causation is determined, a claimant must illustrate that the defendant's breach was a *factual* cause (a "but for" cause) of the damage: "but for" the defendant's negligence would the claimant have suffered the damage he or she did? Once factual causation has been established the claimant must go on to show that the defendant was the legal cause of the damage.

[45] Legal causation may involve an examination of the effect of intervening acts of *third parties* or those of the claimant, which occurred between the defendant's negligence and the claimant's injury. However, the question of legal causation also holds a strong policy role allowing the court to determine the 'appropriate limit to place on the defendant's liability as a matter of policy'. In this sense, it should be noted that while the related approach of 'remoteness of damage' also holds a significant role in placing fair limits on liability for wrongful conduct, this doctrinal approach concerns questions as to whether a defendant should be responsible for outcome harm that occurred in some unusual or more extensive manner. See further Mark Lunney and Ken Oliphant, *Tort Law Text and Materials* (Oxford: Oxford University Press, 2nd Edition, 2003), 188. In examining legal causation as it arises alongside mitigation doctrine in this chapter, the focus is upon an 'intervening cause' by the claimant.

negligence'"[46] - both doctrines are capable of subjecting a claimant's behaviour to scrutiny.[47] Applicable to both claims in both contract and tort,[48] these doctrines govern 'aspects of the relations between the plaintiff's actions, the defendant's breach and the damage caused and suffered.'[49] The central thrust of both mitigation and causation in this context is that claimants should not gain 'a windfall where they have been in some way responsible (in part or in whole) for the loss they have

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[46] Jeremy Pomeroy, 'Reason, Religion, and Avoidable Consequences: When Faith and the Duty to Mitigate Collide' (1992) 67 *New York University Law Review* 1111, 1116.

[47] Note that the doctrines of *volenti non fit injuria* and contributory negligence also scrutinise claimant's conduct and there are significant overlaps between both these, and causation and mitigation. All express the claimant's individual responsibility for damage. *Volenti* is a voluntary agreement by the claimant to absolve the defendant from the legal consequences of an unreasonable risk of harm, under circumstances where the claimant has full knowledge of both the nature and extent of risk. Contributory negligence applies where it can be established that the claimant 'did not take reasonable care of himself and contributed, by this want of care, to his own injury' (*Nance v British Columbia Electric Railway Co* Ltd [1951] AC 601, at 611); damages will be reduced to the extent that a court thinks 'just and equitable having regard to the claimant's share in the responsibility for the damage' (section 1(1) of the Law Reform (Contributory Negligence) Act 1945).

[48] While the mitigation doctrine operates identically in tort and contract, there is some dispute as to whether the doctrine of causation as arising in contract, that of 'reasonable contemplation' (*Hadley v Baxendale* (1854) 9 Ex.341), operates identically in tort, that of 'reasonable foreseeability'. In *H Parsons v Uttley Ingham and Co. Ltd* [1978] 1 All ER 525, Lord Denning suggested that in cases of non-economic loss (i.e. personal injury or property damage) where there was concurrent liability, the appropriate test would be that of 'reasonable foreseeability'. Nevertheless, the dominant view seems to be that the test of causation arising in contract law is narrower than that of tort. See further George Appleby, *Contract Law* (London: Sweet & Maxwell, 2001), 447-448.

[49] Timothy Michael FitzPatrick, 'Contributory Negligence and Contract – A Critical Reassessment' (2001) 30 *Common Law World Review* 412.

suffered.'[50] However, in terms of their *general application*, there are important differences between the two. By contrast with causation, which scrutinises the course of events *leading to* the injurious event and therefore deals with *ultimate liability*, the mitigation doctrine retains its focus upon the claimant's behaviour *subsequent* to the injurious event and relates only to *quantum* of damages. Nevertheless, where the two doctrines arise *together* in examining the *same* conduct, it is arguable that there are few relevant differences between the two doctrines, other than the precise justification of the outcome. And this is certainly the case in wrongful conception.

Here, the defendant might claim that the claimant's unreasonable conduct (through a failure to terminate, or place the child for adoption), constitutes a *novus actus interveniens*, an intervening act which breaks the causal chain between the defendant's breach and the damage (the birth of a child). Because of the claimant's failure to act, the damage is not seen as a reasonably foreseeable result (that is, 'naturally flowing') of the initial breach, since the 'background assumption' is that claimants will act reasonably.[51] Should a court be inclined to agree, the defendant will escape liability for the damage – the child maintenance damages - since the claimant's unreasonable behaviour would be seen as the effective cause of the loss. Alternatively, the defendant could argue that since the claimant is under a duty to act reasonably so as to minimise his or her loss, the same unreasonable conduct constituted a failure to mitigate loss. Since the allegedly avoidable loss here is child maintenance costs, the success of such an argument would act to deny the claimant recovery of those damages relating to the 'unmitigated loss' – again, child maintenance damages.

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[50] FitzPatrick, above n 49.

[51] Stephen A Smith, *Contract Theory* (Oxford: Oxford University Press, 2004), 24.

In the context of wrongful conception then, the doctrinal approaches of both intervening cause and mitigation articulate the same notion: that it would be *unfair to make a defendant liable* for losses which are in some way attributable to the claimant's conduct. And importantly, these are *responsibility shifting* exercises: both express the claimant's responsibility for losses resulting from the claimant's reactions to the tort, whether acts or *omissions*. This latter point is significant. While tort law is hesitant to impose liability on *defendants* for nonfeasance,[52] rather than misfeasance, as Peter Cane comments, 'no such wariness seems to apply to the attribution of responsibility to plaintiffs'.[53] The difference in treatment, Cane suggests, 'seems grounded on a widely held ethical principle of self-reliance to the effect that people who do not take care of themselves cannot expect others to bear the costs of their lack of care.'[54] So conceived, what we are dealing with is a type of 'claimant's law' which expresses an ethic of *self*-care, responsibility and *efficiency*.[55] And in wrongful conception, this is the ethic of mitigation.

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[52] *P. Perl (Exporters) Ltd v Camden London Borough Council* [1984] QB 342; *Smith v Littlewoods Organisation Ltd* [1987] 1 All ER 710. But this is not to say that the law never imposes liability for omissions. Liability for pure omission arises in situations where there are established duties of affirmative action. See for example, *Barnett v Chelsea & Kensington Hospital Management Committee* [1969] 1 QB 428.

[53] Peter Cane, *The Anatomy of Tort* (Oxford: Hart Publishing, 1997), 179.

[54] Cane, above n 53, 179.

[55] The expression 'claimant's law' is used here for a number of purposes. Firstly, the term expresses the significance of the invocation of doctrines whose role is precisely to draw attention to the claimant. Secondly, it is being used as a hermeneutic device so as to examine the *frequency* that our attention is drawn to the claimant; that is, who is the central actor in this action? And finally, using this device illustrates the very interconnected nature of legal doctrines such as duty, breach, causation of damage – each of these in the wrongful conception actions, I suggest, are underpinned by 'claimant's law' and the ethic of self-care.

Therefore, while the legal doctrines of intervening cause and mitigation are distinguished within this chapter, our central concern here is upon the mitigation ethic. In the context of wrongful conception this makes sense. Although in linguistic terms causation invokes metaphors of 'chains and links',[56] and mitigation talks of 'reasonable steps' and loss avoidance, from a theoretical perspective, the doctrines are virtually indistinguishable - one invokes the theoretical concerns of the other.

MITIGATION IS DEAD...

> [I]n a few years' time, when abortion perhaps has become a less controversial and more acceptable from of birth control, the imposition of a duty to seek an abortion... may not appear as unreasonable as it does today (Robertson, 1978-1989).[57]

The law does not entertain charlatans or malingerers too readily. The slightest hint of unreliable evidence is almost certain to cast doubt on the rest; or so Park J considered of the claimant's evidence in the case of *Emeh v Kensington and Chelsea and Westminster AHA*.[58] Here the claimant, a mother of three normal children, underwent a sterilisation operation. Later discovering that she was about twenty weeks pregnant, the claimant refused to have an abortion and subsequently gave birth to a child with congenital abnormalities. In response to her claim for child maintenance damages, the defendants argued that the claimant's refusal to have an abortion was so unreasonable as to constitute an intervening cause which broke the chain of causation, or alternatively a failure to mitigate loss. Noting the claimant as "unreliable", and on many matters

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[56] Rogers, above n 18, 211.

[57] Robertson, above n 37, 155.

[58] *Emeh v Kensington and Chelsea and Westminster Area Health Authority and Others* (*The Times*, 3 January 1983).

an "untruthful witness", Park J disregarded the claimant's evidence that she was 'afraid of having an abortion', and stated:

> Despite her evidence to the contrary, I am sure that she knew that she was pregnant within a day or two of 25 January 1977... I am sure that, within a few days of realising that she was pregnant, she made a firm decision to have the baby and abandoned any thought of obtaining an abortion, if ever she had entertained such an idea.

Deeming her decision to continue the pregnancy as a "commercial" one rather than motivated by fear,[59] coupled with her prior experience of abortion, led Park J at first instance to dismiss her action on the basis that her conduct in failing to take steps by having an abortion was such as to constitute an intervening cause.[60] Nevertheless, such suggestions of fraud and commercial gain were swiftly and unanimously rejected by the Court of Appeal, which found Park J's view both unjustified and hard.

Accepting that *certain* aspects of the evidence were unreliable, Waller LJ considered that had greater consideration been given to the claimant's fear of abortion, as well as the advanced nature of her pregnancy, the judge might not have taken such a hard view of Mrs Emeh's conduct.[61]

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[59] *Emeh v Kensington and Chelsea and Westminster Area Health Authority and Others* [1985] QB 1012 at 1027 (*per* Purchas LJ in the Court of Appeal commenting upon the judgment of Park J).

[60] It is also notable that Park J did not feel himself bound by previous authority bearing similar facts in the context of contract law. In *Scuriaga v Powell* ((1979) 123 SJ 406) the court rejected the operation of intervening cause in this context. However, Park J distinguished *Scuriaga* on the basis that the instant case presented very different evidence.

[61] Waller LJ commented (at 1019) the considerable difference between someone who is six to eight weeks' pregnant, and someone who is 'something in the order of 20 weeks' pregnant.'

Furthermore, citing a passage from *McKew v Holland & Hannen,*[62] Waller LJ noted that the degree of unreasonable conduct required by law was very high, and for these reasons, the judge's finding that the claimant's conduct constituted either a *novus actus interveniens* or a failure to mitigate was incorrect and such pleas must therefore fail.[63] And similar criticisms were provided by Purchas LJ who, noting that the claimant's motivation was irrelevant to causation,[64] also considered that it would be 'intolerable' if a defendant, having placed the claimant into a position where a decision had to be made, through his own admitted negligence, should then be able to closely analyse that decision 'so as to show that it might not have been the right choice and thereby escape his liability.'[65]

Nor was Slade LJ greatly impressed by Park J's holding. Expressing 'profound disagreement' with the trial judge's finding,[66] Slade LJ considered the question as to whether or not the claimant had contemplated an abortion as being irrelevant; nor did he consider that defendants in such a situation had any right to expect that a woman should or could procure an abortion at such an advanced stage, rather 'she had the right to expect that she would not be faced with this very difficult choice'.[67] Continuing a pregnancy to term following its late discovery, he suggested, was a reasonably foreseeable consequence of the negligently performed operation. And in his oft-cited passage, Slade LJ went further:

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[62] *McKew v Holland & Hannen & Cubitts (Scotland) Ltd* [1969] 3 All ER 1621.

[63] *Emeh*, above n 59, at 1019.

[64] Although such considerations he stated would be relevant to mitigation.

[65] *Emeh,* above n 59, at 1027.

[66] *Emeh,* above n 59, at 1024

[67] *Emeh*, above n 59, at 1024.

> Save in the most *exceptional circumstances*, I cannot think it right that the court should ever declare it unreasonable for a woman to decline to have an abortion in a case *where there is no evidence that there were any medical or psychiatric grounds for terminating the particular pregnancy.*[68]

By no means are these judgments unanimous in every respect; all but Purchas LJ envisaged the possibility of such doctrines operating in future cases. Considering it 'unacceptable' that the court should be invited to consider the defence of *novus actus interveniens* in this context,[69] it would therefore appear that Purchas LJ would *never* entertain such arguments. By contrast, however, the judgment of Slade LJ explicitly suggests that the courts may be open to such arguments in 'exceptional circumstances'. So, what circumstances might render such a refusal *very* unreasonable?[70]

Taken as a whole, Slade LJ's passage poses quite an intriguing riddle. One possibility is that the 'exceptional' qualification could apply in circumstances where *grounds exist* for an abortion under the Abortion Act 1967.[71] Might this 'elucidate' the circumstances under which Slade LJ conceives his general rule operating, as Kenneth Norrie suggests?[72] This seems highly unlikely; as previously noted, most, if not *all* women who find themselves unexpectedly pregnant within the gestatory time-

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[68] *Emeh*, above n 59, at 1024 [my emphasis].

[69] *Emeh,* above n 59, at 1027.

[70] *Emeh*, above n 59, at 1019 (*per* Waller LJ).

[71] In cases where the claimant would be too late to obtain a legal abortion, defendants will be precluded from raising the failure to terminate in their defence; see for example, *Thake and Another v Maurice* [1986] QB 644.

[72] Kenneth Norrie, 'Compensation for Wrongful Birth: An Examination of the Principles Governing a Physician's Liability in Scots Law for the Failure of a Family Planning Procedure' (Unpublished Doctoral Thesis, University of Aberdeen, 1988), 260.

limits would easily *satisfy* the criteria,[73] thus rendering the rule quite *un*exceptional. Nevertheless, considering the small number of abortions performed for reason of foetal disability, might the substantial risk of a child being born disabled constitute the 'exception', as both Margaret Brazier and Michael Davies hypothesise?[74] Unless this is an unspoken rule, this also seems unlikely, since the judgment never once refers to Mrs Emeh's disabled child in any such context. Alternatively, might the *early* discovery of pregnancy form the exception? Such a possibility is envisaged by Andrew Grubb,[75] and is certainly advocated by others. Timing appears crucial to proponents of the mitigation requirement, like Jeff Milsteen,[76] and arguably arises inferentially in the previous cases of *McKay v Essex Area Health Authority,* and *Scuriaga v Powell.*[77]

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[73] Mason, above n 7. Nor indeed would this have been inconceivable in 1985, when judgment was given in *Emeh* (see the comment of Lord Denning MR giving judgment in 1981, above at 200 of this chapter). Although operating under the provisions of the original Abortion Act 1967 (which was later amended by the enactment of the Human Fertilisation and Embryology Act 1990) where medical practitioners could still theoretically be liable under the Infant Life (Preservation) Act 1929, the statistics suggest that in practice abortions were performed liberally at that time. By 1978 the total number of abortions performed in England and Wales had increased to 141,558 (from 23,641) and in 1988 to 183,798 ('Abortion Statistics Fact sheet', www.care.org.uk/resource/docs/abortionstats.htm, 2002).

[74] Margaret Brazier, *Medicine, Patients and the Law* (London: Penguin Books, 3rd Edition, 2003), 384. Michael Davies, *Textbook on Medical Law* (London: Blackstone Press, 2001), 186.

[75] Andrew Grubb, 'Failure of Sterilisation – damages for "wrongful conception"' (1985) *The Cambridge Law Journal* 30, 31.

[76] Jeff L Milsteen, 'Recovery of Childrearing Expenses in Wrongful Birth Cases: A Motivational Analysis' (1983) 32 *Emory Law Journal* 1167, 1187; considering the difference between obtaining an abortion at three months as opposed to four months he asks: 'might not this present a question of fact as to reasonableness…'?

[77] In the context of contract law, the 'timing' issue was raised in the case of *Scuriaga v Powell* (above n 60), although the defendant gynaecologist in that case conceded that

Whether the recent case of *Richardson v LRC Products* illustrates an 'earlier, the more unreasonable the failure' approach, is arguable since Kennedy J was willing to construe a failure to obtain emergency post-coital contraception as unreasonable.[78] It is suggested, however, that *Richardson* simply advances thinking along the lines of 'the earlier, the better the explanation required for such failure', since a particular feature of this case was the claimant's far from compelling justification.[79] Whatever one extrapolates from this case, it must be regarded as holding fairly limited application in any event, bearing in mind that this concerned the morning-after pill and *not* abortion.

Despite this, timing was clearly a relevant consideration in the minds of Waller and Slade LJJ, both having placed considerable emphasis on the *lateness* of the claimant's discovery of pregnancy in *Emeh*. Slade LJ stressed that abortion at that stage was not without risk, and furthermore, that it was highly foreseeable that she might well decide to keep the child '*particularly after some months* of pregnancy'.[80] Nevertheless, it

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it would have been unreasonable to expect the plaintiff to undergo a repeat abortion at the late stage of eighteen weeks. In *McKay v Essex Area Health Authority* [1982] QB 1166, a wrongful life claim also arising from a failed abortion procedure, the defendant argued that the plaintiff's refusal to have a repeat operation in the 22nd week constituted an intervening cause. Watkins J at first instance dismissed this argument, indicating that it would not be unreasonable for the plaintiff to refuse an abortion at such a late stage since this presented far greater risks to a woman's health.

[78] *Richardson v LRC Products* (2000) 59 BMLR 185 (*per* Kennedy J). This case concerned a claim for personal injury resulting from a defective condom and was brought under Consumer Protection legislation, rather than at common law.

[79] The claimant was somewhat naïve in some respects and argued that she did not think that she could telephone her surgery for an 'emergency' appointment to gain the morning-after pill, and she took quite literally the meaning of 'morning-after'. The judge found this implausible considering that it was a matter of widespread knowledge that the pill is efficacious within 72 hours of intercourse.

[80] *Emeh*, above n 59, at 1024 [my emphasis].

would seem that other factors were also taken into consideration. Waller LJ, for example, suggested that her decision was 'all the more understandable' when considering the claimant's arguments with her husband over abortion,[81] whilst Slade LJ thought the prospect of undergoing yet another operation in such a short expanse of time highly disagreeable. But peculiarly, he also thought it significant that 'the child in this instance was that of her husband'.[82] Might such exceptional circumstances apply to 'single mothers'?[83] This is highly unlikely indeed; it seems more plausible to argue that rather than laying down an authoritative statement as to 'exceptional circumstances', Slade LJ's intention was merely to keep the question open for future courts.

Perhaps the better view then is that the 'unreasonableness' of such a refusal will depend on *all* the circumstances, rather than any particular given reason. As Anna Reichman suggests, 'the stage at which the pregnancy is discovered will obviously be relevant – although not a determinative – factor, as will the plaintiff's past history regarding abortions, as well of course as any suggestions of fraud.'[84] This latter point is significant, since there are fairly uncontentious applications of intervening cause. While an act of sexual intercourse by itself would generally never constitute an intervening cause,[85] the doctrine might well apply so as to defeat the presence of fraud where the claimant *knows* that

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[81] *Emeh*, above n 59, at 1019.

[82] *Emeh,* above n 59, at 1024.

[83] This is a question which Regina Graycar and Jenny Morgan have raised in relation to the Australian case of *CES Superclinics (Australia) Pty ltd* (1995) 38 NSWLR 47 in which the mitigation doctrine arose in relation to the failure of a single woman to place her child up for adoption. See further Graycar and Morgan, above n 32.

[84] Anna C Reichman, 'Damages in Tort For Wrongful Conception – Who Bears the Cost of Raising the Child' (1985) 10 *Sydney Law Review* 568, 586.

[85] By inference this must be correct, since the courts have no difficulty in accepting the causal connection with pregnancy, see *McFarlane, above*, n 15.

they remain fertile. Such an issue arose in the Scots case of *Sabri-Tabrizi v Lothian Health Board.*[86] The claimant in this case became pregnant following a failed sterilization, but chose to terminate the pregnancy. Shortly thereafter, she became pregnant once again and gave birth to a stillborn child. In response to the claim for damages for both pregnancies, the defenders pleaded that in respect of the second pregnancy, the claimant's decision to have sexual intercourse after the first pregnancy constituted an intervening cause.[87] Such knowledge of fertility, held Lord Nimmo Smith, rendered her conduct unreasonable in exposing herself to the risk of further pregnancy. Accordingly, the causal chain was broken relieving the defenders of liability for the second pregnancy. Could there be a better example of a claimant 'on the make'? Perhaps then, on differentially situated facts, Andrew Grubb's comical suggestion that 'if the plaintiff resolved the dilemma in favour of keeping the baby because of the prospect of obtaining damages, the court might be disposed to deny her expectations!',[88] might well apply.

But while fraud, past history of abortions, risk of foetal disability, the risks entailed with abortion and so forth might well constitute factors to which Slade LJ was alert, are these the *only relevant* considerations when scrutinising a refusal to terminate a pregnancy? According to John Seymour such refusals 'need be taken seriously only when there is *nothing* to prevent a woman *who would otherwise* have an abortion from

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[86] *June Sabri-Tabrizi v Lothian Health Board* (1997) 43 BMLR 190 (Court of Session, Outer House) (LexisNexis Transcript).

[87] The defenders also raised the defence of *volenti non fit injuria*, arguing that the claimant had accepted the risk through her knowledge of fertility. This claim was rejected on the basis that acceptance of risk must occur either before or contemporaneously with the act or omission, and not after it.

[88] Grubb, above n 75, 31.

doing so.'[89] Such a statement seems counter-intuitive, since it gives the impression that the only refusals we should scrutinise are those of women who have refused for *no* reason. If so, this is clearly hinting at the type of case to which Grubb alluded. The other possibility is that Seymour is advocating scrutiny of refusals where medical grounds *exist* to justify terminations. In the unlikely case that this is what he means, such a statement would seem to place a great deal of weight upon 'objective' *clinical grounds* in abortion decision-making.

Certainly in other personal injury contexts where the doctrines of mitigation and intervening cause arise, deference to medical opinion is quite typical. So the question in such cases would be: 'Would a reasonable man, in all the circumstances, receiving the advice which the plaintiff did receive, have refused the operation?'[90] As Hudson suggests, succumbing to one's own fear of operations or dislike of doctors, rather than *deference to* doctors, would be regarded as unreasonable bases for refusing medical treatment.[91] But does this exclude the operation of other factors – subjective factors - such as sincerely held religious beliefs?[92] In the Australian case of *Flynn v Princeton Motors*[93] the claimant suffered serious injuries in a car crash which necessitated the delivery of any future children by Caesarean birth – and at great risk to her life and health. In response to the suggestion that contraceptives might prevent such dangers, the claimant, a devout Roman Catholic, claimed that her faith precluded such a course of action. The Supreme Court of New South Wales held that in assessing damages, the jury

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[89] Seymour, above n 35, 80 [my emphasis].

[90] *Morgan v Wallis* [1974] 1 Lloyds' Rep 165, at 170 (*per* Browne J).

[91] A H Hudson, 'Refusal of Medical Treatment' (1983) 3 *Legal Studies* 50, 51.

[92] See further, Hudson, above n 91, 55.

[93] *Flynn v Princeton Motors* [1060] 60 SR (NSW) 488.

should consider the sincerity of her religious belief, and assess whether this was conscientiously held.

So, having regard to the religious and moral acrimony over abortion this would surely suggest that *some* individuals at least, might well object to abortion on similar grounds to *Flynn* – could religions or moral beliefs constitute exceptions to the exceptional circumstances rule articulated by Slade LJ? Or are abortion procedures to be treated no differently to any other medical procedure, such as sterilisation for example? While in objective *clinical* terms, there is little difference in terms of seriousness between an early stage abortion and that of an initial tubal ligation, Rogers argues that,

> [I]t would be foolish to ignore the fact that many people who see no ethical objection whatever to sterilization (which is, after all, no more than a form of contraception) might have the strongest possible objections to abortion of a healthy foetus.[94]

Despite exhibiting revulsion at the suggestion that the claimant could have terminated her pregnancy, a notable feature of the *Emeh* judgment is the absence of subjective considerations such as these. Aside from arguments with the wed-locked father-to-be, and the 'disagreeable' nature of undergoing a further operation, we never get a sense that other factors might complicate, if not justify, the claimant's decision to forego abortion. Indeed, this judgment only leaves us certain of one thing, while these defences remain open for future courts, the message as Rogers suggests is, 'not 'never', but 'hardly ever.''[95] But is the message of 'hardly ever' one from we should derive comfort? While clinical considerations may well obscure the point, what the court is really

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[94] W V Rogers, 'Legal Implications of Ineffective Sterilization' (1985) 5 *Legal Studies* 296, 302.

[95] Rogers, above n 94, 302.

suggesting here is that the woman is under an *obligation* to terminate her pregnancy in *undefined circumstances*.

Could the 'hardly ever' message have been generated so as to take account of future changes in reproductive norms? As the wrongful conception action itself testifies, much time has elapsed since courts viewed sterilization as injurious.[96] It is beyond dispute that abortion procedures have gained *greater* acceptance in an increasingly secular society,[97] so might this illustrate the need for such exceptions? This is highly plausible, since authors such as Milsteen conclude that it would be unjust if *all* refusals of abortion were beyond scrutiny of the courts, by expressly pointing to how such procedures have become relatively 'commonplace' in society.[98] But this is to confuse the legal issue that both mitigation and intervening cause raise, since as Norrie argues:

> The real question is whether the *refusal* is unreasonable, not whether an *acceptance* of abortion is reasonable. Just because an act is reasonable, does not make the refusal to undertake the act unreasonable, for both

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[96] Take for instance the comment of Lord Denning MR: 'Take a case where a sterilization operation is done so as to enable a man to have the pleasure of sexual intercourse without shouldering the responsibilities attached to it. The operation is plainly injurious to the public interest. It is degrading to the man himself. It is injurious to his wife and any woman who he may marry...It is illegal, even though the man consents to it...' (*Bravery v* Bravery [1954] 3 All ER 59).

[97] J Scott, 'Generational changes in attitudes to abortion: a cross-national comparison' (1998) 14 *European Sociological Review* 177.

[98] Milsteen, above n 76, 1187. Such a possibility was furnished more recently by Callaghan J in the Australian case of *Cattanach v Melchior* [2003] HCA 38, in which he considered: 'It may be that because of the possibility of changed views in society about reproductivity, the Court may be forced to confront an argument that a decision not to abort, or not to offer for adoption, should be regarded as a failure on the part of the parents to act reasonably...' (at 294).

> decisions may be reasonable: otherwise the law would be compulsory rather than permissive.[99]

While the *acceptability* of a procedure might well point to the unreasonableness of its refusal in other medical contexts, in relation to abortion procedures which are strictly regulated by legislation, the same cannot be said.[100] As Mason notes, while abortion may be available on demand in a *de facto* sense, 'it certainly cannot be seen as that *de jure*.'[101] And in this respect, it might well be pointed out that the mitigation and intervening cause doctrines act upon an operative (il)legal fiction since 'the circumstances are such that neither consent to nor refusal of abortion could be said to be unfettered and, therefore, truly valid.'[102] In other words, the Abortion Act 1967 does not allow *any* room for the creation of a 'duty' to terminate a foetus – as Stephenson LJ in the wrongful life case of *McKay v Essex Area Health Authority* was acutely aware:

> [H]ow can there be a duty to take away life? How indeed can it be lawful? It is still the law that it is unlawful to take away the life of a born child or of any living person after birth... Another notable feature of the Act is that it does not directly impose any duty on a medical practitioner *or anyone else* to terminate a pregnancy, though it relieves

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[99] Norrie, above n 72, 259.

[100] Such confusion is demonstrated by commentators such as Milsteen. In the same breath he speaks of the determination of 'the reasonableness of a plaintiff's decision *not* to undergo a surgical procedure' in other medical contexts, but then switches in the abortion context to 'the reasonableness of an abortion' Milsteen, above n 76, 1186. While this is a subtle difference, the contention here is that it can only ever be correct to question the reasonableness of *refusing* an abortion.

[101] J.K. Mason, 'Unwanted Pregnancy: A Case of Retroversion?' (2000) 4 *Edinburgh Law Review* 191, 199.

[102] Mason, above n 101, 199.

> conscientious objectors of a duty to participate in any treatment by the Act in all cases with one exception...[103]

Rejecting that a doctor could ever be under such a duty to an unborn child, in the absence of specific legislation to achieve this end, Ackner LJ stated that such a proposition ran 'wholly contrary to the concept of the sanctity of human life'.[104] Although the context may be slightly different, the judgments must be seen as holding considerable force here. To impose an obligation to terminate upon a woman, as Margaret Brazier argues, 'is more repugnant to the concept of sanctity of human life than to impose an obligation to abort on a doctor.'[105] And significantly, unless the woman's life is threatened by continued pregnancy, *no* doctor is under a duty to perform an abortion by virtue of section 4 of the Act.[106] Therefore while a doctor's conscientious objection may derive from Hippocratic or religious origins, what of those, who in accordance with *Emeh,* would be required to submit their bodies to such treatment? Indeed, it is the *moral dimension* of abortion that section 4 explicitly protects, that is all too quickly forgotten in relation to mitigation and intervening cause.[107] Exceptional circumstances or not, judges have completely lost sight of the Abortion

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[103] *McKay,* above n 77 (LexisNexis Transcript).

[104] *McKay*, above n 77.

[105] Brazier, above n 74, 383.

[106] Section 4(1) of the Abortion Act provides that, except where treatment is necessary to save the life or prevent grave permanent injury to the physical or mental health of a pregnant woman, 'no person shall be under any duty, whether by contract or by any statutory or other legal requirement, to participate in any treatment authorised by this Act to which he has a conscientious objection.'

[107] Of interest however, notions of sanctity of life, disruption of the family, and concerns that doctors would be under subconscious pressure to advise abortions, have been used as justifications for denying child maintenance damages by Jupp J in *Udale v Bloomsbury Area Health Authority* [1983] 2 All ER 522.

Act and the controversy which continues to surround it. In this regard, Lord Denning MR's comments may well provide a suitably cautionary note:

> Abortion is a subject on which many people feel strongly. In both directions. Many are for it. Many are against it. Some object to it as the destruction of life. Others favour it as the right of the woman. Emotions run so high on both sides that I feel that we as judges must go by the very words of the statute – without stretching it one way or the other – and writing nothing in which is not there.[108]

There are some, however, who argue that neither intervening cause or mitigation create the 'duty' described above. They can only be viewed as imposing a 'hypothetical duty'.[109] Of course, this is true to the extent that both doctrines effectively result in the denial of damages from the point at which the 'reasonable' claimant could have acted to avoid greater damage. Therefore, should the woman choose not to terminate her pregnancy, or surrender her child for adoption shortly after its birth she simply foregoes the damages which such courses of action would have avoided. But as the following justification illustrates, the logic of these positions is deeply flawed:

> In any case, the requirement that the plaintiff take reasonable steps to mitigate *should not be seen as judicial coercion*, compelling the plaintiff to abort or place her child for adoption. Rather the avoidable consequences rule would *only force* the plaintiff to make a choice…[110]

It is precisely behind this 'hypothetical' veil that proponents of mitigation and intervening cause so frequently hide in the context of

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[108] *Royal College of Nursing*, above n 9 (LexisNexis Transcript).

[109] Norman Block, 'Wrongful Birth: The Avoidance of Consequences Doctrine in Mitigation of Damages' (1984-1985) 53 *Fordham Law Review* 1107, 1114; Jackson, A, above n 10, 603;

[110] Milsteen, above n 76, 1187 [my emphasis].

wrongful conception.[111] Rather than being seen to advocate abortion, it neatly avoids the argument that these doctrines convert an entitlement into an obligation, and thereby diffuses all the messy moral implications that flow from this. But for all the sophistry employed, it completely fails to answer the most significant questions that these doctrines give rise to: *why* is a refusal to terminate a pregnancy, or place a child for adoption so 'very unreasonable'? If, as the courts suggest parents' decisions to *keep* their children are 'reasonable, praiseworthy and socially valuable',[112] might not logic dictate that, hypothetical duty or not, compelling parents against their will to dispose of their children in this way is *far* from reasonable? And finally, how could it ever be considered reasonable to transfer complete responsibility to a woman, when *negligence* has given rise to the very dilemma she had the right to avoid? Arguably, such a conclusion ignores the fact of a prior breach by the defendant. It would seem that it is not only the concept of 'duty' that is hypothetical here, but the very notion of reasonableness itself.[113]

Despite these criticisms, however, perhaps we can take refuge in the fact that the 'hardly ever' approach advocated by Slade LJ in *Emeh* has been 'followed almost universally'.[114] As some authors suggested following *Emeh,* no matter how the matter was put, 'a doctor who seeks to defeat an unwanted birth by asserting that parents are under an obligation to minimize the harm caused by the birth of a child [was] likely to fail'.[115]

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[111] Yet the 'hypothetical' nature of this doctrine is often overlooked by those arguing against mitigation and intervening cause in this context.

[112] *Rees* (HL), above n 42, at 136 (*per* Lord Scott).

[113] This aspect of the mitigation requirement is examined in chapter five.

[114] Mason, above n 101, 199.

[115] Seymour, above n 35, 81; See Davies, above n 74, 186 who comments: 'In reality, and quite correctly, there seems little prospect of the plaintiff in such a case being 'punished' by a reduction of damages for not having an abortion'. See also Kerry Petersen, 'Wrongful Conception and Birth: The Loss of Reproductive Freedom and

Or perhaps we could go much further than this, since as Hale LJ commented following the House of Lords decision in *McFarlane*:[116]

> Their Lordships unanimously took the view that it was not reasonable to expect any woman to mitigate her loss by having an abortion. Realistically, some may think, the result of their Lordships' decision could well be that some will have no other sensible option.[117]

Hale LJ's somewhat pessimistic reflection of *McFarlane*, of course, relates to the fact that their Lordships were *also* unanimous in rejecting child maintenance costs on *alternative* grounds. Therefore, unless women do take active steps to avoid parenthood following negligence they *will* be lumbered with the costs of raising the 'unwanted' children.[118] Thus viewed, the rejection of the mitigation requirement unquestionably constitutes a hollow victory. Nevertheless, while *McFarlane* closes the issue of child maintenance costs, so too does it (apparently) put an end to the speculation as to when, 'if ever, a woman will be required to mitigate her loss by undergoing an abortion?'[119] Here, *all* of their Lordships took the opportunity to reject the operation of the mitigation requirement despite the absence of such a claim in the defenders' pleadings. But of all the judgments, the most articulate and

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Medical Irresponsibility' (1996) 18 *Sydney Law Review* 503, who more forthrightly suggests that, 'It is clear that a woman has no obligation to mitigate her loss by having an abortion' (at 521).

[116] *McFarlane*, above n 15.

[117] *Parkinson*, below n 129, at paragraph [66].

[118] And while the House of Lords' was invited to reconsider their previous decision of *McFarlane* in the recent case of *Rees v Darlington Memorial Hospital* (above n 42), the position in respect of *child maintenance* damages remains the same. The conventional award suggested by the majority in *Rees* however, only relates to the loss of the parents' autonomy to plan the size and timing of their family, and not to caring for the unwanted child. See further chapter one.

[119] Lexa Hilliard, '"Wrongful Birth": Some Growing Pains' (1985) 48 MLR 224, 229.

emphatic rejection is provided by Lord Steyn; and it is worth citing at length:

> I *cannot conceive* of any circumstances in which the autonomous decision of the parents not to resort to even a lawful abortion could be questioned. For similar reasons the parents' decision not to have the child adopted was plainly natural and commendable. It is *difficult to envisag*e any circumstances in which it would be right to challenge such a decision of the parents. The starting point is the right of parents to make decisions on family planning and, if those plans fail, their right to care for *an initially unwanted* child. The law does and must respect these decisions of parents which are so closely tied to their basic freedoms and rights of personal autonomy.[120]

In a passage that illustrates a judge struggling to imagine *any* circumstances that might lead a court to entertain the mitigation requirement, particularly when considering the parents' rights of autonomy, surely there can be little doubt that the message here must be, by contrast with *Emeh,* 'absolutely never'? Although criticised for having given 'little reason for their unanimity on the question', which according to Mason, has left us 'to fend for ourselves in establishing why it is unacceptable',[121] their Lordships' judgments present clear opposition to such an argument being presented before any court. If it were suggested, whether on the basis of remoteness or intervening cause, Lord Slynn remarked that he would reject such contentions;[122] echoing this, Lord Clyde remarked that this would constitute his view, even if the courses of abortion or adoption 'were available or practicable.'[123] Lord Hope, by contrast, fully accepted the pursuers' claim that they had no other choice but to accept the child once born, it being 'unthinkable for

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[120] *McFarlane*, above n 15, at 81 [my emphasis].

[121] Mason, above n 101, 199.

[122] *McFarlane*, above n 15, at 74.

[123] *McFarlane,* above n 15, at 105.

them to have put her out for adoption once she had been born.'[124] Indeed, it seems that Lord Millett stands alone in conceding that the mitigation requirement might retain some utility, albeit in 'hard to imagine' circumstances:

> I regard the proposition that it is unreasonable for parents not to have an abortion or place a child for adoption as far more repugnant than the characterisation of the birth of a healthy and normal child as a detriment. I agree with Slade LJ in *Emeh* that save in the most exceptional circumstances (which it is very hard to imagine) it can never be unreasonable for parents or prospective parents to decline to terminate a pregnancy or to place the child for adoption.

But despite Lord Millett's concession, the majority line seems quite clear; whether described as repugnant, inconceivable, unthinkable, a breach of autonomy or unreasonable, is it not beyond question that *McFarlane* heralds the end of the mitigation requirement in the action of wrongful conception?[125]

Certainly, for those who would draw *tight doctrinal distinctions*, there will be no doubt in their minds that the mitigation requirement is truly dead. No longer will the courts *ever* construe a refusal to terminate a pregnancy or surrender a child for adoption as unreasonable. And no United Kingdom court *since* has attempted to do so. But what if one moment, we remove this talk of chains, intervening cause, duty to take reasonable steps, loss minimization and completely sidestep the issues of abortion and adoption? What arguments can be advanced so as to enable the courts to *deny* child maintenance damages? Reflecting on

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[124] *McFarlane,* above n 15, at 90.

[125] As Whitfield argues 'The language of the speeches is so strong that the contrary would seem unarguable in any imaginable circumstance' (Adrian Whitfield, 'The fallout from *McF*arlane' (2002) 18 *Professional Negligence* 234, 243).

comparative law on the subject, Lord Steyn remarked that the grounds for such decisions are diverse:

> Sometimes it is said that there was no personal injury, a lack of foreseeability of the costs of bringing up the child, no causative link between the breach of duty and the birth of a healthy child, or no loss since the joys of having a child always outweigh the financial costs. Sometimes the idea that the couple could have avoided the financial costs of bringing up the unwanted child by abortion or adoption has influenced decisions. Policy considerations undoubtedly played a role in decisions denying a remedy for the cost of bringing up an unwanted child.[126]

And the diversity of responses demonstrates much more than a judicial eagerness to reject these claims; it also illustrates the highly interchangeable nature of legal doctrine. Having reflected on the close relationship between the two supposedly 'separate' doctrines of intervening cause and mitigation, this surely begs the question: what differentiates these from concepts of duty, breach or damage? Do all these concepts play their own distinct roles in the action for wrongful conception?

As previous chapters illustrate, these concepts themselves are not merely 'self-evident, objective and gender-neutral categories'[127] which guide the judge in his 'fact-finding' mission towards an objective resolution. Rather, these concepts overlap and intersect; they are variable, interchangeable, policy-laden smokescreens, 'open to judicial manipulation'.[128] And no where does this become *more* evident than in the action for wrongful conception. The eloquent expressions of judges

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[126] *McFarlane,* above n 15, at 81.

[127] See chapters two and three.

[128] Joanne Conaghan and Wade Mansell, *The Wrongs of Tort* (London: Pluto, 1999), 52.

speaking in 'five different voices',[129] or concessions like those of Lord Hope, that 'there may indeed be other ways of expressing the point'[130] – do little to disguise the policy-driven and interchangeable nature of legal doctrine; they fully expose that something else is at play.

Therefore removing these tight doctrinal distinctions might well enable us to hear what judges are *really* saying; and in wrongful conception this proves extremely illuminating. For once we do so, what we are left with is a highly emotive language that speaks of benefits, love, joy, acceptance, and much wanted children. But this picture of familial bliss is far from innocuous – it is a policy decision – and one that entails the shifting of responsibility to *women* for exercising their *choice to keep the child.* In other words, what remains is the theoretical underpinning of *all* denials of child maintenance damages – the mitigation ethic.

...LONG LIVE MITIGATION!

It is not only feminist scholars uneasy with the concept of choice; so are judges. Not wishing to place 'undue emphasis' on the fact that the pursuers 'chose to keep the child', much easier decided Lord Hope, to discard all this talk of choice – even accept that 'they had no other choice.'[131] But, his Lordship concluded, the fact remains 'they are now bringing the child up within the family.'[132] So perhaps they did make a choice? Also clearly baffled by the question of whether parents might *choose* to keep a child or not, was Lord Millett. Accepting that if it was a choice 'it is one they should never have been called upon to make'; or

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[129] *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] 3 All ER 97, at paragraph [30] (*per* Lord Justice Brooke).

[130] *Rees* (HL), above n 42, at paragraph [52].

[131] *McFarlane,* above n 15, at 97.

[132] *McFarlane*, above n 15, at 97.

he considered, perhaps it might not be a choice at all 'if there is no realistic alternative.' A better substitute must surely be the word "decision" – but he conceded, 'even this is not necessarily appropriate'.[133] Continuing these painful deliberations his Lordship stated:

> It is doubtful whether Mr and Mrs McFarlane made any conscious decision to keep Catherine. It is more likely that they never even contemplated an alternative. The critical fact is that they have kept her, not that they deliberately chose or decided to do so. It is, of course, that act which has inevitably involved them in the responsibility and expense of bringing her up.[134]

So, not really a choice, or a realistic alternative, and nor is it appropriate to call it a decision; or if it *is* a choice then by no means a conscious one, and certainly not one they should have had to make – but it is a choice nevertheless and one for which they should *inevitably* be responsible. But if that fails to convince, then perhaps one could place emphasis on the fact that the pursuers 'accepted the addition to their family';[135] should that sound too much like a decision, then a fatalistic line might prove more fruitful – they simply 'end up with an addition to their family.'[136] So, it just happens by itself? Or perhaps, like Lords Steyn and Slynn it is just better all round to avoid such discussion of choice entirely and justify rejections of child maintenance damages through more legalistic avenues such as distributive justice, or duty.[137] Indeed,

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[133] *McFarlane,* above n 15, at 113.

[134] *McFarlane,* above n 15, at 113.

[135] *McFarlane*, above n 15, at 105 (*per* Lord Clyde).

[136] *McFarlane,* above n 15, at 105 (*per* Lord Clyde).

[137] These aspects of the *McFarlane* decision have already been discussed at length; see chapter one.

their Lordships utter lack of unanimity here perhaps serves to illustrate the propensity of their concerns with the concept of choice – but why?

Conceding that the pursuers have *no choice* might well prove fatal to their Lordships' cause. After all, it hardly seems reasonable to hold pursuers responsible for negligence which has placed them in the position of having no choice; that would be a clear show of making individuals fully responsible for the torts of others, even when their own conduct is beyond question. However, if their Lordships were more candid in expressing that the pursuers *do* have a choice – an entirely desirable route in justifying a claimant's responsibility - then that necessarily entails a discussion as to what the choice precisely consists of. And herein rests their Lordships' dilemma. Choosing to keep the child logically implies that pursuers could have otherwise chosen *not* to keep the child; naturally, the only legal means of exercising such a choice would be via abortion or adoption. The problem for the *McFarlane* court is that holding the pursuers responsible *for not* exercising this choice is the close equivalent of saying they have acted 'very unreasonably'. In other words, this analytical route would require the court to invoke an argument that borders on very doctrine that they unanimously rejected – mitigation - hence their Lordships' prevarication over choice.

In an attempt to avoid these difficulties, slightly different strategies were employed. Lord Hope, clearly uncomfortable with the concept of choice, instead placed great emphasis on the 'benefits' arising out of (unwanted) parenthood and considered it unreasonable to leave such benefits 'out of account'. Invoking a slightly different line of analysis was Lord Clyde, who suggested that:

> A stronger argument can be presented to the effect that the obligation to maintain the child is an obligation imposed upon the parents of the child and that they will not be held to have sustained any loss caused by the defenders' negligence if, *despite the negligence*, they are able to meet those obligations.[138]

At first glance, it is not quite clear what his Lordship is saying here; does he mean that because the (uninsured) claimants can *afford* to pay for the child's upbringing that the defendants should escape liability?[139] Or is the central emphasis upon the parents' *choice* to keep the child? Rejecting that the decision to keep the child could constitute an intervening cause, Lord Clyde considered the situation a peculiar one:

> Without surrendering the child the pursuers cannot realistically be returned to the same position as they would have been in had they not sustained the alleged wrong. But it cannot reasonably be claimed that they should have surrendered the child, as by adoption or, far less, by abortion, so as to achieve some kind of approximation to the previous situation... There is no issue here of mitigation of damages. But while it is perfectly reasonable for the pursuers to have accepted the addition to their family, it does not seem to me reasonable that they should in effect be relieved of the financial obligations of caring for their child.[140]

Unreasonable to expect parents to surrender the child, reasonable for them to keep the child, but unreasonable for them to receive compensation – does this make *any* sense? It does if we insert the words his Lordship conveniently avoided – what he is really saying is that the parents *benefit* from keeping the child. On this view, his approach is no different to that of Lord Hope. Although many of their Lordships

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[138] *McFarlane*, above n 15, at 103.

[139] Of course, this makes no sense since rich or insured claimants then would be precluded from succeeding in negligence actions.

[140] *McFarlane*, above n 15, at 105.

rejected the 'benefits' approach,[141] arguably this strategy is employed by all; the judgments are simply littered with judicial pronouncements as to how the child, though originally unwanted, is now very clearly wanted, having been 'accepted willingly and lovingly into the family.'[142] But as will be apparent, these are by no means judicial commendations; rather these literary tools are designed to illustrate how the apparently injurious situation is really a positive one. As Anthony Jackson comments:

> In situations in which parents are pleased to keep their children, it is suggested that it is straining the concept of an "injury" to state that one has been suffered by them. It appears contradictory to state on the one hand that a child is so unwanted that damages should be available for its very existence and upbringing, while on the other confirming that it is so wanted by these parents that they have chosen to keep the child.[143]

Choice emerges here, but more implicitly. This approach not only stresses parental expressions of joy, but takes the view that keeping the child provides *objective* evidence that no actionable damage arises in such cases. Indeed, failing to surrender the child illustrates how parents have now come to regard their once unwanted child as very much wanted, for is it not true that 'by and large, a person who is deeply injured will go to considerable lengths to avoid the consequences of that injury'?[144] In other words, this approach *assumes* that parents *did have a choice*, but it is not one which they chose to exercise. Why then, the argument runs, should a tortfeasor be responsible for the financial costs of raising such a loved and *chosen* child? Despite their protestations to the contrary, *all* of their Lordships proceeded on the basis that parents *do*

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[141] That is, in seeking to avoid the set-off argument. See chapter one.

[142] *McFarlane*, above n 15: Lord Slynn at 75; Lord Hope at 89 and 97; Lord Steyn at 77 and 82; Lord Clyde at 104-105; and Lord Millett at 106.

[143] Anthony Jackson, 'Wrongful Life and Wrongful Birth' (1996) 17 *The Journal of Legal Medicine* 349 (LexisNexis).

[144] Mason, above n 11, 101.

benefit from the negligence and are left, on the balance, unharmed. A conclusion made all the more remarkable considering Lord Millett's concession that the presumption had little, if any, factual evidential basis:

> [I]n truth the failure to have an abortion or to place the child for adoption *is no evidence* that the parents themselves regard the child as being, on balance, beneficial... But I am persuaded of the truth of the general proposition.[145]

Nor indeed, does it hold any legal basis. As Arthur Ripstein comments, if one person's negligence injures another 'but also confers a benefit, the tortfeasor cannot appeal to the benefit in order to reduce the damages she must pay... since conferring a benefit is irrelevant, a mistake belief about benefits conferred cannot excuse.'[146] So what conclusions might we reach at this stage? Conceding that claimants have *no choice* but to keep the child clearly proves problematic – since this would absolve the *claimant* of all responsibility. Nor does an objective presumption of "benefits" or "no injury" provide a suitable means of avoiding the difficulties of choice, since it holds no factual or legal foundation. Perhaps then, the simpler route is not to problematize the concept, but rather to sustain that claimants *do* have a 'real choice' to keep the child?

Such an argument was advanced by Priestly JA in the Australian case of *CES v Superclinics (Australia) Pty Ltd.*[147] Rejecting that the defendants

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[145] *McFarlane,* above n 15, at 111 (Solipsism: 'Many people have strong moral objection to abortion and would not countenance it even if it were lawful; while adoption is not a realistic option.')

[146] Arthur Ripstein, *Equality, Responsibility and the Law* (Cambridge: Cambridge University Press, 1999), 205. See further, Arthur Ripstein, 'Private Law and Private Narratives' (2000) 20 *Oxford Journal of Legal Studies* 683; Donna K Holt, 'Wrongful Pregnancy' (1981-1982) 33 *Southern California Law Review* 759, 786.

[147] *C.E.S. Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47.

should be liable for the costs of child maintenance, the judge commented:

> The point in the present case is that the plaintiff chose to keep her child. The anguish of having to make the choice is part of the damage caused by the negligent breach of duty, but the fact remains, however compelling the psychological pressure on the plaintiff may have been to keep the child, the opportunity of choice was in my opinion was real and the choice was made voluntarily. It was this choice which was the cause, in my opinion, of the subsequent cost of rearing a child.[148]

In reaching this conclusion Priestly JA found as 'a matter of ordinary commonsense',[149] that the plaintiff's choice, though a difficult one, should be seen as the true cause of the damage, and not the defendant's negligence. Though some might disagree with Priestly JA's 'commonsense' view of the matter, certainly not Lord Millett in *McFarlane,* who, though rejecting the operation of intervening cause, was nonetheless attracted by its conclusion. Far from offering 'grudging support for this view,'[150] his Lordship used the 'thrust' of both the 'real choice' and 'benefits' arguments in denying child maintenance damages; albeit, following deliberations on both, his Lordship seemed far from convinced that parents had made either a 'real choice' *or* derived a benefit. Perhaps better described as *unconvincing* support than a grudging one? Nevertheless, these doubts aside, the antipodean argument has gained further endorsement more recently in the case of *Rees v Darlington Memorial Hospital.*[151]

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[148] *CES Superclinics*, above n 147, at 84-85.

[149] *CES Superclinics,* above n 147, at 85.

[150] Mason, above n 101, 199.

[151] *Rees* (HL), above n 42.

As noted previously, the House of Lords decision in *Rees,* while controversial, was in the main painfully predictable.[152] Who would have expected for one moment that the House, having been invited to reconsider its previous decision in *McFarlane* would stray far from it? Other than the 'gloss' on *McFarlane* in the form of the (un)conventional award for all future wrongful conceptions cases, and perhaps the lack of sympathy exhibited by some towards the plight of a disabled woman, was there anything left to surprise us here? Considering scholarly comments to date, perhaps not;[153] but as the following newspaper clipping might illustrate these may have overlooked one crucial aspect of the case:

> It's particularly shocking that someone in the position of a Law Lord should make that kind of comment... Whatever the rights of the case that he is commenting on, the way in which the life of a child has been referred to as completely disposable is shocking and sickening... There are a lot of people who don't want to have an abortion.[154]

Invoking the outrage of the Pro-Life campaigners commenting above is Lord Scott; and the offence he is alleged as having committed is advising the claimant in *Rees* that 'she could have aborted or given away her unwanted child'.[155] Indeed, Lord Scott's judgment is a worthy read of

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[152] See chapter two.

[153] It is these aspects of the case, coupled with the uncertainty relating to the birth of disabled children that have attracted attention. See further, Antje Pedain, 'Unconventional Justice in the House of Lords' (2004) *Cambridge Law Journal* 19; Roderick Bagshaw, 'Case notes' (2004) 41 *Student Law Review* 55; Clare Dixon , 'An unconventional gloss on unintended children' (2004) 153 NLJ 1732.

[154] Sam Strangeways, 'You could have had abortion: Law Lord' *UK Newsquest Regional Press – This is The NorthEast* (October 17, 2003).

[155] Strangeways, above n 154.

Orwellian proportions; and it is unquestionably capable of causing outrage, since it is simply *outrageous*, from beginning to end.

Noting the difficult issues arising in wrongful conception claims, Lord Scott found it appropriate to examine an analogous case of professional negligence, where such complicating factors could be filtered out. A simpler version of the wrongful conception claim, his Lordship considered, would involve the negligent performance of a gelding operation on a two year old colt, resulting in a mare giving birth to a healthy foal.[156] The mare, quite fortunately in this scenario 'is not damaged by the experience, but the owner sues the vet for damages.'[157] Noting that an account of detriment and benefit would need to be drawn up in ascertaining the potential liability of the veterinary surgeon, Lord Scott considered the situation quite 'absurd':

> It is absurd in my opinion, because the owner of the foal does not have to keep it. Its unexpected and originally unwanted arrival would present him with a number of choices. He could have the foal destroyed as soon as it was born. But this would be an unlikely choice for the foal would be likely to have some value and it would cost very little to leave it with its dam until it could be weaned. Or the owner could decide to keep the foal until it could be weaned and then to sell it... Or he could keep it for his own use. Each of these choices, bar the first, would have involved the owner in some expense in rearing the foal. But the expenses would be the result of his choice to keep the foal.[158]

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[156] In strict *legal* terms the issues raised in veterinary negligence cases do raise similar issues; most notably the standard of care emanating from *Bolam v Friern Hospital Management Committee* ([1957] 1 WLR 582) applies to any profession which requires skill, knowledge and expertise. See further, Charles Foster, 'An Unknown Horse's Breakfast' (1994) 144 NLJ 10.

[157] *Rees,* above n 42, at paragraph [134].

[158] *Rees*, above n 42, at paragraph [134].

Illustrating remarkable skills of perception, Lord Scott acknowledges that the difficulty produced by cases like *McFarlane*, by contrast with the dilemma of the healthy foal, is that the originally unwanted progeny 'is a human being, not an animal,' and for very deeply ingrained cultural and religious reasons, all human life is regarded by law as both precious and incapable of valuation in monetary terms.[159] Despite these subtle differences however, Lord Scott embarked upon examining what he considered to form strong parallels. The expense of raising the 'originally unwanted but, once born, loved and cherished baby' must, according to his Lordship, be seen as resulting from the decision of the parents to keep the child. Indeed, we might reflect, the decisional situation of parents could be construed in remarkably similar ways to the owner of the unwanted foal, since:

> If the parents decided... to place the child with an adoption society... they would not incur those costs... Nor would they incur them if, for whatever reason, the mother had had her unwanted pregnancy terminated.[160]

But Lord Scott, unlike his predecessors in *McFarlane*, is less ambivalent in conceptualising choice, 'if that is the right word';[161] realising that whilst the owner of the unwanted foal might well have a 'true choice', parents might not regard their decision to keep the child as 'representing a choice.' And of course, *their* perception of the matter might well be influenced by cultural, moral, religious and legal expectations under which parents are expected to accept responsibility for a child that holds 'no parallel in the case of the unwanted foal.'[162] And this is the most

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[159] *Rees,* above n 42, at paragraph [135] [sarcasm required].

[160] *Rees,* above n 42, at paragraph [136].

[161] *Rees,* above n 42, at paragraph [136].

[162] *Rees*, above n 42, at paragraph [136].

interesting aspect of Lord Scott's judgment - his reconciliation of choice, in drawing a neat dichotomy between subjective and objective choices.

Accepting that parents may quite reasonably *regard themselves* as having no choice, his Lordship considered that this still did not answer the question as to why the defendant, albeit the *causa sine qua non* of the costs in question, should be liable 'for the economic consequences of the parents' decision to keep and rear the child, reasonable, praiseworthy and socially valuable... that decision was?'[163] So subjective non-choices are now objectively constructed as independent choices? This certainly raises a number of questions. In drawing such a neat dichotomy, does this mean that the law *should* refuse to recognise that individuals in such situations might confront complex choices - even in circumstances where such a dilemma is a *direct* result of a breach? In other words, *whose* perspective *should* matter here?[164] If one accepts that it is both reasonable and praiseworthy for parents to feel - even at subjective level - that they have no choice but to keep the child, then this line of reasoning must certainly fail to answer the key question: why should *claimants* be responsible when that very dilemma of choice arose as a result of the negligence?

Perhaps recognising the problematic nature of such distinctions, Lord Scott sought out 'determinative' arguments – and these rested firmly in the human world. Placing a monetary value on a child's head, his Lordship considered, would not only be inconsistent with the status of being a valued and loved member of the family, but with the fact that parents in wrongful conception actions never once suggested that the 'price was not worth paying.'[165] Was it ever suggested by claimants

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[163] *Rees,* above n 42, at paragraph [137].

[164] This will be examined in the next chapter.

[165] *Rees,* above n 42, at paragraph [138].

that it *was* a price worth paying? These arguments, found Lord Scott, inevitably led to a departure from the normal application of tortious damages, since it was an exception based on 'the unique nature of human life, a uniqueness that our culture and society recognise and that the law, too, should recognise.'[166] Indeed, so *unique* and *precious* is human life that his Lordship found it an '*acceptable irony* that the conclusion is the same conclusion as that which would have been reached in the case of the unwanted foal, but reached by an entirely different route.'[167] And indeed, it is a conclusion that must leave us wondering whether the mother of the wrongfully conceived child is intended to be the equivalent of the unharmed mare or the choice-bearing and therefore unharmed owner.

Considering Lord Scott's judgment in *Rees* overall, it is notable that nowhere does he utter the word 'mitigation'; nor indeed did Priestly JA in *CES Superclinics* conceptualise the issue as one of mitigation, although others have interpreted it precisely this way, including Meagher JA in the same court.[168] And of course, in explicitly rejecting the mitigation requirement in *McFarlane* and constructing the issue instead as one of parental "benefit" and "no damage" – according to Lord Millet quite different arguments to those raised in mitigation[169] – is it reasonable on the whole to conclude that mitigation is dead? Might it just be a matter of scholarly confusion that these *alternative* routes utilise the 'avoidance of consequences language' and argument, in holding that parental failures to surrender their children demonstrates

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[166] *Rees,* above n 42, at paragraph [139].

[167] *Rees,* above n 42, at paragraph [139] [my emphasis].

[168] For an extended commentary on *CES Superclinics,* see Graycar and Morgan, above n 32.

[169] *McFarlane*, above n 15, at 113: 'The present argument is different'.

that the benefits outweigh the costs,[170] or provides evidence of no injury?[171] Indeed, if such tentative conclusions are the product of confusion, then understandably so, given that 'it is not always clear which theory courts have in mind when they speak of a plaintiff's failure to abort the fetus or place the child for adoption.'[172] As Gerald Robertson confidently asserts, these arguments are not, 'as some commentators have suggested, authority for the proposition that the plaintiff in a wrongful birth action must mitigate damages', but rather they relate to the ' somewhat tenuous implication [that] parents have suffered no loss or damage.'[173] Hardly a justified criticism, since the commentary Robertson cites merely suggests that the same language and arguments are used and is quite explicit as to the precise outcomes (no damage and benefits), therefore this far from suggests that this is considered to be a *precise* application of the mitigation doctrine.[174] Nevertheless, authors such as Mark Strasser are certainly open to such black-letter law critique. As a matter of 'strict' law, it is simply incorrect to suggest that 'by limiting damage to pre-birth expenses, courts in effect have imposed the mitigation rule which they themselves admit is unreasonable';[175] although there may be a great deal of truth in such an assertion.

The silencing of such authors, in my mind, poses a *significant* problem. It is entirely possible that the dominance of black-letter law accounts

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[170] Block, above n 109, 1115.

[171] David J Mark, 'Comment: Liability for Failure of Birth Control Methods' (1976) 76 *Columbia Law Review* 1187, fn 89.

[172] Mark, above n 171, fn 89.

[173] Robertson, above n 37, 154.

[174] Robertson makes direct reference to David Mark, above n 171.

[175] Mark Strasser, 'Misconceptions and Wrongful Births: A Call for a Principled Jurisprudence' (1999) 31 *Arizona State Law Journal* 161, 200.

explains the absence of detailed and challenging explorations in this field.[176] Therefore, left only with versions that swiftly write-off the mitigation doctrine through an unyielding reliance on textbook style distinctions, the question as to how different these approaches *really* are in substance is overlooked. Furthermore, black-letter approaches seem to embrace the notion that all of the difficulties raised by mitigation are swiftly cured merely by courts rejecting *that* doctrine. But, it must be conceded that there certainly are *doctrinal* distinctions. Mitigation, while imposing only a 'hypothetical' duty, results in the reduction of damages to the point which claimants could have taken affirmative action. Intervening cause by contrast, results in the severance of liability, whilst 'damage' naturally forms an essential, but separate analytical component in negligence law. Nevertheless, as we have seen, the very 'thrust' of intervening cause has been used to support the finding of no damage and parental benefit,[177] which might well suggest a less than apparent separation between these doctrines. And indeed, so too would it appear that the ideologies of no surrender and self-care deeply underpin notions of duty and distributive justice.[178] Therefore, despite the differential nature of these doctrines, all scrutinise or question the claimant's conduct, whether directly or tangentially, and

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[176] It is a notable feature of such commentaries that assertions challenging the view that mitigation is no longer applied, are incredibly brief, running usually no longer than a single short paragraph or in a footnote. And it is very possibly this fact that opens up such accounts to critique, since their views while holding merit, do need to respond in more detailed fashion to very obvious doctrinal distinctions. It makes no sense (to a black-letter lawyer at least) to say that limiting recover is always the application of mitigation.

[177] See the discussion of Lord Millett's application of Priestly JA's commonsense view above, at 241.

[178] For example, Lords Steyn and Hope justify their *outcomes* respectively on the basis of distributive justice and duty of care, but both place considerable emphasis on the acceptance of the loved and loving child.

justify the transfer of responsibility for reproductive risks onto the parents. And whether expressed through formal notions of causation or not, all regard the claimant's conduct as the *prime mover* in generating the damage – claimants could have chosen *otherwise*. Consequently there must be room for suspicion of a court that declares that it cannot 'conceive of any circumstances'[179] by which parents 'reasonable' and autonomous decisions not to mitigate by abortion or adoption could be questioned, when each of these *different* doctrinal approaches *do exactly this*. In other words, doctrinal distinctions there may be, but both abortion and adoption continue to be used as socio-legal tools in wrongful conception. Even if the mitigation doctrine is dead, the mitigation ethic lives on.

If, as it is suggested, the differences between the doctrines are theoretical rather than practical in this context, might it be worth considering just why the courts have *rejected* the *doctrine* of mitigation? Could this shift be explained by the courts 'distaste for abortion,'[180] and not wishing to advocate such measures or, perhaps a reluctance to *transparently* advocate abortion? Indeed, whilst the mitigation doctrine directly brings abortion and adoption alternatives into play, alternative measures only raise them inferentially; judges can avoid the whole messy business entirely. And, might it also be significant that *mitigation requires* the court to take account of the fact that the only reason a claimant is placed in the position of having to mitigate is because of a prior breach? It is this very aspect of mitigation that explains why the standard of reasonableness in mitigation operates so differently in normal contexts to that of breach of duty. By contrast to assessments of breach of duty, which impose a stringent and objective standard of care on defendants,

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[179] *McFarlane,* above n 15, at 81 (*per* Lord Steyn).

[180] Mason, above n 11, 101.

in mitigation the standard of reasonableness is not only *lower*,[181] but holds a strong *subjective* element.

Perhaps then, we should consider the dichotomous treatment of 'choice' as highly circumspect, since the courts are very clearly utilising an objective standard. In other words, jettisoning the mitigation doctrine in favour of more ambiguous and ill-defined concepts such as 'damage' might well be highly convenient. Courts have room to exercise discretion, construct new boundaries and rules, while at the same time fully embracing the mitigation ethic and ideology. And the operation of these fresh rules in negligence is truly disturbing, since unlike the strict application of doctrines invoking 'claimant's law', in wrongful conception our attention is *completely* extricated from the fact of prior breach, by emphasising the claimant's ability to avoid harmful consequences through exercising choice. In the most transparent operation of this, we come to question whether negligence occurred at all:

> But suppose that they had been *advised not to have any more children* because there was a serious risk to [the claimant's] life or the birth of a defective child? The obvious remedy would be to have recourse to a lawful termination. But suppose that [the claimants] were strongly opposed to abortion, and *could not in conscience resort to one.* Suppose further that, to their great joy and relief, childbirth was uneventful and the baby was entirely normal. It would seem to be absurd to allow a claim for the costs of bringing up the child in these circumstances.[182]

It would indeed be absurd; no court would ever countenance such a claim since the breach has not led to any damage – for who is at fault in

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[181] In this respect, it is also worth highlighting that the standard of 'reasonableness' in intervening cause is also lower than that operating in relation to breach of duty.

[182] *McFarlane*, above n 15, at 109-110 (*per* Lord Millett).

such a situation?[183] While clearly designed to illustrate how parents are better off than they ever expected to be, since the 'feared harm did not materialise',[184] it also questions the parental motivation more subtly in raising a parallel with cases where the very success of such claims *depends* on a parental willingness to undergo an abortion had the option been available.[185] But the example is far from analogous – in the current context, parents wish to avoid childbirth; negligence *has* led to an unwanted outcome. The "analogy" therefore serves only one illustrative purpose - its *author's* intention - to undermine even *subjective* assertions that parents had no choice by illustrating that they would have claimed differently in such a context. And the author's approach reflects the central purpose of the mitigation ethic – to illustrate contradiction, to render suspicious, if not fraudulent, the claims of *all* those bringing actions for wrongful conception. Whether variably expressed as duty, damage, benefits, causation or distributive justice, what we are dealing with is mitigation.

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[183] No claim could proceed on the basis of this example; it is designed to illustrate a wrongful birth claim (see chapter two) although is flawed on two accounts. In such cases, the parents want to have a child, but a healthy one. Negligence in wrongful birth typically arises through failures to diagnose foetal disability until it is too late to obtain an abortion; therefore liability *depends* on the lost right to terminate the pregnancy *and* the birth of a *disabled* child. In the example above, there is *no* evidence of damage resulting from prior negligence – following a diagnosis of foetal disability, parents refused the available option of legal abortion, and nor is there any damage since the healthy child was the wanted outcome. Nevertheless, such an example does raise questions had the parents terminated on the strength of the incorrect diagnosis of foetal disability; in such circumstances there may be a viable wrongful death claim.

[184] *McFarlane,* above n 15, at 110.

[185] Such cases include wrongful birth and information disclosure cases where the claimant complains of a failure to warn of the risk of recanalization.

Therefore, as will be clear at this stage, it is *not* argued here that the mitigation requirement as furnished in *Emeh* lives on, whether conceived as either intervening cause or mitigation doctrine. But rather, that its rejection has given birth to a fluid and unregulated doctrinal approach that fully embraces the mitigation ethic, but adopts a presumptive world-view of individual *decision-making* and *responsibility* that we should regard as far *more* dangerous and objectionable than its predecessor.[186] For under the new ideology of mitigation, no matter how the claim is put, every outcome is *objectively* a wanted one through the power of individual choice - and of course, with choice comes responsibility.

But perhaps a moment of hesitation is required here – having claimed that this new ethic is both dangerous and objectionable, is it being asserted that the *objective* world view of individual decision-making is flawed in some way? If so, might we advocate a more subjective and contextualised enquiry so as to reveal whether and in fact, parents in wrongful conception suits *really* exercise choice or not? How could it be fair to attribute responsibility in the absence of choice? Indeed, one of the problematic features of Lord Scott's judgment in *Rees* is that the subjective perspectives of parents are not merely devalued, but are entirely excluded as holding no legal currency. Therefore we might argue that subjective accounts, such as those advanced by Counsel for the pursuers in *McFarlane*, should be given much greater weight:

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[186] This also raises a further point relating to the burden of proof in the law of negligence. Under the mitigation doctrine the burden of proof is placed upon the defendant, whilst in causation the onus is on the plaintiff; whether these 'technically' applied in *Emeh* is difficult to ascertain (see further, Rogers, above n 94, 300). Under the new mitigation ethic, there is no burden of proof on either the defendant or the claimant, rather the determination of 'unreasonableness' lies solely in the domain of the judge and in wrongful conception is presumed.

> The parents had no choice... since it is a part of their culture that parents do not put their children for adoption... The parents were also morally opposed to abortion. Therefore it is not reasonable to say that they exercised a choice. Matters were beyond their control from the moment of conception. They did not "choose" to "keep" the child.[187]

But such a strategy is not without its problems. Clearly there is a compelling need to incorporate the subjective realm; yet when we consider the wider context of such arguments, it seems inherently contradictory to argue on the one hand that individuals should be recognised as autonomous, responsible and choosing agents, but for the purposes of critiquing the mitigation ethic, that some of their choices are not choices at all. But more particularly, it is a precarious strategy; looking at the field of reproduction alone, such arguments risk reinforcing the very conceptions of female personhood that posit women as *non*-autonomous agents in need of regulation and control. Therefore, while a subjective account of reproductive choice seems initially attractive in breaking the otherwise inevitable leap to responsibility, sensitivity to these wider issues indicates a need for considerable caution in theorizing what counts as a choice.

SHIFTING REPRODUCTIVE NORMS IN AN 'ERA OF CHOICE'

The human biography is in a state of flux. No longer determined by traditional identities, the *human being* has becomes 'a choice among possibilities, *homo optionis*'.[188] Even the most fundamental aspects of daily living are characterized by a plurality of "choice": life, death,

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[187] *McFarlane,* above n 15, at 65.

[188] Ulrich Beck and Elisabeth Beck-Gernsheim, *Individualization, Institutionalized Individualism and its Social and Political Consequences* (London: Sage Publications, 2003), 5.

gender, corporeality, identity, religion, marriage, parenthood, social ties – all become negotiable, 'decidable down to the small print.'[189] And from the era of 'choice' emerges an ethic – an ethic of individual self-fulfilment where the 'choosing, deciding, shaping being who aspires to be the author of his or her own life, the creator of an individual identity, is the central character of our time.'[190] But the concept of "choice" should not fool us here – the ethic of self-determination is 'compulsive and obligatory.'[191] So while 'individualization' heralds the end of 'fixed, predefined images of man',[192] in the sense that the individual's biography is released from 'given determinations' and placed under the control of the self, it also means being '*forced* to live a more reflective life towards an open future.'[193] In other words, faced with a plurality of lifestyle choices where 'the signposts established by tradition now are blank',[194] we have 'no choice but to choose'.[195]

'Choice', however, might well seem too inconsequential a word for what is going on here.[196] Facing an open future with a plurality of choices is not merely a question of 'how to act but who to be'.[197] It means actively

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[189] Beck and Beck-Gernsheim, above n 188, 5.

[190] Beck and Beck-Gernsheim, above n 188, 22.

[191] Beck and Beck-Gernsheim, above n 188, xv.

[192] Beck and Beck-Gernsheim *above* n 188, 5.

[193] Anthony Giddens, 'Runaway World: the Reith Lectures Revisited: Globalisation' (1999-2000 Director's Lectures, London School of Economics, 1999) [my emphasis].

[194] Anthony Giddens, *Modernity and Self-Identity: Self and Society in the Late Modern Age* (Cambridge: Polity, 1991), 82.

[195] Giddens, above n 195, 81.

[196] The problems emerging from 'increased choice' has become a well documented contemporary concern; see for example, Anon, 'Choosing to Choose', *The Economist* (10th April 2004) 23-24; Barry Schwartz, *The Paradox of Choice: Why More is Less* (New York: HarperCollins, 2004).

[197] Giddens, above n 195, 81.

'creating a self-identity rather than simply taking self-identity from a cultural background or traditional form of history'.[198] And for women this has held the promise of truly liberating consequences. As Beck and Beck-Gernsheim comment, the female biography has undergone an 'individualization boost'.[199] Tradition and nature, forces that once structured what it was to be "a woman" – a life bound in domesticity, motherhood and subordination 'in a male dominated universe'[200] - are now declining in their impact. Although motherhood remains 'the strongest tie to the traditional female role' the continued subordination of 'nature to human purposes',[201] serves to disrupt the notion of reproduction as 'fate' or 'natural'.[202] As one author comments, the promises of reproductive technology seem endless:

> Fertile women can stop baby making with Norplant, RU486, or abortion. Infertile couples can still make babies with the help of artificial insemination, *in vitro* fertilisation, donor semen, donor eggs, frozen embryos, and surrogate motherhood. Soon we will be able to exact quality control regarding the health and perhaps the genetic make-up of future children with the aid of genetic screening, genetic engineering, nuclear transplantation, egg fusion, cloning, selective abortion, and *in utero* fetal surgery. A woman can become a mother at age 62. And if experiments in ectogenesis and interspecies gestation

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[198] Giddens, above n 193.

[199] Beck and Beck-Gernsheim *above* n 188, 55.

[200] Giddens, above n 193.

[201] Giddens, above n 195, 144.

[202] The work of Anthony Giddens and Ulrich Beck is cited here where there are strong parallels. However there are salient theoretical differences between their approaches; see further, Margarita Alario and William Freudenburg, 'The Paradoxes of Modernity: Scientific Advances, Environmental Problems, and Risks to the Social Fabric?' (2003) 18 *Sociological Forum* 193.

> prove successful, a woman will be able to become a mother without herself becoming pregnant.[203]

On this view, it seems that reproduction has become 'a variable individual decision',[204] a life-style choice, as the woman's reproductive biography transforms from 'ascribed' to 'acquired', from 'living for others' to a 'life of one's own'.[205] The body becomes 'emancipated'[206] through the transformative power of technology – the power of choice. But increased choice has its consequences, since with the individualization of choice, comes the individualization of risks. No longer are life's events conceived as attributable to things that *just happen*, 'sent by God or nature';[207] rather failures are located at individual level, seen instead as 'consequences of the decisions they themselves have made, which they must view and treat as such.'[208] And the imperative of choice and responsibility holds a further dynamic: the individual is not only responsible for the decisions he or she consciously makes, but also for non-decisions, omissions and incapacities.[209] The individual 'will have to 'pay for' the consequences of decisions not taken, even in the absence of alternatives.[210]

In the field of reproduction, the significance of this is clear – increased reproductive choice 'comes at a price'.[211] The widely held perception

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[203] Ted F Peters, 'Multiple Choice in Baby Making' (1996) 16 *Word & World* 11, 11.

[204] Giddens, above n 195, 221.

[205] Beck and Beck-Gernsheim above n 188, 56.

[206] Giddens, above n 195, 218.

[207] Giddens, above n 195, 136.

[208] Giddens, above n 195, 136.

[209] Beck and Beck-Gernsheim above n 188, 25.

[210] Giddens, above n 195, 135.

[211] Susan Millns, 'The Human Rights Act 1998 and Reproductive Rights' (2001) 54 *Parliamentary Affairs* 475, 475.

that 'nature and biology can be controlled to suit our needs'[212] imposes a burden of responsibility upon individuals, a burden to make 'responsible' choices under the new morality of reproduction. While there are clear dangers that increased choice may 'swiftly evolve into pressure to reproduce',[213] so too can it swiftly translate into a pressure *not* to reproduce. In an era of increased technological control, and increased sentimentalism surrounding children, notions of responsibility have come to take on a much broader meaning. As Beck and Beck Gernsheim comment:

> The more that safe methods of contraception become available, the more widespread becomes the idea of responsible parenthood. Once this referred to the quantitative aspect: only as many children as you can properly bring up and provide for. Now with the new possibilities in reproductive medicine and prenatal diagnostics, the concept of responsibility has been moving in the direction of a qualitative choice that begins before birth or perhaps even before conception.[214]

Women face shifting discourses here; while responsibility is presented as meaning greater autonomy,[215] the traditional norms of maternity have given way to new reproductive norms under which women are *always* confronted with the permanent pain of action. No longer does responsible parenthood simply mean 'intentional parenthood' and 'wanted children' - although it clearly means this too. As 'accidents' transform into 'preventable misfortunes', there is no justification for women to fall pregnant when they crave independent lives. Under the new morality of reproduction, Mary Evans explains, 'a good woman is

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[212] Shelley Day Sclater, 'Introduction' in Andrew Bainham, Shelley Day Sclater and Martin Richards (Eds) *Body Lore and Laws* (Oxford: Hart Publishing, 2002), 15.

[213] Millns, above n 211, 475.

[214] Beck and Beck-Gernsheim, above n 188, 146.

[215] Beck and Beck-Gernsheim, above, n 188.

one who makes effective use of contraception, and sexual relations between unmarried heterosexual partners are acceptable so long as both are 'careful'.[216] Nothing it seems needs to be left to fate - or rather under the notion of reproductive autonomy, nothing *should* be left to fate. The new morality of reproduction then is not *only* 'about the use of technology'[217] – it also entails a judgment upon *women.*

But whether these discourses of choice fairly reflect the reality of women's lives is highly questionable. As Maxine Lattimer comments, the notion that the existence of contraception solves the problem of unwanted pregnancies 'contradicts realities for women.'[218] Furthermore, the presentation of reproduction as a preventable misfortune in the complete control *of women* conceals 'inequalities of power between men and women' and 'issues of women being responsible for male sexuality'.[219] But of equal concern, the increasing responsibilisation of reproductive choice presents women with a 'double-bind', since:

> They live in a society that constructs motherhood as a good and abortion as bad through dominant discourses, but the same discourses assert that babies should be born in the 'right' circumstances. Women are condemned if they do have an abortion, but also if they continue with a pregnancy in culturally unacceptable circumstances that are not 'fair' to the child. Aspects of hegemonic discourses of motherhood condemn single mothers living on state benefits, lone parents and broken homes for being 'unfair' on children, and women who work and leave their children with childminders for not being caring mothers. This is the reality of the contradictory pressures on British women with unplanned

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[216] Mary Evans, *Love, an unromantic discussion* (Cambridge: Polity, 2003), 97.

[217] Evans, above n 216, 97

[218] Maxine Lattimer, 'Dominant Ideas versus Women's Reality: Hegemonic Discourses in British Abortion Law' in Ellie Lee (Ed) *Abortion Law and Politics Today* (London: Macmillan Press, 1998), 64.

[219] Lattimer, above n 218, 64.

> or unwanted pregnancies who must make decisions regarding abortion...[220]

In the context of abortion then, to what extent do these hegemonic discourses impact on women's freedom? If women's decision-making is informed by a series of conflicting messages about motherhood, abortion and sexuality, in what way does this disrupt dominant perspectives of reproductive choice? In this sense, what we are asking is whether concepts of "choice" might best explain the decision of whether or not to terminate a pregnancy. What *exactly* do we mean by "choice" here?

At a strategic and political level, this question is largely rhetorical; gaining reproductive control and "choice" has been a key area of the women's movement; therefore securing choice over the decision of whether to abort or not, is critical. Expressed under the slogan 'A Woman's Right to Choose', feminists have fought hard to gain recognition that pregnant women are, the 'best judges of whether abortion is an appropriate response to their pregnancies... best able to weigh the relevant factors – the particular consequences of pregnancy in their lives at that time and or the potential life under the circumstances.'[221] Of course, this is right, and few feminists would doubt the political *importance* of such a claim; but that is not to say that all are entirely comfortable with its *substance*. In the context of a 'Right to Choose', many are increasingly coming to question both its epistemological foundation *and* political effectiveness in a rights-based society. And such disquiet is well justified.

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[220] Lattimer, above n 218, 66.

[221] Bender, above n 4, 1263.

The potential threat of 'interested parties' contesting these notions of "choice" and "rights" in the area of abortion led Elizabeth Kingdom to warn that if women have the right to reproduce 'there is no obvious reason why that right should not be claimed for men too, and on traditional liberal grounds of equality it would be difficult to oppose that claim.'[222] Of course, it might be pointed out that at both domestic and European level, the courts have been resistant so far to such co-opting, as demonstrated by the failure of putative fathers attempts to gain a decisional stance in the abortion-decision.[223] Yet, it would seem that a possible consequence of men's decisional powerlessness is the generation of a more sophisticated argument that plays *directly* on the fact of their exclusion from the abortion decision: if women have unilateral control over whether or not to continue a pregnancy, it is unfair to hold genetic fathers financially liable for child support. This claim, made by some men's advocates, Sally Sheldon explains, is that legal abortion has challenged the 'inevitability of the causal link between sex and procreation and, as such, it is unfair not to allow that this chain may also be broken for men in certain circumstances.'[224] It is an argument which, akin to the mitigation ethic, fully embraces the liberal notion of reproductive autonomy: for with choice, comes responsibility.

Although this reading of "choice" seems *compulsive* and *obligatory* - if not downright *threatening* - perhaps the most disconcerting features of

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[222] Elizabeth Kingdom, 'The Right to Reproduce' (1986) *Medicine, Ethics and Law* 32 cited in Fiona Beverage and Siobhan Mullally, 'International Human Rights and Body Politics' in Jo Bridgeman and Susan Millns (Eds) *Law and Body Politics: Regulating the Female Body* (Aldershot: Dartmouth, 1995), 247.

[223] *C v S* [1987] 2 WLR 1108; *Paton v BPAS* [1979] QB 276; *Paton v UK* (1981) 3 EHRR 408; see further Jo Bridgeman, 'A Woman's Right to Choose?' in Ellie Lee (Ed) *Abortion Law and Politics Today* (London: Macmillan Press Ltd, 1998).

[224] Sheldon, above n 29, 178.

this rights-based argument, is that it is 'made in the language of feminism.'[225] And on traditional liberal grounds of equality it *is* an extremely difficult claim to rebut; as we have noted in relation to the mitigation ethic, attempts to resist this argument inevitably force us to ask: under what circumstances might we conceptualise continuing a pregnancy as constituting an autonomous choice or not?[226]

From a legal perspective, one might point to those jurisdictions where abortion is generally prohibited in order to argue that women have little choice *but* to continue a pregnancy. And in this respect, the jurisdictional competence of the Abortion Act 1967 is limited. By contrast with the rest of the United Kingdom, its provisions have no application to Northern Ireland where doctors continue to rely on the archaic 'good faith' provision exception created by the case of *R v Bourne.*[227] Therefore terminations are only permitted where the continuation of the pregnancy creates a serious risk that the woman will become a 'physical or mental wreck'. But in the absence of guidelines, many women may be uncertain whether they fit within the terms of a permissible abortion.[228] As a result, those seeking abortion services will do so by, 'illegal and often dangerous means or through travel (mostly in secret and at great cost) to clinics in Great Britain.'[229] If there is anything close to 'choice' here, by no means is it a 'free' one.

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[225] David Nolan, 'Abortion: Should Men Have a Say?' in Ellie Lee (Ed) *Abortion Law and Politics Today* (Macmillan Press Ltd: London, 1998), 218.

[226] In the context of the men's advocates' argument, this question has been explored in great detail by Sally Sheldon. See further Sheldon, above n 29.

[227] *R v Bourne* (1939) 1 KB 687.

[228] Eileen V Fegan and Rachel Rebouche, 'Northern Ireland's Abortion Law: The Morality of Silence and the Censure of Agency' (2003) 11 *Feminist Legal Studies* 221, 222.

[229] Fegan and Rebouche, above n 228, 227. As Donnelly notes in relation to the mitigation doctrine, the legal position of both the Republic of Ireland and Northern

But even where the 1967 Act does apply, it is still arguable that the notion of 'choice' fails to reflect the reality of abortion provision. Despite the apparent liberal provision of abortion under the Act, as Emily Jackson notes, there is no right to abortion 'even if the grounds in the Act are plainly satisfied'.[230] Women continue to be *dependent* on medical discretion, and will need to convince two non-conscientiously objecting doctors under section 1(1)(a) of the Act that an abortion is necessary.[231] Furthermore, women reliant upon NHS funding may not only encounter hostility and judgmental treatment from medical practitioners, but increasingly significant delays in the performance of a termination *if* permission is granted.[232] And in view of the considerable variations in NHS abortion provision nationwide, accessing such services may well depend on the woman's postcode,[233] leaving some having to pay for an abortion in the private sector.[234] While these legal

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Ireland is such that there is clearly no possibility that a plaintiff would be required to mitigate damages.' Mary Donnelly, 'The Injury of Parenthood: The Tort of Wrongful Conception' (1997) 48 *Northern Ireland Legal Quarterly* 10, 22.

[230] Emily Jackson, 'Abortion, Autonomy and Prenatal Diagnosis' (2000) 9 *Social & Legal Studies* 467, 470.

[231] As Sheldon notes, women are unlikely to know the views of their doctors beforehand and there is no obligation upon an anti-choice doctor to refer women to non-objecting clinicians; see Sally Sheldon, 'The Law of Abortion and the Politics of Medicalisation' in Jo Bridgeman and Susan Millns (Eds), *Law and Body Politics: Regulating the Female Body* (Aldershot: Dartmouth, 1995), 112.

[232] In view of the rising delays incurred by women accessing NHS treatment, the Department of Health has announced its plans for abortion procedures to be performed in family planning clinics rather than hospitals to speed up treatment. In addition, there is also discussion of nurses performing abortions in the future; Gaby Hinsliff, 'Nurses set to perform abortions: controversial call to cut waiting times', *The Observer,* 25 April 2004, 8.

[233] Sheldon, above n 8, 46; *The Observer*, above n 232.

[234] As Emily Jackson notes, these access problems may well be more acute for those women from ethnic minority groups or poorly educated women who might lack the

and practical obstacles to abortion provision must leave us in some doubt as to the reality of 'choice', by no means is this the only concern. A further troubling element of choice rhetoric is the 'neglected space between discursive constructions and women's actual negotiation of them in their own experiences'.[235]

As Marie Fox comments, 'at the heart of this issue is the fact that women generally do not experience the decision to abort as one of choice... rather, most women who abort perceive termination as their only viable option.'[236] In other words, presenting abortion as a matter of choice ignores the fact that most women in such situations would rather not be in the position of making *that* choice at all. And this in turn relates to a further dimension of choice which receives little pro-choice 'airtime' – women's *negative* experiences of abortion decision-making. Nevertheless, reluctance to engage in such discussion is perhaps understandable, since those holding political opposition to abortion or general designs towards denying women an *active* choice in reproduction so often typify the issue in *primarily* negative terms. As Mary Boyle comments, such discourse was evident in the Parliamentary debates leading up to the enactment of the Abortion Act 1967 which presented abortion decision-making as: 'inevitably painful and traumatic', 'a

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knowledge or confidence to approach other doctors for a second opinion where their own GP is obstructive. See Jackson, above n 230, 471.

[235] Eileen V Fegan, ''Subjects' of Regulation/Resistance? Postmodern Feminism and Agency in Abortion-Decision Making' (1999) 7 *Feminist Legal Studies* 241.

[236] Marie Fox, 'A Woman's Right to Choose? A Feminist Critique' in John Harris and Søren Holm (Eds), *The Future of Reproduction* (Oxford: Clarendon Press, 1998), 82. This was also the finding by the Commission of Inquiry into the Operation and Consequence of the Abortion Act, having received evidence from many of the witnesses and case histories of individual women: 'the decision to have an abortion

decision that women agonize about', 'a decision of despair', 'intolerable' and 'complex' - when by contrast, evidence illustrates that *many* women *do not* find such decisions difficult, particularly when made at an early stage.[237] But, nor is the negative construction of abortion simply limited to decision-making; increasingly, accounts of abortion itself are typified as not only traumatic, but deeply harmful to women's physical and *mental* health.[238] And for this reason, great caution is required in problematizing women's negative experiences, since this latter claim as Ellie Lee explains, is not only politically driven, but constitutes a significant shift in *pro-life* strategy.[239] No longer relying upon moralized grounds of defending 'unborn life' alone, and in stark contrast to constructing women as the selfish consumers of 'convenience' abortions, the pro-life movement has medicalized the issue by reconstructing women as the 'victims' of abortion at serious threat of suffering from

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often appeared to be the only "choice" available to them. Such a decision does not represent a free choice' (below, n 243, 17).

[237] Mary Boyle, *Re-Thinking Abortion, Psychology, Gender, Power and the Law* (London: Routledge, 1997), 104-105.

[238] And the drive to construct abortion as either a threat to physical or mental health has penetrated problem pages, television soaps and gained considerable attention in the British media generally: See for example, Anon., 'Personal Reviews: Abortion – a hell of a decision' (2000) 321 BMJ 579; Vanessa Thorpe, 'Abortion wrecks your life claims group', *The Independent,* 29 December 1996, 3; Heather Kirby, Ann Kent and James Bone, 'A woman's right eroded?: Abortion', *The Times,* 25 October 1989; Jenni Murray, 'Women: Terminal Anxiety: Abortions make for strong storylines in TV soaps such as EastEnders and Cold Feet', *The Guardian,* 18 December 2001, 8; Hester Lacey, 'The Human Condition', *The Independent*, 3 August 1997, 4; and of particular interest, a 'problem page' *diagnosis* of Post-Abortion Syndrome: see Miriam Stoppard, 'Dear Miriam', *The Mirror*, 1 July 2002, 37.

[239] Ellie Lee, *Abortion, Motherhood and Mental Health* (New York: Aldine de Gruyter, 2003), 2.

post-abortion syndrome (PAS).[240] And this reconstruction of abortion politics is extremely powerful. In centralising women's health, this would seem to situate the pro-life movement as those who are 'truly concerned with women's health and well-being'; nevertheless, their *real* concern sits not with women's well-being, but in promoting a very different conception of *women's rights* in abortion: [241]

> Where those who argue that legal abortion is an aspect of women's rights place emphasis on women's freedom *from* state interference in their lives, PAS claimants argue just the opposite; that women's rights require that the state intervene *to protect women* from ending pregnancies through abortion. The rights of women are redefined as the right to be protected by the state from the psychological harm done by abortion, from the actions of doctors who perform abortion, and from women's relatives and friends, who allegedly pressure them to end pregnancies.[242]

Although the existence and extent of PAS is highly contested between pro-choice and anti-abortion groups, the 'popular consensus' amongst the medical profession would seem to be that abortions pose few adverse psychological consequences.[243] And significantly, it is a consensus presently reflected in English law. To date, there has been no instance of

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[240] As Ellie Lee comments, this reframing of the abortion issue as one based on health in reality reflects the limited success of morally based claims. See further Ellie Lee, 'The Context for the Development of 'Post-Abortion Syndrome' (2003) Pro-Choice Forum.org.uk.

[241] Lee, above n 239, 36.

[242] Lee, above n 239, 36.

[243] However, see further 'The Physical and Psycho-Social Effects of Abortion upon Women' (June 1994), A Report by the Commission of Inquiry into the Operation and Consequence of the Abortion Act. The Commission found however that some of the studies conducted, such as the RCGP/RCOG prospective study, held a number of methodological limitations which may have affected its conclusions (at 29).

litigation on the grounds of inadequate abortion counselling proceeding as far as a full hearing in the United Kingdom; but that is not to say that the prospects of PAS-related litigation is not being taken seriously either in this jurisdiction, or elsewhere.[244]

Nonetheless, whatever the merits of PAS, its foundation is political, pernicious and *far* from beneficent. Rather than protecting women's rights, the intention of anti-abortionists is to demonstrate that women 'did not really choose to end their pregnancy.'[245] Instead, women are typified as non-autonomous agents, 'fragile beings who are unable to make choices for themselves and who are not responsible for their actions.'[246] Therefore, the reluctance of feminists to engage in women's experiences surrounding abortion is completely understandable. The concern here, as Eileen Fegan comments is that negative experiences 'are all too easily captured by anti-choice groups and pathologised into concepts such as 'post-abortion trauma syndrome', which in turn, threaten the legality and availability of abortion services'.[247] Nevertheless, conceding that women's personal narratives might throw 'complex and inconvenient factors into the political balance',[248] Fegan

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[244] Two cases have arisen in the UK; the first did not make as far as court proceedings, and the second was withdrawn, costs of litigation being awarded against the claimant. See Lee, above n 239, 146; and Ellie Lee, 'Abortion, mental distress and litigation' (2003) *Pro-Choice Forum.* However, the situation would appear to be quite different elsewhere, for example the United States. See further Thomas R Eller, 'Informed Consent Civil Actions for Post-Abortion Psychological Trauma' (1996) 71 *Notre Dame Law Review* 639.

[245] Lee, above n 239, 2.

[246] Lee, above n 239, 2; see further, Ellie Lee, 'Tough Life Choices', *The Guardian,* 14 June 2002, 19; Mary Boyle, 'Reflections on abortion and psychology: the hidden issues' (2002) *Pro-Choice Forum,* www.prochoiceforum.org.uk.

[247] Fegan, above n 235, 266.

[248] Fegan, above n 235, 265.

argues that listening to these stories has become critically important for feminism as a political movement. Therefore, constructing abortion as an accessible and relatively unproblematic medical procedure, she claims is strategically unsatisfactory in the long term since:

> It does not acknowledge or speak to the vast and varied personal experiences of women who may suffer after abortions, yet remain pro-choice in principle and who would make the same decision again.[249]

Therefore, while many women report 'feeling fine' about abortion, feel 'very certain' about the decision to terminate, and express 'relief' following the procedure, *negative* accounts of abortion and related decision-making *do* exist.[250] Some women find the decision difficult, and experience feelings of loss, lack of control, ambivalence, anxiety and regret.[251] While these positions seem to conflict, as Mary Boyle considers, the negative social and legal construction of abortion, combined with women's lack of power in abortion decision-making, might well be productive of such negative responses. So too, might more positive expressions be explained through the power dynamics of abortion legislation.[252] But whatever the influence - whether discourse surrounding reproduction, or cultural, religious and familial commitments - acknowledging the *diversity* of women's experiences

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[249] Eileen V Fegan, 'Recovering Women: Intimate Images and Legal Strategy' (2002) 11 *Social & Legal Studies* 155, 168.

[250] See Rosalind P Petchesky, *Abortion and Women's Choice* (Northeastern University Press, 1986), 367; and Boyle, above n 237, 105.

[251] Angela Harden and Jane Ogden, 'Young women's experiences of arranging and having abortions' (1999) 21 *Sociology of Health & Illness* 426, 441. See also Petchesky, above n 250.

[252] As Mary Boyle suggests women may 'overstate their certainty about their decision, and deemphasise ambivalence, because they are afraid that otherwise their request for an abortion may be refused.' Boyle, above n 237, 106.

means embracing the positive *and* negative accounts. Having uncovered negative feelings about abortion decisions in her research, Fegan forewarns that 'a refusal to acknowledge this in feminist and pro-choice literature does not make the issue go away.'[253] Embracing these perspectives, she argues, has become crucial:

> In the absence of a feminist discourse of agency which might enable pro-choice groups to consider... women's mixed and contradictory emotions surrounding abortion – such as, isolation and relief, pain and anger at bearing the responsibility – women are left to negotiate these experiences through whatever interpretative frameworks – discourses and ideologies – are currently available.[254]

While these conflicting experiences of abortion certainly illustrate the 'mismatch between law and the social realities of women',[255] how do we reconfigure "choice" so as to embrace these diverse experiences? If abortion decision-making is in some instances subjectively defined as a difficult decision or even a not-choice, should these not count as *autonomous* choices at all? Such an approach is firmly rejected by Sheldon, who comments that while such analyses illustrate that 'choice' is problematic for some:

> [I]t does not deny that many of the women who will terminate pregnancies in Britain... *will* exercise careful, thoughtful choices. These are women with alternatives (though typically none of them ideal) which are often considered and discussed at length, sometimes in extremely supportive, explicitly pro-choice environments.[256]

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[253] Fegan, above n 235, 266.

[254] Fegan, above n 235, 266.

[255] Fegan, above n 249, 158.

[256] Sheldon, above n 29, 184.

But what of those women in the minority who describe themselves as having no choice, or no realistic alternatives, or that the choice is difficult – do these women not exercise autonomous choice? By contrast to Sheldon's more wide-ranging concern with countering the logic of the men's advocates' argument, in the context of the mitigation ethic, these are the very individuals that occupy us.[257] Nevertheless, even on this narrower view, suggesting that *these* women do not exercise choice seems to present an unrealistic, if not rather utopian account as to when autonomy applies as a value. As Marilyn Friedman comments, autonomy is not 'only about choosing a luxurious life from among prosperous options, a life of endless delights. Even the most desperate and tragic circumstances may present someone with different ways to respond.'[258] In this respect, whilst these women are 'choosing' under less than ideal conditions, which undoubtedly makes it *harder* to choose, if we accept autonomy operates even where options are severely restricted, then these women are still choosing and responsible agents.

However, while this analytical perspective presents difficult choices and subjective 'no choices' as still counting as autonomous choices, not all readily accept this claim. Some feminists would reject this perspective as myopic, and argue that under particular conditions, what might appear to be an act of choosing 'turns out to be an instance of conformity'.[259] Contrary to the view that reproductive technology provides *increased*

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[257] So, in other words, Sheldon is covering a wider field of women's experiences, whilst in the context of the mitigation ethic, our attention is exclusively drawn to those who claim that they have no choice.

[258] Marilyn Friedman, *Autonomy, Gender, Politics* (Oxford: Oxford University Press, 2003), 26.

[259] Kathryn Pauly Morgan, 'Women and the Knife: Cosmetic Surgery and the Colonization of Women's Bodies' in Susan Sherwin and Barbara Parish (Eds) *Women, Medicine, Ethics and the Law* (Aldershot: Ashgate, 1991), 354.

choice, scholars such as Kathryn Morgan, claim that there are important 'ideological, choice-diminishing dynamics at work' which *structure* women's 'choices' towards the goals of perfectionism and eugenicism.[260] Similarly, Barbara Katz Rothman suggests that technologies such as amniocentesis and selective abortion, surrogacy, embryo transplants and so forth are being used to give the 'illusion of choice.'[261] And like Morgan, she regards 'choices' as the product of social structures that create needs: 'the needs for women to be mothers, the needs for small families, the needs for "perfect children" – and creates the technology that enables people to make the needed choices.'[262] Further along these lines, however, are those who argue that the "choices" women make are structured by an 'integrated system of power relations that systematically disadvantages women.'[263] Such claims, variably referred to as 'ideological determinism' or 'false consciousness', forward that women buy into their own marginalization – perpetuate the gender system themselves – for example, by choosing to leave the workplace to allow them to care for children.[264] Therefore, when we refer to such actions as 'choices', Joan Williams argues, this is because we are blinded by gender prescriptions, since women have to choose *not* to fulfil their family responsibilities, whereas men do not.[265]

Although well-meaning, these views are both highly controversial and problematic. As Kathryn Abrams comments, not only do such claims

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[260] Morgan, above n 259, 357.

[261] Barbara Katz Rothman, *The Tentative Pregnancy, Prenatal Diagnosis and the Future of Motherhood* (London: Pandora Press, 1988), 14.

[262] Rothman, above n 261, 14.

[263] Joan C Williams, 'Deconstructing Gender' (1988-1989) 87 *Michigan Law Review* 797, 826.

[264] Williams, above n 263, 826-828.

[265] Williams, above n 263, 831.

overlook the complex influences of race, class and sexual orientation and multi-causal explanations of women's choices; but the suggestion that women are assimilating gendered ideology and playing an active role in their own subordination, actually provides support 'for the position that women lack the capacities for self-determination necessary to give them autonomous control over *all* spheres of their existence.'[266] And in the context of our current discussion this is an essential point. Interestingly, scholars such as Williams *consciously* avoid scrutinising decisions to abort or carry to term entirely. As Abrams remarks, this stems not from the impossibility of making such claims, but rather, because the purpose of feminism in this area 'is to protect women's opportunities for choice,' and 'any argument which questions the ways in which women choose or impugns their capacities as rational decision-makers seems unaccountably reckless.'[267]

But ideological determinism claims remain 'unaccountably reckless' even when limited to the sphere of domesticity. They ignore to their peril the risk that such arguments might be used to make much broader claims about women's choices. Therefore, considering that the abortion debate is so polarised, and abortion decision-making is commonly typified by pro-life groups as both difficult and harmful, *any* claims that 'women do not choose' are at serious risk of spreading into the reproductive field.[268] In this vein, Abrams argues:

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[266] Kathryn Abrams, 'Ideology and Women's Choices' (1990) 24 *Georgia Law Review* 761, 776 [my emphasis].

[267] Abrams, above n 266, 788.

[268] In what must be regarded as a response to Kathryn Abrams criticisms that abortion is overlooked, Joan Williams falls victim to the same isolated approach without appreciating the dangers of doing so. She advocates the reconstruction of 'choice' in abortion decisions so as to embrace the language of domesticity and suggests: 'While domesticity in the context of work/family conflict rebounds to the detriment of

> Doubts about the capacity of women to make critical choices... have long played a role in the opposition to equality for women. The fact that these arguments no longer occupy the primary ground of political debate does not mean that they have been successfully banished... It may be no coincidence that many of the most popular forms of legislation restricting abortion require women to secure the consent of others, rather than allowing the reproductive choices to be made by the women by themselves.[269]

And this argument must hold force more generally to our question of when does a "choice" count as such, since alternative arguments encounter exactly the same problem – problematizing choice risks undermining women's agency. So for example, whilst we might draw a distinction between abortion decisions from those to continue a pregnancy, and suggest that the latter does not constitute a choice since it is the product of pronatalist norms or, 'a deep-rooted or a 'natural' course of events',[270] these arguments hold equal risk to women's agency. Furthermore, as Sheldon comments, such appeals to biology are deeply problematic, since feminists 'have worked hard precisely to establish that motherhood is not the natural or 'default' option for women'; rather arguments reinforcing female stereotypes of maternity are more typically invoked by those who *oppose* abortion rights.[271] Similarly, appeals to religious conformity and socialisation as rendering not-choices, not only give rise to 'counter-intuitive results',[272] but more specifically provide

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women, the imagery of domesticity is less perilous in the abortion context'. See further Joan Williams, 'Gender Wars: Selfless Women in the Republic of Choice' (1991) 66 *New York University Law Review* 1559, 1592.

[269] Abrams, above n 266, 789-790.

[270] Sheldon, above n 29, 184.

[271] Sheldon, above n 29, 184.

[272] Sheldon, above n 29, 186. Here Sheldon explains that while a strict Catholic might argue that she has no choice but to continue a pregnancy in conformity with her faith,

an under-inclusive view of autonomy.[273] In accepting that autonomy applies even in less than ideal conditions, discounting religious motivations would, as Friedman suggests, 'prompt persons to regard a greater number of others as failures at personhood and thereby reduce the number of others they regard as respectworthy.'[274]

So, what is the combined effect of these arguments? As considered earlier, one of the most problematic features of the mitigation ethic was its exclusion of the subjective realm; yet, quite consistently with this ethic, the arguments advanced above merely *affirm* that view. Under circumstances where abortion decision-making is difficult, even highly restrictive, it is concluded that women still make a choice;[275] and even if they subjectively regard abortion as not constituting a choice, continuing a pregnancy still constitutes a choice notwithstanding. Similarly so, in discounting the claims of ideological determinism, the notion that women might be coerced into tests such as screening for foetal

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to recognise this as a not-choice would also render decisions to marry based on faith, as not-choices, whilst decisions to marry on the basis of tax benefits would.

[273] This perhaps leads onto the further related point as to how easily 'choice' might well translate into a *judgment* over those who break from socialized norms, unless we fully embrace a diversity of reproductive responses as counting as 'choice'. As Katherine Franke suggests, since reproduction has been so taken for granted that only women who are *not* parents are regarded as having made a non-traditional, unconventional and unnatural choice. By contrast, she argues, for lesbians who choose motherhood, the issue of choice switches, since they continue to have an identity understood as non-reproductive in nature (Katherine M Franke, 'Theorising Yes: An Essay on Feminism, Law and Desire' (2001) 101 *Columbia Law Review* 181, 185-186.

[274] Friedman, above n 258, 23.

[275] Even in the example of women travelling from Northern Ireland to Great Britain for abortions. As Fegan and Rebouche comment, these women still exercise agency 'through their secret and subversive actions – but only at great psychological, physical and financial costs.' Fegan and Rebouche, above n 228, 228.

abnormality is also rejected; as Ann Furedi comments, 'women are capable of making hard choices, and for many a difficult decision is preferable to being an ignorant victim of circumstance.'[276] Indeed, it would seem that the dangers of arguing 'no choice' in all of these circumstances inevitably leads us to the conclusion that in most instances, women *do* choose to continue a pregnancy. And as Sheldon's exploration of this area suggests, arguing that women are capable decision-makers 'seems to allow no basis for refuting the men's advocates' argument.'[277]

But, at this juncture we should consider quite carefully the impoverished choice that *we* have been presented with, by both the men's advocates' argument and the mitigation ethic: it is one of 'Control versus Freedom'.[278] The only way to preserve the reproductive freedoms we have is by making *no* concessions to the view that women are fully responsible and choosing agents for the fear that women's freedom will be further undermined and subject to increased regulation and control.

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[276] Ann Furedi, 'Wrong but the Right Thing to Do: Public Opinion and Abortion' in Ellie Lee (Ed) *Abortion Law and Politics Today* (London: Macmillan Press, 1998), 169.

[277] Sheldon, above n 29, 192. In the context of the men's advocates' arguments, Sally Sheldon considers a wide range of alternative factors, that are perhaps *less* relevant here, such as the needs of the child, voluntary creation of need and the question as to whether children should be a private or collective responsibility. Nevertheless, her conclusion is that these other avenues yield little in the way of a convincing basis for imposing support obligations on unwilling fathers and the question of how to respond remains.

[278] As Brown explains, the 'Control versus Freedom' label stands for a 'resistant politics conducted in the name of women'; see further Beverley Brown, 'Bodily Oppositions/Controlling Fantasies' in Jo Bridgeman (Ed) *Body Politics: "Control versus Freedom", The Role of Feminism in Women's Personal Autonomy* (University of Liverpool: Feminist Legal Research Unit, Working Paper No. 1, 1993), 51.

Yet are we satisfied with that choice, when considering that many women experience so little choice when "deciding" to continue a pregnancy, terminate a pregnancy, undergo screening for foetal abnormality or indeed surrender a child for adoption? How do we even begin to create a 'woman-centred discourse' that allows women an alternative interpretative framework to negotiate these experiences,[279] when we seem irretrievably trapped between 'Control versus Freedom'?

AN INCONCLUSIVE CONCLUSION

As Beverley Brown argues, the critical framework of 'Control versus Freedom' runs the risk of both promoting and at the same time denying bodily fantasies. In its denial, she argues that this framework 'works to undercut the validity of complex and often ambivalent feelings of women towards their bodies.'[280] Indeed, the very discourse that we have embraced in the reproductive realm - of freedom of choice and self-determination - seems to exclude those women whose experience of 'falling pregnant' is yet another instance of a world perceived to be out of their control?'[281] In excluding this domain, we have become caught up in a binary logic, 'yes/no, all or nothing, form,' a framework that works 'to deny components of guilt or regret in women's feelings' as well as the 'imaginative possibilities' surrounding abortion.[282] At the same time, argues Brown, this framework may itself promote fantasies:

> These are fantasies in which the foetus is represented as an alien, invading being, a parasite feeding off its host. Here the self is radically threatened by this being that has penetrated the body's defences, got

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[279] Fegan, above n 249, 170.

[280] Brown, above n 278, 55.

[281] Brown, above n 278, p. 55.

[282] Brown, above n 278, 56.

> inside the boundary that marks out 'I' from the world... This really is individualism.[283]

As previous chapters have examined, liberal individualist concepts of autonomy treat the body as something to be controlled by the mind, and bodily boundaries as in need of protection from outside invasion; this is law's way of seeing, understanding and engaging with human nature. And it is precisely this aspect of choice rhetoric that many find so troublesome;[284] it systematically reconstructs individuals as self-interested, adversarial, selfishly pursuing their own vision of the good and, as Fox argues 'facilitates the characterization of the woman who seeks abortion as selfish.'[285] While this framework might, Brown suggests, reflect the way that *some* women feel about pregnancy, it serves to exclude those who experience feelings that may alternate with other fantasies.[286] In other words, this framework not only acts to deny such fantasies of complexity, relationality and connection, but casts them 'into the realm of the 'irrational' and hence unmentionable.'[287]

Should we then, as some suggest abandon the language of choice in favour of one rooted in women's 'needs'? Indeed, because choice is so open to contestation, represents *all* women as selfish decision-makers, and holds little meaning to women who do not experience such choice and control in their lives, perhaps this alternative language will, as Fox suggests, help us to 'frame a vision of justice founded in the needs and realities of women's lives as a building block towards a meaningful

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[283] Brown, above n 278, 57.

[284] See for example Bridgeman, above n 223, 85-89.

[285] Fox, above n 236, 81.

[286] Brown, above n 278, 57.

[287] Brown, above n 278, 52.

vision of equality.[288] Indeed, such a framework might provide a more forceful expression that true freedom depends,

> [N]ot only on the number of adequate alternatives and on the importance these alternatives have for an individual's life plan and the value [s]he – and the society which surrounds h[er] – attaches to them, but also on the question of how difficult it is to realize these alternatives.[289]

There is some merit in this approach; appreciating the constraints that individuals confront in making choices is clearly essential if we are committed to embracing and responding to, individuals' diverse experiences of reproduction. But how do we construct the linguistic framework of need – how might our claim look? A right or responsibility to have one's needs fulfilled? Or a need to have one's needs recognised? For myself, this alternative language, while initially compelling is not wholly convincing; and on further reflection this talk of needs fails to stand up to closer scrutiny. As Jeremy Waldron forwards in the context of 'rights' and 'needs', the abstract nature of *both* terms, renders 'needs' equally open to contestation, since 'they are a dialectical response among a diverse and quarrelsome community of thinkers to the complexity of human life and its problems.'[290] Indeed, it is not difficult to reconstruct putative fathers' claims in terms of needs, whether *his* need to realize parenthood, or a 'need' for the recognition of foetal personhood *over* the needs of the mother. Furthermore, 'needs', unlike 'rights' which invoke a duty or responsibility, is not

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[288] Fox, above n 236, 97-99. Marie Fox at the same time notes that there are dangers to jettisoning the concept of choice.

[289] Elisabeth Hildt, 'Autonomy and freedom of choice in prenatal genetic diagnosis' (2002) 5 *Medicine, Health Care and Philosophy* 65, 66.

[290] Jeremy Waldron, 'The Role of Rights in Practical Reasoning: "Rights versus "Needs" (2000) 4 *The Journal of Ethics* 115, 121.

'straightforwardly prescriptive in the way that rights-talk is.'[291] And this links to a further point; while 'needs' might well sound less adversarial than the liberal conception of the autonomous chooser, if we are pitting our 'needs' against others' 'rights' or 'choices', then it is likely that the language of needs might so easily collapse into equally individualistic language when we seek to give it prescriptive force ("I need this"). Even if we resist that urge, then arguably we risk reinforcing another stereotype of women – the "I am in need" woman who is constructed as 'an emotionally weak, unstable (even suicidal) victim of her desperate social circumstances'[292] – in need of sympathy and control. Therefore, while there may well be room for 'needs' in an alternative framework, by no means is it clear in practice how this would differ in substance from choice-based claims of freedom since:

> This is a political predicament, not a semiotic one: there are no magic words which, if only we could find them, would do everything we want them to do.[293]

Of course, it could be claimed that the language of 'needs' carries less [liberal] baggage than notions of 'choice', and perhaps for this reason, seems to hold the potential to break the inevitable chain between 'choice' and attributions of 'responsibility'. Nevertheless, in my view, breaking away from liberal conceptions of human behaviour *does not* require that we jettison the concept of choice - 'needs' remain as susceptible to a similar liberal reconstruction. Rather, what is required

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[291] Waldron, above n 290, 121.

[292] Sheldon, above n 39, 35; as Sheldon's critique reveals of the Parliamentary debates leading up to the enactment of the Abortion Act 1967, such narratives of women seeking abortion constructed them as individuals unable to take decisions for themselves, in need of regulation and control.

[293] Waldron, above n 290, 122; although Waldron's discussion of 'needs' and 'rights' is not contextualised, it clearly holds considerable currency in the present discussion.

here is a closer examination of the *framework* that shapes not only concepts such as 'choice', but significantly, the *link* between 'choice' and 'responsibility'.

In the context of the mitigation ethic, this raises a series of important questions. While the notion of 'choice' is clearly problematic, in what *context* is that choice construed and how does this inform the identity of the reasonable mitigator? *Whose* views inform what counts as a choice; and what is their perspective of *responsible* human behaviour? These questions relate less to the issue of whether we should recognise 'not-choices' as choices, but hold direct application in examining whether it is inevitable in all situations that he who chooses *must* take responsibility? In other words, would we feel so much disquiet about 'choice' if we shifted away from liberal tendencies, and took a *different* view as to what 'responsible' decision-making consisted of in the context of reproduction? Nevertheless, this is *not* to completely discard the liberal framework from our analysis – even within this discourse serious questions must surely arise as to whether there is anything *fair* or *reasonable* about making women singularly responsible for reproductive risks once we consider the conflicting hegemonic discourses arising within wrongful conception claims.

Therefore our stage for the final substantive chapter is set - if the 'possibility and the necessity of making choices can lead to a veritable 'moral odyssey'',[294] so too must attributions of responsibility be seen in the same way. Rather than merely restarting our search for 'magic words', it is argued that a closer examination of the ideals that underpin notions of choice and responsibility might well offer a more convincing explanation as to why women have been presented with a Catch-22

[294] Beck and Beck-Gernsheim, above n 188, 148.

situation in negligence - and importantly, why women's needs and diverse experiences of reproduction have so often been *excluded.* Perhaps then, a commitment to *reshaping* this framework might offer a more realisable means of *including* them.

5

Reproducing Harm*less* Stories: The (Unmitigated) Tale of the Willing Volunteer

> ...Then the king said, "The one says, 'This is my son that is alive, and your son is dead'; and the other says, 'No; but your son is dead, and my son is the living one.' " And the king said, "Bring me a sword." So a sword was brought before the king. And the king said, "Divide the living child in two, and give half to the one, and half to the other." Then the woman whose son was alive said to the king, because her heart yearned for her son, "Oh, my lord, give her the living child, and by no means slay it." But the other said, "It shall be neither mine nor yours; divide it." Then the king answered and said, "Give the living child to the first woman, and by no means slay it; she is the mother." And all Israel heard of the judgment which the king had rendered; and they stood in awe of the king, because they perceived that the wisdom of God was in him, to render justice.[1]

ON REASONABLENESS & RESPONSIBILITY

Of the most criticised figures within feminist legal jurisprudence is English law's ubiquitous 'Reasonable Person'. He is a prominent, though 'classless' individual,[2] impressively conversant with many disciplines of law; a chameleonic character whose age, gender, physical ability, skill, religion, ethnicity and foresight will surely vary when

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[1] - 1 Kings 3, vv.23-28. For a feminist critique on the tale of the two harlots, see Ann Althouse, 'The Lying Woman, The Devious Prostitute, and Other Stories From the Evidence Casebook' (1993-1994) 88 *Northwestern University Law Review* 914.

[2] Robin Martyn 'A Feminist View of the Reasonable Man: An Alternative Approach to Liability in Negligence for Personal Injury' (1994) 25 *Anglo-American Law Review* 334, 342.

called upon to do so; he is the true mark of prudence, taking risks only when the burden of their avoidance is too great; he is utterly 'free from both over-apprehension and from over-confidence';[3] and as Sir Alan Herbert once comically commented of this most remarkable person, he is 'an ever-present help in time of trouble, and his apparitions mark the road to equity and right.'[4] However, despite his perfect virtue, the reasonable person is quite ordinary indeed, and is to be found sitting on the Clapham Omnibus,[5] the Bondi Tram, the London Underground,[6] or in the evening pushing a lawn mower in his shirt sleeves. Nor is he free of all shortcomings,[7] but since these are far and few between he continues to occupy his quite privileged place in English law as 'an ideal, a standard, the embodiment of all those qualities which we demand of the good citizen.'[8] So just who or what is this 'Reasonable Person'?

In the law of negligence, the 'Reasonable Person' exemplifies the standard of reasonableness itself. It is an (allegedly) abstract and universal benchmark invoked by the common law to 'represent an objective standard of care against which all are measured'.[9] Thus, actions of the litigant (claimant or defendant) are compared to what the reasonable person would have done in their circumstances, and only 'those who emulate the reasonable person will be considered 'faultless' and hence relieved of the consequences of their actions.'[10] So, the

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[3] *Glasgow Corporation v Muir* [1943] AC 448, at 457.

[4] A P Herbert, *Uncommon Law* (London: Methuen & Co, 1936), 2.

[5] *Hall v Brooklands Auto Racing Club* [1933] 1 KB 205, at 217.

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

[7] Mayo Moran, *Rethinking the Reasonable Person* (Oxford, Oxford University Press, 2003), 132.

[8] Herbert, above n 4.

[9] Joanne Conaghan and Wade Mansell, *The Wrongs of Tort* (London: Pluto, 1999), 52.

[10] Moran above 7, 18.

reasonable person standard determines not merely the breach of duty, but also contributory negligence and mitigation, where assessments as to what is 'objectively' reasonable are central to establishing 'fault' and of course, responsibility. Yet, despite the judiciary's claims as to the objectivity and universality of this standard, this has long been doubted. Although the reasonable man's clothes have changed, in favour of the androgynous uniform well suited to a reasonable person, as Regina Graycar tritely remarks 'the reasonable man is what he remains... he is still wearing his Y-fronts underneath.'[11] And while this character may be found on public transportation, he is very probably travelling to the courtroom since, 'despite his distinguished pedigree, the reasonable man represents little more than the subjective viewpoint of a particular judge.'[12] Therefore, given the limited field from which the judiciary is generally employed (public school and Oxbridge), and its overwhelmingly male composition, it is unsurprising that so many come to doubt the standard's ability to apply to either women,[13] or others who similarly fail to share the same physical or cultural space.[14] As Conaghan and Mansell comment, 'far from being a neutral or even average standard, the standard of care reflects the views of a very narrow and select class in our society.'[15]

Feminist scholarship surrounding the reasonable person and the question as to whether it produces a standard worth rescuing or jettisoning towards the achievement of egalitarian goals is undeniably

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[11] Regina Graycar, 'Hoovering as a Hobby and Other Stories' (1997) 31 *British Columbia Law Review* 17, 33-34.

[12] Conaghan and Mansell, above n 9, 53.

[13] Martyn, above n 2, 374.

[14] Timothy Macklem and John Gardner, 'Provocation and Pluralism' (2001) 64 MLR 815, 816.

[15] Conaghan and Mansell, above n 9, 57.

as illuminating as it is voluminous.[16] Whilst no attempt is made here to recapitulate the varying positions over potential reform, the discussion that follows firmly situates itself within a feminist framework of concerns in analysing the determination of reasonableness and responsibility as they arise in mitigation. Quite simply, whilst the context is *slightly* different, the *same* indictment most certainly applies: the law's assessment as to what is 'reasonable' in wrongful conception is inherently gendered and is in desperate need of reform.

In exploring the gendered content of mitigation in wrongful conception, this chapter argues that not only are women's reproductive choices being held to a *much* higher standard than is typical of this doctrine, but that it is one bordering on strict liability. The standard applied is *un*usually stripped of any moral content, in favour of a purely objective cost-benefit calculation – an approach so clearly lacking analytical power in matters of reproduction. In returning to the action for wrongful birth where the courts have invoked the notion of 'willingness' to deny recovery of 'ordinary' damages, it is suggested that the outcomes of *both* wrongful conception and wrongful birth actions can be understood by reference to the same framework. The stereotype of the autonomous chooser arising in these cases is one

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[16] For detailed examinations of feminist scholarship on the 'Reasonable Man', see Joanne Conaghan, 'Tort Law and the Feminist Critique of Reason' in Anne Bottomley (ed) *Feminist Perspectives on the Foundational Subjects of Law* (London: Cavendish, 1996); Conaghan and Mansell, above n 9; Moran, above n 7. For particular positions on the question of reform see Martyn, above n 2 (arguing that the standard should be abolished, in favour of a legislative schema) ; Moran, above n 7 (arguing towards an abandonment of the personification of the standard); Giorgio Monti, 'A reasonable woman standard in sexual harassment litigation' (1999) 19 *Legal Studies* 552 (arguing for a reasonable woman test); Leslie Bender, 'Changing the Values in Tort Law' (1989-1990) 25 *Tulsa Law Journal* 759 (arguing for a reconstruction of the standard based on a feminist 'ethic of care').

where women are conceptualised as having *voluntarily* assumed the 'ordinary' responsibilities of parenthood. And it is a deeply gendered construction of claimants, perpetuating the traditional maternal norm where women are regarded as 'naturally' responsible for the burdens of caretaking. Even where those risks have been brought about by negligence, caring for children is simply assessed as being 'what women just do'. In adopting the notion of 'complex personhood'[17] and theorizing this within the framework of feminist concerns over 'legal personhood', this chapter seeks to disrupt the invocation of the law's liberal ideal in actions for wrongful birth and conception, and calls for an understanding of autonomy and harm that resonate a deeper, and relational understanding of reproductive choice and responsibility.

PLAYING BY THE RULES OF REASONABLENESS

> [A]ccording to the liberal conception of responsibility we are entitled to hold someone responsible for his or her actions only if he or she could have chosen otherwise.[18]

As the last chapter concluded, even if mitigation doctrine is dead, the mitigation *ethic* is alive and well. The notion of choice, although clearly confounding those in judicial quarters was conveniently assessed from a purely *objective* rather than *subjective* stance. The rejection of the mitigation doctrine *simpliciter* permitted the court to transform subjectively felt 'no-choices' into objectively-defined choices, thus rendering parental failures to surrender a child as 'wanted' outcomes.

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[17] While this concept originates from Avery Gordon, the work that has inspired the present author's adoption and further theorising of this concept is, Nan Seuffert, 'Domestic Violence, Discourses of Romantic Love and Complex Personhood in the Law' (1999) 23 *Melbourne University Law Review* 211.

[18] Helen Reece, *Divorcing Responsibly* (Oxford: Hart, 2003), 217.

As the most causal glance of decisions in English law illustrates, this is imposing a *much* higher standard of "reasonableness" upon claimants than would normally be the case. Nevertheless, as Jeremy Pomeroy explains, in theory an objective standard is open to the courts,

> The range of ways in which a court could, at least in theory define the "reasonable mitigator" may be conceptualized as lying along an objective-subjective spectrum. At the objective extreme, a court could characterize this reasonable person as a rational agent stripped of all individualized characteristics or as the essence of humankind, devoid of all cultural or historical specificity. Moving closer to the subjective pole, a court might abstract the reasonable mitigator from the general community of the injured party. Further along the spectrum, the standard of reasonableness would be derived from the standards of the victim's immediate circle of associates. At the furtherest extreme, reasonableness would be defined solely in terms of the standards of the party whose efforts to avoid tort consequences are at issue.[19]

Yet, as far as English law is concerned, this *is* theoretical.[20] The application of mitigation in *commercial* contexts reveals a heavy leaning towards the subjective end of the spectrum. The law has not required claimants to accept goods of inferior quality,[21] or to risk their commercial reputation,[22] embark upon complex litigation,[23] and nor can an employee be 'compelled to accept re-employment if it involves lower status, if relations are irretrievably affected by circumstances of

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[19] Jeremy Pomeroy, 'Reason, Religion and Avoidable Consequences: When Faith and the Duty to Mitigate Collide' (1992) 67 *New York University Law Review* 1111, 1116.

[20] See also Kenneth W Simons, 'Contributory Negligence: Conceptual and Normative Issues' in David G Owen (ed) *Philosophical Foundations of Tort* Law (Oxford: Oxford University Press, 1997), in which the author provides a detailed exploration of the justifiable criteria and limits of claimant strict responsibility.

[21] *Finlay v NV Kwik Hoo Tong* [1929] 1 KB 400.

[22] *London & South of England Building Society v Stone* [1983] 1 WLR 1242.

[23] *Pilkinton v Wood* [1953] Ch 770.

dismissal... or if it is likely to be less permanent than alternatives.'[24] Presumably in each of these contexts the claimants considered that mitigation was not a choice, akin to the quite reasonable assessment that an impecunious claimant also has no choice.[25] How do we even begin to draw comparisons between a refusal to terminate pregnancy, or place a child up for adoption, against the clearly more *trivial* refusal of a Rolls Royce driver to opt for a less prestigious vehicle?[26] Might we not regard it as slightly suspicious that the former is judicially conceptualised as having an *objectively* valid choice to mitigate, whilst the latter is assessed on *subjective* grounds as having none?

As it will be remembered, the prime difficulty in overcoming the objective notion of "choice equals wanted" arising in wrongful conception was the apparent need to argue that a woman has 'no choice' but to keep her child, rather than terminate her pregnancy or later place the child up for adoption. Since this posed more problems than promises for the feminist project, this was rejected out of hand. But, on reflection perhaps this was a little too hasty. For in swiftly dismissing this argument, what has been overlooked so far is the question as to whether the parents' submission that they had 'no choice' *should* be taken into account *as a matter of law*. If it should, then the principles of legal justice holding that judges must decide 'like cases alike'[27] must be seriously called into question. There will certainly be firmer grounds

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[24] J Beatson, *Anson's Law of Contract* (Oxford: Oxford University Press, 28th ed, 2002), 615.

[25] John Cooke and David Oughton, *The Common Law of Obligations* (London: Butterworths, 3rd ed, 2000), 306.

[26] *HL Motorworks v Alwahbi* [1977] RTR 276. See further, Donald Harris, David Campbell and Roger Halson, *Remedies in Contract & Tort* (London: Butterworths LexisNexis, 2002), 110.

[27] Robin West, *Re-Imagining Justice, Progressive Interpretations of Formal Equality, Rights and the Rule of* Law (Aldershot: Ashgate, 2003), 107

for sustaining that the differential treatment of reproduction means that not even the principles of 'formal equality' are being met. So, before turning to analyse methods of overcoming the purely objective assessment of "choice equals wanted", it is worth asking here: how would a parent's claim of having 'no choice' play out more subjectively defined grounds? In other words, what would be the outcome in such cases, if the law were properly applied?

As a starting point, it is noteworthy that the law is not so harsh as to hold individuals 'responsible' for *all* their "choices". Indeed, such a radical turn to a Hobbesian state of nature would probably limit dramatically the role that law has to play. So in private contractual disputes for example, the law recognises a series of 'vitiating' factors which undermine 'consent.' Take for example, the doctrine of economic duress. Here, a contracting party, faced with an illegitimate threat by the other party, may find himself presented with a 'choice of two evils'. Neither option presents a realistic way forward, although submitting to the threat in the short-term may present *less* disastrous economic consequences. There is no doubt that the individual has exercised a choice, but the question that law asks is whether *he* should be held to, or be made *responsible* for, his 'contractual promise' *under such circumstances*. Was his 'choice' (or 'consent') made voluntarily? Did *he* have a 'reasonable alternative' so as to enforce that contract? Asking these questions is law's way of policing 'the limits of "fair" bargaining', and bringing into the public domain behaviour that under those circumstances, 'trumps the otherwise prevalent norm of non-intervention.'[28]

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[28] C Dalton, 'An Essay in the Deconstruction of Contract Doctrine' (1985) 94 *Yale Law Journal* 997 in Sally Wheeler and Jo Shaw, *Contract Law* (Oxford: Clarendon Press, 2001), 487.

Or, consider the provocation defence to murder in the criminal law. Although the successful invocation of this defence merely results in the substitution of a manslaughter verdict for one of murder, it still nicely illustrates the point. In making an excusatory case, as John Gardner comments:

> One needs to argue that, even if one had inadequate reasons to kill, one had adequate reasons to get angry to the point at which one killed. In the term favoured by law, one needs to argue that getting angry to a murderous extent was *reasonable*.[29]

Of course the defendant who successfully raises such a defence will still be held *responsible*, albeit he will not be held responsible to the fullest extent that would surely be imposed under a Hobbesian state of nature. Yet despite the law's dispensation, there can be no doubt, the defendant who was provoked to kill still made a choice, and in one sense remains fully responsible, since,

> Like any rational being, the defendants in the cases... wanted to avoid responsibility in the consequential sense; they wanted to avoid facing the unwelcome moral or legal consequences of their wrongs. But they didn't want to do so by denying, or casting doubt on, their responsibility in the basic sense.[30]

And our examples could multiply in providing illustrations as to when the law makes concessions to human behaviour. Nevertheless, what should be emphasised here is that making a "concession" is not necessarily the same as undermining individual responsibility under the liberal autonomy ideal. Law does not undermine responsibility in the 'basic' sense, but makes concessions to full *legal* responsibility in the

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[29] John Gardner, 'The Mark of Responsibility' (2003) 23 *Oxford Journal of Legal* Studies 157, 160.

[30] Gardner, above n 29, 161.

'consequential' sense.[31] And the distinction is important, for the latter constitutes law's recognition of human complexity and subjectivity. To return to Gardner once more, responsibility in the 'basic' sense is, 'the ability to explain oneself, as a rational being. In short it is exactly what it sounds like: response-ability, an ability to respond.'[32] Although that does not mean that the responses law *accepts* as 'rational' are always beyond question.[33]

So, since concessions are permitted elsewhere under the doctrine of mitigation, what response can our claimant in the wrongful conception case offer as a means of avoiding the avoidable consequences rule? How can she justify her 'failure' to terminate her pregnancy, or indeed, place a child up for adoption? As was noted in the previous chapter, abortion is not freely available in a *de jure* sense, and nor is it a procedure completely without risk.[34] Nevertheless, since most judges have not been anxious to point to the legal face of the 1967 Act, or indeed the risks involved, more grounds might be required. Of adoption, our claimant might forward, like Regina Graycar and Jenny Morgan that since adoption rates have significantly declined, the

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[31] Gardner, above n 29.

[32] Gardner, above n 29, 161.

[33] Provocation for example, is one such illustration. As Mandy Burton comments, while the law has accommodated the availability of this defence to abused women through a shift from objectivity to a more subjectively-based enquiry as demonstrated in the case of *R v Smith* ([2000] 3 WLR 654), 'only a few years on it is apparent that the jealous male defence retains a firm hold in England and Wales.' Mandy Burton, 'Sentencing Domestic Homicide Upon Provocation: Still 'Getting Away with Murder' (2003) 11 *Feminist Legal Studies* 279, 280.

[34] For a succinct appraisal of the possible risks and side-effects of an abortion at different gestatory stages, see Jonathan Glover, *Causing Death and Saving Lives* (London: Penguin Books, 1977), 142-143.

statistical likelihood of this choice is 'minimal'.[35] Or perhaps, we could point to the 'spirit' of the Children Act 1989, which as Cath Talbot and Mark Williams note, 'generally supports the principle that children should live with their birth families, whenever this is possible.'[36] However, this is a *general* principle, and appealing to the law in this case does not establish that the *claimant* could not place the child up for adoption; rather it demonstrates the statistical unlikelihood of its finding adoptive parents elsewhere.

Perhaps then, a more subjective stance can be taken in relation to both the "options" of abortion and adoption. Is it unreasonable to decline either of these options once we take account of the claimant's religious or moral scruples? This can be analysed in two ways. Firstly, the claimant's religious or moral sentiments could be utilised to sustain that a refusal to mitigate was not unreasonable; alternatively, the issue of mitigation could be entirely avoided by applying the 'eggshell-skull rule'.[37] The latter route was adopted in the US wrongful conception case of *Troppi v Scarf*, the court stating:

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[35] Regina Graycar and Jenny Morgan, '"Unnatural rejection of womanhood and motherhood": Pregnancy, Damages and the Law, A note on *CES v Superclinics (Aust) Pty Ltd*' (1996) 18 *Sydney Law Review* 323. The same statistical decline is evident in the UK where a large proportion of adoptions are by step-parents; see further Caroline Bridge, 'Changing the nature of adoption: law reform in England and New Zealand' (1993) 13 *Legal Studies* 81, 83. The decline might be explained by reference to reproductive technologies and increased wish for a genetically related child; see Margaret Brazier, 'Can you buy children?' (1999) 11 *Child and Family Law Quarterly* 345.

[36] Cath Talbot and Mark Williams, 'Kinship Care' (2003) 33 *Family Law* 502.

[37] Under the eggshell-skull rule, providing that the 'kind' of damage is foreseeable, the defendant will remain responsible even where an injury of a different or unforeseeable type occurs (*Bradford v Robinson Rentals Ltd* [1967] 1 All ER 267; *Page v Smith* [1995] 2 All ER 736).

> Most women confronted with an unwanted pregnancy will abort the fetus, legally or illegally. Some will bear the child and place him up for adoption. Many will bear the child, keep and rear him. The defendant does not have the right to insist that the victim of his negligence have the emotional and mental make up of a woman who is willing to abort or place the child for adoption. If the negligence of a tortfeasor results in conception of a child by a woman whose emotional and mental make up is inconsistent with abortion or placing the child up for adoption, then, under the principle that the tortfeasor takes the injured party as he finds him, the tortfeasor cannot complain that damages that will be assessed against him are greater than those that would be determined if he had negligently caused the conception of a child by a woman who is willing to abort or place the child for adoption.[38]

Indeed, according to *R v Blaue*, the eggshell-skull rule applies to both the victim's body and mind, including religious convictions held by the victim.[39] Since this principle applies to the criminal law and the civil law, the *Troppi* court's civil law application of the eggshell-skull rule would appear entirely justifiable. However, some commentators have nevertheless expressed doubt as to whether it is appropriate to analogise 'religious beliefs' with pre-existing conditions such as 'physical frailty or psychological incapacity'.[40] According to Pomeroy, the answer 'hinges on whether we treat religious beliefs like the colour of one's skin, an immutable characteristic from which an actor cannot escape, or as a kind of "clothing"...'[41] But as Arthur Ripstein comments, the

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[38] *Troppi v Scarf*, 31 Mich. App. 240 at 257, 187 NW 2d 511 (1971) at 519.

[39] *R v Blaue* [1975] 3 All ER 446; [1976] Crim LR 648. In this case, the defendant stabbed the victim, piercing her lung. She died, following her refusal to accept a life-saving blood transfusion on the grounds of her religious convictions as a Jehovah's Witness. Rejecting the defendant's argument that her refusal was unreasonable and broke the chain of causation, Lawton LJ instructed the jury that the stab wound was the operative and substantial cause of death.

[40] Pomeroy, above n 19, 1152.

[41] Pomeroy, above n 19, 1152.

reason for permitting religious convictions to count within the eggshell-skull rule or mitigation 'is not that the belief is deeply held, nor that it is widely held... rather that the law supposes that that particular category of belief is so important that it is reasonable to act on it.'[42] While the increasing secularisation of society might lead to a lesser emphasis upon religion, it is nevertheless apparent that even those holding no religious affiliation can still hold strong views as to the morality or immorality of abortion. Therefore, insofar as the law currently accepts the eggshell-skull rule as embracing the physical *and* psychological make-up of the individual, it would also seem likely that in relation to both abortion and adoption, no differentiation between moral and religious objections could be sensibly drawn.

And this leads to a further point; while the foregoing has pivoted upon a subjective assessment of reasonableness as applicable to mitigation, it is worth considering briefly what an objective determination of reasonableness on this issue might produce. While the standard of reasonableness is certainly higher than that applying to mitigation, as William Prosser observes of the standard of care:

> [It] must be an external and objective one, rather than the individual judgment, good or bad, or the particular actor; and it must be, so far as possible, the same for all persons, since the law can have no favorites.[43]

If, as is becoming typical of negligence law, one were to establish the objective standard by asking commuters on the underground whether they considered a refusal to terminate a pregnancy or place a child up for adoption as unreasonable, what answers would we receive? While it

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[42] Arthur Ripstein, *Equality, Responsibility and the Law* (Cambridge: Cambridge University Press, 1999), 129.

[43] W P Keaton, *Prosser and Keeton on Torts* (West Publishing CO, St. Paul, MN, 5th ed, 1988), 173.

is doubted that one could locate a clear consensus on adoption, proponents of this option might well point to the absence of moral debate that *dominates* that of abortion.[44] Nevertheless, as Jeff Milsteen comments, the courts have increasingly focused on abortion since its decriminalisation;[45] so socially and judicially, adoption would appear to be an 'option' in decline. And, perhaps it would be worth reminding our trusty commuter that the question is *not* whether placing a child up for adoption is reasonable, but whether it is *unreasonable* for a woman to decline to do so. Yet, even if we cannot be certain as to the responses that the issue of adoption might give rise to, one might well anticipate a polarisation of views over abortion since,

> Men and women of good conscience can disagree, and we suppose some shall always disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision.[46]

Fully embracing this view, Kenneth Norrie remarks that since individuals in society do hold such radically opposing views, the law must provide recognition that such differing views can be 'reasonably held'. This being so, the law is in no position to prefer one view over another, but rather it must, 'recognise that both views may be acceptable for particular individuals to hold, just as it recognises that two – often opposing – schools of thought in medical practice can each

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[44] Anthony Jackson, 'Action for Wrongful Life, Wrongful Pregnancy and Wrongful Birth in the United States and England' (1995) 17 *Loyola of Los Angeles International & Comparative Law Journal* 535, 602.

[45] Jeff L Milsteen, 'Recovery of Childrearing Expenses in Wrongful Birth Cases: A Motivational Analysis' (1983) 32 *Emory Law Journal* 1167, 1185.

[46] *Planned Parenthood of Southeastern Pennsylvania v Casey*, 120 L Ed 2d 674 (1992) at 697.

be reasonable and acceptable.'[47] While slightly different considerations apply as to the judicial acceptance of opposing medical opinion,[48] the logical thrust of Norrie's argument is clear. But if we are looking for a potential trump card as to the reasonableness or otherwise of a failure to terminate a pregnancy, we can turn to Margaret Brazier's brief opinion on the matter, where she says:

> Is it what the hypothetical reasonable woman in 2003 would do? ...Given that the Court of Appeal has finally confirmed that no woman can be forced to undergo a Caesarian section to protect the life or health of the foetus, to 'force' a woman to 'kill' her foetus would be illogical. *Maternal autonomy demands that pregnant women's choices in this delicate arena of moral controversy should be respected.*[49]

Although no woman is 'forced' to terminate as such,[50] there is little doubt that Brazier's emphasis on maternal autonomy is absolutely central to our deliberations here. Bearing in mind that the *McFarlane* court emphatically declared that the law 'does and must respect these

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[47] Kenneth Norrie, 'Compensation for Wrongful Birth: An Examination of the Principles Governing a Physician's Liability in Scots Law for the Failure of a Family Planning Procedure' (Unpublished Doctoral Thesis, University of Aberdeen, 1988), 265-266.

[48] While courts are shifting towards adopting a slightly more critical stance over medical opinion (see *Bolitho v City and Hackney Health Authority* [1997] 4 All ER 771), their reluctance to find clinical opinion unreasonable through the imposition of a more stringent standard of care include, fears of hindering medical progress, encouraging the practice of defensive medicine, imposing a heavy burden upon the NHS through litigation, as well as the judiciary's recognition of its own limitations in acting as an arbiter of scientific perspectives which though often conflicting, can be reasonably held. Nevertheless, this latter point, as Norrie clearly argues, holds considerable weight in relation to moral perspectives surrounding abortion.

[49] Margaret Brazier, *Medicine, Patients and the Law* (London: Penguin Books, 3rd ed, 2003), 384 [my emphasis].

[50] See chapter four.

decisions of parents which are so closely tied to their basic freedoms and rights of personal autonomy',[51] could any court possibly argue that a failure to terminate *or* indeed, place a child up for adoption were *so unreasonable* as to constitute a failure to mitigate?

Whether a failure to terminate a pregnancy or place a child up for adoption is so unreasonable or not, is really quite irrelevant at this stage; in truth, it would be entirely fair to conclude that the courts' deliberations over mitigation have nothing to do with reasonableness at all. But what this discussion endeavours to highlight is the differential application of rules to reproduction than in other contexts – and this is particularly striking. That women are so clearly disadvantaged vis-à-vis the commercial application of mitigation rule becomes even clearer considering the much higher standard of care imposed upon the pregnant woman; and it is one of strict liability that permits no subjective assessment whatsoever at the furtherest end of the 'reasonableness' spectrum. And significantly, it is extremely rare for English law to impose 'strict liability' upon *defendants* (let alone claimants) without compelling reasons, for example, the existence of insurance. In determining the standard of care that a passenger should be entitled to expect of a learner-driver, Lord Denning in *Nettleship v Weston* stated:

> Thus we are, in this branch of the law, moving away from the concept: 'No liability without fault.' We are beginning to apply the test: 'On whom should the risk fall?' Morally the learner driver is not at fault; but legally she is liable to be because she is insured and the risk should fall on her.[52]

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[51] *McFarlane*, above n 6, at 81 (*per* Lord Steyn).

[52] *Nettleship v Weston* [1971] 2 QB 691, at 700.

Although the relationship between liability and insurance is both complex and disputed,[53] Jonathan Morgan observes of more recent cases that there *is* a clear judicial 'approbation for loss-spreading, via insurance as a positive reason for imposing liability in negligence.'[54] However, as a means of justifying the higher standard of care expected of wrongful conception claimants, this also lacks explanatory power. As Janice Richardson remarks of insurance against childbirth, 'in the nineteenth century this would have been viewed as unethical. Now it is simply a bad risk for insurers, such that the premiums would be too high.'[55] Therefore, social uninsurability coupled with minimal "insurance" coverage under the law of negligence[56] will leave many women for the greater part dependant upon their own resources, or those of the state to meet the costs of reproductive risks materialising.

So, if we consider the spectrum of reasonableness, running from the normal application of mitigation rules, a more objectively defined stance to a strict liability basis, what can we conclude as to their varying application to the wrongful conception case? The most obvious point is that it is virtually impossible to justify as a matter of law, the transfer of financial responsibility for reproductive risks being imposed upon the claimant. The heightened standard of care applying to pregnancy and

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[53] See Jane Stapleton, 'Tort, Insurance and Ideology' (1995) 58 MLR 820.

[54] Jonathan Morgan, 'Tort, Insurance and Incoherence' (2004) 67 MLR 384, 386 (*Vowles v Evans* [2003] EWCA Civ 318; [2003] 1 WLR 1607; *Gwilliam v West Herfordshire NHS Trust* [2002] EWCA Civ 1041; [2003] QB 443).

[55] Janice Richardson, 'Feminist perspectives on the law of tort and the technology of risk' (2004) 33 *Economy and Society* 98, 108. Note that the action for wrongful conception is central to Richardson's feminist critique on risk.

[56] There are numerous parallels between negligence as insurance and social insurance, although the defendant can only truly be referred to as the claimant's insurer once he has become legally liable. See Eugene Kontorovich, 'The Mitigation of Emotional Distress Damages' (2001) 68 *The University of Chicago Law Review* 491.

parenthood in the wrongful conception case is not only inapplicable to claimants, but under the circumstances would be unlikely to apply to the tortfeasor himself. But a more significant conclusion on the point is this: if tort law aspires to conceptions of distributive and corrective justice, then the action for wrongful conception reveals that this is not merely a half-hearted aspiration, but an aspiration that has altogether collapsed. Notions of 'formal equality' and 'treating like cases alike' are suddenly suspended when the law enters into the reproductive domain, acting to both misrepresent and deny women's reproductive choice. Instead, the subjective becomes objective, the no-choice becomes choice, the complex becomes simple, and the moral emerges as economic; quite simply, our very female personhood is transformed into the rational (and reproductive) economic man.

ON MITIGATING REASONABLY: WELFARE-MAXIMISING CHOICES & "TRAGIC QUESTIONS"[57]

> Some would dispute the very notion of a child bringing benefit to the parents, smacking of the commodification of the child, regarding him as a species of property in a way now rejected by family law.[58]

According to Phillip Levine and Douglas Staiger, although the abortion debate typically pivots around issues of philosophy, religion, ethics and feminism, 'rarely, if ever, does the debate regarding abortion policy focus on the results of economic analysis. Yet standard economic models of decision-making under uncertainty when applied to this issue

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[57] The term "tragic questions" is adopted from Martha C Nussbaum, 'The Cost of Tragedy: Some Moral Limits of Cost-Benefit Analysis' in Matthew D Adler and Eric A Posner (eds), *Cost-Benefit Analyses* (London: University of Chicago Press, 2000).

[58] The Right Honourable Lady Justice Hale, 'The Value of Life and the Cost of Living – Damages for Wrongful Birth', The Staple Inn Reading (2001) 7 *British Actuarial Journal* 747, 756.

yield interesting predictions regarding women's behaviour.'[59] Approaching abortion decisions as 'the result of a rational decision-making process in which a woman's actions are influenced by the expected costs and benefits of the choices she makes',[60] the authors' 'simple model of decision-making under uncertainty' yields the following results:

> The decision between abortion and birth is made after becoming pregnant and after learning whether the birth will be wanted or unwanted. A woman for whom a birth will be wanted will always give birth... and receive a payoff of 1. A woman for whom a birth will be unwanted will abort if the cost of abortion is less than the cost of giving birth... and will give birth otherwise. In this case the payoff represents the least costly option...[61]

Is it *really* useful, as the authors suggest to regard 'abortion as [a form of] pregnancy insurance'? Will it always be the case that a woman 'for whom a birth will be wanted' will *always* give birth? And what costs will incentivize and disincentivize the exercise of such "choice"? Despite recognising that costs might include both a financial and *psychic* dimension, it still leaves little, if any room for ambiguity in decision-making. Rather, the Solomite wisdom emerging from the objective economic model is that of the standard individuated, self-interested rational decision-maker; and it is the same decision-maker that appears in the action for wrongful conception. The individual objectively assesses their choices, calculating the correlated costs and

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[59] Phillip B Levine and Douglas Steiger, 'Abortion as Insurance' (NBER Working Paper No. W8813, March 2002, http://ssrn.com/abstract=302574).

[60] Levine and Steiger, above n 59, 2.

[61] Levine and Steiger, above, n 59, 2. It should be noted that the scope of Levine and Steiger's paper is broader; the authors also examine the relationship between changes in abortion policy in several jurisdictions upon abortion and birth rates, so as to highlight the 'insurance value' of abortion.

benefits of pursuing a course of action, resulting in a 'voluntary choice' that is *always* 'welfare-maximising'. But how well does this serve as a means of explaining reproductive decision-making, or indeed for that matter, any "choices" exercised within the family domain?

As scholarly criticism of "family economics" illustrates, many aspects of the rational choice model are deeply problematic. The translation of human activity into economic terms, Ann Estin argues, overlooks the construction of the family, and fails to address the division of labour and power dynamics occurring within it.[62] Since children are productive of significant financial and caring costs, particularly for *women*,[63] an economic perspective also fails to explain decisions *to have* children.[64] Therefore, only decisions to *avoid* parenting are explicable as valid "choices", thus rendering a contrary choice as irrational and inefficient. Further illustrating the limited application of economic theory is the impoverished view of personhood that emerges: the rational chooser is both selfish and self-interested, separate from society, and dependent 'only on the decision maker's assessment of her own well-being.'[65] As Himmelweit remarks, the autonomous characteristic is that of 'a shopper who takes her given preferences to the market and makes the best bargain she can at the prices she finds there.'[66] Although this can explain decisions *within* the market, the

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[62] Ann Laquer Estin, 'Love and Obligation: Family law and the Romance of Economics' (1994-1995) 36 *William & Mary Law Review* 989, 1019.

[63] Deborah Friedman, Michael Hechter and Satoshi Kanazawa, 'A Theory of the Value of Children' (1994) 31 *Demography* 375, 388; Susan Himmelweit, 'Economic theory, norms and the care gap, or why do economists become parents?' in Alan Carling, Simon Duncan and Rosalind Edwards, *Analysing Families, Morality and Rationality in Policy and Practice* (London: Routledge, 2002), 231.

[64] Friedman *et al*, above n 63, 394.

[65] Himmelweit, above n 63, 233.

[66] Himmelweit, above n 63, 232.

centrality of 'wealth-maximization' as a guiding value for exercising choice, clearly provides a pernicious typification of parent-to-child relations. Not only does the language of market rhetoric fail to distinguish 'children from stereo equipment',[67] but more significantly, it objectifies the child *as a commodity* to be bought and sold on the market according to personal preference. As Margaret Radin comments, 'reasoning in market rhetoric, with its characterization of everything that people value as monetizable and fungible, tends to make it easy to ignore... other "costs."'[68] And so must the economic view be regarded as an extremely costly enterprise, for it 'erases important values and distinctions, such as the difference between selfishness and generosity or the personal characteristics of individuals.'[69]

Yet, while the flaws of family economics might seem apparent, its language and reasoning have proved highly pervasive in law. And this is particularly true of tort law, which as Leslie Bender comments, has been 'weighted down by a language and value system that privileges economics and costs.'[70] Injuries, remedies and justice are measured by goals of efficiency, cost-benefit analyses, and the costs and statistical probability of their prevention.[71] Therefore, assessments of 'reasonableness' under the standard of care in negligence can be economically guided to the "right" answer in determining the difference between 'what the allegedly negligent party actually did and some

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[67] Estin, above n 62, 1018.

[68] Margaret Radin 'Market-Inalienability' (1987) 100 *Harvard Law Review* 1849, 1878.

[69] Estin, above n 62, 1016.

[70] Bender, above n 16, 767.

[71] Bender, above n 16, 760.

particular undone thing it allegedly *should* have done'.[72] But the would/should distinction has moral limits which are fully exposed in the infamous Learned Hand formula's guide to human 'other-regarding' behaviour: 'economically speaking, treat your neighbor as you would treat yourself. Only impose those costs on someone else that you would impose upon yourself.'[73] So, if the burden of taking precautions to avoid the risk is less than the probability of that risk occurring multiplied by the anticipated gravity of the risk should it arise, only then will one be negligent. But if the burden is deemed too great, and 'unreasonable' for the defendant to bear, then the claimant will bear the burden of their injury alone. And that remains the case, no matter how severe, or devastating the impact of an injury upon the claimant's life or those that care for them – the losses, financial, emotional and physical will lie exactly where they fell.

But if we unwrap this language of economics as it underpins the standard of care in negligence (the likelihood of the risk materialising, the seriousness of the risk should it materialize, the social utility of the defendant's activity, and the practicability of taking precautions), does it really provide an 'objective' determination as to what is or is not 'reasonable'?[74] And what of the economists claim to 'neutrality'? As Thomas Galligan argues, the Hand formula is far from objective or neutral. Rather it encourages *efficiency* which assumes that 'almost everything can be valued in some economic sense. Additionally, almost

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[72] Thomas C Galligan, 'The Tragedy in Torts' (1999) 5 *Cornell Journal of Law and Public Policy* 139, 159.

[73] Galligan, above n 72, 159.

[74] For a critical discussion of the standard of care and application of factors such as foreseeability, social utility and so forth, in relation to decided case law, see further Conaghan and Mansell, above n 9, 52-62.

anything can be viewed as a cost or benefit of something else.'[75] Therefore, 'risk', 'gravity' 'practicability of taking precautions' and 'harm' can all be understood more or less in financial terms. But, is it reasonable to 'measure human life in efficiency terms?'[76] Is harm always commensurate with the language of money? What of pain, emotion, and suffering – how can we capture these 'harms' in financial terms? And, more emphatically, since the standard of care holds a strong prescriptive/proscriptive dimension, is it reasonable to expect individuals' choices to be guided by economic goals of efficiency in their day-to-day lives and dealings with others? What exactly is the problem with the cross-fertilisation of economics into the law?

Disillusionment with the coalition of law and economics, has led some scholars to call for a 'revolutionary decommodification' of the law of tort. Those like Margaret Radin and Richard Abel, suggest that compensating for intangible injuries, such as pain and suffering contribute to 'a cultural view of experience and love as commodities' and 'commodify our unique experience'.[77] Furthermore Radin claims that if bodily integrity is an integral personal attribute, and 'not a detachable object, then hypothetically valuing my bodily integrity in money is not far removed from valuing *me* in money. For all but the universal commodifier, that is inappropriate treatment of a person.'[78] For both Radin and Abel, the answer lies in denying recovery of these types of 'injuries' to articulate the notion that human life activity, 'or at

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[75] Galligan, above n 72, 153.

[76] Conaghan and Mansell, above n 9, 61.

[77] Radin, above n 68, 1876 (citing from Richard Abel, 'A Critique of American Tort Law' (1981) 199 *British Journal of Law & Society* 207).

[78] Radin, above n 68, 1881.

least certain aspects of it, ought not to be traded, nor to be conceived of in market rhetoric or evaluated in market methodology.'[79]

In attempting to overcome the flaws of the economic model, the thesis that both Radin and Abel present goes much too far and leaves quite significant questions unanswered. For example, if 'certain aspects' of human life should not be hypothetically traded like goods on the market, then what aspects of human life can be? And, is it inevitable that awarding damages for pain, suffering and loss of amenity that accompany injury result in the commodification of human life? If we conceptualise physical loss to the body, as a loss of bodily integrity, does this not on their account also involve the commodification of human life? There is a vast difference, as we saw in chapter two, between treating the individual *as* an injury, and compensating for the inevitable repercussions that flow from that injury.[80] It would therefore seem that a great deal of the confusion over commodification results from a failure to separate the injury from its repercussions. Confusion notwithstanding, if taken to its logical limits, such an argument would seem to more sensibly articulate that only financial harms are commensurate with financial remedies, for in truth there is no aspect of our bodily materiality that can truly be priced to reflect its importance and meaning in our lives. But, more significantly, such a thesis proves itself to be quite dangerous once we consider the broader repercussions that might emerge from such a "revolutionary" overhaul of the scope of tortious remedies. As we saw in chapter three, the 'harms' which tort law has traditionally excluded are precisely those which Abel and Radin

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[79] Radin, above n 68, 1887.

[80] See also Brazier, above n 35. Of interest Brazier comments (at fn 19) that 'A complex and related question, which I cannot resolve in my own mind, is whether compensation for an unplanned child... constitutes an unacceptable payment for a child.'

would also deny: the non-physical, non-pecuniary, intimate and relational – all of which have clear resonance in the lives of women to whom, the 'emotional work of maintaining human relationships has commonly been assigned.'[81] In short, the so-called de-commodification of tort may well involve the systematic devaluation, privatisation and normalisation of harms though sustained by many, more often than not are suffered by women.

Nevertheless, there is little doubt that the economic-legal alliance is problematic. Perhaps the most obvious question is that forwarded by Conaghan and Mansell who ask, 'is our vision of human existence really so wretched that we feel comfortable about reducing everything to questions of efficiency and cost?'[82] While sympathetic to this point, it should be noted, however, that the law does not reduce *everything* down to questions of efficiency and cost. Indeed, the problems emerging from economic thought lie not necessarily in what the law 'prices up' - but rather, in what it doesn't. If the market rhetoric dominating law devalues human life, it does so because of the narrow view as to what values guide human decision-making, which in turn informs the law's assessment as to which elements of human life are valuable and *should* be recognised as harmful. In other words, an economic perspective severely limits what law *sees* and therefore *counts* as harm.

As previous chapters attest, it is exactly this economic view that has impacted hard on the question of what harms parents suffer through the wrongful conception or birth of a child. In relation to the birth of a healthy child, the harm was assessed as being purely financial loss,

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[81] Martha Chamallas and Linda Kerber, 'Women, Mothers, and the Law of Fright: A History' (1989-1990) 88 *Michigan Law Review* 814, 814.

[82] Conaghan and Mansell, above n 9, 61.

thereby excluding and rendering invisible the significant relational, caretaking and psychic losses flowing from parental (particularly maternal) responsibility. Also stemming from this narrow view was the notion of "savings" invoked in the wrongful birth cases where the mother was conceptualised as having *avoided* the expense of raising a healthy child through the birth of a disabled one. And in assessing what harm a woman might suffer from pregnancy, here too, the courts' view of injury was narrowed to an either physical assessment of loss, or one based upon a woman's attitude towards her bodily state. While this Cartesian perspective could account for the involuntary invasion of her bodily integrity and the material limits pregnancy might impose, what it denied was the moral, relational and embodied dimension entailed in all pregnancies, quite irrespective of their relative (un)wantedness or physical repercussions. Indeed, one might come to question, 'but for' the unwantedness of, and physical aspects to pregnancy, was the foetus really ever there?

As has already been argued, it is simply not possible to understand what the harm of wrongful conception and pregnancy consists of without reference to precisely these aspects.[83] The stripping away of this complex moral dimension has not only resulted in a narrow (and superficially simple) view as to a woman's perception of pregnancy, her foetus and potential future child, but quite critically there is no conception as to how these aspects might relate to reproductive decision-making. Instead, the legal subject of reproduction is guided not by connectivity, continuity or morality, but by separation, discontinuity and economic rationality. The rational mind, quantifies the relative 'costs' and 'benefits' of continuing or terminating a pregnancy, and objectifies the passive and governed body in which an

[83] See chapter three.

invading entity resides. Since the exercise of rational choice is the sole criterion for welfare maximisation, if a pregnancy is continued rather than avoided, the resulting "unwanted" child will transform into a wanted one. After all, why would a woman rationally choose to give birth to a costly and unwanted child? So, here lies the paradox: if a woman claims to have suffered harm in wrongful conception, is this not simply one that she has voluntarily assumed?

As a means of explaining decisions to become a parent or care for a child, the economic model embraced within law not only lacks explanatory power, but seriously misrepresents the nature of intimate relationships. It transforms our so-called 'autonomous' relations with others as proprietary, separate, contractual and voluntary,[84] thereby excluding love, care, sacrifice, physical nurture, dependency and moral responsibility; as well as other less virtuous values which may equally inhabit the family home, of anger, jealousy, fear, conflict and guilt.[85] There is little doubt that self-interest can play a role within the family realm, as it can within reproductive decision-making. Nevertheless, so many of the values excluded from economic rationality change dramatically the meaning of "choice" within the reproductive and familial domain. Leaving work to care for a child, or 'choosing' to continue a pregnancy that one would otherwise 'rationally' abort, are not necessarily voluntarily "chosen" towards the furtherance of one's self-interests. Rather, the exercise of "choice" within the reproductive and family spheres may be equally understood as driven by a sense of moral responsibility *to others* and conformity with social norms.[86]

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[84] George G Brenkert, 'Self-Ownership, Freedom and Autonomy' (1998) 2 *The Journal of Ethics* 27, 48.

[85] Estin, above n 62, 1082.

[86] Himmelweit, above n 63, 235-239.

Those supportive of the view that the pure exercise of "choice" inevitably leads to increased welfare, illustrate nothing other than a respect for the inherent value of "choice". By excluding the moral domain and the complexity of human decision-making, every individual choice, whether exercised through action or inaction, is assessed as having benefited its owner. Yet, there are many situations that we might confront in life where this would clearly not be true. Sometimes the necessity to make a choice could seem like a double-edged sword – a tragic event, where *none* of the options presented offer any prospect of increased welfare, but rather only its *diminishment*:

> People consent to changes in the world that involve a wide range of market choices, risk pools, and apparent authorities. Wives submit to abusive husbands; employees consent to exploitative and humiliating work environments; consumers consent to sales of defective, dangerous, and over-priced merchandise; women consent to "date rape" and to sexual harassment on the street and on the job; religious converts submit to directives compelling consensual suicide; subjects in an experiment consent to the dehumanizing, authoritative instruction to electrically shock other human beings. [...] Many of those consensual changes leave both the individual and community not just worse off, but miserable. It is not obvious why we should assume that all of these consensual changes in the world are moral changes on the ground that they promote autonomy.[87]

There is no doubt that the wife in Robin West's example, who submits to her abusive husband, rather than leave him to face 'grinding poverty' exercises rational choice. And, of course, the same must be said of the claimant in wrongful conception who continues a pregnancy rather than face an abortion. Both had choices, both exercised rational choice. But

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[87] Robin West, 'Authority, Autonomy and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner' (1985-1986) 99 *Harvard Law Review* 384, 427.

were these women's choices welfare-maximising? Were their choices 'voluntary'? And does the exercise of choice between options render these women better off? These are simply not questions which the economic model asks, but rather it assumes as a matter of 'common sense'. In doing so, the inevitable conclusion generated is one of non-intervention, and therefore, one of full individual and private responsibility for choice.

That we should be dissatisfied with this seemingly inescapable conclusion cannot be over-emphasised. As West remarks it is only once we drop the assumptions driven by economics that we can start asking important questions. So, in the case of the abused wife she comments,

> [W]hy these staggeringly depressing alternatives – an abusive husband, grinding poverty, or an oppressive state – are the only choices we can imagine for an abused wife. If these are in fact her only choices, it is because we have failed to act. And we will not create or even envision better alternatives until we cease to believe what is surely false: that we are all inexorably rational individuals, that we can never assess the misery of a victimized woman's life better than can the victim herself... Until we truly understand that a marriage of terror, no less than a state of terror, is *bad* – even when consensual – we will not be moved to create better alternatives.[88]

Other authors in the field stress similar points; and of the most prominent here, is Martha Fineman who argues that the notion of individual choice is all too often used as a justification for ignoring the 'inequalities in existing social conditions concerning dependency.'[89] In doing so, she suggests that we also fail to recognise that 'choice of

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[88] Robin West, 'Submission, Choice and Ethics: A Rejoinder to Judge Posner' (1985-1986) 99 *Harvard Law Review* 1449, 1455.

[89] Martha Albertson Fineman, *The Autonomy Myth* (New York: The New Press, 2004), 42.

one's status of position carries with it consequences not anticipated or imagined at the time of the initial decision.'[90] So, although a woman might well 'choose' to become a mother, whether she consents to the risks or foregoing the opportunities entailed in dependency work is more questionable; but even if she does consent to these risks, Fineman questions, 'should that let society off the hook?'[91]

What these powerful arguments display is a close attention to context - a dimension to "choice" that is painfully absent from economic thought. Both West and Fineman illustrate that the seemingly inevitable leap from individual choice to individual responsibility is pernicious and flawed. Quite simply, it is far from *inevitable* that autonomy need be read in this way. Stressing this point further, Fineman comments that 'social conditions, particularly conditions of oppression, are of far more than individual concern. They are of public concern, in a society that has established norms of justice, incorporating ideals of equality and inclusion.'[92]

As we have seen of the legal conception of responsibility however, the link between choice and consequential responsibility is often severed on those many occasions when the law *is* prepared to undertake a contextual and *relational* enquiry as to the reality of "choice". In those contexts, the law intervenes and makes 'public' the constraints under which individuals must 'choose'; and significantly it makes public the identity of the actor or circumstances which generated that difficulty of choice. However, in the reproductive field, the law becomes suspiciously silent on constraints surrounding choice - albeit, as occasional concessions in *McFarlane* belie (the pursuers 'had no other

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[90] Fineman, above, n 89, 42.

[91] Fineman, above, n 89, 42.

[92] Fineman, above n 89, 226.

choice'[93]), the judiciary is more than aware of the difficulties here too. But, one should ask, are we only talking about 'difficulties' in making a choice – does this really encapsulate the reality of reproduction? Rather, it seems possible to argue that there are numerous situations in this context where individuals might face what could be termed a "tragic question". As Martha Nussbaum explains:

> The tragic question is not simply a way of expressing the fact that it is difficult to answer the obvious question. Difficulty of choice is quite independent of the presence of moral wrong on both sides of a choice. [...] The tragic question registers not the difficulty of solving the obvious question but a distinct difficulty: the fact that all the possible answers to the obvious question, including the best one, are bad, involving serious moral wrongdoing. In that sense, there is no "right answer".[94]

Take for example, the tragic question that confronts so many women who hold the sole decisional responsibility for making the choice of whether to continue or terminate a pregnancy where genetic testing reveals that the foetus, if born, will be severely disabled. As one genetic counsellor remarked to Barbara Katz Rothman in interview, "It's a choice between bad and worse."[95] And as Rothman herself remarks, 'Taking the least-awful choice is not experienced as "choosing," not really. It is experienced as being trapped, caught. She enters into a rational seeking of information and choices, and finds herself trapped in a nightmare.'[96] So, for women who are trapped between the 'choice' of terminating a foetus, or raising the child in

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[93] *McFarlane*, above n 6, at 97 (*per* Lord Hope).

[94] Nussbaum, above n 57, 171.

[95] Barbara Katz Rothman, *The Tentative Pregnancy* (London: Pandora Press, 1988), 216

[96] Rothman, above n 95, 181.

societal conditions which still fail to support the needs of disabled individuals, what then, is the "right answer"?

And, for the author, this captures the importance of recognising the 'tragic question'. As Nussbaum comments, it reminds us of 'the deep importance of the spheres of life that are in conflict within the drama and of the dire results when they are opposed and we have to choose between them.'[97] In other words, the tragic question reminds us of what matters, the things we deeply care about as humans, and brings to the surface the very real moral framework that underpins and disrupts so many of our 'choices'. Yet, the tragic question is not posed by law within the field of reproduction. Rather, by embracing cost-benefit analysis, 'if anything, it suggests that there is no such question, the only pertinent question being what is better than what.'[98] This is not, however, to claim that all women in reproduction will *always* confront 'tragic questions'; nor indeed, that such questions confront individuals with an impossibility of choice. Some women may exercise such choices with considerable ease, and of course, more selfish considerations might underpin that decision, for example, on the grounds that having a child would simply interfere with their life.[99] But, this cannot speak of all women. As Katherine Bartlett comments of adoption, 'she may conclude that although she longs to keep her child, the child would be better off with an adoptive family. In these circumstances, her decision to place her child for adoption is an act of self-sacrifice for the welfare of the child.'[100] And there is no doubt that

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[97] Nussbaum, above n 57, 177.

[98] Nussbaum, above n 57, 196.

[99] Katherine T Bartlett, 'Re-Expressing Parenthood' (1988-1989) 98 *Yale Law Journal* 295, 324.

[100] Bartlett, above n 99, 323.

similar reasoning may equally underpin rational choices to *avoid* adoption or abortion.

Nevertheless, for all the flaws of the economic think-tank in the family domain, it is worth noting at this stage that none of the foregoing analysis tells us *why* the law fails to pose the tragic question in matters of reproduction. Nor indeed, does it answer why the law adopts a more relational approach in seemingly more trivial matters than the choices confronting women in reproduction. Why *is* the woman of reproduction transformed into a selfish, rational 'choosing' agent, stripped of all her subjectivity, where concessions are made to human frailty elsewhere? If the law, as Ripstein maintains, relieves individuals of responsibility not on the basis that the agent lacked control, but 'rather because the choice is too much to ask of a person'[101] then why does it seem so reasonable to impose responsibility onto women in reproduction? Just why is the woman of reproduction constructed as having 'voluntarily assumed' the risks of reproduction when those risks have been brought about by negligence?

PRIVATISING REPRODUCTIVE RISK: WILLINGNESS, AVOIDANCE & LOVE

> Society has not... responded to the caretaker by counting, valuing, compensating, or accommodating her caretaking. Instead of a societal response, inevitable dependency has been assigned to the quintessentially private institution – the traditional marital family. ...It is conceptualised as placed beyond and protected from intervention by the state. Dependency, through its assignment to the private, marital family, is hidden – privatized within that family, its public and inevitable nature concealed.[102]

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[101] Ripstein, above n 42, 292.

[102] Fineman, above n 89, 38.

As a matter of legal tradition, the ideological institution of 'the family' has been characterised 'as a private realm not generally subject to regulation'.[103] Variously expressed as 'sacred', 'a sanctuary',[104] 'private' and 'natural',[105] the domestic realm is seen as embodying values and norms which serve to differentiate it 'from the institutions occupying the public sphere, particularly those of the market.'[106] The family is the jurisdiction of emotion, love, care, joy, sacrifice, mutual affection, gratuity, and significantly, it is so often the private province of women. But, as feminist critical appraisals illustrate, the idea of the family as a private sphere, 'supposedly untouched by law', is a complete fiction.[107] As Ngaire Naffine argues, the family is 'itself a small society embedded in a larger society and so it is never really private.'[108] Nor is this sacred institution one truly lying outside the law's jurisdiction; the law itself defines what the family is, its constitution and constituency: what it is to be a man, woman (mother, wife) and child.[109] However, it is the perpetuation of this very dichotomy of public and private that leaves, as Lucinda Finley contends, 'law largely ignorant of and

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[103] Joanne Conaghan, 'Tort Litigation in the Context of Intra-Familial Abuse' (1998) 61 MLR 132, 136.

[104] Lior Barkshack, 'The Holy Family and the Law' (2004) 18 *International Journal of Law, Policy and the Family* 214, 214.

[105] Martha Albertson Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (London: Routledge, 1995), 161.

[106] Martha Albertson Fineman, 'Cracking the Foundational Myths: Independence, Autonomy and Self-Sufficiency' (1999) 8 *American University Journal of Gender, Social Policy and the Law* 13, 15.

[107] Ngaire Naffine, 'In Praise of Legal Feminism' (2002) 22 *Legal Studies* 71, 80.

[108] Naffine, above n 107, 80.

[109] Naffine, above n 107, 83.

unresponsive to what happens to women within the private realm. Thus the "public" language of law contributes to the silencing of women.'[110]

The exemption of the 'private' realm from law's gaze however, not only renders all that happens within the family home as non-legal but significantly, as non-economic. Therefore, women's work within the family home, whether caring for children or undertaking housework, is systematically devalued, and becomes merely 'what women just do'[111] – forms of gratuitous labour, explicable through concepts of love and affection. As Anna Lawson comments, the devaluing of labour stereotypically associated with women is particularly apparent in the (non)acquisition of beneficial interests in the family home:

> Most women, and indeed most of their partners, would probably be surprised to learn that if they designed, painted and decorated the home in which they lived with their *de facto* husband, they would be deemed to be acting out of love and affection or a desire to live in comfortable, pleasant surroundings, whereas if they used a 14 lb sledgehammer to break up concrete in the garden, or even contributed regularly to household bills, so as to enable their partner to pay the mortgage, they would be deemed to be motivated by a belief that they owned or that by so doing, would own an interest in the property.[112]

By focusing on direct financial contributions, and labour that goes over and above 'what women just do', Simone Wong argues that such equitable principles 'ignore the effects of sexual division of labour in

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[110] Lucinda M Finley, 'Breaking Women's Silence in law: The Dilemma of the Gendered Nature of Legal Reasoning' (1989) 64 *Notre Dame Law Review* 886, 899.

[111] Regina Graycar, 'Sex, golf and stereotypes: measuring, valuing and imagining the body in court' (2002) 10 *Torts Law Journal* 205.

[112] Anna Lawson, 'The Things We Do For Love: Detrimental Reliance in the Family Home' (1996) 16 *Legal Studies* 218, 229.

such relationships, which place women at a disadvantage.'[113] Reinforcing these points, Katharine Silbaugh notes that the law's failure to recognise a woman's work within the home as holding a productive value has been explicitly and implicitly justified through the discourses of love, leisure, and affection.[114] Therefore, despite its private nature, by no means is a woman's work in the home rendered invisible; rather it is 'subordinated to and dependent upon familial affections'.[115]

Nor is a woman's work invisible in the action for wrongful conception, since it is precisely this relational dimension that becomes the exclusive focus of the courts. Rather than being given productive value, caring work is conceptualised as sitting solely within the province of natural love, affection, care and gratuity. It is only once the caring labour goes beyond 'what women just do', as is typified by the wrongful birth and conception cases involving disabled children, that the law recognises the productive value of women's work in the form of an 'additional' (as opposed to the 'ordinary') award for maintenance. But we might be surprised as to how extensive the nature of that ordinary burden actually is. While Regina Graycar suggests that others, such as grandmothers are exempted from taking on the ordinary burden of caring,[116] this caveat no longer applies in the English law of negligence. As the wrongful conception case of *AD v East Kent Community NHS Trust* illustrates, women's caring role extends well beyond the ordinary

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[113] Simone Wong, 'Constructive Trusts Over the Family Home: Lessons to be Learned from other Commonwealth Jurisdictions?' (1998) 18 *Legal Studies* 369, 388.

[114] Katherine Silbaugh, 'Turning Labour into Love: Housework and the Law' (1996) 91 *Northwestern University Law Review* 1.

[115] Silbaugh, above n 114, 26.

[116] Graycar, above n 111, 207.

burdens of 'motherhood'.[117] In this case, the claimant was a patient under the Mental Health Act 1983 in the care of the defendant NHS Trust. She became pregnant whilst living on a mixed ward, and gave birth to a healthy child. Asserting that her pregnancy was the result of the trust's various failures,[118] including inadequate supervision, the claimant sought damages for pain, suffering and inconvenience of pregnancy and childbirth, the psychiatric trauma caused by her separation from and inability to raise the child, and the additional costs of the child's upbringing, maintenance and education. This latter head of damages was sought not for the claimant, but the child's grandmother who, having been granted a residence order, had taken on the role of the child's carer. While *AD* raises numerous issues of considerable interest,[119] of relevance to the current discussion, is the court's response

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[117] *AD v East Kent Community NHS Trust* [2002] EWHC 1890; [2002] EWCA Civ 1872.

[118] The alleged failures included (at paragraph [6]), placing the claimant in a mixed psychiatric unit; failure to arrange for the claimant to be sterilised or provided with contraception; failure to seek court authorisation in pursuance of sterilisation or suitable contraception; a failure to act upon her mother's concerns over the risk of the claimant becoming pregnant, and a failure to provide an adequate level of supervision. Since *AD* was concerned with the preliminary issue of child maintenance, these issues did not fall to be determined by the court.

[119] Note that this case was decided prior to the House of Lords' determination of *Rees v Darlington Memorial Hospital* ([2003] UKHL 52), but after the Court of Appeal's judgment had been passed down ([2002] EWCA Civ 88). Therefore, in determining whether a claimant, suffering from mental disability, should be able to make a claim for the costs of care, the courts were bound by both *Rees* and *McFarlane* (above, n 6). Despite the possible parallels that could be drawn between *Rees* and *AD* on the basis of disability, there were several complicating factors. First, the claimant herself was unable, and would never be in a position to look after the child; these facts clearly serve to differentiate *AD* from precedent. Secondly, while the damages were claimed on the basis of the substitute cost of care nor did the case fall squarely within the principle of *Hunt v Severs* ([1994] 2 AC 356) since normally such care is provided

to the claim for the substitute cost of care and the question as to whether the grandmother was providing 'caring services' or 'gratuitous care'. In denying the claim for maintenance costs on the basis of *McFarlane*, Cooke J at first instance remarked:

> [B]oth the claimant, to some extent, and her mother, to a greater extent, have the benefits of the child, the value of whose life is incalculable to them. ...Mrs A whilst taking on, as a 50 year old grandmother, a considerable burden in bringing up the child, also receives the great joy and blessing of such a child. ...Mrs A has taken on a great responsibility, no doubt out of love for her daughter, out of a sense of responsibility for her granddaughter and because of natural ties of family love and affection. It clearly involves considerable sacrifice on her part.[120]

But not a compensable sacrifice, since, as the judge concluded, to award the costs of maintenance would have the effect 'of valuing the child to Mrs A as more trouble than she is worth in circumstances where Mrs A, in place of an adoptive parent or foster parent, has voluntarily taken on herself the entire upbringing of the child.'[121] Despite Mrs A's decision being driven, by the 'highest motives', it could not realistically be said considered Cooke J, 'that she is providing services to the claimant', rather 'she is bringing up the child herself in substitution for the claimant.'[122] And, the language of love, gratuity, voluntary assumption and joy also litters the appellate decision of this case. Mrs A, though

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directly for the injured claimant. Nevertheless, one might note that in wrongful birth cases as analysed in chapter two, some courts were willing to stretch these principles in the claimant's favour. A further instructive element of *AD*, is that of Cooke J at first instance, who provides a highly critical reading of the Court of Appeal's determination of *Rees*.

[120] *AD* (High Court), above n 117, at paragraph [27].

[121] *AD* (High Court), above n 117, at paragraph [27].

[122] *AD* (High Court), above n 117, at paragraph [34].

having given up full-time work for part-time work in order to care for her daughter's child, was not the provider of a 'service', but nevertheless she performed an act deserving of both sympathy and admiration in coming 'to C's rescue and provid[ing] her with the love and care that she needs'.[123] So, even when women sacrifice their employment and sources of staple income to care for a child there is *still* no economic value accorded to caring work – quite simply, if it is a 'loss' or a 'risk' emerging from the tort, it was one voluntarily undertaken. According to one judge, if a woman were to obtain damages, 'she would happily be in a position whereby she would look after her much loved child at home, yet at the same time in effect would receive the income she would have earned had she stayed at work.'[124] Rather than constituting compensation, this would be the 'conferment of a financial privilege'.[125]

But the legal construction of all these women as admirable volunteers is far from innocent. Rather, it is a legal strategy designed to 'absolve the defendant from the legal consequences of an unreasonable risk of harm created by the defendant, where the claimant has full knowledge of both the nature and extent of risk.'[126] And the judgments are simply imbued with the language of *volenti non fit injuria* - 'voluntary', 'acceptance' 'assumption', and 'willingness' – as expressions of the individual responsibility for the outcome harm.[127] So, in wrongful conception

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[123] *AD* (Court of Appeal), above n 117, at paragraph [22] (*per* Lord Justice Judge).

[124] *Greenfield v Irwin (A Firm) and* Others [2001] EWCA Civ 113; [2001] 1 WLR 1292, at paragraph [54] (*per* Laws LJ).

[125] *Greenfield,* above n 124, at paragraph [54].

[126] Michael A Jones, *Textbook on Torts* (Oxford: Oxford University Press, 8th Edition, 2002), 591.

[127] *Volenti non fit injuria* has a considerable overlap with contributory negligence and the doctrine of mitigation. Each approach expresses the idea that an individual should

suits involving healthy children, women are constructed as having had made a conscious and 'voluntary' choice to keep the child, as is evidenced by their failure to terminate their pregnancy or place the child up for adoption. And there is little doubt that the same (unarticulated) expectations apply to a woman in such a suit where she gives birth to a disabled child – since there her opportunity to avoid such risks through abortion is all the greater, possibly existing up until term.[128] While the option of abortion clearly does not apply to the wrongful birth suit, the woman is still constructed as having voluntarily undertaken the ordinary burden of motherhood – the voluntary aspect of her labour is illustrated by her 'willingness' to accept a healthy child. In each case, all these women are characterised as having voluntarily run the "risk",[129] and as

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take responsibility for her own actions and thereby centralises the claimant's behaviour. See further, chapter four.

[128] This raises a point of interest since lower courts dealing with this scenario have clearly been under the impression that *McFarlane* ruled out the mitigation doctrine – but ordinary damages have been denied to such notwithstanding. The House of Lords' adjudication of *Rees* (above n 119) illustrated a clear split on the question as to whether 'additional' damages or a conventional award will apply to the wrongful conception suit involving a disabled child, but clearly ruled out 'ordinary' damages. Nevertheless, while it is likely that the same expectations of such women will apply, it is unlikely that the mitigation ethic would be articulated explicitly (see chapter four); as Mason *et al* comment of imposing a duty upon women to terminate disabled foetuses: 'There is no legislative basis for such a suggestion which has strong overtones of positive eugenics.' J K Mason, R A McCall Smith and G T Laurie, *Law and Medical Ethics* (London: Butterworths LexisNexis, 6th Edition, 2002), 189.

[129] A further related point of interest which is not explored here for reasons of space is the gendered construction of risk-taking. As Jenny Steele comments, while men's risk taking is defined as virtuous, courageous, and heroic, risk-taking is less 'valorised for the performance of femininity' (Jenny Steele, *Risks and Legal Theory* (Oxford: Hart Publishing, 2004), 161). Nevertheless, the point that is being made within this thesis is that such reproductive risks are not being constructed as productive of harmful outcomes, but rather beneficial outcomes.

having accepted private responsibility for the much 'loved', 'ordinary' and 'natural' consequences of negligence. Quite simply these women are the authors of their own great *fortunes* – only their own actions can be said to "naturally flow" from the breach - for this is 'what women just do'.

In her examination of ideas surrounding what is normal, ordinary or natural, Mayo Moran observes that these conceptual devices have often been invoked to justify the discriminatory treatment of women, among others.[130] And in the context of the wrongful conception and birth claims, these comments hold equal force. The consequences of negligence are the very ones the female claimants sought to avoid – there is nothing 'natural' about the attribution of responsibility *to* women in such cases. But, the wrongful conception and birth cases are not isolated examples. Such "commonsense" ideas about the 'natural' essence of femininity are positively thriving - the stereotype of the devoted wife, loving mother and gratuitous homemaker, are frequently told stories in law. As Regina Graycar comments in the context of personal injury awards for loss of sexual function, while a man's loss is primarily characterised as one of 'pleasure', 'it is easier to find references to women getting pleasure and satisfaction from housework than it is to find references to sexual pleasure'.[131] Instead, the loss that women suffer is constructed as that consisting of her (in)capacity to reproduce, since 'the natural consequence of women having sex seems to be having children.'[132] Similarly, women's natural capacity to bear children has been used to discount women's damages awards on the basis that they may 'in the future have time out of the workforce to have children', which as Graycar comments, remains the case even when

[130] Moran, above n 7, 157.

[131] Graycar, above n 111, 207.

[132] Graycar, above n 111, 211.

women have indicated that they never wanted any children.[133] In addition, the devaluation of women's work within the home is well illustrated by the discounting of care given to injured family members; unless an individual has given up paid employment, 'the commercial rate is inappropriate where a relative acts out of love or a sense of duty'.[134] In these (non-exhaustive) instances the law is systematically articulating women's lack of 'attachment to the paid labour market in view of their childbearing capacity',[135] and is declaring that women's roles as carer, mother and home-worker, even when negligently brought about, are far from harmful. Rather, according to the law, these are the normal vicissitudes of life for which women are 'naturally' and *morally* responsible.

And here lies the rub; the law most certainly *does* recognise the emotional realm to a woman's decisional responsibility – law *is* in this sense, partially relational. Although this dimension to 'choice' is completely excluded when evaluating the 'avoidable consequences' rule, the law most visibly utilises the language of relationality, love, care, sacrifice and moral responsibility as a means of privatising those harms which women suffer as women. And since it is this very language that has given rise to stereotypical views of 'what women just do', we might well come to question if, in reality, it is the relational domain which harms us:

> [T]here is a strong ideology that through pregnancy and childbirth an enduring bond develops between mother and child which cannot easily be broken. This mystical bond is perceived of as inevitable, and more

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[133] Regina Graycar, 'Damaged Awards: The Vicissitudes of Life as a Woman' (1995) 3 *Torts Law Journal* 1, 7.

[134] Jones, above n 126, 677 (*McCamley v Cammell Laird Shipbuilders Ltd* [1990] 1 All ER 854).

[135] Graycar, above n 133, 14.

> powerful than any woman can realize in advance. ...Insofar as the ideology designates women as the natural rearers of children, it has been used to limit women's options outside the home, especially in the workplace, and thus has not been entirely favourable to women. But as a model for how we might want parents to feel about their children, it seems a constructive starting point...[136]

The ideology of natural bonds of love and affection is absolutely central to the actions of wrongful conception and birth. It is this dimension that is heavily canvassed by those who most object to parents receiving damages awards for unplanned children - how can a parent be harmed, when their child is so loved?[137] Of course, there is a grain of truth in such claims - as Tony Weir's illustrations of the 'outrages consequent on *Emeh*' portray, there is no doubt that many of these parents do love their children – and quite readily declare that they would not give them up 'for the world'.[138] And although we might readily agree with Margaret Bickford-Smith's suggestion that the universality of this experience is disputable,[139] this still leaves the overarching question: does the existence of love mean that such parents are left unharmed?

As this chapter goes on to consider, it is arguable that a *fuller* relational approach can highlight the serious flaws of such an argument, as well as the thin conception of human emotionality that lies beneath it. But

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[136] Bartlett, above n 99, 333.

[137] See for example, Meagher JA's judgment in *CES Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47, in which he points to this dimension as giving rise to problems where mothers variously describe their children as loved or unloved, and comments at paragraph [10]: 'Does that not indicate that the law has strayed into an area in which it has no business?'

[138] Tony Weir, *A Casebook on Tort* (London: Sweet & Maxwell, 9th Edition, 2000), 131.

[139] Margaret Bickford-Smith, 'Failed Sterilisation Resulting in the Birth of a Disabled Child: The Issues' (2001) 4 *Journal of Personal Injury Litigation* 404, 409.

before doing so, it is worth outlining the promises and problems inherent in this enterprise. As the foregoing discussion illustrates, a relational approach certainly holds great merit in developing a different understanding of individuals' connections with others, and in particular, a different perspective of women's reproductive decision-making. Nevertheless, emphasising precisely these aspects - connection, love and moral responsibility - would appear to hold an equal cost. These dimensions to reproduction have been used to perpetuate insidious stereotypes which construct women as both naturally *un*harmed and benefited following negligence. But is this an inevitable cost to emphasising relationality within reproduction? After all, it is best to keep in mind that what we are dealing with here are a series of crude story stereotypes. Nor is this seen as an insurmountable challenge; as Giorgio Monti and others have argued in the context of 'reasonableness', these stereotypes could be broken down by replacing "commonsense" with evidence and information. So, a judicial commitment to exploring the barriers to women's equality, women's sexualised treatment and women's varied perceptions of apparently 'harm*less*' events, might serve to bridge this perceptual gap.[140]

The importance of this line of thought cannot be overstated. In their different ways, what these authors can be interpreted as saying is that the law must embrace a different version of female legal personhood; one that is complex, diverse, with fluid and shifting boundaries. And, perhaps in some ways this tentative perspective offers a few clues as to how we can bridge the perceptual gaps between a pure relational perspective, and the person of law that stands behind the liberal ideal. So, to progress this line of thought, just how do we articulate a deeper

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[140] Monti, above n 16; see also Elizabeth L Shoenfelt, Allison E Maue and Joann Nelson, 'Reasonable Person Versus Reasonable Woman: Does it Matter?' (2002) 10 *Journal of Gender, Social Policy & the Law* 634.

understanding of personhood and responsibility within the law? And, more specifically, what promise does theorising the gap between relationality and liberalism offer for the actions of wrongful conception and birth?

RELATING TO COMPLEXITY: EMBRACING "FUZZINESS"

> Margaret Raby killed her husband after a history of abuse which was described by the judge as 'effectively imprisoning... [her] and then brainwashing... [her] physically, psychologically and sexually.' Margaret Raby testified: 'I loved Keith very much with all my heart and I thought what I could give him, sir, with my love and psychiatric help, we would overcome what he did to me.' She also testified, 'I thought what I could give him – my love, anything he wanted, would [stop the abuse] ... but it didn't. Later she testified, 'I loved him,' to which the prosecutor replied, 'and he wasn't really a bad fellow, was he?'[141]

Some recoil at the thought of 'fuzziness.' When confronted with a question where we can say neither 'yes' or 'no', '1' or '0', 'black' or 'white', 'A' or 'not-A' – what is the 'right' answer? As lawyers we are acutely aware of the advocate's routine insistence in cross-examination that the witness must "just answer the question, 'yes' or 'no'!" – and invariably the witness will need to round-up or round-down for 'certainty' - although her version of events probably sits somewhere in between. This, Bart Kosko would probably claim, is a mismatch problem. While scientists see their art in terms of black and white, computer programmers in terms of all true and false - statements about the world differ, some things are just grey: 'Statements of fact are not all true or all false. Their truth lies between total truth and total

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[141] Seuffert, above n 17, 212 (the author tells the story of *R v Raby* (Unreported, Supreme Court of Victoria, Teague J, 22 November 1994).

falsehood, between 1 and 0. They are not bivalent but multivalent, gray, fuzzy.'[142]

Fuzziness is part of our every day lives, as it is of law. It explains those moments when we add a caveat to an initially firm statement - 'but', 'however', or 'well' ("I support X party, but..."). In law, as Kosko comments, rather than being able to draw a line between breach of contract and not breach, or self-defence and not self-defence, we soon realise that, the 'lines are curves and you have to redraw them in each new case. Every rule, principle, and contract has exceptions'.[143] So, concepts like reasonableness, foreseeability and damage, all of which require the exercise of judgment can also be seen as a series of ambiguous principles equally unsusceptible to 'line-drawing'. And this is where a 'fuzzy' analytic proves valuable. Not content, like bivalence to 'trade accuracy for simplicity', fuzziness takes a multivalent view and therefore deals with uncertainty, degrees, paradoxes, contradiction, and although Kosko does not spell it out, it also deals with human emotionality and emotional complexity.[144]

Nevertheless, despite being imbued with 'fuzziness', law enjoys the certainty that binary logic offers: private/public, reason/emotion, and man/woman and so on – each serves to delineate law's boundaries and jurisdiction. However, as Finley comments, 'the reductive instance of legal language on a consistent yes/no position, a bottom line simple "answer", denies the possibility of shifting contexts and the need to resort to different lines of argument for different purposes.'[145] And the

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[142] Bart Kosko, *Fuzzy Thinking, The New Science of Fuzzy Logic* (London: Flamingo, 1994), 8.

[143] Kosko, above n 142, 263.

[144] Kosko, above n 142, 21.

[145] Finley, above n 110, 903.

very reason that law can achieve such 'simple' answers is through limiting the emotional realm. It is this realm which is seen as disrupting, creating uncertainty where there is none, and as Susan Bandes comments, it is conceptualised as encroaching upon the 'true preserve of law: which is reason.'[146] But, that is not to suggest that emotion is completely absent from law; as we have seen throughout this thesis, this is far from the case. Indeed, legal reasoning can depend 'heavily on assumptions about how people are emotionally constituted',[147] creating not only 'emotional scripts' which determine the proper place for emotion, of love, jealousy, hate, guilt, and their physical manifestation,[148] but emotional outlaws which:

> ...violate emotional scripts in ways that challenge social hierarchies. Welfare recipients who feel resentment rather than gratitude at welfare payments, racial minorities who feel anger rather than amusement at racist jokes, and women who feel discomfort or fear rather than feeling flattered at male sexual banter all experience outlaw emotions. These instances of resentment, anger and fear challenge dominant perceptions of what is going on...[149]

Of course, the appropriate role for emotion in judging is deeply disputed, although most will agree that the idea of the impartial and distanced judge is largely the stuff of myth. As chapter three examined, those like Jennifer Nedelsky, regard emotion as holding an essential role to play in directing legal reasoning.[150] By contrast, Richard Posner

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[146] Susan A Bandes, 'Introduction' in Susan A Bandes (ed) *Passions of Law* (London: New York University Press, 1999), 2.

[147] Cheshire Calhoun, 'Making up Emotional People: The Case of Romantic Love' in Bandes, above n 146, 218.

[148] Calhoun, above n 147, 220.

[149] Calhoun, above n 147, 223.

[150] Jennifer Nedelsky, 'Embodied Diversity and the Challenges to Law' (1997) 42 *McGill Law* Journal 91. See also Bandes, above n 146, 9.

warns of the dangers of 'rational' judgment being 'distorted by "emotionalism"', or being utterly overwhelmed by a more 'primitive mode of reasoning'.[151] And these positions are not as contradictory as one might think, since they both highlight one central concern prevalent in all debates concerning notions of legal personhood: where and when the law *should* recognise emotion.

Critiques of the liberal conception of legal personhood tend to emphasise its inability to deal with connection, in conceptualising humans as essentially 'discrete, bounded units, beings who come in ones, not twos.'[152] And as Ngaire Naffine illustrates, cases such as *Re A (Children)*,[153] and those concerning pregnant women, largely concern failures of individuation, since under the liberal ideal we only 'become persons once we individuate... once we separate from our mothers.'[154] A similar point is also expressed by John Harris who suggests that the most striking feature of *Re A* was how the court resorted to pitting the 'welfare of each child 'against the other' which clearly resonates with the judicial tradition of conceptualising pregnancy in adversarial fashion.'[155] So, if the conception of the rational legal actor is underpinned by a biological assumption, *he* is always 'individuated and therefore sexed (at least in the sense of never pregnant, because this compromises individuation).'[156] In order to be a truly free autonomous

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[151] Richard A Posner, 'Emotion versus Emotionalism in Law' in Bandes, above n 146, 311.

[152] Ngaire Naffine, 'Who are Law's Persons? From Cheshire Cats to Responsible Subjects' (2003) 66 MLR 346, 360.

[153] *Re A (Children)(Conjoined Twins: Surgical Separation)* [2000] 4 All ER 961.

[154] Naffine, above n 152, 360.

[155] John Harris, 'Human Beings, Persons and Conjoined Twins: An Ethical Analysis of the Judgment in *Re A*' (2001) 9 *Med L Rev* 221, 228.

[156] Naffine, above n 152, 364. Note that in Naffine's article, she describes three caricatures of the liberal conceptions of legal personhood.

'rights' wielding actor under the liberal ideal, one must therefore be individuated, independent, disembodied, self-possessed and self-contained.[157]

As a retort to the liberal 'separation thesis', Robin West and others, have offered the 'connection thesis', a relational account of human existence which seeks to include precisely those aspects of our lives that the liberal understanding excludes, of dependency, embodiment, emotionality, connection and care. West's position of female personhood might well be broadly captured in the following:

> Women are actually or potentially materially connected to other human life. Men aren't. This material fact has existential consequences. While it may be true for men that the individual is 'epistemologically and morally prior to the collectivity', it is not true for women. The potential for material connection with the other defines women's subjective, phenomenological and existential state, just as surely as the inevitability of material separation from the other defines men's existential state.[158]

Contextual accounts such as West's strongly reflect the arguments of Carol Gilligan, in drawing broad gender distinctions between the "voices" of men and women.[159] Women, in Gilligan's view, exercise their moral responsibility through relationships, connection, selflessness and care, by contrast with the male pursuit of morality which defines fairness in terms of equality, objectivity, separation and hierarchy. Nevertheless, while clearly influential, relational accounts such as those of Gilligan and West (among others[160]) have not been without their

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[157] Naffine, above n 152, 364.

[158] Robin West, 'Jurisprudence and Gender' (1988) 55 *University of Chicago Law Review* 1.

[159] Carol Gilligan, *In a Different Voice* (Cambridge: Harvard University Press, 1982).

[160] See for example, Bender, above n 16, and Finley, above n 110.

critics either. One criticism to which relational accounts are open is well-elucidated by Joanne Conaghan when she questions:

> Do not such appeals to a unified female experience make the same false claims to universality that feminists attribute so frequently to men, resulting moreover in the same oppressive consequence, namely, that those who do not share the privileged experience are thereby excluded and their experience denied?[161]

Furthermore, bespeaking the criticisms of many, Joan Williams observes that the danger of relational accounts is that they are 'potentially destructive',[162] in rehabilitating 'inherently loaded stereotypes'[163] derived from the 'pre-modern stereotype of woman as the "weaker vessel"', both in physical and intellectual terms.[164] The claim that there is a 'singular' female voice not only runs against the theoretical tide of anti-essentialism,[165] but that the values attached to the 'female voice', of emotion, caring and moral responsibility, are pernicious. Since it is these values which have traditionally acted to oppress and control women, relational feminism is thus seen by many as creating the potential for it to be 'used as a weapon against women.'[166] Indeed, this chapter has highlighted that it is this 'universal' and 'contextual' standard as to what is ordinary, normal and natural that has been used against women in the wrongful conception case; and as others illustrate, many have used the same stereotype to argue for the

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[161] Joanne Conaghan, 'Tort Law and the Feminist Critique of Reason' in Anne Bottomley (ed) *Feminist Perspectives on the Foundational Subjects of Law* (London: Cavendish, 1996), 65.

[162] Joan C Williams, 'Deconstructing Gender' (1988-1989) 87 *Michigan Law Review* 797, 801.

[163] Williams, above n 162, 821.

[164] Williams, above n 162, 804.

[165] Conaghan, above n 161, 67.

[166] Williams, above n 162, 813.

delegitimization of abortion on 'the grounds that it goes against women's instinct to have babies.'[167] Therefore, attempts to undermine the liberal autonomy ideal through a more contextualised standard, give rise to the danger of reinforcing the very stereotypes we wish to jettison; as Nicola Lacey comments:

> One of the avoidable binds that we have sometimes been caught in, then, is a reassertion of the very stereotypes we are challenging. By getting seduced by the explanatory power of our doctrinal critique, and in our enthusiasm to deconstruct the oppositions which it has exposed, we see them where they may already have been dislodged; we construct them as more seamless than they are. We confirm the stories we say legal doctrine has told, and even begin to believe that they are as powerful as the most sexist man could wish.[168]

If the relational perspective of autonomy is so deeply flawed, holding the capacity to undermine women's agency and personhood under the law, what conception of autonomy does this leave us with? According to Beate Rössler, because women have so often been 'compelled to understand themselves not as independent but as dependent', a non-relational concept of autonomy appears to be both conceptually coherent and normatively appropriate.[169] And Rössler goes on to suggest that it is 'precisely the distinction between a relational and non-relational concept of autonomy that allows a person the possibility of extricating herself from relationships.'[170] So, do we just return back to square one then, content to stick with the liberal vision of autonomy

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[167] Ellie Lee, 'Psychologizing Abortion: Women's 'Mental Health' and the Regulation of Abortion in Britain' in Anne Morris and Susan Nott (eds) *Well women, the gendered nature of health care provision* (Aldershot: Ashgate, 2002), 66.

[168] Nicola Lacey, *Unspeakable Subjects, Feminist Essays in Legal and Social Theory* (Oxford: Hart Publishing, 1998), 205.

[169] Beate Rössler, 'Problems with Autonomy' (2002) 17 *Hypatia* 143, 149.

[170] Rössler, above n 169, 149.

which is, after all, just as 'essentialist' since 'it assumes one standard for everyone'?[171] Or, might there be another way to supply 'a fuller, more realistic account of the legal lives of men and women: to make us appreciate 'the rich thicket of reality'?'[172]

Well, perhaps – albeit what is being offered here is merely a tentative account, a way of engaging in the debate as to how we can attempt to strive towards a more authentic account of human personhood. And, this hangs quite critically, on embracing complexity. If we return to Jeremy Pomeroy's spectrum of objectivity and subjectivity,[173] and place liberal individualism on one end, and relational accounts at the other, what we may be describing is a spectrum of possible accounts of personhood that could describe us surprisingly well at different points in our lives. Emotions might fluctuate between either extreme, or sit constantly in the middle; these might vary from hour to hour, from day to day and so on, and be subject to change depending upon our social environment, lifestyle, material living conditions, health, friendships and family – since quite often all these aspects of our lives are quite conditional. Or one might confront a life-event which changes us quite radically as a person and invokes the most selfish, self-regarding behaviour, or by contrast, brings out other-regarding behaviour that is grounded in connectivity, selflessness, and care. And, of course, one might exercise one's autonomy based on emotions which could be derived from both ends of the spectrum, a confluence of selfish and caring concerns.

In other words, what is being furnished here is that neither the liberal autonomy ideal, nor the relational account of personhood can ever

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[171] Monti, 16, 573.

[172] Naffine, above n 107, 79.

[173] Pomeroy, above n 19.

provide the perfect blue-prints that we aspire to. Absent of complexity, no singular account ever will. All that a unitary account can achieve is a simplistic two-dimensional view of personhood that necessarily filters out aspects of the human condition – and any comparison of our 'real' emotional complex selves will inevitably result in contradiction, confusion, or at worst, a failure of personhood at particular times. Consider Hazel Biggs's description of two women's exercise of autonomy in end of life decisions,

> They fought for their autonomy to be respected not only so that they might die in a manner and at the time of their choosing, which some would regard as selfish, but also in order to protect those they cared for and spare them the hurt associated with watching them die over a protracted period.[174]

As Biggs is acutely aware, constructing the exercise of autonomy as expressed through connection and care holds particular dangers. One of those concerns being, 'how can we be certain that a person is acting autonomously when she is clearly motivated by her perception of the needs of others?'[175] Here is the first contradiction on a liberal account - doubts immediately surround 'other-regarding', rather than fully individuated behaviour. But, so must we question whether the desires of these women can be understood as being completely immersed in concerns for others under a relational account. As Biggs notes of one of these women who asked for the withdrawal of life-sustaining treatment, 'In her view this would be preferable not only *for her*, but also for those who cared about her'.[176] Therefore, Biggs's rightly argues that, 'autonomy will be better respected by accepting that people have their

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[174] Hazel Biggs, 'A Pretty Fine Line, Death, Autonomy and Letting It B' (2003) 11 *Feminist Legal Studies* 291, 298.

[175] Biggs, above n 174, 298.

[176] Biggs, above n 174, 293 [my emphasis].

own reasons for making decisions, and that for many women the desire to shield their loved ones from the unpleasant experience of their own protracted dying will be *amongst* them.'[177] The complex confluence of individual and relational concerns must mean that neither extreme of the spectrum provides a full explanation as to the exercise of these women's autonomy, although relational concerns are certainly strong. Furthermore, recognition that for these women, this was one particular *moment*, an event, in their lives is particularly important here. It was the very nature of the "tragic question" they confronted that brought 'others' into the decision-making forum - the people that mattered the most at that time to these women, whose lives would otherwise be rendered incomprehensible without reference to those that also exercised love, sacrifice and affection *for* them.

The notion that autonomy is guided by different concerns at different points in one's life is of considerable importance towards our quest for authenticity in structuring the 'ideal' vision of personhood. Recognising that some individuals will experience a deep connection of love and care with others at the end of life, or indeed at its beginnings with intra-uterine life is not to deny that there are those who do not similarly share these emotions. Indeed, in some cases, it may be those very relational connections that harm us, that serve to present us with the "tragic question", disrupting the 'yes' and 'no' bivalent framework when moral concerns bear down on our decision-making. But acknowledging that individuals are guided by different concerns throughout their lives in no way undermines their autonomy – it is to recognise that humans are complex, that emotional scripts are not set in stone, and that sometimes we are forced to consider questions that rarely give rise to black and white answers, only grey.

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[177] Biggs, above n 174, 298-299.

Similarly, recognising individuals' exercise of autonomy as complex and diverse, that relational connections can both enhance and deter its exercise should also make us rethink the nature of legal and moral responsibility, for this also sits on the same spectrum. Here, we might direct our minds to precisely those occasions where individuals get stuck in between 'yes' and 'no' – and question why some individuals come to confront the 'tragic question' in the first place, the conditions of their choosing and significantly, their responsibility for making that choice. It is at those defining moments, when individuals are torn between two morally unacceptable outcomes, or when they are forced into the position of *having* to make an unpalatable choice, that we should question the absence of realistic alternatives, the relational constraints upon individual choice, no matter how autonomous its exercise may have been.

And this for the author is absolutely central to the actions for wrongful conception and birth. While claimants' decisions to care for healthy and disabled children were certainly the products of rational choice, these were *enforced* choices that presented *them* with a unique decisional responsibility that they never should have had. For those confronting what they regard as a 'no-choice', a "tragic question", for example in abortion decision-making, whether driven by an emotional perspective of an adversarial fight between a woman and her foetus, or from an emotional 'connection between them',[178] it is undeniable that it is this very responsibility to choose that harms her. In this sense then, the damage in these cases is the creation of that very relationship, the unique decisional responsibility it imposes upon the woman, and the resulting loss of autonomy that results. And this perspective of

[178] Carol Gilligan *et al* 'Feminist Discourse, Moral Values and the Law – A Conversation' (1985) 34 *Buffalo Law Review* 11, 38.

relational harm is one that has been embraced elsewhere - as Gleeson CJ in the Australian case of *Cattanach v Melchior* stated:

> If they have suffered actionable damage, it is because of the creation of that relationship and the responsibilities it entails. [...] It was the existence, and the continuation of that relationship that formed the vital link between the potential interference with their financial interests from conception and the actuality of such interference following birth. That relationship is the key to an accurate understanding of the damage they claim to have suffered. ...the claim for damages is not limited to expenses that will be incurred as a result of the legal obligation. It extends to expenses that will be incurred as a matter of moral obligation...[179]

The emotional script from which Gleeson CJ reads provides a very different vision of responsibility to that utilised in the English courts. By contrast with the view that the moral obligation to care renders women unharmed and therefore responsible for the "ordinary" burdens of motherhood, Gleeson CJ locates the damage as emanating from precisely that moral obligation.[180] Here there is no talk of either 'willingness', 'voluntariness' or 'assumption'. For this judge, the harm is far from ordinary, or 'traditional'. Rather it is significant, and results from the *negligent* creation of a relationship of dependency and the loss of autonomy entailed in undertaking the significant moral and legal responsibilities that parenthood imposes on these claimants. Furthering this perspective, is Hayne J presiding in the same court who embraces the complexity of human emotionality in conceptualising "choice":

> That a parent has decided to keep the child (or did not decide not to continue with the pregnancy or to offer the child for adoption) is the premise for debate. ...To say that a child is born and not given for

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[179] *Cattanach v Melchior* [2003] HCA 38 at paragraph [26].

[180] For similar emphases on this notion of responsibility, see also the US decision of *Troppi*, above n 38, at 258.

> adoption as a result of the plaintiff's choice to keep the child *tells only part of the story*. Not only does it ignore the fact of the defendant's negligence, "choice" is an expression apt to mislead in this field. For some, confronted with an unplanned pregnancy, there is no choice which they would regard as open to them except to continue with the pregnancy and support the child that is born. For others there may be a choice to be made. But in no case is the "choice" one that can be assumed to be made on solely economic grounds. Human behaviour is more complex than a balance sheet of assets and liabilities. To invoke notions of "choice" as bespeaking *economic* decisions ignores that complexity.[181]

The sensitive analyses of both Hayne J and Gleeson CJ hold considerable value in bringing a different perspective to bear on notions of responsibility and choice in wrongful conception and birth. Their judgments provide a richer, contextual account as to how individuals' reproductive autonomy has been set back, and significantly, engage more fully as to what those autonomy interests consist of and how parents' lives have been disrupted, rather than benefited. And their judgments must also be seen as holding considerable force in debates surrounding legal personhood. If we consider Hayne J's comment that the notion of parents having a choice to keep the child, 'tells only part of the story',[182] his obvious concern was to narrate the complex relational elements which the liberal notion of choice missed, ignored, and excluded. It is this relational dimension that provides a fuller account of the harms suffered not only in wrongful conception, but elsewhere, in opening up a complex jurisdiction of understanding and

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[181] *Cattanach,* above n 179, at paragraph [222] [my emphasis]; see also the judgment of Kirby P in *CES,* above n 137, at paragraph [139], who similarly suggests that the argument that parents 'chose' to bring up the child 'has an element of the fictional' and emphasises the parents' legal and moral obligations in raising the child as not being freely chosen.

[182] *Cattanach,* above n 179, at paragraph [222].

engagement. Parents who "love", yet did not initially want their negligently born child, the woman who "loves" and therefore stays with her abusive partner, and the woman who resents giving up her employment to care for her much loved child – none of these are understandable through discourses of romantic love - rather, it is their connection and sense of responsibility that actually harms them. This is not contradiction, but complexity, and as Nan Seuffert suggests, the discourses of love might well constitute individuals attempting to 'make sense of their situations in part by positioning themselves within such discourses.'[183]

While a relational approach fully embraces such a possibility, and thereby serves to disrupt false emotional scripting in wrongful conception, birth and elsewhere, it should be stressed that in particular circumstances, so too will relational accounts tell us 'only part of the story'. Both the relational and liberal perspectives of autonomy, tell very different stories about human values, choice, responsibility and emotionality, and as this chapter has argued, both accounts might well represent our emotional make-up at certain points in our lives. And this is the point; these accounts only become problematic when we are tempted to rely upon one or the other as holding the whole truth of human existence. It is only then that the resulting emotional script becomes one that many of us will simply not be able to relate to because

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[183] Seuffert, above n 141, 226. There is a great deal of theoretical work which would have greatly assisted these points although has been excluded for reasons of space. An analysis of Seuffert's work (as cited) would be valuable here in its careful linking of law's repression of the jurisdictions of love and emotion with the traditional legal conceptions of women as functions of property. See also, Peter Goodrich, 'Law in the Courts of Love: Andreas Capellanus and the Judgments of Love' (1995-1996) 48 *Stanford Law Review* 633 (also cited in Seuffert) and for an equally inspiring article that explores the gendered discourses of love and property relations, see Ngaire Naffine, 'Possession: Erotic Love in the Law of Rape' (1994) 57 MLR 10.

the account of personhood will be rendered meaningless fiction. But that is not to say that we dispense with either liberal or relational conceptions of autonomy – but more simply that we situate them upon a spectrum that reveals the full complexity and shifting nature of human emotion.

Therefore, in theorizing concepts of personhood, choice, responsibility, the most valuable spaces for our debate sit within the boundaries of bivalent thought. So, in the same way that feminist theorizing has brought valuable perspectives to bear on the binaries of private/public, reason/emotion and man/woman, so too, must we recognise that in examining the spaces between yes/no, liberalism/relationality, and the link between choice and responsibility, that these boundaries are never stable, nor truly bivalent, but are fuzzy, multivalent, complex and forever shifting.

CONCLUSION: A NOTE ON AUTONOMY & RESPONSIBILITY

> In our judgment while pregnancy increases the personal responsibilities of a woman it does not diminish her entitlement to decide whether or not to undergo medical treatment.[184]

The separation of "choice" and "responsibility" as constituent features of the liberal landscape, of course, has been purposeful. Since it is the liberal framework that binds these concepts together, this chapter has sought out a tentative strategy by which to disrupt their almost inevitable linkage in the actions for wrongful conception and birth. While some regard "choice" as having become the 'trump card' in the

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[184] *St George's Healthcare NHS Trust v S* [1998] 3 All ER 673 at 692 (*per* Judge LJ).

context of abortion,[185] these reproductive torts illustrate a very different view; choice has arisen as a double-edged sword both here, and elsewhere, possibly as a result of its necessarily high political currency in protecting women's reproductive freedom. Insofar as feminist theorizing illustrates grave concerns as to the double-bind that 'choice' creates for women in the field of reproduction, this chapter has sought to illustrate that the same must be said of the concept of responsibility.

As Deborah Lupton has noted, many of the risk-related knowledges and technologies that surround pregnancy and motherhood, already place considerable responsibility on women to ensure foetal health, and women who ignore the 'plethora of expert and lay advice' are all too often labelled as 'irresponsible'.[186] Furthermore, such discourses surrounding women's responsibility are often conflicting, since the responsibility to reproduce or abstain from reproduction arises within a much wider social network of potential 'addressees', to one's family, to the putative father, to society, and of course to the unborn child depending upon its potential future state of health.[187] Yet rarely is one of those addressees the woman herself. Considering the substantial burden of responsibility which women presently confront in matters of reproduction, the 'increasingly inequitable and unequal distribution of societal resources and the corresponding poverty of women and children',[188] it should be of great concern that the English law of tort has further privatised ("ordinary") responsibility for reproductive risks

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[185] Alexander McCall Smith, 'Beyond Autonomy' (1997) 14 *Journal of Contemporary Health Law & Policy* 23, 25.

[186] Deborah Lupton, *Risk* (London: Routledge, 1999), 89.

[187] Ulrich Beck and Elizabeth Beck-Gersheim, *Individualization* (London, Sage Publications, 2003), 146.

[188] Fineman, above 106, 16. See also Mary Becker's comment in 'Caring for Children and Caretakers' (2001) 76 *Chicago-Kent Law Review* 1495.

onto women, even in circumstances where those consequences are brought about through negligence. This, as Robin West, would probably agree, is far from an ordinary burden, but rather constitutes the law of tort legitimating the harm that women suffer as women, if not seeking to convert it 'in the public eye into virtue or public benefit.'[189]

Insofar as much of this analysis has been dedicated in the main towards avoiding the avoidable consequences rule, it is entirely possible that this was achieved in the initial pages of this chapter. An emphasis on the rules of 'formal equality' and treating like cases alike, might well have offered an easier (if not speedier) route of overcoming the 'inevitable' march from choice to responsibility. Indeed, Patricia Peppin's question as to whether tort law 'handle[s] constructively, or merely reflect[s], the unequal nature of society?' [190] is rendered largely rhetorical in this context - there is *no* doubt that women are heavily disadvantaged in matters of reproduction. Nevertheless, the desirability of engaging with this route is to be greatly doubted. Since reproduction clearly raises different considerations, as the most cursory examination of "family economics" illustrates, drawing parallels between more commercially-based decision-making where the liberal imagery of the self-interested legal actor is at his very zenith, and that of reproductive decision-making, must seem altogether inappropriate. Instead, the strategy must be, as Sally Sheldon has commented in the context of abortion:

> [T]to construct one feminist Woman who can best serve the purposes of the array of concrete women who stand by her. ...[A]s rational, self-determining, responsible and mature: as the person best placed to consider the needs of herself and the foetus, and to make the correct

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[189] Robin West, *Caring For Justice* (London: New York University Press, 1997), 139.

[190] Patricia Peppin, 'A Feminist Challenge to Tort Law' in Anne Bottomley (ed) *Feminist Perspectives on the Foundational Subjects of Law* (London, Cavendish, 1996), 70.

> decision with regard of whether or not to abort. This should form the basis for demanding a model of law which leaves the decision of whether or not to abort to the individual woman and therefore leaves the maximum amount of space for women's diversity. The feminist Woman, then, will seek to leave maximum space for real and concrete women.[191]

As a means of forwarding possible strategies, the concept of complex legal personhood has been identified here as one way of creating such a space, by theorising within the boundaries of both liberalist and relational thought. But, there is little doubt that such an approach holds similar pitfalls to which both liberal and relational accounts are open – for it embraces them both. Among the numerous questions which this must generate is the more practical issue as to how such a strategy might provide a realistic possibility for the law. How does the law begin to engage with notions of complexity or complex personhood? What sort of "ideal" does this produce, and where do we draw the lines when there is conduct that the law cannot condone, excuse or make concessions for? In this respect, there is the rather pressing question as to what dangers this strategy might leave *women* open to once "complex personhood" cross-fertilises into areas such as domestic violence, sexual assault, rape, and sexual harassment.[192] While the present author believes that the difficulties can be overcome, through perhaps notions of "tragic questions", alongside a greater emphasis on equality, it is still recognised that any approach that theorises means of severing

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[191] Sally Sheldon, 'Who is the Mother to Make the Judgement?: The Construction of Woman in English Abortion Law' (1993) 1 *Feminist Legal Studies* 3, 22.

[192] Of interest in this respect, Dr Elizabeth Gilchrist, a forensic psychologist, has launched a five-year research project intended to prove her initial research findings that acts of domestic violence by men against their partners, are a defence response to undetected panic attacks. See further, Amelia Hill (2004) 'Wife batterers 'suffering from panic attacks', *The Observer,* 11 April 2004, 13.

'responsibility' from that of 'choice' holds dangers. One of these must be that the empty slot that complex personhood leaves open could, as Naffine suggests of the liberal autonomy ideal, be 'filled in certain gendered ways.'[193]

Of course, having severed the concept of reproductive autonomy down to its basic constituents of 'choice' and 'responsibility', and considered its differential meanings, we should return to the notion as a whole (if this is possible), for it is this notion of complex personhood that is intended to sit behind it. What the foregoing analysis across the past two chapters has illustrated is how feminist scholars have good reason to doubt whether these cases are really about reproductive autonomy at all. Although autonomy has been 'championed' by the law of tort in these reproductive torts, in recognising that parents have been 'denied an important aspect of their personal autonomy',[194] the law's conceptualisation of autonomy has simultaneously underpinned notions of 'willingness', 'voluntariness' and 'assumption of risk', in order to deny, exclude and render harm*less* the most significant aspects of parental harm. Reproductive autonomy, as a potential expression of the losses that individuals, particularly women, suffer through unsolicited parenthood, has become depressingly inexpressive, to the extent that this thesis has questioned the invocation of other notions: the stereotype of the 'natural' maternal norm, the 'loving' mother and the good home-maker. And as a close analysis of the language underpinning these judgments reveals, the courts are clearly operating quite explicitly on the basis of gendered stereotypes of 'what women just do', rather than notions of 'what women really do' in a contemporary era. However, this is not to say that this analysis sits in isolation – it does not. Rather

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[193] Naffine, above n 107, 100.

[194] *McFarlane,* above n 6, at 114 (*per* Lord Millett).

it arises amongst complementary accounts as to the way that law explicitly and implicitly regulates women's sexual and reproductive bodies, by incentivising and disincentivising *particular* reproductive outcomes.[195] In her analysis of the field of reproduction, Ruth Fletcher, for example argues that rather than law providing subjects with reproductive 'rights', we are more likely to find 'that subjects have reproductive responsibilities.'[196] Furthermore, by reference to the reproductive torts in negligence law, she argues that here too, 'private law has also functioned as a medium for procreative responsibilities'.[197] While this point is not developed further, Fletcher's work nevertheless provides a clear and intended framework into which such actions fit. Alongside the regulation of abortion, sterilisation, contraception, enforced caesareans and fertility treatment, Fletcher suggests that all these instances can be seen as providing graphic illustrations of legal form responding to reproductive relations by subjecting species reproduction to 'quality control.'[198] While such accounts raise immensely interesting possibilities as to the intersection of medical practice, its explicit and implicit regulation by the law in encouraging and discouraging particular reproductive outcomes, the overarching concern of such analyses as well as the present thesis, is how the law remains (despite its protestations to the contrary) uncommitted to women's reproductive freedom. And this of course gives rise to the rather difficult and pressing question as to how we best seek to reform the law so as to meet the diverse reproductive needs and desires of all

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[195] See for example, Ruth Fletcher, 'Legal Forms and Reproductive Norms' (2003) 12 *Social & Legal Studies* 217; Katherine M Franke, 'Theorizing Yes: An Essay on Feminism, Law and Desire' (2001) 101 *Columbia Law Review* 181; Paula Abrams, 'The Tradition of Reproduction' (1995) 37 *Arizona Law Review* 453.

[196] Fletcher, above n 195, 230.

[197] Fletcher, above n 195, 231.

[198] Fletcher, above n 195, 232.

women and men – an issue which has led to a large and valuable body of feminist theorising. It would be rather difficult, in view of this to suggest that any issue within the area of women's reproductive freedom has suffered from neglect. Nevertheless, while this chapter might not have brought totally fresh or revolutionary ideas to the feminist table, it has, or at least hopes to have brought a slightly different way of thinking about these ideas. In this respect, this chapter has suggested conceptualising legal personhood in a more 'flexible way' so that both men and women can sit behind the reproductive autonomy ideal as complex actors with emotional repertoires that are fluid and shifting. Furthermore, a rethinking of the complexity of human existence might also encourage a deeper and more complex conceptualisation as to the values underpinning the autonomy ideal. So, rather than valuing autonomy as a concept that is founded in merely bodily integrity or, the ability to exercise rational choice, a theoretical perspective that embraces complexity would place greater emphasis upon autonomy as a value that promotes 'the liberty to define meaning for oneself and control one's destiny',[199] and 'in the capacity to make a *fulfilling choice*'.[200] There is no doubt that envisioning personhood and autonomy through "complexity" holds its own specific sets of problems, and probably fairly remote promises. Nevertheless, it offers one certainty - another way of theorising the possible inclusion of all women's diverse experiences of reproduction within the law.

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[199] Anne Flamme and Heidi Forster, 'Legal Limits: When Does Autonomy in Health Care Prevail?' in Michael Freeman and Andrew D Lewis (eds) *Law and Medicine, Current Legal Issues* (Oxford: Oxford University Press, Volume 3, 2000), 141.

[200] McCall Smith, above n 185, 30.

Conclusion

> 'You're... pregnant?'
>
> 'I haven't menstruated in seven weeks,' she said.
>
> I had always had total confidence in Honoria's grand ability to avoid all unpleasant situations. I knew she'd stopped using the pill because of side-effects and that we had depended mostly on her using a diaphragm. I'd assumed that she was as good at using that as she was at everything else.
>
> 'Right,' I said, not sure after I'd said it what I was agreeing to. 'I, uh... Wow.' Silence.
>
> 'Wow,' echoed Honoria. 'I would guess so.'
>
> 'I... I want to have children,' I managed.
>
> 'Do you? How nice. Too bad you have no uterus.'[1]

According to Margaret Brazier, writing 'about medicine and law these days is rather like chasing a moving target. No sooner is one chapter completed than some novel development throws the process into disarray.'[2] At the time of writing this thesis, the regulators challenge in the field of reproduction alone, is particularly acute. A few examples might assist the point. Should parents be permitted to utilise sophisticated genetic technologies in order to select embryos to deliberately create a "saviour sibling"?[3] Should scientists be permitted

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[1] Luke Rhinehart, *The Search for the Diceman* (London: HarperCollins, 1994), 178.

[2] Margaret Brazier, *Medicine, Patients and the Law* (London: Penguin Books, 3rd Edition, 2003), vii.

[3] See further Sally Sheldon and Stephen Wilkinson, 'Hashmi and Whitaker: An Unjustifiable and Misguided Distinction' (2004) 12 *Med L Rev* 137. Note however, that since Sheldon and Wilkinson's article, the Human Fertilisation and Embryology Authority has indicated their intention to relax the rules on embryo selection to enable

to screen for embryos for genes that lead to breast or bowel cancer to enable parents to prevent placing their children at risk of those diseases?[4] Is the performance of an abortion for 'cleft palate' legally unsound under section 1(1)(d) of the Abortion Act 1967?[5] In the event of clinical misadventure in treatment for infertility, who are the 'parents' of the resulting child if the wrong gametes or embryos are selected?[6] Or, prior to the implantation of an embryo created through IVF treatment, should one partner be able to use that embryo when the other has withdrawn their consent?[7]

What links these complex individual dilemmas is the concept of choice – its expansion, its limits and its setback. In an era of increasing choice, our bodies, destinies and future happiness all seem to hang perilously upon this concept. As we enter into an era of 'choice politics', with promises of increased options in pubic transportation, health care and education, "choice" becomes *the* new political currency where social life can only get better with its increase. And, in many respects this is true; our lives have become increasingly mobilised, our lifestyles increasingly diverse, the market offers a cornucopian supply of goods and services for society to consume, and information now sits at our fingertips - it seems that we every dimension of our lives 'education,

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couples to select an embryo that might be a tissue match for an existing sibling. See further, www.bionews.org.uk/commentary.lasso?storyid=2208.

[4] See further, Mary Papadakis, 'Embryo test to cut cancer risk' (2004) *Sunday Herald,* 27 June 2004.

[5] *Jepson v West Mercia CC* (Permission for Judicial review 1 December 2003; hearing on 24-26 May 2004 postponed pending renewed investigation).

[6] See further, Mary Ford and Derek Morgan, 'Leeds Teaching Hospitals NHS Trust v A – Addressing A Misconception' (2003) 15 *Child and Family Law Quarterly* 199; T H Murray and G E Kaebnnick, 'Genetic ties and genetic mixups' (2003) 29 JME 68.

[7] *Evans v Amicus Healthcare Ltd &Others* [2003] EWHC 2161; [2004] EWCA Civ 727.

career, friendship, sex, romance, parenting, religious observance'[8] are all a matter of our selection. So, as a means of enhancing our individual freedom and autonomy, it seems that choice has become a crucial expression of our modern liberty, the crux of the matter – a good in itself.

But, as an expression of our freedom, the concept of choice can often contribute to a rather distorted view as to the options *really* available in life, the extent of control that we hold over the future and significantly, *which* choices are open to *whom*. And of the field of reproduction this is particularly true. In avoiding parenthood, there is little doubt that the widespread availability of contraception in this country has allowed many women to exert greater control over their reproductive lives. However, the reliability of methods such as the contraceptive pill is often overstated, leading to the 'prevalent belief that pregnancy is now effectively optional.'[9] This is simply not true of any method, since as Brazier remarks 'an infallible contraceptive has yet to be invented.'[10] The reality of many women's lives is that contraceptive failure will leave them reliant upon abortion as the remaining means of regaining control. Yet here too, the notion of unlimited choice is equally troublesome; while for some abortion decisions are exercised without difficulty, for others abortion is not perceived as a choice at all. And, contrary to wide perceptions of abortion being a matter of individual control, available 'on demand', a woman's reproductive freedom continues to remain in the hands of *others* from whom she must gain permission. If we *all* live in an "era of choice", then women's right to inhabit this utopian world seems somewhat more qualified.

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[8] Barry Schwartz, *The Paradox of Choice* (New York: HarperCollins Publishers, 2004), 3.

[9] Ellie Lee and Emily Jackson, 'The pregnant body' in Mary Evans and Ellie Lee (eds) *Real Bodies, A Sociological Introduction* (Hampshire: Palgrave, 2002), 127.

[10] Brazier, above n 2, 262.

The qualified nature of women's reproductive freedom within law is also borne out by an examination of the tortious actions for wrongful conception and birth. Furnished initially as offering the potential symbolic power to reinforce that the set-back of women's choices was a real harm, to enhance women's reproductive freedom by enforcing higher standards of medical care, and by reflecting the reality and diversity of women's lives and the importance of reproductive autonomy within them, on reflection there is little doubt that that symbolic power has been lost. Foregoing analysis has illustrated the differential legal engagements with concepts of 'choice', 'harm' and 'responsibility', and has also highlighted the manner by which these conflict with alternative accounts and understandings that might better resonate with women's lives. Aside from occasional glimpses of promise for the invocation of deeper and richer understandings, for the main part there is little doubt that one 'unruly horse'[11] has dominated the whole proceedings: that of "public policy". And, whatever one chooses to call it, legal policy, distributive justice, duty, breach, causation, mitigation, damage, reasonableness, the man on the underground, or benefits – these reproductive torts reveal that under those various guises, each concept remains, quintessentially "public policy".

As a conceptual device used to override legal principle, it is quite unsurprising that 'public policy' has acquired, 'a bad name in English tort law.' [12] Although some note that the reasons for 'its tumble from grace remain obscure',[13] these are perhaps less difficult to ascertain within the context of the reproductive torts. If, as Lord Nicholls suggested in *Fairchild v Glenhaven Funeral Services Ltd*, the law

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[11] *McFarlane v Tayside Health Board* [2000] 2 AC 59, at 100 (*per* Lord Clyde).

[12] Laura C H Hoyano, 'Misconceptions about Wrongful Conception' (2002) 65 MLR 883, 883.

[13] Hoyano, above n 12, 883.

should be coherent, principled and the basis upon which cases are distinguished, 'transparent and capable of identification',[14] then not only does *McFarlane* fall 'well short of this standard',[15] but Lord Nicholls response in *Rees v Darlington Memorial Hospital* evinces a rather clear breach of his own doctrine.[16]

'Public policy' has not only led to the demise of legal principle in the law of tort in these actions, but appears to have also excluded possibilities of a contractual remedy, and that of a human rights-based framework within these actions. One might speculate that both Articles 8 and 14 of the European Convention of Human Rights and Fundamental Freedoms 1950[17] could offer considerable scope for argument within these actions, and of course, a contractual remedy easily tackles the issue of 'pure' economic losses, by contrast with the traditionally restrictive tortious approach.[18] However, as the case of

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[14] *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22; [2002] 3 All ER 305 at paragraph [36].

[15] Hoyano, above n 12, 890.

[16] *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52.

[17] Articles 8(1) and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 provide respectively that: 'Everyone has the right to respect for his private and family life, his home and correspondence'; 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

[18] However, note that if a contractual route were to bring about a differential result, we would be talking about a fairly limited number of claimants, i.e. those in receipt of private care for which they provide consideration (see *Appleby v Sleep* [1968] 2 All ER 265). Furthermore, there is little prospect of a contractual route leading to full damages, whereas tortious recovery does not. As Lord Scott confirmed in *Rees* (above n 16, at paragraph [113]) the same result will be reached, 'whether the claimant was a private patient or an NHS patient.' Following cases such as *Kent v Griffiths, Roberts and London Ambulance Service* [2000] 2 WLR 1158, assimilating

Greenfield v Irwin illustrates, the appellate courts are ill-disposed to both.[19] While certainly not dispositive of the potentiality of human rights argument within these cases, it must be a matter of some intrigue that no reported cases in this field have given even the most fleeting mention of Convention rights since the passing of the Human Rights Act 1998.[20] And with only two exceptions, commentators also seem to hold the 1998 Act in similar (and silent) disregard.[21]

Nevertheless, if one is inclined to ponder as to why Convention articles have not been explicitly invoked in the reproductive torts, and why the courts are so keen to assimilate the results of tort and contract, it is arguable that the analytical perspective running through this thesis provides a more than sufficient explanation.[22] The demise of these

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the results between contract and tort in health care would appear to be the correct approach.

[19] *Greenfield v Irwin* [2001] EWCA Civ 113.

[20] Note that while Buxton LJ in *Greenfield* dismissed a possible working of Article 8(1) on substantive (albeit, flimsy) grounds by reference to the Commission's decision in *Andersson and Kullman v Sweden* (application no 11776/85) 46 DR 251 (see in particular paragraphs [32-35]), since the Human Rights Act 1998 had not been enacted at the time of the trial decision, and therefore could not be raised on appeal. It is, however, noteworthy that Lord Millett's discussion of the conventional award in *Rees* (above n 16, at paragraph [123]) hints at a human rights based approach where he suggests that personal autonomy: '...is an important aspect of human dignity, which is increasingly being regarded as an important human right which should be protected by the law.'

[21] That is, to the author's knowledge. See Tony Weir, 'The Unwanted Child' (2002) 6 *The Edinburgh Law Review* 258, 250 (who suggests that Article 8 of the Convention might apply); and Alasdair Maclean, 'McFarlane v Tayside Health Board: A Wrongful Conception in the House of Lords?' (2000) 3 *Web Journal of Current Legal Issues* 1, 4 (Here, Maclean suggests that Lord Millett's "conventional sum" in *McFarlane* appeared to be motivated by human rights).

[22] This is not to exclude the operation of other factors, as chapter four made clear; indeed there is little doubt that the present state of the NHS has had *some* bearing upon the outcomes of these claims. However, as was previously argued, this still fails

claims, through the invocation of nebulous legal doctrine and 'public policy' arguments, is explicable through a particular conception of 'harm' – and it is one that is deeply gendered. The exclusion of 'ordinary' child maintenance damages in actions for wrongful conception and birth is justified by reference to 'what women just do', the 'natural', the 'ordinary' and the 'normal'. The legal vision of female personhood is the traditional maternal norm of the volunteer who 'sacrifices' herself, albeit willingly, who 'rescues' others through natural bonds of love and affection – indeed, this Woman of law's virtuosity knows no bounds. But, there is no singular Woman of law, for in other matters she is more inclined towards individuation, selfishness, self-regarding behaviour. Indeed, in those matters where many women might find themselves confronting "tragic questions", this is precisely when the Woman of law becomes altogether more "rational" – and "responsible" for her choices. Since this Woman divorces herself from her 'unwanted' pregnant state, commenting only of her physical discomfort, no moral considerations come into play. Therefore, abortion decision-making – as well as those of adoption – simply become subject to a cost-benefit calculation guided by welfare-maximising considerations - the pure exercise of reason. Perhaps then, this Woman of law is complex after all?

As this thesis has argued, it is time for the law to embrace a very different account of legal personhood, choice and responsibility; one that is based on a more complex subject than the stereotypes that have become so pervasive within legal judgment. Nevertheless, if there is

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to justify the imposition of responsibility for negligence onto uninsured claimants. Furthermore, providing a partial immunity on this basis articulates a sentiment more likely to impact upon all clinical negligence claims, that is, unless we create a hierarchy of harms as to which results of negligence are the most deserving of compensation and those which are not. This, it is argued, is a far from desirable exercise, for the lines are not so easily drawn.

one danger to such a strategy, perhaps it is this – the Woman of law is already quite complex. She is relational at those times when the law wishes to transform harm into the harm*less*, to *reinforce* her responsibility for events occurring within the 'natural and private' spheres of life, even when brought about by negligence; but she becomes the rational self-regarding individual precisely at those times when a relational understanding might provide a better account of human emotionality in the family and reproductive domains. And by no means are such considerations limited to women, for men are inherently emotional creatures too. In other words, if a concept of complex personhood is to offer any potential for both men and women within the law, then we need to spell out when the emotional domain might matter most. And significantly, in the case of the wrongful conception and birth actions there is still time to articulate why a different vision of legal personhood is so desperately required; for we still await a final adjudication of the unsolicited 'disabled child'.

It is, as Maura Ryan suggests, simply fallacious to say that 'we are free to choose all obligations, and are able to formulate all the conditions of our lives to meet our expectations.'[23] Furthermore, in a society that already imposes considerable responsibility for reproduction and dependency work onto women, we should deeply resist laws that seek to exacerbate and reinforce women's already vulnerable position. Illustrating that as human beings we are sometimes left with precious few choices that we regard as meaningful does not mean undermining individual autonomy; rather, it emphasises the very real conditions under which many of us must exercise choice. And while the sense of responsibility we feel towards others that we love and care for is what

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[23] Maura Ryan, 'The Argument for Unlimited Procreative Liberty: A Feminist Critique' in John Robertson, Roberta Berry and Kevin McDonnell (eds) *A Health Law Reader* (Durham, North Carolina: Carolina Academic Press, 1999), 101.

can bring great meaning into our lives, the law must more readily embrace that it can be precisely those connections that also harm us in varying and sometimes extensive ways. Therefore, in calling for a deeper understanding of harm within these actions, what this ultimately requires is a firm commitment to respecting the value of autonomy. And in illustrating such respect, it is essential that our understanding of its worth extends beyond the notion of mere "choice". If autonomy is to hold any *value* or potential in our lives at all, then it must be because our choices are guided towards the aim of human flourishing – or perhaps more simply put, 'to the living of a good life'.[24]

[24] Alexander McCall Smith, 'Beyond Autonomy' (1997) 14 *Journal of Contemporary Health Law & Policy* 23, 30.

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