# Liability for Lost Autonomy in Negligence: Undermining the Coherence of Tort Law?

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## Introduction

In *Reeves v Commissioner of Police of the Metropolis*,[[1]](#footnote-1) Lord Hobhouse emphasised the significance of the ‘the fundamental principle of human autonomy’[[2]](#footnote-2) when he stated:

*Where a natural person is not under any disability, that person has a right to choose his own fate. He is constrained in so far as his choice may affect others, society or the body politic. But, so far as he himself alone is concerned, he is entitled to choose.[[3]](#footnote-3)*

Autonomy is valuable because it leads, Alexander McCall Smith argues, to the living of a good life.[[4]](#footnote-4) As Ronald Dworkin has stated, it ‘allows each of us to be responsible for shaping our lives according to our own coherent or incoherent – but in any case, distinctive – personality’[[5]](#footnote-5) and ‘to lead our own lives rather than be led along them.’[[6]](#footnote-6) By contrast, the person for whom decisions are made by others leads a ‘drab’[[7]](#footnote-7) and ‘poorer life’[[8]](#footnote-8) that is ‘less worth living than the life of the autonomous agent.’[[9]](#footnote-9) This seems to be true on an intuitive level: few of us would wish for all of our decisions to be controlled by another individual.

In light of this, the latter part of the twentieth century heralded a diminishing acceptance of the medical paternalism of the past.[[10]](#footnote-10) Today, bioethical debates emphasise the utmost importance of respecting an individual’s autonomy[[11]](#footnote-11) and there has been no shortage of medical law cases stressing the same point. To see how far we have come, one only needs to compare Lord Denning’s statement in *Hatcher v Black*[[12]](#footnote-12)that doctors are justified in telling a therapeutic lie to their patients with the way the tort of battery has developed to enable mentally competent[[13]](#footnote-13) patients to refuse the amputation of gangrenous limbs,[[14]](#footnote-14) Jehovah’s Witnesses refuse life-saving blood transfusions[[15]](#footnote-15) and prospective mothers to refuse life-saving caesarean-sections even when the life of their unborn child is threatened by such choices.[[16]](#footnote-16) As Judge LJ stated in a case concerning the latter factual scenario,

*Even when his or her own life depends on receiving medical treatment, an adult of sound mind is entitled to refuse it. This reflects the autonomy of each individual and the right of self-determination.[[17]](#footnote-17)*

In fact, such is the focus on protecting patient autonomy that some academics have criticised the tendency to see it as ‘a trump card beating all the other principles.’[[18]](#footnote-18)

Respect for autonomy is therefore a significant social and cultural (not to mention legal) development. Given that the common law is ‘capable of evolving in the light of changing social, economic and cultural developments’[[19]](#footnote-19) it is arguable that one particular area of the common law – the tort of negligence – might be adapted to recognise this. Recent appellate cases such as *Rees v Darlington Memorial Hospital NHS Trust*[[20]](#footnote-20) and *Chester v Afshar*[[21]](#footnote-21) could be interpreted as paving the way towards an interest in autonomy being recognised by this tort and there is a significant body of academic opinion that suggests that such a course has much to recommend it.[[22]](#footnote-22) A first impression of such developments might be that they should be welcomed. After all, if autonomy is A Good Thing then it might be thought that the law of negligence should be changed to further protect it.[[23]](#footnote-23) Indeed, concentrating solely on the doctor-patient relationship and the medical law context with its focus on preserving autonomy might lead one to such a conclusion.

But a wider doctrinal analysis shows that this is not the case. In this article it is argued that protecting an interest in autonomy through the tort of negligence would be an error as it is impossible to do so in a coherent way without distorting established and cogent legal principles. The first section of this article explains the current position of the law towards protecting autonomy by giving a brief overview of the cases of *Rees* and *Chester* and outlines what protecting an interest in autonomy involves. The second part of this paper shows that the very nature of autonomy means its diminishment cannot be considered a form of actionable damage in negligence in a way that is consistent with established principles. However, even if lost autonomy *could* be recognised as actionable damage, it is argued that a duty of care to avoid causing this type of harm would undermine the restrictions that the law has placed on recovery for other types of damage. Specifically, this section of the article addresses the fact that, since the law has limited recovery in negligence for economic loss and psychiatric harm and given that lost autonomy encompasses these kinds of losses, a duty of care to avoid interfering with autonomy would be inconsistent with the current law.[[24]](#footnote-24) It is concluded that while it is true that autonomy is an important value, the protection of this notional interest cannot and should not be achieved by adapting the tort of negligence to perceive autonomy *itself* as a form of damage that people have a duty of care to avoid causing. This is not to deprecate autonomy as a moral value, nor even to say that it should not be further protected by the law generally, but if such protection were achieved through the tort of negligence the damage to the coherence of the common law would outweigh any benefits received by individual claimants.

## Autonomy and Negligence: The Current Position

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### *The Autonomy Cases[[25]](#footnote-25)*

In English law the concept of autonomy is perceived as being content-neutral. In a case concerned with the tort of battery, Lord Donaldson MR stated:

*…the patient's right of choice exists whether the reasons for making that choice are rational, irrational, unknown or even non-existent. That his choice is contrary to what is to be expected of the vast majority of adults is only relevant if there are other reasons for doubting his capacity to decide.[[26]](#footnote-26)*

This is evidence that English law does not require an individual’s choices to be sensible or rational in order to qualify as being autonomous.[[27]](#footnote-27) This account of autonomy is heavily influenced by John Stuart Mill’s statement in *On Liberty* that ‘The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.’[[28]](#footnote-28) Autonomy is therefore conceived as being equivalent to self-determination: the freedom to pursue one’s conception of the good life, just as long as it does not impinge upon another’s identical freedom.[[29]](#footnote-29) If autonomy is to be recognised as an interest in negligence, it is likely that this account of the concept will be used to avoid inconsistency with the tort of battery and other related areas of the law where this definition has gained acceptance.[[30]](#footnote-30)

The first case illustrating that autonomy per se could be an interest protected by the tort of negligence was *Rees v Darlington Memorial Hospital NHS Trust*,[[31]](#footnote-31) where a visually disabled claimant underwent a sterilisation, which was negligently performed by the defendant hospital. As a result she gave birth to a healthy son and claimed for the costs associated with raising the child.[[32]](#footnote-32) Her claim was unsuccessful as the House of Lords followed its previous decision in *McFarlane v Tayside Health Board*,[[33]](#footnote-33)which held that the damages associated with raising a healthy child were irrecoverable.

However, the majority of the House of Lords in Rees (Lord Bingham, Lord Nicholls, Lord Millett and Lord Scott) awarded the claimant a £15,000 conventional sum for having ‘been denied, through the negligence of another, the opportunity to live her life in the way that she wished and planned’[[34]](#footnote-34) (Lord Steyn, Lord Hutton and Lord Hope dissented on this point). As this award does not compensate the claimant for the costs associated with raising a healthy child, it has been interpreted as reflecting the claimant’s diminished autonomy,[[35]](#footnote-35) with Nolan, for example, stating that the case ‘amounts to recognition of diminished autonomy as a form of actionable damage.’[[36]](#footnote-36)

The second case is *Chester v Afshar*.[[37]](#footnote-37) The claimant, Miss Chester, suffered from back pain and visited the defendant consultant, Mr Afshar, who recommended surgery. He failed, however, to warn her about a small risk of cauda equina syndrome (paralysis) inherent in the operation. This risk would be present no matter how expertly the operation was performed and liable to occur at random. Based on his advice, Miss Chester underwent the procedure and, although the surgery itself was not carelessly performed, she suffered from the syndrome.

Miss Chester admitted that she could not say that she would *never* have undergone the operation even if she had been warned of the risks.[[38]](#footnote-38) Instead, she said that she would not have had it at the time that she did but would have instead wanted to discuss the matter with others and explore alternatives. She conceded that she may have chosen to have the surgery on a different day. As a result of this concession, it was arguable that she could not show that Mr Afshar’s carelessness in failing to warn her of the risks had actually *caused* the syndrome because it might have occurred anyway.

The House of Lords, however, found in Miss Chester’s favour (Lord Bingham and Lord Hoffmann dissenting). They held that even though the claimant could not establish that the defendant had *caused* her paralysis,[[39]](#footnote-39) a departure from conventional causation rules was justified because her right to make her own decision about her treatment had been interfered with. Lord Steyn laid emphasis on Miss Chester’s ‘right of autonomy and dignity,’[[40]](#footnote-40) saying it ‘can and ought to be vindicated by a narrow and modest departure from traditional causation principles.’[[41]](#footnote-41) He reiterated that ‘[i]n modern law medical paternalism no longer rules.’[[42]](#footnote-42) Indeed, even Lord Hoffmann (dissenting) believed that there might be a case – albeit one he rejected – for a ‘modest solatium’[[43]](#footnote-43) being awarded for Miss Chester’s diminished autonomy. This *dicta* indicates that, as Devaney has noted, ‘the primary concern of the majority…was to ensure that patient autonomy is respected’[[44]](#footnote-44) and several academics have perceived the *real* damage in this case to be the interference with Miss Chester’s autonomy.[[45]](#footnote-45) Green, for examples, describes it as a ‘loss of autonomy case’.[[46]](#footnote-46)

Finally, in *Montgomery v Lanarkshire Health Board*,[[47]](#footnote-47)the claimant was a pregnant diabetic woman of small stature. Because of this, there was a 9-10% risk of shoulder dystocia (the inability of the baby’s shoulders to pass through the pelvis) involved in a vaginal birth. This problem can usually be resolved by emergency procedures but there is a small risk that the child could be starved of oxygen and suffer serious harm. Unfortunately for Mrs Montgomery, the risks associated with shoulder dystocia eventuated and her child was born with severe disabilities as a result. The claimant submitted that she should have been warned of the risks of her undergoing a vaginal delivery and, if so warned, that she would have elected to undergo a caesarean section. As such, the injuries to her child would not have occurred. The defendant maintained that as the risks of serious injury were low, the consultant obstetrician was not under a duty to warn the patient of them.

The Supreme Court accepted the claimant’s arguments and unanimously held that a doctor is under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments. The leading judgment of Lord Kerr and Lord Reed maintained that test of materiality is whether, in the circumstances of the particular case, ‘a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it.’[[48]](#footnote-48)

This represents a much more patient-centred approach towards the doctor’s duty to warn patients of risks and the case emphasises the importance of respecting patient autonomy. The concurring judgment of Lady Hale arguably goes further. She stated: ‘It is now well recognised that the interest which the law of negligence protects is a person’s interest in their own physical and psychiatric integrity, an important feature of which is their autonomy, their freedom to decide what shall and shall not be done with their body.’[[49]](#footnote-49) *Dicta* such as this might support the contention that autonomy per seeitheris or could be recognised as an interest protected by this tort.

### *Does the Tort of Negligence Already Protect an Interest in Autonomy?*

The above cases have prompted some commentators to suggest that a duty of care to avoid interfering with an individual’s autonomy might be an appropriate solution to the problems raised by cases such as *Rees* and *Chester*.[[50]](#footnote-50) However, it might be said that this adds little and that the tort of negligence already protects people’s autonomy.

If someone’s negligence causes a claimant to, say, suffer gastroenteritis so they cannot work or do the things they enjoy, then their ability to be the author of their own life is limited. Their autonomy will have been interfered with. The tort of negligence responds to this and requires a defendant to compensate a claimant for such interferences. By protecting an interest in not being physically injured, the tort of negligence *indirectly* protects people’s autonomy. The same is true of the other interests that negligence protects. If your carelessness damages my bike then the way in which I choose to live my life will be affected if I have to start taking the bus every day. You will have to pay me compensation for this. This way of protecting autonomy perceives autonomy as being instrumentally valuable: one should not interfere with a person’s autonomy because doing so can lead to undesirable consequences such as personal injury or property damage.

This is very different to what protecting an interest in autonomy per se involves. If autonomy itself is an interest in negligence, as *Chester* and *Rees* imply it could be in certain circumstances, then instead of damages being awarded for personal injury or property damage etc, they will be given for the diminished autonomy *itself*.[[51]](#footnote-51) Autonomy will be seen as *intrinsically* important rather than instrumentally valuable.[[52]](#footnote-52) This would reflect the intrinsic value of autonomy, as opposed to it being valuable for the sake of something else.[[53]](#footnote-53) Instead of having to show that they are suffering from one of the currently recognised forms of damage, all a claimant would have to demonstrate is that their choices have been compromised. This is similar to the way in which the tort of battery operates, which sees interferences with physical autonomy (through unwanted touching) as intrinsically wrong. Being actionable per se, claims can be brought in that tort without further harm having being suffered. Accordingly, if autonomy per se is recognised as an interest in negligence, the way in which autonomy would be protected will be different from how it currently is.

## Autonomy as an Interest in Negligence

Over half a century ago Street stated that ‘[t]he law of torts is concerned with those situations where the conduct of a party causes or threatens harm to the interests of other parties.’[[54]](#footnote-54) Taking ‘interests’ to be claims or wants that human beings seek to satisfy,[[55]](#footnote-55) most torts protect one particular interest. Nuisance protects the interest in the enjoyment of one’s land, defamation protects the interest in one’s reputation and so on. The tort of negligence is different. A defendant will be liable in this tort when they breach a duty of care owed to a claimant and that breach causes damage.[[56]](#footnote-56) Given that there are different forms of damage in negligence, this tort protects several distinct interests. This is because, as Weir has stated, interests are ‘the positive aspects of kinds of damage.’[[57]](#footnote-57)

The tort of negligence can also ‘develop in adaptation to altering social conditions and standards’[[58]](#footnote-58) and recognise new interests. As Lord Macmillan stated in *Donoghue v Stevenson*,[[59]](#footnote-59) ‘[t]he categories of negligence are never closed.’[[60]](#footnote-60) When, for example, society began to develop a greater understanding of psychiatric illnesses, this interest was protected by the recognition that people owe a duty to avoid causing others to suffer a ‘nervous shock’.[[61]](#footnote-61)

Whether autonomy should be recognised as an interest that should be protected by the tort of negligence turns of whether it can be seen as a form of actionable damage and, if so, whether a duty of care to avoid causing such damage can be imposed on defendants. I argue below that the current principles of negligence law indicate that neither of these are tenable propositions.

## Diminished Autonomy as Actionable Damage

While damage is the gist of the action in negligence,[[62]](#footnote-62) it is the most overlooked aspect of this tort.[[63]](#footnote-63) Beyond the currently recognised categories of actionable damage – personal injury,[[64]](#footnote-64) psychiatric harm,[[65]](#footnote-65) property damage[[66]](#footnote-66) and economic loss[[67]](#footnote-67) – there are few established principles determining when and whether a new form of damage will be recognised. As Nolan has stated:

*the requirement of damage has generally been under-emphasised by common lawyers. Issues of damage are frequently repackaged as questions of duty of care or causation, important extensions of the categories of damage take place with little or no analysis or even acknowledgement of the fact, and textbooks fail to give the damage issue the separate treatment it deserves.[[68]](#footnote-68)*

Certain principles, though, can be identified. One is that in order for damage to have been suffered a claimant must be worse off than they otherwise would have been had the defendant’s carelessness not occurred. As Lord Hoffmann stated in *Rothwell v Chemical & Insulating Co Ltd*,[[69]](#footnote-69) damage is ‘an abstract concept of being worse off, physically or economically, so that compensation is an appropriate remedy’[[70]](#footnote-70) and it ‘does not mean simply a physical change, which is consistent with making one better…or with being neutral.’[[71]](#footnote-71)

Nolan takes issue with this definition. He states that ‘not all forms of being worse off count as actionable damage.’[[72]](#footnote-72) This is certainly true with, for example, grief, distress and anxiety that fall short of psychiatric harm and that are not classed as actionable damage in their own right. These are considered ‘normal human emotion[s] for which no damages can be awarded.’[[73]](#footnote-73) This is so despite them undoubtedly making a person worse off: one would much rather not be grieving, distressed or anxious. However, this criticism can be countered by the fact that being worse off is a necessary but not a sufficient condition for damage to have been suffered. One must be worse off but also must meet the standards of the maxim de minimis non curat lex *–* the law does not concern itself with trifles.[[74]](#footnote-74) As the law deems ‘normal human emotions’ such as grief and anxiety to be minimal injuries compared to personal injury or psychiatric harm, they are irrecoverable. Whether the damage suffered is trifling is a question of degree. For example, in *Cartledge v Jopling & Sons Ltd*,[[75]](#footnote-75) the claimant workmen contracted pneumoconiosis, a disease in which slowly accruing and progressive damage may be done to an individual’s lungs without their knowledge. The House of Lords held that it does not matter whether a claimant is aware of the damage or that medical science could not have discovered it at the stage that it occurred provided that it is more than minimal. The fact that disease would be visible on X-rays and that unusual exertion would cause the claimants to suffer meant that the damage was substantial.[[76]](#footnote-76)  In contrast, in *Rothwell v Chemical & Insulating Co Ltd*,[[77]](#footnote-77) the claimants were exposed to asbestos dust and developed pleural plaques, which meant they were susceptible to suffering an asbestos-related disease. Yet the House of Lords held that that since the plaques were symptomless and did not shorten life expectancy, their mere presence in the claimants’ lungs did not constitute an injury capable of giving rise to a claim for damages in tort. Even though the claimants had suffered from anxiety as a result of developing these plaques, they could not recover in negligence. Accordingly, in order for actionable damage to have been suffered in negligence, the claimant must be made worse off and this worsening must be more than minimal.

However, Nolan might also disagree with this recasting of the components required for damage being suffered. He cites examples where one can be *better off* as a result of a defendant’s negligence but still suffer from actionable damage.[[78]](#footnote-78) One is of the skilful artist who paints over someone’s painting unasked. Property damage has still been inflicted in such circumstances even if the individual could now receive more money for it.[[79]](#footnote-79) Another example is this one:

…suppose I leave a bag of old clothes in my front garden ready to take them to the rubbish dump, but before I do so, the clothes are washed away in a flood caused by the defendant’s negligence. Again, the fact that I no longer wanted the clothes and that the flood has saved me the trouble of taking them to the dump, would not prevent me from bringing a claim in negligence if I was so inclined.[[80]](#footnote-80)

Does this mean that one can be better off and still suffer actionable damage? Assuming that Nolan is correct that such claims would be successful, it does not follow that this means one must not be worse off in order for damage to have been suffered. This can be explained by the fact that although one must be worse off to have suffered damage in negligence, whether one is worse off is assessed *objectively* rather than *subjectively*. The law will *deem* someone to be objectively worse off for having their clothing or picture ruined even if subjectively they are better off.[[81]](#footnote-81)

As O’Sullivan has argued, the issue rarely arises in personal injury claims ‘because personal injury is universally, and thus objectively, regarded as detrimental.’[[82]](#footnote-82) However, she acknowledges that such claims may sometimes need to be placed in their proper *context*.[[83]](#footnote-83) For example, the surgical removal of a claimant’s breast will count as damage if the breast was healthy, but not if the breast contained a cancerous tumour (and removal of the breast is an appropriate treatment).[[84]](#footnote-84) Thus, the Jehovah’s Witness whose life is saved by an unwanted blood transfusion cannot sue in negligence for while they subjectively might not like what has happened to them, the law will not treat having one’s life saved as a type of harm in negligence.[[85]](#footnote-85) This is not to say that such claimants would not have an action in another tort, such as battery, but given that battery is a tort that is actionable per se the fact that such cases do not require any damage to be suffered does not undermine O’Sullivan’s argument that damage in negligence is an objective concept.[[86]](#footnote-86) O’Sullivan believes the fact that subjective detriment is insufficient to count as damage in tort represents the paradigm difference between this area of law and that of contract. She states ‘if you want to protect your subjective expectations and preferences, the legal mechanism to use is *contract.* Tort will not do.’[[87]](#footnote-87)

From the above, it is apparent that for actionable damage to be suffered in negligence a claimant must show that the defendant’s conduct has made them objectively, and more than minimally, worse off than they otherwise would be. In light of this, it is highly doubtful that diminished autonomy could be seen as a form of damage in negligence because in many circumstances it will fail to meet these basic requirements.

For example, there are many scenarios where interferences with autonomy not only fail to make a person worse off than they otherwise would be but objectively improve their circumstances. The facts of *Chester v Afshar* can be adapted to illustrate this point. Imagine that Patient (P) is suffering from back pain and visits Doctor (D). The latter advises that surgery should take place but carelessly fails to tell P of a 2% risk of paralysis inherent in the surgery that is likely to occur at random. P might have delayed surgery had they known of this risk but, in ignorance of it, goes ahead. Unlike the facts in *Chester*, however, P’s surgery is a success. Not only do they not suffer from paralysis, but their back pain is completely cured. In other words, D’s interference with P’s autonomy has made P *better off*. This illustrates the point made by Jackson in her article discussing the failure of tort law to protect patient autonomy:

*If the purpose of giving patients information is to facilitate informed decision making, then any failure to disclose material information will have interfered with her ability to make an autonomous choice, regardless of whether she happens to have also suffered physical injury as a result.[[88]](#footnote-88)*

Though it could be argued that D has acted badly in such circumstances, it is hard to maintain that P has suffered any damage as P is not worse off. There will therefore be interferences with autonomy that do not fulfil the requirements to be actionable damage in negligence as they do not make a person worse off.

Nor is it difficult to imagine circumstances where an interference with autonomy will only have a minimal impact upon a person. Indeed, one’s autonomy could be interfered with without one even noticing it. For example, you might have a desire not to be locked in your room. If someone secretly locked your door while you were watching television and unlocked it before the programme had finished your autonomy will have been interfered with without your knowledge. It may be morally questionable for a person to do this and they are likely to have committed the tort of false imprisonment.[[89]](#footnote-89) But unlike negligence that tort is actionable per se: it does not require damage to be proven. The mere fact that a claimant can show they would have a successful action in a trespass tort does not mean that they can succeed in negligence as damage must be proven for the latter.[[90]](#footnote-90) And it would certainly be stretching things to describe something this imperceptible as damage. Interferences with autonomy can therefore often have only minimal effects on people. If such minimal effects were inflicted carelessly it would be difficult for a claimant to maintain that they constitute actionable damage in negligence according to established principles.

Finally, autonomy is neutral as to what choices people make provided such choices do not cause harm. Whether someone’s autonomy is interfered with is therefore dependent upon whether an individual had the desire in question. For example, an individual might have no desire whatsoever to have children (let us assume that this individual will not change their mind about not wanting children). If someone prevented that individual from having a child then that person’s desires have not been interfered with and so their autonomy has not been violated. This is not by any means to say that such conduct is acceptable nor that the individual in question has not suffered a *different* form of damage – merely that the reason such conduct is wrong and that the person is harmed is *not* due to their autonomy being interfered with. However, preventing a person who wishes to become a parent (or who might wish to become a parent in the future) from having a child will frustrate that individual’s desires in a significant way and so will constitute an interference with their autonomy. In this regard, autonomy is an inherently subjective concept and is hard to reconcile with the traditional view in negligence of damage being objective.

There are therefore instances where interferences with autonomy do not meet the criteria of constituting actionable damage in negligence as they do not make people objectively and more than minimally worse off. It might be argued, however, that the above criticisms are unpersuasive. After all, minimal personal injuries are not recoverable in negligence but this does not mean more serious ones should be excluded. In this way, the law sees some injuries as recoverable and others as not. It might be argued that the law should see certain serious interferences with autonomy that objectively make a person worse off as actionable damage and other, more minor, interferences as irrecoverable. For example, if someone is forced to have a child that they do not want (as in *McFarlane* and *Rees*) or rendered infertile as a result of the negligence of another then their life will not go as planned in a significant way. Reproductive autonomy is therefore considered to be important by many people.[[91]](#footnote-91) By contrast, other preferences, such as that viewing pleasant sights as one goes about one’s business, may be seen as of less fundamental significance.[[92]](#footnote-92) Distinguishing between different types of autonomy in this way may potentially pave the way for it to be considered an interest in negligence.[[93]](#footnote-93)

Although this counterargument is prima facie attractive, it is ultimately misconceived as it misrepresents what recovering for autonomy per se involves. The fact that a preponderance of people might see certain choices as more important than others is neither here nor there as far as the concept of autonomy is concerned. The vast majority of people would not choose to be tied up and have their genitals hit with a ruler as notoriously occurred in *R v Brown*.[[94]](#footnote-94) However, if we are to protect people’s ability to live their life in the manner of their choosing providing they do not infringe on the choices of others – in other words, protect their autonomy – then such preferences should be respected. One might think that respecting the choice not to reproduce is more important than that of having a nice view or engaging in sadomasochistic activities, but that may not be true of everyone. It may be legitimate for the law to protect an interest in not having one’s reproductive preferences interfered with above other types of choices but doing this is not protecting an interest in autonomy per se. If one is to say that one kind of interference with autonomy is more serious or worthy of compensation than another type then one is no longer protecting an interest in autonomy *itself* but the other forms of harm that it leads to (in this example reproductive freedom). Put simply, this sees autonomy as instrumentally rather than intrinsically important. While there is nothing wrong with seeing autonomy as instrumentally important (as mentioned earlier, this is the position that negligence currently adopts) it is different from protecting an interest in autonomy *itself* (in the way that cases such as *Rees* and *Chester* arguably do).[[95]](#footnote-95)

Autonomy per se, unlike the other interests negligence protects, is an indivisible concept.[[96]](#footnote-96) Once someone’s autonomy has been interfered with it has been diminished. It is possible to say, for example, that one instance of property damage is worse than another (vase A could be in a worse state than vase B) but there is simply no non-arbitrary way of dividing up certain types of autonomy as more important than others without looking at the consequences of the damage to autonomy (rather than the lost autonomy *itself*). This is because the whole point of protecting autonomy is that it allows people to decide what is best for them and be the author of their own lives.[[97]](#footnote-97) Respect for autonomy per se entails being neutral as to what the most important desires are provided acting on those desires does not cause harm to others. It is therefore contradictory to see autonomy per se as important but then say certain ‘types’ of autonomy are more important, worthy of respect or better than others. The principle of autonomy allows people to make decisions that are *irrational* and *bad* for *them*.

Those who want to defend autonomy per seas an interest that should be protected by the tort of negligence are then left with two choices. Either they should accept that *all* forms of interferences with autonomy can constitute actionable damage or that none can. There is no coherent way of dividing up some forms of autonomy as damage and others as not. Accepting all interferences with autonomy as a form of damage would involve seeing someone as suffering damage even when they are better off as result of an infringement with their autonomy or basing damage upon their subjective preferences and is a course unlikely to be accepted by the courts. As a result of these considerations, those who advocate recognition of autonomy as a form of damage in this tort will need to explain why the currently established principles of this branch of tort law ought to be swept aside to protect this putative interest.

It might be countered that the law of tort already protects an *aspect* of autonomy through the law of battery. The *form* of autonomy that this tort protects is that of bodily autonomy, the freedom from unwanted, unlawful touching. If battery is capable of protecting an aspect of autonomy it might be asked, why cannot the tort of negligence do the same and protect some forms of autonomy but not others?

This, however, is to ask the wrong question. It is not being denied that the tort of negligence can protect aspects of autonomy. Indeed, as stated above, the tort of negligence already does this by protecting interests in not being injured or having one’s property damaged etc. But protecting autonomy in this way is not the same as protecting autonomy per se. Moreover, even if battery did protect an interest in autonomy per se this does not mean that negligence should do the same. As Lord Hoffmann stated in *Wainwright v Home Office*,[[98]](#footnote-98) ‘the policy considerations which limit the heads of recoverable damage in negligence do not apply equally to torts of intention.’[[99]](#footnote-99)

Another relevant consideration concerns tort law’s protection of privacy. Although in England, unlike the United States of America, there is ‘no over-arching, all embracing cause of action for “invasion of privacy”’[[100]](#footnote-100) the protection of various aspects of privacy is a fast emerging area of law.[[101]](#footnote-101) For example, the equitable action for breach of confidence has now developed into the tort of misuse of private information.[[102]](#footnote-102) As Lord Hoffmann states in *Campbell v MGN Ltd*:

Instead of the cause of action being based upon the duty of good faith applicable to confidential personal information and trade secrets alike, it focuses upon the protection of human autonomy and dignity – the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people.[[103]](#footnote-103)

Given that privacy is often considered to be ‘an aspect of human autonomy’[[104]](#footnote-104) it might be argued that if English law is capable of protecting an interest in privacy, that it could also be capable of protecting an interest in autonomy. However, any analogy with tort law’s protection of privacy does not support such an argument.

Privacy is concerned with an individual’s interest in being left alone.[[105]](#footnote-105) As Harris and Keywood have argued, there are many possible foundations for the right to privacy and although autonomy is one of them, others include dignity and physical and moral integrity.[[106]](#footnote-106) It follows that privacy and autonomy are not necessarily synonymous and that there can be interferences with privacy that do not interfere with an individual’s autonomy. For example, if I secretly installed a camera in your living room so that I could film you watching television I would interfere with your privacy. However, if you were unaware of the fact that you were being watched you would presumably go about your business in exactly the same way as you would if the camera was not there. The hidden camera would not necessarily interfere with your choices and your ability to live your life in the manner of your own choosing. It is therefore possible for one’s privacy to be interfered with without having one’s autonomy diminished.[[107]](#footnote-107) Given that privacy and autonomy are not interchangeable concepts, it does not follow that just because the law of tort might be capable of recognising an interest in privacy that autonomy can be similarly protected by the tort of negligence.

Furthermore, even if autonomy *is* the foundation of privacy then the latter will necessarily be more specific and narrowly defined than the concept it is derived from. This may mean that an interest in privacy could be recognised by the law but an interest in autonomy cannot because the latter is too broad. This argument is put forward by Roberts in the context of criminal law. He sees the value of privacy as best understood as a component of personal autonomy but maintains that there cannot be a moral *right* to have one’s autonomy respected. He states:

My interest in a life of boundless opportunity and fulfilment is not a good reason for placing other people under duties to become my skivvies and servants, or to strive endlessly to create the idiosyncratic public culture in which I would especially thrive and prosper. My interests are no warrant for subordinating other people’s life projects to mine. Yet this is essentially what a right to autonomy would entail under prevailing conditions of scarcity, and absent the technological ingenuity to overcome such pragmatic constraints for the foreseeable future (which, admittedly, is not very far into the future, given the quickening pace of technological advances).[[108]](#footnote-108)

By contrast, an interest in being left alone is, he believes, sufficient grounds for placing individuals under duties not to molest or interfere with one another. He maintains that ‘those duties are sufficiently undemanding to be universalised so that, for example, we all have a duty not to invade anybody else’s physical integrity.’[[109]](#footnote-109) Roberts is discussing moral rights and so this discussion should not be completely divorced from its context but an analogous point can be made regarding the interests that tort law should protect. It is arguable that an interest in privacy could be narrowly defined so as to warrant the protection of the law but that autonomy is too broad a concept to form the gist of an action in negligence. In this respect, there is no inconsistency with the law of tort protecting an interest in privacy but not protecting an interest in autonomy: even if the latter concept is derived from the former they are concerned with different levels of generality.

In any case, the courts have declined to go as far as protecting an interest in privacy per se in tort law. As Lord Hoffmann stated in *Wainwright*:

*There seems to me a great difference between identifying privacy as a value which underlies the existence of a rule of law (and may point the direction in which the law should develop) and privacy as a principle of law in itself. The English common law is familiar with the notion of underlying values…A famous example is*Derbyshire County Council v Times Newspapers Ltd *[1993] AC 534, in which freedom of speech was the underlying value which supported the decision to lay down the specific rule that a local authority could not sue for libel. But no one has suggested that freedom of speech is in itself a legal principle which is capable of sufficient definition to enable one to deduce specific rules to be applied in concrete cases. That is not the way the common law works.[[110]](#footnote-110)*

If the courts are unwilling to protect a general principle of ‘invasion of privacy’ then it is highly doubtful that they would protect a much more general principle of ‘invasion of autonomy’. The law does not protect privacy per se.Instead, it safeguards aspects of privacy such as not having private information misused. Other invasions do not always warrant the protection of the law. As Lord Nicholls stated in *Campbell*,‘[a]n individual’s privacy can be invaded in ways not involving publication of information. Strip searches are an example.’[[111]](#footnote-111) It may be possible that the law can protect aspects of autonomy but, as mentioned earlier, this is very different from protecting autonomy per se. It is therefore doubtful that any analogies with the law relating to privacy can support an argument that the tort of negligence should protect an interest in autonomy per se.

None of the above points, however, weakens the possibility of autonomy being a value that can point the direction in which the tort of negligence should develop[[112]](#footnote-112) or from it being protected indirectly by the development of new interests. But an interest in autonomy per se is difficult to reconcile with established negligence principles.

## A Duty of Care to Avoid Interfering with Autonomy

Negligence is not a tort that is actionable per se. If interferences with autonomy cannot be seen as a recognised form of damage, then any prospects of this tort protecting an interest in autonomy *itself* are dashed. However, even if the above analysis is incorrect and diminished autonomy *could* be a form of damage, there is a further obstacle that will prevent its acceptance as an interest protected by negligence. A claimant must show that a defendant owed them a duty of care to avoid interfering with their autonomy. This, I will argue, is something that they will be unable to do in a way that is consistent with established principles.

The question of whether there should be a duty of care to avoid interfering with people’s autonomy itself has not previously come before the courts. It is a novel question and so would be decided under the three-stage *Caparo Industries plc v Dickman*[[113]](#footnote-113)method of weighing up the factors for and against imposing such a duty. The focus below will be on one particular factor that is fatal to the recognition of a duty of care to avoid interfering with autonomy and which overrides any countervailing factors in favour of recognising such a duty. This factor is that recognising such a duty would undermine the restrictions preventing a duty of care being recognised for other forms of damage, namely psychiatric harm and economic loss. Although the restrictions on recovery for psychiatric harm and economic loss in negligence are open to criticism,[[114]](#footnote-114) they are firmly entrenched and while they remain a part of English law a duty of care to avoid interfering with autonomy cannot be coherently recognised in a way that is consistent with them. As such, recognising a duty of care to avoid interfering with autonomy would compound the confusion within this area of law.

The duty of care element of negligence acts as a ‘control device’[[115]](#footnote-115) that places ‘some intelligible limits to keep the law of negligence within the bounds of common sense and practicality.’[[116]](#footnote-116) Nowhere is this more apparent than when the damage a claimant is complaining of is psychiatric harm or economic loss. While the tort of negligence protects several different interests, it does not see them as being of equal value. Tony Weir summed up the position well: ‘the better the interest invaded, the more readily does the law give compensation for the ensuing harm.’[[117]](#footnote-117)

Given the differing importance of the relevant interests that negligence protects, whether a duty of care is owed is dependent upon the form of damage suffered by the claimant. The interests in being free from physical injury or in not having one’s property damaged are more comprehensively protected than those in not suffering from purely economic loss or psychiatric harm. As Lord Oliver stated in *Murphy v Brentwood DC*:[[118]](#footnote-118) ‘The infliction of physical injury to the person or property of another universally requires to be justified. The causing of economic loss does not.’[[119]](#footnote-119)

It is trite tort law that unless a claimant can show that they are a ‘primary victim,’ in other words, that they were ‘involved, either mediately, or immediately, as a participant’[[120]](#footnote-120) in an accident by being exposed to the danger of physical injury,[[121]](#footnote-121) then there a number of hurdles that must be jumped before a claim in negligence for psychiatric harm being successful.

Those who are not primary victims are classed as secondary victims. They are ‘no more than the passive and unwilling witness of injury caused to others.’[[122]](#footnote-122) In order to be successful in a negligence case a ‘secondary victim’ must show:

1. that they are suffering from a recognised psychiatric illness and ‘not merely grief, distress or any other normal emotion;’[[123]](#footnote-123)
2. that the injury would have been experienced by a person of ‘sufficient fortitude’[[124]](#footnote-124) who, in the now rather archaic-sounding, words of Lord Porter in *Bourhill v Young*,[[125]](#footnote-125) ‘possess[es] the customary phlegm.’[[126]](#footnote-126) In other words, it must be foreseeable that a person would suffer from *psychiatric* injury in such circumstances rather than some type of (physical) injury more generally;
3. that the harm must be caused by a ‘sudden and unexpected shock;’[[127]](#footnote-127) and
4. the claimant must also satisfy the criteria laid down in *Alcock v Chief Constable of South Yorkshire Police*[[128]](#footnote-128)to demonstrate that their relationship with the defendant was sufficiently proximate. To do this, there must be (i) close ties of love and affection between the secondary victim and primary victim;[[129]](#footnote-129) (ii) the claimant’s ‘proximity to the accident must be close both in time and space;’[[130]](#footnote-130) and (iii) the shock must be a result of sight or hearing of the event itself or its immediate aftermath.[[131]](#footnote-131)

Unless a secondary victim can meet these criteria then any negligence claim for psychiatric harm will be doomed to fail. However, if, say, someone suffers from PTSD as a result of witnessing a distant relative – or even stranger – being injured then it is not inconceivable that their autonomy will have been interfered with. Their desire not to suffer PTSD will have been violated, in addition to other desires such as, say, not having to take time off work. If a duty to avoid interfering with people’s autonomy was recognised such people could potentially reframe the gist of their claim as one for diminished autonomy and potentially recover damages. This would undermine the restrictions that the law has placed on recovery for psychiatric harm as it would mean that those who had suffered psychiatric harm but do not meet the threshold for a ‘secondary victim’ claim could still have a successful action in negligence and receive damages.

Similar objections are raised when one considers the issue of pure economic loss. While recovery for negligently caused economic loss can succeed in limited circumstances,[[132]](#footnote-132) the law has imposed restrictions on recovery for this type of loss. For example, a claimant cannot recover in this tort when they suffer loss due to a defendant damaging the property of another person.[[133]](#footnote-133) It is also the case that one cannot sue in negligence for economic loss caused by acquiring defective property.[[134]](#footnote-134)

The courts have therefore circumscribed recovery for pure economic loss. Yet if someone loses money because someone damages property belonging to another person or because they have acquired defective property then it is plausible that their autonomy has been infringed due to another’s carelessness. As with psychiatric harm, an individual could side-step the restrictions the law places on recovery for economic loss by framing their claim in this way. After all, if I invest my life savings in property that turns out to be worthless then my ability to live my life as I choose is diminished. But if claims for diminished autonomy were permitted then the constraints on recovery for pure economic loss would be undermined.

As argued earlier, if one wants to protect an interest in autonomy per se there is no non-arbitrary way of dividing up different forms of autonomy. It cannot be argued that there should be a duty of care to protect certain forms of autonomy but not others. This would involve favouring one form of life plan over another and so would not be respecting autonomy itself. Autonomy, by its very nature, encompasses almost all other forms of damage and renders any restrictions for recovery of other types of harm obsolete: such constraints ccould be thwarted merely be reframing the claim as one for lost autonomy. This means that a duty of care to avoid interfering with autonomy itself cannot be reconciled with the boundaries that the law has placed on recovery of psychiatric harm and economic loss (to take merely two examples) because claimants would be able to receive compensation for such losses. This is a powerful factor against imposing a duty to avoid interfering with autonomy per se.

Furthermore, the policy reasons in favour of limiting the number of claims for pure economic loss and psychiatric harm are even more applicable to lost autonomy claims. One of the policies behind the control devices limiting claims for psychiatric harm is that there is a need to restrict the number of such claims. For example, in *McLoughlin v O'Brian*,[[135]](#footnote-135)Lord Wilberforce stated that given psychiatric harm in its nature is capable of affecting a wide a range of people there is ‘a real need for the law to place some limitation upon the extent of admissible claims.’[[136]](#footnote-136) This justification is also present in *White v Chief Constable of South Yorkshire Police*,[[137]](#footnote-137) another case arising out of the Hillsborough disaster, when Lord Steyn commented ‘[t]he abolition or a relaxation of the special rules governing the recovery of damages for psychiatric harm would greatly increase the class of persons who can recover damages in tort.’[[138]](#footnote-138)

Similar reasoning underpins the restrictions on claims for pure economic loss. *One* of the reasons given by Lord Denning MR in *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd*[[139]](#footnote-139) for the refusal of the pure economic loss claim was that ‘if claims for economic loss were permitted for this particular hazard, there would be no end of claims.’[[140]](#footnote-140) This concern was reflected in the leading case of *Caparo*, where the House of Lords was reluctant to expose defendants to ‘liability in an indeterminate amount, for an indeterminate time, to an indeterminate class.’[[141]](#footnote-141)

There is therefore a wealth of evidence that recovery for psychiatric harm and pure economic loss is restricted on the basis that allowing it would lead to a large class of claims (sometimes known as opening the ‘floodgates’). This arguably has several negative consequences as it might impose ‘crushing financial liabilities upon defendants,’[[142]](#footnote-142) expose defendants to liability ‘out of all proportion to their degree of fault’[[143]](#footnote-143) and overburden the court system.[[144]](#footnote-144) Although there are many circumstances where the proposition that imposing a duty of care will open the floodgates is, as Hartshorne as argued, ‘difficult to factually support,’[[145]](#footnote-145) he correctly states that there are certain contexts where its accuracy is self-evident such as if the *Alcock* claims were allowed.[[146]](#footnote-146)

This policy reason is even more applicable to claims for lost autonomy. Logically, whatever the number of people who can show that a defendant’s carelessness has diminished their bank balance or led them to suffer from a psychiatric illness will be, it will be smaller than the number who can show their autonomy has been interfered with. The latter will include people who are suffering from psychiatric harm or economic loss together with anyone else whose choices have been diminished. This factor points against imposing a duty of care to avoid interfering with autonomy.

It might be countered that such policy reasons are spurious and should be swept aside.[[147]](#footnote-147) Instead of restricting claims for lost autonomy, this argument goes, we should liberalise the law on recovery for pure economic loss and psychiatric harm.[[148]](#footnote-148) If these restrictions are unjustifiable then they should not prevent a duty of care to avoid interfering with autonomy being imposed.

Yet as valuable as protecting autonomy is, preserving the coherence of the tort of negligence is also important. Regardless of what one thinks of the rules limiting recovery for pure economic loss and psychiatric harm only the most optimistic of tort lawyers would consider the chances of them being swept aside as being anything other than remote. Rogers has stated that only parliament can undertake radical reform of the law on psychiatric harm[[149]](#footnote-149) and, given the leading case on economic loss was decided by a panel of seven Law Lords and overruled a past House of Lords’ decision, the same is probably true of the law relating to recovery of pure economic loss.[[150]](#footnote-150) Allowing such claims could only occur if the tort of negligence was radically re-written from scratch – and such a scorched-earth approach is not open to judges.[[151]](#footnote-151) The law on pure economic loss and psychiatric harm is here to stay. Given that a duty of care to avoid interfering with autonomy is contrary to these established principles it cannot be recognised without radically altering the basic principles of the tort of negligence.[[152]](#footnote-152) Doing so would be a recipe for confusion and hard to reconcile with the incremental approach to judicial development of the common law.

## Conclusion

Nothing in this article should be seen as preventing an interest in autonomy being protected by a different branch of tort law. Developing the tort of battery[[153]](#footnote-153) or modifying the rule in *Wilkinson v Downton*[[154]](#footnote-154) might provide a more cogent way of doing this than adapting the law of negligence. Or perhaps, as Varuhas has argued, we ought to ‘directly and systematically protect [an interest in autonomy] through a standalone action, perhaps structured similarly to trespassory torts.’[[155]](#footnote-155) Alternatively, the use of human rights law or a statutory scheme could protect such interests.[[156]](#footnote-156) Such work, though, remains to be undertaken and is outside the scope of this article. Nor does anything in this article prevent the law of negligence continuing to perceive autonomy as instrumentally valuable and further protecting it indirectly by developing new interests. This would involve identifying the bad consequences of interfering with autonomy and then imposing duties of care on defendants to avoid causing such consequences. Regardless of whether such alternatives are tenable, though, to prevent the tort of negligence sliding into incoherence it would be better to reject this putative interest unless a clear argument can be provided as to how compensating lost autonomy *itself* is consistent with negligence principles.

What does this mean for *Chester* and *Rees*? Although there have been alternative interpretations of these cases,[[157]](#footnote-157) if the damage in these cases is lost autonomy then they are impossible to reconcile with traditional tort law principles and should be overruled. This may appear harsh on the (deserving) claimants in these cases but one should remember that, as Murphy and Witting state in *Street on Torts*, ‘the law of negligence cannot be seen as the stairway to the Garden of Eden.’[[158]](#footnote-158) However, so far these two cases have not intruded into other aspects of this area of law. While they should not be used as a method of incrementally developing an interest of autonomy in negligence, if they are not to be overruled then at the very least the courts should say ‘thus far and no further.’[[159]](#footnote-159)

It was stated earlier that tort law can adapt itself to changing circumstances to protect new interests. But this does not mean it is a blank slate that can be re-written at will. As John Murphy has stated, ‘[t]he common law needs to be able to develop in such a way that the solutions it provides to tomorrow’s problem cases sit consistently (or at least comfortably) with its own past.’[[160]](#footnote-160) An interest in autonomy per se cannot do this. Taking autonomy to reflect the self-regarding choices of mentally competent adults, the underlying thesis of this article has been that the recognition of this potential interest would be inconsistent with the established rules regarding what constitutes actionable damage in negligence and difficult to reconcile with the restrictions on imposing duties of care on defendants to avoid causing pure economic loss or psychiatric harm. Autonomy may be a central moral value but so is maintaining the credibility and consistency of the common law. Judges and academics should hesitate before encouraging the driving of a steamroller over the latter in order to protect the former.

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   [2000] 1 AC 360. [↑](#footnote-ref-1)
2. Ibid, at 394. [↑](#footnote-ref-2)
3. Ibid. This case was primarily concerned with causation and the volenti defence. Lord Hobhouse was the lone dissenter on those issues but, although his judgment in no way represents the ratio decidendi of the case,his discussion of autonomy succinctly sums up the current law. [↑](#footnote-ref-3)
4. Alexander McCall Smith, ‘Beyond Autonomy’ (1997) 14 *Journal of Contemporary Health Law and Policy* 23, 30. [↑](#footnote-ref-4)
5. Ronald Dworkin, *Life’s Dominion: An Argument about Abortion and Euthanasia* (London: Harper Collins, 1993) 224. [↑](#footnote-ref-5)
6. Ibid., 224. [↑](#footnote-ref-6)
7. McCall Smith, ‘Beyond Autonomy’ 30. [↑](#footnote-ref-7)
8. Ibid. [↑](#footnote-ref-8)
9. Ibid. [↑](#footnote-ref-9)
10. Brazier’s account of how the law developed to protect patient autonomy remains illuminating: ‘Patient Autonomy and Consent to Treatment: The Role of the Law?’ (1987) *Legal Studies* 169. See also Sheila McLean, *Autonomy, Consent and the Law* (Abingdon: Routledge-Cavendish, 2009) 6-40. [↑](#footnote-ref-10)
11. See Tom Beauchamp and James Childress, *Principles of Biomedical Ethics* 7th Edn. (Oxford: Oxford University Press, 2013), Gerald Dworkin, ‘Autonomy and Behaviour Control’ (1976) 6 *Hastings Centre Report* 23, John Harris, *The Value of Life: An Introduction to Medical Ethics* (London: Routledge & Kegan Paul, 1985; Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge: Cambridge University Press, 1988), John Christman, ‘Constructing the Inner Citadel: Recent Work on the Concept of Autonomy’ (1988) 99 *Ethics* 109; Søren Holm, ‘Autonomy’ in Ruth Chadwick (Ed.), *Encyclopaedia of Applied Ethics* Vol 1 (San Diego: Academic Press, 1998). [↑](#footnote-ref-11)
12. (1954) The Times, July 2nd. [↑](#footnote-ref-12)
13. The law on mental capacity is now contained in the Mental Capacity Act 2005. [↑](#footnote-ref-13)
14. *Re C* *(Adult: Refusal of treatment)* [1994] 1 WLR 290. [↑](#footnote-ref-14)
15. *Re T (Adult: Refusal of treatment)* [1993] Fam 95. [↑](#footnote-ref-15)
16. *Re MB (Adult: Medical treatment)* [1997] 2 FCR 541 at 553 per Butler-Sloss LJ and *St George’s Healthcare NHS Trust v S* [1998] 3 WLR 936. [↑](#footnote-ref-16)
17. *St George’s Healthcare NHS Trust v S* [1998] 3 WLR 936 at 950. [↑](#footnote-ref-17)
18. Margaret Brazier, ‘Do No Harm – Do Patients Have Responsibilities Too?’ (2006) 65 *Cambridge Law Journal* 397, 400. See also McCall Smith,’Beyond Autonomy’, Onora O’Neill, *Autonomy and Trust in Bioethics* (Cambridge: Cambridge University Press, 2002) ix, Charles Foster, *Choosing Life, Choosing Death: The Tyranny of Autonomy in Medical Law and Ethics* (Oxford: Hart Publishing, 2009) and ‘Autonomy in the Medico-Legal Courtroom: A Principle Fit for Purpose?’ (2014) 22 *Medical Law Review* 48. [↑](#footnote-ref-18)
19. *R v R* [1992] 1 AC 599 at 616 per Lord Keith. [↑](#footnote-ref-19)
20. [2004] 1 AC 309. [↑](#footnote-ref-20)
21. [2005] 1 AC 134. [↑](#footnote-ref-21)
22. See Roger Crisp, ‘Medical Negligence, Assault, Informed Consent, and Autonomy’ (1990) 17 *Journal of Law and Society* 77, Kumaralingam Amirthalingham, ‘Causation and the Gist of Negligence’ (2005) 64 *Cambridge Law Journal* 32, Donal Nolan, ‘New Forms of Damage in Negligence’ (2007) 70 *Modern Law Review* 59, 79, Nicolette Priaulx, *The Harm Paradox: Tort Law and the Unwanted Child in the Era of Choice* (Abingdon: Routledge-Cavendish, 2007) 9, Victoria Chico, *Genomic Negligence: An Interest in Autonomy as the Basis for Novel Negligence Claims Generated by Genetic Technology* (Abingdon: Routledge-Cavendish, 2011) 134, Tamysn Clark and Donal Nolan, ‘A Critique of *Chester v Afshar*’ (2014) 34 *Oxford Journal of Legal Studies* 659. [↑](#footnote-ref-22)
23. How negligence currently protects autonomy will be discussed below. [↑](#footnote-ref-23)
24. Issues of breach of duty and causation do not necessarily pose any problems for the recognition of an interest in autonomy in negligence and so will also not be the focus of this article. Furthermore, given this paper argues that autonomy should not be an interest protected by negligence, the issue of quantification for lost autonomy will not be considered here. [↑](#footnote-ref-24)
25. The purpose of this article is not to give an in-depth analysis of the different interpretations of, and extensive literature on, these two cases but rather to use them as a starting point for discussing whether autonomy could be an interest in negligence. [↑](#footnote-ref-25)
26. *Re T (Adult: Refusal of Treatment)* [1993] Fam 95 at 112. [↑](#footnote-ref-26)
27. Although there are accounts of autonomy that do not see the concept as being content neutral (see John Coggon, ‘Varied and Principled Understandings of Autonomy in English Law: Justifiable Inconsistency or Blinkered Moralism?’ (2007) 15 *Health Care Analysis* 235; Chico, *Genomic Negligence* 42 and Priaulx, *The Harm Paradox* 9) space constraints prevent a detailed explanation of why these accounts of autonomy are unpersuasive here. This paper proceeds on the basis that if the courts are likely to recognise an interest in autonomy in negligence they are more likely to use the liberal, content-neutral definition of autonomy that is used in other branches of the law. The law of tort would descend into incoherence if two closely related torts such as battery and negligence used different definitions of the same concept. [↑](#footnote-ref-27)
28. John Stuart Mill, ‘On Liberty’ in John Gray (Ed.) *On Liberty and Other Essays* (Oxford: Oxford University Press, 1991) 14. C.f. John Coggon and Jose Miola’s article ‘Autonomy, Liberty and Medical Decision-Making’ (2011) 70 *Cambridge Law Journal* 523 where they argue that there is confusion between the concept of autonomy and that of liberty and that Mill’s work is concerned only with the latter. However, given that autonomy and liberty are used interchangeably in the case law and much of the academic literature, this need not concern us here. See also Clark and Nolan, above n 22, for a discussion of different conceptions of autonomy. [↑](#footnote-ref-28)
29. Kim Atkins, ‘Autonomy and the Subjective Character of Experience’ (2000) 17 *Journal of Applied Philosophy* 71, 74. [↑](#footnote-ref-29)
30. See *Pretty v United Kingdom* (2002) 35 EHRR 1 [62] and *R v Kennedy (No 2)* [2008] 1 AC 269 at 275 per Lord Bingham for evidence that this version of autonomy is used in human rights jurisprudence and the criminal law respectively. [↑](#footnote-ref-30)
31. [2004] 1 AC 309. [↑](#footnote-ref-31)
32. She also claimed, should the claim for the full costs of raising the child be refused, for the *extra costs* she would incur from raising a healthy child attributable to her disability, but this claim was also refused. [↑](#footnote-ref-32)
33. [2000] 2 AC 59. [↑](#footnote-ref-33)
34. *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309 at 317 per Lord Bingham. [↑](#footnote-ref-34)
35. See Chico, *Genomic Negligence* 126 and Priaulx, *The Harm Paradox* 74. [↑](#footnote-ref-35)
36. Nolan, ‘New Forms of Damage in Negligence’ 80. C.f. Nicholas McBride and Roderick Bagshaw, *Tort Law*, 4th Edn. (Harlow: Pearson, 2012) 826 who view the conventional award as vindicating the claimant’s rights rather than compensating her for lost autonomy. [↑](#footnote-ref-36)
37. [2005] 1 AC 134. [↑](#footnote-ref-37)
38. If she could have said this her claim would have been successful. See *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] AC 871. [↑](#footnote-ref-38)
39. There is disagreement over whether this is an issue of factual causation or remoteness/scope of liability. See Clark and Nolan, ‘A Critique of *Chester v Afshar*’ 22. [↑](#footnote-ref-39)
40. *Chester v Afshar* [2005] 1 AC 134 at 146. [↑](#footnote-ref-40)
41. Ibid. [↑](#footnote-ref-41)
42. Ibid at 143. [↑](#footnote-ref-42)
43. Ibid at 147. [↑](#footnote-ref-43)
44. Sarah Devaney ‘Autonomy Rules Ok’ (2005) 13 *Medical Law Review* 102, 107. [↑](#footnote-ref-44)
45. See Amirthalingham ‘Causation and the Gist of Negligence’, David Pearce and Roger Halson, ‘Damages for Breach of Contract: Compensation, Restitution and Vindication’ (2008) 28 *Oxford Journal of Legal Studies* 73, 98; John Murphy and Christian Witting, *Street on Torts* 13th Edn., (Oxford: Oxford University Press, 2013) 159. Clark and Nolan, maintain that the damage pleaded was Miss Chester’s personal injury but that a better solution would have been to compensate her for her lost autonomy – see ‘A Critique of *Chester v Afshar*’ [↑](#footnote-ref-45)
46. Sarah Green in the chapter ‘Lost Chances’ from her book *Causation in Negligence* (Oxford: Hart Publishing, 2015) kindly discussed by personal correspondence. [↑](#footnote-ref-46)
47. [2015] UKSC 11. [↑](#footnote-ref-47)
48. Ibid, at [87]. [↑](#footnote-ref-48)
49. Ibid, at [108]. [↑](#footnote-ref-49)
50. See Amirthalingham, Nolan, Chico, Clark and Nolan, above n 22. [↑](#footnote-ref-50)
51. Chico, for example, states that in *Rees* the House of Lords ‘unwittingly recognised the intrinsic value of autonomy, but not the instrumental or whole value’ (*Genomic Negligence* 128). Some academics have argued that the gist of the action in *Chester* was her diminished autonomy but that damages were awarded for the personal injury. See Murphy and Witting, *Street on Torts* 159. Whether diminished autonomy is compensated by awarding someone a conventional award (as in *Rees*) or all of the consequences of their lost autonomy (as in *Chester*) is not relevant to this article but will be addressed in future research. [↑](#footnote-ref-51)
52. Chico, *Genomic Negligence* 68. [↑](#footnote-ref-52)
53. Jukka Varelius, ‘The Value of Autonomy in Medical Ethics’ (2006) 9 *Medicine, Health Care and Philosophy* 377 at 378. [↑](#footnote-ref-53)
54. Harry Street, *The Law of Torts*, 2nd Edn. (London: Butterworths, 1959) 3. [↑](#footnote-ref-54)
55. Margaret Brazier, *Street on Torts* 9th Edn. (London: Butterworths, 1993) 3. [↑](#footnote-ref-55)
56. *Donoghue v Stevenson* [1932] AC 562 at 618-619 per Lord Macmillan. [↑](#footnote-ref-56)
57. Tony Weir ‘Liability for Syntax’ (1963) 21 *Cambridge Law Journal* 216, 218. [↑](#footnote-ref-57)
58. *Donoghue v Stevenson* [1932] AC 562 at 619. [↑](#footnote-ref-58)
59. Ibid. [↑](#footnote-ref-59)
60. Ibid. [↑](#footnote-ref-60)
61. See the early nervous shock cases such as *Dulieu v White* [1901] 2 KB 669, where the injury actually sustained was physical, but it was recognised that such injuries could be caused psychologically. Admittedly, the introduction of this interest has not been wholeheartedly embraced as discussed in the section of this article on duty of care (below). [↑](#footnote-ref-61)
62. *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] AC 871 at 883 per Lord Scarman. [↑](#footnote-ref-62)
63. See Nolan, ‘New Forms of Damage in negligence’ and ‘Damage in the English Law of Negligence’ (2013) 4 *Journal of European Tort Law* 259, 264. See also Simon Deakin, Angus Johnston, and Basil Markesinis *Markesinis and Deakin’s Tort Law*, 7th Edn. (Oxford: Oxford University Press, 2013) 106. [↑](#footnote-ref-63)
64. See *Perrett v Collins* [1999] PNLR 77. [↑](#footnote-ref-64)
65. See *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310. [↑](#footnote-ref-65)
66. See *Marc Rich & Co v Bishop Rock Marine Co* [1996] AC 211. [↑](#footnote-ref-66)
67. See *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465. [↑](#footnote-ref-67)
68. Nolan, ‘Damage in the English Law of Negligence’ 264. [↑](#footnote-ref-68)
69. [2008] 1 AC 281. [↑](#footnote-ref-69)
70. Ibid. at 289. [↑](#footnote-ref-70)
71. Ibid*.* [↑](#footnote-ref-71)
72. Nolan, ‘Damage in the English Law of Negligence’ 265. [↑](#footnote-ref-72)
73. *Hicks v Chief Constable of South Yorkshire Police* [1992] PIQR 433 at 436 per Lord Bridge. Cf Rachael Mulheron, ‘Rewriting the Requirement for a ‘Recognised Psychiatric Injury’ in Negligence Claims’ (2012) 32 *Oxford Journal of Legal Studies* 77. [↑](#footnote-ref-73)
74. See *Cartledge v Jopling & Sons Ltd* [1963] AC 758 at 779 per Lord Pearce. [↑](#footnote-ref-74)
75. Ibid. [↑](#footnote-ref-75)
76. Ibid. [↑](#footnote-ref-76)
77. [2008] 1 AC 281. [↑](#footnote-ref-77)
78. Nolan, ‘Damage in the English Law of Negligence’ 265. [↑](#footnote-ref-78)
79. Ibid, 277. See also *Jan de Nul (UK) Ltd v Axa Royal Belge SA* [2002] EWCA Civ 209 at [92] per Schiemann LJ. [↑](#footnote-ref-79)
80. Ibid. [↑](#footnote-ref-80)
81. See *UBAF Ltd v European American Banking Corp* [1984] 2 All ER 226 and Janet O’Sullivan, ‘The Meaning of “Damage” in Pure Financial Loss Cases: Contract and Tort Collide’ (2012) 28 *Professional Negligence* 248. This is consistent with Nolan’s argument that damage is a socially constructed, factual concept as opposed to a factual one. See ‘Damage in the English Law of Negligence’ 267. [↑](#footnote-ref-81)
82. O’Sullivan, ‘The Meaning of “Damage” in Pure Financial Loss Cases: Contract and Tort Collide’ 260. [↑](#footnote-ref-82)
83. See Christian Witting ‘Physical Damage in Negligence’ (2002) 61 *Cambridge Law Journal* 189, 203 and Nolan, ‘New Forms of Damage in Negligence’ 75 [↑](#footnote-ref-83)
84. O’Sullivan, ibid, cites *Dobbie v Medway Health Authority* [1994]4 All ER 450 as an example of this. See also *Williamson v East London and City HA* [1998] Lloyd's Rep Med 6. Note that if the cancer could be treated without removing the breast then removal of the breast would be considered damage. [↑](#footnote-ref-84)
85. *Malette v Shulman* (1990) 67 DLR (4th) 321. [↑](#footnote-ref-85)
86. Even if a procedure is in a patient’s best interests and they are better off as a result of it being performed, a battery is still committed if the patient does not consent. See *Devi v West Midlands AHA* [1980] 7 CL 44 where the defendant doctor, while performing minor gynaecological surgery, discovered that the claimant’s womb was ruptured. He had committed a battery by performing a sterilisation without obtaining her consent. [↑](#footnote-ref-86)
87. O’Sullivan, ‘The Meaning of “Damage” in Pure Financial Loss Cases: Contract and Tort Collide’ 258. [↑](#footnote-ref-87)
88. Emily Jackson, ‘“Informed Consent” to Medical Treatment and the Impotence of Tort’ in S McLean (Ed.), *First Do No Harm: Law, Ethics and Healthcare* (Aldershot: Ashgate, 2006) 274. See also Coggon, ‘Varied and Principled Understandings of Autonomy in English Law’ 238: ‘In a case where a similar failure to inform occurred, but in which *no* physical harm resulted [as in *Chester*], it seems hard to believe that a court would allow damages for the harm done to the patient’s autonomy.’ [↑](#footnote-ref-88)
89. See *Meering v Grahame-White Aviation Company Ltd* [1920] 11 LT 44 at 53-54 per Atkin LJ and *Murray v Ministry of Defence* [1988] 1 WLR 692 at 701-703 per Lord Griffiths. [↑](#footnote-ref-89)
90. See also Nolan’s observation, ‘New Forms of Damage in Negligence’ 61 that what qualifies as actionable damage varies between the different torts. [↑](#footnote-ref-90)
91. I am grateful to the anonymous reviewer for this example. [↑](#footnote-ref-91)
92. In English law one cannot have an easement of prospect – in other words, there is no right to an unspoilt view. See *William Aldred’s Case* (1610) 9 CoRep 57. [↑](#footnote-ref-92)
93. See Nolan’s discussion of derivative forms of autonomy: ‘New Forms of Damage in Negligence’ 87. [↑](#footnote-ref-93)
94. [1994] 1 AC 212. [↑](#footnote-ref-94)
95. This is not to say that autonomy cannot be perceived as an important value underlying other interests protected by negligence but it does indicate that autonomy *itself* cannot be a form of damage in this tort. [↑](#footnote-ref-95)
96. See Craig Purshouse, ‘How Should Autonomy be Defined in Medical Negligence Cases?’ (2015) *Clinical Ethics* (forthcoming). [↑](#footnote-ref-96)
97. Dworkin, *Life’s Dominion* 224. [↑](#footnote-ref-97)
98. [2004] 2 AC 406 [↑](#footnote-ref-98)
99. Ibid. at [44]. [↑](#footnote-ref-99)
100. *Campbell v MGN Ltd.* [2004] 2 AC 457 at 464 per Lord Nicholls. [↑](#footnote-ref-100)
101. Ibid. [↑](#footnote-ref-101)
102. As described by Lord Nicholls, Ibid. at 465. [↑](#footnote-ref-102)
103. Ibid, at 473. [↑](#footnote-ref-103)
104. Ibid, at 472. [↑](#footnote-ref-104)
105. See Paul Roberts, ‘Privacy, Autonomy and Criminal Justice Rights: Philosophical Preliminaries’ in Peter Alldridge and Chrisje Brants (Eds.), *Personal Autonomy, the Private Sphere and the Criminal Law: A Comparative Study* (Oxford: Hart Publishing, 2001) 66-7. [↑](#footnote-ref-105)
106. John Harris and Kirsty Keywood, ‘Ignorance, Information and Autonomy’ (2001) 22 *Theoretical Medicine* *and Bioethics* 416, 430. [↑](#footnote-ref-106)
107. I am grateful to Joe Purshouse for this example. [↑](#footnote-ref-107)
108. Roberts, ‘Privacy, Autonomy and Criminal Justice Rights’ 66. [↑](#footnote-ref-108)
109. Ibid, 66-7. [↑](#footnote-ref-109)
110. *Wainwright v Home Office* [2004] 2 AC 406 at [31] per Lord Hoffmann. [↑](#footnote-ref-110)
111. *Campbell v MGN Ltd.* [2004] 2 AC 457 at 465. See also *Wainwright v Home Office* [2004] 2 AC 406. [↑](#footnote-ref-111)
112. Indeed, *Montgomery v Lanarkshire Health Board* [2015] UKSC 11 shows that such an approach need not undermine established negligence principles. [↑](#footnote-ref-112)
113. [1990] 2 AC 605. [↑](#footnote-ref-113)
114. See David Howarth, ‘Negligence After *Murphy*: Time to Re-Think’ (1991) 50 *Cambridge Law Journal* 58, Basil Markesinis and Simon Deakin, ‘The Random Element of their Lordships’ Infallible Judgment: An Economic and Comparative Analysis of the Tort of Negligence from *Anns* to *Murphy*’ (1992) *Modern Law Review* 619, Stephen Hedley, ‘Hillsborough: Morbid Musings of the Reasonable Chief Constable’ (1992) 51 *Cambridge Law Journal* 16, Nicholas Mullany and Peter Handford, *Tort Liability for Psychiatric Damage: The Law of ‘Nervous Shock’* (Sydney: Sweet and Maxwell, 1993), Nicholas Mullany, ‘Fear of the Future: Liability for Infliction of Psychiatric Disorder’ in Nicholas Mullany (Ed.), *Torts in the Nineties* (Sydney: LBC Information Series, 1997), Harvey Teff, ‘Liability for Negligently Inflicted Psychiatric Harm: Justifications and Boundaries’ (1998) 57 *Cambridge Law Journal* 91. [↑](#footnote-ref-114)
115. See Mark Lunney and Ken Oliphant, *Tort Law* 5th Edn. (Oxford: Oxford University Press, 2013) 121. [↑](#footnote-ref-115)
116. See *Caparo v Dickman* [1990] 2 AC 605 at 633 per Lord Oliver, *Customs and Excise Commissioners v Barclays Bank plc* [2006] 1 AC 181 at 192 per Lord Bingham and Jonathan Morgan, ‘The Rise and Fall of the General Duty of Care’ (2006) 22 *Professional Negligence* 206, 223. See also Alan Rodger, ‘Some Reflections on Junior Books’ in Peter Birks (Ed.), *The Frontiers of Liability*,Volume 2 (Oxford: Oxford University Press, 1994) and Jane Stapleton, ‘Duty of Care Factors: A Selection from the Judicial Menus’ in Peter Cane and Jane Stapleton (Eds.) *The Law of Obligations: Essays in Celebration of John Fleming* (Oxford: Oxford University Press, 1998) for further information regarding the ‘weighing of policy factors’ approach to duty of care. Cf Robert Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007) 1-2. [↑](#footnote-ref-116)
117. Tony Weir, *A Casebook on Tort*, 10th Edn. (London: Sweet & Maxwell, 2004) 6. [↑](#footnote-ref-117)
118. [1991] 1 AC 398. [↑](#footnote-ref-118)
119. Ibid at 487. [↑](#footnote-ref-119)
120. *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 at 407 per Lord Oliver. [↑](#footnote-ref-120)
121. As Lord Lloyd stated in *Page v Smith* [1996] AC 155 at 190: ‘Once it is established that the defendant is under a duty of care to avoid causing personal injury to the plaintiff, it matters not whether the injury in fact sustained is physical, psychiatric or both.’ In other words, a claim for this type of injury can be successful provided physical injury was foreseeable even if psychiatric harm itself was not. Indeed, the courts have held that it is *only* those at a foreseeable risk of *physical* injury who can qualify as primary victims. See *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455 and *McFarlane v EE Caledonia* [1994] 2 All ER 1. However, whether this is a correct interpretation of the previous case law is debateable as it is more likely that Lord Lloyd in *Page* was seeking to liberalise the law on primary victims rather than narrow it. See Lord Goff’s dissenting speech in *White*. [↑](#footnote-ref-121)
122. *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 at 407 per Lord Oliver. For criticisms of the division between primary and secondary victims see Stephen Bailey and Donal Nolan, ‘The *Page v Smith* Saga: a Tale of Inauspicious Origins and Unintended Consequences’ (2010) 69 *Cambridge Law Journal* 495. [↑](#footnote-ref-122)
123. *McLoughlin v O’Brian* [1983] 1 AC 410 at 431 per Lord Bridge. See also *Vernon v Bosley* [1997] 1 All ER 577 at 610 per Thorpe LJ. [↑](#footnote-ref-123)
124. *Bourhill v Young* [1943] AC 92 at 117 per Lord Porter. [↑](#footnote-ref-124)
125. [1943] AC 92. [↑](#footnote-ref-125)
126. Ibid, at 117. [↑](#footnote-ref-126)
127. *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 at 412 per Lord Oliver. [↑](#footnote-ref-127)
128. [1992] 1 AC 310. [↑](#footnote-ref-128)
129. Ibid, at 403-404 per Lord Ackner. [↑](#footnote-ref-129)
130. Ibid, at 404-405 per Lord Ackner. [↑](#footnote-ref-130)
131. Ibid. [↑](#footnote-ref-131)
132. See the line of cases following *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 such as *Smith v Eric S Bush* [1990] 1 AC 831, *Henderson v Merrett Syndicates* [1995] 2 AC 145, *White v Jones* [1995] 2 AC 207 and *Spring v Guardian Assurance* [1995] 2 AC 296. [↑](#footnote-ref-132)
133. *Leigh & Sillivan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] AC 785. [↑](#footnote-ref-133)
134. *Murphy v Brentwood District Council* [1991] 1 AC 398. [↑](#footnote-ref-134)
135. [1983] 1 AC 410. [↑](#footnote-ref-135)
136. Ibid, at 422. [↑](#footnote-ref-136)
137. [1999] 2 AC 455. [↑](#footnote-ref-137)
138. Ibid,at 494. [↑](#footnote-ref-138)
139. [1973] QB 27. [↑](#footnote-ref-139)
140. Ibid, at38. [↑](#footnote-ref-140)
141. *Caparo v Dickman* [1990] 2 AC 605 at 621 per Lord Bridge (quoting Cardozo CJ in *Ultramares Corporation v Touche* (1931) 174 NE 441). [↑](#footnote-ref-141)
142. John Hartshorne, ‘Confusion, Contradiction and Chaos within the House of Lords Post *Caparo v Dickman*’ (2008) 16 *Tort Law Review* 8, 19. [↑](#footnote-ref-142)
143. Ibid. [↑](#footnote-ref-143)
144. Ibid. [↑](#footnote-ref-144)
145. Ibid. [↑](#footnote-ref-145)
146. Ibid. [↑](#footnote-ref-146)
147. For criticisms of floodgates arguments see David Howarth, ‘Duty of Care’ in Ken Oliphant (Ed.), *The Law of Tort* (London: LexisNexis Butterworths, 2007). [↑](#footnote-ref-147)
148. See Mullany and Handford, *Tort Liability for Psychiatric Damage* and Howarth, ‘Negligence After *Murphy*’. [↑](#footnote-ref-148)
149. W.V.H. Rogers, *Winfield and Jolowicz on Tort* 18th Edn. *(London:* Sweet and Maxwell, 2010) 297. [↑](#footnote-ref-149)
150. *Murphy v Brentwood District Council* [1991] 1 AC 398. [↑](#footnote-ref-150)
151. Lord Oliver, ‘Judicial Legislation’ (1989) 2 *Leiden Journal of International Law* 3. [↑](#footnote-ref-151)
152. Nor are these the only two areas of law that might be undermined by the recognition of autonomy as an interest in negligence. Public authority omissions cases might be another aspect of the law where areas of non-actionability would be undermined by permitting lost autonomy claims. See *Van Colle v Chief Constable of Hertfordshire* [2009] 1 AC 225. It may also, for example, undermine causation requirements in personal injury cases as in many circumstances it might be easier for a claimant to show that a defendant has *caused* their autonomy to be diminished than show that the defendant has *caused* their personal injury. *Chester* is a prime example of this. [↑](#footnote-ref-152)
153. This issue has previously been considered in Tan Keng Feng, ‘Failure of Medical Advice: Trespass or Negligence’ (1987) 7 *Legal Studies* 149 and Brazier, ‘Patient Autonomy and Consent to Treatment: The Role of the Law?’ However, developments in this area of the law mean that different conclusions may now be reached. See also Jackson, ‘“Informed Consent” to Medical Treatment and the Impotence of Tort’ and Clark and Nolan, ‘A Critique of *Chester v Afshar*’. [↑](#footnote-ref-153)
154. [1897] 2 QB 57. Though c.f. *Wainwright v Home Office* [2004] 2 AC 406. [↑](#footnote-ref-154)
155. Jason Varuhas, ‘The Concept of “Vindication” in the Law of Torts: Rights, Interests and Damages’ (2014) 34 *Oxford Journal of Legal Studies* 253, 270. [↑](#footnote-ref-155)
156. See Clark and Nolan, ‘A Critique of *Chester v Afshar*’. [↑](#footnote-ref-156)
157. See McBride and Bagshaw, *Tort Law* 826 for a rights-vindication interpretation of the conventional award in *Rees* and Jane Stapleton ‘Occam’s Razor Reveals an Orthodox Basis for *Chester v Afshar*’ (2006) 122 *Law Quarterly Review* 426 for an argument that *Chester* is an orthodox personal injury case. [↑](#footnote-ref-157)
158. Murphy and Witting, *Street on Torts* 74. [↑](#footnote-ref-158)
159. As Lord Steyn stated in the context of psychiatric harm claims in *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455 at 500. [↑](#footnote-ref-159)
160. John Murphy, ‘Formularism and Tort Law’ (1999) 21 *Adelaide Law Rev* 115, 125. [↑](#footnote-ref-160)